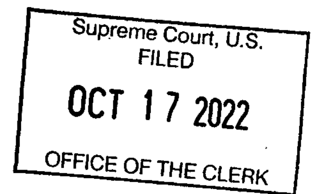

No. 22-A334

IN THE

SUPREME COURT OF THE UNITED STATES

OSCAR STILLEY,
Petitioner

v.

UNITED STATES
Respondent.

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

APPLICATION FOR CERTIFICATE OF APPEALABILITY

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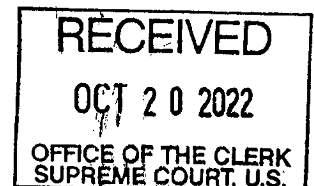

QUESTIONS PRESENTED

1. Whether this Court 1) has a duty to construe an application for a certificate of appealability consistent with the legal test under 28 USC 2253(c)(1)(B) as enunciated in *Barefoot v. Estelle,* 463 US 880 (1983), or 2) has the option to treat such applications as "discretionary," such that the Court need not necessarily apply any articulable legal test whatsoever.
2. Whether a criminal defendant who is compelled to exhaust administrative remedies as condition precedent to getting those things indispensable to a competent appeal, is afterward entitled to prosecute the appeal.
3. Whether a criminal defendant who is by the written admission of the government not guilty of the charge of the indictment, or of the theories of the government pretrial, is entitled to a certificate of appealability, or else some other reasonably direct means of procuring a ruling on those issues?

PARTIES TO THE PROCEEDING

Petitioner is Oscar Stilley. His co-defendant in the federal criminal case below was Lindsey Kent Springer. Petitioner is denied access to the contact information of Springer by his adversary the US Department of Justice, even though the direct criminal appeals were partially consolidated.

Respondent is the United States.

LIST OF ALL PROCEEDINGS

US Court of Appeals for the 10th Circuit, No. 22-5000, *United States v. Oscar Stilley,* appeal of dismissal of 2255 petition, judgment entered 6-6-2022.

US District Court for the Northern District of Oklahoma, *United States v. Oscar Stilley*, Civil Case 4:21-cv-00361-SPF-CDL, 2255 petition dismissed 11-4-2022.

US District Court for the Northern District of Oklahoma, *United States v. Lindsey Kent Springer*, Civil Case 4:13-cv-00145-SPF-TLW, 2255 petition, terminated 8-22-2014.

US District Court for the Northern District of Oklahoma, *United States v. Lindsey Kent Springer and Oscar Amos Stilley*, Criminal 4:09-cr-43 SPF-2), Judgment and Commitment Order entered 4-23-2010.

US Court of Appeals for the 10th Circuit, No. 10-5055 and 10-5057, (partially consolidated) *United States v. Lindsey Kent Springer, United States v. Oscar Stilley,* judgment affirmed 10-26-2011, rehearing and rehearing *en banc* denied 12-12-2011.

US Court of Appeals for the 10th Circuit, No. 09-5165, *In Re Lindsey Kent Springer*, petition for writ of mandamus, denied by order 12-04-2009.

US Court of Appeals for the 10th Circuit, No. 10-5101, *In Re Lindsey Kent Springer*, petition for writ of mandamus, denied by order 10-22-2010.

US Court of Appeals for the 10th Circuit, No. 11-5053 (#447) *United States et al v. Lindsey Kent Springer*, petition for writ of certiorari denied 11-28-2011.

US Court of Appeals for the 10th Circuit, No. 13-5062 (#497) *United States v. Lindsey Kent Springer*, dismissed procedurally 6-20-2013.

US Court of Appeals for the 10th Circuit, No. 13-5113, *In Re: Lindsey Kent Springer*, petition for writ of mandamus, rehearing and rehearing *en banc* denied 11-15-2013.

US Court of Appeals for the 10th Circuit, No. 14-5047 (#554) *United States v. Lindsey Kent Springer*, criminal case, other, dismissed 6-4-14.

US Court of Appeals for the 10th Circuit, No. 14-5109 (#588) *United States v. Lindsey Kent Springer*, prisoner petition, motion to recall mandate denied 9-22-2015, no action letter on petition for rehearing, 11-13-2015.

US Court of Appeals for the 10th Circuit, No. 14-5111, *In Re Lindsey Kent Springer*, petition for writ of mandamus, dismissed 10-22-14, procedural termination without judicial action.

US Court of Appeals for the 10th Circuit, No. 15-5109 (#607) United States v. Lindsey Kent Springer, criminal case, other, terminated 11-17-17, certificate of appealability denied. From this case arises US Supreme Court 17-8312.

US Court of Appeals for the 10th Circuit, No. 18-5104 (#659) *United States v. Springer*, prisoner petition, terminated 6-28-2019.

US Court of Appeals for the 10th Circuit, No. 20-5000 *United States v. Springer*, criminal, post-conviction, terminated 7-15-2020.

United States Supreme Court, No. 11-10096, *Lindsey Kent Springer v. United States*, petition for certiorari related to direct criminal appeal denied 6-4-2012.

United States Supreme Court, No. 17-8312 *Lindsey Kent Springer v. United States*, petition for certiorari denied May 14, 2018.

US Court of Appeals for the 5th Circuit, No. 21-60022, *Oscar Stilley v. Merrick Garland, et al*, appeal of MSSD 3:19-cv-00006, affirmed May 18, 2022, rehearing and rehearing *en banc* denied 7-19-2022.

US District Court for the Southern District of Mississippi, *Oscar Stilley v. Merrick Garland, et al*, Civil Case 3:19-cv-00006-HTW-LRA, prison conditions litigation regarding the right of reasonable access to the courts, lost "Good Conduct Time" (GCT), etc., dismissed 11-20-2020.

US Court of Appeals for the 8th Circuit, No. 18-2188, *Oscar Stilley v. USA et al*, appeal of ARED 2:15-cv-163, affirmed 7-11-19, rehearing and rehearing *en banc* denied 9-11-2019.

US District Court for the Eastern District of Arkansas, *Oscar Stilley v. USA, et al*, Civil Case 2:15-cv-163 BSM, prison conditions litigation including claims regarding the right of reasonable access to the courts. Dismissed 2-16-2018.[1]

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[1] Petitioner believes this list to be legally sufficient but not overinclusive

based upon the language of Supreme Court Rule 14(b)(iii). Petitioner's adversary the DOJ has denied him the contact information of his co-defendant Lindsey Kent Springer, which interferes with further inquiry as to potentially includable litigation by Springer.

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DECISIONS BELOW

The District Court's dismissal of Respondent's 2255 petition in *United States v. Oscar Stilley*, Civil Case 4:21-cv-00361-SPF-CDL, is not reported. See Pet. App. 1.

The Tenth Circuit's ruling is reported at *United States v. Stilley*, No. 22-5000, 2022 U.S. App. LEXIS 15469 (10th Cir. June 6, 2022) and reprinted at Pet. App. 2.

The Tenth Circuit's ruling in *United States v. Lindsey Kent Springer, United States v. Oscar Stilley,* No. 10-5055 and 10-5057, (partially consolidated) judgment affirmed 10-26-2011, is reported at *United States v. Springer*, 444 F. App'x 256 (10th Cir. 2011). Pet. App. 3. The Tenth Circuit's order denying rehearing and rehearing *en banc* 12-12-2011 is not reported. Pet. App. 4.

STATEMENT OF JURISDICTION

On June 6, 2022, the Tenth Circuit issued its opinion denying a certificate of appealability. The District Court had jurisdiction pursuant to 28 USC 1331. Jurisdiction to appeal to the 10th Circuit is at 28 USC 1291, for appeal from a final decision of a US District Court. This Court has jurisdiction pursuant to 28 USC 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case principally involves:

1) US Constitution, 1st Amendment, "Congress shall make no law ...

abridging ... the right of the people peaceably to ... petition the Government for a redress of grievances..."

2) US Constitution, 5th Amendment, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor shall any person ... be deprived of life, liberty, or property, without due process of law..."

3) US Constitution, Article I, Section 9, Clause 2 "The Privileges of the Writ of Habeas Corpus shall not be suspended..."

4) 28 USC 2255 (f)(1) (finality) and (2), (one year to file after removal of impediment to petition), see Pet. App. 6 for the full text of the statute.

STATEMENT OF THE CASE

Oscar Stilley for almost 20 years was an attorney known for advocacy on behalf of taxpayers, in civil, criminal, and administrative proceedings, initiative and referendum, etc. During the later years, Stilley primarily worked for individuals in criminal or civil trouble with the IRS. During those years, he had a national practice, learning a new set of local rules for almost every case.

Stilley came to be under criminal investigation in the middle of 2004, when he prepared a 10th Circuit criminal appellate brief[2] for Ms. Judy Patterson, concerning amongst other things the Paperwork Reduction Act (PRA). Stilley drafted it, Judy Patterson's attorney Jerry Barringer read, signed, and filed it.

The DOJ through various machinations procured a deal for Judy Patterson to drop her appeal in exchange for immediate termination of her prison sentence. *Id.* At the same time (middle of 2004) the DOJ started a retaliatory criminal investigation on Barringer, Stilley, and Lindsey Springer.

Springer and Stilley were purportedly indicted almost 5 years later, in 2009. The proper term is ***purportedly,*** because no indictment was returned in open court.

The government proceeded under not less than 4 different theories of criminal liability. Dkt. 701, pg. 23-25, esp. 24. Pet. App. 55. Two theories were claimed pretrial, one was deceitfully raised during trial, and one was raised post-trial. The government resisted any response to a bill of particulars, on the very

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[2] This is the docket only. Apparently the filed brief is unavailable.

theory that the government is ***bound by the particulars so stated***. Dkt. 42, pg. 8.

Charles O'Reilly was the lead prosecutor. During trial, Mr. O'Reilly casually handed Springer and Stilley copies of a proposed "gift" jury instruction, effectuating the theory switch from the pretrial theories to the trial theory.

This instruction was not filed ***by the government***. Nor was it ***openly*** presented to the District Court. O'Reilly and company ***left no fingerprints*** on it. The District Court *sua sponte* came up with basically the same jury instruction, tweaked to make it harsher on the defendants, and submitted that instruction to the jury. Dkt. 244, pg. 29-31.

On information and belief, O'Reilly engaged in *ex parte* communication with the District Court, to provide him with the jury instruction and theory switch that O'Reilly desperately needed, to avoid an adverse jury verdict.

On 12-8-2009, Stilley filed a consolidated motion for judgment as a matter of law, and motion for new trial, along with a brief in support. Dkt. 261 and 263.

The District Court struck both pleadings *sua sponte* Dkt. 264. This was utterly contrary to the District Court's stated opinion of the law, in written decisions both before and after striking Stilley's pleadings. Dkt. 701, pg. 44-49. Pet. App. 75-80.

On 12-1-2009 Stilley filed a 5 page motion, Dkt. 254, and a 5 page brief, Dkt. 255, requesting transcripts at public expense. These pleadings laid out the utterly destructive impact of incarceration on Stilley's ability to prosecute an appeal. The government didn't respond at all – on the record. Judge Friot burned the clock from

12-1-2009 to 1-12-2010, some 42 days, then denied this unopposed motion. Dkt. 278.

The District Court's theories were laughably wrong and utterly incompatible with the published policy of the Administrative Office of the Courts. See Dkt. 701, pg. 59-67, esp. pg. 62 Pet. App. 93. On information and belief the District Court once again engaged in *ex parte* contact with the government, to make this decision. Dkt. 278. By the District Court's own admission he was getting information from sources not disclosed on the record. *Id.*

The District Court on 1-22-2010 issued another *sua sponte* order, (Dkt. 290) this one much more subtle that the one described above. This was a scheduling order, quite often done *sua sponte* without malice and without prejudice to the parties.

Tucked into this order was a cutoff date of 2-1-2010, for dispositive motions. A mere 12 days later the government switched to a "theft" theory of criminal liability, at least as to Count 4. See comment made 2-12-2010, at Dkt. 310, pg. 11, about Patrick Turner's "naive belief" that "Defendant Springer had any intention of repaying the money Defendants stole."

In other words, the government admitted that their pretrial theories, as well as their brand new theory trotted out in the middle of trial under the most suspicious of circumstances, were all ***thoroughly*** incapable of supporting a criminal judgment.

Indeed, the government on 3-3-2010 confessed that if the trial jury had not adopted the post-trial "stealing" theory of the case, they would have returned

verdicts of "not guilty," at least as to Count 4. Objections to PSR, page 3. They could do this with great confidence, since the District Court had just days before ***cut clean off*** any opportunity to file any dispositive motions. Stilley was relegated to seeking relief on appeal.

The government thereupon utterly crushed and destroyed this legal right – precisely because they knew the probable outcome of a ***competent*** appeal by Stilley.

At sentencing, the government manufactured brand new theories of "tax loss" which resulted in dramatically higher offense levels and restitution amounts. These new theories were all either the product of 1) perjury, or 2) false evidence not arising to the level of perjury, or 3) mathematically impossible claims that won't even survive a trip to a calculator. Dkt. 701, pg. 25-38. Pet. App. 56-69.

US Probation found a Total Offense Level of 26, corresponding to a guideline range of 63-78 months. *Original PSR dated 2-25-10, pg. 16, 19.* Stilley by objection got the calculated Total Offense Level down to 24, for a guideline sentence of 51-63 months. *Revised PSR dated 4-8-10, pg. 15, 19.*

The government argued for a Total Offense Level of 32, with a Guideline Range of 121-151 months. The District Court mixed and matched, but still came up with the government's requested Total Offense Level and Guideline Range.

The District Court then slammed both Springer and Stilley with 180 months, denouncing Stilley as a "thief with a law degree." Sent. TR 450. When Stilley complained about the upward departure, the District Court claimed that it was a variance rather than a departure. Sent. TR 466. This can be fairly described as a

distinction without a difference.

O'Reilly successfully opposed release pending appeal – once again, because he knew the devastating effects of a ***competent*** appeal upon his ***fraudulent*** case. The District Court ordered both defendants to jail 4-23-2010, the last day of sentencing, directing that Stilley and Springer not be incarcerated together. Dkt. 338, pg. 2.

The District Court 1) acknowledged that the right of self-representation is an important right, 2) that incarceration has a negative impact on the ability to exercise that right, and 3) promised to do what he reasonably could to ameliorate the impact of incarceration. Sent. TR 455-456.

The DOJ, by and through its subsidiary the Federal Bureau of Prisons (DOJ-FBOP) made a complete mockery of the administrative remedy process. Dkt. 701, pages 70-80. Pet. App. 101-111. They rendered it impossible to even get through the process during the pendency of the direct criminal appeal proceedings. *Id.*

Since coming to home confinement, Stilley has compiled the 10-5057 docket into convenient and readily accessible form, with links to material filings using ordinal numbers applied by Stilley. For a stacked 448 page set of 10-5057 docket items, click here.

This docket shows that from May 2010 through December 2011, Stilley filed not less than 13 pleadings in the 10th Circuit, trying to get access to the basic wherewithal for a ***competent*** appeal. 10-5057 docket ## 9, 11, 20, 21, 26, 28, 29, 34, 40, 43, and 56.

Stilley's wife packed up a set of the docket and docket items (created by Stilley prior to incarceration) and mailed them to Stilley. Dkt. 701, pg. 75. Pet. App. 106. The DOJ-FBOP arbitrarily returned them to her, without even giving Stilley his due process right to object. This violated official policy of the DOJ-FBOP set forth in their own Program Statements.

Near the end of the proceedings in 10th Circuit 10-5057, Stilley filed a 6 page motion[3] (10-5057 Dkt. 56) asking for permission to file an appeal brief after having completed the ridiculously pathetic administrative remedies to which he had been relegated.

The panel rejected the request, but not for the most obvious reason that could possibly be cited. If any judge on the 10-5057 panel thought Stilley had *already prosecuted* the one direct appeal to which he was entitled, they easily could have said that.

Not one of the 10th Circuit judges did that. Stilley specifically asked for a court order commanding the clerk to withhold issuance of the mandate pending completion of the administrative remedy process and court litigation of his right of reasonable access to the courts. Circuit judges Lucero, Baldock, and Tymkovich construed the motion "as a motion to stay the mandate." 10-5057 Dkt. 57. Knowing full well that Stilley wanted opportunity to brief the court at the conclusion of administrative remedies, and any legal challenges to follow, the panel denied the

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[3] Stilley has no idea how the second page of the document appears to be extraneous. Stilley was in prison, someone else helped him file the document. Filed page 2 has the correct filemark headers at the top.

motion.

Stilley on 4-15-2011 filed a district court motion with included brief (Dkt. 443) that the DOJ-FBOP was rendering the exhaustion of administrative remedies a practical impossibility. O'Reilly sprang into action, now willing to write, to oppose any relief. (Dkt. 444). Stilley replied. (Dkt. 454). The District Court denied the motion on the ground that Stilley was still seeking relief through administrative remedies. (Dkt. 455) Nothing was said about the allegations that the DOJ-FBOP was rendering administrative relief "unavailable" within the meaning of *Ross v. Blake*, 578 U.S. 632, 136 S. Ct. 1850 (2016).[4]

Stilley spent over 400 days in SHU,[5] on hunger strike, mostly either directly or indirectly due to his efforts to get the right of peaceful petition and due process. Dkt. 701, pg. 65. Pet. App. 96. Over 10% of the time Stilley spent in DOJ-FBOP institutions was in SHU, on active hunger strike. Stilley has been force fed with a nasogastric tube 8 times, and threatened with it many more times. Dkt. 701, pg. 75. Pet. App. 106.

Stilley suffered approximately 13 "shots" (formal disciplinary incident reports) and lost over 6 months of "Good Conduct Time," (GCT) all or nearly all of which amounted to attacks on his right of due process and peaceful petition. Stilley's direct appeal of a district court challenge to the DOJ-FBOP's denials, evasions, retaliatory "shots," dirty tricks in the administrative process, etc., was

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4 Admittedly *Ross v. Blake* came years after this motion and order.

5 Special Housing Unit, or jail for the prison.

only recently decided by the 5th Circuit. Stilley's opening brief, the government's response brief, Stilley's reply brief, and the official record on appeal, in *Stilley v. Garland* et al, 5th Cir. 21-60022, are all available online. Likewise the 5th Circuit's decision, and their denial of panel or *en banc* rehearing.

The government claimed, with a straight face, that Stilley has attempted over 50 administrative remedies while in DOJ-FBOP custody, and has failed to exhaust a single remedy. Stilley v. Garland, government response brief, pg. 21.

The truth of the matter is that Stilley did exhaust his administrative remedies – long after the panel in Stilley's vain attempt for his one direct appeal as of right, (10th Cir. 10-5057) had rendered its opinion. The DOJ-FBOP just clammed up and refused to admit it.

After coming to home confinement, Stilley filed a motion for reduction of his sentence pursuant to 18 USC 3582(c). Dkt. 694. Stilley submitted a proposed preliminary order, (*Id.*) which made it plain that Stilley's goal was to first get a truthful record, and then to get a ruling on his motion for reduction of sentence. Stilley didn't get the truthful record. The District Court denied the motion.

Stilley filed his motion under 28 USC 2255 9-1-2021, within one year of coming to home confinement. Dkt. 701 Pet. App. 32. The following day he filed a motion for the phone, email, and mailing address of his codefendant Lindsey Springer, as well as a request for the District Court to explain how he still has any authorization to hear the case,[6] since no version of Miscellaneous #23 is currently

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[6] District Judge Stephen P. Friot is a duly authorized judge of the

valid. Dkt. 702.

The government moved to "dismiss" Dkt. 701 (Pet. App. 32) and Dkt. 702. Dkt. 705, Dkt. 707. The District Court treated the entire 81 page motion, with numbered paragraphs under oath, as mere "argument." Dkt. 719. Pet. App. 1. Since he unilaterally converted all of Stilley's evidence into "argument," Stilley couldn't possibly have any "new" evidence. The District Court didn't deny that Stilley is "***actually innocent***." The District Court "dismissed" both motions without acknowledging or discussing Stilley's ***evidence***. Id.

Stilley prepared a district court docket with entries from the time he came to home confinement to the present. This is essentially a docket with active links to pertinent pleadings, and also to the proposed order previously mentioned. OKND 4:09-cr-43, ##693-730 That's how a single link can be cited as going to multiple documents.

In summary, this is what has transpired.

1) Stilley and Springer utterly devastated the government's pretrial theories, so much that the government abandoned them in favor of theories laughably inconsistent with the indictment. Dkt. 701, pg. 23-25, esp. 24. Pet. App.54-56, esp. 55.

2) Stilley was denied a trial, fair or otherwise, *on the allegations of the purported indictment*. Everyone concedes Stilley is innocent ***of that***.

Western District of Oklahoma, but not the Northern District of Oklahoma, from whence this criminal case arises.

3) Stilley was denied any consideration of his motion for new trial and judgment as a matter of law, altogether contrary to the District Court's own written belief of the requirements of due process. Dkt. 701, pg. 44-49. Pet. App. 75-80.

4) Stilley was denied an unopposed motion for transcripts, at a time that would have allowed him to prepare appellate arguments on the issue of criminal liability, prior to incarceration. Stilley was denied transcripts until the DOJ[7] was able to deprive its ***adversary*** Stilley of access to the official record as defined by FRAP 10(a).

5) The District Court *sua sponte* slammed the door on dispositive motions, just days before the government abandoned the trial theory of liability (itself contradictory to the pretrial theory) and adopted the "theft theory."

6) The government for purposes of sentencing more than doubled its pretrial alleged "tax losses," knowing full well that the evidence in support of this claim was false and fraudulent. Dkt. 701, pg. 26. Pet. App. 57.

7) Stilley and Springer were both locked up immediately upon the imposition of sentence, with instructions to keep the two separate. Dkt. 338, pg. 2. The District Judge ignored objection to interference with the US mails, committed with the apparent intention of obstructing peaceful petition and due process. Dkt. 364, 376.

8) Stilley repeatedly sought the wherewithal to prepare a competent appeal

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7 By and through its subsidiary the DOJ-FBOP.

brief, by pleadings filed from May 2010 through November 2011. 10-5057 docket

9) Stilley sought relief from District Court, for denial of access to those things necessary for a competent appeal, explaining that his administrative remedy requests were being obstructed, but was denied. Dkt. 443, pg. 7.

10) Stilley has exerted full efforts since that time, and pursued a 5th Circuit appeal recently denied, with respect to amongst other things the denial of ***access to*** those things necessary for the preparation of competent appeal briefs.

11) Stilley filed a motion for sentence reduction under 18 USC 3582(c), requesting that the District Court first issue a preliminary order ensuring that the District Court could rule on the basis of an ***honest*** record. Dkt. 694. The District Court declined to order such relief.

12) Stilley filed his motion under 28 USC 2255 within one year of coming to home confinement, same being the earliest plausible time that Stilley was freed from obstruction of access to those things indispensable to a competent appeal. Nobody contends otherwise.

13) The District Court "dismissed" Stilley's 2255 motion, as well as his motion for Springer's contact information, and the District Court's claim of authority to decide this case. Dkt. 719. Pet. App. 1. The District Court declared that Stilley's verified motion under 28 USC 2255 was merely "argument."

Thus we can see that Stilley wasn't ***tried*** on the allegations of the indictment, was denied ***any*** consideration of the most critical post-trial motions, was sentenced on an ***altogether new theory***, after being barred from challenging it, was tagged for obviously ***false and fraudulent*** sentencing guideline "points" and restitution, was denied the ***one direct appeal*** to which he was legally entitled, was denied his 1st Amendment right of peaceful petition and due process for the duration of his incarceration, was repeatedly and extensively punished for efforts to get due process and the right of peaceful petition, and has never had so much as a pretense that any district court has considered or decided any motion under 28 USC 2255 ***on the merits***.

REASONS FOR GRANTING A CERTIFICATE OF APPEALABILITY

Considerations of efficiency.

The honor of clerking for the US Supreme Court is granted only to a select group of highly qualified individuals. Associate Justices get 4 law clerks each – and you're one of them. The fact that you're reading this means you have repeatedly succeeded beyond reasonable expectations.

Part of any petitioner's job is to lighten your load. In fact, failure so to do is sufficient reason, standing alone, to deny a *discretionary* writ. Supreme Court Rule 14(4).

Petitioner has prepared this motion with links, to make it easier to see the materials that he discusses. Petitioner as a pro se litigant cannot file electronically.

However, this pleading is available at https://bustingthefeds.com/wp-content/uploads/2022/10/MtnCOA.pdf.

Petitioner hopes you will use these resources. The trial transcript is some 4,000 pages. The district court criminal record is now well over 7,000 pages. Petitioner generated over 400 pages in his failed attempt to get the one direct appeal to which he is entitled, in 10th Circuit 10-5057. This criminal prosecution has spawned a veritable blizzard of related and/or appellate litigation. The use of links, timelines, etc., is practically indispensable for anyone wishing to present a reasonably complete yet concise summary of the litigation.

Petitioner on the caption page of his original filing requested 2 separate reliefs. First, he requested a certificate of appealability (COA) as to all claims in his petition under 28 USC 2255. Second, he requested certiorari on certain questions.

The clerk rejected the pleading because it combined a petition for certiorari with another pleading, in contravention of Rule 12.4. Petitioner split these claims into two pleadings but hopes these related pleadings will be assigned with efficiency in mind. If a law clerk understands one of these pleadings, they mostly understand the other one as well.

I. The Court should grant a certificate of appealability, and furthermore clarify that this Court has a duty to review an application for a certificate of appealability consistent with the legal test under 28 USC 2253(c)(1)(B) as enunciated in *Barefoot v. Estelle*, 463 US 880 (1983), rather than "discretionary" whereby the Court may simply decline certiorari.

Summary dispositions are specifically authorized by the Court's rules. See Supreme Court Rule 16(1.), which provides:

> 1. After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a **summary disposition on the merits.**
> (Emphasis added)

The government thus far has evaded any obligation to respond substantively to Petitioner's claims. A substantive response would have great value to Petitioner. As the Court explained in *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976):

> ... The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)

Petitioner was sentenced based on theories utterly contradictory to the trial or pretrial theories, or the text of the indictment. Petitioner was denied the one direct appeal to which he was and still is entitled through utterly lawless machinations. After more than 12 years in custody, Petitioner has never had a ruling on the merits of his core arguments. He has never received due process, as that word is defined in the law. Petitioner's conviction and sentence cannot survive a rational decision on the merits.

Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) predates the current statutory scheme but remains the seminal case with respect to the legal test for a COA. For example, see *United States v. Rodriguez*, 768 F.3d 1270, 1271-72 (10th Cir. 2014):

> A certificate of appealability is necessary for Mr. Rodriguez to appeal. 28 U.S.C. § 2253(c)(1)(B). We will issue a certificate only when the applicant makes "a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). This showing requires a demonstration 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.'" *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983), *superseded by statute,* Antiterrorism and Effective Death Penalty Act of 1996, No. 104-132, 110 Stat. 1214,, *as recognized in Slack,* 529 U.S. at 483-84). Under this test, Mr. Rodriguez must show "that the district court's resolution of the claim was either 'debatable or wrong.'" *Laurson v. Leyba,* 507 F.3d 1230, 1231 (10th Cir. 2007) (quoting *Slack,* 529 U.S. at 484). We conclude that no reasonable jurist could regard the merits of the § 2255 motion as debatable or wrong.

Petitioner overwhelmingly meets the legal test for a COA. The government doesn't claim otherwise. They got the 2255 petition "dismissed" on a claim that it was untimely. Pet. App. 1.

A. On motion to dismiss, well pleaded allegations are presumed true.

In *United States v. Gallegos,* 459 Fed. Appx. 714, 716 (10th Cir. 2012) the 10th Circuit explained as follows:

> [*716] Mr. Gallegos has failed to satisfy this burden. In his application for a COA, Mr. Gallegos first contends that the district court erred in "dismissing [his] petition under Fed. R. Civ. P. 12(b)(6) when it failed to assume all facts pleaded . . . to be true and considered material not included in the petition." Aplt. Br. at 3. **Mr. Gallegos is correct that in resolving a motion to dismiss under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view [those] allegations in the light most favorable to the [nonmoving party].**" *Kerber v. Qwest Group Life Ins. Plan,* 647 F.3d 950, 959 (10th Cir. 2011) (quotations omitted). He is also correct that a district court cannot consider material outside of a complaint when considering whether to dismiss a claim under Rule 12(b)(6). See Fed. R. Civ. P. 12(d). ...
> (Emphasis added)

The government takes precisely the opposite approach. Stilley used pages 70-80 of his 2255 motion (Pet. App. 5) to set forth facts that render the 1 year

statute of limitations inapplicable to him. The government at page 5 of its motion to dismiss says "[I]t need not be said, but Mr. Stilley's claims are false."

In other words, the government asked the District Court to *summarily presume* Stilley's factual allegations false – and the District Court obliged. The government presents no evidence whatsoever, to contradict some 80 pages of detailed factual allegations, made under penalty of perjury. The government presented neither argument nor authority to show that Stilley's claims, if true, would not entitle him to relief. The government simply invited the District Court to summarily declare all Stilley's factual allegations false, just because counsel for the government wanted it that way.

Robinson v. Ledezma, 399 Fed. Appx. 329, 329-330 (10th Circuit 2010) involved a petition under 28 USC 2241. Stilley is proceeding under Section 2255, not Section 2241. Nevertheless, this case holds the key to understanding why the government is wrong both on procedure and on the merits. Therefore Stilley will reproduce and highlight substantial parts of this case, beginning with the first two paragraphs:

> This case presents unusual and compelling circumstances for federal post-conviction relief. Petitioner is currently incarcerated for **an additional five years** beyond the statutorily authorized term due to an erroneous specification of his offense in the indictment, plea agreement, and judgment of conviction. The operative mistake, ***actively shared in by defense counsel, the prosecution, and the trial judge***, is patently evident on [**2] the record. The government specifically charged, petitioner (advised by counsel) pled guilty to, and the district court formally convicted defendant of violating 21 U.S.C. § 841(b)(1)(C) for possessing with intent to distribute 1300 grams of marijuana. But possessing with intent to distribute 1300 grams, or 1.3 kilograms, of marijuana is not a violation of [*330] § 841(b)(1)(C), it is a violation of § 841(b)(1)(D) (addressing offense involving less than 50

kilograms of marijuana). And this factually unsupported conviction demonstrably prejudiced the petitioner: the 120-month sentence he received would have been permissible for the former violation but plainly exceeds the five-year maximum authorized for the latter. Petitioner has already served more than the allowed five years; to keep him confined longer is an injustice.

Errors cannot always be remedied by legal action, of course. This is particularly true where **early inaction or procedural misstep by the defendant has left an error in a criminal prosecution unchallenged until well after a conviction has become final**. Congress has erected formidable barriers to relief in this circumstance: the one-year statute of limitations in § 2255(f); [**3] and, where the defendant has already pursued one (or more) § 2255 motion(s) challenging the conviction or sentence in question, the rigorous constraints in § 2255(h) on filing second or successive § 2255 motions. 1 ***But these procedural barriers do not fully extinguish the interests of justice.*** HN1 The limitations period in § 2255(f) **is subject to equitable tolling** for various reasons, **including the actual innocence of the defendant**. *United States v. Gabaldon*, 522 F.3d 1121, 1124 (10th Cir. 2008). More generally, none of the barriers to or constraints on § 2255 motions may be operative if the § 2255 remedy is properly found "inadequate or ineffective to test the legality of [the defendant's] detention," 28 U.S.C. § 2255(e)--**in which case a petition for a writ of habeas corpus under 28 U.S.C. § 2241 may substitute for the remedy unavailable under § 2255.** (Emphases added)

In sharp contrast to the facts of *Robinson v. Ledezma*, Stilley has fought for his rights from beginning to end. Stilley has unfailingly claimed his right to one direct appeal. Stilley has continuously persisted in his claim for reasonable access to the courts. His claim of right of reasonable access to the courts, *Stilley v. Garland*, 5th Circuit #21-60022, was only recently decided – and that decision merely upheld a dismissal *without prejudice*.

Keep in mind that the material Stilley presents for the consideration of this Court is far from exhaustive.

B. Statute of limitations is an affirmative defense.

Statute of limitations is an affirmative defense. FRCivP 8(c). The 10th Circuit requires proof sufficient to support a limitations defense. In *Maughan v. SW Servicing*, 758 F.2d 1381, 1387-1388, (10th Cir. 1985) the Court opined:

> HN8 Summary judgment is appropriate only **when the moving party has established that there is no genuine issue of material fact, and that he is entitled to judgment as a matter of law.** Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion. *Lindley v. Amoco Production Co.*, 639 F.2d 671, 672 (10th Cir. 1981). The motion should not be granted where there are conflicting inferences to be drawn from the affidavits. *United States v. Diebold, Inc.*, 369 U.S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). While cases involving statute of limitations defenses [**16] frequently lend themselves to summary disposition, **a court should not grant summary judgment for the defendant if there is a viable issue of fact as to when the limitations period began.** *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith*, 494 F.2d 168, 171 (10th Cir. 1974); 10A Wright & Miller, and Kane, Federal Practice and Procedure § 2734, at 421 (2d ed. 1983).
> (Emphases added)

The government did not properly raise the defense of limitations at district court. Consider Rule 6 of the Rules Governing Section 2255 Proceedings, which provides in pertinent part:

> Rule 6. Discovery
>
> (a) Leave of Court Required. A judge may, **for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure <u>or</u> Civil Procedure**, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. §3006A.
> (b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request **must also include any proposed interrogatories and requests for admission, and must specify any requested documents.**
> (Emphases added)

We can clearly see that a district court must have the proposed discovery requests, from a litigant seeking discovery. This would be practically impossible prior to the government's answer to the 2255 motion. If the government *admits* a fact, why would a 2255 claimant wish to conduct discovery in order to *establish* that fact? Such procedure puts the cart before the horse. Stilley filed an 80 page motion which includes 510 numbered paragraphs. The applicable rules simply do not contemplate discovery prior to a response to the motion.

Indeed, the government must decide whether it will properly raise the limitations defense *at all*. Consider once again *Robinson v. Ledezma*, 399 Fed. Appx. 329, 331 (10th Circuit 2010), where the court said:

> [*331] The district court rejected this argument. Assuming that a § 2255 motion was presently unavailable to petitioner, the court held such a motion nevertheless was his exclusive remedy, and dismissed the § 2241 petition without prejudice for lack of jurisdiction. Petitioner now appeals. We affirm the dismissal of the § 2241 petition, but on a slightly different analysis that has significant practical consequences for petitioner: ***we hold that relief under § 2255 is still potentially available and should be pursued promptly in the District of Kansas.*** As explained below, petitioner has a colorable basis for equitably tolling the limitations period in § 2255(f). He must pursue that possibility in the Kansas district court through a proper § 2255 motion ***before resort to a § 2241 petition*** as a substitute for an allegedly "inadequate or ineffective" § 2255 motion is considered. In addition, in light of the ***non-jurisdictional nature*** of the time bar, see *United States v. Kelly*, 235 F.3d 1238, 1243 (10th Cir. 2000), the government could ***expressly waive it*** in the interest of justice to enable a prompt and procedurally [**7] appropriate remedy for the ***patently prejudicial error*** tainting petitioner's conviction and resultant sentence, see generally *Robinson v. Johnson*, 313 F.3d 128, 134 (3d Cir. 2002) (collecting cases recognizing that time-bar in § 2255 ***and*** habeas proceedings may be waived by government). Under the unique circumstances here, **we encourage the government to fully consider this expeditious course.**
> (Emphases added)

Two factors are in play. One, Stilley has a strong claim that limitations didn't start to run until Stilley left prison. Nobody contends that Stilley didn't file within one year of leaving prison. Nobody contends that Stilley failed to file within one year of having access to the official court record, as defined by FRAP 10(a).

No competent attorney would even attempt an appeal without the docket and docket items. Nobody argues otherwise. Any such "appeal" would at best be an argument from ignorance, at worst an invitation to malpractice and ethics charges.

Two, the government has a continuing ethical duty to waive limitations even if an arguable limitations defense could be raised. Charles Anthony O'Reilly is a California licensed attorney, bar # 160980. Mr. O'Reilly cannot discharge his ethical duties unless he waives limitations on behalf of the government.

In fact, the failure to formally waive limitations at District Court was an ethics violation separate from his other ethics violations. He had various ethical duties to *the District Court*,[8] that could not have been discharged in any other way. Even if he stonewalled on a petition under 28 USC 2255, and confessed error in the 2241 court, his acts and omissions would violate the attorney ethics rules of California as well as those of practically every other state in the union.

The Tenth Circuit in *Robinson v. Ledezma*, 399 Fed. Appx. 329, at pages 333-334 ***did not*** say that the remedy of 28 USC 2241 was ***necessarily*** unavailable. Consider what they actually said:

> As we have already touched on, HN6 the time bar in § 2255(f) is subject to tolling on the basis of a **developing set of equitable considerations**. And

8 He also has ethical duties to this Court, which he will probably flout.

> this court has recognized actual innocence as one of them. *Gabaldon*, 522 F.3d at 1124; see also *Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007) (noting same point in connection with time bar in § 2244(d)(1)). Diligence in pursuing a § 2255 motion is also a consideration, *Gabaldon*, 522 F.3d at 1124, [**14] though its role in actual-innocence cases has not been definitively settled by this court. We have yet to decide, for instance, **whether a defendant who has demonstrated actual innocence must nevertheless serve the rest of his sentence-possibly the rest of his life-in prison for a crime he did not commit simply because he cannot persuade a court that he acted with sufficient diligence** in raising the issue. Fortunately, we need not wade deeply into this legal quicksand here. The circumstances surrounding petitioner's prosecution, plea, and sentencing proceedings, described earlier, suggest a **facially plausible excuse** for his failure to promptly recognize and seek to remedy the claim he has now raised. In accepting the factual validity of his conviction, and the resultant legality of his ten-year sentence, under § 841(b)(1)(C), petitioner followed legal representations made throughout the proceedings by the government, his own counsel, and the trial judge; indeed, the unanimous affirmation of legal regularity here **culminated in a defense waiver of appellate and collateral review** should sentencing be carried out in accordance [*334] with his conviction under § 841(b)(1)(C).
>
> These circumstances [**15] raise at least a colorable basis to argue for the exercise of **judicial discretion** in tolling the limitations period in § 2255(f) to permit the presentation of a claim of actual innocence in a proper § 2255 motion. And that is enough to render petitioner's direct recourse to § 2241 in this proceeding ***plainly premature and inappropriate***.
> (Emphases added)

Stilley's conduct was diametrically opposed to that outlined in *Robinson v. Ledezma.* Stilley has always claimed innocence, with the utmost vigor, and continuously claimed his rights under the 1st Amendment peaceful petition clause, 5th Amendment right to indictment, etc. For example, the District Court on 1-28-2010, in ruling on Stilley's objection to having his motion for judgment as a matter of law and motion for new trial unceremoniously stricken, declared that "[S]ome of what Mr. Stilley includes in his supporting brief can only be described as a rant." DC Dkt. 293, pg. 17.

Rant or not, Stilley maintained the fight for the duration. Stilley was in SHU (Special Housing Unit, or jail for the prison) on the day he discovered he was going to home confinement. You should know the specific reason and how this transpired.

Stilley at FCC Yazoo City Low had been told since his arrival that computers were on the way. Some 2 years after his arrival at this prison complex, Assistant Supervisor of Education Dontae Dennis was still telling Stilley that primitive typing keyboards (brand names include Forte, Fusion, or Neosmart) were coming soon. They were in Dennis' office – he just wouldn't let the inmates use them.

Stilley knew Dennis was lying through his teeth, and why he was doing it. DOJ-FBOP brass, top to bottom stem to stern, are terrified of educational resources, precisely because such resources are *dual use.* The objectionable use is the exercise of the 1st Amendment right of peaceful petition, and the 5th Amendment right of due process.

By this time Stilley was at FCC Yazoo City Camp. Stilley refused to eat. He deliberately ran his blood sugar down well below 50. He proved this fact to medical personnel, and explained his reasoning. He explained that he wanted the long promised keyboards, and would eat if he got them. Stilley drank enough nutritious liquids to keep from going to SHU immediately, but not enough to prevent him from running his blood sugar down again the next day. Stilley tried to talk to responsible personnel, to get access to the keyboards.

The prison administration sent a flunky to pick up Stilley, late at night, to take him to SHU. At that point in time, negotiation was impossible, "folding" was unthinkable.

On Wednesday, April 8, the day before Passover 2020, Stilley rejected the Passover package. That was truly painful because Stilley is a Messianic, and keeps the Appointments (feasts, even though one is actually a fast) of Yahweh our Elohim. What could he do? He already knew that folding in the face of an attack would virtually guarantee the same attack in the future.

After rejecting the food, the Unit Manager at the housing unit of the Low, where Stilley was previously assigned, told Stilley that he was leaving prison, with words to the following effect. "Forget the keyboards, I've seen your name on the list, you'll soon be using your own computer."

Stilley agreed to eat. The Chaplain brought the food back. Stilley broke the hunger strike and ate.

On September 9, 2020, the day before Feast of Trumpets, the first feast of the 7th Hebrew month, Stilley left halfway house for home confinement. From that time forward, Stilley has worked diligently to expose the manifold frauds practiced upon him, which sent him to prison.

If the petitioner in *Robinson* had a colorable basis to argue tolling, there can be no dispute that Stilley had the same. Stilley has devoted a massive amount of resources toward proving that he is not guilty of any count whatsoever, and that he

should not be obstructed from the use of his own property in the defense of his liberty.

C. Fraud upon the court prevents limitations from commencing.

In case of fraud upon the court, the statute of limitations never starts. *Weese v. Schukman*, 98 F.3d 542, 552-53 (10th Cir. 1996) See 5th Circuit Brief, ppg. 51-63. Stilley has a very strong claim for fraud upon the court, despite the fact that such claims are amongst the most difficult to plead and prove.

If the *Barefoot* test prevails, Stilley necessarily wins.

If Stilley is relegated to a discretionary test, he *almost necessarily* loses. Why? This Court only accepts about 1 case in 100. Plus, some cases involve major companies and large sums of money. Some, such as the recent flurry of abortion litigation,[9] are highly likely to be considered and decided by this Court. The true probability that an obscure criminal litigant will be *granted certiorari* is far below 1%.

Each member of this Court gets 4 law clerks. That's 36 law clerks.[10] The least of these clerks are vastly superior to the average judge on an American bench.

So why can't these clerks simply tell the justices when they come across a meritorious application for certificate of appealability? At the core, clerks get the

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[9] Stilley was involved in certain lawsuits, concerning Dr. Alan Braid, M.D., and others, partly because Stilley knew that a grant of certiorari was highly likely. A Google search for "Oscar Stilley" will make this clear. Whether or not Stilley thought he could get a front row seat or a speaking part for proceedings at the US Supreme Court is beside the point.

[10] Unless the Chief Justice exercises his right to 5 clerks.

job not only because of their qualifications, but also because of the general intangibles that enable a *relationship of trust*. Why is it necessary to trouble the entire Court? Why can't one justice (primarily by and through one clerk) solve these problems? The text of 28 USC 2253(c)(1) speaks in the singular, not the plural.

D. This case is suited for answering this longstanding question.

Petitioner's research suggests this isn't done. Brent E. Newton, *Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction*, 5 J. App. Prac. & Process 177 (2003), (Pet. App. 115) suggests that there is a split of opinion as to the justices of this Court, as to whether the *Barefoot* or discretionary standard applies.

Perhaps Petitioner's research skills fall short, but he doesn't see a pattern of granting certificates of appealability independent of certiorari. In fact he doesn't see ***any*** summary grants of a certificate of appealability, absent certiorari on some legal question upon which the Court has chosen to speak.

This Court should grant a certificate of appealability to Stilley, and remand for further proceedings.

II. The Court should grant a certificate of appealability, clarifying that a criminal defendant compelled to exhaust administrative remedies as condition precedent to getting those things essential to a competent appeal, is entitled to prosecute the appeal afterward.

Stilley at the 10th Circuit filed his Appellant's Combined Opening Brief and Application for a Certificate of Appealability. Stilley in this pleading laid out reasons that he is entitled to 1) a certificate of appealability, as to every issue listed

in Stilley's 2255 motion filed at District Court, and 2) to a reversal of the District Court's decision, and remand for appropriate further proceedings.

Stilley was unlawfully deprived of the one direct appeal to which he was by law entitled. That's what he wants back – more than a decade after the fact.

Stilley wants the opportunity to prepare and file his own appeal brief, using his own resources, without obstruction by his governmental adversaries.

Stilley's adversaries have long feigned a belief that Stilley sought ***free stuff from the government***, to prepare a competent appellate brief. This diversionary tactic is a malicious fraud. **Stilley had all the *stuff*, when he was unceremoniously hustled off to jail.** Stilley was an experienced attorney who had fully briefed literally dozens of appellate cases, both in Arkansas and various federal appellate courts. Stilley didn't need or want governmental largesse. Stilley sought freedom from invidious governmental interference with his right to one direct appeal, from an utterly corrupt and totally fraudulent criminal conviction.

A. One direct appeal is a matter of right.

Occasionally, a single case tells the Court and parties the whole story. This time, the name of the case is *United States v. Winterhalder*, 724 F.2d 109, 111-12 (10th Cir. 1983):

> In the instant appeal, counsel was appointed for defendant, but upon discovery of the possible jurisdictional defect the appointment was vacated pending the resolution of the jurisdictional problem. The parties were asked to address the jurisdictional question, and both parties have responded. "Present federal law has made ***an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right***." *Coppedge v. United States*, 369 U.S. 438, 441, 8 L. Ed. 2d 21, 82 S. Ct. 917 (1962). The criminal defendant is entitled to counsel on his first

appeal of right as a matter of constitutional law. *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963).

This circuit has held that counsel appointed to represent indigent persons on appeal must advise them of their right to appeal and perfect an appeal if that is the client's wish. *Jackson v. Turner*, 442 F.2d 1303, 1307 (10th Cir. 1971). Of course, later decisions have shown that a defendant who retains counsel is entitled to the same constitutional protections as the indigent whose counsel is appointed. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 345, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980).

A line of Fifth Circuit decisions holds that when Sixth Amendment rights have been violated by counsel who promises but fails to file a timely appeal, ***the proper remedy under 28 U.S.C. § 2255 is an out-of-time appeal***. *See, e.g., Mack v. Smith*, 659 F.2d 23, 25-26 (5th Cir. 1981); *Atilus v. United States*, 406 F.2d 694, 698 (5th Cir. 1969). It was this line of cases that the district court relied upon in granting defendant a new appeal.

The proper remedy for a denial of effective assistance of counsel in the prosecution of an appeal is a question of first impression in this circuit. The relief granted by the district court here was to order defendant to file a new notice of appeal which would purportedly resurrect defendant's earlier direct criminal appeal. The filing of a notice of appeal, however, transfers jurisdiction over the matter from the district court to the court of appeals, and the power to reinstate an appeal previously dismissed for failure to prosecute lies with the court of appeals, not the district court. *See Williams v. United States*, 307 F.2d 366 (9th Cir. 1962).

28 U.S.C. § 2255 is not the proper vehicle for the reinstatement of an appeal which has been dismissed by this court for failure to prosecute. We agree with the position of the Ninth Circuit that, "**if an appeal is improvidently dismissed in this court, the remedy is by way of a motion directed to this court asking for a recall of the mandate or certified judgment so that *this court* may determine whether the appeal should be reinstated**." *Williams v. United States*, 307 F.2d at 368; *accord Rivera v. United States*, 477 F.2d 927, 928 (3d Cir. 1973); *Starke v. United States*, 338 F.2d 648, 649 (4th Cir. 1964).

Because the effect of the district court's order is to reinstate defendant's earlier appeal, we hold that the district court lacked the authority under 28 U.S.C. § 2255 to create appellate jurisdiction by directing defendant to file a notice of appeal. Nevertheless, because the district court's findings of fact are unchallenged and the legal conclusion of ineffectiveness of counsel is correct, **we will treat the notice of appeal as an application**

to recall the mandate in defendant's <u>earlier appeal</u>, No. 81-2158. The factual finding of the district court regarding the dismissal of defendant's direct criminal appeal justifies a recall of our mandate and a reinstatement of appeal No. 81-2158.

Accordingly, we adopt the district court's findings that defendant was denied the right to effective assistance of counsel on appeal. **By order entered this same date, the mandate shall be recalled and the appeal reinstated.** The reinstatement of defendant's direct criminal appeal ***<u>allows defendant to raise any and all claims of error properly available to him</u>*.** Without expressing any opinion as to the merit of defendant's claim of ineffectiveness of counsel at trial and in order to preserve the record made by the district court, **the matter is remanded with instructions to the district court to *<u>consolidate</u>* the record of the § 2255 proceedings with the record in the direct criminal appeal and they shall be <u>certified together</u> in No. 81-2158.**

The mandate shall issue forthwith.
(Emphases added)

Winterhalder is about an inmate whose lawyer royally screwed things up, thus depriving the defendant of his right to one direct appeal.

Does it matter one whit that Stilley has been denied his one direct appeal by the lawless deeds of his adversaries and captors? Does it matter that Stilley diligently pursued administrative remedies, and to this day continues to litigate relevant legal questions with utmost vigor?

B. The evil of which Petitioner complains is a feature, not a bug, in the DOJ's carefully crafted and much refined system.

Stilley plainly alleged that the administrative remedy system is designed to cheat inmates out of their constitutional rights. By the time an inmate exhausts the utterly fraudulent pretense of remedies maintained by the Department of Justice-Federal Bureau of Prisons, (DOJ-FBOP) and litigates the question of his 1st

Amendment right of reasonable access to the courts, due process, etc., the underlying criminal appeal will be long over and done with.

That's precisely the way the US Department of Justice (DOJ) wants it. They have engineered this system, and continue refining their cynical trick-bag to this very day. They crush the litigating capacity of their victims, slow-walk everything, and lie about whether the remedies were actually exhausted. They softly mock their victims when the time is up, and it is too late.

Stilley's 2255 proved he was prevented from filing a competent appeal brief. Dkt. 701, pg. 70-80 Pet. App. 101-111. Nobody denies this. Nobody denied ***anything***.[11] Stilley's 2255 was "dismissed." Dkt. 719, pg. 5 Pet. App. 5. It was not considered on the merits. The District Court demoted factual allegations under penalty of perjury to the status of mere "argument." Dkt. 719, pg. 2-4 Pet. App. 2-4.

The form itself tells inmates that they must allege facts – argument should be saved for the brief. Take a look at the 2255 form and related documents at the website of the Northern District of Oklahoma. You will see that Stilley is telling the truth.

Stilley litigated the denial of peaceful petition and reasonable access to the courts. 5th Circuit 21-60022. The *next to last* entry in that case is 4-6-2021, more than a year ago. The 5th Circuit on 5-18-2022 upheld the dismissal of Stilley's entire complaint in an unpublished *per curiam* opinion. On 7-19-2022, the 5th

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[11] Unless an offhand claim or two in a brief can be construed as a denial. There were no denials in conformity with applicable rules and binding precedent.

Circuit denied rehearing and rehearing en banc. The timeline on that litigation alone proves that it is impossible to exhaust administrative remedies, and the legal remedies to follow, and afterward file a ***competent*** appellate brief. It simply can't be done.

C. Remedies must be available to be material.

In the 5th Circuit decision 5-18-22, *Stilley v. Garland*, at page 6, the unidentified author claims that the government's burden of proof of failure to exhaust does not include any requirement to prove that the allegedly unexhausted claim was ***available***.

The biggest fly in that wonderful ointment is the fact that the 5th Circuit less than 3 months prior said the ***exact opposite***. Here is the paragraph from the unpublished per curiam in *Thoele v. Collier*, No. 20-50666, 2022 U.S. App. LEXIS 6237, at *5 (5th Cir. Mar. 9, 2022):

> To prove this affirmative defense, TDCJ must show that (1) ***administrative remedies were available*** and (2) Thoele failed to exhaust them. *Cantwell v. Sterling*, 788 F.3d 507, 508-09 (5th Cir. 2015) (per curiam). Thoele admitted that he did not exhaust, so the only dispute is about the first requirement. (Emphases added)

Just one more click takes us to *Cantwell v. Sterling*, 788 F.3d 507, 508-09 (5th Cir. 2015). There the Court explained in its **published** opinion as follows:

> Exhaustion is an affirmative defense; the defendants have the burden of proving that the plaintiff failed to exhaust ***available*** administrative remedies. *Jones v. Bock*, 549 U.S. 199, 216, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007); *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010). Here, it is undisputed that Texas prisons have a two-step grievance process. Cantwell says that he filed a step-one grievance with prison authorities but never received a response. Because there was no response, he says, he did not proceed to the second step.**1** The question for us is whether these

circumstances suffice for exhaustion. But we cannot decide that issue on the present record.
(Emphasis added)

Stilley v. Garland, Thoele v. Collier, and *Cantwell v. Sterling* all three cite to the US Supreme Court case of *Jones v. Bock*, 549 U.S. 199, 222, 127 S. Ct. 910, 924 (2007). *Thoele* and *Cantwell* both read *Jones v. Bock* to require defendants to prove ***availability*** of administrative remedies, in order to succeed on that affirmative defense. The *Stilley v. Garland* panel has gone in the diametrically opposite direction.

Stilley gave the 5th Circuit a chance to correct their clash with the US Supreme Court, on petition for rehearing and rehearing en banc. Rehearing has been denied, but that issue is not really the point here. The main point is that Stilley's 2019 case (MSSD 3:19-cv-6 HTW-LRA) (which would have been a 2018 case but for hyper-technical objections by the clerk) is just now getting a decision, approximately 3 ½ years later.

This time frame alone proves that exhaustion of administrative remedies, and legal remedies to follow, cannot as a practical matter be completed prior to the entry of decision on direct appeal. If Stilley cannot prosecute his appeal after the conclusion of his administrative remedies and litigation to follow, the DOJ has the perfect recipe for rendering the ***right to one direct appeal in a criminal case*** a practical nullity.

Stilley's litigation over the denial of his 1st Amendment rights of peaceful petition, reasonable access to the courts, due process, etc., has been dismissed

without prejudice, leaving Stilley without a decision on the merits, but with 1) the right to petition for certiorari,[12] and 2) the right to file the same lawsuit again, in the same or (more likely) another venue.

Everyone knows the legally correct and required result, but it is just so very painful to put it down on paper. Confession may be good for the soul, but it is *downright deleterious* for everything else. Stilley's enemies much prefer to leave Stilley dangling, without any definitive decision. A definitive decision requires a ruling that Stilley was ***right all along***, and that Stilley's ***legal right*** to one direct appeal was not annihilated by the fraud, oppression, and chicanery of his adversaries.

The DOJ wants the opposite of justice. ***Never let Stilley get a decision on the merits***. That's their mantra, and that's exactly the system enforced by the DOJ's puppet subsidiary, the DOJ-FBOP. The prosecutor and the jailer have been essentially rolled into one. That ***one*** stomps out the ability of incarcerated persons (including but not limited to Stilley) to prepare and file a competent brief.

Their idea is to stampede their victims into filing a pathetic shadow of a ***competent*** opening brief. Reply briefs aren't required and don't matter. The opening brief, however inadequate and incompetent, is enough for courts to conclude that the one direct appeal has been exhausted. The mandate then starts the clock – their home-made clock they got from Congress through lies and deceit –

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12 Not to suggest whether or not such petition will be filed. The calendar suggests it won't.

on their one year statute of limitations. It is impossible for the inmate to get the wherewithal for reasonable access to the courts within that time. If the victim files a 2255, it will be a joke, easy to swat down, with plausible deniability as to the fraud that gave rise to it.

If the victim does not file within the year, he will get the same treatment that Stilley got. The fact that the time doesn't start – according to the statute - until an impediment preventing the preparation of a *competent* 2255 is removed, will be glossed over or ignored altogether. How else to put innocent people in prison?

The goal is to snuff out the victim's last hope. Convince the victim that the racket worked, that they have no further remedies, and that they should meekly acquiesce to the fraud practiced upon them.

Stilley ***never*** did that. Stilley stood firmly on his claim of right to one direct appeal – always but always, to this very day. Stilley adopted most of Springer's counseled brief, but nobody claimed that this partial adoption *constituted* the opening brief for the ***one direct appeal*** to which his is indisputably entitled. 10-5057 docket, pg. 9 Faced with the question of whether Stilley would get his appeal after exhaustion of administrative remedies and litigation to follow, neither the 10th Circuit panel nor the government argued that Stilley had already filed the opening brief for the one direct appeal to which he is entitled. *Id.*

This Court should grant a certificate of appealability on grounds that time spent exhausting administrative remedies doesn't count against the 1 year statute of limitations.

III. A justice or the Court should grant a certificate of appealability because actual innocence renders criminal conviction and punishment inconsistent with the 5th Amendment.

Stilley has already served more than 5 years each, on two out of three counts, day for day. Therefore, the loss of any count of the indictment means that Stilley is entitled to immediate release, from any incarceration or supervision whatsoever. *United States v. Haymond*, 139 S. Ct. 2369, 2379, 204 L. Ed. 2d 897, 906-907 (2019).

The government admits that Stilley could not possibly be guilty of the charges of the purported indictment, Count 4. 10th Circuit Opening Brief 36-39. The trial theory irreconcilably contradicted the pretrial theory, (*Id.*) and before sentencing the government admitted in writing that if the jury hadn't concluded that Springer and Stilley had ***stolen*** Patrick Turner's money, they would have acquitted. *Id.*

Pretrial, the government consistently claimed that Springer ***earned*** the money, and Stilley paid it over out of client funds. That left Stilley utterly baffled about how he could even be named in the purported indictment.

The illegality of Petitioner's conviction and punishment is clearly established by this Court's precedent. See *Bousley v. United States*, 523 U.S. 614, 624, 118 S. Ct. 1604, 1612 (1998), where the Court said:

> In this case, the Government maintains that petitioner must demonstrate that he is actually innocent of both "using" and "carrying" a firearm in violation of § 924(c)(1). But petitioner's indictment charged him only with "using" firearms in violation of § 924(c)(1). App. 5-6. And there is no record evidence that the Government elected not to charge petitioner with "carrying" a firearm in exchange for his plea of guilty. Accordingly, petitioner need

demonstrate no more than that he did not "use" a firearm as that term is defined in *Bailey*.

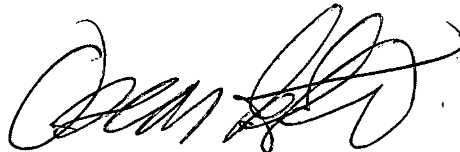
The District Court *sua sponte* swatted down Stilley's motion for judgment as a matter of law, despite written opinions or orders both before and after, stating that he cannot constitutionally do that without prior notice and opportunity to be heard. Dkt. 701, pg. 44-49. Pet. App.75-80.

Stilley proved that attorney ethical rules, civil law, and criminal law required him to pay over the money to the "person entitled." 10th Cir. 22-5000 Opening Brief 47-51. To this day Stilley has not been able to get a ruling on the merits of this legal claim and argument - ***anywhere***. There is no non-frivolous argument in support of denying Stilley a reversal and dismissal of all counts of conviction, with prejudice to any refiling, on this argument.

CONCLUSION

This Court or one of its justices should grant a certificate of appealability, and remand to the 10th Circuit with appropriate instructions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Oscar Stilley, by my signature above as well as the signature set forth below certify that I have this October 16, 2022 served the following by email at Gregory.V.Davis@usdoj.gov, katie.s.bagley@usdoj.gov, and also with hard copy sent by US Mail, with 1st class postage attached to:

Gregory Victor Davis
US Department of Justice
Tax Division, Appellate Section
Ben Franklin Station
PO Box 502
Washington, DC 20044

And

Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Stilley is incapable of serving his co-defendant Lindsey Kent Springer, in the partially consolidated 10th Circuit cases, 10-5055 and 10-5057, because the government refuses to provide his contact information, the District Court refused to order such production, Docket #719, pg. 4 (Pet. App. 4) and the 10th Circuit declined to compel the production of such information on motion and on motion for reconsideration.

By: /s/ Oscar Stilley