NO. _____

IN THE

Supreme Court of the United States

REZA AHMADI
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

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

APPENDIX

Reza Ahmadi, *pro se*
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United States Court of Appeals
for the Fifth Circuit

No. 22-20295

Reza Ahmadi,

Petitioner—Appellant,

versus

Bobby Lumpkin, *Director, Texas Department of Criminal Justice, Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-1677

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Before King, Jones, and Smith, Circuit Judges. Per Curiam:

Treating the petition for rehearing en banc as a motion for reconsideration (5th Cir. R. 35 I.O.P.), the

motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

April 10th, 2023

United States Court of Appeals
for the Fifth Circuit

No. 22-20295

Reza Ahmadi, *Petitioner—Appellant,*

versus

Bobby Lumpkin, *Director, Texas Department of Criminal Justice, Correctional Institutions Division,*

Respondent—Appellee.

Application for Certificate of Appealability
from the United States District Court for the
Southern District of Texas USDC No. 4:22-CV-1677

ORDER:

Reza Ahmadi, formerly Texas prisoner # 1713862, moves this court for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 petition, wherein he sought to challenge his conviction for theft of property in an amount exceeding $200,000, as an unauthorized successive § 2254 petition. He argues that his petition is not successive because his prior Federal Rule of Civil Procedure 60(b) motion was not successive. A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2); Miller-El

v. United States Court of Appeals Fifth Circuit FILED December 22, 2022 Lyle W. Cayce Clerk Case: 22-20295 Document: 24-2 Page: 1 Date Filed: 12/22/2022 No. 22-20295 2 Cockrell, 537 U.S. 322, 327 (2003). When, as in this case, the district court denies relief on procedural grounds, a COA should issue if the movant shows, at least, "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Ahmadi has not made the requisite showing. Consequently, his motion for a COA is DENIED.

Ahmadi is WARNED that the filing of frivolous, repetitive, or otherwise abusive challenges to his conviction or confinement will invite the imposition of sanctions, which can include dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction.

/s/ Edith H. Jones

United States Circuit Judge

December 22, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

REZA AHMADI,	§	
Petitioner,	§	
	§	
v.	§	Civil Action
	§	No. H-22-1677
BOBBY LUMPKIN,	§	
Respondent.	§	

ORDER OF DISMISSAL

Pending before the Court is a habeas petition filed by petitioner *pro se*. Having considered the petition, matters of public court record, and the applicable law, the Court **DISMISSES** the petition for lack of jurisdiction, a shown below

Petitioner was convicted of theft in Harris County, Texas, in case No. 1118773 and sentence to a seven-year term of incarceration in 2008. Petitioner states that he discharged his sentence in April 2018 and is no longer in custody. Petitioner's first federal habeas petition, filed in 2011, was denied in March 2013. *Ahmadi v. Thaler*, C.A. No. B-11-0224 (S.D. Tex.). Petitioner's ensuing Rule 60(b) motion was dismissed as an unauthorized successive habeas petition. His subsequent petition for a writ of coram nobis was

denied for lack of jurisdiction, as coram nobis does not apply to state court convictions in federal court. Id. In August 2018, the Fifth Circuit Court of Appeals denied petitioner's motion for authorization to file a successive habeas petition challenging his conviction. *In Re: Reza Ahmadi*, No. 18-40733 (Fifth Cir. 2018). Undeterred by these adverse court rulings, petitioner filed several unsuccessful civil lawsuit and appeal seeking monetary damages for his allegedly unlawful incarceration. Ultimately, on March14, 2022, the Fifth Circuit imposed a $100.00 monetary sanction against him for his continued filing of frivolous, repetitive, or otherwise abuse lawsuits. The sanction remains unpaid as of this date. Nonetheless, pending before the Court is a new habeas petition filed by petitioner, again seeking to set aside his conviction. He claims he can pursue habeas relief because he has "new evidence: and can show "collateral consequences" of his conviction. The Court notes, however, that the petition remains an authorized successive or second habeas petition over which it lacks jurisdiction. Further the Court declines to construe the petition as seeking a writ of coram nobis, as petitioner is challenging a state court conviction. Petitioner must

obtain authorization from the Fifth Circuit Court of Appeals to file his section 2254 petition with this Court. See 28 U.S.C. §2244(b)(3).

For these reasons, this case is DISMISSED WITHOUT PREJUDICE for lack of jurisdiction. Any and all pending motions are DISMISSED AS MOOT. A certificate of appealability is DENIED. Signed at Houston, Texas, o this 25 day of May, 2022

/s/Keith P. Ellison
Keith P. Ellison
UNITED STATES DISTRICT COURT

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN,
TEXAS 78711
4/13/2022

AHMADI, REZA HAGHIGI

Tr. Ct. No. 1118773-E **WR-76,191-05**

The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

DISTRICT CLERK HARRIS COUNTY
POST CONVICTION/APPEALS SECTION
P.O. BOX 4651
HOUSTON, TX 77210-4651
* DELIVERED VIA E-MAIL *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20598

REZA AHMADI,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas

O R D E R:

Reza Ahmadi, formerly Texas prisoner # 1713862, moves this court for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition, wherein he challenged his 2008 conviction of theft of property in an amount exceeding $200,000, for lack of jurisdiction. Although Ahmadi's sentence was fully discharged in 2018, prior to filing the instant § 2254 petition in 2019, he argues that the district court's procedural ruling was incorrect because he satisfies the "in custody" requirement of § 2254(a). To obtain a COA, a

petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). He must establish that reasonable jurists would find the decision to deny relief debatable or wrong, see *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000), or that the issues he presents deserve encouragement to proceed further. See *Miller-El*, 537 U.S. at 327. When, as here, the district court's denial of relief is based upon procedural grounds without analysis of the underlying constitutional claims, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Ahmadi has not made the requisite showing. Consequently, his motion for a COA is DENIED. This ruling is without prejudice to Ahmadi's ability to petition for a writ of coram nobis, which "provides a way to collaterally attack a criminal conviction for a person . . . who is no longer 'in custody' and therefore

cannot seek habeas relief." *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013).

June 11th, 2020

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

REZA AHMADI,	§	
Petitioner,	§	
	§	
v.	§	Civil Action
	§	No. H-19-2457
LRIE DAVIS,	§	
Respondent.	§	

MEMORANDUM AND ORDER

Former prisoner Reza Ahmadi (former TDCJ #01713862) filed this petition for a writ of habeas corpus to challenge his 2008 conviction and seven-year sentence for theft. (Doc. No. 1,"petition"). The Court concludes that this case must be dismissed without prejudice for lack of jurisdiction because Ahmadi is not "in custody" pursuant to the federal statutes.

I. DISCUSSION

United States district courts may only entertain petitions for habeas corpus relief from persons who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2241(c)(3) (emphasis added). The Supreme Court has clarified

that, for jurisdiction to attach, a habeas corpus petitioner must be "in custody" at the time his petition is filed. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). A petitioner in not "in custody" for the purpose of the federal habeas corpus statues once his sentence has fully expired. *Maleng v. Cook*, 490 U.S. 488, 492 (1989). Ahmadi pleadings reflect that he is no longer incarcerated, and his submission in another habeas proceeding be filed in 2017 in the Houston Division of the Southern District of Texas, of which this court takes judicial notice, reflect that Ahmadi's sentence was fully discharged on April 9, 2018. *See Ahmadi v. Davis,* Civ. No. H-17-3636 (S.D. Tex. 2018), at Doc. No. 25 at 10 (Ahmadi's Exhibit A); see also Petition at 1, 17 (indicating that Ahmadi had a free-world address at the time he file this petition). Because his 7-year sentence was fully discharged before he filed the pending petition, this Court lacks jurisdiction to determine the legality of that conviction under the federal habeas corpus statutes. *See Maleng*, 490 U.S. at 492-93; *Lackawanna County Dist. Atorney v. Coss,* 532 U.S. 394, 401 (2001); see also *Hendrix v. Lynaugh,* 888 F. 2d 336, 337 (5th Cir. 1989) ("Federal district courts do not have jurisdiction to entertain

section 2254 actions if, at the time the petition is filed, the petitioner is not "in custody" under the conviction or sentence which the petition attacks." (citation omitted)). Accordingly, the Court must dismiss this petition for lack of jurisdiction.

II. CERTIFICAT OF APPEALABILITY

Rule 11 pf the Rule governing Section 2254 cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. *See* 28 U.S.C. §2253. A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right.: 28 U.S.C. §2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard*, 542 U.S. at 282 (quoting *Slack v. McDanial*, 529 U.S. 473, 484 (2000)). Under the controlling standard, this requires a petitioner to show "that reasonable jurist 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.'" *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). Where denial of relief is based on procedural grounds, the petitioner must show not only that 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. A district court may deny a certificate of appealability, sua sponte, without requiring further briefing or argument. See *Alexander v. Johnson*, 211 F.3d 895, 898 (5th CCir. 2000). For reasons set for the above this court concludes that jurists of reason would not debate whether the ruling in this case was correct. Therefore, a certificate of appealability will not issue.

III. CONCLUSION AND ORDER

Based on the forgoing, the Court ORDERS as follow:

1. The federal habeas corpus petition is DISMISSED without prejudice for lack of jurisdiction.

2. A certificate of appealability is DENIED.

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas, this 26th day of July, 2019.

/s/ Andrew S. Hanes

Andrew S. Hanen

UNITED STATES DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40733

In re: REZA AHMADI,

Movant

Motion for an order authorizing the United States District Court for the Southern District of Texas to consider a successive 28 U.S.C. § 2254 application

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Before DAVIS, HIGGINSON, and ENGELHARDT, Circuit Judges. PER CURIAM:

Reza Ahmadi, formerly Texas prisoner # 1713862, moves this court for authorization to file a successive 28 U.S.C. § 2254 application to challenge his 2008 conviction of theft of property in an amount exceeding $200,000. He asserts that the State used perjured testimony in obtaining his conviction and failed to disclose exculpatory evidence. He also alleges that his counsel was ineffective for failing to investigate and to interview witnesses and for failing to impeach a State witness by presenting the witness's criminal record. To obtain authorization to file a successive § 2254

application, Ahmadi must make a prima facie showing that (1) "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and that, "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(A)-(B), (b)(3)(C). Ahmadi's ineffective assistance of counsel claims related to the HP contracts, Sister Helen Mayer's testimony, and the criminal record of a state witnesses were raised in his initial § 2254 application. Thus, we do not consider them. See § 2244(b)(1). He fails to make the requisite showing regarding the rest of his claims. § 2244(b)(2)(A)-(B).

Accordingly, IT IS ORDERED that Ahmadi's motion for authorization to file a successive § 2254 application is DENIED. August 30th, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41334
USDC No. 1:11-CV-224

REZA AHMADI,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Southern District of Texas, Brownsville

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O R D E R:

Reza Ahmadi, formerly Texas prisoner # 1713862, moves this court for a certificate of appealability (COA) to appeal the district court's denial of his motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(4) and (b)(6), arguing that the district court improperly construed his motion as an unauthorized successive 28 U.S.C. § 2254 application. He also moves for leave to proceed in forma pauperis (IFP) on appeal.

Where, as here, a movant uses Rule 60(b) in an attempt to alter or amend a judgment in a § 2254 proceeding, a COA is required. *See Ochoa Canales v.*

Quarterman, 507 F.3d 884, 888 (5th Cir. 2007). As a general rule, the decision to grant or deny Rule 60(b) relief is within the sound discretion of the district court. *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011). "It is not enough that the granting of relief might have been permissible, or even warranted [;] denial must have been so unwarranted as to constitute an abuse of discretion." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981). Therefore, in order to prevail on his COA motion, Ahmadi must show that reasonable jurists could debate whether the district court's denial of Rule 60(b) relief was an abuse of discretion. *See Hernandez*, 630 F.3d at 428.

Ahmadi fails to make the requisite showing. Consequently, his motion for a COA is DENIED. His motion to proceed IFP on appeal is also DENIED.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

August 03, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

REZA AHMADI,	**§**	
Petitioner,	**§**	
	§	
v.	**§**	**Civil Action**
	§	**No. 11-224**
RICK THALER	**§**	
Respondent.	**§**	

ORDER

On November 3, 2011, Petitioner Reza Ahmadi ("Ahmadi") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. §2254, Dkt. No. 1. On March 4, 2013, the Court denied Ahmadi's petition. Dkt. No. 22. On July 31, 2015, the Fifth Circuit denied Ahmadi a certificate of appealability, essentially affirming his conviction. Dkt. No. 49.

On July 11, 2016, Ahmadi filed a motion for relief from judgment, pursuant to FED. R. Civ. P. 60(b), asserting that his counsel was ineffective. Dkt. Nos. 51, 52. When a Rule 60(b) motion attacks a previously decided §2254 motion, or challenges the judgement of conviction or sentences, it is a second or successive §2254 petition and must be authorize nu the

appropriate court of appeals. *In re Bower*, 612F. App'x 748, 753-54 (5th Cir. 2015). In such cases, the Court lacks jurisdiction to rule on the motion, absent authorization from the Fifth Circuit. Adams v. Thaler, 679 F.3d 312, 322 (5th Cir. 2012).

Accordingly, the Court **ORDERS** that the motion for relief from judgemtn – Dkt. Nos. 51, 52 – be denied without prejudice to refiling. If Ahmadi wishes for the Court to consider these motions, he must first sek authorization at the Fifth Circuit.

DONE at Brownsville, Texas, on July 11, 2016

/s/ Andrew S. Hanen

Andrew S. Hanen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

REZA AHMADI,	§	
Petitioner,	§	
v.	§	CIVIL NO. B-11-224
	§	
William Stephens,	§	
Respondent.	§	

MOTION FOR RELIEF FROM JUDGMENT

Respectfully:

/s/ RezaAhmadi
Reza H. Ahmadi
7302 Wooded Valley Dr.
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(713) 515-6149
ahmadiray@yahoo.com
Petitioner, Pro Se

TO THE HONORABLE COURT:

COME NOW REZA AHMADI;

hereinafter styled, "Petitioner", pro se, pursued to FRCP Rule 60(b) (4) and (6) filing this motion seeking relief from the district court's March 4th 2013, judgment, challenging the district court's order denying of his 28 U.S.C. § 2254 motion and further denying issuance of his COA, on the ground of "a defect in the integrity of the federal habeas proceedings" and respectfully show the honorable court the following:

I.

JURISDICTION

This honorable court has authority to determine Petitioner's standing to proceed. Under Rule 60(b), Motion for Relief from Judgment should be considered in the first instance by the court that issued the underlying judgment. See Fed. R. Civ. P. 60(b) advisory committee's note on Rules –1946 Amendment ...motion is filed "in the court and in the action in which the judgment was rendered". The Rule preserves judicial power to grant relief in an

independent action "insofar as established doctrine permits," and "expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause." *In re Hunter*, 66 F.3d 1002, 1005(9th Cir. 1995); *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1273-74(10th Cir. 1995); *Hadges v. Yankers Racing corp.*, 48 F.3d 1320, 1325(2nd Cir. 1995). While these actions do not require an independent basis for jurisdiction, they are available only to prevent a grave miscarriage of justice. *U.S. v. Beggarly*, 524 U.S. 38, 47(1998); See Barrett v. Secretary of H&HS,840 F.2d 1259, 1263(6th Cir. 1987); *Southmark Prop. V. Charles House Corp.*, 74 F.2d 862, 872 n.14 (5th Cir 1984).

II.

STATUTE OF LIMITATION

A motion made under Rule 60(b)(4), which may be brought at any time. See, *e.g., Orner v. Shalala* , 30 F.3d 1307, 1310 (10th Cir.1994). as well as a Rule 60(b)(6) motion, which must be brought within a reasonable time, one year. See Fed.R.Civ.P. 60 (b). Petitioner's Certiorari was denied on April 18, 2016. This filing of motion is timely.

III.

BACKGROUND FACTS

An indictment in Cause Number 1118773, filed in the 337th District Court of Harris County, accused Petitioner of Theft in an amount over $200,000, alleging Dennis Leahy as the victim (CR-2). Also indicted, and tried together with Petitioner, was Nereo Garza. A jury found Petitioner guilty as charged (CR -58, RR IX-4). The jury assessed punishment at confinement for seven years in the Texas Department of Criminal Justice, Correctional Institutions Division, plus a $5000 fine (CR-65). Petitioner gave timely notice of appeal (CR-70). The petitioner presented three points of error. The Court of Appeals affirmed the judgment of the trial court in a memorandum opinion. A motion for rehearing was overruled. Pursuant to an extension of time, the petitioner timely filed a petition with the Texas Court of Criminal Appeals for discretionary review. This Court refused discretionary review on October 6, 2010. Petitioner filed a Motion for Rehearing of Petitioner's Petition for Discretionary Review. This motion was rejected on October 25, 2010. The Court of

Appeals extended the time for filing a petition for writ of certiorari with the United States Supreme Court. This Certiorari was denied by this court on April 4, 2011. Petitioner subsequently filed a petition for post-conviction, writ of habeas corpus with the state court on June 10, 2011; this petition was denied without written order. Petitioner filed his federal petition for writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. § 2254 on November 03, 2011. The Director timely filed an answer and motion for summary judgment. On January 24, 2013, the Federal Magistrate Judge recommended that Petitioner's relief be denied and Director's Motion for Summary judgment be granted. Petitioner filed timely objections to the Magistrate Judge's recommendation, but on March 04, 2013, the district court entered an order and judgment expressly adopting the findings and conclusions of the Magistrate Judge, denying petitioner's petition and further denying his COA. On July 31, 2015, the United States Court of Appeals Judge entered a judgment, denying Petitioner's "motion for a COA." On August 12, 2015 the panel for United States Court of Appeals for Fifth Circuit

denied Reconsideration. Subsequently United States Supreme Court denied Certiorari on April 18, 2016.

IV.

ARGUMENT AND AUTHORITY

The Fifth Circuit Court of Appeals held in *UNITED STATES OF AMERICA, v. OLIVER NKUKU*, No. 13-20226 that:" Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a petitioner's failure to obtain authorization from an appellate court to file a second or successive habeas petition is a jurisdictional bar. 28 U.S.C. § 2244(b)(3)(A); *Williams v. Thaler*, 602 F.3d 291, 301 (5th Cir. 2010).... In *Gonzalez v. Crosby*, the Supreme Court instructed that a petitioner's Rule 60(b) motion should be construed as a second or successive petition when it pursues a substantive claim. 545 U.S. 524, 531–32 (2005). Such claims include motions that pursue an alternative ground for relief and those that "attack [] the federal court's resolution of a previous claim on the merits." *Id.* However, "'when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the

federal habeas proceedings,' courts should not construe the motion as a second or successive petition." *Williams*, 602 F.3d at 302 (quoting *Gonzalez*, 545 U.S. at 531–32)." Examples of motions attacking a defect in the integrity of the federal habeas proceedings include a claim of fraud on the court or challenges to a court's procedural ruling which precluded a merits determination, such as when a ruling is based on an alleged failure to exhaust, a procedural default, or a time-bar determination." *United States v. Brown*, 547 F. App'x 637, 641 (5th Cir. 2013) (unpublished)[5] (citing *Gonzalez*, 545 U.S. at 532 nn.4–5)."

With respect to fraud on the court, the Fifth Circuit held that: "A reversal will be granted "only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." 936 F.2d at 978.

Supporting this limited review is a strong policy in favor of the finality of judgments. Id. Fraud upon the court is reserved for only the most egregious misconduct, and requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision. *Wilson*

v. Johns-Manville Sales Corp., 873 F.2d 868, 872 (5th Cir.), cert. denied, 493 U.S. 977 (1989)."

Here, Petitioner's motions 60 (b) attacking a defect in the integrity of the federal habeas proceedings include a claim of fraud on the court. See below petitioner's FIRST claim of "Counsel failure to introduce evidence of IBM was "material."' on Pg.9. and, challenges to a court's procedural ruling which precluded a merits determination, such as when a ruling is based on an alleged failure to exhaust, a procedural default. See the R&R of the Magistrate Judge Pg. 1, holding that: "Petitioner's claims are procedurally defaulted and cannot be considered by the Court." Subsequently the District Court adopted the finding of Magistrate Judge, denying petitioner § 2254 motion, and further denying his COA.

Thus constitutes a true 60(b) motion.

The Fifth Circuit Court of Appeals also held in *UNITED STATES OF AMERICA, v. OLIVER NKUKU*, No. 13-20226, that: "... under Rule 60(b)(6), which empowers the court to relieve a party from a judgment or order for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6). In this motion Petitioner does not contend that the district court

erred on the merits of his claims, but instead asserted that the district court erred by failing to articulate its rationale for the denial of his § 2254 motion.
While determining whether Petitioner's § 2255 motion is wholly meritless requires a glance at the substance of his claims (see STATE HABEAS ACTION below), Petitioner's objection is with the process, not the substance, of his case's disposition. *See Williams*, 602 F.3d at 301 (holding that a Rule 60(b) motion challenging the denial of a § 2255 motion was not a successive habeas petition when it challenged discovery violations).... Because his Rule 60(b) motion did not attack the merits of the district court's decision, we hold that it was not a successive habeas petition and therefore was within the district court's jurisdiction." *IN Hart v. United States,* the Fifth Circuit noted that : "It is a well-established principle that, in the habeas context, findings of fact and conclusions of law "are plainly indispensable to appellate review." *Hart v. United States*, 565 F.2d 360, 362 (5th Cir. 1978). While § 2255 does not mandate reasoned orders, § 2255 (b) states that:

Unless the motion and the files and records of

> the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Even when a district court has concluded that a petitioner is plainly unentitled to relief, we have required the district court to state *why* relief was so plainly unwarranted. *United States v. Khanna*, 62 F.3d 397, 1995 WL 449715, at *2 (5th Cir. 1995) (unpublished). Otherwise, we cannot surmise whether the petitioner is unentitled to relief for procedural or substantive reasons. *Id.* Thus, when district courts have not articulated their rationales for ... (denial) § 2255 motions, we have vacated and remanded those decisions for reconsideration. *See e.g., id.*; *United States v. Edwards*, 711 F.2d 633, 634 (5th Cir. 1983)."

Petitioner describes his Rule 60(b) motion as contending that the district court's ruling on his § 2254 motion was void because it did not address all the issues raised in his § 2254 motion and also because of the fraud on the court. Petitioner

recognizes that a true Rule 60(b) motion must attack some defect in the integrity of the federal habeas proceedings. *See Gonzales v. Crosby,* 545 U.S. 524, 532 (2005). If the motion sought only to correct a defect in the integrity of the federal habeas proceedings, then it should be allowed to proceed as a Rule 60(b) motion. See *Gonzalez v. Crosby,* 545 U.S. 524,125 S.Ct. 2641,2647-48,162 L.Ed.2d 480 (2005)."

STATE HABEAS ACTION

U.S. Supreme Court held *IN MARTINEZ v. RYAN, DIRECTOR, ARIZONA DEPART- MENT OF CORRECTIONS.* No. 10–1001. That: "An attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claim. Without adequate representation in an initial-review collateral proceeding, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-at- trial claim. The same would be true if

the State did not appoint an attorney for the initial-review collateral proceeding. A prisoner's in- ability to present an ineffective-assistance claim is of particular concern because the right to effective trial counsel is a bedrock principle in this Nation's justice system. Allowing a federal habeas court to hear a claim of ineffective assistance at trial when an attorney's errors (or an attorney's absence) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that a collateral proceeding, if undertaken with no counsel or ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. It thus follows that, when a State requires a prisoner to raise a claim of ineffective assistance at trial in a collateral proceeding, a prisoner may establish cause for a procedural default of such claim in two circumstances: where the state courts did not appoint counsel in the initial-review collateral proceeding for an ineffective assistance-at-trial claim; and where appointed counsel in the initialreview collateral proceeding, where that claim should have been raised, was ineffective under *Strickland* v. *Washington,* 466 U. S. 668. To overcome

the default, a prisoner must also demonstrate that the underlying ineffective-assistance-at-trial claim is substantial. Most jurisdictions have procedures to ensure counsel is appointed for substantial ineffective-assistance claims. It is likely that such attorneys are qualified to perform, and do perform, according to prevailing professional norms. And where that is so, States may enforce a procedural default in federal habeas proceedings. Pp. 6–12.

The U.S. Supreme Court in *Trevino v. Thaler.* No. 11–10189 stated that: *In Martinez* we held that lack of counsel on collateral review might excuse defendant's state law procedural default. Our holding in Martinez applies in Texas:

> "[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial, in the [state's] initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U. S., at__(slip op., at 15).

Petitioner preceded State habeas application as Pro Se, where the state courts did not appoint counsel in the initial-review collateral proceeding for an ineffective assistance-at-trial claim. Petitioner also argues that the federal habeas court should excuse his State procedural failing, on the ground that he has

good "cause" for not raising the claim at the right time, namely that, not only had he lacked effective counsel during trial, but also he lacked effective counsel during his direct appeal.

Petitioner contends that the district court failed to follow the procedures articulated by the Supreme Court, which held that ... (denial) without a hearing is only appropriate where a petitioner's allegations, when viewed against the record, are wholly frivolous. *See Blackledge v. Allison*, 431 U.S. 63, 76 (1977). As such, Petitioner requested relief "so that the [district court] may make appropriate findings of fact and conclusions of law."

Petitioner preceded **State habeas** claims without counsel as follows:

1. **Counsel failure to introduce the evidence of IBM was "material."**

On Feb. 2004, a few months into supporting of the St. Agnes high school's "laptop program," Petitioner realized the increase in HP's warranty claims, and promptly contacted different supplier, IBM, via email that reads: "The situation and crises at St. Agnes high school due to the HP's high defective rate[6] is getting worse," and "requested for the IBM to get involved." A

few months later IBM took over the account. Once IBM laptops were deployed, the school's environment starting to change, as 2004 incoming students were purchasing IBM instead, phasing out HP's.The IBM annual report showed that I.I., a warranty service provider for IBM, during 2004-05 submitted claims on an average of two (2) per day. A substantial decrease from HP's 28 claims /day.

The trier of fact did not hear and were prohibited from hearing evidence in regard to IBM charge (Note: IBM was the fourth named complainant in this cause), from start expunged. The trial counsel failed to introduce the evidence of IBM, the counsel could present the "total IBM, material" evidence during the trial, the omitted evidence including:

a- Warranty --- Number of claims per day
b- Monies --- IBM & HP (comparison)
c- Email --- Communication between Petitioner & IBM, i.e. Petitioner's prompt respond to the situation at St. Agnes.
d- Reports --- Generated by IBM, showing total activities, i.e. claims per day, total compensation paid, parts used.
e- Exculpatory evidence --- Toward the innocent of the appellant.

Petitioner argues that there is a "reasonable probability" that if the IBM evidence were presented to the juror at the trial, the outcome of his case would have been different. Trial counsel's failure to investigate and present significant mitigating evidence violated his right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80L. Ed. 2d 674. Counsels' error prejudiced defendant since the omitted evidence might have influenced jury's appraisal of defendant's moral culpability. U.S.C.A. CONST. AMEND. 6; 28 U.S.U.A. §2254 (d) (1). See *Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108L. Ed. 2d 316 (1990). Petitioner's case is governed by statue as amended by AEDPA, section 2254 (d)(1).

Accordingly, in order for Petitioner to obtain federal habeas relief, he must present his case that specifies the condition set by §2254 (d) (1), that provision modifies the role of federal habeas court in reviewing petition filed by the state prisoner.

Petitioner sought to vacate of his conviction in state proceeding, he has established actual innocence, that contradicts a conviction to come with the miscarriage of justice exception to the cause and prejudice

standard governing procedural default. 28 U. S. C. A. §2254.

Petitioner further contends under Rule 60(b) motion, that the district court denied him due process by improperly failing to rule on the merits of his habeas claim, and that this claim had been part of his State habeas proceeding.

The trial counsel who was state appointed counsel for his appeal, failed to introduce the evidence of IBM at trial, instead presented the following error on the appeal:

Judith Golike, a fraud investigation specialist in the district attorney's office, researched ... what Intelligent Interface was paid by Hewlett Packard and by another computer supplier, IBM, for the St. Agnes account (RR VII-46).

State then takes the appellant counsel IBM information and turned it into an extraordinary circumstances in the courts proceedings:

In the State Habeas proceeding, she argues that: "The court of Appeals noted: The number of HP warranty claims submitted from St. Agnes decreased drastically once Garza's employment was terminated.

Pham stated that, the number of warranty repairs decreased substantially once Garza stopped working for the school. Appellant argues the number decreased because the school switched to more reliable IBM laptops; however, there were still students using HP computers after Garza's dismissal. [See Ahmadi No. 14-08-00584-CR, Slip Op. at 8n5.]."

State then misrepresent the "IBM": See the State's Original Answer Pg. 4-5 that: " A witness testified at trial regarding the decrease number of claims under IBM and the appellant court mention the applicant's current argument in its opinion on direct appeal. [See Ahmadi No. 14-08-00584-CR, Slip Op. at 8 n5.]. The state further advancing this deception and states that: The jury therefore was aware of "IBM reduction." See State's Original Answer, conclusion of law and order. Pg. 2, #14. "The appellant opinion makes clear that the jury was aware of the reduction in the number of warranty claims made after St. Agnes School switched from using HP computers to IBM computers."[See Ahmadi, No. 14-08-00584-CR, Slip Op.at 8n5.].

Statement of fact will verify that "IBM" was expunged before the trial, petitioner did not make any argument with regards to IBM at the trial.The trier of fact did not hear and were prohibited from hearing evidence in regard to IBM.

In the Federal habeas proceeding:

State claims that: "the court notes that the IBM contract and the reduced claims were not withheld from Ahmadi; in fact, that evidence was presented to the jury[7]. Dkt. 15-3, Pg. 81". See also Mag. R&R, Pg. 9, Ln. 26.

Fraud on the court occurs when the judicial machinery itself has been tainted, such as when an attorney, who is an officer of the court, is involved in the perpetration of a fraud or makes material misrepresentations to the court. Fraud upon the court makes void the orders and judgments of that court. *In Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985),"[F]raud upon the court includes both attempts to subvert the integrity of the court and fraud by the officer of the court."*Intermagnetics*, 926 F.2d at 916. Furthermore it "must involve an unconscionable plan or scheme which is designed to

improperly influence the court in its decision." *Abatti v. Commissioner*, 859 F. 2d 115, 118(9th Cir. 1988)(internal quotation omitted). See *H.K. Porter Co. Inc., v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119(6th Cir. 1976) (dicta) ("since attorney are officers of the court, their conduct, if dishonest, would constitute fraud on the court."); *Kupferman v. consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1079(2nd Cir. 1972)(an attorney might commit fraud upon the court by instituting an action "to which he knew there was a complete defense"). "The inquiry as to whether a judgment should be set aside for fraud upon the court under Rule 60(b) focuses not so much in terms of whether the alleged fraud prejudiced the opposing party but more in terms of whether the alleged fraud harms the integrity of the judicial process." *Intermagnetics*, 926 F.2d at 217(*Hazel-Atlas*, 322 U.S. at 264, 64 S.CT. at 1010).

When the Rule 60(b) is properly invoked on the basis that the underlying judgment is void, FRCP 60 (b) (4), "'relief is not a discretionary matter; it is mandatory.'" *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994) (quoting *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 n.8 (10th Cir.1979)).

Suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of finding of guilt," *United States v. Aqura* , 427 U.S. at 112, 96 S. Ct. at 2401, a constitutional error occurs, and the conviction must be reversed, only if the confidence in the outcome of the trial. *In Bagly*, this honorable court noted: Under Strickland formulation the reviewing court may consider directly and adverse effect that the prosecutor failure to response might have had on the preparation or presentation of the defendant's case. This court noted in Agura, however, that because there had been" no specific defense request" for the later discovered evidence, therefore no notice to the prosecution that the defense did not already have that evidence or that it considered the evidence to be particular value. 427 U.S., at 106-107, 96 S. Ct. at 2398-2399. Consequently, the court stated that in the "absence of a request" the prosecution has a constitutional duty to volunteer only "obviously exculpatory... evidence." Id., at 107, 96 S. Ct. at 2399. Because this constitutional duty to disclose is different from the duty described in Brady, it's not

surprising that we developed a different standard of materiality in the Agura context.

2. **Failure to Object to false statement offered by State witnesses:**

    (i) False statement of Sister J. Meyer, head of school (principal) St. Agnes, to wit: "I was surprised that Ahmadi did not charge school for the three week of virus work."

The truth of the matter is that Intelligent Interface, I.I., did receive compensation for the virus work, i.e., labor. The invoices provided by I.I. to St. Agnes , the school paying I.I. with two(2) checks, $8,000.^{00}$ and $3,500.^{00}$, that were deposited into the I.I.'s bank account. The statement, testimony of Ms. Meyer was very damaging as it was not rebutted. The triers of fact took it as a fact when it was not, the harm rendered , if counsel investigated the I.I.'s bank account, he would have uncovered said inconsistencies or brought them up through counsel's cross-examination. The statement by Ms. Meyer was admissible under Rule 801(d)(2)(D).Agent/Employee.[8] See *Mc Donough v. City of Quincy*, 452 F.3d 8, 21(1st Cir.2006). And "subject to cross-examination [which] permits a jury to evaluate the trustworthiness of a

statement...." See U.S. v. C Arduscia, 591 F.2d 474, 486-87 (2nd Cir. 1991).

It is noted in the record that trial counsel who was also appellate counsel brought the following points of errors on the appeal: ....Petitioner "agreed to do the virus cleanup at no charge to St. Agnes, obviously with the intent of obtaining paid business in the future. See appellant's Brief at 3 citing (III RR. 43, VR.R. 42) [9]." See also State's Original Answer at 3. Here, State does not negate as a matter of law essential elements of Petitioner's claim of (I.I. charging school for labor, and school paying I.I.). Instead State is reliance on counsel's misrepresentation.

"...Petitioner claim regarding Meyer---that she falsely testifies that St. Agnes paid I.I. for its virus service---contradicts Petitioner's own testimony (Brief) that he "did not charge" the school. Dkt. No. 15-26. Pp. 1594-96. Counsel had duty to make reasonable investigations or to make reasonable decisions that make particular investigations unnecessary. A particular decision not to investigate must directly assessed for reasonableness in all circumstances. Applying a heavy measure of deference to counsel's

judgment. *Strickland*, 466 U.S. 668, 641. "The essence of an ineffective assistance claim is that counsel's unprofessional error so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Nix v. Whiteside*, Supra, 475 U.S. at 175, 106 S. Ct. at 998; *Kockhart v. Fretwell*, 113 S. Ct. 838, at 842.

3. Trial counsel's failure to object was on account of failure to investigate, to wit: HP's contract, the contents, i.e., (i) parts, the buying of, (ii) parts inventory, and or (iii) inventory build-up.

With all due respect the warranty contract states in part... Partners to purchase a minimum of parts annually ... HP urged partners to provide inventory parts to its customers... Parts per serial number, (one part, per unit, every 30 days)... Partners to be compensated at different levels (basic, standard, and premier).... ... Return parts on time (15) days after delivery....

Ms. Jenny Theiss, HP's warranty claims compliance Sec. testified to: "Criticized the build-up of an inventory...."

Q. Is this a proper method to create a proper method to create inventory? A. No.
Q. It's a violation of his contract
A. Yes.
(RRVI-198 - 199).

The question at bar, "is this contrary to what the contents of the contract states? There was no objection, no rebuttal from trial counsel. From the above mentioned, testified to, there was no objection. There was no instruction asked and or rendered as to the inconsistencies of the subject matter. The triers of fact took said testimony at face value, the harm rendered, if counsel had investigate the contents of the contract, he would have uncovered said inconsistencies or brought them up through counsel's cross-examination. The statements made by Ms. Jenny Theiss was admissible under Rule 801(d) (2) (D). *See U.S. v. Cardascia*, 591 F.2d 474, 486-87(2d Cir. 1991). "Generally... because traditional conditions of admissibility, including that the witness be present at the trial, testify under oath, and be subject to cross-examination, [which] permits a jury to evaluate the ...trustworthiness of a statement..."

Ms. Jenny Theiss further testified that:

Q. Is he getting paid for work he is not providing?
A. That's right
Q. So, would that be a fraud?
A. That's how I would classify it. (RRVI-198-199).

Please note: trial counsel logged no objection.

After the trial, petitioner met with the counsel at his office to discuss the HP's contract. Counsel not only he did not know the contents of the HP's contract, he acknowledges that he never seen one?

The right to counsel, ("is to assure fairness in the adversary criminal process.") Thus, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect of challenged conduct on the reliability of the trial process, the Six Amendment quarantee is generally not implicated. "*U.S. v. Cronic*, Supra, 466 U.S. at 658, 104 S. Ct. at 2046.

Petitioner argues that neither the magistrate judge nor the district court ever addressed his arguments presented in state habeas corpus. The record reveals that his claims was raised in his state habeas petition and was continuously asserted throughout the habeas proceedings. Notwithstanding Petitioner's continued

assertion of these claims, however, the district court never made a ruling on it.

Petitioner's contention that the district court failed to consider one or more of his habeas claims represents a "true" 60(b) claim. It asserts a defect in the integrity of the federal habeas proceedings. See *Gonzalez*, 125 S. Ct. at 2648.

The defect lies not in the district court's resolution of the merits of the following claims (since it never reached those merits), but in its failure to make any ruling on any claims that was properly presented in Petitioner's habeas petition. Having determined that these claims represent a "true" claim for Rule 60(b) relief, this court shall next determine whether Petitioner is entitled to a COA.

In cases like this one, where the decision appealed from involves a procedural ruling of the district court, a COA may only issue if "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146

L.Ed.2d 542 (2000). A COA may only issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Here, petitioner has made substantial showing of denial of his constitutional rights, as well as addressing procedural grounds above. Therefore he is entitled to a COA.

IV. CONCLUSION

This honorable Court shall VACATE the district court's previous decision denying his §2254 and COA on Petitioner's assertion, attacking a defect in the integrity of the federal habeas proceedings include a claim of fraud on the court and challenges to a court's procedural ruling, a procedural default, that the district court improperly barred his claims concerning his trial attorney's alleged failure to investigate and present ... at trial.

VII

PRAYER

Petitioner prays that upon reviewing of this Motion for Relief from Judgment that this Honorable Court will set aside the prior judgment caused by defect in habeas corpus proceeding, and grants him to obtain COA pursuant to 28 U.S.C.A §2253(c).

SO PRAYED this __07__day of July, 2016.

Respectfully Submitted,

/s/ Reza Ahmadi

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