ORIGINAL

No. 23-5009

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SUPREME COURT OF THE UNITED STATES

JOSEPH JORDAN
Petitioner

v.

UNITED STATES
Respondent

PETITION FOR WRIT OF CERTIORARI

(to the Second Circuit Court of Appeals)

Joseph Jordan
60818-054
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QUESTIONS PRESENTED

A. Is a judgment denying habeas (or Section 2255) relief final and complete "as to all causes of action," as required by Collins v. Miller, 252 U.S. 364, 370 (1920), or does a jurisdictional defect exist that must be corrected, before an appeal can be taken, when the record reveals that fewer than all properly presented claims in the original petition (or motion to vacate) were considered and decided?

B. Given the holding in Harbison v. Bell, 556 U.S. 180 (2009), that Section 2253(c) applies "only to final orders that dispose of the merits of a habeas petition," id. at 183, is a COA required by that statute to appeal the dismissal (on procedural grounds) of a true Rule 60(b) motion, i.e., one that does not present a new, or reargue an already decided, habeas (or Section 2255) claim?

C. If a COA is required to appeal the procedural dismissal of a true Rule 60(b) motion, do both prongs of the COA standard set out in Slack v. McDaniel, 529 U.S. 473 (2000), for habeas petitions, id. at 484, apply, i.e., must the applicant show that the underlying habeas petition (or motion to vacate) states a valid claim, and that the procedural ruling is debatable? Or is it enough to show only the latter?

D. Does the holding in Kemp v. United States, 142 S.Ct. 1856 (2022), that Rule 60(b)(1) extends to legal errors of a judge, id. at 1862, mean that a Rule 60(b) motion is the appropriate means to seek relief when (as here) the district court has overlooked, failed to consider, and left unadjudicated, certain claims in the original (and only) motion to vacate (that survived Section 2255(b) screening)?

And if so, was petitioner's Rule 60(b) motion - filed following a timely notice of appeal, and before the deadline set by Rule 60(c) - arguably timely?

* The circuits are conflicted with respect to the answers to questions A through C above.

[Subsidiary Question]

E. Given that a habeas petitioner is entitled to the adjudication of all claims presented, Stewart v. Martinez-Villareal, 523 U.S. 637, 643 (1998), when (as here) the record reveals that the district court has overlooked, failed to consider, and left undecided, certain claims properly presented in the original (and only) motion to vacate (that survived screening), and thus its judgment denying Section 2255 relief is not final as to all causes of action, Collins v. Miller, 252 U.S. 364, 370 (1920), does the Court of Appeals have jurisdiction to do anything other than correct the defect?

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SUPREME COURT OF THE UNITED STATES

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Joseph Jordan,
Petitioner,

v.

United States,
Respondent.

----------X

Case No. _____

PETITION FOR WRIT OF CERTIORARI

Now comes Mr. Jordan before this Honorable Court to seek review of the decisions, and decisional processes, of the Second Circuit Court of Appeals (case no. 21-576), including requiring, and refusing to issue, a certificate to appeal the dismissal by the District Court (case no. 18-cv-3372) of a Rule 60(b) motion (on procedural grounds) that sought relief from a defect in a Section 2255 proceeding, to wit, the absence of rulings on certain habeas claims properly presented in a motion to vacate that survived Section 1915A and Section 2255(b) screening.*

By this petition, Mr. Jordan - serving 40 years in prison for convictions based entirely on speech - asserts that the district court's failure to address all of the claims, and the Court of Appeals' refusals to provide relief from that defect, or to allow him to appeal, are (1) contrary to Supreme Court law (cited herein), and thus summary reversal is appropriate, and (2) raise important questions regarding habeas corpus practice, involving circuit splits, which this Court should address.

This Court has jurisdiction under Art. III, Sec. 2 of the U.S. Constitution, S.Ct. Rules 10(a), 10(c), and 16.1, and 28 USC sec. 2601, because this petition is timely presented.**

Following is an overview of the issues presented, circuit conflicts, and reasons to grant certiorari.

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* The special appendix to this petition contains the relevant rules (S.A. 02-08) and statutes (S.A. 09-14). The accompanying record appendix contains the decisions of the Court of Appeals (R.A. 02-04) and District Court (R.A. 06-08, 71-92).

** A timely Section 2255 motion (that survived screening) was denied on August 30, 2019 (R.A. 92). A Rule 60(b) motion (seeking decisions on overlooked and disregarded claims) was filed on August 4, 2020, and dismissed (as untimely) on December 21, 2020 (R.A. 06-08). A COA was required, and denied on January 5, 2022 (R.A. 03-04). And reconsideration was denied on June 24, 2022 (R.A. 02). This Court granted an extension - of time to file this petition - until November 21, 2022 (R.A. 01).

I. INTRODUCTION

A. The Import

While this petition challenges the propriety of the lower courts' decisions, it also presents this Court with the opportunity to resolve important issues - subject of circuit conflicts - regarding: (1) the COA requirement (and the proper standard) when (as here) a true Rule 60(b) motion has been dismissed on procedural grounds; (2) the applicability of civil rules 52(a) and 54(b) to Section 2255 proceedings, and (3) the relief available, if any, under Rule 60(b), Section 1291 or Section 2253(c), when (as here) the district court has denied habeas relief without ruling on all of the properly presented claims.

These issues are important because when a pro se incarcerated poor man's habeas petition (that survived Section 1915A and Section 2255(b) screening) is denied without consideration of, or rulings on, every properly presented claim, and relief from that defect is not available, the "privilege of the writ of habeas corpus" - guaranteed by Art. I, Sec. 9, Cl. 2 of our constitution - is effectively suspended.*

As Justice Kennedy observed, in Martinez v. Ryan, 566 U.S. 1 (2012), "a prisoner's inability to present a claim of trial error is of particular concern when (as here) the claim is one of ineffective assistance of counsel." Id. at 12. This is because it is only through effective counsel that the right to a fair trial can be guaranteed, Strickland v. Washington, 466 U.S. 668, 684-85 (1984), and without that guarantee an innocent person can be convicted. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).* As such, this Court should address the issues raised by this petition because "questions of practice regarding habeas corpus" are important to all of society. Walker v. Johnson, 312 U.S. 275, 278 (1941). And there is no higher duty of a court than the careful processing of habeas petitions. Harrison v. Nelson, 394 U.S. 286, 292 (1969).

* Meaningful access for habeas petitioners (or Section 2255 movants) is critical when it comes to IAC claims because they typically cannot be litigated on appeal, Massaro v. United States, 538 U.S. 500, 502-06 (2003), when a prisoner has the right to counsel. Douglas v. California, 372 U.S. 353, 356-58 (1963). But, instead, must be presented (for the first time) in a subsequent collateral proceeding when there is not yet a recognized right to counsel. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). This means that a poor man (unlike a rich man) who was convicted at a trial where he did not receive the effective assistance of counsel to which he was entitled, McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), has no choice but to proceed pro se, and to somehow navigate the plethora of hurdles that often seem almost endless and insurmountable - especially when (as here) complex issues are involved.

B. The Issues

While this petition follows the denial of a COA (that was required by the Second Circuit) to appeal the dismissal (on procedural grounds) of a Rule 60(b) motion, and thus addresses (as subsidiary issues) the propriety of those decisions, the primary questions presented by this case, and now before this Court, stem from the fact that the district court denied petitioner's motion to vacate (that survived Section 1915A and Section 2255(b) screening) without considering and ruling on all of the claims that were properly presented within it, and regard jurisdiction and the entitlement to a full and fair proceeding.

The primary questions - all subject of circuit conflicts - regard (1) finality and jurisdiction, (2) the COA requirement, and (3) the COA standard with respect to dismissals of true Rule 60(b) motions:

1. The Jurisdictional Defect

When the record reveals that a motion to vacate (that survived Section 2255(b) screening) was subsequently denied without consideration of, or rulings on, all properly presented claims within it, is that decision "final" and "complete" as this Court's holding in Collins v. Miller requires?

In other words, does Rule 54(b) apply to habeas (and Section 2255) proceedings? And if so, when certain claims have been overlooked or otherwise left undecided --

(a) can an appeal be taken - under Section 1291 or Section 2253(c) - given that both statutes (S.A. 11, 13) require the judgment or order below to be "final?" And

(b) is relief from the defect (the unadjudicated claims) available under Rule 60(b) - given that it (S.A. 05) only applies to a "final judgment, order, or proceeding?" Or

(c) must the case simply be remanded (by a higher court) to the district court for consideration of, and findings regarding, the portions of the habeas petition (or Section 2255 motion) that were overlooked or otherwise left undecided?

2. The COA Requirement

Given this Court's holding in Harbison v. Bell, 556 U.S. 180 (2009), that Section 2253(c) applies "only to final orders that dispose of the merits of a habeas petition," id. at 183, is a COA required to appeal the dismissal (on procedural grounds) of a true Rule 60(b) motion, i.e., one that does not present a new, or reargue an already decided, habeas claim?

3. The COA Standard

If a COA is required to appeal the dismissal of a true Rule 60(b) motion on procedural grounds, does the standard set out in Slack v. McDaniel, 529 U.S. 473 (2000), for dismissals of habeas petitions, apply, i.e., must the COA applicant show both that the underlying petition (or motion to vacate) states a valid claim, and that the propriety of the decision dismissing the Rule 60(b) motion is debatable? Or is it enough to show only the latter?

C. The Conflicts

As fully set out later in this petition, this case involves issues subject of circuit conflicts and confusion regarding (1) whether a decision denying habeas relief without consideration of all properly presented claims is "final" and "complete," or requires remand; (2) whether the COA requirement applies to procedural dismissals of true Rule 60(b) motions; and (3) if applicable, whether both prongs of the Slack standard (for habeas decisions) apply.

1. Undecided Claims and The Finality of Habeas Decisions

Petitioner asserted below that he was "entitled to an adjudication of all claims presented" in his motion to vacate, Stewart v. Martinez-Villareal, 523 U.S. 637, 643 (1998); that the decision denying Section 2255 relief - without consideration of (or rulings on) all properly presented claims - was not "final ... as to all the causes of action" or "complete," Collins v. Miller, 252 U.S. 364, 370 (1920); and that the court of appeals was without jurisdiction to do anything other than remand the case for the Section 2255 proceeding to be completed. See Andrews v. United States, 373 U.S. 334, 340 (1963)(applying Collins to Section 2255 proceedings). See motion for a COA (R.A. 223-24).*

At least two circuits agree with petitioner. See Clisby v. Jones, 960 F.2d 925, 938 (11th Cir. 1992) (district court must address all claims), and Porter v. Zook, 803 F.3d 694, 699 (4th Cir. 2015)(Rule 54(b) applies to habeas decisions). Neither circuit treats the habeas judgment as "final," regardless of the district court's intent, and both circuits remand for consideration of the unaddressed claims. Id. But the Second Circuit denied a COA and dismissed petitioner's appeal without a remand (R.A. 03-04 [order]), and in Cox v. United States, 783 F.3d 145 (2d Cir. 2015), it held that a habeas decision was "final" - regardless of improperly disregarded claims - if the district court intended it to be. Id. at 147-48. And at least two circuits agree. See Young v. Herring, 777 F.2d 198, 201-02 (5th Cir. 1985)(remand is not necessary), and Miller v. Misfud, 762 F.2d 45, 45-46 (6th Cir. 1985)(Rule 54(b) does not apply to habeas decisions). Thus, the Supreme Court should resolve this issue.

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* See Rule 54(b) (S.A. 03)

2. Rule 60(b) Motion Dismissals and The COA Requirement

Petitioner asserted below that a COA should not be required to appeal the procedural dismissal of a Rule 60(b) motion that did not present a new (or reargue an already decided) habeas claim - because (a) such was a "true" Rule 60(b) motion, Gonzalez v. Crosby, 545 U.S. 524, 532-33 (2005); (b) the decision dismissing it occurred after - and outside of - the Section 2255 proceeding, Banister v. Davis, 140 S.Ct. 1698, 1710 (2020); and (c) that decision was not a "final order that dispose[d] of the merits of [the] habeas corpus proceeding." Harbison v. Bell, 556 U.S. 180, 183 (2009)(interpreting Section 2253(c)). See motion for clarification (R.A. 205) and order requiring a COA (R.A. 209).

At least two circuits agree with the petitioner. See United States v. McRae, 793 F.3d 392, 400 (4th Cir. 2015)(explaining that the appeal of a procedural dismissal of a Rule 60(b) motion is unrelated to the underlying habeas judgment), and Mizori v. United States, 23 F.4th 702, 705 (6th Cir. 2022)(explaining that a COA is not necessary to appeal a decision that does not dispose of the merits of a habeas petition). But the Second Circuit requires a COA to appeal the dismissal of a true Rule 60(b) motion - even one that was dismissed on procedural grounds, Kellogg v. Strack, 269 F.3d 100, 103-04 (2d Cir. 2001), and denied petitioner's motions to forgo that requirement (R.A. 209 [order]).

At least two circuits wholeheartedly agree with the Second Circuit. See Bracey v. Superintendent, 986 F.3d 274, 282 (3d Cir. 2021)(holding that a COA is required to appeal the procedural dismissal of a Rule 60(b) motion), and United States v. Winkles, 795 F.3d 1134, 1142 (9th Cir. 2015)(same). But several other circuits have acknowledged that the Supreme Court's holding in Harbison, 556 U.S. at 183, has called their circuit's policy - of requiring a COA to appeal any Rule 60(b) motion - into question. See Storey v. Lumpkin, 8 F.4th 382, 388 (5th Cir. 2021)(opining that it is unclear whether the ruling in Harbison applies to Rule 60(b) decisions), United States v. Handy, 743 Fed. Appx. 169, 172 n.3 (10th Cir. 2018)(noting "tension" between circuit's COA requirement and Harbison), and Wilson v. Secretary of Pa. DOC, 782 F.3d 110, 115 (3d Cir. 2014)(Harbison undermines circuit precedent requiring a COA to appeal Rule 60(b) motion denials). Thus, this Court should address the conflicts and end the confusion.

3. True Rule 60(b) Motions and The COA Standard

Petitioner asserted below that the first prong of the COA standard set out in Slack v. McDaniel, 529 U.S. 473 (2000), which requires an applicant, seeking to appeal the dismissal of a habeas petition, to show that it stated a valid claim of the denial of a constitutional right, id. at 484, should not apply to an appeal of a dismissal of a true Rule 60(b) motion - because such a motion is not part of the habeas proceeding, Banister v. Davis, 140 S.Ct. 1698, 1710 (2020), and does not present habeas claims for review. Gonzalez v. Crosby, 545 U.S. 524, 532-33 (2005).

Before an appeal of a procedural dismissal of a true Rule 60(b) motion may be taken, the Second Circuit - applying the two-prong Slack standard (for habeas dismissals), requires that the COA applicant show that "jurists of reason would find it debatable whether [1] the district court abused its discretion in denying the Rule 60(b) motion, and [2] the underlying habeas petition [or Section 2255 motion] states a valid claim of the denial of a constitutional right." Kellogg v. Strack, 269 F.3d 100, 104 (2d Cir. 2001). This even when (as here) the appeal, if allowed to occur, would not regard the merits of any habeas (or Section 2255) claim.

Not surprisingly, at least one circuit has expressed confusion regarding the application of the Slack standard to appeals of procedural dismissals of a Rule 60(b) motion, and how it should be applied. See United States v. Merizcales-Delgadillo, 243 Fed. Appx. 435, 439 n.3 (10th Cir. 2007). Thus if a COA is required to appeal such a dismissal, this Court should make clear what the proper standard is.

D. The Case

This petition follows the denial of a COA required by the Second Circuit (R.A. 03-04 [order]) to appeal the dismissal - by the Southern District of New York - of a Rule 60(b) motion on procedural grounds (R.A 06-08 [order]). While the motion was filed following a timely notice of appeal, and before the deadline set by Rule 60(c), the court dismissed it as "untimely" (based on the "local rule" and circuit law). See "Rule 60(b) Relief," Section IIA3, infra. The Rule 60(b) motion sought relief from defects in the underlying Section 2255 proceeding, to wit, the absence of consideration of, and rulings on, certain

properly presented IAC claims in the original (and only) motion to vacate that survived Section 2255(b) screening (R.A. 15-70 [motion]).

The defects were apparent in the opinion denying Section 2255 relief because in it, the district court: (1) stated that petitioner's "memorandum" (as opposed to the actual motion to vacate) was used as the list of claims to be decided (R.A. 76 [order]) (and so every claim presented in the motion that was not also briefed in memorandum was overlooked, not considered, and not even mentioned, by the court); (2) expressly refused to rule on an IAC claim regarding the witness tampering statute and protected speech, opining that it should have been raised on direct appeal (R.A. 83 [order]); and (3) misconstrued (by evaluating evidence that wasn't at issue in), and thus effectively left undecided, a claim regarding U.S. mail that was intercepted by the FBI, read without a warrant, and used as the only alleged evidence of witness tampering on count four (R.A. 89-90 [order]).

In all, 22 primary IAC claims - properly presented (and separately enumerated) in the original (and only) motion to vacate (R.A. 93-164 [motion]) - were left unadjudicated (S.A. 15-17 [list of unaddressed claims]). And so - after a timely notice of appeal (of the judgment denying Section 2255 relief) and the denial of a timely motion for reconsideration (under Rule 59(e)) - relief from the remaining defects in the proceeding (i.e., the unresolved claims) was sought by the Rule 60(b) motion (R.A. 216 [docket entry]). The Court of Appeals was notified that such relief was being sought in the district court (R.A. 225-26 [COA application]).

Following the denial of a COA regarding the IAC claims that had been addressed by the district court, the Rule 60(b) motion was dismissed, a timely notice of appeal (of that dismissal) was filed, and the Court of Appeals required, and ultimately denied, a COA. See "The Appeal," Section IIA4, infra. In the application for the COA, petitioner (again) asserted that - owing to the overlooked and otherwise undecided IAC claims - the judgment denying Section 2255 relief was not "final," and that the Court of Appeals was therefore without jurisdiction to do anything other than correct (or remand for correction of) that jurisdictional defect (R.A. 222-24 [COA application]).

II. STATEMENT OF CASE

A. The Proceedings

1. Criminal Case

After a jury trial in the Southern District of New York (case no. 08-cr.-0124), and general verdicts of guilt for threats and telephone harassment (counts 1-3) and non-violent witness tampering (counts 4-5), a sentence of 13 years imprisonment for the former, concurrent with 40 years imprisonment for the latter, was imposed (Dkt. 202 [judgment]). Following a direct appeal to the Second Circuit (case no. 14-79), that did not involve any IAC claim (Dkt. 68 [brief]), a timely motion to vacate (under Section 2255) was filed in the district court (case no. 08-cr.-0124) that set forth only IAC claims (each separately enumerated) with the relevant supporting facts (Dkt. 246 [motion]).

2. Habeas Case

A Section 2255 proceeding in the Southern District of New York (case no. 18-cv-3372) began, and, after screening (pursuant to Section 1915A and Section 2255(b)) the government was ordered to respond to the motion to vacate (Dkt. 1) in its entirety (Dkt. 5 [order]). (The motion to vacate was supported by an affidavit (Dkt. 8), a submission of documents (Dkt. 9), and a memorandum (Dkt. 11) that briefed some, but not all, of the habeas claims presented in the motion (Dkt. 1).) But on August 30, 2019, the district court denied habeas relief (Dkt. 16 [judgment]) without a hearing, and without addressing, making findings regarding, or even mentioning, most of the claims presented within it the motion to vacate (Dkt. 1).

On September 16, 2019, a motion - seeking reconsideration (under Rule 59(e)) of decisions on habeas claims that were based on inaccurate facts - was filed (Dkt. 17). So too was a timely notice of appeal of the Section 2255 judgment (Dkt. 18). The Rule 59(e) motion was denied - without further consideration of any claim - on October 1, 2019 (Dkt. 22). And from the Second Circuit (case no. 19-2987) a COA was sought to appeal the decisions on those claims that the district court had addressed (Dkt. 18). And in that application (Dkt. 120), the Court of Appeals was notified that certain other claims were not subject of it only because the district court had overlooked them, and that relief from that defect was being sought in the lower court. Id. at page 2, notes 2-3 (R.A. 227 [application]).***

3. Rule 60(b) Relief

A Rule 60(b) motion - seeking relief from the defects in the Section 2255 proceeding (case no. 18-cv-3372) - was filed on August 4, 2020 (Dkt. 24 [R.A. 70]) following a timely notice of appeal (Dkt. 21 [R.A. 215]), and within one year of the judgment (Dkt. 16 [R.A. 92]) that it regarded (in compliance with Rule 60(c) [S.A. 05]). But the district court dismissed it as time-barred: (a) by the "local rule" which reduced the time to file to "14 days"; and (b) by circuit law which prohibited its filing "after the time to appeal the judgment had elapsed" (Dkt. 27 [R.A. 07]).

Following the dismissal of the Rule 60(b) motion by the district court (case no. 18-cv-3372), a timely notice of appeal was filed (Dkt. 44 [R.A. 05]). And requests that were made to the Second Circuit (case no. 21-576) for leave to appeal the district court's procedural ruling without a COA were denied (Dkt. 12 [motion], Dkt. 54 [order], Dkt. 71 [motion], Dkt. 95 [order], with explicit denials at Dkt. 139 [order] (R.A 205-07, 209 [docket entries])). On October 18, 2021, a motion for a COA - accompanied by copies of the motion to vacate (R.A. 93-164 [motion]), the decision denying Section 2255 relief (R.A. 71-92 [order]), the Rule 60(b) motion (R.A. 15-70 [motion]), and the decision dismissing it (R.A. 06-08 [order]) - was filed (Dkt. 120 [application]).

In the application for a COA, it was asserted: (a) that the Rule 60(b) motion was timely and true; (b) that the Rule 60(b) motion sought relief (only) from the district court's failure to consider and address certain claims that had been presented in the motion to vacate; (c) that (regardless of Rule 60(b)) Mr. Jordan was entitled to decisions on the unresolved claims; and (d) that the defect (i.e., the undecided claims) prevented the district court's decision - denying Section 2255 relief - from being "final" and "complete," and thus a remand (for consideration of the unaddressed claims) was necessary (R.A. 217-24 [application]).*

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* The Court of Appeals was made aware of the jurisdictional defect (the absence of rulings by the district court on certain claims in the motion to vacate) by (1) the motion for a COA (in case no. 19-2987) to appeal the denial of the motion to vacate (Dkt. 18 at page 2 & notes [R.A. 227]), and (2) the motion for a COA (in case no. 21-576) to appeal the dismissal of the Rule 60(b) motion (Dkt. 120 at pages 5-7 [R.A. 222-24]).

The application for a COA (case no. 21-576) was denied on January 5, 2022 (Dkt. 120) by summary order (R.A. 03-04 [order]). A motion for reconsideration (Dkt. 163) was docketed on May 9, 2022 (R.A. 210 [docket entries]), and denied on June 24, 2022 (R.A. 02 [order]). This petition followed.

4. The Appeal

On appeal (case no. 21-576), a request to proceed without a COA (Dkt. 12 [R.A. 205]) and an application for a COA (Dkt. 120 [R.A. 208]) were denied (Dkt. 139 [R.A. 209]). In the application (Dkt. 120), petitioner had (1) challenged the propriety of the procedural dismissal of his Rule 60(b) motion (id. at 3-6 [R.A. 220-23]), and (2) asserted that the defect from which that motion sought relief, to wit, the absence of consideration of, and rulings on, certain claims (that had been presented in the underlying motion to vacate) prevented the district court's judgment (denying Section 2255 relief) from being final and complete, and thus left the Court of Appeals without jurisdiction to do anything other than correct that defect (id. at 6-7 [R.A. 223-24]).

B. The Evidence

To the extent that it is necessary to the proper consideration of the issues presented by this petition, a brief summary of the record evidence - relevant to the underlying habeas claims - follows:

1. Alleged Threats

After learning that a woman he cared about ("ST") had been sexually assaulted by her uncle (Tr. 406), and after being threatened by her aunt ("Phillip"), then an ambassador from a Caribbean nation to the U.K., when he called to check on ST's welfare (Tr. 315-18), Mr. Jordan (in NYC) disclosed ST's allegation about Phillip's husband to embassy staff (Tr. 275-77) to prompt someone there (in London) to help her (Aff. 24). And when that disclosure was reported on (by the news media) in Phillip's home country, her ambassadorship was jeopardized (Tr. 292).*

* "Tr." = The trial transcript (Dkt. 79-80) in the Southern District of New York (Case no. 08-cr.-0124). (All other references are to the movant's submissions in the Section 2255 proceeding (Case no. 18-cv-3372), including: "App." (Dkt. 4) [appendix]; "Aff." (Dkt. 8) [affidavit]; and "Doc." (Dkt. 9) [documents].)

That's when Phillip began a campaign to discredit Mr. Jordan: (a) back in America, her sister (Dodson) and other niece (Adams) complained (about threatening telephone calls) to, respectively, the NYPD (Tr. 74) and FBI (Tr. 164, 168), even though neither woman had heard from him in over a month (Tr. 68-69 [Adams], Tr. 176-81 [Dodson]); and (b) Phillip directed ST to email him "to stop the harassment" (Tr. 330-31), and told her what to write (Tr. 284). The next day two email responses (from him) arrived in ST's email box: first, an expression of concern for her welfare, "given what you told me about your aunt's husband" (Tr. 411); and second, a promise to "rescue" ST (GX 63) "unless I hear from you directly that you are safe" (Tr. 413-14).

Several days after the emails were received (and seen by Phillip), Mr. Jordan was arrested, and later indicted for "threats" and "harassment" (counts 1-3), including (a) a threat to kidnap ST (based on the promise - in the email (GX 63) - to "rescue" her, even though she had replied to the email by writing "I love you [and] want to be with you forever" (Doc. A2)), and (b) telephone threats to Adams, Dodson, and ST (Tr. 897-88 [bill of particulars read to jury]), even though ST had made no such accusation (Tr. 399-400).*

2. Truth-Seeking (counts 4-5)

The conduct (all speech) alleged to constitute witness tampering consisted of (a) letters intended for ST, and (b) a press release (about the case) received by government officials.

(a) Letters To ST (count 4)

While ST did not testify before the grand jury, the FBI agent who did (Waller) inaccurately related that she had been threatened by Mr. Jordan (via telephone) while she was in Virginia - before traveling to London (App. 107 [grand jury minutes]). When Mr. Jordan learned of that accusation (charged in count 1 together with other alleged threats to Adams, Dodson, and Phillip (Tr. 898-900 [bill of particulars])), he naturally (but erroneously) believed that ST had made it (Aff. 27-28). And so he wrote to her.

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* Asked at trial (on direct) if she recalled having been threatened over the telephone (at any time) by Mr. Jordan (as charged in count 1), ST testified that she did NOT. Id.

Mr. Jordan's letters (to ST) were intercepted (and read) by the FBI without a warrant (Tr. 750-55). And only two of them (GX 400 & GX 401E) mentioned the federal case against him, and only one of those (GX 400) contained a request regarding it: "write to the judge [and tell] the truth" about the sole alleged spoken threat to harm her - because no such threat was made (Tr. 754). And although she never received that request (or any of the letters), when she was asked (on direct) if she recalled any such threat having been spoken to her (at any time), she testified that she did not (Tr. 399-400).

In summation, trial counsel neglected to explain to the jury (1) that ST's testimony - that she had not been threatened by Mr. Jordan (as charged in count 1) - was proof that his pre-trial effort to get her to say so was, in fact, lawful truth-seeking, not witness tampering; and (2) that the prosecution's theory - that the intent behind another letter (that didn't mention the case) was to improve her opinion of him before she testified at trial (Tr. 855) - was not inconsistent with the theory of "truth-seeking."

(b) Press Release (count 5)

Before trial (on counts 1-3), the judge ruled that whether or not ST had made (and Mr. Jordan was aware of) the sexual misconduct accusation (about Phillip's husband) was relevant to whether the email (GX 63) - with the promise to "rescue" ST (Tr. 413-14) - was a "true threat" to kidnap her (as charged in count 1) or a genuine expression of concern for her safety while she was staying in Phillip's home. See United States v. Doe (Jordan), 2008 U.S. Dist. LEXIS 86534 (SDNY 2008). Accordingly, Mr. Jordan believed that the fact that ST had alleged sexual misconduct, and the fact that Phillip had threatened him (with voodoo) when he had called to check on ST's welfare, would help justify (or at least explain) the email message about "rescu[ing]" her (GX 63). And so he sought to bring out those facts (before trial) by issuing a press release (Aff. 33-34).

The press release (GX 81-82), sent to the FBI and to the Trinidadian government, (1) prompted the latter to confront Phillip with it (Tr. 301-03), including Mr. Jordan's claim (reported therein) that he had a recording of her threatening him over the phone (App. 234 [GX 81-82]), and (2) prompted the former to

confront ST with it (App. 288, 292 [FBI reports]) because it stated that she had told others (not just Mr. Jordan) about the sexual misconduct in Phillip's home, and that they would testify at trial (App. 233 [GX 81-82]). So confronted, both women could not deny these facts at trial - because ST had told others of the sexual abuse by Phillip's husband (Tr. 432), and Phillip had, in fact, threatened Mr. Jordan when he called to check on ST's welfare (Tr. 315-18).

Trial counsel neglected to explain to the jury that not only did those two facts justify the "rescue" email (GX 63), but, also, that the deception in the press release (there was no recording of Phillip, and no other defense witnesses available) forced the women to testify truthfully on those two subjects that Mr. Jordan believed were crucial to his defense of the charges based on the email.

Like the press release, at least one of the letters intended for ST (GX 401E) also referred to the purported recording of Phillip threatening Mr. Jordan, and to "romantic messages" from ST to him. Id. One of them (sent after their separation) spoke of reuniting (Tr. 799-800). Not surprisingly, he believed that those messages would refute the prosecution's claim that she didn't want to be with him (Aff. 29). So he wrote to the judge (before trial) seeking a subpoena for them (App. 31). But unfortunately (for him), T-Mobile had purged the messages from its system before a subpoena could be issued, and so he sought to dupe ST into being honest about what she had written (to him) by falsely telling her that his sister had seen them, and by writing to her (ST) on the back of a legitimate copy of the subpoena that sought their content (Aff. 29).

It was very clever "truth-seeking," and given the affirmative defense (under sec. 1512(e)), completely lawful. But his trial counsel didn't tell him (or the jury) about that defense! And while the prosecution also argued that the conduct alleged to constitute witness tampering (under sec. 1512(b)) was intended to "harass" and "cause problems" (Tr. 852-53), trial counsel neglected to - as a fallback - request a lesser-included offense instruction on "witness harassment" (under sec. 1512(d)) - which would have made the maximum sentence (for the two witness tampering counts) 34 years less. Instead, and owing to these and other errors, Mr. Jordan is serving 40 years in prison for speech that should have been protected!

C. The Claims

Following a direct appeal, that did not involve any IAC claim, United States v. Jordan, 639 Fed. Appx. at 768-69 (2d Cir. 2016)(listing claims), a timely motion to vacate initiated the Section 2255 proceeding (case no. 18-cv-3372). The motion (Dkt. 1) survived screening (Dkt. 5 [order]). It set forth 29 primary IAC claims, each properly presented with relevant facts (per Section 2255 Rule 2(b)), and separately enumerated (R.A. 93-164 [motion]). The claims regarded defense counsel's performance at trial and sentencing on all five counts. Id. An accompanying memorandum (Dkt. 11) briefed only those claims involving the witness tampering counts (R.A. 167-69 [contents]). The motion was denied (Dkt. 16) without consideration of or rulings on most of the claims that it presented (R.A. 71-92 [order]).*

Among the 22 primary IAC claims (in the motion to vacate) that were overlooked, misconstrued, and otherwise left unadjudicated by the district court (case no. 18-cv-3372), and which were identified in the subsequent Rule 60(b) motion (Dkt. 24), were those that faulted trial counsel for:

1. Failure to challenge the constitutionality, or seek judicial narrowing, of so much of the federal witness tampering statute as places the burden on the accused to prove that his conduct and intent was lawful, allowed convictions to be based on speech that should have been protected (R.A. 95-98 [motion]).

2. Failure to inform Mr. Jordan of the affirmative defense of "truth-seeking" (under Section 1512(e)) before his right to testify was waived, invalidates the waiver (as unintelligently made), and deprived him of the opportunity to testify in support of that viable defense (R.A. 97 [motion]).

3. Failure to move to suppress letters (U.S. mail) intercepted by the FBI without a warrant, and used as the only evidence of witness tampering (count 4), deprived Mr. Jordan of a dismissal of that charge (R.A. 102 [motion]).

4. Failure to utilize available documentary evidence to impeach the testimony of telephone "threats" and "harassment" (counts 1-3) allowed convictions to be based on conduct (spoken words) that did not occur (R.A. 106-13 [motion]).

5. Failure to object (or otherwise respond) to the imposition of sentences for non-violent witness tampering (counts 4-5) of 40 years imprisonment without the required judicial explanations, or any mention during sentencing of the underlying conduct, allowed a sentence that is 35 years above the applicable obstruction of justice guideline (R.A. 155-56 [motion]), and prevented a fair appeal (R.A. 163-64 [motion]).

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* The motion to vacate (under Section 2255) put forth only IAC claims - which could not be litigated on direct appeal (R.A. 95-164), and those claims regarded trial counsel's performance with respect to charges of communicating threats (counts 1-3) and non-violent witness tampering (counts 4-5). Id.

D. The Defects

By a Rule 60(b) motion, petitioner sought relief from defects in the Section 2255 proceeding (case no. 18-cv-3372), including a prejudice analysis (Under Strickland) that was incomplete and based, in part, on inaccurate facts (R.A. 23-40); overlooked and otherwise unaddressed claims (R.A. 40-59); and materially misconstrued (and thus effectively undecided) claims (R.A. 59-69). And while the Rule 60(b) motion did identify the undecided claims, it did not re-argue any decided - or present any new - claim. Id. In other words, the record clearly shows that all of the claims subject of the Rule 60(b) motion (Dkt. 24 [R.A. 15-70]) were made in the original (and only) motion to vacate (Dkt. 1 [R.A. 93-164]), but were not addressed in the opinion denying Section 2255 relief (Dkt. 16 [R.A. 71-92]).*

1. The Defective Prejudice Analysis

In his motion to vacate (Dkt. 1), petitioner faulted trial counsel for, among other omissions, not arguing in support of the affirmative defense to the witness tampering charges (id. at 5-6 [R.A. 97-98]), and not seeking judgments of acquittal (counts 4-5) based on sufficient record proof of the affirmative defense (id. at 8 [R.A. 100]). But in its written opinion denying Section 2255 relief (Dkt. 16), the district court neither mentioned these claims, nor conducted a prejudice analysis (under Strickland) regarding the evidence (of "truth-seeking") that supported the affirmative defense (under sec. 1512(e)) which, when adequate, trumps even sufficient proof of witness tampering (under sec. 1512(b)).

As the written opinion (Dkt. 16) evinces, the prejudice analysis that was conducted regarded the charges involving transmitting a threat (counts 1-3), not witness tampering (counts 4-5). And yet none of the IAC claims that regarded the former set of counts was addressed - or even mentioned - in the opinion.

* In its opinion denying Section 2255 relief, the district court addressed 8 claims, but one of those "claims" had not been made by Mr. Jordan, and had nothing to do with the case! With respect to the claims that did, the district court stated that some had already been raised on direct appeal (R.A. 71). But, in fact, while the motion to vacate presented only IAC claims, no IAC claims were litigated on direct appeal. United States v. Jordan, 639 Fed. Appx. 768, 768-69 (2d Cir. 2016) (listing claims).

2. The Overlooked and Improperly Disregarded Claims

While the motion to vacate (Dkt. 1) put forth 29 primary - separately enumerated - IAC claims regarding defense counsel's performance at trial and sentencing (id. 2-70 [R.A. 94-164]), and after screening (in accordance with Sections 1915A and 2255(b)), the government was ordered to respond to the motion in its entirety (Dkt. 5 [order]), the district court's written opinion denying Section 2255 relief (Dkt. 16) addressed only 8 claims (id. at 8-22 [R.A. 78-92]). And one of those "claims" addressed was not even made in the motion (Dkt. 1), and had nothing to do with the case. So, of 29 properly presented IAC claims, only 7 of them were addressed in the opinion.***

The district court explained that it had relied on petitioner's memorandum (as opposed to the actual motion to vacate) as the list of claims to be decided (id. at 6 [R.A. 76]), and that it "considered" all of the "arguments" made within it (id. at 22 [R.A. 92]). But 13 claims - that were properly presented (with relevant facts) - in the actual motion (Dkt. 1) were not briefed in the memorandum (Dkt. 11), and thus were overlooked and not considered.

In addition to overlooking all of the claims presented (in the motion) that were not briefed (in the memorandum), the record reveals that the district court also overlooked claims (presented in the motion) that were briefed (in the memorandum). This is evident because the motion to vacate (Dkt. 1) presented 14 (separately enumerated) IAC claims regarding the witness tampering charges (id. at 3-14 [R.A. 95-106]); the memorandum (Dkt. 11) presented separate arguments in support of each of those 14 claims (id. at ii-iv [R.A. 167-69]); and yet, in its written opinion denying Section 2255 relief (Dkt. 16), the district court stated that only "two arguments" had been made regarding defense counsel's performance with respect to the witness tampering charges, and it identified two claims, addressed one of them, and made no mention of 10 others (id. at 13 [R.A. 83]).

*** That the district court overlooked certain properly presented claims in the Section 2255 proceeding (case no. 18-cv-3372) is apparent because it stated, in its written opinion (Dkt. 16), that movant's memorandum (as opposed to his motion to vacate) was used as the list of claims to be considered, id. at 6 (R.A. 76), and (not coincidentally) none of the claims presented in the motion to vacate (Dkt. 1) that were not briefed in the memorandum (Dkt. 11) were addressed (or even mentioned) in that opinion!

3. The Misconstrued - and Thus Undecided - Claim

While the motion to vacate (Dkt. 1) faulted defense counsel for, among other things, failing to move to suppress letters "addressed to ST" (U.S. mail) that had been intercepted by the FBI without a warrant, and later used as the only evidence of an intent "to influence" her testimony (id. at 10 [R.A. 102]), and the accompanying memorandum (Dkt. 11) identified those particular letters by citations to the trial transcript (id. at 77 [R.A. 199]), in its written opinion denying Section 2255 relief (Dkt. 16), the district court focused on another set of letters sent to a "friend" that had been willingly provided to the FBI, opining that no expectation of privacy existed. (id. at 19-20 [R.A. 89-90]). But, as explained in the Rule 60(b) motion (Dkt. 24), none of the letters that were provided to the FBI by the friend (GX 409, 411-16) were "addressed to ST," alleged to constitute the crime, or subject of the IAC claim (id. at 49-52 [R.A. 66-69]). And so the claim - regarding the letters "addressed to ST" (GX 400, 401E-403E, 405E-407E) that were alleged to constitute witness tampering with her (id.) - has never actually been decided.

III. REASONS TO GRANT CERTIORARI

Certiorari should be granted - under Supreme Court Rules 10(a) and 10(c) - because the record below reveals that the lower courts have "departed from the accepted and usual course of judicial proceedings" (and thus summary reversal may be appropriate), and because this case presents important questions (regarding habeas practice), subject of circuit conflicts and confusion, that this Court should resolve.

The issues to be addressed in the four sections that follow are: (A) whether a Section 2255 judgment is final and complete when all properly presented claims have not been adjudicated; (B) whether a COA is required, and if so, whether the Slack standard applies, to appeal the procedural dismissal of a true Rule 60(b) motion; (C) whether the petitioner's Rule 60(b) motion was arguably timely and true; and (D) whether petitioner's underlying motion to vacate stated a valid claim of the denial of a constitutional right.

A. Whether A Habeas (or Section 2255) Judgment Is Final and Complete For Purposes of Appeal, Or A Jurisdictional Defect Exists That Must Be Corrected, When (as here) All Properly Presented Claims Have Not Been Adjudicated

This section presents: (1) petitioner's position (based on Supreme Court law); and (2) the circuit conflicts to be resolved.

1. Petitioner's Position Regarding Finality and Appealability

Regardless of the propriety of the order denying Rule 60(b) relief, summary reversal of the order dismissing the appeal (that followed) is appropriate (here) because, as the record reveals, the district court's judgment denying the underlying motion to vacate was made without consideration of, or rulings on, all of the properly presented claims within it, and thus, according to Supreme Court law, the Court of Appeals was without jurisdiction to do anything other than correct that defect in the Section 2255 proceeding. But it did not do so.

(a) The Facts

This petition follows the denial of a COA to appeal the dismissal of a Rule 60(b) motion that sought relief from defects in a Section 2255 proceeding. See "The Proceedings," Section IIA, supra. The Rule 60(b) motion sought relief from the order - denying the motion to vacate - that was entered without consideration of, or rulings on, all of the claims properly presented within it. See "The Defects," Section IID, supra. And in the application for a COA, it was asserted, among other things, that the defect in the proceeding below (the unresolved claims) prevented the district court's judgment (denying Section 2255 relief) from being final and complete, and thus the Court of Appeals was without jurisdiction to do anything other than correct the defect. See "The Appeal," Section IIA4, supra.***

(b) The Law

[The adjudication of Habeas Claims]

While a habeas petitioner (or Section 2255 movant) is entitled to "full and fair" consideration of the claims put before the court, Kaufman v. United States, 394 U.S. 217, 228 (1969), and to adjudication of all claims presented, Stewart v. Martinez-Villareal, 523 U.S. 637, 644 (1998), the record below clearly reveals that - in considering petitioners motion to vacate - the district court (1) overlooked all of the claims that were not briefed in the separate memorandum, (2) expressly refused to rule on one IAC

claim, opining that it should have been raised on direct appeal, (3) disregarded (and made absolutely no mention of) other claims, and (4) materially misconstrued another. See "The Defects," Section IID, supra.

When (as here) a claim has been inadvertently overlooked, it has not been decided on the merits. Johnson v. Williams, 568 U.S. 289, 32, 302-03 (2013). When (as here) a constitutional claim is rejected solely because it could have been raised on direct appeal, the rejection is error. Kaufman v. United States, 394 U.S. 217, 222-24 (1969). When (as here) habeas claims are disregarded without adequate explanation, a remand is necessary. Corcoran v. Levenhagen, 558 U.S. 1, 1-2 (2009). And when (as here) a claim has been misconstrued, it has not actually been decided. See Dyer v. Farris, 787 Fed. Appx. 485, 494 (10th Cir. 2019)(a procedural defect occurs when a claim is misunderstood), and see Peterson v. Secretary of DOC, 676 Fed. Appx. 827, 828 (11th Cir. 2017)(a misapprehended claim has not been adjudicated).

[The Finality of Judgments and Jurisdiction]

The Supreme Court has held that to be appealable a habeas judgment must be final and complete as to "the whole subject matter" and "all causes of action." Collins v. Miller, 252 U.S. 364, 370 (1920). A claim is a "cause of action." See Keene v. United States, 508 U.S. 200, 210 (1993)(citing Black's Law Dictionary). Here, multiple "cause[s] of action" (habeas claims) were left unresolved. And remain unresolved. As such, the district court's judgment denying Section 2255 relief - that was not the result of consideration of, and rulings on, all properly presented claims - was not, and is not, final. See Andrews v. United States, 373 U.S. 334, 340 (1963)(until appropriate action is taken by the district court, a Section 2255 judgment is not final).

Rule 54(b) - applicable to Section 2255 judgments via Rule 81(a)(4) - states that "any order, however designated, which adjudicates fewer than all the claims [presented] shall not end the action [as to any claim]" (S.A. 03). And the "final judgment" rule is the dominant rule in federal appellate practice. DiBella v. United States, 369 U.S. 121, 124-26 (1962). Here, the Section 2255 judgment was clearly not

final and complete, and so the court of appeals lacked jurisdiction under Section 1291 (S.A. 11) and Section 2253 (S.A. 12). And as the Supreme Court has held, when jurisdiction is lacking an appellate court has only the authority to correct the jurisdictional defect. Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986). But that didn't happen here. Thus, this Court should summarily reverse the dismissal of petitioner's appeal because it is invalid, see Frad v. Kelly, 302 U.S. 312, 316 (1937)(orders made without jurisdiction must be vacated), and remand for rulings on the unaddressed Section 2255 claims.

2. The Circuit Conflicts Regarding Unresolved Habeas Claims and Jurisdiction

In Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), the Supreme Court emphasized that a habeas petitioner was entitled to rulings on all properly presented claims. Id. at 643. And in Collins v. Miller, 252 U.S. 364 (1920), the Supreme Court held that to be appealable a judgment must be both "final" and "complete." Id. at 370. With these holdings, of course, all circuits agree. What the circuits do not agree upon is whether or not a judgment in a habeas (or Section 2255) proceeding is "final" and "complete" when (as here) the district court did not rule on all properly presented claims. See Foxworth v. Maloney, 515 F.3d 1, 3 n.1 (1st Cir. 2008)(noting the circuit conflicts). In other words, there is a circuit split as to the appealability of such a judgment, and the applicability of Rule 54(b) to such proceedings.*

The Eleventh Circuit has held that Rule 54(b) applies to decisions in habeas cases. Clisby v. Jones, 960 F.2d 925, 936-38 n.17 (11th Cir. 1992) (en banc). The Fourth Circuit agrees. United States v. Kerr, 855 Fed. Appx. 883, 886 n.3 (4th Cir. 2021). And both circuits remand cases when (as here) a judgment has been entered without all claims having been addressed. Id. But the Seventh Circuit has held that Rule 54(b) does not apply, that a judgment (granting or denying habeas relief) without all claims having been addressed is "final," and that a remand is not necessary. Stachulak v. Coughlin, 520 F.2d 931, 934 (7th Cir. 1975). The Fifth Circuit agrees. Young v. Herring, 777 F.2d 198, 201-02 (5th Cir. 1992).

*** See Rule 54(b) (S.A. 03)

While the Ninth Circuit has held that there is no reason for a remand for rulings on unaddressed claims when the district court has granted relief on another claim, Blazak v. Ricketts, 971 F.2d 1408, 1410-15 (9th Cir. 1992), the dissent vigorously argued otherwise. Id. at 1415-19. And warning of "[t]he havoc [that] failure to address all claims in a habeas petition [can] have on the [judicial] system," the Eleventh Circuit mandated remands for any case in which all claims have not been expressly ruled on in a district court's written decision. Clisby v. Jones, 960 F.2d 925, 938 (11th Cir. 1992) (en banc). The Clisby mandate applies to both Section 2254 and Section 2255 cases regardless of whether relief has been granted or denied, Rhode v. United States, 383 F.3d 1289, 1291 (11th Cir. 2009), and to summary denials as well. Carver v. United States, 722 Fed. Appx. 906, 908-09 (11th Cir. 2018).

More recently, in Porter v. Zook, 803 F.3d 694 (4th Cir. 2015), the Fourth Circuit held that when the record reveals that all claims have not been addressed, a decision denying habeas relief is not final regardless of the district court's intent. Id. at 696-97. And in United States v. Fazel, 808 Fed. Appx. 209 (4th Cir. 2020), it held that a decision denying Section 2255 relief was not final because certain IAC claims had been overlooked by the district court. Id. at 210. And so the appeal was dismissed, and the case was remanded for rulings on the undecided claims. Id.

But the Second Circuit dismissed Mr. Jordan's appeal without a remand for rulings on the overlooked and undecided claims. And in Cox v. United States, 783 F.3d 145 (2d Cir. 2015), it held that an order denying habeas relief was "final" if the district court intended it to be - regardless of improperly disregarded claims. Id. at 147-48. Thus, this Court should grant certiorari, and resolve this important issue.*

* Here, Mr. Jordan asserted (in his motion for a COA) that the absence of rulings on all of his claims (that were properly presented - with relevant record facts - in his motion to vacate that survived Section 2255(b) screening) prevented the district court's decision (denying Section 2255 relief) from being "final" and "complete," and that the Court of Appeals was without jurisdiction to do anything other than remand the case for consideration of, and rulings on, the overlooked and otherwise undecided claims (R.A. 222-24 [motion]).

B. Whether A COA Is Required, and If So, Whether The Slack Standard Applies When (as here) The Appeal Regards The Procedural Dismissal of A True Rule 60(b) Motion

This section presents: (1) petitioner's position (based on Supreme Court law); and (2) the circuit conflicts to be resolved.

1. Petitioner's Position Regarding The COA Requirement

Even if appellate jurisdiction existed, summary reversal of the order denying a COA (and dismissing the appeal) is appropriate (here) because the appeal regarded (only) the procedural dismissal of a true Rule 60(b) motion, that decision did not "dispose of the merits" of a habeas petition (or Section 2255 motion), and thus, according to Supreme Court law, a COA should not have been required to appeal it.

(a) The Facts

This petition follows the denial of a motion to proceed without a COA, and the denial of an application for a COA, to appeal the procedural dismissal of a Rule 60(b) motion. See "The Appeal," Section IIA4, supra. The Rule 60(b) motion sought relief from defects in a Section 2255 proceeding, to wit, the denial of the motion to vacate (that survived Section 2255(b) screening) without consideration of, and rulings on, all of the claims that were properly presented within it. See "The Defects," Section IIA3, supra.*

(b) The Law

In Harbison v. Bell, 556 U.S. 180 (2009), the Supreme Court held that the COA requirement "only applies to final orders that dispose of the merits of a habeas petition." Id. at 183. Years earlier, in Kellogg v. Strack, 269 F.3d 100 (2d Cir. 2000), the Second Circuit opined that "[t]here is no question that the denial of a Rule 60(b) motion is a 'final order.'" Id. at 103. But it is not a "final order" that "disposes of the merits" of a habeas petition (or Section 2255 motion) because, as the Supreme Court explained (again) in Banister v. Davis, 140 S.Ct. 1698 (2020), a Rule 60(b) motion cannot be filed until after the habeas (or Section 2255) proceeding is closed, and the "appeal of a Rule 60(b) denial is independent of the appeal of the original petition [and] does not bring up the underlying judgment for review." Id. at 1710.

*** By motion below regarding the COA requirement (case no. 21-576), petitioner sought to appeal without a COA (Dkt. 12 [R.A. 205]), and was denied (Dkt. 139 [R.A. 209]).

In other words, the appeal of a Rule 60(b) motion has nothing to do with the merits of any claim in the underlying habeas (or Section 2255) proceeding. Id. And thus a COA should not be required to appeal the dismissal of a true Rule 60(b) motion. And this is especially so when (as here) a true Rule 60(b) motion has been dismissed on procedural grounds - because such a dismissal order not only doesn't "dispose of the merits" of any underlying habeas (or Section 2255) claim, it doesn't even dispose of the merits of the Rule 60(b) motion. See Johnson v. Williams, 568 U.S. 289, 301 (2013)(An order made without consideration of the substantive arguments and relevant facts is not made on the merits).

For these same reasons, even if the COA requirement could properly (and fairly) be applied to appeals of procedural dismissals of true Rule 60(b) motions, the second prong of the COA standard (used by the Second Circuit) should not apply. It requires an applicant to show (before a COA is issued) that "jurists of reason [could debate] whether the underlying habeas petition (or Section 2255 motion) states a valid claim of the denial of a constitutional right." Kellogg v. Strack, 269 F.3d 100, 104 (2d Cir. 2000). That prong is adopted from the COA standard set out in Slack v. McDaniel, 529 U.S. 473 (2000), but that standard regards an appeal of the procedural dismissal of a habeas petition (that actually presents a habeas claim), id. at 484, not the procedural dismissal of a true Rule 60(b) motion (that does not). Gonzalez v. Crosby, 545 U.S. 524, 532-33 (2005).

Thus, this Court should grant certiorari and summarily reverse the lower court's dismissal of the appeal (if not already void for lack of jurisdiction) because petitioner had a right to appeal the procedural rejection of his Rule 60(b) motion without a COA. Gelboim v. Bank of America Corp., 574 U.S. 405, 407 (2015).*

* If the application for a COA had been granted, the only issue on appeal would have been the timeliness of the Rule 60(b) motion. And only if petitioner succeeded on appeal would the district court have had to decide the Rule 60(b) motion on its merits. And that decision would only regard whether or not it had failed to properly adjudicate certain claims (not whether or not the claims had merit). Only if the Rule 60(b) motion was granted (by the district court) would the Section 2255 proceeding be opened, and the undecided claims addressed. In other words, there were several layers of separation between the application for a COA and the claims in the original (and only) Section 2255 motion.

2. The Circuit Conflicts Regarding The COA Requirement and True Rule 60(b) Motions

(a) COA Requirement

In Harbison v. Bell, 556 U.S. 180 (2009), the Supreme Court held that Section 2253(c) - requiring a COA to appeal (S.A. 13) - "only applies to final orders that dispose of the merits of a habeas petition." Id. at 183. And in Banister v. Davis, 140 S.Ct. 1698 (2020), the Supreme Court explained that "the appeal of a Rule 60(b) denial is independent of the appeal of the [habeas] petition, [and] does not bring up the underlying [habeas] judgment for review." Id. at 1710. Nevertheless, the circuit split, noted in Buck v. Davis, 137 S.Ct. 759 (2017), as to whether a COA is required to appeal the denial of a Rule 60(b) motion, id. at 772 n.*, remains.*

In Kellogg v. Strack, 269 F.3d 100 (2d Cir. 2001), the Second Circuit held that a COA is required to appeal the denial of a Rule 60(b) motion. Id. at 103-04. The Eleventh Circuit agrees. Gonzalez v. Secretary of DOC, 366 F.3d 1253, 1263-64 (11th Cir. 2004). But as the dissent (in Gonzalez) pointed out, neither holding distinguished between a true Rule 60(b) motion and a disguised successive petition or between a denial on the merits or a dismissal on procedural (or jurisdictional) grounds. Id. at 1299-1300. And both cases preceded the Supreme Court's holding in Harbison.

The Fifth Circuit has opined that "Harbison does not amount to a clear directive" to set aside its established policy of requiring a COA to appeal a decision on a Rule 60(b) motion. Storey v. Lumpkin, 8 F.4th 382, 388 (5th Cir. 2021). The Tenth Circuit has acknowledged "tension between [its] COA requirement [to appeal the denial of a Rule 60(b) motion] and the Supreme Court's holding in Harbison v. Bell." United States v. Handy, 743 Fed. Appx. 169, 172 n.3 (10th Cir. 2018). And the Third Circuit has noted that its holding - requiring a COA to appeal an order denying a Rule 60(b) motion - has been "undermined" by Harbison. Wilson v. Secretary of Pa. DOC, 782 F.3d 110, 115 (3d Cir. 2014).

* In Buck v. Davis, 137 S.Ct. 759 (2017), the Supreme Court assumed "without deciding" that a COA was required to appeal the denial of a Rule 60(b) motion, Id. at 772 n.*. But in Ayestas v. Davis, 138 S.Ct. 1080 (2018), the Supreme Court assumed "for the sake of argument" that a COA was not needed to appeal an issue that was "collateral to the merits" of a habeas petition. Id. at 1088 n.1.

Notwithstanding its concern about the effect of Harbison, the Third Circuit has more recently held that a COA is necessary even to appeal the dismissal of a Rule 60(b) motion on procedural grounds. Bracey v. Superintendent of Rockview SCI, 986 F.3d 274, 282 (3d Cir. 2021). And the Ninth Circuit agrees. United States v. Winkles, 795 F.3d 1134, 1142 (9th Cir. 2015). But the Fourth Circuit says that "a jurisdictional dismissal of a collateral attack on a habeas proceeding is so far removed from the merits of the underlying habeas petition that it cannot be said to be a 'final order' disposing of the merits of a habeas corpus proceeding," and thus a COA is not required to appeal the dismissal (on procedural grounds as opposed to the denial on the merits) of a true Rule 60(b) motion. United States v. McRae, 793 F.3d 392, 400 (4th Cir. 2015), quoting Harbison, 556 U.S. at 183. And the Sixth Circuit agrees. Mizori v. United States, 23 F.4th 702, 705 (6th Cir. 2022).

Given the distinction explained in Gonzalez v. Crosby, 545 U.S. 524 (2005), between a purported Rule 60(b) motion (that is actually a successive petition) and a true Rule 60(b) motion (that seeks relief from a defect), id. at 532 & n.4, and the explanation in Banister v. Davis, 140 S.Ct. 1698 (2021), that a Rule 60(b) motion is separate from (and outside of) the habeas (or Section 2255) proceeding, id. at 1709-10, this Court should grant certiorari to resolve the issue - whether a COA is required - at least with respect to an appeal (as here) of the dismissal of a true Rule 60(b) motion on procedural grounds.

(b) COA Standard

Obviously, the circuits that do not require a COA to appeal the dismissal of a Rule 60(b) motion on procedural grounds do not apply a COA standard. But others do - with some confusion. See United States v. Marizcales-Delgadillo, 243 Fed. Appx. 435 (10th Cir. 2007), in which it was observed that "in the context of a request for a COA to appeal the procedural denial of a Rule 60(b) motion, there is a question as to whether we look to the underlying habeas petition or Section 2255 motion when making the inquiry, to the Rule 60(b) motion [only], or perhaps to some combination of the two." Id. at 439 n.3. The confusion is not surprising because an order dismissing a true Rule 60(b) motion does not address the merits of, or even mention, any underlying habeas (or Section 2255) claim.

Applying the COA standard articulated in Slack v. McDaniel, 529 U.S. 473 (2000), for decisions denying habeas petitions (id. at 484), the Second Circuit requires that an applicant for a COA - to appeal the denial (or dismissal) of a Rule 60(b) motion - must (to obtain it) show that "jurists of reason would find it debatable whether [1] the district court abused its discretion in denying the Rule 60(b) motion, and [2] the underlying habeas petition [or motion to vacate] states a valid claim of the denial of a constitutional right." Kellogg v. Strack, 269 F.3d 100, 104 (2d Cir. 2000). The Ninth Circuit employs a similar two-prong standard. United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015).

But the COA standard articulated in Slack - and applied by these circuits to Rule 60(b) motions - regarded the dismissal of a habeas petition on procedural grounds, Slack at 484, not the dismissal of a Rule 60(b) motion on procedural grounds. And the difference is significant: the former presents actual habeas claims for review, and the latter does not. Gonzalez v. Crosby, 545 U.S. 524, 532, 539 (2005) (explaining the difference between a "true" Rule 60(b) motion and a second and successive habeas petition). In Buck v. Davis, 137 S.Ct. 759 (2017), it was "agreed" by the parties that the proper standard was "whether the district court arguably abused its discretion in declining to reopen the judgment." Id. at 777. But there is no mention as to whether that standard required a showing that the underlying habeas claim was valid. So if a COA is in fact required, this Court should clarify the proper standard.

C. Whether A Rule 60(b) Motion Is Timely and True When (as here) It Is Filed (by a pro se incarcerated litigant) Following A Timely Notice of Appeal, Within The Time Allowed By Rule 60(c), and Seeks Relief From The District Court's Failure To Consider, and Rule On, All Claims Properly Presented In The Original (and only) Section 2255 Motion To Vacate

This section provides the Supreme Court law (and other authorities) that render the district court's procedural dismissal of petitioner's Rule 60(b) motion clearly erroneous with respect to the issues of (1) timeliness, and (2) propriety.

1. The Timeliness of Petitioner's Rule 60(b) Motion

Assuming that a judgment denying habeas (or Section 2255) relief is "final" when (as here) the district court did not consider (or rule on) all properly presented claims, a Rule 60(b) motion is the proper

means to seek relief from that defect. And when (as here) the Rule 60(b) motion is filed following a timely notice of appeal, and within the time allowed by Rule 60(c), it is timely filed.

(a) The Facts

This petition follows the denial of a COA to appeal the dismissal of a Rule 60(b) motion on procedural grounds. See "The Appeal," Section IIA4, supra. The Rule 60(b) motion sought relief from defects in the Section 2255 proceeding, to wit, the absence of consideration of, and rulings on, all properly presented claims in the motion to vacate that survived Section 2255(b) screening. See "The Defects," Section IID, supra. But the district court rejected the Rule 60(b) motion as untimely, stating that it had been filed after the "14 days" allowed by the "local rule," and after the "time to appeal had elapsed." See "Rule 60(b) Relief," Section IIA3, supra.

(b) The Law

In Kemp v. United States, 142 S.Ct. 1856 (2022), the Supreme Court explained that a Rule 60(b) motion - seeking relief from a district court's "mistake, inadvertence, [or] neglect" - must be filed within a "reasonable time," and (at most) no more than "one year after entry of [the] judgment." Id. at 1860. And in Gonzalez v. Crosby, 545 U.S. 524 (2005), the Supreme Court opined that it could be concluded that a Rule 60(b) motion has been filed within a reasonable time when (as here) it is filed before the one year limit (set by Rule 60(c) [S.A. 05]) by "an incarcerated pro se litigant." Id. at 542. As such, it was at least debatable, if not certain, that petitioner's Rule 60(b) motion filed less than a year following the denial of Section 2255 relief, and ten months after the denial of a Rule 59(e) motion (see "The Proceedings," Section IIA, supra), and during a pandemic, was filed within a reasonable time. And the government did not argue otherwise.

However, the district court did not reject petitioner's Rule 60(b) motion because it was not filed within a reasonable time. Instead, it dismissed it as time-barred by the "local rule," setting a limit of "14 days," and by Second Circuit precedent requiring that such a motion be filed before the time to appeal has elapsed:

> In this most recent petition, Jordan seeks reconsideration of the August 2019 Opinion for a second time, this time under Rule 60(b), Fed. R. Civ. P. That motion is denied.3
>
> "Rule 60(b) is not a substitute for appeal." Competex, S.A. v. Labow, 783 F.2d 333, 335 (2d Cir. 1986). A movant may not, therefore, use a Rule 60(b) motion to "relitigate" the basis of the challenged judgment. Id. Furthermore, a Rule 60(b)(1) motion premised on a judge's error is time-barred once the time to appeal the judgment has elapsed. See In re 310 Assocs., 346 F.3d 31, 35 (2d Cir. 2003). And pursuant to Local Rule 6.3, motions for reconsideration must be brought within fourteen days after the challenged judgment.
>
> The Court denied Jordan's § 2255 petition on August 30, 2019. Under Local Rule 6.3, then, he was required to bring any motion for reconsideration by September 13, 2019. And pursuant to Fed. R. App. P. 4(a)(1)(B), his deadline to appeal the August 2019 Opinion -- and thus to bring the instant Rule 60(b) motion -- expired on October 29, 2019. From either perspective, then, this Rule 60 motion is**{2020 U.S. Dist. LEXIS 4}** untimely. In any event, Jordan has put the very same arguments in this Rule 60 application into his appeal pending before the Court of Appeals. Jordan may not use this Rule 60 motion as a duplicate of his appeal.4

This ruling was not just arguably wrong (and thus a COA should have issued), it was obviously erroneous (and thus should be summarily reversed). For starters, petitioner's Rule 60(b) motion was not filed "after the time to appeal had elapsed." It was filed following a timely notice of appeal. See "Rule 60(b) Relief," Section IIA3, supra, and docket sheets (R.A. 214-16). And as the Supreme Court explained in Stone v. INS, 514 U.S. 386 (1995), a Rule 60(b) motion may be filed before or after an appeal. Id. at 401.

What's more, the "local rule" limiting the time to file a "motion for reconsideration" to "14 days" (following judgment) does not (and could not) apply to an actual Rule 60(b) motion - because, as the Supreme Court explained in Banister v. Davis, 140 S.Ct. 1698 (2020), a "Rule 60(b) motion" filed within 28 days (of the judgment) is actually a Rule 59(e) motion regardless of its title. Id. at 1710 and n.9. In other words, to be treated under Rule 60(b) the motion would have to be filed (as it was here) at least 29 days after the judgment, which is two weeks after the deadline set by the "local rule!"

Moreover, the "local rule" (setting a filing deadline no later than "14 days" following the judgment) is inconsistent with the one year time-bar set by Rule 60(c) (S.A. 05 [rule]). And, as the Supreme Court explained in Frazier v. Heebe, 482 U.S. 641 (1987), a local rule that is inconsistent with a federal rule or statute is invalid. Id. at 646 and n.4. See also Carlisle v. United States, 517 U.S. 416, 426 (1996)

(observing Rule 83(a) and Section 2071).

Thus, given the record facts, and the clear Supreme Court law, the district court's dismissal of petitioner's Rule 60(b) motion, or, alternatively, the Second Circuit's denial of a COA to appeal that dismissal, should be summarily reversed.*

2. The Propriety of Petitioner's Rule 60(b) Motion

Although petitioner's Rule 60(b) motion was dismissed solely on the ground that it was "untimely" (R.A. 06 [order]), in that order, the district court (a) at least implied that such a motion was not the proper means by which to seek relief regarding claims in the underlying Section 2255 motion, and (b) stated that the same claims had been presented to the Court of Appeals (R.A. 07 [order]). Neither is accurate --

(a) Proper Means of Relief

The district court stated (in its order) that "Rule 60(b) is not a substitute for appeal [and a] movant may not [use it] to 'relitigate' the basis of the challenged judgment." Id. But the record (here) clearly reveals that nothing was being relitigated - because the Rule 60(b) motion regarded only claims that were presented in the original (and only) Section 2255 motion but inadvertently overlooked, improperly disregarded, and mistakenly misconstrued. See "The Defects," Section IID, supra. And, as the Supreme Court held in Kemp v. United States, 142 S.Ct. 1856 (2022), a Rule 60(b) motion may be used to seek relief from the district court's "mistake, inadvertence, [or] neglect." Id. at 1860.**

* In its order dismissing the Rule 60(b) motion as untimely, the district court stated (erroneously) that the motion "raised the very same grounds" as were at issue in the pending appeal (R.A. 07). By "appeal," the district court was referring to the application for a COA from the Second Circuit (case no. 19-2987). And that application did not raise any of the "same grounds" as the Rule 60(b) motion. In fact, as the record clearly demonstrates, that application (Dkt. 18) included a notice to the Court of Appeals that certain habeas claims had been overlooked, that those claims therefore could not be addressed in the application, and that relief from the defect was being sought in the district court (R.A. 163 [pages 1-2 and notes 2-3 of the COA application]).

** Of course, a purported "Rule 60(b) motion" that presents a new habeas claim (for first time review), or that reargues the merits of an already decided claim, is not a true Rule 60(b) motion. The former is a successive petition. Gonzalez v. Crosby, 545 U.S. 524, 532, 539 (2005). The latter, if filed more than 28 days after the judgment, is an untimely Rule 59(e) motion. Banister v. Davis, 140 S.Ct. 1698, 1706-07 (2020).

(b) Rule 60(b) versus Appeal

In dismissing the Rule 60(b) motion as "untimely," the district court explained that it had been filed "after the time to appeal had elapsed" (R.A. 07 [order]). But then stated (in the very next paragraph of that order) that petitioner "has put the same arguments in his Rule 60(b) application into his appeal pending before the Court of Appeals." Id. In other words, somehow petitioner missed the deadline to appeal and yet did litigate an appeal! Of course, neither is true: As stated previously, a timely notice of appeal (of the judgment denying Section 2255 relief) was filed, but a COA was not issued. See "Habeas Case," Section IIA2, supra. And so there was no appeal in which "the very same arguments" could have been made.

Moreover, in the application for a COA that followed the judgment denying Section 2255 relief, petitioner notified the Court of Appeals that certain claims (in his motion to vacate) had been overlooked (and not ruled on by the district court), and thus were not subject of that application, and that he was seeking relief in the lower court from that defect. See "Habeas Case," Section IIA2, supra. But neither the Court of Appeals, nor the district court ever addressed the issue. Thus, this Court should grant certiorari, and summarily reverse either the district court's dismissal of the Rule 60(b) motion, or, alternatively, the Second Circuit's denial of a COA to appeal that dismissal.*

D. Whether Petitioner Stated A Substantial Claim of The Denial of A Constitutional Right In His Original (and only) Motion To Vacate, and Section 2255 Relief, or At Least A COA To Appeal The Dismissal of The Rule 60(b) Motion, Should Have Been Granted

This section presents overviews (for a general assessment in accordance with Miller-El) of five of the twenty-two IAC claims that were put forth (and separately enumerated) in the original (and only) motion

* Regardless of the title of the motion, when a district court is confronted with its failure to consider (or rule on) all properly presented claims in a habeas petition (or Section 2255 motion), it must correct that omission because the petitioner is entitled to adjudication of every claim, Stewart v. Martinez-Villareal, 523 U.S. 637, 643 (1998), and absent such, its judgment denying habeas (or Section 2255) relief is not final as to all causes, Collins v. Miller, 252 U.S. 364, 370 (1920), and thus cannot be challenged under Rule 60(b) or appealed under Section 2253(c).

to vacate (that survived Section 2255(b) screening), but were overlooked, disregarded, and otherwise left unadjudicated, by the district court. See "The Defects," Section IID, supra. The Supreme Court law (and other authorities) is provided to show that the motion to vacate (subject of the Rule 60(b) motion) stated substantial claims of the denial of a constitutional right. (The other twenty-two IAC claims are available for review in the appendix to this petition.)*

The claims presented in this section regard trial counsel's: (1) failure to challenge so much of the witness tampering statute as compels an accused to prove that his speech was lawful; (2) failure to inform petitioner of the available affirmative defense (under sec. 1512(e)) before his right to testify (in support of it) was waived; (3) failure to move to suppress U.S. mail that was intercepted (and read) by the FBI without a warrant, and alleged to be (the only) evidence of witness tampering; (4) failure to utilize available evidence to demonstrate that prosecution testimony was false; and (5) failure to object to the unreasoned terms of imprisonment imposed (for witness tampering) that were eight times greater than the sentence recommended by the applicable obstruction of justice guidelines.

1. Failure to challenge the constitutionality, or seek judicial narrowing, of so much of the federal witness tampering statute as can reach protected speech, and thus places the burden on the accused to prove that his conduct and intent were lawful, allowed convictions to be based on speech that should have been protected.

The IAC claim - that trial counsel should have challenged the constitutionality, or at least sought judicial narrowing, of so much of the federal witness tampering statute that can reach protected speech (R.A. 95-98) [motion]) was well-founded: The charges against Mr. Jordan (under Section 1512(b)) were based solely on "written communications" (see Section IIB2, supra [the evidence]), and the federal witness tampering statute (Section 1512(b)), as written, allows conviction (under three of its four conduct clauses) to be based on speech (not necessarily per se unlawful) that was, in fact, intended "to

* A total of 29 primary IAC claims were put before the Southern District of New York (case 18-cv-3372) in the original (and only) motion to vacate (Dkt. 1 [R.A. 93-164]), but only 7 of them were mentioned in the opinion denying Section 2255 relief (Dkt. 16 [R.A. 71-92]), and so 22 of the claims were identified in the Rule 60(b) motion (Dkt. 24 [R.A. 18-70]) as not having been adjudicated. Id. And each of these record documents was presented to the Second Circuit (case no. 21-576) with the application for a COA (Dkt. 120 [R.A. 217-24]).

influence" a witness properly (S.A. 9 [statute]), unless the accused invokes (and proves) the affirmative defense (under Section 1512(e)) of "truth-seeking" (S.A. 10 [statute]).*

Thus, a person with "innocent" intent (or proper purpose) such as one who was seeking "to influence" a witness to be truthful (or not to testify falsely) can be punished under the statute, as written, unless he invokes the affirmative defense and proves that his speech - alleged to constitute witness tampering - was lawful (R.A. 175-89 [memorandum]). But this is precisely what the First Amendment prohibits. Speiser v. Randall, 357 U.S. 513, 526-27 (1958). The Supreme Court has expressed serious constitutional concerns about such a burden being placed on the defendant. Ashcroft v. Free Speech Coalition, 535 U.S.234, 255 (2002). And the Third Circuit has opined (but not had occasion to hold) that the statute is unconstitutional. United States v. Clemons, 843 F.2d 741, 752 (3d Cir. 1988).

That the district court (here) refused to rule on this "expanded" First Amendment claim - because it could have been raised on direct appeal (R.A. 83 [order]) is contrary to Kaufman v. United States, 394 U.S. 222 (1969), requiring "full and fair" consideration (id. at 228), and Ex parte Siebold, 100 U.S. 371 (1880), holding that an unconstitutional law is invalid. Id. at 376.

2. Failure to inform Mr. Jordan of the affirmative defense (of "truth-seeking") before his right to testify was waived, invalidates that waiver (as unintelligently made) and deprived him of the opportunity to testify in support of that viable defense

Mr. Jordan's assertions - (a) that trial counsel failed to inform him of the affirmative defense (available under Section 1512(e)) before his right to testify was waived, and (b) that had he been informed of it, he would have taken the stand to testify in support of that defense - were neither disputed by the government, nor refuted by the record (R.A. 97 [motion]). Thus a valid claim of the denial of a constitutional right was clearly stated, supported by an affidavit, and briefed (R.A. 190-96 [memorandum]).

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* In Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005), the Supreme Court held that the "corruptly persuades" clause of Section 1512(b) requires the government to prove wrongful intent - given the adverb "corrupt[]" (id. at 706). But that decision did not address the other three conduct clauses of the statute that are not modified by such an adverb, and can reach protected speech.

And Mr. Jordan's argument was strong: To be valid, a waiver must be intelligently made, Brady v. United States. 397 U.S. 742, 748 (1970); a waiver based on inadequate (or no) advice is invalid, Bousley v. United States, 523 U.S. 614, 626 (1988); and a lawyer's failure to inform his client of the relevant law is deficient performance, Hill v. Lockhart, 474 U.S. 52, 62 (1985), especially when (as here) sufficient proof of the affirmative defense (i.e., "truth-seeking") would override sufficient proof of witness tampering. United States v. Johnson, 968 F.2d 208, 213 (2d Cir. 1992).*

That the district court neither held a hearing on this claim (involving facts outside of the record), nor mentioned it (at all) in its decision denying habeas relief (R.A. 71-92 [order]) can only be explained as an oversight. See Spitznas v. Boone, 464 F.3d 1213, 1224-25 (10th Cir. 2000) (Rule 60(b) defect).

3. Failure to move to suppress letters (first-class mail) - intercepted (and read) by the FBI without a warrant (or permission) - that were used as the only evidence of witness tampering (count 4) deprived Mr. Jordan of a dismissal of that charge

Given that first-class mail is protected by the Fourth Amendment, United States v. Jacobsen, 466 U.S. 249, 251 (1970), until it reaches the actual hands of the addressee, United States v. Van Leeuwen, 397 U.S. 249, 251 (1970), and that the only evidence (in this case) alleged to constitute the witness tampering conduct toward ST (count 4) were letters intended for her that had been intercepted (and read) by the FBI without a warrant (See Section IIB2(a), supra [letters to ST]), Mr. Jordan made the claim - in his motion to vacate - that trial counsel's failure to move to suppress that particular evidence (GX 400, 401E-403E, 405E-407E) deprived him of a dismissal of that count of the indictment (R.A. 102 [motion]).

As is apparent from Mr. Jordan's memorandum that accompanied the motion to vacate, this claim was valid: first-class mail cannot be read by authorities without a warrant, Ex parte Jackson, 96 U.S. 727, 732-33 (1877), and when it has been, defense counsel's failure to move to suppress it is ineffective

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*: While it was asserted (under Section 2255) that automatic reversal was required because the waiver of the right to testify (made without awareness of the available affirmative defense) was invalid, it was also asserted (alternatively) that trial counsel's error deprived Mr. Jordan of the opportunity to testify in support of that defense (R.A. 97 [motion]). And the affidavit (cited to in the memorandum and motion) provided what his testimony would have been (R.A. 190-96 [memorandum]).

assistance. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). But in its ruling on "this" claim, the district court focused solely on the wrong evidence, to wit, a different set of letters that had been addressed to his friend (Dr. Mayer), and voluntarily provided to the FBI (GX 409, 411-416), and thus it found no expectation of privacy (R.A. 90 [order]). But that finding did not regard the set of letters (GX 400, 401E-403E, 405E-407E) that were subject of the claim, that had been improperly intercepted, and that were the only alleged evidence of witness tampering conduct toward ST! Thus the actual claim was effectively left undecided.

4. Failure to utilize available documentary evidence to impeach prosecution testimony of telephone threats and harassment (counts 1-3) allowed convictions to be based on conduct (spoken words) that did not occur

Given that a conviction may not be based on false testimony, Franks v. Delaware, 438 U.S. 154, 183 (1978), and that documentary evidence trumps testimonial evidence, United States v. Bergman, 354 F.2d 931, 934 (2d Cir. 1966), Mr. Jordan - convicted of "telephone threats and harassment" (count 3) based entirely on the testimony of related prosecution witnesses (See Section IIB1, supra [alleged threats]) - made the claim that he was deprived of a not guilty finding (on that count) by trial counsel's failure to use available documentary evidence (including telephone records) that would have demonstrated that the testimony was false (R.A. 106-13 [motion detailing evidence of false testimony with citations to the record]).

And the unused proof of false testimony was powerful. Id. In fact, after reviewing it, former chief judge of the Ninth Circuit, Alex Kozinski (now in private practice) remarked: "No competent jurist could conclude that justice has been served." American Free Press (2020). But in its decision denying Section 2255 relief, the district court made no mention of this (or any other) claim that was presented in the motion (to vacate) but not briefed in the memorandum that accompanied it - because, as the court explained, the memorandum (and not the motion) was used as the list of claims to be decided (R.A. 76 [order]). In other words, all unbriefed claims were overlooked. And its only mention of the alleged telephone conduct (underlying counts 1-3), made for the purpose of showing the strength of the

prosecution's case, was the sole alleged telephone threat to ST (R.A. 78 [order]) that, in fact, was not proven at trial (See Section IIB1, supra [the evidence]).*

5. Failure to object to the imposition of sentences for non-violent witness tampering (counts 4-5) amounting to 40 years imprisonment, and imposed without any explanation, allowed a sentence (when aggregated) 35 years above the guidelines, and prevented a fair appeal

Given that the aggregate sentence imposed for non-violent witness tampering (based entirely on written words) was 35 years above the obstruction of justice guidelines (USSG sec. 2j1.2), and that a "procedural error occurs" when (as here) "the district court miscalculates the guidelines [or] does not adequately explain the sentence imposed [or] deviates from the guidelines without explanation," United States v. Cossey, 632 F.3d 82, 86 (2d Cir. 2011), Mr. Jordan made the claim - in his motion to vacate - that his attorney's failure to object (or otherwise respond) to the miscalculated, and unexplained above-guidelines sentence, allowed it to erroneously stay in place (R.A. 155-56 [motion]), and prevented a full and fair appeal (R.A. 163-64 [motion]).

To be sure, a sentence that is seven times greater than that recommended by the guidelines, and made without any explanation, is made contrary to Section 3553. Yet in its decision denying Section 2255 relief, the district court neither ruled on, nor even mentioned, this - or any other - IAC claim regarding sentencing (R.A. 71-92 [order]). This is attributable to the fact that it overlooked every claim in the motion (to vacate) that was not briefed in the memorandum that accompanied it - because, as the court explained, it used only the latter as the list of claims to be decided (R.A. 76 [order]).**

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* The district court began its opinion (denying habeas relief) by stating that this case "is a decade old" (R.A. 71), which likely explains its misstatements of the evidence.

** Of course, a Section 2255 litigant is not required to brief all (or any) claims, but, rather, must simply state the ground(s) for relief, and provide the relevant facts in the motion (as was done here for every claim). Mayle v. Felix, 545 U.S. 644 (2005). Nevertheless, as can be confirmed by comparing the district court's decision with the motion and memorandum, not a single claim presented in the motion that was not argued in the memorandum is mentioned in the district court's opinion.

IV. CONCLUSION

For the reasons presented herein, and those apparent in the record, petitioner prays that this Honorable Court will grant certiorari, review the case, answer the questions it presents, and take the action that it deems just and appropriate.

Respectfully submitted,

Date: Nov. 18, 2022

Joseph Jordan, Sr., Reg. No. 60818-054
FCI-1, P.O. Box 1000, Butner, NC 27509

CERTIFICATE OF MAILING & SERVICE

The undersigned hereby certifies, and states under the penalty of perjury, that he has on this date provided this petition, the special appendix, the record appendix, and the motion for IFP status, to the appropriate prison staff for screening and mailing to the Court and Solicitor General in envelopes that have First-Class postage affixed, and are addressed to: Supreme Court, 1 First St., N.E., Washington, D.C. 20543, and Solicitor General, DOJ, Room 5616, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530. And a cover letter is included in each envelope.

Date: Nov 18, 2022 *

Joseph Jordan

* I hereby state that the same remained on May 29, 2023 in the same fashion and served copies of S.G. and at the address on this date. May 29, 2023