No. 24-6438

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

IRAN DEWAYNE KETCHUP — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

IRAN DEWAYNE KETCHUP
(Your Name)
FEDERAL CORRECTIONAL INSTITUTION LOMPOC II
3901 KLEIN BLVD.
(Address)

LOMPOC, CALIFORNIA 93436
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

(1) Did **Federal Rules of Civil Procedure, Rule 60** allow the lower courts to re-open the **28 U.S.C. § 2255** proceedings, pursuant to **Gonzalez v. Crosby**, 545 U.S. 524 (2005), when that error was based upon the "injustice" to the Petitioner, and the risk to public "confidence in the judicial process" that would accrue were his **§ 2255** proceedings not re-opened, which involves the Petitioner serving a sentence for which 1) he was not charged, indicted, nor convicted of the crime recited in the Judgment in a Criminal Case, and 2) Petitioner's **18 U.S.C. § 924(c)** were not permitted to start, due to Congress' directive that such sentences are to be served "consecutive," to any other sentence, that is properly interpreted as a lawful sentence?

(2) When the government admitted to the lower courts that it had not been truthful in the Petitioner's first and initial **28 U.S.C. § 2255** proceedings, concerning claims of denial of counsel at critical stages of the prosecution and ineffective assistance of counsel, was the Eleventh Circuit required to investigate whether it was a victim of fraud upon the Court, when it was brought to its attention, pursuant to **Federal Rules of Civil Procedure, Rule 60**, and **Gonzalez v. Crosby**, 545 U.S. 524 (2005)?

(3) Does the reasoning in **In re West**, 103 F.4th 417 (6th Cir. 2024) set forth a pattern, for which this Court may craft a remedy in this case, pursuant to **Federal Rules of Civil Procedure, Rule 60(b)(6)**?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A, B, C, D to the petition and is 2022 U.S. App. LEXIS 30583 (11th Cir.)

[X] reported at 2024 U.S. App. LEXIS 1 (11th Cir.); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix E & H to the petition and is 2021 U.S. Dist. LEXIS 190549 (10/4/21)

[X] reported at 2022 U.S. Dist. LEXIS 106246 (6/14/22); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**: N/A

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was January 2, 2024.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 3, 2024, and a copy of the order denying rehearing appears at Appendix K.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:** N/A

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

***AMENDMENT 5, U.S. CONSTITUTION:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without justb compensation

***AMENDMENT 6, U.S. CONSTITUTION:**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

***18 U.S.C. § 922(g)**

This Statute is found in **APPENDIX M.**

***18 U.S.C. § 924**

This Statute is found in **APPENDIX N.**

***FEDERAL RULES OF CIVIL PROCEDURE, RULE 60**

This federal rules of court procedures is found in **APPENDIX O.**

STATEMENT OF THE CASE

The Court is alerted that the "Statement of the Case," which follows, includes a Chronological reference of the actions that have occured in the U.S. District Court for the Middle District; the Eleventh Circuit, and this Court. The Chronological references also includes the actions that occurred in the 1) U.S. District Court for the District of Kansas, 2) the Tenthc Circuit, 3) the U.S. District Court for the Northern District of West Virginia, 4) the Fourth Circuit, 5) the U.S. District Court for the Northern District of Georgia, 6) the U.S.District Court for the Central District of California, and 7) the Ninth Circuit. The Chronological references includes the actions previously taken in this Court.

Because of the nature of the issues presented to this Court, through this petition, Ketchup wishes to inform this Court of all of the means by which he has sought to get relief, and what lead Ketchup to file this petition, presenting the substantial questions that he has brought to this Court's attention, spanning decades of litigation in the various federal courts.

In August 1994, a federal grand jury returned an indictment **(ECF No. 1)** against Ketchup; which was superseded in February 1995 **(ECF No. 11)**, charging him with

1) Three Counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951;

2) Three Counts of Using a Firearm during the commission of crimes of violence (the robberies), in violation of 18 U.S.C. § 924(c); and

3) **One Count of possessing AMMUNITION while a felon, in violation of 18 U.S.C. § 922(g)(1). (ECF No. 11)**

In September 1995, a jury found Ketchup guilty on all seven counts **(ECF No. 20)**. In January 1996, Ketchup was sentenced to serve a total of **675 months** in prison, to be followed by **36 months** of supervised release. Ketchup was sentenced to prison for:

1) 135-months on each of the three robbery offenses, to run concurrently to each other,

2) **zero-months for the felon in possession of AMMUNITION, but 120-months for felon in possession of a FIREARM**, to run concurrently with the three robbery sentences;

3) Ketchup was also sentenced for additional time of imprisonment for:

60 months on the first §924(c) offense, and 240 months on each of the other and consecutively to the concurrent robbery and possession of a firearm by a convicted felon sentences.

The sentencing judge did not correct the error in the criminal judgment, concerning the "felon in possesion of a firearm." (ECF No. 29)[1]. Ketchup appealed his conviction and sentences, and the Eleventh Circuit affirmed, without any mention to the error in the criminal judgment. (ECF No. 34).

In 1998, Ketchup moved under 28 U.S.C. § 2255 to vacate his sentence (ECF Nos. 35 and 38). The district court initially dismissed the motion as untimely, but the Eleventh Circuit concluded that the dismissal was in error, and thus vacated and remanded for further consideration. (ECF No. 61). On remand, the district court denied Ketchup's § 2255 motion and entered judgment in the government's favor on September 10, 2001 (ECF No. 80), after the government stated:

> Petitioner complains that he was denied effective assistance of counsel because he was subjected to a corporeal lineup without his consent and without the presence of an attorney. This claim is completely false as there was never a physical lineup of the Petitioner. The record is clear that each victim in the armed robberies of the Eckerd Drug stores viewed a photographic lineup consisting of six African American males with similar characteristics shortly after the incident but before indictment (R2-54, 65, 77, 85, 107, 133, 145, 214, 220, 226). There is no mention anywhere within the records, not even within Petitioner's case in chief (R2-250-R3-18), that Petitioner was ever made to participate in a physical lineup without his consent and without counsel. That simply did not happen.

(ECF No. 75 at 13-14). Thereafter, Ketchup filed a motion to alter or amend the judgment,

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[1] In 1994, §924(c)(1) mandated a 20-year term of imprisonment for a "second or subsequent conviction" under §924(c)(1). 18 U.S.C. § 924(c)(1)(1994). Section 924(c)(1) also mandated that any term of imprisonment imposed under that section had to be served consecutively to "any other term of imprisonment." Id.. Ketchup's §924(c) sentences started to commence, subsequent to other sentences, but without the "possession of ammunition" sentence ever commencing, because the Bureau of Prisons did not have a criminal judgment that allowed them to execute such sentence, due to the substitution of the "Possesion of a Firearm by a convicted felon" sentence.

under Rule 59(e), and alerted the district court that it failed to adjudicate thirteen (13) claims of ineffective assistance of counsel, on remand. **(ECF No. 81)**. The district court denied such motion and denied Ketchup's request for a Certificate of Appealability **("COA")**. **(ECF Nos. 82, 84, 87)**. Ketchup appealed, and the Eleventh Circuit denied a COA request by stating:

> Appellant's motion for a certificate of appealability and limited remand are DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2255(c)(2) Appellant's motion to proceed on appeal in forma pauperis is DENIED AS MOOT.

(ECF No. 90). Ketchup requested the Eleventh Circuit to reconsider its denial, and the Eleventh Circuit denied that request, and stated:

> Appellant has filed a motion for reconsideration of this Court's order dated February 21, 2002. Upon reconsideration, appellant's motion for a certificate of appelability and for a limited remand are DENIED because he has failed to make the requisite showing. 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L.Ed 2d 542 (2000). Appellant's motion to proceed on appeal in forma pauperis is DENIED AS MOOT.

(No. 01-16303-6, Apr. 11, 2002). In October 2002, the U.S. Supreme Court denied Ketchup's petition for a writ of certiorari. **(No. 02-5877)**.

Ketchup, thereafter filed an application for leave to file a second or successive §2255 motion in the Eleventh Circuit, concerning the unadjudicated claims, pursuant to the Eleventh Circuit's precedent of **Clisby v. Jones**, 960 F.2d 925 (11th Cir. 1992). The Eleventh Circuit denied that motion in 2003. **(No. 03-10682-A)**. Ketchup filed an additional application for leave to file a second or successive § 2255 motion in the Eleventh Circuit alleging that the district court determined incorrectly during the consideration of Ketchup's previously filed §2255 motion that ineffective assistance of counsel claims must be raised on direct appeal, in violation of **Massaro v. United States**, 538 U.S. 508 (2003). In 2004 the Eleventh Circuit denied that motion. **(No. 04-10420-F)**.

In 2005, Ketchup filed a petition for writ of mandamus, which the Eleventh Circuit denied, and stated:

> The record from this Court's consideration of Ketchup's prior motion for certificate of appealability **shows that this Court reviewed all of his ineffective-assistance claims and determined them to be SPECIOUS such that remand for the district**

court to consider them was NOT warranted.

(No 05-15106-G)(emphasis added). In 2016, Ketchup sought leave to file a second or successive §2255 motion, following a U.S. Supreme Court decision in Johnson v. United States, 136 S. Ct. 2551 (2015), and Welch v. United States, 136 S.Ct. 1257 (2016). The Eleventh Circuit denied the application. (No. 16-13969).

After unsuccessful attempts in the District of Kansas (No. 5:03-Cv-3185 D. Kan. Nov. 17. 2003); the Tenth Circuit (No. 04-3033, 10th Cir. Oct. 2004); the Northern District of West Virginia (No. 2:08-Cv-53-REM. N.D.W. Va, Oct. 22, 2008); the Fourth Circuit (341 F. App'x 869, 4th Cir. 2009); and the U.S.Supreme Court (No. 09-9693, 559 U.S. 1083 (2010)), on attempts to gain relief under 28 U.S.C. § 2241 petitions and appeals, Ketchup filed a 28 U.S.C. § 2241 petition in the Northern District of Georgia. As with the other §2241 petitions, the Northern District of Georgia dismissed for lack of jurisdiction in 2017 (No. 1:17-Cv-943-MHC-JSA, Sept.28, 2017, N.D. Ga)(ECF No. 145). The Eleventh Circuit affirmed the dismissal in a November 2018 Order, which confirmed that "Ketchup can raise his claim of fraud on the court through a Rule 60 motion in his §2255 proceeding" in the Middle District of Georgia. (No. 17-15792-E, Nov. 29, 2018)(ECF No. 145-3 at 7). Ketchup eventually did just that.

In August 2020, Ketchup moved under Fed. R. Civ. P., Rule 60, and Gonzalez v. Crosby, 545 U.S. 524 (2005), to set aside the 2001 judgment that denied his §2255 motion (ECF No. 127). In support, Ketchup asked the district court to "investigate whether the attorney for the United States committed fraud upon the court," pursuant to Rule 60 and Gonzalez. (ECF No. 127). Ketchup alleged that the government's counsel in his initial §2255 proceedings committed fraud upon the court by lying to that court, on the record, that Ketchup had not been placed in a corporeal line-up and denied counsel at that lineup; that infected with error "every subsequent decision related to Ketchup in the U.S. Supreme Court, the Eleventh, Fourth and Tenth U.S. Court of Appeal; the U.S DIstrict Courts for Kansas, Northern West Virginia, Middle District of Georgia, and Northern District of Georgia." (ECF

127 at 2-3). The government opposed Ketchup's Rule 60 motion (ECF No. 141), but conceded:

> In his initial §2255 motion Ketchup claimed ineffective assistance of counsel in that he was subjected to a corporeal lineup without his consent and without the presence of an attorney. Eg. Doc. 127 at 2. The statements Ketchup believes constitutes fraud on the court comes from the United States's response in opposition to this claim. Id. Specifically, the United States stated that "[t]his claim is completely false as there was never a physical lineup of the Petitioner," and "[t]here is no mention anywhere within the record, not even within the Petitioner's case in chief (R2-256-R3-18), that Petitioner was ever made to participate in a physical lineup without his consent and without counsel." Id. See also Doc. 93-2 at 42.[2] Ketchup baldly claims that these statements constitute fraud on the court and that they "affected every subsequent decision made by this Court since 2001." Doc. 127 at 2. Ketchup claims that the statements were made to "compel" the Court to deny his §2255 motion, and, without any evidence in support, goes so far as to suggest that the United States committed the alleged fraud in order to "shield this Court from any allegations" that the Court did not protect his right to counsel or to "protect the legacy" of the magistrate judge assigned to the case at the time. Id. at 5-6. **Review of the record shows that Ketchup accurately quoted the United States response in his Rule 60 motion. Compare Doc. 127 at 22 with Doc. 120-1 at 15-16. The United States did state that "there was never a physical lineup of the Petitioner," Id. Upon review of the record, this was a misstatement by the United States....**Moreover, Ketchup has entirely failed to show the denial of his §2255 motion was "obtained through" or "impacted by" the alleged fraud on the Court.

(ECF No. 141 at 4-6). After various objections and responses, the district court denied Ketchup's Rule 60 motion in October 2021, which Ketchup did not receive such order until December 2021 (ECF Nos. 147, 149, 152).

During the Rule 60 proceedings, Ketchup brought to the attention of the district court, the defect and error that appeared in his criminal judgment; which the Federal Bureau of Prisons ("BOP") had in error (because of the district court's judgment in a criminal case), executed a 120-month sentence against Ketchup for "Possession of a FIREARM by a convicted felon,' instead of "Possession of AMMUNITION by a convicted felon." (ECF No. 152-2 at 8-9). Ketchup also pointed out that he had gave the government notice about the error in his criminal judgment (ECF No. 152 at 8; 158 at 9); and cited the Eleventh Circuit's precedent in United States v. Massey, 443 F.3d 814, 822 (11th Cir. 2006), in which the Eleventh Circuit identified:

> "It is a fundamental error for a court to enter a judgment of conviction against a defendant who has not been charged, tried or found guilty of the crime recited in the judgment."

Id.

After bringing the matter to the attention of the district court, it failed to act (ECF Nos. 157, 159). Ketchup appealed the district court's decision to the Eleventh Circuit (ECF Nos. 160, 164).

In December 2021, while Ketchup was litigating his Rule 60 motion in the Middle District of Georgia and the Eleventh Circuit, he was also litigating a 28 U.S.C. § 2241 petition in the U.S. DIstrict Court for the Central District of California, alleging that:

> **Service of a sentence of 120 months for Possession of a FIREARM by a Convicted Felon, for which a Grand JUry did not indict, and a Trial Jury did not return a conviction.**

(No. CV-21-09936 MCS (RAO)). That district court stated, after the United States responded and objections were made:

> Petitioner claims that the sentencing court's judgment erroneously stated that he was convicted of "possession of a **firearm** by a convicted felon," rather than "possession of **ammunition** by a convicted felon," and thus he has completed a sentence for an offense of which he was not convicted and has been prejudiced ....Here, Petitioner contends that he served a sentence for possession of a **firearm** by a convicted felon due to a clerical error by the sentencing court that was carried out by the Bureau of Prisons ("BOP"). (Pet. at 305.) He argues that he is challenging the manner in which his sentence has been executed by the BOP, and that the "court should not be so easily convinced that this case is not about the "execution of Petitioner's sentence" and the "manner" in which it has been "executed." (Opp. at 4)(emphasis in original) The Court, however, agrees with Respondent that at its core, Petitioner's underlying challenge is to the legality of his sentence for possession of a firearm by a convicted felon, which must generally by brought under Section 2255 in the sentencing court. Petitioner's attempt to characterize his claim as a clerical error that morphed into a Section 2241 claim is unavailing....Here, Petitioner appears to argue that he makes a claim of actual innocence by "show[ing] that the BOP executed (and is executing) a sentence against [him]' where no reasonable juror would have convicted him because he was not charged, nor indicted" with the firearm count. (Opp. at 9)(emphasis in original) To show factual innocence, Petitioner must demonstrate that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted." Bousley, 503 U.S. at 623....Respondent argues that Petitioner's contention that the judgment erroneously reflected a conviction for possession of a firearm, instead of ammunition, by a convicted felon is a "purely legal argument." (Mot. at 16.) The Court finds that Petitioner has not shown that a clerical error in the judgment qualifies as a claim of actual innocence under the escape hatch.... Respondent argues that the legal basis for Petitioner's claim arose before he had exhausted his direct appeal or filed his first Section 2255 motion, and thus, he could have raised a discrepancy between the judgment and the indictment on direct appeal and in his initial section 2255 motion (Mot. at 15) **Petitioner does not disagree, but counters that it is not his fault that he did not know he was serving a sentence for a crime for which he was not indicted.** (Op. at 7) **He argues that no one, including his various attorneys, the U.S. Attorney's Office for the Middle District of Georgia, the BOP, and**

> **the courts, alerted him about the clerical error in the judgment, which was discovered after he had already served the 120 month sentence for the firearm charge.** (PEt. at 7; Opp. at 7-8.) The Court finds that Petitioner has not shown he lacked an unobstructed procedural shot to pursue his claims. Even if it was not his fault that he lacked knowledge of the alleged clerical error in the judgment before he exhausted his direct appeal or filed his first Section 2255 motion, his belated discovery does not constitute a new legal basis for his claim....Whether the judgment entered by the sentencing court contained a clerical error regarding Count 5 is a fact that existed at the time of Petitioner's sentencing in January 1996, well before he exhausted his direct appeal or filed his first Section 2255 motion. (Pet., Exh. 2.) Thus, Petitioner had an unobstructed procedural shot to pursue his claims in his direct appeal or in his first Section 2255 motion.[4] Accordingly, the escape hatch does not apply and this Court lacks jurisdiction over this action. The Petition is construed as a Section 2255 motion, which must be filed in the sentencing court.

Id. The district court dismissed the petition for lack of jurisdiction; and the Ninth Circuit denied a request for a COA. **Ketchup v. BIrkholz**, 2022 U.S. Dist. LEXIS 104563 (C.D. Cal. May 17, 2022); **Ketchup v. Birkholz**, 2022 U.S. Dist. LEXIS 108634 (C.D. Cal. June 17, 2022); **Ketchup v. Birkholz**, 2023 U.S. App. LEXIS 33675 (9th Cir. Dec. 19, 2023).

Additionally, in 2022, while litigating in the Middle District of Georgia, the Eleventh Circuit, the Central District of California, and the Ninth Circuit; Ketchup was trying to get the BOP to provide relief, through its four-step Administrative Remedy Program for inmate grievances, which includes four levels, including three [redacted] formal levels; and is codified at **28 C.F.R. § 542.10 et seq;** [redacted] concerning the execution of the criminal judgment, for which Ketchup alleged had a clerical error. The BOP recommended that Ketchup:

"follow up with correspondence to the appropriate court." [redacted]

On six (6) occasions, while appealing the Rule 60 "fraud upon the court by the government" matter, **Ketchup brought to the attention of the Eleventh Circuit**, the error in the 1996 criminal judgment. See, **Motion to Disqualify Assistant U.S. Attorney Michelle Lee Schieber and the United States Attorney's Office for the Middle District of Georgia**, at 10. See, **Brief of Defendant-Appellant**, at 29. See, **December 12, 2022 Letter to Eleventh Circuit Court Clerk, entitled: "In re: Service of a Sentence of 120-months Imprisonment, for which I was not indicted, nor convicted of such an offense for such term of imprisonment**, at 1-3 and attachments. See, **Reply Brief**

for Defendant-Appellant, at 8. See, **Petition for Rehearing and Rehearing En Banc**, at 14-15. See, **Appellant's Supplemental Appendix for Petition for Rehearing and Rehearing En Banc**, at 50-70.

The Eleventh Circuit affirmed the district court's decision in the Rule 60 appeal, and Ketchup sought a Panel Rehearing and Rehearing En Banc, which were both denied on October 3, 2024, and the judgment was issued on October 11, 2024 as the mandate of the Eleventh Circuit **(Case No. 22-12269)**. Ketchup received the October 3, and October 11 Orders on October 17, 2024, through prison officials.

Ketchup filed a "Motion for Stay of Mandate to File Petition for Writ of Certiorari in the United States Supreme Court," on October 31, 2024, pursuant to the "mailbox rule," and served the Eleventh Circuit and this Court. The U.S. District Court for the Middle District of Georgia was also served with this motion, through a "Notice of Intent to File a Petition for Writ of Certiorari in the United States Supreme Court," contemporaneously, on October 31, 2024.

Ketchup received correspondence from the Clerk of this Court, acknowledging that this Court received Ketchup's "Motion for Stay of Mandate," which was also filed in the Eleventh Circuit, on November 22, 2024.

REASONS FOR GRANTING THE PETITION

At the outset of this petition for certiorari, Iran Dewayne Ketchup **("Ketchup")** submits that the arguments and positions of Ketchup are conditioned upon respecting this Court's decision in **Gonzalez v. Crosby**, 545 U.S. 524 (2005), in not making this petition about issues that should, or could have been raised in Ketchup's first and initial §2255. As Ketchup stated to the Eleventh Circuit U.S. Court of Appeals **("Eleventh Circuit")**, in respecting **Gonzalez**:

> Ketchup respectfully submits this brief in support of his appeal from the district's court's denial of his Motion filed, pursuant to Federal Rules of Civil Procedure, Rule 60(b), to re-open his proceedings which relates to the integrity of the district court, which denied his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255....The Court is pointed to the district court's agreement that the Rule 60 motion was not "second or successive," by that court's statement: Preliminarily, Petitioner's motion does not constitute a second or successive motion under § 2255 because he "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 proceeding [.]" Gonzalez v. Crosby, 545 U.S. 524, 532-33 (2005); see also Galatolo v. United States, 394 F. Appx. 670, 671-72 (11th Cir. 2010)(per curiam). **(Doc. 147, pg. 2 n.1)**.... VI. This Court is faced with an issue of how it should resolve whether it must sua sponte raise the issue of a clerical error in the judgment of conviction. For over 26 years, there has been an error in the district court's Judgment in a Criminal Case **(Doc. 29)**. Ketchup has served a sentence which he was not indicted. United States v. Starr, 717 Fed. Appx. 918, 925 (11th Cir. 2017), states....This Court should **sua sponte**, grant the relief in this regard, concerning Ketchup's Sentence of 120-months for "Possession of a Firearm by a Convicted Felon." **(Doc.29)**. Ketchup was not indicted by a grand jury, nor convicted by a trial jury, of such offense. The Court is alerted that Ketchup has already served such sentence, which was executed by the Federal Bureau of Prisons, through the Judgment. **(Doc. 29)** Ketchup has begun to serve his consecutive sentence for 18 U.S.C. § 924(c), which is bundled with his other sentence, as part of the "Sentencing Package Doctrine." Additionally, Ketchup has not served, according to the Bureau of Prisons records, any imprisonment for the conviction of "Possession of Ammunition by a Convicted Felon." Because this Court is in the best position to determine whether the district court can properly resentence Ketchup, despite the government's silence on this matter, and the district court having been presented with this issue, before appeal; Ketchup does not make any specific recommendations about this matter, other than to alert this Court of its existence. Ketchup currently has a writ of habeas corpus appeal, pending in the Ninth Circuit Court of Appeals, against the warden of United States Penitentiary Lompoc, about the execution of such sentence. The government has opposed the grant of relief in that case. See, Case No. 22-55673, Ketchup v. Birkholz.

(Ketchup's Opening Brief, Case No. 22-12269 (11th Cir.), pgs. vii, 5-6, 29)

This Court is requested to understand that Ketchup, as a **pro se** petitioner has tried to accomplish everything that was necessary to identify the travesty

that has reached constitutional magnitude, and risk to the public's confidence in the judicial process.

I. **Federal Rules of Civil Procedure allowed the lower courts to re-open the §2255 proceedings to correct a fundamental error, pursuant to Gonzalez v. Crosby, 545 U.S. 524 (2005), when that error was based upon the "injustice" to the Petitioner and the risk to public "confidence in the judicial process" that would accrue were Petitioner's §2255 proceedings not re-opened; which involves Petitioner serving a sentence for a crime which he was not charged, indicted, nor convicted; and the government committed fraud upon the lower courts in the Petitioner's first and initial §2255 proceedings:**

In a **Fed. R. Civ. P., Rule 60** proceeding, Ketchup, pursuant to **Gonzalez v. Crosby**, 545 U.S. 524 (2005) presented to the U.S. District Court for the Middle District of Georgia, and the Eleventh Circuit (on appeal): 1) that the government had committed fraud upon the court during his first and initial §2255 proceedings by denying that Ketchup had been denied counsel at critical stages of the prosecution and he was denied effective assistance of counsel (which the government admitted 19-years later); and 2) that Ketchup had, according to the Federal Bureau of Prisons ("BOP") records, served a 120-month sentence for possession of a **FIREARM** by a convicted felon, pursuant to **18 U.S.C. § 922(g)**, instead of the offense alleged in the indictment and at trial, which was properly the offense for possession of **AMMUNITION** by a convicted felon, pursuant to **§ 922(g)**.

There is no case law, jurisprudence, statutes that deal with the service of a sentence for a crime that was was not included in the indictment and for which a jury did not convict at trial. There is constitutional support and this Court has many cases that are not directly on point, but do support the basis that Ketchup was entitled to have his § 2255 proceedings re-opened to correct, what should have been "fundamental errors." Ketchup outlines how these fundamental errors matured to a petition in this Court for certiorari, that basically identify the basic fundamental precept that Ketchup could not be denied life, liberty or property without Due Process, and a remedy is in place to assert that right.

(a) **The U.S. Constitution requires that a criminal defendant be indicted and convicted of a federal offense, before a court can impose a sentence of imprisonment and supervised release to be served.**

In **Stirone v. United States**, 361 U.S. 212 (1960), this Court stated: "The crucial question here is whether he was convicted of an offense not charged in the indictment." **Id.**, 361 U.S. at 213.

This Court has been specific about an indictment's purpose: "The crime charged here is a felony and the Fifth Amendment requires that prosecution be begun by indictment. " **Id.** 361 U.S. at 215. "Ever since **Ex parte Bain**" 121 U.S. 1 "was decided in 1887 it has been the rule that after an indictment has been returned it charges may not be broadened through amendment except by the grand jury itself." **Id.**, 361 U.S. at 216.

In this matter, the results of being sentenced for a crime that was not in the indictment gives cause for this Court's warning in **Stirone**:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance with the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed.' 121 US 1, 10. The Court went on to hold in Bain: 'That after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney.

If the **Bain** case and **Stirone** Case stands for the rule that a court cannot permit a defendant to be tried on charges that are not in the indictment against him, it is all the more that a court cannot sentence a person for a charge that is not in the indictment. Yet, the district court did permit that in this case, by doing so itself.

THe indictment here cannot fairly be read as charging Ketchup with possession of a **FIREARM** by a convicted felon. The grand jury which found the indictment in this case was satisfied that Ketchup's allege conduct, before trial, in Count Five was: "having been convicted of a crime punishable by imprisonment for a term exceeding one (1) year did knowingly possess **ammunition**, to wit: Remington-Peters caliber .380 ACP cartridges and casings, which had been shipped and transported in interstate commerce, all in violation of Title 18, United States Code, Sections 922(g) and 924(a)."

(ECF No. 11, at 5), Affidavit in Support to Motion for Stay of Mandate, at 4.

Although the trial/sentencing court did not permit a formal amendment to the indictment, the effects of what it did at sentencing, was the same. **Compare, (ECF No. 11, at 5)** with **(ECF No. 29)**. The jury that convicted Ketchup, surely could have not amended the indictment to include possession of a **FIREARM** by a convicted felon, to allow it find that such a element existed for conviction. Of course that is not what occured. The trial/sentencing court allowed the Judgment in a criminal case to recite the wrong crime.

(b) The district court was forbidden from reciting the wrong crime in the Judgment in a criminal case, when it sentenced Ketchup.

For over 28-years, there has been an error in the district court's JUdgment in a Criminal Case **(ECF No. 29)** Ketchup has served a sentence for which he was not charged, indicted, nor convicted. The Eleventh Circuit has been specific about occasions like these. In **United States v. Starr**, 717 Fed. Appx. 918, 925 (11th Circ. 2017), it stated:

> Finally, the district court should also correct a clerical error in the judgment on remand. Starr's judgment states that he was convicted of "possession of a firearm and ammunition by a convicted felon," rather than "possession of ammunition by a convcited felon." Starr's indictment is clear that he was never charged with possession of a firearm by a convicted felon, and therefore the district court should correct the judgment in this regard. See United States v. Massey, 443 F.3d 814, 822 (11th Cir. 2006)("We may **sua sponte** raise the issue of clerical errors in the judgment and remand with instructions that the district court correct the errors....**It is fundamental error for a court to enter a judgment of conviction against a defendant who has not been charged, tried, or found guilty of the crime recited in the judgment.**)

This Court has long acknowledged the government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case. E.g., **United States v. Goodwin**, 457 U.S. 368, 457 (1982); **Confiscation Cases**, 7 Wall, 454, 74 U.S. 457-459 (1869). The Government could have charged Ketchup with possession of a **FIREARM** by a convicted felon, but it chose not to, and settled for the pursuit of charges based upon **18 U.S.C. § 924(c)**. **See, (ECF. No. 11, at 4)**. Basically, the government charged Ketchup with possession of the **FIREARM**, in Count Four, and charged Ketchup with the **AMMUNITION**, in such

firearm, based on the same criminal incident.

Federal Rules of Criminal Procedure, Rule 32(b)(1), provides that the sentence is a necessary component of a "judgment of conviction." **Ball v.United States**, 470 U.S. 856, 862 (1985). Applying this rule to the **18 U.S.C. § 922(g)** and **18 U.S.C. § 924(a)**, it is clear that Congress did not intend to subject felons to a sentence where the crime is not identified in the indictment, but is reflected in the judgment. The conviction of possession of **AMMUNITION**, with a sentence for possession of a **FIREARM**, is an unauthorized punishment for a separate offense. Thus, even if it results is no greater sentence, it still is an impermissible punishment. While the government may seek a multiple-count indictment against a felon for violation of **18 U.S.C. § 922(g)**, the statute states: **"any firearm [OR] ammunition."**

The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty. The government, for over 28-years has known about this error, if for no other reason than, through the Federal Bureau of Prisons, when executing the sentence against Ketchup. **Giglio v. United States**, 405 U.S. 150, 154 (1970)("The prosecutor's office is an entity and as such it is the spokesman for the Government"),**United States v. Kattar**, 840 F.2d 118, 127 ("The Justice Department's various offices ordinarily should be treated as an entity, the left hand of which is presumed to know what the right hand is doing.")

(c) When Ketchup was sentenced and completed the sentence for "possession of FIREARM by a convicted felon," instead of "possession of AMMUNITION by a convicted felon," Ketchup's 18 U.S.C. § 924(c) sentences should have not started.

This Court, in **LOra v. United States**, 599 U.S. 453, 455 (2023), started out by stating: When a federal court imposes multiple prison sentences, it can typically choose whether to run the sentences concurrently or consecutively. See 18 U.S.C. § 3584. An exception exists in subsection (c) of § 924, which provides that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment." §924(c)(1)(D)(ii). In this case we consider whether §924(c)'s bar on concurrent sentences extends to sentences imposed under a different subsection: 924(j). We hold that it does not. A sentence for a §924(j) conviction therefore can run either concurrently with or consecutively to another sentence.

Ketchup builds off of the same congressional mandate that **"no term of imprisonment**

imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. § 924(c)(1)(D)(ii). In other words, the sentence must run consecutively, not concurrently, in relation to [other] sentences.

Here, Ketchup was convicted of "possession of **AMMUNITION** by a convicted felon, as prescribed by 18 U.S.C. § 922(g), and was to be sentenced pursuant to 18 U.S.C. § 924(a). But, Ketchup was sentenced for "possession of a **FIREARM** by a convicted felon, as prescribed by 18 U.S.C. § 922(g). § 922(g) allows a charge to be based upon 1) a firearm, or 2) ammunition. Ketchup was not charged, indicted or convicted of possession of a **FIREARM** by a convicted felon, as it relates to 18 U.S.C. § 922(g).

Ketchup was charged, indicted, convicted and sentenced for three (3) 18 U.S.C. § 924(c) offenses, which according to the reasoning of **Lora**, should have ran consecutive to his sentence based upon the § 922(g) offense. But, the § 922(g) conviction for possession of **AMMUNITION** never received a sentence from the district court/sentencing court at sentencing. Therefore, this disallowed the § 924(c) sentences to commence, only until Ketchup finished his § 924(a) sentence for possession of **AMMUNITION** by a convcited felon, under § 922(g). Instead, Ketchup was sentenced to 120-months imprisonment for possession of a **FIREARM** by a convicted felon, for which Ketchup has already completed twenty (20) years ago, according to the records of the Federal Bureau of Prisons.

According to this Court's precedents, and the Constitution, Ketchup was entitled to not be sentenced to a term of imprisonment, for a crime that he had not been charged, indicted, nor convicted. But, the question that should be answered by this Court is: Could Ketchup's § 924(c) consecutive sentence run, without the commencement and completion of the proper § 922(g) conviction, under the sentence of § 924(a)?

Logic dictates that Ketchup's § 924(c) sentences should have not started, because the "wrong sentence" for the "wrong crime" should have disallowed the Federal Bureau of Prisons from executing the § 924(c) sentence until Ketchup finsished his sentence for "possession of **AMMUNITION** by a convicted felon," pursuant to 18

U.S.C. § 924(c), that in actuality, never started. Ketchup is over 30 years into, a 675-month sentence. After Ketchup finished the 120-months (10-year) sentence for the wrong crime, **18 U.S.C. § 924(c) forbade** the execution of the **§ 924(c)** sentences.

In the Sixth Circuit Court of Appeals, that court decided and stated in **In re West**, 103 F.4th 417 (6th Cir. 2024):

> West's Rule 60(b) motion in this case is trained on the "injustice" to himself and the risk to public "confidence in the judicial process" that could accrue were his unconstitutional life sentence permitted to stand. See **Buck**, 580 U.S. at 123 (quoting **Liljeberg**, 486 U.S. at 864) West essentially contends that, separate and apart from any claim of constitutionally deficient counsel, a sentencing judge's acknowledgement in non-habeas post-conviction proceedings that a prisoner is serving an unconstitutionally imposed life sentence is both so unique and so extraordinary--with such grave consequences for the prisoner himself and the judicial system more broadly--that it supplies a freestanding basis for relief under Rule 60(b)(6). He also argues that the Government's conduct in this case raises the specter of fraud on the court, an allegation capable of supplying a separate and independent basis for Rule 60(b)(6) relief. **Gonzalez**, 545 U.S. at 532....Whatever the district court exercising its "wide discretion," contends as to the merits of these claims, they are bona fide Rule 60(b) arguments, not habeas claims in disguise, and should be considered as such. See **Buck**, 580 U.S. at 123.

Ketchup raised his issue about being sentenced for the wrong crime, in the District Court and the Eleventh Circuit, under **Rule 60** and **Gonzalez v. Crosby**, 545 U.S. 524 (2005). Ketchup, while in the lower courts, repeatedly identified that his reasons for presenting such issues were in relation to risk of the public's confidence in the judicial process, where Ketchup had been sentenced for a crime that he had not been charged, indicted, nor convicted; and had served a 120-month (10-year) sentence in the Federal Bureau of Prisons for a crime that was not in line with Eleventh Circuit precedent (**Starr**, **Massey**), which identified such error as a "fundamental error" when discovered. **See, Black's Law Dictionary, 10 Ed.**, (Plain error. (1801) an error that is so obvious and prejudicial that an appellate court should address it despite the parties' failure to rAISE A PROPER OBJECTION AT TRIAL* a plain error is often said to be so obvious and substantial that failure to correct it would infringe a party's due-process rights and **damage the integrity of the judicial process**...Also termed **Fundamental Error**, error apparent of the record).

The District Court and the Eleventh Circuit were required to adhere to the **"prior precedent rule,"** in which the Eleventh Circuit stated: "The prior precedent rule requires us to follow a prior binding precedent unless it is overruled by this Court **en banc** or by the Supreme Court." **United States v. Whitaker**, 2024 U.S. App. LEXIS 20426, August 14, 2024 (11th Cir. 2024); **United States v. White**, 837 F.3d 1225 1228 (11th Cir. 2016). "To constitute an overruling for the purposes of this prior panel precedent rule, the Supreme Court decision must be clearly on point." **United States v. Kaley**, 579 F.3d 1246, 1255 (11th Cir. 2009). "In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel." **Id.** "The prior panel precedent rule applies regardless of whether the later panel believes the prior panel's opinion to be correct, and there is no exception to the rule where the prior panel failed to consider arguments raised before a later panel." **United States v. Gillis**, 938 F.3d 1181, 1198 (11th Cir. 2019). THe Eleventh Circuit, nor the District Court adhered to the "prior precedent rule," by disregarding: **United States v. Starr**, 717 Fed. Appx. 918 (11th Cir. 2017); and **United States v. Massey**, 443 F.3d 814 (11th Cir. 2006), as they relate to "fundamental errors" found in Criminal Judgments that recite the wrong crimes, that a defendant has not been charged, indicted, tried, nor found guilty of such crime.

Additionally, this Court has elaborated about **"stare decisis,"** by stating in **Erlinger v. United States**, 602 U.S. 821, 219 L.Ed. 2d. 451 (2024)(Justice Kavenaugh):

> The principle of stare decisis is encompassed within the "Judicial Power" of Article III of the Constitution. Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and **perceived integrity of the judicial process**....Of course, adherence to constitutional precedent is not and should not be absolute....But the Court requires a "special justification" or "strong grounds" before revisiting a settled holding." (Citations omitted).

When applying **stare decisis**, the District Court and the Eleventh Circuit failed to respect the **"perceived integrity of the judicial process,"** as Ketchup identified through his **Rule 60** proceedings.

(d) **The District Court and the Eleventh Circuit had a duty to re-open the § 2255 proceedings, pursuant to Fed. R. Civ. P., Rule 60 and Gonzalez v. Crosby, 545 U.S. 524 (2005), because Ketchup had brought to their attention that Eleventh Circuit precedent required some form of relief in those proceedings.**

During the **Rule 60** proceedings, in the District Court and the Eleventh Circuit (on appeal), Ketchup brought to the attention of both courts, the defect and error that appeared in his Criminal Judgment; which the Federal Bureau of Prisons **("BOP")** had in error (because of the district court's error in the Judgment in a Criminal Case); executed a 120-month sentence against Ketchup for **"Possession of a FIREARM by a convicted felon,"** instead of **"Possession of AMMUNITION by a convicted felon." (ECF No. 152-2 at 8-9).** Ketchup also pointed out that he had gave the government notice about the error in his Criminal Judgment **(ECF No. 152 at 8; 158 at 9)**; and cited the Eleventh Circuit's precedent in **United States v. Massey**, 443 F.3d 814, 822 (11th Cir. 2006), in which the Eleventh Circuit identified:

> "It is a fundamental error for a court to enter a judgment of conviction against a defendant who has not been charged, tried or found guilty of the crime recited in the judgment."

Id. After bringing the matter to the attention of the district court, it failed to act **(ECF Nos. 157, 159).** Ketchup appealed the district court's decision to the Eleventh Circuit **(ECF Nos. 160, 164).**

On six (6) occasions, while appealing the **Rule 60** decision of the district court, Ketchup brought to the attention of the Eleventh Circuit, the error in the 1996 Criminal Judgment. **See, Motion to Disqualify Assistant U.S. Attorney Michelle Lee Schieber and the United States Attorney's Office for the Middle District of Georgia**, at 10. **See, Brief of Defendant-Appellant**, at 29. **See, December 12, 2022 Letter to Eleventh Circuit Court Clerk, entitled: "In re: Service of a Sentence of 120-months Imprisonment, for which I was not indicted, nor convicted of such offense for such term of imprisonment**, at 1-3 and attachments. **See, Reply Brief for Defendant-Appellant**, at 8. **See, Petition for Rehearing and Rehearing En Banc**, at 14-15. **See, Appellant's Supplemental Appendix for Petition for Rehearing and Rehearing En Banc**, at 50-70.

(e) **The Eleventh Circuit was properly notified of the fundamental error in the Judgment of Conviction, and failed to recognize such issue during the appeal process.**

Ketchup stated in his **Petition for Rehearing and Rehearing En Banc**, that he wanted the Eleventh Circuit to rehear the case by the panel or full court because the following issue was contrary to [redacted] the precedents of the Eleventh Circuit, as follows:

> VII. THE MERITS PANEL DECISION IS CONTRARY TO THE FOLLOWING PRECEDENTS OF THIS COURT, AND REHEARING IS NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE DECISIONS IN THIS COURT, AS THEY APPLY TO UNITED STATES V. STARR, 717 FED. APPX. 918 (11TH CIR. 2017); AND UNITED STATES V. MASSEY, 443 F.3D 814 (11TH CIR. 2006), FOR WHICH IT HAS JURISDICTION TO CORRECT A FUNDAMENTAL ERROR THAT HAS BEEN BROUGHT TO ITS ATTENTION IN THE OPENING BRIEF OF THIS MATTER. This Court has been placed upon notice that the Criminal Judgment, in the Lower Court has an error that is in violation of United States v. Starr, 717 Fed. Appx. 918 (11th Cir. 2017), and United States v. Massey, 443 F.3d 814 (11th Cir. 2006), and for which it has jurisdiction because a fundamental error has been brought to its attention, in Ketchup's Opening Brief, pg. 29, as it relates to these two precedents of the Eleventh Circuit. See Appellant's Appendix, pg. 50. See also, Appellant's Appendix, pgs. 51-70. See also, Appellant's Appendix, pgs. 51-70. See also, Appellant's Reply Brief, pg. 8. As these matters show, this Court usually remedies such problems **sua sponte.** The government has not opposed such remedy, nor has it denied that the Bureau of Prisons has executed a sentence against Ketchup, from a 1996 Judgment in a Criminal Case, that Ketchup was not indicted, convicted, nor charged. The Bureau of Prisons has already executed such sentence. The District Court for the Central District of California, has already alerted Ketchup that such matter is properly a matter for the MIddle District of Georgia, and the Eleventh Circuit, for which his § 2255 was brought in such jurisdictions. See, Ketchup v. Birkholz, 2022 U.S. Dist. LEXIS 104563 (C.D. Cal. May 17, 2022); Ketchup v. Birkholz, 2022 U.S. Dist. LEXIS 108634 (C.D. Cal. June 17, 2022); Ketchup v. Birkholz, 2023 U.S. App. LEXIS 33675 (9th Cir. Dec. 19, 2023).

Id., at 14-15. Surely, Ketchup was diligently trying to pursue remedy in this matter, before petitioning this Court.

Because Ketchup is factually innocent of the offense of **Possession of a FIREARM by a convicted felon**, and the Bureau of Prisons has fully executed such sentence, it is proper for this court to explore whether Ketchup's sentences for **18 U.S.C. § 924(c)** were properly executed, and discussed next. The BUreau of Prisons is fully aware of this matter, but have alleged that it, "as an agency," cannot do anything because the Judgment must be corrected by the "federal courts." **See, Motion for Stay of Mandate to File Petition for Writ of Certiorari in the United States Supreme Court**, at 7; **Documents**, at 1-3; and **Affidavit In Support to Motion for Stay of Mandate**,

at 1.

(f) The Eleventh Circuit was in the position to discover and determine that 18 U.S.C. § 924(c) did not allow Ketchup to serve a sentence, consecutive to a sentence where he had not been indicted, tried, nor convicted of the offense preceding the § 924(c) sentence.

(1) "Firearm" or "Ammunition."

THe Eleventh Circuit correctly acknowledge during the appellate process, in its opinion disqualifying Assistant United States Attorney Michelle Lee Schieber, that **18 U.S.C. § 922(g)** stated a choice between alternative things **("Or")**:

> Iran Ketchup is a federal prisoner serving a 675-month sentence for Hobbs Act robbery, possession of a firearm in futherance of drug trafficking or a crime of violence, and possession of a firearm **[or]** ammunition as a felon.

Opinion, Eleventh Circuit, Doc. 26-2, 6/14/2023, at 2)(Brackets added).

18 U.S.C. § 922(g), states in relevant part:

(g) It shall be unlawful for any person----

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year....

to ship or transport in interstate or foreign commerce, **or possess in or affecting commerce any FIREARM or AMMUNITION**, or to receive any **FIREARM or AMMUNITION** which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a) states in relevant part:

(a)(1) Except as otherwise provided in this chapter, whoever---

(7) Whoever knowingly violates subsection (d) or (g) of section 922 [18 USCS § 922] shall be fined under this title, imprisoned for not more than 15 years, or both.

While there was a variance in the sense of a variation between pleading, proof and sentencing, that variation in this case destroyed Ketchup's substantial right to be tried only on charges presented in an indictment returned by a grand jury, and upon conviction, be sentenced according to Congress' demand in **18 U.S.C. § 924(a)**. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance or harmless error. The Eleventh Circuit, itself, has

considered such error to be "fundamental," by stating:

> Finally, the district court should correct a clerical error in the judgment on remand, Starr's judgment states he was convicted of "possession of a firearm and ammunition by a convicted felon," rather than "possession of ammunition by a convicted felon." Starr's indictment is clear that he was never charged with possession of a firearm by a convicted felon, and therefore the district court should correct the judgment in this regard. See United States v. Massey, 443 F.3d 814, 822 (11th Cir. 2006)("We may **sua sponte** raise the issue of clerical errors in the judgment and remand with instructions that the district court correct the errors....**It is fundamental error** for a court to enter a judgment of conviction against a defendant who has not been charged, tried, or found guilty of the crime recited in the judgment.")

United States v. Starr, 717 Fed. Appx 918, 925 (11th Cir. 2017) **See also, Opening Brief**, at 29 (Case No. 22-12269, 11th Cir., United States v. Ketchup)

The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorneys or judges.

There are two (2) essential elements of **18 U.S.C. § 922(g)**: 1) the possession of a firearm, or 2) possession of ammunition. It follows that when only one particular kind of possession is charged to have been burdened a conviction must rest upon, that charge and not another, must rest upon in general terms of a conviction. The right to have the grand jury make the charge on its own judgment is a **substantial right** which cannot be taken away with or without court amendment. Ketchup was sentenced for a convcition that a trial jury never made, and a grand jury never made against him. This was a **fatal error**. **Cole v. Arkansas**, 333 U.S. 196 (1948). In **Cole**, this Court stated:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. **Re Oliver**, 333 U.S. 257, 273....**It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made** ....We are constrained to hold that the petitioner have been denied safeguards guaranteed by due process of law--safeguards essential to liberty in a government dedicated to justice under law. **(emphasis added)**

Ketchup was sentenced to a crime that was not charged, or indicted, which denied him due process. **DeJonge v. Oregon**, 299 U.S. 353, 362 (1936)("We must take

the indictment as thus construed. Conviction upon a charge not made would be a sheer denial of due process.")

(2) **Appearance of a Constitutional Requirement, affects the Court's integrity.**

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates back at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times through its cystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential element of guilt. **C. McCormick, Evidence § 321**, at 681-682 (1954); **See also, 9 j. Wigmore, Evidence § 2497 (3rd Ed. 1940)**.

The "reasonable doubt" standard adherence "reflect a profound judgment about the way in which law should be **enforced** and justice **administered**. **Duncan v. Louisiana**, 391 U.S. 145, 155 (1968)(Emphasis added).

This Court stated in **Brinegar v. United States**, 338 U.S. 160, 174 (1949), a valuable concern:

> "...[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has cystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust conviction, **with resulting forfeitures of life, liberty and property." (emphasis added).**

See also, Davis v. United States, 160 U.S. 469, 488 (1895)(stated that the requirement is implicit in "constitutions...[which] recognize the fundamental principles that are deemed essential for the protection of life and liberty.")

The requirement of proof beyond a reasonable doubt has a vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has a stake interest of immense importance, both because of the possibility that he may lose his **liberty** upon conviction and because the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime

when there is reasonable doubt about his guilt. **As to Ketchup, there is more than reasonable doubt about, due to the failure of indicting him for possession of a FIREARM by a convicted felon, pursuant to 18 U.S.C. § 922(g).** This Court stated in **Speiser v. Randall**, 357 U.S. 513, 525-526 (1958):

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has a stake an interest of transcending value--as a criminal defendant his **liberty**--this margin of error is reduced as to him by the process of placing on the other party the burden of ... persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his **liberty**, unless the Government has borne the burden of ... convincing the factfinder of his guilt. **(emphasis added)**

In this case, Ketchup lost his liberty, without the government convincing the factfinder (Grand jury/trial jury) that he should lose his liberty for [redacted] "possessing a **FIREARM** and being a felon." This Court stated in **In re Winship**, 397 U.S. 358, 364 (1970):

> Moreover, use of the reasonable-doubt standard is indespensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not to be diluted by a standard of proof that leaves people in a doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is **charged.** **(emphasis added)**

The perception of justice in this case is neither present, nor near. Ketchup was entitled to be **sentenced** for a crime that he was duly indicted and convicted by a factfinder. Not by the sentencing court, who may well have perceived a different conclusion while attending Ketchup's trial.

(g) The consecutive sentences based upon the §924(c) convictions should have not statutorily commenced until Ketchup completed his sentence for "Possession of AMMUNITION by a convicted felon," which never occurred.

This Court has laid out the traditional process that should occur in a federal court, before a sentence is handed down to the defendant, by stating:

> UNder our system of separation of powers, Congress is just as incompetent to instruct the judge and jury in an American court what evidence is enough for conviction as the courts are to tell the Congress what policies it must

adopt in writing criminal laws. The congressional presumption, therefore, violates the constitutional right of a defendant to be tried by a jury in a court set up in accordance with the commands of the Constitution. **It clearly deprives a defendant of his right not to be convicted and punished for a crime without due process of law**, that is in a federal case, a trial before an independant judge, **after an indictment by grand jury**, with representation by counsel, and opportunity to summon witnesses in his behalf, and an opportunity to confront the witnesses against him. This right to a full-fledged trial in a court of law is guaranteed to every defendant by Article III of the Constitution, by the Sixth Amendment, and by the Fifth and Fourteenth Amendments' promises that **no person shall be deprived of** his life, **liberty**, or property without due process of law--that is, a trial according to the law of the land, both constitutional and statutory. **(emphasis added)**

Leary v. United States, 395 U.S. 6, 55 (1969)(Justice Black, concurring). Therefore, Ketchup's **§ 924(c)** sentences should have never started, after he served a prior sentence, based in the same Criminal Judgment, for a crime that he was never indicted, tried, nor convicted of.

(h) The "Rule of Lenity" should apply in a "Rule 60 proceedings," to support the "integrity of the courts" perception by the community.

In its interpretation of a statute, this Court may look to canons and rules of statutory interpretation, and for further support, in a criminal case, may also apply the rule of lenity. **See, e.g. Simpson v. United States**, 435 U.S. 6, 14-15 (1978). By the application of lenity, courts "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on more than a guess as to what Congress intended." **Id.**, at 15. (quoting **Ladner v. United States**, 358 U.S. 169, 178 (1958)).

Lenity, the quality of being lenient or merciful, is an application of the common law principle that criminal statutes are to be strictly construed, a rule which"is perhaps not much less old than construction itself." **United States v. Wiltberger**, 18 U.S. (5Wheat) 35, 43 (1820). The rule "rests on the fear that expansive judicial interpretation will create penalties not originally intended by the legislature. **3 N. Singer, Sutherland Statutory Construction, § 59.03 (4th Ed. 1986)**. It is "an outgrowth of our reluctance to increase or multiply punishments absent a clear and definate legislative directive." **Simpson**, 435 U.S. at 15-16.

Furthermore, this Court has stated specifically that lenity "applies not only

to interpretations of the substantive ambit of criminal prohibitions, **but also to the penalties they impose."** **Bilfulco v. United States**, 447 U.S. 381, 387 (1980).

It would appear that in enacting section **922(g)**, it was not within Congress' comprehension or intention that a person could be sentenced, for a single incident, under one division of **§ 922(g)** for a crime that does not appear in the indictment, and because the wording of the statute of **§ 922(g)** states: **"firearm"** [or] **"ammunition,"** it would be alright if the judgment got it wrong, so long as the wording of either the **"firearm"** or **"ammunition"** appeared in the same statute. **Alleyne v. United States**, 570 U.S. 99 (2013)(Violation of the Federal Constitution's Sixth Amendment, as "brandishing" was an element of the offense and thus required determination by a jury.)

In this case, there is not even support in this Court's test found in **Blockburger v. United States**, 284 U.S. 299, 304 (1932), in which this Court established a test to determine whether a defendant may be sentenced to consecutive terms of imprisonment "where the same act or transaction constitutes a violation of two distinct statutory provisions...." Under **Blockburger**, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." **Id.**. **See also, Ball v. United States**, 470 U.S. 856, 861-62 (1985)

In this matter, it does not take a lot of elaboration to understand that: "Ammunition" is not a "Firearm;" and a "Firearm" is not "ammunition." These are distinctive and different fruits, from separate trees. It should not be disputed that, in this case, Ketchup's trial jury was required to find that he "possessed AMMUNITION, while a felon." Not a FIREARM, while a felon. Ketchup was indicted, tried and sentenced under **18 U.S.C. § 924(c)** for a FIREARM alleged in the incident, which was placed before a jury. The sentencing court had to respect the grand jury, the trial jury and Congressional law, in sentencing Ketchup. It could not be disputed that in this case, it "requires proof of fact which the other does not." **Blockburger**, 284 U.S. at 304.

Accordingly, the "integrity of the court" is tarnished if a remedy of this sort is not had in a **Rule 60** proceeding. The lower courts had this understanding, but failed to act.

(i) "Potential Adverse Collateral" consequences are present.

In **Ball v. United States**, 470 U.S. 856, 864-65 (1985) this Court identified a distinctive principle, by stating:

> "a separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." See also **Spencer v. Remna**, 523 U.S. 1, 12 (1998)(presuming significant collateral consequences in the context of criminal convictions).

This Court also made clear that federal courts must be mindful of the "ends of justice" before dismissing a successive habeas petition. The lower court never deemed Ketchup's **Rule 60** motion as a "second or successive" habeas petition. **See, supra, pg.** 12 .

Ketchup, in this matter, have undoubtly suffered "adverse collateral consequences." He was sentenced to a 120-month sentence for a crime that was not in his indictment, nor was he convicted of such crime. Ketchup was sentenced for such crime, and has served a 120-month sentence for such crime. Ketchup is only in the custody of the Bureau of Prisons because he is serving a sentence under **18 U.S.C. § 924(c)**, which Congress mandated to be served **consecutive** to a properly imposed sentence, for a properly convicted offense.

(j) Re-opening the §2255 proceedings is only appropriate.

Ketchup does not ask this Court to determine whether he received ineffective assistance of counsel. Nor does he ask this Court to determine whether his first and initial §2255 motion was properly adjudicated because the district court and the Eleventh Circuit failed to apply the circuit precedent of **Clisby v. Jones, Supra.**

Ketchup has asked this Court to determine two (2) essential questions:

(1) Whether the reputation of the federal courts are imperiled because Ketchup was sentenced for a crime that he was not indicted for, and he raised this issue in a **Rule 60** motion; and

(2) Whether the Eleventh Circuit was required to investigate whether it was the victim of fraud when the government admitted that it had been untruthful, as part of its response in Ketchup's first and initial § 2255 proceedings, and this admission was made nineteen (19) years after the district court and the Eleventh Circuit ruled in its favor.

As the issues presented in this Section I, in the "REASONS FOR GRANTING THE PETITION" identify, this Court has been made aware that the lower courts have failed to recognize the importance of **Rule 60**, which affects the integrity of the court. This Court, in **Kemp v. United States**, 596 U.S. 528, 533 (2022) stated:

> Kemp also argues that Rule 60's structure favors interpreting the term "mistake" narrowly. Our interpretation, he contends, would create confusing overlap between Rule 60(b)(1) and Rule 60(a), which authorizes a court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." We disagree. Because Rule 60(a) covers a subset of "mistake[s]" simpliciter, the overlap Kemp alleges would exist even if "mistake" reached only factual errors. And Courts of Appeals have well-established rules for determining when Rule 60(a), rather than Rule 60(b), should apply. See, e.g., United States v. Griffin, 782 F.2d 1393, 1397 (CA7 1986).

This Court did cite **Gonzalez v Crosby**, **Id,**, in **Kemp**, by stating, for obvious reasons, the principles established in **Rule 60(b)**, by stating:

> Federal Rule of Civil Procedure 60(b) permits "a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." Gonzalez v. Crosby, 545 U.S. 524, 528....

This Court reasoning in **Kemp**, was focused upon **"Rule 60(b),"** and not on the use of **Rule 60(a)**, nor the "integrity of the court," as identified in fraud upon the court applications, which Ketchup's case brings to bare, and identifys a stark contrast of the **Kemp** case. The Eleventh Circuit and the district court never identified that the issue concerning the errors in the Judgment in a Criminal case, was untimely in Ketchup's case, under **Rule 60**. **Gonzalez** nonetheless held that Rule 60(b) retained some purpose in habeas proceedings: It is an appropriate vehicle for an argument which "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." **Gonzalez**, at 532. This Court identified that **Rule 60(a)** relates to clerical mistakes, while **Rule 60(b)(1)** "includes a judge's errors of law. **Kemp**, at 533. See also **United States v. Begerly**, 524 U.S. 38, 43 n. 1 (1998)("Rule 60(a) dealt then, as it deals

now, with relief from clerical mistakes in judgments.") Ketchup did state to the lower courts that there was a "clerical mistake" in his Criminal Judgment. And Ketchup filed a petition in the Central District of California, alleging this very basis for relief. **See Supra, pgs.** 9-10 . Therefore, timeliness of the mistake in the Judgment in Ketchup's case, with a crime recited in it, that Ketchup has served a term of imprisonment for, and for which recited a crime that Ketchup had not been charged, indicted, nor convicted, should in all points, been corrected by the lower courts.

II. The Eleventh Circuit was required to investigate whether it was the victim of fraud, when Ketchup placed before it that the government had been untruthful in his first and initial §2255 proceedings, and admitted to the district court, during a Rule 60 proceedings that it had been untruthful, which denied Ketchup relief concerning a claim that he had been denied counsel at critical stages of the prosecution and he received ineffective assistance of counsel before trial, at trial, at sentencing and on direct appeal.

(a) The Eleventh Circuit did not apply this Court's decision in Hazel Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), to investigate the fraud alleged to have been committed in its court.

While in the Eleventh Circuit, the government stated in its Appellee Brief, the following relevant statements:

> The substanceof his brief is no different. Over the span of 30 pages, Ketchup argues the merits of his Rule 60(b) motion, contending [redacted] that the district court erred in denying it. (Blue Br. 1-30) All these arguments are trained on the October 4, 2021, order---the appeal of which has been dismissed for lack of jurisdiction....Nowhere in the substantive sections of his brief does Ketchup argue that the district court erred when it denied his motion to file an untimely objection to the Magistrate Judge's report and recommendation....By failing to offer any argument on those discrete issues, Ketchup has wholly abandoned them on appeal.

Appellee Brief, at 23-24.

The Eleventh Circuit stated in relevant part, in its January 2, 2024 opinion:

> Ketchup also moved to file out-of-time objections and to strike the government's response to this Rule 60 motion, which the district court also denied. However, we will not review the denial of the motions because Ketchup failed to plainly and prominently raise those issues in his appellate brief. See Timson v. Simpson, 518 F.3d 870, 879 (11th Cir. 2008)(holding that issues not briefed by a pro se litigant are deemed abandoned)....As a preliminary matter, the current case is not moot.

The Eleventh Circuit failed to recognize this Court's explicit directives concerning the timeliness of "Fraud on Court" allegations, for which Ketchup distinctly identified, infected with error "every subsequent decision, related to Ketchup, in the U.S. Supreme Court; the Eleventh Circuit...U.S. Court of Appeals...Middle District of Georgia." **(ECF No. 127, pgs. 2-3). See also,** Government's **Appellee Brief**, at 4-6.

This Court, in **Hazel Atlas Glass Co. v. Hartford-Empire Co.**, 322 U.S. 238, 246 (1944), vacated a decision of the court of appeals that had been obtained by fraud on the court, **even though the action seeking relief was filed nine years after the decision.** This Court held that a **lack of diligence** by a party seeking relief for fraud on the court does not prevent relief. **Id.** at 246. **See also, In re M.I.G. Inc.**, 366 B.R. 730, 753, Bankr. LEXIS 1190 (Apr. 16, 2007, E.D. Mich.).

When Ketchup brought to the attention of the Eleventh Circuit that fraud had been perpetrated against it, and the lower court, it had a duty to act. This is so, especially since the government conceded that it's attorney had not been truthful during Ketchup's first and initial **§ 2255** proceedings, wherein he alleged that he had been denied counsel at critical stages of the prosecution, and such denial infected his trial and direct appeal with constitutional error. This Court stated in **Hazel:**

> But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties....[T]ampering with the administration of justice in the matter indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Id., **Hazel**, 322 U.S. at 246.

This Court is alerted to the Government's statements, in it first response to Ketchup's **Rule 60** motion, while in the district court, which gives reasons for Ketchup to identify the government's tactics:

[ISSUE 3] "Since that time, Ketchup has filed various counseled and pro se

[ISSUE 3] "since that time, Ketchup has filed various counseled and pro se motions that have not required responses from the United States." See Docket Sheet. (Doc. 141, pg. 2)
This statement is partially true. It is true that the Government has not been required to respond to "various counseled and pro se motions," by order of this Court. But, this is not a virtue. This statement appears to be stated, in an attempt by the Government to try and insinuate, quite brilliantly, that maybe "if this Court had ordered the Government to respond to these "various counseled and pro se motions," it would have not taken almost twenty (20) years to admit the obvious. The Court is reminded that the Government (the United States) and its officers of the court are always under the obligation, as officers of the court, to be candid with the Court. See (Doc. 120, pgs. 5-8) This obligation is not conditioned upon whether Ketchup filed any pleading in this Court. Ketchup was still serving a sentence that he had placed in question, in 2001, and the Government has revealed what it knew in 1998, when Ketchup filed his § 2255 motion in this Court: That he had been placed in a corporeal lineup and was denied counsel at this critical stage lineup. The Government's obligation to this Court does not depend upon different administrations, appointment of different U.S. Attorney's in the district, or the location and timing of litigation concerning the same subject matter and the same parties: The United States and Ketchup. This Court is also reminded that Ketchup brought the "Government's fraud upon the court" claim in several federal courts, which included the District of Kansas, the Northern District of West Virginia, the Northern District of Georgia, the Tenth Circuit Court of Appeals, the Fourth Circuit Court of Appeals, the Eleventh Circuit Court of Appeals, and the U.S. Supreme Court. It would be an incredible assertion for the Government to allege that it had no idea that Ketchup was alleging that the Government's attorney had committed fraud upon this Court; before he filed his Rule 60 motion in this Court on August 18, 2020. Therefore, the Government's position that because the "U.S. Attorney's Office for the Middle District," had not been ordered to respond, does not mean that the "United States" had not been required to respond to this claim in other Courts, like the NOrthern District of West Virginia, and the Northern District of Georgia. It is worth mentioning that the "U.S. Attorney's Office for the Northern District of West Virginia" filed a significant amount of the documents that were filed by Ketchup and the Government in this Court, as exhibits in that Court. Therefore, the United States knew then, what it knows now. Other U.S. Attorney's Offices were arguing against relief, while the U.S. Attorney's Office for the Middle District of Georgia was silent about the Assistant U.S. ATTorney that was the subject of Ketchup's numerous complaints. See Bush Ranch v. E.I. duPont Nemours & Co. 918 F. Supp. 1529 (M.D. Ga. 1995)("Dupont obtained that order through a deliberate and willful fraud on the Court, concealing and continuing its prior pattern of abuse. In so doing Dupont has made this Court an instrument of its continuing fraud").

(ECF No. 142 at 3-4, 06/22/21)(emphasis in original)

(b) The Eleventh Circuit's designation as a sua sponte dismissal, was actually at the prompting of a government's attorney that it had disqualified in the case, before the dismissal of the case, in part.

The Eleventh Circuit, through a Motions Panel, stated in a November 3, 2022 Order:

> Upon sua sponte review, this appeal is DISMISSED, in part, for lack of jurisdiction....Fed. R. App. P. 4(a)(1)(B)(i), 4(c)(1); 28 U.S.C. §2107(b)(1) ....Accordingly, we lack jurisdiction to review the denial of Ketchup's Rule 60(b) motion, and the appeal is dismissed to that extent. See Hamer v. Neighborhood Hous. Servs. of Chi., 138 S.Ct. 13, 21 (2017); Green v. Drug Enf't Admin., 606 F.3d 1296, 1300-02(11th Cir. 2010)....No motion for reconsideration may be filed unless it complies with the timing and order requirements of 11th Cir. R. 27-2 and all other applicable rules.

Such decision was in contravention of the U.S. Supreme Court, in **Hamer v. Neighborhood Housing Services of Chicago**, 138 S. Ct. 13 (2017); because that decision held that this Court and other federal courts had been overlooking the distinction of "claim processing rules" and jurisdictional rules, by stating:

> This case presents a question of time, specifically, time to file a notice of appeal from a district court's judgment....Because the Court of Appeals held jurisdictional a time limit specified in a rule, not a statute...we vacate that court's judgment dismissing the appeal....This Court and other forums have sometimes overlooked this distinction, "mischaracteriz[ing] claim processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis."

An important and distinctive point in Ketchup's case was that the district court docket reveals that Ketchup never received a timely Magistrate Report and Recommendation **("R&R") (ECF Nos. 147, 148, 149, 150, 151)**, nor did Ketchup received the October 4, 2021 district court order, because Ketchup was being tranferred by the Bureau of Prisons, between three (3) prisons, to arrive at the final prison destination. **(ECF No. 152-1, pgs 1-19).**

Additionally, **Hamer** identifies in a Headnote that extensions may be made, if an appellant does not receive a timely notice. **Id.** The Eleventh Circuit never considered such circumstances, nor did the the government identify such exceptions, in the face of the fraud on the court allegations. Also, the Court stated in it's November 3, 2022 Order: "Upon sua sponte review, this appeal is DISMISSED, in part, for lack of jurisdiction.

This Court is alerted of the government's response to a **MOtion to Disqualify Assistant U.S. Attorney Michelle Lee Schieber and the United States Attorney's Office for the Middle District of Georgia**, filed by Ketchup on August 1, 2022, and

stated to the Motions Panel of the Eleventh Circuit:

> Ketchup did not file a timely notice of appeal from the October 4, 2021 order denying his Rule 60 motion for relief. Instead Ketchup filed two new motions that the district court denied and that are the subject of this appeal. See Notice of Appeal, Doc. 160, dated July 8, 2002, appealing the district court order, Doc. 159, entered June 14, 2022.

United States Response to Motion to Disqualify, pg. 4 (USCA Case No. 22-12269) (by AUSA Michelle Lee Schieber). Ketchup had already filed his Opening Brief, dated Agust 17, 2022, and served the government, before such response was made. The indirect argument, proposed by AUSA Schieber appeared to be a direct reflection of an adversarial opposition of Ketchup's Opening Brief. And as such, the filing of such response appeared from the record, that the Eleventh Circuit's **sua sponte** decision was in actuality, a decision made at the prompting of AUSA Schieber, through the August 29, 2022 opposition of Ketchup's Motion to Disqualify AUSA Schieber. In actuality, the recused and disqualified government's attorney, put forth an argument to the Eleventh Circuit's Motion Panel, for which the **sua sponte** designation in its ORDER, was in contravention of **Peer v. Lewis**, 606 F.3d 1306, 1313 (11th Cir. 2010), where the Eleventh Circuit has previously identified that: "By definition, a court responding to a motion is not acting **sua sponte.**" Had the Eleventh Circuit (Motions Panel) not dismissed a portion of Ketchup's appeal at the prompting of the disqualified and recused government's attorney (as she proverbially "walked out the door"), alleging that Ketchup's notice of Appeal was late, as it pertained to the district court's OCtober 4, 2021 Order; the Eleventh Circuit would have been required to take the same position that it took in **Pierre v. United States**, 2023 U.S. App. LEXIS 5558 (Mar. 8, 2023, 11th Cir.) (No. 23-10241-H), which stated:

> While his notice of appeal, deemed filed on January 19, 2023 is untimely, Pierre alleged that he did not receive notice of the entry of the order disposing of his Rule 36 motion within 21 days of its entry, and his notice of appeal was filed within 180 days after the entry of order. See. Fed. R. App. P. 4(a)(6); 28 U.S.C. § 2107(c). His notice of appeal is therefore treated as a timely motion under Federal Rule of Appellate Procedure 4(a)(6). See Sanders v. United States, 113 F.3d 184, 186-87 (11th Cir. 1997)(explaining

> that when a pro se appellant alleges that he did not receive notice of the entry of the order from which he seeks to appeal within 21 days of its entry, we will treat the notice as a Rule 4(a)(6) motion. Accordingly, we **sua sponte** REMAND the case to the district court for the limited purpose of determining whether to reopen the appeal period under Rule 4(a)(6).

Ketchup timely requested a reconsideration of the Eleventh Circuit's Motions panel Novemeber 3, 2022 Order, for which the Eleventh Circuit denied. The Motion's Panel stated, on June 14, 2023, in its ORDER disqualifying AUSA Schieber:

> Schieber was not involved in Ketchup's case as counsel at the district court level and has not yet submitted a brief on the government's behalf, and thereafter, replacing her with another attorney would not disrupt the proceedings. Given this fact, the agreement of the parties, and the strict rules barring a U.S. Attorney from working on a case even if there is a mere appearance of conflict. Schieber's motion is granted. See 28 U.S.C. § 528. Accordingly, Ketchup's motion to disqualify is also granted, insofar as it applies to Schieber.

Because the Motions Panel of the Eleventh Circuit issued it's disqualification and recusal of AUSA Schieber on June 14, 2023, its **sua sponte** decision concerning a matter that was raised by the disqualified and recused government attorney; the Eleventh Circuit, according to Ketchup, was required to revisit such issue, through his arguments raised in his Reply Brief, on pages 3-7.

(c) The dismissal of the appeal was BEFORE the Eleventh Circuit had assessed whther Ketchup's appeal was timely, pusuant to Hamer v. Neighborhood Housing Services of Chicago, 138 S. Ct. 13.

THe Eleventh Circuit's use of **Glass v. Seaboard Coast Line R.R. Co.**, 714 F.2d 1107, 1109 (11th Cir. 1983), as cited in its November 3, 2022 ORDER, was incompatible and contrary with this Court's directive in **Hamer v. Neighborhood Housing Services of Chicago**, 138 S. Ct. 13, (2017). The portion of Ketchup's appeal that the Eleventh Circuit determined was juridictionally barred, applied under **Glass**, but not according to **Hamer**.

(d) The Eleventh Circuit had made previous decisions that were affected by the government's fraud upon the district court, and resulted in the denial of previous appeals based upon the government's fraud upon the court.

Surely, the Government's failure to be truthful, was the type of fraud that "embraces only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial

machinery cannot perform in the usual manner its impartial task of adjudging in cases that are presented for adjudication." **Mills v. Commissioner**, 102 F.4th 1235, 1243 (11th Cir. 2024) This is revealed by the Eleventh Circuit's and District Court's previous statements, after the government's fraud upon the court:

> The record from this Court's consideration of Ketchup's prior motion for a certificate of appealability **shows that this Court reviewed all of his ineffective-assistance claims and determined them to be SPECIOUS such that remand for the district court to consider them ws NOT warranted.**

In re: Iran Dwayne Ketchup, No. 05-15106-G (11th Cir. 2005)(On petition for writ of mandamus)(emphasis added);

> The Court has reviewed Petitioner's most recent motion for evidentiary hearing/ reconsideration. Petitioner is not entitled to the relief he seeks in his most recently filed motion, **as has been explained by this Court and the Court of Appeals in orders on previous motions by Petitioner**. Accordingly, Petitioner's motion is denied....Clay D. Land."

(ECF No. 95)(June 29, 2005);

> Ketchup also reasserted the **Clisby** error in a motion before the district court "for adjudication of the claims that th[e] court failed to adjudicate." The district court denied the motion. We denied him leave to proceed IFP when he appealed, explaining that "[t]he record from this Court's consideration of Ketchup's prior motion for a certificate of appealability shows that this Court reviewed all of his ineffective-assistance claims and determined them to be **SPECIOUS** such that remand for the district court to consider them was not warranted." We denied Ketchup's subsequent motion for reconsideration, and the **Supreme Court** denied his petition for a writ of certiorari.... In addition, a § 2255 proceeding is an adequate and effective mechanism for Ketchup to raise his claim that the government committed fraud on the court during the § 2255 proceeding. A prisoner may file a motion under Fed. R. Civ. P. 60 to attack a defect in the integrity of his § 2255 proceeding. Gonzalez v. Crosby, 545 U.S. 524, 532 & n.5 (2005)(stating that fraud on the § 2255 court is an example of a defect that may be raised in a Rule 60 motion); see also Fed. R. Civ. P. 60(b)(3), (d)(3)(permitting relief from judgment due to fraud or fraud on the court). Ketchup could raise his claim of fraud on the Court through a Rule 60 motion in his § 2255 proceeding. In conclusion, a § 2255 proceeding is a adequate and effective mechanism for Ketchup to raise the claims in his §2241 petition...."

Ketchup v. Warden, No. 17-15792 (11th Cir. 2018)(On motion for leave to proceed on appeal IFP)

> When Ketchup stated to the district court, in his **Rule 60** MOtion
>
> Ketchup alleges that the government's fraud on the court, as identified in (Doc. 75), and shown above, affected every subsequent decision made by this Court, since 2001...The government's fraud upon this Court, in 2001, also affected every subsequent decision related to Ketchup, in the U.S. Supreme Court, the Eleventh...U.S. Court of Appeal...Middle District of Georgia.... These other Courts were affected because Ketchup alerted these courts of the governments fraud upon this Court....

(ECF No. 127, at 2-3);

Ketchup understood that "the judicial machinery" could not "perform in the usual

[redacted] manner its impartial task of adjudging in cases that are presented for adjudication." **Mills v. Commissioner**, 102 F.4th 1235, 1243 (11th Cir. 2024). The district court identified that the government had not been truthful in the prior proceedings, by stating:

> Although Respondent admits the AUSA misrepresented facts concerning Petitioner's corporeal lineup, Respondent contends the misrepresentation did not impact the Court's ruling on Petitioner's motion to vacate....Respondent asserts the AUSA's misstatement of the record was merely a mistake....

(ECF No. 147, at 4-9). Originally, the government's attorney, in Ketchup's first §2255, devoted two (2) pages of arguments to the corporeal lineup argument. Ketchup identified the government's trangression in a **MOtion for Sanctions (ECF No. 143, at 3-14)**, which should have made it difficult for any reasonable observer to conclude that the government had made some sort of mistake or misstatement.

(e) The government conceded that it had not been truthful in Ketchup's first and initial §2255 proceedings, which were conceded by the government in the district court and the Eleventh Circuit, on appeal.

A simple review of the Government's Appellee Brief, at 4-6, identifies its concessions that it was untruthful, while litigating against Ketchup in his §2255 proceedings, twenty-three (23) years ago. It took the government nineteen (19) years, to subsequently concede to the fact that it had been untruthful to the district court, only in 2021. But, this admission only came through Ketchup's prompting, through his **Rule 60** motion **(ECF No. 127). See also, Supra "Statement of Case,"** Pg. 7-8.

(f) The Eleventh Circuit had not determined or ruled that the appeal, nor the district court decision were based upon reasons that were disallowed by Gonzalez v. Crosby, 545 U.S. 524 (2005).

The government had "unclean-Hands." The lower courts should have held the government to the standard that it deserved: No reward for its misconduct. **See generally, Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin,** 283 U.S. 520, 521-22 (1931)(litigant who engages in misconduct "will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

Ketchup was forced by **Gonzalez**, to say as-less-as-possible about the prior district court's decision, concerning the ruling of his first §2255, least Ketchup would be accused of violating **Gonzalez**, of attacking the prior decision of the §2255 proceedings on the merits. Indeed, Ketchup wanted to bring the subject to bear, concerning the thirteen (13) ineffective assistance of counsel claims, that the district court failed to adjudicate in his first and initial §2255 proceedings. This is especially true, since the district court commented upon such unadjudicated claims, despite their unadjudication. **See, Ketchup's Opening Brief**, at 15-18. But, the Eleventh Circuit never determined that Ketchup violated **Gonzalez**, by turning his **Rule 60** motion into a "second or successive" §2255.

(g) **The Eleventh Circuit was required to, sua sponte, review whether it was the victim of fraud, when the government conceded on appeal that it had been untruthful concerning Ketchup's claim of denial of counsel at critical stages of the prosecution, and he received ineffective assistance of counsel; almost twenty (20) years after the initial §2255 proceedings had been terminated in the government's favor, and the government's fraud had been brought to the attention of the district court in the initial §2255 proceedings (but the government was silent about its untruthfulness during that period of time, as part of the initial §2255 proceedings).**

This Court, noting that attorneys had urged a falsified article upon the court and had prevailed, held that they "are in no position now to dispute its effectiveness." **Hazel-Atlas**, **Id.**, at 247.

This Court, in **Universal Oil Products Co. v. Roots Refining Co.**, 328 U.S. 575 (1946), outlined that it had the power to "unearth such fraud" and to "unearth it effectively," by bringing "before it by appropriate means all those who may be affected by the outcome of its investigation," and to have a "proper hearing." **Id.** 328 U.S. at 580.

Because Ketchup met his requirement under **Gonzalez** (**ECF No. 147, at 3n. 1**); **Hazel-Atlas**, **Id.**; and **Universal Oil**, **Id.**, all required the Eleventh Circuit to investigate whether it was the victim of fraud upon the court. Despite the government's admissions in the district court and the Eleventh Circuit, the Eleventh Circuit failed to act. **Genereux v. Raytheon**, 754 F.3d 51, 58 (1st Cir. 2014)(Courtss"'consider

an express representation by an officer of the court to be a solemn undertaking, binding on the client'")("Where, as here, counsel makes such representation to the trial court and to the lawyers for the opposing party, neither he nor his client can complain when the trial court takes them at their word.")

III. The reasoning in In re West, 103 F.4th 417 (6th Cir. 2024) sets forth a template for which this Court may create a remedy in this case, pursuant to Federal Rules of Civil Procedure, Rule 60(b)(6).

In the case of **In re West**, 103 F. 4th 417 (6th Cir., May 29, 2024), the Sixth Circuit U.S Court of Appeals provided an instructive decision, which may be applied similarly , by this Court, in this matter.

It should be noted that the government, in its first response to Ketchup's Rule 60 motion, while in the district court, gave Ketchup reasons to attack its deceptive tactic toward the district court, by stating:

> "Procedural and Factual History....On September 12, 1995, Ketchup was found guilty by a jury trial to...possession of a firearm by a convicted felon in violation of 18 U.S.C. §922(g) and §924(a) (count 5)."

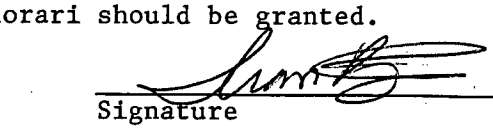
See,(ECF No. 141, at 1). Ketchup forcefully countered and identified that the government was still continuing to express the wrong crime, as late as 2021, when such assertions were not true. **See, (ECF No. 142, at 3, 06/22/2021).**

In re West, **Id.**, identifies the solutions that may be caused by an: "error on the part of competent people--prosecutors, defense counsel, probation officers," the "judge at the time of sentencing," and "even skilled appellate counsel." **In re West**, **Id.** Justice and the integrity of the judiciary demands a solution to the problems presented in this petition for writ of certiorari.

IV. Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted by:



Signature

Iran Dewayne Ketchup
Register Number: 82262-020
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3901 Klein Blvd.
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December 16, 2024

Date