

APPENDIX

United States Court of Appeals
for the Fifth Circuit

No. 24-10373

United States Court of Appeals
Fifth Circuit

FILED

July 17, 2024

Lyle W. Cayce
Clerk

IN RE NICHOLAS LEE BLAIR,

Petitioner.

Petition for Writ of Mandamus to the
United States District Court
for the Northern District of Texas
USDC Nos. 5:17-CV-280, 5:13-CR-100-1

UNPUBLISHED ORDER

Before JONES, HIGGINSON and Ho, *Circuit Judges*.

PER CURIAM:

Nicholas Lee Blair, federal prisoner # 47121-177, has filed in this court a pro se petition for a writ of mandamus and a motion requesting leave to file his mandamus petition in forma pauperis (IFP). The motion for leave to proceed IFP is GRANTED.

Blair's mandamus petition arises out of his conviction for aiding and abetting production of child pornography. Blair's direct appeal of his conviction was dismissed on his own motion. *United States v. Blair*, No. 14-10330 (5th Cir. July 7, 2014). He then filed a motion under 28 U.S.C. § 2255, which the district court dismissed as time barred on April 24, 2018. Blair filed a motion for reconsideration under Federal Rule of Civil Procedure 59(e), which the district court denied on May 10, 2018. This court denied

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his application for a certificate of appealability (COA). *United States v. Blair*, No. 18-10599, at 2 (5th Cir. Feb. 7, 2019) (unpublished). Blair later filed a motion under Federal Rule of Civil Procedure 60(b), challenging the district court's time-bar dismissal, which motion the district court denied on February 15, 2022. This court denied his application for a COA. *United States v. Blair*, No. 22-10239, at 2 (5th Cir. Oct. 6, 2022) (unpublished). Subsequently, Blair requested and was denied authorization from this court to file a successive § 2255 motion. *In re Blair*, No. 23-10367, at 2 (5th Cir. May 25, 2023) (unpublished).

In his petition, Blair challenges his child-pornography conviction and 210-month sentence, raising claims that he received ineffective assistance of counsel, the trial court erred at sentencing, he is actually innocent, law enforcement engaged in misconduct, and his guilty plea was unknowing and involuntary. He additionally contends that the district court committed error when it dismissed his § 2255 motion as time-barred and denied his Rule 60(b) motion. He asks that we "direct the district court to adjudicate his claims on the factual and legal merits."

"Mandamus is an extraordinary remedy that should be granted only in the clearest and most compelling cases." *In re Willy*, 831 F.2d 545, 549 (5th Cir. 1987). A party seeking mandamus relief must show both that he has no other adequate means to obtain the requested relief and that he has a "clear and indisputable" right to the writ. *Id.* (internal quotation marks and citation omitted). Mandamus is not a substitute for appeal. *Id.* "Where an interest can be vindicated through direct appeal after a final judgment, this court will ordinarily not grant a writ of mandamus." *Campanioni v. Barr*, 962 F.2d 461, 464 (5th Cir. 1992).

Blair challenged his conviction and sentence through the appropriate remedies of his direct appeal and his § 2255 proceedings. He is not entitled

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to the extraordinary remedy of a writ of mandamus simply because he pursued his appropriate remedies and either neglected to raise his current claims, raised his claims and failed to prevail, or otherwise was unable to meet the requirements for maintaining those actions. *See In re Willy*, 831 F.2d at 549.

The petition for a writ of mandamus is DENIED.



A True Copy
Certified order issued Jul 17, 2024

Tyler W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

No. 24-10373

FILED
August 26, 2024

Lyle W. Cayce
Clerk

IN RE NICHOLAS LEE BLAIR,

Petitioner.

Petition for a Writ of Mandamus to the
United States District Court
for the Northern District of Texas
USDC No. 5:17-CV-280, USDC No. 5:13-CR-100-1

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

UNPUBLISHED ORDER

Before JONES, HIGGINSON, and Ho, *Circuit Judges*.

PER CURIAM:

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

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re NICHOLAS LEE BLAIR-PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

NICHOLAS LEE BLAIR

BUTNER FMC

PO BOX 1600

BUTNER, NORTH CAROLINA 27509

LIST OF PARTIES

1. The United States of America, represented by the United States Attorney for the Northern District of Texas, Criminal Appeals Division
2. The Solicitor General of the United States of America

LIST OF ALL PROCEEDINGS

Initial proceeding, criminal conviction UNITED STATES V. NICHOLAS LEE BLAIR, 5:13CR-00100-C, judgment date March 9, 2014.

Appeal proceeding, UNITED STATES V. Blair, No 14-10330 (5th Cir. July7, 2014). 28 U.S.C. § 2255 motion proceeding, UNITED STATES OF AMERICA V. NICHOLAS LEE BLAIR, No. 5-17-CV-280, dismissed April 24, 2018.

Certificate of Appealability proceeding, United States of America v. Nicholas Lee Blair, No. 18-10599, at 2 (5th Cir. Feb 7, 2019).

Motion Under Fed. R. of Civ. P. Rule 60(b) proceeding, No. 5-17-CV-280, denied by the district court February 15, 2022.

Cert. of App. for the Rule 60(b) denial proceeding, United States v. Nicholas Lee Blair, No. 22-10239, at 2 (5th Cir. Oct. 6, 2022).

Fifth Circuit Mandamus Proceeding, In re Blair, No. 23-10367, at 2 (5th Cir. May 25, 2023).

QUESTIONS PRESENTED FOR REVIEW

1. What is the proper statutory definition of the terms "lascivious exhibition", "engaging in", and "sexually explicit", as written in 18 U.S.C. § 2256?
2. Can new precedent made by another Circuit Court which validates claims made in a 28 U.S.C. § 2255 application, where the certificate of appealability was denied, provide the means for a Rule 60(b) motion under Federal Rules of Civil Procedure, to rectify the dismissal of actual innocence claims and the denial of a certificate appealability once the new precedent shows the "reasonable jurist" standard has been met as has the colorable actual innocence claim?
3. Can a meritorious actual innocence claim be "time-barred" and certificate of appealability denied when precedent in sister circuits have conceded the argument in favor of petitioner in cases with similar circumstances and in consideration of the denying Circuit to this petitioner has no "bright-line" or "per se" rule concerning the claim?

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In re, NICHOLAS LEE BLAIR, Petitioner.

A PETITION FOR A WRIT OF MANDAMUS

TO THE HONORABLE JUSTICE, Samuel J. Alito, OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Nicholas Lee Blair, respectfully requests that Justice Alito, or if necessary, the Court en banc, issue a writ of mandamus remanding this case to the United States District Court for the Northern District of Texas, Lubbock Division, for further proceedings.

CITATIONS OF THE ORDERS ENTERED IN THIS CASE.

Petitioner was convicted of one count in violation of 18 U.S.C. § 2251(a), United States v. Nicholas Lee Blair, 5:13CR-00100-C (Nor. Dist. Tex. March 9, 2014). He appealed the conviction, United States v. Blair, No. 14-10330 (5th Cir. July 7, 2014). The appeal was dismissed by Blair for reasons to be presented. Blair later filed an application under 28 U.S.C. § 2255, United States of America v. Nicholas Lee Blair, No. 5-17-CV-280, that was dismissed April 24, 2018. A Certificate of Appealability was filed, United States of America, No-18-10599, at 2 (5th Cir. 2018) and denied February 7, 2019. After new precedent in sister circuits, Blair filed a Rule 60(b) under Federal Rules of Civil Procedure with the district court-No. 5-17CV-280 and denied February 15, 2022. Cert. of App. was timely filed-United States v. Nicholas Lee Blair, No. 22-10239, at 2 (5th Cir. 2022) denied October 6, 2022. Blair filed for a writ of mandamus with the Fifth Circuit-In re Blair, No. 23-10367, at 2 that was denied May 25, 2023. This petition now follows.

STATEMENT OF THE BASIS FOR JURISDICTION.

This petition is prompted by the denial of a writ of mandamus by the United States Court of Appeals for the Fifth Circuit on July 17, 2024, and a timely filed rehearing en banc denial on August 26, 2024. This Court is the only Court who can correct the error of the lower court and has statutory jurisdiction under 28 U.S.C. § 1651.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS.

This petition for a writ of mandamus stems from the errors by the lower courts that have prevented the privilege of the Writ of Habeas Corpus, against the Constitution. See Art. I, § 9, cl 2 "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasions the public safety may require it." When all remedies have been exhausted and the clear and indisputable rights have still been erroneously denied a petitioner by the lower courts, only this Court can provide relief. The vehicle is a writ of mandamus under 28 U.S.C. § 1651 "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This Court may decide an alternative writ is more applicable. § 1651(b) "An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction." Blair, the petitioner, attempted to utilize a motion under Federal Rules of Civil Procedure Rule 60(b) to correct the mistakes of the court and the misconduct of the opposing party once new evidence was discovered. A rule afforded in Rule 60(b)(1),(2),(3), and (6), respectively.

STATEMENT OF THE CASE.

Blair contends that his application under 28 U.S.C. § 2255 was improperly dismissed and the subsequent certificate of appealability was improperly denied.

He further contends that newly discovered evidence and new precedent for both his Circuit, the 5th Circuit, and precedent from other circuits, point to proof of misconduct by the prosecution and investigators of his case while new precedents show a colorable claim of actual innocence, respectively.

The Court of Appeals for the Fifth Circuit (Court of App., herein) denied Blair the ability to be heard at any stage of his proceedings and a writ of mandamus from this Court is the only means to compel the lawful and legal right for Blair to be heard. Without intervention by this Court Blair will be unable to exercise his rights and privileges under the Constitution and federal law in violation of those laws and the precedents of this Court.

ARGUMENT.

Blair was convicted of one count in violation of 18 U.S.C. § 2251(a), aiding and abetting. From the beginning Blair made the contention that he did not believe the language of the statute applied to the circumstances of his case. The language of the statute is clear when it describes the scienter requirement and what the images must display. The images are to be transmitted, or would be transmitted with the knowledge of the producer. Also, the images must contain "sexually explicit" depictions of a minor "engaging in" the "lascivious exhibition" of the genitals. Blair was not allowed to argue his point with his attorney because his attorney simply kept saying the circumstances fit. Blair was unable to check the legalities because he was in administrative segregation prior to conviction in Lubbock County Detention Center, where there was a policy which denied law library access when represented by an attorney.

When Blair was finally allowed to study the law in relation to his case he discovered that there was numerous points of misconduct by police and the prosecutor, that his counsel was ineffective and he is actually innocent. Being denied access to a law library and the misconduct being so deceptive it

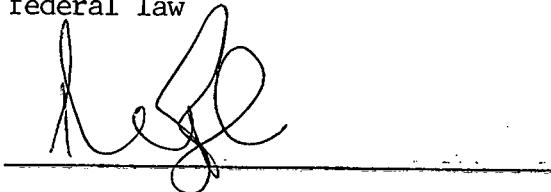
took the better part of three years to discover the depth of the misconduct but once fully discovered, Blair filed his § 2255 within three months. The explanation for the delay was overlooked by the district court and a dismissal resulted. The claim of actual innocence was never reasoned or acknowledged by the district court. Once the cert. of app. was filed, it was denied by the court of app for not meeting the "jurist of reason" standard set out in 28 U.S.C. § 2243. The actual innocence claim was disregarded by the court of app.

Since, Blair discovered new evidence of misconduct by state police while also discovering the ruling in United States v. Hillie, 38 F.4th 235 (D.C. Cir. 2022) proved Blair's initial claims were colorable, at the very least, and should have allowed a cert. of app. The new evidence proving misconduct should have been considered. Blair filed a Fed. R. of Civ. P. Rule 60(b) to introduce the new evidence and show the new precedent warranted further proceedings. The Rule 60(b) was construed by the district court as a subsequent § 2255 and denied for lack of subject matter jurisdiction, initially. Blair filed an appeal. The appeal was construed as a cert. of app. request. During the wait for resolution this Court decided Kemp v. United States, 142 S. Ct. 1856 (2022), showing a Rule 60(b) could be used to correct legal mistakes. The district court changed its earlier decision and denied the Rule 60(b) motion outright and the court of app. denied the cert. of app. within days of on another. Depriving Blair the ability to adequately argue his claim and without a justifiable reason by the district court to new evidence or actual innocence

Blair later filed a writ of mandamus requesting the court of app. hear the argument set out in the original § 2255 and the Rule 60(b), now that precedent shows the standard of "jurist of reason" had been met. Blair was granted his application for IFP but denied the mandamus request as the court of app saw it as an attempt at a new appeal. The court of app. reasoned that Blair cannot

INMATE DECLARATION

I, Nicholas Lee Blair, make this declaration, that I did place the petition for a writ of mandamus, and the copies for service to opposing parties, in the Butner FMC mailbox, according to Butner and BOP policy for legal mail, on February 18, 2025 I make this declaration under penalty of perjury to applicable federal law

A handwritten signature in black ink, appearing to read "Nicholas Lee Blair", is written over a horizontal line.