

NOV 16 2017

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN P. FOREMAN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Benjamin P. Foreman
(Your Name)

FCI-Milan/ P.O. Box 1000
(Address)

Milan, MI. 48160-0190
(City, State, Zip Code)

None (Incarcerated)
(Phone Number)

QUESTION(S) PRESENTED

Question #1

Whether the Sixth Circuit Court of Appeals plainly erred by holding that Petitioner Foreman was not prejudiced by the Judicial Fraud that clearly occurred within his first 2255 Motion and further holding that Foreman's Civil Procedure 60(d)(1), independent action did not demonstrate a grave miscarriage of justice, thus should a C.O.A. issue as it is debatable amongst jurists of reasons whether Foreman's First Amendment; Fifth Amendment and Sixth Amendment Rights were violated pursuant to the U.S. Constitution?

Question #2

Whether the Sixth Circuit Court of Appeals plainly erred by holding that Foreman's Civil Procedure 60(b)(1) raising a Mistake in Law was not filed within one-year of the two relevant orders and furthermore by holding that pursuant to Civil Procedure 60(b)(6), that Foreman showed "no exceptional or extraordinary circumstances," however the change in policy by the Department of Justice demonstrated that the District Court's procedural bar ruling could no longer be enforced, thus entitling Foreman to a merits Ruling as to his previously BARRED sentencing appellate ineffectiveness claims and coerced guilty plea ineffectiveness claim which violates his Sixth Amendment Rights of the U.S. Constitution?

LIST OF PARTIES

- ☒ 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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A 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 United States district court appears at Appendix B to the petition and is

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☒ is unpublished.

☐ For cases from **state courts**:

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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 23, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 18, 2017, and a copy of the order denying rehearing appears at Appendix C.

☐ 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**:

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

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STATEMENT OF THE CASE

In the beginning of September of 2016, Petitioner Foreman filed his pro se Motion for Partial Disqualification of U.S. District Court Judge Robert H. Bell and Motion to Set Aside § 2255 Denial Judgment In Light of Judicial Fraud By The Court and in the end of September of 2016, Petitioner Foreman filed his pro se Motion To Grant Rule 60 (b) 91) Based Upon a Mistake In Law. On October 18, 2016, the District Court denied both legal motions in a single eight page Opinion. A timely Notice of Appeal was filed and Petitioner Foreman was denied a Certificate of Appealability as to both Questions Presented on June 23, 2017. Petitioner Foreman filed a Panel Rehearing Or Rehearing En Banc in which was denied on August 18, 2017. Thus, Petitioner Foreman, respectfully requests that this Honorable U.S. Supreme Court GRANT his pro se Writ Of Certiorari and GRANT Benjamin P. Foreman a Certificate of Appealability as to both questions presented in the matter herein.

REASONS FOR GRANTING THE PETITION

Petitioner Foreman, acknowledges that a review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted by this court only for compelling reasons, see Supreme Court Rule 10.

In the instant case, Petitioner Foreman, respectfully request that this Court GRANT his pro se Writ of Certiorari and issue a Certificate of Appealability as to Question # One and Two, as relevant to question # 1, Judicial Fraud By The Court was committed when Foreman's 2255 Motion was Summarily Denied in part and Dismissed in part by retired U.S. District Court Judge Robert H. Bell the evidence presented supports Judicial Fraud, however the Sixth Circuit has turned a blind eye to such abuse of the judicial authority by a federal judge, thus constituting a clear miscarriage of justice relief via an independent action via Rule 60 (d) (1) is warranted. In reference to Question # 2, Petitioner Foreman filed a Rule 60 (b) (1) based upon a Mistake In Law when the U.S. District Court Judge Robert H. Bell transferred Defects # 1 and 2, within a Transfer Order on December 23, 2015, to the Sixth Circuit Court of Appeals via 28 U.S.C. § 1631; and the Sixth Circuit's Order on July 8, 2016, which held specifically that the "new claim" raised within Foreman's Supplemental Brief (in which was filed by Attorney Gary T. McEntee), was a "second or successive 2255" motion, however Petitioner Foreman presented a true Rule 60 (b) as to Defects # 1 and 2 to the District Court but the Sixth Circuit failed to recognize this point, thus the Sixth Circuit's failing to REMAND back to the District Court as to Defects # 1 and 2,

clearly conflicts with the U.S. Supreme Court precedents in **Gonzalez v. Crosby**, 545 U.S. 524, 532, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)). Thus, Petitioner Foreman, argues that the Sixth Circuit plainly erred in failing to GRANT a C.O.A. for a mistake in law or alternatively via Rule 60 (b) (6), as the DOJ's new policy "no longer" enforcing previously executed waivers of claims of ineffective assistance of counsel resulting in prejudice or when debatable certainly constitutes "exceptional or extraordinary circumstances" as Benjamin Preston Foreman has a meritorious sentencing/ appellate ineffectiveness claims that violate his Sixth Amendment Rights of the U.S. Constitution.

QUESTION # ONE:

Whether the Sixth Circuit Court of Appeals plainly erred by holding that Petitioner Foreman was not prejudiced by the Judicial Fraud that clearly occurred within his first 2255 Motion and further holding that Foreman's Civil Procedure 60 (d) (1), independent action did not demonstrate a grave miscarriage of justice, thus should a C.O.A. issue as it is debatable amongst jurists of reason whether Foreman's First Amendment; Fifth Amendment and Sixth Amendment Rights were violated pursuant to the U.S. Constitution ?

The question before this Honorable U.S. Supreme Court is whether a certificate of appealability should be issued as to Question # One before this Court herein. Congress has provided that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2). The Supreme Court has explained that this means the petitioner must show "reasonable jurists could debate whether (or, for that matter, agree that) the petition

should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)); accord *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003).

The certificate of appealability requirement is to be administered at the threshold of the appeal, and deciding whether to issue one neither requires nor permits full consideration of the factual and legal merits of the claims, *Miller-El*, at 336, 123 S. Ct. at 1039, because "the question is the debatability of the underlying constitutional claim, not the resolution of that debate," *id.* at 342, 123 S. Ct. at 1042. That means a petitioner is not required to demonstrate entitlement to [supreme relief] appellate relief in order to be given an opportunity to pursue it. Still, the certificate of appealability requirement is not a toothless one, and it should be applied with its purpose in mind, which is to separate out those appeals that deserve more careful attention from that do not. More than the absence of frivolity or the presence of good faith is required for a petitioner to clear this hurdle. *Id.* at 335-38, 123 S. Ct. at 1039-40.

Of particular relevance here this Honorable U.S. Supreme Court has before it, which involves a Rule 60 (d) (1) independent action for Judicial Fraud By The Court on procedural issues in addition to merits issues, is the *Slack* decision. In that case the district court denied the habeas petition on procedural grounds without reaching the underlying constitutional claim. *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604. The Supreme Court held that in those circumstances a certificate of appealability should issue only if the petitioner makes both a substantial showing that he had

a valid claim of the denial of a constitutional right, and a substantial showing that the procedural ruling is wrong. *Id.* at 484, 120 S. Ct. at 1604. Those are the two components of the showing a petitioner in that situation must make in order to be entitled to a certificate of appealability. If either of the components is lacking, a court may deny the application for a certificate because of the absence of that component without deciding whether the other one exists. *Id.* at 485, 120 S. Ct. at 1604. ("Each component of the § 2253 (c) showing is part of a threshold inquiry, and a court may find it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.").

First, Petitioner Foreman, asserts that he must prove to this Honorable U.S. Supreme Court that his Question # One, raises a debatable constitutional question. See Slack, 120 S. Ct. at 1604.

In the instant case, Petitioner Foreman, contends that for the past 10 years plus he has been diligently challenging his conviction and sentence to demonstrate that his conviction was obtained in violation of his Fifth and Sixth Amendment Rights pursuant to the U.S. Constitution, however the District Court now retired the Honorable Robert H. Bell and AUSA Nils R. Kessler have effectively apparently indirectly worked hand and hand to DENY Benjamin Preston Foreman his **one full and fair opportunity** under the ("ADEPA") to present his 2255 Motion To Vacate by failing to issue a Show Cause Order, Mr. Kessler within his Motion To Dismiss, see Doc. # 6 Filed: 01/13/09 Page 4 of 5 PageID # 166 erroneously listing the first two claims raised in Foreman's Motion To Vacate

and stating that none of Foreman's claims challenge the validity of the guilty plea, however Foreman's Argument One and Eight challenge the validity of the plea, therefore AUSA Kessler's actions were fraud on the court (although not relevant here as such fraud on the court was never raised before the lower courts, however it is mentioned for this Court to have a more fuller understanding of Foreman's original 2255 Proceedings) to prevent Foreman from fully developing his claims within 2255 motion as Argument Eight involved Mr. Kessler. When the District Court adjudicated the merits of Foreman's 2255 motion on July 19, 2010, he Summarily Dismissed Foreman's 2255 Motion, however he blatantly ignored Benjamin Preston Foreman's coerced guilty plea ineffectiveness within Foreman's sworn affidavit and 2255 Brief as Foreman argued that his guilty plea was tainted by ineffective assistance of counsel and failing to adequately consider on the record Foreman's Reply Brief to the government's Motion to Dismiss, therefore all the facts and circumstances render that the 2255 Proceedings the procedures were circumvented by the retired Honorable Robert H. Bell which in turn violated Benjamin P. Foreman's due process of law rights as guaranteed to him by the U.S. Constitution. Moreover, Petitioner Foreman, contends the District Court ignored the command of Harris v. Nelson, 394 U.S. 286, 292 (1969), and Benjamin P. Foreman is being unlawfully imprisoned in violation of his rights guaranteed to him by the U.S. Constitution.

First, Petitioner Foreman, states that he filed a Motion For Partial Disqualification Of U.S. District Court Judge Robert H. Bell, see Doc. # 76, however remarkably prior to the District Court addressing the merits of Foreman's partial disqualification in the first instance he addressed the merits thereto of the

underlying Motion To Set Aside § 2255 Denial Judgment In Light Of Judicial Fraud By The Court rendering Foreman's partial disqualification to be meaningless in violation of due process of law rights pursuant to the Fifth Amendment of the U.S. Constitution.

Turning now to the actual merits of Foreman's Motion For Partial Disqualification in which was filed under 28 U.S.C. § 455 (a) and (b) (1) and Section 2255 Rules, supra note 2247, R. advisory committee's note, thus he was entitled to at minimum partial disqualification based upon the following:

Petitioner Foreman, states that he filed a pro se Motion For Partial Disqualification Of U.S. District Court Judge Robert H. Bell, see Doc. # 76 and attached is a sworn affidavit of bias; prejudice and conflict of interest in which justifies partial disqualification of the Honorable Robert H. Bell.

Benjamin P. Foreman's sworn affidavit makes clear that partial disqualification is required in compliance with § 455 (a) and (b) (1) by stating under penalties of perjury as follows:

Foreman will summarized relevant sections of sworn affidavit for this Honorable U.S. Supreme Court.

This sworn affidavit is being submitted to support pro se Motion For Partial Disqualification Of U.S. District Court Judge Robert H. Bell, as he presents the appearance that his impartiality might reasonably be questioned and he presents the appearance of personal bias against me, thus there is appearance of a conflict of interest.

1. On September 7, 2006, the Honorable Robert H. Bell sentenced me to 300 months of imprisonment, however during my federal sentencing hearing proceedings the Honorable Robert H. Bell was

rude, bias and created hostile atmosphere by repeatedly interrupting my lawyer Attorney Maddaloni, thus exhibited the appearance of "lack of impartiality."

2. During my 2255 Proceedings the Honorable Robert H. Bell failed to issue a Show Cause Order; blatantly disregarded several sworn affidavits for the sole purpose of not having to conduct a prompt evidentiary hearing and ensuring that Judge Bell could deny my 2255 motion so I could remain in federal prison serving an "unjust" and unauthorized 25-year sentence. Judge Bell blatantly disregarded my sworn statements within my 2255 sworn affidavit of coercion by Attorney Maddaloni of my Rule 11 Plea Colloquy, thus as the result of a coerced guilty plea constituting a serious constitutional Fifth and Sixth Amendment violation because it turns upon events that occurred outside the courtroom it requires a evidentiary hearing and this is why Judge Bell blatantly ignored this evidence entailed within my sworn affidavit statements within my 2255 Memorandum of Law. This is why Judge Bell purposely omitted at page 13, that the "motion" in this case conclusively show that Movant is entitled to ne relief under § 2255 Judge Bell failed to comply with the statutory requirement under 28 U.S.C. § 2255 (b), which requires that "the motion and files and records of the case conclusively demonstrate that the prisoner is entitled to no relief." In light of this, I have filed a Judicial Fraud By The Court as my 2255 motion was dismissed and denied based upon fraud, thus the Honorable Robert H. Bell presents the appearance of personal bias towards me and Judge Bell's impartiality might reasonably be questioned for him to preside over my Judicial Fraud By The Court motion attached herein, thus Section § 455 (a),

requires disqualification of the Honorable Robert H. Bell.

3. There presents the appearance of conflict of interest for the Honorable Robert H. Bell to preside over my Judicial Fraud By The Court, thus disqualification is required in the case herein.

4. I believe in light of the personal bias and lack of impartiality that has been displayed by the Honorable Robert H. Bell since my federal sentencing hearing to present some 10 years later it reasonably appears that Judge Bell has formed a **dislike or hatred towards me** which requires the Honorable Robert H. Bell pursuant to 28 U.S.C. § 455 (b) (1) to disqualify himself in the matter herein.

Petitioner Foreman, argues firmly he presents a meritorious claim of Judicial Fraud By The Court and partial disqualification is **required** because there is not a reasonable likelihood that the Honorable Robert H. Bell could preside in "a fair and impartial manner" or could try the facts "with detachment and objectively," see Webbe, 549 F.2d 1358, 1361 (10th Cir. 1997). Because the District Court could not preside in "**fair and impartial manner**" at Benjamin P. Foreman's federal sentencing on September 7, 2006 and during his 2255 Proceedings, thus it is reasonable likelihood (in which has ultimately resulted in a demonstration that Judge Bell could not preside in a "**fair and impartial manner**" over Foreman's Judicial Fraud By The Court, thus partial disqualification was required, see Webbe, 549 F.2d at 1361 (10th Cir. 1997).

Thus, Petitioner Foreman, argues firmly that taking his sworn affidavit as true as the District Court was **bound** to pursuant to 28 U.S.C. § 455 (a) and (b) (1), see In re: Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997) (movant's affidavit must be accepted

by district court judge "as true even though it may contain averments that are false and may be known to be so"); and furthermore the fact that at least two federal Circuit Courts have held that the mere accusation of judicial bias and misconduct justified partial recusal, see *Ellis v. United States*, 313 F.3d 636, 641-42 (1st Cir. 2002); *Murchu v. U.S.*, 926 F.3d 50, 53 n. 3, 56-57 (1st Cir. 1991); and *Shemonsky v. Resolution Trust Corporation*, 132 Fed. Appx. 424 f.n. 1 (3d Cir. 2005), thus as thorough review of the legal basis as to why Judge Bell denied Foreman's Partial Disqualification, see Doc. # 78, at page 5-6, he states in relevant part as follows:

Here, the Court carefully reviewed each of Movant's eight claims for relief; and found that Movant waived the right to challenge his sentence by direct appeal and by collateral attack in his plea agreement. (ECF No. 12, PageID. 226) This was clear from both the terms of his plea agreement and his testimony at the plea hearing, where he stated under oath that he understood that he waiving this right. (Id. at PageID. 226-27.) Because the waiver was valid, it barred his right to challenge his conviction under § 2255. (Id. at PageID. 234.) The Court formed an opinion based on the facts presented, and did not display deep-seated favoritism or antagonism. Therefore, Movant's motion for partial disqualification is without merit, and is denied.

Remarkably, Petitioner Foreman, contends that at no time did the District Court address the actual merits of Foreman's sworn affidavit in which must be taken as true, thus the District Court clearly abused it's discretion when Judge Bell failed to partially disqualify himself, therefore violating Benjamin Preston Foreman's due process of law rights in which entitles him to a "fair and impartial manner" to preside over his case, see *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-243 (1980), in which violates the letter and spirit of 28 U.S.C. § 455 (a) and (b) (1). See Appendix D.

Therefore, Petitioner Foreman, argues firmly that it is

certainly debatable amongst jurists of reason that Benjamin P. Foreman's Fifth Amendment Rights under the due process clause were violated by the District Court's failure to disqualify himself partially, thus consistent with Slack the first prong has been demonstrated.

Part II.

Reasonable jurists could debate that the District Court and the Sixth Circuit's Ruling that Foreman's Judicial Fraud By The Court was wrong or debatable amongst jurists of reason that it stated a valid constitutional violation of Foreman's First; Fifth and Sixth Amendment Rights.

Petitioner Foreman, asserts that the District Court denied his pro se Motion To Set Aside § 2255 Denial Judgment In Light Of Fraud By The Court, see Doc. # 78, at pages 1-5, however the District Court stated the following recharacterizing Foreman's properly filed Rule 60 (d)(1), as either a Rule 60 (d) (3); or Rule 60 (b) (6) motion. On page 1 and 2 of Judge Bell's Opinion and Order Denying Foreman's Motion To Set Aside, see ECF No. 78, which states in relevant part as follows:

I. Motion to Set Aside § 2255 Denial

Movant requests the Court to set aside its denial, under Federal Rule of Civil Procedure 60 (d) (1), because of the Court's misrepresentation and fraud. It appears that Movant's ground for relief from judgment is Rule 60 (b) (3) fraud, misrepresentation, or misconduct by an opposing party. Movant argues that the Court made material misrepresentation when it failed to consider three sworn affidavits submitted within his memorandum of law. A Rule 60 (b) motion for fraud, misrepresentation, or misconduct must be made "no more than one year the entry of the judgment or

order or date of the proceeding." Fed. R. Civ. P. 60 (c). On July 19, 2010, the Court entered its order denying Movant's motion to vacate, set aside, or correct his sentence under § 2255. Movant did not file his motion to set aside until September 12, 2016, which was well past the one-year filing deadline. Therefore, this motion is time-barred.

Here the District Court held that Benjamin P. Foreman's pro se Motion To Set Aside § 2255 Denial Judgment In Light Judicial Fraud By The Court was time-barred as it **recharacterized** Foreman's Judicial Fraud By The Court under either Rule 60 (b) (3), however that section specifically addresses if fraud, misrepresentation, or misconduct committed by an opposing party (not the District Court itself). (emphasis added). Furthermore, Petitioner Foreman, states that Rule 60 (b) (6), is not the proper remedy to raise a claim of **fraud by the court**, however as Petitioner Foreman filed his Fraud By The Court under **Rule 60 (d) (1)**, it was the proper remedy to raise such claim of fraud by the court, see *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1359 (11th Cir. 2014) (The Federal Rules of Civil Procedure 60 (d) (1) "preserve a court's historical equity power to 'entertain an independent action to relieve a party from a judgment, order, or proceeding.'").

Thus, Petitioner Foreman, argues firmly that there can be **no doubt** that Judge Bell has the authority pursuant to Rule 60 (d) (1) to entertain the cause of action as it maybe filed at **any time**, see *Mitchell v. Rees*, 651 F.3d 593, 594 (6th Cir. 2011) (Rule 60 (d) (1), the Rule 60 savings-clause provision. Such an action has **no time limitation**).

Therefore, Petitioner Foreman, argues firmly that his properly

filed Rule 60 (d) (1) filed Rule 60 (d) (1) motion for Judicial Fraud By The Court forms the basis of a viable claim as Benjamin P. Foreman lodged a claim that Judge Robert H. Bell committed Fraud By The Court, thus the U.S. Supreme Court's Ruling in Marshall v. Holmes, 141 U.S. 589, 596 (1891), supports that fraud is a proper basis to lodge a claim under the purview of Rule 60 (d) (1), that the District Court and Sixth Circuit's decision to the contrary was **erroneous**. (emphasis added).

Petitioner Foreman, argues that the Judicial Fraud By The Court involves procedural defects that the District Court has blatantly and arbitrary distortment of the procedures entailed with the Rules-Section 2255 Proceedings, see Rule 4 (b) "standard for issuance of Show Cause"; and Rule 8 (a) "determining whether to hold a hearing". Furthermore, Petitioner Foreman, asserts that 28 U.S.C. § 2255 (b), mandates that the "motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court "shall" cause notice thereof to be served upon the United States attorney, grant a make findings of fact and conclusions of law with respect thereto." Failing to consider three sworn affidavits that were properly referenced to in Foreman's 2255 Memorandum of Law as exhibits to support his ineffective assistance of counsel as to Argument One and Foreman's Argument Eight that his guilty plea was invalid because it was based on false promises by the prosecution and defense counsel.

Procedures for post-conviction review may not "transgress [] any recognized principle of fundamental fairness in operation." See Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 69, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009). Thus, Petitioner Foreman, asserts that when Congress

affords a prisoner as they have with 28 U.S.C. § 2255 federal post-conviction remedy, due process requires they also have access to procedures that are "fundamentally [] adequate to vindicate the substantive rights provided." Id. To make out a procedural due process violation in this context, a prisoner must show (1) a substantive "parent right" that derives from a source such as Congress's statutory post-conviction scheme, and (2) lack of procedures adequate to assert and protect that right. Id. at 68.

Here, Petitioner Foreman, argues firmly that retired U.S. District Court Robert H. Bell violated his procedural due process rights when he committed Judicial Fraud By The Court, thus to establish a meritorious due process of law Fifth Amendment violation Foreman will establish the two prongs necessary to establish a due process violation.

(1) a substantive "parent right" that derives from a source such as Congress's statutory post-conviction scheme;

In the instant case, Petitioner Foreman, asserts that a substantive "parent right" is derived from Congress's statutory authority for a federal prisoner to file a Motion To Vacate, Set Aside, Or Correct A Sentence under 28 U.S.C. § 2255. Thus, Petitioner Foreman, argues that prong number one is established herein.

(2) lack of procedures adequate to assert and protect that right;

Petitioner Foreman, contends that 28 U.S.C. § 2255, Motion To Vacate, Set Aside, Or Correct A Sentence has specific procedures that must be employed to adequately assert and protect a federal prisoners rights, however in the case herein the District Court disregarded Rule 4 (b) "standard for issuance of Show Cause"; Rule 8 "determining whether to hold a hearing" and the mandate of 28 U.S.C. § 2255 (b); as well failing to consider three sworn

affidavits in which were properly referenced and attached to Foreman's 2255 Memorandum of Law. The repeated failure to ignore Foreman's coerced guilty plea ineffectiveness within his 2255 Brief and sworn affidavit has lead to Benjamin P. Foreman being prevented fully developing the record within his 2255 Proceedings even within Foreman's Judicial Fraud By The Court the District Court and the Sixth Circuit **never** addressed the fact that Benjamin P. Foreman's cocerced guilty plea ineffectiveness claim has **never been addressed** upon the merits. (emphasis added). The lack of the procedure employed by the District Court clearly violated Benjamin P. Foreman's due process of law rights as they were fundamentally inadequate to vindicate the substantive rights of Petitioner Foreman, thus his procedural due process of law rights were violated in the case at bar.

Furthermore, Petitioner Foreman, asserts that the District Court violated his Right of Court Access by blatantly and arbitrary refusal to issue a Show Cause Order even though Foreman met the legal standard under Rule 4 (b); refusing to conduct a evidentiary Hearing even though Foreman's "motion" demonstrated that the case does not conclusively show that he is not entitled to relief, thus consistent with 28 U.S.C. § 2255 (b), the Court was **required** to issue Show Cause Order and conduct a Hearing, however the District Court totally disregarded **procedures** and **properly presented sworn affidavits**, therefore it follows that the District Court effectively denied Benjamin P. Foreman his constitutional right to **court access** in violation First Amendment Rights, and Privileges and Immunities Clause of Article IV of the Constitution, see Murray v. Giarrantano, 492 U.S. 1, 11 n. 6, 109 S. Ct. 2765 (1989).

and in violation of his Fifth Amendment Rights to due process of law rights.

Thus, Petitioner Foreman, asserts that it is debatable amongst jurists of reason that his First and Fifth Amendment Rights were violated in the case herein. See Slack, 120 S. Ct. at 1604.

Second, Petitioner Foreman, contends that he must prove to this Honorable U.S. Supreme Court that the soundness of the procedural ruling is debatable, see Slack, 120 S. Ct. at 1604.

Petitioner Foreman, states that the Sixth Circuit Court of Appeals held that Foreman was not entitled to relief via Rule 60 (d) (1) independent action because an independent action is 'available only to prevent a grave miscarriage of justice' quoting United States v. Beggerly, 524 U.S. 38, 47 (1998). However, Petitioner Foreman, contends that because he was denied his due process right to a full and fair OPPORTUNITY to present and fully develop his one and only chance to demonstrate that he is being confined **illegally** in violation of his Fifth and Sixth Amendment Rights as the result of Foreman having a 25-year sentence, thus such an **INJUSTICE** should constitute a a grave miscarriage of justice when viewed by the fact that a federal judge committed **FRAUD** undermined the intergrity of the judicial proceedings and his oath of office, thus relying upon **Marshall v. Holmes**, 141 U.S. 589, 596 (1891), Benjamin P. Foreman, argues firmly that this claim is in fact debatable amongst jurists of reason, thus a C.O.A. should issue in the case at bar. See Slack, 529 U.S. at 484 (2000).

QUESTION # TWO:

Whether the Sixth Circuit Court of Appeals plainly erred by holding that Foreman's Civil Procedure 60 (b) (1) raising a

Mistake In Law was not filed within one-year of the two relevant orders and furthermore by holding that pursuant to Civil Procedure 60 (b) (6), that Foreman showed "no exceptional or extraordinary circumstances," however the change in policy by the Department of Justice demonstrated that the District Court's procedural bar ruling could no longer be enforced, thus entitling Foreman to a merits Ruling as to his previously BARRED sentencing/ appellate ineffectiveness claims and coerced guilty plea ineffectiveness claim which violates his Sixth Amendment Rights of the U.S. Constitution ?

When deciding whether to grant or deny a Certificate of Appealability this determination has two components, "one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Slack, 529 U.S. 473, 484 (2000).

If a district or appellate court denies a § 2255 petition on procedural grounds, a circuit or supreme court judge must also consider whether "jurists of reason" could disagree with the procedural ruling. Slack, 529 U.S. 473, 484 (2000).

First, Petitioner Foreman, argues firmly the first prong of Slack, will be demonstrated below herein that the petition raised a debatable constitutional question, Slack, 120 S. Ct. at 1604.

At page 6 and 7, see Doc. # 78 Filed: 10/18/16, the District Court held in relevant part as follows:

"Movant also brings a Rule 60 (b) (1) motion based upon a mistake in law. (ECF No. 77). Movant raises this claim reliance on the Department of Justice's new policy that it would no longer enforce previously executed waivers of claims of ineffective assistance of counsel. Movant argues that the Court has not ruled on the merits as to Exhibit A, Movant's memorandum of law. (ECF No. 5-1).

Along with the above-mentioned affidavits, this exhibit was attached to Movant's for leave to file excess pages, which the Court denied. (ECF No. 13)" See page 6, at line 10-16.

See page 7, at last paragraph, see Doc. # 78 page 7 of 8:

In addition, Movant claims that the Court did not rule on the merits of its ineffective assistance of counsel claims because Movant's waiver. Yet the Court examined Movant's claim of ineffective assistance of counsel because it may have affected the validity of his plea agreement. The Court concluded that the claim contradicted the record, and was "without merit."

Petitioner Foreman, argues firmly that a thorough review of Foreman's Summarily Dismissal of 2255 Motion, see Doc. # 12, see page 6, the District Court states, Foreman identifies seven (7) examples of erroneous assistance when he contends influence his guilty plea. In you turn to page 7, the District Court states after he lists the seven examples of erroneous assistance which he contends influences his guilty plea you will see that the District states (Dkt. No. 5, Mem. in Supp. of § 2255 Mot. 19-20.). See Appendix E (A copy of Foreman's Summarily Dismissal Opinion decided by the Honorable Robert H. Bell on July 19, 2010, at page 6 and 7); and Appendix F (A copy of Foreman's 2255 Memorandum of Law filed on January 12, 2009, see Doc. # 5-2, at pages 22 of 72 through 30 of 72). However, Petitioner Foreman, asserts that the District Court **never** adjudicated a merits ruling as to pages 22 of 72 through 30 of 72 as there were previously BARRED by Foreman's collateral-attack waiver provision within his plea agreement, thus a thorough review of the District Court's July 19, 2010, 14-page Summarily Dismissal Opinion Denying 2255 Motion reveals and supports Foreman's claim herein. In mid-August of 2010, Petitioner Foreman filed his pro se Motion To Alter Or Amend A Judgment pursuant to Rule 59 (e), on October 18, 2010, the District Court held as follows at page 8, Doc. # 21 which states

in relevant part:

"In summary, this Court did not err by finding that the guilty plea and appellate waiver were not the result of ineffective assistance of counsel, by not addressing one of three arguments that were correctly determined to be waived by the plea agreement, and in not holding an evidentiary hearing."

Specifically, Petitioner Foreman, argued within his Rule 59 (e) motion that the District Court failed to rule on all the claims raised within his 2255 motion, see Appendix G (A copy of Cover Page of Foreman's pro se Motion To Alter Or Amend A Judgment at pages 23 of 34 and 24 of 34, see Doc. # 15 & Rule 59 (e) Opinion at page 1 and page 8).

Argument VI. states in relevant part as follows:

In the case at bar Judge Bell abused his discretion in failing to address the merits of the following arguments of Movant Foreman's § 2255 Memorandum of Law as follows:

2. Trial counsel's failure to object to improper career offender enhancement violating Foreman's Sixth Amendment Rights.

6. Judge Bell failed to address the fact that Foreman submitted as a exhibit Dismissal Order from 30th Circuit Court of Foreman's 02' Delivery conviction that was used as the second predicate offense to designate him as a career offender. Although raised in Foreman's § 2255 motion that the 02' Delivery charge is a VOID judgment Judge Bell fails to address claim altogether.

One more important point of emphasis to this Honorable U.S. Supreme Court the **only** claims of ineffective assistance of counsel that the District Court addressed upon the merits were the seven (7) exmaples that influenced the guilty plea which were raised within Foreman's Plea-Bargaining Stage ineffective assistance of counsel claims, see Doc. # 5-2, at pages 20 of 72 through page

22 of 72, see Appendix H (A copy of Foreman's Memorandum of Law at pages 20-22, filed on January 12, 2009, see Doc. 5-2), however within the District Court's Summarily Dismissal Opinion at page 7, see Doc. 13, (Dkt. No. 5, Mem. in Supp. of § 2255 Mot. 19-20), thus the seven (7) examples of Foreman's **Plea-Bargaining Stage** ineffectiveness are listed at page 20 of 72 through 21 of 72, see Doc. # 5-2, however at no time within the District Court's 14-page Summarily Dismissal Opinion Denying Foreman's 2255 Motion To Vacate did the lower court **ever adjudicate the merits** of Benjamin Preston Foreman's Sentencing ineffective assistance of counsel, see Doc. # 5-2, at pages 22 of 72 and Appellate ineffective assistance of counsel, see Doc. # 5-2, at pages 29 of 72 through 30 of 72, thus as the District Court ruled after Petitioner Foreman complained of this fact in his Rule 59 (e) motion the District Court held the **Sentencing/ Appellate ineffectiveness claim** "were correctly determined to be waived by the plea agreement," see Doc. # 21, at page 8. (emphasis added).

Petitioner Foreman, argues firmly that in light of the DOJ's new policy issued on October 14, 2014, **"no longer"** enforcing previously executed collateral-attack waivers that because 28 U.S.C. § 2255 (b), requires a findings of fact and conclusion of law and, thus there has **never** been a final judgment entered consistent with the mandate of the Fed. R. Civ. 54 (b) and 58, see *Stewart v. Bishop*, 403 F.2d 674, 680 (8th Cir. 1968); and *Clisby v. Jones*, 960 F.2d 925, 936-38 (11th Cir. 1992). Therefore, Benjamin P. Foreman argued a meritorious Sixth Amendment constitutional violation of ineffective assistance of counsel during his sentencing phase and appellate stage as he is not a Chapter Four Career Offe-

nder because one of two predicate offenses Delivery charge was pending a final judgment at the time Foreman was sentenced on September 7, 2006, thus a viable objection should have been made to the Presentence Investigation Report and during the sentencing proceedings just 5 days after Foreman's federal sentencing his Delivery charge was DISMISSED rendering it to be a VOID JUDGMENT, however "no action" was taken by Foreman's trial counsel or appellate counsel, thus "jurists of reason" could find it debatable whether he states a valid Sixth Amendment constitutional violation. Slack, 529 U.S. 473, 484 (2000). See Appendix I.

Second, Petitioner Foreman, contends that he must prove to this U.S. Supreme Court that his Question # Two claim that the soundness of the procedural ruling is debatable or wrong, Slack, 120 S. Ct. at 1604.

Petitioner Foreman, argues firmly that he will demonstrate that a court could resolve the (procedural) issue in a different manner, thus a C.O.A. must issue, see Barefoot, 463 U.S. at 893 n.4, 103 S. Ct. 3394 n. 4.

In the instant case, Petitioner Foreman, asserts that the District Court and the Sixth Circuit's procedural ruling that his Rule 60(b)(1) arguing a viable Mistake in Law was rendered in the District Court's December 23, 2015, Transfer Order of his Rule 60 (b)(6) motion to the Sixth Circuit Court of Appeals and the Sixth Circuit's on July 08, 2016 affirmance thereto is in direct conflict of the U.S. Supreme Court precedents in Gonzalez v. Crosby, 545 U.S. 524, 532-33 (2005), because Foreman's Defects #1 and 2 constituted a true Rule 60(b) as it merely challenges the integrity of the original 2255 proceedings and it was not a "second or

successive 2255" only the new claim raised by Attorney Gary T. McTee was a "second or successive 2255 motion" as Petitioner Foreman conceded to that point with the Sixth Circuit, however argued firmly that a VACATE and REMAND was required consistent with U.S. Supreme Court precedents in Gonzalez v. Crosby, 545 U.S. 524, 532-33 (2005), as to Defects #1 and 2. (emphasis added).

Petitioner Foreman, states that the distinction between his facts and circumstances and that of the U.S. Supreme Court's GRANT of Writ of Certiorari than the dismissal thereafter over a well-articulated dissent of Justice Stevens, see Abdur' Rahman v. Bell, 537 U.S. 88 (2002), is the fact that in Abdur the Sixth Circuit deemed his January 18 and February 11, 2002 legal motions to be "second or successive 2255" applications, however the Sixth Circuit denied Foreman a C.O.A. and thereafter denied Panel Rehearing and Rehearing En Banc. (emphasis added).

Thus, Petitioner Foreman, argues firmly that this Honorable U.S. Supreme Court should GRANT Foreman's Writ of Certiorari as the result of it being debatable amongst jurists of reason whether Foreman's Rule 60(b)(1) Mistake in Law were timely filed within one-year from the District Court's Transfer Order on December 23, 2015 Rule 60(b)(1) motion was filed within 10 months after Transfer Order handed down; and the Sixth Circuit's ORDER on July 08, 2016 (Rule 60(b)(1) motion was filed within 2 months after Sixth Circuit's Order was issued), thus in light of Justice Stevens' well-articulated dissent in Abdur, 537 U.S. 88 (2002), this procedural ruling is "debatable" amongst jurists of reason, thus a C.O.A. should be issued.

Part II

Petitioner Foreman, asserts also that the District Court and the Sixth Circuit held that relief was not available via Federal Rules of Civil Procedure 60(b)(6), because Foreman did not show "exceptional or extraordinary circumstances" justifying relief, see pg. 2 of the Sixth Circuit three-page Opinion.

However, Petitioner Foreman, argues firmly that where here denying Rule 60(b) relief is precluding examination of his sentencing/appellate ineffective assistance of counsel claims within his original 2255 Proceedings, thus no full merits of his 2255 Motion to Vacate have been resolved by the District Court, therefore federal courts have allowed for more leniency in re opening cases, see *Seven Elves*, 635 F.2d 396, 402 (5th Cir. 1981); *Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207, 210 (D.C. Cir. 1954); and *United States v. Fernandez*, 2014 U.S. Dist. LEXIS 74752 (E.D. La., June 2, 2014) (Reopening 2255 Proceedings after more than twenty (20) years pursuant to Rule 60(b)(6) motion because the District Court failed to adjudicate the merits of all claims presented within Fernandez's 2255 Motion, thereafter VACATED convictions and GRANTED a new trial). (emphasis added).

Thus, Petitioner Foreman, asserts that the fact that he is "actually innocent" of his erroneous Chapter Four Career Offender and he properly raised meritorious ineffective assistance of counsel claims of sentencing/appellate stage ineffectiveness in violation of his Sixth Amendment Rights of the U.S. Constitution, therefore in light of the U.S. Department of Justice October 14, 2014, see Appendix J, change in policy "no longer" enforcing previously executed collateral-attack waivers of claims of

ineffective assistance of counsel this certainly should establish "exceptional or extraordinary circumstances" to justify granting relief pursuant to Rule 60(b)(6), because the District Court's procedural bar is now inequitable and should no longer continue to be enforced as it significantly prejudiced Benjamin P. Foreman as "if" the collateral-attack waiver provision is "no longer" enforced Mr. Foreman should have been released on supervised release in September of 2016, thus the interests of JUSTICE would be better served by addressing the merits. Day, 547 U.S. at 210, 126 S.Ct. 1675 (2006). Moreover, Rule 60(b)(6) "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice'", see Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988). Because Benjamin Preston Foreman's 25-year sentence is based in part upon an erroneous Career Offender designation in which he received an 'extra' 10 YEARS in federal prison and his collateral-attack waiver provision in which is "no longer" enforceable, thus this should surely justify "exceptional or extraordinary circumstances" to accomplish (consistent with Rule 60(b)(6)), JUSTICE in the matter herein. (emphasis added).

Lastly, Petitioner Foreman, argues that the D.C. Circuit Court of Appeals recently held in Price v. USDOJ, et al, 865 F.3d 676, 682-83 (D.C. Cir. Aug. 4, 2017) (The D.C. Circuit held: "After all, a defendant can never waive his right to bring a colorable claim of ineffective assistance of counsel, even though such claims undermine finality.") Since the DOJ's new policy was handed down on September 14, 2014, no longer enforcing previously

executed waivers of claims of ineffective assistance resulting in prejudice or when the defendant's ineffective assistance claim raises debatable issue that a court should resolve, thus in the wake of the DOJ's new policy the Eleventh Circuit Court of Appeals has GRANTED at least three Certificate of Appealability applications, see *Jones v. United States*, 582 Fed. Appx. 845 (11th Cir. 2014) (In light of this new policy, and in response to our directive asking the United States to address its impact on the instant case, the Government has withdrawn its reliance on Jeremy Jones' collateral attack waiver. As a result, the judgment of the District Court is VACATED and the case is REMANDED with instruction to afford Jones an evidentiary hearing on his ineffective-assistance-counsel claim. VACATED and REMANDED, with instructions.); *Marshall v. United States*, 592 Fed. Appx. 919 (11th Cir. 2015) (same); and *Murdock v. United States*, 589 Fed. Appx. 526 (11th Cir. 2015) (same). (emphasis added).

Therefore, Petitioner Foreman, argues firmly that a court could resolve the issues in a different manner, thus in light of Day, Marshall, Murdock and Jones, see Barefoot, 463 U.S. at 893 n. 4, a C.O.A. should issue and the U.S. Supreme Court should issue a directive to the United States asking to address its impact on Foreman's case as Benjamin Preston Foreman has never received a merits Ruling as to Sentencing/Appellate ineffective assistance of counsel claim in violation of his Sixth Amendment Rights of the U.S. Constitution, thus a C.O.A. should issue as to Question #Two, see Slack, 529 U.S. at 484 (200).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x Benjamin P. Foreman

Date: November 13, 2017