NO. 23 - 6020

IN THE

SUPREME COURT OF THE UNITED STATES

HENRY ZABALA-ZORILLA
Peitioners,

vs.

SUPERINTENDENT PHOENIX, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Henry Zabala-Zorilla
#LD4282
SCI-Phoenix
1200 Mokychic Drive
Collegeville, PA 19426

QUESTION(S) PRESENTED

In *Kemp v. United States,* 142 S. Ct. 1856, 213 L. Ed. 2d 90 (2022), this Honorable Court held that a "mistake," pursuant to Rule 60(b) (1), included a mistake of law: that is, where a judge makes a legal error, the aggrieved party must move to correct that error under Rule 60(b) (1) rather than the catch-all provision of Rule 60(b) (6). Id. at 1861-1862.

The Third Circuit Court of Appeals refusal to apply *Kemp* to a judges legal error without first seeking authorization from the Third Circuit Court of Appeals to file a second successive habeas corpus petition under Section 2254 before addressing Petitioner's *Kemp* claim under Fed.R.Civ.P. 60(b)(1), conflicts with this Court's precedent.

This case, thus, presents the following questions:

I. Whether the Third Circuit Court of Appeals erred in not finding the Disrtict Court's decision rested upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact by requiring the Petitioner to seek authorization from the Third Circuit Court of Appeals to file a successive habeas corpus petition under Section 2254, before reviewing the merits of Petitioner's judicial error allegations pursuant to *Kemp*?

II. Whether the Third Circuit Court of Appeals erred in finding Petitioner's Rule 60(b)(1) motion predicated upon legal judicial error was untimely?

LIST OF PARTIES

[X] All parities 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.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

STATUTES AND RULES

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 to the petition petition and is

[X] reported at Henry Zabala-Zorilla v. Superintendent Phoenix SCI; et al., Case No. 23-1750; 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

[X] reported at Henry Zabala-Zorilla v. Tammy Ferguson, E.D. Pa. Civ. No 19-cv-00544; 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 the 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 August 16, 2023.

[X] 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: _____, 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) on 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

Federal Rules of Civil Procedure–Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may 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. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or

proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

STATEMENT OF THE CASE

As the Pennsylvania Superior Court has summarized this case: "At several docket numbers, the Commonwealth charged Petitioner with multiple sex offenses and related crimes against multiple victims. Under some pretext or other, Petitioner eventually took each victim back to his residence, where he held his victim against her will and sexually violated her." *Commonwealth v. Zabala-Zorilla,* No. 841 MDA 2016; No. 842 MDA 2016 (Pa. Super., June 1, 2018).

At trial, Megan Collins testified that, during the hours Zabala held her captive, she saw an older couple on the first floor of the house who later went upstairs. She also saw someone she identified as Zabala's son. Collins banged on the son's door as she tried to escape the house, but he ignored her and turned the television up. According to Collins, the son also entered the room while Zabala was raping Collins, at which time she asked him for help, but he just "grinned at" her and left the room. See *Zabala-Zorilla v. Ferguson,* 2021 US Dist LEXIS 143853 at *19-20.

On March 25, 2013, a jury sitting in the Court of Common Pleas for Berks County acquitted Zabala of charged conduct involving two alleged victims, Iriz Guzman and Christina Totaro, and was not able to reach a verdict as to a third alleged victim, Barbara Hodge-Velez. *Commonwealth v. Zabala-Zorilla,* No. 1014 MDA 2013, 1017 MDA 2013 at 3 (Pa. Super. Mar. 25, 2014). Nevertheless,

Zabala was convicted in two joined cases of committing crimes relating to Megan Collins and Christina Donia. Id.

For purposes of this instant Petition for Writ of Certiorari, Petitioner's facts will focus on his habeas corpus proceedings which are germane to the instant proceedings. A complete factual and procedural history can be seen in Petitioner's Motion to Vacate Judgment or Order pursuant to Fed.R.Civ.P. 60(b) at 4-10.

On February 6, 2019, Petitioner filed a *pro se* petition for habeas corpus relief. The District Court Judge Mark A. Kearney appointed the Federal Defender to represent him. The Federal Defender filed an Amended Petition on March 19, 2019. On March 20, 2019, this matter was stayed pending the resolution of Zabala's second PCRA petition in the Pennsylvania courts. The PCRA court dismissed Zabala's second PCRA petition as untimely on March 3, 2020 and the Pennsylvania affirmed the dismissal on October 22, 2020.

On December 16, 2020, the stay was lifted in the present habeas matter. Petitioner's counsel filed a Memorandum of Law on April 1, 2021. Counsel specified in the Amended Petition and in the Memorandum of Law that she was adding to the claims originally raised *pro se* in Petitioner's original petition.

On August 2, 2021, Magistrate Judge Scott W. Reid recommended that Petitioner's claim regarding ineffective assistance of counsel for failing to investigate/call witnesses be denied with prejudice; and that the remainder of the

claims be dismissed with prejudice.

In denying relief, Magistrate Judge Reid's Report and Recommendation found Petitioner's ineffective assistance of counsel claim for failing to investigate/call witnesses could not prevail because, *"the certification of Henry Zabala-Zorilla, Jr., does* ***not*** *say he was prepared and willing to testify at trial on Appellant's behalf." See Zabala-Zorilla v. Ferguson,* 2021 US Dist LEXIS 143853 at *26. (Bold in original & emphasis added).

The Court's rationale for not granting relief on this claim was based on Petitioner not including the "available and willing to testify language," when presenting this claim in the state courts. *See Zabala-Zorilla v. Ferguson,* 2021 US Dist LEXIS 143853 at *26.

On February 8, 2022, District Judge Kearney approved and adopted Judge Reid's Report and Recommendation. A timely notice of appeal and formal request for the issuance of a certificate of appelability ("COA") was filed. On August 4, 2022, the Third Circuit Court of Appeals denied Petitioner's request for the issuance of a COA. *See Zabala-Zorilla v. Superintendent of Phoenix SCI,* 2022 U.S. App. LEXIS 23228.

On March 13, 2023, Petitioner filed a Motion to Vacate Judgment or Order pursuant to Fed.R.Civ.P. 60(b) where he argued Magistrate Judge Reid's Report and Recommendation denying Petitioner's ineffective assistance of counsel claim

for failing to investigate/call witnesses could not prevail because, *"the certification of Henry Zabala-Zorilla, Jr., does* ***not*** *say he was prepared and willing to testify at trial on Appellant's behalf,"* was an error of law. *See Zabala-Zorilla v. Ferguson,* 2021 US Dist LEXIS 143853 at *26. (Bold in original & emphasis added).

The Distict Court derived this requirement not from federal law, but from Pennsylvania's five-factor test. Under that test, Pennsylvania courts generally require a defendant to show that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) *the witness was willing to testify for the defense*; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

As a result, the Superior Court concluded Mr. Zabala, Jr., "was unavailable at trial, defense counsel cannot be deemed ineffective for failing to present his testimony." *See Zabala-Zorilla v. Ferguson,* 2021 US Dist LEXIS 143853 at *27. Based upon Pennsylvania's fourth requirement-showing a witness's willingness to testify before, the Court found that there is no basis under AEDPA for disturbing the Superior Court's conclusion that trial counsel was not constitutionally ineffective under Strickland for failing to present Zabala, Jr., as a witness. *See Zabala-Zorilla v. Ferguson,* 2021 US Dist LEXIS 143853 at *30

The Court's rationale for not granting relief on this claim was based on Petitioner not including the "available and willing to testify language," when presenting this claim in the state courts. *See Zabala-Zorilla v. Ferguson,* 2021 US Dist LEXIS 143853 at *26.

In *Kemp v. United States,* 142 S. Ct. 1856, 213 L. Ed. 2d 90 (2022), this Honorable Court held that a "mistake," pursuant to rule 60(b) (1), included a mistake of law: that is, where a judge makes a legal error, the aggrieved party must move to correct that error under Rule 60(b) (1) rather than the catch-all provision of Rule 60(b) (6). Id. at 1861-1862.

In *Williams v. Superintendent Mahanoy SCI,* ___ F.4th ___ , 2022 U.S. App. LEXIS 23009, 2022 WL 3453339, at *11-12 (3d Cir. 2022), the Third Ciruit Court of Appeals recently made clear that they "have sometimes examined a state court's finding that a witness would have been unwilling to testify, as if it mattered. *See Rolan v. Vaughn,* 445 F.3d 671, 681 (3d Cir. 2006). Today, we make clear that, absent a testimonial privilege, willingness to testify does not matter."

On March 23, 2023, the Respondents filed a Response to Motion to Vacate Judgment or Order pursuant to Federal Rules of Civil Procedure 60(b). On March 31, 2023, the Honorable Mark A. Kearney issued a Memorandum and Order denying Petitioner's Motion to Vacate Judgment or Order pursuant to Fed.R.Civ.P. 60(b) holding,

"His motion under Rule 60(b)(1) is untimely. And even if he brought a timely motion, his effort represents an unauthorized successive habeas because we analyzed his fulsome habeas petition on the merits following Judge Reid's extensive Report and Recommendation. The incarcerated person cannot establish a basis to vacate our habeas denial as affirmed by the Court of Appeals. We deny his petition."

See, 3/31/23 Memorandum of the District Court at 1.

The District Court's denial of Petitioner's Motion to Vacate Judgment or Order is untimely filed under under Federal Rules of Civil Procedure 60(b). Petitioner then sought the Issuance of a Certficate of Appealability with the Third Circuit Court of Appeals. On August 16, 2023, the Third Circuit Court of Appeals denied Petitioner's request for a certificate of appealability and held:

"The District Court denied Zabala-Zorilla's Rule 60(b) motion as untimely and as an unauthorized second or successive § 2254 petition. In order to obtain a certificate of appealability, Zabala-Zorilla must show that jurists of reason would debate both the District Court's denial of his Rule 60(b) motion and the merits of his underlying habeas claim. Bracey v. Superintendent Rockview SCI, 986 F.3d 274, 283 (3d Cir. 2021). Jurists of reason would not debate the District Court's denial of the Rule 60(b). See Fed. R. Civ. P. 60(b)(c)(1); Gonzalez v. Crosby, 545 U.S. 530-32 (2005)(holding that a post-judgment motion in a habeas case should be treated as a second or successive § 2254 petition if it advances a claim for habeas relief). Nor would jurists of reason debate the underlying merits of his habeas claim of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687-96 (1984)(describing the standard for claims of ineffective assistance of counsel)."

See 8/16/23 Order of the Third Circuit Court of Appeals at 1-2

Petitioner asserts the Third Circuit Court of Appeals erred in not finding the

the the Disrtict Court's decision rested upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact by finding that Petitioner's reliance upon this Court's decision in *Kemp* was untimely and as an unauthorized second or successive § 2254 petition. As Petitioner *"challenges a defect in the integrity of the federal habeas proceedings,"* the Third Circuit Court of Appeals erred in finding the District Court *did not* respectfully erred in finding that Petitioner's arguments presented under section 60(b)(1) is a second or successive section 2254 petition. This forms the basis of the instant Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. **Whether the Third Circuit Court of Appeals erred *in not* finding the District Court abused it's discretion in finding the instant Rule 60(b) Motion represents an unauthorized successive habeas corpus petition.**

First, the Petitioner claims the Third Circuit Court Appeals erred in not finding the District Court abused its discretion in finding the instant Rule 60(b) Motion represents an unauthorized sucessive habeas corpus petition. In finding that Petitioner's Rule 60(b) Motion represents an unauthorized sucessive habeas corpus petition, the District Court determined:

> "Mr. Zabala-Zorilla's Rule 60(1) motion directly challenges "the substance of the federal court's resolution of a claim on the merits." He asks us to reconsider the merits of his ineffective assistance of counsel claim considering *Williams*. Although Mr. Zabala-Zorilla argues he is not challenging the merits of our decision, but "some defect in the integrity of the federal proceeding[,]" he is directly challenging a claim we decided on the merits. Because Mr. Zabala-Zorilla's Rule 60(b) motion challenges our merits-based decision on his ineffective assistance of counsel claim, it is a successive petition for which he first needs to get approval from our Court of Appeals."

See, 3/31/23 Memorandum of the District Court at 11.

Petitioner argues that he is not directly challenging a claim previously decided on the merits, but rather, Petitioner asserts a "defect in the integrity of the federal habeas proceedings," where the District Court found that there was no basis under AEDPA for disturbing the Superior Court's conclusion that trial counsel was not constitutionally ineffective under *Strickland* for failing to

demonstrate Zabala, Jr's witness's willingness to testify at trial. Petitioner argues in light of the new intervening change in law announced in *Williams* the District Court made a mistake pursuant to *Kemp* in not disturbing the Superior Court's conclusion based on it's mistaken belief Petitioner had to prove the witness was willing to testify on his behalf. Petitioner asserts this was a "defect in the integrity of the federal habeas proceedings."

In *Williams,* the Third Circuit Court of Appeals made it clear that "absent a testimonial privilege, willingness to testify does not matter." Id. 2022 U.S. App. LEXIS *11-12.

The *Williams* Court further held, "[a]bsent extenuating circumstances, such as the existence of a privilege or the witness's incapacity or death, whether a witness is ready and willing to testify is irrelevant since defense counsel can compel testimony through a trial subpoena." Id. 2022 U.S. App. LEXIS *12.

The starting point for analyzing whether the instant motion is actually an unauthorized second or successive habeas petition is *Gonzalez v. Crosby,* 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005). In *Gonzalez,* the Supreme Court addressed the circumstances in which the use of Rule 60(b) is "inconsistent with" AEDPA's second or successive petition requirements and, consequently, unavailable to a state prisoner seeking habeas relief. 545 U.S. at 526 (addressing "whether, in a [section 2254] habeas case, such motions are subject to the

additional restrictions that apply to 'second or successive' habeas corpus petitions under [AEDPA], codified at 28 U.S.C. § 2244(b)").

This Court explained that federal courts must construe a Rule 60(b) motion as a "second or successive habeas corpus application" when it advances "one or more 'claims.'" Id. at 531-32 (quoting 28 U.S.C. § 2244(b)(1), (2)). The Court observed that "[i]n most cases, determining whether a Rule 60(b) motion advances one or more 'claims' will be relatively simple. A motion that seeks to add a new ground for relief . . . will of course qualify." Id. at 532. In addition, this Court instructed that a petitioner is actually advancing a habeas claim in a Rule 60(b) motion if the petitioner "attacks the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." Id. (footnote omitted).

Similarly, a motion seeking to present newly discovered evidence in support of a claim that the court previously denied represents a habeas claim. Id. In contrast, a motion is a "true" Rule 60(b) motion if it challenges a procedural ruling made by the district court that precluded a merits determination of the habeas petition, or "challenges a defect in the integrity of the federal habeas proceedings," such as an assertion that the opposing party committed fraud upon the court. Id. at

532, n.4.

A. The Applicability of *Kemp v. United States*:

In *Kemp,* this Court recently held that a "mistake," pursuant to rule 60(b)(1), included a mistake of law: that is, where a judge makes a legal error, the aggrieved party must move to correct that error under Rule 60(b)(1) rather than the catch-all provision of Rule 60(b)(6). Id. at 1861-1862.

This Court in *Kemp* considered whether judicial error was properly addressed under the one-year period specified by Rule 60(b)(1) for "mistake, inadvertence, surprise, or excusable neglect," or whether such errors could also be addressed "within a reasonable time" under the catch-all exception set forth in Rule 60(b)(6). *Kemp,* 142 S. Ct. at 1860. Proceeding from the definition of the term "mistake," the Court concluded that "Rule 60(b)(1) covers all mistakes of law made by a judge." Id. at 1862. In so doing, the Court rejected the Government's argument that Rule 60(b)(1) pertained only to "obvious" legal errors, while also rejecting Kemp's argument that the subsection was limited to "non-judicial, non-legal errors." Id. at 1862-63.

Rule 60(b)(6) applies only if subsections (1) through (5) are inapplicable and, even then, only under "extraordinary circumstances" or to prevent extreme and undue hardship, which is not the case here. *See Kemp,* 142 S. Ct. at 1861 ("This last option is available only when Rules 60(b)(1) through (b)(5) are

inapplicable."). *Kemp* marks a shift in the Court's conception of the function of Rule 60(b)(6) which portends well for the finality and error correction and an increased role in constitutional development for the federal courts. If only, in inadvertent legal errors are "mistakes," all other legal error would fit elsewhere in Rule 60(b)(6), which collectively covers the waterfront of grounds for reopening.

As stated *infra,* the *Kemp* Court rejected the litigants' efforts to limit Rule 60(b)(1) to "obvious" or "non-judicial, non-legal" errors, *Kemp,* 142 S. Ct. at 1862-63, and instead extended it to include "all mistakes of law made by a judge," Id. at 1862. Moreover, *Kemp* did not purport to alter existing case law restricting the applicability of Rule 60(b)(6), including the "reasonable time" requirement set forth in Rule 60(c)(1). And, as noted earlier, *Kemp* confirmed that relief under Rule 60(b)(6) was "available only when Rules 60(b)(1) through (b)(5) are inapplicable." Id. at 1861 (*citing Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 863 n.11, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)).

As the *Kemp* Court concluded that "Rule 60(b)(1) covers all mistakes of law made by a judge," Petitioner's assertion regarding the District Court's mistake of law was reviewable by the District Court and the Thrid Circuit Court of Appeals. *See Kemp,* Id. at 1862.

Here, Petitioner argues in light of the new intervening change in law announced in *Williams,* the District Court made a mistake in not disturbing the

Superior Court's conclusion based on it's mistaken belief Petitioner had to prove the witness was willing to testify on his behalf.

In *Kemp,* the Supreme Court held that a "mistake," pursuant to Rule 60(b)(1), included a mistake of law: that is, where a judge makes a legal error, the aggrieved party must move to correct that error under Rule 60(b)(1) rather than the catch-all provision of Rule 60(b)(6). Id. at 1861-1862.

As Petitioner *"challenged a defect in the integrity of the federal habeas proceedings,"* the District Court respectfully erred in finding that Petitioner's arguments presented under section 60(b)(1) is a second or successive section 2254 petition.

B. The Applicability of the New Intervening Change of Law Announced in *Williams v. Superintendent Mahanoy SCI*:

Petitioner also argued as a potential basis for relief under Rule 60(b)(6) is an intervening change in law. Petitioner argues the asserted change in *Williams* is material to the basis on which the district court initially denied habeas relief. *See Norris v. Brooks,* 794 F.3d 401, 404-405 (3d Cir. 2015). As stated *infra,* the Third Circuit Court of Appeals for the first time definitively made clear in *Williams* that, "absent a testimonial privilege, willingness to testify does not matter." Id. 2022 WL 3453339, at *11-12.

The *Williams* Court specifically held:

"[a]bsent extenuating circumstances, such as the existence of a

> privilege or the witness's incapacity or death, whether a witness is ready and willing to testify is irrelevant since defense counsel can compel testimony through a trial subpoena. *Grant v. Lockett,* 709 F.3d 224, 239 n.10 (3d Cir. 2013). Compulsory process, after all, is guaranteed in criminal trials by the Sixth and Fourteenth Amendments. See *Pennsylvania v. Ritchie,* 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) ("Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial . . . ."). Unwilling witnesses can be made to testify."

Id. 2022 U.S. App. LEXIS *12.

As such, the *Williams* decision is a new intervening change of law regarding this Circuit rejection of Pennsylvania's standard requiring proof of a witness's willingness to testify and declined to apply it to the *Strickland* standard when assessing counsel's failure to call or interview witnesses.

In rejecting relief under Rule 60(b)(6) the District Court held,

> "Since relief under Rule 60(b)(1) due to a mistake of law is available to Mr. Zabala-Zorilla, he cannot seek relief for the same mistake of law under Rule 60(b)(6) to avoid the one-year time limitation. Mr. Zabala-Zorilla also cannot succeed to the extent he is seeking relief under Rule 60(b)(6) because he contends *Williams* is an intervening change of law which constitutes an "extraordinary circumstance" under Rule 60(b)(6). Mr. Zabala-Zorilla's Rule 60(b) motion challenges our merits-based decision as expalined above. So even when viewed as a change of law under Rule 60(b)(6) instead of mistakie of law under Rule 60(b)(1), Mr. Zabala-Zorilla continues to "reassert claims of error in the state conviction" which we decided on the merits. We must treat and deny his attempt as an unauthorized successive habeas petition."

See, 3/31/23 Memorandum of the District Court at 11-12.

The District Court's determination that Petitioner cannot seek relief for the same mistake of law under Rule 60(b)(6) under a distinct legal argument of an intervening change in law to avoid the one-year time limitation is respectfully incorrect.

In this present case, the change in law was clearly material as it did not allow the Court to properly assess Petitioner's ineffective assistance of counsel claim due to the Court's mistaken belief that Petitioner had to show a witness's willingness to testify before disturbing the Superior Court's conclusion that trial counsel was not constitutionally ineffective under *Strickland* for failing to present Zabala, Jr., as a witness. The Distict Court's failure properly assess Petitioner's ineffective assistance of counsel claim due to the Court's mistaken belief that Petitioner had to show a witness's willingness to testify before disturbing the Superior Court's conclusion that trial counsel was not constitutionally ineffective clearly effected *the integrity of the federal habeas proceedings.*

As Petitioner *"challenged a defect in the integrity of the federal habeas proceedings,"* the District Court respectfully erred in finding that Petitioner's arguments presented under section 60(b)(6) is a second or successive section 2254 petition.

It is clear that the Third Circuit Court of Appeals erred in not finding the District Court District Court abused it's discretion in finding the instant Rule 60(b)

Motion represents an unauthorized successive habeas corpus petition.

2. Whether the Third Circuit Court of Appeals erred in finding the instant Rule 60(b) Motion was untimely filed.

The District Court first claimed Petitioner's request under Rule 60(b)(1) was untimely filed. In finding Petitioner'e request under Rule 60(b)(1), the District Court found:

> "Mr. Zabala-Zorilla had one year from our February 8, 2022 denial of his habeas petition — until February 8, 2023 — to move for relief on March 9, 2023 (although the docket clerk docketed the motion on March 15, 2023). So even if Mr. Zabala-Zorilla idenitifed a legal error which warranted our consideration under Rule 60(1), he failed to bring it within the one-year timeframe. His request is time barred."

See, 3/31/23 Memorandum of the District Court at 7-8.

Petitioner acknowledges requested relief under Rule 60(b)(1) is untimely but contends that the court should follow the decision of its own circuit announced in *Murray v. Diguglielmo, Civ. A.* No. 09-4960, 2016 U.S. Dist. LEXIS 82875, 2016 WL 3476255 (E.D. Pa. June 27, 2016) and excuse any delay in filing this motion.

In *Murray,* the petitioner argued that his Rule 60(b) motion was timely because he filed it within a year of the Supreme Court's denial of a writ of certiorari. *See Murray,* 2016 U.S. Dist. LEXIS 82875, 2016 WL 3476255, at *2. In addressing this argument, the Honorable C. Darnell Jones, II, explained that the petitioner was "mistaken about when the clock starts ticking," as the time ran from

the entry of the judgment complained of and was not tolled by any appeal. Id. (citing *Moolenaar v. Gov't of V.I.,* 822 F.2d 1342, 1346 n.5, 23 V.I. 449 (3d Cir. 1987)). Since the petitioner did not file the Rule 60(b) motion until three years after the entry of the judgment denying his habeas petition, Judge Jones concluded that the motion was untimely. Id.

Nonetheless, Judge Jones found that the delay was reasonable. Id. at *3. Judge Jones explained that "Petitioner has clearly stated the reason for the three[-] year delay: his mistaken assumption that an appeal tolled the time. While incorrect legally, that is understandable, logically. Given Petitioner's pro se status, the Court defers to his logic." Id. Judge Jones then proceeded to address the merits of the petitioner's Rule 60(b) motion. *See also Muir v. Link,* 2021 U.S. Dist. LEXIS 179359, 2021 U.S. Dist. LEXIS at *29-31 (September 21, 2021)(applying the rationale of *Murray* to a *pro se* Petitioner's Rule 60(b) motion filed over three years beyond the filing date).

Here, the situation is similar to the facts of Murray Petitioner sought relief under Rule 60(b)(1) motion a year and 29 days after District Judge Kearney entered an order denying Petitioner's habeas petition on February 8, 2022. In addition, Petitioner asserts he was mistaken regarding the time to file a Rule 60(b) motion. As with *Murray,* Petitioner in this case was *pro se* and was also mistaken on the belief of when his Rule 60(b) Motion should have been filed.

In addition, he did not file the motion until a year and 29 days after the District Court denied habeas corpus relief, Petitioner's filing was only 29 day delay in his filing, whereas *Murray* had a three year delay in filing his Rule 60(b) motion after the District Court denied his petition. Nonetheless, in addition the District Court did not consider the Department of Corrections' COVID-19 lockdown impeded his use of the law library. Petitioner attempted to respond to the Respondents allegations regarding the untimeliness of his petition contained in their March 23, 2023 Response to Petitioner's Rule 60(b) Motion but was unable to before the District Court denied Petitioner's Rule 60(b) Motion on March 31, 2023.

Although Petitioner filed a motion for an enlargement of time to respond to the the Respondent's response, the District Court denied Petitioner's motion without considering Petitioner's request for an enlargement of time to respond to the respondents response to his Rule 60(b) Motion.

It is clear in light of these factors that the Third Circuit Court of Appeals erred in not finding the District Court abused it's discretion in finding the instant Rule 60(b) Motion was untimely filed.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgement and opinion of the Third Circuit Court of Appeals.

Respectfully Submnitted,

Henry Zabala

Henry Zabala-Zorilla
#LD4282
SCI-Phoenix
1200 Mokychic Drive
Collegeville, PA 19426