

No.

In the Supreme Court of the United States

LUCIOUS BOYD,
PETITIONER

V.

RICKY DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-10299

LUCIOUS BOYD,

Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:16-cv-62555-DPG

Before JILL PRYOR, NEWSOM, and GRANT, Circuit Judges.

GRANT, Circuit Judge:

Lucious Boyd filed a motion to amend his federal habeas petition under Rule 15(a)(2). Alternatively, he said, his filing could be considered a motion for relief from the judgment under Rule 60(b)(6). Either way, it was an attempt to reopen his habeas proceeding to introduce new evidence supporting one of his claims.

And either way, it was too late. The district court had denied his claim on the merits more than two years earlier—thus closing his case, at least as far as the district court was concerned. Besides, this Court assumed exclusive control of Boyd’s case when he filed his notice of appeal. Because the district court already denied his petition on the merits, any attempt to relitigate those claims is a second or successive petition. And because Boyd’s new filing does not meet the requirements for a second or successive petition, we affirm the district court’s dismissal.

I.

Boyd is a Florida prisoner who was sentenced to death after being convicted of first-degree murder, sexual battery, and armed kidnapping. *Boyd v. State*, 910 So. 2d 167, 176 (Fla. 2005). Following a series of unsuccessful state collateral attacks, he filed for a federal writ of habeas corpus under 28 U.S.C. § 2254, raising six grounds for relief from his state convictions and death sentence.

The district court held an evidentiary hearing on one of those claims—Boyd’s allegation that his Sixth and Fourteenth Amendment rights were violated when a juror lied about her disqualifying criminal history. That juror, Tonja Striggles, testified at the hearing. She admitted her criminal history, but also made a few unexpected disclosures: she was related to Boyd through marriage, she had heard about the murder before jury selection, and she had felt “stoned” during jury selection because of her prescription medications. Boyd argued after the hearing that Striggles’s testimony supported his original juror-misconduct claim, but he did not set out these new disclosures as additional grounds for relief. Nor did he seek leave to amend his habeas petition. Nine months after the hearing, the district court denied Boyd’s habeas petition on the merits. The court granted a certificate of appealability, and Boyd appealed.

Roughly two years later, while his appeal was still pending, Boyd moved in the district court for leave to amend his original habeas petition under Rule 15(a)(2) of the Federal Rules of Civil Procedure, or in the alternative, to reopen his habeas proceedings under Rule 60(b)(6). For the first time, he suggested that Striggles’s disclosures provided independent grounds for his juror-misconduct claim. His proposed amended petition otherwise presented the same six claims as before. Boyd asserted that the amendments were allowed because the appeal of the original petition was still pending.

The district court disagreed. It determined that Boyd's motion was properly characterized as a second or successive habeas petition, which meant that he needed preauthorization from this Court before he could proceed in district court. 28 U.S.C. § 2244(b)(3). Because Boyd had neither sought nor received such authorization, the court rejected his motion.

The district court did grant a certificate of appealability on one issue: whether a habeas petitioner can seek leave to amend his petition while an appeal from a final judgment is pending, or whether such a motion is instead properly characterized as a second or successive habeas corpus petition. *See id.* § 2244(b). This appeal followed.

II.

Ordinarily, we review a district court's denial of a motion for leave to amend a habeas petition under Rule 15(a) for abuse of discretion. *See Bowers v. U.S. Parole Comm'n*, 760 F.3d 1177, 1183 (11th Cir. 2014). But we review de novo a district court's determination that a prisoner's filing is a "second or successive" application for habeas corpus relief under § 2244(b). *Ponton v. Sec'y, Florida Dep't of Corr.*, 891 F.3d 950, 952 (11th Cir. 2018). We also review questions about the district court's jurisdiction de novo. *Zakrzewski v. McDonough*, 490 F.3d 1264, 1267 (11th Cir. 2007).

III.

Under the Antiterrorism and Effective Death Penalty Act, "a state prisoner always gets one chance to bring a federal habeas challenge to his conviction." *Banister v. Davis*, 590 U.S. 504, 509

(2020). But he almost never gets another. Federal law imposes strict limitations on “second or successive” applications for federal habeas corpus relief, which include showing that a claim has not been raised before and that it is either based on a new rule of constitutional law or newly discovered evidence proving a prisoner’s factual innocence. 28 U.S.C. § 2244(b). On top of that, the prisoner must first obtain approval from the federal court of appeals before filing in the district court. *Id.*

Boyd, understandably enough, wishes to avoid these limitations. To do that, he argues that his new district court filing should be treated as an amendment to his original habeas petition—the same petition currently pending on appeal in this Court—rather than as a “second or successive” habeas corpus application under § 2244(b). His contention fails twice over.

First, under jurisdictional principles common to all federal civil cases, a prisoner cannot amend a habeas petition and relitigate the case after the district court has entered its final judgment and he has appealed. A final judgment ends the district court proceedings, cutting off the opportunity to amend pleadings and precluding relitigation of any claim resolved by the judgment unless that judgment is first set aside. And an appeal transfers jurisdiction to the appellate court, depriving the district court of authority to set aside its judgment or otherwise alter the status of the case as it stands before the court of appeals. All that to say, by

the time a federal habeas petition is on appeal, it is too late to amend it—no different than in any other civil case.

Second, once a district court has entered its final judgment on the merits in a habeas case, a new filing by the same prisoner seeking federal habeas corpus relief from the same state conviction is almost always properly considered a second or successive habeas petition, no matter what the prisoner calls it.¹ Boyd’s “amended” petition, which raised the same six claims the district court denied on the merits two years before and added new evidence in support of one of them, easily qualifies as a second or successive habeas corpus application under § 2244(b). Because Boyd did not receive authorization to file this petition (and could not have done so even if he had tried), the district court was correct to reject his filing.

A.

We begin by explaining what may seem obvious: a district court has no jurisdiction to grant a motion to amend a pleading that is no longer pending before it. Before trial, the rules are more lenient—parties can seek leave to amend under Rule 15(a) (the rule Boyd cites), and district courts are instructed to “freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2); *see* 28 U.S.C. § 2242 (amendments in habeas actions are governed by the rules of

¹ To date, the Supreme Court has identified only one exception to this general rule, allowing “*Ford* claims”—challenging the execution of a prisoner on the ground that he is insane—when they are filed as soon as they are ripe. *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007) (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)). That exception does not apply here.

civil procedure). But a trial court’s final judgment “resolves conclusively the substance of all claims, rights, and liabilities of all parties to an action” and “ends the litigation on the merits” in the district court. *Collar v. Abalux, Inc.*, 895 F.3d 1278, 1283 (11th Cir. 2018) (quotation omitted). So once the court has entered final judgment, Rule 15(a) no longer applies and no amendment is possible unless the judgment is first set aside.² *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1344–45 (11th Cir. 2010); *Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins.*, 953 F.3d 707, 720 (11th Cir. 2020).

Boyd acknowledges this rule. But he says it should not apply in habeas cases when an appeal from the district court’s judgment remains pending. He proposes instead that to ensure “one full opportunity to seek collateral review,” state prisoners should be able to add or modify claims in a federal habeas petition at any point before appellate proceedings have concluded. *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (quotation omitted). So long

² For the first time at oral argument, Boyd suggested that his proposed amendment was permissible under Rule 15(b)(2), which provides for postjudgment amendments of the pleadings “to conform them to the evidence” and to raise an issue that was not pleaded but was tried by consent of the parties. Fed. R. Civ. P. 15(b)(2). The first problem with this argument is that Boyd forfeited it by failing to raise it earlier. See *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004). And in any event, Boyd is not attempting to conform his pleading to the evidence the court considered. To the contrary, he is trying to change the result of his first habeas proceeding based on an argument he didn’t make until after the district court entered final judgment.

as the petition remains pending somewhere, he says, the district court's judgment is not "final," and the petitioner should be allowed to go on litigating, revising, and relitigating his claims in the district court.

No. The notion that a petitioner could pursue his claims in the district court and in the court of appeals at the same time offends not just common sense, but firmly established rules of procedure. To begin, a district court's judgment in a civil case cannot be appealed unless it is "final" in the sense that it "ends the litigation on the merits" and "resolves the entire case," leaving "nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945); *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 38 (2020); see 28 U.S.C. § 1291. This "long-established rule against piecemeal appeals in federal cases" applies equally in habeas corpus proceedings: a federal habeas judgment is appealable only if it is "final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." *Andrews v. United States*, 373 U.S. 334, 340 (1963) (quoting *Collins v. Miller*, 252 U.S. 364, 370 (1920)); see 28 U.S.C. § 2253.

Nor does appealing a final judgment somehow reopen the case in the district court as Boyd seems to suggest. To the contrary, an appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023) (quotation omitted). Until this Court decides an appeal and issues the mandate, the district court lacks jurisdiction

to rule in the case except on collateral issues or in aid of the appeal. *Mahone v. Ray*, 326 F.3d 1176, 1179–80 (11th Cir. 2003); *Zaklama v. Mt. Sinai Med. Ctr.*, 906 F.2d 645, 649 (11th Cir. 1990). In the meantime, the district court has no authority to set aside its judgment, grant leave to amend the complaint, or allow any further litigation of the issues involved in the appeal. See *Mahone*, 326 F.3d at 1179–80; *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003).

What the transfer of authority from the district court to the court of appeals does *not* do is rob the district court’s judgment of its effect while the appeal is pending. Instead, a district court’s judgment is generally both effective and “final” for preclusion purposes as soon as it is entered. *Coleman v. Tollefson*, 575 U.S. 532, 539 (2015). That is true whether or not the losing party files an appeal. *Id.* So although the appellate court may ultimately reverse or vacate the district court’s final judgment, the appeal itself does not suspend the finality of the judgment or permit the losing party to start over in the district court while waiting for the appellate court to act.

These points add up to a simple conclusion—Boyd cannot relitigate his habeas petition in the district court while his appeal of the district court’s judgment in that same case remains pending.

B.

But could he proceed on his proposed amended habeas petition as a separate action? No—his filing was a “second or successive habeas corpus application” under AEDPA. 28 U.S.C.

§ 2244(b).³ For that reason, the district court correctly dismissed Boyd’s new petition because it did not satisfy AEDPA’s strict requirements.

AEDPA does not define “second or successive,” and the Supreme Court so far has declined to offer a global definition. See *Banister*, 590 U.S. at 511–12. The answer is clear here, however—a habeas petition that presents new evidence in support of a claim that was adjudicated on the merits in an earlier application “is in substance a successive habeas petition and should be treated accordingly.” *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005); see *Tompkins v. Sec’y, Dept. of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009). Any filing that “seeks to revisit the federal court’s denial *on the merits*” of a habeas claim (besides a timely motion for

³ We join the majority of our sister circuits that have considered the problem in holding that a “motion to amend” a federal habeas petition filed after the district court entered its final judgment and while an appeal remains pending should be treated as a “second or successive” habeas application under § 2244(b). See *Rivers v. Lumpkin*, 99 F.4th 216, 220–21 (5th Cir. 2024); *Moreland v. Robinson*, 813 F.3d 315, 324 (6th Cir. 2016); *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012); *Williams v. Norris*, 461 F.3d 999, 1003–04 (8th Cir. 2006); *Balbuena v. Sullivan*, 980 F.3d 619, 636–37 (9th Cir. 2020); *Ochoa v. Sirmons*, 485 F.3d 538, 540–41 (10th Cir. 2007). The Second and Third Circuits have taken a different view, holding that “so long as appellate proceedings following the district court’s dismissal of the initial petition remain pending when a subsequent petition is filed, the subsequent petition does not come within AEDPA’s gatekeeping provisions for ‘second or successive’ petitions.” *United States v. Santarelli*, 929 F.3d 95, 105 (3d Cir. 2019) (quoting *Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005)). For reasons we have explained, we respectfully disagree.

reconsideration) presented in an earlier habeas petition is a “second or successive” application for habeas corpus relief—no matter what the prisoner labels it. *Gonzalez*, 545 U.S. at 534 (emphasis in original); *see id.* at 532; *Banister*, 590 U.S. at 517–18.

And a second or successive petition, as we briefly explained earlier, is subject to several highly restrictive limitations. To start, a prisoner must ask the circuit court for authorization to file, which can only be granted if he shows that the claims he seeks to raise have not been presented in an earlier petition. Plus, a would-be petitioner must also show one of two things: that his claims are based on either “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable” or newly discovered clear and convincing evidence establishing his factual innocence of the underlying crime. 28 U.S.C. § 2244(b)(1)–(3).

Boyd did none of this. More than two years after the district court denied all of his claims on the merits in a 79-page order, he filed a new pleading raising the same claims as before, and challenging the same state court convictions and death sentence as before. He did not request preauthorization from this Court or otherwise attempt to meet any of the requirements for a second or successive habeas petition. The fact that Boyd styled his new pleading as a “motion to amend” his previously adjudicated habeas petition or to set aside the judgment under Rule 60(b) does not evade the ordinary jurisdictional limitations on the one hand, or

save his filing from AEDPA's restrictions on second or successive petitions on the other. *See Gonzalez*, 545 U.S. at 531–32.

So Boyd's filing, though labeled as a motion to amend or to set aside the judgment, was a "second or successive habeas corpus application" under § 2244(b). And that means the district court lacked jurisdiction to consider it because he did not obtain authorization from this Court before filing.

★ ★ ★

A prisoner's "one chance to bring a federal habeas challenge to his conviction" does not mean that prisoner can amend a habeas petition *ad infinitum* and outside the ordinary rules of civil procedure. A district court's final judgment resolving an application for federal habeas corpus on the merits does what it sounds like—it ends the litigation in the district court. And filing a notice of appeal, rather than preserving some kind of right to amend, sets up additional jurisdictional barriers—once the case is on appeal, the district court cannot reopen proceedings to permit new claims or allow the petitioner to relitigate old ones. At that point, the only way to bring a new claim challenging the same state court judgment is by satisfying the requirements for a second or successive habeas corpus application. 28 U.S.C. § 2244(b). Here, that did not happen.

We therefore **AFFIRM** the district court's judgment.

JILL PRYOR, Circuit Judge, Concurring:

We hold today that when a federal habeas petitioner files a motion to amend a petition while an appeal from the denial or dismissal of the petition is pending, the motion is properly characterized as second or successive under 28 U.S.C. § 2244(b). Section 2244(b) requires the petitioner to obtain authorization from our Court before the district court has jurisdiction to consider the amendment. I concur and join the majority opinion.

I write separately to add one clarifying point about what happens if, on appeal from the denial or dismissal of the initial petition, the petitioner succeeded in obtaining vacatur of the district court's ruling and remand to the district court. Once the district court's ruling denying or dismissing the petition was vacated, on remand there would no longer be a final judgment. *See McKiver v. Sec'y, Fla. Dep't of Corr.*, 991 F.3d 1357, 1367 (11th Cir. 2021) (explaining that a vacated or reversed decision is “officially gone” and “has no legal effect whatever” (internal quotation marks omitted)); *Quarles v. Sager*, 687 F.2d 344, 346 (11th Cir. 1982) (stating that “no final judgment on the merits exist[ed]” after the appellate court vacated it). It follows that if the petitioner wanted to amend his petition on remand, he would not need to file an application seeking authorization from this Court under § 2244(b)(2). Instead, he would be free to file a motion to amend in the district court. And in deciding whether to grant leave to amend, the district court would look to Federal Rule of Civil Procedure 15, not § 2244(b). *See Sandoval Mendoza v. Lumpkin*, 81 F.4th 461, 470–71 (5th Cir. 2023)

(explaining that petitioner’s motion to amend, filed after vacatur and remand to the district court, was properly reviewed under Rule 15).

And this would be true even if, before filing a motion to amend in the district court, the petitioner first filed a second-or successive application in this Court, and we denied it. We may authorize a district court to consider a second or successive application only if (1) the petitioner’s “claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable” or (2) “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” and the “facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2). But this rigorous standard does not apply to a motion to amend a habeas petition when, upon remand, the motion is filed in the district court.

As the majority opinion acknowledges, our decision today about how a district court must treat a motion to amend filed while the petitioner has a pending appeal conflicts with decisions from the Second Circuit in *Whab v. United States*, 408 F.3d 116 (2d Cir. 2005), and the Third Circuit in *United States v. Santarelli*, 929 F.3d 95 (3d Cir. 2019). But it is worth noting that a petitioner who succeeds on appeal may, as a practical matter, end up in much the same

position under our decision as he would under the Second Circuit's or Third Circuit's approaches. Under all three approaches, on remand the district court would apply Rule 15's standard to determine whether to grant the petitioner leave to amend his petition.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 0:16-cv-62555-GAYLES

LUCIOUS BOYD,

Petitioner,

v.

**SECRETARY, FLORIDA
DEPARTMENT OF
CORRECTIONS,**

Respondent.

ORDER ON PENDING MOTIONS

THIS CAUSE comes before the Court on Petitioner Lucious Boyd's Motion for Leave to Amend Habeas, Or Alternatively, For Relief From Judgment Pursuant to Rule 60(b) [ECF No. 56], and Petitioner's Motion Requesting Court For An Indicative Ruling Pursuant to Rule 62.1 [ECF No. 57]. In the first Motion, Petitioner seeks leave to amend his Habeas Petition pursuant to 28 U.S.C. § 2254 [ECF No. 1], in order to raise a new claim of juror misconduct. [ECF No. 56]. In the second Motion, Petitioner requests an indicative ruling on the first Motion to secure a limited remand from the Eleventh Circuit. [ECF No. 57]. For the following reasons, the Motions are denied and a certificate of appealability is granted.

I. BACKGROUND

A. Procedural History

In 2002, Petitioner was convicted of first-degree murder, armed kidnapping, and sexual battery and subsequently sentenced to death. *See Boyd v. State*, 910 So. 2d 167, 174 (Fla. 2005), *cert. denied* 546 U.S. 1179 (2006) (affirming Petitioner's conviction and death sentence). In 2015,

the Florida Supreme Court affirmed the denial of postconviction relief. *See Boyd v. State*, 200 So. 3d 685 (Fla. 2015).

In 2016, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this Court, challenging his conviction and death sentence. [ECF No. 1]. Finding “the factual determinations of the Florida Supreme Court to be unreasonable,” and its decision to be “an unreasonable application of clearly established federal law,” this Court granted a limited evidentiary hearing on Petitioner’s first claim: that he was denied a fair and impartial jury due to Juror Striggles’ misrepresentation of her criminal history during *voir dire*. [ECF No. 37 at 24–25].

On July 10, 2019, following an evidentiary hearing in which the Court heard testimony from Juror Striggles, the Court denied Petitioner’s Habeas Petition. [ECF No. 52]. As to Petitioner’s claim that Juror Striggles lied during *voir dire*, depriving him of a fair and impartial jury, “the Court conclude[d] that Juror Striggles did not deliberately or maliciously mislead the state court during *voir dire*. The Court determine[d] that she answered the single question at issue to the best of her intellectual abilities and limited understanding of the criminal justice system.” *Id.* at 39. The Court granted a certificate of appealability as to this claim. *Id.* at 78–79.

Petitioner then appealed to the Eleventh Circuit. [ECF No. 53]. While the appeal was pending, Petitioner filed a Successive Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851(d)(2)(A) based upon new evidence of juror misconduct that came to light during this Court’s evidentiary hearing. He also moved to stay proceedings in the Eleventh Circuit based on his state court Rule 3.851 motion. The Eleventh Circuit granted the stay, permitting Petitioner to exhaust his state court remedies before proceeding with the appeal of his federal Habeas Petition. Petitioner’s state court remedies became exhausted on September 2, 2021, when the Florida Supreme Court denied Petitioner’s motion for rehearing of its May 13, 2021

decision denying relief. *See Boyd v. State*, 324 So. 3d 908, 914 (Fla. 2021), *reh'g denied*, 324 So. 3d 919.

B. The Instant Motions

On September 7, 2021, Petitioner filed the instant Motion for Leave to Amend his Habeas Petition to add the new claim of juror misconduct or, in the alternative, for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b). [ECF No. 56]. He claims that Juror Striggles' testimony at the evidentiary hearing "established additional grounds for relief that he was denied his right to a fair and impartial jury trial." *Id.* at 14. Specifically, Petitioner points to Juror Striggles' testimony "disclosing her familial relationship to Mr. Boyd's family, the true extent of her prior knowledge about the case, and her impaired mental state at the time of service on Mr. Boyd's jury." *Id.* at 15. Petitioner asserts that the Florida Supreme Court's "denial of Mr. Boyd's claim of juror misconduct was an unreasonable application of clearly established federal law and was based upon unreasonable determination of the facts in light of the state court record." [ECF No. 56 at 16]; *see also Boyd*, 324 So. 3d at 914.

In addition, Petitioner filed a Motion Requesting an Indicative Ruling pursuant to Federal Rule of Civil Procedure 62.1 on his Motion for Leave to Amend/Rule 60(b) Motion. [ECF No. 57]. On September 28, 2021, the Eleventh Circuit denied Petitioner/Appellant's "Motion to Remand to District Court for Indicative Ruling, or, in the Alternative, to Relinquish Jurisdiction." *See Boyd v. Sec'y, Dep't of Corr.*, No. 19-13051-P (11th Cir. Sept. 28, 2021). Petitioner had asked the Eleventh Circuit to relinquish jurisdiction or remand this case to the district court, pursuant to Federal Rule of Appellate Procedure 12.1, so that the district court could entertain his motion to amend his § 2254 Habeas Petition or for Rule 60(b) relief from the judgment on his Petition.¹ The

¹ Rule 12.1 provides that where "a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending," the court of appeals may either dismiss the appeal or

Eleventh Circuit denied the Motion because this Court had “not yet issued any ruling or indicative ruling on [Petitioner’s] motion.” *Boyd*, No. 19-13051-P [Docket No. 31 at 2].

II. DISCUSSION

A. Relief Under Fed. R. Civ. P. 60(b)

The Court begins with Petitioner’s alternative request for relief under Fed. R. Civ. P. 60(b). Since final judgment has been entered and this case is closed, the Court may only permit Petitioner to amend his Habeas Petition if it first reopens this case pursuant to Rule 60(b).² *See Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1344–45 (11th Cir. 2010) (“Post-judgment, the plaintiff may seek leave to amend if he is granted relief under Rule 59(e) or Rule 60(b)(6)”) (quoting *United States ex rel. Atkins v. McInteer* 470 F.3d 1350, 1361 n.22 (11th Cir. 2006)).

Rule 60(b) “allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence.” *Gonzalez v. Crosby*, 545 U.S. 524, 528–29 (2005). Rule 60(b)(6), the particular provision Petitioner cites, permits reopening for “any . . . reason” other than the specific reasons set forth in Rules 60(b)(1)–(5). Fed. R. Civ. P. 60(b)(6); *Gonzalez*, 545 U.S. at 529. A Rule 60(b)(6) movant “must prove ‘extraordinary circumstances’ justifying the reopening of a final judgment.” *Howell v. Sec’y, Fla. Dep’t of Corr.*, 730 F.3d 1257, 1260 (11th Cir. 2013) (citations omitted).

In *Gonzalez*, the Supreme Court held that a Rule 60(b) motion in a § 2254 habeas case is properly characterized as a second or successive petition pursuant to 28 U.S.C. § 2244(b) if it “seeks to add a new ground for relief.” 545 U.S. at 532. Section 2244(b) requires a habeas

retain jurisdiction and remand for further proceedings “[i]f the district court states that it would grant the motion or that the motion raises a substantial issue.” Fed. R. App. P. 12.1(a), (b).

² Although Petitioner’s case is currently on appeal, district courts retain jurisdiction pending appeal to deny (but not grant) Rule 60(b) motions. *See Mahone v. Ray*, 326 F.3d 1176, 1179 (11th Cir. 2003). As explained below, before it can grant Petitioner leave to amend his Habeas Petition, this Court would first need to issue an indicative ruling under Rule 62.1 indicating to the Eleventh Circuit that it should remand for that purpose.

petitioner who seeks to file a second or successive petition to “move in the appropriate court of appeals for an order authorizing the district court to consider the application.” § 2244(b)(3)(A). Therefore, if Petitioner’s Rule 60(b) motion is in effect a second or successive habeas petition, this Court could not entertain it unless and until he obtains authorization from the Eleventh Circuit. *See In re Bradford*, 830 F.3d 1273, 1277 (11th Cir. 2016) (“§ 2244(b)(3)(A) requires a petitioner to seek and obtain authorization from the court of appeals to file a second or successive habeas petition in the district court.”).

Petitioner moves for relief under the catch-all provision of Rule 60(b)(6)—although, in reality, his motion seeks relief on the grounds of “newly discovered evidence” pursuant to Rule 60(b)(2). Regardless of which provision Petitioner cites, however, his Motion is properly characterized as a second or successive petition pursuant to 28 U.S.C. § 2244(b) because it “seeks to add a new ground for relief.” *Gonzalez*, 545 U.S. at 532. In *Gonzalez*, the Supreme Court held that “[u]sing Rule 60(b) to present new claims for relief from a state court’s judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA’s requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts.” *Id.* (citing § 2244(b)(2)). “The same is true of a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated.” *Id.* The Supreme Court emphasized that “use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals.” *Id.*

Here, Petitioner undoubtedly “seeks to add a new ground for relief . . . from a state court’s judgment of conviction.” *Id.* In his prior Habeas Petition, Petitioner raised a claim of juror misconduct based on Juror Striggles’ “fail[ure] to disclose critical criminal history information during *voir dire* despite being asked to disclose information regarding involvement with the

criminal justice system.” [ECF No. 1 at 25]. Here, Petitioner’s new claim is based on newly discovered evidence that came to light during the Court’s evidentiary hearing on this claim. Specifically, Juror Striggles testified at the hearing that “I should have never been picked. It’s like I told them, my cousin is married to his brother.” Tr., Evid. Hr’g [ECF No. 47 at 11:24–25]. Striggles then explained to the Court that at the time of the trial, her cousin Shawna Bennett Boyd was married to Petitioner’s brother. *Id.* at 12:5–9. Further, Striggles testified that during the trial she “was on heavy medication” that made her lethargic and she could not stay awake. Striggles testified, “I always felt, like I was stoned.” *Id.* at 32:13–38:2.

Petitioner avers that this testimony presents “newly revealed evidence of juror misconduct” supporting “additional grounds for relief.” [ECF No. 56 at 37]. He acknowledges that “[t]he extraordinary circumstances [Juror Striggles’] testimony presents are not one-in-the same as the claim of juror misconduct which was presented to this Court in Mr. Boyd’s original habeas proceedings.” [ECF No. 56 at 14]. As such, Petitioner effectively concedes that his Rule 60(b) motion “seeks to add a new ground for relief.” *Gonzalez*, 545 U.S. at 532. Also notable is the fact that the Florida Supreme Court found that this evidence supported a new claim not previously raised. *Boyd*, 324 So. 3d at 914. The Florida Supreme Court held that although Petitioner’s “claim [was] procedurally barred to the extent it seeks to relitigate his prior claims concerning juror Striggles’s failure to reveal her criminal history,” Petitioner’s claim that “juror Striggles engaged in misconduct when she failed to reveal her familial connection to [Petitioner] and her pretrial knowledge of the case” was an entirely new claim. *Id.* The Florida Supreme Court then addressed, and rejected, this new claim on the merits. *Id.*

In sum, Petitioner cannot obtain relief from judgment under Rule 60(b) because his Motion “seeks to add a new ground for relief.” *Gonzalez*, 545 U.S. at 532. As further explained below, this

claim must therefore be presented to the Eleventh Circuit in an application to file a second or successive petition pursuant to 28 U.S.C. § 2244(b).

B. Leave to Amend Habeas Petition

Having found that it cannot reopen this case under Rule 60(b), the Court finds that it cannot grant Petitioner leave to amend his Habeas Petition pursuant to Federal Rule of Civil Procedure 15(a). *See Atkins*, 470 F.3d at 1361 n.22 (“Fed. R. Civ. P. 15(a) has no application once the district court has dismissed the complaint and entered final judgment for the defendant. Post-judgment, the plaintiff may seek leave to amend if he is granted relief under Rule 59(e) or Rule 60(b)(6).” (internal citations omitted)).

Petitioner contends that because his appeal is pending, his § 2254 proceeding has not yet become final, and thus an amended petition would not be second or successive. Petitioner relies on decisions of the Second and Third Circuit Courts of Appeal: *Ching v. United States*, 298 F.3d 174 (2d Cir. 2005) and *United States v. Santarelli*, 929 F.3d 95, 104 (3rd Cir. 2019). He claims that these decisions “have held that while a habeas petition is pending on appeal, an attempt to amend is not deemed a ‘second or successive’ petition.” [ECF No. 56 at 7]. These decisions, however, do not support Petitioner’s proposition; they dealt with habeas petitions that were still pending before the district court when leave to amend was sought. The Eleventh Circuit (as well as other circuits) have held that a new, substantive claim filed after the district court has denied habeas relief and an appeal is pending is a second or successive habeas petition.³

³ Petitioner concedes that a majority of circuits to confront this issue have rejected his position. *See Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2016) (Motion for relief from judgment and motion to amend filed by habeas petitioner after initial habeas petition was denied and appeal was pending were “second or successive habeas petitions”); *see also Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012) (same); *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006) (same); *Balbuena v. Sullivan*, 980 F.3d 619 (9th Cir. 2020) (same); *Ochoa v. Sirmons*, 485 F.3d 538 (10th Cir. 2007) (per curiam) (same).

In *Santarelli*, the petitioner sought leave to file an amended habeas petition “while her initial habeas petition was still pending before the District Court.” 929 F.3d at 99. Similarly, in *Ching*, the initial § 2255 motion was pending before the district court on remand from the Second Circuit. 298 F.3d at 176. The *pro se* petitioner in *Ching* filed a § 2241 petition that the district court liberally construed as an amended § 2255 motion and dismissed as an unauthorized second or successive motion. *Id.* The Second Circuit reversed, holding that “a habeas petition submitted during the pendency of an initial § 2255 motion should be construed as a motion to amend the initial motion.” *Id.* at 175.

By contrast, the Eleventh Circuit addressed the scenario at issue here in *United States v. Terrell*, 141 F. App’x 849 (11th Cir. 2005). There, “while the § 2255 appeal was pending in [the Eleventh Circuit], Mr. Terrell filed a motion to reopen and to reduce sentence in the district court.” *Id.* at 850. The Eleventh Circuit determined that “[r]egardless of how Mr. Terrell characterized his motion . . . the claim he asserted was a brand new substantive claim for relief on the merits, and one that had not been presented in his initial § 2255 motion.” *Id.* Relying on *Gonzalez*, the Eleventh Circuit held that any motion filed in a closed § 2254 or § 2255 case “is properly characterized as a second or successive petition pursuant to 28 U.S.C. § 2244(b) if, among other things, it ‘seeks to add a new ground for relief.’” *Id.* at 851 (quoting *Gonzalez*, 545 U.S. at 532).

Notably, the Eleventh Circuit in *Terrell* distinguished *Ching* on the grounds that when the petitioner in *Ching* filed his amended motion, the district court “had before it both the initial § 2255 motion and a subsequent motion.” *Id.* at 851. In *Terrell*, however, “[w]hen Mr. Terrell filed his motion to reopen and reduce sentence, the district court had already denied the initial § 2255 motion.” *Id.* at 852. “In other words, there was no pending § 2255 motion in the district court when Mr. Terrell filed his motion and, hence, there was nothing to amend.” *Id.*

Such is the case here. Petitioner seeks leave to amend his Petition after this Court has already denied it. Therefore, there is “nothing to amend.” As in *Terrell*, the claim Petitioner seeks to add is “a brand new substantive claim for relief on the merits,” based on new information that came to light after the initial habeas petition was filed. 141 F. App’x at 851. Accordingly, Petitioner’s amended petition would be second or successive.

Petitioner points out that the Eleventh Circuit “appear[s] to have taken opposite positions” on this issue. *Amodeo v. United States*, 743 F. App’x 381, 385 n.1 (11th Cir. 2018). In *Amodeo*, the Eleventh Circuit noted a conflict between *Terrell* and *In re Cummings*, No. 17-12949-D (11th Cir. July 12, 2017) (per curiam), in which it denied an application to file a second or successive § 2255 motion as premature “because there was still time to seek Supreme Court review on an earlier § 2255 motion.” *Amodeo*, 743 F. App’x at 385, n.1. The Eleventh Circuit observed that it “has no published opinion establishing when the adjudication of a § 2255 motion becomes final such that the ‘second or successive’ limitation applies to all future motions.” *Id.* at 385.

Cummings, however, did not reach the ultimate issue here: whether the petitioner could amend his habeas petition to add a new, substantive claim after the district court had denied his initial habeas petition and an appeal was pending. In *Cummings*, the Eleventh Circuit merely held that “Cummings’s application for leave to file a second or successive § 2255 motion [was] still premature” because “[t]he 90-day period in which Cummings may file a petition for *certiorari* with the Supreme Court . . . ha[d] not run.” No. 17-12949-D [Docket No. 3 at 2–3]. The Eleventh Circuit did not indicate whether Cummings could seek leave to amend his motion in the district court or whether he simply had to wait. Although *Terrell* is unpublished, it expressly addressed the issue here and contains a more thorough analysis. Therefore, this Court finds that *Terrell*

governs this case and precludes granting Petitioner leave to amend his Habeas Petition. Accordingly, Petitioner's Motion, [ECF No. 56], will be denied.⁴

C. Motion for an Indicative Ruling Pursuant to Rule 62.1

Because an appeal is pending, Petitioner must seek an “indicative ruling” from this Court under Rule 62.1 on his Motion for Leave to Amend/Rule 60(b) Motion. [ECF No. 57]. Normally, “the filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of authority over aspects of the case involved in the appeal.” *Madura v. BAC Home Loans Servicing, LP*, 655 F. App'x 717, 723 (11th Cir. 2016). Thereafter, district courts “retain jurisdiction . . . to entertain and deny a Rule 60(b) motion,” but not to grant a Rule 60(b) motion. *Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003). Thus, this Court could only grant Petitioner's Motion for Leave to Amend/Rule 60(b) Motion if the Eleventh Circuit relinquished its jurisdiction and remanded to this Court for that purpose.

Federal Rule of Civil Procedure 62.1(a) provides that:

If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

- (1) defer considering the motion;
- (2) deny the motion; or
- (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

Fed. R. Civ. P. 62(a)(1)–(3). In other words, “when a party files a Rule 60(b) motion to vacate a judgment pending on appeal . . . a district judge may not grant [the] Rule 60(b) motion absent a remand but may deny the motion, defer consideration, or issue an ‘indicative ruling’ stating the

⁴ As discussed in the Conclusion, *infra*, the apparent tension between *Terrell* and *Cummings*—and the Eleventh Circuit's observation in *Amodeo* that it has no published opinion addressing this issue—is sufficient to warrant a certificate of appealability in this case.

motion would be granted on remand or the motion raises a substantial issue.” *Madura*, 655 F. App’x at 723–24.

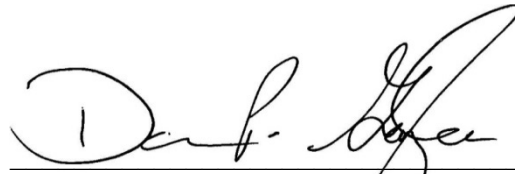
Here, the Court has decided to deny Petitioner’s Motion for Leave to Amend/Rule 60(b) Motion. Therefore, there is no need for an indicative ruling under Rule 62.1(a)(3) stating that the Court “would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.” Fed. R. Civ. P. 62.1(a)(3). Accordingly, the Motion for an Indicative Ruling, [ECF No. 57], is moot.

Accordingly, it is **ORDERED AND ADJUDGED** that

1. Petitioner’s Motion for Leave to Amend Habeas, Or Alternatively, For Relief From Judgment Pursuant to Rule 60(b), [ECF No. 56], is **DENIED**.
2. A Certificate of Appealability is **GRANTED** as to the following issue: whether a habeas petitioner can seek leave to amend his petition while an appeal from a final judgment is pending, or whether such a motion is properly characterized as a second or successive petition pursuant to 28 U.S.C. § 2244(b). The Court finds that there is a substantial showing of a denial of a constitutional right and “jurists of reason could disagree with the district court’s resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citation omitted).
3. Petitioner’s Motion Requesting Court for An Indicative Ruling Pursuant to Rule 62.1, [ECF No. 57], is **DENIED as moot**.

4. Petitioner's Motion for Leave to File Reply, [ECF No. 60], is **DENIED**.⁵

DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of December, 2021.



DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

cc: All counsel of record via CM/ECF

⁵ Pursuant to S.D. Fla. L.R. 7.1(c)(1), Petitioner did not need to seek leave of this Court to file a Reply.

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-10299

LUCIOUS BOYD,

Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:16-cv-62555-DPG

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR
REHEARING EN BANC

Before JILL PRYOR, NEWSOM, and GRANT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

28 U.S.C. § 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C. § 2244. Finality of determination

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

Federal Rule of Appellate Procedure 12.1

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Federal Rule of Civil Procedure 15

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course no later than:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Federal Rule of Civil Procedure 60

(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.
-

Federal Rule of Civil Procedure 62.1

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

- (1) defer considering the motion;
- (2) deny the motion; or
- (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.