No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

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STEVE HENLEY,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI

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

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## Question Presented: Capital Case

In Gonzalez v. Crosby, 545 U.S. 524 (2005), this Court left open the question whether a petitioner seeking to appeal the denial of relief under Fed.R.Civ.P. 60 in a habeas proceeding requires a certificate of appealability. This petition presents that issue:

> Does a petitioner appealing the denial of a Fed.R.Civ.P. 60 motion for relief from judgment in a habeas proceeding require a certificate of appealability under 28 U.S.C. §2253(c)(1)(A)?

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES



### STATE CASES



### DOCKETED CASES



### FEDERAL STATUTES

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Steve Henley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The February 2, 2009 opinion of the United States Court of Appeals for the Sixth Circuit denying a certificate of appealability is unreported. A1-A2. The District Court's order denying Henley's motion for equitable relief is unreported. A3-A8. The District Court's order denying a certificate of appealability is also unreported. A9-A11.

## JURISDICTION

A panel of the Sixth Circuit denied relief on February 2, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

## RELEVANT STATUTORY PROVISIONS & RULES

28 U.S.C. §2253 . . . (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255.

Fed.R.Civ.P. 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: . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . (6) any other reason that justifies relief.

Fed.R.Civ.P. 60(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; . . . (3) set aside a judgment for fraud on the court.

## STATEMENT OF FACTS

1. Co-defendant Terry Flatt was the prosecution's key witness against Steve Henley at his trial on charges of first-degree murder in Jackson County, Tennessee. At trial, Flatt alone claimed that he and Steve Henley drove up to the Stafford's home; robbed them; shot them; after which Henley supposedly ordered Flatt to pour gasoline in the house and the house was set on fire.

Before trial, Flatt agreed to testify against Henley and was sentenced to 25 years in prison on charges of second-degree murder. The prosecution tried to paint Flatt as being a credible witness who had owned up to his misdeeds and would face 25 years in prison for them. The defense, however, tried to establish that Flatt was not telling the truth, because he and the prosecution had struck a deal by which the prosecution would get Flatt released on parole in a fraction of his 25-year sentence.

As the defense on cross-examination sought to establish that Flatt would get out in a fraction of his 25-year sentence, Flatt claimed otherwise. He told the jury that he "could have to pull the whole 25 years" in prison.[1] Flatt specifically denied that he had any deal with the prosecution about getting early release on parole, telling the jury that even though he would be eligible for parole in 7½ years,[2] *the fact that he would be eligible for parole was "the only" agreement he knew of.*[3] Again, to make the jury think that Flatt would have to serve 25 years in prison, Flatt told the jury at the prosecution's behest that his eligibility for parole didn't "mean anything" at all,[4] and he wasn't guaranteed to get out then.

The prosecutor relied heavily on Flatt's testimony against Henley, with the prosecution specifically arguing that Flatt's story about Henley was believable. The prosecutor boasted: "I thought Flatt made one of the best witnesses I've ever seen."[5] The jurors agreed. They convicted Steve Henley of first-degree murder, and having been assured that Flatt would serve 25 years with no deals for any parole consideration, they sentenced Henley to death.

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[1] Trial Tr. 899-900.

[2] Id. at 900.

[3] Id.

[4] Id. at 947.

[5] Id. at 1386.

2. In state court, Henley has specifically requested the disclosure of any exculpatory evidence relating to the credibility of witnesses. In state court, Henley specifically asked for disclosure of all *Brady* materials, requesting evidence "which is or may be calculated to become of benefit to the defendant either on the merits of the case or on the question of credibility of witnesses."[6] The State, however, told Henley that there was no such evidence.[7]

3. After Henley was denied post-conviction relief in the state courts, he sought federal habeas corpus relief. In his amended petition for writ of habeas corpus, Henley alleged two due process violations arising from Flatt's critical testimony against him.

a. First, Henley alleged that the prosecution presented false testimony in violation of due process. Specifically, Henley alleged that Flatt lied to the jury when he claimed that had no deal or expectation of assistance from the District Attorney in securing parole, with the jury being misled into thinking that Flatt would serve his sentence in its entirety. Henley's conviction and death sentence, therefore, were unconstitutional.[8]

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[6] R. 145, Ex. 2 (Memorandum In Support Of Motion For Equitable Relief).

[7] Id., Ex. 3.

[8] See R. 53, Amended Petition, pp. 14-15, ¶36-46.

b. Second, Henley alleged that his conviction and death sentence were tainted by the prosecution's withholding of exculpatory evidence concerning Flatt's testimony. Specifically, the prosecution withheld evidence that, in exchange for Flatt's testimony, Flatt and the District Attorney had agreed that the District Attorney would not oppose Flatt's parole when he became eligible for release. Henley's conviction and death sentence were thus unconstitutional.[9]

4. In its District Court Answer, the state denied that Flatt and the District Attorney had any agreement concerning parole, that any evidence of such an agreement was ever withheld, and that Flatt's testimony at trial was false.[10] Of course, that answer was subject to Fed.R.Civ.P. 11, which means that the denial of Henley's allegations of a deal were represented as being "warranted on the evidence" "formed after an inquiry reasonable under the circumstances."[11]

5. The District Court denied both claims as being procedurally defaulted because they had not been previously presented to the state

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[9] Id., ¶¶ 47-50 & 56. In Amended Petition ¶50, Steve Henley alleged that "The prosecution withheld agreements or understandings (both formal and informal, express or implied) in which Flatt was promised or expected assistance from the District Attorney when seeking parole and/or favorable parole consideration in consideration of his testifying at trial against Steve Henley."

[10] See Answer, R. 55, pp. 32, 33 (denying allegations of agreement concerning parole contained in Amended Petition ¶¶42, 44, 45, 49-50).

[11] Fed.R.Civ.P. 11(b)(4) & 11(b).

courts,[12] and, despite Henley's assertion on appeal that the state had misled him in state court by falsely representing that it had disclosed all exculpatory evidence under *Brady*,[13] the Sixth Circuit concluded that Henley's claims were defaulted because he lacked "cause" for not presenting his due process challenges to the state courts in the first instance.[14]

6. While Flatt denied that he had any deal for parole at trial, and while the state denied that Flatt had such a deal or lied about it in its Answer, Flatt finally admitted the truth in 2008: *He and the prosecution did, in fact, have an agreement that in return for Flatt's testimony against Henley, the prosecution would not oppose his parole.* Flatt has now admitted this to Investigator Chris Armstrong, but Flatt has refused to sign an affidavit to that effect.[15] That Flatt's recent admission is true is confirmed by additional facts that were already before the District Court in

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[12] See R. 113, pp. 63, 65 (District Court Memorandum).

[13] *Henley v. Bell*, 6th Cir. No. 03-5891: Brief Of Appellant, p. 38, *citing* R. 107 (Supplemental Authority containing counsel's request for exculpatory evidence and state's response that all such evidence *had* been disclosed) and

[14] *Henley v. Bell*, 487 F.3d 379, 389 (6th Cir. 2007).

[15] See R. 145, Exhibit 1 (Memorandum In Support Of Motion For Equitable Relief: Affidavit Of Chris Armstrong). Specifically, Flatt "said that he was 90% certain that part of his agreement with the District Attorney was that the D.A. wouldn't oppose his parole when he came before the Parole Board" and "Flatt reiterated that he was 'almost positive' that, as part of the deal, the D.A. agreed not to oppose his parole." R. 145, Ex. 1 (Affidavit of Chris Armstrong).

prior proceedings, *viz.*: the prosecution ultimately told the parole board that Flatt "made a great witness,"[16] the District Attorney's Office said they wouldn't resist or block Flatt's release on parole,[17] the prosecution voiced "no objection" to Flatt's release,[18] and Flatt was then released after serving barely 5 years of his supposed 25-year sentence,[19] even though his record in prison was less than stellar.[20]

7. Given Flatt's admission to Investigator Armstrong, Henley filed a motion for equitable relief from judgment under Fed.R.Civ.P. 60(b)(3), (b)(6), (d)(1) & (d)(3).[21] He alleged that Flatt's new admission that there was a deal demonstrates that in the federal habeas proceedings, the state falsely answered his petition and withheld exculpatory evidence that it was under a duty to disclose in habeas.[22] Thus, Henley alleged that he was entitled to relief under Rule 60(b), because he has been the victim of "fraud

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[16] R. 93, Memorandum In Support Of Motion For Summary Judgment, Appendix 9 (Flatt Parole File, p. 201).

[17] Id., Appendix 10 (Transcript Of Flatt Early Release Hearing, Dec. 20, 1989, p. 3); Id, Appendix 11 (Ex. 1 to Fann Deposition, pp. 1, 9).

[18] Id., Appendix 12 (Transcript Of Flatt Dec. 20, 1990 Parole Hearing, p. 3).

[19] Id., Appendix 13 (Flatt Parole Certificate).

[20] Id., Appendix 16 (Flatt Parole Board File).

[21] R. 144 (Motion For Equitable Relief From Judgment).

[22] See R. 145 (Memorandum In Support Of Motion For Equitable Relief).

. . . misrepresentation, or misconduct by an opposing party"[23]and Flatt's new admission provided "any other reason that justifies relief" under Fed.R.Civ.P. 60(b)(6).[24]

Likewise, under Fed.R.Civ.P. 60(d)(1), which preserves the "independent action in equity," Henley asserted that he is entitled to equitable relief, because, given the falsity of the state's answer and the withholding of the evidence of the deal, "In equity and good conscience, the judgment here ought not be enforced, where the judgment would otherwise cost Steve Henley his life despite its error in denying habeas relief."[25] Henley likewise alleged that the circumstances established "fraud on the court" under Fed.R.Civ.P. 60(d)(3) and the Sixth Circuit's decision in Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993), which provides for relief where an officer of the court deceives the court by making a positive averment or concealment that is "intentionally false, willfully blind to the truth, or is in reckless disregard for the truth." Henley argued that he was entitled to an evidentiary hearing at which he could prove his entitlement to equitable relief on his allegations under Rule 60(b), 60(d)(1) and 60(d)(3).

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[23] Fed.R.Civ.P. 60(b)(3).

[24] R. 145: Memorandum In Support Of Motion For Equitable Relief, pp. 6-12.

[25] R. 145, Memorandum, p. 13.

8. After Henley filed his motion, counsel for the state requested an extension of time to respond to the motion, given the "serious allegations of professional misconduct," where counsel needed to "conduct some investigation," including contacting the District Attorney who prosecuted Henley.[26] After conducting that investigation, Respondent then filed a response, but did not deny the existence of the deal which Henley alleged, nor did Respondent present any evidence which controverted the Armstrong affidavit recounting Flatt's new admission that he and the prosecution did, in fact, have a deal whereby the prosecution would not opposed his parole.

9. Without holding a hearing, the District Court denied relief by concluding that the evidence at an evidentiary hearing would not establish the deal: "[T]he Court harbors no expectation that Flatt would testify to the contents of Mr. Armstrong's declaration at an evidentiary hearing." The District Court concluded that Henley did not establish "fraud upon the court" because he had not produced any direct, admissible evidence of any fraud perpetrated on the court.[27] The Court did so, however, without affording Henley his requested evidentiary hearing, while unilaterally declaring his belief that Flatt would not testify to the deal he admitted to Mr. Armstrong. The Court did not advert to any of the other evidence

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[26] R. 148, p. 2, Motion For Extension Of Time.

[27] Id., p. 5 (District Court Order), A7.

confirming that there was such a deal, nor take into account the Respondent's failure to present any controverting proof. The Court also stated that there was no evidence that the state's counsel in habeas proceedings knew of the deal.[28] The Court also denied relief under Rule 60(b)(3) and 60(b)(6), while also stating that Henley had not shown any basis for securing relief in an independent action in equity under Rule 60(d)(1).[29]

10. After the District Court denied relief, Henley filed a motion with the District Court asking the District Court to hold that he need not obtain a certificate of appealability (COA) to appeal the denial of his Rule 60 motion. The District Court held that Henley was required to obtain a COA, and denied a COA.[30] The Sixth Circuit likewise rejected Henley's argument that he was not required to obtain a COA, and like the District Court, the Sixth Circuit denied a COA, concluding that Henley had not met the standard for obtaining a certificate of appealability.[31]

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[28] Id. (A7)

[29] Id., pp. 5-6 (A7-8).

[30] A11-12.

[31] A1-2.

## REASONS FOR GRANTING THE WRIT

### I. In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), This Court Acknowledged A Circuit Conflict On The Question Whether The Certificate Of Appealability Requirement Of 28 U.S.C. §2253 Applies To Rule 60 Motions In Habeas Proceedings, But Left The Issue Unresolved

28 U.S.C. §2253(c)(1)(A) requires an appellant to obtain a certificate of appealability to appeal the denial of "the final order in a habeas corpus proceeding. . . ." In Gonzalez v. Crosby, 545 U.S. 524, 535 n.7 (2005), this Court left open the question whether an order denying relief under Fed.R.Civ.P. 60 is this "final order" identified by §2253(c)(1)(A). While acknowledging that some courts of appeals have required the movant to obtain a certificate,[32] this Court likewise acknowledged a contrary rule in the Fifth Circuit,[33] but specifically "did not decide in this case whether this construction of §2253 is correct," because the Eleventh Circuit had granted Gonzalez a certificate.[34] Where the Sixth Circuit has required Henley to obtain a certificate[35] but has *denied* that certificate (unlike in *Gonzalez*), this petition presents a more appropriate vehicle to resolve the conflict acknowledged by *Gonzalez* but left undecided there.

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[32] Gonzalez, 545 U.S. at 535 n.7, *citing* Reid v. Angelone, 369 F.3d 363 (4th Cir. 2002); Gonzalez v. Crosby, 366 F.3d 1253 (11th Cir. 2004).

[33] Dunn v. Cockrell, 302 F.3d 491, 492 (5th Cir. 2002).

[34] Gonzalez, 545 U.S. at 535 n. 7.

[35] A1, *citing* United States v. Hardin, 481 F.3d 924 (6th Cir. 2007).

## II. In *Harbison v. Bell*, U.S.No. 07-8521, This Court Is Deciding The Scope Of 28 U.S.C. §2253's Certificate Requirement, And As A Matter Of Textual Interpretation And Context, 28 U.S.C. §2253 Does Not Require An Appellant Like Henley To Obtain A Certificate Of Appealability

In *Harbison v. Bell*, U.S.No. 07-8521, *cert. granted* 554 U.S. ___ (2008), this Court will be deciding the scope of §2253's certificate of appealability requirement in the context of an appeal from the denial of clemency counsel under 18 U.S.C. §3599. In fact, the parties there have conceded that, by its terms, §2253 does not apply to the appeal of such a motion. See e.g., *Harbison v. Bell*, U.S.No. 07-8521, Brief Of The Petitioner, pp. 16-17 (noting that all the parties agree that §2253's certificate requirement did not apply, emphasizing that the "final order" in a habeas proceeding contemplated by §2253 is the "order finally disposing of the habeas petition challenging the petitioner's detention.").

Just as §2253 does not apply by its terms to the denial of a motion under 18 U.S.C. §3599, it does not apply to Henley's Rule 60 motion either. Under 28 U.S.C. §2253(c)(1)(A), a certificate of appealability is only required from "*the final order* in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." An order denying a Rule 60(b) motion is not such a "final order in a habeas corpus proceeding" within the meaning of §2253. Gonzalez v. Crosby, 366 F.3d 1253, 1299-1300 (11th Cir. 2004)(Tjoflat, J., concurring and dissenting).

Indeed, to obtain a certificate to appeal the denial of a final order, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). The requirement of a substantial showing of the denial of a constitutional right makes sense when a petitioner is appealing the order denying the habeas petition itself, which involves resolution of a petitioner's federal constitutional claims "for relief from a state court's judgment of conviction." Gonzalez v. Crosby, 545 U.S. 524, 530 (2005).

A proper Rule 60(b) motion (Henley's was conceded to be such a motion below) has nothing to do with constitutional challenges to a state conviction. Rather, it involves "some defect in the integrity of the federal habeas proceedings." Gonzalez, 545 U.S. at 532 & n. 5. Where (as here), a Rule 60 motion is grounded on allegations that the *federal judgment* was tainted by fraud, misrepresentation and/or misconduct, there is no allegation of a constitutional violation, and hence no need (or ability) to show the denial of a constitutional right.

Indeed, the whole point of *Gonzalez* is that a proper Rule 60(b) motion doesn't involve allegations of constitutional deprivation. Thus, §2253 – which by its terms does not apply to a 60(b) motion – simply has no applicability. It is anomalous to require a showing of a constitutional violation in a proceeding which doesn't involve such violations. This is why

§2253 is limited by its terms to final orders which adjudicate the existence *vel non* of such violations in the state court proceedings.

*Harbison* will enlighten the proper scope of §2253's certificate of appealability requirement, and it quite clearly appears as a textual and contextual matter that it is anomalous to require the showing of the denial of a constitutional right by a state court in proceeding which only involves challenges to the integrity of the federal habeas proceeding. This Court, therefore, should at least hold Henley's petition pending *Harbison*, and after deciding *Harbison*, grant the petition, vacate the judgment, and remand for further proceedings.

## III. Henley's Appeal Presents Substantial Grounds For Reversal Which Would Entitle Him To Relief Had He Not Been Denied An Appeal Through Erroneous Application Of The Certificate Of Appealability Requirement

Henley's appeal from the denial of his Rule 60 motion is substantial. As Henley has emphasized below, the District Court concluded that Henley could not established any fraud because he had been unable to present direct proof from Flatt that he had a deal, but the only reason Henley could not present that proof was because Flatt refused to cooperate and Henley could not, therefore, present Flatt's testimony without a hearing. As the Fourth Circuit has recognized a District Court cannot deny a hearing on well-pleaded allegations where the moving party has done all in his power to present competent evidence necessary to secure a hearing. United States

v. Mason, 52 F.3d 1286 (4th Cir. 1995). Under the circumstances, the Armstrong affidavit establishing Flatt's deal *is* sufficient to warrant a hearing, where Flatt has refused to cooperate.

Similarly, the District Court faulted Henley for allegedly failing to establish that state attorneys either had knowledge of Flatt's deal when they answered the habeas petition, or acted willfully or with reckless disregard for the truth in denying the deal that existed. The District Court, however, failed to consider Fed.R.Civ.P. 11, which confirms that any answer to Henley's habeas petition was, by definition, subject to reasonable investigation before it was made. Henley could therefore establish this necessary element of fraud, were he accorded a hearing.

Further, as Henley has emphasized, had Flatt's newly-admitted deal been properly admitted on the pleadings, Henley ultimately would have been able to demonstrate his entitlement to habeas relief. Had the deal been properly admitted in the answer, Henley clearly would have established "cause" for any alleged failure to initially raise his due process claims in state court: A truthful answer would have made manifest that the state's response to his state court *Brady* motion was untrue and misleading and impeded his ability to raise the claims in state court, while the false *Brady* response was left uncorrected. Banks v. Dretke, 540 U.S. 668 (2004).

Similarly, Henley would have established "prejudice" arising from Flatt's false testimony denying the deal at trial, where, most importantly, the jury sentenced Henley to death while left with the impression that co-defendant Flatt would spend 25 years in prison. Had the jury known that Flatt was essentially assured of being released when parole eligible (he actually was released in just over 5 years) there is a reasonable probability that all twelve jurors would not have sentenced Henley to death, given the concern that the death sentence was highly disproportionate to Flatt's 5-7 year sentence. See e.g., State v. Marlow, 786 P.2d 395 (Ariz. 1989) (reducing death sentence to life imprisonment where co-defendant was sentenced to only four (4) years in prison and sentencer failed to consider this disparity); 18 U.S.C. §3592(a)(4)(disparity in sentencing mitigating circumstance).

In other words, the Sixth Circuit imposed a certificate of appealability requirement, and in doing so denied Henley an appeal which presents substantial grounds for reversal. By concluding that Henley was not required to obtain a certificate of appealability and reversing the court of appeals on that matter, there is a reasonable likelihood that Henley could secure relief on his 60(b) appeal. Thus, this petition provides an appropriate vehicle for deciding the applicability of §2253's certificate of appealability requirement, and this Court should grant the petition and reverse.

## CONCLUSION

This Court should grant the petition for writ of certiorari and hold the petition pending the decision in *Harbison v. Bell*, U.S.No. 07-8521 which will be addressing the scope of §2253's certificate of appealability requirement. Alternatively, the Court should grant the petition and reverse the judgment below and remand for further proceedings.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari was served upon Elizabeth Ryan, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 3rd day of February, 2009.

/s/Paul R. Bottei