No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVE HENLEY,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

APPLICATION FOR STAY OF EXECUTION

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

To The Honorable John Paul Stevens,
Circuit Justice For The United States Court Of Appeals
For The Sixth Circuit

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Steve Henley's petition for writ of certiorari presents the question whether, under 28 U.S.C. §2253(c)(1)(A), Henley is required to obtain a certificate of appealability to appeal the denial of his Fed.R.Civ.P. 60 motion. That question is worthy of this Court's consideration, especially where this Court has already agreed, in *Harbison v. Bell*, U.S. No. 07-8521, to address the scope of §2253 in the context of the appeal of a motion under 18 U.S.C. §3599.

Certiorari is warranted, because the judgment below contends that a certificate is required for Rule 60 appeals, but the statute and its operation indicate otherwise. The terminology of Section 2253(c)(1)(A) confirms that Henley is not, and was not, required to obtain such a certificate, because the certificate only applies to "the final order" in a habeas proceeding under §2254. By definition an order denying Rule 60 relief is not "the final order." Further, Section 2253's requirement that the inmate "demonstrate that jurists of reason could disagree with the district court's resolution of his constitutional claims" Banks v. Dretke, 540 U.S. 668, 705 (2004) simply makes no sense in the context of Rule 60 motion where constitutional claims are not at issue.

Henley's Rule 60 motion has made serious – and unrefuted – allegations of fraud during the federal proceedings. Boiled down, in his habeas petition, Henley alleged that: (1) the state withheld exculpatory evidence that co-

defendant Flatt – the prosecution's key witness who received a 25-year sentence – had a deal with the prosecution that the prosecution would not his parole (which he received in 5 years) and (2) Flatt's testimony about his agreements with the prosecution was false. In state court, the prosecution stated that it had provided all exculpatory evidence. Then, in federal court the state in its answer to the habeas petition denied the existence of the deal, after which Henley was denied habeas relief. It was not until 2008 that Flatt finally admitted that there was such a deal when he admitted this to an investigator, but he refused to sign an affidavit.

Henley sought relief from judgment under Fed.R.Civ.P. 60(b), 60(d)(1) & 60(d)(3) in light of this new disclosure, presenting an affidavit from the investigator to establish that Flatt did indeed have a deal for parole, which means that the state's answer (filed pursuant Fed.R.Civ.P. 11) which denied both the deal and Flatt's false testimony was untrue. Thus, he established "fraud" for purposes of an independent action in equity under Fed.R.Civ.P. 60(d)(1), and fraud upon the court under Fed.R.Civ.P. 60(d)(3). See Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

The District Court, however, denied relief by refusing to credit the investigator's affidavit, unilaterally concluding (without a hearing) that Flatt

would not testify to the deal, and by failing to acknowledge that the answer was signed pursuant to Rule 11. As noted in the accompanying certiorari petition, the District Court's errors are serious and warrant reversal, but Henley has not been allowed to appeal, because the District Court and Sixth Circuit have said that he requires a certificate of appealability and have denied one.

That both courts denied a certificate is not surprising, where Henley's Rule 60 motion has not alleged constitutional violations *per se*, but a lack of integrity in the federal habeas process. By definition, because he is not challenging a state court proceeding, he cannot satisfy the §2253 standard and thus cannot reasonably appeal the District Court's flawed denial of relief.

Were this Court to conclude that a certificate is unnecessary, there is a substantial likelihood that he win his appeal and ultimately establish his claims of fraud under Fed.R.Civ.P. 60(d)(1) and/or (d)(3). As the record stands now, based upon Flatt's new admission that he had in fact had a deal, Henley has alleged that untrue denials in the state's habeas answer precluded a fair hearing on his withheld exculpatory evidence/false testimony claims.

Had the state answered truthfully, Henley would have conclusively established his entitlement to relief in his habeas proceedings, because the

admission of the deal would establish "cause" for the alleged procedural default of his claim: It would convincingly establish that the state's denial of the deal in state court were untrue and misleading, thereby establishing "cause" for not raising his claims in state court while the taint of the state's inaccurate *Brady* response remained. See Banks v. Dretke, 540 U.S. 668 (2004). Likewise, a truthful admission of the deal in the answer would have established "prejudice" resulting from the alleged default of the claims: It would have established that Flatt had a deal that the prosecution would not oppose parole, and where Flatt was the prosecution's key witness but failed to reveal that he reasonably expected to be released in a matter of several years – not the 25 year he claimed at trial – there is a reasonable probability that Henley would not have been convicted (given the centrality of Flatt's testimony to the prosecution's case) and that at least one juror would not have voted to have Henley executed. Indeed, at least one conscientious juror would not have voted to executed Henley had s/he known that Flatt would be released in 5-7 years. He was released in 5. See Banks, *supra*.

Thus, this Court should grant a stay of execution. There is reasonable likelihood that this Court will grant certiorari and reverse. Should this Court grant Henley's petition and conclude that Henley was not required to obtain

a certificate and Henley be granted his appeal as of right, he would be able to establish fraud sufficient to warrant relief under Rule 60(d)(1) and/or 60(d)(3) (See Demjanjuk, *supra*) so he shows a likelihood of success; he faces irreparable harm, as he faces execution; and the remaining stay equities favor him, as neither the state nor the public has an interest in either a tainted federal judgment or a capital sentence which has been tainted by the withholding of material exculpatory evidence. See e.g., Cone v. Bell, U.S.No. 07-1114, *cert. granted* 553 U.S. ___ (2008). Where Henley has made a *prima face* showing of fraud and can establish such fraud at a hearing – especially where the state now does not deny Flatt's deal – he should be entitled to a hearing to prove his entitlement to relief.

On a final note, it is also not Henley's fault that the state has let Flatt's false testimony go unremedied for so long. Any claim that Henley seeks relief too late flies in the face of what has actually occurred: Flatt lied, and the state failed to correct it for years, leaving Henley vulnerable to execution. The state ought not be rewarded for successfully hiding the truth by blaming Henley for not unearthing it sooner. This much is clear. Banks v. Dretke, *supra* (state may not be rewarded for playing hide and seek with exculpatory evidence).

Especially where this Court is addressing the scope of §2253's certificate

requirement in Harbisonv. Bell, U.S.No. 07-8521 (whether §2253 by its terms applies to the appeal of an order denying relief under 18 U.S.C. §3599), this Court should grant Henley's petition, and grant a stay of execution so long as necessary to apply the dictates of *Harbison*, conclude that Henley was not required to obtain a certificate, and remand for further proceedings.

CONCLUSION

This Court should grant a stay of execution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing application for stay of execution 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