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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMAS G. BRUTON
CLERK, U.S. DISTRICT COURT

Richard Bailey,

Petitioner,

v.

Case No. 1:97-cv-07665

United States of America,

Respondent.

_____ /

**MOTION UNDER RULE 60(b) TO REOPEN
MR. BAILEY'S \$2255 PROCEEDINGS**

Mr. Bailey has tried for years to show that he is actually innocent of Helen Brach's murder. Mr. Bailey has passed a polygraph examination and the real murderer has confessed. Nonetheless, for more than two decades, this court has refused to allow Mr. Bailey an opportunity to be heard.

Initially, this court plainly erred when it concluded Mr. Bailey's first \$2255 motion was untimely. See **Bailey v. United States**, No. 12-3400 (7th Cir. April 9, 2013) (Opinion reproduced as Attachment "1"). Thereafter, this court (and the Court of Appeals) refused to construe Mr. Bailey's subsequent newly discovered evidence motions in a manner that permits adjudication on the merits. **Id.** at 1. In sum, this court turned the liberal construction principle on its head; in that this court found methods to avoid deciding the merits, rather than construing the pleading in a manner most favorable to the pro se litigant.^{/1}

^{/1} We recognize that some of Mr. Bailey's filings were counseled and some ghostwritten, nonetheless, some were not. Cf. generally **Bailey v. United States**, 1997 U.S. Dist. LEXIS 17639 (N.D. Ill. 1997) ("This opinion characterizes Bailey's submission as pro se only in the sense that no counsel signed the motion. It is obvious that nonlawyer Bailey has received legal assistance in connection with the memorandum".).

The last attempt by Mr. Bailey resulted in the Seventh Circuit vacating this court's order construing the Rule 60(b) motion as a second or successive, instead the circuit court found the motion a true Rule 60(b)(6). But the circuit found Mr. Bailey did not diligently pursue the action—eight years was too long. *Id.* Now, five years later, the Supreme Court announced in **Beckles v. United States**, 137 U.S. 886 n.4 (2017) ("The Court's adherence to the distinction between mandatory and advisory guidelines leaves open the question of whether mandatory guidelines are challengeable) that one of Mr. Bailey's earlier propositions is likely correct.

Mr. Bailey alleged that because he was sentenced in the mandatory-guideline era, his claims of actual innocence were more in the nature of a challenge to a conviction rather than to a sentence. Stated differently, in the context of sentencing ranges, a sentencing factor transforms into an element of a distinct crime when the fact (sentencing factor) changes a mandatory guideline.

Under the Supreme Court's 2017 reasoning, this court's imposition of an enhanced (mandatory) sentence based on unindicted, judge-found facts constitutes an unconstitutional action, which effectively nullifies the criminal judgment. This claim, even if less elegantly presented, was raised in the original §2255. The claim, however, has never been adjudicated on the merits.

As the Supreme Court and this circuit have recognized, a Rule 60(b) motion is the proper vehicle to correct a habeas corpus mistaken procedural ruling that prevented the habeas court from reaching the merits of the claim. See **Gonzalez v. Crosby**, 545 U.S. 524, n.5 (2005) (When a movant asserts a non-merits ground was in error, such as failure to exhaust, procedural default, or statute of limitations, then the ground is properly raised via Rule 60(b)); see **Bradley v. Lockett**, 549 Fed. Appx. 545, 551 (7th Cir. 2013).

Mr. Bailey shows that not only did this court err in time-barring the initial motion, but this court also overlooked the miscarriage-of-justice exception to time limits and procedural default. **McQuiggin v. Perkins**, 133 S.Ct. 1924 (2013). Arguably, the actual-innocence exception is subject to a much less stringent diligence requirement than other extraordinary circumstances. In **McQuiggin**, 133 S.Ct. 1924 (2013) (The inmate filed a petition more than eleven years after his conviction for first-degree murder claiming that he was actually innocent and supporting the claim with three affidavits. The Supreme Court held the supported allegations of actual innocence overrides the expiration of the statute of limitations).

Mr. Bailey previously presented the murderer's statements and the polygraph results. At that time this court did not recognize the miscarriage of justice exception was implicated because it misperceived the challenge as a sentencing-error claim; instead of a challenge to conviction for a distinct crime and a more serious crime than Mr. Bailey admitted to in the plea bargain. There is no time period on raising a claim of actual innocence. Cf generally **Montgomery v. Louisiana**, 136 S.Ct. 718 (2016) ("There is no grandfather clause that permits States [or the federal government] to enforce punishments the Constitution forbids" merely because "the criminal judgment became final before a court recognized the defect").

Mr. Bailey's sentence is defective because a judge—not a unanimous jury—found a fact that imposed a mandatory penalty. This court's dual, procedural mistakes (time bar and innocence-of-a-mandatory-penalty standard) creates an extraordinary circumstance, which ruptures the integrity of the process, therefore rendering Rule 60(b) appropriate.

This court should reopen the §2255 and adjudicate the merits of Mr. Bailey's unresolved claims.

Respectfully submitted by Richard Bailey on this 14th day of June 2017.



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CERTIFICATE OF SERVICE

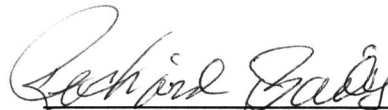
This motion was delivered in a pre-addressed, postage-paid envelope to the prison mailing authorities on the same day as signed. The United States of America's attorney of record is registered with the CM/ECF docketing system; thus, the petitioner requests that notice of the filing and service of this motion on the United States occur through that system's electronic medium. A copy of this motion has been served on the United States via its attorney of record at the United States Attorney's Office.



Richard Bailey

VERIFICATION

Under penalty of perjury as authorized in 28 U.S.C. §1746, I declare the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.



Richard Bailey

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CLERK, U.S. DISTRICT COURT

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Northern District of Illinois
Office of the Clerk
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20th Floor
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