October 30, 2003

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

CLERK OF THE COURT
708 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, Minnesota 55101
U.S. CERTIFIED MAIL NO. 7003-0500-0003-6598-4282

RE: LAMBROS vs. U.S.A., Civil No. 99-28 (DSD)
Criminal No. 4-89-82(5) (DSD)

Dear Clerk:

Attached for **FILING** in the above-entitled action, Civil No. 99-28, is one (1) original and one (1) copy of:

1. MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S ORDER DATED OCTOBER 23, 2003, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE. Dated: October 30, 2003.

Please contact me if I have not followed any of the filing rules.

I have mailed copy of the above motion to the U.S. Attorney's Office.

Thanking you in advance for your continued assistance in this matter.

Sincerely,

John G. Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of the above listed document/motion was mailed within a stamped addressed envelope from the USP Leavenworth legal mail box/room on this **30th DAY OF OCTOBER, 2003,** to:

1. U.S. Attorney's Office, District of Minnesota, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415.

John G. Lambros

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS,	*	**CIVIL NO. 99-28 (DSD)**
Plaintiff,	*	Criminal No. 4-89-82(5) (DSD)
vs.	*	
UNITED STATES OF AMERICA,	*	**AFFIDAVIT FORM**
Respondent/Defendant.	*	

MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S ORDER DATED OCTOBER 23, 2003, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

COMES NOW, Petitioner JOHN GREGORY LAMBROS, Pro Se, (hereinafter Movant) offering his MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S ORDER DATED OCTOBER 23, 2003, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

STANDARD OF REVIEW:

1. Rule 59(e) of the Federal Rules of Civil Procedure serves to allow a district court to rectify its own mistakes immediately following the entry of judgment. WHITE vs. NEW HAMPSHIRE DEPT. OF EMPLOYMENT SEC., 455 U.S. 445, 71 L. Ed.2d 325 (1982). District Courts have broad discretion in deciding whether to alter or amend judgment pursuant to this rule. ROBINSON vs. WATTS DETECTIVE AGENCY, 685 F.2d 729, 743 (1st Cir. 1982) (Rule 59(e) motion addressed to discretion of trial court.); IN RE PRINCE, 85 F.3d 314, 324 (7th Cir. 1996)(decision to grant or deny Rule 59(e) motion is discretionary). Moreover, the timely filing of a motion under Rule 59(e) gives this Court the jurisdiction to amend the judgment for **ANY REASON**, and this Court is not limited to the grounds contained in this motion in granting relief. VARLEY vs. TAMPAX INC., 855 F.2d 696 (10th Cir. 1988). In addition, a motion under Rule 59(e) SUSPENDS THE FINALITY OF THE JUDGMENT FOR purposes of appeal. VAUGHTER vs. EASTERN AIR LINES INC., 817 F.2d 685 (11th Cir.

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1987); GRIGGS vs. PROVIDENT CONSUMER DISCOUNT CO., 74 L.Ed. 2d 225, 229-30 (1982).

ARGUMENT

2. A Rule 59(e) motion to alter or amend judgment may be granted when a judgment, absent amendment, results in a manifest injustice or a clear legal error. See, MOBILE OIL CORP. vs. AMOCO CHEMS. CORP., 915 F.Supp. 1333, 1377 (D. Del. 1994)(motion to amend damage award granted to prevent manifest injustice).

3. On October 23, 2003, this Court ORDERED "Defendant's [Lambros'] motion to vacate judgment due to intervening change in controlling law DENIED and Lambros' motion offering clarification of facts, record and evidence [Doc. No. 267] as denied as moot.

4. This Court stated within its' October 23, 2003, ORDER, page 6:

> "In short, if defendant's previous motion was a proper Rule 60(b) motion, the Court of Appeals **HAD JURISDICTION TO AFFIRM THE DISMISSAL WITHOUT A COA.** If it was instead a disguised successive habeas petition, it necessarily failed for want of permission from the Court of Appeals. See, 28 U.S.C. §2255. Because the court finds no intervening change of law requiring it to vacate its dismissal of defendant's purported Rule 60(b) motion or its denial of defendant's motion for COA, the present motion is denied." (emphasis added).
>
> "... While a **COA IS A JURISDICTIONAL PREREQUISITE TO AN APPEAL FROM THE DENIAL OF A HABEAS PETITION,** the Court of Appeals considered defendant's motion as a Rule 60(b) action when it affirmed the district court's dismissal. ..... Thus, **A CERTIFICATE OF APPEALABILITY WAS NOT REQUIRED TO CONFER JURISDICTION UPON THE COURT OF APPEALS.**" (emphasis added)

5. The threshold question is:

> **WHETHER A COA IS REQUIRED BEFORE AN APPEAL FROM THE DENIAL OF A TRUE RULE 60(b) MOTION CAN PROCEED?**

6. Five of the six circuits that have addressed this issue in published opinions have concluded that a COA is required either for the appeal from the

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denial of all habeas-related **RULE 60(b) MOTIONS, OR AT LEAST FOR THE APPEAL FROM THE DENIAL OF TRUE RULE 60(b) MOTIONS.** See, KELLOGG vs. STRACK, 269 F.3d 100, 103 (2nd Cir. 2001), cert. denied, ... 152 L.Ed.2d 216 (2002); RUTLEDGE vs. U.S., 230 F.3d 1041, 1046-47 (7th Cir. 2000), cert. denied, ... 149 L.Ed.2d 120 (2001); MORRIS vs. HORN, 187 F.3d 333, 336 (3rd Cir. 1999); LANGFORD vs. DAY, 134 F.3d 1381, 1382 (9th Cir. 1998); **ZEITVOGEL vs. BOWERSOX, 103 F.3d 56, 57 (8th Cir. 1996).** See, GONZALES vs. SECRETARY FOR DEPT. OF CORRECTIONS, 317 F.3d 1308, 1311 (11th Cir. 2003). See, **EXHIBIT A** (GONZALES, 317 F.3d Pages 1310, 1311, and 1312)

7. Therefore, six (6) circuits, in published opinions, have held **THAT THE COA REQUIREMENT APPLIES TO ANY APPEAL FROM AN ORDER DENYING RULE 60(b) RELIEF FROM THE DENIAL OF A SECTION 2254 PETITION, EVEN IF THE RULE 60(b) MOTION IS NOT THE FUNCTIONAL EQUIVALENT OF A SUCCESSIVE SECTION 2254 PETITION.** This court is obligated to follow the direction of the Eighth Circuit Court of Appeals, ZEITVOGEL vs. BOWERSOX, 103 F.3d 56, 57 (8th Cir. 1996).

8. Movant Lambros is also attaching copy of LAZO vs. U.S., 314 F.3d 571, 573-575 (11th Cir. 2002), as **EXHIBIT B:**

> "The threshold issue is whether Lazo must obtain a COA before he can appeal the district court's denial of his Rule 60(b) motion, which sought relief from a judgment denying his §2255 motion. **THE AIM OF A MOTION PROPERLY BROUGHT UNDER Fed.R.Civ.P. 60(b) AND A MOTION BROUGHT UNDER 28 U.S.C. §2255 ARE QUITE DIFFERENT.** A §2255 motion asserts that a conviction was imposed "in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. §2255. **A 60(b) MOTION, HOWEVER, SEEKS TO VACATE A FEDERAL JUDGMENT BASED ON MATTERS THAT AFFECTED THE INTEGRITY OF THE PROCEEDING. A PROPER 60(b) MOTION WILL CONTAIN AN ARGUMENT THAT A COURT SHOULD RELIEVE A PARTY FROM A FINAL JUDGMENT OR ORDER FOR ONE OF THE REASONS ENUMERATED IN THE RULE.** See, LAZO, at 573 (emphasis added)

9. Movant Lambros filed his original motion to vacate all judgments and orders by United States District Court Judge Robert G. Renner pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure for violations of Title 28 USCA

§ 455(a) and §455(b)(3). The U.S. Supreme Court made clear that "[R]elief from final judgment 'for any other reason,' pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, is neither categorically available nor categorically unavailable for **ALL VIOLATIONS OF 28 USCS § 455**, which defines the circumstances that mandate the disqualification of federal judges; ..... See, LILJEBERG vs. HEALTH SERVICES CORP., 100 L.Ed.2d 855, 860 (1988).

10. This Court stated within its' October 23, 2003, ORDER, Page 6, "Moreover, the Eighth Circuit cited the reasons stated by this Court as the basis of its affirming opinion. See, Id. Among those reasons was the court's finding that the motion was **WITHOUT MERIT.** (Order of March 8, 2002, n. 2.)" The Supreme Court has stated in dictum that a Rule 60(b)(6) on appeal can not be judged on the merits of the underlying judgment, from an order denying a Rule 60(b)(6). See, BROWDER vs. DIRECTOR, ILL. DEPT. OF CORRECTIONS, 54 L.Ed.2d 521, 530, n. 7 (1978)

CONCLUSION

11. Therefore, this Courts' ORDER dated October 23, 2003, resulted in a manifest injustice and/or clear legal error when it stated:

a. "... the Court of Appeals had jurisdiction to affirm the dismissal without a COA." See, Paragraph 4; **(ON THE MERITS)**

b. "Thus, a certificate of appealability was not required to confer jurisdiction upon the court of appeals."; See, Paragraph 4 **(ON THE MERITS)**

c. "Moreover, the Eighth Circuit cited the reasons stated by this Court as the basis of its affirming opinion. See id. Among those reasons was the court's finding that the motion was **WITHOUT MERIT.** (Order of March 8, 2002, n.2)" See, Paragraph 10. Also see, MILLER-EL vs. COCKERELL, 123 S.Ct. 1029, 1039 (2003) (Absent a COA, "court of appeals lack jurisdiction to rule on the **MERITS** of appeals from habeas petitioners.")

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12. The attached EXHIBITS A & B:

a. GONZALES vs. SECRETARY FOR DEPT. OF CORRECTIONS, 317 F.3d 1308 (11th Cir. 2003);

b. LAZO vs. U.S., 314 F.3d 571 (11th Cir. 2002).

will assist this Court in amending and/or altering its October 23, 2003, ORDER, as to the legal requirement of a **COA** from an order denying a RULE 60(b) motion.

13. The application of MILLER-EL to this action dictated that this Court and the Eighth Circuit should of ordered a CERTIFICATE OF APPEALABILITY (COA) in Movant's action, as the incorrect and/or too demanding a standard in evaluating Movant Lambros' COA was used. "As a result, until a COA has been issued federal courts of appeals **LACK JURISDICTION TO RULE ON THE MERITS** of appeals from habeas petitioners." MILLER-EL vs. COCKRELL, 154 L.Ed.2d 931, 949 (February 25, 2003). (emphasis added).

14. Based on the foregoing, Movant Lambros respectfully requests this Court amend or alter its judgment ORDER, dated October 23, 2003, due to an intervening change in controlling law.

15. I JOHN GREGORY LAMBROS, declare under the penalty of perjury that the foregoing is true and correct. Title 28 U.S.C.A. §1746.

EXECUTED ON: October 30, 2003.

John Gregory Lambros, Pro Se
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000 USA
Web site: www.brazilboycott.org

6.

CARNES, Circuit Judge:

[1] Aurelio Gonzalez, a Florida prisoner serving a ninety-nine year sentence for robbery with a firearm, appeals from the district court's denial of his Fed.R.Civ.P. 60(b) motion, which asked the district court to reconsider its dismissal of his habeas corpus petition filed pursuant to 28 U.S.C. § 2254. Because Gonzalez filed his habeas petition and his Rule 60(b) motion after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214 (1996), the provisions of that act govern this case.

I.

Gonzalez was convicted and sentenced in the state courts of Florida in 1992. He did not file a direct appeal. In November of 1996, Gonzalez filed a Fla. R.Crim. P. 3.850 motion in state court collaterally attacking his conviction. The grounds he asserted were newly discovered evidence showing that his guilty plea was unintelligent, unknowing, and involuntary. The state trial court denied relief on December 10, 1996, and Gonzalez appealed that denial to the Florida Court of Appeals, which affirmed it. The state appellate court denied rehearing on May 8, 1997.

Gonzalez then filed a § 2254 petition attacking his state court conviction. He signed and mailed that petition on June 17, 1997. It contained the same claim Gonzalez had asserted in his Rule 3.850 proceeding in state court. On September 9, 1998, the district court dismissed Gonzalez's § 2254 petition as time-barred because it had not been filed within the one-year statute of limitations set out in 28 U.S.C. § 2244(d)(1). The district court initially granted Gonzalez a certificate of appealability (COA) but failed to specify any ground for it, which is required by § 2253(c)(3). After we remanded for clarification the district court denied Gonzalez a COA, and then so did we. Our denial came on April 6, 2000.

In July of 2001, Gonzalez filed a Rule 60(b) motion asking the district court to reconsider its September 9, 1998 order denying him habeas relief on statute of limitations grounds in light of the intervening Supreme Court decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), which interpreted the "properly filed" clause of the tolling provision contained in § 2244(d)(2). The district court denied that motion on March 5, 2002. Gonzalez then filed a notice of appeal from that denial, and the district court declined to issue a COA for the appeal.

[2] A judge of this Court did issue Gonzalez a COA to permit this appeal, but the COA describes an issue that is not directly related to the district court order Gonzalez is seeking to appeal, which is the order of March 5, 2002 denying his Rule 60(b) motion. Instead, the COA that was issued is on the question of whether the district court's September 9, 1998 order which ruled Gonzalez's § 2254 petition was barred by the statute of limitations was error. That could have been a proper issue for a COA to permit an appeal from the denial of habeas relief in 1998, but the issue in this appeal is the different one of whether the district court abused its discretion in March of 2002 when it entered the order refusing to set aside its September 1998 denial order in light of the Supreme Court's intervening *Artuz* decision. A new COA will have to be issued or the appeal dismissed if a COA is required for an appeal from the denial of a Rule 60(b) motion in a habeas proceeding. We now turn to that question.

II.

In our recent decision in *Lazo v. United States*, 314 F.3d 571, No. 02–12483, 2002 WL 31809847 (11th Cir. Dec. 16, 2002), we

held that the 28 U.S.C. § 2253(c)(1) requirement of a COA applies to an appeal from the denial of a Rule 60(b) motion if that motion is in reality an attack on the underlying conviction and sentence instead of a challenge to the previous federal court order denying relief from that conviction and sentence. In other words, if the motion is in reality a successive application or motion for relief parading as a Rule 60(b) motion, an appeal from the denial of it cannot proceed without a COA. So holds *Lazo*, an appeal in which the Rule 60(b) motion sought to raise a claim that had not been raised in the § 2255 motion itself. *See id.* at 573.

The threshold question in this case is different, because this is an appeal from the denial of a "true" Rule 60(b) motion—one which attacks the prior federal court habeas order denying relief from the state court judgment of conviction and sentence, instead of attacking the underlying conviction and sentence judgment itself as the motion in *Lazo* did. This case, unlike *Lazo*, does not involve an attempt to raise a new claim. The stated ground for the motion in this case is that an intervening Supreme Court decision supposedly establishes that the denial of habeas relief to Gonzalez on statute of limitations grounds four years ago was based upon a misapprehension of law. We held in the pre-AEDPA era that an intervening Supreme Court decision can in some circumstances be a valid basis for granting Rule 60(b) relief from the denial of habeas relief. *See Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir.1987). At least one panel of this Court has arguably concluded to the contrary in a post-AEDPA case, saying that every Rule 60(b) motion related to the denial of relief in a § 2254 proceeding must be treated as a second or successive habeas petition and denied pursuant to § 2244(b)(1), at least if the motion relates to a claim raised in the earlier § 2254 petition, as the Rule 60(b) motion in that case did. *Mobley v. Head*, 306 F.3d 1096, 1096 (11th Cir.2002).

[3] Before we get to that issue, however, we need to resolve the threshold question of whether a COA is required before an appeal from the denial of a true Rule 60(b) motion can proceed. Five of the six circuits that have addressed that issue in published opinions have concluded that a COA is required either for the appeal from the denial of all habeas-related Rule 60(b) motions, or at least for the appeal from the denial of true Rule 60(b) motions. *See Kellogg v. Strack*, 269 F.3d 100, 103 (2d Cir.2001), *cert. denied*, 535 U.S. 932, 122 S.Ct. 1306, 152 L.Ed.2d 216 (2002); *Rutledge v. United States*, 230 F.3d 1041, 1046–47 (7th Cir.2000), *cert. denied*, 531 U.S. 1199, 121 S.Ct. 1207, 149 L.Ed.2d 120 (2001); *Morris v. Horn*, 187 F.3d 333, 336 (3d Cir.1999); *Langford v. Day*, 134 F.3d 1381, 1382 (9th Cir.1998); *Zeitvogel v. Bowersox*, 103 F.3d 56, 57 (8th Cir.1996). *But see Dunn v. Cockrell*, 302 F.3d 491 (5th Cir.2002).[1] The best explanation of the reasoning behind the majority position (most of the cited opinions contain no explicit reasoning on this point) is set out in the Second Circuit's *Kellogg* opinion. Section 2253(c)(1) requires a COA before an appeal may be taken from "the final order in a habeas corpus proceeding." *Kellogg*, 269 F.3d at 102. As the Second Circuit explained:

1. The decisions we have cited make no distinction insofar as the COA issue is involved between a state prisoner's attempt to use Rule 60(b) to re-open the denial of a § 2254 petition and a federal prisoner's attempt to use it to re-open the denial of a § 2255 motion. Neither do we. Materially identical statutory language describes the COA requirement as it applies to proceedings under § 2254 and § 2255. *Compare* § 2253(c)(1)(A)(applicable to § 2254 proceedings) with § 2253(c)(1)(B)(applicable to § 2255 proceedings).

8.

EXHIBIT A.

To begin with, the plain text of § 2253(c)(1) would seem to make the COA requirement applicable here. There is no question that the denial of a Rule 60(b) motion in non-habeas cases is a "final order" for purposes of appeal, *see Stone v. INS*, 514 U.S. 386, 401, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995), and absent indications to the contrary, we would expect Congress to have intended the same meaning when using the term "final order" in crafting AEDPA, *see, e.g., Strom v. Goldman Sachs & Co.*, 202 F.3d 138, 147 (2d Cir.1999). Not only is there no such contrary indication, but it would be rather anomalous for Congress to have intended to screen out unmeritorious appeals from denials of habeas corpus petitions and yet not have wished to apply this same screen to 60(b) motions seeking to revisit those denials.

Id. at 103. We agree, and align ourselves with the five circuits that have so concluded. An appeal may not be taken from any order denying Rule 60(b) relief from the denial of a § 2254 petition unless a COA is issued. Our conclusion effectively extends *Lazo*'s holding to appeals involving the denial of true Rule 60(b) motions.

III.

The district court's March 5, 2002 order denying the Rule 60(b) motion in this case stated: "Petitioner already has taken an appeal to the Eleventh Circuit. Accordingly, this Court no longer has jurisdiction over his claims." As we have explained, the COA that a judge of this Court issued does not cover that order denying Rule 60(b) relief, which is the order Gonzalez is attempting to appeal, but that COA is instead aimed at the 1998 order denying his § 2254 petition, the appeal of which ended more than two years ago. Accordingly, we quash that COA and proceed to consider whether we should grant a new one in order to permit Gonzalez to appeal the denial of his Rule 60(b) motion.

[4, 5] The Supreme Court has held that when a district court denies a habeas petition on procedural grounds without reaching the merits of the underlying constitutional claims, the requirements for issuance of a COA include a showing "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). From that holding we conclude that a COA should not issue in the appeal from the denial of a Rule 60(b) motion in a habeas case unless the petitioner shows, at a minimum, that it is debatable among jurists of reason whether the district court abused its discretion, *see Mobley*, 306 F.3d at 1097 ("This Court reviews a denial of a 60(b) motion for an abuse of discretion."); *Kellogg*, 269 F.3d at 104, by denying the motion.[2] For two independently adequate reasons, we do not find it debatable among jurists of reason whether the denial of Gonzalez's Rule 60(b) motion was an abuse of discretion. First, that motion is barred by the *Mobley* decision's conclusion that under post-AEDPA law all Rule 60(b) motions in habeas cases are to be treated as second or successive petitions.

Second, even if pre-AEDPA law applied, it would still be clear that Gonzalez's Rule 60(b) motion was due to be denied. The *Ritter* decision concluded that a change in the law standing alone was not a proper basis for Rule 60(b) relief absent extraordinary circumstances. 811 F.2d at 1401 (explaining that "[o]ur investigation [of the law], leads us to conclude that something more than a 'mere' change in the law is

2. Because Gonzalez has not made even that showing, we need not address the showing, if any, he would have to make regarding the merits of his underlying claims. *See Kellogg*, 269 F.3d at 104.

In March 2002, the district court, without explanation, summarily denied the motion. Lazo timely filed a motion for a COA in the district court and sought permission to proceed in forma pauperis. In April 2002, Lazo also filed a notice of appeal as to the denial of his Rule 60(b) motion. The district court granted the motion to proceed in forma pauperis and denied the request for COA.

[1] The threshold issue is whether Lazo must obtain a COA before he can appeal the district court's denial of his Rule 60(b) motion, which sought relief from a judgment denying his § 2255 motion. The aim of a motion properly brought under Fed.R.Civ.P. 60(b) and a motion brought under 28 U.S.C. § 2255 are quite different. A § 2255 motion asserts that a conviction was imposed "in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. A 60(b) motion, however, seeks to vacate a federal judgment based on matters that affected the integrity of the proceeding. A proper 60(b) motion will contain an argument that a court should relieve a party from a final judgment or order for one of the reasons enumerated in the rule.[1] In this case, a motion properly brought under 60(b) would seek to invalidate the judgment of the district court dismissing Lazo's § 2255 motion. The contents of the motion would be an attack on the district court's order denying Lazo's § 2255 motion, not an attack on the sentence itself.

[2] Having examined Lazo's "Rule 60(b)" motion,[2] we conclude that it is the functional equivalent of a successive § 2255 motion.[3] In his Rule 60(b) motion, Lazo does not attack the district court's order denying his § 2255 motion. Instead, he makes the argument that his conviction is void because the district court lacked subject matter jurisdiction to hear his case and impose a sentence because the indictment was insufficient. He argues that the grand jury failed to allege an interference with interstate and/or foreign commerce under 21 U.S.C. § 801, failed to give him "notice" as to the penalty against which he must defend in violation of the Sixth Amendment, and failed to give jurisdiction to the sentencing court to impose his sentence under 21 U.S.C. § 841(b)(1)(A) by failing to establish an interference with interstate commerce. (R. Ex. 2–172, 173.) Lazo advances no Rule 60(b) argument to support an attack on the order denying his § 2255 motion. He simply makes new arguments attacking the validity of his sentence. After examining the contents of Lazo's motion, it is readily apparent that the motion is really a successive § 2255 motion in 60(b)'s clothing.

Because we construe the motion as the functional equivalent of a successive § 2255 motion, we hold that Lazo must

1. Those reasons include: mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, other misconduct of an adverse party, the judgment is void, the judgment has been satisfied, or any other reason justifying relief from the judgment. Fed.R.Civ.P. 60(b) (2002).

2. Under *United States v. Jordan*, 915 F.2d 622 (11th Cir.1990), district courts have an obligation to look behind the label of a pro se inmate's motion to determine whether the motion is cognizable under a different remedial statutory framework. *Id.* at 624–25.

3. Lazo admits as much in his motion: "Movant respectfully prays this Court not construe this Rule 60(b)(4) motion as a second or successive motion ... [r]ather, that this motion 'relates back' to the original pleadings." (R. Ex. 2–173 at 26.)

EXHIBIT B.

10.

obtain a COA prior to appealing the denial of his motion. This holding is consistent with our decision in *Mobley v. Head*, 306 F.3d 1096 (11th Cir.2002),[4] which interpreted *Felker v. Turpin*, 101 F.3d 657 (11th Cir.1996). In *Felker*, we stated that "the established law of this circuit ... forecloses [the petitioner's] position that Rule 60(b) motions are not constrained by successive petition rules.... Rule 60(b) cannot be used to circumvent restraints on successive habeas petitions." *Felker*, 101 F.3d at 661. Failure to petition this court for permission to file a successive § 2255 motion leaves the district court without jurisdiction to rule on the successive § 2255 motion and the motion should be dismissed. Section 2253(c)(1)(B) states that an appeal may not be taken to a court of appeals from a final order in a proceeding under § 2255 unless a judge issues a COA. 28 U.S.C. § 2253(c); *see also Edwards v. United States*, 114 F.3d 1083, 1084 (11th Cir.1997) (stating that a district court judge first must rule on the issuance of a COA). Under these circumstances, a district court order denying the successive § 2255 motion is "a final order in a proceeding under section 2255" and therefore a COA is a necessary prerequisite to appealing the denial of the 60(b) motion. 28 U.S.C. § 2253(c)(1)(B).[5]

[3] Construing Lazo's notice of appeal as a motion for a COA, we determine that a COA is not warranted in this case. Fed. R.App. P. 22(b)(2); *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S.Ct. 1595, 1603, 146 L.Ed.2d 542 (2000) (dealing with § 2254 motion and stating that the court of appeals should have treated the notice of appeal as an application for a COA); *see also Gay v. United States*, 816 F.2d 614, 616 n. 1 (11th Cir.1987) (stating that principles developed in § 2254 cases apply to cases involving § 2255 motions). A COA is authorized "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has added that

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 484, 120 S.Ct. at 1604. When a plain procedural bar is present and the district court is correct to invoke it, then a reasonable jurist could conclude neither that the district court erred in dismissing the petition nor that the peti-

4. We note that the *Mobley* court chose to stay Mobley's execution pending the upcoming decision of the Supreme Court in *Abdur'Rahman v. Bell*, 535 U.S. 1016, 122 S.Ct. 1605, 152 L.Ed.2d 620 (2002). The Court granted certiorari in *Abdur' Rahman* to answer the question of whether every Rule 60(b) motion constitutes a prohibited second or successive habeas petition as a matter of law. *Id.* If the Court answers that question in the affirmative, this order will be in accordance with that decision. However, should the Supreme Court abrogate *Mobley*'s bright line rule, the ultimate resolution of this matter would not change.

5. Whether we conclude that Lazo's 60(b) motion is a successive § 2255 motion because *Mobley* dictates that all 60(b) motions filed by habeas petitioners are successive or whether we conclude that Lazo's 60(b) motion is a successive § 2255 motion because we examine the contents of the motion, the result is the same. Lazo's Rule 60(b) motion must be treated as a successive § 2255 motion. As such, he must move this court for and receive a COA before he will be permitted to appeal the district court's denial of his Rule 60(b) motion.

tioner should be allowed to proceed further. *Id.* In this case, the "plain procedural bar" to Lazo's motion was that he needed to petition this court for an order authorizing the district court to consider his successive § 2255 motion. 28 U.S.C. § 2244(b)(3)(A).

In conclusion, we find that Lazo's 60(b) motion should be treated as a successive § 2255 motion. Because Lazo's Rule 60(b) motion is treated as a successive § 2255 motion, the district court had no jurisdiction to consider the motion without an order from this court permitting it to do so. Lazo did not seek that order, thus the district court should have dismissed his motion. Because the district court's denial of his successive § 2255 motion is a "final order in a § 2255 proceeding," Lazo must obtain a COA before he will be permitted to appeal the order. 28 U.S.C. § 2253(c). Finally, because there is a plain procedural bar to his motion, Lazo is not entitled to a COA.

CERTIFICATE OF APPEALABILITY DENIED; APPEAL DISMISSED.

In re Robert T. BASS.

No. 02–1046.
Reexamination Nos. 90/004, 127 and 90/004, 403.

United States Court of Appeals, Federal Circuit.

Dec. 17, 2002.

Applicant appealed decision of the United States Patent and Trademark Office, Board of Patent Appeals and Interferences, (PTO) affirming the examiner's rejection of claims as obvious. The Court of Appeals, Mayer, Chief Circuit Judge, held that substantial evidence supported Board's finding that prior art disclosed low profile motorized sports boat with limited visability.

Affirmed.

1. Patents ⇐113(6)

Court of Appeals conducts a de novo review of the conclusions of law of the Patent and Trademark Office, Board of Patent Appeals and Interferences, and affirms its findings of fact if they are supported by substantial evidence.

2. Patents ⇐97

Until a matter has been completed, the Patent and Trademark Office (PTO) may reconsider an earlier action. 35 U.S.C.A. § 307(a).

3. Patents ⇐140

A notice of intent to issue a reexamination certificate (NIRC) merely notifies the applicant of the intent of the Patent and Trademark Office (PTO) to issue a certificate; a NIRC does not wrest jurisdiction from the PTO precluding further review of the matter. 35 U.S.C.A. § 307(a).

4. Patents ⇐165(3), 167(1.1)

When examining a patent claim, the Patent and Trademark Office (PTO) must apply the broadest reasonable meaning to the claim language, taking into account any definitions presented in the specification.

5. Patents ⇐162

Words in a patent claim are to be given their ordinary and accustomed meaning unless the inventor chose to be his own lexicographer in the specification.