

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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Appeal No. 09-11043-C  
District Court No. 1:00-cv-2145

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JESSE JEROME DEAN, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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REQUEST FOR CERTIFICATE OF APPEALABILITY

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**NO. 09-11043-C**

**JESSE JEROME DEAN, JR. v. UNITED STATES OF AMERICA**

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Eleventh Circuit Rule 26.1-1, I HEREBY CERTIFY that the following named persons are parties interested in the outcome of this case:

1. Acosta, R. Alexander, United States Attorney, Southern District of Florida.
2. Butler, James Q., district court counsel for petitioner-appellant Dean in the underlying Rule 60 proceeding.
3. Daise, Kimberly S., district court counsel for petitioner-appellant Dean in the underlying Rule 60 proceeding.
4. Dean, Jesse Jerome, Jr., petitioner-appellant.
5. Hurley, Honorable Daniel T. K., United States District Court Judge.
6. Kastrenakes, John Steven, Assistant United States Attorney, district court counsel for the United States in the underlying Rule 60 proceeding.
7. Lewis, Guy, Assistant United States Attorney, district court counsel for the United States in the initial prosecution.
8. Rose, Debra, district court and appellate counsel for Dean for the initial prosecution and on direct criminal appeal.

9. Rose, Jacob, district court and appellate counsel for Dean for the initial prosecution and on direct criminal appeal.
10. Schultz, Anne R., Assistant United States Attorney, appellate counsel for the United States in this proceeding.
11. Schwartz, Barbara, Assistant United States Attorney, district court counsel for the United States in the initial prosecution.
12. Truncale, Charles L., appellate counsel for Dean in this proceeding.
13. White, Honorable Patrick A., United States Magistrate Judge.

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## STATEMENT OF THE CASE

Jesse Jerome Dean, Jr. (“Dean”) is requesting a certificate of appealability (“COA”) from the denial of a renewed request for relief from judgment, pursuant to Fed. R. Civ. P. 60(b)(6) or, in the alternative, pursuant to Fed. R. Civ. P. 60(d)(1), which was filed in the United States District Court for the Southern District of Florida, Northern Division, Daniel T. K. Hurley, United States District Court Judge, challenging Dean’s prior judgment of conviction and sentence on constitutional and other grounds.

Through counsel, Dean filed his Rule 60 motion on November 14, 2008. *Doc. 122.*<sup>1</sup> The district court entered an Order summarily denying the motion on December 11, 2008. *Doc. 127.* On December 19, 2008, Dean timely filed a motion for reconsideration of the Order denying Rule 60 relief. *Doc. 133.*

Dean filed a combined notice of appeal and request for certificate of appealability on February 22, 2009. *Doc. 136.* On March 10, 2009, the district court entered an Order denying the request for certificate of appealability. *Doc. 141.* Dean’s counsel moved to withdraw, *Docs. 144-45,* and the district court entered an order permitting their withdrawal, *Doc. 146.*

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<sup>1</sup>Unless otherwise noted, references are to the docket entries of *Jesse Jerome Dean, Jr. v. United States*, District Court Case No. **1:00-cv-2145**, United States District Court for the Southern District of Florida, Northern Division.

Dean filed in this Court a motion for permission to appeal in forma pauperis and an affidavit accompanying the motion. The undersigned has been retained by Dean's family to represent him in requesting a certificate of appealability in this Court.

### **CASE HISTORY**

In September 1994, a grand jury charged Dean, a Bahamian citizen, in a multi-defendant indictment with conspiring to import cocaine, importing cocaine, conspiring to distribute cocaine, possessing cocaine with intent to distribute, and using a communication facility to further a conspiracy to distribute cocaine. The case involved several persons who were arrested in connection with the government's "Operation Vestrac" and charged as coconspirators in the Luis Miguel Perez drug-trafficking organization. Dean proceeded to trial alone in January 1997, was convicted on all charges, and was sentenced to concurrent terms of 360 months' imprisonment on all counts other than the communication facility count for which he was sentenced to a concurrent term of 48 months' imprisonment.

Dean testified at trial and has always asserted both his actual and legal innocence. The trial evidence established that in late 1991, Dean, a citizen of the Bahamas and former Senior Air Traffic Controller employed by the Government of the Bahamas, saw an advertisement in a "Flying" magazine that invited its interested

readers to call “1-800-BE-ALERT” to report incidences of illegal drug-trafficking. Dean responded, learning that up to \$250,000 could be earned, provided that one became a documented confidential informant.

On October 2 and 3, 1991, Dean was debriefed by both United States Customs Agent Scott Lowen and United States DEA Special Agent David Shelton at a local hotel. Dean was assured that no information that he disclosed would be used against him. Upon invitation, on November 6, 1991, Dean presented himself to the United States Embassy where he was met by Customs Agent Lowen. Lowen fingerprinted and photographed Dean over a 30-minute period.

Dean was accepted as an informant and in that capacity, he lawfully “assisted” others in arranging the importation of 600 kilograms of cocaine into North Andros, Bahamas, which was seized by law enforcement with Dean’s help. Dean also “assisted” in arranging the importation of 500 kilograms of cocaine into Nassau, Bahamas, which was seized by law enforcement with Dean’s help. Dean also provided various intelligence information to the DEA.

In all, Dean was paid a total of \$26,700 by the United States government for his informant assistance. At all times, Dean acted unilaterally– without neither direction nor supervision by Agents Lowen or Shelton. When asked, Dean was told by DEA Agent Shelton that the \$250,000 reward was available only when actual

assets were seized, as opposed to just illegal narcotics, which had no recognized value.

During the course of his activities as an informant, Dean became acquainted with Elio and Luis Miguel Perez, owners of E & M Seafood in south Florida, through Jeffrey Collins. Through Collins, Dean provided information to Elio Perez to assist the Perez brothers in poaching the Bahamian waters. Dean later came to learn that Elio ran the fishing business while his brother ran a drug trafficking organization. When Collins mysteriously disappeared, Dean began contacting the Perez brothers directly. Upon learning that Luis Miguel Perez had substantial assets, Dean sought to ingratiate himself with a view toward causing these assets to be seized and hopefully earn the \$250,000 reward. As Dean had no previous drug trafficking association with Luis Miguel Perez, it was difficult to gain his trust, although Dean was able to do so over time.

As he did on previous successful seizures, Dean eventually proffered proposals which would attract Luis Miguel Perez's interest. At some time during these presentations, Dean met with Agents Lowen and Shelton in Nassau who confirmed that 'Miguel Perez was a bonafide trafficker.' When Dean responded that Dean was assisting the Perezes in their poaching in Bahamaian waters, DEA Agent Shelton stated; "We don't care about the fishing, we want to know about the drugs." there

were no drugs to report at the time, so Dean continued in earnest to try and interest Luis Miguel Perez in Dean's proposals which never came to fruition.

Unbeknownst to Dean at the time (but learned for the first time at trial) Dean was deactivated as a DEA informant on April 28, 1994. In this regard, both Dean and DEA Agent Shelton testified that Dean had never been informed of any "deactivation."

The Perez organization eventually, without either the knowledge or assistance of Dean, went on to import 908 kilograms of cocaine into Fort Lauderdale, Florida by way of Belize, which was the basis of the offenses charged in the indictment. Dean had been acting in the capacity as a confidential informant for the DEA when the DEA in south Florida overheard conversations of Dean infiltrating the Luis Miguel Perez drug-trafficking organization during the time that the 908 kilograms of cocaine were being imported. Before Dean reported all of Perez's illegal activities to Dean's DEA contact in the Bahamas (Agent Shelton), the south Florida DEA authorities arrested Dean for the conspiracy to import and distribute the cocaine into the United States. As noted above, Dean's DEA contact from the Bahamas (Agent Shelton) testified that Dean's informant services relationship had been "deactivated" prior to Dean's infiltration into the Perez organization but Shelton never advised Dean of the deactivation until trial.

After Dean was convicted, his trial attorneys represented him on direct appeal. Dean's primary arguments on appeal were insufficiency of evidence, particularly with regard to the government's failure to rebut that Dean reasonably believed that he was acting in the capacity of a government confidential informant when he infiltrated the Perez organization to learn of the pending drug activities and allegedly joined the conspiracy. Dean also challenged the admission of evidence that of prior crimes that Dean had provided to the DEA during the informant interview process, asserted a fatal variance between the indictment and proof, asserted errors in jury instructions on coconspirator liability, and asserted sentencing guideline errors. On March 3, 1999, this Court affirmed the convictions and sentences. *United States v. Dean*, 176 F.3d 492 (11th Cir. 1999). On December 6, 1999, the United States Supreme Court denied Dean's petition for writ of certiorari, *Dean v. United States*, 528 U.S. 1053 (1999), and on February 22, 2000, the Supreme Court denied Dean's motion for rehearing, *Dean v. United States*, 528 U.S. 1184 (2004).

On June 15, 2000, Dean timely filed a *pro se* motion to vacate his sentence pursuant to 28 U.S.C. § 2255, *Doc. 1*, with supporting memorandum, *Doc. 4*, in which he raised six claims:

(1) that Dean received ineffective assistance of counsel, who failed to argue on appeal that DEA Special Agent David Shelton, who was Dean's control agent in

the Bahamas, committed perjury at trial when he repeatedly testified that he had given Dean instructions to guide Dean's activities as a confidential informant;

(2) that Dean received ineffective assistance of counsel, who failed to argue on appeal that the government's witness, Luis Miguel Perez, committed perjury at trial when he testified concerning his alleged drug-trafficking activities with Dean;

(3) that Dean received ineffective assistance of counsel, who failed to argue on appeal that the government committed *Brady*<sup>2</sup> violation by having failed to provide in pretrial discovery an alleged "Cooperating Individual Agreement" purportedly signed by Dean, causing Dean to be unfairly surprised at trial and unable to defend himself;

(4) that Dean received ineffective assistance of counsel, who failed to argue on appeal that the prosecutor committed prosecutorial misconduct by breaching a promise not to introduce Dean's immunized "prior bad acts," by violating discovery rules, and by making highly-prejudicial, improper and unsubstantiated remarks in closing argument;

(5) that the United States violated Dean's Fifth Amendment protection against self-incrimination and due process by using at trial Dean's "informally immunized" disclosures made to DEA Special Agent David Shelton and United

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<sup>2</sup>*Brady v. Maryland*, 373 U.S. 83 (1963).

States Customs Service Special Agent Scott Lowen during processing of Dean as a confidential informant; and

(6) that Dean's Fifth Amendment right to due process was violated when he was "entrapped by estoppel" by being deactivated from his service as a confidential informant without being informed by DEA Special Agent David Shelton and by relying upon misrepresentations by Shelton which led to his wrongful conviction.

The district court denied relief without an evidentiary hearing, *Doc. 42*, and this Court denied a certificate of appealability, *Doc. 60 & Appeal No. 01-14120-D (Order dated Nov. 14, 2001)*.

On June 17, 2002, Dean filed the first of three motions for relief from judgment pursuant to Fed. R. Civ. P. 60(b). *Doc. 62*. In his first *pro se* Rule 60(b) motion and supporting memorandum, Dean argued that newly discovered evidence established that the government committed a fraud upon the district court through the presentation at trial of a fabricated "Cooperating Individual Agreement" and the perjured trial testimony of its two principal witnesses— DEA Special Agent David Shelton and Luis Miguel Perez. *Id. and Doc. 63* (memorandum in support of motion for Rule 60(b)(6) relief). On October 24, 2002, the district court summarily denied relief stating that Dean had raised the same in his motion to vacate pursuant to 28 U.S.C. § 2255. *Doc. 67*.

As for this first motion for Rule 60 (b) relief, on February 18, 2003, the district court denied a certificate of appealability after treating the motion as a second or successive habeas petition and holding that the motion was improperly filed and therefore, Dean had failed to make a substantial showing of the denial of a constitutional right, citing 28 U.S.C. § 2253(c)(2) and *Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996). *Doc. 76*. On March 31, 2003, this Court denied Dean's motion for certificate of appealability on grounds that Dean had failed to make the requisite showing, citing 28 U.S.C. § 2253(c)(2) and *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed.2d 542 (2000). *Doc. 77 & Appeal No. 03-10167-C (Order dated March 31, 2003)*. On May 12, 2003, this Court denied Dean's motion for reconsideration of the denial of the certificate of appealability on the same grounds as stated in its March 31, 2003 Order. *Doc. 78*. On December 16, 2003, this Court denied Dean's supplemented motion for certificate of appealability on grounds that Dean had failed to make a substantial showing of the denial of a constitutional right, citing 28 U.S.C. § 2253(c)(2). *Doc. 88 & Appeal No. 03-14554-B*. Then, on February 24, 2004, this Court denied Dean's motion for reconsideration of its December 16, 2003, Order denying the certificate of appealability on grounds that Dean had failed to make a substantial showing of the denial of a constitutional right, citing 28 U.S.C. § 2253(c)(2). *Doc. 89 & Appeal No. 03-14554-B (Order dated*

*February 24, 2004).*

On July 2, 2004, Dean filed his second *pro se* motion pursuant to Rule 60(b). *Doc. 91*. In the motion, Dean thoroughly argued that the government had committed a fraud upon the district court and that Dean was a victim of the government's fraudulent scheme to unjustly convict him based on the combined use at trial and continued use in the 2255 proceedings of: (1) a fabricated "Cooperating Individual Agreement" that had not been produced in pretrial discovery, that contained written instructions of duties of informants and a false signature of Dean, which was improperly used at trial and its contents improperly disclosed to the jury despite that its admission was denied for lack of proper authentication, and which now mysteriously missing from the government's custody, (2) the perjured testimony of the lead DEA agent, David Shelton, who falsely testified that Shelton had instructed Dean concerning purported DEA requirements of confidential informants to report their activities, (3) the perjured testimony of Luis Miguel Perez who falsely testified that Dean was involved in drug trafficking activities with Perez since 1987 despite that DEA reports of Perez's debriefings showed that Perez never mentioned Dean as an accomplice or coconspirator at any time, (4) the fact that Dean reasonably believed that he was acting in the capacity as a confidential informant at the behest of DEA Special Agent Shelton when Dean infiltrated the Perez organization to obtain

information about drug activities to earn an award of \$250,000 because of statements made by Shelton to Dean about wanting information about drug activities and Shelton's failure to tell Dean that Shelton had "deactivated" Dean's services, (5) the suppression of the results of a joint US/Bahamian investigation of Dean from August 1990 through July 24, 1991 that showed no evidence of Dean's involvement in drug trafficking, (6) the suppression of a second US government investigation into Dean's activities that again proved negative as to any criminal wrongdoing during the relevant period of Perez's false testimony, and (7) the existence of another individual with the name "Jesse Dean" that had the exact same suspect identifying number as Dean thereby creating the likelihood of mistake as to evidence relating to Dean. *Doc. 91.*

Initially, the district court summarily denied the Rule 60(b) motion, *Doc. 92*, but then granted a motion for reconsideration and referred the motion to the magistrate judge as a new civil action with Case No. 1:05-cv-20432, *Doc. 94*.

On February 24, 2005, the magistrate judge issued a Report concluding that the Rule 60(b)(3) motion was the functional equivalent of a successive section 2255 motion that required a prior application and approval by the Court of Appeals. *Case No 1:05-cv-20432, Doc. 4*. Therefore, the magistrate judge recommended denial of the motion for failure to obtain the appellate approval to file. *Id.* On April 6, 2005,

the district court denied the motion for Dean's failure to obtain appellate court approval to file it. *Case No 1:05-cv-20432, Doc. 9.*

On April 11, 2005, the district court also entered an Order denying the Rule 60(b)(3) motion as moot based on the Order it entered in Case No. 1:05-cv-20432. *Doc. 105.* Dean filed a motion for reconsideration which the district court denied, thereafter, Dean filed a notice of appeal and request for certificate of appealability, *Doc. 108,* and then, on July 8, 2005, the district court denied the certificate of appealability on grounds that Dean failed to make a substantial showing of the denial of a constitutional right, *Doc. 114.* On July 24, 2006, this Court denied Dean's request for a certificate of appealability finding that Dean had failed to make the requisite showing that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues he seeks to raise, citing 28 U.S.C. § 2253(c)(2) and *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed.2d 542 (2000). *Doc. 120.*

Prior to filing the third and current underlying Rule 60(b) motion, Dean sought leave in this Court to file a second or successive motion to vacate sentence pursuant to 28 U.S.C. § 2255 on August 15, 2006. Dean raised four grounds, three of which were based on newly discovered evidence and one on an asserted new rule of law. *See Appeal No. 06-14436-G.* This Court denied the application on August 29, 2006.

On November 14, 2008, through former retained counsel, filed a renewed request for Rule 60(b)(6) relief from judgment arguing that the government committed a fraud on the district court by continuing to rely on (1) a fabricated “Cooperating Individual Agreement” that had not been produced in pretrial discovery, that contained written instructions of duties of informants and a false signature of Dean, which was improperly used at trial and its contents improperly disclosed to the jury despite that its admission was denied for lack of proper authentication, and which now mysteriously missing from the government’s custody, (2) the perjured testimony of the lead DEA agent, David Shelton, who falsely testified that Shelton had instructed Dean concerning purported DEA requirements of confidential informants to report their activities, (3) the perjured testimony of Luis Miguel Perez who falsely testified that Dean was involved in drug trafficking activities with Perez since 1987 despite that DEA reports of Perez’s debriefings showed that Perez never mentioned Dean as an accomplice or coconspirator at any time, (4) the fact that Dean reasonably believed that he was acting in the capacity as a confidential informant at the behest of DEA Special Agent Shelton when Dean infiltrated the Perez organization to obtain information about drug activities to earn an award of \$250,000 because of statements made by Shelton to Dean about wanting information about drug activities and Shelton’s failure to tell Dean that Shelton had

“deactivated” Dean’s services, (5) the suppression of the results of a joint US/Bahamian investigation of Dean from August 1990 through July 24, 1991 that showed no evidence of Dean’s involvement in drug trafficking, (6) the suppression of a second US government investigation into Dean’s activities that again proved negative as to any criminal wrongdoing during the relevant period of Perez’s false testimony, and (7) the existence of another individual with the name “Jesse Dean” that had the exact same suspect identifying number as Dean thereby creating the likelihood of mistake as to evidence relating to Dean. *Doc. 122.*

On December 11, 2008, the district court entered an Order denying the Rule 60(b) motion on grounds that the motion did not raise any new arguments from those that had been raised in the prior section 2255 motion and other motions filed in Dean’s case. *Doc. 127.* Dean filed a motion for reconsideration which the district court denied. On February 25, 2009, Dean filed a notice of appeal and request for certificate of appealability, *Doc. 136*, which the district court denied on March 10, 2009, finding that Dean had failed to make the requisite showing that reasonable jurists would find debatable the merits of the underlying claims, citing *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed.2d 542 (2000). *Doc. 141.*

Dean thereafter retained counsel for his request for COA at the Court of

Appeals and this request has proceeded in a timely manner.

## **ARGUMENT AND AUTHORITIES**

### **I. PRELIMINARY CONSIDERATIONS - THE STANDARDS APPLICABLE TO ISSUANCE OF A COA.**

In order to obtain a COA a petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Pagan v. United States*, 353 F.3d 1343, 1346 (11th Cir.2003). In determining whether to grant a COA, the Court of Appeals “look[s] to the District Court's application of AEDPA to petitioner's constitutional claims and ask[s] whether that resolution was debatable amongst jurists of reason.” *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003).

*Miller-El* explained what is required. As mandated by federal statute, a prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite because the COA statute mandates that “[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ...” § 2253(c)(1). As a result, until a COA has been issued federal courts of appeal

lack jurisdiction to rule on the merits of appeals from habeas petitioners.

A COA will issue only if the requirements of § 2253 have been satisfied. “The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal.” *Slack v. McDaniel*, 529 U.S. 473, 482, 120 S.Ct. 1595 (2000); *Hohn v. United States*, 524 U.S. 236, 248, 118 S.Ct. 1969 (1998). Section 2253(c) permits the issuance of a COA only where a petitioner has made a “substantial showing of the denial of a constitutional right.” In *Slack*, supra, at 483, 120 S.Ct. 1595, the Court recognized that Congress codified the prior judicial certificate of probable cause (“CPC”) standard, announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing.

Under the controlling standard, a petitioner must “sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” 529 U.S., at 484, 120 S.Ct. 1595 (quoting *Barefoot*, supra, at 893, n. 4, 103 S.Ct. 3383).

The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. This Court is required to look to the district court's application of AEDPA to the petitioner's constitutional

claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief.

The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince the court that he would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. A prisoner seeking a COA must prove “something more than the absence of frivolity” or the existence of mere “good faith” on his or her part. *Barefoot*, *supra*, at 893, 103 S.Ct. 3383. It is not required that the petitioner prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

As the Court stated in *Slack*, “[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find

the district court's assessment of the constitutional claims debatable or wrong.” 529 U.S., at 484, 120 S.Ct. 1595.

## **II. WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE TO REVIEW THE FAILURE OF THE DISTRICT COURT TO ENTERTAIN DEAN’S EQUITABLE TOLLING ARGUMENT.**

The statute of limitations for post-conviction proceedings can be equitably tolled where a petitioner untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. Johnson v. United States, 340 F.3d 1219, 1226 (11<sup>th</sup> Cir. 2003); Drew v. Dep’t of Corrections, 297 F.3d 1278, 1286 (11<sup>th</sup> Cir. 2003); Steed v. Head, 219 F.3d 1298, 1300 (11<sup>th</sup> Cir. 2000); Sandvik v. United States, 177 F.3d 1269, 1271 (11<sup>th</sup> Cir. 1999). Equitable tolling is an extraordinary remedy and is applied sparingly. Johnson, 340 F.3d at 1226; Jones v. United States, 304 F.3d 1035, 1039-40 (11<sup>th</sup> Cir. 2002); Drew, 297 F.3d at 1286. The burden of establishing entitlement to equitable tolling rests with the petitioners. Johnson, 340 F.3d at 1226; Drew, 297 F.3d at 1286.

Whether equitable tolling is warranted is a decision that must rest on the facts of each case. Downs v. McNeil, 520 F.3d 1311 (11<sup>th</sup> Cir. 2008). The purpose of equitable tolling is to allow diligent petitioners to have their claims heard in cases where those claims were made untimely by extraordinary circumstances beyond the petitioner’s control. *Id.*

In his Rule 60 motion, Dean requested that the district court consider the doctrine of equitable tolling to revisit and correct the manifest miscarriage of justice which was the denial of the initial section 2255 motion and all of Dean's subsequent post-conviction efforts caused by the absence of the fabricated "Cooperating Individual Agreement" that in large part contributed to Dean's convictions. *Doc. 122 at 4-6*. The document was critical to his convictions because the DEA agent Shelton testified, and the prosecutor argued, that the document showed that Dean had been instructed about the DEA requirements for informants to report their activities to their control agents. This was a dispositive factual issue relating to Dean's defense of public authority and entrapment by estoppel. The document was false and the government did not produce the document until Dean was cross-examined at trial.

If the document were produced to Dean post-trial, he would be able to prove that the document was fabricated for trial through handwriting analysis and other forensic testing. Therefore, Dean asserted that the doctrine of equitable tolling should be applied to toll any and all time limitations until such time as the government produces the suspect document. *Doc. 122 at 6*. Thus, Dean argued that government's failure to produce the suspect document, combined with the multiple instances of perjured testimony by Shelton and Luis Miguel Perez are sufficiently extraordinary and unavoidable circumstances that have prevented Dean from having the district

court actually determine the true facts of Dean's case and fashion the appropriate relief. *Doc. 122 at 5.*

Dean clearly demonstrated that Government Trial Exhibit 7, the "Cooperating Individual Agreement" was pivotal to the government's case, was used, relied upon and now remains missing. Thus, equitable tolling is applicable to the case and the district court should have considered the doctrine in assessing whether relief was warranted. Therefore, Dean respectfully submits that he has made a substantial showing of the denial of a constitutional right as to the above issue and is entitled to the issuance of a certificate of appealability on the issue.

**III. WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE TO REVIEW THE FAILURE OF THE COURT BELOW TO ADJUDICATE DEAN'S BRADY V. MARYLAND CLAIMS BASED ON NEWLY DISCOVERED EVIDENCE**

Dean asserted the discovery of new evidence on March 20, 2002, through Freedom of Information Act requests after the filing of his initial section 2255 motion. Dean used the new evidence as a basis to advance his claims to the district court. The new evidence showed that:

1. Dean had been the subject of a year-long, joint US/Bahamian criminal investigation into drug activities which was closed due to lack of evidence and the investigation related to the period of time in which key government trial witness Luis

Miguel Perez testified that Dean was involved in drug trafficking activities with Perez;

2. The alleged “Cooperating Individual Agreement” that had not been produced in pretrial discovery, that contained written instructions of duties of informants and a false signature of Dean, which was improperly used at trial and its contents improperly disclosed to the jury despite that its admission was denied for lack of proper authentication, was unable to be located by the government in response to the Freedom of Information Act request; and

3. The existence of another individual with the name “Jesse Dean” that had the exact same suspect identifying number as Dean in the Narcotics and Dangerous Drugs Indexing System (NADDIS) thereby creating the likelihood of mistake as to evidence relating to Dean.

This new evidence is highly exculpatory and undermine the government’s reliance on the testimony of its key witnesses, DEA Special Agent Shelton and Luis Miguel Perez, in its habeas case. The evidence supports Dean’s argument that he was convicted on perjured testimony and was never a member of the Luis Miguel Perez drug-trafficking organization, as Perez had falsely testified, and Dean had never been given instructions on informants duties for the DEA in the Bahamas, as DEA Special Agent David Shelton falsely testified.

As Dean stated in his request for a Certificate of Appealability to the district court, these post-section 2255 discovered documents were highly exculpatory, thus the government's failure to produce them prior to trial violated its duties pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose all favorable evidence. As such, Dean's due process rights were violated by the suppression of these documents because had they been disclosed "there is a reasonable probability that the result would have been different." *Strickler v. Greene*, 527 U.S. 263 (1999).

If, as in *Demarco v. United States*, 928 F.2d 1074 (11th Cir. 1991), a *Brady* violation required the vacation of a conviction, surely it is sufficient to trigger relief in the context of a fraud upon the court. In fact, *Brady* violations have been shown to be among the most frequent reasons for granting relief. *See United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999); *United States v. Golyansky*, 281 F.3d 1330 (10th Cir. 2002); *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002); *Sawyer v. Hofbauer*, 299 F.3d 605 (6th Cir. 2002); *Mendez v. Artuz*, 303 F.3d 411 (2nd Cir. 2002); *United States v. Yeager*, 303 F.3d 661 (6th Cir. 2002); *Scott v. Mullin*, 303 F.3d 1222 (10th Cir. 2002).

Therefore, Dean respectfully submits that he has made a substantial showing of the denial of a constitutional right as to the above issue and is entitled to the issuance of a certificate of appealability on the issue.

**IV. WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE TO REVIEW THE FAILURE OF THE COURT BELOW TO INVESTIGATE AND ADJUDICATE DEAN'S CLAIMS OF FRAUD ON THE COURT.**

Dean thoroughly addressed his claim of fraud upon the court by agents of the government in his underlying Rule 60(b)(6) motion. *Doc. 122*. Government's trial Exhibit 7, a purported "Cooperating Individual Agreement" allegedly signed by Dean was absolutely critical to the case against Dean; it was relied upon in the government's answer to Dean's initial section 2255 motion yet it is now unable to be located by the government in response to Dean's Freedom of Information Act request. The district court should have investigated and adjudicated the circumstances surrounding the now missing document, especially when other documents of the same alleged time period were immediately produced. Also, the newly discovered evidence that Dean had been previously cleared by a joint US/Bahamian criminal investigation and other internal DEA inquiries should have prompted the lower court to inquire into the government's representations in the 2255 proceedings because these new revelations wholly undermined the credibility of government's trial witnesses David Shelton and Luis Miguel Perez, upon which the government's representations relied.

Dean's claims mirror the near classic example of fraud upon the court as demonstrated in *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115 (1st Cir. 1989). *Aoude*

involved the dismissal of a civil suit based on a contract which, through discovery, was shown to be a completely bogus document. The instant case involves both the collusion of key government witnesses with the prosecutor to present known perjured testimony and the presentation of a government-fabricated document which led to the denial of his section 2255 motion. The district court should have permitted investigation into the claim of fraud on the court especially with regard to Government Exhibit 7 which purportedly contained instructions to DEA informants, but Dean claimed to have been possibly forged and fabricated for trial and then disposed of by the government.

Further, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) presents the standard for adjudication of claims of fraud on the courts where the Supreme Court concluded that judgment should be set aside and the case dismissed. Had the district court investigated and adjudicated the claims of fraud on the court in this case, a similar result would be required.

Therefore, Dean respectfully submits that he has made a substantial showing of the denial of a constitutional right as to the above issue and is entitled to the issuance of a certificate of appealability on the issue.

**V. WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE TO REVIEW THE FAILURE OF THE DISTRICT COURT TO CONDUCT AN EVIDENTIARY HEARING.**

DEA Special Agent Shelton testified at trial that Dean did not know that Dean had been deactivated. This admission by Shelton is an unequivocal violation of the Department of Justice's Guidelines Regarding the Use of Confidential Informants. *See Rule 60(b)(6) motion, Doc. 122, Ex. B.* This admission also is a clear violation of the Accardi doctrine, rooted in *Accardi v. Shaughnessy*, 374 U.S. 260 (1954), which is a long settled principle that the rules promulgated by a federal agency, which regulate the rights and interests of others, are controlling on the agency. This doctrine is premised on fundamental notions of fair play underlying the concept of due process. *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969).

Dean has long asserted both his actual and legal innocence, the latter under this Court's precedent in *United States v. Baptista-Rodriguez*, 17 F.3d 1354 (11th Cir. 1994). This Court should grant a COA to permit an evidentiary hearing into dean's claim of actual innocence just as this Court did so in *Wyzykowski v. Department of Corrections*, 226 F.3d 1213, 1218 (11th Cir. 2000).

With the detailed showings in Dean's Rule 60 motion, *Doc. 122*, at a minimum, the district court should have conducted an evidentiary hearing as every district court has the power to conduct an independent inquiry to determine whether it has been a

victim of fraud. *E.I. DuPont de Nemours & Co., Benlate Litigation*, 99 F.3d 363, 367 (11th Cir. 1996).

Therefore, Dean respectfully submits that he has made a substantial showing of the denial of a constitutional right as to the above issue and is entitled to the issuance of a certificate of appealability on the issue.

### **CONCLUSION**

Based on the foregoing, Petitioner Dean respectfully submits that he has made a substantial showing of the denial of a constitutional right as to the above issues and is entitled to the issuance of a certificate of appealability as to those issues.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been furnished to Anne R. Schultz, Assistant United States Attorney, Office of the United States Attorney, 99 N.E. 4<sup>th</sup> Street, Suite 512, Miami, Florida 33132-2131, by United States Postal Service, first class mail, postage prepaid, this 1st day of June, 2009.

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Charles L. Truncale