IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action NO. **96-CR-68-M**

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY JAMES MCVEIGH,

Defendant.

PETITION FOR STAY OF EXECUTION
TOGETHER WITH MEMORANDUM IN SUPPORT

(Redacted for Public Filing)

The Defendant, Timothy James McVeigh, by and through undersigned counsel, respectfully requests that the Court enter an order prohibiting the United States Attorney General and the United States Marshal from implementing the sentence of death against Mr. McVeigh on June 11, 2001. This petition is made pursuant to the All Writs Act, 28 U.S.C. §1651(a). In support of the application counsel for Mr. McVeigh show the Court the following:

I. INTRODUCTION.

By letter dated January 16, 2001 the United States Bureau of Prisons notified Mr. McVeigh that this Court's judgment would be implemented and he would be executed on May 16, 2001. On May 8, 2001 the government informed Mr. McVeigh's attorneys the FBI had discovered additional materials, including FBI 302's and inserts, which should have been produced under the reciprocal discovery agreement, but were not. The government confirmed

this statement by letter dated May 9, 2001. (The government's letter is submitted with the separately bound exhibits as Exhibit "1"). On May 11, 2001 the United State Attorney General held a press conference and announced that Mr. McVeigh's execution would be rescheduled for the 11th day of June, 2001, "in order to allow his attorneys to review these documents and to take any action they deem appropriate in the interval". (The Attorney General's statement is submitted as Exhibit "2"). By letter dated May 14, 2001 the Bureau of Prisons informed Mr. McVeigh that his execution had been rescheduled to take place on June 11, 2001 at 7:00 a.m.

It is admitted that the government breached the reciprocal discovery agreement and withheld witness statements that should have been produced prior to the time of trial. More importantly, the government withheld *Brady* material including witness statements that had been specifically identified and sought prior to trial by Mr. McVeigh's attorneys. During the course of pretrial hearings, the Court gave the government clear direction concerning the efforts that must be taken prior to trial in order to safe guard Mr. McVeigh's constitutional rights:

> The lawyers appearing on behalf of the United States, speaking for the entire government, must inform themselves about everything that is known in all the archives and all of the data banks of all of the agencies collecting information which could assist in the construction of alternative scenarios to that which they intend to prove at trial. That is their burden under *Brady*. They must then disclose that which may be exculpatory under the materiality standard of *Kyles*. The government has objected to some of Mr. McVeigh's requests as "burdensome". That is not a proper objection. The failure to comply with a constitutional command to present evidence fairly at trial is not excused by any inconvenience, expense, annoyance, or delay. Determining materiality of information discoverable under Rule 16 or required to be produced under *Brady* must not be made according to a cost benefit analysis.

United States v. McVeigh, 954 F.Supp. 1441, 1449 (D.Colo. 1997), citing *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995). The Court also defined for the government the scope of information that must be provided to the defense as beneficial:

> The government seeks a jury recommendation for a sentence of death pursuant to 18 U.S.C. §3593. Under §3592(a) "minor participation" is a mitigating factor and non-prosecution of equally culpable participants may be an additional mitigator. Accordingly, anything tending to show involvement of persons other than or in addition to Timothy McVeigh may be material to his defense.

Id. at 1447. The court held that *Brady* material "should be given to the defense as it becomes known to the government, since the information and material must be available to the defense in sufficient time to make fair use of it." *Id*. at 1449. The Court could not have been clearer about the government's obligation to apprise itself of exculpatory evidence possessed by the FBI and produce that evidence to the defense. The government did not fulfill its obligations even though it made repeated statements to the Court that it had done so.

The government's false statements that everything had been obtained and produced worked a fraud upon the Court and defeated Mr. McVeigh's right to a fair trial and sentencing proceeding. *See Section VII, infra*. The continuing nature of the fraud prevented Mr. McVeigh from presenting a meaningful *Brady* claim in his motion submitted pursuant to 28 U.S.C. §2255. The only remedy is for the Court to grant a stay of execution and allow Mr. McVeigh to reopen his 2255 motion based upon the government's failure to disclose exculpatory evidence.

Some of the evidence withheld until 6 days before Mr. McVeigh's scheduled execution involved named witnesses and suspects that counsel for Mr. McVeigh had specifically requested prior to trial. In addition, Mr. McVeigh will demonstrate that there is substantial reason to believe that exculpatory evidence continues to be withheld and that some may have been intentionally destroyed or not documented. Counsel for Mr. McVeigh prays for an evidentiary hearing to determine how the current set of circumstances occurred and to insure that exculpatory evidence does not continue to be withheld. Counsel also requests the execution be

stayed so that Mr. McVeigh can now have the opportunity to make fair use of the evidence so recently produced.

II. RELEVANT PROCEDURAL BACKGROUND.

Mr. McVeigh, was charged by Complaint filed April 21, 1995 with violation of 18 U.S.C. §844(f), destruction by explosives. On August 10, 1995, an Indictment was returned charging Mr. McVeigh and Terry Lynn Nichols with one count of conspiracy to use a weapon of mass destruction, 18 U.S.C. §2332(a); one count of use of a weapon of mass destruction, 18 U.S.C. §2332(a); one count of destruction by explosives, 18 U.S.C. §844(f); and eight counts of first degree murder, 18 U.S.C. §§1114 and 1111. On October 20, 1995, the government filed Notices of Intent to Seek the Death Penalty against both Defendants.

By Opinion dated December 1, 1995, the Tenth Circuit Court of Appeals granted Mr. Nichols' Petition for Writ of Mandamus and held that the extraordinary circumstances of the case required recusal of Western District of Oklahoma Judge Wayne Alley. *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995). By Order dated December 4, 1995, the Honorable Stephanie K. Seymour designated Chief Judge Richard P. Matsch of the United States District Court for the District of Colorado to preside over future proceedings.

By Memorandum Opinion and Order dated February 19, 1996, this Court granted the Defendants' Motion for Change of Venue and transferred the case to Denver, Colorado. *United States v. McVeigh*, 918 F. Supp. 1467 (D. Colo. 1996). By Memorandum Opinion dated October 25, 1996, the Court granted the Defendants' Motion for Severance and ordered that the trial of Mr. McVeigh would occur first. *United States v. McVeigh*, 169 F.R.D. 362 (D. Colo. 1996).

Beginning on March 31, 1997, a two and one-half month jury trial was held for Mr. McVeigh. On June 2, 1997, the jury returned guilty verdicts against Mr. McVeigh on all

eleven counts of the Indictment. Following the guilty verdicts, the sentencing phase of the trial began on June 4, 1997. On June 13, 1997, the jury returned verdicts of death against Mr. McVeigh on each of the counts. On August 14, 1997, Mr. McVeigh was sentenced. The Court imposed a sentence of death on each of the eleven counts.

Mr. McVeigh appealed his conviction and sentence of death to the Tenth Circuit Court of Appeals. By Opinion dated September 8, 1998, Mr. McVeigh's conviction and sentence were affirmed. *United States v. McVeigh*, 173 F.3d 1166 (10th Cir. 1999). Mr. McVeigh filed a Petition for Writ of Certiorari in the United States Supreme Court. On March 8, 1999, Mr. McVeigh's Petition for Writ of Certiorari was denied. *McVeigh v. United States*, 526 U.S.1007 (1999).

On March 6, 2000, Mr. McVeigh filed his Motion to Vacate Conviction and Sentence and for New Trial Pursuant to 28 U.S.C. §2255 and Rule 33 of the Federal Rules of Criminal Procedure. On March 31, 2000 the government filed its Answer and Brief of the United States Opposing Timothy McVeigh's Motion to Vacate Conviction and Sentence. On May 4, 2000 Mr. McVeigh filed his Reply to Answer and Brief of the United States Opposing Timothy McVeigh's Motion to Vacate Conviction and Sentence. Oral arguments were heard on August 17, 2000, and on October 12, 2000 the District Court entered its order dismissing Mr. McVeigh's Motion to Vacate. Thereafter, Mr. McVeigh waived his right to appeal.

On January 16, 2001 the Bureau of Prisons informed Mr. McVeigh that his execution had been scheduled for May 16, 2001.

During this entire process, including the trial, direct appeal, and 2255 proceedings, the government provided no indication to the Court or Mr. McVeigh that required discovery had not been produced. Such an indication was made for the first time eight days prior to Mr. McVeigh's scheduled execution.

III. FACTS CONCERNING THE WITHHELD DISCOVERY.

A. The Government's Representation and Breach of Discovery Obligations.

In addition to his rights to discovery pursuant to Fed.R.Crim.P.16 and *Brady v. Maryland*, 373 U.S. 83 (1963), Mr. McVeigh, through his attorneys, entered into a pre-trial reciprocal discovery agreement with the government whereby the government agreed to provide to the defense all witness interviews. Neither the existence nor the relevant terms of the reciprocal discovery agreement are in dispute. In a brief filed January 24, 1996 the government stated, "[t]he United States in this case voluntarily has agreed to make all witness statements to law enforcement officers available to the defense even though '*Brady* does not demand an open file policy.'" Doc. 881 at 19. Recently the government again confirmed the existence of the reciprocal discovery agreement. In a Report to the United States Attorney General Regarding Post-Trial Production of FBI Documents, the government acknowledged that "the prosecution agreed to make available to the defense every FBI witness interview that was memorialized in a formal 'FBI-302' or in a less formal 'insert' report." (The government's report is attached hereto as Exhibit "3").

During pre-trial proceedings the defense was persistent in its effort to obtain discovery from the government. The defense filed over sixty pleadings with this Court in order to compel government compliance with various discovery obligations. Attached hereto as Exhibit "4" is a Discovery Pleading Index that demonstrates Mr. McVeigh's consistent efforts to obtain relevant information.

In response, the government repeatedly assured this Court that required discovery had been provided. The government's representations to the Court were consistent and unequivocal, and now we know, untrue. The government's statements to this Court taken from the relevant pleadings and court hearings included:

1. "The United States has provided discovery of evidence more extensive than required under Rule 16. Likewise, the United States has gone well beyond what Brady requires by implementing an expansive policy allowing the defense timely and meaningful access to virtually all statements (inculpatory and exculpatory) made to law enforcement officers." Doc. 881 at 1.

2. "The United States is fully complying with, and going well beyond, the discovery obligations imposed by the Federal Rules of Criminal Procedure and the constitutional obligations imposed by the *Brady* decision." Doc. 881 at 35.

3. "The United States is complying with its discovery obligations under Rule 16, the *Jencks* Act and *Brady*. . . . The United States is continuing to comply with its discovery obligations under Rule 16 and *Brady*." Doc. 1162 at 1,13.

4. "Simply put, the prosecution has disclosed all materials and information -- even that to which the defense has no legal entitlement -- gathered in connection with the investigation of the Oklahoma City bombing, with only minor exceptions." Doc. 2081 at 2-3.

5. "McVeigh has received all witness statements . . ." Doc. 2081 at 14.

6. "As the prosecution in this case has been providing discovery of all reports of interviews, lab reports and physical evidence, it is presumed to be discharging its *Brady* obligations absent a contrary showing by the defense." Doc. 2081 at 16.

7. "The prosecution is exceeding its *Brady* obligations by continuing to provide McVeigh with all evidence -- even that which appears incredible on its face -- that might negate guilt or mitigate punishment." Doc. 2475 at 1.

8. "Nevertheless, the government has provided and will, continue to provide all documents, tangible items, FBI 302s, inserts, or other agencies reports in our possession. These reports document the statements of individuals interviewed in connection with the investigation of the Oklahoma City bombing." Doc. 2475 at 9.

9. "The government has disclosed and will continue to disclose all statements of individuals interviewed in connection with the investigation of this case." Doc. 2475 at 17.

10. "The government has disclosed and will continue to disclose all documents, tangible items, FBI 302s, Inserts or other agencies' reports in our possession pertaining to mitigation or exculpation of Timothy McVeigh." Doc. 2475 at 18.

11. "McVeigh has been given virtually all evidence . . . that the FBI and other investigating agencies gathered in connection with the bombing investigation." Doc. 2478 at 2.

12. "[T]he government has committed itself to providing the defense with all FBI 302's and Inserts . . ." Doc. 2478 at 39.

13. "And as you know, we have turned over everything in this investigation." Tr. 11/13/96 at 33. At this same hearing the United States Attorney in response to questions from the Court committed to produce all 302 reports by December 15, 1996. Tr. 11/13/96 at 29-31.

14. "We have disclosed our entire investigation in this case. . . . I realize this is probably the biggest investigation in the history of the country, where the entire investigation has been turned over to the defense." Tr. 11/14/96 at 319.

15. "Well, your honor, we have provided reports of interviews, I think, of every witness that has been interviewed." Tr. 11/14/96 at 339.

16. "The government has voluntarily provided unprecedented discovery in this case, precisely because we understand the importance of assuring the public that this process is as fair and open as is consistent with the overriding interest in a fair trial." Doc. 2816 at 5.

The prosecutors assured the Court that all agencies and FBI field offices were disclosing all relevant documents:

> [W]e have been engaging in this process for the last couple of months, going back to the field offices and making sure that we have disclosed everything that was prepared."

Tr.11/13/96 at 144.

The Court relied upon this statement to insure the integrity of the trial:

> THE COURT: "All right. So maybe it's fair to put it this way: That you are telling me that you have complied with your obligation under *Brady* and under Rule 16 based on the information you presently have and have made the necessary inquiries of agencies that would have information?
>
> MS. WILKINSON: "Yes, we have; and we will continue to do that.

Tr. 11/14/96 at 310.

It is now beyond dispute the government did not "make sure that [they] had disclosed everything that was prepared" and the government did not make the "necessary inquiries of agencies that would have information."

The government now admits the reciprocal discovery agreement was breached. In the

letter to defense counsel dated May 9, 2001, the Special Assistant to the United States Attorney General stated many of the materials recently produced "should have been produced pursuant to the reciprocal discovery agreement". (Exhibit "1"). On May 11, 2001, the Attorney General stated "it is now clear that the FBI failed to comply fully with the discovery agreement reached in 1996". (Exhibit "2").

The extent of this failure numerically can be summarized in this way: On May 10, 2001, the government produced 3,132 pages of discovery that should have been produced prior to trial. On May 16, 2001, the government submitted 103 additional pages. Additional productions included 327 pages on May 19, 2001, 409 pages on May 22, 2001, and finally 478 pages on May 24, 2001, just 18 days prior to the government's current proposed date of execution. The government produced 11 separate computer discs containing approximately 16 hours of audio and videotapes on May 26, 2001. In all the government has now provided 4,449 pages and 11 CD's of discovery previously withheld in violation of the agreement.

These admissions that required discovery was not provided to the defense provide part of the showing necessary to establish that a fraud was committed upon the Court. The remainder of that showing has to do with the government's incredible explanation for its breach of discovery requirements and the circumstances which show that the government is still withholding evidence.

B. The Government's Explanation for Withheld Evidence.

On May 16, 2001, Louis J. Freeh, Director of the Federal Bureau of Investigation, testified before the House Committee on Appropriations: Subcommittee on Commerce, Justice, State and Judiciary:

> Because of the magnitude of this investigation, and the vast

> amounts of information being gathered, the FBI established a separate command center, called the OKBOMB COMMAND POST that operated essentially as a separate FBI field office. In the fall of 1995, the COMMAND POST instituted a special case management and document tracking system which required all investigative materials to be sent to the Oklahoma City office for entry into a case-specific date base.

(Transcript of hearing before House Committee on Appropriations, May 16th, 2001, at 11. Attached as Exhibit "5")[1]

The FBI has fifty-six field offices in the United States and legats overseas. According to Director Freeh, all fifty-six field offices and legats were ordered to turn over all documents regarding the "OKBOMB" investigation to Oklahoma City. *Id*. at 11. Between August, 1995 and November, 1996, eleven separate communications were sent to the field offices requesting that all evidence be sent to the "OKBOMB command post". *Id*. at 12. It was discovered on November 14, 1996, following a discovery hearing, that the command post had not received surveillance logs from the field offices. On November 15, 1996, Director Freeh "…sent a strongly worded priority teletype to all field offices and all legats…directing that all investigative materials be sent promptly to the command post with written confirmation from the office heads." *Id*. at 12. In his testimony Director Freeh did not explain why it was necessary for him to personally send a directive ordering the field offices and legats to comply with the previous ten directives. However, the facts as known today are that almost all of the FBI field offices and one legat failed to comply. In all there were sixteen communications sent to the field offices, two of which were from the director himself. *Id*. Pg. 18. According to Director Freeh these communications were "…absolutely clear…that everything and anything was to be retrieved and sent to Oklahoma City." *Id*. at 18. On May 11, 2001, Director Freeh

[1] All citations to the Congressional Testimony are to the unofficial record attached as exhibit "5". The official record is not yet attainable by the defense.

"…ordered a complete shakedown of the FBI, telling each special agent in charge and assistant director that [he] would hold them personally responsible for this last effort." *Id*. at 14. The shakedown ordered on May 11, 2001 uncovered material in addition to the 3,132 pages produced on May 10, 2001 that had not been given to the defense. Counsel for Mr. McVeigh have made written request for the directives, but the government has declined to produce them.

The circumstances leading to the discovery of the new material should be the subject of inquiry by this Court. According to Director Freeh, an archivist sent a communication to all field offices on December 20, 2000, setting forth procedures for maintenance and disposition of records relating to the "OKBOMB" investigation. According to Danny Defenbaugh, Special Agent in Charge and former head of the OKBOMB task force, the process to appropriately archive all investigative records began in December, 2000. During this process "it was determined that some materials were not a part of the investigative database." (FBI Press Release, statement of Danny Defenbaugh, May 11, 2001, attached as Exhibit "6").

Special Agent Defenbaugh says that he first became aware of the problem in early January 2001. However, he has proffered no explanation for why he waited until the Tuesday before Mr. McVeigh's scheduled execution to report this to any of his supervisors. (Exhibit "6").

C. Reasons To Believe the FBI Is Still Withholding Exculpatory Evidence.

In an unprecedented move, four former FBI agents, each of which worked on the Oklahoma City bombing investigation, stated publicly in a nationally televised program on CBS May 29, 2001, that they do not believe the newly produced documents came to light in the way the government now asserts. Special Agent Dan Vogel, a career FBI agent assigned to the Oklahoma City Field Office told CBS News that he could not imagine production of discovery occurred as suggested by the FBI:

> No [, I do not believe the explanation.] I know that if I would have done something like that when I was working criminal cases that I would have been disciplined for it and you know it would have been very severe…Possibly criminal conduct because at that point, the defense should have it and if you're not turning them over, you're obstructing justice.
>
> (Exhibit "7" at page 5).

Moreover, former Special Agent Rick Ojeda wrote a letter to Senator Charles Grassley on March 7, 2000 and in that letter indicated exculpatory evidence had been withheld:

> The reputation of the FBI, as an agency that covers up crimes and destroys evidence is well deserved. Instances such as Ruby Ridge, and Waco have brought this to the public's attention. I am also aware of instances in other cases, including the Oklahoma City bombing, where exculpatory evidence was ignored and not documented. Including exculpatory information I personally gathered from leads assigned me in the case.

(Ricardo W.J. Ojeda's letter to Senator Charles Grassley, March 7, 2000, Exhibit "8" at page 6). (emphasis supplied).

Former Special Agent Jim Vols, a 27 year veteran of the FBI stated:

> It's extremely surprising to me that these documents all of a sudden show up. There is no reason for it unless there is negligence.

(Transcript Exhibit "7" at page 3).

Former Special Agent Dan Vogle summed up the problem in this way:

> They've admitted they've known about the documents since January and didn't say anything. Publicly anyway. That's the greatest concern to me is that you wait until a week before the execution to say "Oh, by the way we have your documents".

(Exhibit "7" at page 1).

At the time Mr. McVeigh's execution was delayed the Attorney General indicated that the Office of Inspector General would conduct an investigation concerning the withheld documents. Counsel for Mr. McVeigh respectfully submit that such an investigation does not

begin to suffice. The government's representations concerning discovery and the production of exculpatory evidence were made during the course of Mr. McVeigh's criminal trial. The government's 12th hour statements that the discovery had not been produced establishes that this Court's directives – and the government's obligations under the Due Process Clause -- were not obeyed. Counsel for Mr. McVeigh respectfully requests that an evidentiary hearing be conducted so that the true facts concerning the manner in which this evidence was withheld, and whether other exculpatory evidence continues to be withheld, can be accurately ascertained by the Court.

IV. INFORMATION CONTAINED WITHIN THE NEW DISCOVERY PRODUCTION AND THE MATERIALITY OF THAT INFORMATION.

Pages 13 through 28 Redacted.

VII. THE LEGAL BASIS FOR MR. MCVEIGH'S REQUEST FOR A STAY OF EXECUTION

A. The Power to Stay an Execution Under the All Writs Act Is Appropriately Exercised in the Circumstances Presented.

Under the All Writs Act, the federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages of law." 28 U.S.C. §1651. As the Supreme Court has explained, "The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999).

Mr. McVeigh has no adequate remedies at law other than the remedy he pursues here.

As we set forth in the next section, Mr. McVeigh seeks the opportunity to move pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the judgment entered on October 12, 2000, denying his motion under 28 U.S.C. §2255 to vacate his conviction and sentence. He has no other remedy available to him other than the Rule 60(b) proceeding. He is precluded from filing a

successive motion under §2255 because he cannot meet the requirements for filing a successive application.[2] He cannot file a habeas petition under 28 U.S.C. §2241(a), pursuant to the "savings" provision of 28 U.S.C. §2255,[3] unless this Court first determines that he has no remedy to pursuant to Rule 60(b).

Moreover, Mr. McVeigh is not yet able to file his motion pursuant to Rule 60(b), because he does not yet have access to all the facts that bear upon his ability to show the elements of a "fraud upon the court." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). The reason he does not have access to all these facts is that, as we have shown herein, the government has not yet told the truth about why the documents produced since May 9, 2001, were withheld from discovery, or why more documents are still being withheld from discovery notwithstanding their representations that all documents have been turned over.

Accordingly, Mr. McVeigh has no option but to ask the Court to stay his execution "in aid" of its jurisdiction, 28 U.S.C. §1651, to entertain the Rule 60(b) "fraud on the court" proceeding. There can be no question in these circumstances that this Court has "the authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject matter of the [impending Rule 60(b) motion]." *United States v. Shipp*, 203 U.S. 563, 573 (1906).

A. A Rule 60(b) "Fraud on the Court" Proceeding Provides a Remedy for Mr. McVeigh in the Circumstances of His Case.

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[2] Mr. McVeigh does not have "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense," nor can he rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §2255 (second (1), (2)).

[3] "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. §2255 (savings provision).

Rule 60(b) of the Federal Rules of Civil Procedure permits a party to a civil proceeding to obtain relief from a final judgment if the judgment was obtained, among other reasons, by "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party...." Fed.R.Civ.P. 60(b)(3). If the 60(b) motion is brought more than one year after the judgment, the motion must be treated as "an independent action to relieve [the] party from [the] judgment...." *Id*. One of the bases for such an action is that the judgment was produced by a "fraud upon the court." The leading case in this area, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), explained that when a judgment has been obtained by fraud, the need for equity to be served overcomes the competing need for finality:

> [A] judgment finally entered has [n]ever been regarded as completely immune from impeachment after the term. From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.

Id. at 251 (citations omitted).

In federal habeas corpus proceedings under 28 U.S.C. §2254 and motions by federal prisoners to set aside their convictions and sentences under 28 U.S.C. §2255, the courts have treated Rule 60(b) motions as successive habeas petitions or post-conviction motions, subject to the same strictures as any other successive habeas petition or 2255 motion. *See, e.g., Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998); *United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998); *Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997); *Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir.), *cert. denied*, 519 U.S. 989 (1996); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996); *Hunt v. Nuth*, 57 F.3d 1327, 1339 (4th Cir. 1995), *cert. denied*, 516 U.S. 1054 (1996); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993); *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990); *Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992), *cert. denied*, 508 U.S. 916 (1993). The rationale is that, in seeking to set aside an adverse judgment in the post-conviction

proceeding, the purpose of which was to set aside the underlying conviction and/or sentence, Rule 60(b) movants are "essentially seek[ing] to set aside their convictions on constitutional grounds, as [in] §2255 motions." *United States v. Rich*, 141 F.3d at 551.

In relation to "the equivalent motion [to a Rule 60(b) motion] in the court of appeals – ... a motion to recall the mandate," *Burris v. Parke*, 130 F.3d at 783, the Supreme Court has agreed with the federal appellate courts. *Calderon v. Thompson*, 523 U.S. 538 (1998). As the Court explained in *Thompson*:

> In a §2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of §2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, §2244(b)(1), or the bar against litigation of claims not presented in a prior application, §2244(b)(2). If the court grants such a motion, its action is subject to AEDPA irrespective of whether the motion is based on old claims (in which case §2244(b)(1) would apply) or new ones (in which case §2244(b)(2) would apply).

Id. at 553.

Despite the Supreme Court's agreement in *Thompson* with the circuits' view that Rule 60(b) motions must generally be treated as successive §2254 or §2255 applications, the Court carved out one exception to this rule – when the Rule 60(b) motion is based on "fraud upon the court." The Court suggested that such motions would not be deemed successive applications subject to the strictures of 28 U.S.C. §2244(b). *See Thompson*, 523 U.S. at 557. As the Fifth Circuit recently explained in *Fierro v. Johnson*, 197 F.3d 147, 153 (5th Cir. 1999), *cert. denied*, 530 U.S. 1206 (2000),

> The Court qualified its *Thompson* opinion with the following language:
>
> > We should be clear about the circumstances we address in this case.... This [ ] is not a case of fraud upon the court, calling into question the very legitimacy of the judgment. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).
>
> *Thompson*, [523 U.S. at 557,] 118 S.Ct. at 1501-02. The Court thus

> suggests that cases involving claims of fraud on the court may warrant different treatment.

In *Fierro*, the Fifth Circuit assumed that a §2254 or §2255 applicant could still bring a "fraud on the court" motion that would not be deemed a successive petition -- even after the AEDPA tightened the restrictions on filing successive applications, 197 F.3d at 153 – but denied relief because of Fierro's failure to allege the kind of fraud necessary to sustain such an action. The Fifth Circuit also noted that the only other Circuit to have confronted this question was the Fourth Circuit, in an unpublished opinion, *United States v. McDonald*, No. 97-7297, 1998 WL 637184 (4th Cir. 1998). There, the court held that §2244(b)'s successive application restrictions, as amended by AEDPA, did not preclude a Rule 60(b) motion based upon fraud upon the court. 1998 WL 637184 at *3. The Fourth Circuit's rationale was that

> actions alleging fraud upon the court ... attack the validity of a prior judgment, based on the theory that "a decision produced by fraud on the court is not in essence a decision at all and never becomes final."

Id. (quoting 11 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE §2870 at 409 (1995)) (quoting *Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, 691 (7th Cir.1968)). As in *Fierro*, the court went on to conclude that the facts alleged did not constitute fraud on the court. *Id.* at *3-6.

Two years after *Fierro*, still no other circuit or district court has examined this question. What was said in *Calderon v. Thompson*, however, as the Fourth and Fifth Circuits have recognized, is enough. Notwithstanding the consensus of the federal circuits, aided by the holding in *Thompson*, that Rule 60(b) motions directed against judgments denying §2254 or §2255 applications must be treated as successive applications governed by §2244(b), the Supreme Court has carved out from this consensus Rule 60(b) motions alleging "a fraud on the court." Accordingly, if Mr. McVeigh can show that the denial of his §2255 motion was the result of a fraud on the court, he should prevail in his request to set

aside the judgment denying his §2255 motion and should be permitted to amend his §2255 motion and have the motion determined anew.[4]

Hazel-Atlas Glass still provides the touchstone for what is meant by "a fraud on the court." The fraud in *Hazel-Atlas Glass* involved Hartford-Empire's submission to the Patent Office of a trade journal article by a purportedly disinterested expert in support of its patent application. 322 U.S. at 240. The article touted Hartford-Empire's glass manufacturing method as "a remarkable advance in the art of fashioning glass by machine." *Id*. After the patent was issued and later enforced against Hazel-Atlas in an infringement proceeding, Hazel-Atlas learned that the article had actually been written by Hartford-Empire's "officials and attorneys," *id*., who then paid the expert to lend his name to the article. 322 U.S. at 244. The Supreme Court held that this deception demanded the exercise of the courts' equitable power to vacate the judgment of the lower court to prevent a fraud on the court itself:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot be complacently tolerated consistently with the good order of society.

322 U.S. at 245-246. The Court emphasized, "This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here ... we find **a deliberately planned and carefully executed scheme to**

[4]If Mr. McVeigh were attacking an ordinary civil judgment procured by fraud, he would not be required to bring a "fraud on the court" proceeding. Rather, because his §2255 motion was denied on October 12, 2000, and it is still within one year of that judgment, he could file a Rule 60(b)(3) motion. As the Fifth Circuit explained in *Fierro*, "the requirements for a 'fraud on the court' action [are] much more stringent than those for a Rule 60(b)(3) motion." 197 F.3d at 154 n.13 (citing cases). However, because Mr. McVeigh is attacking a judgment in a §2255 proceeding, the only kind of 60(b) motion he can file – given the rule that 60(b) motions in §2254 or §2255 cases must be construed as successive habeas or post-conviction applications – is a "fraud on the court" motion. The Supreme Court's reference in *Thompson* to what has become a term of art, "fraud on the court," and the cite to *Hazel-Atlas Glass*, make it clear that Mr. McVeigh must satisfy the "more stringent" requirements of a "fraud on the court" motion.

defraud not only the Patent Office but the Circuit Court of Appeals.'" *Id*. at 245 (emphasis supplied).

Thus, the "fraud on the court" doctrine rests on two distinct features. First, as the Tenth Circuit has explained in *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996), "whatever else it embodies, [fraud on the court] requires a showing that one has acted with an intent to deceive or defraud the court." Second, as the Tenth Circuit explained in *Bulloch v. United States*, 763 F.2d 1115, 1118 (10th Cir. 1985) (*en banc*), the deception must go to the heart of the judicial proceeding, creating an impression about the core, operative facts that is relied on by the court and is false. "Fraud on the court ... is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court.... It is ... where the impartial functions of the court have been directly corrupted." Or, as the Fifth Circuit has put it,

> To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its discretion. Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.

First Nat'l Bank of Louisville v. Lustig, 96 F.3d 1554, 1573 (5th Cir.1996) (quotation marks and citations omitted).[5]

[5]This passage is taken from *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978), which quotes *England v. Doyle*, 281 F.2d F.2d 304, 310 (9th Cir. 1960). Both sources have been quoted with approval by the Tenth Circuit. *See,.e.g., Weese v. Schukman*, 98 F.3d 542, 552-553 (10th Cir. 1996) (quoting *Rozier*); *Robinson v. Audi Aktiengesellschaft*, 56 F.3d at 1267 (quoting *Rozier*, quoting *England*).

As the facts thus far known to Mr. McVeigh demonstrate, he may well be able to make the showing required under *Hazel-Atlas Glass* if his attorneys are permitted the time, and provided appropriate compulsory process, to get to the truth. By the time of Mr. McVeigh's trial, the government's proof established that only Mr. McVeigh and Mr. Nichols were responsible for the bombing of the Murrah Building.

Pages 36 and 37 Redacted.

CONCLUSION

For these reasons, Mr. McVeigh respectfully requests that the Court

1. Enter an order staying Mr. McVeigh's execution pending the filing and disposition of a Rule 60(b) motion, and

2. Enter an appropriate order requiring the government to show cause, in an evidentiary hearing, why it cannot produce all remaining investigative documents and information that are still being withheld from the defense.

Respectfully submitted,

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By: _____

ATTORNEYS FOR TIMOTHY McVEIGH

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing instrument and the separately bound exhibits numbered 1 through 8 was hand delivered on the _____ day of May, 2001, to the following:

Sean Connelly
Special Attorney to the
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_____
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