No. _____

In the
Supreme Court of the United States

Keith Byron Baranski,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After being released from custody following a conspiracy conviction, Keith Baranski challenged his conviction by filing a petition for writ of error *coram nobis*. The petition was based on critical new impeachment evidence suppressed by the prosecution, including the offer of a reduced sentence to the sole witness tying Baranski to the alleged conspiracy. After a hearing by the District Court, the Eighth Circuit on appeal did not apply *coram nobis* standards and *Brady*/*Giglio* materiality principles. Instead, without briefing on this issue, it chose to apply the stringent standard for "second or successive" motions by "prisoners in custody" under 28 U.S.C. §2255 to Baranski's *coram nobis* petition.

1. Whether, without briefing, a Court of Appeals may substitute the 28 U.S.C. §2255 standard for "second or successive" motions by prisoners in custody for the legal standard enunciated by this Court for *coram nobis* petitions by persons not in custody?

2. Whether under *Brady*/*Giglio* precedents the prosecution may suppress evidence of a sentence reduction offered to the sole witness implicating the defendant, because there was only a "likelihood" of a future sentence reduction as opposed to an absolute "promise" of a reduction?

3. Whether it was error under *Brady*/*Giglio* to consider the suppressed evidence regarding the key witness's credibility in isolation rather than cumulatively?

PARTIES TO THE PROCEEDING

Petitioner Keith Baranski was the petitioner for a writ of error *coram nobis* in the District Court and appellant in the Court of Appeals. The United States was the respondent in the District Court and appellee in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Certiorari should be granted because the Eighth Circuit did something unprecedented, important, and clearly incorrect in this case. It rejected the standards established by this Court for post-conviction *coram nobis* petitions by persons not in custody and substituted the extraordinarily stringent standard applicable to "second or successive petitions" under 28 U.S.C. §2255(h). The statutory scheme established by 28 U.S.C. §2255 for post-conviction relief is, by its terms, applicable only to a "prisoner in custody," which Baranski was not.

The standard of review for common law *coram nobis* petitions collaterally attacking a conviction has long been settled by this Court, beginning with *United States v. Morgan*, 346 U.S. 502 (1954). That is the standard that the dissent to the denial of rehearing *en banc* in this case believed should apply, and under which the appeal was briefed. *See* Order denying rehearing *en banc* (four judges dissenting). App. 109a. As stated in *United States v. Denedo*, 556 U.S. 904, 911 (2009), "a writ of *coram nobis* can issue to redress a fundamental error," such as a constitutional violation. The writ "may not issue when alternative remedies … are available." *Id.*

The provisions of §2255 have no application to individuals, like Baranski, who have completed their sentence and supervised release. To obtain relief from a flawed conviction, such individuals may proceed by a petition for writ of error *coram nobis*, because they have no alternative remedy. They cannot proceed

under §2255 because they are not "prisoners in custody," and accordingly their *coram nobis* petitions are not governed by that statute.

Proceedings seeking relief from due process violations caused by improper suppression of evidence by prosecutors may be brought under principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of evidence generally) and *Giglio v. United States*, 405 U.S. 150 (1972) (impeachment evidence) and their progeny. Such a proceeding may be brought under §2255 if the individual is in custody, or by *coram nobis* if the individual has been released from custody. The substantive standards for *Brady*/*Giglio* relief apply in both situations. However, for a "second or successive" §2255 motion brought by a prisoner in custody, Congress has chosen to impose an exceptionally high bar for obtaining relief. In place of the *Brady*/*Giglio* "materiality" standard, §2255(h)(1) requires a petitioner to provide "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 the movant guilty of the offense…." That standard is very difficult to meet.

That standard is also inapplicable to *coram nobis* cases. *Coram nobis* is based on common law, whereas §2255 is statutory. They are completely separate legal regimes. The lower federal courts do not have the power to arbitrarily engraft procedural or substantive standards from the statutory scheme of §2255 onto the accepted standards for *coram nobis* relief. In fact,

they have uniformly refused to do so because they have recognized that §2255 does not apply to *coram nobis* petitions. But now the Eighth Circuit has chosen to substitute an inapplicable statutory test for the standard adopted by this Court and employed by the other Courts of Appeals.

The other errors alleged in this petition for certiorari are also important and are contrary to the decisions of this Court and accepted *Brady*/*Giglio* principles. These include suppression of an offer to further reduce the sentence of the sole witness implicating Baranski in the alleged conspiracy, and allowing the witness's false denial of that offer during trial to go uncorrected; suppression of medical records in the government's possession showing that the key witness continually complained of memory problems; and denial of access to information in the pre-sentence report that would have further impeached the testimony of that witness.

The erroneous legal standard adopted by the Eighth Circuit, without briefing by the parties or consideration by the District Court, threatens immediate consequences. If the Eighth Circuit continues to apply the §2255 test in *coram nobis* cases, those cases will be adjudged according to the wrong legal standard, and it will be difficult to undo or re-litigate them later. Furthermore, with recently stepped up immigration enforcement, already at a high level numerically, *coram nobis* petitions are being used to challenge prior convictions that may have been affected by constitutional error in order to avoid deportations. It is important that the correct

standard be used, and that this erroneous standard not spread to other circuits.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 880 F.3d 951 and reproduced at App.1a.

The Memorandum and Order of the District Court is reported at 2016 WL 1258583 and reproduced at App. 13a.

The order denying rehearing *en banc*, with accompanying dissent, is reported at 2018 WL 2027400 and reproduced at App. 109a.

JURISDICTION

The Court of Appeals issued its judgment on January 23, 2018. A timely motion for rehearing *en banc* was filed by petitioner, which was denied by order dated May 1, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following Constitutional provisions and statutes are involved in this case: U.S. Const., Amend. V, 18 U.S.C. §2, 18 U.S.C. §371, 18 U.S.C. §922(g), 18 U.S.C §924(e), 18 U.S.C. §1956(a)(1), 26 U.S.C. §5861, 28 U.S.C. §1651, 28 U.S.C. §2244, 28 U.S.C. §2253, and 28 U.S.C. §2255.

The pertinent portions of these texts are reproduced at App. 114a.

STATEMENT OF THE CASE

In 2011, Baranski filed a petition for writ of error *coram nobis* seeking to vacate his conviction in 2002 of one count of conspiracy in violation of 18 U.S.C. §371. The petition was brought under the All Writs Act, 28 U.S.C. §1651(a), and jurisdiction in the District Court was founded on 28 U.S.C. §1331.

At Baranski's trial in 2002, the only witness who tied Baranski to the alleged conspiracy was James Carmi who, unknown to Baranski, was a convicted felon with a long criminal record. JA 1404-1407.[1] Baranski resided in Ohio and had recently begun business as a licensed firearms importer and dealer. Those licenses allowed him to import and sell National Firearms Act ("NFA") firearms legally to proper purchasers. As a licensed importer and NFA dealer, Baranski could obtain the release of imported NFA firearms from a bonded customs warehouse where arms were stored, if he submitted an application to ATF with a law enforcement demonstration letter and ATF issued an import permit. JA 1559-60, 1563. Baranski had never been convicted of any felony, and has had no convictions since his release.

While returning from a business trip to Arkansas in 1999, Baranski stopped to see Carmi at his place of business in Missouri in response to an ad placed by Carmi in *Shotgun News*. JA 341. James Carmi's

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[1] References to "JA" are to the Joint Appendix at the Eighth Circuit.

brother David Carmi, and James Carmi's wife Vicki Carmi, had a federal license as a firearms dealer, operating under the name "Vic's Guns." JA 1380. However, Carmi actually ran the business, even though as a felon he was prohibited from doing so, and represented himself to Baranski as "Dave." JA 341, 564-65, 1380, 1528-30. Months later, Carmi expressed interest in obtaining firearms from Baranski.

In May of 2000, Carmi was involved in a serious motorcycle accident and was in a coma for an extended period. It caused memory problems for him. App. 47a. In October of 2000, Carmi was arrested in Elsberry, Missouri, in possession of approximately 800 machine guns. JA 564, 568-69. Shortly thereafter, he was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g). JA 569, 1412, 1631. Carmi cooperated with prosecutors, and proffered information against Baranski. App. 24a.

Carmi's sentencing took place on November 8, 2001. App 29a. At the sentencing, there was a discussion between Judge Webber, Carmi's attorneys, and AUSA Poehling in chambers regarding a motion filed by Poehling for a downward departure from the sentencing guidelines pursuant to Section 5K1.1. JA 1371. Thereafter, Judge Webber stated on the record to Carmi:

> I'm convinced that based on your unusual efforts in this case, that I should sentence you at substantially less under the 5K1.1 motion

> than I customarily would do. In this case, it's my intention to sentence you at 42 months.

Having disposed of the 5K1.1 reduction, Judge Webber then further stated on the record:

> I have – it's been represented to me that depending upon certain circumstances that happen hereafter, which you and counsel can discuss, that *there's a likelihood that a further reduction at some time in the future, depending upon your continued cooperation, may occur*.

JA 1371 (emphasis added); App. 29a-30a. AUSA Poehling was present for these statements, and acknowledged them. *Id.* Judge Webber then ordered that the sentencing transcript be sealed, and sentenced Carmi to 42 months with supervised release for three years. JA 1372-73.

Before his trial in November of 2002, counsel for Baranski made detailed, repeated requests of AUSA James Martin to turn over all *Brady*/*Giglio* material, including prison medical records created during Carmi's incarceration, and Carmi's pre-sentence report ("PSR"). JA 315-16, 322, 1299, 1303; App. 95a. AUSA Martin continually insisted to counsel that all *Brady* and impeachment material had been produced, including relevant medical records, and repeated those claims in a hearing before a magistrate judge. JA 1421-1460-61.

At Baranski's trial, Carmi provided testimony to the effect that Baranski was part of a conspiracy with Carmi and others to import machine guns illegally by

the use of fraudulent law enforcement demonstration letters. *See e.g.*, JA 1548-49, 1556. The only witness tying Baranski to this scheme was Carmi. It was undisputed that it was Carmi who obtained the letters from law enforcement officials. Baranski did not know these officials, had never met them, and never communicated with them. JA 1565-67. He had met Carmi only once. JA 341.

At Baranski's trial, Carmi flatly and falsely denied that he had any expectation or promise of a further sentence reduction, or that he had ever asked for such a reduction. On cross-examination, the following exchange occurred:

> Q. And you wanted another -- you expected you were going to get another deal for actually testifying- -didn't you?
>
> A. I never said that, and I never expected it. I've never been promised anything….

The prosecutor, AUSA Martin, did not correct this false testimony at trial or thereafter.

After the verdict, the trial judge, Judge Charles Shaw, stated "I think this was a very close case. I think this was a very, very close case here." JA 1578. The next day, Judge Shaw repeated that "this was a close case," and opined that "I believe that the whole case hung on Mr. Carmi." JA 1596.

Baranski was sentenced to five years in prison and three years of supervised release. App. 2a. He appealed and the 8th Circuit affirmed. *United States v. Baranski*, 75 Fed.Appx. 566 (8th Cir. 2003). While

Baranski was incarcerated, the District Court denied his post-conviction motion to vacate, set aside, or correct the sentence under 28 U.S.C. §2255 and the Eighth Circuit affirmed. *Baranski v. United States*, 2006 WL 472451 (E.D. Mo. Feb. 27, 2006), *aff'd*, 515 F.3d 857 (8th Cir. 2008). None of these proceedings relied on the new evidence presented in the later *coram nobis* case.

Baranski completed his prison sentence and period of supervised release in 2009. App. 2a.

In 2010, Baranski obtained from government officials a crucial letter (JA 619) from the USAO's files. JA 367-71. That letter demonstrates that there had been discussions of a Rule 35 sentence reduction between Carmi's attorneys and the USAO, and that Carmi's counsel stated Carmi had lied at Baranski's trial when he denied that he expected a further reduction in sentence.

That set off a chain of events, including the filing of this *coram nobis* case, in which Baranski obtained voluminous new documentation, including Carmi's sentencing transcript documenting the sentence reduction offer; correspondence between Carmi and his attorneys concerning that Rule 35 offer; Carmi's prison medical records documenting memory problems and his expectation of an upcoming sentence reduction; and Carmi's PSR. Every critical document forming the basis for this *coram nobis* proceeding was first revealed to Baranski only after his release from custody. Those documents relate to Carmi's credibility as a witness and could have been

used to impeach him at trial had they not been suppressed by the prosecution.

In a key ruling before the evidentiary hearing on the *coram nobis* petition, Judge Shaw found that Carmi was the only material witness against Baranski, and "therefore any evidence that impeaches and discredits Carmi's testimony is material because Carmi's credibility is the difference between guilt or innocence for petitioner." JA 127. The Court further observed regarding Baranski's trial, "The government's case was weak and depended almost entirely on Carmi's testimony. Without it there could have been no indictment and no evidence sufficient to bring the case before a jury." *Id.*

An evidentiary hearing in the *coram nobis* case was held on December 7-8, 2015. App 13a. By Memorandum and Order dated March 31, 2016, the District Court dismissed all remaining counts in Baranski's petition.

Baranski appealed, and the case was briefed before the Eighth Circuit under standard principles settled by this Court for *Brady*/*Giglio* and *coram nobis* cases.

The appeal was orally argued before the Eighth Circuit panel on September 20, 2017. During oral argument Judge Loken, participating by telephone, raised a question as to whether any party had considered or argued whether AEDPA furnished the

standard of review.[2] Both counsel replied in the negative.[3] Judge Loken mentioned two cases, the *Brown* case from the Fourth Circuit and the *Baptiste* case from the Third Circuit, as indicating that this case ought to be governed by the "second or successive" standards of AEDPA. Counsel for Baranski offered to submit briefing on this subject but the Court declined.

Shortly after oral argument, counsel for both parties filed Rule 28(j) letters indicating that *coram nobis* was the proper remedy available to Baranski. Neither letter contended that the relief sought by Baranski should be addressed as a successive habeas petition. App. 130a-137a.

The panel's opinion was filed on January 23, 2018. It held that "AEDPA's restrictions on the grant of successive relief set forth in §2255(h)(1) and (2) limit the grant of *coram nobis* relief to a petitioner whose motion for §2255 relief was denied while he was still in custody." App. 7a. The opinion concluded that "Baranski must present '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

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[2] The "second or successive" requirements in §2255(h) were added by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, known as AEDPA.

[3] The recording of the oral argument is at http://media-oa.ca8.uscourts.gov/OAaudio/2017/9/163699.MP3, and the relevant discussions are at 5:45-8:20 and 14:10-14:50.

factfinder would have found the movant guilty of the offense.' 28 U.S.C. §2255(h)(1)." App. 11a.

Without discussion of any of the evidence presented by Baranski, the opinion noted that the District Court found that "Carmi was not promised a Rule 35 sentence reduction in exchange for testifying against Baranski." App. 9a. Again without discussion of Baranski's evidence, the opinion stated that the District Court "found that Carmi testified 'extensively and truthfully' regarding his injury and memory loss issues," and that "[n]one of the documents relating to mental condition and memory loss 'would have opened a new line of impeachment or provided a different avenue of impeachment.'" App. 10a. The panel further noted that the District Court "found that the government did not mislead the defense regarding Carmi's incarceration exposure," one of the issues to which the PSR was relevant. *Id.*

On March 9, 2018, Baranski timely filed his petition for rehearing *en banc*. The government responded on March 26, 2018. The Eighth Circuit denied the *en banc* petition on May 1, 2018. App. 109a. Four judges would have granted the petition for rehearing *en banc*.

A written dissent authored by Judge Stras was filed with the order. App. 109a. The dissent states that the first sentence of §2255 makes it "clear that only a 'prisoner in custody' is subject to §2255." App. 110a. As stated by the dissent, the panel opinion:

> both rewrites §2255 and alters the standard for *coram nobis* petitions. It rewrites §2255 by excising the words "prisoner in custody" from the first sentence. And it alters the standard for *coram nobis* petitions by applying §2255(h)'s restrictions, rather than Supreme Court precedent.

App. 113a.

After summarizing the proper *coram nobis* standard announced in *United States v. Morgan*, 346 U.S. 502, 511–12 (1954), the dissent concludes: "Only Congress can rewrite §2255, only the Supreme Court can overrule *Morgan*, and neither has done so." App. 113a.

REASONS FOR GRANTING THE WRIT

I. Review is Needed Because, Without Briefing, the Eighth Circuit Applied the 28 U.S.C. §2255(h) Standard for "Second or Successive" Motions Which Is Contrary to Statute and to the Standard Used by This Court and the Courts of Appeals for *Coram Nobis* Petitions.

A. The decision by the Court of Appeals is contrary to statute.

The Eighth Circuit opinion states that "a critical issue, not addressed by the district court, is whether AEDPA's restrictions on successive §2255 motions affect the availability of *coram nobis* relief to a petitioner whose claim would be barred had he petitioned for relief while still in federal custody." App. 6a.

But until the panel opinion, no one—not the District Court and not the parties below or on appeal—had ever supposed that this was an issue, because no court has held that a *coram nobis* petition by an individual not in custody should be governed by AEDPA standards for second or successive motions under §2255.

Under the Eighth Circuit's own precedents, that issue should not have been decided by the panel because "As a general rule we will not consider on appeal an issue not raised in the district court." *Cole v. Hunter*, 726 F.2d 434 (8th Cir. 1984).

In any event, the decision to apply §2255(h) to a *coram nobis* petition by an individual not in custody is contrary to statute. The entirety of §2255 applies only to a "prisoner in custody," which Baranski is not. Section 2255(h) is simply inapplicable.

The panel opinion provides no compelling reason why §2255(h) should be applied in *coram nobis* cases brought by persons not in custody. In fact, it provides a compelling reason why it should not.

The opinion first examines the question, not argued by either party on the appeal, whether Baranski should have been required to obtain prior authorization from the Court of Appeals before instituting his *coram nobis* case in the District Court. The opinion observes that:

> the restriction is in §2244(b), which is plainly limited to "a second or successive habeas corpus application," and the cross-reference in §2255(h) is similarly limited to a "second or

> successive [§2255] motion." As Congress did not impose this restriction on *coram nobis* petitioners seeking successive post-conviction relief, we may not read it into the statutes.

App. 6a. That is correct. Courts are not at liberty to apply statutes to situations to which, by their express language, they do not apply.

Then, inexplicably, the opinion does exactly that regarding the standard in §2255(h). The Court's rationale is that "it would make no sense to rule that a petitioner no longer in custody may obtain *coram nobis* relief with a less rigorous substantive showing than that required by AEDPA's limitations for successive habeas corpus and §2255 relief." App. 8a. But just as with the prior authorization requirement, the answer is not whether the terms of the statute "make sense" to a court, but what the text of the statute enacted by Congress actually provides. Here, Congress has not chosen to make the prior authorization requirements of § 2244(b) applicable to *coram nobis* petitions by individuals not in custody, and it has not chosen to make the "second or successive" standards in §2255(h) applicable to petitions by such individuals, either. In addition, *coram nobis* petitions may already be subject to a somewhat higher standard than first motions under §2255, since they are limited to "circumstances compelling such action to achieve justice." *Morgan*, 346 U.S. at 511.

Although the opinion cites several cases, none of those cases apply to *coram nobis* petitions any

substantive or procedural part of the series of statutes enacted by Congress regarding habeas corpus, motions attacking sentences, or associated procedural requirements (in general, 28 U.S.C. §§2241-2255). Instead of having support in case law, the Eighth Circuit's decision contradicts this Court's precedents regarding *coram nobis* jurisprudence, by adding requirements that are not there. It also contradicts this Court's well-settled line of *Brady* cases, by substituting for the *Brady* "materiality" standard the standard contained in §2255(h) if the petitioner has previously filed a §2255 motion.

B. The decision is contrary to this Court's longstanding precedents for *coram nobis* cases and *Brady/Giglio* cases.

This Court has consistently stated that the writ of error *coram nobis* is an "extraordinary remedy" for correcting errors of "the most fundamental character" when the "circumstances compel[ ] such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511–12 (1954) (internal quotation marks and citation omitted).

Coram nobis is thus a recognized vehicle for raising errors that may have affected the validity of a trial. In a case involving *coram nobis* relief in military courts, this Court held that "Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect," noting that "Article III courts have a like authority." *United States v. Denedo*, 556 U.S. 904, 917

(2009) (ineffective assistance of counsel); *see also United States v. Addonizio*, 442 U.S. 178, 186 (1979) (*coram nobis* available to address errors of "the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid.").

A *Brady/Giglio* violation is necessarily a fundamental error, since such an error deprives the defendant of a fair trial and due process of law under the Fifth Amendment, and requires reversal. As stated in *Giglio*, 405 U.S. 150, 153 (1972), "suppression of material evidence justifies a new trial" and when "'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [citation omitted]." *See also Strickler v. Greene*, 527 U. S. 263, 282 n.21 (1999) ("Our cases make clear that *Brady's* disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness. *United States v. Bagley*, 473 U.S. 667, 676 (1985).").

This Court has clearly recognized that *coram nobis* and §2255 are non-overlapping and that the distinction is whether the person is in custody. "A petition for a writ of *coram nobis* provides a way to collaterally attack a criminal conviction for a person … who is no longer 'in custody' and therefore cannot seek habeas relief under 28 U.S.C. §2255 or §2241." *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013).

To the best of petitioner's knowledge, this Court has never engrafted the standards of §2255, or any of the procedural requirements associated with that section or habeas relief, onto a *coram nobis* petition. Certiorari should be granted to prevent the Eighth Circuit from doing so.

The Eighth Circuit's decision also upsets this Court's *Brady* jurisprudence. As the Court has stated:

> There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler, 527 U. S. at 281-82.

The third requirement—that prejudice must have ensued—is often referred to as the "materiality" requirement. A suppression of evidence is material, and constitutional error results, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). However, a convicted individual "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. [citation omitted].... He must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016). Indeed, under this standard, a defendant may prevail even if "the undisclosed

information may not have affected the jury's verdict." *Id.* at 1006 n.6 (emphasis added).

To require a *coram nobis* petitioner who is not in custody to "establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense" simply obliterates these longstanding *Brady/Giglio* standards. Instead of a showing that the new evidence "undermines confidence" in the verdict, such a petitioner must show that he absolutely would have been acquitted.

The Eighth Circuit opinion recognizes this. It cites the "reasonable probability" test, and describes it as "the standard for determining whether a *Brady/Giglio* violation is material. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012)." App. 11a. In the next sentence, the opinion states, "As we have explained, that is not the proper standard for obtaining substantively successive post-conviction *coram nobis* relief." *Id*.

Until the instant case, the Eighth Circuit applied the standards enunciated by this Court in *coram nobis* cases.

In *United States v. Noske*, 235 F.3d 405 (8th Cir. 2000), a prisoner in custody filed a petition for *coram nobis*. The Court held that "our case law clearly precludes *coram nobis* relief to a federal prisoner." *Noske*, 235 F.3d at 406. Being in custody, her remedy, if any, was a §2255 motion. But the Eighth Circuit also denied relief because, even if *coram nobis* would have been an available remedy, the standard to be applied is the "fundamental" error test under

Morgan, and the court did not believe such error had been shown.

The Eighth Circuit recently applied these standards in *coram nobis* cases even when the individual had been released from custody after filing a petition under §2255; that is, in cases that are directly contrary to the Eighth Circuit's holding in the case at bar.

In *Bustamante v. United States*, 558 Fed.Appx. 721 (8th Cir. 2014) (unpublished), the defendant was convicted, filed a §2255 motion while in custody, and a *coram nobis* petition after his release. The Court reviewed petitioner's appeal citing *coram nobis* standards, and with no suggestion that §2255's "second or successive" standards applied. In *United States v. Dickson*, 676 Fed.Appx. 609 (8th Cir. 2017) (unpublished), the Eighth Circuit affirmed the denial of a post-release *coram nobis* petition after a §2255 petition was denied while the individual was in custody, without any finding that §2255(h) applied.

C. The decision conflicts with holdings by other Courts of Appeals.

There is a clear circuit split here. To the best of petitioner's knowledge, no other circuits have applied the "second or successive" test in §2255(h) to a *coram nobis* petition filed after release from custody, even when a §2255 petition had been filed while in custody.

The Sixth Circuit specifically held that a *coram nobis* petition filed by a person not in custody is not "in substance" a second or successive §2255 motion, as the Eight Circuit held. Instead, it found that "part

of the substance of a §2255 motion is that it is filed by '[a] prisoner in custody under sentence of a court established by Act of Congress[.]' 28 U.S.C. §2255(a)."

> [Petitioner] was no longer in custody when she filed her petition for a writ of *coram nobis*, which means *her petition is not in substance a motion under §2255*. Her petition is therefore not a second or successive motion for relief under that section…."

Pilla v. United States, 668 F.3d 368, 372 (6th Cir. 2012) (emphasis added).

In *United States v. Esogbue*, 357 F.3d 532 (5th Cir. 2004) the Fifth Circuit reversed the dismissal of Esogbue's *coram nobis* petition, holding that a successive motion under §2255 was not available to him, because he was no longer in custody. Thus, *coram nobis* relief was an available remedy. In remanding the case, the Fifth Circuit carefully noted that the *Morgan* standard would be applied in *coram nobis* review. *Id.* at 535. *See also Adeleke v. United States*, 550 Fed.Appx. 237, 238 (5th Cir. 2013) (unpublished) (certificate of appealability not required in *coram nobis* case); *United States v. Few*, 372 Fed.Appx. 564, 565 (5th Cir. 2010) (unpublished) ("[t]here is no requirement to obtain a COA in order to appeal the denial of a petition for a writ of *coram nobis*.").

The Ninth Circuit has held that requirements of AEDPA cannot be tacked on to a *coram nobis* case. In *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005), *abrogated on other grounds by Padilla v. Kentucky*,

559 U.S. 356 (2010), the Court held that §2253(c)(1) makes the grant of a certificate of appealability necessary only in the specific instances referenced by statute, including §2255 cases. *Id.* at 1010. Because Kwan was no longer in custody, "he is no longer eligible for any form of relief governed by AEDPA…." *Id.* at 1011. *See also United States v. Price*, 589 Fed.Appx. 350 (9th Cir. 2015) (unpublished) (no COA needed for *coram nobis* appeal).

The Tenth Circuit has also expressly held that *coram nobis* petitions filed by individuals not in custody cannot be recharacterized as §2255 motions. In *United States v. Miles*, 697 Fed.Appx. 601, 602 (10th Cir. 2017) (unpublished), the district court recharacterized a *coram nobis* petition by an individual not in custody as a "second and successive §2255 petition" requiring authorization from the court of appeals pursuant to 28 U.S.C. §2244(b)(3)(A). The Tenth Circuit held that the recharacterization was erroneous, noting that "[a] §2255 petition…can only be filed by a federal 'prisoner in custody.'" Because §2255 did not apply, the Court further held that a certificate of appealability was not required pursuant to 28 U.S.C. §2253(c). *See also United States v. Carpenter*, 598 Fed.Appx. 576, 580-81 (10th Cir. 2015) (unpublished) (recharacterization and COA requirement are improper when plaintiff not in custody); *Gomez v. MacGrew*, 593 Fed.Appx. 775, 777 n.1 (10th Cir. 2014) (unpublished) (COA not required to appeal dismissal of *coram nobis* petition).

The Third Circuit has also refused to import procedures applicable to §2255 motions into *coram*

nobis cases. In *United States v. Baptiste*, 223 F.3d 188, 189 n.1 (3d Cir. 2000), the Third Circuit stated that "Neither … 28 U.S.C. §1651(a), nor any Federal Rule of Appellate Procedure requires a certificate of appealability before an appeal may be taken, nor does such a requirement appear in the case law."

As noted by the dissent in the instant case, "Even the United States recently conceded that it is erroneous to characterize a *coram nobis* petition 'as a second or successive §2255 motion,'" citing Memorandum Brief of United States at 5, *United States v. Miles*, 697 Fed.Appx. 601 (10th Cir. 2017). App. 11a.

The Eighth Circuit opinion cites not a single case in which any of the requirements of AEDPA were expanded to apply to *coram nobis* petitions, in which a *coram nobis* petition filed by a person not in custody was treated as a successive §2255 motion "in substance," or in which a *coram nobis* petition was subjected to the requirements of §2255(h). Except for this decision by the Eighth Circuit, the case law recognizing *coram nobis* and §2255 as separate legal regimes is quite uniform, and certiorari should be granted to keep it that way.

II. Review is Needed Because Under *Brady/Giglio* the Prosecution May Not Suppress Evidence of a Sentence Reduction Offered to the Sole Witness Implicating the Defendant Because There Was Only a "Likelihood" of a Future Reduction as Opposed to an Absolute "Promise" of a Reduction.

The Eighth Circuit's opinion stated only that the District Court "found that Carmi was not promised a Rule 35 sentence reduction in exchange for testifying against Baranski." App. 9a. It made no independent findings. Because the Court of Appeals applied the §2255(h) test, its discussion of the actual issues in Baranski's case was cursory at best.

The prospect of a sentence reduction or similar inducement to a prosecution witness generally must be disclosed under Giglio/*Brady*. The rationale is that a witness's testimony might have been motivated "by the possibility of a reduced sentence on an existing conviction." *Wearry*, 136 S. Ct. at 1007, relying on *Napue v. Illinois*, 360 U.S. 264, 270 (1959).

As described in the Statement of Facts, at Carmi's sentencing there was a discussion between Judge Webber, Carmi's attorneys, and AUSA Poehling in chambers. Thereafter, Judge Webber recounted on the record that he would sentence Carmi to 42 months under Section 5K1.1, and that, further:

> I have – it's been represented to me that depending upon certain circumstances that happen hereafter, which you and counsel can discuss, that *there's a likelihood that a further reduction at some time in the future,*

> *depending upon your continued cooperation, may occur.*

JA 1371 (emphasis added). AUSA Poehling was present for these statements, and acknowledged them. *Id.*

Judge Webber's statement, transcribed by a court reporter, that there was not just a possibility but a "likelihood" of a future reduction in sentence based upon Carmi's continued cooperation, establishes beyond dispute that a further sentence reduction was offered to Carmi. There it is, in black and white. Nothing more is needed to show that the prospect of a sentence reduction was dangled in front of Carmi to induce him to cooperate.

While the District Court did find that "that the Government did not promise Carmi a further reduction in his sentence under Rule 35(b) in return for his testimony at Mr. Baranski's trial…." (App. 71a), the definition of "promise" apparently applied by the District Court is so far outside the interpretation given it by this Court and other courts that it amounts to legal error.

The District Court made a distinction between an ironclad "promise" of a reduction, and the "possibility" of a reduction:

> While Carmi's sentencing judge, Judge Webber, made reference during the sentencing to an off-the-record discussion in chambers about the *possibility* of a further reduction in Carmi's sentence, there is no indication there was a *promise* for a Rule 35

> reduction in exchange for Carmi's testimony *against Mr. Baranski*.

App. 73a (emphasis in original). The District Court further found that "AUSA Poehling discussed the possibility with at least Rogers, but the Court finds there was no promise." App 78a.

But an inducement to a government witness for testimony in a future trial will rarely take the form of an absolute promise, but will instead be conditional on satisfactory cooperation by the witness. In the case of a sentence reduction, there can virtually never be an absolute promise that the sentence will be reduced, because a sentence reduction can only be made by a judge, not a prosecutor.

Under prevailing case law, deals far less concrete than the one in this case must be disclosed. In *Wearry*, "the State had failed to disclose that, contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against *Wearry*," and the police had told Brown that they would "talk to the D.A. if he told the truth." *Wearry*, 136 S. Ct. at 1004 (2016). The mere fact that the witness thought a deal might be brewing was sufficient to summarily reverse the denial of post-conviction relief, finding that "denial of Wearry's *Brady* claim runs up against settled constitutional principles" and that this was a case in which "lower courts have egregiously misapplied settled law…." *Wearry*, 136 S. Ct. at 1006-07.

Contrary to the District Court in this case, a "possibility" of a deal for a sentence reduction is

sufficient to trigger *Brady/Giglio* disclosure obligations, and a "promise" is not needed. As this Court noted in *Wearry*, describing *Napue*, "[E]ven though the State had made no binding promises, a witness' attempt to obtain a deal before testifying was material because the jury 'might well have concluded that [the witness] had fabricated testimony in order to curry the [prosecution's] favor'." Here, the sentence reduction amounted to a "likelihood," as stated by Judge Webber.

Disclosure is especially important when the testimony relates to a key witness, as in *Giglio,* where "the Government's case depended almost entirely [that witness's] testimony; without it there could have been no indictment and no evidence to carry the case to the jury." *Giglio*, 405 U.S. at 154-55.

Whether the prosecutor who actually tried the case knew of the understanding with the witness is of no moment:

> [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government.

Id. at 154. Thus, the repeated statements by the District Court that the prosecutor who tried the Baranski case, AUSA Martin, was not aware of the Rule 35 sentence reduction offer is irrelevant and legally erroneous if it is intended to show that the prosecution had no duty to disclose that offer. App. 43-44a, 88-89a, 99a.

There was also abundant contemporaneous, written documentation that Carmi was fully aware of the offer, expected to receive a further sentence reduction, and lied about it at trial, possibly as the result of coaching by AUSA Martin.

A few days after Carmi's sentencing, Carmi's counsel John Rogers memorialized AUSA Poehling's representation in a letter to Carmi, dated November 14, 2001. It stated:

> *Your sentence should be significantly reduced so long as your cooperation continues.* Assistant United States Attorney Richard *Poehling will file a Rule 35 motion* within the next six (6) months. After this has been filed, *I anticipate a significant further reduction in your sentence.* Please contact me in March of 2002 and I will monitor the Rule 35 status.

JA 624 (emphasis added).

On March 20, 2002, Carmi's other counsel, Scott Rosenblum, wrote a letter to Carmi stating that "The government should be finishing up their investigation in the next month. Once their investigation is completed, *I have been told by Assistant U.S. Attorney Poehling that there will be a further reduction of your sentence.*" JA 625 (emphasis added). In April 2002, Carmi replied:

> Got your letter the other day. Sounds good but still does not answer my most important question. When do I get out. At the time of sentencing, John Rodgers told me Dick [Poehling] would cut my time to 18-24

> months…. I believe its pretty much up to Dick.

JA 628.

On May 3, 2002, Rogers wrote a third letter to Carmi stating that *"The Rule 35 will be filed. Dick Poehling will wait until the cases*[4] *are disposed of, however, before filing his motion.* I promise we will not forget to follow up on your behalf." JA 626 (emphasis added).

In a letter to Rosenblum, written in the weeks before Baranski's trial in November 2002, Carmi stated:

> *When will the Rule 35 be filed. I was told twice by you it would be in May.* In writing both times. What is the deal. I have done everything I could to help the Feds and still am helping…. John promised, *day of sentence, a Rule 35*, 18-24 month drop. When does this occur…. *Help them remember their promise.*

JA 634 (emphasis added).

Suppressed Bureau of Prisons records also demonstrate that in the summer prior to Baranski's trial Carmi was expecting an early release from prison based on his upcoming testimony at Baranski's trial: "[Carmi] reported he is a little apprehensive about his role … at trial; however, he will likely get a

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[4] At the time of Baranski's trial, Jeffrey Knipp, the other alleged conspirator, had pled guilty but had not been sentenced. JA 1564-65.

reduction in his sentence….” (JA 620); “[Carmi] just returned from WRIT on August 7, 2002…. He says that he will be getting out in two months or so, based on this court proceeding.” (JA 621); “Mr. Carmi recently returned on writ…. He explained he is waiting to hear information from the court, and he is expecting ‘good news’.” (JA 622).

Baranski’s trial concluded on November 18, 2002. Within a few days, Carmi wrote a letter to Rosenblum which stated in part:

> I am sure you saw the front page of the Post Tuesday Nov 19. I did my job good. The ATF agent even said so…. Please get me out. It will be a year on Dec. 7 from my sentencing date. A Rule 35 has to be filed in a year. So we’ve got 2 weeks left…. Anyhow, I am most anxious to get this filed. And also to be out ASAP.

JA 636-37.

On November 26, 2002, Rogers followed up by phone with AUSA Martin to request that the government file the Rule 35 motion. JA 1237, 1349. Martin’s response was that he had not promised Carmi a Rule 35, that he had had a conversation with Poehling who did not represent to Rogers that a Rule 35 motion would be filed, that Carmi had received enough of a reduction through the Section 5K1.1 motion, and that it was his intention not to file a Rule 35 motion. JA 1349.

On February 17, 2003, Rogers wrote a letter to Carmi, which stated:

> Both Scott and I have had numerous meetings with Jim Martin and Dick Poehling regarding this issue. Dick denies promising the Rule 35. Jim Martin's position is even if Dick did provide the Rule 35, you are not entitled to it because you lied when being questioned about this very issue at trial.

JA 619. Carmi replied with a letter to Rosenblum and Rogers expressing shock:

> Cant hardly believe the last letter you sent me. Especially after our phone conversation in January in which you said Jim Martin was not aware of the deal you and Dick Poeling made. You said that Dick remembers and he will honor the promise. Then after you sent me that letter, *on the phone you also told me that they cant give me a sentence reduction as it will mess up the Baranski conviction. Thats not my fault. I said what they told me. That I had no promise. Id been told from the day of sentencing that I did.*

JA 647-48 (emphasis added).

Carmi's denial at Baranski's trial that he expected any further reduction in his sentence was blatantly false, and the U.S. Attorney's Office knew that testimony was false because AUSA Poehling was at Carmi's sentencing hearing.

Prior to Baranski's trial, counsel for Baranski requested in writing Carmi's sentencing transcript from AUSA Martin. JA 237, 1234. However, Martin

refused to provide it, stating that it was a public record, when in fact it was sealed. JA 239, 240, 1338.

Baranski's counsel relied, as they were entitled to do, on Martin's representations that there was nothing of impeachment value in Carmi's sentencing transcript. Attorney Gardiner testified that "we did not [seek to unseal Carmi's sentencing transcript] because Mr. Martin indicated there was nothing exculpatory or impeachment in it." JA 305. As this Court held in *Banks v. Dretke,* 540 U.S. 668, 693 (2004): "[T]he State asserted, on the eve of trial, that it would disclose all *Brady* material…. As *Strickler* [v. *Greene,* 527 U. S. 263 (1999),] instructs, Banks cannot be faulted for relying on that representation." On the contrary, he "was entitled to treat the prosecutors' submissions as truthful." *Id.* at 698.

III. Review Is Needed Because it is Error Under *Brady/Giglio* to Consider the Suppressed Evidence Regarding the Key Witness's Credibility in Isolation Rather Than Cumulatively.

The Eighth Circuit rejected the *Brady/Giglio* materiality test, and thus made no findings regarding whether Baranski's new evidence, considered cumulatively and not in isolation, undermined confidence in the verdict.

This Court's decisions clearly establish that to determine materiality, all of the suppressed evidence must be considered cumulatively; that is, "collectively, not item by item." *Kyles*, 514 U.S. at 436 (1995); *see also Wearry*, 136 S. Ct. at 1007 (2016).

That is especially important because "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States v. Agurs,* 427 U.S. 97, 113 (1976). As noted above, immediately after Baranski's trial Judge Shaw repeatedly observed that the case was "very, very close" and that "the whole case hung on Mr. Carmi." JA 1578, 1596.

Apart from the offer of sentence reduction discussed above, the two major categories of evidence suppressed by the prosecution are: 1) Carmi's prison medical records showing, among other things, complaints by Carmi of memory loss; and 2) the PSR for Carmi, which contained several items of impeachment value.

However, for these two issues, the District Court's findings regarding materiality were made in isolation, not cumulatively. At the conclusion of its discussion of the medical records, the District Court stated, "The documents Mr. Baranski complains were not provided, even if not entirely cumulative, do not establish the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense, such that confidence in the verdict is undermined." App. 88a.

Regarding the PSR, the District Court stated, "Mr. Baranski has not shown that the sentencing range as reflected in the PSR was so significant" that "the result of the proceeding would have been

different, such that confidence in the outcome of the trial is undermined." App. 102.

In other words, the effect of each of these two categories of evidence was considered separately, not cumulatively.

A. Suppression of Carmi's medical records from the Bureau of Prisons was improper and if considered cumulatively would have further undermined confidence in the verdict.

Baranski's attorneys requested that the prosecution produce all *Brady* and *Giglio* information that was within the possession of the U.S. government. JA 1298. Among other specific requests, Baranski's attorneys sent a letter to AUSA Martin requesting "a complete copy of [Carmi's] mental and physical health (medical) records which are in the possession or within the control of the U.S. Department of Justice, Federal Bureau of Prisons." JA 1299.

Martin replied by letter dated August 21, 2002, "I do not see how you are entitled to this information, and will not provide it unless you have case law which supports your request." JA 1339. The government did produce to Baranski's counsel a court-ordered Forensic Report from the U.S. Medical Center for Federal Prisoners in Springfield, Missouri, which concluded that Carmi's memory and mental problems were not as severe as he represented them to be, and that Carmi was "malingering." JA 1256, 1279. In other words, the prosecution produced a document favorable to the prosecution in Baranski's case.

Not only did AUSA Martin refuse to produce the requested medical records, he repeatedly stated to Baranski's defense counsel that he had produced all *Brady*/*Giglio* material. In a motions hearing not long before Baranski's trial, he represented to a magistrate judge that "everything they are legally entitled under the rules of discovery, *Brady*, and the like and beyond have been supplied to defense counsel." JA 1421. In that same hearing, he specifically represented to her regarding Carmi's medical records from the prison at Rochester, Minnesota, where Carmi was held:

> They asked for any medical records that he has had since he has been sent to prison after his plea. We solicited that information from Minnesota. I went through those files. Anything that related to his mental capacity versus his physical ailments, we turned those over.

JA 1460-61.

But AUSA Martin did not turn over the pertinent records that could have been used for impeachment. After Baranski's release from custody, and the cascade of information came out in connection with this *coram nobis* proceeding, Carmi's prison medical records were obtained. These included:

- Progress note, dated October 28, 2000, in which Carmi "reported resultant memory and concentration difficulties" stemming from his motorcycle accident and severe head injury. JA 248, 292.

- Progress note, dated October 24, 2000, in which it is stated that Carmi "Still feels 'in a fog,' poor memory." JA 248.

- Intake screening, dated January 17, 2002, documenting that Carmi was experiencing various mental problems including "memory problems." JA 249.

- Dental screening, dated January 19, 2002, in which Carmi listed "brain damage from accident, head injury." JA 250-51.

- Psychology data system, dated February 7, 2002, regarding 1/24/2002 contact in which "He continues to report retrograde and anteretrograde amnesia in relation to a motorcycle accident that occurred in May 2000." JA 251.

- Progress note, dated January 30, 2002, which states, "He is alleged to have suffered some brain damage, and has difficulty with recent and remote memory." JA 251.

- Psychology Services Intake Summary, in which Carmi states that he "cannot recall if he lost consciousness or sustained a concussion" during his motorcycle accident, and reports other mental problems including "memory problems." JA 252.

- Inmate request to staff, dated February 14, 2002, in which Carmi was said to suffer from various mental or nervous conditions, including "memory and speech problems." JA 252-53.

• Inmate request, dated February 24, 2002, in which Carmi states "I had a head injury and have trouble with memory." JA 253.

• Sick call clinic note, dated April 17, 2002, which notes various head related ailments, including "some difficulty with memory." JA 254.

• Progress note, dated April 25, 2002, which records that Carmi "has episodes of not knowing where he is and can't remember things." JA 254-55.

At Baranski's trial, when Carmi testified about memory loss, AUSA Martin got him to state that he was lying about his memory loss. JA 1550-51. If defense counsel had had these records, they could have been used *seriatim* to cross-examine Carmi extremely effectively. As it was, counsel had nearly nothing to work with.

B. Suppression of the pre-sentence report was improper and if considered cumulatively would have further undermined confidence in the verdict.

Carmi testified at Baranski's trial that he was given a sentence reduction to 42 months as a result of his cooperation. JA 1552-53. When asked what his original sentencing exposure was, without the reduction, Carmi testified that it was 76 to 86 months. JA 1553. He testified that his sentence had been cut by about three and a half years. *Id.* The prosecution did not correct that understatement of his exposure.

However, the PSR indicated that the guideline range was 87 to 108 months, almost two years longer. JA 1412. Thus, Carmi's exposure as indicated in the PSR was up to nine years according to the guidelines, and he received a reduction to only three and a half years, which was a reduction of five and a half years, not a reduction of three and a half years as Carmi testified.

Carmi not only received this 5K1.1 reduction, but the government also dropped the felon in possession charge for which Carmi was originally indicted and allowed him to plead guilty to one count of money laundering (18 U.S.C. § 1956(a)(l)(A)(i)) and one count of causing false entries to be made on ATF forms (18 U.S.C. § 2 and 26 U.S.C. § 5861). JA 1396.

According to the PSR, dropping the felon in possession charge allowed Carmi to avoid being sentenced as an Armed Career Criminal. The PSR stated that "Absent the plea agreement, if the indictment for Felon in Possession of a Firearm, in violation of 18 USC 922(g)(l), were not dismissed in this case, the defendant would have been punishable under 18 USC 924(e) [the Armed Career Criminal statute], subjecting him to a term of imprisonment of not less than fifteen years, with no probation, resulting in a guideline sentence of 180 months." JA 1412.

The PSR also contained evidence that Carmi complained of memory problems. The PSR revealed that Carmi "reported ongoing problems as a result of the head injury, to include both long-term and short-

term memory loss." JA 1408-09. It further stated that he "began counseling after his motorcycle accident and is having difficulty with his memory…." JA 1409. This information could also have been used for impeachment.

The relevant impeachment information in the PSR was not provided to counsel for Baranski prior to his trial in November 2002. JA 316. Robert Sanders, one of Baranski's attorneys, asked "[Martin] for any material within the presentence report that would be *Brady*, *Giglio* impeachment or anything favorable to the defendant." JA 315. Martin indicated to Sanders "that he had reviewed it, and there was nothing of that nature in there; there was no *Brady*, *Giglio* material within the presentence report." *Id.*

Sanders "took it on good faith that [he] was being told the truth [by Martin]…." JA 322. This Court has held in *Banks* and *Strickler* that defense counsel are entitled to rely on prosecutors' *Brady* representations.

The District Court found that the sentencing range had been recalculated by Judge Webber and that the reduction Carmi received was therefore not as great as comparison with the PSR would indicate. App. 98a-99a. The District Court also contended that the PSR was incorrect in that Carmi could not have been sentenced as an Armed Career Criminal, and that Baranski's defense counsel should have been able to figure that out. App. 100a-101a. But that reverses the burden. Baranski's counsel asked Martin if there was any potential *Brady*/*Giglio* material in the PSR, he denied it, and allowed erroneous

testimony by Carmi at Baranski's trial to stand. This is part of a repetitive pattern of suppressing evidence in Baranski's trial, and considered cumulatively it further undermines confidence in the verdict.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

For the Eighth Circuit

No. 16-3699

Keith Byron Baranski

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court

for the Eastern District of Missouri - St. Louis

Submitted: September 20, 2017

Filed: January 23, 2018

Before LOKEN, ARNOLD, and SHEPHERD, Circuit Judges.

LOKEN, Circuit Judge.

In November 2002, a jury convicted Keith Baranski, a federally licensed firearms dealer, of conspiracy to import machine guns from Eastern

Europe by submitting forms with false entries to the Bureau of Alcohol, Tobacco and Firearms (ATF). The district court[1] imposed a sentence of sixty months in prison and three years of supervised release. Baranski appealed; we affirmed. United States v. Baranski, 75 F. App'x 566 (8th Cir. 2003). The district court subsequently denied his post conviction motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255; we again affirmed. Baranski v. United States, 2006 WL 472451 (E.D. Mo. Feb. 27, 2006), aff'd, 515 F.3d 857 (8th Cir. 2008).

Baranski completed serving his prison sentence and three years of supervised release in August 2009. In 2011, he filed a Petition for Writ of Error *Coram Nobis*, asserting violations of his constitutional rights at trial. As later amended, the Petition asserted that new evidence establishes the government failed to disclose that it promised cooperating conspirator James Carmi a further sentence reduction for his testimony at trial; misled the court and the defense about Carmi's incarceration exposure; and deliberately withheld medical records tending to show that Carmi's trial testimony was tainted by amnesia and memory loss. After a two-day evidentiary hearing, the district court dismissed the Petition in a thorough 72-page Memorandum and Order. Baranski appeals. We affirm.

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[1] The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

I. The Writ of Error Coram Nobis in Federal Court.

The writ of error *coram nobis* is an ancient common law remedy that modern federal courts are authorized to issue under the All Writs Act, 28 U.S.C. § 1651(a). See United States v. Morgan, 346 U.S. 502, 506 (1954). As applied in criminal cases, *coram nobis* "is a step in the criminal case and not, like habeas corpus . . . the beginning of a separate civil proceeding. . . . This motion is of the same general character as one under 28 U.S.C. § 2255." Id. at 505 n.4. First enacted in 1948, § 2255 is a comprehensive statutory remedy intended "to meet practical difficulties" of federal habeas corpus jurisdiction. United States v. Hayman, 342 U.S. 205, 219 (1952). The Reviser's Note to § 2255 explained that the statute "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus." Id. at 218.

"[T]he All Writs Act is a residual source of authority . . . . Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." Carlisle v. United States, 517 U.S. 416, 429 (1996) (quotation omitted); see United States v. Denedo, 556 U.S. 904, 911 (2009). Section 2255, like habeas corpus, is limited to persons "in custody." Thus, "coram nobis relief is available when the defendant is no longer in custody for the applicable conviction, while custody is a prerequisite for habeas relief." United States v.

Camacho-Bordes, 94 F.3d 1168, 1172 n.6 (8th Cir. 1996); see United States v. Little, 608 F.2d 296, 299 (8th Cir. 1979) (*coram nobis* and § 2255 are "substantially equivalent" remedies).

The Supreme Court held in Morgan that the enactment of § 2255 created no bar to granting a writ of error *coram nobis* to a person who was convicted of a federal crime but is no longer in custody. 346 U.S. at 511. However, the Court explained, this "extraordinary remedy" should be allowed "only under circumstances compelling such action to achieve justice." Id. *Coram nobis* relief has been called the criminal law equivalent of the Hail Mary pass in American football. United States v. George, 676 F.3d 249, 251 (1st Cir. 2012). There is good reason for this reluctance. "The further a case progresses through the remedial steps available to a criminal defendant, the stiffer the requirements for vacating a final judgment. . . . The writ of error coram nobis lies at the far end of this continuum." Id. at 258.

Res judicata does not apply to successive petitions for federal habeas or § 2255 relief. See Sanders v. United States, 373 U.S. 1, 14 (1963). However, limitations on the filing of successive habeas petitions in 28 U.S.C. § 2244(b), a federal habeas statute, establish a "qualified application of the doctrine of res judicata." McCleskey v. Zant, 499 U.S. 467, 486 (1991), quoting S. Rep. No. 1797, at 2 (1966), 1966 U.S.C.C.A.N. at 3664. The Court in McCleskey defined an abuse-of-the-writ inquiry that a petitioner must satisfy to warrant relief on a successive post-conviction habeas or § 2255 petition. Id. at 489-96.

Under Morgan, a petitioner who was denied § 2255 relief while serving his sentence and is no longer in federal custody may seek what is in substance successive post-conviction relief by filing a petition for a writ of error *coram nobis*. 346 U.S. at 505-06, 505 n.4. Unless he is required to make at least the same showing as a prisoner who seeks successive § 2255 relief, "federal prisoners might deliberately wait until after their sentences expire to challenge their convictions." United States v. Correa-De Jesus, 708 F.2d 1283, 1286 (7th Cir. 1983).

In the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress imposed stricter limitations on the filing of second and successive § 2255 motions than the abuse-of-the-writ principles applicable under former § 2244(b) and McCleskey. First, a second or successive § 2255 motion must now be authorized "by a three-judge panel of the court of appeals." 28 U.S.C. § 2244(b)(3)(B). This rule may not be evaded "by simply filing a successive § 2255 motion in the district court." Boykin v. United States, 242 F.3d 373 (Table), No. 99-3369 at *1 (8th Cir. 2000). Second, a court of appeals panel may not certify a second or successive § 2255 motion unless it contains:

> (1) 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 the movant guilty of the offense; or

> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

§ 2255(h). Section 2255(h)(1) "alters the common law miscarriage of justice exception . . . by changing the standard from 'more likely than not' to 'clear and convincing evidence.'" United States v. Williams, 790 F.3d 1059, 1076 (10th Cir. 2015). Given that habeas, § 2255, and criminal *coram nobis* relief are substantively indistinguishable, a critical issue on this appeal, not addressed by the district court, is whether AEDPA's restrictions on successive § 2255 motions affect the availability of *coram nobis* relief to a petitioner whose claim would be barred had he petitioned for relief while still in federal custody.

The first question is procedural: whether a *coram nobis* petitioner whose motion for § 2255 relief was denied while he was in custody must obtain authorization from a three-judge panel of the court of appeals in accordance with § 2244(b)(3)(B). Given the legislative history of these remedies -- in particular, the Reviser's Note explaining that § 2255 is a "procedure in the nature of the ancient writ of error coram nobis" -- we believe that Congress, had it focused on this question, would have required *coram nobis* petitioners in this situation to obtain court of appeals authorization. But the restriction is in § 2244(b), which is plainly limited to "a second or successive habeas corpus application," and the cross-reference in § 2255(h) is similarly limited to a "second or successive [§ 2255] motion." As Congress did not

impose this restriction on *coram nobis* petitioners seeking successive post-conviction relief, we may not read it into the statutes.

The second question is substantive: whether AEDPA's restrictions on the grant of successive relief set forth in § 2255(h)(1) and (2) limit the grant of *coram nobis* relief to a petitioner whose motion for § 2255 relief was denied while he was still in custody. We conclude the answer to this question must be yes. Congress and the Supreme Court have reacted to "the increasing burden on federal courts caused by successive and abusive petitions" by enacting and amending 28 U.S.C. § 2244(b) and by refining and strengthening the Court's equitable abuse-of-the-writ jurisprudence. See McCleskey, 499 U.S. at 481-89. These efforts have been complementary, at least for the most part. The Supreme Court has ruled that, even when the terms of AEDPA do not govern a particular case, "a court of appeals must exercise its discretion in a manner consistent with the objects of the statute. In a habeas case, moreover, the court must be guided by the general principles underlying our habeas corpus jurisprudence." Calderon v. Thompson, 523 U.S. 538, 554 (1998). When a procedural Rule 60(b) motion "is in substance a successive habeas petition [it] should be treated accordingly." Gonzalez v. Crosby, 545 U.S. 524, 531 (2005). Likewise, we have stated that "[t]he writ of coram nobis may not be used to circumvent the clear congressional directive embodied in the 'second or successive' provisions of § 2255." United States v. Noske, 235 F.3d 405, 406 (8th Cir. 2000).

It is widely accepted that custody is the only substantive difference between *coram nobis* and habeas petitions. See Chaidez v. United States, 133 S. Ct. 1103, 1106 n.1 (2013). *Coram nobis* relief is not available to a federal prisoner while in custody, even if a successive § 2255 motion would be barred by AEDPA's restrictive standards. See United States v. Brown, 178 F. App'x 299 (4th Cir. 2006); United States v. Baptiste, 223 F.3d 188, 189-90 (3d Cir. 2000). Given that *coram nobis* is an extraordinary remedy available at the far end of a post-conviction continuum only for the "most fundamental" errors, Morgan, 346 U.S. at 512, it would make no sense to rule that a petitioner no longer in custody may obtain *coram nobis* relief with a less rigorous substantive showing than that required by AEDPA's limitations for successive habeas corpus and § 2255 relief. Therefore, we conclude that Baranski's *coram nobis* petition is subject to the restrictions on second or successive § 2255 motions set forth in § 2255(h)(1) and (2).

II.

Turning to the facts of this case, the trial testimony of cooperating conspirators James Carmi and Jeff Knipp, corroborated by other government witnesses and extensive documentary evidence, established that Baranski obtained machine guns in Eastern Europe and placed them in a bonded customs warehouse; Carmi used bribes to obtain fictitious letters from Knipp, chief of police of Farber, Missouri, and other law enforcement officials requesting demonstrations or indicating a desire to purchase the

weapons; and Baranski used those letters to fraudulently remove machine guns from the customs warehouse and sell them to Carmi. See 26 U.S.C. §§ 5844(1), 5861(l).

Baranski alleged that his conviction and sentence should be vacated because the government violated the constitutional principles of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), by (i) failing to disclose that it offered Carmi a Rule 35 sentence reduction in return for his testimony at Baranski's trial, and letting Carmi falsely testify that he had not asked for and expected no further reduction; (ii) failing to turn over medical records regarding Carmi's mental problems and memory loss following a May 2000 motorcycle accident -- records that could have been used for impeachment purposes; (iii) failing to disclose Carmi's PSR and allowing Carmi to testify falsely about his sentence exposure; and (iv) vindictively prosecuting Baranski for filing a Bivens action challenging the seizure of his firearms.

After a two-day evidentiary hearing, the district court rejected all claims on the merits and dismissed the *coram nobis* petition. First, the court found that Carmi was not promised a Rule 35 sentence reduction in exchange for testifying against Baranski. Moreover, "[t]he jury that found Mr. Baranski guilty heard Carmi testify his sentence was cut in half for agreeing to cooperate against Mr. Baranski," so he "failed to show the likelihood of a different result great enough to undermine confidence in the outcome of the trial." Second, the court found that Carmi

testified "extensively and truthfully" regarding his injury and memory loss issues. None of the documents relating to mental condition and memory loss "would have opened a new line of impeachment or provided a different avenue of impeachment." There was no Brady violation because the records not produced were "similar to and largely cumulative of the information that was available to Mr. Baranski's defense team before trial."

Third, the court found that the government did not mislead the defense regarding Carmi's incarceration exposure. Baranski has not shown "a reasonable probability that had the PSR's incorrect sentencing range [for Carmi] been disclosed, the result of the proceeding would have been different, such that confidence in the outcome of the trial is undermined." Finally, the court found that the allegation of vindictive prosecution was factually without merit. The district court's lengthy Memorandum and Order noted that defense counsel's cross examination at trial included "Carmi's mental health and memory loss, the charges Carmi pleaded guilty to, his sentencing exposure, promises the Government made to Carmi . . . and the benefits he received, and the possibility of Carmi receiving a motion pursuant to Rule 35." The court further noted "there was corroborated evidence and testimony, including Mr. Baranski's own personal communications to Carmi, concerning the criminal scheme charged in the case." The court concluded "that Mr. Baranski has failed to meet his burden to

establish that he is entitled to the extraordinary relief of coram nobis."

On appeal, in addition to challenging all the district court's essential findings, Baranski argues he is entitled to *coram nobis* relief because, if the government had made the required disclosures and not elicited false testimony, "there is a reasonable probability that . . . the result of the proceeding would have been different," the standard for determining whether a Brady/Giglio violation is material. Smith v. Cain, 132 S. Ct. 627, 630 (2012). As we have explained, that is not the proper standard for obtaining substantively successive post-conviction *coram nobis* relief. Rather, Baranski must present "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 the movant guilty of the offense." 28 U.S.C. § 2255(h)(1).[2] He has no new evidence relating to the elements of the offense that would support a claim of actual innocence, only allegedly new information that no doubt would have expanded defense counsel's cross examination and attempted impeachment of cooperating conspirator Carmi on subjects that were extensively explored at trial. Applying the proper § 2255(h) substantive standard, the district court did not abuse its discretion in concluding that no

[2] Baranski is not relying on a new, retroactive rule of constitutional law, so § 2255(h)(2) is not at issue.

"fundamental" error warranted issuing an extraordinary writ of error *coram nobis*.

The Order of the district court dated March 31, 2016 is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KEITH BYRON BARANSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No.4:11-CV-123 CAS

MEMORANDUM AND ORDER

This matter is before the Court on petitioner Keith Byron Baranski's Third Amended Verified Petition for Writ of Error Coram Nobis and respondent United States of America's motion for summary judgment. The Court held an evidentiary hearing in this matter on December 7 and 8, 2015. After the hearing transcript was prepared, the Court ordered the parties to submit proposed findings of fact and conclusions of law for its consideration, and provided them an opportunity to file responses. This matter is now ready for decision. The Court makes the following findings of fact and conclusions of law, and ultimately concludes petitioner has failed to establish that he is entitled to the extraordinary relief of a writ of coram nobis.

I. Background

Mr. Baranski was convicted of one count of conspiracy to import machine guns illegally by submitting false entries in forms submitted to the Bureau of Alcohol, Tobacco & Firearms ("ATF"), in violation of 18 U.S.C. § 371. The government sought and obtained criminal forfeiture of the weapons. Mr. Baranski was sentenced to a term of sixty months' imprisonment followed by three years supervised release. Mr. Baranski appealed his conviction and sentence and the Eighth Circuit Court of Appeals affirmed. United States v. Baranski, 75 F. App'x 566 (8th Cir. 2003) (unpublished per curiam). Mr. Baranski filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255, which this Court denied. Baranski v. United States, 2006 WL 472451 (E.D. Mo. Feb. 27, 2006). Mr. Baranski appealed the denial of his § 2255 motion and the Eighth Circuit affirmed. Baranski v. United States, 515 F.3d 857 (8th Cir. 2008).

Mr. Baranski's term of supervised release terminated on August 17, 2009. Mr. Baranski filed a pro se Petition for Writ of Error Coram Nobis on January 18, 2011, and an amended petition through counsel on March 14, 2011 that asserted three counts. Mr. Baranski filed a second Amended Petition for Writ of Error Coram Nobis on May 21, 2014 that asserted ten counts (Doc. 140).[1] The government

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[1] This matter was originally set for evidentiary hearing in December 2011. (Doc. 27.) Between October 2011 and

moved to dismiss the Second Amended Petition as abuse of the writ. The Court granted the government's motion to dismiss as to five counts and denied it as to five counts.[2] See Mem. and Order of Oct. 7, 2014 (Docs. 177, 181.) The Court also granted Mr. Baranski's motion for leave to file a third amended petition for writ of error coram nobis, directing him to omit from his amended petition those claims that the Court held constituted abuse of the writ or were second or successive. (Id.)

Petitioner filed a Third Verified Amended Petition for Writ of Error Coram Nobis ("Petition") that asserts the following counts:

I. The Government Promised Witness James Carmi a Further Reduction in His Sentence Under Rule 35(b), Federal Rules of Criminal Procedure, but Deliberately Withheld that Information at Baranski's Trial.

II. The Government Was Fully Aware of the Extent of Witness James Carmi's Memory Impairment and Deliberately Withheld Records Supporting Carmi's Amnesia and Memory Loss.

January 2014, Mr. Baranski filed seven motions for continuance of the hearing. (Docs. 30, 39, 83, 88, 110, 115 and 123.)

[2] As discussed more fully *infra*, the Court also dismissed the portion of petitioner's tenth count that related to the other dismissed counts.

III. The Government Misled the Court and Baranski's Defense Team about the Extent and Length of Witness James Carmi's Incarceration Exposure.

IV. The Government Deliberately Withheld Information About Favors Offered to and/or Requested by Witness James Carmi.

V. Prosecutorial misconduct and vindictive prosecution, based on the foregoing.

(Doc. 187.)

The government filed a motion for summary judgment on August 17, 2015. The government's summary judgment motion asserts that (1) the facts do not support any of Mr. Baranski's counts, and (2) Mr. Baranski has failed to show a fundamental constitutional error that merits the extraordinary remedy of coram nobis. Summary judgment briefing was completed on November 20, 2015. On November 30, 2015, the Court denied petitioner's motion for leave to file a surresponse in opposition to the government's summary judgment motion (Doc. 277).

The Court held a prehearing conference on December 3, 2015. Among other things, the Court stated it would take the government's summary judgment motion with the evidentiary hearing. The Court also addressed Mr. Baranski's Motion for Relief Under Rule 32(a)(4), Fed. R. Civ. P., which sought permission to use the complete depositions of petitioner's witnesses William Brown, John Rogers and Scott Rosenblum at the evidentiary hearing in lieu of their live testimony. The Court granted the

motion as to witness Brown, who was recovering from surgeries and hospital stays for a failed hip replacement. As to attorneys Rogers and Rosenblum, Mr. Baranski stated they would be out of town in trial and asserted this met the "exceptional circumstances" requirement of Rule 32(a)(4)(E). The Court expressed concern at these witnesses' potential absence from the hearing because "it might need to rule on [their] credibility," and asked Mr. Baranski's counsel several times whether he considered issuing subpoenas to Rogers and Rosenblum. (See Tr. of Prehearing Conf. at 2, 5, 6-7, 8, 36, Doc. 289).[3]

On the morning of the evidentiary hearing, Mr. Baranski's counsel stated he had issued subpoenas to Rogers and Rosenblum, but had also learned additional details about the serious nature of the state court criminal case Rogers was defending, which he described on the record. The Court then found that Rogers' absence was due to an exceptional circumstance under Rule 32(a)(4)(E) and granted petitioner's motion to introduce his deposition in lieu of live testimony. Mr. Baranski's attorney stated that although he issued a subpoena to Rosenblum, Rosenblum's testimony would be submitted through

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[3] At the conclusion of the prehearing conference, the Court said to Mr. Baranski's counsel, "[T]his whole thing, I mean, you know, as far as these unavailable witnesses. And for me to deal with Rogers in terms of credibility, it probably would be good for him to be here, but if you don't subpoena him, then he's not here, and I can't – then that's that." (Tr. of Prehearing Conf. at 37.)

his deposition. (Tr. Vol. I at 153-54.) Mr. Baranski did not request that the subpoenas be enforced or seek a continuance of the evidentiary hearing so that Rogers or Rosenblum could be present to offer live testimony.

The evidentiary hearing lasted two days. After the hearing transcript was prepared, the parties filed proposed findings of fact and conclusions of law. As part of his proposed findings and conclusions, Mr. Baranski withdrew his claims in Count IV of the Third Amended Verified Petition, that the government deliberately withheld information about favors offered to and/or requested by James Carmi. See Pet.'s Proposed Findings of Fact and Conclusions of Law at 3, ¶ 6. The Court therefore does not address Count IV.

II. Legal Standard.

A writ of coram nobis is an "extraordinary remedy," and courts should grant the writ "only under circumstances compelling such action to achieve justice," United States v. Morgan, 346 U.S. 502, 511 (1954), and to correct errors "of the most fundamental character." Id. at 512 (quoted case omitted). "[J]udgment finality is not to be lightly cast aside; courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases." United States v. Denedo, 556 U.S. 904, 916 (2009).

The burden is on the petitioner to show that he is entitled to coram nobis relief on the merits of his claim. Willis v. United States, 654 F.2d 23, 24 (8th Cir. 1981). "[A] petitioner must show a compelling basis before coram nobis relief will be granted, see

Kandiel v. United States, 964 F.2d 794, 797 (8th Cir. 1992), and the movant 'must articulate the fundamental errors and compelling circumstances for relief in the application for coram nobis.' Id." United States v. Camacho-Bordes, 94 F.3d 1168, 1172-73 (8th Cir. 1996). To be entitled to coram nobis relief, a petitioner must also demonstrate that he is suffering from adverse collateral consequences due to the allegedly wrongful conviction. Stewart v. United States, 446 F.2d 42, 43-44 (8th Cir. 1971).

III. Findings of Fact

A. Summary of the Witnesses Who Testified

1. Mr. Richard Gardiner ("Gardiner") represented Mr. Baranski during his criminal trial, his direct appeal to the Eighth Circuit, his petition pursuant to 28 U.S.C. § 2255, and the appeal thereof. (Evidentiary Hearing Transcript ("Tr.") Vol. I, 15-90; 16:1-21.)

2. Mr. Robert E. Sanders ("Sanders") also represented Mr. Baranski during his criminal trial at issue in this case, but his representation of Mr. Baranski ended after the jury verdict. (Tr. Vol. I, 91-118; 105:9-14.)

3. Petitioner Baranski testified at the evidentiary hearing. Mr. Baranski was charged with conspiracy to import, receive and possess machine guns by making and submitting false entries on records submitted to ATF knowing such entries to be false. (See United States v. Baranski, No. 4:02-CR-361 CAS (E.D. Mo.)). Starting on November 12, 2002 and ending on November 18, 2002, Mr. Baranski was tried before a jury and was found guilty. (See Trial

Transcript. Vols. I–V, No. 4:02-CR-361 CAS ("Trial Tr.")) At the evidentiary hearing, the Court also admitted Mr. Baranski's deposition pursuant to Rule 32(a)(3). (See Baranski Dep., Gov't Ex. D.)

4. Mr. John Rogers ("Rogers") testified via deposition transcript at the evidentiary hearing. Rogers represented Carmi concerning a federal firearms investigation and a criminal conviction that was prior to Mr. Baranski's trial and related to the federal criminal case against Mr. Baranski. (See Gov't Ex. O; Tr. Vol. I, 190-198.)

5. William J. Ekiss ("Ekiss") is a criminal defense attorney and was retained by Mr. Baranski when Mr. Baranski was under investigation by the ATF and the United States Attorney's Office in the Eastern District regarding a weapons violation. (Tr. Vol. II, 5-17.)[4]

6. Mr. Scott Rosenblum ("Rosenblum") testified via deposition transcript. (See Gov't Ex. P; Tr. Vol II, 18-31.) Rosenblum represented Carmi after he was arrested for possession of a firearm. (Tr. Vol. II, 32:20-21.)

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[4] The second volume of the evidentiary hearing transcript does not contain line numbers. The Court has indicated the lines on which the relevant testimony appears, as determined by manual counting of the lines. Every effort has been made to accurately reflect the location of the testimony, but errors may have occurred nonetheless as to specific line citations.

7. Carmi testified at Mr. Baranski's criminal trial in November 2002 as a co-conspirator with Mr. Baranski and also testified at the evidentiary hearing in this matter. (Tr. Vol. II, 31-79.)

8. Former Assistant United States Attorney Richard Poehling ("AUSA Poehling") was employed with the USAO from 1979 through 2011. (Tr. Vol. II, 81:21-82:3.) AUSA Poehling was the supervisor of the Violent Crime Unit of the USAO in 2000. (Tr. Vol. II, 82:23-83:4.) AUSA Poehling handled the case against Carmi and Mr. Baranski while he was the head of the Violent Crime Unit. (Tr. Vol. II, 82-83.) AUSA Poehling testified about his involvement with the prosecution of Carmi and Mr. Baranski in 2000 before he recused himself from the case. (Tr. Vol. II, 81-143.) Pursuant to Mr. Baranski's request, the entire deposition of AUSA Poehling was received into evidence. (Poehling Dep., Pet.'s Ex. 120.)

9. Agent Michael Johnson ("Agent Johnson") is a supervisory special agent with ATF and testified about his involvement in the investigation of Carmi and Mr. Baranski. (Tr. Vol. II, 143- 163.) Pursuant to Mr. Baranski's request, the entire deposition of Agent Johnson was received into evidence. (Johnson Dep., Pet.'s Ex. 117.)

10. Former Assistant United States Attorney James Martin ("AUSA Martin") testified about his involvement with the prosecution of Mr. Baranski starting in April 2002 after AUSA Poehling was recused from the case. (Tr. Vol. II, 165-195.) AUSA Martin worked for the USAO for over 20 years and

held the positions of Assistant United States Attorney, Executive Assistant United States Attorney, and United States Attorney. (Tr. Vol. II, 165.) Pursuant to Mr. Baranski's request, the entire deposition of AUSA Martin was received into evidence. (Martin Dep., Pet.'s Ex. 119.)

B. James Carmi's Relevant Criminal Proceedings

11. On October 17, 2000, the Government initiated criminal proceedings against Carmi based on a referral by ATF. Carmi was charged in a Complaint with being a convicted felon in possession of a firearm, specifically a Class III machine gun. (United States v. Carmi, No. 4:01-CR- 91 ERW (E.D. Mo.), Doc. 1; Tr. Vol. II, 83:9-16.)

12. When Carmi was arrested, a federal search warrant was obtained to search his property. (Tr. Vol. II, 84:12-15.) The search warrant revealed a weapons vault with 800 or so fully automatic weapons and numerous other types of armaments. (Tr. Vol. II, 149:5-8.)

13. When Carmi was first arrested, AUSA Poehling and Carmi's attorney, Rosenblum, petitioned the Court for Carmi to be medically and psychologically examined by the Bureau of Prisons at the Springfield Federal Medical Center for a competency evaluation. (Tr. Vol. II, 33:16- 20.) At that evaluation, Dr. Robert L. Denny ("Dr. Denny"), who is board certified in neuropsychology and forensic psychology, determined that Carmi was malingering with respect to his claimed mental condition. (Springfield Forensic Report, Gov't Ex. E.) A report

was prepared by the Springfield Federal Medical Center which extensively detailed Carmi's medical and mental health, history, and conditions. (Id.)

14. On February 28, 2001, Carmi was indicted by a federal Grand Jury in this district on one count of being a prior convicted felon in possession of a firearm (a Heckler & Koch MP5 submachine gun equipped with a silencer) in violation of 18 U.S.C. § 922(g)(1). (United States v. Carmi, No. 4:01-CR-91 ERW, Doc. 29.)

15. During the course of AUSA Poehling's investigation of the Carmi matter and preparation of the case for trial, it appeared to AUSA Poehling that some other people were involved with criminal activity as well as Carmi. (Tr. Vol. II, 87:21-25.)

16. Jeffrey Knipp ("Knipp") was the Chief of Police of Farber, Missouri, a town of 300-400 people. (Trial Tr. Vol. III, 42.) Knipp prepared letters requesting demonstration of certain firearms "for evaluation by his department's tactical unit," which were false because Knipp did not care to see a demonstration of firearms and did not have a tactical unit, but rather wanted to obtain free guns. (Trial Tr. Vol. III, 47-48; Tr. Vol. II, 88:4-15.) Knipp pleaded guilty to knowingly making a false entry on ATF Forms 6 and testified for the Government at Mr. Baranski's criminal trial. (Trial Tr. Vol. III, 42-64.)

17. AUSA Poehling testified that he believed Mr. Baranski was involved in the importation of large capacity gun magazines, which were illegal to possess at the time, and which would work in machine guns.

AUSA Poehling wanted to investigate Mr. Baranski's possible criminal actitivies further and wanted to obtain Carmi's cooperation against Mr. Baranski and Knipp, which included testifying on behalf of the Government. (Tr. Vol. II, 88:16-22, 90:23-91:18, 140:18-41:4.)

18. AUSA Poehling set up proffer meetings with Carmi which were attended by ATF agents, Carmi's counsel, and on three occasions by AUSA Poehling. (Tr. Vol. II, 89:1-90:22; Gov't Exs. S, T, U, V; Poehling Dep., Pet.'s Ex. 120, 11:23-12:16.)

19. On August 31, 2001, Carmi pleaded guilty to a superseding information which amended the charges from the original indictment. (United States v. Carmi, No. 4:01-CR-91 ERW, Docs. 56- 58; Tr. Vol. II, 92:15-25, 104:12-15.)

20. AUSA Poehling amended the charges because of the cooperation Carmi provided and to aid in the prosecution of Mr. Baranski and Knipp, because it was the course of conduct that overlapped between Carmi and Mr. Baranski in criminal activity. (Tr. Vol II, 104:18-105:2.)

21. Carmi entered a plea of guilty to Counts 1 and 2 of the superseding information which included violations of 18 U.S.C. §§ 2 and 956(a)(1(a)(i), concerning money laundering, and 26 U.S.C. § 5861(1), concerning false entries on applications and permits for importation of firearms. In exchange, the Government agreed to move for the dismissal of the original indictment at the time of sentencing, and agreed that no further federal prosecution would be

brought in this district relative to Carmi's acquisition and distribution of firearms of which the government was aware. (Tr. Vol. II, 96:8-25; Stipulation of Facts Relevant to Sentencing ("Plea Agreement"), Gov't Ex. C; United States v. Carmi, No. 4:01-CR-91 ERW, Docs. 56-58.)

22. In addition, the Plea Agreement states in part, "Defendant [Carmi] has entered into an agreement with the Government in which the Defendant [Carmi] has offered to assist the Government. The Defendant [Carmi] has provided assistance to the Government in its ongoing firearms investigation. The Government, at or near the time of sentencing, agrees to file a motion for downward departure under Section 5K1.1 of the Guidelines." (Plea Agreement, Gov't Ex. C; Tr. Vol. II, 97:19-25.)

23. Paragraph 13 of the Plea Agreement states that the agreement is the entire agreement between the Government and Carmi, as follows:

> This agreement constitutes the entire agreement between the defendant and the United States, and no other promises, or inducements have been made, directly or indirectly, by any agent of the United States, including any Department of Justice attorney, concerning any plea to be entered in this case, or the stipulations, agreements, or recommendations found herein.
>
> In addition, the defendant states that no person has, directly or indirectly, threatened or coerced him to do or to refrain from doing

> anything in connection with any aspect of this case, including entering a plea of guilty.

(Tr. Vol. II, 109:1-11; Plea Agreement, Gov't Ex C.)

24. AUSA Poehling testified that the Government did not make any other promises to Carmi and did not have any other agreements to get Carmi to enter the plea, and anything that was promised to Carmi was included in the Plea Agreement. (Tr. Vol. II, 109:16-110:1.)

25. According to AUSA Poehling, the Government agreed to file and did file a motion pursuant to United States Sentencing Guidelines § 5K1.1 for a reduction in Carmi's sentence "[b]ecause of the cooperation he provided in the investigation of Keith Baranski, which basically consisted of providing intelligence information that the government previously was not aware of concerning Mr. Baranski's activities, appearance and providing testimony at the Federal Grand Jury regarding the Baranski matter and testimony at trial regarding the Baranski - - regarding what he had provided in conjunction with Mr. Baranski." (Poehling Dep., Pet.'s Ex. 120, 39:14-40:5; Motion for Downward Departure for Carmi, Gov't Ex. TT; Tr. Vol. II, 122:18-123:25.)

26. AUSA Poehling testified it was understood that Carmi would provide full cooperation regarding the investigation of Mr. Baranski which included testifying at Mr. Baranski's trial if asked to do so. (Tr. Vol. II, 140:18-41:18.)

27. Carmi's former attorney Rosenblum testified that Carmi's Presentence Investigation Report

("PSR") was "captured in the plea agreement, and I think in almost every plea agreement it contemplates continuing cooperation. . . . It contemplates continuing cooperation as to a particular case that he's receiving a reduction. . . . [W]hen you receive a 5K1, it contemplates that the individual is agreeing to cooperate, and the cooperation will be continuing vis-a-vis that case." (Rosenblum Dep., Gov't Ex. P, 41:17-42:4.)

28. AUSA Poehling testified that another way a federal prosecutor could ask a court to reduce a sentence is under Federal Rule of Criminal Procedure 35, which he stated allows the Government to file a motion advising the Court that the defendant has provided newly discovered evidence, and as a result the Government is asking the Court to consider reducing the originally imposed sentence. (Tr. Vol. II, 98:15-99:13.)

29. AUSA Poehling testified that if there had been a Government promise to file a Rule 35 for Carmi, it would have been included in the Plea Agreement because that would have been an inducement to get Carmi to plead guilty. (Tr. Vol. II, 110:4-12.)

30. AUSA Poehling testified that the difference between a Rule 35 motion and a 5K1.1 motion is that a 5K1.1 does not have any time parameters on it in terms of how old the information can be, but a Rule 35 requires that the information be newly discovered. (Tr. Vol. II, 99:4-10.) AUSA Martin also testified that the Government could file a Rule 35 motion "within

one year from the date of an individual's sentencing, if they provide additional cooperation – and I think the cooperation had to be something new[.]" (Tr. Vol II, 175:11-19.)

31. Rosenblum also testified that if Carmi got a 5K1 reduction it would not be typical in this district or in any district for him to get a Rule 35 reduction for the same information and testimony. (Rosenblum Dep., Gov't Ex. P, 42:8-12.)

32. AUSA Poehling testified the Government did not agree to file a reduction of sentence under Rule 35 on behalf of Carmi for his cooperation or testimony against Mr. Baranski because Rule 35 did not apply in his case. (Tr. Vol. II, 99:11-13.)

33. On August 31, 2001, Carmi appeared and testified under oath at a change of plea hearing. (Carmi Change of Plea Transcript ("Plea Tr."), Case No. 4:01-CR-91 ERW, Gov't Ex. I). AUSA Poehling and Rogers attended the hearing. (Id., 1.)

34. Judge Webber formally found Carmi to be guilty, found that Carmi was competent and capable of entering an informed plea, and accepted the plea. (Plea Tr., 28.)

35. Carmi testified at the guilty plea hearing that there were no other agreements or understandings or deals that existed which would affect his case in any way. (Plea Tr., 19:15-19.)

36. Carmi also testified at the guilty plea hearing that, other than the Plea Agreement, no one had made any other or different promises, representations or

assurances to induce his plea of guilty. (Plea Tr., 19:23-20:2.)

37. There was no mention of a Rule 35 in the Plea Agreement or at the plea hearing. (Tr. Vol. II, 99:17-24, 115:5-7; Plea Agreement, Gov't Ex. C; Plea Tr., Gov't Ex. I.)

38. On November 8, 2001, the Court granted the Government's motion pursuant to U.S.S.G. § 5K1.1 and departed downward from the Sentencing Guidelines range. Carmi was sentenced by Judge Webber to 42 months imprisonment. (Carmi Sent. Tr., Gov't Ex. Q.) There is no reference in the sentencing transcript to an agreement or promise by the Government to file a Rule 35 motion for a further reduction of Carmi's sentence. (Id.).

39. At Carmi's sentencing, Judge Webber stated in part, "Mr. Poehling has filed, with your attorney's knowledge, a 5K1.1 motion, which will permit me to sentence you at something less than the United States sentencing guidelines. We have conducted a rather intensive conference in chambers and I'm convinced that based upon your unusual efforts in this case, that I should sentence you at substantially less under the 5K1.1 motion than I customarily would do. In this case, it's my intention to sentence you at 42 months." (Id., 7:18-16.)

40. Judge Webber also stated, "[I]t's been represented to me that depending upon certain circumstances that happen hereafter, which you and counsel can discuss, that there's a likelihood that a further reduction at some time in the future,

depending upon your continued cooperation, may occur." (Id., 7:17-21.)

41. Gardiner testified that Judge Webber's statement concerning a further reduction did not specifically mention Mr. Baranski's prosecution, or Rule 35, or any agreement or promise by the Government to do anything in the future. (Tr. Vol. I, 86:9-18.)

42. AUSA Martin testified that although the cooperation agreement was reached between AUSA Poehling and Carmi's attorneys before Martin became involved in the case, Carmi got the benefit of the 5K1.1 motion before Mr. Baranski's trial and before his cooperation for the 5K1.1 was completed. (Tr. Vol. II, 169:3-10.)

43. AUSA Poehling testified that when Judge Webber made the statement at Carmi's sentencing about the likelihood of a further reduction, Judge Webber had to be referring to additional cooperation which Carmi proffered beyond the Baranski matter. AUSA Poehling testified that evidence Carmi had provided regarding Mr. Baranski would not have been newly discovered and therefore would not have been eligible for a further reduction. (Tr. Vol. II, 128:8-129:7.)

44. AUSA Poehling testified that instead, such additional cooperation would have involved other subjects or other criminal activity that Carmi was aware of unrelated to Mr. Baranski. (Tr. Vol. II, 129:2-7.)

45. AUSA Poehling testified in his deposition that he was unaware of Carmi proffering anything unrelated to Mr. Baranski that would have merited a Rule 35 consideration, but "that possibility existed if he came up with something new[.]" (Poehling Dep., Pet.'s Ex. 120, 27:11-12.)

C. Count I – There Was No Promise of a Rule 35 Sentence Reduction to Carmi

46. Carmi never received a Rule 35 sentence reduction from the Government. (Tr. Vol. II, 65:15-17.)

47. At Mr. Baranski's trial, during cross-examination, Carmi was specifically asked if he believed that he was going to get a further reduction pursuant to a Rule 35 motion and Carmi denied that the Government promised him a Rule 35 in exchange for testifying against Mr. Baranski:

> Q: [by Mr. Gardiner] And you wanted another – you expected you were going to get another deal for actually testifying, didn't you?
>
> A: I never said that, and I never expected it. I've never been promised anything. And as a matter of fact, I've never asked for anything except to be moved from Ste. Genevieve to St. Louis County so I could be closer for the phone bills. It would be $3 instead of $10. And that's all I've ever asked this whole time. (Trial Tr. Vol. II, 92:6-13.)

48. In addition, Mr. Baranski's attorney asked Carmi at trial, "But you did get your sentence cut in

half for agreeing to testify?" Carmi testified, "Yes, sir, I did." (Trial Tr. Vol. II, 92:14-16.)

49. Carmi testified that his sentence exposure was 76 to 86 months. (Trial Tr. No. 4:02-CR- 361 CAS, Vol. II, 42:6-11.) Carmi's sentence exposure was actually 78 to 97 months. (Sent. Tr., Gov't Ex. Q, 4:4-13.) Carmi's Presentence Investigation Report incorrectly stated that Carmi was facing 87 to 108 months, but Judge Webber corrected this at Carmi's sentencing. (Id.)

50. AUSA Martin did not correct this error in Carmi's testimony at Mr. Baranski's trial.

51. Carmi's former attorney Rogers testified in his deposition that AUSA Poehling told him orally that as long as Carmi continued to testify truthfully and assist the Government in his testimony against Mr. Baranski, "he anticipated the Government would file a Rule 35, further reducing James Carmi's sentence." (Tr. Vol. I, 190:19-24.)

52. After Carmi was sentenced, Rogers sent Carmi a letter in November 2001 that stated in part, "Your sentence should be significantly reduced so long as your cooperation continues. Assistant United States Attorney Richard Poehling will file a Rule 35 motion within the next six (6) months. After this has been filed, I anticipate a significant further reduction in your sentence." (Letter from Rogers to Carmi (Nov. 14, 2001), Pet.'s Ex. 15.)

53. Carmi's former attorney Rosenblum wrote a letter to Carmi in March 2002 that stated, "The government should be finishing up their investigation

in the next month. Once their investigation is completed, I have been told by Assistant U.S. Attorney Poehling that there will be a further reduction of your sentence." (Letter from Rosenblum to Carmi (Mar. 20, 2002), Pet.'s Ex. 16.)

54. Rosenblum testified in his deposition, "As I said, I recall a discussion or discussions with Mr. Poehling as this case was proceeding. And my impression never changed. Leaving those discussions, my impression was Mr. Poehling was going to recommend a Rule 35." (Rosenblum Dep., Gov't Ex. P, 28:8-15.)

55. Rogers wrote Carmi a letter in May 2002 that stated in part, "The Rule 35 will be filed. Dick Poehling will wait until the cases are disposed of, however, before filing his motion. I promise we will not forget to follow up on your behalf." (Letter from Rogers to Carmi (May 3, 2002), Pet.'s Ex. 17.)

56. At Mr. Baranski's trial, his attorney asked Carmi if he told Robert Matuszny ("Matuszny"), an investigator for Mr. Baranski, that he expected to get a Rule 35 motion to further reduce his sentence. In response, Carmi testified, "No, sir. Q: You didn't tell him that? A: No. Q: You never mentioned Rule 35 to him? A: I asked him what it was." (Trial Tr. Vol. II, 91:2-15.)

57. Over a month before Mr. Baranski's trial, he hired Matuszny to interview Carmi. (Tr. Vol. I, 81:2-13.) At Mr. Baranski's trial, Matuszny was asked what Carmi told him about a Rule 35, and he testified, "[Carmi] told me *he was going to ask* for a

Rule 35, and he explained to me it was a reduction in sentence to apply for it under federal law, that if he testifies against Keith Baranski, he was going to *ask for* that rule to shorten his sentence." (Trial Tr. Vol. IV, 27:11-16) (emphases added).

58. At the evidentiary hearing, Carmi testified that the "Government never promised [him] a Rule 35." (Tr. Vol. II, 65:18-21.)

59. Carmi also testified at the evidentiary hearing that he believed he was asked at Mr. Baranski's trial, "Did the Government promise you anything?," and he testified, "No." (Tr. Vol. II, 38:17-20.) According to Carmi, he testified truthfully when he testified at Mr. Baranski's trial. (Tr. Vol. II, 38-39.) Carmi testified that he remembered being asked about a Rule 35 twice at Mr. Baranski's trial and he believed he was asked whether the Government promised him a Rule 35 and he testified truthfully "no" both times. (Tr. Vol. II, 65:22-66:5.)

60. At the evidentiary hearing, Carmi was asked whether, at the time he responded "no" during Mr. Baranski's trial, he was confident that he did not have an offer of a Rule 35. Carmi testified, "It's kind of a complicated situation. My lawyer said this, this and this. I talked with Agent Mike Johnson, and he asked me if I had a promise, and he – and I said, yeah. And he said, 'No, you don't. You don't have no promise.' Then I talked to Jim Martin the next day, and he said, 'No, you don't have no promise.'" (Tr. Vol. II, 38:23-39:3.)

61. Carmi further testified at the evidentiary hearing, "So the Government said I don't have no promise, my lawyer said I do have a promise. The lawyer asked me, 'Does the government promise you nothing?' I told the truth. The Government said I don't have no promise." (Tr. Vol. II, 39:4-7.)

62. Carmi testified at the evidentiary hearing that during his sentencing hearing before Judge Webber, he did not hear Judge Webber's statement that a further reduction in his sentence might be possible. Carmi testified he did not realize Judge Webber had made the statement until he was looking at the sentencing transcript two years ago, i.e., twelve years after he testified against Mr. Baranski. (Tr. Vol. II, 78:7-17.)

63. AUSA Poehling testified that in his thirty-two years with the USAO, he only filed a Rule 35 motion twice. (Tr. Vol. II, 100:10-13.) In the twenty years that AUSA Martin worked for the USAO, he never filed a Rule 35 motion. (Tr. Vol. II, 175:9-10.)

64. The only two cases in which AUSA Poehling filed a Rule 35 motion occurred at the request of the Federal Bureau of Prisons and involved prisoners who provided assistance to guards in the Bureau of Prisons. (Tr. Vol. II, 100:14-101:2; Poehling Dep., Pet.'s Ex. 120, 26:16-19.)

65. Defendants were never given a 5K1.1 reduction along with a Rule 35 for the same information and testimony because that could not be done in good faith. (Tr. Vol. II, 101:8-10; Poehling Dep., Pet.'s Ex. 120, 40:23-41:18.)

66. AUSA Poehling never promised Carmi's attorneys, either Rogers or Rosenblum, that he would file a Rule 35 motion on behalf of Carmi in addition to the 5K1.1 motion that was promised in the Plea Agreement. (Tr. Vol. II, 101:11-21, 138:14-23.)

67. There is no evidence of any document authored by anyone with the United States Attorney's Office referring to a promise of a Rule 35 to Carmi prior to Mr. Baranski's trial. (Tr. Vol. I, 185:7-186:10; Vol. II, 188:2-11; Baranski Dep., Gov't Ex. D, 208:7-209:16 (any claimed discussions about a Rule 35 were allegedly communicated verbally); Rogers Dep., Gov't Ex. O, 27:20-28:2 ("I don't recall ever receiving anything from Dick Poehling in writing regarding a Rule 35.")).

68. AUSA Poehling recalled having a series of conversations with Rogers in which Rogers asked about a Rule 35 "in reference to the Baranski information" and Poehling told Rogers that information regarding Mr. Baranski would not qualify as newly discovered evidence pursuant to Rule 35. (Tr. Vol. II, 129:17-130:1; Poehling Dep., Pet.'s Ex. 120, 26:4-24, 27:13-16.) In the event that Carmi came up with something totally unrelated to the Baranski investigation that was newly discovered, then there was a possibility that a Rule 35 further reduction could apply, but that never happened. (Tr. Vol. II, 99; Poehling Dep., Pet.'s Ex. 120, 26:9-12; 27:11-13; 28:4-12.)

69. AUSA Poehling does not recall having any discussions with Rosenblum regarding Carmi's case.

(Tr. Vol. II, 129:20-21.) Rosenblum did not remember any discussion with AUSA Poehling prior to Carmi's sentencing regarding a Rule 35, but testified vaguely that he had probably more than one informal discussion with AUSA Poehling on the issue. (Rosenblum Dep., Gov't Ex. P, 22:2-14, 32:11-14.) In addition, Rosenblum does not have any recollection of speaking with AUSA Martin regarding Carmi or a Rule 35 reduction. (Id., 33:7-11.)

70. All of the claims of discussing a promise of a Rule 35 reduction came from alleged discussions between Rogers and AUSA Poehling, and not AUSA Martin. (Rogers Dep., Gov't Exhibit O.)

71. Mr. Baranski attempted to add AUSA Poehling as a defendant in his civil lawsuit in Kentucky in 2002. Immediately thereafter, AUSA Poehling recused himself and every other AUSA in the USAO's Violent Crime Unit from the Baranski case because of a conflict of interest that would result from prosecuting someone who named him as a defendant in a lawsuit. (Tr. Vol. II, 135:13-24; Poehling Dep., Pet.'s Ex. 120, 15:16-24.)

72. AUSA Martin replaced Poehling in the Baranski investigation. The only time AUSA Poehling talked to AUSA Martin about the case was after Mr. Baranski's criminal trial ended, when AUSA Martin asked AUSA Poehling if he promised Carmi a Rule 35, and AUSA Poehling said no. (Tr. Vol. II, 136:2-9; Gov't Ex. A.)

73. In the six-month period from when AUSA Martin took over the case until Mr. Baranski's trial,

AUSA Martin did not have any communication with Carmi's counsel regarding a Rule 35 sentence reduction. (Tr. Vol. II, 176:15-18.)

74. In his pretrial meetings with Carmi, AUSA Martin repeatedly told Carmi to tell the truth, as he instructed every witness. (Tr. Vol. II, 172:25-173:6; Tr. Vol. II, 67:11-25.)

75. AUSA Martin testified that he talked with Carmi during pretrial preparation sessions about the 5K1.1 deal he had received, and told Carmi he needed to tell the jury he was testifying as part of an ongoing pledge of cooperation. Martin had no discussions with Carmi of any further possibility of receiving any additional benefit from the Government. Martin told Carmi explicitly that he was not going to get anything else in exchange for testifying at Mr. Baranski's trial. (Tr. Vol. II, 173:11-174:6.)

76. AUSA Martin testified, "When we talked about the deal we went over specifically that he already had his 5K1 motion. He already got his reduction in sentence from, I think it was Judge Webber, and that that was the extent of what he was getting. At the time we were unaware of any discussion of consideration of a Rule 35. So it wasn't a matter of saying, 'I don't know what you thought before. You are not going to get this.' It was just a matter of pointing out, 'You've got what you got. That's all you are going to get. You need to explain to the jury that you are here as part of your ongoing pledge of cooperation.'" (Tr. Vol. II, 173:14-25.)

77. Carmi also testified that Agent Johnson specifically told him that he did not have a promise of a Rule 35 prior to Carmi testifying at Mr. Baranski's trial. (Tr. Vol. II, 57:21-58:12.)

78. AUSA Martin had no discussion with Carmi of any consideration of any further possibility of any additional benefit from the Government. (Tr. Vol II, 174:1-6.)

79. Carmi never told AUSA Martin that he believed he was going to get a further sentence reduction before testifying at Mr. Baranski's trial. (Tr. Vol. II, 66:1-19, 174:7-11.) Even when AUSA Martin told Carmi that he had no promises, Carmi never told AUSA Martin that his attorneys promised him a Rule 35 sentence reduction. (Tr. Vol. II, 66:16-19.)

80. Carmi's counsel did not attend any of the pre-trial preparation sessions and never talked with AUSA Martin before Mr. Baranski's trial. (Tr. Vol. II, 174:16-24; Rogers Dep., Gov't Ex. O, 29:9-11.)

81. Carmi never told Rogers that AUSA Martin specifically told Carmi he was not getting any promises in exchange for testifying against Mr. Baranski. (Rogers Dep., Ex. O, 30:7-10.)

82. Before he testified against Mr. Baranski, Carmi never wrote any letters to any government officer, including AUSA Martin or AUSA Poehling, regarding a promise of a Rule 35. (Tr. Vol. II, 65:1-7.)

83. On November 26, 2002, after Mr. Baranski's trial had ended, Rogers called AUSA Martin and

asked whether Carmi was going to receive a further sentence reduction pursuant to Rule 35. (See Letter from AUSA Martin to John Rogers (Dec. 2, 2000), Gov't Ex. A; Tr. Vol. II, 176:19- 178:24.)

84. AUSA Martin told Rogers during the call that he was "disinclined to do a Rule 35, but that [he] would talk to Dick Poehling and others in the office to see whether anybody thought it was appropriate for Mr. Carmi to get a Rule 35. The reason I would have had to talk to Dick Poehling was because I knew that Jim Carmi got a 5K1 motion and successfully received a reduction in sentence, and so I wanted to talk to Dick Poehling [about] whether he thought it was even conceivable that our office would provide two bites at the apple for the same set of cooperation efforts." (Tr. Vol. II, 178:4-13.)

85. After talking with AUSA Poehling and others, AUSA Martin wrote a letter to Rogers that stated, "According to both you and Dick [Poehling], there was no promise from the Government to file a Rule 35 motion. Rather Dick told you he would leave open the possibility of such a motion." (Letter from AUSA Martin to John Rogers (Dec. 2, 2000), Gov't Ex. A; Tr. Vol. II, 178:19-23.)

86. AUSA Martin specifically used the phrase "according to both you and Dick" in the letter because, "I had the conversation first with John Rogers, and that was what he had indicated to me, was that there was not a promise, though he had indicated that I should talk to Dick because he thought Dick had indicated there was a possibility of it. And so I -- I,

one, had that information fromJohn Rogers. And then after the phone call, I spent some significant time with Dick Poehling to understand what the situation was and Dick also told me there was no promise by the Government for a Rule 35 motion." (Tr. Vol. II, 178:25-179:10.)

87. In the letter to Rogers, AUSA Martin also stated, "My dealings with Mr. Carmi also clearly indicate there was no promise from this office to seek a further reduction in his sentence." (Letter from AUSA Martin to John Rogers (Dec. 2, 2000), Gov't Ex. A; Tr. Vol. II, 179:15-17.)

88. AUSA Martin wrote this sentence in his letter because, "I thought it was important that John Rogers understood that there was nothing in my dealings with Mr. Carmi that would have suggested to me that Mr. Carmi would have thought there was any promise from the office. And I set forth two different reasons. One, I spent a lot of time with Mr. Carmi, and he never suggested to me that that was the case. And to the contrary we had . . . had indicated to him that he would not be getting any further reduction in sentence, at least based on the Baranski case. But, second, he testified about -- he was asked that during cross-examination, and he specifically testified at trial that he had not expected a Rule 35 and had not been promised one. So based on those two factors, I was comfortable saying that all indications from Mr. Carmi was he had no expectation of a Rule 35." (Tr. Vol. II, 179:19-180:9.)

89. AUSA Martin also stated in the letter to Rogers, "Rule 35 has a one year limitation period, unless Mr. Carmi provided information he did not know in the one year period." (Letter from AUSA Martin to John Rogers (Dec. 2, 2000), Gov't Ex. A.) AUSA Martin stated that Carmi was sentenced on November 8, 2001, and Mr. Baranski's trial started on November 11, 2002, and therefore the one year period had already expired and Carmi could not have gotten a reduction pursuant to Rule 35 as a matter of law.[5] (Id.)

90. Finally, AUSA Martin stated in his letter to Rogers, "If you believe my facts are incorrect, please give me a call." (Id.)

91. In a letter to Carmi from Rogers dated February 17, 2003, Rogers stated, "Jim Martin's position is even if Dick did provide the Rule 35, you are not entitled to it because you lied when being questioned about this very issue at trial." (Pet.'s Ex. 1.) This statement is not accurate because it was never AUSA Martin's position that Carmi lied. (Tr. Vol. II, 180:10-15.)

92. AUSA Martin did not think that Carmi lied on the stand and he never indicated to Rogers either in writing or verbally that he thought Carmi lied. (Tr. Vol. II, 180:10-15.)

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[5] AUSA Martin's letter of December 2, 2002 stated that the trial started on November 11, 2002, but the trial transcript indicates that testimony did not start until November 12, 2002.

93. When AUSA Martin was asked about Rogers' statement in the letter to Carmi that Martin said Carmi had lied when questioned about a Rule 35, AUSA Martin testified it was his position that Carmi "would have lied about it if he was taking the position that he was actually promised [a Rule 35]. Because he said on the stand that he was not promised that. But that was not – that was not the way I communicated the information – my position to John Rogers. It wasn't – it was if he's taking that, I need to take it to the Court. And in the earlier [letter], when I quote from the transcript, the purpose of that was to show that every piece of evidence I had indicated that there was no promise, not to say 'watch out, he lied.'" (Tr. Vol. II, 186:13-22.)

94. On December 2, 2002, after Mr. Baranski's trial had ended, AUSA Martin moved to have Carmi's sentencing transcript unsealed based on the November 26, 2002 conversation he had with Rogers. (Tr. Vol. II, 181:6-13; Pet.'s Ex. 18.)

95. AUSA Martin testified that he had not seen Carmi's sentencing transcript and did not have a copy of the transcript until after Mr. Baranski's trial, as it was under seal. (Tr. Vol. II, 190:23-191:4.)

96. Because AUSA Martin did not have a copy of Carmi's sentencing transcript, he would not have represented the content of the transcript to Mr. Baranski's attorneys, but instead told them in letters during the discovery process before Mr. Baranski's trial that they could seek permission from the Court

to have the transcript released from under seal. (Tr. Vol. II, 190:19-22.)

97. In a letter to Mr. Baranski's attorney Sanders dated August 21, 2002, written in response to Sanders' requests for discovery contained in a letter dated August 15, 2002, AUSA Martin stated in pertinent part, "As to the transcript of the plea and sentencing of Mr. Carmi and Mr. Knipp, no transcript has been made, but you can contact the court reporter and request a copy since it is a public record." (Letter from Martin to Sanders (Aug. 21, 2002), Gov't Ex. J at 2.)

98. Mr. Baranski's defense counsel Gardiner admitted that he was aware Carmi's sentencing transcript was sealed, but did not make any attempt to get it unsealed before Mr. Baranski's trial. (Tr. Vol. I, 50:19-23, 85:7-17.) In addition, Gardiner admitted that the sentencing transcript was under seal pursuant to a Court policy, and not by action of the USAO. (Tr. Vol. I, 84:7-17.) Mr. Baranski admitted that AUSA Martin told him that Martin could not provide him with a copy, but that Mr. Baranski needed to get it from the court reporter. (Baranski Dep., Gov't Ex. D, 126:18-25.)

99. After he reviewed the sentencing transcript following Mr. Baranski's trial, AUSA Martin did not think that it meant Carmi was promised a Rule 35 sentence reduction. (Tr. Vol. II, 182:4- 183:22.)

100. AUSA Martin testified, "I don't know what my thought was back then, but I didn't think it meant that somebody was promised a Rule 35 motion. In

fact, I would have assumed if somebody had been promised a Rule 35 motion that would have been very explicit. Also, I was aware at the time that Mr. Carmi was at least available to possibly cooperate against other targets besides Keith Baranski. So I didn't know whether the comment – I assumed, actually, in talking to Dick Poehling that the comment wasn't related to the Baranski trial but may have been related to other potential cooperation Mr. Carmi might have been doing." (Tr. Vol. II, 182:22-183:8.)

101. The sentencing transcript does not indicate that there was a promise of a Rule 35 for Carmi, and further does not indicate that Judge Webber's mention of continued cooperation was in reference to the case against Mr. Baranski. (Carmi Sent. Tr., Gov't Ex. Q, 7:17-25.)

102. After AUSA Martin sent the December 2, 2002 letter to Rogers, AUSA Martin and Rogers talked again about the Rule 35 issue. AUSA Martin sent another letter to Rogers dated January 9, 2003. (Tr. Vol. II, 183:23-184:24; Letter from Martin to Rogers (Jan. 9, 2003), Gov't Ex. B.)

103. AUSA Martin's January 9, 2003 letter to Rogers stated, "As a follow-up to my letter of December 2, 2002, and our telephone conversation of yesterday, please notify me as soon as possible in writing if you believe that Dick Poehling made any promise, expressed or implied, to your client that he would get a Rule 35 motion for his testimony in the Baranski trial. While everything set forth in my December 2, 2002 letter still holds true, given Mr.

Carmi's testimony regarding this issue, I may need to notify the Court and opposing counsel if you believe there was such a promise." (Letter from Martin to Rogers (Jan. 9, 2003), Gov't Ex. B; Tr. Vol. II, 185:10-18.)

104. AUSA Martin testified he wrote the January 9, 2003 letter "to be able to ensure that they were not claiming that there had been a promise made by Dick Poehling. And if there had been a promise made, I felt that we would likely have to take that to the Court because it was contrary to what Mr. Carmi had testified at the trial; and, therefore, Mr. Baranski and the Court would need to know about that." (Tr. Vol. II, 185:22-186:6.)

105. Rogers testified that he received AUSA Martin's letter dated December 2, 2002 and AUSA Martin and Rogers had one phone conversation after his receipt of that letter, but Rogers did not respond in writing to AUSA Martin's December 2, 2002 letter. (Tr. Vol. II, 187:7-13; Rogers Dep., Gov't Ex. O, 30:11-23.)

106. Rogers received AUSA Martin's letter dated January 9, 2003, but never replied to it. (Tr. Vol. II, 187:7-13; Rogers Dep., Ex. O, 30:11-23.)

107. Neither Rogers nor Rosenblum ever filed anything with the Court indicating that there was a promise of a sentence reduction on behalf of Carmi. (Tr. Vol. II, 187:14-20.)

108. Overall, Carmi testified truthfully at Mr. Baranski's criminal trial that he was not promised a Rule 35 sentence reduction. (Tr. Vol. II, 65:18-66:19.)

In a letter sent to this Court regarding his testimony at Mr. Baranski's trial, Carmi said, "I told the truth as I believed it. I did not lie in your court." (Gov't Ex. F at 2; Tr. Vol. II, 70:15-71:7.)

D. COUNT II – Carmi testified extensively and truthfully at Mr. Baranski's trial regarding his injury and claimed memory loss issues

109. Carmi testified at Mr. Baranski's trial that in May 2000, he "ran into a truck with [his] motorcycle and [he] was hurt pretty bad." (Trial Tr. Vol. II, 21:1-2.)

110. Carmi also testified at Mr. Baranski's trial, "I had a bad head injury, and I was sedated for about 12 days. They kept me out with large doses of narcotics, I guess, and then from like the 2nd to the 12th. And then after that I was awake, but I'll be honest, I don't remember it all." (Trial Tr. Vol. II, 21:4-8.)

111. Carmi testified at Mr. Baranski's trial, "And I have blackouts. I have severe memory problem, still struggle with that." (Trial Tr. Vol. II, 21:21-22.)

112. Carmi testified, "I did have memory loss, but it wasn't bad enough to know that I wasn't real guilty for what I was arrested for. I knew I was doing something wrong, and I didn't want to admit it, so I just said I couldn't remember it." (Trial Tr. Vol. II, 48:11-14.)

113. Carmi also testified that he claimed, "I don't remember nothing," but also told the jury, "That was not true." (Trial Tr. Vol. II, 22:2-10.)

114. Carmi was asked at Mr. Baranski's trial, "So you have both memory loss problems and you lie to doctors both?" and in response he testified, "I guess that's probably true, sir." (Trial Tr. Vol. II, 48:15-17.)

115. At Mr. Baranski's trial, Matuszny testified that he met with Carmi and Carmi told him "he had memory losses. And actually after he – I guess he was in a coma for several weeks at the hospital, and after he was released from the hospital, he had no memory of who he was or what he was, meaning that he was a criminal, until he returned home and was basically informed as to who and what he was." (Trial Tr. Vol. IV, 26:25-27:6.)

116. Mr. Baranski's defense attorneys were aware, or should have been aware, of Carmi's mental and medical condition prior to Mr. Baranski's criminal trial. As part of the discovery in Mr. Baranski's criminal case, Mr. Baranski and his attorneys knew that Carmi had experienced or was diagnosed with a head injury before trial. (Baranski Dep., Gov't Ex. D, 54:9-13.) In addition, Mr. Baranski and his counsel knew that Carmi had been diagnosed with memory impairment or memory loss before his trial. (Id., 54:14-16.) Further, Mr. Baranski and his counsel knew that Carmi had been diagnosed as a malingerer. (Id., 54:17-19.)

117. Mr. Baranski first learned of Carmi's motorcycle accident from Vicki Carmi, Carmi's wife, when Carmi was in a coma in the hospital in May 2000, and Vicki did not know whether he was going to live or die. (Baranski Dep., Gov't Ex. D, 44:21-45:14.)

Mr. Baranski also knew that Carmi had an injury because when he spoke with him after the accident, in his view, "he was in rough shape." (Id., 74:12-13.)

118. In addition, Mr. Baranski's defense team hired a private investigator who talked with Carmi before Mr. Baranski's trial and Carmi told the investigator that he had memory problems. (Tr. Vol. I, 81:2-82:3; Baranski Dep., Gov't Ex. D, 55:1-13; Trial Tr. Vol. II, 48:9-17.)

119. Mr. Baranski's defense team had copies of medical records regarding Carmi.[6] Prior to his trial, Mr. Baranski and his counsel learned that Carmi had been psychologically and medically examined by the Bureau of Prisons and they received from the Government a copy of the Forensic Report from the Springfield Medical Center ("Springfield Forensic Report") "that detailed extensively Mr. Carmi's medical and psychological history". (Baranski Dep., Gov't Ex. D, 48:14- 20, 51:17-19, 56:7-57:24;

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[6] Mr. Baranski's former attorney Gardiner testified that the defense team had a copy of the Springfield Forensic Report, but his former attorney Sanders claimed he never received any BOP documents from the Government. (Tr. Vol. I, 74:2-76:19 (Gardiner); 99-103 (Sanders).) The Court notes, however, that Mr. Sanders' testimony is contradicted by his letter to AUSA Martin of August 15, 2002, which states in pertinent part, "As to James Carmi, thank you for providing the report of mental examination with a finding of competence which was prepared by the Bureau of Prisons Medical Center at Springfield, MO." (Letter from Sanders to Martin (Aug. 15, 2002), Gov't Ex. H at 10.)

Springfield Forensic Report, Gov't Ex. E; Tr. Vol. I, 75:4-76:19, 83:2-8, 162:20-163:1.)

120. The Springfield Forensic Report is twenty-eight pages long and discussed all of the sources of information used to evaluate Carmi, Carmi's personal history, behavioral observations and hospital course, the offenses charged against Carmi, his psychological test results, general cognitive functioning issues, clinical formulation, and Dr. Denny's discussion and opinions and prognosis. (Springfield Forensic Report, Gov't Ex. E.)

121. Regarding the sources of data for the Springfield Forensic Report, a thorough evaluation was performed on Carmi including routine observations, formal interviews, medical history and physical examination, neurological consultation, CT scan study of his head and electroencephalogram, and administration of eighteen psychological tests. (Springfield Forensic Report, Gov't Ex E.)

122. Numerous other sources were reviewed for the Springfield Forensic Report, including other medical records, telephone calls between Carmi and his relatives, ATF Report of Investigations, Carmi's Social Security Notice of Disapproved Claims and undercover videotapes of Carmi and ATF agents dated August 13, 2000 and October 6, 2000. (Springfield Forensic Report, Gov't Ex. E, 2-3.)

123. The details of the videotapes were documented and established that Carmi was able to "follow a conversation as indicated by his ability to ask direct questions that are appropriate to the

conversation;" "he is able to effectively problem solve for other individuals;" he also demonstrated "abstract reasoning and an ability to effectively problem solve within a short duration;" he was also able to recall specific information, follow a conversation; "ask socially appropriate questions;" and "demonstrate short-term memory and long-term memory." (Springfield Forensic Report, Gov't Ex. E, 15-16.) The Springfield Forensic Report also noted that in the video Carmi told undercover agents he "sustained mild brain damage." (Id., 12).

124. The Springfield Forensic Report detailed Carmi's claims of memory loss and mental health claims. Carmi reported that after his motorcycle accident he "was told when [he] woke up [he] had the mentality of a three-year-old." (Springfield Forensic Report, Gov't Ex. E, 6-7.) Carmi reported that he "can't remember anything I had to relearn everything." (Id. 7, 11.) "Carmi indicated he had sustained memory impairment following his motorcycle accident." (Id., 11.) When asked about his past criminal behavior, Carmi stated, "I have some recollection of it, but I don't have details of that much anymore." (Id.) Carmi also indicated that he was not employed after his accident because "he had difficulty remembering." (Id.) "I don't remember much following the accident." (Id.) Carmi also said, "[I]t seems like since the accident I only remember what people tell me from years previous. Something's happening to my brain." (Id.)

125. Despite Carmi's statements, Dr. Robert Denny, a board-certified physician in

neuropsychology and forensic psychology, found based on all of the evidence reviewed that Carmi "grossly over exaggerated items indicative of physical complaints" and the "resulting profile would be classified as a malingering illness profile in light of the fact other scales reveal consistency throughout the test, indicating that he understood the items he was reading." (Springfield Forensic Report, Gov't Ex. E, 18, 28.) Dr. Denny also stated that Carmi's performance on the actual memory test "is more indicative of malingering than true brain injury performance." (Id., 19.)

126. When asked at the evidentiary hearing if he agreed with Dr. Denny's conclusion, Carmi testified, "Yeah. I was faking." Carmi claims, however, that he was "trying to be really normal." (Tr. Vol. II, 34:11.)

127. Because Gardiner and Sanders had the Springfield Forensic Report prior to Mr. Baranski's trial, they were aware of all the information contained therein including all of Carmi's statements, and could have cross-examined Carmi regarding them. (Tr. Vol. I, 75:11-12.)

128. In addition, Mr. Baranski's criminal defense team received certain of Carmi's medical records from the Rochester Federal Medical Center in Minnesota prior to Mr. Baranski's trial. (Baranski Dep., Gov't Ex. D, 61:1-64:6, Tr. Vol. I, 172:11-16.) Mr. Baranski's counsel also sought and received prior to trial some of Carmi's medical records from St. Anthony's Hospital in St. Louis. (Baranski Dep., Ex. D, 73:18-74:10; Tr. Vol. I, 83, 173:3-10.)

129. Mr. Baranski contends the Government should have provided copies of certain other Bureau of Prison ("BOP") records of various types concerning Carmi (see Pet.'s Exs. 12-14, 38-48, 53-56), some of which indicate that Carmi believed he was going to get a reduction in his sentence, and others that record Carmi's assertions he had brain damage from a motorcycle accident and suffered from resulting memory problems, dizziness and blackouts.

130. Gardiner conceded that all of the statements Carmi made in the exhibits Mr. Baranski contends should have been disclosed – the fact that he had an accident, has brain damage, doesn't remember well – were all contained in the Springfield Forensic Report which he received prior to trial. (Tr. Vol. I, 80: 19-24.)

131. In a letter to Sanders dated August 21, 2002, written in response to requests for discovery contained in a letter from Sanders dated August 15, 2002, AUSA Martin stated in pertinent part, "I have also enclosed certain medical records from the Federal Prison in Minnesota. I have pulled out the records related to mental or psychological issues. I do not intend on providing his other medical records." (Letter from Martin to Sanders (Aug. 21, 2002), Gov't Ex. J at 4.) Gardiner and Mr. Baranski conceded there is no evidence to establish that the USAO had possession of copies of the records presented Mr. Baranski offered at the evidentiary hearing, prior to Mr. Baranski's criminal trial. (Tr. Vol. I, 71:7-18, 165:8-20.)

132. AUSA Martin's August 21, 2002 letter to Sanders stated in part, "Any Brady material of which we are aware, has been provided. As you have just now made a Giglio request, I will begin the process to retrieve any such information." (Letter from Martin to Sanders (Aug. 21, 2002), Gov't Ex. J at 2.)

133. Both Sanders and Gardiner admitted they received a voluminous amount of discovery prior to Mr. Baranski's trial. (Tr. Vol. I, 16:22-25 (Gardiner was given multiple Bankers Boxes of records); 95:9-10 (Sanders testified they received a "high volume" of documents).)

134. Mr. Baranski's defense team did not themselves seek to obtain any records from the BOP regarding Carmi prior to Mr. Baranski's trial, even though they knew they existed. (Tr. Vol. I, 102:22-25; 116:13-18.) Sanders testified he relied on AUSA Martin's statements that he had reviewed Carmi's medical and psychiatric records and that they contained "nothing exculpatory or of any impeachment value." (Tr. Vol. I, 102:12-21.)

135. Based on the testimony of numerous witnesses, Carmi did not have memory problems that would have prevented him from testifying truthfully in Mr. Baranski's trial. According to AUSA Poehling, Carmi's state of mind was lucid, he was oriented to time and place, and he "came forth with an amazing amount of detail regarding prior events involving the machine guns." (Tr. Vol. II, 90:7-9.)

136. While Carmi told ATF Agent Johnson that he had problems remembering things, Johnson

testified that Carmi "was very lucid" and had "a well-above average memory and recollection of the facts." (Tr. Vol II, 154:23-24; 161:23-162:2.) ATF Agent Johnson testified that Carmi "has a remarkable memory for a lot of the things we talked about. We'd go into that [gun] vault, and he would explain. Before, during and after his arrest, he could tell serial numbers, dates, models, where he got it, what police letter he used." (Johnson Dep., Pet.'s Ex. 117, 99:6-11.)

137. Agent Johnson testified that in Carmi's first proffer, as they were talking Carmi started answering very slowly, hung his head, stuttered, stammered, and took thirty seconds or more to answer a question in the beginning. Agent Johnson confronted Carmi and said, "Jim, I've dealt with you already. I have spoken to you on the phone. I have spoken to you in person. I know this is not you." Carmi then started answering lucidly from that point on. Agent Johnson testified that while Carmi stated he had been injured in a motorcycle accident, "Everyone involved in the investigation was impressed with his memory." (Tr. Vol. II, 155:2-21.)

138. Carmi's attorney, Rogers, was present during Carmi's proffers with the government and testified that Carmi had "elaborate information" with respect to Mr. Baranski and specifically testified that "no government agent spoon-fed Mr. Carmi factual information about Mr. Baranski." (Rogers Dep., Ex. O, 26:24-27:14.) Rogers also stated that "Carmi was quick to proffer information in detail against Mr. Baranski." (Id., 27:15-19.)

139. When AUSA Martin was asked if he told Carmi he had to tell the jury the truth about his medical and psychiatric condition, Martin testified, "I tell every witness that they have to tell the truth. And we were certainly exploring wanting to tell the truth about the full extent of his cooperation, his convictions and this unique issue, the full extent of his injury, his memory loss and his extent of feigning his memory loss." (Tr. Vol. II, 173:2-6.)

140. AUSA Martin never told Carmi to minimize or misrepresent the nature or the degree of his diagnoses. (Tr. Vol. II, 173:7-10.) Agent Johnson also testified that no one on behalf of the Government coached Carmi to downplay his memory impairment. (Id., 162:5-7.)

141. The evidence establishes that Carmi was mentally and physically competent to testify against Mr. Baranski, the Government disclosed the detailed Springfield Forensic Report and other records regarding Carmi before Mr. Baranski's trial, and Mr. Baranski's defense team obtained others independently. The BOP records Mr. Baranski believes should have been produced by the Government are largely cumulative of the information he and his defense team already possessed. (Tr. Vol. I, 80:19-24; 164:23-165:2, 175:25-176:5.)

E. COUNT III – The Government did not mislead Mr. Baranski regarding the length of Carmi's incarceration exposure.

142. At Mr. Baranski's trial, Carmi testified he believed his sentence exposure under the Sentencing Guidelines was 76 to 86 months, but that he was sentenced to 42 months because of his cooperation. (Trial Tr. Vol. II, 42:6-16.)

143. Judge Webber stated at Carmi's sentencing that Carmi was facing a range of 78 to 97 months because his total offense level was 26, with a criminal history category of 3. (Sent. Tr., Gov't Ex. Q, 6:4-13.)

144. The Presentence Investigation Report ("PSR") indicated that Carmi's guideline range was 87 to 108, but during Carmi's sentencing Judge Webber found the PSR's range to be inaccurate. (Sent. Tr., Gov't Ex. Q, 6:4-13; PSR, Gov't Ex. FF, 14.)

145. Mr. Baranski claims the Government should have provided him a copy of Carmi's PSR, but that document was under seal pursuant to the standard procedures of the U.S. District Court for the Eastern District of Missouri, and the Government was prohibited from disseminating any of the information contained in the PSR. (See Cover Letter to PSR, Gov't Ex. FF; Baranski Dep., Gov't Ex. D, 132:12-20.)

146. Mr. Baranski's attorneys filed a motion in his criminal case for disclosure of Carmi and Knipp's PSRs. Magistrate Judge Mary Ann L. Medler denied the motion stating, "The PSIs prepared for the sentencing of Carmi and Kipp [sic] are private, are filed under seal and defendant has no right to them

under any rule of discovery, evidence or case law. This request is denied." (Order and Report and Recommendation of United States Magistrate Judge, No. 4:02-CR-361 CAS, Doc. 54 at 7, ¶ 19.) Mr. Baranski did not appeal the Magistrate Judge's ruling to the district court.

147. Carmi was sentenced before the Sentencing Guidelines became advisory, which meant the Court only had the authority to depart from the Guidelines under certain circumstances and had to make a record of the reasons for the departure. The sentencing in a typical case was within the Guidelines range. (Tr. Vol. II, 101:22-102:22.)

148. Judge Webber was not a party to the Plea Agreement between the Government and Carmi, and was not bound by the agreement. Judge Webber could have imposed whatever sentence he wanted to, up to the statutory maximum. (Tr. Vol. II, 102:6-12.)

149. Carmi's Plea Agreement did not refer to any possible departure from the Guidelines other than the 5K1.1 motion the Government agreed to file. (Tr. Vol. II, 103:12-16; Plea Agreement, Gov't Ex. C, 3-4.)

150. At the time of Mr. Baranski's trial, he and his attorneys knew what charges Carmi had pleaded guilty to, the potential length of sentence those charges carried, and the actual sentence that Carmi received. (Baranski Dep., Gov't Ex. D, 128:21-129:13; Tr. Vol. I, 66:11-67:23.)

151. Mr. Baranski's attorneys received a copy of Carmi's Plea Agreement in discovery prior to trial. (Tr. Vol. I, 172:5-10; 66:21-25.)

152. Prior to trial Mr. Baranski and his lawyers also received in discovery a copy of Carmi's prior criminal history. (Tr. Vol. I, 65:23-66:7 (Q. "All right. As part of the discovery in the criminal case with Mr. Carmi, did you receive a copy of his criminal history? A. I believe – I believe we received a copy of his NCIC printout. Q. That showed the convictions that he had and the dispositions of those? A. Well, not all of the dispositions, if I remember correctly. I believe it showed some charges without dispositions.")). Mr. Baranski testified that he traveled to a municipality where Carmi had been charged with burglary to verify the outcome of that charge against him. (Tr. Vol. I, 137:18-138:1.)

153. Before Mr. Baranski's trial, his defense counsel was aware of the United States Sentencing Guideline ranges related to Carmi's federal criminal case and prior criminal history. (Tr. Vol. I, 67:21-69:9.)

154. At the evidentiary hearing, Mr. Baranski's defense attorney Gardiner admitted that he cross-examined Carmi extensively at Mr. Baranski's trial about Carmi's sentence and the benefits he got from the Government. (Tr. Vol. I, 69:6-9.)

155. Mr. Baranski's Petition claims that Carmi could have been charged as an armed career criminal under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), and that Carmi was not charged thereunder due to an alleged undisclosed agreement between Carmi and the Government. In a post-hearing filing, Mr. Baranski asserts that his claim is

actually that Carmi "could have been facing long term imprisonment, and that his avoidance of that could have affected his credibility with the jury."[7] Before Mr. Baranski's trial, his counsel knew or at least believed that Carmi could have been charged as an armed career criminal. (Tr. Vol. I, 68:8-12.)

156. Carmi did not qualify as an armed career criminal, a designation that would have carried a mandatory fifteen-year minimum sentence, because the ACCA required three prior felony convictions for serious drug offenses or violent felonies. (Tr. Vol. II, 94:10-14;18 U.S.C. § 924(e).)

157. Carmi was not eligible to be considered an armed career criminal because some of his prior felony convictions were not predicate convictions under 18 U.S.C. § 924(e), as he received a suspended imposition of sentence in those cases. (Tr. Vol. II, 117:14-24; Gov't Ex. FF, ¶ 46 (PSR refers to a March 27, 1981 conviction in St. Louis County; imposition of sentence was suspended and Carmi was placed on three years' probation).) This conviction would not qualify as a prior felony conviction under the ACCA. (Tr. Vol. II, 117:25-118:3.)

158. Whether a conviction constitutes a prior felony conviction for purposes of the ACCA is determined by the law of the jurisdiction where the conviction was charged. (Tr. Vol. II, 118:8- 11.) Under

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[7] See Petitioner's Response to Respondent's Proposed Findings of Fact and Conclusions of Law, Doc. 316 at 58.

Missouri law, a suspended imposition of sentence is not a considered a conviction. (Tr. Vol. II, 118:17-24.)

159. Paragraph 50 of Carmi's PSR refers to a burglary second conviction, and two convictions for stealing over $150.00 dollars in St. Louis County. (Tr. Vol. II, 119:19-25; Gov't Ex. FF, ¶ 50.) The stealing convictions are not considered crimes of violence, but the burglary conviction is considered a crime of violence. The disposition of Carmi's burglary conviction was imposition of a suspended sentence and an unspecified period of probation. (Tr. Vol. II, 120:8-15.)

160. The federal conviction listed in paragraph 54 of Carmi's PSR is a conviction for conspiracy to possess with intent to distribute marijuana, which would qualify as a serious drug conviction. (Tr. Vol. II, 120:22-121:5; Gov't Exhibit FF, ¶ 54.)

161. Carmi's conviction for altering serial numbers in Tennessee in 1993 would not subject him to a fifteen-year mandatory minimum sentence. (Tr. Vol. II, 121:9-18.)

162. Carmi had a conviction in 1997 for attempted unlawful use of a weapon in St. Louis County. This conviction would not have subjected Carmi to the fifteen-year mandatory minimum sentence because it was merely an attempt crime. (Tr. Vol. II, 121:19-122:5.)

163. In summary, Carmi did not qualify for the fifteen-year mandatory minimum sentence for an armed career criminal because at most he had one applicable conviction. (Tr. Vol. II, 122:10- 17.)

164. Mr. Baranski's defense counsel were familiar with how someone is considered to be an armed career criminal. (Tr. Vol. I, 68:13-15, 106:18-108:10.)

165. Mr. Baranski's defense team had all of the necessary information to make an educated determination regarding whether Carmi could have been convicted as an armed career criminal and could have cross-examined Carmi about that issue.

F. Count V - Claims of Prosecutorial Misconduct and Vindictive Prosecution

166. On April 11, 2001, ATF agents seized Mr. Baranski's firearms from the Pars International Corporation's U.S. Customs Bonded Warehouse in Louisville, Kentucky, based in part on information provided by Carmi and pursuant to a search warrant issued by a U. S. Magistrate Judge in the Western District of Kentucky. See Baranski v. Fifteen Unknown Agents of ATF, 195 F.Supp.2d 862, 864 (W.D. Ky. 2002). On July 5, 2001, Mr. Baranski filed a civil action in the Western District of Kentucky against numerous ATF agents, including case agent in charge Special Agent Michael Johnson, and the United States. Baranski v. Fifteen Unknown Agents of ATF, No. 3:01-CV-398-H (W.D. Ky.). The action asserted, among other things, a Bivens claim.[8]

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[8] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Bivens, the Supreme Court recognized direct constitutional claims against

167. On March 7, 2002, a meeting was held attended by Mr. Baranski, his attorney William Ekiss, Department of Defense Agent William Armstrong, and AUSA Poehling. Mr. Baranski testified the purpose of the meeting was to discuss his ability as an importer to provide firearms to the Department of Defense. (Tr. Vol. 1, 126:18-24.) Mr. Baranski denied that the meeting was a proffer, (id., 127:10-24), but he and Ekiss signed a USAO proffer agreement at the meeting, at Ekiss' direction. (Id., 128:10-14; Gov't Ex. L.)

168. Ekiss testified that at the time of the meeting, Mr. Baranski was under investigation by the ATF and the USAO "on some form of a weapons violation," and he arranged the March 7, 2002 meeting with AUSA Poehling at Mr. Baranski's request to discuss weapons with the Department of Defense agent as a means of cooperating with the Government. (Tr. Vol. II, 5:13-20.) Ekiss testified they were "trying to avert an indictment" by holding the meeting (id., 7:20:25), and that he was not there to negotiate the sale of weapons to the U.S. Government (id., 14:11-13), although he also denied the meeting was a proffer. (Id., 17:10-18.)

169. AUSA Poehling testified that the purpose of the meeting was a proffer, Mr. Baranski was under investigation at the time, and the "standard proffer

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federal officials acting in their individual capacities. Buford v. Runyon, 160 F.3d 1199, 1203 n.6 (8th Cir. 1998).

agreement" was entered into. (Tr. Vol. II, 132:10-133:5.)

170. Mr. Baranski testified that at the March 7, 2002 meeting, AUSA Poehling was angry, stated he was under a lot of pressure from Washington about Mr. Baranski's Bivens action (Tr. Vol. 1, 12:4-8), and told Mr. Baranski that if he didn't cooperate and drop the suit, AUSA Poehling would "indict your ass, send you to prison, and even when you get out, for the next 20 years there's going to be agents following you around." (Id., 131:8-12.) Subsequently, Mr. Baranski attempted to add AUSA Poehling as a defendant to the Bivens action, but his motion to do so was denied. (Id., 131:13-15.)

171. Ekiss testified that AUSA Poehling said for the March 7, 2002 meeting or any other meetings with the USAO to go forward, the Bivens action would need to be dismissed or withdrawn. (Tr. Vol. II, 8:13-17; 9:13-17.) Ekiss testified it was his understanding from the meeting and AUSA Poehling's anger and statements that if Mr. Baranski did not drop the Bivens action he would be indicted, although Ekiss did not "really believe it was worded in that fashion." (Id., 9:18-23.)

172. On March 27, 2002, Mr. Baranski signed an affidavit that detailed his recollection of the March 7, 2002 meeting, including a description of AUSA Poehling's statements. (Gov't Ex. CC.)

173. On April 1, 2002, Ekiss wrote a letter to Mr. Baranski summarizing the March 7, 2002 meeting. (Pet.'s Ex. 121.) The letter stated in part, "In what

started as a non-confrontational meeting, turned ugly as Poehling went on the defensive and threatened us with getting the indictment, seeing you go to prison and claiming that ATF or some other government agency would be watching you for the next 20 years." (Id. at 1.)

174. AUSA Poehling denied telling Mr. Baranski that he was under pressure from Washington to indict him because of the Bivens action, that he would indict Mr. Baranski if he did not drop the suit, or that the Government would go after him for twenty years after he was released from prison. (Tr. Vol. II, 134:14-20.)

175. When AUSA Poehling was informed that Mr. Baranski was attempting to add him as a defendant in the Bivens action, he immediately filed a memo of recusal to the USAO for himself and everyone in his line of supervision. (Tr. Vol. II, 135:1-24.) AUSA Poehling was replaced by AUSA Martin as the head of the investigation. (Id., 135:25-136:1.)

176. After AUSA Poehling was recused from the case, he never discussed the investigation or prosecution of Mr. Baranski with AUSA Martin, except when AUSA Martin asked him following Mr. Baranski's trial if he had promised a Rule 35 to Carmi, and AUSA Poehling said no. (Tr. Vol. II, 136:2-9.)

G. Present Adverse Consequences of Mr. Baranski's Conviction

177. Mr. Baranski testified he is pursuing this coram nobis action to overturn his conviction in part

so he can have the ability "to possess firearms and to continue the business that [he] was excluded from." (Tr. Vol. I, 161:23-162:2.)

IV. Conclusions of Law

A. Coram Nobis Standards

A writ of error coram nobis the proper way to "attack[] the validity of a sentence which has already been served." Mustain v. Pearson, 592 F.2d 1018, 1021 (8th Cir. 1979). "The writ of error coram nobis is an extraordinary remedy reserved for correcting errors of the most fundamental character." Morgan, 346 U.S. at 512. The Supreme Court has cautioned that "judgment finality is not to be lightly cast aside; courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases." Denedo, 556 U.S. at 916.

Coram nobis relief is not warranted where the error complained of was not of the most fundamental character or could have been raised on direct appeal or in a 28 U.S.C. § 2255 motion. Camacho-Bordes, 94 F.3d at 1173; Azzone v. United States, 341 F.2d 417, 419 (8th Cir. 1965) (per curiam) ("Coram nobis may not be used as substitute for an appeal."); see Sawyer v. Whitley, 505 U.S. 333, 338 (1992) (successive habeas petition raising identical grounds as prior petition must generally be dismissed).

The burden is on the petitioner to show he is entitled to coram nobis relief on the merits of his claim. Willis, 654 F.2d at 24. In addition, coram nobis relief is not available "unless a petitioner can show that he . . . suffers from ongoing civil disabilities, or

adverse collateral consequences, due to his . . . allegedly wrongful conviction[.]" Tufte v. United States, 16 F.3d 1228 (8th Cir. 1994) (Table) (unpublished per curiam) (quoted case omitted); Stewart, 446 F.2d at 43-44 (petitioner must demonstrate he is suffering from present adverse consequences to be entitled to coram nobis remedy).

B. Present Adverse Consequences

As a threshold matter, the government renews the argument previously made in its motions to dismiss and for summary judgment, that Mr. Baranski cannot obtain coram nobis relief because he failed to prove "present adverse consequences" from his conviction, citing McFadden v. United States, 439 F.2d 285, 287 (8th Cir. 1971), and Stewart, 446 F.2d at 43-44. The government cites cases from other circuits holding that a criminal conviction alone is not enough to show continuing collateral consequences, and argues Mr. Baranski has not shown such consequences as he testified he is currently unemployed because the instant case consumes much of his time and because he suffers significant disabilities as a result of injuries he incurred in the first Gulf War.

The Eighth Circuit has not had the opportunity to address in any detail the type of "present adverse consequences" that must be shown to authorize coram nobis relief. The First Circuit describes the case law concerning this requirement as "uneven," as some courts require something more than the mere fact of conviction, while others conclude sufficient collateral

consequences naturally flow from the fact of conviction:

> For example, several courts have indicated that something more than the stain of conviction is needed to show continuing collateral consequences. See, e.g., Fleming v. United States, 146 F.3d 88, 90-91 & n.3 (2d Cir. 1998) (per curiam); United States v. Dyer, 136 F.3d 417, 429-30 & n.33 (5th Cir. 1998); Hager [v. United States], 993 F.2d [4,] 5 [(1st Cir. 1993)]; United States v. Osser, 864 F.2d 1056, 1059-60 (3d Cir. 1988); see also United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988) (holding that continuing collateral consequences arise only in situations where the disability is unique to a criminal conviction). Other courts have indicated that continuing collateral consequences invariably flow from a felony conviction alone. See, e.g., United States v. Peter, 310 F.3d 709, 715-16 (11th Cir. 2002) (per curiam); [United States v.] Walgren, 885 F.2d [1417,] 1421 [(9th Cir. 1989)]; United States v. Mandel, 862 F.2d 1067, 1075 & n. 12 (4th Cir. 1988). Yet another court has granted coram nobis relief without mentioning the requirement. See Allen v. United States, 867 F.2d 969, 971-72 (6th Cir. 1989).

United States v. George, 676 F.3d 249, 254 (1st Cir. 2012).

Here, Mr. Baranski both pleaded and testified that as a convicted felon, he cannot possess firearms or engage in his prior business of importing firearms, which requires a federal firearms license. His inability to engage in this business or to obtain a federal firearms license could be considered something more than the mere stain of conviction. In the absence of Eighth Circuit precedent on this issue, and in light of the varying standards adopted by other circuit courts, the Court declines to adopt the Government's position that Mr. Baranski cannot obtain coram nobis relief because he has failed to establish present adverse consequences from his conviction.

C. The Government Did Not Promise Carmi a Rule 35 Reduction

In Count I, Mr. Baranski asserts that the government promised Carmi, the key witness against him at trial, a reduction in his sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure in return for his testimony against Mr. Baranski, but when Carmi was asked on cross- examination whether he expected to receive a Rule 35 reduction or other consideration in exchange for his testimony, Carmi lied and denied that any such promises had been made. Mr. Baranski asserts that the government was fully aware of Carmi's untruthfulness and coached him to deny the existence of a promise for a Rule 35 sentence reduction, and willfully and deliberately withheld this exculpatory and impeachment material from defense counsel.

In Brady v. Maryland, the Supreme Court held that if the prosecution suppresses evidence favorable to an accused after a request for disclosure by the defendant, due process is violated "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id., 373 U.S. 83, 87 (1963). "Under Brady and its progeny, prosecutors have a duty to disclose to the defense all material evidence favorable to the accused, including impeachment and exculpatory evidence." United States v. Robinson, 809 F.3d 991, 996 (8th Cir. 2016). Evidence that could be used to impeach a prosecution witness falls within the Brady rule. United States v. Bagley, 473 U.S. 667, 676 (1984); Reutter v. Solem, 888 F.2d 578, 581 (8th Cir. 1989). "This duty extends not only to evidence of which a prosecutor is aware, but also to material 'favorable evidence known to the others acting on the government's behalf in the case, including the police.'" Robinson, 809 F.3d at 996 (quoting Kyles v. Whitley, 514 U.S. 419, 437 (1995)); see Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006) (per curiam).

The Brady rule requires that a "conviction be reversed, however, only if the undisclosed impeachment evidence was material to the question of petitioner's guilt." Reutter, 888 F.2d at 581. The Supreme Court has "explained that 'evidence is "material" within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" Smith v. Cain, 132 S. Ct. 627, 630

(2012) (quoting Cone v. Bell, 556 449, 469-70 (2009)). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" Id. (quoting Kyles, 514 U.S. at 434). See also Wearry v. Cain, 136 S. Ct. 1002, 1006 (2016) (per curiam) (habeas petitioner "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict.") (quoting Smith, 132 S. Ct. at 630).

Having heard all of the evidence, the Court finds that the Government did not promise Carmi a further reduction in his sentence under Rule 35(b) in return for his testimony at Mr. Baranski's trial, and further finds that the Government did not deliberately withhold information concerning an alleged promise to Carmi for a Rule 35(b) reduction or coach him to falsely deny that such a promise was made. It is certain Carmi never received a Rule 35 sentence reduction. At Mr. Baranski's trial and at the evidentiary hearing, Carmi consistently testified that the Government never promised him a further sentence reduction. AUSAs Martin and Poehling testified credibly that no promise of a Rule 35 sentence reduction was made to Carmi. There is no written evidence from anyone at the U.S. Attorney's Office of a Rule 35 promise, and as discussed below it does not appear that Carmi met the requirements for a Rule 35 reduction for his trial testimony against Mr. Baranski.

The evidence does indicate there was some discussion between AUSA Poehling and Carmi's attorneys regarding the possibility of a Rule 35 reduction. The primary evidence regarding the possibility of a Rule 35 sentence reduction relates to Carmi's attorney John Rogers' understanding of verbal communications between himself and AUSA Poehling. Rogers testified in his deposition that AUSA Poehling made a verbal promise to his client for a further reduction, but that interpretation of their communications is not supported by the record. The Court also notes that because Rogers was not present to testify at the evidentiary hearing, it is impossible to evaluate his credibility.

Several factors support the conclusion that no Rule 35 promise was made. First, Carmi received a 5K1.1 reduction in his sentence for cooperating in Mr. Baranski's prosecution, which the Court finds implicitly included the expectation that Carmi would continue to cooperate by testifying against Mr. Baranski at his trial. AUSA Poehling testified that Carmi was expected to continue to cooperate, including by testifying at Mr. Baranski's trial. Carmi's former attorney Rosenblum, a very experienced criminal defense attorney, testified that "almost every plea agreement . . . contemplates continuing cooperation" "as to a particular case that [the defendant is] receiving a reduction [for]," and "I think in standard plea agreements in this district, when you receive a 5K1, it contemplates that the individual is agreeing to cooperate, and the cooperation will be continuing vis-a-vis that case."

(Rosenblum Dep., Gov't Ex. P, 41:17-42:4.) This type of continued cooperation is consistent with the Court's experience with criminal prosecutions in this district. Also, there was no mention of a Rule 35 sentence reduction in Carmi's plea agreement, which the Court believes should have been included had the Government made a promise to Carmi for a Rule 35 reduction, and Carmi specifically testified in his change of plea hearing that no other promises were made to him.

While Carmi's sentencing judge, Judge Webber, made reference during the sentencing to an off-the-record discussion in chambers about the *possibility* of a further reduction in Carmi's sentence, there is no indication there was a *promise* for a Rule 35 reduction in exchange for Carmi's testimony *against Mr. Baranski*. AUSA Poehling, the only witness who testified in person at the evidentiary hearing about this part of the sentencing hearing – other than Carmi who was not present during the in-chambers discussion – testified credibly that Judge Webber was referring to additional cooperation Carmi might proffer beyond the Baranski matter involving other subjects or other criminal activity. Carmi testified he did not hear Judge Webber make the statement about a Rule 35 reduction at his sentencing hearing, and did not realize what had been said at the hearing until he read the transcript years later. Because he did not hear Judge Webber's statement, Carmi could not have believed he had a promise of a Rule 35 sentence reduction based on the sentencing hearing when he testified against Mr. Baranski.

Second, under the version of Federal Rule of Criminal Procedure 35 in effect at the time of Mr. Baranski's trial in November 2002, Carmi was not eligible for a further reduction based on his trial testimony. At the time of Mr. Baranski's trial, a defendant could only receive a Rule 35 reduction for "subsequent substantial assistance in investigating or prosecuting another person" provided to the government under two circumstances: (1) if the Government filed a motion on the defendant's behalf *within one year* after the defendant's sentencing, or (2) if the defendant provided the Government substantial assistance involving "information or evidence *not known* by the defendant until one year or more after sentence is imposed." Fed. R. Crim. P. 35(b) (emphasis added).

Here, Carmi's testimony at Mr. Baranski's trial occurred more than one year after his sentencing proceeding. Carmi's attorneys did not contact AUSA Martin to request that the Government file a Rule 35 motion prior to Mr. Baranski's trial, i.e., within the one-year limit, and no such motion was filed.[9] Carmi could therefore have only received a Rule 35 for his trial testimony by providing information or evidence *not known by him* until more than a year after sentence was imposed. It is clear Carmi's trial

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[9] The Advisory Committee Comments to the 1991 Amendments to Rule 35 note that while the government must make a motion to reduce sentence before one year had elapsed, it did not require the court to rule on the motion within the one-year limit.

testimony against Mr. Baranski did not provide information or evidence that Carmi did not know until more than a year after he was sentenced.

"[I]f a defendant has already received a reduction of sentence under U.S.S.G. § 5K1.1 for substantial pre-sentencing assistance, he or she may not have that assistance counted again in a post- sentence Rule 35(b) motion." Rule 35, Fed. R. Crim. P., Advisory Committee Comments to 1998 Amendments. Here, Carmi had already received a § 5K1.1 reduction for his cooperation against Mr. Baranski, which was expected to include testimony at Mr. Baranski's trial. Thus, under the then- existing version of Rule 35, the Government could not have moved for a Rule 35(b) sentencing reduction for Carmi following his testimony at Mr. Baranski's trial, and the Court could not have granted such a motion.

As Mr. Baranski observes, Rule 35(b) was amended effective December 1, 2002, and the amendment authorized government motions to reduce sentence more than one year after sentencing if a defendant's substantial assistance involved:

> (A) information not known to the defendant until one year or more after sentencing;
>
> (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

> (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

Rule 35(b)(2)(A)-(C), effective Dec. 1, 2002.

Mr. Baranski contends that Carmi's trial testimony was eligible for sentence reduction under Rule 35(b)(2)(B), as Carmi provided information within one year of his sentencing but it did not become useful to the Government until more than one year after sentencing, i.e., the time of trial. Mr. Baranski does not cite any legal authority in support of his argument, and the Court does not find it persuasive. The Advisory Committee gives an example of Rule 35(b)(2)(B)'s application as "when the government starts an investigation to which the information is pertinent." Rule 35, Fed. Crim. P., Advisory Committee Comments to 2002 Amendments. Clearly, this example contemplates a new investigation, as opposed to Carmi's continued cooperation with respect to Mr. Baranski's case.

Although the Committee's example is not the only possible circumstance where information provided within one year of sentencing would not become useful to the government until after one year has passed, the Committee also explained that the amendment "would not eliminate the one- year requirement as a generally operative element." Id.

The amendment was intended to apply where the "*usefulness of the information is not reasonably apparent until a year or more after sentencing*," or if the information was "previously provided, for the government to seek to reward the defendant *when its relevance and substantiality becomes evident*." Id. (emphases added; parenthesis omitted).

In the absence of any case law or other authority to support Mr. Baranski's contention, the Court is not persuaded that the relevance and substantiality of Carmi's testimony was not "reasonably apparent" or "useful" to the Government until it was actually given, particularly where Carmi was interviewed numerous times by ATF agents as they investigated Mr. Baranski's case. The Court therefore does not believe that a Rule 35(b)(2)(B) reduction was available to Carmi when it became effective in December 2002 following his trial testimony.

Further, assuming for purposes of argument that Carmi was eligible for a sentence reduction under Rule 35(b)(2)(B), if the Government had actually promised Carmi a Rule 35 reduction in return for his testimony, the Court believes Carmi's attorneys would have asked the Government to file a Rule 35 motion within the one-year period rather than wait for a post-trial motion under the 2002 Amendment, which Congress could have declined to adopt after the one-year period expired and Carmi gave his testimony.

Third, the evidence does not support Mr. Baranski's assertion that there was a promise made

to Carmi for a Rule 35 reduction. AUSA Poehling testified credibly that he never promised Carmi's attorneys, either Rogers or Rosenblum, that he would file a Rule 35 motion on behalf of Carmi because Carmi had already been promised the 5K1.1 motion for cooperating with respect to Mr. Baranski. Knowing that receiving sentence reductions pursuant to both a 5K1.1 motion and a Rule 35 motion is not usual, Carmi's attorneys never requested or received anything in writing from the Government regarding this alleged promise. There is no evidence authored by anyone with the United States Attorney's Office regarding the alleged promise of a Rule 35 motion. Carmi and his attorneys may have hoped for a Rule 35 reduction, and as discussed above, AUSA Poehling discussed the possibility with at least Rogers, but the Court finds there was no promise.

The Court does not find Rogers and Rosenblum's correspondence to Carmi concerning the future filing of a Rule 35 motion to be persuasive evidence of the existence of such a promise, and notes that none of the letters mentions the Baranski case or Carmi's future testimony at his trial.[10] The Court also notes

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[10] The Court gives little to no weight or credence to the various statements contained in Carmi's voluminous correspondence to his attorneys, AUSA Martin and the Court, none of which were signed under penalty of perjury. This includes but is not limited to Carmi's assertions that John Rogers told him his sentence would be reduced to 18 to 24 months or that he would receive an additional 18 to 24 month reduction. Rogers, an experienced criminal defense attorney, testified he

that Rosenblum testified in his deposition that Rogers was the lead attorney on Carmi's case and that Rosenblum had not reviewed the file in over ten years. Rosenblum's testimony did not exhibit a particular recall of the facts of the case or of the alleged promise by AUSA Poehling for a Rule 35 reduction.[11] Rosenblum was not present at Carmi's sentencing before Judge Webber and testified he had no understanding of the discussion that took placed in Judge Webber's chambers. Rogers' deposition testimony concerning alleged conversations that happened ten years prior is also not strong evidence, particularly where the Court was unable to observe Rogers' demeanor and ability to recall facts in live testimony.

Fourth, the evidence is that Carmi knew he would not receive a reduction in sentence under Rule 35 at the time he testified at Mr. Baranski's 2002 trial. AUSA Martin made it very clear to Carmi before he testified that he was not getting anything in return for testifying against Mr. Baranski. Carmi never told AUSA Martin that he believed he had been promised or was going to get a further sentence reduction under Rule 35. Carmi also never told his attorneys that the United States Attorney's Office was telling him that

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would never represent or promise a particular range or estimate for a further reduction. (Rogers Dep., Gov't Ex. O, 20:11-18.)

[11] Rosenblum often responded to deposition questions about Carmi's case by saying, "Ask Mr. Rogers." (Rosenblum Dep., Gov't Ex. P, 15:18-16:2, 16:12-15, 20:23-25, 27:5-7.)

he was not going to get a sentence reduction in return for testifying against Mr. Baranski. Assuming AUSA Poehling stated at one time that Carmi could be considered for a Rule 35 motion, Carmi knew as a result of AUSA Martin's unequivocal statements before Mr. Baranski's trial that any possibility of a Rule 35 sentence reduction in return for his testimony no longer existed.

There is no evidence that Carmi committed perjury at Mr. Baranski's trial when he testified he did not have a deal for a Rule 35 sentence reduction in return for his testimony, or that the Government knew or should have known of any alleged perjury on that issue. See, e.g., Koehler v. Wetzel, 2015 WL 2344932, at *23-24 (M.D. Pa. May 14, 2015) (finding because a witness believed that any non-prosecution agreement had been revoked prior to his testimony at trial, there was no exculpatory or impeaching evidence in the form of a non-prosecution agreement that the prosecutor had a duty to disclose).

After AUSA Poehling was recused from the Baranski case, there was no communication between AUSA Martin, who took over the case, and Carmi's attorneys. Specifically, there was no pretrial communication from Carmi's attorneys related to a further sentence reduction even though Rule 35's then-existing one-year deadline was quickly approaching. AUSA Martin testified that neither Rogers nor Rosenblum contacted him before Mr. Baranski's trial or before the one-year deadline requesting that the Government file a Rule 35 motion. Further, Carmi's counsel did not attend any

pretrial preparation sessions with Carmi and the Government before Mr. Baranski's trial.

Fifth, the communication from Carmi's attorney Rogers to AUSA Martin after Mr. Baranski's trial indicates that Rogers did not believe a promise for a Rule 35 reduction had been made to Carmi, as Rogers never expressed to AUSA Martin that he believed Carmi was entitled to a further reduction. After Mr. Baranski's trial, when AUSA Martin first learned about Carmi's request for a Rule 35 sentence reduction, he promptly investigated whether AUSA Poehling had ever promised Carmi any further reduction and determined that no such promise was made. AUSA Martin then promptly sent a letter to Rogers which stated in part, "According to both you and Dick [Poehling], there was no promise from the Government to file a Rule 35 motion. Rather, Dick told you he would leave open the possibility of such a motion."[12] (Gov't Ex. A at 1) (emphasis added). In other words, after talking with both AUSA Poehling and Rogers, AUSA Martin determined there was no promise to Carmi of a Rule 35 sentence reduction in return for his testimony. There is no evidence Rogers disputed this statement made by AUSA Martin in his letter.

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[12] Contrary to Rogers' letter to Carmi dated February 17, 2003 that was introduced into evidence at the hearing, AUSA Martin never represented that he believed Carmi lied at Mr. Baranski's trial.

In addition, on January 9, 2003, AUSA Martin sent Carmi's counsel Rogers a second letter that stated,

> As a follow-up to my letter of December 2, 2002, and our telephone conversation of yesterday, please notify me as soon as possible in writing if you believe that Dick Poehling made any promise, expressed or implied, to your client that he would get a Rule 35 motion for his testimony in the Baranski trial. While everything set forth in my December 2, 2002 letter still holds true, given Mr. Carmi's testimony regarding this issue, I may need to notify the Court and opposing counsel if you believe there was such a promise.

(Gov't Ex. B.) AUSA Martin testified he wrote the second letter "to be able to ensure that they were not claiming that there had been a promise made by Dick Poehling . . . . And if there had been a promise made, I felt that we would likely have to take that to the Court because it was contrary to what Mr. Carmi had testified at the trial; and, therefore, Mr. Baranski and the Court would need to know about that." Rogers received AUSA Martin's January 9th letter, but he never responded.

Sixth, Carmi's counsel never filed anything with the Court requesting that the Government file a Rule 35 motion or otherwise pursue their understanding of discussions they had with AUSA Poehling.

There has been no convincing evidence offered to show that prior to Mr. Baranski's trial Carmi or the Government believed Carmi had a promise the Government would file a Rule 35 motion in return for his trial testimony. Similarly, there is no evidence to suggest AUSA Martin ever told Carmi or implied to Carmi that he should deny he had a promise for a Rule 35 motion. There is abundant evidence to the contrary on both these points, and the two letters from AUSA Martin to Rogers demonstrate the opposite. Thus, there can be no fundamental constitutional error.

In addition, before Mr. Baranski's trial, he and his counsel knew about the potential issue of a Rule 35 motion, and cross-examined Carmi about it at trial. Mr. Baranski called a witness at trial, Matuszny, who testified that he spoke to Carmi about a Rule 35 promise. Matuszny testified that Carmi said he was going to *ask for* a Rule 35 sentence reduction, not that he was promised one. Thus, the issue of a possible Rule 35 sentence reduction for Carmi was before the jury for its consideration.

The jury that found Mr. Baranski guilty heard Carmi testify his sentence was cut in half for agreeing to cooperate against Mr. Baranski. There was no evidence presented at the evidentiary hearing in this matter sufficient to establish that the Government promised Carmi a further Rule 35 sentence reduction in return for his testimony. Because the jury heard Mr. Baranski's attorney put forth evidence that Carmi was going to request a further reduction in his sentence, the jury could have believed that evidence

yet still found Mr. Baranski guilty after hearing all of the evidence. It cannot be considered fundamental constitutional error when the jury had an opportunity to consider the very issue Mr. Baranski alleges in his Petition. For these reasons, Mr. Baranski has failed to show the likelihood of a different result great enough to undermine confidence in the outcome of the trial.

Finally, the Court takes judicial notice of and has reviewed the entire trial transcript of Mr. Baranski's criminal trial. Although Carmi was the most significant witness against Mr. Baranski, the Court's earlier comments in this proceeding that the entire case rested on Carmi's testimony were overstated, and were based in part on a then-required reading of the Petition in the light most favorable to Mr. Baranski.

Unlike in the recent Supreme Court case Wearry v. Cain, offered by petitioner as supplemental authority, the Government's evidence at Mr. Baranski's criminal trial did not "resemble[] a house of cards" built on Carmi's testimony. Id., 132 S. Ct. at 1006. At trial, there was corroborated evidence and testimony, including Mr. Baranski's own personal communications to Carmi, concerning the criminal scheme charged in the case. (Trial Exs. 2, 3, 5, 7.) For example, Mr. Baranski prepared Form 6 applications stating he needed five of each weapon in order to have sales samples for each of his salesmen, but sent a fax to Carmi which indicated that he intended to sell

Carmi all of his dealer samples. (Tr. Ex. 3.)[13] ATF witness Mary Jo Hughes testified concerning the false Form 6 applications Mr. Baranski submitted to ATF attempting to import hundreds of high-caliber machine guns and weapons from foreign countries for demonstration to a three-person municipal police department in Farber, Missouri (Trial Tr. Vol. III, 3:10-36:15); Robert Douglas Patterson, former marshal for the Village of Jemez Springs, New Mexico, testified regarding the falsity of one of the law enforcement letters Mr. Baranski submitted to ATF from Patterson's two-man police department for a town of 484 people requesting a demonstration of 76 machine guns (id., 36:20-40:25); and former Farber, Missouri Police Chief and co-conspirator Jeff Knipp testified concerning the criminal scheme and conspiracy (id., 41:11-64:16).

These witnesses' testimony provided additional support for Carmi's testimony that Mr. Baranski knew of the fraudulent nature of the law enforcement letters. Cf. Willis v. United States, 87 F.3d 1004, 1006-07 (8th Cir. 1996) (§ 2255 movant's claim that key issue of his intent to defraud turned entirely on his and the government's principal witness' testimony was belied by other evidence of defendant's knowledge of and participation in the fraud;

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[13] The fax from Mr. Baranski to Carmi stated in pertinent part, "Remember, I'll get the weapons directly to me, then we'll simply transfer them to you (my dealer samples.)" (Tr. Ex. 3 at 2.)

defendant was not prejudiced by defense counsel's failure to conduct an adequate investigation of the witness' plea agreement where other testimony and evidence supported the witness' testimony concerning defendant's knowledge of and participation in the fraud).

In addition, ATF Special Agent Michael Johnson testified about the criminal scheme, including the January 18, 2001 interview with Mr. Baranski in Ohio, during which Mr. Baranski lied to Agent Johnson (id., 65:18-123:6). Significantly, Mr. Baranski himself testified. In his testimony at trial and at the evidentiary hearing, Mr. Baranski admitted he lied to Agent Johnson during the January 2001 interview about having met former Police Chief Knipp, about meeting Knipp at Carmi's house, and about having several telephone conversations with Knipp, none of which occurred. (Trial Tr. Vol. IV, 156:18-157:19, 158:19-159:12; Baranski Dep., Gov't Ex. D, 250:3-251:5; Tr. Vol I, 183:5-184:4.) Mr. Baranski testified he lied to Agent Johnson even though at the time he thought Johnson was a compliance officer there to help him rather than a law enforcement officer. (Trial Tr. Vol IV, 157:22-158:13.) Mr. Baranski also testified that once he knew Agent Johnson was a law enforcement officer, he lied that Carmi had nothing to do with Mr. Baranski getting the law enforcement letter from Knipp. (Id., 166:4-24.) "An effort to deceive in order to distance oneself from wrongdoing implies a consciousness of guilt and is clearly a circumstance

supporting a conviction." United States v. Sloan, 293 F.3d 1066, 1068 (8th Cir. 2002).

At Mr. Baranski's criminal trial, his attorneys extensively cross-examined Carmi about a number of credibility issues. The cross examination issues for the jury included Carmi's mental health and memory loss, the charges Carmi pleaded guilty to, his sentencing exposure, promises the Government made to Carmi (i.e., the 5K1.1 sentence reduction) and the benefits he received, and the possibility of Carmi receiving a motion pursuant to Rule 35. This placed all of the issues related to Carmi as contained in Count I of Mr. Baranski's Petition before the jury for its assessment as it evaluated Carmi's testimony. The jury was able to hear the testimony and assess the witness' credibility, and no fundamental Constitutional error exists in that process.

As Mr. Baranski asserts, the reasoning of Napue v. Illinois, 360 U.S. 264 (1959), has been extended to the Brady context, both by the Supreme Court and the Eighth Circuit. In Banks v. Dretke, 540 U.S. 668 (2004), the Supreme Court rejected the state's argument that no Brady violation occurred because the witness was "heavily impeached at trial," thus rendering his status as a paid informant "merely cumulative." Id. at 702 (alterations omitted). The Supreme Court found that no other impeachment evidence was "directly relevant" to the witness's status as an informant, and held that "one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the

defense." Id. at 702-03. See also Reutter, 888 F.2d at 581 ("The state argues that because Trygstad was a convicted felon his credibility already was suspect and the additional information regarding his petition for commutation and pending hearing thereon would not have affected the jury's judgment as to his truthfulness. Logic of this kind has been dismissed by the Supreme Court." (citing Napue, 360 U.S. at 270)).

Here, although Mr. Baranski complains that numerous additional documents relating to Carmi's mental condition and memory loss were not provided by the Government to his attorneys, none of the documents he identifies would have opened a new line of impeachment or provided a different avenue of impeachment. Other impeachment evidence that was provided by the Government to Mr. Baranski's attorneys was directly relevant to Carmi's mental condition and memory loss. Cf. Banks, 540 U.S. at 702. The documents Mr. Baranski complains were not provided, even if not entirely cumulative, do not establish the existence of the requisite "reasonable probability of a different result" had the suppressed information been disclosed to the defense, such that confidence in the verdict is undermined.

Mr. Baranski also contends the Government violated Brady when it failed to provide his attorneys a copy of Carmi's sentencing transcript, and falsely informed them it was available from the court reporter even though it was actually filed under seal. The evidence, however, is that AUSA Martin did not have a copy of the sentencing transcript until after Mr. Baranski's trial, and informed defense counsel

the transcript could be obtained from the court reporter. The fact that AUSA Martin incorrectly told defense counsel the transcript was publicly available is irrelevant, as defense counsel could have made inquiry of the court reporter or the Clerk's Office, learned the transcript was under seal, and then filed a motion to lift the seal. They did not do so, however. "Due process does not require the prosecution to turn over its entire file or to do the defense counsel's work." United States v. Willis, 997 F.2d 407, 412-13 (8th Cir. 1993). The Court specifically finds AUSA Martin's testimony that he did not have a copy of the transcript credible, and therefore discounts the testimony of Mr. Baranski's former attorney that AUSA Martin represented there was nothing exculpatory in the transcript.[14]

For all of these reasons, the Court concludes Mr. Baranski has failed to present sufficient evidence to prevail on his claims in Count I.

D. The Government Did Not Deliberately Withhold Records Concerning Carmi's Amnesia and Memory Loss or Coach Carmi to Commit Perjury Regarding His Alleged Brain Damage and Memory Loss

In Count II, Mr. Baranski asserts that "the Government was fully aware of the extent of Carmi's

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[14] The Court also finds AUSA Martin's incorrect statement to Mr. Baranski's defense attorney that the transcript was publicly available tends to support Martin's testimony that he did not have a copy of the transcript.

memory impairment, and deliberately withheld records supporting Carmi's amnesia and memory loss," "prepared Carmi for Baranski's trial by coaching him to downplay his memory impairment," and "spoon fed Carmi with information purported to be the past factual events that he could not remember[.]" (Third Amended Verified Petition, Doc. 187, ¶¶ 83-93.)

At Mr. Baranski's criminal trial, however, Carmi testified extensively regarding his alleged memory loss issues. In addition, Mr. Baranski's investigator testified at the trial that he met with Carmi and Carmi told the investigator he had memory issues. The evidence shows that Carmi testified truthfully and accurately regarding his mental state at the time of Mr. Baranski's trial. The Court finds there was no credible evidence presented at the evidentiary hearing to suggest that the Government instructed Carmi to minimize or otherwise misrepresent his brain damage or memory loss when he testified against Mr. Baranski, or that the Government spoon fed Carmi factual information that he could not remember.

With respect to the claim that the Government deliberately withheld records, Mr. Baranski and his counsel testified at the evidentiary hearing that they knew about Carmi's medical, mental health, and alleged memory loss issues. Specifically, Mr. Baranski and his counsel knew that Carmi had experienced a serious head injury before trial, had been in a coma for days and at one point was not expected to live, that Carmi claimed to have memory

impairment or memory loss as a result of the head injury, and had been diagnosed as a malingerer. Mr. Baranski had first-hand knowledge of Carmi's mental health condition because he personally interacted with Carmi both before and after his accident. Before trial, Mr. Baranski's attorneys were provided or obtained medical records concerning Carmi's mental and physical health from the Springfield Federal Medical Center, the Rochester Federal Medical Center in Minnesota, and St. Anthony's Hospital where Carmi was privately treated. In addition, Mr. Baranski's defense team hired a private investigator who talked with Carmi before Mr. Baranski's trial and Carmi told the investigator he had memory problems.

Further, prior to his trial, Mr. Baranski and his counsel knew that Carmi had been psychologically and medically examined by the Court and they received a copy of the Springfield Forensic Report that described Carmi's medical and psychological history. The treating physicians prepared an extensive report that detailed Carmi's medical, mental and psychological conditions and concluded that Carmi was malingering. This comprehensive forensic report also clearly documented Carmi's statements about his memory loss issues. Again, at Mr. Baranski's trial, Carmi testified both about his claims of memory impairment and mental health issues, and that he was diagnosed as a malingerer. When asked at the evidentiary hearing if he agreed with the finding in the Springfield Forensic Report, Carmi testified, "Yeah. I was faking."

Mr. Baranski offered numerous medical records from the BOP at the evidentiary hearing and claims the Government should have provided these documents prior to his trial even though the documents contain largely similar information as documented in the Springfield Forensic Report. (See Pet.'s Ex. 38 ("involved in a car accident and suffered head trauma"), Ex. 39 ("Still feels "in a fog," poor memory."), Ex. 40 ("memory problems"), Ex. 41 ("brain damage from accident, head injury"), Ex. 42 ("He continues to repeat retrograde and anterograde amnesia in relation to a motorcycle accident that occurred in May 2000"), Ex. 43 ("He's alleged to have suffered some brain damage and has difficulty with recent and remote memory"), Ex. 44 ("memory problems"), Ex. 46 ("memory and speech problems"), Ex. 47 ("I had a head injury and have trouble with memory."), Ex. 48 ("We discussed his accident and the long-term effects of his head injury."), Ex. 53 ("difficulty with memory"), Exhibit 54 ("He says he has episodes of not knowing where he is and can't remember things"). The Court notes that some of these documents record statements by Carmi himself, as opposed to medical diagnoses or medical findings.

Mr. Baranski introduced several of these exhibits at the evidentiary hearing, asking his former attorney Gardiner how he would have used each at trial had they been produced. Gardiner responded generally that he would have used each document to cross-examine Carmi concerning his memory. (Tr. Vol. I, 28:4-35:8.) For example, Mr. Baranski introduced Petitioner's Exhibit 40, a medical intake screening

record from the BOP dated January 17, 2002. (Tr. Vol. I, 29:3-14.) Gardiner read a portion of this document into the record: "On the psychology services inmate questionnaire, Mr. Carmi indicated he has been experiencing anxiety, memory problems, dizziness, relationship problems, concentration problems and severe headaches." (Id., 29:15-18.) Gardiner testified that this information was not conveyed to him before Mr. Baranski's trial, (id., 29:19-21), and he would have cross-examined Carmi at Mr. Baranski's trial about his memory problems. (Id., 29:22-30:1.) Gardiner admitted, however, that he had a copy of the Springfield Forensic Report prior to trial. (Tr. Vol. I, 74:2-76:19.) At numerous places in the Springfield Forensic Report are mentions of the same or similar statements concerning Carmi's motorcycle accident, brain injury and his alleged memory loss. More importantly, Mr. Baranski's attorney cross-examined Carmi at trial regarding his "severe memory loss," referencing the Springfield Forensic Report, and elicited from Carmi the admission that it was "probably true" he had "both memory loss problems and [he] lie[d] to doctors."[15] (Trial Tr. Vol II, 47:18-48:17.)

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[15] Moreover, there is no evidence to suggest that the United States Attorney's Office had a copy of Exhibit 40 (and many other BOP records that Mr. Baranski introduced as exhibits) prior to Mr. Baranski's trial. The evidence suggests to the contrary. For example, at the bottom of Petitioner's Exhibit 40 is a reference to the date "12/11/2009." (See Pet.'s Exs. 40, 12, 42 and 48.) In 2009, Carmi was charged in a different federal

As discussed above with respect to Count I, the records Mr. Baranski claims were not released to him do not open any new avenues of impeachment, and are similar to and largely cumulative of the information that was available to Mr. Baranski's defense team before trial. See, e.g., Rivera v. United States, 494 F.Supp.2d 383, 387 (E.D. Va. 2007) (where defendant received the essential information contained in the documents at issue, it was not a Brady violation that the specific documents were not produced); see also Burton v. Dormire, 295 F.3d 839, 847 (8th Cir. 2002) (evidence of a second plea agreement was purely cumulative for impeachment purposes; "when the [state] does not disclose a potential source of evidence but the evidence available from that source is cumulative of evidence already available to the defendant, it has committed no Brady violation.") (quoted case omitted). Mr. Baranski and his legal team were able to cross-examine Carmi as to his mental condition and memory loss with the Springfield Forensic Report, and could have also cross-examined Carmi with the

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criminal case by the United States Attorney's Office. It is likely these records were obtained by the United States Attorney's office in relation to the 2009 Carmi case, seven years after Mr. Baranski's trial, and therefore would have been impossible to produce to Mr. Baranski's attorneys in 2002. In addition, while Mr. Baranski's attorneys knew that BOP records existed regarding Carmi, they did not subpoena the records or take any additional steps to obtain them, and did not investigate the matter further. See Willis, 997 F.2d at 413 ("Due process does not require the prosecution to turn over its entire file or to do the defense counsel's work.").

medical records they had from the Rochester Federal Medical Center and St. Anthony's Hospital, but chose not to do so.

Mr. Baranski points to a sixteen-page letter his attorneys wrote to AUSA Martin containing numerous discovery requests, including for "a complete copy of the mental and physical health (medical) records which are in the possession or within the control of the U.S. Department of Justice, Federal Bureau of Prisons." (Letter from Robert E. Sanders to AUSA Martin (Aug. 14, 2002), Gov't Ex. H at 11.)[16] AUSA Martin responded to Mr. Baranski's counsel that he would not provide those documents "unless you have caselaw which supports your request." Gov't Ex. J. Mr. Baranski and his attorneys do not dispute that they never sought records directly from the BOP despite knowing of the existence of such records. Before his criminal trial, Mr. Baranski sought to have Carmi's medical file from the federal prison produced by the USAO, but Magistrate Judge Medler issued a lengthy Order denying the request. (Order and Report and Recommendation, No. 4:02-CR-361 CAS, Doc. 54.) Mr. Baranski could have

[16] Government Exhibit H was not admitted at the evidentiary hearing, but the Court considers it as Mr. Baranski cited to it in his post-hearing brief and it was included as an exhibit with the Government's previously filed Motion for Summary Judgment.

appealed this ruling but failed to do so, and as a result its assertion in this matter is abuse of the writ.[17]

The Court also rejects Mr. Baranski's assertion that the USAO had a duty to provide the BOP information not in its possession under Kyles, 514 U.S. at 437, and United States v. Lacey, 219 F.3d 779 (8th Cir. 2000). Neither case contemplates the obligations Mr. Baranski asserts are required. The Supreme Court stated in Kyles that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437. Information the police have about a defendant's criminal investigation is significantly different than medical records from a completely separate government entity treating a witness in a case. The BOP medical providers who treated Carmi were not acting on the Government's behalf in prosecuting Mr. Baranski. The assertion that a prosecutor would be required to seek information from any government agency that

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[17] The abuse of the writ doctrine is more fully discussed *infra* at 70-71. The Court also notes that in the August 2002 letter from Sanders to AUSA Martin, Mr. Baranski's counsel referred to the Springfield Forensic Report and stated "there is considerable evidence that James Carmi suffered a severe head injury in a motorcycle accident in May of 2000." He also noted the report stated that "Mr. Carmi's head injury has resulted in amnesia, poor memory, and inability to handle ordinary demands of his everyday life." (Gov't Ex. H at 11.) This shows Mr. Baranski's defense team were aware of the extent of Carmi's injury and memory loss prior to the trial.

interacted with or had information about a witness goes well beyond what Kyles requires. Similarly, the Eighth Circuit Court in Lacey does not contemplate the USAO having a duty to obtain and produce BOP medical records concerning Carmi simply because they knew such medical records existed. Further, as stated above, Mr. Baranski and his attorneys knew Carmi's medical records existed and could have subpoenaed the BOP, but failed to do so. See United States v. Roy, 781 F.3d 416, 421 (8th Cir. 2015) ("The government does not suppress evidence in violation of Brady by failing to disclose evidence to which the defendant had access through other channels.") (quoted case omitted).

The Court concludes that Mr. Baranski's claims regarding the Government's alleged failure to produce records regarding Carmi's mental health issues including amnesia and memory loss do not rise to the level of a fundamental constitutional error meriting *coram nobis* relief. Based on the same reasoning as discussed above with respect to Count I, Mr. Baranski's defense team was provided with significant impeachment evidence concerning Carmi's mental state and memory loss issues. In addition, the other evidence presented at Mr. Baranski's trial, as detailed above, was sufficient to convict Mr. Baranski beyond a reasonable doubt. The Court concludes that Mr. Baranski has failed to present sufficient evidence to establish the existence of the requisite "reasonable probability of a different result" had the allegedly suppressed information been disclosed to the defense. For these reasons, the

Court concludes Mr. Baranski has failed to present sufficient evidence to prevail on his claims in Count II.

E. The Government Did Not Mislead the Court or Mr. Baranski's Defense Team Concerning Carmi's Sentencing Exposure

In Count III, Mr. Baranski alleges that the Government misled the Court and his defense team about the extent and length of Carmi's incarceration exposure. (Third Verified Amended Petition, Doc. 187, ¶¶ 94-103). Specifically, Mr. Baranski claims the Government made a deal with Carmi that in exchange for his testimony against Mr. Baranski, the Government (1) would not seek a sentence in the Sentencing Guidelines range of 87 to 108 months, (2) would not seek a mandatory fifteen-year term against Carmi under the Armed Career Criminal Act, (3) would not prosecute Carmi for a number of additional criminal charges, and (4) permitted Carmi to keep various items of real and personal property that were the proceeds of illegal activity. (Third Verified Amended Petition, Doc. 187, ¶¶ 97-99.) Mr. Baranski presented no evidence in support of the third and fourth allegations and therefore the Court does not discuss them further.

At Mr. Baranski's criminal trial, Carmi testified that he believed his sentence exposure – based on the United States Sentencing Guidelines – was 76 to 86 months, and that he was sentenced to 42 months because of his cooperation. In fact, Judge Webber determined at Carmi's sentencing that Carmi was

facing a range of 78 to 97 months because his total offense level was 26, with a criminal history category of 3. While the upper end of the sentencing range was actually eleven months longer than Carmi testified, and this error was not corrected by the Government, there is no indication the error was intentional or significant.[18] Further, while Mr. Baranski attempts to make much of the fact that the PSR originally stated Carmi's sentencing guideline range was 87 to 108 months, Judge Webber determined that the PSR was in error and Carmi's correct sentencing range was 78 to 97 months.

Pursuant to the Plea Agreement, Carmi pleaded guilty to Count I (False Statements to Acquire Firearms) and Count II (Money Laundering), and the Government agreed "that no further federal prosecution will be brought in this District relative to the Defendant's Acquisition and Distribution of Firearms, of which the Government is aware at this time, from October, 1999 to the date of this agreement." Mr. Baranski and his attorneys had a copy of the plea agreement prior to his trial. As such, they were aware of the statutes under which Carmi was charged. As experienced attorneys, Mr. Baranski's counsel were aware of the statutory range of punishment for the charged offenses, and any other crimes with which Carmi could have been

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[18] As previously stated, the Court finds that AUSA Martin did not have a copy of Carmi's sentencing transcript until after the conclusion of Mr. Baranski's trial.

charged. In addition, Mr. Baranski's attorneys were familiar with and knew of the United States Sentencing Guidelines and how they applied to Carmi's circumstances. Therefore, the evidence shows by the time of Mr. Baranski's trial, he and his attorneys knew what charges Carmi had pleaded guilty to, the potential length of sentence those charges carried, and the actual sentence that Carmi received. Indeed, Mr. Baranski's attorney admitted at the evidentiary hearing that he cross-examined Carmi extensively about his sentence and the benefits Carmi got from the Government.

Mr. Baranski claims that Carmi could have been charged as an armed career criminal, but that he was not so charged due to an undisclosed agreement with the Government. No evidence was presented at the evidentiary hearing to support this claim. The evidence established that Carmi did not qualify as an armed career criminal, which requires three or more qualifying prior felony convictions. Carmi could not have been charged as an armed career criminal because some of his prior felony convictions were not predicate convictions for the purpose of the Armed Career Criminal Act. Carmi did not qualify for the fifteen-year mandatory minimum sentence for an armed career criminal because although he had several convictions, only one was a qualifying prior felony conviction under the ACCA.

Mr. Baranski's defense counsel, Gardiner and Sanders, admitted they were familiar with how a defendant can be considered to be an armed career criminal. Mr. Baranski's defense counsel were aware

of Carmi's past criminal history and of the United States Sentencing Guideline ranges. For these reasons, Mr. Baranski's defense counsel had all of the information they needed to determine whether Carmi could have been considered an armed career criminal prior to Mr. Baranski's trial, and could have cross-examined Carmi about it.

Mr. Baranski contends the USAO should have provided his defense counsel with a copy of Carmi's confidential PSR that was filed under seal, and that AUSA Martin misrepresented the PSR's contents by representing that it did not contain any Brady or Giglio material or anything favorable to Mr. Baranski. Under this Court's rules and procedures, the USAO could not have provided a copy of the sealed PSR to Mr. Baranski's attorneys, and in fact they filed a motion to obtain a copy of the PSR which Magistrate Judge Medler denied.

It is true that the Government may have an obligation to disclose information from a PSR that constitutes Brady or Giglio material even where the PSR itself cannot be disclosed. The Court has some concern about AUSA Martin's representation to Mr. Baranski's attorneys that there was no Brady or Giglio material in Carmi's PSR, as it contained the sentencing range Carmi faced, even though Judge Webber later determined the PSR's sentencing range was incorrect. However, "[T]he application of Brady does not depend on the prosecutor's culpability for the non-disclosure, but rather on whether the non-disclosure deprived the defendant of a fair trial."

Robinson, 809 F.3d at 1003 (J. Kelly, dissenting in part).

Mr. Baranski has not shown that the sentencing range as reflected in the PSR was so significant in the context of his criminal case – considering the information that was available to Mr. Baranski's attorneys about the charges against Carmi, his criminal history, the Sentencing Guidelines, the sentence Carmi actually received, and the cross-examination of Carmi that occurred at trial – that there is a reasonable probability that had the PSR's incorrect sentencing range been disclosed, the result of the proceeding would have been different, such that confidence in the outcome of the trial is undermined. The Court therefore concludes that Mr. Baranski failed to present sufficient evidence at the evidentiary hearing to prevail on Count III.

F. Petitioner's Prosecutorial Misconduct and Vindictive Prosecution Claims are Without Merit or are Abuse of the Writ

In Count V, Mr. Baranski alleges that AUSAs Poehling and Martin, and ATF agents involved in his criminal case:

> shared a common design and understanding, and/or common goal; and conspired, to conceal the promise of a Rule 35 motion for Carmi and records thereof; to conceal the severity of Carmi's head injury and memory loss and records thereof; to conceal Carmi's oral statements; to conceal Carmi's criminal history; conceal that Carmi was an Armed

> Career Criminal; to commit witness tampering; to coach and allow perjured testimony to be presented.

Third Amended Verified Petition at 27, ¶ 115. Mr. Baranski also alleges that the AUSAs misrepresented facts to his attorneys, coached Carmi to testify falsely, intimidated witnesses, and vindictively prosecuted Mr. Baranski because he refused to dismiss his then-pending Bivens action arising out of the seizure of his firearms from the bonded U.S. Customs Warehouse in which they were kept. Id., ¶¶ 116-118.

In the Order that addressed the Government's motion to dismiss Mr. Baranski's Second Amended Petition, the Court concluded Mr. Baranski's prosecutorial misconduct and vindictive prosecution count was properly considered under the same analysis as the individual claims set forth in other counts, as the prosecutorial misconduct/vindictive prosecution count was based on the same factual allegations as the individual claims. See Mem. and Order of Oct. 7, 2014 at 28 (Doc. 177). The Court also concluded that certain of Mr. Baranski's claims were subject to dismissal as abuse of the writ or as a second and successive § 2255 claim. Id. As relevant to the prosecutorial misconduct and vindictive prosecution claims in Count X, the Court stated:

> The Court concludes that the omnibus prosecutorial misconduct and vindictive prosecution claims in Count X are properly considered under the same analysis as the

> individual claims set forth in the preceding counts, as the prosecutorial misconduct claims are based on the same factual allegations as the individual claims. Accordingly, the Court finds the claims in Count X are an abuse of the writ to the extent they are based on the allegations contained in Counts III, IV, VII and VIII, as those counts are abuse of the writ, and Count IX as that count is second or successive, but the claims in Count X are not an abuse of the writ to the extent they are based on Counts I, II, V and VI. The government's motion to dismiss for abuse of the writ will be granted in part and denied in part as to Count X.

Mem. and Order of Oct. 7, 2014 at 28. The Court also granted Mr. Baranski's motion for leave to file a third amended petition for writ of error coram nobis, but directed him to omit from it the claims that had been dismissed as abuse of the writ or as second and successive. Id. at 29-30.

The allegations in Counts I through IV of Mr. Baranski's Third Amended Petition correspond, respectively, to Counts I, II, V and VI of Mr. Baranski's Second Amended Petition. As Mr. Baranski has withdrawn Count IV, only Counts I, II, III and V remain.

Mr. Baranski's allegations of prosecutorial misconduct and vindictive prosecution based on the alleged concealing of a promise of a Rule 35 motion for Carmi, the severity of Carmi's head injury and

memory loss, Carmi's oral statements, and Carmi's alleged status as an Armed Career Criminal; and the Government's alleged coaching and allowing of perjured testimony by Carmi and misrepresenting facts to Mr. Baranski's attorneys, are without merit and fail for the same reasons discussed *supra* with respect to Counts I, II and III, and based on the Court's conclusion that Mr. Baranski has failed to establish he is entitled to the extraordinary relief of coram nobis on any of his underlying allegations.

The Court also concludes Mr. Baranski cannot establish that he is entitled to coram nobis relief for prosecutorial misconduct or vindictive prosecution based on AUSA Poehling's alleged statements that if Mr. Baranski did not dismiss his Bivens action, he would be indicted and sent to prison, and upon his release government agents would follow him around for the next twenty years. As stated above, the prosecutorial misconduct and vindictive prosecution allegations in Count V relate to the same facts as the underlying allegations in Counts I through IV. Nothing in Counts I through IV relate to alleged threats made by AUSA Poehling to Mr. Baranski, so the existence or non-existence of these threats have no bearing on what this Court has previously determined to be the scope of Count V.[19]

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[19] In addition, at the pretrial conference before the evidentiary hearing in this matter, the Court ruled that evidence of alleged threats made by AUSA Poehling to Mr. Baranski could be admitted only for purposes of impeachment. (Pretrial Conf. Tr., Doc. 289 at 31-32.)

More fundamentally, the Court concludes that Mr. Baranski's allegations of prosecutorial misconduct and vindictive prosecution based on AUSA Poehling's alleged threats cannot be considered because they are barred as abuse of the writ. The abuse of the writ doctrine "in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." McCleskey v. Zant, 499 U.S. 467, 490 (1991). The abuse of the writ doctrine applies to coram nobis cases. Camacho-Bordes, 94 F.3d at 1172-73.

"[T]he abuse-of-the-writ doctrine . . . concentrate[s] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." McCleskey, 499 U.S. at 490. The Supreme Court held that the "cause" and "prejudice" standard used to determine whether to excuse state procedural defaults is the standard for determining whether there has been an abuse of the writ through inexcusable neglect. See id. at 490-96. Where a petitioner files a second or successive petition "the government bears the burden of pleading abuse of the writ" and does so "if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ." Id. at 494. If this initial burden is met, it then shifts to the petitioner to disprove abuse. Id. To excuse his failure to raise a claim earlier, the petitioner "must show cause for failing to raise it and prejudice therefrom." Id.

Here, the Government met its burden to plead abuse of the writ in its motion to dismiss Mr. Baranski's Second Amended Petition. See Mem. and Order of Oct. 7, 2014 at 6-7. Because Mr. Baranski's allegations of prosecutorial misconduct and vindictive prosecution are based on an incident that occurred in his and his attorney's presence in March 2002, the allegations could have been raised at his criminal trial, on direct appeal, or in his first collateral attack of his conviction under 28 U.S.C. § 2255, but were not. The instant coram nobis proceeding is Mr. Baranski's second collateral attack of his conviction. There can be no cause for Mr. Baranski's failure to raise in his first federal habeas petition his claims of prosecutorial misconduct and vindictive prosecution based on AUSA Poehling's statements. As a result, these claims cannot be considered in this coram nobis case. See McCleskey, 499 U.S. at 490.

For these reasons, the Court concludes that Mr. Baranski failed to present sufficient evidence at the evidentiary hearing to prevail on his claims of prosecutorial misconduct and vindictive prosecution in Count V to the extent they are based on the underlying claims in Counts I, II and III of the Petition, and that the remaining claims in Count V based on the alleged statements of AUSA Poehling are subject to dismissal as abuse of the writ.

V. Conclusion

After carefully considering Mr. Baranski's allegations, the evidence presented at the evidentiary hearing, the evidence in rest of the record in this case,

and the record in Mr. Baranski's underlying criminal case, the Court concludes for the reasons discussed herein that Mr. Baranski has failed to meet his burden to establish that he is entitled to the extraordinary relief of coram nobis. Mr. Baranski has not shown that the "likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" Smith, 132 S. Ct. at 630 (quoting Kyles, 514 U.S. at 434). The Court is satisfied that Mr. Baranski received a fair trial that resulted in a verdict worthy of confidence.

Accordingly,

IT IS HEREBY ORDERED that Counts I, II, III and V of petitioner Keith Byron Baranski's Third Verified Amended Petition for Writ of Error Coram Nobis are **DISMISSED**. [Doc. 187]

IT IS FURTHER ORDERED that Count IV of petitioner Keith Byron Baranski's Third Verified Amended Petition for Writ of Error Coram Nobis is **DISMISSED**, having been withdrawn.

IT IS FURTHER ORDERED that the United States of America's motion for summary judgment is **DENIED as moot**. [Doc. 237]

An appropriate Order of Dismissal will accompany this Memorandum and Order.

/s/

CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE
Dated this 31st day of March, 2016.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 16-3699

Keith Byron Baranski

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis
(4:11-cv-00123)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Kelly, Judge Erickson, Judge Grasz, and Judge Stras would grant the petition for rehearing *en banc*.

STRAS, Circuit Judge, dissenting from the denial of the petition for rehearing en banc. I would grant en banc rehearing to correct the panel opinion's conclusion that *coram nobis* petitions filed by individuals who are no longer in custody are "subject to the restrictions on second or successive § 2255

motions set forth in § 2255(h)(1) and (2)."[1] *Baranski v. United States*, 880 F.3d 951, 956 (8th Cir. 2018).

My disagreement with the panel opinion boils down to three words: "prisoner in custody." These words, from the first sentence of 28 U.S.C. § 2255, explain *who* falls under the statute. They make clear that only a "prisoner in custody" is subject to § 2255. The statute then uses the word "prisoner" five additional times, each time referring back to the "prisoner in custody" mentioned in the first sentence. Baranski, however, is no longer in custody, having completed his supervised-release term two years before filing his *coram nobis* petition, so applying any portion of the statute—whether substantive or procedural—to his petition is directly contrary to the statute's text.

I do not stand alone in my skepticism. The Sixth Circuit, for example, has concluded that a *coram nobis* petition filed by an individual who is "no longer in custody" is "not in substance a motion under § 2255" and "therefore not a second or successive motion" for § 2255 relief. *Pilla v. United States*, 668 F.3d 368, 372 (6th Cir. 2012). The Ninth Circuit has

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[1] As the panel noted, this issue was "not addressed by the district court." *Baranski v. United States*, 880 F.3d 951, 955 (8th Cir. 2018). Indeed, the parties did not even have an opportunity to address what later became the panel's central holding, except at oral argument through questioning by the court. Reconsideration en banc, accompanied by adversarial briefing on the § 2255 question, could well lead this court to a different conclusion.

similarly concluded that AEDPA's certificate-of-appealability requirement does not apply to *coram nobis* petitions filed by those who are no longer in custody, explaining that once an individual is no longer in custody, "he is no longer eligible for *any* form of relief governed by AEDPA." *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005) (emphasis added), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356, 370 (2010). Even the United States recently conceded that it is erroneous to characterize a *coram nobis* petition "as a second or successive § 2255 motion." Memorandum Brief of United States at 5, *United States v. Miles*, 697 F. App'x 601 (10th Cir. 2017) (No. 17-6037).

The United States attempts to distinguish these cases through some exquisite statutory dissection. The first cut carves out the so-called procedural requirement, which bars "second or successive [§ 2255] motion[s]" unless they are "certified" by a court of appeals panel. 28 U.S.C. § 2255(h). The second cut slices off the so-called substantive requirement, which calls for "second or successive motion[s]" to "contain" either "newly discovered evidence" or "a new rule of constitutional law." *Id.* The government maintains that the cases have addressed only the first cut, leaving the applicability of the substantive requirement to *coram nobis* petitions wide open. The panel, though failing to discuss the relevant

precedent, apparently endorses this distinction.[2] *See* 880 F.3d at 955–56.

The statute cannot be sliced so finely. It is instead one integrated whole: the substantive standard governs the court of appeals' consideration of a second or successive § 2255 motion and would not exist in the absence of the procedural requirement to first obtain authorization for the motion. The panel opinion was no doubt correct when it stated that "we may not read . . . into the statutes" a requirement that *coram nobis* petitions filed by out-of-custody individuals must comply with § 2255(h)'s procedural demands. *Id.* at 955. But this line of analysis applies equally to § 2255(h)'s so-called substantive requirement. After all, the same statutory provision contains both—indeed, within just a single sentence.

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[2] To the extent the United States argues that the panel applied the limitations in § 2255(h) as an exercise of its discretion over when to grant *coram nobis* relief—rather than as a matter of statutory interpretation—the United States reads into the panel opinion something that is not there. The panel opinion states that § 2255(h) "*limit[s]* the grant of *coram nobis* relief" to petitioners like Baranski, "Baranski's *coram nobis* petition *is subject* to" those restrictions, and § 2255(h)(1), in particular, is "the proper standard" under which to evaluate Baranski's petition. 880 F.3d at 956–58 (emphasis added).

The panel opinion therefore both rewrites § 2255 and alters the standard for *coram nobis* petitions. It rewrites § 2255 by excising the words "prisoner in custody" from the first sentence. And it alters the standard for *coram nobis* petitions by applying § 2255(h)'s restrictions, rather than Supreme Court precedent. The Supreme Court has instructed us that the writ of *coram nobis* is an "extraordinary remedy" for correcting errors of "the most fundamental character" when the "circumstances compel[] such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511–12 (1954) (internal quotation marks and citation omitted); *see also id.* at 511 (concluding that a previous version of § 2255 was no "bar" to the filing of a *coram nobis* petition). As the panel opinion demonstrates, incorporation of the § 2255(h) standard means either that we never get to the *Morgan* standard or that, once a petition clears the § 2255(h) hurdle, satisfying *Morgan* may well be a foregone conclusion. Either way, the standard that we are actually bound to apply does little work under the panel's approach.

For these reasons, I respectfully dissent from the denial of the petition for rehearing en banc. Only Congress can rewrite § 2255, only the Supreme Court can overrule *Morgan*, and neither has done so.

May 01, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §2

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §371

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each

shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §922(g)

§922. Unlawful acts

***

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is

defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

***

18 U.S.C. § 924(e)

§ 924. Penalties

***

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled

Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C §1956(a)(1)

§1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of

specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

26 U.S.C. §5861

§5861. Prohibited acts

It shall be unlawful for any person—

(a) to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special (occupational) tax required by section 5801 for his business or having registered as required by section 5802; or

(b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or

(c) to receive or possess a firearm made in violation of the provisions of this chapter; or

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter; or

(g) to obliterate, remove, change, or alter the serial number or other identification of a firearm required by this chapter; or

(h) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered; or

(i) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or

(j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required by this chapter; or

(k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or

(l) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

28 U.S.C. §1651

§1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respecttive jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. §2244

§2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to

inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2253

§2253. Appeal

(a) In a habeas corpus proceeding or a proceed ing under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2255

§2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) 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.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) 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 the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

[Dan M. Peterson PLLC letterhead]

September 29, 2017

Michael E. Gans, Clerk
United States Court of Appeals
for the Eighth Circuit
111 South 10th Street
Room 24.329
St. Louis, MO. 63102

Re: *Baranski v. United States*, No. 16-3699

Dear Sir:

Pursuant to Fed. R. App. P. 28(j), this letter is to advise the Court regarding two authorities not cited in the parties' briefs: *United States v. Baptiste*, 223 F.3d 188 (3d Cir. 2000), and *United States v. Brown*, 178 Fed.Appx. 299 (4th Cir. 2006) (copies attached).

At oral argument, one of the judges questioned counsel whether this *coram nobis* petition would have been "successive" if it had been a *habeas* petition, and questioned whether *coram nobis* relief was proper if there was an alternative remedy, mentioning *Baptiste* and *Brown*.

Unlike the present case, in *Baptiste* and *Brown* the individuals who brought actions styled as *coram nobis* petitions were incarcerated. They thus had an available remedy, subject to successive motion limitations, under 28 U.S.C. § 2255, which requires that the individual be "in custody." In *Baptiste*, there

was "no basis … for *coram nobis* relief, because Baptiste is still in custody." *Baptiste*, 223 F.3d at 189. However, the Court noted that *coram nobis* has "traditionally been used" to attack convictions when the petitioner is no longer "in custody" for purposes of § 2255. *Id.* In *Brown*, a federal prisoner brought an action styled as a *coram nobis* petition, but it was construed as a motion under § 2255 because he was incarcerated, and was dismissed as a successive motion.

Baranski was not in custody when his petition was filed. His supervised release terminated on August 17, 2009, and he filed his original *coram nobis* petition on January 18, 2011. Pet. Br. 7, citing JA 1625 (District Court Memorandum at 2). He affirmatively pled the lack of an alternative remedy. Third Amended Petition ¶ 69, JA 167. This Court has held that "*[c]oram nobis* lies only where the petitioner has completed his sentence and is no longer in federal custody…." *United States v. Little*, 608 F.2d 296, 299 n.5 (8th Cir. 1979); *United States v. Kindle*, 88 F.3d 535, 536 (8th Cir. 1996). Baranski had no alternative remedy, and his petition is not successive because it was properly brought under 28 U.S.C. § 1651, the All Writs Act, after his release.

Respectfully submitted,

/s/ Dan M. Peterson
Dan M. Peterson PLLC
Counsel for Petitioner
Keith Baranski

[U.S. Attorney letterhead]

October 16, 2017

FILED VIA CM/ECF

Mr. Michael E. Gans
Clerk of Court
United States Court of Appeals for the Eighth Circuit
111 So. 10th Street, Room 24.329

Re: *Keith Baranski v. United States*
No. 16-3699
Rule 28(j) Citation of Supplemental Authority

Dear Mr. Gans,

Pursuant to Federal Rule of Appellate Procedure 28(j), the United States respectfully provides notice of supplemental pertinent and significant authorities that came to Appellee's attention subsequent to oral argument before the Court.

At oral argument, the Court inquired with both parties whether the relief sought by Appellant should have been addressed as a successive habeas petition. The Government agrees with Appellant's counsel that because Mr. Baranski was no longer in custody, the only process available to him was to pursue a coram nobis petition. *See Fleming v. United States,* 146 F.3d 88, 89–90 (2d Cir.1998), citing *United States v. Morgan,* 346 U.S. 502, (1954) (Coram nobis is a

remedy of last resort for petitioners who are no longer in custody pursuant to a criminal conviction and therefore cannot pursue direct review or collateral relief by means of a writ of habeas corpus).

The Court also inquired about a sentencing transcript that was on file with the District Court and the effect that had on Appellant's *Brady* allegations. In *United States v. Landoucer*, 573 F.3d 628, 636 (8th Cir. 2009) this Court found that the Government's failure to produce a transcript did not violate *Brady* because the transcript was as available to the defendant as it was to the Government. *See United States v. Albanese,* 195 F.3d 389, 393 (8th Cir.1999); *United States v. Jones,* 160 F.3d 473, 479 (8th Cir.1998) ("There is no *Brady* violation if the defendant[ ], using reasonable diligence, could have obtained the information." The record in this case shows that Appellant knew the sentencing transcript existed, and where and how to seek a copy. Because Appellant could have obtained a copy of the transcript himself, he cannot claim that the Government suppressed evidence. *See United States v. Jones,* 34 F.3d 596, 600 (8th Cir.1994) (" '[T]he Government cannot be held to have suppressed Brady material' when the defendant is in 'a position of parity with the government as far as access to this material.' ")

Thank you for your consideration.

Very truly yours,

JEFFREY B. JENSEN
United States Attorney

/s/ *Matthew T. Drake*
By: Matthew T. Drake–
46499MO
Assistant United States Attorney

Cc: ATTORNEY (via CM/ECF)

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 28(j), the body of this letter does not exceed 350 words.

/s/ *Matthew T. Drake*
By: Matthew T. Drake–
46499MO
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 16, 2107, the foregoing was filed electronically with the Clerk of Court to be served by operation of the

Court's electronic filing system upon all counsel of record.

/s/ *Matthew T. Drake*
By: Matthew T. Drake–
46499MO
Assistant United States Attorney

[Dan M. Peterson PLLC letterhead]

October 18, 2017

Michael E. Gans, Clerk
United States Court of Appeals
for the Eighth Circuit
111 South 10th Street
Room 24.329
St. Louis, MO. 63102

Re: *Baranski v. United States*, No. 16-3699

Dear Sir:

This letter is a response to the Rule 28(j) letter filed by Respondent/Appellee on October 16, 2017. Petitioner/Appellant agrees with Respondent that coram nobis is an available remedy for Petitioner.

The four cases cited by Respondent regarding the sentencing transcript do not address anything new (the 1994 *Jones* case discussed below is cited in Respondent's Brief), and are factually inapplicable to

this appeal. In each of those cases, unlike this appeal, the material allegedly suppressed was publicly available and a matter of public record.

In *U.S. v. Jones*, 160 F.3d 473, 479 (8th Cir. 1998) the relevant Rule 35 offer of a further sentence reduction was known to defense counsel and they cross-examined the witness on it. The allegedly suppressed material related to an earlier deal, and was a "matter of public record." *Id.* n.5. *U.S. v. Ladouceur*, 573 F.3d 628, 636 (8th Cir. 2009), concerned testimony in a transcript from a public trial in another state of which the defendant was fully aware. In *U.S. v. Jones*, 34 F.3d 596, 599 (8th Cir. 1994), the information consisted of criminal convictions from another state which were not even known to the prosecution. They were also a "public record." *Id.* at 600. *U.S. v. Albanese*, 195 F.3d 389, 393 (8th Cir. 1999), involved testimony given at "a public proceeding."

Here the sentencing transcript was sealed, and AUSA Martin repeatedly represented to Petitioner's counsel and the Magistrate Judge that all *Brady/Giglio* items had been turned over. There was no reason to seek to unseal it, because Petitioner's counsel were entitled to rely on the truthfulness of those representations. The U.S. Attorney's Office was aware of the additional sentence reduction offered to Carmi because AUSA Poehling participated in the sentencing hearing and acknowledged the reduction described by Judge Webber. The prosecution was obligated to disclose that offer to Baranski's attorneys, regardless of the existence of a

transcript. But it did not: not before trial, not during trial when its star witness falsely denied the expectation of a further reduction, and not after trial when the prosecutors were confronted by Carmi's attorneys.

Respectfully submitted,

/s/ Dan M. Peterson
Dan M. Peterson PLLC
Counsel for Petitioner
Keith Baranski