No. _____

In The

Supreme Court of the United States

BERNARD J. BAGDIS

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

BERNARD J. BAGDIS, *pro se*
Petitioner

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QUESTIONS PRESENTED

This petition for certiorari includes two separate questions, but both are related to the proper application of 28 U.S.C. §2255, for the determination of the timeliness of a *habeas* petition, and the calculation of the limitations date under the statute.

The First Question Presented:

Should the Supreme Court grant certiorari to resolve the differences in treatment among the various circuits and to clearly establish when a judgment of conviction becomes "final" under 28 U.S.C. §2255(f)(1) if a petition for rehearing (of the order denying the petition for a writ of certiorari) is filed after the petition for certiorari has been denied?

The Second Question Presented:

Should the Supreme Court grant certiorari, vacate the lower court decision and remand this case to correct a violation of due process because the lower courts dismissed a timely filed *habeas* motion as "time-barred" under 28 U.S.C. §2255(f)(4) without making any fact-based determination of timeliness and without establishing any record of reasoning needed for effective appellate review?

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PETITION FOR A WRIT OF CERTIORARI

Bernard J. Bagdis respectfully petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the Third Circuit Court of Appeals , #17-3710, ("*Bagdis-IV*") appears at Appendix 1a-2a and is unpublished. The denial Order sur Petition for Rehearing *en banc* appears at Appendix 3a-4a.

The Order of the Third Circuit Court of Appeals, #17-1711, ("*Bagdis-III*") appears at Appendix 5a-6a and is unpublished. The denial Order sur Petition for Rehearing *en banc* appears at Appendix 7a-8a.

The Order of the United States District Court for the Eastern District of Pennsylvania, dated October 8, 2017, appears at Appendix 9a and is unpublished.

The Order of the United States District Court for the Eastern District of Pennsylvania, dated May 1, 2017, appears at Appendix 10a and is unpublished.

The Order of the United States District Court for the Eastern District of Pennsylvania, dated February 10, 2017, appears at Appendix 11a and is unpublished.

JURISDICTION

The Opinion of the United States Court of Appeals for the Third Circuit was entered May 4, 2018. (*Bagdis-IV*). A Petition for an extension of time was filed and was granted until and including November 30, 2018. Application No. 18A150. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9, Clause 2 of the United States Constitution provides in relevant part: "The Privilege of the Writ of Habeas Corpus shall not be suspended ... ." U.S. Const. art.I, §9, cl.2.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be ... deprived of life, liberty, or property, without due process of law; ... " U.S. Const. amend. V.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2255 provides in relevant part:

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

STATEMENT OF THE CASE

There are two distinct Questions in this case, but both are related to the determination of timeliness in 28 U.S.C. §2255(f), under which federal prisoners apply for post-conviction relief.

The first Question addresses a still unresolved ambiguity in the definition of when a judgment of conviction becomes "final", and asks whether the conviction can be considered as final when certiorari is denied if another procedural step is taken after certiorari is denied. At least two Circuit Courts of Appeal have commented that the Supreme Court has yet to define when a criminal conviction becomes final for AEDPA[1] purposes if a petition for rehearing is requested.

Four circuits have based their reasoning about when a conviction becomes "final", on Supreme Court Rule 16.3, which predates the subject amendment to the statute. Five other circuits have based their determination of when a judgment of conviction becomes "final" using a misapplication of *Clay v. United States*, 537 U.S. 522 (2003). Neither approach properly answers the question. Three other circuits have failed to definitively resolve the issue at all. The unanimous decision in *Clay* established when a conviction becomes final at the appellate level, under 28 U.S.C. §2255(f)(1), and this case now provides an opportunity for this Court to unequivocally establish when that conviction becomes final at the Supreme Court level, when a petition for certiorari is denied but a petition for rehearing is filed.

1 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

The second Question in this case addresses the necessity of a factual determination when 28 U.S.C. §2255(f)(4) is used to establish the limitation date. New discoveries, their method and date of discovery "through the exercise of due diligence" are questions of fact, which require an adequate record to support a decision. Here, the district court accepted as true the government assertion that since there had been a significant passage of time, it was not possible for new, undiscovered evidence to emerge. Just dismissing the 2255 motion, based only on a government assertion is especially damaging to a defendant's rights when the new evidence discovered is *Brady*[2] material that had been successfully suppressed by the government during the entirety of this case.

When interpreting and applying this section of the statute, both the district court and the Third Circuit failed to recognize a requirement for a proper factual determination. The district court held no hearing to create the necessary record. The Third Circuit had no factual record for proper appellate review. The motion was dismissed anyway. This case is an appropriate opportunity for this Court to grant certiorari, vacate the decision(s) of the lower court(s), and remand this matter for a factual determination as to whether the motion was timely filed within the period of limitation specified under 28 U.S.C. §2255(f)(4).

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2 *Brady v. Maryland*, 373 U.S. 83 (1963).

BACKGROUND

On November 30, 2015, this Court denied the petition for rehearing filed after this Court denied a petition for certiorari on October 5, 2015.

On October 3, 2016, exculpatory material (received by the government in 2008, but never disclosed as *Brady* requires) was discovered, which established the limitations date under §2255(f)(4) as October 3, 2017.

On November 29, 2016, a Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody under 28 U.S.C. §2255 was timely filed.

The district court dismissed the motion as time-barred and denied a COA - without comment or explanation as to how the limitations date was determined.[3] (See Order p.11a). The decision was appealed to the Third Circuit (#17-1711). Several motions were filed with the district court to show that the 2255 motion was timely, not only under §2255(f)(1), but also under §2255(f)(4). The filings included a motion for reconsideration under Rule 59(e) and for relief from the dismissal order, under Rule 60(b).[4] The appeal was stayed under Rule 4(a)(4) because the district court had not yet ruled on all of the outstanding motions.[5]

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3 The government filed a motion to dismiss contending that the 2255 motion was time barred under §2255(f)(1) based on the October 5, 2015 denial of certiorari date, and also claimed that the passage of time after trial was sufficient to conclude that any new evidence must have been previously discoverable, thereby discounting any possibility of §2255(f)(4) having applicability. The district court simply accepted this government proposition and dismissed the 2255 motion as time-barred.

4 Mr. Bagdis had filed a motion for reconsideration under Rule 59(e) after the government's motion to dismiss had been granted. He then filed to amend the 2255 motion under Rule 15(a) and also filed a motion for relief from the dismissal order under Rule 60(b), expressly showing that the §2255(f)(4) date applied.

5 April 4, 2017 letter from the clerk of the Third Circuit: "It appearing that a timely post-

In July of 2017, the Third Circuit denied a certificate of appealability (COA), even while there were *outstanding motions* before the district court. (See Order p.5a-6a). The Third Circuit denied Reconsideration or *en banc* review on September 20, 2017. (See p.7a-8a).

As the October 2017 §2255(f)(4) limitations date approached, a *copy* of his original 2255 motion[6] was refiled with the district court. The Rule 60(b) motion was also still-outstanding at this time.

On October 17, 2017, the district court treated the submitted *copy* of the 2255 motion as "an unauthorized second or subsequent motion", disclaimed jurisdiction, generally denied all "remaining pending motions" without comment or explanation, and broadly denied a COA. (See Order p.9a).

This order was appealed (#17-3710), and on May 4, 2018, the Third Circuit again denied a COA, without addressing the portion of the order that denied "all outstanding motions"[7]. (See Order p.1a-2a). The Rule 60(b) motion was entitled to an appeal of right, but the request for reconsideration or *en banc* review was denied by the Third Circuit on May 4, 2018. (See p.3a-4a).

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decision motion of a type specified by Fed. R. App. P. 4(a)(4), is pending in the District Court, it is hereby ORDERED ... the appeal(s) is(are) stayed ... pending disposition of the motion."

6 The resubmitted 2255 motion was modified slightly from the original to specifically highlight that the motion was timely under §2255(f)(4) - as a reminder to the district court.

7 The Third Circuit re-characterized the "Timely Resubmittal of Motion under 28 U.S.C. §2255(f)(4)" as a *new or second* Rule 60(b) collateral attack, then denied the re-characterized *new/second* Rule 60(b) motion a COA because the *new/second* Rule 60(b) motion "failed to make a substantial showing, see 28 U.S.C. § 2253(c), that the limitations period should have been extended under §2255(f)(4)." The Third Circuit did not even address the appeal of the *original/first* Rule 60(b) motion, as filed on May 19, 2017.

REASONS FOR GRANTING THE PETITION

I. The definition of "final" in 28 U.S.C. §2255(f)(1) is *still* incomplete, even after the unanimous decision of this Court in *Clay*, and several circuits have noted that this Court has not resolved the issue.

In the unanimous decision of this Court in *Clay v. United States*, 537 U.S. 522 (2003), this Court was called upon to supply elements of the definition of when a criminal conviction becomes "final" for AEDPA purposes, because "final" was not precisely defined within the statute. *Clay* provided a clear and precise ruling, for application at the court of appeals level: A judgment of conviction becomes final when the time for petitioning for certiorari expires - if no petition for certiorari is filed. Obviously, if a petition for certiorari is filed, the judgment cannot yet be final, because there is at least one more procedural step that must conclude before the judgment may actually become final.

However, *Clay* did not address the situation when a petition for certiorari is denied, and then a petition for rehearing is filed with the Supreme Court. Because of the limitations of the *Clay* ruling, this Court is now being called upon to resolve a further ambiguity resulting from the same imprecise language in the statute: when is a judgment of conviction "final" if a rehearing is requested after a petition for certiorari is denied?

A. There is a split between the circuits as to when a criminal conviction becomes final for AEDPA purposes - if a petition for rehearing is filed after certiorari is denied.

Over a period of almost two decades - almost since 28 U.S.C. §2255 was

amended[8] to include limitations periods - nine Courts of Appeal have individually struggled to address the issue of when a conviction becomes final if certiorari is denied and a petition for rehearing is filed. Before *Clay* was decided in 2003, four circuits based their reasoning on Supreme Court Rule 16.3. After *Clay*, five circuits applied language taken from Justice Ginsburg's discussion in *Clay*, but, as noted *infra,* that language is applied out of context and is not consistent with the actual holding in *Clay*. In the Third Circuit, this case was dismissed with a non-precedential order that contradicts a prior holding in the circuit. The DC Circuit and the Sixth Circuit have not yet addressed this issue.

1. Four Circuits based their decisions on Supreme Court Rule 16.3.

Common sense dictates that a judgment of conviction cannot be "final" if there is the potential to alter it, and Rule 16.3 is not dispositive of the question of whether the limitations clock should be running pending the disposition of a petition for rehearing after certiorari is denied. According to the Fourth, Fifth, Eighth, and Tenth Circuits[9], a judgment of conviction becomes final for purposes of determining a limitations date under 28 U.S.C. §2255(f)(1) when the Supreme Court denies certiorari. The holdings in these four circuits predate this Court's ruling in *Clay*. They all rely on an interpretation of Supreme Court Rule 16.3,

8 Pub. L. No. 104-132, 110 Stat. 1214. Apr. 24, 1996. Sec 105. 2255 Amendments.

9 See *Campa-Fabela v. United States,* 339 F.3d 993, 993 (8th Cir. 2003); *Giesberg v. Cockrell,* 288 F.3d 268, 270-71 (5th Cir. 2002); *United States v. Segers,* 271 F.3d 181, 184-86 (4th Cir. 2001); *United States v. Willis,* 202 F.3d 1279, 1280-81 (10th Cir. 2000).

which rule states in relevant part: "Whenever the Court denies a petition for a writ of certiorari, ...[t]he order of denial will not be suspended pending disposition of a petition for rehearing ... ." [Emphasis added.]

According to Webster's dictionary[10], "suspend" means

> 1 : to debar temporarily especially from a privilege, office, or function - suspend a student from school
>
> 2a : to cause to stop temporarily - suspend bus service
>
> b : to set aside or make temporarily inoperative - suspend the rules
>
> 3 : to defer to a later time on specified conditions - suspend sentence
>
> 4 : to hold in an undetermined or undecided state awaiting further information - suspend judgment, suspend disbelief

Evaluating each particular element of the definition shows that each given meaning of "suspend" contains a time transient element. The first two meanings (1, 2a and 2b) contain the word "temporarily". Meaning 3 includes "defer to a later time" and meaning 4 includes "awaiting further information". Thus having something "not suspended" does not mean that a result becomes "final", it just implies that during the time "pending disposition" the *status quo* will be preserved.

In the context of a criminal conviction, a judgment becomes enforceable when a court imposes sentence. During appeal, the judgment will not be "suspended," and the defendant remains convicted, and subject to the consequences of that conviction. However, there are some procedural steps which might relieve

10 https://www.merriam-webster.com/dictionary/suspend, last visited October 25, 2018.

the defendant of some of those immediate consequences, even though the judgment of conviction is "not suspended." For example, there may be a grant of bail pending appeal - and while the defendant may temporarily be free from incarceration, the defendant's conviction is "not suspended." He still stands convicted, but his conviction will not be "final" until the appeal process has been concluded.

In this same context, the four circuits that rely on Rule 16.3 are interpreting "the order of denial will not be suspended pending disposition of a petition for rehearing" as the determinant of "final". While the order of denial of certiorari is "not suspended" after a petition for rehearing is filed, the defendant's case is not yet final, at least until the next procedural step (a rehearing decision) is completed. When certiorari is denied, the conviction remains: *pending disposition* of the rehearing, at which point the situation *might change,* so the judgment of conviction cannot be "final" - because a favorable decision on rehearing will continue the case.

2. Five Circuits do not apply the logic of *Clay* but instead have based their decisions on words that are not part of the holding in *Clay.*

The reasoning used in *Clay* calculates the limitations date from the time when a defendant must exercise a procedural option at the circuit court, (petition for certiorari), or lose that right forever. If he declines to file for certiorari, his judgment of conviction will only become "final" when the date to exercise that right passes. If he files for certiorari, his case is not yet "final".

It seems logically consistent with *Clay* to calculate the limitations date from

the time when a defendant must exercise a procedural option at the Supreme Court, (petition for rehearing), or lose that right forever. If he declines to file for rehearing, his judgment of conviction should also only become "final" when the date to exercise that right passes. If he files for rehearing, his case should not yet be considered "final" because there is still some other action to be taken.

Under Supreme Court Rule 44.2 there is an absolute deadline of only twenty-five (25) days to file a petition for rehearing - no extensions.[11] If a defendant does not file within that period, his judgment of conviction will become "final" as of the date that right lapses. But if he files for rehearing, his case should also continue, and his judgment of conviction should not be construed as "final" until the rehearing petition is resolved.

However, the holdings in the First, Second, Seventh, Ninth, and Eleventh Circuits[12] have not used that logic. Instead, they seem to have relied on a specific statement made by Justice Ginsburg in *Clay,* 537 U.S. at 527:

> Here, the relevant context is post-conviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. See *e.g.*, *Caspari*

11 S.Ct. Rule 44.2 states in relevant part: "Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial ... The time for filing a petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ will not be extended."

12 See *Rosa v. United States,* 785 F.3d 856, 857 (2d Cir.), *cert. denied,* 136 S. Ct. 270 (2015). ("The statute of limitations runs from the denial of certiorari, not from the denial of rehearing of the certiorari petition"). See *United States v. Aguirre-Ganceda,* 592 F.3d 1043, 1045 (9th Cir. 2010); *Drury v. United States,* 507 F.3d 1295, 1297 (11th Cir. 2007); *In re Smith,* 436 F.3d 9, 10 (1st Cir. 2006); *Robinson v. United States,* 416 F.3d 645, 650 (7th Cir. 2005).

> v. *Bohlen,* 510 U.S. 383, 390 (1994); *Griffith* v. *Kentucky,* 479 U.S. 314, 321, n.6 (1987); *Barefoot* v. *Estelle,* 463 U.S. 880, 887 (1983); *United States* v. *Johnson,* 457 U.S. 537, 542, n.8 (1982); *Linkletter* v. *Walker,* 381 U.S. 618, 622, n.5 (1965).

The statement that finality attaches "when this Court denies a petition for a writ of certiorari" from the citation above, and relied upon by all five circuits, is taken out of context. Justice Ginsburg focused her analysis in *Clay* specifically on when finality occurred *if no petition for certiorari is filed.* An analysis of her supporting cases and the precise holding of *Clay* confirms that neither the cited cases nor the actual holding in *Clay* deals with finality if a petition for rehearing is filed after the Supreme Court has denied a petition for certiorari.

Justice Ginsburg first looks to *Caspari* v. *Bohlen,* 510 U.S. 383, 390 (1994), a case in which defendant did not even file a petition for certiorari. Bohlen's criminal conviction became "final" after his 90-day period for filing a certiorari petition expired. *Caspari* relied on *Griffith* v. *Kentucky,* 479 U.S. 314, 321, n.6 (1987). In footnote 6 of *Griffith* we find the suspect language: "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari [is] finally denied." [Emphasis added]. The inclusion of "finally" confirms that there might be some further action after a mere denial of certiorari - such as the resolution of a petition

for rehearing - which might alter the effect of an initial denial.

In *Barefoot* v. *Estelle,* 463 U.S.880, 887 (1983), the language specifically states "When the process of direct review -- ...[which] includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence." [Emphasis added]. There is no explicit determination that upon denial of certiorari the process comes to an end. There is only a presumption of finality when the process of seeking review at the Supreme Court comes to an end. The process does not actually end with the denial of certiorari if a petition for rehearing is filed.

In *United States* v. *Johnson,* 457 U.S. 537, 542, n.8 (1982), the Court specifically inserted the phrase "petition for certiorari finally denied" into note 8: "By final, we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed [or a petition for certiorari finally denied...]." [Brackets and text in original.] The specific addition of the modifier "finally" to "denied" by the *Johnson* Court, with respect to a petition for certiorari was expressly added to language taken from *Linkletter* v. *Walker,* 381 U.S. 618, 622, n.5 (1965), and supports the proposition that there could be some further future action after the mere denial of certiorari - such as a petition for rehearing - which

might alter the effect of an initial denial of certiorari.

In all five cases reviewed in *Clay,* not one addresses the situation of when a petition for rehearing is filed after certiorari is denied. While *Clay* is clear and dispositive of the definition of "final" at the circuit court of appeals level, the holding has no direct applicability at the Supreme Court level.

Despite that limitation of *Clay,* in *Rosa v. United States*, 785 F.3d 856, 859 (2d Cir. 2015), the Second Circuit shows how they relied on *Clay* in the new and different situation - if a rehearing is requested after certiorari is denied.

> [T]he Supreme Court has held that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States,* 537 U.S. 522, 527... (2003) (*addressing situation where no certiorari petition was filed*); *accord Jimenez v. Quarterman,* 555 U.S. 113, 119 ... (2009) "With respect to post-conviction relief for federal prisoners, this Court has held that the conclusion of direct review occurs when this Court affirms a conviction on the merits on direct review or [finally] denies a petition for a writ of certiorari." (internal quotation marks omitted)[13]. Relying on *Clay,* our court has recognized that particular convictions became final on the dates the Supreme Court denied petitions for writs of certiorari in those cases. [Clarifications, footnote, and emphasis added.]

However, neither the reasoning nor the holding from *Clay* has been properly applied by the Second Circuit. Justice Ginsburg confirms in *Clay* that "§2255 simply leaves 'becomes final' undefined", [*Clay,* 537 U.S. at 529] and the holding in *Clay* only and explicitly states that "... for federal criminal defendants who do

13 The omitted citations refer to the same out of context statement from *Clay* relied on in *Rosa.*

not file a petition for certiorari with this Court on direct review, §2255's one-year limitation period starts to run when the time for seeking such review expires." *Id.* at 532.

Jimenez v. Quarterman, 555 U.S. 113 (2009), cited for support by *Rosa,* is another example of how a court took a statement from *Clay* out of context, and then disregarded the actual holding of *Clay.* In *Jimenez,* this Court reversed the Fifth Circuit, because the "process of direct review" has not "com[e] to an end" *Id.* at 685. This Court was concerned that "a presumption of finality and legality" cannot yet have "attache[d] to the conviction and sentence," because "petitioner's conviction was again capable of modification." *Id.* at 685-686.

Clay only deals with the situation when the defendant declines to file a petition for certiorari. *Clay* did not address what happens at the Supreme Court level, nor when a rehearing is requested after the denial for a petition for certiorari.

3. The Third Circuit dismissed this appeal, with a non-precedential order that failed to even consider the reasoning of the prior Third Circuit decision in *Kapral v. United States.*

After 28 U.S.C.§ 2255 was amended in 1996, but before the rule in *Clay* was established in 2003, the Third Circuit decided *Kapral v. United States*, 166 F.3d 565 (3d Cir. 1999). The Third Circuit reasoned that the limitations period under §2255 runs from the "conclusion of Supreme Court review". *Id.* at 576.

The Third Circuit further concluded that Congress did not intend "to disrupt

settled precedent by requiring that a criminal defendant pursue collateral relief before the time for seeking direct review expires and during a time period in which he or she may still rightfully be considering the wisdom of further direct review". *United States v. Thomas*, 203 F.3d 350, 354 (5th Cir. 2000) referencing *Kapral*, 166 F.3d at 570; and *Feldman v. Henman*, 815 F.2d 1318, 1320-21 (9th Cir. 1987). See I.C, *infra.*

In *Kapral,* the Third Circuit rejected the idea that waiting 90 days for seeking certiorari to expire would thwart AEDPA's goal of speeding up the collateral review process, reasoning that "it does not appear that Congress intended to encourage the commencement of collateral proceedings before a defendant has had a full and fair opportunity to litigate his or her claims on direct review." *Kapral*, 166 F.3d at 573. The Third Circuit also rejected the suggestion that the stringent requirements of AEDPA for seeking and obtaining collateral relief, §2255 must be interpreted to provide "as little time as possible for a defendant to file for collateral relief." *Ibid.*

Following this reasoning, filing for rehearing after certiorari is denied keeps open the door for further direct review, with a delay of only another 25 days; but until there is decision on that petition, the judgment cannot yet become "final". "[A] 'judgment of conviction [only] becomes final,' within the meaning of §2255 on the date when direct review ends and there is no opportunity for further direct review." *Kapral*, 166 F.3d at 578. (ALITO, J. concurring).

In this case, the Third Circuit had a perfect opportunity to clearly define a meaningful guideline for this specific situation - the definition of "final" under §2255(f)(1) when a petition for rehearing is filed after certiorari has been denied. Instead the Third Circuit issued non-precedential orders, which conflict with existing Third Circuit reasoning, as expressed in *Kapral.* (See Orders p.1a-2a and 5a-6a). The net result is that there is now no clear reasoning in the Third Circuit for when a case becomes "final" if a petition for rehearing is filed.

4. The Sixth Circuit and the D.C. Circuit have not decided this issue.

There is no precedential ruling available for the Sixth Circuit; and the D.C. Circuit has also not yet been asked to resolve this question, according to *Rosa*, 785 F.3d 856, n1.

5. This case can easily establish a uniform guideline for use by all circuits.

While *Clay* solved a portion of the problem with the definition of "final" in the context of 28 U.S.C. §2255(f)(1), its holding didn't finish the task. Although rare, the granting of a petition for rehearing, after certiorari is denied, does happen. Many litigants file for a rehearing, and while it may seem a futile gesture,[14] it will sometimes actually bear fruit.[15] At least two circuits have commented on the lack of

14 For statistics about the proportion of petitions for rehearing that are granted, see Gressman, Eugene *et al.*, *Supreme Court Practice* 814–15 (9th ed., BNA 2007).

15 Bruhl, Aaron-Andrew P., *When is Finality ....Final? Rehearing and Resurrection in the Supreme Court,* Journal of Appellate Practice and Process, Vol. 12, No.1 (Spring 2011).

guidance from this Court in the particular circumstances when a petition for rehearing is filed after certiorari is denied. It is an important issue. In *Rosa,* 785 F.3d at 859, the Second Circuit noted that: "Neither the Supreme Court nor [the Second Circuit] has yet decided when a conviction becomes final for AEDPA purposes under the circumstances present in this case." The Seventh Circuit agrees. See *Robinson v. United States*, 416 F.3d 645 (7th Cir. 2005) ("The Supreme Court has not directly addressed the effect of rehearing procedure on the finality of a conviction for purposes of §2255").

The comprehensive meaning of "final" in 28 U.S.C. §2255(f)(1) remains undefined for the circumstances where a rehearing is requested after certiorari is denied. There is still a need for uniformity and precision - especially when constitutional rights are at risk. If a Supreme Court rehearing is requested after certiorari is denied, the limitation date for finality should, consistent with the method in *Clay*, be calculated from the date the motion for rehearing is abandoned or, if requested, after rehearing is decided. Accepting certiorari in this case can establish a firm rule for application by all circuits, and will also provide the necessary notice to litigants, as is required by due process.

B. Holding that a conviction is final when there is another action that can change the result of the conviction contradicts common sense, especially when a plain English reading of the statute shows that a conviction cannot be final until the last possible action is either taken (and resolved) or that step is abandoned.

It is not logical to conclude that a process is final when there is at least one more possible step that, if taken, can change the outcome. Until the last step is completed, a legal proceeding cannot be "final". There is at least one more step in the legal proceeding if a rehearing by the Supreme Court is requested after certiorari has been denied. If the Supreme Court grants the petition for rehearing, the proceeding is not over. Furthermore, should the case be remanded for further action, the proceeding is still not over. The decision on remand may even be subject to further appeal, in which case the proceeding may move in an entirely different direction; so the proceeding will certainly not be over.

Holding that a judgment of conviction becomes "final" when certiorari is denied but before there is decision on a requested rehearing defies common sense. The plain English language of the statute in relevant part states: "A 1-year period of limitation ... shall run from the ... date on which the judgment of conviction becomes final."[16]

According to Webster's dictionary[17], "final" means:

> 1a : not to be altered or undone;
>
> 1b : of or relating to a concluding court action or proceeding;

16 28 U.S.C. §2255(f)(1).

17 https://www.merriam-webster.com/dictionary/final, last visited October 23, 2018.

2: coming at the end : being the last in a series, process, or progress;

3: of or relating to the ultimate purpose or result of a process.

Thus applied, logic, common sense, and plain English[18] dictate that the one year limitations date should properly be defined as commencing only after no other court action that might change the outcome is possible.

This common sense meaning of "final" is of particular importance because petitions under 28 U.S.C. §2255 are often filed by untrained *pro se* litigants, who, in the absence of a clear ruling by this Court, not only must rely on common sense but also must rely on the plain language meaning of words included in the English text of §2255(f).

If the court determination of "when a criminal conviction becomes final", and the statutory use of "final" are in conflict with plain English definitions, such that a judgment of conviction be defined as final at some point that is not quite the last procedural step, such a holding should be plain and unambiguous, and this Court should clearly say so.

18 In his concurring opinion in *Kapral,* Justice Alito performs a similar definitional analysis using *The Random House Dictionary.* See *Kapral,* 166 F.3d at 577.

C. A collateral attack may not be commenced until the underlying criminal conviction is "final". Holding that finality occurs when certiorari is denied, instead of after a requested rehearing is resolved after that denial, creates a potential paradox in the process itself.

Any paradox created by the indeterminate definition of "final" as currently found in the §2255(f)(1) statute has the potential to cause procedural and precedential nightmares. In order to be able to file a 2255 motion, the defendant must wait until his criminal conviction is "final". Any other rule would be inconsistent with well-settled principles of finality in the collateral review context. "Collateral attack is generally inappropriate if the possibility of further direct review remains open." See *Kapral*, 166 F.3d at 570; see also *Feldman v. Henman*, 815 F.2d 1318, 1320-21 (9th Cir. 1987). ("Such a rule would also be inconsistent with analogous Supreme Court precedent"). See *Griffith v. Kentucky*, 479 U.S. 314, 334 n.6 (1987) (federal conviction becomes final when a "judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied").[19] [Emphasis added.]

If the rule is, as multiple circuits have held for a variety of different reasons, that the conviction becomes final when certiorari is denied, rather than "finally denied," such as after a petition for rehearing is denied, then the one year period of limitations clock starts to run when certiorari is denied - but before the case may

19 *Griffith* is one of the cases Justice Ginsburg used to build her opinion in *Clay*.

actually be over. Such a holding leads to several potential problems.

Hypothetical 1:

The Defendant files a timely 2255 Motion within a year of the denial of certiorari and the Supreme Court then grants rehearing.

If the Supreme Court grants rehearing, the criminal conviction is no longer final - but the already "timely filed" 2255 motion is proceeding through the court system. What happens to the 2255 motion? Does the 2255 motion become suspended or nullified? If the 2255 motion is dismissed, does the defendant have to obtain permission to file a "second or subsequent 2255 motion" if the rehearing decision is unfavorable?

Suppose this Court grants certiorari after rehearing. What happens to the 2255 motion while the certiorari is pending? If the Supreme Court remands the case, what happens to the 2255 motion? It is now possible that there would be two separate actions pending within the lower court system for the same case at the same time.

Now suppose the district court grants relief under the 2255 motion, and overturns all or a part of the conviction, but on rehearing this Court affirms the conviction. Which decision controls?

Hypothetical 2:

The defendant waits to file a 2255 Motion but the denial of his petition for rehearing comes more than one year after the denial of certiorari.

Now consider what happens if, in order to avoid multiple actions pending for

the same case at the same time, the defendant decides to wait for a decision on his petition for rehearing, and doesn't file his 2255 petition until after the Supreme Court denies his rehearing. Significant time could pass before the rehearing petition is denied.

The defendant has a period of twenty-five (25) days within which to file his petition for rehearing. There is no express time limitation in the Supreme Court rules as to when a decision on rehearing is required by the Court, but the process will most likely be concluded in as little as a few weeks, although it could potentially take much longer.

What happens if the rehearing request is filed during this Court's recess at the end of term? Under Supreme Court Rule 44.6, if there is a "technical" error in the petition for rehearing - which is not unlikely with *pro se* litigants - the clerk will return the filing to the petitioner who will have an additional fifteen (15) days, after the date of the clerk's letter, to correct the error and re-file.[20] There is no time set for the clerk to return the petition. With *pro se* litigants it is not inconceivable that there might be multiple errors, requiring multiple cycles of correction and re-filing after the clerk's letter(s). Then under Supreme Court Rule 44.3, if a petition for rehearing is accepted, there will normally be a response requested by the Court.[21]

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20 Rule 44.6 If the Clerk determines that a petition for rehearing submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition for rehearing submitted in accordance with Rule 29.2 no more than 15 days after the date of the Clerk's letter will be deemed timely.

21 Rule 44.3 The Clerk will not file any response to a petition for rehearing unless the Court

There is no specified period for requesting a response, nor is there a deadline for preparing and filing that response.

When all of the potential time periods specified in court rules and the possible procedural delays are accumulated and then added to the normal delays of the prison mail delivery system, there may be a significant time lag after denial of certiorari before the rehearing issue is ultimately resolved. It is even conceivable that a year may pass before resolution of the rehearing petition.

If the Supreme Court then denies a rehearing, the criminal proceeding is now over, as nothing else can be done to directly attack the judgment of conviction. But if a year has passed since denial of certiorari, any 2255 motion would now be deemed to be time-barred. Does the defendant then lose his opportunity for a post conviction review because he can no longer file a timely 2255 motion? Does the defendant lose his constitutional right to one complete *habeas* review?

Clarification of the definition of "final" should prevent any paradox.

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requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.

D. The importance of a defendant's right to a *habeas* review outweighs the minor inconvenience to a prisoner (or to the courts) for any delay resulting from a determination that a conviction does not become final until a petition for rehearing (if filed) is resolved.

For an incarcerated defendant, having his 2255 motion heard is far more important than a short passage of time before he can file his 2255 motion.

In commenting on a federal review of a state *habeas* matter, under 28 U.S.C. §2244, former Supreme Court Justice Stevens addressed the constitutional impact of both the issue of a dismissal on defective procedural grounds as well as the issue of finality of a judgment[22]:

> Unfortunately, the Court underestimates the significance of the fact that petitioner was effectively shut out of federal court without any adjudication of the merits of his claims because of a procedural ruling that was later shown to be flatly mistaken. ... "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas,* 571 U.S. 314, 324 (1996); see also *Slack v. McDaniel,* 529 U.S. 473, 483 (2000) (The writ of habeas corpus plays a vital role in protecting constitutional rights.") When a habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of the judgment. Indeed the State has experienced a windfall, while the ... prisoner has been deprived - contrary to congressional intent - of his valuable right to one full round of federal habeas review. [Emphasis added].

The principals enumerated by Justice Stevens should also be applicable to

22 See *Gonzalez* 545 U.S. 524, 541 (2005).

federal *habeas* proceedings under 28 U.S.C. §2255. Because of the identified indeterminate meaning of "final" in 28 U.S.C. §2255(f)(1), it is a particularly unfair consequence to deprive a petitioner of his *habeas* rights, based on an interpretation that is beyond his scope of understanding and outside his level of information. No one should lose an important constitutional right based on the imprecise definition of a critical term.

While a petition for rehearing is being dealt with by this Court, the respective impact of the passage of time[23] - for the defendant as well as for the court system - should be balanced against the potential loss of an important constitutional right, and in the end, the result should be resolved in favor of the constitutional right. Due process requires a plain and concise definition of when the judgment of conviction becomes "final". If this Court makes a definitive ruling, as requested by several Circuit Courts of Appeal, all circuits will have a clear rule to follow.

23 Supreme Court Rules provide for a very short twenty-five day period to petition for rehearing, and a decision on that petition will likely be rendered in a few weeks. Also see n.11, p.11.

E. Improper application of §2255 may be an unconstitutional suspension of the Writ of *habeas corpus.*

The common law writ of *habeas corpus* predates the Magna Carta, and is so critical to our system of jurisprudence that it is expressly included within the text of the United States Constitution itself at *U.S. Const. art.I, §9, cl.2.* When Congress passed the AEDPA, and imposed a one-year statute of limitations, §2255 was no longer coextensive with *habeas corpus* as it existed at common law, where applications for the writ were never time-barred nor limited in number.

Recently, in an unsigned note, *Suspended Justice: The Case Against 28 U.S.C. §2255's Statute of Limitations*, 129 Harv. L. Rev. 1090, 1096 (2016), the author noted that "close attention to §2255's evolution and to the reasoning underlying the Court's few Suspension Clause cases suggests that it may be possible to establish that §2255's statute of limitations constitutes a suspension [of *habeas* rights]." The article further comments that the "principles espoused in the Court's Suspension Clause cases suggest that AEDPA constitutes an unconstitutional suspension of habeas corpus to prisoners convicted under federal law." *Id.* at 1098.

For all of the above reasons, certiorari should be accepted by this Court, to resolve Question One, and complete the definition of "final" for the purposes of 28 U.S.C. §2255(f)(1).

II. Failure to establish the factual record needed for a valid determination of timeliness under 28 U.S.C. §2255(f)(4) is a due process violation, which can be remedied by a grant, vacate and remand order.

When ordered to respond to the original 2255 motion ("the ***original* 2255 motion**") by the district court, attorneys for the government instead filed a motion to dismiss by misrepresenting the timeliness of the *original* 2255 motion - under both §2255(f)(1)[24] and §2255(f)(4). However, the unrebutted facts contained in the motion itself - the discovery of suppressed *Brady* material only two months before the 2255 motion was filed - confirmed that the motion was certainly timely filed under §2255(f)(4).

No hearing was held before the district court to resolve any questions of fact, and the district court seemingly just accepted the mere conjectures[25] of the government as "fact". The district court's dismissal order provided no explanation of its reasoning, but just granted the government's motion to dismiss the *original* 2255 motion as "untimely filed". (p.11a). Making a ruling contrary to the facts of record, without holding a hearing, is a due process violation which the Third Circuit should have addressed.

After the motion to dismiss the *original* 2255 motion as time-barred was granted, timeliness under §2255(f)(4) was specifically addressed in a Rule 59(e)

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24 Timeliness under §2255(f)(1) is addressed in detail in Part I, *supra.*

25 As noted in the Statement of the Case, (p.4 *supra.*), and n.3 of Background, (p.5 *supra.*), the government simply asserted that the significant passage of time made it impossible for new, undiscovered evidence to emerge - which was especially misleading because the new evidence that emerged was *Brady* material successfully suppressed by the government since 2008.

motion for reconsideration. The district court, again without comment, denied the Rule 59(e) motion. (p.10a). The district court, for a third time, was informed of the timeliness under §2255(f)(4) through a Rule 60(b) motion for relief from the dismissal order, which attacked only the improper dismissal of the 2255 motion, not the conviction itself. To inform the district court a fourth time, a *revised copy* of the original 2255 motion was re-submitted - just before the §2255(f)(4) limitations date would have passed. These motions were denied - again without any hearing, comment, or reasoning. (p.9a).

A. Errors by the Third Circuit in the *First* Appeal (#17-1711).

In dismissing a first appeal, the Third Circuit denied a COA, even while the Rule 60(b) motion was still pending before the district court. As a consequence of the first dismissal, the district court's decisions - to ignore the §2255(f)(4) limitation date and/or to allow the critical date to be determined without benefit of testimony or factual inquiry determination - were affirmed. (See Order p.5a-6a) The Third Circuit has previously correctly dealt with the issue of an insufficient record to justify a timeliness determination under §2255(f)(4); but the Third Circuit failed to apply its own prior reasoning in this case.

In *United States v. Johnson*, 590 Fed. Appx. 176 (3d Cir. 2014), after a district court entered an order denying a 2255 Motion as untimely filed, the Third Circuit noted that the district court "completely missed altogether that Johnson's efforts to file a 2255 motion were timely under the discovery rule of §2255(f)(4)."

Johnson, 590 Fed.Appx. at 179. The Third Circuit held that the denial of Johnson's motion was based on an insufficiently developed record, and then ruled that without findings of fact it was error to deny Johnson's motion as untimely. The case was remanded to the district court to "determine whether Johnson's request for leave to file a 2255 motion was timely under §2255(f)(4)". *Id.* at 180. Failing to apply the *Johnson* reasoning in this case, the Third Circuit did not remand the case for a proper factual determination and supplemented record. Instead, the Third Circuit, like the district court, simply denied a COA and dismissed the matter.

In *Buck v. Davis*, 137 S. Ct. 759 (2017),[26] this Court held that there is a very low threshold for granting a COA. When constitutional issues arise, this Court also expressed its preference for a decision "on the merits" rather than a dismissal for improper procedural reasons. *Buck* was decided before the Rule 59(e) motion for reconsideration, highlighting *Buck,* was filed. This district court denied the Rule 59(e) motion - again without a factual analysis or any explanation of its reasoning - seemingly ignoring *Buck.* (See Order p.10a). The first appeal was then filed with the Third Circuit. (#17-1711).

The Third Circuit overlooked the lack of any record from the district court.

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26 Although the *Buck* decision was issued after the dismissal of a 2244 motion by a district court, because of the similarity between §2244 and §2255, the usual practice in the Third Circuit in AEDPA cases is to apply the same reasoning to both sections. *Kapral,* 166 F.3d at 581 n.6. citing *Miller v. New Jersey State Dep't, Corrections*, 145 F.3d 616, 618 n.1 (3d Cir. 1998) ("[W]e have followed the practice, whenever we decide an AEDPA issue that arises under §2244 and the same holding would analytically be required in a case arising under §2255, or vice versa, of so informing the district courts.")

They also overlooked the lack of any factual determination under §2255(f)(4). The panel seemingly overlooked *Buck.* Instead of following the prior Third Circuit *Johnson* case, which was remanded for a determination of whether Johnson's 2255 motion was timely under §2255(f)(4), this panel denied a COA, and just dismissed the case, without ever addressing the timeliness under §2255(f)(4). (See Order p.5a-6a). A motion for reconsideration or for rehearing *en banc* was then also denied. (See Order p.7a-8a).

B. Errors by the Third Circuit in the *Second* Appeal (#17-3710) overlooking the still unresolved Rule 60(b) motion which attacked a defect in the integrity of the *habeas* proceedings.

At the time the Third Circuit dismissed Appeal 17-1711, a proper[27] Rule 60(b) motion, (the "***proper* Rule 60(b) motion**"), was still before the district court. Just before the §2255(f)(4) limitations date arrived, a copy of the original 2255 motion, ("the **2255 *copy***"), was re-submitted to remind the district court of the important §2255(f)(4) date. After the critical date had passed, the district court then treated the 2255 *copy* as "an unauthorized second or subsequent [2255] motion," submitted without a court of appeals authorization. The district court disclaimed jurisdiction; dismissed the 2255 *copy*; and then generically denied all "remaining pending motions" - including the outstanding *proper* Rule 60(b) motion. Once again, no reasoning was given by the district court. (See Order p.9a).

A second appeal was now necessary, and the timeliness of the *original* 2255

27 A "proper" Rule 60(b) motion attacks the integrity of the habeas proceeding rather than challenging the merits of the conviction itself. See Breyer, J. concurrence in *Gonzalez, infra.*

motion under §2255(f)(4) again came before the Third Circuit (#17-3710)[28]. The Third Circuit again denied a COA, treated the 2255 *copy* as a court-created new Rule 60(b) motion, ("the ***new* Rule 60(b) motion**"), and dismissed the entire appeal. The Third circuit never addressed the denial of the *proper* Rule 60(b) motion - which was entitled to an appeal of right under Fed.R.App.P. 4.

In that confusing ruling, the Third Circuit committed three errors of law[29] when it stated that "a certificate of appealability is not warranted because [appellant] failed to make a substantial showing, see 28 U.S.C. §2253(c), that the limitations period should have been extended under §2255(f)(4)"; denied a COA; and just dismissed the appeal - without addressing the *proper* Rule 60(b) motion. (See Order p.1a-2a).

Justice Breyer has noted that: "a proper Federal Rule of Civil Procedure 60(b) motion 'attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.' " *Gonzalez v. Crosby,* 545 U.S. 524, 538 (2005) (BREYER, J. concurring). The *proper* Rule 60(b) motion submitted in this case did not attack the conviction. It specifically challenged the unexplained dismissal of the *original* 2255 motion as

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28 This second appeal expressly challenged the denial of the *proper* Rule 60(b) motion which only attacked the integrity of the habeas proceeding and only sought relief from the first unsupported dismissal order, but did not attack the conviction itself.

29 First, the suppression of *Brady* material is a *per se* violation of constitutional due process; failure of the district court to create a record of its reasoning is another due process violation. Second, the Third Circuit failed to review the unexplained denial of the *proper* Rule 60(b) motion. Third, because there was no record produced by the district court for review, the Third Circuit never determined if the *original* 2255 motion was timely under §2255(f)(4).

time-barred - a challenge to the integrity of the habeas proceeding. The *proper* Rule 60(b) motion was entitled to an appeal of right. Instead, this *proper* Rule 60(b) motion was overlooked by the Third Circuit.[30]

The federal statute, 28 U.S.C. §2255(f), expressly defines timeliness as the latest of four defined dates. There is no requirement to make a substantial showing that the limitations period should have been "extended" under §2255(f)(4). Timeliness is a question of fact. Supporting facts were explicitly laid out in the pleadings, which form a *prima facie* basis for determining the timeliness of this motion under §2255(f)(4). The Third Circuit has never reviewed the timeliness issue because no record from the district court was produced. The Third Circuit failed to follow its own prior holding - overlooking *Johnson* now for a second time - by not remanding the case to the district court to "determine whether [the *original*] §2255 motion was timely under §2255(f)(4)". *Johnson,* 570 Fed. App'x. at 180.

A motion for reconsideration or rehearing *en banc*, again specifically directed the Third Circuit to the overlooked *proper* Rule 60(b) motion, which only attacked the integrity of the habeas proceeding - based on the unfounded dismissal of the *original* 2255 motion as time-barred. Further, the Third Circuit was again reminded of its prior holding in *Johnson,* which found error in the district court's

30 The Third Circuit Order (p.1a-2a) only addresses the *new* Rule 60(b) motion as construed by the court from the 2255 *copy* filed to remind the district court of the approaching 2255(f)(4) date. Denial of the *proper* Rule 60(b) motion never received appellate review.

failure to develop a sufficient record, and remanded the Johnson case for additional fact finding. In this case, the Third Circuit has neither addressed the *proper* Rule 60(b) motion, nor has it addressed the lack of a record by the district court to assess timeliness of the *original* 2255 motion under §2255(f)(4) - which is a denial of due process. The Third Circuit again denied reconsideration and rehearing. (See Order p.3a-4a).

Accepting this petition enables this Court to grant certiorari, vacate the rulings of the lower court, and remand the case for a factual determination to properly ascertain whether the *original* 2255 motion was timely under §2255(f)(4).

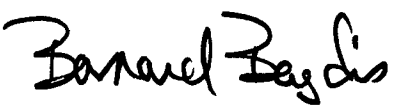
CONCLUSION

This case provides an opportunity, under Question One, for this Court to grant this petition for a writ of certiorari to the Court of Appeals for the Third Circuit, for the purpose of properly defining the meaning of "final" under 28 U.S.C. §2255(f)(1) when a petition of rehearing is filed after a petition for certiorari is denied.

In the alternative, under Question Two, Petitioner requests that this Court grant certiorari, vacate the decision of the Third Circuit, and remand for further proceedings to develop a proper fact-based determination of timeliness of the *original* 2255 motion under 28 U.S.C. §2255(f)(4).

For all of the foregoing reasons, the Writ of Certiorari should issue.

Respectfully submitted,



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