No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GINO VELEZ SCOTT,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a classic example of the injustice that flows from the Eleventh Circuit rule that when the government suppresses material evidence until after the defendant's numerically-first post-conviction motion is concluded, the defendant may not challenge the government misconduct unless he can satisfy the gatekeeping provision of 28 U.S.C. § 2255(h), requiring a showing of actual innocence.

Though bound to follow that rule, the Eleventh Circuit Panel below emphasized that the rule "not only corrodes faith in our system of justice, but it undermines justice itself, and it cannot be allowed." The Panel thus urged the en banc court to rehear the case and reconsider its rule. The en banc court, however, declined to do so. Petitioner Gino Scott thus respectfully requests certiorari review on the following federal question of exceptional importance:

> Where a numerically-second § 2255 motion raises an actionable *Brady/Giglio*[1] violation that (a) the government suppressed until after the conclusion of the defendant's numerically-first § 2255 motion, and (b) the defendant could not have discovered until the government revealed it, does the Constitution and this Court's precedent require that the numerically-second § 2255 motion not be subjected to the "gatekeeping" requirements of a "second or successive" motion?

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

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PETITION FOR A WRIT OF CERTIORARI

Gino Velez Scott respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals affirming the denial of his motions for post-conviction relief under 28 U.S.C. § 2255.

OPINION BELOW

The Eleventh Circuit's opinion, as reported at 890 F.3d 1239 (11th Cir. 2018), is set forth in Appendix A. The orders denying panel and en banc rehearing are provided in Appendix B. The district court orders denying the numerically-second § 2255 motion are attached as Appendix C and Appendix D.

JURISDICTION

The United States District Court for the Middle District of Florida, Jacksonville Division, had jurisdiction over Mr. Scott's case originally under 18 U.S.C. § 3231, and in the instant post-conviction proceedings under 28 U.S.C. § 2255. The district court denied Mr. Scott's § 2255 motions, but granted a certificate of appealability. App. C and D. The Eleventh Circuit affirmed on May 23, 2018, App. A, and denied rehearing by the panel and the court en banc on August 16, 2018, App. B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Suspension Clause, Article I, Section 9, clause 2, of the United States Constitution provides in pertinent part:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U. S. Const. art. I, § 9, cl. 2.

The Due Process Clause of the Fifth Amendment to the Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U. S. Const. amend. V.

Section 2255 of the United States Code, Title 28, provides in relevant part:

> (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.
>
> * * *
>
> (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.

* * *

(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.

28 U.S.C. § 2255.

STATEMENT OF THE CASE

The facts necessary to resolve the sole question of law presented herein are simple. The government suppressed *Brady/Giglio* evidence relating to its star witness at Petitioner Scott's trial until after the conclusion of Scott's numerically-first § 2255 motion. And the government misrepresented that the evidence did not exist when Scott tried to discover it during trial, on direct appeal, and in the numerically-first § 2255 proceedings. When the government finally revealed the evidence, Scott was precluded from litigating the *Brady/Giglio* violation because his numerically-second § 2255 motion was deemed "second or successive."

To put those facts in context, the rather lengthy procedural history of the case is discussed below.

1. Scott's trial. Scott was tried and convicted in the Jacksonville Division of the Middle District of Florida in 2004, on the charge of conspiracy to possess with the intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. §§ 841, 846. The government's star witness at Scott's trial, paid DEA-informant Freddy Pena, orchestrated the reverse sting that resulted in Scott's indictment and conviction. Before trial, the government represented that it had disclosed to defense counsel all *Brady/Giglio* material relating to Pena. Defense counsel relied on that representation and did not investigate Pena's honesty or trustworthiness.

During direct examination of Pena, the prosecutor elicited Pena's testimony that he had never given "false or misleading" testimony or information to the DEA while employed as an informant. And during his closing argument, the prosecutor

told the jury that although Pena had been convicted of conspiracy to distribute heroin in the 1990s, he had "paid his debt to society, accepted responsibility, and then he moved on into this line of work that involved essentially working with DEA in 2001."[2] Further, the prosecutor told the jury, "there was also no question that [Pena] had performed successfully for DEA in the past and they continued to use him."

2. Scott's direct appeal. On direct appeal, Scott argued that the district court should have continued his trial so defense counsel could have obtained further information regarding Pena.[3] In response, the government wrote:

> The crux of his argument is his wholly unsupported claim that the United States could not possibly be trusted to have performed its obligation under *Brady* to reveal or identify impeaching information about Pena and that Scott should have been permitted to engage in a fishing expedition involving Pena's testimony in over a dozen other trials to see if he could dig up something.

United States v. Scott, 2005 WL 4735498, *15 (11th Cir. Feb. 2, 2005) (App. No. 04-15248) (Brief of the United States). The government then chided Scott for failing to establish the existence of any additional information regarding Pena's untrustworthiness and dishonesty. *Id.* at *21 ("Importantly, even now, Scott fails to suggest what impeachment material he would have found in Pena's testimony from other DEA prosecutions had he been furnished pre-trial with information concerning those prosecutions.").

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[2] The prosecutor relied heavily on Pena during his closing argument, mentioning Pena by name 25 times.

[3] *See United States v. Scott*, 2004 WL 4973688 (11th Cir. Dec. 1, 2004) (App. No. 04-15248) (Brief of Appellant Scott).

In affirming Scott's conviction, the Eleventh Circuit agreed with the government, stating:

> Scott has failed to demonstrate how his substantial rights were affected by the court's failure to grant a continuance, as he has not explained how, with the benefit of additional time, he could have impeached Pena's testimony, nor has he identified any information about Pena that would have changed the outcome of his trial had he learned the information sooner.

United States v. Scott, 136 F. App'x 273, 276 (11th Cir. 2005) (App. No. 04-15248) (internal citation omitted).

3. Scott's numerically-first § 2255 motion. In 2006, Scott timely filed his numerically-first 28 U.S.C. § 2255 motion, claiming ineffective assistance of counsel for failing to investigate regarding Pena. In response, the government represented that no prejudice resulted because there was no further evidence that counsel could have uncovered. The district court relied on the government's representation in denying Scott's § 2255 motion in 2008.

4. The truth revealed. In 2011, the government admitted that it possessed evidence concerning Pena's dishonesty and untrustworthiness that it had not disclosed to Scott. The DEA initially activated Pena as an informant in the Tampa Division of the Middle District of Florida. In 2002, the DEA learned that Pena had not been honest with his DEA handlers. Pena had withheld the fact that he had lied about the source of the heroin he had trafficked in, and that he and another DEA informant had stolen 1.5 kilograms of cocaine from a drug dealer who was a DEA target. When the DEA office in Tampa discovered this evidence in 2002, it moved Pena to "restricted use," with an Assistant U.S. Attorney commenting that

he would be hesitant to use Pena again. A few months later, the DEA in Jacksonville activated Pena to investigate Scott.

5. Scott's numerically-second § 2255 motion. When the government revealed the evidence it had been suppressing since Scott's trial,[4] Scott promptly filed another § 2255 motion raising the *Brady/Giglio* issue. But by then, according to the district court, it was too late.

Despite finding that Scott "could not possibly have discovered the factual predicate underlying the current *Brady/Giglio* claims before he filed his initial §2255 motion (because the government was withholding it)," App. C at 6, the district court dismissed Scott's numerically-second §2255 motion as "second or successive" based on binding Eleventh Circuit precedent—*Tompkins v. Sec'y, Dep't of Corrections*, 557 F.3d 1257 (11th Cir. 2009) (holding that a numerically-second § 2254 petition that raised a *Brady/Giglio* claim is a "second or successive" petition, subject to the gatekeeping provisions of § 2244(b)).

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[4] While the individual Assistant U.S. Attorney who prosecuted Scott and responded to his 28 U.S.C. § 2255 motions claimed he was unaware of this evidence until 2011, he never explained how he was able to remain "unaware" when other prosecutors in his office were aware of it. More importantly, he never disputed that his agents knew of it. Scott was not afforded an evidentiary hearing below to explore why the prosecutor and his agents failed to disclose this evidence because the district court dismissed Scott's § 2255 motion as being "second or successive."

The dismissal of Scott's numerically-second § 2255 motion gave rise to his appeal, No. 15-11377, for which the district court granted a certificate of appealability on the following issue:

> Whether, under *Tompkins v. Sec'y, Dep't of Corrections*, 557 F.3d 1257 (11th Cir. 2009), a numerically-second motion to vacate is "second or successive" when raising a claim that was previously unavailable because the government withheld evidence relevant to the claim until after the district court resolved the first motion to vacate.

App. D at 2.

The district court also reopened Scott's numerically-first § 2255 motion and allowed Scott to address the newly-disclosed *Brady/Giglio* material in the context of his ineffective assistance of counsel claim. The court reopened the proceedings because the government's false representation in 2006 had formed the basis for the district court's denial of Scott's numerically-first § 2255 motion. *See* App. C at 25-26. The district court nonetheless denied that § 2255 motion again, reasoning that counsel could not be ineffective for failing to investigate Pena because counsel was entitled to trust the government to divulge any exculpatory or impeachment evidence against Pena. Scott appealed that ruling too, Appeal No. 15-11950. The Eleventh Circuit consolidated the two appeals, and affirmed the denial of both § 2255 motions. *See* App. A.

6. The appeal of the numerically-second § 2255 motion. Like the district court, the Eleventh Circuit Panel was sympathetic to Scott's dilemma, but was powerless to do anything about it because, under the prior precedent rule, the court was bound to follow *Tompkins*.

The Panel, however, proceeded to explain why *Tompkins* is "fatally flawed," conflicts with this Court's decision and reasoning in *Panetti v. Quarterman*, 551 U.S. 930 (2007), and effectively results in a suspension of the writ of habeas corpus. App. A. The Panel thrice urged the Eleventh Circuit to reconsider *Tompkins* en banc and "establish the rule that our Constitution and Supreme Court precedent require." App. A at 1244, 1258, 1259. The Eleventh Circuit declined to do so. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This Court's decision in *Panetti v. Quarterman*, as well as the Due Process and Suspension Clauses of the Constitution, require that a numerically-second § 2255 motion not be subjected to the "gatekeeping" requirements of a "second or successive" motion if (a) the motion raises an actionable *Brady/Giglio* violation that the government suppressed until after the conclusion of the defendant's numerically-first § 2255 motion; and (b) the defendant could not have discovered the violation until the government revealed it.

The government — i.e., the prosecutor and his agents[5] — successfully withheld significant evidence from Scott during his trial, direct appeal, and numerically-first § 2255 motion. The government then actively thwarted Scott's attempts to challenge his conviction based on that evidence by falsely representing to the courts below and Scott that such evidence did not exist. It was not until Scott's numerically-first § 2255 motion had become final that the government finally admitted the existence of that evidence. By then, however, Scott was faced with the Eleventh Circuit rule relegating numerically-second post-conviction motions that raise actionable *Brady/Giglio* violations to the status of being "second or successive." Based on that rule, the Eleventh Circuit Panel below was mandated to affirm the

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[5] *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (holding that a "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. But whether the prosecutor succeeds or fails in meeting this obligation ... the prosecution's responsibility for failing to disclose known, favorable evidence ... is inescapable.").

denial of Scott's numerically-second § 2255 motion. The Panel, however, emphasized the importance of the issue and the need for further review.[6]

In urging the Eleventh Circuit to rehear the matter en banc, the Panel opinion explained why the Eleventh Circuit rule — which "rewards the government for its unfair prosecution and condemns the petitioner for a crime that a jury in a fair trial may well have acquitted him of" — "not only corrodes faith in our system of justice, but it undermines justice itself, and it cannot be allowed." App. A at 1244. The Panel opinion expounded on how the Eleventh Circuit rule conflicts with this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), as well as the United States Constitution's Due Process and Suspension Clauses. The Eleventh Circuit en banc, however, denied rehearing, leaving this Court with the final opportunity to consider and correct the injustice wrought by the Eleventh Circuit rule that prevented the courts below from considering the merits of Scott's *Brady/Giglio* issue.

Scott respectfully requests that this Court grant certiorari review to address whether the government can preclude consideration of actionable *Brady/Giglio* violations by suppressing the evidence and falsely representing it does not exist until after the defendant's numerically-first § 2255 motion has concluded.

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[6] *See* App. A at 1243 ("Establishing the correct rule and framework for determining whether any particular numerically second collateral motion based on a *Brady* claim is cognizable is critically important to maintaining the integrity of our judicial system.").

A. This Court set forth the framework for determining when a numerically-second post-conviction motion is "second or successive" in *Panetti*.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) places a virtually insurmountable burden on defendants who attempt to bring a "second or successive" § 2255 motion based on newly discovered evidence. *See* 28 U.S.C. § 2255(h), (requiring a showing of actual innocence). But not all numerically-second § 2255 motions are "second or successive" within the meaning of the AEDPA.

This Court addressed the meaning of "second or successive" in *Panetti*, directing courts interpreting the AEDPA to consider the AEDPA's purposes — i.e., "to further the principles of comity, finality, and federalism" — and "the practical effects of our holdings — including the "implications for habeas practice" and the abuse of the writ doctrine. 551 U.S. at 945-47. "This is particularly so when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review . . . .'" *Id.* at 945-46. The Court, thus, has "resisted an interpretation of the statute that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Id.* at 946 (quoting *Castro v. United States*, 540 U.S. 375, 380-81 (2003)).

Applying that framework to the particular claim the defendant sought to raise in *Panetti* — a challenge to a pending execution based on the defendant's mental incompetence, in light of *Ford v. Wainwright*, 477 U.S. 399 (1986) (*Ford* claim) — this Court held that the defendant's numerically-second § 2254 motion was not "second or

successive." This Court explained that the *Ford* claim did not ripen until after the defendant's numerically-first habeas petition was concluded, and requiring the defendant to prematurely raise the claim to preserve it before it became ripe would have "far reaching and seemingly perverse" implications for habeas practice. 551 U.S. at 943.

The Eleventh Circuit Panel below applied *Panetti*'s analysis in the present context. App. A at 1247-53. The Panel first pointed to the deleterious effects on habeas practice that would result from denying judicial review of newly-revealed *Brady/Giglio* violations that the defendant could not have discovered on his own. *Id.* at 1250-51. Second, the Panel explained how finality concerns do not justify precluding habeas review of *Brady/Giglio* violations "where the government's failures affirmatively and entirely prevented" the defendant from raising them in his numerically-first post-conviction motion. *Id.* at 1251-52. Third, the Panel demonstrated how precluding such claims is inconsistent with the abuse-of-the-writ doctrine. *Id.* at 1252-53.

The Panel then concluded: "[A]ll the *Panetti* factors — the implications for habeas practice, the purposes of AEDPA, and the abuse-of-the-writ doctrine — compel the conclusion that numerically-second *Brady* claims cannot be 'second or successive' for purposes of § 2255(h)." *Id.* at 1253 (footnote omitted). At a minimum, that well-reasoned conclusion requires further exploration by this Court.

B. The Eleventh Circuit narrowly restricted *Panetti* to *Ford* claims, thereby running afoul of the Constitution.

In *Tompkins,* the Eleventh Circuit read *Panetti* as being limited to *Ford* claims — a reading that is belied by the language and analysis of *Panetti*. *See* App. A at 1254-56. According to the Eleventh Circuit, however, *Brady/Giglio* violations are unlike *Ford* claims because the *Brady/Giglio* violation occurs in the trial proceedings, rendering it "ripe" for inclusion in a numerically-first post-conviction motion. *Tompkins,* 557 F.3d at 1259-60.

It is respectfully submitted that the Eleventh Circuit's novel interpretation of "ripeness" defies common sense and reality. How can a *Brady/Giglio* claim be "ripe" if the government is denying the existence of the claim and suppressing the evidence to establish it? Surely, this interpretation of "ripeness" warrants this Court's intervention. *See* App. A at 1256.

Moreover, the Eleventh Circuit rule announced in *Tompkins*, and applied here, "effects a suspension of the writ of habeas corpus" for the narrow subset of defendants who could not have discovered the *Brady/Giglio* violation that the government suppressed until after the numerically-first post-conviction motion was denied, but who would have had a reasonable probability of acquittal if the suppressed evidence had been timely disclosed. App. A at 1259; *see also id*. at 1251 ("imprisoning someone based on the results of an unfair trial and then precluding any remedy at all might well work a suspension of the writ of habeas corpus"); U.S. Const., Art. I, § 9, cl. 2.

Furthermore, the Eleventh Circuit rule signals to the government and its agents that if they just hide exculpatory evidence long enough to allow the

defendant's numerically-first § 2255 motion to conclude, they need not worry about due process or fundamental fairness, because the defendant will be precluded from litigating the *Brady/Giglio* violation.[7] Certainly that is not the message Congress or this Court intended to send.

Certiorari review of the Eleventh Circuit rule is thus imperative and will enable this Court to fashion a rule that applies the proper framework for determining whether/when newly-revealed *Brady/Giglio* violations can be raised in a numerically-second § 2255 motion.

C. An actionable *Brady/Giglio* violation — that the defendant could not have discovered earlier and that the government suppressed and repeatedly denied the existence of — is in a special category of claims that should not be barred from review under the AEDPA's gatekeeping provisions.

While the gatekeeping provision of § 2255(h) purports to apply to successive motions containing claims based on "newly discovered evidence," the "newly discovered evidence" in Scott's case is of a special kind. This Court has explained why it is different:

> [T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's

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[7] *See generally* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 275, 279-80 (2007) (collecting studies finding alarming rates of *Brady* violations resulting in criminal convictions).

obligation to serve the cause of justice.

United States v. Agurs, 427 U.S. 97, 110-11 (1976); *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 359 (2006) ("In the case of a *Brady* claim, it is impossible for the defendant to know as a factual matter that a violation has occurred before the exculpatory evidence is disclosed.")

Just so here: Scott should not have to satisfy the almost insurmountable obstacles erected by 28 U.S.C. § 2255(h), as opposed to the showing of materiality applicable to *Brady/Giglio claims*, merely because the evidence was suppressed by the government until after his numerically-first § 2255 motion became final. This Court has declared,

> [*Brady* and its progeny] illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Strickler v. Greene, 527 U.S. 263, 281 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *cf. Banks v. Dretke*, 540 U.S. 668, 695-96 (2004) ("Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.").

And to hold that *Brady/Giglio* claims, when diligently pursued once they are made known, are not subject to the gatekeeping provisions of § 2255(h), does not render superfluous the newly discovered evidence language contained in § 2255(h). There are many examples of newly discovered evidence that proceeds from "neutral

sources." *Agurs*, 427 U.S. at 110-11. One such example are exculpatory affidavits which appear many years after the conviction is final. *See, e.g., Herrera v. Collins,* 506 U.S. 390, 423 (1993) (O'Connor, J., concurring) ("Affidavits like these are not uncommon . . . Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism."). This is the sort of "newly discovered evidence" that Congress intended to be subject to the AEDPA gatekeeping provisions for second or successive petitions — evidence proceeding from neutral sources, not evidence suppressed by the government in violation of "the prosecutor's obligation to serve the cause of justice." *Agurs*, 427 U.S. at 111.

"Congress also enacted AEDPA to reduce delays in the execution of state and federal sentences, promote judicial efficiency, and conserve judicial resources." *Douglas v, Workman*, 560 F.3d 1156, 1195 (10th Cir. 2009). "But again, here, any delay, inefficiency, or waste of judicial resources stems from the prosecution, not Mr. [Scott]." *Id*. It cannot have been Congress's intent in enacting AEDPA to encourage the government to conceal impeachment evidence about its key witnesses until it is too late, preventing the habeas petitioner from asserting the existence that evidence in his initial habeas petition and thereby insulating egregious government behavior from any habeas review. *Id*.

CONCLUSION

Based on the foregoing, and for the reasons set forth in the Eleventh Circuit Panel opinion below, Petitioner Gino Scott respectfully requests that this petition for writ of certiorari be granted to allow for further review of the critically important issue presented herein.

Respectfully submitted,

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Appendix A

Opinion Below
Gino Scott v. United States,
890 F.3d 1239 (11th Cir. 2018)

sically search electronic devices of any American citizen returning from abroad. This new-found government position presents a different and difficult question, one not addressed by the Supreme Court or (until today) any appellate court. In my view, this Court need not reach this issue to decide this case. I therefore concur only in the Court's alternative holding that "the district court correctly denied Touset's motions to suppress because the forensic searches of his electronic devices were supported by reasonable suspicion." Maj. Op. at 1237.

Gino Velez SCOTT, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

Nos. 15-11377
16-11950

United States Court of Appeals, Eleventh Circuit.

(May 23, 2018)

Background: Following affirmance of conviction for conspiracy to possess cocaine for distribution on direct appeal, No. 03-00343-CR-J-32-HTS, 136 Fed.Appx. 273, defendant filed a motion to vacate sentence. The United States District Court for the Middle District of Florida, Timothy J. Corrigan, J., 2015 WL 327505, denied the motion. Following disclosures by government of impeachment evidence regarding government informant, defendant filed a second motion to vacate sentence. The District Court Nos. 3:11-CV-01144-TJC-PDB, 3:06-CV-00906-TJC-PDB, dismissed the motion as "second or successive" and defendant appealed.

Holdings: The Court of Appeals, Rosenbaum, J., held that:

(1) inmate's *Brady-Giglio* claim was second or successive claim under prior panel decision in *Tompkins v. Secretary, Department of Corrections*, and

(2) trial counsel's failure to seek further impeachment material within the wide range of professionally competent assistance.

Affirmed.

1. Criminal Law ⚿1992

An actionable *Brady* violation, where the government withholds evidence that reasonably probably changes the outcome of a defendant's trial, deprives the defendant of a fundamentally fair trial. U.S. Const. Amend. 5; U.S. Const. Amend. 14.

2. Criminal Law ⚿1139, 1158.36

In an appeal challenging a ruling on a motion to vacate sentence, court of appeals reviews legal issues de novo and factual findings for clear error. 28 U.S.C.A. § 2255.

3. Criminal Law ⚿1156.11

Court of appeals reviews a district court's order on a motion to reopen judgment for abuse of discretion. Fed. R. Civ. P. 60(b)(3).

4. Criminal Law ⚿1668(1)

Phrase "second or successive" in Antiterrorism and Effective Death Penalty Act (AEDPA) provision restricting filing second or successive motions to vacate sentence is a term of art, and because it limits the courts' jurisdiction, courts read it narrowly. 28 U.S.C.A. § 2255(h).

5. Criminal Law ⚿1668(1)
Habeas Corpus ⚿894.1

Precedent interpreting Antiterrorism and Effective Death Penalty Act (AEDPA) restrictions on filing second of successive

petition for federal habeas corpus is instructive for interpreting its parallel restrictions for motions to vacate sentence, and vice versa. 28 U.S.C.A. §§ 2254, 2255.

6. Criminal Law ⚿1668(1)

Phrase "second or successive" in Antiterrorism and Effective Death Penalty Act (AEDPA) provision restricting filing second or successive motions to vacate sentence takes its full meaning from Supreme Court case law, including decisions predating the enactment of AEDPA. 28 U.S.C.A. § 2255(h).

7. Habeas Corpus ⚿896

Under the abuse-of-the-writ doctrine, which defined circumstances in which federal courts declined to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus prior to enactment of Antiterrorism and Effective Death Penalty Act (AEDPA), in order to determine whether an application is second or successive, a court must look to the substance of the claim the application raises, and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application.

8. Habeas Corpus ⚿898(1)

If petitioner had no fair opportunity to raise a claim in prior application for federal habeas corpus, a subsequent application raising that claim is not "second or successive," and Antiterrorism and Effective Death Penalty Act (AEDPA) bar on second or successive claims does not apply. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

9. Constitutional Law ⚿4594(1), 4716

Brady and its progeny stand for the proposition that the prosecution's suppression of evidence favorable to the defendant violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. U.S. Const. Amend. 5; U.S. Const. Amend. 14.

10. Criminal Law ⚿1992

Evidence is material, for purposes of *Brady*, when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

11. Criminal Law ⚿1992

No actionable *Brady* violation occurs unless nondisclosure of evidence favorable to defendant was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

12. Criminal Law ⚿1991

An actionable *Brady* violation includes three elements: (1) evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching (2) that evidence must have been suppressed by the State, either willfully or inadvertently, and (3) prejudice must have ensued.

13. Criminal Law ⚿1991

Prosecutors are always obligated to disclose exculpatory evidence to the defendant.

14. Criminal Law ⚿1990

Because of the nature of a *Brady* violation, defendant often cannot learn of such a violation, even when acting diligently, unless and until the government discloses it.

15. Criminal Law ⚿2008

When a *Brady* violation occurs, a defendant is entitled to a new trial.

16. Criminal Law ⚿1992

A prosecution that withholds evidence which, if made available, would tend to exculpate the defendant or reduce the penalty, casts the prosecutor in the role of an

architect of a proceeding that does not comport with standards of justice, even though his action is not the result of guile; a criminal defendant does not receive a fair trial when a *Brady* violation occurs.

17. Criminal Law ⚿1992

A trial is not unfair in the constitutional sense if the government failed to disclose non-material exculpatory information in its possession, because such a violation, by definition, could not have affected the outcome of the trial.

18. Criminal Law ⚿1995

When government never possessed newly discovered evidence before or during trial, trial is not constitutionally unfair, pursuant to *Brady*, because of the absence of the newly discovered evidence, because the government did not wittingly or unwittingly use its advantage as the prosecuting authority to obtain a conviction it otherwise might not have been able to secure.

19. Habeas Corpus ⚿201

Finality of criminal convictions is important because giving a habeas petitioner a new trial can prejudice the government through erosion of memory and dispersion of witnesses that occur with the passage of time.

20. Habeas Corpus ⚿898(2)

To demonstrate that a habeas petitioner has been deprived of a full and fair opportunity, abuse-of-the-writ doctrine requires him to make two showings: (1) he has cause, or a legitimate excuse, for failing to raise the claim in prior petition, and (2) he was prejudiced by the error he claims.

21. Criminal Law ⚿1668(3)

Federal inmate's *Brady-Giglio* claim in motion to vacate sentence, arising from Government's disclosure of impeachment evidence regarding government informant approximately five years after inmate filed prior motion to vacate, was second or successive claim under prior panel decision in *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257, which held that all *Brady-Giglio* claims in second-in-time postconviction petitions are necessarily "second or successive" because they ripen during trial or sentencing, and thus inmate was barred from raising the claim by Antiterrorism and Effective Death Penalty Act's (AEDPA) gatekeeping provision. 28 U.S.C.A. §§ 2255, 2255(h).

22. Courts ⚿90(2)

"Prior panel precedent rule" requires subsequent panels of Court of Appeals to follow the precedent of the first panel to address the relevant issue, unless and until the first panel's holding is overruled by the Court of Appeals sitting en banc or by the Supreme Court, even when a later panel is convinced the earlier panel is wrong.

See publication Words and Phrases for other judicial constructions and definitions.

23. Courts ⚿90(2)

Under "prior panel precedent rule," requiring subsequent panels of Court of Appeals to follow the precedent of the first panel to address the relevant issue, later panel must follow the reasoning behind a prior holding if it cannot distinguish the facts or law of the case under consideration.

See publication Words and Phrases for other judicial constructions and definitions.

24. Criminal Law ⚿1519(6)

Trial counsel's failure to undertake additional steps to seek further impeachment material regarding government informant, after Government assured counsel that it had produced all *Brady* and *Giglio* material, was within the wide range of professionally competent assistance, and thus, district court did not abuse its discretion in declining to grant relief on federal inmate's ineffective assistance claim in re-

opened motion to vacate sentence, even though Government produced impeachment evidence regarding the informant nearly five years after inmate filed the motion, where no red flags calling for further inquiry into informant existed at time of trial. U.S. Const. Amend. 6; 28 U.S.C.A. § 2255; Fed. R. Civ. P. 60(b)(3).

25. Criminal Law ⇐1870

Sixth Amendment right to counsel is the right to effective assistance of counsel. U.S. Const. Amend. 6.

26. Criminal Law ⇐1881

Claim of ineffective assistance of counsel requires a two-pronged showing: (1) that counsel's performance was constitutionally deficient, and (2) that counsel's deficiencies prejudiced the proceeding's outcome. U.S. Const. Amend. 6.

27. Criminal Law ⇐1882

An attorney's performance fails to meet the constitutional minimum effectiveness when it falls below an objective standard of reasonableness, which means that it is outside the wide range of professionally competent assistance. U.S. Const. Amend. 6.

28. Criminal Law ⇐1871

When evaluating attorney's effectiveness, omissions are inevitable because trial lawyers, in every case, could have done something more or something different; accordingly, court of appeals conducts a highly deferential review of counsel's performance, and indulges the strong presumption that counsel's performance was reasonable, and that counsel made all significant decisions in the exercise of reasonable professional judgment. U.S. Const. Amend. 6.

29. Criminal Law ⇐1891, 1922

Trial counsel has not performed deficiently when a reasonable lawyer could have decided, under the circumstances, not to investigate or present particular evidence. U.S. Const. Amend. 6.

30. Criminal Law ⇐1882

An attorney's performance is not deficient in hindsight just because he or she made one choice versus another. U.S. Const. Amend. 6.

Appeals from the United States District Court for the Middle District of Florida, D.C. Docket Nos. 3:11-cv-01144-TJC-PDB; 3:06-cv-00906-TJC-PDB

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Roberta Josephina Bodnar, U.S. Attorney's Office—FLM, 35 SE 1st Ave Suite 300, Ocala, FL 34471, Michelle Thresher Taylor, Arthur Lee Bentley, III, U.S. Attorney's Office, 400 N Tampa St. Suite 3200, Tampa, FL 33602-4798, David Rodney Brown, U.S. Attorney's Office, 300 N Hogan St. Suite 700, Jacksonville, FL 32202-4270 for Respondent-Appellee.

Before ROSENBAUM and JILL PRYOR, Circuit Judges, and BARTLE,* District Judge.

ROSENBAUM, Circuit Judge:

Prosecutors are "servant[s] of the law" and should "prosecute with earnestness and vigor." *Berger v. United States*, 295

* The Honorable Harvey Bartle III, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). But though the prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Id.*

[1] More than fifty years ago, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), established that a prosecutor's suppression of material evidence favorable to the accused amounts to a foul blow. An actionable *Brady* violation—where the government withholds evidence that reasonably probably changes the outcome of a defendant's trial—deprives the defendant of a fundamentally fair trial. Yet because of the nature of a *Brady* violation, a defendant, through no fault of his own, may not learn that such a violation even occurred until years after his conviction has become final and he has already filed a motion for post-conviction relief concerning other matters.

Meanwhile, the Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes limitations on post-conviction relief a prisoner may obtain. This case examines whether under those limitations, a *Brady* claim can ever be cognizable in a second-in-time post-conviction motion under 28 U.S.C. § 2255 if it does not meet the criteria under the statute's "gatekeeping" provision, 28 U.S.C. § 2255(h). And that presents a question of first impression in this Circuit.

But that the case involves an issue of first impression does not necessarily mean we are writing on a clean slate. As it turns out, our Circuit has already written all over this slate. Indeed, we decided this issue's fraternal twin—whether a *Brady* claim can ever be cognizable in a second-in-time 28 U.S.C. § 2254 petition if it does not meet any of the criteria under 28 U.S.C. § 2244(b)(3)(A)—in *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257 (11th Cir. 2009). Because we cannot distinguish *Tompkins*'s reasoning from the facts or law at issue here, our Circuit's prior-precedent rule binds us to apply *Tompkins*'s rule: a second-in-time collateral motion based on a newly revealed *Brady* violation is not cognizable if it does not satisfy one of AEDPA's gatekeeping criteria for second-or-successive motions.

Though we have great respect for our colleagues, we think *Tompkins* got it wrong: *Tompkins*'s rule eliminates the sole fair opportunity for these petitioners to obtain relief. In our view, Supreme Court precedent, the nature of the right at stake here (the right to a fundamentally fair trial), and the Suspension Clause of the U.S. Constitution, Art. I, § 9, cl. 2, do not allow this. Instead, they require the conclusion that a second-in-time collateral claim based on a newly revealed actionable *Brady* violation is not second-or-successive for purposes of AEDPA. Consequently, such a claim is cognizable, regardless of whether it meets AEDPA's second-or-successive gatekeeping criteria.

Petitioner-Appellant Gino Scott's *Brady* claim may or may not be an actionable *Brady* violation. But we think that the district court in the first instance should have the chance to address that question by determining whether Scott's *Brady* claim is, in fact, actionable—a question the district court never had reason to reach. *Tompkins*'s rule precludes this from happening because it prohibits second-in-time collateral petitions based on all types of *Brady* claims—actionable and inactionable, alike—simply because they are *Brady* claims.

Establishing the correct rule and framework for determining whether any particular second-in-time collateral motion based on a *Brady* claim is cognizable is critically important to maintaining the integrity of our judicial system. No conviction resulting from a fundamentally unfair trial

should be permitted to stand.[1] And when a petitioner could not have reasonably been expected to discover an actionable *Brady* violation before filing his first federal collateral-review motion, precluding the filing of a second-in-time petition addressing the newly discovered violation is doubly wrong. It rewards the government for its unfair prosecution and condemns the petitioner for a crime that a jury in a fair trial may well have acquitted him of. This not only corrodes faith in our system of justice, but it undermines justice itself, and it cannot be allowed. So we urge the Court to rehear this case en banc to establish the rule that our Constitution and Supreme Court precedent require.

I.

In 2003, a grand jury indicted Scott and his codefendant Jose Tamayo for conspiracy to possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. Tamayo pled guilty, but Scott elected to go to trial.

At trial, the government presented evidence that Scott and Tamayo, longtime friends who made occasional drug deals, agreed with each other to buy cocaine from a couple of dealers in Jacksonville, Florida. Under the plan, Scott would give Tamayo cash, and Tamayo would drive from their hometown of Valdosta, Georgia, down to Jacksonville to make the purchase. To ensure the dealers' bona fides, Scott first arranged to meet one of them before any money changed hands. But unbeknownst to Scott and Tamayo, the purported cocaine dealer he met was actually a government informant named Freddy Pena.

Pena did his job well, and Scott was satisfied. So Scott gave Tamayo $54,000 in cash to make the purchase. Tamayo then drove to Jacksonville and met Pena. No sooner did they convene than law enforcement arrived on the scene and arrested Tamayo.

Law enforcement presented Tamayo with an offer to cooperate, and he agreed. At their direction, Tamayo made several recorded phone calls to Scott in which Scott incriminated himself in the deal. Law enforcement then arrested Scott, too, charging him with conspiracy to possess cocaine for distribution.

To prove its case, among other evidence, the government called two DEA agents who showed the jury wads of $100 bills confiscated from Scott upon his arrest.

The government also presented Tamayo. He testified that he and Scott went together to the pre-purchase meetings with Pena, that Scott gave him the $54,000 to purchase the cocaine, and that after getting arrested, Tamayo made a number of recorded phone calls to Scott in which Scott made incriminating statements. The government also played recordings of those phone calls for the jury.

Besides this evidence, the government put on Pena to testify about his pre-purchase meeting with Scott. In its direct examination of Pena, the government prompted him to disclose four items of information that prosecutors had previously revealed to Scott through pretrial disclosures of evidence tending to impeach Pena, disclosures required under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Those four items included the following: (1) that Pena was convicted in 1996 for conspiring to distribute heroin, (2) that the DEA had paid Pena more than $168,000 for cooperation

1. *See generally* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 Hofstra L. Rev. 275, 279-80 (2007) (collecting studies finding alarming rates of *Brady* violations resulting in criminal convictions).

on about sixteen cases since 2001, (3) that Pena had been paid $3,500 for Scott's case so far, and (4) that Pena would likely receive additional payment in the future.

To offset any negative effect of Pena's answers to these questions, the government also asked Pena whether he had ever given testimony or information to the DEA that was "false or misleading," to which Pena replied, "No, sir." Then the government inquired as to whether Pena had told the truth in his past testimony as an informant. Pena answered, "Always."

As it turns out, Pena's answers to these questions were false. But as we explain later, many years passed before the prosecuting U.S. Attorney's Office realized that the government was in possession of information demonstrating the falsity of Pena's answers and therefore before the prosecuting U.S. Attorney's Office disclosed this information to Scott.

In the meantime, and without any knowledge of this information during the trial, on cross-examination, Scott's attorney reiterated the details of Pena's heroin-trafficking conviction and emphasized how Pena benefited from working as an informant. Pena acknowledged that he stood to receive more than $10,000 from the drug money seized from Scott. He also agreed that for him, the alternative to working as an informant would be to make ends meet through strenuous manual labor. At no point did Scott's attorney confront Pena about his past truthfulness in other cases.

In its closing argument, the prosecution acknowledged Pena's monetary motive for testifying against Scott. But the prosecution emphasized that Pena "had performed successfully for DEA in the past and they continued to use him." Scott's attorney addressed Pena only briefly, noting that Pena needed the money he received working as a government informant because the job was one of only a few career options he had as a convicted felon. The jury convicted Scott, and the district court sentenced him to life in prison.

II.

Soon after his conviction, Scott filed a direct appeal. *United States v. Scott*, 136 Fed.Appx. 273 (11th Cir. 2005). In his appeal, Scott raised a number of issues, including, as relevant here, a claim that his trial counsel had been ineffective for failing to conduct an adequate investigation of Pena's background. *Id.* at 275. We affirmed Scott's conviction, though we declined to address his ineffective-assistance claim because the record on that issue had not been developed at that point. *Id.* at 275, 279. Scott sought certiorari, and the Supreme Court denied his petition on October 17, 2005. *See Scott v. United States*, 546 U.S. 970, 126 S.Ct. 502, 163 L.Ed.2d 380 (2005).

In 2006, Scott filed his first motion to vacate under 28 U.S.C. § 2255 (the "2006 Motion"). Among other claims, Scott again argued that his trial counsel was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for failing to properly investigate Pena ahead of trial. The district court denied the claim. Notably, however, it concluded that even if his trial counsel did exhibit deficient performance, Scott could not show that he was prejudiced because he "fail[ed] to show what additional information could have been uncovered to further impeach the witness at trial." Scott appealed on other grounds, and we affirmed. *See Scott v. United States*, 325 Fed.Appx. 822, 825 (11th Cir. 2009).

Roughly five years later, in the spring of 2011, Scott's prosecutors notified the district court of impeachment information about Pena purportedly unknown to them at the time of Scott's trial. Federal prosecutors in another jurisdiction had recently

advised them of the following: (1) Pena lied to law enforcement in 1996 when he was arrested for conspiracy to distribute heroin; (2) Pena admitted to Tampa DEA agents in 2002 that he had stolen cocaine from a drug dealer the year before; and (3) as a result of his admission in 2002, though no charges were brought against him, a prosecutor at the time said he would be hesitant to use Pena in future cases, and the Tampa DEA moved Pena to "restricted use." Scott's prosecutors described their failure to include this among their required pre-trial disclosures as "inadvertent," maintaining that they were "unaware of this information until almost 7 years after the trial."

Based on this information, on November 17, 2011, Scott filed another motion under § 2255 to vacate his conviction and sentence ("2011 Motion"). In his 2011 Motion, Scott asserted for the first time that the Government had obtained his conviction by violating *Brady*, 373 U.S. 83, 83 S.Ct. 1194, and *Giglio*, 405 U.S. at 150, 92 S.Ct. 763. Both of these claims relied on the Government's 2011 disclosure of evidence relating to Pena. Scott asserted that had the government before his trial turned over the evidence disclosed in 2011, it is reasonably probable that he would not have been convicted.

In explaining how the government's failure to disclose the information affected his trial, Scott pointed to Pena's statement that he had never given "false or misleading" testimony during his time as an informant. He complained that in its closing remarks at trial, the government argued "that although Pena had been convicted of conspiracy to distribute heroin in the 1990s, he had paid his debt to society, accepted responsibility, and then moved on into this line of work that involved essentially working with DEA in 2001." Indeed, Scott emphasized, the government represented there was "no question that Pena had performed successfully for DEA in the past and they continued to use him." But based on the evidence the government disclosed in 2011, Scott argued that Pena's testimony and the government's statements at trial were false, and the government knew or should have known this at the time. Finally, Scott urged that the testimony and statements were not harmless beyond a reasonable doubt.

To explain his failure to raise these issues on direct appeal, Scott explained that he was not aware of the information at the time. And because the information was "known only to the government" as of the time of trial, and the government had assured Scott and the trial court that it had turned over all *Brady* material, Scott reasoned, he could not have discovered the recently disclosed information earlier through the exercise of due diligence.

The government moved to dismiss Scott's 2011 Motion, asserting it was barred as "second or successive" under 28 U.S.C. § 2255(h). The district court agreed, concluding it was bound by our decision in *Tompkins*, 557 F.3d 1257. In *Tompkins*, a panel of this Court held that a second-in-time habeas petition raising claims under *Brady* and *Giglio* and brought under 28 U.S.C. § 2254 always counts as "second or successive" and is therefore subject to AEDPA's gatekeeping restrictions on second or successive petitions.

Though the district court dismissed Scott's 2011 Motion, it granted Scott's alternative motion to reopen his original 2006 Motion pursuant to Federal Rule of Civil Procedure 60(b)(3), which permits a court to reopen a final judgment on various grounds, including "fraud . . ., misrepresentation, or misconduct by an opposing party." The court then reevaluated Scott's 2006 Motion in light of the new information about Pena and once again denied it. In reconsidering Scott's *Strickland* claim

in light of the newly revealed evidence, the district court concluded that Scott's trial counsel did not exhibit constitutionally deficient performance in violation of *Strickland* by failing to conduct further investigation of Pena. The court did not address *Strickland*'s prejudice prong. Scott then appealed.

III.

[2, 3] "In an appeal challenging a § 2255 ruling, we review legal issues *de novo* and factual findings for clear error." *Murphy v. United States*, 634 F.3d 1303, 1306 (11th Cir. 2011). We review a district court's order on a Rule 60(b)(3) motion for abuse of discretion. *Am. Bankers Ins. Co. of Fla. v. Nw. Nat'l Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir. 1999).

IV.

We first address whether the district court correctly concluded that 28 U.S.C. § 2255(h) bars Scott's 2011 Motion as "second or successive." Section 2255(h) functions as a "gatekeeping provision" for "second or successive" motions to vacate brought under AEDPA. Under section 2255(h) no "second or successive" motions may be brought unless they identify either "(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." 28 U.S.C. § 2255(h).

Neither of those exceptions applies here. So we must consider whether Scott's 2011 Motion qualifies as "second or successive." If so, we must dismiss it.

We do not get much help from AEDPA in discerning the meaning of the phrase "second or successive." In fact, AEDPA does not define the phrase. Nor is the phrase itself "self-defining." *Panetti v. Quarterman*, 551 U.S. 930, 943, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

[4, 5] But the Supreme Court has explained that "second or successive" does not capture all collateral petitions "filed second or successively in time, even when the later filings address a ... judgment already challenged in a prior ... application."[2] *Id.* at 944, 127 S.Ct. 2842. Instead, "second or successive" is a "term of art." *Slack v. McDaniel*, 529 U.S. 473, 486, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). And since it limits the courts' jurisdiction, we read it narrowly. *See Castro v. United States*, 540 U.S. 375, 381, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) (citing *Utah v. Evans*, 536 U.S. 452, 463, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002)).

[6] As the Supreme Court has construed the phrase, "second or successive" "takes its full meaning from [the Supreme Court's] case law, including decisions predating the enactment of [AEDPA]." *Panetti*, 551 U.S. at 943-44, 127 S.Ct. 2842. So we must explore the relevant case law on the meaning of "second or successive."

A. *Panetti v. Quarterman* set forth the factors for determining whether a second-in-time petition is "second or successive."

Our starting point is the Supreme Court's decision in *Panetti*. In *Panetti*, the

2. *Panetti* involved a petition filed under 28 U.S.C. § 2254, whereas Scott's motion arises under § 2255. We have recognized that "precedent interpreting one of these parallel restrictions is instructive for interpreting its counterpart." *Stewart v. United States*, 646 F.3d 856 n.6 (11th Cir. 2011). Indeed, *Stewart* applied *Panetti*'s discussion on the meaning of "second or successive" in the context of evaluating a second-in-time § 2255 motion.

petitioner (named Panetti) was convicted of capital murder and sentenced to death. *Id.* at 937, 127 S.Ct. 2842. After exhausting his state-court remedies to no avail, he filed a federal petition for habeas relief under 28 U.S.C. § 2254. It, too, was denied. *Id.*

The state set an execution date, and Panetti filed another state habeas claim, this time asserting for the first time that he was not mentally competent to be executed. *Id.* at 937-38, 127 S.Ct. 2842. Following the state court's denial of the petition, Panetti filed another federal habeas petition under § 2254. *Id.* at 938, 127 S.Ct. 2842. He argued that executing him while he was mentally incompetent would violate the Eighth Amendment and transgress *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). *See id.* at 938-41, 127 S.Ct. 2842. The district court denied his petition, and the circuit court affirmed. *Id.* at 941-42, 127 S.Ct. 2842.

The Supreme Court granted certiorari. *Id.* at 942, 127 S.Ct. 2842. Before addressing the merits, the Court considered whether it had jurisdiction over Panetti's claim, in light of 28 U.S.C. § 2244(b)(2), a habeas gatekeeping mechanism that is much like § 2255(h) but applies to federal habeas petitions seeking review of state rather than federal cases. Similar to § 2255(h), § 2244(b)(2) precludes consideration of any "claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application" unless it satisfies one of two exceptions—neither of which applied to Panetti's claim.[3]

The Court concluded that it enjoyed jurisdiction over Panetti's case because Panetti's second-in-time § 2254 petition was not "second or successive" as that phrase is used in § 2244(b)(2)'s gatekeeping mechanism. *Id.* at 947, 127 S.Ct. 2842. In arriving at this conclusion, the Court looked solely to three considerations: (1) the implications for habeas practice if the Court found it lacked jurisdiction over Panetti's claim; (2) the purposes of AEDPA; and (3) the pre-AEDPA abuse-of-the-writ doctrine. *See id.* at 943-47, 127 S.Ct. 2842.

Beginning with the implications for habeas practice, the Court first discussed the nature of a *Ford* claim. *See id.* at 943, 127 S.Ct. 2842. Because a *Ford* claim asserts that a petitioner is not competent to be executed, the Court noted that such a claim does not ripen unless the petitioner both is incompetent to be executed and imminently faces execution in that state. *See id.* And since many years can pass between the imposition and execution of a death sentence, a petitioner may not fall into a state of mental incompetence until after the courts have resolved his first habeas petition. *Id.* So if "second or successive" encompassed *Ford* claims, a mentally competent prisoner would always have to prophylactically raise a *Ford* claim in his first federal habeas petition, regardless of whether he had any indication that he might eventually become incompetent, just to preserve the possibility of raising a

3. Section 2244(b)(2) provides,

> (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.

Ford claim at a later time. *Id.* This practice, the Court observed, "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Id.* at 943, 127 S.Ct. 2842.

On top of burdening federal habeas practice in this way, the Court concluded that treating second-in-time *Ford* claims as "second or successive" would also conflict with AEDPA's purposes. AEDPA was designed to "further the principles of comity, finality, and federalism." *Id.* at 945, 127 S.Ct. 2842 (citation and internal quotation marks omitted). But "[a]n empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies." *Id.* at 946, 127 S.Ct. 2842. And as for finality concerns, the Court observed they are not implicated by a *Ford* claim: because of the nature of a *Ford* claim, federal courts are generally unable to address such claims within the time frame for resolving first habeas petitions, anyway. *Id.*

[7, 8] Finally, the Court accounted for the abuse-of-the-writ doctrine,[4] *id.* at 947, 127 S.Ct. 2842, the pre-AEDPA legal doctrine "defin[ing] the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus," *McCleskey v. Zant*, 499 U.S. 467, 470, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Under the abuse-of-the-writ doctrine, "to determine whether an application is 'second or successive,' a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application." *Magwood v. Patterson*, 561 U.S. 320, 345, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010) (Kennedy, J., dissenting) (citing *Panetti*, 551 U.S. at 947, 127 S.Ct. 2842). "[I]f the petitioner had no fair opportunity to raise the claim in the prior application, a subsequent application raising that claim is not 'second or successive,' and [AEDPA's] bar does not apply." *Id.* at 346, 130 S.Ct. 2788 (Kennedy, J., dissenting) (citing *Panetti*, 551 U.S. at 947, 127 S.Ct. 2842). Since a *Ford* claim considers a petitioner's mental state at the time of proposed execution and Panetti's first § 2254 petition was filed well before that time, Panetti did not have a full and fair opportunity to raise that claim—that is, the claim did not ripen—until after his first § 2254 petition was resolved. *See Panetti*, 551 U.S. at 947, 127 S.Ct. 2842. For that reason, the Court found no abuse of the writ. *Id.*

So ultimately, the Supreme Court held that AEDPA's "second or successive" bar did not preclude Panetti's second-in-time petition raising a *Ford* claim. *Id.* As the Court explained, "We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party." *Id.*

B. Applying the *Panetti* factors to an actionable *Brady* violation that the petitioner in exercising due diligence could not reasonably have been expected to discover in the absence of the government's disclosure yields the conclusion that such a claim is not "second or successive."

In *Panetti*'s light, we must consider whether second-in-time petitions raising newly disclosed actionable *Brady*[5] viola-

4. Justice Kennedy has described "the design and purpose of AEDPA [as being] to avoid abuses of the writ of habeas corpus." *Magwood v. Patterson*, 561 U.S. 320, 344, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010) (Kennedy, J., dissenting).

5. For convenience, we use the term "*Brady* violation" to refer to *Giglio* violations as well

tions—where the newly disclosed evidence creates a reasonable probability that it would change the outcome of the proceeding—are "second or successive" within the meaning of § 2255(h)'s gatekeeping provision. We find that they are not. The *Panetti* factors and their sub-considerations uniformly require this conclusion.

1. *Precluding claims based on* Brady *violations that a prisoner could not have discovered through due diligence would adversely affect habeas practice.*

First, as the *Panetti* Court observed is true of *Ford* claims, precluding *Brady* claims that a prisoner could not have discovered through due diligence would adversely affect habeas practice. This is so because of the nature of a *Brady* claim.

[9–13] *Brady* and its progeny stand for the proposition that the prosecution's suppression of evidence favorable to the defendant "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Brady*, 373 U.S. at 87, 83 S.Ct. 1194) (internal quotation marks omitted). Evidence is "material," in turn, when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (citation and internal quotation marks omitted). So no actionable *Brady* violation occurs "unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[6] *Id.* at 281, 119 S.Ct. 1936 (internal quotation marks omitted).

[14] Because of the nature of a *Brady* violation, the petitioner often cannot learn of such a violation at all, even when acting diligently, unless and until the government discloses it. As with second-in-time *Ford* claims, then, "conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) [*Brady*] claims in each and every [first § 2255] application [(and direct appeal)]," *Panetti*, 551 U.S. at 943, 127 S.Ct. 2842, to preserve then-hypothetical claims on the chance that the government might have committed a material *Brady* violation that will eventually be disclosed. And also like with *Ford* claims, the courts would be forced to address this

as *Brady* violations, as *Brady* and *Giglio* represent manifestations of the same type of due-process violation. *See Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (describing the three components of a *Brady* violation as follows: "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.") (emphasis added).

6. Prosecutors are, of course, always obligated to disclose exculpatory evidence to the defendant. But the Supreme Court has classified as "real" (and therefore actionable) *Brady* violations only one subset of cases where the prosecution fails to disclose exculpatory evidence within its possession: those in which it is reasonably probable in hindsight that a jury privy to the undisclosed material would have returned a different verdict. *See Strickler*, 527 U.S. at 281, 119 S.Ct. 1936. So an actionable *Brady* violation includes three elements: "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." *Id.* at 281-82, 119 S.Ct. 1936. In this opinion, we analyze only whether these actionable *Brady* violations, which we refer to simply as "*Brady* violations," are "second or successive." Our analysis does not apply to cases where it is not reasonably probable that exculpatory evidence withheld by the government would have changed the outcome of the proceeding.

avalanche of substantively useless *Brady* claims—only there would be even more meritless *Brady* claims because *Brady* does not apply only in capital cases, like *Ford* does. For this reason, finding second-in-time *Brady* claims to be "second or successive" under § 2255 would have even more deleterious effects on habeas practice than concluding second-in-time *Ford* claims were "second or successive."

2. Precluding Brady *claims that a petitioner could not have discovered through due diligence impedes finality interests.*

Second, precluding *Brady* claims that a petitioner could not have discovered through due diligence actually impedes finality interests. We start from the proposition that at the very least, the second-in-time filing of a *Brady* claim that a prisoner could not have discovered earlier through the reasonable exercise of due diligence does not negatively implicate AEDPA's finality concerns any more than does the second-in-time filing of a *Ford* claim,[7] though for different reasons. To explain why, we return to the nature of a *Brady* violation.

[15–18] When a *Brady* violation occurs, a defendant is entitled to a new trial. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. As the Supreme Court has explained, "[a] prosecution that withholds evidence ... which, if made available, would tend to exculpate [the defendant] or reduce the penalty[,] ... casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though ... his action is not 'the result of guile.' " *Id.* at 87-88, 83 S.Ct. 1194. Put simply, a criminal defendant does not receive a fair trial when a *Brady* violation occurs.[8]

Yet the Constitution guarantees criminal defendants a fair trial. *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). So imprisoning someone based on the results of an unfair trial and then precluding any remedy at all might well work a suspension of the writ of habeas corpus. *Cf. Magwood*, 561 U.S. at 350, 130 S.Ct. 2788 (Kennedy, J., dissenting) (opining that refusal to consider a second-in-time habeas petition challenging an alleged violation that occurred entirely after the denial of the first petition "would be inconsistent with abuse-of-the-writ principles and might work a suspension of the writ of habeas corpus").

And even if precluding a remedy for a *Brady* violation that a petitioner could not reasonably have been expected to discover through due diligence does not suspend the writ, it certainly clashes with finality concerns. The Supreme Court has noted that finality is important to endow criminal law with "much of its deterrent effect." *McCleskey*, 499 U.S. at 491, 111 S.Ct. 1454 (citation and quotation marks omitted). But an uncorrected unfair trial has the opposite effect.

7. Unlike in the § 2254 context, comity and federalism are not concerns when it comes to § 2255 claims since these claims involve only federal proceedings. *See infra* at 1257.

8. The trial is not unfair in the constitutional sense if the government failed to disclose *non-material* exculpatory information in its possession. Such a violation, by definition, could not have affected the outcome of the trial. Similarly, where the government never possessed the newly discovered evidence before or during trial, the trial is not constitutionally unfair because of the absence of the newly discovered evidence. In that case, the government did not wittingly or unwittingly use its advantage as the prosecuting authority to obtain a conviction it otherwise might not have been able to secure. Because neither of these types of events renders a trial constitutionally unfair, they do not affect AEDPA's finality concerns the same way as does a *Brady* violation, which, again, will involve only *material* non-disclosures.

Procedural fairness is necessary to the perceived legitimacy of the law. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 Ct. Rev. 4, 7 (2007-2008) (citing Tom. R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 Ann. Rev. Psychol. 375 (2006)). And legitimacy affects compliance. *Cf. id.* (citing studies showing reduced recidivism when defendants perceived themselves as having received fair process). When the government imprisons a person after a constitutionally unfair trial, that undermines the legitimacy of the law and its deterrent effect. A person who perceives that the government will cheat to convict him, regardless of his guilt or innocence, actually has less incentive to comply with the law because, in his view, compliance makes no difference to conviction.

[19] But that is not the only reason that precluding second-in-time *Brady* claims is at odds with finality concerns. Finality is also important because giving a habeas petitioner a new trial can prejudice the government through "erosion of memory and dispersion of witnesses that occur with the passage of time." *McCleskey*, 499 U.S. at 491, 111 S.Ct. 1454 (citation and internal quotation marks omitted). Yet the government alone holds the key to ensuring a *Brady* violation does not occur. So the government cannot be heard to complain of trial prejudice from a new trial necessitated by its own late disclosure of a *Brady* violation, since it is solely responsible for inflicting any such prejudice on itself in such circumstances. Whatever finality interest Congress intended for AEDPA to promote, surely it did not aim to encourage prosecutors to withhold constitutionally required evidentiary disclosures long enough that verdicts obtained as a result of government misconduct would be insulated from correction.

Finality interests then are not served by saying a prisoner has not timely brought his *Brady* claim where the government's failures affirmatively and entirely prevented him from doing so. *Cf. Williams v. Taylor*, 529 U.S. 420, 437, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (comity interests "not served by saying a prisoner 'has failed to develop the factual basis of a claim' [under § 2254(e)(2)] where he was unable to develop his claim in state court despite diligent effort"). For this reason, finality concerns cannot justify precluding *Brady* claims that a prisoner could not have discovered through due diligence.

3. Precluding Brady *claims that a prisoner could not have discovered through due diligence is not consistent with the abuse-of-the-writ doctrine.*

Finally, allowing a second-in-time *Brady* claim that a prisoner could not have discovered earlier through the reasonable exercise of due diligence does not offend the abuse-of-the-writ doctrine. As we have noted, the abuse-of-the-writ doctrine calls for courts to consider whether a habeas petitioner has previously had "a full and fair opportunity to raise the claim in the prior application." *Magwood*, 561 U.S. at 345, 130 S.Ct. 2788 (Kennedy, J., dissenting) (citing *Panetti*, 551 U.S. at 947, 127 S.Ct. 2842).

[20] To demonstrate that a petitioner has been deprived of a "full and fair opportunity," the doctrine requires him to make two showings: (1) he has "cause," or a "legitimate excuse," for failing to raise the claim earlier, *McCleskey*, 499 U.S. at 490, 111 S.Ct. 1454, and (2) he was prejudiced by the error he claims, *id.* at 493, 111 S.Ct. 1454. *See also Sawyer v. Whitley*, 505 U.S. 333, 338, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

"Cause" explains why the petitioner could not have filed his claim earlier even "in the exercise of reasonable care and diligence." *McCleskey*, 499 U.S. at 493, 111 S.Ct. 1454. A petitioner satisfies the cause requirement where he can demonstrate "interference by officials that makes compliance with the ... procedural rule impracticable, and a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Id.* at 493-94, 111 S.Ct. 1454 (citation and internal quotation marks omitted).[9] A *Brady* violation that a prisoner could not reasonably have been expected to discover through the exercise of due diligence falls into that category. *See*, *e.g.*, *Strickler*, 527 U.S. at 289, 119 S.Ct. 1936 (finding cause for failing to raise a *Brady* claim where the prosecution withheld exculpatory evidence, the petitioner reasonably relied on the prosecution's open-file policy, and the government asserted during state habeas proceedings "that petitioner had already received 'everything known to the government.' ").

As for prejudice, as we have noted, when a *Brady* violation is at issue, a petitioner must demonstrate a reasonable probability that had the government disclosed the evidence at issue, the outcome of the proceeding would have differed. *Strickler*, 527 U.S. at 280, 119 S.Ct. 1936. So a petitioner cannot establish a *Brady* violation without also satisfying the abuse-of-the-writ doctrine's requirement to show prejudice.

That means a petitioner can demonstrate both cause and prejudice by establishing a *Brady* violation that he could not reasonably have discovered through due diligence. And where a petitioner shows both cause and prejudice, he has enjoyed no "full and fair opportunity" to bring the claim earlier. To remedy this problem, the abuse-of-the-writ doctrine favors allowing such a second-in-time claim.

In short, all the *Panetti* factors—the implications for habeas practice, the purposes of AEDPA, and the abuse-of-the-writ doctrine—compel the conclusion that second-in-time *Brady* claims cannot be "second or successive" for purposes of § 2255(h).[10] And nothing *Panetti* teaches us to consider so much as hints otherwise.

C. *Tompkins* nonetheless requires us to conclude that second-in-time *Brady* claims are always "second or successive."

[21] The district court, however, concluded that our decision in *Tompkins v. Secretary, Department of Corrections* precluded it from ruling that second-in-time *Brady* claims that could not have been discovered earlier through the exercise of reasonable diligence are not "second or successive." We now take a look at *Tompkins* to decide whether that is correct.

In *Tompkins*, this Court considered whether a second-in-time § 2254 petition that raised *Brady* and *Giglio* claims,

9. Though *McCleskey* spoke of the ''cause'' standard above in the context of the doctrine of procedural default, the Supreme Court expressly concluded that the standard for showing ''cause'' under the abuse-of-the-writ doctrine is the same as for demonstrating ''cause'' for a procedural default. *See McCleskey*, 499 U.S. at 493, 111 S.Ct. 1454; *see also Schlup v. Delo*, 513 U.S. 298, 318-19, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (''The application of cause and prejudice to successive and abusive claims conformed to [the Supreme Court's] treatment of procedurally defaulted claims.'').

10. The rule we think *Panetti* requires for the limited subset of second-in-time actionable *Brady* claims we discuss renders the jurisdiction and merits inquiries a single question where no issues of fact exist. But that is no different than the situation when a petitioner raises a second or successive claim under § 2255(h)(1); there, too, the jurisdiction and merits inquiries are one and the same when no issues of fact arise.

among others, qualified as "second or successive" for purposes of § 2244(b)(3)(A). The *Tompkins* panel determined it did. 557 F.3d at 1260.

To reach this conclusion, the panel first determined that the Supreme Court in *Panetti* "limit[ed] its holding to *Ford* claims." *Tompkins*, 557 F.3d at 1259. The panel, in essence, deemed the *Panetti* factors irrelevant to analyzing the issue before it and further attempted to explain why *Panetti* was factually distinguishable from the case it was reviewing. *Id.* at 1260.

1. Tompkins *was incorrectly decided.*

We respectfully disagree with the *Tompkins* panel's analysis and conclusion. As we read *Panetti*, the Supreme Court did not limit its analysis to petitions involving *Ford* claims. And when we apply the *Panetti* factors to *Brady* claims, as we must, *Brady* claims cannot be factually distinguished from *Ford* claims for purposes of determining whether they are "second or successive."

a. *Panetti* did not limit its analysis to petitions involving *Ford* claims.

Beginning with the breadth of *Panetti*'s holding, we cannot agree that the Supreme Court restricted its analysis to second-in-time petitions involving only *Ford* claims. Neither *Panetti*'s language nor its analysis supports such a conclusion.

First, *Panetti*'s language rules out such a narrow holding. In fact, the Supreme Court summarized its own jurisdictional holding as recognizing "exceptions"—plural—to the rule that a second-in-time petition fails AEDPA's "second or successive" bar: "In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's 'second or successive' bar. There are, however, *exceptions*." *Panetti*, 551 U.S. at 947, 127 S.Ct. 2842 (emphasis added).

Of course, that alone does not specify what exactly the Court had in mind. But the Court then immediately followed up this statement with what we understand as a partial test for determining whether a second-in-time petition that includes a particular type of claim qualifies as "second or successive": "We are hesitant to construe [AEDPA], implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party." *Id.* If the Court intended to limit its holding to second-in-time *Ford* claims only, we think it would have employed the singular form of "exception," rather than the plural, and it would have referred specifically to *Ford* claims in that sentence instead of stating a generally applicable rule for construing the phrase "second or successive" in AEDPA.

Second, the analysis in *Panetti* itself demonstrates that the Supreme Court did not limit *Panetti*'s holding to *Ford* claims. As we have noted, the *Panetti* Court arrived at its conclusion solely by evaluating three different generally applicable factors: the "implications for habeas practice," AEDPA's purposes, and the abuse-of-the-writ doctrine. *See id.* at 945-47, 127 S.Ct. 2842. Not one of these factors applies uniquely to *Ford* claims. Nor does any factor apply in such a way as to allow only *Ford* claims through.

Significantly, the Supreme Court also emphasized the importance of accounting for AEDPA's purposes and the implications for habeas practice not just when considering whether *Ford* claims are "second or successive" but whenever "petitioners run the risk under the proposed interpretation [of AEDPA] of forever losing their opportunity for any federal review of their . . . claims." *Id.* at 945-46, 127 S.Ct. 2842 (citation and internal quotation marks

omitted). Towards that end, the Court drew on examples where it had construed other aspects of AEDPA's limiting language to nonetheless allow for claims and procedures where failure to do so would preclude any opportunity for petitioners to have potentially meritorious claims heard.

For example, the *Panetti* Court pointed to *Castro v. United States*, 540 U.S. 375, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003). In that case, the *pro se* petitioner filed a motion for new trial under Federal Rule of Criminal Procedure 33. *Castro*, 540 U.S. at 378, 124 S.Ct. 786. The district court recharacterized the filing as a § 2255 motion, without notice to the petitioner. The district court denied the motion on the merits, and we affirmed. *Id.* at 378-79, 124 S.Ct. 786. Three years later, when the petitioner sought to file a motion he called a § 2255 motion, the motion was dismissed as "second or successive." *Id.* at 379, 124 S.Ct. 786. The Supreme Court granted certiorari to consider whether a *pro se* petitioner's motion may be recharacterized as second or successive without notice to the petitioner. *Id.* But before the Court could consider the answer to that question, it had to determine whether it could even take up the case since § 2244(b)(3)(E) requires that the "grant or denial of an authorization by a court of appeals to file a second or successive application . . . shall not be the subject of a [certiorari] petition." *Id.* at 379, 124 S.Ct. 786 (quoting 28 U.S.C. § 2244(b)(3)(E)). The *Castro* Court held that it could still review the case, despite the lower courts' actions. *Id.*

In *Panetti*, the Court described its holding in *Castro* as having "resisted an interpretation of [AEDPA] that would produce troublesome results, create procedural anomalies, and close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Panetti*, 551 U.S. at 946, 127 S.Ct. 2842 (internal quotation marks omitted). And the Court cited other several cases that demonstrate these same principles. *See Williams*, 529 U.S. at 437, 120 S.Ct. 1479 (holding that under § 2254(e)(2), a "fail[ure] to develop" a claim's factual basis in state-court proceedings is not established unless the petitioner is not duly diligent); *Johnson v. United States*, 544 U.S. 295, 308-09, 125 S.Ct. 1571, 161 L.Ed.2d 542 (2005) (holding that where an underlying state conviction used to enhance a federal sentence has since been vacated, § 2255's one-year limitations period does not begin to run until petitioner receives notice of order vacating the prior conviction, as long as petitioner sought order with due diligence); *Granberry v. Greer*, 481 U.S. 129, 131-34, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) (holding that where the state fails to object on grounds of exhaustion and a potentially meritorious exhaustion defense exists, a federal court should not simply dismiss the petition but should instead exercise discretion to determine whether the administration of justice would be better served by insisting on exhaustion or by instead addressing the merits of the petition); *Duncan v. Walker*, 533 U.S. 167, 178, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (holding that federal habeas corpus review does not toll limitation period under § 2244(d)(2) on grounds that contrary reading "would do far less to encourage exhaustion prior to seeking federal habeas review and would hold greater potential to hinder finality").

These cases involve a variety of claims and portions of AEDPA's language. But they all share one thing: to resolve each case, the Supreme Court relied on the implications for habeas practice and the purposes of AEDPA. That the Supreme Court found these considerations applicable in these different cases demonstrates definitively that *Ford* claims are not a one-off; rather, they are but one type of claim among several where, in construing the

meaning of AEDPA's language, we must consult the implications for habeas practice and the purposes of AEDPA.

b. *Brady* claims are not factually distinguishable from *Ford* claims for the purposes of determining whether they are "second or successive."

With *Panetti* and its factors out of the way, *Tompkins* then factually distinguished *Brady* claims from *Ford* claims without applying the *Panetti* factors, instead creating a new test not found in *Panetti*. Specifically, *Tompkins* homed in on the *Panetti* Court's pronouncement that "*Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition." *See Tompkins*, 557 F.3d at 1259-60 (quoting *Panetti*, 551 U.S. at 942, 127 S.Ct. 2842) (internal quotation marks omitted). Then *Tompkins* ascribed a meaning and significance to the term "ripe" that directly conflicts with *Panetti*'s analysis. In particular, *Tompkins* concluded that a claim's "ripeness" depends on when the violation supporting the claim occurred. *Id.* at 1260. And since a *Brady* violation happens during trial or sentencing, *Tompkins* reasoned, any claim based on a *Brady* violation necessarily ripens, at the latest, by the end of sentencing. *See id.*

We see two problems with this reasoning. First, the Supreme Court in *Panetti* did not purport to define the word "ripe." Nor does *Tompkins* cite anything to support its definition of the term. *See id.* at 1259-61. In fact, *Tompkins*'s definition of the word conflicts with how the term is generally understood in the law. "Ripeness" refers to "[t]he state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made." *Ripeness*, Black's Law Dictionary (10th ed. 2014). But when, through no fault of the petitioner, a *Brady* violation goes undiscovered through trial and sentencing, the facts concerning a claim based on that violation have *not* been developed sufficiently to permit an intelligent and useful decision to be made. Indeed, they have not been developed at all until such time as the *Brady* violation is discovered.

Second, and even more significantly, to the extent that *Panetti* referred to ripeness as a consideration within its framework for evaluating whether a second-in-time claim is "second or successive," *Tompkins*'s discussion of "ripeness" cannot be harmonized with *Panetti*'s. *Panetti* accounted for what it referred to as ripeness only for the purpose of evaluating the implications on habeas practice of holding an unripe claim to be "second or successive." *Panetti*, 551 U.S. at 943-45, 127 S.Ct. 2842. As we have discussed, *Panetti* expressed concern that holding unripe claims to be "second or successive" would flood the courts with useless claims on the off chance that such claims might later ripen. *See id.* at 943, 127 S.Ct. 2842. But, of course, that is true of *Brady* claims that could not have been discovered earlier through due diligence. So *Panetti* is not distinguishable on grounds of a difference in ripeness between *Ford* claims and *Brady* claims that could not have been discovered earlier. On the contrary, *Panetti*'s use of ripeness in its analysis compels the conclusion that a second-in-time *Brady* claim that could not have been discovered earlier is not "second or successive."

2. The prior-panel-precedent rule requires us to apply Tompkins, *though we are "convinced it is wrong."*

Though we disagree with *Tompkins* and its reasoning, we recognize that it is nonetheless our precedent. Because *Tompkins* addresses whether *Brady* claims in § 2254 petitions can ever avoid being "second or successive," we must consider whether

Tompkins controls the outcome when § 2255 petitions are involved. We conclude that it does.

[22, 23] The prior-panel-precedent rule requires subsequent panels of the court to follow the precedent of the first panel to address the relevant issue, "unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court." *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). Even when a later panel is "convinced [the earlier panel] is wrong," the later panel must faithfully follow the first panel's ruling. *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc). We of course are not bound by anything that is mere dictum. *See Lebron v. Sec'y of Fla. Dep't of Children & Families*, 772 F.3d 1352, 1360 (11th Cir. 2014) ("[D]iscussion in dicta 'is neither the law of the case nor binding precedent.' ") (citation omitted). But our case law reflects that under the prior-panel-precedent rule, we must follow the reasoning behind a prior holding if we cannot distinguish the facts or law of the case under consideration. *See Smith*, 236 F.3d at 1301-04. So we consider whether we may limit *Tompkins*'s holding to only *Brady* claims arising under § 2254.

Important differences between § 2254 and § 2255 do exist. Among others, § 2254 vindicates the concerns of comity and federalism by restricting when federal courts can reopen state criminal convictions, while § 2255, which deals with federal criminal convictions, does not.

Nor is the interest of finality exactly the same for § 2254 and § 2255 claims. "Finality has special importance in the context of a federal attack on a state conviction." *McCleskey*, 499 U.S. at 491, 111 S.Ct. 1454.

And separation-of-powers considerations drive § 2255 claims. *See Bousley v. United States*, 523 U.S. 614, 620-21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (characterizing separation-of-powers concerns as "the doctrinal underpinnings of habeas review" of federal convictions and sentences); *see also Welch v. United States*, —— U.S. ——, 136 S.Ct. 1257, 1268, 194 L.Ed.2d 387 (2016). But they have no relevance to § 2254 claims.

Plus, the federal government has a distinctive concern for ensuring that federal prosecutors have acted appropriately when it reviews § 2255 claims: "the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler*, 527 U.S. at 281, 119 S.Ct. 1936 (internal quotation marks omitted) (quoting *Berger*, 295 U.S. at 88, 55 S.Ct. 629).

Even the language of the two statutes' respective gatekeeping provisions differs. *Compare* 28 U.S.C. § 2244(b)(2)(B) (restricting habeas review of state convictions to, among others, cases where "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence"), *with* 28 U.S.C. § 2255(h) (limiting federal habeas review to cases of "newly discovered evidence," among others). *But see Gonzalez v. Sec., Dep't of Corr.*, 366 F.3d 1253, 1262 (11th Cir. 2004) (en banc) (recognizing "no material difference in the relevant statutory language" between gatekeeping provisions of sections 2244 and 2255).

All of these differences provide good reason to treat § 2254 and § 2255 claims differently under appropriate circumstances. But none of them allows us to sufficiently distinguish *Tompkins*'s reasoning in analyzing *Brady* claims under § 2254 from how we must analyze *Brady* claims in this Circuit under § 2255.

As we have noted, *Tompkins* based its determination that all *Brady* claims are necessarily "second or successive" on its conclusion that all *Brady* claims ripen during trial or, at the latest, sentencing. We have already explained why, were we starting our analysis from scratch, we would conclude that is not correct.

But we see no basis that allows us to distinguish between state and federal proceedings in this regard; *Brady* claims in state proceedings do not "ripen" any sooner than do *Brady* claims in federal proceedings under *Tompkins*'s definition of the word. And while federal courts have a special interest in ensuring the integrity of federal proceedings, we do not think that that fact alone explains why *Brady* claims in state proceedings should be treated any differently than *Brady* claims in federal proceedings.

For these reasons, we must conclude that *Tompkins*'s reasoning governs all second-in-time *Brady* claims, regardless of whether they are brought under § 2254 or § 2255. Despite *Tompkins*'s failure to adhere to—or even to attempt to apply—the *Panetti* factors, we must nonetheless hew to *Tompkins*'s command and deem Scott's 2011 Motion "second or successive" under § 2255(h). Because *Tompkins* is fatally flawed, however, we respectfully urge the Court to take this case en banc so we can reconsider *Tompkins*'s reasoning.

V.

[24] Having concluded we must dismiss Scott's § 2255 motion as "second or successive," we now turn to Scott's alternative motion to reopen his original 2006 Motion under Rule 60(b)(3). As we noted at the outset, the district court ultimately granted Scott's alternative motion to reopen but declined to grant him relief on the merits. On appeal, neither party disputes that the district court was within its power to reopen the 2006 Motion. Scott argues, however, that the district court incorrectly concluded that he failed to adequately allege ineffective assistance of his trial counsel in light of the government's previously undisclosed evidence about Pena.

[25, 26] The Sixth Amendment right to counsel "is the right to effective assistance of counsel." *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052 (citation and internal quotation marks omitted). A claim of ineffective assistance of counsel requires a two-pronged showing: that counsel's performance was constitutionally deficient and that counsel's deficiencies prejudiced the proceeding's outcome. *Id.* at 693, 104 S.Ct. 2052. The district court concluded that even in light of the new evidence about Pena, Scott's trial counsel did not exhibit constitutionally deficient performance.

[27–29] An attorney's performance fails to meet the constitutional minimum when it falls "below an objective standard of reasonableness . . ., which means that it is outside the wide range of professionally competent assistance." *Payne v. Allen*, 539 F.3d 1297, 1315 (11th Cir. 2008) (citations and internal quotation marks omitted). We have observed that "omissions are inevitable" because "trial lawyers, in every case, could have done something more or something different." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000). We therefore "conduct a highly deferential review of counsel's performance and indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment." *Payne*, 539 F.3d at 1315 (alteration and internal quotation marks omitted). "[T]rial counsel has not performed deficiently when a reasonable lawyer could have decided, under the circumstances, not to investigate or present particular evidence." *Id.* at 1316 (quoting *Grayson v.*

Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001)).

The district court acknowledged that Scott's counsel took the government at its word that it had produced all *Brady* and *Giglio* material, and, as a result, that his counsel did not undertake additional steps to seek further impeachment material for Pena. But the court refused to find "that no competent lawyer would have declined to expend further time and resources" on searching for *Brady* and *Giglio* material when defense counsel is "entitled presume that the government had disclosed all such matters." Scott argues on appeal that this is incorrect, and that under the district court's reasoning, "no counsel could ever be found ineffective, entitled as counsel would be to blindly rely on the presumption that the prosecution has provided the defense with all the exculpatory or impeachment material that is to be found in the case."

[30] We conclude the district court did not abuse its discretion in declining to find Scott's trial counsel ineffective. The decision to refrain from additional investigation into Pena's background was within the "wide range of professionally competent assistance," given the inevitable choices defense lawyers must make about how to deploy their limited time and resources. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. An attorney's performance is not deficient in hindsight just because he or she made one choice versus another. *Cf. Willis v. Newsome*, 771 F.2d 1445, 1447 (11th Cir. 1985) ("Tactical decisions do not render assistance ineffective merely because in retrospect it is apparent that counsel chose the wrong course.").

This is not to say that no attorney could ever be found ineffective for taking the government's word as grounds for refraining from further investigation. In some cases obvious red flags might exist calling for further inquiry, even where the government has assured defense counsel that it has disclosed all *Brady* and *Giglio* material. An attorney who does not investigate under those circumstances might indeed be constitutionally ineffective. But on the facts of this case, no such red flags existed. We conclude that the district court did not abuse its discretion in declining to grant Scott relief on his reopened 2006 Motion.

VI.

Ultimately, *Tompkins* binds us to conclude that in § 2255 cases, all second-in-time *Brady* claims are "second or successive" under § 2255(h), even if the petitioner could not reasonably have been expected to discover the *Brady* violation and there is a reasonable probability that timely disclosure of the suppressed evidence would have resulted in an acquittal. We think this conclusion conflicts with *Panetti* and effects a suspension of the writ of habeas corpus as it pertains to this narrow subset of *Brady* claims. Supreme Court precedent, the nature of the right at stake here, and habeas corpus require a petitioner who has reasonably probably been convicted because the government failed to disclose material exculpatory evidence, to have a full and fair opportunity to obtain relief. For this reason, we urge our colleagues to rehear this case en banc and reevaluate the framework we established in *Tompkins*.

AFFIRMED.

Appendix B

Rehearing Denied

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 15-11377; 16-11950-EE

GINO VELEZ SCOTT,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: ROSENBAUM and JILL PRYOR, Circuit Judges, BARTLE,* District Judge.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*The Honorable Harvey Bartle III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

ORD-41

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 15-11377; 16-11950-EE

GINO VELEZ SCOTT,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

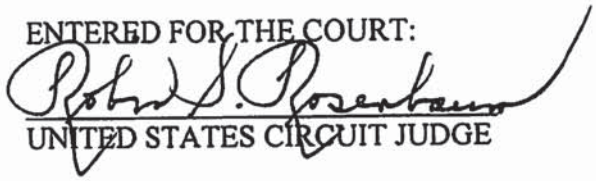
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ROSENBAUM and JILL PRYOR, Circuit Judges, and BARTLE,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

*The Honorable Harvey Bartle III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

ORD-42

Appendix C

District court order denying Scott's numerically-second § 2255 motion, and reopening his numerically-first § 2255 motion, Case No. 3:11-cv-1144-J-32, Doc. 35

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GINO VELEZ SCOTT,

Petitioner,

vs. Case No.: 3:11-cv-1144-J-32PDB
3:06-cv-906-J-32HTS
3:03-cr-343-J-32PDB

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

This case is before the Court on Petitioner Gino Velez Scott's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Doc. 1)[1] and Memorandum of Law (Doc. 3). The Court appointed counsel for Petitioner in this matter. (Crim. Doc. 141). On July 9, 2014, the Court directed counsel for Petitioner to file a supplemental brief explaining why the Court should not dismiss Petitioner's § 2255 motion as second or successive, or alternatively, why Petitioner's Rule 60(b)(3) motion is not untimely. Petitioner and the government have since filed several supplemental briefs. (Docs. 26, 31, 34). Having reviewed the parties' filings, the Court is satisfied that it has been briefed on the matter and is prepared to rule. Upon review of the case law, the Court concludes that Petitioner's § 2255 motion is second or successive and is due to be dismissed without prejudice to his right to seek permission from the

[1] Citations to Petitioner's criminal case file, United States of America vs. Gino Velez Scott, 3:03-cr-343-J-32HTS-2, are denoted as "Crim. Doc. ___." Citations to Petitioner's current § 2255 case file, 3:11-cv-1144-J-32PDB, are denoted as "Doc. ___."

Eleventh Circuit Court of Appeals to file a second motion to vacate. However, Petitioner's alternative motion for relief from judgment on his initial § 2255 motion, pursuant to Fed. R. Civ. P. 60(b)(3), is appropriately tailored as such and due to be granted, with further instructions to follow.

I. Background

On June 30, 2004, a jury found Petitioner guilty of one count of conspiracy to possess five kilograms or more of cocaine with intent to distribute. (Crim. Doc. 89). Because of prior convictions, the Court sentenced Petitioner to life in prison. (Crim. Doc. 109). Petitioner appealed to the Eleventh Circuit Court of Appeals, which affirmed Petitioner's conviction in 2005. United States v. Scott, 136 F. App'x 273 (11th Cir. 2005). The Supreme Court denied Petitioner's request for certiorari review.

In 2006, Petitioner filed an initial motion to vacate under 28 U.S.C. § 2255. Among other things, Petitioner alleged that counsel rendered ineffective assistance by failing to investigate and uncover further evidence that would have impeached one of the government's witnesses against him, an ex-convict-turned-DEA-informant named Freddy Pena. The Court denied Petitioner's motion to vacate on April 16, 2008, explaining that trial counsel elicited damaging admissions from Pena on cross-examination relating to his prior heroin conviction and status as a paid informant, but that Petitioner failed to show that further investigation would have yielded any additional impeachment. (Case No. 3:06-cv-906-J-32HTS, Doc. 12 at 5-7). The Court

therefore concluded that Petitioner had failed to show prejudice under Strickland v. Washington.[2] For its part, the United States argued:

> What would further investigation have disclosed? … [T]he defendant must provide some evidence that had defense counsel conducted a more thorough investigation of the witness, something of use to the defense would have been uncovered. The defense has had more than two years to suggest something that further investigation would have turned up that might have made a difference in the trial. The petition has nothing on this topic… Notably, even if the defense had found a Brady or Giglio violation during these intervening years, the burden still would be on the defendant to show that, had the evidence been disclosed, a reasonable probability exists that the outcome of the trial would have been different.

(Case No. 3:06-cv-906-J-32HTS, Doc. 8 at 8). Thus, the United States contended that no prejudice resulted from trial counsel's abridged investigation of Pena because there was no further impeachment evidence that counsel could have uncovered.[3]

But there was more impeachment evidence. In April 2011, the United States notified Petitioner that it had information about Pena about which it claimed to have been unaware during Petitioner's trial and initial § 2255 proceeding. The United States disclosed to Petitioner that: (1) Pena lied to investigators about the source of heroin that was the subject of his 1996 arrest for heroin trafficking, (2) in October 2001, Pena and a DEA confidential source stole 1.5 kilograms of cocaine from a drug dealer who was the target of a DEA investigation; (3) in November 2001, the DEA's

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[2] Strickland v. Washington, 466 U.S. 668 (1984) (to obtain relief from a conviction or sentence due to the ineffective assistance of counsel, a petitioner must show both that counsel performed deficiently, and that such performance prejudiced the petitioner.).

[3] Because the Court declined to rule on whether defense counsel had performed deficiently under Strickland, the Court's decision that Petitioner had not shown prejudice was dispositive. (Case No. 3:06-cv-906-J-32HTS, Doc. 12 at 5-7).

Tampa office activated Pena as a confidential source, but Pena did not disclose his participation in the theft of cocaine one month earlier; (4) sometime in 2002, DEA agents learned about the theft of cocaine and confronted Pena about it, and Pena admitted to the theft; and (5) in June 2002, the Tampa DEA's office moved Pena to "restricted use," with one Assistant United States Attorney commenting that he would be hesitant to use Pena again in the future. Later in 2002, the Jacksonville DEA's office activated Pena anyway for the investigation against Petitioner. Petitioner was not aware of any of the aforementioned information during his trial or first § 2255 proceeding, nor did the United States disclose it during pretrial discovery.

The United States made the belated disclosures after an Assistant United States Attorney from Massachusetts alerted the Jacksonville United States Attorney's Office to the information. The Massachusetts prosecutor was researching Brady material on Pena because his office was using Pena as a witness in one of its own trials, and discovered the above information while reviewing the files of the DEA's Tampa office. Another prosecutor with the Jacksonville office had also disclosed this same impeachment evidence in another trial where Pena was a witness[4], but the prosecutor in Petitioner's case averred that he was not actually aware of this information until learning about it in March or April of 2011. The prosecutor maintains that he notified Petitioner as soon as he learned about the information.

[4] That case was United States of America vs. Don Robert Brown, Jr., 3:03-cr-238-J-32MCR (M.D. Fla.).

Based on the new disclosures, Petitioner filed a second § 2255 motion to vacate on November 17, 2011. (Doc. 1). Petitioner asserts that the prosecution suppressed evidence in Petitioner's trial and subsequent collateral proceeding on four occasions: (1) by failing to comply with the Court's standing pretrial discovery order; (2) by representing that all Brady material had been turned over when trial counsel protested that the United States' disclosures were incomplete (See Crim. Doc. 96 at 51-53); (3) when the United States elicited testimony from Pena at trial that Pena had never provided false or misleading information to the DEA; and (4) when the United States argued, in response to Petitioner's initial § 2255 motion, that Petitioner could not show prejudice from trial counsel's failure to adequately investigate Pena because there was no further impeachment evidence to uncover. (See Doc. 3 at 13-14). Petitioner has not obtained permission from the Eleventh Circuit Court of Appeals to file a second or successive motion to vacate, as is typically required by 28 U.S.C. §§ 2255(h) and 2244(b). Petitioner contends that the disclosures revealed Brady and Giglio violations, and that the Court should not consider the current motion to vacate "second or successive" because the claims could not have been raised in Petitioner's initial motion given that the United States withheld the evidence until after the Court had already ruled on his first motion to vacate.

Alternatively, Petitioner requests that if the Court finds that his current motion to vacate is second or successive, then it should reopen the judgment in the initial § 2255 case pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 60(b)(3). Petitioner points out that the April 2011 disclosures

contradict the United States' representation in the initial § 2255 case that further investigation by trial counsel would not have revealed any additional impeachment evidence against Pena. Petitioner argues that the United States' representation in the first § 2255 case – a representation that now appears to have been untrue – establishes that the United States committed fraud, misrepresentation, or misconduct warranting a revisitation of the second ineffective assistance of counsel claim raised in Petitioner's first motion to vacate.

II. Discussion

A. Petitioner's Motion to Vacate is "Second or Successive"

The Court asked the parties why it should not dismiss the current motion to vacate as "second or successive" under the authority of Tompkins v. Sec'y, Dep't of Corrections, 557 F.3d 1257 (11th Cir. 2009), Stewart v. United States, 646 F.3d 856 (11th Cir. 2011), and Maye v. United States, 2014 WL 99303 (M.D. Fla. Jan. 9, 2014). (See Doc. 23). The parties have since thoroughly briefed the Court on the matter. Petitioner's arguments against regarding the current motion as "second or successive" are reasoned and persuasive. Were the Court writing on a blank slate it might be inclined to agree with Petitioner. Indeed, because Petitioner could not possibly have discovered the factual predicate underlying the current Brady/ Giglio claims before he filed his initial § 2255 motion (because the government was withholding it), Petitioner has not evinced any intent to abuse the writ. And as Petitioner points out, the Supreme Court has indicated that pre-AEDPA "abuse of the writ" doctrine may still inform whether a motion should be considered "second or

successive." See Panetti v. Quarterman, 127 S. Ct. 2842, 2853 (2007); but see Magwood v. Patterson, 130 S. Ct. 2788, 2799 (2010) ("The dissent similarly errs by interpreting the phrase 'second or successive' by reference to our longstanding doctrine governing abuse of the writ. AEDPA modifies those abuse-of-the-writ principles and creates new statutory rules under § 2244(b)."). "But the judicially-created equitable rules set forth and applied in [pre-AEDPA case law] have since been largely superseded by the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA')." Ellis v. United States, ____ F. App'x ____, 2014 WL 6653035 at *1 (11th Cir. Nov. 25, 2014) (citing 28 U.S.C. §§ 2244(b), 2255(h); Gonzalez v. Sec'y, Dep't of Corr., 366 F.3d 1253, 1269 (11th Cir. 2004)). This Court is constrained to rule consistently with Tompkins and Stewart, which instruct that a motion to vacate like Petitioner's is "second or successive." The procedural background of Tompkins, in particular, reveals that it was decided on a factual record similar to the case at hand.

In Tompkins, a prisoner on Florida's death row filed a second § 2254 motion to vacate in which he raised new Brady and Giglio claims.[5] 557 F.3d at 1259. Tompkins argued that the court should not dismiss his § 2254 motion as "second or successive" by likening his case to Panetti v. Quarterman. In Panetti, the Supreme Court held that a petitioner's claim of incompetency-to-be-executed based on his mental condition at the time of the scheduled execution is not one that must be brought in

[5] "Because of the similarities between the provisions governing second or successive petitions under § 2254 and second or successive motions under § 2255, precedent interpreting one of these parallel restrictions is instructive for interpreting its counterpart." Stewart, 646 F.3d at 859 n.6.

an initial habeas motion on pain of being treated as "second or successive." 127 S. Ct. at 2853. The Panetti Court emphasized that its holding was limited to incompetency-to-be-executed claims because such claims are necessarily unripe until after the time has passed to file an initial habeas petition. Id. at 2852. Nevertheless, Tompkins argued that his new Brady and Giglio claims should similarly be regarded as not "second or successive." The Eleventh Circuit rejected that argument, stating:

> Unlike a Ford [incompetency-to-be-executed] claim, the Gardner, Brady, and Giglio claims Tompkins wants to raise are claims that can be and routinely are raised in initial habeas petitions. The violation of constitutional rights asserted in these kinds of claims occur, if at all, at trial or sentencing and are ripe for inclusion in a first petition.

Tompkins, 557 F.3d at 1260. The court described Tompkins' case as "the usual case [where] a petition filed second in time and not otherwise permitted by the terms of [28 U.S.C.] § 2244 will not survive AEDPA's 'second or successive' bar." Id. (quoting Panetti, 127 S. Ct. at 2855). The court went further, explaining:

> Tompkins would have us hold that any claim based on new evidence is not "ripe" for presentation until the evidence is discovered, even if that discovery comes years after the initial habeas petition is filed. That is not what the Supreme Court in Panetti meant by "ripe."… The reason the Ford claim was not ripe at the time of the first petition in Panetti is not that evidence of an existing or past fact had not been uncovered at that time. Instead, the reason it was unripe was that no Ford claim is ever ripe at the time of the first petition because the facts to be measured or proven—the mental state of the petitioner at the time of execution—do not and cannot exist when the execution is years away.

Tompkins, 557 F.3d at 1260 (citations omitted). Thus, the court held that a claim cannot avoid being characterized as "second or successive" simply because it is based on a factual predicate that was previously undiscovered. Only a claim of incompetency-to-be-executed could avoid being characterized as "second or

successive," and then only because the facts relevant to that claim necessarily do not even exist until the time for execution draws close – not because the supporting facts existed but were previously unknowable. Id.

Petitioner acknowledges the force of Tompkins, but argues that the court's holding should be limited to its facts. Petitioner points out that the facts as recited in Tompkins do not make clear whether Tompkins' Brady and Giglio claims were based on a factual predicate that he knew of when he filed his first habeas petition, or whether, like Petitioner's case, the claims were based on facts only discovered after the first motion to vacate was resolved because the government had hitherto concealed them. (Doc. 3 at 17). Petitioner contends that the holding of Tompkins was limited to the situation where a petitioner files a second motion to vacate based on Brady or Giglio claims that he already pled or could have included in his first petition. Therefore, Petitioner contends that Tompkins does not apply to this case.

Petitioner is correct that Tompkins' recitation of the facts does not make the context entirely clear. However, the background of Tompkins reveals that the court rendered its decision based on a procedural history similar to Petitioner's. Tompkins filed an initial habeas petition in federal district court in 1989 (Wayne Tompkins vs. Harry K. Singletary, 8:89-1638-CIV-T-99B), which the district court denied on the merits. The Eleventh Circuit affirmed the district court's decision on appeal. Tompkins v. Moore, 193 F.3d 1327 (11th Cir. 1999). Then, in 2001, the State of Florida disclosed police reports that arguably contradicted the theory of guilt which the State had advanced at trial. Initial Brief for Tompkins, Tompkins v. Florida, 994

So. 2d 1072 (Fla. 2008) (Nos. SC08-992, SC08-1979, SC08-2000), 2008 WL 5007468 at *9. Also in 2001, the State turned over previously undisclosed documents about a possible witness who had been the murder victim's boyfriend, and who subsequently provided an affidavit giving a statement favorable to Tompkins. Id. at 10. After unsuccessfully moving for post-conviction relief in state court, Tompkins filed a second § 2254 motion to vacate in federal court in 2008, raising Brady and Giglio claims based on the 2001 disclosures. (Case No. 8:08-cv-2212-T-23MAP, Doc. 1 at 11). The district court dismissed the petition as being an unauthorized second or successive motion to vacate. Tompkins v. Sec'y, Dep't of Corrections, 2008 WL 4844716 (M.D. Fla., Nov. 10, 2008). That decision led to the Eleventh Circuit's opinion in Tompkins, 557 F.3d 1257. Thus, the Brady and Giglio violations alleged in Tompkins were based on disclosures made by the State only after the petitioner's first § 2254 motion was decided. Moreover, the disclosures were of evidence in the government's possession. That is the same as the situation here, where Petitioner raises Brady and Giglio claims based on disclosures the United States made only after his initial motion to vacate had been decided. Therefore, the fact that Petitioner's new claims are based on information disclosed only after his first motion to vacate was resolved does not distinguish this case from Tompkins.

Petitioner asserts that the Eleventh Circuit retreated from Tompkins in Stewart v. United States. (Doc. 3 at 19). However, Stewart evinces no intent to recede from Tompkins. Stewart involved a defendant who, after filing an initial § 2255 petition, obtained vacatur of a state conviction that was a necessary predicate

for his sentence as a career offender under the Armed Career Criminal Act. 646 F.3d at 858. After getting the state conviction vacated, Stewart moved to correct his federal sentence through a second habeas petition, arguing that his career offender sentence was rendered invalid without the predicate conviction. Id. Thus, the defect under attack in Stewart's second habeas petition (continued imposition of the career offender sentence without the necessary predicate convictions) did not even exist until the predicate conviction was vacated, which in turn only occurred after Stewart's first federal habeas petition was resolved. The court of appeals therefore found that Stewart's motion to vacate was not "second or successive," and that he was not required to obtain permission from the court of appeals before filing it. Id. at 865. In reaching that conclusion the court discussed with approval the Fifth Circuit's decision in Leal Garcia v. Quarterman, 573 F.3d 214 (5th Cir. 2009), where the Fifth Circuit held that a prisoner's second habeas petition, based upon a 2005 declaration by President George W. Bush to enforce an order of the International Court of Justice, was not "second or successive." According to Leal Garcia, the petitioner's second motion to vacate was not "second or successive" because the defect complained of did not even come into existence until the state of Texas decided it would not respect the President's 2005 directive to comply with the International Court of Justice's order. Leal Garcia, 573 F.3d at 223-24. Stewart and Leal Garcia, however, emphasized the distinction between claims based on a factual predicate that was "merely undiscoverable" and claims based on a defect that was altogether nonexistent.

Stewart, 646 F.3d at 863; Leal Garcia, 573 F.3d at 222. As the Eleventh Circuit recounted:

> On appeal, the Fifth Circuit set out to determine if Leal Garcia's petition was successive under AEDPA, and, therefore, subject to the statute's gatekeeping provisions. Id. at 219. Leal Garcia… argue[d] that his petition was "non-successive because it [was] based on a claim unavailable to him at the time of his first habeas petition." Leal Garcia, 573 F.3d at 220 (emphasis added). The court rejected the full breadth of Leal Garcia's interpretation because it did not comport with AEDPA's treatment of the term "successive." Id. at 221. To adopt Leal Garcia's approach—classifying as "non-successive" any petition based on a claim that was "unavailable" at the time of a first petition—would nullify AEDPA's gatekeeping provisions. Id. (explaining that "claims based on new rules of constitutional law (made retroactive by the Supreme Court)," and "claims based on a factual predicate not previously discoverable" are both subject to the gatekeeping provision; therefore, both are previously unavailable and "successive" under AEDPA).

Stewart, 646 F.3d at 861. In explaining why Stewart could bring his second motion to vacate without it being considered "second or successive," the Eleventh Circuit said:

> "[C]laims based on a factual predicate not previously discoverable are successive," but "[i]f ... the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later petition based on that defect may be non-successive." Leal Garcia, 573 F.3d at 221, 222. We are not faced with a claim based on facts that were merely undiscoverable. Rather, Stewart has presented a claim, the basis for which did not exist before the vacatur of his predicate state convictions—after his first § 2255 motion had already been filed and dismissed.

Stewart, 646 F.3d at 863 (emphasis in original).

Far from retreating from Tompkins, the Stewart decision reiterates that a second habeas petition will not avoid being characterized as "second or successive" simply because the factual predicate of a claim was previously undiscoverable.

Rather, it is only defects that were wholly nonexistent at the time the petitioner filed his initial motion to vacate that will avoid being characterized as "second or successive" in a subsequent motion to vacate. The Eleventh Circuit specifically rejected the theory that any claim unavailable when the petitioner filed his first motion to vacate is not "second or successive." Stewart, 646 F.3d at 860 ("But adopting that approach too broadly would threaten Congress' clear intention to limit 'second or successive' attempts at post-conviction relief."). Because AEDPA specifically provided a mechanism for bringing claims based on newly discovered evidence in a subsequent motion to vacate, see 28 U.S.C. §§ 2244(b), 2255(h), to hold that such claims may nevertheless proceed without comporting with the requirements of § 2244(b) would be to subvert the statutory scheme erected by Congress to regulate habeas litigation. See Stewart, 646 F.3d at 860.

The Court acknowledges that its decision is in tension with those of other circuit courts of appeals to have confronted the same issue. The Ninth and Tenth Circuits have each addressed whether a claim should be treated as "second or successive" when based on new evidence that the government withheld until after the petitioner has filed his first motion to vacate. United States v. Lopez, 577 F.3d 1053 (9th Cir. 2009); Douglas v. Workman, 560 F.3d 1156 (10th Cir. 2009). Each of those circuits found that such claims should not be treated as "second or successive." Lopez, 577 F.3d at 1064-65 ("A broad rule… under which all second-in-time Brady claims would be subject to § 2255(h)(1), would completely foreclose federal review of some meritorious claims and reward prosecutors for failing to meet their constitutional

disclosure obligations… This would seem a perverse result and a departure from the Supreme Court's abuse-of-the-writ jurisprudence."); Douglas, 560 F.3d at 1192-93 ("[T]o treat Mr. Douglas's Brady claim as a second or successive request for habeas relief, subject to the almost insurmountable obstacles erected by 28 U.S.C. § 2244(b)(2)(B), would be to allow the government to profit from its own egregious conduct… Certainly, that could not have been Congress's intent when it enacted AEDPA.")[6]. However, this Court must follow Eleventh Circuit precedent, not out-of-circuit decisions. Because the government's alleged Brady and Giglio violations existed at the time Petitioner filed his first motion to vacate, even though the factual predicate was undiscoverable by Petitioner, Petitioner's claim does not fall within Stewart's narrow exception for subsequent claims that do not qualify as "second or successive."

The Court also recognizes the apparent inequity in holding that the government, either through simple negligence or purposeful misconduct[7], could withhold exculpatory evidence until after a petitioner has filed a first habeas petition,

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[6] Douglas is distinguishable from the current case, however. Importantly, the petitioner's initial motion to vacate in Douglas was still open when he discovered the new Brady material, and therefore his first motion to vacate was still unresolved. Id. at 1190. Thus, the Tenth Circuit held that "to allow Mr. Douglas to supplement his first habeas petition in this manner would not be contrary to one of the recognized purposes of AEDPA-finality." Id. Here, Petitioner's first habeas petition was resolved in 2008, so finality is a greater concern. Moreover, in In re Pickard, 681 F.3d 1201 (10th Cir. 2012), the same circuit court held that a § 2254 petition raising new Brady and Giglio claims based on information obtained from the government through FOIA requests only after petitioner's first habeas petition was resolved were "certainly second or successive claims…" Id. at 1205.

[7] The Court does not believe that the United States suppressed exculpatory evidence on purpose. The seasoned prosecutor, well-known to the Court, which has no doubt of his integrity, promptly disclosed the information to Petitioner once he discovered it. The Court is nevertheless troubled that the government's negligence could result in depriving Petitioner of the ability to be heard on this claim earlier and now, through no fault of his own, the Petitioner must meet the higher burden of § 2255(h)(1).

and then require the Petitioner to meet the heightened burden of demonstrating to the court of appeals by clear and convincing evidence that the newly discovered evidence would produce an acquittal. See 28 U.S.C. § 2255(h)(1). However, the Court is bound by Tompkins and Stewart, neither of which suggests that Brady or Giglio violations discovered subsequent to an initial habeas petition may be treated as anything other "second or successive." Petitioner is not completely without a remedy, though. While the burden is high, Petitioner may still seek permission to file a second or successive motion to vacate from the Eleventh Circuit Court of Appeals based on the newly disclosed evidence.

Accordingly, Tompkins and Stewart dictate that Petitioner's motion to vacate be deemed "second or successive." A district court may only consider a second or successive motion to vacate if the petitioner has obtained permission from the circuit court of appeals to file one. 28 U.S.C. § 2255(h). "The bar on second or successive motions is jurisdictional…" In re Morgan, 717 F.3d 1186, 1193 (11th Cir. 2013) (citing Panetti, 127 S. Ct. at 2852). Petitioner has not yet obtained authorization from the Eleventh Circuit to file this second motion to vacate. Accordingly, the motion is due to be dismissed for lack of jurisdiction, but without prejudice to Petitioner's right to request permission from the Eleventh Circuit to refile it in this Court.

B. Petitioner is entitled to the limited relief afforded by Rule 60(b)(3) to reopen the judgment on Petitioner's first habeas petition

The Court considers, in the alternative, whether it should reopen the judgment on Petitioner's initial § 2255 motion pursuant to Fed. R. Civ. P. 60(b). Petitioner

argues that the government committed "fraud, misrepresentation, or misconduct" under Rule 60(b)(3) when it asserted in the initial § 2255 case that there was no other impeachment evidence against Freddy Pena that Petitioner's counsel could have uncovered, though in fact there was. Petitioner argues that this misrepresentation created a defect in the integrity of the initial collateral proceeding, and thus the Court should revisit that judgment. The United States insists that it did not intentionally mislead the Court concerning additional impeachment evidence, and therefore that the Court should deny relief under Rule 60(b)(3).

1. Jurisdiction

The limit against second or successive motions to vacate is jurisdictional. In re Morgan, 717 F.3d at 1193. Therefore, before the Court can rule on Petitioner's alternative Rule 60(b) motion, the Court must be satisfied that it is not actually a successive motion to vacate disguised as one under Rule 60(b) designed to circumvent the requirements of 28 U.S.C. § 2255(h). The Supreme Court has provided instruction on how to construe prisoners' claims under Rule 60. Gonzalez v. Crosby, 125 S. Ct. 2641, 2647-48 (2005). If the Rule 60 motion seeks to add a new ground for relief from the underlying conviction, or attacks the district court's resolution of an initial § 2255 motion on the merits, then a court should consider the Rule 60 motion a "second or successive" motion to vacate. Id. But "when a Rule 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," a court should not consider the Rule 60 motion to be a "second or successive" motion to vacate. Id. at 2648.

Under Petitioner's alternative Rule 60 argument, he does not attempt to add a new claim for relief, nor does he challenge the Court's reasoning for its decision on the initial motion to vacate. Instead, Petitioner asserts that the government's argument in the initial § 2255 proceeding that there was no further Brady material Petitioner's trial counsel could have uncovered, when in fact there was, corrupted the Court's judgment on the ineffective assistance of counsel claim. In other words, Petitioner's Rule 60 motion does not attempt to vacate the underlying conviction by adding a new Brady or Giglio claim, but instead seeks to vacate the court's previous order denying post-conviction relief based on the government withholding evidence relevant to the prejudice prong of Petitioner's Strickland claim. Because Petitioner has so narrowly tailored his argument, the Court is satisfied it is a proper Rule 60(b) claim rather than a disguised successive motion to vacate. Therefore, the Court has jurisdiction to rule on the motion.

2. The timeliness of Petitioner's Rule 60(b)(3) motion

The parties have disputed whether the Court should consider Petitioner's alternative Rule 60(b) motion timely, as it was filed three years after judgment in the initial § 2255 case. Petitioner characterized his Rule 60(b) motion as one alleging fraud, misrepresentation, or misconduct under Rule 60(b)(3). A motion under Rule 60(b)(3) must be brought within one year of the judgment under attack. Fed. R. Civ. P. 60(c)(1). However, this time limitation is not jurisdictional, Fed. R. Civ. P. 82, and the government did not raise the time limitation defense in its responsive pleading. See Doc. 16 at 16 n.11. The government did not raise the defense at all until nearly

three years after Petitioner filed the motion, when the Court brought it to the parties' attention sua sponte. Petitioner therefore argues that the government either waived or forfeited the time limitation defense by failing to raise it for several years, that it would be unfair in view of all the circumstances for the Court to aid the government by enforcing the time limitation sua sponte, and that if the Court does find that the government did not forfeit or waive the time limitation defense, then the Court should equitably toll the one-year limitations period for filing a Rule 60(b)(3) motion.[8]

The Court does not reach Petitioner's equitable tolling argument because it agrees that the government has forfeited the time limitations defense. A party should raise any defenses it has in its responsive pleading, Fed. R. Civ. P. 8(b)(1)(A), including a statute of limitations defense. Fed. R. Civ. P. 8(c)(1). A party that fails to timely raise a non-jurisdictional statute of limitations defense loses the right to enforce it. Although a court may raise an overlooked statute of limitations sua sponte, a court is not required to enforce it unless the limitation is jurisdictional. See Day v. McDonough, 547 U.S. 198, 209 (2006) ("In sum, we hold that district courts are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's

[8] Petitioner could also have moved for relief from judgment under Fed. R. Civ. P. 60(d)(3) due to "fraud on the court," because such motions have no time limit. However, establishing "fraud on the court" under Rule 60(d)(3) is significantly more difficult than establishing fraud, misconduct, or misrepresentation under Rule 60(b)(3). Whereas fraud, misconduct, or misrepresentation under Rule 60(b)(3) may encompass conduct that is not purposeful, see United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372, 1375 n.6 (11th Cir. 1981), "fraud on the court" under Rule 60(d)(3) "embrace[s] only that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Zakrewski v. McDonough, 490 F.3d 1264, 1267 (11th Cir. 2007) (quoting Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985)). The broader grounds for obtaining relief from judgment under Rule 60(b)(3) is the likely reason why Petitioner has argued against the Court finding the Rule 60(b)(3) motion time-barred.

habeas petition."). In Day, a habeas petitioner filed his § 2254 motion outside of the one-year time limit imposed by AEDPA. The state of Florida miscalculated the amount of untolled time that had passed and conceded that the motion was timely, but the district court identified the error, raised the issue sua sponte, and dismissed the motion. The Supreme Court upheld the district court's decision to dismiss, holding that a court may raise AEDPA's statute of limitations sua sponte where the government neither raised the defense nor intelligently waived it. Id. at 209, 210 n.11. However, the Supreme Court also stated:

> [B]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions. Further, the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred.

Id. at 210 (citations omitted) (emphasis added). Of course, Day involved AEDPA's statute of limitations rather than that contained in Fed. R. Civ. P. 60(c)(1), but the principle that a court should not enforce a statute of limitations sua sponte unless it is assured that the interests of justice will not be disserved is equally instructive here. While the Court has given both parties fair notice and an opportunity to present their positions on the timeliness of Petitioner's Rule 60(b)(3) motion, the Court is not convinced that the interests of justice will be served by dismissing Petitioner's Rule 60(b)(3) motion sua sponte. The government not only failed to argue the issue until three years after Petitioner filed the current motion, but it also made it impossible for Petitioner to timely file a Rule 60(b)(3) motion because it failed to disclose potentially impeaching evidence about Freddy Pena until three years after

Petitioner's initial § 2255 motion was resolved. Therefore, the Court declines to dismiss Petitioner's Rule 60(b)(3) motion as untimely. The government forfeited Rule 60(c)(1)'s one-year statute of limitations defense by not raising the matter in its responsive pleading or any other for three years. Only unfairness would result to Petitioner were the Court, under these circumstances, to dismiss the motion on its own initiative.

3. The merits of Petitioner's Rule 60(b)(3) motion

"On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for… (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party…" Fed. R. Civ. P. 60(b)(3). To succeed on a Rule 60(b)(3) motion, a party must prove by clear and convincing evidence[9] that the adverse party obtained the verdict through fraud, misrepresentation, or other misconduct. Cox Nuclear Pharmacy, Inc. v. CTI, Inc., 478 F.3d 1303, 1314 (11th Cir. 2007) (citing Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1287 (11th Cir. 2000)). Additionally, the movant must show "that the conduct prevented the losing party from fully and fairly presenting his case or defense." Frederick, 205 F.3d at 1287. However, Rule 60(b)(3) "does not require that the information withheld be of such nature as to alter the result in the case." Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978) (citing Seaboldt v. Pennsylvania RR. Co., 290 F.2d 296, 299-300 (3d Cir. 1961)).

[9] "Clear and convincing evidence" is difficult to define, but it has been described as evidence that "place[s] in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984).

Misrepresentation and misconduct are separate grounds for relief under Rule 60(b)(3) apart from fraud, and neither necessitates showing purposeful misconduct or malice. United States v. One (1) Douglas A-26B Aircraft, 662 F.3d 1372, 1375 n.6 (11th Cir. 1981). The Eleventh Circuit explained:

> Were the term "misrepresentation" as used in Rule 60(b)(3) interpreted to encompass only false statements made with the intention to deceive, the behavior described by that word would be wholly subsumed within the category of behavior that the same subsection of the rule refers to as "fraud." Such a narrow reading of the word would render it superfluous for purposes of Rule 60(b)(3) and would thus conflict with the established principle of statutory construction that all words within a statute are intended to have meaning and should not be construed as surplusage. United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972). While few cases have addressed the question, at least one decision in the Fifth Circuit has afforded relief for misrepresentation under Rule 60(b)(3) despite the absence of "a deliberate evil purpose to misstate or conceal or thereafter engage in foot-dragging lest the truth might be uncovered." Bros. Inc. v. Grace Mfg. Co., 351 F.2d 208, 211 (5th Cir. 1965).

Id. The First, Fourth, Fifth, Seventh, and Ninth Circuit Courts of Appeals agree that Rule 60(b)(3) applies to unintentional misconduct or misrepresentations as well as intentional ones. Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988) ("Misconduct" under Rule 60(b)(3) does not require proof of nefarious intent or purpose); Schultz v. Butcher, 24 F.3d 626, 630 (4th Cir. 1994) (inadvertent as well intentional failure to comply with a discovery order constitutes misconduct under Rule 60(b)(3)); W.E. Grace Mfg. Co., 351 F.2d at 211 (Fifth Circuit decision that a party can obtain relief due to misrepresentation even in the absence of "a deliberate evil purpose to misstate or conceal or thereafter engage in foot-dragging lest the truth might be uncovered."); Lonsdorf v. Seefeldt, 47 F.3d 893, 897 (7th Cir. 1995) ("Rule

60(b)(3) applies to both intentional and unintentional misrepresentations."); In re M/V Peacock on Complaint of Edwards, 809 F.2d 1403, 1405 (9th Cir. 1987) (negligent misrepresentations may support relief from judgment under Rule 60(b)(3)). Therefore, the absence of intent to deceive does not foreclose relief under Rule 60(b)(3).

The government has maintained that it did not purposefully conceal impeachment evidence about Freddy Pena as part of a scheme to convince the Court or defendant's counsel that further investigation by trial counsel into Pena's record would have been fruitless. The Court agrees. There is no evidence that the government acted intentionally to withhold the evidence, and the Court reiterates its confidence that the nondisclosure was unintentional, even if negligent. But in arguing that the Court should deny Petitioner's Rule 60(b) motion because he has failed to demonstrate an unconscionable scheme or plan, the government conflates the standard governing an independent action for fraud on the court under Rule 60(d)(3) with the more flexible standard allowing for relief under Rule 60(b)(3). See Rozier, 573 F.2d at 1338 (explaining that the standard governing an independent action for "fraud on the court" is distinguishable from the standard governing claims of fraud, misrepresentation, or other misconduct under Fed. R. Civ. P. 60(b)(3)). Unintentional neglect in failing to comply with discovery requirements, or negligent misrepresentations to the court, can satisfy the requirements of Rule 60(b)(3), and thus the Court may not deny relief under Rule 60(b)(3) only because Petitioner has not shown intentional misconduct.

Applying the law to this case, the Court concludes that Petitioner has shown by clear and convincing evidence that, during the initial § 2255 proceeding, the government inaccurately represented that trial counsel had uncovered all of the impeachment evidence there was against Pena. The government failed to disclose significant impeachment evidence about Pena for years, and indeed, it has forthrightly admitted so. In 2011, the government turned over previously undisclosed DEA records showing that Pena, both before and after his activation as a confidential informant, had proven himself to be materially dishonest with his federal handlers, and that in 2002 the DEA's Tampa office moved him to "restrictive use" on its own initiative because it considered him untrustworthy. Yet Pena falsely testified at Petitioner's trial that he had never given false or misleading information to law enforcement officers. (Crim. Doc. 96 at 232). Then, during Petitioner's first collateral proceeding, the government represented that there was no impeachment evidence against Pena other than what trial counsel elicited on cross-examination. (See Case No. 3:06-cv-906-J-32HTS, Doc. 8 at 8). The government could and should have known that such a representation was untrue. Indeed, a prosecutor in the very same United States Attorney's Office discovered the impeachment information on Pena and disclosed it in a case that was tried merely weeks before Petitioner's trial. Another Assistant United States Attorney, from Massachusetts, discovered the same information in the DEA's Tampa files while conducting due diligence for a trial in which Pena was a witness. Thus, the government has no explanation for being unaware of the information. The government was negligent (albeit not intentional)

in representing during the civil § 2255 case that Petitioner's trial counsel had discovered all the impeachment evidence against Pena that existed.

The only remaining question is whether the misrepresentation prevented Petitioner from fully and fairly presenting his case for post-conviction relief. See Frederick, 205 F.3d at 1287. The Court finds that it did, and points to its order denying Petitioner's initial § 2255 motion. Regarding the claim in Petitioner's first § 2255 motion that counsel rendered ineffective assistance by inadequately investigating Pena, the Court bypassed a determination of whether counsel performed deficiently and disposed of the claim on Strickland's prejudice prong. (See Case No. 3:06-cv-906-J-32HTS, Doc. 12 at 5-7). The Court found, just as the government had urged, that Petitioner could not show prejudice under Strickland because he had not shown that further investigation into Pena would have yielded anything. See id. Thus, the government's representation that defense counsel had dug up all the impeachment evidence against Pena that existed formed a core part of the Court's rationale for its decision. As a result, the Court denied Petitioner's § 2255 motion without an evidentiary hearing. Had the government accurately represented or disclosed that there was significant additional impeachment evidence, it is likely the Court would not have denied Petitioner's first motion to vacate without so much as an evidentiary hearing. The Court is therefore satisfied that Petitioner has met his burden of showing that the government's inaccurate representation prevented him from fully and fairly presenting his case for post-conviction relief.

C. The remedy

The scope of Petitioner's relief under Rule 60(b)(3) is narrow in light of that rule's interaction with AEDPA's restrictions on second or successive motions to vacate. Petitioner has successfully shown that the order denying his initial § 2255 motion (Case No. 3:06-cv-906-J-32HTS, Doc. 12) was obtained as the result of a negligent misrepresentation. That order is therefore due to be vacated and the case reopened. However, Petitioner is not allowed to add new claims to the now-reopened § 2255 motion, elsewise he will have used Rule 60(b) to circumvent AEDPA's limitation on second or successive motions to vacate. See Gonzalez v. Crosby, 125 S. Ct. at 2647-48 (a Rule 60(b) motion that seeks to add new claims should be construed as a second or successive motion to vacate). Petitioner's Rule 60(b) relief is limited to revisiting only the claims included in the original § 2255 motion. The Court will therefore request Petitioner to file a supplemental brief explaining how the newly disclosed evidence concerning Freddy Pena affects the analysis of any of the claims raised in Petitioner's original § 2255 motion to vacate (Case No. 3:06-cv-906-J-32HTS, Docs. 1 and 2), and advising the Court how it should now proceed.

Because the foregoing discussion of Tompkins, 557 F.3d 1257, and Stewart, 646 F.3d 856, also resolves the present motion to vacate, the Court will enter a separate final order for the purposes of Fed. R. Civ. P. 54 and 28 U.S.C. § 1291 in Case Number 3:11-cv-1144-J-32PDB. The final order will dismiss Petitioner's second motion to vacate as an unauthorized second or successive motion and grant Petitioner a certificate of appealability. As that order will mark the Court's final decision on

Petitioner's second motion to vacate and terminate any consideration of the merits of the claims raised therein, Petitioner may appeal from that order while Petitioner's first § 2255 case is reopened.

Accordingly, it is hereby

ORDERED:

1. Petitioner's alternative Rule 60(b)(3) motion for relief from judgment on his first § 2255 motion to vacate (Case No. 3:06-cv-906-J-32HTS) is **GRANTED**.
2. As to Petitioner's first motion to vacate (Case No. 3:06-cv-906-J-32HTS), the Court's order denying relief (Doc. 12) is hereby **VACATED** pending further briefing by the parties. The Clerk is directed to reopen the file in Case No. 3:06-cv-906-J-32HTS.
3. Petitioner is directed to file a supplemental brief in Case No. 3:06-cv-906-J-32HTS, discussing how the newly disclosed evidence affects the first § 2255 motion. Petitioner shall have until **February 26, 2015** to file his supplemental brief.*
4. The government's response is due **March 26, 2015**. The Court will then determine whether to set a hearing, evidentiary or otherwise.
5. A separate order will follow with respect to Petitioner's second § 2255

* The Court continues its appointment of the Office of the Federal Public Defender for the reopened § 2255 proceeding.

motion to vacate (Case No. 3:11-cv-1144-J-32PDB).

DONE AND ORDERED at Jacksonville, Florida this 26th day of January, 2015.

TIMOTHY J. CORRIGAN
United States District Judge

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Copies:
Counsel of record
Pro se party

Appendix D

District court order denying Scott's numerically-second § 2255 motion, Case No. 3:11-cv-1144-J-32, Doc. 36

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GINO VELEZ SCOTT,

Petitioner,

vs. 3:11-cv-1144-J-32PDB
3:03-cr-343-J-32PDB

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL ORDER

This case is before the Court on Petitioner Gino Velez Scott's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Doc. 1)[1] and Memorandum of Law (Doc. 3). In the previous Order (Doc. 35), entered this date, the Court explained why the instant motion to vacate is "second or successive," but granted Petitioner relief under Fed. R. Civ. P. 60(b)(3) in relation to his first § 2255 proceeding (Case No. 3:06-cv-906-J-32HTS). For the reasons discussed in the previous Order (Doc. 35), the Court lacks jurisdiction to consider the Brady and Giglio claims raised in the instant motion to vacate. Consequently, the instant motion to vacate is due to be dismissed.

However, due to the unusual procedural posture of this case, with proceedings continuing in the related case, 3:06-cv-906-J-32HTS, the Court enters this Order separately to reflect that it is the Court's final judgment on the motion to vacate in

[1] Citations to Petitioner's criminal case file, United States of America vs. Gino Velez Scott, 3:03-cr-343-J-32HTS-2, are denoted as "Crim. Doc. ___." Citations to Petitioner's current § 2255 case file, 3:11-cv-1144-J-32PDB, are denoted as "Doc. ___."

Case Number 3:11-cv-1144-J-32PDB for purposes of Fed. R. Civ. P. 54 and 28 U.S.C. § 1291. If Petitioner wishes to appeal this Court's final order, the Court has determined to grant a certificate of appealability.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS GRANTED

The Court has determined that Petitioner is entitled to a certificate of appealability as to the following issue:

> Whether, under Tompkins v. Sec'y, Dep't of Corrections, 557 F.3d 1257 (11th Cir. 2009), a numerically second motion to vacate is "second or successive" when raising a claim that was previously unavailable because the government withheld evidence relevant to the claim until after the district court resolved the first motion to vacate.

A prisoner seeking a motion to vacate has no absolute entitlement to appeal a district court's denial of his motion. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). Id. "A [COA] may issue… only if the applicant has made a substantial showing of the denial of a constitutional right." Id. at § 2253(c)(2). To make such a showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). If the district court denies the petition on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable

whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Thus, where the district court's decision rests on a procedural ground, a valid COA may issue only if (1) the court issuing the COA finds that the procedural ruling is debatable or wrong, and (2) the court issuing the COA identifies the underlying constitutional issue on which the petitioner has made a substantial showing of a denial of his rights. See Damren v. Florida, No. 13-15017, 2015 U.S. App. LEXIS 871, at *9 (11th Cir. Jan. 21, 2015).

Petitioner has made the requisite showing in these circumstances. Given that Tompkins, on its face, is unclear about whether claims rendered undiscoverable by the government's own conduct are nevertheless considered "second or successive" if brought in a numerically second motion to vacate, and given the conflicting opinions of other circuits, the Court opines that jurists of reason could find its procedural ruling that Petitioner's motion is an unauthorized "second or successive" petition to be debatable or wrong. The Court further opines that Petitioner has made a sufficiently substantial showing of the denial of a constitutional right, that is, his Fifth Amendment right to a fair trial on account of potential Brady and Giglio violations committed by the government during the trial. The Court's procedural ruling entails the possibility that Petitioner will be denied review of these constitutional claims. Therefore, the Court opines that its procedural ruling is debatable, and coupled with potentially meritorious constitutional claims under

Brady and Giglio, Petitioner is entitled to a COA. Because Petitioner is entitled to a certificate of appealability, he is also entitled to appeal in forma pauperis.

Accordingly, it is hereby **ORDERED:**

1. For the reasons stated in the previous Order (Doc. 35), entered this date, Petitioner Gino Velez Scott's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Doc. 1) is **DISMISSED WITHOUT PREJUDICE** to Petitioner's right to refile upon receiving permission from the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. §§ 2255(h)(1) and 2244(b).[2]
2. The Clerk shall close the file in Case No. 3:11-cv-1144-J-32PDB.
3. A certificate of appealability is **GRANTED** as to the issue described herein.[3]
4. As Petitioner is represented by the Office of the Federal Public Defender and is entitled to a certificate of appealability, the Court further approves Petitioner to proceed in forma pauperis.

DONE AND ORDERED at Jacksonville, Florida this 26th day of January,

[2] If appointed counsel for Petitioner believes that applying to the Eleventh Circuit Court of Appeals to file a successive motion to vacate is warranted, counsel's appointment extends to that effort as well.

[3] The Court also continues its appointment of the Office of the Federal Public Defender for the purpose of appealing the Court's decision to dismiss Petitioner's second motion to vacate as "second or successive" in Case No. 3:11-cv-1144-J-32PDB, if such an appeal is warranted.

2015.

TIMOTHY J. CORRIGAN
United States District Judge

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Copies:
Counsel of record
Pro se party