ORIGINAL

No. 18-7792

IN THE

SUPREME COURT OF THE UNITED STATES

Anthony Donato — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony Donato #71455-053
(Your Name)
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(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. Whether The Second Circuit's Decision That Petitioner's Second-In Time Brady Claim Is Successive Conflicts With Applicable Decisions Of This Court?

2. Whether The Second Circuit's Decision Used A Standard Which Conflicts With That Used In Other Circuits And Is More Restrictive Than That Permitted By The Antiterriorism and Effective Death Penalty Act ("AEDPA")?

3. What Remedy Is Available For A Second-In-Time Collateral Claim Based On A Newly Revealed Actionably Brady Violation Which Does Not Satisfy One Of AEDPA's Gatekeeping Criteria For Second-Or-Successive Motions, When Foreclosing Federal Review Would Encourage Prosecutors To Continue To Withhold Constitutionally Required Evidentiary Disclosures Long Enough That Verdicts Obtained As A Result Of Government Misconduct Would Be Insulated From Review, As Well As Reward Prosecutors For Failing To Meet Their Constitutional Obligations Under Brady?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was June 28, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 28, 2018, and a copy of the order denying rehearing appears at Appendix F.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244

28 U.S.C. § 2254

28 U.S.C. § 2255

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

Suspension Clause, US Constitution Art. 1, § 9, cl. 2

STATEMENT OF THE CASE

A. Criminal Case

In 2006, Petitioner and others were indicted for the murder of Frank Santoro based on the false testimony of Dominick Cicale. Appendix ("Appx") A, Exhibit ("Exh") 1 (¶¶ 4-5). During his cooperation and pre-trial incarceration, BOP staff revealed that Cicale had solicited Carlos Medina and other inmates to falsely claim co-defendant Vincent Basciano asked a BOP officer to kill Cicale on Basciano's behalf. Id. (¶¶ 8-9). After Basciano brought Cicale's bogus murder plot to the district court's attention, the government filed sealed documents related to the plot, including a 7-page letter written by Medina and BOP staff affidavits. Id. (¶¶ 10-11). Medina's letter purportedly provides significant details of Cicale's scheme to implicate a co-defendant in a fake murder plot to curry favor with the prosecutor. Id. (¶ 12).

Through sealing and protective orders, the government shielded much of that information. Id. (¶ 14). On August 6, 2008, Petitioner pled guilty to the to the charges without the benefit of knowing the full extent of information contained in the Medina letter and the impact of on his available defenses. Id. (¶¶ 15-16). On December 16, 2008, Petitioner was sentenced to 25 years and did not appeal. Id. (¶ 17).

B. First § 2255 Motion (The "2009 Motion")

On December 18, 2009, Petitioner filed his first motion to vacate under 28 U.S.C. § 2255. Id. (¶ 18). Among other claims, Petitioner argued that his plea was involuntary because the government had failed to fully disclose the Cicale

bogus murder plot documents. Id. On September 20, 2012, the district court denied the claim because it was not raised on appeal. Id. (¶ 19).

C. Newly Discovered Evidence (The "Barone Evidence")

In June 2017, Petitioner discovered a government suppressed FBI 302 containing exculpatory evidence gathered from FBI informant, Joseph Barone, suggesting Cicale confessed that he acted alone in the Santoro murder as a favor to Basciano. Id. (¶ 20). It stated "Cicale approached Santoro [] and shot and killed him", "as a favor to his friend, Basciano", at Basciano's request "to r[i]se quickly in status and responsibilities as a member of Basciano's 'crew'". Id. (¶ 21 & Exh 2). No mention was made of Petitioner being involved. Id.

In July 2017, Petitioner discovered more Barone 302's ("Barone Evidence"), consisting of 90 pages of documents, which were suppressed from him, and from Basciano during his first two trials, but then provided to Basciano under a protective order once he complained. Id. (¶ 22-24). The suppressed Barone Evidence concerned the Santoro murder, Basciano, Cicale and other Bonanno family associates, including statements that "Cicale did the shotgun murder" without mention of Petitioner. Id. (¶ 25 & Exh 3).

D. Second § 2255 Motion (the "2018 Motion).

On May 31, 2018, Petitioner filed a motion for successive authorization on the basis that the newly discovered evidence (i.e., the Barone Evidence), if proven and viewed in the light of the evidence as a whole, would establish by clear and convincing evidence that no reasonable fact finding would have

found Petitioner guilty. Appx A (¶ 11). The proposed § 2255 claim argued that the government violated Brady by failing to disclose statements that contradicted its main witness (Cicale) which could have been used to exculpate Petitioner and impeach the credibility and account of the sole individual who claimed Petitioner was involved in the Santoro murder. Id.

On June 11, 2018, Petitioner filed a separate motion which sought a ruling that the 2018 Motion is non-successive. Appx B. Petitioner argued that although he filed a prior § 2255, he was not afforded his one full opportunity to seek collateral review as ensured by the AEDPA and the Suspension Clause as a consequence of the government's wrongful concealment of the Barone Evidence which was the proximate cause of his failure to raise his present claim in his prior § 2255 motion. Id. (p. 6-8). He argued further that because the 2018 Motion would not be successive under the pre-AEDPA abuse-of-writ doctrine, and because it raised a claim that could not have been raised in his 2009 Motion, it is nonsuccessive in the context of the AEDPA, and that the denial of permission to bring the claim as a first in time § 2255 claim may implicate the Suspension Clause. Id. (p. 9-10).

E. Appellate Court Decision Concerning The 2018 Motion

On June 28, 2018, the Second Circuit denied Petitioner's request for successive authorization stating Petitioner "has not shown that the 'newly discovered evidence' on which he relies, 'if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have

found [him] guilty of the offense.'" Appx C (p.2). It reached that decision, however, only after essentially deciding the proposed § 2255 motion on the merits:

> "Petitioner pleaded guilty and his sworn statements in support of his guilty plea 'carry a strong presumption of verity,' Blackledge v Allison, 431 U.S. 63, 74 (1977), which his present assertions do not overcome. Despite Petitioner's contrary arguments, the proffered new evidence does not exculpate him but, at most, provides a basis for impeaching prosecution witness Dominic Cicale, who, in a related trial, implicated himself, Petitioner, and Vincent Basciano in the Santoro murder to which Petitioner pleaded guilty. For much of the same reason that the Constitution does not require 'preguilty plea disclosure of impeachment information, United States v Ruiz, 536 U.S. 622, 629 (2002), the post-conviction identification of such information is hardly sufficient to allow a defendant who pleaded guilty to satisfy § 2255(h)(1)."

Appx C (p.2).

In that same order, the Court also denied Petitioner's motion for a ruling the the 2018 Motion was nonsuccessive, finding the that the "proposed motion would be successive because his § 2255 motion challenged the same criminal judgment and was decided on the merits." Id. (p.1). It also found that "Petitioner has not demonstrated that application of the successive petition rules to his claims would violate the Suspension Clause". Id. (p. 2).

F. Petition For Panel And En Banc Rehearing

On September 27, 2018, Petitioner mailed a timely petition for panel and en banc rehearing to the Second Circuit, Appx E, after being granted an extension of time until October 3, 2018. Appx D. The petition sought rehearing on the basis that, inter alia, the court (1) overlooked facts which properly considered would lead it to conclude that the 2018 Motion was non-successive within the meaning of the AEDPA, and that subjecting the motion to the successive rules would violate the Suspension Clause, and (2) utilized an

improper standard to deny successive authorization by impermissibly deciding the § 2255 motion on the merits (without jurisdiction to do so) and then utilizing that determination to deny successive authorization. Appx E.

G. Appellate Court Decision On Rehearing Request

On November 14, 2018, the Second Circuit summarily denied Petitioner's request for panel rehearing and/or rehearing en banc, without explanation. Appx F.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S DECISION THAT PETITIONER'S SECOND-IN TIME BRADY CLAIM IS SUCCESSIVE, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The court of appeals erred in concluding that Petitioner's 2018 Motion is a "successive" merely "because his first § 2255 motion challenged the same criminal judgment and was decided on the merits," Appx C (p. 1), and in doing so, it decided the question in a way in conflict with applicable decisions of this Court.

The Antiterrorism and Effective Death Penalty Act of 1986 (AEDPA), does not define the phrase "second or successive", nor is the term "self-defining." Panetti v Quarterman, 551 U.S. 930, 943 (2007). In Panetti, the Court explained the phrase does not capture all collateral challenges "filed second or successfully in time, even when the later filings address ... a judgment already challenged in a prior ... application." Id. at 944. Instead, "second or successive" is

a "term of art," Slack v McDaniel, 529 U.S. 473, 486 (2000), which, since it limits the courts' jurisdiction, must be read narrowly. Castro v United States, 540 U.S. 375, 381 (2003).

As this Court has construed the phrase. "second or successive" "takes its full meaning from [Supreme Court] case law, including decisions predating the enactment of [AEDPA]." Panetti, 551 U.S. at 943-44.

In Panetti, this Court set forth factors for determining whether a second-in-time petition is "second or successive" under the AEDPA. There, the petitioner was convicted of capital murder and sentenced to death. Id. at 937. After his state-court remedies were denied, he filed a federal petition for habeas relief under 28 U.S.C. § 2254, which, too, was denied. Id. When the state later set an execution date, Panetti filed another state habeas claim, asserting for the first time that he was not mentally competent to be executed, which was denied. He then filed a second § 2254 petition arguing that executing him while mentally incompetent would violate the Eighth amendment pursuant to Ford v Wainwright, 477 U.S. 399 (1986), which too was denied and affirmed on appeal. Id. at 938-42.

On certiorari, this Court first considered whether it had jurisdiction over Panetti's claim, in light of 28 U.S.C. § 2244(b)(2), which similar to § 2255(h), precludes consideration of any "claim presented in a second or successive habeas 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. The Court determined it had jurisdiction after concluding that

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. It arrived at this conclusion, by looking solely at three considerations: (1) the implications for habeas practice of adopting a literal interpretation of "second or successive" (2) the purposes of AEDPA; and (3) the Court's prior decisions in the context of the pre-AEDPA abuse-of-writ doctrine. Id. at 943-47.

Beginning with the implications for habeas practice, the Court explained that Ford claims do not generally ripen unless the petitioner is both incompetent to be executed and imminently faces execution. Id. at 943. And since many years can pass between imposition and execution of a death sentence, a petitioner may not become incompetent until after the courts have resolved his first habeas petition. Id. So, if "second successive" encompassed Ford claims, a mentally competent prisoner would always have to prophylactically raise a Ford claim in his first habeas petition, regardless of whether he had any indication that he might eventually become incompetent, just to preserve the possibility of raising a Ford claim at a later time. Id. This practice, "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." Id.

The Court then concluded that treating second-in-time Ford claims as "second or successive" would also conflict with AEDPA's purposes of "further[ing] the principles of comity, finality, and federalism", because "[a]n empty formality of 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 945-946. The Court found that finality concerns are not implicated since (due to the nature of a Ford claim) federal courts are generally unable to address such claims within the time frame for resolving first habeas petitions. Id.

Lastly, the Court accounted for the abuse-of-writ doctrine, Id. at 947, 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 (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 Peterson, 561 U.S. 320, 345 (2010)(Kennedy, L., dissenting)(citing Panetti, 551 U.S. at 947). "[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. Since a Ford claim considers a petitioner's mental state at the time of proposed execution and Panetti's first § 2254 petition was filed will 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 was resolved. Panetti, 551 U.S. at 947. For that reason, the Court found no abuse of the writ. Id.

Ultimately, the Court held that AEDPA's "second or succes

sive" bar did not preclude Panetti's second-in-time petition raising a Ford claim. Id. In reading an "exceptio[n]" in the AEDPA's gatekeeping provisions, the Court explained, "[w]e 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.

Application of the Panetti factors to a Brady violation, which 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" within the meaning of § 2255(h)'s gatekeeping provision.

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.

Brady stands 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 (1999)(quoting Brady, 373 U.S. at 87)(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.

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 obligated 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, 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 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."

Second, precluding Brady claims that a petitioner could not have discovered through the exercise of due diligence actually impedes finality interests. To this end, 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, though for different reasons due to the nature of a Brady violation.

When a Brady violation occurs, a defendant is entitled to a new trial. Brady, 373 U.S. at 87. "A prosecution that withhold evidence ... which, if made available, would tend to

exculpate [the defendant] ... 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. Put simply, a defendant does not receive a fair trial when a Brady violation occurs.

Yet the constitution guarantees criminal defendants a fair trial. Delaware v Van Arsdall, 475 U.S. 673, 681 (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 (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").

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 Court has noted that finality is important to endow criminal law with "much of its deterrent effect." McCleskey, 499 U.S. at 491. But an uncorrected unfair trial has the opposite effect.

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.

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. 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. 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 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 (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.

Third, allowing a second-in-time Brady claim that a prisoner could not have discovered earlier through the exercise of due diligence does not offend the abuse-of-writ doctrine. As noted above, the 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 (Kennedy, J., dissenting)(citing Panetti, 551 U.S. at 947).

To demonstrate that a petitioner has been deprived of a "full and fair opportunity," the doctrine requires him to make two showings: (1) that he has "cause," or a "legitimate excuse," for failing to raise the claim earlier, McCleskey, 499 U.S. at 490, and (2) that he was prejudiced by the error he claims, Id. at 493.

"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. The cause requirement is satisfied when petitioners 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. 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 (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 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. 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, and the court of appeals decision concluding otherwise conflicts with the above cited applicable decisions of this Court.

II. THE SECOND CIRCUIT'S DECISION USED A STANDARD WHICH

CONFLICTS WITH THAT USED IN OTHER CIRCUITS AND IS MORE RESTRICTIVE THAN THAT PERMITTED BY THE AEDPA

A. The AEDPA Precludes Appellate Courts From Reaching The Merits Of A Proposed § 2255 Claim And Then Using That Determination To Deny Successive Authorization

The AEDPA, codified under 28 U.S.C. § 2255(h), forbids a second or successive motion unless an appellate court certifies "as provided in section 2244" that it contains "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."

Section 2244(b)(3)(C), the parallel (but not identical) provision for second or successive motions by state prisoners seeking federal habeas corpus under § 2254, provides that the court of appeals "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of that subsection."

Referring to a lack of guidance from "statutory language or history or case law", courts of appeals have construed the phrase "'as provided in section 2244,'" which appears in § 2255, to mean that in considering an application under section 2255 for permission to file a second or successive motion [they] should use the section 2244 standard, and thus insist only on a prima facie showing on the motion's adequacy." Bennett v United States, 119 F.3d 468, 469 (7th Cir 1997).

While "[v]ery few opinions from [the] circuit[s] ... grapple with the meaning of 'prima facie showing' ... The few that do agree that the statute establishes a permissive standard that does not require any analysis of a claim's merits." In re Williams, 898 F.3d 1098, 1107 (11th Cir 2018). Cf. Ochoa v Simmons, 485 F.3d 538, 541-42 (10th Cir. 2007)(per curium)("This statutory mandate does not direct appellate courts to engage in a preliminary merits assessment. Rather, it focuses our inquiry solely on the conditions specified in § 2244(b) that justify raising a new habeas claim"); In re Hoffner, 870 F.3d 301, 308 (3rd Cir 2017)("we do not address the merits at all in our gatekeeping function"); In re Rogers, 825 F.3d 1335, 1340 (11th Cir 2016)("the statute does not allow us to reach the decision on the merits at the application stage but rather 'restricts us to deciding whether a petitioner has made out a prima facie case of compliance with the 28 U.S.C. § 2244(b) requirements."); Hertz v Liebman, 2 Federal Habeas Corpus Practice and Procedures § 28.3[d], at 1717 (7th ed. 2015)(explaining that "lack of merit" is "irrelevant" at the § 2244(b) authorization stage).

In the somewhat analogous certificate of appealability ("COA") context, the Court has held the COA statute's "threshold inquiry" is satisfied so long as the issues presented are adequate to deserve encouragement to proceed further." Buck v Davis, 197 L.Ed.2d 1, 16 (2017)(citing Miller-El v Cockrell, 537 U.S. 322, 327 (2003)). As the Court went on to explain "[w]hen a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of

the actual merits, it is in essence deciding an appeal without jurisdiction." Id.; see e.g., Miller-El v Cockrell, 537 U.S. at 342 (holding this is "fundamental" error because "the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims" when deciding whether to grant COA).

Given the expressed lack of guidance from "statutory language or history or caselaw" on the "prima facie showing" standard, and expressed confusion in the appellate courts as to the meaning of "prima facie showing", the Court should extend Buck v Davis in the context of §§ 2244(b) and 2255(h) to hold that the AEDPA precludes the appellate courts from reaching the merits of a proposed second or successive habeas petition, and then using such determinations to deny successive authorization.

B. By Deciding The 2018 Motion On The Merits And Using The Determination To Deny Successive Authorization, The Second Circuit's Standard Conflicts With Other Circuits Circuits And Is More Restrictive Than Permitted By AEDPA

The Second Circuit phrased its determination in proper terms - Petitioner "has not shown that the 'newly discovered evidence' on which he relies, 'if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no fact finder would have found [him] guilty of the offense.'" Appx C (p. 2). However, it reached that conclusion only after determining the proposed § 2255 claim on the merits:

> "Petitioner pleaded guilty and his sworn statements in support of his guilty plea 'carry a strong presumption of verity,' Blackledge v Allison, 431 U.S. 63, 74 (1977), which his present assertions do not overcome. Despite Petitioner's contrary arguments, the proffered new evidence does not exculpate him but, at most, provides a basis for impeaching prosecution witness Dominic Cicale, who, in a related trial, implicated himself, Petitioner, and Vincent Basciano in the Santoro murder to which Petitioner pleaded guilty. For much of the same reason that the Constitution does not require 'preguilty plea disclosure of impeachment information, United States v Ruiz, 536 U.S. 622, 629 (2002), the post-conviction identification of such information is hardly sufficient to allow a defendant who pleaded guilty to satisfy § 2255(h)(1)."

Appx C (p.2).

But the question for the Second Circuit was not whether Petitioner's "present assertions [] overcome" "his sworn statements in support of his guilty plea", or whether or not "the proffered new evidence [is] exculpat[ory]", Id. These are ultimate merits determinations, which the Second Circuit lacked jurisdiction to reach, and which could not appropriately be made without further development of the relevant facts, and without viewing the evidence cumulatively to determine, for instance, whether it is materially exculpatory for purposes of Brady. See e.g., Kyles v Whitely, 514 U.S. 419, 436 (1995).

To be sure, it is well settled that determinations on whether new evidence is exculpatory, or whether assertions in a habeas claim are sufficient to overcome the petitioner's sworn plea allocution statements, are merits-based determinations. See e.g., United States v Rivas, 377 F.3d 195, 199 (2nd Cir 2004)("[t]urning to the merits of the Brady issue ... [the] statement can be viewed as having both inculpatory and exculpatory effect."); Small v Less, 2016 US Dist Lexis 69872 (SDNY)(the "claim fails on the merits [because the new evidence] is not exculpatory within the meaning of Brady");

Gottleib v SEC, 2007 US Dist Lexis 19635 (SDNY)("the Court will not reach the merits of Plaintiff's argument that the purportedly new documents are exculpatory"); United States v Hernandez, 242 F.3d 110, 114 (2nd Cir 2001)(holding defendant's claim "fails on the merits because his factual assertions ... contradict his sworn statements at the plea allocution"); United States v Rivernider, 828 F.3d 91 (2nd Cir 2015)("reject[ing] on the merits Rivernider's claim" because his assertions "are insufficient to overcome the 'strong presumption of accuracy' that is afforded to [his] sworn testimony offered at the plea colloquy"); United States v Torres, 2017 US Dist Lexis 2886 (SDNY)(holding time-barred "claim would fail on the merits" because movant's "assertions in th[e] motion do not overcome the 'strong presumption of veracity' afforded to his sworn statements at his plea allocution").

Because the Second Circuit lacked the jurisdiction to consider the merits of the 2018 Motion, see In re Rogers, 825 F.3d at 1340, it was precluded from making its merits-based decisions on the proposed § 2255 motion, and from relying on those determinations to deny successive authorization in its gatekeeping capacity under the AEDPA.

As in Buck v Davis, supra, the Second Circuit impermissibly sidestepped the AEDPA process by first deciding the merits of the second-in time § 2255 claims and then justifying its denial of successive authorization based on its adjudication of the actual merits.

Not only did the Second Circuit commit "fundamental error" by resolving the merits of Petitioner's constitutional

claims, when it had no jurisdiction to do so, but by adjudicating his claims without telling him that it would do so, the Second Circuit implicated the "core due process concepts" of notice and foreseeability. Rogers v Tennessee, 532 U.S. 451, 459 (2001).

To this end, the Second Circuit applied an unexpectedly more stringent process to Petitioner (which required him to prove his proposed § 2255 claim at the initial gatekeeping stage, pretermitting the opportunity for a hearing on the fuller development of evidence) without notice, contrary to the procedures announced in numerous cases. See e.g., Bouie v City of Columbia, 378 U.S. 347, 354 (1964)("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law"); see also Case v Hatch, 731 F.3d 1015, 1027 (10th Cir 2013)(after "the petitioner makes a prima facie showing at the circuit level ... [t]he second gate requires [him] to back up the prima facie showing at the district court level with actual evidence to show he can meet this standard.")

Had the Second Circuit followed the established procedures, or had it given Petitioner notice that it intended to adjudicate fully the merits of his proposed § 2255 claims, he could have supplemented his claims with additional evidence.

C. The Second Circuit's Merits Analysis Was Not Only Inappropriate At The Initial Gatekeeping Stage, But It Was Also Incorrect

Not only did the Second Circuit lack jurisdiction to reach the merits of the proposed § 2255 claims, but its merits determinations were also incorrect. In this, it erroneously determined the new evidence was not exculpatory. This led to the erroneous determination that there was no preguilty disclosure obligation, which in turn led to the erroneous conclusion that Petitioner's present assertions do not overcome the sworn statements of his guilty plea.

Whether The New Evidence Is Exculpatory? The newly discovered evidence consists of suppressed FBI 302s containing exculpatory evidence gathered from FBI informant, Joseph Barone, which suggested Cicale confessed to Barone that he (Cicale) acted alone in committing the Santoro murder as a favor to Basciano. Appx A, Exh 1 (¶ 20). The 302 states "Cicale approached Santoro while he was walking his dog [] and shot and killed him", "as a favor to his friend, Basciano", at Basciano's request, and he did so "to r[i]se quickly in status and responsibilities as a member of Basciano's 'crew'". Id (¶ 21 & Exh 2). No mention is made of Petitioner being involved in the murder. Id. There are approximately 90 pages of additionally suppressed FBI 302s concerning, inter alia, the Santoro murder, Cicale, Basciano, and other Bonanno Family associates, including statements that "Cicale did the shotgun murder" without mention of Petitioner's involvement. Id (¶ 25 & Exh 3).

In the proposed § 2255 claim, Petitioner argued that:

> "the Barone Evidence is exculpatory because it suggests/shows: (a) Cicale committed the Santoro murder on his own, as a favor to Basciano, at Basciano's request, and to rise

> quickly in his status and responsibilities as a member of Basciano's crew, which would have supported [Petitioner's] trial defense that Cicale was lying in implicating [him] in the Santoro murder to gain favor with the government to obtain a lesser sentence; (b) Cicale told others, without referencing [Petitioner], that he (Cicale) was responsible for killing Santoro, that he did so as a favor to Basciano, at Basciano's request, and to rise in status in Basciano's crew; and (c) Barone never wavered from his first reporting in 2003 that Cicale "shot and killed" Santoro on his own, through his final reporting, three years later in 2006 that "Cicale did the shotgun murder", as a favor to Basciano."

Appx A (Exh.1 ¶ 27).

In its merits analysis, the Panel determined the "proffered new evidence does not exculpate [Petitioner] but, at most, provides a basis for impeaching prosecution witness Dominic Cicale." Appx C (p. 2).

This merits analysis fails to recognize that Cicale's pre-cooperation confession, which shows he (Cicale) committed the Santoro murder on his own, as a favor to Basciano, in order to rise quickly in his status and responsibilities as a member of Basciano's crew, is plainly the type of evidence that "go[es] to the heart of [Petitioner's] guilt or innocence" and would "undermine" Petitioner's guilt if the assertions made in the confession are proven true, and is therefore exculpatory. District Attorney's Office v Osborne, 557 U.S. 52, 77 (2009)(defining exculpatory as evidence that would "undermine respondent's 'guilt' or 'punishment' if he allegations are true."); see also Jones v Jago, 575 F.2d 1164, 1168 (6th Cir 1978)(statement of eyewitness to crime which makes no reference to the defendant's presence must be viewed as potentially powerful exculpation); United States v Avellino, 136 F.3d 249, 255 (2nd Cir 1998)(defining "evidence that is exculpatory [as that] going to the heart of the defendant's guilt or innocence").

In view of Petitioner's proffered defense (that he was

not involved in the murder, and that Cicale's post-cooperation statements to the contrary were lies advanced to gain favor with the government to reduce his sentence) the fact that before his cooperation Cicale confessed the details of the murder to Barone and claimed to have acted on his own as a favor to Basciano and to rise in Basciano's crew, might well have been viewed by the jury as a critical piece of evidence supporting the defense theory. See e.g., Tate v Wood, 963 F.3d 20, 25 (2nd Cir 1992)("This kind of information would clearly be exculpatory in terms of establishing a defense of justification"); see also United States v Rivas, 377 F.3d 195, 199-200 (2nd Cir 2004)(explaining that suppressed evidence had an "exculpatory effect" because it "might well have been viewed by the jury as a critical piece of evidence supporting the defense theory").

At a minimum, the disclosure of this evidence, would have created a reasonable likelihood that, after hearing it, the jury's suspicion about Cicale would have led to a reasonable doubt about Petitioner's guilt. This disclosure would have been especially significant when added to the evidence that after his cooperation, Cicale was caught red handed in a scheme to falsely implicate his co-defendant in a murder conspiracy, and the fact that Cicale's post-cooperation statements against Petitioner supplied the only evidence linking Petitioner to the Santoro murder.

Thus, the suppressed evidence contained the kind of information that would clearly be exculpatory in terms of establishing a defense that Petitioner was not involved in the Santoro murder and Cicale's post-cooperation to the contrary

statements were untrue. It goes to the heart of, and undermines, Petitioner's guilt and is therefore properly considered exculpatory as defined by the above precedent.

Moreover, the question of "whether evidence in written form is exculpatory or favorable is [] an issue of fact to be determined not merely from its content but its significance in light of all attendant circumstances." Jones v Jago, 575 F.2d at 1267; see also Moldowan v City of Warren, 570 F.2d 698, 748 (6th Cir 2009)("We must consider evidence cumulatively in determining whether it is materially exculpatory for purposes of Brady.")(citing Kyle v Whitley, 514 U.S. 419, 436 (1995)).

Because the Second Circuit improperly reached the merits at the prima facie stage, Petitioner was denied the opportunity and process to present all of the attendant circumstances that were relevant to the merits determination of whether the suppressed evidence had exculpatory value.

This error is significant because the question of whether the evidence is exculpatory or merely impeaching is dispositive to the proposed § 2255 claim since after this Court's decision in United States v Ruiz, 536 U.S. 83 (2002), "the Brady rule applies in the plea-bargaining context only to exculpatory evidence, but not to impeachment evidence." See e.g., Davis v United States, 2015 US Dist Lexis 35391 (D. Conn. 2015)(citing Friedman v Rehal, 618 F.3d 142, 153 (2nd Cir 2010).

Whether The Plea Validity Must Be Reassessed? To show prejudice resulting from the government's suppression of the exculpatory evidence, Petitioner alleged that:

"Had the Barone evidence not been withheld, I would not have pled guilty and instead proceeded to trial. Objective factors supporting this statement include: (a) my guilty plea was made without my knowledge that Cicale had confessed to Barone that he committed the murder on his own, as a favor to Basciano, at Basciano's request, and that he did so to rise quickly in status and responsibilities as a member of Basciano's crew, and (b) the Barone evidence provides substantial basis for doubting the strength of the government's case against me because it both exculpates me and provides distinct reasons to impeach Cicale. Given the degree to which the prosecution relied upon Cicale's testimony to establish its case against me, the withheld evidence, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfindier would have found me guilty of the Santoro murder charges. This is especially so given that: (a) Cicale is the only occurrence witness to claim that I was involved in the Santoro murder; (b) there was no other material evidence that implicates me in the Santoro charges; (c) the government's own account of the evidence it possessed concerning the Santoro murder, shows the only other purported evidence linking me to the charges were telephone records allegedly showing Cicale attempted to reach me when he learned Basciano was arrested; (d) none of the other government witnesses who testified at Basciano's trials (Basciano I Trial, Sal Vitale Tr. At 2896-2900; Basciano II Trial, PJ Piscotti Tr at 3429-32) implicated me in the murder charges; (e) Cicale testified at Basciano II that when Basciano was asked by Joe Massino, the alleged Bonanno family boss, who was involved in the Santoro murder Basciano never mentioned me as a participant; and (f) after becoming a cooperating witness, Cicale was caught attempting to persuade inmates at MCC Manhattan to falsely claim co-defendant Basciano and others were conspiring to murder him, which he did for the purpose of gaining favor with the prosecutor to obtain a lower sentence",

Appx A (p. 5a).

In its merits analysis, the Second Circuit determined that Petitioner's "present assertions do not overcome" "his sworn statements in support of his guilty plea". Appx C (p.2). But this is grounded in fundamental error because it fails to recognize that the newly discovered evidence was exculpatory, and that since it constitutes exculpatory Brady material, the government was "obligat[ed] to make [its] disclosure for use in Petitioner's "determination of whether or not to plead guilty" and Petitioner "was entitled to make [his] decision [to plead guilty] with full awareness of [that] favorable evidence known to the government." United States v Avellino, 136 F.3d at 255.

So, although Petitioner's "guilty plea is generally considered valid so long as the plea was intelligent and voluntary, the validity of [his] plea must be reassessed [because] it resulted from ... Brady violations". United States v Avellino, 136 F.3d at 255. "[W]here prosecutors withh[o]ld favorable material evidence, even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge." Id (citing Miller v Angliker, 848 F.2d 1312, 1320 (2nd Cir 1988)(holding that Brady violation invalidated agreement to plead guilty).

Consideration of all the attendant circumstances will establish the "barrier" of Petitioner's plea record "although imposing, is not invariably insurmountable", Blackledge v Alison, 431 US at 74, because Petitioner's 'allegations when viewed against the record of the plea hearing, were [not] so 'palably incredible,' so as to warrant summary dismissal," Blackledge at 75-76, where he made a prima facie showing that "but for the failure to produce [the Barone Evidence he] would not have entered the plea but would have instead insisted on going to trial." Tate v Wood, 963 F.2d at 24.

III. What Remedy Is Available For A Second-In-Time Collateral Claim Based On A Newly Revealed Brady Violation Which Does Not Satisfy One Of AEDPA's Gatekeeping Criteria For Second-Or-Successive Motions

The question of whether §§ 2244(b) or 2255(h) applies to second-in-time Brady violations, where the government's failures (intentional or inadvertent) affirmatively and

entirely prevented a petitioner from bringing a Brady claim in his first collateral proceeding, is a matter of first impression in this Court. However, in United States v Lopez, 577 F.3d 1053 (9th Cir 2011), the Ninth Circuit recognized, without so holding, that in such circumstances Brady claims may be exempt from satisfying the provisions governing second or successive petitions. See e.g. Id. at 1067 ("we leave open the more difficult question whether Panetti supports an exemption from § 2255(h)(1)'s gatekeeping provisions for meritorious Brady claims that would have been reviewable under the pre-AEDPA prejudice standard.")

Similarly, in Velez-Scott v United States, 2018 US App Lexis 13558 (11th Cir 2018), the panel recognizing that it was bound by earlier precedent holding that all second-in-time Brady claims are "second or successive" under § 2244(b) criteria, "urge[d] the Court to take this case en banc so [it] can reconsider [the earlier case's] reasoning." The panel explained that the earlier holding "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." Id.

Both above decisions reasoned that foreclosing review in such circumstances would "encourage prosecutors to withhold constitutionally required evidentiary disclosures long enough that verdicts obtained as a result of government misconduct

would be insulated from correction", Velez-Scott v United States, supra, and "reward prosecutors for failing to meet their constitutional disclosure obligations under Brady [which] would seem a Perverse result and a departure from the Supreme Court's abuse-of-the-writ jurisprudence." Lopez, 577 F.3d 1064-65.

Because the Second Circuit's decision in this case conflicts with Panetti and effects a suspension of the writ of habeas corpus, the Court should grant cert to provide guidance to the circuit courts as to what remedy is available for a second-in-time collateral claim based on a newly revealed actionable Brady Violation which does not satisfy one of AEDPA's gatekeeping requirement, where the government's failures (intentional or inadvertent) affirmatively and entirely prevented a petitioner from bringing a Brady claim in his first collateral proceeding.

CONCLUSION

For good cause having been shown the petition for a writ of certiorari should be granted.

Respectfully Submitted

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