

No. 17A1127

IN THE
SUPREME COURT OF THE UNITED STATES

EDMUND BOYLE,
Defendant,

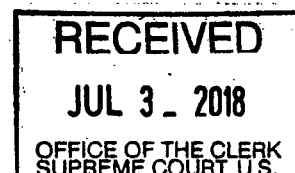
v.

UNITED STATES OF AMERICA,
Respondant.

On Petition For A Writ Of CERTIORARI
To The United States Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

WHETHER A COURT OF APPEALS SHOULD REMAND A HABEAS ACTION WHERE THE LOWER COURT FAILS TO FULLY ADJUDICATE THE UNDERLYING HABEAS CLAIMS ON THE MERITS AND RENDERS A DECISION IRRECONCILABLE WITH THE REQUIREMENTS OF 28 U.S.C. § 2255 THAT PROPER FACT-FINDING MUST BE CONDUCTED BY A REVIEWING COURT BEFORE A PLAUSIBLE CLAIM FOR RELIEF IS DISSMISSED; AND

2.

WHETHER A COURT OF APPEALS SHOULD ISSUE A CERTIFICATE OF APPEALABILITY AND GRANT REVIEW OF A CASE IN WHICH THE LOWER COURT DENIED HABEAS RELIEF DESPITE PETITIONER'S PRESENTATION OF UNCONTROVERTED EVIDENCE THAT THE GOVERNMENT SUPPRESSED MATERIAL IMPEACHMENT EVIDENCE CONCERNING A KEY WITNESS AND PERMITTED SUCH WITNESS TO FALSELY TESTIFY REGARDING THE SUBSTANCE OF HIS COOPERATION AGREEMENT WITH PROSECUTORS.

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ISSUES PRESENTED

Under the Due Process Clause, a criminal defendant is entitled to a fair trial. A fair trial includes one untainted by the Government's suppression of evidence favorable to the defense as demonstrated by *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. When the Government violates this obligation, a defendant's constitutional rights have been denied and a resulting conviction must be overturned. In addition to the requirements established by *Brady* and its progeny, the Government is also prohibited from presenting false testimony in order to obtain a conviction. The Government's presentation of false testimony is inapposite to a fair proceeding. When the Government knowingly presents or fails to correct false testimony in a criminal proceeding, a defendant's constitutional due process rights are violated.

The Supreme Court has consistently held that a new trial should be afforded when the Government fails to disclose evidence that casts doubt on the prosecution's case. *Kyles v. Whitley*, 514 U.S. 419 (1995). Likewise, the Court has long mandated that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgement of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). Moreover, a conviction must be set aside if a *Brady* violation materially concerns the impeachment of a key witness, *Giglio v. United States*, 405 U.S. 150 (1972), or if the "false testimony goes only to a witness's credibility rather than the defendant's guilt." *Napue v. Illinois*, 360 U.S. 264, 270 (1959).

In this case, the United States District Court for the Eastern

District of New York repeatedly denied Petitioner's request for habeas relief, even though he proffered uncontroverted evidence showing that the prosecution engaged in the very acts barred by the above jurisprudence. The judgements below eviscerate controlling precedents, ignore the constitutional significance of the Government's evidentiary withholdings, and dismiss that the Government knowingly suborned perjury at Petitioner's trial.

Specifically, Petitioner proffered both documentary and testimonial evidence in support of his Brady and perjury claims, which included: (1) certified transcripts from post-trial judicial proceedings in which both the witness and his defense attorney discussed with the Government undisclosed sentencing promises made by the Government in exchange for the witness's cooperation; and (2) post-trial letters written by that witness to the courts, which contained undisclosed impeachment information and further demonstrated the falsity of the witness's testimony at Petitioner's trial. The information contained in these letters include the witness's admission that the Government coerced him to plead guilty and guaranteed him leniency, that he suffered memory issues at the time of his cooperation caused by medication and alcohol abuse, and that he falsely testified as to his involvement in at least one robbery for which he took responsibility. Notwithstanding this proof, neither the Government nor the lower court fully addressed Petitioner's central Brady and perjury claim on the merits or the multitude of evidence proffered by Petitioner in support thereto. Without even conducting an evidentiary hearing, the court summarily denied Petitioner's request for relief.

JURISDICTION

If both the district court and the court of appeals deny a COA or remand as to all issues, a petition for writ of certiorari may be filed in the United States Supreme Court seeking review of that denial. Hohn v. United States, 524 U.S. 236 (1998) (holding that the USSC jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals).

"There can be little doubt that Hohn's application constitutes a case under § 1254(1). As we have noted [t]he words 'case' and 'cause' are constantly used as synonyms in statutes ... each meaning a proceeding in court, a suit or action." Blyew v. United States, 13 Wall 581, 595 (1872). "The dispute over Hohn's entitlement to a certificate falls within this definition. It is a proceeding seeking relief or an immediate and redressable injury, i.e., wrongful detention in violation of the Constitution."

The judgement of the court of appeals was entered on January 8, 2018. The application for an extension of time within which to file a petition for a writ of certiorari in this case has been presented to Justice Ginsburg, who on April 18, 2018 extended the time to and including June 28, 2018.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part, "No person shall ... be deprived of life, liberty, or property, without due process of law[.]"

STANDARD OF REVIEW

At the COA stage, the only dispositive question is whether the Petitioner has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 765 (2017). Under this standard, the Court must "limit its examination to a threshold inquiry into the underlying merit of claims" raised by the Petitioner and ask "only if the District Court's decision was debatable." *Id.* at 774.

REASONS FOR GRANTING THIS APPLICATION

This Court should grant Petitioner's request for a remand, because the lower court failed to fully adjudicate Petitioner's habeas claims on the merits and summarily dismissed his habeas action without considering uncontroverted evidence supporting Petitioner's claims that the Government suppressed Brady evidence regarding the benefits provided to key witness Gerard Bellafiore ("Bellafiore") the only cooperating witness credited by the jury as to the charged burglaries¹ - in exchange for his cooperation, and suborned perjury during Petitioner's criminal trial. The Court did not hold a hearing to resolve Petitioner's claims, although the record did not dispute such claims. Courts are in agreement that where the lower court fails to fully and properly adjudicate a habeas action on the merits, the proper remedy is remand. Thus, remand is necessary to provide the lower court

the opportunity to review and fully adjudicate Petitioner's claims on the merits pursuant to the procedures mandated by § 2255.

In the alternative, this Court should grant review of Petitioner's case, because the evidence contained in Petitioner's motion indicates the Government engaged in unconstitutional acts during Petitioner's criminal trial, including suppression of evidence and subornation of perjury. It is well established that the Government's Brady obligations require the Government to disclose any potentially exculpatory evidence to the defense. Evidence that could be used to impeach the prosecution's witness is "classic Brady material." *Boyette v. Lefevre*, 246 F. 3d (2d Cir. 2001). Courts are in further agreement that where, as here, the Government knowingly suborns perjury or fails to correct false testimony, the conviction of a criminal defendant must be overturned to ensure protection of his due process rights. Protections of these rights are enshrined in the seminal Supreme Court cases *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264, 268 (1959), and *Giglio v. United States*, 405 U.S. 150, 153 (1972).

The Brady rule requires the disclosure of favorable evidence known by the prosecution. A prosecutor's duty to disclose under Brady includes any evidence potentially demonstrating a defendant's innocence, mitigating a defendant's sentence, or impeaching the credibility of an adverse witness. The Brady rule thus serves as a key safeguard, ensuring the accused a fair judicial process. Brady requirements are of constitutional significance because they embody the notion that the Government will seek justice and the accused will not be deprived of liberty without receiving due process of law. Courts

have found Brady violations when the Government withholds impeachment evidence pertaining to a witness crucial to the Government's case. See, e.g., *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (holding witness could have been impeached by evidence that "he may have been motivated to come forward ... by the possibility of a reduced sentence on an existing conviction"); *Banks v. Dretke*, 540 U.S. 668, 701 (2004) ("Had the jurors known of Farr's continuing interest in Deputy Sheriff Huff's favor ... they might well have distrusted his testimony...").

In *Napue*, the Supreme Court explicitly stated that where the prosecution allows false testimony to go uncorrected, a criminal defendant's due process rights are violated. *Napue*, 360 U.S. at 271. Moreover, the Court stated, "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Id.* at 269. In *Giglio*, the Court "made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio*, 405 U.S. at 153 (internal quotation marks omitted).

The lower court's judgements runs contrary to this clearly established law, and a review by this Court is required to correct such misapplication affecting both Petitioner's case and criminal proceedings generally. If upheld, the judgements below render obsolete the key protections afforded to criminal defendants under the due process clause and threaten the viability of habeas actions to correct constitutional errors. Moreover, the lower court's ruling eviscerates

the core protections found in Brady, Napue, and Giglio. Without such protections, the courts effectively grant permission for the Government, an entity always more powerful than a criminal defendant, to engage in the suppression of evidence and subornation of perjury, thus giving legitimacy to wrongful convictions based on false evidence. In the light of these circumstances, jurists of reason could disagree with the district court's resolution of Petitioner's constitutional claims or could conclude that the issues presented are adequate to deserve encouragement to proceed further.

Accordingly, this Court should grant the relief requested.

STATEMENT OF THE CASE

A. Relevant Procedural & Trial Facts

On March 21, 2005, following a jury trial in the United States District Court for the Eastern District of New York, Petitioner was convicted of, inter alia, racketeering and racketeering conspiracy, in violation of 18 U.S.C. § 1962(c)-(d), and bank and attempted bank burglaries, in violation of 18 U.S.C. § 2113(a). Boyle v. United States, No. 10-cv-2639 (SJ), 2013 U.S. Dist LEXIS 177924, at *1 (E.D.N.Y. Dec. 18, 2013). Petitioner was sentenced to a 151-month term of incarceration to be followed by three years of supervised release. On direct appeal, the Appellate Court affirmed Petitioner's convictions, but vacated his sentence for unrelated reasons and remanded for resentencing. On remand, Petitioner was credited for 33 months of imprisonment, which Petitioner served on a New York State burglary conviction. In all other respects, the district court imposed

the same sentence.

In its indictment, the Government charged Petitioner as a member of a putative "association-in-fact" enterprise under the RICO statute. According to the Government, Petitioner participated in several bank burglaries between 1991 and 1999. The key members of the group included Salvatore "Fat Sal" Mangiavillano, Tommy Dono, Beck Fiseku, Christopher Ludwigsen, William Galloway, and Gerard Bellafiore. The central evidence against Petitioner consisted of Bellafiore's testimony.

In 2001, while imprisoned, Bellafiore, facing numerous racketeering, bank burglary, robbery, and arson charges in a separate matter pending before the Eastern District of New York (Hon. Edward R. Korman (U.S.D.J., E.D.N.Y.)) entered into a cooperation agreement with the Government. Bellafiore pled guilty to racketeering and using a firearm in relation to a crime of violence. His agreement contained a conditional benefit that the Government would write a 5K1.1 letter to Bellafiore's sentencing court if he fully complied in cooperating with federal authorities. As a result of his agreement, Bellafiore was released from prison in 2003 and he remained on bail when he testified against Petitioner in 2005.

At Petitioner's trial, Bellafiore testified that he had not been promised any specific sentence as part of his cooperation agreement:

Q: Has anybody made promises to you as to what your sentence will be?

A: No.

Tr. 490. See also Tr. 487-90; 651-52; 657-58.

Bellafiore further testified that the Government did not assist him in attaining bail in 2003. Tr. 626. He consistently testified that

he received no benefit other than the Government's promise that it may write a 5K1.1 letter on his behalf. Tr. 601-626. Bellafiore testified that he was facing a sentence of twenty years imprisonment for his crimes and that he had no expectation as to his prospective sentence:

Q: As you sit here today, do you have any idea how much time you are going to get on your sentence?

A: No.

Tr. 490.

In addition, Bellafiore testified that he had undergone a moral transformation as a result of his cooperation. Specifically, Bellafiore testified that he had freely admitted his guilt in crimes that he committed, Tr. 601-626, and he was "just done with this life" and didn't "want to commit crimes any more." Tr. 485.

The prosecution's summation was later tailored to solidify Bellafiore's credibility based on Bellafiore's testimony on the above matters:

Let me talk a moment about Gerard Bellafiore and his motive to lie... [H]e has a greater incentive to tell the truth ... Without his cooperation; Bellafiore can expect a sentence of almost 20 years in jail.

Just like the others, the potential sentence gave him motive, I submit to you, to be truthful. It would be crazy to implicate yourself in unsolved crimes, plead guilty to them, knowing your only hope is a letter from the government at the time of sentence, and to lie about who was involved, it would guaranty an even harsher sentence.

[Y]ou can see what could happen if they violated the cooperation agreement, you can see they could be prosecuted, that they are not going to get a letter from the government, you can see the consequences befall them if they break the terms of their agreement. The terms under their agreement is to tell the truth, and from all of the other evidence you have seen, you know they will.

B. Post-Trial Revelations Concerning Bellafigiore

In 2009, while still on bail from his criminal case in New York, Bellafigiore was again indicted on several charges of bank burglaries arising within the Southern District of Florida. He pled guilty in that case and was sentenced to 78 months imprisonment. United States v. Bellafigiore, No. 09-cv-60139 (WJZ) (S.D.Fla. May 27, 2009). When the United States Attorney's Office for the Eastern District of New York determined that Bellafigiore breached his cooperation agreement with its office and refused to file the 5K1.1 letter on Bellafigiore's behalf, Bellafigiore began writing letters to federal courts in New York seeking assistance with vacating his 2001 guilty plea.

The Bellafigiore letters contained a multitude of undisclosed Brady evidence and numerous statements that were divergent from Bellafigiore's trial testimony against Petitioner. For example, Bellafigiore stated that the "pleas he took was [sic] incorrect" and that he was under a lot of pressure and medications at the time of his cooperation. Exhibit 5, Letter filed in 00-cr-824 (Docket No. 214). Bellafigiore also stated that he suffered from alcoholism for many years up until 2009. Id. Bellafigiore stated that during his cooperation with the Government, these problems affected his memory and ability to recall the offenses that he committed and he "didn't know what the U.S. Attorney was talking about" in regard to certain offenses to which he has admitted guilt. Id. Bellafigiore further stated that he felt coerced into pleading guilty and the Government guaranteed him that it would write a 5K1.1 letter in exchange for his cooperation against Petitioner before he

signed his agreement. Exhibit 6, Letter filed in 00-cr-824 (Docket No. 212).

A non-exhaustive list of Bellafiore's statements demonstrating these points is as follows:

I would never have pled guilty to the charges had I not been guaranteed the 5K1.1 motion! Granted I messed up on Bond and was punished for that accordingly but that I messed up should not void or negate any assistance I've rendered to the government. Exhibit 5, Letter filed in 00-cr-824 (Docket No. 212).

I mean I know I took the plea and I read it .. I will be honest with you, I had never read it fully when I first took the plea. You know, it sounded great. Exhibit 6, Tr. of Status Conf. Hr'g at 4 (00-cr-824).

I pled guilty to an actual robbery with a gun and a mask. I never carried a gun in my life. Exhibit 6, Tr. of Status Conf. Hr'g at 4 (00-cr-824).

The plea I took was incorrect and I was confused and under a lot of pressure back then and wasn't on one of the robbery's [sic] which is a serious charge and not the way I ever acted. Exhibit 4, Letter filed in 00-crr-824 (Docket No. 214).

I tried to do everything possible to resolve this 924C [sic] which is the CBS robbery that happened on February 4, 1993 ... Your Honor I wasn't there that day for this robbery. I was mistaken. Exhibit 7, Letter filed in 00-cr-824 (Docket No. 221).

After numerous consultations with the court, Bellafiore eventually abandoned his attempts to vacate his guilty plea and was sentenced in 2011. The court explained to Bellafiore "even if I think you breached the agreement, I could still give you credit for your cooperation." Exhibit 7, Tr. of Sent. Hr'g at 17-19 (00-cr-824).

Of further significance, at Bellafiore's sentencing hearing, it was revealed for the first time that prosecutors assisted in attaining Bellafiore's release from prison in 2003, having promised him a

specific sentence of 41-months imprisonment prior to his bail application. Bellafiore's attorney explained to the court that, based upon his conversations with the Government, Bellafiore had already served, prior to Petitioner's trial, the maximum sentence the Government would seek as a result of his cooperation to date.

Bellafiore's counsel explained that while Bellafiore was in pretrial detention in 2003 [before Petitioner's trial],

the government said - called me up and said, 'You know, Bellafiore's been in jail too long. He's done too well. He's done 41 months and we don't think any judge would give him more than 41 months, given the level of his cooperation to date.' And on the government's motion, he was released.

Exhibit 7, Tr. of Sent. Hr'g at 3-4 (00-cr-824).

Later in the proceeding, the court explicitly adopted this sequence of events concerning the promises afforded to Bellafiore without objection from the Government. The Court explained, "Well, I think you can say he [Bellafiore] was released from custody because [AUSA] Andres thought ... 41 months was more than what he would [receive]." Exhibit 7, Tr. of Sent. Hr'g at 13 (00-cr-824).

C. Petitioner's § 2255 Motion

On June 7, 2010, Petitioner filed a pro se petition to vacate his conviction pursuant to 28 U.S.C. § 2255. (Docket No. 1 in 10-cv-02369.) In short, Petitioner argued claims based on the information revealed in connection with Bellafiore's sentencing hearing, coupled with the letters written by Bellafiore, which demonstrated that the Government failed to disclose material impeachment evidence concerning Bellafiore's credibility. In addition, Petitioner alleged that the Government knowingly introduced false testimony concerning these

matters at Petitioner's trial, which included Bellafiore's false testimony concerning the specific sentencing promises prosecutors provided to him in exchange for his cooperation.

On April 11, 2011, the Government opposed Petitioner's motion. (Docket No. 12 in 10-cv-02369.) The Government argued that "Boyle's petition fail[ed] to establish a cognizable claim for relief pursuant to Section 2255" because "Bellafiore's letters to the court constitute[d] cumulative impeachment evidence that itself provide[d] insufficient grounds for this Court to vacate or set aside Boyle's sentence." Id. at 4.

On December 18, 2013, after two years and no documented reply from Petitioner, the district court denied the petitioner.² See Exhibit 1, Order I. In its denial, the court construed Petitioner's argument to allege only that "Bellafiore's attempt to withdraw his guilty plea indicate[d] that Bellafiore's testimony against Boyle was either perjured or unreliable and that the government was complicit in Bellafiore's conduct..." Id. at 5. The court found Petitioner failed to establish that Bellafiore provided perjured testimony based on his attempted plea withdrawal, because his statements were not conclusive and his attempt to withdraw his plea was aborted. Id. at 6.

On July 15, 2014, Petitioner appealed and the Appellate Court remanded the matter to permit the lower court to determine whether Petitioner's reply papers would have altered the lower court's decision. (Docket No. 45 in 14-134 (2d Cir.)).

On August 11, 2014, after considering Mr. Boyle's reply papers, the court again denied the petition. See Exhibit 2, Order II. The court noted that Petitioner's reply presented "claims identical to the

petition, albeit in considerably greater detail." Id. at 3. In addition "[P]etitioner d[id] not present new information or specific responses to the arguments the Government set[] forth in its opposition to Petitioner's request for a writ of habeas corpus." Id at 3-4. The court concluded that the undisclosed information contained in Bellafigliore's letter was merely "additional impeachment material" and if presented, would not "have materially changed [the] jury's assessment of Bellafigliore's reliability or the outcome of Boyle's trial..." Id. at 4-5.

On September 4, 2014, Petitioner filed a Motion to Alter the Judgement denying habeas relief. (Docket No. 24 in 10-cv-02369.) Petitioner contended that his habeas claims involving the Government's suppression of evidence and its presentation of false testimony warranted a closer examination by the court. Petitioner sought reconsideration because the court did not consider all of the evidence supporting Petitioner's motion and it failed to hold evidentiary hearing on claims not refuted by the record. Among other issues, Petitioner alerted the court that it did not address the undisclosed Brady evidence revealed during Bellafigliore's sentencing hearing in 2011 or the contradictory testimony Bellafigliore provided at Petitioner's trial.

On January 30, 2015, the Government filed papers in opposition to Petitioner's motion for reconsideration. (Docket No. 27 in 10-cv-02369.) The Government did not to address the substance of Petitioner's arguments. Instead, the Government argued in conclusory fashion that Petitioner failed to proffer "any new evidence warranting reconsideration" and the "government complied with its obligations

under Brady v. Maryland..." Id. at 4-5. On February 3, 2015, Petitioner filed a timely reply to the Government's opposition. (Docket No. 28 in 10-cv-02369.) The motion for reconsideration was thus fully briefed at such point, and remained pending without any action by the lower court until August 2017.³

In the meantime, after waiting years for a decision by the court on his motion for reconsideration, Petitioner filed a letter on March 6, 2017 requesting the court order the Government to show cause as to why Petitioner should not be granted habeas relief. (Docket No. 29 in 10-cv-02369.) Petitioner also alerted the court that Bellafiore was rearrested, on July 4, 2016, for committing yet another violent bank robbery and for assaulting a police officer with a deadly weapon. As a consequence of Bellafiore's pending prosecution, Petitioner argued it was unlikely the Government would be able to produce sufficient evidence to defend against the claims raised in the underlying habeas proceeding.

On August 4, 2017, without addressing Petitioner's motion to show cause or the Brady evidence revealed at Bellafiore's sentencing, the lower court again summarily denied habeas relief. See Exhibit 3, Order III. Instead of examining the central issues, the court found "that when Bellafiore recanted his statements, he didn't recant any testimony specific to Boyle's offenses." Id. at 5. Notwithstanding the multitude of record-based evidence provided for consideration, the court concluded that an evidentiary hearing was not required, because Petitioner "has yet to provide the Court of evidence that is not firmly contradicted by the record." id.

**I. The Appeal Court's Decision Conflicts With 28 U.S.C. § 2253(c)
And Controlling Precedent Because It Imposes A higher Burden
For Prisoners To Secure A COA.**

The Appeal Court's decision directly conflicts with controlling precedent mandating that appellate courts do not place too "heavy a burden on the prisoner at the COA stage" by conducting a merit-based review of the underlying claims. *Buck v. Davis*, 137 S. Ct. 759, 774 (2017). Specifically, this Court explains, "Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Id.* at 773 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)) (emphasis added). Here, however, relying on *Kellogg v. Strack*, the appeals court has disregarded such mandate and advanced a dated and higher burden on Petitioner at the COA stage "designed to permit an appeal to go forward only if the appeal has a threshold quantum of merit." 269 F. 3d 100, 104 (2d Cir. 2001). The merit-based rationale employed by *Kellogg* is simply inconsistent with *Buck* and the commands of 28 U.S.C. § 2253(c), both of which require only that a prisoner state a valid claim of the denial of a constitutional right at the COA stage. See e.g., *Buck*, 137 S. Ct. at 773 ("This threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims").

In addition, the Appeals Court has improperly conflated the burden in Petitioner's case by extending the higher "abuse of discretion" standard of review discussed in *Kellogg* for Rule 60(b) motions as being conterminous with a appellate court's review of COA applications stemming from Rule 59(e) motions. See Order (Docket No.

162), at Exhibit 4 (noting that Petitioner was required to show that "jurist of reason would find it debatable whether the district court abused its discretion in denying [Rule 59(e)] motion") ((citing Kellogg, 269 F. 3d at 104 (2d Cir. 2001)). However, the heightened "abuse of discretion" standard utilized by the appeals court in a 60(b) context for COA purposes does not apply to Petitioner's request for a COA from the denial of his Rule 59(e) motion that was timely filed in connection with the underlying habeas judgement, because there are operative differences between motions filed pursuant to Rule 59(e) and Rule 60(b) in the habeas context. See e.g., United States v. Fiorelli, 337 F. 3d 282, 288 (3d Cir. 2003) ("Although motions for reconsideration under Federal Rules of Civil Procedure 59(e) and 60(b) serve similar functions, each has a particular purpose.").

Application of the "abuse of discretion" standard is improper at the COA stage in the context of Rule 59(e), because a timely filed Rule 59(e) motion attacks the merits of the underlying judgement and tolls its finality.⁴ Unlike a Rule 60(b) motion, an appeal from the denial of a motion under Rule 59(e) in the habeas context brings up the entire underlying judgement for appellate review in one instance. Indeed, the underlying habeas judgement is not final or even appealable until the Rule 59(e) motion is adjudicated. See e.g., Browder v. Dir. Dep't of Corr., 434 U.S. 257, 265 (1978) (noting that an appeal in a habeas corpus proceeding lies only from a final order as directed by 28 U.S.C. § 2253). Under such circumstance, the plain text of 28 U.S.C. § 2253(c) does not require any heightened showing (i.e., abuse of discretion review) for a COA to issue in connection with the underlying habeas judgement. Likewise, this Court's decision in Buck mandates that

appellate court's refrain from heightening the statutory threshold in such context.

Overall, the standard of review at the COA stage cannot be the same for appeals dealing with motions filed under Rule 60(b) and Rule 59(e). *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263, n. 7, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978) (explaining that Rule 60(b) proceedings are rare in that they are subject to only limited and deferential appellate review). Rather, an appellate court must focus cumulatively on all filings connected to the underlying habeas judgement at the COA stage, including a Rule 59(e) motion that served as a "device to relitigate the original issue decided by the district court." *United States v. Fiorelli*, 337 F. 3d 282, 288 (3d Cir. 2003).

Moreover, as in Petitioner's case, when new evidence is presented in a Rule 59(e) motion, such evidence must too be viewed in connection with the underlying habeas judgement. Unlike the constraints of a Rule 60(b) motion, a habeas movant can petition the lower court under Rule 59(e) to reconsider the merits of the underlying claims if: "(1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; or (3) it becomes necessary to remedy a clear error of law or to prevent obvious injustice." *Marino v. United states*, 1998 U.S. Dist. LEXIS 12687, No. 97 Civ. 1884 (S.D.N.Y. Aug. 18, 1998). The allowance to enter new evidence in support of the underlying claims is not only permitted under Rule 59(e), but also may be necessary to clarify the claims presented when, as here, the prisoner was acting pro se in perfecting the habeas motion. *Id.* at *7-9 (finding reconsideration of habeas claim was warranted, because the basis for relief plead in the initial pro se petition was not clear).

Ultimately, a timely filed Rule 59(e) motion is not distinct from the underlying judgement in the habeas context, and it tolls the finality of such judgement until the Rule 59(e) motion is determined. It is thus improper for an appellate court to review the arguments and evidence presented in a Rule 59(e) motion separate from the underlying habeas motion at the COA stage, and for it to require a Petitioner to satisfy a higher burden than what is required under 28 U.S.C. § 2253(c).

Accordingly, granting of this case is warranted, because it was error for the Appellate Court to require a higher burden at the COA stage, and in requiring Petitioner to make a heightened showing that it was "debatable that the district court abused its discretion" in connection with the denial of the issues and new evidence raised in his Rule 59(e) motion.

II. Petitioner Has Made A Substantial Showing Of The Denial Of A Constitutional Right Regarding His Brady And Napue Claims.

Granting of this case is also warranted, because when considered in the proper context of 28 U.S.C. § 2253(c), Petitioner has shown, at a minimum, that his Brady and Napue claims are debatable at the COA stage "even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, the Petitioner will not prevail." Buck v. Davis, 137 S. Ct. 759, 774 (2017).

In connection with his Brady claim, Petitioner has proffered uncontroverted evidence demonstrating that the Government suppressed

evidence regarding benefits it provided to its key cooperating witness, Gerard Bellafiore. During Bellafiore's 2011 sentencing hearing, Bellafiore's counsel revealed for the first time that while Bellafiore was in pretrial detention in 2003, prosecutors secured his release on bail and promised Bellafiore that he would receive a sentence no greater than 41-months imprisonment "given the level of his cooperation to date."⁵ See Exhibit 7, (Tr. of Bellafiore Sent. Hr'g at 17-19 (00-cr-824)). Petitioner also proffered evidence demonstrating that prosecutors suppressed other favorable evidence undercutting Bellafiore's credibility.⁶

In connection with his Napue claim, Petitioner presented direct references to certified trial transcripts proving that Bellafiore falsely testified about the benefits provided by the Government in connection with his cooperation. Among other things, Bellafiore testified that prosecutors did not secure his release on bail, and that he received no promises from prosecutors regarding his sentencing exposure. The prosecution relied on this false testimony during its summation to bolster Bellafiore's credibility.

In addition, Petitioner provided the district court with post-trial letters written by Bellafiore that further demonstrated the falsity of his trial testimony. For example, the information contained in these letters include Bellafiore's divergent admission that the Government coerced him to plead guilty in exchange for guaranteed leniency, that he suffered memory loss due to alcohol and drug abuse, and that he falsely testified as to his involvement in at least one robbery for which he pled guilty.

Notably, these irregularities were material, because Bellafiore

was the linchpin to the Government's case. His testimony not only allowed the trial to proceed forward in light of a potential statute of limitations defense, but also was significant given the jury's inability to reach a verdict on the pivotal NatWest Robbery charge. This demonstrates that the jury relied extensively on Bellafigliore's testimony, and it did not credit the Government's other cooperating witnesses.

When considering the totality of circumstances, Petitioner easily establishes a valid Brady claim, because i) the evidence at issue was favorable to the defense, serving to impeach the key witness against petitioner; ii) the evidence was certainly withheld by the Government; and iii) prejudice ensued given the centrality of the witness' testimony. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Likewise, Petitioner has also shown that the Government offered false testimony at trial in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). Thus, Petitioner has satisfied the requirements of § 2253(c) for COA purposes. See e.g., *United States v. Espinoza*, 622 F. App'x 745, 748 (10th Cir. 2015) ("At this stage, we simply take a quick look .. to determine whether the [movant] has facially alleged the denial of a constitutional right and we will not delve into the merits of the claim").

Accordingly, this Court should grant Petitioner's case for review.

III. The Appellate Court Overlooked That The District Court Failed To Properly Adjudicate Petitioner's Claims As Required Under 28 U.S.C. § 2243.

The Appellate Court's decision overlooks the district court's failure to discharge its duty to "hear and determine the facts" pursuant to 28 U.S.C. § 2243. As evidenced by the judgements below, the district court did not address, implicitly or otherwise, the specific facts proffered in support of Petitioner's habeas claims. The lack of consideration by the lower court conflicts with the statutory requirement that a habeas court "haer and determine" the facts before it disposes of the motion. See 28 U.S.C. § 2243. Notably, this Court explains that a reviewing Court cannot circumvent the rights afforded to a habeas movant pursuant to § 2243:

[When] an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received. This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed to determine the facts of the case, by hearing the testimony and arguments.

Walker v. Johnston, 312 U.S. 275, 285 (1941).

Likewise, this Court has directed that habeas movants be entitled to plenary review, and certain procedural processes to ensure that the necessary fact-finding is completed by the reviewing court before the movant is adjudicated. See e.g., Townsend v. Sain, 372 U.S. 293, 312 (1963); Harris v. Nelson, 394 U.S. 286, 291 (1969); Bracy v. Gramley, 520 U.S. 899, 908-09 (1997).

Notwithstanding the fact that the District Court has had several opportunities to hear and determine the facts supporting Petitioner's claims, they have failed to do so. At a minimum, a remand of Petitioner's § 2255 motion is thus required to satisfy the mandate of the writ itself that a movant's claims be properly adjudicated. See e.g., Espinoza, 622 Fed. App'x at 748 (noting Petitioner "undoubtedly has a right have [habeas] claim[s] decided and heard on its merits."); see also Bryant v. Warden, FCI, 50 Fed. App'x. 13, 16 (2 Cir. 2002)(remanning to determine actual innocence claim where lower court did not address issue on the merits); Wojtowicz v. United States, 550

F. 2d 786, 787 (2 Cir. 1977) (remanding case for hearing on unresolved issue of whether petitioner was competent during sentencing phases).

Here, Petitioner was not afforded the statutory processes of the writ and a plenary review of his § 2255 motion because the lower court never heard and decided the specific facts and arguments relating to his Brady and Napue claims. Accordingly, this Court should grant Petitioner's request for review.

Conclusion

For the above reasons, it is most respectfully suggested, certiorari should be granted, or in the alternative, the matter should be remanded to the Second Circuit with appropriate instruction.

Dated: June 25, 2018

FOOTNOTES

1. As discussed *infra*, the centrality of Bellafiore's testimony is best illustrated by both the Government's extensive reliance on his testimony at trial and the jury's verdict concerning the charged offenses.
2. Petitioner had served his reply by mail in 2011, but it was never received by the court's chamber or docketed in the electronic filing system by the Clerk's Office.
3. On October 14, 2014, the Appellate Court issued an order holding Petitioner's appeal in abeyance pending the district court's ruling on the motion for reconsideration. (Docket No. 64 in 14-134 (2d Cir.)).
4. None of this is true in a 60(b) context, because the filing of a Rule 60(b) motion does not affect the finality of the lower court's judgement and it is not a device to reargue the merits of the underlying claims.
5. The Government was a party to this proceeding and did not contest these representations, which were ultimately adopted by the Hon. Edward R. Korman (U.S.D.J., E.D.N.Y.) as true.
6. The evidence offered by Petitioner in support of his Brady and Napue claims was also provided to this Court for review. See COA Request (Docket No. 141).