No. 19-5012

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Frank Sarcona — PETITIONER
(Your Name)

FILED
MAY 16 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eleventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Frank Sarcona
(Your Name)

1001 W. Maxwell Blvd., F.P.C.
(Address)

Montgomery, AL 36112
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

1. Did the District Court and the Court of Appeals for the 11th Circuit err in relying on procedural bar instead of relying on the underlying constitutional issues by blocking a federal evidentuary hearing; thus denying Defendant the opportunity to establish his actual innocence of the conviction?

2. Was Defendant's trial counsel, Mrs. Randy J. Golder ineffective for failing to call Dr. Forgione to testify at trial on Defendant's behalf to establish Defendant's actual innocence, resulting in a fundamental miscarriage of justice?

3. Was Prosecutor Kerry S. Baron guilty of prosecutorial misconduct and cause a Giglio violation by deliberately misleading the jury by not calling Dr. Forgione to testify and avoiding disclosure of critical exculpatory testimony while suborning Mrs. Brock's perjured testimony, which he obtained through threatening to prosecute Brock unless she testified at trial and "she could tell him something to change his mind"?

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:

Acosta, R. Alexander

Alexandra, Angela

Amidei, Gianna

Anderson, Laura

Baron, Kerry S.

Bowen, Mary

Boyer, Nicole

Brock, Kathy

Broda, Angie

Brooks, Michelle

Cooperstein, Glenna

Cougar, Michael

Evans, Stephanie D.

Ferrer, Wifredo A.

Forgione, George

Foster, Jessica

Fowler, Melissa

Futerfas, Alan S.

Golder, Randee J.

Greenberg, Benjamin G.

Herridge, Dawn

Hieronimus, Jennni

Hopkins, Hon. James M.

Hudson, Dorothy

Jantzen, Dorothy

Johnson, Kenneth N.

Johnson, Lori

Lester, Mark

Marks, Patricia

Marra, Hon. Kenneth A.

Maya, Joseph Dr.

Miranda, Rosemary

Mulhall, Rutherford

Ottey, David Ricardo

Palm Beach County Board of County Commissioners

Powell, Linda

Powers, Jean

Rodriguez, Silvia

Rowe, Diana

Sarcona, Frank

Schumacher, Howard J.

Sheridan, Amy

Shienman, Jennifer

Sloman, Jeffrey H.

Smith, Sandra

Smachetti, Emily M.

Stickney, Robert W.

Vitunac, Hon. Ann E.

Wester, Rebecca Sue

Wusterbarth, Jamie

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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 A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished. (To the best of my knowledge)

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished. (To the best of my knowledge)

[ ] 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 Nov. 5, 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: Feb. 27, 2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ineffective assistance of counsel
Strickland v. Washington
466 US 668 (1984)

Giglio violation
Giglio v. United States
405 US 150 (1972)

Actual innocence of conviction and miscarriage of justice
Schulp v. Delo
513 US 298 (1995)

House v. Bell
547 US 518 (2006)

McQuiggin v. Perkins
567 US 133 (2013)

2255(h)

2255(f)(4)

STATEMENT OF THE CASE

In October of 2004, I along with Dr. George Forgione, was indicted for mail fraud, wire fraud, promotional money laundering and related charges through my involvement with Dr. Forgione's company, Lipoban Clinic Inc. Liboban sold a safe and natural diet program consisting of a low-calorie diet, a "test survey" booklet and a clinically-proven high-fiber, safe and effective dietary supplement called Lipoban. Lipoban consisted of the natural ingredient, Chitosan, derived from the exoskeletons of crustations. Chitosan is a safe and natural product sold in capsule form that has been the subject of no less than nine successful clinical double-blind studies for weight loss that showed successful weight loss for human subjects in independant scientifically-conducted studies conducted at major universities throughout the world. The average weight loss of all nine studies was a low, of (an average) of 1.5 pounds per month to a high of (an average) over 10 pounds per month with and without the use by subjects of a low calorie diet or exercise program. Chitosan is even today sold through dozens of brand names for weight loss for humans throughout the world. Chitosan works by binding with undigested fats in the digestive tract, rendering the fat portions of foods undigestable so it is simply eliminated as waste.

Between 1999 and 2004, the Lipoban Company sold the Lipoban program to over 137,000 customers and grossed approximately sixteen million dollars. It had a customer satisfaction rate of nearly 90% and a return rate of approximately 10%. The company paid approximately 1.1 million dollars in refunds between 1999 and 2004. The government never alledged that any refunds were

not made or that anyone who ordered and paid for the Lipoban program did not receive it. Instead, the government argued that the ingredient in Lipoban (Chitosan) was a "worthless" product, incapable of assisting in weight loss. This position the government maintained throughout the trial until its closing arguments, when the prosecution was forced, after the facts presented at trial proved the Lipoban product worked to cause weight loss without diet and exercise, but shifted its contension that even though Lipoban worked, "it did not work as well as advertised," thereby technically admitting the government was prosecuting what was, in fact, a civil case, as a criminal case. This fact was obviously lost to an unsophisticated jury of lay persons. This, inspite of the fact the defense provided half a dozen Lipoban customers who testified at trial that they lost the amounts of weight in the time periods as advertised without diet or exercise; exercise of the amount that was enough to have caused the amounts of weight loss each experienced. They all testified that their own testimonies reproduced in the advertising were 100% true and accurate using the Lipoban product and their weight losses of between 30 pounds in 30 days, 80 pounds in six months, and as much as 120 pounds in 90 days were totally true and accurate and exactly what happened. The advertizing made it clear in several places that "individual weight loss will vary."

Meanwhile, the government also produced just seven people from 137,000 users who were not satisfied with Lipoban, one or

two of these people claimed to have lost weight using Lipoban, but hoped to lose more. One testified that she did not take the Lipoban product as instructed. The others all testified that they had all tried many various diets to lose weight over the past years and were never successful in losing weight on any of them. All said they returned the Lipoban product, were refunded their money back -- those who filled out the Lipoban "test survey" returned it and additional to receiving their money back also received the $50.00 promised them in the advertising for just trying the program. (Note: Many of the Lipoban customers were believed to only have bought the program in the first place in order to return it to receive the $50.00 fee for just filling out the "Test Survey" booklet and returning it.)

By his subornation of perjury of a key material witness and creating a Giglio violation, along with the ineffective assistance of my appointed counsel, Mrs. Randy J. Golder, by not calling or even interviewing Dr. George Forgione to testify as to the truth of my actual relationship with him and to the Lipoban Clinic Inc, and Mrs. Golden's failure to follow my instructions to meet with Dr. Forgione, though he was always available and expecting to meet and be called by her; As a result, I was found guilty and sentenced to 20 years in prison in 2010 with a restitution of $720.00 (Seven Hundred and Twenty Dollars).

To secure my conviction, Prosecutor Baron argued throughout the trial that I was Dr. Forione's partner, that I was responsible

for the direction of the Lipoban Clinic Inc., that Lipoban was a fraud and I was responsible. Dr. Forgione was the only person, other than myself, who could have testified to the truth to the jury as to my actual relation with his company, the Lipoban Clinic Inc., as the jury gave no authority or trust to anything I said as a result of Mr. Baron's portrayal of me and the court's continuous instruction to the jury not to consider anything I had to say about the clinical studies. This was because my attorney, Mr. Golder, did not produce an expert witness who could explain the validity of the numerous clinical studies used to support the Lipoban product's effectiveness, even though many were available. So it was left to me to explain and I was not considered an expert by the court.

Dr. Forgione was critical to my defense to explain to the jury that Mrs. Brock lied about my relationship with the Lipoban Clinic Inc.

Dr. Forgione was listed to be called by Mr. Baron as a government witness but Dr. Forgione refused to lie as Mr. Baron wanted him to do and to tell the jury I was his partner. Mr. Baron did not call Dr. Forgione to testify. Mrs. Golder unbeknown to me, did not list him as a defense witness, because she mistakenly expected Mr. Baron to call him. Mrs. Golden's incompetence in not calling Dr. Forgione was a boon to Mr. Baron's theory of the case and devastating to me.

I have tried, since 2017, to timely get the district court

and the 11th Circuit to grant an evidentiary hearing so Dr. Forgione could finally testify to the truth of my actual innocence of my conviction and to reveal to the district court, to put on the record and to prove the fundamental miscarriage of justice that occurred in this case, but both the district court and the 11th Circuit Court of Appeals, though I made numerous attempts to do so, have continually denied me. Both courts were more willing to substitute their procedural bar for this court's decisions in Slack v. McDaniel, 529 U.S. 473 (2000), Schlup v. Deco, 513 US 898 (1995), McQuiggin v. Perkins, 569 US 133 (2013), House v. Bell, 547 U.S. 518 (2006), Ayestas v. Davis 584 US No. 16-6795) (2018), to look to the underlying constitutional issues and claim of actual innocence, and miscarriage of justice as presented to them and refused to allow for a hearing on the unadjudicated merits of the constitutional issues of the case, even though I have met both prongs of the decision expounded by this court in Slack v. McDaniel, ID. After being denied a certificate of authority, I attempted to prove to the district court that my motion was not a second and successive 2255, but a numerically second, but not a second and successive 2255. The following pages show the legal precedence for that motion. I argued:

This motion is a numerically second 2255, but not a successive under the framework of the AEDPA and Panetti v. Quarterman, 551 U.S. 930, 934-44, 168 L.Ed 2d 662 (2007). Thus, the Eleventh Circuit is not required to approve the District

Court's authority to adjudicate the merits of Petitioner's claim.

In Scott v. United States, 761 F.Supp. 2nd 320 (E.D.N.C. 2011), the Court stated: Where the subsequent section 2255 motion asserts a claim that was not ripe at the time of the prior section 2255 motion is "not second or successive."

For example, in Stewart v. United States, 646 F3d, 856 (11th Cir. 2011), the 11th Circuit permitted a second-in-time 2255 motion challenging a sentence based upon facts that did not happen until after Stewart filed the original 2255 motion.

The Court concluded, ... Stewart's numerically second motion was not second or successive and the 2255(h) gatekeeping provision did not apply.

In addition, the Stewart Court said, "The posture in Panetti was 'unusual,' but it was not unique. In Tompkins, we refused to apply Panetti to claims that 'can be and routinely are raised in initial habeas petitions." Id. at 1260. But when a claim could not have been raised in a prior habeas petition, courts have interpretted Panetti to permit that claim to be raised in a subsequent petition. United States v. Buenrostro, 638 F.3d 720, 725 (9th Cir. 2011) ('Panetti does not apply only to Ford claims. Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded.'); Johnson v. Wynder, 408 F. App'x 616, 619 (3d Cir. 2010) ("We see no reason to avoid applying Panetti in the context of other types of claims that ripen only after an initial federal habeas petition

has been filed.') United States v. Lopez, 577 F.3d 1053, 1064 (9th Cir. 2009) ('The considerations the Supreme Court identified in support of its holding are not specifically limited to Ford claims, and therefore must be considered in deciding whether other types of claims that do not survive a literal reading of AEDPA's gatekeeping requirements may nonetheless be addressed on the merits.' (citation omitted)."

Prosecutor Kerry Barron deliberately kept Dr. Forgione and me sequestered from each other before, during and after trial. I had no way to contact Dr. Forgione, nor did he have any way to contact me as we were both confined to different prisons. I therefore had no choice but to wait for Dr. Forgione to contact me when he finished his sentence.

In Trucchio v. United States, 553 F.Ed. App'x, 862 (11th Cir. 2014) the Court says, "We have held that the 'due diligence' element of § 2255(f)(4) requires neither the 'maximum feasible diligence' nor the undertaking of repeated exercises in futility, but it does require that a prisoner make 'reasonable efforts' in discovering the factual predicate of his claim. Aron v. United States, 291 F.3d 708, 712 (11th Cir. 2002). 'Moreover, the due diligence inquiry is an individualized one that must take into account the conditions of confinement and the reality of the prison system.'"

I am innocent of all charges of my conviction. I have been the subject of a fundamental miscarriage of justice brought about

by an overzealous prosecutor and his misconduct and by the ineffective assistance of appointed counsel. Accordingly, had the jury been allowed to hear Dr. Forgione's testimony, which they were entitled to in order to come to a correct and just decision that would have revealed to them the truth of the numerous lies told to them throughout the trial, it is more than likely that no reasonable juror viewing the record as a whole, with Dr. Forgione's testimony included, would have lacked reasonable doubt as to my guilt, and found me innocent.

REASONS FOR GRANTING THE PETITION

This is an appeal from the district court's and the 11th Circuit's denial for a hearing on the merits of "new facts" that only became available to me recently for the first time and were presented to the district court in a timely manner. These "new facts" are proof of my fundamental innocence of the charges in my conviction. By these facts not being revealed to the jury at trial the jury was denied the truth of my involvement in the subject company's actions and therefore were denied the ability to reach a correct and informed decision as to my guilt or innocence. As a result I was denied the due process of a fair and impartial trial and was unjustifiably convicted.

Unless a reversal of the district court's and 11th Circuit's denial to hold a full hearing and allow my co-defendant, Dr. George J. Forgione, the owner of said company to testify to the truth in this matter a fundamental miscarriage of justice will continue to result if Dr. George Forgione is not allowed to testify once again as he was prevented from testifying at trial.

This jurisdiction is established because the claims became ripe once witness Dr. George Forgione provided Petitioner with an Affidavit that rendered his federal conviction in violation of due process under Giglio and ineffective assistance of counsel.

Constitutional issues - A **Giglio** violation, 2) **ineffective assistance of counsel.** Both issues are ripe for the first time for adjudication on the merits.

Prosecutor Kerry S. Baron knew Dr. George Forgione testified to the grand jury under oath as well as in person that I was not his partner. Yet Prosecutor Baron allowed and even encouraged Kathy Brock, an employee of Dr. Forgione, to purjure herself while under oath and threat of prosecution in order to convince the jury that I was Dr. Forgione's partner. Dr. Forgione was not called to testify though he was readily available.

As Dr. Forgione stated in his sworn affidavit (Exhibit A1 at 4), "I would have been willing to testify under oath to all of the foregoing."

Under cross examination Brock admitted she lied to the Government. She initally described me as a "consultant" and "Dr. Forgione was my boss". (See Trial Transcripts Page 934, Lines 1-4 and Page 933, Lines 8-25, Exhibit B). Brock further testified that Prosecutor Baron informed her "He was inclined to prosecute her unless she could change his mind" (See Trail Transcripts Page 938, Lines 14-25, Page 939, Lines 1-25, Page 940, Lines 1-24, Exhibit B). Brock's testimony shows she held great personal malice towards me (See Trial Transcripts Page 932, Lines 8-25, Page 919, Lines 19-25, Page 920, Lines 1-14, Page 917, Lines 1-25, Exhibit B). See Exhibit C for a listing of numerous other trial transcript pages that reveal the many contradictions and lies told by Brock under oath to "change Prosecutor Baron's mind".

Brock's testimony was long and extensive and was instrumental in the jury believing I was Dr. Forgione's partner

which led to my conviction because the jury was denied Dr. Forgione's testimony to put the truth to Brock's self-serving testimony.

This is a clear Giglio violation of Giglio vs United States, 405 U.S. 150. because: 1) Prosecutor Baron knew that Dr. Forgione testified before the grand jury as well as to him personally that I was not his partner, yet he continuously told the jury that I was Dr. Forgione's partner and he deliberately did not call Dr. Forgione to testify (See sworn testimony of Dr. Forgione, Exhibit A at 1. and 2.). 2) there is a reasonable likelihood that Brook's false testimony "could have affected the judgment."

In his sworn testimony, Dr. Forgione explains: "My companies were known as The LipoBan Clinic, Inc., and National Pharmaceutical, Inc. I also had other companies. Frank Sarcona had no ownership interest, management responsibility, position as officer or director, nor was he an employee of LipoBan or National Pharmaceutical, or any other company in which I had an interest. Mr. Sarcona was the principal in his own business, National Marketing Data, which was a wholly unrelated and separate company, in which I had no interest. My companies used independent contractors other than Mr. Sarcona for a variety of services. Mr. Sarcona's only role with respect to my companies was on behalf of his own business, National Marketing Data, to provide advertising agency and consulting services. Mr. Sarcona's company was paid the total of the four payments stated in paragraph 7 of our written Consulting Agreement (although the agreement also refers

to a percentage, the actual arrangement was for the amounts in paragraph 7, which were paid in varying monthly amounts totaling the paragraph 7 sums). Mr. Sarcona and his business were an independent contractor for these services, and Mr. Sarcona was never at any time an employee of my companies. To the best of my recollection, the only payments by my companies or me to Mr. Sarcona were made to his company, National Marketing Data, as per paragraph 7 of the Consulting Agreement (plus some expenses). Neither Mr. Sarcona or his company received any shares of or participation in the profits or earnings of my companies, particularly of The LipoBan Clinic.

At no time did Mr. Sarcona have the authority to issue any orders or make any decisions about my companies without my specific instruction and direction. All advertising content was specifically and always authorized by me, not by Mr. Sarcona. I personally approved all advertising copy, including any portions of copy prepared by Mr. Sarcona or his company. Any and all actions taken by anyone employed by or associated with my companies was always my total, sole and complete responsibility. In particular, the advertising statements alleged in the indictment against Mr. Sarcona were based exclusively on information provided by the manufacturers of the raw material for my products to Mr. Sarcona and requested by me to be included in the advertisements. Mr. Sarcona did not have the right or responsibility to delete or supplement any of the information provided." (Sworn testimony of Dr. Forgione, Exhibit A1 2. and 3.)

I was always an independent contractor. My function was

that of an independent advertising agency through my company, National Marketing Data, as I wrote and placed the advertising that Dr. Forgione hired me to do and that he sanctioned. That was how and for what I was compensated.

Dr. Forgione was the sole owner of the LipoBan company and my co-defendant. Prior to being indicted, Dr. Forgione testified under oath to the grand jury that I was not his partner. His testimony was consistent with his sworn affidavit (See Exhibit A). In Item 5 of the Consulting Agreement it reads:
"Relationship of the Parties. Notwithstanding any provision hereof, for all purposes of this Agreement each party shall be and act as an independent contractor and not as partner, joint venturer, or agent of the other and shall not bind nor attempt to bind the other to any contract. Consultant is an independent contractor and is solely responsible for all taxes, withholdings, and other statutory or contractual obligations of any sort, including, but not limited to, Workers' Compensation Insurance ..." This was signed by both Dr. George Forgione and Frank Sarcona on June 1, 2000. (See Exhibit D)
Included in Exhibit A at 1, 2, and 4:

"Mr. Kerry S. Baron, the prosecutor in the LipBan case knew I asked to testify before the Grand Jury and the day I did, I testified that Mr. Frank Sarcona was not, nor was he ever, my partner. This, I clearly testified to under oath before the Grand Jury."

"After I was indicted and still incarcerated, in meetings with my attorney and Mr. Baron, Mr. Baron would repeatedly ask me

if Frank Sarcona was my partner. When I continaully told Mr. Baron, "No, Mr. Sarcona was never my partner," Mr. Baron would look upset. He would get up and leave the room. My attorney then told me, "You have to say Mr. Sarcona was your partner. That's what he wants you to say." I then told my attorney, "I am totally willing to testify to the truth, but I will not lie. Mr. Sarcona was not my partner."

"At another meeting, Mr. Baron said to me, "Mr. Sarcona brought you into the LipoBan business and he also introduced you to Dr. Maya, isn't that true?" Once again I corrected him and told him, "No. It was Mike Dibiano who I was partners with. Dibiano introduced me to LipoBan and his company, National LipoBan Clinic, as well as to the mail order business. National LipoBan was the predecessor of The LipoBan Clinic and Dibiano's company was already selling LipoBan with the same LipoBan advertisement I was indicted for before Dibiano and I became partners in The LipoBan Clinic. It was Dibiano who brought me to meet Dr. Maya. Dibiano and I were partners until he and I had a falling out.

It was Dibiano who financed the LipoBan Clinic along with myself." Again, Mr. Baron got up and left the room and my attorney again told me, "He wants you to say just the opposite of what you just told him, Goerge. He wants you to blame Sarcona for everything."

I again informed my attorney and, when he returned to the room, I told Mr. Baron, that I will totally cooperate by telling the truth, but I refuse to lie and make things up as you want me to do." Curiously, even though Mike Dibiano was my equal partner

in the LipoBan Clinic Inc., and he was responsible for creating and starting it, he was never charged with anything."

I asked my appointed trial attorney, Mrs. Randy J. Golder, to call Dr. Forgione to testify to the truth on my behalf that I was not his partner. She said she would, then **she did not call him.** I asked her at trial, "When will Dr. Forgione testify?" She replied, **"The prosecutor will call him. Then I will cross examine him."** The prosecutor never did call Dr. Forgione to testify and the lies and misrepresentations throughout the trial that Dr. Forgione's testimony would have exposed and corrected went unchallenged and uncorrected. I was therefore convicted and sentenced to 20 years in prison. In Dr. Forgione's sworn testimony in Exhibit A at 5. he says:

"All along, I had fully expected to be called by Mr. Baron or Mr. Sarcona's attorney to testify where I would have told the jury the above truths. I was totally shocked when I was not called to testify and Mr. Sarcona was convicted."

In Dr. Forgione's sworn testimony in Exhibit A1 at 4, he says:

"After my arrest and transfer to West Palm Beach for holding, Mr. Sarcona and I were always kept separated from each other. However, after our transfer to the Detention Center in Miami, on two occasions we were in the Health Services Department at the same time with a number of other inmates. On one of those times, I told Mr. Sarcona that I didn't understand why he was being charged, as I was solely responsible for the LipoBan statements. I told him that I would be willing to give that

testimony (and the foregoing) on his behalf, and I asked him to have his attorney contact me. A month or two later, again in the Health Services Department, I asked Mr. Sarcona why I had not heard from his attorney. Mr. Sarcona told me that he had asked his attorney "over and over" to contact me, and she told him that she would do so. I was never contacted. Had I been, I would have been willing to testify under oath to all of the foregoing. I remain willing to testify under oath to all of the above."

Calling Dr. Forgione to testify to counter Kathy Brock's and others' purjured testimony that I was Dr. Forgione's partner was critical to my defense. I preserved this claim in my original 2255 motion in Ground Two, Claim 2.1 (See copy of that Claim as Exhibit C). In that Claim, I told the District Court that my court-appointed attorney, Mrs. Randy J. Golder, was ineffective for not calling Dr. Forgione to trial to testify against the falsity that I was his partner. The government responded on Page 23 of its reply, "Government's answer to Petitioner's motion to vacate, set aside, or correct sentence pursuant to Title 28 United States Code, Section 2255" in Civil Case 13-80993-CIV-MARRA/WHITE the Government contended: "Petitioner has not presented any affidavits from any prospective witnesses to support Petitioner's thoughts about what these witnesses would have testified to at trial." The District Court denied me a hearing. I had hoped the Court would have granted me a hearing as well as appointed me an attorney so that the witnesses could be called to testify, especially Dr. Forgione.

I was unable, since my conviction, to contact Dr. Forgione

because we were both incarcerated and always kept at different facilities I had no idea where he was and no way of contacting him nor could he have contacted me When he finally was released from prison he was able to contact me and provided me with the enclosed two sworn statement affidavits that are the basis of this heretofore unavailable evidence that makes my ineffective assistance of counsel and Giglio violation claims ripe for adjudication.

Dr. Forgione s sworn testimony signed 9/9/16 was not received by me until the beginning of October 2016.

In reaching the decision to recommend to dismiss Petitioner's motion, which he purposefully styled "Subsequent" or "Numerically Second" Motion pursuant to §2255 (f) (4) , Magistrate Judge White quickly and quietly passed over the provision of law that allowed for such as held by this circuit in Stewart v. United States, 646 F.3d, 856 (11 cir 2017) (citing Panetti v. Quarterman, 551 US 930,127 S.Ct 2842, 168 L.ED 2d 662 (2007). In fact Judge White fails to even address the provision of §2255 (f) (4) choosing rather to "look behind the label of a prisoner' s post-conviction motion" to reach a more convenient stylistic conclusion not found in the framework of the Petitioner's motion.

Furthermore, in reaching his decision to recommend dismissing Petitioner's motion, Judge White mistakens his

"review of the Movant's motion (Cr-DE-#1) together with all pertinent portions of the underlying criminal file as well as the movant's prior §2255 motion" (Report and Recommendation at 2) for that of another, wherein, just two pages later he holds that "Even if Movant were able to raise before the Court of Appeals his argument relating to the lawfulness of his career offender enhancement, it does not appear that his arguments would prevail."

Petitioner, having not been convicted as a career offender, nor receiving such enhancement, is not now, nor has he ever raised an "argument relating to the lawfulness of his career offender enhancement."

Quite contrary, Petitioner submits to the court that his motion is not a second and successive petition under §2255 (h) no more than it is an argument about a career offender enhancement.

However, the Court's inquiry does not end there. Although the instant Motion follows the filing of a §2255 motion in 2013, it is not successive, as the phrase "second or successive" does not literally refer to all habeas applications or motions for post-conviction relief that are filed second or successively in time (Panetti, at 943-44). A small subset of unavailable claims that could not have been

raised in a prior habeas petition are not held to the literal meaning of the "term of art" "second or successive." Stewart, 646 F3d at 861; see also Singleton v. Norris, 319 F3d 1018, 1023 (8th Cir. 2003), United States v. Orozco-Romirez, 211 F3d, 862, 869, 871 (5th Cir. 2000) "(Orozco-Ramirez's) claim of ineffective assistance of councel during (his) out-of-time appeal... could not have been raised in (his) prior proceeding and, thus, is not "second or successive!").

The instant motion presents such a claim that "could not have been raised in a prior proceeding, and thus, is not "second or successive" in that the facts supporting the claim presented could not have been discovered through the exercise of due diligence, 28 US §2255 (f) (4).

The facts supporting Petitioner's claim goes straight to a constitutional question of due process and could not have been discovered by due diligence as Plaintiff had no way to contact Dr Forgione until he was released from prison and contacted Plaintiff on his own.

Now Petitioner at last has the supporting facts for the first time in the form of Dr Forgione's two sworn affidavits and his willingness to testify to the truth on Plaintiff's behalf of certain material facts that were critical to Plaintiff's defense.

In said affidavits Dr Forgione makes it clear that he testified to certain material facts before the grand jury, specifically that Petitioner "was not, nor has he ever been (his) partner." The Government was obviously present for this

testimony and yet during trial the Government knowingly used a perjuring witness to testify to the exact opposite, forgoing Dr Forgione's assertions of fact and truth for a lie more supportive of their narrative and conversely more damaging to the defense.

The prosecution denies a criminal defendant due process when it knowingly uses false evidence, i.e. perjured testimonies, at trial, or allows false evidence to go uncorrected. see Giglio v. United States, 405 US 150, 92 S.Ct 763, 31 L.Ed 2d 104 (1972); Napue v. Illinois, 360 US 264, 79 S.Ct 1173, 3 L.Ed 2d 1217 (1959); Faulder v. Johnson, 81 F3d 515, 519 (5th Cir. 1996).

To demonstrate prosecutorial misconduct on the basis of false evidence, a petitioner must show that (1) the evidence was actually false, (2) the prosecutor knew it was false, and (3) the evidence was material. Kirkpatrick v. Whitley, 992 F2d 491, 497 (5th Cir 1993); see also United States v. Hawkins, 969 F2d 169, 175 (6th Cir. 1992); United States v. Mach, 695 F2d 820, 822-23 (5th Cir 1983). Evidence is "false" if, interalia, it is "specific misleading evidence important to the prosecution's case in chief." see Donnelly, 416 US 637, 647, 94 S.Ct 1868, 40 L.Ed 2d 431 (1974). False evidence is "material" if there is any reasonable likelihood that (it) could have affected the jury's verdict," Westley v. Johnson, 83 F3d 714, 726 (5th Cir. 1996), cert. denied, 519 US 1094, 117 S.Ct. 773, 136 L.Ed 2d 718 (1997).

In addition to using false testimonies, the prosecution

openly, with the aid of Dr Forgione's defense counsel, threatened and coerced Dr Forgione to perjure himself as well. When Dr Forgione refused to do so, he was not called to testify.

In conclusion, the Petitioner believes that he has demonstrated that the evidence presented at trial by use of perjured testimony was actually false, that the prosecutor knew it was false and that the evidence was not just material but vital to the government's case.

Additionally, Petitioner has demonstrated that the claims of the instant petition for writ of habeas corpus is not second or successive but rather are of the small subset of unavailable claims that could not have been raised in a prior petition in that the facts supporting the claim could not have been discovered through the exercise of due diligence and thus rendering §2255 (f) (4) the controlling authority thereby giving the court jurisdiction.

The 11th Circuit's requirements for the issuance of a C.O.A. from a district court is as follows: "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a C.O.A. should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right and the 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, 120 S. Ct. 1595, 1604, 146 L.ED. 2d 542 (2000). Thus when a request concerns a procedural ruling, the required showing must include both the procedural issue and the constitutional issue. id. Lambrix v. Sec'y, Fla Dept. of Corr. 851 F.3d 1158 (11th Cir. 2017).

The underly constitutional claims in this petition are:

A) Ineffective assistance of counsel through defense counsel's failure to investigate or call exculpatory witness.

B) Giglio, due process violation: Prosecutor used known perjured testimony of a key witness to secure my conviction.

In compliance with the 11th circuit requirements for the district court to allow a COA I submit that the first prong of the two requirements are, 1) An underlying constitutional issue(s) that has been satisfied by the prima facia evidence already submitted with my original motion in this petition filed on October 5, 2017. The prima facia showing consist of the two sworn affidavits from Dr. George Forgione dated September 9, 2016 that was received by me in the beginning of October 2016 and July 20, 2017 that goes directly to perjured trial testimony of Kathy Brock. Additional showings are made by copies of my original 2255 Ground two, claim 2.1, relevant portions of the signed contract between Dr. Forgione and myself dated June, 2000 and trial transcripts of perjured testimony.

The second prong for a district court to issue a COA is that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling". This second prong of jurists of reason is evinced as follows:

1) Judge Terrence W. Boyle of the E.D.of NC whom one could agree is considered a "jurist of reason" has held in Truman Scott v,

United States, 761 F. Supp. 2d 320; 2011 U.S. Dist. Lexus 7208 7:98-Cr-79-BO-1 January 24, 2001; Judge Boyle says: "The case law reveals several circumstances where a subsequent 28 U.S.C.S. §2255 motion has been conclusively deemed not to be 'second or successive'. For example, where the prior §2255 motion was not adjudicated on the merits, any **subsequent §2255** motion is not 'second or successive' for purposes of a motion to set aside sentence under 28 U.S.C.S. §2255(h)(1)(2). Where the **subsequent §2255** motion asserts a claim that was not ripe at the time of the prior §2255 motion, the **subsequent §2255** motion is not 'second or successive' ".

2) Additional "jurists of reason" Judges Martin, Jill Pryor and Anderson from the 11th circuit in Tulio Rivera, v. State Of Florida, 670 Fed. Appx. 685; 2016 U.S. App. Lexus 20393 No. 15-15709, November, 14, 2016 concur in Rivera where they write in **III DISCUSSION:** "To determine whether a prisoner's petition is second or successive, we must look to whether the petitioner previously filed a federal habeas petition challenging the same judgement. Insignares v. Sec'y, Fla. Dept. of Corr., 755 F.3d 1273, 1278 (11th Cir. 2014). If a previous §2255 petition was dismissed as premature or for failure to exhaust, the dismissal was not on the merits and a later petition is not considered second or successive. See Stewart v. Martinez-Villareal, 523 U.S. 637, 644-45, 118 S. Ct. 1618, 140, L. Ed. 2d 849 (1998) (explaining that "the dismissal of a first habeas petition for technical procedural reasons" does not "bar the prisoner from ever obtaining federal habeas review"); Dunn v. Singletary, 168 F.3d 440, 441 (11th CIr. 1999) ("When an earlier habeas corpus

petition was dismissed without prejudice, a later petition is not 'second or successive' for purposes of §2244(b).").

3) Judge James K. Bredar for the District Of Maryland in Monica McCants v. United States 2014 U.S. Dist. Lexus 171698, December 2014 concurs where he says: "it is improper for a lower court to formulaically conclude that every motion filed after an initial section 2255 motion is filed is a 'second or successive motion'". Scott, 761 F. Supp. 2d at 325. Importantly, where a petitioner's initial §2255 was not adjudicated and disposed of on the merits, any subsequent §2255 petition may not be deemed "second or successive." See Slack v. McDaniel, 529 U.S. 473, 485-86, 120 S. Ct. 1595, 146L. Ed. 2d 542 (2000).

4) Judges Marcus, Wilson, and Anderson of the 11th Circuit in Alina Feas v. United States 2017 U.S. App. Lexus 11654, June 2017 concur and said "We have recognized that "the phrase 'second and successive' is not self-defining and does not refer to all habeas applications filed second or successive in time." **Stewart v. United States, 646** F.3d 856, 863 (11th Cir. 2011) (citing Panetti v. Quarterman, 551 U.S. 930, 943-44, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007). Specifically, there are a "small subset of available claims that must not be categorized as successive". Id. However, those small subset of claims involve previously unavailable "facts,"...

5) Judges Flat, Wilson, and Seymour of the 11th circuit in Stewart v. United States 646 F.3d 856; 2011 U.S. App. Lexis 14386; 23 Fla. L. Weekly Fed. C 103 No. 09-15821, July 2001 concur when they said "Panetti was 'unusual,' but it was not unique. In Tompkins, we refused to apply Panetti to claims that

'can be and routinely are raised in initial habeas petitions. Id. at 1260. But when a claim could not have been raised in a prior habeas petition, courts have interpreted Panetti to permit that claim to be raised in a subsequent petition. United States v. Buenrostro, 638 F.3d 720, 725 (9th Cir. 2011) (per curiam) ('Pannetti does not apply only to Ford claims. Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded.'); Johnson v. Wynder, 408 F. Appx. 616 (3rd Cir. 2010) ('We see no reason to avoid applying Panetti in the context of other types of claims that ripen only after an initial federal habeas petition has been filed'.)"

The petitioner asked the district court to reconsider its denial of a hearing because in my original 2255 motion the court denied Ground 2, claim 2.1 for ineffective assistance of counsel for counsel's failure to investigate and call an exculpatory witness, my co-defendant Dr. George Forgione, to testify.

The court based its denial on, and I quote Magistrate White's decision: "In claims...2.1... The movant provides no affidavit or other objective evidence in this §2255 proceeding that these purported witnesses would have testified as proffered. Such a bare and conclusory allegation, bereft of record to support, is subject to summary dismissal. Machibroda v. United States, 368 U.S. 487 (1962). In addition to not providing any affidavit from the witnesses to establish that

they would have provided exculpatory evidence, it is highly likely that none of these witnesses would have testified as proffered".

Contrary to Magistrate White's contention Dr. Forgione is prepared to testify according to his two sworn affidavits to everything I claimed he would have testied to.

Constitutional Issue One: Ineffective Assistance Of Trial Counsel.

Issue One:

It was always known to by me that Kathy Brock had committed perjury in her testimony but I was never able to prove it without Dr. Forgione's testimony when I submitted my original 2255 motion. In my naive, inexperienced and trusting pro se thought processes, I foolishly believed that if I made the claim to the court that Dr. Forgione would testify to the truth and the facts that would have countered Brock's self serving and numerous lies as well as the lies and misconceptions of many others at my trial then I would have been given the benefit of the doubt. I innocently believed I would be granted a hearing and appointed an attorney who could find and bring Dr. Forgione from wherever he was confined in prison so he could testify to the truth against the numerous instances of perjury that were responsible for my conviction and prove my appointed attorney Mrs. Randy Golder was ineffective in her representation of me.

Now, my Ground 2, claim 2.1 claim of ineffective assistance of counsel has finally become ripe to be heard on its merits and I pray this court will allow the issues to be adjudicated and

grant this motion for such purpose.

Constitutional Due Process -Giglio- Issue Two:

My claim of a due process - Giglio violation - is also now ripe and also timely made because of Dr. Forgione's sworn affidavit of July 20, 2017.

It was unknown to me at the time of my original 2255 motion that my co-defendant Dr. George Forgione, in numerous pre trial interviews and in the presents of his own attorney, told the prosecutor in my case, Mr. Kerry Baron, that I was not, nor had I ever been Dr. Forgione's partner in any of his many companies, in particular the LipoBan Clinic Inc... Proving that I was Dr. Forgione's partner and that I had directed the actions of the LipoBan Clinic, Inc. was the key element prosecutor Baron needed to convince the jury of to secure my conviction.

When coerced by Mr. Baron Dr. Forgione refused to lie and commit perjury by testifying that I was his partner in order to satisfy Mr. Baron's prosecutorial needs (See Dr. Forgione's sworn affidavit of July 20, 2017). Instead Mr. Baron was forced to rely upon having Kathy Brock, an admitted liar, testify instead to what was known to be fabrications. Brock was an employee of the LipoBan Clinic Inc. who was hired well after Dr. Forgione and I entered into our written contract. She had absolutely no way of knowing what our relationship was. While admitting on the stand to having great malice and animosity towards me (see trial transcripts pg. 932, lines 8-25, pg. 919, lines 19-25, pg. 920, lines 1-14, pg. 917, lines 1-25, Exhibit B

Initially Brock told government agents

that I was an employee and a consultant of Dr. Forgione and that he was my boss (see trial transcripts pg. 943, line 1-4 and pg. 933, lines 8-25, Exhibit B: Then 6 months later when faced with threat of prosecution herself, she willingly lied and committed perjury under sworn oath, changing her story 180 degrees after Prosecutor Baron informed her " He was inclined to prosecute her unless she could change his mind" (see trial transcripts pg. 938, lines 14-25, pg. 939, lines 1-25, pg. 940, lines 1-24, Exhibit B, Both Brock and prosecutor Baron knew she was lying and committing perjury. Prosecutor Baron suborned Brock's perjury both throughout the trial and in his closing remarks against me in order to secure my conviction.

My appointed attorney Mrs. Randy J. Golder mistakenly believed that Dr. Forgione would be called to testify and she "would cross examine him then". This she confided to me during trial (see my sworn affidavit under perjury enclosed as Exhibit E). Of course, although he was available and eager to testify on my behalf prosecutor Baron did not call Dr. Forgione to testify nor did Mrs. Golder list or even interview him though I urged her to do so time and time again. She told me she would do so, but she never did (see Exhibit E). This egregious error, on Mrs. Golder's part, to not call Dr. Forgione (who was my most important defense witness) was critical to proving my innocence. The jury would have no doubt found Kathy Brock's testimony for the lies that they were had Dr. Forgione testified. Of all people, Dr. Forgione would know best who his partners were and

were not and he unlike Brock had nothing to gain by lying.

I only learned of the constitutional due process, Giglio violation after Dr. Forgione told me of his conversations with prosecutor Baron in July of 2017 and his sworn affidavit to that effect that detailed those events (see Exhibit E).

In Ground Two, claim 2.1 of my original 2255 I alluded to Dr. Forgione having testified to the grand jury that he and I were not partners. At the time I could only hope and speculate that was what he told the grand jury because it was the truth. Now we come to know that speculation was 100% accurate (see Dr. Forgione's sworn affidavit of July 20, 2017).

It was always known to me that Brock had committed perjury in her testimony but I was never in a position to be able to prove it without Dr. Forgione's testimony to the facts when I submitted my original 2255 motion. I had no way of acquiring that affidavit at that time. Now, finally this claim is now ripe to be heard.

In the United States v. Stein, No: 14-15621, January 18, 2017 (11th circuit) judge Pryor recites the requirements for a Giglio violation: "To prevail on a Giglio claim, a defendant must establish that (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material i.e., that there was any reasonable likelihood that the false testimony **could have** affected the judgement (bold added). See DeMarco v. United States, 928 F.2d 1074, 1076-77 (11th Cir. 1991) (finding prosecutorial misconduct warranting a new trial despite no

suppression of evidence where the prosecutor not only failed to correct false testimony, 846 F.3d 1148 but also capitalized on the false testimony in closing argument); United States v. Sanfilippo, 564 F.2d 176, 178-79 (5th Cir. 1977) (same)".

From UNITED STATES v. STEIN, No: 14-15621, January 18, 2017 (11th Cir):

2. The *Giglio* Claims

Mr. Stein next argues that the government violated *Giglio* by knowingly relying on false testimony. "*Giglio* error, a species of *Brady* error, occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." *Ford v. Hall*, 546 F.3d 1326, 1331 (11th Cir. 2008) (internal quotation marks omitted). *Giglio* also applies where the prosecutor herself made "explicit factual representations" to the court or "implicit factual representations to the jury," knowing that those representations were false. *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995).

"To prevail on a *Giglio* claim, a [defendant] must establish that (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material *i.e.*, that there is any reasonable likelihood that the false testimony could have affected the judgment." *Ford*, 546 F.3d at 1331-32 (internal quotation marks and ellipses omitted); *accord Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011). "'The could have standard requires a new trial unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt.'" *Guzman*, 663 F.3d at 1348 (quoting *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1333-34 (11th Cir. 2009)). Thus, "*Giglio*'s materiality standard is more defense-friendly than *Brady*'s." *Id.* (internal quotation marks omitted).

In addition, because *Giglio* error is a type of *Brady* violation, the defendant generally must identify evidence the government withheld that would have revealed the falsity of the testimony. *See, e.g., Ford*, 546 F.3d at 1331 (emphasizing that *Giglio* error "occurs when the *undisclosed* evidence demonstrates that the prosecutor's case included perjured testimony" (emphasis added) (internal quotation marks omitted)). In other words, "[t]here is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object." *Routly v. Singletary*, 33 F.3d 1279, 1286 (11th Cir. 1994) (holding that because defense counsel was aware that a false statement was subject to impeachment and yet failed to object to the statement, there was no due process violation under *Giglio*). But where the government not only fails to correct materially false testimony but also affirmatively capitalizes on it, the defendant's due process rights are violated despite the government's timely disclosure of evidence showing the falsity. *See DeMarco v. United States*, 928 F.2d 1074, 1076-77 (11th Cir. 1991) (finding prosecutorial misconduct warranting a new trial despite no suppression of evidence where the prosecutor not only failed to correct false testimony, {846 F.3d 1148} but also capitalized on the false testimony in closing argument); *United States v. Sanfilippo*, 564 F.2d 176, 178-79 (5th Cir. 1977) (same).

Kathy Brock was the government's key witness to convince the jury that I was Dr. Forgione's partner. The prosecutor's summation to the jury adopted Brock's perjured testimony and capitalized on it.

In Demarco v. United States, 928 F2.d 1074 (11th Cir. 1991) the Court found:

"A conviction must be overturned which rests in part upon the knowing use of false testimony if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. United States v. Agurs, 427 U.S. 97, 98 S.Ct. 2392, 48 L. Ed. 2d 342 (1976). ...

We conclude that the prosecutor's argument to the jury capitalizing on the perjured testimony reinforced the deception of the use of false testimony and thereby contributed to the deprivation of due process."

Issue of National Importance

This case is of national importance because in addition to upholding the sense of justice in the judicial system as expounded on in my statement of the case on page 5.A when Prosecutor Barron admitted in his closing arguments that Lipoban did, in fact, work for causing weight loss without diet and exercise, he admitted that this criminal case was, in reality, a civil case.

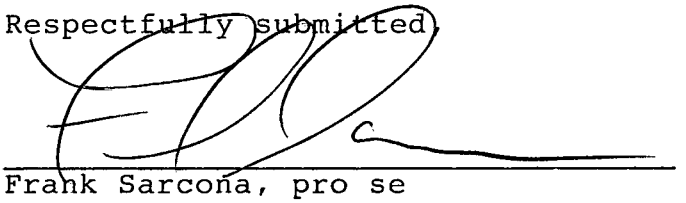
This sets a dangerous precident if the government can now prosecute what should be civil cases as criminal cases at their whim as in this case, where a grossly overweight prosecutor as here decides to prosecute individuals criminally for advertising hyperbole he is personally offended by.

CONCLUSION

I am requesting of this honorable court to remand this case back to the 11th Circuit with instructions to have the district court conduct a full hearing on the merits of the two constitutional issues presented in this writ or to grant any other relief it deems appropriate to the issues presented in this petition.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Frank Sarcona, pro se

5/16/19
DATE