No. 19-6231

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

William Chapman — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

William Chapman
(Your Name)

Morgantown Federal Corrections Institution
P.O. Box 1000, Morgantown, WV 26507
(Address)

Morgantown, WV 26507
(City, State, Zip Code)

n/a
(Phone Number)

QUESTIONS PRESENTED

1) a. Is equitable tolling warranted when access to legal files and resources is severely hampered? Where the 4th Circuit has denied equitable tolling for circumstances that would warrant tolling according to the 7th Circuit standard in Socha v. Boughton, is there a circuit split or need for uniform clarification?

b. Did the 4th Circuit ignore the Supreme Court in Holland v. Florida, which states that there is a presumption in favor of equitable tolling of AEDPA's statute of limitations?

2) a. Is the test of materiality of new evidence to allow the filing of a 2255 petition that the new evidence must prove innocence at trial?

b. Does Kyles v. Whitley govern materiality of new evidence to allow a 2255 petition?

c. Is the at-trial test of materiality inappropriate to a case where a plea was taken? Should the District Court have used a Hill v. Lockhart inquiry as the test of materiality?

d. Is either an at-trial test or Hill v. Lockhart inquiry appropriate to evidence supporting a claim of fraud upon the court, where the issue is a violation of due process?

3) Are District Court judges entitled to rely on affidavits of respondents in denying an evidentiary hearing of a 2255 proceeding? Are District Court judges required to follow the rules of procedure for 2255? Is due process denied when the District Court does not follow the rules?

4) a. Did the District Court grossly misapply the 4th Circuit case of U.S. v. Dyess to Petitioner's attorney's complete lack of investigation? Is conducting an investigation that uncovers no exculpatory evidence the same as conducting no investigation at all?

b. Is the 4th Circuit case of U.S. v. Dyess consistent with Strickland?

5) Is the belief that a witness is a "cooperating witness", by itself, a valid exception to defense counsel's Strickland duty to interview all witnesses who may have information on the guilt or innocence of the defendant?

6) a. Did the District Court abuse it's discretion by wrongly finding that Petitioner's allegation of prosecutorial misconduct and fraud upon the court was unfounded and mere speculation?

b. Was Petitioner required to submit evidence supporting his case in order to require an evidentiary hearing, or was it enough that the allegations in his 2255 motion were clearly-stated?

7) a. Did the District Court abuse it's discretion by an over-reliance on Rule 11 as a per se rule?

b. Is Lemaster correctly applied by the District Court? Are clearly-stated allegations of extraordinary circumstances sufficient to meet the non-absence requirement of Lemaster, or must a Petitioner also prove the allegation with evidence prior to being granted an evidentiary hearing?

8) a. Does the combination of Miller v. United States and Raines v. United States, as presented by the District Court, create an evidentiary requirement that violates Supreme Court precedent and §2255 rules? Is a petitioner required to prove the clearly-stated allegations in his or her 2255 motion prior to being granted an evidentiary hearing?

b. Did the District Court mistate and misapply the cases of Miller and Raines to create an unfair bar for petitioners to receive an evidentiary hearing?

c. Is a petitioner, in a collateral attack of a plea agreement, required to disprove "facts" which are not in the plea agreement? Is it enough that a petitioner disproves "facts" which are stated in the plea agreement? Conversely, when a judge insists that a petitioner must prove a point which the plea already acknowledges, has the judge made an error and, thus, abused discretion?

LIST OF PARTIES

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

RELATED CASES

William Dean Chapman v. United States of America, No. 1:15-cv-1683, U.S. District Court, Eastern District of Virginia, Alexandria Division. Judgement entered July 28, 2017.

United States of America v. William Dean Chapman, No. 1:13-cr-233, U.S. District Court, Eastern District of Virginia, Alexandria Division. Judgement entered December 6, 2013.

United States of America v. William Dean Chapman, No. 17-7018, U.S. Circuit Court of Appeals, Fourth Circuit. Judgement entered January 10, 2018.

United States of America v. William Dean Chapman, No. 19-6844, U.S. Circuit Court of Appeals, Fourth Circuit. Judgement entered August 27, 2019.

William Dean Chapman v. United States of America, No. 18-1590, U.S. Circuit Court of Appeals, Fourth Circuit. Judgement entered July 23, 2018.

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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

[XX] 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.

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

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

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

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

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

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

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

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 7/23/2018.

[ ] 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: ~~3/22/2018~~ 7/23/2018, and a copy of the order denying rehearing appears at Appendix _____.

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

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

* Petitioner originally filed a brief with the Supreme Court on June 15, 2018, but it was lost in the mail. After writing to the Court, Petitioner received a letter in August, 2019, allowing him to send in a brief. Noo time period or deadline was specified in the letter.

[ ] 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).

TABLE OF AUTHORITIES CITED

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STATUTES AND RULES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

§2255 (b) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

1) Is equitable tolling warranted when access to legal files and resources is severely hampered? Where the 4th Circuit has denied equitable tolling according to circumstances that would warrant tolling according to the 7th Circuit standard in Socha v. Boughton, is there a circuit split or need for uniform clarification? Did the 4th Circuit ignore the Supreme Court in Holland v. Florida, which states that there is a presumption in favor of equitable tolling of AEDPA's statute of limitations?

The 7th Circuit determined that equitable tolling was warranted when access to legal files and resources was severely hampered (Socha v. Boughton, 763, F. 3d 674, 7th Cir. 2014). In Petitioner's case, Petitioner was transferred from a federal facility in Ashland, KY to another federal facility in Morgantown, WV, in September, 2015. Prior to transfer, Petitioner had to hand over all legal files to be transferred separately. Petitioner was in transit for approximately three weeks, during which time Petitioner had no access to his legal files and no access to a law library or legal resources. Even had a law library been available, it would have been of no use because inmates are not allowed to carry any items with them during transit, so any work would have to have been discarded. Inmates are not told when they will be transported, so there is no ability to plan to send work by mail. There was simply no way to get any work done. Petitioner was transferred from Ashland to Oklahoma to Atlanta and - finally - to Morgantown. Each transfer took a complete day - three full days in which Petitioner was in handcuffs and leg restraints. Even after arriving at Morgantown, it was another two weeks before finally receiving legal files from Receiving & Delivery within the prison. A total of five weeks elapsed where Petitioner was completely without access to personal legal files, three of those

weeks were also without access to legal resources such as a law library.

Petitioner submitted his 2255 on December 17, 2015 and believed it to be timely, having been told by his attorney that the deadline was December 18th, 2015. As it turns out, the deadline was December 15, 2015 and Petitioner was two days late. The District Court refused to toll the two days and refused to recognize Petitioner's lack of access to legal files and resources, even though Petitioner raised the issue and the case of Socha v. Boughton on Motion for Reconsideration. The 4th Circuit Court rubber-stamped the District Court decision, but neither court explained their reasoning. The decision of the 4th Circuit is not in agreement with Socha v. Boughton and there appears to be a difference in how the circuits are applying equitable tolling.

Additionally, the 4th Circuit appears to be ignoring Supreme Court precedent. This court has stated that there is a "presumption in favor" of equitable tolling of AEDPA's statute of limitations (Holland v. Florida, 560 U.S. 631, 646, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010)(emphasis in original). This court has further stated that AEDPA's statute of limitations "Does not set forth 'an inflexible rule requiring dismissal whenever it's clock has run'." (Id, quoting Day v. McDonough 547 U.S. 198, 208, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006)). This court, in Holland, specifically made clear that courts must be flexible and exercise their equitable powers on a case-by-case basis, not by blindly following "mechanical rules" (quoting Holmberg v. Armbrecht, 327 U.S. 392, 396, 66 S. Ct. 582, 90 L. Ed. 743 (1946)). Yet, in spite of these Supreme Court decisions, the District Court in Petitioner's case appears to be following just such a mechanical rule, does not appear to be following a presumption in favor of equitable tolling - but clearly against it - and appears to be entirely inflexible even in the face of acceptable circ

circumstances to allow equitable tolling.

This court has also stated, in Holland, that a court is not bound to follow past precedent when doing so would prevent it from "'according all the relief necessary to correct particular injustices.'" (quoting Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 248, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944)). Yet, the District Court felt obliged to entertain a previous ruling it had made in which it denied tolling three days as a reason why it should not allow tolling two days in Petitioner's case, even though the circumstances were different and Petitioner's case clearly met the requirements set forth in the 7th Circuit standard of Socha v. Boughton.

Petitioner's 2255 is his first habeas petition. It is in the interest of justice and due process for it to be heard. "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human history." (Lonchar v. Thomas, 517 U.S. 314, 324. 134 L. Ed. 2d 440, 116 S. Ct. 1293 (1996)).

Should the District Court have allowed equitable tolling for the time Petitioner was without access to legal files and resources? Is it acceptable for the 4th Circuit to ignore Supreme Court precedent in Holland v. Florida concerning a presumption in favor of equitable tolling? Is it acceptable for the 4th Circuit to ignore the Supreme Court decision in Day v. McDonough and treat AEDPA's statute of limitations as an inflexible, categorical, per se rule?

2) a. Is the test of materiality of new evidence to allow the filing of a 2255 petition that the new evidence must prove innocence at trial?

b. Does Kyles v. Whitley govern materiality of new evidence to allow a 2255 petition?

c. Is the at-trial test of materiality inappropriate to a case where a plea was taken? Should the District Court have used a Hill v.. Lockhart inquiry as the test of materiality?

d. Is either an at-trial test or Hill v. Lockhart appropriate to evidence supporting a claim of fraud upon the court, where the issue is a violation of due process?

On November 10, 2015, Petitioner received a transcript of an interview of his employee, Michael Arko, with the SEC. This transcript strongly supported Petitioner's assertion that the Statement of Facts in the plea agreement was untrue, that the prosecution deliberately lied to and mislead the court, and that Petitioner's defense counsel was ineffective for refusing to speak with Arko, contact the SEC, or conduct any kind of meaningful investigation. Petitioner submitted his 2255 motion on December 17, 2015 - one month after receiving the transcript.

The District Court made six statements regarding the materiality of Arko's SEC interview. These statements almost uniformly contradict the evidence before the court and end with a test of materiality which does not consider Kyles v. Whitley or Hill v. Lockhart and requires an outcome of innocence at trial. These statements are:

1) The District Court stated," ...the Arko testimony simply does not undercut Petitioner's admissions in the Statement of Facts." (Memo Opinion & Order, p.11)) This is demonstrably not true. The plea's Statement of Facts is only 10 pages in total. Four pages are devoted to a description

of "Victim 2". In Arko's SEC interview, he accepts complete responsibility for those events and calls it an accident - his accident. He acknowledges that I was angry with him when I learned about it. This aligns with Petitioner's descriptionsof events in his request to withdraw the plea agreement in 2013 - before sentencing. Arko's statements to the SEC don't simply undercut the supposed "facts" of the plea, they obliterate it - how could Petitioner have deliberately and with criminal intent done the acts set forth in the plea agreement when Arko fully admits to having done them, states that they were his own accident and that Petitioner did not even know about it until after the fact?

Especially when considered with the brokerage statements and emails Petitioner submitted with his 2255 motion, which show that the "facts" of "Victim 1" - the only other specific circumstance - were also incorrect and simply did not occur, the entire veracity of the plea agreement is in question. These were the only two instances mentioned in the plea and they are both disproven. They constitute 60% of the content of the plea agreement's Statement of Facts. The balance of the plea agreement is a general listing of actions, none of which are criminal but are simply taggedat the end as having been done with "criminal intent". How could anyone go about disproving or proving the thoughts in their head? All I can do is disprove the actual specific facts - and this Petitioner has done. There is nothing left to disprove.

How could it be possible, then, that Arko's SEC transcript is not relevant new evidence when it directly addresses and refutes "facts" in the plea agreement Statement of Facts and directly supports Petitioner's allegations in his 2255 motion?

This is not the only issue that Arko's SEC interview addresses. In 2013, the Government submitted a highly-redacted FBI-302 of Arko - Petitioner's

employee - purporting to show that Petitioner had lied to Arko and then relied on that document to state in court that Petitioner had lied to Arko and suggest that I had lied to everyone. Petitioner alleged, in his 2255 motion, that the redactions made by the Government not only misrepresented the facts, they directly contradicted them and - if Arko's FBI-302 were submitted unredacted - would show the opposite of the Government allegation. Specifically, Arko's FBI-302 would show that Petitioner had never lied to Arko and the Government had made the redactions solely to misrepresent the contents and support an allegation they knew to be false.

Arko's SEC transcript strongly refutes the Government's presentation of his FBI-302 and the allegation that Petitioner lied to Arko. It is strong support for Petitioner's 2255 allegation that the Government deliberately redacted Arko's FBI-302 in order to deceive and mislead the court. In Arko's SEC transcript, on six separate occasions, he refutes the Government's argument and casts serious doubt ont he contents of his FBI-302 and shows how highly suspicious it is that so much of that FBI-302 was redacted.

If Petitioner's argument was without merit, the Government could easily have shown it by filing an unredacted version of Arko's FBI-302. Instead, they claimed that the redactions were made to protect confidential information on clients and another legal case (another lie) and then submitted a new highly-redacted version of Arko's FBI-302. The new version had four additional sentences visible. Each new sentence directly supported Petitioner's 2255 allegation. This was detailed to the District Court on Motion for Reconsideration and to the Circuit Court on appeal. Both denied.

When the Government deliberately lies to the court, that bears directly on the due process rights of the defendant. The unfairness is clear,

prejudice is presumed. How could it be possible that Arko's SEC transcript is not material new evidence when it directly supports Petitioner's argument in his 2255 motion that the Government deliberately lied to the court?

This is not an argument of innocence (although Petitioner is, in fact, innocent, and made the argument of innocence in both his request to withdraw his plea and in his 2255 motion), but an argument of denial of due process. How, then, is it appropriate to use as a standard of materiality that of an outcome of innocence at trial? Especially when a trial never took place!

2) The District Court stated that "Arko's testimony to the SEC does not offer any evidence that refutes Petitioner's admissions that he immediately sold client's securities upon receipt..." (Memo Opinion & Order, p.11, 2nd paragraph). There is no need for Arko's SEC transcript to do this, as the plea itself acknowledges that Petitioner "...had the right to sell the customer's securities upon receipt." (Plea, Statement of Facts, p.2). The District Court makes a clear error of logic, for why should any evidence be required to prove a point that the plea already acknowledges? The District Court appears to be confused and unaware that Petitioner had an explicit contractual right to sell and that the plea agreement acknowledged it. However, Petitioner pointed out the error in his Motion for Reconsideration and on appeal to the Circuit Court. Both deenied and neither explained their position.

3) Similarly, there is no need to address whether funds were "misused" for personal expenses. (Memo Opinion & Order, p.11, 2nd paragraph). No funds were misused and the plea agreement does not state that funds were misused. In this, the District Court has taken unsupported statements from the Government and assumed them into the plea without ever checking

to see

to see if they are actually there. They are not. On the whole, Petitioner put more money into ACM (Petitioner's company) than was ever withdrawn - a point Petitioner has made on multiple occasions and the Government has never deenied. It is the sufficiency of the plea that is under attack, not the Government's unproven statements made outside the plea. This is another error of the District Court - to assume facts into the plea which are not there. Why should any evidence be required of Petitioner to disprove a point which the plea does not make?

4) The District Court continues, "...used funds from new client transactions to repay maturing client obligations." (Memo Opinion & Order, p.11, middle). This occurred only to the extent that all funds that went into the company's reserves did so without regard to when the transaction took place and came out of the reserve without regard to when maturing transactions had been initiated. This is a necessary aspect of diversification of business and market risk - across time. There is nothing criminal about it and it is a near-universal practice in the insurance and investment industries. In fact, Petitioner had an expert witness testify to the viability of Petitioner's business and overall business model at his Request to Withdraw the plea, prior to sentencing in 2013. The expert witness testimony was ignored based on incorrect and unfounded assumptions of the judge, based solely on unfounded statements from the Government. (This circumstance is outlined in Petitioner's 2255 motion, pp.80-81, #6).

Even if Arko's SEC transcript did not address this point directly, that does not invalidate all the other points that his interview does address.

5) The District Court continued to state that Arko's SEC interview did not address "...how ACM [Petitioner's company] failed to disclose it's

it's financial difficulties to new or existing clients." (Memo Opinion & Order, p.11, middle). As Petitioner has stated repeatedly and the plea agreement itself acknowledges, Petitioner did not interact with clients directly. All communication was handled by marketing partners, who spoke with a client or potential client's attorneys or advisors. Arko acknowledges in his SEC transcript that Petitioner told both him and marketing partners about Petitioner's company's financial position. The marketing partners were responsible for communicating this information to client's - that is why they were told. This is material support to Petitioner's position and shows that the District Court was simply wrong in it's statement that Arko's SEC transcript did not address it.

6) Finally, the District Court concluded, "The Court finds that nothing contained in Mr. Arko's testimony constitutes material or exculpatory evidence becuase there is not a reasonable probability that the testimony would have shown Petitioner's innocence had it been introduced at trial." (Memo Opinion & Order, p.11, middle). This is an astonishingly incorrect statement, but it also appears to be the wrong standard. The District Court is holding to a requirement that new evidence must prove innocence at trial in order to be material. However, this court has made clear that the "touchstone of materiality is a 'reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in it's absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

The District Court did not consider Kyles in it's decision but instead held to a standard that evidence is material where it changes the outcome

of a trial - exactly as Kyles says not to do.

The question of whether a trial would ahve been fair without the evidence is fairly apparent. If Petitioner had been accused at trial of the actions described in the plea for "Victim 2" and the jury was not allowed to see Arko's explanation that it was all his fault and that it was an accident - or to hear Arko say it on the witness stand - would that be fair? If the Government alleged at trial that Petitioner had lied to Arko - as they alleged and appeared to show with Arko's doctored FBI-302 - would it be fair if the jury was not able to see that Arko had contradicted those statements years earlier to the SEC - or, even better, to hear Arko say in open court that he had never made the statements alleged to him by the Government and had actually stated the opposite? Would it not sway a court to be shown that the Government was clearly lying and dishonest? Of course it would not be fair! Petitioner meets the test as applied in Kyles.

Arko's SEC transcript supports multiple of Petitioner's allegations. Arko's SEC transcript highlights the ineffective assistance of counsel Minter for refusing to speak with Arko or contact the SEC. It raises a Brady issue for why the Government did not disclose this evidence to Petitioner prior to the plea when they clearly had it in their possession. It supports Petitioner's argument that the Government deliberately misled the District Court (and continues to do so, even today, by refusing to correct the issue by submitting Arko's FBI-302 unredacted). Arko's SEC transcript is clearly material new evidence supporting Petitioner's motion.

The District Court's test is inappropriate because it does not consider Kyles, but is an at-trial test even the correct test? Petitioner took a plea and insists that ineffective assistance led to the plea. In

Jae-Lee v. United States, this Court stated "...'counsel's deficient performance led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of the proceeding itself.' (quoting Flores-Ortega, 528 U.S., at 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985). When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain. That is because, while we ordinarily 'apply a strong presumption of reliability to judicial proceedings,' 'we cannot accord' any such presumption 'to judicial proceedings that never took place'. (Id., at 482-483, 120 S. Ct. 1029, 145 L. Ed. 2d 985." (Jae Lee v. United States, 137 S. Ct. 1958, 1965 (2017)). This Court then continued to outline that Hill v. Lockhart was the applicable test - whether "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Id., quoting Hill v. Lockhart, 474 U.S., at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203).

If Hill v. Lockhart is the applicable test for defendants who even have taken a plea, the test is even more simplified for Petitioner, since Petitioner claims a total failure to investigate. "No showing of prejudice is necessary 'if the accused is denied counsel at a critical state of his trial,' ... Similarly, prejudice is presumed 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." (Gilberto Garza v. Idaho, Supreme Court of the United States, 139 S. Ct. 738, 203 L. Ed. 2d 77, 82 (2/27/2019) (quoting United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). Therefore, in Petitioner's case, the only requirement is to show that counsel failed to investigate at a cricial stage - and a plea is a critical stage. No showing of prejudice is necessary.

Petitioner asks, then, if an allegation of ineffective assistance of counsel that led to a plea is claimed in a 2255 motion, is the appropriate test of materiality of evidence supporting that allegation an at-trial test or a Hill v. Lockhart analysis of the decision of the defendant to take the plea in the first place?

How should evidence be evaluated for materiality when the issue is neither at-trial nor plea-related? For example, Petitioner's allegation of prosecutorial misconduct is an argument of denial of due process. It may not directly relate to a trial or a plea. The §2255 rules state that evidence must support an allegation. Is the real test of materiality only that the evidence must support the claims in Petitioner's 2255 motion? That seems like the most reasonable, simple and all-encompassing test.

3) Are District Court judges entitled to rely on affidavits of respondents in in denying an evidentiary hearing of a 2255 proceeding? Are District Court judges required to follow the rules of procedure for §2255? Is due process denied when the District Court does not follow the rules?

The District Court stated "...in a signed affidavit, Ms. Minter states that 'all information presented by Mr. Chapman in defense of his case was reviewed by [her] or another member of the Office of the Federal Public Defender.'" (Memo Opinion & Order, p.8, bottom of 2nd paragraph). Without considering the truth of affiants statement, what is clear is that the court was relying on the affidavit of the respondent. The District Court similarly relied on an affidavit from Pleasant Brodnax (Memo Opinion & Order, p.9, 2nd paragraph). Again, without considering the truth of affiants statement, the District Court is relying on the statements in the affidavits to support his decision without holding an evidentiary hearing. Is the District Court entitled to do so?

The United States Code Service Rules of Procedure, Section 2255 Rules, Rule 5, states:"...Numerous cases have held that the government's answer and affidavits are not conclusive against the movant and if they raise disputed issues of fact a hearing must be held."

The rule cites the following cases in support of this requirement:

1) Machibroda v. United States, 368 U.S. 487, 494, 495 (1962);
2) United States v. Salerno, 290 F. 2d. 105, 106 (2nd Cir. 1961);
3) Romero v. United States, 327 F. 2d. 711, 712 (5th Cir. 1964);
4) Scott v. United States, 349 F. 2d. 641, 642, 643 (6th Cir. 1965);
5) Schiebelhut v. United States, 357 F. 2d. 743, 745 (6th Cir. 1966); and
6) Del Piano v. United States, 362 F. 2d. 931, 932, 933 (3rd Cir. 1966).

The District Court, in relying on affidavits and denying a hearing,

err

erred by not following rule 5. Petitioner brought this issue to the attention of the District Court on Motion for Reconsideration - so the court was aware of the issue - but refused to change position or explain itself. The issue was raised on appeal to the Circuit Court and that court similarly chose not to explain itself.

Romero v. United States discusses the issue directly, stating that, "The district judge, in denying the motion without a hearing, fell into his error by undertaking to rely upon an affidavit of the district attorney, that no statement of the kind were made, and upon his own finding and conclusion, that the claim of the applicants, that such promises were made was ridiculous and preposterous upon it's face. This he could not do."

U.S. v. Salerno states "Section 2255 requires a hearing unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." Applying this language, the Supreme Court has frowned upon reliance on factual statements in opposing affidavits, since these are not 'files and records of the case" ...under the decisions it seems he should have one [a hearing], however fruitless it appears likely to be."

Was the District Court entitled to rely on the affidavits in refusing to hold an evidentiary hearing?

4) a. Did the District Court grossly misapply the 4th Circuit case of U.S. v. Dyess to Petitioner's attorney's complete lack of investigation? Is conducting an investigation that uncovers no exculpatory evidence the same as conducting no investigation at all?

b. Is the 4th Circuit case of U.S. v. Dyess consistent with Strickland?

It is impossible to overstate defense counsel Whitney Minter's failure to investigate. She interviewed no witnesses, she requested no evidence, she did not even review evidence that was presented to her by Petitioner. She made no evidence requests to the Government. She literally conducted no independent investigation. Ms. Minter largely acknowledges this in her affidavit. "Mr. Chapman is correct that I did not seek to obtain the transcript of Michael Arko's testimony before the Securities & Exchange Commission." and "Mr. Chapman is correct that I did not seek to interview Michael Arko." (Minter affidavit, 2/21/17, p.2, #4 and #5). Instead of addressing this failure, the District Court quoted United States vs Dyess, 730 F. 3d. 354, 362 (4th Cir. 2013), stating "Strickland does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client." In doing so, the Court attempts to state that:

1) investigating a civil investigation from which the Government was known to have received information is not important, in spite of the urging of the defendant;

2) interviewing a central figure with obvious knowledge of key events and information - or anyone at all, since Minter interviewed no one - in spite of repeated and insistent urging of the defendant, is not important; and

3) reviewing documents supplied by the defendant in support of his case was

case was not important to do before advising and pressing defendant to take a plea.

None of these failures are scraps - they are central to the case. The comparison to Dyess is entirely unwarranted and misapplied. In Dyess, the defendant faults counsel for failing to discover information (that a police investigator was sleeping with his wife), but the defense counsel did investigate - he hired a private investigator and pursued the matter - he simply did not discover anything. This is not the situation in Petitioner's case. Defense counsel Minter did not investigate at all. She did not even attempt it. It was not because she didn't think to do it - it was not an oversight - Petitioner was begging and arguing with her to do it and asking her if she had done any of it at each successive meeting. At each meeting, the answer was no, until finally she said she wasn't going to contact Arko because he was "cooperating with the Government and would say whatever they told him to say." Since when is guessing an adequate substitute for actual investigation?

Petitioner's 2255 details Ms. Minter's glaring failure to investigate anything at all (2255, pp.18-28). A damning summary was provided, of which the following points are just a few:

- Ms. Minter never looked at the evidence - any evidence... in spite of repeated requests.

- Ms. Minter never interviewed anyone... in spite of [Petitioner's] repeated requests.

- Ms. Minter never evaluated opportunities at trial, nor was she ever in a position to do so, in spite of [Petitioner's] repeated requests.

(Petitioner 2255, p.23)

In Porter v. McCollum, the Supreme Court found that counsel's performance was constitutionally deficient where counsel "did not even take the first

step of interviewing witnesses or requesting records." (Porter v. McCollum, 588,U.S. 30, 130 S. Ct. 447, 453, 175 L. Ed. 2d 398 (2009)). Counsel Minter's failure to investigate basic facts was not a failure to investigate every nook and cranny, it was a total failure to investigate basic facts by taking basic first steps that any rational attorney would have taken to investigate evidence and witnesses that were right in front of her and begging to be reviewed.

Rather than looking at the totality of the circumstances - everything that Ms. Minter did not do - to consider a failure to investigate, the District Court looked at each distinct fact in isolation and tried to reason away the failures. It is very unconvincing - Petition has researched many similar cases and has never seen one worse than his own instance case.

The District Court stated that "Ms. Minter's decision not to interview Mr. Arko also falls well below the level of establishing extraordinary circumstances because Ms. Minter was aware that Mr. Arko was cooperating with the Government." (Memo Opinion & Order, p.8). Why should this have anything to do with it? This would be in direct contradiction to a lawyer's explicit Strickland duty "to investigate all witnesses who may have information concerning his or her client's guilt or innocence." (Towns v. Smith, 395 F. 3d. 251, 258 (6th Cir. 2005)). Nor is "an actual failure to investigate [excused] by a hypothetical decision not to use it's unknown result." (Soffar, 368 F. 3d. at 674). A witness is not excluded from this requirement simply because he is (according to the Government) "working with the Government". If this were true, the Government could pre-empt any defense independent investigation by merely stating that all potential witnesses were cooperating. Also, if this were a valid excuse excuse, then why did Minter not interview Robert Strauss or Dan Stafford?

Why did she not interview anyone?

Not only is there no exception for witnesses purportedly cooperating with the Government, it would seem that, if a witness were cooperating with the Government, it would be even more important to interview that person, not less. The Supreme Court has found that information known to be used by the Government is a prime source of information and failure to investigate it is extraordinary. (Rompilla v. Beard, 545 U.S. 374, 383-390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)).

Ms. Minter's failure to investigate is also not dependent on whether Mr. Arko had exonerating information or not (although he did). The issue is that counsel could not make an informed decision without conducting an investigation. She did not conduct an investigation and there is no excuse for it, therefore her decision could not have been an informed decision. The 4th Circuit found that "counsel, despite a professional obligation to conduct an investigation, failed to investigate at all. Because no strategic reason could support the total failure to investigate, no amount of deference could compel any fair conclusion other than that petitioner was denied effective assistance of counsel." (Elmore v. Ozmint, 661, F. 3d 783, 4th Cir. 2010).

Defense counsel Minter failed to investigate:

1) anything from the SEC;

2) anything from the Oklahoma Department of Securities;

3) any witnesses at all. Not Michael Arko, Dan Stafford, Robert Strauss, any customers or regulators or prior legal counsel; or

4) any evidence and information that Petitioner directly gave her.

In addition, Ms. Minter did not make any information or evidence requests to the Government. She reviewed only what bits and pieces the Government decided to show her. That is not an independent investigation. That is not

is not an investigation at all. It is a legitimate question to ask - "what independent investigation did Ms. Minter conduct?" The answer is that she did not conduct one at all.

Concerning point #4 above, Ms. Minter stated in her affidavit that "all information presented by Mr. Chapman in defense of his case was reviewed..." The District Court is not entitled to rely on this statement to deny a hearing, only to make the issues, according to Rule 5 of §2255 Rules of Procedure, and the Court should have called for an evidentiary hearing. Ms. Minter's statement is a clever bit of language that is deliberately vague on the issue of timing. When Ms. Minter reviewed this information is important - doing so after Petitioner took the plea would have been worthless in informing her opinion of whether Petitioner should take a plea or go to trial. Correct? Yet, Ms. Minter did not review any documents Petitioner gave her until long after advising Petitioner to take a plea. Minter knows that she did not and she also knows that Petitioner knows it. How? In mid-June 2013, Ms. Minter contacted Petitioner and told him that she was reviewing the evidence Petitioner had given her, in preparation for sentencing, but that she could not access them because she did not have the password (the files were saved on a thumb drive). Since she didn't even have the password until mid-June, 2013, it is impossible that she reviewed the evidence before the plea was entered on May 23, 2013 (although she was advising Petitioner to take a plea at least a month before that - April, 2013.) Ms. Minter was deliberately vague because she knew that if the issue went to an evidentiary hearing, I would be able to prove this.

What is surprising is that Ms. Minter, in her affidavit, acknowledged everything Petitioner alleged in his 2255 motion, with the sole exception being the vague response as to when she reviewed Petitioner's files. Even

the Government conceded that "It is difficult to believe that [defense counsel] would have performed as incompetently as defendant now maintains." (Government Response to Defendant's Notice of Filing (2013 Request to Withdraw), p.8). Petitioner noted this in his 2255 motion (p.28, 2nd paragraph) as well as noting that the Request to Withdraw was much less detailed than Petitioner's 2255 motion. Even with the additional detail and the Government's acknowledgement that such behavior constituted incompetence, the District Court fashioned a defense of Minter's ineffective assistance by explaining away each individual failure, instead of looking at the totality of the failure.

b. Is the 4th Circuit case of Dyess consistent with Strickland?

The Strickland standard is that defense counsel should interview all witnesses who may have information on the guilt or innocence of their client. The phrasing is very deliberate and all-encompassing. It does not say "most" or "a reasonable number of" witnesses. There is no exception for the kind of witness. The only qualification of Strickland is that, to the extent defense counsel does not follow this rule, it should have good reasons.

The 4th Circuit case of Dyess is actually about the requirement to uncover information, not the requirement to investigate. Counsel in Dyess clearly investigated, they simply did not uncover the information. If counsel searches for information but does not find it, they still conducted an investigation. There is no failure to investigate. Yet, the 4th Circuit is using Dyess for failure to investigate circumstances. This appears inappropriate and, if allowed to stand, undermines the Supreme Court in Strickland. This should be clarified so that the 4th Circuit does not continue on this path and, potentially, even enlarge the exceptions to Strickland.

5) Is the belief that a witness is a "cooperating witness", by itself, a valid exception to defense counsel's Strickland duty to interview all witnesses who may have information on the guilt or innocence of the defendant?

The District Court stated that "Ms. Minter's decision not to interview Mr. Arko also falls well below the level of establishing extraordinary circumstances because Ms. Minter was aware that Mr. Arko was cooperating with the Government." (Memo Opinion & Order, p.8). It is not clear why this should be the case. Petitioner can find no other case or rule in which a cooperating witness is excluded from the explicit duty "to investigate all witnesses who may have information concerning his or her client's guilt or innocence." (Towns v. Smith 395 F. 3d. 251, 258 (6th Cir. 2005)). If such an exception were to be valid, unscrupulous prosecutors could pre-empt any independent investigation by the defense by merely saying that all potential witnesses were cooperating (or, at least, the one's that might contradict the Government).

The only exception Petitioner is aware of to the Strickland requirement is that, to the extent an investigation is not undertaken, there should be good reasons for it. Was it reasonable for counsel Minter to simply assume that a "cooperating witness" would say "whatever the government told him to say" and therefore refuse to interview that witness over the protests of Petitioner? Perhaps if there were many other witnesses, but Ms. Minter interviewed no one - not a single person. No did she look at any other evidence.

But, to the specific issue of a "cooperating" witness, which is the sole reason given by the District Court for why Minter's conduct was not ineffective, this Court has found that information known to be used by the Government is a prime source of information and failure to

investigate it is an extraordinary circumstance. (Rompilla v. Beard, 545 U.S. 374, 383-390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)). That would suggest that a cooperating witness is exceptionally important to interview. "No reasonable lawyer would forgo examination of the file... looking at a file the prosecution says it will use is a sure bet whatever may be in that file is going to tell the defense counsel something about what the prosecution can produce... It is owing to these circumstances that the state courts were objectively unreasonable in concluding that counsel could reasonably decline to make any effort to review the file." (Rompilla v. Beard, 545 U.S. 374, 383-390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)). This was discussed in Petitioner's 2255 (p.25-26).

Since Petitioner is unable to find case law that is definitive one way or another, it seems to be an important question - are cooperating witnesses excluded from the Strickland requirement to be interviewed? If so, why?

6) a. Did the District Court abuse it's discretion by wrongly finding that Petitioner's allegation of prosecutorial misconduct and fraud upon the court was unfounded and mere speculation?

b. Was Petitioner required to submit evidence supporting his case in order to require an evidentiary hearing, or was it enough that the allegations in his 2255 motion were clearly-stated?

The District Court stated that "Petitioner is unable to produce any evidence to support this accusation and it appears to be purely speculative." (Memo Opinion & Order, p.11, bottom). Is this true? Did Petitioner put forward an allegation that was without any evidentiary support, pulling it out of thin air? The allegation put forward by Petitioner in his 2255 motion was that the Government deliberately redacted the majority of Arko's FBI-302 interview in order to create the false appearance that Petitioner had lied to Arko about how his company operated. Petitioner alleged that, underneath the redactions, you would find not only that Petitioner had made no such false statements, but that the opposite of the Government's argument would be shown. (2255, p.6, 2nd paragraph).

Is such a statement without evidentiary support? Petitioner submitted Arko's SEC interview as evidence in support of this allegation. In his interview with the SEC, Arko stated the opposite of the Government position no less than six unique times. Petitioner detailed a number of statements from Arko's SEC transcript that contradicted the Government (2255, pp.49-51). These are so directly relevant that they are worth repeating here:

1) ARKO: ...the most common question was, how are you executing this transaction?

SEC: Okay.

ARKO: and I didn't know the answer to that... since I wasn't doing the trading, I didn't know, in fact, what he was doing... Even if I did know it, it wouldn't have been appropriate for me to explain it." (Arko SEC interview, p.45,line 19 - p.46 line 10).

2) ARKO: ...I was able to reproduce virtually the entire pricing structure... so, it was reasonable to conclude that, whether he was physically doing it, it sure matched my hedge strategy mathematically." (ARKO SEC interview, p.49, lines 3-17).

3) SEC: The math works, but as far as the mechanics of did he actually go out and enter the contract?

ARKO: I don't know. (ARKO SEC interview, p.49, lines 18-20).

So the point is not missed, Arko was asked point blank if he know how the contracts were actually executed - not just what he thought or assumed - and his answer was "I don't know."

4) ARKO: ...in fact, he [Petitioner] got kind of upset with me at that point when I mentioned that I think I figured out the math. And his concern was, well, what if Emerging Money - you know, then they don't need us anymore. Right? I mean, did you just give away the house? (Arko SEC interview, p.49 line 24 - p.50 line 3).

Arko is explaining the importance of proprietary information as to the nature of the transaction.

5) SEC: ...did you ever discuss the specifics of how he would go about doing the hedging?

ARKO: No. (Arko SEC interview, p.52, lines 5-9).

6) ARKO: ...as I've already explained, I - Bill was unwilling to tell me how he was executing the transactions. So, I didn't know that part... it was Emerging Money.[Petitioner's external marketing partner]... that was with them that I was having these conversations. So, most likely, I would have gott

I would have gotten it from them." (Arko's SEC interview, p.80, lines 11-12).

Another instance where Arko tells the SEC that Petitioner did not tell him how Petitioner's company executed transactions and that Arko believed he got his ideas from Emerging Money (an external marketing partner).

7) SEC: Once you started entering into new contracts, are you hedging each individual contract or do you know?

ARKO: I no longer had any idea what the trading strategies were. They had always been proprietary. I never actually knew. I just had, you know, ideas that were consistent with the pricing." (Arko'SEC interview, p.107, lines 2-8).

8) SEC: But he never explained to you how he's generating the table?

ARKO: He never did, no. (Arko SEC interview, p.111, lines 7-9).

The eight unique quotes above all support Petitioner's argument that the Government's allegation is not true and that the redactions made by the Government were done deliberately to hide the truth. They all come from Arko's SEC interview transcript, which was submitted with Petitioner's 2255 motion as Exhibit 28. Arko's SEC transcript was discussed at length on pages 48-51 of Petitioner's 2255 and is also the subject of Ground #4, starting on page 5. Petitioner pointed out to the judge specifically how Arko's SEC interview was relevant and important new evidence and how it supported Petitioner's allegation. This alone should have been enough to realize that Petitioner's allegation was not "pure speculation" and that a hearing was necessary.

But is that all the evidence? Is there anything else the District Court could have looked to as evidence supporting Petitioner's allegation? The answer is yes. The Government submitted an opposition statement to

Petitioner's 2255 motion and, along with it, an almost-identical copy of Arko's FBI-302 that had originally been submitted in 2013. The only difference was that four additional sentences were visible. Each one supported Petitioner's allegation. To be clear - every additional sentence shown in Arko's FBI-302 directly supported Petitioner's allegation. Petitioner detailed this new evidence in his response to the Government's opposition statement (Petitioner Response to Oppoisition Statement of the United States RE: 2255, pp.8-9). Petitioner also listed these points in his Motion for Reconsideration with the District Court and on appeal to the Circuit Court. Both were denied without explanation.

Here are the four additional sentences from Arko's FBI-302, which had been previously redacted:

1) "Chapman never told Arko how the deals were structured";

2) "Chapman never talked about where he got his idea for his hedging strategy";

3) "Chapman would not provide any information about his trades"; and

4) "Arko advised that Chapman was very secretive".

By redacting these statements (and many others which are still redacted) the Government mislead the District Court into believing the Government's false allegation that Petitioner had disclosed a false hedging strategy to Arko. The new FBI-302 submitted by the Government is clear evidence supporting Petitioner's allegation. IN fact, it is highly incriminating of the Government. It is clear from Arko's SEC transcript and from the additional statements now in view in the second Arko FBI-302 that these are compelling evidence supporting Petitioner's allegation. That being the case, how could the District Court - and the Circuit Court, too - possibly state that Petitioner's allegation was "purely speculative" and without "any evidence"? The District Court is undeniably wrong.

As for the Government, they were not done with their lying. the Government stated in it's Opposition Statement that Petitioner could not have access to the unredacted Arko FBI-302 because "The FBI notes contain confidential information regarding ACM's clients and details on an investigation in a separate legal proceeding. The United States was and is entitled to protect this information." If that were the case - if we are to believe that the redactions took place to protect confidential information about clients and other proceedings - then why were the four newly-uncovered statements redacted in the first place? They clearly have nothing to do with clients or other cases - so why? The answer is that they were covering it up to promote a lie and they don't want to admit it, so they have made another lie. There is nothing confidential about clients or separate legal proceedings in the redacted portions of Arko's FBI-302. This will be proven when Arko's FBI-302 is finally uncovered without redaction and the Government will be shown to have lied to the Court twice, at least.

What Petitioner has listed and described above should have been enough for the District Court to realize there was ample evidence supporting Petitioner's claims. Petitioner simply does not understand how the court could say there is no evidence when there was an abundance of evidence right in front of it. Did the District Court err by not recognizing the evidence presented as supporting Petitioner's claim? Was Petitioner required to submit such evidence or was the Court's requirement unnecessary prior to an evidentiary hearing? Was it enough that Petitioner's allegations were clearly-stated?

Petitioner filed a Motion for Reconsideration in August, 2017, detailing the above issues. While Petitioner was waiting, he received a letter from Arko - in February, 2018. In the letter, Arko strongly denied ever telling the FBI what the Government alleged and insisted that he had actually

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stated the opposite (sound familiar? This was Petitioner's exact allegation in his 2255 motion). Arko stated that, if anyone even suggested otherwise, they were horrible liars (Petitioner paraphrases because what Arko actually said was much more strongly worded). Petitioner submitted the letter to the Court and asked it to review this new evidence in conjunction with the Motion for Reconsideration or to allow certiorari of a subsequent 2255 petition. What the District Court did next seems deliberate and inexcusable.

The District Court waited 21 months to respond to Petitioner's Motion for Reconsideration, which is - curiously - 13 months from the time of receiving and submitting Arko's letter. The District Court denied Petitioner's Motion for Reconsideration without explanation and proceeded to moot Petitioner's submission of Arko's letter as evidence. The Court never considered Petitioner's request for certiorari of a subsequent 2255 petition while also never considering the letter as evidence supporting the Motion for Consideration. By waiting 13 months to respond, the District Court took away Petitioner's right to file a subsequent 2255 based on new evidence. Petitioner wrote a letter to the District Court to make sure the court was aware of what was happening as a result of it's actions, but received no response. Petitioner appealed to the Circuit Court, but was denied without explanation.

Petitoner believes that this is horribly unfair and a clear denial of due process. It is disturbing to think that the District Court may have acted in such a manner deliberately to attempt to end the case. Did the District Court abuse it's discretion by acting as it did and denying due process to Petitioner?

Does Arko's SEC transcript, the newly-submitted FBI-302 and Arko's letter constitute sufficient evidence to support Petitioner's allegation and warrant an evidentiary hearing? Did Petitioner's clearly-stated allegation of

of prosecutorial misconduct and supporting evidence meet the standard set forth by Slack v. McDaniel of a "substantial showing of the denial of a constitutional right" that would trigger an evidentiary hearing?

7) a. Did the District Court abuse it's discretion by an over-reliance on Rule 11 as a per se rule?

b. Is Lemaster correctly applied by the District Court? Are clearly-stated allegations of extraordinary circumstances sufficient to meet the non-absence requirement of Lemaster, or must a Petitioner also prove the allegation prior to being granted an evidentiary hearing?

The District Court stated that Petitioner's allegation that defense counsel Minter failed to investigate "directly conflicts with Petitioner's statements made under oath at his Rule 11 hearing when he stated that he was satisfied with the representation his attorneys had given him... The Court gives these statements a great deal of consideration because 'in the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should, without holding an evidentiary hearing, dismiss any §2255 Motion that necessarily relies on allegations that contradict sworn statements.' United States v. Lemaster, 403 F. 3d. 216, 221 (4th Cir. 2005))." (Memorandum Opinion & Order, p.7-8).

The District Court, in quoting Lemaster, seems to have ignored the opening phrase "in the absence of extraordinary circumstances..." (Id.) A failure to investigate is an extraordinary circumstance that would overcome a reliance on rule 11. Yet, the District Court goes on to list several of the things that Ms. Minter did not do and then state that they did not constitute a failure to investigate. If you look at the long list of things that Minter did not do (and which she mostly acknowledges in her affidavit), it is hard not to look at the cumulative effect and conclude that she failed to investigate and offered clearly ineffective assistance. My Minter could have been in a coma and the District Court would have ruled

ruled that her assistance was effective! Petitioner's allegation of ineffective assistance of counsel Minter, when looked at in total, is an allegation that Minter conducted no investigation and did absolutely nothing except tell Petitioner he had to take a plea. According to the District Court, that constitutes effective assistance. If the District Court is correct, then failure to investigate simply does not exist. This is obviously counter to all precedent.

The District Court appears to be relying on Lemaster to discount the allegation in the first place. The judge appears to be saying "Petitioner cannot have extraordinary circumstances because the extraordinary circumstances he alleges conflict with his Rule 11 statements." If such an application is not pointed out and rebuked, Lemaster becomes a sledgehammer against any and all claims of ineffective assistance made after a plea. However, Petitioner's allegations do not conflict with his Rule 11 statements in any direct or specific manner. Petitioner simply stated that he was satisfied with counsel's representation, while Petitioner's allegations in his 2255 motion are very specific and substantial in nature and almost-full fully corroborated by counsel Minter and other evidence. But, also, there are numerous instances where both statements could be true and therefore not in conflict. For example, Petitioner could have been satisfied at the time of the Rule 11 colloquy, only to discover later that there was ineffective assistance. Or, a petitioner may not have known or understood the significance of the question in the plea colloquy (as is the case with Petitioner in this case. Petitioner had assumed it was a polite question of no significance, similar to "How do you find the temperature in the courtroom today?" It was not until later that Petitioner learned of it's significance.) If Petitioner is unaware of the significance of the question, it is likely that many defendants also share such an

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ignorance. It is unfair to require defendants to be experts on the significance of the law as it relates to effective legal representation.

A Court "must accept the truth of the [movant's] allegations unless they are clearly frivolous based on the existing record." (United States v. Lilly, 536 F. 3d. 190, 195 (3rd Cir. 2008)). Are clearly-stated allegations of ineffective assistance of counsel frivolous if they potentially contradict Rule 11 statements or are they legitimate claims of extraordinary circumstances that would be an exception to Lemaster?

8) a. Does the combination of 4th Circuit cases of Miller v. United States and Raines v. United States, as presented by the District Court, create an evidentiary requirement that violates Supreme Court precedent and §2255 rules? Is a petitioner required to prove the clearly-stated allegations in his or her 2255 motion prior to being granted an evidentiary hearing?

b. Did the District Court mistate and misapply the caséssof Miller and Raines to create an unfair bar for petitioners to receive an evidentiary hearing?

c. Is a petitioner, in a collateral attack of a plea agreement, required to disprove "facts" which are not in the plea agreement? Is it enough that a petitioner disproves "facts" which are stated in the plea agreement? Conversely, when a judge insists that a petitioner must prove a point which the plea already acknowledges, has the judge made an error and, thus, abused discretion?

In it's Memorandum Opinion & Order denying an evidentiary hearing, the District Court stated, "When filing a 2255 motion to vacate, set aside, or correct a sentence, a petitioner bears the burden of proving their grounds for collateral attack by a preponderance of the evidence." and then cited Miller v. United States, 261 F. 2d 546, 547 (4th Cir. 1958). The District Court immediately followed this with "If the motion, when viewed against the record, shows that the petitioner is entitled to no relief, the court may summarily deny the motion." and cited Raines v. United States, 423 F. 2d 526, 529 (4th Cir. 1970). (Memorandum Opinion & Order, pp.4-5). If the District Court's interpretation of Miller is correct, then a petitioner has to prove his case with evidence at the time of filing. This seems to be an absurd arrangement - what is the

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purpose of an evidentiary hearing if the evidence to prove the allegation must be presented prior to being granted an evidentiary hearing? The hearing would be moot at that point. Following Miller with Raines, a district court can (and did, in Petitioner's case) deny a motion without an evidentiary hearing if a petitioner does not prove his case with evidence at the time of filing.

Such a situation appears to be at odds with the §2255 rules, as explained in the case of United States v. Lilly, 536 F. 3d 190, 195 (3rd Cir. 2008): "Discretion whether to grant a hearing is constrained by Section 2255, which requires the district court to hold an evidentiary hearing 'unless the motion and files and records of the case show conclusively that the movant is not entitled to relief.'" This is not a high bar for a movant to meet, especially since the district court, in considering a Section 2255 claim, "must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record." (Id.)

A section 2255 motion "can be dismissed without a hearing [only] if (1) the [movant's] allegations, accepted as true, would not entitle the [movant] to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." (United States v. McCoy, 410 F. 3d. 124, 134 (3rd Cir. 2005)). A district court's decision not to hold an evidentiary hearing may be reversed for abuse of discretion if "the files and records of the case are inconclusive on the issue of whether movant is entitled to relief." (Id.) Petitioner has met the requirements for an evidentiary hearing: the allegations, if accepted as true, would entitle Petitioner to relief, are not clearly frivolous, are not contradicted by the record, inherently incredible, or conclusions rather than statements

of fact. Yet, Petitioner was denied a hearing. Does the combination of Miller and Raines, as used by the District Court, violate §2255 rules and prior precedent by creating an evidentiary requirement at the time of filing the motion?

With respect to the second part of this issue (Question 8.b), the District Court made subtle changes to the language used in both Miller and Raines that amount to a substantial change. First, Miller does not state "When filing", as the District Court stated in it's Memorandum Opinion & Order, p.4. Miller actually states "In a §2255 motion, the defendant bears the burden of proving the grounds for collateral attack by a preponderance of the evidence." (Miller v. United States, 261 F. 2d. 546, 547 (4th Cir. 1958)). The District Court changed the phrase "In a §2255 motion" to "When filing a 2255 motion" and this change is very important. The District Court's rephrasing gives the impression that a petitioner must prove his case at the very beginning - "when filing". This is very misleading and also incorrect.

Likewise, Raines states "Where the defendant's motion, when viewed against the record, does not state a claim for relief, the Court should summarily dismiss the motion." (Raines v. United States, 423 F. 2d. 526, 529 (4th Cir. 1970)). The District Court changed Raines to state "If the motion, when viewed against the record, shows that the petitioner is entitled to nowrelief, the court may summarily deny the motion." Compare the underlined sections. Perhaps they do not appear that different on first view, but the change is substantial. Raines simply says that a district court can dismiss a 2255 which does not make a claim for which the court can provide relief. That is very different from a conclusion that a petitioner has not shown that they are entitled to relief - something that would require proof. If a petitioner states a claim that, if true, would entitle him to relief, but a

would entitle him to relief, but an evidentiary hearing is denied because the petitioner did not prove the claim at the time of filing - now you can see how the combination of mistatements gave the District Court carte blanche to deny a hearing for valid claims. This is directly counter to §2255 rules, prior precedent, and the spirit of the law and due process.

With respect to the third and final issue (Question 8.c), Petitioner references the subject matter of Question 2 on pp.4-11 of this brief, in order to avoid repetition and the waste of space, as the subject matter was brought up in that Question.

With respect to the District Court's second statement (this brief, p.7, #2), why should any evidence be required to prove a point that the plea already acknowledges is true? Is a petitioner required to prove that he did not do something that the plea already acknowledges was allowable?

With respect to the District Court's third statement (this brief, p.7, #3), why should any evidence be necessary to disprove a point that the plea does not make? When a judge reads into a plea agreement "facts" or requirements which are not there, is that error?

These two issues are especially important because they appear to show that the judge was either confused about what was and was not in the plea agreement or was simply trying too hard to make a case that was not there. This prejudiced Petitioner by denying an evidentiary hearing.

REASONS FOR GRANTING THE PETITION

Petitioner raises multiple issues of national importance with respect to due process of law. There is a need for clarification or correction to avoid a continued move in the wrong direction by the 4th Circuit and, potentially, other circuits. Subtle changes to the wording of prior precedent which cause substantial elimination of rights of petitioners to evidentiary hearings - and directly conflict with §2255 rules and procedures and prior precedent. An inappropriately high bar as a test for materiality of newly discovered evidence that is in conflict with new Supreme Court precedent. Clarification is needed on the issue of equitable tolling of AEDPA's statute of limitations. In Petitioner's case, the 4th Circuit has done numerous things that would curtail the due process rights of all petitioners, if allowed to go unchecked. Petition Petitioner asks for review not only for his own benefit, but the benefit of the judicial system as a whole and petitioners within it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William Chapman

Date: 9/21/19