No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

GREGORY BARTKO – PETITIONER

VS.

UNITED STATES OF AMERICA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DONALD F. SAMUEL

GARLAND, SAMUEL & LOEB, P.C.

3151 MAPLE DRIVE, N.E.

ATLANTA, GEORGIA 30305

Tel. 404-262-2225

QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

I. Did the lower courts err in failing to properly review and conclude that the prosecution's withholding of exculpatory and impeachment evidence favorable to Bartko's defense, coupled with the conscious presentation of false or perjured testimony from the Government's principal witness, could have resulted in a reasonable likelihood of a different result sufficient to undermine confidence in the outcome of Bartko's trial, contrary to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Wearry v. Cain*, 136 S. Ct. 1002 (2016)?

II. Did the lower courts err in failing to find that the Government's knowing, or reckless, presentation of the false and/or perjured testimony at trial of the Government's principal witness violated Bartko's rights to Due Process and this Court's decision in *Napue v. Illinois*, 360 U.S. 264 (1959), and that the Government's presentation of this evidence prejudiced Bartko's defense?

III. Did the lower courts err in failing to properly assess Bartko's gateway claim of actual innocence, considering the district court's errors of law in determining Bartko's Supplemental *Brady* Claims to be untimely under 28 U.S.C. § 2255(f)(1), but failing to consider the timeliness of the claims under 28 U.S.C. § 2255(f)(4), and considering the district court's summary repudiation of the sworn recantation statements given by the Government's key trial witness?

LIST OF PARTIES

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

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

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Appendix - Exhibit.3 - *Bartko v. United States* [D.E. 351] (Dismissal of Section 2255 Petition)

Appendix - Exhibit.4 - *United States v. Bartko* [4th Cir. Case No. 18-7528 D.E. 11, 12] (Denial of COA)

Appendix - Exhibit.5 - *United States v. Bartko* [4th D.E. Case No. 18-7528 D.E. 18] (Denial of Rehearing)

Appendix - Exhibit.6 - *In re: Gregory Bartko* [4th Cir. Case No. 19-551 D.E. 10] (Denial of Section 2244 Authorization)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment to the United States Constitution
2. 28 U.S.C. § 2255
3. 28 U.S.C. § 2253(c)
4. 28 U.S.C. § 2244
5. 28 U.S.C. § 2242
6. 28 U.S.C. § 455(a), (b)(1)

STATEMENT OF THE CASE

I. General Remarks

This case represents a classic example of how and why *Brady* violations are among the most pervasive and recurring types of prosecutorial misconduct in our criminal justice system today. And, as Bartko demonstrates in this Petition, *Brady* violations most tragically have not infrequently contributed to the conviction of innocent persons who, because of the prosecutor's suppression, lacked critical evidence to prove their innocence. This case involves much more than the Government's suppression of evidence from Bartko's defense. The prejudice to his defense was magnified by the intentional, or at least deliberately indifferent, presentation of false and perjured testimony by the Government's key witness, Scott B. Hollenbeck ("Hollenbeck").

In this case, Petitioner Gregory Bartko ("Bartko"), demonstrates that his conviction after trial in the Eastern District of North Carolina was the result of a text-book case of a series of egregious violations of the Court's seminal decisions in the *Brady/Giglio/Napue* line of cases. These violations of Bartko's Due Process rights were not inadvertent, but deliberate, including the Government's presentation of false narratives of Bartko's guilt; the presentation of false and perjured trial testimony by the Government's principal witness; and the concealment of a plethora

of material *Brady* evidence that if it had been disclosed to Bartko's defense would not have enabled the Government to hoodwink Bartko's jury.

In Bartko's challenges to his convictions under 28 U.S.C. § 2255, the district court held no evidentiary hearings; allowed no discovery; refused to permit Bartko to supplement his § 2255 petition following the full-throated recantation of the Government's principal witness under oath; declared Bartko's habeas claims to be "laughable" and "non-sensical;" and announced that the court would never believe anything the Government's principal witness had to say. All of this after the district court and the Government steadfastly maintain that Hollenbeck's trial testimony was truthful.

II. Case History

On November 1, 2010, Bartko stood trial in the Eastern District of North Carolina accused of one count of conspiracy to commit mail fraud, money laundering, and the sale of unregistered securities, four counts of mail fraud, and one count of selling unregistered securities. The sales of investments related to two small start-up private equity funds Bartko was a managing-member of, the Caledonian Fund and the Capstone Fund. Bartko, a long-time securities lawyer and securities dealer in Atlanta, GA proceeded to trial focused on his lack of knowledge, lack of criminal intent and his good faith, as the actual fraudulent sales activities of the prosecution's principal witness, Hollenbeck, were accomplished without Bartko's

knowledge or participation. In fact, Bartko did everything he reasonably could to restrict Hollenbeck's activities with his clients to avoid more trouble than he was already in. On November 18, 2010, Bartko's jury returned guilty verdicts on the six counts described above. Complicating the facts and the relationship between Bartko and Hollenbeck, Bartko agreed to represent Hollenbeck in connection with an investigation of Hollenbeck's investment sales activities by the Securities and Exchange Commission ("SEC") that predated Bartko's introduction to Hollenbeck.

On April 4, 2012, Bartko was sentenced to a term of imprisonment for 276 months and ordered to pay restitution in the amount of $885,947. This despite the fact that Bartko had voluntarily refunded approximately $2,784,929 to all Capstone Fund investors directly and through the transparency of a federal interpleader action. All of the Capstone Fund investments were returned to its investors save for a six (6%) percent finders' fee totaling $143,116 paid to a financial advisory firm which proved unrecoverable. By plea agreements, Bartko's co-defendants agreed to testify during the Government's case-in-chief, although co-defendant Laws' testimony completely corroborated Bartko's own trial testimony and co-defendant Plummer's testimony did not conflict with Bartko's own testimony on any material aspects of the Government's proofs. [D.E. 345-1 at 11-12].

Seven months after trial, the second chair prosecutor, David Bragdon ("AUSA Bragdon") assumed responsibility over Bartko's case, as the lead Government

prosecutor, Clay C. Wheeler ("AUSA Wheeler"), left the United States Attorney's Office as of May 31, 2011. AUSA Bragdon discovered several pieces of evidence favorable to Bartko's defense that had never been disclosed to Bartko's lawyers by AUSA Wheeler. The undisclosed material included an "immunity contract" for Hollenbeck and his wife, and a statute of limitations tolling agreement and an amendment between the Government and a third witness, Levonda Leamon ("Leamon"), Plummer's business partner in a financial advisory company, Legacy Management Resources, Inc. ("Legacy"). The tolling agreement extended the risk of prosecution over Leamon until shortly after she testified as a Government witness. Leamon was never prosecuted, but AUSA Wheeler was intent on holding the "Sword of Damocles" over Leamon's head until after she testified. Also revealed after trial by the prosecution was a memorandum of interview ("MOI") following a September 28, 2008 pretrial interview by AUSA Wheeler of a North Carolina Superior Court judge, Anderson Cromer. Judge Cromer had supervised successful receivership litigation co-managed by Bartko concerning the Bull Mountain Coal Mine, an investment touted by Hollenbeck to his clients for losses of over $21.0 million recovered by Bartko and his co-counsel.

Following these revelations of suppressed *Brady* evidence, Bartko filed a series of four new trial motions as the disclosure of these *Brady* materials was released piecemeal. Bartko's new trial motions alleged that the Government had

violated *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959). The *Napue* violations stemmed from the fact that Hollenbeck had repeatedly denied in his trial testimony receiving any promises or benefits from the prosecution in exchange for his cooperation. Although the district court found Hollenbeck's testimony to be truthful, the Fourth Circuit Court of Appeals on direct appeal disagreed with that finding, holding that Hollenbeck had provided false testimony in that regard and that Bartko's prosecutors had a duty to correct the false testimony. *United States v. Bartko*, 728 F.3d 327, 337 (4th Cir. 2013). App. Exh. 1.

It became evident that Bartko's lead prosecutor, AUSA Wheeler, who conducted pretrial proceedings and discovery, had withheld the *Brady* evidence since he both drafted and signed the Hollenbeck and Leamon agreements. He also personally conducted the interview of Judge Cromer. In a 120-page decision dated January 17, 2012, the district court denied Bartko's new trial motions. App. Exh. 2. Although the district court found the Government did have a duty to disclose the *Brady* evidence known at that time but failed to do so, due to the "mountain of evidence" of Bartko's guilt, the evidence was not deemed to be material to the outcome of the trial. The district court also held that Hollenbeck's denials of receiving benefits and promises from the prosecution was not false or misleading testimony. It is significant to mention here that in the court's decision, no mention

was made of evidence presented by the defense, no review of the defense testimony or exhibits was recounted. Only the Government's evidence was referred to as supporting the decision. As shown in this Petition, this "confirmation bias" has been a continuing impediment in Bartko's efforts to demonstrate the significant impact the Government's *Brady* violations have had in his case.

Following Bartko's sentencing, his direct appeal to the Fourth Circuit Court of Appeals was prosecuted. *Bartko*, 728 F.3d 327 (4th Cir. 2013). Although the court affirmed Bartko's conviction and sentence in a 40-page published decision, it took the rather unusual step of excoriating Bartko's prosecutors (primarily AUSA Wheeler) for suppression of the *Brady* evidence known to exist at that time; heavily criticized discovery violations and abuse the court examined relating to other tainted prosecutions within the Eastern District of North Carolina; and referred AUSA Wheeler's misconduct to the United States Attorney General and the Department of Justice's Office of Professional Responsibility. *Id.* at 341-44.

Following the revelation of the known *Brady* evidence withheld by AUSA Wheeler, Bartko began an eight-year effort pursuant to the Freedom of Information Act, 5 U.S.C. § 552 et seq. ("FOIA") to obtain additional investigative materials concerning Bartko's prosecution. Bartko discovered through his FOIA actions that AUSA Wheeler had falsified a declaration filed in opposition to Bartko's new trial

motions asserting that he never discussed benefits or promises with Hollenbeck or his counsel before Bartko's jury deliberated. [D.E. 227-7].

Bartko timely filed his collateral challenge to his conviction under 28 U.S.C. § 2255 on January 26, 2015. ("§ 2255 Petition"). On July 27, 2015, Bartko filed an amendment to his petition, ("Amended § 2255 Petition"), which included numerous exhibits, all of which were the product of his efforts under the FOIA. The Government then re-filed its Motion To Dismiss, or Alternatively for Summary Judgment on November 25, 2015. [D.E. 331, 332]. Bartko's response included his Cross-Motion For Partial Summary Judgment on the issue of cause and prejudice, which was raised to excuse any procedurally defaulted habeas claims. [D.E. 327, 328]. Finally, Bartko moved for discovery on January 19, 2016 and had incorporated into his § 2255 Petition, as amended, his request for an evidentiary hearing. Bartko's § 2255 Petition was not decided until 44 months after his initial filing. For almost three years, and after briefing was complete, Bartko's § 2255 Petition languished until the district court entered its 43-page decision on November 2, 2018 dismissing all habeas claims, denying Bartko any discovery, denying Bartko's Motion For Leave to raise additional *Brady* claims arising from Hollenbeck's recantation statements, and rejecting his request for an evidentiary hearing. ("Order") [D.E. 351]. App. Exh. 3.

Bartko's § 2255 Petition initially asserted 18 claims, almost all of which were derived from a distinct pattern by Bartko's lead prosecutor to selectively suppress exculpatory and impeachment evidence, not only contrary to the Government's constitutional obligations under the *Brady/Giglio/Napue* line of cases, but contrary to AUSA Wheeler's express, written representations to the district court and Bartko's counsel that "open file" discovery in the case would be allowed. [D.E. 86]. This is a case where AUSA Wheeler was fully aware of the marginal nature of the Government's evidence, monumental credibility concerns with the prosecution's key witness, Hollenbeck, and as AUSA Bragdon's own words at Bartko's sentencing reveal, an impression that gaining a conviction of Bartko was seen as having a one in a hundred chance of success. ("Out of a hundred defendants who committed a crime like this, most of them would not have done time, most of them would not have been prosecuted....") Sent. Hr. Tr. at 145 [D.E. 217-4].

Bartko's § 2255 Petition, as amended, reveals the following exculpatory and impeachment evidence in the Government's possession which was suppressed from Bartko's defense; that Bartko's defense had no access to this evidence; and that the evidence was material as that standard was most recently defined in *Smith v. Cain*, 565 U.S. 73 (2012) and *Wearry v. Cain*, 136 S. Ct. 1002 (2016):

1. Handwritten interview notes of an October 29, 2010 interview of Government witness, Mark Winn (an attorney) at the Financial Industry Regulatory

Authority ("FINRA") prepared by FBI case agent Joan Fleming. [D.E. 292 at 13-16, 305 at 6-7, 328 at 10-11]. The handwritten notes, which Bartko obtained in his FOIA actions, contain material variances from the FBI 302 provided in discovery;

2. Handwritten interview notes by case agent Michael Carroll of the U.S. Postal Inspection Service, of a September 2, 2010 interview of J. Alexander Rue, ("Rue"), a trial attorney with the Securities and Exchange Commission ("SEC"), following an interview of Rue by AUSA's Wheeler and Bragdon. [D.E. 292 at 16-17, 305 at 8-9, 328 at 16-19]. The notes contain Rue's comments that "he did not believe Bartko knew that Hollenbeck was selling securities for Bartko," which statement is inconsistent with the information contained in the MOI provided in discovery and goes to the heart of Bartko's defense of having no knowledge of Hollenbeck's sales activities;

3. Handwritten interview notes, taken during a May 28, 2009 interview of John K. Colvin ("Colvin"), who did not testify at Bartko's trial but who was Hollenbeck's *de facto* business partner and deemed to be a co-conspirator in Bartko's prosecution. [D.E. 292 at 17-19, 305 at 9-11, 328 at 11-13]. Statements recorded in the notes were at material variance with the MOI provided to Bartko's defense and could have been used by the defense as impeachment of Colvin's statements under Fed. R. Evid. 806;

4. Information and written directions given by at least one of Bartko's prosecutors to case agents responsible for contacting prospective witnesses in Bartko's case. These directions instructed the case agents not to record any notes during their telephone interviews and to "cross victim [witnesses] off the list" if they could not provide favorable information to the Government. [D.E. 292 at 19-20, 305 at 11-13, 328 at 19-21];

5. An MOI and Inspector Carroll's notes of a May 4, 2010 interview of attorney David Lewis, who did not testify at Bartko's trial, but whose interview contained exculpatory information supporting Bartko's defense that he was not privy to Hollenbeck's lulling activities that were known by Lewis and J. Wesley Covington, Bartko's co-counsel in Hollenbeck's SEC investigation. [D.E. 292 at 21, 305 at 13-14, 328 at 14-15];

6. An MOI and notes of the interview of SEC broker-dealer examiner Gannon Lasseign conducted by AUSA's Wheeler and Bragdon on September 2, 2010. The content of the MOI was favorable to Bartko's defense since Lasseign was privy to the false statements by Rue and McClellan concerning the purpose and origination of the broker-dealer examination. Lasseign's testimony would have supported Bartko's claims of an improper and collusive parallel investigation. [D.E. 292 at 21-22, 32-42, 305 at 14-16, 328 at 21-26];

7. An FBI 302 of an October 15, 2010 interview of Hollenbeck's lawyer, C. Scott Holmes ("Holmes"), who although he did not testify at Bartko's trial, revealed in his interview that he had interviewed Bartko in January 2008 and had provided handwritten notes of his interview to case agents in Bartko's case. Those notes included information favorable to Bartko's defense. [D.E. 292 at 22-23, 305 at 16-18, 328 at 26-28];

8. Handwritten notes of the case agents who had interviewed Government witnesses Plummer and Leamon. [D.E. 292 at 23-25, 305 at 18-20, 328 at 29-31]. These notes contain statements that were at material variance with the information provided to Bartko in the form of the MOI's and FBI 302's provided to Bartko's defense. Also undisclosed by the Government was an abundance of records which revealed another follow-on real estate scheme devised by Hollenbeck and participated in by Leamon and Plummer that would have been powerful impeachment evidence against all three witnesses. Bartko has obtained newly discovered and previously undisclosed evidence in sworn interview statements given by Plummer on October 15, 2019 that she was interviewed by AUSA Wheeler before trial, threatened if she did not cooperate in Bartko's prosecution and threatened Plummer's husband with prosecution, after which he attempted suicide. Although handwritten notes by AUSA Wheeler were taken during this undisclosed Plummer interview, neither the notes nor a formalized witness summary were ever disclosed

to Bartko's defense which would have been effective impeachment material. [D.E. 379].

9. The statements and information provided to AUSA's Wheeler and Bragdon by Hollenbeck in his subsequent interview conducted on June 3, 2010. The handwritten notes of that interview contained favorable information useful to Bartko's defense and were never provided to Bartko's lawyers. All of the withheld evidence was highly material and is chronicled in Bartko's Amended § 2255 Petition filed on July 27, 2015, [D.E. 292 at 25 and D.E. 305 at 20-27, 328 at 31-35], and Bartko's Motion For Leave filed on March 28, 2018. [D.E. 339, 340];

10. The fact that Hollenbeck had testified falsely during his testimony in the Colvin prosecution in June, 2010. In addition, AUSA Wheeler had actual knowledge that Hollenbeck made false statements during his allocution at his sentencing hearing in May, 2008. [D.E. 292 at 26, 305 at 20-27, 328 at 31-35];

11. Handwritten notes of the case agents who interviewed trial witness Tim Cook on September 25, 2009, which revealed statements favorable to Bartko's defense made by Cook which were at material variance with the content of the MOI prepared by Inspector Carroll that was provided in discovery. [D.E. 292 at 27, 305 at 27-29, 328 at 15-16];

12. The Government used "fabricated theories" to argue that Bartko had confronted Hollenbeck in a three-way conference call with Covington on January

31, 2005 regarding certain investor refund checks Bartko had sent back to Capstone Fund investors in January, 2005 rather than the actual date of the call which occurred on April 12, 2005 as demonstrated by Hollenbeck's own undisclosed records in the possession of the Government. The Government's false narrative was highly material to the Government's "round-trip scheme" theory which the Government attributed to Bartko when in fact Bartko had no knowledge of Hollenbeck's round-trip activities. [D.E. 292 at 27-32, 305 at 29-32, 328 at 35-38];

13. AUSA Wheeler, acted in bad faith and collusively coordinated his investigation of Bartko with Rue at the SEC, and in doing so, violated Bartko's Due Process rights. Specifically, Rue and a second broker-dealer examiner from the SEC, David McClellan (who also testified at trial) expressly lied to Bartko in May, 2005 about the nature of the SEC's examination of Bartko's broker-dealer in an effort to obtain evidence from Bartko that was then funneled to AUSA Wheeler for his criminal investigation. The falsity of these statements by Rue and McClellan who initiated the broker-dealer examination, was never disclosed to Bartko's defense. If the evidence had been disclosed, Bartko would have been able to impeach the trial testimony of Rue and McClellan as well as seek to suppress the evidence obtained during the course of the improper investigation. [D.E. 292 at 32-42, 305 at 33-35];

14. Eight additional witness interview statements were withheld from Bartko's defense (both MOI's and FBI 302's), most of which were witness interviews of

Bartko's executive office management personnel. The undisclosed information revealed the inconsistencies and inadequacies in the Government's timelines and phone call patterns among Bartko, Hollenbeck, Plummer, and Leamon. The interview reports of attorney, Randy James (who represented Leamon and Plummer) and investor Pastor McCullough (never disclosed to Bartko's defense) both included exculpatory evidence supportive of Bartko's defense. In addition, the Government withheld interview statements and handwritten interview notes of pretrial interviews with Quinn Hopkins, Crysta-Taylor Glover, Benita Clark, and Susan Smith, all of whom were employees in Bartko's office suite, and a December 2, 2009 interview with office tenant Attorney Ted Johnson. This undisclosed information would have demonstrated material gaps and inconsistencies in the Government's theories of Bartko's guilt---most notably the Government's theories of Bartko's phone contacts with Hollenbeck, Plummer and Leamon. [D.E. 292 at 42 to 43, 305 at 35-39, 328 at 40-48];

15-16. The *Brady* evidence withheld from Bartko's defense, and the documentary materials which demonstrate actions taken by AUSA Wheeler to conceal much of this *Brady* evidence, encouraging Hollenbeck to testify falsely, and in fact, incentivizing Hollenbeck to testify falsely in several respects, give rise to ancillary Due Process prosecutorial misconduct claims included in Bartko's § 2255

Petition. Of primary importance was AUSA Wheeler's false (and likely perjured) declaration filed in opposition to Bartko's new trial motions which

falsely stated that the prosecutor had no discussions with Hollenbeck or his lawyer about promises and benefits of his cooperation until Bartko's jury began deliberations. [D.E. 227-7, 305 at 42-45, 328 at 40-48]; and

17. Bartko's gateway claim of actual innocence and a miscarriage of justice have been shown in Bartko's habeas claims revealed by the pattern of *Brady/Giglio/Napue* violations, the knowing presentation by the prosecution of Hollenbeck's perjured trial testimony, the concealment by Bartko's prosecutors of evidence contradictory of the Government's false theories of Bartko's guilt, and the district court's unwillingness to even consider newly discovered evidence that could have materially affected the outcome of Bartko's trial. [D.E. 292 at 10-11, 305 at 45-48, 328 at 48-50, 351 at 35-40].

Approximately eight months before the district court decided Bartko's § 2255 Petition, newly discovered evidence in the form of a comprehensive recantation by Hollenbeck of his trial testimony was put before the district court in Bartko's Motion For Leave. Hollenbeck's recantation statements given to Bartko's investigators in the presence of a certified court reporter on March 7, 2018 were sworn under oath. Hollenbeck had also given two earlier interviews to Bartko's investigators that were tape recorded with Hollenbeck's consent on January 17 and 19, 2018, but were not

given under oath. Hollenbeck's sworn recantation was not a mere general repudiation of his trial testimony. It was a lengthy ninety-minute statement identifying upwards of 21 perjured, false, or misleading statements made at trial---revealing a series of incentives and benefits extended to him from his counsel, Holmes, as authorized by AUSA Wheeler. [D.E. 339 at 4-15; D.E. 340 at 5-7]. Bartko's Motion For Leave asserted that this newly discovered evidence allowed Bartko's existing habeas claims to be supplemented in accordance with Fed. R. Civ. P. 15(c) and (d) and 28 U.S.C. § 2242. In response the Government submitted an MOI prepared by Inspector Carroll stemming from a post-recantation interview with Hollenbeck on April 26, 2018, [D.E. 344, 346, 346-1], where Hollenbeck stated during that unsworn interview that he told the truth during Bartko's trial. Various conclusions reached by the district court reflect only a cursory review of the evidence as a whole in Bartko's case; disassociation from the evidence presented at trial by Bartko's defense; and the use of intemperate judicial language in the court's refusal to consider the factual basis supporting many of Bartko's habeas claims.

On December 20, 2018, Bartko filed a timely Application For A Certificate Of Appealability pursuant to 28 U.S.C. § 2253(c) ("COA Application") with the Fourth Circuit Court of Appeals. [D.E. 3, 6]. On February 26, 2019, Bartko filed a Motion For Relief From Judgment Pursuant To Fed. R. Civ. P. 60(b)(1) or 60(b)(6) in the district court. ("Rule 60(b) Motion"). [D.E. 359]. By a per curiam opinion

dated August 15, 2019 entered by the Fourth Circuit, Bartko's COA Application was denied. [D.E. 11, 12]. App. Exh. 4. On September 11, 2019, Bartko filed his Petition For Rehearing And Rehearing En Banc with the Fourth Circuit and thereafter on September 30, 2019 filed an Amended Petition For Rehearing And Rehearing En Banc. [D.E. 13, 15]. The Fourth Circuit Court of Appeals denied rehearing on October 16, 2019. [D.E. 18]. App. Exh. 5. On November 14, 2019, Bartko filed his Motion for Authorization to file a second §2255 petition with the Fourth Circuit Court of Appeals seeking approval under 28 U.S.C. §2244 to file his proposed Supplemental *Brady* Claims in the district court. On December 6, 2019, the motion was denied. App. Exh. 6. This Petition is therefore timely.

SUMMARY OF ARGUMENT

I. Under *Brady* and *Giglio* and their progeny, exculpatory and impeachment evidence is material and its suppression violates Due Process, if "there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (Per Curiam) (quotations omitted). The Court in *Wearry* stated that to prevail on a Brady claim, the defendant need not show that he "more likely than not" would have been acquitted had the withheld evidence been available and used effectively by the defendant. (citing *Smith v. Cain*, 565 U.S. 73, ___ ; 132 S. Ct. 627, 639 (2012)). "[The Petitioner] must show only that the new

evidence is sufficient to 'undermine confidence' in the verdict." *Wearry*, 136 S. Ct. at 1006. A fair assessment of Bartko's habeas claims satisfies this standard.

In *Mooney v. Holohan*, 294 U.S. 103 (1935) and *Napue v. Illinois*, 360 U.S. 264 (1959), and their progeny, "the 'knowing use' by the [Government] of perjured testimony to obtain a conviction and the deliberate suppression of evidence to impeach that testimony constitutes a denial of due process of law." *Mooney*, 294 U.S. at 110. The exculpatory and impeachment evidence suppressed by Bartko's prosecutors, coupled with the known presentation of false and perjured testimony by the Government's principal witness, Hollenbeck, meets the materiality standards set forth in this Court's Brady line of decisions.

Materiality depends in part on the strength of the Government's case. If the Government's case is weak, even evidence of minor importance may be enough to change the outcome of a trial, and therefore will be deemed material. *United States v. Agurs*, 427 U.S. 97, 113 (1976). In post-conviction proceedings thus far in this case there is nothing more than "lopsided" factual conclusions reached by the district court to the effect that Bartko's trial resulted in the presentation of a "mountain of evidence" of his guilt.[1] What has not thus far been recognized in judicial review is

[1] The district court's opinions denying Bartko's new trial motions and dismissing his habeas claims include multiple, emphatic references to this "mountain of evidence." There are seven such references in the court's new trial opinion, [D.E. 246] and five more in the dismissal of Bartko's § 2255 Petition. [D.E. 351].

that the so-called mountain of evidence was built upon a foundation of perjured and false testimony by Hollenbeck, laced with the suppression of the very evidence that, if disclosed, likely would have exposed to Bartko's jury the true facts supporting Bartko's innocence. As this Court found in *Napue*, "[t]he duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate." (citation omitted). Relying on the earlier holding in *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), this Court held the proposition to be well settled that "[i]n cases which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of the lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

II. Bartko's claim of actual innocence is supported by law enforcement and prosecutorial records which consist of material *Brady* evidence withheld from his defense by AUSA Wheeler and Hollenbeck's recent admissions under oath that his trial testimony implicating Bartko in his fraudulent activities was false. This Court has made clear the standard a habeas petitioner must meet to demonstrate actual innocence as a gateway to overcome procedural default of his claims. *Schlup v. Delo*, 513 U.S. 298 (1995); *Bousley v. United States*, 523 U.S. 614, 623 (1998); *House v.*

Bell, 547 U.S. 518, 539 (2006); and *McQuiggin v. Perkins,* 569 U.S. ___, 133 S. Ct. 1924 (2013). The district court below erred in two important respects in dismissing Bartko's assertion of actual innocence. It applied the wrong standard in determining the viability of Bartko's claim under *Schlup*, by its misplaced reliance on *United States v. Pettiford,* 612 F.3d 270, 284 (4th Cir. 2010), and its refusal to consider "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House*, 547 U.S. at 538 (citing *Schlup*, 513 U.S. at 327-28).

III. Bartko's COA Application was denied by the Fourth Circuit Court of Appeals without substantive comments. On review by this Court, it should be clear that no court that has reviewed Bartko's conviction has conducted its own independent review of the record below, which has been substantially enhanced by presentation of many items of suppressed *Brady* evidence and a sworn, comprehensive recantation statement given by the Government's principle witness, Hollenbeck. The district court's findings have merely been adopted without any probing examination of the evidentiary basis on which those conclusions are founded. This is due to the deference usually accorded to a trial court's factual conclusions, especially on evidentiary and credibility of witness matters. But, reviewing appellate courts also have a corresponding duty not to be bound by the conclusions of lower courts where federal constitutional deprivations are apparent.

Napue, 360 U.S. at 272 (citing *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)). Bartko's § 2255 Petition raised claims far beyond frivolity and that reasonable jurists would find debatable whether his claims were resolved properly. *Slack v. McDaniel*, 529 U.S. 473 (2000). The Fourth Circuit's assessment of Bartko's COA Application was far too limited. See also 28 U.S.C. § 2253(c).

REASONS FOR GRANTING THE PETITION

I. A Pattern Of *Brady/Giglio/Napue* Violations Has Been Overlooked By The Lower Courts

A. Bartko is entitled to habeas relief under 28 U.S.C. § 2255 since he has demonstrated on a cumulative basis the Government withheld material information favorable to his defense contrary to *Brady* and its progeny and that his prosecutors presented false or perjured testimony elicited from key witness Hollenbeck.

A deliberate effort was undertaken by Bartko's lead prosecutor, AUSA Wheeler, to win a conviction against Bartko by suppressing a multitude of pieces of information in the Government's possession which were favorable to Bartko's defense---both exculpatory and impeachment material---and damaging to its witnesses and theories of Bartko's guilt. Here, the question whether Bartko received a fair trial turns on the materiality of the undisclosed information---meaning whether there is any reasonable likelihood the information (if properly disclosed) could have affected the judgment of the jury. (emphasis added). *Wearry*, 136 S. Ct. at 1006. Intentional suppression of favorable evidence affects the materiality calculus.

In Hollenbeck's March 7, 2018 sworn recantation statements given to Bartko's investigators, Hollenbeck stated that in his pretrial interviews with AUSA Wheeler, Wheeler intimated to Hollenbeck that without his cooperative testimony against Bartko, a successful prosecution of Bartko was unlikely. [D.E. 339-1 at 65-66]. Hollenbeck also admitted his willingness to "tell Mr. Wheeler whatever he wanted in order to give him---so he knows I was cooperating." *Id.* at 63. AUSA Wheeler assured Bartko's defense that all interview statements had been provided to the defense before trial, but Bartko has shown that assurance to have been false. [D.E. 86]. The information found in these interview statements and/or the investigators' handwritten notes recorded during the interviews was not merely benign, inconsequential information. Roughly half of these withheld interview reports contained information consistent with the focus of Bartko's defense, i.e. a lack of knowledge of and the absence of intent to participate in Hollenbecks' on-going investment schemes. The remaining half of these undisclosed witness statements revealed repeated interviews with Bartko's office staff (unknown by Bartko) apparently for the purpose of evincing how Bartko conducted his office affairs, his phone call patterns with Plummer, Leamon and Hollenbeck, and in some measure the case agents' efforts to establish Bartko's use of unauthorized phones within his office space reflecting his possible concealment of his communications. Failing to disclose these office staff interviews foreclosed an opportunity for Bartko's defense

to focus on the "dry holes" the Government pursued during its investigation, which would have demonstrated the inadequacy and incompleteness of the Government's investigation.

In his Supplemental Brady Claim, Bartko identified the magnitude of Hollenbeck's fabricated testimony, [D.E. 339], and compiled testimony from 21 of the Government's 31 trial witnesses. [D.E. 345-1]. To a person, those witnesses testified that they had no contact or communication with Bartko prior to their investment decisions. 15 of the "victim" witnesses recalled having no awareness of or dealings with Bartko until he initiated the return of invested funds to Capstone Fund investors. These witnesses testified that they dealt with Hollenbeck on an exclusive basis in making their investment decision. The Government's case pivoted on the presentation of Hollenbeck's testimony spanning three trial days and falsely implicated Bartko in his investment schemes by telling the jury that "Bartko knew everything I was doing." Hollenbeck Tr. Trans. [D.E. 217-4 at 335]. The Government's evidence was primarily presented through Hollenbeck's own false testimony or was derived from his false and misleading statements provided by the prosecution before trial.[2]

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[2] The 16-page FBI 302 recounting Hollenbeck's April 21-22, 2009 debriefing by AUSA Wheeler and the case agents begins by reciting that no promised had been made to Hollenbeck in exchange for his cooperation. This statement was false and enabled prosecutors to avoid disclosure of the promises made to Hollenbeck.

This Court has long recognized the "special role played by American prosecutors in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The "over-riding concern" of the *Brady* rule is the "justice of the finding of guilt." *Agurs*, 427 U.S. at 112. *Brady* protects defendants' fair trial rights by "preserv[ing] the criminal trial .... as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v. Whitley*, 514 U.S. 419, 440 (1995). Materiality "must be evaluated in the context of the entire record." *Agurs*, 427 U.S. at 112. Courts must consider the cumulative effect of all the suppressed evidence favorable to the defense. *Kyles*, 514 U.S. at 421, 436, 441. Here the cumulative materiality inquiry must not only include the impact of withholding evidence from Bartko's defense, it must include the horrific damage that can be done by the knowing presentation of false testimony by a key witness for the Government ---especially one who is alleged to be an accomplice of the accused.

Applying these well-developed principles into the context of Bartko's prosecution, it is clear that the district court examined only the Government's evidence in both post-conviction decisions. The court stated many times in its denial of Bartko's new trial motions and in its dismissal of Bartko's § 2255 Petition that "Bartko's own testimony was incredible."[3] In the denial of Bartko's new trial

[3] Combining both decisions, the district court made this point seven times. [D.E. 246 and 351].

motions, nowhere does the district court reveal what testimony of Bartko was "incredible," or for that matter what testimony of Bartko was contradictory to his defense. The district court used the same approach in its Order dismissing Bartko's § 2255 Petition.

Considering the deception that permeated Hollenbeck's trial testimony; the impeachment evidence selectively withheld from Bartko's defense by AUSA Wheeler; AUSA Wheeler's own actions designed to conceal express, written evidence of the details of promises and benefits advanced to both Mr. and Mrs. Hollenbeck in exchange for their cooperation; and the newly discovered recantation statements given by Hollenbeck, Bartko's conviction should not stand. If Bartko's jury would have been exposed to the admissions and statements made in Hollenbeck's sworn recantation, any reasonable juror (and likely all twelve) would not have voted to convict Bartko.

Bartko's prosecutors had actual knowledge of Hollenbeck's false statements under oath in two previous legal proceedings, both of which went undisclosed to Bartko's defense. The prosecution knew the sort of witness their case relied upon. The district court and the Government both concluded that Hollenbeck's testimony was not consequential, and in some respects not even needed to convict Bartko. Contrary to the compelling weight of the evidence amassed in this case, the district court and the Government found that Hollenbeck's trial testimony was truthful. Both

of these propositions are demonstrably in error and require relief on review by this Court. The district court's conclusion, buttressed by the Government's position, that Hollenbeck was not the principal witness against Bartko is mere wishful thinking. In response to Bartko's new trial motions, the Government admitted that "Hollenbeck was at the center of the case." [D.E. 219 at 5]. Hollenbeck played the starring role in closing arguments with his testimony being discussed by counsel on 88 of the 144 pages of argument transcripts. No other witness at trial garnered anywhere near the attention paid to Hollenbeck's testimony which spanned three trial days. See also Motion For Leave at 9-19 [D.E. 340].

Bartko's *Brady/Giglio/Napue* claims also give rise to ancillary prosecutorial misconduct claims under the Fifth Amendment's Due Process Clause of the Constitution. This Court has long held that a prosecutor violates Due Process rights of an accused when he knowingly allows perjured testimony to be introduced without correction. *Agurs*, 427 U.S. at 103. The law of the case doctrine in Bartko's case establishes that AUSA Wheeler knowingly failed to correct Hollenbeck's false testimony denying his receipt of promises and benefits from the Government in exchange for his cooperation. *Bartko*, 728 F.3d at 337. At that point in time, however, the Fourth Circuit found AUSA Wheeler's violation to be harmless error, concluding that Hollenbeck's false testimony would not have made a difference in the trial's outcome. *Id.* Following Bartko's direct appeal, and as he waited 44 months

for a decision on his § 2255 Petition, Hollenbeck completely altered the significance of his false trial testimony. His sworn recantation statement outlines a complete roadmap of his true motivations underlying his testimony, his desire---in fact obsession---to please AUSA Wheeler in his cooperation, his lies and intentional deception in implicating his lawyer, Bartko, in his investment fraud schemes, and how AUSA Wheeler actually incentivized Hollenbeck's cooperation. The district court's belief of the devastating impeachment of Hollenbeck's trial testimony ignores the reality that impeachment on the basis of a pecuniary or a *quid-pro-quo* basis is fundamentally different than impeachment on the basis of character for dishonesty or other bad acts. *Thomas v. Westbrooks*, 849 F.3d 659, 666 (6th Cir. 2017). Although Hollenbeck was impeached on other grounds (character for dishonesty and other bad acts), he lied about his motivations underlying his testimony in his repeated denials of no *quid-pro-quo* in exchange for his cooperation. Hollenbeck sought to burnish his credibility by ascribing his motives to altruism. AUSA Wheeler permitted this. Therefore, Hollenbeck's impeachment on other grounds is no bar to a finding that the withheld impeachment evidence was material under *Brady/Giglio/Napue. Thomas*, 849 F.3d at 662. (A $750 payment suppressed by the state as a pecuniary benefit was particularly egregious considering the witness touted her altruistic reasons for testifying.)

B. The Cumulative Impact Of The *Brady/Giglio/Napue* Violations Resulted In Prejudice

The *Brady* evidence withheld from Bartko's defense, combined with the Government's knowing presentation of Hollenbeck's false, perjured and misleading testimony, represents a compelling case where Bartko's Due Process rights were eviscerated, resulting in the conviction of an innocent person. This cumulative assessment must include the evidence withheld consisting of Hollenbeck's immunity contracts, the Leamon tolling agreements and the Cromer MOI.

In order to get a clear picture of the prejudice to Bartko's Due Process rights at trial resulting from the Government's *Brady/Giglio/Napue* violations, a brief review of the Government's trial strategy to convict Bartko is instructive. The Government portrayed Bartko as a "successful securities attorney" with virtually no aberrant history, well educated, financially stable and an ability to develop sound interpersonal relationships. Gov't Sent. Memo. at 28. [D.E. 250]. The jury was told he was highly skilled in the area of securities law and was able to use
his abilities to front his illegal schemes by using credentialed and respected figureheads like Laws, Dr. Dagi, Hollenbeck and others. Bartko was characterized as the mastermind behind the unlawful fund raising conducted by the Caledonian and Capstone Funds. In sixteen discreet areas of Bartko's trial testimony the Government asserted that Bartko committed perjury, and following the receipt of Bartko's verdict on November 18, 2010, the district court found that Bartko had

obstructed justice by testifying falsely during trial. Post-Verdict Hrg. Tr. at 22-23. [D.E. 194]. According to the Government, Bartko's false statements "were at the heart of the Defendant's trial." Gov't Sent. Memo at 28.

What in reality was at the heart of Bartko's trial was a concerted effort by the Government, through the actions of AUSA Wheeler, to present a fabricated narrative of Bartko's level of knowledge of Hollenbeck's investment sales activities, concerning the Caledonian and Capstone Funds. The Government ascribed to Bartko the creation of what the Government dubbed at trial as the "round-trip scheme." According to the Government, this scheme permitted Bartko to look as if he was returning investments to unqualified investors of the Capstone Fund yet at the same time directing Hollenbeck, Leamon and Plummer to further the scheme to return those funds to the Capstone Fund by round-tripping the investments. Perhaps the most damaging piece of demonstrative evidence developed by the Government and presented to the jury was the Government's Round-Trip Chart which diagrammed the flow of investments, then a return of those funds to investors by Bartko with Hollenbeck intercepting these investments, redirecting all but six refund checks to Legacy with Legacy then returning the funds back to the Capstone Fund. See Round-Trip Chart. [D.E. 219, Exh.7; Gov't Tr. Exhs. 35 and 686; Hollenbeck Tr. Trans. at 147-59, 167-76. [D.E. 200]. Ascribing the round-trip scheme to Bartko was only

possible through the perjured testimony of Hollenbeck, which has since been recanted.

Although the trial testimony of Hollenbeck, Plummer and Leamon was the core of the Government's case, the problem is that Hollenbeck's false testimony was "bought and paid for" by AUSA Wheeler's concealed incentives. To reduce the most damaging impeachment opportunities of Hollenbeck, the Government withheld both Hollenbeck immunity contracts; altered the Hollenbeck FBI 302 to reflect that no promises were made to him in exchange for his cooperation; and concealed AUSA Wheeler's pretrial discussions with Hollenbeck and his counsel to avoid the damaging impeachment ordinarily associated with a Rule 35(b) sentence reduction for a witness. AUSA Wheeler certainly knew that flirting with a sentence reduction for Hollenbeck was likely to result in Hollenbeck's trial testimony being precisely what the Government needed, i.e. implicating Bartko in Hollenbeck's own schemes. AUSA Wheeler had actual knowledge of the falsity of Hollenbeck's testimony. He had elicited the exact same false denials during Hollenbeck's testimony in the Colvin trial six months earlier. AUSA Wheeler also knew Hollenbeck had made false statements in his own allocution during his sentencing hearing in May, 2008. The best evidence of AUSA Wheeler's knowledge of Hollenbeck's false testimony is evident from the fact that AUSA Wheeler believed it to be necessary to conceal *Brady* evidence from Bartko's defense.

AUSA Wheeler's intentional withholding of the *Brady* evidence described in this Petition, his active concealment of facts which establish that he falsified statements made under penalty of perjury in filings in the district court, and that he consciously presented false, perjured and misleading evidence to Bartko's jury primarily through his awareness of Hollenbeck's false trial testimony violated Bartko's Due Process rights. This misconduct runs contrary to the Court's seminal decision in *Berger v. United States*, 292 U.S. 78, 88 (1935). The district court turned a blind eye towards this misconduct. Order at 30. The Fourth Circuit did not. See *Bartko*, 728 F.3d at 341- 44. During oral argument on appeal, Government counsel explained that AUSA Wheeler merely forgot about the withheld Hollenbeck and Leamon agreements. Oral Argument at 24:50-25:10. Id. at 342. Judge Keenan noted that "such an idea 'just strains credulity.'" Oral Argument at 21:54-21:56. Id. The opinion itself characterized the Government counsel's response as "farfetched." Id. AUSA Wheeler negotiated, drafted and signed all of the agreements entered into with the Hollenbecks and Leamon, but even more compelling, AUSA Wheeler began discussions with Hollenbeck's counsel as early as January 2009 related to a sentence reduction for Hollenbeck allowed under Fed. R. Crim. P. 35(b). [D.E. 305 at 42-45, D.E. 311, Exhs. 17(a)-17(c)]. Supporting his claim of misconduct, Bartko filed with the district court a copy of the previously sealed transcript of the in chambers hearing conducted in Hollenbeck's criminal case on February 2, 2009.

[D.E. 328, Exh. G]. This hearing transcript, unsealed on November 16, 2015, supported Bartko's claim that AUSA Wheeler submitted false statements to the district court in his denials of having any discussions with Hollenbeck or his counsel about a sentence reduction before Bartko's jury began deliberations on November 18, 2010. AUSA Wheeler's misconduct robbed Bartko of a fair trial. As the Fourth Circuit stated in Bartko, "something must be done." *Bartko*, 728 F.3d at 342. The Government was also able to fabricate the theory that Bartko had engaged in an angry confrontational phone call with Hollenbeck as early as January 31, 2005 despite the existence of evidentiary materials seized from Hollenbeck by the FBI tying the call much later to April of 2005, after which Bartko terminated Hollenbeck as a client. On this point of the Government's timeline theory, AUSA Bragdon argued in closing that Bartko lied about when the confrontational phone call occurred. [D.E. 292 at 28-31]. See Tr. Trans. at 1311-1312.

The Government's timeline construct provided to the jury in the form of a Government exhibit, Gov't Tr. Exh. 31, did not reveal the inconsistencies that were evident in other investigative information the prosecutors suppressed. The Government failed to disclose investigators' inability to tie Bartko's telephone contacts with Hollenbeck, Leamon and Plummer to fit the Government's narrative of how Bartko was leading the alleged round-trip investment scheme. Interviews of five putative witnesses within Bartko's office suite were conducted at some length,

none of which produced evidence supportive of the Government's false narrative. The undisclosed existence of these "dry hole" interview summaries was suppressed enabling the Government to advance a false narrative of Bartko's supervision and participation in the investment schemes.

The suppression of a number of the other witness interview statements in the form of FBI 302's and MOI's included impeachment evidence that would have enabled Bartko's counsel to far more effectively impeach Government witnesses, Mark Winn of FINRA, the co-conspirator statements of Colvin that were admitted under Fed. R. Evid. 801(d)(2)(E), the testimony of SEC attorney Rue who made statements during his September 2, 2010 interview revealing that he did not think Bartko knew Hollenbeck was selling securities, and statements by attorneys David Lewis and Randy James, both of whom provided information to case agents which the defense could have used to enhance Bartko's lack of knowledge and good faith defenses. Equally favorable to Bartko's defense, but suppressed by AUSA Wheeler, were the statements made by the second SEC broker-dealer examiner, Gannon Lasseign, who was privy to the deceit and trickery used by trial witnesses, Rue and McClellan (also from the SEC). This evidence could have been effectively used by Bartko's defense to argue the improper and collusive investigation of Bartko's broker-dealer designed to obtain evidence for use in the Government's criminal investigation.

Finally, in several instances described in Bartko's § 2255 Petition, the handwritten notes recorded by case agents present during witness interviews included information favorable to Bartko's defense but not characterized in the same light as the statements recited in the FBI 302's and/or the MOI's. Such was the case with Government witnesses Winn, Rue, Plummer, Leamon, Hollenbeck, McClellan and Cook. The testimony of Winn, Leamon and Cook was for all practical purposes unimpeached.

II. Bartko's gateway claim of actual innocence included in his § 2255 Petition under *Schlup* was inappropriately ignored by the district court. Bartko's claims should have been examined on their merits rather than procedurally barred.

The district court summarily rejected Bartko's assertion of actual innocence in 12 lines of its 43-page decision. Order at 32-33. In so doing, the court applied an incorrect quantum of evidence standard which a habeas petitioner must meet, relying on one inapposite Fourth Circuit case. See e.g. *United States v. Pettiford*, 612 F.3d 270, 284 (4th Cir. 2010). The court committed error when requiring Bartko to establish, by clear and convincing evidence, that he was factually innocent of the offenses for which he was convicted. The district court's reliance

on the incorrect standard is contrary to this Court's decisions in *Schlup*, *Bousley*, *House*, and *McQuiggin* . The "newly discovered evidence" Bartko relies upon in support of his *Schlup* actual innocence claim includes not only the newly discovered

Brady material which serves as the foundation of his several *Brady* claims, but the significant amount of newly discovered exculpatory evidence contained in Hollenbeck's March 7, 2018 recantation statements, Plummer's September 6-7, 2018 interview statements given to Bartko's investigators, Plummer's sworn interview statements given on October 15, 2019, and non-trial witness Elrico (Rick) Saddler's interview statements given on August 2, 2018. [D.E. 339-1, 347-2, 347-3, 369-3, 379-1 and 379-2].

Hollenbeck's sworn recantation statements were summarily repudiated by the district court. Order at 37- 40. The district court also made it patently clear that the court intends to never credit anything Hollenbeck may say. *Id.* at 38. These conclusions were reached without due consideration for Hollenbeck's current credibility as opposed to the district court's assessment of Hollenbeck's credibility at Bartko's trial in 2010. The district court failed to follow the Fourth Circuit's own suggestions that "an evidentiary hearing may be necessary to assess whether recantations are credible, or whether 'the circumstances surrounding the recantation[s] suggest [that they are] the result of coercion, bribery or misdealing.'" *Wolfe v. Johnson*, 565 F.3d 140, 169-70 (4th Cir. 2009) (quoting *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973)). Accord *Teleguz v. Pearson*, 689 F.3d 322, 327 (4th Cir. 2012). No court has yet taken the time to evaluate the reliability of Bartko's newly discovered evidence as required by *Schlup*. The district court's

summary repudiation of Bartko's newly discovered evidence thwarted his ability to demonstrate "that it is more likely than not that no reasonable juror would have found [Bartko] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327.

The district court determined that Bartko's Supplemental *Brady* Claims arising from Hollenbeck's recantation were untimely since these claims were not filed within the one-year limitations period set forth in 28 U.S.C. § 2255(f)(1). Order at 36. The district court then went one step further in its conclusion that under Fed. R. Civ. P. 15(c)(1)(B), Bartko's proposed claims did not arise out of the conduct, transaction, or occurrence set out.... in the original pleading. Order at 36. The district court erred by failing to apply the statute of limitations within § 2255(f)(4) properly and erred in its refusal to allow relation back of Bartko's Supplemental *Brady* Claims with his original, timely § 2255 Petition. In Bartko's Rule 60(b) Motion, now pending before the district court, he has exhaustively argued that under § 2255(f)(4), the filing of his Motion For Leave to add his Supplemental *Brady* Claims was timely as his proposed *Brady* claims were filed on March 28, 2018, 21 days after Hollenbeck's sworn recantation statement was obtained by his investigators. [D.E. 359 at 2-15]. Under the analysis of other similar habeas claims arising from sworn recantations by witnesses, assuming due diligence, the date the petitioner gains access to the recantation commences the statute of limitations in § 2255(f)(4). *United States v. MacDonald*, 641 F.3d 596, 604-08 (4th Cir. 2011), *Daniels v. Uchtman*,

421 F.3d 490 (7th Cir. 2005). Under this Court's decision in *Mayle v. Felix*, 545 U.S. 644, 650, 659-70 (2005), in the habeas context, the focus on whether an amended claim relates back to an earlier timely claim under Rule 15(c)(1)(B) is whether the amended claim arises from the "same core facts [in time and type] as the timely filed claims." Hollenbeck's recantation statements relate directly to his perjured trial testimony and his motivations for his testimony---both of which relate to the exact time and type of Bartko's timely filed § 2255 Petition. *Napue* violations are a form of a Brady claim. See *Strickler*, 527 U.S. at 280-81, *Kyles,* 514 U.S. 432-33 and *Agurs*, 427 U.S. at 103. Bartko is entitled to relief due to the district court's errors of law with respect to the timeliness of his supplemental claims.

III. Bartko's § 2255 Petition adequately demonstrated that reasonable jurists would find it debatable whether his habeas claims should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

Following the district court's dismissal of his §2255 Petition, Bartko timely made application to the Fourth Circuit Court of Appeals for a Certificate of Appealability ("COA"), [D.E. 3,6], pursuant to 28 U.S.C. §2253(c). *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Bartko sought a COA on five grounds stated in the application. *Id.* at 4-5. Following Bartko's filing of his initial § 2255 Petition; following Bartko's shocking discovery of an abundance of *Brady* evidence suppressed from disclosure to his defense; following the discovery of Hollenbeck's

sworn recantation admitting wholesale perjury during his trial testimony; following further discovery of additional newly discovered evidence from Government witness Plummer and non-witness Saddler----the district court dismissed all of Bartko's habeas claims under Fed. R. Civ. P. 56 and 12(b)(6). The Order includes no meaningful analysis of the evidentiary facts at issue. The intemperate judicial tenor of the post-conviction rulings in Bartko's case reveals a troubling pattern which exposes a personal bias and lack of impartiality by the district court. After sober reflection on the entirety of these post-conviction proceedings, Bartko moved for disqualification of the judge assigned to his case under 28 U.S.C. §455(a), (b)(1) as well as Canon 3(C) of the ABA Code of Conduct for United States Judges. Bartko's request for disqualification was made in his Rule 60(b) Motion in reliance on *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11, 864 (1998). Bartko's request for disqualification remains undecided.

Recently in *McGee v. McFadden*, 139 S. Ct. 2608 (2019), Justice Sotomayor dissented from a denial of the Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit concluding that the Fourth Circuit should have reviewed McGee's COA application more fully and unduly restricted review and issuance of a COA. *Id.* at 2611. ("Unless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down.") In Bartko's case, it is patently obvious that the COA process has again broken down. This Court should

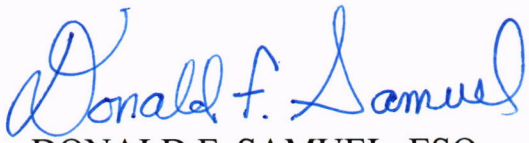
provide relief to Bartko by granting a Writ of Certiorari to the Fourth Circuit Court of Appeals.

CONCLUSION

Bartko respectfully requests that this Court issue a Writ of Certiorari to review the November 2, 2018 decision of the United States District Court for the Eastern District of North Carolina and the subsequent decision by the Fourth Circuit Court of Appeals denying Bartko's Application for a Certificate of Appealability, or alternatively, grant such other and further relief the Court deems appropriate.

RESPECTFULLY SUBMITTED,

GARLAND, SAMUEL & LOEB, P.C.



DONALD F. SAMUEL, ESQ.
Georgia Bar No. 624475
Counsel for Petitioner

3151 Maple Drive, N.E.
Atlanta, GA 30305
(404) 262-2225
Fax: (404) 365-3843
Email: dfs@gsllaw.com

Date: January 9, 2020

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

GREGORY BARTKO – PETITIONER

VS.

UNITED STATES OF AMERICA – RESPONDENT

CERTIFICATE OF COMPLIANCE

I hereby certify that this *PETITION FOR WRIT OF CERTIORARI* is in 14-point Times New Roman type and contains 8,997 words.

This the 9th day of January, 2020.

DONALD F. SAMUEL, ESQ.
Georgia Bar No. 624475
Counsel for Petitioner

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

GREGORY BARTKO – PETITIONER

VS.

UNITED STATES OF AMERICA – RESPONDENT

PROOF OF SERVICE

I, Donald F. Samuel, do swear or declare that on this date, January 9, 2020, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

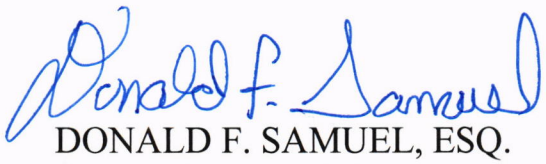
The names and addresses of those served are as follows:

Kristine L. Fritz
Assistant United States Attorney
Room 800
310 New Bern Avenue

Raleigh, North Carolina 27601

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.



DONALD F. SAMUEL, ESQ.
Georgia Bar No. 624475
Counsel for Petitioner