No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON BERNARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE
PETITIONER IS SCHEDULED TO BE EXECUTED
DECEMBER 10, 2020, AT 6:00 P.M. EASTERN TIME

CAPITAL CASE
QUESTION PRESENTED

Petitioner was sentenced to death for his role at age 18 in a carjacking that led to a double homicide, committed by five teenagers who belonged to the same youth gang. A central theme of the Government's case for death was that Petitioner's gang involvement made him "likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others," which the government reinforced by eliciting testimony that the gang was not hierarchically organized and "everyone [was] equal in the gang."

Meanwhile, the government – despite having represented to the trial court that it would comply with *Brady v. Maryland*, 373 U.S. 83 (1963) – was in possession of the opinion of a law enforcement gang expert, never disclosed to Petitioner's counsel, that the gang in fact had a typical hierarchical structure, that three of the other defendants sat high in its ranks, and that Petitioner was at its "very bottom." The government's emphasis on Petitioner's gang ties as a basis for finding him a "continuing threat to the lives and safety of others" makes it reasonably likely that, had this information been disclosed, at least one juror would not have voted for death.

Petitioner's initial § 2255 motion did not, and could not, raise these *Brady/Napue* issues, because the government continued to withhold the *Brady* information throughout the initial § 2255 proceeding, telling the § 2255 court that it had maintained an open file discovery policy prior to trial (which would presumably have resulted in the disclosure of all *Brady* information). The § 2255 court cited that policy in denying Petitioner's initial § 2255 petition without discovery or a hearing.

Petitioner first learned of the *Brady* information (and a concomitant violation of *Napue v. Illinois*, 360 U.S. 264 (1959)) after his initial § 2255 motion had been denied. Petitioner brought a second § 2255 motion raising *Brady* and *Napue* issues, urging that under this Court's analysis in *Panetti v. Quarterman*, 551 U.S. 930 (2007), the motion should not be deemed successive. The district court called Petitioner's procedural argument "compelling," but foreclosed by Fifth Circuit precedent. The Fifth Circuit affirmed, holding that Petitioner's *Brady* and *Napue* claims were barred from review under § 2255 even though the government's actions had prevented him from discovering the facts in time to include them in his first § 2255 motion.

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The following question is presented:

> Where government action prevented Petitioner from bringing his claims under *Brady* and *Napue* in his initial § 2255 motion, should a second-in-time motion asserting those claims be deemed non-successive under this Court's analysis in *Panetti*?

RELATED PROCEEDINGS

United States District Court for the Western District of Texas, Waco Division:

United States of America v. Brandon Bernard, No. W-99-CR-070 (2)

United States of America v. Brandon Bernard, No. W-04-CV-164

United States Court of Appeals for the Fifth Circuit:

United States of America v. Brandon Bernard, No. 00-50523

United States of America v. Brandon Bernard, No. 13-70013

United States of America v. Brandon Bernard, No. 18-70008

United States of America v. Brandon Bernard, No. 19-50837

United States of America v. Brandon Bernard, No. 19-70021

United States District Court for the Southern District of Indiana:

Brandon Bernard v. T.J. Watson, No. 2:20-CV-616

United States Court of Appeals for the Seventh Circuit:

Brandon Bernard v. T.J. Watson, No. _____ (to be filed)

Supreme Court of the United States:

Brandon Bernard v. United States of America, No. 02-8492

Brandon Bernard v. United States of America, No. 14-8071

Brandon Bernard v. United States of America, No. 18-6992

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I. PETITION FOR WRIT OF CERTIORARI

Brandon Bernard petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in his case.

II. OPINIONS BELOW

The Fifth Circuit's unpublished opinion is reported at 820 F. App'x 309 (5th Cir. 2020) and attached as Appendix 1. Its Order denying en banc review is attached as Appendix 2. The district court's orders (dismissing Petitioner's motion as successive, and later vacating that decision and transferring the motion to the Court of Appeals under 28 U.S.C. § 1631are unreported and attached as Appendices 4 and 5.

III. JURISDICTION

The Fifth Circuit denied Petitioner's appeal on September 9, 2020 and denied en banc review on November 6, 2020. *See* Appendices 1 and 2. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2255. The text of this statute is contained in Appendix 3.

V. STATEMENT OF THE CASE

A. Introduction

Petitioner is under a federal death sentence for his role as a non-shooting accomplice in a gang-related carjacking that ended in murder. In urging a death

sentence at trial, the government argued that Petitioner was a "top dog" gangster whose immersion in the gang meant that he would inevitably commit acts of violence in prison if his life were spared. Years later, long after his initial § 2225 proceeding concluded, Petitioner discovered through scouring the record of a codefendant's 2018 resentencing hearing that the government had suppressed law enforcement expert opinion evidence that Petitioner was positioned at "the very bottom" of the gang's pecking order, with his codefendants close to the top.

This petition arises from Petitioner's effort to bring a second motion under 28 U.S.C. § 2255 to remedy the government's *Brady* and *Napue* violations, which the government's misconduct prevented him from raising in his initial § 2255 motion. As relevant here, Petitioner contended that this second § 2255 motion, by virtue of this Court's analysis in *Panetti v. Quarterman*, 551 U.S. 930 (2007), should not be deemed successive. The district court viewed Bernard's *Panetti* argument as "compelling," but was constrained by Fifth Circuit precedent to treat the petition as successive. Appendix 4 at 012a. The Fifth Circuit affirmed. Appendix 1

As a result, through no fault of Petitioner's, there has never been judicial review of his contention that the government hid *Brady* material or violated *Napue* or that, absent these constitutional violations, there is a reasonable probability that Petitioner would not have been sentenced to death. The far-reaching consequence of decisions like the one below is that the government, by keeping its *Brady* and *Napue* violations hidden until a defendant's first § 2255 is completed, can insulate them permanently from judicial review. Numerous federal appellate judges have criticized

that outcome as directly conflicting with this Court's decision in *Panetti*. The conflict warrants this Court's review, and Petitioner's case is an ideal vehicle for resolving it.

B. Statement of Proceedings

1. Proceedings prior to Petitioner's second § 2255 motion

In 2000, Petitioner and Christopher Vialva were tried before a single jury in the Western District of Texas on charges arising from a carjacking that ended in a double murder. The government sought death against both defendants, and the jury convicted them on all counts.[1] Petitioner was absent when the victims were abducted, took no part in robbing them, and did not shoot either victim. Jurors spared Petitioner's life on two of the three capital counts, while sentencing Vialva to death on all three death-eligible counts.[2]

Petitioner's conviction and death sentence were affirmed on appeal.[3] He then unsuccessfully sought relief via an initial motion under 28 U.S.C. § 2255 raising a

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[1] *United States v. Vialva and Bernard*, No. W-99-CR-070 (W.D. Tex., judgment entered June 16, 2000). The charges were (1) carjacking resulting in death, *see* 18 U.S.C. § 2119; (2) conspiracy to commit murder, *see* 18 U.S.C. § 1117; and (3 and 4) the murders of Todd and Stacie Bagley, *see* 18 U.S.C. § 1111(a). The district court had jurisdiction over these offenses under 18 U.S.C. § 3231. The three other teenagers charged in connection with the crimes – Terry Brown, Christopher Lewis, and Tony Sparks – were too young to face a death sentence under federal law. Brown and Lewis cooperated with the government and testified at trial. Both have been released from custody. Sparks pleaded guilty separately and remains behind bars with a projected release date of April 2030.

[2] *See* ROA.19-70021.341, 354, 301, 314, 327 (references to "ROA" are to the appellate record from the United States Court of Appeals for the Fifth Circuit in *United States v. Brandon Bernard*, No. 19-70021).

[3] *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002).

variety of challenges to his death sentence.[4] This motion did not include the *Brady*/*Napue* claims that underlie this petition for certiorari, because at the time the government was still concealing the evidence that would surface in 2018.

2. Facts relevant to the questions presented

a. In urging the jury to sentence Petitioner to death in 2000, the government emphasized that his ties to the youth gang responsible for the crime made him a "continuing threat to the lives and safety of others," a key aggravating factor in the government's presentation. At the same time, it led jurors to believe that the gang had no hierarchy of status or leadership.

The crime underlying this case involved a plan by five teenage members of a youth gang in Killeen, Texas – the "212 PIRU Bloods" – to carjack and rob someone. On the afternoon of June 21, 1999, three of those teens – Vialva, Sparks, and Lewis – obtained a ride from youth ministers Todd and Stacie Bagley under false pretenses, and then pulled a gun on them and forced them into the trunk of their own car. The boys attempted to withdraw money from the victims' bank account (via ATM) and tried to pawn some of their personal property, and the victims spent several terrible hours locked in the trunk in the fierce Texas summer heat. Late in the afternoon, the trio called Petitioner and Terry Brown to come in Petitioner's mother's car to meet them. After a discussion about what to do,[5] Petitioner and Brown bought lighter fluid

[4] *See United States v. Bernard*, 762 F.3d 467 (5th Cir. 2014) (denying certificate of appealability).

[5] At trial, it was disputed exactly what plan was made and who was party to it. According to Lewis, Petitioner came up to the Bagleys' vehicle and there was a discussion about what to do, punctuated by Brown's "screaming out the door" of Petitioner's car that they should abandon the car in the park and not kill the victims.

at a convenience store and then followed the trio (still driving the victims' car) onto a rural part of the Fort Hood military reservation. There, the trunk was opened, Vialva shot each of the Bagleys in the head at close range, and Petitioner, at Vialva's direction, set the car on fire. Todd Bagley was killed instantly when Vialva shot him; Stacie Bagley may have lived for a few more moments or minutes but was unconscious and unable to feel pain from the moment she was shot.[6]

As this summary suggests, the government faced an uphill fight in persuading the jury to impose a death sentence on Petitioner. For one thing, there was no disputing his distinctly lesser role in the crime. For another, he was just 18 and had

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ROA.19-70021.4925-26. Lewis claimed that Vialva at that time announced that "he had to kill them," and that "everybody [could] hear" him. ROA.19-70021.4926-27. In Brown's account, Petitioner remained in his own car and Brown had the conversation with the others at the Bagleys' car. ROA.19-70021.4468. According to Brown, no one was shouting, and although Vialva did say he "had to burn the car and kill the people," Brown "doubted" he meant it. ROA.19-70021.4463-64. Brown continued to believe that Vialva would burn the car but "[not] that he would harm the people." ROA.19-70021.4465. Although Brown told Petitioner "about the plan" after the conversation, he did not tell him that the plan was to "shoot these people," but that "the car would be burned." ROA.19-70021.4468, 4515, 4471 (Brown informed Bernard of Vialva's plans "regarding the vehicle").

[6] As the government has recognized, consciousness is a prerequisite to experiencing pain or suffering. In defending its current execution protocol, the government has stated that pentobarbital ensures a humane death precisely because it causes the condemned prisoner to "lose consciousness within 10-30 seconds," with the result that he is "unaware of any pain or suffering before death occurs within minutes." *See* Application for a Stay or Vacatur of the Injunction Issued by the United States District Court for the District of Columbia, *United States v. Lee*, No. 20A8 (U.S. Sup. Ct., July 13, 2020). As noted, here Mrs. Bagley was rendered instantaneously unconscious when Vialva shot her.

no history of violence. What the government did have to work with was Petitioner's involvement in the "212 PIRU Bloods." In that regard, it pursued two different tacks.

First, it presented evidence to lead jurors to believe that all members of the gang considered each other equals, and that there was no hierarchy of authority within the gang. That would help inoculate the government's "future dangerousness" claim, and indeed its entire case for death, against the response that nothing about Petitioner's role in the crime suggested he was a leader of the gang or likely to affiliate with "Bloods" in prison if his life were spared. The government elicited the necessary testimonial support by asking its witnesses questions specifically directed to the issue of hierarchy within the gang. *See* ROA.19-70021.5366 (question from prosecutor to Terry Brown: "Q: All right. And did you ever have a conversation with James Presley regarding everyone being equal in the gang?") (emphasis added); ROA.19-70021.5367 (after Brown affirmed that he had had such a conversation, the prosecutor followed up with, "And what did he tell you?") (emphasis added); ROA.19-70021.5382 (prosecutor's question to Texas Ranger Aycock: "Q: Now, in regards to Mr. Presley, you've heard some discussion [by witnesses] about crown holders and who's in charge of Two-One-Two PIRU. Based on your investigation, could you explain a little bit about that?") (emphasis added); *id*. (in response, Aycock explains that the gang's founding members expressly wanted to avoid a hierarchical structure, and why). A reasonable juror would have understood the government's emphasis on this point (and particularly its implication that Aycock's explanation was "[b]ased on [his] investigation," and thus represented information which Aycock had vetted through

multiple credible sources) as a signpost: *This information about the structure of the gang – that everyone in the gang was equal to everyone else – is important.*[7]

Second, based on the government's contentions in other ongoing litigation in Petitioner's case, we anticipate that the government in this Court may contend, e.g., that it did not base its future dangerousness argument on Petitioner's gang affiliation. Anticipating that characterization, Petitioner respectfully refers the Court to the government's brief from Petitioner's direct appeal. Filed more than fifteen years ago, when the government had no motive to cherry-pick the trial testimony in trying to minimize the importance of Petitioner's involvement in the gang to the government's overall presentation of the facts, that brief provides a fairer measure of the inferences the jury likely drew from the trial evidence.

During the direct appeal, the government took the position that the trial evidence showed that both Vialva and Petitioner were solidly involved in gang activity. For example, it described the evidence without qualification as proving Vialva and Bernard were "both affiliated with a nationwide gang called 'the Bloods.'" Brief for the United States of America, *United States v. Bernard and Vialva*, No. 00-50523 (5th Cir., filed Oct. 18, 2001) 2001 WL 34093837 at *17 (citing 18 R. 1861). It repeatedly termed them "members" of the gang.[8]

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[7] For this reason, any claim by the government that it did not "argue" this issue to the jury (that everyone in the gang was supposedly equal) is belied by the fact that anytime a party highlights the importance of a particular fact in questioning a witness, it is "arguing" to the jury and the jurors presumably are taking note.

[8] *Id*. at *37 (Lewis "was also a member of the '2-1-2 PIRU' affiliate of the Bloods gang," which "included Brandon Bernard") (citing 20 R. 2307); *id*. at *51 (describing event

To this repeated description of Petitioner as a "member" of the "212 PIRU Bloods," the government's direct appeal brief pointed to testimony that showed him behaving in stereotypically "gangster" ways.[9] In short, the government's brief on appeal shows clearly that the government sought to prove at trial that Petitioner was a committed member of the "Bloods," not simply someone who associated or hung around with the group.

More important for present purposes, in its direct appeal brief the government repeatedly asserted that the trial evidence could have persuaded a reasonable juror that Petitioner's status in the gang was a powerful predictor of his likely future dangerousness. It did so, first, by pointing to specific testimony linking Petitioner's involvement with the local gang to his purported identification with the larger "nationwide gang called 'the Bloods,'" and the active presence of the Bloods gang in prison.[10]

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involving Petitioner "and other members of the '2-1-2 PIRU' gang") (citing 23 R. 2782); *id*. at *52 (describing witness's testimony identifying photographs depicting "gang members" that included "Vialva and [Petitioner] in gang colors 'throwing gang signs'") (citing 23 R. 2796and G.E. 193); *id*. at *124 (describing all five defendants as "gang members") (citing 18 R. 1912).

[9] *See*, *e.g.*, 2001 WL 34093837 at *52 (Petitioner "throwing gang signs") (citing 23 R. 2796); *id*. at *56 (different witness; photo shows "the Appellants [i.e., Vialva and Petitioner] throwing gang signs") (citing 24 R. 3121and G.E. 193); *id*. at *57 (describing Petitioner's mother's testimony that she bought Petitioner "a lot of red clothing" (citing 24 R. 3153), after having pointed out that the colors favored by the Bloods gang "were red and green, and members would wear clothing with that color" (*37, citing 20 R. 2309).

[10] *See*, *e.g.*, 2001 WL 34093837 at *52 (describing testimony that Petitioner was "throwing the 'five point star' [hand sign] in a photo, depicting the 'five point nation' that the Bloods belong to" (citing 23 R. 2798), and pointing out that "[t]he five point

Finally, and most important, the government in its brief on direct appeal expressly argued that the trial evidence showed "[c]learly" that Petitioner's "membership in a violent gang" showed "that [he] will be a danger to the community in the future":

> Appellant Bernard provided the gun, the incendiary fluid, the vehicle to accomplish the plan to car jack some innocent bystander and to rob them, and actually lit the car on fire. Bernard's same vehicle was used as a get away car. Further, *Bernard's history showed this activity was related to his membership in a violent gang. Clearly, the facts and intent regarding the instant offense show that Bernard will be a danger to the community in the future. Appellant Bernard was affiliated with a nationwide gang called "the bloods." Appellants Bernard and Vialva were part of the "2-1-2 PIRU" gang in Killeen, which was part of the Bloods.*

2001 WL 34093837 at *122 (emphasis added; footnote and record citations omitted). The government further stated that jurors would have inferred from the trial evidence that Petitioner's involvement with a "nationwide" gang was linked to his participation in acts of "violence."[11] The jury had heard expressly from an expert witness, Bureau of Prisons intelligence officer Anthony Davis, whose testimony

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star was part of a national alliance made between nationwide gangs in 1992" (citing 23 R. 2809)); *id*. at *122 (summarizing testimony as showing that Petitioner "was affiliated with a nationwide gang called 'the bloods'" through his connection to the 212 PIRU set in Killeen, "which was part of the Bloods") (citing 18 R. 1861and 18 R. 1863); *id*. at *124 ("Moreover, the evidence also showed the 'bloods' gang was part of the 'five point nation' alliance of gangs nationwide") (citing 23 R. 2798); *id*. at *125 (citing testimony from "[a] gang officer from Killeen" that "high school males" belonging to "the local gang" would "affiliate with the same national gang if sent to the penitentiary") (citing 23 R. 2807).

[11] *See*, *e.g.*, *id*. at *124 (Petitioner's "criminal history reflected that he was involved in gang violence for some time. Moreover, the evidence also showed the 'bloods' gang was part of the 'five point nation' alliance of gangs nationwide" (citing 23 R. 2798)).

aimed to convince the jury that Petitioner would continue to pursue violent gang-related activities in prison. ROA.19-70021.5730-31. Davis told the jury: "The Bloods operate by – once they're incarcerated, they get as many numbers as possible. They recruit as many members as they possibly can, or just inmates that they possibly can, to have the numbers to continue their criminal behavior and activity, just like they did out in the streets. If they're unable to get the numbers and recruit the members to have their own Blood gang, they will eventually have to join a prison gang, which is a more violent and more sophisticated gang in the prison system." *Id.*

This phrase from the government's brief on appeal sums up the view of the evidence it had urged on the jurors at trial:

> This evidence of Bernard's graduation from burglaries and assaults, to capital murder, especially in light of the heinous facts of the instant case, *along with the overwhelming context of gang affiliation and motivation*, supports the jury's finding that Appellant Bernard was likely to commit criminal acts of violence in the future.

2001 WL 34093837 at *125 (Emphasis added).

Thus, in 2001 – years before it acquired an urgent interest in characterizing the trial testimony as *not* linking Petitioner's gang involvement to his purported "future dangerousness" – the government freely admitted that its presentation of the case to the jury offered "gang affiliation and motivation" as the "overwhelming context" for understanding the entire case, and that jurors would have understood the trial evidence to make such "gang affiliation and motivation" an essential pillar in the prosecution's argument that Petitioner "was likely to commit criminal acts of violence in the future." 2001 WL 34093837 at *125.

b. Even as it pressed the jury to condemn Petitioner to death based on "the overwhelming context of gang affiliation and motivation" surrounding his involvement in the crime, the government was concealing the expert opinion of a law enforcement agent that the actual context was completely different: Petitioner was peripherally connected to the gang at best, as illustrated by his occupying the very lowest rung in its supposedly non-existent hierarchy.

In February 2018, Bernard's codefendant Tony Sparks was resentenced after a grant of habeas relief.[12] At his resentencing hearing, the government called former Killeen Police Department (KPD) Sergeant Sandra Hunt as an expert witness. Sgt. Hunt had previously headed the KPD's Gang Unit; her testimony addressed Sparks' position within the youth gang to which all the defendants in this case belonged, the 212 PIRU Bloods. ROA.19-70021.2314-15.

Sgt. Hunt's testimony showed that the government had contacted her *prior to Petitioner's trial* regarding her analysis of the hierarchy of the 212 PIRU Bloods. ROA.19-70021.2321. Sgt. Hunt's expert opinion was that the gang had a pyramidal hierarchy of 13 tiers, and that Petitioner was at its "very bottom." Id. [ROA.19-70021.2321. Her opinion was supported by two charts (an arcane handwritten one seized from a local teenager and a formal one prepared by the police, who interpreted the original based on information in the gang unit's files). Codefendant Sparks, an "enforcer" for the gang, was far above Petitioner (separated by eight tiers and "about

[12] *See In re Sparks*, 657 F.3d 258 (5th Cir. 2011) (granting relief under *Miller v. Alabama*, 567 U.S. 460 (2012)); *see also Sparks v. United States*, No. W-99-CR-070-3, 2018 WL 1415775 (W.D. Tex., March 19, 2018) at *1 and n.1. The presiding judge in *Sparks* was Hon. Lee Yeakel.

30 people"). ROA.19-700212320-21; 2413-14. Another codefendant, Terry Brown (whose role mirrored Petitioner's but who escaped capital prosecution because he was two months shy of 18), sat just one tier below Sparks, and lead defendant Christopher Vialva (consistently characterized by the government since trial as the ringleader in the crimes) one tier below that. *Id*. Thus, the other defendants in the case all occupied significantly higher positions in the gang's hierarchy than Petitioner, separated from him by multiple tiers and at least two dozen other named individuals. As noted, Petitioner was on the gang's bottommost rung. ROA.19-70021.2414.

Neither Sgt. Hunt's expert opinion about the gang's structure and the various defendants' positions within it, nor the police-prepared chart, was disclosed to Petitioner's counsel, either during the original trial proceedings or the initial § 2255 proceeding.[13]

3. How the questions presented were raised and decided below

Prior to trial, the government represented to the court that it would disclose all *Brady* material.[14] During proceedings on Petitioner's initial § 2255 motion, the government represented to the court that its open file discovery policy prior to trial had effectively disclosed any information it was constitutionally obligated to

[13] The government now claims that it disclosed the handwritten chart, but it has never denied concealing the police-created chart and, more important, Sgt. Hunt's expert opinion.

[14] *See* Government's Response to Defendant's Motion to Discover Transcripts of Grand Jury Testimony and for Extension of Time to File Motion to Quash Indictment at 1, *United States v. Bernard*, No. W-99-CR-070 (W.D. Tex., July 29, 1999), dkt. 32. ROA.19-70021.91.

provide.[15] As a result, Petitioner was unable to raise in his initial § 2255 motion the constitutional violations arising from the government's failure to disclose Sgt. Hunt's expert opinion, and from its presentation of trial testimony that was, in light of her conclusions, misleading.

After discovering in 2018 that the government had concealed Sgt. Hunt's expert opinion for nearly twenty years, Petitioner brought a second § 2255 motion raising his *Brady*/*Napue* claims. Substantively, he argued that two key findings that shaped the jury's sentencing verdict – their failure to find the mitigating factor that co-defendants with equal or lesser culpability were not facing a death sentence, and their finding of the aggravating factor of Petitioner's alleged "future dangerousness," were directly impacted by the information the government had concealed (in violation of *Brady*) and by its misleading depiction of the gang as having no hierarchy of status

[15] Despite its claim during trial that defense counsel were being afforded "open file" access to all relevant information, the government never disclosed this exculpatory expert opinion to Petitioner's trial team. The government then abruptly closed its purportedly "open file" as soon as it secured a death sentence, never once permitting counsel on collateral review to inspect the government's file. *See* Motion for Leave to Conduct Discovery and Brief in Support at 5-6, *United States v. Bernard*, No. 99-CR-00070, dkt 411 (W.D. Tex. November 12, 2004). And after closing its file, the government defeated the *Brady* claims that Petitioner raised in the initial § 2255 proceeding (which did not relate to Sgt. Hunt's opinion, of which Petitioner then remained unaware) by citing its claimed "open file" policy from trial. ROA.19-70021.1569, 1741, 2270-71, 2415-16. This claim of an "open file" also hindered Mr. Bernard's ability to obtain discovery that would have led to the suppressed Sgt. Hunt opinion and exhibits. The district court cited the government's supposed "open file" policy from the pretrial period when denying Bernard's post-conviction discovery request. ROA.19-70021.1741, Order at 25, *United States v. Bernard*, No. W-99-CR-070, dkt. 449 (W.D. Tex. September 28, 2012).

or leadership (in violation of *Napue*).[16] Procedurally, Petitioner contended that this Court's analysis in *Panetti* foreclosed treating his motion as successive. ROA.19-70021.2284-2300.

The district court called that procedural argument "compelling" but contrary to Fifth Circuit precedent. It eventually transferred the motion to the Court of Appeals under 28 U.S.C § 1631, *see* App. 5, and Petitioner appealed. The Fifth Circuit affirmed, adhering to its position that, notwithstanding *Panetti*, a second-in-time § 2255 motion raising a *Brady* or *Napue* claim based on information that was being concealed from the movant at the time of his initial motion, such that he was unable to raise the claims in that proceeding, was nevertheless successive and subject to 28 U.S.C. § 2255(h). App. 1. Because that provision forecloses review of sentencing-based

[16] Petitioner pointed out that when resentencing Sparks in 2018, the court cited Sgt. Hunt's expert opinion about Sparks' *high* rank and status in the gang as a justification for imposing a *harsher* sentence. By the same token, evidence that Petitioner was at "the very bottom" of the gang hierarchy would have tended to show that he could be adequately punished with a sentence of life imprisonment without possibility of parole, rather than the death penalty. *See* ROA.19-70021.2276-77. Also, and equally important, the suppressed information bore directly and favorably on the issue of Petitioner's "future dangerousness," a topic to which the government devoted much of its punishment-phase presentation. The government's "future danger" claim rested on painting Petitioner as a hard-core "thug for life," a gang-banger who wore his allegiance to the Bloods not just on his red sleeve but on his gold teeth, who aspired to high status in the gang and would naturally ally himself with other "Bloods" in federal prison to commit further violent crimes. See ROA.19-70021.2262-63. That frightening and false portrayal almost certainly drove the jury to find that Petitioner would pose a "continuing and serious threat to the lives and safety of others" even in a prison setting. ROA.19-70021.359. The expert opinion from Sgt. Hunt that the government failed to disclose would have cast this aspect of the sentencing hearing in an entirely different light, by showing that Petitioner was not hopelessly enmeshed in this gang but operating on its periphery and thus unlikely to seek out an affiliation with "Bloods" in prison if his life were spared.

challenges not based on new retroactive decisions from this Court, Petitioner's claims of government misconduct were unreviewable.[17] App. 1. This Petition follows.

VI. REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision – deeming Petitioner's second-in-time § 2255 motion to be successive and thus subject to the gatekeeping provisions of § 2255(h)– conflicts with this Court's decision in *Panetti* on an important question of federal law. Equally important, the Fifth Circuit's approach produces an inequitable result, because it rewards the government for its own misconduct, by forever barring Petitioner's penalty-phase *Brady* and *Napue* allegations from review. Under the Fifth Circuit's approach, if the government manages to hide *Brady* material through the completion of a capital defendant's first § 2255 proceeding, and that material touches only on his sentence, the defendant can *never* have a court review that *Brady* claim. Although no circuit split yet exists on the issue, a full panel of the Eleventh Circuit and numerous other federal appellate judges have strongly expressed the view that this result is both impossible to square with *Panetti* and creates a dangerous incentive for prosecutors to conceal information they are constitutionally bound to disclose. The

[17] Title 28 U.S.C. § 2255(h) provides that to allow a second or successive § 2255 motion to proceed, a panel of the appropriate court of appeals must certify that the motion contains "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant *guilty of the offense*." (Emphasis added). In the alternative, such a motion may proceed if it invokes a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.*

conflict with this Court's decision in *Panetti* is genuine, recurring, and important, and Petitioner's case is an excellent vehicle for resolving it.

1. This Court's reasoning in *Panetti* supports the view that a second-in-time application for collateral relief is not improperly "successive" where it presents a claim that could not have been brought earlier, and where the implications for habeas practice and the abuse of the writ doctrine warrant considering its merits.

In *Panetti*, the Court held that a death-sentenced prisoner need not raise in his initial habeas petition the possibility that he may become incompetent at a later date, and thus be barred from execution under *Ford v. Wainwright*, 477 U.S. 399 (1986). Instead, if those circumstances arise, he may litigate his *Ford* claim in a second application. The logic by which the Court reached that result suggests that the same should be true for penalty-phase claims under *Brady* and *Napue*.

The Court analyzed the question of what constitutes a second or successive motion in light of both AEDPA's purposes (to further "comity, finality, and federalism") and "the practical effects" of this Court's holdings when interpreting AEDPA, including the "implications for habeas practice" and the abuse of the writ doctrine. *See Panetti*, 551 U.S. at 945-47. The Court observed that focusing on these considerations was especially appropriate in situations where, as here, a proposal to impose a particular procedural hurdle would threaten a petitioner with "forever losing [his] opportunity for any federal review . . ." of a particular constitutional claim. *Id*. at 945-46.

The Court began by examining the implications for habeas practice of a rule requiring a petitioner to raise a speculative claim about possible future incompetency

– a claim for which no facts would have existed – in his initial habeas petition, so as to preserve it for possible future review. The Court concluded that such a rule would have a "far reaching and seemingly perverse" impact, since the recognized risk of eventual cognitive deterioration would require a prisoner with no apparent mental problems at the time of his initial habeas filing to assert such a claim anyway. *Panetti*, 551 U.S. at 943 (citation omitted). Such a rule would force conscientious defense attorneys to file unripe and often meritless *Ford* claims. *Id.* The Court rejected this "counterintuitive" approach, *id.*, finding that it would "add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Id.* at 931.

The Court then explained that "[t]he phrase 'second or successive' is not self-defining," but instead takes its meaning from the case law, including the dense web of habeas corpus decisional law that predated AEDPA. *Id.* at 943-44. The Court noted that it had already recognized in other contexts that not every second-in-time habeas application is "second or successive." It emphasized that its precedent required looking to the implications for habeas practice when interpreting that term. *Id.* at 945.

In reaching its conclusion that the second-in-time petition presenting Panetti's *Ford* claim should not be deemed improperly "successive," the Court looked to the AEDPA's purpose of furthering "the principles of comity, finality, and federalism." *Panetti*, 551 U.S. at 945 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 337 (2003).[18] It

[18] *Panetti* concerned a state prisoner's claim brought under § 2254, while the present case concerns a federal prisoner's claim brought under § 2255. Thus, the concerns of comity and federalism that underlie AEDPA – respecting state-court judgments and

sought to balance those goals with the need to avoid "forever" denying petitioners the opportunity for any federal review of previously unavailable claims. *See Panetti*, 551 U.S. at 945-46 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)). The Court noted that absent clear indication of contrary Congressional intent, it would resist interpreting the habeas statute in a way that would "produce troublesome results," "create procedural anomalies," and "close our doors to a class of habeas petitioners seeking review[.]" *Id.* at 946 (quoting *Castro v. United States*, 540 U.S. 375, 380 (2003)).

The Court then considered whether requiring prisoners to file unripe *Ford* claims would further AEDPA's goals. It concluded that such a mandate would not "conserve judicial resources, 'reduc[e] piecemeal litigation,' or 'streamlin[e] federal habeas proceedings.'" *Id.* (quoting *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (per curiam) (bracketing in *Panetti*)).

In finding jurisdiction, the *Panetti* Court noted that AEDPA's successive-application bar was designed to restrain "what is called in habeas corpus practice 'abuse of the writ.'" *Id.* at 947 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)). The "abuse of the writ" doctrine reflected an equitable interest in foreclosing repeated

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reducing friction between state and federal courts exercising habeas jurisdiction – are absent here. If anything, the absence of such concerns supports providing greater leeway for a federal prisoner to seek relief in a second-in-time motion. *Panetti* itself, which notes that finality concerns are "not implicated" by giving district courts jurisdiction to hear previously unreviewable claims, suggests as much. *See Panetti*, 551 U.S. at 946 ("AEDPA's concern for finality, moreover, is not implicated, for under none of the possible approaches would federal courts be able to resolve a prisoner's *Ford* claim before execution is imminent").

habeas motions from prisoners who lacked good grounds for failing to bring particular claims earlier. *See*, *e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 484-85 (1991). Panetti, of course, had good grounds for not bringing his *Ford* claim earlier, since it was unripe. Thus, allowing Panetti's second-in-time petition in no way frustrated AEDPA's goal of curtailing actual "abuse."

Emphasizing the importance of interpreting the relevant statutory language to reflect the realities of post-conviction practice, the Court concluded that Panetti's claim was properly before the federal district court:

> We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party.

Id. at 947.

2. Under *Panetti*'s analysis, a second-in-time § 2255 motion like Petitioner's, which raises a penalty-phase *Brady* claim that could not have been brought earlier because the government managed to hide the necessary evidence past the completion of the original § 2255 proceeding, should not be deemed "successive."

Ordinarily, 28 U.S.C. § 2255(h) bars review of "[a] second or successive motion" for relief from a federal prisoner unless it (1) contains newly discovered evidence sufficient to establish his innocence, or (2) relies on a previously unavailable and retroactive "new rule of constitutional law[.]" Its aim is to prevent prisoners from abusing the writ through intentionally prolonging litigation or repeatedly filing frivolous claims. *See Panetti,* 551 U.S. at 945-47**.** But under the Court's reasoning in *Panetti*, applying § 2255(h) to Petitioner's claims would not only fail to serve those purposes, but would frustrate other important purposes of § 2255, such as ensuring

accurate and fair judgments and preventing executions where government misconduct led to the underlying death sentence. As we discuss in greater detail below, *Panetti* thus supports deeming Petitioner's second-in-time § 2255 motion not "successive."

Although *Brady* and *Ford* claims differ in their substance, the *Panetti* analysis applies in the same way to both. One primary focus of *Panetti* was the implications for habeas practice if the Court found it lacked jurisdiction over Panetti's claim. Precluding *Brady* claims that a prisoner could not have discovered through due diligence would adversely affect habeas practice in the same way that a contrary ruling in *Panetti* would have. The nature of *Brady* claims – that they involve evidence that was not properly disclosed by the Government prior to trial – means that even diligent prisoners often cannot discover them unless the government belatedly discloses the evidence. Just as with *Ford* claims, such a regime would require the filing of "unripe (and, in many cases, meritless) [*Brady*] claims in each and every [first § 2255] application." *Panetti*, 551 U.S. at 943. Thus, as with *Ford* claims, such an inflexible rule would force the courts to address an "avalanche of substantively useless *Brady* claims[.]" *Scott v. United States*, 890 F.3d 1239, 1250-51 (11th Cir. 2018). In fact, the burden of treating sentencing-related *Brady* claims in this manner would be "even more deleterious" than with *Ford* claims, since *Ford* applies only in capital cases. *Id.* at 1251.

Panetti also addressed finality interests. Finality is generally important because the difficulty in prosecuting a long-past offense can prejudice the

government. *See Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986). But allowing a second-in-time filing of a previously unavailable sentencing-phase *Brady* claim, like a comparable *Ford* claim, would not undermine AEDPA's finality concerns. Because the government itself controls whether *Brady* violations occur in the first place, it has in its hands the means to protect the finality of judgments. *See Scott*, 890 F.3d at 1252. Barring such claims as successive "would … allow the government to profit from its own egregious conduct," which "[c]ertainly … could not have been Congress's intent" in enacting AEDPA. *Long v. Hooks*, 972 F.3d 442, 487 (4th Cir. 2020) (en banc) (Wynn, Thacker, and Harris, JJ., concurring) (citation omitted). Furthermore, as with *Ford* claims, finality is "not implicated" because, so long as the Government hides the *Brady* material, courts would not be able to resolve claims based on that material. *See Panetti*, 551 U.S. at 946 (finality "not implicated" where unavailability of evidence would keep courts from resolving relevant claims).

Third, *Panetti* considered the abuse-of-the-writ doctrine. Under that longstanding rule, a claim presented in a second habeas application was not abusive (and thus could be reviewed on the merits) if the prisoner could demonstrate cause for not raising the claim sooner and prejudice from the alleged legal violation. *McCleskey v. Zant*, 499 U.S. 467, 490 (1991). A *Brady* violation that a petitioner could not reasonably have discovered due to his reliance on a purported open file discovery policy constitutes "cause." *Strickler v. Greene*, 527 U.S. 263, 289 (1999). The built-in materiality component of a *Brady* claim – that no violation exists unless timely disclosure of the evidence would have created a reasonable probability of a different

outcome – satisfies the prejudice requirement. *Id.* Thus, a petitioner does not "abuse the writ" by bringing a second motion alleging a *Brady* violation, where he could not reasonably have discovered that claim at the time of his first motion, due to continued governmental action in hiding the *Brady* material. There is "no argument" that such actions would constitute an abuse of the writ. *See Panetti*, 551 U.S. at 947.

In short, all the perspectives from which the Court considered the "second or successive" issue in *Panetti* – the implications for habeas practice, the purposes of AEDPA, and the abuse-of-the-writ doctrine – support concluding that second-in-time penalty-phase *Brady* claims should not be deemed "successive" for purposes of § 2255(h).

Some lower courts have resisted applying *Panetti*'s analysis to *Brady* claims because this Court described *Ford* claims as generally not being ripe "until after the time has run to file a first federal habeas petition." 551 U.S. at 943. According to these courts, *Brady* claims by contrast ripen when the violation occurs (*i.e.* when the government initially withholds the *Brady* material).[19] But *Panetti* did not define the term, and in fact "ripeness" typically refers to the point which an issue reasonably becomes litigable. Black's Law Dictionary says a dispute is ripe when it "has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.'" *Ripeness*, Black's Law Dictionary (10th ed. 2014)).

[19] *See*, *e.g.*, *In re Wogenstahl*, 902 F.3d 621, 627–28 (6th Cir. 2018); *Brown v. Muniz*, 889 F.3d 661, 674 (9th Cir. 2018).

By that measure, a *Brady* claim is unripe if the wronged defendant cannot make "an intelligent and useful decision" about whether to raise it, and it goes without saying that a defendant who has no idea that particular *Brady* material may exist (like Petitioner prior to 2018) is not yet positioned to make such a choice. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 359 (2006) ("In the case of a *Brady* claim, it is impossible for the defendant to know as a factual matter that a violation has occurred before the exculpatory evidence is disclosed.") And the exact definition of "ripeness" does not matter in any event. *Panetti* referenced ripeness only in terms of analyzing the implications for habeas practice of treating a claim as second or successive. 551 U.S. at 943-45. In other words, the Court in *Panetti* did not treat "ripeness" as a litmus test, but merely saw it as relevant to the ultimate test – the implications for habeas practice of forever barring from review a claim that could not reasonably have been raised in an initial collateral attack.

It might be argued that treating *Brady* claims as non-successive, even in circumstances like those in Petitioner's case, would unduly reduce the efficacy of § 2255(h), since that section allows merits review of successive petitions based on "newly discovered evidence." But the "newly discovered evidence" in this case is of a special kind, the type of evidence that the government was constitutionally bound to disclose at trial. When the government fails to fulfill that obligation, there must be a reliable recourse, and one that does not penalize the defendant. This Court has already said as much:

> [T]he fact that such [exculpatory] evidence was *available to the prosecutor and not submitted to the defense* places it in *a different*

> *category* than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the [otherwise applicable] severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

United States v. Agurs, 427 U.S. 97, 110-11 (1976).

Petitioner here should not have to endure a more severe burden, where the government falsely reassured the § 2255 court that it had maintained open file discovery at trial: defense counsel cannot be forced to "scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. 668, 695 (2004); *see also Strickler v. Greene*, 527 U.S. 263, 283 n. 23 (1999) ("if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.").

3. Numerous federal judges have recognized that the approach endorsed by the Fifth Circuit in Petitioner's case conflicts with *Panetti* because it produces inequitable results in individual cases and creates a destructive systemic incentive for prosecutors to flout *Brady*.

Although technically there is not yet a circuit split on this issue, a panel of the Eleventh Circuit has concluded that *Panetti* requires precisely the result Petitioner urges, although it was bound by an earlier panel's contrary conclusion. *See Scott v. United States*, *supra*. And a strong component of the majority of the full Fourth Circuit, echoing *Scott*'s analysis, has called for the Fourth Circuit to reconsider its

contrary precedent. *See Long*, 972 F.3d at 486 (Wynn, Thacker, and Harris, JJ., concurring). A panel from the Ninth Circuit has also recognized the problem. In *Cage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015), the panel recognized that exempting *Brady* claims from the "second or successive" petition doctrine had merit. The panel noted that that Ninth Circuit precedent (which it described as based on a "constrained reading" of *Panetti*) prevented it from reaching Cage's argument that *Brady* claims should warrant such an exemption, lamenting that "under our precedents as they currently stand, prosecutors may have an incentive to refrain from disclosing *Brady* violations related to prisoners who have not yet sought collateral review." A dissenting judge from the Sixth Circuit, too, has criticized the "second or successive" petition doctrine's preclusive effect on *Brady* claims. *See Allen v. Mitchell*, 757 Fed. Appx. 482 (6th Cir. 2018) at *4 (Moore, J. dissenting) ("[T]reating Allen's *Brady* claim as second or successive would incentivize state prosecutors to withhold materially exculpatory evidence until after a petitioner exhausts his initial federal habeas claims; . . . foreclosing adjudication unnecessarily restricts federal habeas review of *Brady* violations.").

Because *Scott* undertakes a very detailed analysis of *Panetti* and how it bears on the question at hand than any other court has conducted, the opinion is worth a close look. The *Scott* court first took account of how this Court in *Panetti* analyzed the issue of what constitutes a "second or successive" petition as to *Ford* claims. *Scott* observed that the Court had examined only three considerations: "(1) the implications for habeas practice if the Court found it lacked jurisdiction over Panetti's claim; (2)

the purposes of AEDPA; and (3) the pre-AEDPA abuse-of-the-writ doctrine." *Scott*, 890 F.3d at 1248 (citing *Panetti,* 551 U.S. at 943-47). It then addressed the implications of those three considerations with respect to *Brady* claims.

As to the first consideration, the *Scott* court concluded that "precluding *Brady* claims that a prisoner could not have discovered through due diligence would adversely affect habeas practice." *Scott*, 890 F.3d at 1250. The nature of *Brady* claims – that they involve evidence that was not properly and timely disclosed by the government prior to trial – means that even diligent prisoners often cannot discover them unless the government discloses them or provides access to its files. Just as with *Ford* claims, such a regime would force conscientious defense counsel to preserve "then-hypothetical" *Brady* claims "on the chance that the government might have committed a material *Brady* violation that will eventually be disclosed." *Id.* at 1250 (citing *Panetti*, 551 U.S. at 943). As with *Ford* claims, such an inflexible rule would burden petitioners with presenting and courts with addressing an "avalanche of substantively useless *Brady* claims[.]" *Id.* at 1250-51. The resulting effect on habeas practice would be "even more deleterious" than with *Ford* claims, since *Ford* applies only in capital cases, while *Brady* applies to any case. *Id.* at 1251.

The *Scott* court then turned to the second *Panetti* consideration, finality interests. For two reasons, it concluded that "the second-in-time filing of a *Brady* claim that a prisoner could not have discovered earlier through the reasonable exercise of due diligence does not negatively implicate AEDPA's finality concerns any more than does the second-in-time filing of a *Ford* claim[.]" *Scott*, 890 F.3d at 1251.

First, the *Scott* court pointed out, finality is generally important because a new trial can prejudice the government, given the difficulty in prosecuting a long-past offense. But because "the government alone holds the key to ensuring a *Brady* violation does not occur" in the first place, any such problem would be of the Government's own making. *Id.* "Whatever finality interest Congress intended for AEDPA to promote, surely it did not aim to encourage prosecutors to withhold constitutionally required evidentiary disclosures long enough that verdicts obtained as a result of government misconduct would be insulated from correction." *Id.*[20]

The *Scott* court summarized its discussion of the considerations addressed in *Panetti* as follows:

> In short, all the *Panetti* factors – the implications for habeas practice, the purposes of AEDPA, and the abuse-of-the-writ doctrine – compel the conclusion that second-in-time *Brady* claims cannot be "second or successive" for purposes of § 2255(h). And nothing *Panetti* teaches us to consider so much as hints otherwise.

Id. (footnote omitted). The court went on to express concern that any contrary holding would violate the Suspension Clause of the U.S. Constitution, Art. I, § 9, cl. 2. *Scott*, 890 F.3d at 1243. It summarized its analysis as follows: "Supreme Court precedent, the nature of the right at stake here (the right to a fundamentally fair trial), and the Suspension Clause . . . require the conclusion that a second-in-time collateral claim

[20] The court also observed in passing that precluding a remedy in this situation could undermine the deterrent effect of the criminal law, one of the values that emphasizing finality is supposed to serve. *Scott*, 890 F.3d at 1251. As it pointed out, "[p]rocedural fairness is necessary to the perceived legitimacy of the law," and "legitimacy affects compliance." *Id.*at 1252. In other words, one who fears that the government will cheat to win at trial "actually has less incentive to comply with the law because, in his view, compliance makes no difference to conviction." *Id.*

based on a newly revealed actionable *Brady* violation is not second-or-successive for purposes of AEDPA." *Id.* at 1259.

Thus, judges from a wide swath of the country – from the Fourth, Sixth, Ninth, and Eleventh Circuits – share a concern that the prevailing narrow reading of *Panetti* blocks federal court review of *Brady* claims that prosecutors have managed to keep hidden through an initial round of post-conviction review. That effect, in turn, incentivizes prosecutors to continue concealing *Brady* material, corrupting both the trial process and the functioning of post-conviction procedural mechanisms for correcting unjust outcomes. Those mechanisms (like proceedings under § 2255) are essential because the record is often underdeveloped to permit such correction on direct appeal. As the *Long* court noted, "*Panetti* elaborated on one such exception (related to mental competency for execution), but left the door open to others." *Long*, 972 F.3d at 486. Indeed, *Panetti* itself held warned against reading the federal habeas statutes in a way that would "produce troublesome results," 510 U.S. at 946 (citation omitted); as these judges recognize, reading 2255 in the manner embraced by the Fifth Circuit in Petitioner's case is doing just that.

The urgent question raised by these numerous federal appellate judges about the proper scope of *Panetti* deserves this Court's attention.

4. The centrality of the *Brady* rule to the integrity of the American criminal justice system supports construing the federal habeas statutes to permit second-in-time, non-successive collateral attacks raising *Brady* claims, where government misconduct made it impossible to raise them in an initial application for post-conviction relief.

It is beyond dispute that a prosecutor's suppression of material exculpatory evidence results in "a proceeding that does not comport with standards of justice[.]" *Brady*, 373 U.S. at 88. As a result, allowing valid *Brady* claims to proceed is critical to "ensuring the integrity of our criminal justice system." *See California v. Trombetta*, 467 U.S. 479, 485 (1984). The importance of complying with *Brady* is reflected in the fact that both houses of Congress recently unanimously passed, and the President signed, the Due Process Protections Act, which amended Fed. R. Crim. P. 5 to require that "on the first scheduled court date when both prosecutor and defense counsel are present," the court must "issue an oral and written order" to both parties that confirms the prosecutor's disclosure obligation under *Brady* "and the possible consequences of violating such order under applicable law." *See* Pub. L. No. 116-182 (2020); Fed. R. Crim. P. 5(f).

The injury to the legitimacy of the legal system inflicted by an initial *Brady* violation is compounded where the government succeeds in concealing the violation throughout the prisoner's initial § 2255 proceeding. In such circumstances, "precluding the filing of a second-in-time petition addressing the newly discovered violation is doubly wrong." *Scott*, 890 F.3d at 1244. Specifically, barring such a second-in-time motion rewards "prosecutors who engage in the unconstitutional

suppression of evidence with a 'win'—that is, the continued incarceration of a person whose trial was fundamentally unfair (and unconstitutional)." *Long*, 972 F.3d at 486 (Wynn, Thacker, and Harris, JJ., concurring). And here the reward awaiting the prosecutors is even more disturbing: Petitioner's long-term incarceration in conditions of psychologically damaging, near-solitary confinement, followed by his death by lethal injection less than a week from now.

And while allowing claims like Petitioner's to proceed would postpone finality, it is important to remember the benefits that such a slight delay will confer: more reliable sentencing judgments, and the elimination of sentences secured through governmental misconduct and outright fraud. Moreover, the government has no basis to complain about any delay necessary to conduct remedial review proceedings. All it must do to avoid delay on the "back end" is comply with *Brady* on the "front end." *See Scott*, 890 F.3d at 1252. Foreclosing consideration of *Brady* claims in the circumstances of Petitioner's case "eliminates the sole fair opportunity for these petitioners to obtain relief," and not only "corrodes faith in our system of justice" but "undermines justice itself." *Id.* at 1243. It "cannot be allowed." *Id.*

5. Petitioner's case is an exceptionally compelling vehicle for considering and deciding this important and unresolved question of federal law.

Petitioner's case presents an excellent vehicle for considering and deciding whether a *Brady* claim asserted in a second 2255 motion, which could not have been included in an initial 2255 motion solely due to government action, should be deemed "successive" and thus required to satisfy the gatekeeping provisions of § 2255(h).

For one thing, no procedural barrier other than the one that is the subject of the question presented stands between Petitioner and merits review of his *Brady* and *Napue* claims (that is, there are no questions of forfeiture, waiver, or retroactivity that the Court would have to address in order to reach the question presented). Similarly, while it is possible that an analogous issue about the application of *Panetti* to claims of prosecutorial misconduct could arise in a case brought by a state prisoner under 28 U.S.C. § 2254, if this Court's examination of that question made it necessary to consider the merits of the underlying *Brady* issue, the impact of a prior state-court decision might have to be taken into account. *See* § 2254(d). Reviewing the issue in a case brought by a federal prisoner like Petitioner under § 2255 provides a more straightforward path.

Second, the *Brady* information that the government concealed here was plainly material. Petitioner played a decidedly secondary role in the offense. To push jurors toward a death sentence, the government worked to persuade them that Petitioner's connection to the gang responsible for the crimes made him a threat of lethal violence in the prison setting where he would live out his years if they spared him. Had jurors known that – contrary to the government's depiction – the gang was organized in the traditional top-down fashion and Petitioner was at its "very bottom," it is at least reasonably likely that they would not have voted unanimously for death.

Finally, the equities favor Petitioner. Petitioner faces execution (in less than a week) and the Court has emphasized that its "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v.*

Whitley, 514 U.S. 419, 422 (1995) (internal quotation marks omitted; citation omitted); *see also*, *e.g.*, *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (noting that "the severity of [a death] sentence mandates careful scrutiny in the review of any colorable claim of error"). In addition, the Court has a special responsibility to superintend the administration of justice in federal court, which includes setting rules to encourage compliance with *Brady* by federal prosecutors like the ones who concealed Sgt. Hunt's expert opinion from Petitioner.[21]

VII. CONCLUSION AND PRAYER FOR RELIEF

This Court should grant certiorari to consider whether, under *Panetti*, it is fair to treat as "successive" a second-in-time § 2255 motion that presents sentencing-phase *Brady* and *Napue* claims that – as a result of government misconduct – could not have been raised in the prisoner's first such motion. Such an approach, as a growing number of federal appellate judges have recognized with alarm (*see Scott, Long, Allen*, and *Cage*, *supra*), allows the government unilaterally to bar a prisoner from any judicial review of such claims. Here, leaving the Fifth Circuit's ruling

[21] As former Chief Judge Kozinski of the Ninth Circuit observed in 2013, "There is an epidemic of *Brady* violations abroad in the land," in both state and federal court, and "[o]nly judges can put a stop to it." *Olsen v. United States*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc). This epidemic includes the notorious misconduct by federal prosecutors in the trial of the late Senator Ted Stevens of Alaska. *See*, *e.g.*, Charlie Savage & Michael S. Schmidt, *Inner Workings of Senator's Troubled Trial Detailed*, N.Y. Times, Mar. 16, 2012, at A19. Unfortunately, such violations are not always the result of a rogue prosecutor or prosecutorial office; instead, "[s]tudies, reports, and commissions have found striking evidence of widespread noncompliance" with *Brady* obligations. John C. Jeffries, *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 227 (2013).

undisturbed will have the terrible consequence of allowing the government to execute Petitioner while sweeping under the rug its violations of his basic rights in his capital sentencing hearing.

The Court should stay Petitioner's execution and grant certiorari to review the Fifth Circuit's judgment in his case, or grant such other relief as justice requires.

Respectfully submitted,

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