CASE No. ____

In The Supreme Court of the United States

JOHN MANDACINA,

Petitioner,

v.

FREDERICK ENTZEL,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals correctly conclude that petitioner's *Brady* claim fell outside the scope of the "savings clause" of 28 U.S.C. § 2255(e).

2. Does the Due Process Clause permit resort to 28 U.S.C. § 2241 based on *Brady* evidence that was withheld by the Government until after the prisoner's first opportunity for federal habeas relief has concluded.

II. TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

PETITION FOR WRIT OF CERTIORARI

John Mandacina respectfully petitions this Court for a writ of certiorari to review the United States Court of Appeals for the Seventh Circuit's judgment affirming the district court's denial of his 28 U.S.C. § 2241 petition.

OPINIONS BELOW

The Seventh Circuit's opinion and judgment affirming the district court's denial is published at *Mandacina v. Entzel*, 991 F.3d 758 (7th Cir. 2021), and is included in the Appendix ("App.") B at 24A. The order in the district court is not published in the Federal Supplement but is available at *Mandacina v. Kallis*, 1:18-cv-1453 (C.D. Ill. Nov. 29, 2019) and in App. A.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2021. The petitioner has 150 days to file his petition for writ of certiorari which is until

August 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Part III of the Rules of the Supreme Court of the United States. This petition is timely pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 924. Penalties

(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a

crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.].

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or

device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—
(A) be sentenced to a term of imprisonment of not less than 15 years; and
(B) if death results from the use of such ammunition—
(i) if the killing is murder (as defined in section 1111 [18 USCS § 1111]), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and
(ii) if the killing is manslaughter (as defined in section 1112 [18 USCS § 1112]), be punished as provided in section 1112 [18 USCS § 1112].

18 U.S.C. § 1513. Retaliating against a witness, victim, or an informant

(a) (1) Whoever kills or attempts to kill another person with intent to retaliate against any person for—
(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings,
shall be punished as provided in paragraph (2).
(2) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112 [18 USCS §§ 1111 and 1112]; and
(B) in the case of an attempt, imprisonment for not more than 30 years.
(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—
(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer;
or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.
(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.
(d) There is extraterritorial Federal jurisdiction over an offense under this section.
(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible

commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

(f) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(g) A prosecution under this section may be brought in the district in which the official proceeding (whether pending, about to be instituted, or completed) was intended to be affected, or in which the conduct constituting the alleged offense occurred.

18 U.S.C. § 1958. Use of interstate commerce facilities in the commission of murder-for-hire

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

(b) As used in this section and section 1959 [18 USCS § 1959]—

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything

else the primary significance of which is economic advantage;
(2) "facility of interstate or foreign commerce" includes means of transportation and communication; and
(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
(c) The writ of habeas corpus shall not extend to a prisoner unless—
(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or

omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of

confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
(c)
(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255 [28 USCS § 2255].
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the

final judgment on application for a writ of habeas corpus.
(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.
(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
(1) the date on which the judgment of conviction becomes final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under

this section shall be governed by section 3006A of title 18.
(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—
(1) 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; or
(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

(a) Mandacina's Original Proceedings

John A. Mandacina was charged in the Western District of Missouri with "conspiring to retaliate against an informant, 18 U.S.C. § 371 (1988), retaliating against an informant, 18 U.S.C. § 1513(a) (1988), using interstate commerce in the commission of the retaliation, 18 U.S.C. § 1958 (1988 & Supp. V 1993), and using a firearm in the commission of the two substantive offenses, 18 U.S.C. § 924(c) (1988 & Supp. V 1993). *United*

States v. McGuire, 45 F.3d 1177, 1180 (8th Cir. 1995). The charges relate to the murder of Larry Strada ("Strada"), a cooperating witness. As recounted by the Eighth Circuit in Mandacina's direct appeal:

> Larry Strada provided information to the FBI implicating Mandacina in bookmaking and other criminal activity in the Kansas City area. Mandacina later pled guilty to charges of conspiracy to conduct an illegal gambling business. On May 3, 1990, Mandacina was sentenced to twelve months imprisonment.
>
> At approximately 2:00 a.m. on May 16, 1990, Larry Strada returned home from a bar he operated and was killed in front of his home while taking out the trash. He was shot six times in the head and twice in the chest. The gunman did not take Strada's jewelry, his wallet with approximately $200 in cash, or a bank bag with the bar's nightly receipts. The Kansas City Area Metro Squad investigated Strada's murder for approximately one week before turning it over to the FBI and law enforcement authorities in Gladstone, Missouri. No one found a weapon, a witness, or a lead.
>
> In mid-December 1990, McGuire and his brother-in-law Terry Dodds were arrested while committing a bank robbery in Milwaukee, Wisconsin. Dodds pled guilty to bank robbery and firearm charges, and received a sentence of seven years, nine months. In early 1992, Dodds decided

to cooperate with the federal authorities. FBI Agent Daniel Craft interviewed Dodds regarding a number of bank robberies. During this interview, Dodds implicated Thomas Earlywine as a participant in the robberies. Dodds also stated that he had overheard a conversation in which Mandacina said that he wanted somebody killed who had fingered him for a crime.

The FBI arrested and interviewed Earlywine about the robberies and the contract killing in Kansas City. Earlywine identified the victim of the contract killing as Lonnie or Larry Strada or Strocka. Earlywine told Agent Craft that, in May of 1990, a hitman murdered Strada while Strada was taking out his trash, and that Mandacina ordered the hit for $25,000.

Earlywine testified at trial that, in November 1989, Earlywine and Dodds went to the Red Front Restaurant and Lounge in the river market area of Kansas City. Both Earlywine and Dodds described a conversation in which Mandacina told McGuire that he had been indicted on federal gambling charges and that he thought that Strada had already fingered him or was preparing to do so. Mandacina then asked if McGuire would kill Strada.

Earlywine stated that McGuire bragged previously that he would do anything for Mandacina or members of Kansas City organized crime, including "heavy work," i.e. murder. McGuire told Earlywine that he wanted to ingratiate himself with the people he believed to be in "the outfit" or mafia in Kansas City.

Earlywine also testified that on another occasion, Mandacina mentioned the gambling indictment, but told McGuire and Earlywine that he did not want to talk further at the Red Front. He suggested that they go to his brother-in-law's restaurant, "Chubby's." Once there and while in Earlywine's presence, Mandacina said that he wanted Strada murdered and that he would pay McGuire $25,000 to do it. Mandacina also asked McGuire if he would murder Mandacina's son-in-law. McGuire said that he would and that it would be "gratis," or free.

In June 1990, McGuire met Earlywine at a bar in Rockford and told Earlywine that Strada had been murdered. McGuire said that Strada was murdered while taking out his trash and that he had deserved it. Earlywine did not ask McGuire if he killed Strada, because Earlywine believed that McGuire would have told him directly if McGuire wanted him to know.

In July 1990, Earlywine and McGuire came to Kansas City. McGuire called Frank Angotti and arranged to meet him for a drink at the Red Front. In an attempt to get Angotti to join their crime spree, McGuire told Angotti about the bank robberies in which Earlywine, Dodds and McGuire were involved and took him outside to show him a bag full of guns and a bag full of money. They then went back into the Red Front. Angotti testified to the following exchange, which occurred after Earlywine left the table:

I told Pat [McGuire], I said, "Pat, I have been hearing rumors about you." He said, "What kind of

rumors?" I said, "Well, I hear that you did Larry. Did you do Larry?" He said yes.

At trial, Dodds and Earlywine testified regarding numerous robberies involving both of them and McGuire. They also testified regarding the necessity of obtaining weapons for this purpose. While drinking in Jennie's restaurant in downtown Kansas City, Earlywine and Dodds testified that McGuire asked the bartender where he could buy more guns. The bartender introduced McGuire to a woman at the bar, Brock Decastrogiovannimausolf, whose boyfriend owned a gun shop. The next day Brock introduced McGuire to the gun shop's owner, Dennis Crouch. At first Crouch refused to sell guns to McGuire, and McGuire enlisted John Mandacina to give assurances to Crouch for the sale, which was ultimately concluded.

McGuire, 45 F.3d at 1181-82. As the district court

recognized, the prosecution also:

relied, in part, on the testimony of Agent Daniel Craft to proof its case. Agent Craft was one of the key FBI Agents who conducted the initial interviews of Dobbs and Earlywine. According to Mandacina's brief, the prosecution, in his closing argument at trial, told the jury that "[i]f you think Earlywine is lying, if you want to believe that, then you have to believe that Special Agent Craft fed him all this stuff. . . ." Pet. at 10 (Doc. 1). The prosecution also told the jury "[t]here is some dispute, and I am not sure we will ever get to the bottom of it, about whether Dodds gave Special Agent Craft the name Larry Strada during that

first interview." *Id.* Accordingly, Agent Craft's testimony and reliability was, at a minimum, at issue at the trial.

(b) Agent Craft's Misconduct

The district court found that Mandacina did not learn "until after his initial motion under 28 U.S.C. § 2255 was denied [that] Agent Craft had engaged in previous misconduct." That misconduct, as recounted by the district court, was quite serious:

In 1983, Agent Craft had "conspired to falsify the results of a polygraph examination" that he had administered. (R. 1688). As summarized in a letter by FBI officials disciplining Craft:

The results of the tests in which [Craft] contrived to circumvent established Bureau procedures could have caused damage to this vital program. [Craft's] conduct in this matter undercut the integrity of the polygraph process and cannot be condoned. [Craft's] attempt to cover up an employee's misrepresentations, if undetected, would have usurped the authority and responsibility of the Director to deal fairly and impartially with matters of internal misconduct. Pet. App. at R. 1689 (Doc. 1-7 at 89).

Additionally, Agent Craft mishandled memos called "302" reports regarding eyewitness photo

identifications in a federal bank robbery case, which lead to the wrongful convictions of Frank Bolduc and Francis Larkin. *See Bolduc v. United States*, 402 F.3d 50, 52 (1st Cir. 2005). In the 302 reports eyewitnesses had identified other individuals as the perpetrators, but the 302 reports were not placed in the investigation file, were not turned over to the U.S. Attorney's Office, and were not made available to the defendants. Id. The memos later were discovered when the true bank robbers confessed to the crimes. Mandacina also points the Court to misconduct of Agent Craft that occurred after Mandacina's trial. *See United States v. Acosta*, 111 F. Supp. 2d 1082, 1088 (E.D. Wis. 2000) (recounting misconduct of Agent Craft in Minnesota involving failure to heed a request for counsel).

(c) Mandacina's Pre-2241 Habeas Litigation

Mandacina was sentenced to life imprisonment and his convictions were later affirmed by the Eighth Circuit. *McGuire*, 45 F.3d at 1190. Mandacina later moved for 28 U.S.C. § 2255 relief, but the district court denied the motion. *Mandacina v. United States*, 2001 U.S. Dist. LEXIS 10971 (W.D. Mo. July 25, 2001);

Mandacina v. United States, 328 F.3d 995 (8th Cir. 2003).

Mandacina appealed the denial of his § 2255 motion. After briefing in Mandacina's appeal was complete, Mandacina attempted to add the *Giglio* claim that eventually formed the basis of his § 2241 petition in the district court. According to the district court, the Eighth Circuit's "opinion as a whole does not mention his motion to supplement the record or his *Giglio* claim, so it seems unlikely that this language was meant to address his *Giglio* claims. Instead, it appears that the Eighth Circuit did not address the motion to supplement with the *Giglio* claim at all."

Mandacina next sought leave to file a second or successive 28 U.S.C. § 2255 motion with the Eighth Circuit. Mandacina argued that the Government's failure to turn over the *Giglio* material concerning Agent Craft's misconduct was

unlawful. The Government argued that the *Giglio* material did not satisfy the requirements of 28 U.S.C. § 2255(h) because the evidence was not "newly discovered" and was only impeaching. The Eighth Circuit, without explanation, denied Mandacina's request for authorization to file a second or successive § 2255 motion.

(d) Mandacina Files For 28 U.S.C. § 2241 Relief

On December 24, 2018, Mandacina petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Mandacina argued he was entitled to § 2241 relief because the Government's *Giglio* violation wherein it failed to disclose Agent Craft's misconduct. Further, Mandacina contended he could proceed via § 2241 because there was a "structural problem" with § 2255 which precluded an original, unobstructed procedural shot at raising his *Giglio* claim. To the

extent § 2255(e) could not be construed as authorizing his challenge, Mandacina argued that § 2255(e) violated the Suspension Clause and Due Process Clause.

(e) The District Court Dismissed Mandacina's Petition

On November 18, 2019, the district court dismissed Mandacina's § 2241 petition after finding that his *Giglio* challenge did "not fall within the savings clause." App. at A. The district court found that "Agent Craft's testimony and reliability was, at a minimum, at issue at the trial." Nevertheless, without deciding whether Mandacina had a meritorious *Giglio* claim, the district court held that Mandacina's challenge could not proceed under the savings clause.

According to the district court, the *Giglio* claim Mandacina raised fell "squarely within the type of

claims § 2255(h)(1) intended to limit." As the district court put it:

> While § 2255(h)(1) does not allow any claims that a person is constitutionally innocent of the type of punishment, § 2255(h)(1) would allow a *Giglio* claim that meet (sic) the heightened "clear and convincing" standard. Mandacina argues no *Giglio* claim could meet this heightened standard, but the Court disagrees. There could be a case where later-discovered evidence showed that a material prosecution witness was clearly lying—which if the prosecution had little or no other evidence of guilt could amount to "clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense."

The district court also concluded that Congress was aware of *Giglio* claims when it created § 2255(h) and therefore "later-discovered *Giglio* claims are exactly the type of cases Congress meant to restrict under § 2255(h)(1) when it passed AEDPA."

Similarly, the district court held that Mandacina could not resort to the savings clause because his *Giglio* claim was not one of actual innocence.

Finally, the district court held that Mandacina's inability to resort to § 2241 did not violate the Suspension Clause because Congress "is free to limit the extent to which federal courts can provide post-conviction collateral remedies." The district court did not address Mandacina's argument that restricting access to § 2241 under these circumstances violates Due Process.

(f) <u>The Seventh Circuit Affirmed the District Court</u>

On March 12, 2021, the Seventh Circuit affirmed the district court's decision to deny the § 2241 petition. The Court found that Mandacina's claim rested on *Brady v. Maryland*, 373 U.S. 83 (1963) instead of *Giglio*. The Court held that Brady claims are made and decided under § 2255 routinely and there is nothing "inadequate or ineffective" about § 2255 from that perspective. The Court further held that Mandacina's

contention that any limit on § 2241 unconstitutionally suspends the writ of habeas corpus conflicts with the decision holding that the Suspension Clause does not entitle anyone to successive collateral attacks on a criminal judgment.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Erred In Holding That Mandacina's *Brady* Claim Fell Outside The Scope Of The "Savings Clause" Of 28 U.S.C. § 2255(e).

The Seventh Circuit's decision exacerbates a long-standing circuit split about what the proper test for the "savings clause" of 28 U.S.C. § 2255(e) is.

Prior to 1998, the Department of Justice took the view that relief under the saving clause is unavailable for statutory claims. Following rulings by courts of appeals that "decline[d] to adopt the government's restrictive reading of the

habeas preserving provision of § 2255," *Triestman v. United States*, 124 F.3d 361, 376 (2d Cir. 1997), see *In re Davenport*, 147 F.3d 605, 608-612 (7th Cir. 1998); *In re Dorsainvil*, 119 F.3d 245, 248-252 (3d Cir. 1997), the Department reconsidered its views, taking the position, that an inmate can seek relief for a statutory-based claim of error under § 2255(e). The Department has since reevaluated that change in position and has determined, in accord with *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, *cert. denied*, 138 S. Ct. 502 (2017), and the Tenth Circuit's decision in *Prost v. Anderson*, 636 F.3d 578, 597 (2011) (Gorsuch, J.), *cert. denied*, 565 U.S. 1111 (2012) that its original interpretation of § 2255(e) was correct, and that a contrary reading would be insufficiently faithful to the statute's text and to Congress's evident purpose in limiting the circumstances in which a criminal defendant may

file a second or successive petition for collateral review.

The court of appeals' approach to the savings clause is particularly unsound as applied to the circumstances of this case, which involves whether the saving clause of 28 U.S.C. § 2255(e) permits a *Brady* claim based on evidence that existed at the time of trial, but was not discovered until after § 2255 relief became unavailable because of the Government's concealment.

Because the proper test for the savings clause was directly raised in the district court and on appeal, the instant case presents an excellent vehicle for the Court to provide long-needed guidance to lower courts about how to properly apply the savings clause of § 2255(e).

II. Due Process Is Implicated If The Statutory Savings Clause Cannot Be Satisfied In This Case

The court of appeals rejected Petitioner's interpretation of the savings clause, and rejected his right to present his *Brady* claim as a matter of Due Process. The Seventh Circuit in the case of *Morales v. Bezy*, 499 F.3d 668, 670 (7th Cir. 2007), said "[t]hat is not to say that a decision by Congress to eliminate all postconviction remedies could not be challenged," and that "the proper route would be the due process clauses rather than the suspension clause . . . ." *Id.* That "proper route" was invoked in this case, and affords this Court an alternative basis upon which to reverse the judgment of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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