No. 21-6757

IN THE

SUPREME COURT OF THE UNITED STATES

DIMITAR PETLECHKOV — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DIMITAR PETLECHKOV
(Your Name)

780 MOROSGO DR NE, UNIT 13272
(Address)

ATLANTA, GA 30324
(City, State, Zip Code)

404-954-0890
(Phone Number)

QUESTION(S) PRESENTED

Question 1:

Is judicial reviewability of a trial attorney's failure to impeach a key prosecution witness with regard to the most critical and material aspect of the case with perjurious and exculpatory sworn prior statements reasonably debatable among jurists of reason to warrant granting a Certificate of Appealability, where counsel investigated the law and facts surrounding an accused's case but the course of action chosen was so woefully deficient to the point of depriving the accused of his Sixth Amendment right to effective assistance of counsel and a fair trial?

The District Court for the Western District of Tennessee and the Sixth Circuit said the issue is not subject to debate. Numerous appellate decisions from the Third, Seventh, Eighth, Ninth and Eleventh Circuits as well as prior decisions of the Sixth Circuit say that not only is the issue debatable, but that the Sixth Amendment is absolutely offended by such failure to impeach. The very case on which the Sixth Circuit relied to deny a COA actually reviewed that attorney's failure to impeach before concluding it was not prejudicial, but the Sixth Circuit refused to do so in this case.

Question 2:

Part A. Are an accused's First and Fifth Amendment rights of access to the courts and Due Process violated when a court clerk refuses to docket a tendered motion to reconsider said clerk's adverse action/decision in order to avoid judicial review even though the Federal Rules of Appellate Procedure and the 6th Circuit Local Rules expressly permit judicial review of adverse decisions of a court clerk?

Part B. Did the court clerk err when she returned a timely filed petition for en banc rehearing of an order denying a Certiciate of Appealability as "successive" when the only previously filed petition sought rehearing before the original panel and both the Federal Rules of Appellate Procedure and the 6th Circuit I.O.P. Rules expressly permit a separately filed petition for en banc review of an order denying COA?

LIST OF PARTIES

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

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

RELATED CASES

Petlechkov v. United States, No. 21-5263, United States Court of Appeals for the 6th Circuit. Judgment entered August 23, 2021. Rehearing denied September 28, 2021

Petlechkov v. United States of America, No. 19-cv-2467, United States District Court for the Western District of Tennessee. Judgment entered February 23, 2021

United States v. Petlechkov, No. 17-cr-20344, United States District Court for the Western District of Tennessee. Judgment entered July 7, 2020

TABLE OF CONTENTS OPINIONS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

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

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

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

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

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

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

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was August 23, 2021.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 28, 2021, and a copy of the order denying rehearing appears at Appendix C.

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

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

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

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

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

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI:

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

STATEMENT OF THE CASE

Petitioner was indicted on mail fraud charges stemming from an alleged "scheme" to obtain discounted shipping rates by misrepresenting to FedEx that he was a vendor for one of their larger corporate customers – General Dynamics. General Dynamics had highly discounted shipping rates due to its large amount of shipping volume with FedEx. The Master Agreement between the two companies provided that subsidiaries and divisions of General Dynamics can receive the discounted pricing as

long as they are at least 51% owned by the corporate parent. Trial Tr., Cr. R. 75, PID 377-78 & Exhibits 1-3. See also App. B at *8.

As relevant here, the government was required to prove materiality of Petitioner's false statement that he was a vendor to a General Dynamics subsidiary, in order to obtain discounted shipping rates from FedEx. See App. A at *3, fn. 1. The key prosecution witness – Andrew Newbon – testified at trial that it was "FedEx's standard 'operating procedure' [] to extend a customer's discounts to its vendors. R. 75, Pg. ID 384-85, 397-98." *United States v. Petlechkov*, 922 F.3d 762, 769 (6th Cir. 2019). Indeed, the Sixth Circuit affirmed Petitioner's conviction on direct appeal for this very reason: "Because FedEx had such a policy, an ordinary, prudent employee would follow it. Thus, Petlechkov's false statement was capable of influencing FedEx's decision." Id.

Petitioner's § 2255 motion filed in the district court presented a single claim for relief – alleging that trial counsel was constitutionally deficient under the Sixth Amendment of the U.S. Constitution for failing to impeach the key government witness with grossly inconsistent, perjurious and more favorable (exculpatory) prior statements. Indeed, "the government's case rested *entirely* on the testimony of its star witness, Andrew Newbon ... Mr Newbon provided the critically damaging testimony that rendered defendant's misrepresentation material ... Mr Newbon's [] testimony was central to the issue of determining defendant's guilt." R. 1, PID 4. Notably, no documents were introduced at trial to corroborate Mr. Newbon's testimony and no other witnesses testified on this topic. The uncorroborated testimony of this witness was the only proof offered by the government on the essential criminal element of materiality in a mail fraud prosecution under 18 U.S.C. § 1341 and that testimony was highly incriminating to Petitioner.

Further, Petitioner alleged, and counsel Stengel admitted, that he was in possession of grossly inconsistent and more favorable prior statements made by this witness in an earlier civil proceeding, *Federal Express Corp. v. Petlechkov*, No. 15-2565, (N.D. Ga). See App. B at *8. These prior statements were made under oath and were exculpatory in nature because they would have had the effect of proving that Petitioner's misrepresentation could not possibly be material. Specifically, Mr. Newbon was deposed in the civil case as a FedEx corporate designee pursuant to Fed.R.Cv.P. 30(b)(6) and his testimony in that deposition was that *vendors* to General Dynamics are *not* entitled to receive the discounted rates enjoyed by General Dynamics and its subsidiaries and affiliates. R. 1-1, PID 19. See also App. E at 239: 13-25. This deposition transcript was not only a perjurious prior statement but was also substantive evidence highly supportive of the defense's theory that Petitioner's misrepresentation was not material. In addition, Mr. Stengel also had a General Dynamics National Account Master Report which showed that *not a single legitimate vendor* in the history of the FedEx/General Dynamics relationship *ever* received a discount on their shipping rate. See R. 1-1, PID 21-23. Besides the above evidence and inconsistent statements, Petitioner also averred that other inconsistent statements and evidence relating to how FedEx discovered the alleged "scheme" should have been used to undermine Mr. Newbon's credibility. R. 1-1, PID 7, 24, 28, 30, 31 & App. B at *8. Notably, counsel Stengel did not use any of the above statements and evidence to cross examine Mr. Newbon, even though they were readily available and could and would have raised significant doubt in the mind of any rational juror.

The district court denied the § 2255 motion on the merits reasoning that "counsel's decision whether and to what extent to conduct cross examination are

necessarily strategic and thus 'effectively insulated' from ineffectiveness review," citing to an unpublished case *Hurley v. United States*, 10 F. App'x 257, 260 (6th Cir. 2001), and in any event, reasonable and competent. See App. B at *9. The court also denied a Certificate of Appealability concluding that no jurists of reason could debate this claim. *Id.* at *11. Significantly, at no point did the government, counsel Stengel or the district court ever acknowledge the substance of the prior inconsistent statements – which unequivocally exonerate Petitioner of this "crime." Nor did they ever acknowledge any of the 16 appellate cases Petitioner included in support of his § 2255 motion which show that numerous courts have found ineffectiveness based on a failure to impeach a crucial witness with grossly inconsistent and more favorable prior statements. R. 1-1, PID 8-13 & R. 12-1.

A single judge from the Sixth Circuit summarily affirmed the district court, similarly concluding that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," citing to *Strickland*, 466 U.S. at 690 and *Moss v. Hofbauer*, 286 F.3d 851, 864 (6th Cir. 2002), and further finding that "no reasonable jurist could debate the district court's denial of Petlechkov's ineffective-assistance-of-counsel claim." App. A at *4.

On August 30, 2021 Petitioner filed a 20 page motion to reconsider the single judge order (6th Cir. No. 21-5263, Doc: 21) and on September, 28, 2021 a three judge-panel of the Sixth Circuit, construing the motion as a petition for rehearing before the original panel, denied it with a single sentence: "We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in Petlechkov's COA application." See App. C. On October 7, 2021 Petitioned filed a timely petition for en banc review. The court clerk returned the petition unfiled on November

5, 2021 stating that "[f]urther review of the court's ruling is not available. Neither the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circuit make any provision for filing successive petitions for rehearing." App. D. The same day, Petitioner filed a motion for reconsideration of the court clerk's decision by a judge. See App. F. To date, the clerk has refused to docket said motion or present it to a judge for review.

REASONS FOR GRANTING THE PETITION

I. The Proceeding Presents A Question Of Exceptional Importance To The Public – By Completely Removing Judicial Review Of An Attorney's Performance At Trial Under The Guise Of Strategic Choice, The Sixth Circuit Has Given Its Attorneys A License To Act With Impunity.

A. The panel said the attorney's decision on how to conduct cross examination is "unreviewable" and refused to acknowledge or address the substance and potential impact of the exculpatory evidence and prior inconsistent statements and the lines of questioning trial counsel did not pursue, which Sixth Circuit precedent requires the court to do

In his order denying a Certificate of Appealability, Judge Clay concluded that jurists of reason could not debate the district court's decision that Petitioner's trial counsel's "strategic choices made after thorough investigation of law and facts" are "unchallengeable," citing to *Moss v. Hofbauer*, 286 F.3d 851, 864 (6th Cir. 2002). App. A at *4. Firstly, it should be noted that in *Moss*, a panel of the Sixth Circuit actually reviewed counsel's choices and decisions to forego certain lines of questioning on the merits before ruling that those avenues would not have changed the outcome of the proceeding. *286 F.3d at 864-66*. Specifically, the court noted: "[the attorney] considered [the witness's] testimony to be inherently unbelievable and thought that cross-examination would simply focus additional attention on [petitioner]'s alleged admission." Id. at 864.

In the instant case, Judge Clay essentially ruled that the court cannot indulge in analyzing the avenues counsel did not pursue when counsel chose to limit the scope of cross examination. App. A at *4. For this reason, the court did not even consider how further cross examination could have affected the outcome of the trial. Mr. Stengel simply provided a self-serving and misleading statement that further cross examination would have allowed Mr. Newbon to "equivocate" and Judge Clay rubberstamped this as effective strategy without further proof or inquiry. Not so. In reality, Mr. Newbon's prior sworn testimony and so called "equivocation" would have only further discredited his false trial testimony. Mr. Newbon admitted in the civil case that the only discount to be had from a vendor relationship was a waiver of pickup fees for Ground shipments. See App. E at 240. This is wholly immaterial to the case at hand and would have done nothing to rehabilitate Mr. Newbon in the eyes of the jury had he been confronted with his prior statements. Ironically, in *Moss*, Judge Clay took the opposite view by vehemently dissenting from the majority and noting that he found Moss's counsel's actions or inactions deficient and that prejudice should be presumed. See *286 F.3d at* 870-878. Thus, Judge Clay's decision that the court cannot analyze counsel's strategic choices is not only in direct conflict with the very case he cites but also in contravention of a long line of precedental cases from the Sixth Circuit, as shown below.

For instance, in *Higgins v. Renico*, 470 F.3d 624, 632-33 (6th Cir. 2006), the sole witness to the crime had given inconsistent prior statements. The petitioner's trial counsel had plenty of ammunition with which to impeach the witness's testimony and the need for such impeachment was compelling. This Court found that counsel's decision to forgo the opportunity to damage the credibility of the prosecution's only witness to the crime amounted to a significant dereliction of duty and was clearly

deficient. It noted:

> In our adversarial system of justice, a defendant's right to cross-examination is an essential safeguard of fact-finding accuracy. It is the principal means by which the believability of a witness and the truth of his testimony are tested ... Given the importance of the star witness's testimony, it is not difficult to imagine that the outcome of the trial was unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.
> Id. (internal quotations and citations omitted).

The Court reasoned that by failing to cross examine the witness, "his attorney left the jury with essentially unrebutted, and untested, testimony [implicating petitioner] ... in effect providing [petitioner] with no defense at all." Id. (internal quotation marks omitted). Finally, the Court found prejudice in the case obvious "where defense counsel failed to cross-examine an identification witness whose inconsistent identification testimony from previous trials could have raised questions in the minds of the jurors regarding the witness's credibility and/or ability to identify the defendant." Id. (citation omitted).

Similarly, in *Blackburn v. Foltz*, 828 F2.d 1177, 1183 (6th Cir. 1987), this Court reasoned that where a witness's inculpatory testimony is central to a case, weakening it through impeachment with prior inconsistent statements is the one obvious and only logical defense and that the failure to do so left the only evidence against the petitioner virtually unchallenged to the point of depriving him of a meaningful defense. The Court remarked that due to counsel's error, the petitioner "was unable to subject the prosecution's case to the crucible of meaningful adversarial testing – the essence of the right to effective assistance of counsel" thus rendering the "resulting conviction unreliable." Id. (internal quotation marks omitted).

More recently, in *Peoples v. Lafler*, 734 F.3d 503, 512-14 (6th Cir. 2013), the Sixth

Circuit again revisited the importance of witness impeachment, observing that not seeking testimony or asking additional questions of witnesses to elicit information favorable to the defense "could not have been a protected strategic decision when there is no conceivable way that this decision could help the defense." Id. The Court went on to explain that the petitioner "was deprived of a substantial defense because he had no other way to prove his theory." Id. Citing to *Hutchison v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002) and *Foster v. Wolfenbarger*, 687 F.3d 702, 708 (6th Cir. 2012), the Court considered "whether the evidence that counsel did not pursue would have been consistent with the defense theory to determine whether performance was deficient" and ultimately "finding deficient performance where ... defense ... would have been 'completely consistent with, and in fact complimentary to, trial counsel's theory.'" Id. The Court then concluded as follows:

> Where, as here, counsel fails to use [evidence and documents] the client himself obtained that would have proven counsel's own defense theory, the failure is, a fortiori, unreasonable to the point of constitutional deficiency. It certainly is not, by any objective measure, sound trial strategy.
>
> Trial counsel's failure to use readily available evidence to impeach the credibility of the only witnesses tying [petitioner] to the crime was well outside the range of professionally competent assistance, and it so undermined the trial that it cannot be relied on as having produced a just result.

734 F.3d at 514.

As far back as *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974), the Sixth Circuit has found deficient performance where counsel could have taken a course of action that would have better protected his client. "It is a denial of the right to the effective assistance of counsel for an attorney to advise his client erroneously on a clear point of law if this advice leads to the deprivation of his client's right to a fair trial. Defense strategy and tactics which lawyers of ordinary training and skill in the criminal

law would not consider competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected a defendant and was reasonably foreseeable as such before trial." Id. (citations omitted).

As Petitioner has shown, the decision of the Sixth Circuit in this case is contrary to its own line of precedents. Therefore, consideration by this Court is necessary to secure and maintain uniformity of the court's decisions. Most importantly, leaving this decision in place will set a very dangerous precedent that every attorney in the Sixth Circuit is free to do whatever they feel like in terms of strategy - even if they decide to not do any cross examination at all - because they won't suffer any consequences as long as they cloak their ill-chosen strategy under the guise of strategic choice after thorough investigation of law and facts, no matter how ridiculous and nonsensical that strategy may be. As the dissent in *Moss* put it so well, the majority's position "appears to come down to a finding that so long as counsel is physically present during trial and conscious, ineffective assistance of counsel *per se* cannot be found." *286 F.3d at 862, 873.*

B. Every circuit to have addressed an attorney's failure to impeach a key witness with grossly inconsistent and more favorable prior statements has found such conduct not only judicially reviewable but also deficient and prejudicial – in clear violation of the Sixth Amendment.

For instance, in *Nixon v. Newsome*, 888 F.2d 112, 115-16 (11th Cir. 1989), a witness testified at trial that she saw the petitioner shoot her husband, but in a prior trial she had testified that another defendant had shot her husband. The court found that the attorney's failure to cross examine by confronting the witness with her prior statements or by introducing the transcript "sacrificed an opportunity to greatly weaken the star witness's inculpatory testimony" and it "perceived no excuse for the failure to

impeach [the witness] with her previous testimony." Id.

In *Smith v. Wainwright*, 799 F.2d 1442, 1443-44 (11th Cir. 1986), the only witness against the petitioner had initially confessed to police to committing the crime. The witness's wife also made an initial statement to the police that her husband had told her about the crime and she did not implicate the petitioner. At trial, they both testified that the petitioner committed the crime and the jury was never made aware of these initial statements to the police. The court reasoned that the jury would have had good reason to disbelieve the witnesses' trial testimony if they knew how remarkably different it was from their initial statements, which were never introduced. In the end, the court concluded that witness "credibility was the central issue in the case. Available evidence would have had great weight in the assertion that [the witness's] testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different." Id.

Similarly, in *Driscoll v. Delo*, 71 F.3d 701, 709-11 (8th Cir. 1995), the petitioner's counsel knew about a witness's prior statements to investigators, yet "never questioned him about the inconsistencies between those prior statements and his testimony at trial. In fact, counsel never made the jury aware of [the witness's] prior statements." All things considered, the court found "no objectively reasonable basis on which competent defense counsel could justify a decision not to impeach a [witness]."

Next, in *Berryman v. Morton*, 100 F.3d 1089, 1098-99 (3d Cir. 1996), the Third Circuit had before it a case where a trial witness gave remarkably different and inconsistent testimony compared to an earlier judicial proceeding. Here, too, the petitioner's counsel "never attempted to use the prior testimony to impeach [the

witness]" who implicated the petitioner in the crime during trial.

> "Petitioner's counsel had in his hands material for a devastating cross-examination of [the witness] on the critical issue in the case. Because of his failure to confront her with her prior sworn testimony, the jury did not learn ... that her prior descriptions were very different from her testimony at [petitioner's] trial." Id.

The Third Circuit readily affirmed the district court's findings that:

> "there is no way in which the failure to confront [the witness] with her prior inconsistent identification testimony can be justified as sound trial strategy or a reasonable strategic choice. ... Indeed, it borders on the inconceivable that a trial attorney would fail to inform a jury of [the witness's] prior problems with this identification... The reliability of this victim's uncorroborated identification of [petitioner] cuts directly to the heart of the only evidence against [petitioner]. [Counsel] failed to use it. That failure simply can not be condoned as reasonable trial strategy." Id.

The Eighth Circuit reached much the same conclusion in *Steinkuehler v. Meschner*, 176 F.3d 441, 445-46 (8th Cir. 1999), affirming the district court's finding that "trial counsel had in his hands material for a devastating cross-examination of [the witness] on the critical issue in the case" and that "it borders on the inconceivable that a trial attorney would fail to inform a jury of [the witness]'s dishonesty and win at all costs attitude." Id.

Similarly, the Seventh Circuit in *Raether v. Meisner*, 608 F. App'x 409, 412, 414-15 (7th Cir. 2015) (per curiam) found that counsel's decision not to confront a witness with prior inconsistent testimony and other evidence rendered his performance well "short of the mark. We can see no reasonable justification for failing to make use of the crucial witnesses' prior inconsistent statements." Id. The court also noted that "counsel's choice to abandon certain lines of questioning ... was pointless, particularly when those lines of questioning would have impeached otherwise damning testimony." Id.

In addition, in *Moffett v. Kolb*, 930 F.2d 1156, 1160-63 (7th Cir. 1991), the Seventh

Circuit agreed with the district court that the "petitioner was prejudiced by his trial counsel's failure to introduce [] prior inconsistent statements of [a] state witness" which would have corroborated the defense theory. The court determined that "[t]hese statements were critical evidence for [petitioner]'s counsel's defense theory, and his failure to produce them at the trial most definitely fell below an objective standard of reasonableness" because without these statements, the witness's trial testimony sounded completely trustworthy. If, on the other hand, the witness "had been impeached with his earlier statement, then the jury would have been forced to assess his credibility and very well could have not believed his latter testimony." Thus, "there is a reasonable probability that [petitioner]'s defense theory would have been successful." Id.

Lastly, the Ninth Circuit in *United States v. Tucker*, 716 F.2d 576, 585-86 (9th Cir. 1983), a case decided before *Strickland*, observed that counsel's failure to introduce any prior inconsistent and perjurious statements for cross examination of witnesses who incriminated the petitioner was a "serious dereliction of duty" because "[t]he jury was thus deprived of the opportunity fairly and fully to assess the accuracy of testimony damaging to [petitioner], or to determine the honesty of the witnesses who gave that testimony." Id.

Clearly, this is a question of exceptional importance and all the circuits to have looked at this issue have concluded that some strategic choices are in fact judicially reviewable when there's no conceivable way they could have helped the defense and when a different course of action would have significantly increased the odds of acquittal. In the case at hand, the jury never learned that Mr. Newbon had testified in a prior court proceeding where he had stated that vendors to General Dynamics are not

eligible to obtain the shipping discounts available to General Dynamics's majority-owned subsidiaries, divisions and affiliates. The jury also never learned that not a single vendor of General Dynamics ever received a discount on their shipping rate from FedEx based on its status or relationship with General Dynamics, as could have been shown through the National Account Master Report. That, coupled with the language in the pricing agreements – which did not authorize discounts for vendors, and the numerous inconsistencies between Mr. Newbon's trial and deposition testimony about how he discovered this alleged "fraud" would have most assuredly raised doubts in the mind of any rational juror as to whether Mr. Newbon's trial testimony sounded believable (when all of available evidence pointed to the contrary). But the jury was never given this chance to assess the credibility of the testimony or the witness who gave it because attorney Stengel never called out Mr. Newbon on these material aspects of the case.

II. The Proceeding Presents A Question Of Exceptional Importance To The Public – If Left Unchecked, A Court Clerk Can Completely Deprive A Petitioner Of His First Amendment Right Of Access To The Courts And His Fifth Amendment Right To Due Process By Singlehandedly Deciding Which Filings Deserve Judicial Intervention

A. The Deputy Court Clerk For The Sixth Circuit Has Refused To Docket A Tendered Motion To Reconsider Said Clerk's Adverse Action/Decision In Order To Avoid Judicial Review Even Though The Federal Rules Of Appellate Procedure And The Sixth Circuit's Local Rules Expressly Permit Judicial Review Of Adverse Decisions Of A Court Clerk

This Court has long recognized the First Amendment's right of access to the courts. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) ("The right

of access to the courts is indeed but one aspect of the right of petition."); see also *Monsky v. Moraghan*, 127 F.3d 243, 246 (2d Cir.1997) ("It is well established that all persons enjoy a constitutional right of access to the courts.").

"Meaningful access to the courts is a fundamental constitutional right, grounded in the First Amendment right to petition and the Fifth and Fourteenth Amendment due process clauses." *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir.1993); see also *Christopher v. Harbury*, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002), grounding the right of access to the courts in the First Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments, see id. at 415 n. 12.

Both Fed. R. App. P. 27(b) and 6 Cir. R. 27(g) & 45(b) expressly permit judical review of procedural orders and decisions made by court clerks. In this case, Petitioner electronically filed a Motion To Reconsider asking a judge to review the clerk's decision to return unfiled a timely Petition for Rehearing En Banc. See App. F. Despite that, the deputy clerk for the Sixth Circuit has consciously decided that her actions in this case should not be reviewed by an actual judge and has refused to docket the aforementioned motion or present it to a judge, resulting in a deprivation of Petitioner's First and Fifth Amendment rights of access to the courts and due process. The reason for that decision seems pretty clear, as explained infra.

B. The Reason The Court Clerk Has Not Docketed The Motion To Reconsider Is Because The Clerk Erred In Returning Petitioner's Timely Filed Petition For En Banc Rehearing

When she entered her order returning unfiled a Petition for Rehearing En Banc, the deputy clerk for the Sixth Circuit stated that "[f]urther review of the court's ruling is not available. Neither the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circuit make any provision for filing successive petitions for rehearing." App. D.

Firstly, it should be noted that Petitioner has filed a single Petition for En Banc rehearing, so the clerk's reference to "successive" is misleading. What the clerk is intimating is that a panel of the Sixth Circuit ruled on a motion which it construed as a Petition for Rehearing before the original panel *prior to* the expiration of the time to file a petition for en banc review. Therefore, Petitioner was well within his rights to seek en banc review. Secondly, Fed. R. App. P. 35(b)(3) has expressly recognized the possibility that a petition for rehearing and rehearing en banc could be filed separately. And 6 Cir. I.O.P. 35(g)(3) expressly permits en banc review of any order denying a COA. It was wrong for the deputy clerk to return the Petition for En Banc Rehearing.

CONCLUSION

The government's case against Petitioner was extremely weak as to one element of the offense – materiality. Mr. Newbon provided the only incriminating testimony; no other evidence was introduced as to this element. He had a motive to lie at trial – he lost the civil case and a conviction here was the only way he could obtain restitution on behalf of his employer. The jury was never made aware of Mr. Newbon's prior statements and other evidence favorable to the defense and/or damaging to Mr. Newbon's credibility. Without that, the jury could not properly assess the truthfulness of Mr. Newbon's uncorroborated trial testimony that rendered Petitioner's misrepresentation material. His inculpatory testimony remained virtually unchallenged. Trial counsel's performance in this regard was arguably both deficient and prejudicial.

The bar for obtaining a COA is low. "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner

will not prevail." *Miller-El v. Cockrell*, 537 U.S. at 338 (2003).

In sum, Petitioner has shown that his trial counsel's decision not to impeach the key prosecution witness – Andrew Newbon – with available grossly inconsistent, perjurious and more favorable/exculpatory prior statements is most certainly debatable among jurists of reason and a COA should have issued. The Sixth Circuit's decision to deny a COA when it failed to consider lines of questioning Petitioner's counsel did not pursue is contrary to and flies in the face of existing precedent from all the Circuit Courts to have looked at the issue. Therefore, this Court's intervention is needed to secure uniformity among the courts' decisions and to address a question of exceptional importance which, if left unchecked, would give attorneys in the Sixth Circuit a license to act with impunity.

Alternatively, because by not docketing Petitioner's motion for reconsideraion the deputy court clerk for the Sixth Circuit has deprived him of access to the courts and due process, this Court should vacate the clerk's order returning unfiled the Petition for En Banc Rehearing and direct the clerk to docket the Petition for Rehearing En Banc, or at the very least this Court should direct the clerk to docket the motion for reconderation of the clerk's decision to return said petition unfiled so a judge could review the clerk's actions.

WHEREFORE, premises considered, the petition for a writ of certiorari should be granted or the case remanded to the Sixth Circuit Court of Appeals for further proceedings.

Dated: December 24, 2021

Respectfully submitted,

/s/ Dimitar Petlechkov

Dimitar Petlechkov
780 Morosgo Dr NE
Unit 13272
Atlanta, GA 30324

Petitioner, *pro se*