No. 22-5635

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

*

VLADIMIR VLADIMIROVICH BRIK,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

*

PETITION FOR WRIT OF CERTIORARI

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Vladimir V. Brik
Fed. Reg. #18466-041
FCI Elkton
P.O. Box 10
Lisbon, OH 44432
Petitioner/pro-se

QUESTION PRESENTED FOR REVIEW

Are second-in-time petitions raising newly discovered material Brady violations "second or seccessive" within the meaning of §2255(h)'s gatekeeping provision?

PARTIES TO THE PROCEEDINGS

Vladimir Vladimirovich Brik #18466-041, Petitioner,
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

Pro-se representation for Petitioner

Attorney for Respondent,
United States,

Ms. Katherine Thornton Buzicky
U.S. ATTORNEY'S OFFICE
District of Minnesota
600 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415

RELATED CASES

- **United States v. Brik**, No. 15-cr-78(03), U.S. District Court for the District of Minnesota. Judgment entered April 14, 2022. [Doc. No. 766].
- **United States v. Brik**, App. No. 22-1882, U.S. Court of Appeals for the Eighth Circuit. Judgment entered May 27, 2022. (8th Cir. J. [5159542-2] [22-1882].)
- **United States v. Brik**, App. No. 22-1882, U.S. Court of Appeals for the Eighth Circuit. Rehearing Judgment entered July 8, 2022. (8th Cir. J. [5166661-2] [22-1882].)

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Petitioner, Vladimir Vladimirovich Brik, pro-se, prays that this Honorable Court will issue a writ of certiorari to review the judgment of the United States of Court of Appeals for the Eighth Circuit, entered in the above proceeding on July 8th, 2022.

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I.

CITATIONS OF OPINIONS AND ORDERS IN CASE

The original judgment of conviction of Brik in the United States District Court for the District of Minnesota was on 7/12/16. (See Plea Agmt. [Doc. No. 375]). On 6/27/17, the Court sentenced him to a term of imprisonment of 118-months. (See Sentencing J. [Doc. No. 548]; Am. Sentencing J. [Doc. No. 554]).

The original judgment of conviction of Brik was appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the conviction and sentence. (See [Doc. No. 596]).

In April, 2019, Brik filed a Pro-se Motion to Vacate under 28 U.S.C. §2255 (Doc. No. 624), raising claims of ineffective assistance of counsel. Specifically, he asserted that his trial counsel was ineffective for the following reasons: (1) providing him inaccurate advice regarding the mens rea requirement under the Analogue Act; (2) failing to oppose a two-point upward adjustment at sentencing; (3)failing to challenge the Court's ruling on Defendant's proposed jury instructions; and (4) failing to show him the entire Presentence Investigation Report ("PSR"). (Def.'s §2255 Mot., Grounds 1-4). The Court denied Brik's motion on the

merits and denied his application for certificate of appealability, United States v. Brik, No. 15-78(SRN/BRT), 2019 WL 6037570 (D.Minn. Nov. 14, 2019); (Nov. 14, 2019 Order [Doc. No. 639]).

Brik appealed, and after review, the Eighth Circuit dismissed his appeal, (8th Cir. §2255 J. [Doc. No. 649]).

On May 03, 2021, Petitioner filed his pro-se Motion Pursuant to Fed.R.Civ.P. 60(b) to repopen his §2255 Motion for newly discovered evidence ("Motion to Reopen"). (Def.'s Mot. to Reopen [Doc. No. 746]).

On 4/14/2022, the District Court dismissed Brik's 60(b) as being "second or successive" and requiring preauthorization from the Eighth Circuit. [Doc. No. 766]. Attached hereto as Appendix "B".

On 5/27/2022, Brik's application for certificate for appealability was denied by the Eighth Circuit Court of Appeals. (8th Cir. J. [5159542-2][22-1882].) Attached hereto as Appendix "A".

On 7/08/2022, the Eighth Circuit Court of Appeals denied his petition for enbanc rehearing and panel rehearing. (8th Cir. J. [5166661-2][22-1882].) Attached hereto as Appendix "C".

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II.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 8th, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment of the United States constitution provides:

> "No person shall be... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The statute under which Brik sought habeas corpus relief was 28 U.S.C. §2255, which states in pertinent part:

> "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 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 sentence."...
>
> "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 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 courts find 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 aside the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

3. The statute involved and under review is, 28 U.S.C. §2255(h), which states:

"A second or successive motion must be certified as provided in section 2244 [28 U.S.C. §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. 28 U.S.C. §2255(h)."

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IV.

STATEMENT OF THE CASE AT HAND

On 3/17/15, Brik was indicted for Conspiracy to Distribute, and Possess with the Intent to Distribute Controlled Substance Analogues AM-2201, UR-144 and XLR-11 from March, 2011 to late 2013, in violation of Title 21, United States Code, Sections 802(32)(A), 813, 841(a)(1), 841(b)(1)(C), and 846.

On 7/12/16, on the first day of trial, Brik pleaded guilty to controlled substance analogue distibution and money laundering conspiracy charges. (See Plea Agmt. [Doc. No. 375] Pg. 1).

On 3/29/21, Brik discovered for the first time, through a case from the Law Library at his instituiton, that the Government withheld, and that his plea was unintelligently accepted without knowledge of, material exculpatory evidence pertaining to Dr. Arthur Berrier, a DEA Chemist. Attached hereto as Appendix "D" for materiality of Dr. Berrier's evidence.

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V.

COURSE OF PROCEEDINGS IN THE SECOND-IN-TIME 2255 CASE BEFORE THIS COURT

On May 03, 2021, Brik filed his Pro-se Motion Pursuant to Fed.R.Civ.P. 60(b) for newly discovered evidence to Reopen his §2255 Motion ("Motion to Reopen"). (Def.'s Mot. to Reopen [Doc. No. 746].) Brik raised two claims in his Motion to Reopen (Id. at 1, 5-12.) He asserts that this guilty plea was not voluntary and informed because: (1) the prosecution withheld exculpatory material evidence; and (2) his attorney was ineffective for not investigating or disclosing to him the value of such exculpatory evidence. (Id.)

On June 21, 2021, Brik filed his Pro-se Motion to Supplement the Record for Timeliness, arguing that his Motion to Reopen was timely filed. (Def.'s Mot. to Supplement [Doc. No. 748].)

The Government filed its response to Brik's Motion to Reopen on December 28, 2021, arguing that Brik's Motion should be denied because his motion, although stylized as a Rule 60(b) motion, is more properly classified as an unauthorized second or successive habeas petition. (Govt.'s Resp. [Doc. No. 762] at 5-6.) As Brik has not received permission from the Eighth Circuit to file a successive §2255 motion to vacate, the Government argued that the Court lacked jurisdiction to hear his motion. (Id. at 7.)

On 4/14/22, the District Court dismissed Brik's 60(b) as being "second or successive" and requiring preauthorization from the Eighth Circuit. [Doc. No. 766].

On 5/19/22, Brik timely filed a notice of appeal and a motion for issuance of certificate of appealability. (8th Cir. [5159542] [22-1882].)

On 5/27/22, Brik's application for certificate of appealability was denied by the Eighth Circuit Court of Appeals. (8th Cir. J. [5159542-2] [22-1882].)

On 6/10/22, Brik timely filed for Petition for enbanc rehearing and panel rehearing. (8th Cir. J. [5166661-2] [22-1882].)

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VI.

EXISTENCE OF JURISDICTION BELOW

Brik was indicted and convicted in the United States District Court for the District Court of Minnesota, for controlled substance analogue distribution and money laundering conspiracy charges. A Fed.R.Civ.P. 60(b) to Reopen his §2255 Motion was appropriately made in the convicting court and subsequently denied. A timely appeal to the United States Court of Appeals for the Circuit was filed.

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VII.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

The Eighth Circuit Panel Judgment denying a Certificate of Appealability to the district court's dismissal of Brik's 60(b) to Reopen his §2255 motion holding that, a material Brady claim is "second or successive" and subjected to the §2255(h) gateway requiring pre-authorization. Contrary to the Eighth Circuit Court's holding, Brik's second-in-time petition raising a newly revealed Brady claim for withheld material exculpatory evidence is not "second or successive" within the meaning of AEDPA. To hold that his motion is subjected to the structures of §2255(h) is in direct conflict with the applicable decisions of this Court in Panetti v. Quarterman, 551 U.S. 930, 944, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007). This Court should exercise its supervisor powers over the lower courts and issue the writ.

Brik respectfully urges that the Circuit Court's decision is erroneous and at a variance with this Court's decision as explained in the argument below.

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VIII.

ARGUMENT AMPLIFYING REASONS FOR WRIT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL ON THE BASIS THAT BRIK'S MATERIAL BRADY CLAIM IS "SECOND OR SUCCESSIVE" AND SUBJECTED TO §2255(h).

Section 2255(h) functions as a "gatekeeping provision" for "second or successive" motions to vacate brought under AEDPA. Under section 2255(h), no "second or successive" motions may be brought unless they identify either, "(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." 28 U.S.C. §2255(h).

This Court does not get much help from AEDPA in discerning the meaning of the phrase "second or successive". In fact, AEDPA does not define the phrase. Nor is the phrase itself "self-defining". Panetti v. Quarterman, 551 U.S. 930, 943, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

But this Court has explained that "second or successive" does not capture all collateral petitions "filed second or successively in time, even when the later filings address a... judgment already challenged in a prior... application." Id. at 944. Instead, "second or successive" is a "term or art". Slack v. McDaniel, 529 U.S. 473, 486, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

As this Court has construed the phrase, "second or successive" takes its full meaning from [the Supreme Court's] case law, including decisions predating the enactment of [AEDPA]." Panetti, 551 U.S. at 943-44. So this Court may explore the relevant case law on the meaning of "second or successive".

A. PANETTI V. QUARTERMAN SET FORTH THE FACTORS FOR DETERMINING WHETHER A SECOND-IN-TIME PETITION IS "SECOND OR SUCCESSIVE"

In Panetti, the petitioner (named Panetti) was convicted of capital murder and sentenced to death. Id at 937. After exhausting his state-court remedies to no-avail, he filed a federal petition

for habeas relief under 28 U.S.C. §2254. It, too, was denied. Id.

The State set an execution date, and Panetti filed another state habeas claim, this time asserting for the first time that he was not mentally competent to be executed. Id. at 937-38. Following the state court's denial of the petition, Panetti filed another federal habeas petition under §2254. Id. at 938. He argued that executing him while he was mentally incompetent would violate the Eighth Amendment and transgress Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1985). See Id. at 938-41. The district court denied his petition, and the circuit court affirmed. Id. at 941-42.

This Supreme Court granted certiorari. Id. at 942. Before addressing the merits, the Court considered whether it had jurisdiction over Panetti's claim, in light of 28 U.S.C. §2244(b)(2), a habeas gatekeeping mechanism that is much like §2255(h) but applies to federal habeas petitions seeking review of state rather than federal cases. Similar to §2255(h), §2244(b)(2) precludes consideration of any "claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application" unless, it satisfies one of two exceptions - neither of which applied to Panetti's claim.

This Court concluded that it enjoyed jurisdiction over Panetti's case because Panetti's second-in-time §2254 petition was not "second or successive" as that phrase is used in §2244(b)(2)'s gatekeeping mechanism. Id. at 947. In arriving at this conclusion, the Court looked solely to 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. See Id. at 943-47.

Beginning with the implications for habeas practice, the Court first discusses the nature of a Ford claim. See Id. 943. Because a Ford claim aserts that a petitioner is not competent to be executed, this Court noted that such a claim does not ripen unless the petitioner both is incompetent to be executed and imminently faces execution in that state. See Id. And since many years can pass between the imposition and execution of a death sentence, a petitioner may not fall into a state of mental incompetence until after the courts have resolved his first habeas petition. Id. So if "second or successive" encompassed Ford claims, a mentally competent prisoner would always have to prophylactically raise a Ford claim in his first federal habeas petition, regardless of whether he had any indication that he might eventually become incompetent, just to preserve the possibility of raising a Ford claim at a later time. Id. This practice, this Court observed, "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." Id. at 943.

On top of burdening federal habeas practice in this way, the Court concluded that treating second-in-time Ford claims as "second or successive" would also conflict with AEDPA's purposes. Notably, the Court held that §2244 should not be interpreted in a manner "that would 'produce troublesome results', 'create procedural anomalies', and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such

was Congress'[s] intent'." Id. at 946 (quoting Castro v. United States, 540 U.S. 375, 380-81, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003)). And, noting that AEDPA's purposes were to promote "comity, finality, and federalism", the Court held that "[t]hese purposes, and the practical effects of [the Court's] holdings, should be considered when interpreting AEDPA", "particularly... when petitioners run the risk under the proposed interpretation of forever losing their opportunity for any federal review of their unexhausted claims." Id. at 945-46 (internal quotation marks ommited). But "[a]n empty formality requiring prisoners to file unripe Ford claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies." Id. at 946. And as for finality concerns, the Court observed they are not implicated by a Ford claim: because of the nature of a Ford claim, federal courts are generally unable to address such claims within the time frame for resolving first habeas petitions, anyway. Id.

Finally, the Court accounted for the abuse-of-the-writ doctrine, Id. at 947, the pre-AEDPA legal doctrine "defin[ing] the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus," McCleskey v. Zant, 499 U.S. 467, 470, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Under the abuse-of-the-writ doctrine, "to determine whether an application is 'second or successive', a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior

application." Magwood v. Patterson, 561 U.S. 320, 345, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010)(Kennedy, J., dissenting)(citing Panetti, 551 U.S. 947). "[I]f the petitioner had no fair opportunity to raise the claim in the prior application, a subsequent application raising that claim is not 'second or successive', and [AEDPA's] bar does not apply." Id. at 346 (Kennedy, J., dissenting)(citing Panetti, 551 U.S. at 947). Since a Ford claim considers a petitioner's mental state at the time of proposed execution and Panetti's first §2254 petition was filed well before that time, Panetti did not have a full and fair opportunity to raise that claim-that is, the claim did not ripen-until after his first §2254 petition was resolved. See Panetti, 551 U.S. at 947. For that reason, the Court found no abuse of the writ. Id.

So ultimately, the Court held that AEDPA's "second or successive" bar did not preclude Panetti's second-in-time petition raising a Ford claim. Id. As the Court explained, "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 not party." Id.

B. APPLYING THE PANETTI FACTORS TO AN ACTIONABLE BRADY VIOLATION THAT THE PETITIONER IN EXERCISING DUE DILIGENCE COULD NOT REASONABLY HAVE BEEN EXPECTED TO DISCOVER IN THE ABSENCE OF THE GOVERNMENT'S DISCLOSURE YIELDS THE CONCLUSION THAT SUCH A CLAIM IS NOT "SECOND OR SUCCESSIVE".

In Panetti's light, this Court must consider whether second-in-time petitions raising newly disclosed actionable Brady violations-where the newly disclosed evidence creates a reasonable probability that it would change the outcome of the proceeding-are "second or successive" within the meaning of the §2255(h)'s gatekeeping provision. The Panetti factors and their sub-considerations uniformly require the conclusion that they are not.

1. Precluding claims based on Brady violations that a prisoner could not have discovered through due diligence would adversely affect habeas practice.

First, as the Panetti Court observed is true of Ford claims, precluding Brady claims that a prisoner could not have discovered through due diligence would adversely affect habeas practice. This is so because of the nature of a Brady claim.

Brady and its progeny stand for the proposition that the prosecution's suppression of evidence favorable to the defendant "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)(quoting Brady, 373 U.S. at 87)(internal quotation marks omitted). Evidence is "material", in turn, when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. (citation and internal

quotation marks omitted). So no actionable Brady violation occurs "unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Id. at 281 (internal quotation marks omitted).

Because of the nature of the Brady violation, the petitioner often cannot learn of such a violation at all, even when acting diligently, unless and until the government discloses it. As with second-in-time Ford claims, then, "conscientious defense attorneys would be obligated to file unripe (and in many cases, meritless) [Brady] claims in each and every [first §2255] application [(and direct appeal)]," Panetti, 551 U.S. at 943, to preserve then-hypothetical claims on the chance that the government might have committed a material Brady violation that will eventually be disclosed. And also like the Ford claims, the courts would be forced to address this avalanche of substantively useless Brady claims-only there would be even more meritless Brady claims because Brady does not apply only in capital cases, like Ford does. For this reason, finding second-in-time Brady claims to be "second or successive" under §2255(h) would have even more deleterious effects on habeas practice than concluding second-in-time Ford claims were "second or successive".

2. Precluding Brady claims that a petitioner could not have discovered through due diligence impedes finality interests.

Second, precluding Brady claims that a petitioner could not have discovered through due diligence actually impedes finality interests. The Court should start from the proposition that at the

through due diligence does not suspend the writ, it certainly clashes with finality concerns. The Supreme Court has noted that finality is important to endow criminal law with "much of its deterrent effect." McCleskey, 499 U.S. at 491 (citation and quotation marks omitted). But an uncorrected unfair trial has the opposite effect.

Procedural fairness is necessary to the perceived legitimacy of the law. Kevin Burke & Steve Leben, Procedural Fairness: A Key Ingredient in Public Satisfaction, 44 Ct. Rev. 4, 7 (2007-2008) (citing Tom R. Tyler, Psychological Perspectives on Legitimacy and Legitimation, 57 Ann. Rev. Psycol. 375 (2006)). And legitimacy affects compliance. Cf. id. (citing studies showing reduced recidivism when defendants perceived themselves as having received fair process). When the government imprisons a person after a consitutionally unfair trial, that undermines the legitimacy of the law and its deterrent effect. A person who perceives that the government will cheat to convict him, regardless of his guilt or innocence, actually has less incentive to comply with the law because, in his view, compliance makes no difference to conviction.

But that is not the only reason that precluding second-in-time Brady claims is at odds with finality concerns. Finality is also important because giving a habeas petitioner a new trial can prejudice the government through "erosion of memory and dispersion of witnesses that occur with the passage of time." McCleskey, 499 U.S. at 491 (citation and internal quotation marks omitted). Yet the government alone holds the key to ensuring a Brady violation

does not occuer. So the government cannot be heard to complain of the trial prejudice from a new trial necessitated by its own late disclosure of a Brady violation, since it is solely responsible for inflicting any such prejudice on itself in such circumstances. Whatever finality interest Congress intended for AEDPA to promote, surely it did not aim to encourage prosecutors to withhold consitutionally required evidentiary disclosures long enough that verdicts obtained as a result of government misconduct would be insulated from correction.

Finality interests then are not served by saying a prisoner has not timely brought his Brady claim where the government's failures affirmatively and entirely prevented him from doing so. Cf. Williams v. Taylor, 529 U.S. 420, 437, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000)(comity interests "not served by saying a prisoner 'has failed to develop the factual basis of a claim' [under §2254(e)(2)] where he was unable to develop his claim in state court despite diligent effort"). For this reason, finality concerns cannot justify precluding Brady claims that a prisoner could not have discovered through due diligence.

In other words, unless the petitioner becomes aware of the suppressed evidence shortly after trial, his claim will be subjected to higher standards-through no fault of his own. To subject Brady claims to the heightened standard of §2244(b)(2) is to reward investigators or 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). Worse still, this situation creates

incentives for any state actors withholding material evidence to violate the petitioner's other constitutional rights, if subtly. Such an incentive structure promotes neither the interests of justice nor finality. Surely Congress did not intend such a perverse result.

In fact, Congress recently reinforced the principles that Brady claims would not impede finality interests by amending Federal Rule of Criminal Procedure 5(f) through the Due Process Protections Act of 2020; Pub.L.No. 116-182, 116th Cong., 2d Sess. (codified at Fed.R.Crim.P. 5(f)). See Fed.R.Crim.P. 5(f)(5); "If the Government fails to comply with this Court's Rule 5(f) Order or the obligations imposed by Brady and its progeny, the Court, in addition to ordering production of the information, may:"..."dismiss charges before trial or vacate a conviction after trial or a guilty plea". The DPPA's scant legislative history reveals that Congress decided, because of "inadequate safeguards in Federal law," to require Brady "reminder" orders to ensure that prosecutors complied with their constitutionally mandated disclosure obligations; 166 Cong. Rec. H4582 (Sept. 21, 2020). Representative, Sheila Lea Jackson, a House Speaker, pointed to the 2008 trial of then-Senator Ted Stevens as a "prominent example" of why such orders were needed. Id. at H4583. After a jury found Senator Stevens guilty of seven counts of making false statements, the district court set aside the verdict due to post-trial revelations that the government had failed to disclose exculpatory evidence to the defense. The DPPA seeks to prevent similar outcomes and safeguarding a criminal defendant's right to

a fair trial. Congress stressed safeguarding against Brady violations over finality. Holding second-in-time petitions raising Brady violations as "second or successive" would impede Congress' urgency for safeguarding. Their silence regarding "second or successive" indicates its existing intent not to subject petitions for Brady claims to the higher standards at the benefit of the Government and finality.

3. Precluding Brady claims that a prisoner could not have discovered through due diligence is not consistent with the abuse-of-the-writ doctrine.

Finally, allowing a second-in-time Brady claim that a prisoner could not have discovered earlier through the reasonable exercise of due diligence does not offend the abuse-of-the-writ doctrine. As noted, the abuse-of-the-writ doctrine calls for courts to consider whether a habeas petitioner has previously had "a full and fair opportunity to raise the claim in the prior applications." Magwood, 561 U.S. at 345 (Kennedy, J., dissenting) (citing Panetti, 551 U.S. at 947).

To demonstrate that a petitioner has been deprived of a "full and fair opportunity", the doctrine requires him to make two showings: (1) he has "cause", or a "legitimate excuse", for failing to raise the claim earlier, McCleskey, 499 U.S. at 490; and (2) he was prejudiced by the error he claims, id. at 493. See also Sawyer v. Whitley, 505 U.S. 333, 338, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

"Cause" explains why the petitioner could not have filed his claim earlier even "in the exercise of reasonable care and diligence." McCleskey, 499 U.S. at 493. A petitioner satisfies the

cause requirement where he can demonstrate "interference by officials that makes compliance with the... procedural rule impracticable, and a showing that the factual or legal basis for a claim was not reasonably available to counsel." Id. at 493-94 (citation and internal quotation marks omitted). A Brady violation that a prisoner could not reasonably have been expected to discover through the exercise of due diligence falls into that category. See, e.g., Strickler, 527 U.S. at 289 (finding cause for failing to raise a Brady claim where the prosecution withheld exculpatory evidence, the petitioner reasonably relied on the prosecution's open file policy, and the government asserted during state habeas proceedings "that petitioner had already received 'everything known to the government'.").

As for prejudice, as we have noted, when a Brady violation is at issue, a petitioner must demonstrate a reasonable probability that had the government disclosed the evidence at issue, the outcome of the proceeding sould have differed. Strickler, 527 U.S. at 280. So a petitioner cannot establish a Brady violation without also satisfying the abuse-of-the-writ doctrine's requirement to show prejudice.

That means a petitioner can demonstrate both cause and prejudice by establishing a Brady violation that he could not reasonably have discovered through due diligence. And where a petitioner shows both cause and prejudice, he has enjoyed no "full and fair opportunity" to bring the claim earlier. To remedy this problem, the abuse-of-the-writ doctrine favors allowing such a second-in-time claim.

CONCLUSION

Mr. Brik has been deprived of basic fundamental rights guaranteed by the Fifth Amendment of the United States Constitution and seeks relief in this Court to restore his rights. Based on the argument and authorities presented herein, Brik's guilty plea was sustained in violation of Due Process and not voluntary or intelligently entered because of the withheld exculpatory evidence. There is a reasonable probability that Brik would not have plead guilty in light of the evidence from Dr. Berrier, nor would competent counsel have recommended him to. Therefore his second-in-time petition for newly revealed material Brady claim was not "second or successive" within the meaning of AEDPA. Petitioner prays this Court will issue a writ of certiorari and reverse the Judgment of the Eighth Circuit Court of Appeals.*1

Respectfully submitted on this 6 of September, 2022.

Vladimir V. Brik #18466-041
Petitioner/pro-se
V. Brik 9/6/22

1. If this Court elects not to address the issues presented in this petition at this time, it is requested that the writ issued and the matter be remanded to the Eight Circuit Court of Appeals for reconsideration in light of this Court's opinion in **Panetti v. Quarterman**.