No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY BARTKO - PETITIONER

vs.

UNITED STATES OF AMERICA-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Is the stringent second-and-successive gatekeeping standard under 28 U.S.C. § 2244(b), which some circuits have applied to after-acquired *Brady/Napue* claims even if the exculpatory evidence was not known at the time of the initial habeas petition, consistent with AEDPA and the Court's decision is *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

LIST OF PARTIES

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

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gregory Bartko ("Bartko" or "Petitioner") asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeal for the Fourth Circuit in this case.

OPINION BELOW

The Fourth Circuit's unpublished opinion is styled as *United States v. Bartko*, No. 20-7879 (4th Cir. May 20, 2022) and attached as Appendix 2. Its Order denying *en banc* review is attached as Appendix 3. The district court's orders (dismissing Petitioner's motion as successive and determining Petitioner's Rule 60(b) Motion to be a mixed Rule 60(b)/§ 2255 Motion are unreported.

JURISDICTION

The Fourth Circuit denied Petitioner's appeal on May 20, 2022 and denied *en banc* review on August 16, 2022. Appendices 2 and 3. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves 28 U.S.C. §2244 and 28 U.S.C. §2255. This case also involves the Fifth Amendment to the Constitution of the United States. U.S. Const. amend. V.

STATEMENT OF THE CASE

A. Introduction

On November 1, 2010, Bartko stood trial in federal court accused of one count of conspiracy to commit mail fraud, money laundering, and the sale of unregistered securities, four counts of mail fraud, and one count of selling unregistered securities. The charges primarily concerned two private equity funds that Bartko, a long-time securities lawyer and securities dealer in Atlanta, Georgia, organized. Ultimately, the trial focused on Bartko's knowledge, intent, and good faith and whether Bartko was a knowing participant in the fraud schemes perpetrated by his former client, Scott B. Hollenbeck ("Hollenbeck"), the government's key witness. On November 18, 2010, after a thirteen-day trial, a jury convicted Bartko of six counts. Bartko testified in his own defense which testimony was essentially contradictory of Hollenbeck's three days of testimony presented by the government.

Seven months after trial on July 1, 2011, Bartko moved for a new trial alleging that the government violated *Brady v. Maryland,* 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Since Hollenbeck during his testimony had falsely denied receiving any promises from prosecutors in exchange for his cooperation, and prosecutors knew that testimony was false, Bartko's new trial motions also included claims under *Napue v. Illinois,* 360 U.S. 264 (1959) for the government's knowing presentation of false or perjured testimony. Without an evidentiary hearing on January 17, 2012, the district court denied Bartko's motions. *United*

States v. Bartko, 2012 U.S. Dist. LEXIS 189014, 2012 WL 13185533 ("Bartko I").

On April 4, 2012, Bartko was sentenced to a total of 276 months. Bartko appealed to the Fourth Circuit Court of Appeals and on August 23, 2013, in a published opinion, that court affirmed Bartko's conviction, although the decision identified significant misconduct by the government regarding its suppression of evidence favorable to Bartko.[1] *United States v. Bartko*, 728 F.3d 327 (4th Cir. 2013). The court also found that Hollenbeck testified falsely during trial in connection with his denials of receiving promises and benefits from the government in exchange for his cooperation. In Bartko's direct appeal to the Fourth Circuit, brought at a time when only a small part of the withheld *Brady* evidence was known, the court expressed incredulity over the lead prosecutor's lack of candor concerning his excuses for having failed to disclose witness immunity agreements and a statute of limitations tolling agreement with another prosecution witness that would have permitted the government to prosecute the witness. Id., 728 F.3d at 341.

(i) Petitioner's Initial Motion Under 28 U.S.C. §2255

On January 26, 2015, armed with the *Brady* evidence amassed since trial, Bartko moved under 28 U.S.C. §2255 to vacate, set aside, or correct his sentence, raising several *Brady/Napue*-related

[1] Judge Floyd who authored the opinion instructed the Clerk of Court to forward a copy of the decision to the United States Attorney General and the Office of Professional Responsibility for the Department of Justice. Bartko, 728 F.3d at 342.

claims which were premised upon the government's concealment of a multitude of exculpatory materials that Bartko had obtained under the FOIA and the concealed evidence the government had previously admitted to. Most pertinent to this Petition, on March 28, 2018, (before the district court ruled on Bartko's §2255 Petition), Bartko moved for leave to file a supplement to his initial habeas petition pleading a new claim arising from Hollenbeck's three recantation statements in January-March, 2018. ("Supplemental *Brady* Claims"). Hollenbeck's recantations to most all his inculpatory trial testimony, one of which was given under oath in the presence of a court reporter, did not occur until March 7, 2018 after he completed his sentence and supervised release. **It is critical to distinguish on these facts that the supplemental claims advanced by Bartko were not newly discovered facts that existed at the time Bartko filed his initial habeas petition, rather Hollenbeck's sworn recantation on March 7, 2018 came into existence as of that date.** (Emphasis added).

On November 2, 2018, 44-months after the filing of Bartko's initial habeas petition, the district court denied Bartko's Motion for Leave to File Supplemental *Brady* Claims. The Fourth Circuit thereafter denied Bartko's application for a certificate of appealability. *United States v. Bartko*, 774 Fed. App'x. 815 (4th Cir. 2019) (unpublished). The result of these proceedings has been that no federal court has ever properly weighed Bartko's *Brady/Napue* claims related to Hollenbeck's sworn recantation statement. In denying Bartko's effort to supplement his initial habeas § 2255 petition, the district court found that the Supplemental *Brady* Claims did not relate back to his timely filed habeas claims under Rule 15(c),

making virtually no factual findings or analysis for any appellate court to examine. *Bartko v. United States*, No. 5:09-CR-321-D at 36-37 (E.D.N.C. Nov. 2, 2018) ("Bartko II"). Although Bartko argued below that the Supplemental *Brady* Claims arose out of the same conduct, transaction, or occurrence set out in his timely-filed petition, the district court's finding that they did not arise from the same core of operative facts supports Bartko's position that his Supplemental *Brady* Claims did not exist and were unripe for purposes of his initial §2255 Petition since the facts supporting the Supplemental *Brady* Claims did not exist until Hollenbeck's recantations and that Bartko had no fair opportunity to raise those after-acquired claims in his first habeas petition and therefore, they do not give rise to a "'second or successive' application." *Magwood v. Patterson*, 561 U.S. 320, 343 (2010) (Breyer, J., concurring) (internal quotation marks omitted).

(ii) Petitioner's Rule 60(b) Motion

In furtherance of Bartko's due process challenges, on February 26, 2019, Bartko filed Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ.P. 60(b)(1) Or 60(b)(6) ("Rule 60(b) Motion"). Bartko's Rule 60(b) Motion challenged the trial court's mistake in failing to properly apply the statute of limitations found in 28 U.S.C. §2255(f)(4) as applied to Bartko's Supplemental *Brady* Claims. The trial court found that the Rule 60(b) Motion constituted a second or successive habeas petition and dismissed the motion pursuant to 28 U.S.C. § 2244(b). Bartko's Rule 60(b) Motion addressed what was perceived to be procedural deficiencies in the trial court's order on specific issues

raised by one or both parties in Bartko's Motion for Leave.

Bartko argued below that his Supplemental *Brady* Claims arising from Hollenbeck's March 7, 2018 recantation of his trial testimony under oath were timely under the statute of limitations for his *Brady/Napue* claims arising from Hollenbeck's sworn recantation. The trial court deemed Bartko's Supplemental *Brady* Claims not only did not relate back to his initially filed § 2255 Petition, but also his claims were untimely, and in so doing the lower court granted the Government's Motion to Dismiss. Bartko's effort to have his *Brady/Napue* claims heard has been rejected by the trial court and the Fourth Circuit on appeal.

The result below is that the trial and appellate courts have effectively foreclosed Bartko's right to adjudicate his Supplemental *Brady* Claims and/or seek to appeal any adverse decision by the trial court that prohibits adjudication of those claims based upon the determinations that Bartko's Supplemental *Brady* Claims constitute a "second or successive" motion brought under § 2255 without Fourth Circuit pre-authorization. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). This result has led to the anomalous consequence that no federal court has ever considered the impact of Hollenbeck's perjured trial testimony and his true motives for his testimony, nor the complicity of the prosecution in permitting the presentation of that testimony to Bartko's jury.

In summary, the relevant procedural steps Bartko took below in challenging his conviction included: (i) his initial motion to vacate his conviction under 28 U.S.C. § 2255; (ii) his effort to supplement his *Brady* claims asserted in his initial motion to vacate by seeking leave to do so by supplementing

facts which were learned on March 7, 2018 following Hollenbeck's three recantation statements; and (iii) Bartko's further efforts challenging the trial court's denial of his motion for leave to supplement his *Brady* claims by bringing his Rule 60(b) Motion which sought to obtain relief under Rule 60(b) by claiming that the trial court was mistaken in failing to address the applicable statute of limitations on his Supplemental *Brady* Claims. Not one evidentiary hearing has ever been held during the twelve years of proceedings since the date Bartko's jury returned its verdicts.

REASONS FOR GRANTING THE WRIT

Circuit courts have applied different interpretations of the "second or successive" language that yield significantly diverging results. These differences and inconsistencies exist not only among the different circuits but also among different decisions within certain individual circuits.

The lower courts' decisions here suggest that the question in this case is limited to the rote application of 28 U.S.C. § 2244(b) to habeas claims brought under the blackletter law established by this Court in *Brady v. Maryland*, 373 U.S. 83 (1963) and several related decisions.

The question broadly implicated is whether if the government manages to conceal multiple due process violations until after a petitioner's first federal habeas petition has been adjudicated, it can thereby block the petitioner from ever obtaining federal judicial review of that claim.

The AEDPA ("Act" or "AEDPA"), which became law in 1996, incorporated many changes that severely

restrict a prisoner's ability to bring a habeas corpus challenge. Proponents of the AEDPA argued that prisoners were abusing their right to federal habeas corpus, which flooded the courts with frivolous petitions and prolonged the administration of punishment, most notably in death penalty cases. Thus, these restrictions were passed to achieve Congress's goal of "finality, federalism, and comity." Most notable among these changes is § 2244(b)(2)(B) of the Act, which created a much higher standard for filing second or successive federal petitions. The statute provides:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Although AEDPA introduced this new, rigorous standard for "second or successive" habeas petitions, there is no definition included in the Act as to what constitutes a "second or successive" habeas petition. Thus, courts are free to create their own definitions of this phrase, which has led to extremely different

interpretations and applications across various circuits. Consequently, circuit courts have applied different interpretations of the "second or successive" language that yield significantly diverging results. Some circuits incorporate the abuse of writ standard that existed prior to the enactment of the AEDPA into the definition of "second or successive," interpreting the phrase as a term of art. Other circuits only interpret the phrase's meaning to include the plain meaning of the terms "second or successive."[2] In certain instances, such as those present in Bartko's case, violations of the rules set forth in *Brady* and *Napue* do not ripen until years later, often after prisoners have already filed their first habeas petition under § 2255. As a result, multiple circuits have been forced to address the issue of whether a second-in-time *Brady* claim is subject to the AEDPA's strict rules applying to "second or successive" petitions set forth in § 2244(b)(2)(B). Although the Fourth Circuit has applied this analysis more liberally than the Fifth Circuit, the appellate court in Bartko's case failed to recognize that an entire subclass of habeas petitioners is being shut out from review of legitimate and often egregious violations of this Court's principles espoused in its *Brady/Napue/Giglio* line of decisions.

Most of the circuits have held that a prisoner's habeas corpus "application is not second or successive simply because it follows an earlier federal petition." This conclusion is based upon the language in 28 U.S.C. § 2244, which sheds light on the purpose of the AEDPA—"to preclude prisoners from repeatedly

[2] Mark T. Pavkov, Does "Second" Mean Second: Examining the Split Among the Circuit Courts of Appeals in Interpreting AEDPA's Second or Successive Limitations on Habeas Corpus Petitions, 57 CASE W. RSRV. L. REV. 1007, 1008 (2007).

attacking the validity of their convictions and sentences." These circuits then turn to the language of § 2244(b)(2)(B), which states that a federal review may be granted to a prisoner's claim if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" or the newly discovered evidence would establish that "no reasonable fact finder would have found the applicant guilty of the underlying offense." The Fifth Circuit for example has interpreted the language of § 2244(b)(2)(B)(i) to mean that claims based on a factual predicate not previously discovered, but that existed at the time, are successive. *Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009). Essentially, the Fifth Circuit's rule states that if the purported defect existed, or the claim was ripe, at the time of the prior petition, the later petition is likely to be held successive even if the legal basis for the challenge was not. The result of this rule is that second-in-time *Brady* and *Napue* claims, although undiscovered, are barred under the Fifth Circuit's interpretation of the AEDPA's "second or successive" language. *Garcia*, 573 F.3d at 222; *United States v. Bernard*, 820 F. App'x 309, 310 (5th Cir. 2020). See also *Bernard*, 141 S. Ct. at 504 (Sotomayor, J., dissenting) (quoting Electronic Case Filing in No. 2:20–cv–00616, Doc. 3 (SD Ind., Nov. 24, 2020) (App. Vol. I), p. 46 (ECF)). This result obtains in most instances due to misconduct by the government. That is precisely the factual scenario in Petitioner's case, except the factual predicate for Bartko's Supplemental *Brady* Claim came into existence only as of March 7, 2018.

For 44 months after Bartko filed his initial motion to vacate, the trial court had not yet ruled. Upon discovery of Hollenbeck's interest in recanting his entire trial testimony and implicating the

prosecutor in the effort to present what was then known to be false and perjured testimony, Bartko moved to supplement his initial motion to vacate by filing a Motion for Leave to File Supplementary *Brady* Violations. Following briefing on Bartko's Motion for Leave, the trial court entered its decision on November 2, 2018 denying Bartko's initial motion to vacate and denying his effort to supplement his initial petition by adding additional *Brady/Napue* violations that came into existence through Hollenbeck's recantations. In the process of doing so, the trial court failed to properly evaluate the timeliness of Bartko's effort to supplement his earlier *Brady/Napue* claims. That ruling resulted in the trial court's decision that the after-acquired *Brady/Napue* claims revealed through Hollenbeck's recantations did not relate back to the initially-filed *Brady/Napue* claims—a decision that was unsound, against the weight of the nature of the two sets of claims, and inconsistent with customary applications of Fed. R. Civ. P. 15(c).

ARGUMENT

I. PETITIONER'S AFTER-ACQUIRED *BRADY/NAPUE* VIOLATIONS ARE NOT SUBJECT TO THE HIGHER STANDARD ENFORCED BY CIRCUIT COURTS' INTERPRETATIONS OF THE AEDPA'S "SECOND OR SUCCESSIVE" HABEAS APPLICATIONS

A. *Panetti v. Quarterman*: A Prior Supreme Court Exception to § 2244(b)(2)'s Bar on "Second or Successive" Habeas Petitions

Should be Extended to After-Acquired *Brady* Violations Where the Event Giving Rise to the Claim Did Not Previously Exist

In *Panetti*, a prisoner was convicted of capital murder and sentenced to death. The prisoner filed a second-in-time federal habeas petition that alleged a Ford claim, challenging his mental competency to be executed. *Ford v. Wainwright*, 477 U.S. 399 (1986). The government argued that because the prisoner failed to raise a Ford-based claim in his first § 2254 petition, the district court lacked jurisdiction. This Court disagreed laying out three considerations that guided its analysis and led to its conclusion: "(1) the implications for habeas practice of adopting a literal interpretation of 'second or successive[;]' (2) the purposes of the AEDPA; and (3) the Court's prior decisions in the context of the pre-AEDPA abuse-of-writ doctrine."

As to the first consideration, the Court noted that requiring a petitioner to file an unripe Ford claim in his first petition is flawed because it requires defense attorneys "to file unripe (and in many cases, meritless) Ford claims in each and every Section 2254 application." The Court stated that when analyzing the AEDPA's phrase "second or successive," a court must consider the implications of habeas practice when construing the extent of § 2254. The Court concluded "that Congress did not intend the provisions of the AEDPA addressing 'second or successive' habeas petitions to govern a filing in the unusual posture presented here: a Section 2254 application raising a Ford based incompetency claim filed as soon as that claim is ripe." The Court also remarked that its conclusion was further evidenced by

the AEDPA's enumerated purposes of "further[ing] the principles of comity, finality, and federalism." The Court specified that Congress's purposes when enacting the AEDPA and the practical effects of judicial holdings regarding these claims should inform its interpretation of AEDPA provisions, especially in instances where petitioners would potentially "forever los[e] their opportunity for any federal review of their unexhausted claims." The Court noted that there are exceptions to second-in-time habeas petitions that are barred by the terms of § 2244 and, in instances such as this, the Court is "hesitant to construe a statute . . . in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to benefit no party." Thus, the Court held that the statutory bar set forth in § 2244(b)(2) against "second or successive" habeas applications "does not apply to a Ford claim brought in an application filed when the claim is first ripe." It is important to take note that unripe Ford claims when they develop have nothing to do with government misconduct in the concealment of the facts supporting the claim, unlike concealed *Brady/Napue* claims.

Similarly, but cast from an entirely different mold, undiscovered *Brady/Napue* claims do not exist factually until a determination is made by the trier of fact that perjured testimony was presented at trial. And that the testimony was material to the outcome of the proceeding and that the government fostered the presentation of the perjured testimony contrary to its constitutional obligations not to hide the truth and "deliberately misrepresented the truth," as condemned by this Court in *Miller v. Pate*, 386 U.S. 1, 6 (1967). In short perjury is not perjury until a fact finder determines it to be such. Until then, how can a

habeas petitioner raise a *Brady/Napue* claim based upon perjured testimony such as that presented by Hollenbeck and how can Bartko's claims be raised until such a determination is made? This analysis is not unlike a Ford claim where the existence of mental illness or incompetency is not apparent until long after a petitioner is incarcerated. An after-acquired revelation that wholesale perjury was knowingly relied upon by the government to secure a conviction, and that the government was involved in presenting perjured testimony to the jury, should be accorded the same treatment as Ford claims for purposes of § 2244(b)(2)(B). All the same considerations weigh in favor of like treatment, especially in challenging a federal conviction where comity and federalism are not considerations.

In *Bernard v. United States*, 141 S. Ct. 504, 504 (2020) (Sotomayor, J., dissenting), this Court confronted a similar factual scenario in declining to grant a writ of certiorari that led to the execution of the petitioner, Brandon Bernard. Procedurally, although Bernard's challenge to his death sentence arose from his Texas conviction, his case trajectory and Bartko's case trajectory are in parallel. Bernard appealed his conviction and sentence, which were both affirmed. Bernard then filed his first 28 U.S.C. § 2255 habeas petition. In his first habeas petition, Bernard alleged ineffective assistance of counsel, a *Brady* claim, cumulative error, and a Fifth Amendment claim. Later, Bernard moved for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), requesting to reopen his initial § 2255 habeas petition on the basis that Judge Walter Smith, the judge for Bernard's trial and first habeas proceeding, "was unfit to conduct proceedings because of 'impairments'" and errors that he made in the

previous proceedings he oversaw. The district court held that the motion was a "second or successive" petition under § 2255 and, thus, the court dismissed it for lack of jurisdiction. The court of appeals then denied the certificate of appealability.

After learning of material exculpatory information during the resentencing of one of Bernard's co-defendants, Bernard moved for relief from judgment pursuant to § 2255 and, in the alternative, Rule 60(b).[3] In his motion, Bernard alleged "for the first time that the government (1) failed to disclose favorable evidence in violation of *Brady* . . . and (2) presented false testimony at trial in violation of *Napue*." Bernard argued that with the testimony presented at his co- defendant's resentencing, he would have been able to "undermine[] the prosecution's case that he was an equal participant in gang activity and posed the same risk of future dangerousness as other gang members." The district court held that Bernard's motion was successive but, pursuant to § 1631, transferred it to the Fifth Circuit Court of Appeals. The Fifth Circuit

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[3] Procedurally, Bartko's habeas claims have been presented in similar fashion, however, the underlying facts in this Petition are far more compelling than those in Bernard. Bernard's second in time habeas petition was supported by newly discovered evidence secreted by the prosecution until discovery in a separate proceeding, but here, Bartko's support for his Supplemental *Brady* Claims did not even exist until Hollenbeck recanted much of his trial testimony under oath on March 7, 2018. Bartko's second-in-time motion brought under § 2255 (according to the lower courts) is far more akin to a Ford claim than discovery of exculpatory evidence withheld by the government that existed prior to discovery. The distinction is critical.

Court of Appeals applied its incorrect interpretation of the language of § 2244(b)(2)(B)(i), stating that "if a prisoner's later-in-time petition raises a new claim based on evidence that the prisoner alleges was undiscoverable at the time of his earlier petition, the petition is successive." Consequently, the court held that Bernard's motion fell into this category of claims and, thus, was successive. The Fifth Circuit's decision to deny this motion without considering Bernard's *Brady* and *Napue* claims on the merits relied on precedent that the Fifth Circuit continues to uphold. In *Bernard v. United States*, 141 S. Ct. 504 (2020) the three dissenting justices concluded that:

> "The Fifth Circuit got it wrong. Its illogical rule conflicts with this Court's precedent, and it rewards prosecutors who successfully conceal their *Brady* and *Napue* violations until after an inmate has sought relief from his convictions on other grounds. This Court held in *Panetti v. Quarterman* , 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), that the restrictions on second-or-successive petitions do not apply to a claim that was not ripe when the inmate filed his first-in-time petition. Id., at 945, 127 S.Ct. 2842. Any other rule would have troubling consequences, as *Panetti* explained. Through no fault of their own, inmates would " 'run the risk' ... of 'forever losing their opportunity for any federal review of their unexhausted claims.' " Id., at 945–946, 127 S.Ct. 2842 (quoting *Rhines v. Weber,* 544 U.S. 269, 275, 125 S.Ct. 1528, 161 L.Ed.2d 440

(2005)). Consequently, "conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) ... claims in each and every" case to preserve claims in case they later became ripe. 551 U.S. at 943, 127 S.Ct. 2842."

Bernard v. United States, 141 S. Ct. 504, 506 (2020).[4]

The dissent in *Bernard* concludes by positing that:

"*Panetti* 's reasoning applies with full force to *Brady* claims. As in *Panetti*, applying the bar on second-or-successive habeas petitions to *Brady* claims "would produce troublesome results, create procedural anomalies, and close [the courthouse] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." 551 U.S. at 946, 127 S.Ct. 2842 (quoting *Castro v. United States* , 540 U.S. 375, 380–381, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003); internal quotation marks omitted). Take the present case.

[4] In note 3 of the dissenting opinion in *Bernard*, Justice Sotomayor states: "In other words, as Justice BREYER explained in *Magwood v. Patterson*, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010), "*Panetti 's* holding [is] that an application containing a claim that the petitioner had no fair opportunity to raise in his first habeas petition is not a second or successive application." Id., at 343, 130 S.Ct. 2788 (opinion concurring in part and concurring in judgment) (internal quotation marks omitted)."

> How exactly was Bernard supposed to have raised a *Brady* claim more than a decade ago when he brought his first habeas petition, given that he was unaware of the evidence the Government concealed from him?"

Again, more recently in the dissenting opinion in *United States v. Higgs*, 141 S. Ct. 645 (2021), Justices Breyer and Sotomayor remarked as follows:

> "Consider next Brandon Bernard. Bernard, who was only eighteen when he committed the crimes for which he was executed, raised credible allegations that the Government secured his death sentence by withholding exculpatory evidence and eliciting knowingly false testimony in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). But Bernard never received consideration of those claims on the merits. Instead, the Court of Appeals for the Fifth Circuit held that, even though Bernard could not have known about the suppressed evidence when he filed his first habeas petition, those claims were subject to the general bar on second-or- successive habeas petitions. *United States v. Bernard*, 820 Fodmaps. 309 (2020) (per curiam); see also 28 U.S.C. § 2255(h)(1)."

Ford and *Brady/Napue* claims are not the only

type of claims federal courts have considered in determining whether they fall within the context of second or successive habeas claims. *In re Weathersby*, 717 F.3d 1108, 1110 (10th Cir. 2013) ("The term "second or successive" is not defined in § 2255 or elsewhere in AEDPA. We know, however, that it does not simply refer to every § 2255 motion filed second in time to a previous § 2255 motion. See *Panetti v. Quarterman*, 551

U.S. 930, 944, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007) ("The Court has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application."). In *Panetti*, the Supreme Court concluded that a claim that was not ripe at the time the state prisoner filed his first federal habeas petition would not be considered "second or successive" under § 2244(b) if the petitioner asserted the claim in a later habeas petition once it became ripe. Id. at 947, 127 S.Ct. 2842; see also *Magwood v. Patterson*, ——U.S. ——, 130 S.Ct. 2788, 2796, 177 L.Ed.2d 592 (2010) (describing *Panetti* as having "creat[ed] an exceptio[n] to § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his first application" (second alteration in original) (internal quotation marks omitted)).")

This Court has held that relief under § 2255 is not available until the state conviction used to enhance the federal sentence is vacated. *Johnson v. U.S.*, 544 U.S. 295 (2005); 125 S.Ct. 1571. It is the fact of the state court vacatur that gives rise to the federal claim; the facts supporting the challenge to the state conviction do not themselves provide the basis for the § 2255 claim. Id. at 305–07, 125 S.Ct. 1571. There

simply is no legal fiction that distinguishes an after-acquired vacatur of state court convictions used as an enhancement to a federal sentence and after-acquired exculpatory evidence concealed by the government until a habeas petitioner has exhausted his initial § 2255 petition. In seeking to draw the distinction between the circuits' analysis of these sorts of after-acquired habeas claims, the Seventh Circuit succinctly drew the following conclusion:

> "Consequently, when discerning whether a second-in-time petition is successive, courts must be careful to distinguish genuinely unripe claims **(where the factual predicate that gives rise to the claim has not yet occurred)** from those in which the petitioner merely has some excuse for failing to raise the claim in his initial petition (such as when newly discovered evidence supports a claim that the petitioner received ineffective assistance of counsel); **only the former class of petitions escapes classification as "second or successive."**

Flores-Ramirez v. Foster, 811 F.3d 861, 865 (7th Cir. 2016).

The cases such as *Bernard, Donati*,[5] and others are not outliers or aberrations. This Court has previously been asked to address fully and finally the second or successive analysis in after-acquired *Brady/Napue* claims. Most recently in *Storey v.*

[5] Anthony Donati, Petition for Writ of Certiorari, United States Supreme Court Case No. 18- 7792.

Lumpkin, No. 21-6674 (June 30, 2022), Justice Sotomayor again summarized the disarray in the circuit courts in the differing way federal courts are addressing these important habeas challenges. In Justice Sotomayor's dissent in *Storey*, her statement summarizes the situation:

> "The facts of this case offer a cautionary tale for those Courts of Appeals that have yet to define what constitutes a restricted "second or successive habeas corpus application," 28 U.S.C. §2244(b)(2), in the context of prosecutorial misconduct. I write to underscore how erroneous the Fifth Circuit's definition is and how it unfairly deprives individuals of an opportunity to raise serious claims of prosecutorial malfeasance in federal habeas proceedings."
>
> "Storey then sought relief in federal court, which the Fifth Circuit ultimately denied on federal procedural grounds. See 8 F. 4th 382 (2021). The State argued that Storey's request for relief constituted a "second or successive habeas corpus application" under 28 U.S.C. §2244(b), which bars federal courts from considering such applications except in limited circumstances not present here. Storey maintained that his request was not "'an abuse of the writ'" under this Court's case law and therefore not successive, given that he was not aware of the

State's misconduct until late 2016. *Banister v. Davis*, 590 U.S._____, (2020) (slip op., at 7); see ibid, (explaining that if a "later-in- time filing would have 'constituted an abuse of the writ'" under '"our prior habeas corpus cases,'" "it is successive; if not, likely not"). The Fifth Circuit concluded otherwise, finding itself bound by Circuit precedent holding that "'*Brady* claims raised in second-in-time habeas petitions are successive regardless of whether the petitioner knew about the alleged suppression when he filed his first habeas petition.'" 8 F. 4th, at 392 (quoting *In re Will,* 970 F.3d 536, 540 (CA5 2020))."

"The Fifth Circuit's rule contravenes this Court's precedent. *Panetti v. Quarterman,* 551 U.S. 930 (2007), holds that a petition bringing a claim that was not ripe when the petitioner filed his first-in-time petition is not "second or successive." That reasoning "applies with full force to *Brady* claims" like Storey's, where the issue is that the State unlawfully failed to disclose evidence favorable to the defense, and the petitioner is not aware of that evidence until after the first-in-time petition. *Bernard*, 592 U.S., at____ (SOTOMAYOR, J., dissenting) (slip op., at 4-5)."

"At least three other Courts of Appeals have adopted the same erroneous

> interpretation as the Fifth Circuit. See *In re Wogenstahl*, 902 F.3d 621, 626- 628 (CA6 2018) (per curiam); *Brown v. Muniz*, 889 F.3d 661, 668-671 (CA9 2018); *Tompkins v. Secretary, Dept. of Corrections*, 557 F.3d 1257, 1259- 1260 (CA11 2009) (per curiam). But see *Scott v. United States*, 890 F.3d 1239, 1254-1258 (CA11 2018) (disagreeing with *Tompkins* at length but following it as binding); *In re Jackson*, 12 F. 4th 604, 611-616 (CA6 2021) (Moore, J., concurring) (opining that *Wogenstahl* was wrongly decided)."

Since Justice Sotomayor's dissent in *Storey,* the Sixth Circuit in an unpublished decision dated September 30, 2022 heavily criticized *Wogenstahl* again but remarked that it remains the law of the circuit. In granting habeas relief in *Baugh v. Nagy*, No. 21-1844 (6th Cir. Sep. 30, 2022) the court remarked that:

> "We find it "illogical" to hold that the abuse of the writ doctrine is abused when a petitioner seeks vindication for a previously unknown Brady violation. *Storey v. Lumpkin*, 142 S.Ct. 2576, 2578 (2022) (Mem) (Sotomayor, J.). Rather, "[w]here a prisoner can show that the state purposefully withheld exculpatory evidence, that prisoner should not be forced to bear the burden of section 2244, which is meant to protect against the prisoner himself withholding such information or intentionally prolonging

the litigation." *Workman v. Bell*, 227 F.3d 331, 335 (6th Cir. 2000) (*en banc*) (Merritt, J., dissenting). In fact, Brady claims seem to fall perfectly within the realm of claims that should not be considered "second or successive."'

"Although several other circuits have reached the same conclusion that we did in *Wogenstahl*, we likewise are not alone in second-guessing whether such holding was correct. See, e.g., *Scott v. United States*, 890 F.3d 1239, 1243 (11th Cir. 2018) ("Though we have great respect for our colleagues, we think Tompkins got it wrong: Tompkins's rule eliminates the sole fair opportunity for these petitioners to obtain relief."); *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015) ("We acknowledge that Gage's argument for exempting his Brady claim from the § 2244(b)(2) requirements has some merit. ..... But as a three-judge panel, we are bound to follow [circuit precedent]."); *Long v. Hooks*, 972 F.3d 442, 487 (4th Cir. 2020) (Wynn, J., concurring) (expressing doubt that *Brady* claims should be subjected to § 2244(b)'s gatekeeping mechanism, but ultimately following circuit precedent that held § 2244(b) applies)."

"Unfortunately, as ill-guided as *Wogenstahl* may be, it remains the law of our circuit, *Salmi v. Sec'y of Health &Human Servs.*, 774 F.2d 685, 689 (6th

> Cir. 1985), so we must hold that Baugh's petition alleging a Brady violation is "second or successive." *Baugh v. Nagy*, No. 21-1844, at *11-12 (6th Cir. Sep. 30, 2022)

Baugh prevailed on his *Brady* claim by meeting the evidentiary gatekeeping requirements in § 2244(b)(2).

This Court should therefore grant certiorari to firmly and finally determine that, like the Ford exception created by the Court in *Panetti*, *Brady/Napue* claims of the nature such as those that arise only after the petitioner has exhausted his initial petition brought under § 2255 are not subject to the gatekeeping requirements of § 2244(b)(2) against "second or successive" habeas applications where the factual basis of the after-acquired claim did not exist at the time of the adjudication of the petitioner's initial petition. This result is consistent with *Panetti*.

As Justice Sotomayor pointed out in the *Bernard* dissent, the Court's analysis in *Panetti* applied to Bernard's case because it was not Congress's intention nor does it align with the goals of the AEDPA "to subject *Brady* claims to the heightened standard of Section 2244(b)(2)." If the Court were to do so, it would adversely affect habeas practice and infringe on the constitutional rights of prisoners.

There is a significant distinguishing feature in Bartko's Supplemental *Brady* Claims that does not exist in many other after-acquired *Brady/Napue* claims. That is that the Hollenbeck recantations never existed until January-March, 2018. The facts exposed by his recantation under oath were not facts

that existed at the time of Bartko's initial habeas petition. The Hollenbeck recantation did not exist. The basis of the *Brady/Napue* claims brought forth in Bartko's Rule 60(b) Motion and his effort to supplement his initial habeas petition did not exist either. Bartko's supplemental claims could not possibly have been brought in his initial § 2255 petition because they did not exist. In this regard, there is no distinction whatsoever between the ripeness of a Ford claim or a federal sentencing enhancement based on state convictions subsequently vacated. Ergo *Panetti* should apply to Bartko's after-acquired *Brady/Napue* claims.

B. The Supreme Court's Reasoning in *Panetti* Should Apply to After-Acquired Habeas Petitions that Allege *Brady* Violations

Barring second-in-time *Brady* motions under § 2244(b)(2) "would 'produce troublesome results,' 'create procedural anomalies,' and 'close [the] door[] to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Panetti*, 551 U.S. at 946, 127 S.Ct. at 2854. It is unmistakable that Congress, in enacting the AEDPA, did not wish to prevent prisoners from filing *Brady* claims that could potentially reduce their sentences or save their lives. Such a goal would directly conflict with the principles of habeas corpus and due process preserved in the U.S. Constitution. As in *Panetti*, the AEDPA's concern for finality would not be implicated with *Brady* claims because federal courts would only be required to resolve claims at the time of first filing when they come to light. *Brady* violations require a

preliminary showing that there is a "reasonable probability of a different result" before it is allowed to proceed." Finally, although many *Brady* violations are technically "ripe" before the first habeas petition is filed, a second-in-time habeas petition that alleges previously undiscovered *Brady* violations does not constitute an abuse of the writ. This is like *Panetti* in that if the reasoning of the Fifth Circuit were to apply, as espoused in *Bernard*, which would require the defense to preserve a claim that is factually unsupported at the time of filing the first habeas petition, then it would create a flood of "claims to be raised as a mere formality, to the benefit of no party" nor the judicial system. Instead, it would undermine the principles of comity, finality, and federalism which are foundational to the AEDPA.

This interpretation is also extremely dangerous, especially in the context of capital cases. This procedure allows prosecutors to avoid accountability and their duty to administer justice by concealing their violations, at least until after a prisoner's first habeas petition has been resolved. As Judge Wynn stated in his concurrence in *Long v. Hooks*, 972 F.3d 442, 487 (4th Cir. 2020) "to subject *Brady* claims to the heightened standard of Section 2244(b)(2) is to reward investigators or prosecutors who engage in the unconstitutional suppression of evidence with a 'win.'" Consequently, the Fifth Circuit rule allows a prisoner to be stripped of his right to a fair trial and his right to challenge his conviction through the writ of habeas corpus as well. This was the case for Bernard—his *Brady* claim was dismissed before it was able to be heard on its merits, and he was subsequently executed.

Here Petitioner has been sentenced to 23 years

in federal prison. Lost his 31-year legal career, his assets, his freedom and of course his reputation. No federal judge has ever taken one minute of testimony exploring the factual basis of Bartko's Supplemental *Brady* Claims. They were all summarily dismissed as second or successive habeas claims under § 2255 and § 2244(b)(2).

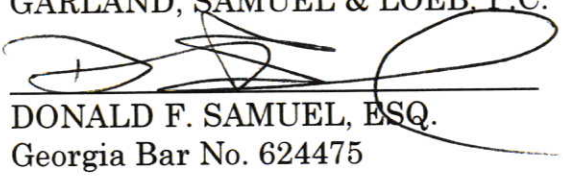
II. Conclusion

Brady violations are distinguishable by nature from other second-in-time habeas claims because they are undiscoverable, even with diligence on the part of the defense attorney, unless the prosecution discloses them. To further the AEDPA's purpose of finality as well as the constitutional guarantees for procedural fairness, courts need to recognize an exception to the § 2244(b)(2) bar on "second or successive" habeas petitions, as the Court did in *Panetti*. As it is well known, "procedural fairness is necessary to the perceived legitimacy of the law." Habeas corpus is a right that is crucial to safeguard individuals against arbitrary executive power. Bartko has thus far been denied that right. Certiorari should be granted.

Dated this 28th day of December, 2022.

RESPECTFULLY SUBMITTED,

GARLAND, SAMUEL & LOEB, P.C.



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INDEX OF APPENDICES

Attachment No. 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

NO. 5:09-CR-321-D
NO. 5:15-CV-42-D

GREGORY BARTKO, Petitioner,
v.
UNITED STATES OF AMERICA, Respondent.

PETITIONER'S SUPPLEMENTAL BRADY CLAIMS

Petitioner Gregory Bartko, ("Bartko"), hereby asserts the following additional and supplemental claims against the Respondent, United States of America, pursuant to 28 U.S.C. § 2242 and § 2255 and as allowed in accordance with Fed. R. Civ. P. 15(d) upon leave being granted:

1. Bartko previously filed his initial Motion To Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 on January 26, 2015. [D.E. 292, 295]. Bartko then filed an amendment to his Motion To Vacate on July 27, 2015. [D.E. 305, 310-1 through 310-22]. Jointly, these motions are hereinafter referred to as the "Motion To Vacate."
2. Bartko files these supplemental claims

based upon newly discovered information and evidence that has been obtained as a result of recent interviews conducted of the government's key witness at Bartko's trial, Scott B. Hollenbeck ("Hollenbeck").

3. After diligent inquiry by investigators working on behalf of Bartko, Hollenbeck's resident address upon his release from federal prison was discovered near Orlando, Florida. Prior to these efforts to locate Hollenbeck, it was believed that he was incarcerated as a federal prisoner following his conviction in the Eastern District of North Carolina ("EDNC") in January, 2008.

4. In early January, 2018, Bartko's investigators approached Hollenbeck to determine whether he would voluntarily submit to an interview by the investigators to review and discuss his testimony at Bartko's trial in the EDNC on November 3, 4 and 5, 2010.

5. Hollenbeck did agree to speak with Bartko's investigators on two separate occasions in January, 2018. The first two interviews with Hollenbeck were recorded interviews with his approval and consent. Neither of these interviews was given by Hollenbeck under oath or otherwise under penalty of perjury. Bartko's investigators and his legal counsel have duplicates of Hollenbeck's recorded interviews, which have since been transcribed for ease of filing with the Court in support of these claims.

6. Following Hollenbeck's initial interviews, a date certain was arranged for Hollenbeck to continue his interview with Bartko's investigators and provide his statement under penalty of perjury. Shortly thereafter, Hollenbeck was hospitalized for a period of time following a heart attack and corrective bypass surgery.

7. After his recuperation, Hollenbeck agreed to be interviewed by Bartko's investigators on March 7, 2018, which was conducted in the presence of a licensed court reporter. Hollenbeck's most recent interview was conducted under oath as sworn by the court reporter and was again given voluntarily with Hollenbeck's consent.

8. Hollenbeck's sworn interview was also recorded, and the transcript has been prepared. Bartko attaches hereto as Exhibit "A" a certified transcript of Hollenbeck's interview referred to as his "Recantation Statement."

9. In all three of Hollenbeck's recent interviews, he admitted that he testified falsely at Bartko's trial in a number of material respects, that he perjured multiple aspects of his testimony, and falsely and intentionally implicated Bartko in his fraudulent investment schemes to obtain the benefits of a reduction of his 168-month prison sentence, to avoid prosecution of himself and his wife related to investment

products other than Mobile Billboards of America, Inc. ("MBA"), and to avoid what he perceived to be the intimidation and veiled threats of prosecution coming from the government.

10. Although Hollenbeck's recently recanted statements speak for themselves, and are incorporated herein by reference, the areas of his testimony in Bartko's trial that were either perjured, false or misleading include the following which are not intended to be an exclusive or exhaustive list. References to "Tr. _____" refer to the Hollenbeck trial transcript. References to "RS _____" refer to Hollenbeck's Recantation Statement attached as Exhibit "A".

Trial testimony	**Recantation Statement**
(a.) that Bartko knew Hollenbeck was selling and using his fake surety bond "on a regular basis" after he was told in the strongest terms not to do so; Tr. at 182. Hollenbeck also stated that the terms of the Capstone Fund were the same as the terms of the Franklin Asset Exchange investments; Tr. at 113.	(a.) Hollenbeck has admitted in several parts of his Recantation Statement that he intentionally concealed his selling activities and use of his fake surety bond from Bartko. Hollenbeck stated that since Bartko was located in Atlanta, GA and his selling activities were primarily in North Carolina, he knew he could conceal his activities fromBartko.

	[RS at 6-7, 26, 29, 31-34, 37, 39-42, 48, 50-51, 56, 63-64].
(b.) that Bartko's letter sent to Capstone Fund subscribers with their investment refunds checks, although received by Hollenbeck from Bartko, did not include reference to the so-called round-trip scheme--- implying that Bartko intentionally did not include any reference to the scheme in order to conceal it; Tr. at 200.	(b.) Hollenbeck's Recantation Statement establishes that Bartko was unaware of Hollenbeck's plans to collect the Capstone Fund refund checks so he could route them to Legacy for Legacy to invest in the Capstone Fund. Hollenbeck verified that Bartko's intent was to refund the investments Hollenbeck had sent to him from non-accredited investors and close out the Capstone Fund. [RS at 34, 37, 51-56].
(c.) following the conversation between Bartko and Dr. Teo Dagi on the way to the Piedmont Airport in early January, 2005, Bartko instructed Hollenbeck to retrieve the Capstone Fund refund checks from the subscribers so those funds could be re-routed to Legacy for	(c.) Hollenbeck admits in his Recantation Statement that the conversation he testified about concerning Bartko's instructions to him to collect the refund checks so they could be endorsed over to Legacy never happened. Hollenbeck has stated that Bartko was unaware of Hollenbeck's

reinvestment back to the Capstone Fund; Tr. at 149-153.	actions concerning the refund checks. [RS at 32-33].
(d.) Hollenbeck stated that the [round-tripping] of the Capstone Fund refund checks was to facilitate the investment club structure discussed by Bartko; Tr. at 152.	(d.) Hollenbeck admits that, although Bartko did describe the structure of an "investment club" with him as a possible means of aggregating some of Hollenbeck's non-accredited investors, Hollenbeck never took any steps to aggregate his smaller investments from his clients. Instead, Hollenbeck devised the so-called "round-tripscheme." [RS 28, 30-31].
(e.) Hollenbeck testified that Bartko called Hollenbeck on January 31, 2005 about Bartko's discovery of a shortage of the total amount of the Capstone Fund refund checks and that Bartko was very upset, with Hollenbeck's testimony establishing that Bartko called about the missing funds the same day that Bartko had received and deposited the	(e.) Hollenbeck admits that his testimony which supported the government's theory that Bartko and Covington discovered Hollenbeck's embezzlement of six investor checks from those refunded by Bartko on or about January 31, 2005 was false and he recalls the confrontational phone call with Bartko and Covington to be

subscription from Legacy for $1,303,831; Tr. at 170-172. Hollenbeck falsely implied that Bartko's concern was over the missing funds, not his embezzlement.	monthslater in early April, 2005. Hollenbeck said his testimony indicating Bartko to be more concerned with the missing money not being included in the Legacy investment was false. [RS at 35, 39, 58-59].
(f.) told Bartko's jury that he requested his investor-clients who had received Bartko's refund checks to endorse them over to Legacy; Hollenbeck then delivered those checks to Legacy so they could be resent back to the Capstone Fund--- implying that the round-trip of the refund checks was accomplished at Bartko's request and with his knowledge; Tr. at 166.	(f.) Hollenbeck's statement reflects that Bartko had no awareness of or participation in the round-trip scheme. [RS at 34-35, 37, 51, 55-56, 58-59].
(g.) Although Hollenbeck admitted misappropriating six of the Capstone Fund refund checks, when Bartko found out, he was more upset that the money he expected to be	(g.) Hollenbeck admits that his testimony to the effect that Bartko was angry over the missing refund money returned to Capstone Fund investors was false. [RS at 36-37, 54-

round-tripped through Legacy back to the Capstone Fund was shorted the amount Hollenbeck misappropriated; Tr. at 159, 164-168.	55].
(h.) gratuitously implicated Bartko in testimony to the effect that Bartko knew all of his fundraising included the use of Hollenbeck's fake surety bond; Tr. at 227.	(h.) Hollenbeck admits that he concealed his fundraising activities from Bartko as well as his continued use of his fake surety bond. [RS at 32, 38, 41].
(i.) that Hollenbeck gratuitously implicated Bartko in testimony describing his forgery of approximately 130 client names used as consents to join the Mobile Billboards civil lawsuit as plaintiffs by testifying that Bartko knew of his forgeries and said nothing or tacitly approved; Tr. at 99, 101, 228-229.	(i.) Hollenbeck admits testifying falsely over Bartko's knowledge of his forgery of approximately 130 client signatures on consents for his clients to join the Mobile Billboards of America civil litigation as plaintiffs. [RS at 26-27].
(j.) testified that defense Exhibit 314, a document describing the Capstone Fund investment terms and defense Exhibit 500 were fraudulently	(j.) Hollenbeck admits that he created a number of fake documents related to the Capstone Fund and other investment

prepared by Hollenbeck, but with the knowledge and approval of Bartko; Tr. at 230-233.	products, all of which were prepared without Bartko's knowledge or consent, and that his trial testimony that Bartko was aware of his fraudulent creation of documents was false. [RS at 39, 57-58, 46-48].
(k.) stated at Bartko's trial that Bartko gave him instructions that each check received from his clients for the purchase of an investment in the Capstone Fund was to be payable to Franklin Asset Exchange and that Franklin was to issue a check in like amount to the Capstone Fund; Tr. at 136-137.	(k.) Hollenbeck admits that he intentionally failed to follow Bartko's admonitions about making sure the Franklin Asset Exchange investment in the Capstone Fund was permissible as an accredited investor. Hollenbeck stated that he told his clients to send individual checks to Franklin Asset Exchange and he then decided to send checks to Bartko in like amounts knowing this process was improper. Hollenbeck also admits altering the Capstone Fund subscription agreements without Bartko's knowledge. [RS at 29-32].
(l.) that Bartko knew that the Franklin Asset	(l.) Hollenbeck admits that Bartko was

Exchange checks sent to him in December-January, 2005 represented funds that came from Hollenbeck's unaccredited investors and that Bartko was aware that these funds were not being invested by Franklin Asset Exchange; T. at 141.	unaware that he was misleading his non-accredited investors by telling them they were investing in the Capstone Fund when in fact Hollenbeck knew they could not qualify for the investment. [RS at 31- 32].
(m.) testified that he was not certain if he gave investor Shirley Bibey altered, whited-out materials related to the Caledonian Fund, but probably did, when in fact Hollenbeck knew that he provided those documents to Ms. Bibey and others; Tr. at 238; and falsely implied in his testimony that Bartko was aware of his use of those materials; Tr. at 245.	(m.) Hollenbeck admits that he delivered fund disclosure materials concerning the Caledonian Fund and the Capstone Fund without Bartko's knowledge, contrary to Bartko's written instructions, and after whiting out portions of Bartko's instructional letter; and that he did so to investor Shirley Bibey and others. [RS at 33-34, 40, 42, 56-58].
(n.) implicated Bartko by testifying that he was aware of and approved Hollenbeck's use of forms (specifically defense Exhibits 319 and 320) that were created by Hollenbeck to mislead	(n.) Admits that he lied in his testimony when he implicated Bartko in his use of forms with Hollenbeck's clients that misled his clients about the Franklin Asset Exchange and

his investor-clients in regards to their Franklin Asset Exchange investments; Tr. at 248-250.	Capstone Fund investments. [RS at 40].
(o.) stated that Bartko wanted his relationship with Hollenbeck to continue even though Bartko knew of the legal and regulatory problems Hollenbeck was in claiming that Bartko's motivation was to continue to receive money from Hollenbeck's fraudulent sales efforts; Tr. at 239-240.	(o.) Admits that his trial testimony to the effect that Bartko overlooked his legal and regulatory problems so that the Capstone Fund would continue receiving funding through his efforts was false. [RS at 32, 54, 58, 64-65].
(p.) in reviewing defense Exhibit 405, Hollenbeck identified a particular form that had been used in sales efforts for Colvin's Disciples Trust Fund, and that Bartko approved the use of the same form to be sent to Capstone Fund investors and approved the use of the Capstone Fund name on the form instead of the Disciples Trust name; Tr. at 251-253.	(p.) Admits that Hollenbeck's testimony asserting that Bartko approved his use of fraudulently prepared forms, was false. [RS at 40].

(q.) attributed to Bartko the suggestion that a new company, CMH Enterprises, LLC, be formed with a name that would not reveal that the Hollenbecks owned or managed the company or were affiliated with the company as a way to avoid regulatory scrutiny; Tr. at 121, 317-318.	(q.) Admits that his testimony attributing the selection of the name for Hollenbeck's newly formed limited liability company, CMH Enterprises, LLC, was not selected by Bartko, but he recalled the name was suggested by Covington. Hollenbeck has stated that Bartko had no role in trying to conceal Hollenbeck's identify in doing so. [RS at 28, 41-42].
(r.) in Hollenbeck's testimony relating to the Capstone Fund Finders' Agreement, and specifically the attachment to the agreement which identified a series of activities Hollenbeck was instructed not to engage in, Hollenbeck feigned that he did not understand why the attachment was needed and did not know what it meant; Tr. at 320.	(r.) Admits that his testimony denying the relevance of the attachment to the finder's agreement between the Capstone Fund and CMH Enterprises, LLC was false and he knew very well what he was prohibited from doing as a "finder." [RS at 5-6, 22-23, 32-33, 49].
(s.) that Bartko was knowingly involved in the agreement between Legacy and Hollenbeck	(s.) Admits that Bartko was not privy to the discussions or agreement reached

on the split of the 6% finders' fees earned under the Capstone Fund Finders' Agreement and that Bartko routed fee payments to Hollenbeck through Legacy to conceal that arrangement; Tr. at 330-331.	between Hollenbeck and Legacy relating to the fee split of 6% paid by the Capstone Fund to Legacy as a finder's fee. [RS at 42].
(t.) that Bartko was aware of Hollenbeck's practices in selling many investment products, including the Franklin Asset Exchange and that Bartko approved the documents used by Franklin as legal counsel. Hollenbeck stated that ["Bartko"] knew everything [he] was doing; Tr. at 335.	(t.) Admits that his testimony to the effect that "Bartko knew everything I was doing" was false and admits that his testimony to the effect that Bartko prepared the investment documents for the Franklin Asset Exchange was also false. [RS at 42].
(u.) Bartko was not duped by Hollenbeck in the manner that he was fundraising for the Capstone Fund because Bartko and Colvin had an "intimate" relationship and as a result, Bartko knew every bit of what Hollenbeck had been through as well as his	(u.) Admits his perjured testimony accusing Bartko of having a close relationship with Colvin; knew what money problems Hollenbeck was dealing with; and that Bartko was aware of Hollenbeck's selling practices. [RS at 39, 40-42].

selling practices; Tr. at 334-335.	

11. Before Bartko's prosecutors approached Hollenbeck to obtain his cooperation and testimony in the Bartko and Colvin prosecutions, AUSA Wheeler was well aware of Hollenbeck's history of being an habitual liar and fraudster. AUSA Wheeler had previously investigated and prosecuted Hollenbeck in the Mobile Billboards prosecution. Even at Hollenbeck's own sentencing following his Mobile Billboard's conviction, AUSA Wheeler had to know Hollenbeck lied under oath during his allocution.
12. Bartko's prosecutors disclosed some of Hollenbeck's past misconduct such as his false statements over the years, his 1988 "confession" given at the time Hollenbeck was forced to sever his relationship with the Fairhaven Baptist Church in Indiana and his notary fraud. What AUSA Wheeler failed to disclose to Bartko's defense team was the effort to encourage Hollenbeck to cooperate in the Bartko and Colvin prosecutions through a number of inducements discussed with Hollenbeck or his legal counsel, Scott Holmes.
13. These inducements for Hollenbeck's cooperation included a Rule 35(b) sentence reduction motion to reduce Hollenbeck's 168-month federal prison sentence and a willingness not to further prosecute Hollenbeck or his wife for

crimes that otherwise were prosecutable. Hollenbeck was receptive to these inducements in part because he felt threatened and intimidated by the prosecutors, who communicated in one form or another the nature and manner that they wanted Hollenbeck to implicate Bartko in Hollenbeck's on-going investment schemes.

14. Hollenbeck was encouraged to implicate Bartko in his fake surety bond schemes by voluntarily submitting to one or more interviews with prosecutors and case agents in preparation for Bartko's and Colvin's indictments and trials, which encouragement was accomplished primarily in discussions between AUSA Wheeler and Hollenbeck's legal counsel, Holmes. Holmes recounted these discussions with Hollenbeck, assuring him that a Rule 35 reduction of sentence was likely if he cooperated and that he (and his wife) would avoid prosecution if he cooperated with the government in the Bartko case.

15. Hollenbeck was aware, however, that truthful information or testimony from him would not implicate Bartko as the prosecutors had expected. Instead, Hollenbeck was aware that he needed to provide false, misleading and perjured information and testimony to implicate Bartko as a knowing participant in Hollenbecks' investment schemes. Hollenbeck also felt he had to do so in order to obtain the prosecution's

inducements for his cooperation.

16. Knowing full well of Hollenbeck's expectations for benefits and leniency from Bartko's prosecutors (as communicated to Hollenbeck's counsel) and being fully cognizant of Hollenbeck's ability and proclivity to fabricate and deceive most any one, Bartko's prosecutors proceeded with the case against Bartko in large measure in reliance on Hollenbeck's false narrative of Bartko's knowing complicity in his investment schemes.

17. Bartko's prosecutors were also well aware of the exposure Hollenbeck would subject himself to on cross-examination if he were called to testify at Bartko's trial. To blunt the effectiveness of Hollenbeck's cross-examination, several pieces of exculpatory and impeachment evidence were suppressed from Bartko's defense team, including but not limited to the Hollenbecks' immunity contracts.

18. Hollenbeck was also encouraged to testify that the government had in fact made him no promises in exchange for his testimony against Bartko and eliciting the lack of promises in the first few minutes of direct examination and by misleading Bartko's jury into believing Hollenbeck's deceitful conduct was in his past, that he had taken responsibility for his crimes, and that his willingness to testify against Bartko was to make things right with his many victims. AUSA Wheeler was fully aware,

or should have been aware, that these motives expressed to Bartko's jury were false and misleading by Hollenbeck, because Holmes had told Hollenbeck that based on his conversations with AUSA Wheeler, a Rule 35 motion would be filed if Hollenbeck cooperated.

19. Colvin's trial took place six months before Bartko's trial and Hollenbeck testified in that trial as he was expected to do by the prosecution. Hollenbeck's testimony in the Colvin trial provided further notice to Bartko's prosecutors that Hollenbeck was fully capable of lying under oath in a federal courtroom.

20. AUSA Wheeler took several steps before Bartko's trial to avoid disclosing to Bartko's defense team Hollenbeck's true motives for his cooperation and implication of Bartko in Hollenbeck's fraudulent investment schemes. These actions and omissions included the following:

    a. by establishing a line of communications with Hollenbeck at his prison facility through Hollenbeck's former court-appointed lawyer, Scott Holmes ("Holmes"), designed to incentivize Hollenbeck to cooperate as a government witness in Bartko's and Colvin's prosecutions. This arrangement acted as a means of concealment by AUSA Wheeler of the inducements and potential benefits

ultimately given to Hollenbeck in exchange for his cooperation and favorable testimony;

b. by suppressing not only the two proffer/immunity contracts entered into with Hollenbeck and his wife, but by failing to disclose any of the inducements for Hollenbeck's cooperation to Bartko's defense team and enabling Hollenbeck to falsely deny his true motives behind his willingness to testify favorably for the government in Bartko's trial; and

c. by AUSA Wheeler's denials of having any discussions with Hollenbeck or Holmes concerning any sentence reduction, agreements not to prosecute Hollenbeck or his wife, or other benefits that would inure to Hollenbeck upon his agreement to cooperate and testify favorably in Bartko's trial.

21. In the various respects described in paragraph 10 of the Supplemental Brady Claims, and in the various respects Hollenbeck has revealed in his recent interviews, Bartko's prosecutors should have known of the false, perjured and misleading evidence and testimony presented throughout his testimony during Bartko's trial; at a minimum, the prosecutors were recklessly indifferent to Hollenbeck's false denials of any expected benefit. They were also fully aware, or

should have been aware, of the expectations of leniency held by Hollenbeck in exchange for his cooperation and testimony.

22. Hollenbeck's perjured, false and misleading testimony at Bartko's trial was material to the ultimate outcome of the guilty verdict. Although Bartko's defense team elicited other impeachment evidence affecting Hollenbeck's credibility, evidence of false testimony such as that presented by Hollenbeck on such a massive scale is a far more compelling form of impeachment. In other words, it was one thing for the jury to learn that Hollenbeck had a history of improprieties, but it would have been an entirely different matter for Bartko's jury to learn that after taking an oath to tell the truth, Hollenbeck made a conscious decision to lie to implicate Bartko so that he would benefit from a reduction of his prison sentence and so he and his wife would not be prosecuted further.

23. There is a reasonable likelihood that Hollenbeck's false and perjured testimony could have affected the judgment of Bartko's jury, and due to the prosecution's suppression of the impeachment evidence described above and its failure to correct Hollenbeck's false testimony, this misconduct resulted in a verdict unworthy of confidence.

24. Bartko's prosecutors failed to correct any aspect of Hollenbeck's trial testimony that

> they should have known was perjured, false or misleading. The cumulative effect of Hollenbeck's false testimony, buttressed by the dissembling minimizations of the prosecution's awareness of Hollenbeck's false testimony and their refusal to acknowledge the violations of Bartko's due process rights, resulted in Bartko's wrongful conviction and his unconstitutional detention, which continues.

Bartko therefore requests that the Court grant relief in accordance with 28 U.S.C. § 2255 by setting aside Bartko's conviction and sentence and to grant Bartko a new trial subject to the government's election (if allowable) to retry Bartko on his superseding indictment. Bartko further requests that the Court grant such other and further relief as prayed for in Bartko's Motion To Vacate the same as if said relief was recited here in these Supplemental Brady Claims.

Dated this 28th day of March, 2018.

Respectfully Submitted,

s/Donald F. Samuel
Donald F. Samuel
GA State Bar No. 624475

s/ Amanda R. Clark Palmer
Amanda R. Clark Palmer
GA State Bar No. 130608

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Bartko

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing PETITIONER'S SUPPLEMENTAL BRADY CLAIMS with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

This the 28th day of March, 2018.

s/Donald F. Samuel
Donald F. Samuel
GA State Bar No. 624475

Attachment No. 2

USCA4 Appeal: 20-7879 Doc: 11 Filed: 05/20/2022

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-7879

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
GREGORY BARTKO,
Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever, III, District Judge. (5:09-cr-00321-D-1; 5:15-cv-00042-D)

Submitted: April 26, 2022

Decided: May 20, 2022

Before DIAZ and RUSHING, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Donald Franklin Samuel, GARLAND, SAMUEL & LOEB, Atlanta, Georgia, for Appellant. Michael Gordon James, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gregory Bartko appeals the district court's orders construing his Fed. R. Civ. P. 60(b) motion for relief from judgment as an unauthorized, successive 28 U.S.C. § 2255 motion and dismissing it for lack of jurisdiction.* In a § 2255 proceeding, "a Rule 60(b) motion . . . that attacks the substance of the federal court's resolution of a claim on the merits is not a true Rule 60(b) motion, but rather a successive" § 2255 motion, and is therefore subject to the preauthorization requirement of 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). *McRae*, 793 F.3d at 397 (internal quotation marks omitted). By contrast, "[a] Rule 60(b) motion that challenges some defect in the integrity of the federal habeas proceedings . . . is a true Rule 60(b) motion, and is not subject to the preauthorization requirement." *Id.* (internal quotation marks omitted). Where the movant "presents claims subject to the requirements for successive applications as well as claims cognizable under Rule 60(b)," such a pleading is a mixed Rule 60(b) motion/§ 2255 motion. *Id.* at 400 (internal quotation marks omitted).

In his Rule 60(b) motion, Bartko sought a remedy for a perceived flaw in his § 2255 proceeding and raised a direct attack on the district court's resolution of

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A certificate of appealability is not required to appeal the district court's jurisdictional categorization of a Rule 60(b) motion as an unauthorized, successive § 2255 motion. *United States v. McRae*, 793 F.3d 392, 400 (4th Cir. 2015).

his claims on the merits. Thus, our review leads us to conclude that the district court properly construed Bartko's Rule 60(b) motion as a mixed Rule 60(b) motion/§ 2255 motion. *See* * *Will v. Lumpkin*, 978 F.3d 933, 938-39 (5th Cir.), *cert. denied*, 142 S. Ct. 579 (2020). The district court then afforded Bartko the opportunity to elect between deleting his successive § 2255 claims or having his entire motion treated as a successive §
2255 motion. *See McRae*, 793 F.3d at 400; *United States v. Winestock*, 340 F.3d 200, 208 (4th
Cir. 2003). When Bartko declined to remove the improper claims, the court properly treated Bartko's entire motion as a successive § 2255 motion and dismissed it for lack of jurisdiction because he failed to obtain prefiling authorization from this court. *See* 28 U.S.C. §§ 2244(b)(3)(A), 2255(h); *McRae*, 793 F.3d at 397-400. Accordingly, we affirm the district court's orders.

Consistent with our decision in *Winestock*, 340 F.3d at 208, we construe Bartko's notice of appeal and informal brief as an application to file a second or successive § 2255 motion. Upon review, we conclude that Bartko's claims do not meet the relevant standard. *See* 28 U.S.C. § 2255(h). We therefore deny authorization to file a successive § 2255 motion.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Attachment No. 3

USCA4 Appeal: 20-7879 Doc: 15 Filed: 08/16/2022 Pg: 1 of 1

FILED: August 16, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7879 (5:09-cr-00321-D-1)
(5:15-cv-00042-D)

UNITED STATES OF AMERICA, Plaintiff - Appellee
v.
GREGORY BARTKO, Defendant – Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Diaz, Judge Rushing, and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk