

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTAVIUS MCLENDON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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PETITION FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

Where 28 U.S.C. § 2255 grants convicted federal inmates the right, in lieu of common law habeas corpus, to “move the court which imposed the sentence” to grant relief from constitutional violations, may a court of appeals, upon concluding that the district court erroneously dismissed the § 2255 motion as procedurally defaulted without reaching the merits, deny the § 2255 motion on the merits, rather than remanding to the district court for the post-conviction review guaranteed by the statute?

## **INTERESTED PARTIES**

The caption contains the names of all of the parties interested in the proceedings.

## **RELATED PROCEEDINGS**

*McLendon v. United States*, No. 21-13480, 2023 WL 2417690 (11th Cir. Mar. 9, 2023)

*McLendon v. United States*, No. 16-cv-20643, 2021 WL 3516585 (S.D. Fla. Aug. 10, 2021)

*McLendon v. United States*, No. 16-cv-20664, 2021 WL 3518205 (S.D. Fla. Mar. 30, 2021)

*United States v. Bryant*, 780 F. App'x 738 (11th Cir. 2019)

*United States v. Bryant*, No. 12-cr-20276, 2016 WL 8732411 (S.D. Fla. Oct. 27, 2021)

*United States v. Mack*, 572 F. App'x 910 (11th Cir. 2014)

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## **PETITION FOR WRIT OF CERTIORARI**

Octavius McLendon respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number No. 21-13480 on March 9, 2023.

### **OPINION BELOW**

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, unpublished and available at 2023 WL 2417690, is contained in the Appendix (App. 1). The decision of the Eleventh Circuit denying the petition for rehearing is contained in the Appendix (App. 12).

### **JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The petition is timely filed.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Petitioner relies upon the following constitutional and statutory provisions:

**U.S. Const. amend. V** (due process clause):

No person shall be ... shall ... be deprived of life, liberty, or property, without due process of law.

**28 U.S.C. § 2106**

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the

cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

## **28 U.S.C. § 2255(a)**

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

### **STATEMENT**

The statutory design of 28 U.S.C. § 2255 is clear in requiring that the court which imposed the defendant's sentence hear and decide the motion to set aside the sentence. The Eleventh Circuit, apparently alone among the Circuits, has adopted a standardized practice of reaching the merits of and resolving § 2255 motions where district courts on procedural default grounds have erroneously dismissed the motion, and thus failed to review the claimed constitutional violations. The Eleventh Circuit's practice deprives the defendant of the opportunity to have the court that is actually familiar with the case, including aspects of it that cannot be fully appreciated by review of the cold record, evaluate and rule on the § 2255 motion.

In petitioner's case, the court of appeals not only bypassed the district court's authority over the § 2255 motion, it failed even to acknowledge the magistrate judge's report and recommendation on the merits issue that remained unresolved in the

district court. The magistrate judge that heard evidence found a constitutional violation that vitiated the verdict of guilty for the alleged principal in a firearm possession case (under 18 U.S.C. § 924(c)) as to which petitioner, in a joint trial with the alleged principal, was convicted solely as an aider and abettor. Depriving petitioner of the statutorily-granted right of district court review of his claim that vitiation of the validity of the jointly-tried principal's verdict necessarily tainted the petitioner's aiding-and-abetting verdict unfairly prejudiced petitioner. This petition asks that this Court enforce petitioner's statutory right of district court review of his § 2255 claim.

Petitioner and two co-defendants, Henry Bryant and Daniel Mack, were charged by federal indictment with conspiracy and attempt to possess cocaine. Relevant to this petition, the indictment also alleged that petitioner aided and abetted co-defendant Mack in knowingly carrying a firearm in relation to a drug trafficking crime, under 18 U.S.C. § 924(c)(1)(A). The prosecution arose from an undercover sting in which petitioner and Bryant were hired to transport packages purportedly containing cocaine on two occasions between Miami Beach and Aventura, two cities in Miami-Dade County, Florida. App. 93. A Miami police officer (Mack) followed the short trips in his police car acting in a protective capacity at the request of Bryant. App. 94. The government offered testimony by an FBI agent (Dante Jackson) that coded language used in Mack's presence should have alerted him that he was protecting cocaine

transports. App. 101 (citing testimony by FBI agent regarding code words that would have alerted Mack to a cocaine transaction). Mack was convicted as a principal in a § 924(c) offense, and petitioner was convicted of the § 924(c) charge, but solely as an aider and abettor of Mack's offense. App. 9, 105.

After petitioner was sentenced, the government revealed that FBI agent Jackson, whose testimony was critical to convicting Mack, had been engaged in illegal, obstructive activity in other investigations, including covering up an informant's involvement in a first degree murder and lying to police about his undercover work. App. 36 ("As it turns out, the investigative team aiming 'to weed out ... corruption' [in the police department] included an [FBI] agent with his own integrity issues: Agent Jackson."; describing the FBI agent's misconduct as "egregious").

Petitioner and Mack filed motions for new trial based on newly discovered evidence of *Brady v. Maryland*, 373 U.S. 83 (1963), violations relating to FBI agent Jackson. App. 46. The motions were consolidated for hearing and decision, and the assigned magistrate judge, after a two-day evidentiary hearing, concluded that the *Brady* violation violated Mack's due process right to a fair trial and warranted a new trial for Mack on all counts of the indictment, including the § 924(c) count of conviction. App. 78. The magistrate judge recognized that petitioner had argued that if Mack was denied a fair trial on the § 924(c) count, petitioner also was denied a fair trial, because at the joint trial of the three defendants, petitioners were convicted solely on an aiding

an abetting theory. App. 84–85 (“The defendants also argue that if Mack’s conviction was improperly obtained, Mr. Bryant and McLendon’s § 924(c) conviction was likewise improperly obtained. ... The government did not address this argument.”).

The magistrate judge nevertheless recommended denying relief to petitioner. App. 85 (relying erroneously on precedent holding that in *separate* trials—unlike the *joint* trial in this case—inconsistent verdicts as to the principal and an abettor need not be reconciled; failing to address precedent holding that impropriety affecting the verdict as to the principal in a *joint* trial necessarily affects the verdict of a jointly-tried defendant convicted of aiding and abetting that principal; and noting “Mr. Mack would not be acquitted, he would merely be receiving a new trial”). Some four months after its order in petitioners’ cases (adopting the magistrate judge’s report and denying relief), the district court modified its decision by stating that it did not adopt the report as to the finding of a *Brady* violation requiring a new trial for Mack and instead, via a final settlement of Mack’s case between the government and defendant Mack, vacated Mack’s drug conviction, but left his § 924(c) conviction in place. *Id.*

On petitioner’s appeal of the new trial denial order, the Eleventh Circuit affirmed, rejecting petitioner’s argument “that because the magistrate judge recommended that Mack be granted a new trial on the § 924(c) charge” and the district court adopted the magistrate judge’s recommendation in petitioner’s case, petitioner was “entitled to a new trial on that charge as well.” App. 39. The Eleventh Circuit

held that despite the fact that the district court's initial order in petitioner's case adopted the magistrate judge's report, relief could not be granted to petitioner because the district court later modified the order in Mack's case and ultimately did not grant Mack a new trial. *Id.* The Eleventh Circuit held that the post-order settlement by Mack and the government foreclosed relief to petitioner. *Id.*

Petitioner then pursued 28 U.S.C. § 2255 relief, again asserting the claim that the district court had not ruled on in resolving the new trial motion: whether Mack was denied a fair trial and thus whether petitioner was derivatively denied a fair trial. App. 30. The district court denied the § 2255 claim as to derivative denial of a fair trial by finding that it had been procedurally defaulted on direct appeal where petitioner had erroneously proceeded on the theory that the district court's adoption of the magistrate judge's report extended to adoption of the grounds for rejecting the derivative due process violation claim. App. 30–31.

Petitioner appealed to the Eleventh Circuit, contending that the procedural default doctrine does not apply in this context, for multiple reasons, including that the district court's new trial ruling was, at best, ambiguous on the derivative due process claim and that procedural default is inapplicable to the failure to appeal new trial rulings. The Eleventh Circuit granted a certificate of appealability as to the following issue concerning the derivative due process violation claim: "Whether the district court erred in denying, as procedurally defaulted, [petitioner's] claim[] that a violation of

*Brady v. Maryland*, 373 U.S. 83 (1963), affected his conviction[] under 18 U.S.C. § 946(c) as [an] aider[]-and-abettor[.]” But on appeal, the Eleventh Circuit did not decide the procedural default question. Instead, the court of appeals, without addressing the magistrate judge’s finding of a violation of Mack’s due process rights, engaged in an independent review of the impact of the *Brady* violation on the evidence offered at trial specifically in relation to petitioner, thus failing to reach the question of whether Mack was denied a fair trial due to the *Brady* violation and whether petitioner suffered derivative prejudice in the constitutional violation that led the jury to believe that Mack, the principal, had committed the crime that petitioner was found to have aided Mack in committing. The Eleventh Circuit reasoned as follows:

We have not applied procedural default in a context where a claim was unavailable on direct appeal, but available and not raised, on appeal from the denial of a post-trial, post-appeal Rule 33 motion for a new trial. Importantly, however, we’ve held that we may skip procedural default issues if the claim would fail on the merits. *See Dallas v. Warden*, 964 F.3d 1285, 1307 (11th Cir. 2020) (addressing a 28 U.S.C. § 2254 petition), *cert. denied sub nom. Dallas v. Raybon*, 142 S. Ct. 124 (2021).

\* \* \*

Here, it is unnecessary for us to address whether the district court properly concluded that McLendon’s *Brady* claim concerning Count 4 was procedurally defaulted by his failure to raise it on direct appeal following the denial of his motion for a new trial. This is because we conclude that McLendon cannot satisfy his burden under *Brady* for his firearm conviction (Count 4). *See Dallas*, 964 F.3d at 1307. Specifically, he cannot establish that, had the law enforcement agent’s misconduct been disclosed, there is a reasonable probability that the outcome of his firearm charge would have been different.

The question currently before us is whether -- based on the government's failure to disclose prior to trial that Special Agent Jackson had engaged in misconduct both before and during the defendants' trial -- there is a reasonable probability that the outcome of McLendon's firearm charge would have been different if the exculpatory evidence had been disclosed. ... We do not believe that there is, because the record reflects that there was ample evidence -- besides Special Agent Jackson's testimony -- to support McLendon's firearm conviction. ... Detective Tyson testified that he had seen a firearm in Mack's gunbelt when he was with Bryant earlier in the day of the second transport, and in a recording the jury heard, Bryant referred to McLendon as his "point man" and "brother" and said they'd share payments, suggesting that McLendon was fully in on the plans. On this record, it was more than reasonable to conclude that McLendon believed that the marked police cruiser following his vehicle closely during a drug transport for eight to ten miles was driven by an armed officer.

As for Jackson's testimony, it is unclear what testimony he offered that would have been material to McLendon's firearm conviction. Jackson told the jury that the only communication he'd had with McLendon was during their in-person meetings on the dates of the two sham drug transfers. Notably, both of these interactions were recorded and played before the jury. We simply do not see how his testimony was relevant to the firearm conviction.

App. 4–5, 9–10 (citations omitted). The Eleventh Circuit did not address whether Mack was deprived of a fair trial due to the *Brady* violation and, if he was, whether the tainting of the jury verdict as to Mack, the alleged principal, would require a finding that the verdict was also tainted as to petitioner, who was convicted solely on the theory of having aided and abetted the commission of a crime by Mack.

## REASONS FOR GRANTING THE PETITION

The Constitution provides that the right of habeas corpus shall not be suspended. U.S. Const., art. I, § 9, cl. 2. This Court has concluded that 28 U.S.C. § 2255 sufficiently effects an avenue for habeas relief for federal defendants and thus is constitutional. *See, generally, Jones v. Hendrix*, 143 S. Ct. 1857, 1863 (2023) (“Since 1948, Congress has provided that a federal prisoner who collaterally attacks his sentence ordinarily must proceed by a motion in the sentencing court under § 2255, rather than by a petition for a writ of habeas corpus under § 2241. To that end, § 2255(e) bars a federal prisoner from proceeding under § 2241 ‘unless ... the [§ 2255] remedy by motion is inadequate or ineffective to test the legality of his detention.’”).

Section 2255 provides for jurisdiction in the district court that imposed the sentence. Deprivation of that right to the petitioner in this case warrants this Court’s review, to maintain the statutory structure that fulfills the constitutional requirement.

Courts of appeals are not suited to resolution of trial-affecting constitutional violations in the first instance. They did not see or hear the witnesses or defendants; they did not conduct evidentiary hearings on the issues; and they can hardly be expected to undertake the complete consideration of cold and live record factors in the first instance. Thus, in other Circuits, the defendant’s right to have the relevant district court determine the issues raised by a § 2255 motion is maintained.

The course adopted by the Eleventh Circuit reveals in petitioner's case the grave harm of watering down post-conviction rights. The Eleventh Circuit's decision to take up the § 2255 claim, without even acknowledging the magistrate judge's findings and analysis of the due process violation vitiating Mack's conviction as principal in the joint trial in which petitioner was convicted as an aider and abettor, shows that Congress's decision to place the habeas authority in the hands of the district court that imposed sentence is important and worth preserving from judicial erosion.

The procedure employed by the Eleventh Circuit to bypass the district court in petitioner's case is apparently unique among federal courts of appeals. *See, e.g., Abbamonte v. United States*, 160 F.3d 922, 925 (2d Cir. 1998) (court of appeals need "make no comment on the validity of this claim" that the district court erroneously found procedurally barred; remanding for merits consideration of § 2255 motion); *Batista v. United States*, No. 22-8, 2023 WL 2975132, at \*1 (2d Cir. Apr. 13, 2023) (given government's "explicit waiver of the procedural default defense relied on by the district court, ... the case is REMANDED for further proceedings. *See* 28 U.S.C. § 2106."); *United States v. McClammy*, 801 F. App'x 142 (4th Cir. 2020) ("[M]indful that we are a court of review, not of first view,' *Lovelace v. Lee*, 472 F.3d 174, 203 (4th Cir. 2006) (internal quotation marks omitted), we vacate the district court's order [finding procedural default] and remand for further proceedings. We express no opinion on the

ultimate resolution of McClammy’s Davis claims.”); *United States v. Williams*, 402 F. App’x 943, 944 (5th Cir. 2010) (“[T]he district court erred in dismissing Williams’s § 2255 motion as barred by the statute of limitations, and we VACATE and REMAND for further proceedings.”); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018) (“[T]he judge who reviewed his § 2255 motion is the same judge who sentenced him. It is difficult to think of a better source of information about what happened the first time around.”); *Ballinger v. United States*, 379 F.3d 427, 430 (7th Cir. 2004) (“Ballinger’s ineffective-assistance-of-counsel claim is not procedurally defaulted. So Ballinger must be allowed to litigate his ineffective-assistance-of-counsel claim.”); *United States v. Skurdal*, 341 F.3d 921, 928 (9th Cir. 2003) (“This constitutional error excuses Mr. Skurdal’s procedural default in failing to present his contentions in his pro se briefs on his direct appeal. Accordingly, we REVERSE the district court’s dismissal of Mr. Skurdal’s § 2255 motion and we REMAND this matter to the district court with directions to consider the merits of the issues presented in that motion.”); *United States v. Martin*, No. 96-6061, 1997 WL 57153, \*2 (10th Cir. 1997) (“The procedural bar rule does not apply to ineffective assistance of counsel claims, however. ... The case must be remanded, therefore, to the district court for further proceedings only on those ineffective assistance claims.”); cf. *Herman v. Claudy*, 350 U.S. 116, 118-19 (1956) (“[W]here a denial of ... constitutional protections is alleged in an appropriate

proceeding by factual allegations not patently frivolous or false on a consideration of the whole record, the proceeding should not be summarily denied.”).

The Court should grant certiorari because of the importance of the constitutional rights at issue and to validate rights guaranteed under § 2255 to have the district court that imposed the sentence determine whether the sentence should be set aside.

### **CONCLUSION**

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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