No. _____

9th Cir. No. 21-15828
D.C. No. 2:19-cv-05028-DGC

IN THE

Supreme Court of the United States

_____

MICHAEL ROCKY LANE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

On Petition For Writ of Certiorari
From The United States Court of Appeals, Ninth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The Circuit Courts Have Decided An Important Question Of Federal Law That Should Be Definitively Settled By This Court?

II. Whether 28 U.S.C. § 2255(h)'s 'Clear & Convincing Evidence' Standard Should Not Apply To Mr. Lane's *Brady* Claim & Others Like It?

I. If 28 U.S.C. § 2255(h)'s "Clear And Convincing Evidence" Standard Applies, Whether Mr. Lane's Claims Meet That Standard?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Mr. Lane respectfully prays that a writ of certiorari issue to review the judgment below. The Circuit Courts have decided an important question of federal law that should be definitively settled by this Court: Whether a claim raised pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), in a second or successive proceeding pursuant to 28 U.S.C. §2255 must satisfy the heightened 'clear and convincing standard' criteria for relief set forth in §2255(h)(l) when, despite due diligence, the *Brady* violation was not discovered until after the defendant's first §2255 proceeding had concluded? The Circuit Courts have decided the issue in a way that conflicts with this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007). The issue of second or successive *Brady* claims is of great public importance because requiring a defendant to meet the heightened clear and convincing standard implicates an inequitable result. Such a rule eliminates the sole fair opportunity for defendants to obtain relief on a strong equitable claim: the right to a fundamentally fair trial.

OPINIONS BELOW

The Order of the Ninth Circuit granting the Application to File Second or Successive 28 U.S.C. § 2255 Motion is annexed as Appendix E. The Report & Recommendation of the United States Magistrate Judge regarding the 28 U.S.C. § 2255 Motion is annexed as Appendix D. The Order of the United States District Court denying the 28 U.S.C. § 2255 Motion is annexed as Appendix C. The Memorandum Decision of the Ninth Circuit affirming the District Court's Order is annexed as

Appendix B. The Ninth Circuit's Order denying the Petition for Panel Rehearing is annexed as Appendix A.

JURISDICTION

The United States Court of Appeals, Ninth Circuit decided this case on April 20, 2023 and the Petition for Rehearing was denied on May 31, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and the appellate jurisdiction established by Article III, Section 2, Clause 2 of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 21 U.S.C. § 813 (Controlled Substance Analogue Enforcement Act)
2. 28 U.S.C. § 2244(b)(2)(B)(ii)
3. 28 U.S.C. § 2255
4. U.S. Const. Amend. VI (fair trial)
5. U.S. Const. Amend. XIV (due process)

STATEMENT OF THE CASE

The Second Superseding Indictment alleged that from early 2011 through July 2012, Mr. Lane conspired to manufacture and distribute the controlled substance analogues MDPV (prior to October 2011), a-PVP, a-PBP, pentylone, pentedrone, and MPPP in violation of 21 U.S.C. §§846, 841(a)(1) and 841(b)(1)(c). 3-ER-455.[1] The Indictment also alleged that on July 25, 2012, Mr. Lane possessed with the intent to distribute the controlled substance analogues a-PVP, pentedrone, and MPPP. *Id*. The

[1] Citations are to the Excerpts of Record ("ER") filed in the Ninth Circuit Court of Appeals.

Indictment alleged the analogues were substantially similar to the chemical structure of cocaine, methamphetamine, methcathinone, MDMA, and after October 21, 2011, MDPV, methylone, and methphedrone. *Id*.

The Analogue Act prohibits the manufacture, distribution, and possession of controlled substance analogues. 21 U.S.C. §§ 813(a), 841. A controlled substance analogue is defined as a substance:

> 1) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> 2) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. § 802(32)(A). This means an otherwise legal substance becomes a prohibited controlled substance analogue when it is substantially similar in chemical structure to a Schedule I or II controlled substance ("Prong One") and it has a substantially similar effect on the central nervous system ("Prong Two").

Mr. Lane was convicted after a jury trial of all three counts alleged in the Indictment and sentenced to 180 months imprisonment. 1-ER-119; 1-ER-115. Mr. Lane filed a direct appeal and a Petition for Writ of Certiorari, both of which were denied. 1-ER-112; 1-ER-111; 1-ER-110. On December 2, 2016, Mr. Lane filed his first 28 U.S.C.

§2255 Motion, which was denied, as was his request for a certificate of appealability. 1-ER-100; 1-ER-99.

On or about July 20, 2018, Mr. Lane's trial counsel was contacted by an attorney from Dallas, TX and informed about documents she had received from the Government that she believed were relevant to Mr. Lane's case. 1-ER-4-5. The materials were from the case *United States v. Gas Pipe, Inc., et al*., Northern District of TX Case No. 3:14-cr-00298-M (hereinafter "*Gas Pipe*") and constituted newly discovered evidence because they were not previously disclosed by the Government. 1-ER-7-8.

Two offices within DEA played prominent roles in the determination of which substances qualified as analogues under the Analogue Act: Office of Diversion Control and Office of Forensic Sciences. Dr. Thomas DiBerardino ("Dr. DiBerardino") worked in the Office of Diversion Control. For purposes of analogue cases, Dr. DiBerardino performed the Prong One analysis. 3-ER-378. In Mr. Lane's case, Dr. DiBerardino was the Government's *only* witness on the Analogue Act's Prong One element and presented the only evidence that the substances Mr. Lane was charged with were substantially similar to the chemical structure of a controlled substance. 3-ER-360; 3-ER-375-454; 3-ER-364-370; 2-ER-200-355.

The *Gas Pipe* materials revealed that at the time of Mr. Lane's trial there was a deep divide between the Office of Diversion Control and the Office of Forensic Sciences on Prong One determinations, which substances met the requirement of substantial similarity in chemical structure, and at what point the chemical structures of two substances could be considered 'substantially similar'. This information was never

disclosed in Mr. Lane's case and included information that impeached Dr. DiBerardino's testimony, as well as documents showing disagreements on a number of controlled substance analogues, at least one of which Mr. Lane was convicted of: MDPV. 3-ER-508-533.

GAS PIPE MATERIALS:	EVIDENCE PRESENTED IN MR. LANE'S CASE
• In the beginning, analogue determinations were to be by consensus between both Forensic Sciences and Diversion Control. 4-ER-625.	• Dr. DiBerardino testified that when a monograph is published "we are all in agreement." 3-ER-410.
• Forensic Sciences was tasked with reviewing the monographs drafted by Diversion Control and rendering an opinion about Prong One's substantial similarity in chemical structure. 4-ER-574.	• Dr. DiBerardino testified that when there is a disagreement on substantial similarity, "we discuss it…It's not like everybody is sure this is absolutely substantially similar and then one person thinks it's not. That's not how it usually works…But what happened is that we may be on the fence and then somebody will push us over and say, no, and then we will agree. Maybe not. **And we will step back from that**. 2-ER-210.
• The process would have been for Diversion Control to draft the monographs and send them to Forensic Sciences for a Prong One review. Forensic Sciences would then assign the review to SFL1, usually Dr. Arthur Berrier. Dr. Berrier would then provide his written report on the Prong One determination back to Forensic Sciences, who would in turn provide it to Diversion Control. 4-ER-578-579.	• No information was ever disclosed by the Government about Dr. Berrier's written analysis or conclusions on the Prong One determinations for the analogues charged in Mr. Lane's case.
• Dr. Berrier was the most qualified person to review monographs. 4-ER-	• No information was ever disclosed by the Government about Dr. Berrier's

577.	written analysis of the monographs for the analogues charged in Mr. Lane's case
• Dr. Berrier is a very talented organic chemist and knew more about emerging drugs than anyone else in the Emerging Drugs Unit of Forensic Sciences. 4-ER-628. Dr. Berrier led the creation of the Emerging Drugs Unit at SFL1. *Id*. Dr. Berrier had significant experience determining and studying the chemical structures of emerging drugs. 4-ER-629. That is why Forensic Sciences chose him to review substantial similarity issues regarding new substances. Dr. Berrier was one of only a few senior research chemists within Forensic Sciences, and his specialty among the senior research chemists was the organic synthetic side. He was tasked with knowing the organic side of things intimately, so he was in the most appropriate position to be able to answer questions about substantial similarity in chemical structure. *Id*.	• No information was ever disclosed by the Government about Dr. Berrier's position or expert opinion on substantial similarity in chemical structure for the analogues charged in Mr. Lane's case.
• Most of the DEA's analogue reviews were conducted by Dr. Berrier. 4-ER-598.	• No information was ever disclosed by the Government about Dr. Berrier's reviews of the analogues charged in Mr. Lane's case
• Forensic Sciences and Diversion Control appeared to be utilizing different methodologies or measures in making their Prong One determinations about substantial similarity in chemical structure. 4-ER-603-604, 610, 616-617.	• Dr. DiBerardino testified that he applied the DEA's method of determining substantially similar chemical structure to all of the chemicals in Mr. Lane's case and that he did not "vary from that process at all in analyzing any of these chemicals." 3-ER-408.

• Part of the disagreement between Forensic Sciences and Diversion Control involved identifying what the real core structure was between the different elements. 4-ER-594.	• In making determinations on substantial similarity in chemical structures they do not rely on three-dimensional (3D) models. In the final analysis, it's not necessary because all the information needed to make these determinations is contained in the two-dimensional drawing. 3-ER-383.
• In making Prong One determinations, Diversion Control placed more emphasis on the overlay of a structure, particularly the overlay of the core structure, as opposed to Forensic Sciences' approach which was to look at numerous facets such as functional groups, bonds, overlays, 3D modeling, and other various things. 4-ER-581-582.	• Dr. DiBerardino testified the process he used to compare chemical structures was to "look at the core" and then "look at the attachments and substitutions" and then he went "through [his] review process with others at the DEA." 2-ER-251. Dr. DiBerardino testified all the information that can be represented in 3D is actually contained in the 2D representation, and that relative to the comparison of chemical structures when looking of substantial similarity within the Controlled Substances Act, a 3D comparison does not add anything. 3-ER-365-367. The Government did not disclose any information that an entire division of chemists within a different office of the DEA (Forensic Sciences) disagreed with Dr. DiBerardino's method of determining substantial similarity in chemical structure.
• Forensic Sciences had a narrower interpretation of what it meant for something to be substantially similar in chemical structure than Diversion Control did. 4-ER-580.	• The Government did not disclose any information that an entire division of chemists within a different office of the DEA (Forensic Sciences) disagreed with Dr. DiBerardino's method of determining substantial similarity in chemical structure.
• Eventually in approximately April 2011, when reviewing the monographs for MDPV, a meeting was held between Dr. Berrier (Forensic Sciences)	• Nothing was disclosed in Mr. Lane's case about the deep divide between Diversion Control and Forensic Sciences on their differing methodologies in

and Dr. DiBerardino (Diversion Control) because they were arriving at different chemistry conclusions. 4-ER-630-631; 4-ER-591-593. The purpose of the meeting was to try to resolve the differences in methodologies between the two offices on the Prong One analysis. *Gas Pipe* T. 8/23/2018 (Vol. 2 of 2) at p. 134. There was not a uniform approach by Diversion Control and Forensic Sciences to the review process. *Id.* The structural features that each division was looking at were not the same. *Id.*	making Prong One determinations. Instead, Dr. DiBerardino testified about "the procedure, the analysis that you go through to determine if two chemical structures…whether they have a substantially similar chemical structure." Dr. DiBerardino testified that he applied this method to each of the chemicals in Mr. Lane's case and that he did not "vary from that process at all in analyzing any of these chemicals." 3-ER-407-408. Dr. DiBerardino gave no indication, and the Government never disclosed, that an entire division of the DEA disagreed with Dr. DiBerardino's methodology.
• In March 2011 Dr. DiBerardino had produced a draft monograph for MDPV claiming it was substantially similar in chemical structure to MDEA and sent it to Forensic Sciences for their review and analysis. 3-ER-508-533.	• This document was concealed from Mr. Lane and never disclosed.
• Forensic Sciences sent a written dissent to Diversion Control on the Prong One determination for MDPV as compared to MDEA. 4-ER-621; 3-ER-508-533.	• The written dissent was concealed from Mr. Lane and never disclosed.
• On April 5, 2011, John Casale sent an email to Dr. DiBerardino and Arthur Berrier stating, "In my humble opinion, MDPV is not an analog of MDEA" and that he believed the major differences in MDPV's chemical structure "place MDPV into a 'class of its own' and should be controlled specifically as that compound." 3-ER-508-533.	• The opinion of Forensic Science's chemists that MDPV is in a "class of its own" and therefore instead of being listed as an analogue of another controlled substance "should be controlled specifically as that compound" was never disclosed to Mr. Lane.
• On April 8, 2011, Forensic Science's	• This document was concealed from Mr.

Senior Research Chemists Arthur Berrier and John Casale sent an email to Diversion Control stating they had conducted independent reviews of the draft MDPV monograph, and both agreed there were substantial structural differences between MDEA and MDPV. 3-ER-508-533; 4-ER-601-602.

Lane and never disclosed. When defense counsel made a specific *Brady* request for "any dissenting assertions in the Lane case, either from the DEA Office of Diversion Control, including the Drug and Chemical Evaluation Section or the Office of Forensic Science" the Government responded that there were no "dissenting assertions with regard to the substances charged in our case." 2-ER-185-186.

- As of April 14, 2011, Forensic Sciences was of the opinion that MDPV and MDEA were not substantially similar in structure. 4-ER-622; 3-ER-508-533.

- Regarding the evaluation of MDPV, Dr. DiBerardino testified it first went to the chemists within his group, and then through the Analogue Committee which would involve the chemists in Forensic Sciences. 3-ER-441. The Government suppressed Forensic Science's dissenting opinion.

- On April 14, 2011, Forensic Sciences sent an email to Diversion Control stating, "[Forensic Sciences] is of the opinion that MDEA and MDPV are not substantially similar in structure. I am concerned that the AUSA will be provided a position from the agency when no consensus has actually been reached. I cannot imagine that this an ideal situation for the agency…In the end, federal prosecutors will be left with weighing the implications and potential fallout of DEA chemists' split opinion on this matter." 3-ER-508-533.

- In response to defense counsel's specific *Brady* request for "any dissenting assertions in the Lane case, either from the DEA Office of Diversion Control, including the Drug and Chemical Evaluation Section or the Office of Forensic Science" the Government responded that there were no "dissenting assertions with regard to the substances charged in our case." 2-ER-185-186. In an email on July 15, 2013, the Associate Chief Counsel instructed the Assistant United States Attorney to "oppose this defense request". 2-ER-180-181. It can only be presumed the Government was untruthful about the existence of the dissenting opinions because they were worried about the "potential fallout of DEA chemists' split opinion" in Mr. Lane's case.

- By April 28, 2011, Dr. DiBerardino

- This information was concealed from

knew that Forensic Sciences did not agree with him about his determination of MDPV being an analogue of MDEA. 4-ER-627.	Mr. Lane.
• At some point thereafter, Dr. DiBerardino went to New York to give a briefing of the issue to the U.S. Attorneys in an MDPV case in New York. 4-ER-606. Some members from Forensic Sciences New York lab attended the meeting and defended the position of Forensic Sciences that MDPV did not meet Prong One, which was in disagreement with Diversion Control. 4-ER-607.	• This information was concealed from Mr. Lane and never disclosed by the Government.
• At one point, Diversion Control had "called a timeout and chose not to make the recommendation to pursue" MDPV as an analogue. 4-ER-576-577.	• This information was concealed from Mr. Lane and never disclosed by the Government.
• Dr. DiBerardino's monographs claiming MDPV was an analogue of MDEA were drafted in March and April 2011. 3-ER-508-533. The monograph comparing MDPV as an analogue of methcathinone was not published until January 2012. 3-ER-483.	• Dr. DiBerardino testified the DEA determined MDPV was an analogue of methcathinone in approximately 2010 or 2011 "around there." 3-ER-415-416.
• It is unknown if Forensic Sciences ever agreed that MDPV was substantially similar in chemical structure to methcathinone. David Rees (a senior forensic chemist in Forensic Sciences from 2009 through 2016) testified that he "[did] not remember how it was resolved" and after reviewing the January 2012 MDPV Monograph comparing it to methcathinone testified "I do not know" in response to the question, "Do you know	• Dr. DiBerardino testified the DEA determined MDPV was an analogue of methcathinone. 3-ER-415-416.

whether Forensic Science did or did not agree with that?" 4-ER-607-608.

- On July 29, 2011, Dr. Berrier provided his analysis to Forensic Sciences disagreeing with Diversion Control's Prong One determination on the substances AM-694 and JWH-250. 4-ER-609. Dr. Berrier opined that neither AM-694 nor JWH-250 were substantially similar in chemical structure to the scheduled substance JWH-018. 3-ER-495-506. For the same reasons as JWH-250, Dr. Berrier also believed that JWH-167, JWH-203, JWH-204, JWH-206, JWH-251, and JWH-302 did not meet Prong One because they were all substantially similar in structure to each other, but not to JWH-018. *Id*.

- This information was concealed from Mr. Lane and never disclosed by the Government. None of Dr. Berrier's dissenting opinions were disclosed to Mr. Lane.

- On September 1, 2011, Dr. DiBerardino reached out to Forensic Sciences for the results of their review of five analogue monographs (including AM-694 & JWH-250), in which Dr. DiBerardino expressed "[Diversion Control] is confident that the documents are correct, and that [Diversion Control] chemist and pharmacologist can testify with confidence to their findings." Therefore, he stated that unless he heard from Forensic Sciences by September 6, he would with publishing the monographs to their analogue determinations and provide support to prosecutors. 3-ER-495-506.

- Dr. DiBerardino testified that an analogue determination not made unless they are all in agreement. 3-ER-389.

- Diversion Control admitted in November 2011 that it was in the position of having to proceed with analogue determinations "without

- Dr. DiBerardino testified that an analogue determination is not made by "one or even two people who happen to be in agreement. We're pretty

[Forensic Science's] concurrence"…"as we have in the past." 3-ER-492.

- As to Forensic Science's differing opinions on core chemical structure, Dr. DiBerardino stated, "Let them advise, let us consider it, then let us take it or leave it." 3-ER-492.

- By at least November 2011, Diversion Control began proceeding with analogue determinations without Forensic Sciences' concurrence. 4-ER-624-625; 3-ER-492.

- There were instances when the Analogue Committee approved monographs that Forensic Sciences did not agree were analogues. 4-ER-575.

- On April 19, 2012, Diversion Control published the monologue for UR-144 to the analogue list even though **Forensic Sciences disagreed** with Diversion Control's conclusion that UR-144 was not substantially similar in chemical structure to a scheduled substance. 4-ER-583; 4-ER-611-612; 3-ER-471-482.

adamant that we all need to be in agreement." 3-ER-389.

- Dr. DiBerardino testified, "These analogue determinations go out to the forensic chemists…and we get feedback from the chemists so that we're **in unity** and there's a clear decision." 3-ER-389.

- Knowing this, on May 14, 2013 Dr. DiBerardino *still* testified that a "monograph is the completed document that has been—it was already evaluated DEA-wide and approved by our Analogue committee in that we all agree that it can be treated as scheduled and controlled substance analogue." 3-ER-410.

- Dr. DiBerardino testified, "when we do these reviews, there is a very, very, very high degree of certainty. And that certainty is reflected in the thorough review and the fact that many chemists have agreed that other chemists outside of DEA would find it reasonable that these can be treated as analogues." 3-ER-444. Dr. DiBerardino further testified, "we in DEA take a stance that when we reach a conclusion, any reasonable person would agree with that." 3-ER-422.

- On May 14, 2013, Dr. DiBerardino testified a monograph for a particular substance is published after "it was already evaluated DEA-wide and approved by our Analogue Committee in that **we all agree** that it can be treated as a scheduled and controlled substance analogue. But when it's published as a monograph, again, **we**

	are all in agreement." 3-ER-410. (Dr. DiBerardino stated when he said "we" he meant "within the DEA". 3-ER-422).
• By April 2012, Forensic Sciences was "keeping a running list" of all of the substances that Diversion Control "knew" Forensic Sciences disagreed with them on the Prong One determinations. 4-ER-613-615; 3-ER-471-482. The running list included at least a dozen chemicals, including MDPV, JWH-250, JWH-251, AM-694, and others. *Id*.	• Regarding potential disagreements about the structural similarity of two substances, in which some would say there are definite similarities and others would say there are definite differences, Dr. DiBerardino testified at Mr. Lane's trial that "if we get those kids of interesting arguments, I could almost **guarantee [it] would not go forward as an analogue**. Because **if there is any doubt**, we don't want to push something that is going to waste a lot of people's time and – I mean, **it would be wrong**." 2-ER-273
• During the time period from 2011 to 2014, there were some published monographs that Diversion Control did not send to Forensic Sciences for review. 4-ER-589-590.	• Dr. DiBerardino testified, "when it's published as a monograph, again, we are all in agreement.... [a]nd I would do the chemical [structural] evaluation portion.... [t]hat would be scrutinized and reviewed.... [a]nd when it is accepted, then it becomes part of the record and we publish it as a monograph." 3-ER-410.
• In a letter dated July 10, 2013, the AUSA in *United States v. Fedida* disclosed to the parties in that case that Diversion Control had "conducted its analysis and determination that XLR-11 meets the definition of a controlled substance analogue without consulting [Forensic Sciences]." 2-ER-182.	• Dr. DiBerardino testified that analogue determinations are highly scrutinized within the DEA and they are done "in unity" when there is a "clear decision." 3-ER-389.
• By May of 2014, Forensic Sciences was essentially out of the Prong One determinations and didn't want to be on the record as having rendered an	• Dr. DiBerardino testified the persons within the DEA that were active in the determination of substantially similar chemical structure for MDPV were the

opinion one way or the other. 4-ER-584-585.

chemists within Dr. DiBerardino's group and the chemists in Forensic Sciences. 3-ER-441-442.

- By at least October 2014, Forensic Sciences had stopped opining on substantial similarity altogether. 4-ER-586-588.

- Dr. DiBerardino testified that within the DEA there is a review on the decisions of analogues. 3-ER-390.

- In an email dated October 2, 2014, Jeffrey Comparin of Forensic Sciences stated, "Here's how we're handling this one. [Dr. Berrier] and I will have brief discussions on the monographs that [Diversion Control] provided without rendering an opinion one way or the other…We won't be on the record as having rendered an opinion one way or the other." 2-ER-178. Scott Oulton responded, "Sounds good to me…I just want to make sure they don't turn around writing something that says '[Forensic Sciences] concurs with x substance being an analogue,' when we in fact did not make a determination." *Id*.

- At no time during Mr. Lane's post-trial proceedings did the Government disclose this information.

- Diversion Control admitted the information from "Forensic Services regarding chemical structure differences" would be helpful to a defense attorney to "dissuade from the opinion of substantial similarity". 3-ER-524.

- In opposing Mr. Lane's § 2255 Motion, the Government has taken the contrary position that these *Brady* materials would not have changed the outcome in Mr. Lane's case.

- David Rees is a senior forensic chemist with the DEA who worked in the Office of Forensic Sciences from 2009 through 2016. An analogue determination did not have to be unanimous between the Offices of Forensic Sciences and Diversion Control. The Office of Diversion

- Dr. DiBerardino testified, "The monograph is the completed document that has been -- it was already evaluated DEA-wide **and approved by our Analogue Committee in that we all agree** that it can be treated as a scheduled and controlled substance analogue…when it's published as a

Control made the decision on whether something was substantially structurally similar or not, and Forensic Sciences just gave their opinion from their point of view. 4-ER-596-597.	monograph, again, **we are all in agreement**…I would do the chemical evaluation portion…that would be scrutinized and reviewed. And **when it's accepted,** then it becomes part of the record and we publish it as a monograph. 3-ER-410.
• The Analogue Committee was not designed to be 100% consistent or consensus based. 4-ER-573.	• Dr. DiBerardino testified about the process of finalizing the analogue monographs, "We don't add it to a list, but we do have a list of completed monographs so that – I mean, these – once it's gone through – we have an Analogue Committee. I didn't mention that. But once it's passed by the Analogue Committee…Like the chemists will determine the structural aspect. And then, of course, the pharmacologist will weigh in on their issues. And once we get a good marriage of the two and we're confident and it goes through the Analogue Committee…and **once we come in agreement**, we publish the monograph on our Web site." 2-ER-269-270.
• In August 2018, Forensic Sciences admitted they had "provided documents that shows several of the dissenting opinions [Dr. Berrier] has had through discovery." 4-ER-626.	• None of the documents provided by Forensic Sciences or the dissenting opinions have ever been disclosed by the Government to Mr. Lane.

Based upon this newly discovered evidence, the Ninth Circuit granted Mr. Lane's request to file a second § 2255 Motion on August 21, 2019. 1-ER-97. After full briefing, the District Court denied Mr. Lane's 2255 Motion his requests for discovery and an evidentiary hearing. 1-ER-27; 1-ER-2. The Ninth Circuit then granted Mr. Lane a certificate of appealability on whether appellant's motion satisfies 28 U.S.C. § 2255(h),

including whether the district court properly concluded that 28 U.S.C. § 2255(h)'s "clear and convincing evidence" standard applied to appellant's *Brady* claim, but ultimately affirmed the District Court's denial.

REASONS FOR GRANTING THE WRIT

I. The Circuit Courts Have Decided An Important Question Of Federal Law That Should Be Definitively Settled By This Court

The Circuit Courts have decided an important question of federal law that should be definitively settled by this Court: Whether a claim raised pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), in a second or successive proceeding pursuant to 28 U.S.C. §2255 must satisfy the heightened 'clear and convincing standard' criteria for relief set forth in §2255(h)(l) when, despite due diligence, the *Brady* violation was not discovered until after the defendant's first §2255 proceeding had concluded? The prevailing answer from every Circuit that has directly addressed the question is that a *Brady* claim raised in a second or successive proceeding must satisfy all the heightened criteria for relief under the AEDPA. *See Quezada v. Smith*, 624 F.3d 514, 522 (2d Cir. 2010) (applying gatekeeping requirements of 28 U.S.C. § 2244(b) to *Brady/ Giglio* claim raised in second or successive habeas petition); *Munchinski v. Wilson*, 694 F.3d 308, 339 (3d Cir. 2012) (applying clear and convincing evidence standard set forth in 28 U.S.C. § 2244(b)(2)(B)(ii) to *Brady* claim raised in second or successive petition); *Evans v. Smith*, 220 F.3rd 306, 323 (4th Cir. 2000) (applying 28 U.S.C. § 2244(b) to federal habeas review of *Brady* claim in second or successive application for relief); *Blackman v. Davis*, 909 F.3d 772, 778 (5th Cir. 2018) (*Brady* and *Giglio/Napue* claims are subject to AEDPA's

requirements for successive petitions under § 2244(b)(2)(B)); *In re Wogenstahl*, 902 F. 3rd 621 (6th Cir. 2018) (second or successive habeas petition raising *Brady* violations that existed at time of the first petition but were not known must pass through gatekeeping mechanism of § 2244(b)(2)(B)); *Crawford v. Minnesota*, 698 F. 3rd 1086, 1090-91 (8th Cir. 2012) (authorization of second habeas raising *Brady* claim denied because petitioner could not establish by clear and convincing evidence that, but for the prosecution's withholding of evidence, no reasonable factfinder would have found him guilty); *Brown v, Munoz*, 889 F. 3rd 661 (9th Cir. 2018) (court rejected all but strict application of AEDPA requirements on second or successive habeas petition raising *Brady* claim); *In re Pickard*, 681 F. 3rd 1201 1205 (10th Cir. 2012) (aligns 10th Circuit with others on strict application of AEDPA requirements on second or successive petitions raising *Brady* claims); *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009) (petitioner must meet stringent requirements contained in § 2244(b)(2)(B) for newly discovered *Brady* and *Giglio* claims raised second habeas petition). Every Circuit Court that has ruled has held that a *Brady* claim not raised in the first habeas proceeding makes a second or successive petition subject to the stringent requirements of the AEDPA – even if the *Brady* claim is newly discovered – because the claim was ripe since the facts existed at the time of the first petition, even if unknown. *E.g., Brown v. Munoz*, 889 F. 3rd 661 (9th Cir. 2018), and cases cited at 666, n.9. *See also, Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257 (11th Cir. 2009) (same).

The Circuit Courts have decided the issue of second or successive *Brady* claims in a way that conflicts with a relevant decision of this Court: *Panetti v. Quarterman*, 551

U.S. 930 (2007). In *Panetti,* this Court dealt with the concern of raising unripe *Ford* claims and held in essence that not all second-in-time petitions are second and successive petitions for purposes of the AEDPA. Requiring a petitioner to file an unknown *Brady* claim with his first § 2255 Motion is akin to requiring the filing of an unripe *Ford* claim. Notwithstanding the near unanimity among the Circuit Courts who have decided this issue, there are a number of judges who disagree with the existing law in their Circuit and much of that dissent derives from this Court's *Panetti* decision. *E.g., Scott* v. *United States*, 890 F. 3d 1239, 1254-1258 (11th Cir. 2018) (disagreeing with *Tompkins* at length but following it as binding); *Jimenez v. Secretary of Florida Dept. of Corrections*, 758 Fed. Appx. 682, 687-8 (11th Cir. 2018) (Rosenbaum, J., concurring) (in light of the fact that we are nonetheless bound by *Tompkins*, I do not opine on whether, in the absence of *Tompkins*, Jimenez's first claim would be "second or successive" under *Panetti*); *In re Jackson*, 12 F. 4th 604, 611-616 (6th Cir. 2021) (Moore, J., concurring) (opining that *Wogenstahl* was wrongly decided); *Baugh v. Nagy*, No. 21-1844, 2022 U.S. App. LEXIS 27469, 2022 WL 4589117, at *6 (6th Cir. Sept. 30, 2022), cert. denied, 143 S. Ct. 2637 (2023) (panel expressed belief that controlling 6th Circuit precedent decided wrongly, but was compelled to follow it); *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).

As the 11th Circuit panel in *Scott* expressed,

> "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. In our view, Supreme Court precedent, the nature of the right at stake here (the right to a fundamentally fair trial), and the Suspension Clause of the U.S. Constitution, Art. I, § 9, cl. 2, do not allow this. Instead, they require the conclusion that a second-in-time collateral claim based on a newly revealed actionable *Brady* violation is not second-or-successive for purposes of AEDPA. Consequently, such a claim is cognizable, regardless of whether it meets AEDPA's second-or-successive gatekeeping criteria." 890 F.3rd at 1243 (11th Cir. 2018).

However, the panel in *Scott* felt it was bound by circuit precedent in *Tomkins*, followed the earlier case, and denied relief. For these reasons, this Court should grant a writ of certiorari to finally and definitively settle the issue.

II. 28 U.S.C. § 2255(h)'s 'Clear & Convincing Evidence' Standard Should Not Apply To Mr. Lane's *Brady* Claim & Others Like It.

A. Meritorious *Brady* Claims

As a panel of the 9th Circuit has acknowledged, utilizing the clear and convincing standard for every second-in-time *Brady* claim would reward prosecutors for failing to meet their constitutional disclosure obligations under *Brady*. *See United States v. Lopez*, 577 F.3d 1053, 1064 (9th Cir. 2008) ("If §2255(h) applies literally to every second-in-time *Brady* claim, federal courts would be unable to resolve an entire subset of meritorious *Brady* claims: those where the petitioner can show the suppressed evidence establishes a "reasonable probability" of a different result and is therefore "material" under *Brady*, but cannot, under §2255(h)(l)'s more demanding prejudice standard, show that the evidence

establishes by "clear and convincing evidence" that no reasonable juror would have voted to convict the petitioner"). In *Lopez*, the Ninth Circuit ultimately dismissed the *Brady* claim because it found: 1) *Brady* claims that fail to establish materiality (and therefore lack merit) are subject to AEDPA's gatekeeping provisions, and 2) Lopez had failed to establish materiality. *See also King v. Trujillo*, 638 F.3d 726, 729 (9th Cir. 2011) (recognizing that a *Brady* claim in a second or successive habeas petition "*may* not be subject to the 'clear and convincing standard,' provided the newly discovered evidence supporting the claim was 'material' under *Brady*") (emphasis in original). In contrast, Mr. Lane has established materiality as demonstrated in Section III, below. 28 U.S.C. § 2255(h) should not be applied in a way that leaves the federal courts unable to resolve meritorious *Brady* claims where, despite due diligence the *Brady* claim was not discovered prior to the conclusion of the first petition and the suppressed evidence is 'material', but cannot get over the hurdle placed by § 2255(h)(l)'s 'clear and convincing evidence' standard.

B. Outrageousness: Willfulness, Lying, Pursuing Strategy To Put Defendant At Disadvantage Of Second Or Successive Petition

In dicta, the Court in *Lopez* also noted the circumstances of the nondisclosure did not "rise to the level of outrageousness." The Court noted there was "no evidence the government willfully withheld the *Brady* material, lied about such material or was unwilling to own up to the mistake once discovered. *Lopez*, 577 F.3d at 1068 (9th Cir. 2009). Contrary to *Lopez*, in Mr. Lane's case there is direct evidence the Government acted willfully in withholding the *Brady* material, lied about the existence of the

material, and has ever since been unwilling to own up to its wrongful actions. When defense counsel made a specific *Brady* request for "any dissenting assertions in the Lane case, either from the DEA Office of Diversion Control, including the Drug and Chemical Evaluation Section or the Office of Forensic Science" the Government responded that there were no "dissenting assertions with regard to the substances charged in our case." 2-ER-186. Then, in a failed attempt to place the blame on Mr. Lane, the Government argued in its briefing in the § 2255 proceedings that Mr. Lane should have been able to figure out the Government was lying to him about the existence of dissenting opinions, which included at least one substance involved in his case and possibly more (although that cannot be determined because Mr. Lane's requests for discovery and an evidentiary hearing were wrongfully denied by the District Court and the 9th Circuit as argued in Mr. Lane's briefings in those courts). Mr. Lane could not have made a more direct request that specifically required the Government to disclose the dissenting opinions on MDPV. But instead of truthfully responding that such dissenting opinion ***existed*** as to MDPV, the Government affirmatively misrepresented on the record at trial that no such documents existed. To date, the Government has NEVER disclosed to Mr. Lane any of the information regarding dissenting opinions, as to MDPV or otherwise, even though Mr. Lane made several requests that specifically covered such information. 2-ER-123. The only *Brady* materials that Mr. Lane has ever received are from defense counsel in the unrelated *Gas Pipe* case.

The Ninth Circuit noted in *Lopez* that although the failure to disclose the evidence to the defendant earlier prevented her from bringing a *Brady* claim in her first

§ 2255 motion and thereby imposed on her the burdens of complying with § 2255(h), "there was no evidence that the prosecutors were pursuing a strategy to put her in such an unfavorable position." The Court concluded that, "[w]ere there such evidence, ***this would be a different case***." *Lopez*, 577 F.3d at 1069 (emphasis added). Mr. Lane's case is such a case. The evidence points to the Government's suppression of the dissenting opinions and the disagreements between Diversion Control and Forensic Sciences as pursuing a strategy to disadvantage Mr. Lane and other similarly situated defendants at every stage of their cases to put them in an unfavorable position. The *Gas Pipe* materials also show that Dr. DiBerardino lied during his testimony in Mr. Lane's case to bolster his Prong One determinations of substantial similarity in chemical structure and make the Government's case appear stronger than it was.

In *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009), the 10th Circuit found the prosecutor's misconduct was not merely inadvertent but was instead willful and intentional. A habeas petitioner can succeed on a *Brady* claim by establishing that the government suppressed evidence material to the defense while acting either intentionally or inadvertently. But in that case, the defendant had established more than just a *Brady* violation: he had been able to establish a *Giglio/Napue* violation—that the prosecutor knowingly presented false testimony. Therefore, the 10th Circuit found the prosecutor's conduct warranted special condemnation. A prosecutor's knowing use of false testimony involves, not "just" prosecutorial misconduct, but "more importantly ... [the] corruption of the truth-seeking function of the trial process." *Id., citing United States v. Agurs,* 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The same has been

demonstrated in Mr. Lane's case as set forth in Section III, below. In light of these circumstances, to treat Mr. Lane's *Brady* claim (or others like it) as second or successive, subject to the almost insurmountable obstacles erected by 28 U.S.C. § 2255(h), would be to allow the Government to profit from its own egregious conduct. *See Douglas*, 560 F.3d at 1193. Certainly, that could not have been Congress's intent when it enacted AEDPA. *Id*.

C. 9th Circuit Precedent Conflicts With *Panetti*

The District Court cited to the Ninth Circuit's decision in *Brown v. Muniz*, 889 F.3d 661, 666 (9th Cir. 2018) in finding that § 2255(h)'s clear and convincing evidence standard applied to Mr. Lane's *Brady* claim. In *Brown*, the Ninth Circuit concluded that *Brady* claims are subject to AEDPA's second or successive gatekeeping requirements because the "factual predicate [supporting a *Brady* claim] existed at the time of the first habeas petition." *Id*. at 668. First and foremost, such a conclusion guts *Brady* and *Kyles* and undermines this Court's intent specifically with regard to *Brady* evidence.

However, Mr. Lane's case is distinguishable from *Brown* in many respects. *Brown* involves a state-court conviction and mentions state-federal comity because it was a § 2254 petition (whereas Mr. Lane's federal § 2255 petition does not implicate those concerns). The second priority identified, finality of criminal proceedings, also fails as to the particular *Brady* materials involved in Mr. Lane's case. Requiring Mr. Lane to file his unknown *Brady* claim with his first § 2255 Motion would have been akin to requiring the filing of an unripe *Ford* claim as discussed in *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 2844 (2007). In *Panetti,* this Court ultimately held petitions "that would

require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party," are not second or successive under AEDPA. In finding that the exception applied to *Ford* claims does not apply to *Brady* claims, the Ninth Circuit noted "whereas a *Brady* claim involves a 'factual predicate' that existed but could previously 'not have been discovered,' an unripe [*Ford*] claim involves no previously existing 'factual predicate' at all." Despite the Ninth Circuit's attempts to distinguish an unripe *Ford* claim from an unknowable *Brady* claim, the practical application is the same in Mr. Lane's case. Just as this Court was concerned in *Panetti* with the raising of unripe *Ford* claims, had Mr. Lane been required to file an unknown (and therefore factually unsupported) *Brady* claim without the *Gas Pipe* materials as a mere formality in his first 2255 Motion, it would have benefited no one. Particularly after the Government had already lied to Mr. Lane's trial counsel and asserted that the very *Brady* materials requested by counsel (and later found in *Gas Pipe* to exist) did not exist. Also, the AEDPA's concern for finality was not implicated by Mr. Lane's yet unknown and completely factually unsupported *Brady* claim, for under none of the possible approaches would the Court have been able to resolve Mr. Lane's *Brady* claim before the *Gas Pipe* materials had been discovered (especially when the Government would have simply continued to deny such materials existed as it had done at trial, and Mr. Lane did not have any evidence to the contrary at the time of his first § 2255 proceeding). *See Brown v. Muniz*, 889 F.3d 661, 670 (9th Cir. 2018).

Also, in *Brown* the Ninth Circuit found the newly-discovered impeachment evidence was tangential and had no nexus to any evidence inculpating the petitioner,

and the only officer who testified at trial was not involved in investigation beyond his presence at crime scene for approximately 20-40 minutes, did not uncover any exculpatory or inculpatory evidence, and had no reason to lie about his witness interviews. In contrast, the newly-discovered evidence in Mr. Lane's case goes to the very heart of the Government's case. It invalidates an essential element of the charges (substantial similarity in chemical structure) and proves Mr. Lane is factually innocent as set forth in Section III, below. As in *Davis v. United States*, 417 U.S. 333, 346–47, 94 S. Ct. 2298, 2305 (1974), if Mr. Lane's contention is well taken, then his conviction and punishment are for an act that the law does not make criminal. "There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice and 'present(s) exceptional circumstances' that justify collateral relief under § 2255." *Id*. Other exceptions have similarly been made to § 2255 for claims of "actual innocence" *See e.g. Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611, 140 L. Ed. 2d 828 (1998).

d. Relief In Mr. Lane's Case And Others Similar Is Consistent With The Purposes Of The AEDPA

Declining to apply 28 U.S.C. § 2255(h)'s heightened clear and convincing standard to Mr. Lane's *Brady* claim does not implicate the concerns underlying Congress's enactment of AEDPA's severe restrictions on granting a habeas petitioner relief on second or successive petitions. *Douglas v. Workman,* 560 F.3d 1156, 1195 (10th Cir. 2009). Congress enacted AEDPA in part to "curb[ ] the abuse of the statutory writ of habeas corpus." *Id., quoting Montez v. McKinna,* 208 F.3d 862, 869 (10th Cir.2000). In this

case, however, there is no indication that Mr. Lane has, in any way, abused the writ or unnecessarily delayed his federal habeas proceedings. Instead, the record establishes and the District Court found Mr. Lane acted with due diligence in pursuing his *Brady* claim.

In *United States v. Buenrostro*, 638 F.3d 720, 723 (9th Cir. 2011) the Ninth Circuit notes this Court has not decided a post-AEDPA case concerning the meaning of "second or successive" under § 2255(h) and Congress did not define the term. However, the Ninth Circuit did cite to *Magwood v. Patterson*, 561 U.S. 320, 336, 130 S. Ct. 2788, 2799, 177 L. Ed. 2d 592 (2010) for the proposition that "second or successive" is "a habeas 'term of art' " that "incorporates the pre-AEDPA abuse-of-the-writ doctrine." As this Court noted in *Magwood* in relation to § 2254 applications, "it is well settled that the phrase [second or successive] does not simply 'refe[r] to all § 2254 applications filed second or successively in time.' " *Id*. at 332.

At a minimum, as Justice Sotomayor expressed in her dissent in *Bernard v. United States*, 141 S. Ct. 504 (Mem), 208 L. Ed. 2d 484 (2020), the application of the "far more stringent" standard of clear and convincing evidence to *Brady* claims raised in a second or successive petition is "illogical" because it 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. *Id*. at 506 (Sotomayor, dissenting). 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.'" *Id*. (quoting *Pannetti*, 551 U.S. at 946., 127 S.Ct. 2842). Such a rule "perversely rewards the Government for keeping exculpatory information secret until after an inmate's first habeas petition has been resolved." *Id.* at 507.

As Justice Sotomayor expressed in her statement respecting the denial of certiorari in *Storey v. Lumpkin*, 142 S. Ct. 2576, 2578, 213 L. Ed. 2d 1136 (2022), Mr. Lane's case is one that "illustrates the injustice that can flow from an overbroad view, unsupported by precedent, of what constitutes a 'second or successive' habeas petition." As Justice Jackson recently pointed out in *Jones v. Hendrix*, 143 S. Ct. 1857, 1888 (2023) (Jackson, dissenting):

> "When Congress crafted § 2255(h), it legislated against an important background equitable principle pertaining to postconviction relief: Courts should not interpret statutory provisions governing habeas review to even 'run the risk' of causing prisoners to 'forever los[e] their opportunity for any federal review of their ... claims.' " (citing *Panetti v. Quarterman*, 551 U.S. 930, 945–946, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007); *Rhines v. Weber*, 544 U.S. 269, 275, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005); and *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998)).

Mr. Lane now finds himself "procedurally barred by a similarly perverse and illogical rule" as Justice Sotomayor feared in *Bernard*. Requiring defendants to meet the heightened 'clear and convincing evidence' standard for second or successive *Brady* claims turns the burden of proof in criminal cases completely on its head. The burden of proof rests with the Government, and remains with the Government throughout the course of the trial. When the Government tests evidence to build its case, it is the Government's responsibility to turn over the results to the defendant -- whether those

results are inculpatory or exculpatory -- rather than hide the fact that the tests ever occurred in the first place. The tests that were included in the *Gas Pipe* materials and suppressed in Mr. Lane's case were critical (as detailed in Section III, below) and it was a violation of *Brady* for the Government to withhold them. Since the Government was successful in hiding such critical evidence until the point after Mr. Lane's first § 2255 proceeding had concluded, the Government now gets the added benefit of the high bar placed on Mr. Lane by § 2255(h). That rewards the Government for successfully suppressing *Brady* material to the longest extent possible, instead of encouraging the Government to be forthcoming with such evidence. It is the exact opposite of what the this Court sought to remedy with *Brady* and *Kyles*. *See Long v. Hooks*, 972 F.3d 442, 464 (4th Cir 2020).

Applying a heightened 'clear and convincing evidence' standard to second or successive *Brady* claims effectively locks federal defendants with equitable and meritorious claims out of the courthouse. Mr. Lane is aware of only *one* case since the enactment of the AEDPA in which a petitioner successfully met the heightened bar. *See Buagh v. Nagy,* 2022 U.S. App. LEXIS 27469, 2022 WL 4589117 (6th Cir. 2022). Mr. Lane's case exemplifies how the Circuit Courts' decisions on second or successive *Brady* claims incentivize and reward bad faith on the part of the Government by rewarding those guilty of *Brady* violations for committing *additional* violations to subject the future *Brady* claim to a higher standard of review. That is not consistent with the purposes of the AEDPA.

III. Even If 28 U.S.C. § 2255(h)'s "Clear And Convincing Evidence" Standard Applies, Mr. Lane Has Met It.

With the newly discovered *Brady/Giglio/Napue* evidence, and without the (newly discovered) false testimony of Dr. DiBerardino, Mr. Lane has established by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offenses.

A. Mr. Lane Has Met The Clear & Convincing Evidence Bar

The Ninth Circuit found that, under the applicable clear and convincing evidence standard, Mr. Lane's newly found evidence is insufficient to establish that no reasonable factfinder would have found him guilty of the charged offenses. However, the Ninth Circuit erroneously found that the *Gas Pipe* materials only indicated subdivisions within the DEA "occasionally disagree" about where certain substances are analogues. The *Gas Pipe* materials demonstrated much more than an occasional disagreement between Diversion Control and Forensic Sciences.

Brady claims must be considered cumulatively when determining their materiality. *See Kyles v. Whitley*, 514 U.S. 419, 440, 115 S. Ct. 1555, 1569, 131 L. Ed. 2d 490 (1995) (suppressed evidence must be considered collectively, not item by item). The controlling standard is not whether the newly discovered evidence proves innocence *beyond all doubt*, but is one of *reasonable doubt*. *See In re Will*, 970 F.3d 536, 547 (5th Cir. 2020) (emphasis in original).

The cumulative impact of all of the *Gas Pipe* evidence on Mr. Lane's case was not considered by the Ninth Circuit. The disagreements between Forensic Sciences and

Diversion Control on how to determine substantial similarity in chemical structure and whether two substances were "substantially similar" was a very broad and ongoing dispute between Forensic Services and Diversion Control at the time of Mr. Lane's trial. That debate was raging within the DEA as to numerous substances and constituted a fundamental disagreement within the DEA about how to determine "substantial similarity" in chemical structure between two substances. The issue of how to determine substantial similarity was a central issue at Mr. Lane's trial, and the suppressed evidence that a fundamental disagreement existed within the DEA itself on that issue was essential to Mr. Lane receiving a fair trial. That disagreement was relevant not only to the specific fight over MDPV but was also relevant on the question of all the chemicals charged in Mr. Lane's case (a- PVP, a-PBP, pentedrone, pentylone, and MPPP).

Based upon the *Brady* materials Mr. Lane provided from the *Gas Pipe* case, in April 2012 (during the time frame of Mr. Lane's trial) Diversion Control had made analogue determinations for at least a dozen substances, including UR-144, MDPV, JWH-250, JWH-251, AM-694, and others, even though Forensic Sciences did not believe the chemicals met the substantial similarity in chemical structure prong (Prong One). The testimony in *Gas Pipe* also revealed that as early as November 2011 (which was prior to Mr. Lane's trial), Diversion Control began proceeding with analogue determinations without Forensic Science's concurrence. This was happening at the same time the prosecution was presenting evidence in Mr. Lane's case that a substance was only considered an analogue when everyone involved at the DEA agreed.

It does not matter if the dissenting monographs were not for substances charged in Mr. Lane's case because it's the methodology Dr. DiBerardino used to make those determinations that would have been material to Mr. Lane's case. The Government's case was based in significant part on the results of Dr. DiBerardino's structural analysis and testing. That being the case, considerations of fundamental fairness required that Mr. Lane have access to the material concerning the manner and means of testing so that he could have made an independent determination of its reliability and had a fair opportunity to challenge the Government's evidence.

Even more material than just the disagreement between Forensic Sciences and Diversion Control over MDPV is the cumulative effect of the legion of the disagreements on all of the analogue determinations because that would have shown there was no consensus within the DEA – the exact opposite to what Dr. DiBerardino testified in Mr. Lane's case. *See Long v. Hooks*, 972 F.3d 442, 463 (4th Cir 2020). The dissenting opinions on substantial similarity in chemical structure have both an individual and a cumulative effect. *Id*. As the court laid out in a similar argument in *Long v. Hooks*: I got one dissenting opinion showing Diversion Control's substantial similarity determination was incorrect. Okay, now I've got a second dissenting opinion on another substance. And now the jury is paying attention. And now I've got a third dissenting opinion and a fourth dissenting opinion, and pretty soon it creates a snowball effect that Dr. DiBerardino's methodology of determining substantial similarity in chemical structure is incorrect.

If Mr. Lane had all the dissenting monographs at the time of trial, Dr. DiBerardino would have been required to explain how he had arrived at the determination that those substances were substantially similar in chemical structure to scheduled substances and why he was ultimately wrong in those determinations. This would have undercut his methodology and ultimate opinion on substantial similarity as to the chemicals involved in Mr. Lane's case. Additional testimony submitted by Lane from *Gas Pipe* shows in April 2011 a meeting was held at the DEA about the nature of the disagreement between Dr. Berrier in Forensic Sciences and Dr. DiBerardino in Diversion Control because they were arriving at different chemistry conclusions. Forensic Sciences wanted to know how Dr. DiBerardino was arriving at his conclusions and Diversion Control wanted to know how Dr. Berrier was arriving at his conclusions. There was no agreement about the appropriateness of either of the methodologies being employed. Testimony in the *Gas Pipe* case also revealed Forensic Sciences and Diversion Control appeared to be utilizing different methodologies or measures in making their Prong One determinations about substantial similarity in chemical structure. Forensic Sciences had a narrower interpretation of what it meant for something to be substantially similar in chemical structure than Diversion Control did. In making Prong One determinations, Diversion Control used a completely different methodology than Forensic Sciences. Mr. Lane's entire case was prejudiced because such evidence proved the DEA's own chemists at Forensic Sciences agreed with the defense's theory and methodology on the "substantial similarity" determinations, not with the prosecution.

Further, the Ninth Circuit found Mr. Lane's conviction was for MDPV as an analogue of methcathinone and "Lane points to no evidence that suggests any internal disagreement within the DEA about whether MDPV is substantially similar to methcathinone." Simply because Mr. Lane's requests for discovery and an evidentiary hearing have been denied at every turn does not mean no dissenting opinions exist as to MDPV and methcathinone. Mr. Lane produced evidence from *Gas Pipe* that the position of Forensic Science chemists on whether MDPV is substantially similar in chemical structure to methcathinone is still unknown. During the *Gas Pipe* case, David Rees testified as follows:

Q: Do you know how this issue of MDPV as an analogue ever got resolved?
A: I do not remember how it was resolved.
Q: Do you know whether Forensic Science ever agreed that it was – that MDPV was appropriately considered an analogue of methcathinone?
A: I would have to see what the last monograph was before I could ever be able to state what the final position was.
Q: Handing you the last monograph, MDPV monograph, dated January 2012. That's a monograph comparing it to methcathinone, is it not?
A: So if this was the last monograph then they changed to say that it was methcathinone.
Q: And my question is: Do you know whether Forensic Science did or did not agree with that?
A: I do not know.
Q: Would you expect that there would be written communications surrounding that issue?
A: I would think there would be.

4-ER-607-608. Also, in its Ninth Circuit briefing, the United States never denies that other dissenting opinions exist. That constitutes more than just mere speculation.

The scope of the *Brady* materials is not limited to the substance MDPV only. MDPV was not just a stand-alone analogue charge but was also the comparator

substance (i.e., a Schedule I substance) as to the other charges Mr. Lane was convicted on. This creates a domino effect once the substantial similarity in chemical structure for MDPV has been undermined, particularly in light of Forensic Sciences' opinion that the major differences in MDPV's chemical structure "place MDPV into a class of its own." 3-ER-508-533. The DEA was aware of the materiality of such information as expressed in an email from Diversion Control's Acting Section Chief to the Forensic Sciences office on April 14, 2011, Diversion Control admitted the information from "Forensic Services regarding chemical structure differences" between MDPV and MDEA would be helpful to a defense attorney to "dissuade from the opinion of substantial similarity". 3-ER-524. The DEA admitted the chemical structure differences expressed by Forensic Services would not only be helpful "in developing the practical approaches" for prosecuting MDPV, but also in "similar emergent drugs cases." *Id*.

B. Impeachment Of Dr. DiBerardino's Testimony

The Ninth Circuit also found, "the newly discovered evidence presents little, if any, impeachment value." The court stated, "Lane can point to no disagreement within the DEA as to Dr. DiBerardino's testimony." But the Ninth Circuit's findings overlook the material fact that Dr. DiBerardino gave false testimony in Mr. Lane's case. At the *Daubert* Hearing, Dr DiBerardino testified:

> "Q: And how about whether or not a method like this can be subject to peer review?
> A: Well, we highly scrutinize these within DEA. These analogue determinations go out to the forensic chemists.
> Let me just clarify that my group is at headquarters. We sit at desks and we have the forensic chemical sections that are throughout the country and we get feedback from the chemists so that we're in unity and there's a clear

> decision…It's an internal DEA evaluation. But, again, it's not one or even two people who happen to be in agreement. We're pretty adamant that we all need to be in agreement."
> …
> Q: So it sounds to me like you have explained to us that within the DEA there is a review on the decisions of these analogues; is that correct?
> A: Correct."

3-ER-389-390. Dr. DiBerardino also testified that all monographs are "evaluated DEA-wide and approved by our Analogue Committee in that we all agree that it can be treated as a scheduled and controlled substance analogue…[W]hen it's published as a monograph, again, we are all in agreement…I would do the chemical evaluation portion. And like I said, that would be scrutinized and reviewed. And when it's accepted, then it becomes part of the record and we publish it as a monograph." 3-ER-410. In response to who within DEA is active in the determinations of substantially similar in chemical structure, Dr. DiBerardino answered, "It would be the chemists within my group and then go through the Analogue Committee which would involve the chemists in the forensic laboratory system…So it's really the chemists at headquarters and then the chemists in the forensic sciences." 3-ER-441-442. Dr. DiBerardino also testified, "…when we do these reviews, there is a very, very, very high degree of certainty. And that certainty is reflected thorough the review and the fact that many chemists have agreed that other chemists outside of DEA would find it reasonable that these substances can be treated as analogues…" 3-ER-444.

Dr. DiBerardino was again called at Mr. Lane's trial and gave the following testimony:

Q: So you talked about doing your write-up and then getting a review. Are there times during the review process that somebody disagrees?
A: Oh, yeah.
Q: And what happens?
A: Well, then we discuss it…It's not like everybody is sure this is absolutely substantially similar and then one person thinks it's not. That's not how it usually works…But what happened is that we may be on the fence and then somebody will push us over and say, no, and then we will agree. Maybe not. And we will step back from that.

2-ER-210. After giving his opinion that each substance was substantially similar to a Schedule I or II controlled substance, Dr. DiBerardino further testified at trial about the process of finalizing the monographs for those substances as follows:

Q: Once you go through a process like this…does DEA then add it to a list? Hey, Dr. DiBerardino has looked at the structure, so you know, be aware at least as to the structure this looks like it could be an analogue?
A: No. We don't add it to a list, but we do have a list of completed monographs so that – I mean, these – once it's gone through – we have an Analogue Committee. I didn't mention that. But ***once it's passed by the Analogue Committee***…Like the chemists will determine the structural aspect. And then, of course, the pharmacologist will weigh in on their issues. And once we get a good marriage of the two and ***we're confident and it goes through the Analogue Committee***…and ***once we come in agreement***, we publish the monograph on our Web site.
Q: And when you're talking about marrying the two, you're talking about your opinion on structure, a pharmacologist's opinion on actual effect, and then you may present that to the Analogue Committee?
A: Right. We present the completed document. ***And once that's approved***, then it goes onto our Web site and becomes available to persons like yourself and agents.

2-ER-269-270 (emphasis added). Regarding a hypothetical disagreement about the structural similarity of two substances, Dr. DiBerardino testified, "I could almost guarantee this would not go forward as an analogue. because **if there is any doubt, we don't want to push something** that is going to waste a lot of people's time and – I mean, **it would be wrong**." 2-ER-273. (emphasis added). Both at trial and at the *Daubert*

hearing, Dr. DiBerardino consistently testified that a monograph declaring a substance as an analogue was not published unless there was an agreement among the chemists at both Diversion Control and Forensic Sciences on structure and pharmacological effect, and it had been approved by the Analogue Committee. That testimony by Dr. Diberardino has been proven false by the *Brady* materials.

In the case of *Baugh v. Nagy*, No. 21-1844, 2022 WL 4589117, at *14 (6th Cir. Sept. 30, 2022), *cert. denied*, 143 S. Ct. 2637 (2023), the Sixth Circuit found the defendant's second-in-time *Brady* claim met both the §2244(b)(2)(B) heightened clear and convincing evidence standard, as well as the prejudice standard required under *Brady* – materiality. In *Baugh v. Nagy*, the Sixth Circuit found the state had a threadbare case against Baugh with a single witness's testimony being the only evidence that inculpated Baugh. As a result, the Sixth Circuit could see no way a jury could find Baugh guilty beyond a reasonable doubt if that witness had been properly impeached. Like Baugh, Mr. Lane's conviction hangs on a single witness's testimony – Dr. DiBerardino. Without it, the jury could not have found Mr. Lane guilty beyond a reasonable doubt because there was no other evidence introduced at his trial of substantial similarity in chemical structure – a required element of each charge. The only evidence connecting the chemical structures of the substances sold by Mr. Lane to Schedule I or II controlled substances was the testimony of Dr. DiBerardino. Any exculpatory or impeaching evidence that discredited Dr. DiBerardino is the difference between an acquittal and a guilty verdict for Mr. Lane. As in *Baugh*, Mr. Lane could not have been found guilty if Dr. DiBerardino had been properly impeached with the *Gas Pipe* materials. Without the ability to properly

impeach the state's star witness, Mr. Lane's current conviction is not worthy of confidence. *Id.*

An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled. *Rosenberg v. United States*, 360 U.S. 367, 371, 79 S. Ct. 1231, 1234, 3 L. Ed. 2d 1304 (1959). Evidence is not independent; it is related and thus the exclusion of exculpatory evidence can make an entire case against a defendant seem far more compelling than it actually is.

The cumulative effect of the suppressed DEA dissenting opinions and the impeachment of Dr. DiBerardino's testimony established clear and convincing evidence that no reasonable factfinder would have found Mr. Lane guilty.

C. *Giglio v. United States* and *Napue v. Illinois*

Under *Giglio v. United States*, 405 U.S. 150 (1972), the U.S. Supreme Court extended the government's *Brady* disclosure obligation to impeachment evidence. A witness's prior statements that are both material and inconsistent with anticipated trial testimony are *Brady* material. *United States v. Hanna,* 55 F.3d 1456, 1459 (9th Cir. 1995).

Evidence of Dr. DiBerardino's previous involvement in the dispute between Diversion Control and Forensic Sciences concerning determinations of substantial similarity of analogue substances and his knowledge of the dissenting opinions constitute impeachment evidence that should have been disclosed by the Government. This newly discovered evidence demonstrates Dr. DiBerardino gave false testimony in Mr. Lane's case about how the DEA was reaching its analogue determinations, when it

was reaching them, the consensus and strength of those decisions, and who was involved in reaching them. Dr. DiBerardino's testimony about the DEA's process of analogue determinations was at the very least highly misleading – if not outright false – and was a complete misrepresentation of what was actually occurring with many analogue determinations.

Dr. DiBerardino's testimony representing analogue determinations as a consensus between Diversion Control, Forensic Sciences, and the Analogue Committee was presented to bolster his individual opinion about the substantial similarity in chemical structure element. This testimony assured the jury that everyone at DEA agreed with Dr. DiBerardino's opinion on substantial similarity. The *Brady* evidence provided by Mr. Lane proves that assertion was false.

The issue with and prejudice from Dr. DiBerardino's testimony is this: Dr. DiBerardino led the Court at the *Daubert* hearing, and later the jury at trial, to believe that every analogue determination by the DEA was reached by consensus between Diversion Control, Forensic Sciences and ultimately final approval by the Analogue Committee. Every piece of *Brady* evidence demonstrates that was not the case. The *Gas Pipe* materials prove that is not what was actually happening at the time of Mr. Lane's trial. Instead, Diversion Control was making analogue determinations on some substances (the extent of which is not yet known) either without consulting with Forensic Sciences, or without approval by the Analogue Committee, or sometimes even when Forensic Sciences chemists directly disagreed that the analogue substance was substantially similar in structure to a controlled substance.

Therefore, a *Giglio* violation also occurred in Mr. Lane's case in addition to the *Brady* violation. If Mr. Lane had this information along with the testimony of DEA chemists David K. Rees, John F. Casale, Liqun L. Wong, Authur Berrier, David Boyd, and Jeffery Comparin, the result of Mr. Lane's trial would have been different.

Under *Napue v. Illinois*, 360 U.S. 264 (1959), convictions obtained through the use of false testimony also violate due process. *Id*. at 269. The *Brady* materials show that Dr. DiBerardino testified falsely and lied by omission, through his testimony both in the *Daubert* hearing and at trial. Under *Napue*, a violation occurs whether the prosecutor solicits false statements or merely allows false testimony to go uncorrected. The constitutional prohibition applies when the testimony is relevant to the witness's credibility, and even if the testimony merely misrepresents the truth. *Miller v. Pate,* 386 U.S. 1, 6, 87 S. Ct. 785, 787 (1967). The Government's only witness to testify as to the Prong One determination, and how the Government determines a substance is an analogue, lied both outright and by omission and misrepresented the truth throughout his testimony as detailed in the Statement of Facts. Therefore, Mr. Lane has also established the false and misleading testimony of Dr. DiBerardino constitutes *Giglio* & *Napue* violations.

CONCLUSION

This case involves questions of exceptional importance involving a question of federal law that has not been, but should be, settled by this Court. For the reasons set forth herein, Mr. Lane respectfully requests this Court grant him a writ of certiorari.

RESPECTFULLY SUBMITTED this 29th day of August 2023.

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