ORIGINAL

24-6228

No.:

THE SUPREME COURT OF THE UNITED STATES

Fuhai Li

Petitioner

v.

United States of America

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should a court of appeals recall its mandate to revisit the merits of its prior decision where a petitioner's recall motion demonstrates a credible showing of actual innocence and a federal constitutional violation resulting in the conviction and incarceration of an innocent person but without satisfying the statutory terms in 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition?

2. Should the miscarriage of justice exception that had applied to abusive or successive habeas petitions prior to AEDPA apply to 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition following AEDPA's enactment so that a court of appeals can recall its mandate to revisit the merits of its prior decision where a petitioner's recall motion demonstrates a credible showing of actual innocence and a federal constitutional violation resulting in the conviction and incarceration of an innocent person but without satisfying the statutory terms in 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition?

TABLE OF CONTENTS

APPENDIX

Exhibit I: Petitioner Li's motion to recall the mandate, which includes the following Exhibits:

Exhibit A: Li's 28 U.S.C §2255 motion (Relevant parts of Doc. 258 and Doc. 259)
Exhibit B: The government's memorandum of law in opposition (Relevant parts of Doc. 270)
Exhibit C: The district court's opinion and order (Relevant parts of Doc. 276 and Doc. 277)
Exhibit D: The court of appeals' order denying Li's application for a certificate of appealability.

Exhibit E: Reproduced Record (RR)

Exhibit II: The court of appeals' order denying Petitioner Li's motion to recall the mandate.

TABLE OF CITED AUTHORITIES

CASES

STATUTES

RULES

PROCEEDINGS IN THE COURTS

On February 10, 2021, Petitioner Fuhai Li ("Petitioner Li") filed a pro se 28 U.S.C. §2255 motion (Doc. 258) along with a memorandum of law in support of the said motion (Doc. 259) in the United States District Court for the Middle District of Pennsylvania captioned as United States of America v. Fuhai Li (case No. 3:16-CR-00194-001). On May 21, 2021, the government filed its memorandum of law in opposition to Petitioner Li's §2255 motion (Doc. 270). On June 10, 2021, Petitioner Li filed a reply brief (Doc. 272). On May 6, 2022, the district court wrote its opinion (Doc. 276) and issued an order (Doc. 277) denying Petitioner Li's §2255 motion and declining the issuance of a certificate of appealability (COA). On June 13, 2022, Petitioner Li filed an application for a COA in the United States Court of Appeals for the Third Circuit (case No. 22-2086). On November 30, 2022, a panel of the court of appeals denied Petitioner Li's request for a COA. On January 13, 2023, Petitioner Li filed a petition for rehearing, and the court of appeals denied Petitioner Li's rehearing on February 1, 2023. On March 21, 2023, Petitioner Li filed a petition for a writ of certiorari in the Supreme Court of the United States (case No. 22-7112), and Petitioner Li's petition was denied on April 24, 2023.

On October 2, 2023, Petitioner Li filed a motion to recall the mandate in the United States Court of Appeals for the Third Circuit. On October 24, 2024, the court panel denied Petitioner Li's recall motion without any opinion. On January 16, 2024, Petitioner Li filed a petition for a writ of certiorari in the Supreme Court of the United States (case No. 23-6735), and Petitioner Li's petition for a writ of certiorari was denied on March 18, 2024.

On August 5, 2024, Petitioner Li filed his 2nd motion to recall the mandate ("Motion") in the United States Court of Appeals for the Third Circuit where he supplemented actual innocence claim along with claims of constitutional errors (Exhibit I), and the government did not file a response in opposition to Petitioner Li's Motion. On August 23, 2024, the court panel denied Petitioner Li's Motion without any opinion (Exhibit II).

CITATION OF THE COURT'S OPINION AND ORDER

The United States Court of Appeals for the Third Circuit in this case provided no opinion, but an order that "[a]ppellant's motion to recall the mandate is DENIED" entered on August 23, 2024. See Exhibit II.

STATEMENT OF JURISDICTION

This court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1). The filing of this petition is timely pursuant to Rule 13 of the Rules of the Supreme Court of the United States, because the court of appeals' order denying Petitioner Li's Motion was entered on August 23, 2024 (see Exhibit II), and the original paper of this petition was filed on November 12, 2024. Further, the filing of the corrected petition is timely pursuant to Rule 14.5 of the Rule of the Supreme Court of the United States, because the return of the original petition by the Office of the Clerk to correct the non-compliant contents was dated on November 21, 2024.

STATUTORY PROVISIONS INVOLVED

1. [28 U.S.C] §2255. Federal custody; remedies on motion attacking sentence.

...

(h) A second or successive motion must be certified as provided in section 2244 [28 U.S.C.S §2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

2. [28 U.S.C] §2244. Finality of determination.

...

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 [28 U.S.C. §2254] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 U.S.C. §2254] that was not presented in a prior application shall be dismissed unless:

(A) the applicant shows that the claim relied on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise pf due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

Petitioner Li was a medical doctor specializing in pain management and neurology, and practiced both pain management (90%) and neurology (10%) in Milford, PA since August 2010. Doc. 259 at 5-6.

In about October 2012, Petitioner Li's disgruntled employee reported Petitioner Li to the Pike County District Attorney's Office for "prescribing high amounts of narcotics outside the scope of his medical profession." Id at 6. An investigation about Petitioner Li's prescriptions for controlled substances was conducted by the Pike County District Attorney's Office, the PA Office of Attorney General and the PA Department of State Bureau of Licensing, and was concluded that "the PA State Department Bureau of Licensing did not believe they had enough information to take administrative action against Li's medical license at this time." Id.

In about March 2013, Petitioner Li's case along with an informant---Petitioner Li's disgruntled employee, was referred to DEA by the Pike County detectives. Id at 7. On March 5, 2013, DEA agent Hischar initiated his investigation about Petitioner Li's "illegal prescribing of controlled substance medicine." Id. From March 2013 to May 2014 while working in Petitioner Li's medical office, the informant stole 97 patients' protected health information/medical records and handed them to Agent Hischar. Doc. 259-1 at 7. On January 29, 2015, the DEA

agents conducted a search of Petitioner Li's two residencies and a medical office, and seized all patients' medical records, patients' payment records, billing records, carbon copies of all prescriptions, and QuickBooks records among other things. Doc. 259 at 7-8.

On November 15, 2015, Agent Hischar presented his case to a grand jury without an expert's opinion, which did not return any indictment against Petitioner Li. Id at 8.

On July 19, 2016, Agent Hischar presented his case to a grand jury with an expert's opinion delivered by Dr. Thomas on July 6, 2016, and a 24-count indictment was returned against Petitioner Li. Id at 8-9.

On October 17, 2017, Agent Hischar presented his case to a grand jury again which returned a 32-count superseding indictment against Petitioner Li, including count 1 through count 23 with violation of 21 U.S.C. §841 (a)(1), count 24 with violation of 21 U.S.C. §841 (a)(1) and 841 (b)(1)(c), count 25 with violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §861(f), count 26 and count 27 with violation of 21 U.S.C. §856 (a) (1), count 28 and count 29 with violation of 18 U.S.C. §1957, and count 30 through count 32 with violation of 26 U.S.C. §7201. Id at 9.

On May 1, 2018, a Daubert hearing was held before late Honorable Judge Caputo. The government's expert, Dr. Thomas testified that the conclusions he drew on specific patients were not based upon any authority. RR at 21.

From May 2 to June 4, 2018, a jury trial was held before late Honorable Judge Caputo. The government relied on Dr. Thomas' testimony to prove beyond a reasonable doubt that Petitioner Li's prescriptions for controlled substances were not for a legitimate medical purpose in all 35 patients or in all drug-related counts. Doc. 259-3 at 6. Dr. Thomas testified that Petitioner Li's prescriptions for controlled substances were not for a legitimate medical purpose and Petitioner Li's prescriptions for controlled substances "may have had a legitimate medical purpose" but "substandard" based upon the very same objective standard he generally used to form his opinion. Id at 5-6. However, the trial counsel failed to cross-examine Dr. Thomas about his self-contradictory testimony and failed to present critical exculpatory evidence from professional guidelines and other published literatures to the jury at trial on a patient-by-patient basis in all 35 patients or in all drug-related counts. Id at 6. Further, in death count (count 24), counsel failed to present critical exculpatory evidence from professional guidelines and other published literatures, Id at 10-11, and from the government's discovery including the lethal (post-mortem) oxycodone level of 400 to 700 ng/ml, the unknown level of morphine found in the deceased patient's system and the unknown blood level of zolpidem (a sleep pill and respiratory suppressant) in the deceased patient's blood. Id at 12-13. In the post-trial motion---a motion for judgment of acquittal, the trial counsel failed to raise the issue of Dr. Thomas' self-

contradictory testimony, see Doc. 181 through Doc. 183, Doc. 225 and the appeal counsel failed to raise the same issue on direct appeal as well. *United States v. Li*, 819 F. Appx. 111 (3d Cir. 2020). Further, the appeal counsel failed to raise the issue of insufficient evidence on direct appeal, Id, despite the fact that the government failed to prove beyond a reasonable doubt that Petitioner Li knew or intended that his prescriptions for controlled substances were not for a legitimate medical purpose where the trial court's jury instruction about the mens rea applied to authorization under 21 U.S.C §841(a)(1) in all drug-related counts was fairly consistent with the Supreme Court's new ruling in *Ruan v. United States*, 142 S. Ct. 2370, 2375 (2022). See Doc. 225 at 8.

On June 4, 2018, Petitioner Li was convicted on all remaining 30 counts in the superseding indictment. Doc. 259 at 10. On April 3, 2019, Petitioner Li was sentenced to 330-month imprisonment. Id.

On September 13, 2019, Petitioner Li appealed his conviction in the United States Court of Appeals for the Third Circuit, which affirmed Petitioner Li's conviction on July 9, 2020. *Li*, 819 F. Appx. at 111.

COMPELLING REASONS FOR GRANTING THIS PETITION

A. Petitioner Li's factual arguments about his actual innocence and a federal constitutional error---ineffective assistance of counsel resulting in the conviction and incarceration of an innocent person in his Motion have already prevailed.

Petitioner Li in his 2nd motion to recall the mandate ("Motion") supplemented actual innocence claim along with claims of constitutional errors where he offered credible and compelling factual evidence demonstrating that he is actually innocent and a federal constitutional error---ineffective assistance of counsel resulted in the conviction and incarceration of an innocent person, see *Exhibit I* at 9-56, yet the government did not raise any factual issues and did not offer any factual evidence to rebut Petitioner Li's above factual arguments in the court of appeals. Further, the court of appeals did not opine that Petitioner Li's factual arguments about his actual innocence and a federal constitutional error---ineffective assistance of counsel resulting in the conviction and incarceration of an innocent person in his Motion had failed when it denied Petitioner Li's Motion. See *Exhibit II* at 1. As a result, Petitioner Li's such factual arguments about his actual innocence and a federal constitutional error ---ineffective assistance of counsel resulting in the conviction and incarceration of an innocent person in his Motion have already prevailed, because the government has forfeited its right to raise factual issues and

to offer factual evidence to refute Petitioner Li's factual arguments before this Court when it failed to raise any factual arguments in a timely fashion in the court below. See *Steagald v. United States*, 451 U.S. 204, 208-09 (1981) ("The government, however, may lose its right to raise factual issues of this sort before this court when it has made contrary assertions in the court below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.").

B. If the miscarriage of justice exception should apply to 28 U.S.C. §2255(h), Petitioner Li's Motion should be granted, and his conviction and sentence should be vacated.

A court of appeals to recall its mandate is warranted to "avoid a miscarriage of justice" in a habeas case where "a strong showing of actual innocence" is established. *Calderon v. Thompson*, 523 U.S. 538, 558-59 (1998). But a motion to recall the mandate initiated by a petitioner in a habeas case is subject to 28 U.S.C. §2244(b) [or 28 U.S.C. §2255(h)] [(1)] for a second or successive habeas petition following AEDPA's enactment. *Id* at 553. Petitioner Li admits that his Motion did not satisfy the strict statutory requirements of 28 U.S.C. §2255(h) for a second or successive

(1). 28 U.S.C. §2255(h) for a second or successive §2255 motion by a federal prisoner is equivalent to 28 U.S.C. §2244(b) for a second or successive habeas petition by a state prisoner. See 28 U.S.C. §2255(h), and 28 U.S.C. §2244(b) (1) and (2).

habeas petition, because the factual evidence supporting his actual innocence claim was not newly discovered, but was available in the initial habeas petition. See *28 U.S.C. §2255(h)*. Therefore, Petitioner Li's motion to recall the mandate could be conveniently and justifiably denied by the court of appeals.

But prior to AEDPA, the court's traditional equitable authority---the miscarriage of justice exception allowed a petitioner's supplemental claims of constitutional errors that had been previously rejected or that could have been raised in the first petition to be considered on the merits if the petitioner made a proper showing of actual innocence. See *Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("In a series of cases,... we have held that a prisoner otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence"); *McQuiggin v. Perkins*, 569 U.S. 383, 392-93 (2013) ("We have applied the miscarriage of justice exception to overcome various procedural defaults. These include 'successive' petitions asserting previously rejected claims..., 'abusive' petitions asserting in a second petition claims that could have been raised in a first petition"). If the miscarriage of justice exception that had applied to abusive or successive

habeas petitions before AEDPA should apply to 28 U.S.C. §2255(h) for a second or successive §2255 motion after the enactment of AEDPA, the court of appeals should recall its mandate, Petitioner Li's supplemental claims of constitutional errors in his Motion should be considered on the merits, and his conviction and sentence should be vacated, because his factual arguments in his Motion that he is actually innocent and a federal constitutional violation---ineffective assistance of counsel resulted in the conviction and incarceration of an innocent person have already prevailed as discussed above. See *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ [of habeas corpus]…").

C. The courts of appeals split about whether the miscarriage of justice exception should apply to 28 U.S.C. §2255 (h) or §2244 (b) following the enactment of AEDPA.

Several courts of appeals examined this issue and reached different conclusions. Majority of the courts of appeals indicated that a court of appeals should recall its mandate to revisit the merits of its prior decision where a petitioner's recall motion demonstrates a credible showing of actual innocence despite without satisfying the statutory terms in 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition,

supporting that the miscarriage of justice exception should apply to 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition. See *United States v. Kenney*, 391 Fed. Appx. 169, 172 (3d Cir. 2010) ("[O]ur habeas jurisprudence also allows us to hear a successive petition to avoid a miscarriage of justice. See e.g. *Calderon*, 523 U.S. at 558. This is a high bar under which we will not revisit the merits unless the petitioner makes a 'strong showing of actual innocence.' Id at 558-559."); *Goodwin v. Johnson*, 224 F.3d 450, 461 (5th Cir. 2000) ("We must adhere to *Thompson*'s directive that a federal court of appeals 'recall[s] its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner' only where it determines such an act is required 'to avoid a miscarriage of justice as defined by [the court's] habeas corpus jurisprudence'... .This requires Goodwin makes a showing of actual, as opposed to legal, innocence."); *Lambert v. Buss*, 489 F.3d 779, 780 (7th Cir. 2007) ("Motions to recall the mandate in a §2254 habeas case are subject to the restrictions on successive petitions found in §2244(b)... . The only way Mr. Lambert can avoid the requirements of §2244(b) is to prove that he is actually innocent."); *Davis v. Kelley*, 854 F.3d 967, 970-71 (8th Cir. 2017) (Where a petitioner filed a motion to recall the mandate, the court in relying on *Herrera* court's decision opined that the miscarriage-of-justice

exception allows a successive petition if "he makes a proper showing of actual innocence."); *Lucero v. McKune*, 780 Fed. Appx. 667, 668 (10th Cir. 2019) ("[A]ppellate courts must be especially cautious when considering whether to recall the mandate in a habeas case… .'In the absence of a strong showing of actual innocence, the state's interests in actual finality outweigh the prisoner's interest on obtaining yet another opportunity to review.' … . It 'was a grave abuse of discretion' for court to recall mandate absent credible showing of actual innocence.").

But others suggested that a court of appeals should not recall its mandate to revisit the merits of its prior decision if a petitioner's recall motion does not meet the strict statutory terms in 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition following the enactment of AEDPA, supporting that the miscarriage of justice is not an exception to 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition following the enactment of AEDPA. See *United States v. Barrett*, 178 F.3d 34, 48 n8 (1st Cir. 1999) ("We are cognizant that if we were to perform a 'cause and prejudice'/ 'actual innocence' analysis of every second or successive petition under §2255, we would be undermining the clear intent of Congress that stricter standards apply under AEDPA and that the pre-clearance process be streamlined."); *Lewis v. United States*, 2021 U.S. App. Lexis 9853 (6th Cir. 2021) ("[E]ven if there were an 'actual innocence' or 'miscarriage of

justice' exception for second and successive motion to vacate, this claim would not qualify..."); *Gonzales v. Secret. of the Dept. of Corr.*, 366 F.3d 1253, 1275 (11th Cir. 2004) (en banc) ("If the recall is based on a motion by the petitioner, that motion is the functional equivalent of a second or successive petition and the terms of the AEDPA's §2244 (b) apply regardless of the label put on it". Only two exceptions apply to the rule: "a mere clerical error in the judgment" and "fraud upon the court").

D. This Court delivered an ambiguous opinion about whether the miscarriage of justice exception should apply to 28 U.S.C. §2255(h) or §2244(b) following the enactment of AEDPA.

This Court on two occasions delivered ambiguous opinions (in dicta) about this issue. In *Calderon v. Thompson*, this Court opined that a motion to recall the mandate initiated by the court was not subjected to 28 U.S.C. §2244(b), *Calderon*, 523 U.S. at 554, but could only be granted to avoid a miscarriage of justice in a case where a strong showing of actual innocence was demonstrated. *Id* at 558-59. On the other hand, a motion to recall the mandate initiated by a petitioner was subject to 28 U.S.C. §2244(b), *Id* at 553, but the Court was silent about whether the miscarriage of justice exception that had applied to abusive or successive habeas petitions before AEDPA should continue to apply to 28 U.S.C. §2244(b) for a second or successive habeas petition after the enactment of AEDPA when the

petitioner files his motion to recall the mandate where he demonstrates a strong showing of actual innocence.

In *McQuiggin v. Perkins*, this Court in citing *Calderon* appeared to suggest that a court of appeals may recall its mandate to revisit the merits of its prior decision where a petitioner's recall motion demonstrates actual innocence despite without satisfying 28 U.S.C. §2244(b) for a second or successive habeas petition, see *McQuiggin*, 569 U.S. at 393 ("[t]he miscarriage of justice exception, our decisions bear out, survived AEDPA's passage. In Calderon v. Thompson..., we applied the exception to hold that a federal court may, consistent with AEDPA, recall its mandate in order to revisit the merits of a prior decision..."), supporting that the miscarriage of justice exception should apply to 28 U.S.C. §2244(b) for a second or successive habeas petition when a motion to recall the mandate is initiated by a petitioner after AEDPA, because a motion to recall the mandate initiated by the court is not subject to 28 U.S.C. §2244(b), and thus has no bearing on AEDPA's passage. *Calderon*, 523 U.S. at 554.

E. The miscarriage of justice exception should apply to 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition in order to guarantee that federal constitutional errors do not result in the incarceration of innocent persons.

As this Court observed, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice

system. That concern is reflected, for example in the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Schlup v. Delo*, 513 U.S. 298, 325 (1995). Our Court, motivated by this concern, recognized a miscarriage of justice exception to procedural default for habeas relief in "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent", *Murray v. Carrier*, 477 U.S. at 496, and the Court described "this class of cases as implicating a fundamental miscarriage of justice." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). Later, this miscarriage of justice exception also applied to abusive or successive use of the writ of habeas corpus. See *Id* at 494-95 ("[T]he failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim... . [A]n 'ends of justice' inquiry...required federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence."); *Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("[W]e have held that a prisoner otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence."). Therefore, the miscarriage of justice exception applied to various procedural bars was a well-established

equitable authority of the court and Congress knew or should have known its existence by the time Congress enacted AEDPA in 1996. As our Court made clear, "[t]his rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Id.*

As discussed above, the miscarriage of justice exception allows a petitioner's supplemental constitutional claims that have been previously rejected or that could have been raised in a prior petition to be considered on the merits if the petitioner makes a proper showing of actual innocence. *McCleskey*, 499 U.S. at 494-95; *Herrera*, 506 U.S. at 404; *McQuiggin*, 569 U.S. at 392-93. *Supra*. But AEDPA's 28 U.S.C. §2255(h) and §2244(b) provides that only such an actual innocence claim where the supporting evidence is newly discovered is to be entertained by the court in a second or successive habeas petition, and all other claims where evidence was available in a prior petition, including claims that have been presented or could have been presented in a prior petition, should be dismissed. See *28 U.S.C. §225(h); 28 U.S.C §2244(b)(1) and (2)*. Accordingly, the question is whether AEDPA's 28 U.S.C. §225(h) or §2244(b) replaced the miscarriage of justice exception or the miscarriage of justice exception that had applied to abusive or successive habeas petitions prior to AEDPA should continue to apply to 28

U.S.C. §225(h) or §2244(b) for a second or successive habeas petition following the enactment of AEDPA.

This Court has indicated that the court's traditional equitable principles continue to have a place in the review of habeas petitions after AEDPA's enactment. *Holland v. Florida*, 130 S. Ct. 2549, 2560-62 (2010). As this Court's case laws demonstrated, the miscarriage of justice exception that had applied to abusive or successive habeas petitions was a well-entrenched equitable authority of the court and Congress knew or should have known its existence when Congress enacted AEDPA in 1996. See *McCleskey*, 499 U.S. at 494-95; *Herrera*, 506 U.S. at 404; *McQuiggin*, 569 U.S. at 392-93. *Supra.* Therefore, the miscarriage of justice exception that had applied to abusive or successive habeas petitions before the enactment of AEDPA was a historically grounded norm. Further, "a fundamental miscarriage of justice" is implicated in "an extraordinary case, where a federal constitutional violation has probably resulted in the conviction of one who is actually innocent". *Murray v. Carrier*, 477 U.S. at 496; *McCleskey*, 499 U.S. at 494. Therefore, the above well-established miscarriage of justice exception is also a constitutionally grounded norm. If Congress intended that 28 U.S.C. §225(h) and §2244(b) should displace such a historically and constitutionally grounded norm—the miscarriage of justice exception, it would clearly state so in 28 U.S.C. §225(h) and §2244(b), because our Court would not expect Congress to unsettle it lightly

without such a clear statement in AEDPA's statutory texts. See *Jones v. Hendrix*, 599 U.S. 465, 492 (2023) ("Typically, we find clear-statement rules appropriate when a statute implicates historically or constitutionally grounded norms that we would not expect Congress to unsettle lightly") (Citing *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S. Ct. 2485 (2021) (per curiam); *Landgrat v. USI Film Products*, 511 U.S. 244, 265-66 (1994); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985)). "[W]here a provision precluding review is claimed to bar habeas review", our Court has "required a particularly clear statement". *Demore v. Kim*, 538 U.S. 510, 517 (2003). "[W]e will 'not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland*, 130 S. Ct. at 2560 (quoting *Miller v. French*, 530 U.S. 327, 340 (2000)). Because Congress in AEDPA's statutory texts—28 U.S.C. §2255(h) and 28 U.S.C. §2244(b) did not state such a clearest command that the Court's traditional equitable authority---the miscarriage of justice exception that had applied to abusive or successive habeas petitions should not continue to apply to 28 U.S.C. §2255(h) and 28 U.S.C. §2244(b) for a second or successive habeas petition or that 28 U.S.C. §2255 (h) and §2244(b) replaced the miscarriage of justice exception following the enactment of AEDPA, see *28 U.S.C. §2255 (h)*; *28 U.S.C.§2244(b)*, the Court will not construe 28 U.S.C. §2255(h) or §2244(b) to displace the Court's traditional equitable authority---the miscarriage of justice

exception. In fact, this Court has suggested in a dictum that "[t]he miscarriage of justice exception, our decisions bear out, survived AEDPA's passage", *McQuiggin*, 569 U.S. at 393, supporting that the miscarriage of justice exception continues to exist after AEDPA or that the AEDPA's passage—28 U.S.C. §2255(h) or §2244(b) did not replace the miscarriage of justice exception. Therefore, the miscarriage of justice exception that had applied to abusive or successive habeas petitions before AEDPA should continue to apply to 28 U.S.C. §2255(h) and §2244(b) for a second or successive habeas petition after the enactment of AEDPA.

Furthermore, the court's recognition of the miscarriage of justice exception to 28 U.S.C. §2255(h) and §2244(b) for a second or successive habeas petition is not inconsistent with AEDPA's basic principle. AEDPA seeks to eliminate abusive or successive habeas petitions, but it is hard to imagine that AEDPA seeks to do so at all costs including compelling an innocent person to suffer an unconstitutional loss of liberty where a federal constitutional violation has resulted in the conviction and incarceration of one who is actually innocent. If the miscarriage of justice exception should continue to apply to 28 U.S.C. §2255(h) and §2244(b) for a second or successive habeas petition, an innocent person who was wrongfully convicted and incarcerated due to federal constitutional errors but failed to raise or argue such an actual innocence claim along with claims of constitutional errors in his initial habeas petition as a pro se petitioner would be afforded an opportunity to

file a second or successive habeas petition to vacate and set aside his wrongful conviction, thus guaranteeing that "federal constitutional errors do not result in the incarceration of innocent persons", *Herrera*, 506 U.S at 404, which Congress would intend to see. If the miscarriage of justice exception, on the other hand, should not continue to apply to 28 U.S.C. §2255(h) and §2244(b) for a second or successive habeas petition, the above innocent person would be compelled to suffer an unconstitutional loss of liberty simply because the factual evidence supporting his actual innocence claim is not newly discovered but was available in the initial habeas petition, and his such an actual innocent claim thus does not satisfy the strict statutory terms set forth in 28 U.S.C. §2255(h) or §2244(b). See *28 U.S.C. §2255 (h); 28 U.S.C. §2244(b)*. Accordingly, it is difficult to conclude that Congress intended that the miscarriage of justice exception should not continue to apply to 28 U.S.C. §2255(h) or §2244(b) and the innocent person who was wrongfully convicted and incarcerated due to federal constitutional errors thus should be compelled to suffer an unconstitutional loss of liberty when it enacted AEDPA, because "[w]hen Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights'", *Holland* 130 S. Ct. at 2562 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)), "[t]he miscarriage of justice exception… serves as an additional safeguard against

compelling an innocent man to suffer an unconstitutional loss of liberty", *McCleskey*, 499 U.S. at 495, "the principles of comity and finality ... *must yield* to the imperative of correcting a fundamentally unjust incarceration", *House v. Bell*, 547 U.S. 518, 536 (2006) (emphasis added), and 28 U.S.C. §2255 "incorporates the fundamental principle that it is never just to punish a man or woman for an innocent act." *United States v. Barron*, 172 F. 3d 1153, 1161 (9th Cir. 1999) (en banc).

Finally, recognition of the miscarriage of justice exception to 28 U.S.C. §2255(h) and §2244(b) for a second or successive habeas petition may eliminate concerns about whether 28 U.S.C. §2255(h) or §2244(b) itself violates the federal constitution. Federal courts have held that reading AEDPA to deny a petitioner the right to collateral review of his actual innocence claim would raise serious constitutional concerns. See *In re Davis*, 557 U.S. 952 (2009) (per curiam) (Stevens, J., concurring) ("Serious constitutional concerns [] would arise if AEDPA were interpreted to bar judicial review of certain actual innocence claims."); *Rivas v. Fischer*, 687 F.3d 514, 552 (2d Cir. 2012) ("'Serious Eighth Amendment and due process questions would arise with respect to [] the AEDPA' if it were read to deny collateral review to a prisoner who is actually innocent."); *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997) ("Were no other avenue of judicial review available for a party who claims that s/he is factually or legally

innocent...we would be faced with a thorny constitutional issue."); and *Prost v. Anderson*, 636 F.3d 578, 607 (10th Cir. 2011) ("[I]nterpreting AEDPA to bar judicial review of actual innocence claims raises serious constitutional concerns---under the Eighth Amendment and the Due Process Clause."). If the miscarriage of justice exception should continue to apply to 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition, the court may just adjudicate a petitioner's actual innocence claim along with claims of constitutional errors without concerning whether 28 U.S.C. §2255(h) or §2244(b) itself violates the federal constitution when the petitioner invokes the miscarriage of justice exception to 28 U.S.C. §2255(h) or §2244(b) to file a second or successive habeas petition. But if the miscarriage of justice exception should not continue to apply to 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition, the court may have to determine whether 28 U.S.C. §2255(h) or §2244(b) itself is unconstitutional when it applies 28 U.S.C. §2255(h) or §2244(b) to deny a collateral review to the petitioner who raised a credible and compelling claim of actual innocence along with claims of constitutional errors in a second or successive habeas petition but whose such a claim did not meet the strict statutory requirements of 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition, simply because the evidence supporting his actual innocence claim was not newly discovered.

Because the courts of appeals about this issue split and this Court's opinion about this issue was ambiguous, and more importantly, an innocent person who was wrongfully convicted and incarcerated due to federal constitutional errors will be compelled to suffer an unconstitutional loss of liberty if the miscarriage of justice exception should not continue to apply to 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition following the enactment of AEDPA or if a court of appeals should not recall its mandate to revisit the merits of its prior decision where a petitioner demonstrates a credible showing of actual innocence and a federal constitutional violation resulting in the conviction and incarceration of an innocent person but without satisfying the strict terms in 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition, it is compelling for this Court to grant this petition and decide in this case in which such a decision actually matters that the miscarriage of justice exception should apply to 28 U.S.C. §2255(h) or §2244(b) for a second or successive petition or a court of appeals should recall its mandate to revisit the merits of its prior decision where a petitioner demonstrates a credible showing of actual innocence and a federal constitutional violation resulting in the conviction and incarceration of an innocent person despite without satisfying the strict terms in 28 U.S.C. §2255(h) or §2244(b) for a second or successive habeas petition so that an innocent person who was wrongfully convicted and incarcerated due to federal constitutional errors will

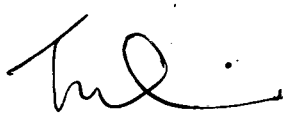
be afforded an opportunity to vacate and set aside his wrongful conviction, thus guaranteeing that "federal constitutional errors do not result in the incarceration of innocent persons" as made clear by this Court. *Herrera*, 506 U.S. at 404.

CONCLUSION

For the foregoing reasons, Petitioner Li respectfully prays that this Court grant this petition, hold that the miscarriage of justice exception should apply to 28 U.S.C. §2255(h) for a second or successive §2255 motion, and then vacate Petitioner Li's conviction and sentence.

Respectfully submitted,

By:



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