No. _____

In the Supreme Court of the United States
October 2025 Term

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WILLIAM J. WISE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## Question Presented for Review

The sole question raised by this Petition for Certiorari is whether the Ninth Circuit Court of Appeals fundamentally erred by dismissing the appeal of petitioner's amended section 2255 motion to vacate sentence as an impermissible second or successive petition, in direct contravention of this Court's opinion in *Panetti v. Quarterman*, 551 U.S. 930 (2007), and the Ninth Circuit's own published opinion in *United States v. Jackson*, 21 F.4th 1205 (9th Cir. 2022), among other authorities.

## Parties to the Proceeding

The parties to the proceeding are only those listed in the caption: the petitioner, William J. Wise, and the United States Government.

## List of Directly Related Proceedings

The following list contains all proceedings in the federal trial and appellate courts directly related to the instant case.

1. *United States v. Wise*, Northern District of California, No. 12-cr-111-EMC, in which judgment was entered on May 11, 2022. The district court's unpublished order is included in the Appendices to the instant petition for certiorari as Appendix C.

2. *United States v. Wise*, United States Court of Appeals for the Ninth Circuit, No. 22-16165 in which judgment was entered on September 13, 2024, and petitioner's petition for rehearing was denied on November 22, 2024. The Ninth Circuit's unpublished decision is included in the Appendices as Appendix B, and the Ninth Circuit's order denying the petition for rehearing is at Appendix A.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## Opinions Below

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit appears at Appendix ("App.") B. The district court's order denying petitioner's section 2255 motion to vacate sentence appears at App. C. Finally, the Ninth Circuit's order denying petitioner's petition for rehearing appears at App. A.

## Jurisdiction

The district court had jurisdiction pursuant to 18 U.S.C. § 2255(a). The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253, and 2255(d). The Ninth Circuit entered judgment on September 13, 2024, affirming the district court's denial of petitioner's section 2255 motion to vacate sentence. *See* App. B at 3, 5. Petitioner timely filed a motion for panel rehearing and for rehearing en banc with the Ninth Circuit on September 21, 2024, which the lower court denied on November 22, 2024. *See* App. A at 1.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitutional Provisions

The Fifth Amendment to the United States Constitution guarantees that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law …." U.S. Const., Amend. V.

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const., Amend. VI.

**Statutory Provisions**

28 U.S.C. § 2255(a) provides: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

28 U.S.C. § 2255(h) states: "A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

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

(2) a new rule of constitutional law, made retroactive to cases on collateral

review by the Supreme Court, that was previously unavailable."

## STATEMENT OF THE CASE

### A. Procedural Background

This petition for certiorari arises out of an appeal of the district court's denial of a motion to amend a previously filed motion to correct sentence under 28 U.S.C. § 2255(a), which the district court denied on the merits, but which the Ninth Circuit rejected as a second or successive motion under section 2255(h).

On February 21, 2012, the government filed an indictment in twenty-three counts charging Mr. Wise (hereinafter referred to as "petitioner") and his co-defendant with offenses relating to a fraudulent investment scheme. ER-174-187. Seventeen of the twenty-three counts charged petitioner with the following offenses: conspiracy to commit mail and bank fraud (18 U.S.C. § 1349) (count 1), mail fraud (§ 1341) (counts 2-13), wire fraud (§ 1343) (counts 14-16), and money laundering (§ 1957) (count 17). ER-176, 182-184. Petitioner was also charged with a single count of tax evasion (26 U.S.C. § 7201) in a related case that was transferred from the Eastern District of North Carolina, No. 12-cr-00642-EMC. ER-229 (docket sheet); ER-150 (Plea Hearing); *see* ER-160 (plea agreement). Petitioner's co-defendant was indicted in 22 counts, including all of the offenses for which petitioner was indicted other than the single count of money laundering.

ER-178, 182-187.

On September 12, 2012, petitioner pleaded guilty to the 17 counts in the indictment, and the tax evasion count from the related case. ER-158; *see* ER-160. Nearly two and a half years later, on February 4, 2015, the district court sentenced petitioner to a term of 262 months in federal prison, with a three-year term of supervised release. ER-100-101; *see* Dkt 119 (judgment).[1]

On February 3, 2016, petitioner filed a motion to vacate sentence, pursuant to 28 U.S.C. § 2255(a), raising claims that his Sixth Amendment right to counsel was violated by his attorney's conflict of interest and ineffective representation as to petitioner's cooperation with the government before sentencing, and that the government violated the plea agreement. Dkt #160 at 4-5; Dkt #161 at 2, 12, 15, 19-20. The district court initially ordered an evidentiary hearing to address petitioner's claims of ineffective assistance (Dkt #195) but then granted the government's motion for reconsideration (Dkt #208) and denied petitioner's section 2255 motion without a hearing. Dkt #209. This Court affirmed the district court's ruling in Appeal No. 17-15129. Dkt #213.

[1] Documents available on the district court's docket through the CM/ECF system (if not included in the appellant's excerpts of record) are cited as "Dkt" followed by their docket number (in Northern District of California Case No. 12-cr-00111-EMC), and by the page number of the PDF file where appropriate.

In April of 2022, shortly after he learned that his request to be transferred to Canada to serve the remainder of his sentence there had been denied by the Department of Justice (ER-23), petitioner filed a motion to amend his section 2255 motion to add the newly ripened claim that his attorney failed to competently advise and represent petitioner during the plea proceedings with respect to the United States's promise that it would not oppose his application to transfer to a Canadian prison, including counsel failing to thoroughly review the plea agreement with petitioner and properly advise him about the agreement's meaning and limitations. ER-20-24; *see* ER-10-19.

On May 11, 2022, the district court denied petitioner's motion to amend his section 2255 motion on the merits. App. C at 4. Following the district court's denial of his motion for reconsideration (ER-4), petitioner filed a timely notice of appeal on August 1, 2022. ER-188. On August 15, 2022, the district court granted a certificate of appealablity as to the issue whether petitioner's appointed attorney provided ineffective assistance during the plea proceedings regarding the United States' promise not to oppose petitioner's transfer to Canadian prison. *See* ER-2-3; *see also* ER-20-23.

On September 13, 2025, the Ninth Circuit Court of Appeals affirmed the district court's denial of petitioner's motion to amend his section 2255 motion,

concluding that the motion was an impermissible second or successive petition under section 2255(h). App. B at 3-5.

This Petition for Writ of Certiorari is timely under Rule 13(3) of the rules of this Court, as the 90th day from the Ninth Circuit's denial of petitioner's petition for panel rehearing and rehearing en banc falls on February 20, 2025.

**B. Factual Background**

At the change of plea hearing on September 12, 2012, petitioner affirmed during the plea colloquy that the government would be able to prove the following facts, which are set forth in Paragraphs 2.a. through 2.f. of the plea agreement (but which were not recited during the plea hearing):

> With respect to Count One of the Indictment (conspiracy to commit mail and wire fraud), I agreed with my co-defendant, Jacquline Hoegel, to commit mail and wire fraud by engaging in a long-running scheme to defraud investors by selling fraudulent certificates of deposit (CDs) issued by three entities: (1) Millennium Bank; (2) United Trust of Switzerland ("UT of S"); and (3) Sterling Bank and Trust ("Sterling") (collectively, the "Millennium Entities"). More than 1,200 investors purchased fraudulent CDs issued by the Millennium Entities, all of which promised guaranteed rates of return that co-defendant Hoegel and I falsely informed investors were and would be generated by overseas investments. As co-defendant Hoegel and I both knew, the Millennium Entities did not use investor funds to make overseas investments; instead, as we both knew, the Millennium Entities were a Ponzi scheme through which earlier investors' guaranteed interest payments consisted of later investors' funds. I exercised ultimate control over the Millennium Entities, with co-defendant Hoegel acting as my co-conspirator and right-hand person in running the scheme to defraud.
>
> With respect to Counts Two through Thirteen of the Indictment (mail fraud),

along with co-defendant Hoegel, I engaged in the above-described scheme to defraud investors via fraudulent CDs issued by the Millennium Entities. In furtherance of the scheme to defraud investors, co-defendant Hoegel and I directed others working for the Millennium Entities to tell certain investors to mail their account applications and personal checks (to purchase fraudulent CDs) to the Napa, California, office run by co-defendant Hoegel. The Napa, California, office run by co-defendant Hoegel was known by various names throughout its existence, including Millennium Offshore Advisors, Globalized Services, and Global Advisors ("Millennium/Global"). Millennium/Global received account applications and personal checks via U.S. Mail as well as interstate commercial carrier, such as Federal Express. In addition, co-defendant Hoegel and I directed Millennium/Global employees to send post-dated interest payment checks to certain investors via U.S. Mail and interstate commercial carrier. Counts Two through Five and Seven through Twelve represent checks sent by investors to Millennium/Global via U.S. Mail or interstate commercial carrier. Counts Six and Thirteen represent post-dated interest payment checks sent from Millennium/Global to investors via U.S. Mail or interstate commercial carrier.

With respect to Counts Fourteen through Sixteen of the Indictment (wire fraud), in furtherance of the above-described scheme to defraud investors, co-defendant Hoegel and I (and others working at our direction) told certain investors to wire funds from their personal accounts to accounts in the name of UT of S at Washington Mutual in Las Vegas, Nevada, and Napa, California. Counts Fourteen through Sixteen represent interstate wire transfers initiated by investors who purchased fraudulent CDs.

With respect to Count Seventeen of the Indictment (money laundering), knowing that the money in the Bank of America account ending in -9544 represented proceeds of the above-described scheme to defraud investors, I directed an employee working for Millennium/Global to transfer $15,000 from that Bank of America account to an account in the name of L.W., for L.W.'s personal use.

I agree that I knowingly participated in the above-described scheme to defraud investors from approximately 1999 to late March 2009, and that, during this time, I intended to defraud the investors. I further agree that

> between January 2004 and March 2009, via the Millennium Entities, co-defendant Hoegel and I caused the sale of more than $129.5 million worth of fraudulent CDs, which caused investors to suffer actual losses of more than $75 million.
>
> I agree that in 2008, I earned significant income from the above-described scheme to defraud investors, that I was aware that I had $1,045,250 of tax due and owing to the United States based on that income, and that I willfully took affirmative steps to evade or defeat that tax due and owing. For example, I used cash extensively, and I failed to maintain any books and ledgers for income and expenditures, as are routinely kept in the normal course of business. In addition, I used my income – both cash and otherwise – to pay debts owed to creditors other than the IRS (such as making interest payments on a private jet, and paying for construction and furnishings on a large personal property in St. Vincent and the Grenadines).

ER-163-65 (plea agreement); *see* ER-156-58 (plea hearing).

## REASONS FOR GRANTING THE WRIT

### I. Introduction.

Petitioner seeks a writ of certiorari in the instant case as to a single issue of exceptional importance, which turns on the Ninth Circuit's erroneous application of federal law in construing petitioner's motion to vacate sentence based on his appointed attorney's ineffective assistance of counsel as an impermissible second or successive petition under section 2255(h).

Petitioner is a 73-year old Canadian man with no criminal record of any sort prior to entering his guilty plea in this case. Although he earned a Canadian law degree in the 1970s, prior to this case petitioner had no experience with the

criminal justice system, either in Canada or America.

Petitioner was residing in Toronto when he learned he had been indicted in this matter, and through a Canadian lawyer he negotiated an agreement with the government whereby he would waive formal extradition, fly to San Francisco, and immediately self-surrender to federal authorities. It was contemplated that petitioner would plead guilty and cooperate with the government against other participants in the fraud scheme. A key promise from the government was that the United States would not oppose petitioner's application for transfer to a Canadian prison, pursuant to treaty, after he had served a third of his sentence in federal prison. For example, in an email from AUSA Tracie Brown to petitioner's Canadian attorney dated March 30, 2012, Brown wrote

> I have authority to agree that the United States will not oppose [petitioner's] application for a transfer to Canada, provided that he may not apply for such a transfer until he has served at least 1/3 of his sentence or 54 months (4.5 years) in the United States, whichever is longer. The government's agreement on this point is subject to [petitioner] (a) voluntarily surrendering in San Francisco no later than April 16, 2012; (b) immediately going into custody; and (c) not breaching any terms of the plea agreement we ultimately execute.

ER-173.

One reason this promise was material to petitioner's decision is that Canada liberally accepts unopposed transfer requests from its citizens and offers parole to nonviolent offenders after they complete a third of their prison sentence.

In March of 2012, before petitioner had travelled to San Franciso and while the negotiations around his self-surrender were taking place, an attorney (Paul Wolf) was appointed to represent petitioner in the Northern District of California. After petitioner flew to San Francisco and voluntarily surrendered, on April 16th, the Canadian attorney was no longer involved in the case. Represented by new counsel, petitioner maintained his intention to plead guilty and cooperate with the government, based on the understanding he had reached with AUSA Brown prior to his surrender. While petitioner was in custody prior to pleading guilty, on multiple occasions AUSA Brown assured him, with his attorney present, that his right to apply for an unopposed transfer to Canada would be honored, including telling him that the promise "was already cleared in Washington." Also during this period, petitioner was assured by his attorney, Wolf, that his right to transfer would be preserved and that he should trust the promises made to him by AUSA Brown.

With the plea hearing set for September 12, 2012, petitioner had limited contact with his attorney, despite petitioner's repeated requests to meet to discuss the plea agreement. On September 12th, Wolf met with petitioner at the courthouse before the change of plea hearing, in order to show him the final plea agreement and discuss petitioner's concerns about it. In order to allay petitioner's concerns, Wolf invited AUSA Brown to attend the tail end of the meeting. However, Wolf

arrived late for their meeting, and they only had 10-15 minutes to discuss the plea agreement. They had not finished going through the document when ASUA Brown arrived.

With the plea hearing about to commence, Brown assured petitioner that his cooperation with the government had thus far met "the gold standard" and that he would receive a sentence that was "nowhere near 20 years." In response to petitioner's question, Wolf assured him that his "right to unequivocally transfer to Canada" was secured and that he shouldn't worry about it. This assurance by petitioner's attorney mirrored the promises petitioner had received from AUSA Brown since before he self-surrendered and was taken into custody.

Petitioner signed the plea agreement and pleaded guilty on September 12, 2012. While the plea agreement included the promise that the United States would not oppose petitioner's transfer to Canada, the plea agreement also included a separate, boilerplate provision (Paragraph 15) stating that the government's promises in the agreement bind only the local U.S. Attorney's Office.

Not until late 2021 was petitioner able to discover that, contrary to what he thought he had been promised, the Department of Justice had vetoed his transfer request, citing as reasons the seriousness of the offense and its opinion that petitioner was a domicile of the United States, apparently because he has been

incarcerated here since his arrest in 2012. Based on this new development in the case, petitioner brought the instant motion to amend his previously filed 2255 motion to add the claim that his attorney was ineffective for failing to competently represent and advise him with respect to the government's promise that it would not oppose his transfer to Canada.

The district court addressed petitioner's claim of ineffective assistance of counsel on the merits, and erred by denying the motion to amend by ignoring a number of critical factual allegations, and failing to hold an evidentiary hearing in order to vet those allegations, which demonstrate that petitioner's attorney was ineffective for failing to thoroughly review the plea agreement with him and explain the limitation in Paragraph 15, by encouraging him to rely on the repeated off-the-record promises and assurances from AUSA Brown that his transfer to Canada would not be opposed by the United States Government, and for failing to take other measures to protect petitioner's interests.

Despite the district court's ruling on the merits of petitioner's claim, the Ninth Circuit erroneously construed petitioner's motion to amend his previously filed section 2255 motion as second or successive under section 2255(h). This ruling by the Ninth Circuit was in clear violation of well-established principles of federal law: Contrary to the Ninth Circuit's conclusion, petitioner's claim of

ineffective assistance of counsel, under *Strickland v. Washington*, was not yet ripe at the time he entered his guilty plea because the prejudice required to support that claim (*i.e.*, *Strickland*'s second prong) did not occur until November 5, 2021, when the Department of Justice vetoed petitioner's request to transfer to a Canadian prison, which was well after his initial, first-in-time section 2255 motion had been denied. Thus, the factual predicate for petitioner's claim of ineffective assistance of counsel did not exist until November 5, 2021, and he filed his motion to amend shortly after that date, in April of 2022. For this reason, "the facts underlying the claim" cannot be said to have "occurred by the time of the initial petition." *Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018). Moreover, the Ninth Circuit's ruling directly contravenes this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), as well as its own published precedent, *United States v. Jackson*, in which the court held that a second-in-time section 2255 motion does not constitute a second or successive petition where "the factual circumstances underlying [the] motion did not occur until after his first § 2255 petition had been resolved." *United States v. Jackson*, 21 F.4th 1205, 1212 (9th Cir. 2022).

## II. The Ninth Circuit Court of Appeals Erred in Construing as Second or Successive Petitioner's Motion to Amend His Section 2255 Motion to Include a Newly Ripened, Not Previously Available Claim of Ineffective Assistance of Counsel in Violation of the Sixth Amendment.

### A. Pertinent Legal Principles.

Under the AEDPA, 28 U.S.C. § 2255(h), a petitioner "may file a 'second or successive' motion only if the court of appeals certifies that the motion contains newly discovered, dispositive evidence or relies on a new constitutional rule made retroactive to collateral proceedings." *Tong v. United States*, 81 F.4th 1022, 1024 (9th Cir. 2023). However, a previously filed section 2255 motion may be amended to add a new claim where "the facts underlying the [new] claim" cannot be said to have "occurred by the time of the initial petition." *Brown*, 889 F.3d at 667; *see United States v. Buenrostro*, 638 F.3d 720, 725-26 (9th Cir. 2011). For example, under the Ninth Circuit's decision in *United States v. Jackson*, a new claim added by amendment to an earlier filed section 2255 motion is not considered a second or successive petition where "the factual circumstances underlying [the] motion did not occur until after his first § 2255 petition had been resolved." *Jackson*, 21 F.4th at 1212.

### B. The District Court's Decision.

The district court denied petitioner's motion for leave to amend his section 2255 motion on the basis that amendment would be futile because there was no

merit to the claim of ineffective assistance of counsel that he wished to add to his earlier-filed motion to vacate. App. C. at 3-4. In denying the motion, the district court reasoned as follows: First, the plea agreement clearly stated that it only bound the United States Attorney's Office, as opposed to other agencies of the United States; second, petitioner stated during his plea colloquy that the government had made no promises other than those contained in the plea agreement; and third, petitioner is a "sophisticated individual with a law degree" and therefore it was "implausible" that ineffective representation by his attorney could have altered his understanding of the plea agreement. App. C. at 3-4.

The district court erred in this ruling by failing to consider a number of relevant facts which, when considered together, show that petitioner's attorney performed deficiently and that his attorney's failures induced petitioner to accept a plea he would not have entered if he had been properly advised. On appeal, petitioner demonstrated that the district court erred by denying his amended 2255 motion without holding an evidentiary hearing, where petitioner's factual allegations, which were plausible and therefore must accepted as true if no hearing is held, established that the attorney who represented him during the plea negotiation process and guilty plea hearing was ineffective on multiple fronts and entirely failed to provide petitioner with reasonably competent advice and

representation, rendering petitioner's guilty plea not knowing and voluntary as required by due process. AOB 40-42; *see* AOB 22-39. Critically, the district court rejected the government's argument that petitioner's motion was second or successive and addressed its ruling entirely to the merits of petitioner's claim, despite ruling erroneously in that regard, as set forth in petitioner's appellate briefs filed with the Ninth Circuit. *See* App. C. at 1-4; *see* AOB 22-42; ARB 9-16.

**C. The Decision of the Court of Appeals.**

In its unpublished decision, the Ninth Circuit engaged in a truncated analysis to rule that petitioner's amendment to his section 2255 motion constituted an impermissible second or successive petition. The Ninth Circuit concluded that petitioner's ineffective assistance of counsel claim was second or successive on the basis that "the factual predicate for [petitioner's] second-in-time motion accrued when [he] was prejudiced by his counsel's allegedly deficient performance – *i.e.*, when he pleaded guilty – which was well before he filed his initial § 2255 motion." App. B. at 3. For the reasons set forth below, the Ninth Circuit erred by rejecting petitioner's motion as second or successive, and thereby ignoring petitioner's valid claim that he was deprived of his Sixth Amendment right to counsel and Fifth Amendment due process right to be convicted only after a knowing and voluntary plea. See *Hill v. Lockhart,* 474 U.S. 52, 56-57 (1985); *Tollett v. Henderson*, 411

U.S. 258, 267 (1973); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); *see also Strickland v. Washington*, 466 U.S. 668, 691-92 (1984).

### D. The Court of Appeals Fundamentally Erred, Failing to Vindicate Petitioner's Fifth and Sixth Amendment Rights to Effective Assistance of Counsel During the Plea Process, by Rejecting His Amended Section 2255 Motion as Second or Successive.

The Ninth Circuit's ruling directly conflicts with this Court's opinion in *Panetti v. Quarterman*, 551 U.S. 930 (2007), as well as the Ninth Circuit's own published opinion in *United States v. Jackson*, 21 F.4th 1205 (9th Cir. 2022). A comparison between the case at bar and the *Jackson* decision will illustrate the misconceived nature of the Ninth Circuit's decision under these authorities.

In *Jackson*, the defendant filed a second-in-time section 2255 motion, over a year after his initial 2255 motion was denied, based on a new factual development: the government offered a sentence to his codefendant that was lower than the sentence he had received. *Jackson*, 21 F.4th at 1210. The defendant (Jackson) argued that this new fact supported claims that his guilty plea had not been knowing and voluntary, due to the government's breach of the plea agreement and ineffective assistance of counsel. *Id*. The breach claim argued that the government had promised during the plea negotiations that it would not offer Jackson's codefendant a lesser sentence than that which it offered Jackson. *Id*. The ineffective assistance of counsel claim alleged that Jackson's attorney failed to

ensure that the government's promise was memorialized in the written plea agreement, failed to raise the issue at the plea hearing, and instructed Jackson to falsely tell the court that no promises had been made other than what was in the written plea agreement. *Id*. at 1210, 1216.

Just as in the case at bar, Jackson's ineffective assistance of counsel claim challenged the voluntariness of his guilty plea but also contained a factual predicate that occurred only much later: the government's offer of a lesser sentence to Jackson's codefendant. The *Jackson* Court reasoned that the motion was not second or successive because "[o]n its face, Jackson's claim is clearly based on events that took place after his first petition was resolved." *Jackson*, 21 F.4th at 1212; *see id*. at 1216. Having determined that the court had jurisdiction to entertain Jackson's second-in-time petition, this Court remanded for the district court to address the merits of Jackson's claim that his attorney was ineffective during the plea process. *Id*. at 1216.

As noted above, in the case at bar the Ninth Circuit panel deemed petitioner's ineffective assistance claim to be second or successive on the basis that "the factual predicate for petitioner's second-in-time motion accrued when petitioner was prejudiced by his counsel's allegedly deficient performance – *i.e.*, when he pleaded guilty – which was well before he filed his initial § 2255 motion."

App. B. at 3. However, precisely as was the case in *Jackson*, petitioner's new claim of ineffective assistance was based a factual predicate that had not yet occurred when he filed his initial section 2255 motion: the government's denial of his request to transfer to a prison in his home nation of Canada. In direct contravention of *Jackson*, the Ninth Circuit conflated the elements of petitioner's *Strickland* claim (deficient performance and resulting prejudice) with the factual predicates of that claim. It is true here (as in *Jackson*) that counsel's deficient performance happened before and during the plea hearing, and that prejudice resulted when a guilty plea was entered that was not knowing and voluntary due to counsel's deficiency. However, in both cases a critical factual predicate for the claim had not yet occurred at the time of the initial 2255 motion: Here, it was the government's denial of petitioner's application to transfer to a Canadian prison, while in *Jackson* it was the government's offer of a lesser sentence to the codefendant. *See Jackson*, 21 F.4th at 1212. Thus, just as in *Jackson*, petitioner's "claim is clearly based on events that took place after his first petition was resolved." *Id*. at 1212.

Just as the Ninth Circuit's decision violates its own circuit precent in *Jackson*, the lower court's ruling also contravenes this Court's decision In *Panetti v. Quarterman*. In *Panetti*, this Court found an Eighth Amendment claim under by *Ford v. Wainwright*, 477 U.S. 399 (1986) to not be second or successive because

the claim had not become "ripe" until after the initial habeas petition had been filed. *Panetti*, 551 U.S. at 945, 947. The Court reasoned that a *Ford* claim could only become "ripe" when its necessary factual predicates had occurred: that the petitioner is mentally incompetent and facing an imminent execution. *Id*. at 945, 947-950; *see Brown v. Muniz*, 889 F.3d 661, 667 (2018) (explaining that under *Panetti* "a claim ripens only at the time the factual predicate supporting a habeas claim accrues").

Under *Panetti*, where the factual predicates for a claim existed prior to the filing of the initial petition, but were not discovered by the defendant, the claim is considered second or successive. *Brown*, 889 F.3d at 667 (*citing Panetti*, 551 U.S. at 945). For example, claims that the prosecution withheld evidence in violation of *Brady v. Maryland* have been held to be second or successive, where the exculpatory evidence existed prior to the initial petition even though it was not revealed to the defendant until later. *See id*. at 668, 671-74; *see, e.g., Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015); *see also Buenrostro*, 638 F.3d at 725-26 (ineffective assistance claim second or successive where factual predicate existed before initial petition but was discovered by defendant only later).

In juxtaposition to this situation are cases – such as *Panetti*, *Jackson*, and the case at bar – where the factual predicate for a constitutional claim did not yet exist

when the initial petition was filed. *See Panetti*, 551 U.S. at 945, 947; *Jackson*, 21 F.4th at 1212; *see also Brown v. Atchley*, 76 F.4th 862, 873 (9th Cir. 2023) (considering "whether the events that gave rise to Brown's constitutional claims occurred before" initial petition, and ruling that claims are second or successive if they "could have been brought in" earlier petition). The Ninth Circuit's decision in *Jackson* shows why petitioner's claim became ripe only after his initial section 2255 motion. Just as in *Jackson*, petitioner's Sixth Amendment claim is based on his attorney's deficient performance prior to entry of his guilty plea. In *Jackson*, the defendant's claim that his attorney failed to protect his interests with respect to an off-the-record promise by the government only ripened when the government later broke that promise. *Jackson*, 21 F.4th at 1212, 1216. Here, just as in *Jackson*, petitioner also claims that his attorney failed to protect his interests with respect to an off-the-record promise by the government. *See* AOB at 18-19 (*citing* ER-6-8, 20, 23, 25). And also as in *Jackson*, the factual predicate petitioner's claim did not ripen until the government broke its alleged promise by denying his request to transfer to a Canadian prison, which happened years after his first section 2255 motion had been resolved.

A reason for the Court of Appeal's flawed analysis, and its resulting contravention of *Panetti* and *Jackson*, appears to be that the Ninth Circuit's

decision is premised on a misunderstanding of petitioner's underlying constitutional claim. Under *Strickland v. Washington* and its progeny, in order to establish a violation of the Sixth Amendment the defendant must show that his attorney performed deficiently and that the deficient performance resulted in prejudice. *See Strickland*, 466 U.S. at 687-690; *see also Hill*, 474 U.S. at 56-57; *Lambert v. Blodgett*, 393 F.3d 943, 979-980 (9th Cir. 2004). The deficient performance by petitioner's attorney took place before and during the plea hearing, as the Ninth Circuit noted. App. B at 3. However, the factual basis for the other half of a cognizable *Strickland* claim – the requirement that prejudice be shown – did not occur until November 5, 2021, when the Department of Justice vetoed petitioner's request to transfer to a Canadian prison. The Ninth Circuit's opinion entirely ignores this critical, dispositive fact. App. B at 3.

As an example, if petitioner had somehow managed to do what the Ninth Circuit's decision faults him for failing to do – that is, to recognize his attorney's deficient performance relating to the Canadian transfer before his application was denied, and raised that claim in his initial section 2255 motion, it is obvious that respondent would have argued, no doubt with success, that petitioner had not suffered prejudice because his application had not yet been made and denied. Moreover, in this scenario the proposition that petitioner had failed to demonstrate

prejudice would likely have been further supported by assertions that the application would have a high probability of success once petitioner made it. This is so because, as noted at pages 26-27 of the opening brief filed with the Ninth Circuit, in addressing the contentions that petitioner raised in his initial 2255 motion, both respondent and the district court characterized the transfer provision of the plea agreement as being likely to result in petitioner's successful application to transfer to a Canadian prison, as well as being as a primary incentive underlying petitioner's decision to plead guilty. *See, e.g.*, Dkt #189 at 19 (respondent's Reply re Motion to Dismiss, asserting that "despite his hyperbole, defendant is not likely to die in prison. Because of the Canadian transfer provision, defendant can apply to transfer to Canada after serving one-third of his sentence"); *id.* at 22 (referring to "the likelihood that [petitioner] will be transferred to Canada after serving one-third of his sentence, and then paroled once there"); Dkt #209 at 18 & fn. 12 (district court's Amended Order Granting Motion to Dismiss, reasoning that "[t]he lack of any reasonable probability of [petitioner] insisting on a trial is further established by the fact that, if he were to go to trial, he would lose the transfer-back-to-Canada deal and noting that petitioner's transfer application was likely to succeed given that "the U.S. government agreed that it would not oppose" it); Dkt #180 at 25, 48 (respondent's Motion to Dismiss, arguing petitioner "may only

serve a portion [of his sentence] after his transfer to Canada," and opining that he did not ask to withdraw guilty plea prior to sentencing because he "would have lost the benefit of his Canadian transfer provision"); Dkt #194 at 4 (Supplemental Brief re Motion to Dismiss, arguing that plea deal was valuable to petitioner due in part to "very favorable Canadian transfer provision"); *see also* Dkt #114 at 7 (respondent's Sentencing Memorandum, arguing that court should consider that petitioner may "be eligible for 'conditional release' to the community when transferred to Canada, and thus may serve considerably less than any sentence imposed by this Court"). Thus, it should be abundantly clear that the final necessary factual predicate for petitioner's *Strickland* claim did not arise until November 5, 2021, when the Department of Justice vetoed his transfer request. For this reason, "the facts underlying the claim" cannot be said to have "occurred by the time of the initial petition." *Brown*, 889 F.3d at 667; *see Panetti*, 551 U.S. at 945, 947; *Jackson*, 21 F.4th at 1212; *Buenrostro*, 638 F.3d at 725-26.

Accordingly, the Ninth Circuit's decision directly conflicts with this Court's decision in *Panetti v. Quarterman*, as illustrated by the Ninth Circuit's published decision in *United States v. Jackson*, as well as other authorities, such as *Brown v. Atchley*, by misapplying the standard established by this Court and misapprehending a critical point of fact by ruling that petitioner's claim ripened

before a necessary factual predicate for that claim (the government's broken promise) had yet come into existence. Because the Ninth Circuit Court of Appeals erroneously rejected petitioner's section 2255 motion as second or successive, and thereby ignored the underlying violation of petitioner's Sixth Amendment right to the effective assistance of counsel, the instant Petition for Writ of Certiorari should be granted.

## CONCLUSION

For the reasons set forth above, the petitioner respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals, which erroneously rejected as second or successive petitioner's section 2255 motion to vacate sentence. This Court should grant review to correct the manifest legal error by the Ninth Circuit and vindicate petitioner's right to the effective assistance of counsel.

Dated: January 21, 2025

Respectfully submitted,

_____

GEOFFREY M. JONES
Attorney for Petitioner
William J. Wise

No. _____

In the Supreme Court of the United States
October 2025 Term

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WILLIAM J. WISE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# APPENDIX
# to Petition for Writ of Certiorari

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# APPENDIX A

Order of the
United States Court of Appeals for the Ninth Circuit
Denying Petition for Panel Rehearing and Petition for Rehearing En Banc

Filed November 22, 2024

FILED

NOV 22 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>WILLIAM J. WISE,<br><br>Defendant-Appellant. | No. 22-16165<br><br>D.C. Nos.<br>3:12-cr-00111-EMC-1<br>3:12-cr-00642-EMC-1<br><br>ORDER |

Before: BEA and MENDOZA, Circuit Judges, and M. FITZGERALD,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Mendoza votes to deny the petition for rehearing en banc and Judge Bea and Judge Fitzgerald so recommend. The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter.

The petition for panel rehearing and rehearing en banc, Dkt. No. 71, is DENIED.

* The Honorable Michael W. Fitzgerald, United States District Judge for the Central District of California, sitting by designation.

# APPENDIX B

Unpublished Memorandum Opinion of the
United States Court of Appeals for the Ninth Circuit

Filed September 13, 2024

**NOT FOR PUBLICATION**

FILED

SEP 13 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>WILLIAM J. WISE,<br><br>Defendant-Appellant. | Nos. 22-16165, 24-383<br><br>D.C. Nos.<br>3:12-cr-00111-EMC-1<br>3:12-cr-00642-EMC-1<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Submitted September 9, 2024**
San Francisco, California

Before: BEA and MENDOZA, Circuit Judges, and M. FITZGERALD,*** District Judge.

Defendant-Appellant William J. Wise appeals the district court's orders:

(1) denying his motion to amend his motion to vacate or set aside his conviction

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Michael W. Fitzgerald, United States District Judge for the Central District of California, sitting by designation.

under 28 U.S.C. § 2255, and (2) denying his motion for compassionate release. We review de novo whether the district court lacked jurisdiction to hear a § 2255 motion because it is an improper "second or successive" motion. *United States v. Jackson*, 21 F.4th 1205, 1212 (9th Cir. 2022). We review for abuse of discretion a district court's denial of a motion for compassionate release. *United States v. Roper*, 72 F.4th 1097, 1100 (9th Cir. 2023). We affirm.

1. We construe Wise's motion to amend as a § 2255 motion because it raises a "new ground for relief." *United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). 28 U.S.C. § 2255 permits a defendant in federal custody to challenge a sentence that was imposed "in violation of the Constitution or laws of the United States," by filing a motion with "the court which imposed the sentence to vacate, set aside or correct the sentence." The defendant "is generally limited to one motion under § 2255." *United States v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011). But a defendant may file a "second or successive" motion "only if the appropriate court of appeals certifies that the motion contains newly discovered, dispositive evidence or relies on a new constitutional rule made retroactive to collateral proceedings." *Tong v. United States*, 81 F.4th 1022, 1024 (9th Cir. 2023) (citing 28 U.S.C. § 2255(h)).

Wise's § 2255 motion is second or successive. In the habeas context, "second or successive" is a "term of art," *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), and "[h]abeas petitions that are filed second-in-time are not necessarily second or successive," *Clayton v. Biter*, 868 F.3d 840, 843 (9th Cir. 2017). A second-in-time filing is not second or successive if the court dismissed the first-in-time motion on "technical procedural grounds without reaching the merits." *Goodrum v. Busby*, 824 F.3d 1188, 1194 (9th Cir. 2016). Similarly, a second-in-time habeas filing is not second or successive if "the factual predicate for [the second-in-time] claim accrued only after the time of the initial petition." *Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018). But that is not the case here. The district court dismissed Wise's initial § 2255 motion on the merits. And the factual predicate for Wise's second-in-time motion accrued when Wise was prejudiced by his counsel's allegedly deficient performance—*i.e.*, when he pleaded guilty—which was well before he filed his initial § 2255 motion. *Brown v. Atchley*, 76 F.4th 862, 873 (9th Cir. 2023).

Because Wise's § 2255 motion is second or successive, he was "required to obtain permission from the court of appeals before filing [his] § 2255 motion in district court." *United States v. Lopez*, 577 F.3d 1053, 1056 (9th Cir. 2009). But he did not obtain this court's permission, so the district court lacked jurisdiction to hear his claim. *Id.* And even if we construe Wise's motion as a belated request for

certification, we would deny it. Certification is appropriate where "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h). Neither situation is present here.

2. The district court did not abuse its discretion in denying Wise's motion for compassionate release. 18 U.S.C. § 3582(c)(1)(A)(i) permits a court to modify an imposed term of imprisonment where it considers the factors laid out in 18 U.S.C. § 3553(a) and finds that "extraordinary and compelling reasons warrant such a reduction." The district court correctly concluded that Wise's medical conditions and age do not amount to extraordinary and compelling reasons to reduce his sentence. Wise's motion for compassionate release highlighted the various medical issues he is dealing with in prison. But the district court correctly noted that the record demonstrated that Bureau of Prisons ("BOP") physicians were evaluating and treating Wise's conditions. The district court also correctly determined that, even if BOP had failed to meet some or all of Wise's medical needs, Wise had not met his burden of showing that he was at risk of "serious

deterioration in health or death" or "serious deterioration in physical or mental health" as U.S.S.G. § 1B1.13(b) requires.

**AFFIRMED.**

# APPENDIX C

Order of the United States District Court for the Northern District of California
Denying Motion for Leave to File Amended Motion
to Vacate Sentence under 28 U.S.C. § 2255

Filed May 11, 2022

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>WILLIAM J. WISE,<br>Defendant. | Case No. 12-cr-00111-EMC-1<br><br>**ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO AMEND**<br><br>Docket No. 295 |
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>WILLIAM J. WISE,<br>Defendant. | Case No. 12-cr-00642-EMC-1<br><br>Docket No. 136 |

Currently pending before the Court is Mr. Wise's motion for leave to amend his § 2255 petition.

Before addressing the motion, the Court takes into account the history of the proceedings. Mr. Wise filed his first § 2255 petition back in February 2016. *See* Docket No. 160 (§ 2255 petition). In December 2016, the Court denied the petition. *See* Docket No. 209 (order).

Some three years later, Mr. Wise sought relief from that order, *see* Docket No. 216 (motion), but the Court denied that motion noting that Mr. Wise had essentially filed an impermissible successive petition. *See* Docket No. 217 (order).

In June 2021, the Court ordered the government to respond to a contention made by Mr. Wise that the government was not complying with the plea agreement with respect to a possible

transfer to Canada. *See* Docket No. 265 (notice). In response, the government noted, *inter alia*, that (1) it had no obligation to facilitate the transfer, (2) its only obligation was not to oppose the transfer, and (3) per the express terms of the plea agreement, the obligation was applicable to the USAO for the Northern District of California and the USAO for the Eastern District of North Carolina only, and not any other federal, state, or local agency. *See* Docket No. 266 (response, filed on 7/1/2021); *see also* Docket No. 293-1 (Plea Agmt. ¶¶ 15-16) ("I agree that the Agreement binds the U.S. Attorney's Offices for the Northern District of California and the Eastern District of North Carolina only, and does not bind any other federal, state, or local agency," and "[t]he government . . . agreement that it will not oppose the defendant's application for a transfer to serve part of his sentence in Canada, provided that the defendant does not breach any terms of this Agreement, including his promise not to apply for such a transfer until he has served at least 1/3 of his sentence or 54 months in the United States . . . , whichever is longer."). At a subsequent hearing, the Court held that the government had not breached its obligations under the plea agreement. The Court also noted that Mr. Wise had raised the issue of ineffective assistance of counsel – *i.e.*, based on counsel's failure to advise that the plea agreement did not cover the entire federal government but rather only the two USAOs – but left it to him to decide whether and how to pursue that claim. *See* Docket No. 272 (minutes); *see also* Docket No. 293-1 (Tr. at 6-7) (at hearing, Mr. Wise arguing ineffective assistance of counsel).

On November 5, 2021, the Department of Justice sent a letter to the relevant Canadian authority, informing it that it had denied Mr. Wise's request to transfer to Canada "because of the seriousness of the offense and because [he] has become a domiciliary of the United States." Docket No. 293-1 (letter).

Mr. Wise now asks for leave to amend his § 2255 petition so that he may assert a claim of ineffective assistance of counsel. As indicated above, Mr. Wise contends that he has a viable claim for relief because counsel assured him that he had a right to transfer to Canada (subject to approval by the Canadian government) but failed to advise him that the plea agreement bound only the two USAOs. He asserts that his counsel never pointed out that limitation to him and that, if he had been so notified, he never would have signed the plea agreement. *See, e.g.*, Docket No.

276 (letter); Docket No. 293-1 (Tr. at 6-7).

Mr. Wise's motion to amend is subject to Federal Rule of Civil Procedure 15. *See* James v. Giles, 221 F.3d 1074, 1077 (9th Cir. 2000) (stating that Rule 15 "'applies to habeas actions with the same force that it applies to garden-variety civil cases'"). Rule 15 provides in relevant part that a "court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Factors that a court considers in determining whether to give leave to amend include "undue delay, the movant's bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility." *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020).

The government argues that amendment would be futile because Mr. Wise is essentially bringing an impermissible successive petition. The government, however, has not responded to Mr. Wise's assertion that his petition is "not second or successive [because] ' . . . the factual predicate for [his] claim accrued only after the time of the initial petition.'" *United States v. Jackson*, 21 F.4th 1205, 1212 (9th Cir. 2022). According to Mr. Wise, his new claim did not accrue until the Department of Justice denied his request to transfer on November 5, 2021.

As a facial matter, Mr. Wise's position seems to have some merit. Nevertheless, even if Mr. Wise is correct on this issue, the Court finds that amendment would be futile for other reasons. Mr. Wise's position is predicated on his counsel failing to sufficiently review the plea agreement with him – in particular, the limitation in ¶ 15 of the agreement which specified that the agreement bound only the USAOs and not any other federal agency. *See, e.g.*, Docket No. 276 (letter); Docket No. 293-1 (Tr. at 6-7). But at the plea hearing on November 15, 2012, Mr. Wise specifically stated on the record that he had sufficient time to speak with his attorney, that he had discussed the agreement thoroughly with his attorney, and that there were no promises made to him other than what was contained in the agreement. *See* Docket No. 38 (Tr. at 5, 10). There is no indication that these statements were made unknowingly and/or involuntarily, particularly given that Mr. Wise has a law degree himself. *See* Docket No. 38 (Tr. at 4); *see also Muth v. Fondren*, 676 F.3d 815, 822 (9th Cir. 2012) (stating that a "[p]etitioner's statements at the plea colloquy carry a strong presumption of truth" and "[o]ther circuits [that] have confronted the

question whether a petitioner may rest a collateral challenge on allegations that directly contradict the petitioner's in-court statements . . . have held that, ordinarily, such petitions must fail"); *United States v. Lemaster*, 403 F.3d 216, 220-21 (4th Cir. 2005) (stating that, "in the absence of extraordinary circumstances, allegations in a § 2255 motion that directly contradict the petitioner's statements made during a properly conducted Rule 11 colloquy are always palpably incredible and patently frivolous or false"). Here, the agencies bound by the agreement were specifically and expressly spelled out in the plea agreement which Mr. Wise signed. And as noted, in response to the court's questions, Mr. Wise affirmed there were no promises made to him by the government other than what was stated in the plea agreement. As a sophisticated individual with a law degree, absent some specific compelling evidence suggesting he has a viable claim of ineffective assistance, his proposed amendment to assert an IAC claim is implausible.

Accordingly, Mr. Wise's motion for leave to amend is hereby **DENIED**.

**IT IS SO ORDERED**.

Dated: May 11, 2022

EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California