24-7234

NO ____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE DAVID DIEHL,
Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS

David A. Diehl, 53214018
Federal Correctional Institute
PO Box 7007
Marianna, Florida 32447-7007

DAVID A. DIEHL
David A. Diehl
5-1-2025
PRO-SE

QUESTIONS PRESENTED

QUESTION ONE

Federal habeas law divides prisoners seeking post-conviction relief into two groups. Those in state custody file "habeas corpus applications" under 28 U.S.C. §2254. Those in federal custody file "motions to vacate" under 28 U.S.C. §2255.

A seperate statutory provision instructs district courts to dismiss any "claim presented in a second or successive habeas corpus application under 2254 that was presented in a prior application." 28 U.S.C. §2244(b)(1).

Whether the bar in 28 U.S.C. § 2244(b)(1) applies to claims presented by federal presoners in a second or successive motion to vacate under 28 U.S.C. § 2255.

QUESTION TWO

Whether fraud and deceit per Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and Fed. R. Civ. P. Rule 60(b)(3), and 60(b)(6) are subject to the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

LIST OF PARTIES

United States Court Of Appeals For The Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, Louisianna 70130-3408

Solicitor General of the United States
Room 5614 Department of Justice
950 Pennsylvania Ave., N.W.
Washington D.C. 20530-0001

RELATED PROCEEDINGS

The following proceedings are related under this court's Rule 14.1(b)(iii):

In Re Diehl, No 24-51024 (5th, 3-24-2025) (Letter from clerk denying a motion to recall the mandate)

In Re Diehl, No 24-51024 (5th, 2-26-2025) (Letter from clerk denying motion for reconsideration)

In Re Diehl, No 24-51024 (5th, 1-31-2025)(Order denying authorization to file a second or successive 2255)

United States of America v. David Andrew Diehl, 2022 U.S. App. Lexis 37201 (5th cir. October 4, 2022) No. 22-50100 (Order denying Fed.R.Civ. P. 60(b) motion)

United States of America v. David Andrew Diehl, 803 Fed. Appx. 800; 2020 U.S. App. Lexis 14538 (5th Cir. May 6, 2020) No. 19-50165 (Order denying 28 U.S.C. §2255)

United States of America v. David A. Diehl, 775 F.3d 714, (5th Cir. 2015) (Order denying direct pro-se appeal) No. 11-51076 Judgment and Conviction

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IN THE
SUPREME COURT of the UNITED STATES

In re DAVID DIEHL

PETITION FOR A WRIT OF HABEAS CORPUS

David Diehl is a prisoner in custody at Marianna Federal Correctional Institute in Marianna FL. He respectfully petitions this Court for a writ of habeas corpus.

OPINIONS BELOW

The Fifth Circuit's order of January 31, 2025 denying Petitioner's request for authorization to file a second 28 U.S.C. § 2255 motion to vacate based on 2255 (h)(1) new evidence is unreported, but is reproduced as Appendix ("App.")A, 1a-3a.

JURISDICTION

The Fifth Circuit denied authorization to file a second 28 U.S.C. §2255 motion to vacate his 18 U.S.C. §2251(a) conviction on January 31, 2025. This court has jurisdiction under 28 U.S.C. §§ 1651 and 2241.

STATUTORY PROVISIONS INVOLVED

Section 2255(h) of Title 28 of the U.S. Code provides:

> 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.

Sections 2244(b) of Title 28 of the U.S. Code provides:

> **(1)** A claim presented in a second or successive habeas corpus application under section 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 that was not presented in a prior application shall be dismissed unless—
>
> **(A)** the applicant shows that the claim relies 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 of due diligence; and
>
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> **(3)**
>
> **(A)** Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

STATEMENT PURSUANT TO RULE 20.4(a) & 28 U.S.C. § 2242

Pursuant to Rule 20.4(a), Petitioner states that he cannot file a habeas corpus petition in "the district court of the district in which [he] is held," Sup. Ct. R. 20.4(a) (quoting 28 U.S.C. § 2242), as he has no legal avenue for doing so. By statute, a federal prisoner may file a 28 U.S.C. §2241 habeas petition in the district court only where a 28 U.S.C. §2255 motion to vacate would be "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The district court where Petitioner is confined would transfer the motion to the district court which sentenced Diehl which in turn would determine it has no jurisdiction.

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STATUARY BACKGROUND

Section 2244(b)(1) provides in full: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." All agree that only *state* prisoners file "habeas corpus application under section 2254." By contrast, *federal* prisoners file "motions to vacate" under 28 U.S.C. § 2255. Although § 2244(b)(1)'s text applies only to state-prisoner habeas corpus applications filed under § 2254, six circuits have held that § 2244(b)(1)'s bar also applies to federal-prisoner motions to vacate filed under § 2255.

In 2019, the Sixth Circuit broke from those six circuits. In *Williams v. United States*, 927 F.3d 427, 434–36 (6th Cir. 2019), that court followed the plain text of the statute and rejected the policy-based decisions of the six other circuits. The Sixth Circuit's decision was so persuasive that, shortly thereafter, the government itself agreed in a filing in this Court. *Avery v. United States*, U.S. Br. in Opp., 2020 WL 504785, at *10, 13 (No. 19-633) (Jan. 29, 2020). That led Justice Kavanaugh to opine that, in an appropriate case, he would grant review in light of § 2244(b)(1)'s plain text, the circuit conflict, and the government's concession that the majority view was wrong. *Avery v. United States*, 140 S. Ct. 1080, 1080–81 (2020) (Kavanuagh, J., respecting the denial of certiorari). Since Justice Kavanaugh's opinion, the Fourth and Ninth Circuits have expressly joined the Sixth Circuit, holding that § 2244(b)(1)'s bar does not apply to § 2255 motions filed by federal prisoners and rejecting the majority view. *In re Graham*, 61 F.4th 433, 438–41 (4th Cir. 2023); *Jones v. United States*, 36 F.4th 974, 981–84 (9th Cir. 2022). At present, then, the circuit split is 6–3.

This case provides an excellent vehicle to resolve if 28 U.S.C. §2244(b)(1) is relevent to §2255(h)(1) cases versus 2255(h)(2) cases which this court has already agreed to consider in re Bowe[1].

In Diehl's request for authorization to file a second 2255 with the Fifth Circuit, Diehl presented new evidence which would undermine his 18 U.S.C. §2251(a) conviction. No rational juror would convict. The new evidence shows that Diehl is legally innocent. However, instead of evaluating the new evidence, or the eight new 2255 grounds which rely on that evidence, the Fifth Circuit threatened sanctions for abuse of writ. The court was implying that Diehl's issues were previously considered and resolved. Section 2255 (h)(1) however has no res judicata or other procedural bar. Diehl herein argues that 2244(b)(1) does not apply to 2255 claims.

Diehl presents a second ground for consideration. The question is whether fraud and deceit per Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972) and Fed.R Civ. P. Rule (b)(3) and 60(b)(6) are subject to the Antiterrorism and Effective Death Penalty Act,expecially where additional fraud is perpetrated on the Habeas court to destroy evidence. The circuit courts are split on the issue, and courts that find AEDPA applies are often troubled by their precident. In Storey v. Lumpkin, 142 S.Ct. 2576 (2022) Justice Satomayer expressed an interest in this important due process issue that affects the reputation of the court.

1, In Re Micheal Bowe 24-5438

Proceedings Below

TRIAL

In 2010 David Diehl pleaded innocent in the Western District of Texas to ten counts of sexual exploitation of a minor per 18 U.S.C. §2251(a) (2008). Diehl stipulated to all elements of the offense with the exception of the interstate commerce element: " if such visual depiction was transported in interstate commerce."

During a day and half bench trial the court concluded evidence of interstate commerce was sufficient. Specifically the court found that the government's evidence, which consisted of video reproductions found in unrelated cases, outside of Texas was sufficient, Court: "... and it takes nothing more." Trans p. 6,7. Day 2.

During the trial the court randomly alternated between the correct version of 2251(a), and the much expanded post 2008 version.

DIRECT APPEAL

On direct appeal as ineffective counsel Diehl challenged the nexus finding in two ways[1] First Diehl said that the reproduction evidence was insufficient because Diehl did not "use" a minor to produce the visual depictions. Diehl also argued it was a constructive amendment to rely on post 2008 §2251(a) language, which substantially expanded federal jurisdiction.

Unfortunately instead of considering these arguments, the Fifth Circuit at the government's bequest altered the trial court's expressfinding to rely on inferences[2] The first inference was that Diehl's seized internal hard drives may have charged counts. The second inference was that Diehl himself may have used the internet

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1. Fifth Circuit precident disallows ineffective claims to be considered on direct appeal. See United States v. Watts, 2023 U.S. App. lEXIS 26202(11TH Cir) citing United States v. Isgar, 739 f.3d 829 ,841 (5th Cir. 2014)
2. Trial court basically entered a Fed.R.Cr.P 23(c) finding

to transport the original visual depictions.[1] These two inferences were dependent on altering the trial court's credibility finding of the government's only witness Ken Courtney. Courtney had been writed out of Florida state jail. During a Rule 29 motion at trial the trial court specifically said it found Courtney "credible to that part." That part was that Courtney allegedly discovered Count 1 on the internet. The Judgment and Commitment confirmed the trial court's very limited finding. A motion for rehearing, and en banc hearing was denied, and Certiorary was denied.

28 U.S.C. 2255

Following the appeal court finding Diehl began preparing for a 2255 filing by requesting the case file from his ex sentencing attorney . This attorney (Gerald Moris) however notified the prosecutor who moved for a protective order. The file had been provided to Diehl's trial attorney (Steve Orr) in 2010 without any protective order or any agreement limiting disclosure to Diehl.

Following a protracted battle, Magistrate Mark Lane denied Diehl all information, and actually ordered the entire client file destroyed. As a result the evidence described as new in Diehl's Second or successive motion could not be discovered despite due diligence.

Diehl filed a 2255 where he argued 1)His counsel had no reasonable trial strategy and brought forward anargument that had been defeated in every Circuit to have heard it, 2)That the stipulation was based on a different argument. 3) That counsel was ineffective

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1. The trial courts finding instead was just being on internet was enough. TT 155, 187. This finding ignores 2251(a)plain language

for failing to object to fluctuating 2251(a) nexus language being used at trial;[1] and 4) That counsel was ineffective for his failure to renew his motion for suppresion of illegally seized hard drives.[2] The government had promissed at pretrial not to rely on those internal hard drives in its case in chief, but then at trial tried to use them as if they were evidence - which they were not. One was blank, and one was encrypted. Finally , on 2255 Diehl argued that prosecutorial misconduct occured as a result of promissed made by the prosecutor concerning government witness Ken Courtney.

Relevent to the second or successive petition is the following: 1) The district court misinterpreted that Diehl's primary nexus argument, raised as ineffective counsel on appeal, had actually been considered and resolved on appeal. Court: "Diehl argues his counsel was ineffective for failing to properly argue Diehl's jurisdictional defense, i.e., that the court does not have jurisdiction over this crime unless the Government proves the created images were transported across state lines." Doc 270 P. 13. This was not the raised issue; the raised issue was that Diehl did not use any minor to produce the reproductions evidence that the government relied on as evidence.[3] The court continued to conflate the issue relying on,Court: "The fact that the videos that were created in Texas and found in multiple other states ...." Page 13. The only thing however found outside of Texas were reproductions Diehl did not create. The government never argued Diehl produced the

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1. 2255 Ground 3-Constructive Amend. Ground 4-Ex Post Fact. Ground 4 was completly ignorred, Ground 3 was improperly barred.
2. Judge at pre-trial postponed suppresion hearing.
3. Appeal Brief P. 36-37

reproductions, instead they relied on 18 U.S.C. §2251(a) applying to encorporeal scenes, not physical material.[1] The court tries to cover this problem by finding that "tangible objects also travelled in interstate commerce," Court "... the Fifth Circuit also affirmed that the 'the record includes specific evidence from which the district court could reasonably infer that Diehl himself transported the images across state lines, both physically and via the internet.'" Page 14. Relevant here,the physical transport depends on the government recomended inference to the fifth Circuit on appeal, that the internal seized hard drives have counts according to their jail-house witness Ken Courtney. The internet inference also depends on witness Courtney testifying that Diehl used a computer program called IRC to transport charged counts. This use of the internet, which absolutely changed the trial court's limited finding in turn is affected by the constructive amendment claim referenced above. Quoting the Fifth Circuit's appeal opinion the 2255 court said "the district court correctly identified the issue and the government's burden, and expressly found that the government had proven that the videos actually moved in interstate commerce ...." Since the district court didn't rely on Diehl transporting at all however, the post 2008 changes to 18 U.S.C. §2251(a)'s nexus language would have been of no concern to that court.[2]

Also relevent to the second or successive 2255 is that the district court agrees the internal hard drives used to draw the

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1. This obviously was the entire basis of the stipulation and bench trial, The stipulation was a guilty plea otherwise. 2255 Ground 7.
2. This demonstrates what can happen with improper inferences, and under the circumstances becomes impossible to defend against. Courts have also found that IRC doesn't prove interstate commerce.

inference on direct appeal were not admitted as evidence at trial. See Page 18 citing Dkt #85 (Government Exhibition List).

An evidence hearing was denied, and the 2255 was denied. Diehl filed timely objects, and a reconsideration motion which was denied. The 2255 appeal was denied, and cert was denied.

FED.R.CIV.P. 60

Following the denial of certiorari Diehl filed a Fed.R.Civ.P 60(b)(6), and (d)(3) motion. Diehl argued that the above mistakes resulted in his valid 2255 grounds not being properly addressed and resolved. Diehl also argued that the government committed fraud on the Fifth Circuit and district court concerning the nexus element.

The district court denied the 60(b) saying it was a merit challenge in violation of Gonzalez v. Crosby, 545 U.S. 524 (2005). The court did not transfer the motion to the Fifth Circuit as a a request for authorization to file a second 2255 via 28 U.S.C. § 1631. Diehl appealed the categorization[1] and requested a de novo review which was denied. Cert was also denied.

NEW EVIDENCE

Despite the aforementioned interfearance with Diehl's attorney-client privilages, and his constitutional right to review released discovery, not limited by a protective order, Diehl eventually obtained a FBI 302 which formed the basis of new evidence in Diehl's second 2255.

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1. Two of the Grounds were not found to be successive

The FBI 302 was an interview summary conducted with witness Ken Courtney. App. . The 302 indicates that Courtney never told the FBI that he saw any charged visual depictions on the internal seized hard drives which the Fifth Circuit's physical transport inference was based on. Courtney repeatedly identified an unseized external unencrypted drive that sat on Diehl's office desk. These statement's in turn led to questions about a forensic computer examination report, which was witheld from all parties.[1] This is true because the government had said on multiple occasions that the seized internal drives could not be decrypted. It was only on this basis the Fifth Circuit inferred that the internal drives had counts. Worse Diehl's attorney was in possession of an external drive which he took possession of folowing the denial of the government's search warrant.[2] These facts of course lead to a question of loyalty and ethics. The Fourth amendment is also involved since during a sua sponte seizure at sentencing, "other media devices" were seized without notice, or objection from Diehl's second attorney.

In Diehl's request for authorization to file a second 2255 he also presented two other pieces of new evidence. First, through state Freedom of Information requests Diehl obtained an interview of witness Ken Courtney who the Fifth Circuit inferences relied on. In the interview report Courtney told the arresting agent that he knew knowone involved with child pornography, and then offered to cooperate in the arrest of a friend of his who was involved

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1. This summary report was a part of an inventory list the government was forced to disclose in the protective order battle discussed in more detail below.
2. Per ethics rules if counsel was concerned about the exgternal drive, he was required to notify Diehl

in narcotics.[1] A second piece of evidence was Courtney's resentencing transcripts following his cooperation in Diehl's trial. Although at Diehl's trial Courtney said he was promised no benefits, the re-sentencing transcripts indicate he fully forsaw a sentence reduction, and the federal prosecutor in Diehl's case did far more than say Courtney was truthful. In fact, this evidence combined with already identified wild inconsistencies show most serious Giglio violations on the part of the government. For example Courtney at Diehl's trial could not identify a single thing about the video he allegedly got off the internet, and watched 50 times.[2] Without Courtney no inferences were possible and Diehl's primary nexus argument, which the Fifth Circuit did not evaluate , would have resulted in the conviction being overturned. No rational trier of fact would convict on the fact reproductions existed outside of Texas, and were available on the internet. This was the exact finding of the trial court. The plain language of 18 U.S.C. §2251(a)'s third nexus clause (2008) rules.."Such" visual depiction refers to what was produced, when a minor was used. Diehl did not use a minor to produce unrelated reproductions, and this was the only evidence presented at trial. See United States v. Lively, 852 F.3d 549, 558 (6th Cir. 2017) (identifying and resolving the issue); United States v. Burnette, 382 F. Appx. 813-15(11th Cir. 2010); United States v. Monson, 2023 U.S. App. Lexis 16075, Lex 8 (1st Cir. 2023) (Citing Lively):

1. Trial Trans p. 116
2. Trial Trans p. 104

In Monson the court didn't actually resolve the issue, finding that Monson also made the reproductions. Also see United States v. Dickson, 632 F.3d 186, Lex 5 (5th Cir. 2011) saying images are produced when they are downloaded, citing other circuits. This confirms that the government's reproduction evidence was produced by others. They are not §2251(a)'s "such" visual depiction.

To draw an analogy, two different pictures of the same subject arn't the same material for interstate commerce purposes[1] Section 2251(a) doesn't apply to encorporeal scenes but actual material. In fact digital data that has been transmitted was not even covered until after 2008, which doesn't apply here.

Had Diehl's trial counsel brought this argument, which the stipulation was based on,Diehl's would have won at trial based on a gramatical interpretation of 2251(a). There is reason why knowone else has been convicted in such a manner as Diehl. There is also a reason the United States relied on hard drives having counts, after telling the trial court reproductions found outside of Texas was sufficient. In fact they committed to this when the judge sought assurance before his express and narrow finding.

AUTHORIZATION DENIAL ORDER

In the fifth Circuit's order dismissing authorization to file a second 2255, the court did not provide much detail as to why the petition did not meet the AEDPA standard. The court said only that future filings may result in sanctions, citing United States v. Hanner, 32 F.4th 430, 434 (5th Cir. 2022).

1. Page 12 of the AGREED STIPULATION OF FACTS AND EVIDENCE 1/31/11 describes visual depiction "...e.g., video tape or digital video of the conduct ...[which was] mailed or actually transported in interstate or foreign commerce." Its a corporeal substance. Data that has been transmitted was added past 2008.

Petitioner is precluded from further review per 28 U.S.C. § 2244(b)(3)(E). Petitioner would be jurisdictionally bared from filing in the sentencing court, and filing in the district of confinement per 28 U.S.C. §2241 would unquestionably result in that motion being redirected to the trial court. Accordingly, Petitioner Diehl has no available option but to seek an extraordinary writ in this court.

This concludes the proceeding section of this brief.

REASON FOR GRANTING THE PETITION

Unlike the petition in Bowe (supra), this petition concerns 2255(h)(1) new evidence, instead of 2255(h)(2) new law. In both situations however 2244(b)(1) is applied to bar the petition. In Diehl's case the Fifth Circuit denies authorization and threatend sanctions because Diehl again challenges 2251(a)'s nexus element. Section 2255(h)(1) says nothing of res judicata, collateral estoppel or any other procedural bar procedure. All that is necessary for authorization is a prima facia showing that no reasonable factfinder would have found Diehl guilty of the offense. Other than the 2244(b)(1) obstacle, Diehl has made this showing, and the court has not said otherwise.

Diehl in his request for authorization actually raised eight different grounds. The court reviews none of them. All eight are based on the new evidence the governement prevented Diehl from obtaining, and was successful in having destroyed.

The new evidenced presented in Diehl's petition presents the case in an entirely different light, and this is often the case with witheld evidence - thats why the government witheld it in the first place.

The reason for granting the petition here first and foremost is because this case and Bowe involve the same issue which is the applicability of 2244(b)(1) to 2255 cases. Bowe's brief which is scheduled to be heard this summer fully explains the grounds for the Supreme Courts consideration. First, the Circuits are deeply and openly divided on whether 2244(b)(1) applies to federal prisoners filing 2255 motions. Second, the majority view is clearly wrong per the statutes plain text. Section 2244(b)(1) applies to successive "habeas corpus applications under section 2254 ...." Bowe brief p.15. Third, exceptional circumstances warrant this court's intervention. The question is recurring and important. Bowe p.18.

As a procedural matter this case is an ideal vehicle for 2255(h)(1) - new evidence. The FBI 302 shows that the Fifth Circuits inference on appeal to non-evidence internal hard drives was a gross error.[1] The forensic report, which must be based on the external unencrpted drive is esculpatory. The two Florida state reports further show why the trial court itself refused to rely on jailhouse witness Ken Courtney. Upon arrest he said he knew knowone involved in child pornography, but also offered then

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1. It has been argued before that the government at pre-trial promissed those drives would not be used in their case in chief.

and there to cooperate against a friend. The resentencing transcript of Courtney reeks of a pre-arranged deal. Clearly Courtney was brought to Diehl's trial because the government always knew 18 U.S.C. §2251(a)'s third nexus clause doesn't apply to reproductions Diehl himself did not produce. Most of the released discovery which the government got destroyed has still not been reviewed by Diehl, including FBI "interviews" with Courtney's attorney. The Giglio, Brady, and Rule 60(d) fraud implications in this case are most serious. This is also a common scenerio involving 2255(h)(1) applications where the witholding of esculpatory evidence underlies the claim.

In summary, there is new evidence which eliminates the physical transport inference. There is also new evidence which eliminates the Internet inference. Eliminating these inferences leads right back to the trial court's specific, explicit finding, which is basically that there is no distinction between depictions produced by Diehl, and reproductions produced by unrelated third party's. Because this distinction is so important, and in fact the entire bench trial relied on it,[1] the government engaged in serious fraud on the court as described herein Ground 2.

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1. And a 30 year plea offer was refused based on the strength of the plain language argument.

GROUND 2

WHETHER FRAUD AND DECEIT PER BRADY V. MARYLAND, 373 U.S. 83 (1963), GIGLIO V. UNITED STATES, 405 U.S. 150 (1972) , AND FED. R. CIV. P. RULE 60(b)(3) and 60(d) ARE SUBJECT TO THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA).

INTRODUCTION

In Will v. Davis, 142 S.Ct. 2576 (2022) Justice Sotomayor opined that treating all "late" Brady and Giglio claims as second or successive contravenes Panetti v. Quarterman, 551 U.S. 930 (2007) (Bringing a claim that was not ripe when Petitioner filed his first in-time petition is not second or successive.) The Fifth Circuit however treats all Brady and Giglio claims as successive under the premise they pre-existed. The 4th, 6th, 9th, and 11th Circuit's are in-line. The 10th Circuit is arguably split. See Douglas v. Workman, 560 f.3d 1156 (10th Cir. 2009) citing In Re Pickard, 681 F.3d 1201, 1205 (10Th Cir. 2012) ("We cannot accept the proposition that the governement has a free pass to decieve a habeas court into denying discovery just because it similarly deceived the trial court ... This would compound a substantial injustice.") id 1207. The Eleventh Circuit in Scott v. United States, 81 F. Supp. 3d 1326 (11th Cir. 2015) said it questions its own precident (Thompson), but clarifies only when the defects were wholly non-existent at the time Petitioner filed his first 2255. Other courts have questioned

their precident on the subject. See Gage v. Chappell, 793 F.3d 1159, 1165 (9th Cir. 2015); Baugh V. Naggy, 2022 U.S. app. Lexis 27469 (6th Cir. 2022) criticizing Wogenstahl V. Warden, 2023 U.S. Dist. Lexis 44984 (S. Dist. Ohio, 2023). See United States v. Hayes, 352 F. Supp. 3d 629 (4th Cir. 2019) discussing the issue.

REASON FOR GRANTING A WRIT FOR GROUND 2

AEDPA was never intended to be used to alow the government to circumvent the protections Brady, Giglio and Fed.R.Civ.P. 60 (d), and (b)(6) provide. Although there is not an obvious circuit split, as shown the courts are not comfortable with their own precident. At least one justice of the Supreme Court has also expressed concern on the matter.

This case presents the perfect opportunity to clarify whether AEDPA should be applied to Brady, Napue and fraud on the court claims.[1]

FACTS

After the fifth Circuit on appeal relied on government recommended inferences to uphold the conviction, Diehl while preparing for his pro se 2255 requested of his attorney a copy of his file. The file had been in his possession for years and no protective order had ever been requested. As an officer of the court, and per Fed. R. Cr. P. 16 Counsel was permitted a copy.

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1. Diehl currently has a fraud on the court motion pending with the Fifth Circuit

Diehl was also permitted to view the file as the defendant who was representing himself on 2255. Despite these facts Diehl's attorney (G Morris) notified the government of Diehl's request and the government moved for a protective order. See doc 202, 215. [1] The end result of a multi-year battle, the district court denied the entire file, and then ordered Mr. Morris to destroy his file. During this process Diehl filed an interlocutory appeal to the Fifth Circuit. See motion titled "Appellate Appeal Concerning Objection To Magistrate Order", dated 12-19-16. Unbeknownst to Diehl the government had sent a letter to the Fifth Circuit WDTX case manager listing irrelevant docket entries and saying Diehl was seeking discovery - as in discovery process. This misrepresentation caused that court to deny the appeal. See denial on 11-28-2017 referencing Doc 200. Doc 200 however was a discovery request. The relevant protective order filings didn't start until doc 202 on. Its obvious that the government knew this, as is evidenced by their own statements in other filings. [2]

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1. In the magistrates protective order ruling. no relevant law was followed i.e. Fed.R.C.P. 16(d) or Fed. Civ.P. 26. There was no evaluation whether "a significant possibility of disclosure of identifiers would cause harm." The victims were over 18, and an in camera review, which is standard was denied. See Doc 208. The Judge himself misconstrued #208. Finally, magistrates don't appear to have authority per 28 U.S.C. §636 to rule on injunctions which would force an attorney to destroy his client files.
2. In Doc 201 the court denied 2255 Rule 6 discovery. In DOC 202 the government acknowledged this fact. They were fully aware it was almost certainly improper to obtain a protective order under the circumstances, and this drove them to deceive the Fifth Circuit as described.

As a result of the attorney's file being destroyed, Diehl was prevented from discovering the new evidence.

Diehl's request for authorization makes a Brady claim in Ground two, and a Napue/Giglio claim in Ground three. The Brady claim concerns the witholding of the forensic computer examination report from all parties. The report would likely reveal that it was made from the external drive in Diehl's trial counsel's possession. Otherwise, it had to be made from the internal encrypted drive, however the government told the district court and the Fifth Circuit, that drive could not be decrypted - the inference was applied on that basis.[1]

The Ground three Napue/Giglio claim is supported by the new Florida investigative report concerning government witness Ken Courtney, and his resentencing transcripts as described. This new evidence, along with the existing record provides strong support that the witness comitted perjury at Diehl's trial, and the government had every reason to know this. The client-attorney file ordered destroyed also contained interviews with Courtney's attorney that Diehl has not been permitted to see. The Courntey resentencing transcripts contradict Courtney's statements at Diehl's trial where he testified no promises or deals for his testimony were made. Clearly he expected a sentencing, and immunity benefit for his testimony which fundamentally changed after he was writted out of Florida state jail and flown to Texas.

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1. The government committed fraud on the 2255 court over the belated request for a protective order. Their true intention was to prevent Diehl from discovering about the forensic examination of the external drives they wern't entitled to.

The above covers the Brady, Giglio, and Napue claims which AEDPA is being applied to seriously complicate. In this case however, there are also fraud on the court claims and in the request for authorization they are explored in the five ineffective counsel claims. These claims include that counsel was ineffective for failing to obtain the computer forensic examination report which was according to the summary report exculpatory. Counsel also failed to cross examine witness Courtney about what equipment he allegedly saw charged counts on. Finally, counsel was ineffective for failing to determine or object to the sua sponte seizure. At this point it seems quite possible the external drive, which was not in any warrant, and in counsel's possession, was illegally seized in violation of Diehl's Fourth Amendment rights.

If counsel did cooperate with the government in the manner described he created a giant conflict of interest, and it would explain many things including alowing the suppression hearing at pre-trial to be postponed, and failing to renew it at trial. It explains his failure to inspect the drives, to cross examine Courtney,and the FBI properly. Lastely it may explain why he failed to bring the Nexus argument the stipulation was reliant on, or challenge the statute of limitations his employment was conditioned upon. The charges were a decade old. See United States v. Throckmorten, 98 US 61,66 (1878). In Panetti v. Quarterman, 551 U.S. 930 (2007) this court said AEDPA was not meant to apply to unusual circumstances. Also see Fiero v. Johnson, 197 F.3d 147, 153-54 (5th Cir. 1999) (60(b)3) may survive AEDPA).

CONCLUSION

Exceptional circumstances warrant this court's intervention. Those circumstances include:

1. The questions presented within are recurring and important. Whether 2244(b)(1) is applicable to 2255(h)(1) is as important as whether it applies to 2255(h)(2) which this court has already agreed to consider in Bowe this summer.

2. As a procedural matter this case is a perfect 2255(h)(1) case.

3. The fraud, Brady, and Napue violations in this case are extremely serious and permeated the entire case including during 2255. Evidence was destroyed on 2255 to conceal fraud.

4. A confluence of highly unusual circumstances make an extraordinary writ the only way to challenge these important issues.

5. The raised issues raised herein affect the integrity of the federal court system

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