

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH WILLIAMS

Petitioner,

VS.

UNITED STATES OF AMERICA

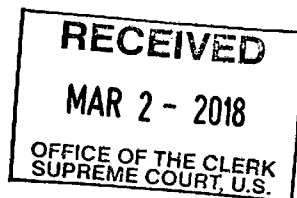
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

- I. DID THE GOVERNMENT'S PROSECUTORS COMMIT FRAUD ON THE COURT, BY FALSELY ALLEGING BEFORE THE DISTRICT COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS THAT THE PETITIONER COMMITTED A MURDER THAT NEVER HAPPEN?
- II. DID THE COURT OF APPEALS ABUSED ITS DISCRETION BY CONTRAVENING THIS COURT'S DECISION IN HAZEL-ATLAS GLASS CO. V. HARTFORD-EMPIRE CO., 322 U.S. 238, 246-47 (1944)?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this court contains the name(s) of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit.

Specifically, the Petitioner Kenneth Williams and Respondent United States Of America, neither party is a corporation or subsidiary thereof, parties to the proceedings:

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 26, 2017. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES,
RULES AND REGULATIONS INVOLVED

United States Constitution, Amendment Five provides in part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . .nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

United States Constitution, Amendment Six provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Title 21, United States Code, section 841 provides in part:

a.) Unlawful Acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense a counterfeit substance.

Title 21, United States Code, section 848 provides in part:

b.) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section if--

(1) such person is the principal administrator, organizer or leader of the enterprise or is one of several such principal administrators, organizers or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received \$10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

Title 21, United States Code, section 952 provides in part:

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV or V of subchapter I of this chapter. . .

Title 21, United States Code, section 963 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 18, United States Code, section 924(o) provides:

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years,

fined under this title or both; and if the firearm is a machine gun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

Title 18, United States Code, section 924(c) provides partly:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment not less than five years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years. . .

11th Cir.R. 41-1(c) STATEMENT

Per 11th Cir.R. 41-1(c), when a motion to recall mandate:

"is tendered for filing more than one year after issuance of the mandate, the clerk shall not accept the motion for filing unless the motion states with specificity why it was not filed sooner. The court will not grant the motion unless the movant has established good cause for the delay in filing the motion."

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully requests that a Writ of Certiorari issue in order to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on June 26, 2017.

OPINION BELOW

The June 26, 2017, opinion of the Eleventh Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is reprinted in Appendix-A of this petition.

STATEMENT OF THE CASE

I. Procedural History

On May 17, 1999, the petitioner was arrested for violating multiple federal drug laws. On September 8, 1999, a federal grand jury for the Southern District of Florida Miami Division, returned a seventeen count third superseding indictment, against the petitioner and fourteen other co-defendants, with multiple violations of the United States federal drug laws. Specifically, the petitioner was charged with eight counts of the following offenses: (1) one count of 21 U.S.C. 848 CCE; (2) one count of 21 U.S.C. 846 conspiracy; (3) one count of 21 U.S.C. 963 importation; (4) four counts of 21 U.S.C. 841 distribution; (5) one count of 18 U.S.C. 924(o) fire-arm conspiracy. See: District Court Docket No. 199-cr-00135-KKM-7 (Criminal DE#407)

On February 7, 2000, the petitioner was tried before a federal jury. March 31, 2000, the petitioner was found guilty on all eight counts alleged in the third superseding indictment. On June 1, 2000, the petitioner was sentenced to life plus twenty years in federal prison, by the district court judge. District Court Docket No. 1:99-CR-00125-KKM-7. The final judgment was entered in the District Court on June 6, 2000.

The petitioner pursued his direct appeal. On December 15, 2005, the Eleventh Circuit Court of Appeals affirmed the judgment of the district court. United States v. Baker, 432 F.3d 1189 (11th Cir. 2005) The Supreme Court denied the petitioner Writ of Certiorari; See Williams v. United States, 549 U.S. _____, 127 S.Ct. 1140, 166

L.Ed. 2d 906 (2007).

On February 15, 2008, the petitioner filed a timely Motion to Vacate, Setaside, or Correct Sentence, pursuant to 28 U.S.C..2255..

RECALL OF MANDATE PROCEDURAL HISTORY

1. On May 5, 2017, Williams filed a Motion To Recall Mandate, based upon fraud on the court and to prevent injustice.
2. On June 26, 2017, a single circuit judge for the Eleventh Circuit Court of Appeals, denied Williams' Motion To Recall Mandate, citing Calderon v. Thompson, 523 U.S. 538, 549-550, 118 S.Ct. 1489 (1998).
3. On July 7, 2017, Williams filed a Motion for Panel Review Pursuant to Federal Rule Appellate Procedure 27(c).
4. On August 10, 2017, Attorney Demitrus Evan's "Motion for Leave to Amend Motion for Panel Review," which was construed as a motion requesting leave to file an out-of-time amend motion for reconsideration in place of William's pro-se motion is Granted. Attorney Evans was directed to file the amended motion for reconsideration within twenty-one (21) days of the date of this order, by the Eleventh Circuit Judge.
5. On August 30, 2017, Attorney Demitrus Evans filed the Amended Motion for Reconsideration with the Clerk of the Court of Appeals for the Eleventh Circuit.
6. On September 29, 2017, Williams Amended Motion for Reconsideration was denied.
7. On October 12, 2017, Williams filed a Petition for Hearing or Re-hearing En Banc, for a full panel review to the Eleventh Circuit Court of Appeals which was returned on October 17, 2017, unfiled by David J. Smith (Clerk of Court) pursuant to 11th Circuit Rule 27.2.

COMES NOW, Kenneth Williams, the Petitioner in pro-se respectfully move this Honorable Court to grant this Writ of Certiorari in order to review the Eleventh Circuit Court of Appeals' judgments, pertaining to the Petitioner's "Motion To Recall The Mandate" entered on June 26, 2017, and the Petitioner's "Motion For Panel Review Pursuant to Federal Rule Appellate Procedure 27(c) entered on September 29, 2017, based upon fraud on the court and newly-discovered evidence, Appeal No. 00-13083-GG. See: Appendix-A

STATEMENT OF THE FACTS

In federal court, the Petitioner was tried and convicted for a murder that never happen. The Petitioner is currently incarcerated for allegedly killing Anthony Ankey Ellis in August of 1992, in Norfolk, Virginia. In February of 2000, during opening statements and closing arguments, at the Petitioner's trial, the government's prosecutors (Christopher Clark, Stacy Levine and Bruce Brown) successfully argued before the District Court Judge K. Michael Moore and the twelve jurors, that the Petitioner had committed a retaliatory murder in Norfolk, Virginia. Anthony Anky Ellis alleged murder was used to secure both the Petitioner's drug convictions, and to enhance his sentence to life, under the 1st degree murder statute 18 U.S.C. 1111, pursuant to § 2A1.1(a) base offense level 43.

The Petitioner's sentence was enhanced pursuant to Section 2D1.1 (d)(1) which provides the Cross Reference Provision, and states in relevant part: "If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111... apply § 2A1.1(First Degree Murder) as appropriate, if the resulting offense level is greater

than that determined under this guideline." USSG § 2D1.1(d)(1). This cross-reference section provides for an enhanced base offense level of 43, §2A1.1(a).

In February of 2000, the trial prosecutors presented highly inflammatory false testimony from FBI confidential informant Kevin Becton, who falsely testified before the jury, that the Petitioner had murdered an individual by the name of Ankey in August of 1992, in Norfolk, Virginia. **See: Appendix-B**

In addition, after the Petitioner's conviction in the district court, the governments prosecutors convinced the Eleventh Circuit Court of Appeals to affirm the Petitioner's convictions, because the Petitioner had murdered Ankey in furtherance of a drug conspiracy. See, United States v. Baker, 432, F.3d 1189, 1209(11th Cir. 2005).

On February 9, 2000, confidential informant Kevin Becton testified in August of 1992, he eyewitnessed Richard Stitt and Kenneth Williams (the Petitioner) shoot to death a rival drug dealer name Ankey at an apartment building in Norfolk, Virginia. Becton claimed Ankey was killed in retaliation, for Becton being shot the day before the murder, by the Thomas brothers.

Instead of correcting the FBI confidential informant Kevin Becton's false testimony, the trial prosecutor Stacy Levine vouched vigorously for Becton's perjurious testimony. In her closing argument before the jury, AUSA Stacy Levine argued the following:

"Williams and Richard Stitt shoot and kill [H]ankey. Who is [H]ankey? He's a member of the Thomas Gang who was killed in retaliation for the shooting that was perpetrated on Kevin Becton."

See: Appendix-C

The government knew or should have known that Becton's testimony was false, because the alleged homicide victim is still alive, and currently reside in Miami, Florida. The government relied heavy on Becton's testimony, without presenting any corroborating evidence, demonstrating a prima facie case, proving that Ankey was murdered.

On December 13, 2005, Court of Appeals for the Eleventh Circuit Judges Barkett, Marcus and George ruled the Petitioner had committed the murder, and "the Ankey murder was committed during the scope and in furtherance of the Count 2 conspiracy." **See: Appendix-D**

In March of 2017, the Petitioner received confirmation from several individuals from Miami, that Ankey is alive. These several individuals, indentified Ankey the alleged murder victim, through several pictures posted on his personal webpage as Anthony Ankey Ellis. The Petitioner was also informed that Ankey are friends with Aaron and Hugley Thomas, the two brothers who the government dubbed the Thomas gang.

REASON FOR GRANTING WRIT OF CERTIORARI

II. The Eleventh Circuit Panel Judgment Denying The Petitioner's Motion To Recall The Mandate, Conflicts With The Supreme Court's Decision In Hazel-Atlas Glass Co. v. Hartford.Empire Co., 322 U.S. 238 (1944).

The Petitioner contends based on the Eleventh Circuit's decision denying the Petitioner's Motion To Recall The Mandate filed May 5, 2017, based upon fraud on the court and prevent injustice, directly creates a conflict with the following cases; *infra*, decided

by the Supreme Court and the Eleventh Circuit's prior decisions, decided by the Court of Appeals. The Petitioner express a vehement belief, that his Motion to Recall Mandate should have been granted by the Eleventh Circuit's Judges, or considered for a merits review by the judges. in order to secure and maintain uniformity of decisions decided by both courts, the Supreme Court and the Eleventh Circuit Court of Appeals.

III. Fraud On The Court Applicable Law

The panel decision directly conflict with the Supreme Court decision in Hazel-Atlas Glass Co. v. Hartford-Empire Co., . . . , In Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246-47 (1944), The Supreme Court ruled that appellate courts may recall their mandates and order that a lower Court's judgment be set aside when a party perpetrates a fraud on the court. The Court of Appeals refused to set aside its judgment in favor of Hartford, but the Supreme Court reversed. After recounting "this sordid story" Id at 243. 64 S.Ct. at 1000, the Court held that the term rule was no bar to correcting the effect of the fraud, that Hazel-Atlas delay in uncovering the fraud was not a bar, and that effectiveness of the fraudulent article for Hartford's case in the Court of Appeals could not be disputed. Id at 244-47, 64 S.Ct. at 1000-02. Permitting the judgment to be set aside for fraud on the court where the fraud, whether or not the "primary basis" for the filing, at the very least "did impress the Court."

IV. Intra-Circuit Conflicts

In addition, intra-circuit conflicts justifies a Writ of Certiorari because the Eleventh Circuit Court of Appeals through an "old fifth" holding adopted as binding precednet in Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), has define "fraud on the court" as the fabrication of evidence by a party in which an attorney is implicated..." See Razier v. Ford Motor Co. 573 F2d 1332, 1338 (5th Cir. 1978).

Passage of time does not limit the Court's power to act on a motion to recall mandate for any reason including fraud. The Petitioner contents the Eleventh Circuit has recognized there is no time litmitation on its power to address a fraud perpetrated on it. See SEC v. ESM Group, INC., 835 F.2d 270, 273 (11th Cir. 1988) ("Fraud that prevents the functioning of the judicial process does not have to be brought within any specific period of time.").

V. DID THE GOVERNMENT'S PROSECUTORS COMMIT FRAUD ON THE COURT, BY FALSELY ALLEGING BEFORE THE DISTRICT COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS THAT THE PETITIONER COMMITTED A MURDER THAT NEVER HAPPEN?

The Petitioner contends, did the government's prosecutors commit fraud on the court, by willfully deciving the district court and the Court of Appeals about an alleged murder in Norfolk, Virginia that never happened? The government relied on the "Ankey" murder at trial to obtain the Petitioner's drug convictions and mandatory U.S.S.G. § 2A1.1 life sentence, and further relied on the "Ankey murder to convince this Court: (1) to hold the "Ankey" murder was committed during the scope of and in furtherance of the Count 2 conspiracy, 432,

F.3d 1189, 1209 (11th Cir. 2005); (2) to withhold redress on ten evidentiary errors it found the trial court committed, with specific reference to Kevin Becton's testimony "concerning Williams role in the "Ankey" murder as the basis it withheld redress, 432 F.3d at 1224-25; and (3) to find credible and further rely on Becton (who provided the only evidence concerning the Ankey murder) in rejecting other pertinent issues raised on direct appeal, 432 F.3d at 1209, 1219, 1225, 1226, 1227, 1228, 1229, 1231 and 1235. The Petitioner vehemently asserts that confidential informant Becton was the only alleged eyewitness to Ankey murder, which never happen, because "Ankey" is alive. (emphasis added).

The Supreme Court explained in Hazel-Atlas that, "this is not simply a case of judgment obtained with the aid of a witness who, on the basis of after discovered evidence, is believed possibly to have been guilty of perjury," but instead was 'a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals," Id. at 245-46, 64 S.Ct. at 1001. The Court of Appeals decision was reversed with directions for it to recall the original mandate directing the district court to set aside judgment in favor of Hartford, and to take any additional action that was necessary and appropriate, Id at 251, 64 S.Ct. at 1004.

VI. 28 U.S.C. § 2244(b)

The Petitioner's recall of mandate claims are raised for the first time. The Petitioner has made the required prima facie showing that; (1) the factual predicate could not have been discovered previously through the exercise of due dilligence, section 2244(b)

(2)(B)(i) and (2) that these assertions, if true, would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the Petitioner guilty of the underlying offense, see *id* at section 2244(b)(2)(b)(ii).

VII. *Demjanjuk v. Petrovsky*

In the Sixth Circuit Court of Appeals, all the judges agreed that the court can reconsider the petition if there was a fraud upon the court, as explained in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). The elements of fraud set out in *Demjanjuk* are conduct:

(1) On the part of an officer of the court; (2) That is directed to the "judicial machinery" itself; (3) That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; (4) That is a positive averment or is concealment when one is under a duty to disclose; (5) That deceives the court. *id.* at 348.

Where a prisoner can show that the prosecutors purposefully withheld exculpatory evidence, that prisoner should not be forced to bear the burden of section 2244, which is meant to protect against the prisoner himself withholding such information or intentionally prolonging the litigation. See, *Workman v. Bell*, 227 F.3d 331, 335 (6th Cir. 2000).

In the Petitioner's case, the fraud on the court strongly suggests that an unreliable judgment was reached, and the trial prosecutors had no intentions about finding out the truth, concerning "Ankey" alleged murder. Such a judgment is inherently unreliable, and therefore satisfies the requirements of section 2244 in spirit, see *id* at 227 F.3d at 335.

The Petitioner had alleged sufficient facts to support an evidentiary hearing before the district court to determine whether there was

fraud on the district court and the Eleventh Circuit Court of Appeals. The Petitioner has vehemently maintained that the alleged eyewitness Kevin Becton to the "Ankey murder willfully lied about the homicide in Norfolk, Virginia because the alleged homicide victim is not dead, and is still alive! In the Petitioner's case, Calderon v. Thompson, 532 U.S. 538, 549-550, 118 S.Ct. 1489, 1498 (1998), is inapplicable in this case.

VIII. Recall Of Mandate Base On Fraud On The Court

In Calderon v. Thompson, the Supreme Court reviewed a decision of the Ninth Circuit, sitting en banc, which recalled the court's mandate, reopened the case, and subsequently granted the petitioner's previously denied-request for a writ of habeas corpus. According to Calderon v. Thompson, the Court of Appeals are recognized to have an inherent power to recall their mandates, which is subject to review for abuse of discretion. See *id.* at 549 (citing Hawaii Housing Authority v. Midkiff, 463 U.S. 1323, 1324(1983)). See also Bellsouth Corp v. Federal Communications Comm., 96 F.3d 849, 851(6th Cir. 1996). One of the reasons which would justify recalling a mandate is the potential existence of a fraud upon the Court. See 523 U.S. at 557.

The Petitioner contends, cases of fraud upon the court are excepted from the requirements of section 2244. The rationales that lie behind such an exception are persuasive. First, the requirement of section 2244 place the burden on the Petitioner to prove that the outcome of his case would have been different in the face of new evidence, forcing the Petitioner to prove that his trial was fundamentally unfair. In most cases, this burden lies with the prisoner

because it would have been his duty to search for and argue the evidence in his favor at the time of trial. Prisoners bear that duty in order to avoid subjecting the courts to repeated relitigation due to the submission of evidence which could have been discovered earlier. That is not the situation in the Petitioner's case. In a case of fraud upon the court, as noted above, the legitimacy of the judgment is called into question because of the intentional wrongdoing by the prosecution, not the inaction or inefficiency of the defense. Where the Petitioner can show that the government intentionally withheld exculpatory evidence, the Petitioner should not be forced to bear the burden of section 2244, which is meant to protect against the Petitioner himself from withholding such information or intentionally prolonging the litigation.

Moreover, the Court noted that fraud upon the court calls into question the very legitimacy of a judgment. That characterization of the situation which arises when the prosecution fails to reveal exculpatory evidence to the defense would seem to satisfy, at least in spirit, the requirement of section 2244. The difference between questions of fraud upon the court and ordinary newly-discovered evidence situations is that an allegation of fraud casts a dark shadow over the prosecution intentions. The situation suggests that a judgment may have been reached with the assistance of a prosecutor who may not have had the intention of finding the true perpetrator. Such a judgment is inherently unreliable, and therefore satisfies the requirements of section 2244 in spirit.

Before the Court of Appeals, the Petitioner alleged sufficient facts to support his Recall of Mandate Motion, and sufficient facts to support an evidentiary hearing before the district court. To determine whether the government's prosecutors committed fraud upon the district court and the Court of Appeals. The elements of a "fraud upon the court" are numerous. Fraud on the court is conduct by an officer of the court, who willfully or recklessly fail to disclose information to the court, that would have the results of deceiving the court. The Petitioner has demonstrated sufficient facts to create a material dispute of facts on this issue. In addition, there is a material dispute of fact, based on the false testimony of FBI confidential informant, Kevin Becton, concerning whether the government's prosecutors and confidential informant Becton intentionally deceived the district court at the Petitioner's trial, about a murder (Ankey's alleged murder) that never happen. Based on these facts of this case, the Petitioner should be entitled to a fully evidentiary hearing to determine whether or not a fraud was committed on the district court or the Eleventh Circuit's panel below.

IX. Evidentiary Hearing On The Newly Discovered Evidence

In addition, to raising this issue fraud upon the court, the Court of Appeals should have addressed the Petitioner's new evidence independent of the allegation of fraud. Whether or not an intentional or reckless fraud was committed in violation of Brady v. Maryland, 373 U.S. 83 (1963). The constitutional error in this case is the alleged violation of the rule of Brady v. Maryland, 373 U.S. 83 (1963). The Court of Appeals task was to determine whether the

facts alleged by the Petitioner's were sufficient to make a prima facie showing. See Workman v. Bell, 227 F.3d 331, 337-38 (6th Cir. 2000); See; 28 U.S.C. § 2244(b)(3)(c).

Without FBI confidential informant Kevin Becton's false testimony about a murder that never happen, the government's prosecutors (Christopher Clark, Stacy Levine and Bruce Brown) must have had little faith that the testimony of other government's witnesses could persuade a unanimous jury beyond a reasonable doubt that the Petitioner was guilty for violating the federal drug laws.

X. Constitutional Errors

The factual allegations in the Petitioner's application, together with the supporting documentation, make a prima facie showing of flagrant violations of the Petitioner's constitutional rights. Specifically, the Petitioner has proffered evidence (i) that the government's prosecutors knowingly used perjured testimony, in violation of Napue v. Illinois, 360 U.S. 246 (1959); (ii) that he failed to disclose information that could have been used to impeach important inculpatory testimony., Giglio v. United States, 405 U.S. 150 (1972); See also Brady v. Maryland, 373 U.S. 83(1963).

(a) The Knowing Use Of Perjured Testimony

"A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995) (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)).

In order to establish such a denial due process, the Petitioner "must show that the statement in question was false, and that the prosecution knew it was false, and that it was material." A statement is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Klyes, 514 U.S. at 434 (quoting United States, v. Bagley, 473 U.S. 667, 682 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682

The Petitioner has proffered evidence that the government's prosecutors who prosecuted him, knowingly used false testimony from FBI confidential informant Kevin Becton, about a murder (Anky's alleged murder) in Norflok, Virginia that never happen, because the alleged murder victim (Anthony Anky Ellis) is still alive, informant Kevin Becton's testimony was undoubtedly material.

XI. DID THE COURT OF APPEALS ABUSED ITS DISCRETION BY CONTRAVENING THIS COURT'S DECISION IN HAZEL-ATLAS GLASS CO. V. HARTFORD-EMPIRE CO., 322 U.S. 238, 246-47 (1944)?

The Petitioner contends, did the Court of Appeals abused its discretion by contravening the Supreme Court's decision in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246-47 (1944)? According to the Supreme Court's decision in Hazel-Atlas Glass Co. v. Hartford-Empire Co., appellate courts may recall their mandates and order that a lower court's judgment by set aside when a party perpetrates a fraud on the court. Permitting a judgment to be set aside for fraud on the court where the fraud, whether or not the "primary basis" for for the ruling, at the very least did impress the court.

Because the government's prosecutors chose to rely exclusively on FBI confidential informant Kevin Becton's false testimony, as the sole eyewitness to Anky's alleged murder, the government must bear the consequence of the fraud, perpetrated by the government's prosecutors. See *In re E.I Dupont De Nemaurs Co. v. Benlate Litigation*, 99 F.3d 363, 367-68 (11th Cir. 1996) (recognizing power of district courts to investigate whether there has been a fraud on the court and if so to vacate and set aside any fraudulently obtained judgment).

XII. The Mandate Recalled To Prevent Injustice

Under 11th Cir.R. 41-1(b), the Court of Appeals could recall its mandate to prevent injustice. See: 11th Cir.R. 41-1(b) ("A mandate once issued shall not be recalled except to prevent injustice.") See Gradsky v. United States, 376 F.2d 993, 995 (11th Cir. 1997) (noting the Court of Appeals retains jurisdiction over its mandates to prevent injustice); 11 Wright & Miller, *Federal Practice and Procedure* § 2805 (1973) (in general courts have "the power and duty to grant redress whenever in its judgment, action is required to prevent injustice.")

XIII. Actual Innocence

The Petitioner contends, that he is actual innocent of the Anky's alleged murder, because Anthony Anky Ellis is alive. A claim of actual innocence must be based upon reliable evidence not presented at trial. See: Anthony Anky Ellis' pictures, Appendix-D

XIV. THE PANEL JUDGES OVERLOOKED THE SUPREME COURT AND THE ELEVENTH CIRCUIT PRIOR DECISIONS, CONCERNING A MOTION TO RECALL MANDATE.

The Petitioner contents, the Eleventh Circuit Panel Judge(s) Marcue, Wilson and George overlooked the undisputed facts contained within Williams Motion to Recall Mandate, and the Supreme Court's decision in Hazel-Atlas Glass Co. v. Hartford-Empire Co., Supra.

The Petitioner was tried and convicted in federal court, for a murder in Norfolk, Virginia that never happen because the alleged homicide victim, who the government's prosecutors alleged the Petitioner killed is still alive!

The panel made a legal decision that is contrary to the authoritative decisions by the U.S. Supreme Court in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), the Eleventh Circuit prior decisions in Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc); SEC v. ESM Group, Inc., 835 F.2d 270, 273 (11th Cir. 1988); the Fifth Circuit prior decision in Rozier v. Ford Motor Co. 573 F.2d 1332, 1338 (5th Cir. 1978).

In addition, the panel made a legal decision that is contrary to the Sixth Circuit decision in Workman v. Bell, 227 F.3d 331, 335 (6th Cir. 2000). The Eleventh Circuit panel decision has created an inter-circuit conflict, which is a legitimate basis for granting the Petitioner's Writ of Certiorari.

In Workman v. Bell, the Sixth Circuit ruled a mandate may be recalled when it is necessary to address new circumstances before the court which are "grave" and "unforseen" or which are, in other words, unforeseeable circumstances which implicate the justice of the judgment previously rendered. Cases of fraud upon the court

are excepted from the requirements of 28 U.S.C.S. § 2244. In Simmons v. Lockhart, 856 F.2d 1144, 1147 (8th Cir. 1988) the Eighth Circuit granted the inmate's motion to recall the mandate and remand back to the district court to hold an evidentiary hearing.

CONCLUSION

For the reasons stated above, the Petitioner respectfully request that this Honorable Court grant this petition for Writ of Certiorari. Accordingly, the Petitioner ask this court to grant relief on the following:

1. Authorize the panel to consider the merits on his Hazel-Atlas Glass Co. v. Hartford-Empire Co. claim.
2. Grant an evidentiary hearing to develop the record.
3. Remand the Petitioner's Recall of Mandate Motion back to the court of Appeals for a merits review.
4. And grant any other relief as law and justice require.

Respectfully submitted,


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