

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Isni Gjuraj — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Isni Gjuraj

(Your Name)

Federal Correctional Institution
33½ Pembroke Road

(Address)

Danbury, Ct 06811

(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. Whether the exception to 28 U.S.C. § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his/her first petition, which the Court created in *Panetti v Quarterman*, 551 U.S. 930 (2007), also applies in the context of § 28 U.S.C. 2255(h)?

2. What remedy is available to a habeas petitioner who contends a district court's transfer order (to the circuit court for successive authorization under 28 U.S.C. §§ 2244(b) or 2255(h)) is erroneous because the petition or motion is not "successive"?

3. Whether the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) creates a duty on the part of circuit courts when a district court erroneously transfers a pro se litigant's nonsuccessive motion or petition, to a court of appeals for "successive" authorization under 28 U.S.C. §§ 2244(b) or § 2255(h)?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix H to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 29, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 15, 2017, and a copy of the order denying rehearing appears at Appendix J.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The statute under which Petitioner sought post conviction relief was 28 U.S.C. § 2255:

(a) 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.

(b) Unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

...

(h) 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.

2. The analogous statute for a second or successive habeas corpus application under section 2254, which was interpreted by the Court in *Panetti v United States*, 551 U.S. 930 (2007), was 28 U.S.C. § 2244, which provides:

...

(b)(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 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 the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(b)(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.

(b)(3)(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(b)(3)(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(b)(3)(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

3. The Suspension Clause of the United States Constitution,
Art 1, § 6, cl., 2, provides:

"the Privilege of the Writ of Habeas Corpus shall not be
suspended, unless when in Cases of Rebellion or Invasion the
public Safety may require it."

STATEMENT OF THE CASE

I. BACKGROUND

This case focuses on two habeas motions under 28 U.S.C. § 2255, which Petitioner, who is serving a 320 month sentence for a drug offense, filed in federal court. He filed the first motion in 2012, and the second in 2016.

Petitioner's second § 2255 motion raises a claim that would have been unripe, and factually unsupported, had it been presented in his first § 2255 motion. In particular, he challenged an unconstitutional deprivation in the adjudication of his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2), which he filed in 2014 after his direct appeal and first § 2255 were completed, based on the § 3582 court's reliance on a mistaken and unsupported drug estimate in his presentence report to deny § 3582 relief.

The district court erroneously concluded the second § 2255 motion was a "successive" petition that must be transfer to the Second Circuit for "successive" authorization, based on its determination that the motion raises a claim that could have been raised in the first § 2255 motion.

In the appellate court, Petitioner challenged the transfer order as erroneous because the motion is nonsuccessive under this Court's decision in *Panetti v Quarterman*, 551 U.S. 930 (2007), which created an exemption to the analogous § 2244(b) for a second application raising a claim that would have been unripe had the claim been presented in an earlier habeas petition.

Although a number of other circuit courts have assumed, without deciding, that the Panetti exception applies in the context of § 2255(h), the Second Circuit has not, and it denied Petitioner's request to re-transfer his nonsuccessive motion back to the district court, without addressing the question of whether the motion was successive. Instead, the denial was impermissible based on a merits review of the claims raised in the second § 2255 motion, without any jurisdiction to do so, since nothing in the statute permits circuit courts to consider the merits of claims raised in a motion which is transferred to a circuit court for § 2255(h) or § 2244(b) authorization.

This Petition shows the lower courts have decided a federal question in a way in conflict with applicable decisions of this Court and of other circuit courts, and that the Second Circuit's decision has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's use of its supervisory powers.

This case presents three important questions of federal law, that have not been, but should be, settled by the Court:

- * Whether the exception to 28 U.S.C. § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his/her first petition, which the Court created in Panetti, also applies in the context of 28 U.S.C. § 2255(h).

- * What remedy is available to a habeas petitioner who contends a district court's transfer order (to a circuit court for successive authorization under 28 U.S.C. §§ 2244(b) or 2255(h)) is erroneous because the application is not

"successive".

* Whether the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) creates a duty on the part of circuit courts when a district court erroneously transfers a pro se litigant's nonsuccessive motion or petition to a court of appeals for "successive" authorization under 28 U.S.C. §§ 2244(b) or § 2255(h).

Clarification of these issues is of significant importance to clarify the law and to obtain uniform application of this Court's successive interpretations in the context of § 2255(h), which is necessary to avoid to decisions, like the one here, that foreclose any review of constitutional claims that arise after the completion of a petitioners' first § 2255 motion, thereby raising serious constitutional questions with respect to the Suspension Clause of the United States Constitution, Art. 1, § 9, cl. 2.

II. THE COURSE OF THE PROCEEDINGS BELOW

1. THE CRIMINAL PROCEEDINGS

On March 12, 2008, Petitioner was charged with, inter alia, a conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a) and 841(b)(1)(A)(iii). Appendix ("Appx") A (p. 4).

At his plea hearing, Petitioner conceded his offense involved at least 4.5 kilograms ("KG") of cocaine base, which warranted a base offense level of 38 under the US Sentencing

Guidelines. Appx E (p. 1). The presentence report (PSR) based its offense level determination on the 4.5 KG figure, but "conservatively estimated that [Petitioner's] relevant conduct ... involved 56 kilograms of cocaine base." Id. In response to the PSR, Petitioner asserted in his sentencing memorandum that his conspiracy involved over 4.5 KG but less than 50 KG of powder cocaine. Id. (p. 1-2).

At sentencing, the district court stated that there were "no objections to the factual statements in the" PSR (other than the objections not now relevant) and, thus, "adopt[ed] the factual statements contained in the PSR as the Court's own findings for purposes of this sentencing." Id. (p. 2) The district court did not mention the PSR's 56 KG estimate or Petitioner's statement in his sentencing memorandum. Id. In reciting the guideline calculations agreed to by the parties, the court stated that the drug conspiracy "starts as a base offense level of 38 under Section 2D1.1(c)(1) because the conduct involved at least 4.5 [KG] of ... cocaine [base]", and calculated the total offense level at 41, which, at a criminal history category of I, equates to a Guidelines range of 324 to 405 months. Id. The Court then sentenced Petitioner to 320 months incarceration. Appx A (p. 6).

2. THE FIRST § 2255 MOTION ("2012 Motion")

On November 27, 2012, Petitioner filed a pro se motion under 28 U.S.C. § 2255 raising ineffective assistance of counsel claims. Dkt 4 (p. 13-14) (16cv366). The district court denied the motion on July 10, 2013. Id. The Second Circuit

denied his request for a certificate of appealability on March 4, 2014. Id.

3. THE § 3582 MOTION

On April 7, 2014, after his direct appeal and first § 2255 motion were completed, Petitioner filed a pro se motion under 18 U.S.C. § 3582(c)(2) seeking a sentence reduction based on Amendment 750 to the United States Sentencing Guidelines, which increased the threshold quantity of for a base offense level of 38 from 4.5 KG to 8.4 KG of cocaine base. Appx A (p. 6-7). It is noteworthy that a new judge was assigned to the § 3582 proceeding because the sentencing judge passed away. The new judge, denied the motion holding that, at sentencing, the previous judge had adopted the PSR's finding that the offense involved 56 KG, and therefore Amendment 750 did not affect its "prior conclusion that a base offense level of 38 applied", and, Petitioner was "thus ineligible for relief under the statute". Id. The new judge was not aware that the 56 KG estimate was never mentioned at sentencing, nor aware that the prior judge had instructed Petitioner that he could dispute the 56 KG estimate in his sentencing memorandum. Appx G (p. 10-18). The Second Circuit denied his request to proceed in forma pauperis and dismissed the appeal without giving him an opportunity to file an opening brief on December 31, 2014, and it denied his request for reconsideration on March 4, 2015. Appx A (p. 6-7).

4. THE SECOND § 2255 MOTION ("2016 Motion")

On March 3, 2016, Petitioner filed a pro se 18 U.S.C. § 2255 motion challenging an unconstitutional deprivation of his opportunity to obtain § 3582(c)(2) relief, based on the § 3582 court's reliance on a mistaken and unsupported 56 KG estimate in the PSR. Appx A. The motion also argued that the claims are nonsuccessive because they "did not 'ripen' ... until after Petitioner's first 2255 was completed." Id (p. 3). The government argued the motion is "successive" and the district court did not have jurisdiction to consider it because Petitioner failed to obtain successive authorization from the Second Circuit. Dkt 4 (p. 19-29) (16cv366). Petitioner argued that the denial of permission to bring his nonsuccessive claims will implicate the Suspension Clause of the U.S. Constitution, Art. 1, § 9, cl. 2.. Appx B (p. 19-20).

The district court transferred the 2016 Motion to the Second Circuit for "successive" authorization, based on its determinations that the motion (1) "seeks to relitigate the sentencing court's drug quantity calculation" and is therefore a "collateral attack on the original judgment and sentence imposed" and (2) "raises a claim that could have been[] raised in an earlier petition" and is therefore a "successive petition that must be transferred to the [] Second Circuit". Appx D (p. 7).

The Second Circuit docketed the transferred motion as a motion for leave to file a second or successive petition for writ of habeas corpus. Dkt 2 (16-3177). On October 7, 2016, Petitioner filed a "motion to re-transfer" the case back to the district court, which challenged the transfer order as

erroneous "because the factual predicate for the specific claims raised did not exist or ripen until after the conclusion of his prior 2255 motion", and that failure to permit him to bring the claim will implicate the Suspension Clause of the U.S. Constitution, Art. 1, § 9, cl. 2. Appx D (p. 7-10 & 14-16).

On January 9, 2017, a Second Circuit motion panel directed the Government to "brief the following issues: (1) whether the March 2016 motion should be construed as a successive § 2255 or a motion for reconsideration of the § 3582 denial, or both (2) whether, prior to sentencing, Petitioner's statement in his sentencing memorandum that his offense involved over 4.5 kilogram but less than 50 kilogram of cocaine base [SIC] should be construed as an objection to the PSR's 56 kilogram estimate (3) whether he was required to object to the PSR's 56 kilogram estimate, when any amount over 4.5 kilograms would have qualified him for offense level 38 and an objection would not have had any material effect on the sentence calculation (4) whether the district court's adoption of the PSR's factual findings at sentencing should be construed as including the 56 kilogram estimate under these circumstances (5) whether Petitioner is now entitled to an evidentiary hearing on the amount attributable to him and (6) assuming the district court erred in any respect, whether those errors are harmless. Appx E (p. 1-2).

In response to the motion panel's January 9, 2017 order, the Government made two arguments. Dkt 20 (16-3177). First, that the Second Circuit should construe the 2016 Motion as a successive petition and deny successive authorization. Id.

Second, that even if the 2016 Motion could be construed as a motion for reconsideration of the denial of the § 3582 motion, it should be denied. Id. In reply, Petitioner renewed his arguments that the 2016 Motion is nonsuccessive, and that failure to permit him to bring his claims will implicate the Suspension Clause of the U.S. Constitution, Art. 1, § 9, cl. 2. Appx F (p. 2-6).

On August 29, 2017, a second motion panel of the Second Circuit denied Petitioner's "motion to re-transfer", without addressing Petitioner's nonsuccessive arguments, explaining only that "[t]o the extent Petitioner seeks remand to permit reargument of his motion pursuant to 18 U.S.C. § 3582(c)(2), remand would be futile because his argument concerning the drug amount was already decided against him by the district court, his appeal from that prior decision was dismissed as frivolous, and we decline to revisit the issue." Appx H.

On October 10, 2017, Petitioner filed a Petition for panel rehearing and rehearing en banc. Appx I. The Petition raised several arguments. First, the decision overlooked, and failed to address, Petitioner's claim that the 2016 Motion is nonsuccessive. Id (p. 4-7). Second, it failed to consider the circuit court's duties and limited jurisdiction under 28 U.S.C. § 2244 and the Suspension Clause of the U.S. Constitution, Art. 1, § 9, cl. 2. Id (p. 7-9) Third, it was based on a misapprehension of facts. Petitioner's request for reconsideration was denied on November 15, 2017. Id (p. 9).

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISION OF THIS COURT AND OF OTHER CIRCUIT COURTS

1. THE MEANING OF "SECOND OR SUCCESSIVE" IN § 2255(H)

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides that a district court may not entertain a "second or successive" motion filed by a federal prisoner unless the prisoner has first obtained authorization from the court of appeals. See 28 U.S.C. §§ 2244(b), 2255(h).

Petitioner did not ask the Second Circuit for permission to file the 2016 Motion, nor do the claims raised in that motion fall under either of the AEDPA's written exceptions to the prohibition on successive motions. See § 2255(h) (permitting successive motions only when they raise claims based on either newly discovered evidence that establishes the petitioner's innocence, or "a new rule of constitutional law[] made retroactive to cases on collateral review"). As such, if § 2255(h) was interpreted according to its plain meaning, the 2016 Motion could not go forward.

Although this Court has not decided a post-AEDPA case concerning the meaning of "second or successive" under § 2255(h) and Congress did not define that term, circuit court's have relied on this Court's decisions under 28 U.S.C. §§ 2254 and 2244(b)(2) to define its meaning. See e.g., *United States v Buenrostro*, 638 F.3d 720, 723-724 (9th Cir 2011) ("We assume, without deciding, that the [Supreme] Court's interpretations of 'second or successive' for purposes of § 2244(b)(2) applies

to § 2255(h)).

In the context of petitions filed under 28 U.S.C. § 2254, this Court has held repeatedly that not every petition "filed second or successively in time" to a prior petition counts as "second or successive," "even when the later filings address a [] judgment already challenges in a prior § 2254 application". Panetti, 551 U.S. at 944; see also Magwood v Patterson, 177 L.Ed.2d 592 (2010) ("[I]t is well settled that the phrase does not simply refe[r] to all § 2254 applications filed second or successively in time.") (internal quotations omitted).

This Court's decision in Panetti sheds light on numerically second petition or motion should be subject to the special rules for successive filings. There, a death row inmate who previously had filed a federal habeas corpus petition sought to bring a second petition which asserted he was mentally incompetent and thus could not be executed under Ford v Wainwright, 477 U.S. 399 (1986). Panetti, 551 U.S. at 937-938. Although the state conceded that Ford claims are generally unripe until well after the AEDPA's standard one-year limitation period for filing an initial petition has run (because the prisoner cannot raise a Ford claim until his execution is imminent), it argued Panetti's second petition was nevertheless "second or successive" to his first and thus barred by Section 2244(b). Id at 942-943. The Court rejected this reading of the law, holding instead that a petition raising a previously unripe Ford claim is not second or successive to a prior petition and thus does not fall within the purview of § 2244(b). Id at 947.

In so holding, the Court refused to construe the AEDPA

"in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party." Id at 947. Panetti's conclusion hinged on the fact that the Ford claim was not available when Panetti brought his first federal petition. Id at 943-47. The Court later described Panetti as having "creat[ed] an exceptio[n] to § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his first application". Magwood, 177 L.Ed.2d at 602 (internal quotations omitted).

A number of circuit courts have generalized this logic to apply to other types of second-in-time petitions or motions that were not ripe at the time of the initial petition in the context of §§ 2254 and 2255 cases. See e.g., *Stewart v United States*, 648 F.3d 856, 865 (11th Cir 2011) ("Because the basis for his Johnson claim did not exist before his proceeding on his proceedings on his initial § 2255 motion, Stewart's numerically second motion is not 'second or successive,' and § 2255(h)'s gatekeeping provision does not apply"); In re *Weathersby*, 717 F.3d 1108, 1111 (10th Cir 2013) (if the "basis for his proposed § 2255 claim did not exist when those proceedings were ongoing, his claim to reopen his federal sentence based on the state court vacatur is not 'second or successive'"); *United States v Hairston*, 754 F.3d 258 (4th Cir 2014) (holding that a "numerically second § 2255 motion should not be considered second or successive pursuant to § 2255(h) where, as here, the facts relied on by the movant seeking resentencing did not exist when the numerically filed motion was filed and adjudicated"); *United States v Buenrosto*, 638

F.3d 720, 725 (9th Cir 2011) ("Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded ... [S]uch claims were not ripe for adjudication at the conclusion of the prisoner's first federal habeas proceeding." (citing cases)); Johnson v Wynder, 408 F.App'x 616, 619 (3rd Cir 2010) ("We see no reason to avoid applying Panetti in the context of other types of claims that ripen only after the initial federal habeas petition has been filed."); In re Jones, 652 F.3d 603, 605 (6th Cir 2010) (petition raising ex post facto claim based on amendments to state law that occurred after first petition was not second or successive); Leal Garcia v Quarterman, 573 F.3d 214, 222-24 (5th Cir 2009) ("If however, the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later petition based on that defect may be non-successive.").

Thus, while the Second Circuit has not decided whether Panetti's holding, that petition raising a previously unripe claim is not successive to a prior petition, applies to § 2255(h), nearly every other circuit has applied Panetti's holding in the context of 2255(h).

2. THE 2016 MOTION IS NOT "SUCCESSIVE" UNDER PANETTI

Panetti "creat[ed] an exceptio[n] to § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his first application", Magwood, 177 L.Ed.2d at 602 (internal quotations omitted), which has been by applied by a number of circuit courts in the

context of § 2255(h).

Pursuant to the Panetti exception, the 2016 Motion is not successive, because the factual predicate for the specific claims raised did not exist or ripen until after conclusion of the 2012 Motion.

To be sure, the motion challenges the unconstitutional deprivation of Petitioner's opportunities to obtain § 3582(c)(2) relief based on the §3582 court's reliance on a mistaken and unsupported PSR drug estimate to deny §3582 relief, which occurred years after Petitioner's sentence was imposed and prior § 2255 motion was completed.

"the Court, in connection with Petitioner's sentence, adopted the findings of the [PSR] that included a mistaken and unsupported drug quantity estimate, which Petitioner properly objected to, and which the Government never provided corroborating evidence to insure the reliability of the estimate. This error was harmless, at that time, because the estimate did not affect the length of his sentence. Years later, the error resulted in an actual injury, when the Court relied on the previously adopted and unsupported estimate to deprive Petitioner of a [3582(c)] sentence reduction ... based on Amendment 750 [USSG]. This ripened into a cognizable constitutional claim on March 4, 2015, when Petitioner's opportunity to seek review of the denial was dismissed [on appeal]. The error also forms the basis of a separate claim due to the unconstitutional deprivation of [his] opportunity for sentence reduction under Amendment 782". Appx A (p. 1-2).

The specific injury-in-fact alleged in both claims (i.e., the inadequate adjudication and dismissal of his attempt to appeal the denial of his § 3582(c)(2) under Amendment 750, and the unconstitutional deprivation to obtain relief under Amendment 782, did not occur until after the March 4, 2015 order, when he sustained an actual injury-in-fact, fairly traceable to the challenged conduct, due to the lower courts

reliance on the mistaken and unsupported PSR estimate to deny and dismiss his opportunities to obtain § 3582(c)(2) relief. Prior to having sustained an actual injury-in-fact, Petitioner could not have brought his specific claims to court. See e.g., *Lewis v Casey*, 518 U.S. 343, 351-55 (1996) (actual injury is a constitutional prerequisite for bringing a case to court).

Because the factual predicate for the specific claims raised did not exist or ripen until sometime after the March 4, 2015 order, well after the conclusion of the 2012 Motion, the claim was not available when Petitioner brought his first § 2255 motion, and the 2016 Motion raising the previously unripe claim is not successive pursuant to the exception described in *Panetti*.

3. THE DISTRICT COURT'S TRANSFER ORDER IS ERRONEOUS

The district court transfer order was based on its erroneous conclusion that the 2016 Motion is a "successive petition" based on its erroneous determination that the motion "raises a claim that could have been[] raised in an earlier petition" in "seek[ing] to relitigate the sentencing court's drug quantity calculation". Appx D (p. 7).

First, the factual predicate of Petitioner's claim is not the sentencing court's drug quantity calculation, but rather, the § 3582 court's "reliance upon the factually inadequate 56 kilogram estimate to determine he was ineligible for a sentence den[y] reduction", Appx A (p. 14), which did not come into existence until after completion of Petitioner's first § 2255 motion.

Petitioner does not possess the prescience of a clairvoyant, and before the inadequate adjudication and dismissal of his attempt to obtain § 3582 relief, he did not, and could not, know that the § 3582 court would conclude he was ineligible for § 3582 relief by construing the sentencing court's adoption of the PSR's factual statements as including the factually inadequate and objected to 56 KG estimate, when any amount over 4.5 KG would have qualified him for offense level 38.

As such, it would have been impossible for Petitioner to have brought the claim (which challenges the § 3582 court's adjudication as violative of due process) in his first § 2255 motion, since the claim is based on the § 3582 court's adjudication, which did not take place until after his first § 2255 motion was completed, and which Petitioner was not capable of predicting.

Second, there was no actionable error committed by the sentencing court that could have been raised in either Petitioner's appeal or his first § 2255 motion, with respect to the 56 KG estimate at his sentencing, since "it was not necessary for the [sentencing] court to resolve the 56 kilogram estimate dispute, nor make a specific calculation above 4.5 kilograms, because Petitioner was subject to the highest baseline offense level". Appx A (p. 13).

Thus, any error concerning the 56 KG estimate was harmless at that time, and could not have been raised as a claim in an earlier petition, because the error did not affect Petitioner's sentence since his offense level of 38, at that time, was based on a range of 4.5 KG or greater, and as such,

his sentence would not have changed regardless of whether he was accountable for 4.5 KG or the erroneous 56.KG estimate of crack.

Third, although Amendment 750, which increased the threshold drug amount for a base offense level of 38 from 4.5 KG to 8.4 KG, created an opportunity to move to reduce his sentence, its not a fact that by itself gave rise to an alleged violation of Petitioner's due process rights in the circumstances of this case.

Fourth, Petitioner's claim - that his claim - that he was unconstitutionally deprived his opportunity to obtain § 3582 relief - simply did not accrue or ripen until the denial and dismissal of his request for § 3582 relief. In Johnson v United States, 544 U.S. 295 (2005), this Court held that a judicial order in a petitioner's own case may constitute the "factual predicate" of his subsequent § 2255 claim. Johnson supports Petitioner's contention that a legal decision, in this case, the denial and dismissal of his 3582(c)(2) request, constitute the "factual predicate" of the claims raised in the 2016 Motion.

As such, contrary to the district court's conclusion, the 2016 Motion is not "successive" because the motion does not "raise[] a claim that could have been raised in his earlier petition."

4. THE DISTRICT COURT'S TRANSFER ORDER CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

The Court has refused to interpret AEDPA's "second or

successive" provisions in a way that would "produce troublesome results", "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent", or "require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party". Panetti, 551 U.S. at 947. In *Castro v United States*, 540 U.S. 375 (2003), after repeating these holdings, the Court added that "any such conclusion would prove difficult to reconcile with the basic principle that we read limitations on our jurisdiction to review narrowly." *Id.* at 381.

The district court's erroneous "successive" conclusion, within its transfer order, was decided in a way in conflict with with the above holdings of this Court in Panetti and Castro, and of other circuit courts.

First, the erroneous "successive" conclusion forecloses any review of a constitutional claim that did not ripen, or even exist, until after the first § 2255 motion, and thereby "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent". Panetti, 551 U.S. at 947.

Second, the erroneous "successive" conclusion, which faults Petitioner for not having brought his claims in his first § 2255 motion (when the claims were then "unripe", factually unsupported, and unavailable), is based on an impermissible interpretation of the AEDPA "that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party". *Id.*

Third, the erroneous "successive" conclusion "would prove

difficult to reconcile with the basic principle that [the Court] read[s] limitations on [its] jurisdiction to review narrowly." Castro, 540 U.S. at 381.

Fourth, the district court's failure to recognize that the 2016 Motion was not not successive (where the motion raised claims that were unripe, and did not exist, until after completion of Petitioner's first § 2255 motion) is in conflict with the following decisions of this Court and of other circuits. *Panetti v Quarterman*, 551 U.S. 930 (2007) (holding that a petition raising a previously unripe claim is not successive); See e.g., *Stewart v United States*, 648 F.3d 856, 865 (11th Cir 2011) ("Because the basis for his Johnson claim did not exist before his proceeding on his proceedings on his initial § 2255 motion, Stewart's numerically second motion is not 'second or successive,' and § 2255(h)'s gatekeeping provision does not apply"); *In re Weathersby*, 717 F.3d 1108, 1111 (10th Cir 2013) (if the "basis for his proposed § 2255 claim did not exist when those proceedings were ongoing, his claim to reopen his federal sentence based on the state court vacatur is not 'second or successive'"); *United States v Hairston*, 754 F.3d 258 (4th Cir 2014) (holding that a "numerically second" § 2255 motion should not be considered second or successive pursuant to § 2255(h) where, as here, the facts relied on by the movant seeking resentencing did not exist when the numerically filed motion was filed and adjudicated"); *United States v Buenrosto*, 638 F.3d 720, 725 (9th Cir 2011) ("Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded ... [S]uch claims were not ripe for adjudication at

the conclusion of the prisoner's first federal habeas proceeding.") (citing cases).

II. THE SECOND CIRCUIT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

For the reasons stated in Section I, *supra*, the 2016 Motion raised claims that were unripe, and did not exist, until after completion of Petitioner's first § 2255 motion. As such, the Second Circuit was required to rule that the District Court's "successive" conclusion was erroneous and transfer the 2016 Motion back to the District Court for a determination in the merits.

By failing to recognize that the 2016 Motion was not successive, and by failing to transfer the motion back to the district court, the Second Circuit's decision conflicts with decisions of this Court and other circuits. See e.g., *Panetti v Quarterman*, 551 U.S. 930 (2007) (holding that a petition raising a previously unripe claim is not successive); See e.g., *Stewart v United States*, 648 F.3d 856, 865 (11th Cir 2011) ("Because the basis for his Johnson claim did not exist before his proceeding on his proceedings on his initial § 2255 motion, Stewart's numerically second motion is not 'second or successive,' and § 2255(h)'s gatekeeping provision does not apply"); *In re Weathersby*, 717 F.3d 1108, 1111 (10th Cir 2013) (if the "basis for his proposed § 2255 claim did not exist when those proceedings were ongoing, his claim to reopen his federal sentence based on the state court vacatur

is not 'second or successive'); United States v Hairston, 754 F.3d 258 (4th Cir 2014) (holding that a "numerically second § 2255 motion should not be considered second or successive pursuant to § 2255(h) where, as here, the facts relied on by the movant seeking resentencing did not exist when the numerically filed motion was filed and adjudicated"); United States v Buenrosto, 638 F.3d 720, 725 (9th Cir 2011) ("Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded ... [S]uch claims were not ripe for adjudication at the conclusion of the prisoner's first federal habeas proceeding.") (citing cases).

III. THE COURT OF APPEALS DECISION HAS SO FAR DEPARTED FROM
THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS
AS TO CALL FOR THIS COURT'S USE OF SUPERVISORY POWERS

Because the claims raised in the 2016 Motion were not "second or successive" under §§ 2255(h) or 2244(b), the gatekeeping provisions of the AEDPA did not apply, there was not need for him to apply for authorization to file a second or successive petition, and the district court erred in transferring the "nonsuccessive" 2016 Motion to the Second Circuit for "successive" authorization. See Sections I & II, *supra*.

After the district court transferred the 2016 Motion to the Second Circuit for successive authorization, Petitioner filed a motion to re-transfer the case back to the district court, in which he challenged the transfer order as

erroneous.

Because the 2016 Motion was not successive, the Second Circuit was required to rule that successive authorization was unnecessary and transfer the motion back to the district court for a determination on the merits.

Because nothing in the statutory language of §§ 2255(h) or 2244(b) allows for circuit courts to consider the merits of claims raised in a nonsuccessive application erroneously transferred to a court of appeals for successive authorization, the Second Circuit lacked jurisdiction to review the claims raised in the 2016 Motion on the merits.

1. THE ACCEPTED AND USUAL COURSE OF JUDICIAL
PROCEEDINGS WHEN A "NONSUCCESSIVE" MOTION IS
ERRONEOUSLY TRANSFERRED TO A CIRCUIT COURT FOR
"SUCCESSIVE" AUTHORIZATION

It is well settled that "[a]n order of a district court transferring a § 2255 motion as second or successive is neither a final decision appealable pursuant to 28 U.S.C. § 1291 nor a decision that would be appealable under the collateral order doctrine." *Marmolejos v United States*, 789 F.3d 66 (2nd Cir 2015). As such, an appellate court "lacks jurisdiction to entertain a purported appeal, or to grant a certificate of appealability to permit the appeal of, the district court's transfer order". *Id.*

Accordingly, when a habeas petitioner "contends that a transfer order was erroneous because he believes his petition or motion is not second or successive" he "may challenge the

transfer by moving to retransfer the matter to the district court." *Marmolejos v United States*, 789 F.3d at 69.

However, in such circumstances, appellate courts "have no jurisdiction to review the merits of a [nonsuccessive] petition" because "nothing in the statutory language allows [the circuit court] to consider the merits of claims raised in a nonsuccessive application". *James v Walsh*, 308 F.3d 162, 169 (2nd Cir 2002).

2. THE SECOND CIRCUIT'S DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS

In deciding Petitioner's motion for re-transfer, the Second Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

First, it failed to address the single question which it had jurisdiction to address; i.e., whether or not the claims raised in the 2016 Motion were "successive".

Second, instead of addressing the single question that the statute provides circuit courts with jurisdiction to consider, it denied Petitioner's request for re-transfer, by reviewing the merits of the claims raised in the 2016 Motion, which it lacked the jurisdiction to consider.

Third, because of these failure, the Second Circuit's decision has foreclosed any review of a constitutional claim that arose only after the completion of Petitioner's first § 2255 motion, thereby raising a serious constitutional question with respect to the Suspension Clause of the United States

Constitution, Art. 1, § 9, cl. 2.

IV. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW,
WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT

This Court's past precedents do not conclusively address the issues central to this dispute, including:

- * Whether the exception to 28 U.S.C. § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his/her first petition, which the Court created in *Panetti*, also applies in the context of 28 U.S.C. § 2255(h).

- * What remedy is available to a habeas petitioner who contends a district court's transfer order (to a circuit court for successive authorization under 28 U.S.C. §§ 2244(b) or 2255(h)) is erroneous because the application is not "successive".

- * Whether the AEDPA creates a duty on the part of circuit courts when a district court erroneously transfers a pro se litigant's nonsuccessive motion or petition to a court of appeals for "successive" authorization under 28 U.S.C. §§ 2244(b) or § 2255(h).

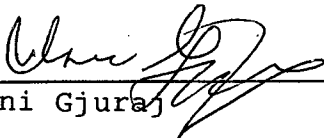
This case evinces confusion and a lack of uniformity amongst the lower courts concerning the extent to which the exception created in *Panetti* is available in the context of § 2255(h), the procedure to remedy a district court's erroneous transfer of a nonsuccessive application to an circuit court for successive authorization, and the circuit court's duties in such an instance.

Clarification of these issues is of significant importance to clarify the law and to obtain uniform application of this Court's successive interpretations in the context of § 2255(h), which is necessary to avoid to decisions, like the one here, that foreclose any review of constitutional claims that arise after the completion of a petitioners' first § 2255 motion, thereby raising serious constitutional questions with respect to the Suspension Clause of the United States Constitution, Art. 1, § 9, cl. 2.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Isni Gjura

Date: February 12, 2018