IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

***In re*: Andrew Swainson**	)	**Case No. 12-1598**

Motion To Remand Petitioner's Petition For Writ of Habeas Corpus To The District Court And, Alternatively, To Authorize The District Court To Consider Petitioner's "Second or Successive" Petition For Writ of Habeas Corpus

I. Factual and Procedural Summary

Andrew Swainson is serving a life sentence for the January 17, 1988 shooting death of Stanley Opher.[1] Swainson has claimed his innocence since the day police arrested him. Newly-discovered evidence from the Commonwealth's key witness, Paul Presley, proves that Swainson is actually innocent of Opher's murder and that the Commonwealth knowingly presented false testimony and failed to disclose exculpatory evidence.

Swainson's conviction is premised entirely on Paul Pressley's testimony. Remarkably, the police arrested Presley fleeing the scene immediately after Opher was shot. He was bleeding from his hand and had a large amount of blood on his overcoat. All charges were dropped against Presley, however, when he supposedly identified Swainson after viewing a seven-man photo array on February 12, 1988.

Prior to trial, the Commonwealth averred that it had disclosed all *Brady* evidence. At trial, Presley identified Swainson as the shooter and said he was "certain" his identification was correct.[2] Presley also discussed Detective Manuel Santiago's seven-man photo array and informed the jury that he identified

[1] A more comprehensive factual and procedural history is provided in Swainson's *Petition for Writ of Habeas Corpus*, at 2-27.
[2] *See Petition For Writ of Habeas Corpus*, at 12-14.

Swainson as the shooter at the police station on February 12, 1988. Thus, Presley premised his in-court identification on his (alleged) out-of-court identification.

Presley also explained why he signed a June 10, 1988 affidavit,[3] which he gave to defense investigator, Terrance Gibbs, where he said his identification of Swainson was incorrect because the shooter was a dark-skinned African-American, while Swainson was a light-skinned Jamaican. At trial, however, Presley said his statements were false. When the prosecutor, Judy Rubino, asked him why he signed a false affidavit, Presley said Gibbs pressured him and told him he would be compensated for doing so.[4] Presley also said he did not receive benefits from the Commonwealth.[5] Detective Santiago corroborated Presley's testimony, describing how he prepared the seven-man photo array and how Presley "immediately" and "without hesitation" identified Swainson.[6] He also corroborated Presley's testimony regarding the June 10, 1988 affidavit and his claim that he did not receive benefits for his testimony. The prosecutor spent much of her closing argument explaining why Presley's identification and testimony was reliable and truthful.[7] She also emphasized Detective Santiago's corroborating testimony and said Presley received no benefits.[8] During deliberations, the jury sent the following note to the trial judge: "Your honor, may we see the testimony of Paul Presley."[9] The jury convicted Swainson and Presley's and Detective Santiago's testimony affected that decision.

[3] *See id.* at 13-14, Ex. 1.
[4] *See id*. at 14.
[5] *See id*. at 15.
[6] *See id.* at 15. Detective Santiago also testified in great detail about his alleged seven-man photo line-up at the suppression hearing on March 9, 1989. *See* NT, Suppression Hrg., 3/9/89, at 1-60.
[7] *See id*. at 15-16.
[8] *See id*.
[9] *See id*. at 16 (quoting the trial testimony).

Swainson collaterally attacked his conviction in state and federal court.[10] While he claimed that Presley's photo array was suggestive, Swainson did not claim his testimony was false or the Commonwealth engaged in misconduct. Relying on the Commonwealth's *Brady* assertion, Swainson reasonably assumed the Commonwealth adhered to its *Brady* obligations. After pursuing state and federal relief, and still claiming his innocence, Swainson sought DNA testing pursuant to 42 Pa. C.S. 9543.1.[11] For all Swainson knew, Presley viewed a seven-person photo array and identified him as Opher's killer. Based on Presley's testimony and the Commonwealth's *Brady* assertion, Swainson reasonably assumed that Presley simply misidentified him; it was a *misidentification* issue, not a *misconduct* issue. Rectifying an *honest* misidentification is nearly impossible with a recantation,[12] but not with post-conviction DNA testing.[13] DNA is conclusive; a recantation by a witness indicating that he *may have* misidentified the prisoner as the perpetrator is not. Once Swainson exhausted the DNA testing angle, he sought out Presley as a last ditch effort.

In 2005, Swainson enlisted the services of Russell Kolins who provided *pro bono* investigative support.[14] In early 2007, Kolins spoke with Presley's mother to see if she knew of Presley's whereabouts; she refused to help. When Kolins visited her home again shortly thereafter, he interviewed another family member who said Presley was in prison. Kolins located Presley at Bayside State Prison,

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[10] *See id*. at 17-20 (chronicling Swainson's initial state and federal challenges).

[11] *See id*. at 20.

[12] To be clear – Presley's identification of Swainson is NOT an honest misidentification. According to Presley's recantation, he told the prosecutor and her investigators that Swainson was not the shooter because he was a light-skinned Jamaican. *See Petition for Writ of Habeas Corpus*, Ex. 2. Due to prosecutorial and police misconduct, though, Presley purposely (and dishonestly) misidentified Swainson as Opher's shooter. A dishonest or purposeful misidentification can easily be exposed by the witness recanting his testimony and explaining why he purposely misidentified the defendant at trial. Here, Presley purposely misidentified Swainson because of prosecutorial and police misconduct.

[13] According to the Innocence Project, 70% of the first 289 DNA exonerations involved at least one misidentification. *See* www.innocenceproject.org.

[14] Kolins submitted an affidavit discussing his investigation. His affidavit is attached as exhibit 44 to his *Petition for Writ of Habeas Corpus*.

met with him in October 2007, and asked him whether he would discuss his trial testimony. Presley refused.[15]

Kolins wrote Presley in November 2007, asking him again if he would discuss his trial testimony. On December 12, 2007, Presley sent Kolins a Christmas card, informing him he had "reservations" about discussing his trial testimony before consulting with an attorney.[16] Kolins wrote Presley back on December 14, 2007, informing him to consult with an attorney and once he had done so to contact him.[17] Presley never contacted Kolins.[18]

In September 2008, Kolins searched for Presley once again, locating him at the Albert "Bo" Robinson Assessment and Treatment Center in Trenton, New Jersey. Presley met Kolins on October 3, 2008 and told him he still had "serious reservations" about discussing his trial testimony, but that he was a changed man because of the drug treatment he was receiving and because he had recently accepted the Jesus into his life.[19] While Presley spoke openly about his sobriety and transformation, he did not discuss or recanted his trial testimony, but agreed to meet with Kolins again to "possibly" discuss his trial testimony.[20]

On October 13, 2008, Kolins interviewed Presley again at the treatment center, at which point Presley provided a handwritten and audio-taped statement recanting his testimony.[21] In both statements, Presley averred:

- He never picked Swainson out of a seven-man photo line-up. Instead, the prosecutor and detectives showed him several photos of only one person – Andrew Swainson – and told him that: (1) Swainson was the individual who shot and killed Opher; (2) Swainson was a "notorious" drug kingpin; and that (3) Swainson was responsible for other murders. When Presley viewed

[15] *See Petition for Writ of Habeas Corpus*, Ex. 44, at ¶¶ 8-10.
[16] *See id*., Ex. 21 (Presley's Christmas Card); Ex. 44, at ¶¶ 10-15.
[17] *See id*., Ex. 22 (Kolin's December 14, 2007 letter to Presley); Ex. 44 at ¶¶ 15-17.
[18] *See id*., Ex. 44, at ¶ 13.
[19] *See id*., Ex. 44, at ¶ 14-15.
[20] *See id.*
[21] See id., Exs. 2-3.

the photos of Swainson, he told the prosecutor that Swainson *was not the shooter*. Presley said the prosecutor and her agents told him he *had to* identify Swainson as the shooter.

- Presley knew "in his heart" Swainson "was surely not" the shooter because the shooter was a dark-skinned African-American, while Swainson was a light-skinned Jamaican.

- Terrence Gibbs never bribed or pressured him to sign the June 10, 1988 affidavit. Instead, the prosecutor told him before trial that *he had* to testify that he signed the affidavit because Gibbs bribed and threatened him and that the statements in the affidavit were false.

- He had an *implicit* agreement with the prosecutor that if he testified against Swainson, the prosecutor would (1) drop pending charges against him from Philadelphia County and (2) find him a job where he could utilize his artistic abilities. The Commonwealth dismissed the charges pending against Presley relating to Opher's death as well as other pending criminal charges.

Based on Presley's recantation, undersigned counsel (Cooley) interviewed Terrance Gibbs, who – by that point – was a Lieutenant with the Philadelphia Police Department's Internal Affairs Division. On December 2, 2008, Gibbs signed an affidavit attesting to the following facts regarding his interview of Presley on June 10, 1988:

- He never told Presley that either he (Gibbs) or Swainson would compensate him with drugs or money if he (Presley) signed an affidavit exonerating Swainson.

- He never threatened or pressured Presley to sign the affidavit.

- Perry DeMarco, Swainson's trial counsel, never asked him to testify on Swainson's behalf to rebut Presley's allegations. Had DeMarco asked him to testify, he would have testified and denied the allegations.

- The prosecutor (Rubino) called him, informing him of Presley's allegations. He told the prosecutor the allegations were false. Gibbs cannot remember whether the prosecutor called before, during, or after Swainson's trial.

- The Philadelphia Police Department did not arrest him for bribery and the Philadelphia District Attorney's Office did not prosecute him for bribery or suborning perjured testimony. [22]

On October 27, 2008, based on Presley's recantation, Kolins sent a letter to James Brown, the prisoner who assaulted Presley shortly before Swainson's preliminary hearing.[23] Brown was an inmate at SCI-Huntingdon when Kolins wrote him. At trial, the Commonwealth and Presley claimed that Swainson had paid Brown to assault Presley to deter him from testify against Swainson at his preliminary hearing and trial. On October 29, 2008, Brown sent a letter to Kolins averring the following facts:

- Swainson had absolutely nothing to do with his assault on Presley.
- He assaulted Presley for two reasons:
    - (1) He was angry that Presley kept flirting with (or hitting on) a female guard that Brown liked; and
    - (2) He assaulted Presley because he stole his medication (valium) and not because Presley allegedly stole Brown's shoes.[24]

Based on this newly-discovered evidence, Swainson filed a PCRA petition on December 10, 2008,[25] raising numerous claims, including *Brady*, *Napue*, and *Strickland* claims. Swainson requested discovery and a hearing to fully develop the factual basis of his claims, but the state courts denied his requests and ruled that his PCRA petition was untimely because he did not diligently obtain Presley's recantation sooner than October 2008.[26] After exhausting state court remedies,

[22] *See id*., Ex. 4 (Lt. Gibb's affidavit).
[23] *See id*., Ex. 12 (Letter from Kolins to Brown).
[24] *See id*., Ex. 13 (Letter from Brown to Kolins).
[25] *See id*., Exs. 50-51.
[26] *See id*., Exs. 46-47.

Swainson quickly filed his instant petition in the district court on January 13, 2012.[27] The district court transferred his petition to this Court on March 6, 2012.

II. Arguments

A. Swainson's Petition Is Not A Successive Petition Because He Did Not Violate The Abuse-Of-The-Writ Doctrine

AEDPA does not define the phrase "second or successive," *Bencoff v. Colleran*, 404 F.3d at 816, and it "is not self-defining." *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). Instead, it is a "term of art" that is "given substance" by the U.S. Supreme Court's habeas jurisprudence. *See Slack v. McDaniel*, 529 U.S. 473, 486 (2000). This Court has held that the phrase "second and successive… is not to be read literally" and a "prisoner's application is *not* second or successive simply because it follows an earlier federal petition." *Bencoff v. Colleran*, 404 F.3d at 817 (emphasis added); *Panetti* v. *Quarterman*, 551 U.S. at 944.

The Supreme Court, this Court, and other circuits have interpreted the phrase "second or successive" as a derivative of the "abuse-of-the-writ" doctrine developed in pre-AEDPA cases. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996).[28] This Court has held that "the abuse of the writ doctrine retains viability as a means of determining when a petition should be deemed 'second or successive' under [AEDPA]." *Bencoff v. Colleran*, 404 F.3d at 817; *accord Goldblum v. Klem*, 510 F.3d 204, 216 n.8 (3d Cir. 2007).

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[27] Because Swainson had a *good-faith* belief that his instant petition was *not* a successive petition under AEDPA, he did not seek authorization from this Court, as required by § 2244(b)(3), before filing his petition. *See Magwood v. Patterson*, 130 S.Ct. 2788, 2796 (2010) ("If… Magwood's application was not second or successive, it was not subject to § 2244(b) at all[.]"); *Bencoff v. Colleran*, 404 F.3d 812, 816 (3d 2005); *Quezada v. Smith*, 624 F.3d 514, 517 (2d Cir. 2010).

[28] *Panetti* ratified the view of the majority of the circuit courts that the meaning of "second or successive" is informed by the abuse-of-the-writ doctrine. *See United States v. Barrett*, 178 F.3d 34, 42-44 (1st Cir.1999); *James v. Walsh*, 308 F.3d 162, 167 (2d Cir.2002); *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir.2005); *In re Cain*, 137 F.3d 234, 235-36 (5th Cir.1998); *In re Bowen*, 436 F.3d 699, 704 (6th Cir.2006); *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir.2001); *Allen v. Ornoski*, 435 F.3d 946, 956 (9th Cir.2006); *Reeves v. Little*, 120 F.3d 1136, 1138-39 (10th Cir.1997); *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir.2003).

An abuse-of-the-writ occurs when a petitioner raises a federal claim that could have been raised in an earlier habeas petition. *See McCleskey v. Zant*, 499 U.S. 467, 493 (1991). The abuse-of-the-writ doctrine concentrates "on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *Id.* at 490. The question is "whether [a] petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." *Id.* at 498. The petitioner, as a result, "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." *Id.* A petitioner, however, is not required to include "fruitless" claims in his first habeas petition, *see Wilson v. Beard*, 426 F.3d 653, 666 (3d Cir. 2005), or claims based on "mere speculation." *See Strickler v. Greene*, 527 U.S. 263, 286-87 (1999). The primary issue, consequently, is whether Swainson could have raised his current federal claims in his 1999 *pro se* habeas petition. To resolve this issue, though, the Court must decide whether Swainson could have obtained Presley's recantation before October 13, 2008. Swainson could not.

Presley averred in his recantation that he would not have discussed his trial testimony with Swainson's legal team prior to his October 13, 2008 interview with Kolins.[29] Indeed, when Kolins initially spoke with him on October 11, 2007 at Bayside State Prison, Presley refused to talk about his trial testimony until he spoke to an attorney.[30] Similarly, when Presley sent Kolins a Christmas card on December 7, 2007, he informed Kolins again that he had "reservations" about discussing his testimony before consulting with an attorney.[31]

[29] *See Petition for Writ of Habeas Corpus*, Exs. 2, 44.
[30] *See id*., Ex. 44, at ¶10.
[31] *See id*., Exs. 21, 44.

In October 2008, in a last ditch effort, Kolins located Presley at the treatment center and met with him on October 3, 2008.[32] During this interview, Presley told Kolins that he had not been mentally, emotionally, or spiritually ready to discuss his testimony until he had undergone drug and alcohol treatment and accepted the Jesus into his life.[33] Presley, though, did not recant his testimony at this meeting, but instead used the meeting to explain why it took him two decades to finally feel comfortable to possibly discussing his testimony. At the end of meeting, Presley agreed to meet with Kolins again on October 13, 2008.[34] During the October 13, 2008 meeting, Presley recanted his trial testimony.[35] Consequently, because Presley said he would not have spoken to Swainson's legal team prior to October 2008, Swainson could not have obtained his recantation any sooner. The critical issue, consequently, boils down to whether Swainson had a duty to continually contact Presley with the hopes of eliciting a recantation. Swainson had no such duty.

First, the Commonwealth *has the burden* of diligently correcting the record when it knowingly presents false evidence and conceals exculpatory evidence. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). The Supreme Court made this crystal clear in *Banks v. Dretke*: "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." 540 U.S. 668, 675-76 (2004).

Second, the Commonwealth said it disclosed all *Brady* material prior to trial. Swainson could "reasonably rely" on this assertion to assume that the Commonwealth disclosed all material exculpatory and impeachment evidence. *See Strickler v. Greene*, 527 U.S. at 283 n.23. As the Supreme Court emphasized, its

[32] *See id*., Ex. 44, at ¶15.
[33] *See id*.
[34] *See id*., Ex. 44, at ¶¶ 14-15.
[35] *See id*., Ex. 44, at ¶¶ 16-23; Exs. 2-3.

Brady "decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. at 695. In other words, a "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 696.

Third, even if Swainson did not specifically request the exact *Brady* evidence that he has now uncovered with Presley's recantation, and the Commonwealth did not explicitly affirm that it disclosed all *Brady* evidence prior to trial, Swainson had every reason to believe the Commonwealth adhered to its *Brady* obligations. Under *Brady*, "a defendant's failure to request favorable evidence d[oes] not leave the Government free of all obligation," *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), especially when the failure to disclose favorable evidence violates "the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976).[36] Thus, "it was appropriate for [Swainson] to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Banks v. Dretke*, 540 U.S. at 696.

Fourth, based on Presley's initial refusals to speak with Kolins, as well as his clear expression that he would not have cooperated with Swainson's legal team prior to October 2008, Presley had every right to be left alone. Due diligence does not require a prisoner or his legal team to continually hound a witness until he is willing to talk – especially when the prisoner's interest in talking with that witness is based on mere speculation. More importantly, under state law, Presley could have filed suit against Swainson's legal team for violating his right to be "left alone." *See DeAngelo v. Fortney*, 515 A.2d 594, 595 (Pa. Super. 1986) (discussing the "intrusion upon seclusion" claim).

[36] Any ethical and reasonable prosecutor would have disclosed the information contained in Presley's recantation and realized that failing to do so would render Swainson's entire trial fundamentally unfair.

Fifth, Swainson's purpose of approaching Presley would have been based on mere speculation that he *may have* purposely fabricated his trial testimony and identification. The record, as mentioned, contained *no evidence* suggesting that Presley viewed photographs of Swainson *only* (as compared to a seven-man photo array) or that he repeatedly told the Commonwealth that Swainson *was not* the shooter. Indeed, while Presley's June 1988 affidavit says that Swainson was not the shooter, it does *not* say that he repeatedly told the Commonwealth that Swainson was not the shooter.[37] Likewise, Presley's preliminary hearing and trial testimony mentioned nothing about the fact that the Commonwealth showed him photographs of Swainson *only* or that he repeatedly told the Commonwealth that Swainson was not the shooter.

Based on these facts, Swainson did not have the evidentiary support to pursue *Brady* or *Napue* claims during his initial state post-conviction and federal habeas proceedings. If Swainson pled such a claim, and sought post-conviction discovery pursuant to Pa. R. Crim. P. 902(E)(1), his claim and discovery request would have been based on mere speculation. Prisoners, though, have no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." *Strickler v. Greene*, 527 U.S. at 286-87; *accord Banks v. Dretke*, 540 U.S. at 695-96. The Supreme Court added, "Mere speculation that some exculpatory material may have been withheld is unlikely to establish [extraordinary circumstances][38] for a discovery request on collateral review. Nor… should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support." *Strickler v. Greene*, 527 U.S. at 286.

[37] *See id*., Ex. 1.

[38] To receive post-conviction discovery under Pa. R. Crim. P. 902(E)(1) a prisoner must demonstrate that there are "extraordinary circumstances" warranting discovery.

B. Meritorious *Brady* and *Napue* Claims Are Exempt From AEDPA's Successive Petition Requirements

AEDPA no doubt restricted the scope of federal habeas, *see Felker* v. *Turpin*, 518 U.S. at 664, but Swainson firmly believes Congress did not intend to turn a blind eye to the egregious constitutional violations and misconduct witnessed in his case – constitutional violations, mind you, that could not be timely raised during Swainson's initial post-conviction and federal habeas proceedings do to the very nature of the misconduct at issue. In other words, meritorious *Brady* and *Napue* claims, where materiality can be established, are exempt from AEPDA's successive petition requirements because "the writ is a bulwark against convictions that violate fundamental fairness." *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring). Swainson draws significant support for his position from *Panetti*.

In *Panetti*, the Supreme Court held that competency-to-be-executed claims based on *Ford v. Wainwright*, 477 U.S. 399 (1986), were exempt from AEDPA's "second or successive" petition requirements. Noting that "*Ford*-based incompetency claims… are not ripe until after the time has run to file a first federal habeas petition," the Court concluded that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented" in a case where a second-in-time habeas petition raises a "*Ford*-based incompetency claim filed as soon as that claim is ripe." *Panetti v. Quarterman*, 551 U.S. 930 at 943. The Supreme Court identified three considerations supporting its conclusion: (1) the implications for habeas practice of reading "second or successive" literally for such claims, (2) whether barring such claims would advance the policies behind AEDPA, and (3) the Court's pre- and post-AEDPA habeas jurisprudence, including the common law abuse-of-the-writ doctrine. *See id*. at 945-47. These considerations are not limited to *Ford* claims,

see id. at 945, and must be considered in deciding whether other types of claims, that do not survive a literal reading of AEDPA's gatekeeping requirements, may nonetheless be addressed on the merits.

The Supreme Court also cautioned against interpreting AEDPA's "second or successive" provisions in a way that would foreclose – altogether – federal review of meritorious constitutional claims, or otherwise lead to perverse results, absent a clear indication that Congress intended that result. *See id.* at 945-46. Usually "a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's 'second or successive' bar," but the Supreme Court was reluctant to construe the statute "in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality[in the first petition]." *Id.* at 947.

Given the nature of *Brady* and *Napue* violations, prisoners may often not be at fault for failing to timely raise these claims in their first habeas petition. It is the prosecutor who knowingly presents false testimony or violates her *Brady*'s obligations by not disclosing material evidence, and that prosecutorial error may not surface until the prisoner's first habeas petition has already been resolved. Such prosecutorial error, however, does not violate the Federal Constitution unless the prisoner demonstrates prejudice: the undisclosed and false evidence must be material. *See Strickler v. Green,* 527 U.S. at 281-82 (noting that *Brady* claims apply the reasonable probability standard where the non-disclosed evidence must undermine confidence in the prisoner's conviction); *Napue v. Illinois*, 360 U.S. 264, 271 (1959) (noting that false evidence claims apply the reasonable likelihood standard where the prisoner must demonstrate that the false evidence *may have* affected the jury's decision to convict).

Before AEDPA, if the prosecution failed to disclose *Brady* evidence until after a first habeas petition had been resolved, the prisoner could raise *Brady* and

Napue claims in a second-in-time petition so long as they were not barred by the abuse-of-the-writ doctrine. *See McCleskey v. Zant*, 499 U.S. 467 (1991). Applying the prejudice analysis in *Strickler*, for instance, federal courts could reach the merits of second-in-time *Brady* claims only when the suppressed evidence was material. *See Strickler v. Greene,* 527 U.S. at 296. Thus, before AEDPA, federal courts had the authority to remedy *all* meritorious *Brady* and *Napue* claims presented in a second-in-time petition when the "cause" prong of the abuse-of-the-writ doctrine was satisfied.

In contrast, under a literal reading of "second or successive" in AEDPA, federal courts would lack jurisdiction to consider any second-in-time *Brady* or *Napue* claims unless the prisoner demonstrates by clear and convincing evidence that no reasonable factfinder would have found the prisoner guilty had the newly-disclosed evidence been available at trial. *See* § 2244(b)(2)(B)(ii). In other words, federal courts could not resolve an entire subset of meritorious constitutional claims dealing with egregious prosecutorial misconduct: those where prisoners can show the suppressed evidence *undermines confidence* in their conviction or that there is a *reasonable likelihood* the false evidence may have affected the jury's decision to convict. Under § 2244(b)(2)'s standard, however, these prisoners would be unable to show that the newly-discovered facts establish, by clear and convincing evidence, that no reasonable juror would have voted to convict them.[39]

A broad rule, based on the literal meaning of "second or successive," under which *all* second-in-time *Brady* and *Napue* claims would be subject to § 2244(b)(2), not only completely forecloses federal review of meritorious prosecutorial misconduct claims, it *rewards prosecutors* for failing to meet their constitutional obligations to disclose favorable evidence and to present truthful

[39] Swainson, fortunately, is not one of these prisoners. Paul Presley's recantation demonstrates beyond clear and convincing evidence that, had he testified truthfully at Swainson's trial, no reasonable juror would have voted to convict Swainson. *See infra*, pp. 16-19.

evidence. Congress did not intend for such a perverse and unjust result – nor did it intend to depart this far off course from the Supreme Court's pre-AEDPA abuse-of-the-writ case law. *See Panetti v. Quarterman*, 551 U.S. at 945-46. Barring these claims would promote finality – one of AEDPA's purposes – but it would do so only at the expense of foreclosing all federal review of meritorious claims that a prisoner could not have presented to a federal court any sooner – certainly not an AEDPA goal. *Cf. See id.* at 946 (explaining AEDPA's concern for finality was not implicated because federal courts are not "able to resolve a petitioner's *Ford* claim before execution is imminent").

Swainson draws further support for his "exemption" argument from § 2244(d)(1)(D) – which says that AEDPA's one-year statute of limitation starts to run "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Read literally – this section plainly says that Swainson's one-year statute of limitations started on October 13, 2008 when Presley recanted his testimony. Thus, if § 2244(d)(1)(D) and § 2244(b)(2) are both read literally, they are irreconcilable – something Congress could not have intended. The question, therefore, becomes what interpretation best promotes AEDPA's objectives as well as the writ's historical objectives. While AEDPA is not the best example of stellar statutory draftsmanship, *see Lindh v. Murphy*, 521 U.S. 320, 336 (1997), Swainson firmly believes Congress intended to exempt *meritorious* second-in-time *Brady* and *Napue* claims from § 2244(b)(2)'s standard. Such an exemption is not only consistent with the writ's and AEDPA's objectives of remedying convictions infected by fundamental *un*fairness and furthering the ends of justice, it takes into consideration the "practical effects," *Panetti v. Quarterman*, 551 U.S. at 945-46, of the contrary interpretation – where an exemption *would not* be recognized.

If the Court does not recognize an exemption for second-in-time *Brady* and *Napue* claims – where the prisoner can establish materiality, but not satisfy § 2244(b)'s standard – presumably innocent people will continue to be incarcerated, while dishonest and unethical prosecutors will not be punished and held accountable for their egregious unconstitutional conduct. While guilty defendants need to be held accountable for their unlawful actions, unethical prosecutors who choose to cheat the system to increase their chances of obtaining a conviction must also be held to answer for their lies and deceptions – especially today, where there is growing sentiment across the country that there is far too little oversight and deterrence to reign in and stop rouge and unethical prosecutors. Indeed, *60 Minutes* aired a segment on prosecutorial misconduct on March 25, 2012 – two days before undersigned counsel filed this brief.[40] Likewise, just last week, a 500 page report by special counsel detailed numerous instances of prosecutorial misconduct by federal prosecutors in the Ted Stevens case. *See* Richard A. Serrano & Kim Murph, *Report Details Prosecutors' Alleged Misconduct In Ted Stevens Case*, L.A. TIMES, March 16, 2012. Perhaps the best example demonstrating the lack of oversight and deterrence are the Supreme Court's cases regarding the Orleans Parish District Attorney's Office. *See Kyles v. Whitely*, 514 U.S. 419 (1995); *Connick v. Thompson*, 131 S.Ct. 1350 (2011); *Smith v. Cain*, 132 S.Ct. 627 (2011). In each case, which spanned more than two decades, the District Attorney's Office routinely violated the defendant's due process rights by failing to disclose plainly material evidence – even after the Supreme Court's stern warnings in *Kyles*. These are just a few examples, but there are many more.[41] Thus, giving federal courts the authority to review meritorious second-in-time *Brady* and *Napue*

[40] *See 60 Minutes* website, at www.cbsnews.com/8301-18560_162-57402685/freedom-after-nearly-25-years-of-wrongful-imprisonment/?tag=contentMain;cbsCarousel.

[41] *See also* KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 (2010); Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today, Sept. 23, 2010.

claims will serve as a deterrent to prosecutors because, in the end, a federal court will ultimately hold them accountable for their unconstitutional conduct.

In the end, the focus in these circumstances – where prosecutorial misconduct prevented a prisoner from timely raising meritorious constitutional claims in his initial federal habeas petition – must remain on fundamental fairness and not on innocence. While the conviction of an innocent person "may be the archetypal case of a manifest miscarriage of justice, it is not the only case." *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J., concurring in judgment). As Justice Stevens emphasized, "There is no reason why 'actual innocence' must be both an animating and the limiting principle of the work of federal courts in furthering the 'ends of justice.'" *Id*. Fundamental fairness, in other words, "is more than accuracy at trial," while "justice is more than guilt or innocence." *Id*. Even Judge Friendly emphasized that there are contexts in which, irrespective of guilt or innocence, constitutional errors violate fundamental fairness. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151–154 (1970).

C. Swainson Satisfies 2244(d)(3)(C)'s *Prima Facie* Requirement

Swainson satisfies § 2244(b)(3)(C)'s *prima facie* requirement, *i.e*., his petition presents a *prima facie* case that the factual predicate(s) for his current federal claims could not have been previously discovered through due diligence and the facts underlying the claims, 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 Swainson guilty. *See* § 2244(b)(2)(i-ii).

In terms of the *prima facie* showing, § 2244(b)(3)(C) merely requires a "sufficient showing of possible merit to warrant a fuller exploration by the district court." *Goldblum v. Klem*, 510 F.3d at 219 (quoting *Bennett v. United States*, 119

F.3d 468, 469 (7th Cir. 1997)). The Second Circuit, for instance, understands the *prima facie* standard to mean that Swainson's allegations must "be accepted as true" unless they are "fanciful" or "demonstrably implausible." *Quezada v. Smith*, 624 F.3d at 521 (emphasis added). Thus, if the Court reviews Swainson's application, and "it appears reasonably likely" that it satisfies § 2244(b)'s requirements, the Court "shall grant" his application. *Goldblum v. Klem*, 510 F.3d at 219.

The *prima facie* standard does not refer to the merits of Swainson's federal claims, but only to the merits of his showing with respect to § 2244(b)(2)'s substantive requirements. *See Goldblum v. Klem*, 510 F.3d at 219 n.9. Swainson also need not demonstrate that his custody is in violation of clearly-established federal law, as required by § 2254(d)(1). *See Quezada v. Smith*, 624 F.3d at 521. Whether Swainson satisfies § 2254(d)(1) is a determination the *district court* must make (after remand or authorization) before it can issue a writ to Swainson. *See id*.

Swainson's factual allegations must be accepted as true, including those contained in Presley's recantation. In state court the Commonwealth argued that Pressley's recantation is unreliable, but the Commonwealth's characterization cannot be dispositive or given significant consideration because Pressley's recantation is not fanciful or demonstrably implausible. *See Quezada v. Smith*, 624 F.3d at 521. The reliability of Presley's recantation is also bolstered by the fact that several parts of it are corroborated by Lt. Gibb's and James Brown's affidavits.[42] Thus, if Swainson's factual allegations must be accepted as true, he satisfies § 2244(b)(3)(C)'s *prima facie* requirement.

First, the critical factual predicates of his federal claims are from Presley's recantation, which Swainson could not have developed until October 2008. His federal claims include the knowing presentation of false evidence, *Napue v.*

[42] *See Petition for Writ of Habeas Corpus*, Exs. 4, 13.

Illinois, 360 U.S. 264, 269 (1959),[43] the failure to disclose exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83, 87 (1963),[44] the inability to present a complete and meaningful defense, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006),[45] introducing fabricated identification evidence, *Manson v. Brathwaite*, 432 U.S. 98 (1977),[46] and ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984).[47]

Second, Presley acknowledged in his recantation that he told the prosecutor and her investigators that Swainson was *not* Opher's shooter because the shooter was as a dark-skinned African-American, while Swainson was a light-skinned Jamaican. Had Presley testified truthfully at trial and offered this testimony, no reasonable fact finder would have found Swainson guilty because Presley represented the only Commonwealth witness who saw Opher's murder. No physical evidence or other witnesses placed Swainson at the scene of the shooting when it occurred. *See Quezada v. Smith*, 624 F.3d at 522.

Third, Presley also said that the prosecutor and her investigators only showed him pictures of one person – Andrew Swainson. At trial, however, Detective Santiago testified that he presented a seven-man photo array to Presley and that he "immediately" identified Swainson's picture as the man who shot Opher. Had the Commonwealth disclosed the fact that it only showed Presley pictures of Swainson, trial counsel would have used this information to bar Presley's identification altogether or demolish the reliability of his identification at trial. Regardless of the scenario, no reasonable fact finder would have found Swainson guilty.

[43] *See id*. at 30-33.
[44] *See id*. at 34-40.
[45] *See id*.
[46] *See id*. at 41.
[47] *See id*. at 42-46.

Fourth, the Commonwealth's refusal to disclose plainly exculpatory information and trial counsel's failure to develop readily available exculpatory information prevented Swainson from presenting a complete and meaningful defense. Had the Commonwealth and trial counsel adhered to their constitutional obligations, Swainson's defense at trial would have completely and meaningfully demolished the Commonwealth's case against him where no reasonable fact finder would have found him guilty.

Consequently, Swainson has made a *prima facie* showing that but for constitutional error, no reasonable factfinder would have found him guilty.

III. Prayer for Relief

WHEREFORE, Swainson respectfully requests the following relief:

1. An order finding that Swainson's instant petition is not a second or successive petition and remanding it back to the district court so it may conduct a traditional first-in-time petition analysis under AEDPA; or, in the alternative,
2. An order granting Swainson authorization to file his "second or successive" petition.

Respectfully submitted this the 27th day of March, 2012.

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Date: March 27, 2012

Certificate of Service

Undersigned counsel certify, under penalty of perjury, that they mailed via standard mail a true and accurate copy of Swainson's *Motion To Remand Petitioner's Petition For Writ of Habeas Corpus To The District Court And, Alternatively, To Authorize The District Court To Consider Petitioner's "Second or Successive" Petition For Writ of Habeas Corpus* to the following parties on March 27, 2012:

PHILADELPHIA DISTRICT ATTORNEY'S OFFICE
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/s/ Craig M. Cooley
Craig M. Cooley

Dated: March 27, 2012

Certificate of Compliance

Undersigned counsel certifies that the submitted brief complies with the Third Circuit Court of Appeals' font and page length requirements for filing briefs. The word count for the submitted brief is 7001 words.

/s/ Craig M. Cooley
Craig M. Cooley

Dated: March 27, 2012