SECOND-IN-TIME *BRADY* CLAIMS: PROSECUTORIAL MISCONDUCT AND THE AEDPA

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I. INTRODUCTION

In elementary school, American students are taught the basic principles of the country's system of democracy, including the fundamental rights and freedoms guaranteed by the United States Constitution.[1] Though elementary students do not yet have the capacity to understand the nuances of our constitutional rights, elementary schools often emphasize certain enumerated rights, like freedom of speech, as well as foundational concepts of the American system, like "innocent until proven guilty."[2] We are told that the system is fair and just, but what happens when it is not?

Brandon Bernard was only eighteen years old when he was convicted of murder and sentenced to death, making him "one of the youngest people ever sentenced to death in federal court."[3] In June 1999, Bernard helped carry out a plan to commit a carjacking and robbery with four other teenagers, all members of the same gang; this plan ultimately resulted in the deaths of Todd and Stacie Bagley.[4] Although Bernard's involvement was minimal, he was

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[1] *See* Lori T. Meier et al., *We the People: Elementary Pre-Service Teachers and Constitutional Readability*, 24 SRATE J. 47, 47–48 (2014), https://files.eric.ed.gov/fulltext/EJ1057203.pdf.

[2] *See We the Civics Kids Lesson 3: The Bill of Rights*, NAT'L CONST. CTR., https://constitutioncenter.org/learn/educational-resources/lesson-plans/we-the-civics-kids-lesson-3-the-bill-of-rights (last visited June 27, 2021).

[3] Petition for Clemency Seeking Commutation of Death Sentence at 2, *In re* Brandon Bernard, OFF. OF THE PRESIDENT AND U.S. PARDON ATT'Y (Nov. 10, 2020).

[4] *Id.*

sentenced to death on one of three capital charges he faced.[5] The prosecution theorized that Bernard was one of the most dangerous members of the gang and posed an ongoing risk to the safety of others.[6]

In 2017, one of Bernard's accomplices, Tony Sparks, was granted a resentencing hearing.[7] At this hearing, it was revealed that the prosecution had withheld material evidence in violation of *Brady v. Maryland*,[8] and that Bernard had played a substantially lesser role in the robbery and carjacking than the prosecution's theory suggested.[9] Bernard argued that he was never given this evidence and that he could have used it to undermine the prosecution's theory of his involvement in the crime.[10] As a result, Bernard filed a second-in-time habeas petition pursuant to 28 U.S.C. § 2255 moving for relief from judgment.[11] However, the Fifth Circuit applied a "perverse and illogical rule"[12] that conflicted with the analysis set forth in Supreme Court precedent and, as a result, Bernard was denied due process of the law.[13] He was subsequently executed before his claims were fully considered on the merits.[14]

This Note discusses the unjust execution of Brandon Bernard by the federal government of the United States and argues that *Brady* violations should fall into a categorical exception from the bar against "second or successive" petitions, like the Supreme Court

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[5] *Id.* at 3. Bernard faced four counts, three of which were death penalty eligible. *Id.* at 10. The jury found Bernard guilty on all counts; however, for three of the four, he was sentenced to life imprisonment. *Id.* Bernard was only sentenced to death for the murder of Stacie Bagley. *Id.* at 13–14.

[6] *Id.* at 3–4.

[7] Sparks v. United States, W-11-CV-123, 2018 U.S. Dist. LEXIS 46485 (W.D. Tex. Mar. 19, 2018), *aff'd*, 941 F.3d 748 (5th Cir. 2019).

[8] 373 U.S. 83, 87 (1963).

[9] Bernard v. United States, 141 S. Ct. 504, 505 (2020) (Sotomayor, J., dissenting).

[10] Petition for Clemency Seeking Commutation of Death Sentence, *supra* note 3, at 4.

[11] United States v. Bernard, 820 F. App'x 309, 310 (5th Cir. 2020).

[12] *Bernard*, 141 S. Ct. at 505–07 (Sotomayor, J., dissenting) (stating the Fifth Circuit required Bernard to adhere to the rule for successive petitions and produce "newly discovered evidence . . . sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense").

[13] *Id.*

[14] *Brandon Bernard Executed in Trump's Final Days*, BBC NEWS (Dec. 11, 2020), https://www.bbc.com/news/world-us-canada-55261224.

recognized for *Ford*[15] claims in *Panetti v. Quarterman*.[16] Part II introduces and summarizes the "Great Writ" of habeas corpus, a fundamental right recognized in the United States Constitution, and the limitation that the Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes on that right.[17] Part III completes an in-depth analysis into Brandon Bernard's case and subsequent habeas petitions. Finally, Part IV argues that second-in-time habeas petitions alleging *Brady* violations should not be subject to the AEDPA's gatekeeping provisions set forth in 28 U.S.C. § 2244(b)(2),[18] but instead should follow the analysis set forth by the Supreme Court in *Panetti* in order to execute the full and fair administration of justice.[19]

II. HABEAS CORPUS AND THE AEDPA

A. The Creation and Evolution of Habeas Corpus

Habeas corpus, the "remedy used to bring a confined person before a court to ensure that the person's detention is not illegal," is a foundational concept of American jurisprudence.[20] The Framers of the U.S. Constitution recognized this concept to be so central to the idea of personal liberty that they enumerated the right to habeas corpus in the "Suspension Clause" of the Constitution.[21] As a result, habeas corpus is, and continues to be, "an important instrument to safeguard individual freedom against arbitrary executive power."[22]

Under the administration of President George Washington, the Judiciary Act of 1789 was signed into law, which authorized

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[15] Ford v. Wainwright, 477 U.S. 399 (1986).

[16] 551 U.S. 930, 934 (2007) (holding that *Ford*-based claims of incompetency to be executed were not barred by the AEDPA's prohibition against "second or successive" petitions).

[17] Nathan Nasrallah, *The Wall that AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act*, 66 CASE W. RSRV. L. REV. 1147, 1148–51 (2016).

[18] 28 U.S.C. § 2244(b)(2).

[19] *See Panetti*, 551 U.S. 930.

[20] *The History of Habeas Corpus in America*, 2255 MOTION, https://2255motion.com/history-habeas-corpus-america (last visited Feb. 25, 2021).

[21] *Id.* The Suspension Clause states "[t]he 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." U.S. CONST. art. I, § 9, cl. 2.

[22] *What You Should Know About Habeas Corpus*, AM. C.L. UNION, https://www.aclu.org/other/what-you-should-know-about-habeas-corpus (last visited Feb. 25, 2020).

federal courts to issue a writ of habeas corpus for the first time.[23] It was not until decades later that this right of federal habeas corpus was extended to state prisoners through the Habeas Corpus Act of 1867, an amendment of the Judiciary Act of 1789.[24] In 1948, Congress enacted 28 U.S.C. § 2255.[25] Section 2255 allows federal prisoners to request that a court vacate, correct, or set aside a federal sentence on the grounds that it "was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."[26] Essentially, this statute provided the necessary mechanism for federal prisoners to invoke habeas corpus challenges to their sentences.[27]

Initially, Congress did not impose a statute of limitations on motions filed under § 2255, as the statute's mechanism was most similar to the historical precedent of federal habeas corpus law.[28] The limits imposed on habeas review prior to 1996 included "limits on successive federal challenges to state custody, . . . a strict procedural default bar on claims and evidence not properly preserved in state court proceedings, and . . . [confining] habeas appeals to substantial federal questions."[29] However, that all changed with the passage of the AEDPA in April 1996.[30]

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[23] Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789); *see also Judiciary Act of 1789: Primary Documents in American History*, THE LIBR. OF CONG., https://www.loc.gov/rr/program/bib/ourdocs/judiciary.html (last visited Feb. 25, 2021); *The History of Habeas Corpus in America*, *supra* note 20.

[24] This provision amending the Judiciary Act is as follows: "[t]he several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1867).

[25] *The History of Habeas Corpus in America*, *supra* note 20.

[26] 28 U.S.C. § 2255(a).

[27] *The History of Habeas Corpus in America*, *supra* note 20.

[28] Benjamin R. Orye III, *The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. 2255(1)*, 44 WM. & MARY L. REV. 441 (2002).

[29] James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK L. REV. 411, 416 (2001).

[30] *Id.*

B. The AEDPA's Limitations to Habeas Corpus Challenges

In January 1995, the "Gingrich Congress"[31] followed through with one of its election platform promises by introducing the "Effective Death Penalty Act" to Congress.[32] The bill was later combined with an Antiterrorism Act proposed by the Clinton administration in response to the bombing of the front of the Murrah Federal Building in Oklahoma City by Timothy McVeigh in April 1995, which resulted in the death of 168 people.[33] Although the bill faced strong opposition initially in both the Senate and the House, it ultimately passed with the support of President Clinton.[34] Thus, the enactment of the AEDPA was the result of a combination of three events: "Timothy McVeigh's twisted patriotism and disdain for 'collateral damage,' the Gingrich Revolution in its heyday, and the Clinton Presidency at the furthest point of its most rightward triangulation."[35]

The AEDPA incorporated many changes that severely restrict a prisoner's ability to bring a habeas corpus challenge.[36] Proponents of the AEDPA argued that prisoners were abusing their right to federal habeas corpus, which flooded the courts with frivolous petitions and prolonged the administration of punishment.[37] Thus, these restrictions were passed to achieve Congress's goal of "finality, federalism, and comity."[38] Most notable among these changes is § 2244(b)(2)(B) of the Act, which created a much higher standard for filing second or successive federal petitions:

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[31] *Id.* at 412. In the 1994 midterm elections, Newt Gingrich published his "Contract with America," which contained proposals for conservative bills. Lesley Kennedy, *The 1994 Midterms: When Newt Gingrich Helped Republicans Win Big*, HISTORY (Oct. 9, 2018), https://www.history.com/news/midterm-elections-1994-republican-revolution-gingrich-contract-with-america. This "Contract" contributed to the Republicans gaining control of both the House and the Senate for the first time in forty years. *Id.* Thus, the "Gingrich Congress" is a term coined to recognize this shift to Republican congressional control. *Id.*

[32] Liebman, *supra* note 29, at 412.

[33] *Id.*

[34] *Id.* at 413.

[35] *Id.*

[36] *Id.* at 416.

[37] Nasrallah, *supra* note 17, at 1151–52.

[38] *Id.* at 1151.

> (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 . . . (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[39]

These two narrow requirements in § 2244(b) (2) (B) (i) and (ii) have been described as creating "a nearly insurmountable bar against second or successive applications for habeas relief."[40] However, even though the AEDPA introduced this new, rigorous standard for "second or successive" habeas petitions, there is no definition included in the Act as to what constitutes a "second or successive" habeas petition.[41] Thus, courts are free to create their own definitions of this phrase, which has led to extremely different interpretations and applications across circuits.[42] Additionally, only a few months after the Act was enacted, the Supreme Court failed to provide a clear interpretation or definition of the AEDPA's "second or successive" language in *Felker v. Turpin*, where it "rejected a facial challenge to the constitutionality of AEDPA's restrictions on successive habeas petitions."[43] Consequently, circuit courts have applied different interpretations of the "second or successive" language that yield significantly diverging results.[44] Some circuits incorporate the abuse of writ standard that existed prior to the enactment of the AEDPA into the definition of "second or successive," interpreting the phrase as a term of art.[45] Yet other circuits

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[39] 28 U.S.C. § 2244(b) (2) (B).

[40] John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 442 (2011).

[41] Mark T. Pavkov, *Does "Second" Mean Second: Examining the Split Among the Circuit Courts of Appeals in Interpreting AEDPA's Second or Successive Limitations on Habeas Corpus Petitions*, 57 CASE W. RSRV. L. REV. 1007, 1008 (2007).

[42] *Id.* at 1009.

[43] *Id.* (referencing Felker v. Turpin, 518 U.S. 651 (1996)).

[44] *Id.*

[45] *Id.*

only interpret the phrase's meaning to include the plain meaning of the terms "second or successive."[46]

C. The AEDPA's "Second or Successive" Language's Application to Brady *and* Napue *Claims in Various Circuits*

In *Brady v. Maryland*, the Supreme Court held that due process is violated when the government withholds "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[47] Prior to *Brady*, the Supreme Court had established in *Napue v. Illinois* that the government may not knowingly use false evidence or testimony to obtain a conviction.[48] In certain instances, violations of the rules set forth in *Brady* and *Napue* are not discovered until years later, often after prisoners have already filed their first habeas petition under § 2255.[49] As a result, multiple circuits have been forced to address the issue of whether a second-in-time *Brady* claim is subject to the AEDPA's strict rules applying to "second or successive" petitions set forth in § 2244(b)(2)(B).[50]

The Fifth Circuit, like other circuits,[51] has held that a prisoner's habeas corpus "application is not second or successive simply

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[46] *Id.*

[47] 373 U.S. 83, 87 (1963). In *Brady*, the defendant was found guilty of first-degree murder and sentenced to death along with his accomplice. *Id.* at 84. In his initial trial, Brady admitted to participating in the crime, but claimed that his accomplice was the one who actually murdered the victim; Brady's counsel conceded that he was guilty of first-degree murder, asking that the jury spare him from a death sentence. *Id.* Before the trial, Brady's counsel requested the statements the prosecution had from Brady's accomplice; the prosecution complied with the request for the most part but did not give Brady's counsel a statement in which Brady's accomplice confessed to the murder. *Id.* It was not discovered until after Brady had been tried, convicted, sentenced, and his sentence was affirmed that the prosecution had withheld this key information. *Id.*

[48] Napue v. Illinois, 360 U.S. 264, 269 (1959). In *Napue*, the prosecution failed to correct false testimony that was given at trial by one its key witnesses. *Id.* at 265. This led to the conviction of the defendant for murder. *Id.* at 266.

[49] *See, e.g.*, Scott v. United States, 890 F.3d 1239, 1245–46 (11th Cir. 2018).

[50] *Id.* at 1245; *see also* Petition for Rehearing En Banc, United States v. Bernard, (5th Cir. Oct. 23, 2020) (No. 19-70021).

[51] The Fifth Circuit follows the majority of jurisdictions here (the First, Second, Third, Eighth, Ninth, and Tenth Circuits) by interpreting the phrase "second or successive" to be a term of art that incorporates the pre-AEDPA abuse of writ standards. *See* Pavkov, *supra* note 41, at 1021–22. The Eleventh Circuit also follows the majority interpretation in some panel decisions. *Id.*

because it follows an earlier federal petition."[52] This conclusion is based upon the language in 28 U.S.C. § 2244, which sheds light on the purpose of the AEDPA—"to preclude prisoners from repeatedly attacking the validity of their convictions and sentences."[53]

These circuits then turn to the language of § 2244(b)(2)(B), which states that a federal review may be granted to a prisoner's claim if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" or the newly discovered evidence would establish that "no reasonable fact finder would have found the applicant guilty of the underlying offense."[54]

Herein lies the problem. The Fifth Circuit has wrongly interpreted the language of § 2244(b)(2)(B)(i) to mean that claims based on a factual predicate not previously discovered, but that existed at the time, are successive.[55] Essentially, the Fifth Circuit's rule states that "if the purported defect existed, or the claim was ripe, at the time of the prior petition, the later petition is likely to be held successive even if the legal basis for the attack was not."[56] The result of this rule is that second-in-time *Brady* and *Napue* claims, although undiscovered, are barred under the Fifth Circuit's interpretation of the AEDPA's "second or successive" language.[57] The reasoning for this result is that even though the claims were not discovered until after the prisoner filed his first habeas corpus application, they were technically available and not preserved at the time of the first application.[58]

III. A CASE STUDY: BRANDON BERNARD

A. Facts and Procedural History

On June 21, 1999, Brandon Bernard, then eighteen years old, helped four of his fellow teenage gang members, Christopher Vialva, Christopher Lewis, Terry Brown, and Tony Sparks, carry out

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[52] *In re* Cain, 137 F.3d 234, 235 (5th Cir. 1998).

[53] *Id.*

[54] 28 U.S.C. § 2244(b)(2)(B).

[55] Garcia v. Quarterman, 573 F.3d 214, 222 (5th Cir. 2009). The Fifth Circuit strays from the majority view in its interpretation here by following the "plain wording of § 2244(b)." *See* Pavkov, *supra* note 41, at 1022.

[56] *Garcia*, 573 F.3d at 222.

[57] *Id.*

[58] *Id.*

a carjacking and robbery, which ultimately resulted in the murders of Todd and Stacie Bagley.[59] Vialva, Lewis, and Sparks met on June 20, 1999, to plan a robbery, where they decided they would ask someone for a ride, then steal the person's personal effects and money and force the victim into the trunk of the car.[60] The next day, they approached Bernard and Brown, two fellow gang members, to help them carry out their plan.[61]

The group initially only had one gun but decided that they needed a second to execute the crime, so Bernard provided one of his own.[62] The group then drove around town to various parking lots at local convenience stores in order to locate a victim.[63] They saw Todd Bagley using a pay phone outside of a convenience store, so Lewis and Sparks approached him to ask for a ride, to which Todd agreed.[64] Vialva joined Lewis and Sparks, climbing into the backseat of the Bagleys' car; after a few minutes of driving, Vialva and Sparks pulled out their guns and directed Todd to pull over.[65] At this point, Vialva, Sparks, and Lewis robbed the Bagleys and forced them into the trunk of the car.[66] Bernard and Brown were not present for the carjacking or the robbery.[67]

Although the initial plan was just to rob the victim, after locking the Bagleys in the trunk for several hours, Vialva alerted the other men that he had to kill the Bagleys since they had seen his face.[68] Upon Vialva's instructions, Brown and Bernard doused the interior of the car with lighter fluid, then Vialva shot both of the Bagleys.[69] Bernard set the car on fire, and the group ran down a hill to their getaway car.[70] They were caught soon after while trying to push the car out of a muddy ditch.[71]

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[59] United States v. Bernard, 299 F.3d 467, 471–73 (5th Cir. 2002).

[60] *Id.* at 471.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 471–72.

[65] *Id.* at 472.

[66] *Id.*

[67] *Id.* at 472 n.2.

[68] *Id.*

[69] *Id.* at 472–73.

[70] *Id.* at 473.

[71] *Id.*

Both Vialva and Bernard were indicted on four counts: carjacking, conspiracy to commit murder, the murder of Todd Bagley, and the murder of Stacie Bagley.[72] The prosecution gave notice that it would seek the death penalty for both Vialva and Bernard.[73] The three other individuals who participated in the crime were all minors at the time and, thus, were not eligible for capital sentences.[74]

During the sentencing phase, the prosecution's case for the death penalty against Bernard was based in part "on the theory that he was 'likely to commit criminal acts of violence in the future.'"[75] The prosecution "repeatedly invoked [Bernard's] gang affiliations" and "emphasiz[ed] that all members of his gang were supposedly 'equal.'"[76]

As a result, the jury found Vialva and Bernard guilty on all counts on June 1, 2000.[77] On June 8, 2000, the jury recommended a sentence of death for Vialva on Counts One, Three, and Four but recommended a sentence of death against Bernard only on Count Four.[78] The district court gave Vialva a life sentence for Count Two, but death on the other three counts.[79] The court gave Bernard a life

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[72] *Id.* The full explanation of the counts are as follows: "carjacking and aiding and abetting the same in violation of 18 U.S.C. §§ 2, 2119 ('Count One'); conspiracy to commit murder in violation of 18 U.S.C. §§ 1111, 1117 ('Count Two'); the murder of Todd Bagley, within the special maritime and territorial jurisdiction of the United States, and aiding and abetting the same in violation of 18 U.S.C. §§ 2, 1111 ('Count Three'); and the murder of Stacie L. Bagley, within the special maritime and territorial jurisdiction of the United States, and aiding and abetting the same in violation of 18 U.S.C. §§ 2, 1111 ('Count Four')." *Id.*

[73] *Id.*

[74] Petition for Clemency Seeking Commutation of Death Sentence, *supra* note 3, at 10. Christopher Lewis was fifteen years old at the time of the crime. *Id.* He testified for the prosecution and was sentenced to only twenty years in prison for his active participation in the abduction, robbery, and kidnapping of the Bagleys. *Id.* at 14. Terry Brown, seventeen years old at the time of the crime, testified for the prosecution and received twenty years in prison. *Id.* Brown, like Bernard, was not present during the carjacking but helped to douse the car in lighter fluid. *Id.* Both Lewis and Brown have completed their sentences. *Id.* Tony Sparks, sixteen years old at the time of the crime, actively participated in all aspects of the crime, like Lewis. *Id.* at 15. He was originally given a life sentence that was later reduced to thirty-five years. *Id.*

[75] Bernard v. United States, 141 S. Ct. 504, 504 (2020) (Sotomayor, J., dissenting) (quoting Electronic Case Filing in No. 2:20–cv–00616, Doc. 3 (SD Ind., Nov. 24, 2020) (App. Vol. I), p. 46 (ECF)).

[76] *Id.* at 504.

[77] United States v. Bernard, 299 F.3d 467, 473 (5th Cir. 2002).

[78] *Id.*

[79] *Id.*

sentence for Counts One, Two, and Three, but death on Count Four.[80]

Bernard appealed his conviction and sentence, which were both affirmed.[81] Bernard then filed his first 28 U.S.C. § 2255 habeas petition.[82] In his first habeas petition, Bernard alleged ineffective assistance of counsel, a *Brady* claim,[83] cumulative error, and a Fifth Amendment claim.[84] Later, Bernard moved for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), requesting to reopen his initial § 2255 habeas petition on the basis that Judge Walter Smith, the judge for Bernard's trial and first habeas proceeding, "was unfit to conduct proceedings because of 'impairments'" and errors that he made in the previous proceedings he oversaw.[85] The district court held that the motion was a "second or successive" petition under § 2255 and, thus, the court dismissed it for lack of jurisdiction.[86] The court of appeals then denied the certificate of appealability.[87]

B. Bernard's Most Recent Habeas Petition

In a resentencing proceeding for one of Bernard's accomplices, Tony Sparks,[88] Sergeant Sandra Hunt testified as a witness for the prosecution.[89] Sergeant Hunt was the former head of the

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[80] *Id.*

[81] *Bernard*, 299 F.3d at 473, *cert. denied*, 539 U.S. 928 (2003).

[82] United States v. Bernard, 762 F.3d 467, 470 (5th Cir. 2014).

[83] *Id.* at 480. The *Brady* claim in this habeas petition included assertions that the government failed to turn over information about Brown's criminal history, mental health, and drug use that could have been used to impeach him at Bernard's original trial. *Id.* at 481.

[84] *Id.* at 482.

[85] United States v. Vialva, 904 F.3d 356, 358 (5th Cir. 2018).

[86] *Id.*

[87] *Id.*

[88] *See* Sparks v. United States, W-11-CV-123, 2018 U.S. Dist. LEXIS 46485 (W.D. Tex. Mar. 19, 2018). Sparks was originally sentenced to life in prison without the possibility of parole in April 2000. *Id.* at *1. However, he filed an Unopposed Successive Motion to Vacate, Set Aside, or Correct Sentence after the Supreme Court's decision in *Miller v. Alabama*, which held that that the Eighth Amendment's prohibition on cruel and unusual punishment is violated by imposing mandatory life imprisonment without the possibility of parole for those under eighteen at the time of their crimes. *Id.* at *1 n.1; *see* Miller v. Alabama, 567 U.S. 460 (2012). The U.S. District Court for the Western District of Texas granted Spark's motion and held a resentencing hearing for him in accordance with the *Miller* decision. *Sparks*, 2018 U.S. Dist. LEXIS 46485, at *1 n.1.

[89] Bernard v. United States, 141 S. Ct. 504, 504 (2020) (Sotomayor, J., dissenting) (quoting Electronic Case Filing in No. 2:20–cv–00616, Doc. 3 (SD Ind., Nov. 24, 2020) (App. Vol. I), p. 46 (ECF)); *see also Sparks*, 2018 U.S. Dist. LEXIS 46485.

gang unit for the Killeen Police Department in Killeen, Texas, during the time of the murders.[90] In her testimony, she stated that she went over the gang's structure with the prosecution before Bernard's trial and informed them that it was composed of a "thirteen-tier hierarchy with Bernard at the very bottom."[91] In addition, she provided a diagram denoting the gang's structure that she had developed with a government informant.[92] The prosecution failed to disclose "Sergeant Hunt's opinion that [Bernard] was on the periphery of the gang [and] the existence of the diagram illustrating his subordinate role."[93]

After learning of Sergeant Hunt's testimony in *Sparks*,[94] Bernard moved for relief from judgment pursuant to § 2255 and, in the alternative, Rule 60(b).[95] In this motion, Bernard alleges "for the first time that the government (1) failed to disclose favorable evidence in violation of *Brady* . . . and (2) presented false testimony at trial in violation of *Napue*."[96] Bernard argued that with Sergeant Hunt's testimony, he would have been able to "undermine[] the prosecution's case that he was an equal participant in gang activity and posed the same risk of future dangerousness as other gang members."[97] The district court held that Bernard's motion was successive but, pursuant to § 1631, transferred it to the Fifth Circuit Court of Appeals.[98]

The Fifth Circuit Court of Appeals applied its dangerous and wrongful interpretation of the language of § 2244(b)(2)(B)(i) in this case, stating that "if a prisoner's later-in-time petition raises a new claim based on evidence that the prisoner alleges was undiscoverable at the time of his earlier petition, the petition is successive."[99] Consequently, the court held that Bernard's motion fell into this category of claims and, thus, was successive.[100] The Fifth

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[90] *Bernard*, 141 S. Ct. at 504 (Sotomayor, J., dissenting) (quoting Electronic Case Filing in No. 2:20–cv–00616, Doc. 3 (SD Ind., Nov. 24, 2020) (App. Vol. I), p. 46 (ECF)).

[91] *Id.* at 505.

[92] *Id.*

[93] *Id.*

[94] *See Sparks*, 2018 U.S. Dist. LEXIS 46485.

[95] United States v. Bernard, 820 F. App'x 309, 310 (5th Cir. 2020).

[96] *Id.*

[97] *Bernard*, 141 S. Ct. at 505 (Sotomayor, J., dissenting).

[98] *Bernard*, 820 F. App'x at 310.

[99] *Id.*

[100] *Id.* at 3.

Circuit's decision to deny this motion without giving proper consideration to Bernard's *Brady* and *Napue* claims on the merits adheres to extremely dangerous precedent that the Fifth Circuit continues to uphold.[101]

IV. SECOND-IN-TIME *BRADY* VIOLATIONS SHOULD NOT BE SUBJECT TO THE HIGHER STANDARD ENFORCED BY CIRCUIT COURTS' INTERPRETATIONS OF THE AEDPA'S "SECOND OR SUCCESSIVE" HABEAS APPLICATIONS

A. Panetti v. Quarterman*: A Prior Supreme Court Exception to§ 2244(b)(2)'s Bar on "Second or Successive" Habeas Petitions*

In his motion for relief, Bernard argued that *Panetti v. Quarterman*[102] required the Fifth Circuit Court of Appeals to conclude that his motion fell into a narrow exception where second-in-time claims are deemed non-successive.[103]

In *Panetti*, a prisoner was convicted of capital murder and sentenced to death.[104] The prisoner filed a second-in-time federal habeas petition that alleged a *Ford* claim,[105] challenging his mental competency to be executed.[106] The government argued that because the prisoner failed to raise a *Ford*-based claim in his first § 2254 petition, [107] the district court lacked jurisdiction.[108] The Supreme Court in *Panetti* laid out three considerations that guided its analysis and led to its conclusion: "(1) the implications for habeas practice of adopting a literal interpretation of 'second or successive[;]' (2) the purposes of the AEDPA; and (3) the Court's prior

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[101] *Id.* at 4.

[102] *See* Panetti v. Quarterman, 551 U.S. 930 (2007).

[103] *Bernard*, 820 F. App'x at 310.

[104] *Panetti*, 551 U.S. at 930.

[105] Ford v. Wainwright, 477 U.S. 399, 399 (1986). In *Ford*, the Supreme Court held that the Eighth Amendment to the U.S. Constitution prohibits the government from carrying out the death penalty upon insane prisoners; thus, the petitioner is entitled to an evidentiary hearing on the question of mental competency to determine whether his sentence should be carried out. *Id.*

[106] *Panetti*, 551 U.S. at 930.

[107] 28 U.S.C. § 2254 is the statute available for writ of habeas corpus for state prisoners. 28 U.S.C. § 2254.

[108] *Panetti*, 551 U.S. at 931.

decisions in the context of the pre-AEDPA abuse-of-writ doctrine."[109]

As to the first consideration, the State argued that a federal court can review a prisoner's *Ford* claim when it becomes ripe but only if the prisoner preserved the claim by including it in his initial habeas petition.[110] This approach, as the Court noted, is flawed because it requires defense attorneys "to file unripe (and in many cases, meritless) *Ford* claims in each and every Section 2254 application."[111] Thus, the Court stated that when analyzing the AEDPA's phrase "second or successive," the court must consider the implications of habeas practice when construing the extent of § 2254.[112] Ultimately, the Court concluded "that Congress did not intend the provisions of the AEDPA addressing 'second or successive' habeas petitions to govern a filing in the unusual posture presented here: a Section 2254 application raising a *Ford* based incompetency claim filed as soon as that claim is ripe."[113]

Next, the Court stated that its conclusion was further evidenced by the AEDPA's enumerated purposes of "further[ing] the principles of comity, finality, and federalism."[114] The Court specified that Congress's purposes when enacting the AEDPA and the practical effects of judicial holdings regarding these claims should inform its interpretation of AEDPA provisions, especially in instances where petitioners would potentially "forever los[e] their opportunity for any federal review of their unexhausted claims."[115]

Finally, the Court analyzed whether the petitioner's actions constituted an abuse of the writ.[116] The Court noted that there are exceptions to second-in-time habeas petitions that are barred by the terms of § 2244 and, in instances such as this, the Court is "hesitant to construe a statute . . . in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to benefit no party."[117] Thus, the Court held that the

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[109] Petition for Writ of Certiorari at 9, Anthony Donato v. United States, No. 18-7792 (2nd Cir. Feb. 1, 2019).

[110] *Panetti*, 551 U.S. at 943.

[111] *Id.*

[112] *Id.* at 945.

[113] *Id.*

[114] *Id.* (quoting Miller-El v. Cockrell, 537 U.S. 322, 337 (2003)).

[115] *Id.* at 945–46 (quoting Rhines v. Weber, 544 U.S. 269, 275 (2005)).

[116] *Id.* at 947.

[117] *Id.*

statutory bar set forth in § 2244(b)(2) against "second or successive" habeas applications "does not apply to a *Ford* claim brought in an application filed when the claim is first ripe."[118]

B. Fifth Circuit's Wrongful Application of Panetti *to Bernard's Case*

Similar to *Panetti*, Bernard's motion inherently hinges on a court's interpretation of the gatekeeping provisions of the AEDPA, specifically in § 2244(b)(2).[119] The Fifth Circuit ultimately concluded that the factual predicate for Bernard's *Brady* claim existed even before he filed his first habeas petition, so his second-in-time petition was successive.[120] Thus, the Fifth Circuit determined that the discoverability of the facts was determinative of whether Bernard met the requirement for filing a successive petition under § 2244(b)(2).[121] Because § 2244(b)(2) establishes such a high evidentiary standard, the court held that it did not have jurisdiction and held that it was an unauthorized successive habeas petition.[122]

The Fifth Circuit also attempted to distinguish *Panetti* from Bernard's *Brady* claims through its interpretation of the "ripeness" doctrine.[123] The Supreme Court establishes a twofold inquiry for questions regarding the ripeness doctrine where courts are required "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[124] In its opinion, the Fifth Circuit reasoned that the Supreme Court's holding in *Panetti*—that the second-in-time petition was not successive—was based on the fact that the *Ford* claim (or factual predicate) could not have existed at the time the first petition was filed and, thus, was not ripe.[125] In contrast, the Fifth Circuit held that the factual predicate in Bernard's case, his *Brady* claims, existed before Bernard filed his first habeas petition.[126] Thus, the Fifth Circuit held that Bernard's *Brady* claims were ripe at the time he filed

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[118] *Id.*

[119] United States v. Bernard, 829 F. App'x 309 (5th Cir.), *cert. denied*, 141 S. Ct. 504 (2020).

[120] *Id.* at 311.

[121] *Id.*; *see also* Blackman v. Davis, 909 F.3d 772, 778–79 (5th Cir. 2018).

[122] *Bernard*, 829 F. App'x at 311; *see also* Blackman, 909 F.3d at 780.

[123] *Bernard*, 829 F. App'x 310–11.

[124] Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

[125] *Bernard*, 829 F. App'x 310–11.

[126] *Id.* at 311.

his first habeas petition and, since he failed to preserve the claims by including them in his first petition, § 2244(b)(2) barred the successive habeas petition.[127]

Although the Supreme Court denied Bernard's subsequent application for a stay of execution and petition for a writ of certiorari, Justice Sotomayor wrote a dissent in which she analyzed the Fifth Circuit's ruling.[128] Essentially, Justice Sotomayor argued that the Court's analysis in *Panetti* applied to Bernard's case because it was not Congress's intention nor does it align with the goals of the AEDPA "to subject *Brady* claims to the heightened standard of Section 2244(b)(2)."[129] If the Court were to do so, it would adversely affect habeas practice and infringe on the constitutional rights of prisoners.

C. The Supreme Court's Reasoning in Panetti *Should Apply to Second-in-Time Habeas Petitions that Allege* Brady *Violations*

The standard that must be met for a *Brady* violation is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," or, more simply, a "reasonable probability of a different result."[130] However, the Fifth Circuit's rule requires that the withheld evidence must "establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense," or else the *Brady* claim is barred by the circuit's interpretation of the AEDPA's "second or successive" language.[131]

By instituting and upholding this rule, the Fifth Circuit directly contradicts the analysis set forth by Supreme Court precedent established in *Panetti*. It does not contemplate the three considerations set forth in *Panetti*.[132]

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[127] *Id.*

[128] Bernard v. United States, 141 S. Ct. 504 (2020) (Sotomayor, J., dissenting).

[129] *Id.* at 506–07.

[130] Kyles v. Whitley, 514 U.S. 419, 434–35 (1995).

[131] 28 U.S.C. § 2244(b)(2)(B)(ii).

[132] *See Bernard*, 141 S. Ct. at 506 (Sotomayor, J., dissenting).

i. Application of the First *Panetti* Factor to Bernard's Case

If the Fifth Circuit were to apply the first consideration set forth in *Panetti*[133] to the *Brady* claims in Bernard's case, it would quickly become evident that barring second-in-time *Brady* motions under § 2244(b)(2) "would 'produce troublesome results,' 'create procedural anomalies,' and 'close [the] door[] to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'"[134] It is unmistakable that Congress, in enacting the AEDPA, did not wish to prevent prisoners from filing *Brady* claims that could potentially reduce their sentences or save their lives.[135] Such a goal would directly conflict with the principles of habeas corpus and due process preserved in the U.S. Constitution. But for the *Brady* violations by the prosecution in Bernard's case, he would have had the chance to reduce his sentence to a life sentence, rather than being executed.[136]

ii. Application of the Second *Panetti* Factor to Bernard's Case

Continuing the application of the *Panetti* factors to the *Brady* claims in Bernard's case, the second consideration[137] also strongly contradicts the Fifth Circuit's rule.[138] As in *Panetti*, the AEDPA's concern for finality would not be implicated with *Brady* claims because federal courts would only be required to resolve claims at the time

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[133] *See id.* at 506–507. The first consideration is the effect of adopting a literal interpretation of 'second or successive" on habeas practice. Petition for Writ of Certiorari, *supra* note 109, at 9.

[134] Panetti v. Quarterman, 551 U.S. 930, 946 (2007) (quoting Castro v. United States, 540 U.S. 375, 380 (2003)).

[135] *See Bernard*, 141 S. Ct. at 507.

[136] Petition for Clemency Seeking Commutation of Death Sentence, *supra* note 3, at 3–4. *See also Jurors and Appellate Prosecutor Say Teen Offender Brandon Bernard Should Not be Executed*, DEATH PENALTY INFO. CTR. (Dec. 8, 2020), https://deathpenaltyinfo.org/news/jurors-and-trial-prosecutor-say-teen-offender-brandon-bernard-should-not-be-executed. Five of the original trial jurors in Bernard's case stepped forward before his execution stating that they support commuting his sentence as a result of the new evidence that diminishes Bernard's role in the crimes which had been suppressed by the prosecution. *Id.*

[137] The second consideration includes an evaluation of the purposes the AEDPA was enacted to serve. *See Panetti*, 551 U.S. at 945–46; *see also Bernard*, 141 S. Ct. at 506–507 (Sotomayor, J., dissenting).

[138] *See generally* United States v. Bernard, 820 F. App'x 309 (5th Cir. 2020).

of first filing when they come to light.[139] Further, *Brady* violations require a preliminary showing that there is a "reasonable probability of a different result" before it is allowed to proceed.[140]

iii. Application of the Third *Panetti* Factor to Bernard's Case

Finally, although *Brady* violations are technically "ripe" before the first habeas petition is filed, a second-in-time habeas petition that alleges previously undiscovered *Brady* violations does not constitute an abuse of the writ.[141] This is similar to *Panetti* in that if the reasoning of the Fifth Circuit were to apply, which would require the defense to preserve a claim that is factually unsupported at the time of filing the first habeas petition, then it would create a flood of "claims to be raised as a mere formality, to the benefit of no party" nor the judicial system as a whole.[142] Instead, it would undermine the principles of comity, finality, and federalism which are foundational to the AEDPA.[143]

Not only does the Fifth Circuit's rule conflict with Supreme Court precedent[144] but this interpretation is also extremely dangerous, especially in the context of capital cases like Bernard's. This rule allows prosecutors to avoid accountability and their duty to administer justice by concealing their violations, at least until after a prisoner's first habeas petition has been resolved.[145] As Judge Wynn stated in his concurrence in *Long v. Hooks*, "to subject *Brady* claims to the heightened standard of Section 2244(b)(2) is to reward investigators or prosecutors who engage in the unconstitutional suppression of evidence with a 'win.'"[146] Consequently, the Fifth Circuit rule allows a prisoner to be stripped of his right to a fair trial[147] and his right to challenge his conviction through the writ of habeas corpus as well.[148] This was the case for Bernard—his *Brady* claim was

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[139] *Panetti*, 551 U.S. at 946.

[140] *Bernard*, 141 S. Ct. at 506.

[141] *Id.*

[142] *Panetti*, 551 U.S. at 947.

[143] *See id.*

[144] *See id.*

[145] *See generally* United States v. Bernard, 820 F. App'x 309 (5th Cir. 2020).

[146] 972 F.3d 442, 486 (4th Cir. 2020) (Wynn, J., concurring).

[147] U.S. CONST. amend. V.

[148] U.S. CONST. art. I, § 9.

dismissed before it was able to be heard on its merits, and he was subsequently executed.[149]

V. CONCLUSION

The impact of a rule like the one utilized by the Fifth Circuit is that it undermines the concept of justice itself, which is foundational to American society. It allows prosecutorial misconduct to become the basis for convicting and sentencing individuals, depriving them of "life, liberty, or property, without due process of law."[150] Furthermore, this rule and others like it corrode the trust and faith of citizens in the American system of justice. If the judicial system's purpose is not to enforce the constraints of the U.S. Constitution and protect citizens' individual rights enumerated within it, our democracy fails.

Brady violations are distinguishable by nature from other second-in-time habeas claims because they are undiscoverable, even with diligence on the part of the defense attorney, unless the prosecution discloses them.[151] In order to further the AEDPA's purpose of finality as well as the constitutional guarantees for procedural fairness, courts need to recognize an exception to the § 2244(b)(2) bar on "second or successive" habeas petitions, as the Supreme Court did in *Panetti*.[152] As it is well known, "procedural fairness is necessary to the perceived legitimacy of the law."[153]

Brandon Bernard's right to life was taken from him without due process of the law. Although there is no guarantee that Bernard's death sentence would have been overturned if his second-in-time habeas petition had been examined under the correct analysis, he would have at least had the chance to be heard fully on the merits of his claim—the chance that his life could have been spared. Habeas corpus is a right that is crucial to safeguard individuals against arbitrary executive power, as stated at the beginning of this Note.[154] Brandon Bernard was explicitly denied that right in the

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[149] *See* United States v. Bernard, 820 F. App'x 309, 311 (5th Cir. 2020).

[150] U.S. CONST. amend. V.

[151] *See generally* Brady v. Maryland, 373 U.S. 83 (1963).

[152] Panetti v. Quarterman, 551 U.S. 930 (2007).

[153] KEVIN BURKE & STEVE LEBEN, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION, 44 CT. REV. 4, 7 (2008) (citing Tom. R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006)).

[154] *What You Should Know About Habeas Corpus*, *supra* note 22.

most dire, life-or-death situation because the Fifth Circuit refused to follow the analysis set forth in *Panetti* by the Supreme Court.[155] The denial of this right goes against the very foundational concepts of American democracy that we are taught in elementary school.

[155] *See* United States v. Bernard, 820 F. App'x 309, 310 (5th Cir. 2020).