**ORAL ARGUMENT SCHEDULED FOR JANUARY 13, 2005**

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**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 01-3013, 01-3127, & 03-3145**

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**UNITED STATES OF AMERICA,** **Appellee,**

**v.**

**JONATHAN JAY POLLARD,**
**Appellant.**

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**APPEALS FROM THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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**Crim. No. 86-207(TFH)**

## CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee, the United States of America, hereby states as follows:

A. Parties and Amici: The parties to this appeal are appellant, Jonathan J. Pollard; appellee, the United States of America; and *amici curiae* the American Civil Liberties Union of the National Capital Area, the National Association of Criminal Defense Lawyers, the American Association of Jewish Lawyers and Jurists, and 14 individuals.

B. Rulings Under Review: Appellant challenges several rulings of the district court: the January 12, 2001, denial of appellant's emergency motion for access to classified documents; the August 7, 2001, denial of appellant's motion for reconsideration of the January 12, 2001, Order; the November 12, 2003, denial of appellant's motion for modification of the January 12, 2001, Order (published at 290 F. Supp. 2d 165); the August 7, 2001, denial of appellant's motion for resentencing pursuant to 28 U.S.C. § 2255, (published at 161 F. Supp. 2d 1); and the November 12, 2003, denial of appellant's motion for reconsideration of the August 7, 2001, Order (published at 290 F. Supp. 2d 153). Appellant also seeks a certificate of appealability as to the issues raised in the § 2255 motion.

C. Related Cases: This Court affirmed the denial of appellant's first motion under 28 U.S.C. § 2255 in United States v. Pollard, 959 F.2d 1011 (D.C. Cir. 1992).

# I N D E X

## TABLE OF CASES



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* Cases chiefly relied upon are marked by an asterisk.

OTHER REFERENCES

## STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), appellee notes that all pertinent statutes and regulations not included in appellant's brief are set forth in an Addendum attached to this brief.

## ISSUES PRESENTED

In the opinion of appellee, the following issues are presented:

I. Whether this Court should deny appellant's request for a certificate of appealability from the denial of his second § 2255 motion where reasonable jurists could not debate whether the district court abused its discretion in concluding that the motion was procedurally barred for two independently sufficient reasons: (1) because it was not filed within the AEDPA's one-year statute of limitations; and (2) because appellant did not obtain this Court's authorization to file a second § 2255 motion in accordance with the AEDPA's gatekeeping requirements.

II. Whether the district court abused its discretion by denying appellant's motion for access to the classified information filed as part of the court record at the time of appellant's sentencing, where the Protective Order entered at that time requires a person seeking access to the classified information to comply with certain requirements and obtain the district court's permission, and where the district court determined that the request of appellant's counsel to access the

**classified information so that he could better support a clemency petition failed to established a "need to know" the information in order to assist the President in exercising his discretionary clemency power.**

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 01-3103, 01-3127 & 03-3145**

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**UNITED STATES OF AMERICA,** **Appellee,**

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**JONATHAN J. POLLARD,** **Appellant.**

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**APPEALS FROM THE UNITED STATES DISTRICT COURT**
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# BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

### A. Background

On June 4, 1986, appellant Jonathan Jay Pollard pleaded guilty to one count of conspiracy to deliver national defense information to a foreign government, in violation of 18 U.S.C. § 794(c). The charge arose from appellant's sale of large amounts of highly classified U.S. intelligence information to agents of the Israeli government between June 1984 and November 1985. On March 4, 1987, appellant (represented by Richard Hibey), was sentenced to life imprisonment by United States District Court Judge Aubrey Robinson. He did not file a direct appeal.

Three years later, on March 12, 1990, appellant (now represented by Hamilton Fox III) filed his first collateral attack pursuant to 28 U.S.C. § 2255. In it, he alleged that the government had breached its plea agreement (i) by arguing for a life sentence; (ii) by not limiting its allocution to the "facts and circumstances" of the case; and (iii) by failing to adequately advise the sentencing court of appellant's cooperation. Appellant also contended that, because the government "wired" his plea to his wife's, his plea was not voluntary. Finally, appellant asserted that, at his sentencing, the government had wrongly argued that he had breached his plea agreement by giving an unauthorized interview to journalist Wolf Blitzer. On September 11, 1990, Judge Robinson denied appellant's motion. 747 F. Supp. 797 (D.D.C. 1990). Appellant (first represented by Fox, and then by Theodore Olson, John Sturc, and Theodore Boutrous, Jr.) then appealed this decision. This Court affirmed the district court's denial of appellant's first § 2255 motion. 959 F.2d 1011 (D.C. Cir.), cert. denied, 506 U.S. 915 (1992).

B. Second § 2255 Motion

Eight years later, on September 20, 2000, Appellant (represented by current counsel, Eliot Lauer and Jacques Semmelman) filed his second § 2255 motion, styled as a Motion for Resentencing (A. 25). In it, he raised claims of ineffective assistance of

counsel relating to his representation by Mr. Hibey.[1/] On August 7, 2001, then-Chief-Judge Norma Holloway Johnson dismissed appellant's second § 2255 motion on two separate and independent grounds. 161 F. Supp. 2d 1 (D.D.C. 2001). The court first concluded that, because appellant had already filed one § 2255 motion, he had to comply with the gatekeeping requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA), by "first mov[ing] in the appropriate Court of Appeals for an order authorizing the district court to consider the second § 2255 motion." 161 F. Supp. 2d at 8 (citing 28 U.S.C. § 2244(b)(3)). Second, the district court concluded that appellant had filed his second § 2255 motion outside the one-year AEDPA statute of limitations. Id. at 10.

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[1/] Appellant claimed Hibey was ineffective because he: 1) failed to file a notice of appeal; 2) failed to argue that the government breached its plea agreement; 3) failed to request an adjournment of the sentencing after receiving a supplemental declaration of Secretary of Defense Caspar Weinberger; 4) failed to adequately rebut the assertions contained in the supplemental declaration or demand a hearing to address them; 5) failed to inform the sentencing court that he had been authorized to provide an interview to journalist Wolf Blitzer or demand a hearing to address this; 6) failed to demand a hearing at which the government would have to prove he disclosed classified materials during the second Blitzer interview; and 7) breached the attorney-client privilege by telling the sentencing court that Appellant had given the interviews against counsel's advice.

**C. The denial of the request for a certificate of appealability**

**On October 5, 2001, appellant filed a motion for reconsideration or, in the alternative, for issuance of a certificate of appealability (COA) (A-670). On November 12, 2003, Chief Judge Thomas F. Hogan, to whom the case had been reassigned, denied the motion and alternative request for a COA. 290 F. Supp. 2d 153 (D.D.C. 2003). After "carefully reviewing Judge Johnson's thorough discussion of the AEDPA and her conclusion that Mr. Pollard's second § 2255 motion . . . would have failed the pre-AEDPA 'cause and prejudice' test," Judge Hogan ruled that appellant's second § 2255 motion "was properly dismissed as a successive motion." Id. at 162-63. Judge Hogan also determined that "Judge Johnson correctly ruled that Mr. Pollard's motion was barred by the one year statute of limitations found in § 2255." Id. at 161. Accordingly, Judge Hogan denied appellant's COA request because "'a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that petitioner should be allowed to proceed further.'" Id. at 164 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).**

**D. The district court's ruling on the motion for access to classified documents.**

**Shortly after filing the second § 2255 motion, on November 29, 2000, appellant's current counsel filed an "Emergency Motion to Add**

to List of Defense Counsel Authorized to Access Sealed Docket Materials Pursuant to Protective Order" (A-289). The motion sought access to the classified portions of five documents filed at the time of appellant's sentencing, but redacted of their classified material: the Declaration of former Secretary of Defense Caspar W. Weinberger; appellant's Memorandum in Aid of Sentencing (authored by appellant himself); appellant's Second Memorandum in Aid of Sentencing (authored by his trial counsel); the government's Reply to Defendant's Sentencing Memorandum; and the transcript of a bench conference during the sentencing hearing.

Pursuant to a Protective Order issued by Judge Robinson in 1986 (A-72), appellant and his trial counsel were permitted access to the classified portions of these documents. The Protective Order further provides that:

> All other individuals other than defendant, above-named defense counsel, government counsel, appropriately cleared Department of Justice employees, and personnel of the originating agency, can obtain access to classified information and documents *only after having been granted the appropriate security clearances by the Department of Justice through the Court Security Officer and the permission of this Court*. (A-73; emphasis added.)

The 2000 emergency motion filed by appellant's current counsel represented that one of appellant's lawyers, Eliot Lauer, had been granted "Top Secret" security clearance by the Department of

Justice on November 2, 2000.[2/] Counsel sought the Court's permission, pursuant to the Protective Order, to review the classified portions of the documents "in order to represent his client effectively in various respects, including in connection with contemplated applications for executive clemency and/or commutation of sentence" (A-290). The motion specifically denied any intent to use the information in connection with the pending § 2255 motion.

The government opposed counsel's motion, arguing that counsel had not established a "need to know" the information, as required by Executive Order 12958, 60 Fed. Reg. 19825 (April 17, 1995) (A-327-34).[3/] The government cautioned that disclosure of the

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[2/] Appellant's other current lawyer, Jacques Semmelman, was subsequently granted "Top Secret" clearance.

[3/] This Executive Order was amended without change in this requirement by Executive Order 13292, 68 Fed. Reg. 15315 (March 25, 2003).

Appellant's previous collateral-proceedings counsel, Hamilton Fox, had also unsuccessfully sought the court's permission, in 1990, to gain access to the classified materials (A-363). Fox claimed that he sought access in order to fully prepare appellant's § 2255 motion to withdraw his guilty plea (A-367). Judge Robinson ruled that this stated reason did not establish a "need to know." 747 F. Supp. at 806-07. This Court affirmed without addressing the merits of that ruling. See 959 F.2d at 1031 n.15 ("Assuming *arguendo* that the district judge's refusal to direct the United States Attorney to provide appellant's new counsel with access to the Weinberger classified submission was erroneous, our examination of the material satisfies us that the error was harmless.").

classified "Top Secret" sentencing materials -- even to security-cleared counsel -- increases the risk of disclosure to unauthorized persons and, hence, of "exceptionally grave danger" to the national security (A-329).[4/]

The district court agreed and denied the motion on January 12, 2001, after hearing argument the previous day (A-440). Judge Johnson indicated that she had viewed the classified materials and found the exceptionally grave concern over national security to be warranted. She then concluded that appellant's counsel had not established a "need to know" the contents of the materials in order to address the arguments of those opposed to clemency. Judge Johnson reasoned that the President has access to the classified materials and can review them without counsel's assistance; that there was no evidence that the President had asked counsel about the contents of the classified materials; and that the President has available for review the memoranda of appellant's trial attorney, who had access to the classified materials and commented extensively on them at sentencing (A-442-43).

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[4/] "Top Secret" information is defined by Executive Order as information the unauthorized disclosure of which reasonably could be expected to cause "exceptionally grave damage to the national security." Executive Order 12958, as amended by Executive Order 13292, 68 Fed. Reg. 15315, Sec. 1.2(a)(1).

Within days, appellant's counsel moved for reconsideration and modification of the court's January 12 Order, asking the court to conduct a hearing at which the Court Security Officer would go through each redacted passage and testify as to which sentences within each passage actually contain information that, if disclosed, would pose a grave risk to national security (A-444-46). The court denied this motion on August 7, 2001 (A-635).

On August 16, 2001, appellant's counsel moved again for modification of the Court's January 12 Order (A-636). This motion was based on a letter that counsel had recently received from Court Security Officer Michael Macisso, who was responsible for the classified materials at issue. Macisso's letter was, in turn, in response to an inquiry from appellant's counsel asking Macisso whether any additional security clearance was required in order to access the classified materials (A-659). Macisso explained that:

> Even though your background investigations will support SCI [Sensitive Compartmented Information] access, there are other criteria which must be met, including an SCI indoctrination briefing and a "need to know" determination from the Court or the government. Chief Judge Norma Holloway Johnson's Memorandum Order, filed January 12, 2001, states that you have "not demonstrated a 'need to know' the contents of the classified materials." Absent a "need to know" ruling from the Court or the government, the Department of Justice will not be able to upgrade your clearance level or provide you access to this material. (A-650.)

Appellant's motion for modification claimed that the Macisso letter "effectively admit[ted]" that there would be no danger to national security if counsel were provided access to the classified materials, thus undercutting what counsel perceived to be a separate ground for the Court's January 12 Order (A-636-39).[5/]

While this motion was pending, the case was reassigned to Chief Judge Hogan. Thereafter, appellant's counsel filed a motion to "enlarge" the "scope" of his pending motion for modification based upon a letter from Assistant Attorney General Daniel J. Bryant in response to inquiries made on appellant's behalf by U.S. Congressman Anthony Weiner (A-749). In the letter, Mr. Bryant stated that the log in which instances of access to the classified documents are recorded showed 25 instances of access recorded between November 19, 1993, and January 12, 2001 (A. 754). The letter further stated that "[i]n some instances, a single individual accessed the documents on more than one occasion." (Id.).

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[5/] Meanwhile, appellant noted an appeal from the January 12, 2001, Order and the August 7, 2001, denial of the motion for reconsideration (A. 665). This Court thereafter ordered the appeal held in abeyance pending the resolution of the second motion for modification and the motion for reconsideration of the denial of appellant's second § 2255 motion, and ordered the appeals consolidated.

Judge Hogan held a hearing on the pending motion for modification (and the motion for reconsideration of the denial of appellant's second § 2255 motion), on September 2, 2003 (A-784). As he has in his appellate brief, appellant's counsel tried at the hearing to focus the court's scrutiny on alleged misrepresentations by the government, rather than on the ultimate issue of "need to know." In its written opposition to appellant's motion for access, the government, while arguing that counsel had not demonstrated a "need to know," also stated that counsel's "present clearance is insufficient to review the classified declaration of Secretary Weinberger, which contains Sensitive Compartmented Information (SCI)" (A-333). At the January 11, 2001, hearing before Judge Johnson, the prosecutor, while again arguing that counsel had not demonstrated a "need to know" the information, also characterized this as a failure of counsel to obtain the "right clearances" (A-424). Before Judge Hogan, appellant's counsel called the argument about clearances a "[g]overnment[] falsehood and concealment" that was exposed when Macisso's letter clarified that counsel's "Top Secret" clearance would permit access to the SCI information (A-788-89). Judge Hogan did not see it this way, noting that counsel had interpreted a sentence from Macisso's letter out of context (A-789). Judge Hogan explained that the rest of the paragraph, including the sentence that said the Department of Justice would

"not be able to upgrade your clearance level" absent a determination of a "need to know," showed that counsel needed a higher level of clearance conditioned on a "need to know" ruling (A-792).[6/]

Appellant's counsel then argued that the letter from Assistant Attorney General Bryant, stating that there had been 25 instances of access since 1993, supported his argument that he had a need to know. As counsel reasoned, these instances of access to the classified information must have been in connection with the clemency petitions appellant filed during that time period, and therefore demonstrated that counsel had an "equal need to know" what was in those materials (A-795-96). Judge Hogan expressed skepticism that the 25 "instances" of access had much significance,

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[6/] Judge Hogan stated, "I think there may be a confusion in the words here. I don't see that quite as fraud of the Government upon you when the agent [Macisso] says you 'will not be able to upgrade your clearance level' until you have a need to know ruling." (A. 792.)

Despite Judge Hogan's rejection of appellant's allegations of government falsehoods, counsel persists in the appellate brief in using similar rhetoric, accusing the government (at 23) of creating "the false impression that clearance would remain an insurmountable obstacle *even if* the Court found that counsel had a 'need-to-know,'" and referring to the Macisso letter (at 22) as containing a "startling admission," among other examples. As Judge Hogan clearly understood, this rhetoric does nothing to answer the ultimate issue of whether counsel has demonstrated a need to know (A-792).

noting that Bryant's letter had stated that in some instances the same individual accessed the documents more than once (A-798).[7/]

In his subsequent written ruling, Judge Hogan found that appellant had offered "no new justification" for the Court to determine that counsel had a "need to know" the classified information. 290 F. Supp. 2d 165, 166 (D.D.C. 2003). Noting that clemency had been denied three times previously, the Court determined that counsel could not demonstrate a "need to know" in support of a "speculative possibility of executive clemency." Id.

## SUMMARY OF ARGUMENT

The district court correctly determined that appellant's second § 2255 motion was procedurally barred for two independently sufficient reasons: (1) because it was filed outside of the AEDPA's one-year statute of limitations; and (2) because appellant did not obtain this Court's authorization to file a second § 2255 motion in accordance with the AEDPA's gatekeeping requirements. These conclusions are not fairly debatable by reasonable jurists.

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[7/] Counsel also argued that the "astonishing" letter from Bryant disclosing 25 instances of access revealed that the prosecutor had misled Judge Johnson at the January 11, 2001, hearing when he argued that the classified information was outdated and irrelevant (A-796). What the prosecutor had actually argued is that, because the President could obtain a new, updated damage assessment when considering any clemency petition, he would not need to rely on the classified documents written a decade ago in resolving a new clemency petition (A-426-27).

Therefore, this Court should deny appellant's request for a certificate of appealability if it concludes that the district court was correct in either of these two procedural rulings.

The district court did not abuse its discretion by denying appellant's motion for access to the classified information filed as part of the court record at the time of appellant's sentencing. The Protective Order entered at that time requires any person seeking access to the classified information to comply with certain requirements and to obtain the permission of the district court. The district court properly denied access to appellant's counsel because his request to see the information in order to support a clemency petition failed to establish a "need to know." Clemency determinations are committed to the sole discretion of the President, unfettered by procedural requirements. The district court did not abuse its discretion by determining that appellant had not demonstrated a "need to know" the classified information in order to assist the President in exercising his clemency power.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY DETERMINED THAT APPELLANT'S § 2255 MOTION WAS PROCEDURALLY BARRED AND THAT NO CERTIFICATE OF APPEALABILITY SHOULD ISSUE.

In this case, the district court determined that appellant could not obtain review of his second § 2255 motion because the

motion was barred by the statute of limitations *and* because appellant did not obtain authorization from this Court to file a second § 2255 motion. Either procedural bar is fatal to appellant's motion.[8/] Also fatal is appellant's failure to obtain a certificate of appealability allowing an appeal from the denial of this motion. Although he now seeks a COA from this Court, for the reasons that follow, none should be granted.

A. Standard of review.

"Under [28 U.S.C.] § 2253, a COA may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" United States v. Saro, 252 F.3d 449, 453 (D.C. Cir. 2001). "In Slack v. McDaniel, the Supreme Court held that when a 'district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue . . . if the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Id. (quoting

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[8/] Appellant has made no attempt to show that he could meet the AEDPA's gatekeeping requirements for obtaining this Court's authorization to file a second § 2255 motion. See 28 U.S.C. § 2255 ¶ 8. Therefore, the only question (which the Court need not answer if it agrees that appellant's claims are time-barred), is whether the AEDPA's gatekeeping requirements apply to appellant's motion.

Slack, 529 U.S. at 478). Appellant cannot make either showing, much less both. Thus, jurists of reason would not find it debatable whether the district court was correct in either of its procedural rulings or whether appellant has stated a valid claim of the denial of a constitutional right.

Once a COA has issued, as a general principle, the trial court's findings of fact in a § 2255 proceeding are reviewed for clear error, while its conclusions of law are reviewed *de novo*. United States v. Weaver, 234 F.3d 42, 46 (D.C. Cir. 2000).

### B. No evidentiary hearing was necessary to determine that appellant's second § 2255 motion was barred by the AEDPA's statute of limitations.

Appellant's second § 2255 motion -- filed 13 years after appellant was sentenced -- is clearly barred by the AEDPA's one-year statute of limitations. That period of limitation begins to run on "the date on which the judgment of conviction becomes final," unless any of three other limitations periods is applicable. 28 U.S.C. § 2255 ¶ 6(1). Appellant claims that the limitation period of ¶ 6(4) -- which begins on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence" -- applies to him. It is not fairly debatable that the district court correctly rejected this argument without the need for an evidentiary hearing.

1. Appellant's knowledge of the "facts" supporting his claim

Appellant claims (at 47) that it is "not correct, as Judge Johnson found, that appellant actually 'knew the acts or omissions of counsel supporting his claim . . . years before May 2000'" (quoting 161 F. Supp. 2d at 9 n.5). Appellant further argues (at 48) that the district court improperly "lumped all of the claims together, and did not perform a claim-by-claim analysis." But appellant fails to put forth any "claim" for which the district court's conclusion is not correct. Although he posits (at 48) that "there is no evidence that Pollard knew before 2000 that Hibey had never demanded an evidentiary hearing on the allegation of harm in the Weinberger Supplemental Declaration," to simply enunciate that claim is to defeat it. As the district court correctly found, appellant knew well before 2000 that Hibey had not "demanded" an evidentiary hearing at appellant's 1987 sentencing. 161 F. Supp. 2d at 9 n.5. Appellant was there. He knew that his sentencing was not adjourned so that an evidentiary hearing on the government's claims could be conducted. Appellant thus also knew -- well before 2000 -- that Hibey had not demanded further proof from the government of the harm appellant's crime had caused. No affidavit

from Hibey or Fox was required to establish appellant's knowledge of these purported "omissions."[9/]

What appellant is really complaining about is that he did not discover until 2000 the purported "material and prejudicial deficiencies in Mr. Hibey's representation" of him. (A-43 (Pollard's 8/28/00 Dec. at ¶ 59). Appellant's lack of knowledge of

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[9/] This case is thus distinguishable from the cases relied upon by appellant (at 49). In Mandarino v. Ashcroft, 290 F. Supp. 2d 253, 260 (D. Conn. 2002), the district court found the petitioner's § 2255 motion timely because, at the time of his guilty plea, he was advised that he would be able to seek a waiver of deportation from the INS upon the completion of his sentence, and he did not learn otherwise until he received notice from the Immigration and Naturalization Service (INS) that deportation proceedings were being commenced and he was subject to removal based on a statute enacted after his guilty plea. The district court held that his motion, filed within one year of the INS notice and within one year of the Supreme Court's decision interpreting the statute governing waivers of deportation, was timely. In United States v. Smith, 101 F. Supp. 2d 33, 337-38 (W.D. Pa. 2000), the government agreed that the petitioner's motion was timely because it was filed within one year of petitioner learning that the federal Bureau of Prisons did not consider his federal sentence to have run concurrently with his state sentences, despite the fact that the state courts had ordered the state sentences to run concurrent with petitioner's federal sentence. And in Lewis v. United States, 985 F. Supp. 654, 657 (S.D. W. Va. 1997), the court ruled that the limitations period of § 2255 ¶ 6(4) began on the date on which the petitioner learned of the fact that a document was transmitted by private carrier, not by U.S. mail, and therefore could not be the basis for a mail fraud conviction. The court did not rule that the limitations period began on the date that petitioner learned of the legal significance of this fact; to the contrary, it was the discovery of the fact itself -- that the document had been transported by private carrier (a fact that had not been disclosed by the government) -- which triggered the one-year limitation period. Id. at 656-57.

his legal "right[s]" to a hearing or an adjournment is irrelevant to the § 2255 statute-of-limitations calculus.[10/]

In a transparent attempt to avoid the plain language of § 2255 ¶ 6(4) -- which refers to "the *facts* supporting the claim or claims presented" -- appellant asserts (at 50) that the "prevailing norms of the legal profession . . . are *facts*." The ramifications of this argument would be profound. If accepted, appellant's argument would mean that the AEDPA's statute-of-limitations clock would never begin running until a petitioner first learned, for example, that an

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[10/] See, e.g., LoCascio v. United States, 267 F. Supp. 2d 306, 324 (E.D.N.Y. 2003) (dismissing motion as time-barred where petitioner "certainly knew of the joint defense and of [co-defendant] Gotti's control of counsel many years ago," although he may not have "know[n] until recently of [his attorney's purported] flagrant deviation from his professional responsibility . . . and the legal consequences of those known facts, namely the claimed ineffective assistance of counsel"); Candelaria v. United States, 247 F. Supp. 2d 125, 130 (D.R.I. 2003) ("[T]he 'facts' which matter in the present case are those which existed at the time of the plea colloquy -- namely, that petitioner was not advised of the factual basis of the charges against him, that he was not informed of the state's burden of proof, that he was not told which constitutional rights he would forego by pleading guilty, and that he was not notified that he was facing deportation upon entering a guilty plea. Whether petitioner knew of the legal consequences of those 'facts,' i.e., that the state conviction, therefore, was invalid, is irrelevant for § 2255 purposes."); Fraser v. United States, 47 F. Supp. 2d 629, 630 (D. Md. 1999) ("The *fact* upon which the present motion is based is that Mr. Fraser's 1981 discharge restored his civil rights. Whether anyone -- be it Mr. Fraser or any of his prior attorneys -- appreciated the legal effect of the fact that he had received the 1981 discharge prior to [present counsel]'s having appreciated it is quite beside the point.") (emphasis in original).

attorney had a responsibility under prevailing professional norms to "consult with the defendant on important decisions" or to "keep the defendant informed of important developments in the course of the prosecution," Strickland, 466 U.S. at 688. Every assertion that an ineffective-assistance-of-counsel claim was time-barred by the AEDPA would thus be converted into an analysis of the petitioner's subjective understanding of the prevailing professional norms. Rather than objectively analyzing the historical facts that make up a prisoner's ineffective-assistance-of-counsel claim, courts would be reduced to asking questions such as, "Did the prison library contain a copy of the ABA Standards for Criminal Justice and when did the prisoner read it?"

If a prisoner raises, for example, a conflict-of-interest claim, the court's role is to assess when the prisoner first learned of (or could have learned of through due diligence) the historical facts that amounted to that conflict (i.e., when the prisoner learned, for example, that his attorney had earlier represented a prosecution witness). The court's role is not then to ask when did the prisoner glean, via reference to caselaw or ABA standards, that counsel has a duty to provide conflict-free representation. Similarly, if the prisoner raises an ineffective-assistance claim premised on his attorney's failure to investigate an alibi, the court's role is to ask when the prisoner learned that counsel had

not interviewed anyone on the prisoner's list of alibi witnesses. The court's role is not to assess when the prisoner first learned, via a conversation with his newly hired attorney, that counsel has a professional duty to investigate all viable defenses.[11/]

In the present matter, appellant knew by the conclusion of his 1987 sentencing hearing that his counsel had not moved for an adjournment or sought an evidentiary hearing. Further, appellant certainly knew when he read counsel's sentencing memorandum that counsel had informed the court that appellant's Blitzer interviews had been given against counsel's advice. Appellant also knew by the end of his sentencing hearing that his counsel had not argued to the court that the government had breached its plea agreement. And it is undisputed that appellant knew by at least 1992 (the date of this

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[11/] Willams v. Callahan, 938 F. Supp. 46 (D.D.C. 1996), relied on by appellant (at 50), provides no support for his assertion that prevailing professional norms are "facts" under § 2255 ¶ 6(4). Williams was a legal malpractice case in which the court explained that, in order to make a *prima facie* case, "expert testimony proving the applicable standard of care is an essential element." Id. at 50. Williams has nothing to do with collateral attacks on criminal convictions or with the AEDPA's statute of limitations. In the criminal setting, the Supreme Court treats the question of whether counsel was "deficient" as a mixed question of fact and law that is reviewed *de novo*. Strickland, 466 U.S. at 698. That the applicable standard of care may be a "fact" necessary to prove breach of that standard for purposes of a civil legal malpractice claim says nothing about what "facts" trigger the AEDPA's statute of limitations. Appellant has cited no case in which any court has held that knowledge of prevailing professional norms is a "fact" that triggers § 2255 ¶ 6(4).

Court's decision affirming the denial of appellant's first collateral attack) that his counsel had not filed a notice of appeal.[12/] In short, well before 2000, appellant knew all of the historical facts that make up his present claims of ineffective assistance of counsel. Thus, the district court was correct in concluding that appellant did not file his motion "within one year of the date on which he discovered the facts supporting his claims." 161 F. Supp. 2d at 11.

The Seventh Circuit's decision in Owens v. Boyd, 235 F.3d 356 (2000), demonstrates the proper mode of analysis in the present matter, a mode of analysis that Judge Johnson and Judge Hogan both correctly followed. In Owens, the petitioner was charged with

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[12/] In his "Statement of the Case and of the Facts," appellant makes much of Hibey's failure to file a Notice of Appeal from the life sentence, arguing (at 4-5) that this "egregious" conduct was the "culmination of [Hibey's] woefully deficient representation of Pollard before and during sentencing," and (at 8), that he suffered "enormous prejudice." We do not dispute that failure to file a notice of appeal may, in certain circumstances, be grounds for an ineffective-assistance-of-counsel claim. Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). In this case, however, it is not clear that appellant is continuing to press this claim on appeal because he offers no argument in support of it, nor has he even attempted to explain why he was not on notice of the fact that his counsel had not filed an appeal when he read this Court's opinion issued in 1992. See Pollard, 959 F.2d at 1015 (after sentencing, "Pollard did not appeal his conviction"; and after an unsuccessful Rule 35 motion, Pollard "again, did not appeal"). Appellant showed no diligence, in the eight years after this Court's opinion was issued, in pursuing the issue of whether his counsel was ineffective for failing to file a notice of appeal or to consult with him about appealing.

aiding a murder by providing an AK-47 to the shooter. At trial, petitioner testified that he provided the shooter with the weapon only because he feared violence at the hands of fellow gang members. Id. at 358. Based on this testimony, Owens's counsel asked the trial court to instruct the jury on a coercion theory of the defense. The trial court declined and Owens was convicted. Owens's appellate counsel then argued that a recent Illinois Supreme Court decision (People v. Serrano) permitted the coercion instruction. The court of appeals rejected this argument. In his subsequently filed § 2254 motion, Owens contended that his "trial counsel was ineffective for making a doomed coercion defense," and that his "appellate counsel was ineffective for not arguing that trial counsel had been ineffective (attempting, instead to vindicate trial counsel's strategy by relying on Serrano)." Id. at 358-59. In arguing that his § 2254 motion was timely under AEDPA, Owens, like appellant here, argued that "the year to file a federal petition begins when a prisoner *actually understands* what legal theories are available." Id. at 359 (emphasis in original).

The Seventh Circuit rejected Owens's contention: "Time begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." Moreover, the Owens court ruled, all of the facts relating to Owens's ineffective-assistance-of-trial-counsel claim

were "known at trial" and all of the facts supporting Owens's ineffective-assistance-of-appellate-counsel claim were "readily available" to him by simply "read[ing] the brief filed on his behalf." 235 F.3d at 359-60. See also Brackett v. United States, 270 F.3d 60, 69 (1st Cir. 2001) ("We think that the reference in subsection (4) was to basic, primary, or historical facts, as that is the sense in which Congress has used similar language elsewhere." (citing parallel habeas provisions)); cf. Hasan v. Galaza, 254 F.3d 1150, 1154-55 & n.3 (9th Cir. 2001) (AEDPA clock on ineffective-assistance claim did not start until petitioner learned of romantic relationship between man accused of tampering with petitioner's jury and prosecution's main witness, but warned that "this is not to say that [petitioner] needed to understand the legal significance of those facts -- rather than simply the facts themselves -- before the due diligence (and hence the limitations) clock started ticking").

2. Due diligence

There was no reason for the district court to look outside the existing record to determine that appellant had not exercised "due diligence" in discovering the factual basis for his claims.[13/]

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[13/] Other circuits have reviewed the district court's determination of whether a petitioner exercised due diligence under the AEDPA for clear error. See, e.g., Aron v. United States, 291 F.3d 708, 711 (11th Cir. 2002); Montenegro v. United States, 248 F.3d 585, 591 (7th Cir. 2001), *partially overruled on other grounds*

(continued...)

Appellant's excuse for his failure to act with any sort of "due diligence" hinges on the core premise that the government misled him in 1990 when it praised the work of Mr. Hibey in its opposition to appellant's motion to withdraw his guilty plea. Citing to a single paragraph in that opposition -- where the government noted that Hibey's performance was "skillful" and his pleadings and sentencing allocutions "eloquent" -- appellant now claims (at 41) that the government's "deception" induced his inaction. According to appellant (at 41), this "deception," allegedly abetted by Fox's concession that appellant did not challenge the effectiveness of trial counsel, led the district court judge and this Court to rely on trial counsel's performance in finding that the government had not breached the plea agreement. "Had the Government acknowledged the truth about Hibey's performance," appellant argues (at 41), this Court would have concluded that the government had breached the plea agreement and would have vacated appellant's life sentence. This circular argument lacks merit and is not supported by the cases upon which appellant relies.

First, appellant's assertions (at 40, 42) that the government "purposely misled" and "affirmatively misled" him about Hibey's performance assume that the government breached the plea agreement

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[13]/(...continued)
*by* Ashley v. United States, 266 F.3d 671 (7th Cir. 2001).

and that Hibey was deficient for failing make that argument in the trial court. But the government's position has always been that it did *not* breach the plea agreement. See Pollard, 959 2d at 1024 (concluding government did not violate promise not to recommend life sentence); id. at 1026 (concluding government did not violate agreement to bring cooperation to court's attention).[14/] There being no breach, there was nothing deficient about Hibey's failure to raise the issue in the trial court or to appeal based on such a claim. Moreover, Hibey *did* represent appellant at the 1987 sentencing in a "skillful" and "eloquent" manner. Even the most cursory glance at appellant's own § 2255 Exhibits -- including the 45-page "Second Memorandum in Aid of Sentencing," authored by Hibey (A-112) and the 64-page sentencing transcript (A-139) -- reveals that Hibey was, as the government accurately stated in its responsive papers, a forceful and compelling advocate on behalf of his client.

Second, the suggestion that appellant relied on the government's advocacy about his trial attorney's performance -- a single paragraph in a 50-page pleading (A-171) -- to delay

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[14/] This Court found it "unnecessary" to decide whether the government breached the limitation on allocution to the "facts and circumstances" of appellant's offenses because even if it had, the breach would not have been a "fundamental defect" resulting in a "complete miscarriage of justice." 959 F.2d at 1028.

investigating his ineffective-assistance-of-counsel claim defies credulity. Appellant now claims (at 42) that he "was entitled to take the Government at its word[,] [a]bsent a triggering event that would have placed him on inquiry notice that the Government had lied." But at the time the government made its purportedly false allegations about Hibey's performance, appellant was simultaneously arguing that the government had breached its plea agreement. Appellant's current claim thus requires this Court to believe that when appellant was arguing in 1990 that the government had *broken its word* and breached its agreement, he was at the same time *accepting the government's word* that Hibey had been a skillful advocate. As Judge Johnson correctly found, Pollard's excuse for his lack of diligence is simply not "persuasive." 161 F. Supp. 2d at 11.

Third, Banks v. Dretke, 124 S. Ct. 1256 (2004), relied on by appellant (at 43), does not support appellant's argument that the government's assertions in its 1990 responsive papers that Hibey was "skillful" and "eloquent" were "lie[s]" that should excuse appellant's 10-year silence regarding his ineffective-assistance-of-counsel claim. In Banks, a capital-murder case, the state violated its obligation under Brady v. Maryland, 373 U.S. 83 (1963), to disclose impeaching evidence about two essential prosecution witnesses. The Brady violation began with the state's pretrial

assertion that it would provide all discovery without the need for motions, continued throughout the trial when the witnesses testified untruthfully, and persisted throughout state collateral-review proceedings when the state denied petitioner's assertions that it had failed to turn over Brady material. Banks, 124 S. Ct. at 1263-67. The Supreme Court held that the petitioner had shown cause for his procedural default in state court based on the state's misleading representations that it had complied with its Brady obligations and its persistence in hiding the impeaching material by denying the petitioner's Brady assertions on collateral attack. Id. at 1273-74.

The Court relied upon its decision in Strickler v. Greene, 527 U.S. 263 (1999), in which it had found cause for the petitioner's failure to raise a Brady claim in state court based on three factors equally applicable in Banks:

> (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the [State] confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government.

Banks, 124 S. Ct. at 1273 (quoting Strickler, 527 U.S. at 289) (internal quotation marks and footnote omitted by Banks Court).

These three factors -- directly applicable in the case of an alleged Brady violation -- are wholly inapplicable here, where

appellant has never alleged that the government withheld Brady material. They provide no support for appellant's assertion that he should be excused for failing to exercise due diligence based on the government's representation, in response to his 1990 motion, that his trial counsel had performed "skillful[ly]." This representation, though not made in the context of responding to a claim of ineffective assistance, is at bottom a representation that goes to an issue of law: whether counsel was deficient. Banks does not hold that cause can be based on an opponent's representations about an issue of law.[15/] No evidentiary hearing was required where there was no basis for appellant's argument that he was induced into inaction by the government.

Nor does appellant make a case for an evidentiary hearing by arguing (at 44) that the district court relied on the fact that appellant was represented by multiple counsel between his sentencing and the time he retained current counsel. See 161 F. Supp. 2d at 7 n.3 & 12. Judge Johnson concluded that appellant's assertion that the government's representations had deceived him was undermined by the fact that he had been represented by multiple counsel since

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[15/] We do not quarrel with appellant's argument (at 44), based on Banks, that he "was 'entitled to treat the prosecutor's submissions as truthful'" (quoting Banks, 124 S. Ct. at 1276). But the prosecutor's statements about trial counsel's performance *were* truthful, and therefore provide no basis for appellant's argument that he was deceived into inaction.

those representations were made. Id. at 12. Although appellant now argues that he has had only one other lawyer, Larry Dub, since the enactment of the AEDPA, his earlier representation by several attorneys, including several who represented appellant on appeal before this Court, was certainly relevant to the district court's determination that he was not deceived by the government's representations in its 1990 opposition.[16/] As the Second Circuit stated in Wims v. United States, 225 F.3d 186, 190 (2000), cited repeatedly by appellant (at 39-41), "[t]he proper task . . . is to determine when a duly diligent person in petitioner's circumstances would have discovered" the factual basis for his claim. A duly diligent person in appellant's circumstances is one who has had numerous attorneys working on his case -- including several who argued that the government had breached the plea agreement -- during the period in which he claims to have been deceived by the

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[16/] Thus, appellant's reliance (at 45) on Aron v. United States, 291 F.3d 708 (11th Cir. 2002), is misplaced. In Aron, the Eleventh Circuit stated that "a petitioner's failure to exercise due diligence before AEDPA was enacted cannot support a finding that a petition fails to satisfy the timeliness requirement of § 2255 [¶6](4)." Id. at 713. Even if this statement is correct -- and we are not at all certain it is -- the Aron court went on to make clear that "in evaluating whether a petitioner exercised due diligence *after* [the date of the enactment of the AEDPA], a court should consider any previous actions the petitioner took to assess what it would have been reasonable for him to do after that date." Id. (emphasis in original). That is all that Judge Johnson did in this case.

government. There is no need for an evidentiary hearing to determine what questions these attorneys asked appellant during the course of their representation of him.

3. Equitable tolling

This Circuit has yet to determine whether the AEDPA's statute of limitations is subject to equitable tolling. United States v. Cicero, 214 F.3d 199, 203 (D.C. Cir. 2000). Other circuits that have employed equitable tolling in the AEDPA context have done so "'only sparingly'" and only "'if "extraordinary circumstances" beyond a prisoner's control make it impossible to file a petition on time.'" Id. (citations omitted). In the present matter, the district court determined that appellant could not "establish that 'extraordinary circumstances' beyond his control" prevented him from filing his motion on time. 161 F. Supp. 2d at 13. Because this conclusion is correct, there is no need for this Court to decide whether equitable tolling is permitted by the AEDPA.

Appellant argues (at 46-47) that an evidentiary hearing should have been held because of the "unique circumstances here, in which the Government's misrepresentations (compounded by habeas counsel) led the defendant to believe, plausibly but incorrectly, that he had no grounds for relief based upon counsel's performance."[17/] To the

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[17/] Appellant cites (at 46) Delaney v. Matesanz, 264 F.3d 7 (continued...)

contrary, the district court, relying on the extant record, correctly concluded that appellant did not demonstrate due diligence in attempting to learn the factual basis for his claim. See *supra* at 23-30. This failure alone dooms any "equitable tolling" argument. See, e.g., Drew v. Department of Corrections, 297 F.3d 1278, 1290 n.5 (11th Cir. 2002) ("equitable tolling has always required a showing of diligence"), cert. denied, 537 U.S. 1237 (2003); see also Baldayaque v. United States, 338 F.3d 145, 150 (2d Cir. 2003) ("To equitably toll the one-year limitations period, a petitioner must show that extraordinary circumstances prevented him from filing his petition on time, and he must have acted with reasonable diligence throughout the period he seeks to toll.") (quotation and citation omitted). Further, the extant record amply

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[17/](...continued)
(1st Cir. 2001), and Curtis v. Mount Pleasant Correctional Facility, 338 F.3d 851 (8th Cir.), cert. denied, 124 S. Ct. 837 (2003), as support for his argument. In each case, however, the court of appeals affirmed the lower court's conclusion -- reached without an evidentiary hearing -- that the extraordinary remedy of equitable tolling was *not* mandated. 264 F.3d at 15; 338 F.3d at 855-56.

demonstrates that there were no government "misrepresentations."[18] See *supra* at 24-25.

Appellant's second § 2255 motion was not filed within one year of the date that his conviction became final, and appellant cannot establish the applicability of any other limitations period under the AEDPA. These conclusions are not debatable by jurists of reason on this record. If the Court agrees that appellant's motion is time-barred, it need not resolve issues related to the applicability of the AEDPA's gatekeeping requirements, discussed below, and should instead deny appellant's request for a certificate of appealability and dismiss his appeal of the denial of his second § 2255 motion.

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[18] Appellant thus draws no support for his argument from Baldayaque, in which the court held that the actions of appellant's lawyer "were far enough outside the range of behavior that reasonably could be expected by a client that they may be considered 'extraordinary.'" 338 F.3d at 152. In Baldayaque, the appellant had, through his wife and a friend, retained a lawyer for the specific purpose of filing a § 2255 motion. The attorney not only failed to file the motion, but also wrongly advised that it was too late to file such a motion when it was not, filed a different, frivolous motion that he erroneously represented had merit, did no legal research on the appellant's case, never spoke to the appellant, and never made any effort to inform the appellant about the status of the case. Id. at 152. In this case, by contrast, appellant's former counsel, Hamilton Fox, filed a lengthy, well researched motion to withdraw appellant's guilty plea, which included extensive references to the record and citations to authority (A-156, 158). Fox's actions provide no basis for asserting that the AEDPA statute of limitations should be equitably tolled.

**C. No evidentiary hearing was required to determine that appellant did not establish cause for his failure to raise ineffective assistance of counsel in his first § 2255 motion.**

**1. Legal standards**

**As the district court concluded, appellant's second § 2255 motion was procedurally barred not only by the statute of limitations, but also by the "gatekeeping" requirements of the AEDPA, with which appellant failed to comply. Under the AEDPA, a defendant seeking to file a second § 2255 motion must first obtain an order from the appropriate court of appeals authorizing the district court to consider the motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255 ¶ 8. A petitioner whose first motion was filed before the AEDPA's enactment may be held to this gatekeeping requirement as long as its application would not be "improperly retroactive." United States v. Ortiz, 136 F.3d 161, 166 (D.C. Cir. 1998). In order to lay the foundation for establishing an improper retroactive effect, appellant must first establish that "he would have met the former cause-and-prejudice standard under McCleskey [v. Zant, 499 U.S. 467 (1991)] and previously would have been allowed to file a second § 2255 motion, but could not file a second motion under the AEDPA." Ortiz, 136 F.3d at 166. Because appellant has not met this foundational requirement, he necessarily has failed to establish**

that application of the gatekeeping requirement to his second § 2255 motion is improperly retroactive.[19/]

> Under McCleskey,
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> > the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. Objective factors that constitute cause include "'interference by officials'" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." In addition, constitutionally "[i]neffective assistance of counsel . . . is cause." Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. Once the petitioner has established cause, he must show "'actual prejudice' resulting from the errors of which he complains."

499 U.S. at 493-94 (citations omitted). It is the petitioner's burden to show cause and prejudice, and the petitioner's "opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard." Id. at 494. Further, the McCleskey Court explained, application of the

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[19/] Because appellant cannot establish cause and prejudice for failing to raise his ineffective-assistance claim in his first § 2255 motion, this Court need not address whether the district court was the proper court to make that ruling in the first instance, or whether it should have been made by this Court on a request for authorization to file a second § 2255 motion. As we discuss *infra*, no reasonable jurists could debate whether appellant has established cause or prejudice, thus appellant's COA should be denied and the appeal of the denial of his second § 2255 motion dismissed.

cause and prejudice standard is not meant to "imply that there is a constitutional right to counsel in federal habeas corpus," as there is not. Id. (citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1990)).

2. Analysis

Appellant contended in the district court -- as he does now (at 52) -- that the "cause" of his failure to raise an ineffective-assistance-of-counsel claim in his first § 2255 motion was "an undisclosed conflict that rendered [his collateral-proceedings counsel, Fox] unwilling to criticize Hibey irrespective of the consequences to his client." As Judge Hogan correctly recognized, however, "a defendant is not entitled to the assistance of counsel in connection with a § 2255 motion in the first place." 290 F. Supp. 2d at 162-63. As a matter of law, then, Pollard cannot claim "cause" stemming from the alleged deficiencies of his collateral-proceedings attorney. See Coleman v. Thompson, 501 U.S. 722, 752 (1991) (because there is no constitutional right to an attorney in post-conviction proceedings, petitioner cannot establish cause by claiming constitutionally ineffective assistance of counsel in such proceedings); Finley, 481 U.S. at 555 (no constitutional right to counsel when attacking a conviction that has become final); see also Rouse v. Lee, 339 F.3d 238, 250 (4th Cir. 2003) (because no constitutional right to counsel in federal habeas proceedings,

attorney error attributable to petitioner), cert. denied, 124 S. Ct. 1605 (2004); Callins v. Johnson, 89 F.3d 210, 213 (5th Cir. 1996) (because no constitutional right to counsel in habeas proceedings, "no error by habeas counsel can ever constitute cause").

In a futile effort to escape the Coleman bar, appellant argues (at 52-53) that Fox's alleged "conflict" is "a factor 'external to the defense,'" which, unlike ordinary attorney error, constitutes cause. He concludes (at 53) that the "acts of a conflicted (or otherwise unethical) habeas attorney are not imputed to the client, since the attorney is not acting in the interests of the client." This Court should reject appellant's strained effort to manufacture "cause" by re-labeling Fox's purported ineffectiveness as a "conflict of interest." Because appellant had no right to counsel for his § 2255 motion, inadequate representation in litigating that motion, even if precipitated by collateral-proceedings counsel's conflict of interest, cannot establish cause for failure to raise a claim that could have been raised. See, e.g., Nevius v. Sumner, 105 F.3d 453, 459-60 (9th Cir. 1996) (alleged conflict of first habeas counsel, who were also counsel at trial and on appeal, cannot establish cause for failing to assert ineffectiveness in first

habeas petition); Moran v. McDaniel, 80 F.3d 1261, 1271 (9th Cir. 1996) (same).[20/]

Even assuming arguendo that appellant could rely on Fox's alleged ineffectiveness to justify appellant's failure to raise an ineffectiveness-of-sentencing-counsel claim in his first § 2255 motion, Judge Johnson correctly determined that appellant did not "meet his burden" of alleging facts showing that Fox was either conflicted or ineffective. 161 F. Supp. 2d at 5. Appellant attacks this ruling too, arguing (at 53) that, "without *any* evidence to support her finding, Judge Johnson somehow determined that Fox had engaged in a 'strategy' not to raise ineffective assistance."

In making this argument, appellant ignores two fundamental truisms. First, it was his burden to allege sufficient facts to establish legal "cause." McCleskey, 499 U.S. at 494. Thus, he was

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[20/] The cases cited by appellant (at 53) are thus readily distinguishable because the counsel who was alleged to have a conflict in those cases was counsel to which the appellants had a constitutional right. See Manning v. Foster, 224 F.3d 1129, 1134 (9th Cir. 2000) (conflict of trial counsel, who failed to file a notice of appeal after the defendant directed him to do so and then interfered with the defendant's right to file a habeas petition by telling the defendant that he had no such right, held to be cause); Hollis v. Davis, 941 F.2d 1471, 1479 (11th Cir. 1991) (conflict of trial counsel). In Joubert v. Hopkins, 75 F.3d 1232 (8th Cir. 1996), it was legal novelty, rather than an alleged conflict of interest, that was asserted as cause. In dicta, the court explained the uncontroversial principle that "[i]nterference by the state, ineffective assistance of counsel, and conflicts of interest are examples of factors external to the defense." Id. at 1242.

**required to proffer something other than the mere suggestion that, because Hibey and Fox were both members of the D.C. white-collar defense bar, Fox must have chosen to remain mute with respect to Hibey's purportedly deficient performance. Second, Strickland v. Washington, 466 U.S. 668 (1984), teaches that courts reviewing ineffective-assistance claims "should recognize that counsel is *strongly presumed* to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. 668, 690 (1984) (emphasis added). That is all the district court did when it declared that it would "not second guess a strategy of defense counsel *without proof* that the choices of counsel were not reasonable." 161 F. Supp. 2d at 5 (emphasis added).**

**Appellant now cites to three "*unrebutted* facts" which, he claims (at 54-55), sufficed to meet his burden and were ignored by the district court:**

> **[1] Although the deficiencies in Hibey's performance (such as the failure to file a Notice of Appeal) would have been obvious to Fox, . . . he never told Pollard there were any deficiencies or that there was a viable claim for relief based upon ineffective assistance;**
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> **[2] Even though the Government argued in opposition to the 1990 Motion that Hibey's failure to object was strong proof that the Government had acted properly, Fox still refrained from criticizing Hibey *and went out of his way to praise Hibey* -- a gesture fatal to the 1990 Motion, as Fox must have recognized;**

> [3] Hibey and Fox are both members of the D.C. white collar criminal defense bar, and both have served as Assistant United States Attorneys. (Emphasis in original; citations to appendix omitted.)

Appellant's first two "facts" simply assume that Hibey was ineffective (a premise that Judge Johnson rightly rejected), but do nothing to establish appellant's claim that Fox was laboring under an actual conflict of interest. It is only the third "fact" -- that Hibey and Fox were members of the same legal community -- that even arguably relates to appellant's conflict claim. As the district court correctly noted, however, if the court were to "accept[]" this suggestion, "then any case litigated by a lawyer from the Washington, D.C., defense bar in which the lawyer does not bring an ineffective-assistance-of-counsel claim against trial counsel would be suspect." 161 F. Supp. 2d at 6.[21/]

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[21/] Appellant suggests (at 53) that it was the government's burden to "submit[] an affidavit from Fox." Pollard has things backwards. Absent any proffer of evidence to the contrary, the government was entitled to rely on Strickland's "strong" presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement. Thus, it was appellant's current counsel who fell down on the job by failing to procure affidavits from either Fox or Hibey, and chose instead to rely on, inter alia, vague newspaper articles, weak inferences, and inapposite case citations. Further, Judge Johnson was under no obligation to order an evidentiary hearing at which Fox would have to explain his conduct, as appellant suggests (at 56). An evidentiary hearing was only required if appellant's motion had "raise[d] 'detailed and specific' factual allegations whose resolution require[d] specific information outside of the record." United States v. Pollard, 959 F.2d at 1031. Judge Johnson did not abuse her broad discretion in

(continued...)

In sum, there was no "cause" for appellant's failure to raise his ineffective-assistance claim in his first motion.[22] Thus, as the district court correctly determined, the AEDPA's gatekeeping requirement applies to his second § 2255 motion. Because appellant never obtained authorization from this Court to file this second motion, the district court properly dismissed it. Reasonable jurists would not find this conclusion any more debatable than the

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[21] (...continued)
concluding that Pollard's claims could be resolved by reference to the extant record. See id. (decision whether to hold hearing is "committed to the district court's discretion").

[22] Appellant has made only brief reference (at 56 n.11) to the "prejudice" showing required to excuse his procedural default; and his arguments are unconvincing. It is not the lost opportunity to litigate his ineffective-assistance-of-counsel claim that can be used to establish prejudice, nor whether Fox's failure to bring that claim undermined the 1990 motion. Rather, prejudice can be established only by showing that appellant would have prevailed on an ineffective-assistance-of-counsel claim. Appellant states conclusorily (at 56 n.11) that "[h]ad Fox raised ineffective assistance, this Court's majority would likely have recognized Hibey's silence as the result of ineffective representation, not as proof that the Government had done nothing wrong (citing Pollard, 959 F.2d at 1025, 1028, 1030). This is nothing more than a claim that, had the case been argued differently, the result would have been different. But there is no basis for this assertion. It was only because there was no obvious breach of the plea agreement by the government that this Court even looked to defense counsel's lack of objection at sentencing. See Pollard, 959 F.2d at 1025, 1028, 1030. Had the alleged breaches been obvious (or even real), as appellant now argues they should have been, the Court would hardly have needed to consider counsel's performance in determining that the government had breached the agreement. See *infra* at 41 n. 23 (citing Court's findings that government did not breach its promises).

district court's conclusion that appellant's motion is barred by the statute of limitations. This Court may therefore deny the motion for a certificate of appealability on either ground.[23/]

## II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DETERMINING THAT APPELLANT HAD NOT DEMONSTRATED A "NEED TO KNOW" THE CLASSIFIED SENTENCING INFORMATION.

Appellant's motion for access to the classified information in this case is based on the fundamentally incorrect notion that the litigation model of due process in criminal cases (or something akin to it) should be superimposed on the clemency process. But the Constitution entrusts the President with complete discretion to make clemency decisions unhampered by procedural requirements. Appellant's alleged "need to know" the classified information therefore must be evaluated in the context of the reason he seeks access – to support a clemency petition. The district court did not

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[23/] Moreover, this Court can deny the COA because reasonable jurists would not find it debatable whether appellant has stated a valid claim of ineffective assistance of counsel. Slack, 529 U.S. at 478. Most of the substantive claims underlying appellant's present ineffective-assistance-of-counsel claim were rejected by this Court in 1990, where, for example, this Court determined that the government did not "violate[] its promise not to recommend a life sentence"; did not breach its agreement to bring to the court's attention the "nature, extent, and value" of appellant's cooperation; and did not err in bringing Pollard's unauthorized Blitzer interview to the sentencing court's attention. 959 F.2d at 1024-1026 & 1030 n.12. In his brief, appellant fails to make substantive arguments in support of either these old claims or his new claims.

abuse its discretion by determining that appellant had not demonstrated a "need to know" the classified information in order to assist the President in exercising his clemency power.

A. Legal principles and standard of review.

Were appellant in the position of other clemency petitioners, he would have to either proceed with his clemency request without access to the classified information, or request disclosure pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Under FOIA, appellant would face an immediate roadblock because the first exemption from disclosure is for information that has been classified pursuant to criteria established by Executive Order as necessary to be kept secret "in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1). Appellant avoided this immediate roadblock because of the unusual circumstances of this case, in which the classified information is contained in court documents and subject to a court-issued Protective Order. Based on the Protective Order's requirement that the district court approve access to the classified information by anyone not listed in the Order, appellant and his counsel sought access directly from the district court. Although the Protective Order was issued for an entirely different purpose, appellant has used it to his advantage and gained the opportunity to be heard in the district court on his alleged "need to know."

Under the terms of the Protective Order, no one other than those identified in the Order may obtain access to the classified portions of the sentencing materials absent the necessary security clearance from the Department of Justice, the execution of a Memorandum of Understanding prohibiting disclosure of the information, *and* the permission of the Court (A-72-73). Moreover, under Executive Order 12958, as amended by Executive Order 13292, 68 Fed. Reg. 15315, Sec. 4.1, no person may obtain access to classified materials absent a "need to know" the information. "Need to know" is defined as "a determination by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Executive Order 12958, amended by Executive Order 13292, 68 Fed. Reg. 15315, Sec.6.1(z) (emphasis added). Thus, absent a "need-to-know" determination, counsel cannot obtain access to the classified materials.

Counsel's request for access to the classified materials in this case is akin to a discovery request under the Classified Information Procedures Act (CIPA), 18 U.S.C. App. §§ 1-16,[24/] or an

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[24/] Unlike the motion for access in this case, in which appellant disavows any intention to use the information in pending litigation, CIPA exists to provide discovery to defendants in (continued...)

effort to demonstrate "particularized need" for access to grand jury materials under Fed. R. Crim. P. 6(e). District court rulings on both of these types of requests are reviewed for abuse of discretion, see United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) (CIPA); Illinois v. F.E. Moran, Inc., 740 F.2d 533, 537 (7th Cir. 1984) (Rule 6(e)), a deferential standard that is equally applicable to the district court's ruling in this case.[25/]

### B. The district court did not abuse its discretion by denying counsel access to the classified materials.

The power to grant executive clemency is reserved solely to the President. See United States Constitution, Article 2, Section 2 ("The President . . . shall have Power to grant Reprieves and

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[24/] (...continued)
pending criminal cases. Thus, the analogy to CIPA is really more favorable to appellant than is warranted.

[25/] Although we do not concede that courts normally have a role in supervising the disclosure of information related to clemency requests, we do not contest the district court's jurisdiction over the access issue in this case because the terms of the Protective Order reserve that role for the court. Similarly, we do not contest the jurisdiction of this Court to hear this particular appeal. As in appeals of Rule 6(e) disclosure rulings where the criminal proceeding has long been over, the ruling at issue here is fairly considered a "final decision." 28 U.S.C. § 1291. See Moran, 740 F.2d at 535-536 (Rule 6(e) disclosure ruling appealable as long as it will not delay or interfere with criminal proceeding); see also In re: Motions of Dow Jones & Company, Inc., 142 F.3d 496, 498 n.3 (D.C. Cir. 1998) (court has jurisdiction over appeal by media from denial of access to rule 6(e) materials).

Pardons for Offences against the United States, except in Cases of Impeachment."); see also Judicial Watch, Inc. v. Department of Justice, 365 F.3d 1108, 1119 (D.C. Cir. 2004) (power to grant pardons "is a quintessential and non-delegable Presidential duty"). In speaking about state clemency proceedings, but in terms equally applicable to clemency petitions submitted to the President, the Supreme Court has written:

> Clemency proceedings are not part of the trial -- or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. They are conducted by the executive branch, independent of direct appeal and collateral relief proceedings. And they are usually discretionary, unlike the more structured and limited scope of judicial proceedings. While traditionally available to capital defendants as a final and alternative avenue of relief, clemency has not traditionally "been the business of courts."

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 284 (1998) (plurality) (quoting Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)) (other citations omitted).

Appellant seeks to treat applications for clemency as adversarial proceedings in which the government is the adversary and the petitioner is entitled to equal access to information and a right to rebuttal.[26/] But the Constitution imposes no such

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[26/] We agree with *amici* (at 19) that a proceeding does not have to be adversarial in order for a person seeking access to (continued...)

requirements. Just as the ultimate decision whether to grant clemency is committed to the President's discretion, so too are the procedures that govern clemency proceedings.[27] "The Due Process Clause is not violated where, as here, the procedures in question do no more than confirm that the clemency and pardon powers are committed, as is our tradition, to the authority of the executive." Woodard, 523 U.S. at 276.

Although appellant makes allegations about government pretext,[28] the only argument he advances for why his counsel has a

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[26] (...continued)
classified information to establish a "need-to-know."

[27] Although several members of the Supreme Court have suggested that "some *minimal* procedural safeguards apply to clemency proceedings," Woodard, 523 U.S. at 289 (O'Connor, J., joined by Souter, Ginsburg, & Breyer, JJ., concurring in part and concurring in judgment) (emphasis in original), their suggestion came in a capital murder case and the examples the Justices gave of when judicial intervention might be warranted were if clemency decisions were made by the flip of a coin or if certain petitioners were arbitrarily denied access to the clemency process.

[28] Appellant argues (at 33-35) that the government's concern about the risk to national security of further disclosure is a "pretext" because the bestowal of "Top Secret" clearance on counsel reflects the government's determination that counsel is trustworthy. However, the granting of security clearances is only part of the system for safeguarding classified information. The government's concern about limited access is not a pretext; it is the very reason for the requirement that there be a "need-to-know" determination before classified information is disclosed. It simply is not the case that anyone with the proper clearance will be afforded access to any classified information at that clearance level at any time. The risk to national security of such liberal
(continued...)

"need to know" the classified information is that access would help him submit an effective clemency petition by permitting him to rebut insinuations by opponents and to defuse what he calls a "campaign of disinformation."[29] See Appellant's Brief at 31; *Amici* Brief at 18. But showing that information would be relevant or helpful does not demonstrate a "need to know." Furthermore, the President has not provided petitioners with the right to see or to rebut what is

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[28] (...continued)
access -- even to security-cleared persons -- is obvious. *Amici* also misconstrues the government's national-security concerns by suggesting (at 21-23) that the government is using a double standard when applying the "need-to-know" standard to appellant's counsel. But *amici* has pointed to nothing in the record that suggests the government employees who have been granted access to the classified documents have not had a "need to know." Moreover, *amici* cites no requirement that clemency petitioners enjoy access to information equal to that afforded those who are advising the President.

[29] *Amici* also rely on language of the Protective Order to argue that access such as that now requested was contemplated by the Order, but the quoted language provides no such support. The Protective Order specifies which forms must be filled out in application for the requisite security clearance "by all persons whose assistance the defense reasonably requires," but current counsel do not profess to need access to the classified information in order to "assist[]" in appellant's "defense." Appellant pleaded guilty to espionage and was sentenced for his crime more than 17 years ago. Appellant's counsel have professed (at 19) that they do *not* seek access to the classified information in order to support appellant's § 2255 motion for resentencing. The purported reason that counsel seek access to the classified information -- to assist in the preparation of a petition for clemency -- is *not* to assist in appellant's *defense*. Cf. In re Grand Jury Subpoenas dated March 9, 2001, 179 F. Supp. 2d 270, 289-90 (S.D.N.Y. 2001) (lawyers acted principally as lobbyists, not lawyers, when petitioning for clemency).

written or relied upon by opponents of clemency. As Judge Johnson correctly concluded, the President has all resources available to him for assessing any petition for clemency on appellant's behalf, and thus far has expressed no need for appellant's counsel's assistance in reviewing the classified information.[30/] Indeed, to our knowledge, appellant has submitted no clemency petition for consideration by the current President.

Appellant and *amici* argue that the timing of the 25 instances of access to the classified information "strongly evidences a direct connection to the clemency process" (Appellant's Brief at 32; see also *Amici* Brief at 21). But even if one assumes that all 25 instances of access were in connection with the President's

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[30/] Appellant argues that Judge Johnson's denial of the motion for access was based on the government's false argument that counsel did not have the necessary clearance and the government's false assurance that the classified materials were not being accessed as part of the clemency process. We disagree that the government's argument about the requisite clearance was untrue, and we also disagree that the government ever "assur[ed]" the court that the classified documents were not being accessed by government employees for clemency purposes. See *supra* at 10-11 & n.6, 12 n.7. This Court need not address appellant's accusations of government deception, however, because the only issue before the Court is whether the district court abused its discretion by concluding that appellant's counsel had not established a "need to know" the classified information in order to perform or assist in a lawful and authorized governmental function. See *Amici* Brief at 11, 14) ("[t]he only relevant inquiry is . . . whether [appellant's counsel] have a 'need-to-know' the classified information").

consideration of clemency, that would not provide a basis for counsel's asserted "need to know."

Neither appellant nor *amici* point to a single case in which any court has held that counsel is entitled to access to classified information in order to support a petition for clemency or in order to rebut arguments that they believe may have been made by opponents of clemency. This is for good reason. As argued above, there can be no "need to know" by clemency counsel where the President has the sole discretion over clemency decisions. As Judge Johnson held, the President has access to the classified materials in appellant's case and can independently review them (A-442). The President can request an up-to-date assessment of the *actual* damage, and not just the *projected* damage, caused by appellant's espionage activities.

Appellant points (at 17) to published articles stating that President Clinton had "once ordered a separate reassessment of the case, which concluded that Mr. Pollard had seriously damaged national security" (A-403 (December 12, 2000, New York Times article titled "Pressure Is Again Emerging to Free Jonathan Pollard"), as evidence of the "fierce" opposition that he must rebut. But even if the President's request for a reassessment of the case supplied the "need" for government employees to access the classified

information, this does not mean that appellant's counsel have a corresponding "need to know."[31/]

*Amici*'s protestations (at 25) that the government is forcing him to proceed "blindfolded and with one arm tied behind his back" are unpersuasive.[32/] Appellant and his counsel have made no showing that they need to see the classified information in order to rebut arguments made by opponents of clemency. If appellant and his

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[31/] The "fairness" argument made by appellant (at 32) is inapposite. Appellant's assertion that the government's view is that only persons who oppose clemency have a "need to know," while those who support clemency do not, is wholly unsupported. The news reports and press conferences referenced by appellant indicate that President Clinton sought a reassessment of the case (A-403) and a recommendation from the Department of Justice (A-766, -769, -773). They do not suggest that he sought information only from those opposed to clemency.

[32/] *Amici* also argue (at 25) that Department of Justice attorneys would be "outrage[d]" if they were blocked from access to case files containing the factual basis for arguments made by clemency petitioners. Maybe they would be, but there is nothing they could do about it. Although federal regulations state that a person seeking executive clemency should submit a petition to the Pardon Attorney at the Department of Justice, 28 C.F.R. § 1.1, and that the Attorney General will then investigate and make a recommendation to the President, 28 C.F.R. § 1.6, these regulations are "advisory only and for the internal guidance of Department of Justice Personnel," and they do not restrict the authority of the President under Article 2 of the Constitution. 28 C.F.R. § 1.11. Just as the President has no obligation to consult with appellant's counsel about a clemency petition, he has no obligation to consult with Department of Justice attorneys. Nor is the President precluded from consulting any person or agency he believes may have information relevant to the clemency proceeding if he concludes that the information he has gives him an inadequate basis to make a decision.

counsel have reason to believe that appellant's espionage has not caused serious damage to this country's national security, there is nothing stopping them from making those arguments, even without seeing the classified information. Appellant is thus in a better position than defendants who seek access to alleged Jencks[33/] or Brady[34/] material, but who cannot establish that disclosure is required because they are foreclosed from seeing the material. See United States v. North American Reporting, Inc., 761 F.2d 735, 740 (D.C. Cir. 1985) ("'The [Jencks] Act's major concern is with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which [are not Jencks]. . . . It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them.'") (quoting Palermo v. United States, 360 U.S. 343, 354 (1959)); see also Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) ("[d]efense counsel has no constitutional right to conduct his own search of the State's files to argue relevance"). The logic of *amici*'s argument is that "open file" discovery should be permitted in clemency cases. But, as we explained above, the

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[33/] 18 U.S.C. § 3500.

[34/] Brady v. Maryland, 373 U.S. 83 (1963).

Constitution does not superimpose litigation discovery requirements on clemency proceedings.[35/]

Appellant's argument that he and his counsel have a "need to know" the classified information is not strengthened by exaggerated complaints (at 17-18, 31; see also *Amici* Brief at 21) that opponents of clemency have engaged in a "campaign of disinformation." The only example appellant points to shows no "campaign of disinformation" or reliance on classified material.[36/]

In an interview on Meet the Press, former United States Attorney Joseph diGenova apparently stated that appellant had identified "agents in the field" (A-306). In response to a letter from appellant's counsel asking where diGenova had obtained this information, diGenova explained that it was his "professional opinion based solely upon all of the information in the public court record in the Pollard case, including the public damage assessment" (A-306) (emphasis in original). DiGenova then quoted from the non-classified Government's Memorandum in Aid of Sentencing, which

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[35/] Even in a criminal litigation setting, open file discovery is not required by Fed. R. Crim. P. 16, the Jencks Act, or Brady. See Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy."); Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and Brady did not create one . . . .").

[36/] Appellant's citations to A-296 and A-398-99 are to his attorney's own affidavits.

explained that appellant had sold to Israel "information from human sources whose identity could be inferred by a reasonably competent intelligence analyst. Moreover, the identity of the authors of these classified publications were included in the unredacted copies which defendant compromised." (A-306.) (Emphasis in original.) He also quoted a passage alleging that "[d]isclosure of such specific information to a foreign power, even an ally of the United States, exposes these human sources of information . . . " (A-307) (emphasis in original). To the New York Times, diGenova referred to appellant as having "done the gravest kind of damage to the United States" (A-403).

For the reasons argued above, appellant's asserted need to rebut a "campaign of disinformation" would not establish a "need to know" the classified information even if appellant could show that such a campaign exists. But the statements of a former United States Attorney, based entirely on the public record, do not show a "campaign of disinformation," much less "falsehoods" spread by opponents of clemency "using their actual or professed familiarity with" the classified information (Appellant's Brief at 17).

Finally, the arguments of appellant (at 35-37) and *amici* (at 15-17) that Judge Hogan applied an incorrect legal standard to the "need-to-know" determination misconstrue Judge Hogan's ruling. Judge Hogan was not considering appellant's motion in the first

instance, but was ruling on a motion to *modify* Judge Johnson's January 12, 2001, ruling denying counsel access to the classified information. Judge Johnson had ruled that counsel had not demonstrated a "need to know" the contents of the classified materials because: (1) the President had access to them and could independently review them; (2) there was no evidence the President had asked appellant's counsel any questions about the classified information; and (3) the President had available the memoranda prepared by Pollard's trial attorney, who had seen the classified information and commented extensively on it at the time of sentencing (A-442-43). When Judge Hogan ruled on the motion to modify this ruling, he was asked to consider whether new facts or circumstances warranted a different result. He answered that question in the negative, holding that "Mr. Pollard and his attorneys have offered no new justification for this Court to determine that any of them have a 'need to know.'" 290 F. Supp. 2d at 166. That alone was a sufficient basis to deny the motion for modification. The observations that Judge Hogan went on to make -- that appellant had shown no evidence that the current President was more likely to grant clemency than previous Presidents and that, in light of the security threats faced by the nation since September 11, 2001, the "speculative possibility" of clemency could not justify the disclosure of classified information -- did nothing more

than recognize that no new facts warranted a modification of Judge Johnson's ruling. Far from being the basis for a determination that appellant's counsel had no "need to know," these statements established only that appellant had shown no reason to modify Judge Johnson's Order denying the emergency motion for access.

## CONCLUSION

WHEREFORE, this Court should deny the motion for a certificate of appealability and dismiss the appeal from the district court's denial of the second § 2255 motion, and should affirm the Orders of the district court denying access to the classified information.

Respectfully submitted,

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**CERTIFICATE OF WORD COUNT**

**I HEREBY CERTIFY that this brief conforms to the word limit imposed by D.C. Circuit Rule 28(d)(1) and contains 13,793 words.**

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY that two copies of the foregoing have been mailed (first-class postage prepaid) to counsel for Jonathan J. Pollard, Eliot Lauer and Jacques Semmelman, Curtis, Mallet-Prevost, Colt & Mosle LLP, 101 Park Avenue, New York, New York 10178-0061; and to counsel for *Amici Curiae*, G. Brian Busey, Alexandra Steinberg Barrage, and Brett Walter, Morrison & Foerster LLP, 2000 Pennsylvania Ave., N.W., Washington, D.C. 20006-1888, on this 29th day of October, 2004.**

**MARY B. MCCORD**
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