No. 12-1412

In the Supreme Court of the United States

LEE VANG LOR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that, even liberally construed, petitioner's pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 did not contain a claim that the government violated *Brady* v. *Maryland*, 373 U.S. 83 (1963).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 706 F.3d 1252. The order of the district court (Pet. App. 18a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2013. A petition for rehearing was denied on March 1, 2013 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on May 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Wyoming, petitioner was convicted of conspiring to possess with intent to distribute methamphetamine, in violation of

21 U.S.C. 841(a)(1), (b)(1)(A), and 846; and possessing with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Pet. App. 2a. He was sentenced to 121 months of imprisonment, to be followed by five years of supervised release. *Ibid.* The court of appeals affirmed. *Id.* at 32a-41a. Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. The district court denied that motion, Pet. App. 18a-31a, and the court of appeals, after granting a certificate of appealability, affirmed, *id.* at 1a-17a.

1. a. On March 13, 2007, Trooper Ben Peech of the Wyoming Highway Patrol stopped a sports utility vehicle for speeding. Petitioner, who was driving, and his passenger, Lee Thao, told Peech that they had been visiting Reno, Nevada, but they gave inconsistent stories as to why they had been there. Pet. App. 2a-3a. When Peech asked Lor for the car's registration, Lor gave Peech a rental agreement that showed that the vehicle had been rented in Minnesota by a third party who was a resident of Wisconsin. *Id.* at 19a. Lor was acting nervously at the time. *Id.* at 34a. Peech told the men that he was going to detain them until a drug dog arrived. Petitioner and Thao then gave both verbal and written consent to a search of the vehicle. *Ibid.* Peech and three other troopers searched the vehicle and found two pounds of crystal methamphetamine and about half a pound of a methamphetamine dilutant. *Id.* at 37a.

b. On March 22, 2007, a federal grand jury returned an indictment charging petitioner and Thao with conspiring to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and 846; and possessing with intent to dis-

tribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Indictment 1-2.

Petitioner and Thao each moved to suppress the evidence seized from the vehicle on the grounds that they were "unreasonably detained" in violation of the Fourth Amendment and that they did not voluntarily consent to the search. Pet. App. 37a. On May 31, 2007, the district court held a hearing on the motions, at which petitioner, Thao, Peech, and the three other troopers who conducted the search all testified. Thao testified that he had withdrawn his consent for the search by yelling "stop." *Id.* at 40a. The troopers testified that neither petitioner nor Thao asked them to stop the search. The district court denied the motions, explaining that it found the testimony of the troopers more credible than the testimony of petitioner and Thao. See *id.* at 3a-4a, 40a.

Petitioner thereafter entered a conditional guilty plea to the charges in the indictment, reserving his right to appeal the denial of his suppression motion. The district court sentenced him to 121 months of imprisonment, to be followed by five years of supervised release. Judgment 1-2; Pet. App. 33a.

c. The court of appeals affirmed. Pet. App. 32a-41a. The court held that Peech had reasonable suspicion to detain petitioner and Thao, citing several factors identified by Peech, see *id.* at 38a-39a, including "the discrepancy between Thao and Lor's description of who they knew and what they did while in Reno—inconsistencies which were apparent after the Trooper's first round of questioning," *id.* at 39a. The court also held that petitioner and Thao's written consent to the search of the vehicle had been voluntary. *Id.* at 40a. In reaching that conclusion, the court recounted

the troopers' relevant testimony as well as the district court's credibility findings. *Ibid.*

2. a. Petitioner, with the assistance of a law student, filed a pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 based on newly discovered evidence. C.A. R.E. 1-15. The newly discovered evidence, according to petitioner, was the Wyoming Highway Patrol's termination of Peech in October 2007 for falsifying an April 2007 dispatch report. *Id.* at 13; Pet. App. 2a.[1] Petitioner argued that "because the main issue during the suppression hearing was one of credibility, new evidence showing that Mr. Peech was fired for falsifying information during and about traffic stops severely undercuts Mr. Peech's credibility." C.A. R.E. 14. Petitioner maintained that, "[i]f this information had been available at the time of the suppression hearing," the district court "would have ruled differently in light of this new evidence." *Ibid.*

The district court denied petitioner's motion. Pet. App. 18a-31a. The court noted that, "where a defend-

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[1] According to a news article introduced by the government in response to petitioner's Section 2255 motion, in April 2007 Peech was working on an investigation with the federal Drug Enforcement Agency (DEA). As part of that investigation, the DEA directed him to conduct a stop of a silver Dodge truck because of a tip from an informant. Due to budget cuts in Wyoming, however, troopers did not ordinarily patrol the highways after midnight. Peech therefore felt that he needed a reason to justify his presence on the highway after midnight. To create a reason for the highway patrol to dispatch him, he called a local drunk-driving hotline and falsely reported seeing a vehicle driven by someone under the influence. Peech was subsequently dispatched and he stopped the Dodge truck for a traffic violation. After obtaining consent to search the truck, he found $3.3 million in cash. C.A. R.E. 75.

ant has had a full, fair, and unimpeded opportunity to litigate his Fourth Amendment issues before the district court and on direct appeal, he may not thereafter renew his Fourth Amendment claim in a § 2255 proceeding." *Id.* at 26a (citing *Stone* v. *Powell*, 428 U.S. 465, 494 (1976); *United States* v. *Cook*, 997 F.2d 1312, 1317 (10th Cir. 1993)). The court concluded that petitioner "was given a full and fair opportunity" to litigate his Fourth Amendment claims. In support of that conclusion, the court recounted that the district court held an evidentiary hearing at which petitioner was assisted by a translator and represented by competent counsel; counsel preserved petitioner's ability to appeal the district court's ruling on those claims by negotiating a conditional plea agreement; and counsel "fully represented [petitioner's] Fourth Amendment claims to the Tenth Circuit on appeal." *Id.* at 27a-28a.

The court went on to explain that the new evidence would only be relevant to whether petitioner had a "full and fair opportunity" to present his claims if the evidence had been suppressed by the government. Pet. App. 28a-29a. But the court found no "[i]mproper government action" in this case. *Id.* at 29a. Finally, the court found that, even if new evidence could provide grounds for re-litigation of a Fourth Amendment claim under Section 2255, the newly discovered evidence here was not substantial enough to warrant relitigation because it "d[id] not directly contradict any of the evidence provided to th[e] Court at [the] suppression hearing." *Id.* at 29a. The court denied a certificate of appealability. *Id.* at 30a-31a.

b. Petitioner filed a pro se appeal and request for a certificate of appealability with the Tenth Circuit. The court of appeals directed the government to brief

the following questions: "Whether evidence discovered after a Fourth Amendment claim has been fully litigated can ever be the basis for relief under 28 U.S.C. § 2255, and if so, under what standard that evidence should be assessed." Pet. App. 5a-6a. The court subsequently granted a certificate of appealability on those questions, appointed counsel to represent petitioner, and ordered counsel to file a supplemental opening brief. *Id.* at 6a. The court affirmed the denial of petitioner's Section 2255 motion. *Id.* at 6a-17a.

i. Petitioner argued that the district court erred by not holding an evidentiary hearing to determine whether the government's failure to disclose the newly discovered evidence violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). Pet. C.A. Supp. Br. 25-38. The court of appeals declined to consider petitioner's argument, finding that his Section 2255 motion did not include a *Brady* claim. The court acknowledged that it had a duty to "construe pro se pleadings liberally," but determined that, "even construed as liberally as possible," petitioner's motion "simply does not raise a *Brady* claim." Pet. App. 7a. The court explained that the motion "did not mention *Brady* or request an evidentiary hearing"; rather, petitioner "raised *Brady* only in his reply brief before the district court." *Id.* at 6a-7a.[2] Referring to the rule that a party waives an

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[2] Petitioner asserts (Pet. 19) that the court's statement (Pet. App. 6a) that petitioner's Section 2255 motion did not request an evidentiary hearing was an "oversight" by the Tenth Circuit. The Tenth Circuit, however, was correct. Petitioner's 2255 motion clearly requested a new suppression hearing at which petitioner could introduce the new evidence, not an evidentiary hearing under Section 2255. See C.A. R.E. 14 ("I ask that the court grant the following relief: * * * grant me a new suppression hearing

issue in the district court not raised until its reply brief, the court found the rule "logically appl[icable] in a § 2255 proceeding." *Id.* at 7a.[3]

ii. Petitioner also maintained that the newly discovered evidence concerning Peech entitled him to relief under Section 2255 because it "demonstrates that [he] was denied the opportunity for 'full and fair litigation' or 'full and fair consideration' of his Fourth Amendment claims in the trial court or on direct appeal." Pet. C.A. Supp. Br. 12. The court rejected this argument as well. Pet. App. 8a-17a.

Relying on *Stone*, *supra*, the Tenth Circuit held that habeas corpus relief is not available to a petitioner whose claim is that the evidence used to convict him was obtained in violation of the Fourth Amendment. The court further noted that it had "expanded the *Stone* bar to § 2255 petitions" and that, to determine whether a Section 2255 petition is barred, it looks to whether the petitioner had an opportunity to raise the claim in question. Pet. App. 10a-11a. "An 'opportunity' for full and fair consideration," the court explained, "requires at least 'the procedural opportunity to raise or otherwise present a Fourth Amendment claim,' a 'full and fair evidentiary hearing,' and 'recognition and at least colorable application of the correct Fourth Amendment constitutional standards.'" *Ibid.* (quoting *Cook*, 997 F.2d at 1318).

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to be able to introduce this newly-discovered evidence relevant to my fourth amendment claim.").

[3] In a footnote, the court also noted that it is an open question whether *Brady*'s disclosure requirements apply to the motion-to-suppress stage at all. See Pet. App. 7a (citing *United States* v. *Stott*, 245 F.3d 890, 901 (7th Cir.), cert. denied, 534 U.S. 1079 (2001).

The court observed that petitioner "identifie[d] no procedural deficiencies in this case and d[id] not claim his counsel was ineffective." Pet. App. 11a. Instead, petitioner argued that the newly discovered evidence showed that he did not have a full and fair opportunity to litigate his claim. The court rejected that argument, explaining that, as the Seventh Circuit held in *Brock* v. *United States*, 573 F.3d 497, 501, cert. denied, 558 U.S. 1058 (2009), "[a] defendant is not deprived of a full and fair opportunity to litigate simply because he does not discover all potentially relevant evidence until after his suppression hearing." Pet. App. 13a. "Absent ineffective assistance of counsel or government concealment," the court continued, "a defendant cannot claim that the mere existence of undiscovered material evidence deprived him of an *opportunity* to litigate his claim." *Ibid.*

The court also rejected petitioner's contention that the government's concealment of the newly discovered evidence deprived him of the opportunity to litigate his claim. The court found "nothing suggest[ing] the Government covered up evidence," citing the fact that "[t]he Wyoming Highway Patrol did not put Trooper Peech on paid leave until October 2007, four months after [petitioner's] suppression hearing" and that no one except for Peech "apparently knew about the false dispatch report" at the time of the hearing. Pet. App. 14a. The court concluded that Peech's knowledge was not imputable to the government for *Brady* purposes because prosecutors do not "have a duty to investigate officers' actions in entirely unrelated cases just in case some impeaching evidence may show up." *Id.* at 15a (citing *Giglio* v. *United States*, 405 U.S. 150 (1972)). The court recognized that "things might have been

different if the Wyoming Highway Patrol had begun investigating Peech for possible misconduct before the suppression hearing," but found "nothing indicat[ing] that was the case." *Ibid.* The court found that, "even assuming the Government had a *Brady*-like duty to disclose material evidence prior to a suppression hearing, that duty does not extend to discovering every tidbit of information that is, or could ripen into, impeachment evidence." *Ibid.* The court also cast doubt on whether "the evidence here would qualify as material under *Brady*," noting that the only disputed facts at the hearing involved whether petitioner and Thao withdrew their consent to search, and Peech's testimony that they did not "was backed up by the testimony of three officers whom the district court found credible." *Id.* at 15a n.5.[4]

ARGUMENT

Petitioner contends that the court of appeals erred by failing to apply the proper standard for review of pro se pleadings. According to petitioner, the court of appeals refused to consider his *Brady* claim because he did not cite any relevant case law in his Section 2255 motion and it refused to consider the case law cited in his reply brief. See Pet. 9-22. That contention lacks merit, and the court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the court below effective-

[4] The court ruled, in the alternative, that even if the government could "be charged with knowledge of the evidence here," petitioner would not be entitled to a second suppression hearing because allowing evidence of Peech's false report to be introduced on collateral review would "be contrary to the purposes of the exclusionary rule and inconsistent with *Stone v. Powell*." Pet. App. 16a-17a.

ly considered petitioner's *Brady* claim in the context of analyzing whether he had a full and fair opportunity to litigate his Fourth Amendment claims. The court of appeals' opinion thus does not warrant this Court's review or summary action.

1. a. A motion under Section 2255 to vacate, set aside, or correct a sentence must, *inter alia*, "(1) specify all the grounds for relief available to the moving party" and (2) "state the facts supporting each ground." Rule Governing Section 2255 Proceedings in the United States District Courts 2(b). If such a motion is filed pro se, it "is to be liberally construed." *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)) (internal quotation marks omitted). When the factual allegations in a Section 2255 motion do not support a claim, however, that claim is waived. See *Berkey* v. *United States*, 318 F.3d 768, 774 (7th Cir. 2003) (argument not raised in Section 2255 motion before the district court is waived), cert. denied, 541 U.S. 1055 (2004); *United States* v. *Cook*, 997 F.2d 1312, 1316 (10th Cir. 1993) (same).

The court of appeals applied those standards and correctly concluded that, "even construed as liberally as possible, [petitioner's] § 2255 petition simply does not raise a *Brady* claim." Pet. App. 7a. To state a *Brady* claim, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant (either because it was exculpatory or impeaching, see *United States* v. *Bagley*, 473 U.S. 667, 676 (1985)); and (3) the evidence was material to the defendant's guilt or punishment. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Although "it is hardly clear that the *Brady* line of Supreme

Court cases applies to suppression hearings," *United States* v. *Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999), petitioner cannot prevail even if *Brady* applies in such situations.

Petitioner's Section 2255 motion did not allege that, before the suppression hearing, the prosecution knew or should have known about Peech's April 2007 false report, let alone that it should have disclosed that information to him. Rather, petitioner simply claimed that "[t]he court should hear new evidence that would likely result in a different finding by this court regarding the suppression of evidence and allow me to fully and fairly litigate my fourth amendment claim." C.A. R.E. 10. In setting forth the basis for that claim, petitioner described the newly discovered evidence; noted that *Stone* permits a Section 2255 movant to raise a Fourth Amendment claim if he did not have a full and fair opportunity to litigate it; and argued that he lacked such an opportunity because the new evidence was not contained in the record. *Id.* at 13. Significantly, petitioner blamed that record omission not on any failure of the government to disclose the evidence, but on the timing of Peech's termination. As petitioner explained, "because Mr. Peech was not fired from his position as a state trooper until *after* [petitioner's] conviction, sentence, and notice of appeal, the district court record d[id] not include * * * this information * * * [and] [u]nder the Federal Rules of Appellate Procedure, the Tenth Circuit does not consider material outside the record before the district court."[5] *Id.* at 14. Thus, petitioner's Section

[5] Although petitioner mentioned Peech's termination in a footnote in his brief to the court of appeals on direct appeal, 10-8069

2255 motion, even liberally construed, did not raise a *Brady* claim.

b. Petitioner's contention to the contrary notwithstanding (Pet. 9-11, 14-20), the court of appeals did not hold that petitioner "waived his *Brady* claim solely because he did not cite *Brady* in his initial petition," Pet. 19; see also Pet. 9. Although the court initially noted that petitioner's motion "did not mention *Brady*," Pet. App. 6a, it went on to cite the liberal construction standard applicable to pro se pleadings and found that, "even construed as liberally as possible," petitioner's motion "simply d[id] not raise a *Brady* claim," *id.* at 7a. That analysis would have been unnecessary if the court were merely applying the litmus test petitioner alleges, *i.e.*, whether the motion cited *Brady*. And as petitioner notes elsewhere (Pet. 21), the Tenth Circuit has previously held that the liberal pleading standard "means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, [or] his confusion of various legal theories[.]" *Hall* v. *Bellmon*, 935 F.2d 1106, 1110 (1991); accord *Firstenberg* v. *City of Santa Fe*, 696 F.3d 1018, 1024 (10th Cir. 2012) (quoting *Hall*); *Smith* v. *United States*, 561 F.3d 1090, 1096 (10th Cir. 2009) (same). In light of that precedent and the court's express application of the liberal pleading standard in this case, petitioner's contention that the court imposed a heightened requirement on pro se habeas petitioners, such that they must provide legal citations

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Appellant C.A. Br. 4 n.1, he did not argue that the termination was in any way relevant to his asserted grounds for relief.

in their initial motions to support their asserted grounds for relief, is unfounded.[6]

Contrary to petitioner's contention (Pet. 9-10), this case does not conflict with either *Johnson* v. *Puckett*, 929 F.2d 1067, 1070 (5th Cir. 1991), or *Jones* v. *Jerrison*, 20 F.3d 849 (8th Cir. 1994), which both state that a habeas corpus petition need not plead the law.[7] In addition, unlike here, the habeas petitions in those cases alleged sufficient facts to provide notice of the claims being raised. In *Johnson*, the Fifth Circuit held that the petition fairly raised an equal protection

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[6] Nor could the court, sitting as a three-judge panel, have overruled that prior circuit precedent. See, *e.g.*, *Muskrat* v. *Deer Creek Pub. Schs.*, 715 F.3d 775, 792 (10th Cir. 2013).

[7] Petitioner also asserts that the Tenth Circuit relied on the Ninth Circuit's decision in *United States* v. *Berry*, 624 F.3d 1031 (2010), cert. denied, 132 S. Ct. 431 (2011), "to hold that § 2255 petitions must expressly identify legal claims and cite appropriate authority." Pet. 10. Petitioner cites *Berry*, along with his own case, to assert that "the Ninth and Tenth Circuits hold that a petitioner waives any claim that is not expressly and correctly identified with legal citation in the initial pleading." Pet. 10-11. But *Berry*, like this case, does not support such an assertion. In *Berry*, the Ninth Circuit declined to consider the petitioner's allegations of a *Brady* violation because the defendant "did not identify" a *Brady* claim "in either his [Section 2255] motion or in his initial supporting memorandum," and instead "raised th[e] claim for the first time in his reply brief before the district court." 624 F.3d at 1039 n.7. Thus, the Ninth Circuit explained, "it was not addressed by the district court and f[ell] outside [the] certificate of appealability." *Ibid.* Contrary to petitioner's assertion, the Ninth Circuit said nothing about the need for legal citations in an initial Section 2255 motion. And the Tenth Circuit did not rely on *Berry* to support such a requirement. Moreover, as petitioner recognizes (Pet. 10 n.2), the opinion in *Berry* does not indicate whether the Section 2255 motion stated sufficient facts to support a *Brady* claim. *Ibid.*

claim because it stated, as a ground for relief, that "[d]iscrimination in selection of the Grand Jury Foreman existed at the time of Petitioner's Indictment," and went on to allege the historical absence of black grand jury foremen in the county in question. 929 F.2d at 1070 (brackets in original). Likewise, in *Jones*, the Eighth Circuit held that the petition's "allegation that the 'indictment failed to charge a crime in that it did not allege that petitioner knowingly deceived [his victim] or that she had relied on petitioner's representations' was sufficient to apprise the district court of a possible denial of due process." 20 F.3d at 853. In contrast, petitioner's Section 2255 motion said nothing to suggest that the government suppressed the evidence regarding Peech. The motion therefore did not apprise the district court of a potential *Brady* claim. Cf. *McNeil* v. *United States*, 508 U.S. 106, 113 (1993) ("While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed, and have held that some procedural rules must give way because of the unique circumstances of incarceration, we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.") (internal citations and footnote omitted).

2. a. Petitioner also incorrectly contends (Pet. 21-22) that the decision in this case conflicts with this Court's statements in *Neitzke* v. *Williams*, 490 U.S. 319 (1989), that "the liberal pleading standard of *Haines* [v. *Kerner*, 404 U.S. 519 (1972)] applies only to a plaintiff's factual allegations" and that "[r]esponsive pleadings thus may be necessary for a *pro se* plaintiff to clarify his legal theories." 490 U.S. at 330 n.9.

In *Neitzke*, the Court held that a complaint that fails to state a claim within the meaning of Rule 12(b)(6) of the Federal Rules of Civil Procedure is not necessarily frivolous within the meaning of the in forma pauperis statute and therefore cannot be dismissed sua sponte before the plaintiff has an opportunity to respond. 490 U.S. at 320, 328-329. The Court stated that the liberal pleading standard applicable to pro se plaintiffs insufficiently protects plaintiffs from such dismissals. Thus, as the Court explained, because that standard applies only to factual allegations, "[r]esponsive pleadings * * * may be necessary for a *pro se* plaintiff to clarify his legal theories." *Id.* at 330 n.9. Those statements simply reflect the long-understood principle that a plaintiff can use responsive pleadings to further explain the legal theories on which he relies. See, *e.g.*, *Roman* v. *Jeffes*, 904 F.2d 192, 197 (3d Cir. 1990). But nothing in *Neitzke* suggests that a plaintiff can raise for the first time in a reply brief a claim that is not supported by the facts alleged in his initial Section 2255 motion. And that is exactly what petitioner did here. *Neitzke* is therefore inapposite and no conflict exists.

b. Petitioner also contends that the court below erred by holding "that [petitioner's] reply brief citation was evidence of waiver rather than clarification of the fact-based grounds for relief that [petitioner] had pleaded in his petition." Pet. 21. That holding, according to petitioner, conflicts with the decisions of numerous other circuits which have held that "courts must consider a petitioner's responsive pleadings to determine whether the petitioner raises a claim for relief." *Id.* at 11-12. Petitioner is incorrect.

Petitioner misrepresents the holding of the court below. The court did not disavow reliance on responsive pleadings for purposes of construing pro se filings. The court instead recognized that—contrary to the petitioner's assertion—he did not include in his original petition any fact-based grounds for relief that would have supported a *Brady* claim. Pet. App. 7a. And none of the decisions cited by petitioner suggest that a claim, unsupported by the factual allegations contained in an initial pleading, should still be considered if raised in a reply.

In *Franklin* v. *Rose*, 765 F.2d 82 (6th Cir. 1985), for example, the habeas corpus petitioner included four claims on the habeas corpus form but then attached a 17-page statement of facts that raised several additional grounds for relief. *Id.* at 84. The district court refused to recognize any grounds for relief not included on the form itself. *Ibid.* The court of appeals reversed, holding that the district court should have recognized all of the habeas petitioner's claims, including those supported by the facts in the attached statement of facts, because "[e]ven [the petitioner's] undeveloped allegations * * * state[d] facts that point[ed] to a real possibility of constitutional error." *Id.* at 85 (internal quotation marks omitted) (quoting *Blackledge* v. *Allison*, 431 U.S. 63, 75 n.7 (1977)).

The Third Circuit reached a similar conclusion in *Roman*, *supra*, explaining that the district court should not have dismissed the plaintiff's complaint because "[a] fair reading of the factual allegations of plaintiff's complaint suggests that plaintiff could make out a [constitutional claim.]" 904 F.2d at 197. The court therefore recognized that, in such situations, "[r]esponsive pleadings * * * may enable the

plaintiff to clarify his legal theories." *Ibid.* The Ninth Circuit held likewise in *Alvarez* v. *Hill*, 518 F.3d 1152 (2008), where the plaintiff's complaint "contained factual allegations establishing a 'plausible' entitlement to relief[.]" *Id.* at 1157. Though the court noted, as part of its holding, that the defendants were provided with "fair notice" of that claim by both the complaint and the plaintiff's subsequent filings, nothing in the court's opinion suggested that the claim would have survived based on allegations in subsequent filings alone. *Ibid.* Finally, the Eighth Circuit in *Thompson* v. *Missouri Board of Parole*, 929 F.2d 396 (1991), found that the petitioner did not abuse the writ of habeas corpus where the petitioner "raise[d] the claims now urged on appeal in supplemental pleadings before the district court," in part, because "the focus of th[e] petition is generally the same as the claims now raised on appeal." *Id.* at 399. The court therefore considered the merits of the petitioner's claims. *Ibid.*

Here, petitioner's reply brief did not properly clarify the legal theories that supported the claims in the original motion. Rather, the reply brief alleged a *Brady* violation in response to the government's argument that petitioner's claim was barred under *Stone* v. *Powell*, 428 U.S. 465 (1976). The government, in responding to petitioner's Section 2255 motion, explained that under *Stone* a petitioner cannot relitigate a Fourth Amendment claim if the petitioner had previously been afforded a full and fair opportunity to litigate that claim. C.A. R.E. 44. The government identified an exception to that rule for cases where improper government action compromised the petitioner's chance to fairly present his claim, but

contended that no improper action occurred in this case. *Ibid.* Petitioner, in his reply brief, was simply explaining why that exception should be applied to his case. *Id.* at 88-90.[8]

3. In any event, petitioner would not have prevailed even if the Tenth Circuit had considered his *Brady* claim independently because, to determine whether the *Stone* bar applied, the court of appeals did consider the merits of petitioner's *Brady* claim. See Pet. App. 14a ("Whether or not *Brady* applies at the suppression stage, we can at least assume that [petitioner] might be deprived of a 'full and fair evidentiary hearing' if the Government withholds material evidence.") (quoting *Cook*, 997 F.2d at 1318). In doing so, the court found that "nothing suggests [that] the Government covered up evidence" and that "[n]o one involved in this case, other than Peech himself, apparently knew about the false dispatch report at the time of [petitioner's] suppression hearing." *Ibid.* The court concluded that Peech's knowledge of his own false dispatch report was not imputable to the government. *Id.* at 14a-15a. "So even assuming the Government ha[d] a *Brady*-like duty to disclose all material evidence prior to a suppression hearing," the government did not violate that duty in this case. *Id.* at 15a. The court also expressed doubt that the evi-

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[8] In fact, petitioner did not assert an independent *Brady* claim until his supplemental briefing on appeal. See, *e.g.*, Pet. Supp. C.A. Br. 20-21 & n.5 (arguing that "a violation of a defendant's due process rights of the type recognized in *Brady* v. *Maryland* is outside the scope of *Stone*" and that a defendant presenting newly discovered evidence of such a violation need not establish that he was denied a full and fair opportunity to litigate the claim beforehand); *id.* at 25-38 (asserting *Brady* claim).

dence regarding Peech "would qualify as material under *Brady*" because three other troopers, whom the district court deemed credible, also testified at the suppression hearing. *Id.* at 15a n.5. Thus, even if courts have an obligation to consider claims raised for the first time in a responsive pleading, and even if the petitioner can be said to have raised an independent *Brady* claim in his reply brief, the court considered that claim here. Neither further review nor summary action is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2013