

APPENDIX A
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-55418 D.C. No. 2:15-cv-04222-R-DTB
Filed: May 8, 2018

TERRENCE EDWIN PRINCE,

Petitioner-Appellant,

v.

JOE A. LIZARRAGA, Warden,

Respondent-Appellee.

MEMORANDUM*

Appeal from the United States District Court for the
Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted October 19, 2017
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: CALLAHAN and BEA, Circuit Judges, and RESTANI, ** Judge.

Petitioner Terrence Prince challenges his 1982 conviction and sentence for first degree murder, claiming that the state suppressed materially exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The district court dismissed Prince's action for lack of jurisdiction. Because Prince failed first to apply to this court for leave to file a second or successive petition for habeas relief in the district court, *see* 28 U.S.C. §2244(b), we **AFFIRM**.

1. In 1982, a jury convicted Prince of first-degree murder and possession of a concealed firearm by a convicted felon. Prince was one of two or three men who broke into a restaurant and check-cashing business in an attempted robbery gone awry. Over the course of a minute, Prince shot multiple times at the restaurant owner, Bruce Horton. Horton died from his wounds and Prince was charged with Horton's murder. Prince is currently serving a life sentence without the possibility of parole.

Substantial evidence inculpated Prince: multiple eyewitnesses positively identified him; Prince had previously been photographed brandishing the type of gun used to kill Horton; eyewitness descriptions of Prince's gun were consistent with the type of gun used to kill Horton; Prince had a jacket at his residence

** The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

that eyewitnesses testified was of the type he wore to commit the crime; Prince brought his co-conspirator to the hospital to receive treatment for gunshot wounds shortly after the crime; Prince appeared flustered and paranoid at the hospital; Prince did not wait for his co-conspirator to be treated but instead left hurriedly; Prince never reported his co-conspirator's injuries to the police; and Prince's testimony at trial contradicted the testimony of multiple witnesses in material ways.

2. The California Court of Appeal affirmed Prince's conviction and sentence and the California Supreme Court denied review in 1984. In 1989, Prince filed a petition for a writ of habeas corpus in federal district court, which the court dismissed without prejudice for failure to exhaust state-court remedies. In 1991, Prince refiled his petition, which the district court dismissed on the merits. The Ninth Circuit affirmed the dismissal in 1994.

In 2007, Prince filed a second state habeas petition. Over the course of that proceeding, the Los Angeles County District Attorney's Office turned over Officer Robert Peloquin's notes of interviews related to the robbery-murder. The notes were the same as the notes the State disclosed to Prince before his trial, except that now—twenty-seven years later—they included an additional page. The previously undisclosed page was an account of Peloquin's interview with one Nelida Walsh. Walsh was standing across the street from the restaurant at the time of the crime when she heard gunshots. She saw a man armed with a shotgun or rifle standing in the doorway of the restaurant. Walsh's description of the

man conflicted with the eyewitness descriptions of Prince. Walsh provided the same account to Detective Charles Worthen, but Worthen did not document Walsh's existence or her statements in any official reports.¹

In 2013, the state superior court granted Prince's habeas petition based on the Walsh statement, concluding it was *Brady* material, but the California Court of Appeal reversed in 2015, and the California Supreme Court denied review. Later in 2015, Prince filed a federal habeas petition in district court asserting a *Brady* claim based on the Walsh evidence. The court dismissed the case for lack of jurisdiction because it held that the petition was second or successive under 28 U.S.C. § 2244(b), and therefore Prince could invoke the district court's jurisdiction only with the approval of this court.

¹ The California Superior Court determined that defense counsel was apprised of some of the information provided by Walsh. For example, Detective Worthen testified that the shooter wore a red and white striped shirt—a detail that came from Walsh. In addition, some of the information Walsh provided to police was included in a preliminary investigation report and in Williams' arrest report. It is unclear from the record what information was, in fact, included in any official documents disclosed to defense counsel at trial.

3. Prince argues that his petition is not second or successive because he filed his first federal habeas petition before § 2244(b) was enacted as part of the Antiterrorism and Effective Death Penalty Act (“AEDPA”). He reasons that applying AEDPA’s second-or-successive bar would amount to an impermissible retroactive application of AEDPA. The district court rejected this argument, as do we.

We have already considered and decided the issue that Prince raises in his petition. In *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1163-64 (9th Cir. 2000), we explained that applying AEDPA to second-in-time habeas petitions, where the initial habeas petition was filed pre-AEDPA, does not constitute retroactive application of AEDPA, let alone impermissible retroactive application. This is because AEDPA’s enactment does not “impair” a petitioner’s right to file a second-in-time habeas petition, regardless of when he filed his initial petition. *See id.* at 1163. The fact that the standard for bringing a second or successive petition was different at the time of the first habeas filing “does not make the application of the new [AEDPA] provisions to his most recent motion retroactive.” *Id.* Prince’s argument to the contrary is therefore foreclosed.

Moreover, for the reasons set forth in our concurrently filed published opinion, *Brown v. Muniz*, No. 16-15442, --- F.3d ---- (9th Cir. 2018), Prince’s petition is second or successive notwithstanding his ignorance of the *Brady* material at the time he filed his initial federal petition. Because the factual predicate for Prince’s *Brady* claim—the State’s failure to turn over the alleged exculpatory evidence—

accrued before Prince filed his initial petition, AEDPA § 2244(b)(2)(B) governs his action. It is therefore second or successive, meaning Prince must first apply to this court for permission to have his petition heard in the district court. 28 U.S.C. § 2244(b)(3). He has not done so.

AFFIRMED.

APPENDIX B
FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

GREGORY L. BROWN, No. 16-15442
Petitioner-Appellant,
v. D.C. No.
4:14-cv-04497-YGR

W. L. MUNIZ, OPINION
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted October 19, 2017
San Francisco, California

Filed May 8, 2018

Before: Consuelo M. Callahan and Carlos T. Bea,
Circuit Judges, and Jane A. Restani,* Judge.

Opinion by Judge Callahan

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

SUMMARY****Habeas Corpus**

The panel (1) affirmed the district court's dismissal of California state prisoner Gregory Brown's second-in-time habeas corpus petition for failure to obtain authorization from this court to file a second or successive petition, and (2) denied his application for leave to file a second or successive petition.

Brown's second-in-time habeas petition alleged failure to disclose materially exculpatory evidence under *Brady v. Maryland*. The panel held that *Brady* claims are subject to AEDPA's second or successive gatekeeping requirements because the factual predicate supporting a *Brady* claim—the state's failure to disclose exculpatory evidence before trial—exists at the time of the first habeas petition.

Considering the exculpatory evidence individually and together with the evidence presented at trial, the panel held that Brown fails to make a *prima facie* showing of actual innocence by clear and convincing evidence. The panel therefore denied his application for leave to file a second or successive petition.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Grace R. DiLaura (argued), Assistant Federal Public Defender; Steven G. Kalar, Federal Public Defender; Office of the Federal Public Defender, San Francisco, California; for Petitioner-Appellant.

Gregory Ott (argued), Deputy Attorney General; Peggy S. Ruffra, Supervising Deputy Attorney General; Jeffrey M. Laurence, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, San Francisco, California; for Respondent-Appellee.

OPINION

CALLAHAN, Circuit Judge:

We must decide whether a prisoner's second-in-time habeas petition based on a claim under *Brady v. Maryland*, 373 U.S. 83 (1963) is second or successive for purposes of federal court review. The State of California disclosed allegedly exculpatory evidence in Petitioner Gregory Brown's case after Brown's initial federal habeas petition was denied. Because he did not know of the evidence at the time of his initial petition, Brown argues he should not be subject to the more stringent standard for seeking habeas relief in any subsequent federal petition.

We conclude that Brown's argument is foreclosed by the plain text of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), binding Supreme Court and Ninth Circuit precedent, and Congress' intent in enacting AEDPA. We therefore

apply AEDPA's second or successive bar to Brown's claim and assess whether he has made the requisite *prima facie* showing of actual innocence. Because the alleged exculpatory evidence falls short of this standard, we affirm the district court's dismissal of Brown's petition for lack of jurisdiction and deny his application for leave to file a second or successive habeas petition with the district court.¹

I.

Gregory Brown is currently serving a sentence of fifty-six years-to-life for the February 7, 1995 attempted murder of Ms. Robin Williams. Brown was convicted by a jury of one count of conspiracy to commit murder and one count of attempted murder in California state court on an aiding and abetting theory. His two co-defendants, Wanda Fain and Joseph Diggs, were also convicted.

A.

The following facts were presented to the jury at the trial of the three co-defendants. On January 6, 1995, Williams was at the home of Brown, Fain, and Diggs in San Francisco. Williams lived nearby, and frequented Brown's home. Responding to a domestic disturbance nearby, police approached Brown's home, where they found Brown in the doorway holding a bag of crack cocaine and a gun. The police arrested Brown and Williams. That same day, Williams gave a

¹ Brown's motion for judicial notice (Dkt. No. 17) is **GRANTED**.

statement to the police that she had seen Brown with both the cocaine and the gun.

About a week-and-a-half later, and while Brown was awaiting trial on drug charges stemming from his January 6 arrest, Fain and Brown approached Williams at a neighbor's home. As Brown looked on, Fain gave Williams a note that stated: "Well, well, well, as you know playing with fire get burned. Silence is the very best policy, bitch. P.S.: Chickens get plucked every day, so don't play." Included with the note was an explicit photo of Williams that Brown had taken years earlier. Fain then told Williams that Brown wanted to speak with her. Williams refused because she was scared. Fain and Brown left the residence.

Brown later ran into Williams on the street. Brown told her that he would take care of her if she did not testify against him in his drug case. After that conversation, Williams resumed her visits to Brown's residence where, on at least one occasion, the two smoked crack cocaine.

According to Williams, on the day of the attempted murder, she traveled to and from Brown and Fain's residence several times, smoking crack cocaine throughout the day. When she arrived at the residence at 7 p.m. to see Fain, she saw that Brown and Fain were talking (Diggs was also present), and so left to take a walk. She returned about five minutes later. By that time Brown had left. Fain asked Williams if she wanted to go to a "trick house" on Third Street so that they could prostitute themselves. Williams agreed because she wanted money to pay for

more drugs. Williams, Fain, and Diggs left the residence at around 7:30 p.m. Fain told Williams that Diggs was joining them to provide protection. Williams was “very high” at the time. Brown did not accompany them. Notably, expert testimony established that Williams’ habitual crack cocaine use, combined with the head injury she sustained from being shot in the head later that evening, could have impaired her memory of that evening’s events.

From that point on, the accounts of Williams, Fain, and Diggs diverge. Williams testified that she, Fain, and Diggs boarded a bus together at around 7:30 p.m. The three departed the bus at the corner of Third and Jerrold Streets. From there, Williams testified that she and Fain walked down the street, laughing and talking, with Diggs following behind. Williams’ last recollection before she was shot was a car approaching her from behind. The police never identified the car.

In contrast, Diggs told Officer Jeffrey Levin that he got off the bus with Williams and then went into a nearby Kentucky Fried Chicken on his own. He stated that he later re-boarded a bus, leaving Williams behind.

Fain’s account of her movements is both internally inconsistent and contrary to Diggs’ account. Fain first told Levin that she met up with Diggs for the first time at the Third and Jerrold Street bus stop—*i.e.*, after she departed the bus. But later she said that she got on the bus with both Williams and Diggs.

The defense introduced several pieces of exculpatory evidence. Besides the fact that no forensics connected Fain or Diggs—let alone Brown—to the attempted murder, the defense also introduced impeachment evidence against Williams. The defense showed that Williams had been involved in altercations with others in the past, was beaten up for committing burglary, and had informed on perpetrators in other crimes—all of which suggested that individuals other than the co-defendants may have had a motive to kill Williams. The jury also heard testimony that a man known as “Tails” had threatened Williams at gunpoint the day before the attempted murder. Finally, the jury heard from Angel Stigert, who found Williams lying in the street after she was shot. Stigert saw a car parked two blocks away with someone standing outside, “crouching over [and] looking toward where [Williams’] body was.” Stigert offered a vague description of “a big black person with [a] white T-shirt.” The mysterious interloper, thereafter nicknamed “Suspect 1,” was never identified. Despite the exculpatory evidence, the jury convicted Brown, Fain, and Diggs.

B.

In 1998, the California Court of Appeal affirmed the convictions and sentences of all three co-defendants and the California Supreme Court denied review. The Court of Appeal discussed the inculpatory facts in Brown’s case. On the conspiracy charge, the court noted that (1) Brown had a motive to murder Williams because he was angry with her for talking to the police and wanted to prevent her from testifying against him in his drug case; (2) he demonstrated an

intent to act on these motives through specific actions—namely, “he directed Fain to prepare and deliver the threatening note; he gave Fain a suggestive photograph of Williams to attach to the note; he accompanied Fain when the note was delivered but waited outside and had Fain tell Williams that he wanted to speak with her privately”; (3) he told Williams he would protect her *if* she did not testify against him in his drug case; (4) on the day of the shooting Brown was present with Fain and Diggs at their apartment when Williams arrived; and (5) Brown left shortly before Fain suggested that she and Williams prostitute themselves—an excursion that culminated in Williams’ attempted murder. As to the last fact, the Court of Appeal concluded that “[t]he jury could reasonably infer that Brown left the apartment so Williams would not become suspicious: not because he was unaware of some hidden agreement between Fain and Diggs.”

On the charge of aiding and abetting attempted murder, the court found that, based on the same evidence supporting the conspiracy conviction, the jury could have reasonably concluded that Brown at least intended to aid and abet Fain and Diggs in the attempted murder, even if he did not personally intend to kill Williams.

In 1998, after the Court of Appeal affirmed his convictions, Brown filed a writ of habeas corpus in federal district court, which the court denied on the merits. The court refused to grant a Certificate of Appealability (“COA”), as did the Ninth Circuit, thereby concluding Brown’s first attempt at federal habeas relief.

C.

New evidence came to light more than a decade later. Between October 2010 and May 2011, the Trial Integrity Unit of the San Francisco District Attorney’s (“DA”) Office issued letters to the San Francisco County Public Defender’s Office and San Francisco Bar Association’s Indigent Defense Administrator, stating that three San Francisco Police Department officers had material in their personnel files that was previously undisclosed and which “may be subject to disclosure under *Brady v. Maryland* (1963) 373 U.S. 83.” The letters implicated three officers who were in some way related to Brown’s case: Ms. Pamela Hockett (May 19, 2011), Sergeant Michael Hutchings (Apr. 29, 2011), and Sergeant Wallace Gin (Oct. 6, 2010).

The Hockett information dates back to 1987, the Hutchings information to 1989, and the Gin information to 1988—long before the officers’ associations with the Brown, Fain, and Diggs case. The letters state that the DA’s office was not conceding that any of the information was exculpatory or that it cast doubt upon the correctness of any convictions.

The material implicating Hockett is potential impeachment evidence. It shows that more than a decade before Brown’s trial, Hockett was arrested on charges of drug possession, carrying a concealed firearm, having a hypodermic needle, and carrying a loaded firearm in a public place. The charges were dismissed. Hockett did not testify at Brown’s trial or at any preliminary hearing. She was, however, one of

the officers who responded to the crime scene. She also produced a crime scene log listing the comings and goings of police personnel. No claim is made that the crime scene log was inculpatory or exculpatory, in and of itself.

The material implicating Hutchings is also potential impeachment evidence. The information involves a 1984 charge against Hutchings for loitering where children congregate, resisting arrest, and prostitution. The charges were dismissed after diversion. Like Hockett, Hutchings also did not testify at Brown's trial or at any preliminary hearing. Nor did Hutchings have any involvement in Brown's attempted murder case. Hutchings' association with Brown stemmed from his participation in Brown's January 1995 arrest for drug possession. In fact, Hutchings was a *defense* witness at a pretrial motion to suppress the drug evidence.

The material implicating Gin involves an unrelated matter that predated the Williams shooting by seven years.² Of the three officers, Gin was the most closely involved in Brown's case: unlike Hockett and Hutchings, Gin testified at Brown's trial. And while Gin had no role in the investigation and did not interview the co-defendants or the victim, he interviewed the driver of a bus who happened upon Williams' body, as well as two passengers on the bus. The information in Gin's investigation report was

² The material itself is filed under seal and is not reproduced in this opinion.

corroborated by live witnesses, including the bus driver, who testified at Brown's trial.

In 2014, Brown filed a second-in-time habeas petition in federal district court under 28 U.S.C. § 2254, alleging that the Hockett, Hutchings, and Gin information was materially exculpatory *Brady* evidence. The district court dismissed Brown's petition without prejudice for lack of jurisdiction. It determined that the petition was second or successive, and therefore Brown was required to obtain authorization from the Ninth Circuit to file his petition in order for the district court to assert jurisdiction. The district court granted a COA on the question of whether Brown's petition was second or successive, and Brown timely appealed.

II.

We review a district court's dismissal of a habeas petition as second or successive de novo. *Wentzell v. Neven*, 674 F.3d 1124, 1126 (9th Cir. 2012). Our review of an application to file a second or successive habeas petition is governed by the standard set forth in AEDPA, as is our determination of whether a second-in-time habeas petition is second or successive under AEDPA. *See* 28 U.S.C. § 2244(b)(2)–(b)(3).

A.

First-in-time habeas petitions filed in federal court are subject to AEDPA § 2254, which provides that

[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A different and more demanding standard governs most second-in-time federal habeas petitions, termed “second or successive.” While AEDPA does not define “second or successive,” we have looked to the text of the statute, the corpus of Supreme Court jurisprudence interpreting § 2244(b), and the pre-AEDPA abuse-of-the-writ doctrine to trace its contours. It is now understood that a federal habeas petition is second or successive if the facts underlying the claim occurred by the time of the initial petition, *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007), and if the petition challenges the same state court judgment as the initial petition, *Magwood v. Patterson*, 561 U.S. 320, 333 (2010) (explaining that

a writ of habeas corpus is filed “on behalf of a person in custody pursuant to *the judgment* of a State court.” (emphasis in opinion) (quoting 28 U.S.C. § 2254(b)). Stating the second criterion in the converse, a petition is *not* second or successive if it is based on an intervening state court judgment—e.g., a new sentencing determination—notwithstanding that the same *claim* challenging a conviction (or even the new sentence) could have been brought in the first petition. *See Magwood*, 561 U.S. at 331-36. Nor is a petition second or successive if the factual predicate for the claim accrued only after the time of the initial petition. *United States v. Buenrostro*, 638 F.3d 720, 725-26 (9th Cir. 2011) (*per curiam*).

If the petition is second or successive, then the district court lacks jurisdiction and must dismiss the petition unless and until the court of appeals grants an application to file it. 28 U.S.C. § 2244(b)(3)(A). In evaluating such an application, the court of appeals is bound by § 2244(b)’s gatekeeping requirements:

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

- (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

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

Id. § 2244(b)(2).³ Thus, absent a showing of intervening constitutional law, a second or successive habeas petitioner must overcome two obstacles to invoke the district court's jurisdiction: he must (1) show that the factual predicate for his habeas claim reasonably could not have been discovered at the time of his initial habeas petition, and (2) demonstrate that the previously undiscovered facts, if shown to be true in a habeas action, suffice to

³ The Supreme Court upheld § 2244(b) as consistent with the Suspension Clause of the United States Constitution in *Felker v. Turpin*, 518 U.S. 651, 664 (1996). The Suspension Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const., art. I, § 9, cl. 2.

prove his innocence by clear and convincing evidence. *Buenrostro*, 638 F.3d at 725-26.⁴

B.

We conclude that *Brady* claims are subject to AEDPA’s second or successive gatekeeping requirements because the “factual predicate [supporting a *Brady* claim] existed at the time of the first habeas petition.” *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015). This conclusion is compelled by the plain text of § 2244(b), Supreme Court precedent, and our own case law.

1. We begin, as always, with the plain text of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Section 2244(b)(2)(B)(i) applies the second or successive bar to claims in which “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.” Two premises necessarily underpin this provision: the factual predicate must have existed previously, and the defense must not have known about it. Section 2244(b) therefore essentially *defines*

⁴ *Buentrostro* involved AEDPA § 2255(h), not § 2244(b). Section 2255(h) governs second or successive habeas petitions filed pursuant to a *federal court judgment*, rather than a state court judgment, but it incorporates by reference and applies the standard set forth in § 2244. Our circuit cites cases interpreting both provisions interchangeably. *See, e.g., Gage*, 793 F.3d at 1165 (a case applying § 2244, and relying on *Buenrostro*).

a *Brady*-type event.⁵ It follows ineluctably that *Brady* claims are therefore subject to § 2244(b).

2. Supreme Court case law accords with this interpretation. The Court has explained that § 2244(b) applies to second-in-time habeas petitions except where the factual predicate did not *exist* at the time of the initial habeas petition. *See Panetti*, 551 U.S. at 945.

In *Panetti*, the Court assessed a death row inmate's second-in-time habeas petition—brought years after his initial petition was denied—in which he argued that his death sentence was unconstitutional under *Ford v. Wainwright*, 477 U.S. 399 (1986) because he was insane. *Ford* ruled that the Eighth Amendment precludes the government from executing an insane inmate. *Ford*, 477 U.S. at 409-10. Because a claim ripens only at the time the factual predicate supporting a habeas claim accrues, *Panetti* explained that “*Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition”—and oftentimes not until execution is imminent. *Id.*; *Magwood*, 561 U.S. at 335 n.11. *Panetti* therefore deemed the inmate's petition not to be second or

⁵ We note that, should exculpatory evidence be discovered by the State *after* the first habeas petition is filed, and is thereafter suppressed by the State over the course of post-conviction proceedings, the result would be different. In that event, the factual predicate for a *Brady* claim would have accrued only after the petitioner filed his initial petition, and so the new claim would not have been ripe at the time of the initial filing. *See Panetti*, 551 U.S. at 945.

successive because his *Ford* claim did not ripen until just before the time of his execution. *Panetti*, 551 U.S. at 945. In reaching this conclusion, the Court considered (1) its own case law both pre- and post-AEDPA, and (2) AEDPA's purposes. *Id.* at 943-47.

First, *Panetti* looked to the Court's decisions in *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), and *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998). *Slack* held that a pre-AEDPA petition was not second or successive notwithstanding that it challenged the same state court judgment, because it merely supplemented a first-in-time petition that was dismissed for lack of exhaustion.⁶ 529 U.S. at 487. *Martinez-Villareal* reached the same conclusion with regard to a *Ford* claim that the petitioner, unlike the petitioner in *Panetti*, *had* raised in his first habeas petition. 523 U.S. at 644. The district court dismissed the first petition, however, because it was unripe at the time. *Id.* In discussing the rationale behind *Martinez-Villareal*, the Court in *Panetti* explained the unusual circumstance presented by *Ford* claims:

While the later filing "may have been the second time that [the prisoner] had asked the federal courts to provide relief on his *Ford* claim," the Court declined to accept that there were, as a result, "two separate applications, [with] the second ... necessarily subject to § 2244(b)." The Court instead held that, in light of the particular circumstances

⁶ The Court implied that it would have reached the same result under AEDPA. 529 U.S. at 486.

presented by a *Ford* claim, it would treat the two filings as a single application. The petitioner “was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.”

551 U.S. at 944-45 (quoting *Martinez-Villareal*, 523 U.S. at 643). Rather than limiting *Martinez-Villareal* to exempting only those *Ford* claims that were actually brought as (unripe) claims in an initial petition, *Panetti* couched *Martinez-Villareal* in a broader doctrinal context. The Court concluded that “Congress did not intend the provisions of AEDPA addressing ‘second or successive’ petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe.” *Id.* at 945.

Panetti fortified its conclusion by considering Congress’ intent under AEDPA, and the “practical effects” of its holding. *Id.* The Court explained that

[t]he statute’s design is to “further the principles of comity, finality, and federalism.” *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003) (internal quotation marks omitted). Cf. *Day v. McDonough*, 547 U.S. 198, 205-206, 126 S. Ct. 1675, 164 L.Ed.2d 376 (2006) (“The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is

fresh, and lends finality to state court judgments within a reasonable time” (internal quotation marks omitted)).

Id. The Court determined that requiring a petitioner to file an unripe *Ford* claim to preserve the right to full habeas review of that claim—a la *Martinez-Villareal*—would frustrate Congress’ goals:

An empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, “reduc[e] piecemeal litigation,” or “streamlin[e] federal habeas proceedings.” *Burton v. Stewart*, 549 U.S. 147, 154, 127 S. Ct. 793, 797, 166 L.Ed.2d 628 (2007) (*per curiam*) (internal quotation marks omitted). AEDPA’s concern for finality, moreover, is not implicated, for under none of the possible approaches would federal courts be able to resolve a prisoner’s *Ford* claim before execution is imminent. See *Martinez-Villareal, supra*, at 644-645 (acknowledging that the District Court was unable to resolve the prisoner’s incompetency claim at the time of his initial habeas filing).

Id. at 946. The Court ultimately held that petitions “that would require unripe (and, often, factually unsupported) claims to be raised as a mere

formality, to the benefit of no party,” are not second or successive under AEDPA. *Id.* at 947. Thus, “the statutory bar on ‘second or successive’ applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe.”⁷ *Id.*

⁷ *Panetti* marked the Supreme Court’s first foray into the area of unripe claims filed after a habeas petition has been decided, but it was not the first court to venture into the patch. Over the span of nearly two decades, several lower courts have recognized that unripe claims—albeit outside the *Ford* context—are not subject to the second or successive bar when properly raised in a subsequent federal habeas petition. *See, e.g., Hill v. Alaska*, 297 F.3d 895, 898-99 (9th Cir. 2002) (challenge to release date based on post-sentencing parole determination was not second or successive because the factual predicate—calculation of the release date—occurred after petitioner filed his initial petition); *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003) (challenge to prison disciplinary proceeding was not second or successive because it “could not have been raised in an earlier petition” challenging petitioner’s conviction or sentence); *James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002) (challenge to calculation of release date was not second or successive because it was based on facts that “did not exist” at the time of the initial habeas petition); *Crouch v. Norris*, 251 F.3d 720, 725 (8th Cir. 2001) (claim stemming from a refusal to grant parole was not second or successive because the facts underlying the claim did not exist at the time of the initial habeas petition); *In re Cain*, 137 F.3d 234, 235-36 (5th Cir. 1998) (challenge to prison disciplinary decision was not second or successive because it occurred after petitioner filed his initial habeas petition); *Walker v. Roth*, 133 F.3d 454, 455 (7th Cir. 1997) (*per curiam*) (petition was not second or successive because it “challenge[d] the constitutionality of a proceeding which obviously occurred after [petitioner] filed, and obtained relief, in his first habeas petition”); *United States v. Scott*, 124 F.3d 1328-29, 1330 (10th Cir. 1997) (petition was not second or successive where ineffective assistance of appellate counsel claim raised in the petition did not exist at the time of petitioner’s initial petition);

Panetti's limited exception to § 2244(b) comports with the plain text of § 2244(b)(2)(B)(i): whereas a *Brady* claim involves a "factual predicate" that existed but could previously "not have been discovered," an unripe claim involves no previously existing "factual predicate" *at all*. Section 2244(b)(2)(B)(i) simply does not contemplate such a scenario.

Treating unripe claims as second or successive is also inconsistent with AEDPA's purposes of promoting comity, finality, federalism, and judicial efficiency, as *Panetti* explained. *See Panetti*, 551 U.S. at 946-47. Doing the same for *Brady* claims, by contrast, serves AEDPA's goals. It gives due regard to States' administration of their own criminal justice systems by limiting collateral attacks on state court judgments to those where "extreme malfunctions in the state criminal justice systems" occurred. *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (emphasis added). In the same vein, by recognizing only those *Brady* claims that show by clear and convincing evidence a petitioner's actual innocence, a court of appeals acts consistent with Congress' purpose of keeping the federal courts' focus on ensuring the integrity of a verdict, rather than second-guessing state court judgments. *See id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (habeas relief is available only where the state court's

cf. Benchoff v. Colleran, 404 F.3d 812, 817-18 (3d Cir. 2005) (because challenged parole determination occurred before petitioner filed his first habeas petition, his subsequent challenge was second or successive).

decision was so unreasonable that there is no “possibility for fairminded disagreement” (internal quotation marks omitted)).

In sum, having reviewed § 2244(b)’s plain text and the Supreme Court’s narrowly circumscribed exception for unripe claims, we decline to read into the Court’s decisions an additional and qualitatively different exception for *Brady* claims.

3. Finally, our own case law accords with this interpretation. Indeed, we explained this very distinction in *Buenrostro*, albeit in the context of an ineffective assistance of counsel (“IAC”) claim. 638 F.3d at 725-26. *Buenrostro* involved a petitioner serving a life sentence for federal drug crimes. *Id.* at 721. After the district court denied his initial petition, *Buenrostro* discovered that his trial attorney had rejected a plea deal that would have limited his sentence to fourteen years. *Id.* *Buenrostro* argued that his attorney’s rejection of the deal amounted to deficient performance, and that his case should be reopened under Federal Rule of Civil Procedure 60(b). *Id.*

The district court construed *Buenrostro*’s motion as second or successive under § 2255—the federal court analog to § 2244. *Id.* A panel of this court agreed and, applying § 2255’s “actual innocence standard,” denied his application to file his petition in district court. *Id.* at 725-26. *Buenrostro* then went on to distinguish *Panetti*. It explained that *Panetti* is limited to the narrow circumstance of a claim that does not ripen until after an initial habeas petition is decided. *Id.* at 725. *Buenrostro*’s IAC claim, by

contrast, *was* ripe at the time of his first habeas petition: the alleged constitutional error had already occurred, and the district court would have had jurisdiction to rule on it. *See id.* at 725-26. Buenrostro just didn't know about it. The court held that § 2255 addresses this precise scenario, and explained that "the words of § 2255(h) indicate Congress' clear intent to prohibit us from certifying second-in-time claims, ripe at the time of a prisoner's first § 2255 proceeding but not discovered until afterward," unless the petitioner can satisfy § 2255's criteria. *Id.*

Our subsequent decision in *Gage* also concerned facts discovered after trial but before the filing of an initial habeas petition. But in *Gage*, those facts supported a *Brady* rather than an IAC claim. *Gage* was serving a 70-year sentence for sexually assaulting his daughter. *Gage*, 793 F.3d at 1163. After he was convicted but before he was sentenced, the trial judge ordered the state to turn over the victim's medical and psychiatric records for *in camera* review. *Id.* While *Gage* was not permitted to view the records, the trial court disclosed some of their contents—namely, that the victim's mother—*Gage*'s ex-wife—had described her daughter as a "pathological liar." *Id.* Armed with this exculpatory evidence, the trial court "concluded that the testimony of the victim and her mother [implicating *Gage*] was not credible, leaving insufficient evidence to support the jury's verdict." *Id.* The court thereby vacated *Gage*'s conviction. *Id.*

After the California Court of Appeal reinstated the conviction and sentenced *Gage* to seventy years, *Gage* ran his appeals up through the state courts,

arguing that the State's failure to turn over the victim's medical records violated *Brady*. *Id.* The state courts rejected Gage's appeals. *Id.* Gage eventually filed a *pro se* habeas petition in federal district court. *Id.* at 1164. Curiously, Gage did not press his *Brady* claim in the federal proceeding. *Id.* at 1163-64. The district court denied the petition, which a panel of this court upheld. *Id.* at 1164.

Years later, Gage sought this court's permission to file a second-in-time habeas petition to assert his *Brady* claim. *Id.* A panel of this court rejected Gage's argument that the petition fell under the *Panetti* exception. *Id.* at 1165. The court held that *Buenrostro* "foreclose[d] Gage's argument," reasoning that, unlike the petitioner's *Ford* claim in *Panetti*, the factual predicate for Gage's *Brady* claim "existed at the time of [Gage's] first habeas petition." *Id.* More specifically, *Gage* determined that

[t]he factual predicate for Gage's *Brady* claim developed, at the latest, when the state trial judge commented on the contents of [the victim's] medical records This is not a case where the basis for the would-be petitioner's second petition did not exist or was unripe when the first petition was filed.

Id. at 1165.

Critically, the court found only that the factual predicate for Gage's *Brady* claim accrued "*at the latest* when the state trial judge commented on the contents of [the victim's] medical records." *Id.* (emphasis added). The court left open the question

of when a factual predicate actually accrues for purposes of a *Brady* claim. That question is squarely presented here because the alleged *Brady* material was completely unknown to Brown and his counsel at the time of trial. Whereas *Gage* had knowledge of the *Brady* evidence when he filed his initial habeas petition, Brown was completely in the dark when he filed his own.

Today, we answer the question left open by *Gage*. We conclude that a factual predicate accrues at the time the constitutional claim ripens—*i.e.*, when the constitutional violation occurs. *See Panetti*, 551 U.S. at 945; *Magwood*, 561 U.S. at 335 n.11. In the case of a *Brady* claim, the violation occurs at the time the State should have disclosed the exculpatory evidence—*i.e.*, before trial.⁸ If the factual predicate accrues before a petitioner brings an initial federal habeas petition, then any subsequent federal petition raising a claim based on that factual predicate is second or successive and is governed by § 2244(b). Our conclusion is compelled by the plain text of § 2244(b), the Supreme Court’s decisions in *Panetti* and

⁸ To the extent *Gage* suggested that the factual predicate accrues at the time the petitioner learns of it, that case runs afoul of the distinction—made clear in *Buenrostro*—between *unripe* claims and *unknown* claims. At any rate, because *Gage* did not *hold* that the requisite factual predicate there did not accrue until the trial judge disclosed the alleged *Brady* material, we need not and do not credit that court’s dicta and instead follow *Buenrostro*’s clear holding to the contrary.

Magwood, and our own subsequent decision in *Buenrostro*.⁹

C.

We observe that our decision in *United States v. Lopez*, 577 F.3d 1053, 1064 (9th Cir. 2009) is in some tension with our subsequent decisions in *Buenrostro*, *Gage*, and our holding today. But *Lopez* is not controlling because it expressly declined to reach the question we answer here. *Lopez* held that the *Brady* claim there was, in fact, second or successive. *Id.* However, it rested its decision on a finding that the evidence underlying the claim was not material. *Id.* The court declined to resolve whether “all second-in-time *Brady* claims”—*i.e.*, material and immaterial claims alike—“must satisfy AEDPA’s gatekeeping requirements.” *Id.*; see *King v. Trujillo*, 638 F.3d 726, 729 (9th Cir. 2011) (*per curiam*) (recognizing *Lopez* for the proposition that a *Brady* claim in a second-in-time habeas petition “may not be subject to the ‘clear and convincing standard,’ provided the newly discovered

⁹ Our determination aligns the Ninth Circuit with our brethren in the Fourth, Tenth, and Eleventh Circuits. *In re Pickard*, 681 F.3d 1201, 1205 (10th Cir. 2012) (*Brady/Giglio* claims were “certainly second-or-successive ... because they assert[ed] a basis for relief from the underlying convictions”); *Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1259-60 (11th Cir. 2009) (*per curiam*) (holding that all second-in-time habeas petitions based on *Brady* claims are second or successive); *Evans v. Smith*, 220 F.3d 306, 323 (4th Cir. 2000) (“the standards that Congress has established for the filing of second or successive petitions account for precisely the type of situation[—*Brady* claims—]Evans alleges”).

evidence supporting the claim was ‘material’ under *Brady*” (emphasis in original)).

We also observe that *Lopez*’s distinction between material and immaterial *Brady* claims derives from the *pre-AEDPA* abuse-of-the-writ doctrine. *Lopez*, 577 F.3d at 1064. While AEDPA’s provisions are inspired by and borrow heavily from that judicially-developed rule, see *Slack*, 529 U.S. at 486, we are bound by AEDPA itself, not the judicial standard it superseded. AEDPA § 2244(b) makes no distinction based on the materiality of predicate facts. Its only concern is with the *existence* of those facts at the time of the initial habeas petition.¹⁰

D.

Turning to the matter before us, we first consider Brown’s argument that his *Brady* claims had not ripened at the time of his first habeas petition. Brown seeks a rule that *Brady* claims only ripen when a

¹⁰ Brown’s reliance on *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009), is unavailing. First, it is non-binding extra-circuit precedent. Second, *Douglas* acknowledged that the case was “unusual” and even “unique” for several reasons that set it apart from the typical second-in- time petition based on a *Brady* claim. *Id.* at 1187, 1189. Among other things, *Douglas*’s first habeas petition was pending when he discovered the *Brady* evidence. *Id.* at 1190. Because the “first habeas petition had never been finally resolved,” the Tenth Circuit deemed the second petition not to be second or successive. *Id.* Moreover, in a subsequent decision, the Tenth Circuit made clear that it was aligned with its sister circuits in deciding that *Brady* claims are, as a general rule, subject to AEDPA’s second or successive bar. *In re Pickard*, 681 F.3d 1201, 1205 (10th Cir. 2012).

petitioner is on notice of the *Brady* evidence. He relies heavily on our decision in *Lopez* but, as discussed, that case is inapposite. Brown also notes that in *Magwood*, seven justices concluded that a petition is not second or successive if the petitioner had no “full and fair opportunity to raise” the claim in the first petition. In *Magwood*, those seven justices agreed that, because Congress did not define “second or successive,” pre-AEDPA abuse-of-the-writ principles are relevant to determining whether a second-in-time habeas petition may be maintained. Under the abuse-of-the-writ doctrine, “to determine whether an application is ‘second or successive,’ a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application.” *Magwood*, 561 U.S. at 346 (Kennedy, J., dissenting). Because Brown did not know of the *Brady* material at the time of his first petition, he argues that he did not have a “full and fair opportunity to raise” his claim at that time.

Brown misreads *Magwood*. As Justice Kennedy made clear in his dissent—which was joined by three other justices and commanded a plurality of the Court—a petitioner “had no fair opportunity to raise the claim in the prior application” if “[1] the claim was not yet ripe at the time of the first petition, or [2] where the alleged violation occurred only after the denial of the first petition.” *Id.* at 345-46 (Kennedy, J., dissenting) (internal citation omitted).

Brown fails to satisfy either prong of Justice Kennedy’s disjunctive test. First, the alleged *Brady* violations occurred before Brown sought federal

habeas review for the first time, and so the “alleged violation” did not occur “after the denial of [his] first petition.” Second, contrary to his legal contention, Brown’s *Brady* claim did not ripen only when he *learned* of the alleged *Brady* material. As discussed, whether a claim is ripe under AEDPA turns on whether the factual predicate existed, not whether the petitioner *knew* it existed at the time of his initial habeas petition. *Buenrostro*, 638 F.3d at 725 (emphasis in original).

Consistent with the decisions in *Panetti*, *Magwood*, and *Buenrostro*, we hold that Brown’s *Brady* claim was ripe at the time of his first habeas petition because the alleged constitutional violation—failure to turn over the Hockett, Hutchings, and Gin information—occurred before Brown’s trial even began. Thus, § 2244(b) applies to Brown’s claim and he is entitled to file a second or successive habeas petition only if he satisfies that provision’s gatekeeping requirements.

III.

To make it through the § 2244(b) “gateway,” Brown must make a *prima facie* showing that (1) the purported *Brady* material “could not have been discovered previously through the exercise of due diligence,” and (2) that the material—if proven on habeas review—establishes by “clear and convincing evidence that” Brown is actually innocent. 28 U.S.C. § 2244(b)(2)(B), (b)(3)(C); *Lopez*, 577 F.3d at 1064; *Gage*, 793 F.3d at 1166. The state concedes that Brown makes a *prima facie* showing as to factor (1). Because we agree with the State that Brown fails to

make the requisite showing as to factor (2), we address only that factor.

A.

Brown faces an uphill climb straight out of the gate. He must show that “the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing evidence* that, but for constitutional error, *no reasonable factfinder* would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added); *Lopez*, 577 F.3d at 1064; *see also Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (*en banc*). In other words, Brown must do more than simply satisfy the standard for prevailing on the underlying constitutional claim. For example, to prevail on a straight *Brady* claim, a petitioner must show that the state “suppressed [] evidence, either willfully or inadvertently,” that is “favorable to the accused, either because it is exculpatory, or because it is impeaching,” and which is “material.” *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017). “Evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Id.* (internal quotation marks omitted); *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (same). Section 2244(b)(2), however, elevates the “reasonable probability” standard for *Brady* materiality to a more demanding “clear and convincing evidence” standard. *Lopez*, 577 F.3d at 1064. Thus, our charge is to decide whether the petitioner’s “claim (1) is based on newly discovered evidence and [also] (2) establishes that he

*is actually innocent of the crimes alleged,” King, 638 F.3d at 730 (emphasis added)—not whether the petitioner merely sustained a prejudicial constitutional injury. We have observed that “[f]ew applications to file second or successive petitions ... survive [§ 2244(b)’s] substantive and procedural barriers.” *Id.* (internal citation omitted).*

B.

Brown argues that the Hockett, Hutchings, and Gin information would have “played a significant role in the case” because of the weak evidence against him. But Brown fails to show how the three officers’ participation in his case—which was tangential at best—would have tipped the scales in any juror’s mind.

The record reflects that Hockett’s involvement in Brown’s trial had no nexus to any evidence inculpating Brown. She was one of the first responders at the crime scene and produced a log listing the comings and goings of police officers. She offered no testimony and Brown makes no assertion that her crime scene log omitted exculpatory evidence. Moreover, even if Brown could have impeached Hockett with the later-disclosed information, that would not have affected the case at all because nothing in the crime scene log, nor any actions taken by Hockett, inculpated Brown. Thus, the Hockett information does not point to Brown’s actual innocence.

We reach the same result regarding the Hutchings material. Like Hockett, Hutchings did not

testify at Brown's trial. In fact, Hutchings was not even involved in the attempted murder investigation. Instead, he was a *defense* witness in Brown's case for drug possession. Brown inexplicably argues that impeachment evidence against his own witness in a separate case would have "weakened the credibility of the [attempted murder] investigation."

Further, the purported *Brady* material—information that Hutchings was charged more than ten years earlier with loitering where children congregate, resisting arrest, and prostitution—is not material because it bears no relation to his credibility in Brown's case. And, as with Hockett, even if Brown could have impeached Hutchings with the information, that would not have reasonably affected the outcome because Hutchings gathered no evidence inculpating Brown.

Gin had a more substantive role in the attempted murder case, but, again, any impeachment evidence is not material. While Gin testified at Brown's trial and produced a report, his crime scene interviews with the bus driver and two bus passengers were corroborated by live witness testimony. Moreover, Gin was not involved in the investigation beyond his presence at the crime scene for approximately twenty-to-forty minutes, he did not uncover any exculpatory or inculpatory evidence, and he had no reason to lie about his witness interviews.

In sum, considering the exculpatory evidence individually and together with the evidence presented at trial, we hold that Brown fails to make a prima

facie showing of actual innocence by clear and convincing evidence.

IV.

We appreciate that our application of AEDPA's second or successive bar to *Brady* claims may seem harsh. Why should courts saddle petitioners with a stringent standard of proof that is a function of the government's own neglect, or worse, malfeasance? The answer is that such is the framework Congress established. That a petitioner's burden is higher under these circumstances may seem inequitable, but that is a policy, not a legal, objection. Through § 2244(b), Congress made the legislative choice to prioritize state-federal comity and the finality of criminal proceedings over affording petitioners multiple opportunities to invoke the federal courts' jurisdiction under the same standard of review—a choice that the Supreme Court has definitively held to be consistent with the Suspension Clause. *Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The added restrictions which [AEDPA] places on second habeas petitions are well within the compass of th[e] evolutionary process [defining the parameters of the writ of habeas corpus], and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9."). Indeed, the Suspension Clause establishes no particular review standard for habeas petitions; it *does*, however, guarantee access to the federal courts to press a habeas claim. Section 2244(b) preserves this bedrock constitutional right by requiring the court of appeals to grant an application for habeas review when clear and convincing evidence of actual innocence so requires.

CONCLUSION

Petitioner Gregory Brown's habeas petition alleging *Brady* violations is second or successive because the factual predicate underlying his constitutional claim existed at the time he filed his first-in-time habeas petition. Under a second or successive analysis, his claim fails because the underlying facts do not point to—let alone show by clear and convincing evidence—his actual innocence. The district court's dismissal of Brown's habeas petition for failure to obtain authorization from this court to file a second or successive petition is therefore **AFFIRMED**, and Brown's application for leave to file a second or successive habeas petition is **DENIED**.

APPENDIX C

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No. CV 15-04222-R (DTB)

TERRENCE EDWIN PRINCE,

Petitioner,

vs.

JOE A. LIZARRAGA, Warden,

Respondent.

**ORDER ACCEPTING FINDINGS,
CONCLUSIONS AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, and the Report and Recommendation of the United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a *de novo* determination of those portions of the Report and Recommendation to which objections have been made, the Court concurs with and accepts the findings, conclusions and recommendations of the Magistrate Judge. IT THEREFORE IS ORDERED that respondent's Motion to Dismiss is granted and that Judgment be entered dismissing this action without prejudice.

Dated: March 9, 2016

/s/ Manuel L. Real

MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

APPENDIX D

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No. CV 15-04222-R (DTB)

TERRENCE EDWIN PRINCE,

Petitioner,

vs.

JOE A. LIZARRAGA, Warden,

Respondent.

**REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On June 4, 2015, petitioner, through counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Pet.”) herein, together with a supporting Memorandum of Points and Authorities (“Pet. Mem.”) and exhibits attached to the Petition (“Pet. Exh.”) and the Memorandum of Points and Authorities (“Pet. Mem. Exh.”). On June 6, 2015, the Court issued its Order Requiring Response to

Petition. After one extension of time, on August 25, 2015, respondent filed an “Application for Leave to File Motion to Vacate Order Requiring Response” (“Application”), together with a “Motion to Vacate Order Requiring Response” (“Motion to Vacate”), on the grounds that petitioner failed to comply with 28 U.S.C. § 2244(b) and the Petition is unverified.¹ Petitioner opposed this Application. On August 31, 2015, the Court denied the Application, and instead construed respondent’s Motion to Vacate as a Motion to Dismiss Petition for Writ of Habeas Corpus (“Motion”). Petitioner filed his Opposition (“Opp.”) to the Motion on September 21, 2015.

Thus, this matter is now ready for decision. For the reasons discussed hereafter, the Court recommends that the Motion be granted and that the Petition be dismissed for lack of jurisdiction.

BACKGROUND

A. Procedural History

On June 24, 1982, a Los Angeles County Superior Court jury found petitioner guilty of first degree murder and possession of a concealable firearm by an ex-felon. The jury found true the allegations that the murder was committed during a robbery and that petitioner used a firearm during the commission of the robbery. On September 14, 1982, the trial court sentenced petitioner to life without the possibility of

¹ Respondent requested two extensions of time, one of which was granted in part, and another of which was denied for failure to show good cause.

parole for the murder, plus a consecutive term of eight months on the possession charge. (Pet. at 2; Pet. Exh. 1.)

Petitioner appealed his conviction and sentence to the California Court of Appeal. In an unpublished decision issued on January 13, 1984, the Court of Appeal modified petitioner's sentence to provide that the eight-month term would be served first, followed by the life sentence, and affirmed the judgment in all other respects. (Pet. Exh. 1.) Petitioner's ensuing Petition for Review to the California Supreme Court was denied on March 14, 1984. (Pet. at 3.)

On January 9, 1987, petitioner collaterally challenged his conviction in state court, by filing a habeas petition in the California Court of Appeal, which was denied on February 3, 1987. (Pet. Exh. 3; Respondent's Notice of Lodging ["Lodgment"] No. 1.) Petitioner then filed a habeas petition in the California Supreme Court on February 13, 1987, which was denied on March 26, 1987. (Pet. Exh. 4; Lodgment No. 2.)

On March 31, 1989, petitioner filed a habeas petition in the United States District Court (Case No. CV 89-1904-MRP (GHK)), challenging his 1982 conviction. On April 6, 1989, the petition was denied and dismissed without prejudice for failure to exhaust state court remedies. (Pet. Exh. 5.)

On February 13, 1990, petitioner returned to state court and filed a habeas petition in the California Supreme Court, which was denied on March 14, 1990. (Lodgment No. 3.) On March 12,

1991, petitioner filed another habeas petition in the United States District Court (Case No. CV 91-1351-R (GHK)), challenging his 1982 conviction and raising claims unrelated to the claim asserted in the Petition herein. (Pet. Exh. 6.) On June 11, 1993, the Court denied the petition and dismissed the action on the merits. (Pet. Exh. 7.) On June 9, 1994, the Ninth Circuit Court of Appeals affirmed the Court's denial of the habeas petition. (Pet. Exh. 8.)

Thereafter, on April 26, 2007, petitioner filed another habeas petition in the United States District Court (Case No. CV 07-2757-R (JWJ)), challenging his 1982 conviction. (Pet. Exh. 9.) On July 25, 2007, the petition was denied and dismissed without prejudice for failure to exhaust state court remedies. (Pet. Exhs. 10, 11.)

Meanwhile, on March 27, 2007, petitioner filed a habeas petition in the Los Angeles County Superior Court. (Pet. at 4.) Petitioner filed an amended petition on February 5, 2008. (Pet. Mem. at 6 n.7; Pet. Mem. Exh. A at 2.) In June 2009, the Superior Court ordered an evidentiary hearing. (Pet. Mem. C at 18.)

On December 7, 2009, petitioner filed a petition for writ of mandate in the California Court of Appeal, which was denied on December 15, 2009. (Lodgment No. 4.) On or about July 16, 2010, petitioner filed a third-amended petition in the Los Angeles Superior Court, raising the same claim asserted in the Petition herein. (See Pet. Mem. at 6-7.) The Superior Court held an evidentiary hearing, and on March 14, 2013, the Superior Court granted the habeas petition on the ground that the State violated petitioner's due

process rights by concealing a statement by Nelida Walsh (“Walsh”). (Pet. Mem. Exh. A.) The People appealed and on August 26, 2014, the California Court of Appeal reversed the Superior Court’s order granting the petition and remanded to the Superior Court with directions to enter a new order denying the petition. (Pet. Mem. Exh. C.)² On October 6, 2014, petitioner filed a Petition for Review in the California Supreme Court, which was denied on November 12, 2014. (Pet. Mem. Exhs. D, E.)

As explained, the instant Petition was filed on June 4, 2015.

B. Factual background

Petitioner’s conviction stems from the murder of Bruce Horton (“Horton”), which occurred during an attempted robbery of Horton’s check-cashing business on February 16, 1980. (Pet. Exh. 1 at 2; Pet. Mem. at 1.) Two witnesses were present during the robbery and identified petitioner as one of the perpetrators: Carol Croce (“Croce”), who owned the hamburger stand in which the check-cashing business was located, and Keith Zarin (“Zarin”) (who previously went by Keith Sarazinski), who worked as a busboy at the hamburger stand. (Pet. Exh. 1 at 2-3; Pet. Mem. at 8, 12-13.) These witnesses testified at trial that petitioner and another man broke into and tried to rob Horton’s check-cashing business. (Pet. Mem. at 1.)

² Both the Superior Court’s and Court of Appeal’s decisions also addressed a *habeas* petition filed by Edwards Charles Williams, who was separately tried and convicted for the same murder and attempted robbery.

They further testified that petitioner entered the hamburger stand holding a gun and Croce testified that petitioner shot Horton while Horton was struggling with the second robber, Williams. (Pet. Exh. 1 at 3; Pet. Mem. at 1, 12-13, 15-18; Pet. Mem. Exh. C at 3.)³

Petitioner has filed the instant Petition because he claims that the prosecution withheld exculpatory evidence relating to another eyewitness, Walsh. Petitioner alleges that, until 2010, the State failed to disclose the existence of this other witness, who had spoken to the police twice on the day of the shooting. Walsh, who was across the street from the hamburger stand, told the police that, immediately after hearing shots fired, she looked across the street and saw “a large man—who did not fit [petitioner’s] height and weight—standing at the entrance to Mr. Horton’s business, and pointing a weapon inside the business.” (Pet. Mem. at 1-2, 10-11.) According to petitioner, this information would have offered him a viable and persuasive defense because (1) this information would have impeached the testimony of Croce and Zarin and (2) Walsh’s observations were explained and corroborated by the location of two spent .45 caliber casings found at the scene supporting a theory that the shooter was at the doorway of the business. (Pet. Mem. at 2-3.)

³ Another witness, John McCarty, who worked in a realty company near Horton’s business, testified that, after hearing the gunshots, he looked out the window and saw two men getting into a car. (Pet. Mem. at 18.)

PETITIONER'S CLAIM HEREIN

The State suppressed favorable, material evidence in violation of the Fifth and Fourteenth Amendments and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). (Pet. at 5.)

DISCUSSION

Respondent contends that the Petition must be dismissed because a prior habeas petition was dismissed on the merits and petitioner did not obtain an order authorizing the filing of the instant Petition.

The Antiterrorism and Effective Death Penalty Act of 1996 (the “AEDPA”) provides that a claim presented in a second or successive federal habeas petition that was not presented in a prior petition shall be dismissed unless:

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder

would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

Further, “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). If the petitioner does not first obtain authorization from the appropriate court of appeals, the district court lacks jurisdiction to consider the petition. *Burton v. Stewart*, 549 U.S. 147, 152-53, 127 S. Ct. 793, 166 L. Ed. 2d 628 (2007) (*per curiam*).

Here, petitioner previously filed a Section 2254 petition challenging his 1982 conviction, which was denied on the merits in 1993. (See Pet. Exhs. 6, 7.) The instant Petition challenges the same 1982 conviction. However, nothing in the record demonstrates that petitioner satisfied the gatekeeping requirements by obtaining the requisite authorization from the Ninth Circuit and petitioner does not claim that he sought or received such authorization. Rather, petitioner claims that the instant Petition does not require authorization because he has raised a material *Brady* claim, the factual predicate for which did not ripen until 2010 “at the earliest.” (Opp. at 11-12.) Petitioner maintains that his *Brady* claim, raised for the first time in the instant Petition, falls within an exception to the AEDPA’s gatekeeping requirements pursuant to *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007) and *United States v.*

Lopez, 577 F.3d 1053 (9th Cir. 2009) and thus, does not constitute a “second or successive” petition. (Opp. at 12-21.)

In *Panetti*, 551 U.S. at 947, the Supreme Court held that the gatekeeping requirements for “second or successive” petitions did not apply to a *Ford*⁴ claim brought in a Section 2254 petition filed when the claim was first ripe. Noting that “*Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition,” the Supreme Court concluded that Congress “did not intend the provisions of AEDPA addressing ‘second or successive’ petitions to govern a filing in the unusual posture” in which a Section 2254 petition raising a *Ford*-based incompetency claim was filed as soon as that claim was ripe. *Id.* at 943-45. The Supreme Court identified three considerations in support of this conclusion: “(1) [T]he implications for habeas practice of adopting a literal interpretation of ‘second or successive,’ (2) the purposes of [the] AEDPA and (3) the Court’s prior habeas corpus decisions, including those applying the abuse-of-the-writ doctrine.” *Lopez*, 577 F.3d at 1063. As the Supreme Court explained, the phrase “second and successive” is not self-defining: “It takes its full meaning from [the Court’s] case law, including decisions predating the enactment of the [AEDPA]” and the Court “has declined to interpret ‘second or successive’ as

⁴ *Ford v. Wainwright*, 477 U.S. 399, 409-10, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) (concluding that “the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane”).

referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application.” *Panetti*, 551 U.S. at 943-44. Usually, “a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA’s ‘second or successive’ bar.” However, the Court was reluctant to construe “a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality” in the first petition. *Id.* at 947.

Following the Supreme Court’s decision in *Panetti*, the Ninth Circuit considered whether a second-in-time 28 U.S.C. § 2255 motion, raising a *Brady* claim, was subject to the AEDPA’s “second or successive” requirements.⁵ *Lopez*, 577 F.3d at 1055-56. Although the Ninth Circuit acknowledged that the

⁵ In particular, the Ninth Circuit in *Lopez* focused on the gatekeeping provisions in 28 U.S.C. § 2255(h), which are similar to those in § 2244(b). 28 U.S.C. § 2255(h) provides:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

considerations identified in *Panetti* in support of its holding were not specifically limited to *Ford* claims, the Court nevertheless concluded that “*Brady* claims are not categorically exempt from AEDPA’s gatekeeping provisions and that second-in-time *Brady* claims that do not establish materiality of the suppressed evidence are subject to dismissal under § 2255(h)(1).” *Id.* at 1064, 1066. In reaching this decision, the Ninth Circuit considered the pre-AEDPA abuse-of-the-writ standard. Before the passage of the AEDPA, federal habeas courts could reach the merits of a *Brady* claim in a second-in-time petition only if the suppressed evidence was material, *i.e.*, there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 1064. Second-in-time *Brady* claims that did not establish materiality would have been barred under the pre-AEDPA abuse-of-the-writ doctrine. As such, as the Ninth Circuit explained, at a minimum, *Brady* claims that would have been barred under the abuse-of-the-writ doctrine are subject to the AEDPA’s gatekeeping requirements. *Id.* at 1068. The Ninth Circuit concluded that, “although the Court’s reasoning in *Panetti* is potentially applicable to other types of habeas claims, [it] did not believe *Panetti* can be read to support a construction of AEDPA that *expands* federal courts’ pre-AEDPA ability to reach the merits of claims presented in second-in-time petitions.” *Id.* at 1056 (emphasis in original). Because the petitioner in *Lopez* did not establish materiality under *Brady*, her claim would have been barred under the abuse-of-the-writ doctrine and therefore, she was required to satisfy Section 2255(h)(1)’s gatekeeping provisions.

However, the Ninth Circuit *expressly* declined to “resolve the more difficult question whether *all* second-in-time *Brady* claims must satisfy AEDPA’s gatekeeping requirements.” *Lopez*, 577 F.3d at 1067 (emphasis in original); *see also id.* at 1056 (declining to resolve “the more difficult question whether federal courts have jurisdiction to consider a subset of meritorious *Brady* claims that federal courts would have considered on the merits under the pre-AEDPA abuse-of-the-writ doctrine but that would be barred under a literal reading of ‘second or successive’ in the gatekeeping requirements); *id.* at 1068 (“we leave open the more difficult question whether *Panetti* supports an exemption from § 2255(h)(1)’ gatekeeping provisions for meritorious *Brady* claims that would have been reviewable under pre-AEDPA prejudice standard”). Although not resolving the issue, the Ninth Circuit noted that the Supreme Court’s reasoning in *Panetti* may not “translate to second-in-time *Brady* claims” for at least two reasons. First, Section 2255(h)(1) contains an express statutory standard for dealing with “second or successive” claims based on “newly discovered evidence.” “Congress’ expressed intent to limit the circumstances in which a court can entertain a petition based on newly discovered evidence may therefore distinguish *Brady* claims from the ‘unusual posture presented’ in *Ford* claims.” *Id.* at 1065. Second, a literal application of Section 2255(h)(1) would not bar all second-in-time *Brady* claims because some meritorious claims will establish “by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense,” and thereby, establishing one of the

exceptions to the bar. As the Ninth Circuit noted, “[p]erhaps the differing effects that § 2255(h)(1) would have on meritorious *Brady* claims-barring some and allowing others to proceed-is a ‘clear indication’ that Congress intended to restrict the type of *Brady* violations for which courts may grant relief in second-in-time petitions.” *Id.* at 1066. Such considerations would be equally applicable in addressing second-in-time Section 2554 petitions raising *Brady* claims.

The Ninth Circuit has not resolved the question left open by *Lopez*. In *King v. Trujillo*, 638 F.3d 726, 729 (9th Cir. 2011) (*per curiam*), the Ninth Circuit indicated that it had recently recognized that “a *Brady v. Maryland* violation claim in a habeas petition *may* not be subject to the ‘clear and convincing standard,’ provided the newly discovered evidence supporting the claim was ‘material’ under *Brady*.” (Footnotes omitted, emphasis in original). However, because the petitioner’s claims in *King* did not fit “within this narrow exception,” the Ninth Circuit did not further consider this issue. *Id.*

Several circuits have held that second-in-time habeas petitions raising *Brady* claims are *not* exempt from the second or successive gatekeeping requirements. *See Quezada v. Smith*, 624 F.3d 514, 520 (2d Cir. 2010) (applying section 2244(b) to *Brady* claim); *In re Siggers*, 615 F.3d 477, 479 (6th Cir. 2010) (same); *Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1259-60 (11th Cir. 2009) (*per curiam*); *Evans v. Smith*, 220 F.3d 306, 323-24 (4th Cir. 2000) (rejecting argument that the petitioner was not required to meet the AEDPA’s gatekeeping requirements in order to

bring his *Brady* claim); *Johnson v. Dretke*, 442 F.3d 901, 911 (5th Cir. 2006).

In light of the Ninth Circuit’s explicit refusal to resolve whether all second-in-time *Brady* claims must satisfy the AEDPA’s gatekeeping requirements, the Court concludes that petitioner has not shown that he is exempt from the gatekeeping provisions of Section 2244(b).⁶ See *Fellman v. Davison*, 2011 WL 2471579, at *3 (N.D. Cal. Jun. 22, 2011) (concluding that *Lopez* did not create a Section 2244 exception to *Brady* claims). The decision whether to allow petitioner to proceed with his Petition alleging a new *Brady* claim must be made, in the first instance, by the Ninth Circuit.⁷ See *Lopez v. Runnels*, 2010 WL 2348742, at

⁶ Indeed, as the district court in *Fellman* explained, subsequent Ninth Circuit case law supports the conclusion that no such *Brady* exception exists. In *United States v. Buenrostro*, 638 F.3d 720, 725-26 (9th Cir. 2011) (*per curiam*), the Ninth Circuit dismissed a second-in-time petition based on ineffective assistance of counsel, finding that “the words of § 2255(h) indicate Congress’ clear intent to prohibit us from certifying second-in-time claims, ripe at the time of a prisoner’s first § 2255 proceeding but not discovered until afterward, unless such claims” meet the AEDPA’s gatekeeping standards.

⁷ The Court also rejects petitioner’s remaining contentions that application of the AEDPA’s gatekeeping requirements would have an impermissible retroactive effect and would be unconstitutional. (See Opp. at 23-31.) The Ninth Circuit has held that the AEDPA’s gatekeeping requirements apply to new petitions filed after the date of the AEDPA’s enactment, even if the original petition was filed before the AEDPA’s enactment, *United States v. Villa-Gonzalez*, 208 F.3d 1160, 163-64 (9th Cir. 2000) (*per curiam*); see also *Cooper v. Calderon*, 274 F.3d 1270, 1272 (9th Cir. 2001) (*per curiam*), and has applied these gatekeeping requirements to a second *habeas* petition raising a

*3 (E.D. Cal. Jun. 8, 2010) (concluding that in light of *Lopez*, the decision whether to permit the petitioner to proceed on his *Brady* claim must be made by the Ninth Circuit), *Report and Recommendation adopted by* 2010 WL 3185660 (E.D. Cal. Aug. 9, 2010); *Fellman*, 2011 WL 2471579, at *3.⁸

Therefore, before petitioner can proceed with the instant Petition, he must move in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3). As such, the Petition must be dismissed without prejudice to its re-filing upon obtaining authorization from the United States Court of Appeals for the Ninth Circuit.⁹

Brady claim. *See, e.g., Gage v. Chappell*, 793 F.3d 1159, 1165-66 (9th Cir. 2015).

⁸ Given the limited record currently before the Court, it does not resolve the materiality issue at this time. The Court notes, however, that it appears unlikely that petitioner can establish that the evidence at issue was material under *Brady*. As the California Court of Appeal noted, there was strong evidence that the shooter was *inside* the restaurant and strong, if not overwhelming, identification evidence that petitioner was the person who shot Horton. (*See* Pet. Mem. Exh. C at 36-43.)

⁹ Respondent also argues that the Petition is subject to dismissal because it was unverified. However, on August 28, 2015, petitioner requested leave to file a verification of the Petition, which was granted on September 1, 2015. *See* Rules Governing Section 2254 Cases in the United States District Courts, Rule 2(c)(5).

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) Approving and accepting this Report and Recommendation; (2) granting respondent's Motion to Dismiss; and (3) directing that Judgment be entered dismissing this action without prejudice.¹⁰

DATED: February 4, 2016

/s/ David T. Bristow

THE HONORABLE DAVID T. BRISTOW
UNITED STATES MAGISTRATE JUDGE

¹⁰ Ninth Circuit Rule 22-3(a) provides in part that “[i]f a second or successive [§ 2254] petition ... is mistakenly submitted to the district court, the district court shall refer it to the court of appeals.” Such referral is not appropriate here, as there is no indication that petitioner mistakenly filed the Petition in this Court. On the contrary, petitioner’s contentions that he is exempt from the gatekeeping requirements affirmatively demonstrates that he did not mistakenly file in this Court.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-55418 D.C. No. 2:15-cv-04222-R-DTB
Central District of California,
Filed: JUL 20 2018 Los Angeles

TERRENCE EDWIN PRINCE,
Petitioner-Appellant,

V.

JOE A. LIZARRAGA, Warden,
Respondent-Appellee.

ORDER

Before: CALLAHAN and BEA, Circuit Judges, and RESTANI,* Judge.

The panel has voted to deny the petition for panel rehearing and Judges Callahan and Bea vote to deny the petition for rehearing en banc. Judge Restani makes no recommendation on the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

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rehearing and the petition for rehearing en banc are
DENIED.