No. 18-673

In the Supreme Court of the United States

TERRENCE EDWIN PRINCE, *Petitioner*,

v.

JOE A. LIZARRAGA, WARDEN, *Respondent.*

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether AEDPA's restrictions against second or successive federal habeas petitions apply to a newly discovered *Brady* claim.

2. Whether those restrictions apply when the habeas petitioner's first federal petition was filed before the enactment of AEDPA.

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STATUTES

STATEMENT

1. In 1980, petitioner Terrence Prince and his accomplice, Edward Williams, attempted to rob a check-cashing business inside a Los Angeles takeout restaurant. C.A. Excerpts of Record (ER) 22-24. While Prince searched the check-cashing booth, a struggle broke out in the kitchen between Williams and the booth's owner, Bruce Horton, an ex-police officer who was carrying a concealed handgun. ER 22, 24-25. Williams wrestled Horton to the ground and pinned him against a refrigerator. ER 25. Prince stepped out of the booth, walked towards them, and shot Horton. *Id.* Carol Croce, the owner of the restaurant, grabbed Prince's arm. *Id.* Prince shoved Croce aside and shot Horton again. *Id.* Horton, now mortally wounded, fired two shots in return, one of which struck Williams. *Id.* Prince and Williams fled. *Id.* Horton was pronounced dead minutes later. ER 26.

A Los Angeles County jury convicted Prince of first-degree murder with special circumstances (commission during a robbery and personal use of a firearm). Pet. App. 44a. The verdict was based on direct and circumstantial evidence which included the following: Croce, who stood next to Prince when he shot Horton, repeatedly identified him as the shooter, ER. 26; Keith Sarazinski, a restaurant employee, identified Prince as the gunman who forced his way into the building just before the shooting, ER 23; John McCarty, who was working in an office nearby, heard the gunshots and saw two men resembling Prince and Williams get into a car and drive off, ER 28; Rita Tanner, an emergency room clerk, recalled that Prince appeared nervous and paranoid when he brought Williams into the emergency room shortly after the shooting, that Prince refused to answer any questions, and that he

immediately left, ER 28-29; and a search of Prince's home produced a jacket matching the one worn by the shooter and photographs of Prince holding a .45-caliber handgun that would have been capable of firing the .45-caliber bullets that killed Horton, ER 30-31. *See also* Pet. App. 2a-3a.

The trial court sentenced Prince to life in prison without the possibility of parole. Pet. App. 2a. The state court of appeal affirmed the judgment, and the California Supreme Court denied review in 1984. *Id.* at 3a.

2. In 1991, before Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Prince filed a federal habeas petition, which the district court denied on the merits. Pet. App. 3a. The court of appeals affirmed. *Id.*

In 2007, Prince filed a second state habeas petition. Pet. App. 3a. During the ensuing litigation, the State turned over police interview notes. *Id.* The notes had been disclosed before trial, but they now included an additional page. *Id.* That page summarized an interview with Nelida Walsh, who lived across the street from the restaurant. *Id.* at 3a-4a. According to the notes, Walsh was walking up the front stairs to her apartment building on the day of the murder when she heard three gunshots. ER 38. She turned around and saw a man who resembled neither Prince nor Williams standing outside the front door of the restaurant. *Id.* The man pointed either a rifle or a shotgun into the restaurant before moving the weapon to a "port arms" position, with the barrel pointed upward. *Id.* After seeing the man, Walsh turned and continued up the stairs. ER 38-39.

Prince amended his habeas petition to allege that at the time of trial the prosecution had violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose material exculpatory evidence. Pet. App. 3a-4a. Over the course of forty-two days, the superior court held an evidentiary hearing on the *Brady* claim as well as two other claims. ER 93-94. Walsh testified at the hearing that she heard a gunshot, turned, and saw the back of a man facing the restaurant door from the sidewalk. ER 39. She was running upstairs to her apartment when she heard a second shot, and she was inside when she heard a third shot. *Id*. The man had been holding a weapon, but Walsh was unable to describe how he was pointing it. ER 39-40.

A firearms expert called by Prince testified that Horton could have been shot by someone standing outside the restaurant, where Walsh had placed the man with the rifle. ER 40, 42. His opinion was based on the location of the expended .45-caliber shell casings and his belief that the doorway was in the corner of the restaurant rather than in the center of the restaurant's wall. ER 40-42, 58. Prince's expert also testified that there were three long-barreled guns available in 1980 that were capable of firing the .45-caliber bullets that killed Horton. ER 43.

A firearms expert called by the State testified that, consistent with the eyewitness trial testimony, the shooter was inside the restaurant. ER 43-44. He based his opinion on the trajectory of the bullets that caused Horton's wounds and Croce's description of how Horton and Williams were positioned. *Id*. He explained that, because Prince's expert used only the location of the spent shell casings to determine the position of the shooter, which was not the typical practice of firearms experts, his opinion was unreliable.

ER 44. Moreover, the location of the spent casings was consistent with Croce's description of Prince's position at the time of the shooting. *Id.* The State's expert also testified that he was certain, based on his examination of the firing pin, extractor, and ejector markings on the casings, that Horton had been shot with a Colt .45-type semiautomatic handgun rather than a long barreled firearm. ER 44-45.

Following the evidentiary hearing, the state trial court found that the failure to disclose Walsh's statement was a material *Brady* violation and granted Prince's habeas petition. Pet. App. 4a; *see* ER 102-104.

The California Court of Appeal reversed. Pet. App. 4a; ER 67. Noting that the superior court had not made any factual findings as to whether it believed or disbelieved the evidence, had not resolved any evidentiary conflicts, and had not weighed or compared the trial and evidentiary-hearing testimony, the court of appeal independently reviewed Prince's *Brady* claim. ER 55. It observed that Walsh's statement about the unidentified man was no more exculpatory than inculpatory because the evidence was consistent with his having participated as an additional accomplice who was not the sole shooter. ER 57. The court also reasoned that the opinion of Prince's expert was "effectively eviscerate[ed]" by the photographic evidence refuting his premise about the position of the restaurant's door, ER 58, while the opinion of the State's expert was scientifically grounded and consistent with Croce's trial testimony, ER 61. The court of appeal concluded that, in light of the strong evidence that Prince shot Horton inside the restaurant, Walsh's statement was not material for *Brady* purposes. ER 61-63.

The California Supreme Court denied review. Pet. App. 4a.

3. Prince then filed a second federal habeas petition alleging the same *Brady* violation. Pet. App. 4a. The district court dismissed the petition as unauthorized because Prince's first federal petition was adjudicated on the merits and Prince had not sought or been granted authorization under 28 U.S.C. § 2244(b)(3) to file a "second or successive" petition. *Id.* The district court rejected Prince's contentions that newly discovered *Brady* claims are exempt from that statutory restriction on second or successive petitions and that applying the restriction to Prince's first federal habeas petition filed after AEDPA's enactment would give it impermissible retroactive effect. Pet. App. 56a-57a & n.7.

The court of appeals affirmed. Pet. App. 1a-6a. Applying the reasoning of its concurrently filed opinion in *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018) (reprinted at Pet. App. 7a-40a), the court held that second or successive petitions alleging newly discovered *Brady* claims are not exempt from AEDPA's gatekeeping restrictions. Pet. App. 5a-6a. The court also held, consistent with longstanding circuit precedent, that applying those restrictions in this case would not give them impermissible retroactive effect. Pet. App. 5a.

ARGUMENT

Prince argues that AEDPA's restrictions on second or successive federal habeas petitions do not apply to newly discovered *Brady* claims. Pet. 9-19. But the court of appeals' rejection of that contention is consistent with the decisions of every lower court that has considered the question and with this Court's reasoning in *Panetti v. Quarterman*, 551 U.S. 930 (2007), and

Magwood v. Patterson, 561 U.S. 320 (2010). As Prince points out, the lower courts have divided over whether AEDPA's restrictions on second or successive federal petitions apply where, as here, the prisoner's first federal petition was filed before AEDPA was enacted. But the Court has previously declined to address that issue, which now affects a small and diminishing number of cases. Moreover, the application of pre-AEDPA abuse-of-the-writ standards would produce the same result in this case. There is no reason for further review.

1. a. There is no disagreement among the circuits that a new habeas petition presenting *Brady* claims like Prince's, which were reasonably unknown to the petitioner at the time an earlier petition was filed, is "second or successive" within the meaning of 28 U.S.C. § 2244(b). *See Blackman v. Davis*, 909 F.3d 772, 778-779 (5th Cir. 2018), *cert. denied*, No. 18-7229 (Feb. 19, 2019); *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018) (reprinted at Pet. App. 7a-40a), *cert. denied*, 139 S. Ct. 841 (2019) (No. 18-6759); *In re Pickard*, 681 F.3d 1201, 1205 (10th Cir. 2012); *Quezada v. Smith*, 624 F.3d 514, 520 (2d Cir. 2010); *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1259-1260 (11th Cir. 2009); *Evans v. Smith*, 220 F.3d 306, 323-324 (4th Cir. 2000). This Court has recently declined to review the question in several cases. *See Blackman*, *supra* (No. 18-7229); *Scott v. United States*, 139 S.Ct. 842 (2019) (No. 18-6783); *Brown v. Hatton*, 139 S.Ct. 841 (2019) (No. 18-6759) (seeking review of *Brown v. Muniz*, *supra*); *Solorio v. Muniz*, 139 S.Ct. 608 (2018) (No. 18-6396) (seeking review of decision issued same day as and applying *Brown*). There is no reason for a different result here.

As the court below recognized in *Brown*, the position adopted by the lower courts follows from the plain language of the statute. Pet. App. 21a-22a (reprinting *Brown v. Muniz*, 889 F.3d at 668). Under Section 2244(b)(2)(B), a claim presented for the first time in a second or subsequent federal habeas petition must be dismissed unless (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 the light of all the evidence, would establish by clear and convincing evidence that the petitioner would not otherwise have been convicted. A premise of the first requirement is that "the factual predicate must have existed previously, and the defense must not have known about it." Pet. App. 21a. That requirement "essentially *defines* a *Brady*-type event," in which the existence of the facts underlying the claim was reasonably unknown to the petitioner at the time of trial proceedings and, as relevant here, the filing of a first federal petition. *Id*. at 21a-22a.

Because section 2244(b)(2)(B) sets out the requirements a petitioner must meet in order to proceed with such a claim in a second or subsequent petition, the circumstance that the claim was previously unknown through no fault of the petitioner necessarily cannot by itself prevent the claim from being treated as "second or successive." *See In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018) ("if the claims raised by the petitioner fall within the scenario addressed by § 2244(b)(2)(B), then the petition is second or successive and the claims must satisfy that section"). Nothing in the statutory language suggests that Congress intended for newly discovered *Brady* claims to be analyzed differently from any other claim that relies on newly discovered evidence.

b. This Court's reasoning in *Panetti v. Quarterman* does not lead to a different conclusion. *See* Pet. 11-15. *Panetti* held that a capital prisoner's second-in-time habeas petition challenging his competency for execution under *Ford v. Wainwright*, 477 U.S. 399 (1986), was not "second or successive" because the *Ford* claim was not legally ripe until after the petitioner's first habeas petition had been adjudicated on the merits. *Panetti*, 551 U.S. at 943-945. In that "unusual" circumstance, AEDPA does not require "unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party," in order to avoid the gatekeeping restrictions against second or successive petitions. *Id.* at 945-947.

Panetti's distinction between legally ripe and unripe claims rests on whether the claim even existed at the time of the first petition, not on whether its factual predicate was reasonably discoverable. *See United States v. Buenrostro*, 638 F.3d 720, 725-726 (9th Cir. 2011) (*Panetti* applies to claims "based on events that do not occur until a first petition is concluded" but not to claims in which the factual predicate existed but was not discovered at the time of the first petition); *Stewart v. United States*, 646 F.3d 856, 863 (11th Cir. 2011) (claim not second or successive because it was not "based on facts that were merely undiscoverable"). In contrast, the constitutional violation underlying a *Brady* claim generally "occurs at the time the State should have disclosed the exculpatory evidence—i.e., before trial." Pet. App. 31a. "The reason the *Ford* claim was not ripe at the time of the first petition in *Panetti* is not that evidence of an existing or past fact had not been uncovered at that time." *Tompkins*, 557 F.3d at 1260. Rather, "no *Ford* claim is ever ripe at the time of the first petition because the facts to be

measured or proven—the mental state of the petitioner at the time of execution—do not and cannot exist when the execution is years away." *Id.* In other words, "*Panetti*'s limited exception to § 2244(b) comports with the plain text of § 2244(b)(2)(B)(i) ... [because] an unripe claim involves no previously existing 'factual predicate' *at all*." Pet. App. 27a.

Every court of appeals to have decided this issue has either explicitly or implicitly concluded that a *Brady* claim is generally legally ripe at the time of trial, even though important underlying facts are (by definition) normally unknown to the defense at that time. *See Blackman*, 909 F.3d at 778-779 (*Brady* claim subject to AEDPA's gatekeeping requirements because it relied on "precisely such previously undiscovered facts" as described in § 2244(b)(2)(B)(i)); *Wogenstahl*, 902 F.3d at 627 (petitioner's "claims were not unripe at the time he filed his initial petition because the purported *Brady* violations … had already occurred when he filed his petition, although [he] was unaware of these facts"); *Pickard*, 681 F.3d at 1205 (*Brady* claims were "certainly second or successive … because they assert[ed] a basis for relief from the underlying convictions"); *Quezada*, 624 F.3d at 520 (applying AEDPA's gatekeeping requirements to *Brady* claim); *Tompkins*, 557 F.3d at 1260 ("The violation of constitutional rights asserted in [a *Brady* claim] occur[s], if at all, at trial or sentencing and [is] ripe for inclusion in a first petition"); *Evans*, 220 F.3d at 323 ("the standards that Congress has established for the

filing of second or successive petitions account for precisely the type of [*Brady* claim] Evans alleges").[1] Because Prince's *Brady* claim was legally ripe at the time of his first petition, *Panetti* is inapposite.

c. Prince argues that the phrase "second or successive" in Section 2244(b) must be interpreted in light of this Court's decisions, including those pre-dating AEDPA. Pet. 11-12; *see Panetti*, 551 U.S. at 943-944. He argues that under pre-AEDPA authority a claim would not have been considered an abuse of the writ, and therefore would not have been barred if raised in a second or successive petition, unless the prisoner had a "fair opportunity" to raise the claim earlier. *See* Pet. 10 (citing *Magwood v. Patterson*, 561 U.S. 320, 343 (Breyer, J., concurring); *id.* at 349 (Kennedy, J., dissenting)).

"While AEDPA's provisions are inspired by and borrow heavily from" abuse-of-the-writ principles, courts "are bound by AEDPA itself, not the judicial standard it superseded." Pet. App. 33a. The "fair op-

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[1] The Tenth Circuit came to a different result on particular facts in *Douglas v. Workman*, 560 F.3d 1156, 1192-1193 (2009). As the court below observed in *Brown*, the *Douglas* court "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." Pet. App. 33a (reprinting *Brown*, 889 F.3d at 673 n. 10). And in its later decisions in *Case*, 731 F.3d at 1027-1028, and *Pickard*, 681 F.3d at 1205, the Tenth Circuit too applied Section 2244(b)(2) to *Brady* claims. Similarly, while a panel of the Eleventh Circuit recently criticized that court's precedent on this point, it acknowledged the contrary law of the circuit, and the full court declined to grant en banc review to revisit the issue. *Scott v. United States*, 890 F.3d 1239, 1253-1258 (11th Cir. 2018), *cert. denied*, 139 S.Ct. 842 (2019) (No. 18-6783).

portunity" rule Prince suggests would permit consideration of any claim based on facts of which the petitioner was previously reasonably unaware.[2] That, however, "would considerably undermine—if not render superfluous—the exceptions to dismissal set forth in § 2244(b)(2)," which treat a finding that "the factual predicate for [a] claim could not have been discovered previously through the exercise of due diligence" as only one factor in determining whether the claim may be raised. *See Magwood*, 561 U.S. at 335. Because the statute expressly addresses claims that were previously undiscoverable, the "fair opportunity" principle cannot govern such claims. Rather, as this Court has suggested, it may inform applications of Section 2244(b) that AEDPA does not speak to directly. *See id.* at 346 (Kennedy, J., dissenting) (consideration based on "fair opportunity" principle "can occur where the claim was not yet ripe at the time of the first petition … or where the alleged violation occurred only after the denial of the first petition"); *see also id.* at 343 (Breyer, J., concurring). That is not the situation here.

2. Prince also argues that the Court should resolve a conflict among the lower courts about whether Section 2244(b) applies to a second or subsequent petition filed after AEDPA when the petitioner's first petition was filed before that Act took effect. Pet. 19-32. As he points out, the Third, Sixth, Tenth, and D.C. Circuits

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[2] Prince offers no basis for limiting his rule to *Brady* claims. Pre-AEDPA law generally permitted consideration of any claim based on evidence that the petitioner reasonably failed to discover earlier. *See McCleskey v. Zant*, 499 U.S. 467, 487-488 (1991) (abuse-of-the-writ principles recognized new discovery of evidence as acceptable reason for failing to raise claim earlier). One purpose of AEDPA was to tighten that rule.

have held that AEDPA does not apply in that circumstance, based on the presumption against retroactivity. *See In re Minarik*, 166 F.3d 591, 595-599 (3d Cir. 1999); *In re Hanserd*, 123 F.3d 922, 930-932 (6th Cir. 1997); *Daniels v. United States*, 254 F.3d 1180, 1187-1188 (10th Cir. 2001); *United States v. Ortiz*, 136 F.3d 161, 165-166 (D.C. Cir. 1998). The First, Second, Fifth, Seventh, Ninth, and Eleventh Circuits instead apply AEDPA's restrictions to any petition filed after the Act became effective. *See Pratt v. United States*, 129 F.3d 54, 58-60 (1st Cir. 1997); *Mancuso v. Herbert*, 166 F.3d 97, 101 (2d Cir. 1999); *Graham v. Johnson*, 168 F.3d 762, 781-786 (5th Cir. 1999); *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1163 (9th Cir. 2000); *In re Magwood*, 113 F.3d 1544, 1552-1553 (11th Cir. 1997).

This conflict is longstanding, and the Court has previously denied review in cases that addressed the issue. *See Graham v. Johnson*, 529 U.S. 1097 (2000) (No. 98-10002); *Mancuso v. Herbert*, 527 U.S. 1026 (1999) (No. 98-9305); *Pratt v. United States*, 523 U.S. 1123 (1998) (No. 97-7817).[3] AEDPA was enacted in 1996, and the disagreement could now affect only a small and diminishing class of potential federal petitioners. There is no reason for the Court to take the issue up now.

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[3] The Court has also decided cases involving application of Section 2244(b) where the petitions at issue straddled AEDPA's enactment, without identifying any retroactivity issue. *See Magwood*, 561 U.S. at 326; *Felker v. Turpin*, 518 U.S. 651, 655-656 (1996); *see also Pratt*, 129 F.3d at 58 ("if pre-AEDPA jurisprudence somehow attached to an entire course of post-conviction proceedings by virtue of a prisoner's having filed a pre-enactment petition at some point along the way, then the Court's opinion in *Felker* would be drained of all meaning").

In any event, resolution of the conflict would not affect the outcome of Prince's case. Those circuits that have adopted Prince's view recognize that a petitioner seeking consideration of a second or subsequent petition must still satisfy pre-AEDPA abuse-of-the-writ principles. *Cress v. Palmer*, 484 F.3d 844, 852 (6th Cir. 2007); *Minarik*, 166 F.3d at 602; *Daniels*, 254 F.3d at 1198-1199; *Ortiz*, 136 F.3d at 167. Before AEDPA, a *Brady* claim raised in a second or subsequent petition would have been rejected as abusive if the petitioner failed to establish materiality. *See Strickler v. Green*, 527 U.S. 263, 296 (1999) (non-material *Brady* claim would not have survived cause-and-prejudice standard for overcoming procedural default); *McCleskey*, 499 U.S. at 493-494 (cause-and-prejudice standard for these purposes derived from procedural default standard); *see also United States v. Lopez*, 557 F.3d 1053, 1064 (9th Cir. 2009) (under abuse principles "federal courts could reach the merits of second-in-time *Brady* claims only when the suppressed evidence was material"). Prince's *Brady* claim would be barred under that standard.

As the California Court of Appeal correctly concluded, the missing notes of Walsh's statement were not material. ER 56-63. Eyewitnesses established at trial that Prince shot Horton inside the restaurant, and circumstantial evidence also strongly tied him to the shooting. Pet. App. 2a-3a; ER 23-29, 56-57. Walsh's statement that she saw someone who has never been identified holding either a rifle or a shotgun outside the building did not undermine the trial evidence. ER 57. And the opinion of the State's firearms expert during the state habeas evidentiary hearing reaffirmed the account of the shooting given at trial. ER 43-44, 61. In contrast, the opinion of Prince's state habeas firearms expert, that the person who shot

Horton could have been standing in the doorway, was undermined by photographs contradicting the expert's premise about the position of the door. ER 58. There is no reasonable probability that the result of Prince's trial would have been different had Walsh's statement been disclosed earlier. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (failure to disclose evidence is material under *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). Prince's current habeas petition would therefore have been barred even under pre-AEDPA law.

CONCLUSION

The petition for a writ of certiorari should be denied.

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