No. 18-673

IN THE

Supreme Court of the United States

TERRENCE EDWIN PRINCE,

Petitioner,

v.

JOE A. LIZARRAGA, WARDEN OF MULE CREEK PRISON,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

I. The State does not dispute that the Ninth Circuit's decision would incentivize prosecutors to withhold exculpatory evidence until after a first habeas petition is adjudicated and all but foreclose a petitioner from obtaining relief based on that evidence. In the Ninth Circuit's own words, it would "saddle petitioners with a stringent standard of proof that is a function of the government's own neglect, or, worse, malfeasance[]." Pet. App. 39a.

The State maintains that this result is consistent with this Court's precedents. Opp. 8-9. Yet it ignores entirely the test this Court set out in *Panetti v. Quarterman*, 551 U.S. 930 (2007), for determining when a claim is "second or successive" for purposes of 28 U.S.C. § 2244(b). The State simply asserts that a *Brady* claim is "ripe" at the time of a first petition, regardless of when the violation was disclosed, without any explanation of why that is so or why that trumps *Panetti*'s multi-factor analysis.

This is a frequently recurring question where the lower courts are misinterpreting an important federal statute and contradicting this Court's precedent; that is all that is needed to warrant this Court's review. Moreover, the majority view is in considerable tension with the Tenth Circuit's opinion in *Douglas v. Workman,* 560 F.3d 1156, 1187-89 (10th Cir. 2009) (per curiam), and it was sharply condemned in the Eleventh Circuit's recent opinion in *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018). This case is a far superior vehicle for resolving the question than was *Scott* or other recent cases this Court has passed on.

II. The State agrees that the circuits are deeply divided on the question whether § 2244(b) applies retroactively. Opp. 11-12. The decision below, which held that AEDPA applies regardless of when a first petition was filed, is consistent with the views of the First, Second, Fifth, Seventh, and Eleventh Circuits. But it directly conflicts with opinions of the Third, Sixth, Tenth, and D.C. Circuits, all of which hold, based on the presumption against retroactivity, that § 2244(b) does not bar claims that could have been adjudicated on the merits at the time a petitioner filed a first, pre-AEDPA petition.

That a split has persisted for years, Opp. 12, has never been reason to deny certiorari. Particularly so where, as here, the age of the split demonstrates its intractability. Courts on both sides have reaffirmed their views since setting out their positions, and courts on both sides have acknowledged the conflict.

The issue continues to arise. Numerous cases involving petitions that straddle AEDPA are adjudicated in the lower courts every year. As this case proves, it is unfortunately all too common for evidence material to a petitioner's guilt or innocence to come to light many years after conviction.

The State's only remaining objection is that the *Brady* evidence underlying Mr. Prince's claim may not be material. But that issue would not arise until remand. The open materiality question would not interfere with this Court's review, just as it posed no object to the district court's and Ninth Circuit's determinations below.

ARGUMENT

I. The Ninth Circuit's Holding That All Second-In-Time *Brady* Claims Are "Second Or Successive" Is Contrary To This Court's Precedent.

A. The Ninth Circuit's decision is wrong. In defending it, the State, like the decision itself, ignores *Panetti*'s reasoning entirely. The State does not dispute that each of the factors *Panetti* identified as important to consider when determining whether a claim is "second or successive"—the practical implications for habeas practice, AEDPA's purposes, and this Court's prior habeas decisions, *Panetti*, 551 U.S. at 943-47—dictates that, just like *Ford* claims, *Brady* claims based on evidence not disclosed until after a first petition is adjudicated are not "second or successive." Pet. 11-16.

Rather, the State reduces *Panetti* to a single question: whether or not a claim was "ripe" at the time of a first petition. Opp. 8. Even if the State were correct that ripeness is the lynchpin (which would render much of *Panetti*'s detailed and considered analysis superfluous), no holding of this Court supports the State's further conclusion that a *Brady* claim ripens "at the time of trial," Opp. 9, regardless of when the violation is disclosed. Indeed, the opinions of seven Justices in *Magwood v. Patterson*, 561 U.S. 320 (2010), suggest the State's view of ripeness is incorrect. Those Justices explained that, under *Panetti*, a claim is not "second or successive" when "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." *Id.* at 346 (Kennedy, J., dissenting) (emphasis added); *accord id.* at 343 (Breyer, J. concurring); *see* Opp. 11 (citing these passages). So even though a *Brady violation* may occur at the time of trial, a *claim* may nevertheless "not yet [be] ripe" for purposes of § 2244(b) at the time of the petitioner's first habeas petition.[1]

B. The State suggests this question does not merit review because "[t]here is no disagreement among the circuits." Opp. 6. The lack of a square conflict, however, does not undermine the need for clarity from this Court where, as here, multiple courts have cast doubt on the reasoning underlying the majority view. *See Douglas*, 560 F.3d at 1187-89 (discussing *Panetti*'s reasoning and treating a previously unavailable *Brady* claim as a "supplement to [petitioner's] initial habeas petition" rather than a "second or successive" claim); *see generally Scott*, 890 F.3d 1239 (criticizing Eleventh Circuit precedent holding that all second-in-time *Brady* claims are "second or successive"); *see also*

[1] The State cites several court of appeals opinions in support of its view, Opp. 9-10, but those holdings are in considerable tension with others concluding that claims based on executive misconduct do not accrue until *at least* the point at which the plaintiff has reason to know of the violation. *McDonough v. Smith*, 898 F.3d 259, 265-67, 269 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 915 (2019) (fabrication of evidence claim "accrued when McDonough became aware of the fabricated evidence"); *Julian v. Hanna*, 732 F.3d 842, 849 (7th Cir. 2013) (petitioner's "*Brady* claim was ripe" because "[t]he exculpatory evidence had been revealed"); *cf. Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 389 (4th Cir. 2014) (a "plaintiff has a complete and present cause of action … when the plaintiff knows or has reason to know of his injury").

supra n. 1. This Court just last term granted certiorari to correct a decision that, like this one, misinterpreted a federal statute, even though the courts of appeals were largely aligned on the other side. *See Pereira v. Sessions*, 138 S. Ct. 2105 (2018); Br. in Opp. at 18-19, *Pereira*, No. 17-459 (Dec. 12, 2017).

Moreover, the State does not dispute that the issue is exceptionally important and frequently recurs. As we explained, *Brady* violations are among the most common causes of reversal in postconviction proceedings. Pet. 17-18. The upshot of the Ninth Circuit's rule is that these victims of prosecutorial misconduct will be saddled with an "almost insurmountable" bar to relief. *Douglas*, 560 F.3d at 1192. Most will "forever los[e] their opportunity for any federal review" of their constitutional claims. *Panetti*, 551 U.S. at 945-46.

C. The State also observes that this Court recently denied certiorari in several cases presenting similar questions. Opp. 6. But in *Brown v. Hatton*, 139 S. Ct. 841 (2019) (No. 18-6759), and *Solorio v. Muniz*, 139 S. Ct. 608 (2018) (No. 18-6396), the Ninth Circuit had the relevant state-court records before it and made an explicit determination that the *Brady* evidence in those cases was not material. Pet. App. 37-38a (*Brown*); *Solorio*, 896 F.3d 914, 921-22 & n.8 (9th Cir. 2018). So Mr. Brown and Mr. Solorio could not have prevailed under the rule they advocated for; both Petitioners agreed there is no exception to § 2244(b) where the evidence is not material (and thus the claim would be barred under the pre-AEDPA standard). *Blackman v. Davis* is also inapposite; there, the Fifth Circuit first rejected petitioner's argument that her

claim was not subject to § 2244(b) in a request for authorization to file a "second-or-successive" petition. *See* No. 15-10114, Order at 2 (5th Cir. Jun. 18, 2015) (per curiam). The petitioner did not seek certiorari from that determination, but instead waited to seek certiorari following further proceedings, after she had been granted permission to file a "second or successive" petition, at which point the question presented here was no longer central. Finally, *Scott v. United States*, 139 S. Ct. 842 (2019) (No. 18-6783), involved a § 2255 motion seeking relief from a federal conviction and thus did not implicate the same set of considerations as petitions seeking relief from state convictions, as the Eleventh Circuit recognized. *See* 890 F.3d. 1239, 1257 (11th Cir. 2018) (explaining that considerations of comity, finality, federalism, and separation of powers differ as between § 2255 motions and § 2254 petitions).

This case, by contrast, is a clean and representative vehicle to resolve the issue. Pet. 32-34. The State does not dispute that the district court and court of appeals squarely addressed the question presented, that no federal court has made any finding that the evidence in question is not material, and that prevailing on the question presented would be outcome determinative.[2]

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[2] The court of appeals recently denied Mr. Prince's separate request for authorization to file a "second or successive" petition in a summary order with no commentary on the materiality of his claim. No. 18-72093 (9th Cir. Apr. 12, 2019).

II. The State Acknowledges The Circuits Are Divided Four To Six On § 2244(b)'s Retroactivity.

A. The State agrees that the courts of appeals are deeply divided on the question whether AEDPA's restrictions on "second or successive" petitions apply when a petitioner's first habeas petition was filed before AEDPA's enactment. Opp. 11-12. As we explained, the Ninth Circuit's decision is aligned with the First, Second, Fifth, Seventh, and Eleventh Circuits' holdings that § 2244(b) applies regardless of when a first petition was filed. Pet. 24-26. The Third, Sixth, Tenth, and D.C. Circuits, however, hold that where a petitioner filed an initial habeas petition before AEDPA's passage, a second-in-time petition that would have satisfied the pre-AEDPA standard is not subject to § 2244(b). Pet. 20-23.

The State nevertheless maintains that certiorari should be denied because the split is "longstanding" and of "diminishing" importance, Opp. 12, and because, according to the State, Mr. Prince's *Brady* claim is ultimately not material, Opp. 13. None of these misguided objections is justification for allowing the conflict to persist.

This Court frequently grants certiorari to resolve longstanding splits among the lower courts. *See, e.g.*, *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 876-77 (2019) (cases on one side of the split were 22 and 17 years old at time of grant; case on the other side was 13 years old); *Betterman v. Montana*, 136 S. Ct. 1609, 1613 & n.1 (2016) (involving multiple cases on both sides of the split that were several decades old

at the time of grant). The maturity of the split is no reason to deny resolution of a deep and entrenched conflict, especially where, as here, the conflict is intractable. Courts on both sides have acknowledged the conflict and explicitly rejected the views of the other side. *See In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998); *United States v. Orozco-Ramirez*, 211 F.3d 862, 866 n.5 (5th Cir. 2000); *United States v. Ortiz*, 136 F.3d 161, 165 (D.C. Cir. 1998). And courts on both sides have reaffirmed their holdings since initially staking out their positions, including in recent years. *See, e.g.*, *Hutto v. Lawrence Cty., Alabama*, 717 F. App'x 960, 960-61 (11th Cir. 2018); *In re: Austin*, No. 13-2345, Order at 1-2 (3d Cir. Aug. 5, 2013); *In re Owens,* 525 F. App'x 287, 289 (6th Cir. 2013); *Cress v. Palmer*, 484 F.3d 844, 852 (6th Cir. 2007); *Sosa v. Dretke*, 133 F. App'x 114, 118 (5th Cir. 2005).[3]

The State is also wrong that the disagreement "could now affect only a small and diminishing class of potential federal petitioners." Opp. 12. As we ex-

[3] Although this Court denied certiorari in three of the early cases, those cases presented substantial jurisdictional problems or procedural complications not present in this case. *See* Br. in Opp. at 7-8, *Pratt v. United States*, No. 97-7817 (Apr. 7, 1998) (petition sought review of an application to file a second or successive petition, which is prohibited under § 2244(b)(3)(E)); Pet. for Cert. at 5-6, *Pratt*, No. 97-7817 (Feb. 4, 1998) (first habeas petition was not a collateral attack but sought leave to file a direct appeal); Pet. for Cert. at 4, 20-21, *Mancuso v. United States*, No. 98-9305 (Apr. 23, 1999) (second-in-time petition was initially filed before AEDPA, then re-filed after); Pet. for Cert. at 11-13, *Graham v. United States*, No. 98-10002 (Jun. 21, 1998) (second-in-time petition was initially filed before AEDPA, then re-filed after, and raised the same claims litigated in an initial petition).

plained, new evidence routinely comes to light decades after a conviction, as it did here. Pet. 18-19; *see, e.g.*, *Shelton v. Marshall*, 796 F.3d 1075, 1082 (9th Cir.), *amended on reh'g*, 806 F.3d 1011 (9th Cir. 2015). Indeed, the volume of litigation in just the last two years involving petitions that straddle AEDPA proves that the issue is very much alive. *See, e.g.*, *Hutto*, 717 F. App'x at 961; *Holman v. Kennedy*, No. 18-cv-1195-DRH, 2018 WL 5785996, at *1, 3 (S.D. Ill. Nov. 5, 2018); *Colon v. McClellan*, No. 91-cv-6475 (RJS), 2018 WL 461142, at *2 n.1 (S.D.N.Y. Jan. 18, 2018), *appeal dismissed* (Apr. 5, 2018); Mem. for Pet'r, *Rodwell v. Rodrigues*, No. 18-2246, at 5 n.2 (1st Cir. Dec. 14, 2018); *Barnes v. Forman*, No. 16-cv-12240, 2017 WL 467410, at *2 (E.D. Mich. Feb. 3, 2017); *Weatherspoon v. Burt*, No. 17-1766, 2017 WL 6762417, at *1 (6th Cir. Dec. 27, 2017); *Heflin v. White*, No. CV-16-204-ART, 2017 WL 417195, at *1 (E.D. Ky. Jan. 31, 2017).[4]

The State's final reason for letting the split persist is its erroneous and irrelevant view that the newly turned-over evidence in this case is not material. Opp. 13. Neither the Ninth Circuit nor the district court addressed the materiality of Mr. Prince's claim, and the State itself argued that "discussion of the materiality of the Walsh Statement would be premature" given the limited motion-to-dismiss record, which does not include any of the transcripts of the state habeas trial or evidentiary hearing. Resp.

[4] Because requests to file "second or successive" petitions are often denied in unpublished orders, *see, e.g.*, *Prince*, No. 18-72093 (9th Cir. Apr. 12, 2019), the number of habeas petitions implicated is far greater than the published opinions reflect.

C.A. Br. 45-46 (Dkt. 17). Materiality would be a downstream issue to be decided in the first instance on remand if Mr. Prince were to prevail on either of the purely legal questions presented. The possibility that a respondent might eventually prevail on remand has never been a basis for denying certiorari. *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018) (remanding for determination whether probable cause justified search); *Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018) (remanding for application of a clarified standard in the first instance).

Moreover, the full record will demonstrate that the suppressed evidence here is indeed material. "[I]mpeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *United States v. Price*, 566 F.3d 900, 914 (9th Cir. 2009). Here, as the state trial court found following a 42-day evidentiary hearing, Walsh's testimony would have contradicted the testimony of the State's eyewitnesses, one of whom was a minor and did not see the shooting, as to the shooter's clothing, location, and weapon. C.A. ER 93, 100. Walsh's observations were corroborated by expert ballistics testimony that could have been presented at trial. *Id.* 102-03. And her description of the shooter matched a person the police were already investigating. *Id.* 83-84, 91, 103. There is more than a "reasonable likelihood" that this evidence, had it been presented, "*could* have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (emphasis added).

B. The State makes no attempt to defend the decision below on the merits. As we explained, Pet. 28-

32, the Ninth Circuit's opinion (and the opinions of the First, Second, Fifth, Seventh, and Eleventh Circuits) cannot be squared with this Court's precedent.

Applying § 2244(b) to bar a second-in-time claim that would have survived at the time a petitioner filed a pre-AEDPA petition would have an impermissible retroactive effect: It would "attach[] a new disability, in respect to transactions or considerations already past." *I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001). Because AEDPA does not include any "express command" or "unambiguous directive" that its restrictions on "second or successive" petitions apply retroactively, *Lindh v. Murphy*, 521 U.S. 320, 325 (1997), the presumption against retroactivity "teaches that [those provisions] do[] not govern," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

Some courts on the Ninth Circuit's side of the split have suggested that petitioners can, in some narrow circumstances, avoid § 2244(b)'s restrictions if they can "furnish[] … evidence" that they actually relied on the continued availability of pre-AEDPA law. *Alexander v. United States*, 121 F.3d 312, 314 (7th Cir. 1997); *see also Pratt v. United States*, 129 F.3d 54, 59 (1st Cir. 1997); *Orozco-Ramirez*, 211 F.3d at 866 n.5; *In re Medina*, 109 F.3d 1556, 1562 (11th Cir. 1997). But "the presumption against retroactive application of statutes does not require a showing of detrimental reliance." *Vartelas v. Holder*, 566 U.S. 257, 272-73 (2012). That courts in those circuits continue to invoke a detrimental reliance standard even after *Vartelas, see, e.g.*, *Holman*, 2018 WL 5785996 at *3,

further underscores the need for clarity from this Court.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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