

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY L. BROWN, *Petitioner*

v.

W.L. MUNIZ, *Respondent*

APPLICATION TO THE HON. JOHN G. ROBERTS, JR.,
FOR A 32-DAY EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Pursuant 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Petitioner Gregory Brown prays for a 32-day extension of time to file his petition for a writ of certiorari, to and including Monday, November 19, 2018.

1. The judgement from which review will be sought is *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018). A copy of the decision, dated May 8, 2018, is attached as Exhibit 1. The Ninth Circuit denied Petitioner's timely filed petition for rehearing on July 20, 2018, which is attached as Exhibit 2. Therefore, the current deadline for filing a petition for a writ of certiorari is October 18, 2018. This application is being filed more than 10 days before that date.

2. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

3. This case presents a substantial question of law meriting this Court's attention: Whether a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), brought in a

second-in-time habeas petition is “second or successive” for purposes of 28 U.S.C. § 2244(b) when the claim is based on previously undisclosed evidence.

a. A jury convicted petitioner Gregory Brown and two codefendants of conspiracy and attempted murder in 1995, and he is currently serving a sentence of 56-years-to-life in prison. *See Brown*, 889 F.3d at 663. Brown’s first federal habeas petition was denied in 1998. *See id.* at 665. More than a decade later, the Trial Integrity Unit of the San Francisco District Attorney’s Office issued letters indicating that three investigating officers’ personnel files may have contained impeachment material subject to disclosure under *Brady*, which had not been previously disclosed. *See id.* at 665-66. After exhausting the issue in state court, Brown filed a federal habeas petition under 28 U.S.C. § 2254, seeking relief under *Brady*, based on the newly disclosed information concerning the officers’ personnel files. The district court dismissed Brown’s habeas petition without prejudice for lack of jurisdiction, determining that his petition was “second or successive” under the Antiterrorism and Effective Death Penalty Act (AEDPA), and that Brown was therefore required to obtain advance authorization from the Ninth Circuit under AEDPA’s severe restrictions on “second or successive” petitions contained in § 2244(b). *See id.* at 666.

As relevant here, § 2244(b) requires dismissal of any “second or successive” petition based on newly discovered evidence unless the petition establishes, 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). Commonly referred to as an “actual innocence” standard, the

requirements of § 2244(b)(2)(B) are extremely stringent and “almost insurmountable.” *Douglas v. Workman*, 560 F.3d 1156, 1192 (10th Cir. 2009).

b. The Ninth Circuit’s determination that *Brady* claims based on newly disclosed evidence are “second or successive” and subject to § 2244(b) is contrary to this Court’s precedent. It is well-established that a new petition is “second or successive” only if it raises claims that were or could have been adjudicated on their merits in an earlier petition. See *Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998); see also *Magwood v. Patterson*, 561 U.S. 320, 343 (2010) (Breyer, J., concurring). A *Brady* claim based on evidence that was disclosed after a first petition was adjudicated could not have been adjudicated in that prior petition. Thus, under this Court’s precedents, a petition raising a newly disclosed *Brady* claim is not “second or successive.”

4. The extension request is justified by the importance of these issues and the significant public interests implicated by the Ninth Circuit’s ruling. As an Eleventh Circuit panel recently observed in criticizing that court’s precedent, treating newly disclosed *Brady* violations as “second or successive” removes any meaningful opportunity for federal habeas review of meritorious constitutional claims. *Scott v. United States*, 890 F.3d 1239, 1253 (11th Cir. 2018) (noting that such result “might well work a suspension of the writ of habeas corpus.”). Moreover, the Ninth Circuit’s rule would have the perverse result of “encourage[ing] prosecutors to withhold constitutionally required evidentiary disclosures long enough that verdicts obtained as a result of government misconduct would be insulated from correction.” *Id.* at 1252.

The Ninth Circuit acknowledged that its rule would “saddle petitioners with a stringent standard of proof that is a function of the government’s own neglect, or, worse, malfeasance[.]” *Brown*, 889 F.3d at 676.

Further, the question presented will continue to recur. As was the case here, *Brady* evidence frequently is not revealed until years after a conviction, meaning it is often the case that a petitioner has already filed his first habeas petition at the time the relevant evidence comes to light.

5. The extension request is also justified because Brown’s previous counsel, Grace R. DiLaura, recently left the Office of the Federal Public Defender, and undersigned counsel was only assigned to Brown’s case on September 10, 2018. Accordingly, undersigned counsel requires additional time to familiarize himself with the complex record and legal issues involved in this case. Undersigned counsel is an Assistant Federal Public Defender and carries a substantial appellate and habeas caseload. In addition to this matter, undersigned counsel currently serves as counsel of record in eight pending non-capital habeas cases in the Northern District of California, and also serves as counsel of record in nine pending appeals before the Ninth Circuit.

For the foregoing reasons, Petitioner respectfully requests that an extension of time be granted, to and including November 19, 2018, within which petitioner may file a petition for a writ of certiorari.

Respectfully submitted,

Dated: September 25, 2018

s/ Todd M. Borden

Todd M. Borden

Assistant Federal Public Defender

Counsel for the Petitioner