No. 18-_____

IN THE

Supreme Court of the United States

TERRENCE EDWIN PRINCE,
Petitioner,

v.

JOE A. LIZARRAGA, WARDEN OF MULE CREEK PRISON,
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 to Rule 13(5) of the Rules of this Court, Applicant Terrence Edwin Prince moves for an extension of time of 32 days, to and including Monday, November 19, 2018, within which to file a petition for a writ of certiorari.

1. The judgment from which review will be sought is *Prince v. Lizarraga*, 733 F. App'x 382 (9th Cir. 2018). A copy of the decision, dated May 8, 2018, is attached as Exhibit 1. The current deadline for filing a petition for writ of certiorari is October 18, 2018. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

2. This case presents two substantial questions of law meriting this Court's attention: (1) Whether a *Brady* claim 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, and (2) whether § 2244(b) has an impermissible retroactive effect on a petitioner who files a second-in-time petition raising a newly

discovered *Brady* claim when the petitioner's first habeas petition predates the Antiterrorism and Effective Death Penalty Act (AEDPA).

a. Petitioner Terrence Prince was convicted of murder in 1982. Nearly three decades later, in 2010, the state disclosed exculpatory evidence material to Mr. Prince's conviction and sentence: a page of notes from an eyewitness interview containing a description of the shooter that was incompatible with the state witnesses' testimony at trial. After exhausting the issue in state court, Mr. Prince filed a federal habeas petition seeking relief under *Brady v. Maryland*, 373 U.S. 83 (1963), based on the newly revealed evidence. The district court dismissed his petition, and the court of appeals affirmed, holding that, because Mr. Prince previously filed a habeas petition (in 1991) that was adjudicated on the merits, his instant petition is "second or successive" and therefore subject to the severe restrictions AEDPA places on "second or successive" petitions.[1] *Prince* Mem. 4-5. 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

[1] The Ninth Circuit ruled in Mr. Prince's case in a memorandum disposition that incorporated the "reasons set forth in [the Court's] concurrently filed published opinion [in] *Brown v. Muniz*, 16-15442, [889] F.3d [661] (9th Cir. 2018)," which was argued the same day. A copy of the decision, dated May 8, 2018, is attached as Exhibit 2.

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."

c. The Ninth Circuit's holding that § 2244(b)'s restrictions apply to *Brady* claims following petitions that predate AEDPA's enactment is also contrary to this Court's precedent. At the time Mr. Prince filed his 1991 habeas petition, he was not precluded from bringing a meritorious *Brady* claim in a successive petition to challenge either his sentence or his conviction should *Brady* evidence later come to light. *See Strickler v. Greene*, 527 U.S. 263, 296 (1999). Under the Ninth Circuit's ruling, § 2244(b) would foreclose him and similarly situated petitioners from bringing the same successive petition absent a showing of actual innocence. AEDPA would thus attach retroactive consequences to the pre-AEDPA act of filing an initial petition. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 277, 280.

Because "AEDPA contains no unambiguous guidance regarding retroactive application of AEDPA's new 'second or successive' petition standards and procedures to cases in which the first habeas petition was filed before AEDPA's enactment," *In re Minarik*, 166 F.3d 591, 599 (3d Cir. 1999), the "traditional presumption teaches that it does not govern," *Landgraf*, 511 U.S. at 280.

3. The extension request is justified by the extraordinary 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* Slip Op. 676.

The questions presented will continue to recur. *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. And since new evidence can arise even decades after a

conviction, as the facts here illustrate, petitioners in a significant subset of these cases will have filed an initial habeas petition under the pre-AEDPA rules.

4. The extension request is also justified by counsel's press of business on other matters that are currently pending. Among other matters, the undersigned is responsible for filing an opening brief in *Stephen Lanzo III and Kenra Lanzo v. Cyprus Amaz Minerals Co. et al.*, No. A-005717-17T3 (N.J. Super. Ct. App. Div.), due October 29, 2018; and filing a motion for a new trial in *Ingham v. Johnson & Johnson*, No. 1522-CC-10417-01 (Mo. Cir. Ct.), due September 20, 2018.

For the foregoing reasons, petitioner hereby 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 19, 2018

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Robert M. Loeb

Robert M. Loeb
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