No. _____

IN THE

Supreme Court of the United States

SHARRIEFF BROWN,

Petitioner,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Sharrieff Brown filed a claim for the ineffective assistance of counsel based on trial counsel's failure to locate critical impeachment materials on the forensic pathologist witness that were in trial counsel's possession. Trial counsel failed to discover them in reliance on the prosecutor's statement, in response to his request for disclosure of the impeachment materials, that no such materials exist. Habeas counsel learned of the existence of the materials in the prosecutor's office. Later, when habeas counsel learned that those same materials had been in trial counsel's possession at the time of trial, she filed a petition within one year.

Did the Ninth Circuit's finding of untimeliness under 28 U.S.C. § 2244(d)(1)(D) so clearly misapply the law as to call for summary reversal?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Sharrieff Brown and Respondent California Department of Corrections and Rehabilitation. The California Attorney General represents Respondent.

Brown was convicted by jury in the Los Angeles County Superior Court on May 10, 2010 in *People v. Sharrieff Brown*, case no. MA043976, Judge Jared Moses, presiding. Petitioner's Appendix attached hereto ("App.") 108-110. Judgment was entered against Brown on May 27, 2010. App. 111.

The California Court of Appeal affirmed the judgment on appeal in an unpublished opinion filed on May 10, 2011 in *People v. Brown*, case no. B225175. App. 76. The California Supreme Court denied Brown's petition for review on August 10, 2011 in case no. S193922. App. 75.

On April 5, 2017, Brown timely filed a *pro se* habeas corpus petition in *Sharrieff Brown v. CDCR,* C.D. Cal. case no. CV 12-9126-DMG-MRW. District court docket 1. Brown filed a counseled second amended petition on May 9, 2017. District court docket 101. On March 29, 2018, the magistrate judge filed a report recommending that Brown's habeas corpus petition be denied and the action dismissed with prejudice. App. 37. On October 3, 2018, United States District Judge Dolly M. Gee entered orders accepting the recommendation, denying the petition, dismissing the action with prejudice, and granting a certificate of appealability ("COA"). App. 32-36; district court

dockets 130, 131, 134. Judgment was entered against Brown the same day. App. 34; district court docket 131.

Petitioner timely filed a notice of appeal on October 26, 2018. District court docket 135. On February 10, 2020, the Ninth Circuit, per the Honorable Mary Schroeder and Michelle Friedland, Circuit Judges, and Roslyn Silver, United States District Judge for the District of Arizona, sitting by designation, affirmed the judgment in an unpublished opinion in *Sharrieff Brown v. California Department of Corrections and Rehabilitation*, case no. 18-56432. App. 21-31. The panel denied rehearing. App. 20.

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

Sharrieff Brown petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals affirming the judgment against him in his habeas corpus action.

Sharrieff Brown maintained that the death of Trecion Grace while in his care was the result of an accident. He left 18-month old Grace on the counter in the kitchen when he left the room to attend to another child. When he returned, she was unresponsive on the floor.

The state's entire case against Brown rested on the testimony of coroner James Ribe. His testimony amounted to a medical diagnosis of murder. No other medical expert testified on behalf of the prosecution, and the prosecutor repeatedly emphasized Dr. Ribe's certainty and reliability in her closing argument.

But as it turned out, Dr. Ribe had a history of repeatedly changing his diagnoses in outcome determinative ways in other child death cases. Had that evidence been deployed in cross examination, Dr. Ribe's credibility would have been severely questioned and it is likely at least one reasonable juror

would have decided the case differently. *Strickland v. Washington*, 466 U.S. 668 (1984). But trial counsel failed to discover this impeachment evidence and to deploy it despite the fact that much of it was in his possession at the time of trial. Instead, trial counsel relied on the prosecutor's false statement that there was no impeachment material on Dr. Ribe.

During post-conviction investigation, habeas counsel discovered, in 2012, that the impeachment materials ("the Ribe boxes") were in the prosecution's possession. It was not until 2014, however, that she learned the Ribe boxes had been in trial counsel's constructive possession at the time of trial. It was at this time that the factual predicate for his *Strickland* claim was discovered. *Hasan v. Galaza*, 254 F.3d 1150, 1154–55 (9th Cir. 2001). And it was this date, January 2014, that began the one-year statute of limitations under 28 U.S.C. § 2244(d)(1)(D). Habeas counsel filed the claim within one year. The Ninth Circuit, on a straightforward application of precedent, should have found the claim timely. This Court should summarily reverse.

OPINIONS BELOW

The Ninth Circuit's opinion affirming the judgment against Brown is reported at *Brown v. CDCR*, 802 Fed.Appx. 253 (9th Cir. 2020), and reproduced at App. 21-31. The remaining orders and opinions entered in the case are unreported, but reproduced beginning at App. 32.

JURISDICTION

The Ninth Circuit affirmed the judgment against Brown on February 10, 2020. App. 21-31; Ninth Circuit docket 42. It denied Brown's petition for panel rehearing on March 9, 2020. App. 20. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.1 and the Court's order of March 19, 2020 extending the filing deadline for certiorari petitions by another 60 days because of Covid-19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

The Six Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

28 U.S.C. § 2244

"1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from . . . (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

STATEMENT OF THE CASE

I. Trial

Brown was charged with second-degree murder, assault on a child under the age of eight resulting in death, and felony child abuse. App. 108-110. Los Angeles County Deputy Public Defender Joel Lofton was appointed to represent Brown. Deputy District Attorney S. Kelly Cromer prosecuted the case. App. 108.

The prosecution's case rested on the testimony of Dr. James Ribe, a medical examiner with the Los Angeles County coroner's office. App. 42-43. Dr. Ribe performed the autopsy on the decedent. App. 125. Dr. Ribe testified that the decedent's head injuries were not consistent with a 36-inch fall from a kitchen countertop to the floor, as claimed by Brown. App. 121-122.

The matter of Dr. Ribe's impeachment was first raised during a pretrial hearing during which Lofton stated that he believed the People had impeachment material on Dr. Ribe and demanded that it be turned over. App. 113-117. The prosecutor responded by stating falsely, "No, and counsel is mistaken; there are no files that the People keep on Dr. Ribe." App. 115.

During trial, on cross-examination, Lofton asked Dr. Ribe if he had "had occasion to change your diagnosis," and Dr. Ribe replied, "[m]ultiple times." App. 129. Trial counsel asked no follow-up questions to probe further.

Brown was convicted on May 10, 2010, of Counts 1 and 2, second degree murder and assault resulting in the death of a child. App. 108-110. He was acquitted on Counts 3 and 4, felony child abuse alleged to have occurred weeks or months before Trecion died. App. 108-110.

II. State Direct Appeal and Post-Conviction

On May 10, 2011, Brown's conviction was affirmed in an unpublished opinion. App. 76-83. A petition for review was filed on June 13, 2011 and summarily denied on August 10, 2011. App. 75. Brown did not petition this Court for a writ of certiorari.

In 2012, habeas counsel undertook an investigation of Brown's case. App. 97-103. She learned of Dr. Ribe's history of changing his testimony in criminal cases in outcome determinative ways, and the Los Angeles District Attorney Office's ("LADA") history of assembling discovery materials relating to Dr. Ribe, referred to as the Ribe boxes. App. 89-94; 97-103.

In October of 2012, LADA confirmed that it was in possession of impeachment material regarding Dr. Ribe. App. 97-103. The contents of the Ribe boxes include the following materials: (1) autopsy reports, (2) trial and preliminary hearing transcripts, (3) transcripts of Dr. Ribe's testimony, (4) miscellaneous materials from the cases in which Dr. Ribe testified, and (5) internal memoranda authored by deputy district attorneys expressing grave concerns about Dr. Ribe's credibility. App. 84-96.

In late January 2014, Brown's habeas counsel unexpectedly learned that the LADA had turned over the Ribe boxes to the Los Angeles County Public Defender's Office ("LACPD") in 2004, six years before Brown's trial took place. App. 97-103.

On May 30, 2014, Brown filed a petition for a writ of habeas corpus in Los Angeles County Superior Court which was denied on July 16, 2015.

Brown filed a petition for writ of habeas corpus with the California Supreme Court on September 4, 2015. App. 71. The California Supreme Court denied the petition on October 12, 2016. App. 70.

III. Federal Habeas Action

On November 7, 2012, Brown timely filed a pro se federal habeas corpus petition. District court docket 1. After Brown returned from state court, he filed on May 6, 2017 a counseled second amended petition including the ineffective assistance of counsel ("IAC") claim at issue here. District court docket 101.

The magistrate judge issued a report recommending denying the petition on March 29, 2018. App. 37. Specifically, the magistrate judge found that Brown's IAC claim was timely but the claim failed for want of prejudice. App. 60-65.

On February 27, 2018, United States District Judge Dolly M. Gee entered orders accepting the recommendation, denying the petition,

dismissing the action with prejudice, and granting a COA. App. 32-36. Judgment was entered against Brown the same day. App. 34.

On February 10, 2020, the Ninth Circuit affirmed the judgment against Brown in a unpublished opinion. App. 21-31. Two members of the panel, the Honorable Mary Schroeder and Michelle Friedland, rejected Brown's argument that the IAC claim was timely because he raised it within one year of habeas counsel's discovery of the Ribe boxes in trial counsel's possession, the triggering fact under 28 U.S.C. § 2244(d)(1)(D). App. 21-25. Judges Friedland and Schroeder held that "[t]he factual predicate of Brown's ineffective assistance of counsel claim is the medical examiner's history of changing his medical testimony, which Brown knew about at least by November 2012, when his habeas counsel copied at the prosecutor's office boxes of impeachment material about the medical examiner." App. 24. The Honorable Roslyn Silver found the claim to be timely under the theory advanced by Brown. App. 27.

The panel denied rehearing. App. 20.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. Standards Of Review

The Court reviews the district court's denial of Brown's habeas corpus petition *de novo*. *Curiel v. Miller*, 830 F.3d 864, 868 (9th Cir. 2016) (en banc).

The Court reviews *de novo* questions of law and mixed questions of law and fact. *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001) (en banc). The application of the Antiterrorism and Effective Death Penalty Act ("AEDPA") is a mixed question of law and fact. *Mann v. Ryan*, 828 F.3d 1143, 1151 (9th Cir. 2016) (en banc). "To the extent it is necessary to review findings of fact made in the district court, the clearly erroneous standard applies." *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002).

II. The Ninth Circuit's finding of untimeliness so clearly misapprehends the governing standards as to call for summary reversal

AEDPA provides that "[t]he limitations period [for filing an initial federal habeas petition] shall run from the latest of" one of four specific circumstances. 28 U.S.C. § 2244(d)(1). These circumstances include situations where a petitioner was unable to file particular claims because the factual or legal bases for the claims were not previously known or available. 28 U.S.C. § 2244(d)(1)(D); *see Redd v. McGrath*, 343 F.3d 1077, 1083-84 (9th Cir. 2003); *Hasan v. Galaza*, 254 F.3d 1150, 1154 n. 3 (9th Cir. 2001) (citing *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000). In this case, Brown's claim was timely because it was filed within one year of habeas counsel's discovery of the Ribe impeachment materials in the office of trial counsel, public defender Joel Lofton.

Here, the factual predicate of Brown's IAC claim—namely, that trial counsel was in possession of critical impeachment materials relating to the prosecution's key witness, Dr. Ribe, at the time of petitioner's trial but failed to find and use those materials—was not discovered until January 2014, when state habeas counsel discovered that the Los Angeles District Attorney had provided the Ribe boxes to the Los Angeles County Public Defender in 2004.

Trial counsel was aware of the existence of some materials related to Dr. Ribe which prompted a request to the prosecutor for disclosure of *Brady*[1] impeachment material on Dr. Ribe. The prosecutor falsely stated to the court and counsel that no such documents existed. Thus, despite his knowledge of a state court decision addressing some of the Ribe materials,[2] trial counsel relied on the prosecutor's assertion that there were no *Brady* materials to disclose. And, even after habeas counsel located the Ribe materials at the prosecution's office and copied them, it appeared to her that she had a strong claim for *Brady* violations by the prosecutor, but not an IAC claim against trial counsel. That is because (1) the Los Angeles District Attorney had the

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *People v. Salazar*, 35 Cal. 4th 1031 (2005), referenced some materials on Dr. Ribe.

Ribe materials, and (2) trial counsel never obtained those materials because the prosecutor falsely stated that they did not exist and trial counsel relied on that representation. Based on these facts, petitioner did not have a colorable claim for IAC because he could not sufficiently allege deficient performance based on trial counsel's inability to discover suppressed evidence.

It was not until the winter of 2014 that Brown was made aware of facts that entirely changed the legal landscape in his case. It was only at that point that Brown learned that his trial counsel failed to take the most basic investigatory steps to learn of the existence of the *Brady* evidence in his *own* office. These facts, which were unknown until habeas counsel discovered them in 2014, are necessary to establish both deficient performance and prejudice prongs of the IAC claim. *See Hasan*, 254 F.3d at 1154-55 (holding that the district court erred in finding that petitioner had the factual predicate for his IAC claim when "critically, Hasan did not know at that time-nor did he have reason to know-what he later learned: the added facts that such an investigation would have revealed.").

A. Counsel did not provide deficient performance when he relied on the prosecutor's false statement that no files existed on Dr. Ribe

The Ninth Circuit has held that "to have the [§ 2244(d)(1)(D)] factual predicate for a habeas [claim] based on ineffective assistance of counsel, a petitioner must have discovered (or with the exercise of due diligence could

have discovered) facts suggesting *both* unreasonable performance and resulting prejudice." *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001) (emphasis added). A claim for IAC does not exist based on trial counsel's failure to discover evidence that the prosecutor has flatly told him does not exist.

To the extent the Ninth Circuit found that the predicate facts for the IAC claim existed before habeas counsel discovered that the impeachment materials were in trial counsel's possession at the time of trial, it made trial counsel responsible for the prosecutor's *Brady* violations. This is so clearly contrary to this Court's precedent that summary reversal is required. *Banks v. Dretke*, 540 U.S. 668, 695 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."); *Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014) ("[D]efense counsel may rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce."). *Cf. Rompilla v. Beard*, 545 U.S. 374, 384 (2005) (holding trial counsel's performance deficient where it was "undisputed" that record in question was "public document, readily available ... at the very courthouse where Rompilla was to be tried"). Trial counsel was not deficient for failing to discover evidence the prosecution suppressed and

thus there was no IAC claim until habeas counsel learned in 2014 that trial counsel was in possession of the impeachment materials all along.

B. The materials that were "widely available" did not provide reasonably adequate impeachment information.

The Ninth Circuit faulted trial counsel for his "failure to find or use widely available impeachment information and to do so after becoming aware of a California Supreme Court case identifying the existence of that information, *see People v. Salazar*, 112 P.3d 14 (Cal. 2005)," amounted to deficient performance. App. 5; *see Rompilla*, 545 U.S. at 384.

The majority's reliance on the fact that the impeachment materials were widely available at the time of Brown's trial, is clearly erroneous. As noted above, the Ribe boxes contained materials that were not available outside of the District Attorney's Office. Instead, the widely available information was (1) newspaper articles discussing Dr. Ribe and the DA's practice of gathering possible *Brady* on Dr. Ribe; (2) the California Supreme Court's discussion of some of those materials in *People v. Salazar*, 112 P.3d 14 (2005), which held that they were immaterial under the facts of that case; and (3) transcripts from the *Salazar* case. And none of these secondary sources would have provided adequate foundation for impeaching Dr. Ribe.

No reasonable trial counsel, then, would have tried to impeach Ribe based solely on the fact that he had changed his opinions in past cases—not

without knowing *why* he'd changed them. It is only by demonstrating the cause for the change in opinion -- be it "astounding" workloads causing the expert to miss important details only discovered later, a repeated changing of opinion based on no new information whatsoever thereby demonstrating a lack of credibility, or a decision not to consult with other experts -- that it has any impeachment value. *See* Ninth circuit docket 43 (Appellant's Reply Brief) at 11-19. The publicly available information did not include any of these details. The only way reasonable counsel could have evaluated Ribe's reasons for changing his opinions would have been to obtain, review, and analyze the contents of the Ribe boxes—the autopsy reports, trial and preliminary hearing transcripts, transcripts of Ribe's testimony in congressional hearings, other materials from the cases in which Dr. Ribe testified, and internal memoranda authored by deputy district attorneys reflecting concerns about the reliability of Ribe's opinions.

It is only those materials that could have informed a cross examination reasonably designed to cast doubt on his reliability. Without those materials, then, the fact that Ribe had changed his opinions in previous cases did not amount to impeachment.

Instead, these widely available secondary sources put trial counsel on notice of the existence of the Ribe boxes, which he then requested from the Deputy District Attorney assigned to Brown's case:

> It was the *Salazar* case which led me to believe that the prosecutor may have a file on Dr. Ribe which contained Brady [*sic*] material. I requested in open court that Deputy District Attorney Cromer turn over any filed they kept on Dr. Ribe. When Deputy District Attorney Cromer denied in open court and on the record to the existence of such a file, I relied on that representation and made no further investigation.

App. 104.

What made Lofton's investigation deficient, then, was that he failed to discover the impeachment materials *already in his own possession*. It was therefore not until January 2014—when Brown's habeas counsel herself discovered that the records had been in Lofton's possession all along—that there was an adequate factual predicate for a *Strickland* claim, sufficient to overcome the strong presumption that counsel performed adequately. *See Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). Only then was it clear to habeas counsel that it was trial counsel's shoddy investigation, separate and apart from his reliance on the prosecutor's statement, that was responsible for his failure to find and use the Ribe box materials.

The Ninth Circuit's decision otherwise is clearly erroneous and summary reversal is warranted.

III. Minimal review here can avert a fundamental injustice and check the integrity of the proceedings below.

Indeed, this Court "has not shied away" from summarily deciding even "fact-intensive cases" where, as here, lower courts have "egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases) (summarily reversing upon holding that prosecution suppressed evidence in violation of due process).

Even a cursory review of the magistrate judge's finding of timeliness, and the split decision of the Ninth Circuit Judges with respect to the question of timeliness shows that the decision was in error. Merits review of the claim can then be left to the lower court. The minimal effort would be worth it, not just to avert the fundamental injustice of perpetuating the sentence of a possibly innocent young Black man, but also to check the integrity of the proceedings below.

"[A] number of judges have suggested that unpublished opinions are breeding grounds for abuse." David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1667, 1684 (2005). These include Justice Thomas, who in his *Plumley v. Austin* dissent noted the "disturbing" prospect that a circuit panel had

opted not to publish 39-page opinion written over dissent in order to "avoid creating binding law." 135 S. Ct. 828, 831 (2015). The panel decision here presents s similar prospect. To start, the magistrate judge found the claim to be timely, the district judge found the claim to be timely, and one member of the panel found the claim timely.

Yet despite these factors, the panel opted to dispose of the case in an unpublished disposition. This leaves it difficult to rule out that the panel succumbed to the incentives Justice Thomas identified, and "intentionally cho[se] to duck some inconvenient issues." 62 Wash. & Lee L. Rev. at 1689.

There is no reason to think the panel's approach in denying Brown's claim as untimely was any different. This is particularly troubling in a case that involves a potential misuse of forensic testimony at trial. As the Court noted in *Hinton v. Alabama*, "[s]erious deficiencies have been found in the forensic evidence used in criminal trials," with invalid forensic testimony contributing to convictions in 60% of exoneration cases analyzed in one study. *Hinton*, 571 U.S. 263, 276 (2014). "This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses." *Id.* But it was maximized here, because Lofton failed to locate the impeachment materials that were necessary to counter Dr. Ribe's testimony and the prosecutor's emphasis on Dr. Ribe's credibility.

Unless the Court at least imposes a spot check in circumstances like these, the incentives to "engage in ad hoc decision-making and avoid accountability for so doing" will persist. 62 Wash. & Lee L. Rev. at 1680. The cost will be dwindling confidence in the fairness of the courts, an erosion of judicial accountability, and the perpetuation of wrongful convictions.

CONCLUSION

For the foregoing reasons, the Court should grant the petition, reverse the judgment of the Ninth Circuit, and remand for further proceedings.

Respectfully submitted,

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DATED: August 5, 2020

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