No. 21-6674

IN THE
Supreme Court of the United States

PAUL DAVID STOREY,
Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

TRAVIS G. BRAGG
Assistant Attorney General
Counsel of Record

Post Office Box 12548
Capitol Station
Austin, Texas 78711
512.936.1400
Travis.Bragg@oag.texas.gov

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

Whether this Court should create an unworkable exception to the jurisdictional "second or successive" petition rules dictated by Congress in 28 U.S.C. § 2244(b) for claims of prosecutorial misconduct, particularly, permitting such claims to proceed without authorization from the Fifth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

BRIEF IN OPPOSITION

In an execution-style slaying, Storey shot and killed Jonas Cherry while robbing the local putt-putt golf course. After exhausting his direct and initial collateral review proceedings in both state and federal courts, he filed a subsequent state habeas application alleging claims of prosecutorial misconduct, all relating to a single statement made by the prosecution during its punishment-phase closing arguments. Ultimately, the Court of Criminal Appeals (CCA) dismissed the application under Texas's abuse-of-the-writ bar.

Storey then initiated several improper actions in federal district court attempting to circumvent the jurisdictional requirements of 28 U.S.C. § 2244(b) by seeking review of successive federal habeas claims in the district court. That court dismissed/transferred these actions to the Fifth Circuit for want of jurisdiction. Storey finally engaged the Fifth Circuit in this process, but still not in the procedurally correct manner. He filed a flurry of appeals only challenging the lower court's decision, but notably, not seeking the appropriate authorization from the circuit court for his successive petition. In a consolidated opinion, the Fifth Circuit rejected all of his assertions.

Storey now asks this Court for extraordinary relief: help him eschew the proper path of seeking authorization and carve out a new exception to the statutory framework. But Storey fails to articulate specifically what the new rule should be. Indeed, he unwittingly presents two options to the Court but expressly chooses neither. And both options are ill-conceived as both would eviscerate the protections laid out by Congress in § 2244(b). Finally, Storey's case presents a poor vehicle to consider any new rule, as he would be unable to meet a necessary showing of due diligence like what the statute requires in § 2244(b)(2)(B)(i). As such, his petition should be denied.

STATEMENT OF THE CASE

I. Initial State and Federal Proceedings

On September 15, 2008, the Criminal District Court No. 3 of Tarrant County, Texas, entered a judgment of conviction for capital murder and sentence of death. ROA.1622–25.[1] The CCA affirmed the judgment on direct appeal, ROA.1116, and this Court denied Storey's

[1] Storey had four cases in the Fifth Circuit at the same time, each with their own record on appeal (ROA). Unless otherwise indicated, "ROA" refers to the appellate record for cause number 20-70014.

petition for writ of certiorari. *Storey v. Texas*, 563 U.S. 919 (2011). The CCA denied relief in his initial state habeas proceeding. ROA.5851–52.

Storey then filed his initial federal habeas petition in district court. ROA.38–120. That court denied relief and denied a COA. ROA.312–360. The Fifth Circuit also denied him a COA. ROA.365–375. This Court again denied his petition for a writ of certiorari, thus concluding his initial federal habeas proceedings. ROA.380.

II. Subsequent State Habeas Proceedings

Storey filed a subsequent state habeas application alleging several claims of prosecutorial error. *Ex parte Storey*, WR-75,88-02, 2017 WL 1316348, at *1 (Tex. Crim. App. Apr. 7, 2017) (*Storey I*). His claims focused on a single statement made by the State during its the punishment-phase closing arguments at trial. Buried in its twenty-five pages of closing arguments, the prosecution said: "[Storey's] whole family got up here yesterday and they pled for you to spare his life. And it should go without saying that all of Jonas's family and everyone who loved him believe the death penalty is appropriate." ROA.4822. Storey later discovered that the parents of the victim, Glenn and Judith Cherry (the

Cherrys), were generally opposed to the death penalty. *Ex parte Storey*, 584 S.W.3d 437, 438 (Tex. Crim. App. 2019) (per curiam) (*Storey II*).

The CCA remanded four claims to the district court for evidentiary development regarding Texas's abuse-of-the-writ bar and, if proper, the merits. *Storey I*, 2017 WL 1316348, at *1. Particularly, the trial court was "ordered to make findings of fact and conclusions of law regarding whether the factual basis of these claims was ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed." *Id.* at 2–3; *see also* Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), (e). After a three-day hearing—with testimony from the two prosecuting attorneys, Storey's trial counsel, the victim's parents, and the victim's wife—the trial court recommended that the CCA find that Storey satisfied an exception to the procedural bar and that relief be grated as to all claims. *Storey II*, 584 S.W.3d at 439.

However, based on its own review, the CCA held that the trial court made several critical errors in its assessment of the procedural bar. *Id.* First, the CCA found that Storey failed to present any evidence regarding the diligence of his initial state habeas attorney "in his particular case." *Id.* Storey also failed to present evidence "showing what [initial state

habeas counsel] did or did not know regarding the victim's parents' anti-death penalty views." *Id.*

Conversely, the CCA relied on the testimony of the victim's father who stated that he was open about his beliefs and had talked about it "to 'anybody that wants to know or has ever asked me.'" *Id.* (quoting 3.SHRR.175).[2] Thus, the CCA concluded that Storey failed to show the factual basis of his claims was unavailable and, in a published opinion, dismissed all claims as an abuse of the writ. *Id.* at 439–40. Once again, this Court denied his petition for a writ of certiorari. *Storey v. Texas*, 140 S. Ct. 2742, 2742 (2020).

III. Successive Federal Habeas Proceedings

Storey then filed several actions in federal district court attempting to have these claims reviewed there. In his initial federal habeas proceedings, he filed a purported motion under Federal Rule of Civil Procedure 60(b) asking the district court to reopen these initial proceedings so it could review many of the same constitutional claims he raised in his subsequent state habeas application (60(b) Motion).

[2] SHRR refers to the reporter's record from the evidentiary hearing that was a part of Storey's subsequent habeas proceedings. It is preceded by the volume number and followed by the pertinent page numbers.

ROA.434–53. He filed a second motion effectively seeking the same relief but pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (Motion to Review). ROA.553–82. The district court properly determined that both motions were second or successive petitions and, thus, dismissed them for lack of jurisdiction. ROA.656–57.

Under a new cause number, Storey filed a second-in-time federal habeas petition seeking review of the same constitutional claims advanced in his two motions. ROA.20-70017.5–17. The district court properly transferred this petition to the Fifth Circuit pursuant to 28 U.S.C. §§ 1631, 2244. ROA.20-70017.336–37. Storey appealed all these decisions to the Fifth Circuit.[3] That court denied a certificate of appealability (COA) regarding the district court's dismissal of Storey's motions filed in his initial federal habeas proceedings, and it affirmed the district court's transfer of his second-in-time federal habeas petition. Pet'r's App. 1 at 17–18. Storey now petitions this Court to review those decisions and, particularly, the long-standing rule that prosecutorial

[3] Storey also challenged the federal district court's denial of his attorneys' request for compensation for work done in his subsequent state habeas proceedings. Pet'r's App. 1 at 15. The Fifth Circuit affirmed that decision, *Id.* at 17–18, which Storey does not contest here.

misconduct claims are subject to 28 U.S.C. § 2244(b). *See generally* Pet. Writ Cert. (Pet.)

REASONS FOR DENYING THE PETITION

I. The Pre-AEDPA [4] Abuse-of-the-Writ Doctrine Has Been Superseded by Statute, Where Congress Made the Gatekeeping Provisions Clear And Expressly Placed the Authority for Authorization Within the Sole Discretion of the Circuit Courts.

As this Court is well aware, the gatekeeping provision of 28 U.S.C. § 2244(b)(2) commands that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless" certain circumstances are met. When a petitioner relies on a newly discovered fact, as Storey does here, he can proceed on the new claim if he can show that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence . . . ." § 2244(b)(2)(B)(i).

But the statute also requires that he show "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the

[4] AEDPA stands for the Antiterrorism and Effective Death Penalty Act.

applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). To determine whether a claim meets these conditions, a petitioner must seek authorization from the circuit court. § 2244(b)(3). These requirements are jurisdictional. *Burton v. Stewart*, 549 U.S. 147, 152–53 (2007).

In broad strokes, Storey asks this Court to hold for the first time that claims of prosecutorial misconduct are not subject to the requirements of § 2244(b). But truly what he asks is that he not be required to seek authorization from the Fifth Circuit. He also wants to avoid any required showing that he is actually innocent of his crime, and this is because he knows that he cannot meet that requirement. Indeed, the complained of fact—that the parents of the victim were generally opposed to the death penalty—has nothing to do with Storey, i.e., the circumstances of the crime, his background, or his character.

Storey points to pre-AEDPA case law as support for his argument that he should be permitted to proceed in district court and only have to show "cause" for why he did not raise the claim earlier. Pet. 17–20 (citing, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986)). Of course, this argument fails on its face. The current version of § 2244(b) became effective on April 24, 1996, when Congress passed

AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 326–27 (1997). And because Storey's filed his second-in-time over two decades past that date, AEDPA necessarily applies to his claims, including § 2244(b). *See Slack v. McDaniel*, 529 U.S. 473, 474 (2000).

In fact, there were grave problems with the pre-AEDPA case law. First, prior to *McCleskey*, there was "[m]uch confusion" on what the standard was for determining when to apply the abuse-of-the-writ bar. *McCleskey*, 499 U.S. at 477. But even after the Court "attempt[ed] to define the doctrine of abuse of the writ with more precision," *Id.* at 489, the pre-AEDPA version of § 2244 gave the many district courts the discretion to apply this bar, *see Id.* at 483–87 (discussing the prior versions of § 2244). This further added to the confusion and patchwork application of the bar.

With the passage of AEDPA in 1996, Congress "simply transfer[ed] from the district court to the court of appeals a screening function which would previously have been performed by the district court as required by 28 U.S.C. § 2254 Rule 9(b)." *Felker v. Turpin*, 518 U.S. 651, 664 (1996). "The Act also codifie[ed] some of the pre-existing limits on successive petitions, and further restrict[ed] the availability of relief to habeas

petitioners." *Id.* In *Felker*, the Court addressed an argument analogous to the one Storey presses here: that § 2244(b) effectively cuts off an avenue for relief by raising the gate on successive habeas petitions.

In flatly rejecting that contention, a unanimous Court "recognized that 'the power to award the writ by any of the courts of the United States, must be given by written law,' and . . . likewise recognized that judgments about the proper scope of the writ are 'normally for Congress to make.'" *Id.* (quoting *Ex parte Bollman*, 8 U.S. 75, 94 (1807), and *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996), respectively). The Court held that the restrictions of § 2244(b), enacted by Congress, were proper given the evolutionary process of the "abuse of the writ" doctrine. *Id.*

To be certain, the doctrine under *McCleskey* "was more forgiving than AEDPA's gatekeeping provision . . . ." *Banister v. Davis*, 140 S. Ct. 1698, 1707 (2020). This is no doubt why Storey seeks a return to the former rules. But nothing has changed since this Court's holding in *Felker*. And a rule permitting any petitioner raising a second-in-time claim of prosecutorial misconduct to simply seek permission from the district court under the old "cause and prejudice" standard would eviscerate the specific protections Congress enacted in § 2244(b) and

would undo their express grant to the circuit courts to decide on authorization.

II. The Reasoning of *Panetti* Is Inapplicable to Claims Attacking the Underlying Conviction.

Next, Storey attempts to follow the logic of *Panetti v. Quarterman*, 551 U.S. 930 (2007), claiming that merely designating his petition as second-in-time, but not successive, is the most practical way to resolve his case. Pet. 21–25. But *Panetti* stands for the proposition that a particular class of claim *which does not attack the underlying conviction*—incompetency to be executed—is not subject to the jurisdictional requirements of § 2244(b) because it is not truly successive. Its holding and reasoning do not support an expansion of *Panetti* in the manner that Storey suggests.

In *Panetti* this Court addressed the unique and "unusual posture" of an incompetency-to-be-executed claim. 551 U.S. at 945. The Court's reasoning started with a simple precept: as a general matter, a claim that a petitioner is incompetent to be executed is "not ripe until after the time has run to file a first federal habeas petition." *Id.* at 943; *see also Id.* at 947 ("we have confirmed that claims of incompetency to be executed remain unripe at early stages of the proceedings."). Addressing the

State's arguments on ripeness, the Court noted that while some prisoners may have "mental conditions indicative of incompetency" at the time of filing the initial petition, many will have "no early sign of mental illness." *Id.* And "[a]ll prisoners are at risk of deteriorations in their mental state." *Id.* Thus, a petitioner cannot know whether he or she will even have a valid claim they are incompetent to be executed, much less the supporting evidence for that claim, until closer in time to execution and, indeed, further removed from the trial.

Storey misses the distinction here, though. He argues that his claim was not ripe until his federal habeas counsel discovered the underlying facts well after the conclusion of his initial federal habeas proceedings. But this is not the same. The factual predicate for a prosecutorial misconduct claim must necessarily *occur* before the end of trial, whether it is suppression of evidence or the knowing elicitation of false testimony. That the factual predicate is not discovered until later in time can excuse bars such as procedural default and even the successiveness bar (if, of course, the petitioner can fulfill the other requisites). But that does not create ripeness.

Conversely, the facts supporting a claim of incompetency to be executed may not *occur* until years after the initial federal habeas proceeding, when the onset of mental disease or deterioration happens. That is when this claim becomes ripe. And this is the crux of the issue that Storey completely neglects. Run of the mill federal habeas claims that attack a prisoner's conviction or sentence—whether alleging error by the State, their counsel, or the trial court—are backward looking by their nature. Even a claim that a petitioner is intellectually disabled and, thus, ineligible for the death penalty looks backwards at whether the disability appeared prior to the age of eighteen and how it affects the petitioner's culpability of the crime.

An incompetency-to-be-executed claim is forward looking. In fact it has nothing to do with the crime or the trial. Hence, either under pre-AEDPA law or the current guiding statutes, a petitioner could *never* meet the requirements to pass through the gateway of the successive bar. That is fundamental to this Court's holding in *Panetti* and why, to find otherwise, would create "implications for habeas practice [that] would be far reaching and seemingly perverse." *Stewart v. Martinez-Villareal*, 523

U.S. 637, 644 (1998); *see also*, *Panetti*, 551 U.S. at 943 (quoting *Martinez-Villareal*).

Storey tries to make his case seem perverse by contorting the law and the facts. He makes it seem as though he has no legal path forward if he is not allowed to present his claim directly to the district court. Of course, that is technically untrue. Section 2244(b) exists specifically for this purpose.[5] But as discussed above, *supra* Reasons I, Storey likely knows that he cannot satisfy the actual innocence requirement of § 2244(b)(2)(B)(ii).

What's more, he cannot satisfy the due diligence requirement of § 2244(b)(2)(B)(i). When faced with the analogous question under Texas's abuse-of-the-writ bar, the CCA applied the procedural bar expressly because Storey failed to demonstrate that the factual predicate of his claim was not ascertainable through the exercise of due diligence when he filed his initial state habeas application. *Storey II*, 584 S.W.3d at 439; *see* Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), (e). And it did so based in

---

[5] Moreover, other paths outside of §§ 2244, 2254 exist, e.g., an original habeas petition to this Court, *see Felker*, 518 U.S. at 660–62 (holding that § 2244(b) "has not repealed [this Court's] authority to entertain original habeas petitions"), and clemency, *see Burris v. Parke*, 130 F.3d 782, 785 (7th Cir. 1997) ("A state governor or clemency board may receive and act on such evidence; under § 2244(b), a federal court may not.").

large part on the uncontroverted fact that the victim's father said he was open about his beliefs and had talked about it "to 'anybody that wants to know or has ever asked me.'" *Id.* (quoting 3.SHRR.175).[6]

Perhaps this is why he suggests treating prosecutorial misconduct claims like those asserting incompetency to be executed. Adopting an analogous rule such as *Panetti* would simply mean that any petitioner could say the magic phrase "prosecutorial misconduct" and escape any gatekeeping mechanisms. Storey could skip the authorization process of § 2244(b)(3), the actual innocence requirement of § 2244(b)(2)(B)(ii), and even the due diligence showing under § 2244(b)(2)(B)(i). This is his ultimate ask of the Court: to avoid any and all procedural requirements.

---

[6] In his petition Storey asserts that the state district court's favorable factual findings remain "undisturbed." Pet. 20. But this is plainly false. Almost the entirety of that court's findings and conclusions were either expressly rejected by the CCA or directly inconsistent with its dismissal of his subsequent application. Based on its own review of the case, the CCA made several critical statements demonstrating an express rejection of almost all of the district court's findings and conclusions. *See, e.g.*, *Storey II*, 584 S.W.3d at 439 ("The trial court found that the remanded claims met Section 5 and had merit, and it recommended that punishment relief be granted. We disagree. . . . . [I]f our independent review of the record reveals circumstances that contradict or undermine the trial judge's findings and conclusions, we can exercise our authority to enter contrary findings and conclusions."). Save for a single express factual finding the CCA expressly rejected all findings and conclusions related to the procedural bar. *Id.* at 439–40. And because the CCA predicated the district court's review of the merits on a finding that his claims satisfied the requirements of 11.071, section 5(a), *see Storey I*, 2017 WL 1316348, at *2–3, all findings and conclusions related to the merits were also expressly rejected, or at the very least, rendered directly inconsistent with the CCA's opinion.

But of course, there must be some gatekeeping mechanisms. Otherwise, AEDPA's superseding "principles of comity, finality, and federalism" would be undone. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). "Finality has special importance in the context of a federal attack on a state conviction." *McCleskey*, 499 U.S. at 491 (citing *Murray*, 477 U.S. at 487). "And if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition." *Id.* at 492. "AEDPA aimed to prevent serial challenges to a judgment of conviction, in the interest of reducing delay, conserving judicial resources, and promoting finality." *Banister*, 140 S. Ct. at 1707.

III. There Is No Actual Circuit Court Split, And Storey Offers No Other Compelling Reason Why This Court Should Expend Its Limited Judicial Resources.

To his credit, Storey admits that "there may not be a full split among the circuits regarding the issue presented in [his] case . . . ." Pet. 25. In truth, there is no circuit split. He offers a "splintering of opinion" on the issue in several concurrences and dissents. Pet. 25. Obviously, this does not create such a split. Storey dutifully recognizes

the several circuit courts that all act in accord applying § 2244(b) to successive petitions raising prosecutorial misconduct claims. Pet. 25–28. But Storey offers *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009), as the contrary circuit, ostensibly creating this mini-split. Pet. 26.

However, Douglas's case "present[ed] a more complicated procedural challenge" with truly "unique circumstances." *Id.* at 1169. There, Douglas presented new claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), while his initial federal habeas petition was pending in the circuit court. *Id.* at 1190. These claims closely mirrored other prosecutorial misconduct claims which Douglas raised in his initial federal habeas petition and which his co-conspirator and co-appellant, Powell, also raised (and on which Powell won relief). As such, and after still working through the § 2244(b)(2) factors, the circuit court took the extreme step of permitting those claims to be *supplemented* with Douglas's initial federal habeas petition and then granting relief on those claims, while also reversing the district court's denial of relief on Douglas's other prosecutorial misconduct claims.

So the *Douglas* case can be considered an outlier which is not analogous to Storey's case. What's more, in cases like Storey where a petitioner raises a prosecutorial misconduct claim in a successive petition, the Tenth Circuit routinely applies § 2244(b), an important note when discussing an apparent circuit split which Storey neglected to uncover. *See, e.g.*, *Case v. Hatch*, 731 F.3d 1015, 1026–44 (10th Cir. 2013); *LaFevers v. Gibson*, 238 F.3d 1263, 1264–68 (10th Cir. 2001). So there is no circuit split, and Storey can point to no other compelling reason why this Court should expend its limited resources or further frustrate the finality of this conviction any longer. *See* Sup. Ct. R. 10.

CONCLUSION

This Court should not undo the gatekeeping mechanisms enacted by Congress in § 2244(b). Whether under the pre-AEDPA structure or the *Panetti* framework, the new rule that Storey would have the Court adopt would fundamentally undue the principles of AEDPA an would open the floodgates to the district courts. Finally, Storey's case presents a poor vehicle through which to consider such a massive shift in jurisprudence. For these reasons, this Court should deny the petition.

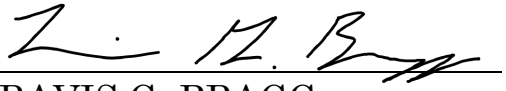
Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division



TRAVIS G. BRAGG
Assistant Attorney General
State Bar No. 24076286
Counsel of Record

Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
Travis.Bragg@oag.texas.gov

Attorneys for Respondent