No. 22-6798

In the Supreme Court of the United States

RONALD JEFFREY PRIBLE, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Houston bank robber Jeff Prible was convicted and sentenced to death for killing a family of five in their home. After shooting his partner-in-crime, Steve Herrera, Prible sexually assaulted and shot Herrera's fiancée, Nilda Tirado. Prible then set Tirado's body ablaze to destroy the incriminating DNA evidence Prible deposited in Tirado's body. The resulting fire filled the couple's home with fatal levels of soot and carbon monoxide, and Prible left their three sleeping children to die. Prible was the last person seen at Herrera's house and remains the only person with a motive to incinerate that damning evidence and the opportunity to commit these crimes.

Prible nevertheless maintains that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing evidence of a ring of informants that allegedly conspired to manufacture a jailhouse confession adduced at trial. The Fifth Circuit held that this ring-of-informants theory, which in various federal habeas pleadings Prible had attempted to portray as four distinct yet overlapping claims, was procedurally defaulted.

The questions presented are:

1. Whether Prible lacks cause to excuse his procedural default when the factual basis for claiming the State violated *Brady* was available to state habeas counsel prior to Prible's first state habeas application.

2. Whether Prible's ring-of-informants *Brady* "claims" are appropriately considered collectively for purposes of analyzing procedural default because they were based on the same underlying set of facts.

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A panel of the Fifth Circuit unanimously decided that the district court erred in granting Prible habeas relief from a capital-murder conviction for killing a family of five. The district court awarded Prible relief upon finding that the State violated *Brady* by suppressing information about an alleged ring of jailhouse informants. Because Prible failed to properly raise his ring-of-informants theory in state court, any claim based on that theory was procedurally defaulted. Before the district court could review the merits of any such claim, Prible first had to establish cause and prejudice to excuse his procedural default. The district court excused Prible's procedural default by blaming Prible's tardiness on the State's alleged suppression of evidence. Prible attempted to defend that ruling on appeal. But as the Fifth Circuit correctly held, Prible cannot fault the State for his failure to timely raise that assertion in state court.

The decision below was a straightforward and factbound application of this Court's precedents governing cause and prejudice for procedural default of federal constitutional claims. Prible's first question presented insists that this case implicates an entrenched circuit (and state high court) split over whether diligence is a component of a substantive *Brady* claim. Not so. It is undisputed that Prible did not bring any *Brady* claim challenging the alleged ring of informants in his initial state habeas petition. Thus, the question fairly presented here is whether Prible established cause for that procedural default.

Neither of Prible's two main authorities, *Strickler v. Greene*, 527 U.S. 263 (1999), and *Banks v. Dretke*, 540 U.S. 668 (2004), alter the well-established burdens a petitioner must carry to establish cause and prejudice for procedurally defaulted claims—including *Brady* claims. And *Williams v. Taylor*, 529 U.S. 420 (2000), which Prible does not even cite, confirms that federal habeas petitioners must diligently develop and present potential *Brady* claims in state habeas proceedings or risk default. Besides, Prible cannot benefit from the rule he seeks. The state habeas trial court found, and the Texas Court of Criminal Appeals (CCA) agreed, that information that would have preserved a claim based on Prible's ring-of-informants theory was available to his state habeas counsel prior to his first state habeas application, thus triggering a procedural bar. AEDPA's presumption of correctness attached to these factual determinations and Prible failed to overcome that presumption. *See* 28 U.S.C. § 2254(e)(1). Remarkably, Prible does not mention section 2254(e)(1). Furthermore, certiorari is unwarranted because Prible faces additional vehicle problems and other independent grounds justify the denial of habeas relief.

Prible fares no better under his second question presented. Here, Prible complains that his ring-of-informants *Brady* theory should have been addressed as piecemeal "claims" to

get multiple bites at the procedural-default apple, rather than as a single claim relating back to the same operative facts. Prible candidly acknowledges that his second question presented does not present a circuit split. That concession makes sense. The Fifth Circuit issued no broad pronouncement prohibiting other litigants from asserting separate justifications to excuse a procedural default. Prible construes the Fifth Circuit's approach of assessing the default of his four ring-of-informants *Brady* allegations together as imposing a new rule restricting petitioners to presenting a single cause excusing default where claims relate back. The Fifth Circuit did no such thing. Instead, in a footnote, that court rejected Prible's novel assertion that the State forfeited its procedural default argument by addressing his *Brady* claims cohesively. That was the district court's framing, which explained that Prible's "claims" would have been untimely under AEDPA *unless* they related back. The State, as the appellant, engaged with the district court's reasoning as the district court offered it. There are no broader consequences to the Fifth Circuit's footnote.

In any event, the Fifth Circuit was right that it made little sense to treat the *Brady* claims as factually divergent: the district court viewed this case the same way in assessing the materiality of the *Brady* allegations, and Prible himself contended that each of his ring-of-informants *Brady* allegations were so intertwined with the claims he raised in his original federal petition that they could relate back to that filing.

Ultimately, Prible identifies no split of authority that this case could resolve, no error to correct, and no way to avoid multiple other obstacles to this Court's review and relief. His petition should be denied.

STATEMENT

I. Factual Background

A. The shootings and arson

On the morning of April 24, 1999, Steve Herrera, Nilda Tirado, and their three children were found dead in their home. Herrera's friend, bank robber Ronald Jeffrey Prible, was the last person seen at the house. R.13452.[1] Prible would later admit to police he had recently given the proceeds from several bank robberies to Herrera to fund profitable drug deals that would let them open a bar together. R.13475-77; R.13725.

Around 10 pm the night before, Herrera's brother-in-law, Victor Martinez, went to Herrera's house. R.13427-28. Martinez found Herrera and Prible drinking beer and playing pool in the garage. R.13430-31. Around midnight, Tirado opened the door and called to Herrera. R.13434-35. Tirado went back inside, and the men continued playing pool. R.13435. Around 12:30 am, Martinez, Herrera, and Prible went to a nightclub in Martinez's car. R.13438-40.

Herrera and Prible contemplated getting some cocaine from Herrera's brother. R.13444; R.13489. Around 2 am, Herrera called his brother from Prible's phone to say he was headed home. R.13439-46; R.13492. Herrera's brother, unable to supply any cocaine, went to bed and the two never spoke again. R.13496.

Back at Herrera's house, Martinez, Herrera, and Prible talked out front while Herrera and Prible smoked marijuana. R.13446-48. Herrera and Prible went inside the garage.

[1] "R.__" refers to the electronic record on appeal in *Prible v. Lumpkin*, No. 20-70010 (5th Cir.).

When Martinez left, sometime before 3:30 am, Herrera and Prible were playing pool in the garage. R.13447-48. Martinez never saw Prible enter the house that evening. R.13437-40.

Around 6:30 am that morning, neighbors saw smoke coming from the house. R.12422-24. One neighbor found Herrera in the garage, face-down in a pool of blood. R.12427-30. The house was filled with smoke—the fire, confined to the living-room couch, was smoldering. R.12488-92. Tirado, wearing only a t-shirt and burned beyond recognition, was slumped face-down on the couch, blood around her head. R.12489; R.12537-40. A burned gasoline container, an aerosol can, and a roll of paper towels soaked in flammable liquid were on the floor, and a burned metal can lay beside her body. R.12534-35; R.12728; R.12737.

Firefighters also discovered the bodies of their three young children. Seven-year-olds Valerie and Rachel were in their bedroom; twenty-two-month-old Jade was in the master bedroom. R.12494-501; R.12544; R.12561. The children died from inhaling fatal levels of soot and carbon monoxide. R.14673-94.

B. The investigation, Prible's lies to police, and his confession

The investigation began immediately. There were no signs of forced entry into Herrera's home. R.12550. Herrera was killed by a close-range gunshot to the back of the neck, and a bullet was recovered from Herrera's body. R.12919-21; R.14654-59. Tirado's body was identified by dental records. R.12943. She was killed by a gunshot to the back of the neck. R.12941; R.14663-68. Police found the bullet under the carpet near her body. R.12689. A firearms examiner later concluded the same gun fired the bullets that killed Herrera and Tirado. R.13333.

Arson investigators determined the fire was deliberate. R.12533-36; R.12740. The metal can next to Tirado contained Kutzit, an extremely flammable solvent. R.12683; R.12738;

R.12749. More Kutzit cans were found in the garage and a shed. R.12683; R.12766. Tirado's burns suggested accelerants were poured on her body and set afire after she was shot. R.12740; R.12943. A swab of her mouth revealed sperm cells. R.13021; R.13199-200. When lab results came back later, Prible's DNA was consistent with the DNA on the swab. R.5477; R.13202; R.13259-60.

Witnesses told police that Prible had been at Herrera's house the night before. ROA.13093. Prible was at his house, located less than a mile away from Herrera's, when the police arrived approximately ten hours after the bodies were discovered. ROA.13094-98. The police searched Prible's home. R.13094-98; R.14932. The murder weapon was never found, but the search revealed guns, ammunition, a semiautomatic-pistol magazine that did not fit any of the recovered weapons but could have fit the murder weapon, and a check stub showing payment for nine-millimeter ammunition consistent with the type used on Herrera and Tirado. R.13338-48.

In the first of two written police statements, Prible explained that Herrera picked him up on April 23 at 8 or 9 pm, that they played pool and drank beer in the garage, and that Martinez joined them around 11 pm before taking them to the nightclub. R.5469; R.12795. The men drove back to Herrera's house around 2 am; Martinez left around 2:30 am. R.5469; R.12796. Prible said he and Herrera played pool and drank until Tirado "came out into the garage and gave a look at Steve." R.5469; R.12796. Prible "knew it was time to leave" and, he claimed, Herrera drove him home "about 4:00 AM." R.5469; R.12796.

Prible initially denied that he had been in any kind of relationship with Tirado. ROA.12805. But later, when a detective asked, "what if some of your semen is in or on Nilda," Prible changed his story. R.13087; R.5473. In a second written statement, Prible

claimed he and Tirado were having an affair but never had sex until the morning she died. R.5472; R.12805; R.13087. Prible said that after returning from the nightclub, he left the garage and Tirado performed oral sex on him in the house. R.5472; R.12805. He said he initially lied about the affair because "it would ruin [her] reputation." R.5472; R.12806. To corroborate this story, investigators spoke to two of Tirado's closest friends, but neither considered it likely. R.13542-43; R.13557. Shortly before her death, Tirado told her friends that Prible "gives [her] the creeps," "[s]he didn't like him," R.13543, and "she was tired of him being [at her home]." R.13557.

A month after the murders, Prible pleaded guilty in federal court to bank robbery. *United States v. Prible*, No. 4:99-cr-00348-1 (S.D. Tex. 1999), ECF No. 6. He was convicted and sent to federal prison in Beaumont. *Prible*, *supra*, ECF Nos. 13 & 14. In July 2001, the State charged Prible with capital murder. R.6171. He was moved from Beaumont's low-security facility to medium security. R.13614.

At Beaumont Medium, Prible approached Michael Beckcom, a fellow inmate who had pleaded guilty to murder to avoid a capital-murder charge. R.13600-02; R.13623. Because Beckcom had "fought a case like" the one Prible faced, Prible asked Beckcom about what to expect. R.13624. Beckcom said it depended on what evidence the prosecution had. R.13625. When Beckcom explained the gravity of DNA evidence, Prible dismissed it because he and Nilda were "having an affair." R.13625.

Prible confided in Beckcom that he killed Herrera and Tirado over money: "He took $250,000 of my hard earned money and he came up with some lame story that things didn't go down the way they were supposed to. . . . He fucked me out of my money and then he was going to kill me, so I handled my business." R.13643. Prible killed Herrera "[i]n the pool

room" by shooting him in the back of the head, and he shot Tirado, partially clothed on the couch, in the back of the head. R.13640. Unable to find the money, Prible said he set a fire "to cover his tracks," and implied he had disposed of the gun. R.13628; R.13643. Prible boasted, "Anybody that can go in a house and take out a whole family and get out without being seen is a bad mother fucker and I'm that mother fucker." R.13644-45.

Nathan Foreman, Beckcom's cellmate, told Beckcom how to reach the prosecutor in Prible's case, Harris County Assistant District Attorney Kelly Siegler. R.13614-15. Foreman knew about Siegler because he had offered to testify in another case Siegler prosecuted. R.4055.

Siegler and Beckcom spoke by phone in October 2001. R.13614-16. In December, Siegler and a Harris County investigator visited Beckcom. R.13616-18. Siegler entered the meeting aware that Beckcom was potentially "another inmate maybe spinning a yarn," but Beckcom supplied Siegler with information convincing her that he was credible. R.13617. On December 10, Beckcom gave Siegler a letter detailing his knowledge of Prible's crime. Pet. App. 40a; *see* R.6451-56. Siegler and Beckcom spoke by phone a few more times and met again in May 2002. R.13618.

Siegler also received several letters from inmates offering to testify against Prible. *E.g.*, R.6528-29; R.6533; R.6535-36. Prible understood that inmates might offer to provide testimony against other inmates in return for sentence reductions: in June 2001, he obtained a 27-month reduction of his own sentence for bank robbery in exchange for serving as an informant. R.14870-72.

II. Pretrial Proceedings, the Trial, and Direct Appeal

A. Guilt/Innocence

At a pre-trial conference, Siegler provided detailed disclosures of the nature and extent of the prosecution's contact with Beckcom. R.7514 (summary of the pretrial conference). But she asserted "that any notes that either [she] or [her investigator] made when [they] went to visit Michael Beckcom [wa]s work product" and not discoverable. ROA.9489. The trial court agreed. ROA.9489. Prible's trial counsel never asserted a *Brady* right to that work product.

At trial, the State established: (1) Prible was the last person seen with Herrera before the murders, *e.g.*, R.13447-48; (2) a failed business venture supplied a motive, *e.g.*, R.13643; (3) the bullets that killed Tirado and Herrera were fired from the same weapon, suggesting a single killer, *e.g.*, R.13333; (4) Prible's sperm was found in Tirado's mouth, *e.g.*, R.13021; (5) a full DNA profile of the sperm was consistent with it being deposited there around the time of her death, *e.g.*, R.13256-57; (6) the sexual contact was unlikely to have been consensual, *e.g.*, R.13542-43; (7) the fire was set deliberately to destroy the DNA evidence found on Nilda, *e.g.*, R.12740-41; and (8) Prible admitted to Beckcom that he committed the murders, *e.g.*, R.13642-43. *See Prible v. State*, 175 S.W.3d 724, 730 (Tex. Crim. App. 2005).

Beckcom acknowledged at trial that he was trying to reduce the time he might spend in prison by testifying. R.13606. The defense tried to show that Beckom was lying: it cross-examined Beckcom about his criminal past, R.13653-61, and called a witness to impeach his character, R.13927. The defense also attempted to show that Beckcom had learned details about the murder without Prible's confession. *Prible*, 175 S.W.3d at 729-30. Defense counsel called a witness to testify that Prible possessed at the prison a copy of the probable-cause

affidavit detailing the capital-murder allegations and that Prible had discussed his case *ad nauseam* with fellow inmates. R.13919-20. Beckom's testimony, however, did not mirror that document. *Id.* For example, he testified—accurately—that the police thought they had found a drop of blood on a pair of Prible's shoes, but that the "blood" was actually ketchup. R.13641; R.13686; *see* R.5476-77. That detail was not in the probable-cause affidavit. *Prible*, 175 S.W.3d at 730; *see* R.14982-83.

Prible's DNA expert—who was serving at the time as the State expert's Ph.D. adviser, R.14005-06—testified it was not "possible to extrapolate" from "the amount of DNA" found "roughly what time that [it] was placed there." R.14009. As for the State expert's suggestion "that there was very little or no time between the point when the sperm were deposited into the oral cavity and when the victim died," Prible's expert considered it based on "a series of dangerous assumptions." R.14012-13. He said it was "not scientifically valid": there were "too many variables that you would have to know . . . in order to make that kind of statement." R.14013; R.14018; *see* R.14030-31.

The defense offered Prible's neighbor, who was twelve at the time of the murders, as an alibi witness. She testified that she saw Prible speaking with Herrera in Prible's driveway sometime after 1 am on April 24, although she could not recall the precise time that she looked at her clock and saw the men talking. R.13899-902. The jury rejected that purported alibi and convicted Prible. R.14151; R.15842.

B. Punishment

Prible's ex-wife testified that Prible was physically violent towards her, R.14181; when angered by others, he would say, "I could kill their whole fucking family and burn their house and nobody would ever know it was me," R.14192. A Harris County sheriff recounted

Prible's rage when he was rejected for a position with the department. R.14211. An acquaintance said that after a business with Prible failed, Prible and Prible's father came to his house with a gun. R.14217-23. Several bank employees recounted how Prible threatened them with a bomb or a gun during his robberies. R.14235; R.14261-80; R.14300. The jury found against Prible and the court sentenced him to death. R.14432-33; R.15851-54.

On direct appeal, the CCA affirmed the conviction and sentence. *See Prible*, 175 S.W.3d at 726. This Court denied certiorari. *See Prible v. Texas*, 546 U.S. 962 (2005).

III. State and Federal Habeas Proceedings

A. The first three state-habeas applications

In 2004, Prible filed a counseled habeas application, claiming ineffective assistance of trial and appellate counsel, and that his jury did not reflect a fair cross-section of the community. R.19115-16.

In 2007, while his first application was still pending, and notwithstanding that the CCA does not recognize hybrid representation, R.16487, Prible attempted to file a pro-se subsequent habeas application. R.16541-49. He asserted a claim for relief based on his "ring-of-informants" theory for the first time in this subsequent application. He claimed Siegler "encouraged Beck[c]om with the incentive of a letter to the prosecutor asking for a time reduction to get close to Prible and find any information that would aid her in making her case." R.16543. He said that "Siegler was using Beck[c]om and his group of friends from Federal Prison to aid her in making cases," including his, "where there was no evidence." R.16544. He alleged that this conduct violated his Sixth Amendment right against uncounseled interrogation, *Massiah v. United States*, 377 U.S. 201 (1964), and that failure to disclose related evidence violated *Brady*. R.16542-44. Prible's counsel declined to adopt this pro se

application because "[n]one of it [was] useful." R.16657. Prible responded to the CCA, arguing he did not need "permission for [the subsequent application] to be added to my writ." R.16655.

Also in 2007, Prible filed a third state-habeas application pro se. R.16560-64. He claimed trial counsel could and should have discovered that Siegler was "a Rogue Prosecutor," "fabricating evidence to bring back a conviction" using "the same group of jailhouse informants" in his case as in the prosecution of "Hermilio Herrero who went to trial a month before I did." R.16561.

Two months later, Prible wrote the CCA, complaining that his trial attorney and the trial judge were corrupt because they had "not want[ed] to make [Siegler's] wrongful act known." R.16517. In 2008, Prible filed yet another pro se "motion to overturn [his] conviction" due to "prosecutorial misconduct (repeatedly using the same []jailhouse informant)." R.16451-52. A similar letter followed in 2008. R.16450. Two weeks later, he wrote the CCA claiming he was warned before trial that "Siegler gonna bring someone in to lie [about] me." R.16457. Prible wrote the CCA in April 2008 claiming he discovered a "bribery scheme" between the trial judge, appellate counsel, and habeas counsel. R.16699.

The CCA denied the counseled habeas application on the merits and dismissed the others as abuses of the writ. *Ex parte Prible*, Nos. WR-69,328-01, WR-69,328-02, WR-69,328-03, 2008 WL 2487786, at *1 (Tex. Crim. App. June 18, 2008) (per curiam), *cert. denied*, *Prible v. Texas*, 555 U.S. 1176 (2009).

B. The first federal-court petition and fourth state application

Prible timely filed a federal-habeas petition and amended it. R.31, 94. The district court abated proceedings for Prible to exhaust state remedies. R.322.

In 2010, Prible's counsel filed a fourth state-habeas application. R.16772. For the first time, counsel argued that Beckcom "was part of a ring of informants in the Beaumont federal prison," R.16776, and claimed to have obtained "insider information" from one of the ring's members, inmate Carl Walker, R.16783. Walker claimed Beckcom and Foreman solicited him to snitch on Prible and directed him to write a letter to Siegler with case details. R.8129-30. In an August 2010 interview with Prible's habeas counsel, Walker opined that "the prosecutor was working directly with Foreman, I want to assume." R.3668. Walker speculated that "someone high on the food chain was feeding these guys the information because" Prible "wasn't telling" Walker details of the crime. R.8129-30.

Prible alleged he "was unable to identify Carl Walker . . . as a witness until the fall of 2005, despite diligently attempting to locate him." R.16800. He asked the state court to overlook Texas's rule against successive applications because (1) the Walker information was newly discovered evidence, R.16782; (2) even with due diligence, he could not have discovered that evidence before his first state-habeas application was due, R.16799; and (3) "there was little evidence of the crime apart from [Beckcom's] testimony." R.16779. Prible asserted *Massiah*, *Brady*, and *Giglio v. United States*, 405 U.S. 150 (1972), claims regarding his ring-of-informants theory. R.16803-20.

The CCA remanded for the trial court to decide "whether any of the claims satisfy the requirements of Article 11.071, § 5," avoiding the successive-application bar, and to determine "when and how [Prible] obtained the evidence at issue and whether he exercised reasonable diligence to obtain this evidence at the earliest opportunity." *Ex parte Prible*, No. WR-69,328-04, 2010 WL 5185846, at *1 (Tex. Crim. App. Dec. 15, 2010) (per curiam).

The trial court held an evidentiary hearing, which included testimony from Prible's initial state-habeas counsel. The attorney was aware of Walker before he filed the first application and testified that "Walker was privy to the activities of the district attorney with respect to this group of cooperating inmates," as well as "what efforts were being made to recruit witnesses against Mr. Prible in federal prison." R.21213-14. He professed inability to locate Walker because Prible disclosed only Walker's last name and "[t]hat he was black." R.21213-14. The attorney did not call or visit FCI Beaumont, send an investigator, issue a subpoena, or seek a court order to locate Walker. R.21218-19.

The court found Walker's statements "consist almost entirely of hearsay and speculation and contain no direct evidence of [Prible's] conspiracy theory." R.3401-02. Such statements were "unpersuasive and have little evidentiary value with respect to the validity of" Prible's alleged ring of informants. R.3402. Additionally, Prible "provided [habeas] counsel with very limited information regarding the identity of Walker" and "counsel did not urge the applicant's conspiracy theory" in the initial habeas petition. R.3402-03. The court found "the factual basis for the instant [ring-of-informants] claims [was] available when the applicant's initial habeas petition was filed." R.3403. That meant Prible could not avoid the state-law subsequent-application bar. R.3405. The CCA adopted the trial court's findings, dismissing the fourth application as an abuse of the writ. *Ex parte Prible*, No. WR-69,328-04, 2011 WL 5221864, at *1. (Tex. Crim. App. Nov. 2, 2011) (per curiam).

C. Prible's return to federal court

Back in federal court, Prible filed second, third, and fourth amended petitions. R.393; R.3727; R.5167. He reiterated his ring-of-informants conspiracy theory in greater detail.

He identified an overlap in the inmates who sought sentence reductions via testimony in Prible's case and the unrelated trial of another FCI Beaumont inmate, Hermilio Herrero.

In early-to-mid 2001, jailhouse snitch Jesse Moreno met with Siegler to supply details of a confession by Herrero. R.5208. Moreno said Herrero confessed to him and to Nathan Foreman. R.5208-09. Moreno and another inmate, Rafael Dominguez, testified at Herrero's trial. R.5217. Moreno, Dominguez, Foreman, and Eddie Gomez (another inmate) received letters from Siegler reflecting their cooperation, even though she had found Foreman not to be credible. R.5217-18.

According to Prible, after he was charged with murder, Siegler moved him from Beaumont Low "to the same FCI Beaumont unit," Beaumont Medium, "as Nathan Foreman," who was released from Beaumont's secure housing unit into general population the same day. R.5209-10. The cooperating inmates in Herrero's case, alongside Beckcom and Walker, ingratiated themselves to Prible, and, using commissary vouchers, "staged photos" with Prible "so that the State could bolster the credibility of the testifying informants." R.5251; R.13675. The plan was to grow close to Prible, then "contact Siegler and offer" to "snitch." R.5247. "[W]hether [Prible] actually confessed was irrelevant," R.5250, because someone—Walker "assume[d]" it was Siegler, R.3990—had already provided Moreno, Foreman, and Beckcom with details of Prible's case. R.5249-50.

Prible also claimed that Siegler met with Foreman in August 2001 to discuss Herrero. R.5210. During the meeting, Foreman claimed Prible had confessed to him, but was unable to supply details; it was obvious to Siegler and her investigator that he was lying. R.5210-11. In mid-November, Foreman's attorney sent Siegler a letter promising that Foreman "ha[d] information that w[ould] lead you to the weapon that was used in the murder case

that you are preparing to go to trial on in the near future." R.5213. Siegler met with Foreman again in December the same day she met with Beckcom. R.5214. It was during that meeting with Beckcom that Beckcom provided Siegler with details of Prible's confession. R.5214-15.

Between March and May 2002, when Siegler was working with Beckcom to prepare for trial, other members of the purported ring, including Carl Walker, a Mark Martinez, and a Jesse Gonzalez, wrote to Siegler to claim that they also could testify against Prible in exchange for sentence reductions. R.5215-16. Siegler never called them as witnesses. R.5216-17.

Prible thus made the following *Brady* allegations in federal court:

Claim II: The State violated *Brady* by "suppress[ing] material evidence that Beckcom" and his roommate "Foreman were part of an organized attempt to secure favors in return for fabricating a false confession." R.5365.

Claim III: The State violated *Brady* by failing to disclose that Foreman (who was not a witness at Prible's trial) tried to fabricate evidence. R.5384.

Claim IV: The State violated *Brady* by failing to disclose "that Foreman was attempting to bargain" "for State favors in return for incriminating information," including "fabricated evidence." R.5389.

Claim V: The State violated *Brady* by violating pretrial disclosure orders. R.5391.

Prible also asserted that the State employed Beckcom as a state agent to elicit incriminating statements from Prible in violation of *Massiah* (claim 6) and a different *Brady* claim that the State allegedly suppressed evidence that Siegler was advised that semen could survive 72 hours in an oral cavity (claim 10). R.5397; R.5421.

Because many claims were subject to procedural default and raised after AEDPA's one-year limitation period, Prible moved for an evidentiary hearing on cause and prejudice (to overcome the default) and actual innocence (to overcome the default and limitations). R.7768-69. The court held a three-day evidentiary hearing (over the State's objection), with testimony from Beckcom, Walker, Foreman, and Siegler, among others. R.20; R.8136; R.8665-67; R.8698; R.8754; R.8986; R.8990; R.9273-75. In discovery (and prior to the hearing), the State produced the 2002 letters Siegler received from inmates (including Walker) claiming that Prible confessed to them. R.8131 & n.9.

D. The district court's grant of habeas relief

The court found the *Brady* allegations related back to Prible's timely ring-of-informants *Brady* claim, Pet. App. 78a-79a, but that Prible had procedurally defaulted his *Brady* and *Massiah* claims, Pet. App. 80a-81a; Pet. App. 107a-108a. The court found cause and prejudice excusing the default because "Siegler's suppression of [favorable] evidence prevented Prible from developing his *Brady* [and *Massiah*] claims in state court." Pet. App. 83a; *see* Pet. App. 108a. On the merits, the court granted relief upon finding *Brady* violations with respect to the ring-of-informants theory and DNA evidence, Pet. App. 103a-104a, and that Siegler used Beckcom as a surreptitious state agent in violation of *Massiah*, Pet. App. 111a-112a.

E. The court of appeals' reversal

A Fifth Circuit panel unanimously reversed.[2] Pet. App. 2a. The State had challenged the grant of habeas relief on three grounds: (1) that Prible did not overcome the procedural

[2] Judge Dennis concurred only in the judgment, Pet. App. 1a n.*, but did not file a separate opinion.

default of his claims, (2) that 28 U.S.C. § 2254(e)(2) barred the new evidence on which Prible relied, and (3) that Prible's claims failed on the merits. Pet. App. 16a. The court resolved the appeal on procedural default and did not reach the other grounds. Pet. App. 16a.

The court began with first principles. Courts "may not review the merits of procedurally defaulted claims absent a showing of cause and prejudice to excuse the default." Pet. App. 17a (citing *Dretke v. Haley*, 541 U.S. 386, 388 (2004)). Cause exists when "some objective factor external to the defense impeded counsel's efforts to raise the claim in state court." Pet. App. 17a; *see McCleskey v. Zant*, 499 U.S. 467, 493 (1991). And courts must "presume a state court's findings of fact are correct unless the petitioner rebuts this presumption with 'clear and convincing evidence.'" Pet. App. 18a (quoting 28 U.S.C. § 2254(e)(1)).

From those precepts, the court analyzed Prible's ring-of-informants *Brady* theory (denominated as claims two, three, four, and five in Prible's amended federal habeas petition). Pet. App. 19a. Prible argued that the State "waived the argument that he did not show cause for the default by addressing claims two, three, four, and five together as if they 'reduce to a single ring of informants claim.'" Pet. App. 19a. As the court noted, though, the "district court addressed the claims together because they 'share a common core of operative facts.'" Pet. App. 19a. "Absent that finding, claims three, four, and five could not relate back to the original federal petition (claim two) and thus would have been time-barred." Pet. App. 19a. Prible "cannot rely on relation-back doctrine below to overcome timeliness issues and now argue the claims are so factually distinguishable to require separate cause analyses." Pet. App. 19a (citing *Mayle v. Felix*, 545 U.S. 644, 657 (2005)). The court thus "assess[ed] the default of the four ring-of-informants *Brady* claims together." Pet. App. 19a.

The record confirmed "the state court's finding that the factual basis for the ring-of-informants claims was available" before Prible's initial state habeas application. Pet. App. 20a. "Prible professed knowledge" of "Siegler's alleged efforts to conspire with Beaumont informants to present false testimony" long before he obtained the notes and letters he claimed were improperly withheld. Pet. App. 22a. Moreover, "factual support for these claims was available from another source known to Prible—Walker—but Prible did not diligently pursue it." Pet. App. 23a. His counsel's lack of diligence in seeking relief based on the alleged ring-of-informants was "chargeable" to Prible. Pet. App. 24a (quoting *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam)). Even if his counsel was skeptical, diligence "depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful." Pet. App. 25a (quoting *Williams*, 529 U.S. at 435). In sum, Prible "possessed, or by reasonable means could have obtained, a sufficient basis to allege" a *Brady* claim based on an alleged ring of informants "in the first petition and pursue the matter through the [state] habeas process." Pet. App. 26a (quoting *McCleskey*, 499 U.S. at 498 (brackets in original)).

The court then rejected Prible's *Massiah* claim for lack of cause to excuse the procedural default, Pet. App. 27a, rejected his DNA *Brady* claim for failure to show prejudice, Pet. App. 29a-30a, and rendered judgment denying the writ. Pet. App. 32a. Prible thereafter filed a petition for panel rehearing and petition for rehearing en banc, which the Fifth Circuit denied without a vote. Pet. App. 122a.

REASONS FOR DENYING THE PETITION

Prible renews his claim that the State violated *Brady* in a way that warranted habeas relief. Pet. 24-25. But the split that Prible identifies concerning *Brady* and diligence has been the subject of a half-dozen petitions for a writ of certiorari over the past two decades, and the Court has denied all of them. Prible's petition warrants the same outcome. Any split is not fairly presented here and Prible cannot benefit from the rule he seeks in any event. The Fifth Circuit correctly applied well-established procedural-default rules and concluded that Prible could have raised his ring-of-informants *Brady* theory in his initial state habeas application—thus, any related *Brady* claim he belatedly brought in state court was procedurally defaulted. Moreover, Prible's improper reliance on evidence developed in federal court in violation of 28 U.S.C. § 2254(e)(2) and his failure to establish the substantive elements of a *Brady* claim present independent vehicle problems that preclude this Court's resolution of any potential split.

The Fifth Circuit also correctly addressed the procedural default of Prible's ring-of-informants *Brady* theory collectively, rather than piecemeal. On this second question presented, Prible neither identifies a circuit split nor shows that the Fifth Circuit applied the wrong standard when analyzing the procedural default. Prible does not—and cannot—dispute that the district court took the same view of the collective nature of the evidence as the Fifth Circuit later did. It would have made little sense for the court of appeals to depart from that framework in assessing the merits of the district court's order granting habeas relief. In any event, Prible's petition is a poor vehicle on the second question presented because Prible cannot show prejudice. Based on the district court's reasoning, Prible's *Brady* theories cannot stand alone. If any aspect was untimely or failed substantively under

any *Brady* prong—suppression, favorability, materiality— the Fifth Circuit was obligated to reverse. The Fifth Circuit reached the only proper outcome under the facts that Prible presented.

I. The First Question Presented Does Not Warrant Review.

A. The circuit split Prible identifies is neither worthy of review nor fairly presented.

Prible asserts that "[l]ower courts are intractably split over the fundamental element of suppression under *Brady*," with some circuits (and state courts of last resort) imposing a "due diligence" requirement and other courts finding that such a requirement is inconsistent with *Brady*. Pet. 16. This Court has repeatedly declined to take up that question and should likewise do so here. But to the extent that federal courts of appeals and state courts of last resort disagree in the application of *Brady* to material that was discoverable with reasonable diligence, this case is not a vehicle to resolve that disagreement.

1. This Court has repeatedly denied petitions for writs of certiorari asserting a similar conflict, including once this term. *See Blankenship v. United States*, 143 S. Ct. 90 (2022) (No. 21-1428); *Guidry v. Lumpkin*, 142 S. Ct. 1212 (2022) (No. 21-6374); *Walker v. United States*, 139 S. Ct. 1168 (2019) (No. 18-6336); *Yates v. United States*, 139 S. Ct. 1166 (2019) (No. 18-410); *Georgiou v. United States*, 577 U.S. 954 (2015) (No. 14-1535); *Rigas v. United States*, 562 U.S. 947 (2010) (No. 09-1456); *Cazares v. United States*, 552 U.S. 1056 (2007) (No. 06-10088); *Metz v. United States*, 527 U.S. 1039 (1999) (No. 98-6220); *Schledwitz v. United States*, 519 U.S. 948 (1996) (No. 95-2034). The Court should take the same approach here because, among other reasons, the decision below can be upheld under well-established principles of procedural default. *See infra* Part I.B.

2. Nor is the circuit split fairly presented. Prible's argument implicates procedural default, not the substantive elements of a *Brady* claim. On this point, Prible cannot dispute that the Fifth Circuit correctly identified the procedural-default standard. Pet. App. 17a-19a. Prible's true complaint is a bare request for error correction that does not merit certiorari. Sup. Ct. R. 10.

Prible nonetheless suggests that the path to merits relief for a substantive *Brady* violation and the path for overcoming procedural default are identical. *See* Pet. 16-17. In short, Prible maintains that if he is right that *Brady* cannot require diligence, then procedural default cannot require diligence either. But this Court has never decided that issue. By forcing the Court to take up that threshold question to reach the rule he seeks, Prible's first question presented poses a significant vehicle problem. Moreover, Prible is mistaken. The primary cases that he cites for his novel proposition—*Strickler* and *Banks*—do not support, and in fact contradict, his assertion.

The three components of a substantive *Brady* violation are that (1) the evidence at issue is favorable to the defense, either because it is exculpatory or impeaching, (2) the prosecution suppressed the evidence, and (3) the evidence is material. *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972) (citing *Brady*, 373 U.S. at 87); Pet. App. 18a. Prible contends that under "this Court's jurisprudence, 'cause'" for purposes of analyzing procedural default "parallels the element of 'suppression'" under *Brady*. Pet. 16 (citing *Strickler*, 527 U.S. at 281-82; *Banks*, 540 U.S. at 691). Nothing in either case, however, purported to overturn or cast doubt on the routinely applied cause and prejudice framework set out in *Murray v. Carrier*, which turned on a defaulted *Brady* claim. 477 U.S. 478, 484 (1986). Indeed, both cases cited *Murray* favorably. *E.g.*, *Strickler*, 527 U.S. at 283-84; *Banks*, 540 U.S. at 696. *Strickler*, in

fact, took care to reiterate *Murray*'s statement that unavailability of "the factual . . . basis" for a theory might constitute cause to excuse a procedural default. 527 U.S. at 283 n.24 (quoting *Murray*, 477 U.S. at 488).

Strickler and *Banks* are also factually inapposite. In *Strickler*, the Court considered whether there was acceptable cause for the petitioner's failure to raise a *Brady* claim in state court. 527 U.S. at 282. In finding that there was, the Court held that "the implicit representation" that exculpatory materials "would be included in the open files tendered to defense counsel for their examination" made state habeas counsel's failure to bring the *Brady* claim at issue understandable. *Id.* at 284. Unlike Prible's habeas proceedings, the "state habeas proceedings *confirmed* petitioner's justification for his failure to raise a *Brady* claim." *Id.* at 287 (emphasis added). The Court in *Strickler* also took care to cabin its ruling, stating that its decision "d[id] not reach, because it [wa]s not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." *Id.* at 288 n.33.

Banks followed several years later. The Court's discussion of cause for the failure to develop a *Brady* claim in state court was "informed by *Strickler*." *Banks*, 540 U.S. at 692. "[P]rosecutors represented at trial and in state postconviction proceedings that the State had held nothing back," and in state postconviction court, "the State's pleading denied" that a key witness was a paid informant. *Id.* at 698. Under those circumstances, the petitioner "was entitled to treat the prosecutor's submissions as truthful," and had thus shown cause for failing to present evidence in state court to substantiate his *Brady* claim. *Id.* As in

Strickler, the Court did not address a situation where the defendant knew of the information underlying the *Brady* claim and had not claimed otherwise.

The state habeas court's findings here confirm that this case is unlike *Strickler* and *Banks*. In *Strickler*, the state habeas record showed that the petitioner could not have been expected to raise his habeas claim in state court. 527 U.S. at 287. By contrast, the state habeas court here determined that "the factual basis for the instant [ring-of-informants] claims w[as] available" when Prible's initial habeas petition was filed. R.3403. Because "the factual . . . basis" for Prible's theory was "reasonably available" to him before the initial state-habeas application, *Strickler*, 527 U.S. at 283 n.24 (quoting *Murray*, 477 U.S. at 488), Prible's lack of diligence, not suppression of evidence by the State, caused his untimely failure to press a ring-of-informants *Brady* claim. Nothing in the Fifth Circuit's decision contravened *Strickler* or *Banks*, let alone *Brady*.

B. The Fifth Circuit correctly enforced Prible's procedural default.

As Prible notes (at 16, 27), a procedurally defaulted claim cannot be heard absent a showing of cause and prejudice to excuse the default. *Dretke*, 541 U.S. at 388; *Murray*, 477 U.S. at 488. "To establish 'cause' . . . the prisoner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Davila v. Davis*, 582 U.S. 521, 528 (2017) (quoting *Murray*, 477 U.S. at 488).

The district court found, and Prible does not dispute, that Prible raised no ring-of-informants *Brady* claim in his first state habeas application. Pet. App. 80a-81a. Per Texas law, raising such a claim thereafter was an abuse of the writ and could not serve as a basis for relief in state court. Tex. Code Crim. Proc. art. 11.071, § 5(a), (c); *Prible*, 2011 WL 5221864, at *1; *Prible*, 2008 WL 2487786, at *1; *see* Pet. App. 80a-81a. Federal courts impose

a procedural default on that basis. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *e.g.*, *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006) ("Texas's abuse of the writ doctrine is a valid state procedural bar foreclosing federal habeas review.").

The question before the district court was whether there was an impediment "external to the defense," *Davila*, 582 U.S. at 528, that excused the procedural default. The Fifth Circuit properly determined that Prible failed that test. The state courts already resolved that question against Prible in findings that bind federal courts under AEDPA. And, in any event, Prible's failure was not attributable to the State.

1. Prible cannot overcome AEDPA's factual deference to the state courts' findings.

As an initial matter, Prible does not even cite section 2254(e)(1), which, as the Fifth Circuit noted, precludes Prible's attempt to relitigate the facts surrounding his procedural default. Pet. App. 26a. The state habeas trial court found "the factual basis for the instant [ring-of-informants] claims w[as] available when the applicant's initial habeas petition was filed." R.3403. But Prible "provided [habeas] counsel with very limited information regarding the identity of [Carl] Walker," R.3402—only Walker's last name and "[t]hat he was black," R.21213-14—even though Prible would have known more about Walker and his appearance from their time together in Beaumont, *see* R.3401. Additionally, Prible's habeas counsel took few steps to find Walker, *see* R.21218-19, was consequently "unable to locate . . . Walker prior to the filing of the initial habeas application," and "did not urge [Prible's] conspiracy theory" in that application, R.3402-03.

The district court was required to presume that all state court factual determinations, together with any implicit findings, were correct. *See* 28 U.S.C. § 2254(e)(1). Prible bore

"the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* As the Fifth Circuit correctly recognized, "Prible did not rebut the state court's findings on this point at all, much less by clear and convincing evidence as required by the federal habeas statute." Pet. App. 26a.

2. Prible's asserted cause for the default also fails because it is not external to his defense.

The Fifth Circuit also correctly concluded that Prible's alleged cause was insufficient to overcome procedural default because it was not external to the defense. Pet. App. 23a-26a. To the contrary, Prible's counsel "did not diligently pursue Walker or otherwise investigate Prible's ring-of-informants story" prior to filing Prible's initial state habeas petition. Pet. App. 23a. In fact, he "consciously failed to pursue Walker despite knowing he might have key information." Pet. App. 24a. And "attorney error committed in the course of state postconviction proceedings" "is attributed to the prisoner" and "cannot supply cause to excuse a procedural default." *Davila*, 582 U.S. at 528-29. If counsel's lack of diligence contributed to the failure to timely find Walker, that failure is Prible's. Pet. App. 24a. Even the district court acknowledged that the ring-of-informants theory arose from and "relie[s] heavily" on Walker's interview. Pet. App. 52a; *see* R.3401; R.5245 (Prible's description of Walker as his "key witness"). That means, as the state court found, "the factual . . . basis" for Prible's theory was "reasonably available" to him before the initial state-habeas application. *Murray*, 477 U.S. at 488; *see* R.3403. Prible's lack of diligence, not any suppression by the State, caused his untimely failure to press a ring-of-informants claim. Pet. App. 23a-26a.

Prible cannot avoid this conclusion by blaming state suppression for his lack of diligence. Prible's multiple pro se filings in state court demonstrate that his primary objections are to his own counsel's refusal to adopt his ring-of-informants theory and Texas's rules against hybrid representation. *E.g.*, R.16561, R.16655. But Prible's disagreements with his own counsel are not attributable to the State. His counsel was "skeptical of Prible's theory from the beginning." Pet. App. 24a. "[E]ven assuming" that Prible's counsel "erred in failing to trust Prible, it would not create cause," Pet. App. 24a, because "the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation," *Coleman*, 501 U.S. at 753; Pet. App. 24a. At minimum, because Prible's argument is intertwined with the strategic choices of his lawyer, this case is a poor vehicle to resolve the question presented.

For decades, this Court has made clear that it is incumbent on state habeas petitioners to properly litigate their disputes in state court first. And here, Prible's state habeas counsel was on notice from the trial record that there were grounds to dispute, noted at a pretrial conference, the extent to which the prosecutor's file was open and would disclose work product. ROA.9489. Prible's trial and habeas counsel were on notice to pursue an argument that *Brady* obligated the turnover of more information, or at a minimum, to raise that argument. *See, e.g.*, *Williams*, 529 U.S. at 439-40. At a minimum, Prible's state habeas counsel was obligated to pursue this argument because a petitioner is required to raise *all* grounds for cause and prejudice in state court before he can raise them in federal court. *See, e.g.*, *Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000) (explaining that a petitioner who uses a claim as "cause" to excuse a procedural default must properly raise that claim in state

court); *see also Murray*, 477 U.S. at 489 (claim must be independently raised in state court before using it as "cause" to excuse procedural default).

That task was particularly important here because this Court has not yet resolved the extent to which work product can be withheld consistent with *Brady*. *See Goldberg v. United States*, 425 U.S. 94, 98 n.3 (1976) (reserving this question). As some lower courts have correctly held, *Brady* does not apply to such materials because "fairness does not encompass an obligation on the prosecutor's part to reveal his or her strategies, legal theories, or impressions of the evidence." *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006); *cf. Mincey v. Head*, 206 F.3d 1106, 1133 n.63 (11th Cir. 2000). This case presents a poor vehicle to address that question due to Prible's threshold failure to litigate it properly in state habeas proceedings.

C. Multiple vehicle problems preclude resolution of any split.

1. Prible relies on new evidence in contravention of 28 U.S.C. § 2254(e)(2).

The district court relied on evidence developed in the federal habeas proceedings, but not developed in the state habeas proceedings, before concluding that Prible established *Brady* violations on his ring-of-informants theory. *E.g.*, Pet. App. 84a-85a; *see* Pet. 13-14 (citing the district court's opinion). Under 28 U.S.C. § 2254(e)(2), this was error. Because Prible "failed to develop the factual basis of a claim in State court proceedings," the district court could not hold an evidentiary hearing unless, as relevant here, Prible showed "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2), (e)(2)(A)(ii).

As noted above, after an evidentiary hearing, the state-habeas trial court found that grounds for Prible's challenge were available to (but not pursued by) state-habeas counsel before the first state-habeas application. R.3403. Prible necessarily did not "seek an evidentiary hearing in state court in the manner prescribed by state law" needed to prevail on his claims, *Williams*, 529 U.S. at 437; the CCA dismissed Prible's subsequent application as an abuse of the writ, *Prible*, 2011 WL 5221864, at *1. Consequently, section 2254(e)(2)'s opening clause bars Prible from supporting defaulted claims with new evidence. *See Williams*, 529 U.S. at 439-40; *see also Holland*, 542 U.S. at 653 ("Attorney negligence . . . is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied.").

Williams is instructive because it applied section 2254(e)(2) to bar new evidence supporting a *Brady* claim. As the Court explained, information available in state habeas would've put a reasonable attorney on notice of potential *Brady* material. *Williams*, 529 U.S. at 437-38. Although federal habeas counsel developed the referenced evidence, "a diligent attorney would have done more" in state habeas and "[c]ounsel's failure to investigate these references in anything but a cursory manner triggers the opening clause of § 2254(e)(2)." *Id.* at 439-40. Under *Williams*, courts may, and in fact must, require petitioners to develop evidence in state habeas proceedings of potential *Brady* violations. *See id.*; *supra* Part I.B.2. Prible (at 24-25) is wrong that diligence plays no role in analyzing cause.

Just last term, the Court reaffirmed that "Congress enacted AEDPA and replaced . . . [the] cause-and-prejudice standard for evidentiary development with the even 'more stringent requirements' now codified at 28 U.S.C. § 2254(e)(2)." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022) (citing *Williams*, 529 U. S. at 433). *Shinn* reiterated that section 2254(e)(2)'s trigger includes fault attributable to the prisoner or his counsel. *Id.* at 1734-

35. All of this confirms that the district court erred in allowing Prible to develop new evidence for the first time in federal court.

The district court's evidentiary hearing and subsequent factual findings based on that hearing infected the court's substantive analysis. The Fifth Circuit concluded that "Prible has not overcome procedural default even on the expanded record developed below" and expressed "no view on the district court's decision to hold a hearing and consider new evidence." Pet. App. 16a. But for Prible to prevail in this Court, he would have to be right that the district court appropriately held a hearing—otherwise, he does not have evidence to excuse his procedural default. *Williams* and *Shinn* prevent him from succeeding on that argument.

2. Prible's ring-of-informants theory is meritless.

Prible's substantive *Brady* argument is also meritless. Prible's ring-of-informants conspiracy theory remained unproven. *E.g.*, Pet. App. 94a. The district court's analysis therefore relied on evidence that the court theorized *might* have led to evidence of a conspiracy, such as Beckcom's association with fellow inmate Foreman and documents from prosecutor Siegler's work-product folder about informants. Pet. App. 89a, 92a, 95a. That evidence was not favorable, suppressed, or material. *Moore*, 408 U.S. at 794-95 (citing *Brady*, 373 U.S. at 87).

a. With respect to information about Foreman, he did not testify, so evidence showing him in a bad light is irrelevant. Rather than "cast[] doubt on the State's method of investigation," R.8169, Siegler's decision not to call Foreman as a witness when she found him not to be credible bolsters the credibility of the witnesses she did decide to call at trial. Nor was evidence of Foreman's association with Beckcom suppressed. Beckcom's December 10,

2001, letter to Siegler, which was discussed by both sides at trial, was clear that Beckcom was working with Foreman to elicit a confession from Prible. *See* R.6451-56. Prible conceded below that counsel could have impeached Beckcom with that letter. R.5333-38. *Brady* provides no right to cumulative evidence. *See United States v. Agurs*, 427 U.S. 97, 114 (1976); *e.g.*, *Spence v. Johnson*, 80 F.3d 989, 995 (5th Cir. 1996); *Beuke v. Houk*, 537 F.3d 618, 645 (6th Cir. 2008).

For related reasons, this evidence was not material. Suppressed evidence is material and causes prejudice "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The evidence against Prible turned not on the confession but on the presence of Prible's DNA, R.14059-61, Prible's lie about the "affair," R.14112-15, the localization of the fire on Tirado's body to destroy DNA evidence, R.14105, the testimony from Tirado's friends that Prible repulsed her, R.14059, the fact that he was the last person seen at Herrera's house, R.14127, and the discovery of a nine-millimeter magazine at Prible's house with no corresponding gun, R.14065-66. That evidence permits no reasonable probability of a different verdict.

b. Letters from other inmates and related documents "reveal[ing] the extent of Siegler's involvement with the ring of informants" cannot support a *Brady* claim either. *Contra* Pet. App. 95a. Other inmates' correspondence to Siegler is not favorable because none of those inmates testified against Prible. The district court even acknowledged that "the letters themselves do not establish that Siegler guided a ring of informants that would fabricate testimony against Prible." Pet. App. 94a. And, for the reasons explained above, a

wealth of evidence apart from Beckcom's testimony yielded no reasonable probability of a different verdict.

3. Independent grounds preclude relief.

Prible's path to relief in district court depended on *both* his ring-of-informants theory *and* a separate *Brady* claim concerning DNA evidence. Pet. App. 73a-74a. That *Brady* claim was "premised on the State's failure to disclose a note suggesting that McInnis, head of the Harris County crime lab, advised Siegler about the lifespan of sperm cells." Pet. App. 30a. The note stated: "Pam McInnis – semen lives up to 72 hrs." Pet. App. 30a. Prible claimed this note "'support[ed] his defense that he had consensual sexual contact with [Tirado] earlier in the night' and 'impeach[ed] the State's argument that semen deposited in the mouth disappears in 'moments, if not seconds.'" Pet. App. 30a.

The district court described the DNA evidence as "one of two pillars"—the other being Beckcom's testimony—"upon which the prosecution's case relied almost exclusively." Pet. App. 96a. Thus, even if Prible were right about the ring-of-informants allegations (and he is not, for the reasons explained above), he still runs headlong into the Fifth Circuit's independent holding that the alleged suppression of a memo about the DNA evidence was not prejudicial. Pet. App. 29a-32a. That decision is correct.[3]

As the panel observed, "the experts disputed how long Prible's sperm could have been present in Tirado's mouth before she was shot, not how long the cells might have remained alive there." Pet. App. 31a. Indeed, the jury heard that a DNA profile could "[a]bsolutely"

[3] The State also correctly asserted that there was no "suppression" under *Brady* because other sources of evidence regarding the lifespan of sperm cells was available, and in fact introduced, at trial. Pet. App. 30a.The Fifth Circuit did not reach that issue.

be obtained from dead sperm cells. Pet. App. 31a. Prible never explained "how a note merely suggesting sperm cells 'live[] up to 72 hours'" was pertinent to his defense. Pet. App. 31a. Plus, Prible still cannot plausibly explain why his sperm was in Tirado's mouth other than sexual assault. The note's 72-hour timeframe was "not even material to confirming Prible's own theory" of consensual sex with Tirado "within a few hours of her death." Pet. App. 32a. And none of Prible's new evidence casts doubt on the lay testimony that showed he was lying about a consensual affair that never existed. R.14112-15; R.14059.

* * *

The district court ordered the State to retry Prible twenty years after five murders "on the basis of little more than speculation with slight support." *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995) (per curiam). Prible's story reduced him "to arguing that some other person (or persons) managed to kill the victim[s]" in an hour or two, a theory any jury "can hardly be faulted for not accepting." *Loliscio v. Goord*, 263 F.3d 178, 190-91 (2d Cir. 2001) (Sotomayor, J.) (explaining implausibility that some unknown party killed and transported victim in hour-and-a-half window after defendant's sex with victim). The district court should not have countermanded Prible's jurors. The Fifth Circuit's judgment comports with this Court's precedent and does not warrant review.

II. The Second Question Presented Does Not Warrant Review.

A. There is no circuit split on the interplay between the relation-back doctrine and procedural defaults.

Prible claims that the Fifth Circuit "upend[ed] accepted habeas analysis" by "combining the distinct standards for relation back of new claims and cause to excuse procedural default." Pet. 25. That does not accurately describe the Fifth Circuit's reasoning, which presents no split of authority.

1. The Fifth Circuit merely rejected a forfeiture theory that Prible raised for the first time on appeal and in response to the State's appellate brief; it broke no new ground on procedural default. The State's opening brief asserted that Prible's procedural default precluded the relief awarded by the district court. In response, Prible advanced a novel forfeiture argument. He contended that the State "proceeds as if Prible's second, third, fourth, and fifth *Brady* claims reduce to a single ring of informants claim" and that the State therefore "waived objections to the District Court's determination that 'the prosecution withheld critical information from the defense in this case,' establishing cause for not exhausting the foregoing facts in state court proceedings." Brief for Appellee, *Prible v. Lumpkin*, No. 20-70010, 2021 WL 2580541, at *17-18 (5th Cir. June 21, 2021) (quoting R.8161, R.8162).

The Fifth Circuit rejected that notion, pointing out that the "district court addressed the claims together because they 'share a common core of operative facts.'" Pet. App. 19a (quoting *Prible v. Davis*, No. 09-CV-1896, 2020 WL 2563544, at *21-23 (S.D. Tex. May 20, 2020)). Absent that finding, "claims three, four, and five could not relate back to the original federal petition (claim two) and thus would have been time-barred." Pet. App. 19a. It did not make sense to rely on the relation-back doctrine to overcome those timeliness problems

yet simultaneously maintain that the "claims" were "so factually distinguishable to require separate cause analyses." Pet. App. 19a.

Essentially, Prible's argument reduces to a one-off complaint about a factbound decision concerning the relation back doctrine. His request for error correction does not merit review. Sup. Ct. R. 10. And in any event, Prible cannot benefit from the rule he seeks. A "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." 28 U.S.C. § 2244(d). It is undisputed that three of Prible's four ring-of-informants *Brady* "claims" were filed outside that window. Pet. App. 75a-76a. "An amended habeas petition . . . does not relate back . . . when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 650. So, on Prible's theory, the factual distinctiveness of his "claims" would doom his argument that he asserted them in a timely manner.

2. Courts have not faced difficulty in deciding this issue. As Prible concedes, other circuit courts have "never address[ed]" the Fifth Circuit's "proposed holding directly." Pet. 29. He cites cases from the Sixth, Ninth, and Tenth Circuits that he contends demonstrate that courts evaluate relation back separately from cause excusing procedural default. Pet. 29-30. Nothing in the Fifth Circuit's opinion is inconsistent with those approaches. Presented with a difficult fact pattern, the Fifth Circuit may very well "evaluate[] relation back and excuse of procedural default as distinct and separate questions." Pet. 29. Because the Fifth Circuit's observation about the relation back doctrine came in the context of Prible's forfeiture argument and was based on the unique facts of how Prible litigated this matter in state and federal proceedings, a future case might lead to a different mode of analysis.

There was no categorical holding here, let alone one that "abrogates this Court's precedent." *Contra* Pet. 25. Prible even states that this Court has "never addressed directly" the interplay of the relation back doctrine and the procedural default analysis. Thus, there is no conflict among the courts of appeals on how to interpret this Court's cases in that regard because there is no on point precedent to consider.

The primary authority that Prible highlights, *Mayle*, 545 U.S. 644, which the Fifth Circuit cited, too, *see* Pet. App. 19a, dealt exclusively with the relation-back question. To the extent there is a meaningful difference in how courts should analyze whether a claim relates back for purposes of AEDPA and whether a petitioner has sufficient excuse for procedural default—and it is not clear that there is, *infra* Part II.B.—the lack of reasoned opinions from the courts of appeals on that issue counsels against granting the petition. "[F]urther consideration" in the lower courts will enable this Court "to deal with the issue more wisely at a later date" if needed. *McCray v. New York*, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari).

B. The Fifth Circuit's approach was correct.

The Fifth Circuit "assess[ed] the default of the four ring-of-informants *Brady* claims together," Pet. App. 19a, and that approach comported with the underlying record and the district court's view of Prible's theory. The district court emphasized that Prible's ring-of-informants *Brady* allegations "share[d] a common core of operative facts," Pet. App. 77a; were "interrelated," Pet. App. 88a; and that "each of the four claims relate to Prible's purported confession and Siegler's interaction with FCI Beaumont inmates," Pet. App. 89a. Those are the two primary issues that the Fifth Circuit assessed in evaluating cause. *See* Pet. App. 20a-26a. Because the Fifth Circuit conducted a detailed review of the district

court's decision, it is unclear what more Prible would have had the Fifth Circuit do. He insists that his "claims" about Beckcom and Foreman are distinct from his claim about the "wider circle of informants." Pet. 26. This makes little sense; as the district court noted, claims two through five in the amended federal petition related to Prible's confession and the prosecutor's interactions with informants. Pet. App. 88a-89a. Prible thus "conflate[s] availability of the factual basis for [his] ring-of-informants claims with access to evidence supporting them." Pet. App. 21a (citing *McCleskey v. Zant*, 499 U.S. at 498).

The Fifth Circuit was also right that it would be counterintuitive to allow a plaintiff to "rely on relation-back doctrine below to overcome timeliness issues" and then maintain that "the claims are so factually distinguishable to require separate cause analyses." Pet. App. 19a. Relation back "depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." *Mayle*, 545 U.S. at 659 (quoting *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260 (9th Cir. 1982)). The district court made that finding as *Mayle* requires, even suggesting that the "only difference between the *Brady* claim in the original petition and those in the Fourth Amended Petition is that, as a result of additional discovery in the case, the new claims specify with greater particularity the evidence that Siegler suppressed." Pet. App. 77a. In that same vein, the state habeas court separately found that the factual basis for Prible's ring-of-informants theory was available before his initial state habeas application. R.3403. Prible did not rebut that finding with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Both conclusions are consistent with the Fifth Circuit's ultimate holding that Prible failed to show cause for the default of his ring-of-informants *Brady* "claims," and no more was required for the Fifth Circuit to reverse the district court's judgment.

C. Independently, Prible cannot show prejudice.

Even if Prible were correct that the Fifth Circuit erred in assessing cause, his "claims" remain procedurally defaulted because he cannot show prejudice. The district court found materiality based on Prible's evidence "taken as a whole," which "would have allowed the defense to seriously undercut the two main arguments the prosecution relied upon." R.8180. That determination was error. Based on the district court's evaluation of the evidence, if any *Brady* claim fails, all of them do. For the reasons explained in Part I.C.2, the evidence that the district court relied on was not suppressed, favorable, or material. The State emphasized the jury did not need to believe "one word" from Beckcom. R.14128. As the CCA indicated, the physical evidence spoke for itself. *See Prible*, 175 S.W.3d at 730. Thus, Prible would not have been able to overcome his procedural default even if the Fifth Circuit engaged in a piecemeal cause analysis: his "claims" would still have failed for lack of prejudice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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