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,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

GRETCHEN N. SCARDINO
SCARDINO LLP
501 Congress Avenue
Suite 150
Austin, TX 78701
(512) 443-1667

PHILIP H. HILDER
JAMES G. RYTTING
HILDER & ASSOCIATES, P.C.
819 Lovett Boulevard
Houston, TX 77006
(713) 597-8012

JEFFREY T. GREEN*
JASON A. PETTY
YUZHI HU
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005
(202) 736-8291
jgreen@sidley.com

Counsel for Petitioner
*Counsel of Record

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INTRODUCTION

Respondent acknowledges a split as to the fundamental element of suppression under *Brady* v. *Maryland*, 373 U.S. 83 (1963), with some courts imposing a "due diligence" requirement and others holding that such a requirement is inconsistent with *Brady* and its progeny. BIO 20–21. Respondent does not contest the split because the Fifth Circuit did not reach the merits of Prible's *Brady* claim. However, this split over whether "due diligence" must be considered in determining suppression of evidence lies at the heart of the matter. The Fifth Circuit's reliance on authority that incorporates due diligence into the analysis of suppression is what drove the Fifth Circuit to interpret the parallel element of cause in a manner that violates this Court's holding in *Banks* v. *Dretke,* 540 U.S. 668 (2004). The split is not only causing a sharp division in *Brady* jurisprudence with substantial effects on outcomes, but is causing havoc with this Court's cause and prejudice doctrine. The existence of so many recent petitions for review on this same issue indicates there is a recurring conflict here that calls out for this Court's guidance.

This case is an ideal vehicle to resolve the persistent conflict. First, the legal questions forming the basis for the split are cleanly presented here. Second, the factual circumstances of the case neatly present the issue to be answered by the Court.

Moreover, the question presented is of enduring importance to criminal defendants and federal courts. The Fifth Circuit's interpretation of this Court's precedent, if allowed to stand, insulates prosecutorial misconduct from federal court review, incentivizes habeas

petitioners to file bare-bones habeas petitions, and improperly burdens petitioners by requiring a level of due diligence that contravenes this Court's precedents.

I. THE FLOOD OF RECENT PETITIONS ON THE SAME ISSUE COUNSELS IN FAVOR OF GRANTING REVIEW.

Respondent admits that "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. . . ." BIO 20. Yet Respondent suggests that this Court should deny review because it has never granted any of the recent petitions raising the issue. Respondent has it backwards. The deluge of petitions evidences a need for guidance as to whether the parallel concepts of *Brady* suppression and cause excusing procedural default require the same level of diligence by a defendant.

The other petitions denied by the Court have posed vehicle problems that are not present in this case. For example, in *Blankenship* v. *United States*, 143 S. Ct. 90 (2022), the most recent denial cited by Respondent, the court of appeals expressly rejected a due diligence requirement and instead found that Blankenship could not carry his burden in asserting a *Brady* claim when he was "undoubtedly" aware of the undisclosed information. That is not the case here.

II. THE FIFTH CIRCUIT'S OPINION CLEANLY RAISES IMPORTANT QUESTIONS IN UNDERSTANDING *MURRAY, BANKS,* AND *STRICKLER* AND FURTHER DEEPENS THE SPLIT.

Murray v. *Carrier,* 477 U.S. 478 (1986), held that the "cause" inquiry turns on events or circumstances "external to the defense," precisely the argument Prible presses here. *Id.* at 488. Respondent's contention that

Prible is trying to alter the cause and prejudice framework set out in *Murray* thus rings hollow. Likewise, Respondent's attempts to distinguish *Strickler* v. *Greene,* 527 U.S. 263 (1999), and *Banks* v. *Dretke,* 540 U.S. 668 (2004), factually and legally from this case fall flat. *Banks* and *Strickler*, relying on *Murray,* defined the contours of *Brady* by addressing the conduct of the *prosecutor*, not the defendant. See *Banks,* 540 U.S. at 696; *Strickler,* 527 U.S. at 283. This case cleanly presents all three inquiries from *Strickler* and *Banks* underlying the "cause" determination: (1) whether the prosecutor withheld exculpatory evidence; (2) whether the petitioner reasonably relied on the prosecutor's open file policy as fulfilling the prosecution's duty to disclose evidence; and (3) whether the State confirmed the petitioner's reliance on that policy by asserting during the state habeas proceedings that the petitioner had already received everything known to the government. *Strickler,* 527 U.S. at 289; *Banks,* 540 U.S. at 692–93.

This case also neatly presents the legal questions undergirding the state high court and federal circuit split. The Fifth Circuit cited both *Strickler* and *Banks* in its *Prible* opinion: *Strickler* for the proposition that "[a] *Brady* violation can provide cause and prejudice to overcome a procedural bar . . . because cause and prejudice parallel two of the three components of the alleged *Brady* violation itself," and *Banks* for the proposition that "the State's suppression of . . . relevant evidence can be cause." Pet. App. 17a–18a (internal quotation marks omitted). But contravening *Murray, Strickler,* and *Banks,* the Fifth Circuit's opinion focuses on the conduct of the defendant rather than on the prosecutor's "deceptive behavior and active con-

cealment" of evidence, *id.* at 103a, and thereby intensifies the split regarding the role, if any, of a defendant's due diligence in the *Brady* analysis.

Respondent's brief misunderstands the state of the law following *Strickler* and *Banks* in arguing Prible's case does not present a suitable vehicle to consider this question. Respondent goes further than the Fifth Circuit did, arguing that the *Brady* rule does not even apply to a prosecutor's work product. See BIO 28. To get there, Respondent relies on *Morris* v. *Ylst,* 447 F.3d 735 (9th Cir. 2006), which says nothing of the sort. *Morris* involved "opinion" work product—specifically, a note written by a prosecutor's legal assistant, after the trial, indicating she suspected one of the state's witnesses had lied. The *Morris* court held that "in general, a prosecutor's opinions and mental impressions of the case are not discoverable under *Brady unless* they contain underlying exculpatory facts." *Id.* at 742 (emphasis in original). The court characterized the paralegal's report as "a statement of the prosecutor's opinion" and explained that "[s]o understood, it is not *Brady* material." *Id.* at 742–43. But it *would* have been *Brady* material if it had "referred to exculpatory *facts* unknown to the defense." *Id.* at 743 (emphasis in original). The "work product" withheld by the prosecutor in Prible's case has never been characterized as "opinion" work product, nor could it be. Thus the "vehicle problem" asserted by Respondent is an empty diversion.

In addition to fashioning a new *Brady* rule specifically for work product, Respondent proposes a "prosecutor-may-hide, defendant-must-seek-at-least-twice" standard to whatever information a prosecutor decides to withhold from the defense under the guise of "work product." Respondent argues that the prosecutor's statement that she was withholding work product, at

a pre-trial hearing at which she was ordered to produce all *Brady* material, portended her deliberate concealment of favorable evidence and should have put Prible on notice to assert a second *Brady* demand for any evidence she may still have been hiding notwithstanding the court's orders. BIO 27. This novel argument is antithetical to *Banks, Strickler,* and decades of *Brady* progeny but is a logical extension of the Fifth Circuit's ruling if that ruling is allowed to stand.

Mr. Prible's petition for writ of certiorari should be reviewed because his case is so similar to *Banks* and *Strickler,* but the Fifth Circuit, relying on those two cases, reached a diametrically opposite result. The question posed by Mr. Prible's case can be neatly addressed by this Court: either the Fifth Circuit got it wrong, or this Court needs to clarify, for the circuits on the other side of the split, that "cause" and "suppression" are not actually parallel concepts, at least when it comes to a defendant's right to reasonably rely on a prosecutor's representations that she has discharged her disclosure duties. Under the Fifth Circuit's interpretation, a prosecutor's word cannot be relied upon, and in fact *must* be met with skepticism. If a prosecutor represents to the court that she has complied with her disclosure obligations, such a representation will trigger for the defendant a duty to then investigate the prosecutor to determine whether she is secretly manufacturing evidence for use at the criminal trial. If she does manufacture evidence but the defendant is unable to discover it before his state habeas application is due, the federal courts will be powerless to do anything about the prosecutor's misconduct.

III. THIS IS A CLEAN VEHICLE FOR CONSIDERING THE FIRST QUESTION PRESENTED.

Respondent poses various other phantom vehicle problems, each of which can be readily dismissed. First, this Court has already decided that suppression and cause are overlapping concepts; thus, the "threshold question" that Respondent argues is necessary to resolve before reaching the question presented (BIO 22) has already been decided. Respondent incorrectly asserts that "this Court has never decided [the] issue" of whether, if "*Brady* cannot require diligence, . . . procedural default cannot require diligence either." *Id.* This Court decided that issue in *Strickler* and *Banks* when it held that state habeas counsel is entitled to rely on a prosecutor's representations of compliance at trial, including her open file policy. *Strickler,* 527 U.S. at 283 n.23; *Banks,* 540 U.S. at 692–93.

Second, Respondent misrepresents this Court's holding in *Edwards* v. *Carpenter,* 529 U.S. 446 (2000), in arguing that "a petitioner is required to raise *all* grounds for cause and prejudice in state court before he can raise them in federal court." BIO 27 (emphasis in original). This is not the rule and never has been. The issue in *Carpenter* was whether a federal habeas court is barred from considering an ineffective assistance of counsel ("IAC") claim as "cause" for the procedural default of another claim when the IAC claim has itself been procedurally defaulted. 529 U.S. at 448. Because an IAC claim is an independent constitutional claim, the exhaustion doctrine required the IAC claim to first be raised in state court. Mr. Prible did not assert that his trial counsel was ineffective for failing to discover the *Brady* evidence. The rule applicable here was explicitly stated in *Murray:* "The question whether there is cause for a procedural default does

not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause—a question of federal law—without deciding an independent and unexhausted constitutional claim on the merits." 477 U.S. at 489.

Third, Respondent is incorrect that section 2254(e)(2)'s opening clause bars Mr. Prible from supporting his defaulted *Brady* claims with new evidence. "By the terms of its opening clause [Section 2254(e)(2)] applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings.'" See *Williams* v. *Taylor,* 529 U.S. 420, 430 (2000). In *Williams,* the case relied on by Respondent, the Court interpreted the word "failed" to require a "lack of diligence or some other fault" of the prisoner. *Id.* at 434. But it was quick to distinguish situations involving prosecutorial misconduct, explaining:

> If the opening clause of § 2254(e)(2) covers a request for an evidentiary hearing on a claim which was pursued with diligence but remained undeveloped in state court because, for instance, the prosecution concealed the facts, a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim even if he could satisfy § 2254(d). The "failed to develop" clause does not bear this harsh reading, which would attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court.

Id. at 434–35 (citation omitted). The *Williams* court held that section 2254(e)(2) did not apply to Williams' prosecutorial misconduct claim. *Id.* at 443.[1]

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[1] *Williams* can also be distinguished from this case on the facts. In *Williams,* the issue was whether a co-defendant's psychiatric

This case is actually an ideal vehicle for considering the due diligence question presented, for several reasons. First, there is no dispute that the *Brady* evidence at issue was withheld from the defense and was only discovered by the district court itself during an *in camera* review of the prosecutor's work product file in the federal habeas proceeding. Second, there is no overlapping ineffective assistance of counsel claim to muddy the waters. Third, the Fifth Circuit vacated the lower court's grant of habeas relief solely on procedural default grounds, without reaching the merits of Mr. Prible's *Brady* claims or Respondent's 28 U.S.C. § 2254(e)(2) arguments. Pet. App. 16a n.2 ("[w]e express no view on the district court's decision to hold a hearing and consider new evidence.") Both issues could be resolved on remand.[2]

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report should have been discovered by Williams' state habeas counsel. 529 U.S. at 437–38. There were repeated references to the report in a transcript of the co-defendant's sentencing proceeding, which Williams' own state habeas counsel had attached to the state petition he filed. *Id.* at 438. Understandably, the Court found that the transcript put state habeas counsel on notice of the report's existence and possible materiality. *Id.* at 439. *Williams* is thus critically different from Prible's case, which involved the clandestine activities of the prosecutor that he could not have known about.

[2] In any event, § 2254(e)(2) does not prevent hearings related to cause, and *Shinn* v. *Ramirez,* 142 S. Ct. 1718 (2022), does not hold otherwise. *Shinn* held that hearings related to cause are futile in the *Martinez* v. *Ryan,* 566 U.S. 1 (2012), context if excusing the default still would not permit consideration of evidence on the underlying claim.

CONCLUSION

For these reasons and the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

GRETCHEN N. SCARDINO
SCARDINO LLP
501 Congress Avenue
Suite 150
Austin, TX 78701
(512) 443-1667

PHILIP H. HILDER
JAMES G. RYTTING
HILDER & ASSOCIATES, P.C.
819 Lovett Boulevard
Houston, TX 77006
(713) 597-8012

JEFFREY T. GREEN*
JASON A. PETTY
YUZHI HU
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005
(202) 736-8291
jgreen@sidley.com

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