No.

In the
United States Supreme Court

James Jordan McClain,

Petitioner,

v.

Tammy L. Campbell, Warden

Respondent.

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

Petition for a Writ of Certiorari

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Questions Presented

California convicted James McClain of first-degree murder for a shooting. McClain claimed that, before he shot the decedent, the decedent struck him unprovoked. This should have resulted in a self-defense acquittal or a lesser homicide (e.g. voluntary manslaughter or second-degree murder). But the State suppressed McClain's best corroborating evidence—a witness' statement that she saw the decedent first strike McClain.

McClain spent years looking for this witness. Once he found her, he spent years attempting to get her affidavit to prove a *Brady* violation. But the time it took McClain to locate and gather this evidence rendered the *Brady* claim untimely. That was so, the Ninth Circuit held, because McClain was not entitled to equitable tolling as the State's *Brady* suppression did not make an earlier filing *impossible*.

The Ninth Circuit also held that McClain failed to demonstrate a reasonable probability of an acquittal on a self-defense theory or a lesser conviction of voluntary manslaughter—ignoring the reasonable probability of a lesser second-degree murder conviction only.

Therefore, the questions presented are:

1. In assessing whether extraordinary circumstances stood in a petitioner's path for equitable-tolling purposes, do those circumstances need to make earlier filing "impossible"?
2. Did the Ninth Circuit reversibly err by ignoring McClain's clearest argument for prejudice?

Parties to the Proceeding

Petitioner is James Jordan McClain and Respondent is Tammy L. Campbell—current warden of California State Prison Corcoran where McClain is imprisoned. *See* Fed. R. App. P. 43(c)(2). The case was previously captioned under the previous warden of that facility, Robert Neuschmid.

Related Proceedings

U.S. Court of Appeals for the Ninth Circuit

- *McClain v. Neuschmid*, 21-56035 (memorandum disposition entered on August 10, 2023, petition for rehearing denied on August 30, 2023).

U.S. District Court for the Central District of California

- *McClain v. Neuschmid*, 8:20-cv-00656-SVW-LAL (judgment denying petition for writ of habeas corpus entered on July 27, 2021).

California Supreme Court

- *In re McClain (James Jordan) on Habeas Corpus,* S257743 (denying petition for writ of habeas corpus on January 2, 2020).
- *People v. McClain,* S046851 (denying petition for review on direct appeal on July 12, 1995).

California Court of Appeal

- *In re James Jordan McClain on Habeas Corpus*, G058013 (denying petition for writ of habeas corpus on July 25, 2019).
- *In re James Jordan McClain on Habeas Corpus*, G057935 (denying petition for writ of habeas corpus without prejudice on July 3, 2019).
- *In re James Jordan McClain on Habeas Corpus*, G056992 (denying petition for writ of habeas corpus on November 29, 2018).
- *People v. McClain*, G015635 (affirming on direct appeal on April 25, 1995).

California Superior Court

- *In re James Jordan McClain on Habeas Corpus*, M-17903 (order denying petition for writ of habeas corpus on April 19, 2019).
- *In re James Jordan McClain on Habeas Corpus*, M-17302 (order denying petition for writ of habeas corpus on February 7, 2018).
- *People v. McClain*, C-99486 (entering judgment and sentence against McClain for first-degree murder on March 7, 1994).

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Opinions Below

The Ninth Circuit's unpublished memorandum decision is available at 2023 WL 5125043, and reproduced in Pet. App. 2a, and their order denying re-hearing is reproduced at Pet. App. 1a. The judgment of the district court is reproduced at Pet. App. 10a-12a. The remaining state opinions, orders, and judgments are reproduced at Pet. App. 38a-60a.

Jurisdiction

The Ninth Circuit issued its memorandum disposition on August 10, 2023, and denied McClain's petition for rehearing on August 30, 2023, Pet. App. 1a-9a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Due Process Clause of the Fourteenth Amendment provides that: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2244(d) provides that:

(1) 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. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Statement of the Case

A. The shooting of Willie Ford

One night in October 1991, various individuals were present at a nightclub in Santa Ana, California, including James McClain and Willie Ford—a 6 foot, 5 inches tall man with a lengthy and violent criminal history. *See* SSER-183-185, 190-191; 4-SER-929.[1]

Outside the nightclub at the end of the night, Ford and a group of his friends stood near their vehicle. *See* 5-SER-1036, 1042, 1133-1134, 1173. McClain remained yards away, near his vehicle. 5-SER-1042. And a woman, known only by her moniker, "Phamous," stood within feet of McClain. *See* 5-SER-1042-1043.

Ford approached McClain, threw his hands up and yelled "What's up?" in an aggressive manner. 4-SER-868-867; 5-SER-1085, 1109; 6-SER-1246. What happened next was the entire dispute in the case.

McClain contended that he walked Phamous to her vehicle, at her request, because Ford and his friends had made aggressive sexual comments towards her. 5-SER-1157-1158, 1173. As he walked Phamous to her vehicle, Ford approached him and struck him in the head. 5-SER-1157, 1159. Dazed from being struck, McClain pulled out his weapon and shot Ford. 5-SER-1160-1163. As McClain ran and ultimately drove away, he fired in the air, intending to keep Ford's

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[1] "SER" refers to the "Supplemental Excepts of Record" filed by the State, "SSER" refers to the "supplement to the supplemental excerpts of record" filed by McClain, and "FER" refers to the "further excerpts of record" filed by McClain. Those are available on the Ninth Circuit's Pacer page: *McClain v. Neuschmid*, 21-56035 at Docket 10, 25, and 38, respectively.

friends on the ground, thus avoiding any retaliation from them. *See* 5-SER-1190.

The prosecution contended otherwise. Although their version of motive remains unclear, their theory was essentially that McClain shot Ford after some type of verbal altercation. *See* 4-SER-870-871.

Ford died from the gunshot wounds. 4-SER-928. An autopsy report reflected that the trajectory of the various bullets could mean different things, including: (1) being shot while making a turning motion; or (2) being shot from behind. 4-SER-926, 932.

B. The investigation of the shooting reveals a photograph of an eyewitness, known only as "Phamous," containing her pager number.

Police arrived at the scene of the shooting. The two officers tasked with evaluating the scene were trainee officer David Foster and his field training officer. 4-SER-858. Foster was assigned to maintain the crime scene and contact "some witnesses." 4-SER-973; 5-SER-1095.

Saint Anthony Fox, an employee at the nightclub, provided Foster a polaroid photograph of Phamous taken on the date of the shooting. 4-SER-787; 5-SER-1051-1052. Phamous wore a black outfit, and the back of that photograph contained her pager number. 4-SER-787; 5-SER-1033.

Another employee, security guard Leo Parker, had written down McClain's license plate. 4-SER-873. Knowing his vehicle, police found McClain, and the State charged him with first-degree murder. SSER-172-173.

C. Police inexplicably "lose" the photograph of Phamous.

Unaccountably, Officer Foster "lost" the photograph of Phamous containing her picture and number. 4-SER-787; 5-SER-1091-1092. Police supposedly recorded the number, providing that to McClain, and only lost the actual photograph. 4-SER-788.

But no one could find her. Police represented they made significant efforts to locate Phamous, to no avail. SSER-155, 177-180; 4-SER-814; *see also* SSER-152 (the prosecution arguing good faith and a lack of exculpatory value). Due to the lack of a statement from Phamous, and the lack of any contact with her, the parties did not know what Phamous would testify to. *See* 6-SER-1233 (Defense counsel noting "there's no way we can tell this court what Phamous would say").

After the shooting, but prior to trial, the Santa Ana Police Department fired Foster for unknown reasons. 4-SER-835, 858.

D. McClain moves to dismiss the charge due to the State's destruction of evidence but, without any evidence of Phamous' statements, the trial court denies the motion.

Due to the destruction of Phamous' potentially-exculpatory evidence, McClain moved to dismiss the charges, or in the alternative, impose sanctions on the prosecution. SSER-154-160. The State opposed the motion, arguing the lack of any bad faith and the lack of exculpatory value. SSER-152.

After a hearing on the matter, the trial court found that McClain had not made a sufficient showing of exculpatory value, and

denied the motion. 4-SER-816. In other words, the court denied the motion, because Phamous had not made a statement.

The case thus proceeded to trial.

E. The State's actions force McClain to go to trial without Phamous.

1. The prosecution's case-in-chief: largely-undisputed facts and a single eyewitness.

Beyond presenting witnesses to establish the largely-undisputed facts set out above, and despite numerous people being present in the parking lot during the shooting, the prosecution presented a single eyewitness to establish their murder case: Leo Parker Sr.

Parker Sr. worked as a security officer at the nightclub. 4-SER-861-862. He observed Ford approach McClain, and throw his hands up, stating "What's up?" 4-SER-868-869. McClain exited the vehicle and spoke with Ford. 4-SER-869. After some type of verbal altercation, Ford ran, and McClain pulled out a handgun. 4-SER-869-871. McClain then fired several shots. 4-SER-871, 873.

McClain fled. 4-SER-874-877.

2. McClain's defense.

The defense presented witnesses Saint Anthony Fox, Leo Parker Jr., and McClain himself to testify in support of his defense.

a. Saint Anthony Fox

Saint Anthony Fox worked as a promoter and assistant manager at the nightclub. 5-SER-1023, 1030. Earlier in the evening, Fox took a picture with Phamous. 5-SER-1032-1033. She gave him the

photograph and wrote her number on it, hoping to come back to the club and get VIP passes. 5-SER-1033-1034.

Once the nightclub reached closing time, Fox exited the building and headed toward the parking lot. He observed Phamous approach McClain's vehicle and heard her make some comment to the effect of "all guys [are] talking about their private parts . . . ." 5-SER-1041-1042. Ford stated something to Phamous and followed her towards McClain's vehicle. 5-SER-1042-1043.

Fox then heard a confrontation and a loud "smack." 5-SER-1043. After Fox heard the smack, Ford stood with his hands in a boxing pose near McClain. 5-SER-1044. McClain then pulled out a firearm and fired. 5-SER-1044-1045. After firing, McClain sped off while shooting in the air. 5-SER-1047.

The prosecution, however, impeached Fox because he did not include some of the above information during his original statement to police. 5-SER-1061-1075; *see* 6-SER-1224-1225, 1271-1272.

b. Leo Parker Jr.

Parker Jr. was present at the nightclub at the time of the shooting. 5-SER-1099. He observed Phamous speaking with McClain. 5-SER-1111. McClain exited his vehicle as Phamous and McClain spoke. 5-SER-1111, 1120.

Parker Jr. then overheard the words "What's up?" 5-SER-1109, 1111. Ford approach McClain's vehicle and Parker Jr. believed a fight was imminent. 5-SER-1109-1110. Parker Jr. heard a fight and gunfire in quick succession. 5-SER-1111.

c. James McClain

McClain went to the nightclub that night and spoke with Phamous and had drinks with her. 5-SER-1147. At the end of the night, McClain went to his vehicle and Phamous approached him. 5-SER-1155. She asked McClain to walk her to her vehicle because Ford and his friends, also in the parking lot near her vehicle, had made sexual comments to her. 5-SER-1157-1158, 1173. McClain agreed.

As McClain walked Phamous to her vehicle, Ford punched McClain in the head. 5-SER-1156-1157. McClain fell back, dazed from the punch. 5-SER-1160-1161. McClain then pulled out his weapon and shot. 5-SER-1160. He did not intend to kill Ford, just stop the assault. 5-SER-1160, 1163. And this all happened in a manner of seconds. 5-SER-1167.

After McClain started shooting, Ford ran back toward his vehicle. McClain also ran. 5-SER-1162. After he got in his vehicle, continuing to run, McClain fired more rounds from the vehicle into the air because he was afraid that Ford's friends were going to attack him. He did not intend to harm anyone with these shots, nor did he. *See* 5-SER-1190.

3. The prosecution's rebuttal witness.

Confronted with McClain's evidence, the prosecution announced its intent to call Melissa Jorgenson to impeach McClain and Fox. 6-SER-1229. Defense counsel objected and argued that prohibiting her testimony would be a perfect opportunity to impose sanctions on the prosecution for the unavailability of Phamous. 6-SER-1232-1233. But

the court again stated there was no showing of Phamous' exculpatory value. 6-SER-1233-1234. Thus, the court again denied the motion for sanctions and permitted Jorgenson to testify. 6-SER-1234.

Jorgenson allegedly witnessed the shooting, although she could only identify the shooter as a black man. 6-SER-1243. She likewise, and incorrectly, identified Ford as five foot, 10 inches tall and "kind of stocky." 6-SER-1253-1254. And she, again incorrectly, was "positive" that Phamous wore a white dress. 6-SER-1251.

She allegedly heard the shooter say to Phamous, "I have a big dick. So why don't you suck it?" 6-SER-1244. She did hear Ford yell "what's up?," but never observed Ford in a combative stance or throw any punches. 6-SER-1246, 1248.

Following this rebuttal testimony, the parties proceeded to closing arguments.

4. Closing arguments

The prosecution argued for premeditated and deliberate murder. 6-SER-1333-1334. As for McClain's motive, all the prosecutor could come up with was the fable of the scorpion and the frog. The moral of the story was: sometimes people just do bad things for no reason because it's their nature. 6-SER-1383-1384.

But defense counsel argued otherwise. 6-SER-1336. He argued that Jorgenson was not credible, due to her misremembering many details, whereas Fox and McClain were credible. 6-SER-1340-1341, 1345-1346. He also stressed Phamous was absent at trial. 6-SER-1341-1342. He urged the jury to return a not-guilty verdict based on a self-

defense theory. 6-SER-1350-1351, 1362. Alternatively, he argued that if McClain had an unreasonable belief in the need for self-defense or acted excessively, at most that established voluntary manslaughter. 6-SER-1350-1351, 1362.

In rebuttal, the prosecution mocked the defense's theory, commenting that "[t]he defense wants us to believe that Phamous, . . . was just trying to pick [McClain] up. . . . and that . . . Ford attacked him, putting him in a situation where he had to use deadly force . . . ." 6-SER-1369-1370. She added the defense attorney's focus on Phamous was misplaced:

> [the] defense attorney was playing a big issue about Phamous. Where is Phamous? Seems to be the theme of the defense case, implying that if Phamous was produced, Phamous could somehow help the defense in this case. There's no evidence of that.

6-SER-1374.

5. The jury instructions, deliberations, and verdict.

In preparing the final jury instructions, McClain's attorney requested a spoilation instruction against the prosecution for causing Phamous' unavailability. 6-SER-1298-1299. The trial court refused to give that instruction. 6-SER-1299.

The court did, however, instruct on the various types of homicide at issue:

- first-degree murder (malice aforethought);
- second-degree murder (murder without the elements of deliberation and premeditation, or resulting from an unlawful act dangerous to human life);

- voluntary manslaughter (unlawful killing without malice aforethought, or "heat of passion"); and
- involuntary manslaughter.

6-SER-1416-1424; SSER-87-100. The court also instructed on self-defense and "imperfect" self-defense. 6-SER-1426-1427; SSER-109-119. After the court instructed the jury, the jury retired to deliberate.

During deliberations, the jury sent four notes to the court. First, it asked about the difference between first and second-degree murder. SSER-53. Second, it asked for 12 copies of the jury instructions on first and second-degree murder. SSER-54 (requesting SSER-87-93). Third, it asked for copies of McClain's testimony. SSER-55. And fourth, it requested readbacks of McClain's testimony. SSER-56.

Ultimately, the jury found McClain guilty of first-degree murder. 6-SER-1442-1443; SSER-51. The court imposed a 25-to-life sentence on the murder count, and for a firearm enhancement, imposed a consecutive five years. 6-SER-1480-1481; SSER-50.

F. Direct Appeal

McClain appealed. In 1995, the California Court of Appeal affirmed, and the California Supreme Court subsequently denied review. SSER-41-49.

G. McClain makes repeated efforts to locate Phamous, and after a decades-long search, discovers that Phamous is Georgia Brown.

Shortly after his conviction, McClain's family put together enough money to place newspaper advertisements, seeking

information on Phamous. 1-SER-28-29. They requested any information regarding her whereabouts. 1-SER-43. These efforts proved fruitless.

McClain then spent years writing to attorneys and investigators, attempting to locate Phamous and secure counsel. 1-SER-29-30. He was able to briefly secure the help of a jailhouse attorney, but after their separation due to a prison housing change, McClain was no longer able to obtain his assistance. 1-SER-29, 45.

In 2010, McClain received a letter from an attorney, Wendy Koen. 1-SER-49. But in her opinion, McClain could not proceed until he located Phamous. 1-SER-55. Consequently, McClain again placed an advertisement on a webpage offering a reward for anyone who could locate Phamous. 1-SER-30, 51.

Three years later, McClain placed another advertisement in a newspaper seeking Phamous' whereabouts and listing the phone number of McClain's mother. 1-SER-53. At long last, Phamous called McClain's mother. Phamous stated that her real name is Georgia Brown. 1-SER-30. McClain's mother relayed this to McClain, who relayed this to attorney Koen. 1-SER-30, 55.

In 2014, Koen interviewed Brown and prepared a memo for the California Innocence Project. 1-SER-55-56. But the California Innocence Project rejected the case. 1-SER-56. And because McClain and Koen could not agree on her proposed retainer, the communication between the two came to a standstill. 1-SER-31, 58-60.

After failing with Koen, McClain wrote his counsel on direct appeal. 1-SER-31. But that office informed McClain they could not assist him either. 1-SER-62. He also, at various times, sought help from wrongful conviction avenues—like innocence projects and the Orange County Associate Defender—but none would represent him. *See* 1-SER-33, 66-67, 73, 75.

H. Georgia "Phamous" Brown writes the Superior Court, informing the court that her testimony would have been favorable to McClain's defense.

Separately, in 2015, Brown wrote a letter to the Orange County Superior Court. 1-SER-64, 209; *see also* SSER-37-38. She explained that Ford attacked McClain while McClain escorted her to her vehicle. 1-SER-209. She also explained that—only hours after the shooting—police contacted her and she told them Ford had attacked McClain. 1-SER-209. But police never contacted her again. 1-SER-209.

The court declined to act on the letter, calling it an ex parte communication. 1-SER-64. Brown received a copy of that minute order. SSER-37-38. After that, she "was done with the matter" and "continued with [her] life and didn't care to be involved after that." She worried about how it would affect her life and her family. SSER-38.

McClain also received a copy of that minute order, but had to repeatedly ask to get Brown's letter. In 2016, he finally received the letter, and asked Brown to prepare an affidavit under penalty of perjury. 1-SER-69. He wrote Brown about twice a month, and attempted phone calls, until he realized she would not assist him.

SSER-35. As Brown later explained in an affidavit, she deliberately avoided McClain. SSER-38.

I. Collateral Review

1. The initial state petitions

In 2017, without an affidavit from Brown, and after repeated attempts to secure legal help, McClain petitioned the Orange County Superior Court for writ of habeas corpus pro se. 1-SER-171-273. He argued, among other things, the newly discovered evidence of Brown's exculpatory statements and a violation of his due process rights by the prosecution's suppression of those statements. 1-SER-173-175, 183-190. He attached Brown's 2015 letter to the court in support of this. 1-SER-209.

The Superior Court denied the petition in 2018. It stated the *Brady* issue, somehow, should have been raised on appeal. 1-SER-277-78. It also denied the claim related to Brown's statement, because it was not signed under penalty of perjury, nor was it material. 1-SER-279.

In 2018, McClain then petitioned for writ of habeas corpus in the California Court of Appeal. 2-SER-281-417. In late 2018, the court denied the petition in an unexplained order. 2-SER-418.

2. Brown's exculpatory 2019 affidavit.

Finally, in 2019, Brown had regrets that McClain had "been imprisoned for so many years without the Court knowing the truth of what actually happened." SSER-38. She finally signed an affidavit and mailed it to McClain. 1-SER-69-70; SSER-38.

Brown's affidavit essentially confirmed everything McClain had raised in his defense. *See* SSER-39-40. She explained that she had signed the photograph with her moniker "Phamous" and placed her pager number on it. As she exited the nightclub, Brown asked McClain to walk her to her vehicle, because Ford and his friends had been disrespectful to her, and Ford, or one of his friends, grabbed his crotch telling Brown that he had "a big dick, and you should suck it. . . ." SSER-39.

As McClain walked Brown to her vehicle, Ford approached them. SSER-39. Once Ford got to them, he struck McClain in the face. SSER-39-40. McClain stumbled back and collided with Brown, and Brown fell to the ground. Then, McClain pulled out a handgun and shot Ford. Brown ran. SSER-40.

Later that day, a Santa Ana police officer called Brown. That officer explained he had obtained her number from the photograph. Brown explained the above facts to the officer, and he told her that a detective would follow up with her. But no one ever contacted Brown again. SSER-40.

3. McClain returns to state court with Brown's 2019 affidavit.

After obtaining this affidavit in 2019, McClain almost immediately filed a new habeas petition in the Superior Court, re-raising his previous arguments. 2-SER-419-500. He submitted Brown's affidavit, under penalty of perjury, to cure the deficiency the Superior

Court found the first time. 2-SER-485-486. But the Superior Court now found the claim untimely and successive. 2-SER-502-503.

McClain then filed his petition in the California Court of Appeal. 3-SER-505-585. The court—evidently not knowing McClain had already filed in the Superior Court—denied the petition without prejudice to first allow for filing in Superior Court. 3-SER-586. McClain refiled to clarify the court's misapprehension, and the court denied the petition without explanation. 3-SER-587-665.

Finally, in mid-2019, McClain petitioned for writ of habeas corpus in the California Supreme Court. 3-SER-666-745. The court denied the petition solely on timeliness grounds in 2020. 3-SER-746 (*citing In re Robbins*, 18 Cal. 4th 770, 780 (1998)).

4. The federal habeas petition

a. The district court finds equitable tolling appeared to render McClain's claim timely, but denies the claim on the merits.

Following these state denials, in 2020, McClain petitioned the federal court for a writ of habeas corpus. 1-SER-79-170. He argued, as relevant here, a *Brady* violation for the suppression of Phamous' exculpatory statement and the State's "loss" of the photograph. 1-SER-115-124.

The magistrate judge found that equitable tolling appeared to render this claim timely, FER-9, but issued a report and recommendation recommending denial of McClain's petition on the merits, SSER-10-34. The district court adopted this report and recommendation. SSER-8-9. The court dismissed McClain's petition,

but granted a certificate of appealability as to this *Brady* claim. SSER-5-7.

b. The Ninth Circuit finds equitable tolling doesn't render McClain's claim timely and finds no prejudice—ignoring one of McClain's arguments for prejudice.

McClain appealed. As before, he argued a violation of *Brady* for the State's suppression of Brown's statements. On the timeliness front, McClain argued for equitable tolling. As part of that argument, among other extraordinary circumstances standing in his path, McClain argued the State's *Brady* violation stood in his path. Appellant's Reply Brief, Docket 37, 10-11 (2023). On the prejudice front, McClain pointed to the reasonable probability of a self-defense acquittal, or a lesser conviction of voluntary-manslaughter or second-degree murder only. Appellant's Opening Brief, Docket 24, 31-33, 35 (2023).

Unlike the district court, however, the Ninth Circuit found that McClain was not entitled to equitable tolling. While the court assumed McClain exercised reasonable diligence, it found his inability to obtain Phamous' affidavit did not constitute an "extraordinary circumstance" standing in his path that made it "impossible" to timely file a federal petition. Pet. App. 4a-5a.

The Ninth Circuit also found that McClain did not suffer prejudice from the State's *Brady* violation. The court held that, even though Phamous' statements corroborated McClain's defense that Ford punched him before McClain drew his firearm, other witnesses did not observe Ford act aggressively and McClain continued shooting as Ford

turned to run.[2] This, the court held, defeated self-defense or a lesser voluntary-manslaughter conviction. Pet. App. 6a. The court, however, did not address McClain's argument regarding the reasonable probability of a lesser second-degree murder conviction.

Senior District Judge Bennett, sitting by designation, concurred in judgment on the prejudice question only. On the timeliness issue, Judge Bennett pointed out that the impossibility standard should be interpreted leniently, citing *Holland v. Florida*, 560 U.S. 631 (2010). He pointed out that, because the state trial court had rejected McClain's petition for lacking an affidavit—a non-existent requirement under state law—filing any earlier would have been futile and prejudicial. Pet. App. 8a-9a.

McClain then petitioned for rehearing, pointing out that the court overlooked that the State's *Brady* violation stood in McClain's path, incorporated the defunct "impossibility" standard for equitable tolling, and overlooked the prejudice due to the possibility of a lesser conviction of second-degree murder. But the Ninth Circuit denied the petition for rehearing. Pet. App. 1a.

McClain now petitions this Court for a writ of certiorari.

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[2] The Ninth Circuit also referenced McClain firing shots from his car window as he escaped as cutting against self-defense or voluntary manslaughter. Pet. App. 6a. But McClain did not shoot *at* anyone, he shot *in the air* to keep Ford's friends from retaliating against him. 5-SER-1047 (Fox); *see also* 5-ER-1190 (McClain). Thus, these shots do not indicate anything about McClain's mens rea at the time of the shooting of Ford.

Reasons for Granting the Writ

A. This Court should grant certiorari to clarify the standard for equitable tolling, particularly in *Brady* cases.

Federal habeas petitioners must bring their claims within one year of the latest of various triggering dates. 28 U.S.C. § 2244(d)(1). These dates include the date when the state-action impediment was removed, or when the claim's factual predicate could have been discovered through due diligence. 28 U.S.C. § 2244(d)(1)(B), (D).

But even if the claim is untimely under this standard, equitable tolling can render it timely. *Holland v. Florida*, 560 U.S. 631, 649 (2010). For equitable tolling to apply, a petitioner needs to show that: (1) he has pursued his rights diligently, and (2) some extraordinary circumstance stood in his way and prevented timely filing. *Id.* The latter extraordinary-circumstances question is the issue here.

The extraordinary-circumstances question, as this Court explained in *Holland*, is subject to equitable principles. Courts thus make that determination on a case-by-case basis, avoiding mechanical or rigid rules. *Holland*, 560 U.S. at 649-50. Doing so is necessary to avoid the "evils of archaic rigidity . . . ." *Id.* at 650 (citations omitted).

1. The Courts of Appeal are divided on whether, to establish extraordinary circumstances standing in a habeas petitioner's path, a petitioner need establish that the circumstance made earlier filing "impossible."

Notwithstanding *Holland*, the Courts of Appeal are divided as to the standard for extraordinary circumstances: whether to apply the flexible approach without categorical rules or whether the

extraordinary circumstances needed to make earlier filing impossible. *See* Supreme Court, Rule 10(a).

Some circuits adhere to the flexible approach this Court announced in *Holland*—eschewing mechanical and rigid rules. *See*, *e.g.*, *Socha v. Boughton*, 763 F.3d 674, 683-84, 688 (7th Cir. 2014). The Ninth Circuit is ostensibly one of these circuits. *Fue v. Biter*, 842 F.3d 650, 657 (9th Cir. 2016) (en banc). As the Ninth Circuit observed in 2016, this impossibility language originated before *Holland* and conflicts with that decision:

> The word impossible crept into our jurisprudence before the Supreme Court's decision in *Holland*, which stressed flexibility and a disdain for mechanical rules. Our post-*Holland* cases have applied this impossibility standard leniently, rejecting a literal interpretation. To the extent that we have required that petitioners must demonstrate that it was impossible to file a timely petition, such a requirement is inconsistent with *Holland's* requirement that a habeas petitioner demonstrate only (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.

Id. (citations and quotation marks omitted). But that conflict continues, as other panels of the Ninth Circuit have nonetheless continued to cite this impossibility language—ostensibly applying that standard literally. *See, e.g., Razavi v. Seale*, 786 F. App'x 722, 722 (9th Cir. 2019); *Camargo v. Ryan*, 684 F. App'x 607, 609 (9th Cir. 2017).

As have other circuits. The Fourth, Sixth, and Eighth Circuits impose the rigid requirement that the extraordinary circumstance must have made filing an earlier petition impossible. *See, e.g., Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (the Fourth Circuit re-

affirmed this language later a closely-related immigration context in *Lawrence v. Lynch*, 826 F.3d 198, 203-04 (4th Cir. 2016), citing *Holland*); *Mann v. United States*, 2023 WL 3479402, at *2-3 (6th Cir. 2023); *Symmes v. Waddell*, 446 F. App'x 821, 822 (8th Cir. 2012) (*citing Riddle v. Kemna*, 523 F.3d 850, 857 (8th Cir. 2008) (en banc)).

Following these circuit's leads, district courts—even those in circuits that eschew the impossibility language—often rely on the impossibility language. *See, e.g.*, *Everett v. Barrow*, 861 F. Supp. 2d 1373, 1377 (S.D. Ga. 2012); *Dennis v. McClain*, 2023 WL 6065878, at *3 (S.D. Ala. 2023); *Martinez v. Allison*, 2023 WL 3874310, at *3 (S.D. Cal. 2023); *Thomas v. Sayler*, 2022 WL 4079378, at *3 (D.N.D. 2022); *Salinas-Tinoco v. Davis*, 2018 WL 3979865, at *5 (N.D. Tex. 2018). Thus, the courts are divided as to whether the extraordinary circumstances needed to make earlier filing impossible.

That division changes whether a court will hear a federal habeas claim at all. If a petitioner is lucky enough to have a court apply the flexible standard announced in *Holland*, a court might hear the merits of his constitutional claims. If he is unlucky enough to be on the other side of the split, then his constitutional claims are forever foreclosed, because—no matter how *difficult* timely filing may have been—it is rarely *impossible*.

Due to this deep circuit split, and its grave consequences for petitioners, this Court should grant a writ of certiorari to clarify the correct standard for equitable tolling.

2. The impossibility standard is wrong under this Court's decision in *Holland*.

The circuits that apply the impossibility standard are wrong under *Holland*. This Court never used the word "impossible" in *Holland*. And for good reason: the Court eschews mechanical or rigid rules. *Holland*, 560 U.S. at 649-50. But creating an impossibility standard does just that—it imposes a rigid and mechanical requirement that ignores the equities at play and carries with it the "evils of archaic rigidity." *Id.* at 650. Thus, *Holland's* reasoning suggests that this impossibility standard is wrong.

As does *Holland's* holding. In *Holland*, Holland's attorney missed the AEDPA statute of limitations. But that didn't make timely filing impossible. Indeed, Holland ended up filing a pro se federal petition when he learned of his attorney's failure. *Holland*, 560 U.S. at 639-640. If the impossibility standard applied, this would have ended the matter, because it still remained possible to timely file a petition notwithstanding that attorney's failures. But this didn't end the matter. *See id.* at 654 (remanding the case). Thus, if this impossibility standard existed, this Court would have decided *Holland* differently.

Put simply, *Holland* never used the word impossible, eschewed mechanical and rigid rules, and impliedly held that the impossibility standard does not apply. Thus, the courts that hold that the extraordinary circumstances must make filing impossible are wrong.

3. This impossibility standard is particularly inequitable in cases of *Brady* violations—where the State bears the responsibility for the wrongdoing

Not only is this impossibility standard wrong generally, it is particularly inequitable in cases involving *Brady* violations. *See Holland*, 560 U.S. at 650 ("specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case."). A *Brady* violation differs from other extraordinary circumstances standing in someone's path—it is a violation committed by the sovereign. And because the sovereign violates *Brady*, it bears the responsibility for it, not the petitioner.

For those reasons, in the closely-related "cause and prejudice" analysis of procedural default, *Brady* violations establish cause external to the petitioner. *Banks v. Dretke*, 540 U.S. 668, 691 (2004) ("a petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence . . . ."). In fact, *Banks* clarified that a "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 696.

But, in a *Brady* case, imposing an impossibility standard on petitioners does just that. The impossibility standard requires a petitioner, notwithstanding the State suppressing exculpatory evidence, to go to extraordinary lengths to find that evidence. Otherwise, he risks a court saying that timely filing—although extremely difficult—was not technically impossible.

That is precisely what happened to McClain. The State suppressed the best evidence in McClain's defense—a witness who confirmed the decedent first struck McClain before McClain shot. Then McClain spent years locating that witness. When he finally did, he attempted to gain her sworn affidavit—something the state court erroneously told McClain he needed to do. And once McClain obtained it, the courts told him this delay rendered his claim untimely, because it was not impossible to file an earlier petition.

But the State put McClain in the position of locating and obtaining the evidence that it suppressed. The prosecutor hid, McClain sought. And the time it took McClain to seek rendered his claims untimely. While it may not have been literally impossible to file an earlier petition, the State erected the barriers to filing one—making timely filing extremely difficult. Rewarding the State for this misconduct is decidedly inequitable.

In short, because the State bears the responsibility for a *Brady* violation, it is particularly inequitable to hold petitioner's to this erroneous impossibility standard in *Brady* cases.

B. This Court should reverse the Ninth Circuit's alternative prejudice ruling, because the Ninth Circuit ignored McClain's clearest argument for prejudice.

In the alternative to the timeliness holding, the Ninth Circuit held that McClain failed to demonstrate prejudice. Specifically, the court rejected McClain's arguments that there existed a reasonable probability that the suppressed witness' statement would have established self-defense or a lesser voluntary-manslaughter conviction

only. Pet. App. 6a-7a. The court, however, ignored McClain's remaining argument for prejudice—the reasonable probability of a lesser conviction of only second-degree murder.

Second-degree murder in California is "the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder." *California v. Knoller*, 41 Cal. 4th 139, 151 (2007); *see* Cal. Penal Code §§ 187(a), 189.

In this respect, the suppressed witness' statements evince that McClain had no premeditated or deliberated plan to take a life. McClain did not carefully think or weigh his options. *See* SSER-90 (defining deliberate and premeditated). Rather, he shot only after the decedent punched him in the head. *See* SSER-39-40. That sudden attack evinces that McClain had no premeditation or deliberation to his actions—it happened suddenly when McClain was dazed from a punch to the head.

Seeing this issue, the jury asked the trial court about the differences between first and second-degree murder, requested copies of those instructions, requested copies of McClain's testimony, and requested readbacks of McClain's testimony. SSER-53-56. These questions evince that the jury struggled to find any evidence of premeditation or deliberation.

As did the prosecutor. During closing arguments, she told the fable of the scorpion and the frog. The moral of the story was: sometimes people just do bad things for no reason because it's their

nature. 6-SER-1383-1384. In other words, the prosecutor had no idea why this happened and struggled to come up with a motive for why McClain would act with premeditation or deliberation. Given even the prosecutor's professed ignorance, the suppressed witness' statements could have easily tipped the balance to a second-degree murder conviction only. Thus, McClain demonstrated a reasonable probability of a different result.

The Ninth Circuit, however, simply ignored this argument. *See* Pet. App. 6a-7a. By ignoring a strong argument for prejudice, even after McClain pointed out this oversight in a petition for rehearing, the Ninth Circuit "far departed from the accepted and usual course of judicial proceedings" such that it calls for "an exercise of this Court's supervisory power . . . ." *See* Supreme Court, Rule 10(a). Therefore, this Court should either grant certiorari on this prejudice question or summarily reverse the Ninth Circuit's prejudice holding.

Conclusion

For these reasons, the Court should grant McClain's petition, vacate the Ninth Circuit's judgment, and remand.

Respectfully submitted,
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