CAPITAL CASE
No. 22-

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 United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, to establish "suppression" under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the parallel "cause" to excuse procedural default of a *Brady* claim, a defendant must show that he could not have discovered the favorable evidence through his own independent due diligence, as the Fifth Circuit and five other circuits have held, or whether the defendant's diligence is irrelevant to the analysis of "suppression" and "cause," as the remaining six courts of appeals have held.

2. Whether a petitioner may present separate and distinct causes excusing the procedural default of claims that have been found to relate back to an original federal habeas petition under *Mayle* v. *Felix,* 545 U.S. 644 (2005), or whether a petitioner is restricted to presenting a single cause excusing default where claims relate back.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Ronald Jeffrey Prible, petitioner on review, was the petitioner-appellee below.

Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division, respondent on review, was the respondent-appellant below.

No party is a corporation.

RULE 14.1(B)(III) STATEMENT

This case arises from the following proceedings in:

Prible v. *State,* 175 S.W.3d 724 (Tex. Crim. App. Jan. 26, 2005)

Prible v. *Texas,* 546 U.S. 962 (Oct. 17, 2005)

Prible v. *State,* 245 S.W.3d 466 (Tex. Crim. App. Feb. 18, 2008)

Ex parte Prible, 2008 WL 2487786 (Tex. Crim. App. June 18, 2008)

Prible v. *Texas,* 555 U.S. 833 (Oct. 6, 2008)

Prible v. *Texas,* 555 U.S. 1176 (Feb. 23, 2009)

Ex parte Prible, 2010 WL 5185846 (Tex. Crim. App. Dec. 15, 2010)

Ex parte Prible, 2011 WL 5221864 (Tex. Crim. App. Nov. 2, 2011)

Prible v. *Davis,* No. 4:09-CV-1896 (S.D. Tex. May 20, 2020)

Prible v. *Lumpkin,* No. 20-70010; 43 F.4th 501 (5th Cir. August 8, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Ronald Jeffrey Prible respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 43 F.4th 501. The District Court's opinion is available at 2020 WL 2563544.

JURISDICTION

The Court of Appeals issued its opinion on August 8, 2022. The court denied a timely petition for panel rehearing and a petition for rehearing en banc on October 17, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." 28 U.S.C. § 2254(b)(1) provides, in relevant part that: "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State." Texas Code of Criminal Procedure Article 11.071 provides, in relevant part that:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent

application unless the application contains sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application . . . .

INTRODUCTION

This case involves two issues of fundamental importance and recurring concern to the criminal justice system. First, this case presents an acknowledged and entrenched circuit split concerning how to establish suppression under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and cause to excuse procedural default of a *Brady* claim under *Banks* v. *Dretke*, 540 U.S. 668 (2004). The Fifth Circuit held below that to establish suppression and cause, a defendant must show he could not have discovered, through his own due diligence, favorable evidence concealed through State action. In so holding, the Fifth Circuit continues to align with the First, Sixth, Seventh, Eighth, and Eleventh Circuits and various state high courts. The Fifth Circuit's holding deepens a divide with the Second, Third, Fourth, Ninth, Tenth, and D.C. Circuits and many state high courts, which hold that a defendant's due diligence is irrelevant to the assessment of suppression and cause, particularly where State action has impeded discovery of the favorable evidence. This broad and established split among federal courts of appeals and state high courts warrants this Court's review.

Second, this case asks whether a petitioner may present multiple and distinct causes excusing the procedural default of habeas claims, where those claims were not included in an initial federal habeas petition but have been found to relate back to that original petition under *Mayle* v. *Felix,* 545 U.S. 644 (2005). The Fifth Circuit held below that a petitioner is limited to presenting only one cause. This holding conflicts with precedent in the Sixth, Ninth, and Tenth Circuits permitting petitioners to present multiple causes excusing default. The Fifth Circuit's interpretation of the interplay between procedural default and relation back

will have broad consequences for habeas petitioners and calls for this Court's review.

STATEMENT OF THE CASE

Fourteen years after Jeffrey Prible was convicted of capital murder based on the testimony of a jailhouse informant, the district court judge presiding over his federal habeas proceedings reviewed prosecutor Kelly Siegler's work product file *in camera* and discovered notes "buried" therein which, "[h]ad [they] been disclosed to the defense, [] would reasonably have undercut the [evidence] upon which the prosecution's case against Prible solely rested." Pet. App. 98a, 100a. The handwritten notes detailed the substance and dates of the prosecutor's meetings with two federal prison inmates who turned out to be players in a ring of informants working with the prosecutor to convict two separate men in two unrelated cold case murders. The men were Prible and Hermilo Herrero. Along with other documents secreted as work product and withheld, including letters from and photographs of several inmates angling to testify against Prible, the prosecutor's interview notes confirmed what Prible had suspected but could not prove: that he had been set up by a ring of inmates working with the prosecutor to close out murder cases in exchange for sentence reductions.

The State should have produced the exculpatory documents from the prosecutor's file many times over prior to federal habeas proceedings. They should have been included with the prosecutor's "open file" discovery, they were responsive to pre-trial discovery orders, and they were responsive to post-conviction discovery requests.

The federal district court granted Prible relief on five separate and distinct *Brady* claims stemming from the suppression of the exculpatory evidence. Finding

cause to overcome procedural default on each of the claims, the court determined that "[w]ithout question, the prosecution in this case engaged in a pattern of deceptive behavior and active concealment" that began before Prible was indicted and continued through every stage of post-conviction proceedings, until the district court itself discovered the evidence giving rise to Prible's *Brady* claims fourteen years into his conviction. *Id.* at 103a. The court found that "the evidence suppressed sufficiently serves to controvert the primary basis for Prible's conviction." *Id.*

On appeal, the Fifth Circuit vacated the district court's judgment, finding Prible had failed to establish cause to excuse the procedural default of his *Brady* claims—even while acknowledging his "lack of concrete evidence to support his claims" until he got to federal court. *Id.* at 22a. Rather than focusing on whether the State withheld evidence from trial and original state habeas counsel, the Fifth Circuit defaulted all of Prible's *Brady* claims as well as his *Massiah* claim (deliberate elicitation of statements after charges filed and counsel appointed) claims on grounds that he could have unraveled the prosecutor's informant scheme earlier than he did from sources other than the State of Texas. See *Massiah* v. *United States*, 377 U.S. 201 (1964).

A. Factual Background

On the night of April 23, 1999, Jeffrey Prible and Steve Herrera drank and played pool at the house Herrera shared with his girlfriend, Nilda Tirado, and their three children. Sometime around 4:00 a.m., Herrera drove Prible home. Prible's neighbor saw Herrera drive away. Around 6:00 a.m., Herrera's neighbor noticed smoke coming from Herrera's house. Herrera and Tirado were found inside, shot and killed at close range. The perpetrator used an accelerant to set fire to

the scene, and the resulting smoke killed the three children sleeping in other rooms.

Herrera and Prible had been engaged in a bank robbery scheme. Prible robbed the banks and gave the proceeds to Herrera, who grew the money by buying and re-selling drugs. Detectives interviewed and photographed Prible. "Investigators could not find blood stains, accelerant, or any forensic evidence on Prible or his clothing." Pet. App. 35a. He gave two written statements within hours, telling police he had been at Herrera's house the night before and had had consensual oral sex with Tirado.

Several weeks later, DNA tests showed a microscopic amount of Prible's DNA in Tirado's mouth. The case went cold. Meanwhile, Prible pleaded guilty to the bank robberies and was sent to federal prison in Beaumont, Texas ("FCI Beaumont").

Two years later, cold case prosecutor Siegler began reviewing the case. Around the same time, one of her prior jailhouse informants, Jesse Moreno, wrote her saying he had information about a different murder case. Moreno was serving time in FCI Beaumont also, but in a different unit than Prible. The prosecutor arranged to meet with Moreno. He told her that a prisoner named Hermilo Herrero had confessed to a murder in the presence of Moreno and his fellow inmate Nathan Foreman. The prosecutor brought up Prible's case, and Moreno "suggested [she] seek out the assistance of Foreman." Pet. App. 90a. Confident she had prison informants in place, she brought charges against both Herrero and Prible two days later. Foreman and Prible were then transferred to the same unit of FCI Beaumont on the same day.

Shortly after, the prosecutor and her investigator met with Foreman "to find out what [he] knew about

Prible. They learned that Foreman was looking for a reduction of his own sentence in exchange for testimony against Prible. However, both Siegler and [her investigator] testified that they believed that Foreman not only lacked credibility, but also was fabricating evidence against Prible before he had even met him." *Id.* Nevertheless, the prosecutor continued to communicate with Foreman. *Id.* at 90a–91a.

Weeks later, Foreman suggested to his new cellmate, Michael Beckcom, that he call the prosecutor. Beckcom was serving time for the murder of a federal witness. "Foreman already knew some facts about Prible's case and [] relayed them to Beckcom. Foreman had gotten his information from Moreno and Siegler." *Id.* at 61a. Beckcom called the prosecutor "to see whether he could arrange for a reduction in his sentence *even though he did not have any evidence [against Prible] at that time." Id.* at 110a.

The prosecutor met separately with Foreman and Beckcom on December 10, 2001. At the meeting, Beckcom drafted a ten-page handwritten letter detailing his and Foreman's supposed conversations with Prible and Prible's alleged "confession." *Id.* Beckcom claimed that it was Prible who approached Beckcom and Foreman to talk about his murder case and later confessed to both of them at the same time.

Prible was tried for capital murder in October 2002. Beckcom was the State's star witness. The prosecutor elected not to call Foreman. Prible's trial counsel made several pre-trial *Brady* motions asking the "State to furnish the date, place, and manner of all contacts with Beckcom, a statement of how contact with Beckcom was first initiated, a copy of all statements made by Beckcom, notes of any conversations had with Beckcom, and any agreements made with Beckcom concerning benefits in exchange for testimony." *Id.* at

85a. In response, the prosecutor turned over the handwritten letter from Beckcom and told the court he had been the one to initiate contact. *Id* at 110a. "Siegler did not, however, disclose that . . . she had long been communicating with Beckcom's cellmate Foreman, or that she found Foreman's testimony regarding Prible's confession to not be credible." *Id*. at 85a. At a pre-trial hearing, the prosecutor told the court that she "didn't take any notes" of her communications with Beckcom and "[didn't] remember the dates." *Id.* at 37a. The trial court ordered her to disclose all witness statements, but she did not reveal any of her communications with Foreman or Moreno, letters she had written for them advocating sentence reductions under Fed. R. Crim. P. 35, letters she received from other inmates offering to testify against Prible, or other exculpatory evidence. See *infra* at 10.

Beckcom's trial testimony tracked the letter he drafted, ending with Prible's supposed "confession" to him and Foreman. Having withheld evidence that Beckcom was working with Foreman and other informants to incriminate Prible, the prosecution told the jury that "everything [Beckcom's] telling you about what happened is the truth," and to believe the defense's case, they would have to find that "there has been a conspiracy to frame this Defendant both in the free world and prison, so audacious it makes any frame up that has ever been conducted in the annals of crime look like child's play." *Id.* at 46a. The jury convicted Prible of capital murder and sentenced him to death.

B. State Habeas Proceedings

The State withheld the foregoing exculpatory evidence from Prible's initial state habeas counsel. But "while on death row, Prible started to hear about other defendants—including a man named Hermilo Herrero—who had also been prosecuted by Siegler using

what seemed to be an overlapping set of prison informants." Pet. App. 49a. Prible asked his state habeas attorney, Roland Moore, to investigate. Moore hired an investigator, filed *Brady* motions, sought and reviewed the State's file, and "diligent[ly] attempt[ed] to discover" evidence of a larger ring of informants, but "Siegler's suppression of evidence left precious little for Moore to work with in investigating suspicions of prosecutorial misconduct. The only information Moore had was the identities of Beckcom and Foreman [the only inmates mentioned by the State at trial], and Prible's suggestion that a man with the last name of Walker might have relevant information." Pet. App. 86a. Moore bench-warranted Foreman for an interview, but Foreman refused to talk. Moore sought permission from Beckcom's attorney to speak with his client, but the attorney refused to make him available. Moore hired an investigator to try to identify Walker, but "with no other identifying information, that effort quickly became 'a fool's errand.' With no concrete evidence to support" Prible's prosecutorial misconduct claims, Moore did not include any such claims in Prible's state habeas application. *Id.*

Prible sought to discover Walker's identity on his own from death row, but mistakenly determined that a different FCI Beaumont inmate, Larry Wayne Walker, had information. Prible sent Larry Walker several letters. "Only through sheer coincidence did Prible learn *Carl* Walker's identity" after Larry Walker and Carl Walker were transferred to the same facility and Larry Walker realized Carl Walker might be the intended recipient of the letters. *Id.* at 86a. But other than confirming he was the correct "Walker," Carl Walker would not respond to any inquiries. "Thus, . . . Prible had no way to obtain supporting evidence from him." Pet. App. 87a.

Nonetheless, Prible filed two *pro se* applications in 2007, while his initial state application was still pending, raising *Brady, Giglio*, *Massiah,* and *Strickland* issues relating to the use of inmate testimony in his case. See *Giglio* v. *United States,* 405 U.S. 150 (1972); *Strickland* v. *Washington*, 466 U.S. 668 (1984). Prible alleged that the prosecution failed to disclose "her true ties to Mike Beckom [sic] and her jailhouse informants" and that, had he been made aware of this information, he could have used it as impeachment evidence in his case. *Id.* at 49a. In his other application, Prible alleged that his trial counsel was ineffective for not investigating Hermilo Herrero as a potential witness. Prible also bombarded the state court with other filings, begging the judge to consider his conspiracy claim, remove Moore, and appoint him a new attorney. See, *e.g.,* ROA.16143, 16009-11, 16095-96, 16098-99.

The Texas Court of Criminal Appeals ("TCCA") denied Prible's state application, construed the second and third *pro se* pleadings as subsequent applications, found that they did not meet the requirements for merits review because neither application contained "sufficient specific facts establishing that the application meets one of the exceptions set out in [Tex. Code Crim. Proc. Ann.] Art. 11.071, § 5," and dismissed them as abusive. *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).

C. Initial Federal Court Proceedings

"Only after federal proceedings commenced did Walker change his mind and provide a statement" to Prible's investigator. Pet. App. 87a. Walker described a circle of informants, headed by Foreman, who were recruited to provide information to the State. Prible timely filed a federal habeas petition raising claims related to the State's development and use of inmate

testimony. The federal court remanded so Prible could exhaust his claims.

D. Successive State Proceedings

On September 8, 2010, Prible filed a successive state habeas application, asserting that Beckcom and Foreman were part of a ring of informants whom the prosecutor had recruited and fed information to assist her in securing a conviction against Prible. The trial court forwarded Prible's successive application to the TCCA. The TCCA remanded it so that the trial court could determine "whether the factual basis for these claims was unavailable on the dates that applicant filed his previous applications." *Ex parte Prible*, No. WR-69,328-04 2010 WL 518546, at *1 (Tex. Crim. App. Dec. 15, 2010).

Upon returning to the state trial court, the State disclosed, for the first time, three letters addressed to the prosecutor that were sealed in an envelope designated "attorney work product." Pet. App. 54a. The letters were from Walker and two other as-yet-unknown inmates, Jesse Gonzalez and Mark Martinez, offering to testify against Prible in exchange for "help" with their sentences. In Hermilo Herrero's casefile, Prible's counsel found letters from the prosecutor to Assistant U.S. Attorneys advocating Rule 35 sentence reductions for Moreno, Foreman, and two other informants.

The state trial court convened an evidentiary hearing in 2011. The court admitted the Rule 35 letters and the sealed informant letters to the prosecutor but made no findings as to the availability of this evidence. Pet. App. 54a, 57a. "Based on this circumscribed analysis," the state trial court found that the factual basis for Prible's claims was available at the time he filed his initial state habeas petition in 2004. *Id.* at 57a. The TCCA dismissed Prible's application on the ground

that "the allegations fail[ed] to satisfy the requirements of Article 11.071, § 5(a)" (which requires subsequent state habeas petitioners to plead "sufficient specific facts" establishing that the claims could not have been presented previously in a timely initial application) and dismissed Prible's successive application as an abuse of the writ. *Ex parte Prible,* No. WR-69,328-04, 2011 WL 5221 864, at *1 (Tex. Crim. App. Nov. 2, 2011).

E. Federal District Court Proceedings

Back in federal court, the State opposed Prible's attempts to develop evidence supporting his belief that inmates had conspired with the prosecutor to manufacture false testimony against him, calling the theory "unrealistic." ROA.8462.

In 2016, in response to a federal subpoena, the Harris County District Attorney's Office ("HCDA") produced additional evidence from Prible's casefile, including a DOJ Fact Witness Voucher showing the prosecutor had testified at Moreno's Rule 35 hearing two months before Prible's trial and persuaded the court to shave 77 months off his 78-month sentence. However, the HCDA withheld over 500 pages of documents on grounds that they were protected work product and mailed them to the Assistant AG representing the State in the federal proceedings, asking her to review them to ensure all *Brady* evidence had been disclosed. The AG declined on grounds that it did not control the HCDA or the HCDA's file and could only urge that office to comply with its *Brady* obligations. ROA.4850.

Prible filed a motion to compel the work product file, which the district court granted. Reviewing the work product file *in camera,* the district court found "a significant amount of exculpatory information that was

not disclosed to the defense," including notes memorializing the prosecutor's meetings with Beckcom and Foreman concerning Prible's case (some dated before Foreman had even met Prible); notes indicating the prosecutor contemplated setting Prible up with a "potential federal prison roommate" before he was indicted; and a note memorializing a conversation with the head of the Harris County crime lab that contradicted the State's theory of the DNA evidence presented at trial. Pet. App. 84a.

Based on this new evidence, Prible filed a Fourth Amended Petition containing four *Brady* claims in addition to the *Brady* claim filed in his original petition. The district court granted federal habeas relief to Prible on all five *Brady* claims, noting "[i]t is beyond serious dispute that the prosecution withheld critical information from the defense in this case." *Id.* Key to the district court's decision was the evidence that the district court itself found in the prosecutor's work product file:

> In the end, the Court need not look further than the State's own file to demonstrate that Siegler prevented the defense from learning about exculpatory material evidence. In her deposition, Siegler claimed that she had an "open file" policy and did not maintain a separate work product file. In reality, however, the State maintained a dense work product file containing a significant amount of exculpatory information that was not disclosed to the defense. . . . **These materials came to light only because of court proceedings and court orders occurring after Prible filed his initial federal petition**. . . . Because of the evidence Siegler suppressed, Prible's defense team had no knowledge of her contacts

> and communications with other FCI Beaumont informants, or even the full extent and nature of her contacts with Beckcom.

Id. at 84a–85a (emphasis added).

The court held that the prosecutor's suppression of evidence prevented Prible from developing his *Brady* claims in state court, thus providing cause to overcome procedural default:

> Although Prible may have suspected prosecutorial misconduct, including *Brady* violations, during the course of state court proceedings, Siegler's efforts to suppress evidence of her contacts with Beckcom and the other informants left Prible with no concrete evidence to support such a claim during those proceedings, despite Prible and his counsel's diligent efforts to discover such evidence. Prible may not be penalized for failing to raise claims for which he lacked any evidence. . . . Siegler's suppression of evidence created an external obstacle that impeded Prible's ability to bring his *Brady* claims during state habeas proceedings. Siegler's actions in this case therefore provide cause to forgive the procedural default of Prible's *Brady* claims.

Id. at 87a–88a.

F. Fifth Circuit Opinion

The Fifth Circuit vacated the district court's judgment, finding Prible had not established cause to excuse the default of his four informant *Brady* claims and had not established prejudice to excuse the default of the DNA *Brady* claim. Pet. App. 32a. In procedurally defaulting Prible's four distinct informant *Brady* claims, the court reduced them to a single "ring-of-

informants" claim with the same factual basis—even though they relied on different items of suppressed evidence. The Fifth Circuit credited Beckcom's trial testimony and did not address the district court's fact findings concerning the prosecutor 's misconduct. Rather, the panel found Prible's efforts to overcome the State's actions in suppressing evidence insufficient to overcome "cause."

Reversing the lower court's "cause" finding, the panel held that "the district court conflated availability of the factual basis for Prible's ring-of-informants claims with access to evidence supporting them"—holding Prible needed to assert his prosecutorial misconduct conspiracy claim for which he had no evidentiary support in his initial petition. Pet. App. 21a. Said the court: "[H]ere it was Siegler's alleged efforts to conspire with Beaumont informants to present false testimony, not her meeting notes or the inmates' letters, that formed the factual basis for Prible's ring-of-informants claims." *Id.* at 22a.

Alternatively, the panel held that "Siegler's failure to disclose her ties with Beaumont informants did not make the factual basis for Prible's claims 'unavailable'" because he could presumably have gotten facts to support his conspiracy theory from her anonymous informant, Walker. *Id.* at 23a. "There is no 'suppression,' and thus no cause, where facts are 'available from other sources' or 'can be discovered by exercising due diligence.' Here, factual support for these claims was available from another source known to Prible—Walker—but Prible did not diligently pursue it." *Id.* The panel's opinion thus places a burden of uncovering evidence of intentional prosecutorial misconduct squarely upon the habeas petitioner's shoulders, rather than focusing on the prosecutor's deliberate concealment of evidence.

REASONS FOR GRANTING THE PETITION

I. LOWER COURTS ARE DIVIDED ON A DUE DILIGENCE REQUIREMENT FOR *BRADY* CLAIMS.

Lower courts are intractably split over the fundamental element of suppression under *Brady*. See *Fontenot* v. *Crow*, 4 F.4th 982, 1065–66 (10th Cir. 2021) ("many of our sister circuits deem evidence 'suppressed' under *Brady* only if 'the evidence was not otherwise available to the defendant through the exercise of reasonable diligence' . . . [b]ut that is not the law in this circuit") (quoting *United States* v. *O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002)). This entrenched split has also been highlighted by many legal scholars. See Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 153 (2012) (discussing "divergence among courts" concerning application of "due diligence" rule in *Brady* analysis).

How a Circuit resolves the question of whether due diligence must be considered in the *Brady* suppression analysis necessarily determines what qualifies as "cause" excusing procedural default of *Brady* claims. Under this Court's jurisprudence, "cause" parallels the element of "suppression." See *Strickler* v. *Greene,* 527 U.S. 263, 281–82 (1999); *Banks,* 540 U.S. at 691.

In *Murray* v. *Carrier,* this Court set the cause and prejudice standard necessary to overcome the procedural default of a federal habeas claim, holding that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U.S. 478, 488 (1986) (citations omitted).

Applying this standard to defaulted *Brady* claims, this Court squarely held in *Banks* v. *Dretke* that "[t]he 'cause' inquiry . . . turns on events or circumstances 'external to the defense.'" 540 U.S. at 695. Thus, "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." *Id.* at 691.

Under *Banks,* when the State impedes discovery, defense counsel's efforts—whether at trial or post-conviction—to overcome those impediments are irrelevant to the determination of "suppression" under *Brady* and "cause" under *Murray*. See *Banks,* 540 U.S. at 695–96. However, despite this Court's instruction that the concept of "suppression," either as an element of a *Brady* claim or as an external impediment establishing "cause," is independent of trial or state habeas counsel's performance, a split has intensified in recent years after the *Banks* decision over whether defendants must nonetheless demonstrate some due diligence toward locating evidence that authorities had suppressed. Many courts recognize a "due diligence" requirement to be irreconcilable with *Banks* and other *Brady* decisions, while others have doubled down, rejecting claims that *Banks* requires a different approach.

At this point, the split includes all circuit courts that hear criminal matters.

A. The Federal Circuit Courts are Divided

1. The First, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits Require a Defendant to Use Some Level of "Diligence" to Locate Suppressed Evidence

Six circuits require some level of diligence, though the level varies among each circuit. In the First Circuit:

> [E]vidence is not suppressed within the meaning of *Brady* if the defendant either knew, or *should have known,* of the essential facts permitting him to take advantage of the evidence. The 'should have known' standard refers to trial preparation, and will generally impute to the defendant knowledge which he otherwise would have possessed from a diligent review of the evidence in his control.

United States v. *Cruz-Feliciano,* 786 F.3d 78, 87 (1st Cir. 2015) (cleaned up) (citing *United States* v. *Pandozzi,* 878 F.2d 1526, 1529 (1st Cir. 1989)).

In the Fifth Circuit, "[a] *Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence." See *Guidry* v. *Lumpkin,* 2 F.4th 472, 487 (5th Cir. 2021). "[E]vidence is not suppressed if the defendant knows or should know of the essential facts that would enable him to take advantage of it." *United States* v. *Brown,* 650 F.3d 581, 588 (5th Cir. 2011) (cleaned up).

Likewise, in the Seventh Circuit, evidence is deemed suppressed only if it "was not otherwise available to the defendant through the exercise of reasonable diligence." See *Camm* v. *Faith,* 937 F.3d 1096, 1108 (7th Cir. 2019) (citing *Boss* v. *Pierce,* 263 F.3d 734, 740 (7th Cir. 2001)). However, in assessing whether the defense exercised sufficient diligence, the Seventh Circuit distinguishes between access to a document containing *Brady* material and "*Brady* material contained in a witness's head." See *Boss,* 263 F.3d at 741. "Holding that reasonable diligence requires defense counsel to ask witnesses about matters of which counsel could

not have reasonably expected a witness to have knowledge is inconsistent with the aim of *Brady* and its progeny." *Id.* at 743; *Camm,* 937 F.3d at 1109.

The Eighth Circuit holds that evidence is not "new" if it was unavailable at the time of trial through the exercise of due diligence, but:

> [D]ue diligence does not require a defendant to root out information that the State has kept hidden. The State cannot play 'hide and seek' with information it was required to disclose and then accuse defense counsel of lacking due diligence . . . particularly when defense counsel specifically requested disclosure of the evidence now at issue.

Jimerson v. *Payne,* 957 F.3d 916, 927 (8th Cir. 2020).

The Eleventh Circuit subscribes to a rule that "[t]he government is not obliged under *Brady* to furnish a defendant with information he already has or, with any reasonable diligence, he can obtain himself." *United States* v. *Stein,* 846 F.3d 1135, 1146 (11th Cir. 2017) (citing *United States* v. *Valera*, 845 F.2d 923, 928 (11th Cir. 1988)). Furthermore, there is no suppression "where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material." *Rossell* v. *Macon SP Warden,* No. 21-13525, 2023 WL 34103, at *3 (11th Cir. Jan. 4, 2023).

The Sixth Circuit has waffled in recent years on the issue of due diligence, ultimately declining to adopt a blanket rule that a diligence requirement is inconsistent with *Brady* and *Banks.* In *United States* v. *Tavera*, the Sixth Circuit acknowledged that other courts and its own prior precedents "were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule." 719 F.3d 705, 711 (6th

Cir. 2013). But it "decline[d] to adopt the due diligence rule that the government proposes based on earlier, erroneous cases," because "the clear holding in *Banks* should have ended that practice." *Id*. at 711–12. A few years later, in *Woods* v. *Smith,* the Sixth Circuit qualified its holding in *Tavera,* stating that "[t]hough we have read *Banks* broadly to repudiate a 'diligence' requirement in all *Brady* cases that we consider de novo, we have never purported to decide that *Banks* 'clearly established' such a rule." 660 F. App'x. 414, 436 (6th Cir. 2016). Pointing out the "unique circumstances before the *Banks* court," the Sixth Circuit agreed with the application of a due diligence requirement "to *Brady* claims that do not involve a prosecutor's misleading representations." *Id.*

2. The Second, Third, Fourth, Ninth, Tenth, and D.C. Circuits Reject a Due Diligence Requirement

In contrast, six other Circuits reject a due diligence requirement. In *Dennis* v. *Sec'y, Pa. Dep't of Corr.,* the Third Circuit noted "the United States Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*. . . . *Brady's* mandate [is] entirely focused on prosecutorial disclosure, not defense counsel's diligence." 834 F.3d 263, 290 (3rd Cir. 2016) (en banc). Pointing to *Strickler* and *Banks,* the Third Circuit observed that this Court "has rejected the notion that defense counsel's diligence is relevant in assessing 'cause' for the failure to raise a *Brady* suppression issue in state court proceedings." *Id.* at 290–91.

The Fourth Circuit does not impose a due diligence requirement. See *United States* v. *Blankenship,* 19 F.4th 685 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 90 (2022) (mem.). Rather, only a "common sense notion of self-help imputable to a defendant in preparing his

case" is required and the defense "should not be allowed to turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial." *Id.* at 694–95. The Fourth Circuit holds that "[i]n the context of a *Brady* claim, a defendant cannot conduct the reasonable and diligent investigation to preclude a finding of procedural default when the evidence is in the hands of the State." See *Long* v. *Hooks,* 972 F.3d 442, 469 (4th Cir. 2020) (en banc).

The Tenth Circuit recently addressed the circuit split and squarely rejected any due diligence requirement. See *Fontenot,* 4 F.4th at 1066 (citing *Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995)) ("prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge"). The Tenth Circuit reasoned that "the fact that defense counsel 'knew or should have known' about the [pertinent] information . . . is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was 'exculpatory.'" *Id.* at 1066 (citing *Reynolds,* 54 F.3d at 1517).

The Ninth Circuit has held that the insertion of a due diligence requirement "would flip [the prosecutor's *Brady*] obligation" on its head and "enable a prosecutor to excuse his failure by arguing that defense counsel could have found the information himself." See *Amado* v. *Gonzalez,* 758 F.3d 1119, 1135–36 (9th Cir. 2014) ("The prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence."). Likewise, the D.C. Circuit rejects a due diligence requirement. See *United States* v. *Nelson,* 979 F. Supp. 2d 123, 133 (D.D.C. 2013) ("*Brady* does not excuse the government's disclosure obligation where reasonable investigation and due diligence by the defense could

also lead to discovering exculpatory evidence."); *In re Sealed Case No. 99-3096 (Brady Obligations),* 185 F.3d 887, 896 (D.C. Cir. 1999).

The Second Circuit holds that the "prosecution has a clear and unconditional duty to disclose all material, exculpatory evidence" and that "the Supreme Court has never required a defendant to exercise due diligence to obtain *Brady* material." *Lewis* v. *Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015) (citing *United States* v. *Agurs*, 427 U.S. 97, 107 (1976)). It explained that "this requirement speaks to facts already within the defendant's purview, not those that might be unearthed. It imposes no duty upon a defendant . . . to take affirmative steps to seek out and uncover such information in the possession of the prosecution in order to prevail under *Brady*." *Id.*

B. State Courts are Divided

State high courts have also split on the same question—at least sixteen have imposed a due diligence requirement on the defendant in a *Brady* analysis, and at least eight others have rejected the notion entirely.

Many state courts analyze the diligence of a defendant in identifying suppressed evidence under *Brady*. For instance, West Virginia considers a defendant's efforts to uncover the evidence as part of the determination of whether it was suppressed. *State* v. *Peterson*, 799 S.E.2d 98, 115–16 (W. Va. 2017) ("Evidence is considered suppressed when . . . [it] was not otherwise available to the defendant through the exercise of reasonable diligence."(citation omitted)). And the Supreme Court of Florida has held that *Brady* material need not be turned over when it is "equally accessible"

to the defense. *Morris* v. *State*, 317 So. 3d 1054, 1071 (Fla. 2021).[1]

Several other state high courts have made clear that anything akin to a "due diligence" requirement has no place in the *Brady* analysis. The Supreme Court of Ohio "repudiated the imposition of any due-diligence requirement on defendants in *Brady* cases." *State* v. *Bethel*, 192 N.E.3d 470, 477 (Ohio 2022). Similarly, in 2019, the Supreme Court of Wisconsin recognized that "[f]ederal courts are currently divided as to whether a defendant's ability to acquire . . . evidence through 'reasonable diligence' or 'due diligence' forecloses a *Brady* claim," declining to adopt a diligence requirement "due to its lack of grounding in *Brady* or other United States Supreme Court precedent." *State* v. *Wayerski*, 922 N.W.2d 468, 480–81 (Wis. 2019).

Six other states have reached this same conclusion. See *People* v. *Bueno,* 409 P.3d 320, 328 (Colo. 2018) (en banc) (rejecting argument that "defense" must "search for a needle in a haystack" when the government has represented that it has met its disclosure obligations); *People* v. *Chenault,* 845 N.W.2d 731, 738 (Mich. 2014); *State* v. *Durant*, 844 S.E.2d 49, 55 (S.C. 2020) ("Shifting the burden to defense counsel lessens the State's duty to disclose exculpatory evidence and has the risk of adding an additional element to *Brady*."), *cert. denied*, 141 S. Ct. 1423 (2021) (mem.); *State* v. *Reinert*, 419 P.3d 662, 666 n.1 (Mont. 2018) ("We will [now] decide issues regarding the withholding of exculpatory

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[1] *See also Anglin* v. *State*, 863 S.E.2d 148, 156 (Ga. 2021); *Brown* v. *State*, 306 So. 3d 719, 737 (Miss. 2020) (en banc); *State* v. *Sosa-Hurtado*, 455 P.3d 63, 78 (Utah 2019); *State* v. *Green*, 225 So. 3d 1033, 1037 (La. 2017); *State* v. *Kardor*, 867 N.W.2d 686, 688 (N.D. 2015); *Commonwealth* v. *Roney*, 79 A.3d 595, 608 (Pa. 2013); *People* v. *Williams*, 315 P.3d 1, 43–44 (Cal. 2013); *State* v. *Rooney*, 19 A.3d 92, 97 (Vt. 2011).

evidence without reference to a reasonable diligence requirement."); *Commonwealth* v. *Tucceri*, 589 N.E.2d 1216, 1221–22 (Mass. 1992) ("As a general rule, the omissions of defense counsel . . . do not relieve the prosecution of its obligation to disclose exculpatory evidence[.]"); *State* v. *Williams*, 896 A.2d 973, 992 (Md. 2006) (citing *Banks*, 540 U.S. at 696 to conclude that a "defendant's duty to investigate simply does not relieve the State of its duty to disclose exculpatory evidence under *Brady*").

C. The Fifth Circuit's Reasoning is Flawed

Because suppression under *Brady* and cause under *Murray* are parallel concepts, the Fifth Circuit's holding that suppression requires due diligence necessarily contravenes federal habeas law set forth in *Banks*. In *Banks,* this Court rejected the Fifth Court's view that the defense's actions were relevant, holding "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695. The Fifth Circuit's holding below would do just that and would also lead to secondary litigation over what constitutes sufficient diligence.

Ultimately, *Brady* is based on the fundamentally American precept that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." *Brady*, 373 U.S. at 87. *Brady*'s "mandate and its progeny are focused on prosecutorial disclosure, not defense counsel's diligence." *Dennis*, 834 F.3d at 290. Thus, this Court has consistently defined the contours of *Brady* by addressing conduct of the prosecutor, not the defendant or defense counsel. Cf. *Banks*, 540 U.S. at 695–96 (counsel has no "procedural obligation" to protect his client's *Brady* rights, based on "mere suspicion" of prosecutorial misconduct). The "due diligence"

rule flips this principle on its head and impermissibly "shifts the burden of disclosure from the government to the defendant." Weisburd, 60 UCLA L. Rev. at 142. It also introduces a highly speculative fourth element to the *Brady* analysis: whether the defendant could have located the information independently. As happened here, that element invites courts to assume what the petitioner might have discovered rather than analyzing what *actually* occurred—i.e., favorable evidence was suppressed. These "due diligence" assessments are also made with the significant benefit of hindsight. The existence of a "ring of informants" may seem obvious now because of the skeletons that belatedly and reluctantly emerged from the prosecutor's file closet, but these skeletons were nowhere to be seen when post-conviction counsel knew only that his client was claiming that there was a wide-ranging conspiracy against him.

II. THE FIFTH CIRCUIT'S HOLDING THAT IF A CLAIM RELATES BACK IT PRECLUDES A FINDING OF CAUSE FOR PROCEDURAL DEFAULT NULLIFIES *MAYLE* V. *FELIX*

The Fifth Circuit's holding—that it did not need to do separate cause analyses for Prible's four distinct informant *Brady* claims because the district court found that those claims shared a common core of operative facts and therefore related back to the initial federal habeas petition—upends accepted habeas analysis. By combining the distinct standards for relation back of new claims and cause to excuse procedural default, the Fifth Circuit abrogates this Court's precedent and ignores separate bodies of case law, rules, and legislation developed by this Court and enacted by Congress. In so doing, the Fifth Circuit stands unique among federal circuit courts.

The Fifth Circuit's core rationale was that "Prible cannot have it both ways: he 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. The court effectively restricts a petitioner to presenting a single cause for procedural default when separate claims have been found to relate back to the initial federal petition. *Id.* Even if it somehow could be said that Moore did not exercise sufficient due diligence as to "Walker" and that there was therefore no cause for the default of the *Brady* claim concerning the wider circle of informants (Claim 2),[2] there certainly is cause in the form of the suppression of wholly unknown facts relating to the claims about Beckcom (the star witness at Prible's trial) and Foreman (the "non-testifying corroborating witness to Beckcom's story about Prible's confession") (Claims 3 and 4).[3] Walker had no knowledge pertinent to these latter claims because he was not privy to the "confession" that Beckcom and Foreman allegedly heard, nor was he privy to the prosecutor's meetings with those two witnesses. The Fifth Circuit's cobbling together of distinct doctrines would undercut petitioners' abilities to vindicate their constitutional rights and would provide perverse incentives for petitioners and their counsel to draft vague, skeletal initial state petitions.

A. The Fifth Circuit's Holding Combines Distinct and Separate Statutory Bases of Law

The standards for relation back and cause to excuse procedural default arise from violations of federal and state law, respectively. Relation back allows claims

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[2] *See* Pet App. 58a.

[3] *Id.*at 58a, 89a.

made after AEDPA's one year bar to be amended to an original petition under Federal Rule of Civil Procedure 15 and AEDPA, 28 U.S.C. § 2242 ("Application for a writ of habeas corpus . . . may be amended or supplemented as provided in the rules of procedure applicable to civil actions."). Under Fed. R. Civ. P. 15, "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct transaction, or occurrence set out—or attempted to be set out—in the original pleading." See also *Mayle* v. *Felix*, 545 U.S. 644 (2005). Relation back therefore remedies a federal procedural violation.

In contrast, procedural default is a federal judicial doctrine. AEDPA § 2254(b)(1)(A) requires a petitioner to exhaust state court remedies before appealing to federal court. Where a petitioner wishes to present a new claim in state court in order to meet this exhaustion requirement but is prevented from doing so for failure to comply with state procedural requirements, such as a bar on subsequent habeas claims, the claim is exhausted but "procedurally defaulted." For example, Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a) prohibits claims subsequent to an initial petition unless "(1) the current claims and issues have not been and could not have been presented previously in a timely initial application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application."

Excuse of procedural default operates to remedy this issue. Unlike relation back, excuse of procedural default was a judicially created instrument. See generally J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 Geo. J.L. & Pub. Pol'y 109 (2004). And unlike relation back, excuse of procedural default cures state procedural violations. Thus,

separate bodies of legislation underlie these distinct doctrines. The Fifth Circuit's holding combines these disparate statutory regimes in a manner that upends this Court's bodies of precedent for each standard.

B. The Fifth Circuit's Holding is Contrary to This Court's Precedent

This Court's precedent recognizes the standards for relation back and excuse of procedural default as separate and distinct. The Fifth Circuit's holding, by conflating the "cause" standard to excuse procedural default with the relation back doctrine, undercuts this line of precedent.

This Court has determined when an amended claim relates back under a line of precedent distinct from the standard for "cause" to excuse procedural default. See *Mayle*, 545 U.S. at 655. As noted earlier, this stems, in part, from the fact that each standard arises out of a different body of law.

Excuse of procedural default developed independent of relation back. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murray* v. *Carrier*, 477 U.S. 478 (1986). While never addressed directly, no prior case from this Court has interlocked the two doctrines in the manner prescribed by the Fifth Circuit. And prior cases have examined multiple causes for excuse of procedural default. See, *e.g.*, *Martinez* v. *Ryan*, 566 U.S. 1 (2012) (evaluating ineffective assistance of counsel for both failing to raise an argument on initial appeal and failing to notify her client of her actions). The Fifth Circuit's standard thus differs from how this Court has historically regarded these distinct standards.

C. The Fifth Circuit's Precedent is an Outlier Among Federal Circuit Courts

No other federal court has agreed with the Fifth Circuit that claims that relate back cannot rely on different causes excusing procedural default. Although never addressing this proposed holding directly, other circuit courts have consistently evaluated relation back and excuse of procedural default as distinct and separate questions in line with this Court's precedent.

For example, in *Ha Van Nguyen* v. *Curry*, 736 F.3d 1287 (9th Cir. 2013), *abrogated on other grounds by Ross* v. *Williams*, 930 F.3d 1160 (9th Cir. 2020), the Ninth Circuit found petitioner's claim related back under *Mayle* because his claims shared a common core of operative facts with his original petition. *Id.* at 1297. Separately, the Ninth Circuit evaluated two separate causes excusing procedural default: ineffective assistance of appellate counsel and ineffective assistance of second appellate counsel. *Id.* at 1298. The Ninth Circuit held that if the district court found ineffective assistance of original appellate counsel did not apply to petitioner's claim, his procedural default would nevertheless be excused by ineffective assistance of his second appellate counsel. The Ninth Circuit's evaluation of separate causes—two distinct instances of ineffective assistance of counsel—would not be permitted under the Fifth Circuit's approach because the petitioner's claims related back.

This holding reflects the consistent approach taken by the Ninth Circuit and other sister circuits in evaluating relation back and excuse of procedural default as distinct and separate standards. See *Schneider* v. *McDaniel*, 674 F.3d 1144 (9th Cir. 2012) (finding petitioner's claims related back but separately evaluating and declining to find cause for excuse of procedural default); *Pinchon* v. *Myers*, 615 F.3d 631, 642–43 (6th

Cir. 2010) (evaluating relation back separately from cause excusing procedural default); *United States* v. *Jordan*, 461 F. App'x. 771, 777–78 (10th Cir. 2012) (evaluating separate excuses for procedural default for intrusion on attorney-client relationship and *Brady* claims even if the claims were to relate back); *Brown* v. *Bradley*, No. 18-3768, 2018 WL 7316267, at *2–3 (6th Cir. Nov. 27, 2018) (separately evaluating relation back under *Mayle* and excuse of procedural default under *Carrier*).

The Fifth Circuit's holding opens a split of authority over an important and oft-recurring question of federal habeas procedure.

III. THE FIFTH CIRCUIT'S HOLDING PRESENTS A RECURRING AND IMPORTANT QUESTION OF FEDERAL LAW

A. New Facts and Claims Are Unlikely to be Exhausted and May be Excused by More Than One Cause

When new facts or claims are amended to a federal habeas petition out of time, they must relate back under Fed. R. Civ. P. 15 and *Mayle*. Those new facts or claims must also be exhausted under AEDPA § 2254(b)(1)(A) before they may be appealed to a federal court. While not all new claims will be unexhausted, many are likely to not have been exhausted precisely because they are new and amended to an existing petition. Under the Fifth Circuit's holding, petitioners are confined to presenting a single cause argument to excuse the procedural default of all newly amended claims where those claims "share a common core of operative facts." Pet. App. 19a. This ignores the reality of federal habeas, in which federal investigation may uncover new evidence, related to core operational facts on which the original claim depends, that was suppressed

by distinct State actions. For example, the State may withhold the identity of an eyewitness who contradicts the State's eyewitness at trial, but also withhold documentary evidence showing that the eyewitness's testimony was incredible (such as a prior inconsistent statement). These withholdings would constitute two independent, external causes excusing a default of related claims.

B. The Fifth Circuit's Holding Encourages the Filing of Skeletal, Blanket Habeas Petitions

By denying the reality that petitioners may have multiple causes to excuse their procedural default, the Fifth Circuit's holding creates "perverse incentives for counsel on direct appeal" to raise all possible claims in skeletal petitions to avoid the possibility of a future waiver. *Massaro* v. *United States*, 538 U.S. 500, 506 (2003). This undermines the thrust of this Court's habeas precedent to "conserve judicial resources" and emphasize finality. *Id.* at 504.

Here, Prible had what could only be viewed at the time as a wild conspiracy theory involving some fellow named "Walker." His instincts turned out to be correct. To avoid the Fifth Circuit's compression of excuse of procedural default and relation back, he would need to have presented unsupported claims of *Brady* violations and *Massiah* violations.

In fact, according to the Fifth Circuit "Prible could have asserted the claims in his initial application and then acquired supporting evidence through state habeas proceedings", every incarcerated petitioner would be incentivized to offer all manner of separate and distinct claims in their initial state post-conviction petition to preserve the remote possibility that their conspiracy theories may turn out to be correct. Pet. App.

22a. Such claims would include but would not be limited to:

- Prosecutorial misconduct such as *Brady* claims, *Massiah* claims, failure to preserve evidence claims under *Arizona* v. *Youngblood*, 488 U.S. 51 (1988), improper use of preemptory challenges under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), knowing use of perjured testimony;
- Juror misconduct including dishonesty on *voir dire*, improper jury discussions, racial animus, premature or predisposed deliberation, independent juror investigation, or jury tampering;
- Ineffective assistance of counsel including improper advice regarding a plea, lack of pretrial investigation, failure to demand a competency hearing, opening the door to otherwise inadmissible evidence, failure to present alibi witnesses, failure to impeach witnesses, or failure to challenge obviously deficient jury instructions;
- Trial court error including *Batson* challenges, witness testimony objections such as *Estelle* v. *Gamble*, 429 U.S. 97 (1976), challenges, or improper admission of evidence.

This contravenes this Court's prior habeas rulings discouraging skeletal petitions and encouraging finality in criminal appeals. See *Reed* v. *Ross*, 468 U.S. 1, 16 (1984) (refusing to "disrupt[ ]" lower court proceedings by "encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition"); *Johnson* v. *United States*, 520 U.S. 461, 468 (1997) ("[S]uch a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent.") This also contravenes Congress's goals in promoting

finality and comity in state court rulings by enacting AEDPA.

The Fifth Circuit itself has repeatedly warned defense counsel *not* to burden that court with hopeless preservation claims: such appeals represent a "roadblock in the way of expeditious conviction or punishment." *United States* v. *Pineda-Arrellano*, 492 F.3d 624, 625–26 (5th Cir. 2007).

The Fifth Circuit's holding, by encouraging broader petitions, would thus serve to increase litigation over whether claims were initially included—and thus, not defaulted—in original petitions and places additional habeas burdens on federal courts. And that burden on federal courts is immense. According to the Federal Judicial Caseload Statistics in 2021, around 11,000 prisoner petitions were filed in federal courts of appeals and over 17,000 petitions were filed in federal district courts. *Federal Judicial Caseload Statistics*, United States Courts (March 31, 2021), http://bit.ly/3E40wH9. Accordingly, the Fifth Circuit's novel precedent would undercut efforts to promote finality and reduce burdens on federal courts.

IV. THIS CASE IS AN IDEAL VEHICLE

This case provides an appropriate and suitable vehicle to clarify a habeas petitioner's due diligence requirements under *Banks* and *Brady*. This case is unencumbered procedurally. The questions presented were preserved and passed upon before the Fifth Circuit Court of Appeals. See *Prible* v. *Lumpkin*, No. 20-70010; Pet. for Reh'g En Banc, ECF No. 124 (5th Cir. Sept. 21, 2022); Pet. for Panel Reh'g, ECF No. 125 (5th Cir. Sept. 21, 2022). All motions were timely filed.

The Fifth Circuit's holding rests squarely on the two questions presented. If a petitioner may present multiple causes excusing procedural default where

amended claims relate back, on remand the Fifth Circuit must consider the other causes Prible presented excusing procedural default of his *Brady* and *Massiah* claims. If Prible could only present one cause excusing procedural default because his claims relate back, his default is excused if he is not required to exercise due diligence in locating undisclosed evidence and not excused if he is so required. The Fifth Circuit's reversal is not explained by any other holding or evaluation of any other standard.

The particular facts of this case highlight the divisions within the split among circuit courts regarding due diligence obligations under *Brady* and *Banks*. The presence of an open file policy here, in addition to the clear presentation of these questions, make this an ideal vehicle for clarifying the diligence requirements of habeas petitioners where an open policy is in place but the State nevertheless suppresses evidence.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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