No. 16-55418

# In The United States Court Of Appeals For The Ninth Circuit

TERRENCE PRINCE,

*Petitioner-Appellant*,

v.

JOE A. LIZARRAGA,

*Respondent-Appellee*.

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On Appeal from the United States District Court
United States District Court for California, Central District
The Honorable Manuel L. Real
Civ. No. 2:15-cv-04222-R-DTB

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## BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR REHEARING AND REHEARING *EN BANC*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* National Association of Criminal Defense Lawyers hereby states that it does not issue stock or have a parent corporation.

Dated: July 2, 2018

Respectfully submitted,

By: /s/ *Rohit D. Nath*

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Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Local Rule 29-2, the National Association of Criminal Defense Lawyers respectfully submit this brief *amicus curiae* in support of Petitioner-Appellant's petition for rehearing *en banc*. All parties have consented to this filing.[1]

## INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and no one other than *amicus*, its members, or its counsel contributed any money to fund its preparation or submission.

assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a strong interest in the fair and efficient administration of criminal justice. The panel decisions in *Brown v. Muniz,* No. 16-15442, and *Prince v. Lizarraga*, No. 16-55418, unfairly close the courthouse door to victims of prosecutorial misconduct who fail to raise a *Brady* claim in their initial federal petition based on evidence about which they were unaware.[2] The decisions also create perverse incentives both for petitioners to bring unripe *Brady* claims and for prosecutors to suppress exculpatory evidence until after a petitioner has filed her initial habeas petition.

## SUMMARY OF THE ARGUMENT

The panel decisions in *Brown* and *Prince* punish habeas petitioners for not knowing what they could not know. The panel opinion in *Brown* creates a rule that all claims under *Brady v. Maryland*, 373 U.S. 83 (1963), that are not raised in an initial federal habeas petition are subject to the near-impossible actual innocence standard set forth in 28 U.S.C. § 2244(b). Under the panel rule, the stringent second-and-successive standard applies to later-brought *Brady* claims even if the exculpatory evidence was not known at the time of the initial petition. This

[2] This brief has been filed in both the *Brown* and *Prince* cases. Because the decisions in both cases are based on the published opinion in *Brown v. Muniz*, *Amicus* primarily references the slip opinion ("slip op.") throughout this brief. The *Prince* memorandum disposition is referenced as "*Prince* Mem."

decision conflicts with Supreme Court precedent, conflicts with the decision of at least one sister circuit, *Scott v. United States*, 890 F.3d 1258 (11th Cir. 2018), and creates poor incentives for prosecutors and petitioners alike.

*Brown* and *Prince* "involve[] a question of exceptional importance." Fed. R. App. P. 35(a)(2). As explained below, *Brady* violations are common and difficult to detect, and exculpatory evidence is often unearthed – through no fault of the petitioner – decades after a conviction. The panel opinion punishes petitioners for the misconduct of prosecutors, and creates incentives for prosecutors to continue to withhold evidence until an initial federal petition is on the books. Such an unjust rule – one that punishes victims of prosecutorial misconduct for the mistakes of the perpetrators – could not have been what the drafters of the Antiterrorism and Effective Death Penalty Act (AEDPA) intended. The panel decisions in *Brown* and *Prince* should therefore be reheard *en banc*.

## ARGUMENT

### A. The panel opinion guarantees that victims of prosecutorial misconduct will be denied justice for no fault of their own.

A *Brady* claim has three elements: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Under the panel opinion, if a *Brady* claim is

not raised in an initial federal habeas petition, the claim is treated as "second and successive" and as a result the petitioner is without remedy unless she can show by clear and convincing evidence that no reasonable juror would convict her of the crimes for which she was charged and convicted. 28 U.S.C. § 2244(b). Slip op. at 30; *Prince* Mem. at 4-5. The section 2244(b) standard has been described as "almost insurmountable." *Douglas v. Workman*, 560 F.3d 1156, 1192 (10th Cir. 2009). Under the panel opinion, a petitioner is "saddle[d] [with this] stringent standard of proof" even when a petitioner does not even discover the existence of withheld evidence until *after* the filing of an initial habeas petition, as was the case in both *Brown* and *Prince*. Slip op. at 30; *Prince* Mem. at 3. The upshot is that many unconstitutional convictions in this circuit will stand due to a technicality.

This is an issue of exceptional importance because *Brady* violations are both common and exceedingly difficult for even the most able petitioners and counsel to detect. As then-Chief Judge Kozinski observed not long ago, "*Brady* violations have reached epidemic proportions in recent years," *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing *en banc*), and the case reports are filled with examples throughout the Ninth Circuit. *See, e.g.*, *Browning v. Baker*, 875 F.3d 444, 476 (9th Cir. 2017), *cert. denied sub nom. Filson v. Browning*, No. 17-1390, 2018 WL 1696869 (U.S. June 4, 2018) (reversing district court's denial of Brady claim because prosecution's

failure to disclose evidence that another person may have committed crime at trial was material; evidence was disclosed later at evidentiary hearing); *Amado v. Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014) (granting section 2254 petition where petitioner's "attorney did not receive [] probation report until after trial, too late to use in cross examination."); *Maxwell v. Roe*, 628 F.3d 486, 509 (9th Cir. 2010) (reversing with instructions to grant section 2254 petition where prosecutors failed to disclose favorable deal given to jailhouse informant who served as prosecutor's star witness at trial); *Bailey v. Rae*, 339 F.3d 1107 (9th Cir. 2003) (finding *Brady* violation where prosecution failed to disclose victim's therapist reports where victim's mental capacity was an element of the offense); *Benn v. Lambert*, 283 F.3d 1040, 1054 (9th Cir. 2002) (affirming grant of section 2254 petition where "impeachment material that was suppressed by the prosecution"); *Stevens v. Carlin*, 286 F. Supp. 3d 1092, 1098 (D. Idaho 2018) (granting section 2254 petition where prosecution withheld evidence concerning the chain of custody of victim's body).

The National Registry of Exonerations compiled by the University of Michigan, Michigan State, and U.C. Irvine law schools reports at least nine exonerations as a result of *Brady* violations since 2013 alone. *See* Nat'l Registry of Exonerations, *Recent Exonerations*, online at: https://www.law.umich.edu/special/exoneration/Pages/recentcases.aspx (accessed June 27, 2018). These cases

are just the tip of the iceberg: there will likely be far more revelations of *Brady* evidence withheld due to the recent advent of conviction integrity units by state and local entities, and there is much more withheld exculpatory evidence that may never be revealed at all. *See* Nat'l Registry of Exonerations, *Exonerations in 2017*, online at: https://www.law.umich.edu/special/exoneration/Documents/ProfessionalExonerators.pdf (accessed June 27, 2018) (discussing "rapid growth in the number of CIUs and CIU exonerations since 2007").

Under the panel opinion, victims of such prosecutorial misconduct in the future, like the petitioners in *Brown* and *Prince*, will be without a remedy. An initial federal habeas petition must filed within one year of "the date on which judgment became final by the conclusion of direct review" or collateral state review. *See* 28 U.S.C. § 2244(d)(1)-(2). If *Brady* material comes to light only after that time, then relief is barred under the panel's rule unless the petitioner can meet the "almost insurmountable" actual-innocence standard set forth in section 2244(b). *Douglas*, 560 F.3d at 1192. But petitioners have no control over when evidence withheld by prosecutors will come to light. *Brady* material is often not unearthed until a decade or more after a conviction, through conviction integrity units, public records requests, or simply luck. In *Haley v. City of Boston*, for example, the petitioner was found guilty of murder in 1972. 657 F.3d 39, 45 (1st Cir. 2011). It was not until more than thirty years later that new impeachment

evidence came to light after public records requests uncovered typed statements memorializing interviews with key witnesses. *Id.* Similarly, in *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013), which involved a 1990 murder conviction, new *Brady* material was revealed more than a decade after the conviction, and as of the date of this court's 2013 opinion in that case, "some evidence . . . [still] ha[d not] been produced." *Id.* at 1001.

These cases and other demonstrate that, through no fault of their own, petitioners often cannot raise *Brady* claims in their initial federal petition concerning exculpatory evidence yet to be revealed. The Supreme Court has cautioned courts to avoid "interpretation[s] of the [AEDPA] that would produce troublesome results, create procedural anomalies, and close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). Yet the panel's rule does exactly that: It closes the door to victims of prosecutorial misconduct who often literally could not have discovered their claims at the time of their initial federal petitions.

### B. The panel opinion creates perverse incentives for both prosecutors and petitioners' counsel.

The panel decision not only unfairly punishes victims of prosecutorial misconduct, but also creates harmful incentives for both petitioners (and their

counsel) and prosecutors. The panel decision forces petitioners to flood courts across this Circuit with unripe *Brady* claims. To avoid "saddl[ing] [her client] with a stringent standard of proof that is a function of the government's own neglect, or worse, malfeasance," slip op. at 30, a petitioner's attorney must raise *Brady* claims addressing guessed-at evidence that has not yet been revealed, and then hope that something turns up before the initial habeas proceeding concludes. It is likely, therefore, that the district courts across this Circuit will be flooded with unripe *Brady* claims as petitioners try to escape the harsh results of the panel opinion. *Cf. Runningeagle v. Ryan*, 686 F.3d 758, 769–71 (9th Cir. 2012) (holding a petitioner cannot state *Brady* claim by "merely speculat[ing] about what" exculpatory evidence may exist).

The incentives created for prosecutors are even more troubling. The panel opinion effectively inoculates prosecutors' offices from their *own* misconduct if they wait to reveal any exculpatory evidence until an initial federal habeas petition is on the books. This is problematic: A prosecutor who suppressed evidence and is facing renewed scrutiny into a decades-old conviction – possibly from a newly created conviction integrity unit (slip op. at 8), a public records request (*Halley*, 657 F.3d 39 at 45), or an evidentiary hearing (*Browning*, 875 F.3d at 476) – knows that dragging her feet just long enough will ensure that the ill-gotten conviction is secure. Members of this Court have recognized that "[a] robust and rigorously

enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence." *Olsen*, 737 F.3d at 630 (Kozinski, C.J., dissenting from denial of rehearing *en banc*). Yet the panel decision compounds these poor incentives by instructing prosecutors exactly how long to wait before revealing exculpatory evidence without risking relief for an unconstitutional conviction.

## CONCLUSION

The petition for rehearing *en banc* should be granted and the judgments of the district court reversed with instructions to permit the filing of the petitions for writ of habeas corpus.

Dated: July 2, 2018

Respectfully submitted,

By: /s/ *Rohit D. Nath*

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* National Association of Criminal Defense Lawyers in Support of Petitions for Rehearing and Rehearing *En Banc* complies with the type-volume limitation, because this brief is 9 pages and 2108 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: July 2, 2018

By: /s/ *Rohit D. Nath*
Rohit D. Nath

## STATEMENT OF THE PARTIES' CONSENT

In accordance with Federal Rule of Appellate Procedure 29(a), counsel reports that counsel to Appellants Brown and Prince and counsel to Appellees Muniz and Lizarraga have given consent to the filing of this amicus brief.

Dated: July 2, 2018

By: /s/ *Rohit D. Nath*
Rohit D. Nath

9th Circuit Case Number(s) 16-15442

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