No. _____

In the Supreme Court of the United States

TIMOTHY FILSON, WARDEN, *et al.*,
Petitioners,

v.

PAUL L. BROWNING,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED—CAPITAL CASE

The question presented is:

Whether the Ninth Circuit failed to adhere to the deferential requirements of review required by AEDPA when it relied on circuit precedent to define the contours of constitutional rights and merely substituted its own judgment for that of the Nevada Supreme Court by improperly engaging in independent fact-finding.

PARTIES TO THE PROCEEDING

Petitioner Timothy Filson is the warden of the Ely State Prison in Nevada, and substitutes Renee Baker, who was the named warden in the Court of Appeals. Petitioner Adam Paul Laxalt, Attorney General of the State of Nevada, is a party to the proceeding not listed in the caption. He joins this petition in full. Respondent Paul L. Browning is an inmate at Ely State Prison.

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Justice Robert Jackson famously said, about this Court, that "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring). Less well known is that he penned that memorable line while concurring in a judgment denying habeas relief. This trenchant observation about the role of the federal judiciary within our government was a shot across the bow of the *Brown* majority, warning them that their decision to consider the merits of a claim asserting a violation of the Sixth Amendment right to trial by jury in a federal habeas action would lead to upsetting the balance of interests at stake in federal habeas review, which had previously been narrowly limited to questions involving the jurisdiction of the state courts. *Id*. Justice Jackson's concern was based upon the reality that reasonable minds will often differ about how to resolve disputes that implicate provisions of the Constitution. And when this Court disagrees with how a state court resolved a constitutional issue, this Court only wins the dispute because it has the last word on the matter, not because its members have some superior sense of justice than their counterparts from state courts. *Id*.

In the decades that followed, Justice Jackson's prediction about the majority's ruling leading federal courts beyond the edge of the proverbial slippery slope proved accurate, ultimately prompting Congress to intervene through the adoption of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). While not completely prohibiting review of federal claims on the merits, AEDPA is designed to curtail

federal court overreach into matters where state courts have faithfully adhered to their duty to enforce relevant provisions of the Constitution of the United States. *Burt v. Titlow*, 571 U.S. 12, 15-16 (2013). Indeed, this Court has acknowledged that AEDPA codifies a solution to Justice Jackson's core concern from *Brown* by precluding federal habeas relief in the presence of room for fair-minded debate about whether this Court's then-existing precedents required a state court to reach a different result. *See*, *e.g.*, *Harrington v. Richter*, 562 U.S. 86, 102 (2012). Unless "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law," leaving no room for fair-minded debate on the issue, then federal courts must decline to intrude on a state's sovereign right to enforce its judgment. *Id*. at 103.

But just as the *Brown* majority failed to heed Justice Jackson's prophetic warning—doubtless from admirable but misguided motives—so too the lower federal courts, presumably for similar reasons, have struggled to heed the requirements of AEDPA. *See*, *e.g.*, *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) ("Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold."). This case presents another example of a lower federal court paying lip-service to AEDPA's requirements, while blatantly breaking the cardinal rules this Court has repeatedly outlined in its decisions summarily reversing lower court judgments granting habeas relief. First, the Ninth Circuit's decision in this case turns to

its own precedents to identify the boundaries of relevant federal constitutional principles. But worse, rather than asking whether this Court's holdings leave room for fair-minded debate about the Nevada Supreme Court's conclusions in this case, the panel majority engaged in its own factual analysis of the record, eliding the presumption of correctness that cloaks state court factual determinations under 28 U.S.C. § 2254(e)(1), and improperly substituted its judgment for that of the Nevada Supreme Court's.

As the dissent and the district court both concluded, the Nevada Supreme Court's analysis of Browning's claims under *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264 (1959), and *Strickland v. Washington*, 466 U.S. 688 (1984), was reasonable. And while the panel majority below may disagree with the correctness of the Nevada Supreme Court's decisions under *Brady* and *Strickland*, that is not enough to grant relief under AEDPA, especially where—like here—the federal court of appeals turned to its own precedent to define the contours of the Constitution and based its decision on its own independent factual determinations about the case. While this Court's constitutional precedents may be both final and infallible vis-à-vis the Nevada Supreme Court, the Ninth Circuit's precedents are not. This Court should summarily reverse the Ninth Circuit's judgment.

OPINIONS BELOW

The original opinion reversing the judgment of the district court and dissent were reported at *Browning v. Baker*, 871 F.3d 942 (9th Cir. 2017), but have since been withdrawn. The order denying rehearing, and the

amended opinion and dissenting opinion are reported at *Browning v. Baker*, 875 F.3d 444 (9th Cir. 2017). *See also* App. 1-100. The order and judgment of the United States District Court for the District of Nevada denying the petition are not reported. App. 101-203. The relevant opinion from the Nevada Supreme Court is published at *Browning v. State*, 91 P.3d 39 (Nev. 2004).

JURISDICTION

The Ninth Circuit entered judgment reversing the district court on September 20, 2017, and denied the petition for rehearing and rehearing *en banc* on November 3, 2017. App. 5-6. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides, in part, that: "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides that: "No State shall … deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides, in part, that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the

judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

I. Factual Background

Just after 4:00 PM on November 8, 1985, while napping in the back room of a jewelry store she owned with her husband Hugo, Josy Elsen was awoken by noises coming from the showroom of the store. *Browning*, 91 P.3d at 43; App. 8. Entering the showroom, she "saw a black man wearing a blue cap squatting over her husband holding a knife." *Id*. Josy ran out the back door to a neighboring store where she asked employees to call law enforcement. *Id*. A woman named Debra Coe returned to the store with Josy, and stayed with Josy and Hugo until law enforcement and medical personnel arrived a few minutes later. App. 102.

At trial, Josy testified that the man she saw stabbing her husband had hair that "was a little bit puffed out on the bottom." App. 64-65. Law enforcement tried to have her identify her husband's attacker in a photo line-up about a month later, but she was unable to do so, only saying that the individuals in pictures #1, #6, and #11 had hair similar to her husband's attacker. App. 9. Browning was in picture #5. App. 9. At trial, she did affirmatively identify Browning as the culprit. App. 9.

Ms. Coe also described a man she had seen running south from the Elsens' store. *Browning*, 91 P.3d at 44. "[H]e was wearing a blue cap, blue jacket, Levi's, and

tennis shoes; was about 27 years old and about six-feet tall; and had hair a little longer than the cap he was wearing and a mustache." *Id*. After they later arrested Browning, police brought Ms. Coe to a show-up identification and presented her with another individual, but she stated that he was definitely not the person she had seen. App. 65. Police then brought out Browning, who she identified as the person she had seen earlier in the day. App. 65. She indicated that his hair was matted down as if he had been wearing a hat. App. 65.

Charles Woods, owner of a jewelry store a few buildings to the south of the Elsens' store, also saw "a black man wearing a dark or blue cap and dark trousers, about six-feet tall, and weighing about 180 pounds" run by his store, coming from the direction of the Elsens' store. *Browning*, 91 P.3d at 44. Mr. Woods subsequently identified Browning as the person he had seen run by his store. *Id*.

Three officers arrived at the Elsens' store at nearly the same time: Officers Radcliff, Branon, and Robertson. App. 31, 123-25. At trial, Officer Radcliff testified that Hugo Elsen identified his attacker as a black man wearing a blue baseball cap. App. 13. Browning called Officer Branon to testify at trial, who gave a description of the suspect, including that the suspect had shoulder-length "Jheri curl" type hair, but Officer Branon did not say who provided that description. App. 15.

At the time of the murder, Randy Wolfe had been working on his landlady's car when he heard someone yelling at him from his apartment. App. 11. He went upstairs to find Browning sitting on a bed wearing a

blue cap that said "Hollywood." App. 11. When Randy asked Browning what he was doing, Browning told Randy that he had just robbed a jewelry store and that he thought he killed someone. App. 11.

Randy then told Browning he was going to get some heroin, and Browning asked Randy to buy him some too. App. 11. Upon leaving, Randy grabbed his wife, Vanessa, and told her to keep Browning occupied while he went to get the police. App. 11.

Vanessa indicated that when she entered Wolfe's room, Browning was shaking water off a knife, and a hat with the word "Hollywood" on it was on the floor. App. 13. There was a lot of jewelry on the bed. App. 103. She helped Browning remove tags from the jewelry, and Browning asked for help getting rid of things because he thought that he had just killed somebody. App. 103. Vanessa threw Browning's hat and shirt and some of the jewelry tags in a dumpster, and she put the knife that Browning had given her into a pizza box and hid it in a closet under the stairs. App. 67. Officers were able recover each of those items. App. 67-68.

Investigation of the scene revealed Browning's fingerprints on a broken shard of glass from the vendor-side door of a display counter and the top of another display counter. App. 68. There were also a series of bloody footprints leading from the victim's body to the front door of the store; however, the tread of the footprints did not match the footwear Browning was wearing at the time of his arrest. App. 68.

After officers took Browning to the police station, they handcuffed him in an interrogation room.

App. 166. Left alone momentarily, Browning was able to pick the lock on the handcuffs and attempted to escape. App. 166.

The jury ultimately found Browning guilty of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, burglary, and escape. App. 7, 17. Browning appealed and the Nevada Supreme Court affirmed his convictions and sentences. *Browning v. State*, 757 P.2d 351 (1988).

Browning then pursued post-conviction relief. Relevant to this proceeding, Browning sought to develop a claim of prosecutorial misconduct for not disclosing favorable evidence and a claim of ineffective assistance of counsel. He tied these claims to (1) the source of bloody footprints leading from Hugo Elsen to the door of the store, (2) allegations of an agreement between the State and Randy Wolfe for preferential treatment in exchange for his testimony in the case, and (3) Hugo Elsen's description of his attacker.

The state district court conducted multiple days of evidentiary hearings. During a hearing in 1999, Officer Branon testified that Hugo Elsen was able to describe his attacker as "a black man wearing a blue cap with loose curled wet hair." App. 102. Additionally, Officer Branon testified that when he arrived on the scene there were bloody footprints on the ground near Hugo Elsen. App. 102. When called as a witness, the trial prosecutor testified that he had not agreed to provide any benefit to Randy Wolfe in exchange for favorable testimony, but he did acknowledge that after Browning's trial he vouched for Wolfe during a sentencing hearing in an unrelated matter and helped Wolfe find a job. App. 22.

The state district court ultimately denied relief after entering findings of fact and conclusions of law. App. 105. Browning appealed. App. 105.

On appeal, the Nevada Supreme Court affirmed the denial of Browning's guilt phase claims, but granted relief with respect to his capital sentence. App. 105. The court denied Browning's ineffective assistance of counsel claims. First, the court denied Browning's challenge to his counsel's failure to interview Officer Branon about Hugo Elsen's description of his attacker because, despite concluding that counsel should have interviewed Officer Branon, the court determined that Browning had failed to establish actual prejudice from the failure to conduct the interview. *Browning*, 91 P.3d at 46. The court also concluded that counsel provided a reasonable strategic explanation for not further investigating the source of the bloody footprints after it was determined that the footprints did not match the shoes Browning was wearing at the time of his arrest. *Id*. The court further determined that counsel made a reasonable decision not to interview the Wolfes because (1) it was his practice not to individually interview witnesses, and (2) the defense's investigator had already obtained sufficient information to properly cross-examine the Wolfes. *Id*.

The court denied Browning's claims alleging that the State failed to disclose a purported deal between Randy Wolfe and the State because the court found the information was immaterial. *Id*. at 55. Addressing the claims with respect to nondisclosure of the footprint evidence and Hugo Elsen's description of his attacker, the court found *Brady* had not been violated because

that information was reasonably available to the defense through an interview of Officer Branon. *Id*.

II. The Proceedings Below

Following his state habeas proceedings, Browning filed a federal habeas petition that included claims under *Brady*, *Napue*, and *Strickland*, related to the bloody footprints, the State's purported deal with Randy Wolfe, and Hugo Elsen's description of his attacker. The federal district court denied relief after determining that that the Nevada Supreme Court reasonably applied this Court's precedents in denying Browning's claims. App. 116-25 (addressing claims regarding footprints), 131-36 (Wolfe's credibility), 147-50 (Hugo Elsen's identification of attacker).

In its order denying the petition, the district court granted a certificate of appealability (COA) on some of the *Brady*, *Napue*, and *Strickland* claims. App. 201. On appeal, the Ninth Circuit expanded the COA to include additional claims. App. 25 n.3, 29-30.

The Ninth Circuit issued a split decision with the panel majority reversing the district court's judgment in part, affirming in part, and remanding for proceedings consistent with the opinion. App. 63. In reaching its conclusion, the court initially affirmed the denial of Browning's *Napue* claims, as well as any challenge to Browning's conviction for escape. But the majority determined that Browning was entitled to relief under *Brady* and *Strickland*.

In a lengthy dissent, Judge Callahan criticized the majority for failing to adhere to the limited scope of review required by AEDPA. App. 63-100. The dissent addressed each of Browning's claims, explaining

how—under AEDPA—there is at least room for debate about the correctness of the Nevada Supreme Court's rulings, and repeatedly challenged the majority for making its own factual determinations in addressing the merits of Browning's claims. App. 64, 83, 89.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly admonished lower federal courts for using circuit precedent to define the contours of federal constitutional provisions and substituting their own judgment for the state courts'. The panel majority below followed this well-worn path, instead of properly and deferentially assessing whether the Nevada Supreme Court's decision on Browning's *Brady* and *Strickland* claims were reasonable and consistent with *this* Court's precedents. This case merits summary reversal.

I. The Majority Opinion Improperly Relies on Circuit Precedent to Define and Apply Relevant Constitutional Standards.

Time and again, this Court has reminded the lower courts that "clearly established federal law, as determined by the Supreme Court of the United States," means just that: lower courts are prohibited from relying on circuit precedent to assess constitutional claims under AEDPA. *See*, *e.g.*, *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013)) ("But Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.'").

The panel majority properly adhered to its duty to limit its review to this Court's holdings when affirming

the denial of Browning's claims under *Napue*. App. 28-29, 31-32, 36. But then it shifted to its own precedents to assess Browning's *Brady* and *Strickland* claims, invoking circuit precedent when addressing Browning's ability to satisfy different aspects of relevant constitutional standards. App. 42, 54-56. And the improper reliance on circuit precedent is compounded by the panel majority's failure to adhere to the deferential nature of AEDPA review, leading the court to grant relief where AEDPA dictates the opposite.

II. The Panel Majority Failed to Adhere to its Obligations Under AEDPA, Substituting the State Court's Judgment With its Own.

Rather than correctly assess the reasonableness of the Nevada Supreme Court's decision addressing Browning's claims under *Brady* and *Strickland*, the panel majority fell into the all-too-common trap of substituting its own judgment for the state court's. This is particularly concerning in light of Judge Callahan's step-by-step diagnosis of how the court departed from AEDPA. App. 63-100.

A. The panel majority's articulation of what AEDPA requires has, in part, been rejected by this Court.

The panel majority started its divergence from AEDPA by quoting a fifteen-year-old Ninth Circuit case explaining the Ninth Circuit's standard for the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1). The court stated that

> "'[a] state court's decision can involve an unreasonable application of Federal law if it either [(1)] correctly identifies the governing rule

> but then applies it to a new set of facts in a way that is objectively unreasonable, or [(2)] extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable.'"

App. 26-27 (quoting *Hernandez v. Small*, 282 F.3d 1132, 1142 (9th Cir. 2002)). But this Court has squarely rejected the second half of that articulation of the "unreasonable application" standard, and repeatedly acknowledged that state courts enjoy double deference in instances "where the precise contours of a specific right remain unclear …." *White v. Woodall*, 134 S. Ct. 1697, 1705-07 (2014) (internal quotation marks omitted); *see also Cullen v. Pinholster*, 563 U.S. 170, 189-90 (2011) (noting that AEDPA review of broadly defined tests like the standard for ineffective assistance of counsel is "doubly deferential").

Because the panel majority went on to engage in its own *de novo* review of Browning's claims, rather than applying AEDPA deference to the state court's opinion, it is not entirely clear which aspect of the *Hernandez* test the panel majority applied in its analysis. To the extent the panel majority based its decision on the second half of the *Hernandez* standard, the majority opinion conflicts with this Court's decision in *Woodall*. And even assuming the court sought to apply only the first half of the standard, the majority's analysis demonstrates that it merely substituted its judgment for the Nevada Supreme Court's, rather than deferring to the Nevada Supreme Court's reasonable application of broadly defined standards like the issue of materiality under *Brady* and the *Strickland* standard for ineffective assistance of counsel.

B. The Nevada Supreme Court reasonably resolved Browning's *Brady* claims.

A successful *Brady* claim has three components. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). First, the petitioner must identify favorable evidence. *Id*. at 281-82. Second, he must establish that the prosecution suppressed that evidence, whether intentionally or inadvertently. *Id*. at 282. And third, he must show that the favorable evidence was material, which is established by demonstrating that the new evidence creates a reasonable probability of a different outcome at trial. *Id*. 282, 289-90.

The panel majority determined that the Nevada Supreme Court unreasonably denied these claims by focusing on the first and third prongs of *Brady*. App. 30-51. But the majority failed to actually evaluate the reasonableness of the Nevada Supreme Court's analysis: it completely ignored the Nevada Supreme Court's determination that any information derived from Officer Branon was not "suppressed," and merely substituted its own judgment for the Nevada Supreme Court's determination that any information about the purported deal between Randy Wolfe and the prosecution was not material. And even assuming, notwithstanding these errors, that the Ninth Circuit should have reached the materiality of Officer Branon's testimony, the court improperly engaged in its own review of the record, rather than asking whether fair minds could disagree about whether the evidence was material.

1. The Nevada Supreme Court reasonably determined that the prosecution did not "suppress" favorable evidence related to Officer Branon.

The Nevada Supreme Court squarely addressed Browning's *Brady* claims regarding information that Officer Branon testified to during Browning's state habeas evidentiary hearing:[1] that there were bloody footprints near the victim when he arrived at the scene, and that the victim had stated that his assailant had curly, wet, shoulder-length hair, while Officer Branon was the source of the term "Jheri curl." The state court denied Browning's claim that the State had suppressed that information because trial counsel could have discovered that information merely by interviewing Officer Branon prior to trial. *Browning*, 91 P.3d at 55.

The panel majority below never assessed whether that conclusion was reasonable. Instead, the panel started its analysis by addressing whether the evidence was favorable, and then immediately jumped to determining whether the evidence was material. App. 30-51. By failing to assess whether the Nevada Supreme Court's determination on the issue of suppression was reasonable, the panel majority failed to adhere to the dictates of AEDPA, overlooking a significant point that undercuts the availability of habeas relief with respect to Officer Branon's testimony.

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[1] As the federal district court noted, Officer Branon's testimony was equivocal as to whether he actually shared this information with Officer Horn. App. 119-23.

This Court's holdings expressly recognize that the Constitution does not impose a duty requiring prosecutors to turn over every piece of information they learn about a case just because something they have discovered in their own review of the case might conceivably help the defendant. *United States v. Agurs*, 427 U.S. 97, 106-114 (1976) (discussing a prosecutor's duty to disclose favorable evidence and acknowledging that the Constitution does not compel disclosure of every fact that might possibly be helpful to the defense). In the absence of a specific discovery request from defense counsel, prosecutors have some discretion in deciding when disclosure becomes necessary. *Kyles v. Whitley,* 514 U.S. 419, 436-37 (1995). But because this Court has recognized that *Brady* imputes information known by law enforcement to the possession of the prosecutor, this Court has also recognized that prosecutors have a concomitant duty to learn of favorable evidence in the possession of other government agents. *Kyles*, 514 U.S. at 437.

What this Court has not clearly defined is how far the Constitution compels a prosecutor to go when searching for facts known to a law enforcement officer that might conceivably become favorable to the defense at some later date. Nor are Petitioners aware of any precedent of this Court establishing where a prosecutor's duties under *Brady* intersect with trial counsel's obligations to conduct a reasonable investigation of the case. Just as this Court has recognized that the prosecutor "alone can know what is undisclosed," *id*., often only the defense will know what strategic path it will follow up until the time of trial, leaving the prosecutors and law enforcement in the dark as to what information they may need to disclose.

As a result, defense strategies unknown to the prosecutor may well impact whether information later becomes favorable and material. That being the case, there must be some play in the joints between the prosecutor's duty to seek out exculpatory information that might be known by an investigating law enforcement agent, and defense counsel's obligation to make a reasonable investigation of the case.

This case presents a set of facts that emphasizes the absence of clear guidance in this area. Browning called Officer Branon as a witness at trial and could have interviewed him prior to trial. As the Nevada Supreme Court did here, various circuits have concluded that *Brady* does not apply where the exculpatory material was readily available to the defendant by other means, including through diligent investigation. *See*, *e.g.*, *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) ("[W]e find no *Brady* violation because Wilson was free to question Brill in preparation for trial."); *Lugo v. Munoz*, 682 F.2d 7, 9-10 (1st Cir. 1982) (noting that where evidence was available to a diligent defendant through other means, the prosecution's failure to disclose did not sufficiently undermine the fairness of the trial). The lack of clear guidance in this Court's holdings about whether *Brady* applies when the favorable information was readily available to the defendant through diligent investigation of the case, or even merely questioning the defendant's own witness, either creates an open question that precludes habeas relief or, at the very least, requires federal courts reviewing state criminal convictions to give state courts

broad deference until this Court provides more precise guidance on the issue.[2]

In light of the foregoing, Browning's *Brady* claims that focused on Officer Branon's evidentiary hearing testimony should fail because there is room for debate about whether this Court's precedents required the Nevada Supreme Court to determine that Browning satisfied the suppression prong of *Brady*.

2. The Nevada Supreme Court reasonably determined that the purported deal with Wolfe was not material.

The only remaining evidence to assess for materiality is the purported deal between Randy Wolfe and the State. While the Nevada Supreme Court determined that evidence implying the existence of a deal should have been disclosed to the defense, the court engaged in a detailed analysis of the record respecting Wolfe's credibility and ultimately determined that any information about a deal between Randy Wolfe and the State was immaterial. *Browning*, 91 P.3d at 55. The panel majority disagreed, but failed to set forth an analysis showing that the Nevada Supreme Court's determination to the contrary was objectively unreasonable.

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[2] As addressed below, the Nevada Supreme Court also reasonably resolved Browning's related ineffective assistance of counsel claims by concluding that (1) counsel made a reasonable strategic choice not to pursue additional information about the source of the bloody footprints, and (2) Browning did not suffer actual prejudice as a result of counsel's failure to interview Officer Branon regarding Hugo Elsen's description of his killer.

First the panel majority assumed that Randy Wolfe "*knew*" the prosecutor was going to help him in exchange for his testimony against Browning. App. 33 (emphasis in original). But the Nevada Supreme Court's decision indicating that the State must disclose "any evidence *implying* an agreement or an understanding" does not necessarily compel the conclusion that Randy Wolfe actually expected a benefit in exchange for his testimony. App. 33 (emphasis added). This was a factual conclusion of the panel majority's own invention

Additionally, the panel majority also appears to have assumed that *both* Wolfes knew of the purported agreement, without pointing to any evidence establishing that *Vanessa* Wolfe knew of the purported deal. App. 42. This point is important because the Wolfes both testified that at different times Browning independently informed them that he "thought" he killed someone while robbing a jewelry store. App. 11, 103. Thus, even assuming that Randy Wolfe expected some benefit for his testimony, Vanessa Wolfe's testimony corroborated Randy Wolfe's, and the panel majority does not identify any evidence suggesting Vanessa Wolfe believed the State would give her husband a deal if she testified for the State.

Most importantly, regardless of any duty to disclose the purported agreement, the panel majority did not apply AEDPA deference to the Nevada Supreme Court's determination on materiality. Rather than evaluating the reasonableness of the Nevada Supreme Court' ruling and adhering to the presumption of correctness under 28 U.S.C. § 2254(e)(1), the majority openly admitted that it was making its own credibility

determinations to determine whether it thought the jury would reach the same result. App. 42 n.12.[3] The court's suggestion that its proper role was to place itself "in the shoes of the jurors" and make its own factual determinations on the merits of a claim is clearly inappropriate for a federal court reviewing a state court judgment under 28 U.S.C. § 2254(d)(1). App. 42 at n.12.

C. The Nevada Supreme Court reasonably rejected Browning's *Strickland* claims.

As it did with Browning's *Brady* claims, instead of analyzing whether the Nevada Supreme Court's decision was reasonable, the panel majority conducted its own analysis of Browning's ineffective-assistance of counsel claims, and then deemed its view of the case as the only reasonable one. But a plain reading of what the majority did when assessing Browning's *Strickland* claims demonstrates that it merely substituted its judgment for the Nevada Supreme Court's. That is not

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[3] This last point creates a fundamental flaw in the entire materiality analysis, regardless of whether the court needed to include the evidence derived from Officer Branon's testimony. Additionally, the panel majority's improper factual determinations are inherently suspect: while the panel majority—unlike the district court, *see* App. 120—was willing to give full credit to Officer Branon's fourteen-year-old memory of the crime scene and what Hugo Elsen said to him, the panel majority completely discounted the other witnesses identifications. Also, because the materiality standard under *Brady* mirrors *Strickland*'s prejudice standard, and the majority essentially incorporated the materiality analysis into its determination of prejudice under *Strickland*, the flaws resulting from the majority's improper factual determinations infect its resolution of Browning's *Strickland* claims too.

a proper basis for granting habeas relief. *See*, *e.g.*, *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (acknowledging that even a showing of clear error is not enough to obtain habeas relief under AEDPA). Federal habeas relief is reserved for only those circumstances "when there could be no reasonable dispute that [the state courts] were wrong." *Id*.

1. The Nevada Supreme Court *reasonably* determined that defense counsel had a *reasonable* strategic explanation for not investigating the source of the bloody footprints.

The Nevada Supreme Court denied Browning's claim that his attorney was ineffective for not investigating the source of the bloody footprints because defense counsel plausibly stated that once he learned that Browning's shoes did not match the footprints, he strategically chose not to investigate the source of the footprints any further. *Browning*, 91 P.3d at 46. The panel majority rejected the Nevada Supreme Court's analysis of the claim but did so in a way that is contrary to this Court's clear directives on assessing counsel's performance.

The panel majority broadly concluded that counsel's performance in preparing for trial was inadequate, and then further nitpicked counsel's explanation for not interviewing Officer Branon about the bloody footprints. App. 53, 56-57. As this Court has recognized before, federal courts on habeas review of state-court convictions must be very careful not to Monday-morning quarterback and second-guess trial counsel's performance. A hyper-technical, hindsight analysis of counsel's performance is exactly what courts

are *not* to do when applying *Strickland*. *See*, *e.g.*, *Bell v. Cone*, 535 U.S. 685, 698 (2002) (reiterating *Strickland*'s requirements to eliminate hindsight and strongly presume that counsel's actions "might be considered sound trial strategy") (internal quotation marks omitted).

The question to be answered under *Strickland* is not a focus on whether counsel could have done something better than he did (especially in hindsight), but whether what counsel did was *reasonable* based on what was known to counsel at the time he made the decision. *Id*. And when asking whether what counsel did was reasonable, federal courts on habeas review are to begin with a strong presumption that counsel provides reasonably effective assistance. *Id*.

That is precisely what the Nevada Supreme Court did here, determining that counsel made a *reasonable* strategic choice not to *further* investigate the source of the footprints *after* he learned that the footprints did not match Browning's shoes. Counsel wanted to preserve ambiguity about the source of the footprints so that he could argue that the footprints, which were proved to be different than the shoes his client had on when arrested, were made by the "real killer." App. 92.

In contrast, the panel majority's analysis of this issue does not demonstrate that there is no room for fair-minded debate about how to apply *Strickland* in this case. Instead of giving the Nevada Supreme Court the double deference that is owed when reviewing *Strickland* claims under AEDPA, the panel majority engaged in its own review of the record and a hair-splitting analysis of how counsel could have parsed his questions just right to get the answer he wanted from

Officer Branon without sacrificing the ambiguity defense based on the "real killer" making the bloody footprints. App. 57. But, first, as Judge Callahan noted in her dissent, there is no guarantee that Officer Branon would have answered defense counsel's questions the way the panel majority assumed he would. App. 96 n.13. And, second, the panel majority's decision is based on the very sort of hindsight analysis this Court warned against when deciding *Strickland*. *See*, *e.g.*, *Bell*, 535 U.S. at 701-02 (finding counsel's reasoning for waiving closing argument "a tactical decision about which competent lawyers might disagree" and reiterating *Strickland*'s requirements to "indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance" and to avoid "the harsh light of hindsight").

The Nevada Supreme Court reasonably applied *Strickland*'s deferential standard in deciding that counsel provided a reasonable strategic explanation for not investigating the source of the bloody footprints. The Ninth Circuit failed to give *either* Browning's trial counsel *or* the Nevada Supreme Court any deference.

2. The Ninth Circuit failed to defer to the Nevada Supreme Court on counsel's decision not to interview the Wolfes, but nevertheless agreed that the issue was irrelevant.

The panel majority also failed to follow AEDPA in analyzing Browning's challenge to counsel's decision not to interview the Wolfes before trial. It improperly disregarded factual determinations that the Nevada Supreme Court made in relation to counsel's reasoning for not interviewing the Wolfes. But the panel majority

did ultimately recognize that no prejudice resulted from the alleged deficiency because counsel would not have learned anything new by interviewing the Wolfes.

The Nevada Supreme Court provided *two* reasons for deciding that counsel did not perform deficiently in not interviewing the Wolfes before trial. First, the court recognized that it was reasonable for counsel to engage in a practice of not interviewing witnesses himself. *Browning*, 91 P.3d at 46. Second, the court concluded that defense counsel's investigator had already compiled sufficient information about the Wolfes—"their version of events, their drug usage, their informer status, their lying, and their convictions and arrests"—to allow for adequate cross-examination. *Id*.

The Ninth Circuit agreed with the Nevada Supreme Court that counsel's decision not to personally interview witnesses was reasonable, but then suggested that counsel's decision not to interview the Wolfes himself did not explain why counsel did not have his investigator interview the Wolfes. App. 58. But the panel majority did not address the Nevada Supreme Court's factual determination that the investigator had already collected adequate information for proper cross-examination of the Wolfes, which indicates the Nevada Supreme Court went the extra step that the panel majority suggested the Nevada Supreme Court failed to address: because the investigator had already collected enough information to properly cross-examine the Wolfes, it was reasonable to not expend resources on an unnecessary interview.

More importantly, the Ninth Circuit agreed with the Nevada Supreme Court on the issue of prejudice, concluding that an interview of the Wolfes would not have produced any fruitful information because the Wolfes would have denied the one thing that Browning suggests counsel would have discovered from interviewing Randy Wolfe. App. 61. Accordingly, even if the Nevada Supreme Court had unreasonably resolved the deficient performance prong, counsel's failure to have the Wolfes interviewed before trial does not add anything to the calculus because the Ninth Circuit correctly concluded that counsel's deficiency did not create any prejudice to Browning.

3. The Nevada Supreme Court reasonably rejected Browning's claim regarding counsel's failure to interview Officer Branon about the victim's description of his assailant.

The Nevada Supreme Court reasonably determined that Browning failed to establish actual prejudice on his claim regarding his counsel's failure to question Officer Branon about Hugo Elsen's description of the suspect. *Browning*, 91 P.3d at 46.

The Nevada Supreme Court acknowledged that the issue of whether Hugo Elsen's killer had a "Jheri curl" or an "afro" was "extensively explored at trial," and determined that the distinction of whether Hugo Elsen or Officer Branon called the hair-style a Jheri curl would not have created a reasonable probability of a different outcome. *Id*. Rather than ask whether that determination was reasonable, the panel majority incorporated its fundamentally flawed materiality analysis into its analysis of the *Strickland* claim.

App. 60-62. It is not the role of the federal courts to make independent factual determinations when addressing the merits of constitutional claims under AEDPA. The panel majority exceeded its authority in reviewing this case by substituting its judgment for the Nevada Supreme Court's. This Court should grant the petition and reverse the Ninth Circuit's judgment.

CONCLUSION

The Ninth Circuit characterized the State's case against Browning as unable to withstand the weight of ensuring that Browning received a fair trial. But it is the Ninth Circuit's analysis that is unable to withstand the deferential weight of AEDPA. In line with Justice Jackson's concern in *Brown*, there is room for fair-minded debate about whether this Court's precedents required the Nevada Supreme Court to reverse Browning's conviction. But unlike in 1953, Congress has expressly prohibited federal courts from granting habeas relief under such circumstances. This Court should summarily reverse the Ninth Circuit's judgment.

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