CAPITAL CASE

No. _____

In the Supreme Court of the United States

IN RE CHARLES D. RABY,

PETITIONER

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

PETITION FOR A WRIT OF CERTIORARI AND ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

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September 3, 2019

CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Charles Raby, a death-row inmate convicted of murder without any physical evidence tying him to the crime, moved the Court of Appeals for the Fifth Circuit for authorization to file a second habeas petition based on newly discovered evidence that blood not belonging to Petitioner or the murder victim was found under the victim's fingernails. While "readily acknowledg[ing] that the previously unavailable evidence muddies the waters," the Fifth Circuit denied the motion for authorization. *In re Raby*, 925 F.3d 749, 759 (5th Cir. 2019). Exceeding its jurisdiction at the gatekeeping stage, the court concluded that "Raby does not *establish* that if the newly discovered evidence had been available to him in 1994, no reasonable juror would have voted to convict." *Id.* at 760 (emphasis added).

The Fifth Circuit's jurisdiction in this matter was limited to deciding the preliminary question of authorization to file a successive habeas petition; instead, it decided the merits of the habeas petition. Under 28 U.S.C. § 2244(b)(3)(C), a movant seeking a circuit court's authorization to file a successive habeas petition must only make "a prima facie showing that the application satisfies the requirements of this subsection." The district court will then "dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." 28 U.S.C. § 2244(b)(4). Petitioner is not seeking review of the Fifth Circuit's premature determination that he has not met the § 2244 requirements for a successive habeas

petition; indeed, the Fifth Circuit had no jurisdiction to reach that decision. The Court's intervention is needed to clarify, as a matter of first impression, a circuit court's jurisdiction upon reviewing a motion for authorization.

The questions presented are:

1. Whether 28 U.S.C. § 2244(b)(3)(C) permits a court of appeals, when ruling on a motion for authorization to file a successive habeas petition based on newly discovered evidence, to reach fact issues raised by that evidence.

2. Whether a movant seeking authorization from the court of appeals to file a successive habeas application under 28 U.S.C. § 2244(b)(3) based on newly discovered evidence must *establish* that, had that evidence been available at trial, no reasonable juror would have voted to convict.

3. Whether a court of appeals has jurisdiction to usurp the district court's statutory responsibility for resolving, in the first instance, whether a petitioner has *shown* he is authorized to pursue habeas corpus relief in a successive habeas corpus proceeding, or whether the jurisdiction of the court of appeals is limited to its statutory role of determining whether there is a *prima facie* case for such relief.

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the Petition. Petitioner is Charles D. Raby. Respondent is Lorie Davis, Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

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PETITION FOR A WRIT OF CERTIORARI AND ORIGINAL PETITION FOR A WRIT OF HABEAS CORPUS

Charles Raby ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, Petitioner petitions this Court to exercise its original jurisdiction to issue a writ of habeas corpus.

OPINIONS BELOW

The unpublished November 27, 2002 Memorandum and Order of the United States District Court for the Southern District of Texas denying the Petition for Writ of Habeas Corpus (*Raby v. Cockrell*, 4:02-cv-0349, Dkt. 20 (S.D. Tex. Nov. 27, 2002)) is reproduced at Pet. App. A, and the same court's unpublished denial of reconsideration (*Raby v. Cockrell*, 4:02-cv-0349, Dkt. 23 (S.D. Tex. Dec. 30, 2002)) is reproduced at Pet. App. B. The October 15, 2003 opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of the Petition for Writ of Habeas Corpus (*Raby v. Dretke*, 78 F. App'x 324 (5th Cir. 2003)) is reproduced at Pet. App. C, and this Court's 2004 denial of certiorari (*Raby v. Dretke*, 542 U.S. 905 (2004)) is reproduced at Pet. App. D.

The June 4, 2019 opinion of the United States Court of Appeals for the Fifth Circuit denying Petitioner's motion for authorization to File a Successive Habeas Petition (*In re Raby*, 925 F.3d 749 (5th Cir. 2019)) is reproduced in Pet. App. E.

JURISDICTION

The decision of the Fifth Circuit denying Petitioner's motion for authorization to file a successive habeas petition was entered on June 4, 2019. Pet. App. E. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Under 28 U.S.C. § 2244(b)(3)(E), "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." However, the subject of Petitioner's Writ of Certiorari is not the Fifth Circuit's denial of his motion for authorization, but instead the Fifth Circuit's extra-jurisdictional end-run around the statutorily mandated procedure in 28 U.S.C. § 2244(b)(2)(B)(ii). In addition, as Justice Souter recognized in *Felker v. Turpin*, § 2244(b)(3)(E) "does not necessarily foreclose all of [the Court's] appellate jurisdiction." 518 U.S. 651, 667 (1996) (Souter, J., concurring) (citing as examples "28 U.S.C. § 1254(2) (certified questions from courts of appeals); § 1651(a) (authority to issue appropriate writs in aid of another exercise of appellate jurisdiction); this Court's Rule 20.3 (procedure for petitions for extraordinary writs)").

Moreover, Justice Souter added in *Felker* that, "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed," which could happen if "the courts of appeals adopted divergent interpretations of the gatekeeper standard," then "the question whether the statute exceeded Congress's Exceptions Clause power would be open." *Id.* As discussed below, the courts of appeals have broadly divergent interpretations of the gatekeeper standard for successive habeas petitions under § 2244(b)(3)(C).

With regard to Petitioner's Original Petition for Writ of Habeas Corpus, he satisfies Rule 20.3. Rule 20.3 requires a petitioner seeking a writ of habeas corpus to demonstrate that (1) "adequate relief cannot be obtained in any other form or in any other court"; (2) "exceptional circumstances warrant the exercise of this power"; and (3) "the writ will be in aid of the Court's appellate jurisdiction." Further, this Court's authority to grant relief is limited by 28 U.S.C. § 2254, and any considerations of a second petition must be "inform[ed]" by 28 U.S.C. § 2244(b). *See Felker*, 518 U.S. at 662-63.

Adequate relief for the Fifth Circuit's extra-jurisdictional actions cannot be pursued anywhere but in this Court. To the extent that this Court determines that a petition for writ of certiorari from the Fifth Circuit's denial of the motion for authorization is an improper vehicle for review in this Court, then the only remaining avenue for relief is for this Court to employ its original jurisdiction and grant a writ of habeas corpus. For the same reasons, a writ would be in aid of the Court's jurisdiction.

Exceptional circumstances exist to warrant the exercise of original jurisdiction. First, this case presents a unique opportunity to address screening procedures to ensure that circuit courts act within their authority and jurisdiction, which procedures this Court has never examined in the 23 years since they were enacted. Second, this case arises from, and exemplifies the injustice of, the Wild West of the 1990's Harris County District Attorney's Office; the heyday of malfeasance by the Houston Police Department ("HPD") Crime Lab, which became known as the worst

of its kind in the country; and the darkest years of Texas indigent appeal representation. Third, in a case involving no physical evidence tying Petitioner to the crime, a contradictory and contradicted custodial statement, and a weak State theory on motive (the victim was a mere acquaintance), Petitioner has presented uncontradicted evidence that someone else left blood under the victim's right-hand fingernails and DNA under her left-hand fingernails. No court has reviewed Petitioner's habeas corpus claims regarding this evidence.

Finally, any consideration of this petition would be "inform[ed]" by 28 U.S.C. § 2244(b) because no preliminary screening has yet occurred. The Fifth Circuit issued only a merits decision, circumventing the authority of the district court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix F reproduces the Exceptions Clause to the United States Constitution, Const. Art. III, § 2, Cl. 2; the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; and 28 U.S.C. § 2244.

STATEMENT OF THE CASE

A. Introduction

In ruling on Petitioner's motion for authorization to file a successive habeas petition under 28 U.S.C. § 2254, the Fifth Circuit ignored the applicable "prima facie showing" set forth in 28 U.S.C. § 2244(b)(3)(C), and improperly denied the motion on the grounds that Petitioner "does not establish that if the newly discovered evidence had been available to him in 1994, no reasonable juror would have voted to convict." *In re Raby*, 925 F.3d at 759-60.

Petitioner, a death-row inmate convicted of the murder of Edna Franklin without any physical evidence tying him to the crime, sought authorization from the Fifth Circuit under 28 U.S.C. § 2244 to file a successive habeas petition in the United States District Court for the Southern District of Texas. Petitioner based his successive habeas petition primarily on newly discovered evidence that blood not belonging to him or Franklin was found under Franklin's fingernails—evidence not presented at Petitioner's trial. *See* Offense Rep. at 014, Proposed Successive Petition for a Writ of Habeas Corpus at 25 (henceforth "Proposed Pet."); *In re Raby*, 925 F.3d 749 (5th Cir. 2019) ("Description of Body" section of Offense Report described Franklin's "fingernails [as] long and there [was] blood caked underneath the nails").[1] In his successive habeas petition, Petitioner claimed that the State destroyed exculpatory evidence that is no longer available for testing in violation of *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988); that the Houston Police Department ("HPD") crime lab analyst falsely referred to exculpatory serological results as "inconclusive," in violation of *Giglio v. United States*, 405 U.S. 150 (1972); that the State withheld material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and that Petitioner is actually innocent, and as such is confined in violation of the Eighth and Fourteen Amendments.

[1] The proposed successive petition and its exhibits were attached to the Motion for Order Authorizing Filing and Consideration of Second Petition for Writ of Habeas Corpus as an appendix. Petitioner cites to facts as presented in the proposed successive petition by citing to the exhibit name and the page number on which that exhibit was cited.

A claim based on newly discovered evidence that is presented in a successive habeas corpus application under 28 U.S.C. § 2254, and was not presented in the prior application, shall be dismissed unless "(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244 (b)(2)(B).

However, at the motion for authorization stage, a petitioner's burden is to make only "a *prima facie showing* that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C) (emphasis added). The Fifth Circuit ignored this statutory procedure by going beyond the *prima facie* showing to make a determination that must be made in the first instance by the district court, thereby exceeding its jurisdiction. Because the Fifth Circuit ignored the statutory procedure governing successive applications, it short-circuited the factual development procedure by which a petitioner is permitted to make a record under § 2244.

B. Prior Proceedings

On October 15, 1992, Franklin was found dead in her home by one of her two adult grandsons, both of whom lived with her. Pet. App. A at 2. The assailant had stabbed Franklin with a knife that was never recovered. *Raby v. Davis*, No. 4:02-cv-00349 (S.D. Tex. Nov. 13, 2017), Dkt. 37-4, p. 149 (Trial Tr.). Petitioner was a friend of Franklin's grandsons and was seen in Franklin's neighborhood on the day of the

crime; but no physical evidence tied Petitioner to the crime. Pet. App. A at 3. Under coercive circumstances, Petitioner signed a police-drafted custodial statement with all the hallmarks of a persuaded false confession.[2]

After a botched suppression hearing, and a trial at which defense counsel put up little resistance to the State's custodial statement and concluded its defense by conceding guilt,[3] a Harris County, Texas jury convicted Petitioner of capital murder and sentenced him to death on June 17, 1994. After his conviction, Petitioner received incompetent counsel, including in the form of a habeas petition that contained only record claims not properly raised in state habeas corpus proceedings. Petition for Writ of Habeas Corpus, *Ex parte Raby*, No. 9407130-A (248th Dist. Ct., Harris County, Tex., Nov. 14, 2000).[4] The state courts rejected those claims. *Ex parte Raby*, No. 9407130-A (248th Dist. Ct., Harris County, Tex., Nov. 14, 2000); *Ex parte Raby*, No. 48131-01 (Tex. Crim. App. Jan. 31, 2001).

Current counsel began representing Petitioner in federal habeas corpus proceedings. Petitioner's first federal habeas petition focused primarily on the defective and disastrous performance of Petitioner's trial and initial state habeas counsel. The federal district court denied relief, a certificate of appealability, and a motion to alter or amend the judgment. Pet. App. A and B. The Fifth Circuit denied

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[2] *See* Proposed Pet. at 67-78 (discussing the coercive circumstances of Petitioner's confession).

[3] *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), Dkt. 31-23 at 7–9 (Trial Tr.).

[4] State habeas counsel's waiver of Petitioner's non-record claims, an error that doomed his first federal habeas petition, was a product of the above-referenced darkest period in Texas' indigent habeas representation. *See* Amici Curiae Brief of the Capital Punishment Center of the University of Texas School of Law in Support of Petitioner, No. 18-8214 at 4–20 (detailing significant, systemic problems with Texas' indigent habeas representation in that time period).

a certificate of appealability, and this Court denied certiorari. Pet. App. C and D. The claims in Petitioner's proffered second federal habeas petition were not in his first petition.

Petitioner's current claims are predicated on newly discovered blood evidence that was not turned over to Petitioner before trial and post-conviction DNA evidence. On November 19, 2002, while the federal habeas petition was pending in the district court, Petitioner filed a motion for post-conviction DNA testing. The state district court denied the motion but, on June 29, 2005, the Texas Court of Criminal Appeals ("TCCA") reversed and ordered DNA testing of three items from the crime scene: (1) bloodstains on a pair of women's underwear found near Franklin, (2) Franklin's blood-caked fingernail clippings, and (3) Franklin's bloodstained nightshirt. *Raby v. State*, No. AP-74,930, 2005 WL 8154134, at *8 (Tex. Crim. App. June 29, 2005) (not designated for publication). After the TCCA ordered the DNA tests, evidentiary hearings failed to resolve the whereabouts of the decedent's nightshirt and the underwear found near her body.[5] Because the State lost critical crime-scene evidence, only Franklin's fingernail clippings were ultimately available for DNA testing.

What remained of Franklin's fingernail clippings was sent to Serological Research Institute, an accredited laboratory capable of performing Y-Chromosome Short Tandem Repeat ("STR") DNA testing. *See* Jan. 16, 2009 DNA Hr'g Tr. at 35:3–8, Proposed Pet. at 47. By isolating STR-DNA markers found only on the Y-

[5] At the evidentiary hearing, the various departments and offices handling evidence each disavowed possession of the missing evidence. *See* Tr. to Mar. 10, 2006 DNA Hr'g 10-11, 18-19, 29, 47, 63, 85, 88-89, 97, 105-109, Proposed Pet. at 45 n.133. To this day, the State has been unable to produce or account for the critical missing crime-scene evidence.

chromosome, STR DNA testing has proven particularly useful in cases in which a male perpetrator's DNA might otherwise be "overwhelmed" by DNA material from a female victim in a "mixed" sample. Proposed Pet. at 48. In September 2006, the DNA testing demonstrated the presence of DNA from one, or possibly two, males underneath Franklin's fingernails of the decedent and conclusively excluded Petitioner as the source of that DNA. See Raby DNA Test Results, Proposed Pet. at 48-49.

Testing of Franklin's fingernail clippings revealed two vital pieces of evidence never heard by Petitioner's original jury: (1) a partial male DNA profile that was not Petitioner's was found under Franklin's left-hand fingernails; and (2) blood that was also foreign to Petitioner and Franklin was found under Franklin's right-hand fingernails. *See* Raby DNA Test Results, Proposed Pet. at 48-49; Aug. 27, 2009 DNA Hr'g Tr. at 47:5-47:25, Proposed Pet. at 46; Jan. 16, 2009 DNA Hr'g Tr. at 63:6-15, 124:19-25, 125:1-6, 126:3-14, Proposed Pet. at 49. The testing also excluded Franklin's grandsons as the source of that DNA, thus excluding the only two males with whom the elderly Franklin had any regular or intimate contact. *See* DNA Test Results, Proposed Pet. at 49-50.

Biological material from under a victim's fingernails, especially that of drawn blood, is highly indicative of the attacker because casual contact is unlikely to deposit DNA beneath a person's nails. Such deposits tend to remain intact even when submerged in water or otherwise disturbed. *See* Proposed Pet. at 50 nn.152-53.

After DNA testing was complete, the state district court held evidentiary hearings in 2009 regarding the results of the DNA testing, during which the State took the remarkable step of hiring an expert to scrutinize the serology work in the case. The State's serologist ultimately testified *on direct examination* to two serious problems with the work of Joseph Chu, an analyst with the HPD cime lab. First, Chu failed to follow industry standards in subjecting Franklin's fingernail clippings to an initial forensic test that consumed most of the evidence. Second, Chu testified falsely in calling his results inconclusive, because the presence of blood group substance A in the sample, foreign to both Petitioner and Franklin, was conclusive. *See* Aug. 27, 2009 DNA Hr'g Tr. at 38:23-39:5, 39:19-40:5, 44:1-6, 59:22-25, Proposed Pet. at 11-12 n.20. Because Petitioner has blood type O and Franklin's blood type was B, the blood found was neither his nor hers. Amended Findings of Facts at 5-6 ¶¶ 17-20. Indeed, the array of malfeasance and/or incompetence that infected Petitioner's case led to the shuttering of the HPD crime lab in 2003. *See* Adam Liptak and Ralph Blumenthal, *New Doubt Cast on Testing in Houston Police Crime Lab*, N.Y. TIMES, Aug. 5, 2004 (describing, *inter alia*, shuttering of the lab).[6] This revelation, combined

[6] Article available at https://www.nytimes.com/2004/08/05/us/new-doubt-cast-on-testing-in-houston-police-crime-lab.html. The article also describes a later exoneration following the discovery that "a crime laboratory official—because he either lacked basic knowledge of blood typing or gave false testimony—helped convict an innocent man of rape in 1987." *Id.* Petitioner's case also involves an HPD crime lab analyst whose work violated even basic principles of serology, to the benefit of the State.

The New York Times called the lab "the worst in the country" during this period, citing both poor skills and bias. Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, N.Y. TIMES, Mar. 11, 2003 (available at https://www.nytimes.com/2003/03/11/us/houston-dna-review-clears-convicted-rapist-and-ripples-in-texas-could-be-vast.html).

with the publication of the Michael Bromwich Reports,[7] which revealed that "inconclusive" was code among HPD crime lab analysts for "exculpatory," led to the discovery of all four claims at issue here.

Despite this evidence of Chu's malfeasance, the state district court ruled against Petitioner on January 28, 2013. Amended Findings of Facts Pursuant to Article 64 of the Texas Code of Criminal Procedure, *State v. Raby*, No. 9407130 at 1 (248th Dist. Court Harris County, Texas, Jan. 19, 2013) ("Amended Findings of Facts"). Petitioner appealed, arguing that the DNA and blood test results were powerful evidence of innocence and that the state district court should have considered other evidence challenging the conviction, including the circumstances surrounding Petitioner's custodial statement. On April 22, 2015, the TCCA affirmed the state district court's findings, concluding *inter alia* that the state district court properly excluded the evidence, which "would be more properly raised in Article 11.071 habeas proceedings." *Raby v. State*, No. AP-76,970, 2015 WL 1874540, at *2 (Tex. Crim. App. Apr. 22, 2015) (not designated for publication).

Petitioner next filed a second application for state habeas corpus relief on June 10, 2016. On May 17, 2017, the TCCA dismissed the application as an abuse of the

[7] The "Bromwich Reports" were the result of an independent investigation led by Michael R. Bromwich, who was hired by a Stakeholders Committee created by the HPD Chief in 2004. In brief summary, this independent investigation led to the publication of seven different reports and hundreds of pages documenting massive mismanagement and problematic policies, testing, and analysts at the HPD Crime Lab and Property Room. Chu featured prominently in these reports. The Bromwich reports and the history of that investigation are available at http://www.hpdlabinvestigationorg/about .htm#From%20Home. *See also* Section III.E.3 of Proposed Pet. at 40 (describing Bromwich report findings).

writ in a *per curiam* order without legal analysis and over the dissent of Justice Elsa Alcala. *Ex parte Raby*, No. WR-48131-02 (Tex. Crim. App. May 17, 2017).

Following the TCCA's refusal to hear Petitioner's second habeas application, on August 4, 2017, Petitioner filed a motion for relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Petitioner sought merits review of his previously defaulted claims based on, *inter alia*, this Court's decisions in *Buck v. Davis*, 137 S. Ct. 759 (2017), *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 566 U.S. 1 (2012). The federal district court denied Petitioner's motion. *Raby v. Davis*, H-02-349, Dkt. 44 (S.D. Tex. Apr. 6, 2018). Petitioner's efforts to appeal the federal district court's order were also unsuccessful. *Raby v. Davis*, 907 F.3d 880 (5th Cir. 2018).

The discovery of materially misleading testimony and suppressed evidence bearing directly on Petitioner's guilt or innocence formed the factual basis for the second state and federal habeas petitions. These claims, and the facts supporting them, have yet to be heard on the merits. Thus, to date, Chu has never been summoned to testify about his malfeasance in Petitioner's case.

C. Motion for Authorization to File Successive Habeas Petition

After the conclusion of proceedings related to Petitioner's Rule 60(b)(6) motion, on December 21, 2018, Petitioner filed in the Fifth Circuit a Motion for Order Authorizing Filing and Consideration of Second Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254, along with a copy of Petitioner's proposed successive petition. The proposed successive petition sought relief on four separate grounds: the State

withheld material, exculpatory evidence at trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); the State's crime lab analyst knowingly gave false testimony at trial by referring to exculpatory blood-typing results as "inconclusive" in violation of *Giglio v. United States*, 405 U.S. 150 (1972); the State destroyed exculpatory evidence from Franklin's fingernail clippings in violation of *California v. Trombetta*, 467 U.S. 479 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988); and Petitioner is actually innocent, such that his confinement offends the Eighth and Fourteenth Amendments, and his execution would be constitutionally intolerable.

Brady. *Brady* imposes an affirmative prosecutorial duty "to *learn* of any favorable evidence known to others acting on the government's behalf in the cases, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added). Here, the State did not disclose to defense counsel at trial the blood-typing evidence performed by the HPD crime lab. The State's failure to produce the favorable and exculpatory results of the blood-type testing, which indicated the presence of blood on Franklin that could not belong to her or Petitioner, violated Petitioner's constitutional rights. Chu also failed to disclose that he discovered no blood on any of Petitioner's clothes, a fact that by itself is exculpatory and contradicted Petitioner's custodial statement, endorsed by the State at trial.

Giglio. The Due Process Clause prohibits the State from knowingly presenting false testimony as well as failing to correct it. *United States v. Thompson*, 709 F. App'x 758, 763 (5th Cir. 2017) (citing *Giglio*, 405 U.S. at 153), *cert. denied*, 138 S. Ct. 934 (2018). Petitioner sought relief under *Giglio* based on three extreme instances of false

testimony at trial: Chu's knowingly false testimony that the results of his blood-type testing were inconclusive; an HPD sergeant's knowingly false testimony that there was nothing incriminating in the blood-typing results; and Chu's knowing failure to disclose that testing revealed no blood on the clothes that HPD believed Petitioner was wearing the night of the murder. There is far more than a reasonable likelihood that the false testimony could have affected the jury's verdict.

Trombetta and *Youngblood*. In using an improper method of blood typing that unnecessarily consumed much of the biological material contained under Franklin's fingernails, the State violated Petitioner's due process rights and caused irreparable damage. The State's misconduct ensured that minimal biological material was available for subsequent additional DNA testing; the DNA lab was ultimately unable to pull any DNA profile from the biological material from Franklin's right hand. The State's needless consumption of the fingernail clippings prevented Petitioner from proving a DNA match to the profile derived from Franklin's left hand, which harm was magnified by its loss of critical crime-scene evidence—Franklin's nightshirt and underwear.

Freestanding Actual Innocence Claim. A freestanding actual innocence claim is cognizable when a state attempts to execute a person who is probably innocent in light of all the evidence and who no longer has any state avenue open for relief on his actual innocence claim. Petitioner's conviction was based primarily on a police-drafted custodial statement and the testimony of a single witness who saw someone hopping Franklin's fence on the night of the murder but could not identify him as

Petitioner. The State's other evidence tended to show that Franklin was murdered and that Petitioner was in her neighborhood on the day of her death; the evidence did not show that Petitioner was the perpetrator. There were no eyewitnesses, there was no murder weapon, there was no blood on Petitioner's clothes or person, and Petitioner bore no signs of a defensive struggle. Because Petitioner's new evidence establishes that he is probably innocent, he is entitled to relief based on a freestanding actual innocence claim, even in the contrasting light of any evidence of guilt.

Petitioner's motion for authorization raised each of these important state misconduct claims in federal court for the first time. These claims were eligible for review under 28 U.S.C. § 2244(b)(2)(B) because Petitioner pled a *prima facie* case that they could not have been raised with reasonable diligence in the original petition; and the facts underlying these claims, when viewed in light of the evidence as a whole, unequivocally prove by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found Petitioner guilty of the underlying offense.

D. Denial of Motion for Authorization

On June 4, 2019, the Fifth Circuit denied Petitioner's Motion for Order Authorizing Filing and Consideration of Second Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, finding that Petitioner did not meet the standard to warrant a second or successive petition. *In re Raby*, 925 F.3d at 752. The Fifth Circuit correctly articulated the standard for a motion for authorization of a successive petition:

> We permit the filing of a successive petition only if we conclude that Raby's application makes a *prima facie* showing that it satisfies the strict requirements in. A *prima facie* showing is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." Consequently, if it seems reasonably likely that a successive petition meets the strict requirements provided in the statute, we will grant the motion for a successive petition. . . .
>
> Both parties concede that the claims presented by Raby were not raised in his initial federal habeas petition, so he must make a *prima facie* showing that he satisfies the requirements of § 2244(b)(2)(B):
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> . . .
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. at 754 (internal citations omitted). Yet, while paying lip service to the statutory scheme in which a petitioner's burden is to make only a *prima facie* showing that the application satisfies the requirements of § 2244(b)(2)(B)—"simply a sufficient showing of possible merit to warrant a fuller exploration by the district court," (*In re Raby*, 925 F.3d at 754) (citations omitted)—the panel went well beyond that in concluding that Petitioner had not *established* "that if the newly discovered evidence had been available to him in 1994, no reasonable juror would have voted to convict." *Id*. at 759-60. It therefore cited, but did not apply, the correct standard, placing too heavy a burden on Petitioner at this stage and usurping the federal district court's role in the statutory scheme.

While other circuits have concluded that a *prima facie* showing does not include a consideration of the merits of the successive habeas petition, the Fifth Circuit does exactly that. It referred to the necessary showing as "a stringent requirement" and engaged in a full consideration of the merits of Petitioner's successive habeas petition with no deference given to Petitioner's allegations. The Fifth Circuit repeatedly overstepped its gatekeeping role and purported to resolve issues in the first instance that are reserved for the federal district court.

For example, in support of his *Trombetta/Youngblood* claim, Petitioner alleged that the State acted in bad faith and cited as support evidence of a documented pattern of Chu conducting unnecessary destructive testing, inaccurately and improperly characterizing blood test results as "inconclusive," and giving false testimony regarding exculpatory evidence. *See* Motion for Order Authorizing Filing of Second Petition for Writ of Habeas Corpus at 19-20, *In re Raby*, 925 F.3d 749 (5th Cir. 2019). In dismissing Petitioner's claim that the State violated Petitioner's due process rights by improperly and unnecessarily consuming most of the biological material contained under Franklin's fingernails, the Fifth Circuit impermissibly weighed the evidence before it and resolved the merits in the State's favor:

> *The state has the better of the argument*. First, the evidence presented by Raby fails to establish bad faith on the part of Chu [the State's blood serologist]. Contrary to Raby's assertion, Chu's decision to perform the highly consumptive Lattes test on the biological material before employing the preferred Absorption-Elution ("AE") test is not evidence of bad faith. Rather, in line with the findings of the Bromwich Report, it is evidence of a lack of training.

Id. at 756 (emphasis added). Showing no deference whatsoever for Petitioner's allegations, the Fifth Circuit considered the evidence before it and made a merits determination *that the State had the better argument*—by which it meant better *facts,* and that Petitioner had not shown bad faith in its handling of the biological material. It used the same evidence of a lack of training to rationalize the State's misconduct in sponsoring Chu's false testimony that the blood-typing on Franklin's fingernail clippings was "inconclusive" and dismissing Petitioner's *Giglio* claim. *Id*.

Petitioner's *Brady* claim received the same treatment. The Fifth Circuit enumerated the elements of a due process violation and assessed the merits of Petitioner's claim based on its review of the evidence before it:

> First, the evidence suppressed must be favorable to the defendant. The evidence may be either exculpatory or impeaching. Second, the state must have suppressed the evidence. The suppression may be willful or inadvertent. Third, "prejudice must have ensued"—*i.e.*, the suppressed evidence must have been material. . . . It is Raby's burden under AEDPA to establish that he has a viable claim such that he is entitled to relief.
>
> As an initial matter, Raby fails to carry his burden concerning the second element. The state notes that "Raby's *Brady* claim depends critically on his assertions that trial counsel, Felix Cantu, was not provided a copy of Mr. Chu's lab report during trial and was, consequently, unaware that Mr. Chu's testing revealed the presence of an A blood type and did not indicate the presence of blood on Raby's clothes." At trial, however, the prosecution asserted that it had opened its entire file to Raby and his counsel. Raby's counsel did not contradict this assertion. Cantu did receive a copy of an offense report stating that the blood typing results were "inconclusive." Importantly, Cantu acknowledged in a 2009 affidavit that the HPD Crime Lab report may have been produced to him during trial.

Id. at 760.

This is not a court performing its gatekeeping function. The Fifth Circuit weighed accounts from Petitioner's counsel that the lab report was not produced at trial, and was not in trial counsel's files, against the prosecutor's global declaration in the trial record that the State maintained an "open file." The court viewed the matter in the light most favorable to the State, even though it is well known that Harris County's assistant district attorneys adhered in the 1990s to an impermissibly narrow view of *Brady,* under which only evidence deemed "credible" to the prosecutor made its way into that "open file."[8] The impropriety of the Fifth Circuit's handling of this and each of Petitioner's other claims starkly demonstrates the extent to which the Fifth Circuit diverges from other circuit courts in the burden that it places on a petitioner applying for authorization to file a successive petition.

REASONS FOR GRANTING THE PETITION

In creating screening procedures for habeas corpus relief that are not subject to appeal, Congress also created the risk that the law surrounding that screening procedure would remain insulated from judicial scrutiny. Indeed, this Court has never provided any guidance as to AEDPA's procedures for successive habeas corpus petitions in the 23 years since its enactment. The absence of any guidance has led to disarray and disparate treatment among the circuit courts of appeals, particularly as to the showing a petitioner must make in a motion for authorization to file a

[8] *See, e.g.*, coverage of the *McCarty* case, *available at* https://www.houstonchronicle.com/news/houston-texas/houston/article/Prosecutors-accused-of-hiding-evidence-inventing-8340431.php; Proposed Pet. at 175-80 (discussing several Harris County cases with *Brady* failures).

successive habeas petition. Petitioner's case presents an opportunity to provide this urgently needed guidance.

Here the Fifth Circuit did not exercise the authority given it under § 2254(b)(3)(C)—to check for *prima facie* allegations of new evidence that could not have been presented in an earlier habeas petition despite due diligence; rather, it usurped the federal district court's authority under § 2254(b)(4) to hear the merits of a habeas corpus petition. The question of the scope of the circuit court's jurisdiction as to habeas corpus merits is within this Court's jurisdiction, either through a petition for certiorari or a petition for an original writ of habeas corpus. An issue of jurisdiction such as this falls outside of the screening procedure's exemption from appeal.

A. Under 28 U.S.C. § 2244(b)(3)(C), a Court of Appeals May Not Reach Fact Issues Raised by a Motion for Authorization Based on Newly Discovered Evidence.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, before a state prisoner may file a second or successive habeas application, the petitioner "shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). The court of appeals must make a decision on the application within 30 days. *Id*. § 2244(b)(3)(D). Specifically, under § 2244(b)(3)(C), a "court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b). In § 2244(b)(3)(C), the short-form term "application" means an "application for a writ of habeas corpus. *See id*. § 2244(a)

(referencing an "application for a writ of habeas corpus" and "prior application for a writ of habeas corpus"); *id.* § 2244(b)(1) (referencing a "second or successive habeas corpus application" and "prior application"); *id.* § 2244(b)(2) (same); *id.* § 2244(b)(3)(A) (referencing a "second or successive application permitted by this section" and "the application"); *id.* § 2244(b)(3)(B) (referencing a "second or successive application").

Thus, under § 2244(b)(3)(C), a court of appeals may authorize the filing of a successive habeas petition only if it determines that the habeas petition makes a *prima facie* showing that satisfies the requirements of § 2244(b). Section 2244(b) authorizes review of claims not previously presented to the courts when (A) "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; or (B) "(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, ***if proven*** and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2) (emphasis added).

The Supreme Court has held, in the context of addressing § 2244's new-retroactive-law gateway, that "th[e] limited time [in which] the court of appeals must determine whether the application makes a prima facie showing . . . suggests that the courts of appeals do not have to engage in the difficult legal analysis that can be

required to determine questions of retroactivity in the first instance." *Tyler v. Cain*, 533 U.S. 656, 664 (2001) (internal quotation marks omitted). Likewise, 30 days is insufficient time for a court of appeals to comb through the state trial record and multiple prior state and federal habeas corpus proceedings in order to make the legal and factual determinations necessary to determine, in the first instance, whether a petitioner has satisfied the § 2244(b)(2)(B) gateway. Congress assigned that function to the district courts. *See* 28 U.S.C. § 2244(b)(4). All the court of appeals can do in the 30-day window is decide whether the claims as pled—and if *later* proven—satisfy § 2244(b)(2)(B).

1. Circuit courts disagree on what constitutes a "prima facie showing" for the purposes of 28 U.S.C. § 2244(b)(3)(C).

The Seventh Circuit was among the first to address the post-AEDPA procedures for filing a successive petition for habeas corpus relief. Early on, the Seventh Circuit interpreted § 2244(b)(3)(C) as assigning circuit courts a gatekeeping function with respect to successive habeas petitions that does not include a review of a petition's merits. *Bennett v. United States*, 119 F.3d 468, 469-70 (7th Cir. 1997) (Posner, J.). In discussing § 2244(b), the Seventh Circuit stated:

(1) "Prima facie showing" means "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Id.* at 469 (noting as support the "tight" 30-day deadline by which it must "rul[e] on such an application," and that all it may have before it is "the application itself and documents

required to be attached to it, consisting of the previous motions and opinions in the case").[9, 10]

(2) "If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Id.* at 469-70.

(3) "The movant must get through two gates before the merits of the motion can be considered." *Id.* at 470 (explaining that "the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion") (citing 28 U.S.C. § 2244(b)(4))).

Thus, whatever the Seventh Circuit meant when it defined a "prima facie showing" as "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court," its understanding was that its gatekeeping role under § 2244 did not include "reaching" or "consider[ing]" the merits of the successive habeas petition. *In re Williams*, 330 F.3d 277, 281–82 (4th Cir. 2003) ("*Bennett* emphasizes that the § 2244(b) inquiry must be resolved before the district court may consider the merits of a claim within a successive application").

Since *Bennett*, every other circuit court but the D.C. Circuit has at least paid lip service to the Seventh Circuit's definition of a "prima facie showing." *See*

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[9] Here, the Seventh Circuit appears to reference the documentation requirements in Seventh Circuit Rule 22.2(a)(4)-(5).

[10] *Cf. Tyler*, 533 U.S. at 664 ("The stringent time limit . . . suggests that the courts of appeals do not have to engage in the difficult legal analysis that can be required to determine questions of retroactivity . . . .").

Rodriguez v. Superintendent, Bay State Corr. Ctr., 139 F.3d 270, 273 (1st Cir. 1998) ("adopt[ing]" Seventh Circuit's interpretation in *Bennett* of "the standard by which a court of appeals is to gauge the 'prima facie showing' . . . that a prospective repeat petitioner must make"); *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002) (*per curiam*) (citing *Bennett* as support for definition of "prima facie showing"); *Goldblum v. Klem*, 510 F.3d 204, 219 (3d Cir. 2007) ("adopting the meaning of 'prima facie showing' discussed in *Bennett*"), *cert. denied*, 129 S. Ct. 106 (2008); *In re Williams*, 330 F.3d at 281 ("We join our sister courts and adopt the *Bennett* standard."); *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003) (noting the Fifth Circuit has "followed the Seventh Circuit's definition of prima facie showing explained in its opinion in *Bennett v. United States*"); *In re Lott*, 366 F.3d 431, 432-33 (6th Cir. 2004) (quoting *Bennett* in defining "prima facie showing"); *Johnson v. United States*, 720 F.3d 720, 720 (8th Cir. 2013) (*per curiam*) (citing *Bennett* and "adopting the proposition that a prima facie showing in this context is 'simply a sufficient showing of possible merit to warrant a fuller exploration by the district court'"); *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) ("agree[ing] with the Seventh Circuit's interpretation of 'prima facie showing'"); *Case v. Hatch*, 731 F.3d 1015, 1029 (10th Cir. 2013) ("adopting *Bennett*'s understanding of what is required to make a 'prima facie showing'"); *In re Holladay*, 331 F.3d 1169, 1174 (11th Cir. 2003) ("adopting" Seventh Circuit's "standard" for "prima facie showing").

However, the circuit courts' citation to the Seventh Circuit's definition of a "prima facie showing" belies material inconsistencies in their interpretation of

whether, and to what extent, § 2244(b)(3)(C) permits them to consider the merits of a successive habeas petition. These inconsistencies are easier to categorize in the context of § 2244(b)(2)(A) claims based on an alleged new rule of constitutional law, but are greater in the context of § 2244(b)(2)(B) claims based on newly discovered evidence and have resulted in disparate treatment based on the circuit in which the review is sought.

a. Circuit courts disagree on whether § 2244(b)(3)(C) imposes a light or heavy burden.

The confusion among the circuit courts is immediately evident in that some circuits consider the "prima facie showing" to be a lenient standard, while others opine that it places a heavy burden on the petitioner. *See In re Williams*, 330 F.3d at 281 ("courts of appeals differ over whether this is an exacting requirement or a relatively lenient one"). For example, in the First Circuit, the showing "erects a high hurdle." *Rodriguez*, 139 F.3d at 273. But, in the Second Circuit, it is "not a particularly high standard." *Bell*, 296 F.3d at 128. Similarly, the Third Circuit describes the showing as a "light burden," (*In re Hoffner*, 870 F.3d 301, 307 (3d Cir. 2017)), and in the Sixth Circuit, it has been described as "not a difficult standard to meet" and "lenient" (*In re Wogenstahl*, 902 F.3d 621, 628 (6th Cir. 2018)). By contrast, the Fifth Circuit characterizes the prima facie showing requirement as "strict," (*United States v. Clay*, 921 F.3d 550, 554 (5th Cir. 2019), as revised (Apr. 25, 2019)) and the Seventh Circuit considers it to be a "very heavy burden" (*Bennett*, 119 F.3d at 469). To further confuse matters, the Ninth Circuit has sometimes described the *prima facie* standard as a "light" burden, (*Henry v. Spearman*, 899 F.3d 703, 706 (9th

Cir. 2018)) and sometimes as a "heavy" burden (*King v. Trujillo*, 638 F.3d 726, 730 (9th Cir. 2011)).

b. The majority of circuits interpret their gatekeeping role as requiring them not to reach the merits (and/or to assume the truth) of a petitioner's allegations.

A more fundamental question divides the circuits. As noted above, the Seventh Circuit in *Bennett* stated that its understanding was that its gatekeeping role under § 2244 did not include "reaching" or "consider[ing]" the merits of the successive habeas petition. The petitioner in *Bennett* sought to file a successive habeas petition based on what he claimed to be newly discovered evidence that he had been administered a powerful psychotropic drug during trial that impaired his testimony at trial in support of his insanity defense. The Seventh Circuit denied authorization to file the successive petition, but did so only after making the assumption in the petitioner's favor that he had in fact been drugged during his testimony as alleged. *Bennett v. United States*, 119 F.3d at 469.

The Third, Fourth, and Tenth Circuits have each expressly held that the Seventh Circuit's holding in *Bennett* precludes a court of appeals from reaching the merits of the claims in a successive habeas petition, and permits it to consider only the "potential merit" of the petitioner's showing with regard to the filing prerequisites. *See In re Williams*, 330 F.3d at 282 ("[T]he 'showing of possible merit' alluded to in *Bennett* relates to the possibility that the claims in a successive application will satisfy the stringent requirements for the filling of a second or successive petition, not the possibility that the claims will ultimately warrant a

decision in favor of the applicant.") (internal quotation marks and citations omitted); *Goldblum v. Klem*, 510 F.3d at 219 n.9 (same); *Case v. Hatch*, 731 F.3d at 1028 (court of appeals' finding of "possible merit to warrant a fuller exploration by the district court" was "focused 'solely on the conditions specified in § 2244(b) that justify raising a new habeas claim not to any assessment regarding the strength of the petitioner's case"). Thus, while the Fourth Circuit in *In re Williams* denied authorization to file the successive petition, it did so only after accepting as true the petitioner's allegation that one of the individuals who testified as an eyewitness at trial had admitted to the petitioner later that he had fabricated his testimony as part of an undisclosed deal with the prosecutors. *In re Williams*, 330 F.3d at 282-84.

The Second Circuit has also taken a petitioner's substantive habeas allegations as true in determining whether the petitioner has made a *prima facie* showing with respect to its filing prerequisites. The Second Circuit has stated that "we understand the 'prima facie' standard of section 2244(b)(3)(C) to mean, as the phrase normally does, that the applicant's allegations are to be accepted as true, for purposes of gate-keeping, unless those allegations are fanciful or otherwise demonstrably implausible." *Quezada v. Smith*, 624 F.3d 514, 521 (2d Cir. 2010). The Second Circuit in *Quezada* authorized the filing of a successive habeas petition containing *Brady* and *Giglio* claims based on prosecutors' alleged coercion of a witness to testify against the petitioner, noting that it did so without reaching the issues of whether the coercion actually occurred or the extent to which the petitioner's conviction depended on the testimony. *Id*. at 522. The Second Circuit noted that the petitioner "has made a prima

facie showing that the alleged suppression is constitutional error and that but for the alleged coercion, which is claimed to have induced [the witness] to falsely identify [the petitioner] as the shooter, no reasonable jury would have convicted [the petitioner]." *Id.*

The First Circuit has also concluded that it must "refrain from a full inquiry" at the gatekeeping stage, citing its precedent adopting the Seventh Circuit's decision in *Bennett* and the fact that: "We generally do not rule on questions—whether of fact or of law—until a district court has done so, a practice that enhances the quality of our decisions both by allowing us to consider the district court's analysis and by allowing the parties to hone their arguments before presenting them to us. *Evans-Garcia v. United States*, 744 F.3d 235, 237–38 (1st Cir. 2014) (internal citation omitted). As a result, in determining whether a petitioner has made a *prima facie* showing, the First Circuit will not "consider contested evidence," or "even . . . a purely legal issue." *Id.* at 237, 240.

c. Three other circuits interpret their gatekeeper role as requiring them to take as true only the petitioner's allegations related to § 2244(b)(2)(B)(ii).

Other circuits reviewing a motion for authorization to file successive habeas motion based on newly discovered evidence will assume that a petitioner's factual allegations are true, but only for the purpose of determining whether a petitioner has made a *prima facie* showing with respect to § 2244(b)(2)(B)(ii), and not with respect to § 2244(b)(2)(B)(i). Of course, § 2244(b)(2)(B)(ii) expressly requires that the facts underlying a claim in a successive habeas petition, "if proven," would establish that no reasonable factfinder would have found the applicant guilty of the underlying

offense. Thus, in assuming the truth of a petitioner's allegations for the purpose of § 2244(b)(2)(B)(ii) only, these circuits appear merely to be giving effect to the plain language of that subsection.

The Sixth Circuit is one such circuit. *See, e.g.*, *In re Sigger*s, 615 F.3d 477, 479 (6th Cir. 2010) (holding that it must consider whether petitioner's allegations, "if true," would constitute a constitutional violation); *In re McDonald*, 514 F.3d 539, 545 (6th Cir. 2008) (petitioner's motion for authorization "requires a finding that the facts surrounding [allegedly perjured testimony presented at trial], if found to be true, would indeed constitute a constitutional violation").

The Ninth Circuit has also held that a petitioner seeking to file a successive habeas petition based on newly discovered evidence must "(1) show that the factual predicate for his habeas claim reasonably could not have been discovered at the time of his initial habeas petition, and (2) demonstrate that the previously undiscovered facts, if shown to be true in a habeas action, suffice to prove his innocence by clear and convincing evidence." *Brown v. Muniz*, 889 F.3d 661, 668 (9th Cir. 2018), *cert. denied sub nom. Brown v. Hatton*, 139 S. Ct. 841 (2019).

Similarly, the Eleventh Circuit has held that its first step in determining whether a petitioner relying on newly discovered evidence has made a *prima facie* showing with respect to § 2244(b)(2)(B)(ii) is identifying the facts underlying the petitioner's claim and "accept[ing] them as true for purposes of evaluating the application." *In re Boshears*, 110 F.3d 1538, 1541 (11th Cir. 1997). It appears to make no assumptions concerning the petitioner's allegations with respect to

§ 2244(b)(2)(B)(i). *In re Everett*, 797 F.3d 1282, 1290 (11th Cir. 2015) (denying authorization to file successive habeas petition only after assuming statements in letters proffered as newly discovered evidence were true). In addition, the Eleventh Circuit will not assume a petitioner's allegations to be true for the purposes of § 2244(b)(2)(B)(ii) if, in the view of the court, the record "conclusively forecloses" those allegations. *Boshears*, 110 F.3d at 1541 n.1.

d. Two circuits, including the Fifth Circuit, do not give the petitioner the benefit of any fact assumptions at the *prima facie* showing stage.

At the other end of the spectrum from the several circuits that believe their gatekeeper role under § 2244(b)(3)(C) requires them to take a petitioner's allegations as true are those circuits that make no such assumptions on behalf of a petitioner at the *prima facie* showing stage. Those circuits ignore or give mere lip service to the language in § 2244(b)(3)(C) and § 2244(b)(2)(b)(ii) requiring deference to a petitioner's allegations. These circuits focus instead on the wording of just §§ 2244(b)(2)(B)(i) and (ii), and often a selective reading of the Seventh Circuit's ruling in *Bennett*—flouting their assigned role as mere gatekeepers at the authorization stage.

The Eighth Circuit, when considering a request for leave to file a successive habeas petition based on newly discovered evidence, noted the *prima facie* showing requirement in § 2244(b)(3)(C) but denied authorization based on the petitioner's failure to *prove* the facts required by §§ 2244(b)(2)(B)(i) and (ii). *See Roberts v. Bowersox*, 170 F.3d 815, 816 (8th Cir. 1999) (holding petitioner "has not shown he could not have discovered the factual basis for the claim before through the exercise of due diligence, or that the facts underlying the claim would be enough to establish

by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of capital murder").

The Fifth Circuit also denies petitioners authorization to file successive habeas petitions based on their failure to make the showings required by §§ 2244(b)(2)(B)(i) and (ii), as illustrated by Petitioner's case. The Fifth Circuit ruled with respect to Petitioner's *Trombetta* and *Youngblood* claims that "he cannot 'establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense,'" and that "[c]onsequently, he fails to make a *prima facie* showing sufficient to warrant authorization for a second-or-successive habeas petition on this ground." *In re Raby*, 925 F.3d at 755. The Fifth Circuit based its ruling in pertinent part on its finding that "the evidence presented by [Petitioner] fails to establish bad faith on the part of Chu," interpreting Chu's unnecessary destruction of important biological material as evidence of poor training rather than (as alleged by Petitioner) bad faith. *Id.* at 756. Petitioner not only alleged that Chu acted in bad faith, but also presented strong evidence of his bad faith—including his documented pattern of conducting unnecessary destructive testing, inaccurately and improperly characterizing blood test results as "inconclusive," and giving false testimony regarding exculpatory evidence he found or otherwise mischaracterizing his results.[11] The Fifth Circuit's finding that Chu's conduct was

[11] The Fifth Circuit's other basis for its ruling was that there was "nothing in [Petitioner's] application to suggest" that the exculpatory value of the biological material was evident before it was destroyed. *In re Raby*, 925 F.3d at 756. But that showing is a requirement only for a *Trombetta* claim, not a *Youngblood* claim. *See* Mot. for Order Authorizing Filing and Consideration of Second Pet. for Writ of Habeas Corpus at 19-20. If a petitioner makes a *prima facie* showing as to any one of his claims,

instead attributable to poor training—a fact that was by no means conclusively established by the record before the court—was outside the scope of its gatekeeping role as defined by § 2244(b)(3)(C) and § 2244(b)(2)(B)(ii). The Fifth Circuit's resolution of facts and claims against Petitioner at the gate-keeping stage conflicts with the approach of those circuits that assume as true the facts pled in support of the motion for authorization, and do not reach or consider the merits of the claims.

Similarly, the Fifth Circuit ruled that Petitioner had not made a *prima facie* showing with respect to his *Giglio* claim on the grounds that Petitioner: (1) "fails to ***establish*** that the state knowingly presented false testimony," given "Chu's testimony was ***probably*** the result of inadequate training and procedures at the HPD crime lab," (*In re Raby*, 925 F.3d at 756 (emphasis added)); (2) "does not ***show*** that the prosecution used the testimony knowing that it was false," (*id.* at 757 (emphasis added)); and (3) regardless, "does not have a reasonable likelihood of showing, by clear and convincing evidence, that but for the *Giglio* violation, not a single reasonable juror would have found him guilty of murder." *Id.*

The first two fact findings contradicted both Petitioner's allegations and supporting evidence. In particular, when the State's expert serologist declared Chu's testimony false, she did not opine that the probable cause for his testimony was lack of training; she testified simply that Chu's reporting differed so radically from accepted practices as to be incompetent—if done sincerely. *See* Aug. 27, 2009 DNA Hr'g Tr. at 16:15-24, 60:3-10, 61:7-14, Proposed Pet. at 11. As Petitioner argued below,

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he may proceed upon his entire application in the district court. *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (citing 28 U.S.C. § 2244(b)(4)).

and as described above, the Bromwich Reports (and later exonerations) revealed a pattern and practice of similar false testimony that concealed exculpatory evidence. *See* Fifth Bromwich Rep. at 35, 85, Proposed Pet. at 43, n.124. The State's serologist, who had participated in the Bromwich investigation, testified that Petitioner's case could very well fall into that same troubling pattern. Aug. 27, 2009 DNA Hr'g Tr. at 39:21-40:3, 79:4-5, Proposed Pet. at 119.

Further, Chu was just one of several members of the prosecution team who knew the testimony was false, and that was sufficient. *See* Offense Rep. at 057, Proposed Pet. at 123-24 ("This request is to the crime lab . . . please check fingernail scraping collected at the morgue . . . we are requesting D.N.A. be done if possible in this case"; "please advise Sergeants Allen and Wendel of the results"); *see also United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) ("In considering use of perjured testimony this Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel."); *United States v. Manners*, 384 F. Appx. 302, 308-09 (5th Cir. 2010) (citation omitted) ("It is well-settled that the government may be charged with the knowledge of its investigating agents.").

The court supported its third conclusion by improperly weighing and rejecting as insufficient Petitioner's proffered allegations and evidence that his purported confession—the key support for his conviction in a case in which no physical evidence tied Petitioner to the crime—was unreliable given its many conflicts with the physical evidence. Proposed Pet. at 79-82. Indeed, the Fifth Circuit rejected the bulk of

Petitioner's evidence of these conflicts in reliance on its own rank speculation. Taking as examples just two of the many conflicts in Petitioner's custodial statement, Petitioner stated that he was alone with Franklin (the evidence shows she had blood under her fingernails belonging to neither herself nor Petitioner), struggled with her, ended up "on top of her" as she was "covered in blood," and walked home with sticky blood on his hands (the evidence shows there was no blood on the clothes Petitioner wore that night, including a long-sleeved jacket). *Id*. at 103. The Fifth Circuit dismissed these conflicts on the grounds that (1) Petitioner could not "rule out" contamination of the blood-typing evidence; and (2) Petitioner may not have had any blood on his clothes because he attacked Franklin from behind, and she may not have fought back (speculation contradicting, not just the custodial statement, but also record evidence of defensive wounds on Franklin's hands and arms. *In re Raby*, 925 F.3d at 758-59. In other words, far from making a gatekeeping assessment of whether Petitioner had made a *prima facie* showing, the Fifth Circuit improperly reached and decided fact issues potentially raised by Petitioner's evidence.

Finally, the Fifth Circuit refused to authorize Petitioner's *Brady* claim on the grounds that: (1) Petitioner "fails to carry his burden" on the second *Brady* element, i.e., that the State suppressed the blood-typing evidence and the fact that no blood was found on Petitioner's clothes; and (2) even if Petitioner had a *Brady* claim, he "does not have a reasonable likelihood of showing, by clear and convincing evidence, that but for the alleged *Brady* violation, not a single reasonable juror would have found him guilty of murder." *Id.* at 760-61. The Fifth Circuit made the first finding

despite the fact that Petitioner alleged and offered evidence that the exculpatory evidence was not made available to Petitioner before his trial.[12] It did so on the basis of other evidence suggesting only that the exculpatory evidence *may* have been provided to Petitioner's trial counsel before or at trial.[13] The court offered no explanation for its second conclusion, though it was presumably based on the same weighing of the evidence discussed in connection with Petitioner's *Giglio* claim. It failed to address Petitioner's *Brady* claim based on the State's failure to disclose that its testing uncovered no blood on the clothes that Petitioner was wearing on the night of Franklin's murder.

2. The circuit split must be resolved in favor of giving effect to the "prima facie showing" language in § 2244(b)(3)(C) and recognizing the court of appeals' limited role at the motion for authorization stage.

There is a circuit split regarding whether and to what extent a circuit court, when determining whether a petitioner may file a successive habeas corpus petition in the federal district court based on newly discovered evidence, may reach and consider fact issues raised by a petitioner's evidence. Consistent with basic principles of statutory construction, that split must be resolved to give effect to the "prima facie showing" requirement in § 2244(b)(3)(C). *See Life Techs. Corp. v. Promega Corp.*, 137

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[12] *See* Cantu Aff. at ¶ 7, Proposed Pet. at 26; *see also* Proposed Pet. at 97-100 (discussing evidence of non-disclosure in *Brady* context including State expert Hamby admitting that a statement from Chu should have been included in the offense report and circumstantial evidence provided by the Bromwich Commission).

[13] *In re Raby*, 925 F.3d at 760. The Fifth Circuit ultimately concludes that "it is, at best, unclear whether Chu's notes and findings concerning the presence of A antigen activity were available to [Petitioner] at trial." In other words, the court concluded that Petitioner had not conclusively proven his *Brady* claim on the merits, and not that Petitioner had not made a *prima facie* showing that warranted further exploration by the district court. *Id.*

S. Ct. 734, 740 (2017) ("Whenever possible, . . . we should favor an interpretation that gives meaning to each statutory provision."). The circuit split should also be resolved in favor of a standard of review that courts of appeals can reasonably apply under the constraints placed on them by the gatekeeping role contemplated by § 2244, including the statute's 30-day deadline, lack of provision for any submissions other than the petitioner's motion for authorization, and prohibition of rehearing or certiorari review of the court of appeal's determination. *See* 28 U.S.C. §§ 2244(b)(3)(B), (D), and (E).

The Sixth, Ninth, and Eleventh Circuits' interpretation of § 2244(b)(3)(C) as requiring deference to a petitioner's allegations only with respect to § 2244(b)(2)(B)(ii) does not give effect to § 2244(b)(3)(C)'s *prima facie* showing requirement. As noted above, § 2244(b)(2)(B)(ii) already requires an inquiry into whether "the facts underlying the [petitioner's] claim, *if proven* and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id*. (emphasis added). At the motion for authorization stage, where it is intended that a court of appeals determine whether a petitioner has made a "prima facie showing" that the successive habeas petition satisfies § 2244(b)(2)(B)(ii), the court of appeals must apply a more lenient standard of review than that already dictated by § 2244(b)(2)(B)(ii). Section 2244(b)(3)(C) also requires that the court of appeals apply a more lenient standard of review at the motion for authorization stage than that dictated by § 2244(b)(2)(B)(i), and there is no indication that the Sixth, Ninth, or Eleventh Circuits are doing so.

By the same reasoning, the Fifth Circuit's interpretation of § 2244(b)(3)(C) as requiring no more lenient a standard of review than that dictated by §§ 2244(b)(2)(B)(i) and (ii) for a successive habeas petition does not give effect to § 2244(b)(3)(C). As shown, the Fifth Circuit—unlike the Sixth, Ninth, and Eleventh Circuits—does not even give effect to the "if proven" language in § 2244(b)(2)(B)(ii). Moreover, the strict standard of review adopted by all four circuits is inconsistent with the limitations placed on a court of appeals' gatekeeping role at the motion for authorization stage. Indeed, at least some of these circuits have held that § 2244(b)(3)(D)'s 30-day deadline for granting or denying a motion for authorization is not mandatory. *See, e.g.*, *Ezell v. United States*, 778 F.3d 762, 765 (9th Cir. 2015); *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997). *Cf. In re Raby*, 925 F.3d 749 (5th Cir. 2019) (entered 200 days after December 21, 2018 motion for authorization).

Of the interpretations of § 2244(b)(3)(C) adopted by circuit courts, only that adopted by the circuit majority gives effect to the "prima facie showing" requirement that defines a court of appeals' gatekeeping function. Those circuits do so, first, by accepting the petitioner's non-frivolous allegations as true with respect to all of § 2244(b)'s statutory requirements, and not just § 2244(b)(2)(B)(ii). Second, and only after making that presumption in the petitioner's favor, they determine whether it is "reasonably likely" that the successive habeas petition will satisfy § 2244(b)'s statutory requirements. Those two practices combined create a gatekeeping standard of review that is both more lenient than that dictated by §§ 2244(b)(2)(B)(i) and (ii)

and informed by the practical limitations that §§ 2244(b)(3)(B), (D), and (E) place on the court of appeals' gatekeeping role.

B. Regardless, a Petitioner Seeking Authorization Under 28 U.S.C. § 2244(b)(3) Based on Newly Discovered Evidence Is Not Required to Establish That, Had That Evidence Been Available at Trial, No Reasonable Juror Would Have Voted to Convict.

As shown above, circuit courts do not consistently interpret or apply § 2244(b)(C)(3)'s *prima facie* showing requirement. However, regardless of whether or how that circuit split is resolved, the Fifth Circuit's interpretation and application of the *prima facie* showing requirement in denying Petitioner's motion for authorization with respect to his *Trombetta* and *Youngblood* claims was necessarily improper. Section 2244(b)(C)(3)'s mandate that a petitioner make a "prima facie showing" that a successive habeas petition satisfies the statutory requirements for such a petition, by definition, cannot require a petitioner to "establish" that the petition satisfies those requirements. Such an interpretation would improperly render § 2244(b)(C)(3) meaningless and would gut the gatekeeping function that the provision assigns to courts of appeal.

The Fifth Circuit opens its discussion of Petitioner's *Trombetta* and *Youngblood* claims by stating:

> [Petitioner] avers that "the state destroyed exculpatory or potentially useful evidence" in violation of *Trombetta* and *Youngblood*. Even assuming, *arguendo*, that the claim is not time-barred and that Raby could not have previously discovered the factual predicate for the claim using due diligence, *he cannot "establish* by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). *Consequently*, he fails to make a *prima facie* showing

> sufficient to warrant authorization for a second-or-successive habeas petition on this ground.

In re Raby, 925 F.3d at 755 (emphasis added). As discussed above, the court goes on to find that "the evidence presented by [Petitioner] fails to establish bad faith on the part of Chu." *Id.* at 756. The court interpreted Chu's unnecessary destruction of important biological material merely as evidence of poor training despite Petitioner's allegation and evidence of bad faith.

At no point in the Fifth Circuit's discussion of Petitioner's *Trombetta* and *Youngblood* claims is there any evidence that the court is applying any standard of review other than that dictated by § 2244(b)(2)(B)(ii), which *cannot* be applied at the motion for authorization stage. Indeed, the court states that Petitioner fails to make his *prima facie* showing *because* he cannot satisfy § 2244(b)(2)(B)(ii). This is not a case in which the allegations and evidence offered by Petitioner in support of his claim are so specious that they could simply be ignored. *See supra* Statement of the Case, parts B & C. This is particularly so given that the court's conclusion that Chu's conduct was attributable to poor training rather than bad faith was pure speculation.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari, or grant the Original Petition for Writ of Habeas Corpus, or summarily reverse the denial of Petitioner's Motion for Order Authorizing Filing and Consideration of Second Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254.

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September 3, 2019