No. 19-5820

IN THE

Supreme Court of the United States

In re CHARLES D. RABY,
Petitioner.

On Original Petition for a Writ of Habeas Corpus and on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 26th day of November, 2019, a copy of **Respondent's Brief in Opposition to Original Petition for a Writ of Habeas Corpus and Petition for a Writ of Habeas Corpus** was sent by electronic mail to: Sarah Frazier, Law Office of Sarah Frazier, PLLC, 1919 Decatur St., Houston, Texas, 77007, sarah@sarahfrazierlaw.com. All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400

Counsel for Respondent

No. 19-5820

IN THE
Supreme Court of the United States

In re CHARLES D. RABY,
Petitioner.

On Original Petition for a Writ of Habeas Corpus and on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO ORIGINAL PETITION FOR A WRIT OF HABEAS CORPUS AND PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

MARK PENLEY
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
jay.clendenin@oag.texas.gov

Counsel for Respondent

QUESTIONS PRESENTED

Petitioner Charles Raby was found guilty and sentenced to death in 1994 for the murder of Edna Franklin. During the next twenty-five years, Raby unsuccessfully challenged his conviction and sentence in state and federal court and obtained postconviction DNA testing that the state court found did not provide results favorable to him. Raby filed a motion for authorization in the Fifth Circuit based on evidence found in Ms. Franklin's fingernail clippings of a blood type and a partial DNA profile belonging to neither him nor Ms. Franklin's grandsons and based on the absence of blood on his clothing. The Fifth Circuit applied the appropriate standard and denied the motion because, *inter alia*, Raby could not make a prima facie showing of innocence in light of the overwhelming circumstantial evidence and his confession.

Raby now requests that this Court grant him the extraordinary remedy of a writ of habeas corpus by way of an original petition or statutorily impermissible certiorari review of the denial of his motion for authorization. These facts raise the following questions:

> Should the Court exercise its original habeas corpus jurisdiction where Raby had an adequate remedy in state and federal court, the Fifth Circuit applied the appropriate standard to his motion, and he has failed to make a prima facie showing of innocence?
>
> Should the Court grant certiorari review where such relief is statutorily prohibited and where Raby fails to justify finding for the first time an exception to the statutory prohibition?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes and Rules

BRIEF IN OPPOSITION

Petitioner Charles Raby was properly convicted and sentenced to death in 1994 for the murder of Edna Franklin. Raby has unsuccessfully challenged his conviction and sentence in state and federal court. He filed his initial federal habeas petition in 2002. *See generally* Pet'r's App. A. Raby's federal habeas proceedings concluded in 2004 when this Court denied his petition for a writ of certiorari. Pet'r's App. D. Raby pursued forensic testing in state court, which the Texas Court of Criminal Appeals (CCA) granted. *Raby v. State*, 2005 WL 8154134, at *8 (Tex. Crim. App. 2005). Those proceedings concluded in 2015 when the CCA denied relief, holding that "the results of the DNA testing were not favorable to [Raby]." *Raby v. State*, 2015 WL 1874540, at *5–9 (Tex. Crim. App. Apr. 22, 2015). Thereafter, Raby filed a subsequent state habeas application. The CCA dismissed the application. *Ex parte Raby*, 2017 WL 2131819, at *1 (Tex. Crim. App. May 17, 2017).

Raby then sought authorization from the Fifth Circuit to file in the district court a successive petition to raise claims alleging that (1) the State destroyed exculpatory evidence in violation of *California v. Trombetta*[1] and

[1] 467 U.S. 479, 488 (1984) (holding that due process may be violated when the state fails to preserve evidence that might be expected to play a significant role in the suspect's defense and possessed an exculpatory value that was apparent before it was destroyed).

Arizona v. Youngblood,[2] (2) the prosecution violated *Giglio v. United States*[3] by presenting false testimony from Joseph Chu, a Houston Police Department (HPD) Crime Lab forensic serologist, that the serological results he obtained were inconclusive, (3) the State withheld material, exculpatory evidence in violation of *Brady v. Maryland*,[4] and (4) he is actually innocent. Pet'r's App. E at 4. The Fifth Circuit denied the motion, holding that Raby failed to make a prima facie showing that his claims satisfied 28 U.S.C. § 2244(b)(2)(B)(ii). Pet'r's App. E at 9, 15, 17.

Raby now seeks the extraordinary remedy of a writ of habeas corpus by way of an original petition. *See generally* Pet. He argues that the Court should grant his petition to determine the appropriate gateway standard of review under 28 U.S.C. § 2244(b)(2)(B)(ii). Pet. ii–iii. Raby is not entitled to the extraordinary relief he requests. First, Raby is appealing the Fifth Circuit's denial of his motion for authorization, but such an appeal is expressly prohibited by 28 U.S.C. § 2244(b)(3)(E). Second, the Fifth Circuit's treatment

---

[2] 488 U.S. 51, 58 (1988) (holding that a state's failure to preserve potentially useful evidence does not violate due process unless the defendant shows bad faith on the part of the state).

[3] 405 U.S. 150 (1972) (holding that due process is violated where the prosecution knowingly presents false testimony and it is reasonably likely that the false testimony could have affected the jury's verdict).

[4] 373 U.S. 83 (1963) (holding that due process is violated where the prosecution suppresses exculpatory or impeachment evidence and the withheld evidence is material).

of motions for authorization is consistent with § 2244 and other circuits' treatment of such motions. Lastly, the Fifth Circuit applied the appropriate prima facie standard to Raby's claims and evidence and found they did not satisfy the standard. In doing so, the court did not exceed its jurisdiction.

The limitations of § 2244(b) "certainly inform[s]" this Court's consideration of Raby's original petition, *Felker v. Turpin*, 518 U.S. 651, 663 (1996), and the Fifth Circuit's well-justified conclusion that Raby's claims failed to satisfy the statute's prima facie standard—a conclusion similar to the one the state court made in light of the same evidence—supports the denial of Raby's request for this extraordinary remedy. Consequently, Raby is not entitled to a writ of habeas corpus.

Raby also seeks certiorari review. But his request is statutorily impermissible, and is, in any event, merely one seeking error correction. Therefore, his petition for a writ of certiorari should also be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider an original petition for a writ of habeas corpus. 28 U.S.C. § 2241(a); *see Felker*, 518 U.S. at 660–62. The Court lacks jurisdiction to consider a petition for a writ of certiorari appealing the denial of a motion for authorization to file a successive federal habeas petition. 28 U.S.C. § 2244(b)(3)(E).

STATEMENT OF THE CASE

I. Statement of Facts

A. Facts of the Crime

> Edna Mae Franklin, the 72-year-old complainant in this case, lived with her two grandsons, who were [Raby's] friends. Although Franklin had barred [Raby] from her home, her grandsons often snuck him in through a window and allowed him to spend the night. On the night of the offense, the two grandsons left their grandmother at home and went out. Upon their return, one of them discovered Franklin dead on the living room floor. She had been severely beaten and repeatedly stabbed, and her throat was cut. Her attacker had undressed her below the waist. The contents of her purse had been emptied onto her bedroom floor. Police concluded the attacker's point of entry was the same window through which the grandsons had previously ushered [Raby]. After further investigation, police arrested [Raby] for the offense, and he confessed to the killing.

Raby v. State, 970 S.W.2d 1, 2 (Tex. Crim. App. 1998).

B. Punishment facts

1. The State's evidence

> Witnesses testified to a series of assaults committed by [Raby], with the victims including [Raby's] girlfriend, his stepfather, a ten-year-old boy, a two-year-old girl, a friend's mother, and others. While incarcerated, [Raby] repeatedly attacked jailers and sheriff's deputies, fought with other inmates, and was found in possession of weapons on more than one occasion.

Id. at 2.

2. The defense's evidence

"[Raby] offered testimony . . . relating to his troubled upbringing, including his mother's mental health problems, his commitment to foster care

and institutions, and episodes of physical abuse. Other witnesses testified that [Raby] had a peaceful disposition and that his problems during incarceration had been provoked by jailers." *Id.* at 2.

C. State court DNA proceedings

The CCA summarized the evidence and the trial court's findings during the postconviction DNA proceedings:

> We granted [Raby's] motion for post-conviction testing on the victim's underwear, nightshirt, and fingernail clippings. The nightshirt was not tested because it was never found in the Houston Police Department property room and testing on the underwear indicated that the blood was from the victim. The Article 64.04 hearings focused on the fingernail clippings, which were determined to contain a weak and incomplete DNA profile from an unknown male.
>
> At the close of the hearings, which spanned a three-year timeframe, the trial court completed Findings of Fact and Conclusions of Law. The trial court stated,
>
> > Having heard arguments, read the parties' briefing, affidavit evidence, and other exhibits, reviewed the trial transcript, and considered the testimony of experts, including forensic DNA experts interpreting the DNA test results that have been obtained, this Court has concluded that the results are not favorable to [Raby], and that had the DNA test results obtained under Chapter 64 been available in 1994, it is reasonably probable that Raby would have been prosecuted or convicted.
>
> The trial court's findings of fact and conclusions of law also included the following: The trial court found that two of the fingernail clippings from the victim's left hand contained indications of low-level Y-chromosome DNA; that the DNA from the fingernails is a mixture of at least two individuals and is weak

and incomplete; that [Raby] is not a contributor to the DNA profile found on the fingernail clippings; and that the victim's grandsons were also excluded as contributors to the DNA profile from the fingernail clippings.

The serology reports discussed at the hearings indicated that the victim had type B blood and [Raby] has type O blood. The trial court noted that the original report said that blood having an inconclusive typing result was found on the victim's fingernails and that at trial, the HPD crime lab employee said that he was unable to do a comparison between the evidence and [Raby's] blood, so the results were inconclusive. The trial court found [Raby's] expert to be credible and persuasive when she testified at the hearing on post-conviction testing that the reporting of the results as "inconclusive" was contrary to and not supported by the record. [Raby's] serology expert also testified that the A antigen activity detected on the victim's right fingernail could not have come from [Raby] or the victim, and the source of the A antigen activity remained unknown. [Raby], however, cannot be excluded as a contributor to the blood detected on the victim's fingernails. The serologist opined that the police offense report should have stated that the A and B activity detected on the fingernail samples could not have come from the defendant and that blood was not detected on the defendant's jacket or t-shirt.

The trial court found that the victim was undernourished, weak, frail, and ill; she had trouble walking and spent most of her time in bed. [Raby] was friends with the victim's grandsons and had been in her home on many occasions, often entering through two different bedroom windows. The trial court found that a week prior to the offense, the victim told [Raby] to leave her house because she did not like him, which caused [Raby] to get angry and throw a beer bottle. The court found that the victim's house was messy and in disarray at the time of the offense and that her grandson admitted that he was a poor housekeeper. The victim's grandsons often had friends visit the house and the house was being painted by a male painter at the time of the offense. The trial court found that the victim's daughter spoke to her at 6:45 pm on the evening of the offense. The victim's grandson returned home at 10:00 pm and found the victim's body in the living room. The cause of death

was multiple stab wounds, which could have been inflicted by a pocketknife with a blade as small as two inches.

The trial court found that [Raby] confessed, "stating that he was carrying a pocketknife that he used to clean his fingernails on the day of the complainant's murder. In his confession, [Raby] recounted, *inter alia*, how he had been drinking beer, whiskey, and Mad Dog 20/20 and stated the following:"

> I drank the bottle of wine and then I walked over to Lee's house on Westford Street. Lee lives there with his grandmother, Edna and his cousin Eric. There is an old Volkswagon [sic] in the drive way at their house. I walked up to the front door. The front door has a screen type door in front of a wooden door. I knocked on the door. I did not hear anyone answer. I just went inside. I sat down for a little bit on the couch. I called out when I got inside but I did not hear anyone say anything. I heard Edna in the kitchen. I walked into the kitchen and grabbed Edna. Edna's back was to me and I just grabbed her. I remember struggling with her and I was on top of her. I know I had my knife but I do not remember taking it out. We were in the living room when we went to the floor. I saw Edna covered in blood and underneath her. I went to the back of the house and went out the back door that leads into the back yard.
>
> Shortly after I had left Lee's house on Westford I was approached by a man and this man told me something like "I had better not catch you in my yard," "jumping his fences." Or something like that. I woke up later on the ground near the Hardy Toll Road and Crosstimbers. I walked home, on Cedar Hill from there. I remember feeling sticky and I had blood on my hands. I washed my hands off in a water puddle that is near the pipe line by the Hardy Toll Road. I do not remember what I did with my knife.
>
> The next day I knew I had killed Edna. I remembered being at her house and struggling with her and Edna

> was covered with blood when I left. I think I was wearing a black concert shirt, the blue jeans Im [sic] wearing and my Puma tennis shoes. I also had on a black jacket.

The trial court also found that the defense did not urge an exculpatory account of the offense at trial; the defense conceded that [Raby] admitted to killing the victim but argued that it did not rise to the level of a capital murder because the State failed to prove that the offense was committed in the course of robbery, aggravated sexual assault, or burglary. The defense asked the jury to return a verdict of the lesser-included offense of murder and stated that the defendant killed the victim and nothing more.

The court found unpersuasive and not dispositive to the findings the information in [Raby's] proffered affidavits from individuals who were not involved in the postconviction DNA testing process. The trial court concluded that [Raby's] DNA expert's testimony that the presence of weak and incomplete male DNA on the victim's fingernails was "potentially probative evidence" in identifying the killer does not warrant a favorability finding under Article 64.04. The trial court found that the results of postconviction DNA testing are not favorable to the defendant based on the following evidence: the absence of [Raby's] DNA on evidence subjected to DNA testing did not warrant the conclusion that [Raby] did not commit the offense; there was no indication of when or how the low levels of DNA were deposited on [the] victim's fingernails; the expert could not say that the DNA originated from the assailant; there were sources for the male DNA other than the assailant; it is possible for foreign DNA to be under the fingernails from daily contact; the weak and incomplete male DNA on the victim's fingernails could have been deposited by contact with various surfaces, such as the floor where her body was discovered or from other male individuals who entered her home. The trial court also considered the expert's statement that [Raby] could not be excluded as a contributor of the blood detected on the victim's fingernails.

The trial court found that the totality of the evidence, including the confession and circumstantial evidence, present a strong case that [Raby] committed the offense. The trial court considered

> circumstantial evidence such as [Raby's] prior confrontation with the victim, trial witnesses who saw [Raby] in the victim's neighborhood at the time of the murder, [Raby's] statement to one neighbor that he was going to the victim's house to look for his friends, and [Raby's] flight from his girlfriend's house when the police arrived to question him. Trial witnesses also corroborated details of [Raby's] confession, including the clothes he was wearing, that he was drinking and carrying a pocket knife just prior to the offense, that he exited out the back door of the victim's house, and that he was confronted by one of the neighbors for jumping the fence after the offense. The trial court stated:
>
> > I make my findings based on seeing juries' strong reliance on confessions, especially when confessions are supported with witnesses who know [Raby] is heading to the decedent's home and witnesses who see [Raby] flee from the back of the home, in addition to photos of a home where it would not be unlikely for any dweller to pick up DNA from a source other than [Raby]. Accordingly, this Court finds that the jury would have made the same determination even with the new DNA and Serology evidence.

Raby v. State, 2015 WL 1874540, at *1–3.

II. Procedural History

Raby was convicted and sentenced to death in 1994 for the murder of Edna Franklin. 30 RR 476;[5] 37 RR 1073. The CCA upheld Raby's conviction and death sentence on direct appeal. *Raby v. State*, 970 S.W.2d 1 (Tex. Crim. App. 2009), *cert. denied*, 525 U.S. 1003 (1998). Raby filed a state application

[5] "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s).

for a writ of habeas corpus, which was denied. Order, *Ex parte Raby,* No. 48,131-01 (Tex. Crim. App. Jan. 31, 2001).

Raby then filed a federal habeas petition, which the district court denied in 2002. Pet'r's App. A. The Fifth Circuit denied a certificate of appealability in 2003. Pet'r's App. C; Pet'r's App. D (cert. denied).

During his federal habeas proceedings, Raby moved in state court for DNA testing in November 2002. The motion was ultimately granted in part. *Raby v. State*, 2005 WL 8154134, at *8. Testing was conducted and the trial court held an evidentiary hearing after which the CCA denied relief. *Raby v. State*, 2015 WL 1874540, at *8–9.

After Raby's federal habeas proceedings concluded, he challenged via 42 U.S.C. § 1983 the method by which his execution would be carried out. Raby's lawsuit was rejected. *Raby v. Livingston*, 600 F.3d 552, 562 (5th Cir. 2010).

In 2016, Raby filed a subsequent state habeas application raising ineffective-assistance-of-trial-counsel claims he later presented in a motion for relief from judgment in the federal district court as well as the claims he later raised in a motion for authorization to file a successive federal habeas petition. The CCA dismissed the application as an abuse of the writ. Order, *Ex parte Raby*, No. 48,131-02 (Tex. Crim. App. May 17, 2017).

Raby then filed in the district court a motion for relief from judgment. Mot., *Raby v. Davis*, 4:02-CV-349 (S.D. Tex. Aug. 4, 2017). Following briefing,

the district court denied the motion. Order, *Raby v. Davis*, 4:02-349 (S.D. Tex. Apr. 5, 2018). Raby requested a certificate of appealability, which was denied. *Raby v. Davis*, 907 F.3d 880, 885 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2693 (June 10, 2019).

Raby next filed in the Fifth Circuit a motion seeking authorization to file a successive habeas petition. The Fifth Circuit denied the motion. *See generally* Pet'r's App. E.

Raby then filed in this Court an original petition for a writ of habeas corpus and a petition for a writ of certiorari. *In re Raby*, No. 19-5820. The instant brief in opposition follows.

ARGUMENT

I. Raby Is Not Entitled to the Extraordinary Remedy of a Writ of Habeas Corpus.

Raby first asks the Court to grant a writ of habeas corpus to hold that the Fifth Circuit erroneously denied his motion for authorization to file a successive federal habeas petition and to resolve a purported circuit split regarding the proper treatment of claims and facts alleged in a motion for authorization. Pet. at 22–38. Raby fails to justify the extraordinary remedy he seeks.

A. Raby had avenues available to raise his due process claims, and his original petition is an end-run around AEDPA.

Supreme Court Rule 20.4(a) provides that, "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted." *See Felker*, 518 U.S. at 665 (explaining that Rule 20.4(a) delineates the standards under which the Court grants such writs). Raby fails to advance an exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

First, Raby is not entitled to the extraordinary remedy of a writ of habeas corpus by way of an original petition because he had a remedy available in state and federal court. But, as made clear by the Fifth Circuit's denial of Raby's motion for authorization and the state court's dismissal of his subsequent habeas application raising the same claims as his motion, his underlying allegations that he was deprived of his right to due process and that he is actually innocent do not merit relief.[6] *See generally* Pet'r's App. E; Order, *Ex parte Raby*, No. 48,131-02 (Tex. Crim. App. May 17, 2017). Moreover, the

[6] As the Fifth Circuit recognized, Raby's free-standing actual innocence claim is not cognizable in a federal habeas corpus proceeding. Pet'r's App. E at 6. The CCA, however, recognizes such claims. *See Ex parte Navarijo*, 433 S.W.3d 558, 566–67 (Tex. Crim. App. 2014).

state court granted DNA testing and, afterwards, considered the same evidence (i.e., evidence of a foreign blood type, an unknown DNA profile, and evidence that blood was not found on Raby's clothing) that Raby now relies upon to assert his innocence. *Raby v. State*, 2015 WL 1874540, at *2, 6 The court found that the results of DNA testing were not favorable to him. *Id*. at *8. Consequently, Raby fails to show that "adequate relief [could] not be obtained in any other forum or from any other court," and he is not entitled to the extraordinary relief he seeks in this Court. *Felker*, 518 U.S. at 652.

Second, Raby is not entitled to the extraordinary relief he seeks because his original petition is, in effect, an effort to circumvent AEDPA's restriction on successive habeas petitions. 28 U.S.C. § 2244(b)(3)(E). But knowing he is statutorily precluded from appealing the Fifth Circuit's denial of authorization, he has sought relief through an original petition. Raby's attempt to circumvent AEDPA should not be condoned. Indeed, the Court in *Felker* held that while 28 U.S.C. § 2244(b)(3)(E) did not repeal the Court's authority to entertain original habeas petitions, § 2244(b)(1) and (2) "certainly inform [the Court's] consideration" of them. *Felker*, 518 U.S. at 662–63. Consequently, the fact that Raby failed to make a prima facie showing that his claims satisfied § 2244(b)(2)(B)(ii) "certainly inform[s]" the Court's consideration of Raby's original petition, and it provides an additional basis on which to deny Raby's extraordinary request. *Felker*, 518 U.S. at 662–63.

Rule 20.4(a) and 28 U.S.C. § 2242 state that an original habeas petition in the Supreme Court must set forth "reasons for not making application to the district court." In this case, the reasons are clear: Raby's original habeas petition is actually a successive habeas petition, and he simply disagrees with the circuit court's denial of his motion for authorization. His original petition should be denied.

B. Raby does not identify a relevant circuit split.

Raby's primary contention is that the Fifth Circuit's opinion in this case reflects a circuit split regarding the proper treatment of claims and facts alleged in a motion for authorization. Pet. at 26. He argues that most circuits assume the movant's allegations are true, but the Fifth Circuit does not give deference to the movant's allegations. Pet. at 26–35. Raby fails to identify a real circuit split.

First, Raby describes "disarray" among the circuit courts, but the cases on which he relies reflect consistency and belie his assertion that this Court's intervention is necessary. Pet. at 19. The cases to which Raby cites show that the circuit courts apply the same prima facie standard requiring "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court," the same standard the Fifth Circuit applied in this case. *See Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997); Pet'r's App. E at 5. Raby also asserts the circuit courts describe the prima facie standard as either

a lenient or strict burden.[7] Pet. at 25–26. But regardless of the descriptor, all the circuits that have addressed the question have adopted the same standard. *See* Pet. at 23–24. Raby cannot justify the extraordinary remedy he seeks to address a non-existent circuit split.[8]

Second, the Fifth Circuit did not rest its denial of authorization regarding Raby's *Giglio* and *Brady* claims on the lack of merit, or potential merit, of those claims. Indeed, the court *assumed* Raby sufficiently alleged such constitutional violations. Pet'r's App. E at 10, 17. The court denied authorization because he did not make a prima facie showing of innocence.[9]

---

[7] Raby asserts that the Fifth Circuit characterizes the prima facie standard as a "strict" one. Pet. at 25 (citing *United States v. Clay*, 921 F.3d 550, 554 (5th Cir. 2019)). In *Clay*, the Fifth Circuit appears to describe the statutory scheme as a whole under § 2244(b)—not the prima facie standard—as strict. 921 F.3d at 554; *see* Pet'r's App. E at 5 ("[I]f 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.") (emphasis added).

[8] Raby also asserts there is a circuit split as to whether a court reviewing a motion for authorization must give deference to a movant's allegations regarding the diligence requirement of § 2244(b)(2)(B)(i). Pet. at 36–37. The Fifth Circuit did not deny Raby's motion for authorization by finding he did not make a prima facie showing of diligence. In fact, the court assumed Raby made the requisite prima facie showing of diligence. Pet'r's App. E at 7, 10, 17. He fails to show how the alleged circuit split as to the standard applicable to a movant's diligence under § 2244(b)(2)(B)(i) is relevant. Any opinion as to that issue in this case would be purely advisory.

[9] For the sake of brevity, the Director will refer to the gateway § 2244(b)(2)(B)(ii) standard—a prima facie showing that "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 [movant] guilty of the underlying offense"—as a prima facie showing of innocence.

Pet'r's App. E at 10–15, 17. Similarly, with regard to Raby's *Youngblood/Trombetta* claim, the Fifth Circuit found that the purportedly destroyed evidence—biological material found in Ms. Franklin's fingernail clippings that was tested during the postconviction DNA proceedings—did "not exonerate Raby." Pet'r's App. E at 9. Consequently, Raby's assertion that this Court should grant his original petition to resolve a circuit split as to the appropriate deference given to a movant's allegations regarding the merits of his claims is simply beside the point.

Raby's claims rested on the premise that newly discovered evidence that (1) A antigen activity that could not be attributed to Raby or Ms. Franklin was detected in Ms. Franklin's fingernail clippings, (2) a partial DNA profile belonging to neither Raby, Ms. Franklin, nor her grandsons was found in her fingernail clippings, and (3) no blood was found on his clothes satisfied the requirement of making a prima facie showing of innocence. The Fifth Circuit accepted those facts but concluded they did not make the required showing in light of the evidence as a whole, which included "overwhelming circumstantial evidence and Raby's confession." Pet'r's App. E at 11–14. In finding these factual allegations insufficient, the Fifth Circuit discussed the evidence presented during the state court postconviction DNA proceedings, which provided potential explanations for the detection of A antigen activity and an unknown DNA profile. Pet'r's App. E at 13–14.

The Fifth Circuit properly denied Raby's motion not only because he did not sufficiently allege or establish the merit of each of his constitutional claims—although the court did appropriately address whether Raby made such a prima facie showing—but also because Raby could not make the requisite prima facie showing of innocence. Pet'r's App. E at 9–17. Consequently, he cannot justify the extraordinary remedy of a writ of habeas corpus via an original petition to address a purported circuit split that would not, even if resolved in his favor, affect the outcome of his case. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical set of facts.") (quotation marks and citation omitted).

Third, the Fifth Circuit had before it more than two thousand pages of exhibits provided by Raby. The evidence included, *inter alia*, the offense report, the Bromwich Report,[10] the HPD Crime Lab's worksheets, multiple affidavits, and the record of Raby's postconviction DNA proceedings. Raby seemingly asserts that the Fifth Circuit either was required to ignore his evidence or could only consider the evidence in the way he framed it. The Fifth Circuit was

[10] The Bromwich Report was the result of an investigation into the HPD Crime Lab's practices and procedures. Pet'r's App. E at 7 n.9.

required to do neither.[11] *See Bennett*, 119 F.3d at 469–70 ("*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.") (emphasis added). Instead, the Fifth Circuit properly considered Raby's allegations and the "evidence as a whole" and determined he did not warrant authorization. 28 U.S.C. § 2244(b)(2)(B)(ii).

Raby provides no reason to conclude that other circuit courts would treat a movant's evidence differently from how the Fifth Circuit treated his evidence. By way of example, the Fourth Circuit's treatment of evidence of a witness's recantation of his trial testimony is consistent with the Fifth Circuit's treatment of such evidence. *Compare In re Williams*, 330 F.3d 277, 283–84 (4th Cir. 2003) (citing *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)), *with In re Murphy*, 2019 WL 5406288, at *2 (5th Cir. Oct. 22, 2019). In each case, the court found the recanting affidavits insufficient to outweigh the inculpatory evidence of the movants' guilt. Indeed, the Fourth Circuit has explained that the "'evidence as a whole' is exactly that: all the evidence put before the court

[11] Relatedly, Raby complains with regard to the Fifth Circuit's denial of his *Youngblood* claim that the court determined "*the State had the better argument*—by which it meant better *facts*." Pet. 18 (emphasis in original). The Fifth Circuit did not conclude the State had better facts—the court relied only on the facts provided by Raby.

at the time of its § 2244(b)(2)(B)(ii) . . . evaluation." *United States v. MacDonald*, 641 F.3d 596, 610 (4th Cir. 2011). Therefore, Raby fails to establish a real circuit split.

For the same reason, the Fifth Circuit's consideration of Raby's evidence does not indicate that the circuit courts have adopted a "divergent" interpretation of § 2244(b)(2)(B)(ii). *Felker*, 518 U.S. at 667 (Souter, J., concurring). Raby asks this Court to grant his petition and resolve the purported circuit split such that the courts of appeals can resolve motions for authorization under the constraints of § 2244, which Raby asserts includes the "lack of provision for any submissions other than the petitioner's motion for authorization." Pet. at 36. But his submissions included thousands of pages of exhibits, which he cited to and relied upon extensively in support of his motion. After failing to convince the Fifth Circuit to grant his motion with the benefit of that evidence, he now seeks to have it both ways. This is plainly insufficient to warrant the extraordinary relief he requests.

Notably, in many of the cases on which Raby relies to allege a circuit split, the courts noted the limited record in front of them or other limitations on their review of the movant's claims. *See, e.g., Evans-Garcia v. United States*, 744 F.3d 235, 238 (1st Cir. 2014); *Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013) (citing *Ochoa v. Sirmons*, 485 F.3d 538, 541–42 (10th Cir. 2007)); *Goldblum v. Klem*, 510 F.3d 204, 219 n.10 (3d Cir. 2007); *Bennett*, 119 F.3d at

469–70 (noting that the court "usually" only has before it the motion for authorization and "previous motions and opinions in the case"). But there is nothing prohibiting courts from considering the evidence proffered by the movant. *Cf. Quezada v. Smith*, 624 F.3d 514, 517 n.3 (2d Cir. 2010) (noting that a circuit court may exceed the statutory thirty-day time limit to rule on a motion for authorization where an issue requires a published opinion that cannot reasonably be prepared in that time). The Fifth Circuit did not err, then, in considering the evidence Raby proffered and finding it insufficient to warrant a fuller exploration by the district court. This is especially true where the "overwhelming circumstantial evidence" and Raby's confession made the conclusion that he could not satisfy § 2244(b)(2)(B)(ii) "inevitable." Pet'r's App. E at 12; *cf.* Pet'r's App. A at 7 (the district court's rejection of Raby's claim that trial counsel failed to suppress his confession, finding "the obdurate reality and the facts [did] not coincide with [Raby's] theories"). And the Fifth Circuit's evaluation of the specific facts of Raby's case does not reflect a circuit split.

Fourth, Raby fails to demonstrate the Fifth Circuit is an outlier among the circuit courts regarding the proper treatment of a movant's allegations in a motion for authorization.[12] Indeed, the Fifth Circuit's opinions in cases like

[12] Raby asserts the Eighth Circuit requires a movant to prove the facts required by § 2244(b)(2)(B). Pet. at 30–31 (citing *Roberts v. Bowersox*, 170 F.3d 815, 816 (8th Cir. 1999)). In doing so, he cites one opinion in which the movant filed his motion for authorization only hours before his execution and without "attempt[ing] to" satisfy

Raby's belie his assertion of a circuit split. For example, the Fifth Circuit in *In re Swearingen* "assume[d] the merits" of the movant's claims and considered whether his new evidence made a prima facie showing of innocence under § 2244(b)(2)(B)(ii). 556 F.3d 344, 348–49 (5th Cir. 2009). The Fifth Circuit granted authorization "given the importance" to the prosecution's case of the purportedly false testimony. *Id*. at 349. Raby cannot point to an intractable circuit split considering the consistency of the circuit courts',[13] including the

---

the requirements of § 2244(b)(2). *Roberts*, 170 F.3d at 815–16. This is plainly insufficient to demonstrate an intractable circuit split or that "the courts of appeals [have] adopted divergent interpretations of the gatekeeper standard." Pet. at 2 (citing *Felker*, 518 U.S. at 667 (Souter, J., concurring)).

[13] *See, e.g., Solorio v. Muniz*, 896 F.3d 914, 923 (9th Cir. 2018) (holding movant failed to make prima facie showing of innocence because the new exculpatory and impeachment evidence did not outweigh the "considerable inculpatory evidence"); *Allen v. Mitchell*, 757 F. App'x 482, 486 (6th Cir. 2018) (denying authorization to raise *Brady* claim where "DNA analysis reveal[ed] multiple men had, at some point, left DNA in gloves found near" the victim's body and weighing that evidence against the "damning" inculpatory evidence); *In re Clark*, 2016 WL 11270015, at *3 (6th Cir. 2016) (granting authorization where movant made "sufficient allegations" and provided "some documentation" that warranted a fuller exploration by the district court); *In re Bolin*, 811 F.3d 403, 409 (11th Cir. 2016) (denying authorization despite movant's allegation that an inmate confessed to murdering the victim and that a forensic analyst may have compromised the physical evidence because, "[e]ven discounting the physical and DNA evidence altogether, the State presented other evidence linking [movant] to the murder"); *In re Everett*, 797 F.3d 1282, 1289–93 (11th Cir. 2015) (denying authorization where movant's evidence submitted with his motion for authorization did not make a prima facie showing under § 2244(b)(2)(B)); *In re Siggers*, 615 F.3d 477, 481 (6th Cir. 2010) (assuming movant's allegations of a constitutional violation were true but denying authorization after considering the movant's new evidence and the prosecution's evidence presented at trial); *Jones v. Ryan*, 733 F.3d 825, 845 (9th Cir. 2013) (denying authorization to raise *Brady* claim because, assuming the facts movant alleged were true, he could not make a prima facie showing of innocence "in large part due to the strength of the other evidence against" him); *King v. Trujillo*, 638 F.3d 726, 731–32 (9th Cir. 2011) (assuming

Fifth Circuit's,[14] treatment of motions for authorization like his, i.e., assuming a constitutional violation occurred and considering whether the movant has made a prima facie showing of innocence in light of the exculpatory and inculpatory evidence. *Compare In re Fowlkes*, 326 F.3d at 547 (the Fourth Circuit's denial of authorization as to *Brady* claim based on its finding that movant's evidence would only impeach the witness's testimony "somewhat"), *with In re Rodriguez*, 885 F.3d 915, 919 (5th Cir. 2018) (the Fifth Circuit's

---

movant's allegation that a prosecution witness had no memory of the murder was true but denying authorization in light of other incriminating evidence); *In re McDonald*, 514 F.3d 539, 547 (6th Cir. 2008) (granting authorization to raise *Brady* claim where the prosecutor allegedly suppressed potential alibi testimony and the prosecution presented no direct evidence linking the movant to the murder); *Bryan v. Mullin*, 100 F. App'x 783, 787 (10th Cir. 2004) (denying authorization to raise *Brady* claim because the evidence of movant's guilt was, "though entirely circumstantial, overwhelming"); *In re Fowlkes*, 326 F.3d 542, 547 (4th Cir. 2003) (denying authorization as to movant's *Brady* claim despite allegation that the prosecution suppressed evidence that its key witness testified in exchange for leniency because a reasonable juror could still credit the witness's testimony); *In re Buenoano*, 137 F.3d 1445, 1446–47 (11th Cir. 1998).

[14] *See, e.g., In re Swearingen*, 935 F.3d 415, 419–20 (5th Cir. 2019) (denying authorization despite "assuming the facts underlying" the movant's claim were true in light of overwhelming evidence of guilt); *In re Murphy*, 2019 WL 5406288, at *2 ("Moreover, even with the recanting testimonies of Davis and Young, Murphy cannot demonstrate facts indicative of his innocence."); *In re Young*, 789 F.3d 518, 526–27 (5th Cir. 2015) (denying authorization despite accepting movant's allegation that threats were made against witnesses and witnesses were offered inducements to testify); *In re Pruett*, 711 F. App'x 732, 737 (5th Cir. 2017) (discussing DNA evidence and impeachment evidence proffered by movant and concluding movant was not entitled to authorization); *In re Coleman*, 344 F. App'x 913, 915–17 (5th Cir. 2009) (denying authorization despite assuming statements in affidavits provided by movant were true and assuming movant's allegations established a *Brady* violation); *In re Wright*, 298 F. App'x 342, 345 (5th Cir. 2008) (assuming *arguendo* that the movant's allegation that his codefendant wore jeans at the time of the murder on which the victim's blood was found was true but denying authorization).

denial of authorization based on its finding that movant's evidence amounted only to "marginal impeachment"). Notably, the Fifth Circuit has granted movants authorization to file successive petitions raising due process claims like Raby's. *See, e.g.*, Order, *In re Blackman*, No. 15-10114 (5th Cir. June 18, 2015); *In re Swearingen*, 556 F.3d at 348–49; *In re Johnson*, 322 F.3d 881, 883 (5th Cir. 2003).

To show the Fifth Circuit is an outlier, Raby points only to its opinion in his case, which he argues shows that the court denied authorization because it improperly weighed the facts underlying his claims and did not accept his allegations as true. Pet. at 31–35. Raby is incorrect.

Raby first asserts that the Fifth Circuit improperly disregarded his factual allegations underlying his *Youngblood/Trombetta* claims. Pet. at 31–32. He asserts the Fifth Circuit improperly found Raby did not establish bad faith on the part of the crime lab analyst. Pet. at 31. Section 2244(b)(2)(B)(ii) requires a court to consider whether the facts, "if proven," would demonstrate the movant's innocence by clear and convincing evidence. *See In re Williams*, 330 F.3d at 283 (addressing separately whether the movant sufficiently alleged a constitutional claim and whether the movant made a prima facie showing that the new facts and the record as a whole established his innocence). As discussed above, Raby presented the Fifth Circuit with thousands of pages of exhibits, which included the Bromwich Report that detailed the inadequacy of

the HPD Crime Lab's practices and concluded that the failures of the lab were result of defective procedures, not the result of mistakes or interpretive errors by individual serologists. *See* Pet'r's App. E at 7 n.9, 8. The Fifth Circuit did not question the veracity of Raby's evidence. Instead, it concluded Raby's own evidence—the Bromwich Report—belied the conclusion that the analyst acted in bad faith and because Raby did not present any evidence that the exculpatory value was apparent when the analyst performed his testing.[15] Pet'r's App. E at 8–9. The court did not err in relying on the voluminous evidence Raby presented and concluding that his *Youngblood/Trombetta* claims did not satisfy § 2244(b)(2)(B)(ii). Pet'r's App. E at 8–9.

Raby next asserts that the Fifth Circuit improperly resolved fact issues regarding his *Giglio* claim against him. Pet. at 32–34. He argues the Fifth Circuit improperly disregarded his allegations that the prosecution knowingly presented false testimony of the crime lab analyst. Pet. at 32. As with Raby's *Youngblood/Trombetta* claim, the Fifth Circuit simply relied on Raby's evidence. That evidence—the Bromwich Report—belied the conclusion that the prosecution knowingly presented false testimony. Pet'r's App. E at 8–10. More

---

[15] Notably, the issue of bad faith under *Youngblood* is a mixed question of fact and law. *United States v. Bohl*, 25 F.3d 904, 909 (10th Cir. 1994). The Fifth Circuit was not required to accept the legal conclusion Raby averred must be drawn from the facts. 28 U.S.C. § 2244(b)(2)(B)(ii). Importantly, the Fifth Circuit cited to an earlier case in which a *Youngblood/Trombetta* claim based on the HPD Crime Lab's practices—and Chu in particular— was rejected by the state court and district court. *Napper v. Thaler*, 2012 WL 1965679, at *24–35 (S.D. Tex. 2012).

importantly, the Fifth Circuit *assumed* Raby could establish a due process violation under *Giglio*. Pet'r's App. E at 10. The court determined the *Giglio* claim could nevertheless not satisfy § 2244(b)(2)(B)(ii) "[c]onsidering the overwhelming circumstantial evidence," all of which was within the evidence Raby relied upon to support his motion. Pet'r's App. E at 12. Raby cannot identify any error in the Fifth Circuit's analysis, as § 2244(b)(2)(B)(ii) requires a court to consider "the evidence as a whole."

Raby asserts that the Fifth Circuit denied authorization as to his *Giglio* claim because his newly discovered evidence did not "establish" his innocence. Pet. at 4, 16 (citing Pet'r's App. E at 14). But the Fifth Circuit stated its conclusion plainly and, in doing so, echoed the Seventh Circuit's *Bennett* standard. Pet'r's App. E at 12 ("Considering the overwhelming circumstantial evidence and Raby's confession, Raby has not shown that it is reasonably likely that he will be able to demonstrate, by clear and convincing evidence, that but for the *Giglio* violation, no reasonable juror would have voted to convict him of murder."); *Bennett*, 119 F.3d at 469–70. Consequently, the premise of Raby's assertion that the Fifth Circuit exceeded its jurisdiction and applied an improper standard is incorrect. *See* Pet'r's App. E at 15 ("Raby does not make a prima facie showing that § 2244(b)(2)(B)(ii)'s requirements are met.").

Raby also complains that the Fifth Circuit erred because it did not disregard his confession. Pet. at 33–37. But Raby did not raise a claim in his

motion for authorization alleging his confession was coerced or otherwise involuntary. The Fifth Circuit was not required to accept Raby's allegations regarding his confession and accept his invitation to jettison it as evidence of his guilt. *See House v. Bell*, 547 U.S. 518, 538 (2006) (in conducting a review of a gateway claim of actual innocence, a court "must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial") (internal quotation marks omitted); *Schlup v. Delo*, 513 U.S. 298, 329 (1995) ("It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do."); *MacDonald*, 641 F.3d at 614. The Fifth Circuit appropriately considered the "evidence as a whole" and rejected Raby's effort to "forestall" the "inevitable conclusion" that the circumstantial evidence of his guilt was "overwhelming."[16] Pet'r's App. at 14; 28 U.S.C. § 2244(b)(2)(B)(ii).

Lastly, Raby asserts the Fifth Circuit improperly disregarded his allegations regarding his *Brady* claim. Pet. at 34–35. Specifically, Raby argues

---

[16] As noted above, the district court rejected Raby's challenges during the initial federal habeas proceedings to the admissibility of his confession because "the obdurate reality and the facts d[id] not coincide with his theories." Pet'r's App. A at 7, 10–11.

the Fifth Circuit concluded he did not establish the prosecution withheld exculpatory evidence despite his allegation they did and the affidavit of trial counsel. Pet. at 35. But the Fifth Circuit merely recognized the ambiguity in trial counsel's affidavit—which Raby provided—regarding whether he was provided the purportedly withheld evidence before trial and concluded it was "unclear" whether evidence was withheld. Pet'r's App. at 16 n.17. Nonetheless, as it did regarding Raby's *Giglio* claim, the Fifth Circuit went on to assume Raby could establish a *Brady* violation. Pet'r's App. E at 17. It concluded that the *Brady* claim did not warrant authorization.[17] Pet'r's App. E at 17.

Raby simply fails to show the Fifth Circuit erred in considering and relying on his voluminous evidence and concluding it was insufficient in light of the evidence as a whole to make a prima facie showing under § 2244(b)(2)(B)(ii). For the same reasons, Raby fails to show that the Fifth Circuit exceeded its jurisdiction in denying his motion for authorization. His request for the extraordinary remedy of a writ of habeas corpus by way of an original petition should be denied.

---

[17] Raby's allegations regarding the facts underlying his *Giglio* and *Brady* claims were largely the same—i.e., that a blood type or DNA not belonging to Raby or Ms. Franklin was found in Ms. Franklin's fingernail clippings and no blood was found on Raby's clothes. Pet'r's App. E at 10, 13, 15. As Raby acknowledges, the Fifth Circuit's conclusion that he did not make a prima facie showing of innocence with regard to his *Giglio* claim overlaps with its finding regarding his *Brady* claim. Pet. at 35.

C. The Fifth Circuit properly considered the evidence as a whole and determined that Raby was not entitled to authorization because he did not make a prima facie showing of innocence.

Raby moved in the Fifth Circuit for authorization to file a successive federal habeas petition raising three claims: (1) the state violated *Brady* by withholding exculpatory evidence from Joseph Chu's lab report that Raby was excluded as a source of blood found on Ms. Franklin's fingernail clippings and that no blood was found on the clothes he wore on the night of the murder, (2) the State violated *Giglio* by presenting the false testimony of Chu that the blood typing test he performed on blood found in the victim's fingernails produced inconclusive results, and (3) the state violated *Youngblood/Trombetta* by destroying potentially exculpatory evidence during forensic testing of Ms. Franklin's fingernail clippings.[18] Pet'r's App. E at 4. The Fifth Circuit denied authorization because Raby failed to make a prima facie showing of innocence. In doing so, the court properly considered "the evidence as a whole," which included Raby's thousands of pages of exhibits. Raby seeks to invoke this Court's original jurisdiction to resolve a non-existent circuit split and to obtain authorization to file a successive habeas petition despite the

[18] Raby asserts that the State lost Ms. Franklin's underwear. Pet. at 8, 14. The underwear was not lost. It was tested during the postconviction DNA proceedings and revealed a DNA profile consistent with Ms. Franklin. *Raby v. State*, 2015 WL 1874540, at *1.

"overwhelming circumstantial evidence" and his confession, which he admitted at trial was true. Pet'r's App. E at 12; *see* Pet'r's App. A at 3, 10–11. As discussed below, Raby cannot justify the extraordinary relief he seeks in the face of that evidence.[19]

In asserting his innocence, Raby relies primarily on evidence developed during postconviction DNA testing. The results of the testing of Ms. Franklin's fingernail clippings revealed a low-level, weak, and incomplete partial profile of a mixture of at least two males, which did not include Raby or Ms. Franklin's grandsons. Pet'r's App. E at 14. He argued that those results, and the evidence of Joseph Chu's lab report indicating a blood type belonging to neither Raby nor Ms. Franklin and the absence of blood on Raby's clothing, supported each of his claims. Pet'r's App. E at 15. He also argued that Chu's unnecessary consumption of evidence during his blood typing testing prevented Raby from obtaining a full DNA profile from Ms. Franklin's fingernail clippings during the postconviction DNA proceedings. Pet'r's App. E at 7. But the state court and the Fifth Circuit found Raby's evidence insufficient. Pet'r's App. E at 9, 11–14, 17; *Raby v. State*, 2015 WL 1874540, at *8.

---

[19] Additionally, all of Raby's claims are procedurally defaulted and time-barred. *See* Pet'r's App. E at 15 n.15 (noting that the Director presented "compelling" arguments that Raby's claims were procedurally defaulted and time-barred and failed to satisfy § 2244(b)(2)(B)(i)'s diligence requirement). A motion for authorization may be denied where the claims the movant seeks to raise are time-barred. *In re Mathis*, 483 F.3d 395, 399 (5th Cir. 2007). Consequently, Raby is not entitled to the extraordinary relief he requests.

As the CCA explained in concluding the DNA testing results were not favorable to Raby,

> [Raby's] expert testified that the results were potentially probative, but that the DNA could have been deposited in many ways. . . . The fingernails were stored in two plastic containers, one container for the fingernails of each hand, and the DNA could have come from the top of or underneath the fingernails. . . . [Raby's] expert did testify that there was no way of knowing when or how the DNA was deposited. . . . The [State's] expert also said that the victim could have picked up male DNA from laying on the floor after her attack and that contamination cannot be ruled out because the sample was small and weak. [Raby's] expert agreed that contamination could not be ruled out and that there was no way of knowing when the DNA got on the victim's fingernails.

Raby v. State, 2015 WL 1874540, at *6–7. Evidence submitted to the state court and the Fifth Circuit also showed that, "although [Ms. Franklin] was ill and rarely left her home, she had a lot of contact with people." *Id*. at 7. In light of that, the presence of a weak, incomplete DNA profile is simply not evidence of Raby's innocence. *See* Pet'r's App. E at 14.

Evidence of the absence of blood on Raby's clothing is also insufficient to make a prima facie showing of innocence. As the Fifth Circuit found, such evidence does not contradict Raby's confession considering Ms. Franklin's frailty, Raby's statement in his confession that he attacked her from behind, and the possibility she was unable to fight back.[20] Pet'r's App. E at 13.

[20] Notably, Sergeant Waymon Allen testified at trial there was no physical evidence to connect Raby to the crime. Pet'r's App. E at 14.

Consequently, Raby simply cannot show that no reasonable factfinder would have found him guilty of capital murder if it was aware that Chu's testing of Raby's clothes did not indicate the presence of blood.

Lastly, and most importantly, evidence of an unknown person's blood or DNA on Ms. Franklin's fingernail clippings and the absence of blood on Raby's clothing cannot satisfy Raby's prima facie burden under § 2244(b)(2)(B)(ii) because of the extensive circumstantial evidence of his guilt and his confession. As the Fifth Circuit explained, Raby was a friend of Ms. Franklin's grandsons, Eric Benge and Lee Rose, who lived with her. Pet'r's App. E at 11. About one week before Ms. Franklin was murdered, Raby visited her home to see Benge and Rose. Pet'r's App. E at 11. Raby was drunk and Ms. Franklin told Raby he was not welcome in her home. Pet'r's App. E at 11. Raby reacted angrily, verbally abusing Ms. Franklin and throwing a beer bottle on her porch. Pet'r's App. E at 11.

On the day of the murder, Benge left home, returning at night to find Ms. Franklin dead. Pet'r's App. A at 2. Ms. Franklin's purse was knocked over and her pants and underwear had been pulled down. Pet'r's App. A at 2.

Ms. Franklin's daughter, Linda McClain, testified that she last spoke with Ms. Franklin on the phone at about 6:45 p.m. Pet'r's App. E at 11. Shirley Gunn lived near Ms. Franklin's home. Pet'r's App. E at 11. On the evening of Ms. Franklin's murder, Raby came to Gunn's home at about 5:00 p.m. Pet'r's

App. E at 11. Raby was wearing a jacket. Pet'r's App. E at 11. Gunn smelled alcohol on Raby's breath. Pet'r's App. E at 11. While speaking with Gunn, Raby took out a pocketknife and cleaned his fingernails with it. Pet'r's App. E at 11. Gunn estimated the knife was two to three inches in length. Pet'r's App. E at 11. Raby left Gunn's home at 6:00 p.m. Pet'r's App. E at 11. Before Raby left, he asked Gunn whether her son was at Ms. Franklin's home. Pet'r's App. E at 11.

Mary Alice Scott also lived near Ms. Franklin. Pet'r's App. E at 11. Sometime between 7:00 and 7:45 p.m., Raby knocked on her back door. Pet'r's App. E at 11. When Scott got to her door, she looked outside and saw Raby walking down her driveway to the street. Pet'r's App. E at 11. Raby was wearing blue jeans and a dark jacket. Pet'r's App. E at 11.

Barbara Wright lived ten to twelve blocks from Ms. Franklin. Pet'r's App. E at 11. Wright testified Raby passed by her home at about 5:00 p.m. on the night of the murder and again after 6:00 p.m. Pet'r's App. E at 11. Raby had a black jacket over his shoulder. Pet'r's App. E at 11.

Leo Truitt lived behind Ms. Franklin's home. Pet'r's App. E at 11. Martin Doyle visited Truitt's home at about 8:00 p.m. on the night of the murder. Pet'r's App. E at 11. As Doyle pulled into Truitt's driveway, he saw a white man walk through the yard and jump over Truitt's fence. Pet'r's App. E at 11. The man walked eastward away from Truitt's home. Pet'r's App. E at 11. Truitt

and Doyle drove down the road and stopped to speak to the man who had jumped Truitt's fence. Pet'r's App. E at 11. At trial Doyle estimated the man's height to be 6 feet or less. Pet'r's App. E at 11. The prosecutor had Raby stand up in court, and Doyle testified that Raby was "about the same" height as the man he saw jump Truitt's fence. Pet'r's App. E at 11. On the day after the murder, Truitt described for the police the man who he pursued and confronted after jumping his fence as a white male between 5 feet 6 inches and 5 feet 7 inches tall and 160 pounds. Pet'r's App. E at 12. Raby was about 5 feet 7 inches tall and about 160 pounds. Pet'r's App. E at 12.

On the day after the murder, the police attempted to arrest Raby at his girlfriend's home, but Raby fled. Pet'r's App. E at 12. Raby was arrested three days after the murder. Pet'r's App. E at 12. Raby initially denied going to Ms. Franklin's home on the day of the murder. Pet'r's App. E at 12. When told he was seen jumping over a fence leaving Ms. Franklin's home, Raby confessed.[21] Pet'r's App. E at 12; *see Raby v. State*, 2015 WL 1874540, at *2.

Raby argued that the evidence of his guilt was weak and that his confession was unreliable in a number of ways, primarily because the absence of blood on his clothes or scratches on his skin and that his DNA was not found

[21] Raby asserted that he has "recanted" his confession. Pet'r's App. E at 13. However, Raby's recantation went only so far as to assert that he has "no memory of killing Mrs. Franklin." Pet'r's App. E at 13. Despite his uncertainty of whether he killed Ms. Franklin, Raby was certain he did not rape her. Pet'r's App. E at 13.

on Ms. Franklin's fingernails contradict the description in his confession that he struggled with Ms. Franklin. Pet'r's App. E at 13. But as the Fifth Circuit found, the absence of blood on Raby's clothes does not show that he did not commit the murder, especially in light of the fact that Raby stated he grabbed Ms. Franklin from behind and Ms. Franklin's wounds were to the front of her neck and chest. Pet'r's App. E at 13. Further, there is no reason to believe that Ms. Franklin was able to scratch her attacker, much less that she would have been able to draw blood from her attacker (Raby was wearing a jacket on the night of the murder). Pet'r's App. E at 13. Indeed, Ms. Franklin was exceptionally frail. *See Raby v. State*, 2015 WL 1874540, at *2. She had trouble walking and spent most of her time in bed. *Id*. And as the testimony at the state court's DNA hearing showed, the partial profile obtained from Ms. Franklin's fingernail clippings could have originated from many places other than her assailant. *Id.* at *3, 7. Moreover, Raby could not be excluded as a contributor of the biological material collected from Ms. Franklin's right hand. Pet'r's App. E at 13. And, again, Raby adopted his confession at trial when he testified that it was true. Pet'r's App. A at 11.

To obtain authorization to file a successive petition, Raby was required to make a prima facie showing that no reasonable factfinder would have found him guilty of capital murder in light of this evidence if the prosecution had disclosed to the defense, and the factfinder knew, that Chu's testing of Ms.

Franklin's fingernail clippings indicated the presence of type A blood, DNA from an unknown individual was found in the fingernail clippings, and no blood was found on Raby's clothes. 28 U.S.C. § 2244(b)(2)(B)(ii). Raby simply could not make that showing in light of the "overwhelming circumstantial evidence" and his confession. Pet'r's App. E at 12. The testimony of multiple witnesses plainly placed Raby (or a man of the same height and weight as Raby and wearing clothing matching the description of the clothes Raby was wearing) as walking to Ms. Franklin's house, where he was not welcome, near the time of the murder carrying a knife and leaving her house shortly thereafter, between the last time Ms. Franklin was known to be alive and later found dead. Pet'r's App. E at 11–13.

Because Raby cannot make a prima facie showing of innocence despite having been afforded opportunities to do so, there is no basis to grant the extraordinary remedy he seeks. Raby's original petition for a writ of habeas corpus should be denied.

II. Raby's Petition for Certiorari Review Is Statutorily Prohibited and Amounts to Nothing More than a Request for this Court to Correct the Fifth Circuit's Application of a Properly Stated Rule of Law.

Raby also asks this Court to grant certiorari review of the Fifth Circuit's denial of his motion for authorization. Pet. at 2. Knowing that such relief is statutorily prohibited, 28 U.S.C. § 2244(b)(3)(E), he asserts he is not appealing

that decision but instead challenging the court's "extra-jurisdictional" decision. Pet. at 2. But as discussed above, the Fifth Circuit did not exceed its jurisdiction by denying authorization because Raby failed to make a prima facie showing of innocence. For the same reason, the Fifth Circuit's decision does not represent a "divergent" application of § 2244 such that this Court should, for the first time, decide that AEDPA exceeds the Exceptions Clause in this context. *See Felker*, 518 U.S. at 667 (Souter, J., concurring); U.S. Const. art. III, § 2, cl. 1. Raby certainly cannot justify doing so where this Court explicitly held that the opportunity to file an original petition for a writ of habeas corpus "obviates any claim" under the Exceptions Clause. *Felker*, 518 U.S. 654.

Even if such a possibility existed, Raby does not show an entitlement to it. As discussed above, he points to only an illusory circuit split and does not identify an important issue that warrants this Court's attention. And while Raby focuses on the Fifth Circuit's purported treatment of the merits of his claims, he elides the basis of the court's rejection of his motion for authorization—that the facts underlying his claims were, when "viewed in light of the evidence as a whole," insufficient to make a prima facie showing of innocence. 28 U.S.C. § 2244(b)(2)(B)(ii); Pet'r's App. E at 9 (the facts underlying Raby's *Youngblood/Trombetta* claim did "not exonerate Raby"), 10–15, 17.

Raby's failure to identify a true circuit split also means that he cannot identify a compelling reason justifying this Court's attention. Sup. Ct. R. 10. The absence of a compelling reason lays bare Raby's true request—for this Court to correct the Fifth Circuit's application of a properly stated rule of law. Raby's dissatisfaction with the Fifth Circuit's decision is a plainly inadequate justification for this Court to not only jettison the statutory limit on this Court's certiorari jurisdiction but also reach a question this Court does not grant certiorari to address. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). And that is because "[e]rror correction is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J.) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)). His petition for a writ of certiorari should be denied.

CONCLUSION

The original petition for a writ of habeas corpus and the petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

MARK PENLEY
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1800
Fax: (512) 320-8132
e-mail: jay.clendenin@oag.texas.gov

Counsel for Respondent