CAPITAL CASE

No. 19-5820

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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REPLY BRIEF FOR THE PETITIONER

Petitioner Charles D. Raby, currently on death row, seeks review as a matter of first impression of the standard applicable to a motion to authorize a successive habeas corpus petition. The circuit courts are split as to whether they are permitted to reach the merits of a movant's allegations in determining whether the movant has made a *prima facie* showing under 28 U.S.C. § 2244(b)(3)(C). The State has effectively conceded that split by arguing that the Fifth Circuit properly assumes facts in the movant's favor only with respect to a movant's constitutional claims, and not with respect to a movant's § 2244(b)(2)(B)(ii) allegations. In the absence of any physical or eyewitness evidence tying Raby to the murder of Edna Franklin, the evidence that Raby's confession was inaccurate, that he had no physical contact with Franklin, and that she was attacked by an unknown assailant goes to the heart of the State's case. Such evidence would satisfy the *prima facie* showing standard applied by a majority of other circuits, which assume the truth of a movant's § 2244(b)(2)(B)(ii) allegations.

This Court is free to address the circuit split through a petition for certiorari or, alternatively, through an original writ. This case is an ideal vehicle for resolving the circuit court confusion regarding the application of § 2244(b)(3)(C), because the new evidence goes directly to Raby's innocence. The Fifth Circuit's opinion makes clear that the court gave the State, rather than Raby, the benefit of any doubt with respect to Raby's § 2244(b)(2)(B)(ii) allegations. It is the State's position that the court properly reached the merits of those allegations. This Court's review is critical to ensure that legitimate allegations of innocence, grounded in science, do not fall on

deaf ears simply because a would-be habeas petitioner files a motion for authorization in a minority circuit court.

I. Circuit Courts Are Split on What Constitutes a "Prima Facie Showing" for the Purposes of 28 U.S.C. § 2244(b)(3)(C).

While most circuits have adopted the Seventh Circuit's holding in *Bennett v. United States*, 119 F.3d 468 (7th Cir. 1997), there are material differences in their application of the § 2244(b)(3)(C) *prima facie* standard. The State thus cannot show that a motion for authorization to file a successive habeas petition will receive similar treatment regardless of where it is filed.

The State incorrectly argues that all circuits uniformly assume the merits of a movant's constitutional claims, but then make an independent determination regarding the § 2244(b)(2)(B)(ii) showing based on the "evidence as a whole"—including all evidence submitted in support of both a motion for authorization *and* a proposed habeas petition. The State's argument ignores the strictly circumscribed role of the circuit courts under § 2244(b)(3)(C) at this stage and, if accepted, would erase § 2244's distinction between the circuit court's gatekeeping role and the district court's responsibility to adjudicate the issue in the first instance. The State concedes that the Fifth Circuit ignored that distinction, *see infra* at § I.A, implicitly admitting that the court's application of the statute is contrary to that of other circuits.

The State refers repeatedly in its brief to what the Fifth Circuit called "overwhelming circumstantial evidence," and cites cases from other circuit courts in which a movant's new evidence was rejected as insufficient in such a context. But it is clear from those other decisions that Raby would satisfy the *prima facie* showing

requirement in the majority of those courts, which accept a movant's § 2244(b)(2)(B)(ii) fact allegations as true. Here, no eyewitness or physical evidence tied Raby to the crime. There was no trace of blood on his clothing, a fact that undermines the integrity of his recanted, police-drafted "confession" describing physical contact with a victim "covered in blood." Blood and DNA found under the victim's fingernails could not have come from the victim or Raby. The Fifth Circuit concluded that this evidence was an insufficient *prima facie* showing of innocence, because it considered each of Raby's allegations in isolation and in the light most favorable to the State. That approach is inconsistent with other circuits' and the statutory scheme for adjudicating motions to authorize review of successive habeas applications.

A. Circuit courts disagree on whether § 2244(b)(3)(C) imposes a light or heavy burden, but the majority have concluded that their role is not to reach the merits of a movant's § 2244(b)(2)(B)(ii) allegations.

"[C]ourts of appeals differ over whether [the standard of review established by § 2244(b)(3)(C)] is an exacting requirement or a relatively lenient one." *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003); *see also* Pet. at 22-26 (citing cases). The State dismisses these as different "descriptors" for the same test, Resp't Br. at 14-15, but the split is far from superficial. Contrary to the State's suggestion that a circuit court's deference to a movant's factual allegations begins and ends with the movant's constitutional claims, *see, e.g.*, Resp't Br. at 15, 17, 21-22, the majority of circuit courts interpret their gatekeeping role as prohibiting them from reaching the merits of a movant's factual allegations in ruling on whether he has made a *prima facie* showing

for purposes of § 2244(b)(2)(B)(ii). Pet. at 26-30. The State cites no authority for its position other than the Fifth Circuit's divergent practice, evidencing the split.

The Second Circuit, for example, takes a movant's allegations—including those related to § 2244(b)(2)(B)(ii)—as true unless they "are fanciful or otherwise demonstrably implausible." *Quezada v. Smith*, 624 F.3d 514, 521-22 (2d Cir. 2010) (granting motion for authorization based on evidence of coercion of only witness to identify petitioner, assuming in petitioner's favor both that coercion occurred and that it caused witness to give false testimony). By contrast, the Fifth Circuit made fact assumptions in the *State's* favor (*e.g.*, that the victim's fingernail clippings were contaminated and that she did not fight back against her assailant). Such presumptions are more fanciful than Raby's assertions that the absence of blood on his clothing, and the presence of blood under the victim's fingernails that did not come from her or Raby, showed that Raby had no physical contact with the victim.

The State fails in its attempts to show that the Fifth Circuit's decision was consistent with other circuits' methodology when concluding that a movant did not make a *prima facie* showing with respect to § 2244(b)(2)(B)(ii). Resp't Br. at 21 n.13. In those cases, the new evidence did not refute *direct* evidence linking the movant to the crime, was merely cumulative of evidence presented at trial, and/or bore no relation to the movant's guilt. It was thus possible to accept the movant's § 2244(b)(2)(B)(ii) allegations and still conclude the movant had not made a *prima facie* showing.

As discussed in more detail below, this case is distinguishable. The supposedly "overwhelming circumstantial evidence" cited by the Fifth Circuit as evidence of

Raby's guilt includes: (1) the fact that Raby knew the victim because he was friends with her grandsons; (2) witness testimony that, "[r]oughly a week before her murder," the victim "informed an intoxicated Raby that he was not welcome in her house, and he responded by verbally abusing Franklin and hurling a beer bottle onto her porch"; (3) witness testimony "plac[ing] Raby near Franklin's home at the time she was murdered," with a pocket knife; (4) witness testimony that, "shortly before Franklin was murdered, Raby asked a friend's mother whether her son was at Franklin's house"; and (5) evidence that Raby fled from police the day after the murder. *In re Raby*, 925 F.3d 749, 757-58 (5th Cir. 2019). But the Fifth Circuit missed or omitted important contextual facts, including that Raby lived in the victim's neighborhood, and knew not just the victim but also several people who lived close to the victim; and that, while Raby's pocket knife had a two-inch blade, the victim's knife wounds were four inches deep—without visible hilt marks. Mot. for Auth. at 7; Proposed Pet. at 81. This is not a case in which the new evidence comes nowhere close to refuting *direct* evidence of guilt or was merely cumulative of trial evidence.[1]

The State insists that the Fifth Circuit properly denied Raby's motion for authorization based on its review of the thousands of pages of evidence that he cited *in support of his habeas petition*, only some of which was incorporated by reference in

[1] Indeed, despite the State's attempt to claim that no circuit court would have treated Raby's application differently, it cites two Sixth Circuit cases that relied on the significance of the lack of any physical evidence tying the petitioner to the crime in granting motions for authorization. *See In re Clark*, No. 15-2156, 2016 WL 11270015, at *3 (6th Cir. Mar. 28, 2016) (granting application where petitioner alleged police withheld exculpatory evidence that excluded petitioner as the perpetrator because such evidence merited further review "given that there was no physical evidence linking [petitioner] to the crime and no witness observed" the actual killing); *In re McDonald*, 514 F.3d 539, 547 (6th Cir. 2008) (granting application because witness's recantation of his testimony "loomed large" given "the lack of direct evidence linking [petitioner] to the underlying crimes").

his motion, and its speculative presumptions in the State's favor. *See, e.g.*, Resp't Br. at 17-19, 23-24. The State's position is out of step with the holdings of the majority of circuit courts, which limit their *prima facie* review to the allegations and evidence the movant offers in support of the motion, and take those allegations as true unless they are obviously inconsistent with that evidence. *See* Pet. at 26-30. Indeed, this Court has observed, as have some circuit courts,[2] that the limited time a circuit court has to assess whether a *prima facie* showing has been made necessarily limits its scope of review. Pet. at 21-22 (citing *Tyler v. Cain*, 533 U.S. 656, 664 (2001)). The State's argument simply highlights the circuit split.

B. The Fifth and Eighth Circuits do not give the movant the benefit of fact assumptions at the *prima facie* showing stage.

Two circuit courts—the Eighth[3] and Fifth Circuits—have sharply diverged from the other circuit courts by refusing to give a petitioner the benefit of any fact assumptions at the motion-for-authorization stage. *See* Pet. at 25-34. In Raby's case,

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[2] *See, e.g.*, *Case v. Hatch*, 731 F.3d 1015, 1028-29 (10th Cir. 2013) (quoting *Bennett* and noting that, "[t]hus, gate one is at the circuit court level where a preliminary assessment occurs based on the application; gate two is at the district court level where a record is made and a final assessment occurs"); *Goldblum v. Klem*, 510 F.3d 204, 220 (3d Cir. 2007) ("a court of appeals should make its determination within an extremely tight deadline and on the basis of a limited inquiry"); *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004) ("Judge Posner's 'tight deadline' point is further reinforced by subsection (b)(3)(E), which states that 'the 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.' Congress has emphasized the need for quick action by the court without further review."); *Bennett*, 119 F.3d at 469 (citing the "tight deadline" for a circuit court's ruling on a motion for authorization as partial support for its conclusion that a *prima facie* showing is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court").

[3] The State suggests that the Eighth Circuit's decision in *Roberts v. Bowersox*, 170 F.3d 815 (8th Cir. 1999), is somehow irrelevant to the analysis because, in denying the motion for authorization where the petitioner had failed to *prove* the facts required by § 2244(b)(2)(B), the Eighth Circuit noted that the petitioner did not "attempt" to "satisfy the requirements of § 2244(b)(2)." Resp't Br. at 20 n.12 (citing *Roberts*, 170 F.3d at 816). But the Eighth Circuit's comment merely reinforces that it denied the motion, because the petitioner failed to make a showing he was not required to make.

while the Fifth Circuit paid lip service to the correct standard of review, it improperly denied his motion, because he failed to make at the motion-for-authorization stage the showing that § 2244(b)(2)(B) requires in the district court.

For example, the panel ruled with respect to Raby'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.'"[4] *In re Raby*, 925 F.3d at 755. Of course, 28 U.S.C. § 2244 does not require that Raby "establish" in his motion that he can satisfy § 2244(b)(2)(B)(ii). Any such requirement would render meaningless the reference to a "prima facie" showing in § 2244(b)(3)(C). The court also ruled, with respect to Raby's *Giglio* and *Brady* claims, that he "does not have a reasonable likelihood of showing, by clear and convincing evidence[] that[,] but for" his alleged constitutional violation, "not a single reasonable juror would have found him guilty of murder." *Id.* at 757, 760. While the Seventh Circuit in *Bennett* acknowledged that a showing of a reasonable likelihood of success is *sufficient* to satisfy § 2244(b)(3)(C), 119 F.3d at 469, it did not hold that a movant must make that showing, or do so without the benefit of any fact assumptions.

Indeed, the lower court here went beyond merely refusing to assume facts in Raby's favor, and instead repeatedly made improper and unsupported factual assumptions in the State's favor, holding Raby to a greater burden than its sister courts or AEDPA require. For example, the Fifth Circuit:

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[4] The State argues that this language must be read in conjunction with the Fifth Circuit's conclusory recitations of the statutory language. Resp't Br. at 25. But the Fifth Circuit's opinion makes clear that the court did in fact prematurely rule that Raby could not make his § 2244(b)(2)(B)(ii) showing due to potential adverse inferences from the evidence as a whole.

- inexplicably presumed—contrary not just to Raby's allegations and evidence, but also to the findings of a state commission—that the Houston Police Department ("HPD") Crime Lab's errors were "probably" the result of poor training and procedures rather than bad faith, *In re Raby*, 925 F.3d at 756;

- ignored Raby's allegations and evidence with regard to his coerced confession in favor of rank speculation that (a) the victim's fingernail scrapings contained blood belonging to neither her nor Raby because the sample had somehow been contaminated (no evidence of contamination has ever been presented), *id.* at 759; and (b) Raby had no blood on his clothes because the victim did not fight back (contradicting Raby's custodial statement and record evidence of defensive wounds on the victim's hands and arms), *id.* at 758;

- misleadingly found that "the presence of A antigen activity in the biological material recovered" from the victim's fingernails "do[es] not exclude Raby as a contributor of the biological material," *id.* at 759;[5] and

- speculated that statements in Raby's confession that conflict with the physical evidence "may" have been the result of Raby's intoxication, *id.*

The State's response is that the Fifth Circuit applied the correct standard of review by simply "assum[ing]" or "accept[ing]" that Raby sufficiently alleged his constitutional claims, that there was blood and DNA found in the victim's fingernail clippings that did not belong to her or Raby, and that Raby did not have blood on his clothes, before concluding that the new evidence was "insufficient." Resp't Br. at 15-16. But the Fifth Circuit only assumed *arguendo* that Raby sufficiently alleged his constitutional claims, after attacking them on factual grounds including those set forth above, and concluded that they were irrelevant because Raby could not (or was not reasonably likely to be able to) make his § 2244(b)(2)(B)(ii) showing—citing the same adverse presumptions. *In re Raby*, 925 F.3d at 756, 759, 761.

[5] The court's language is misleading because it is undisputed that Raby has Type-O blood, and thus could not have contributed the A antigen activity. *See* Mot. for Auth. at 22. The court appears to have been referring instead to the H antigen activity in the biological material, which does not exclude Raby *or anyone else* as a contributor. *See id.*

Moreover, the Fifth Circuit gets no credit for accepting that blood and DNA found in the victim's fingernail clippings did not belong to her or Raby and that Raby did not have blood on his clothes—those are undisputed facts. The court's conclusion that they were "insufficient" based on its multiple assumptions *regarding* those facts, all in the State's favor, improperly reaching the merits of Raby's successive habeas claim at the gatekeeping stage, is what sets the Fifth Circuit's application of 28 U.S.C. § 2244(b)(3)(C) apart from that of the majority of other circuits. The State incorrectly suggests that Raby contends the court should have ignored the evidence presented in connection with his motion for authorization. Resp't Br. at 17. But other circuits contemplate some limited review at the gatekeeping stage of the evidence offered in support of the motion for authorization.[6] They do not sanction a circuit court's resolution of disputed issues of material fact in the first instance when the evidence is subject to different interpretations. That is the role of the district court.

As a secondary argument, the State points to the Fifth Circuit's decision in *In re Swearingen*, 556 F.3d 344 (5th Cir. 2009), as an example of a case in which the court supposedly deferred to the movant's § 2244(b)(2)(B)(ii) allegations.[7] It is true

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[6] *See, e.g.*, *Quezada*, 624 F.3d at 521 ("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 gatekeeping, unless those allegations are fanciful or otherwise demonstrably implausible"); *Bennett*, 119 F.3d at 469-70 (court will grant a motion for authorization "[i]f 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").

[7] In *Swearingen*, the court granted a motion for authorization based on an affidavit from the medical examiner stating that she would have given different testimony as to the victim's time of death had she been provided certain additional information. 556 F.3d at 348. The Fifth Circuit assumed the merits of Swearingen's asserted constitutional error at this stage," and then found that he had made his *prima facie* showing "given the importance of [the medical examiner's] expert testimony to the State's case," *id*., without further comment.

that the Fifth Circuit in *Swearingen* did not, as it did here, conclude that the new evidence had "probably" not been withheld in bad faith, discount the new evidence by speculating that it had been contaminated, or dismiss it by speculating that the murder had occurred in a manner different from the State's theory at trial. But assuming that the Fifth Circuit in *Swearingen* actually applied the *prima facie* standard of review it quoted, then *Swearingen* is an outlier. Other Fifth Circuit denials of motions for authorization demonstrate that the Fifth Circuit routinely applies a materially stricter standard than that required by statute or applied by other circuits.[8]

II. The Circuit Split Must Be Resolved in Favor of Giving Effect to the "Prima Facie Showing" Language in 28 U.S.C. § 2244(b)(3)(C) and Recognizing the Court of Appeals' Limited Role at This Stage.

In the 23 years since AEDPA's enactment, this Court has not reviewed the procedures governing successive habeas corpus petitions. In the interim, despite the express dictates of § 2244(b), the circuit courts have developed starkly disparate standards of review for motions for authorization. This disarray in the application of

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[8] *See, e.g.*, *In re Murphy*, No. 19-40741, 2019 WL 5406288, at *2 (5th Cir. Oct. 22, 2019) (denying motion in part because "the record in the instant case does not reflect that . . . this newly discovered information ***proves***, by clear and convincing evidence, that but for the prosecution's misconduct, no reasonable factfinder would have found Murphy guilty" (emphasis added)); *In re Berkley*, 375 F. App'x 413, 415 (5th Cir. 2010) (denying motion in part because, "[g]iven the strength of the State's case, we ***cannot say*** that without the [testimony called into question by newly discovered evidence] no reasonable factfinder would have found [movant] guilty of capital murder" (emphasis added)); *In re Coleman*, 344 F. App'x 913, 916-17 (5th Cir. 2009) (denying motion in part because: "even were we to conclude that there was a *Brady* violation, [movant] ***has not shown by 'clear and convincing evidence'*** that, but for the suppression of the exculpatory evidence, the jury would not have found him guilty of the underlying offense, as required by 28 U.S.C. § 2244(b)(2)(B)(ii)" and "[c]ertainly, [movant] ***has not shown by clear and convincing evidence*** that but for the *Brady* violation he would not have been found guilty, which is a requirement for an exception to the rule that new claims raised in successive habeas petitions must be dismissed" (emphasis added)); *In re Smith*, 142 F.3d 832, 836 (5th Cir. 1998) (denying motion because, "[e]ven assuming that [movant] has discovered new evidence that was unavailable to him earlier, the submitted portion of the report, which merely contains descriptive information about the crime, ***falls far short of satisfying*** § 2244(b)(2)(B)(ii)" (emphasis added)).

§ 2244(b) is significant and entrenched. Raby's case is an ideal vehicle to address the circuit split for the reasons set forth in his Petition, including that his conviction was tainted by malfeasance in the Harris County District Attorney's Office and HPD Crime Lab, and that he has presented uncontradicted evidence of foreign blood under the victim's right-hand fingernails and foreign DNA under her left-hand fingernails.

The current circuit split must be resolved in favor of a gatekeeping standard of review that is both more lenient than that dictated by §§ 2244(b)(2)(B)(i) and (ii) and gives effect to the requirements of §§ 2244(b)(3)(B), (D), and (E) (*e.g.*, § 2244(b)(3)(D)'s requirement that the court of appeals resolve a motion for authorization within 30 days of filing, and § 2244(b)(3)(E)'s prohibition on appeals, petitions for rehearing, or writs of certiorari). *See Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017) ("Whenever possible, . . . we should favor an interpretation that gives meaning to each statutory provision."). This standard associated with the majority of circuit courts (Third, Fourth, Seventh, Tenth) (1) accepts as true a petitioner's nonfrivolous allegations with respect to the requirements of § 2244(b), and (2) determines on that basis whether it is "reasonably likely" that the successive habeas petition will satisfy § 2244(b)'s requirements.

III. 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.

Raby's December 21, 2018 motion for authorization raised substantial state misconduct claims in federal court for the first time. These claims were eligible for review under § 2244(b)(2)(B) because Raby pled a *prima facie* case under

§ 2244(b)(3)(C) that they could not have been raised with reasonable diligence in the original petition, and that 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 Raby guilty of the underlying offense.

The Fifth Circuit correctly characterized the standard as requiring "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, however, went well beyond that in concluding that Raby 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 based on the incomplete record before it. This not only placed too heavy a burden on Raby in seeking a motion for authorization but also usurped the role of the federal district court in the statutory scheme.

The misapplication of the standard for review under 28 U.S.C. § 2244(b)(3)(C) is evident in the Fifth Circuit's treatment of each of Raby's state misconduct claims.

- The Fifth Circuit dismissed Raby's *Trombetta* and *Youngblood* claims thus:

> [H]e ***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). Specifically, rejecting Raby's allegation and evidence of bad faith, the panel improperly concluded that Chu's

unnecessary destruction of important biological material was merely evidence of poor training and did not "establish bad faith on the part of Chu." *Id*. at 756. This was speculation in service of the wrong standard.

- In dismissing Raby's *Giglio* claim, the panel relied on the same gross speculation regarding Chu's conduct. *See supra* at 13 (citing *In re Raby*, 925 F.3d at 759).
- Raby's *Brady* claim received the same consideration:

> As an initial matter, Raby fails to carry his burden concerning the second element [that the state must have suppressed the evidence]. 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 (internal citations omitted).

The above passage belies that Raby had produced counsel declarations attesting that the blood-type results were not among the files received from trial counsel after assuming representation and, indeed, that there was no practice to disclose such records until, at earliest, cross-examination of the witness, when it was too late to use them effectively. *See, e.g.*, Proposed Pet. Exh. II.5 ¶ 7. A prosecutor's alleged "open file" policy cannot realistically overcome specific evidence of

suppression. This is especially so given the historical suppression of exculpatory evidence in Harris County capital cases despite the "open file" policy.[9]

In essence, the Fifth Circuit found that Raby failed to make his *prima facie* showing *because* he could not satisfy the requirements of § 2244(b)(2)(B)(ii). This exceeded the panel's jurisdiction in this matter, which was limited to deciding the preliminary question of authorization to file a successive habeas petition; instead, it decided the merits of the habeas petition. The Fifth Circuit's ruling subverts the statutory framework for review of motions for authorization and is wholly at odds with other circuit courts' interpretation and application of that framework.

IV. This Court has Jurisdiction Over This Case to Resolve a Circuit Split Concerning Review of Successive Petitions

The State chiefly relies on its talismanic recitation that there is no circuit split and therefore no jurisdiction exists here, *i.e.*, no question worth addressing. Raby has shown, however, that a circuit split exists.

The State misinterprets the Petition as an end-run around the prohibition on appeals in 28 U.S.C. § 2244(b)(3)(E). The central issue in this Petition, however, is not whether Raby's successive petition should ultimately be authorized—or whether he committed the crime for which he was convicted—but whether the Fifth Circuit's

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[9] To illustrate, in the recent case of *Texas v. Hamilton*, No. 901049-B in the 180th District Court in Harris County, Texas granted resentencing after hearing evidence and issuing findings that the HPD Crime Lab's policy was to not document instances in which it failed to match a fingerprint to the suspect. *See* Findings of Fact and Conclusions of Law, *Texas v. Hamilton*, No. 901049-B (180th Dist. Ct., Harris County, Tex. Oct. 14, 2019), attached as Exhibit 1. Until at least 2002, defense counsel could not learn of such a result even by calling the Crime Lab: "The open file policy in Harris County at the time of Hamilton's trial meant defense counsel had 'to rely on the integrity of the person who was presenting those files for review, either prosecutors or the State of Texas.'" *Id.* at ¶ 141. As in *Hamilton* and the cases discussed in the Bromwich reports, suppression of exculpatory evidence occurred here at the hands of at least prosecution team member Chu, despite "open file" assurances.

review was extra-jurisdictional. Future successive petitioners are entitled to have a district court weigh legitimate new evidence and related testimony.[10]

Justice Souter opined in *Felker* that "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open." *Felker v. Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring). That day has come. Raby is without any other recourse to rectify the Fifth Circuit's extra-jurisdictional acts. The State derides Raby's attempt to seek redress in this Court, stating that he cannot "identify an important issue that warrants this Court's attention." Resp't Br. at 36. Yet, it is undeniable that federal successive petitioners currently receive disparate treatment in the circuit courts based on divergent interpretations of their essential gate-keeping role. If the lives that are at stake are not important, then nothing is.

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 Raby's Motion for Order Authorizing Filing and Consideration of Second Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254.

[10] Joseph Chu, probably the most important witness regarding Raby's claims, has *never* been cross examined over these new claims. Some of the witnesses in this case are already passing away. Time is running short to understand the motives of State actors, making review of the circuit courts' gate-keeping role even more vital.

Respectfully submitted,

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