No. 19-____

IN THE
Supreme Court of the United States

IN RE JULIUS JEROME MURPHY,
Petitioner.

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

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

I. 28 U.S.C. § 2244(b)(3) tasks federal courts of appeals with determining whether an applicant has made a "prima facie showing" that his application satisfies the requirements of Section 2244(b) before the court may authorize the applicant to file a second or successive habeas petition. The question presented is: Does a circuit court exceed its jurisdiction by requiring a petitioner to satisfy the burden of *actually establishing* that his application to file a successive habeas petition satisfies the requirements of Section 2244(b) at the motion for authorization stage, rather than merely make the "prima facie showing" set forth in the text of the statute?

PARTIES TO THE PROCEEDING

This petition stems from a habeas corpus proceeding in which Petitioner, Julius J. Murphy, was the Movant before the United States Court of Appeals for the Fifth Circuit.

Respondent is Lorie Davis, Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

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Julius Jerome Murphy respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit in this case. Alternatively, Murphy petitions this Court to exercise its original jurisdiction to issue a writ of habeas corpus.

OPINIONS BELOW

In its October 22, 2019 opinion, the United States Court of Appeals for the Fifth Circuit denied Murphy's Motion for Authorization to File a Successive Habeas Petition. Pet. App. 1a–5a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Pursuant to 28 U.S.C. § 2244(b)(3)(E), "[t]he grant or denial of an authori-

zation 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." But Murphy's Petition for a Writ of Certiorari is *not* premised on the substance of the Fifth Circuit's denial of his Motion for Authorization. Instead, it focuses on the Fifth Circuit's extra-jurisdictional procedure for evaluating his application, which circumvented the requirements of 28 U.S.C. § 2244(b). The question of the scope of the circuit court's jurisdiction at Section 2244(b)'s authorization stage is within this Court's jurisdiction through a petition for certiorari.

In the alternative, this Court may invoke its original jurisdiction over Murphy's Original Petition for Writ of Habeas Corpus. Murphy's Original Petition satisfies Supreme Court Rule 20, which requires a petitioner seeking a writ of habeas corpus to show that (1) "adequate relief cannot be obtained in any other form or in any other court;" (2) "exceptional circumstances warrant the exercise of the Court's discretionary powers;" and (3) "the writ will be in aid of the Court's appellate jurisdiction." Sup. Ct. R. 20.1. Further, this Court's authority to grant relief is limited by 28 U.S.C. § 2254, and any considerations of a second petition must be "inform[ed]" by 28 U.S.C. § 2244(b). *See Felker* v. *Turpin*, 518 U.S. 651, 662–663 (1996).

As required by Rule 20.4 and 28 U.S.C. § 2242 Murphy states that he has not applied to the district court for a writ of habeas corpus because the circuit court prohibited such an application. This Court is Murphy's only means for relief. If a petition for certiorari is improper, then the only remaining

avenue for relief is for this Court to exercise its original jurisdiction and grant a writ of habeas corpus. This also demonstrates why a writ would be in aid of the Court's appellate jurisdiction.

Exceptional circumstances warrant the exercise of this Court's original jurisdiction. First, there is widespread confusion among federal courts of appeals concerning screening procedures when reviewing applications to file second, or successive, habeas petitions pursuant to 28 U.S.C. § 2244. Those procedures have never been examined by this Court in the more than 20 years since they were enacted. This case provides the Court with an opportunity to ensure that circuit courts do not exceed their jurisdictional limits under Section 2244(b) and that habeas petitioners, like Murphy, do not have their rights improperly curtailed without an appropriate opportunity for review. Second, new evidence shows that serious prosecutorial misconduct infected Murphy's case. Prosecutors wrongfully withheld evidence that law enforcement made threats and promises to the two key witnesses at Murphy's trial—Javarrow Young and Christina Davis—despite repeated requests from Murphy's trial counsel for such information. Third, Murphy's state post-conviction proceedings were defective because Young and Davis were unavailable to testify at the evidentiary hearing, despite counsel's best efforts to secure their presence.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2244(b)(2)(B) provides:

> A claim presented in a second or successive habeas corpus application under sec-

> tion 2254 that was not presented in a prior application shall be dismissed unless—
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(3) provides:

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> * * *
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

28 U.S.C. § 1651(a) provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

INTRODUCTION

A state prisoner who wishes to file a second or successive federal habeas petition must first "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). The plain text of the statute requires a petitioner to make only "a *prima facie showing* that the application satisfies the requirements of" Section 2244(b) in order to have his application granted. *Id.* at § 2244(b)(3)(C) (emphasis added).

The court below ignored this statutory mandate in adjudicating Murphy's Motion for Authorization. The Fifth Circuit instead stressed that petitioners must "satisf[y] the stringent requirements for the filing of a successive petition," and required Murphy to "*prove*[], by clear and convincing evidence," that he met Section 2244(b)'s requirements—a far higher burden than merely making a "prima facie showing." Pet. App. 4a (emphasis added) (quoting *Reyes-Requena* v. *United States*, 243 F.3d 893, 899 (5th Cir. 2001)).

Under the plain text of the statute, a petitioner need not "prove" that he has met Section 2244(b)'s requirements at the motion for authorization stage. That showing is first required at the district court, after the circuit court has already granted a petitioner authorization to proceed. 28 U.S.C. § 2244(b)(4) (directing district courts to assess whether "the applicant shows that the claim *satisfies the requirements* [of 28 U.S.C. § 2244(b)]." (emphasis added)).

By requiring Murphy to actually satisfy the requirements of Section 2244(b)(2) at the authorization stage, the Fifth Circuit substituted the prima facie

showing required by statute with the heightened showing required after authorization, *see* 28 U.S.C. § 2244(b)(4).

The Fifth Circuit thus subverted the process by which Congress intended applications for successive habeas petitions to be reviewed, improperly curtailed consideration of Murphy's claims, and exceeded its jurisdiction under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA").

STATEMENT OF THE CASE

In 1997, Julius Murphy and his co-defendant, Christopher Solomon, were charged with Capital Murder in connection with the death of Jason Erie. *See* Pet. App. 24a. Murphy was found guilty and sentenced to death, as was Solomon. *Id.*

The Texas Court of Criminal Appeals ("TCCA") affirmed his conviction and sentence, Op., *Murphy* v. *State*, No. 73,194 (Tex. Crim. App. May 24, 2000) (not designated for publication), and denied his applications for state habeas corpus relief. *See* Pet. App. 24a–25a. In January 2006, Murphy filed a petition for state habeas raising a claim under *Atkins* v. *Virginia*, 536 U.S. 304 (2002). Pet. App. 25a. That petition was ultimately denied. *Id.* In July 2015, his execution date was set for November 3, 2015. Order Setting Execution Date, *Texas* v. *Murphy*, No. 97-F-462-102 (102nd Dist. Ct., Bowie County, Tex. July 14, 2015).

In 2015, Murphy learned for the first time that the prosecution had withheld evidence that the State had made threats and promises to the two key witnesses at Murphy's trial—Christina Davis and

Javarrow Young—in exchange for their testimony, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972). Based on this newly discovered evidence, Murphy filed a Successive Application for Writ of Habeas Corpus in the TCCA. Pet. App. 25a–26a.

To support these claims, Murphy introduced affidavits from Christina Davis and Javarrow Young, among other witnesses, who swore that they were threatened with charges of murder (Young) or conspiracy to commit murder (Davis) if they did not testify against Murphy. *See* Ex. 1 (Young Aff.) ¶ 10 to Appl. for Postconviction Writ of Habeas Corpus (Sept. 24, 2015); Ex. 2 (Davis Aff.) ¶¶ 12–13 to Appl. for Postconviction Writ of Habeas Corpus (Sept. 24, 2015). Based on this new evidence, the TCCA remanded the prosecutorial misconduct claims for resolution, finding that Murphy's prosecutorial misconduct claims had "satisf[ied] the requirements of Article 11.071 § 5" to file a successive petition—namely, that (i) "the factual or legal basis for [Murphy's] claim[s were previously] unavailable," and (ii) "by a preponderance of the evidence, but for a [constitutional violation] no rational juror could have found [Murphy] guilty beyond a reasonable doubt." *See* Pet. App. 56a (citing Tex. Code Crim. Proc. Ann. art. 11071 § 5 (2015)).

In September 2017, without opportunity for discovery, the trial court scheduled an evidentiary hearing to begin in less than 30 days. *See* Pet. App. 14a; *see also* Order at 1–2 (102nd Dist. Ct., Bowie County, Tex. Sept. 22, 2017). The two most critical witnesses—Young and Davis—were not able to attend, despite the best efforts of Murphy's counsel. *See* Hr'g

Tr. at 8:13–11:9, *State* v. *Murphy*, No. 97-F-462-102 (5th Dist. Ct., Bowie County, Tex. Oct. 20, 2017). Notably, state officials failed to transport Young from the Wynne Unit of the Texas Department of Criminal Justice, despite successful service of a subpoena. *See id.* at 8:17–22, 10:22–11:1. And Murphy's counsel were unable to locate Davis to serve her with a subpoena compelling her attendance, including efforts made to enlist the local sheriff's assistance. *See id.* at 11:1–9.

The trial court ultimately denied the petition, and the TCCA affirmed. *See* Pet. App. 6a–8a, 23a–53a.

Murphy then filed a Motion for Authorization to pursue his prosecutorial misconduct claims through federal habeas proceedings in the Fifth Circuit. *See* Pet. App. 3a; *see also* Opposed Mot. for Authorization to Proceed in the Dist. Court on his Pet. for Habeas Corpus, *In re Murphy*, No. 19-40741 (5th Cir. Aug. 28, 2019) ("Motion for Authorization").

In October 2019, the Fifth Circuit denied Murphy's Motion for Authorization. Pet. App. 1a–5a. In a *per curiam* decision, the panel concluded that Murphy did not satisfy the "stringent" procedural requirements to merit authorization. Specifically, the panel found that Murphy's newly discovered information did not "*prove*[], by clear and convincing evidence that but for the prosecution's misconduct, no reasonable factfinder would have found [him] guilty." Pet. App. 4a (referencing the showing required by Section 2244(b)(2)(B)(ii) (emphasis added)). The Fifth Circuit denied Murphy's application "[b]ecause [he] ha[d] not *satisfied* the stringent requirements under 28 U.S.C. § 2244(b)(2)." Pet. App. 5a (emphasis added).

This petition followed.

REASONS FOR GRANTING THE PETITION

Before a federal district court may evaluate the merits of a petitioner's successive habeas claim, a petitioner must pass through the first of two procedural gates by making a "prima facie showing" to the appropriate circuit court that his application satisfies the requirements of 28 U.S.C. § 2244(b). *See* 28 U.S.C. §§ 2244(b)(3)(A), (C). The statute, however, does not define what is required to make a "prima facie showing."

This Court's review is warranted to resolve confusion among the federal courts of appeals regarding what constitutes a "prima facie showing" at the authorization stage for second or successive petitions. In particular, there is confusion among the circuit courts regarding whether Section 2244(b)(3)(C)'s "prima facie showing" imposes a "light burden" requiring petitioners to show only that there is a reasonable likelihood that their petition satisfies the requirements of Section 2244(b), or whether it requires petitioners to satisfy the "heavy burden" of actually establishing Section 2244(b)'s requirements at the authorization stage.

This question is important: consistent application of the proper showing is necessary to ensure effective and non-arbitrary consideration of federal habeas claims, and federal courts must limit themselves to the jurisdiction granted by statute. This Court accordingly should grant review.

I. THERE IS CONFUSION AMONG FEDERAL COURTS OF APPEALS ABOUT WHETHER A PETITIONER MUST *ESTABLISH* THE REQUIREMENTS OF SECTION 2244(b) AT THE AUTHORIZATION STAGE.

The decision below highlights the confusion among the circuit courts about the proper application of Section 2244(b)(3)(C)'s standard and makes clear that this Court's intervention is required. The federal courts of appeal all claim to adhere to the same "prima facie" standard under Section 2233(b)(3)(C). In practice, however, things are far from uniform. As the Fourth Circuit has observed, courts of appeals disagree whether Section 2244(b)(3)(C)'s "prima facie" requirement is an "exacting" or "relatively lenient one." *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003). Indeed, the Ninth Circuit has at times described the "prima facie showing" as a "heavy burden," *see, e.g.*, *King* v. *Trujillo*, 638 F.3d 726, 730 (9th Cir. 2011), and at other times a "light burden," *see, e.g.*, *Henry* v. *Spearman*, 899 F.3d 703, 706 (9th Cir. 2018) (quoting *In re Hoffner*, 870 F.3d 301, 307 (3d Cir. 2017)). This Court's review is necessary to clarify whether a petitioner must mount the "high hurdle" of actually establishing the requirements of Section 2244(b) to make a "prima facie showing" under Section 2244(b)(3)(C).

1. Every court of appeals to have addressed the issue has technically adopted the same prima facie standard first announced in *Bennett* v. *United States*, 119 F.3d 468, 469–470 (7th Cir. 1997): "simply a sufficient showing of possible merit to warrant a

fuller exploration by the district court," such that if it appears "reasonably likely" that the application satisfies the requirements of Section 2244(b), "[the court] shall grant the application." *See, e.g.*, *Rodriguez* v. *Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 273 (1st Cir. 1998), *abrogated on other grounds by Bousley* v. *United States*, 523 U.S. 614 (1998); *Bell* v. *United States*, 296 F.3d 127, 128 (2d Cir. 2002) (*per curiam*); *Goldblum* v. *Klem*, 510 F.3d 204, 219 (3d Cir. 2007); *In re Williams*, 330 F.3d at 281; *Reyes-Requena*, 243 F.3d at 899; *In re Lott*, 366 F.3d 431, 432–433 (6th Cir. 2004); *Johnson* v. *United States*, 720 F.3d 720, 720 (8th Cir. 2013); *Woratzeck* v. *Stewart*, 118 F.3d 648, 650 (9th Cir. 1997); *United States* v. *Murphy*, 887 F.3d 1064, 1068 (10th Cir. 2018); *In re Holladay*, 331 F.3d 1169, 1174 (11th Cir. 2003).

Indeed, the Fifth Circuit in its order here accurately parroted the standard from *Bennett*. *See* Pet App. 4a. In practice, however, courts do not apply the same prima facie standard, and the result is that a petitioner in Texas (before the Fifth Circuit) must clear a far higher bar to file a successive habeas petition than one in neighboring Oklahoma (before the Tenth Circuit).

2. For the Sixth, Second, and Tenth Circuits, Section 2244(b)(3)(C)'s "prima facie showing" is a lenient threshold. These courts do not require successive habeas applicants to establish Section 2244(b)(2)(B)'s requirements at the authorization stage.

The Sixth Circuit faithfully adheres to the *Bennett* standard, interpreting Section 2244(b)(3)(C)'s "prima facie showing" to require only "sufficient allegations of fact together with some documentation that would

warrant a fuller exploration in the district court." *See In re McDonald*, 514 F.3d 539, 546 (6th Cir. 2008) (quoting *In re Lott*, 366 F.3d at 433) (internal quotation marks omitted). Indeed, the Sixth Circuit has described Section 2244(b)(3)(C)'s prima facie showing "as 'not a difficult standard to meet' and 'lenient.'" *In re Wogenstahl*, 902 F.3d 621, 628 (6th Cir. 2018) (quoting *In re Lott*, 366 F.3d at 432–433).[1] And that court has emphasized that it is not necessary at the authorization stage for petitioners to actually satisfy the requirements of Section 2244(b). *See In re McDonald*, 514 F.3d at 546–547 ("we do not need to *find* that given the alleged constitutional violation no reasonable factfinder would have found [the petitioner] guilty of the underlying offense" (emphasis added)).

The Second Circuit similarly has reiterated that "[a] prima facie showing is not a particularly high standard." *Bell,* 296 F.3d at 128. Thus, the court does not require petitioners to *establish* Section 2244(b)'s requirements at the authorization stage. In *Quezada* v. *Smith*, the court found that constitutional error alleged by the petitioner had "most likely" affected the outcome of the petitioner's trial, but mentioned that petitioner's successive habeas application would likely not satisfy the "clear and convincing evidence" standard set forth in Section 2244(b)(2)(B)(ii). 624 F.3d 514, 521–522 (2d Cir. 2010). Nevertheless, the court still determined that

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[1] The Third Circuit similarly has recognized that "[a]lthough AEDPA does not define 'prima facie,' the context of Section 2244(b) confirms that we hold the petitioner to a *light burden*." *In re Hoffner*, 870 F.3d at 307 (emphasis added).

the petitioner had made the *prima facie showing* required to file a successive petition because the constitutionally defective evidence—witness testimony implicating the petitioner, made under threats of prosecution—was crucial to the petitioner's conviction. *Id.* at 522 (emphasis added). Indeed, the court reiterated that its decision that the petitioner had made a prima facie showing did not mean that the petitioner's application actually satisfied Section 2244(b)'s requirements, or that his claims were meritorious, but that the petitioner had cleared the bar necessary to be afforded an opportunity to do so in the district court. *See id.*

So too in the Tenth Circuit, which holds that a petitioner makes a prima facie showing under Section 2244(b)(3)(C) so long as it "appears reasonably likely" that the application satisfies the statutory requirements. Order at 3–4, *In re Carl Case*, No. 08-2129 (10th Cir. July 1, 2008) (quoting *Bennett*, 119 F.3d at 469–470). In *Case*, because the petitioner had shown "that the facts underlying his claim, if proven and viewed in the light of the evidence as a whole, '*may be sufficient* to cause the fact finder to reach the conclusion beyond a reasonable doubt that [he] was not guilty,'" the panel determined that the petitioner had made the necessary prima facie showing under Section 2244(b)(2)(B)(ii). *Id.* at 8–9 (quoting *In re Lott*, 366 F.3d at 434) (emphasis added). And the panel emphasized that courts "are not required to *find* * * * that no reasonable factfinder would have found [the petitioner] guilty in order to grant his motion for authorization." *Id.* at 11 (emphasis added). Rather, the Tenth Circuit explained, it is for the district court to "determine whether the petition did, *in fact*, satisfy the requirements of

§ 2244(b)." *Case* v. *Hatch*, 731 F.3d 1015, 1030 (10th Cir. 2013) (emphasis added).[2]

3. Clearing the authorization stage hurdle in the Fourth and Fifth Circuits, however, is much more difficult. Those courts require petitioners to show that their application *actually satisfies* the requirements of Section 2244(b), in conflict with the plain text and structure of the statute itself.

In *In re Williams*, the Fourth Circuit announced that it was adopting the *Bennett* prima facie standard. 330 F.3d at 281. But that is not the standard the court applied. Rather than require a showing that the petitioner's application was only "reasonably likely" to satisfy Section 2244(b)'s requirements, the court explained that the newly discovered evidence "must 'be *sufficient to establish* by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.'" *Id.* at 282 (quoting 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added)). Applying this standard, the court ultimately rejected the petitioner's application because the proffered new evidence "d[id] not clearly and convincingly outweigh" the other evidence adduced at trial. *Id.* at

[2] As further evidence of the confusion among the circuit courts, notwithstanding the *Case* panel's adherence to the *Bennett* standard, at least one other panel of the Tenth Circuit has described Section 2244(b)(3)(C)'s "prima facie showing" as imposing "a 'heavy burden of persuasion'" on petitioners. *See Calcari* v. *Ortiz*, 495 F. App'x 865, 868 (10th Cir. 2012) (quoting *LaFevers* v. *Gibson*, 238 F.3d 1263, 1268 (10th Cir. 2001) (emphasis added)).

284. This requires a greater showing than AEDPA demands.[3]

And then there is the Fifth Circuit, which routinely requires petitioners to show that their claims actually *satisfy* Section 2244(b)'s requirements before they can file a successive petition. *See, e.g.*, *United States* v. *Clay*, 921 F.3d 550, 554 (5th Cir. 2019); *In re Raby*, 925 F.3d 749, 755 (5th Cir. 2019) (denying motion in part because the petitioner "cannot '*establish* by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense'") (quoting 28 U.S.C. § 2244(b)(2)(B)(ii)); *In re Coleman*, 344 F. App'x 913, 916–917 (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

[3] The Fourth Circuit's practice is similar to the First Circuit's observation that "despite its superficially lenient language, [Section 2244(b)(3)(C)] erects a high hurdle" for petitioners seeking authorization to file a successive habeas corpus petition under Section 2244(b)(2)(A). *Rodriguez*, 139 F.3d at 273; *see also Moore* v. *United States*, 871 F.3d 72, 79 (2017) (reaffirming *Rodriguez* in the context of successive habeas applications under Section 2255(h)(2)).

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)).

Murphy's case was no exception. Here, the court's consideration of Murphy's application got off to an auspicious start when it announced that it would apply *Bennett*'s prima facie standard. Pet. App. 4a (quoting *Reyes-Requena*, 243 F.3d at 899). But almost immediately thereafter the court ignored the standard just announced and required much more.

The court held that Murphy's new evidence did not "*prove*[], by clear and convincing evidence, that but for the prosecution's misconduct, no reasonable factfinder would have found Murphy guilty." *Id*. And "[b]ecause Murphy ha[d] not *satisfied* the stringent requirements under 28 U.S.C. § 2244(b)(2)," the court denied his motion for authorization. *Id.* at 5a (emphasis added). Of course, actually *satisfying* stringent requirements is a much more difficult task than demonstrating a reasonable likelihood that you can do so later in the district court—after there is a fuller record, more extensive briefing, and no expedited consideration of the petitioner's claims. *See*, *e.g.*, *Jordan* v. *Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007) ("Things are different in the district court.").

4. Finally, while the Ninth Circuit has not squarely addressed whether a petitioner must actually satisfy Section 2244(b)'s requirements at the authorization stage, that court's jurisprudence on this topic high-

lights the confusion among the lower federal courts about how to properly apply the statute. According to one panel of the Ninth Circuit, for example, making a prima facie showing that a successive application satisfies Section 2244(b) "is no easy task" and imposes a "heavy burden." *King*, 638 F.3d at 730. Yet, another panel concluded that "by its terms, § 2244(b) imposes on the petitioner only a 'light burden.'" *Henry*, 899 F.3d at 705–706 (quoting *In re Hoffner*, 870 F.3d at 307).

Only this Court can resolve the confusion among the circuit courts about what is required to make a prima facie showing under Section 2244(b)(3)(C).

II. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is important and warrants consideration for at least two reasons.

First, the standard for a prima facie showing under Section 2244(b)(3)(C) should be uniform among the circuit courts. Whether a petitioner's application to file a second or successive habeas petition is subjected to the proper level of scrutiny—*i.e.*, a "reasonable likelihood" of satisfying Section 2244(b)'s requirements—should not depend on the jurisdiction in which the petitioner is prosecuted. Many circuit courts adhere to their proper primary gate-keeping role under AEDPA. Others, however, have assumed the secondary gate-keeping role properly reserved to the district court, thus exceeding their jurisdiction. This Court's intervention is warranted to resolve the inconsistency among the circuits—*e.g.*, the Sixth Circuit's appropriately lenient standard and the heavier burden imposed by the Fifth Circuit—and to provide clarity to federal habeas petitioners.

This divergence in authority is particularly problematic in the context of this case, where Murphy is facing a death sentence. Without this Court's intervention, prisoners sentenced to death who reside in the Fifth Circuit, like Murphy—where states regularly carry out executions—or other circuits that misapply their gate-keeping function, may have review of their habeas claims improperly cut short. This arbitrariness is precisely what this Court has sought to avoid in death cases. *See Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (reinstating the death penalty on the condition that it not be "inflicted in an arbitrary and capricious manner"). Indeed, some courts have recognized that AEDPA's structure "counsels greater caution before denying an authorization than before granting one." *Henry*, 899 F.3d at 706 (quoting *Moore*, 871 F.3d at 78). This variability in the circuit court's enforcement of its AEDPA gate-keeping role is worthy of the Court's attention.

Second, review of the decision below is necessary to ensure that circuit courts do not exceed their jurisdiction or the statutory strictures of AEDPA. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). At the authorization stage, circuit courts only have jurisdiction to determine whether a petitioner's application to file a second or successive habeas petition "makes a prima facie showing that the application satisfies the requirements of [Section 2244(b)]." 28 U.S.C. § 2244(b)(3)(C). The circuit court therefore exceeds its jurisdiction by requiring a greater showing at the authorization stage. Indeed, AEDPA reserves to the

district court the more searching review of the petitioner's second or successive petition. *See Jordan*, 485 F.3d at 1358 ("The statute puts on the district court the duty to make the initial decision about whether the petitioner *meets* the § 2244(b) requirements." (emphasis added)). This Court's review is warranted to ensure that the circuit courts do not exceed their jurisdiction and assume the role delegated to the district courts by statute.

CONCLUSION

Review of the question presented is critical. The stakes for Murphy are life and death, as is true for numerous other federal habeas petitioners on death row. They should be afforded consistent and equal justice, regardless of geography. And federal courts should be limited to the jurisdiction granted to them by statute, particularly when exceeding their jurisdiction results in cutting short consideration of an inmate's legitimate claim of serious prosecutorial misconduct.

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

Respectfully submitted,

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