No. 19-932

IN THE

Supreme Court of the United States

In re JULIUS MURPHY,
Petitioner.

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

RESPONDENT'S BRIEF IN OPPOSITION

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
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548
Austin, Texas 78711

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Julius Murphy was found guilty and sentenced to death in 1998 for the murder of Jason Erie. During the next twenty years, Murphy unsuccessfully challenged his conviction and sentence in state and federal court. Murphy filed a motion for authorization in the Fifth Circuit seeking to raise claims based on his allegations that two prosecution witnesses were threatened with criminal charges and promised leniency in exchange for their testimony against Murphy. The Fifth Circuit denied the motion because Murphy provided no evidence of diligence, he confessed to Mr. Erie's murder, and the affidavits of the purportedly recanting witnesses did not and could not exculpate Murphy.

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

1. Should the Court grant certiorari review where such relief is statutorily prohibited and where Murphy fails to justify finding for the first time an exception to the statutory prohibition?

2. Should the Court exercise its original habeas corpus jurisdiction where Murphy 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 diligence or innocence?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Rules

BRIEF IN OPPOSITION

Petitioner Julius Murphy was properly convicted and sentenced to death in 1998 for the murder of Jason Erie. Murphy has unsuccessfully challenged his conviction and death sentence in state and federal court. Murphy received a stay of execution from the Texas Court of Criminal Appeals (CCA) in 2015 to litigate two claims he raised in a subsequent state habeas application. The claims alleged that (1) two prosecution witnesses, Christina Davis and Javarrow Young, were threatened by police officers and prosecutors with criminal charges related to Mr. Erie's murder and promised leniency in exchange for their testimony against Murphy and (2) Young presented testimony that gave the "false impression" that he did not receive any threats or promises from the prosecution other than the threats he testified about at Murphy's trial. *See* Pet'r's App'x at 3a. Murphy was provided the opportunity to substantiate his claims during an evidentiary hearing in state court, but he failed to do so. Following the evidentiary hearing, the CCA denied Murphy's due process claims. Pet'r's App'x at 6a–8a.

Murphy then filed a motion for authorization in the Fifth Circuit to file a successive federal habeas petition raising the two claims described above. *See* Pet'r's App'x at 3a. The Fifth Circuit denied the motion, holding that Murphy was not entitled to authorization because he provided no evidence of his diligence, he confessed to Mr. Erie's murder, and the affidavits of Davis and Young did not and could not establish his innocence. Pet'r's App'x at 4a–5a & 5a n.3.

Murphy now seeks statutorily prohibited certiorari review of the circuit court's denial of his motion for authorization. Pet. at 1–3, 17–18; 28 U.S.C. § 2244(b)(3)(E). His request is impermissible. In any event, his request for certiorari review is merely one seeking error correction. Therefore, Murphy's petition for a writ of certiorari should be denied.

Murphy also seeks the extraordinary remedy of a writ of habeas corpus by way of an original petition. Pet. at 11–14. He argues the Court should grant his petition to determine the appropriate gateway standard of review under 28 U.S.C. § 2244(b)(2). Pet. at 11–14. Murphy is not entitled to the extraordinary relief he requests. First, Murphy 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 of motions for authorization is consistent with § 2244 and other circuits' treatment of such motions. Lastly, the Fifth Circuit appropriately denied authorization where Murphy presented no evidence of his diligence, he confessed to the murder, and his new evidence did not—and could not—establish his innocence. In so holding, the Fifth Circuit did not exceed its jurisdiction.[1]

The limitations of § 2244(b) "certainly inform" this Court's consideration of Murphy's original petition, *Felker v. Turpin*, 518 U.S. 651, 663 (1996). And the Fifth Circuit's well-justified conclusion that Murphy's claims

---

[1] Notably, this Court recently denied a petition for a writ of certiorari and original petition for a writ of habeas corpus raising arguments largely identical to Murphy's. *See* Pet., *Raby v. Davis*, No. 19-5820 (Sept. 3, 2019).

did not warrant authorization—a conclusion similar to the one the CCA made in light of the same evidence—supports the denial of Murphy's request for this extraordinary remedy. Pet'r's App'x at 8a. Consequently, Murphy is not entitled to a writ of habeas corpus.[2]

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. The Facts of the Capital Murder

---

[2] Murphy makes a conclusory assertion that exceptional circumstances warrant the exercise of this Court's original jurisdiction because Young and Davis were not present at the state habeas trial court's evidentiary hearing. Pet. at 3, 7–8. Murphy does not, however, brief such an argument. It is, therefore, waived. Moreover, Murphy did not specifically complain in his motion for authorization about Young's and Davis's absence from the hearing. *See generally* Mot. for Auth., No. 19-40741 (5th Cir. Aug. 28, 2019). Therefore, he has not preserved any such argument. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992). Nonetheless, Murphy argued in his petition for a writ of certiorari seeking review of the CCA's rejection of his subsequent state habeas application that the trial court violated his right to due process by denying his request for a continuance based on Young's and Davis's absence. Pet. Cert. at 22–24, *Murphy v. Texas*, No. 18-1022 (Feb. 5, 2019). This Court denied Murphy's petition. *Murphy v. Texas*, 139 S. Ct. 2638 (May 28, 2019).

> As the State's evidence demonstrated, [Murphy] was in a car riding with friends around Texarkana during the early morning hours of September 19, 1997.[3] There had been a heavy consumption of alcohol and marijuana throughout the previous day. The group passed an individual who appeared to be having car trouble and who had attempted to elicit their help. At the suggestion of a friend, [Murphy] agreed to drive back with an aim to "jack" or rob the stranded driver. After returning to the stranded motorist, [Murphy] and his friends helped jump-start the broken-down vehicle. The driver, Jason Erie, provided a small reward to [Murphy] and his friends for their help and returned to his car. [Murphy] then stepped from his vehicle, and, armed with a gun, demanded Erie's wallet. Initially, Erie protested and refused to hand over his property. As he finally began to comply, [Murphy] fired a single shot from close range into [Mr. Erie's] forehead and retrieved the stolen wallet from the spot it had fallen. It was later discovered along a nearby road where [Murphy] told investigators it had been discarded. Erie

---

[3] The car was driven by Chris Solomon. *See Solomon v. State*, 49 S.W.3d 356, 360 (Tex. Crim. App. 2001). The passengers in the car were Virginia Wood, Murphy, and Davis. *Id.*

> was alive when rescue workers arrived, but died a short time later.

Murphy v. State, No. 73,194, slip op. at 2–3 (Tex. Crim. App. Oct. 12, 1998).

II. The State's Punishment Case

The prosecution presented evidence detailing Murphy's prior criminal history. Murphy was arrested in October 1995 for stealing stereo components. 20 RR 75–76, 78–81.[4] He was arrested a year later for possession of marijuana. 20 RR 32–35. In January 1996, Murphy was arrested for evading detention. 20 RR 37. He was initially placed on probation for the crime, but that probation was revoked when he was again arrested for possession of marijuana in May 1997. 20 RR 37–41; SX 31. The court sentenced Murphy to thirty days in jail. SX 31. In May 1997, Murphy threatened a woman that he would kill her and appeared prepared to physically assault her if not for the intervention of an off-duty police officer. 20 RR 19–20.

III. Murphy's Mitigation Case

---

[4] "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). "CR" refers to the "Clerk's Record," the transcript of pleadings and documents filed in the trial court, followed by the internal page number(s). "SX" refers to the State's exhibits admitted during the trial.

The defense presented the jury with evidence of Murphy's turbulent family history, his drug and alcohol dependence, and expert psychological and medical testimony suggesting that Murphy suffered from organic brain damage. He was born to a poor teenage mother who had a series of abusive relationships with men. 21 RR 18–30, 120–21, 152–53.

A psychologist who interviewed Murphy testified that Murphy began drinking alcohol as early as eight or nine years old. 21 RR 160. Murphy then started smoking marijuana at the age of ten or eleven, gradually increasing to daily consumption by the age of twelve. 21 RR 161. He soon progressed to smoking marijuana that had been dipped in "embalming fluid" (phencyclidine or PCP), as well as inhaling household chemicals, snorting cocaine, smoking methamphetamine, and experimenting with Kool-Aid that had been laced with hallucinogenic mushrooms. 21 RR 161–62. Murphy's drug use continued up until the time of his arrest for capital murder. 21 RR 162.

The defense also presented testimony that Murphy suffered a series of head injuries. A neurologist testified that testing revealed Murphy suffered from some damage to the frontal lobes of his brain, presumably as a result of these injuries and Murphy's chronic substance abuse. 21 RR 49–57, 84–99, 168. A neuropsychologist testified that Murphy scored in the "low average" range of intelligence, but he classified Murphy as "borderline" because Murphy had only completed the eighth grade. 21 RR 86.

IV. Evidence Presented at the State Habeas Court's Evidentiary Hearing

After the CCA remanded Murphy's subsequent state habeas application to the trial court, the trial court held an evidentiary hearing on Murphy's claims that the prosecution withheld impeachment evidence and presented false testimony. Murphy presented the testimony of Bill Schubert, Murphy's trial counsel. SHRR at 14–64.[5] Murphy also presented the testimony of Jennifer Hancock, an acquaintance of Javarrow Young. SHRR at 66–77; *see* Pet'r's App'x at 35a–36a. However, the trial court struck her testimony insofar as she provided hearsay statements of Young. SHRR at 77. Murphy offered, and the trial court admitted, affidavits of Davis and Young.[6] Resp't's App'x at 1a–5a.[7]

The State presented the testimony of the prosecutors from Murphy's trial, Alwin Smith and Kristie Wright. SHRR at 80–117. The State also

---

[5] "SHRR" refers to the Reporter's Record of the state habeas evidentiary hearing. *See generally Ex parte Murphy*, No. 38,198-04. The Reporter's Record is found within the third supplemental volume of the Clerk's Record. The state habeas court's Clerk's Record will be cited to as "SHCR," preceded by the volume number and followed by the page number being cited. The third volume of the Clerk's Record contains the state habeas court's findings and conclusions. 3 SHCR-04 at 250–83.

[6] Prior to the hearing, Murphy moved for a continuance based on his assertion that he had insufficient time to review documents he received in response to a public records request. 2 SHCR-04 at 76–86. At the outset of the hearing, Murphy requested a continuance because Davis and Young were not present at the hearing. SHRR at 4, 7–9. The trial court denied the requests. 2 SHCR-04 at 102; SHRR at 11.

[7] Davis's and Young's affidavits were admitted during the evidentiary hearing as Petitioner's Exhibits 6 and 7. The affidavits are contained in Respondent's Appendix.

presented the testimony of an investigator, Lance Hall. SHRR at 121–34.

A. Murphy's evidence

Mr. Schubert, Murphy's trial counsel, testified that he filed pre-trial motions seeking evidence of any threats made against or promises given to any witness. SHRR at 25–30. Mr. Schubert testified he had a pretrial meeting with Mr. Smith and Ms. Wright during which he asked the prosecutors why they did not file charges against Davis. SHRR at 33. Mr. Schubert was curious as to the reason but was not accusing the prosecutors of withholding any information. SHRR at 33. However, Mr. Schubert had been told by others in the community that Mr. Smith did not play "above board." SHRR at 34.

Mr. Schubert also recalled an argument he had with Mr. Smith that stemmed from a meeting Mr. Schubert had with Davis. SHRR at 36–38. Mr. Schubert spoke with Davis and arranged a meeting with her at his office. SHRR at 36–37. Mr. Smith later called Mr. Schubert to say that he knew Mr. Schubert had contacted the prosecution's witnesses. SHRR at 36–37. Mr. Smith told Mr. Schubert that Davis wanted him to be present at the meeting. SHRR at 37. Davis was not at Mr. Schubert's office when Mr. Smith arrived, so Mr. Smith left. SHRR at 37. Soon after Mr. Smith left, Davis arrived at Mr. Schubert's office. SHRR at 38. She seemed nervous, but she wanted to proceed with the interview even though Mr. Smith had left. SHRR at 38. During the meeting, Davis asked Mr. Schubert if Mr. Smith was going to charge her with a crime related to Jason Erie's murder. SHRR at 39. Mr. Schubert told her that he did not know. SHRR at 39. Mr. Smith found out

the interview had proceeded without him, which angered him. SHRR at 38. Mr. Schubert testified that the prosecution did not disclose any threat of prosecution or promise of leniency to Davis or Young. SHRR at 41–42.

On cross-examination, Mr. Schubert testified that the prosecution made an affirmative statement to him that no deal had been made with Davis because the prosecution could not charge her with any crime related to Mr. Erie's murder. SHRR at 48. Mr. Schubert also testified that he did not recall whether Davis mentioned the prosecution making any threats or promises to her. SHRR at 52. He testified he would likely remember such a statement if Davis had stated that and would have cross-examined her regarding such a threat or promise. SHRR at 52. Mr. Schubert also testified on cross-examination that he questioned Young during Murphy's trial regarding threats the police had purportedly made to Young. SHRR at 55.

Davis's affidavit stated that she dated Murphy for about two years leading up to the capital murder. Resp't's App'x at 1a. Davis stated that detectives, Mr. Smith, Ms. Wright, and the elected district attorney told her she would be charged with conspiracy to commit murder if she did not cooperate with the prosecution. Resp't's App'x at 2a. Davis also stated the prosecutors told her she could not speak with Murphy's attorneys because it would interfere with the case. Resp't's App'x at 2a. She stated that after her testimony, the prosecutors told her she would not be charged with a crime. Resp't's App'x at 2a.

Young's affidavit stated that police officers threatened him during his interview at the police station. Resp't's App'x at 4a. He stated the officers called him and his baby racial slurs, "roughed [him] up," and said they would take his baby away. Resp't's App'x at 4a. Young also stated the prosecutor threatened that he would be charged with murder and would lose his baby if he did not testify against Murphy. Resp't's App'x at 4a. He stated that as a result of the threats, he "did not tell the jury the whole truth." Resp't's App'x at 5a.

B. The State's evidence

Mr. Smith testified that the prosecution did not inform Murphy's trial counsel of any promises made to witnesses because no such promise was made. SHRR at 83. Mr. Smith also testified the prosecutors did not threaten Davis or Young that they would be charged with a crime if they did not testify against Murphy. SHRR at 84. Young did not have criminal liability related to Mr. Erie's murder and, even if he did, Mr. Smith would not have made such a threat. SHRR at 86. And if any agreement was made between the prosecutors and a witness, he would have disclosed such an agreement to the defense. SHRR at 86. Mr. Smith testified that in Murphy's co-defendant's—Chris Solomon's—trial, the prosecution offered to reduce a charge against Virginia Wood to aggravated robbery in exchange for her testimony. SHRR 83–84.

Mr. Smith described Davis as an eager witness. SHRR at 87. Mr. Smith testified that neither he, Ms. Wright, nor the elected district attorney threatened Davis or Young with criminal charges or made any promises in exchange for their testimony. SHRR at 90–

92. Mr. Smith testified that he told the defense "repeatedly" that Davis was not going to be charged with a crime related to Jason Erie's murder. SHRR at 96.

Mr. Smith also recalled the meeting Davis had with Mr. Schubert. SHRR at 87–88. Davis called the prosecutors to inform them of her planned meeting with Mr. Schubert. SHRR at 87–88. The prosecutors told Davis she could meet with Mr. Schubert if she wanted to and that the prosecutors could be present at the meeting. SHRR at 87. On the day of the meeting, Mr. Schubert told the prosecutors he could not make it to the meeting due to a doctor's appointment. SHRR at 88. The prosecutors called Davis but were unable to reach her. SHRR at 88. Later, Davis called the prosecutors upset that they had not attended her meeting with Mr. Schubert. SHRR at 88. Davis said she had gone to Mr. Schubert's office and was told that Mr. Schubert would be late. SHRR at 88. When Mr. Schubert arrived, he proceeded to interview Davis despite the prosecutors' absence. SHRR at 88. Mr. Smith later spoke with Mr. Schubert who said that he gave Davis the choice of returning at a later date, but she chose to proceed with the interview. SHRR at 89. Mr. Smith credited Mr. Schubert's account of his meeting with Davis because Davis was "wishy washy" as to which "side of the fence she was on." SHRR 89, 95.

Ms. Wright similarly testified that she was not aware of any threats or promises made to Davis or Young in exchange for their testimony. SHRR 109. Ms. Wright recalled speaking with Davis several times on the telephone. SHRR 107. Ms. Wright described Davis as anxious but not reluctant to testify. SHRR 107. Ms.

Wright also spoke with Young before Murphy's trial. 108. On cross-examination, Ms. Wright acknowledged that she was not present for the interviews conducted by the police and that she did not know whether Mr. Smith had meetings with witnesses without her being present. SHRR 117.

Mr. Hall testified that Young was incarcerated in prison at the time of the evidentiary hearing. SHRR at 122. Mr. Hall also testified regarding Young's criminal record, which included burglary, forgery, family violence assault, violations of protective orders, reporting a false alarm, theft, and prostitution. SHRR at 127–34.

C. The state habeas trial court's findings and conclusions

The state habeas trial court found that Young was not credible due to his extensive criminal record. Pet'r's App'x at 42a. Further, his trial testimony was consistent with his statement to the police that he did not witness Mr. Erie's murder. Pet'r's App'x at 42a. On the other hand, Young's affidavit, written twenty years after Murphy's trial, was contradicted by Murphy's confession in which he admitted to shooting Mr. Erie. Pet'r's App'x at 42a. And Young's affidavit did not provide the basis for his statement that he "never told them that Chris [Solomon] pulled the trigger" nor did his affidavit explain how his trial testimony was false. Pet'r's App'x at 42a. Moreover, Murphy's other evidence (i.e., Ms. Hancock's affidavit) that implied Young admitted to shooting Mr. Erie was inconsistent with Young's affidavit in which he implied Chris Solomon was the triggerman. Pet'r's App'x at 42a–43a.

The state habeas trial court also found that Davis was not credible. Pet'r's App'x at 44a–46a. Specifically, the court found Davis's assertion that the prosecutors threatened to charge her with conspiracy to commit murder if she did not testify against Murphy was contradicted by the testimony at the evidentiary hearing that no such threat was made and that Davis had been a willing and eager witness. Pet'r's App'x at 45a. Her credibility was also undermined by the assertion in her affidavit that the prosecutors did not allow her to speak with Murphy's trial counsel, which was contradicted by the testimony at the evidentiary hearing. Pet'r's App'x at 45a.

The state habeas trial court found that the testimony of Mr. Smith and Ms. Wright was credible. Pet'r's App'x at 47a–49a. The court credited their testimony that no threats of criminal charges or promises of leniency were made to Davis or Young. Pet'r's App'x at 49a. Based on those findings, the court concluded that Murphy failed to show the prosecution withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), or presented false testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972). Pet'r's App'x at 51a–52a. The CCA denied relief based on its own review. Pet'r's App'x at 6a–8a.

V. Procedural History

Murphy was convicted and sentenced to death for the murder of Jason Erie. CR 2, 277–78; 19 RR 170; 21 RR 284–85. The CCA upheld Murphy's conviction and death sentence on direct appeal. *Murphy v. State*, No. 73,194.

Murphy filed his initial state application for a writ of habeas corpus in the trial court. The trial court entered findings of fact and conclusions of law recommending that Murphy be denied relief, which the CCA adopted. Order, *Ex parte Murphy,* No. 38,198-02 (Tex. Crim. App. Apr. 10, 2002) (unpublished order).

Murphy then filed his initial federal habeas petition. Pet., *Murphy v. Thaler*, No. 5:02-CV-086 (E.D. Tex. Feb. 7, 2003). The district court denied the petition. Order, *Id.* (E.D. Tex. Aug. 20, 2004). Murphy then filed an application for a certificate of appealability (COA) in the Fifth Circuit, which was denied. *Murphy v. Dretke*, 416 F.3d 427 (5th Cir. 2005), *cert. denied*, 546 U.S. 1098 (2006).

The convicting court set Murphy's execution date in 2006. Prior to his scheduled execution date, Murphy filed a subsequent state habeas application claiming that he was ineligible for execution because he was intellectually disabled. The CCA stayed Murphy's execution and remanded the application. *Ex parte Murphy*, 2006 WL 8430564, at *1 (Tex. Crim. App. Jan. 18, 2006). Following an evidentiary hearing, the CCA denied relief. *Ex parte Murphy*, 2014 WL 6462841, at *1 (Tex. Crim. App. Nov. 19, 2014), *cert. denied*, 135 S. Ct. 2350 (2015).

Murphy also filed in the district court a second petition for a writ of habeas corpus and a motion to transfer the petition to the Fifth Circuit. *Murphy v. Stephens*, Civ. Act. No. 5:14-CV-146 (E.D. Tex. Nov. 20, 2014). The District Court granted Murphy's motion to transfer, Order, *Id.* (5th Cir. Nov. 21, 2014), and the Fifth Circuit later denied Murphy's motion for

authorization to file a successive habeas petition. Order, *In re Murphy*, 14-41311 (5th Cir. Apr. 29, 2015).

Murphy's execution was then scheduled in 2015. Prior to the scheduled execution, Murphy filed a subsequent state habeas application raising his *Brady* and *Giglio* claims as well as a challenge to the constitutionality of the death penalty. The CCA stayed Murphy's execution and remanded Murphy's *Brady* and *Giglio* claims to the trial court. Pet'r's App'x at 54a–56a; *Ex parte Murphy*, 2015 WL 5936938, at *1 (Tex. Crim. App. Oct. 12, 2015). Following an evidentiary hearing, the trial court recommended that relief be denied on Murphy's *Brady* and *Giglio* claims. Pet'r's App'x at 23a–53a. The CCA denied Murphy's *Brady* and *Giglio* claims based on its own review and dismissed Murphy's claim that the death penalty is unconstitutional. Pet'r's App'x at 6a–8a.

Murphy next filed a motion in the Fifth Circuit seeking authorization to file a successive federal habeas petition. The Fifth Circuit denied the motion. Pet'r's App'x at 1a–5a.

Murphy then filed in this Court a petition for a writ of certiorari and an original petition for a writ of habeas corpus. The instant brief in opposition follows.

REASONS TO DENY THE PETITION

I. Murphy'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.

Murphy asks this Court to grant certiorari review of the Fifth Circuit's denial of his motion for authorization. Pet. at 2–3. 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 below, the Fifth Circuit did not exceed its jurisdiction by denying authorization because Murphy presented "[n]o evidence" of his diligence and he could not demonstrate his innocence in light of his confession and his failure to identify evidence "indicative of his innocence." Pet'r's App'x at 4a–5a, 5a n.3. For the same reason, the Fifth Circuit's well-justified 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. Murphy 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, Murphy does not show an entitlement to it. As discussed below, he points to only an illusory circuit split and does not identify an important issue that warrants this Court's attention. And while Murphy focuses on the Fifth Circuit's purported extra-jurisdictional decision, he elides the basis of the court's rejection of his motion for authorization—that he failed to present *any* evidence of his diligence and failed to support his assertion that he would have been found not guilty but for the alleged

prosecutorial misconduct. Pet'r's App'x at 5a, 5a n.3. *A fortiori*, Murphy did not make a prima facie showing of diligence or innocence. *See* 28 U.S.C. § 2244(b)(2).

Moreover, as discussed below, Murphy'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 Murphy's true request—for this Court to correct the Fifth Circuit's application of a properly stated rule of law. *See* Pet'r's App'x at 3a ("For our court to grant Murphy permission to file a successive habeas petition, he must make a prima facie showing" that his claims satisfy § 2244(b)(2)(B).). Murphy'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 it 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.

II. Murphy Is Not Entitled to the Extraordinary Remedy of a Writ of Habeas Corpus.

Murphy also 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 application of § 2244(b)(2) to a motion for authorization. Pet. at 11–18. Murphy fails to justify the extraordinary remedy he seeks because he had adequate avenues through which to raise his due process claims and he does not identify an exceptional circumstance warranting this Court's intervention.

A. Murphy had adequate 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). Murphy fails to advance an exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus.

First, Murphy is not entitled to the extraordinary remedy of a writ of habeas corpus by way of an original petition because he had an adequate remedy available in state and federal court. But, as made clear by the Fifth Circuit's denial of Murphy's motion for authorization and the state court's denial of his subsequent habeas application raising the same claims as his motion, his underlying due process claims lack merit. Pet'r's App. at 1a–5a, 23a–53a. Indeed, the CCA permitted Murphy to raise his due process claims in a subsequent application, and he was provided the

opportunity for evidentiary development of the claims.[8] Pet'r's App'x at 31a–41a, 54a–56a. Murphy simply failed to substantiate his claims, and the CCA denied them on the merits. Pet'r's App'x at 8a. Consequently, Murphy 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, Murphy 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. Murphy's attempt to circumvent AEDPA should not be permitted. 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 Murphy failed to make a prima facie showing that his claims satisfied § 2244(b)(2)(B)(i) and (ii) "certainly inform[s]" the

---

[8] Murphy failed to secure Young's and Davis's attendance at the trial court's evidentiary hearing despite the fact that the hearing occurred more than one year after the CCA remanded Murphy's application for resolution. *See* Brief in Opp. at 27–28, *Murphy v. Texas*, No. 18-1022 (Apr. 18, 2019). Murphy failed to secure Young's attendance because he did not obtain the requisite bench warrant, and he failed to locate Davis during the month that passed between the date of the trial court's order scheduling the hearing and the date of the hearing. *Id*. at 28–29.

Court's consideration of his original petition, and it provides an additional basis on which to deny Murphy'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: Murphy'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. This is a patently insufficient justification for the extraordinary relief Murphy requests, and his original petition should be denied.

B. Murphy does not identify an extraordinary circumstance that warrants this Court's intervention.

Murphy's primary contention is that the Fifth Circuit's opinion in this case reflects a circuit split regarding the proper application of the prima facie standard of § 2244(b)(3)(C) to a motion for authorization. Pet. at 11–16. Murphy fails to identify a real circuit split or an extraordinary circumstance that warrants this Court's intervention.

First, Murphy describes "confusion" among the circuit courts regarding the proper application of the prima facie standard, but the cases on which he relies reflect consistency and belie his assertion that this Court's intervention is necessary. Pet. at 10. The cases to which Murphy 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. at 3a–4a. Murphy also asserts the circuit courts describe the prima facie standard as either a lenient or strict burden. Pet. at 11–16. But regardless of the descriptor, all the circuits that have addressed the question have adopted the same standard. *See* Pet. at 10–11. Murphy cannot justify the extraordinary remedy he seeks to address a non-existent circuit split.

Second, the Fifth Circuit did not simply conclude that Murphy's claims failed to satisfy § 2244(b)(2). Rather, the court denied authorization because he presented *no* evidence of diligence and because he necessarily could not establish his innocence in light of his confession and the fact that his new evidence did not—and could not—provide a basis on which to conclude Murphy was innocent. Pet'r's App'x at 4a–5a, 5a n.3. *A fortiori*, Murphy did not make a prima facie showing of either diligence or innocence. 28 U.S.C. § 2244(b)(2)(i), (ii). Without any showing of diligence or support for his assertion of innocence, the Fifth Circuit could not have concluded that Murphy had made a sufficient showing of possible merit that warranted a fuller examination by the district court. *See Bennett*, 119 F.3d at 469. Murphy's assertion that this Court should grant his original petition to resolve a circuit split as to the appropriate application of the prima facie standard of § 2244 fails because it elides the fact that he provided the lower court no basis on which to conclude it was reasonably likely that his claims satisfied § 2244(b)(2).

Third, Murphy fails to demonstrate the Fifth Circuit is an outlier among the circuit courts regarding the proper application of the prima facie standard of § 2244 to a motion for authorization. Indeed, the Fifth Circuit's opinions in cases like Murphy'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. Murphy cannot point to an intractable circuit split considering the consistency of

the circuit courts',[9] including the Fifth Circuit's,[10] treatment of motions for authorization like his. *Compare*

---

[9] *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 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

In re Fowlkes, 326 F.3d 542, 547 (4th Cir. 2003) (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 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 Murphy'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).

---

authorization to raise *Brady* claim because the evidence of movant's guilt was, "though entirely circumstantial, overwhelming"); *In re Buenoano*, 137 F.3d 1445, 1446–47 (11th Cir. 1998).

[10] *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 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).

To show the Fifth Circuit is an outlier, Murphy points to its opinion in his case, which he argues shows that the court denied authorization because it concluded he did not satisfy § 2244(b)(2) rather than considering only whether he made a prima facie showing that his claims satisfied that standard. Pet. at 16. Murphy's argument is based on an overly constrained reading of the Fifth Circuit's opinion. While the Fifth Circuit stated its conclusion too broadly,[11] the court's opinion plainly shows that it applied an appropriately low standard to Murphy's motion.

As discussed above, the Fifth Circuit denied Murphy's motion for two reasons. First, Murphy presented *no* evidence of diligence. Pet'r's App'x at 4a. Indeed, Murphy's claims were seventeen years late despite the fact that the trial record gave him "reason to explore" his claims. Pet'r's App'x at 4a. Second, Murphy's evidence underlying his due process claims was patently insufficient to satisfy § 2244(b)(2)(ii) where the evidence did not call Murphy's guilt into doubt. Pet'r's App'x at 5a, 5a n.3. Even accepting Murphy's new evidence—purportedly recanting affidavits of Young and Davis—he could not support his assertion of innocence where those affidavits did not provide any direct support for the conclusion that Murphy was not guilty because those witnesses did not see who shot Mr. Erie. Pet'r's App'x at 5a n.3, 42a, 46a–47a. Moreover, Murphy confessed orally and in writing to the murder. Pet'r's App'x at 5a, 5a n.3. Tellingly, the Fifth Circuit's

---

[11] Pet'r's App'x at 5a ("Because Murphy has not satisfied the stringent requirements under 28 U.S.C. § 2244(b)(2), his motion for authorization to file a successive petition for a writ of habeas corpus is DENIED.").

analysis of Murphy's motion required only a few sentences of discussion. Pet'r's App'x at 4a–5a.

Murphy suggests that he could demonstrate that his claims satisfy § 2244(b)(2) if permitted to file a successive petition in the district court with the benefit of more briefing and a "fuller record." Pet. at 16. He does not explain, however, how briefing his due process claims yet again would benefit him or how further evidentiary development of his claims (assuming he could show an entitlement to development of his claims in federal court) where the state court conducted an evidentiary hearing during which Murphy failed to substantiate either the merits of his claims or his assertion that he is innocent.

Murphy's request that this Court grant the extraordinary remedy of a writ of habeas corpus should be denied because the Fifth Circuit plainly applied a low threshold to Murphy's motion. Moreover, the overwhelming evidence of Murphy's guilt and his failure to present any evidence of diligence compels the conclusion that his due process claims did not warrant a fuller exploration by the district court. *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."). For the same reasons, Murphy fails to show that the Fifth Circuit exceeded its jurisdiction in denying his motion for authorization or that there is an extraordinary circumstance that warrants this Court's intervention. Consequently, he is not entitled to the extraordinary remedy of a writ of habeas corpus for the purpose of raising his due process claims in the district court.

C. The Fifth Circuit properly determined that Murphy was not entitled to authorization because he provided no support for the conclusion that his claims satisfied either § 2244(b)(2)(i) or (ii).

As discussed above, the Fifth Circuit concluded Murphy was not entitled to authorization to file a successive petition because he did not present any evidence of diligence or support for his assertion that he is innocent. Pet'r's App'x at 4a–5a. The Fifth Circuit's conclusion is plainly correct.[12]

1. Murphy failed to make a prima facie showing that he pursued

[12] Additionally, as the Director argued in the court below, Murphy's due process claims are time-barred. Resp. at 50–54, *In re Murphy*, No. 19-40741 (5th Cir. Oct. 6, 2019). 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, Murphy is not entitled to the extraordinary relief he requests.

his due process claims with diligence.

Murphy had the burden in the court below to make a prima facie showing that his claims could not have been discovered previously with due diligence. 28 U.S.C. § 2244(b)(2)(B)(i). Murphy failed to present any such evidence.

As the Fifth Circuit has stated, the merits of a petitioner's *Brady* claim are *not* "collapsed with the due diligence requirements of § 2244(b)(2)(B)(i)," particularly "where the record demonstrates that the defendant or defense counsel was aware of the potential *Brady* material but failed to pursue investigation of that ultimate claim." *Johnson v. Dretke*, 442 F.3d 901, 910 (5th Cir. 2006) (citing *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002)). Rather, the question is "whether due diligence at the *time of the first habeas petition* would have resulted in the discovery of the factual basis for the new claim such that it could have been included in the first petition." *In re Davila*, 888 F.3d 179, 184 (5th Cir. 2018) (emphasis in original). Therefore, Murphy had the burden to make a prima facie showing that he could not have obtained Young's and Davis's affidavits through due diligence during his initial federal habeas proceedings in 2003 and 2004. *Id*.

Murphy argued that he diligently investigated *before* his trial whether the prosecution's witnesses had been threatened with criminal charges or promised leniency in exchange for their testimony and that he relied on the prosecution's duty to disclose exculpatory and impeachment evidence prior to trial. Mot. at 14, *In re Murphy*, 19-40741 (5th Cir. Aug. 28, 2019). He

asserted that the evidence supporting his *Brady* and *Giglio* claims "came to light in 2015" when Young and Davis "came forward with this information." *Id*. at 15. But Murphy did not explain any efforts he made to investigate his claims between his trial in 1998 and 2015 when he obtained the affidavits.

Murphy knew at his trial that Davis was the only one of the four car occupants not to be charged with a crime related to Mr. Erie's murder. 18 RR 24. If Murphy doubted—as he apparently did by 2015—that Davis had been told she might be charged with a crime or if he believed Davis may have been promised leniency in exchange for her testimony, he could have inquired with Davis at any time before his initial federal petition was filed in 2003.[13]

And Murphy knew at trial that Young was purportedly told by the police that he might lose custody of his child. 18 RR 74–75. If Murphy doubted that Young had not been threatened further or promised leniency in exchange for his testimony, he could have inquired with Young at any time before his initial federal petition was filed in 2003.

Mr. Schubert filed a pre-trial motion seeking evidence of "any offers of immunity or promises of leniency" to any prosecution witness, and stated that,

> Defendant has reason to believe and does believe, that one or more persons who will testify for the State have been granted

---

[13] Notably, Davis stated in her 2015 affidavit that the prosecutors told her after she testified at Murphy's 1998 trial that she would not be charged with any crime. Resp't's App'x at 2a.

> immunity from prosecution for certain offenses which could have been prosecuted by the State, or have been promised leniency in exchange for their testimony against the Defendant

CR 86; SHRR 28. Murphy does not provide any justification for then waiting seventeen years after his trial to investigate his claims, especially in the absence of any indication that either Young or Davis were previously unavailable or unwilling to provide the information in their affidavits.

Murphy failed to carry his burden to make a prima facie showing of due diligence. The Fifth Circuit's rejection of Murphy's motion for authorization based on his failure to present any evidence of diligence was plainly justified, and it belies any argument that he is entitled to the extraordinary relief he seeks. Therefore, Murphy's petition for a writ of habeas corpus should be denied.

2. Murphy failed to make a prima facie showing that the facts underlying his due process claims, if proven, would establish his innocence by clear and convincing evidence.

Murphy was also required in the court below to make a prima facie showing that, but for an alleged constitutional error, no reasonable factfinder would have found him guilty of the murder of Jason Erie. 28 U.S.C. § 2244(b)(2)(B)(ii). In the face of his written and oral confessions to Mr. Erie's murder and the absence of evidence of Murphy's innocence, Murphy could not make

such a showing. Consequently, Murphy cannot justify the extraordinary relief he seeks.

First, Murphy confessed both in a written statement and in a spontaneous oral statement to a police officer to shooting Mr. Erie. 19 RR 22–23 (Murphy's written statement), 106 (Captain Ronnie Sharp's testimony that Murphy said, "I bet y'all never had anybody stand up and say straight out that he killed a motherf---er"). Young's and Davis's affidavits were plainly insufficient to overcome the probative value of Murphy's confession.

Murphy asserted in the court below that his confession is unreliable because he is intellectually disabled and was intoxicated at the time of the murder. Mot. at 26. But Murphy's claim of intellectual disability was raised and rejected. *Ex parte Murphy*, 2014 WL 6462841, at *1. Moreover, the jury was aware that Murphy was intoxicated on the night of the murder. 18 RR 35, 61–66. And, notably, the detective who took Murphy's statement testified that Murphy did not appear intoxicated or tired at the time he took Murphy's statement, which was about three days after the murder. 19 RR 21.

Murphy's confession was also corroborated by other evidence. For example, Murphy stated that, prior to the murder, he, Solomon, Wood, and Davis drove to a Texaco where they spoke with Young and two others. 19 RR 23. Young testified to the same facts. 19 RR 42. Both Murphy's and Solomon's statements explained that they were riding in a car with Wood and Davis on the night of the murder when they saw a man—Jason Erie—on

Summerhill Road who needed help with his car.[14] 2 RR 29; 19 RR 22. Solomon and Murphy helped Mr. Erie, who gave Solomon $5.00. 2 RR 29; 19 RR 23. Murphy then demanded more money and shot Mr. Erie. 2 RR 29; 19 RR 23. Murphy picked up Mr. Erie's wallet and the group left. 2 RR 30; 19 RR 23. Murphy took $140 from the wallet and later discarded the wallet. 2 RR 30; 19 RR 23. The police found Mr. Erie's wallet discarded near a road. 18 RR 185.

Consistent with Murphy's statement, Davis testified that Murphy was given a gun before he exited the car. 18 RR 129, 145–46, 161. Soon thereafter, Davis heard a gunshot. 18 RR 129. Robert Poole, the Chief of the Physical Evidence section of the crime laboratory at the Dallas Institute of Forensic Science, testified that the bullet recovered from Mr. Erie's body was fired from the gun the police recovered from the car Murphy was riding in on the night of the murder. 19 RR 83; *see* 18 RR 225–26. The testimony at Solomon's trial was similarly consistent, identifying Murphy as the shooter. *See Solomon*, 49 S.W.3d at 360–61.

Considering all the evidence, Murphy plainly failed to show that, but for the alleged constitutional violations, no reasonable factfinder would have found him guilty. *See Schlup*, 513 U.S. at 327–28, 332 ("[T]he court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence."). The Fifth

---

[14] Murphy's and Solomon's written statements appear at the end of volume two of the Reporter's Record. Each statement was read into the record. 2 RR 28–30 (Solomon's statement); 19 RR 22–23 (Murphy's statement).

Circuit's denial of Murphy's motion on that basis was plainly justified.

Second, neither Davis's nor Young's affidavit are exculpatory because neither saw the shooting. Pet'r's App'x at 5a n.3. Indeed, Murphy necessarily could not satisfy § 2244(b)(2)(B)(ii)—a standard described as the rough equivalent of a "strict form of innocence"—with regard to Davis where Davis did not provide any exculpatory evidence.

As to Murphy's allegations regarding Young, Murphy's evidence was inherently contradictory. Pet'r's App'x at 43a. Jennifer Hancock's affidavit implied that Young was the shooter and Young's affidavit implies that Solomon was the shooter, Pet'r's App'x at 42a–43a, despite Young having not been an eyewitness to the shooting.[15] 18 RR 69. Young's affidavit did not affirmatively state that Murphy did not shoot Mr. Erie, nor did it explain how his trial testimony was false. Resp't's App'x at 4a–5a. And, as discussed above, the jury heard Young's assertion that the police threatened he might lose custody of his child. 18 RR 74–75. Murphy is not entitled to authorization based on Young's new assertions that are, in effect, cumulative of his trial testimony. *See Turner v. United States*, 137 S. Ct. 1885, 1895 (2017) (holding that *Brady* claim failed where the

---

[15] Young testified that he, along with two friends, drove away from Mr. Erie's home before the shooting occurred and drove by the home later and saw Mr. Erie laying on the driveway, which prompted Young to flag down a passing ambulance. 3 RR (Young's Voluntary Statement); 18 RR 45–46. Young's trial testimony was corroborated by the driver of the ambulance who testified he was stopped by three people who directed him to Mr. Erie. 18 RR 105.

purportedly undisclosed impeachment evidence "was largely cumulative of impeachment evidence petitioners already had and used at trial").

Murphy's new evidence is simply not exculpatory, and he cannot show that no reasonable factfinder would have found him guilty if he or she was aware that Young and Davis made unsubstantiated allegations they had been threatened with criminal charges and promised leniency in exchange for their testimony or that Young made a vague assertion that he "did not tell the jury the whole truth when [he] testified at Julius's trial," Resp't's App'x at 5a, where Murphy confessed and the consistent and corroborated evidence places Murphy at the scene of the murder with the murder weapon shortly before Mr. Erie was shot. The Fifth Circuit's denial of Murphy's motion for authorization based on his failure to present evidence "indicative of his innocence" was plainly justified and shows that no exceptional circumstances exists that warrants this Court's intervention. Pet'r's App'x at 5a & 5a n.3. His original petition for a writ of habeas corpus should be denied.

Conclusion

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

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney

JEFFERSON CLENDENIN
Assistant Attorney General

OFFICE OF THE ATTORNEY

General

MARK PENLEY
Deputy Attorney General
for Criminal Justice

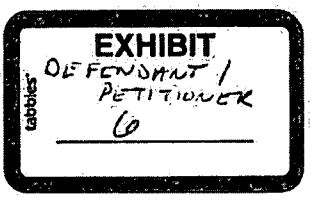
EDWARD L. MARSHALL
Chief, Criminal Appeals
Division

February 10, 2020

GENERAL OF TEXAS

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

Respondent's Appendix



AFFIDAVIT OF CHRISTINA DAVIS

I, Christina Davis, state and declare as follows:

1. My name is Christina Davis. I am 37 years old and competent to make this statement.

2. I dated Julius Murphy for approximately two or two and a half years before the murder of Jason Erie in September 1997.

3. I met Chris Solomon after I met Julius. I frequently saw Chris and his friends Josh Thompson and Javarrow Young carrying guns. Julius did not own or carry a gun when I knew him.

4. On the day of Jason Erie's murder, a group of us, including Julius, Chris, Marie Woods (Chris' girlfriend), Javarrow, Elena DeRosia (Javarrow's girlfriend), and me were hanging out together at Julius' mom's house. We were drinking and smoking weed. At one point, I saw Chris and Javarrow go into Julius' mother's bathroom to roll a blunt. This stood out to me as strange because, in the past, we always rolled blunts in front of each other. When I took a hit of the blunt it made my mouth numb and my lips numb. It made me feel dizzy. I thought the blunt might have been laced with something so I did not smoke any more. I believe that Chris and Javarrow laced the blunt with "water."

5. Julius smoked the entire rest of the blunt. He had an immediate, bad reaction, which frightened me. Julius's pupils got very big and he did not look like himself. He also did not act like himself at all. Julius was usually very quiet and mellow, but after smoking the blunt that night, he was loud and belligerent. He also seemed confused, as though he did not understand the things I was saying to him. He did not appear to be in control of his actions. I had never seen Julius like that before.

6. That evening, we left Julius's mom's house and drove to New Boston. Javarrow drove in a truck with Elena and their baby. Julius, Chris, Marie, and I drove separately in Marie's car. During the drive to New Boston, I tried to talk with Julius, but it was as though he could not hear or understand me, and he seemed to be out of his mind. At one point during the drive to New Boston, Julius tried to hang his entire body out of the car window while we were on the highway.

7. When we left New Boston, we drove back to Texarkana. When we arrived in Texarkana, we stopped at a convenience store on Summerhill Road. Chris got out of the car to talk to Javarrow. I did not hear what they said.

8. When we were driving down Summerhill Road we passed a man in his driveway who needed his car jumped. Chris had seen him standing in the driveway and pulled his car over into the driveway. Javarrow pulled his truck over and parked in a lot across the street.

9. Chris got out and jumped the man's car. The man then came over to the driver's side window of Marie's car and opened his billfold and gave Chris $5 for helping him. Chris saw more money in his billfold and said to Julius, "Let's do a lick." Chris kept saying, "Let's hit a lick. Let's rob him." Julius did not say anything in response. I told Julius that he should tell Chris "no," but it was like Julius could not hear or understand me.

10. I put my head down and began crying. All of a sudden I heard a gunshot or multiple gunshots. A few moments later, Chris started the car and we left the scene and drove all the way to Memphis.

11. After Memphis, we drove to Arlington, Texas. I did not want to get back in the car with Chris, and so I left them and called my Aunt Vicky. She called the police and I went to the police station in Arlington. The detectives from Texarkana came to pick me up and brought me back to Texarkana.

12. In my interview with the detectives they told me that they would charge me with conspiracy to commit murder if I did not cooperate with them. I believed them.

13. I later talked to the District Attorneys, Bobby Lockhart, Al Smith, and Kristie Wright, who told me that if I did not testify they would charge me with conspiracy to commit murder. I believed them.

14. The District Attorneys also told me I was not allowed to talk to Julius's attorneys because it could interfere with the case.

15. I testified on behalf of the prosecution at Julius's trial.

16. After I testified, the District Attorneys told me for the first time that I would not be charged with any crime.

17. Later, Josh Thompson told me that Javarrow called Crimestoppers immediately after the shooting and received a $1,000 reward for turning in Chris, Julius, Marie, and me. I heard that Javarrow used the money to stay in a motel for a week after the murder.

18. I have read and reviewed this 3-page affidavit.

I declare under penalty of perjury under the laws of the United States of America and the State of Texas that the foregoing statement is true and correct to the best of my knowledge and that this affidavit was executed on September 5, 2015 in Tarrant, Texas.

x _____

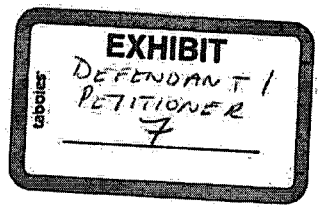
Christina Davis

Subscribed and sworn to before me on September 5, 2015.

_____

Notary Public, State of Texas

LARA MORPHEW
Notary Public, State of Texas
My Commission Expires
May 04, 2016



AFFIDAVIT OF JAVARROW YOUNG

I, Javarrow Young, state and declare as follows:

1. My name is Javarrow Young. I am 35 years old and competent to make this statement.

2. I remember the day and night of Jason Erie's murder like it was yesterday.

3. On the day Jason Erie was murdered, I was with my girlfriend at the time, Elena DeRosia, our baby daughter, and Phil Schuey. We went over to Julius Murphy's mother's house in the afternoon to hang out. We were drinking, smoking weed, and playing dominoes.

4. After a few hours, we left Julius's mother's house to visit a friend, Andrew Pace, in New Boston.

5. We were all smoking weed that night and I know that Chris rolled a "wet" smoke for Julius. I do not know if Julius knew it was "wet." Julius was acting crazy after he smoked it.

6. When we left Andrew Pace's, Elena, myself, our baby daughter, and Phil drove from New Boston back to Texarkana.

7. We were following a car with Chris, Julius, Marie, and Christina on I-30. Julius was hanging all the way out of the car window and I thought he was going to die by throwing himself onto the interstate. It scared me because I was sure he was about to die.

8. When we arrived in Texarkana, we stopped at the Walmart on Jarvis Road. I told Julius to come with us so that I could calm him down, but he did not want to leave Christina.

9. A few days after the murder, police officers came to my house to talk to Elena and me. They took us to the police station. They interviewed us separately, and they were threatening me from the start. Throughout the interrogation, they called me names and racial slurs, roughed me up and said they would take my "nigger baby." My daughter was only weeks old at the time and I believed they could take her away.

10. When it came time for Julius's trial, the prosecutor threatened me with a murder charge and said they had enough evidence on me if I did not testify for them against

Julius. They told me again that if I did not testify against Julius, I would lose my daughter. I believed them.

11. The police put pressure on me. They questioned me for hours. I never told them that Chris pulled the trigger because I knew they were after Julius and did not want that information. I was afraid; I did not want to be charged with conspiracy to commit murder or murder and I did not want to lose my daughter. Because of this, I did not tell the jury the whole truth when I testified at Julius's trial.

12. I am willing to testify to the above information if called as a witness.

13. I have read and reviewed this 2-page affidavit.

I declare under penalty of perjury under the laws of the United States of America and the State of Texas that the foregoing statement is true and correct to the best of my knowledge and that this affidavit was executed on September 10, 2015 in Lumberton, Texas.

X _____

Javarrow Young

Subscribed and sworn to before me on September 10, 2015.

Notary Public, State of Texas

ANTONIO L. FORD
Notary Public, State of Texas
My Commission Expires
September 23, 2017