No. 19-932

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

REPLY BRIEF FOR PETITIONER

THIS IS A DEATH PENALTY CASE

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INTRODUCTION

Murphy has no adequate avenue to challenge the Fifth Circuit's extra-jurisdictional decision misapplying the "prima facie showing" required under Section 2244(b)(3)(C) to file a second or successive habeas petition, an issue on which federal courts of appeals are divided. Further, extraordinary circumstances warrant this Court's review: In denying Murphy's habeas application, "the Fifth Circuit stated its conclusion too broadly," Br. in Opp'n 25, exceeding its jurisdiction. Murphy's state habeas proceedings were also inadequate, and prosecutorial misconduct infected Murphy's trial. This Court's review is necessary.

ARGUMENT

I. MURPHY IS ENTITLED TO AN ORIGINAL WRIT OF HABEAS CORPUS.

To invoke this Court's original habeas jurisdiction, Murphy must show: (1) "adequate relief cannot be obtained in any other form or from 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. The State does not contest that the third factor is satisfied, and Murphy has satisfied prongs one and two.

A. Murphy Cannot Obtain Adequate Relief Elsewhere, and His Original Petition Is Not an End-Run Around AEDPA.

Murphy appropriately seeks an original writ of habeas corpus because "adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(a); *see also Ex Parte Fahey*, 332 U.S. 258, 260 (1947) (original writ appropriate where "appeal is a clearly inadequate remedy"). Murphy has been foreclosed from seeking certiorari review of the Fifth Circuit's denial of his motion for authorization. *See* 28 U.S.C. § 2244(b)(3)(E); *see also* Ltr. from Scott S. Harris, Clerk, Supreme Court of the United States to E. Desmond Hogan (Jan. 21, 2020) (returning Murphy's Petition for Writ of Certiorari because "[t]he denial of authorization by a court of appeals to file a second or successive petition for writ of habeas corpus may not be reviewed on certiorari"). His only remaining avenue for relief is thus for this Court to exercise its original jurisdiction to grant his Petition for a Writ of Habeas Corpus.

Under Section 2244(b)(3)(C), federal courts of appeals are tasked with determining whether an application to file a successive habeas petition "makes a prima facie showing that the application satisfies the requirements of [subsection 2244(b)]." 28 U.S.C. § 2244(b)(3)(C). That mandate is limited. The courts of appeals only act as a high-level, prima-facie gatekeeper, ensuring that petitioners' claims warrant a more complete review before the district court. Congress tasked district courts with the substantive gate-keeping function to determine whether a habeas petition can actually *satisfy* the statutory requirements. *See* 28 U.S.C. § 2244(b)(4). Here, however, the Fifth Circuit ignored these statutory limitations and denied Murphy's application "[b]ecause [he] ha[d] not *satisfied* the stringent requirements of 28 U.S.C. § 2244(b)(2)." Pet. App. 5a (emphasis added). Even the State concedes that "the Fifth Circuit stated its conclusion too broadly[.]" Br. in Opp'n 25. And Murphy's case is not unique in this regard. *See, e.g.*, *In re Raby*, 925 F.3d 749, 755 (5th Cir. 2019); *In re Coleman*, 344 F. App'x 913, 916–917 (5th Cir. 2009).

That the Fifth Circuit *announced* the right standard—a "sufficient showing of possible merit to warrant a fuller exploration by the district court," such that it appears "*reasonably likely*" that a petitioner's application satisfies Section 2244(b)(2)(B)'s requirements, *Bennett* v. *United States*, 119 F.3d 468, 469–470 (7th Cir. 1997) (emphasis added)—does not substitute for *applying* the appropriate standard, which the court plainly did not do. *See, e.g.*, Pet. App. 1a–5a; *see also* Pet. 14–17. Nor does the Fifth Circuit stand alone in applying an overly muscular "prima facie" standard. As explained below, the

Fourth Circuit also routinely exceeds its jurisdiction when reviewing motions for authorization.

The State's argument that Murphy had an adequate remedy available because he participated in state and federal court habeas proceedings misses the mark. Indeed, virtually every petitioner who files an original petition has also participated in state and federal habeas proceedings. *See, e.g.*, *In re Davis*, 557 U.S. 952 (2009), slip op. at 1 (Stevens, J., concurring). The same is true as to the State's attempt to frame Murphy's Petition as an end-run around AEDPA. *See* Br. in Opp'n 18–20. The State cites *Felker* v. *Turpin*, 518 U.S. 651 (1996), to argue that Section 2244(b) "informs" the Court's evaluation of an original habeas petition. *Id.* at 19–20. But *Felker* held expressly that "[AEDPA] does not repeal [the Court's] authority to entertain a petition for habeas corpus," 518 U.S. at 661–662, and this Court has subsequently clarified that *Felker* "expressly le[ft] open the question whether and to what extent [AEDPA] applies to original petitions." *In re Davis*, slip op. at 1. In short, there is no "end-run" around AEDPA because AEDPA "makes no mention of [this Court's] authority to hear habeas petitions filed as original matters" in the first place. *Felker*, 518 U.S. at 661.

To be clear, Murphy's Petition does not address the merits of his prior proceedings. Murphy's Petition instead seeks to challenge the Fifth Circuit's extra-jurisdictional review of his motion for authorization. The State does not argue—nor can it—that Murphy has ever had any opportunity to challenge the Fifth Circuit's extra-jurisdictional interpretation of 28 U.S.C. § 2244(b)(3)(C)'s "prima facie showing." Nor

can the State contest that Murphy will be foreclosed from doing so unless this Court grants this Petition.

Without this Court's intervention, federal courts of appeals like the Fifth Circuit below—but not limited to that circuit, as we next discuss—will continue to exceed their jurisdiction when reviewing successive habeas applications.

B. Exceptional Circumstances Warrant the Exercise of This Court's Original Habeas Jurisdiction.

With respect to the second prong, exceptional circumstances also warrant this Court's exercise of its original jurisdiction, for at least three reasons. First, the federal courts of appeals are deeply divided and confused regarding how to properly apply Section 2244(b)(3)(C)'s prima facie standard. Second, the State prevented Murphy from adequately developing his underlying habeas claims. Finally, serious prosecutorial misconduct infected Murphy's trial.

First, as Murphy explained in his Petition, Pet. 10–17, there is confusion among the circuit courts as to what constitutes a prima facie showing under Section 2244(b)(3)(C). That inconsistency means that habeas petitioners in certain circuits are arbitrarily subjected to improper, extra-jurisdictional review of their habeas applications. For death-sentenced petitioners in particular, proper review of habeas applications is important and should be undertaken with particular caution. *See Moore* v. *United States*, 871 F.3d 72, 78 (1st Cir. 2017).

Section 2244(b)(3)(C) grants circuit courts jurisdiction only to determine whether an application to file a successive habeas petition "makes *a prima facie*

showing that the application satisfies the requirements of [subsection 2244(b)]." (emphasis added). It is true that most courts reviewing applications under Section 2244(b)(3)(C) recite the proper prima facie standard articulated in *Bennett*—that courts shall grant an application where it appears "reasonably likely" that it satisfies the statutory requirements. But Murphy acknowledged as much in his Petition, Pet. 10–11, and the State ignores what Murphy's Petition really seeks to challenge: the circuit courts' divergent *application* of that standard, with some veering outside the jurisdiction granted under ADEPA. Pet. 10–17. Only the Second, Sixth, and Tenth Circuits consistently stay within the jurisdictional lane assigned by Congress. *See* Pet. 11–14. Those circuits recognize that the prima facie standard "is not * * * particularly high," *Bell* v. *United States*, 296 F.3d 127, 128 (2d Cir. 2002) (per curiam), and requires only that it appear reasonably likely that the application satisfies the statutory requirements.

In contrast, while the Fourth and Fifth Circuits routinely give lip service to the *Bennett* standard, they then go on to require petitioners to actually *establish* the statutory requirements, exceeding their jurisdiction under 2244(b)(3)(C). *See* Pet. 14–17. For example, in *In re Williams* the Fourth Circuit announced that it was adopting the *Bennett* standard, but then claimed that 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.'" 330 F.3d 277, 282 (4th Cir. 2003) (quoting 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added)). And here, the Fifth Circuit

recited the *Bennett* standard before holding 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." Pet. App. 4a.

The State's attempt to argue that no split exists because the Fifth Circuit *sometimes* applies the *Bennett* standard correctly, Br. in Opp'n 22–26, also is no answer because that court did not do so here. Even assuming the State is correct that the Fifth Circuit can apply the *Bennett* standard correctly, that says nothing about whether it consistently applies the proper standard, including here. This Court's review is necessary to articulate the proper standard, homogenize circuit courts' application of that standard, and to address the exceptional circumstances created by this inconsistency which creates arbitrary outcomes for habeas petitioners.

Second, Murphy's habeas claims would benefit from a fuller record, contrary to the State's assertions. Br. in Opp'n 26. Murphy's state habeas hearing was inadequate. Two key state-witnesses—Young and Davis—signed sworn affidavits which confirm that serious prosecutorial misconduct infected Murphy's trial. But the state trial court never heard live testimony from these crucial witnesses. Despite extensive efforts, counsel was unable to locate Davis to serve her, and state officials failed to transport Young from the jail where he was incarcerated.[1] *See* Pet. 7–8. The court denied counsel's

[1] The State suggests that Murphy has waived arguments regarding the slipshod state post-conviction hearing. Br. in Opp'n 3 n.2. Not so. Murphy explicitly raised the defective

request for a continuance, Hr'g Tr. at 11:17–18, *State* v. *Murphy*, No. 97-F-462-102 (5th Dist. Ct., Bowie County, Tex. Oct. 20, 2017), and following the hearing, the court discredited the allegations in Young and Davis's sworn affidavits in large part *because they were absent*, Pet. App. 44a, 46a. Meanwhile, it credited the State's live witnesses' testimony and concluded that Murphy had failed to establish his habeas claims. *Id.* at 47a–49a, 51a–52a. Murphy's claims therefore were denied before any court heard from his two key witnesses.

Third, serious prosecutorial misconduct infected Murphy's trial. Davis and Young's affidavits establish that the prosecutors at Murphy's trial failed to disclose to the defense all favorable evidence, including any deals, threats to prosecute, or promises of leniency in exchange for testimony, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). For example, despite five written requests from Murphy's trial counsel for *Brady* information, the prosecutor never disclosed that he threatened Davis with criminal charges if she did not cooperate against Murphy. *See* Ex. 2 (Davis Aff.) ¶ 13 to Appl. for Postconviction Writ of Habeas Corpus (Sept. 24, 2015) [hereinafter "Davis Aff."]. More, the prosecutors allowed Davis and Young to testify untruthfully about these threats

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state post-conviction proceedings as exceptional circumstances warranting this Court's review. Pet. 3, 7–8. Moreover, Murphy does not assert that his state post-conviction proceedings are an independent ground for habeas relief, only that they contribute to the exceptional circumstances in this case warranting this Court's review.

and promises at trial, in violation of *Giglio* v. *United States*, 405 U.S. 150 (1972).

The government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Justice is not done by truncating review of Murphy's substantial claims of prosecutorial misconduct. Murphy's case accordingly presents exceptional circumstances warranting the exercise of this Court's discretionary powers.

II. MURPHY'S CLAIMS SATISFY 28 U.S.C. §§ 2244(b)(2)(B)(i) AND (ii).

A. Murphy Could Not Have Discovered the State's *Brady* and *Giglio* Violations Any Earlier Than 2015, and the Texas Court of Criminal Appeals Found That Murphy Satisfied This Exact Standard When It Granted His Section 5 Petition.

As the Texas Court of Criminal Appeals determined, Murphy satisfied the exact standard required by § 2244(b)(2)(B)(i), when it found Murphy's claims satisfied Article 11.071, Section 5 of the Texas Code of Criminal Procedure—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)).

Murphy's trial counsel made five separate written requests for the State to disclose any and all evidence of threats, charges, or promises of leniency

that were made either directly or indirectly to witnesses. In response to those requests, the State told trial counsel that no deals had been made with witnesses. Murphy relied in good faith on the State's misrepresentations. So, at minimum, Murphy has established that whether he was unable to discover the factual predicate of his claims through due diligence warrants a fuller exploration by the district court. This is all that Section 2244(b)(3)(C) requires. *See In re Rollins*, 381 F. App'x 365, 367–369 (5th Cir. 2010) (quoting *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003)).

B. Murphy Satisfied the Limited Burden to Make a Prima Facie Showing Under § 2244(b)(2)(B)(ii), and No Reasonable Factfinder Could Have Found Murphy Guilty of Capital Murder.

Murphy also made "a sufficient showing of possible merit to warrant a fuller exploration by the district court" under Section 2244(b)(2)(B)(ii), because but for the constitutional errors that infected his trial, no reasonable factfinder would have found him guilty of capital murder. *See In re Swearingen*, 556 F.3d 344, 347 (5th Cir. 2009) (quoting *In re Morris*, 328 F.3d at 740).

No physical evidence tied Murphy to the crime. In 2015, Young and Davis—the State's two key witnesses at trial—came forward for the first time and disclosed that their testimony at Murphy's trial was the product of undisclosed threats and promises made by the State. Specifically, Young gave a sworn statement that the State threatened to charge him with murder and take away his baby if he did not testify against Murphy. *See* Ex. 1 (Young Aff.) ¶ 10

to Appl. for Postconviction Writ of Habeas Corpus (Sept. 24, 2015). Young affirmatively stated that he provided false testimony at Murphy's trial, as he feared the State's threats. *Id*. ¶ 11. Similarly, Davis gave a sworn statement that the State threatened to charge her with conspiracy to commit murder if she did not testify against Murphy. *See* Davis Aff. ¶ 12. Had the jury known about these threats, it would have substantially undercut the testimony of Young and Davis, and no reasonable factfinder would have found Murphy guilty of capital murder.

Accordingly, Murphy has satisfied the prima facie showing required by Section 2244(b)(2)(B)(ii).

CONCLUSION

This Court should grant Murphy's Original Petition for Writ of Habeas Corpus, or transfer Murphy's Petition to the appropriate district court for a hearing and determination.

Respectfully submitted,

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