

IN THE
Supreme Court of the United States

JULIUS JEROME MURPHY,
Petitioner,

v.

LORIE DAVIS, DIRECTOR OF THE TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

**MOTION TO DIRECT THE CLERK TO FILE A PETITION FOR A WRIT OF
CERTIORARI**

THIS IS A DEATH PENALTY CASE

SARAH M. CUMMINGS
REED SMITH LLP
2501 N. Harwood Street,
Suite 1700
Dallas, TX 75201

E. DESMOND HOGAN
Counsel of Record
KATHRYN MARSHALL ALI
ELIZABETH LOCKWOOD
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5600
desmond.hogan@hoganlovells.com

March 6, 2020

Counsel for Petitioner

MOTION TO DIRECT THE CLERK TO FILE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 21, Petitioner Julius Murphy respectfully moves to direct the Clerk to file his Petition for a Writ of Certiorari. The Clerk's office declined to file Murphy's Petition for a Writ of Certiorari concluding that the Fifth Circuit's denial of Murphy's motion for authorization was not a permissible basis for a petition for certiorari under. *See* 28 U.S.C. 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."). But Murphy's petition does not challenge the merits of the Fifth Circuit's decision denying Murphy's motion for authorization. Rather, Murphy's petition challenges the Fifth Circuit's *extra-jurisdictional* decision to improperly require Murphy to establish Section 2244(b)(2)(B)'s requirements in his application to file a successive habeas petition. This jurisdictional error is the actual subject of Murphy's petition, and it is not prohibited by Section 2244(b)(3)(E).

Background

1. Under Section 2244(b)(3)(C), federal circuit courts must evaluate whether a petitioner's successive habeas application "makes a prima facie showing that the application satisfies the requirements of [subsection 2244(b)]." 28 U.S.C. § 2244(b)(3)(C). Federal courts of appeals only act as initial gate-keepers at the authorization stage. Federal district courts, in contrast, are tasked with determining whether a habeas petition actually *satisfies* the statutory requirements. *See* 28 U.S.C. § 2244(b)(4).

2. Murphy filed a Motion for Authorization to Proceed in the District Court on his Petition for Habeas Corpus in the Fifth Circuit in August 2019. The Fifth Circuit denied Murphy's motion for authorization “[b]ecause [he] ha[d] not satisfied the stringent requirements under 28 U.S.C. § 2244(b)(2).” Op. at 4–5, *In re Murphy*, No. 19-40741 (5th Cir. Oct. 22, 2019) (per curiam)¹.
3. By requiring that Murphy “*satisf[y]*” Section 2244(b)(2)(B), the Fifth Circuit exceeded its jurisdiction and circumvented the appropriate standard for circuit courts to apply at the authorization stage. The correct standard, to which the Fifth Circuit provided only lip service, only requires 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).
4. On January 17, 2020, Murphy submitted his Petition for a Writ of Certiorari and Original Petition for Writ of Habeas Corpus challenging the Fifth Circuit’s extrajurisdictional application of Section 2244(b)(3)(C) and identifying a split among the circuit courts as to what constitutes a “*prima facie showing*” under Section 2244(b)(3)(C). Compare *In re McDonald*, 514 F.3d 539, 546–547 (6th Cir. 2008) (“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”); with *In re Raby*, 925 F.3d 749, 755 (5th Cir. 2019) (denying motion for

¹ Available at Pet. App. 5a of Pet. for Writ of Certiorari (Jan. 17, 2020).

authorization in part because petitioner could not “establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [the petitioner] guilty of the underlying offense” (quoting 28 U.S.C. § 2244(b)(2)(B)(ii)).

5. Murphy’s petition therefore sought this Court’s relief to reconcile the circuit courts’ divided application of Section 2244(b)(3)(C)’s “prima facie showing” standard and the manner by which the Fifth Circuit surpassed its jurisdiction by requiring Murphy to *satisfy* the application requirements outlined in Section 2244(b)(3)(C).
6. The Clerk then returned Murphy’s petition, declining to file it 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.” Ltr. From Scott S. Harris, Clerk, Supreme Court of the United States to E. Desmond Hogan (Jan. 21, 2020). The Clerk further directed Counsel for Murphy to file the petition for a writ of habeas corpus as a separate pleading. *Id.*
7. Counsel for Murphy attempted to separately re-file Murphy’s Petition for a Writ of Certiorari and Original Petition for Writ of Habeas Corpus as separate pleadings on January 21, 2020. The Court accepted Murphy’s Original Petition for Writ of Habeas Corpus, relating its filing date back to January 17, 2020. *See In re Julius Jerome Murphy*, No. 19-932 (petition for certiorari filed Jan. 17, 2020). But the Court once again returned Murphy’s Petition for a Writ of Certiorari “for reasons stated in prior correspondence from [the Clerk’s] Office.” *See* Ltr. From

Scott S. Harris, Clerk, Supreme Court of the United States to E. Desmond Hogan (Jan. 24, 2020) (“The 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”).

Reasons Why This Motion Should be Granted

8. This Court should grant Murphy’s Motion to Direct the Clerk to file his Petition for a Writ of Certiorari, nunc pro tunc, because his petition properly challenges the Fifth Circuit’s extra-jurisdictional application of Section 2244(b)(3)(C).
9. Section 2244(b)(3)(E) of AEDPA bars petitions for a writ of certiorari where the petition’s “subject” is the “grant or denial of an authorization by a court of appeals.” *Castro v. United States*, 540 U.S. 375, 379 (2003) (quoting 28 U.S.C. § 2244(b)(3)(E)). That prohibition applies only to the court’s actual “denial,” and not another type of ruling that incidentally had the “effect of denying authorization *** to file a second *** application.” *Id.* at 380 (emphasis and omissions in original) (internal quotation marks and citations omitted).
10. Here, Murphy’s petition does not challenge the Fifth Circuit’s denial of his claim on the merits. Indeed, Murphy neither asks this Court to review nor grant his motion for authorization. He challenges the Fifth Circuit’s extra-jurisdictional interpretation of Section 2244(b)(3)(C)’s “prima facie showing” standard, an application which only had the “effect of denying [Murphy] authorization *** to file a second *** application.” *Id.* (omissions in original) (internal quotation marks and citations omitted); *see supra* ¶ 3. And as further explained in Mur-

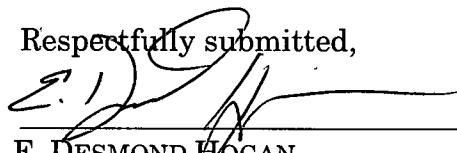
phy's petition, Murphy seeks this Court's review to resolve federal circuit courts' inconsistent application of Section 2244(b)(3)(C)'s "prima facie showing" standard. *See supra* ¶ 4.

Conclusion

For the foregoing reasons, this Court should grant Murphy's Motion to Direct the Clerk to file his Petition for a Writ of Certiorari.

Dated: March 6, 2020

Respectfully submitted,



E. DESMOND HOGAN

Counsel of Record

KATHRYN MARSHALL ALI

ELIZABETH LOCKWOOD

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, DC 20004

(202) 637-5600

desmond.hogan@hoganlovells.com

Counsel for Petitioner