No. 20-8253

IN THE

Supreme Court of the United States

BLAINE MILAM

Petitioner,

V.

BOBBY LUMPKIN, DIRECTOR

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner seeks review from this Court of the Fifth Circuit's judgment affirming the district court's construction of his habeas corpus application as a successive petition for a writ of habeas corpus. *See* Pet. at 4. He is not, contrary to Respondent's Brief in Opposition, attempting to appeal the denial of a motion for authorization to file a successive habeas petition. *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari ("Br. in Opp'n") at 15–16 (citing 28 U.S.C. § 2244(b)(3)(E)). Because Petitioner is not seeking review of the denial of a motion for authorization, Respondent's jurisdictional arguments against certiorari fail.

Petitioner seeks review of the construction of his habeas corpus application as a "second or successive" application subject to 28 U.S.C. § 2244(b). Applying that provision to bar first-time federal habeas corpus merits review of an intellectual disability claim violates both the Eighth Amendment and the Suspension Clause. Pet. at 8–11. As laid out in his petition, Petitioner first sought federal court review of his intellectual disability claim by filing a Motion for Authorization in the Fifth Circuit. *Id.* at 4. The Fifth Circuit ruled that Petitioner could not meet the requirements of 28 U.S.C. § 2244(b). *In re Milam*, 838 F. App'x 796 (5th Cir. Oct. 27, 2020). Petitioner then filed a second-in-time habeas application in district court and argued that § 2244 could not constitutionally operate to bar review of a categorical Eighth Amendment claim. The district court transferred that petition as "second or successive." Petitioner argued in the Fifth Circuit that it was not. However, that Petitioner first sought authorization from the Fifth Circuit to file a second or successive habeas application

raising his intellectual disability claim in a separate proceeding does not convert his petition seeking review of the Fifth Circuit's affirmance of the district court's transfer order into an attempt to seek review of that court's earlier authorization decision. Nor was first seeking authorization a concession that the claim is successive.

In the proceedings below and in his petition before this Court, Petitioner does not challenge any lower court determination that he does not meet the statutory exceptions to the bar contained in 28 U.S.C. § 2244(b). Instead, he is arguing that *because* the Fifth Circuit found he could not meet the statutory requirements for filing a second or successive petition, application of the statute to his categorical Eighth Amendment claim renders the statute unconstitutional. Thus, 28 U.S.C. § 2244(b)(3)(E) does not preclude this Court from exercising jurisdiction to review the Fifth Circuit's affirmance of the district court's transfer order. *See* Br. in Opp'n at 2, 3, 17.

Moreover, Respondent's argument that this Court should deny certiorari because Petitioner's case presents no compelling circumstances, Br. in Opp'n at 17–26, is belied by the very cases on which Respondent relies, *id.* at 18–19. *Id.* Those cases, initially cited by Petitioner, weigh in favor of granting certiorari by demonstrating that Petitioner's case raises a critical question that has arisen in several other cases: the tension between the Eighth Amendment's prohibition on the execution of persons with intellectual disability and the operation of 28 U.S.C. § 2244(b), which may nevertheless permit such executions by precluding federal review of whether the State lacks the constitutional power to execute an individual.

Moreover, Petitioner's case presents this Court with an opportunity to confront this question without the need to enter a stay of execution, a rarity for this type of claim.

Finally, Respondent's argument that the Eighth Amendment "does not prevent an appellate court from applying constitutionally permissible restrictions on the filing of successive applications" begs the question by simply assuming that 28 U.S.C. § 2244 as applied here is a "constitutionally permissible restriction." Br. in Opp'n at 19 (citing *Felker v. Turpin*, 518 U.S. 651, 662, 664 (1996)). As Petitioner has demonstrated, however, applying § 2244(b) in this manner violates both the Eighth Amendment and the Suspension Clause. *See* Pet. at 8–11. In other words, while § 2244(b) may be constitutional on its face, is not a constitutionally permissible restriction as applied to Petitioner in this manner and therefore Respondent's reliance on *Felker* is misplaced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should granted.

Respectfully submitted,

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