CAPITAL CASE
No. 10-949

IN THE

Supreme Court of the United States

TROY ANTHONY DAVIS,
Petitioner,

v.

CARL HUMPHREY, Warden,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

PHILIP W. HORTON
Counsel of Record
JASON EWART
R. REEVES ANDERSON
STEPHEN MARSH
WELLS BENNETT
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Philip.Horton@aporter.com

Counsel for Troy Anthony Davis

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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ARGUMENT

I. CERTIORARI REVIEW IS AUTHORIZED UNDER 28 U.S.C. § 1254(1).

Respondent erroneously claims, without argument or case law, that "certiorari review from the denial of a COA [certificate of appealability] is not authorized." Cert. Opp. 6. Respondent is entirely wrong: In *Hohn v. United States*, 524 U.S. 236 (1998), the Court squarely held that 28 U.S.C. § 1254(1) provides certiorari jurisdiction to review the denial of a COA. Respondent does not acknowledge *Hohn*, which Mr. Davis cited as controlling precedent in his petition. Pet. 5; *see also Miller-El v. Cockrell*, 537 U.S. 322, 326-327 (2003) (granting certiorari and reversing

denial of a COA); *Slack v. McDaniel*, 529 U.S. 473, 482 (2000) ("we ha[ve] statutory certiorari jurisdiction to review the denial of a COA"); *Apker v. United States*, 524 U.S. 935 (1998) (granting certiorari and summarily reversing the denial of a COA).

Respondent's recitation of 28 U.S.C. § 2244(b)(3)(E) is perplexing because that statute does not address certiorari review for the denial of a COA. Section 2244(b)(3)(E) limits this Court's ability to review, by certiorari or appeal, a decision by the court of appeals regarding leave to file a second or successive habeas application. That section does not mention COAs, and thus does not apply to Mr. Davis's petition for certiorari.[1]

II. THE ELEVENTH CIRCUIT HAS STATUTORY JURISDICTION TO HEAR MR. DAVIS'S APPEAL.

Respondent does not contest that 28 U.S.C. §§ 1291 and 2253 ordinarily vest the courts of appeals with jurisdiction to review a district court's final habeas order.[2] The Eleventh Circuit's decision that it lacked jurisdiction to issue a COA, notwithstanding §§ 1291 and 2253, was based on its erroneous conclusion that this Court's habeas power is derived from its Article III original jurisdiction. Pet. App. 4a-5a. Respondent

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[1] Respondent confusingly suggests that Mr. Davis sought review of a denial of a COA in his original habeas petition filed with this Court in 2009. Cert. Opp. 2. That is not true.

[2] Misrepresenting Mr. Davis's position, Respondent asserts that "nothing in § 2241 confers appellate jurisdiction on any circuit court." Cert. Opp. 14. Mr. Davis made no such assertion; as explained in the petition, "28 U.S.C. § 2253 provides that jurisdiction." Pet. 14.

does not defend the merits of that position. Cert. Opp. 14.

Instead, Respondent posits that when this Court transferred Mr. Davis's case in 2009, it implicitly appointed the district court "as this Court's fact-finder," Cert. Opp. 13, "akin to a special master or a magistrate for this Court." *Id.* at 16. That novel theory finds no support in the transfer statute or the Transfer Order and ignores decades of customary procedures employed when the Court *actually* appoints Special Masters.

Finally, Respondent echoes the court of appeals' assumption that its 2009 gatekeeping order under 28 U.S.C. § 2244(b)(3) somehow precludes Mr. Davis's current appeal. Respondent, however, does not rebut Mr. Davis's arguments as to why section 2244 does not apply to this appeal.

A. Respondent Concedes That This Court's Habeas Jurisdiction Is Not Part Of Its Article III Original Jurisdiction.

The Eleventh Circuit refused to issue a COA because it believed that Mr. Davis's habeas petition fell within this Court's Article III original jurisdiction—*i.e.*, cases involving ambassadors, other foreign officials, and U.S. states. In his certiorari petition, Mr. Davis explained that this case falls within the Court's *appellate*, rather than its original, jurisdiction, and Respondent effectively concedes that the court of appeals was wrong to hold otherwise. Cert. Opp. 14 ("Case law does indicate that the Court is exercising its appellate jurisdiction in transferring the case to the district court."); *id.* ("an original habeas petition, as any other habeas petition, would

be appellate in nature as it is filed to review a decision or judgment below" (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807))).[3]

Because this erroneous legal premise was the primary basis for the court of appeals' conclusion that it lacked jurisdiction to issue Mr. Davis's COA—and arguably its *only* basis, *see* Pet. App. 4a-5a—this Court should grant certiorari, summarily reverse the decision below, and direct the court of appeals to issue the COA. Respondent does not dispute that Mr. Davis satisfied the standard for the issuance of a COA. Pet. 17.

B. The District Court Was Not Implicitly Appointed As A Special Master.

Section 2253 is the only statute that discusses federal habeas appeals of state convictions, and it is central to resolving the jurisdictional question raised by the petition. Pet. 14. Yet Respondent mentions section 2253 just once, and only to contend that "if the district court was acting . . . akin to a special master or a magistrate for this Court, the order of the district court would not constitute a 'final order' under § 2253." Cert. Opp. 16. Under those conditions, Respondent argues, "§ 2253 would not apply to Petitioner's case." *Id.* Implicit in this argument is the recognition that section 2253 *does* govern all

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[3] Respondent appears to contradict himself by contending that "the district court properly concluded . . . that this Court had exercised its original jurisdiction when it transferred this case." Cert. Opp. 12. To the extent this statement refers to the Court's original jurisdiction under Article III, Respondent is incorrect for the reasons set forth in the petition for certiorari. Pet. 10-13.

habeas appeals, consistent with the plain meaning of that statute. Pet. 16.[4]

This Court gave no indication that it appointed the district court to act only "as this Court's fact-finder," Cert. Opp. 13, "akin to a special master or a magistrate for this Court." *Id.* at 16. The Transfer Order never uses the terms "Special Master" or "magistrate." When this Court appoints a Special Master, it does so explicitly. *See, e.g., South Carolina v. North Carolina*, 552 U.S. 1160 (2008) (providing for the "appoint[ment]" of "Kristin Linsley Miles, Esq." as "Special Master in this case," and "referr[ing]" motions to the Special Master, who is "directed to submit Reports as she may deem appropriate"). There is no reason to presume that this Court abandoned its traditional practices and procedures and implicitly appointed "the District Court" to serve as a Special Master here. *In re Davis*, 130 S. Ct. 1, 1 (2009) (transferring this case to "the United States District Court for the Southern District of Georgia," not referring the matter to the Honorable William T. Moore).

Similarly, Mr. Davis has not found any instance where a Special Master was appointed in a case arising under the Court's Article III appellate jurisdiction, such as this case. *See United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980) ("In exercising our *original* jurisdiction under Art. III, we appoint special masters . . . .") (emphasis added); *but cf. Brown v. Board of Education*, 345 U.S. 972 (1953)

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[4] Respondent does not cite 28 U.S.C. § 1291 at all, even though that statute provides jurisdiction to the courts of appeals over "all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291.

(interim order requesting briefing on, *inter alia*, whether the Court should "appoint a special master to hear evidence with a view to recommending specific terms" for a prospective desegregation decree).

Respondent finds significance in the fact that when the Court transferred Mr. Davis's petition to the district court, the Court did not explicitly state that it was "declin[ing] to entertain" the petition. Cert. Opp. 8. Respondent concludes that this "obvious absence indicates that the Court transferred the case to the district court to perform a fact-finding role" only. *Id.* Respondent's reasoning cannot be squared with the Court's Transfer Order, which directed the district court to conduct a "hearing *and determination*." *In re Davis*, 130 S. Ct. at 1 (emphasis added); *see* 28 U.S.C. § 2241(b) (transfer "for hearing and determination"). Respondent ignores this second directive, which required the district court to determine and apply the law, in addition to receiving evidence and finding facts.

Finally, Respondent fashions a false dichotomy between "declining to entertain" a petition and "transferring" a petition. By transferring Mr. Davis's petition to the district court, the Court necessarily declined to entertain it, electing instead to have the petition considered in the district court, followed by review in the court of appeals. *See* Sup. Ct. R. 20.4 ("Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U.S.C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.").

C. Section 2244 Does Not Strip Jurisdiction From The Court Of Appeals Or Repeal This Court's Power To Transfer Successive Habeas Petitions.

Lastly, Respondent argues that 28 U.S.C. § 2244(b)(3) negates the jurisdictional grant of 28 U.S.C. §§ 1291 and 2253 in this case. There is no basis for this argument, especially considering that section 2244 does not apply to Mr. Davis's appeal. As shown below, Respondent's position is actually a tacit attack on this Court's authority to transfer original habeas petitions to district courts under 28 U.S.C. § 2241(b), and necessarily challenges the validity of the 2009 Transfer Order.

In his petition, Mr. Davis explained why 28 U.S.C. § 2244(b)(3) does not apply here. Pet. 13-16. First, section 2244(b)(3) does not apply to appeals. "Section 2244(b)(3) addresses whether there will be district-court consideration of a second or successive petition *at all*, not whether the district court's consideration may be reviewed by an appellate court." *Hohn*, 524 U.S. at 262 n.3 (Scalia, J., dissenting on other grounds). Second, section 2244(b)(3) "does not apply" to habeas petitions filed in the Supreme Court and subsequently transferred to a district court, like Mr. Davis's petition. *Felker v. Turpin*, 518 U.S. 651, 662 (1996). Respondent has not responded to these arguments.

Respondent contends, without support, that the "*only* exception allowing a district court to review a successive petition is set out in 28 U.S.C. § 2244, which requires authorization by the circuit court." Cert. Opp. 9 (citing 28 U.S.C. § 2244(b)(3)). That argument ignores the Transfer Order in *this very case*, in which the Court directed the district court to

conduct a hearing and determination on Mr. Davis's successive petition. The Court's Transfer Order precludes Respondent's argument that a "petitioner may *only* file a successive habeas petition if the circuit court grants him authorization." *Id.* (emphasis added). Rather, a successive petition can arrive at the district court in at least two ways: [1] it can be filed in the district court after authorization from the circuit court, § 2244(b)(3) or [2] it can be transferred from this Court, § 2241(b). Pet. 13.

Respondent refuses to accept that this Court's Transfer Order "functional[ly]" reversed the 2009 gatekeeping order of the court of appeals. *Felker*, 518 U.S. at 666 (Stevens, J., concurring). Although section 2244(b)(3)(E) precluded the Court from reviewing that gatekeeping order by writ of certiorari or appeal, the Court provided "the functional equivalent of direct review" of the gatekeeping order through exercise of its habeas powers. *Id.*; Pet. 15-16. By granting Mr. Davis an evidentiary hearing and determination in the district court—the relief he sought and was denied in the Eleventh Circuit—the Court removed any procedural barrier that might have stemmed from the Eleventh Circuit's 2009 gatekeeping order. Pet. 16.

Respondent not only ignores the practical effect of the Transfer Order, he suggests that this Court lacked authority to transfer Mr. Davis's petition in 2009 to an Article III district court (rather than to a Special Master). Under section 2241(b), the Court may transfer a habeas petition only "to the district court *having jurisdiction* to entertain it." 28 U.S.C. § 2241(b) (emphasis added). If AEDPA repealed the jurisdiction of all district courts to consider successive habeas petitions not authorized by the courts of

appeals, as Respondent argues (Cert. Opp. 13-14), then this Court may not "transfer" a successive petition at all, and section 2241(b) is severely curtailed.

Respondent is not shy about this position and its implications for the Court's power to transfer original (and successive) habeas petitions. He suggests that transfer of Mr. Davis's petition to the district court for a "determination"—which is what the Transfer Order required—would be unlawful: "the transfer of the case to the district court to start a new round of review in the district and circuit courts would violate AEDPA." Cert. Opp. 11-12. Indeed, Respondent suggests that AEDPA implicitly repealed the transfer provision of 28 U.S.C. § 2241(b) with respect to successive petitions:

> Petitioner argues that § 2241(b) allows this Court to grant successive federal habeas petitions.[5] The language in § 2241(b) upon which Petitioner relies, and would have this Court consider in isolation, predates the enactment in 1996 of the gatekeeping provision for "successive" petitions.

Id. at 13-14.

This argument violates the "'cardinal rule . . . that repeals by implication are not favored.'" *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974) (quoting *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936)). Indeed, the Court in *Felker* specifically rejected the argument that AEDPA implicitly repealed the Court's ability to act upon successive

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[5] Mr. Davis understands Respondent to mean "transfer" when he says "grant." Section 2241(a), not 2241(b), empowers the Supreme Court to "grant" writs of habeas corpus.

petitions that have not been authorized by the courts of appeals:

> [Section] 2244(b)(3)(E) . . . makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication [in *Ex parte Yerger,* 8 Wall. 85 (1869)], we decline to find a similar repeal of § 2241 of Title 28—its descendant—by implication now.

Felker, 518 U.S. at 661.

In *Felker*, the supposed repeal-by-implication concerned section 2241(a), which empowers this Court to grant habeas petitions. However, Respondent does not explain why the logic of *Felker*—that AEDPA did not implicitly repeal the Court's habeas powers under section 2241—should not extend also to the conclusion that AEDPA did not implicitly repeal the Court's ability to transfer a successive habeas petition to an appropriate district court. Indeed, that is exactly what this Court did in the Transfer Order.

AEDPA did not implicitly repeal section 2241(b) with respect to successive habeas petitions. The Court may still transfer an original, successive habeas petition to a district court-*qua*-district court—just as the Court did in 2009—without resorting to the appointment of a quasi-Special Master. Under those conditions, Respondent does not dispute that 28 U.S.C. §§ 1291 and 2253 would apply, and that the court of appeals would have jurisdiction to issue a

COA and review the district court's final order. Cert. Opp. 16.[6]

III. MR. DAVIS'S PETITION PRESENTS A COMPELLING CASE FOR CERTIORARI.

As set forth in the petition, this case satisfies three of the explicit benchmarks for certiorari, which Respondent does not contest. Pet. 19-22. In particular, Respondent does not deny that Mr. Davis is the only habeas petitioner in the federal system barred from seeking intermediate appellate review and that this outcome is a drastic departure "from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). Instead, he argues that Mr. Davis's exhaustive efforts to obtain an evidentiary hearing *prior* to 2009 negate the need for further appellate review now. Cert. Opp. 17-18.

That argument does not bear scrutiny. In 2009 this Court invoked its extraordinary habeas powers and transferred the petition to the district court *only after* previous courts had not sufficiently evaluated Mr. Davis's innocence. The Eleventh Circuit did not dismiss Mr. Davis's COA application on the basis that Mr. Davis had diligently sought judicial relief in the past; nor could it—Congress provided for appellate review of habeas decisions in 28 U.S.C. §§ 1291 and 2253, and that statutory duty cannot be abrogated on the basis of prior judicial review.

Respondent also ignores the fact that lower courts have been sharply divided on the question of Mr. Davis's innocence. *See Davis v. State*, 283 Ga. 438 (2008) (4-3 split); *In re Davis*, 565 F.3d 810 (11th Cir.

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[6] Respondent does not suggest that §§ 1291 and 2253 were repealed by implication in AEDPA.

2009) (2-1 split). At this moment, Mr. Davis has received *no* appellate review of the evidence he presented at the 2010 evidentiary hearing and *no* appellate review of the district court's factual and legal errors in disposing of Mr. Davis's habeas petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP W. HORTON
Counsel of Record
JASON EWART
R. REEVES ANDERSON
STEPHEN MARSH
WELLS BENNETT
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Philip.Horton@aporter.com

Counsel for Troy Anthony Davis