CAPITAL CASE
No. 10-___

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

On August 17, 2009, this Court transferred Mr. Davis's habeas petition to the district court "for hearing and determination." *In re Troy Anthony Davis*, 130 S. Ct. 1, 1 (2009) (per curiam). After the district court denied relief, the court of appeals summarily dismissed Mr. Davis's appeal for lack of jurisdiction, reasoning that this Court has exclusive jurisdiction to hear an appeal because the Court had transferred Mr. Davis's petition pursuant to its Article III original jurisdiction. The Court's original jurisdiction, however, extends only to "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." U.S. Const. art. III, § 2, cl. 2. In contrast, the Court's habeas jurisdiction is "clearly *appellate*." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-101 (1807). Moreover, the Court's jurisdiction is exclusive only as to "controversies between two or more States." 28 U.S.C. § 1251(a). As a result of the decision below, Mr. Davis is the only habeas petitioner in the federal system denied the opportunity for review in the court of appeals.

The question presented is whether the court of appeals has jurisdiction under 28 U.S.C. §§ 1291 and 2253 to review a district court's final order on a habeas petition that was transferred to the district court from this Court.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 625 F.3d 716. Pet. App. 1a-6a. The final order of the district court is published at 2010 WL 3385081. Pet. App. 17a-165a. The district court's order denying a certificate of appealability is not published. Pet. App. 7a-11a.

JURISDICTION

The court of appeals entered judgment on November 5, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution states in relevant part:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. art. III, § 2, cl. 2.

Section 2253 of Title 28, United States Code, governs an appeal from the final order of a district court in a habeas case:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. . . .
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. . . .

Section 2244(b)(3) of Title 28, United States Code, requires a prisoner to obtain permission from the court of appeals before filing a second or successive habeas petition in the district court:

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. . . .
>
> (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.

Section 2241 of Title 28, United States Code, addresses the power of the Supreme Court to grant or transfer a writ of habeas corpus:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it. . . .

STATEMENT

In 2009, members of this Court recognized the "substantial risk" that Mr. Davis might be executed for a crime of which he is actually innocent. *In re Troy Anthony Davis*, 130 S. Ct. 1, 1 (2009) (Stevens, J., concurring). That risk remains. After this Court transferred Mr. Davis's habeas petition to the district court, the district court denied relief. The Eleventh Circuit summarily dismissed Mr. Davis's appeal, holding that it lacked jurisdiction to review the district court's errors, even if those errors prevented Mr. Davis from obtaining a fair determination of his innocence. The court held that Mr. Davis's only appellate option was to seek direct review in this Court.[1]

In summarily dismissing Mr. Davis's appeal, the court of appeals disregarded its statutory grant of jurisdiction and deprived Mr. Davis of intermediate appellate review. The court erroneously believed that this anomalous outcome was required by the Supreme Court's original jurisdiction over certain disputes and by 28 U.S.C. § 2244(b)(3)—neither of which applies to this case at all. If the decision stands, the most exceptional habeas cases will be entitled to the least amount of judicial oversight.

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[1] Mr. Davis's Jurisdictional Statement, also submitted today, seeks direct appellate review by this Court of the district court's final order. The proper course is to grant this petition and reverse the erroneous decision below. If this petition is denied, however, Mr. Davis respectfully requests that the Court note probable jurisdiction based on the Jurisdictional Statement and review the merits of this case. Considered together, these two filings offer alternative avenues to resolve the jurisdictional question in this case.

To ensure that Mr. Davis receives the judicial review that this remarkable case of actual innocence demands and that Congress provided, the Court should grant the petition, reverse the decision below, and direct the court of appeals to issue a certificate of appealability. *See Hohn v. United States*, 524 U.S. 236 (1998) (the Court has certiorari jurisdiction to reverse court of appeals' denial of a certificate of appealability).

A. Factual Background

In the early morning hours of August 19, 1989, Officer Mark MacPhail was shot and murdered in a parking lot in Savannah, Georgia. Although no physical evidence linked Troy Davis to Officer MacPhail's murder, Mr. Davis was convicted of the crime in 1991 based on eyewitness testimony and secondhand confessions, and he was sentenced to death. In the years following Mr. Davis's conviction, most of the eyewitnesses recanted their trial testimony, the secondhand confessions were exposed as fabrications, and new evidence surfaced implicating the prosecution's principal witness, Sylvester "Redd" Coles, in the murder. Mr. Davis spent the next eighteen years trying to secure an evidentiary hearing to prove his innocence.

The incriminating evidence against Redd Coles is overwhelming. Redd Coles has remorsefully confessed to the murder on multiple occasions to his friends and family. Redd Coles has admitted that he was carrying a .38 caliber revolver on the night Officer MacPhail was killed—the same caliber as the murder weapon. And a new eyewitness, Benjamin Gordon, emerged in 2010 and testified that he watched as Redd Coles murdered Officer MacPhail in the parking lot that night. Benjamin Gordon is a

relative of Redd Coles, and contemporaneous police records corroborate that Mr. Gordon was present at the scene.

There is still no physical evidence linking Mr. Davis to Officer MacPhail's murder.

B. Proceedings Below

1. After new evidence surfaced supporting Mr. Davis's innocence, he sought permission in 2008 from the Eleventh Circuit to file a second habeas petition asserting a free-standing claim of actual innocence under *Herrera v. Collins*, 506 U.S. 390 (1993). On April 16, 2009, a divided panel of the court denied Mr. Davis's application pursuant to the "gatekeeping" provision of 28 U.S.C. § 2244(b)(3). *In re Davis*, 565 F.3d 810 (11th Cir. 2009).

2. In May 2009, Mr. Davis filed a new habeas petition with this Court pursuant to 28 U.S.C. § 2241. In his petition, Mr. Davis argued that although subsection 2244(b)(3)(E) prevented the Supreme Court from reviewing the Eleventh Circuit's decision on certiorari or direct appeal, the Court alternatively could provide Mr. Davis an evidentiary hearing by transferring his petition to the district court pursuant to 28 U.S.C. § 2241(b).

On August 17, 2009, the Court utilized its own habeas jurisdiction and transferred Mr. Davis's petition to the district court "for hearing and determination." *In re Davis*, 130 S. Ct. at 1 (the "Transfer Order"). The Transfer Order was the first exercise of the Court's extraordinary habeas power in nearly 50 years.

3. During the two-day evidentiary hearing in June 2010, Mr. Davis introduced the following exculpatory facts:

- Benjamin Gordon testified that he saw Redd Coles—not Mr. Davis—shoot Officer MacPhail. As a relative and friend of Redd Coles, Mr. Gordon testified that he unmistakably was able to identify Coles as the shooter, but withheld this information for years fearing retribution by Coles.
- Two witnesses testified that Redd Coles remorsefully confessed on multiple occasions to the murder of Officer MacPhail. A third witness was prepared to testify that Coles also confessed to her, but the district court excluded her testimony as "hearsay" and "cumulative." Pet. App. 146a n.82.
- Four witnesses from Mr. Davis's original trial recanted prior testimony against Mr. Davis that implicated him as the shooter. Three other witnesses recanted through affidavit testimony.
- New ballistics evidence dispelled the prosecution's motive theory from Mr. Davis's trial.

The district court afforded little or no weight to these exculpatory facts when it denied Mr. Davis's habeas petition on August 24, 2010. In addition, the district court applied a heightened legal standard of proof for actual innocence that this Court rejected as inapplicable in *Schlup v. Delo*, 513 U.S. 298, 326 n.44 (1995). The district court also failed to consider the impact that *all* the evidence—old and new—would have had on reasonable jurors' assessment of whether Mr. Davis was guilty beyond a reasonable

doubt, as this Court required in *House v. Bell*, 547 U.S. 518, 538 (2007). Mr. Davis has detailed these and other errors in his Jurisdictional Statement.

4. Pursuant to 28 U.S.C. §§ 1291 and 2253, Mr. Davis filed a notice of appeal to the Eleventh Circuit and requested a certificate of appealability ("COA") from the district court. On October 8, 2010, the district court denied Mr. Davis's uncontested COA application. The district court did not reach the merits of the application, instead holding that the court of appeals would have no jurisdiction to review the final order denying Mr. Davis's petition. According to the district court, only this Court could review the district court's final order because this Court had "quite clear[ly] . . . exercis[ed] judicial power found within its original jurisdiction" to transfer the petition to the district court. Pet. App. 8a.

5. Mr. Davis then requested a COA from the court of appeals, asserting that the court had jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 and 2253. On November 5, 2010, the court summarily denied the uncontested application and dismissed Mr. Davis's appeal for lack of jurisdiction. Echoing the district court, the court of appeals held that this Court had exclusive jurisdiction over the appeal because the Court had transferred Mr. Davis's petition pursuant to its "*original* jurisdiction." Pet. App. 4a. The court of appeals did not address Mr. Davis's reliance on the long-settled principle that this Court's jurisdiction over original habeas petitions is "clearly *appellate*." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-101 (1807) (emphasis in original). Nor did the court explain how its 2009 decision denying Mr. Davis leave to file a successive petition somehow

limited the court's jurisdiction over this appeal. Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

To ensure that appellate review continues to be a viable safeguard against the execution of innocent men and women, the Court should grant review and reverse. The court of appeals departed so far from the accepted and usual course of appellate review that the exercise of this Court's certiorari jurisdiction is appropriate. Unlike *all* other habeas petitioners, who benefit from three levels of review—district court, court of appeals, and discretionary review in this Court—Mr. Davis was stripped of intermediate appellate review by the Eleventh Circuit.

The court of appeals refused to hear Mr. Davis's appeal because it erroneously believed that his petition fell within this Court's power to hear cases involving ambassadors, other foreign officials, and U.S. states—*i.e.*, this Court's Article III original jurisdiction. Mr. Davis is not an ambassador, foreign official, or U.S. state; therefore, the Court's original jurisdiction does not apply to this case. The court of appeals should have followed the ordinary appellate rules and statutes that permit Mr. Davis to seek intermediate review in the court of appeals. *See* 28 U.S.C. §§ 1291, 2253; Fed. R. App. P. 22(a).

I. THE COURT OF APPEALS WRONGLY HELD THAT IT COULD NOT REVIEW THE DISTRICT COURT'S FINAL ORDER.

In every habeas case, the court of appeals has jurisdiction to review the final order of a district court. *See* 28 U.S.C. §§ 1291, 2253. Despite its statutory authority and duty to consider Mr. Davis's

appeal, the court of appeals held that it lacked jurisdiction to issue the COA in this case. That holding rested on a basic misunderstanding of this Court's constitutional jurisdiction and a misapplication of 28 U.S.C. § 2244, a statute that has no relevance to Mr. Davis's appeal. Without analyzing the applicable statute—28 U.S.C. § 2253—and without questioning the merits of Mr. Davis's uncontested COA application, the court of appeals concluded that Mr. Davis's direct appeal lies exclusively in this Court. Pet. App. 4a-6a. *See* footnote 1, *supra*.

A. The Supreme Court's Habeas Jurisdiction Is "Clearly Appellate" and Does Not Preclude Judicial Review in the Court of Appeals.

The court of appeals refused to hear Mr. Davis's appeal because it believed that "the Supreme Court was exercising its *original* jurisdiction," and was not "operating within the confines of its *appellate* jurisdiction." Pet. App. 4a (emphasis added; citing Pet. App. 8a). The district court thought—and the court of appeals agreed—that this Court had "express[ly] exercise[d]" its original jurisdiction under Article III of the Constitution. Pet. App. 9a, 4a. The court of appeals concluded that it lacked jurisdiction to review a case stemming from this Court's original jurisdiction under Article III. Pet. App. 4a; *see also* Pet. App. 11a ("[T]he Eleventh Circuit lacks appellate jurisdiction.").

This case, however, does not implicate the Court's original jurisdiction under Article III. Section 2, clause 2 of Article III provides an exhaustive list of matters within the Court's original jurisdiction. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-175

(1803). The Court can only exercise original jurisdiction in "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." U.S. Const. art. III, § 2, cl. 2. *See also* 28 U.S.C. § 1251 (listing the original jurisdiction of the Court). None of those conditions applies here.[2] Accordingly, Mr. Davis filed his habeas petition—and the Court transferred that petition—under Supreme Court Rule 20, not Rule 17 that governs "an action invoking this Court's original jurisdiction under Article III." Sup. Ct. R. 17(1).[3]

The lower courts' confusion seems to have stemmed from the use of the phrase "original habeas jurisdiction" in the concurring opinion of the Transfer Order. *See* Pet. App. 9a, 4a. The Supreme Court's Article III original jurisdiction, however, is distinct from its "original habeas jurisdiction." In the latter context, the term "original" is "misleading." Eugene Gressman et al., Supreme Court Practice 649-50 (9th ed. 2007). An original habeas petition "is commonly understood to be 'original' in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction." *Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring).

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[2] In a habeas action, the warden having direct custody over the petitioner is the proper respondent, not the State. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435, 439-440 (2004) (A convicted prisoner may not "name the State or the Attorney General as a respondent to a § 2241 petition.").

[3] Supreme Court cases under Rule 17 are styled with "Orig." in the case number. *See, e.g.*, *Montana v. Wyoming and North Dakota*, No. 137 Orig. (U.S. argued Jan. 10, 2011). In contrast, Mr. Davis's petition was Case No. 08-1443.

This Court has recognized the *appellate* nature of its habeas jurisdiction for over 200 years. In 1807 Chief Justice John Marshall stated that the Court's exercise of its original habeas jurisdiction is "clearly *appellate*" because it involved "the revision of a decision of an inferior court." *Ex parte Bollman*, 8 U.S. (4 Cranch) at 100-101 (emphasis in original). The Court has periodically reaffirmed this understanding for two centuries. *Ex parte Yerger*, 75 U.S. 88, 96-98, 101 (1869) (Habeas jurisdiction "given by the Constitution and the law to this court is appellate."); *Ex parte Siebold*, 100 U.S. 371, 374 (1879) (reasoning that an original habeas petition "is appellate in its character" by exclusion from the list of cases within the Court's original jurisdiction); *Fay v. Noia*, 372 U.S. 391, 407 (1963) ("[T]he Court would have the power to issue writs of habeas corpus only if such issuance could be deemed an exercise of appellate jurisdiction."), *rev'd on other grounds Wainright v. Sykes*, 433 U.S. 72 (1977); *see also* Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 159.

This distinction was critical in *Felker v. Turpin*, where the petitioner questioned whether the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was constitutional. The Court held that "there can be no plausible argument that [AEDPA] has deprived this Court of *appellate jurisdiction* in violation of Article III, § 2" because AEDPA "does not repeal our authority to entertain a petition for habeas corpus." 518 U.S. at 661-662 (emphasis added).

The Eleventh Circuit compounded its error by implicitly assuming that this Court has *exclusive* jurisdiction over all cases within its original jurisdiction. Pet. App. 4a-5a. That, too, is not true. The Court has

exclusive jurisdiction only over disputes "between two or more States." 28 U.S.C. § 1251(a). Thus, even if this case arose under the Court's original jurisdiction (and it did not), this Court's jurisdiction still would not be exclusive.

Because the Court's power to issue or transfer a writ of habeas corpus derives from its appellate jurisdiction, and not its original jurisdiction, the court of appeals was not "foreclosed" from reviewing the district court's final order in this case. Pet. App. 10a. Under the ordinary appellate rules and statutes, appeal to the court of appeals in the first instance was proper.

B. Section 2253—Not Section 2244—Applies to Mr. Davis's Appeal.

The court of appeals also erred in concluding that its 2009 gatekeeping order under 28 U.S.C. § 2244(b)(3) somehow precludes Mr. Davis's current appeal. That decision and that statute do 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).

A successive petition for habeas corpus can arrive at the district court in at least two ways. First, the court of appeals may authorize a petitioner to file a second or successive application in the district court. 28 U.S.C. § 2244(b)(3). Alternatively, the Supreme Court may "transfer" a successive application to the district court for a hearing and determination. 28 U.S.C. § 2241(b). Once authorized by either the court

of appeals or the Supreme Court, the district court must consider the petition properly before it.

The manner in which Mr. Davis's petition arrived at the district court does not bear on the jurisdiction of the court of appeals to entertain his appeal. 28 U.S.C. § 2253 provides that jurisdiction. Section 2253 requires that all final orders from the district court—successive or not—"*shall* be subject to review, on appeal, by the court of appeals" if the applicant meets the standard for a COA. 28 U.S.C. § 2253(a), (c) (emphasis added).

The court of appeals ignored section 2253 altogether and focused incorrectly on its prior decision under section 2244. Although its reasoning is unclear, the court of appeals believed that its 2009 decision under 2244(b)(3) denying Mr. Davis leave to file a successive petition restricted the court's ability to entertain Mr. Davis's current appeal. Pet. App. 5a.

The court of appeals was wrong for three reasons. First, subsection 2244(b)(3) does not apply to appeals. Subsection 2244(b)(3), by its own terms, applies only "*[b]efore*" a second or successive petition is filed in the district court. Nowhere does section 2244 set out what review is appropriate after the successive petition has been adjudicated in the district court. *Hohn*, 524 U.S. at 262 n.3 (Scalia, J., dissenting on other grounds) (2244(b)(3) does not address "whether the district court's consideration may be reviewed by an appellate court."). The only statute governing federal habeas appeals of state convictions is 28 U.S.C. § 2253, which is titled "Appeal."

Second, subsection 2244(b)(3) "does not apply" to habeas petitions filed in the Supreme Court, like this one. *Felker*, 518 U.S. at 662. In *Felker*, the Court reasoned that the text of 2244(b)(3) applies only to petitions "filed in the district court," *id*. (quoting 28 U.S.C. § 2244(b)(3)), and, therefore, petitions filed in the Supreme Court in the first instance are not subject to the provision. Mr. Davis's petition was filed with this Court in the first instance and then transferred to the district court.

Third, the court of appeals held that by hearing Mr. Davis's appeal, it would "effectively be restoring" Mr. Davis's habeas rights in federal court in contravention of subsection 2244(b)(3) by "nullifying" its previous decision denying leave to file a successive petition. Pet. App. 5a. This is incorrect because 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). Thus, the court of appeals' 2009 decision cannot possibly be a barrier to the current appeal.

In his concurring opinion in *Felker*, Justice Stevens explained that the Court may invoke its own habeas powers in extraordinary cases to reverse the effect of gatekeeping orders issued by the courts of appeals. 518 U.S. at 666. Although 28 U.S.C. § 2244(b)(3)(E) precludes the Court from reviewing gatekeeping orders by "writ of certiorari or appeal," the Court held that 2244(b)(3) did not preclude review of those orders by a petition for habeas corpus filed directly with the Court. 518 U.S. at 662-663 (opinion of the Court). In other words, the Court may provide "the functional equivalent of direct review" of gatekeeping orders through exercise of its habeas powers, as it did in Mr. Davis's case. *Felker*, 518 U.S. at 666 (Stevens,

J., concurring). *Accord Ex parte Siebold*, 100 U.S. at 374 (Even where "no appellate jurisdiction by writ of error" over the circuit court's decision was provided by statute, "this court is authorized to exercise appellate jurisdiction by *habeas corpus* directly.").

This Court's Transfer Order removed any procedural barrier that might have stemmed from the court of appeals' 2009 gatekeeping order. The court of appeals would not be "restoring [Mr. Davis's] remedies in federal court" by issuing the COA requested here, Pet. App. 5a; this Court already restored those rights by acting on Mr. Davis's original petition in 2009. Rather, by granting the COA the court of appeals would be complying with its statutory duty under 28 U.S.C. § 2253 to hear appeals in all cases that meet the standard for a COA.

C. The Court of Appeals Has Explicit Statutory Jurisdiction to Review the District Court's Decision.

Section 2253 of Title 28 provides the exclusive mechanism for a habeas petitioner to seek judicial review of a district court's final decision. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-336 (2003). The statutory jurisdiction of the court of appeals to review habeas cases is explicit: "In a habeas corpus proceeding . . . the final order *shall* be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held" if the district court or a circuit judge issues a certificate of appealability. 28 U.S.C. § 2253(a), (c) (emphasis added).

Similarly, Federal Rule of Appellate Procedure 22(a) recognizes that the courts of appeals have jurisdiction even if the habeas petition was transferred to the district court from another court. Fed. R. App. P.

22(a) ("If a district court denies an application [for habeas corpus] made or *transferred to it* . . . [t]he applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals." (emphasis added)).

To initiate an appeal, a petitioner must apply for and receive a COA from either the district court or the court of appeals. The standard for issuing a COA is not high. "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). As this Court has explained, section 2253(c) requires only that an issue be "debatable" among "reasonable jurists." *Miller-El*, 537 U.S. at 338.

Neither the court of appeals nor the Respondent argued—or even hinted—that Mr. Davis failed to meet this standard. Indeed, there is no indication in the record that the court of appeals or the district court even *considered* the merits of Mr. Davis's COA application, even though "[t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El*, 537 U.S. at 336. As detailed in Mr. Davis's Jurisdictional Statement, this appeal presents numerous issues that warrant a COA, and the court of appeals should have permitted Mr. Davis his statutory right to intermediate appellate review.

It is instructive that the only other court of appeals to have considered a case with this procedural posture did not question its own jurisdiction to entertain the appeal. In *Ex parte Hayes*, Justice Douglas transferred an original habeas petition to the District

Court for the District of Columbia pursuant to 28 U.S.C. § 2241(b). 414 U.S. 1327 (1973) (Douglas, J., in chambers). After the district court denied the petition for failure to exhaust administrative remedies, the Court of Appeals for the D.C. Circuit accepted the appeal and reversed the district court's decision. *Hayes v. Sec'y of Defense*, 515 F.2d 668 (D.C. Cir. 1975). Nowhere did the D.C. Circuit express any doubt of its jurisdiction over the habeas appeal.

II. MR. DAVIS'S EXCEPTIONAL CASE WARRANTS PLENARY REVIEW.

Mr. Davis's claim of actual innocence was "sufficiently exceptional" to warrant invocation of the Court's original habeas jurisdiction for the first time in nearly 50 years. 130 S. Ct. at 1 (Stevens, J., concurring). Necessarily implicit in this Court's transfer is that proceedings in the district court would be subject to further appellate review. *Cf. In re Davis*, 130 S. Ct. at 6 (Scalia, J., dissenting) (suggesting that the district court "might be reversed" if it granted relief).

Unless this Court intervenes, the district court's rejection of Mr. Davis's claim will never be reviewed by any court, even though appellate review in innocence cases has proven pivotal in determining whether a habeas petitioner lives or dies. *See House v. Bell*, 547 U.S. 518 (2006) (reversing lower court determination that habeas petitioner had not proven probable innocence). Paul House is alive today and has been exonerated of all charges because this Court reviewed the district court's errors and granted

appellate relief. This Court should provide the same opportunity for appellate review here.[4]

Appellate review reduces trial court errors that might lead to continued, unlawful incarceration:

> The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a [certificate of appealability] under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.

Slack, 529 U.S. at 483.

Under the court of appeals' holding, however, the most exceptional habeas cases are entitled to the least amount of judicial oversight. Indeed, if the courts of appeals are closed to petitioners like Mr. Davis, habeas cases transferred from the Supreme Court pursuant to this Court's original habeas jurisdiction may receive no appellate review at all.

Accordingly, this petition satisfies three of the explicit benchmarks for certiorari. First, the decision below radically departs "from the accepted and usual course of judicial proceedings" by removing intermediate appellate review in the court of appeals. Sup. Ct. R. 10(a). Second, this case raises important questions of federal law that have not been, but ultimately should be, settled by this Court. Sup. Ct. R. 10(c). Third, the court below decided an important federal question in a way that directly conflicts with relevant decisions of this Court. *Id*.

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[4] *See* Robbie Brown, *Tennessee: Freedom After 22 Years on Death Row*, N.Y. Times, May 13, 2009, at A18.

1. The court of appeals' abdication of its authority to review Mr. Davis's COA drastically departs from the accepted and usual course of ordinary appellate review, where appeals from a district court are heard by the courts of appeals, after which the Supreme Court may exercise discretionary review. The decision below eliminates intermediate appellate review altogether. That departure—in a capital case involving innocence—warrants the exercise of this Court's certiorari jurisdiction. Sup. Ct. R. 10(a) (certiorari may issue where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings"). *Cf. Hollingsworth v. Perry*, 130 S. Ct. 705, 706 (2010) (per curiam) (certiorari granted to resolve whether a district court may order the broadcasting of a federal trial; "Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves."); *Nguyen v. United States*, 539 U.S. 69, 73-74 (2003) (certiorari granted to consider the validity of a judgment in light of the "highly unusual presence of a non-Article III judge as a member of the Ninth Circuit panel").

A definitive ruling that the circuit courts can review habeas petitions transferred under 28 U.S.C. § 2241(b) promotes an efficient use of judicial resources. Intermediate appellate review serves to streamline procedural and legal issues in extraordinary habeas cases and potentially alleviates the need for recurrent plenary review in the Supreme Court. In cases where the district court commits obvious legal errors, as here, the courts of appeals should be available to correct those errors in the first instance.

This is particularly true in a case like this one where the district court not only committed serious errors of law but also issued a decision that is manifestly against the weight of the evidence. The courts of appeals are best equipped, at least in the first instance, to undertake the meticulous review required of such claims.

2. The Court should also grant certiorari to resolve multiple "question[s] of federal law that ha[ve] not been, but should be, settled by this Court," including the jurisdictional question presented here, and, ultimately, questions about innocence and the Eighth Amendment. Sup. Ct. R. 10(c).

As explained above, the jurisdictional question presented in this appeal involves the Court's power to transfer and review extraordinary writs of habeas corpus and the availability of intermediate appellate review under AEDPA. The interplay of these topics carries constitutional significance because, as this Court held in *Felker*, the Court's authority to review lower court decisions by exercising its original habeas jurisdiction avoids serious questions about AEDPA's constitutionality. *Felker*, 518 U.S. at 661-662 ("[S]ince [AEDPA] does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2."); *id*. at 661 ("This conclusion obviates one of the constitutional challenges raised."). That constitutional safeguard is decidedly less meaningful if the most exceptional habeas cases are entitled to less appellate review than ordinary habeas petitions.

More generally, this case involves the constitutionality of executing an individual convicted but innocent of the underlying crime and the standard of proof required to demonstrate such innocence. The standard required to demonstrate innocence remains unsettled because the court of appeals considered itself jurisdictionally barred from hearing Mr. Davis's appeal. If this Court does not grant the petition or note probable jurisdiction over this appeal, no appellate court will ever definitively rule on the critical issues that were decided for the first time in this case by the district court. *See* Pet. App. 91a-111a (Eighth Amendment analysis); 112a-117a (burden of proof).

The Court should grant certiorari and reverse the decision below in order to preserve the Court's ability to resolve these important issues of federal law after consideration in the court of appeals. *See Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339 (1992) (certiorari granted because "of the importance of the federal question and the likelihood that it had been decided in a way conflicting with applicable decisions of this Court").

3. Finally, the Court should grant certiorari to correct the erroneous decision below, which conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). As set forth above, this Court has repeatedly held for two centuries that the exercise of the Court's habeas jurisdiction is "clearly *appellate*." *Ex parte Bollman*, 8 U.S. (4 Cranch) at 100-101. The court of appeals reached the opposite conclusion, finding that the Court's habeas jurisdiction derived from its Article III original jurisdiction.

* * *

The Court should clarify the jurisdictional status of this appeal by reversing the court of appeals' decision below. *Cf. Hagans v. Lavine*, 415 U.S. 528, 533 (1974) ("The jurisdictional question being an important one, we granted certiorari."). If this petition is denied, however, the Court should note probable jurisdiction over Mr. Davis's appeal on the merits. Else, Mr. Davis's case will end without any opportunity for appellate review. In an ordinary case, that result would be inequitable. In a capital case like Mr. Davis's, it is imperative that this Court intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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