No. 18-8844

IN THE
SUPREME COURT OF THE UNITED STATES

FARRIS GENNER MORRIS,
Petitioner,

V.

TENNESSEE,
Respondent

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Does the Court have jurisdiction under 28 U.S.C. § 2244(b)(3)(E) to review the Court of Appeals' denial of authorization to file a second or successive habeas corpus petition that is barred under 28 U.S.C. § 2244(b)?

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STATEMENT OF THE CASE

Trial and Collateral Review Proceedings

In the early morning hours of September 17, 1994, in Jackson, Tennessee, the petitioner entered the home of his neighbors, Charles and Angela Ragland, and held a shotgun to the head of Angela's 15-year-old cousin, Erica Hurd. *State v. Morris*, 24 S.W.3d 788, 792 (Tenn. 2000). Shortly thereafter, the petitioner ordered Charles Ragland to the floor, placed a pillow over his head, and shot him once in the head. *Id*. The petitioner tied up Angela Ragland and left her in one of the bedrooms. *Id*. In another room, he killed Erica Hurd by beating and stabbing her 37 times. *Id*. at 792-93. The petitioner then raped Angela Ragland multiple times before leaving the residence. *Id*. at 792. The petitioner eventually confessed to his crimes. *Id.* at 793.

At trial, the jury convicted the petitioner on two counts of first-degree premeditated murder and one count of aggravated rape. *Id*. at 791. The jury imposed a death sentence for the murder of 15-year-old Hurd and a sentence of life imprisonment without the possibility of parole for the murder of Charles Ragland. *Id*. The trial court imposed a consecutive 25-year sentence for the aggravated rape of Angela Ragland. *Id*.

On direct appeal, the Tennessee Court of Criminal Appeals affirmed the petitioner's convictions and sentences. *State v. Morris*, No. W1998-00679-CCA-R3-DD, 1999 WL 51562 (Tenn. Crim. App. Feb. 5, 1999). The Tennessee Supreme Court affirmed. *Morris*, 24 S.W.3d at 801. This Court denied certiorari. *Morris v. Tennessee*, 531 U.S. 1082 (2001).

Thereafter, the petitioner sought collateral review in state court by filing a petition for post-conviction relief, which the trial court ultimately denied. The Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied discretionary review. *Morris v. State*, No. W2005-00426-CCA-R3-PD, 2006 WL 2872870 (Tenn. Crim. App. Oct. 10, 2006), *perm. app. denied* (Tenn. Feb. 26, 2007).

As pertinent here, during the state-court post-conviction proceedings, the petitioner did not raise a claim of racial discrimination in the jury selection process, under *Batson v. Kentucky*, 476 U.S. 79 (1986), with regard to the State's peremptory challenge of Savanna Ingram as a trial juror. Nor did the petitioner raise a related claim of ineffective assistance of trial counsel in the failure to challenge the State's removal of Mr. Ingram under *Batson*. *Morris v. Bell*, No. 1:07-cv-1084, 2011 WL 7758570, at *12, *59 (W.D. Tenn. Sept. 29, 2011).

Upon the completion of the state-court collateral review proceedings, the petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Tennessee. Upon review, that court granted relief on the petitioner's claim of ineffective assistance of counsel regarding the presentation of mitigation evidence at sentencing. It denied relief on all other claims. On the petitioner's *Batson* claim as to the State's peremptory challenge of Mr. Ingram and on the related claim of ineffective assistance of trial counsel, the district court concluded that both claims were procedurally defaulted because the petitioner failed to exhaust state-court remedies while they were available. *Id.*

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the district court's limited grant of relief, affirmed the denial of relief on the remaining claims on review, and remanded with instructions for the district court to enter judgment denying the petition. *Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015). This Court denied certiorari, *Morris v. Westbrooks*, 137 S. Ct. 44 (2016), as well as rehearing. *Morris v. Westbrooks*, 137 S. Ct. 540 (2016).

After the denial of certiorari, the Sixth Circuit issued its mandate, and the district court entered judgment consistent with the mandate. Thereafter, the petitioner moved the district court to alter or amend the judgment under Fed. R. Civ. P. 59(e). The district court denied the motion, as well as a certificate of appealability. *Morrow v. Westbrooks*, No. 1:07-cv-01084, 2017 WL

2199010, at *2-*3, *14 (W.D. Tenn. May 18, 2017).[1] The Sixth Circuit denied a certificate of appealability, and this Court denied certiorari. *Morris v. Mays*, No. 18-5505 (Jan. 7, 2019).

Proceedings under Foster v. Chatman

On May 23, 2016, the Court decided *Foster v. Chatman*, 136 S. Ct. 1737 (2016), finding that there had been racial discrimination in the jury selection process in that case—discrimination that was declared unconstitutional in *Batson*. On May 19, 2017, the petitioner filed in the trial court a motion to reopen his state-court petition for post-conviction relief, so that he may litigate an allegedly new claim under *Foster* related to alleged racial discrimination in the jury selection process at his trial. (Resp. Apx. 3a). The trial court denied the petitioner's request on July 31, 2017. (Resp. Apx. 3a).

On appeal, the Tennessee Court of Criminal Appeals denied discretionary review in an order filed February 1, 2018. (Resp. Apx. 2a-5a.) Specifically, the court concluded that *Foster* did not create a new rule of constitutional law made retroactively applicable on collateral review. Instead, *Foster* applied this Court's prior decision in *Batson* to the facts presented by the case. "The language of the *Foster* opinion reveals that rather than creating new law, the ruling served only to apply the prior ruling of *Batson* to the facts of the *Foster* case." (Resp. Apx. 2a-5a.) The Tennessee Supreme Court denied discretionary review in an order filed June 7, 2018. (Resp. Apx. 1a.) This Court denied certiorari. *Morris v. Tennessee*, No. 18-6624 (Jan. 14, 2019).

Nevertheless, relying on *Foster*, the petitioner on June 18, 2018, filed in the Sixth Circuit an application for authorization to file a second or successive habeas corpus petition, under 28

[1]In that post-judgment proceeding, the petitioner argued under *Martinez v. Ryan*, 566 U.S. 1 (2012), that he could show cause to excuse the procedural default of his claim of ineffective assistance of trial counsel regarding the failure to raise a *Batson* challenge as to Mr. Ingram. The district court reviewed the circumstances surrounding the State's peremptory challenge of Mr. Ingram and rejected post-judgment relief on the claim. (D.E. 85, PageID# 6577-6580.)

U.S.C. § 2244(b)(3). By order filed November 13, 2018, the Sixth Circuit denied the application. (Pet. Apx. 1a-4a.) The court first concluded that the proposed petition would be an abuse of the writ because he raised the same *Batson*-related claims in his prior petition. (Pet. Apx. 3a.) "Since Morris presented his *Batson* claim in his previous petition, his current petition is subject to dismissal under § 2244(b)(1)." (Pet. Apx. 3a.)

Next, the court concluded under 28 U.S.C. § 2244(b)(2)(A) that *Foster* did not announce a new rule of constitutional law. Instead, *Foster* involved an application of *Batson* to the facts presented. (Pet. Apx. 3a-4a.) Relatedly, the court concluded that, even if *Foster* announced some new rule of constitutional law, this Court has not made the new rule retroactively applicable on collateral review, as required by 28 U.S.C. § 2244(b)(2)(A). (Pet. Apx. 4a.) "Morris has not identified any Supreme Court case or series of holdings demonstrating that *Foster* made a new constitutional rule retroactive to cases on collateral review." *Id*.

On April 12, 2019, the petitioner filed a petition for writ of certiorari to challenge the Sixth Circuit's declination of authorization for a second or successive habeas corpus petition.

ARGUMENT

I. The Court Lacks Jurisdiction To Grant Certiorari.

Pursuant to 28 U.S.C. § 2244(b)(3)(A), a criminal defendant confined by a state-court judgment must receive authorization from the appropriate court of appeals before filing a second or successive habeas corpus petition that includes a new claim.[2] To secure authorization, as relevant here, the petitioner must make a prima facie showing that the purportedly new claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the

[2] A second or successive petition raising a claim presented in a prior petition must be dismissed. 28 U.S.C. § 2244(b)(1).

Supreme Court, that was previously unavailable." 28 U.S.C. §§ 2244(b)(2)(A) and 2244(b)(3)(C). The request must be resolved by a three-judge panel of the court within 30 days. 28 U.S.C. § 2244(b)(3)(B) and (D).

"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 hearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). Thus, the Court has no "authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition." *Felker v. Turpin*, 518 U.S. 651, 661 (1996); *see also Hohn v. United States*, 524 U.S. 236, 249 (1998). For this reason, the Court lacks jurisdiction to review the Sixth Circuit's decision.

The petitioner indicates that 28 U.S.C. § 2244(b)(3)(E) somehow conflicts with *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998), but no conflict exists. In *Martinez-Villareal*, a habeas corpus petitioner presented the Ninth Circuit with an application for authorization to file a second or successive petition. The Ninth Circuit concluded that the petition was not second or successive; therefore, no authorization was needed before its filing in the district court. In its review, this Court concluded that 28 U.S.C. 2244(b)(3)(E) did not apply because the Ninth Circuit did not grant or deny authorization. Instead, that court determined that authorization was not required, because the petition was not second or successive. The restrictive language in 28 U.S.C. § 2244(b)(3)(E) does not disallow review of the threshold determinations of whether a new petition is second or successive and whether authorization by the court of appeals before filing is compelled under 28 U.S.C. § 2244(b). *See also Castro v. United States*, 540 U.S. 375, 380-81 (2003) (concluding that 28 U.S.C. § 2244(b)(3)(E) did not limit Court's review of court of appeals' decision that action filed under 28 U.S.C. § 2255 was second or successive).

Here, there can be no dispute that the new proposed habeas corpus petition is actually second or successive. The petitioner makes no genuine argument to the contrary. Instead, he squarely challenges the Sixth Circuit's decision denying authorization for a second or successive petition: "Because [the petitioner] has already presented a petition to the District Court, and the District Court and the Court of Appeals have acted on that petition, § 2244(b) must apply to any subsequent request for habeas relief." *Martinez-Villareal*, 523 U.S. at 643. And the Court may not now review by writ of certiorari the Sixth Circuit's decision to deny authorization. 28 U.S.C. § 2244(b)(3)(E).

II. Even if the Court Did Not Lack Jurisdiction, Further Review Is Not Warranted Because the Sixth Circuit Appropriately Declined To Authorize a Second or Successive Habeas Corpus Petition.

Since the Sixth Circuit's denial of authorization for a second or successive petition was plainly appropriate, that decision would be upheld even if the Court could review it. The petitioner argues that authorization should have been granted under 28 U.S.C. § 2254(b)(2)(A) because *Foster* created a new claim. The Sixth Circuit correctly concluded otherwise.

As the Sixth Circuit aptly noted, "*Foster* applied the Court's *Batson* precedent to the facts of the case, and did not create a new constitutional rule." (Pet. Apx. 4a.) Applying the three-step analysis from *Batson*, this Court in *Foster* concluded that the prosecution engaged in purposeful discrimination during the jury selection proceedings. *Foster*, 136 S. Ct. at 1747. The Court limited its analysis in *Foster* to *Batson*'s third step—whether the defendant proved purposeful discrimination—and focused on case-specific evidence supporting the conclusion under *Batson* that the prosecution engaged in purposeful racial discrimination during the jury selection proceedings.

The petitioner argues that, with *Foster* and its reliance on *Snyder v. Louisiana*, 552 U.S. 472 (2008), the Court expanded *Batson* in some way. But *Foster* "did not change the applicable principles for analyzing a *Batson* claim. Instead, [the Court] reaffirmed the teaching in *Batson*." *State v. Williams*, 199 So.3d 1222, 1230 (La. Ct. App. 2016). The Court "reiterated the well-settled principle that the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Id*. (citations omitted); *see also Flowers v. Mississippi*, 136 S. Ct. 2157 (2016), Alito, J., dissenting, ("*Foster* did not change or clarify the Batson rule in any way"); *United States v. Ramos*, No. CR15-4058-LTS, 2016 WL 3906650, at *5 n.2 (N.D. Iowa July 14, 2016) (stating that *Foster* did not expand the *Batson* framework in any meaningful way).

In sum, *Foster* did not announce a new rule of constitutional law. The *Foster* decision breaks no new ground and imposes no new obligation on the states or federal government. *Teague v. Lane*, 489 U.S. 288, 301 (1989). Rather, a reading of that decision clearly shows that it was dictated by *Batson*, a decision that undoubtedly existed when the petitioner's convictions became final.[3]

Accordingly, the petitioner was not entitled to file a second or successive petition under 28 U.S.C. § 2244(b)(2), and the Sixth Circuit was absolutely correct in denying him authorization to do so. In effect, the petitioner attempts to relitigate anew claims previously raised under *Batson* and rejected as procedurally defaulted. *Morris*, 2011 WL 7758570, at *12, *59. Under 28 U.S.C.

[3]Because the Court did not announce a new rule of constitutional law in *Foster*, the Court necessarily could not have determined that such a rule applies retroactively, which the Court must do before authorization is allowed under 28 U.S.C. § 2244(b)(2). Indeed, the petitioner recognizes this point within the question presented, where he asks the Court to determine whether *Foster* "should be applied retroactively." (Pet. ii.) Similarly, in the conclusion, the petitioner urges the Court to grant review in order "to decide whether [*Foster*] must be applied retroactively in collateral proceedings." (Pet. 10.) If the Court still must decide whether retroactive application of some rule announced in *Foster* should be compelled, then the Sixth Circuit cannot be faulted for determining under 28 U.S.C. § 2244(b)(2) that the Court has not previously ordered retroactive application.

§ 2244(b)(1), a second or successive petition is disallowed when it includes previously-asserted claims. If the Court had jurisdiction to grant review, it would decline to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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