CAPITAL CASE

No. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

FARRIS GENNER MORRIS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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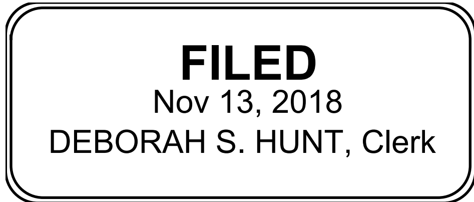
No. 18-5626

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



In re: FARRIS GENNER MORRIS,

Movant.

O R D E R

Before: BOGGS, SILER, and CLAY, Circuit Judges.

Farris Genner Morris, a Tennessee prisoner under sentence of death, moves for an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, Morris argues that the Supreme Court's decision in *Foster v. Chatman*, 136 S. Ct. 1737 (2016), entitles him to relief on his claim that the prosecution struck potential juror Savanah Ingram because of his race.

In 1996, Morris was convicted of murdering Charles Ragland and Erica Hurd and raping Angela Hurd. He received a death sentence for the first-degree murder of Hurd, a sentence of life without parole for the murder of Ragland, and twenty-five years of imprisonment for aggravated rape. The Tennessee Supreme Court affirmed Morris's convictions and sentences. *State v. Morris*, 24 S.W.3d 788 (Tenn. 2000). The Tennessee Court of Criminal Appeals affirmed the denial of Morris's post-conviction petition decision. *Morris v. State*, No. W2005-00426-CCA-R3-PD, 2006 WL 2872870 (Tenn. Crim. App. Oct. 10, 2006).

Morris filed a pro se petition for a writ of habeas corpus in April 2007, and counsel filed an amended petition in January 2008. The district court ruled that Morris had received ineffective assistance of counsel in the sentencing phase and denied his other claims. We affirmed the district court's decision to deny Morris's guilt-phase claims, vacated the district

court's decision to grant relief on his sentencing-phase claims, and remanded the case to the district court for denial of the writ. *Morris v. Carpenter*, 802 F.3d 825, 845 (6th Cir. 2015), *cert. denied*, 137 S. Ct. 44 (2016).

Morris filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) after the district court denied his petition. He argued that he had not received application of *Martinez v. Ryan*, 566 U.S. 1 (2012), to his substantial claims of ineffective assistance of counsel, including the claim that counsel failed to raise a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), claim regarding Ingram. Morris later filed a motion to amend or correct his motion to alter judgment. The district court denied Morris's motions. On appeal, Morris requested that this court certify, among other claims, the claim that counsel ineffectively failed to object to the race-based exclusion of juror Ingram. We denied Morris a certificate of appealability. *Morris v. Mays*, No. 16-6661 (Mar. 9, 2018) (order).

On June 18, 2018, Morris filed a motion for leave to file a second or successive habeas corpus petition. He argues that the prosecution's strike of African-American prospective juror Ingram was motivated in substantial part by discriminatory intent, and contends that the Supreme Court's decision in *Foster* states a new rule of law made retroactive to cases on collateral review.

"A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). To be entitled to an order authorizing the district court to consider a second habeas corpus petition, the applicant must make a prima facie showing that the claim relies on: (1) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or (2) newly discovered evidence which could not have been discovered previously through the exercise of due diligence and which would be sufficient to establish, by clear and convincing evidence, that no reasonable factfinder would have found the applicant guilty. *See* 28 U.S.C. § 2244(b)(2), (b)(3)(C); *In re Tibbetts*, 869 F.3d 403, 405 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 661 (2018). A prima facie showing means sufficient allegations of fact and some documentation that would warrant fuller exploration in the district court. *In re*

Campbell, 874 F.3d 454, 459 (6th Cir.), *cert. denied*, 138 S. Ct. 466 (2017). The Anti-Terrorism and Effective Death Penalty Act does not define "second or successive." Courts apply the abuse of the writ doctrine to determine whether a petition is second or successive. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-45 (1998); *Campbell*, 874 F.3d at 460. A numerically second petition abuses the writ and is 'second' when it raises a claim that could have been raised in the first petition. *McCleskey v. Zant*, 499 U.S. 467, 489 (1991); *Tibbetts*, 869 F.3d at 405. An application that presents a claim that would have been unripe if it had been presented in an earlier application is not second or successive. *See Panetti v. Quarterman*, 551 U.S. 930, 945 (2007); *Stewart*, 523 U.S. at 643-46.

Morris's proposed petition is barred and would be an abuse of the writ because it raises a claim that was presented in a prior petition. *See* 28 U.S.C. § 2244(b)(1); *McCleskey*, 499 U.S. at 489; *Tibbetts*, 869 F.3d at 405. In claim 24 of his amended petition, Morris alleged that the state violated *Batson* by using a peremptory challenge to remove Ingram. The district court held that Morris procedurally defaulted the claim by failing to present it in state court and had not presented cause or prejudice to excuse the default. In claim 9N, Morris alleged that his trial counsel failed to object when the prosecutor removed Ingram. The district court found that Morris had not presented the claim in state court and had failed to demonstrate cause and prejudice for the procedural default. As explained below, *Foster* is an application of *Batson* and not the basis for a new claim. Since Morris presented his *Batson* claim in his previous petition, his current petition is subject to dismissal under § 2244(b)(1).

Nor has Morris made a prima facie showing under § 2244(b)(2). *Foster* did not involve a new rule of constitutional law, it has not been made retroactive to cases on collateral review, and the rule it applied was previously available. Morris argues that the new rule of constitutional law is that a petitioner on collateral review is entitled to relief if the prosecution struck a prospective juror and the strike was "motivated in substantial part by discriminatory intent." *Foster*, 136 S. Ct. at 1754. The *Foster* opinion analyzed the petitioner's claims under *Snyder v. Louisiana*, 552 U.S. 472 (2008), *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Batson*. *Foster*, 136 S. Ct. at

1747, 1752. The Court quoted *Snyder* when it concluded that the prosecutor's jury selection notes showed that the strikes were "motivated in substantial part by discriminatory intent." *Id.* at 1754 (quoting *Snyder*, 552 U.S. at 485). *Foster* applied the Court's *Batson* precedent to the facts of the case, and did not create a new constitutional rule.

Nor did the Court in *Foster* make a new rule retroactive to cases on collateral review. Morris argues that because *Foster* was on collateral review, the Court necessarily made its ruling retroactive to cases on collateral review. "[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001). The Court may also make a new rule apply retroactively when multiple holdings logically dictate the retroactive nature of the new rule. *Id.* at 668 (O'Connor, J., concurring); *In re Watkins*, 810 F.3d 375, 381 (6th Cir. 2015). The Court in *Foster* applied *Batson* to a case on collateral review, but did not announce a new rule or hold it to be retroactive. Even if *Foster* announced a rule that did not exist when Morris filed his first petition, that would not make *Foster* retroactive on collateral review. *See In re Coley*, 871 F.3d 455, 457-58 (6th Cir. 2017). 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.

For the foregoing reasons, we **DENY** Morris's motion.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Re: Case No. 18-5626, *In re: Farris Morris*
Originating Case No. 1:07-cv-01084

Dear Counsel:

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager
Direct Dial No. 513-564-7034

cc: Mr. Thomas M. Gould

Enclosure

No mandate to issue