No. 18-9331

In the Supreme Court of the United States

NAWAZ AHMED,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

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

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. When appointed counsel retires from the practice of law and moves to withdraw, is the district court's order granting that motion immediately appealable on an interlocutory basis?

2. In light of Nawaz Ahmed's many frivolous filings, both at this Court and in others, should the Court instruct the clerk not to accept any further *pro se* filings in civil cases unless Ahmed "pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33"? *Martin v. Dist. of Columbia Court of Appeals*, 506 U.S. 1, 2 (1992).

LIST OF PARTIES

The Petitioner is Nawaz Ahmed, an inmate at the Chillicothe Correctional Institution.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution. Shoop is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State v. Ahmed*, 99-CR-192 (Ct. of Common Pleas, Belmont County, OH) (judgment entered February 2, 2001)

2. *State v. Ahmed*, 2001-871 (Ohio) (judgment entered August 25, 2004)

3. *Ahmed v. Ohio*, 04-8302 (U.S.) (certiorari denied March 28, 2005)

4. *Ahmed v. Ohio*, 05-6113 (U.S.) (certiorari denied Oct. 31, 2005)

5. *Ahmed v. Ohio*, 99-CA-192 (Ct. of Common Pleas, Belmont County, OH) (judgment entered March 8, 2005)

6. *State v. Ahmed*, 05-BE-15 (Ohio Ct. App., 7th District) (judgment entered December 28, 2006)

7. *State v. Ahmed*, 2007-216 (Ohio) (appeal denied May 16, 2007)

8. *Ahmed v. Warden*, 08-cv-493 (S.D. Ohio) (administratively closed November 18, 2010)

9. *Ahmed v. Houk,* 07-cv-658 (S.D. Ohio) (no judgment entered yet)

10. *Ahmed v. Houk*, 07-4881 (6th Cir.) (order denying rehearing en banc entered June 10, 2008)

11. *Ahmed v. Houk*, 09-3241 (6th Cir.) (order dismissing case as improperly transferred March 24, 2009)

12. *Ahmed v. Houk*, 15-3684 (6th Cir.) (order denying rehearing en banc entered November 12, 2015)

13. *Ahmed v. Sheldon*, 15-8912 (U.S.) (in forma paupers status and petition for a writ of certiorari dismissed May 23, 2016)

14. *Ahmed v. Houk*, 17-4481 (6th Cir.) (order that the case remain closed issued May 20, 2014)

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INTRODUCTION

This is a certiorari petition about a habeas case that is still pending in district court. Last year, Nawaz Ahmed's court-appointed attorney retired from the practice of law after forty-six years. He moved to withdraw from representing Ahmed, and the District Court granted that motion. The court also appointed substitute counsel for Ahmed. Displeased, Ahmed immediately appealed to the Sixth Circuit, challenging the order granting former counsel's withdrawal. The Sixth Circuit dismissed the appeal because it lacked jurisdiction over Ahmed's interlocutory appeal of a non-final order. Pet.App.A; Pet.App.D. In his petition, Ahmed asks this Court to reconsider that decision.

This Court should deny certiorari. The case presents no circuit conflict or otherwise-important issue demanding the Court's attention. Every other circuit in the country would have done exactly what the Sixth Circuit did here: dismissed the case for lack of jurisdiction. Rightly so. The District Court has not adjudicated Ahmed's habeas petition, which means there was no final order from which Ahmed could appeal. 28 U.S.C. §§1291, 2253(a). And because the District Court did not certify an interlocutory appeal from its order, the Sixth Circuit could not assert jurisdiction under 28 U.S.C. §1292(b). That leaves the collateral-order doctrine as the only potential basis for an immediate appeal. But that doctrine did not confer jurisdiction on the Sixth Circuit either, because Ahmed's appeal failed to satisfy two of the doctrine's three requirements.

In addition to denying the petition, this Court should exercise its power under Rule 39.8 to deny Ahmed *in forma pauperis* status. It would not be the first

time: this Court has (at least) once before denied Ahmed *in forma pauperis* status under Rule 39.8. *See Ahmed v. Sheldon*, 136 S. Ct. 2384 (2016). It should do so again, given the frivolous nature of Ahmed's petition. The Court should additionally order the clerk not to accept any further uncounseled certiorari petitions from Ahmed unless he "pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33." *Martin v. Dist. of Columbia Court of Appeals*, 506 U.S. 1, 2 (1992). Although represented by appointed counsel below, Ahmed has filed numerous *pro se* pleadings in the District Court. His filings are repetitive and frivolous—so much so that the District Court instructed the court's clerk not to accept any more uncounseled filings from Ahmed. In addition to the current petition for a writ of certiorari, this Court has received five other *pro se* pleadings from Ahmed, every one meritless. And the State must respond to each and every certiorari petition Ahmed files, since he is a death-row inmate. *See* Rule 15.1. The Court should decline to grant Ahmed *in forma pauperis* status here or in any future civil case unless he is represented by counsel.

JURISDICTION

The District Court has jurisdiction over Ahmed's habeas case under 28 U.S.C. §2254(a). But those proceedings have not progressed to a final judgment, and the Sixth District lacked jurisdiction over this interlocutory appeal. *See* Pet.App.A & D. Accordingly, the Sixth Circuit dismissed Ahmed's appeal on September 27, 2018. Ahmed filed a petition for rehearing en banc, Pet.App.C, which the Sixth Circuit denied on December, 3, 2018, Pet.App.E. Ahmed then timely filed his petition for a

writ of certiorari on March 4, 2019. This Court has jurisdiction to review the petition under 28 U.S.C. §1254(1).

STATEMENT

1. On September 11, 1999, a Belmont County Sheriff's Department detective responded to the St. Clairsville, Ohio home of Ahmed's estranged wife, Dr. Lubaina Ahmed. *State v. Ahmed*, 103 Ohio St. 3d 27, 27–29 (2004). The detective discovered the lifeless bodies of Lubaina, Abdul Bhatti (Lubaina's father); Ruhie Ahmed (Lubaina's sister); and Nasira Ahmed (Lubaina's two-year-old niece). The murderer had slashed their throats and fractured their skulls. *Id.* at 27–30.

Another detective discovered Ahmed's work badge near the bodies. *Id.* at 29. And a forensic scientist at the Ohio Bureau of Criminal Identification and Investigation matched Ahmed's DNA profile to blood found at the crime scene. *Id.* at 30. Police discovered a motive, too: Lubaina initiated divorce proceedings a year before the murders. *Id.* at 27. Those proceedings boiled over into a hostile child-custody battle. The divorce court issued a restraining order, yet Ahmed continued to make harassing telephone calls to Lubaina. *Id.* The couple's final divorce hearing was scheduled for September 13, 1999, two days after the quadruple-murder. *Id.* at 28.

The police arrested Ahmed on the evening of September 11 at John F. Kennedy Airport in New York. *Id.* at 29. He had a one-way ticket to Pakistan for a flight that was scheduled to depart within the hour. *Id.* Ahmed also had $7,500 in traveler's checks, nearly $7,000 in cash, his will, and a lacerated thumb. *Id.*

2. A grand jury indicted Ahmed on four counts of aggravated murder. *Id.* at 29. A jury convicted him on all counts and recommended that he be sentenced to

death. *Id*. at 30. The trial court imposed the recommended sentence. *Id.* On direct appeal, the Supreme Court of Ohio unanimously affirmed the judgment and sentence. *Id.* at 58.

Ahmed sought reconsideration, which the Ohio Supreme Court denied. *State v. Ahmed*, 103 Ohio St. 3d 1496 (2004). He also filed two petitions for a writ of certiorari. An attorney representing Ahmed filed the first one in January 2005. *See Ahmed v. State*, No. 04-8302. Ahmed filed a second petition, *pro se*, in May of the same year. *See Ahmed v. State*, No. 05-6113.

When the Court denied both petitions, Ahmed returned to the state courts to seek postconviction relief. After a trial court denied each of his claims, an Ohio appellate court affirmed and the Ohio Supreme Court declined to hear his case. *State v. Ahmed*, 2006-Ohio-7069 (Ohio Ct. App. 2006); *State v. Ahmed*, 113 Ohio St. 3d 1513 (2007).

3. At this point, Ahmed turned to federal court. On September 13, 2007, the United States District Court for the Southern District of Ohio appointed David Graeff and Keith Yaezel to represent Ahmed in federal habeas corpus proceedings. Order, R. 3. Soon after, Ahmed filed a *pro se* motion to appoint S. Adele Shank as additional counsel, which the District Court denied. Order, R. 10. Ahmed filed additional motions to the same effect, prompting the District Court to hold, when rejecting his third such motion, that the right to appointed counsel does not include "the right to counsel of choice." Order, R. 32, pg. 2 (quoting *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006)).

On May 14, 2008, Ahmed, through counsel, filed his federal habeas petitions. *See* 28 U.S.C. §2254. After numerous briefing extensions and other interruptions, the magistrate issued a report and recommendation in 2014, recommending denial of each of Ahmed's twenty-seven grounds for relief. *Ahmed v. Houk*, No. 2:07-cv-658, 2014 U.S. Dist. LEXIS 81971 (S.D. Ohio June 16, 2014). The magistrate also recommended that Ahmed be denied a certificate of appealability because "any appeal would be objectively frivolous." *Id.* at *333.

Soon after the magistrate issued the report and recommendation, Ahmed moved to disqualify both the magistrate and the district court judge. Ahmed complained that one of his attorneys, Keith Yeazel, had engaged in *ex parte* communications with the magistrate and "possibly" with the district court judge too. Pro Se Motion to Stay, R. 94, PageID#9558. The District Court denied the motion because "no *ex parte* communications by the Magistrate Judge with Mr. Yeazel" had occurred. Order Denying Motion to Stay, R. 98, PageID#9568. Ahmed's *pro se* filing prompted the District Court to order the clerk "not to accept any additional *pro se* filings from Ahmed." *Id.* (citing Pet.App.M).

Ahmed's case remains pending in the District Court; the court has neither granted nor denied his petition for habeas relief. Indeed, Ahmed has not even filed his amended objections to the report and recommendations. Order, R. 142, PageID#10263.

4. In the midst of these proceedings, the District Court issued the interlocutory order at the heart of Ahmed's certiorari petition. On January of 2018, one of

Ahmed's appointed counsel, David Graeff, moved to withdraw on the basis that he was retiring from the practice of law. *See* Motion To Withdraw As Counsel, R. 129, PageID#10077. The magistrate granted the motion contingent upon Graeff's timely proposal "of another qualified attorney as [substitute] co-counsel." Order, R. 130, PageID#10079; Pet.App.F. The District Court ultimately allowed Graeff to withdraw and appointed S. Adele Shank—the same attorney Ahmed wanted in the first place—to replace him. Order, R. 131, PageID#10081; Pet.App.G.

Ahmed appealed to the Sixth Circuit, challenging the District Court's withdrawal order. The Court of Appeals dismissed Ahmed's appeal for lack of jurisdiction. *See* Pet.App.A, D. The court recognized that the withdrawal order "was interlocutory in that no final order or judgment" had "been entered by the district court." Pet.App.D. The court found no statutory basis for entertaining the interlocutory appeal. Pet.App.D. It noted that it might nonetheless have jurisdiction if the withdrawal order qualified for an immediate appeal under the collateral-order doctrine. That doctrine permits an immediate appeal of a non-final order that: "(1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." Pet.App.D. (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 105 (2009)). But these factors, the Sixth Circuit held, did not permit immediate review: "Assuming that the order at issue is separable from the underlying merits of the case, it is not effectively unreviewable on appeal from a final judgment." Pet.App.D.

After the Sixth Circuit denied Ahmed's petition for rehearing *en banc*, Pet.App.E, Ahmed filed this petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The Court should deny Ahmed's petition. The Sixth Circuit correctly held that it lacked jurisdiction over Ahmed's interlocutory appeal, and its holding does not implicate a split or otherwise justify review.

In addition to denying the petition, this Court should deny Ahmed's motion for leave to proceed *in forma pauperis* under Rule 39.8, and "direct the Clerk not to accept any further" *pro se* "petitions for certiorari from [Ahmed] in noncriminal matters unless he pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33." *Martin v. Dist. of Columbia Court of Appeals*, 506 U.S. 1, 2 (1992).

I. The Sixth Circuit correctly determined that it lacked jurisdiction over Ahmed's appeal of the District Court's interlocutory order.

The Sixth Circuit correctly held that it had no jurisdiction over Ahmed's appeal of the District Court's withdrawal order. Federal law creates various avenues through which appellate courts may review a lower court's order on appeal. Three are relevant here. First, appellate courts can review final judgments under 28 U.S.C. §1291. Second, they can hear certified interlocutory appeals under 28 U.S.C. §1292(b). Finally, they can hear appeals from non-final orders under the collateral-order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). None of these rules or doctrines permitted Ahmed's interlocutory appeal, and so the Sixth Circuit properly dismissed the appeal below for lack of jurisdiction.

Final order. "The courts of appeals … shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. §1291. And, in habeas proceedings, "the *final* order shall be subject to review, on appeal." 28 U.S.C. §2253(a) (emphasis added). A decision is "final" when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945) (citing *St. Louis, I. M. & S. R. Co. v. Southern Express Co.*, 108 U.S. 24 (1883)).

The order that Ahmed appealed—the one granting his attorney permission to withdraw—was interlocutory rather than final. Indeed, his habeas petition remains pending in the District Court, where he has yet to even file amended objections to the magistrate's report and recommendation. Accordingly, the District Court has not yet resolved Ahmed's petition, and so there is no final judgment to appeal under §1291.

Interlocutory Appeal. In addition to final orders, appellate courts have jurisdiction to hear certified interlocutory appeals under 28 U.S.C. §1292(b). A party seeking to bring an interlocutory appeal must receive permission from both the district and appellate courts. If a district court certifies "in writing" that an appeal would be proper, then the court of appeals *may*, "in its discretion, permit an appeal to be taken from such an order." *Id*.

The District Court's order granting Ahmed's counsel's motion to withdraw was not "certified appealable by the district court … ." Order, R. 138, Page-

ID#10255; Pet.App.D. As a result, §1292(b) did not give the Sixth Circuit jurisdiction to hear Ahmed's interlocutory appeal.

Collateral-order doctrine. The collateral-order doctrine allows a "small class" of orders to be immediately appealed before final judgment under 28 U.S.C. §1291. *Cohen*, 337 U.S. at 546. The Court in *Cohen* reasoned that a "practical rather than a technical construction" of §1291 permits immediate review when there are rights that are collateral to the merits of the action but that are nevertheless sufficiently important to warrant immediate review. *Id.* To be appealable under this doctrine, an order must "(1) conclusively determine[] the disputed question; (2) resolve[] an important issue completely separate from the merits of the action; and (3) [be] effectively unreviewable on appeal from a final judgment." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 105 (2009) (citation omitted). These three requirements must be applied "stringent[ly]," otherwise the collateral-order doctrine will "overpower the substantial finality interests §1291 is meant to further." *Will v. Hallock*, 546 U.S. 345, 349, 350 (2006).

Ahmed's appeal does not qualify for immediate review under this doctrine. Starting with the last of the three requirements, the order allowing his counsel to withdraw is not effectively unreviewable upon final adjudication on the merits. *Cf. Schwartz v. City of New York*, 57 F.3d 236, 237–38 (2d Cir. 1995). If, as Ahmed claims, the withdrawal and substitution of counsel was improper, then the error can be corrected on appeal from final judgment. "Appellate courts can remedy improper" or erroneous rulings "by vacating an adverse judgment and remanding for a new

trial." *Mohawk Indus.*, 558 U.S. at 109. Ahmed gives no reason why such relief would not suffice to remedy any injury in his case.

Additionally, the question whether the District Court erred in granting the motion to withdraw is not "completely separate from the merits of the action." *Id.* at 105. Generally speaking, litigants cannot win reversal based on harmless errors. *See* Fed. R. Civ. P. 61, 28 U.S.C. §2111; *Dietz v. Bouldin*, 136 S. Ct. 1885, 1895 (2016). Ahmed identifies no reason why this principle—which applies even in the context of constitutional errors, *see, e.g.*, *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017)—would not apply in an appeal of an order allowing withdrawal. *See Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 816 (7th Cir. 2017) (rejecting challenge to order allowing attorney withdrawal before criminal defendant's trial, since defendant "suffered no prejudice from her attorney's withdrawal"). Thus, on appeal of the District Court's order granting Ahmed's attorney's withdrawal request, the appellate court would have to consider whether the District Court's order affected the outcome of his trial. That question is not "completely separate from the merits of the action," *Mohawk Indus.*, 558 U.S. at 105, because showing prejudice would require considering the merits of Ahmed's claim—he was not harmed by the substitution of counsel if his claims were so frivolous that no counsel could have prevailed. Because the question whether the District Court erred in allowing withdrawal is entwined with the merits, an appeal of that order does not come within the collateral-order doctrine.

* * *

The Sixth Circuit properly held that it lacked jurisdiction to hear Ahmed's appeal.

II. This case does not implicate a circuit split or some otherwise-important issue deserving of this Court's attention.

No part of Ahmed's petition implicates an uncertain area of law or identifies any conflicting circuit-court decisions. As just explained, congressional statutes and settled doctrine require that Ahmed await a final judgment before appealing the District Court's order permitting his counsel to withdraw. Ahmed does not point to any circuit in the country in which the case would have come out differently.

The Second Circuit has held that the opposite type of order—one denying a motion to withdraw—*is* a collateral order that can be challenged by way of an immediate appeal. *See Whiting v. Lacara*, 187 F.3d 317, 319–20 (2d Cir. 1999). But that does not give rise to a circuit split, because an order *denying* a withdrawal motion, unlike an order *granting* such a motion, is at least arguably immediately appealable under the collateral-order doctrine. First, an order denying a withdrawal "conclusively determines the disputed question." *Mohawk Indus.*, 558 U.S. at 105. Second, in contrast to orders granting withdrawal motions, orders denying such motions are "completely separate from the merits of the action." *Id.* The question whether a party is right or wrong on the merits ought to have no bearing on whether the court erred by *denying* a withdrawal motion. *Whiting*, 187 F.3d at 320. As noted, the opposite is true in cases where courts grant withdrawal motions, since to prove reversible error in that context the client must show prejudice. Finally,

wrongfully denying a motion to withdraw commandeers the attorney's time and energy, *id.* at 320—an injury that is "effectively unreviewable" because it cannot be remedied on appeal, *Mohawk Indus.*, 558 U.S. at 105.

This shows that orders granting and orders denying withdrawal motions present very different questions for purposes of the collateral-order doctrine. So the Sixth Circuit's decision below does not conflict with the Second Circuit's decision in *Whiting*. And the Sixth Circuit's decision could not give rise to a split anyway, since it is unpublished and non-precedential.

III. The Court should instruct the clerk not to accept any further *pro se* filings from Ahmed in civil cases unless he pays the docketing fee required by Rule 38.

Ahmed has already filed, and this Court has already denied, another interlocutory petition for a writ of certiorari arising out of his habeas proceedings. *Ahmed v. Shelton*, No. 15-8912. And, in conjunction with his *pro se* certiorari petition here, Ahmed filed a *pro se* writ of mandamus challenging the same interlocutory order below. *In re Nawaz Ahmed*, No. 18-9332. In addition, Ahmed has filed four other meritless *pro se* petitions in this Court alone. *See Ahmed v. Hershey*, No. 02-9018; *Ahmed v. Sargus*, No. 03-7512; *Ahmed v. Ohio*, No. 05-6113; *Ahmed v. Belmont County Court of Common Pleas of Ohio*, No. 12-9397.

Ahmed has been equally proficient at generating frivolous *pro se* filings in the lower courts. Indeed, because of his repeated attempts to file *pro se* pleadings, the District Court instructed the clerk below not to accept any more of Ahmed's *pro se* filings. Pet.App.M; *see also* Pet.App.N; Pet.App.O; Order, R. 117, PageID#10027.

This Court should exercise its similar power under Rule 39.8 to deny Ahmed *in forma pauperis* status, and to prevent him from seeking such status in civil cases where he represents himself *pro se*. The Court has once already invoked Rule 39.8 to deny Ahmed permission to proceed *in forma pauperis*. *See Ahmed v. Sheldon*, 136 S. Ct. 2384 (2016). It should do so again, this time making clear that the order applies to future filings. Because Ahmed is a death-row inmate, this Court's Rule 15.1 obligates Ohio to file a response every time Ahmed files a *pro se* certiorari petition, no matter how frivolous. Ohio should not have to continue responding to these submissions. The State has many important issues to address and limited resources with which to do so. Responding to such filings takes a great deal of time and attention; no matter how frivolous a petitioner's arguments might be, the State takes great care to furnish the Court with a careful analysis of the petitioner's claims. (Indeed, responding to frivolous petitions can take more work than responding to non-frivolous petitions, since doing so often requires deciphering almost-incomprehensible arguments.)

Denying Ahmed's *in forma pauperis* status as to *pro se* civil submissions would not cut off his access to this Court. Indeed, it would not even cut off his access to *in forma pauperis* status. Ahmed has two qualified attorneys as appointed counsel, and he has received effective representation since 2007. All the State seeks is to have Ahmed enlist the help of those attorneys, or some other officer of this Court, before filing *in forma pauperis*. Since attorneys have an ethical duty to avoid frivolous filings, this will help screen out all and only Ahmed's frivolous petitions.

CONCLUSION

This Court should deny Ahmed's petition for a writ of certiorari.

Respectfully submitted,

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