19-7177 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO SUPREME COURT RULES 10 AND 11

Eric Christopher Miller,

Petitioner, pro se

Vs.

Randy Gibbs
State of Iowa,

Respondent.

No. 4:19-cv-00236-RGE

December 8, 2019

Question Presented for Review

Can District Courts continue to dismiss (numerically) second habeas petitions as 'successive' and hold the petitioner to the stricter AEDPA requirements when the first habeas was dismissed for procedural reason (time bar, no adjudication)?

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Statement of Jurisdictional Grounds

This is a writ to address circuit conflict. Several circuit courts are ruling that (numerically) second habeas petitions are 'successive' (and so held to tougher AEDPA requirements) when they were only procedurally defaulted the first time around.

Miller's Petition for Habeas Corpus was dismissed from the District Court for the 8th Circuit, Southern District for the above-stated reason on 9-24-19. (Attachment A, Appendix p. 16)

This is a growing trend in circuit courts and until they are given Supreme Court instruction, more and more habeas petitions will be held to wrong standards.

Supreme Court Rule 10 - The federal circuit court decision is so out of line with normal judicial standards, that the Supreme Court should exercise its supervisory power to instruct the lower courts.' (McNabb v. United States, 318 U.S. 332, 340-41, 63 S.Ct. 608, 87 L. Ed. 819 (1943)("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.")

Supreme Court Rule 11 – (28 U.S.C. §1254(1) - two prongs must be met to gain pre-judgment certiorari:

1. The case is of such imperative public importance that it justifies a deviation from normal appellate practice;

2. The case presents facts that make immediate determination by the Supreme Court imperative.

Miller files this in pre-judgment from the (8th Circuit) Court of Appeals because even a lawful ruling to follow existing Supreme Court law on the issue won't correct the other circuits perpetuating the faulty law. Also, Miller files this now in fear of being unable to file it should his Request for C.O.A. be dismissed from the Court of Appeals using the same faulty law.

Statement of Relevant Facts

9-24-19 - Miller's habeas dismissed as 'successive'. The District Court for the Southern District of the Eighth Circuit dismissed Miller's habeas as 'successive' due to his first habeas (2015) being time-barred, using a 10th Circuit ruling that goes against Supreme Court law on what constitutes a successive petition. (Attachment A, Appendix p. 16)

9-27-19 – Miller files Motion to Alter Judgment (Attachment B, Appendix p. 18) explaining that controlling authority (Supreme Court law) states that such (numerically) second petitions are not successive. (Denied on 10-23-19 , this time citing 11th circuit case law for validation of the ruling.) (Attachment C, Appendix p. 20)

~9-30-19 – Miller files Motion for C.O.A. to 8th Circuit Court of Appeals, (two addendums also filed on 10-28-19 and 10-29-19)(Attachments D, E, and F, Appendix p. 24, 27, 31) explaining that controlling authority (Supreme Court law) states that such (numerically) second petitions are not successive.

12-8-19 – Miller files this petition requesting Supreme Court intervention and correction of District Court rulings.

ARGUMENT

This Court has already stated what does and does not constitute a 'successive' habeas petition. Gonzalez v. Crosby, 162 L.Ed.2d 480, 545 U.S. 524, 2005 at Headnote 8: It is not second or successive if (1) a previous ruling which precluded a merits determination, for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar. Also See Sanders v. United States, *supra,* 373 U.S. at 15-16. *Accord* 28 U.S.C. §2244(b) (1994)(superseded) (successive petition rule applies only "after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law."); Rule 9(b) of the Rules Governing §2254 Cases ("prior determination... on the merits"); Green v. Reynolds, 57 F.3d 956, 957-58 & n.3 (10th Cir. 1995)(although petitioner previously raised claim in two petitions, current claim is not "successive" because previous petitions were dismissed on procedural grounds and thus claim was never "decided on the merits"); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir.)(*en banc*), *cert. denied*, 497 U.S. 1011

(1990)("The District Court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition"). Also Stewart v. Martinez-Villareal, *supra,* 523 U.S. at 644. *Accord* United States v. Barrett, 178 F.3d 34, 44 (1st Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000), in which the Court explained that the rationale for permitting unrestricted refiling after dismissal for nonexhaustion necessary applies as well to other "dismissal[s] of a first habeas petition for technical procedural reasons": [I]n both situations the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining habeas review. (523 U.S. at 644-45). ("Cases in which numerically second petitioners have not been treated as 'second or successive' can be understood as describing factual scenarios in which the application of a modified *res judicata* rule would not make sense.")(at 644)

However, Miller's (numerically) second petition was dismissed in the 8th Circuit District Court with a ruling citing In Re Raines, 659 F.3d 1274, 1275 (10th Cir. 2011)(per curiam)(holding dismissal of "Rains's first habeas petition as time-barred was a decision on the merits, and any later habeas petition challenging the

same conviction is second or successive and is subject to the AEDPA requirements.") (Attachment A, Appendix p. 16)

Miller filed a Motion to Alter Judgment (Attachment B) again citing Supreme Court law stating that a dismissal for time bar does not make a second habeas a successive; (also that he raised under *Schlup's* Actual Innocence Gateway, which overcomes time bars anyway.)

That Motion was denied, (Attachment C, Appendix p. 20) the court reinforcing its position that Miller's petition is successive and adding the citing of Pray v. Dep't of Corr., No. 18-14750, 2019 WL 5099704 at *1 (11th Cir. Oct. 11, 2019)(per curiam)(finding petitions dismissed as time-barred by the AEDPA one-year limitations period are considered to have been dismissed with prejudice, and subsequent petitions qualify as second or successive.)

On 10-22-19 Miller filed a Motion for C.O.A. to the 8th Circuit Court of Appeals explaining the situation and requesting they not follow the trending circuit court law (Attachments D, E and F, Appendix p. 24, 27, 31), which is still pending.

Miller has respect for the 8th Circuit District Court, but he's stumped as to why (they) would rule with 10th Circuit case law that runs against the controlling

authority of the Supreme Court. How and why did time-barred first habeas petitions suddenly count as 'adjudicated on the merits' for purposes of making the next one 'second or successive' and holding petitioners to a higher standard? There is no logical reason for this.

The implications of this seemingly fly-by-night rule are **severe** in Miller's case. He presents a petition with blatantly non-frivolous Constitutional claims of trial error *and* new evidence (gathered by writing a novel about his life and crime), but because of this new rule is instead relegated to the AEDPA standard because his time-barred first habeas (never adjudicated on the merits) was counted as 'adjudicated on the merits.' His *Schlup* Actual Innocence Gateway claim is being ignored completely because of this trending faulty law. If this law continues to be followed, Miller will do Life Without Parole while holding in hand a valid actual innocence gateway petition.

Miller insists that this current case law is not just, legally or morally. It is clear why this caselaw is unfair:

a) A time-barred habeas is *literally not* an adjudication on the merits. (*Id.* Stewart v. Martinez-Villareal) Petitioners are being penalized for having a prior habeas adjudicated on the merits when they never even got close to that.

b) The rationale behind this trending rule is that 'an untimely habeas can never be made timely, so it might as well be dismissed with prejudice', that it's a 'procedural hurdle that may never be overcome' and that 'an untimely habeas prevents habeas review at a later date.' **None of this is true. *Schlup's* Actual Innocence Gateway nullifies every reason for the current rule.** (Schlup v. Delo, 130 Led.2d 808, 513 US 298) Since Schlup cures all time-related procedural default, then untimely first petitions are not procedural hurdles that may never be overcome, and an untimely first habeas would have no reason to be considered 'adjudicated on the merits.'

Simply put, Miller is raising Schlup's actual innocence gateway to beat a timebar. Yet this rule prevents Miller from raising Schlup because of a timebarred first habeas. And the rationale for that is 'nothing can beat a timebar.' This is not logical. If the only ruling the habeas courts have ever given Miller is that 'we won't see your claims because your appeal is untimely,' and Schlup remedies all untimeliness, then what sense does it make to say Miller can't raise Schlup to beat that untimeliness and have his claims viewed?

Also consider that a petitioner can raise an actual innocence gateway claim in an untimely first habeas, no matter how untimely it is. So what sense does it make to bar a petitioner's actual innocence gateway claim from a numerically second habeas when the first one was not seen because of it being untimely?

Second, it can't be said that the rule is meant to cut back on evidentiary hearings – time-barred habeas petitions don't get one. (Miller has never had an evidentiary hearing, and doesn't even need one on this current habeas. Still, because of the trending rule, he's considered 'successive.')

c) This trending rule directly contradicts the reason *for* habeas. It hinders petitioners instead of helping them gain relief from fundamentally unjust incarcerations. It makes little-if-any difference in overall judicial economy, and even if it did make a difference, the heart of habeas is the belief that the principles of comity and finality, and the conservation of judicial resources 'must yield to the imperative of correcting a fundamentally unjust incarceration." (quoting *Carrier*, 477 U.S. at 495, 106 S.Ct. at 2649) The goal of habeas is to correct cases like Miller's, not hamper his ability to have his petition judged.

It is a miscarriage of justice in itself to label a habeas that was never adjudicated on its merits as a 'habeas adjudicated on its merits' only to make an already-difficult road more onerous for prisoners fighting unjust incarcerations.

Last, it should be noted that Miller's habeas is not successive, but even had it been, he raised his petition under the Actual Innocence Gateway of Schlup v. Delo, 130 Led.2d 808, 513 US 298, in which a colorable claim of actual innocence based on new evidence serves as a gateway through procedural default, including the restriction on successive petitions. *Schlup* doesn't appear to give federal district courts the option of whether or not to adhere to it. Where an actual innocence claim is raised, a *Schlup* analysis is necessary.

Miller's claim of Actual Innocence (*Schlup*) should've been judged; dismissing the petition for being successive was premature.

Miller's actual innocence claim shouldn't be forfeit in the name of an unreasonable shortcut for judicial economy. The need for judicial economy is understandable, but penalizing petitioners for adjudications on the merits they never got is not a fair way to do that, especially considering the core goal of habeas is to correct fundamentally unjust incarcerations.

The way it stands now Miller will likely *never* have a habeas adjudicated on the merits, though he has new evidence and non-frivolous Constitutional claims of trial error in hand.

Wherefore, Petitioner requests this Honorable Court instruct the Circuit Courts that the law has not changed; that habeas petitions dismissed as time barred

without an adjudication on the merits do not count as adjudicated on the merits, and do not make (numerically second) petitions successive and subject to AEDPA requirements. Also that Miller's habeas be remanded to the District Court for a *Schlup* analysis.

Thank you for your time,

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Certificate of Filing and Service

I, the undersigned, hereby certify that on December 8, 2019, I will cause to be filed the above Habeas Application by U.S. mail, postage pre-paid, to the Clerk of the U.S. Supreme Court, at 1 1st St. NE, Washington, D.C., 20543-0001.

Eric Miller