19-8257 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI
FROM THE 8TH CIRCUIT COURT OF APPEALS

PURSUANT TO SUPREME COURT RULE 10(a),(c)

Eric Christopher Miller,

Petitioner, pro se

Vs.

Randy Gibbs,

Respondent.

Case No. _____

April 1, 2020

Eric Christopher Miller
Iowa State Penitentiary
P.O. Box 316
Ft. Madison, IA, 52627

Question Presented for Review

Can the lower courts continue to bypass U.S. Supreme Court law in favor of their self-created rule calling time-barred initial habeas petitions 'adjudicated on the merits' to make them 'successive by default' and negate Actual Innocence Gateway claims as well as subject petitioners to AEDPA's stricter requirements?

List of Parties

Eric Christopher Miller, Petitioner

Randy Gibbs, Warden, Respondent

(Represented by _____)

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CITED AUTHORITIES

Cases

Rules

Opinions Below

To Petitioner's knowledge, the opinions of the lower courts in this case have not been published.

Statement of Jurisdictional Grounds

2-18-20 – Miller's Motion for a C.O.A. is dismissed.
3- 20- 20 – Motion for Rehearing en banc is denied.

This is a writ to address circuit conflict (with Supreme Court law). Several circuit courts are now ruling that (numerically) second habeas petitions are 'successive' (and so held to tougher AEDPA requirements) when they were time-barred and never adjudicated on the merits the first time around. (Miller's Petition was dismissed from the District Court for the above-stated reason on 9-24-19.) (Attachment A, Appendix p. 16)

This is not accurate law. U.S. Supreme Court law states the opposite. (See below.) Still, this rule is trending circuit courts and until they are given Supreme Court instruction, more and more habeas petitions will be held to wrong standards.

Constitutional and Statutory Provisions Involved

Supreme Court Rule 10(a) - The federal circuit court has far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. (McNabb v. United States, 318 U.S. 332, 340-41, 63 S.Ct. 608, 87 L. Ed. 819 (1943)

Supreme Court Rule 10(c) – a United States [district court and] court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Statement of Relevant Facts

The District Court followed a District Court-created rule to dismiss Miller's habeas petition; this rule directly opposes Supreme Court law.

9-24-19 - Miller's habeas dismissed by the District Court for the 8th Circuit, Southern District of Iowa for 'being successive and not obtaining a C.O.A.,' though his initial habeas was immediately time barred and dismissed without adjudication on the merits. (Attachments A and B, Appendix pgs. 12 and 13).

9-27-19 – Miller files Motion to Alter Judgment (Attachment C, Appendix p. 15), explaining that per U.S. Supreme Court law his current habeas isn't successive and that his Actual Innocence Gateway claim should be judged. (This was denied on 10-23-19.)(Attachment D, Appendix p. 17)

~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 – *not attached*)(Attachment E, Appendix p. 21) explaining the same.

2-18-20 - Miller's Motion for a C.O.A. is dismissed. No reason is stated. (See Attachment F, Appendix p. 24)

2-24-20 – Miller files a Motion for Rehearing *en banc* to the 8th Cir. Ct. App. (Attachment G, (p. 3), Appendix p. 25) stressing that adherence to existing U.S. Supreme Court law on what constitutes successive should be maintained.

3- 20-20 – Miller's Motion for Rehearing *en banc* is denied. No reason stated. (See Attachment H, Appendix p. 30)

ARGUMENT

This Court has already stated what does and does not constitute a 'successive' habeas petition in myriad cases: 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) And finally, Slack v. McDaniel, 146 LED2d 542, 529 US 473, 2000 – Federal habeas corpus petition filed by state prisoner, after initial

petition was dismissed without adjudication on merits, held not to constitute 'second or successive' petition subject to dismissal for abuse of writ.

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 [that] Judgment, and in denying it, an additional citing was added: 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.)

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?

It wasn't the AEDPA that did it; the AEDPA doesn't set forth what constitutes 'second or successive' applications. §2244 – II. What Constitutes Second or Successive Applications says nothing concerning initial habeas petitions never adjudicated on the merits.

And, as seen above, (to Miller's knowledge) it wasn't this Court that made such a ruling. This Court's current rule seems to be that a petition is second or successive when it constitutes the Abuse of the Writ Doctrine – a doctrine that also says nothing concerning time-barred initial habeas petitions (and others not adjudicated on the merits).

So, unless Miller is mistaken, this rule crept up out of a District Court, where it somehow stuck and started gathering speed. The sole aim of this rule seems to be furthered judicial economy; in this case, keeping time-barred initial habeas petitions from utilizing the Actual Innocence Gateway of *Schlup* – a case that's being systematically slain over time.

Consider that *Schlup* was first chopped in McQuiggin v. Perkins, 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed.2d 1019, (2013) where it was ruled that successive petitions could no longer use the *Schlup* standard but were to be relegated to the

AEDPA's standard for successive petitions – a more difficult, 'clear and convincing' standard.

And now District Courts are attempting to further chop *Schlup*, ruling that petitions never adjudicated on the merits count as adjudicated on the merits, making them successive and so unable to utilize *Schlup's* Actual Innocence Gateway; forcing them into the AEDPA standard instead.

(Note: If the Supreme Court has ruled like the District Court on this issue, Miller requests reconsideration based on the arguments below. Thank you.)

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

This trending rule is not right. Miller understands the 'rationale' behind it – that 'an untimely habeas can never be made timely, so it might as well be dismissed with prejudice', or that it's a 'procedural hurdle that may never be overcome' - and, were it not for *Schlup*, that may all hold true. But since *Schlup's* Actual Innocence Gateway cures all time-related procedural default, 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 raised *Schlup* to beat a time bar; yet this rule prevents Miller from raising *Schlup* because of a time barred first habeas. And the rationale for the rule is 'nothing can beat a time bar.' That's a problem.

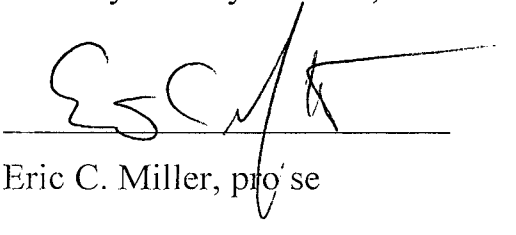
Also consider that a petitioner can raise an actual innocence gateway claim in an untimely first habeas, no matter how untimely it is. So what sense does it make to bar a petitioner's actual innocence gateway claim from a numerically second habeas when the first one never made it past the application because of it being untimely?

Finally, consider that 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.

The implications of this fly-by-night rule are especially severe for Miller. If this rule isn't corrected, Miller will do Life Without Parole while holding in hand a valid actual innocence gateway petition.

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. Miller's habeas was not successive, and his *Schlup* claim should've been judged; dismissing the petition for being successive was erroneous, and the Court of Appeals should've corrected the District Court's error instead of confirming it. That in mind, Miller requests his 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 April 1, 2020, 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