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No. 23-_____

In The
SUPREME COURT OF THE UNITED STATES

GARY WATKINS,
Petitioner,

v.

WILLIS CHAPMAN, Warden
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Gary Watkins, #583264
Petitioner, *in pro per*[*]
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[*] This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

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PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Watkins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The final order of the United States Court of Appeals, 6th Circuit, denying Rehearing En Banc (April 19, 2023) Appears at APPENDIX A to the petition and is reported at Watkins v Stephenson, 2023 U.S. App. LEXIS 9344. The final order of the United States Court of Appeals, 6th Circuit, denying a certificate of appealability (January 13, 2023), appears at APPENDIX B to the petition and is reported at *Watkins v Stephenson*, 57 F.4th 576, 2023 U.S. App. LEXIS 853, No. 21-2914, (6th Cir., Jan. 13, 2023). The final opinion and order of the United States District Court - E.D. Mich., denying the petition for writ of habeas corpus and granting a certificate of appealability appears as APPENDIX C to the petition and is reported at *Watkins v Haas*, 2021 U.S. Dist. LEXIS 165679, 2022 WL 2192925, Dk. No. 2:10-cv-13199, (E.D. Mich., Sept. 1, 2021). The final order from the Michigan Supreme Court is published at 2009 Mich. LEXIS 1224, 483 Mich. 1016, 765 N.W.2d. 320. The final opinion of the Michigan Court of Appeals is published at 2008 Mich. App. LEXIS 2834, (Mich. Ct. App., No. 283745, Aug. 5, 2008). (See Appendix, filed under separate cover).

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its final order on April 19, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The Sixth Amendment of the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense." "The Sixth Amendment right to counsel is applicable to the states through

the Due Process Clause of the Fourteenth Amendment." *People v Williams*, 470 Mich. 634, 641; 638 N.W.2d 597 (2004) (citing *Gideon v Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)).

28 U.S.C. 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment or decree.

28 U.S.C. 1915(a)(1): Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

STATEMENT OF THE CASE

PROCEDURAL HISTORY AND STATEMENT OF FACTS

INTRODUCTION

SUMMARY

Petitioner Gary Watkins (hereinafter "Petitioner") commenced this action as a State prisoner in the District Court pursuant to 28 U.S.C. § 2254, by filing a petition for A Writ of Habeas Corpus on August 12, 2010. On August 20, 2010, District Court Judge Arthur J. Tarnow entered a Memorandum Opinion and Order holding the petition in abeyance to allow Petitioner to exhaust state court remedies (See APP. O, Memorandum Opinion and Order). Afterward, through counsel, a supplemental petition for a writ of habeas corpus was filed on July 25, 2014.

On October 23, 2015, District Court Judge Tarnow issued a Memorandum Opinion and Order granting the Petition for a Writ of Habeas Corpus (See, APP L, Memorandum Opinion and Order granting Petition for a Writ of Habeas Corpus).[1] Pursuant to a published Opinion, the Sixth Circuit reversed that decision, holding that this particular issue was based on an amended petition that did not "relate back" to the initial *pro per* petition that was filed by Petitioner, and remanded the case to the District Court to adjudicate the remaining issues. *Watkins v DeAngelo-Kipp*, 854 F.3d 846 (CA6, 2017).

The District Court re-opened the Habeas case and allowed for supplemental briefing (See APP N, Opinion and Order Re-Opening Case and Setting Deadlines for

[1] Watkins v Haas, 143 F. Supp. 3d 632, 633-634 (E.D. Mich. 2015).

Supplemental Briefs). The District Court initially summarily denied the petition, but then re-opened the habeas case, following Petitioner's Motion for Reconsideration, and again allowed for supplemental briefing (See APP. D, Opinion and Order Granting in part Motion for Reconsideration, Re-Opening Case, and Setting Deadlines for Supplemental Briefs, Page ID # 1584-1587). Petitioner filed a supplemental brief, and Respondent filed a supplemental answer.

On September 1, 2021, District Court Judge Arthur J. Tarnow denied the petition for a Writ of Habeas Corpus, but granted a Certificate of Appealability (See APP. C, Opinion and Order denying Petition for Writ of Habeas Corpus and Granting a Certificate of Appealability). Judgment was entered on the same date.

The final order of the United States Court of Appeals, 6th Circuit, denying Rehearing En Banc was issued on April 19, 2023. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

SUMMARY OF THE ARGUMENTS

Petitioner is serving a 25-50-year prison term and a consecutive prison term of 2 years for his convictions of 2nd degree murder, (M.C.L.A. 750.317), Assault with Intent to Commit Murder, (M.C.L.A. 750.83), and Felony-Firearm, (M.C.L.A. 750.227b). The District Court granted a Writ of Habeas Corpus, finding that Petitioner had been denied the effective assistance of trial counsel, for failing to request an additional competency examination prior to trial, based on his bizarre behavior, which clearly evidenced that he was incompetent to stand trial. The U.S. Sixth Circuit reversed that decision, holding that this particular issue was based on an amended petition that did not "relate back" to the initial *pro per* petition that was filed by Petitioner, and remanded the case to the District Court to adjudicate the remaining issues. *Watkins v DeAngelo-Kipp*, 854 F.3d 846 (CA6, 2017), *cert. den.* 138 S.Ct. 101 (2017).

The District Court re-opened the Habeas case, allowed for supplemental briefing, and the denied the petition. Relying on *Hill v Mitchell*, 842 F.3d 910, 924 (CA6, 2016) and *Watkins v DeAngelo-Kipp, supra.* The Court held that, since the claims sought to be reviewed were raised in an amended petition (following a petition initially raised by Petitioner *pro se*), the supplemental issues did not relate back to the claim filed in an original petition because the claims in the original petition lacked specific factual allegations or evidentiary support, and were not tied to any particular theory of relief.

On appeal, Petitioner argues that any claim in an amended petition should be found to relate back to a claim that was filed in an original petition, particularly

if that petition was filed pro se by a petition with a history of mental illness like Mr. Watkins. In addition, Petition also argued that his current petition should relate back to his previously dismissed 2008 petition, which would make the supplemental petition timely due to the fact that the 2008 petition contained fact-specific claims that mirrored the supplemental brief claims.

Lastly, in light of the extensive history of Petitioner's mental illness, Mr. Watkins argued that the limitations period should be equitably tolled on this basis.

REASONS FOR GRANTING THE PETITION

I. **THE DISTRICT COURT ERRONEOUSLY HELD THAT PETITIONER'S SUPPLEMENTAL HABEAS PETITION RAISING NUMEROUS CLAIMS THROUGH COUNSEL WAS UNTIMELY FILED BECAUSE IT DID NOT RELATE BACK TO THE PETITION PETITIONER INITIALLY FILED PRO SE, AND ALTERNATIVELY, THE STATUTE OF LIMITATIONS PERIOD SHOULD BE TOLLED IN PETITIONER'S CASE IN LIGHT OF HIS EXTENSIVE HISTORY OF MENTAL ILLNESS. US CONST, AMS VI, XIV; CONST, 1963, ART 1, §§ 17, 20.**

ARGUMENT

The District Court ruled that Appellant's remaining claims were not properly before the Court based on a contention that the remaining claims are separate and distinct from the claims he raised in his initial petition (See APP C, Opinion & Order denying Petition for Writ of Habeas Corpus and Granting a Certificate of Appealability). As will be explained below, they are not, and so the amendment was timely.

State prisoners must file "an application for a writ of habeas corpus" within one year of, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U.S.C. §2244(d)(1)(A), or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," 28 U.S.C. §2244(d)(1)(D). In this case, although the Michigan Supreme Court hadn't yet denied Petitioner's last appeal, he filed a petition for a writ of habeas corpus on October 22, 2008, raising claims including (1) juror misconduct, (2) prosecutorial

misconduct, (3) violation of right to be present, (4) right to not appear before the jury while shackled, (5) sufficiency of the evidence, (6) right to present a defense, (7) right to self-representation, (8) ineffective assistance of counsel (Case No. 2:08-cv-14507). The case was assigned to Judge Gerald E. Rosen, and on January 14, 2009, the petition was dismissed by Judge Rosen. "***without prejudice*** for failure to prosecute and for failure to comply with Magistrate Judge Whalen's order." (Case No. 2:08-cv-1450) (emphasis added).

Once the Michigan Supreme Court denied leave to appeal, Petitioner filed in federal court a pleading entitled "motion for equitable tolling to allow petitioner's *pro se* petition for writ of habeas corpus to proceed timely." (Case no. 2:10—cv-13199). The motion included an affidavit, which listed additional issues Petitioner desired to raise in a 6.500 motion (*Id.*). The District Court then administratively ordered the petition be held in abeyance so that Petitioner could initiate post convection proceedings in the state court to exhaust claims prior to filling a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner's family subsequently retained counsel some time later, and a 6.500 motion was filed and appealed through the Michigan Supreme Court. Petitioner then filed an amended habeas petition (Amended Habeas Petition), and the Court granted petitioner a writ of habeas corpus. *Watkins v Haas*, 143 F.Supp.3d 632, 634 (E.D. Mich. 6343 (E.D. Mich. 2015), but the Sixth Circuit Court of Appeals reversed and remanded the case to allow the court to adjudicate the remaining issues. *Watkins v Deangelo-Kipp*, 854 F.3d 846 (CA6, 2017).

A. Petitioner's first petition for a writ of habeas corpus was filed in 2008 when his case hadn't yet become final in the State Supreme Court, and was dismissed without prejudice.

The Federal Rules of Civil Procedure apply to federal habeas corpus petition. *Mayle v Felix*, 545 U.S. 644 (2005). Rule 15(a)(2) allows Petitioners to amend pleading with the court's permission, and district courts "should freely give leave when justice so requires." *Mayle*, 545 U.S. at 654-655. Under Rule 15(c)(1)(B), the amendment of the petition "relates back to the date of the original pleading when ...the amendment asserts a claim...that arose out of the control, transaction, or occurrence set out – or attempted to be set out in the original pleading ...." In the habeas context, the Supreme Court has clarified that the terms "conduct, transaction, or occurrence," are niot so broad as to mean any aspect of the "trial, conviction, or sentence." *Mayle*, 545 U.S. at 663-664. Instead, to prevent circumvention of AEDPA's statute of limitations, claims relate back when they share "a common core of operative facts uniting the original and newly asserted claims." *Id.* When discussing this rule, the Supreme Court discussed two cases that illustrated an amendment that properly relate back. The first case was *Mandacina v United States*, 328 F.3d 995 (CA8, 2003), which involved a *Brady* claim. In his original petition, the petitioner alleged that the prosecutor did not disclosed exculpatory evidence that would have supported the theory that someone other than the petitioner murdered the victim. *Mandacina*, 328 F.3d at 1001. The amended petition offered this refinement: the prosecution failed "to disclose the names of all suspects with strong motives to murder [the victim], as well as all facts developed in the investigation of these suspects." *Id.* This amendment relate back to

the original claim because "the amended *Brady* claim was a slightly more specific iteration of the original *Brady* claim, premised more specifically on the suppression of names of suspects." *Hill v Mitchell*, 842 F.3d at 923.

The second case was *Woodward v Williams*, 263 F.3d 1135 (CA10, 2001), where the original petition alleged a constitutional violation based on the trial court's "admission of recanted statements." *Mayle*, 545 U.S. at 664, n. 7, citing *Woodward*, 263 F.3d at 1142. "[T]he amended petition challenged the court's refusal to allow the defendant to show that the statements had been recanted." Id. The amendment related back because "it clarified or amplified a claim alleged in the original petition." *Hill*, 842 F.3d at 924.

The Sixth Circuit has permitted amendments to relate back to the original petition when the amendment "expand[ed] on the facts supporting a claim in the original petition," such as adding the names of witnesses whom trial counsel have interviewed to establish an alibi. *Cowan v Stovall*, 645 F.3d 815 (CA6, 2011). "The facts recited in the two documents differed not in kind, but in specificity," so the amendment related back to the original filing date. *Cowan*, 645 F.3d at 819.

As in those cases, the refinements of the Due Process claims presented in Petitioner's original petition refined and clarified the same general claim: the fact that he was denied effective assistance of counsel, and was denied his right to self-representation, suffered juror misconduct, prosecutorial misconduct, the Court violated his right to be present and his right to not appear before the jury while shackled, was convicted on insufficient evidence, and was denied his right to present a defense. Although Petitioner did not specifically reference these claims in

his "motion for equitable tolling to allow petitioner's *pro se* petition for writ of habeas corpus to proceed timely", this "motion for equitable tolling to allow petitioner's *pro se* petition for writ of habeas corpus to proceed timely" was premised on his original filing. In this regard, Petition was asking for an extension of time to file a petition.

Since the Sixth Circuit constructed Petitioner's "motion for equitable tolling to allow petitioner's pro se petition for writ of habeas corpus to proceed timely" as a protective petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, the subsequent pleading by Watkins and present counsels should be treated as an extension of time to file a more properly researched petition and brief. See, e.g. *Sueing v Palmer*, 503 F. App'x 354, 356-57 (CA6, 2012) (petition's letter to the district court to grant a stay and abeyance or to extend the time to file a petition for writ of habeas corpus should have been construed as a new habeas petition). A habeas petitioner who is concerned about the possible effects of his or her state post-conviction filings on the AEDPA's statute of limitations can file a "protective" petition in federal court, as petitioner appears to have done. See, *Pace v DiGuglielmo*, 544 U.S. 408, 416 (2005).

This Court should recognize that Petitioner's current "petition" (the "motion for equitable tolling to allow petitioner's pro se petition for writ of habeas corpus to proceed timely" without current counsels' amended petition) is devoid of any specific claims. A federal district court has the power to grant an extension of time to a habeas petitioner to file an amended habeas petition. See, e.g. *Hill v Mitchell*, 30 F.Supp.2d 997, 998 (S.D. Ohio. 1998). This Court should be willing to grant such an

extension of time to file an amended habeas petition which contains the claim that he wished to raise in his petition. *Dye v Hofbauer*, 546 U.S. 1, 4 (2005).

As noted above, Petitioner's 2008 habeas petition is dismissed as deficient because he failed to pay the $5.00 filing fee or an application to proceed *in forma pauperis*. (Case No. 2:08-cv-14507). In lieu of enforcing the deficiency order, the court should have held the petition in abeyance and stay the proceedings, and when Petitioner moved to reopen the case, he would have been required to pay either the $5.00 filing fee or submit an application to proceed *in forma pauperis*. It must be kept in mind that Petitioner was, and still is, severely mentally ill, and applying strict compliance to his matter in this regard is a violation of fair process. What is more, the factual basis underlying the claims have remained the same: This refinement should relate back to the original filing date, and so Petitioner's additional claims could be considered timely.

B. Respondent will suffer no prejudice if these refinements relate back to the date the amended petition was filed.

This Court enjoys broad discretion to grant motions to amend. As a general rule, courts should grant such request freely unless there has been "[u]ndue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies, undue prejudice to the opposing party," or if the amendment is futile. *Coe v Bell*, 161 F.3d 320, 341 (CA6, 1998). The most critical factors are notice and undue prejudice, but "[d]elay by itself is not sufficient to deny a motion to amend." *Coe*, 161 F.3d at 342. Respondent has been aware of

these claims for several years, and so he can hardly claim undue prejudice or surprise.

C. Even if Petitioner presented new claims in the supplemental petition, the statute of limitations should be equitably tolled due to Petitioner's extensive history of mental illness.

If this Court concludes that Petitioner has not complied with AEDPA's statute of limitations, it should find that equitable tolling is appropriate. Section "2244(d) is subject to equitable tolling in appropriate cases." *Holland v Florida*, 560 U.S. 631, 645 (2010). Equitable tolling is appropriate when (1) the petitioner "has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing." Holland v Florida, 560 U.S. at 649.

There can be no question that Petitioner has pursued the claims in his petition diligently in state and federal courts. Equitable tolling is appropriate if the petitioner has been pursuing his claim diligently, and the timely petition was defective because of non-exhaustion but the defect was curable. See, *Butler v Long*, 752 F.3d 1177, 1181 (CA9, 2014) (holding that the statute of limitations for an unexhausted claim was equitably tolled from the date the unexhausted claim is dismissed provided the petition pursues claims diligently).

Following Petitioner's exhaustion of his state post-conviction proceedings, the Sixth Circuit conditionally granted Petitioner's petition based on only his Due Process claim. Respondent appealed, and the Sixth Circuit merely ruled that the Respondent has not yet had the opportunity to respond to the other claims. Throughout these federal proceedings, the facts and the procedural status of

Petitioner's federal petition have been evolving. Thus, even if this Court believes the other claims are untimely, this Court should equitably toll the claims.

II. THIS COURT SHOULD OVERRULE THE DECISIONS IN *HILL V MITCHELL*, 842 F.3D 910 (CA6, 2016) AND *WATKINS V DEANGELO-KIPP*, 854 F.3D 846 (CA6, 2017). BECAUSE THEY UNFAIRLY INFRINGE ON PETITIONER'S ABILITY TO PRESENT HIS CLAIMS FOR REVIEW. US CONST, AMS VI, XIV; CONST, 1963, ART 1, §§ 17, 20.

This Court must grant relief if a state court's adjudication of a federal claim 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state-court decision is contrary to clearly established Federal Law if the state court reaches a conclusion on a question of law opposite to that of the Supreme Court, or the state court decides a case different that the Supreme Court "on a set of materially indistinguishable facts." *Williams v Taylor*, 529 U.S. at 401, 405, 413. If the state court applies the wrong rule, § 2254(d)'s bar to relief is satisfied, and further analysis of the reviewing federal habeas court "will be unconstrained by § 2254(d)(1)." *Williams v Taylor*, 529 U.S. at 406.

Here, petitioner relies on his previously filed amended petition for writ of habeas corpus, and argues that the State Courts' treatment of his issues was contrary to recognized federal law. Even if this Court must defer to the state courts' adjudication, habeas relief is warranted because the state court adjudication

"resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). This occurs where a state court "identifies the correct governing legal principle in existence at the time, but unreasonably applies that principle to the facts of the petitioner's case." *Pouncy v Palmer*, 846 F.3d 144, 158 (CA6, 2017).

Again, Petitioner relies on his previously filed amended petition for writ of habeas corpus, and argues that the State Courts' treatment of his issues was an unreasonable application of recognized federal law. As the E.D. Mich. Judge recognized, he was essentially prevented from considering the claims in the amended petition because of this Sixth Circuit's ruling in *Hill v Mitchell*, 842 F.3d 910, 924 (CA6, 2016) and *Watkins v Deangelo-Kipp*, 854 F.3d 846 (CA6, 2017), (See APP. C, Opinion & Order denying Petition for Writ of Habeas Corpus and Granting a Certificate of Appealability). The Judge went on to note, however, that the Sixth Circuit should reconsider these rulings as they apply to situations where, like here, the petitioner is severely mentally ill since these restrictions against such a petitioner is a violation of due process:

> This Court also believes that the Sixth Circuit should reconsider its decision in this case and in Hill and its progeny which, in this Court's opinion, employ a far too restrictive standard in determining whether a claim in an amended petition relates back to a claim that was filed in an original petition, particularly if that petition was filed pro se by a petition with a history of mental illness like Petition.

(See APP. C, Opinion & Order denying Petition for Writ of Habeas Corpus and Granting a Certificate of Appealability).

This Court took up a similar issue – whether it violates due process to restrict consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity. *Clark v Arizona*, 548 U.S. 735 (2006). In Clark, finding that there was not a due process violation, the Court reasoned that "a State's insistence on preserving its chosen standard of legal insanity cannot be the sole reason for a rule [like this]" *Clark v Arizona*, 548 U.S. at 773. That same year, the Court held in *Holmes v South Carolina*, 547 U.S. 319 (2006) that rules invading an accused's ability to present a defense cannot be arbitrary or disproportionate:

> State and federal lawmakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.... This latitude, however, has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.... This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purpose they are designed to serve.

Holmes v South Carolina, 547 U.S. at 324-325 (internal citations and quotation marks omitted).

In *Hill v Mitchell* and *Watkins v Deangelo-Kipp*, the Sixth Circuit did not expound on why the rule is not arbitrary or disproportionate but instead preserves the legislator's preferred standard, a comprehensive statutory scheme setting forth requirements for and effects of filing a supplemental habeas petition, irrespective of either mental illness or mental retardation. The court essentially stated it was

excluding such considerations when deciding whether a petitioner with severe mental illness may rely on equitable tolling. This is the very explanation this Court said was insufficient.

These justifications provided by the court are inapplicable to habeas petitions. Certainly, the complexities of mental illness, and the individual nature of its effects, remain a valid concern. Further, this case starkly demonstrates one of the problems with eliminating the equitable tolling for petitioners with severe mental illness. It gave the attorney general the ability to simply say the supplemental issues do not relate back to the original petition, content in the knowledge that Petitioner could not argue that, at a minimum, his mental illness prevented him from conforming to these stringent rules. Consequently, the Government did not even need to support their position – they could just agree with Petitioner's long-standing diagnosis of a serious mental illness and argue that it did not matter, that he was nonetheless "out of luck" so to speak. Without any justification besides undue deference to a legislative scheme, the holdings in *Hill v Mitchell* and *Watkins v Deangelo-Kipp* are no longer justifiable or constitutional. Due Process requires a new rule: that Petitioner may argue the issue he raised in his supplemental petition, and may do so outside the limitations period pursuant to equitable tolling.

III. PETITIONER'S FIRST PETITION FOR A WRIT OF HABEAS CORPUS, FILED IN 2008, SHOULD BE THE STARTING POINT WHEN DECIDING IF THE ISSUES RAISED IN HIS AMENDED PETITION CAN "RELATE BACK" TO THAT ORIGINAL FILING, AND ALTERNATIVELY HIS MENTAL ILLNESS ENTITLES HIM TO "EQUITABLE TOLLING." US CONST, AMS VI, XIV; CONST, 1963, ART 1, §§ 17, 20.

In granting a certificate of appealability in this case, the district court observed, "[t]he Sixth Circuit should . . . address the argument raised by Petitioner in his supplemental brief, namely, whether the current petition should relate back to his previously dismissed 2008 petition." (See APP. C, Opinion and Order denying habeas petition and granting certificate of appealability).

In this case, Petitioner filed two habeas petitions – one in 2008 and one in 2010. Petitioner's initial 2008 habeas petition was filed *pro per*, but was dismissed as deficient because he failed to pay the $5.00 filing fee or an application to proceed *in forma pauperis* (Case No. 2:08-cv-14507). After Petitioner re-filled another habeas petition in 2010, it was this petition that the district judge utilized in finding that the amended petition subsequently filed by retained counsel did not "relate back" to the 2010 petition, making the amendments untimely. It has been repeatedly argued, however, that Petitioner was, and still is, severely mentally ill, and that applying the "relate back" rule of *Mayle v Felix*, 545 U.S. 644 (2005) violates Petitioner's due process rights. As stated throughout, the factual basis underlying the claims have remained the same, and any small refinement to his petition (which was prepared subsequently by retained counsel) should relate back

to the original filing date, and so Petition's additional claims could be considered timely.

In granting a certificate of appealability in this case, the district court also observed, "in light of the extensive history of Petitioner's mental illness, jurists of reason could disagree over whether the limitations period should be equitably tolled on this basis." (See APP. C, Opinion and Order denying habeas petition and granting certificate of appealability). The government argues that Petitioner had not set forth any argument in the district court or on appeal as to why he is entitled to equitable tolling, claiming that, "He does not explain why any alleged incompetency prevented him from timely raising his claims, especially in light of his other timely pro se filings. He does not discuss his mental health *at all.*" (Appellee Brief, Doc 13, p. 30)(emphasis in original).

This argument ignores the fact that Petitioner discussed in great detail his extensive and well-documented history of serious mental illness, as well as his psychotic behavior during the pre-trial period and at trial, in the amended habeas petition. This was also the basis for initially granting habeas relief by the district court. See, *Watkins v Haas*, 143 F. Supp. 3d 632, 634-637 (E.D. Mich, 2015). The district court ultimately concluded that Petitioner was entitled to equitable tolling because of this history of mental incapacity. In this regard, here can be no question that Petitioner has pursued the claims in his petition diligently, but was hampered by his mental illness. Equitable tolling is appropriate if the petitioner has been pursuing his claim diligently, and the timely petition was defective because of non-

exhaustion but the defect was curable. See, *Butler v Long*, 752 F.3d 1177, 1181 (CA9, 2014).

IV. PETITIONER SUBMITS THAT THIS IS THE APPROPRIATE CASE FOR THIS COURT TO RECONSIDER ITS PRIOR DECISION. US CONST, AMS VI, XIV; CONST, 1963, ART 1, §§ 17, 20.

Petitioner submits that this is the appropriate case for this Court to reconsider the Sixth Circuit's decisions in *Hill v Mitchell*, 842 F.3d 910 (CA6, 2016) and *Watkins v Deangelo-Kipp*, 854 F.3d 846 (CA6, 2017). In granting a certificate of appealability in this case, the district court observed, "[t]his court also believes that the Sixth Circuit should reconsider its decision in this case and in Hill and its progeny which, in this court's opinion, employ a far too restrictive standard in determining whether a claim in an amended petition relates back to a claim that was filed in an original petition, particularly if that petition was filed pro se by a petitioner with a history of mental illness like Petitioner." (See APP. C, Opinion and Order denying habeas petition and granting certificate of appealability).

The government argues that, "Sixth Circuit Rule 32.1 provides that 'published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc." To that end, the Sixth Circuit has held, "One panel of this court may not overrule the decision of another panel; only the en banc court or the United States Supreme Court may overrule the prior panel." *United States v Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017)." (Appellee Brief, Doc 13, p 26).

Petitioner concedes this assertion is true. However, since this case puts this issue squarely before the Court, the Court now has the opportunity to reevaluate the decision of the Sixth Circuit and adopt a standard that relaxes the "relate back rules" when dealing with severely mentally ill Petitioners, especially when they cannot be held to the same standards as experienced attorneys.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Petitioner submits that he has presented the Court with compelling reasons for consideration and ask that this Court grant the petition for a writ of certiorari, further Petitioner ask that the Court reverse his convictions and remand this matter to the Sixth Circuit Court of Appeals for reconsideration of the issues raised in the supplemental petition, or in the alternative with appropriate instructions to reconsider its holdings in *Hill v Mitchell* and *Watkins v Deangelo-Kipp* as they apply to mentally ill petitioners.

Respectfully submitted,

/s/

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