Case No. _____

In The Supreme Court Of The United States

DANNY LEE HILL, Petitioner,

vs.

TIM SHOOP, Respondent.

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

---

Petition For Writ Of Certiorari

Stephen C. Newman (Ohio Bar 51928)
Federal Public Defender

Sharon A. Hicks (Ohio Bar 76178)
Assistant Federal Public Defender
Counsel of Record

Office of the Federal Public Defender
Capital Habeas Unit
1660 West Second Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856; (216) 522-1951 (f)
sharon_hicks@fd.org

Counsel for Danny Lee Hill

Capital Case

Question Presented for Review

Section 2254 habeas corpus proceedings exist for state prisoners to vindicate their federal constitutional rights. Through the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress sought to conserve judicial resources, reduce piecemeal litigation, and streamline federal habeas proceedings. As a result, it imposed heightened gateway requirements that petitioners must meet before filing a "second or successive" petition. 28 U.S.C. § 2244(b)(2). But those gatekeeping provisions apply only to petitions that are abusive, or would otherwise negatively implicate AEDPA's purposes. As this Court and the Circuits have explained, (1) the term "second or successive" petition is a term of art that must be defined in reference to the historical abuse-of-the-writ doctrine, which bars only those claims that could have been (but were not) raised in the first petition; and (2) requiring petitioners to file unripe claims in their initial habeas petition wastes judicial resources, increases piecemeal litigation, and does not contribute meaningfully to the finality of state convictions. Therefore, as this Court explained in *Panetti v. Quarterman*, petitions raising newly ripened claims are not "second or successive," and are not subject to the heightened gatekeeping provisions of § 2244(b)(2).

Mr. Hill was convicted and sentenced to death in 1986 for aggravated murder, based on "scientific" testimony that Mr. Hill (and only Mr. Hill) could have caused a "bitemark" on the victim's penis. That testimony constituted the only direct evidence

that Mr. Hill was an active participant in the crime, rather than a passive observer. Decades after Mr. Hill filed his initial habeas petition challenging that conviction, the American Board of Forensic Odontology ("ABFO") invalidated the bitemark science used to convict Mr. Hill of aggravated murder. No longer are forensic odontologists permitted to opine that any particular individual created a particular bitemark. Not only that, Mr. Hill presented expert testimony that, applying the current (and correct) scientific standards, the injury to the victim was *not even a human bitemark*.

Mr. Hill promptly raised a federal constitutional challenge based on the invalidation of the bitemark testimony in state court. Following the Ohio state courts' rejections of this challenge, Mr. Hill filed a habeas petition in the district court. The district court determined that Mr. Hill's petition was "second or successive," and transferred his case to the Sixth Circuit for authorization pursuant to § 2244(b)(2). The Sixth Circuit panel agreed with Mr. Hill that his petition was not "second or successive," but the full court vacated the panel's decision and, sitting en banc, determined that Mr. Hill's petition was "second or successive." It returned Mr. Hill's case to the panel for a determination pursuant to § 2244(b)(2). In so holding, the Sixth Circuit strayed from the precedent of this Court and the Circuits. Mr. Hill now raises the following question for this Court's review:

> Is a habeas petition "second or successive" when the factual predicate giving rise to the petitioner's claim occurs long after the petitioner filed his initial habeas petition?

List of Parties

The caption to this petition contains the only parties to this petition for writ of certiorari.

Corporate Disclosure

There are no corporate disclosures necessary for this case.

List of Proceedings

1. **Trial Court**: *State v. Hill*, No. 85-CR-371 (C.P. Trumbull Cty. Ohio) (February 6, 1986).
2. **Direct Appeal**:
   a. *State v. Hill*, Nos. 3720, 3745 (11th Dist. Ct. App. Ohio) (Nov. 27, 1989).
   b. *State v. Hill*, No. 1990-0177 (Ohio Sup. Ct.) (Aug. 12, 1992).
3. **State Post-Conviction Proceedings:**
   a. *State v. Hill*, No. 85-CR-371 (C.P. Trumbull Cty. Ohio) (Nov. 27, 1989).
   b. *State v. Hill*, No. 94-T-5116 (11th Dist. Ct. App. Ohio) (June 16, 1995).
   c. *State v. Hill*, No. 1995-1577 (Ohio Sup. Ct.) (Nov. 15, 1995) (declined to accept jurisdiction).
   d. *State v. Hill*, Case No. 85-CR-371 (C.P. Trumbull Cty. Ohio) (Feb. 15, 2006) (*Atkins* litigation).
   e. *State v. Hill*, No. 2006-T-0039 (11th Dist. Ct. App. Ohio) (July 11, 2008) (*Atkins* litigation).
   f. *State v. Hill*, No. 2008-1686 (Ohio Sup. Ct.) (declined to accept jurisdiction) (*Atkins* litigation).
   g. *State v. Hill*, No. 85-CR-371 (C.P. Trumbull Cty. Ohio) (May 1, 2023) (*Atkins* litigation).
   h. *State v. Hill*, No. 2023-T-0039 (11th Dist. Ct. App. Ohio) (pending) (*Atkins* litigation).
4. **Federal Habeas Proceedings:**
   a. *Hill v, Anderson*, No. 96-CV-795 (N.D. Ohio) (Sept. 29, 1999).
   b. *Hill v. Anderson*, No. 99–4317 (6th Cir.) (Aug. 13, 2002) (remanding with instructions to stay proceedings).

c. *Hill v. Anderson*, No. 96-CV-795 (N.D. Ohio) (June 25, 2014).

d. *Hill v. Anderson*, Nos. 99–4317, 14–3718 (6th Cir.) (Feb. 2, 2018).

e. *Shoop v. Hill*, No. 18–56 (U.S.) (Jan. 7, 2019) (per curiam).

f. *Hill v. Anderson*, Nos. 99–4317, 14–3718 (6th Cir.) (May 20, 2020).

g. *Hill v. Shoop*, Nos. 99–4317, 14–3718 (6th Cir.) (Aug. 20, 2021) (en banc).

h. *Hill v. Shoop*, No. 21-6428 (June 30, 2022) (petition for writ of certiorari denied).

5. Bitemark State Post-Conviction Proceedings:

a. *State v. Hill*, No. 85-CR-371 (C.P. Trumbull Cty. Ohio) (Oct. 3, 2016).

b. *State v. Hill*, No. 2016-T-0099 (11th Dist. Ct. App. Ohio) (Dec. 3, 2018).

c. *State v. Hill*, No. 2019-0068 (Ohio Sup. Ct.) (June 12, 2019) (declined to accept jurisdiction).

6. Bitemark Federal Habeas Proceedings:

a. *Hill v. Shoop*, No. 4:20-cv-01294 (N.D. Ohio) (Aug. 14, 2020).

b. *In re Hill*, No. 20-3863 (6th Cir.) (Aug. 30, 2022).

c. *In re Hill*, No. 20-3863 (6th Cir.) (Aug. 25, 2023) (en banc).

Table of Contents

Page No.

Appendix:

Table of Authorities

Cases **Page No.**

Statutes

Other Authorities

Case No. _____

In The Supreme Court Of The United States

DANNY LEE HILL, Petitioner,

vs.

TIM SHOOP, Respondent.

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

---

Danny Lee Hill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Citations to Opinions Below

The District Court of the Northern District of Ohio transferred Mr. Hill's case to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3). *Hill v. Shoop*, No. 4:20-cv-01294 (N.D. Ohio Aug. 14, 2020). That order is found in the Appendix at A-1.

The Sixth Circuit Court of Appeals found that the requirements of 28 U.S.C. § 2244(b)(2) did not apply to Mr. Hill's Petition and transferred Mr. Hill's Petition to the district court for further proceedings. *In re Hill*, No. 20-3863, 2022 WL 19222585 (6th Cir. Aug. 30, 2022). That order is found in the Appendix at A-2. The Sixth Circuit Court of Appeals vacated the panel's order, *In re Hill*, 62 F.4th 1039 (6th Cir. 2023), and that order is found in the Appendix at A-3.

The Sixth Circuit Court of Appeals, sitting en banc, issued the opinion under review in this petition in *In re Hill*, No. 20-3863, 2023 WL 5493261 (6th Cir. Aug. 25, 2023) (en banc), and that opinion is found in the Appendix at A-4.

Jurisdictional Statement

The United States Court of Appeals for the Sixth Circuit, sitting en banc, held that Mr. Hill's Petition must meet the provisions of 28 U.S.C. § 2244(b)(2) and returned the case to the panel for adjudication pursuant to 28 U.S.C. § 2244(b)(3). *In re Hill*, No. 20-3863, 2023 WL 5493261 (6th Cir. Aug. 25, 2023) (en banc). This Court has jurisdiction to review the Court of Appeals judgment issued below under 28 U.S.C. § 1254(1). *See Castro v. United States*, 540 U.S. 375, 380–81 (2003).

Constitution and Statutory Provisions

28 U.S.C. § 2244(b)(2) states, in pertinent part:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The United States Constitution, Fourteenth Amendment, Section 1 states, in pertinent part:

> 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.

STATEMENT OF THE CASE

Mr. Hill was convicted and sentenced to death in 1986 for the aggravated rape and murder of Raymond Fife. Mr. Hill contacted the police voluntarily, seeking to share information he claimed he possessed about the assault on Fife. During a long and coercive interrogation by the police, the young and intellectually disabled Mr. Hill made several erratic and inconsistent statements to the police, some of which suggested he witnessed Timothy Combs's assault and murder of Fife. Throughout the extended interrogation, Mr. Hill repeatedly and unequivocally named Combs as the sole perpetrator of the assault and murder.

At Mr. Hill's trial, in order to convict him of aggravated murder with death specifications, the State argued that Mr. Hill had actively participated in the assault, rape, and murder of Fife. The crucial evidence at trial—which "established" Mr. Hill's active participation—was the testimony of Dr. Curtis Mertz.[1] A-5, at *16, 28–30, 33 (the Ohio Supreme Court concluded that Mr. Hill's theory of the case was "overwhelmingly negated" by the bitemark evidence). Dr. Mertz, a forensic odontologist and the former president of the American Board of Forensic Odontology ("ABFO"), testified that a purported bitemark on Fife's penis was, in Dr. Mertz's "professional opinion, with a reasonable degree of medical certainty" made by Mr.

[1] At Mr. Hill's trial, the other evidence presented against him was circumstantial and, at most, tended to establish the possibility that Mr. Hill was present and witnessed Combs's assault of Fife. There was no blood, fingerprints, or other forensic evidence that connected Mr. Hill to the crime. A-5, at 20–21, 1196.

Hill's teeth indentation. A-5, at 937. In 1986, when Mr. Hill was tried, ABFO guidelines permitted odontologists, such as Dr. Mertz, to conclude that an individual was the biter that left a bitemark indentation. A-8, at 115–16. Under that incorrect and since-repudiated scientific standard, the ABFO guidelines endorsed a view (broadly accepted by courts at the time) that odontologists could, with medical and scientific accuracy, reliably identify which individual had created a particular bitemark. At the time of Mr. Hill's trial and for years after, this type of testimony was widely admissible in court. *See, e.g.*, *Spence v. State*, 795 S.W.2d 743, 751–52 & n.7 (Tex. Crim. App. 1990).

Decades after Mr. Hill's conviction, and after Mr. Hill had already unsuccessfully challenged his conviction and sentence in federal habeas proceedings, the field of forensic odontology underwent a seismic shift. The individualized bitemark identification—such as was used to convict Mr. Hill—was completely discredited and repudiated as a science.

That process began in 2009 when the National Academy of Sciences (NAS) released a landmark report concluding that individualized bitemark identification lacked sufficient support to be scientifically valid. A-7, at 4–8. In particular, the NAS concluded that there were no reliable scientific methods that permitted odontologists to determine the uniqueness of, or lack thereof, a given bitemark such that a particular bitemark could be associated with an individual biter with any degree of probability. *Id.* at 174. Given the unscientific nature of the inquiry, "different experts provide[d] widely differing results and a high percentage of false positive matches of

bitemarks using controlled comparison studies." *Id.* The NAS report concluded that there was *no* "existing scientific basis" for individualized bitemark identification. *Id.* at 176.

In response to the findings of the NAS and further study, the ABFO in 2013 issued amended guidelines that drastically limited the scope of individualized bitemark identification. *See* A-8, at 117. Those updated guidelines prohibited forensic odontologists from identifying an individual as the "biter" in open population bitemark identification cases. *Id.*

As yet more investigation into the science of bitemark identification continued, the acceptable parameters of bitemark identification narrowed even further. A 2016 construct validity study revealed that not only were forensic odontologists unable to reliably and accurately identify whether distinct features existed on an individual bitemark, they were unable to reliable or accurately determine if a patterned injury *was a human bitemark at all*. A-24. In response, the ABFO concluded that forensic odontologists could not reliably or accurately conclude that any individual's teeth had been responsible for an individual bitemark, and further amended its guidelines to eliminate individualized bitemark identification in all cases. *See Howard v. State*, 300 So.3d 1011, 1017–18 (Miss. 2020) ("And in 2016, the ABFO again revised its guidelines and eliminated individualization entirely."); *see also Ex parte Chaney*, 563 S.W.3d 239, 260–61 & n.41 (Tex. Crim. App. 2018) ("The new Guidelines, as published in March 2016, prohibit individualization testimony in all cases"). Pursuant to the 2016 ABFO guidelines, forensic odontologists can only broadly conclude that an

individual *cannot be eliminated* as the potential biter (a conclusion that, as an evidentiary matter, is nearly worthless). A-9, at 102; *see also State v. Denton*, No. 04-R-330, 2020 WL 7232303, at *6, 13 (Ga. Super. Ct. Feb. 07, 2020) (explaining that "cannot be excluded as the biter" testimony "will likely be deemed highly prejudicial and of little probative value in the future"). This was not a mere change in the scientific standards of individualized bitemark identification; rather, it was a declaration that individualized bitemark identification was never a science *at all*. As a result, "numerous decisions [have] granted relief based on the change in the ABFO Guidelines." *Denton*, 2020 WL 7232303, at *8; *see also, e.g.*, *Howard v. State*, 300 So. 3d 1011, 1013 (Miss. 2020); *Ex parte Chaney*, 563 S.W.3d at 260–61, 278.

In response to the seismic shift in forensic science that invalidated the evidence used to convict him, Mr. Hill promptly moved for leave to file a delayed motion for a new trial. A-10. Mr. Hill argued that the new ABFO guidelines demonstrated constitutional infirmities with his trial. *Id.* Finding that he was "unavoidably prevented" from presenting this evidence earlier, the state court permitted Mr. Hill to file a new-trial motion, and he did so in 2016. A-11. In support of his new-trial motion, Mr. Hill included the affidavit of Dr. Franklin Wright, a forensic odontologist and a former president of the ABFO. Dr. Wright's new affidavit did not constitute a mere battle of experts. A-12, at 1. Following the sea change in forensic science that utterly discredited and invalidated individualized bitemark identification as a field of science, Dr. Wright explained that it was simply "not possible" to determine that Fife's injury was caused by Mr. Hill or any other potential biter. *Id.* at 3–4. Even

had the wound on Fife's genitals been made by a human bitemark—it was not—scientifically valid methods would only have permitted a forensic odontologist to determine whether Mr. Hill could be excluded as a potential biter, not whether he had been the biter. *Id.* In any event, Dr. Wright's review of the bitemark in Mr. Hill's case, pursuant to scientifically valid methods, determined that Fife's injury was *not even a human bitemark*. *Id.* As a result, Mr. Hill *could not* have been the biter. *Id.* Troublingly, Dr. Wright also worked closely with Dr. Mertz, the key expert at Mr. Hill's trial, and had observed Dr. Mertz make extremely racist comments regarding, and use racial epithets referring to, Mr. Hill. A-13, at 7. Further, based on his conversations with Dr. Mertz regarding the case, Dr. Wright believes that Dr. Mertz's racial bias affected his analysis of, and testimony about, the alleged "bitemark." *Id.* Absent the conclusion that Mr. Hill's teeth created the wound on Fife's penis, Mr. Hill was entitled to a new trial.[2]

The trial court rejected Mr. Hill's claims and—based on an arbitrary and erroneous application of *res judicata* in contravention of Ohio law—refused to fairly reexamine and apply the required standard to Mr. Hill's case. *See* A-25. Ohio's Eleventh District Court of Appeals affirmed, A-15, and the Ohio Supreme Court declined to accept jurisdiction, A-16.

[2] Mr. Hill presented additional evidence of his innocence, including evidence that his statements to the police were coerced and therefore unreliable, A-14, at 3–5, and evidence that the trial testimony regarding the injuries to the victim was not scientifically sound, A-22, at 3.

As a result, Mr. Hill filed a habeas petition in the district court. He argued that the invalidation of the individualized bitemark identification evidence used to convict him rendered his trial fundamentally unfair in violation of his due process rights and that the state court's arbitrary adjudication of his new-trial motion deprived him of due process. A-17, at 41–9. Instead of considering the merits of his petition, the district court determined that it was "second or successive" and transferred his case to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3). A-1, at 1–2.

The Sixth Circuit Court of Appeals panel found that the requirements of 28 U.S.C. § 2244(b)(2) did not apply to Mr. Hill's petition because it was *not* a "second or successive" petition as defined by this Court's precedent and transferred Mr. Hill's petition to the district court for further proceedings. A-2. The Sixth Circuit Court of Appeals vacated the panel's order, A-3, and, sitting en banc, concluded that Mr. Hill's petition was "second or successive" and therefore subject to the requirements of 28 U.S.C. § 2244(b)(2), A-4.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's decision conflicts with decisions of this Court and that of other Circuits on the same important matter.

The narrow question presented here is whether Mr. Hill's habeas petition is "second or successive" when the factual predicate giving rise to his claim—the invalidation of the bitemark science used to convict him—*had not yet occurred* when he filed his prior petition. That answer is straightforward: his petition is not "second

or successive" under § 2244(b), and thus he need not seek authorization to proceed in the district court. Precedent from this Court, authority from the Circuits, and the statutory scheme all compel that conclusion. The Sixth Circuit's contrary conclusion departs from that precedent and thus merits certiorari and reversal.

A. Decisions of this Court and other Circuits all make clear that a second petition is not "second or successive" where the factual predicate for the claim did not exist at the time of the prior petition.

Section 2244(b) states that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless" the applicant shows that (1) he relies on a new, retroactive rule of constitutional law, or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2). The statute makes clear that the applicant must meet those heightened requirements *only* if his application is "second or successive." *Id.* If his application does not qualify as "second or successive," a habeas petitioner need not satisfy the requirements of § 2244(b), even if his application is second-in-time.

This Court has explained that "Congress did not define the phrase 'second or successive,'" but "it is well settled that the phrase does not simply refer to all § 2254 applications filed second or successively in time." *Magwood v. Patterson*, 561 U.S.

320, 331–32 (2010) (brackets omitted). Rather, the term "second or successive" "is a term of art" that is "given substance in [] prior habeas corpus cases," *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), including those "predating AEDPA's enactment," *Banister v. Davis*, 140 S. Ct. 1698, 1705–06 (2020) (brackets omitted). To determine what qualifies as "second or successive," courts "look[] for guidance in two main places." *Id.* First, courts consider "historical habeas doctrine and practice." *Id.* Specifically, they ask "whether a type of later-in-time filing would have constituted an abuse of the writ, as that concept is explained in [] pre-AEDPA cases." *Id.* (brackets and quotation marks omitted); *see also id.* at 1707 ("Congress passed AEDPA against this legal backdrop, and did nothing to change it" and particularly "did not redefine what qualifies as a successive petition"). A petitioner abuses the writ "by raising a claim in a subsequent petition that he could have raised in his first." *McCleskey v. Zant*, 499 U.S. 467, 489 (1991). Conversely, petitioners who raise claims that they could not have raised in a prior habeas petition have not abused the writ. *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005); *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003); *Crouch v. Norris*, 251 F.3d 720, 724 (8th Cir. 2001). If a petitioner raises a claim that would have been an abuse of the writ under this Court's pre-AEDPA cases "it is successive; if not, likely not." *Banister*, 140 S. Ct. at 1706. Second, courts must consider "the implications for habeas practice" given "AEDPA's own purposes" of "conserv[ing] judicial resources, reduc[ing] piecemeal litigation, and lend[ing] finality to state court judgments within a reasonable time." *Id.* (quotation marks omitted).

Two key decisions of this Court exemplify this analysis. In *Stewart v. Martinez-Villareal*, this Court held that a competency-to-be-executed claim under *Ford v. Wainwright*, 477 U.S. 399 (1986) was not "second or successive" where the petitioner included the claim in a prior petition, but the district court had dismissed that claim as premature. 523 U.S. 637, 644–45 (1998). This Court explained that a contrary holding "would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Id.* at 645. Then, in *Panetti v. Quarterman*, this Court expanded that reasoning to *Ford* claims raised for the first time in a second-in-time petition. 551 U.S. 930 (2007). This Court explained that requiring "unripe (and, often, factually unsupported) claims to be raised as a mere formality" in the first petition does nothing to "conserve judicial resources, reduce piecemeal litigation, or streamline federal habeas proceedings." *Panetti*, 551 U.S. at 946–47 (brackets and quotation marks omitted). Nor would those claims be barred by the historical abuse-of-the-writ doctrine, as "claims of incompetency to be executed remain unripe at early stages of the proceedings" and so could not have been brought earlier. *Id.* at 947. Likewise, this Court explained that it would not construe AEDPA "in a manner that would require unripe (and often factually unsupported) claims to be raised as a mere formality, to the benefit of no party." *Panetti*, 551 U.S. at 947. As a result, this Court reasoned that § 2244(b)'s statutory bar does not apply to a "claim brought in an application filed when the claim is first ripe." *Id.*

"The considerations [this] Court identified in support of its holding [in *Panetti*] are not specifically limited to *Ford* claims." *United States v. Lopez*, 577 F.3d 1053, 1064 (9th Cir. 2009); *see also Long v. Hooks*, 972 F.3d 442, 486 (4th Cir. 2020) (Wynn, J., concurring) (explaining that *Panetti* "left the door open to other[]" exceptions to the second-or-successive rule). That conclusion is consistent with the longstanding history of the abuse-of-the-writ doctrine. *See McCleskey*, 499 U.S. at 479.

In numerous earlier decisions, the Sixth Circuit faithfully applied this Court's precedent in holding that "a numerically second petition is not properly termed 'second or successive' to the extent it asserts claims whose predicates arose after the filing of the original petition." *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010) ("*In re Curtis Jones*"). "In other words, if 'the events giving rise to the claim had not yet occurred' when the petitioner filed his original habeas petition, his subsequent petition raising this claim need not meet § 2244(b)'s requirements." *In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018). For example, in a case with facts similar to Mr. Hill's, a habeas petitioner asserted claims relating to the state court's denial of his motion for a new trial based on new DNA test results. *In re Harris*, No. 17-2063, 2018 U.S. App. LEXIS 13875, at *1–3 (6th Cir. May 24, 2018). The Sixth Circuit correctly held that the claims were not second or successive because "[t]he events giving rise to" the claim "began in 2016 when [the applicant] first obtained that testing," and thus he "could not have presented those claims in a prior habeas petition." *Id.*

The Sixth Circuit time and again reaffirmed this rule. *See, e.g.*, *In re Boler-Bey*, No. 22-3542, 2022 U.S. App. LEXIS 32875, at *6 (6th Cir. Nov. 29, 2022) ("[T]he

factual predicate for that due process claim concerning the 2020 docket entry did not arise until August 24, 2020, so that claim is not second or successive."); *In re Cox*, No. 22-3729, 2023 U.S. App. LEXIS 1774, at *3 (6th Cir. Jan. 24, 2023) ("Cox's proposed habeas petition is not second or successive because the factual predicate for his proposed claims did not arise until several years after his initial petition was fully adjudicated."). Just last year, the Sixth Circuit confirmed that when the events giving rise to a habeas claim "have not yet occurred at the time of" the first petition, a later application "predicated on those events is not 'second or successive.'" *In re Jones*, 54 F.4th 947, 949–50 (6th Cir. 2022) ("*In re Ronald Jones*") (brackets and quotation marks omitted). "History and statutory context confirm[ed] this conclusion." *Id.* at 950. "American courts have long entertained repeat habeas petitions 'when subsequent occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration'" consistent with the abuse-of-the-writ doctrine. *Id.* (citation omitted). Moreover, "this background rule fits well with AEDPA's underlying concerns" because "applying [the] gatekeeping requirements to claims like [the applicant's] could well *deplete* judicial resources and *increase* piecemeal litigation if, say, prisoners responded by packing their first [habeas] petitions with speculative or unripe claims." *Id.*

Other Circuits "all agree": a claim is not "second or successive" where the factual predicate for the claim did not arise until after the first petition. *Id.* (citing cases); *see also In re Curtis Jones*, 652 F.3d at 606 (same). For example, in *Garcia v. Quarterman*, the petitioner brought a claim alleging that "the Texas courts refused

to afford review" of his case after then-president George W. Bush ordered the states to review cases pursuant to the International Court of Justice's *Avena* decision. 573 F.3d 214, 220 (5th Cir. 2009). The Fifth Circuit reasoned that since the "Bush declaration was not issued until after [the applicant's] first petition was denied, the basis for his claim—Texas's refusal to conduct the review of his conviction—did not occur until well after proceedings on his first petition had concluded." *Id.* at 223–24. Thus, the petitioner's claim was not "second or successive." *Id.*

Until the en banc decision in this case, this factual-predicate rule was uniformly applied by the circuits. *See, e.g.*, *United States v. Orozco-Ramirez*, 211 F.3d 862, 866–71 (5th Cir. 2000) (application not second or successive where "[t]he facts underlying th[e] claim did not occur until after [the applicant] filed his initial habeas motion"); *Brown v. Atchley*, 76 F.4th 862, 864–73 (9th Cir. 2023) (same); *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (same); *United States v. Hairston*, 754 F.3d 258, 261–62 (4th Cir. 2014) (same); *Stewart v. United States*, 646 F.3d 856, 863–65 (11th Cir. 2011) (same); *In re Weathersby*, 717 F.3d 1108, 1110–11 (10th Cir. 2013) (same); *Restucci v. Bender*, 599 F.3d 8, 9–10 (1st Cir. 2010) (same); *United States v. Obeid*, 707 F.3d 898, 902–03 (7th Cir. 2013) (same).

B. The factual predicate for Mr. Hill's claim did not exist at the time of the prior petition, and thus his petition is not "second or successive."

Mr. Hill's petition is not "second or successive," as this Court and the other Circuits have defined it. Mr. Hill's petition did not abuse the writ, because it did not raise "a claim in a subsequent petition that he could have raised in his first." *McCleskey*, 499 U.S. at 489. And the Sixth Circuit's contrary conclusion creates

troubling "implications for habeas practice" given "AEDPA's own purposes" of "conserv[ing] judicial resources, reduc[ing] piecemeal litigation, and lend[ing] finality to state court judgments within a reasonable time." *Banister*, 140 S. Ct. at 1706 (quotation marks omitted).

Critically, when Mr. Hill filed his initial petition in 1996, the bitemark science admitted at his trial had not yet been invalidated, so he could not have asserted a claim alleging that the bitemark science had been invalidated. *See* A-8, at 115–116, 117. Any earlier challenge to the bitemark testimony could have only focused on whether the expert properly identified Hill as the "biter" under the prevailing scientific standards at the time, and not on whether the science itself had been invalidated. The "vital facts" necessary for Mr. Hill to bring a colorable, factually supported, and ripe claim necessarily include the invalidation of individualized bitemark identification. *Rivas v. Fischer*, 687 F.3d 514, 534–35 (2d Cir. 2012). Because the factual predicate underlying Mr. Hill's claim did not occur until long after Mr. Hill filed his original habeas petition, his petition is not "second or successive."

Nor would applying § 2244(b) to applications like Mr. Hill's advance AEDPA's goals. An applicant must generally file his first petition within one year after the conclusion of direct review. *Panetti*, 551 U.S. at 943; 28 U.S.C. § 2244(d). Yet the invalidation of the science underlying a conviction, and the state court's failure to correct the conviction, will almost never occur within that timeframe. *See Scott v. United States*, 890 F.3d 1239, 1249 (11th Cir. 2018) (explaining that *Panetti* was

concerned with the fact that "federal courts are generally unable to address [*Ford*] claims within the time frame for resolving first habeas petitions"). Accordingly, applying § 2244(b) to claims like Mr. Hill's would encourage applicants to file "factually unsupported" claims as "a mere formality," just in case the science underlying their convictions is later invalidated and the state courts then unconstitutionally adjudicate their resulting new-trial motions. *Panetti*, 551 U.S. at 947. Such a rule would "demand clairvoyance—that prisoners predict their claims before they arise." *In re Ronald Jones*, 54 F.4th at 949. It would also "add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Panetti*, 551 U.S. at 943. And, because such claims would be dismissed as factually unsupported, it would foreclose federal review of these types of claims "without any clear indication that such was Congress' intent." *Id.* at 946; *see Lesko v. Sec'y Pa. Dep't of Corr.*, 34 F.4th 211, 227 (3d Cir. 2023) ("We therefore decline to interpret § 2244(b) in a way that allows for [a particular type of] claim to completely evade federal habeas review.").

In this case, such a rule would penalize Mr. Hill for failing to somehow predict the "dramatic change in the scientific understanding and acceptance of the reliability of individualizations in bite-mark analysis in the intervening years" since his first petition. *Howard v. State*, 300 So. 3d 1011, 1018 (Miss. 2020). That is not what § 2244(b) requires. *In re Ronald Jones*, 54 F.4th at 949.

And exempting Mr. Hill's claims from the gatekeeping provisions of § 2244(b) is consistent with § 2244's statutory framework. The statute governs claims where

"the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). But, here, "[w]e are not faced with a claim based on facts that were merely undiscoverable." *Stewart*, 646 F.3d at 863. Rather, Mr. Hill "has presented a claim, the basis for which *did not exist* before" he filed his previous petition. *Id.* (emphasis added). And "courts have been careful to distinguish genuinely unripe claims (where the factual predicate that gives rise to the claim *has not yet occurred*) from those in which the petitioner merely has some excuse for failing to raise the claim in his initial petition (such as when *newly discovered* evidence supports a claim that the petitioner received ineffective assistance of counsel)." *Obeid*, 707 F.3d at 902 (emphases added). The former escapes classification as "second or successive" while the latter does not. *Id.*; *see also United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) (distinguishing between claims "based on events that do not occur until a first petition is concluded" and those involving newly discovered evidence). Mr. Hill's application falls in the former category—his application depends on newly *existing* facts. His application is therefore "not abusive by any definition." *Magwood*, 561 U.S. at 346 (Kennedy, Ginsberg, and Alito, JJ., dissenting). That means it is not "second or successive."

C. The Sixth Circuit's contrary holding conflicts with the precedent from this Court and other Circuits.

The Sixth Circuit determined that because "the bitemark testimony [Mr. Hill] now challenges occurred at trial," the "factual predicates for the claim occurred at trial," meaning his "claim has always been ripe." A-4, at 13. Therefore, the Sixth Circuit concluded, Mr. Hill must now meet the § 2244(b)(2) gatekeeping provisions.

Id. at 13–14. That holding directly conflicts with this Court's "second or successive" jurisprudence, as well as other Circuits' application of this Court's precedent to claims like Mr. Hill's.

As explained above, precedent from this Court and the Circuits makes clear that where the factual predicate to a claim *had not yet occurred* at the time of the prior petition, a second petition raising that claim is not "second or successive." *See supra* at 11–16. Again, the factual predicate for Mr. Hill's claim is the invalidation of bitemark science, something that did not occur until 2013—well after he had filed his first petition. Accordingly, as the dissent explained, "the majority's approach cannot be reconciled with more than two decades of Supreme Court precedent recognizing that a second-in-time habeas petition is not second or successive when the petitioner could not have 'receive[d] an adjudication of his claim' when he filed his earlier petition, *Martinez-Villareal*, 523 U.S. at 645." A-4, at 31.

Moreover, the Sixth Circuit's holding that the "factual predicates for the claim occurred at trial" is incorrect. A-4, at 13. The "factual predicates" for a claim are the "'vital facts' underlying the claim"—i.e., "those without which the claim would necessarily be dismissed under Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts . . . or Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Rivas*, 687 F.3d at 534–35 (citing *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007) and *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998)). The invalidation of bitemark evidence is a "vital fact" to Mr. Hill's claim—he could not assert a claim premised on the invalidation of bitemark evidence if such an

invalidation had not yet occurred.[3] By holding otherwise, the Sixth Circuit has essentially determined that the factual predicate for an invalidated-science claim occurs at trial—before the science has even been invalidated. That makes no sense as a matter of fact and law.

And because the factual predicate for Mr. Hill's claim did not occur until 2013, the Sixth Circuit was wrong to conclude that his claim "has always been ripe." A-4, at 13. "A claim is unripe when 'the events giving rise to the claim had not yet occurred," *In re Tibbetts*, 869 F.3d 403, 406 (6th Cir. 2017) (quoting *In re Curtis Jones*, 652 F.3d at 605), or when it otherwise "depends on future events that may never come to pass, or that may not occur in the form forecasted," *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 72 (1st Cir. 2003). The "events giving rise" to Mr. Hill's claim is the invalidation of the bitemark science, which (again) did not occur until 2013.

To illustrate the Sixth Circuit's error, consider how the federal courts would have adjudicated Mr. Hill's claim if he had raised it in his first habeas petition. Mr.

[3] While the *legal basis* of Mr. Hill's due process claim may have occurred at trial, the *factual predicate*—the invalidation of individualized bitemark identification—*did not occur* until 2013. *See, e.g.*, *Escamilla v. Jungwirth*, 426 F.3d 868, 871 (7th Cir. 2005) (distinguishing between the legal claim and the factual predicate for the legal claim), *abrogated on other grounds*, *McQuiggin v. Perkins*, 569 U.S. 383, 391 (2013); *Sims v. Subia*, 2015 WL 3750450, at *17 (C.D. Cal. June 14, 2015) (factual predicate of a claim is distinct from the "legal basis for the claim"); *Jones v. Burnette*, 2008 WL 2516483, at *3 (S.D. Ga. June 20, 2008) (same); *Hereford v. McCaughtry*, 101 F. Supp. 2d 742, 745 (E.D. Wis. 2000) (same); *see also Ybanez v. Johnson*, 204 F.3d 645, 646 (5th Cir. 2000) (suggesting that factual predicates can be events at trial *or* evidence).

Hill would have been forced to allege either (1) that individualized bitemark identification *has been* invalidated or (2) that individualized bitemark identification *would be* invalidated in the future. The first claim would have lacked any factual basis and the second claim would have been entirely speculative. So they both would have been dismissed as frivolous. *In re Tibbetts*, 869 F.3d at 406; *see also Rivas*, 687 F.3d at 534–35 (discussing the Rules Governing Section 2254 Cases in the United States District Courts and the Federal Rules of Civil Procedure); *Jackson v. City of Cleveland*, 925 F.3d 793, 807 (6th Cir. 2019) (explaining that "a claim may not be adjudicated on its merits unless it is ripe" and "[t]his prohibition comes both from the case or controversy requirement of Article III and from prudential considerations." (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200–01 (1983)).

Equally unavailing is the Sixth Circuit's factual characterization of Mr. Hill's claim—that it is based on a mere change in the "relevant scientific standard." *Id.* at 14. It is not that the standard for individualized bitemark identification has changed such that experts now differ as to the evidence at issue; rather, the science of individualized bitemark identification has been invalidated and *any* forensic odontologist would be unable to make the scientific conclusions Dr. Mertz made at trial that resulted in Mr. Hill's conviction. A-9, at 102; *see* Statement of the Case, *supra*. In any event, that distinction has no relevance as to whether Mr. Hill's claim is "second or successive." Mr. Hill *had no claim* when he filed his first habeas petition because the events giving rise to the claim had not yet occurred. So, Mr. Hill could

not have "possessed, or by reasonable means . . . obtained, a sufficient basis to allege [the] claim in the first petition." *McCleskey*, 499 U.S. at 497.

In short, then, by finding Mr. Hill's petition to be "second or successive," the Sixth Circuit's decision directly conflicts with longstanding precedent from this Court and other Circuits, and certiorari is merited.

II. This petition presents an important issue, and Mr. Hill's case presents an ideal vehicle for settling it.

Whether petitions like Mr. Hill's are "second or successive" presents an important question, as the Sixth Circuit acknowledged by hearing the case en banc. *See* A-21, at 96 ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless … the proceeding involves a question of exceptional importance.").

More specifically, the decision has troubling implications for AEDPA, the courts, and habeas petitioners in the Sixth Circuit. By misstating the "factual predicate" of Mr. Hill's claim, the Sixth Circuit's decision will result in future newly-ripened claims being improperly dismissed or wrongly subjected to the gatekeeping provisions of § 2244(b)(2), in direct contradiction to this Court's precedent. *Panetti*, 551 U.S. at 947 (holding that § 2244(b)'s statutory bar does not apply to a "claim brought in an application filed when the claim is first ripe"). It places future habeas petitioners in an impossible catch-22: they must raise unripe and speculative claims in their initial habeas petitions or "'run the risk'" of "'forever losing their opportunity for any federal review of their . . . claims.'" *Panetti*, 551 U.S. at 931 (citation omitted). Put another way, it interprets AEDPA "in a manner that would require unripe (and

often factually unsupported) claims to be raised as a mere formality, to the benefit of no party." *Panetti*, 551 U.S. at 947. That will waste judicial resources, increase piecemeal litigation, and not lend any additional finality to state court judgments. *Banister*, 140 S. Ct. at 1706.

And permitting claims like Mr. Hill's to be litigated in the district court does not "negatively implicate AEDPA's finality concerns any more than does the second-in-time filing of a *Ford* claim." *Scott*, 890 F.3d at 1247; *see also* John H. Blume, et.al, *Killing the Oblivious: An Empirical Study of Competency to Be Executed Litigation*, 82 UMKC L. Rev. 335, 355–56 (2014) (explaining that *Panetti* had no material impact on the number of *Ford* claims filed). It simply ensures that a federal forum exists for litigants to raise claims that they could not have raised in their first habeas petition.

Moreover, Mr. Hill's case presents an ideal vehicle for this Court to settle this important issue. The sole issue before the Sixth Circuit was whether Mr. Hill's petition is "second or successive." Mr. Hill has consistently argued below that it is not, and no procedural or jurisdictional barriers exist that would prevent this Court from reaching the question presented. Thus, the question presented, and Mr. Hill's petition for a writ of certiorari, merit this Court's review.

* * *

Mr. Hill's due process claim was unripe at the time he filed his prior habeas petition because the factual predicate of his claim—the invalidation of the science of individualized bitemark identification—occurred decades after his prior habeas petition was filed. As a result, Mr. Hill's petition is second-in-time, but not "second

or successive," and therefore not governed by the provisions of § 2244(b). The Sixth Circuit's contrary conclusion departs from the decisions of this Court, prior decisions of the Sixth Circuit, and numerous decisions from its sister Circuits. And the implications of the Sixth Circuit's decision undermine the purposes of AEDPA. It will waste judicial resources by requiring petitioners to raise unripe claims in their first habeas petition instead of ripe claims in a second-in-time petition, it will increase the amount of piecemeal litigation in habeas proceedings, and it will not lend any increased finality to state court judgments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Stephen C. Newman
Federal Public Defender
Ohio Bar: 0051928

/s/ Sharon A. Hicks
Sharon A. Hicks (Ohio Bar: 76178)
Assistant Federal Public Defender
Counsel of Record
Office of Federal Public Defender
1660 West Second Street, Suite 750
Cleveland, OH 44113
(216) 522-4856; (216) 552-4321 (fax)
Sharon_Hicks@fd.org

Counsel for Petitioner Danny Lee Hill