

No. 23-5471

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 14, 2023
KELLY L. STEPHENS, Clerk

In re: DAVID EUGENE MATTHEWS,

Movant.

)
)
)
)
)
)
)

O R D E R

Before: SILER, MOORE, and CLAY, Circuit Judges.

David Eugene Matthews, a Kentucky death-row prisoner, filed in the district court a second petition for writ of habeas corpus under 28 U.S.C. § 2254. But a second or successive § 2254 petition (“successive petition”) may not be filed without this court’s permission, *see* 28 U.S.C. § 2244(b)(3)(A), so the district court transferred it here, *see In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). Once here, Matthews was given a deadline for filing a motion for authorization to file a successive petition (“§ 2244(b) motion”). Instead, he filed a motion to (a) remand the case to the district court and, in the meanwhile, (b) hold proceedings in abeyance. We deny remand but grant him a limited abeyance.

In 1982, Matthews was convicted of two murders and one burglary, then sentenced to death. After exhausting direct-appeal proceedings and one round of state postconviction proceedings, he filed his first § 2254 petition in 1999. The petition was ultimately denied in April 2013, after the United States Supreme Court reversed our decision reversing in part the district court’s denial of relief and remanded the case. *See Matthews v. Parker*, 651 F.3d 489 (6th Cir. 2011), *rev’d*, 567 U.S. 37 (2012). In October 2012—while that first petition was back before this Court—Matthews filed the second § 2254 petition that is now at issue. (And it was a second § 2254 *petition*, rather than a motion to amend the first § 2254 petition, because it raised a “claim” and because the notice of appeal from the district court’s order denying that first petition had already been filed on April 9, 2009, *see Moreland v. Robinson*, 813 F.3d 315, 322–25 (6th Cir.

No. 23-5471

- 2 -

2016)). The claim raised was this: “Trial counsel was ineffective for failing to present readily available psychiatric evidence, to the sentencing jury, that Matthews was unlikely to be a danger in the future if sentenced to less than the death penalty.” Petition for Writ of Habeas, ECF No. 1, 22. The district court held the petition successive and transferred it here for permission to be filed.

Denying that the petition is successive, Matthews argues as follows: The petition is second in time, but not “second or successive” in the § 2244(b) sense. Hence authorization to file need not be sought, and the petition should be remanded to the district court.

Matthews is mistaken, as the recent en banc decision from this court makes clear. “When a second-in-time petition raises a new claim purporting to question the previously challenged judgment, the new claim was neither unripe nor unexhausted the first go-around, and the petitioner nevertheless failed to raise the claim, it is ‘second or successive.’” *In re Hill*, 81 F.4th 560, 569 (6th Cir. 2023) (en banc).

That sentence describes the petition Matthews wishes to file. As he admits, it is second in time. The future-dangerousness claim he now wishes to raise was not raised in the first petition, *see Matthews v. Simpson*, 603 F. Supp. 2d 960, 998–99, 1010–16 (W.D. Ky. 2009), *aff’d in part, rev’d in part sub nom. Matthews v. Parker*, 651 F.3d 489 (6th Cir. 2011), *cert. granted, judgment rev’d*, 567 U.S. 37 (2012), and so it is new. And the claim questions the same judgment the first petition challenged. *See, e.g., id.* at 964.

That leaves only ripeness and whether the claim was unexhausted at the time of the first petition. The new claim satisfies both.

“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 Jones*, 652 F.3d 603, 605 (6th Cir. 2010)). But this claim “has always been ripe because the factual predicates for the claim occurred at trial,” *In re Hill*, 81 F.4th at 572; *see also id.* at 571 n.10, when trial counsel did not present psychiatric evidence that Matthews was unlikely to be a danger in the future.

Finally, Matthews does not suggest that a federal court has previously dismissed the future-dangerousness claim as unexhausted.

No. 23-5471

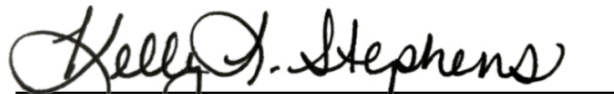
- 3 -

In short, Matthews's new petition is successive and may not be filed without this Court's permission. *See* 28 U.S.C. § 2244(b)(3)(A). Remand is denied.

Matthews admits that he cannot meet the successive-petition filing requirements. But in the interest of orderly procedure, we will grant him a limited abeyance so that he may file a § 2244(b) motion, should he wish to do so.

Accordingly, Matthews's request for remand is **DENIED**, but his request for abeyance is **GRANTED** to this extent: he shall have 30 days from the date of this order to file either a § 2244(b) motion or a letter notifying the court that he does not intend to file such a motion.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk