No.

IN THE

Supreme Court of the United States

LUIS GUTIERREZ,

Petitioner,

v.

GARY MINIARD, 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

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QUESTION PRESENTED FOR REVIEW

Mr. Gutierrez now raises the following question for this Court's review:

Whether a subsequent habeas petition, containing only claims which were unexhausted when the initial habeas petition was untimely filed, was second-in-time because the unexhausted claims were not decided on their merits or were unripe or whether the constitutional ineffectiveness of the attorney who filed the petition can be considered, consistent with *Castro v. United States*, 540 US 375 (2007), to decide whether the petition was second-in-time, despite the language in 28 USC 2254(i).

LIST OF PARTIES

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

CORPORATE DISCLOSURE

There are no corporate disclosures necessary for this case.

LIST OF PROCEEDINGS

1. Initial Federal Habeas Proceedings

a. Gutierrez v. Stoddard, Case No. 1:14-cv-226 (W.D. Michigan, 2014)

b. Gutierrez v. Stoddard, Case No. 14-2199 (6th Cir. 3/25/15)

2. Subsequent Federal Habeas Proceedings

a. Gutierrez v. Miniard, Case No. 2:23-cv-12496 (E.D. Michigan, 2023)

b. In re Gutierrez, Case No. 23-2004 (6th Cir. 4/11/24)

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Page

Constitution

Page

Statutes

Michigan Court Rule

Luis Alberto Gutierrez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

INTRODUCTION

The issue in the certiorari petition is whether the Sixth Circuit Court of Appeals correctly classified Mr. Gutierrez's subsequent petition as second or successive versus second-in-time.

Mr. Gutierrez was represented by an attorney when the initial petition was filed. That attorney recognized that there were exhausted and unexhausted issues. She filed a stay motion and, pursuant to *Rhines v. Weber*, 544 US 269 (2005), she asked the district court to stay the initial petition so that she could return to state court, exhaust the unexhausted issues, and then return to federal court.

The problem with her strategy was that the petition itself was untimely. It was filed more than five months late. The attorney knew that the petition was untimely but filed the petition anyway. She argued that equitable tolling should save the late petition. However, as the district court held, equitable tolling was not available in large part because there was no showing of diligence.

For these reasons, the initial petition was denied as being untimely, and the stay motion was denied as moot.

Mr. Gutierrez, now represented by undersigned counsel, litigated the unexhausted claims in state court and exhausted those claims. The subsequent petition, which is the subject of this certiorari petition, was based

solely on the now-exhausted claims. Nevertheless, both the district court and the Sixth Circuit Court of Appeals treated the subsequent petition as second or successive.

Those decisions warrant this Court's attention for multiple reasons. *First*, the Sixth Circuit considered the unexhausted claims to have been dismissed on their merits even though the federal court did not and could not (because of *Rose v. Lundy*, 455 US 509 (1982)) consider them on their merits. This decision meant that Mr. Guiterrez was denied any sort of federal review of those unexhausted claims.

Second, the unexhausted claims were not ripe for decision because of *Rose.* They would only become ripe after the state courts were given first opportunity to decide them. Despite this fact, the Sixth Circuit concluded that the unexhausted nature of the claims was irrelevant because denying a habeas petition as untimely was a decision on the merits even as to unexhausted claims. This decision is contrary to decisions of this Court that have made exceptions for unripe claims when deciding whether a petition is second-in-time or second or successive.

Third, in *Castro v. United States,* 540 US 375 (2007), this Court concluded that it had the authority to consider whether a petition was second-in-time despite a statute which stated that decisions to not authorize a subsequent petition were not appealable. 28 USC 2244(E). This Court reasoned that a second-in-time ruling was not about authorization and was thus not barred by the statute. Similarly, 28 USC 2254(i) states that the ineffectiveness of counsel is not grounds for relief under section 2254.

In the instant case, prior counsel was clearly ineffective for filing a petition that she knew was untimely when she filed it. Mr. Gutierrez has been prejudiced to date because his subsequent petition has been considered second or successive. Mr. Gutierrez is respectfully asking this Court to conclude that, consistent with *Castro,* ineffective lawyering can be considered when deciding whether a petition was second-in-time or second or successive despite section 2254(i).

Fourth, as an alternative, this Court could invoke its GVR procedure to grant the petition, vacate the lower court decisions, and to remand for further consideration as to why this particular petition is second-in-time.

In sum, this Court is being respectfully asked to grant certiorari so that these important issues can be considered or alternatively to employ its GVR procedure to remand for further consideration of the pertinent matters raised by this certiorari petition.

CITATIONS TO OPINIONS BELOW

The United States District Court for the Eastern District of Michigan transferred Mr. Gutierrez's case to the Sixth Circuit Court of Appeals pursuant to 28 USC 2244(b)(3). *Gutierrez v. Miniard*, Case No. 2:23-cv-12496 (E. D. Michigan November 7, 2023). This Order is found at App. 7a-10a.

The Sixth Circuit Court of Appeals determined that Mr. Gutierrez's petition was second or successive as opposed to second-in-time and declined to conclude that its authorization was

not required. *Gutierrez v. Miniard*, Case No. 23-2004 (6th Cir. April 11, 2024). This Order is found at App. 1a-5a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit decided that the Petition was second or successive and not second-in time. This Court has jurisdiction to review the Court of Appeals judgment issued below pursuant to 28 USC 1254(1) and *Castro v. United States*, 540 US 375, 380-381 (2007).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 USC 2244(b)(1) states:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

28 USC 2244(b)(2) states in relevant 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 the constitutional error,

> no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 USC 2244(d)(2) states:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

28 USC 2254(i) states:

> The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 USC 2106 states:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment or decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The United States Constitution, Sixth Amendment, states in pertinent part:

> In a criminal prosecution, the accused shall enjoy the right to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In 2009, Mr. Gutierrez was convicted by a jury for Criminal Sexual Conduct in the 1st Degree (person under the age of 13). He was sentenced to 25-40 years in prison on November 4, 2009. *People of the State of Michigan v. Gutierrez*, Kent County Circuit Court Case No. 09-1077-FC.

There were no corroborative witnesses who could confirm that the alleged sexual assault actually happened. As a result, the complainant's allegations were the only evidence against Mr. Gutierrez. Her claim that the defendant had penetrated her anally with his fingers became the basis for the conviction. His conviction was confirmed on direct appeal. *People of the State of Michigan v. Gutierrez*, 2011 WL 3299853 (2011).

Mr. Gutierrez's Application for Leave to Appeal to the Michigan Supreme Court was denied. *People of the State of Michigan v. Gutierrez*, 491 Mich 892, 810 NW2d 263 (2012). A Motion for Reconsideration was denied on June 25, 2012. *People of the State of Michigan v, Gutierrez*, 491 Mich 947, 815 NW2d 484 (2012).

Mr. Gutierrez did not seek review from this Court at that time.

On July 3, 2013, Mr. Gutierrez filed a Motion for New Trial in the Kent County Circuit Court. *People of the State*

of Michigan v. Gutierrez, Case No. 09-1077-FC. That Motion was denied on October 3, 2013 as being untimely filed. *Id*.

On March 7, 2014, represented by a different attorney, Mr. Gutierrez filed a habeas corpus action pursuant to 28 USC 2254 in the Western District of Michigan. *Gutierrez v. Stoddard*, Case No. 1:14-cv-226. The attorney admitted that the petition was not timely filed but argued that equitable tolling applied. R., 1, Page ID 2. The attorney referred to a Motion for a New Trial which Mr. Gutierrez had filed which had been denied as improperly filed. Page ID 3. The attorney stated that "[h]ad the trial court issued its ruling in a more timely manner then Mr. Gutierrez would have been left with nearly three months to seek relief in federal court." Page ID 3. Under the heading of "Relief Requested" the pleading stated, "accept the filing pursuant to the doctrine of Equitable Tolling." Page ID 7.

The fifth argument in the brief accompanying the habeas petition was entitled "Although the instant petition is untimely, Mr. Gutierrez is entitled to file and this Honorable Court should consider it under the doctrine of equitable tolling." Page ID 64. In support of equitable tolling, the pleading referred to the Motion for New Trial and stated that "[u]nfortunately his motion was untimely in the trial court and the trial court waited exactly three months to issue an order informing him of same." Page ID 64. The pleading went on to state that "[b]y the time he received the order his time to file a 2254 petition had expired. Had the trial court diligently reviewed the pleadings and issued its order, Mr. Gutierrez would have had sufficient time to file a timely petition." Page ID 65.

A motion to stay was also filed. R., 2, Page ID 111-125. The stay motion asked for the stay so that Mr. Gutierrez could return to the state court and exhaust constitutional claims about the ineffectiveness of counsel and then return to federal court. *Id.* The pleadings stated that "counsel has advised Mr. Gutierrez to pursue these claims in state court and eventually amend hi habeas petition with the new ineffective assistance of counsel claims." *Id.* At Page ID 124. *Rhines v. Weber*, 544 US 269 (2005) was cited for the proposition that "he must exhaust the new claims in state court while seeking a stay in the instant federal case..." *Id.* Counsel also stated that "Mr. Gutierrez concurs with counsel's advice." *Id.*

The Magistrate Judge issued a Report and Recommendation recommending that the petition be denied because it was time barred. *Id.* R., 4, Page ID 127-134. The Magistrate Judge concluded that the statutory limitations period plus 90 days had expired on September 23, 2012, citing *Lawrence v. Florida*, 549 US 327, 332-33 (2007). *Id.*, Page ID 130. The Petition had been filed more than five months after the limitations period had expired. *Id.*

The Magistrate Judge also concluded that Mr. Gutierrez was not entitled to the benefit of equitable tolling. *Id.*, Page ID 131-133. The new trial motion did not toll the statutory limitations period because it had not been properly filed, i.e., the state trial judge denied the motion as untimely filed, citing *Pace v DiGuglielmo*, 540 US 408 (2005). *Id.*

The Magistrate Judge further opined that Mr. Gutierrez had not been diligent because the state new

trial motion did not toll the federal limitation and because the habeas petition had not been filed for more than five months after the new trial motion had been denied. *Id.*

The Magistrate Judge also concluded that there was no evidence presented that Mr. Gutierrez was actually innocent. Page ID 133.

The stay motion was denied as being moot. Page ID 133.

Mr. Gutierrez filed objections to the Magistrate Judge's ruling, but the District Judge approved the Magistrate Judge's Report and Recommendation for the reasons articulated by the Magistrate Judge. R., 6, Page ID 140-143. A Certificate of Appealability was denied. Page ID 143.

Mr. Gutierrez filed an application for a Certificate of Appealability with the Sixth Circuit. *Gutierrez v. Stoddard*, Case No. 14-2199. On March 25, 2015, the Sixth Circuit declined to grant the Certificate. *Id.*, pp. 1-3. The Court stated that "because reasonable jurists could not debate the district court's procedural ruling, Gutierrez is not entitled to a COA even if his underlying constitutional claims have arguable merit. *See, Slack*, 529 US at 584."

Represented by undersigned counsel, Mr. Gutierrez filed a state post-conviction motion pursuant to Michigan Court Rules 6.500, et. seq. This Motion was filed in accordance with state court procedure, i.e., there was no procedural default.

The post-conviction motion asserted that petitioner's trial and appellate counsels were ineffective because, among other things, they did not investigate and locate critical trial witnesses, including a witness who could have provided a motive for false accusations and an expert witness that would have rebutted the prosecution's expert and provided the jury with reasons why a child would falsely accuse him. These claims were unexhausted when the first habeas petition had been filed. *People of the State of Michigan v. Gutierrez*, Case No. 09-1077, Kent County Circuit Court. The Motion was denied without a hearing on March 31, 2020 and reconsideration was denied on June 24, 2020. *Id.*

Mr. Gutierrez timely appealed to the Michigan Court of Appeals which denied relief on March 2, 2021 by a 2-1 vote. The dissenting jurist would have remanded for a hearing before making a decision. *People of the State of Michigan v. Gutierrez*, Case No. 355749. A Motion for Reconsideration was denied on April 12, 2021, by the same 2-1 vote. *Id.*

Mr. Gutierrez appealed to the Michigan Supreme Court which on June 2, 2022 declined to review the case. *People of the State of Michigan v. Gutierrez*, 509 Mich 991, 974 NW2d 224 (2022). A Motion for Reconsideration was denied on October 4, 2022. *People of the State of Michigan v. Gutierrez*, 979 NW2d 824 (2022).

On October 4, 2023, Mr. Gutierrez filed a subsequent habeas petition in the Eastern District of Michigan (the district of his confinement). *Gutierrez v. Miniard*, Case No. 2:23-12496, R., 1, Page ID 1-10. The petition alleged ineffective assistance of trial and appellate counsel.

These were the same issues which had been presented in the state post-conviction proceedings. These previously unexhausted issues were exhausted by the 2020-2022 state court proceedings.

On November 7, 2023, the district court treated the petition as a second or successive petition and transferred the case to the court of appeals for authorization. App. 7a-10a.

On April 11, 2024, a panel of the Sixth Circuit Court of Appeals entered an Order denying authorization to proceed. App. 1a-6a. The Court acknowledged that Mr. Gutierrez was arguing that his petition was second-in-time rather than second or successive and that not all petitions filed second-in-time are second or successive. App. 2a-3a.

The panel cited two Sixth Circuit cases for a three-part test as to when a petition is not second-in time: "1) the second petition challenges a new state-court judgment; (2) the proposed claim would have been unripe at the time of the original petition; or (3) the proposed claim was not decided on the merits because it was dismissed as unexhausted," citing *In re Coley*, 871 F.3d 455 (6th Cir 2017); *In re Hill*, 81 F.4th 560 (6th Cir. 2023)(en banc). App. 2a-3a.

The panel concluded that Mr. Gutierrez did not satisfy any of these three requirements: 1) the petition did not challenge a new judgment; 2) his claims were ripe because the attorney's failures "had already occurred"; 3) the fact that his claims were unexhausted when the initial 2254 petition was filed "is relevant because that petition was denied as untimely." App. 3a.

The panel cited *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000) and *In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) for the proposition that "[t]he dismissal of a petition as untimely is a decision 'on the merits.'". App. 3a.

The panel also pointed out that the district court denied as moot the motion to stay because Mr. Gutierrez's original petition was untimely, i.e., the initial petition was not dismissed because it contained both exhausted and unexhausted claims. App. 3a.

The balance of the opinion focused on whether a second or successive petition could justify relief. App 4a-5a. The panel concluded that it did not. App. 5a

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE GRANTED

Second-in-Time Versus Second or Successive. Mr. Gutierrez argued that his petition was second-in-time as opposed to being second or successive. The Sixth Circuit disagreed, and it is that disagreement that is the basis for Mr. Gutierrez's request for this Court's review.

28 USC 2244(b) limits the ability of petitioners to file second or successive petitions. The statute does not define the phrase "second or successive" and thus the meaning of the phrase has been the subject of much litigation.

This Court has made it clear that a petition is not second or successive just because it was "filed second or successively in time." *E.g., Magwood v. Patterson*, 561 U.S. 320 (2010); *Panetti v. Quarterman*, 551 U.S. 930 (2007).

This Court has "declined to interpret 'second or successive' as referring to all section 2254 applications filed second-in-time, even when the later filings address a state-court judgment already challenged in a prior section 2254 application." *Panetti*, 551 US at 944; *Slack v. McDaniel*, 529 U.S. 473, 486-487 (2000); *Stewart v. Martinez-Villareal,* 523 U.S. 637, 645 (1998).

Ripeness has been considered critical in deciding whether a petition is second or successive or second-in-time. For example, in *Panetti*, the defendant who had been sentenced to death did not raise in his first application a competency claim based on *Ford v. Wainwright*, 477 US 399 (1986). Competency is measured at the time of the scheduled execution and an execution date had not been set when Panetti filed his first habeas petition. This Court concluded that the second petition raising a *Ford* claim was second-in-time because the claim was not ripe at the time of the first habeas petition. In *Martinez-Villareal*, the petitioner had raised a *Ford* claim in his initial petition but the *Ford* claim was dismissed as being premature. This Court concluded that his subsequent petition was second-in-time and thus not subject to the heightened standards of a second or successive petition.

In *Bannister v. Davis*, 590 U.S. 504 (2020), this Court stated that it has "looked for guidance in two main places" when deciding the second-in-time versus second or successive issue. The first is whether the habeas petition at issue "constituted an abuse of writ, as that concept is explained" in cases that predated the AEDPA. If the petition is an abuse of the writ, then it is likely second or successive, but if not, then it is likely second-in-time.

The second has been to look at the reasons behind the AEDPA including "conser(ving) judicial resources, reduc(ing) piecemeal litigation and streamlin(ing) federal habeas proceedings." *Panetti*, 551 U.S. at 946.

Mr. Gutierrez's subsequent petition was not an abuse of the writ. The abuse of writ was a legal doctrine which federal courts used to refuse to examine a claim presented for the first time in a second-or-subsequent petition. *E.g., McCleskey v. Zant*, 499 US 467 (1991). The Court should look at the claim and decide whether the applicant had a full and fair opportunity to raise the claim in the prior application. *E.g., Panetti v. Quarterman*, 551 US 930, 947 (2007); *Magwood v. Patterson*, 561 US 320, 345 (2010) (Kennedy dissent, citing Panetti). Said differently, if the applicant had no fair opportunity to raise the claim in the prior application, the subsequent application should not be treated as second or successive. *Id.*

In Mr. Gutierrez's case, the issues presented in the subsequent petition were unexhausted when the first petition was filed. He thus had no fair opportunity to raise those claims in his first petition and he respectfully submits that his subsequent petition should be treated as being second-in-time rather than as second or successive.

The facts upon which his second-in-time argument is based are:

A. Mr. Gutierrez was represented by an attorney for purposes of the initial habeas petition.

B. Before filing the initial petition, the attorney knew that the time for filing had already passed, i.e., that any

petition based on the prior proceedings would be subject to being dismissed for being untimely.

C. Before filing the petition, the attorney also knew that there were a number of unexhausted claims to be made and that this Court had previously held that a federal district court must dismiss a state habeas petition containing both exhausted and unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). The attorney also knew that this Court had approved a procedure whereby the federal habeas petition would be stayed to give the habeas petitioner an opportunity to return to state court, exhaust the unexhausted claims, and the return to federal court. *Rhines v. Weber*, 544 US 269 (2005).

D. The attorney also knew that Mr. Gutierrez had filed a pro-se Motion for a New Trial in state court and that the state court had denied the Motion as being untimely under state law. The attorney also knew that over five months had passed between the time that the state trial court had denied the new trial motion and the time that the initial habeas petition was ready to be filed.

E. The attorney represented that she had discussed with Mr. Gutierrez the option of filing a Motion to Stay so that Mr. Gutierrez could return to state court to exhaust his remedies and that Mr. Gutierrez had agreed with that strategy.

F. There is nothing in the record that indicates that the attorney discussed with Mr. Gutierrez that if the courts rejected his admittedly untimely initial habeas petition, that rejection could affect his ability to seek any federal review of his unexhausted issues.

G. As described *supra*, the attorney admitted that she knew that the initial petition was being filed out of time. The attorney tried to get around that problem by arguing that Mr. Gutierrez was entitled to equitable tolling. The only grounds that the attorney presented in support of equitable tolling was blaming the state court for the late filing, i.e., that the state court had taken too long to decide the new trial motion and had the state court moved promptly a timely petition could have been filed.

As pointed out by the district court, this equitable tolling argument was a doomed argument because in *Pace v. DiGuglielmo*, 544 U.S. 408 (2008) this Court held that an untimely filed application for post-conviction relief was not properly filed. Consisted with *Pace*, the Magistrate Judge opined that "the trial court cannot be faulted for a three-month delay in denying a motion that was improper under state court rules." The more than five-month delay between the state court's decision and the filing of the habeas petition was also indicative of a lack of diligence and therefore ineligibility for equitable tolling. *Gutierrez v. Stoddard*, Case No. 1:14-cv-00226, R., 4, Page ID 5-6.

The legal issues which support the second-in-time argument have the following components:

A. **Whether a habeas petition dismissed as untimely has been denied on the merits when there are unexhausted claims that could still be litigated in state court?**

In *Slack v. McDaniel*, 529 US 473, 485-486 (2000), this Court stated that "[a] habeas petition filed in the district court after an initial habeas petition was unadjudicated

on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition". This quotation has been the focus of numerous circuit decisions which have attempted to define "on its merits."

Mr. Gutierrez's subsequent habeas petition was based upon claims that had not been exhausted when the initial petition was filed. Mr. Gutierrez had litigated those previously-unexhausted claims in state court after the initial habeas petition was denied. There was no procedural default because state procedure allowed him to litigate those issues despite the passage of time between his conviction in 2009 and the commencement of the state post-conviction proceedings in 2020. MCR 6.502.

It was thus Mr. Gutierrez's position that his subsequent habeas petition was second-in-time because the denial of the first petition as untimely did not adjudicate these unexhausted claims on their merits.

The Sixth Circuit disagreed and held that "[t]he dismissal of a petition as untimely is a decision 'on the merits.'" App. 3a. The Sixth Circuit further reasoned that the fact that there were unexhausted claims was "irrelevant because the petition was denied as untimely." *Id*. The Sixth Circuit referred to the procedure for granting a stay so that a petition containing exhausted and unexhausted claims could be held in abeyance while those claims are litigated in state court. App. 3a-4a. According to the Sixth Circuit, that exception only applies "where a federal court dismissed an earlier petition because it contained exhausted and unexhausted claims and in doing so never passed on the merits." App. 3a-4a. Since Mr. Gutierrez's stay motion was denied as moot and the

petition was dismissed as untimely, the exception for unexhausted claims not decided on the merits did not apply to Mr. Gutierrez's facts. *Id.*

A number of other circuits have held that a dismissal of the first petition as time-barred was a decision on the merits. For example, in *McNabb v. Yates*, 587 F.3d 1028 (9th Cir. 2009), the panel reasoned that "on the merits" means that either the district court considered and rejected the claims or that the district court determined that the underlying claim will not be considered by a federal court. The final holding was that dismissal for a time bar is a permanent bar to federal review, i.e. a time bar cannot be cured.

The Second Circuit also used the "permanent bar" rationale to support the holding that dismissal on timeliness grounds was an adjudication on the merits. *E.g., Murray v. Greiner*, 394 F.3d 78 (2d Cir. 2005); *Villaneuva v. United States*, 346 F.3d 55 (2d Cir. 2003).

Other circuits have also ruled that a dismissal of the first petition as time-barred is a decision on the merits. *E.g., In re Rains*, 659 F.3d 1274 (10th Cir. 2011); *In re Flowers*, 595 F.3d 204 (5th Cir. 2009); *Altman v. Benik*, 337 F.3d 764 (7th Cir. 2001).

The Sixth Circuit so ruled in the instant case. App 1a-4a.

Another Sixth Circuit case suggests the basis for Mr. Gutierrez's argument. In *In re Cook*, 215 F.3d 606 (6th Cir. 2000), Cook's first petition contained a number of claims that were unexhausted. The unexhausted claims could

not be exhausted because the state statute of limitations had run on the relevant state remedies. The panel opined that if the statute of limitations had not run and if the unexhausted claims could have been exhausted, the second petition would not be second or successive. However, since the state statute of limitations had expired, the dismissal of the first petition was a decision on the merits. As a result, the second petition was second or successive rather than second-in-time.

The difference in Mr. Gutierrez's case is that the state statute of limitations had not run, and Mr. Gutierrez litigated the unexhausted claims prior to filing the subsequent habeas petition.

In sum, Mr. Gutierrez respectfully submits that his second petition was second-in-time for at least the following reasons:

A. The subsequent petition was based on claims that were unexhausted when the first petition was filed.

B. Although the petition was dismissed because it was untimely, it is Mr. Gutierrez's position that the dismissal only adjudicated the exhausted claims. There was no ruling on the merits regarding the unexhausted claims.

C. Even though the stay procedure was not available because the petition was untimely, that fact should not be dispositive because the unexhausted claims could still be litigated in state court. Moreover, the purpose of the stay procedure is to assure that the exhausted claims can be litigated. If the petition was dismissed, the exhausted claims could be lost because they would thereafter be

untimely. The stay stops the clock and, as a result, the exhausted claims can be litigated. In the instant case, the exhausted claims were barred because the initial petition was untimely. However, the unexhausted claims, which could be timely presented to the state court, should not be considered as being part of the barred claims.

D. For these reasons, Mr. Gutierrez contends that the dismissal of the petition was not a decision on the merits with respect to the unexhausted claims.

E. Since the subsequent petition only sought to litigate the claims which were unexhausted when the initial petition was filed and which were subsequently exhausted, the second petition should have been treated as being second-in-time.

F. If the petition is not treated as being second-in-time, Mr. Gutierrez will be forever denied federal review of the state court proceedings which litigated the previously unexhausted claims. It is this type of outcome that has influenced this Court in other circumstances to conclude that a petition should be classified as second-in-time. *E.g.*, *Castro v. United States,* 540 US 375 (2007); and

G. The Sixth Circuit's analysis was flawed because: 1) the Sixth Circuit did not consider that the denial of the stay motion as moot did not preclude Mr. Gutierrez from litigating the unexhausted claims in state court; and 2) the Sixth Court did not consider that even if the dismissal of the initial petition as untimely was an adjudication of the merits for the exhausted claims, that dismissal did not adjudicate the unexhausted claims on their merits.

The instant certiorari petition presents an important issue. Mr. Gutierrez is respectfully requesting this Court to conclude that the issue is worthy of this Court's attention and to agree that certiorari should be granted. Alternatively, Mr. Gutierrez is asking this Court to employ its GVR procedure by granting the petition, vacating the Sixth Circuit decision and remanding to the district court with directions to treat the petition as second-in-time.

The unexhausted claims were not ripe for decision. In *Panetti v. Quarterman*, 551 US 930 (2007), this Court considered the ripeness doctrine in the context of whether a second petition could be filed. In *Panetti,* the petitioner had been sentenced to death. When he filed his initial petition, no execution date had been set. He did not raise any claims based on *Ford v. Wainwright*, 477 US 399 (1986). *Ford* had established procedural requirements that had to be followed to assure that the death penalty was not inflicted on insane prisoners. After his execution date was set, he filed a second petition based on *Ford.* The district court and the Fifth Circuit Court of Appeals treated the application as second or successive. This Court granted certiorari and reversed. This Court reasoned that the *Ford* claim was not ripe until a date of execution was set. *Ford* required sanity to be determined at the time he was to be executed and that date had not been set when the first petition was filed. Since the second petition was brought when the *Ford* claim was first ripe, it was not second or successive. This Court did not define the word "ripe," so that the meaning of the term was left open.

In *Stewart v. Martinez-Villareal*, 523 US 637 (1998), a similar issue was presented albeit with somewhat different facts. In *Stewart*, the first petition did raise a *Ford* claim,

but the claim was dismissed as being premature. After his execution date was set, he attempted to return to district court to raise the *Ford* claim. After his claims were denied, this Court granted certiorari and ruled that the second effort was not second or successive. The claim was initially not ripe, and the claim was re-presented when it became ripe. This situation was no different from a petitioner whose claims were dismissed because they had not been exhausted.

The specific issue in Mr. Gutierrez's case is whether his unexhausted claims were unripe.

Mr. Gutierrez is respectfully asking this Court to conclude that the answer to that question is "yes".

In *Rose v. Lundy*, 455 US 509 (1982), this Court determined that a federal district court must dismiss a habeas petition which contained both exhausted and unexhausted claims. This Court reasoned that the reason for this rule was to protect the state court's role in enforcement of federal law and prevent disruption of state judicial procedures. This requirement for exhaustion gives the state court the first opportunity to review all claims of federal constitutional error.

The attorney representing Mr. Gutierrez for the initial petition realized that there were unexhausted claims. She filed a motion to stay arguing that under *Rhines v. Weber*, 544 US 269 (2005), she should be allowed to go back to state court, exhaust the claims, and then return to federal court. Since the petition had been filed late, her motion to stay was denied as moot.

However, that left the issue of what to do with the unexhausted claims.

Under *Rose*, they could not be presented to the federal court because they were unexhausted.

Mr. Gutierrez respectfully contends that this scenario is analogous to the *Ford* claims addressed by this Court in *Panetti* and *Stewart, i.e.* the unexhausted claims were unripe.

Mr. Gutierrez then went into state court and exhausted those claims. The claims were now ripe for federal review.

Under the ripeness doctrine, Mr. Gutierrez respectfully submits that his subsequent petition should have been considered second-in-time as opposed to second or successive.

The Sixth Circuit agreed that one of the categories of second-in-time petitions is a petition where "the proposed claim would have been unripe at the time of the original petition." App. 3a.

The Sixth Circuit reasoned that "his claims were ripe at the time he filed his original petition because the events giving rise to the claim...had already occurred." App. 3a. The Sixth Circuit also reasoned that the unexhausted nature of the claims "is irrelevant "because the initial petition was denied as untimely" and because "dismissal of a petition as untimely is a decision 'on the merits.'" App. 3a.

Mr. Gutierrez respectfully submits that this reasoning gives insufficient consideration to the fact that even if the

events had already occurred, they were unripe because they were unexhausted. Under *Rose,* the federal court could not consider them until they were exhausted. The reasoning also doesn't give consideration to the fact that if the Sixth Circuit is right, unexhausted claims could never be considered for federal review if the initial petition was untimely as to exhausted claims. On the other hand, if the petitioner exhausts those claims and then seeks federal review of those claims only, federal review could be obtained. In addition, the rationale for exhaustion–giving the state first opportunity regarding the federal constitutional claims–would be satisfied because the exhaustion process would accomplish just that.

Mr. Gutierrez's position also squares with the purpose of the abuse of writ doctrine as set forth in *McCleskey v. Zant,* 499 US 467 (1991), *i.e.*, there is no abuse of the writ because the previously unexhausted claims raised in the subsequent petition could not have been presented in the initial petition.

For these reasons, Mr. Gutierrez is respectfully asking this Court to conclude that his subsequent petition based on claims that had been exhausted after the first petition was decided is second-in-time and not second or successive. Mr. Gutierrez is respectfully asking this Court to either grant certiorari or employ the GVR procedure and remand this case to the district court with instructions.

The ineffectiveness of the attorney who represented Mr. Gutierrez during his initial habeas petition should, consistent with *Castro v. United States*, 540 US 375 (2003), be a reason to treat his subsequent petition as second-in-time.

28 USC 2254(i) states that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

There are also numerous cases which are consistent with this statute.

For example, in *Pennsylvania v. Finley*, 481 US 551 (1987), this Court held that prisoners have no constitutional right to counsel when mounting collateral attacks to a conviction. Therefore, prisoners have no right to appointed counsel.

In *Coleman v. Thompson*, 501 US 722 (1991), this Court held that convicted defendants do not have a constitutional right to effective assistance of counsel in the course of collateral proceedings.

In *Murray v. Giarratano*, 492 US 1 (1989), this Court held that the Due Process Clause does not require states to provide counsel for post-conviction proceedings

Circuit decisions also echo these principles.

For example, in *Post v. Bradshaw*, 422 F.3d 419 (6th Cir. 2005), the Court held that the statute bars federal relief based on a claim that a post-conviction lawyer was ineffective. In *Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999), the Court held that a lawyer's mistake or ineffective assistance during post-conviction proceedings is not grounds for equitable tolling. In *Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000), the Court held that an attorney's miscalculation of the limitations period is not a basis for equitable tolling.

As to the instant case, Mr. Gutierrez respectfully contends that his lawyer was ineffective. She knowingly filed a late petition and filed a motion to stay that was moot because the petition was late. The incorrectness of that position was supported by this Court in *Pace, supra.* Mr. Gutierrez was prejudiced because he has to date lost access to federal review of his unexhausted issues.

At the threshold, Mr. Gutierrez agrees that he cannot argue that the ineffectiveness of his initial post-conviction attorney is a reason to grant his habeas petition.

However, Mr. Gutierrez is respectfully asking this Court to extend the rationale of *Castro v. United States*, 540 US 375 (2003) to his facts and to conclude that the ineffectiveness of post-conviction counsel can be a reason to decide that a subsequent petition is not second or successive.

In *Castro,* the statute at issue was 28 USC 2244(b)(3)(E). That statute states that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

In *Castro,* the defendant filed a motion for a new trial. The district re-characterized his motion as a 2255 motion. The defendant did not challenge that decision. Three years later, the defendant filed a second motion raising a claim of ineffective assistance of counsel. His motion was dismissed as second or successive and the appeals court affirmed. This Court reversed. As pertinent to Mr. Gutierrez's case, this Court reasoned that: 1) the certiorari's subject matter

is not the authorization but the lower courts' decision to not view the motion as second-in time; and 2) the Supreme Court reads limitations on its jurisdiction narrowly.

The subject of Mr. Gutierrez's certiorari petition is whether his petition is second-in-time. The subject matter of his ineffective counsel argument is related solely to the question of whether his petition should be considered second-in-time as opposed to second or successive. Had his post-conviction counsel been effective, she would have realized that there was no point to filing an out of time petition. She would also have realized the equitable tolling was not a remedy which would cure the untimely filing. To date, these mistakes have meant that Mr. Gutierrez's subsequent petition has been characterized as second or successive.

Castro's logic would allow this Court to interpret the statute as only applying to situations where the post-conviction lawyer's ineffectiveness was being proposed as a substantive reason for relief. By contrast, when the reason is to establish that the subsequent petition should be considered second-in-time, the statute would not forbid this Court from considering ineffective lawyering as a reason to classify the subsequent petition so that the petitioner would not be denied federal review.

The Sixth Circuit did not directly consider the lawyer's ineffectiveness or 28 USC 2254(i). However, the Sixth Circuit's opinion did attribute the lawyer's mistakes to Mr. Gutierrez by treating the first decision as being on the merits and as foreclosing any remedy for unexhausted claims. App. 3a.

Mr. Gutierrez is respectfully asking this Court to either grant certiorari or to employ the GVR process to remand the case back for further consideration.

The GVR process is an alternate remedy to be considered. In *Stutson v. United States*, 516 US 193 (1996), this Court referred to a number of principles which applied when employing this procedure: 1) the fact that this is a criminal case requires consideration of the fact that "a litigant is subject to the continuing coercive power of the Government in the form of imprisonment;" 2) "[T]echnicalities that caused no prejudice" should not "preclude a remand under 28 USC 2016 (1988 ed) in the interests of justice;" 3) "Procedural accommodations to prisoners are a familiar aspect of our jurisprudence;" 4) "[D]ry formalism should not sterilize procedural resources which Congress has made available to federal courts; 5) "[A] GVR order guarantees the petitioner full and fair consideration of his rights in light of all pertinent considerations...;" 516 US at 196-197.

In the instant case, the fact that the claims at issue were unexhausted and unripe when the initial petition was filed justifies relief under previous decisions made by this Court. As an alternative remedy, this Court could employ the GVR procedure and remand for consideration of those claims that were unexhausted at the time that the initial petition was filed.

CONCLUSION

This Court should grant the petition or, in the alternative, grant, vacate, and remand the case for further consideration.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-2004

In re: LUIS ALBERTO GUTIERREZ,

Movant.

Filed April 11, 2024

ORDER

Before: BOGGS, WHITE, and THAPAR, Circuit Judges.

Luis Alberto Gutierrez, a pro se Michigan prisoner, moves for an order authorizing the district court to consider a second or successive 28 U.S.C. § 2254 petition for a writ of habeas corpus, or, in the alternative, for a determination that authorization is not needed. *See* 28 U.S.C. § 2244(b). Because Gutierrez's proposed petition is second or successive and fails to satisfy the necessary requirements, we deny authorization.

In 2009, a jury convicted Gutierrez of first-degree criminal sexual conduct involving a person under the age of 13. The trial court sentenced him to 25 to 40 years of imprisonment. The Michigan Court of Appeals affirmed, *People v. Gutierrez*, No. 295169, 2011 WL 3299853 (Mich.

Ct. App. Aug. 2, 2011), and the Michigan Supreme Court denied leave to appeal, *People v. Gutierrez*, 810 N.W.2d 263 (Mich. 2012). The trial court denied Gutierrez's motion for a new trial as untimely. He then filed his initial § 2254 petition, but the district court determined that it was barred by the one-year statute of limitations. *Gutierrez v. Stoddard*, No. 1:14-cv-226, 2014 WL 4101509 (W.D. Mich. Aug. 18, 2014); *see* 28 U.S.C. § 2244(d)(1). This court denied a certificate of appealability. *Gutierrez v. Stoddard*, No. 14-2199 (6th Cir. Mar. 25, 2015).

In October 2023, Gutierrez filed a second § 2254 petition, which the district court transferred to this court. Gutierrez has filed a corrected motion for authorization, premising his claims on two affidavits: one from Dr. Katherine Jacobs, who could have testified as an expert witness concerning the unreliability of child testimony and the proper forensic protocols for interviewing a child or could have advised trial counsel about cross-examination; and one from Martin Vasquez, who could have testified that the victim's mother swore to make Gutierrez pay after learning that he was dating another woman. He claims that trial counsel performed ineffectively by failing to obtain an expert witness like Jacobs and by failing to investigate and discover Vasquez's testimony. He also argues that authorization is not necessary because his second-in-time petition is not second or successive.

We begin by analyzing whether Gutierrez's proposed petition is second or successive. "[N]ot all petitions filed second in time are 'second or successive'" and thus subject to the restrictions of § 2244(b). *In re Hill*, 81 F.4th 560,

568 (6th Cir. 2023) (en banc), *petition for cert. filed*, No. 23-6276 (Nov. 20, 2023). A second-in-time petition is not considered second or successive when (1) the second petition challenges a new state-court judgment; (2) the proposed claim would have been unripe at the time of the original petition; or (3) the proposed claim was not decided on the merits because it was dismissed as unexhausted. *Id.* at 568-69; *see In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017).

Gutierrez's claims do not satisfy any of these exceptions. First, he does not challenge a new state-court judgment. Second, his claims were ripe at the time he filed his original petition because the events giving rise to the claim—counsel's failure to investigate and present expert testimony and testimony from Vasquez—had already occurred. Third, whether his proposed claims were unexhausted at the time he filed his initial § 2254 petition is irrelevant because that petition was denied as untimely. The dismissal of a petition as untimely is a decision "on the merits." *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000); *see also In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (per curiam) (collecting cases). And the district court denied as moot his motion for a stay to exhaust additional claims because his petition was untimely. The exception for unexhausted claims is meant to allow a petitioner to return to federal court when he has had some of his § 2254 claims dismissed as unexhausted, which is not the case here. *See Slack v. McDaniel*, 529 U.S. 473, 485-87 (2000); *see also In re Coley*, 871 F.3d at 457 (noting that the unexhausted claims exception is meant to be applied "where a federal court dismissed an earlier petition because it contained exhausted and unexhausted claims and in doing so never

passed on the merits"). Accordingly, Gutierrez's petition is second or successive and he must obtain leave.

We may authorize the filing of a second or successive habeas petition only if Gutierrez makes a prima facie showing, *see* 28 U.S.C. § 2244(b)(3)(C), that the petition contains a new claim that relies on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (2) new facts that could not have been discovered earlier through the exercise of reasonable diligence and that, "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," *id.* § 2244(b)(2). Gutierrez's motion is premised solely on newly discovered evidence.

Gutierrez relies on the affidavits of Dr. Jacobs and Vasquez, but the information contained in these affidavits is not new. Vasquez's affidavit is dated October 19, 2011, and thus was available to Gutierrez when he filed his original 2014 petition. Gutierrez acknowledges that he does not know why it was not included. Similarly, he does not claim that the information provided by Dr. Jacobs about the unreliability of child witnesses and forensic-interview protocols was unavailable either at the time of trial or when he filed his original petition, and thus it could have been discovered with reasonable diligence. *See* 28 U.S.C. § 2244(b)(2)(B)(i). Regardless, Dr. Jacobs possessed no personal knowledge of what occurred

between Gutierrez and the victim, and thus her testimony, although it might have been helpful to his case, is not sufficient to show that "no reasonable factfinder would have found [Gutierrez] guilty" based on the testimony of the victim and other corroborating evidence. 28 U.S.C. § 2244(b)(2)(B)(ii); *see Gutierrez*, 2011 WL 3299853, at *4 (summarizing the evidence).

For these reasons, we **DENY** Gutierrez motion for an order authorizing the district court to consider a second or successive § 2254 petition for a writ of habeas corpus.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-2004

In re: LUIS ALBERTO GUTIERREZ,

Movant.

Filed April 11, 2024

JUDGMENT

Before: BOGGS, WHITE, and THAPAR, Circuit Judges.

THIS MATTER came before the court upon the motion by Luis Alberto Gutierrez to authorize the district court to consider a second or successive 28 U.S.C. § 2254 petition for a writ of habeas corpus.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the motion for authorization is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED NOVEMBER 7, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 2:23-cv-12496

LUIS GUTIERREZ,

Petitioner,

GARY MINIARD,

Respondent.

Honorable Sean F. Cox
United States District Judge

ORDER TRANSFERRING CASE TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Before the Court is Michigan prisoner Luis Gutierrez's second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state-court conviction for first-degree criminal sexual conduct (person under 13 years old), Mich. Comp. Laws § 750.520(b)(1)(a). Petitioner requires authorization from the court of appeals before filing a successive habeas petition. *See* 28 U.S.C. § 2244(b)(3). The case will therefore be transferred

to the Sixth Circuit. *See In re Sims,* 111 F.3d 45, 47 (6th Cir. 1997).

BACKGROUND

Petitioner, who is represented by counsel in this action, was convicted in the Kent County Circuit Court of first-degree criminal sexual conduct. On November 4, 2009, the trial court sentenced Petitioner as a fourth habitual offender, Mich. Comp. Laws § 769.12, to imprisonment of 25 to 40 years. The Michigan Court of Appeals affirmed Petitioner's conviction in a per curiam opinion issued on August 2, 2011. *People v. Gutierrez,* No. 295169, 2011 WL 3299853, at * 1 (Mich. Ct. App. Aug. 2, 2011). The Michigan Supreme Court summarily denied Petitioner's application for leave to appeal on April 4, 2012. *People v. Gutierrez,* 491 Mich. 892, 810 N.W.2d 263 (2012). Petitioner moved for reconsideration of that decision, which was denied on June 25, 2012. *People v. Gutierrez,* 491 Mich·. 947, 815 N.W.2d 484 (2012).

On July 3, 2013, Petitioner filed a motion for new trial in the Kent County Circuit Court. On October 3, 2013, the trial court denied the motion as untimely. *(See* 10/3/13 Kent County Circuit Court Order, docket #1-1, Ex. C, Page ID#74-75.) On March 7, 2014, Petitioner filed a habeas petition in the Western District of Michigan challenging his convictions on the basis that the trial court failed to comply with proper jury selection procedure, which created "a radical defect" in the trial court's jurisdiction over the criminal matter. *See Gutierrez v. Stoddard,* No. l:14-CV-226, 2014 WL 4101509 (W.D. Mich. Aug. 18, 2014).

The district court dismissed the petition on the basis that it was time barred under the one-year statute of limitations. *Id.* at * 1. Petitioner then filed an application for a certificate of appealability ("COA") in the Sixth Circuit, which was subsequently denied.

On January 23, 2020, Petitioner filed a motion for relief from judgment pursuant to Michigan Rules of Court 6.500. In the motion, he raised claims concerning ineffective assistance of trial and appellate counsel. On March 31, 2020, the trial court denied the motion for relief of judgment and on June 24, 2020, the trial court denied Petitioner's motion for reconsideration. Petitioner filed an application for leave to appeal in the Michigan Court of Appeals, which was denied. The Michigan Supreme Court denied Petitioner's application for leave to appeal as well. *People v. Gutierrez,* 509 Mich. 991, 974 N.W.2d 224, reconsideration denied, 979 N.W.2d 824 (Mich. 2022). Now before the Court is Petitioner's habeas petition challenging the same 2009 Kent County conviction for first-degree criminal sexual conduct for the reasons set forth in his motion for relief from judgment.

DISCUSSION

Because Petitioner is challenging the validity of the same conviction on different grounds, the Court concludes that Petitioner is attempting to file a second or successive habeas petition.

The Court does not have jurisdiction to entertain a successive habeas petition absent authorization from the

court of appeals, *See Franklin* v. *Jenkins,* 839 F.3d 465, 473 (6th Cir. 2016) (citing 28 U.S.C. § 2244(b)(3)). Under the Antiterrorism and Effective Death Penalty Act of 1996, an individual seeking to file a successive habeas petition must first ask the appropriate court of appeals for an order of authorization to file a successive petition. *See* 28 U.S.C. § 2244(6)(3)(A); *see also Felker v. Turpin,* 518 U.S. 651, 664 (1996). When a habeas petitioner files a successive petition for habeas corpus relief directly in the district court without first obtaining authorization under § 2244(6)(3)(A), the district court must transfer the case to the court of appeals. *See Sims,* 111 F.3d at 47; 28 U.S.C. § 1631. Petitioner has not obtained appellate authorization to file a second or successive federal habeas petition as required by 28 U.S.C. § 2244(6)(3)(A). Consequently, the Court must transfer this case to the Sixth Circuit.

CONCLUSION

The Court **ORDERS** the Clerk of the Court to transfer this case to the Sixth Circuit pursuant to 28 U.S.C. § 1631 and *Sims,* 111 F.3d at 47.

IT IS SO ORDERED.

Dated: November 7, 2023

/s/Sean F. Cox
U.S. District Judge