No. 18-8194

In the Supreme Court of the United States

JEROME HENDERSON,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

1. Did the Sixth Circuit err in refusing to reverse the denial of a meritless Rule 60(b) motion in an appeal over which it lacked jurisdiction?

2. Now that Jerome Henderson has filed at least three frivolous *pro se* petitions, and been barred from making further *pro se* filings in the Sixth Circuit, should this Court invoke its authority under Rule 39.8 and *Martin v. Dist. of Columbia Court of Appeals*, 506 U.S. 1, 2 (1992) to preclude him from filing *in forma pauperis* in non-criminal matters?

LIST OF PARTIES

The Petitioner is Jerome Henderson, an inmate at the Chillicothe Correctional Institution.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution. Shoop is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

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INTRODUCTION

This is Jerome Henderson's second attempt to obtain Supreme Court review of the very same Rule 60(b) motion's denial. *See Henderson v. Robinson*, 137 S. Ct. 145 (2016) (ordering denying certiorari). He raises versions of the same arguments that he raised last time. *Compare* Pet. with Pet. for Certiorari, *Henderson v. Robinson*, 137 S. Ct. 145 (2016) (No. 15-9846). This time, however, he adds a jurisdictional flaw: he sought permission to appeal the Rule 60(b) motion under § 1292, but the court lacked jurisdiction to grant that relief because Henderson did not get approval for such an appeal from the District Court. 28 U.S.C. § 1292(b). This Court should once again refuse to hear the case. And because this is Henderson's third frivolous certiorari petition (at least), the Court should "direct the Clerk not to accept any further petitions for certiorari from [Henderson] in noncriminal matters unless he pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33." *Martin v. Dist. of Columbia Court of Appeals*, 506 U.S. 1, 2 (1992).

JURISDICTION

The Sixth Circuit entered judgment against Henderson on August 8, 2018. *See In re Henderson,* No. 15-302, 2018 U.S. App. LEXIS 22137, at *1 (6th Cir. Aug. 8, 2018), included at Pet. App. C. It denied his rehearing petition on November 29. *See In re Henderson*, No. 15-302, 2018 U.S. App. LEXIS 33697, at *1 (6th Cir. Nov. 29, 2018), included at Pet.App.D. Henderson timely filed his certiorari petition on February 25, 2019, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Federal Rule of Civil Procedure 60(b)(6) provides: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason that justifies relief."

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

COUNTERSTATEMENT

On the afternoon of March 3, 1985, ten-year-old Joann Acoff returned home to find her mother Mary's lifeless, brutalized body. *State v. Henderson*, 39 Ohio St. 3d 24, 24 (Ohio 1988). Someone had entered the apartment, slashed Mary's throat

at least thirteen times, inflicted blunt-force injuries to Mary's head, chest, neck, and upper extremities, and left her naked in a pool of blood. *Id*. at 24–25.

Police found one of Jerome Henderson's fingerprints at the crime scene. *Id*. at 25. They also spoke with two witnesses who saw Henderson near the apartment building soon after the crime occurred, wearing a long dark coat. *Id.* at 24. Police searched Henderson's home, where they confiscated gym shoes that had human blood on the soles and that matched bloody footprints from Acoff's apartment. *Henderson v. Collins*, 184 F. App'x 518, 521 (6th Cir. 2006). They additionally recovered a blood- and semen-stained black leather coat, as well as a black leather jacket with a knife in the pocket. *Henderson*, 39 Ohio St. 3d at 25. The bloodstains on the coat matched Acoff's blood type, but did not match Henderson's. *Id.* Police tested the semen to see whether it matched semen recovered from Acoff's body, but technology at the time did not allow them to determine whether the semen came from Henderson or Acoff's boyfriend. *See Henderson*, 184 F. App'x at 521.

The State charged Henderson with aggravated burglary, rape, and aggravated murder. And in 1985, an Ohio jury convicted him of each offense except rape, though it did convict him of *attempted* rape. The jury recommended a death sentence and the court agreed. Henderson directly appealed all the way to Ohio Supreme Court, but lost at each step. *See State v. Henderson*, No. C-850557, 1987 Ohio App. LEXIS 5519, at *37–38 (Ohio Ct. App. Jan. 14, 1987); *State v. Henderson*, 528 N.E.2d 1237, 1240 (Ohio 1988). This Court denied certiorari and rehearing. *Henderson v. Ohio*, 489 U.S. 1072 (1989); *Henderson v. Ohio*, 490 U.S. 1042 (1989).

Henderson has been trying to obtain post-conviction relief ever since. He first sought relief in state court. When that failed, he filed a federal petition for relief. That too failed, and this Court denied his petition for certiorari. *See Henderson v. Collins*, 262 F.3d 615, 623 (6th Cir. 2001), *cert. denied Henderson v. Collins*, 535 U.S. 1002 (2002). Henderson responded by filing two Rule 60(b)(6) motions for relief from judgment. *See Henderson*, 184 F. App'x at 519. Again he failed at the Sixth Circuit, *id.* at 519–20, and again this Court denied certiorari, *Henderson v. Collins*, 549 U.S. 1138 (2007). Undeterred, Henderson filed two more successive habeas corpus petitions in 2007 and 2008, which the Sixth Circuit refused to allow. *See* Order, No. 07-3942 (6th Cir. July 23, 2008); Order, No. 08-4304 (6th Cir. Dec. 4, 2008).

After all this, Henderson filed yet another Rule 60(b)(6) motion, which is the motion at issue here. The District Court denied the motion and Henderson responded in two different ways. First, he filed a "pro se petition for leave to appeal" the order under 28 U.S.C. § 1292(b). *In re Henderson,* No. 15-302, 2018 U.S. App. LEXIS 22137, at *1 (6th Cir. Aug. 8, 2018). Second, "he filed a notice of appeal directly from the same order, resulting in an appeal docketed in" the Sixth Circuit as "*Henderson v. Robinson*, No. 15-3490." *Id.* The Sixth Circuit addressed the direct appeal first, again declining to award relief, and faulting Henderson for repeatedly filing "motions and requests which either raise new arguments he should have made the first time or simply rehash arguments that have already been rejected." *Henderson v. Robinson*, No. 15-3490, 2016 U.S. App. LEXIS 23670, at *1 (6th Cir.

Jan. 8, 2016). When Henderson sought a rehearing, the Sixth Circuit decided that enough was enough: "In view of the petitioner's continuing attempt to relitigate issues already adjudicated and his repeated vexatious filings," it ordered the clerk of the court to accept "no further pro se appellate filings … without prior approval of the court." *Henderson v. Robinson*, No. 15-3490, 2016 U.S. App. LEXIS 24374, at *1 (6th Cir. Feb. 19, 2016). This Court again denied a petition for certiorari and a rehearing petition. *See Henderson*, 137 S. Ct. 145, *reh'g denied* 137 S. Ct. 542 (2016).

Even after all this, Henderson's petition for leave to appeal under § 1292 remained on the Sixth Circuit's docket. The Sixth Circuit got around to denying relief on August 3, 2018. It gave two reasons. First, Henderson failed to obtain the District Court's certification of an interlocutory appeal, which "is a prerequisite to a petition for permission to appeal … under 28 U.S.C. §1292(b)." *In re Henderson*, 2018 U.S. App. LEXIS 22137 at *1. Second, Henderson's "challenges to the denial of Rule 60(b) relief could have been raised in the direct appeal"—the one the Supreme Court already declined to consider. *Id*. The court concluded that its "denial of a certificate of appealability in that case has rendered any attempts to appeal the same order moot." *Id*. Henderson again moved for rehearing, and the Sixth Circuit again refused. *See In re Henderson*, No. 15-302, 2018 U.S. App. LEXIS 33697, at *1 (6th Cir. Nov. 29, 2018).

REASONS FOR DENYING THE WRIT

This Court should deny the petition for certiorari. The Sixth Circuit properly concluded that it lacked jurisdiction under § 1292(b) to hear the permissive appeal, which is meritless in any event. The Court should also deny Henderson's motion for

leave to proceed *in forma pauperis* under Rule 39.8, and "direct the Clerk not to accept any further petitions for certiorari from [Henderson] in noncriminal matters unless he pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33." *Martin v. Dist. of Columbia Court of Appeals*, 506 U.S. 1, 2 (1992).

I. HENDERSON'S PETITION IS FRIVOLOUS, BECAUSE THE SIXTH CIRCUIT LACKED JURISDICTION TO AWARD HIM RELIEF.

The Sixth Circuit below denied Henderson leave to file a permissive appeal under § 1292(b). *In re Henderson*, No. 15-302, 2018 U.S. App. LEXIS 22137, at *1 (6th Cir. Aug. 8, 2018). Relevant here, 28 U.S.C. § 1292(b) permits the circuit courts to award leave to appeal *only if* the District Court certifies in writing that its decision "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." "Certification by the district court is a jurisdictional prerequisite to interlocutory review under § 1292(b)." *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002). In this case, the District Court made no such certification. As a result, the Sixth Circuit had no jurisdiction to entertain Henderson's appeal under § 1292, and correctly refused to award him relief on that basis.

II. HENDERSON SEEKS FACTBOUND ERROR CORRECTION RELATING TO QUESTIONS THAT HE ALREADY HAS—OR ALREADY COULD HAVE—LITIGATED.

Henderson's petition does not allege a circuit split. Instead, it lists a series of grievances that Henderson has against the courts, his attorneys, and Ohio's justice system. These grievances all seem to relate to one of three general topics: (1) chal-

lenges to the evidence that supported his conviction based on testing that occurred after his conviction; (2) complaints about ineffective assistance of counsel at every level of his proceedings (trial, appeal, and post-conviction); and (3) accusations of a racial conspiracy by attorneys and judges throughout the Ohio and federal legal systems to deprive him of his civil rights.

None of these complaints is new—indeed, they are essentially the same ones that this Court considered when it denied certiorari in 2016. *See* Pet. for Certiorari, *Henderson v. Robinson*, 137 S. Ct. 145 (2016) (No. 15-9846). Henderson has already litigated the need for and relevance of further DNA testing. *See, e.g.*, *Henderson v. Collins*, 184 F. App'x 518, 524–25 (6th Cir. June 9, 2006). His very first habeas petition raised an ineffective-assistance claim, *see* Initial Habeas Petition, No. 1:94-CV-106 (Feb. 14, 1994) at 70 ("Counsel failed to request funds from the court to hire his own expert to test [the opposing expert's] conclusions."), and other courts have addressed his additional claims in the years since, *see Henderson*, 101 F. Supp. 2d 866, 887–88 (S.D. Ohio 1999); *Henderson v. Collins*, 262 F.3d 615, 617 (6th Cir. 2001); *Henderson* 184 F. App'x at 527–29 (Clay, J., concurring). As for the alleged racial conspiracy, Henderson long ago pressed that claim in a case alleging "a race-based conspiracy to provide him with constitutionally deficient representation and investigation during his aggravated murder trial and subsequent appeals, postconviction proceedings, and federal habeas corpus proceedings deprived him of due process and equal protections rights." *See Henderson v. Kasich*, No. 2:11-cv-119, 2011 U.S. Dist. LEXIS 90618, at *5 (S.D. Ohio Aug. 15, 2011). The District Court proper-

ly treated this claim as an attempt to bring a successive habeas petition, and refused to permit it. *Id*. The Court had no apparent interest in these issues last time they were before it, and Henderson's re-raising them with a new jurisdictional flaw, *see above* 6, should not lead to a different result.

Regardless, Henderson does not even try to show that he has a plausible claim to relief under Rule 60(b). The argument is therefore forfeited. And it is frivolous in any event. That rule provides that a court may reopen a judgment if the moving party shows:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Henderson is presumably relying on the broad catch-all in Rule 60(b)(6). This broad catch-all, however, permits relief "only in 'extraordinary circumstances,'" which "will rarely occur in the habeas context." *Buck v. Davis*, 137 S. Ct. 759, 772 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). If Henderson's case presented such circumstances, some court would have noticed by now.

But there is no need to speculate. The heart of Henderson's petition is his complaint about DNA testing. He appears to claim that a DNA test of blood and

semen recovered at the scene exonerates him, and his ineffective-assistance claims appear to rest on counsel's failure adequately to pursue such tests or introduce such evidence. Pet. 28–40. These arguments are meritless, as the Sixth Circuit held over a decade ago. In 2002, in response to Henderson's earlier Rule 60(b)(6) motion, the District Court ordered further testing of DNA evidence that contributed to Henderson's conviction. *Henderson*, 184 F. App'x at 520. These tests proved to be far more inculpatory than exculpatory. The blood found on Henderson's coat came from a female who was "genetically compatible with Mary Acoff and only a few human beings who have ever lived." *Id.* at 521. So that *confirmed* the jury's conclusion that Henderson murdered Acoff. The recovered semen turned out not to have been from Henderson. But that is fully consistent with the jury's decision to convict Henderson of *attempted* rape while *acquitting him* of rape. *Id.* at 525. As the Sixth Circuit explained, "Henderson's new evidence does not—and, as a logical matter, cannot—undercut any evidence supporting the charges of which the jury actually convicted him." *Id.*

Any suggestion that counsel might have used this mostly incriminating evidence to Henderson's advantage is mistaken. As Sixth Circuit Judge Clay explained in a previous iteration of these proceedings, counsel's "refusal to obtain DNA testing for the first federal habeas petition" was reasonable given the "inculpatory evidence that the DNA testing could and did in fact produce." *Id.* at 528–29 (Clay, J., concurring). "The relatively minuscule benefit of subtracting the semen found in the victim's body from the attempted rape calculus was greatly outweighed

by the danger that the DNA tests could return this inculpatory [blood] evidence." *Id*. at 529.

In sum, Henderson's arguments all relate to evidence that either inculpate or fail to exculpate him. Henderson's desire to present such evidence does not constitute an "extraordinary circumstance" justifying Rule 60(b)(6) relief.

III. THE COURT SHOULD BAR HENDERSON FROM FURTHER *IN FORMA PAUPERIS* FILINGS

This Court first refused to consider the Sixth Circuit's denial of federal habeas relief in 2002. *Henderson*, 535 U.S. 1002. In the seventeen years since, Jerome Henderson has burdened this Court and others with "motions and requests which either raise new arguments he should have made the first time or simply rehash arguments that have already been rejected." *Henderson*, 2016 U.S. App. LEXIS 23670 at *1. "In view of the petitioner's continuing attempt to relitigate issues already adjudicated and his repeated vexatious filings," the Sixth Circuit will "accept no further pro se appellate filings from the petitioner without prior approval of the court." *Henderson*, 2016 U.S. App. LEXIS 24374 at *1.

This Court should exercise its similar power under Rule 39.8 to deny Henderson *in forma pauperis* status. This is the third time since 2010 that Jerome Henderson has filed a frivolous *pro se* petition for certiorari and sought leave to file *in forma pauperis*. *See also In re Jerome Henderson*, No. 09-9255 (U.S.); *Henderson v. Robinson*, No. 15-9846 (U.S.). And there may be more such petitions on the way: Henderson is continuing to litigate, and indeed the Sixth Circuit denied yet another attempt to reverse the denial of Rule 60(b) relief in December. *See Henderson v.*

Shoop, No. 18-3250, 2018 U.S. App. LEXIS 34744 (6th Cir. Dec. 10, 2018). Because he is a death row inmate, this Court's Rule 15.1 obligates Ohio to file a response to each of these petitions, wasting taxpayer resources that could be more fruitfully directed to almost anything else. Furthermore, the "repetitious and frivolous petitions for certiorari" from Henderson and those like him needlessly waste this Court's resources. *Martin*, 506 U.S. at 3. In light of all this, the Court should deny Henderson's petition to file *in forma pauperis* and "direct the Clerk not to accept any further petitions for certiorari from [Henderson] in noncriminal matters unless he pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33." *Id.* at 2. In the alternative, the Court should deny Henderson *in forma pauperis* status as to future *pro se* petitions, leaving him to option to seek *in forma pauperis* status for counseled petitions.

CONCLUSION

The Court should deny Henderson's petition for writ of certiorari, and bar him from seeking *in forma pauperis* status in the future.

Respectfully submitted,

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