
No. 23 - _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID EUGENE MATTHEWS

Petitioner

v.

LAURA PLAPPERT, INTERIM 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

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

For over three decades, the Court has applied the abuse of the writ doctrine to determine if a second-in-time habeas petition is an initial or successive petition. If the petition is successive, 28 U.S.C. §2244(b)'s gatekeeper must open for the petition to be allowed to proceed. But that gatekeeper does not apply to second-in-time initial petitions. Under the Court's decades-long abuse of the writ doctrine, the answer to a simple question determines entirely whether a petition is successive or not: does the petitioner "ha[ve] a legitimate excuse for failing to raise a claim at the appropriate time?" *McCleskey v. Zant*, 499 U.S. 467 (1991). If the answer is yes, the petition is an initial one that shall proceed in the same manner as a first petition, regardless of the nature of the claim. *Banister v. Davis*, 140 S.Ct. 1698, 1706 (2020).

This doctrine balances the value of not requiring every conceivable habeas claim to be raised to preserve it in case the law changes to make a claim viable, with the importance of streamlining habeas and promoting finality. It eliminates any "incentives to withhold claims for manipulative purposes," *McCleskey*, 499 U.S. at 491, and thus ended the practice of saving claims for future petitions. Congress did not change, or even address, the abuse of the writ doctrine when it modified 28 U.S.C. §2244(b) to create limits on when a petition that has been determined to be successive can proceed, as *Banister* recognized less than four years ago.

Despite *Banister* having reaffirmed the doctrine's post-AEDPA applicability, the Sixth Circuit recently held that even if a petitioner has a legitimate excuse for not raising a claim within a first petition, the claim is successive unless it was unripe at the time of the first petition or presented in that petition but unexhausted. That rule conflicts with *Banister* and over three decades of the Court's continued adherence to the abuse of the writ doctrine, and it will result in habeas petitioners no longer winnowing claims foreclosed by existing law, thereby undermining AEDPA's core goals of streamlining habeas and furthering finality. The Sixth Circuit's ruling threatens AEDPA's purpose and provides another in a long list of Sixth Circuit cases that failed to remain faithful to this Court's precedent and holdings.

This gives rise to two questions presented:

- 1) Does limiting second-in-time initial habeas petitions to only petitions that raise (a) a claim that was unripe when the first petition was filed, or (b) an unexhausted claim that was raised in the first petition, conflict with the Court's more than three-decade precedent regarding the abuse of the writ doctrine, reaffirmed less than four years ago in *Banister*, that a petition is not successive so long as the petitioner had a legitimate excuse for not raising the claim in the first petition?

- 2) If categorically limiting second-in-time habeas petitions to only petitions that raise claims that were (a) unripe when the first petition was filed, or (b) an unexhausted claim that was raised in the petition, does not conflict with the abuse of the writ doctrine and *Banister*, should the Court still exercise its equitable powers over habeas rules to make clear the abuse of the writ doctrine's question—whether the petitioner has a legitimate excuse for not raising the claim in the first habeas petition—exclusively governs whether a habeas petition is successive?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Eugene Matthews requests a Writ of Certiorari issue to review the United States Court of Appeals for the Sixth Circuit's order holding his federal habeas petition is successive and denying his motion to retransfer/remand the petition to the district court to be adjudicated as an initial petition.

The magistrate judge, affirmed by the district court, rejected the Warden's argument that the habeas claim had previously been adjudicated and that the petition was successive. The magistrate judge authorized depositions of trial counsel, which were taken, and post-deposition briefing then filed. While awaiting a ruling on the merits of the habeas claim, the judge suddenly reversed course, *sua sponte*

ruling the petition was successive. In doing so, the magistrate judge failed to realize that, as this Court ruled in *Banister v. Davis*, 140 S.Ct. 1698 (2020), 28 U.S.C. §2244(b) did not swallow the abuse of the writ doctrine. Instead, §2244(b) applies only once a court determines a petition is successive. Federal courts still must first apply the abuse of the writ doctrine to determine whether the petition is successive. Section 2244(b) then becomes applicable only if the petition has been determined to be successive. At that point, §2244(b) serves the distinct function of limiting when a successive habeas petition shall be allowed to proceed. Misunderstanding this, the magistrate judge held the petition was successive because it did not satisfy §2244(b). The district judge agreed.

While a motion to retransfer/remand was pending, the Sixth Circuit decided, en banc, in *In re Hill*, 81 F.4th 560 (6th Cir. 2023). Therein, the court abandoned the abuse of the writ doctrine by creating a new rule that a second petition is not successive only if it raises a claim that was either unripe at the time of the first habeas petition or unexhausted when presented within the first petition. Even though Matthews had a legitimate excuse for not raising his claim in his habeas petition, bound by *Hill*, the Sixth Circuit held Matthews' petition was successive because his claim was ripe at the time of his first petition and was not then unexhausted.

Like with *Hill*, Matthews' case squarely deals with how to determine whether a second-in-time petition is successive, and the court of appeals' refusal to apply the longstanding abuse of the writ doctrine to make that determination. This issue arises

despite this Court making clear less than four years ago, in *Banister*, that the abuse of the writ is the sole means for determining whether a habeas petition is initial or successive. Hill presents that issue in his pending Petition for a Writ of Certiorari for which this Court requested the record and has not yet redistributed the case for conference. *Hill v. Shoop*, No. 23-6276. Matthews now presents the issue in a parallel situation, originating from the same court of appeals in a ruling in which the panel was bound by *Hill*. As such, while Matthews' Petition merits certiorari, if this Court grants certiorari in *Hill*, it should also do so in Matthews' case and consolidate the cases, or alternatively, hold Matthews' petition pending disposition of *Hill*. If certiorari is denied in *Hill*, this Court should consider Matthews' Petition on its own.

CITATIONS TO OPINION BELOW

The United States Court of Appeals for the Sixth Circuit's unpublished order holding Matthews' habeas petition is successive, *In re Matthews*, No. 23-5471 (6th Cir. Nov. 14, 2023) is included in the Appendix (App. 1-3). The district court order holding the petition is successive and transferring the petition to the Sixth Circuit to determine whether to authorize filing a successive petition appears at *Matthews v. White*, 2023 WL 3562995 (W.D. Ky.) and is reprinted in the Appendix (App. 4-8). The magistrate judge's ruling that the petition is successive appears at *Matthews v. White*, 2023 WL 3945579 (W.D. Ky.) and is reprinted in the Appendix (App. 9-11). The magistrate order rejecting the Warden's argument that the habeas petition raised an issue that was previously raised and was successive, and instead authorizing

depositions of trial counsel, *Matthews v. White*, No. 3:12-cv-663 (W.D. Ky. Sept. 24, 2015), is unpublished and included in the Appendix (App. 12-17).

JURISDICTION

28 U.S.C. § 1254(1) allows this Court to review, by writ of certiorari, the Sixth Circuit's ruling on whether Matthews' habeas petition was an initial or successive petition and to address the law governing how that determination must be made. *See Castro v. United States*, 540 U.S. 375, 380-81 (2003). The Sixth Circuit's ruling was rendered on November 14, 2023. This Court granted an extension of time to April 12, 2024 to file Matthews' Petition for a Writ of Certiorari. This Petition is timely.

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(b)(1) states “[a] claim presented in a second or successive habeas application under section 2254 that was presented in a prior application shall be dismissed.”

28 U.S.C. §2244(b)(2) states:

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—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) 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.

STATEMENT OF THE CASE

It was undisputed at trial that Matthews murdered the victims. The issues were whether he acted under an extreme emotional disturbance and thus should be convicted of a lesser offense, and whether he should be sentenced to death. Trial counsel attempted to present expert testimony that Matthews' aggression was confined to the family situation that was the precursor for the crime, not directed at society at large, but the judge correctly excluded that lack of future dangerousness testimony as inadmissible at the guilt phase. The jury then convicted Matthews of intentional murder. Counsel then did not attempt to introduce the future dangerousness evidence at the penalty phase—when it was admissible. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (“[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.”).

It is well-established that, “[a]ny sentencing authority must predict a convicted person’s probable future conduct when it engages in the process of determining what punishment to impose” *id.* (internal quotation omitted), and whether the defendant will be a danger in the future, “is nearly always a relevant factor in jury decision-making, even where the State does not specifically argue the point.” *Deck v. Missouri*, 544 U.S. 622, 633 (2005). “[T]opics related to the defendant’s dangerousness should he ever return to society . . . are second only to the crime itself in the attention they receive during the jury’s penalty phase deliberations.” John H. Blume, et al., *Future Dangerousness in Capital Cases: Always “At Issue,”* 86 Cornell L. Rev. 397, 404, 406 Tb.2, 407 Tb.3 (2001).

Both the prosecutor and trial counsel recognized the significance of future dangerousness. The prosecutor argued to the jury that Matthews' "mind and body are so bad, they need to be destroyed" and that "you have to assess whether this is something that could have happened once, or if it is something in the mind and body tissues of David Matthews." Prosecution closing argument, R.25-3, Page ID#327-28 (App. 51-52). Trial counsel told the jury, Matthews' "whole being was directed at his wife and her family, and he's not a threat to anyone else." Defense closing argument, R.25-3, Page ID#337-38 (App. 61-62). Yet, trial counsel failed to support this argument with expert testimony that Matthews would not be a future danger, even though counsel submitted to the trial judge, after the jury's death verdict, an expert's letter explaining Matthews would not be a future danger. Specifically, the expert stated Matthews' personality means "it is quite unlikely that he will again be subject to such stresses and would react by killing or injuring anyone" and Matthews could be rehabilitated. Dr. Chutkow Letter, R.25-2, Page ID#319 (App. 41). Even without this, the jury struggled to determine whether Matthews would be a future danger and whether he should be sentenced to death. During deliberations, the jury asked to review that expert's guilt-phase testimony and asked questions regarding parole eligibility and the availability of imposing consecutive sentences to avoid release. Transcript, R.25-4, Page ID#342 (App. 42-43). Absent the evidence of lack of future dangerousness, the jury voted to impose death.

State post-conviction counsel did not argue this was trial counsel ineffectiveness, thereby defaulting the claim for federal habeas corpus. As is

regularly so for claims the law clearly forecloses, the claim was not presented in Matthews' first habeas petition since there was no then-existing means to excuse the default to allow the claim to be reviewed. That changed years later, when this Court, in *Martinez v. Ryan*, 566 U.S. 1 (2012), created a new means to excuse a procedural default—ineffective assistance of initial-review-collateral-proceeding counsel as to a trial counsel ineffectiveness claim.

Shortly after *Martinez*, Matthews filed his second-in-time habeas petition, raising the trial counsel ineffectiveness claim and asserting ineffective assistance of initial-review-collateral-proceeding counsel to excuse the default. Rejecting the Warden's argument that Matthews' claim had been raised in his first habeas petition, the district court found good cause to depose trial counsel. *Matthews v. White*, No. 3:12-cv-663 (W.D. Ky. Sept. 24, 2015) (App. 14-16). By doing so, the court implicitly held the petition was not successive, as it had no jurisdiction to authorize discovery if the petition was successive.

During their depositions, trial counsel admitted they performed deficiently when they failed to present the jury with penalty phase expert testimony of the lack of future dangerousness. After post-deposition briefing, the case sat for years until the magistrate judge suddenly held the petition was successive. *Matthews v. White*, 2023 WL 3945579 (W.D. Ky.) (App. 9-11). The district court agreed and transferred the petition to the Sixth Circuit to determine whether to grant authorization to file a successive petition. *Matthews v. White*, 2023 WL 3562995 (W.D. Ky.) (App. 6-8). Matthews filed a motion to retransfer to the district court as an initial petition. (App.

18-40.) Bound by its intervening en banc decision in *In re Hill*, the Sixth Circuit construed Matthews’ petition as successive and denied retransfer/remand. *In re Matthews*, No. 23-5471 (6th Cir. Nov. 14, 2023) (App. 1-3).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Before the Sixth Circuit, Matthews relied upon *Banister*’s holding that §2244(b) “did not redefine what qualifies as a successive petition,” 140 S.Ct. at 1707, and thus the district court erred when it relied solely on §2244(b) as the applicable law to determine what constitutes a successive petition, and, resultingly, determined the petition is successive. Matthews explained further that, under *Banister*, the abuse of the writ doctrine is the exclusive means to determine whether a petition is initial or successive and that if the abuse of the writ doctrine is satisfied, the claim is not successive regardless of the circumstances and nature of the claim. *See motion to remand (retransfer) to district court as an initial habeas petition, In re Matthews*, No. 23-5471 (6th Cir.) (App. 18-40).

Under that doctrine and AEDPA’s purpose, Matthews explained his petition was not successive. That is because he had a legitimate excuse for not raising the claim in his first petition—the claim was defaulted with no means to excuse the default prior to *Martinez*; therefore, raising the claim then would have been frivolous. *Id.* As such, he did not abuse the writ by promptly raising the claim when the applicable law regarding default changed. *Id.* Thus, it was an initial habeas petition.

While Matthews’ motion to retransfer was pending, the Sixth Circuit, sitting en banc, decided *Hill*, 81 F.4th 560, which discarded the abuse of the writ doctrine in

favor of holding only two types of claims can ever be considered not successive. Specifically, the court held a claim presented in a second habeas petition that challenges the same judgment is always successive unless the petition raises a claim that was either unripe when the first habeas petition was filed, or raised but unexhausted then. *Id.* at 569. Applying *Hill*, the Sixth Circuit held Matthews' habeas claim had not been raised in his prior petition, but was neither unripe, nor unexhausted then. *In re Matthews*, No. 23-5471 (6th Cir. Nov. 14, 2023) (App. 2-3). Thus, the panel held *Hill* required it to hold the petition was successive and deny retransfer (remand) to the district court. *Id.*

REASONS FOR GRANTING THE WRIT

The questions presented here are whether the abuse of the writ doctrine remains the means to determine whether a habeas petition is initial or successive, and whether a petition raising a claim that satisfies the abuse of the writ doctrine is not successive regardless of the nature and circumstances of the claim. The answer is yes. The Court made that clear in *Banister*, holding §2244(b) did not replace or otherwise supersede the abuse of the writ doctrine for determining whether a habeas petition is initial or successive; thus, whether a claim is successive does not turn on the nature of the claim (for example, unripe or unexhausted). Rather, it turns entirely on the straightforward application of the abuse of the writ doctrine, which requires a court to answer the simple question of whether the petitioner had a legitimate excuse for not raising the claim in the first petition. If they did, the subsequent petition is not successive. It is that simple, and that is literally the end

of the analysis under *Banister* and this Court's long-standing abuse of the writ doctrine. The Sixth Circuit's contrary conclusion, premised on *Hill*'s creation of a narrow set of claims that are the only ones that can ever not be successive, cannot be reconciled with *Banister* or this Court's long-standing abuse of the writ doctrine.

Allowing the Sixth Circuit's ruling to stand would undermine AEDPA's purpose of eliminating unnecessary delay and lead to dire consequences for victim family members who seek closure, habeas petitioners who seek to vindicate their constitutional rights, and the federal judiciary that will have to decide the claims. Pursuant to the Sixth Circuit's ruling, the only way to ensure a currently foreclosed claim could later be reviewed if the law changes, would be for the habeas petitioner to include the claim in the first habeas petition. Thus, to be able to present a claim if the law subsequently changes to make a non-cognizable claim cognizable, habeas petitioners would need to raise every single constitutional claim the law forecloses. The resulting number of additional claims presented therein would skyrocket, making it take even longer for the federal district courts to address habeas petitions, overburdening the court's workload, and resulting in significant unnecessary delay before finality. None of this should be necessary.

The abuse of the writ doctrine, if followed, eliminates this problem, as it creates a means by which claims will not be an abuse of the writ when they had no possibility of success and were therefore not raised in the first habeas petition. Making clear that doctrine remains in place as the sole means to determine whether a petition is

initial or successive will continue to avoid this nightmare situation and ensure the Sixth Circuit has not unintentionally undermined AEDPA's purpose.

Matthews' case is the ideal vehicle for this Court to address the situation. The issue was clearly presented to the Sixth Circuit, who failed to apply the abuse of the writ doctrine because it believed erroneously that no matter the reason a claim was not presented in a prior habeas petition, only certain circumstances could ever result in a habeas petition not being successive. That interpretation of the law required holding Matthews' petition was successive; therefore, the Sixth Circuit's ruling turned entirely on whether *Banister*, and the abuse of the writ doctrine, remained applicable. The Sixth Circuit's ruling clearly conflicts with *Banister*. This Court should therefore summarily reverse, making clear the Sixth Circuit is bound to follow the Court's precedent and apply only the abuse of the writ doctrine to determine whether Matthews' petition is an initial petition. Alternatively, the Court should grant plenary review.

I. The Sixth Circuit's decision conflicts with *Banister*, and the Court's longstanding abuse of the writ doctrine, for determining whether a second-in-time habeas petition is initial or successive.

A. *Banister* makes clear that whether a habeas petition is initial or successive must still be determined through the abuse of the writ doctrine.

This Court has long required its abuse of the writ doctrine be applied to determine whether a subsequent habeas petition constitutes an initial or successive petition. *McCleskey v. Zant*, 499 U.S. 467 (1991). Going back to at least the 1960s, a claim would be considered successive if it had been presented and decided on its merits in a prior habeas petition. *Id.* at 483-84. But the law then did not address a

claim deliberately withheld from a first habeas petition only to be presented in a subsequent petition or any other situation where a claim could have been presented in a manner upon which relief could be granted but, for whatever reason, was not presented in the first petition. That is where this Court's abuse of the writ doctrine, which is based on "equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," comes into play. *Id.* at 489.

As this Court held, an abuse of the writ occurs through deliberate abandonment of a claim or inexcusable neglect. *Id.* at 489-90. What constitutes either? This Court clearly articulated how to determine that, and resultingly, when raising a claim for the first time in a second petition is not an abuse of the writ.

The standard used to decide whether to excuse a procedural default also determines whether an abuse of the writ occurred. *Id.* at 490, 493. Providing more specific guidance and a directive, the Court made clear the inquiry is limited to whether a petitioner "has a legitimate excuse for failing to raise a claim at the appropriate time." *Id.* at 490. Simply, if a habeas petition claim is an abuse of the writ, the petition, "is successive; if not, likely not." *Banister*, 140 S.Ct. at 1706. Said differently, under "more than two decades of Supreme Court precedent . . . 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." *Hill*, 81 F.4th at 583 (Clay, J., dissenting) (quoting *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998)).

This mechanism for determining whether a second habeas petition is successive or not implicates the long-standing key concerns regarding federal habeas and second habeas petitions—finality that includes a state’s ability to enforce its law and judgments and eliminating “incentives to withhold claims for manipulative purposes”—by delineating circumstances in which a second habeas petition shall be quickly disposed. *McCleskey*, 499 U.S. at 491. In this regard, it also furthers those principles by conserving judicial resources and lessening piecemeal litigation, both of which reduce delay and lead to finality.

In the wake of this Court delineating the abuse of the writ doctrine, which again was created largely based on historical practice going back ages, there was no significant debate that this doctrine was both workable and the sole means to determine whether a habeas petition was successive. Nor was there any substantial question as to its efficacy in reducing piecemeal litigation, lessening the number of habeas petitions beyond the first one, and speeding up finality. Against, this backdrop, Congress adopted the AEDPA and modified §2244(b) to address what the abuse of the writ doctrine did not deal with—what limits should be placed on successive habeas petitions once it has been determined through the abuse of the writ doctrine that a subsequent petition is successive?

28 U.S.C. §2244(b) codified what was already law—a claim presented in a second habeas petition that had already been decided in a prior petition must be denied. Without then changing the long-standing abuse of the writ doctrine that furthered AEDPA’s core interest in limiting interference with state court judgments

and furthering finality, Congress, through this statute, placed the first limits on when an already determined successive habeas petition shall be allowed to proceed.

Specifically, §2244(b)(2) states:

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—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) 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.

An initial habeas petition is mentioned nowhere therein. Nor does anything therein discuss how to determine whether a petition is initial or successive. Thus, the plain language makes clear these heightened requirements must be satisfied *only* if the application is successive; if the petition is second-in-time, but not successive, these requirements do not apply.

That §2244(b) has no impact on the continued applicability of the abuse of the writ doctrine as the sole means to determine whether a petition is successive also makes perfect sense in the context of AEDPA's purpose. There was no reason for Congress, which is presumed to have been well-aware of the abuse of the writ doctrine, to have changed it. By then, the doctrine had already been serving effectively for years, the core principle of streamlining habeas and furthering both

finality and the State's ability to enforce its own judgments. Rather than mess with that, Congress, through §2244(b) dealt with, as the statute's plain language made clear, how to limit the adjudication of habeas petition claims that had already passed through the gateway known as the abuse of the writ doctrine. As such, §2244(b) has no application in determining whether a petition is successive or not.

The Court made this clear approximately four years ago when, in *Banister*, it addressed this exact matter, recognized the abuse of the writ doctrine and §2244(b) apply to different matters, and held the abuse of the writ doctrine remains, post-AEDPA/§2244(b), the sole means to determine whether a habeas petition is successive. As this Court noted, “[w]hen Congress ‘intends to effect a change’ in existing law—in particular, a holding of this Court—it usually provides a clear statement of that objective. AEDPA offers no such indication that Congress meant to change the historical practice” of how a court determines if a habeas petition is initial or successive, as opposed to just imposing additional restrictions on whether a successive habeas petition shall be allowed to proceed. *Banister*, 140 S.Ct. at 1707 (internal citation omitted). As such, AEDPA (§2244(b)) “did not redefine what qualifies as a successive petition.” *Id.* Thus, even now, to determine whether a petition is initial or successive, a court shall determine only “whether a type of later-in-time filing would have ‘constituted an abuse of the writ, as that concept is explained in [the Court’s] [pre-AEDPA] cases.’” *Id.* at 1706 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007)). “If so, it is successive; if not, likely not.” *Id.* So, it remains that if a petitioner “has a legitimate excuse for failing to raise a claim

at the appropriate time,” the petition is not successive. *McCleskey*, 489 U.S. at 490. That is all a court may consider when determining if a petition is initial or successive. Anything more or different disregards *Banister* and improperly narrows the abuse of the writ doctrine in a way that conflicts with precedent and AEDPA’s purpose.

B. The Sixth Circuit’s decision cannot be reconciled with *Banister*.

In *Hill*, the Sixth Circuit, sitting en banc, acknowledged the existence of the abuse of the writ doctrine, but misunderstood *Banister* to mean a petition can be considered not successive only if the petition is neither an abuse of the writ nor undermines AEDPA’s purpose. *Hill*, 81 F.4th at 568. With this misunderstanding, the court did not utilize the simple abuse of the writ standard of whether the petitioner had a legitimate excuse for the failure to include the claim within the first petition. It did not even apply that standard. Instead, it noted the Supreme Court has identified “three circumstances when a petition is second in time but isn’t second or successive”: when a second petition (1) “raises a claim that challenges a new state-court judgment;” (2) contains a claim “that would have been unripe at the time of the filing of the first petition;” or (3) “contains a claim that, though raised in the first petition, was unexhausted at that time and not decided on the merits.” *Id.* at 568-69. Summing it up, the court held, “[w]hen 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.’” *Id.* at 569. The Sixth Circuit held those are the only three situations in which a claim presented in a second

petition is not successive, disregarding the governing abuse of the writ doctrine in favor of a checklist by which a court of appeals could simply check off boxes to determine whether a petition is successive or not.

As appealing as it might seem in the abstract to make the analysis merely checking off a list, doing so would undermine the goals of the AEDPA and cannot be reconciled with *Banister* or any of the Court's prior precedent dealing with the abuse of the writ doctrine. Nowhere within *Banister*, or anywhere else, has the Court said there are only three circumstances in which a second habeas petition is not successive. That is for good reason. Limiting second-in-time petitions to just those three situations would leave out petitions raising any other claim for which a petitioner "has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey*, 489 U.S. at 490. This would force habeas petitioners to raise claims that could not be adjudicated on the merits or otherwise could not prevail under governing law, just to preserve the claim for adjudication the rare situation where the law later changes. That would deplete precious federal judicial resources and delay adjudication in contravention of AEDPA's purpose. The abuse of the writ doctrine recognized this conundrum before AEDPA, as did *Banister* post-AEDPA. Thus, as the Court made clear in *Banister*, it makes no difference the type of claim raised or the circumstances surrounding it, other than whether the petitioner had a legitimate excuse for not previously presenting the claim. If the petitioner did, the petition must be allowed to proceed as an initial petition regardless of whether the claim was unripe when the first petition was filed, and regardless of whether the claim was

unexhausted at the time of the first petition. Anything different disregards the abuse of the writ doctrine, conflicts with *Banister*, and undermines AEDPA's purpose. Yet, that is exactly what the Sixth Circuit did in *Hill*.

Because *Hill* was an en banc decision, it binds the Sixth Circuit for all future cases unless the Court (or the Sixth Circuit sitting en banc in the future) overrules *Hill*. Matthews' panel was therefore bound by *Hill*, regardless of how erroneously *Hill* was decided.¹ Noting its recent en banc decision in *Hill* makes clear, "[w]hen 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,'" the Sixth Circuit ruled it was bound to find Matthews' petition successive because it fell directly within this definition. *In re Matthews*, No. 23-5471 at 2-3, App. 2-3, quoting *Hill*, 81 F.4th at 569. Applying its newly created means of determination, the Sixth Circuit held Matthews' petition was successive. Accordingly, the ruling in *Matthews*, like the ruling in *Hill*, conflicts with *Banister* and the Court's decades of repeated explanation of, and application of, the abuse of the writ doctrine.

¹ There can be no doubt that the majority of Matthews' panel believed *Hill* was wrongly decided as to the applicable standard for determining whether a petition is second or successive. Two of the three dissenting judges in *Hill* were on Matthews' Sixth Circuit panel.

II. If the Sixth Circuit’s rule is allowed to stand, it will undermine AEDPA’s purpose of avoiding unnecessary delay.

The Sixth Circuit’s disregard for *Banister* and how the abuse of the writ doctrine has been applied for decades, is a strong basis for granting certiorari. The disastrous consequences of not doing so make the basis to grant certiorari stronger. Allowing the Sixth Circuit’s decision to stand will bog down the federal district courts and delay finality because habeas petitioners will undoubtedly “respond[] by packing their first [habeas] petitions with speculative or unripe claims.” *In re Jones*, 54 F.4th 947, 950 (6th Cir. 2022). That would undermine the AEDPA and finality.

“[N]o useful purpose would be served by requiring prisoners to file . . . claims in their initial petition as a matter of course, in order to leave open the chance of reviving their challenges in the event that subsequent changes” to the law turn a nonviable claim into a viable one. *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010). “Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, ‘reduc[e] piecemeal litigation,’ or ‘streamlin[e] federal habeas proceedings.” *Panetti*, 551 U.S. at 946 (quoting *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (internal quotation marks omitted)).

In this case, the claim Matthews presented in his second-in-time petition had no possibility of success within his first petition. That is because the claim was clearly procedurally defaulted, and no basis then existed to excuse the default. Under governing law, the claim was then frivolous. That does not mean it would necessarily always be frivolous. The law could change, as it did. But litigants are not expected

to anticipate a change in law years or even decades later. The appropriate action was for Matthews to not then raise the claim in his federal habeas petition. That is because he should not raise a claim that is then frivolous with no likelihood of getting a court to overturn the adverse precedent.

The scenario the Sixth Circuit's ruling creates for future habeas petitioners, and punishes Matthews for failing to do in his first petition, has far-reaching implications. Under *Hill* and the Sixth Circuit's ruling in Matthews' case, if a claim is ripe and not unexhausted, there is only one way to be able to litigate the claim in the future if the law changes: raise the claim in the first habeas petition despite there being no possibility the claim could prevail. That is not just for the claim Matthews raised in his second-in-time petition, it would be for all defaulted claims for which no means presently exist to excuse the default, and for all non-defaulted claims that governing law has already rejected.

Despite all the criminal law holdings and rules, and all the habeas procedural rules the Court has laid out over the years, it is extremely rare for the Court to overrule its own precedent or otherwise change the law. It would therefore not significantly harm States or finality of judgments for habeas petitioners to be able to raise those claims on the rare occasions where the law changes, as the abuse of the writ doctrine recognizes. Yet, the Sixth Circuit's failure to follow the abuse of the writ doctrine, and *Banister*, means habeas petitioners would have to raise those claims in their first petition, which would significantly delay finality.

The number of additional “clearly refuted by governing law” habeas claims that would need to be presented solely in case the law changes to make those claims cognizable years to decades down the road is significant. The resulting petition would be massive. Although those claims would, at the time presented in the habeas petition, be rejected, it will still take federal district courts an immense amount of time to sift through the pleadings and rule on those claims, in addition to the claims that should be presented because they are of at least some merit.

The abuse of the writ doctrine furthers AEDPA’s purpose in such a significant and successful way that Congress chose to not change it when it modified §2244(d) to limit when habeas petitions determined under the abuse of the writ doctrine to be successive can proceed. The abuse of the writ doctrine focuses on “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 (internal quotations omitted). It does this by creating a simple standard that allows all second habeas petitions that contain a claim for which the petitioner has a legitimate excuse for not presenting the claim in the first petition to proceed as an initial petition, while requiring all other second petitions to be considered successive and go through §2244(b)’s gatekeeping function. That standard has worked for decades, and continues to work to streamline federal habeas and further finality, while ensuring a habeas petitioner does not have to raise claims existing law would require be denied. By doing so, the abuse of the writ doctrine eliminated the problem the Sixth Circuit’s new standard resurrects.

Allowing the Sixth Circuit's standard to remain undermines the abuse of the writ doctrine and the Court's authority by allowing law that clearly conflicts with governing precedent to remain on the books. It will also deplete judicial resources and delay finality, causing habeas petitions to balloon in size and correspondingly causing further backlog in the district courts. If that sounds overly dire, that is because it is. Certiorari should therefore be granted, not just because the Sixth Circuit's precedent conflicts with *Banister* and the long-standing abuse of the writ doctrine, but also because of the grave consequences if the Sixth Circuit's ruling is allowed to stand.

III. This case presents an ideal vehicle to address the questions presented.

Matthews' Petition for a Writ of Certiorari presents questions of significant importance with dire consequences if the lower court's decision that conflicts with the Court's precedent is allowed to stand. The Petition presents an ideal vehicle to address the questions presented. No procedural hurdles stand in the way, and the Sixth Circuit squarely addressed the issue now before the Court.

Before the Sixth Circuit, Matthews relied on the abuse of the writ doctrine and what the Court held and articulated in *Banister* to explain the sole question before it was whether Matthews had a legitimate excuse for not raising the claim in his first habeas petition, and because he did, his petition was not successive. Rather than, as *Banister* and the abuse of the writ doctrine require, answering this question and only this question, Matthews' panel was bound by the Sixth Circuit's intervening en banc ruling that disregarded *Banister* and the abuse of the writ doctrine in favor of a rule

that there are only three situations in which a second petition may ever be considered not successive. Because Matthews' petition is not any of those three, the panel held it was successive, without deciding any other issue.

That squarely presents to the Court the questions presented here, making Matthews' Petition for a Writ of Certiorari the ideal case to address the questions presented. Those questions are of exceptional importance due to (1) the potential to undermine AEDPA's purpose of streamlining habeas and promoting finality; (2) how leaving the Sixth Circuit's ruling in place will drastically deplete federal district courts' scarce resources; and (3) the clear conflict between the Sixth Circuit's ruling and *Banister*'s holding that the abuse of the writ doctrine still applies.

CONCLUSION

For the above reasons, Petitioner Matthews respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,



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