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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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INDEX TO ATTACHMENTS

No. 23-5471

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: DAVID EUGENE MATTHEWS,

Movant.

O R D E R

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

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

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

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

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

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

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

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

"A claim is unripe when 'the events giving rise to the claim had not yet occurred.'" *In re Tibbetts*, 869 F.3d 403, 406 (6th Cir. 2017) (quoting *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010)). But this claim "has always been ripe because the factual predicates for the claim occurred at trial," *In re Hill*, 81 F.4th at 572; *see also id.* at 571 n.10, when trial counsel did not present psychiatric evidence that Matthews was unlikely to be a danger in the future.

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

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

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

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

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

2023 WL 3562995
Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
Louisville Division.

David Eugene MATTHEWS, Petitioner
v.
Randy WHITE, Warden, Respondent

Civil Action No. 3:12-cv-663-RGJ
|
Signed May 18, 2023
|
Filed May 19, 2023

Attorneys and Law Firms

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Matthew R. Krygiel, Office of Criminal Appeals, Frankfort, KY, for Respondent.

MEMORANDUM OPINION AND ORDER

Rebecca Grady Jennings, District Judge

***1** Petitioner David Eugene Matthews ("Matthews") objects by counsel [DE 70] to Magistrate Judge Lindsay's ("Magistrate Judge") Report and Recommendation [DE 66 ("R&R")] recommending Matthews' petition be transferred to the Sixth Circuit for determination of whether Matthews should be authorized to proceed on his second or successive petition. The Respondent, Randy White, the Warden ("Warden"), responded. [DE 71].[1] Matthews also moved to strike the Warden's response. [DE 72]. The Warden responded [DE 73] and Matthews replied [DE 74]. This matter is ripe. For the reasons below, the Court **DENIES** Matthews' Objection [DE 70], **ADOPTS** the R&R [DE 66], and **GRANTS** Matthews' Motion to Strike [DE 72].

1 Respondent's briefs list Scott Jordan as the warden, not Randy White. Nevertheless, Respondent's briefs were filed under Randy White. The Court will continue to refer to the Warden as Randy White until the appropriate notice of substitution is filed.

I. BACKGROUND

Matthews previously filed another petition for writ of habeas corpus challenging his conviction and sentence in this Court. DE 23, *Matthews v. Parker*, No. 3:99-cv-00091-JHM (filed Feb. 12, 1999). His prior petition was denied by the District Court as to all claims asserted. *See* *Matthews v. Simpson*, 603 F. Supp. 2d 960 (W.D. Ky. 2009). On appeal, the Sixth Circuit affirmed in part and reversed in part the District Court's opinion and instructed the District Court to grant relief to Matthews. *See* *Matthews v. Parker*, 651 F.3d 489 (6th Cir. 2011). The United States Supreme Court granted certiorari on the matter, reversed the Sixth Circuit's decision, and remanded for further proceedings consistent with its opinion. *See* *Parker v. Matthews*, 567 U.S. 37 (2012). The Supreme Court's decision was rendered June 11, 2012. *Id.*

On October 14, 2012, Matthews filed the instant petition. [DE 1]. Matthews raised a claim that trial counsel performed ineffectively for failing "to present readily available psychiatric testimony, from their own expert who testified at trial, to prove Matthews would not pose a danger in the future if sentenced to less than the death penalty." [*Id.* at 36]. He also asserted ineffective assistance of initial-review collateral proceeding counsel for failing to raise the trial counsel ineffectiveness claim as cause to excuse the procedural default. [*Id.*]. After filing this petition, in February 2013, the Sixth Circuit remanded Matthews's first-in-time petition to the District Court with instructions to the District Court to deny it. DE 278, *Matthews v. Parker*, No. 3:99-cv-00091-JHM (entered Feb. 5, 2013) ("Sixth Circuit Order"); DN 279, *Matthews v. Parker*, No. 3:99-cv-00091-JHM (entered Feb. 27, 2013) (Sixth Circuit Mandate). The District Court ultimately denied Matthews's first petition on April 10, 2023. DE 281, *Matthews v. Parker*, No. 3:99-cv-00091-JHM (entered Apr. 10, 2013).

Pursuant to this Court's referral order, the Magistrate Judge issued an R&R on Matthews' § 2254 petition. [DE 66]. The R&R stated that although the issue was addressed the parties' briefs, the Court had not determined whether Matthews' petition is a second or successive petition subject to the gatekeeping requirements of 28 U.S.C. § 2244(b) or merely a second-in-time petition. [*Id.* at 746]. The Magistrate Judge ultimately recommended Matthews' petition be transferred to the Sixth Circuit for determination

of whether Matthews should be authorized to proceed on his second or successive petition. [*Id.* at 749]. Matthews timely objected to the R&R and asked the Court to return the Petition to the Magistrate Judge to address his habeas claims on their merits. [DE 70 at 757–58]. The Warden responded to Matthews' objection contending that the Magistrate Judge's recommendation should be adopted. [DE 71]. The Court now considers the R&R, the objections, and Matthews' motion to strike.

II. MOTION TO STRIKE [DE 72]

***2** Matthews moved to strike the Warden's objection arguing that the objection was seven days late. [DE 72]. Alternatively, Matthews asks for leave to reply. [*Id.* at 781]. In response, the Warden contends that his objection is timely because it responds to a nondispositive motion. [DE 73 at 788]. The Warden also concedes that he missed the 14-day deadline under Federal Rule of Civil Procedure 72(b)(2) and asks for leave to respond to Matthews' objection. [*Id.*]. The Court must consider Matthews' motion as a threshold matter.

A. Standard

Rule 12(f) of the Federal Rules of Civil Procedure governs motions to strike pleadings.[2] It provides that upon a motion made by a party, "[t]he court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A court may strike portions of the pleading on its own initiative or "on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." Fed. R. Civ. P. 12(f)(1)–(2). "Motions to strike under Rule 12(f) are addressed within the sound discretion of the Court, although they are generally disfavored." *Hashemian v. Louisville Reg'l Airport Auth.*, No. 3:09-CV-951-R, 2013 WL 1788473, at *5 (W.D. Ky. Apr. 26, 2013) (citing *Ameriwood Indus. Int'l Corp. v. Arthur Andersen & Co.*, 961 F. Supp. 1078, 1083 (W.D. Mich. 1997) (internal citations omitted)).

2 It is this Court's practice to address motions to strike filings beyond those listed in Rule 7(a). *Masterson v. Xerox Corp.*, No. 3:13-CV-692-DJH, 2016 WL 4926439, at *5 n. 5 (W.D. Ky. Sept. 14, 2016) (citing *Pixler v. Huff*, No. 3:11-CV-00207-JHM, 2011 WL 5597327, at 16–17 (W.D. Ky. Nov. 17, 2011)).

"Striking a pleading is a drastic remedy to be resorted to only when required for purposes of justice." *Id.* (citing *Brown & Williamson Tobacco Corp. v. United States*, 201 F. 2d 819, 822 (6th Cir. 1953)). The function of the motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Kennedy v. City of Cleveland*, 797 F.2d 297, 305 (6th Cir. 1986) (quoting *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)).

B. Analysis

The Court reviewed the Warden's objection and the briefing around Matthews' motion to strike. The Warden contends that his objection is governed by Rule 72(a), which would allow a 21-day response time for dispositive motions. [DE 73 at 788–89]. Yet the R&R cites Rule 72(b)(2) and notes the 14-day objection deadline. [DE 66 at 749 ("Within fourteen (14) days after being served, a party may serve and file specific written objections to these findings and recommendations. Fed. R. Civ. P. 72(b)(2).")]. The Warden should have been aware of the objection deadline. As explained below, the Warden's objection would not affect the Court's outcome. Therefore, allowing additional briefing on the Warden's objection would run counter to the purpose of a motion to strike. *See Kennedy*, 797 F.2d at 305. Because the Warden's objection was untimely and because allowing additional briefing would not affect the Court's outcome, Matthews' Motion to Strike [DE 72] is **GRANTED**. The Warden's objection [DE 71] will be **STRICKEN** from the docket.

III. MATTHEWS' OBJECTION TO THE R&R [DE 70]

Matthews objects to the Magistrate Judge's conclusion that the habeas claim constitutes a successive habeas petition and the Magistrate Judge's failure to apply the abuse of the writ standard to determine whether the habeas petition is successive. [DE 70 at 761]. He also objects to the Magistrate Judge's ultimate recommendation that the habeas petition be transferred to the Sixth Circuit for that court to determine whether to authorize filing a successive habeas petition. [*Id.* at 762].

A. Standard of Review

***3** A district court may refer a motion to a magistrate judge to prepare a report and recommendation. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1). "A magistrate judge must promptly conduct the required proceedings ... [and] enter a recommended disposition, including, if appropriate, proposed findings of fact." Fed. R. Civ. P. 72(b)(1). This Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." *Id.* 72(b)(3). The Court need not review under a de novo or any other standard those aspects of the report and recommendation to which no specific objection is made and may adopt the findings and rulings of the magistrate judge to which no specific objection is filed. *Thomas v. Arn*, 474 U.S. 140, 149–50, 155 (1985).

A specific objection "explain[s] and cite[s] specific portions of the report which [counsel] deem[s] problematic." *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007) (alterations in original) (citation omitted). A general objection that fails to identify specific factual or legal issues from the R&R is not permitted as it duplicates the magistrate judge's efforts and wastes judicial resources. *Howard v. Sec'y of Health & Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). After reviewing the evidence, the Court may accept, reject, or modify the magistrate judge's proposed findings or recommendations. 28 U.S.C. § 636(b)(1)(C).

B. Standard for Second or Successive Habeas Petitions

Pursuant to Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Sta. 1214 (1996) ("AEDPA"),[3] judicial review of second or successive habeas petitions is limited as follows:

> (b)
>
> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) 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.

28 U.S.C. § 2244(b). Even more significantly, a petitioner who seeks to file a second or successive application must move the "appropriate court of appeals for an order authorizing the district court to consider the application." *Id.* § 2244(b)(3)(A). Thus, Congress has vested the screening function for successive petitions in the court of appeals, and this Court is without jurisdiction to consider the second or successive petition of a petitioner who has neither sought nor received authorization from the appropriate court of appeals before filing a petition in this Court. *Burton v. Stewart*, 549 U.S. 147, 152, 157 (2007). As the Magistrate Judge explained, it is this jurisdictional requirement that causes the Court to address this issue at this stage of the case, despite the significant passage of time since this case's initial filing. It is well-established that a court has a continuing obligation to examine whether it has jurisdiction over a case. *See, e.g.*, *In re Wolverine Radio Co.*, 930 F.2d 1132, 1137 (6th Cir. 1991) ("[T]he federal courts are courts of limited jurisdiction and have a continuing obligation to examine their subject matter jurisdiction throughout the pendency of every matter before them.").

3 Though Matthews' original conviction and sentence predate AEDPA, AEDPA nonetheless applies to his petition because both his first-in-time petition and the instant petition were filed after AEDPA's effective date. *See Dennis v. Mitchell*, 354 F.3d 511, 517 (6th Cir. 2003) (noting that petitions filed after the effective date of AEDPA, such as the petition here, are reviewed under AEDPA).

C. Analysis

***4** Matthews makes three arguments in support of his objections. First, he contends that § 2244(b) is not used to determine whether a petition is successive but is, instead, used to determine whether a petition already deemed succussive may proceed. [DE 70 at 764].

The Sixth Circuit has held that "not all second-in-time petitions are 'second or successive.' " *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)). "The phrase 'second or successive application' is a 'term of art,' which is not self-defining.' " *Banister v. Davis*, 140 S. Ct. 1698, 1705 (2020) (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000) and *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007)). District courts do not have jurisdiction to consider a second or successive petition without approval by the circuit court. *See* *Burton v. Stewart*, 549 U.S. 147, 149 (2007).

Although Matthews contends that the abuse-of-the-writ doctrine should apply [DE 70 at 756], "that judge-crafted limitation on second petitions was replaced by the AEDPA." *Hanna v. Shoop*, No. 3:19-CV-231, 2019 WL 4242735 (S.D. Ohio Sept. 6, 2019). The Sixth Circuit directed courts to look for scenarios within the scope of § 2244 when determining whether a petition is second or successive. *See* *In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018). In any event, Matthews' claim does not fall within any of the situations recognized under the abuse-of-the-writ doctrine as making a petition second but not second or successive. [4] He is attacking the same state court judgment of conviction, *see* *King v. Morgan*, 807 F.3d 154, 155–57 (6th Cir. 2015); he did not previously raise this claim before a federal court, which then did not adjudicate it on the merits, *see* *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017); and his claim was not unripe at the time he filed his initial petition because the basis of his claim had already occurred when he petitioned, *see* *In re Jones*, 652 F.3d 603, 604–05 (6th Cir. 2010). Here, the Magistrate Judge applied § 2244 to determine that Matthews' petition was successive. [DE 66 at 748]. Because the Magistrate Judge properly analyzed Matthews' claim using the AEDPA, the Court cannot find merit in Matthews' first argument.

[4] "Under the abuse of the writ doctrine, a numerically second petition is [successive] when it raises a claim that could have been raised in the first petition but was not so raised, either due to deliberate abandonment or inexcusable neglect." *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006).

Next, Matthews argues that *Martinez v. Ryan*, 566 U.S. 1 (2012) does not fall within the scope of § 2244 because it does not create a new rule of constitutional law. [DE 70 at 765]. The Magistrate Judge recommended that Matthews' claim be reviewed by the Sixth Circuit because it relies on a case law from the Supreme court that was made retroactive to cases on collateral review. [DE 66 at 748]. The Supreme Court in *Martinez* held that the ruling was equitable and not constitutional. *See* 566 U.S. at 16. Matthews' contention that the Supreme Court's ruling in *Martinez* was equitable, rather than constitutional, goes to the merits of his claim under the AEDPA. *See* 28 U.S.C. § 2244(b)(2)(A) (The claim shall be dismissed unless "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[.]"). This court has no jurisdiction to address the merits of Matthews' claim under § 2244. *See* *Burton*, 549 U.S. at 149. Whether Matthews' claim is constitutional or equitable goes to the question of jurisdiction and cannot be decided by this court. Accordingly, Matthews' second argument in support of his objection must fail.

***5** Finally, Matthews contends that the Magistrate Judge erred by relying on *Wogenstahl* and *Coley* because these cases predated the Supreme Court's decision in *Banister.* [DE 70 at 766]. Matthews mistakenly contends that *Wogenstahl* and *Banister* are irreconcilable. [*Id.* at 766–67]. Nevertheless, *Wogenstahl* recognized that not all second-in-time petitions are successive. *See* 902 F.3d at 626–27. This holding is consistent with *Banister*'s directive that "second or successive" is merely a term of art. *See* 140 S.Ct. at 1705. Even if *Wogenstahl* were wrongly decided, as Matthews suggests [DE 70 at 763 n.2], the Court cannot ignore precedent from the Sixth Circuit. In *Baugh v. Nagy*, No. 21-1844, 2022 WL 4589117, at *6 (6th Cir. Sept. 30, 2022), which was decided more than two years after *Banister*, the Sixth Circuit held that *Wogenstahl* "remains the law of our circuit." Therefore, the Court must apply *Wogenstahl* to the facts surrounding Matthews' Petition. *See id.* The Court finds

that Matthews' third argument in support of his objection lacks merit.

Matthews has failed to show that the Magistrate erred in its analysis of the law or its application to Matthews' Petition. Accordingly, Matthews' objection is overruled.

III. CONCLUSION

Accordingly, for the reasons stated, and the Court being otherwise sufficiently advised, **IT IS ORDERED** that

1) The Court **GRANTS** Matthews' Motion to Strike [DE 72], and the Court will **STRIKE** the Warden's Objection [DE 71];

2) The Court **ADOPTS** the R&R [DE 66];

3) The Court **DENIES** Matthews' Objection [DE 70]; and

4) This matter will be **TRANSFERRED** to the Sixth Circuit.

All Citations

Slip Copy, 2023 WL 3562995

2023 WL 3945579
Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
Louisville Division.

David Eugene MATTHEWS, Petitioner,
v.
Randy WHITE, Respondent.

CIVIL ACTION NO. 3:12-CV-663-RGJ-CHL
|
Signed March 6, 2023
|
Filed March 7, 2023

Attorneys and Law Firms

David Barron, Dept. of Public Advocacy, Frankfort, KY, for Petitioner.

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REPORT AND RECOMMENDATION

Colin H. Lindsay, Magistrate Judge

***1** Petitioner David Eugene Matthews ("Matthews") filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction and sentence of death. (DN 1.) This matter is referred to the undersigned for "all pretrial, non-dispositive matters and for findings of fact, conclusions, and recommendations for disposition." (DN 33.)

Matthews previously filed another petition for writ of habeas corpus challenging his conviction and sentence in this Court. DN 23, *Matthews v. Parker*, No. 3:99-cv-00091-JHM (filed Feb. 12, 1999). His prior petition was denied by the District Court as to all claims therein asserted. *Matthews v. Simpson*, 603 F. Supp. 2d 960 (W.D. Ky. 2009). On appeal, the Sixth Circuit affirmed in part and reversed in part the District Court's opinion and instructed the District Court to grant relief to Matthews. *Matthews v. Parker*, 651 F.3d 489 (6th Cir. 2011). The United States Supreme Court granted certiorari on the matter, reversed the Sixth Circuit's decision, and remanded for further proceedings consistent with its opinion. *Parker v. Matthews*, 567 U.S. 37 (2012). The Supreme Court's decision was rendered on June 11, 2012, and on October 14, 2012, Matthews filed the instant petition. (DN 1.) Subsequent to the filing of the instant petition, in February 2013, the Sixth Circuit remanded Matthews's first-in-time petition to the District Court with instructions to the District Court to enter an order denying it. DN 278, *Matthews v. Parker*, No. 3:99-cv-00091-JHM (entered Feb. 5, 2013) (Sixth Circuit Order); DN 279, *Matthews v. Parker*, No. 3:99-cv-00091-JHM (entered Feb. 27, 2013) (Sixth Circuit Mandate). The District Court ultimately denied Matthews's first petition on April 10, 2023. DN 281, *Matthews v. Parker*, No. 3:99-cv-00091-JHM (entered Apr. 10, 2013).

Though the issue was addressed in Matthews's instant petition and Respondent's Answer, it does not appear that this Court has ever addressed whether Matthews's instant petition is a second or successive petition subject to the gatekeeping requirements of 28 U.S.C. § 2244(b) or merely a second-in-time petition. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[1] court review of second or successive habeas petitions is limited as follows:

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***2** 28 U.S.C. § 2244(b). Even more significantly, a petitioner who seeks to file a second or successive application must move the "appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Thus, Congress has vested the screening function for successive petitions in the court of appeals, and this Court is without jurisdiction to consider the second or successive petition of a petitioner who has neither sought nor received authorization from the appropriate court of appeals prior to filing a petition in this Court. *Burton v. Stewart*, 549 U.S. 147, 152, 157 (2007). It is this jurisdictional requirement that causes the undersigned to address this issue at this stage of the case and despite the significant passage of time since this case's initial filing. It is well-established that a court has a continuing obligation to examine whether it has jurisdiction over a case. *See, e.g.*, *In re Wolverine Radio Co.*, 930 F.2d 1132, 1137 (6th Cir. 1991) ("[T]he federal courts are courts of limited jurisdiction and have a continuing obligation to examine their subject matter jurisdiction throughout the pendency of every matter before them.").

1 Though Matthews's original conviction and sentence predate AEDPA, AEDPA nonetheless applies to his petition because both his first-in-time petition and the instant petition were filed after AEDPA's effective date. *See Dennis v. Mitchell*, 354 F.3d 511, 517 (6th Cir. 2003) (noting that petitions filed after the effective date of AEDPA, such as the petition here, are reviewed under AEDPA).

The undersigned concludes that Matthews's instant petition is a second or successive petition that this Court is at this juncture without jurisdiction to entertain.[2] Matthews's instant petition brings a claim of ineffective assistance of counsel based on his trial counsel's failure "to present readily available psychiatric testimony, from their own expert who testified at trial, to prove Matthews would not pose a danger in the future if sentenced to less than the death penalty." (DN 1, at PageID # 36.) Matthews argued that his initial-review collateral proceeding counsel was ineffective in failing to raise this argument in state postconviction proceedings and that the claim was unavailable to him until the United States Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), allowed him to use postconviction counsel's ineffectiveness as grounds to overcome procedural default. (DN 1, at PageID # 36.) Thus, he argued that his instant petition is not second or successive because he could not have made his instant claim prior to that ruling by the Supreme Court. (*Id.* at 41-46.) This circumstance is directly addressed by 28 U.S.C. § 2244(b)(2)(A), which provides that an applicant's showing that his or her "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" is one reason a second or successive habeas corpus application should not be dismissed. 28 U.S.C. § 2244(b)(2)(A). The Sixth Circuit has held that where a petitioner's claims fall within that provision, "the petition is deemed second or successive and the claims must pass through the gatekeeping strictures of that provision." *In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018). Therefore, the undersigned concludes Matthews's petition is second or successive.

2 This Court has jurisdiction to consider *whether* Matthews's petition is second or successive such that transfer to the Sixth Circuit pursuant to *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), and 28 U.S.C. § 1631 is required; it simply lacks jurisdiction to adjudicate the *merits* of a second or successive petition absent the required authorization from the Sixth Circuit. *In re Smith*, 690 F.3d 809, 810 (6th Cir. 2012) (holding that transfer to Sixth Circuit was inappropriate where district court was merely "uncertain of its jurisdiction" and had not made a finding that the petition was second or successive).

***3** Though Matthews attempts to rely on a more general argument that his claim was not yet ripe or otherwise unavailable such that under the pre-AEDPA abuse-of-the-writ doctrine his claim is not successive, subsequent Sixth Circuit case law has rejected his argument. In *In re Coley*, petitioner sought to bring claims in a second or successive petition based on the Supreme Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016). *In re Coley*, 871 F.3d 455, 456-57 (6th Cir. 2017). Petitioner attempted to argue that his petition was not subject to § 2244(b). Citing the Supreme Court's decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998), and *Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000), the Sixth Circuit explained that there are generally only two exceptions to whether a second-in-time petition is second

or successive: "where ripeness prevented, or would have prevented, a court from adjudicating the claim in an earlier petition" and "where a federal court dismissed an earlier petition because it contained exhausted and unexhausted claims and in doing so never passed on the merits." *Coley*, 871 F.3d at 457 (citing *Stewart*, 523 U.S. at 645, and *Slack*, 529 U.S. at 485-86). It held, "What the exception *cannot* mean is what Coley claims it means: that a petition is not second or successive whenever it relies on a rule that did not exist when the petitioner filed his first petition." *Id.* (emphasis in original). Thus, the Sixth Circuit denied Coley's request to proceed with his petition because *Hurst* had not been made retroactive to cases on collateral review. *Id.* Matthews's argument regarding the availability of his claim is the same as made by Coley. Therefore, the undersigned finds *Coley* and *Wogenstahl*, cited above, dispositive and that Matthews's petition is second or successive and subject to the gatekeeping requirements of 28 U.S.C. § 2244.

Accordingly, having found Matthews's petition is second or successive and subject to the gatekeeping requirements of 28 U.S.C. § 2244, the undersigned **RECOMMENDS** that this matter be transferred to the Sixth Circuit pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d at 47, for a determination of whether Matthews should be authorized to proceed with his second or successive petition.

Notice

Pursuant to 28 U.S.C. § 636(b)(1)(B)-(C), the undersigned Magistrate Judge hereby files with the Court the instant findings and recommendations. A copy shall forthwith be electronically transmitted or mailed to all parties. 28 U.S.C. § 636(b)(1)(C). Within fourteen (14) days after being served, a party may serve and file specific written objections to these findings and recommendations. Fed. R. Civ. P. 72(b)(2). Failure to file and serve objections to these findings and recommendations constitutes a waiver of a party's right to appeal. *Id.*; *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *see also* *Thomas v. Arn*, 474 U.S. 140 (1985).

All Citations

Slip Copy, 2023 WL 3945579

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

(CAPITAL CASE)

DAVID EUGENE MATTHEWS, Petitioner,

v. Civil Action No. 3:12-cv-P663-DJH-CHL

RANDY WHITE, Respondent.

* * * * *

MEMORANDUM AND ORDER

Before the Court is the motion for discovery filed by Petitioner, David Eugene Matthews, through counsel (DN 23). By way of that motion, Petitioner seeks leave to depose his trial counsel. Respondent, Warden Randy White, has responded (DN 28), and Petitioner has replied (DN 29). The matter being ripe, the motion will be granted for the following reasons.

I.

The sole issue presented in the petition is that Petitioner's trial counsel were ineffective when they failed to present readily available psychiatric testimony to prove that Petitioner would not pose a future harm. Petitioner asserts that his initial-review collateral proceeding counsel performed ineffectively by failing to raise the claim in state post-conviction proceedings, which prevented the claim from being raised in federal court until the Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Now, under *Martinez*, inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a habeas petitioner's procedural default of a claim of ineffective assistance at trial. *See Martinez*, 132 S. Ct. at 1315.[1]

[1] Since Petitioner filed his petition, the Supreme Court has expanded the holding in *Martinez* to include situations where a state's procedural system "in theory grants permission [to raise an ineffective-assistance-of-trial-counsel claim on direct appeal] but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so." *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013).

Petitioner seeks leave under Rule 6 of the Rules Governing Section 2254 Cases in the United States District Court to conduct a limited deposition of his two trial attorneys regarding a letter written by Dr. Lee Chutkow, witness for the defense at Petitioner's trial. That letter stated, in part, that Petitioner's "enduring personality traits do not express recurrent or persistent hostility" and "[d]uring and after a period of imprisonment, [Petitioner] could be rehabilitated to obey the laws of his community . . . ." The letter was presented to the judge but not the jury. Specifically, Petitioner wishes to ask his trial counsel:

> about the circumstances that resulted in the letter being written, when they discussed with Dr. Chutkow the information that ended up in the letter, how the letter supported the defense they presented at trial, why they presented the letter to the trial judge at final sentencing, and why they did not present the letter to the jury.

Respondent opposes the motion for discovery.

II.

Under Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Rules Governing § 2254 Cases, Rule 6(a), 28 U.S.C.A. foll. § 2254. "Rule 6 embodies the principle that a court must provide discovery in a habeas proceeding only 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.'" *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004) (quoting *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). In other words, the requested discovery must be materially related to a claim raised in the habeas petition and likely to "resolve any factual disputes that could entitle [Petitioner] to relief." *Id*. at 975 (internal quotation marks and citation omitted).

Petitioner argues that, to determine whether trial counsel were deficient (the first prong of his two-part burden under *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)), it is necessary to determine if trial counsel had a reason for failing to present the information in the letter to the jury; if so, for what reason; and how trial counsel came to know of Dr. Chutkow's conclusion. He further asserts that if trial counsel performed deficiently in this regard, then initial-review collateral proceeding counsels' performance in failing to raise the claim on post-conviction review was also deficient and prejudicial. Thus, Petitioner argues he has shown good cause to be granted leave to depose trial counsel.

The response directs this Court's attention to Respondent's answer to the habeas petition in this matter and asserts that Petitioner is not entitled to discovery based on procedural deficiency and lack of substantive merit.[2] Respondent further asserts that it is pointless to depose trial counsel to ask them why they failed to ask Dr. Chutkow about an issue that was raised by Petitioner in post-conviction proceedings in state court. In looking at the attachments to Respondent's answer, the Court is not convinced at this time that this particular issue was addressed previously in the state court.[3] As to the merits of the claim, Respondent argues in his answer that, given the brutal nature of the crimes, Petitioner's claim that the jury "was on the

[2] The Court notes that several pages of Respondent's answer to the petition are devoted to arguing that *Martinez v. Ryan* and *Trevino v. Thaler* do not apply in Kentucky. However, that argument has been rejected by the Sixth Circuit. *Woolbright v. Crews*, 791 F.3d 628, 636 (6th Cir. 2015) ("The *Martinez*/*Trevino* exception applies in Kentucky and thus Kentucky prisoners can, under certain circumstances, establish cause for a procedural default of their [ineffective-assistance-of-trial-counsel] claims by showing that they lacked effective assistance of counsel at their initial-review collateral proceedings.").

[3] The exhibits attached to the answer show that in his motion under RCr 11.42 presented to the Jefferson Circuit Court, Petitioner offered the following as one of his reasons to vacate, set aside or correct the judgment: "Counsel failed to adequately investigate, prepare and present certain evidence to mitigate punishment at the penalty phase." Also attached are excerpts from Petitioner's motion to reconsider his RCr 11.42 motion stating, "Chutkow testified equivocally concerning whether movant would be likely to repeat his action in the future but, inexplicable in a letter introduced at sentencing, Chutkow stated that the repetition of his actions was unlikely." Although this language touches on the existence of the letter, it does not point to trial counsel's having submitted the letter to the judge only and not to the jury, *i.e.*, the body which was charged with the responsibility to recommend, or not, the death penalty.

verge of giving him a more lenient sentence than death" is meritless. Respondent further argues that Petitioner's lack of future dangerousness should not have been an issue because the "Commonwealth's entire case," as well as Petitioner's defense, concentrated on "the bitter animosity" between Petitioner and his wife.

In his reply, Petitioner argues that Respondent relies on pre-*Martinez v. Ryan* case law and that Respondent's interpretation of the law would mean that a petitioner could present a claim for the first time in federal court pursuant to *Martinez* but would never be able to present evidence to support the claim. Petitioner also points out that he need not show entitlement to an evidentiary hearing in order to obtain discovery[4] and that he does not seek an evidentiary hearing because he believes that the requisite information can be uncovered through discovery and presented to the Court through expansion of the record. Petitioner further argues that the nature of the crimes did not make a death sentence inevitable, citing to numerous cases for the proposition that brutal crimes do not automatically equate to the death penalty. Further, he argues that Dr. Chutkow's trial testimony failed to suggest that Petitioner would not be a future danger.

Finally, Petitioner argues that because of the "extremely limited" scope of his request for discovery "and the few, narrow questions that he would pose to trial counsel, it would expedite resolution of this case for this Court to authorize the discovery to take place now so that it is completed before this Court decides the procedural and substantive issues within the habeas petition." Petitioner continues that the Court "can then decide in conjunction with its ruling on the habeas claims whether to consider the information obtained through discovery."

[4] Whether an evidentiary hearing may be held is governed by Rule 8 of the Rules Governing Section 2254 Cases.

III.

As the Sixth Circuit instructed in its remand in *Woolbright*, the district court "[sh]ould first address whether [Petitioner] can demonstrate (1) the absence or ineffective assistance of his post-conviction counsel and (2) the substantial nature of his underlying [ineffective-assistance-of-trial-counsel] claims." *Woolbright*, 791 F.3d at 637 (internal quotation marks and citation omitted). If Petitioner "can demonstrate these two elements and therefore establish cause to excuse his procedural default, the district court can then reconsider whether [Petitioner] can establish prejudice from the alleged ineffective assistance of trial counsel." *Id.*

The issue presented in the habeas petition is whether Petitioner's trial counsel were ineffective under *Strickland* when they failed to present information from their own expert to the jury to prove Petitioner would not pose a danger in the future if he was sentenced to less than the death penalty. To satisfy the cause-and-prejudice exemption to procedural default by Petitioner's post-conviction counsel, it would be necessary to show that the ineffective-assistance-of-trial-counsel claim is substantial. The Court finds that Petitioner has shown good cause for the requested discovery. *See, e.g.*, *Smith v. Carpenter*, No. 3:99-cv-0731, 2015 WL 4545736, at *2 (M.D. Tenn. July 28, 2015) ("To the extent that his claims fall within the scope of *Martinez*, . . . the petitioner is entitled to investigate and discover any evidence tending to establish the ineffectiveness of post-conviction counsel and the substantiality of his underlying claims.").

For the foregoing reasons,

IT IS ORDERED that Petitioner's motion (DN 23) is **GRANTED**. Petitioner may depose trial counsel within **90 days** of entry of this Order.

Date: September 23, 2015

Colin Lindsay, MagistrateJudge
United States District Court

cc: Counsel of record
44AS.009

No. 23-5471
United States Court of Appeals
for the Sixth Circuit

In Re: David Matthews	)	Capital case

Motion to remand (retransfer) to district court as an initial habeas petition, and to hold proceedings in abeyance while this Court decides whether to remand

Prefatory statement and introduction

The district court incorrectly determined David Matthews' petition was successive. For the reasons articulated below, Matthews requests that this Court find that his petition was not successive and remand (retransfer) the petition to the district court.

Matthews also requests this Court hold in abeyance filing an application for leave to file a successive petition and the rest of the requirements from this Court's May 22, 2023, "Notice," other than counsel entering an appearance, which has already been filed, as have the counsel appointment motions, until this Court rules on the motion to remand as an initial petition.[1]

[1] Matthews acknowledges he cannot satisfy the requirements for filing a successive habeas petition and thus does not now attempt to do so.

Whether a petition is successive, and the applicable standard for making that determination, will be argued before the en banc court in *In re Hill*, No. 20-3863, next week. Matthews urges this Court to await the en banc court's decision in *Hill* because it may impact how to handle Matthews' case, including the applicable legal standard. To the extent this Court needs to overrule erroneous precedent to rule Matthews' petition is not successive, Matthews suggest this Court *sua sponte* vote to hear this motion initially en banc, if *Hill* does not resolve as a matter of law whether Matthews' petition is initial or successive. Doing so would be valuable here for at least two reasons: first, this Court has only once referenced *Banister v. Davis*, 140 S. Ct. 1698 (2020), in the context of determining whether a petition is successive. In *In re Jones*, 54 F.4th 947 (6th Cir. 2022), this Court applied *Banister* and the abuse-of-the-writ doctrine, determining a petition was not successive without applying §2244(b) or any of this Court's prior precedent that the district court relied upon to conclude §2244(b), not the abuse-of-the-writ doctrine, determines whether a petition is successive.[2] Second, it appears this Court has not yet addressed *Banister*'s impact on this Court's prior precedent, which the district court interpreted incorrectly to limit the abuse-of-the-writ doctrine and to require

[2] *Jones* dealt with whether a subsequent 28 U.S.C. §2255 petition was successive. That changes nothing here because §2255(h) adopts §2244(b)'s language and provisions on when a successive habeas petition may proceed, saying nothing about how to determine whether a petition is or is not successive. The relevant provisions regarding a §2255 habeas petition are the same as for a §2254 petition.

applying §2244(b) to determine whether a petition is successive. If the district court is correct that this Court's precedent requires courts to apply §2244(b) to determine whether a petition is successive, is this Court's precedent no longer good law post-*Banister*?

Under *Banister*, Matthews' habeas petition is not successive. Six things make this clear:

First, *Banister* made clear the abuse-of-the-writ doctrine's application to determining whether a habeas petition is successive has not changed since the Court created the doctrine in the 1980s. Rejecting the position the district court took in Matthews' case and that some courts of appeals, including this one, have taken, *Banister* held AEDPA (§2244(b)), "did not redefine what qualifies as a successive petition." *Banister*, 140 S.Ct. at 1707. The abuse-of-the-writ doctrine therefore remains the only standard to use to determine whether a petition is successive and any case law holding otherwise cannot be reconciled with *Banister*. Therefore, it can no longer apply post-*Banister*.

Second, 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," *id*. at 1706 (quotation marks omitted), and "concentrate[s] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey v. Zant*, 499 U.S.

467, 490 (1991). If the petitioner does, then a second-in-time habeas petition raising the claim does not constitute a successive petition.

Third, Matthews had a legitimate excuse for not raising the claim in his first-in-time habeas petition. The claim was then procedurally defaulted with no means to excuse the default. An attorney has an obligation to not raise a frivolous claim and is expected to not raise claims that clearly cannot prevail under the then-existing law. Disregarding that not only goes against what an attorney is supposed to do, it would have also flown in the face of the abuse of the writ doctrine by causing more judicial resources to be used because a plethora of then-frivolous claims would be raised just to preserve the claims in case of the unlikely scenario where the law changes down the road. "[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 claim. *In re Jones*, 652 F.3d at 605. Because no basis then existed to excuse the default, the frivolity of the claim was a legitimate excuse for not raising it in the first-in-time-habeas petition. This was not sandbagging; it was counsel doing exactly what he was expected to do under the circumstances – not raise the claim.

Fourth, more than a decade later, the law changed, creating a basis to excuse the default; thus turning a frivolous claim into a non-frivolous claim that, with the default excused, should prevail on the merits.

Fifth, promptly then raising the claim as a second-in-time, but initial habeas petition, is consistent with the abuse-of-the-writ doctrine and therefore not successive. *See id*; *Banister*, 140 S.Ct. 1706-07.

Sixth, that is what Matthews did, thus his petition is not successive. The district court erred by ruling otherwise and by failing to apply the abuse of the writ doctrine factors *Banister* reiterated. The district court instead applied §2244(b) as the standard for determining whether a petition is successive, rather than as the requirement one must meet to proceed with a petition *after* it is determined that the petition is successive. In other words, §2244(b) only comes into play once a petition is determined to be successive. It has no relevance before then. This Court should recognize *Banister* as the controlling law, recognize any precedent that applies §2244(b) instead is no longer good law for determining whether a petition is successive, and remand the petition to the district court as an initial habeas petition.

Facts and procedural history

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, and not directed at society at large, but the trial judge correctly excluded Dr. Chutkow's lack of future dangerousness testimony as inadmissible at the guilt phase—which it was because it had no bearing on guilt. The jury then convicted Matthews of intentional murder; whereupon, trial counsel failed to 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.").

As we know, "[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. Trial counsel told the jury that 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#338. Yet, trial counsel never supported this argument with actual testimony from Dr. Chutkow that Matthews would not be a future danger, even though counsel submitted to the trial judge, after the jury's death verdict, a letter from Dr. Chutkow concluding Matthews would not be a future danger. Specifically, Dr. Chutkow stated in the letter that 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.[3] Even without this, the jury struggled to determine whether Matthews would be a future danger and whether he should be sentenced to death. During

[3] While Dr. Chutkow was unavailable to testify at the official imposition of sentence imposed by the judge, and thus a letter was submitted then instead of through live testimony before the judge, the reason for his unavailability did not exist at the time of the penalty phase before the jury—thus trial counsel could have, and should have, presented the information contained in Dr. Chutkow's letter to the jury during the penalty phase. Counsel could have done so by having Dr. Chutkow testify then.

deliberations, the jury asked to review Dr. Chutkow'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#342-46. Without evidence of lack of future dangerousness, the jury voted to impose death.

The district could found good cause to take depositions solely with regard to the specific issue in the habeas petition the district court has now transferred to this Court as a successive petition. The district court could not have found good cause to depose on this specific issue if it did not have jurisdiction—which it would not have had if it were successive. In that deposition regarding the sole claim raised in the second-in-time petition, trial counsel admitted their deficient performance in failing to present expert testimony of the lack of future dangerousness from Dr. Chutkow. Trial counsel recognized submitting the letter to the judge after the jury's verdict, without presenting that information to the jury at the penalty phase, fell below an objective standard of reasonableness.

Problematically for Matthews, state post-conviction counsel never presented a trial counsel ineffectiveness claim for failing to present this lack of future dangerousness evidence at the penalty phase.[4] That failure constituted ineffective

[4] *See*, *e.g.*, Order granting discovery, R.34, Page ID#394 n.3 (The prior state post-conviction litigation claims and arguments "touche[d] on the existence of the letter [by Dr. Chutkow but] does not point to trial counsel's having submitted the letter to the judge only and not to the jury, *i.e.*, the body which was charged with the responsibility to recommend, or not, the death penalty.").

assistance of initial review collateral proceeding counsel, as future dangerousness (or lack thereof) was clearly a significant issue. This was demonstrated by: (1) trial counsel trying to introduce that evidence at the guilt-phase; (2) both sides focusing on it during penalty-phase closing arguments; and (3) the questions the jury asked during deliberation. Because the ineffectiveness claim was not raised in state court, the claim was defaulted by the time of the first habeas petition and there was then no ground for which one could argue the default could be excused under governing law. It would have therefore been improper for prior federal habeas counsel to have raised the issue, because, at the time, it was clearly defaulted with no then-existing ground to excuse the default.[5] As such, habeas counsel did not raise the claim in Matthews' first habeas petition.[6]

This Court granted habeas relief in the first habeas petition because the prosecution failed to prove lack of extreme emotional disturbance. *Matthews v. Parker*, 651 F.3d 489 (6th Cir. 2011). The Supreme Court then reversed and reinstated the conviction and death sentence. *Parker v. Matthews*, 567 U.S. 37

[5] Undersigned counsel did not represent Matthews before the district court in that habeas petition.

[6] *See*, *e.g.*, *Matthews v. Simpson*, 603 F.Supp.2d 960, 995, 1005-06, 1016-24 (W.D. Ky. 2009) (showing what was raised in federal habeas in relation to Dr. Chutkow and thus demonstrating the current ineffectiveness claim was not raised in Matthews' first-in-time habeas petition).

(2012).[7] However, a few months beforehand, the Supreme Court had also decided *Martinez v. Ryan*, 566 U.S. 1 (2012), unexpectedly creating a new ground to excuse a default occasioned by the ineffective assistance of initial-review collateral proceeding counsel. *Martinez* did not establish a new legal rule or right, but rather a judicially-created equitable remedy. That remedy applied to Matthews' unpresented claim, giving him a means by which he could raise a claim that was, until then not cognizable because there was no means to excuse the default. *Martinez* created a means. Matthews thus filed a new habeas petition that did not rely on a new legal rule, but instead relied on the equitable remedy *Martinez* created for getting beyond his default.

Following that filing, the district court rejected the Warden's arguments for dismissal and authorized depositions of trial counsel. Nearly seven years later, the district court abruptly changed course by suddenly addressing whether the petition was successive and transferring the petition to this Court as a successive petition.

[7] The district court noted the first-in-time habeas petition was denied in 2013, after the Supreme Court had reversed this Court's grant of habeas relief. Without clarification that is misleading. Matthews requested leave to file a supplemental brief on how the Supreme Court's reversal of the grant of relief impacted claims this Court had rejected, and provided a basis to revisit those claims, "in light of the Supreme Court's decision" reversing the grant of habeas relief. But this Court simply issued an order remanding to the district court with "instructions that the district court enter an order denying the petition for a writ of habeas corpus." *Matthews v. Parker*, No. 09-5464 (Feb. 5, 2013). The district court then issued an order doing as instructed. That is the 2013 order the district court referenced.

Argument

Under the circumstances and applying the abuse-of-the-writ standard, the petition is not successive and should be remanded to the district court as an initial petition.

By its express language, §2244(b) deals only with successive habeas petitions; it does not even mention initial habeas petitions, let alone control how to determine whether a petition is initial or successive. Section 2244(b) addresses what to do with a petition that is successive, significantly curtailing when that successive petition may proceed, in comparison to the pre-§2244(b) law that was more expansive in allowing successive petitions to advance. Specifically, "[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" certain requirements are shown. §2244(b)(2). The statute makes clear that the applicant must meet those heightened requirements only if the application is "second or successive." *Id*. If the application does not qualify as "second or successive," a habeas petitioner need not satisfy the requirements of §2244(b), even if the application is second-in-time. Yet, relying on a district court case from another district, the district judge referred to the abuse-of-the-writ doctrine as "judge-crafted" and held "that judge-crafted limitation on second petitions was replaced by the AEDPA." Opinion, R.75, Page ID#799

(internal quotation omitted). The court then applied that to determine that Matthews' petition is successive.

While AEDPA replaced the portion of the abuse-of-the-writ standard for determining whether a successive petition may proceed, it made no change to the applicability of the abuse-of-the-writ doctrine for determining whether a petition is successive. Simply, this doctrine and §2244(b) serve different roles and apply to different circumstances, with the latter having nothing to do with determining whether a petition is successive. The Supreme Court made this clear in *Banister*, which was decided a year after the case the district court relied upon.

In *Banister*, the Supreme Court noted, "[w]hen Congress 'intends to effect a change' in existing law–in particular, a holding of th[e] Court–it usually provides a clear statement of that objective. AEDPA offers no such indications that Congress meant to change the historical practice" of how a court determines if a petition is an initial petition or a successive petition 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 quotation omitted). Specifically, AEDPA (§2244(b)), "did not redefine what qualifies as a successive petition." *Id*. Thus, even now, to determine whether a petition is an initial or successive petition, a court must 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 Supreme Court's] pre-

AEDPA cases,'" not under the language of §2244(b). *Id*. at 1706, quoting *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007). The district court erred by failing to follow *Banister*, instead applying §2244(b) to determine the petition is successive. This Court, though, must follow the Supreme Court's directive of *Banister* and apply only the abuse-of-the-writ doctrine.

Under this doctrine, which focuses on historical doctrine and practices, courts must consider "the implications for habeas practice," which, as with AEDPA (§2244(b)), has always focused on "conserv[ing] judicial resources, reduc[ing] piecemeal litigation, and lend[ing] finality to state court judgments within a reasonable time." *Id*. (quotation marks omitted). With these principles in mind, the abuse-of-the-writ doctrine "concentrate[s] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey*, 499 U.S. at 490. If the petitioner does, then a second-in-time habeas petition raising the claim does not constitute a successive petition.

Applying this doctrine, this Court recognized "no 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 turns a nonviable claim into a viable claim. *In re Jones*, 652 F.3d at 605, quoting *Panetti*, 551 U.S. at 946. Requiring such would be contrary to the historical practices and doctrine for habeas, and contrary to the

principles of AEDPA because it would waste judicial resources. Such a course would result in habeas petitioners including all potential claims clearly refuted by the law just in case the law later changes and would make already lengthy habeas petitions significantly longer, thereby requiring more time to be adjudicated and resulting in additional delay before finality. As a result, this Court found Jones' petition to not be successive, and recognized under the abuse-of-the-writ doctrine that when construing a petition as successive would mean a petitioner had to include in the first-in-time habeas petition an unripe claim or a claim that clearly would fail under binding precedent, withholding the claim then was appropriate and raising the claim in a subsequent petition in the rare situation in which the law changes is consistent with habeas doctrine (and even the principles of AEDPA) and therefore not an abuse-of-the-writ and thus not a successive petition. Said differently, a second-in-time petition that raises a claim under these circumstances does not raise a claim that could have been raised in the first petition but was not, due to abandonment or neglect and is therefore not successive. *Banister*, 140 S.Ct. at 1706; *McCleskey*, 499 U.S. at 489. That is exactly the situation here.

The ineffectiveness claim presented here was defaulted by the failure to raise the claim in state court. The claim does not go towards actual innocence of the offense or of the death penalty, nor did any of Matthews' other claims. Therefore, that basis to excuse the default did not then exist. Nor was there an external

impediment attenuated to a constitutional right that prevented state post-conviction counsel from raising the claim. Thus, the only then cognizable grounds for excusing a default clearly did not apply, which meant it would have been obvious to all that binding law required the claim to fail. Raising the claim then would have been a waste of judicial resources since there was no argument through which the claim could prevail. An attorney has a duty to a court to not raise an obviously meritless claim and an obligation under legal ethics to not raise a frivolous claim unless counsel states they are raising the claim solely in case the law changes. Doing that for every claim that falls within that situation would bog down the federal courts with having to read and review habeas petitions potentially raising hundreds of claims that could not prevail and are presented solely to preserve the claim for the rare instance in which the law later changes. No purpose is served by a law/rule requiring that, and an attorney who fails to raise a claim in such a circumstance is not acting under neglect or abandonment in the sense of the abuse-of-the-writ doctrine, but instead is acting prudently through rules of conduct that bind lawyers.

This is particularly so when, as here, there was no reason to anticipate the more than a decade later Supreme Court ruling creating a new, applicable means to excuse a default.[8] All of this means Matthews "has a legitimate excuse for failing

[8] In *Martinez*, the Court decided to not address the issue on which certiorari had been granted, but to instead create the new basis to excuse a default that had not been before the court within the Petition. This further demonstrates what the Court ruled

to raise [the] claim" in his first habeas petition. *McCleskey*, 499 U.S. at 490. Thus, Matthews' habeas petition is not successive and the district court erred by applying §2244(b) to determine it is successive and by also ruling the claim does not fall within any of the situations recognized under the abuse-of-the-writ doctrine for not being successive.[9]

Ruling so would be consistent with this Court's precedent. In *In re Wogehnstahl*, this Court ruled erroneously, as *Banister* later demonstrated, that §2244(b) applies to determining whether a petition is successive and that, if a claim

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in *Martinez*, and even what had been argued therein, should not have been anticipated more than a decade earlier when Matthews' first-in-time habeas petition was filed.

[9] The district judge concluded a petition is not successive under the abuse-of-the-writ doctrine in only three situations: 1) challenging a different judgment; 2) raising the claim in a previous habeas petition, but the claim not then being adjudicated on the merits; and 3) the claim was unripe because the basis of the claim had not yet occurred. *Order*, R.75, Page ID#799-800. While those situations would render a claim not successive, the Supreme Court has not held those are the only situations in which a second-in-time petition is not successive. Nor is an exclusive list like that consistent with *McCleskey* and *Banister*. Rather, as those cases explain, there are specific factors to consider under the abuse-of-the-writ doctrine to determine whether a petition is successive. If those factors go a particular way, the claim is not successive regardless of whether the claim falls within any of the three categories the district court identified. *Banister* makes that clear within its discussion of how to determine whether a petition is successive. To the extent any of this Court's precedent can be considered to have limited what is not successive to the three categories the district court identified, that precedent is not compatible with *Banister* and is therefore no longer good law that must be followed. This panel can recognize that, as can the en banc court if necessary. Under the proper application of the abuse-of-the-writ standard, Matthews' petition is not successive, as explained above.

falls within the scope of §2244(b)(2)(A) or (B), it is successive. 902 F.3d 621, 627 (6th Cir. 2018) (internal citation omitted). Those provisions refer to a claim that "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or a "factual predicate" that could not have been discovered previously through the exercise of due diligence; and…." §2244(b)(2)(A), (B). Matthews' claim is a new claim in the sense that it was not presented in a previous federal habeas petition, but it does not rely on a factual predicate or underlying facts that could not have been discovered earlier and it does not rely on a new rule of constitutional law. Rather, the underlying claim relies on the traditional governing ineffective assistance of counsel law and uses the equitable, not constitutional, rule of *Martinez* as a means to lift the prior impediment to raising the claim and to therefore allow the claim to be raised in a second-in-time but initial petition. This situation does not fall within the plain language, and thus the scope, of §2244(b)(2)(A) or (B). Thus, *Wogenstahl*'s ruling that a petition is successive because it falls within that provision does not swallow Matthews' petition. Under this law, the reverse is that a petition that falls outside the scope of §2244(b)(2)(A) or (B), and that does not raise a claim that was already raised in a prior habeas petition challenging the same judgment, is not successive. Thus, under *Wogenstahl*, the cases *Wogenstahl* relies upon, and cases relying on

Wogenstahl, Matthews' petition is not successive, even though that law erroneously applied §2244(b) to determining whether a petition is successive.

To the extent this Court disagrees and believes its precedent means Matthews' petition is successive, this Court should recognize its precedent is no longer good law because it was either decided before *Banister* or relied on pre-*Banister* decisions that cannot be reconciled with *Banister*.[10] Because a Supreme Court decision renders any adverse precedent on the issue no longer good law, a panel of this Court has the authority to not follow that precedent and to instead apply, under *Banister,* the abuse-of-the-writ doctrine in the manner Matthews has laid out herein. *See Smith v. Comm. Ala. Dep't Corrs.*, 2023 WL 3555565 (11th Cir.) (panel recognizing that one of its precedents is no longer good law in light of an intervening Supreme Court decision in another case that did not directly mention the circuit precedent, and ruling, as a result, it was no longer bound by its own erroneous precedent). If the panel believes it cannot do so, a judge should *sua sponte* call for a vote to hear

[10] The district court held *Banister* and *Wogenstahl* are consistent because *Wogenstahl* held not all second-in-time petitions are successive and *Banister* articulated the term "second or successive" is a term of art. While that is correct, it does not make the decisions consistent. The inconsistency that cannot be reconciled is how one determines if a petition is successive. *Banister* ruled the abuse-of-the-writ doctrine shall still be applied and laid out how to apply it, while *Wogenstahl* did not apply the doctrine in that way and relied on §2244(b) to determine what is successive when, as explained earlier in this motion, *Banister* made clear §2244(b) does not determine what is successive and AEDPA did not replace, modify, or supplant the application of the abuse-of-the-writ doctrine for determining when a petition is successive.

Matthews' motion en banc and the court should do so because *Wogenstahl* and precedent relying upon it (and similar precedent predating it) were wrongly decided, as *Banister* makes clear.

In *Baugh v. Nagy*, this Court stated it "believe[s] that *Wogenstahl* was incorrectly decided," noting "Congress's intention in enacting AEDPA was to curb the abuse of the statutory writ of habeas corpus." 2022 WL 4589117, *6 (6th Cir.) (internal quotations omitted). "But under *Wogenstahl*, we do not further this purpose. Instead, *Wogenstahl* incentivizes prisoners to bring [] claims without any evidence or else risk having a potential [] claim reviewed under the heightened 'second or successive' standards," which "pits the petitioner's interest in vigorously presenting the argument against counsel's interest in preserving their professional reputation." *Id*. (internal quotations omitted). The *Baugh* panel was correct.[11]

Wogenstahl, and construing Matthews' petition as successive, would mean the law requires habeas petitioners to present all potential habeas claims clearly rejected by governing law just in case the law later changes, or be foreclosed from raising such a claim. That covers forty-seven years of modern death penalty jurisprudence and would therefore make already hundreds upon hundreds of pages of a habeas petition into perhaps thousands of pages raising a hundred or more

[11] *See also In re Jackson*, 12 F.4th 604, 611 (6th Cir. 2021) (Moore, J, concurring) ("I write separately, however, to explain why I now believe that *Wogenstahl*—an opinion that I joined—was wrongly decided.").

claims. AEDPA did not intend to create that situation. A ruling that results in such creates the opposite of the purpose of AEDPA while also running contrary to the abuse-of-the-writ doctrine. This Court should recognize that, rule that the abuse-of-the-writ standard is all that applies to determine whether a petition is successive, and apply that standard in the manner *Banister* laid out. While the *Baugh* Court felt bound to follow *Wogenstahl* as circuit precedent despite its belief that *Wogenstahl* was wrongly decided, *Baugh* is an unpublished decision and thus does not bind this Court, and it did not consider *Banister*'s impact on the continued validity of *Wogenstahl* or any similar precedent. *Baugh* therefore does not require this Court to continue to follow erroneous precedent and this Court should not continue to do so. It should instead apply *Banister*, and alternatively, should review Matthews' motion en banc to thereby address the impact of *Banister* since this Court appears to have only once applied *Banister* in the context of determining whether a petition is successive and, therein, did so in a manner consistent with *Banister* but not with *Wogenstahl*, and has never addressed *Banister*'s impact on the validity of this Court's prior precedent and whether *Wogenstahl* has been abrogated or overruled. It should do so now.

Request for relief

Under the abuse of the writ doctrine, as articulated in *Banister*, Matthews' petition is not successive and thus this Court should remand the petition to the district court. Matthews so requests.

Alternatively, this Court should *sua sponte* determine to hear Matthews' motion en banc. And, either way, it should await the en banc court's decision in *Hill* before ruling on Matthews' motion, and should hold in abeyance filing an application to file a successive petition and the documents that would be required to be filed with that application.

Respectfully submitted,

/s/ David M. Barron

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Counsel for David Matthews

June 5, 2023

Certificate of word count

I hereby certify contains 5,175 words, excluding the portions that do not count towards the word count.

/s/ David M. Barron

Certificate of service

I hereby certify that on this date, I filed this motion through the electronic filing system, which emails a service copy to counsel for the Warden.

/s/ David M. Barron

June 5, 2023

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November 13, 1982

Jefferson Circuit Court, Division 15
Hall of Justice
Louisville, KY

Re: COMMONWEALTH OF KY. VS. DAVID MATTHEWS
Case No. 81CR0915

My mother died November 12, I will attend her funeral Nov. 15, in Denver, Colorado, and cannot testify on behalf of David Matthews, as commanded by Subpoena of Nov. 5, 1982. I would like to offer the following opinions and conclusions based upon my psychiatric examinations of Mr. Matthews.

1. Mr. Matthew's killing of his wife and mother-in-law was the culmination of several months of interpersonal conflict between him and his victims, as well as the development of rising intrapersonal strain and anxiety, which greatly impaired his judgment. It is quite unlikely that he will again be subject to such stresses and react by killing or injuring anyone.
2. His enduring personality traits do not express recurrent or persistent hostility. He is not noted for taking things out on other people, nor for taking things out on himself. His conscience and self-ideal are of average strength, and his conduct for the most part is within normal limits. He is fairly successful in conforming his deeds to his standards.
3. During and after a period of imprisonment, he could be rehabilitated to obey the laws of his community and contribute to society, by earning his income. He will need counselling to abstain from alcohol, and should become active in Alcoholics Anonymous.

Respectfully,

Lee R. Chutkow

Lee R. Chutkow, M. D.

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[illegible] it, there is a copy for each of you to use in considering your verdict. When you have reached a verdict, if you will knock on the door, we will receive it. Thank you.

Remember, your verdict must be unanimous and need be signed only by your foreman.

Court remains in session for all purposes in connection with this case.

(JURY RETIRES TO DELIBERATE.)

(AT 7:13 P.M., THE FOLLOWING QUESTIONS WERE INQUIRED OF BY THE JURY:

(1) The jury would like to listen to the 24 minute tape of the police interrogation.

(2) The jury would like to review the testimony of Doctor Chutkow.

(3) If a sentence of life imprisonment is imposed what is the minimum time that must be served before one becomes eligible for parole?

(4) If a sentence of a certain length of time is imposed, what lengths of time must be served before one becomes eligible for parole; for instance, if a sentence of 50 years is imposed when does one become eligible for parole?

(5) If two life sentences or two fixed terms are imposed, can the jury recommend that the terms be consecutive or concurrent?

(6) If a life sentence or a fixed term is imposed can the jury recommend the sentence be served without parole?

Signed, David H. Randall)

(PROCEEDINGS HELD OUTSIDE THE PRESENCE AND HEARING OF THE JURY:)

MR. RIVERS: Your Honor, in regard to the questions by the Jury relating to parole on specific sentences, I'm well aware that the Court cannot instruct the Jury as they would like to be, but could the Jury be instructed that they are to presume that the defendant would serve whatever sentence is given by the Court?

THE COURT: No, sir, I would simply tell them I'm not allowed to further instruct them. I understand that's your request, and you made a motion. I will overrule it.

MR. BUSSE: What is the response the Court intends to offer?

THE COURT: The Court will simply remind them and intends to tell the Jury that I can give them no instructions covering the questions which they have asked, that they should read the Court's instructions and follow the instructions they have been given.

MR. RIVERS: As far as concurrent and

THE COURT: You are correct, sir.

(END OF BENCH CONFERENCE.)

THE COURT: If you will give your attention to Commonwealth in this phase of the proceeding.

MR. SIMON: May it please this honorable Court?

THE COURT: Mr. Simon.

MR. SIMON: Mr. Busse. Mr. Rivers. Mr. Morris.

MR. RIVERS: Mr. Simon.

MR. SIMON: Ladies and Gentlemen of the Jury: Back on Tuesday when we had our voir dire, you all promised us that you could consider imposing, fixing, recommending a death penalty if you believed beyond a reasonable doubt that this defendant is guilty of Intentional Murder under certain types of acts, under certain types of circumstances, and that's the purpose of this proceeding, and that's the purpose for my argument here today.

Now, specifically, in this proceeding, the Commonwealth has proved to you beyond a reasonable doubt that the defendant has committed or there are aggravating circumstances from which you will be authorized to render such a verdict, death by electrocution, and you have made that finding beyond a reasonable doubt, based on your verdict

[redacted] rendered in the case in chief, Burglary in the First Degree and Intentional Murder as to Mary Marlene Matthews and Magdalene Cruse.

No other evidence is required by statute, no other evidence is required under these instructions for you to return that verdict, but by law, you are to consider the mitigating circumstances which will be provided to you in these instructions.

These factors, all the factors that you saw in the case in chief or you heard in the short sentencing trial, are to be considered by you in rendering this punishment or any punishment: 20 years, 30, 40, up to life imprisonment, or death.

The emphasis that I want to bring or the Commonwealth wants to bring to this hearing is on the victims in the case. As you remember, I pointed out to you symbolism indicated by these two chairs of the two victims that are not here because of the act of this man. That's the emphasis the Commonwealth wishes to place on this hearing.

Don't forget that these people, too, are human. They have hopes, they have aspirations, they have loved ones that, you know, never see them again, because of the act of this individual.

You go back to the evidence, and I would point out a couple of things from the items that were introduced in the case in chief, and, basically, they involve the home on North 24th Street. You have a number of pictures on the walls which denote some religious symbols You have toys spread throughout the house. There's a big teddy bear in the corner, and a number of toys on the dresser.

I submit to you that this would indicate not a rich group of people, not a wealthy group of people, by any means, but a happy place, a good place where children had been raised and were being raised at the time of the mother's death and the grandparent's death, and I ask you to take these factors here into consideration when you render your verdict.

Also, take in consideration that these people, these victims of this crime, these intentional murders never had the chance to get their lives in order, because of what happened to them, loose ends that they would like to fix up, things they had, personal relationships they would like to get straight with other people. They never had that opportunity, because of this man.

You can impose a sentence of death, and he will have that time. He will have that time to get his

life in order, but it's too late for Marlene Matthews, and it's too late for Magdalene Cruse.

I'd ask, also, when you go back to the evidence that you heard in the case in chief that you relate the defendant's state of mind to his actions, and I went through that in a lot of detail in my closing argument a few hours ago. You found the defendant guilty of an intentional, a conscious act. You found, I assume by your verdict, that there was no reasonable explanation that he was working under an extreme emotional disturbance at the time by virtue of your verdict.

Now, there's language in the mitigating circumstances here that bring those factors up again. I ask you, when you resolve yourself to recommending a penalty, in fixing a penalty, to consider those thought processes, consider those facts that you had before you in reaching your verdict in this case. And you think about intoxication as a mitigating factor when you think about extreme emotional disturbance and whatever disorder the defendant was supposed to have. Use those factors in rendering a verdict.

It's a very heavy burden to make this recommendation, and nobody promised you when you came on for jury duty that it was going to be a piece of cake or was going to be easy. It's a job that somebody had to work

and I believe you have worked at it very well in examining the evidence. It's a tough job, but you promised us on voir dire that you could do that job if the facts were warranted.

I'm asking you to do that job. I submit to you, the facts are warranted, because we have two individuals who are dead and gone because of one man sitting before you. A cold, calculated killer who planned this whole scheme, planned these murders for no legal or factual reason, no good factual reason, and no good legal reason.

These people are dead because of this individual's thought processes, whatever was going through his head, and it doesn't measure up to the standards of what we impose on all other individuals in our community.

I'd ask, also, that you consider the affect of the absence of these victims, Magdalene Cruse and Marlene Matthews, on the people that surrounded them, the people they came in contact with all the time, and I was thinking Sherry McMichael, Larry Cruse, who lost a mother and sister because of this individual's conduct, Mr. Lawrence Cruse lost a wife and a daughter, and I think you saw this man on the witness stand when he testified as the very first witness in the Commonwealth's case. This man is devastated, and what has he got the rest of his life? Who will he grow

did with because of this man's conduct?

And, finally, the children of Marlene Matthews, the children by her prior relationship with Bobby Masters, eight years old and six years old, and the fifteen month old that was in the same room, and I don't know if she can remember anything, Geri Lynn, I don't know if she can remember anything at all or there will be any lasting effects, but she will grow up without a mother because of his conduct, and those things will be for your consideration

A lot of people, when we get to this stage, have occasion to shout and yell and quote scripture and stuff, and I just can't do that. I don't feel like doing it but you know the significance of this man's actions on June 29, 1981. You know what havoc he wrecked in this family. He tore this family apart. He took two individuals out of that family away from their relatives, their friends, their loved ones forever, and it's all over, and I'm sure the defense counsel will come up here and say that nothing that you will do will bring them back, and that's absolutely right.

But, but, there is something to be said about retribution. It is a theory of the law that's been -- you know, you go back to common law and you go back to old English law, and it's been there from all that time, and

perhaps it's in order here, retribution. Make him pay for what he did, and make him pay for it with his life, because he's one individual who took the lives of two.

Now, we've gone through the entire process, and if you look at it on June 29, 1981 from the time of David Matthews' arrest, he had been afforded every right, every legal right, counsel, everything under the constitution which is entitled, and that's his right. That's everybody's right, and he's had that, and we have come up, we've gone through the Grand Jury, gone through a four day trial from the Jury of its peers, you people, you've heard all the evidence, and you decided beyond a reasonable doubt a verdict of guilty on Intentional Murders and Burglary in the First Degree, and those are authorized verdicts. They are based on the evidence. They are based on the facts.

We go one step further, and we get to this phase, the penalty phase, and this penalty also is authorized, and I submit to you the ultimate penalty of death by electrocution is authorized, too, by the facts in the case.

Now, he's had all those rights, and all his constitutional rights have been protected, and you can render a verdict of death, and his rights are still protected, because that's the way the system works, and we don't go out

immediately after something happens and go after retribution like that. That isn't the way we work. That isn't the way the law works.

We have a process of steps and procedures, and that's how civilized people operate, and we have operated under those procedures from day one, the time of his arrest.

You look at all the rights that have been afforded him, and you see what rights or what the victims in this case have had to go through. The constitution protects our life, liberty and pursuit of happiness. What type of happiness do these victims undergo on June 29, 1981 in the house on North 24th Street?

Their happiness for all time was ended. Their liberty to do the things they wanted to do the remainder of their lives is over, completely over, and, finally, their lives which entail all that other stuff, their lives are ended, too, because of this man.

I'm asking for a verdict, a penalty of death by electrocution. It's justified, and it's authorized.

In one way, you can think of it as that a priest will come by and will bless his immortal soul, if he wants a priest, and his soul will be blessed, and it will remain eternal, but his mind and his body are so bad, they need to be destroyed, and that's the only way you can look

it and I submit to you that that verdict is authorized and it's proper.

That's what I'm asking. That's what I'm asking for your verdict. Return a verdict that's just, that does justice, that means something. Perhaps that brings retribution in there and maybe that's important and I think it is, but, remember, it's authorized and it's set up by the law, and you said that you can consider it if the facts warrant it, and these facts, the facts you heard the past four days, they warrant a death sentence for David Eugene Matthews.

THE COURT: Will you give your attention, Ladies and Gentlemen, to Mr. Busse on behalf of the defendant?

MR. BUSSE: Mr. Simon.

MR. SIMON: Mr. Busse.

MR. BUSSE: Your Honor.

THE COURT: Mr. Busse.

MR. BUSSE: Ladies and Gentlemen: That table represents more than two lives, that table represents three lives, three lives, three lives. These chairs represent two people. I don't have another chair set out in front, but there's a third person. The happiness in the photos was there.

Now, I told you at the beginning that these shootings had happened. We made no attempt, no attempt, none, and if I did, I ask that each of you get back into that Jury Room, and you shout at each other, "Mr. Busse said this didn't happen," or "This wasn't so." But go back into the Jury Room. If we made any attempt to distort what happened in this case from the very beginning, from the very beginning, because, to my knowledge, we have not, because the same process, the same rights that were derived and deprived by David Matthews of these two victims that Mr. Simon so amply put are now put before you to be deprived of David Matthews, but there is a big difference. Again, I want to remind you, there is a big difference.

You are not under the influence of alcohol or drugs or disturbance or anything else. You are not in the heat of any moment. This is a calm, dispassionate, removed, educated, considerate body of people in a process, and David deprived these people without legal rights, but I ask that somehow you look at the circumstances as they occurred. It was a long road, and I think we told you that at the beginning.

From amongst the many jurors, fourteen were selected, and you were selected, because you could consider the death penalty, and, frankly, that's where we

we at at this point in time. There are other issues, but they pay in consideration.

Each of you answered that you could. If there had been a juror amongst you who said he couldn't, he was removed. That's our process, because the Commonwealth is entitled to have people who will consider it, but the same common law and the same Court that asked the people to consider it, asked that people consider all the facts and all the penalties.

The fact that you said you would consider it would be preposterous to state that you would give it before you decided it. It means that you would review all the evidence.

There are two aggravating factors in this case being present from the beginning. The presence of those aggravating factors were never contested, and that their presence does not mean that you may, should, or ought to give the death penalty. It means that you should consider it as a possible penalty.

We are not gathered here in the case of David Matthews to serve the interest of death or life. We are here to serve the interest of justice, and that includes many considerations not normally present when you have a death penalty case.

I had prepared these notes to discuss with you what are considered to be some of the mitigating factors in the statute, and if you read the instructions, it says that you shall consider mitigating or extenuating facts and circumstances as has been presented to you. Even if they don't amount to a legal defense, you have each of you signed a verdict or agreed to a verdict that David intentional killed his wife and mother-in-law. You did so after your early deliberations, and you did so knowing much of the evidence, and we respect that verdict, but the issue is different now. The issue is far more intent, more important, far more permanent, and that's the way these mitigating factors are submitted to you to review along with the aggravating factors.

I don't think that I'm going to go back through the evidence that supports or rejects the mitigating factors, but we haven't had an opportunity to talk since Mr. Simon, in his original closing, discussed our hired gun psychiatrist. Doctor Chutkow is pivotal, because I think his testimony is one of the important reasons why you should save David Matthews' life, and I submit to you that that doctor's testimony tells you that David is not a wild, deranged killer. He is a product of circumstance, and that is important to a Jury, because you have to assess whether

this is something that would have happened once or if it's something in the mind and body tissues of David Matthews.

Mr. Simon just made the comment that those body tissues are all bad. Not that the facts of this trial are bad, that David Matthews' body makeup is bad, and that he wants you to go over there and destroy it.

Well, I think Doctor Chutkow's testimony is pivotal in deciding whether Mr. Simon is right or whether Mr. Rivers and I are right, and I think that you ought to very well resolve that issue before you decide upon something like a death penalty. Who is right about David Matthews' firing?

The only thing I can add to tell you that what Doctor Chutkow told you is true that has not already been said concerning whom he's testifying for, how we got him, Mr. Simon says, "You didn't get him for thirty days." Mr. Simon doesn't even know when a public defender was appointed to represent David. He doesn't know how long the case laid there before we could get a psychiatrist. He doesn't know that we needed to get a Court order to get a psychiatrist to examine David. He doesn't know that we had to get a Court order to get a psychiatrist, and somehow, thirty days becomes a fabrication, and he says, "All this evidence that you put on in the way of Doctor Chutkow is

Busse, and Mr. Busse here, Mr. Busse, you are not unethical, you are not unethical, but all that evidence is no good. Mr. Busse, all we are asking them to do is disregard that testimony, so that we can politely, judiciously kill somebody."

Now, I'm not going to sit there and say that you shouldn't consider the death penalty in this case, because some of the facts are terrible, some of the facts that even Doctor Chutkow put forth that David didn't feel a tremendous amount of remorse are not favorable, but Doctor Chutkow presented the most objective account of what happened, and I'd ask that in your deliberations you review it, you relisten to it, you hear it for its good and its bad, but you pay attention to it, because it's going to be the key in deciding whether that body tissue is to be destroyed or not.

And, by the way, I don't think you ought to say his body is bad and ought to be destroyed, because that's not a body. And regardless of whether a priest blesses it, that's a person, and regardless of what happens, Magdalene Cruse and Marlene Matthews were people, and if I could wish them back into this Courtroom, and I've been on this case for fourteen months, if I could wish them alive, I would have done so a long time ago, but I can't, and I

reassemble the happiness that was in that home, and neither can you, nobody can.

But the one statement that Doctor Chutkow made that I'd ask that you remember, and if it's incorrect, correct me, but if you listen to the tape, I believe it is there, and upon Mr. Morris' examination, the question was put, "Doctor, you are here to justify what David Matthews did; isn't that correct?"

The response: "I'm not here to justify his reaction, I'm only here to explain it and describe it."

So because Doctor Chutkow was not a hired gun, he is one of the few neutral, reliable witnesses you have to assemble what is going to become a very difficult decision process for you, and I'd ask that you listen back to that information, and you listen to his entire testimony, because if you arrive at a verdict, and on Sunday, you tell each other, "I wish I had listened to that Doctor Chutkow to make sure," you are not going to be able to come back to Judge Shobe and say, "Can we listen now? Can we listen now?"

The prosecutor rejected Doctor Chutkow's testimony almost in its entirety, except for the few factual pieces which he fit within his own case, and I'm sorry if I'm getting emotional about this issue, but it's an emotional

Mr. Simon is emotional about his part of the case, and it should be emotional in you. This should not be an easy decision.

He has talked about the fact that you have a jury duty, I believe, in his recent argument, that you have a job you have to work out, that you promised that you could do that job. You promised you could do that job. He wants you now to recall you promised that you could do that job.

Well, your initial oath and your current oath is not a promise to issue the death penalty. The promise is to hear the case and all their facts on both sides and decide whether David Matthews should receive the death penalty.

You all owe no allegiance to me; you all owe no allegiance to Mr. Simon. You only owe allegiance to yourself and what must be done about the case.

I think that even Mr. Simon overstated his case in his argument he just concluded. He said that David planned and committed these acts for no good factual reason at all. He said that Geri Lynn Matthews, who is now two, will grow up without a mother, and that's true. She may grow up without a father.

If I were a juror, and I'm not, and I have

never been one of the facts that I would look to primarily in a case to decide if somebody was to get the ultimate punishment would be the premeditation of the acts, and the premeditation of the acts requires meditation, obviously, beforehand, but meditation, when someone is capable of restricting his acts, controlling his thoughts and movements.

Besides Doctor Chutkow, I think that the premeditational element is the most important in this case, and I would submit to you that if you review the facts as they happened in the original trial that no less than seven people knew about this murder by David's actions, and if seven people knew about it, then he may be premeditating the act, but he's not planning to ever have people not find out about it. He might as well have taken an ad in the newspaper if Elaine Peltier, Eddy Peltier, Carol Engle, Roger -- Roger Matthews, if the seven people that knew about this incident before the police ever got near were there just on the happenstance, and David went ahead and committed the murder, I think that you can surmise from that something about the level of premeditation, but, more than that, that tells you something about the control of David Matthews in those particular hours, but I'd ask that you examine the factors surrounding that immediate incident as to who knew about it and what does that mean?

Frequently, an argument that's made by the Commonwealth in these cases is that we must do this, we must follow through with the ultimate penalty. For some reason, the prosecutor usually likes to refer to things in amorphous terms, so they don't say the electric chair, the electrocution, the killing; it's easier that way. This is your civic duty. It's not something you are doing. He has his rights, so don't worry about what you are doing.

Well, the prosecutor wants you twelve people to kill David Matthews. He doesn't want to do it himself. He's asking you to do it, and the bottom line is that you will be responsible for it. It's your responsibilit

MR. MORRIS: Objection, Judge.

THE COURT: Yes, sir, I think the Jury, of course, will make a recommendation.

MR. BUSSE: Your Honor, I would move that they be instructed that they set the penalty in this case, because they do set the penalty.

THE COURT: The Jury is instructed to make a recommendation.

MR. BUSSE: Typically, the prosecutor argues that you must do this for deterrence, that we've got to do it to prevent it from happening, because David would attack a person on the street. Well, we know from

Doctor Chatkow's testimony that David's hostility, his whole being was directed towards his wife and her family, and he's not a threat to anyone else, so it's no use to say, deter them. It's no use.

There's an old story about the pickpocket killings in London in the 1600's that they would always have a law on the books that pickpockets had to suffer a public hanging, but they had to discontinue it, because there were so many pickpockets in the crowd, which says something about deterrence, but I think you can dismiss deterrence in this case because none of the testimony has said that this will reoccur, so we have gotten back to Mr. Simon's second argument, retribution.

No matter how we come out of this case, you are going to punish David Matthews. He's going to be punished either in the penitentiary for years, for life, or a death penalty warrant is going to issue for him to have a date of execution, but he's going to be punished, and his daughter is gone, his family life is gone, everything is gone but his life, and that's all he has to offer you.

I don't know when you make a decision about something this important if you do get into religion or if you do get into shouting. I get into shouting.

Mr. Simon said he will probably come up here and shout. Well, I think it ought to be a deliberate decision, a permanent decision in whatever you all do on what ought to happen with this case, and I think that when you make a decision of this importance, your moral principles and your religious principles and everything about you should become a part of it, and I would only state that if you incorporate all of that, you will find that very few religions, if any, very few religious teachings, very few moral principles stand for the proposition of killing people because they have killed, and that's the basic framework of most of us, and I think that that's good, but that's the basic framework of most of us.

When you talk about legal rights, Mr. Simon is trying to take the edge off of what will happen if you come back with the death penalty, of what will happen if you come back with a life sentence, but he's pointed to those two chairs there, and it's just as much as if we took this revolver that was used in this case and had each of you take over and point it at David Matthews. Not because it will happen this instant, but because the effect would ultimately be the same. But somehow when we look at it as this, instead of the verdict form, it seems so much more hostile than the verdict form.

About three years ago, my father was in a hospital, and he's the only person I think I have ever known very closely who died, and while he was sitting in intensive care for some months, I came to find out about what death was about, and I can't say that I enjoyed the sight of it all, but one day, when I was there at the hospital, a friend of his came in, and my father openly wept.

Now, I didn't know what it was all about till later, he told me that that woman would give the shirt off of her back for anyone who needed it. Well, that's my father's standard of living. He went on to say that this entire society that we have seems to be getting more and more directed towards repaying violence with violence, and this was in the last week that he was alive, and it upset him that no one could break the cycle. He said, if there were just more people like that woman who just left who would give the shirt off her back, we could stop this.

Well, neither Marlene nor the Cruses nor David are those kind of people, but when you look at your function today, it's not to repay violence with violence.

There was nothing in any of this evidence that would justify what David did. There was nothing in the emotional disturbance that would justify David's shootings, and we have never said that. There was nothing in the

alcohol that would justify these shootings. There was nothing in the drugs that would justify the shootings. There was nothing in the relationship problems that would justify the shootings.

But in all of it, there was enough in the evidence to justify saving his life. This is not a case of someone going openly, soberly, premeditatively into a service station and shooting someone and robbing them and raping them. This is not a case without emotion, without emotion, and because of that, I'd ask that each of you examine the mitigating factors that went into David's mind.

You found already that they are not sufficient to be a defense, but please examine them to determine whether they should save his life. Please. Please. Please don't kill David Matthews.

And before you start to deliberate, take it upon yourself to spend the time with the facts. Please. And if you have done that, then I think that you will have served justice, and David and myself and Mr. Rivers will thank you for that. Please take the time. This is the only chance you will have.

THE COURT: Ladies and Gentlemen, you will now retire to consider your verdict. The verdict form on the top is the one which the Court has signed. If you will