

No. 23-7206
CAPITAL CASE

IN THE SUPREME COURT
OF THE UNITED STATES

DAVID EUGENE MATTHEWS

PETITIONER

v.

LAURA PLAPPERT

Interim Warden, Kentucky State Penitentiary

RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED

Whether the abuse-of-writ doctrine is the exclusive, threshold inquiry to determine if a habeas petition is second or successive.

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FACTS AND OPINIONS BELOW

On June 29, 1981, David Eugene Matthews, at some time between 1:00 and 2:00 a.m., unlawfully entered a home occupied by his wife, Mary Marlene Matthews, and his mother-in-law, Magdalene Cruse. Matthews went into the bedroom where Magdalene was sleeping and shot her from less than 18 inches away. Matthews then entered a separate bedroom where his wife and infant daughter were located and spent approximately four hours in the room-allegedly he had consensual sexual relations with his wife one or two times before shooting and killing her at close range. After the shootings, Matthews went to his mother's home ten-to-twelve blocks away and began actions to conceal his crimes.

Later that morning, Larry Cruse, (Magdalene's husband and Marlene's father), arrived home and noticed the aftermath of the break-in. As he entered, he located his wife, mortally wounded but still alive, convulsing and sweating in the bed eight hours after being shot. She would later die at a local hospital. In the next room, he discovered his grandchild in her bed reaching for him. On the floor in between the toddler's bed and an adjacent adult bed was the body of his daughter. Marlene had been shot twice (once in the stomach and once in the back).

Matthews was found guilty of two murders (among other crimes) and received two death sentences. After years and years of litigation,¹ on June 11, 2012, in a unanimous opinion, this Court reversed the United States Court of Appeals for the Sixth Circuit and denied habeas corpus relief.

¹ Direct Appeal - *Matthews v. Commonwealth*, 709 S.W.2d 414 (Ky. 1985), *cert. denied*, 479 U.S. 871 (1986). State Post-Conviction Proceedings - *Matthews v. Commonwealth*, No. 1996-SC-805-MR (Ky. Nov. 20, 1997), *cert. denied*, 525 U.S. 860 (1998); and *Matthews v. Commonwealth*, No. 2000-SC-1134-MR (Ky. Jan. 17, 2002).

Federal Habeas Petition - *Matthews v. Simpson*, 603 F. Supp.2d 960 (W.D. Ky. 2009). Federal Habeas Intermediate Appeal - *Matthews v. Parker*, 651 F.3d 489 (6th Cir. 2011). Final Appeal to United States Supreme Court - *Parker v. Matthews*, 567 U.S. 37 (2012).

Parker v. Matthews, 567 U.S. 37 (2012).

Despite an exhaustive federal habeas corpus process spanning 13 years, as soon as Matthews was appointed new counsel for clemency and post-habeas related matters, a second, successive federal habeas petition was filed in 2012. Matthews alleged he was raising a “new” claim of ineffective assistance of trial counsel (IATC)—due to the failure to recall Dr. Lee Chutkow, a defense expert, during the sentencing phase of the trial to discuss lack of future dangerousness. Matthews asserted that this claim had not been raised in state courts by his prior attorneys, and *Martinez v. Ryan*, 566 U.S. 1 (2012), created a procedural loophole for him to raise the claim in a new petition (with sufficient cause to excuse the procedural default due to ineffective assistance of post-conviction counsel).

In support of his claim, Matthews cited a letter written by Dr. Chutkow—which was presented at the sentencing hearing a month after the trial ended—and alleged that Dr. Chutkow was less equivocal than in his trial testimony and stated that it was unlikely Matthews would reoffend given the implausibility that he would encounter the same stressors. The letter was written in lieu of live testimony because Dr. Chutkow became unavailable to attend the sentencing hearing due to the death of his mother. Matthews claimed that if Dr. Chutkow had been recalled in the sentencing phase of the trial, and testified in a manner consistent with his letter, he would have avoided his death sentences.

The Warden responded by asserting that this issue had already been raised and rejected in the earlier habeas proceeding. Specifically, it was noted that this issue was part of one of the more expansive claims in the first habeas case—alleging Matthews’s trial attorneys were ineffective with regard to the retention, preparation, and utilization of Dr. Chutkow. *See Matthews v. Simpson*, 603 F.Supp. 2d 960, 1016-1024 (W.D. Ky. 2009). The Warden’s answer provided particular details, and highlighted where Matthews’s post-conviction attorneys specifically referenced the letter from Dr. Chutkow in state-court proceedings to support the IATC claim. The Warden noted that Matthews’s new attorneys simply carved out a narrow portion of the broader claim to try to assert a “new” claim

was being made. Alternatively, the answer also detailed how the underlying claim lacked merit (such that the claim could not be viewed as “substantial,” nor could actual prejudice be shown) given that Dr. Chutkow did testify about lack of future dangerousness during his guilt-phase testimony and essentially said the same thing he said in the letter.

On February 26, 2014, Matthews sought discovery to depose trial counsel about the circumstances of Dr. Chutkow’s letter. Both trial attorneys had already been deposed as part of the earlier habeas proceedings, nevertheless, discovery was granted. Reconsideration was denied, but the Warden continued to assert that Matthews failed to meet the standard for discovery. Moreover, the discovery motion was granted by the district court mainly because of a mistake of fact—the erroneous belief that the letter existed and could have been presented to the sentencing jury, when it was prepared for the sentencing judge a month after the trial, because Dr. Chutkow was unexpectedly unable to attend the hearing. Ultimately, the depositions occurred and the parties filed court-ordered post-discovery briefs.

About six years later, Matthews moved to stay this case and hold it in abeyance pending the litigation of a motion under Kentucky Rule of Civil Procedure (CR) 60.02 in the Jefferson Circuit Court based on exactly the same issue. Matthews conceded that he could not use testimony from the 2016 trial-attorney depositions to support his claim under this Court’s holding in *Shinn v. Ramirez*, 596 U.S. 366 (2022). Therefore, Matthews wanted the district court to pause this proceeding so he could raise a fruitless claim in state court. Matthews believed that by going through the motions of raising his procedurally barred claim in state court, which included attaching the federally produced depositions to his state-court motion, he could use the depositions after the abeyance was lifted and the case was returned to federal court.

The Warden responded—noting that Matthews’s legal gymnastics were contrary to *Shinn*. *Shinn* did not take away any right or overrule any precedent, it merely clarified *Martinez v. Ryan* and its

progeny. From that basis, Matthews could not forum shop his procedurally barred claim back to state court solely to circumvent *Shinn* and get his otherwise impermissible evidence before the district court.

On March 7, 2023, the magistrate issued a report and recommendation concluding that Matthews’s habeas corpus petition was second or successive, and pursuant to the gatekeeping requirements of 28 U.S.C. § 2244, this matter should be transferred to the Sixth Circuit (citing 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997)) for a determination as to whether Matthews could proceed with his petition. After objections by Matthews, the district court adopted the magistrate’s report.

Rather than filing a motion for authorization to file a successive petition, Matthews moved to remand the case to district court and to hold the proceedings in abeyance. Matthews argued that his second-in-time petition was not a second-or-successive petition, therefore, he did not need the authorization and the case should be remanded. Citing *In re Hill*, 81 F.4th 560, 569 (6th Cir. 2023) (en banc),² the Sixth Circuit, on November 14, 2023, issued an Order that denied Matthews’s remand motion but granted the abeyance. Matthews was given 30 days to file a motion authorizing a second petition or a letter notifying the court he did not intend to file the motion.

Matthews’s petition followed.

² “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). Note, Hill’s petition a writ of certiorari to this Court was denied on May 13, 2024. *Hill v. Shoop*, No. 23-6276.

REASONS TO DENY THE PETITION

Consistent with this Court's precedent, the Sixth Circuit correctly denied Matthews permission to file a second or successive habeas petition.

As noted by Matthews in his petition, the exact issues presented here were recently put before this Court in *Hill v. Shoop*, No. 23-6276. *Petition*, pp. 2-3. Matthews hitched his petition for a writ of certiorari to Hill's case in a way that he asserted his habeas petition was denied because the Sixth Circuit was bound by its holding in *In re Hill*, 81 F.4th 560 (6th Cir. 2023) (en banc). *Id.* In fact, Matthews also contended that if a writ was to be granted by this Court in Hill's case, Matthews's petition should also be granted and the cases consolidated. *Id.* Notably, after Matthews filed his petition, this Court denied Hill's petition for a writ of certiorari on May 13, 2024. For the same reasons, Matthews's petition should also be denied.

Habeas corpus writs began as a way to correct jurisdictional defects in criminal judgments. *Brown v. Davenport*, 596 U.S. 118, 128 (2022). Over time, the writ evolved into “[f]ull-blown constitutional error correction.” *Id.* at 130. Limitation came in the form of the abuse-of-writ doctrine, prohibiting habeas petitioners from raising claims that could have been brought in prior petitions. Under the doctrine, if petitioners had “a sufficient basis to allege a claim in the first petition,” they needed to bring the claim there. *McCleskey v. Zant*, 499 U.S. 467, 498 (1991). Failure to do so would not be excused for later evidence that supported a prior claim. *Id.*

Eventually, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted, which strictly limits when the courts of appeals may authorize the filing of “second or successive”³ habeas petition. 28 U.S.C. § 2244(b)(2), (3)(C). For a second or successive habeas petition to be filed in the

³ AEDPA does not define “second or successive,” but this Court has recognized it as a term of art that incorporates the abuse-of-writ doctrine from pre-AEDPA cases. *Slack v. McDaniel*, 529 U.S. 473, 486 (2000).

federal district courts of Kentucky, permission is required from the United States Court of Appeals for the Sixth Circuit. *See* 28 U.S.C. § 2244(b)(3)(A). “The court of appeals may authorize the filing of a second or successive” petition only if the petition “makes a prima facie showing” that it satisfies § 2244(b)’s requirements. § 2244(b)(3)(C). Here, Matthews never received authorization before filing his successive habeas petition in 2012—alleging that permission was not required. The United States District Court for the Western District of Kentucky disagreed, and the case was transferred to the Sixth Circuit. Against Matthews’s protestations, relying on *In re Hill*, 81 F.4th at 569, the Sixth Circuit denied Matthews permission to file his successive habeas petition. Matthews had already acknowledged that he could not meet the requirements to file a second-or-successive petition under § 2244(b). Rather than taking the Sixth Circuit’s offer to briefly hold the case in abeyance so that he might attempt to meet the requirements of § 2244(b), Matthews has challenged the standard used by the Sixth Circuit when reaching its conclusion.⁴

AEDPA codified and bolstered the abuse-of-writ principles. *See Beras v. Johnson*, 978 F.3d 246, 251-252 (5th Cir. 2020) (holding that this Court has interpreted § 2244 to be consistent with the common-law evolution of the abuse-of-writ doctrine). Specifically, the AEDPA provides as follows:

(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

⁴ This Court has jurisdiction to review whether Matthews’s petition is “second or successive.” *Castro v. United States*, 540 U.S. 375, 380–381 (2003); 28 U.S.C. § 1254.

reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

Contrary to Matthews’s claim that abuse-of-the-writ is the sole standard to review when determining the parameters of what was meant by “second or successive,” this Court has looked to (1) abuse-of-writ principles; and (2) the “statutory aims” of AEDPA. *Banister v. Davis*, 140 S. Ct. 1698, 1705–1706 (2020). As this Court explained in *Banister*:

Under AEDPA, a state prisoner always gets one chance to bring a federal habeas challenge to his conviction. *See Magwood v. Patterson*, 561 U.S. 320, 333–334, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010). But after that, the road gets rockier. **To file a second or successive application in a district court, a prisoner must first obtain leave from the court of appeals based on a “prima facie showing” that his petition satisfies the statute’s gatekeeping requirements.** 28 U.S.C. § 2244(b)(3)(C). Under those provisions, which bind the district court even when leave is given, a prisoner may not reassert any claims “presented in a prior application.” § 2244(b)(1). And he may bring a new claim only if it falls within one of two narrow categories—roughly speaking, if it relies on a new and retroactive rule of constitutional law or if it alleges previously undiscoverable facts that would establish his innocence. *See* § 2244(b)(2). Still more: Those restrictions, like all statutes and rules pertaining to habeas, trump any “inconsistent” Federal Rule of Civil Procedure otherwise applicable to habeas proceedings. 28 U.S.C. § 2254 Rule 12.

140 S.Ct. at 1704 (citation omitted) (emphasis added). Therefore, a threshold question about whether an application is “second or successive” under § 2244(b) must be determined, and if the answer is yes, then the second question is whether to dismiss the successive application. *See Magwood v. Patterson*, 561 U.S. 320, 336–337 (2010).

Matthews misreads *Banister*. In that case, Banister moved to alter or amend the habeas court’s judgment via Federal Rule of Civil Procedure 59(e). 140 S.Ct. at 1702. The narrow issue before this Court was settling a circuit split as to whether a Rule 59(e) motion was a second or successive habeas petition. *Id.* at 1705. When examining the issue, the Court looked for guidance from historical habeas doctrine and practice; specifically, pre-AEDPA case law (which included examination of second or

successive applications via the abuse-of-the-writ doctrine). *Id.* at 1705-1706. This analysis was in no way an endorsement of replacing § 2244 or providing the abuse-of-writ doctrine as the “exclusive means to determine whether a petition is initial or successive.” *Petition*, p. 8. This was evident with the *Banister* Court’s citation to *McCleskey v. Zant*, 499 U.S. 467, 483 (1991), noting that *before* AEDPA, abuse-of-the-writ principles limited the ability to file repetitive petitions. *Id.* at 1707. For, as spelled out more clearly in the dissent, had the majority treated *Banister*’s Rule 59(e) motion as what it was, a second-in-time petition, it would have been summarily dismissed under § 2244(b)(1). *Id.* at 1711 (Alito, J., dissenting). In sum, Matthews’s assertion that the Sixth Circuit’s decision in his case conflicts with *Banister* is incorrect—that case did not endorse the abuse-of-writ doctrine as the exclusive, threshold inquiry with regard to whether a petition is second or successive.

In Matthews’s case, the Sixth Circuit relied on *In re Hill*, a case that was specifically guided by *Banister* and *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). In *Hill*’s case, it was noted that what constitutes a second or successive petition would be driven by historical habeas doctrine (pre-AEDPA cases finding an abuse of the writ) and the statutory aims of AEDPA (including conservation of judicial resources, reducing piecemeal litigation, and encouraging finality of state-court judgments). *In re Hill*, 81 F.4th at 568. It was against this same backdrop that Matthews’s petition was assessed.

Further, under this Court’s precedent, the Sixth Circuit specifically identified three circumstances as exceptions to the rule against second-or-successive petitions. First, the second-or-successive petition challenges a new state-court judgment. *Id.* (citing *Magwood v. Patterson*, 561 U.S. 320, 339 (2010)). Second, the new petition raises a claim that was raised in the first petition but was unexhausted at that time and not decided on the merits. *Id.* (citing *Slack v. McDaniel*, 529 U.S. 473, 486–487 (2000)). Finally, the new petition contains a claim that would have been unripe at the time of the filing of the first petition. *Id.* (citing *Panetti v. Quarterman*, 551 U.S. 930, 943–945 (2007)). The Sixth Circuit found that Matthews’s habeas petition was barred relative to this third category, and

because “the new claim was neither unripe nor unexhausted the first go-around,” Matthews’s habeas petition was deemed second or successive. *See Appendix, Order*, p. 2. This finding was consistent with this Court’s standards and guiding principles.

A writ of habeas corpus is an extraordinary remedy that disrupts the delicate balance of power in our dual-sovereignty system of federalism. *See Engle v. Isaac*, 456 U.S. 107, 127–128 (1982). The very act of habeas review itself “intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quoting *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)). Because federal habeas review greatly intrudes on state sovereignty, this Court has repeatedly cautioned federal courts against actions that “needlessly prolong a habeas case.” *Shoop v. Tnyford*, 596 U.S. 811, 820 (2022) (quotations omitted). Nothing from this Court’s precedent supports Matthews’s theory that abuse-of-writ serves as the exclusive means to determine whether a habeas petition is second or successive. Here, the Sixth Circuit examined the issue correctly, under the appropriate standards, and no additional review is warranted.

CONCLUSION

Matthews does not present a compelling reason for this Court to grant the petition. None of the considerations highlighted in Supreme Court Rule 10 exist or create a legal basis for review by this Court.

For these reasons, the petition should be denied.

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FILING/PROOF OF SERVICE

The foregoing Brief in opposition was filed electronically this day, June 12, 2024, and also was mailed to the Clerk of this Court.

Further, I, Matthew R. Krygiel, a member of the Bar of this Court, hereby certify that on the 12th day of June, 2024, a copy of this Brief was mailed via United States Postal Service, postage prepaid, and emailed to Hon. .

/s/ Matthew R. Krygiel
MATTHEW R. KRYGIEL