

No. 23A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID EUGENE MATTHEWS,

Petitioner

v.

LAURA PLAPPERT, Interim Warden

Respondent

**Application to the Honorable Justice Brett Kavanaugh
for an extension of time to file
a Petition for a Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit**

Capital case

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To the Honorable Justice Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit.

Under Supreme Court Rules 13.5 and 30.2, CJA appointed counsel for Petitioner David Eugene Matthews request a sixty (60) day extension of time, from February 12, 2024 through April 12, 2024, to file a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. Counsel for Respondent Plappert does not oppose this extension request and authorized undersigned counsel to so inform the Court.

On November 14, 2023, the Sixth Circuit denied Matthews’ motion to retransfer/remand his second-in-time habeas petition to the United States District Court for the Western District of Kentucky to be decided as an initial habeas petition. That makes the petition for a writ of certiorari due on February 12, 2024.

This Court has jurisdiction under 28 U.S.C. §1254(1).

After Matthews’ second-in-time habeas petition was filed, the district court found good cause to authorize depositions despite the Warden having argued the petition was successive and thus had to be transferred to the Sixth Circuit for authorization to file a successive petition. Those depositions were then taken, and post-deposition briefing was then filed. Approximately eight years later, which was approximately eleven years after the habeas petition had been filed, the district court *sua sponte* determined the habeas petition was successive and transferred it to the Sixth Circuit.

Relying on the long-standing abuse of the writ doctrine and *Banister v. Davis*, 140 S.Ct. 1698 (2020), Matthews argued it was an initial petition and sought retransfer/remand to the district court. Relying on the intervening en banc Sixth Circuit decision of *In re Hill*, 81 F.4th 560 (6th Cir. 2023), Matthews’ Sixth Circuit panel held it was bound to hold Matthews’ habeas petition was successive. A petition for a writ of certiorari in *Hill* is currently pending, with the brief in opposition having been filed on January 12, 2024, and thus a likely conference date of February 16, 2024 – four days after Matthews’ petition for a writ of certiorari is currently due. A certiorari grant in *Hill* would undoubtedly impact Matthews’ case because the Sixth Circuit

relied on *Hill* to rule against Matthews. Thus, it would be prudent to await this Court's action in *Hill* before filing Matthews' petition for a writ of certiorari.

Matthews' petition will address the legal standard for determining whether a second-in-time habeas petition is an initial or successive petition. More specifically, it will address how the standard the Sixth Circuit applied conflicts with the application of the abuse of the writ doctrine this Court has long applied for determining whether a habeas petition is successive, including after the adoption of AEDPA. *See Banister v. Davis*, 140 S.Ct. 1698 (2020). In that regard, it will also address the Sixth Circuit's standard being in conflict with *Banister*, along with the importance of this Court addressing the issue to bring uniformity to the circuit court of appeals as to how to determine whether a second-in-time habeas petition is initial or successive. This issue is important, and resolution of it will impact many cases across the country and bring uniformity to how courts of appeals determine whether a habeas petition is not successive. CJA appointed counsels' deadlines in other cases, along with the prudence of awaiting this Court's action in *Hill*, provide reason to grant the unopposed requested extension of time.

Supreme Court Rule 13.5 permits a Justice of this Court "for good cause" to extend the time to file a petition for a writ of certiorari for a period not exceeding sixty (60) days, as long as the Clerk receives the application at least ten (10) days before the petition is due. Rule 30.2. This request for an extension of time has been filed in advance of that, and as explained herein, good cause exists.

Undersigned counsel of record, David M. Barron, represents eleven of Kentucky's twenty-six death-sentenced inmates, some of whom have multiple legal actions pending in state and federal court. Since the Sixth Circuit's decision in Matthews' case, Barron filed numerous pleadings in capital cases in state and federal courts. Currently, he has the following pleadings due in the near future: a reply to a response in opposition to a certificate of appealability in a case where the district court entirely denied a certificate of appealability, due February 23, 2024; a reply brief before the Sixth Circuit in a capital habeas appeal, due on March 4, 2024; numerous pleadings that will need to be filed in another capital case no later than March 6, 2024; and, a reply brief before the Sixth Circuit in another capital habeas appeal, due, on an extension of time, on April 1, 2024. In addition, he recently completed materials for two local virtual training presentations he is scheduled to present in February 2024, and he has a medical procedure scheduled for April 9, 2024.

Counsel Brian Pomerantz recently completed a multi-day capital evidentiary hearing in California that involved extensive pre-hearing preparation. As a result of the evidentiary hearing, numerous capital case deadlines in Pomerantz's other cases were pushed back. Those deadlines cannot be extended further. This includes an opposition to summary judgment in *Taylor v. State of Utah*, Third Judicial District Court Case No. 230500199, due on February 6, 2024; a state exhaustion petition in *Contreras v. Davis*, No. 1:19-cv-01523 (E.D. Cal.), due by March 8, 2024; a settlement conference in a capital case in Northern California on March 12, 2024 (Pomerantz lives in North Carolina); a settlement brief due in that case two weeks beforehand; and, an

expert report due on March 18, 2024, in the case for which he just had the evidentiary hearing.

These deadlines and scheduling matters, along with the prudence of awaiting this Court's action in *Hill*, provide good cause for granting Matthews' unopposed extension motion.

For the reasons expressed above, Petitioner Matthews requests the Court grant him a sixty-day extension, up to and including April 12, 2024, to file a petition for a writ of certiorari.

Respectfully submitted,



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