

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

RONALD PATRICK SWINEY, )

)

PETITIONER, )

)

V. )

CASE NO.: CV-06-B-1133-S

)

KENNETH L. JONES, Warden; )

TROY KING, ATTORNEY GENERAL )

FOR THE STATE OF ALABAMA, )

)

RESPONDENTS. )

**MOTION TO AMEND PLEADINGS - WRIT OF HABEAS CORPUS**  
**BY A PERSON IN STATE CUSTODY**

Mr. Swiney respectfully submits this amendment to the §2254 petition filed with this Court on June 9, 2006, an in-time petition under the AEDPA. At that time, Swiney assumed that he needed permission to file in the Federal District Courts under 28 U.S.C. §2244. Mr. Swiney filed a 20-page motion with the 11<sup>th</sup> Circuit Court on May 11, 2006 asking for permission to proceed in this Court. The 11<sup>th</sup> Circuit Court clerk returned the motion on May 15, 2006 informing Mr. Swiney that he was required to submit the motion using a form designed by the Court. Mr. Swiney resubmitted the motion using the Court-approved form on May 17, 2006. The 11<sup>th</sup> Circuit denied Mr. Swiney's motion on June 14, 2006 and a copy of that order was forwarded to this Court.

Mr. Swiney avers that §2244(b)(3)(A)'s gatekeeping mechanism does not apply and Mr. Swiney did not require permission from the 11<sup>th</sup> Circuit Court under the law to proceed in this Court for the reasons stated below.

Although Swiney previously filed a Petition for a Writ of Habeas Corpus before this Court containing unrelated claims, the instant Petition is not a second or successive petition subject to 28 U.S.C. §2244(b) because the claims for relief set forth below were previously unavailable to him and could not have been raised in the prior petition.<sup>1</sup>

While the Anti-terrorism and Effective Death Penalty Act (AEDPA) requires Circuit Court approval for the filing of a "second or successive" habeas application, the AEDPA does not define what constitutes a "second or successive" petition. It is clear though that "second or successive" is a term of art and that a petition is not "second or

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<sup>1</sup> 28 U.S.C. §2244(b) requires a litigant to receive authorization from the circuit court of appeals before filing a successive habeas petition in the district court.

successive” merely because it is numerically a second or subsequent motion.<sup>2</sup> To interpret the meaning of “second or successive,” which merely is the AEDPA’s incorporation of longstanding habeas practice,<sup>3</sup> “courts look to the pre-AEDPA abuse of the writ doctrine” that §2244(b) codified.<sup>4</sup>

A petition is a “second or successive” petition under the abuse of the writ doctrine, when the claim was, or could have been, raised in an earlier petition.<sup>5</sup> Conversely, when the claim the petitioner raises in the second-in-time petition could not have been raised during the prior habeas proceeding, there is no abuse of the writ. Federal courts thus hold that under the AEDPA, when a second-in-time habeas petition presents a claim that was not available (had not arisen or could not have been raised) during the prior habeas proceeding, the second-in-time petition is not a “second or successive” petition, and as a result, 2244(b)(3)(A)’s gatekeeping mechanism does not apply.<sup>6</sup> Swiney’s current habeas petition is not a successive petition subject to restrictions of 28 U.S.C. §2244(b) because the four claims presented in this petition were

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<sup>2</sup> *Slack v. McDaniel*, 529 U.S. 473, 487 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 646 (1998); *Benchoff v. Collieran*, 404 F.3d 812, 817 (7th Cir. 2005); *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003); *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002); *Hill v. Alaska*, 297 F.3d 895, 898 (9th Cir. 2002) (citing *Slack*, 529 U.S. at 473, and *Martinez-Villareal*, 523 U.S. at 644-45); *United Crouch v. Norris*, 251 F.3d 720, 725 (8th Cir. 2001); *United States v. Orozco-Ramirez*, 311 F.3d 862, 867 (5th Cir. 2000); *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998) (holding that “a prisoner’s application is not second or successive simply because it follows an earlier federal petition.”)

<sup>3</sup> *In re Cabey*, 429 F.3d 93, 96 (4th Cir. 2005).

<sup>4</sup> *Slack*, 529 U.S. at 486-87 (noting that pre-AEDPA law, including the abuse of the writ doctrine, should be used in interpreting the meaning of “second” or “successive”); *Cabey*, 429 F.3d at 96; *Crone*, 324 F.3d at 837; *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003); *James*, 308 F.3d at 167 (citing *Martinez-Villareal*, 523 U.S. at 643-45) (applying the abuse of writ doctrine to determine if a petition is a successive habeas petition); *Crouch*, 251 F.3d at 723 (citing *Martinez-Villareal*).

<sup>5</sup> *Benchoff*, 404 F.3d at 817; *Crone*, 324 F.3d at 836-37; *James*, 308 F.3d at 167; *Crouch*, 251 F.3d at 724; *Orozco-Ramirez*, 211 F.3d at 867; *Cain*, 137 F.3d at 235; see also, *Rosales-Garcia v. Holland*, 322 F.3d 386, 398 (6th Cir. 2005) (holding that “[a] successive petition raises grounds identical to those raised and rejected on the merits on a prior petition”).

<sup>6</sup> *Cabey*, 429 F.3d at 96-97; *Benchoff*, 404 F.3d at 817; *Singleton*, 319 F.3d at 1023; *Hill*, 297 F.3d at 898

not available to Mr. Swiney at the time the federal district court denied his first-in-time habeas petition in 1998.

Mr. Swiney respectfully submits that this Court has jurisdiction to proceed with adjudication of his §2254 petition and requests that this Court amend his original pleadings to include this information while retaining all pleadings presented in the original petition filed on June 9, 2006.

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Frank Wilson MYERS, Sr.  
Attorney for Appellant

#### CERTIFICATE OF SERVICE

I certify that I have served all parties to this cause by placing a copy of the foregoing in the United States Mail First class postage prepaid, properly addressed as shown below, on this the \_\_\_\_\_ day of \_\_\_\_\_ 2006.

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