No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE SEBASTIAN ECCLESTON

On Petition for Writ of Mandamus
to the United States Court of Appeals for the Tenth Circuit
in Case No. 16-2126

PETITION FOR WRIT OF MANDAMUS

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

Josh Lee
Assistant Federal Public Defender
josh.lee@fd.org
Counsel of Record for Petitioner

633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Fax: (303) 294-1192

August 9, 2019

QUESTION PRESENTED

In 2016, Sebastian Eccleston, a federal prisoner, filed a motion in the court of appeals requesting authorization to pursue a second or successive post-conviction action in the district court. Section 2244(b)(3)(D) of the federal post-conviction statute specifies that "[t]he court of appeals shall grant or deny . . . authorization to file a second or successive application not later than 30 days after the filing of [a] motion" for authorization. The court of appeals (for unspecified reasons) *sua sponte* abated Mr. Eccleston's motion and—over Mr. Eccleston's objection—has kept the case abated without explanation for more than three years. The following question is presented:

Whether the exceptional circumstances of this case warrant the exercise of this Court's discretionary powers to issue a writ of mandamus pursuant to 28 U.S.C. § 1651(a).

PARTIES TO THE PROCEEDING

Petitioner (movant in the court of appeals) is Sebastian Eccleston.

Respondent in this Court is the United States Court of Appeals for the Tenth Circuit. The real party in interest on the respondent-side of this case (the plaintiff in the court of conviction) is the United States.

LIST OF RELATED PROCEEDINGS

The following cases are directly related under Rule 14(1)(b)(iii):

Federal district court:

United States v. Eccleston, No. 1:95-cr-00014-JB-2 (D. N.M.) (judgment entered Nov. 12, 1996).

United States v. Eccleston, No. 1:01-cv-00500-LH-WD (D. N.M.) (judgment entered June 15, 2001).

United States v. Eccleston, No. 1:04-cv-00250-LH-CG (D. N.M.) (judgment entered June 24, 2008).

Eccleston v. United States, No. 1:08-cv-01079-LH-LAM (D. N.M.) (judgment entered Nov. 25, 2008).

Eccleston v. United States, No. 09-cv-2654-JAP (D. N.J.) (judgment entered Feb. 3, 2010).

Eccleston v. United States, No. 11-cv-1352-JAP (D. N.J.) (judgment entered Dec. 7, 2011).

Eccleston v. United States, No. 12-cv-3999-JSL (C.D. Cal.) (judgment entered June 3, 2013).

Eccleston v. United States, No. 1:16-cv-00414-LH-WPL (D. N.M.) (judgment entered May 20, 2016).

Eccleston v. United States, No. 16-cv-1322-TDC (D. Md.) (judgment entered June 7, 2016).

Eccleston v. United States, No. 1:19-cv-00538-RB-CG (D. N.M.) (pending).

Federal courts of appeals:

Eccleston v. United States, No. 04-2107 (10th Cir.) (judgment entered Oct. 17, 2005).

United States v. Eccleston, No. 07-2123 (10th Cir.) (judgment entered Mar. 31, 2008).

In re Eccleston, No. 09-2022 (10th Cir.) (judgment entered Mar. 10, 2009).

Eccleston v. United States, No. 10-1525 (3d Cir.) (judgment entered Aug. 9, 2010).

In re Eccleston, No. 10-2231 (10th Cir.) (judgment entered Nov. 2, 2010).

In re Eccleston, No. 10-2256 (10th Cir.) (judgment entered Dec. 13, 2010).

In re Eccleston, No. 11-2215 (10th Cir.) (judgment entered Dec. 5, 2011).

United States v. Eccleston, No. 13–2112. (10th Cir.) (judgment entered Dec. 20, 2013).

Eccleston v. United States, No. 10-6856 (10th Cir.) (judgment entered Nov. 25, 2013).

In re Eccleston, No. 14-2092 (10th Cir.) judgment entered June 18, 2004).

Eccleston v. United States, No. 13-56065 (9th Cir.) (judgment entered Apr. 14, 2016).

In re Eccleston, No. 16-2126 (10th Cir.) (pending).

In re Eccleston, No. 16-2130 (10th Cir.) (pending).

United States Supreme Court

Eccleston v. United States, No. 08-6163 (U.S.) (certiorari denied Oct. 14, 2008).

Eccleston v. United States, No. 10-6856 (U.S.) (certiorari denied Nov. 8, 2008).

Eccleston v. United States, No. 13-8862 (U.S.) (certiorari denied Mar. 31, 2014).

Eccleston v. United States, No. 16-6805 (U.S.) (certiorari denied Jan. 9, 2017).

TABLE OF CONTENTS

PAGE

APPENDICES

TABLE OF AUTHORITIES

PAGE

Cases

Other Authorities

Rules

Statutes

PETITION FOR A WRIT OF MANDAMUS

Petitioner, Sebastian Eccleston, respectfully requests that this Court issue a writ of mandamus to the United States Court of Appeals for the Tenth Circuit requiring it to act on Mr. Eccleston's motion for authorization without further delay. Mr. Eccleston has also filed, concurrently with this petition for a writ of mandamus, a petition for writ of certiorari. Should the Court determine that this case does not meet the criteria for a writ of mandamus, it should grant Mr. Eccleston's alternative request for a writ of certiorari for the reasons stated in that petition.

DECISIONS BELOW

The judgment of the United States District Court for the District of New Mexico convicting Mr. Eccleston of violating 18 U.S.C. § 924(c) and of committing other related offenses is unpublished but is reproduced as Appendix A to this Petition.

The Tenth Circuit's decision affirming the judgment against Mr. Eccleston on direct appeal is unpublished, but it is available on Westlaw at 1997 WL 774758, and it is reproduced as Appendix B.

The decision of the United States District Court for the District of New Mexico denying Mr. Eccleston's first post-conviction motion is unpublished but is reproduced as Appendix C.

The order of the Tenth Circuit abating Mr. Eccleston's motion for authorization to file a second or successive post-conviction motion is unpublished but is reproduced as Appendix E.

JURISDICTION

This is a petition for an extraordinary writ, filed pursuant to Rule 20. In part, Mr. Eccleston is asking the Court to review the Tenth Circuit's order of abatement, issued on June 24, 2016. In the main, however, Mr. Eccleston is asking the Court to review the Tenth Circuit's failure to decide his case for more than three years.

Jurisdiction to issue a writ of mandamus lies pursuant to 28 U.S.C. § 1651(a). As explained in the Reasons for Granting the Petition, *infra*, that statute authorizes a writ of mandamus here because issuing such a writ would be in aid of this Court's appellate jurisdiction and would be "agreeable to the usages and principles of law." "There are no time limitations specified in statute or rule for filing in the Supreme Court an application for one of the extraordinary writs, such as mandamus." Stephen M. Shapiro et al., SUPREME COURT PRACTICE 662 (10th ed. 2017).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2244(b)(3):

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2255(h):

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> >
> > (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

I. Over Mr. Eccleston's Objection, the Tenth Circuit Has Delayed Ruling on Mr. Eccleston's Motion for Authorization for More Than Three Years.

In 1996, Sebastian Eccleston was convicted of (among other offenses) using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). App'x A. He was sentenced to nearly 35 years' imprisonment.

Mr. Eccleston filed a direct appeal, but the Tenth Circuit affirmed the judgment against him. *See United States v. Eccleston*, No. 96-2272, 1997 WL 774758 (10th Cir. Dec. 17, 1997) (unpublished). Mr. Eccleston then moved for post-conviction relief pursuant to 28 U.S.C. § 2255, but the district court denied relief in a 2001 order. App'x C.

Nineteen years after Mr. Eccleston's conviction, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* held that the Armed Career Criminal Act's so-called residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague. The following year, this Court held that *Johnson* is retroactive to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016).

On April 28, 2016, just weeks after the *Welch* decision, Mr. Eccleston filed in the Tenth Circuit a *pro se* motion for authorization to file a second or successive § 2255 motion.[1] App'x D. He claimed that § 924(c)'s residual clause, like § 924(e)'s residual clause, was unconstitutionally vague—and that he was entitled to file a second or successive motion based on *Johnson* because that decision created a new rule of constitutional law that this Court has made retroactive to cases on collateral review. *Compare* App'x D at 4, *with* 28 U.S.C. § 2255(h)(2).

In the weeks that followed, Mr. Eccleston submitted various *pro se* supplements to his motion for authorization, arguing, among other things, that his § 924(c) conviction was predicated on conspiracy to commit Hobbs Act robbery, which the courts have uniformly held fails to qualify as a predicate "crime of violence" under any portion of § 924(c) except for that statute's residual clause.

In June 2016, counsel entered an appearance and presented additional supplemental filings on his behalf.

---

[1] A second or successive post-conviction motion is forbidden absent authorization from the court of appeals. *See* 28 U.S.C. § 2255(h).

On June 24, 2016, the Tenth Circuit *sua sponte* abated this case in an order that reads, in its entirety:

> Sebastian L. Eccleston filed, on June 7, 2016 [sic], a motion for authorization to file a second or successive motion pursuant to 28 U.S.C. § 2255. This matter is abated pending further order of this court.

App'x E. The court did not give a reason for the abatement, specify what event or events might support lifting the abatement, or give any time frame for how long the case would remain abated.

The Tenth Circuit took no action on the matter for more than two years until, in June 2018, counsel for Mr. Eccleston moved to withdraw and for the court to appoint substitute counsel. The Tenth Circuit lifted the abatement for the limited purpose of appointing the undersigned to represent Mr. Eccleston. The order specified that the case otherwise remained abated.

In July 2018, the undersigned filed a Motion to Lift Abatement. App'x F. The motion detailed five reasons that justified lifting the abatement:

(1) 28 U.S.C. § 2244(b)(3)(D) requires the court of appeals to resolve motions for authorization within 30 days.

(2) Mr. Eccleston is plainly entitled to a grant of authorization under 28 U.S.C. § 2255(h)(2) because his motion is based on *Johnson*, which created "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

(3) The abatement lacks any articulated basis: "[t]he Court did not specify what it is/was waiting on when it abated this matter," and "[a]bsent a compelling reason for further delay, Mr. Eccleston is entitled to have this matter decided."

(4) Mr. Eccleston has a strong case on the merits that his § 924(c) conviction must be vacated.

(5) Mr. Eccleston is being prejudiced by the delay because, absent the § 924(c) conviction, he "would now be eligible for immediate release."

The court of appeals did not take any action or give any response to Mr. Eccleston's motion to lift the abatement—and, more than a year later, it still has not done so. App'x H.

In June 2019, this Court decided *Davis v. United States*, 139 S. Ct. 2319 (2019). *Davis* held that § 924(c)'s residual clause is, indeed, unconstitutionally vague under *Johnson*.

On July 1, 2019, counsel for Mr. Eccleston filed a Status Report that alerted the court to the *Davis* decision and reiterated that "for the reasons set forth at pp. 2–4 of Mr. Eccleston's motion to lift abatement, this Court should lift the abatement and grant Mr. Eccleston authorization to file a second or successive § 2255 motion." App'x G. The Status Report also "respectfully submit[ted] that due process requires a prompt resolution of this case."

To date, the court of appeals has taken no action on Mr. Eccleston's status report and, indeed, has taken no action at all in Mr. Eccleston's case since June 28, 2018, when it appointed the undersigned to represent him. The case has now been abated without explanation for more than three years.

II. The Tenth Circuit Has Abated More Than 80 Cases for More Than Three Years.

Mr. Eccleston's case is hardly unique. Using PACER's advanced search function, the undersigned identified more than 80 motions for authorization that (at least

as of July 29, 2019) have been pending in the Tenth Circuit for more than three years. *See* App'x I.

Among the 80-plus delayed cases are multiple other cases like Mr. Eccleston's, in which a party (sometimes pro se, sometimes through counsel) has filed a motion to lift an abatement.[2] Such motions remain largely unanswered. Also among the 80-plus delayed cases are numerous cases in which prisoners have written pro se letters asking for information about the status of their long-pending cases. In one letter, a prisoner wrote:

> I remain unable to determine exactly why my motion was abated by the Tenth Circuit. If I were to prevail upon the issues submitted to that Court, it would mean that my sentence would have expired, and I would have been released, more than 15 years ago.
>
> Accordingly, I am hereby requesting that, (1) the Tenth Circuit Court explain why my motion of July 6, 2016, was "abated," (2) the Tenth Circuit Court appoint counsel to represent me in this matter, and (3) the

---

[2] *See, e.g.*, Motion to Rescind Abatement, *In re Andretti*, No. 16-1203 (10th Cir. Feb. 11, 2019); United States' Motion to Lift Abatement, *In re Solarin*, No. 16-1201 (10th Cir. Feb. 7, 2019); Motion for Writ of Mandamus, *In re Sandoval-Flores*, No. 16-4046 (10th Cir. Jan. 7, 2019) (arguing that the court's refusal to decide the motion for authorization violates § 2244(b)(3)(D) and deprives the movant of due process because it "keeps him away from his freedom and a life with his family"); Motion to Lift Abatement, *In re Richardson*, No. 16-8050 (10th Cir. Aug. 29, 2018); Motion to Vacate Order of Abatement, *In re Barrett*, No. 16-7039 (10th Cir. Aug. 7, 2018); Status Report, *In re Garcia*, No. 16-2133 (10th Cir. July 9, 2018) (requesting that the court lift the abatement); Petition for Leave to Remove the Abatement, *In re Raifsnider*, No. 16-3159 (10th Cir. July 2, 2018); Motion to Lift Abeyance Stay, *In re Rayford,* No. 16-3166 (10th Cir. June 11, 2018); Motion to Compel the Court for Ruling, *In re Brown*, No. 16-3199 (10th Cir. Apr. 23, 2018); Opposition Motion any Hold Placed on § 2244 Petition, *In re Watson*, No. 16-5062 (10th Cir. Aug. 21, 2017).

> Tenth Circuit Court grant me release on O/R bond to the Federal Halfway House in Denver, Colorado, pending resolution of all the issues presented in my case.

Pro Se Letter, *In re O'Bryan*, No. 16-3222 (Jan. 30, 2017). More than 2 1/2 years after this letter, the Tenth Circuit has provided no explanation for the abatement, nor taken any action on the case. Multiple other cases involve similar unaddressed *pro se* requests for information and for various forms of relief.

REASONS FOR GRANTING THE PETITION

Exercise of this Court's discretion to issue a writ of mandamus is warranted to compel the Tenth Circuit to act on Mr. Eccleston's motion for authorization without further delay.

The discretion of this Court to issue an extraordinary writ, such as a writ of mandamus, is "sparingly exercised," and only supportable where the petitioner "show[s] that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20(1). Each of those factors is present here.

I. A Writ of Mandamus Would Be in Aid of This Court's Appellate Jurisdiction.

First, issuance of the writ will be in aid of this Court's appellate jurisdiction. Although 28 U.S.C. § 2244(b)(3)(E) deprives this Court of the power to review by writ of certiorari the grant or denial of a motion for authorization, this Court has recognized that it retains appellate jurisdiction over decisions on such motions because it can review them by way of writ of habeas corpus. *See Felker v. Turpin*, 518 U.S. 651,

661–62 (1996) ("[S]ince [§ 2244(b)(3)(E)] does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2."). Although petitions for writ of habeas corpus are "commonly understood to be 'original' in the sense of being filed in the first instance in this Court," they are "nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction." *Felker*, 518 U.S. at 667 n.1 (Souter, J., concurring). *See also* Shapiro et al., *supra*, 659 ("There is a sense in which [extraordinary writ] petitions can be described as 'original.' This terminology is, however, somewhat misleading because the Court is exercising appellate jurisdiction, not original jurisdiction."). Thus, this Court would have appellate jurisdiction over the Tenth Circuit's resolution of Mr. Eccleston's motion for authorization.

The Tenth Circuit's failure to resolve Mr. Eccleston's motion for authorization impairs this Court's ability to exercise its appellate jurisdiction over the court's grant or denial of the motion. Until the Tenth Circuit makes a decision, this Court cannot review it. For that reason, this Court has repeatedly recognized that a lower court's failure to timely issue a decision may support a writ of mandamus—at least where all other remedies have been exhausted. *See, e.g.*, *Dolan v. United States*, 560 U.S. 605, 616 (2010); *Spencer v. Kemna*, 523 U.S. 1, 18 (1998); *In re Blodgett*, 502 U.S. 236, 239–240 (1992); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661–62 (1978). The "traditional use of the writ" includes "compel[ling] [a lower court] to exercise its authority when it has a duty to do so." *Bankers Life & Cas. Co v. Holland*, 346 U.S. 379,

382 (1953); *see also Hudson v. Parker*, 156 U.S. 277, 289 (1895) ("The discretion of a judge . . . cannot be controlled by writ of mandamus. But if he declines to exercise his discretion, or to act at all, when it is his duty to do so, a writ of mandamus may be issued to compel him to act."); *Ex Parte Loring*, 94 U.S. 418 (1876) (explaining that, by "use of the writ of *mandamus*," "[w]e may require the Circuit Court to decide in a proper case if it refuses to act"). And mandamus may be proper, in particular, to correct a lower court's erroneous order of abatement. *See Ex Parte Kawato*, 317 U.S. 69, 71–78 (1942). It follows that a writ of mandamus would be in aid of this Court's appellate jurisdiction.

II. This Case Presents Extraordinary Circumstances That Justify Exercise of the Court's Discretionary Powers to Issue an Extraordinary Writ.

Second, the circumstances of this case are extraordinary and warrant the exercise of this Court's discretionary powers. The Tenth Circuit has—without explanation, and over Mr. Eccleston's objection—indefinitely abated his motion for authorization and failed to decide it for more than three years. It is "the constant duty of all judges to discharge their duties with diligence," and where delay potentially prejudices a party, courts of appeals must decide post-conviction cases "without delay." *In re Blodgett*, 502 U.S. at 239–40. Here, the delay is prejudicial to both Mr. Eccleston and to the United States.

As to Mr. Eccleston, the delay is prejudicial because, as this Court has recognized, individuals should not be forced "to linger longer in federal prison than the law demands," and when courts allow them to do so, "reasonable citizen[s]" may "bear a rightly diminished view of the judicial process and its integrity." *Rosales-Mireles v.*

United States, 138 S. Ct. 1897, 1908 (2018) (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333–34 (10th Cir. 2014) (Gorsuch, J.)). By delaying resolution of Mr. Eccleston's motion for authorization, the Tenth Circuit is forcing Mr. Eccleston to remain in prison for the very same years of imprisonment that he seeks to challenge as having been imposed in violation of the Constitution. Mr. Eccleston claims that he was convicted under a portion of § 924(c) that is unconstitutional. This Court has recognized that, when a defendant has suffered "conviction and punishment for an act that the law does not make criminal," "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice.'" *Davis v. United States*, 417 U.S. 333, 346 (1974). By delaying adjudication of Mr. Eccleston's motion for years, the Tenth Circuit delays correcting for years what may be a complete miscarriage of justice. In this situation, justice delayed is justice denied.

As to the Government, the delay is also prejudicial. "The Federal Government, no less than the States, has an interest in the finality of its criminal judgments." *United States v. Frady*, 456 U.S. 152, 166 (1982). "Neither innocence nor just punishment can be vindicated until the final judgment is known," and "'without finality, the criminal law is deprived of much of its deterrent effect.'" *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). By dramatically extending "the period during which the validity of [Mr. Eccleston's] conviction is open to question," the Tenth Circuit is depriving the Government and the public of these benefits of finality. *Gray-Bey v. United States*, 201 F.3d 866, 872 (7th Cir. 2000) (Easterbrook, J., dissenting).

Further, there is no reasonable justification for the Tenth Circuit's delay. The lone issue posed by Mr. Eccleston's motion is a straightforward question of law with a clear answer. Under 28 U.S.C. § 2255(h), "[a] second or successive motion must be certified" if it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Mr. Eccleston's motion obviously meets these criteria. His claim that § 924(c)'s residual clause is unconstitutionally vague relies on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which articulated a new rule of constitutional law that this Court has made retroactive to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016). It shouldn't have required more than 30 days—much less three years—for the Tenth Circuit to conclude that Mr. Eccleston's motion for authorization satisfies § 2255(h). To allow the straightforward question presented by Mr. Eccleston's motion to linger more than three years is an abuse of discretion that warrants intervention by this Court.

The delay in this case is all the more untenable given that Congress has enacted a statute specifying that a court of appeals "shall grant or deny [a motion for] authorization to file a second or successive application not later than 30 days after the filing of the motion." 28 U.S.C. § 2244(b)(3)(D). Although most of the lower courts have read this statute as "hortatory or advisory rather than mandatory," *e.g. Ochoa v. Sirmons*, 485 F.3d 583, 539 n.1 (10th Cir. 2007), this reading is plainly incorrect, for the reasons ably explained by Judge Easterbrook's dissent in *Gray-Bey*, 201 F.3d at 871–77. The Tenth Circuit is not only in violation of § 2244(b)(3)(D) but grossly so.

Based both on the Tenth Circuit's general duty of diligence, and on § 2244(b)(3)(D), Mr. Eccleston's right to have his cause adjudicated without unreasonable delay is "clear and indisputable," as required for a writ of mandamus. *E.g., In re United States*, 139 S. Ct. 452, 452 (2018); *see Gray-Bey*, 201 F.3d at 873–74 (Easterbrook, J., dissenting) (suggesting that "a refusal to issue a timely decision" on a motion for authorization "may be reviewed by mandamus").

III. Mr. Eccleston Has No Other Remedy.

Finally, Mr. Eccleston can't get relief in any other way. Mr. Eccleston has filed, concurrently with this mandamus petition, a petition for writ of certiorari. But if this Court determines that this matter does not meet the criteria for review by way of writ of certiorari, Mr. Eccleston cannot obtain adequate relief in any other form or from any other court. Mr. Eccleston cannot raise his § 2255 claim in the district court until the Tenth Circuit grants authorization, and he has made every effort to induce the Tenth Circuit to rule on his request for authorization. Mr. Eccleston moved the Tenth Circuit to lift the abatement more than a year ago. App'x F. The Tenth Circuit has not given any answer to the motion to lift the abatement, much less any ruling on Mr. Eccleston's underlying motion for authorization. Mr. Eccleston cannot wait for normal appellate processes to correct the problem because it is the very delay of those processes that he seeks to correct. And, of course, Mr. Eccleston has no available damages remedy for the years of imprisonment he must serve while the Tenth Circuit delays acting on his motion for authorization.

CONCLUSION

For these reasons, a writ of mandamus should be granted.

In the alternative, Mr. Eccleston has filed, concurrently with this petition, a separate petition for writ of certiorari. Should the Court determine that this case does not meet the criteria for a writ of mandamus, it should grant Mr. Eccleston's alternative request for a writ of certiorari for the reasons stated in that petition.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Josh Lee
Josh Lee
Assistant Federal Public Defender
josh.lee@fd.org
Counsel of Record for Petitioner

633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Fax: (303) 294-1192