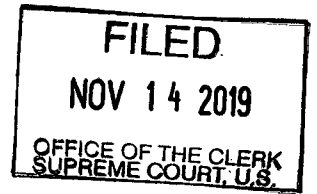


19-6888
No. _____

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

In re Roger Libby — PETITIONER
(Your Name)

vs.

Renee Baker, et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF ~~CERTIORARI~~ TO
Mandamus

Ninth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF ~~CERTIORARI~~
Mandamus

Roger Libby # 30842
(Your Name)

LCC, 1200 Prison Rd.
(Address)

Lovelock, Nevada 89419
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

1. Does the Ninth Circuit Court of Appeals have jurisdiction to circumvent the textual commands of 28 U.S.C. 2244(b)(3)(D), established by Congress, by delaying a Petitioner's request for authorization to file a second or successive application for Writ of habeas Corpus in the district court indefinitely, to prevent its timely filing as required by the 1-year deadline of Section 2244(d)(1)(A), in order to exclude a petitioner from his one, free-standing opportunity to wage a collateral attack?

2. Does the Ninth Circuit Court of Appeals have jurisdiction to circumvent the textual commands of 28 U.S.C. 2244(b)(2)(A), established by Congress, by substituting its own authority in the place of clearly established Federal law as determined by the United States Supreme Court, in order to unfairly influence the outcome of a Petitioner's litigation in violation of the Due Process and Equal Protection Clause?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA. 94119-3939

Aaron Ford
Nevada Attorney General
100 North Carson St.
Carson City, Nevada 89701

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF ~~CERTIORARI~~
Mandamus

Petitioner respectfully prays that a writ of ~~certiorari~~ issue to review the judgment below.
Mandamus

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix NA to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

[] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was June 18, 2019.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____A____.

The jurisdiction of this Court is invoked under [REDACTED]

Rule 20.1, 28 U.S.C. § 1651(a).

[] For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Fourteenth Amendments to the
United States Constitution;

28 U.S.C. 2244(b)

STATEMENT OF THE CASE

This Case involves the Ninth Circuit Court of Appeals' application of Section 2244(b) to Petitioner's request for authorization to file a second in time application for Writ of habeas Corpus in Nevada's Federal District Court. Here, despite the motion's timely filing on April 18, 2019, approximately seven months have now expired without a determination on the motion pursuant to 2244(b)(3)(D), causing the case to surpass the 1-year filing deadline required by Section 2244(d)(1)(A), through no fault of the petitioner.

Furthermore, the Court of Appeals seeks to substitute the requirements of Section 2244(b)(2)(A), that require a petitioner to make a *prima facie* showing based on clearly established Federal law as determined by the Supreme Court of the United States, with its own authority in order to improperly influence the outcome of the litigation. Procedures which invite arbitrariness and error, in violation of Due process and Equal protection.

Petitioner seeks a Writ of Mandamus and prohibition to prevent the Court of Appeals from exceeding its Jurisdiction; to enforce the textual commands of Section 2244(b), and to apply clearly established Federal law to the facts of the case.

REASONS FOR GRANTING THE PETITION

The AEDPA established a stringent set of procedures that a prisoner "in custody pursuant to the judgment of a state court" must follow if he wishes to file a "second or successive habeas corpus application" challenging that custody. Buxton v. Stewart, 549 U.S. 147, 152-154 (2007). In pertinent part, before filing the application in the district court, a prisoner "shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A). When second or successive habeas petitions are filed without authorization by the court of appeals, district courts are required to transfer the motion and application to the court of appeals under section 1631 for the required authorization.

On April 16, 2019, petitioner motioned the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. 2244(b), for authorization to file a second or successive application for writ of habeas corpus with the federal district court, district of Nevada. The motion was accompanied by the application to be filed in the district court, including all exhibits and a copy of the

2008 State Court judgment that petitioner sought to challenge in Federal District Court. The motion was filed on April 18, 2019, and the Court of Appeals maintains jurisdiction of the matter under Case Number 17-70949. Appendix A. See e.g. Cvane v. Cochrell, 324 F.3d 833 (2003) ("Every Federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a case under review...").

Pursuant to AEDPA and the Statutory Commands of Section 2244(b)(3)(D), established by Congress, the Court of Appeals is required to grant or deny the authorization to file a second or successive application no later than 30 days after the filing of the motion. In this case, on June 18, 2019, the Court of Appeals issued an order indicating that proceedings in the case would be held in abeyance pending its final resolution in three unrelated cases, or by further order of the Court. Appendix B.

Currently, over seven (7) months have now expired since petitioner first motioned the Court of Appeals for authorization to file a second or successive application for writ of habeas corpus in the Federal District Court, in violation of the statutory requirements

established by Congress and mandated by Section 2244(b)(3)(d). Furthermore, the Court of Appeals' unconstitutional delay of this matter has resulted in the expiration of the 1-year filing deadline required under Section 2244(d)(1)(A), through no fault of the petitioner. See Appendix C. (Petitioner had 1-year to properly file an application in the district court from the October 9, 2018, date on which the judgment became final, which expired during the Appeals Court extended stay of these proceedings).

In addition, if the Court of Appeals were to ultimately determine that the application constitutes a second or successive habeas corpus application as defined by the United States Supreme Court under Section 2244(b), for which its order staying the proceedings pending the outcome of three unrelated cases would suggest, then pursuant to Section 2244(b)(2)(A), the applicant must show 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. Section 2244(b) contains no language allowing for the decisional authority of the Court of Appeals to govern the determination on whether a prima facie showing has been

made to grant or deny a request for authorization to file applications in the district courts.

Legal Analysis

In establishing AEDPA and the strict procedural requirements outlined under Section 2244(b), Congress' intent was to ensure that applicants received a prompt, full and fair consideration on their requests for authorization to file second or successive applications for writs of habeas corpus in Federal district courts, by requiring a three judge panel of the Court of Appeals to grant or deny the request to file no later than 30 days after the filing of the motion. See 28 U.S.C. 2244(b)(3)(A-D).

Consistent with AEDPA's commands and the bright line rules of Section 2244(b), the Court of Appeals was required to conduct a full and fair evaluation within 30 days of the filing of petitioner's motion on April 18, 2019, to grant or deny authorization to file the application in the district court, based upon the Supreme Court's precedents as they existed at the time that the request was made and not delay the request indefinitely pending its own authority.

There is no legal basis in this Court's Cases or the textual commands of 2244(b) established by Congress allowing the Court of Appeals to replace the requirements of the statute, nor this Court's controlling precedents with its own for the purpose of influencing a particular outcome. See; Jimenez v. Quarterman, 555 U.S. 113, 118-119 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute. It is well established that, when the statutory language is plain, we must enforce it according to its terms"). See also; Greene v. Fisher, 565 U.S. 34, 38 (2011) (Noting that decisions are reviewed based on well established Federal law at the time of the decision), and clearly established Federal law is defined as being established by the Supreme Court of the United States. See; Williams v. Taylor, 529 U.S. 362 (2000) (under 28 U.S.C. 2254(d)(1), clearly established Federal law is determined by the Supreme Court of the United States).

The Ninth Circuit Court of Appeals was required by law to follow and enforce the textual commands of Section 2244(b), by conducting a full and fair review of petitioner Hibby's request for authorization to file his

application in the district court within 30 days of the date of its filing and determine the following:

1. Whether the application is Second or Successive under Section 2244(b), "Where there was a new judgment intervening between the two habeas Corpus petitions" and "the application challenging the resulting new judgment is not Second or Successive at all," based on this Court's holding in Magwood v. Patterson, 127 LEd 2d 592, 608 (2010)? See also: Wentzell v. Neven, 674 F.3d 1124, 1127 (9th cir 2012) Cert. denied, 135 LEd 2d 1095 (2013), or

2. If the application is found to be Second or Successive under Section 2244(b), whether petitioner Libby had established a prima facie showing that the claim relied upon a new rule of Constitutional law made retroactive to cases on Collateral review by the Supreme Court that was previously unavailable? See Tyler v. Cain, 533 U.S. 656, 660-61 Fn 3 (2001); 2244(b)(2)(A).

In the instant matter, Petitioner's application challenged a new 2008 judgment for the first time and should have been promptly authorized to proceed in the district court without incurring unconstitutional, prejudicial delay. Furthermore, were the Court of Appeals to erroneously conclude

that the petition was second or successive, then Petitioner's application otherwise satisfied Section 2244(b)(2)(A), in that the convictions violate a substantive rule of law made retroactive to cases on collateral review by this Court's holding in Montgomery v. Louisiana, 135 LEd 2d 599 (2016), that was previously unavailable and dispositive of the outcome.

The Court of Appeals' indefinite stay of these proceedings, now exceeding seven (7) months since the motion's initial filing on April 18, 2019, has adversely effected the outcome of these proceedings. Here, Petitioner is at serious risk of losing his one, free-standing opportunity to challenge both, the constitutionality of the new judgment in Federal Court, as well as the unconstitutional convictions that violate a substantive rule of law and correcting fundamental miscarriages of justice, due to AEDPA's 1-year statute of limitations having now expired during its stay, see 2244(d)(1).

Petitioner's should not be held to suffer the loss of their one, full and fair opportunity to wage a collateral attack on an unconstitutional conviction for failing to meet AEDPA's 1-year filing deadline because the Court of Appeals improperly exceed the statutory requirements

For rendering a decision on a timely filed motion, 2244(b)(3)(D), which prevented its proper filing in the district court in the time required.

In this case, the Court of Appeals has attempted to assume appellate jurisdiction over the Statutory Commands of both, Section 2244(b), as well as the requirements of Section 2244(b)(2)(A), requiring new rules of Constitutional law "as determined by the Supreme Court", by substituting in their stead its own precedent to improperly influence or otherwise dictate the terms of the litigation. A clear violation of Statutory Due process and Equal Protection under the Fifth and Fourteenth Amendments. See e.g., Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per Curiam) ("the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the States jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted Agents").

Rule 20, Relief Sought

Pursuant to rule 20.1, a Writ of Mandamus and Prohibition should issue to restore the

Statutory Force of Section 2244(b) and this Court's Controlling precedent over decisions governing determinations under 2244(b)(2)(A). As petitioner outlined above, the Court of Appeals attempts to override the statute's mandates and the requirement that determinations under 2244(b)(2)(A) be governed by "clearly established Federal law" with its own unrelated authority. A Writ of Mandamus and prohibition will aid this Court's appellate jurisdiction by "properly restoring appellate jurisdiction to it" and the force behind Section 2244(b) statutory requirements for which the Court of Appeals has flouted. To hold otherwise would be to allow the Court of Appeals to apply the Statute and this Court's precedents at random to whom it chooses, rendering both the Statute's force and this Court's controlling appellate jurisdiction superfluous and in violation of Due Process and equal protection. See e.g. Buck v. Davis, 197 LEd 2d 1 (2017) (noting that a Court of Appeals must limit its evaluation to threshold inquiries as required by the Statute, which sets forth the correct process).

Likewise, because decisions by the Court of Appeals on whether to grant or deny authorization to petitioners to file second or successive applications are final under 2244(b), they ultimately

determine if a prisoner will receive his one, free-standing opportunity to wage a collateral attack or receive the benefits of a new rule of law made retroactive by the Supreme Court in Federal District Courts. Evaluation in the time required by Section 2244(b)(3)(D) ensures that all petitioners can meet AEDPA's 1-year filing deadline for properly filed applications in the district court once authorization has been granted. See e.g., Gonzalez v. Thaler, 181 LEd 2d 619 (2012) (discussing properly filed applications under Section 2244(b)(1)(A)). Here, no limit is currently placed on the length of time the Court of Appeals may stay these proceedings. Such exceptional circumstances warrant the exercise of this Court's discretionary powers to protect future litigants.

Finally, because Section 2244(b)(3)(A) requires a prisoner to first seek authorization in the appropriate Court of Appeals for an order authorizing the district court to consider the application, the Court of Appeals retains jurisdiction of the case under Section 2244(b) and has ordered an indefinite stay of the proceedings as indicated by its June 18, 2019, order. Appendix B. As such, relief cannot be obtained in any other form or from any other court, except by order of this Court through its discretionary powers.

Conclusion

For the following reasons presented, Petitioner respectfully requests this Court issue a Writ of Mandamus and prohibition to the Ninth Circuit Court of Appeals, directing it to immediately comply with the requirements of Section 2244(b), by providing a prompt, full and fair review of Petitioner's motion to file an application in the district court, which will be based on clearly established Federal law as is determined by the Supreme Court of the United States.

In addition, petitioner requests an order directing that the 1-year filing deadline required by Section 2244(d)(1)(A), be tolled during the Court of Appeals improper stay of these proceedings so as not to preclude a petitioner from losing his one opportunity to wage a collateral attack on an unconstitutional conviction. The existence of clear error is dispositive for mandamus purposes, See: Executive Software v. U.S. district Court, 24 F3d 1545 (9th Cir. 1994), and it is a paradigmatic abuse of discretion for a Court to base its judgment on an erroneous view of the law. Cooter & Gell v. Hartman Corp., 496 U.S. 384, 405 (1990).

Respectfully Submitted November 26, 2019.

Chagos Jibby