

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TARYN CHRISTIAN,

Applicant

v.

**CLAYTON FRANK, Director,
State of Hawaii Department of Public Safety.**

Respondent

**APPLICATION FOR AN EXTENSION OF TIME TO
FILE A PETITION FOR A WRIT OF CERTIORARI**

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MAR 11 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Applicant-Petitioner, Taryn Christian, *pro se* respectfully requests pursuant to Supreme Court Rules 13.5, for an extension of time of 60 days, to and including May 18, 2020, to file a petition for a writ of certiorari to review the order of the Ninth Circuit Court of Appeals dated December 20, 2019 (attached as **Exhibit A**), on which a petition for rehearing *en banc* was foreclosed purportedly on the grounds that the case is “closed” per order entered on September 15, 2011. (attached as **Exhibit B**).

The published opinion in Christian v. Frank, 595 F.3d. 1076 (9th Cir. 2010), which Applicant’s attorney of record sought review by the full Court due to new developments that dramatically changed the constitutional facts presented to the original three-judge panel,¹ and which facts are central to the decision-making process of Applicant’s transferred Rule 60(d)(1) independent action characterized by the district court as an application to file a successive habeas corpus petition requiring authorization made pursuant to McCoy v. Louisiana, 584 U.S. __ (2018), is attached as (**Exhibit D**).

An order entered February 28, 2020, involving Applicant’s transferred Rule 60(d)(1) independent action docketed on January 4, 2019, under Number 19-70036, has directed a response by the Respondent as to whether Applicant has made a *prima facie* showing that McCoy v. Louisiana, is applicable and supports his request for authorization, including whether McCoy announced a “new rule of constitutional law, made retroactive to cases on collateral review.” (Attached as **Exhibit C**).

This Court has jurisdiction to grant a writ of certiorari under 28 U.S.C. § 1257(a).

1. The date within which a petition for a writ of certiorari would be due, if not extended, is March 19, 2020. This application is being filed more than 10 days before that date.
2. For good cause set forth herein, Applicant requests that this deadline be extended by sixty days so that the new deadline would be Monday May 18, 2020.

¹Applicant's counsel of record in the District Court and Court of Appeals, attorney, Gary A. Modaffer, is not a member of the bar of the Supreme Court and cannot represent Petitioner in this case on a petition for a writ of certiorari.

BACKGROUND

This case most likely would not have returned to the Ninth Circuit if it was not for the Court's landmark decision in McCoy v. Louisiana, 584 U.S. ___ (2018). Since the entry of an order dated September 15, 2011, which disposed of Applicant's *pro se* motion to recall the mandate in Christian v. Frank, 595 F.3d. 1076 (9th Cir. 2010), without reaching the merits of claims that a fraud upon the court corrupted the integrity of the habeas proceedings and specifically the decision making process of the three-judge panel of the Court of Appeals, Applicant has effectively been foreclosed access to the court on the grounds his case is "closed" from any review.

For the past nine years, Applicant in *pro se* and with represented counsel has diligently but unsuccessfully sought a judicial ruling on the merits of his Brady claims raised in his original habeas petition, including actual innocence as held by this Court in Calderon v. Thompson, 523 U.S. 538 (1998).

On May 31, 2017 in the Court of Appeals, Applicant's counsel properly filed a motion to recall the mandate in Christian v. Frank, (2010), supported by a newly developed record of almost three years of Rule 60(d)(3) proceedings in the district court. Counsel argued Applicant demonstrated that he meets the demanding standard of "a miscarriage of justice" and "actual innocence" as defined by the Supreme Court's decision in Calderon v. Thompson, 523 U.S. 538 (1998), involving the limited circumstances for a Court of Appeals to recall its mandate.

Within three court hours after the filing, counsel received from the clerk a copy of the September 15, 2011 order which stated the case is "closed." When

counsel contacted the court and spoke with the clerk that emailed the order, the clerk assured counsel that all three judges of the original panel had received and reviewed the pleadings, and thereafter, directed the clerk to email counsel the six-year old order stating the case was “closed.”

In the weeks that followed, counsel learned that the clerk’s representation was factually impossible as Judge Robert R. Beezer, who authored the opinion in Christian v. Frank, (2010), had passed away in March of 2012; Judge Raymond C. Fisher had retired as an active judge in January 2013, leaving Judge Susan P. Gruber as the only remaining active judge of the original panel.

The action undertaken by the clerk violated the Ninth Circuit’s General orders. By disposing of Applicant’s motion, no response was filed by the State of Hawaii and Applicant’s counsel was foreclosed from petitioning *en banc* review.

On October 19, 2018, Applicant’s counsel filed a Rule 60(d)(1) independent action in the district court pursuant to this Court’s holding in McCoy v. Louisiana, (2018), demonstrating a grave miscarriage of justice. The district court denied the motion on January 4, 2019 and transferred it to the Court of Appeals as a successive habeas petition requiring authorization. The Ninth Circuit opened its docket under Case No. 19-70036.

Counsel also filed a Rule 60(b)(6) motion seeking redress by district court’s contrary and irreconcilable rulings on the central constitutional facts of the case now at issue in light of McCoy. Applicant’s notice of appeal of the district court’s denial of his motion was docketed under Case No. 19-15179.

On November 18, 2019, a two-judge panel denied Applicant's motion for a certificate of appealability without discussion of the district court's contrary orders on the central facts of the case.

On November 22, 2019, Applicant's counsel filed 'Petitioner's Urgent Motion Requesting a Judicial determination by the Full Court Whether his Habeas Case is Subject to Comprehensive Review of his Transferred Rule 60 (d)(1) Independent Action Invoking McCoy v. Louisiana, 584 U.S. __ 2018, or is Precluded Review per Order Entered on September 15, 2011.'

On December 13, 2019, an order entered by a three-judge panel denied Applicant's Urgent motion, stating "Proceedings in this case will remain in abeyance pending this court's final resolution in McGee v. United States, 18-72243, or further order of this court. No motions for reconsideration, clarification, or modification of this order shall be filed or entertained."

The order did not direct any response be filed by the Respondent to Applicant's transferred Rule 60(d)(1) independent action made pursuant to McCoy which was docketed on January 4, 2019.

On December 20, 2019, a separate panel denied *en banc* review of the denial of Applicant's motion for certificate of appealability on the grounds that the case was "closed."

On February 28, 2020, a three-judge panel entered an order directing the Respondent to respond. The order stated, "Within 35 days after the date of this order, respondent must file a response addressing whether the applicant has made

a *prima facie* showing that McCoy v. Louisiana, 138 S. Ct. 1500 (2018), is applicable and supports his request for authorization, including whether McCoy announced a “new rule of constitutional law, made retroactive to cases on collateral review.” See 28 U.S.C. § 2244(b)(2)(A).”

REASONS EXTENTION IS JUSTIFIED

Supreme Court Rule 13.5 provides that “An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified.” Sup. Ct. R. 13.5. The specific reasons why an extension of time is justified are as follows:

1. For the past nine years, Applicant’s diligent efforts to seek appellate review of the district court’s unexplained refusal to adjudicate the merits of his Brady claims raised in his original habeas petition in 2008 underlying the fraud directed at the federal courts impacting all §2254 claims, were summarily denied on the basis Applicant’s habeas case was “closed” from any further review.

2. Applicant has been informed by his investigators that they have completed an in-depth review of all pleadings filed in his case since the Ninth Circuit entered its published decision in Christian v. Frank, (2010), both in the district court and Court of Appeals. Specifically, they examined the factors and circumstances surrounding the entry of two orders disposing of his *pro se* motion to recall the mandate and timely petition for rehearing which culminated in the order entered on September 15, 2011.

3. Applicant's investigators in preparing a report to be submitted to the Justice Department have determined that the orders entered on July 27, 2011 and September 15, 2011, disposing of the case and which purportedly were authored by the original three-judge panel, were not entered with the express knowledge of the panel judges.

4. Applicant is informed by his investigator, Darryl Carlson, that based on the events, the pleadings filed by counsel of record both in the District Court and the Ninth Circuit, and all subsequent orders generated by the clerks of the Ninth Circuit, it is found to be "highly improbable" that Circuit Judges, Susan Graber and Raymond Fisher, were given notice of the motions filed by counsel that the published decision in Christian v. Frank, (2010) was procured by fraud on the court calling into question the integrity of the judgment.

5. Applicant's investigators have determined that the practice of the clerks in representing to each panel that his case is "closed" from review, whereby permanently enjoining his access to the courts, standing alone, raises grave Constitutional questions of law that *must* be examined by new attorneys that would represent Petitioner in the filing of a petition for certiorari.

5. After being denied appellate review for the past nine years, on February 28, 2020, a panel of the Ninth Circuit has now ordered Respondent to respond to Applicant's transferred Rule 60(d)(1) independent action invoking McCoy v. Louisiana, indicating the case is open and subject to review.

6. In these circumstances, the order entered by a panel on December 20,

2019 stating Applicant's case is "closed" cannot be reconciled with the February 28, 2020 order directing the State of Hawaii to respond.

7. Applicant's case cannot be deemed "closed" from review by numerous panels at the same time an order is entered directing a response to be filed by Respondent in light of McCoy.

8. Where Applicant is requesting representation in the Supreme Court from experienced appellate attorneys dealing with complex litigation, the report by investigators is critical to their understanding of what has transpired in the case since the entry of the 2011 order, and up to the recent order involving Petitioner's Rule 60(d)(1) independent action made pursuant to McCoy v. Louisiana, (2018).

6. The requested extension of 60 days in Petitioner's case will allow new attorneys to familiarize themselves with the exceptional and complex record in the case and to prepare the petition in a professional manner.

Accordingly, Applicant respectfully requests that the time to file a petition for certiorari be extended by 60 days, to and including Monday May 18, 2020.

Dated: February 29 2020.

Respectfully submitted,

Taryn Christian
Taryn Christian
Applicant pro se