

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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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 59 days, to and including November 10, 2019, to file a petition for a writ of certiorari to review the order of the Ninth Circuit Court of Appeals dated June 14, 2019 (attached as Exhibit A), on which a petition for rehearing *en banc* was foreclosed as per an 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 counsel of record sought redress by the full court, due to new developments that dramatically changed the constitutional facts presented to the original three-judge panel,¹ and where these facts are now central to the court's decision-making process of Petitioner's transferred Rule 60(d)(1) independent action made pursuant to McCoy v. Louisiana, 584 U.S. __ (2018), is 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 September 12, 2019. 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 Thursday, November 10, 2019.

¹Applicant's counsel of record in the District Court and Court of Appeals, attorney, Gary A. Modafferi, 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 presents substantial and important questions of federal law that merits this Court's consideration. This is also a case of fraud upon the court, calling into question the very legitimacy of the judgment. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). When new developments in the case proved that the three-judge panel that entered the published decision in Christian v. Frank, 595 F.3d. 1076 (9th Cir. 2010), denying habeas relief pursuant to Chambers v. Mississippi, 410 U.S. 284 (1973), on the misguided premise that "no corroboration existed" to tie the confessions of a third-party to the murder for which Applicant was convicted, counsel of record filed a motion to recall the mandate in the Court of Appeals on May 31, 2017.

Counsel argued that Petitioner 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.² Within three court hours of the filing, counsel of record was emailed a copy of an order dated September 15, 2011, which stated the case was "closed." Applicant's counsel contacted the court and spoke with the clerk that emailed the order. The clerk assured counsel that all three judges had received and reviewed the pleadings and had directed the clerk to email counsel the 2011 order. The action taken by the clerk

² Applicant in *pro se*, unsuccessfully but diligently, attempted to alert the Court of Appeals of the fraud perpetrated upon the panel in his pleadings filed in 2011, *prior* to the existing newly developed record in the district court represented by counsel of record, Gary A. Modafferi.

purportedly on the directive of the panel judges represents a dramatic departure from court precedent and the Ninth Circuit's General orders.

By immediately disposing of Petitioner's motion, the State never filed a response and Applicant's counsel was foreclosed from petitioning *en banc* review. In the weeks that followed, counsel learned that the clerk's representation was a factual impossibility, as Judge Robert R. Beezer, who authored the opinion in Christian v. Frank, (2010), passed away in March of 2012; Judge Raymond C. Fisher, had retired as an active judge in January 2013, leaving Judge Susan P. Graber, as the only remaining active judge of the original panel.

Applicant's counsel recently learned from investigators that the same day he received the September 15, 2011 order stating the case was "closed" from further review, a copy of the order was also filed in the District Court—constituting notification to the District Court that Petitioner's habeas case was "closed" by order of the Court of Appeals. Investigators discovered that the clerk's filing of the September 15, 2011 order in the District Court was not recorded in the Ninth Circuit's docket.

This case most likely would not have returned to the Ninth Circuit if it was not for the Supreme Court's landmark decision in McCoy v. Louisiana, 584 U.S. ____ (2018). On October 19, 2018, Applicant's counsel properly filed a Rule 60(d)(1) independent action in the District Court pursuant to McCoy v. Louisiana, (2018), demonstrating a grave miscarriage of justice. After ordering Respondent to file a response, the District Court denied the motion on January 4, 2019 and transferred

the motion to the Court of Appeals as a “successive” habeas petition requiring authorization. The Ninth Circuit opened its docket under Case No. 19-70036.

On January 31, 2019, Petitioner filed a Motion to Hold in Abeyance the Transferred Rule 60(d)(1) Independent Action Pending Resolution of Independent Related Ninth Circuit Proceedings. (Doc. 3). On April 9, 2019, Petitioner filed a Request for Independent Review by the Full Court of the Published Decision in Christian v. Frank, (2010). (Doc. 5). Counsel of record argued, in part:

“In this exceptional case, Petitioner’s Rule 60(d)(1) independent action cannot proceed until Petitioner’s Brady claims have been adjudicated on the merits. This is not a case where Petitioner’s Brady claims were raised for the first time in a “second or successive” petition. Rather, this is a case where the district court has abrogated its responsibility to decide Petitioner’s constitutional claim in the first instance...”

On May 7, 2019, an order was entered by the Appellate Commissioner denying Petitioner’s motion for the full court’s review of the decision in Christian v. Frank, (2010), on the basis that it was improperly filed in that proceeding and because the panel’s September 15, 2011 order states that no further filings will be accepted. The order directed Applicant’s motion for remand to the district court be filed under appeal No. 19-15179 and held that the case shall be held in abeyance pending the court’s final resolution of Christian v. Frank in Case No. 19-15179. Because the Commissioner’s order constituted a denial of the substantive motion, circumventing the Court’s General Orders for a motion to recall the mandate, Petitioner filed for reconsideration and presented argument in part:

“Motions that equate to recall the mandate should be presented to the motions panels who entered the decision at issue, because, by their

nature, they request relief for “good cause” or to “prevent injustice” where subsequent proceedings in the case renders a previous appellate decision demonstrably wrong. G.O. 4.6.d. says that a motion to recall the mandate shall be presented to the panel. This language with the mandatory “shall” would seem on its face to preclude the order issued in this case. This language should not be construed to defeat the overall structure of the court’s motion-handling process, where motions that need to be decided by panels are decided by motions panels or referred to the full court when the original panel is unavailable and cannot vote...

Before the Court of Appeals can properly review Petitioner’s Rule 60(d)(1) independent action through the lens of the existing record of constitutional “facts” developed since the panel decided Christian v. Frank, 595 F. 3d. 1076 (2010), the Court must address the special circumstances to the extent necessary “to protect the integrity” of the panel’s earlier judgment and ensure that its decision rests upon the actual facts of the case...”

On June 14, 2019, a three-judge panel that did not include Circuit Judges, Susan Graber and Raymond Fisher, denied reconsideration without addressing the court’s General Orders governing a motion to recall an appellate mandate. The order that issued under the names of Circuit Judges, Canby, Silverman and Murguia, simply stated in part: “the panel’s September 15, 2011, order in appeal number 08-17236 states that no further filings will be accepted in that appeal.”

Applicant’s counsel recently learned from investigators that at the time Applicant’s request for reconsideration was submitted to the assigned three-judge panel on June 14, 2019, Judge Susan Graber was a member of the panel which included Judges, Canby and Murguia. Investigators discovered that out of the dozens of cases submitted to the panel between June 11 through June 15—without any explanation in the order or the court’s docket—when the clerk submitted Applicant’s motion for reconsideration, Judge Graber was replaced by Judge Silverman on the panel. This represents a dramatic departure from court precedent

and circumvention of the Ninth Circuit's General Orders.

Accordingly, the order entered on June 14, 2019, that was not authored by the two remaining judges of the original panel, Judges Graber and Fisher, is the subject in part of Applicant's petition for a writ of certiorari, and specifically, the basis of Applicant's request for an extension of time to file his petition.

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. Due to an unforeseen and near fatal medical emergency with Applicant's investigator, Darryl D. Carlson, [retired criminal investigator and former federal agent], Applicant's investigators were unable to complete their final report of their in-depth review of the dockets and pleadings of the District Court and the Ninth Circuit between February 2010 through to June 14, 2019 in the case.

2. 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.

3. Applicant is informed that his investigators seriously question whether the order dated September 15, 2011—closing a habeas case from further review—purportedly authored by the original three-judge panel, was actually entered with the express knowledge of the judges.

4. Applicant's investigators have determined that the practice of the clerks in circumventing the court's General Orders to insulate judicial review of a published decision procured through deception and misrepresentation, 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. 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 filing of Petitioner's Rule 60(d)(1) independent action made pursuant to McCoy v. Louisiana, (2018).

6. The requested extension of 59 days in Petitioner's case will allow new attorneys to familiarize themselves with the 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 59 days, to and including Thursday November 10, 2019.

Dated: August 20 2019.

Respectfully submitted

A handwritten signature in cursive script, reading "Jaryn Christian", is written over a horizontal line.