

APPENDIX A

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUL 13 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

AARON E. CHOAT,

Petitioner-Appellant,

v.

RICK COURSEY, Superintendent, Eastern
Oregon Correctional Institution, Person
having custody of petitioner,

Respondent-Appellee.

No. 19-36044

D.C. No. 2:16-cv-01459-JR
District of Oregon,
Pendleton

ORDER

Before: SILVERMAN and COLLINS, Circuit Judges.

The request to stay proceedings (Docket Entry No. 2) is denied.

The certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

In his request for a certificate of an appealability, appellant asserts a new claim that his conviction by a non-unanimous jury violated his constitutional rights but concedes that this claim was never raised in the district court proceedings and

has not been exhausted in the state courts. This new claim is more properly pursued in an application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court that complies with the requirements of Ninth Circuit Rule 22-3. Specifically, the application must:

- (1) include the proposed second or successive section 2254 petition that the applicant seeks to file in the district court; and
- (2) state as to each claim presented whether it previously has been raised in any state or federal court and, if so, the name of the court and the date of the order disposing of such claim(s); and
- (3) state how the requirements of section 2244(b) have been satisfied.

9th Cir. R. 22-3(a).

In addition, the application must include copies of all relevant state court orders and decisions, if reasonably available to the applicant. *See* 9th Cir. R. 22-3(b).

If the applicant files a new application in this court for authorization to file a second or successive 28 U.S.C. § 2254 petition in the district court, the applicant must show:

- (A) 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; or
- (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would

have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2); *see also* 28 U.S.C. § 2244(b)(3).

The Clerk shall serve the applicant with this order and the standard form application for leave to file a second or successive petition.

If appellant files a standard application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition, this court will assign a new case number to that application.

Any other pending motions are denied as moot.

DENIED.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**Form 12. Application for Leave to File Second or Successive
Petition under 28 U.S.C. § 2254 or Motion under 28 U.S.C. § 2255**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form12instructions.pdf>

9th Cir. Case Number (*to be provided by court*) _____

Applicant Name _____

Prisoner Registration Number _____

Address _____

Name of Respondent (Warden) _____

You MUST answer the following questions:

(1) What conviction(s) are you challenging?

(2) In what court(s) were you convicted of these crime(s)?

(3) What was the date of each of your conviction(s) and what is the length of each sentence?

For questions (4) through (10), provide information separately for each of your previous §§ 2254 or 2255 proceedings. Use additional pages if necessary.

(4) Has the judgment of your conviction or sentence been modified or amended? If yes, when and by what court?

(5) With respect to **each** conviction and sentence, have you ever filed a petition or motion for habeas corpus relief in federal court under **28 U.S.C. § 2254** or **§ 2255**?

Yes No

(a) In which federal district court did you file a petition or motion?

(b) What was the docket number?

(c) On what date did you file the petition/motion?

(6) What grounds were raised in your previous habeas proceeding?

(list all grounds and issues previously raised in that petition/ motion)

(7) Did the district court hold an evidentiary hearing? Yes No

(8) How did the district court rule on your petition/motion?

District court **dismissed** petition/motion. If yes, on what grounds?

District court **denied** petition/motion.

District court **granted** relief. If yes, on what claims and what was the relief?

(9) On what date did the district court decide your petition/motion?

(10) Did you file an appeal from that disposition? Yes No

(a) What was the docket number of your appeal?

(b) How did the court of appeals decide your appeal?

(11) State concisely each and every ground or issue you wish to raise in your current petition or motion for habeas relief. Summarize briefly the facts supporting each ground or issue.

(12) For each ground raised, was it raised in the state courts? If so, what did the state courts rule and when? (*Attach a copy of all relevant state court decisions, if available*)

(13) For each ground/issue raised, was this claim raised in any prior federal petition/motion? (*list each ground separately*)

(14) For each ground/issue raised, does this claim rely on a new rule of constitutional law? (*list each ground separately and give case name and citation for each new rule of law*)

(15) For each ground/issue raised, does this claim rely on newly discovered evidence? What is the evidence and when did you discover it? Why has this newly discovered evidence not been previously available to you? (*list each ground separately*)

(16) For each ground/issue raised, does the newly discovered evidence establish your innocence? How?

(17) For each ground/issue raised, does the newly discovered evidence establish a federal constitutional error? Which provision of the Constitution was violated and how?

(18) Provide any other basis for your application not previously stated.

Signature _____ **Date** _____

In capital cases only, proof of service on respondent MUST be attached. A sample proof of service is attached to this form.

Attach proposed section 2254 petition or section 2255 motion to this application.

Mail this form to the court at:

Clerk, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, CA 94119-3939

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE**Applications for Leave to File Second or Successive 28 U.S.C. §§ 2254/2255
Petitions/Motions****DEATH PENALTY CASES ONLY**

Case Name _____ v. _____

I certify that a copy of the application for leave to file a second or successive 28 U.S.C. § 2254 petition or § 2255 motion with any attachments was served, either in person or by mail, on the person listed below.

Signature _____
(Notary NOT required)

Date of Service _____

Name _____ Address _____

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**INSTRUCTIONS for Form 12. Application for Leave to File Second or
Successive Petition under 28 U.S.C. § 2254 or Motion under 28 U.S.C. § 2255**

Read these instructions carefully.

1. The application, whether handwritten or typewritten, must be legible and signed by the applicant under penalty of perjury. An original must be provided to the Clerk of the Ninth Circuit. The application must comply with Circuit Rule 22-3, which is attached to these instructions.
2. All questions must be answered concisely. Add separate sheets if necessary.
3. If this is a capital case, the applicant shall serve a copy of this application and any attachments on respondent and must complete and file the proof of service that accompanies this form. If this is not a capital case, service on the respondent is not required.
4. The proposed 28 U.S.C. § 2254 petition or 28 U.S.C. § 2255 motion that applicant seeks to file in the district court must be included with Form 12.
5. Applicants seeking authorization to file a second or successive section 2254 habeas corpus petition shall include copies of all relevant state court decisions if reasonably available.

Mail Form 12 to the court at:
Clerk, U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Do not file this instruction page

CIRCUIT RULE 22-3. APPLICATIONS FOR AUTHORIZATION TO FILE SECOND OR SUCCESSIVE 28 U.S.C. § 2254 PETITION OR § 2255 MOTION - ALL CASES; STAY OF EXECUTION - CAPITAL CASES

(a) Applications. An applicant seeking authorization to file a second or successive 28 U.S.C. § 2254 petition or 28 U.S.C. § 2255 motion in the district court must file an application in the court of appeals demonstrating entitlement to such leave under sections 2254 or 2255. *See Form 12.* An original in paper format of the application must be filed with the Clerk of the court of appeals unless the application is submitted via the Appellate Electronic Filing System. No filing fee is required. If an application for authorization to file a second or successive section 2254 petition or section 2255 motion is mistakenly submitted to the district court, the district court shall refer it to the court of appeals. If an unauthorized second or successive section 2254 petition or section 2255 motion is submitted to the district court, the district court may, in the interests of justice, refer it to the court of appeals. (Rev. 12/1/09; Rev. 7/1/13; Rev. 7/1/16; Rev. 12/1/18)

The applicant must:

- (1)** include Form 12 if submitted by an applicant not represented by counsel;
- (2)** include the proposed section 2254 petition or section 2255 motion that the applicant seeks to file in the district court;
- (3)** state as to each claim presented whether it previously has been raised in any state or federal court and, if so, the name of the court and the date of the order disposing of such claim(s); and
- (4)** state how the requirements of sections 2244(b) or 2255 have been satisfied.

(b) Attachments. If reasonably available to the applicant, the application must include copies of all relevant state court orders and decisions. (Rev. 12/1/09; Rev. 7/1/16)

(c) Service.

- (1) Capital Cases:** In capital cases, the applicant must serve a copy of the application, attachments, and proposed section 2254 petition/section 2255 motion on the respondent, and must attach a certificate of service to the application filed with the Court. (Rev. 7/1/16)
- (2) Noncapital Cases:** In noncapital cases, service of the application on the respondent is not required. (New 7/1/16)

(d) Response.

(1) Capital Cases: In capital cases where an execution date is scheduled and no stay is in place, respondent shall respond to the application and file supplemental attachments as soon as practicable. Otherwise, in capital cases, respondent shall respond and file supplemental attachments within 14 days of the date the application is served. (Rev. 12/1/09)

(2) Noncapital Cases: In noncapital cases, no response is required unless ordered by the Court. Respondent may include supplemental attachments with its response. (Rev. 7/1/16)

(e) Decision. The application will be determined by a three-judge panel. In capital cases where an execution date is scheduled and no stay is in place, the Court will grant or deny the application, and state its reasons therefore, as soon as practicable.

(f) Stays of Execution. If an execution date is scheduled and no stay is in place, any judge may, if necessary, enter a stay of execution, *see* Circuit Rule 22-2(e), but the question will be presented to the panel immediately. If the Court grants leave to file a second or successive application, the Court shall stay the applicant's execution pending disposition of the second or successive petition by the district court. (Rev. 12/1/18)

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(b), Documents that may be submitted either electronically or in paper format

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 22-3

The district court is required to transfer mistakenly filed applications for authorization to file a second or successive section 2254 petition or 2255 motion. If an applicant files a document that appears to be an unauthorized section 2254 petition or 2255 motion and facially alleges a claim based on a new rule of constitutional law or newly discovered evidence of actual innocence, the district court may transfer the filing to the court of appeals in the interests of justice or, in the alternative, the district court may dismiss the filing without prejudice to the applicant seeking authorization from the court of appeals on Ninth Circuit Form 12.

The rule requires applicants to provide the court of appeals with the proposed petition or motion. Pro se applicants are encouraged to use the form petition or motion adopted by the district court where the applicant anticipates filing the document. (New 7/1/16)