

20-7635

ORIGINAL

In the
Supreme Court of the United States

No. _____

Lisa A. Biron,
Petitioner,

v.

United States of America,
Respondent.

Petition For A Writ of Certiorari
to the United States Court of
Appeals For the First Circuit

Lisa A. Biron, Reg. #12775-049
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Supreme Court, U.S.
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Question Presented

When the trial court's misunderstanding of the mental intent element of a federal criminal statute becomes apparent in a conclusory footnote in its denial of Defendant's § 2255 motion, and this fundamental defect indicates that she was convicted for a nonexistent offense, does 28 U.S.C. § 2244(a) and Fed. R. Civ. P. 60(b) allow that court to review this defect or does § 2244(b) (1)-(3), expressly applicable only to state prisoners, apply to bar her motion as with the state prisoners in Gonzalez v. Crosby, 545 U.S. 524 (2005) and Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003) ?

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List of Parties

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

Related Cases

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United States v. Biron, no. 16-CV-108-PB (D.N.H. 2017)

Biron v. United States, no. 18-2226 (1st Cir. 2019), re' hrg denied (2020)

Biron v. United States, no. 18-1996 (1st Cir. 2019), re' hrg denied (2020)

Biron v. United States, no. 18-1945 (1st Cir. 2019), denying leave to file successive habeas petition

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, case no. 18-1705, affirming the judgment against her.

Proceedings and Opinion Below

The May 2, 2019 Judgment of the Court of Appeals for the First Circuit appears at Appendix 1 to this Petition and is unpublished.

The November 12, 2020 Order of the Court of Appeals for the First Circuit denying rehearing appears at Appendix 2 to this Petition.

Relevant Statutory Provisions

This Petition concerns the provisions of Title 28 U.S.C. §§ 2244, 2254, & 2255, copies of which appear at Appendix 3 of this Petition.

Jurisdiction

The First Circuit Judgment was issued May 2, 2019. A timely Petition for Rehearing/Hearing En Banc was denied on November 12, 2020. (App'x 1 & 2.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and March 19, 2020 Order No. 589.

Statement of the Case

This Petition involves a question of jurisdiction - jurisdiction to review a fundamental error in statutory interpretation which has not been litigated or addressed by any court and that has resulted in the de facto life sentence of federal prisoner - Petitioner Lisa Biron for a nonexistent offense.

The underlying issue, which has evaded review and is not the subject of this Petition, is the trial court's misapprehension of the scienter and causation required by 18 U.S.C. § 2251(a) to convict a defendant for the production of child pornography. The plain language of the statute requires a defendant to act for a particular purpose, i.e., with specific intent and requires "but-for" causation. The trial court's misunderstanding of § 2251(a) became apparent and was memorialized in a conclusory statement in a footnote in its order denying Ms Biron's motion under § 2255. Therein it stated that § 2251(a) requires proof of only general intent. (Oct. 17, 2017, Order at 14 & 14 n.7) (emphasis added.) It did not issue a certificate of appealability ("COA").

After thoroughly researching her options, Ms. Biron decided that she should first file a motion under Federal Rule of Civil Procedure 60(b) to bring this fundamental error of law to the atten-

tion of the district court, in the first instance¹, so that it could address the error. Because without proof of the scienter and causation elements of § 2251(a), Ms. Biron is actually innocent of the offense.

The district court dismissed the Rule 60(b) motion in a one line order, "for the reasons set forth in the government's objection." (July 17, 2018, Endorsed Order.) The government's objection stated that Ms. Biron's motion challenged her underlying conviction and was, therefore, a successive § 2255 motion, which the district court could not entertain without circuit court authorization. In support of this contention, it cited two cases which involved the application of 28 U.S.C. § 2244(b) to the Rule 60(b) motions filed by state prisoners, Gonzalez v. Crosby, 545 U.S. 524 (2005) and Bodwell v.

1 Petitioner is a formerly licensed attorney. During the time of her trial, however, and for several years thereafter, she was recovering from a synergistic melt-down, depression, regression, alcoholism and substance abuse, etc., and was not functioning, intellectually, at the level of an attorney. But when the district court misstated the law in its October 2017 Order and did not issue a COA, she extensively researched the law and concluded that there was not a definitive deadline to

Pepe, 324 F.3d 66 (1st Cir. 2003).

Ms Biron immediately filed a timely notice of appeal ("NOA") in the district court to appeal the dismissal of her Rule 60(b) motion, and at the same time filed an application for a COA in the circuit court to seek permission to appeal the denial of her motion under § 2255. It soon became apparent, after corresponding by letter with the circuit court clerk, that the application for the COA was mistakenly docketed in the appeal of the dismissal of her motion under Rule 60(b). Consequently, Ms Biron sent a "Letter-Motion to Clarify and Stay All Proceedings Pending Clarification From Court" ("Motion to Clarify") dated August 22, 2018 to the circuit court. Therein she explained (again) that the application for the COA had been docketed in error in the Rule 60(b) appeal and should be unfiled. She further stated that it appeared circuit law did not require a COA in order to appeal the dismissal of a motion under Rule 60(b), but if the circuit court would require one, to

apply to the circuit court for a COA, and instead brought her motion under Fed. R. Civ. P. 60(b). As soon as the district court dismissed her Rule 60(b) motion, she applied to the First Circuit for a COA to appeal the denial of her § 2255 motion. That she allegedly missed a jurisdictional appeal deadline is the subject of two other Petitions filed (or to be filed) with this Court.

advise her of such so that she could file one, otherwise, she requested that the court set a briefing schedule.

On September 25, 2018, Ms. Biron wrote again to the circuit court clerk requesting that the mis-filed application for the CoA be unfiled, and inquiring into the status of her Motion to Clarify as she had not yet submitted any briefing relevant to the present appeal. On September 27, 2018, Ms. Biron sought authorization for leave to file a second or successive motion under § 2255 based on "new evidence" of the district court's mistake of law as revealed in its October 2017 order. Her request was denied by unappealable order on May 2, 2019. (May 2, 2019, Judgment case no. 18-1945.)

Also on May 2, 2019, instead of ruling on her motion to Clarify, and instead of allowing her to make any appellate argument whatsoever - whether by a merits brief or by application for a CoA - the court simply ignored all of her correspondence and her pending motion and issued a seven (7)-sentence judgment citing Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003), to affirm the judgment of the district court dismissing her motion under Rule 60(b) for want of jurisdiction. (App'x 1.)

On June 14, 2019, Ms. Biron filed a Petition for Rehearing/Hearing En Banc which was denied on November 12, 2020. (App'x 2.) She brings this Petition for a Writ of Certiorari which, if granted, will permit this Court to resolve exceptionally

important and conflicting matters of federal law regarding a federal court's jurisdiction to entertain the postconviction motions of federal prisoners like the Rule 60(b) motion at issue here, and the troubling practice of several circuits applying state prisoner habeas corpus law to federal prisoners.

Reasons for Granting this Petition

Introduction

"[I]n a world of silk purses and pigs' ears, the [Antiterrorism and Effective Death Penalty] Act ("AEDPA") is not a silk purse of the art of statutory drafting." Lindh v. Murphy, 521 U.S. 320, 336 (1997). And for twenty-five years the courts and federal prisoners - usually as pro se litigants, have attempted to navigate the Kafkaesque provisions of the AEDPA.

Granting this Petition will redirect the federal courts' treatment of the postconviction filings of federal prisoners. To this point, even disregarding plain statutory language to the contrary, the courts have ignored the Congress-intended differences between federal prisoner and state prisoner postconviction filings and have applied provisions of the AEDPA to federal prisoners that are applicable exclusively to state prisoners. Moreover, the courts have failed to interpret or apply provisions of the AEDPA which plainly do apply to federal prisoners.

Specifically, this Court is asked to determine whether

the provisions in 28 U.S.C. § 2244(b) apply to federal prisoners at all; whether § 2244(a) operates to permit the federal trial court on motion by a federal prisoner under Fed. R. Civ. P. 60(b) to review its apparent fundamental error of statutory interpretation discovered in its order denying her § 2255 motion; or, if § 2255(h)² is a jurisdictional bar to addressing the miscarriage of justice of imprisonment for a nonexistent offense.

Present State of the Law

Federal prisoners file habeas corpus postconviction applications (motions) under 28 U.S.C. § 2255. State prisoners file habeas corpus applications under 28 U.S.C. § 2254. Title 28 U.S.C. § 2244 covers second or successive postconviction applications. The text of § 2244(b) covers applications filed by state prisoners under § 2254. The text of § 2244(a) covers federal prisoners — persons detained "pursuant to a judgment of a court of the United States." § 2244(a). Fed. R. Civ. P. 60(b) allows the court, on motion and just terms, to grant relief from a final judgment for any reason that justifies relief.

Ms. Biron, who is a federal prisoner, filed a motion under Rule 60(b) that was dismissed for want of jurisdiction under the rationale of Gonzalez v. Crosby, 545 U.S. 524 (2005) and Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003). Gonzalez and Rodwell involved state

² 28 U.S.C. § 2255(h) is similar, but not identical to the "gatekeeping" provisions in § 2244(b)(2).

prisoners whose access to Rule 60(b) is governed and limited by the restrictions in the AEDPA applicable to them - to state prisoners. The Gonzalez Court determined that a motion under Rule 60(b) is available to a state prisoner only to the extent that the motion is not inconsistent with the AEDPA's restrictions and the rules governing habeas corpus proceedings under § 2254. Gonzalez, 545 U.S. at 529.

That Court noted the three requirements of § 2244(b) (1)-(3): First, a "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." § 2244(b)(1). Second, a "claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless" it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence. § 2244(b)(2). "Third, before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions," § 2244(b)(3). Gonzalez, 545 U.S. at 529-30. The Court explained that if the prisoner raises a claim related to his state conviction that the AEDPA applies in order to effectuate Congress' intended restrictions on successive claims.

For example, the Court noted that § 2244(b)(2) "require[s]" dismissal unless a claim relies on new facts or a new rule, and that even if a claim escapes § 2244(b)(1)'s prohibition of claims "presented in a prior application," § 2244(b)(2)(B) "requires a more convincing factual showing than does Rule 60(b)." Id. at 531. "Likewise a Rule 60(b) motion based on a purported change in substantive law governing the claim could be used to circumvent § 2244(b)(2)(A)'s dictate[s]...." Id. at 532. "In addition to the substantive conflict with AEDPA's standards[,],... use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." Id.; § 2244(b)(3).

Gonzalez noted its approval of the First Circuit's treatment of a Rule 60(b) motion filed by a state prisoner as an unauthorized successive habeas corpus application. Id. at 531. The Rodwell Panel explained that before filing his Rule 60(b) motion, Mr. Rodwell requested, and was denied, circuit court permission to file a successive habeas petition under § 2244(b)(2)(B)(ii). Rodwell, 324 F.3d at 68. Gonzalez, however, expressly limited its consideration to how "Rule 60(b) applies to habeas proceedings under 28 U.S.C. § 2254 which governs federal habeas relief for [state] prisoner[s]...." Id. at 529 n.3.

But this has not stopp-ed the circuit courts from apply-

ing Gonzalez and § 2244(b) to federal prisoners' motions under Rule 60(b). See Manna v. Schultz, 591 F.3d 664 (3d Cir. 2009) (denying federal inmate authorization to file successive habeas petition citing Gonzalez); United States v. Hernandez, 708 F.3d 680 (5th Cir. 2013) (applying Gonzalez to construe Rule 60(b) motion as successive unauthorized habeas petition and dismissing appeal); In re Nailor, 487 F.3d 1018, 1022 (6th Cir. 2007) (stating that Gonzalez court's reasoning dictates resolution of Rule 60(b) motion and imposing limitations of § 2244(b) (1) & (2)); Suggs v. United States, 705 F.3d 279 (7th Cir. 2013) (noting Supreme Court limited Gonzalez to state prisoners, but applying holding to federal prisoner's Rule 60(b) motion); White v. United States, 371 F.3d 900, 903 (7th Cir. 2004) (same; "Congress made parallel changes to §§ 2254 and 2255 to ensure that successive litigation would take place only under the most compelling of circumstances."); Bennett v. United States, 119 F.3d 470, 471 (7th Cir. 1997) (noting statutory language of section 2254 was "made applicable to section 2255 motions by the eighth paragraph of section 2255 [2255(h)]"); Curry v. United States, 507 F.3d 603 (7th Cir. 2007) (Rule 60(b) is an unauthorized successive § 2255 motion which § 2244(b)(3) forbids and § 2255(h) is similar); United States v. Robinson (In re Robinson), 917 F.3d 856 (5th Cir. 2019) (citing Gonzalez and Rodwell to dismiss federal inmate's Rule 60(b) motion as unauthorized successive § 2255 motion); United States v. Washington, 653 F.3d 1057 (9th Cir. 2011).

(holding defendant's motion under Rule 60(b) is a disguised §2255 motion and citing §2255(h) and §2244(b)(3)(A) to dismiss without precertification).

Likewise, several circuits have applied §2244(b)(2) to deny federal prisoners authorization to file second or successive motions. See United States v. Sanchez, 140 Fed. App'x 409 (3d Cir. 2005) (noting federal inmate needs authorization under §2244(b)(2) to file successive motion); In re Phillips, 879 F.3d 542 (4th Cir. 2018) (citing §2244(b)(1)&(2) to deny federal prisoner's application to file successive motion); In re Bruce, no. 20-5810, 2020 U.S. App. LEXIS 34758 (6th Cir. Nov. 3, 2020) (citing §2244(b)(2)(B)(i) to deny federal prisoner's application to file successive motion); In re Robinson, no. 20-5483, 2020 U.S. App. LEXIS 28566 (6th Cir. Sept. 9, 2020) (same); Suggs, 705 F.3d 279 (§2244(b)(2) applies to federal as well as state prisoners' successive habeas applications); United States v. Torres-Guardado, no. CR-07-22-BLG-SPW, CV-15-07-BLG-SPW, 2015 U.S. Dist. LEXIS 195887 (D. Mont. Feb. 11, 2015) (9th Cir.) (stating federal prisoner Torres might be able to file a successive §2255 but only if he meets the criteria in §2244(b)(2)); United States v. Butler, 200 Fed. App'x 803 (10th Cir. 2006) (citing §2244(b)(2)(B) and Gonzalez to dismiss federal prisoner's motion as unauthorized successive motion); In re Flanders, no. 20-14324-B, 2020 U.S. App. LEXIS 37425 (11th Cir. Nov. 30, 2020) (citing §2244(b)(1)&(2) to deny federal prisoner's application to file second or successive habeas motion).

Recently, Justice Kavanaugh noted the newly-emerging circuit split in applying § 2244(b)(1) to federal prisoners' successive applications. Avery v. United States, NO. 19-633, 589 U.S. ____ (2020) (denying cert) (Kavanaugh, J. statement). He noted that the text of § 2244(b)(1) covers applications by state prisoners, but six Courts of Appeals have interpreted it to apply equally to federal prisoners' applications. See Gallagher v. United States, 711 F.3d 315 (2d Cir. 2013); United States v. Winkelman, 746 F.3d 134 (3d Cir. 2014); In re Bourgeois, 902 F.3d 446 (5th Cir. 2018); Taylor v. Gilkey, 314 F.3d 832 (7th Cir. 2002); Winarske v. United States, 913 F.3d 765 (8th Cir. 2019); In re Baptiste, 828 F.3d 1337 (11th Cir. 2016). In contrast, both the Sixth Circuit and the United States have now rejected the other circuits' interpretation and agree that, consistent with the text, the statute applies only to state prisoners' applications. Williams v. United States, 927 F.3d 427 (6th Cir. 2019). Justice Kavanaugh concluded that "[i]n a future case, [he] would grant certiorari to resolve the circuit split on this question of federal law." Avery, 589 U.S. at ____.

Moreover, in regard to federal prisoners, the First Circuit has interpreted the provisions in the AEDPA, including §§ 2244(b)(3)(A) & 2255(h) and this Court's Felker v. Turpin, 518 U.S. 651, 657 (1996), as "stripping the district court of jurisdiction over a second or successive habeas

petition unless and until the court of appeals has decreed that it may go forward." Bucci v. United States, 809 F.3d 23, 26 (1st Cir. 2015) (quoting Trenkler v. United States, 536 F.3d 85, 96 (1st Cir. 2008); see also United States v. Williams, 790 F.3d 1059 (10th Cir. 2015) (determining that § 2255(h) reflects clear statutory command that limits Courts' power to prevent a miscarriage of justice); Gilbert v. United States, 640 F.3d 1293, 1311 (11th Cir. 2011) ("If second or successive motions are not greatly restricted, there will be no end to collateral attacks on convictions and sentences, and there will be no finality of judgment").

These circuits, however, with the exception, now, of the Sixth Circuit, do not acknowledge the fact that § 2244(b)'s mandatory dismissal provisions apply to state prisoners, and that this Court's Felker decision involved a state prisoner. And they completely ignore § 2244(a) which clearly does apply to federal prisoners, and which is in dire need of interpretation by this Court. Because if § 2244(a) means what it says, precertification before filing a successive motion (or motion under Rule 60(b)) is not always required for a federal prisoner.

Title 28 U.S.C. § 2244(a)

In relevant part, § 2244(a) states: "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the

detention of [a federal prisoner] if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255." 28 U.S.C. § 2244(a) (emphasis added.) This language: "No... judge shall be required... except..." clearly allows "a circuit or district judge" to consider a successive habeas application of a federal prisoner regardless of section 2255's provisions. In Williams, the Sixth Circuit held, and the government agreed, that the substantive requirements of § 2255(h) are nonjurisdictional." Williams, 927 F.3d at 434. The legislative history of § 2244 and the AEDPA support this interpretation.

The original version of § 2244 was enacted in 1948 to curb abuses of the writ and applied to both state and federal prisoners. The 1948 version "denied Federal judges the power to entertain an application for a writ of habeas corpus where the legality of the detention has been determined on a prior application for such a writ, and the later application presents no new grounds." 28 U.S.C. § 2244, annotation, Senate's Explanation for 1966 Amendment. The statute was amended in 1966 to apply only to federal prisoners and was designated as subsection "(a)". The 1966 amendment also "modif[ie]d" this provision so that, while a judge need not entertain such a later application for the writ under such circumstances, he is not prohibited from doing so if in his discretion he thinks the ends of justice require it.

consideration. *Id.*

The next and final amendment to subsection (a) by the AEDPA in 1996 only narrowed the circumstances under which a judge is required to entertain a subsequent application but it did not divest jurisdiction from the court to exercise its discretion to entertain an application - even including a claim brought in a prior application - if the ends of justice demand its consideration.

But the way courts have ignored the plain reading of § 2244(a), has allowed some federal prisoners to remain in prison because of poorly drafted criminal statutes and bad lawyering. As habeas law is presently interpreted, even a new holding by this Court decisively narrowing the reach of a statute to not include the prisoner's conduct does not permit the sentencing court to entertain a successive filing. And this has required prisoners to invoke judicially-created-§ 2255(e)-savings clause-doctrine to file an application under § 2241 in their district of confinement. This cannot be right.

Moreover, instructing the federal courts on the correct application of § 2244 to federal prisoners involves more than protecting the rights of individual prisoners. Justice Sotomayor recently admonished the Eleventh Circuit's practice of publishing its denials of authorization requests as binding precedent. St. Hubert v. United States, 140 S. Ct. 1727 (2020) (Sotomayor, J., concurring, denying cert.). This Circuit's authorization denials

of federal prisoner's applications are affecting entire doctrines of federal criminal law and are unappealable. See In re St. Fleur, 824 F.3d 1337 (11th Cir. 2016) (denying federal prisoner authorization to file successive motion and creating unreviewable, binding circuit precedent on Hobbs Act robbery as crime of violence under 18 USC § 924 (c)(3)(A)'s use-of-force clause). Restricting the application of § 2244(b) to state prisoners will curb this problem because a state prisoner's request for authorization to file a successive petition under § 2244(b)(2)&(3) will never involve the circuit court in interpreting and applying federal criminal law.

Conclusion

In sum, Ms. Biron proposes that under a correct reading of § 2244(a)&(b), Rule 60(b) has a bigger part to play in federal prisoner postconviction proceedings. Federal prisoners and state prisoners stand in very different places - substantively and procedurally. Gonzalez' and Rodwell's rationale is inapt. And answering the questions presented in this Petition will most certainly ensure federal prisoners a fuller measure of the due process protections already enjoyed by state prisoners.

No one should be left to remain in federal prison for an act not proscribed by federal law - no matter when

this fundamental defect is discovered. And Congress left room in 28 U.S.C. § 2244(a) for a judge to entertain such a claim by not mandating dismissal as it did in § 2244(b): "No... judge shall be required..." § 2244(a) - this Court should grant certiorari to decide when that judge may or should entertain a federal inmate's motion under Rule 60(b) or her successive habeas claim.

Respectfully submitted,

3/24/2021

Date

Lisa Biron

Lisa A. Biron, Reg. # 12775-049
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Declaration of Timely Filing

I, Lisa Biron, declare, under penalty of perjury, that this Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari were timely filed by depositing them for mailing in the inmate legal mail system, certified mail, return receipt requested on this date.

3/24/2021

Date

Lisa Biron

Lisa A. Biron