No. 21-5768

ORIGINAL

FILED
SEP 13 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Joseph R Dickey — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Joseph R Dickey 25345-001
(Your Name)

FCI Marianna, PO Box 7007
(Address)

Marianna, FL 32447
(City, State, Zip Code)

N/A
(Phone Number)

RECEIVED
SEP 23 2021
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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. In light of the fact that actual innocence supported by newly discovered evidence is a gateway for habeas relief, has the 11th Circuit constructed a legal framework for federal prisoners that acts as a de facto suspension of habeas corpus by applying 2244(b)(1) to claims of innocence while also precluding any revisitation or use of innocence in a 60(b) motion when there is newly discovered evidence?

2. Does 28 U.S.C. 2244 (b)(1) apply to petitions/applications filed under 28 U.S.C. 2255?

LIST OF PARTIES

[X] 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:

RELATED CASES

United States v. Joseph Dickey
7:05-CR-0321-CLS-PWG
Northern District of Alabama

In re: Joseph Dickey
11th Circuit Court of Appeals
Case No. 20-11417-E

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from **federal courts:**

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.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

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was May 19, 2021.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 7, 2021, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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. § 1254(1).

[ ] 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

28 U.S.C. 2244 (b)(1)

"A claim presented in a second or successive habeas corpus application under Section 2254 [28 U.S.C. 2254] that was presented in a prior application shall be dismissed".

U.S. Constitution Article I Section 9

"The privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it."

Federal Rules of Civil Procedure Rule 60

STATEMENT OF THE CASE

This is a case where the legal framework of the 11th Circuit is precluding any way to address a miscarriage of justice. The legal framework is acting as a de facto suspension of habeas corpus and its foundation is wrong as a matter of law.

In February 2007 I filed a motion in the district court pursuant to 28 U.S.C. 2255 after I received the maximum sentence available (135 years) under the terms of a plea agreement which was recommended to me by my trial attorney. The trial attorney believed the plea agreement was the only possibility of avoiding the maximum sentence, and its terms were for a sentence of 25-30 years (Doc. 162 attachment F1-2). I had been charged with nine counts in an indictment surrounding seven deleted images recovered from a flashdrive found in my house. The charges included: possession of the images, conspiring to produce the images, transporting the images, and six counts of traveling with the intent to engage in sexual activity with the minors who were in the images.

In the 2255 motion I made 11 claims that my conviction was obtained in violation of the Untied States Constitution (Doc. 1). The number one claim in the petition was actual innocence (Doc. 1, pg. 2). I submitted a motion for an evidentiary hearing and a brief in support of the motion (Doc. 40, 41). In the brief I listed several sources of evidence I wanted to present at the hearing. One of

the key pieces of evidence I intended to use was the testimony of the young victim's mother and grandmother to show my actual innocence and that the "Failure of the defense counsel to contact those individuals was ineffective and cause (sic) prejudice." (Doc 40, pg. 1 #5) Sworn declarations were also submitted from the young victim's mother and grandmother in which they indicated they would "testify in court." (See Doc. 2, pgs. 46-47 and Doc. 43)

The district court granted an evidentiary hearing, and counsel was appointed to represent me. My appointed § 2255 attorney refused to address any of the claims in the petition except the trial attorney's belief that probation was possible, and her not understanding the sentencing guidelines. All of my other claims, such as breach of plea agreement, trial attorney's misunderstanding of the scienter elements of the charges, trial attorney's failure to contact the victims as instructed, and most importantly, actual innocence were not presented. In reference to my number one claim of actual innocence the Court stated, "I do not think this is an actual innocence claim before the court, and I don't think Mr. Bramer was asked to undertake it." (§ 2255 Tr. pg. 186 at 4-6) "I don't know that there is such a claim." (§ 2255 Tr. pg. 186 at 12) "I don't know that the issue is in fact in 2255, and it is not a matter before the Court." (§ 2255 Tr. pg. 185 at 18-19). My § 2255 attorney, Jeffrey Bramer, remained silent despite the fact that Actual Innocence was my number one claim.

After the hearing I submitted a complaint to the district judge concerning what took place during the evidentiary hearing and the

behavior of my § 2255 attorney (Doc. 74). Attached to this complaint were letters I had been sending to my § 2255 attorney, in which I insisted he "point out in my objections" numerous erroneous findings of fact and to address the "actual innocence issue" (Doc. 74 attached letter addressed to Mr. Bramer, dated March 31, 2009). The § 2255 attorney did not point out any erroneous findings of fact and absolutely refused to address the "actual innocence issue". The Court never addressed the complaint.

After the evidentiary hearing, but before the judgment was entered, a legal malpractice lawsuit hearing took place in Tuscaloosa, Alabama concerning my trial attorney Edwina Miller. During this malpractice lawsuit new evidence was revealed, which established that the trial attorney had essentially committed perjury at the § 2255 evidentiary hearing. The new evidence also showed new sub-claims of ineffective assistance of trial counsel. The grandmother of the young victims in my criminal case testified at the legal malpractice hearing and she provided testimony which showed Brady violations, ineffective egregious trial attorney, and my actual/factual innocence. The grandmother and mother of the young victims also wrote the district judge in my § 2255 case and the Court, stating they were "enraged" and "confused" as to why they had been ignored during all stages of the case against me, including the § 2255 hearing. In one letter they asked for the letter to be part of the record, but neither letter was saved or addressed by the court. The only reason there is documentation of any such letters is because I received a copy of the letters and insisted my § 2255 attorney send a copy to the court (See Doc. 71)

The Court dismissed the § 2255 on September 30, 2010 (Doc. 83). On November 19, 2010 I submitted a pro se motion for permission to proceed on appeal in forma pauperis and asked for a ruling on all the pending motions, which were never addressed (Doc. 89). Unbeknownst to me, my § 2255 attorney had submitted a notice of appeal and a motion to proceed in forma pauperis (Doc. 84, 86). The Court granted the § 2255 attorney's motions and recommended I keep the same § 2255 attorney for my appeal in spite of this attorney asking to withdraw "as soon as possible", and me asking for a new attorney or permission to proceed pro se (Doc. 88). When I found out about this, I immediately submitted a complaint (Doc. 90). That complaint was never addressed.

b) The § 2255 Appeal

The § 2255 attorney and I were direct adversaries during the appeal. The § 2255 attorney submitted two motions to the 11th Circuit asking to withdraw (Case 10-14655, Nov. 24, 2010, Oct. 26, 2011). I submitted a motion to proceed pro se (Case 10-14655, Dec. 1, 2010), an emergency request for appointment of new counsel (Case 14655, Mar. 8, 2011), request for permission to file a reverse Anders brief (Case 10-14655, Mar. 23, 2011), motion to discharge counsel (Case 10-14655, Apr. 4, 2011), and a final complaint (Case 10-14655, Juse 27, 2011). I alleged the § 2255 attorney had essentially "hijacked" my appeal and was "sabotaging" it by submitting a meritless brief.

In my complaints and motions to the 11th Circuit I showed that the brief filed by my § 2255 attorney contained a meritless argument and the brief was ignoring the valid issues of my case. I begged the

court not to make me accept this attorney's brief as my appeal because it was meritless. I told the court this brief was going to make me lose. I lost the appeal, just as I said, and for one of the exact reasons I stated I was going to lose on (Compare footnote 1 in this court's decision for Case 10-14655 with my submissions and complaints to this court).

I have tried to reopen my case several times under Civil Rule 60(b), but all the motions were ruled to be successive petitions and it was said any new evidence of innocence would be "revisiting" the merits. I have filed several applications to file a successive 2255, but it is always ruled that 2244(b)(1) precludes any claim which was in a previous petition; even claims of innocence based upon newly discovered evidence. All Constitutional claims are barred under 2244(b)(1) if the new claim falls under a previously rejected broad catagory. This case exposes the consequence of applying 2244(b)(1) to federal prisoners while also ruling innocence as a "claim" that cannot be revisited in a 60(b). The consequence is a situation where innocence and a miscarriage of justice can never be addressed, regardless of what new evidence is revealed. This is a "Catch-22" legal situation with absolutely no way to present new evidence of actual innocence, and no way to utilize innocence to address a miscarriage of justice.

REASONS FOR GRANTING THE PETITION

There are basically two reasons for granting this petition:

REASON ONE:

The backbone of the 11th Circuit's legal framework, which is acting as a de facto Suspension of Habeas Corpus in this case, is the application of 28 U.S.C. 2244(b)(1). The application of 2244 (b)(1) creates a Circuit Split, which Honorable Judge Kavanaugh has said needs to be resolved.

The 6th Circuit has ruled that 2244(b)(1) does not apply to Section 2255 applications while other circuits (including the 11th) have ruled it does [See Williams v. United States, 927 F.3d 427 (6th Circuit 2019)]. Most importantly, the United States has now agreed that 2244(b)(1) does not apply to 2255 applications and to do so would be, "inconsistent with the text of Section 2244" [See Avery v. United States (No. 19-633)(Honorable Kavanaugh's comments; also stating, "In a future case, I would grant Certiorari to resolve the Circuit Split on this question of federal law.")]

REASON TWO:

There is confusion and Circuit Splits on what role Actual Innocence and a Miscarriage of Justice have in the context of motions filed under the Federal Rules of Civil Procedure in Habeas cases, The court has ruled in this case that any revisitation of innocence would be substantive and therefore be a successive 2255 [20-12025,

pg. 7] and any attempt to use innocence in an application to file a successive 2255 is precluded by 2244(b)(1), Innocence and a Miscarriage of Justice is rendered moot.

The 11th Circuit has essentially ruled in this case that Actual Innocence and a Miscarriage of Justice carries no weight in a motion filed under Federal Rules of Civil Procedure, and any use of these claims is prohibited because it would be a successive 2255. However, the 3rd Circuit has held that, "The values encompassed by the fundamental Miscarriage of Justice exception, which drive the United States Supreme Court's McQuiggin decision, cannot be divorced from the Fed. R. Civ. P. 60(b) inquiry" [Satterfield v. D.A. Philidelphia, 872 F.3d 132 (3rd Circuit 2017)]. The 6th Circuit has also ruled that the Miscarriage of Justice exception applies to rule 60(b) motions and motions to amend [Penny v. United States, 870 F.3d 459 (6th Circuit 2017)].

The 11th Circuit has clearly "divorced" Actual Innocence from the Federal Rules of Civil Procedure and has created a legal framework where actual innocence based on newly-discovered evidence is rendered moot. In the 11th Circuit, if one claims innocence in a 2255 petition it will most likely be rejected and/or pushed aside because innocence is ruled to be not cognizable in a Habeas petition. Then in the future if new evidence emerges to show innocence, one cannot use it in a 60(b) because it would be considered a successive 2255, nor can one use it in an application to file a successive 2255 because it is precluded by the application of 2244(b)(1). This is nothing more than a legal trap that acts as a de facto Suspension

of Habeas Corpus.

This "Catch-22" trap is only possible because the 11th Circuit's legal framework is based upon a split from the other circuits and rests upon legal conclusions which have not, but should be, resolved by this Court. It is for these reasons that Certiorari should be granted in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph R Dibary

Date: 9-13-21