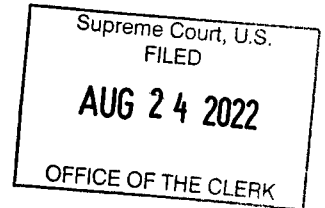


22-5587

ORIGINAL

In The
Supreme Court of the United States

KALEB LEE BASEY
Petitioner,



v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Kaleb Lee Basey
17753-006 Cardinal Unit
Federal Medical Center Lexington
P.O. Box 14500
Lexington, KY 40512-4500
Petitioner in *Pro Se*

QUESTION PRESENTED

This petition presents two question of first impression:

Does a habeas petitioner have a right under
FRAP 22(b)(1) to request a certificate of appealability
("COA") from a specifically chosen circuit judge?

If so, should this Court issue a writ of mandamus to retroactively
honor Basey's request that Ninth Circuit judge Andrew Kleinfeld
Issue him a COA?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kaleb Lee Basey respectfully petitions for a writ of certiorari to review the final decree of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the District of Alaska denying Basey a COA is available at *U.S. v. Basey*, 2021 U.S. Dist. LEXIS 70988, *15 (D. Alaska 13, 2021). The Ninth Circuit's decree denying Basey's petition for a writ of mandamus is unpublished. (Pet. App. 1a).

JURISDICTION

The district court had jurisdiction in *U.S. v. Basey*, No. 4:14-cr-00028-RRB (D. Alaska), under 28 U.S.C. §§2255 and 2253. The Ninth Circuit had jurisdiction over Basey's petition for a writ of mandamus under FRAP 21 and the All Writs Act (28 U.S.C. §1651(a)). Basey's petition for a writ of mandamus was denied on July 12, 2022. (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. §1254(1). This petition is filed within the 90-day limit under Sup. Ct. R. 13.1.

RELEVANT STATUTES AND RULES

28 U.S.C. §2253 provides in relevant part:

- (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may

taken to the court of appeals from—...

(B) the final order in a proceeding under section 2255.

Federal Rule of Appellate Procedure (FRAP) 22(b) provides in relevant part:

- (1) ...If the district judge has denied the certificate, the appellant may request a circuit judge to issue it.
- (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed the notice of appeal constitutes a request addressed to the judges of the court of appeals.

FRAP 47(a)(1) provides in relevant part:

Each court of appeals...may...make and amend rules governing its practice.A local rule must be consistent with... Acts of Congress and rules adopted under 28 U.S.C. §2072....

Ninth Circuit Rule 25-2 provides that “parties shall not submit filings directly to any particular judge.”

STATEMENT OF THE CASE

The District of Alaska had jurisdiction of this case as a proceeding under 28 U.S.C. §2255 in *U.S. v. Basey*, No. 4:14-cr-00028-RRB (D. Alaska). On April 13, 2021, the district court denied Basey's §2255 motion and declined to grant a COA. *Basey*, 2021 U.S. Dist. LEXIS 70988, *15. Basey sought a COA from Ninth Circuit judge Andrew Kleinfeld by (1) putting "To: Circuit Judge Andrew Kleinfeld" in bold lettering at the top of his motion (Pet. App. 2a) and (2) filing a motion to suspend Ninth Circuit Rule 25-2 which bars district submissions to individual judges. (Pet. App. 37a - 41a).

Ultimately, a two-judge panel denied Basey a COA and declared his motion to suspend Rule 25-2 moot. (Pet. App. 42a). Eventually, Basey petitioned for a writ of mandamus or supervisory or advisory mandamus directing the Ninth Circuit clerk to forward Basey's COA request to Judge Kleinfeld. (Pet. App. 43a - 84a). The Ninth Circuit had jurisdiction under FRAP 21 and the All Writs Act (28 U.S.C. §1651(a)) to entertain the petition. The Ninth Circuit summarily denied Basey's petition on July 12, 2022. (Pet. App. 1a).

The Ninth Circuit erred in denying Basey's petition because the plain language of FRAP 22(b) gives habeas petitioners a right to seek a COA from a circuit judge of their choice. This reading of FRAP 22(b) is in accord with how courts have interpreted the Rule. Since Basey did everything he could

reasonably do to invoke his right to a judge of choice, this Court should honor that right by issuing an appropriate writ or opinion. Granting certiorari would also allow this Court to clarify for the thousands of litigants who seek COAs every year that they may choose the circuit judge who decides their COA.

REASONS FOR GRANTING THE WRIT

- I. Basey had a right under FRAP 22(b)(1) to have his COA request decided by a circuit judge of his choice.**
 - A. The language of FRAP 22(b)(1) confers a right to a circuit judge of choice.**

FRAP 22(b)(1) provides that “[i]f the district judge has denied the [COA], the applicant may request a circuit judge to issue it.” Subsection (b)(2) gives an alternative: “A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes.” The Ninth Circuit decides such generalized, nonspecific requests by assigning them to a rotating two-judge panel. Ninth Cir. Gen. Order 6.2(b).

“[P]rinciples of statutory interpretation apply also to the federal rules[.]” *U.S. v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2010). One such principle is that “courts must give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Courts must also “presume differences in language...convey differences in meaning,” *Henson v.*

Santander Consumer USA, 137 S. Ct. 1718, 198 L. Ed. 2d 177, 182 (2017), and avoid interpretations that lead to surplusage. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

When reading FRAP 22(b)(1) and (b)(2) together, it becomes clear that (b)(1) allows a COA requester to seek a COA from a particular circuit judge and (b)(2) is geared toward non-specific requests that are handled as the Circuit prescribes. A contrary reading that would require requests sent to specific judges to be addressed under (b)(2) as a generalized request to the court would not give effect to subsection (b)(1) and render it surplusage.

Further, the use of the word “a” in (b)(1) in reference to the type of circuit judge implies that a requester has choice in judges which to seek a COA. See Oxford English Dictionary (2021) (defining “a” as “one of a class: one, some, any”); Black’s Law Dictionary 94 (6th ed. 1990) (defining “a” as “some; one out of many, any indefinite number. One indiscriminately of whatever kind or quantity.”).

Thus, a plain reading of FRAP 22(b)(1) shows that Basey had a right to seek a COA from any circuit judge.

B. Cases interpreting FRAP 22(b)(1) and the COA statute are in accord.

The plain language reading of FRAP 22(b)(1) is supported by case law. In *Hohn v. U.S.*, this Court said that “Rule 22(b) by no means prohibits

application to an individual judge, nor could it given the language of the statute.” 524 U.S. 236, 244 (1998). In *Salgado v. Garcia*, the Ninth Circuit said that “a single judge is authorized to grant a certificate of appealability.” 384 F.3d 769, 774 (9th Cir. 2014). Regarding the COA statute (28 U.S.C. §2253), the Ninth Circuit has observed, “Congress here gives him *his choice* of a circuit justice and nine circuit judges to whom he may petition for a certificate. *The chosen judge* may well grant it....” *In re Application of Rogers*, 229 F.2d 754, 755 (9th Cir. 1956) (emphasis added).

These cases confirm that FRAP 22(b)(1) creates a right to seek a COA from a specific circuit judge.

C. Basey properly invoked his right under FRAP 22(b)(1) to a circuit judge of choice.

Basey properly invoked his right to seek a COA from Judge Kleinfeld in two ways. First, he put “To: Circuit Judge Andrew Kleinfeld” in bold letters at the top of his request (Pet. App. 2a). *Cf. In re Application of Rogers*, 229 F.2d at 954 (finding a request for COA was addressed to the court, not an individual judge, because it said “To the Honorable, The Above-Entitled Court”). Second, Basey filed a motion to suspend Ninth Circuit Rule 25-2 which provides that “parties shall not submit filings directly to any particular judge.” (Pet. App. 37a - 41a). He argued that the Rule conflicted with FRAP

22(b)(1) and should therefore not be enforced in this case as conflicts between a local circuit rule and the FRAP are forbidden by FRAP 47(a)(1).

Basey did all he could do, but his right to a specific judge was not honored. This Court should remedy the error.

II. A writ of mandamus (or supervisory or advisory mandamus) should be issued in this case to give retroactive effect to Basey's invocation of his right to a judge of choice under FRAP 22(b)(1).

It is axiomatic that this Court has the power to issue a writ of mandamus to compel the Ninth Circuit Clerk to fulfill its duty to see that Basey's COA request gets to Judge Kleinfeld. *See In re Lawrence*, 2020 U.S. App. LEXIS 25096, *2 (11th Cir. 2020). This Court may also invoke its supervisory mandamus power to correct a lower court's failure to follow rules of procedure that has the potential to evade review. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1958). This Court may also invoke its advisory mandamus power since this is an issue of first impression that has the potential to affect thousands of COA requester's choice in who they seek a COA from. *See Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

Since the Ninth Circuit failed to honor Basey's right to seek a COA from circuit judge Kleinfeld, his only recourse is an appropriate writ of mandamus from this Court. This is an important question of federal habeas

law that has the potential to affect many people. Certiorari should be granted to clarify the right Basey was summarily denied.

Conclusion

A petition for a writ of certiorari should be granted.

Respectfully submitted this 11th day of September, 2022.

Kaleb Lee Basey

Kaleb Lee Basey
17753-006 Cardinal Unit
Federal Medical Center Lexington
P.O. Box 14500
Lexington, KY 40512-4500
Petitioner in *Pro Se*