

IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____
(Court of Appeals No. 18-11490)

DANNY RICHARD RIVERS,
Petitioner,

vs.

BOBBY LUMPKIN, Director, Texas Department of
Criminal Justice, Correctional Institutional Division,
Respondent.

PETITIONER'S MOTION TO STAY PROCEEDINGS ON
PETITION FOR WRIT OR CERTIORARI PENDING RESOLUTION
OF APPEAL NO. 21-11031 IN THE FIFTH CIRCUIT COURT OF APPEALS

Comes now, Danny Richard Rivers, in pro se, and respectfully moves this Court for a STAY on my petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit in the above titled cause. This petition for writ of certiorari arises from the continued litigation of my original §2254 petition for writ of habeas corpus. In support of this motion I offer the following:

1) While my original §2254 habeas petition was pending on appeal in the Fifth Circuit (App. No. 18-11490), I became aware for the first time, through the exercise of diligence, of exculpatory expert reports that demonstrate actual innocence on multiple counts of my six count conviction; counts that were used as elemental evidence on the remaining counts.

2) Upon receipt of this exculpatory evidence, I motioned the Fifth Circuit to supplement my COA but was denied whereas the court stated that it would only review what was before the federal district court. I immediately exhausted my state remedies on the new factual basis and then raised the issues to the federal district

court while my original appeal (18-11490) was still pending. In the district court I argued that the claims should be considered an amendment/supplement to my original habeas petition under Fed.R.Civ. P. 15, whereas litigation of that petition was ongoing. (See: USDC No. 7:21-cv-012-0-BP at ECF 27 pg 5-9)(citing multiple circuits case law allowing supplement/amendment while on appeal in the circuit courts under Fed.R.Civ.P. 15).

3) On 09/23/21 the district judge found my claims to be "successive" and transferred the petition to the Fifth Circuit for authorization. (Id. at ECF 28). I filed a notice of appeal of the transfer order, whereas, I contended that the new claims should be considered as supplemental/amendment to my original appeal that was still pending. I had also filed a motion with the appeal court to STAY my original appeal and REMAND the cause back to the district court for further consideration in light of the newly available facts and claims. (filed on May 03, 2021 on App. No. 18-11490).

4) On 02/14/22 the Fifth Circuit denied my STAY/REMAND motion on the original appeal (18-11490). On 06/13/22 the Fifth Circuit ruled on the appeal of my original petition (18-11490) denying relief.

Despite the turn of events, I continued with my appeal on my second in time petition (21-11031) that was based on my averments that the new claims were merely amendment/supplemental to the old. I also continued the litigation of my original petition by filing petitions for panel rehearing and rehearing en banc, both of which were recently denied thus initiating this appeal to the Supreme Court.

ARGUMENT IN SUPPORT OF MOTION

I ask this Court to recognize two significant issues:

- 1) The two appeals directly effect each other. If the first appeal is completely exhausted and denied, then the second appeal is granted (meaning that the issues raised in the second in time petition are indeed considered an amendment under Fed.R.Civ.P. 15 to the original petition) the original petition would then have to be re-adjudicated in light of the new ruling.
- 2) The issue raised in the second appeal is one of which niether the Fifth Circuit nor the Supreme Court has ruled upon. The briefs in this case (both mine and the respondent's) highlight the split in the circuits over this issue. The issue being that:

At least two circuits have ruled that a proceeding on a "prior application" has not concluded until all appeals have been exhausted. Other circuits, not to include the fifth circuit as of yet, have decided that a first in time petition that has been denied by a district court but for which an appeal is pending, counts as a "prior application" for purposes of the "second or successive" bar within §2244.

No matter how the Fifth Circuit decides this matter, a writ of certiorari will surely be filed by the unfavored party. To continue to adjudicate these two causes simultaneously without considering their effects upon each other will likely result in an abundance of avoidable future litigation -- which has been made apparent by the dogged and diligent pusuit of EVERY remedy available to me.

I'm asking the Court to save every party involved time and

money by simply staying the proceedings in this cause (the writ of certiorari pertaining to appeal No. 18-11490 from the Fifth Circuit) until the Fifth Circuit has made a ruling on App. No. 21-11031. (Please see and adopt and make a part of this motion Appellant's Opening Brief, the Brief of Respondent-Appellee, and Appellant's Reply to the "Brief of the Respondent" as if originally appearing hear in their entirety as to inform this court of the seriousness of the matters raised in App. No. 21-11031).

CONCLUSION

For the reasons stated above, I respectfully move this Court to grant a STAY on my appeal of the Fifth Circuits final judgement in cause no. 18-11490. If the Fifth Circuit rules in my favor on cause no. 21-11031, they will have to re-address the merits on 18-11490, potentially making this writ of certiorari moot. If the Fifth Circuit denies my appeal in 21-11031 then I will move this Court to consolidate the two causes to be heard together, whereas, the two appeals have a direct effect on each other.

Respectfully submitted on this 6th day of Nov., 2022 by



Danny Richard Rivers TDCJ# 01775951

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