

23-6236 **ORIGINAL**  
No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

FILED  
NOV 29 2023

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

JOSEPH R DICKEY

— PETITIONER

(Your Name)

VS.

WARDEN, PISTRO

— 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

(Your Name)

FCI MARIANNA PO BOX 7007

(Address)

MARIANNA, FL 32447

(City, State, Zip Code)

N/A

(Phone Number)

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## QUESTION(S) PRESENTED

In light of the plain language contained in 28 U.S.C. 2244(b)(1), which requires any claim presented in a second or successive habeas corpus "application under Section 2254" that was presented in a prior application" to be dismissed, does 28 U.S.C. 2244(b)(1) apply to claims which were in an actual habeas petition and/or an application presented by a federal prisoner under 28 U.S.C. 2255?

Is the legal framework in the Eleventh Circuit unconstitutional for federal prisoners who uncover new evidence of actual innocence?

Did the Supreme Court's decision in Felker v Turpin 518 U.S. 651 (1996) leave open the possibility of an "as applied" challenge to the AEDPA's restrictions for filing a successive 2255?

Does it violate the United States Constitution to imprison someone for life who is actually innocent without any way to present newly discovered evidence or actual innocence?

## LIST OF PARTIES

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, No. CR-321-CLS-SGC, Northern District of Alabama  
Judgment Entered: February 17, 2006

United States v Joseph Dickey, CR-321-CLS-SGC, Eleventh Circuit Court of Appeals  
Judgment Entered: October 12, 2006

Joseph Dickey v United States, No. CV-8006-CLS-PWG, Northern District of Alabama  
Judgment Entered: November 8, 2007

Joseph Dickey v United States, No. 10-14655, Eleventh Circuit Court of Appeals  
Judgment Entered: August 15, 2011

In re: Joseph Dickey, No. 19-10416-D, Eleventh Circuit Court of Appeals  
Judgment Entered: February 26, 2019

Joseph R Dickey v Nash, Warden USP Yazoo City, No. 19-60197, Fifth Circuit Court of Appeals  
Judgment Entered: September 16, 2019

In re: Joseph Dickey, No. 20-11417-E, Eleventh Circuit Court of Appeals  
Judgment Entered: June 16, 2020

Joseph R Dickey v United States, No. 20-12025, Eleventh Circuit Court of Appeals  
Judgment Entered: May 19, 2021

In re: Joseph Dickey, No. 22-13668-B, Eleventh Circuit Court of Appeals  
Judgment Entered: November 21, 2022

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## STATUTES AND RULES

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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**

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,  
 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,  
 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

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 7, 2023.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 17, 2023, 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 \_\_\_\_\_.  
*2*

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"

### **28 U.S.C. 2255(h)**

"A second or successive motion must be certified as provided in Section 2244 [28 U.S.C. 2244] by a panel of the appropriate court of appeals to contain-

- (1) Newly discovered evidence that, if proven and viewed i light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) A new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

### **United States Constitution**

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it" (U.S. Constitution Article 1 & 9, Clause 2)

## STATEMENT OF THE CASE

This is a pro se habeas corpus case in which I attempted to make an "as applied" challenge to the application of 28 U.S.C. 2244(b)(1) to claims of actual innocence based upon newly discovered evidence. The district court as well as the appellate court ruled 2244(b)(1) applies to federal prisoners despite the plain language of the statute. Furthermore, the courts ruled that I could not use a habeas petition under 28 U.S.C. 2241 to make this "as applied" challenge.

I pled guilty to numerous charges surrounding 7 images which were recovered off of a flashcard found in my house. These charges included: possession of the images, conspiring to produce the images, transporting the images across state lines, and traveling for the intent to engage in sexual activity with the victims in this case on six different occasions. I entered a plea agreement my attorney had worked out in which she believed the judge could give me probation. The terms of the plea agreement was for no other sentence, if followed, except the maximum sentence of 135 years. After I received this sentence I filed a direct appeal but the appeal was dismissed based upon the appeal waiver contained in my plea agreement. (Appeal No. 10-14655)

I filed a motion to vacate my sentence on February 20, 2007. (N.D. Ala. Case CR-321, Doc 59) That motion was denied, I appealed, and the Eleventh Circuit affirmed. (N.D. Ala. Case CV-8006, Doc 67, 83, 91) After an evidentiary hearing in my 2255 case took place, new evidence was discovered through a legal malpractice lawsuit which took place against my trial attorney. This new evidence revealed egregious mistakes my trial attorney had made which were not revealed at the 2255 hearing. The new evidence also showed there was evidence of my actual/factual innocence which my trial attorney did not know about. During this legal malpractice lawsuit, my trial attorney admitted under oath that she would not have advised me to plead guilty had she known this evidence existed. I tried to use the evidence to get permission to file a successive 2255 but the Eleventh Circuit ruled my claims must be dismissed pursuant 28 U.S.C. 2244(b)(1) because I had previously claimed actual innocence and ineffective assistance in my original 2255.

After the legal malpractice lawsuit, I submitted a Freedom of Information Act request to the FBI to obtain my entire FBI file. This request took 8 years for me to get the redacted records. When I received the records, there was evidence of Brady Violations, Prosecutorial Misconduct, Franks Violations, and additional evidence of my factual/actual innocence. I once again tried to obtain permission to file a successive 2255

based upon this new evidence, but each time the Eleventh Circuit quoted their binding precedent which has ruled that 28 U.S.C. 2244(b)(1) mandates any claim which was presented in a previous habeas petition must be dismissed, even actual innocence, even for federal prisoners.

I submitted a habeas petition to the Northern District of Florida under 28 U.S.C. 2241 claiming the application of 28 U.S.C. 2244(b)(1) as applied to me and my case is unconstitutional because it is being applied to newly discovered evidence of actual innocence and claims which have never had a merits determination. The Brady claims, and Prosecutorial Misconduct Claims were erroneously dismissed based upon the appeal waiver contained in my plea agreement. This waiver only covered challenges to my "sentence", not to the actual conviction.

The district court ruled I could not use a petition under 28 U.S.C. 2241 to address my "as applied" challenge and even if I could, my claims were foreclosed by circuit precedent. I appealed this denial and the Eleventh Circuit summarily dismissed my case because they ruled all my claims were foreclosed by circuit precedent. I submitted a petition for En Banc rehearing since judges in the Eleventh Circuit agreed with my position in dissenting opinions, but no judge sitting in active duty voted to hear my case En Banc. I am now seeking certiorari from this Honorable Court in order to resolve the circuit split and the many important questions of federal law surrounding the application of 28 U.S.C. 2244(b)(1) to federal prisoners and claims of actual/factual innocence based upon newly discovered evidence.

## REASONS FOR GRANTING THE PETITION

The issues presented in this petition not only affects the petitioner, it affects hundreds if not thousands of federal prisoners. 28 U.S.C. 2244(b)(1)'s plain language clearly states this statute applies to habeas "applications" (not petitions) filed under 28 U.S.C. 2254 (state prisoners) yet several circuits are applying this statute's mandate to dismiss claims to federal prisoners who file habeas petitions under 28 U.S.C. 2255. This Honorable Court has clearly stated that 28 U.S.C. 2244(b)(1) was speaking of habeas applications under 2254 (state prisoners) in Magwood v Patterson 561 U.S. 320 (2010) yet several circuits apply 2244(b)(1) to federal prisoners anyway. This is clearly wrong as matter of law and conflicts with the precedent established in Magwood. Furthermore, this case shows the Eleventh Circuit's legal framework has created a situation where one cannot use any habeas vehicle to challenge the erroneous application of 2244(b)(1) thus the petitioner in this case, and all other similarly situation petitioners, have absolutely no way to bring this Constitutional question up because it will be dismissed based upon circuit precedent. A precedent which judges have acknowledged is wrong but nevertheless it must be followed because it is circuit precedent. As a result, there is absolutely no way to correct this unless this Honorable Court steps in and settles the issue. Therefore, I am presenting this petition praying upon this Honorable Court to grant certiorari on these issues for the following four reasons:

### REASON ONE: THERE IS A WIDE CIRCUIT SPLIT ON THIS ISSUE WHICH NEEDS RESOLVED

There is a wide split on the issue of whether 28 U.S.C. 2244(b)(1) applies to federal prisoners. As a result of this split, justice is determined by the geographical location of the federal prisoner. This Honorable Court needs to resolve this split in order to have uniformity of Federal Law.

The Fourth Circuit has ruled that every word in a statute is given meaning to avoid rendering its terms superfluous, therefore 28 U.S.C. 2244(b)(1) does not apply to federal prisoners because its application would create surplusage with 28 U.S.C. 2255(h). [In re: Graham, 61 F.4th 433 (4th Cir 2023)] The court also noted if Congress intended to limit the gatekeeping test for second or successive 2255 motions to claims that were not previously presented, it knew how to say so. Id. The Sixth Circuit has also ruled that 2244(b)(1) does not

apply to Section 2255 motions. [Williams v United States, 927 F.3d 427 (6th Cir 2019)] Most importantly, in this Sixth Circuit case the government agreed that 2244(b)(1) does not apply to federal prisoners and stated: "Section 2244(b)(1) does not apply to Section 2255 motions and that the contrary view is inconsistent with the text of Section 2244. [Brief In Opposition 10, 13] The Ninth Circuit has joined these two other circuits and ruled 2244(b)(1) does not apply to federal prisoners who file habeas motions pursuant 28 U.S.C. 2255. [Jones v United States, Case No. 20-71862 (9th Cir 2022)] As a result of these rulings, there is a wide circuit split concerning the application of 28 U.S.C. 2244(b)(1) to federal prisoners which needs to be resolved.

#### REASON TWO: JUSTICE KAVANAUGH HAS ACKNOWLEDGED THERE IS NEED TO GRANT CERTIORARI ON THIS ISSUE

Honorable Kavanaugh has recognized there is a circuit split on this issue and has made the following statements in regards to the issue: "The text of that second-or-successive statute covers only applications filed by state prisoners under 2254. Yet six courts of appeals have interpreted the statute to cover applications filed by state prisoners under 2254 and by federal prisoners under 2255, even though the text of the law refers only to 2254. In a future case, I would grant certiorari to resolve the circuit split on this question of federal law". [Avery v United States, Case No. 19-633 (2020)] This petition is an opportunity to resolve this question.

#### REASON THREE: THE ELEVENTH CIRCUIT IS DIVIDED ON THE ISSUE YET THEY REFUSE TO SIT EN BANC

Not only is there a wide circuit split on this issue, the Eleventh Circuit is split on the issue as well. The binding precedent in the Eleventh Circuit is In re: Baptiste, 828 F.3d 1337 (11th Cir 2016) which held that 2244(b)(1) also applies to federal prisoners despite its plain language because it would have been "odd" for Congress to allow federal prisoners to do something state prisoners cannot do. However, judges within the 11th Circuit have argued for years that this precedent is wrong as a matter of law. Consider the following examples:

"The panel holds that Mr. Dickey's claims are barred by In re: Baptiste, which held that the federal habeas statute requires us to dismiss a claim that has been presented in a prior application to file a 2255 motions. I have stated my view that Baptiste has no basis in the text of the habeas statute. Baptiste was construing 28 U.S.C. 2244(b)(1), which says any claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed. Of course 2255 motions are filed by federal prisoners and 2255 motions are certainly not brought under section 2254, which governs

petitions file by state prisoners. But the Baptiste panel ruled that even though 2244(b)(1) does not mention 2255 motions, it applies to them anyway since "it would be odd" if Congress intended to allow federal prisoners to do something state prisoner can't do. Nevertheless, Baptiste is the binding precedent in this circuit, so Mr. Dickey will not be allowed to present his claims to a district court for an examination of whether his convictions are legal" [Dissenting Opinion, In re: Joseph Dickey, Case No. 20-11417-E (11th Cir 2020)]

"I add only that my best understanding is that Baptiste's interpretation is contrary to Supreme Court precedent. In Magwood v Patterson, 561 U.S. 320 (2010), the court interpreted 2244(b)(1) and (b)(2) in the course of deciding what "second or successive" meant as that phrase is used in those provisions. Magwood held those provisions 'apply only to a habeas corpus application under 2254, that is an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court'" [Dissenting Opinion, Ovalles v United States, 905 F.3d 1231 (11th Cir 2018)]

"As I said in my concurrence in an earlier order denying Mr. Dickey leave to file a second or successive 2255 motion, I believe In re: Baptiste, 828 F.3d 1337 (11th Cir 2016), was wrongly decided." [Dissenting Opinion, In re: Joseph Dickey, Case No. 19-10416-D (11th Cir 2019)]

Because the Eleventh Circuit will not sit En Banc to address a precedent which judges within the circuit have argued is wrong as a matter of law, the only way to resolve this issue is for this Honorable Court to utilize its supervisory power to correct something which is fundamentally wrong as a matter of law.

#### REASON FOUR: JUSTICE SOTOMAYOR HAS RECOGNIZED THERE IS A PROBLEM IN THE ELEVENTH CIRCUIT

Honorable Sotomayor has recognized there is a problem within the Eleventh Circuit concerning the process for seeking permission to file a successive 2255. Honorable Sotomayor has suggested the process "raises questions whether the Eleventh Circuit's process is consistent with due process" [United States v St. Hubert, 2020 LEXIS 3146 (Supreme Court June 8, 2020)] This petition I am presenting to this Honorable Court presents an opportunity for this Court to answer the Constitutional questions which the Eleventh Circuit's process has raised.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph R. Dickey

Date: November 27, 2023