24-5570

ORIGINAL

No. ____

IN THE

Supreme Court of the United States

In re JOSEPH R. DICKEY

Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS

JOSEPH R. DICKEY 25345-001
PRO SE PETITIONER
FCI MARIANNA
P.O. BOX 7007
MARIANNA, FL 32447

QUESTION PRESENTED

Federal habeas law divides prisoners seeking post-conviction relief into two groups. Those in *state* custody file "habeas corpus applications" under 28 U.S.C. § 2254. Those in *federal* custody file "motions to vacate" under 28 U.S.C. § 2255.

A separate statutory provision instructs district courts to dismiss any "claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application." 28 U.S.C. § 2244(b)(1) (emphasis added).

The question presented is:

Whether the bar in 28 U.S.C. § 2244(b)(1) applies to claims presented by federal prisoners in a second or successive motion to vacate under 28 U.S.C. § 2255.

LIST OF PARTIES

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

RELATED PROCEEDINGS

The following proceedings are related to this petition. To the best of the petitioner's pro se knowledge, this list complies with this Court's Rule 14.1(b)(iii):

* In re: Joseph R. Dickey, Supreme Court of the United States, No. 23-7199. Judgment entered: May 13, 2024 [Order denying a petition for habeas corpus in which the petitioner attempted to present several questions to this court. The petition was denied without comment].

* Joseph Dickey v. Warden, FCI Marianna, No. 23-10337. Judgment entered: August 7, 2023 [Order dismissing appeal of petitioner's attempt to utilize 28 U.S.C. § 2241 to claim the application of § 2244(b)(1) to him is unconstitutional "as applied" and is acting as a de facto suspension of habeas corpus].

* In re: Joseph Dickey, No. 22-13668-B, Eleventh Circuit Court of Appeals. Judgment entered: November 21, 2022 [Order denying permission to use actual innocence as gateway only claim to file a successive § 2255 based upon new evidence. Baptiste and § 2244(b)(1) is applied to actual innocence, ruling that Mr. Dickey may not use new evidence of innocence as a gateway, nor can it be used as a freestanding claim].

* In re: Joseph Dickey, No. 20-11417-E, Eleventh Circuit Court of Appeals. Judgment entered: June 16, 2020 [Order denying request to have a successive § 2255 application heard En Banc based upon the fact that Baptiste is wrong as a matter of law and there is no other way to revisit the precedent.
Concurring opinion expresses view that Baptiste is wrong as a matter of law, but because Baptiste is the binding precedent, "Mr. Dickey will not be allowed to present his claims to a district court for an examination of whether his convictions are legal."].

* Joseph R. Dickey v. Nash, Warden USP Yazoo City, No. 19-60197, Fifth Circuit Court of Appeals. Judgment entered: September 16, 2019 [Order denying habeas relief via § 2241, and ruling that a § 2255 must be used to attack one's conviction and sentence.].

* In re: Joseph Dickey, No. 19-10416-D, Eleventh Circuit Court of Appeals. Judgment entered: February 26, 2019 [Order denying application to file a successive § 2255 based upon newly discovered evidence because of the application of § 2241(b)(1). Concurring opinions express view that the application of 2241(b)(1) to federal prisoners is wrong as a matter of law].

* In re: Joseph Dickey, No. 17-12705-B, Eleventh Circuit Court of Appeals. Judgment entered: May 5, 2017 [Order denying application to file a successive § 2255 based upon new evidence of constructive denial of counsel and actual innocence. Concurring opinion expresses concern that the binding precedent is wrong as a matter of law and may be blocking

(cont) relief to prisoners who ask the court to take a second look at their case after they got it wrong the first time].

* Joseph Dickey v. United States, CR-321-CLS-SGC, United States District Court, Northern District of Alabama. Judgment entered: October 5, 2018 [Order denying Rule 60(b) motion based upon Supreme Court case of Lee v. United States (2017). Petitioner attempted to use new evidence of actual innocence and ineffective assistance of counsel to reopen his § 2255 proceedings. Order stated that petitioner must first obtain permission to file a successive § 2255].

* Joseph Dickey v. United States, No. 10-14655, Eleventh Circuit Court of Appeals. Judgment entered: August 15, 2011 [Order denying the appeal of petitioner's § 2255].

* United States v. Joseph Dickey, No. CR-321-CLS-SGC, Northern District of Alabama. Judgment entered: February 17, 2006 [Criminal case imposing a 135-year sentence].

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITATIONS

CASES:

STATUTES:

IN THE

Supreme Court of the United States

In re Joseph R. Dickey

PETITION FOR A WRIT OF HABEAS CORPUS

Joseph Dickey is a federal prisoner in custody at Marianna FCI in Marianna, FL. He respectfully petitions this Court for a writ of habeas corpus.

OPINIONS BELOW

The Supreme Court denied petitioner permission to file a habeas corpus petition with this Court on May 13, 2024. In petitioner's application he presented several questions to the Court concerning his federal conviction and asked the Court for a merits determination and habeas relief. this order is produced as Appendix A.

The Eleventh Circuit Court of Appeals denied an appeal of a 28 U.S.C. 2241 petition on August 7, 2023. Petitioner attempted to make an " as applied" challenge to 28 U.S.C. 2244(b)(1) in a 2241 petition claiming it acted as a "de facto" suspension of habeas corpus as it was being applied to him. This order is reproduced as Appendix B.

The Eleventh Circuit Court of Appeals denied an application to file a successive 2255 on November 21, 2022, in which petitioner tried to use new evidence of innocence as a gateway only claim because 2244-(b)(1) was being applied to his new evidence of innocence. This order is reproduced as Appendix C.

The Eleventh Circuit Court of Appeals denied an application to file a successive 2255 on June 16, 2020, in which petitioner asked for his application to be heard "en banc" because he claimed the binding precedent of the Eleventh Circuit (In re: Baptiste, which applies 2244-(b)(1) to federal prisoners) was wrong as a matter of law and the only way for this wrong precedent to be overturned was if the court sat "en banc". This order is reproduced as Appendix D.

The Fifth Circuit Court of Appeals denied the petitioner's habeas corpus petition under 28 U.S.C. § 2241 on September 16, 2019, in which petitioner tried to use new evidence of innocence to have a merits determination made for habeas claims. This order is reproduced as Appendix E.

The Eleventh Circuit Court of Appeals denied petitioner's application to file a successive § 2255 on February 26, 2019. Petitioner's application was based upon newly-discovered evidence, but was denied because of 28 U.S.C. 2244(b)(1). The concurring opinions expressed views that the application of 2244(b)(1) to federal prisoners is wrong as a matter of law. This order is reproduced as Appendix F.

The Eleventh Circuit Court of Appeals denied an application to file a successive § 2255 on May 5, 2017. Petitioner's application was based upon newly-discovered evidence of a constructive denial of counsel and actual innocence. Concurring opinions expressed concern that the binding precedent is wrong as a matter of law and may be blocking relief to prisoners who ask the Court to take a second look at their case after they got it wrong the first time. This order is reproduced as Appendix G.

The United States District Court for the Northern District of Alabama denied a Rule 60(b) motion on October 5, 2018. Petitioner was basing the motion on the Supreme Court case of Lee v. United States (2017). Petitioner attempted to reopen his case based upon the Lee case, newly-discovered evidence of innocence, and new evidence of ineffective assistance of counsel. The Rule 60(b) motion was ruled to be a successive § 2255. This order is reproduced as Appendix H.

JURISDICTION

The Eleventh Circuit Court of Appeals has denied petitioner permission to file a successive § 2255 on several occasions based primarily on the application of 28 U.S.C. § 2244(b)(1). The Eleventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals have both denied appeals of petitioner's attempts to file a habeas corpus petition under 28 U.S.C. § 2241 based upon new evidence of innocence. The Eleventh Circuit Court of Appeals has also denied attempts from the petitioner to have his applications to file a successive § 2255 heard "en banc".

STATUTORY PROVISIONS INVOLVED

Section 2255(h) of Title 28 of the U.S. Code provides:

> A second or successive motion must be certified as provided in Section 2244 by a panel of the appropriate court of appeals to contain-
>
> (1) newly-discovered evidence that, if proven and viewed in 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.

Sections 2244(b) of Title 28 of the U.S. Code provides:

> (1) A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed.
>
> (2) 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-
>
> (A) The applicant shows that the claim relies on a new rule of constitional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or
>
> (B)
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due dilligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for consitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)
>
> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT PURSUANT TO RULE 20.4(a) & 28 U.S.C. §2242

Pursuant to Rule 20.4(a), Petitioner states he cannot file a habeas corpus petition in "the district court of the district in which [he] is held," (quoting 28 U.S.C. § 2242), as he has no legal avenue for doing so. By statute, a federal prisoner may file a 28 U.S.C. § 2241 habeas petition in the district court only where a 28 U.S.C. § 2255 motion to vacate would be "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Petitioner tried to file a 2241 in the district court in which he was being held, but the court dismissed the petition stating it was not the proper vehicle to address the erroneous application of 2244(b)(1) [Dickey v. Warden FCI Marianna CV-84-TKW-ZCB]. Petitioner has absolutely no other way to file a habeas corpus petition to present newly-discovered evidence of innocence and newly-discovered evidence of constitutional violations except by filing a petition directly with this court.

INTRODUCTION

Section 2244(b)(1) provides in full: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." All agree that only state prisoners file 'habeas corpus application under section 2254'. By contrast, federal prisoners file "motions to vacate" under 28 U.S.C. § 2255. Although § 2244(b)(1)'s text applies only to state-prisoner habeas corpus applications filed under § 2254, six circuits have held that § 2244(b)(1)'s bar also applies to federal-prisoner motions to vacate filed under § 2255.

In 2019, the Sixth Circuit broke from those six circuits. In Williams v. United States, 927 F. 3d 427, 434-36 (6th Cir. 2019), that court followed the plain text of the statute and rejected the policy-based decisions of the six other circuits. The Sixth Circuit's decision was so persuasive that, shortly thereafter, the government itself agreed in a filing in this Court. Avery v. United States, U.S. Br. in Opp., 2020 WL 504785, at *10, 13 (No. 19-633)(Jan. 29, 2020). That led Justice Kavanaugh to opine that, in an appropriate case, he would grant review in light of § 2244(b)(1)'s plain text, the circuit conflict, and the government's concession that the majority view was wrong. Avery v. United States, 140 S. Ct. 1080, 1080-81 (2020) (Kavanaugh, J., respecting the denial of certiorari). Since Justice Kavanaugh's opinion, the Fourth and Ninth Circuits have expressly joined the Sixth Circuit, holding that § 2244(b)(1)'s bar does not apply to § 2255 motions filed by federal prisoners and rejecting the majority view. In re Graham, 61 F. 4th 433, 438-41 (4th Cir. 2023); Jones v. United States, 36 F. 4th 974, 981-84 (9th Cir. 2022). At present, then, the circuit split is 6-3. This case provides as excellent vehicle to resolve that deep and acknowledged conflict. Petitioner is serving a 135 year sentence for convictions that new evidence clearly exposes as illegal. Even more compelling is the new evidence showing that some of the crimes for which the petitioner is incarcerated did not even transpire at all.

This case also presents a rare opportunity for the Court to resolve the circuit conflict. Despite the well-publicized split, and despite the recurring nature of the question presented, not a single cert. petition has come to the Court presenting the § 2244(b)(1) question in the four years since Williams. That is due to a unique combination of circumstances. In circuits adopting the majority view, the court of appeals will apply 2244(b)(1) and deny authorization to file a second or successive § 2255 motion where the claim was previously presented. Critically, however, § 2244(b)(3)(E) prevents prisoners from seeking certiorari review of such a ruling. So the question cannot come to this Court in that manner. Meanwhile, in circuits adopting the minority (correct) position, the court of appeals will allow the claim to proceed to the district court. Critically, however, the government now agrees that § 2244(b)(1) does not apply. So the question will not come to this Court by way of a government appeal. Thus, barring unusual circumstances that may never arise, the § 2244(b)(1) question will not come to this Court by way of a traditional cert. petition.

Under these circumstances, then, the Court should use an extraordinary writ to resolve the conflict. The stakes are too high to wait for a 'unicorn' cert. petition that may never come at all. And this case vividly demonstrates the urgent need for the Court's intervention: an a-textual misapplication of § 2244(b)(1) is the only thing standing between Petitioner and freedom. Moreover, this Court recognized in Felker v. Turpin, 518 U.S. 651 (1996) that the continued availability of extraordinary writs is precisely what saved § 2244(b)(3)(E)'s bar on certiorari review from violating the Constitution.

Finally, this Court's intervention is necessary to vindicate AEDPA. That statute embodies Congress's careful policy judgment about how to balance finality, federalism, and justice. Where lower federal courts depart from AEDPA by granting habeas relief where the plain text forbids it, this Court refuses to tolerate such intrasigence; rather, it acts swiftly to ensure adherence to the text. The same

course is warranted here. After all, § 2244(b)(1) is a key provision in AEDPA, and six circuits are flouting its text. That they are doing so to improperly deny rather than improperly grant habeas relief should not matter. What matters is that lower courts are usurping Congress's policy choices in this sensitive area by rewriting the plain text of AEDPA.

STATEMENT OF THE CASE

A. Statutory Background

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), prisoners in state custody are genrally required to seek post-conviction relief by filing an application for a writ of habeas corpus under 28 U.S.C. §2254. Meanwhile, prisoners in federal custody are generally required to seek post-conviction relief by filing a motion to vacate under 28 U.S.C § 2255. AEDPA limits the ability of state and federal prisoners to file second/successive § 2254 petitions and § 2255 motions respectively.

For state prisoners, those limits are codified in U.S.C. § 2244(b). Subsection (b)(1) -the provision at issue here- provides that "[a] claim presented in a second or successive habeas corpus application under § 2254 that was presented in a prior application shall be dismissed." Subsection (b)(1) says nothing about § 2255 motions.

Subsection (b)(2) prescribes the substantive criteria that state prisoners must satisfy. Paraphrased, their successive application must involve a new rule of constitutional law made retroactive by this Court, § 2244(b)(2)(A), or newly discovered evidence of innocence, § 2244(b)(2)(B). Subsection (b)(3) then sets out a series of procedural requirements: a three-judge panel of the court of appeals must certify any second or successive § 2254 petition, § 2244(b)(3)(A)-(B); the state prisoner must make a "Prima facie showing" that his petition satisfies the substantive criteria in subsection (b)(2), § 2244(b)(3)(C); the court of appeals must rule within 30 days, § 2244(b)(3)(D); and that ruling is not subject to a petition for rehearing or certiorari, § 2244(b)(3)(E). Finally, subsection (b)(4) directs district courts to dimiss any claim presented in a second or successive petition "unless the applicant shows that the claim satisfies the requirements of this section" (not just as a "prima facie" matter.).

For federal prisoners seeking to file a second or successive § 2255 motion to vacate, they must satisfy § 2255(h). As is relevant here, that subsection provides: "A second or successive motion must be certified as provided in § 2244 by a panel of the appropriate court of appeals to contain "newly discovered evidence of innocence, § 2255(h)(1), or a new rule of constitutional law made retroactive by this Court, § 2255(h)(2). Six circuits, including the Eleventh Circuit, have held that § 2255(h)'s cross-reference to § 2244 incorporates the bar in § 2244(b)(1), even though § 2244(b)(1) itself refers only to state-prisoner § 2254 petitions. That holding was dispositive here.

B. Proceedings Below

In 2005 Joseph Dickey pleaded guilty in the Northern District of Alabama to charges surrounding seven deleted images which were recovered from a flash-card found in his house. The charges included: possession of the images, conspiracy to produce the images, transporting the images across state lines, and traveling for the purpose to engage in sexual activity with minors, who were in the images, on six different occasions [CR-321-CLS-SGC, Northern District of Alabama]. Mr. Dickey's guilty plea was entered pursuant a plea agreement that was recommended by his trial attorney. Mr. Dickey received a sentence of 135 year: pursuant to the terms of the plea agreement. Dickey appealed his sentence, but the appeal was dismissed based on the appeal waiver contained in the agreement itself.

Mr. Dickey filed his first § 2255 motion to vacate on February 20, 2007 [N.D. Ala Case 7:05cr321, Doc 59]. That motion was denied. Dickey appealed, and the Eleventh Circuit affirmed [Case &:07sc8006, Docs 67, 83, 91]. Mr Dickey then sought the Eleventh Circuit's permission to file a second or successive § 2255, but permission was denied [N.D. Ala Case 7:05cr321, Doc 64]. In the denial, the Eleventh Circuit explained that under 28 U.S.C. § 2244(b)(1) and In re: Baptiste, 828 F.3d 1337 (Eleventh Cir. 2016) Mr. Dickey was therefore

prohibited from "raising a claim that already has been presented in a prior application" for relief under § 2255 [id at 3-4]. Because Dickey had new evidence of his actual innocence, Dickey thought he could overcome procedural barriers to relief because he clearly met the criteria of § 2255(h)(1). Dickey returned to the Eleventh Circuit several times seeking permission to file a second or successive § 2255 motion, but he met the same fate each time: the Eleventh Circuit denied his requests because his argument "only relates to his previous applications to file a second or successive motion(s) and requests that we reconsider our prior precedent and our previous orders denying him relief." (Id at 3]

Having had little or no success in the Northerm District of Alabama and the Eleventh Circuit, Mr. Dickey decided to try something different: he filed a § 2241 petition in the Northern District of Florida (the district in which he was held) on May 5th, 2022 [N.D. Fla Case 5:22cv084]. In this petition, Dickey argued that 28 U.S.C. § 2244(b)(1) does not apply to him and in doing so violates the United States Constitution because it is acting as a de facto suspension of habeas corpus. As relief, Dickey asked the court to "declare 28 U.S.C. § 2244(b)(1) unconstitutional as applied" [N.D. Fla Case 5:22cv084, Doc 1 at 6]. The government responded and moved to dismiss the petition, arguing that the district of confinement does not have jurisdiction because the claims raised are improper for a § 2241 petition and constitute attempts to avoid § 2255's bar on second or successive motions to vacate [Id Doc 8]. Mr. Dickey responded and urged the court "to adjudicate the Constitutional questions [he is] trying to present concerning the application of § 2244 (b)(1)" [Id Doc 9 at 2]. The court dismissed the case for lack of jurisdiction and stated that § 2241 was not the proper vehicle to address the constitutionality of § 2244(b)(1), and indicated the court "did not know what the proper vehicle" to address the issue would be. Mr. Dickey appealed this decision to the Eleventh Circuit Court of Appeals, but the court sua sponte dismissed the appeal [Case No. 23-10337].

Mr. Dickey then tried to submit an original habeas corpus application to the Supreme Court, in which he attempted to submit several questions to the Court and to have a merits determination made on his § 2255 issues. The Court dismissed the petition without comment on May 13, 2024 [Case No. 23-7199]. Dickey is now submitting one critical legal question to this Court which needs to be resolved: does 28 U.S.C. § 2244(b)(1) apply to Federal Prisoners who file habeas corpus petitions under 28 U.S.C. § 2255?

REASONS FOR GRANTING THE PETITION

The circuits are deeply and openly divided on whether the bar in § 2244(b)(1) applies to federal prisoners. And the majority view embraced by six circuits—that § 2244(b)(1) *does* apply to federal prisoners—is contrary to the plain text of the statute. Indeed, even the federal government agrees. Because half the circuits are contravening the plain text of an important provision in AEDPA, this Court's intervention is warranted. And this case offers an ideal vehicle to resolve the conflict, cleanly illustrating why the Court cannot afford to remain idle. Finally, because the § 2244(b)(1) question will be unlikely to come to the Court via a traditional certiorari petition, the Court should use an extraordinary writ to resolve the circuit conflict.

I. The Circuits Are Deeply and Openly Divided

There is no doubt that the circuits are divided on the question presented.

1. In March 2020, Justice Kavanaugh surveyed the legal landscape in his opinion respecting the denial of certiorari in *Avery v. United States*, 140 S. Ct. 1080 (2020). He correctly observed that six circuits—the Second, Third, Fifth, Seventh, Eighth, and Eleventh—had all "interpreted [§ 2244(b)(1)] 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." *Id.* at 1080 (citing *Gallagher v. United States*, 711 F.3d 315 (2d Cir. 2013); *United States v. Winkelman*, 746 F.3d 134, 135–36 (3d Cir. 2014); *In re Bourgeois*, 902 F.3d 446, 447 (5th Cir. 2018); *Taylor v. Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002); *Winarske v. United States*, 913 F.3d 765, 768–69 (8th

Cir. 2019); *In re Baptiste*, 828 F.3d 1337, 1340 (11th Cir. 2016)); *see Bourgeois*, 902 F.3d at 447 (citing additional opinions adopting this majority view).

2. By contrast, Justice Kavanaugh observed, the Sixth Circuit "recently rejected the other Circuits' interpretation of [§ 2244(b)(1)] and held that the statute covers only applications filed by state prisoners under § 2254." *Id.* (citing *Williams v. United States*, 927 F.3d 427 (6th Cir. 2019)). In *Williams*, the Sixth Circuit squarely addressed that issue and, based on its plain text, "conclude[d] that § 2244(b)(1) does not apply to a federal prisoner like Williams." *Id.* at 434; *see id.* at 436 ("We therefore hold that § 2244(b)(1) does not apply to federal prisoners"). In so concluding, it expressly rejected the six other circuits' "main argument against this reading of § 2244(b)(1)'s plain text" based on § 2255(h)'s reference to § 2244. *Id.* at 435. And *Williams* rejected the Eleventh Circuit's contrary precedents as based on "policy grounds" that were "an unjustifiable contravention of plain statutory text." *Id.* at 436.

In light of the decision in *Williams*, Justice Kavanaugh recognized that there was a "circuit split on this question of federal law." *Avery*, 140 S. Ct. at 1081. He also emphasized that the "United States now agrees with the Sixth Circuit that 'Section 2244(b)(1) does not apply to Section 2255 motions,' and that the contrary view is inconsistent with the text of Section 2244. In other words, the Government now disagrees with the rulings of the six Courts of Appeals that had previously decided the issue in the Government's favor." *Id.* at 1080–81 (quoting *Avery*, U.S. Br. in Opp., 2020 WL 504785, at *10, 13 (Jan. 29, 2020)). The government also agreed that *Williams* created a circuit split. *Avery*, U.S. Br. in Opp, 2020 WL 504785, at *15–16.

3. Since Justice Kavanaugh's 2020 opinion in *Avery*, two more circuits have embraced the minority position adopted by the Sixth Circuit and the government.

In *Jones v. United States*, 36 F.4th 974 (9th Cir. 2022), the Ninth Circuit summarized the landscape, observed that "our sister circuits are split" 6–1, and concluded that "the Sixth Circuit has the better of the debate" because "[t]he plain text of § 2244(b)(1) by its terms applies only to state prisoners' applications 'under section 2254'—not federal prisoners' motions under § 2255." *Id.* at 982. The Ninth Circuit added that "[s]tatutory structure further supports this reading. *Id.* at 983. And it expressly rejected the Eleventh Circuit's reasoning in *Baptiste* and *Bradford*. *Id.* at 983–84. Dissenting, Judge Wallace observed that "[t]he majority's approach creates a further split among the circuits on this issue by joining the Sixth Circuit, which alone holds that § 2244(b)(1) does not apply to § 2255 motions. Instead, [he] would join the Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits, and hold that § 2244(b)(1) governs second or successive § 2255 motions." *Id.* at 987.

Most recently, the Fourth Circuit deepened the circuit split in *In re Graham*, 61 F.4th 433 (4th Cir. 2023); *see In re Thomas*, 988 F.3d 783, 788 n.3 (4th Cir. 2021) (previously noting but declining to resolve the "split over whether [§ 2244(b)(1)'s] requirement for successive § 2254 applications also applies to federal inmates seeking to file successive § 2255 applications."). After summarizing the 6–2 split, the Fourth Circuit expressly "join[ed] the ranks of the Sixth and Ninth Circuits and conclude[d] that § 2244(b)(1) does not so apply" to federal prisoners. *Graham*, 61 F.4th at 438. The court's thorough opinion synthesized all of the textual arguments in favor of that

position and rejected all of the contrary arguments, including those advanced by the Eleventh Circuit in *Baptiste and Bradford*. *See Graham*, 61 F.3d at 438–41.

II. The Majority View Is Clearly Wrong

By interpreting § 2244(b)(1) to bar successive claims presented by federal prisoners in a § 2255 motion, six circuits are contravening the plain text of AEDPA.

1. The statute is unambiguous. It provides: "A claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1) (emphasis added). A "habeas corpus under section 2254" can be filed only by "a person in custody pursuant to the judgment of a *State* court." 28 U.S.C. § 2254(a), (b)(1) (emphasis added). And this Court has recognized that "[t]he requirement of custody *pursuant to a state-court judgment* distinguishes § 2254 from other statutory provisions authorizing relief from constitutional violations—such as § 2255, which allows challenges to the judgments of federal courts." *Magwood v. Patterson*, 561 U.S. 320, 333 (2010); *see* 28 U.S.C. § 2255(a). Thus, "[t]he plain text of § 2244(b)(1) by its terms applies only to state prisoners' applications 'under section 2254'—not federal prisoners' motions under § 2255." *Jones*, 36 F.4th at 982. The analysis should begin—and end—with that text.

After all, Congress could have easily extended § 2244(b)(1)'s bar to federal prisoners had it sought to do so. The statute would simply read: "A claim presented in a second or successive habeas corpus application under section 2254 *or a motion to vacate under section 2255 . . . .*" Six circuits have impermissibly re-written the statute by adding those italicized words. That judicial revision is particularly inappropriate

given that, in the preceding statutory provision, Congress expressly referenced § 2255, confirming that it knew how to do so when it chose. *See* 28 U.S.C. § 2244(a). And while Congress expressly limited §§ 2244(b)(1) and (b)(2) to "habeas corpus application[s] under section 2254," it did not include that state-prisoner limitation in the neighboring provisions in §§ 2244(b)(3) or (b)(4). That surrounding statutory structure confirms that Congress meant what it said: § 2244(b)(1)'s bar applies only to second or successive claims presented in a "habeas corpus application under section 2254," not second or successive claims presented in a motion to vacate under § 2255.

2. Discounting that plain text, six circuits have focused on the requirement in § 2255(h) that "[a] second or successive motion must be *certified as provided in section 2244* by a panel of the appropriate court of appeals." But that language does not incorporate the entirety of § 2244, including § 2244(b)(1). Rather, "§ 2255(h)'s reference to § 2244's certification requirement is much more sensibly read as referring to the portions of § 2244 that actually concern the certification procedures, *see* 28 U.S.C. § 2244(b)(3)—the provisions, in other words, that 'provide[ ]' for how such a 'motion [is to] be certified,' *see* 28 U.S.C. § 2255(h)." *Williams*, 927 F.3d at 935. Indeed, "it makes no linguistic sense to direct a court to 'certif[y] as provided in section 2244[(b)(1)]' that a motion contains the threshold conditions discussed in § 2255(h); what makes linguistic sense is to direct a court to certify that those preconditions are met in accordance with the procedures laid out in § 2244(b)(3)." *Id.*

Moreover, "interpreting § 2255(h) to incorporate only § 2244(b)(3) avoids creating surplusage." *Graham*, 61 F.4th at 439 (quotation omitted). That is so

because, as mentioned above, §§ 2244(b)(1) and (b)(2) expressly refer to "habeas corpus application[s] under § 2254," whereas §§ 2244(b)(3) and (b)(4) contain no such limitation. Thus, extending §§ 2244(b)(1) and (b)(2) to § 2255 motions "would render [their] express reference to § 2254 superfluous," whereas "restricting their scope to second or successive § 2254 applications affords their language proper effect." *Id.*

In that regard, even the Eleventh Circuit acknowledged that § 2255(h) "cannot incorporate § 2244(b)(2) because § 2255(h) and § 2244(b)(2) provide different requirements for the *prima facie* case that an applicant must make to file a successive habeas petition or motion." *Bradford*, 830 F.3d at 1276 & n.1. In other words, reading § 2255(h) to incorporate *all* of § 2244, including the substantive criteria in § 2244(b)(2), would conflict with the criteria in § 2255(h) itself—an "illogical, and perhaps even absurd, result." *Graham*, 61 F.4th at 440 (quotation omitted).

Because § 2255(h) cannot be at war with itself, the Eleventh Circuit was forced to conclude that § 2255(h) incorporates *only* § 2244(b)(1) but *not* § 2244(b)(2). But the court failed to justify that selective incorporation. *See Bradford*, 830 F.3d at 1276 n.1. "After all, the text in § 2244(b)(2) that limits its applicability to § 2254 is identical to the text in § 2244(b)(1)." *Jones*, 36 F.4th at 983. And because "identical words used in different parts of the same act are intended to have the same meaning," there is "no reason to credit the cross-reference to § 2254 in § 2244(b)(2) but ignore it in § 2244(b)(1)." *Id.* (quotation omitted). In short: "because § 2255(h) cannot incorporate § 2244(b)(2), nor can it incorporate § 2244(b)(1)." *Graham*, 61 F.4th at 441.

III. Exceptional Circumstances Warrant This Court's Intervention

1. The question presented is recurring and important. After all, nine circuits have issued at least one published opinion addressing it. And that question matters only where a federal prisoner would otherwise satisfy the stringent criteria to file a second or successive § 2255 motion.

The stakes in this case are extremely high. Mr. Dickey can clearly meet the strictest criteria of § 2255(h)(1) because he has new evidence of his factual innocence. However, § 2244(b)(1) is being applied to Mr. Dickey because he made a pro se mistake of claiming his innocence in his original § 2255. Because of this blunder, any and all new evidence of innocence discovered on Mr. Dickey's behalf will always be rejected by § 2244(b)(1). Because of § 2244(b)(1), Mr. Dickey and any other innocent persons under similar or identical circumstances are unable to utilize § 2255(h)(1) in furtherance of their claim[s]. These petitioners have no alternative but to rely upon the wisdom and jurisprudence of This Honorable Court to right this injustice.

The upshot is that it is unclear how this Court could resolve the conflict other than via an extraordinary writ like this one. At the very least it will be highly unlikely for a suitable vehicle to reach this Court any other way. That explains why there have been zero cert. petitions presenting the issue since the Sixth Circuit first created the circuit split in Williams in June 2019. After all, that conflict is well-publicized: one Justice of this Court has expressed a desire to resolve it; the issue recurs regularly; and the government agrees with the defendants. The absence of even a single petition presenting this issue in the five years since Williams confirms that it is highly unlikely for this conflict to be resolved by a traditional certiorari petition.

Notably, this Court anticipated this very scenario in Felker v. Turpin, 518 U.S. 651 (1996). Felker held that § 2244(b)(3)(E)'s bar on certiorari review did not violate the Constitution because this Court retained the ability to entertain

original habeas petitions. See Id. at 660-662. And three Justices wrote separately to observe that § 2244(b)(3)(E) did not restrict the court's jurisdiction to issue other extraordinary writs under the All Writs Act. Id., at 666 (Stevens, J., concurring); Id., at 667 (Souter, J., concurring). But they warned, "If it should later turn out that [such] statutory avenues...for reviewing a gatekeeping determination were closed, the question whether [§ 2244(b)(3)(E)] exceeded Congress's Exceptions Clause power would be open," and that, "question could arise if the courts of appeal adopted divergent interpretations of the gatekeeper standard." Id., at 667 (Souter, J., concurring).

That divergence has now come to pass with respect to § 2244(b)(1), waiting for a certiorari petition that will never arrive would revive the serious constitutional concerns that were identified in Felker. And it would effectively deprive this Court of its supreme authority to definitively interpret AEDPA- a statute this Court has taken pains to safeguard, summarily reversing lower courts where they "clearly violate[ ] this Court's AEDPA jurisprudence" in order to grant habeas relief. Shinn v. Kayer, 141 S. Ct. 517, 520 (2020). The Court should adopt a similar approach where lower courts are flouting the plain text of AEDPA in order to deny habeas relief.

* * *

In sum, this is a rare situation presenting exceptional circumstances that warrant the issuance of an extraordinary writ. Doing so is necessary for this Court to resolve a deep and entrenched circuit conflict on a recurring question of federal habeas law that will otherwise evade review. And doing so is necessary to stop lower federal courts from continuing to re-write the plain text of an important provision in AEDPA, erroneously foreclosing weighty and meritorious claims made by federal prisoners.

Finally, some circuits have relied on policy considerations. The Eleventh Circuit believed that, "it would be odd indeed if Congress had intended to allow federal prisoners to refile precisely the same non-meritous motions over and over

again while denying that right of state prisoners." Baptiste, 828 F. 3d at 1339. But "such a purposive argument simply cannot overcome the force of the plain text." Graham, 61 F. 4th at 441 (quotation omitted). And, in any event, AEDPA'a "comity and federalism concerns arise when a federal court reviews a state court conviction, but not when it reviews a federal court conviction." Jones, 36 F. 4th at 984. That distinction alone sensibly explains § 2244(b)(1)'s differential treatment among state and federal prisoners.

A SUMMARY OF THE NEW EVIDENCE WHICH MEETS 28 U.S.C. 2255(h)(1)'s CRITERIA

28 U.S.C. 2255(h)(1) is the criteria a petitioner must meet in order to be able to file a successive 2255 petition based upon newly discovered evidence. The statute specifically states: "Newly discovered evidence that, if proven and viewed in 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". Mr. Dickey can clearly meet this criteria based upon the following new evidence:

I. NEW EVIDENCE WAS REVEALED AFTER PETITIONER'S 2255 HEARING

After an evidentiary hearing on petitioner's original 2255, the mother and grandmother drafted letters in which they demanded a chance to be heard. They stated it was impossible for Dickey to be guilty of traveling across state lines to abuse their children on six occasions because their children were not present six times, they were only present three times. They also stated Mr. Dickey is in prison for stuff that "DID NOT HAPPEN". They demanded a chance to be heard but were never allowed to be heard in any federal court in any fashion.

II. NEW EVIDENCE WAS OBTAINED DURING A LEGAL MALPRACTIVE LAWSUIT

During a legal malpractice lawsuit trial, the grandmother of the alleged victims testified under oath as an "eyewitness". She swore under oath that the "victims" were picked up at her house for these "camping trips" and they did not go six times. She testified that her oldest grandson only went two times and her youngest grandson only went one time for a total of three times. On the other dates in which Dickey was alleged to have abused them they were no where near his travel destination and the "victims" actually lived in a totally different state from where Mr. Dickey traveled. Additionally, specific statements included those mentioned in letters:

> "Our children have been seen by a counselor and have told us that Joseph Dickey has never abused them nor has he ever taken nude pictures of them. Joseph Dickey is also in prison for events that DID NOT OCCUR. Our children only went on these camping trips 3 times".
>
> "As we have stated, we do not understand the law but it seems insane that someone remains in prison for a crime that was suppose to have been committed upon a person yet the person that was the target of the crime was not even there on the date of the crime".

2. CRIMES FOR WHICH NO REASONABLE FACTFINDER WOULD FIND MR. DICKEY GUILY OF COMMITTING

When the evidence is viewed in totality, it is clear no reasonable factfinder would have found Dickey guilty of any of these crimes. The evidence clearly shows:

1. All of the charges against Mr. Dickey center around seven deleted pictures. Witnesses have sworn the flashcard which contained the deleted illegal images only showed normal family photographs and the forensically recovered illegal images were in no way viewable.

2. The camera in which the flashcard went to was discarded because it was broken. It was Mr. Dickey's mother who saved the flashcard in her Bible. Mr. Dickey did not "knowingly" possess child pornography.

3. Edward Lee Thomas admitted he was alone with the victims while Dickey went to get "pizza" and admitted something happened. That "something" was he made illegal photographs and then deleted them after loading them on to his personal computer. Mr. Dickey's computer had absolutely no illegal images.

4. Thomas initially admitted he was not aware of Mr. Dickey sexually abusing any children during the time he knew him.

While all of this evidence leads any reasonable factfinder to conclude Thomas committed these crimes alone, Thomas' most recent crimes clearly reveals the Modus Operandi which was used against Mr. Dickey. In 2019-20 Edward Lee Thomas was caught again using the exact same method he had used on Dickey to obtain access to young children. He targeted a single dad. He presented himself to the single dad as a caring nurturing individual, then sexually abused and made pornography with the father's infant and toddler when he had a chance to be alone with the children. Homeland Security's Affidavit for Thomas' arrest contains these statements:

> "During the interview with Thomas he was shown the sexual abuse images of two boys, infant and toddler age. He identified them as children he had contact with". "Thomas admitted that he was the person in the pictures and video sexually abusing the children and that he had taken the pictures himself"
>
> "The father of the victims stated that he had not known Thomas was a registered sex offender but Thomas had spent a lot of time with him and the boys. He stated that Thomas often assisted in changing the boys diapers and would offer to give them baths when needed".

Thomas made the illegal pictures in this case when he was alone with Mr. Dickey's family and then Thomas deleted them making it impossible for Mr. Dickey or his family to know such pictures ever existed. Thomas did the exact same thing to another single father with the minor difference he did not use the father's own camera. If Mr. Dickey was involved in conspiring to produce child pornography with these victims, then why are the only photographs of these victims taken on a date in which Thomas was left alone with the children and he admitted something happened? All of the new evidence when combined with the totality of the situation shows Edward Thomas was an opportunistic predator who struck when he had the chance to abuse Mr. Dickey's family just as he did again in 2019-20 with another single father. All of this evidence was revealed AFTER Dickey's first 2255.

III. NEW EVIDENCE OBTAINED IN 2020 FROM A FREEDOM OF INFORMATION ACT (Took 8 years to receive)

1. FBI files revealed the eyewitness (alleged victims grandmother) had told the FBI that her grandchildren (the only alleged victims in this case) only went on these camping trips 2 or 3 times one summer (2002). This was BEFORE Mr. Dickey was indicted for traveling for the intent to abuse these children 6 times. This evidence clearly shows the FBI knew no crime took place on at least 3 of the dates he was charged with a crime yet the prosecutor still charged him for these crimes and hid this exculpatory evidence.

2. FBI files show Edward Thomas (who established the basis for the charges against Dickey) initially testified he was not aware of Mr. Dickey sexually abusing any children.

3. FBI files documented Edward Thomas began providing conflicting statements in 2003 (FBI investigated Mr. Dickey from 2002-2005) and eventually it was deemed there was no evidence to "corroborate" co-conspirator's claims against Mr. Dickey or to "implicate" him in any crime.

4. FBI files revealed the FBI believed the crimes Edward Thomas said happened perhaps did not even happen or if they did happen they may have happened without Mr. Dickey's knowledge.

5. FBI files show Edward Thomas was alone with the victims when Mr. Dickey went to get "pizza" and Thomas admitted something happened while Mr. Dickey was not there.

6. FBI files revealed Dickey's online "screen name" and IP address were run through their central tracking computer (Innocent Images), Index Servers, and Office of Juvenile Justice and Delinquency Prevention on January 3, 2003 with "NEGATIVE" results. Results indicate Mr. Dickey was not associated with online child pornography as Edward Thomas was alleging.

7. FBI files show the Birmingham Alabama FBI office closed their case on Mr. Dickey because there was no evidence he had committed any crimes.

8. About 4 months after first running Dickey's "screen names" and IP address through their central tracking computers, the FBI once again ran his IP address and "screen names" thorough their computers on on May 27, 2003 and once again as before found absolutely nothing.

THE EVIDENCE AS A WHOLE ESTABLISHES NO REASONABLE FACTFINDER WOULD FIND DICKEY GUILTY

This new evidence when combined with all the evidence as a whole, shows no reasonable factfinder would find Mr. Dickey guilty because of two reasons: 1) The evidence shows at least three alleged crimes did not even happen; and 2) The evidence shows all of the other crimes were not committed by Dickey but by Thomas alone.

1. THE CRIMES WHICH DID NOT EVEN HAPPEN

It is factually impossible for Dickey to have traveled for the "purpose" to engage in sexual activities with the minor victims in this case on February 22, 2002, September 13, 2002 or December 6 or 8, 2002 because the minors were nowhere near his travel location, were not part of his travel plans, and actually lived in a totally different state from his travel destination.

CONSTITUTIONAL CLAIMS

The new evidence which was obtained through the legal malpractice lawsuit and from the Freedom of Information Act request not only revealed evidence of innocence, but it also revealed evidence of numerous constitutional violations. These violations include: Brady Violations, Franks Violations, Prosecutorial Misconduct, and Ineffective Assistance of Trial Counsel. Most importantly, it revealed that Joseph Dickey's trial attorney's decisions were based upon her profound ignorance, failure to investigate, and general failure to act as his advocate. As a result, trial attorney's representation went far beyond ineffective and can be viewed as a constructive denial of counsel. Mr. Dickey's plea could not possibly be intelligently and voluntarily made because it was entered into surrounded by all of these constitutional violations and grounded in the profound ignorance of his trial attorney. Most egregious of all, the new evidence revealed that Mr. Dickey's trial attorney thought the plea agreement was the only possibility of avoiding a 135-year sentence, and that its terms were for a sentence of 25-30 years. However, the tragic truth is that the terms of the plea agreement Mr. Dickey entered into, if followed, had no option other than the 135 years. The new evidence reveals that Mr. Dickey's convictions are illegal because his plea was induced by erroneous information and was the result of several constitutional violations. However, because of § 2244(b)(1) Mr. Dickey will not be able to present this new evidence to a district court unless this court grants this petition.

CONCLUSION AND PRAYER FOR RELIEF

It is clear that 28 U.S.C § 2244(b)(1) does not apply to a federal prisoner such as Mr. Dickey. However, 28 U.S.C. § 2244(b)(1) has been applied to every application Mr. Dickey has filed within the Eleventh Circuit. As a result, Mr. Dickey has absolutely no way to seek habeas relief for a fundamental miscarriage of justice unless this Honorable Court addresses the issue. The merits of Dickey's potential § 2255 petition are not before this Court at this time. Only the legal question or whether § 2244(b)(1) applies to Mr. Dickey is before this Court. In this unique case, the application of § 2244(b)(1) is not only being applied to constitutional claims, it is being applied to new evidence of actual innocence, thus rendering the criteria in § 2255(h)(1) moot for Mr. Dickey. If § 2255(h)(1) is not accessible for Mr. Dickey, then he is in a situation which flirts with violating the Suspension Clause of the United States Constitution. It is for these reasons Mr. Dickey is praying upon this Honorable Court for the following relief:

1. GRANT this petition and schedule this case for briefing.

2. In the alternative, construe this petition as a petition for Mandamus and order the Eleventh Circuit Court of Appeals to allow Mr. Dickey to submit an application to file a successive § 2255 without applying § 2244(b)(1) to his application because the statute does not apply to federal prisoners. The law is clear based upon the statutory language of § 2244(b)(1), and Mr. Dickey clearly has a right to file a successive § 2255 without being subjected to § 2244(b)(1). As such, Mandamus relief would be appropriate because Mr. Dickey has a clearly identified right that is being denied by the Eleventh Circuit.

3. GRANT Mr. Dickey any and all other relief this Court deems appropriate in this case based upon the circumstances shown in this petition, including allowing him to present the merits of his proposed successive § 2255 to this Court, and to have this Court grant him relief from his conviction if the Court deems it appropriate after hearing the merits of the constitutional claims.

Respectfully submitted,

Joseph R Dickey 9-5-24

Joseph R. Dickey
Reg. No. 25345-001
FCI Marianna
PO Box 7007
Marianna, FL 32447