

No. 17-6602

IN THE SUPREME COURT OF THE UNITED STATES

JOHN L. LOTTER,

Petitioner,

v.

SCOTT FRAKES, Director,
Nebraska Department of Correctional Institutions,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION

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Capital Case

QUESTION PRESENTED

Whether the procedure used by a circuit court of appeals for allowing the filing of a successive habeas petition seeking relief requires a circuit court of appeals to direct district courts in the circuit to transfer successive petitions to the circuit court of appeals for consideration rather than allowing a circuit court to review a district court's dismissal of a successive petition by the procedure of the habeas petitioner appealing from the dismissal and requesting the circuit court of appeals to issue a certificate of appealability for authorization to file the successive petition.

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Appendix A

District Court for the District of Nebraska,
Memorandum and Order dismissing Lotter's first
habeas proceeding with prejudice, also found at *Lotter*
v. Houston, 771 F.Supp2d 1074 (D.Neb. March 18,
2011).

STATUTES and RULES INVOLVED

28 U.S.C.A. § 2244 provides in relevant part:

...

(b)(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 constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; . . .

...

(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.

...

Rule 22(b) of the Federal Rules of Appellate Procedure provides:

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, . . . the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant 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.

STATEMENT OF THE CASE

A. *Factual Background*

The Petitioner John L. Lotter was convicted by a jury of three counts of first degree murder in Nebraska state court and sentenced to death on each count by a three-judge panel in February 1996. Lotter's murder convictions and capital sentences were affirmed on direct appeal. *State v. Lotter*, 586 N.W.2d 591 (Neb. 1998), opinion modified on denial of reh'g, 587 N.W.2d 673 (Neb. 1999), cert. den. 526 U.S. 1162 (1999). Over the next 18 years, Lotter has pursued a variety of unsuccessful Nebraska state and federal court collateral challenges to his judgment.

The most thorough summary of the facts of Lotter's convictions, sentences, and procedural history can be found in the Nebraska Federal District Court's opinion denying Lotter's first habeas proceeding. (Resp. Appendix A, pp1-26; *Lotter v. Houston*, 771 F.Supp.2d 1074 (D.Neb. March 18, 2011)).

Contrary to the unsupported assertion in Lotter's current cert petition, the jury which convicted Lotter was not subject to any "death-qualification process during voir dire". Rather, prospective jurors were all asked the following standard question by the prosecutor: "Would your views on the

death penalty, *whatever they may be*, would they preclude you or keep you in any way from being able to sit fairly as a juror in a case such as this?" Jurors were not excused or allowed to remain on the jury, merely because of any views on the death penalty, if they could otherwise fairly decide Lotter's guilt or innocence.¹

¹ Lotter's cert petition injects the irrelevant and erroneous notion that Nebraska had abolished the death penalty and that there was no death penalty in Nebraska when the *Hurst v. Florida* decision was issued. Lotter cites a Time magazine article as legal authority. (FN3,cert.pet; p20cert.pet) In fact, the Nebraska Legislature's bill to repeal the death penalty was suspended from going into effect under Nebraska law, by operation of Nebraska's Constitution, pending an election on a voter referendum concerning the Legislature's bill. Over 60% of Nebraska voters then voted down the Legislature's bill to repeal the death penalty.

B. Procedural History of Lotter's Current Federal Habeas Effort

Although Lotter's cert petition is from the decision by the Eighth Circuit (Pet.App.A), he spends much of his effort arguing with the district court's decisions and procedures. The Respondent understands Lotter's cert petition as conceding that he is the one who filed a successive habeas petition in the district court without first having obtained permission to do so from the Eighth Circuit. The Respondent also understands that Lotter's cert petition no longer pursues the second claim of his successive habeas petition, namely, that Lotter's jury was "death-qualified" over 20 years ago in violation of the Federal Constitution.

After the district court denied Lotter's successive habeas petition on the alternative grounds that Lotter's two claims were "frivolous or nearly so" and for failure to obtain permission from the Eighth Circuit Court of Appeals to file the successive habeas petition in the district court, Lotter filed a notice of appeal to the Eighth Circuit on April 26, 2017. Lotter's notice of appeal was filed despite the fact that the district court had denied Lotter a certificate of appealability.

The Eighth Circuit docketed Lotter's notice of appeal and notified Lotter's counsel that, "The Notice of Appeal has been treated as an application

for a certificate of appealability in accordance with Rule 22(b) of the Federal Rules of Appellate Procedure.” The Eighth Circuit simultaneously notified Lotter’s counsel that they had 30 days to file “an additional application for certificate of appealability”. Thus, Lotter’s application found at Pet.App.D was his additional application for a certificate of appealability. The Eighth Circuit then denied Lotter’s application for a certificate of appealability and dismissed his appeal. (Pet.App.A).

REASONS FOR DENYING THE PETITION

1. **There is no circuit court conflict that *Hurst v. Florida* is not a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”.**

Lotter’s cert petition depends upon the preliminary question of whether *Hurst v. Florida*, 136 S.Ct. 616 (2016), established a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”. 28 U.S.C. § 2244(b)(2)(A) established the statutory requirement of a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously

unavailable” in order to obtain circuit court of appeal approval for a successive habeas petition.

Tyler v. Cain, 533 U.S. 656, 662 (2001), explained that the successive habeas authorization statute had the following three requirements:

First, the rule on which the claim relies must be a “new rule” of constitutional law; second, the rule must have been “made retroactive to cases on collateral review by the Supreme Court”; and third, the claim must have been “previously unavailable.”

Tyler v. Cain further held that the second requirement “is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review.” *Id.*

Assuming solely for the sake of argument that *Hurst* said what Lotter claims it said and that *Hurst* announced “a new rule of constitutional law”, this Court has not made *Hurst* “retroactive to cases on collateral review”. There is no circuit court split of authority on the latter issue of retroactivity. The Sixth, Ninth, Tenth, and Eleventh Circuits have all agreed that *Hurst* is not retroactive on collateral review. *In re Coley*, 871 F.3d (6th Cir. 2017) (denial of approval to file successive habeas); *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017) (denial of approval to file successive habeas); *In re Jones*, 847 F.3d 1293 (10th Cir. 2017) (denial of approval to file successive habeas); *Lambrix v. Sec.*,

Florida Dept. of Corrections, 851 F.3d 1158 (11th Cir. 2017) (footnote 2: “*Hurst*, like *Ring*, is not retroactively applicable on collateral review”); *Lambrix v. Sec., DOC*, 872 F.3d 1170, 1182 (11th Cir. 2017) (“*Hurst* is not retroactively applicable on collateral review *under federal law*, and we hold here that no reasonable jurist would find that issue debatable. . . . No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable.”) The Eighth Circuit’s denial of a certificate of appealability on this issue in the present case is in accordance with all circuits who have decided the issue of *Hurst*’s retroactive application.

A certificate of appealability must be denied, even when a petitioner has made a substantial showing of the denial of a constitutional right, if all reasonable jurists would agree that it is not possible to obtain federal habeas relief under federal law. See, *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (Scalia, concurring opinion). All reasonable jurists would agree that under *federal law*, this Court has not held that *Hurst* is retroactively applicable on collateral review, and thus, Section 2244(b)(2)(A) does not allow a circuit court to authorize the filing of a successive habeas petition to assert a *Hurst* claim.

Lotter argues that state court decisions in Florida and Delaware have held that *Hurst* is a new substantive rule of constitutional law and that the

Delaware state court decision went so far as to conclude that the new rule was retroactive. Lotter's reliance is misplaced. Both of the state court decisions involved state court postconviction proceedings, not federal habeas proceedings. Thus, unlike Lotter's case, circuit court approval for the filing of a successive federal habeas proceeding, as required by and in compliance with 28 U.S.C. § 2244(b)(2)(A), were not involved in those state court postconviction decisions.

2. Circuit Courts of Appeals may establish their own procedures for the gatekeeping function for permission to file successive habeas proceedings.

28 U.S.C.A. § 2244 provides for circuit courts of appeal to perform a gatekeeping function before successive habeas proceedings can be filed. There is no statutory requirement mandating how the Circuits must carry out this procedural gatekeeping function. The Question Presented by Lotter's cert petition is whether a district court "should be required" to transfer an unauthorized successive habeas petition to the court of appeals, rather than the district court dismissing it – under all of the various conditions and subparts that are loaded into Lotter's Question Presented.

As noted in Lotter's cert petition, the circuits have various procedures for the granting of permission to file a successive habeas proceeding. The

gatekeeping function can be and is performed by the courts of appeals under the procedural rules for each circuit. Thus, there is no actual circuit split other than circuits having their own local procedural rules for performing the court of appeals' gatekeeping function for successive habeas petitions. Since circuits are generally allowed to have their own local rules and procedures, different circuit procedures and practices for performing the successive habeas gatekeeping function are hardly the same as Rule 10's certiorari consideration of being "a decision in conflict with the decision of another United States court of appeals on the same important matter."

The Second and Sixth Circuit procedures cited in Lotter's cert petition require that successive petitions filed in the district courts without prior circuit court approval are to be transferred to the circuit court for authorization consideration. See, *Liriano v. United States*, 95 F.3d 119 (2nd Cir. 1996); *In re Sims*, 111 F.3d 45 (6th Cir. 1997). The *Liriano* and *Sims* decisions were both decided shortly after the effective date of AEDPA based on concern that pro se prisoners may not be aware of the new statutory requirement of circuit court approval for successive habeas petitions prior to filing successive petitions in district courts. The rationale is not present in Lotter's case when his

successive habeas petition was filed by counsel over 20 years after AEDPA went into effect.

As an aside, the Second Circuit has upheld a district court's dismissal of a successive petition even though the district court did not transfer the successive petition to the Second Circuit Court of Appeals for circuit court authorization. This is because, by the appeal process, the Second Circuit was able to decide the issue of whether authorization would have been granted to file a successive petition or whether it would have been "futile" for the district court to transfer the successive petition. See, *United States v. Larkins*, 670 Fed. Appx. 1 (2nd Cir. 2016). Thus, the general mandatory procedure in the Second Circuit is not actually mandatory when there is no error by the district court in dismissing the successive petition.

The Eighth Circuit has its own Local Rule 22B governing procedures to be followed "[i]n any application for second or successive habeas corpus relief or for second or successive motion", which local rule specifies the information to be provided to the Court of Appeals by the petitioner, and the procedure to follow, including page limit requirements, for successive habeas applications. The preface to the Eighth Circuit Local Rules notes that the Local Rules were adopted under the authority of Rule 47 of the Federal Rules of Appellate.

Regardless of a circuit's local rules and practices, § 2244(b)(3)(A) requires that "before a second or successive application permitted by this section is filed in the district court", a petitioner must "move in the appropriate court of appeals for an order authorizing the district court to consider the application". Lotter's habeas petition, filed by counsel, disregarded this basic requirement by filing his successive petition in the district court without having obtained court of appeals approval. Section 2244 requires dismissal if the successive claim was either presented in a prior habeas proceeding or, if not previously presented, "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable".

Lotter attempts to effect a judicial repeal of the "before filed in the district court" language of § 2244 by requiring a mandatory transfer to the Courts of Appeal of unauthorized successive habeas petitions filed in the district court. Lotter's argument is based on the discretionary "interest of justice" language of 28 U.S.C. § 1631, which generally allows courts to transfer actions filed in the wrong court to the court "in which the action . . . could have been brought at the time it was filed".

Lotter relies largely on the hollow assertion that the one-year AEDPA statute of limitations of § 2244(d)(1) would have expired for raising his *Hurst v. Florida* claim if he hadn't filed the successive petition in the district court without prior Circuit Court authorization. Lotter's argument is misplaced for two reasons. First, the statutory language for the one-year limit states that it "shall apply to an application for a writ of habeas corpus". Second, the one-year limit is tolled during the time in which a properly-filed State postconviction proceeding is pending.

Concerning the first reason, an application to a court of appeals for approval to file a successive habeas petition is part of the application process for a writ of habeas corpus. Thus, to avoid the running of the statute of limitations, Lotter could have filed an approval application in the Eighth Circuit on the last day before the statute of limitations, rather than filing his habeas petition in the district court on the last day (or sooner) and disregarding the requirement for prior circuit court approval.

The second reason why Lotter's statute of limitations argument is misplaced is that his cert petition acknowledges that he filed for state postconviction relief at the same time he filed his federal habeas petition in district court "to protect against expiration of the statute of limitations applicable to his *Hurst* claim under 28 U.S.C § 2244(d)(1)(C)." (Cert.pet,p6)

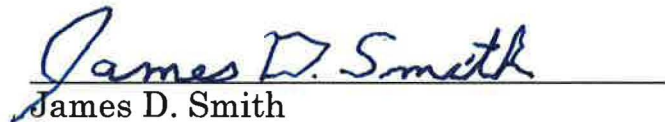
But, the filing of the state postconviction proceeding tolled the running of the federal habeas one-year time limit under the provisions of § 2244(d)(2).

CONCLUSION

For the above reasons, the Respondent requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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A handwritten signature in blue ink, reading "James D. Smith", is written over a horizontal line.

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