No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WARREN SINCENO
Petitioner-Movant

v.

DARREL VANNOY, WARDEN
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO DIRECT THE CLERK TO DOCKET

This Court has held that a Court of Appeals may reissue its judgment to reopen the time for filing certiorari. *Wilkins* v. *United States*, 441 U.S. 468, 469 (1979) (per curiam); *see Sotelo* v. *United States*, 474 U.S. 806, 806 (1985). The Courts of Appeals have afforded this remedy via the procedural device of recalling a mandate. *Nnebe* v. *United States*, 534 F.3d 87, 91-92 (2d Cir. 2008).

Petitioner sought such relief below (Mot. 2a-12a), and the Court of Appeals granted it (Mot. 13a-16a). The Clerk of the Court nevertheless refused to docket the resulting petition. Mot. 1a. Petitioner therefore respectfully moves for an order directing the Clerk to docket the enclosed petition, labeled as Exhibit A.

STATEMENT OF FACTS

The Court of Appeals denied Petitioner's counseled Application for a Certificate of Appealability on November 1, 2018. Mot. 17a-19a. A technical mishap on counsel's part prevented Petitioner from learning of this denial until March 25, 2019. Mot. 2a-4a. As soon as was practicable, Petitioner sought to reopen the time to seek certiorari by moving the Court of Appeals to recall its mandate and reissue judgment. Mot. 4a-6a.

Petitioner's motion was quite clear. It "move[d] [the Court of Appeals] to recall its mandate for the limited purpose of reissuing the judgment so as to re-open the time for seeking certiorari from the Supreme Court of the United States" (Mot. 2a), and cited an example of this practice in another circuit (Mot. 4a-5a). The Court of Appeals granted Petitioner's motion and reissued its judgment and mandate on May 1, 2019. Mot. 13a-16a. There can be no doubt that the judgment reissued along with the mandate on May 1, 2019, as the Clerk of the Court of Appeals specifically wrote: "Enclosed is a copy of the judgment issued as the mandate." Mot. 15a.

Petitioner then timely sought certiorari from the reissued judgment by depositing a petition in his institution's internal mail system ninety days later, or

June 30, 2019. Mot. 22a.[1] He submitted documentary proof of the same to the Court via letter to the Clerk on August 2, 2019 (Mot. 20a-22a), which supplemented the Rule 29.2-compliant proof of service he filed with the petition (Mot. 25a).

On August 20, 2019, Petitioner received the Clerk's letter of August 9, 2019, delivered to his institution on August 15, 2019, declining to docket Petitioner's filings. Mot. 1a, 26a. Aggrieved by that decision of the Clerk, Petitioner submits this motion to the Court, which he has prepared as quickly as he could, and in any event in less than a week, under the institutional pressures that necessarily affect his ability to research and prepare materials.

REASONS FOR GRANTING THE MOTION

This motion presents a simple question: Whether the Clerk of the Court erred by refusing to docket Petitioner's previously filed petition for certiorari. "Yes" is the correspondingly simply answer. The refusal letter's suggestion that the Court of Appeals reissued only its mandate, which would not trigger another window for seeking certiorari under Rule 13.3, overlooked the transmittal from the Court of

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1 Lest Petitioner be thought to have tarried, after he actually received the reissued judgment on May 13, 2019 (Mot. 23a-24a), Petitioner's institution closed the Law Library over the relevant period no fewer than twenty times for power outages, Hurricane Barry, stabbings, and other security incidents—in addition to the times Petitioner could not access it because of holidays and his twelve-hour work shifts in the kitchen. Petitioner was also without his assigned typing station from July 18 until mid-morning July 29, 2019, because the word processor was removed for repairs. Petitioner still managed to attempt to deliver his petition to institutional authorities during business hours on July 29, 2019, but no Classification Officer was available. Mot. 21a.

Appeals' Clerk, dated May 1, 2019, that: (1) stated "Enclosed is a copy of the judgment issued as the mandate"; and (2) in fact enclosed a judgment, also dated May 1, 2019, under the seal of the Court of Appeals. Mot. 1a, 15a-16a. This transmittal of the new judgment used language identical to that in the November 1, 2018, transmittal of the original judgment. Mot. 15a, 17a. A judgment—not just a mandate—therefore issued on May 1, 2019, a new ninety-day window for seeking certiorari opened, and Petitioner timely availed himself of that window.

The confusion evident in the Clerk's letter appears to have arisen from the Clerk of the Court of Appeals stamping as the new judgment the order granting Petitioner's motion to recall the mandate rather than re-stamping the order underlying the November 1, 2018, judgment. But neither order is more or less a judgment than the other. *See Comm'r* v. *Bedford's Estate*, 325 U.S. 283, 285-88 (1945). In the Fifth Circuit, the practice of the Clerk's Office appears to be to issue judgment by placing the Court's seal and words of certification on the opinion or order implicitly calling for the judgment to issue. That is what happened on May 1, 2019, just the same as it happened on November 1, 2018. Mot. 16a, 18a. The practice of issuing a separate piece of paper labeled "Judgment," as still occurs in the district courts, appears to have been abandoned.

Whether the Clerk of the Court of Appeals should have issued such a paper or certified another order as the judgment is, perhaps, to the inveterate procedural perseverator, a question. To worry with such formalities would reverse the trend in courts' rules towards the vindication of substance over form, but Petitioner accepts the prerogative of courts to indulge, wisdom or folly, in the retrograde as much as the anterograde. He respectfully suggests, however, that any such regularization of formalities should be hashed out between this Court and the Court of Appeals on a prospective basis, rather than penalizing him for any lack of foresight on the part of the Court of Appeals' staff attorney and deputy clerk who prepared the subject documents. Petitioner's pro se motion requested the correct form of relief—"recall [of the] mandate for the limited purpose of *reissuing* the *judgment*" (Mot. 2a) (emphases added)—and the Court of Appeals "ORDERED that appellant's motion . . . [be] GRANTED" (Mot. 14a, 16a). He submits that he did all he reasonably could do to observe the procedures contemplated by *Wilkins* v. *United States*, 441 U.S. 468, 469 (1979) (per curiam), and *Sotelo* v. *United States*, 474 U.S. 806, 806 (1985), and the procedure expressly provided for in *Nnebe* v. *United States*, 534 F.3d 87, 91-92 (2d Cir. 2008).[2]

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2 Petitioner could not seek relief directly from this Court as did the petitioners in *Wilkins* and *Sotelo*, which were criminal matters, because the Court lacks the same discretion in civil cases. *Fed. Election Comm'n* v. *NRA Political Victory Fund*, 513 U.S. 88, 90 (1994).

Those patent and simple issues aside, Petitioner offers an opinion on two procedural nits and one prudential concern that he worries might arise during the Court's consideration of this motion. First, he assumes a motion rather than a petition for an extraordinary writ is the correct procedural vehicle for seeking judicial review of the Clerk's refusal to docket a petition. But the only examples Petitioner can find are motions addressed to the Court's discretion to grant leave to file an out-of-time petition rather than addressed to the legal correctness of the Clerk's determination that a petition is untimely. *E.g.*, *Charles* v. *McCain*, 139 S. Ct. 299, 299 (2018). *Cf.* 1 WEST'S FEDERAL FORMS: SUPREME COURT §§ 7, 45 (referring to motions to direct the Clerk to file out-of-time petitions). In an abundance of caution, therefore, Petitioner has enclosed a conditional Rule 20 Petition for an Extraordinary Writ in the form of a writ of mandamus to the Clerk of the Court directing him to docket the petition enclosed as Exhibit A.

Second, Petitioner is aware that 28 U.S.C. § 2101(c) has been interpreted to deprive the Court of jurisdiction over out-of-time petitions in civil cases, of which Petitioner's habeas action is one. *Fed. Election Comm'n* v. *NRA Political Victory Fund*, 513 U.S. 88, 90 (1994). This rule cannot, however, divest the Court of jurisdiction over a reissued judgment without at the same time giving the Courts of Appeals the power to take utterly unreviewable actions. It so happens that, after the

recall of the mandate in Petitioner's case, the Court of Appeals simply reissued the prior judgment without change. But a recalled mandate can result in the reissuance of judgment to much more mischievous effect. *E.g.*, *Calderon* v. *Thompson*, 523 U.S. 538, 550-51 (1998). The Court would do well to retain its authority to check such abuses, and such retention is not inconsistent with the plain language of Section 2101(c), which refers to "any judgment" rather than "the original judgment."

Neither is the fact that Petitioner is *now* beyond the ninety days provided for in Section 2101(c) of jurisdictional moment. The statute requires a petitioner to "take[] or appl[y]" for action by the Court within ninety days. Petitioner did so. The Clerk's refusal to docket Petitioner's filing upon receipt cannot be held to have jurisdictional consequence without improperly investing his office with a portion of the Judicial Power of the United States by granting it the power to dispose of a petition and to do so unreviewably depending on the speed with which it reaches that disposition.

Perhaps, thinks the Court, all that is well and good and Petitioner *could* have his petition docketed, but that does not answer whether prudential grounds exist to compel the conclusion he *should* have his petition docketed.[3] Without conceding the

3 By failing to oppose or subsequently challenge the Court of Appeals' exercise of discretion to recall its mandate and reissue the judgment, Respondent has waived any challenge to the adequacy of the grounds upon which relief was granted below.

existence of a power to refuse to docket a timely filed petition for certiorari, Petitioner submits there is good cause to docket the enclosed petition. As Petitioner's letter of August 2, 2019, to the Clerk states in its second paragraph, this case presents a question very closely related to the question presented in *Roderick White* v. *Louisiana*, No. 18-8862 (O.T. 18), a petition for certiorari being represented by Stanford's Supreme Court Litigation Clinic that has attracted no fewer than three academic amicus briefs at the petition stage. Indeed, were the Court to wish to reach the larger issues urged in two of those amicus briefs that *White* itself does not fairly present, Petitioner's case would make an excellent companion case.[4]

Even if the Court does not find attractive the broader Confrontation Clause issue presented here, Petitioner believes there to be a reasonable probability, although far from any certainty, that the Court will grant certiorari in *White*. If it does, there is a reasonable probability, albeit again far removed from any certainty, that the Court will reverse. And if it does, Petitioner's case is one of the very few likely to be in a posture to benefit from a GVR.

To deprive Petitioner of this path to relief would be unjust. It is true his chances remain slim, but he has a path through whereas the average pro se litigant

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4 Petitioner is aware that, in order for his second Question Presented (the Confrontation Clause claim) to be reviewed *de novo* rather than deferentially under AEDPA, the Court would need to answer the first Question Presented (to do with ineffective assistance of appellate counsel) in the affirmative.

seeking review of the denial of a certificate of appealability does not. Particularly given the compelling facts of Petitioner's case—the gossamer-thin evidence of guilt and his grossly disproportionate sentence to life without parole—Petitioner submits that he merits a favorable exercise of the Court's equitable powers and discretion.

CONCLUSION

Petitioner submits he is entitled as a matter of law to an order directing the Clerk of the Court to file his petition for certiorari because he timely applied for action by the Court and the Clerk erred in concluding otherwise. He also submits that there are compelling equities to support an exercise of discretion to order the same. As such, Petitioner respectfully prays that the Court enter an order directing the Clerk of the Court to file the enclosed petition for certiorari, labeled Exhibit A.

RESPECTFULLY SUBMITTED:

WARREN SINCENO, #514996
MAIN PRISON WEST, PINE-3
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

Date: August 25, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30799

WARREN SINCENO,

Petitioner - Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

Before OWEN, WILLETT, and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion to recall the mandate is GRANTED for the limited purpose of permitting Appellant to file a petition for certiorari with the United States Supreme Court. It is ORDERED that the new mandate issue immediately after withdrawal of the initial mandate.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30799

A True Copy
Certified order issued Nov 01, 2018
Clerk, U.S. Court of Appeals, Fifth Circuit

WARREN SINCENO,

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

O R D E R:

Warren Sinceno, Louisiana prisoner # 514996, moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 petition challenging his conviction and life sentence for murder. Sinceno asserts violations of his rights to confrontation as well as effective assistance of counsel at trial and on appeal.

To obtain a COA, Sinceno must make "a substantial showing of the denial of a constitutional right" by showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted); 28 U.S.C. § 2253(c)(2). He may do so by showing either that that "reasonable jurists

would find the district court's assessment of the constitutional claims debatable or wrong" or "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Sinceno fails to make the requisite showing. Accordingly, IT IS ORDERED that the motion for a COA is DENIED.

/s/ Priscilla R. Owen
PRISCILLA R. OWEN
UNITED STATES CIRCUIT JUDGE

Additional material from this filing is available in the Clerk's Office.