

IN THE  
SUPREME COURT  
OF THE  
UNITED STATES OF AMERICA

FRANK SCHWINDLER,  
Petitioner/Appellant,

v.

Docket No. \_\_\_\_\_

WARDEN, PHILLIPS STATE PRISON;  
GEORGIA DEPARTMENT OF CORRECTIONS,  
Respondent/Appellee.

EMERGENCY APPLICATION FOR EXTENSION OF  
TIME TO FILE PETITION FOR WRIT OF CERTIORARI

COMES NOW FRANK SCHWINDLER, petitioner/appellant, pro se,  
and pursuant to Supreme Court Rule 13.5, makes this emergency  
application for a 60 day extension of time to file his petition  
for writ of certiorari to the United States Court of Appeals  
for the Eleventh Circuit, and shows the Court:

BASIS FOR JURISDICTION The Court has jurisdiction pursuant  
to 28 USC § 2254,

JUDGEMENT TO BE REVIEWED The 11<sup>th</sup> Circuit's Order dismissing  
Schwindler's appeal from a stay entered in his 28 USC § 2254

petition in the United States District Court for the Southern District of Georgia was entered on 8/8/19. The Order denying Schwindler's motion for reconsideration was entered 11/20/19. The deadline for filing a petition for writ of certiorari in this Court is 2/18/20. Copy of both orders are attached.

### EXTRAORDINARY CIRCUMSTANCES JUSTIFYING EXTENSION

Pursuant to Supreme Court Rule 30.2, and 28 USC § 1746, Schwindler states under penalty of perjury that extraordinary circumstances as set forth below exist which justify granting a 60 day extension of time to file his petition for writ of certiorari:

1. The Georgia Department of Corrections in general, and Phillips State Prison in specific are experiencing severe staffing shortages for the past several months which have curtailed or eliminated access to legal research, indigent legal supplies, and legal mail services in or out of the prison:

a. Schwindler has only been permitted to use the prison law library 4 times since the 11<sup>th</sup> Circuit's 11/20/19 order was entered in spite of having been scheduled for access 13 times in this period.

b. Schwindler has only received indigent legal supplies twice since November. (The GDC SOP provides a limit of 20 pieces of paper, 5 sheets of carbon paper, and 5 envelopes per week, and 1 pen per month.)

c. The average delay processing outgoing legal mail has been 10 days. There is no way to predict when outgoing legal mail will be processed, because there's no way to predict when the mail room officer will be required to man another post due to staff shortages.

d. The average delay delivering incoming legal mail has been more than 10 days for the same reason as above, plus the delays due to restricted movement to the mail room.

2. The Georgia Department of Corrections has recently replaced all the legal research computers at Phillips State Prison with Chrome Books which do not permit Schwindler to have any access to any part of his personal legal records or research. As far as Schwindler can ascertain, nothing like this has happened anywhere in American history.

a. The Court is referred to 605 Fed. Appx. 971 (2015); Schwindler v. Comm'r Ga. Dept. of Corr. Briefly - while Schwindler was in the middle of his direct appeals (pro se), the Georgia Department of Corrections seized all documents and records related to Schwindler's case, and denied all access to them. This action obstructed each of Schwindler's legal challenges.

b. Schwindler's state habeas corpus proceedings were transferred between 6 different state superior courts, before 8 different judges, with 8 different respondents. After attempting to retrieve his legal materials and move his state habeas corpus challenge forward for 8 years without any success in the state's

courts, Schwindler filed a 42 USC § 1983 action in the United States District Court for the Northern District of Georgia. The repeated and continual transfers of Schwindler's state habeas corpus case ceased after the 11<sup>th</sup> Circuit entered its 6/5/15 order (above), and counsel appointed by the appellate court was able to work out replacement of some of the "lost" legal materials (including evidentiary items), and access to most of Schwindler's record.

c. The State of Georgia agreed to provide Schwindler with electronic versions of most of the records discussed in the 42 USC § 1983 lawsuit and appeal. 3 CD-Rom discs, and 1 USB Flash-drive were given to Schwindler, and the respondent at the time in the state habeas corpus case promised both the state and Federal courts that Schwindler would receive weekly access to the law library, and that at least one computer in the Phillips State Prison law library was capable of reading the electronic records. It was agreed by the parties that the bulk of the hard copies of records would be destroyed.

d. Because the state habeas corpus proceeding continued to languish, Schwindler filed a Federal 28 USC § 2254 petition in the same Federal court which had his 42 USC § 1983 action - the Northern District of Georgia. (The 28 USC § 2254 was filed 5 years after the 42 USC § 1983.)

e. The Federal courts then began the exact same pattern of transferring the 28 USC § 2254 between courts as the state courts of Georgia had followed for (at that time) 13 years. Schwindler's 28 USC § 2254 has been transferred 3 times in 4 years.

3. Whether or not a district court is required to set aside an order once it is shown that the adverse party has not been properly served with a copy of the Magistrate Judge's Report and Recommendation prior to the court's decision?
4. Whether or not the district court is authorized to enter an order which references and adopts a Magistrate Judge's Report and Recommendation which still has never been served upon petitioner?
5. Whether or not "the policy of the United States courts within the State of Georgia" to transfer § 2254 actions to the district courts within which a conviction occurred outweighs all other considerations including due process, equal protection, and various provisions of law (including the language of 28 USC § 2254, and applicable state laws)?

The 11<sup>th</sup> Circuit dismissed Schwindler's appeal on jurisdictional grounds in a decision Schwindler avers conflicts with the decisions of other United States Courts of Appeals on the same important matter, and also sanctioned the departure of the lower courts from the accepted and usual course of judicial proceedings in such a fashion as to call for an exercise of this Court's supervisory power. (Supreme Court Rule 10(a).) This Court previously decided that a stay order is final and appealable if it puts the appellant "effectively out of court." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 10 (1983)

The district court's 5/4/18, and 4/1/19, stay orders put Schwindler effectively out of court as to both the transfer and stay issues, as well as to his § 2254 action by perpetuating the interminable languishing of his habeas corpus challenge to conviction without permitting him to be heard in opposition.

Given the facts that Schwindler's habeas corpus challenge has languished longer than any other in American history, and that all relevant witnesses have died or gone missing, as well as critical documentary and evidentiary materials, Schwindler believes that addressing the important procedural questions posed in his application for certificate of appealability to the 11th Circuit are far more important for American jurisprudence than is a resolution to his own case.

WHEREFORE, Schwindler prays this Court grant a 60 day extension for him to file his petition for writ of certiorari to the 11th Circuit Court of Appeals. This 4th day of February, 2020.

Frank Schwindler

FRANK SCHWINDLER; 323208/A-2-12-B  
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CERTIFICATE OF MAILING AND SERVICE

Pursuant to 28 USC § 1746, and Supreme Court Rule 29, I certify under penalty of perjury that I have placed this emergency application for extension of time to file petition for writ of certiorari into the legal mail system at Phillips State Prison with 1st class postage properly addressed to the Clerk of the Court, with service copy for counsel addressed to Paula K. Smith, Senior Assistant Attorney General of Georgia; 40 Capital Square, SW; Atlanta, GA 30334. This 4th day of February, 2020.

Frank Schwindler

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