

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

VERNELL CONLEY
PETITIONER,

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION
RESPONDENT.

MOTION TO DIRECT THE CLERK
TO FILE PETITION FOR WRIT OF CERTIORARI
AS TIMELY FILED

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This Motion is brought on behalf of the Petitioner, Vernell Conley, by J. Thomas Sullivan, counsel appointed to represent Petitioner in this action, Petitioner originally filed *pro se* for relief under 42 U.S.C. § 2254. This motion requests the Court reconsider the Clerk's action in refusing to file Conley's tendered Petition for Writ of Certiorari as untimely and, based on existence of extraordinary circumstances caused by the COVID-19 pandemic, excuse the untimely filing and direct the Clerk to accept the petition.

In support of this Motion, counsel would show the following as grounds for excusing the failure to timely file the petition in this instance:

Summary of Material Facts

1. Petitioner filed a petition pursuant to Section 2254 *pro se*, alleging numerous claims of ineffective assistance on the part of his retained trial counsel following state post-conviction litigation in which the Arkansas Supreme Court had determined that trial counsel rendered ineffective assistance in failing to preserve error with respect to two of three counts upon which Conley had been convicted in a joined trial, ordering the charges on those counts dismissed based on insufficient evidence to support conviction. *Conley v. State*, 433 S.W.3d 234, 242-43 (Ark. 2014).

2. Conley, however, did not obtain relief on his claim in post-conviction that counsel was also ineffective in failing to move to sever the counts on which relief was granted from a count charging delivery of cocaine despite Arkansas law providing that the accused's right to sever for separate trials offenses joined on the basis of similarity of the charges was an "absolute right." In his *pro se* federal habeas application, he again argued that counsel rendered ineffective assistance in failing to move to sever the unrelated possession counts upon which relief had been granted from the delivery count.

3. In the federal habeas action undersigned counsel was appointed to represent Petitioner Conley on January 12, 2016, by the Hon. J. Thomas Ray, United States Magistrate Judge, E.D. Arkansas “in the interest of justice,” pursuant to 18 U.S.C. § 3006A(a)(2)(B); Rule 8(c), Rules Governing § 2254 Cases in United States District Courts; Eastern District of Arkansas Criminal Justice Act Plan IV(B)(2) (“CJA Plan”). (PACER DOC. 18; Case 5:15-cv-00093-JLH-JTR).

4. The District Court denied relief after extended litigation that included abeyance to permit further exhaustion of state remedies culminating with denial of certiorari by this Court. *Conley v. Kelley*, 140 S.Ct. 185 (2019). The District Court also denied a Certificate of Appealability and counsel moved for issuance of a COA by the Eighth Circuit, which denied the request and dismissed the appeal by its Judgment entered on July 23, 2021.

5. Thereafter, undersigned counsel began drafting the Petition for Writ of Certiorari seeking review of the decisions by the lower courts denying COA on the issue of trial counsel’s ineffectiveness under the Sixth Amendment in failing to move to sever the charges joined solely on the basis of sameness or similarity. At all times, counsel proceeded with the understanding that the Court’s Order extending the time for filing the petition from 90 to 150 days would control the filing of Conley’s petition, making it due to be filed on or before December 20, 2021. Counsel downloaded both the Court’s Order of March 19, 2020, [Ex. A],

and the *Guidance Concerning Clerk's Office Operations* dated April 17, 2020, [Ex. B], from the Internet on September 19, 2021, and October 4, 2021, respectively. Counsel relied on these sites for use as a reference in proceeding to prepare and file the petition in this Court by the date due under the March 19, 2020, Order.

6. Within days of downloading the Court's March 19, 2020, Order, Counsel contacted the Clerk's Office of the Court to determine whether the 150 day filing period for filing the certiorari petition remained in effect. Counsel telephoned the Clerk's Office on September 24, 2021, at 12:20 p.m. CDT, based on phone records available from ATT¹ for Counsel's home telephone.² Counsel was directed to leave a voice message for a return phone call and left a voice message inquiring as to whether the extended period had been altered or remained in effect. The record shows a conversation of three minutes. However, Counsel never received a return call with any message and never spoke with a deputy clerk; instead, Counsel erroneously regarded the lack of a message as indicating that there had been no change in the Court's 150-day, COVID-related expansion of time for filing a petition for writ of certiorari.

¹ The records of all outgoing telephone calls were searched and are available upon request, but are otherwise too lengthy for inclusion in the exhibits to this motion.

² Counsel has worked only from home from March, 2020, while online teaching for the University of Arkansas at Little Rock School of Law. Counsel retired on November 5, 2021, after being placed on Family Medical Leave due to COVID susceptibility for the fall, 2020, academic term.

7. Counsel first learned of his error in relying on the 150-day period for filing pursuant to the Court's March 19, 2020, Order during a telephone conversation with the Deputy Clerk on December 10, 2021,³ when he called the Clerk's office to inquire about the number of copies to be filed on behalf of Conley, who was proceeding under his Motion for Leave to Proceed *In forma Pauperis*. During the Deputy Clerk's return call, when Counsel sought to confirm the due date, she advised him that the March 19th Order extending the filing date had been rescinded, prospectively terminating the extension and rendering the July 23, 2021, Eighth Circuit order dismissing Conley's petition subject to the 90-day filing period.

8. Counsel proceeded to complete photocopying required to submit ten copies of the Petition and proceeded to ship the original and ten copies, with copies of the Motion for Leave to Proceed *In forma Pauperis* appended, by Federal Express to the Court, [Ex. C], on December 11, 2021, nine days prior to the 150-day period Counsel understood to continue as the applicable due date for timely filing. Counsel also filed the Petition and Appendix electronically on the Court's e-filing site on December 11, 2021. [Ex. D]. While the Deputy Clerk advised during the telephone conversation that the filing would be designated as "untimely," Counsel

³ ATT records show that Counsel called the Clerk's office, again from his home telephone, on December 10, 2021, at 8:42 a.m., again a three minute conversation.

mistakenly assumed that the Court would excuse the untimely filing in light of the compliance with the Court's now rescinded 150-day filing period.

9. Counsel checked for notification of action by the Court on the e-filing site on December 27, 2021, and finding no information entered, Counsel contacted the Court electronically and was informed by response that the Petition would have been returned by mail. [Ex. E]. Counsel then contacted the Clerk's office by telephone and was subsequently advised by the Deputy Clerk in her return telephone call received on his home telephone at 12:32 p.m. CST, that the Petition had been returned by mail and that no further action could be taken to render the filing timely.

10. While this certiorari petition was in the process of being drafted, Counsel had suffered exposure to an individual diagnosed with COVID-19 in mid-November and self-quarantined through the week of Thanksgiving, and did not return to his office until December 28, 2021. On December 19th, he entered to Emergency Room at the University of Arkansas Hospital with symptoms of stroke and was discharged, following evaluation, on the following day with a diagnosis of Transient Ischemic Attack. On December 22nd he was advised of another probable exposure to COVID from a different person at the wedding of his daughter on the night of the 18th, and remained away from his office as a result until the day after his discussion with the Deputy Clerk on December 27th. On the 28th, Counsel

traveled to his office and recovered the returned petition and copies with the Deputy Clerk's letter explaining that the submitted petition was being returned as untimely and beyond the Court's jurisdiction.

11. Petitioner Conley's Petition is tendered with this Motion for relief.

Reason for Granting Requested Relief

12. At the outset, undersigned counsel concedes that the untimely filing in this instance is the result of his erroneous reliance on the March 19, 2021 Order of this Court that was rescinded prior to issuance of the dismissal of Conley's Motion for Certificate of Appealability and dismissal of appeal by the Eighth Circuit Court of Appeals on July 23, 2021. However, Counsel's actions at all times were undertaken in good faith and the untimely filing was the result of inadvertence and does not represent an effort to avoid the consequence of lack of due diligence. Counsel acknowledged in the *Jurisdiction* paragraph of the Petition that he relied on this Court's March 19, 2020, Order in calculating the due date for filing based on the 150-day extended filing period recognized in the Order.

13. Counsel's error, even made in good faith, affords Petitioner Conley no recourse for relief from the Clerk's application of the Court's filing rule which is deemed jurisdictional. A petitioner convicted in a state court proceeding under 42 U.S.C. § 2254 is precluded by subsection (j) from obtaining relief on the basis of counsel's error in the federal habeas process that would otherwise constitute

ineffective assistance. Conley, thus, has no recourse for Counsel's error in failing to timely file the certiorari petition, regardless of the merits of his claim or the likelihood of a writ of certiorari being granted.

14. Counsel recognizes that the Clerk of the Court fully complied with the duty set forth in Rule 13(c) of the Court's Rules in refusing to accept the facially-untimely petition for filing. Subsection (c) provides:

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e. g.*, 28 U. S. C. § 2101(c).

15. 28 U. S. C. § 2101(c) authorizes a Justice to extend the time for filing a petition for writ of certiorari for a period of up to 60 days:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Thus, in extending the time for petitioning from 90 to 150 days in its March 19, 2021, Order, the Court acted within the framework of its authority under Section 2101.

16. Petitioner Conley does not ask the Court to revise its rule governing time limits for petitioning for review by certiorari, but rather, to exercise its inherent authority—not limited by Section 2101(c)—to retroactively apply the temporarily-applicable 150 day filing period authorized by its March 19, 2020 Order to

overrule the Clerk's decision rejecting his Petition for filing. The following circumstances in Conley's case are sufficiently *unique* to warrant retrospective application of the 150 day filing period to hold that his petition be held timely:

- Conley's petition would have been timely had the 150-day filing period remained in effect on the date when the Clerk received it;
- Counsel's failure to timely file the petition was the product of inadvertence in failing to properly identify the Court's action in rescinding its March 19, 2020 Order extending the period for timely filing from 90 to 150 days;
- The extraordinary circumstances warranting the expansion of the certiorari filing period involved practical difficulties impairing the normal operations of the courts attributable to the corona-virus pandemic during the past two years;
- There is no evidence reflecting that Counsel acted in bad faith or deliberate neglect in failing to timely prepare and file Conley's certiorari petition or otherwise advances the argument herein for improper reasons, or otherwise to protect the interest of his client in presenting his federal constitutional claim litigated in the lower courts pursuant to the federal habeas statute
- This Court's authority to use its authority to overrule the Clerk and direct the Clerk to accept Conley's petition as timely filed, essentially relying on the *nunc pro tunc* process to correct the frustration of Conley's expectation of his statutory right to seek review of the denial of a Certificate or Appealability to permit

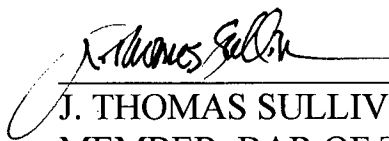
appellate review of the denial of relief on his Sixth Amendment ineffective assistance of counsel claim by the lower courts. *See United States v. Jiminez Recio*, 537 U.S. 1185 (2003) (ordering appointment of counsel *nunc pro tunc*).

CONCLUSION

Based on the unique circumstances of Conley's frustrated effort to seek review of his claim for Certificate of Appealability due to Counsel's inadvertence and good faith, but untimely filing of his Petition for Writ of Certiorari, Petitioner prays the Court exercise its inherent authority to overrule the Clerk's rejection of Petitioner's filing. Petitioner respectfully moves the Court order the Clerk to accept his petition as timely filed, *nunc pro tunc*, and proceed to review his federal constitutional claim for certworthiness.

This motion is brought by Petitioner's undersigned, appointed counsel in good faith and for no purpose other than to protect Petitioner Conley's right pursuant to *Hohn v. United States*, 524 U.S.236 (1998) to seek review of denial of his request for Certificate of Appealability by the United States Court of Appeals for the Eighth Circuit.


Respectfully submitted, this 30th day of December, 2021.


J. THOMAS SULLIVAN
MEMBER, BAR OF THE
SUPREME COURT

1122 WEST CAPITOL
LITTLE ROCK, ARKANSAS 72201
501/376-6280
sullivanatty@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO DIRECT THE CLERK TO FILE PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED has been served upon counsel for the Respondent: Attorney General of Arkansas, 200 Catlett-Prien Tower Building, 323 Center Street, Little Rock, AR 72201, on December 30, 2021.



J. THOMAS SULLIVAN
MEMBER, BAR OF THE
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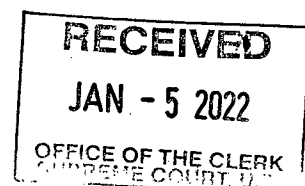
VERNELL CONLEY
PETITIONER,

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION
RESPONDENT.

EXHIBITS

EXHIBIT	DESCRIPTION OF EXHIBIT
A	U.S. Supreme Court Order issued March 19, 2020
B	Guidance Concerning Clerk's Office Operations, April 17, 2020
C	Federal Express shipping receipt, December 11, 2021
D	efilingsupport@supremecourt.gov message, December 11, 2021
E	efilingsupport exchange with counsel, December 27, 2021



(ORDER LIST: 589 U.S.)

THURSDAY, MARCH 19, 2020

ORDER

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.

**SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK
WASHINGTON, D. C. 20543-0001**

April 17, 2020

SCOTT S. HARRIS
CLERK OF THE COURT

AREA CODE 202
479-3011

GUIDANCE CONCERNING CLERK'S OFFICE OPERATIONS

In light of the ongoing COVID-19 pandemic, the Clerk's Office is providing guidance on potential impacts of the virus on operations. This guidance will be updated as new information becomes available.

Modification to Paper Filing Requirements

On April 15, 2020, the Court ordered that for any document filed in a case prior to a ruling on a petition for a writ of certiorari or for an extraordinary writ, or prior to a decision to set a direct appeal for argument, a single paper copy of the document may be submitted on 8½ x 11 inch paper. The filer may choose to format the document under the standards set forth in Rule 33.2 (in which case the page limits of Rule 33.2 apply), or under the standards set forth in Rule 33.1 but printed on 8½ x 11 inch paper (in which case the word limits of Rule 33.1 apply). A single copy of petitions for rehearing may also be filed on 8½ x 11 inch paper as outlined above.

The Court's order of April 15, 2020, also identifies certain categories of documents that, if filed through the Court's electronic filing system, need not be submitted in paper form at all. Those categories are: (1) motions for an extension of time under Rule 30.4; (2) waivers of the right to respond to a petition under Rule 15.5; (3) blanket consents to the filing of amicus briefs under Rules 37.2(a) and 37.3(a); and (4) motions to delay distribution of a cert petition under the Court's Order of March 19, 2020. These types of filings should be filed electronically in cases governed by Rule 34.6, although other types of documents in those cases should still be filed in paper form only. Filers not authorized to file documents through the Court's electronic filing system should continue to send a single copy of such

documents to the Clerk's Office.

The Court's order of April 15, 2020, also encourages parties to reach agreement among each other to serve filings through electronic means only, eliminating the need for paper service.

Filing Deadlines

On March 19, 2020, the Court extended the deadline to file petitions for writs of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This is the maximum extension allowed by statute and rule, so the Court will not docket extension requests with respect to cert petitions covered by this order.

The Court's order of March 19, 2020, also addresses other types of extension requests in existing cert-stage cases, noting that they will ordinarily be granted by the Clerk's Office where the request is reasonable and based upon difficulties relating to COVID-19. The order also authorizes the filing of motions to delay distribution of a cert petition to allow the petitioner time to file a reply brief; such motions are not contemplated by the Court's Rules because Rules 15.5 and 15.6 provide that distribution and consideration of the petition will not be deferred pending receipt of a reply. Motions to defer distribution of a cert petition in these circumstances may be presented in the form of a letter to the Clerk under Rule 30.4. At this time, the Clerk's Office will not send letters to the parties reflecting the result of such Rule 30.4 extension requests, but the results will be reflected on the public docket for the case in question.

While the Court building is closed to the public in light of COVID-19, this closure does not itself affect filing deadlines under Rule 30.1.

Case Distribution and Conference Schedules

The Court is continuing to consider cert petitions and other documents at its regularly scheduled conferences, and order lists addressing the results of those conferences are also being issued. The schedule for the distribution of petitions for

conference consideration is also unaffected.

Delivery of Documents to the Clerk's Office

Filings to be hand-delivered to the Supreme Court Building may be directed to the North Drive on Second Street. Until further notice, all such filings are being directed first offsite for screening before being delivered to the Clerk's Office. In light of health concerns relating to COVID-19, the Court is temporarily suspending its practice of allowing filings delivered to the North Drive in an open container before 2:00 p.m. to be sent to the Clerk's Office on the same day as delivery. It may take up to two days for documents arriving at the North Drive to be physically delivered to the Clerk's Office. Parties are strongly encouraged to send filings by mail or commercial carrier rather than by hand-delivery. In unusual circumstances where especially fast docketing of a particular document is needed, contact the Clerk's Office.

Oral Argument

The Court has announced that oral arguments that had been scheduled for the March and April 2020 argument sessions have been postponed. Some of the cases that had been scheduled for March and April have been rescheduled for telephonic argument in May. The remainder of the cases that had been scheduled for March and April will be scheduled for argument during the October 2020 Term.

Clerk's Office Staffing

While the Clerk's Office remains in operation, staffing in the building is substantially reduced in order to protect the health and safety of employees. If you need to speak to someone in the Clerk's Office, please leave a detailed voicemail; every effort will be made to return calls and emails promptly.

C

Federal Express shipping receipt, December 11, 2021

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Please see the Court's website for our current status of operations - <https://www.supremecourt.gov/announcements/COVID-19.aspx>

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