SUPREME COURT OF THE UNITED STATES
October Term, _____

MICHAEL JACE,
Petitioner,

v

THE STATE OF CALIFORNIA,
Respondent,

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22-6186

PETITION FOR REHEARING ON
PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES TO ACTION

1. Ron Davis, Warden

2. The State of California

CORPORATE DISCLOSURE

There is no parent or publicly held company owning 10% or more of corporation stock.

INTRODUCTION

On November 17, 2022, Petitioner filed a Petition for Writ of Certiorari, case no. 22-6186, that consisted of two questions; (1) Is Rule 60(b) available as a means of providing relief to an individual who missed the appellate deadlines in Rule 4(a)(1) and Rule 4(a)(5)?

(2) Can the State rebutt the "look through" presumption without having fully adjudicated the case?

The Petition for Writ of Certiorari was denied on February 21, 2023. Pursuant to United States Supreme Court Rule 44.2 Petitioner is requesting a Rehearing of said Writ.

INTERVENING CIRCUMSTANCES OF SUBSTANTIAL/ CONTROLLING EFFECT OR SUBSTANTIAL GROUNDS NOT PREVIOUSLY MENTIONED REGARDING QUESTION #1

"The Supreme Court 'has long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional.' Bowles v Russell, 551 U.S. 205, 209, 127 S. Ct. 2360, L.Ed. 2d 96 (2007). But the Supreme Court has also recognized that a district court's authority to provide relief from judgment includes the authority, in certain circumstances, to vacate and reenter a judgment to restore the opportunity to appeal. See Hill v Hawes, 320 U.S. 520, 64 S. Ct. 334, 88 L. Ed. 283(1994). The Federal Rules have been amended since Hill, and some of these amendments limit the relief available to parties who fail to timely appeal due to lack of notice that judgment was entered." Washington v Ryan, 833 F. 3d 1087.

But Petitioner's case, as was Washington's case, is not a lack-of-notice case, "and Congress has neither amended the rules nor enacted a statue to abrogate the district court's authority to vacate and reenter judgment where other grounds support a Rule 60(b) motion... In Hill the Supreme Court recognized that district court authority to vacate and reenter judgment includes the authority to do so for the purpose of restoring the opportunity to appeal. This is consistent with Klapprott v United States, 335 U.S. 601, 615(1949) 'recognizing that Rule 60(b) vests power in courts adequate to enable them to vacate judgments whenever such action is approiate to accomplish justice.' " Washington, 833 F. 3d 1087, citing Tanner v Yukins, 776 F. 3d 434, 441(6th Cir. 2015).

"Perez v Stephens, 745 F. 3d 174, 177(5th Cir. 2014)... created a split. The Ninth Circuit had previously held in Mackey v Hoffman, 682 F.3d 1247(9th Cir. 2012), that Bowles did not bar a district court from granting relief pursuant to Rule 60(b)(6) from the time limits in Rule 4(a)(1) and Rule 4(a)(5) because 'Mackey [sought] relief pursuant to Rule 60(b)(6) to cure a problem caused by attorney abandonment and not by a failure to receive Rule 77(d) notice.' " Tanner, 776 F.3d 434 (2015).

But in Petitioner's case no. 22-55241, filed June 24, 2022, the Ninth Circuit cited United States v Winkles, 795 F.3d 1134 (2015), "We have repudiated, however the practice of vacating and reentering judgments to reopen the time for appeal as a remedy for lack of notice." The controlling factor in Petitioner's case had nothing to do with lack of notice as in Winkles. He was

requesting relief under Rule 60(b) to "restore the right to appeal" And his untimely filing was per Fed. R. App. P. 4(a)(5) as the Ninth Circuit stated in case no. 21-55915, filed December 14, 2021. In the judgment entered December 14, 2021, the court relies on Vahan v Shalala, 30 F.3d 102, "The district court had no discretion to grant an extension beyond the time provided by Rule 4(a)(5) and 4(a)(6), and this court has no authority to re-establish the date on which final judgment was entered. To hold otherwise would circumvent the jurisdictional nature of Rule 4(a)." The controlling factors in Petitioner's case are very similar to those in Tanner, 776 F.3d 434, 441(6th Cir. 2015) and Davis v United States, 2021 U.S. Dist. LEXIS 108939, where relief was granted under Rule 60(b), therefore the Ninth Circuit "ha[d] jurisdiction [and] it also ha[d] a 'virtually unflagging obligation...to exercise' that authority." Reyes Mata v Lynch, 576 U.S. 143 at 150.

The decision(s) denying relief to Petitioner, as is available him per Rule 60(b), is contrary to the solid line of case law recognizing that district courts have the ability to restore appeal rights, in limited circumstances, by vacating and reentering judgment. And is also contrary to United States Supreme Court precedent as previously cited.

INTERVENING CIRCUMSTANCES OF SUBSTANTIAL/ CONTROLLING EFFECT OR SUBSTANTIAL GROUNDS NOT PREVIOUSLY MENTIONED REGARDING QUESTION #2

"On §2254 review of a state court decision, the reviewing court faces a crucial threshold question: whether the state court

actually adjudicated the defendant's claim on the merits. If the court determines that the state did so, AEDPA deference applies, ...See...Brown v Smith, 551 F.3d 424, 428(6th Cir. 2008). If, however, the state court did not adjudicate the claim, the claim is reviewed de novo for questions of law, and for clear error as to questions of fact." English v Berghuis, 900 F.3d 804 citing Williams, 568 U.S. at 301."

"[N]ot all federal habeas claims by state prisoners fall within the scope of §2254, which applies only to claims 'adjudicated on the merits in State Court proceedings.' " Robinson v Howes, 663 F.3d 819(6th Cir. 2011)

"The Supreme Court has explained that '[a] judgment is normally said to have been rendered on the merits only if it was delivered after the court...heard and evaluated the evidence and the parties' substantive arguments.' Williams, 568 U.S. at 302... Williams further clarified that 'merits' means the 'intrinsic rights and wrongs of a case'- as to substance, not form..." English 900 F. 3d 804(6th Cir. 2018)

"If a federal claim is rejected as a result of sheer inadvertance, it has not been evaluated based on the intrinsic right and wrong of the matter... By having us nevertheless apply AEDPA's deferental standard of review in such cases, ...would improperly excise §2254(d)s on-the-merits requirements." Johnson v Williams, 568 U.S. 289

"In Richter, 562 U.S., at 97, 131 S. Ct. 770, 783, 178 L.Ed 2d 624, 638 [this Court] held that §2254(d) 'does not require a state court to give reasons before its decision can be deemed to

have been 'adjudicated on the merits.' Rather [this Court] explained, '[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state law procedural principles to the contrary.' " Williams, 568 U.S. 289 at 298

Petitioner claims there is indication that the state court has not adjudicated any of his Ineffective Assistance Of Counsel claims on their merit, which include state-law procedural principles that made the sheer inadvertence all the more likely. Petitioner attempted to present his IAC claims in a state habeas corpus during the direct appeal because the state appointed attorney refused to present any of them. App. A. When presented to the state court they were denied. Petitioner believes the California Court of Appeals gives strong grounds for overcoming the presumption of adjudication in ther denial dated February 21, 2018. The opinion fails to reach the merits of Petitioner's claims. App. B The order cites People v Clark, 3 Cal. 4th 41 at 173, a California Supreme Court ruling that states at 173, "The general rule that a defendant who is represented by an attorney will not be recognized by the court in the conduct of his case applies to the filing of pro se documents on appeal. Because of the undersirability of fruitlessly adding to the burdens of this court the time consuming task of reading pro se documents which are not properly before us,..."

"The maxim is that silence implies consent, not the opposite --- and courts generally behave accordingly, affirming without fur-

ther discussion what they agree, not when they disagree," YIst v Nunnemaker, 501 U.S. 797 at 804. It would stand to reason that the California Supreme Court followed their own ruling in Clark, 3 Cal. 4th at 173 and not read either of Petitioner's pro se Petitions For Review, particularly in light of the fact that both of Petitioner's pro se Petitions For Review were given the same number S258670 as the state appointed attorney's Petition For Review.

Furthermore the Petition For Review prepared on behalf of the Petitioner by the state appointed attorney, App C, which contained a single issue of IAC was prepared in compliance with Rule 8.508(3)(A). This required the appointed attorney to declare that there were no grounds for the California Supreme Court to review under rule 8.500 thus further diminishing the already minuscule possibility of the petition being accepted for review.

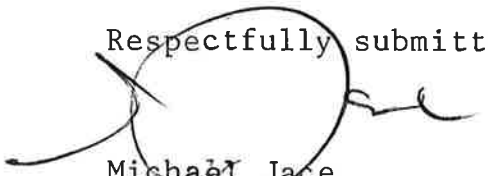
In addition the February 21, 2018 order of the Court of Appeal states, "Petitioner does not rely on any matters that are not part of the record on appeal." This clearly contradicts what Petitioner was told by state appointed attorney. See letter dated October 1, 2017, App A., which states, "[w]hen claims require evidence outside the record you have to file a petition for writ of habeas corpus..." One of the claims of IAC which are outside of the record, App. D, and that was submitted to both the Court of Appeals and the California Supreme Court is a structural violation.

CONCLUSION

Based upon the aforementioned it is petitioner's hope that

this Court would change its position and find there is now a reasonable likelihood it will grant certiorari.

Respectfully submitted,



Michael Jace
Petitioner

Dated MARCH 16, 2023

CERTIFICATE

This Petition for Rehearing of Petition for Writ of Certiorari is restricted to the grounds specified in Rule 44 (2) of the United States Supreme Court Rules. It is also presented in good faith and not for delay.

MARCH 16, 2023

God Bless,

Michael Jace