

JUN 12 2023

OFFICE OF THE CLERK

No. 23-5283

IN THE  
SUPREME COURT OF THE UNITED STATES

CLARENCE L. HEARNS — PETITIONER  
(Your Name)

VS.

Cal TRAHUNE, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Clarence L. Hearns

(Your Name)

900 Quebec Avenue [ID # K-10567]

(Address)

Corcoran, CA 93212

(City, State, Zip Code)

No phone  
(Phone Number)



**QUESTION(S) PRESENTED**

**1.**

**WHETHER DISMISSAL WITHOUT PREJUDICE OF FEDERAL  
HABEAS CORPUS PREMATURELY FILED IN ORDER TO  
EXHAUST ALL AVAILABLE STATE REMEDIES COUNTS AS A  
FIRST AND ONLY ALLOWABLE FILING UNDER AEDPA ?**

**2.**

**WHETHER RULE 60(b) MOTION IS PROPER LEGAL VESSEL  
TO CORRECT OMISSION OF FIRST FEDERAL HABEAS CORPUS  
FROM THE PROCEDURAL HISTORY OF NEW HABEAS CORPUS  
UNDER THE NUNC PRO TUNC DOCTRINE ?**

**3.**

**WHETHER APPELATE COURT'S USE OF WRONG  
STANDARD OF REVIEW IS REVERSABLE ERROR ?**

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

### Respondent Representative:

Ms. Suzann E. Papagoda, dba  
Deputy Attorney General @  
300 S. Spring Street ste. 5000  
LosAngeles, CA 90013-1230

## RELATED CASES

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>GAGNON v. UNITED STATES</u> , 193 U. S. 451	5.
<u>COOTER &amp; GELL v. HARTMARX Corp.</u> , 496 U. S. 384 (1990)	5.
<u>STEWARD v. MARTINEZ-VILLAREAL</u> , 523 U. S. 637.	5c
<u>SLACK v. McDANIEL</u> , 529 U. S. 473 (200)	4a, 5c
<u>HIGHMARK Inc. v. ALLCARE HEALTH Mgmt. Sys.</u> , 572 U.S. 559(2014)	5.
<u>LYNCH v. BLODGETT</u> , 999 F. 2d 401 (9th Cir. 1993)	4a
<u>U.S. v. Winkle</u> , 795 F. 3d 1134 (9th Cir. 2015)	4a

### STATUTES AND RULES

FEDERAL RULES OF CIVIL PROCEDURE (FRCP) rule 60(b)	4a, 5, 5b,
FEDERAL RULES OF EVIDENCE (FRE) rule 201	5a
GENERAL ORDER (Housekeeping rule) 05-06 [§ 2.2]	5

### OTHER

Cal. Penal Code § 1538.5	4
Cal. Evidence Code § 402	4

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## INDEX TO APPENDICES

APPENDIX A 9th Circuit ORDER Denying Appeal dated 02-17-23

APPENDIX B Central District of California Order Denying Rule 60(b) Motion.

APPENDIX C Rule 60(b) Motion filed 04-18-22

APPENDIX D CDCR Prison Inmate Legal Mail Log for Clarence L. Hearns Prison No. K-10567.

APPENDIX E Rule 201 (e) Motion requesting Court to Take Mandatory Judicial Notice.

APPENDIX F 9th Circuit ORDER Directing District Court to GRANT Petitioner's request to reopen time to file NOA

APPENDIX G ORDER Denying Motion for Reconsideration dated 03-29-23

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at 22-55788; or,  
[ ] has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at CV 00-2044-PSG (JEM); or,  
[ ] has been designated for publication but is not yet reported; or,  
 is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 17, 2023.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 29, 2023, and a copy of the order denying rehearing appears at Appendix G.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved in this case are:

The Mode of Criminal Prosecution illustrated in the Sixth Amendment  
to the U.S. Constitution; and

Also the Due Process Clause of the forteenth Amendment of the  
U.S. Constitution.

Federal Rules of Civil Procedure Rule 60 (b)

Nunc Pro Tunc Doctrine

## STATEMENT OF THE CASE

1. On February 28, 1996, Petitioner as a Pro-Per defendant filed a motion under penal code § 1538.5 seeking an evidentiary hearing pursuant Evidence Code § 402. The motion was summarily denied solely on the arguments of the prosecuting attorney's words, that there was no legal basis for suppression of evidence.
2. Petitioner was subsequately convicted and sentence to life in prison, based on evidence stemming from the fruit of the poisoness tree i.e. Pretextual Arrest.
3. A timely Appeal was filed in Los Angeles Superior Court. And the case was sent to California Appellate Court for Review.
4. On August 29, 1996, Petitioner filed a Federal writ of Habeas Corpus, 96-cv-06026. Which was dismissed as premature with leave to exaust all available state remedies, before returning to district court.
5. On February 28, 2000, Petitioner file a new federal writ of habeas corpus, 2:00-cv-02044-FMC-Mc. The magistrate judge, in both these federal habeas proceedings, led Petitioner to believe the magistrate was attempting to relate the new habeas (2:00-cv-02044) back to the original habeas court (96-cv-06026). But in fact he was only attempting to relate the new habeas to a pending civil suit, CV-95-71886 R (Mc).
6. On March 13, 2002, district Judge Florence Marie Cooper dismissed as barred by the statute of limitation, under the AEDPA, habeas[00cv02044]
7. On April 18, 2022, Petitioner file a motion to reopen the habeas proceedings, in order to correct the procedural history.

See APPENDIX "C"

STATEMENT OF THE CASE (page 4a)

8. On or about June 27, 2022, Petitioner had delivered to the Respondent and the court (3) three page formal REQUEST FOR JUDICIAL NOTICE, motion regarding the unrecognized earliest habeas filing court docket no. 96-cv-06026 GHK-Mc. Appendix "D" Inmate Legal Mail Log entry for outgoing mail dated 06-29-2022. And Appendix "E" copy of motion for judicial notice. Motion not Returned
9. On May 5, 2022, the court had entered a judgment summarily dismissing Petitioner's Rule 60(b) motion, unbeknown to any parties to the action. Petitioner did not find out that the habeas proceedings had been closed until the prison law libraian did a check on the status of petitioner's case, in August of 2022.
10. After multiple refusals by the district court to give Petitioner a copy of the final order document 72. As well as the district court's refusall to reopen the time to appeal, based on non-delivery of the final order.
11. The Ninth Circuit issued an order directing the lower court to: "allowing the court to rule on appellant's August 10, 2022, motion, including whether the motion was timely filed..." See full text in Appendix "F" 9th Circuit ORDER (dated Dec. 1, 2022)
12. On appeal, the 9th Circuit order no briefing. And instead issued a summary "denial" citing United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015); Slack v. McDaniel, 529 U.S. 473, 484 (2000) Lynch v. Blodgett, 999 F.2d 401, 403 (9th Cir. 1993). see Appendix A
13. On March 29, 2023, the 9th Circuit issue its last order in this action, in response to petitioner's timely filed motion for re-consideration, denied the request. Appendix G

## REASONS FOR GRANTING THE PETITION

1. Dismissal without prejudice of a habeas Application, with specific instruction to "return to court with new petition" must be read as refer to returning to the same judge.

Under our current procedurally based judicial system, it is envisioned that all legal proceedings are governed by a preset standard of rules. In the case of a habeas applicant returning to a federal court, this action is covered by one rule that is material to this case. That rule is General Order 05-06 (formally known as 224). In that House Keeping rule at § 2.2, it mandates that: "...petitions... filed by a party who previously filed any such case shall be directly assigned to the judge to whom the initial case was originally assigned for civil case credit." emphasis added

This assignment was not done. And this has been the central and fundamental premiss of the present litigation. And despite all the evidentiary, documentary and case citations present in the submitted Rule 60(b) motion (Appendix "C"), the district court failed and refused to render a proper assessment of the applicable law or evidence.

"The abuse of discretion standard does not preclude an appellate court's correction of a district court's legal or factual error: 'A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.' Cooter & Gell v. Hartmarx Corp., 496 U. S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)"  
Highmark Inc. v. Allcare Health Mgmt. Sys., 572 U.S. 559 (2014)

Additionally, the court failed / refused to set the case for an evidentiary hearing as requested in the body of the motion. see Appendix "C" page 1 lines 12-13 pursuant to citations of rule 201 and Local rule 7-6.

Petitioner formally requested the court to take judicial notice under FRE rule 201, of the complete court docket in case number 96-cv-06026 GHK-Mc. And of course, the court was supplied with a copy of the docket, as is required under rule 201(d), (e): Judicial Notice (d) When mandatory — A court shall take judicial notice if requested by a party and supplied with the necessary information. (e) Opportunity to be heard — A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter notice...

This request was twice summarily DENIED. The first time was in the filed rule 60(b) motion. And the second time was with a formal motion for judicial notice. see copy APPENDIX E. The court in this matter both refused to file the motion or return it to Petitioner. see INMATE LEGAL MAIL LOG outgoing mail entry date June 29, 2022, page 22 of 22, entries 2 and 4 from top right side, outgoing mail section.

This failure of the court to take judicial notice appears in Petitioner's request for COA. Though due the district court's refusall to issue a copy of the final order. Petitioner had to submise that the court had not taken judicial notice.

The order itself makes no mention of being requested to take judicial notice. And in fact states without any citation from the record of case number 2:00-cv-02044-PSG-JEM, that:

"On March 11, 2020, Petitioner filed a 'Motion to Reopen Habeas Corpus Proceedings (2254) pursuant FRCP 60(b)'... On April 16, 2020, the Court entered an order denying the First Rule 60 Motion ('First Denial Order'). The Court found that there was no basis for vacating or reconsidering the judgment because, *inter alia*, Petitioner's arguments were based on facts and information known to the Court and the parties at the time the judgment was entered." (p.2 lns 1-6)

Notice that the court only quotes the "First Rule 60 Motion" and "First Denial Order", from the March 11, and April 16, 2020 filings. This is done because none of the remaining statement is true.

The issue raised in the March 11, 2020 Rule 60(b) Motion was the earlier wrongful filing of a NOA on a non-appealable Order Denial of a COA. An action that dislodged the habeas action from Appellate court review. None of which was relevant or material to the issue of the court's failure to relate back these habeas proceedings to the original habeas court. And the wrongful filing was done by the Clerk, not petitioner.

This misstates petitioner's argument. In that it states without quoting from the Motion. "In the instant Motion, Petitioner argues that the case should have been assigned to a different district judge and, therefore, the judgment is void." Appendix B pg. 3, lns. 13-14. This simply was not the argument advanced in the Rule 60(b) Motion. The Petitioner's argument was and is as quoted below:

Representations of Petitioner, in rule 60(b) motion

13)... Magistrate Mc Mahon failed to then assign the habeas [2:00-cv-02044] to the original habeas court district judge King. Who presided over the first habeas, case no. 2:96-cv-06026 GHK-Mc, even though he was the magistrate judge on both cases. And (he) was using General Order 224, Now known as (NKA) General Order 05-06. Which mandates that the newly file Habeas be assigned to the initial habeas district judge. see Exhibits D & E.

page 2 rule 60(b) Appendix "C"

GROUND FOR VACATING DUE TO INTEGRITY OF PROCEEDINGS FLAWED

16) Petitioner's Due Process Right to have Petition [2:00-cv-02044] assigned to original habeas judge was violated, per General Order 224.

see Appendix C page 3 section 16 of Rule 60(b) Motion.

For the record, what petitioner was attempting with the filing of THE RULE 60(b) MOTION, to introduce now the omitted "Original Habeas Corpus, [96-cv-06026] into the second Habeas Corpus' [2:00-cv-02044] procedural history, NUNC PRO TUNC. Which would have garnered Petitioner the August 29, 1996 filing date of the first habeas Corpus [96-cv-06026].

Nunc Pro Tunc amending of court filings has been done since the

Supreme Court decided GAGNON v. UNITED STATES, 193 U. S. 451.

"The power to amend, too, must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission or some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein."

Gagnon, @ 457

This is exactly on point with what petitioner attempted to do.

Is it not time to apply this Nunc Pro Tunc Doctrine to the modern day AEDPA ?

Moving on to the Ninth Circuit Review on appeal of this case. We look at their reviewed the case under the SLACK v. Mc Daniel, 529 U. S. 473. Slack dealt with the issues of second or successive petitions and whether a rule 60(b) motion fits into the category of correcting a mistake made. Which is an understandable application of this case in this appeal. Except for the fact that there was one case actually cited in Slack, that better fits this case at bar. That case is STEWARD v. MARTINEZ-VILLAREAL, 523 U. S. 637.

In this case the court dealt with a petitioner who filed multiple federal writs. With the first of which was a mixed petition. With the court dismissing an unexhausted 8th Amendment Claim. And the Supreme Court later rule that the district and the court of appeals were wrong in not relating his latest habeas filing and his first as one in the same.

"This may have been the second time that respondent had asked the federal courts to provide relief on his Ford claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable application for federal habeas relief."

STEWARD, @ 643.

"The abuse of discretion standard does not preclude an appellate court's correction of a district court's legal or factual error: 'A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."

Highmark Inc. v. Allcare Health Mgmt. Sys. 572 U.S. 559.

In closing, NONE of the cases citing in these proceedings fits squarely on the factual or legal contentions here. And without the guidance of this Supreme Court on the proper application of the Doctrine of Nunc Pro Tunc on omission of premature habeas' dismissals from a subsequent habeas history. The lower courts and the citizens at large will continue to function in this Opaque realm of dysfunction.

THE LAW CANNOT FAIL IN DISPENSING JUSTICE

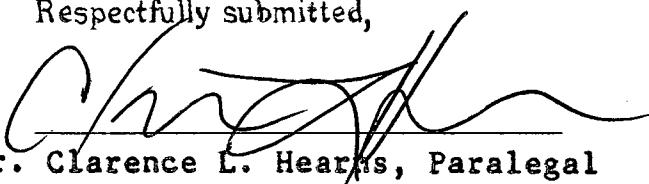
&

THE LAW WILL ALWAYS GIVE A REMEDY

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Mr. Clarence L. Hearns, Paralegal

Date: June 11<sup>th</sup> 2023