No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LEWIS ARMSTRONG, Petitioner,

vs.

UNITED STATES, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Lewis Armstrong, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs, and to proceed in forma pauperis. Petitioner's counsel in the district court and the Court of Appeals were all appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(1)(A), (b). This motion is made pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

Dated: January 24, 2024

/S/ Myra Sun
MYRA SUN
Attorney at Law

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LEWIS ARMSTRONG, Petitioner,

vs.

UNITED STATES, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition is concerned with the denial of a new trial motion under Rule 33(b)(1) of the Federal Rules of Criminal Procedure, filed well after the rule's 14-day deadline, which raised questions of the defendant's competency to rationally assist counsel in his defense at the trial.

The question is: May the district court find excusable neglect on the part of several counsel over the course of the litigation, applying the four-factor test set out in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), based on just one *Pioneer* factor – the length of time that has elapsed between judgment and the filing – when most circuits require consideration of all the factors, and some circuits place more emphasis on a different *Pioneer* factor, the litigant's and his counsel's reason for the delay, but none have found that length of time alone is a basis for finding non-excusable neglect?

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

Lewis Armstrong petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I. OPINION BELOW

The unpublished memorandum decision by the United States Court of Appeal for the Ninth Circuit is attached as Appendix 1. The district court's oral ruling, and its written ruling incorporating it, is attached as Appendix 2.

II. JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 23, 2023, App. 1 at 1. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Am. V, provides that "No person shall…be deprived of…liberty…, without due process of law…".

****

Fed. R. Crim. Proc. 33 provides:

Rule 33.

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) *Newly Discovered Evidence.* Any motion for new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds.* Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

IV. STATEMENT OF THE CASE

A. Mr. Armstrong's competency from before trial through sentencing.

In October 2013, Lewis Armstrong was indicted under 18 U.S.C. §2241(a) of one count of aggravated sexual abuse of his great-niece A.J., who was then six years old. ROA 13:229, DC-Dkt. 114:3.[1]

Mr. Armstrong, then aged 48 and a member of the Lummi Indian nation, has lived a hard life. He experienced a childhood and adolescence with his alcoholic mother and stepfather, and suffered harsh physical abuse by his stepfather. Leaving home at around age 13 or 14, he was often without a home, engaged in heavy alcohol use, rarely had a job, and garnered a criminal history in which alcohol played a major role. Dkt. 12:9.

Family members told Mr. Armstrong, and he has himself sensed, that he has long been attuned to the presence of otherwise invisible spirits. When he was a small child, family told him that he saw a green-colored demon around his mother's leg. His grandmother told him she saw an aura around him that reflected the presence of his protective spirit guardian. Mr. Armstrong described

[1] "ROA" refers to the record on appeal in the Ninth Circuit. "DC-Dkt." refers to the district court docket, by item number and page. "Dkt." Refers to the docket in the appeal below, *United States v. Armstrong*, 9th Cir. No. 22-30095, also by item number and page.

to one of his lawyers that he has heard a spirit voice advising him to do things that protected him from harm – for example, while he was in his early 20s, he was walking on a road overpass and heard a voice telling him to duck, which, he later realized, was a spirit that stopped him from being seriously injured. The spirit also warned Mr. Armstrong against doing things, which he did not always heed – such as when a voice told him not to meet with a friend; .he friend committed a robbery, and Mr. Armstrong got involved in it too. Dkt. 12:9.

After the date of the charge in the indictment, influence from spirits affected Mr. Armstrong's behavior. A spirit voice told him to go to the park, that something good would happen; he was arrested by local authorities for the conduct later charged in the indictment. While he was jailed, staff observed that he showed "slight indications of hallucinations," and noted that he reported "hearing spirits and seeing movements in the corners of the room since childhood." Mr. Armstrong was released from local custody, but his federal arrest followed. Dkt. 12:10.

Mr. Armstrong's sense of having seen spirits continued at his 2014 trial as well. On the first day, he described telling one of his lawyers, Tenney, that he had seen a female spirit in a corner of the courtroom – a woman in all gray, with gray skin, like a black-and-white television image, who smiled at him but later disappeared. He thought the spirit had been trapped in the courtroom. Dkt.

12:11.

On the second day of trial, the official transcript shows that the prosecutor asked few open-ended questions of A.J. Her direct testimony was that she was staying at her grandmother's house one night, and her uncle, Mr. Armstrong, touched her "vagina" with "his tongue" while she was in his bed, in his room. Having undressed her, he then re-dressed her and put her in the living room, where she had been before. DC-Dkt 69:54-56. On cross-examination, A.J. said she had been sleeping in a bed in her father's room with her sister and her father, and another child sleeping on the floor. While she was asleep – she remained asleep during the incident – Mr. Armstrong came in, picked her up, and carried her to his room. As he was taking her away she spoke to her father, saying Mr. Armstrong was "licking my privates," but her father did not awake. It was then that Mr. Armstrong brought her to his room, removed her clothes, and touched her "vagina," then re-dressed her and put her out in the living room, on the couch. Later, A.J. was still asleep when she felt her mother picking her up and carrying her to the car to take her home In the morning, she talked to her mother about what had happened during the night. DC-Dkt. 69:61-65. She later also spoke to a law enforcement officer and the prosecutor about it. DC-Dkt. 69:66-67. Also according to the official trial transcript, there was testimony from a forensic scientist, Kristina Hoffman, who testified to obtaining DNA from A.J.'s

underwear belonging to a "major male" component," and, from a different male, a second trace component. She compared those DNA samples to the DNA of three known males, including Mr. Armstrong. His sample matched the "major male" component; none of the other men's samples matched either of the two samples from the underwear. DC-Dkt. 69:111-116. According to the transcript, Tenney cross-examined Hoffman about various limitations on the conclusions that could be derived from the type of testing Hoffman did; but Deutsch, his other attorney, did not cross-examine Hoffman or speak during her testimony. DC-Dkt. 69:118-123.

On the third day of trial, in March 2014, Mr. Armstrong was convicted. ROA 239.

A few months later Deutsch and Tenney, Mr. Armstrong's court-appointed trial counsel – all of his lawyers have been court-appointed – sought to be relieved, and were relieved. DC-Dkt. 72. Deutsch had represented Mr. Armstrong throughout the case; Tenney joined the defense team a little less than two months before trial; both were federal defenders. DC-Dkt. 3, 21. Neither of them ever raised with the court the issue of Mr. Armstrong's competency before trial, such as about plea negotiations or whether to testify, and they did not do so after.

Mr. Armstrong's next counsel, Bentley, sought and obtained an evaluation

bearing on his client's competency to proceed to sentencing. It was based on counsel's declaration containing Mr. Armstrong's experiences with spirits, ROA 210-218, and Mr. Armstrong's own declaration about testimony he heard at the trial – at odds with the official transcript. ROA 222-228. In a declaration, he described hearing A.J. have the following exchange with the prosecutor, showing she was dreaming about what she said happened:

> Q [the prosecutor]. Do you remember this?
>
> A. [A.J.] I remember it very good.
>
> Q. Good. Could you please tell us?
>
> A. I remember it real good.
>
> Q. OK, then please tell us, will you?
>
> A. I was being taken from my dad's bed. I see him, yeah, I see him he is sleeping, oh, there, Anna she's sleeping, too. They must not be able to feel him like I do. Yeah –
>
> Q. I want you to tell us about the couch.
>
> A. (No answer.)
>
> Q. You do remember the couch, don't you?
>
> A. (Pause.) Oh, yeah, I was taken from there. I was taken to his room and he had me on my back and licked me. Then he took me back to the couch and did it again.

Q. Did what again?

A. Same thing.

Q. Same thing what?

A. Same thing as the room.

ROA 222.

Mr. Armstrong also said in his declaration that Deutsch sought permission to cross-examine Hoffman, after Tenney's cross-examination, that the request was granted, and this exchange followed

Q. [Deutsch] How much DNA was found?

A. [Hoffman] I found more DNA than I could count.

Q. [Deutsch] Could you give an estimate of how many DNAs there were?

A. [Hoffman] There was so much contamination that I would need a buckle swab from each individual in order to answer. ROA 222-223.

Bentley's request for a competency evaluation was granted. He next, sought to be relieved, and his request was granted. DC-Dkt. 88, 98. Black, Mr. Armstrong's next lawyer, obtained an expansion of the evaluation's scope to the retrospective question of whether Mr. Armstrong was competent at his recently-concluded trial. DC-Dkt. 102.

The psychiatric evaluation, completed eight months after the verdict,

included information about Mr. Armstrong's decision-making process on possible dispositions of the case: according to the evaluator, Mr. Armstrong understood from Deutsch that, post-verdict, the government was offering to agree to a sentence lower than the applicable 30-year mandatory minimum if the defense would waive any appeal. He asked a spirit to tell him, with a sign, what the appeal's outcome would be – "specifically, for a shampoo bottle to be moved [by the spirit]. The morning after he made this request, he found the shampoo bottle in his sink. His cellmate denied moving it. Mr. Armstrong thus believe[d] everything [would] be okay in his appeal." He rejected the proposal. ROA 284.

The evaluation also included Deutsch's and Tenney's comments about Mr. Armstrong. They knew there was, in Deutsch's words, "something wrong" with their client. Both she and Tenney felt "his thoughts were not 'tethered in reality.'" Deutsch was aware of Mr. Armstrong's mother's possibly having consumed alcohol while pregnant with him, and of his having been beaten as a child, speculating that he might have suffered a head injury from either fetal alcohol syndrome or from physical abuse. ROA 212, 277. Tenney acknowledged wondering about Mr. Armstrong's competency to stand trial – that he could go through the facts, but was "fixated on nutty ideas." ROA 213. And things he had said would be found in the records of his tribal court case were not

there when she investigated. ROA 213.

Both trial counsel told the evaluator they were pleasantly surprised that Mr. Armstrong was non-hostile during trial. ROA 277. The evaluation does not address whether Tenney corroborated or remembered his description of the grayish spirit in the courtroom. Nor does it show whether they were aware of Mr. Armstrong's encounters with detention center staff, of having suicidal thoughts, before trial. He also described to detention center staff that he actually tried to choke himself overnight between the second and third days of trial. About two weeks after the verdict, when staff learned he had been talking of suicide to other inmates, and that he had written a letter to his sister about killing himself, he was assessed again, and was found calm. ROA 276-277.

The competency evaluation found Mr. Armstrong competent both retrospectively, at the trial, and prospectively, for sentencing. His descriptions of his contacts with spirits were viewed as "culturally sanctioned." ROA 278-279.

Black also sought to be relieved, but the request was denied. DC-Dkt. 112. At the sentencing hearing about 14 months after the verdict, Black corroborated Mr. Armstrong's allusion to post-verdict sentence disposition proposed by, referencing post-verdict "discussions about the possibility of an agreed resolution." He viewed Mr. Armstrong's rejection of this opportunity as being "likely the result of mental health issues, a long history of substance abuse,

and a misunderstanding of the criminal justice system and appellate process, rather than an expression of arrogance or disdain." ROA 201-202.

Black did not, however, ask for a competency hearing, none was held, and the district court did not pass on Mr. Armstrong's competency.

Rather, at the sentencing hearing the district court elicited information from government counsel about failed attempts to negotiate a mitigated sentence, as the federal statutory mandatory minimum was likely much higher than a tribal sentence would have been. ROA 13:176-178, 1821-83. In its oral ruling, the district court expressly mentioned that these discussions "ha[d] not borne fruit." ROA 188. In imposing sentence, it found the statutory mandatory minimum 30-year penalty to be cruel and unusual punishment, and imposed a 20-year sentence instead. 188-189, 191-199.

For his part, Mr. Armstrong spoke in his allocution about "the way that the prosecutor has been able to remove stuff from the court records that prove that this was something that could never have happened[.]" ROA 175.

B. Mr. Armstrong's competency during his direct appeals

After the sentencing, the defense appealed the verdict, and the government cross-appealed from the sentence. DC-Dkt. 118, 125. These proceedings took nearly seven years to resolve, because the issue of Mr. Armstrong's competency

again arose. The government proposed to leave the 20-year sentence in place in exchange for the dismissal of both appeals. This prompted a competency hearing request by appellate counsel and a remand to the district court. ROA 166-170. A hearing resulted, based on two more psychiatric evaluations, by a second Bureau of Prisons psychiatrist and a court-appointed psychiatrist; the latter testified at a competency hearing – and both deemed Mr. Armstrong to be suffering from a delusional disorder and incompetent to assist counsel. ROA 113-121, 299-300, 323-327. Different appointed counsel advocated Mr. Armstrong's view, which was that he was competent. ROA 151-157. The district court found Mr. Armstrong incompetent to rationally assist his counsel with the appeal. ROA 158-162.

It was now 2018. The government withdrew its offer. The defense had appealed the incompetency finding, but this appeal was dismissed as moot, given that the government had withdrawn the offer. ROA 104-105. In 2020 the court of appeals affirmed the conviction on direct appeal, rejecting, among others, Mr. Armstrong's claim that the district court should have *sua sponte* ordered a competency hearing. ROA 100. It granted the government's cross-appeal, vacating the too-short 20-year sentence as illegal, and remanded for resentencing. ROA 102-103.

C. The motion for new trial.

It was now 2022. Before re-sentencing Mr. Armstrong's next counsel, Levy, filed a new trial motion under Fed. R. 33, claiming that Mr. Armstrong's original trial counsel had rendered ineffective assistance of counsel by not seeking a competency hearing. ROA 96-97.

The district court denied the new trial motion. It found that the failure of each of Mr. Armstrong's post-verdict attorneys to file a motion for new trial was not excusable neglect. It held:

> [T] the government noted and objected that there should be no new trial because it was not filed within 14 days after the jury verdict. That's in accordance with Rule 33(b)(1). This appeal [sic] was taken seven years after the verdict. There's no indication that there was excusable neglect on the part of the attorneys to justify granting a variance from the defendant not complying with the rule requirements of when the appeal [sic] is supposed to take place. Therefore, the court would deny the motion for retrial on that basis alone.

App. 2 at 3. The district court also reached the issue of ineffective assistance of counsel, finding there had been none. App. 2 at 4.

The Ninth Circuit, while not passing on the district court's ineffective assistance of counsel finding, did find the district court properly exercised its

discretion in denying the new trial motion. Citing *Pioneer Investment Services. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), or a Ninth Circuit case interpreting it, *Briones v. Riviera Hotel & Casino* 116 F.3d 379 (1997), it held that:

> Although the district court did not explicitly weigh the *Pioneer-Briones* factors when rendering its decision, we conclude that because the *Pioneer-Briones* factors were fully briefed by the parties, the district court presumably considered the submissions and was not required to explicitly analyze each factor on the record. See *M.D. by & through Doe v. Newport-Mesa Unified Sch. Dist.*, 840 F.3d 640, 643 (9th Cir. 2016) (citation omitted), as amended (Nov. 18, 2016) ("The district court may consider the *Pioneer* factors without discussing how much weight it gives to each."). Accordingly, the district court did not abuse its discretion in finding that Armstrong's nearly eight-year delay in bringing a motion for a new trial was not due to excusable neglect.

App. 1 at 4.

Mr. Armstrong seeks certiorari on the denial and affirmance of the denial of his new trial motion.

V. REASONS FOR GRANTING THE WRIT

A. Certiorari is needed to address a circuit split on the weight to be given the factors for determining excusable-neglect in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993).

Certiorari should be granted here to resolve a circuit divergence in the weight given the four-factor test determining excusable neglect in out-of-time filings, articulated over twenty years ago in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993).

Pioneer centered around whether excusable neglect, prompted by misinformation about the deadline, would permit an out-of-time notice-of-claim filing by a bankruptcy creditor. When this Court set out the test, it recognized the "range of possible explanations for a party's failure to comply with a court-ordered filing deadline." This range includes plainly excusable late filings attributable to unanticipated or unforeseeable events at one end, through "inadvertence, miscalculation, or negligence," and, at the spectrum's end, mindful omissions, in which "a party simply may choose to flout a deadline." *Id.* at 387-388. It concluded that the concept of "excusable neglect" is not limited to the obvious situation, "where the failure to timely file is due to circumstances beyond the control of the filer." It is, instead, a "somewhat 'elastic concept'…not limited strictly to omissions caused by circumstances beyond the control of the movant[.]" *Id.* at 391-392 (citation omitted). This view was

"strongly supported" by the treatment of the concept in the federal rules. *Id.* at 392-395.

Pioneer directed courts to apply a four-factor test to whether a proponent has established excusable neglect for an out-of-time filing: (1) the danger of prejudice to the government; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether he has acted in good faith. *Id*. In limning the third factor, the reason for delay, it disagreed with the lower court, which had emphasized the analysis primarily with respect to the role of counsel. It held instead that the "proper focus is upon whether the neglect of respondents *and their counsel* was excusable." *Id.* at 397 (italics in original).

The *Pioneer* test has been expanded to other contexts, including by this Court itself, when it signaled, three years later, that it bears on excusable neglect determinations in criminal cases. *Stutson v. United States*, 516 U.S. 193, 194-196 (1996) (per curiam) (granting certiorari, vacating, and remanding to the Eleventh Circuit to reconsider the dismissal of a notice of appeal in light of the *Pioneer* factors, where the government agreed the test applied, and where the one-day-late filing of was mailed to the wrong court). In utilizing the grant-vacate-remand procedure, this Court found it "not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the

Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Id*. at 196. It found remand appropriate given that "the Court of Appeals' decision may have been premised on the assumption, unanimously rejected by other Courts of Appeals, that more stringent rules as to filing deadlines apply to prisoners than to creditors filing claims in a bankruptcy proceeding." *Id*. at 197.

Since then, the courts of appeals have expressly applied the *Pioneer* test to post-verdict motions for judgment of acquittal and new trial in criminal cases. *See* Fed. R. Crim. Proc. 29, 33 *and*, *e.g.*, *United States v. Cates*, 716 F.3d 445, 448 (7th Cir. 2013) ("we have held that *Pioneer* applies whenever "excusable neglect" appears in the federal procedural rules); *United States v. Munoz*, 605 F.3d 359, 368 (6th Cir. 2010); *United States v. Boesen*, 599 F.3d 874, 879 (8th Cir. 2010); *United States v. Torres*, 372 F.3d 1159, 1161-1163 (10th Cir. 2004).

The Ninth Circuit has noted the standard's applicability to criminal matters in unpublished opinion. *United States v. Foster*, 1999 U.S. Lexis App. 9538 (May 14, 1999). In Mr. Armstrong's case, it did not quarrel with the *Pioneer* test's applicability, finding that the parties adequately briefed this standard. And it has generally endorsed a weighing of the factors, finding a failure to apply the correct legal standard when the district court has failed to consider some of the

factors at all. *Lemoge v. United States*, 587 F.3d 1188, 1192-1193 (9th Cir. 2009). Its standard declines to give particular weight to the reason-for-delay factor, or any other, that " the weighing of Pioneer's equitable factors [is to be left] to the discretion of the district court in every case." *Pincay v. Andrews*, 389 F.3d 853, 859-860 (9th Cir. 2004).

However, other circuits have laid out different analyses on the *weight* to be given the *Pioneer* factors. This Court in *Pioneer* laid stress on the fact that, when it comes to the *reason* for a delay, "the proper focus is upon whether the neglect of respondents *and their counsel* was excusable." *Pioneer*, 507 U.S. at 397 (emphasis in original). It has never said that this factor may outweigh the others. In a mix of cases, mostly civil, and a few criminal matters, the First, Second, Sixth, Eighth and Tenth Circuits have expressly held that "[t]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry." *Lowry v. McDonnell-Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000); *see also Sheedy v. Bankowski*, 875 F.3d 740, 744 (1st Cir. 2017); *Midland Cogeneration Venture L.P. v. Enron Corp.* 419 F.3d 115, 122-123 (2d Cir. 2005); *Munoz*, 605 F.3d at 368-369; *Torres*, 372 F.3d at 1163. The Seventh Circuit, by contrast, has decided excusable-neglect questions

based on an all-factors-equal analysis, while giving considerable weight to an appointed counsel's role in a finding of excusable neglect. *United States v. Brown*, 133 F.3d 993, 996 (7th Cir. 1998). Yet it has also, noting this split, called the reason-for-the-delay factor "immensely persuasive" in applying the test. *see In re K Mart Corp.* 381 F.3d 709 (7th Cir. 2004). *See also Midland Cogeneration Venture L. P. v. Enron Corp*. at 124 (comparing its "'hard line' to applying *Pioneer*…that emphasizes the reason for the delay" to *Pincay*, "applying [a] flexible reading" of the test.

The result in Mr. Armstrong's case is an outlier – no court has determined – as the district court did here, and as the court of appeals approved as a valid exercise of discretion – that there is no excusable neglect in the new trial motion context based on "the length of the delay alone." that demonstrates the need for a grant of certiorari to clarify the weight courts must give to the *Pioneer* factors.

This is particularly true in the case of Mr. Armstrong, an indigent defendant who was represented by appointed counsel throughout his case. His relationship with a succession of appointed counsel does not track that of the typical civil litigant with his retained counsel. Of critical importance, he lacked the right to compel his appointed counsel to seek remand and press a new trial motion on appeal; the selection of issues is left to counsel. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). The pattern of his relationships with these counsel,

and how it bore on both the length of and the reason for the delay in filing the new trial motion, must be given greater weight in a fully equitable excusable-neglect calculation.

Mr. Armstrong's relationship with his attorneys played out in the context of a complicating factor in the interplay between the authority of the district court and that of the court of appeals. The "general rule" holds that a timely notice of appeal has "jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal. *Id*., *citing Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58 (1982) (per curiam). *United States v. Sadler*, 480 F.3d 932, 941 (9th Cir. 2007). Once Mr. Armstrong's appeal began its five years in the court of appeals, jurisdiction over it was lost to the district court as to issues "within the purview of the district court[.]" *Id*. Litigation over an extension of time to file a notice of appeal is within the district court's power, *id*., but motions that effectively reconsider judgments already on appeal are not. *Venen v. Sweet*, 758 F.3d 117, 120 (1st Cir. 1998). The exception is, of course, the remand procedure found in Fed. R. Crim. Proc. 37. *See United States v. Jackson*, 848 F.3d 460, 464 (D.C. Cir., 2017) applied this rule. But – again – Mr. Armstrong could not compel his counsel to seek a remand to litigate a new trial motion. Any neglect on their part, and certainly

his, is fairly considered excusable.

If, as some circuits have held, the weight given to the reason for the delay is the most important factor, this application of the *Pioneer* factors could well have warranted the grant of the new trial motion here. In any event, no court has ever suggested that the length-of-time factor, by itself, might outweigh all of the other *Pioneer* factors. Neither factor should have been dispositive – an equitable consideration of the factors must apply. That is particularly so here. Certiorari should be granted to make clear that *Pioneer* must be interpreted to permit out-of-time filings in light of one of the most fundamental tenets of due process – that a defendant must be competent when he is tried.

B. Why certiorari is appropriate in this case

The district court's ruling was not consistent with the circuit rulings holding that the *reason* for the delay is of paramount importance. As *Pioneer* called on courts to do, those cases focus on both the conduct of a defendant and his attorney. If the district court had given this factor the greater weight it carries in some circuits, it could never have found the defense responsible for the delay here, and this finding would, in turn, have strongly supported an excusable-neglect finding.

There was ample evidence that Mr. Armstrong was not competent when he

was tried. He was, of course, free to rely on his religious faith in making his decisions. His trial lawyers noted his deficits, both cognitive and emotional. His history of hearing voices – which he admittedly did not always heed – suggested that his decision-making process before trial, including the choice to go to trial rather than pursue a non-trial disposition, may have been as much a function of mental illness as of religious faith. That he may well have lacked the competency to rationally consider dispositional offers *before* trial was confirmed when, in the course of his direct appeal, he w*as* found incompetent when confronted with an offer made well *after* the verdict.

There can be no doubt, then, that the claim pressed in the new trial motion, when the district court finally regained jurisdiction, is critical to both the real and apparent administration of justice here. The basis of the new trial motion was the claim that Mr. Armstrong's counsel rendered ineffective assistance of counsel in failing, either before or at trial, to seek a competency hearing. The conviction of an accused person while he is legally incompetent violates due process. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). Specifically, Mr. Armstrong should not have had to stand trial if, at that time, he "lack[ed] the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense," *Drope v. Missouri*, 420 U.S. 162, 171 (1975), which encompasses "the ability to make a reasoned choice among the

alternatives" available. *Dusky v. United States*, 362 U.S. 402 (1960). Moreover, this "standard is applicable from the time of arraignment through the return of a verdict," *Godinez v. Moran*, 509 U.S. 389, 403 (1993) (Kennedy, J., concurring), which necessarily includes the ability to rationally consult with counsel about disposing of the case without a trial. If he was not competent, and if they did not seek a competency hearing, his conviction could not stand. A new trial would have been required.

Federal procedural protections to guarantee that an incompetent defendant is not subject to trial are triggered by a request by either defense or government counsel's "motion for a hearing to determine the mental competency of the defendant." 18 U.S.C. §4241(a). Under this regime, defense counsel plays an important role. He has more contact with the defendant than government counsel, and "is often in the best position to evaluate a client's comprehension of the proceedings." *Stanley v. Cullen*, 633 F.3d 852, 861 (9th Cir. 2011); *Allen v. Mullin*, 368 F.3d 1220, 1239 (10th Cir. 2004). It is expected that defense counsel "who is attuned to his client's mental condition and recognizes that the defendant's competency is in question would not leave it up to the district court to order a competency hearing" but would seek the hearing herself. *United States v. Dreyer*, 705 F.3d 951, 960 (9th Cir. 2013). Too, she is an officer of the court, and "because of the importance of the prohibition on trying those who

cannot understand proceedings against them, she has a professional duty" to raise the issue of her client's competency "when appropriate." *United States v. Boigegraine*, 155 F.3d 1181, 1188 (8th Cir. 1998); *see also Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1993) ("counsel has a duty to investigate a client's competency to stand trial or plead guilty" and "cannot blindly follow a client's demand that his competency not be challenged."); *United States v. Ziegler*, 1 F.4th 219, 228 (4th Cir. 2021), n. 5 ("defense counsel has a duty of candor to alert the court to concerns with his client's competency"); *Rosenthal v. O'Brien*, 713 F.3d 676, 685 (1st Cir. 2013) (if counsel sees substantial indications of incompetency, the need to seek a competency hearing is a settled obligation (citations and quote marks omitted)). If counsel here failed in those obligations, if Mr. Armstrong was not competent, his conviction could not stand.

Though Mr. Armstrong understands that an ineffective assistance of counsel claim normally is raised in collateral proceedings, certiorari should be granted here to make clear that an out-of-time new trial proceeding is also a proper vehicle for resolving an issue like trial competency here, The Ninth Circuit, like the Second Circuit, accepts that *timely* new trial motions can be a proper vehicle for an ineffective assistance of counsel claim. *United States v. Brown*, 623 F.3d 104, 113 (2d Cir. 2010); *United States v. Steele*, 733 F.3d 894, 897 (9th Cir. 2013). In deciding this question, both circuits look to whether a

new-counsel substitution would be necessary, the state of the evidence in the record, and the scope of any evidentiary hearing needed to fully decide the claim. *Id*. at 898, *quoting Brown*., 623 F.3d at 113.

These factors actually incorporate the competing "public interests in judicial efficiency and finality" that this Court recognized in *Stutson*. For Mr. Armstrong, they strike the right balance between "solicitude for his rights" that acceptance of an out-of-time new trial motion would require.

They cleanly delineate what sorts of claims are most appropriate for consideration of ineffective assistance at the presentencing stage, and which are not. They look for narrowly limned issues, such as ineffective assistance of counsel that might have been rendered in the context of plea negotiations, by failing to convey a plea offer the defendant would have accepted. *See Brown*, 623 F.3d at 113-114. A "broad-based" claim might not meet this standard, such as an ineffective-assistance claim with some "seven different 'possible sources.'" *Steele*, *supra*, 733 F.3d at 898.

The motion here focused on one issue: whether counsel were ineffective in not seeking a competency hearing, which in turn would bear on Mr. Armstrong's competency – not merely to stand trial, but to rationally evaluate, with his attorneys, any outstanding plea offers. Such a claim would have required the district court to hold a hearing that would reconstruct Mr.

Armstrong's mental status, and call for evidence of the recollections of counsel, but the issue was discrete. Yet is importance to doing both real and apparent justice here was paramount. Certiorari should be granted to address the flawed standard that prevented Mr. Armstrong's new trial motion from going forward.

VI. CONCLUSION

.....For the above reasons, this Court's suggestion in *Stutson* – that protection of a defendant's rights may sometimes require accommodation on matters such as rule-set deadlines – requires clarification of the weight that may be given to the four factors in a criminal case involving an indigent defendant, substantial questions about his competency, and several appointed counsel.

Respectfully submitted,

DATED: January 11, 2024

/S/ Myra Sun
MYRA SUN
Attorney at Law

APPENDIX

Appendix 1

Appendix 2

A P P E N D I X 1

Memorandum Disposition of the Court of Appeals

NOT FOR PUBLICATION

FILED

OCT 23 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEWIS DEAN ARMSTRONG, Defendant-Appellant.	No. 22-30095 D.C. No. 2:13-cr-00322-RAJ-1 MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Submitted October 4, 2023
Seattle, Washington

Before: WARDLAW and M. SMITH, Circuit Judges, and MATSUMOTO,** District Judge.

Lewis Dean Armstrong appeals his 30-year prison sentence for violating 18 U.S.C. § 2241(c), Aggravated Sexual Abuse of a Minor, imposed on resentencing following remand by this court. We have jurisdiction under 28 U.S.C. § 1291, and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kiyo A. Matsumoto, United States District Judge for the Eastern District of New York, sitting by designation.

we affirm.

1. The district court did not err in finding Armstrong competent to proceed with resentencing. At the sentencing stage, the assessment of competency hinges on "whether the defendant is able to understand the nature of the proceedings and participate intelligently to the extent participation is called for." *United States v. Dreyer*, 705 F.3d 951, 961 (9th Cir. 2013) (internal citation and quotation marks omitted).

The district court properly relied on Dr. Ryan Nybo's opinions in determining that Armstrong was able to participate intelligently in the proceedings. As the district court noted, Dr. Nybo considered Armstrong's demeanor, previous interviews, prior evaluations, medical records, and cognitive abilities, prior to reaching his conclusions. Although previous evaluations from other doctors may have supported a conclusion that Armstrong suffered from a delusional disorder at resentencing, where "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Mercardo-Moreno,* 869 F.3d 942, 959 (9th Cir. 2017) (internal quotation marks omitted). Furthermore, an "old psychiatric report indicating incompetence in the past may lose its probative value by the passage of time and subsequent facts and circumstances that all point to present competence." *Chavez v. United States,* 656 F.2d 512, 518 (9th Cir. 1981). Even though the district court found Armstrong

incompetent more than four years before the competency hearing at issue here based on prior expert evaluation, the district court is permitted to assign greater weight to one expert report than another.

The district court also correctly determined that Armstrong understood the nature and consequences of the resentencing proceedings. After reviewing the record, the district court found that Armstrong understood that he was convicted of aggravated sexual assault, that he had been previously sentenced to a 20-year prison term, and that the mandatory minimum for his offense of conviction was 30 years. The district court also found that Armstrong was aware that he was facing resentencing, where he faced "the real probability that he would receive ten additional years, based on the outcome of the prior appeal." These findings were clearly supported by, and sometimes explicitly drawn from, the record. Accordingly, the district court did not err in finding that Armstrong was competent to be resentenced.

2. The district court did not abuse its discretion in finding that Armstrong's eight-year delay in bringing a motion for a new trial was not due to excusable neglect. *See* Fed. R. Crim. P. 33 Advisory Committee's Note to 2005 Amendment ("[U]nder Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within [14 days after the verdict], the court may nonetheless consider that untimely underlying motion if the court determines

that the failure to file it on time was the result of excusable neglect."). Pursuant to the *Pioneer-Briones* framework, a court applies an equitable analysis to assess whether neglect was excusable, considering at least four factors in particular: "(1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir. 2000) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)); *see also Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997)). The district court concluded that because the motion was filed "seven years after the verdict" and there was "no indication that there was excusable neglect on the part of the attorneys" during that time, Armstrong failed "to justify granting a variance . . . with the rule [33] requirements of when the appeal is supposed to take place." Although the district court did not explicitly weigh the *Pioneer-Briones* factors when rendering its decision, we conclude that because the *Pioneer-Briones* factors were fully briefed by the parties, the district court presumably considered the submissions and was not required to explicitly analyze each factor on the record. *See M.D. by & through Doe v. Newport-Mesa Unified Sch. Dist.*, 840 F.3d 640, 643 (9th Cir. 2016) (citation omitted), *as amended* (Nov. 18, 2016) ("The district court may consider the *Pioneer* factors without discussing how much weight it gives to each."). Accordingly, the district court did not abuse

its discretion in finding that Armstrong's nearly eight-year delay in bringing a motion for a new trial was not due to excusable neglect.

AFFIRMED.

A P P E N D I X 2

Oral and Written Rulings of the District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA,	
Plaintiff,	CASE NO. CR13-322-RAJ
v.	Seattle, Washington
LOUIS DEAN ARMSTRONG,	April 8, 2022
	1:30 p.m.
Defendant.	
	COMPETENCY HEARING

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: TATE LONDON
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For the Defendant: GILBERT H. LEVY
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basis for the court to conclude that the defendant is not competent to proceed to sentencing.

The court would also note that, in the context of any prior evaluation that may have been in reference to trial proceedings, this is a sentencing proceeding. The scope and extent of what takes place at a sentencing proceeding is substantially far less than the complexities of a trial.

Nevertheless, the court is convinced that, based upon the evaluation provided to this court, that that is the best evidence for this court to make a current determination, and, in that light, the court finds that the defendant should proceed to sentencing.

There is also before this court a motion for a new trial. And unless there is something different to be presented to this court, other than the briefing that was provided to this court, the court will make its ruling at this time.

First, the government noted and objected that there should be no new trial because it was not filed within 14 days after the jury verdict. That's in accordance with Rule 33(b)(1). This appeal was taken seven years after the verdict. There's no indication that there was excusable neglect on the part of the attorneys to justify granting a variance from the defendant not complying with the rule requirements of when the appeal is supposed to take place. Therefore, the court would deny the motion for retrial on that basis alone.

But separate and independent is the question of whether or not the trial attorney, in not filing a motion for competency, was ineffective assistance of counsel.

The psychiatrist who evaluated the defendant following conviction concluded the defendant was competent during his trial, and the court is of the firm conviction and belief, based upon the evidence, that the medical professionals, as well as the testimony the court just heard, would clearly support that there's no basis to find that there's ineffective assistance provided by counsel in not seeking the type of evaluation.

There's, at best, a determination the defendant was marginally incompetent for post-conviction proceedings. But, again, there is no evidence to indicate the defendant is suffering from a mental disorder to the extent that it would substantially impair his present ability to understand the nature and consequences of post-conviction proceedings against him, or substantially impair his ability to assist counsel in his defense.

So for these reasons, the court denies the motion for a new trial.

Do we have a sentencing date?

Counsel, how much time do you need to prepare for sentencing? Counsel for the government?

MR. LONDON: Your Honor, 30 days. I don't know if we need a new PSR. I mean, that certainly needs more than 30 days.

Hon. Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. LEWIS DEAN ARMSTRONG, Defendant.	NO. 2:13-cr-00322-RAJ ORDER

THIS MATTER came before the Court upon Defendant Lewis Dean Armstrong's Motion for New Trial. Having considered the Motion, the United States' Memorandum in Opposition, and Defendant's Reply, for the reasons stated orally on the record at a hearing on April 8, 2022, Defendant's Motion for New Trial (Dkt. 268) is DENIED.

DATED this 12th day of April, 2022.

The Honorable Richard A. Jones
United States District Judge

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LEWIS ARMSTRONG,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Myra Sun, hereby certify that on this 11th day of January, 2024, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

DATED: January 11, 2024 _____*/S/ Myra Sun*___
Attorney at Law