

No.

IN THE
SUPREME COURT OF THE UNITED STATES

RICARDO SANDERS,

Petitioner,

vs.

RONALD DAVIS, WARDEN,

Respondent

APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

CAPITAL CASE

To the Honorable John Roberts, Chief Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit.

Petitioner Ricardo Sanders, pursuant to Rule 13(5), respectfully requests a 30 day extension of time to file his petition for writ of certiorari in this Court, to and including Thursday, October 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

On October 13, 2017, the Ninth Circuit Court of Appeals issued an opinion rejecting Mr. Sanders' appeal from the denial of his habeas corpus petition under 28 U.S.C. § 2254. *Sanders v. Cullen*, 873 F.3d 778 (9th Cir. 2017). A copy of the slip opinion is attached as Appendix A. On June 4, 2018, the court denied the timely filed petition for rehearing en banc. The order is attached as Appendix B. The petition for writ of certiorari is due on September 4, 2018. Rules 13(3) and 30(1). On June 27, 2018, the Ninth Circuit stayed the mandate pending the filing of a petition for writ of certiorari. Appendix C.

Deputy Attorney General Michael Wise, counsel for Respondent, has informed me that the California Attorney General has no objection to this request for an extension of time. Mr. Sanders was represented by lawyers appointed under the Criminal Justice Act. 18 U.S.C. § 3006A.

Mr. Sanders was sentenced to death for four murders occurring at a Bob's Big Boy restaurant in Los Angeles, California, on December 14, 1980. He has been on death row since 1982. His convictions and sentence of death were affirmed on automatic appeal to the California Supreme Court on November 20, 1995. *People v. Sanders*, 11 Cal.4th 475 (1995). His state habeas corpus petition was summarily denied on the merits by the California Supreme Court on February 14, 1996.

Mr. Sanders' timely filed 2254 petition was assigned to no less than six different judges. His request for an evidentiary hearing was denied by the district court on grounds that he had failed to prove his claims, even though he was only required to present

a colorable claim for relief. *Phillips v. Woodford*, 267 F.3d 966, 973, 976 (9th Cir. 2001) (a claim is colorable when the allegations, “if proved, entitle him to relief.”).

The Ninth Circuit similarly denied relief on the grounds that he had failed to prove his claims to the California Supreme Court. Appendix A; slip opinion at 31, 34, 38, 43 47, 52, 70. However, the California Supreme Court does not require a habeas petitioner to prove his claims when he files a habeas petition. *People v. Duvall*, 9 Cal.4th 464, 474-475 (1995) (when the allegations, if “later” proved, entitle petitioner to relief, an Order to Show Cause [“OSC”] must issue). Mr. Sanders was only required to plead a prima facie case for relief, a point he stressed in the petition for rehearing en banc.

Mr. Sanders’ state habeas corpus petition raised 26 claims, most of which concerned prosecutorial misconduct with respect to both the eyewitnesses and the informants. The petition was accompanied by over 70 exhibits which included multiple transcripts from other cases and notes in the trial prosecutor’s own handwriting. To date, Mr. Sanders has never had discovery or an evidentiary hearing on his claims in either state or federal court.

Mr. Sanders has maintained his innocence since the day he was arrested. As the Ninth Circuit opinion acknowledges, the only evidence against Sanders was eyewitness identification and criminal informants. These are the two of the leading causes of wrongful convictions. The opinion notes that the physical evidence in the case did not link Sanders to the crimes. Appendix A; Opinion at 17. The opinion also concedes there were problems

with the eyewitness identification and the primary informant was “a liar.” Appendix A; Opinion at 60.

Mr. Sanders intends to raise two issues in his petition for writ of certiorari. The first concerns whether this Court should clarify that when evaluating the summary denial of a California habeas corpus petition, it is critical to determine whether the state court could have reasonably found the petitioner failed to allege a prima facie case for relief. This Court has previously held that: “When a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis to deny relief.” *Harrington v. Richter*, 562 U.S. 86, 98. Habeas relief may be granted only where the state court decision is “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Ibid.* *Harrington v. Richter* does not discuss the prima facie case requirement.

Most recently, this Court issued a per curiam decision reversing a Ninth Circuit grant of habeas relief because it did not adhere to the dictates of *Harrington v. Richter* and instead employed de novo review. *Sexton v. Beaudreaux*, 585 U.S. ___, 138 S.Ct. 2555 (2018). Here again, the prima facie requirement was not discussed.

Thus, what is missing from this Court’s jurisprudence is an evaluation of how California’s prima facie case requirement impacts on the federal habeas petitioner’s burden.

It is one thing to fail to allege a prima facie case. It is quite another to fail to prove the allegations.

In *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) this Court pointed out that in order to determine reasonableness under § 2254(d) the court must look “to what the state knew and did.” In a footnote, *Pinholster* acknowledged that California’s summary denial of a habeas petition on the merits “reflects that court’s determination that the claims did not state a prima facie case for relief. The allegations are generally assumed to be true, but the court does ‘not accept wholly conclusory allegations.’” *Pinholster*, 563 U.S. at 188, n.12, citing *Duvall*, 9 Cal.4th at 474 and *In re Clark*, 5 Cal.4th 750, 770 (1993). Notably however, *Pinholster* did not further explain that a summary denial has nothing to do with a failure to prove the allegations in the petition. *People v. Duvall*, 9 Cal.4th at 464-465.

Given that more than ninety percent of California habeas petitions are summarily denied, it is important to set out clear rules to guide the Ninth Circuit. See Arthur L. Alarcon, Remedies for California’s Death Row Deadlock, 80 S.Cal. L. Rev. 697, 749 (2007) (estimating that 92 percent of death row habeas petitions are summarily denied without issuance of an OSC). Thus far, only one Ninth Circuit decision correctly states the prima facie case requirement but the holding has been overlooked. *Nunes v. Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003) (state court decision denying habeas relief unreasonable for drawing inferences against petitioner when it is evaluating prima facie sufficiency).

The issue in this capital case is whether Mr. Sanders alleged a prima facie case for relief, thus requiring a remand for discovery and an evidentiary hearing. *Townsend v. Sain*, 372 U.S. 293 (1963). The prima facie requirement vis-a-vis *Harrington v. Richter* is an important issue that should be resolved by this Court.

The second issue that Mr. Sanders intends to raise is a “*Lackey* claim,” that is, whether his nearly 40 years on death row is cruel and unusual punishment. See e.g. *Lackey v. Texas*, 514 U.S. 1045 (1995). This Court has yet to address the issue although there have been a number of dissents from the denial of certiorari. See e.g. *Johnson v. Bredeson*, 558 U.S. 1067 (2009) (although certiorari was denied Justices Stevens and Breyer were concerned that this Tennessee death row inmate might have been innocent because the state withheld exculpatory evidence for 11 years). The most recent *Lackey* dissent was in *Jordan v. Mississippi*, 585 U.S. ___, 138 S.Ct. 2567 (2018) where Justice Breyer questioned whether the death penalty “as it is applied today lacks ‘requisite reliability’” given the number of death row inmates who have been exonerated as innocent over the years. 138 S.Ct. at 2570, citing *Glossip v. Gross*, 576 U.S. ___, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015).

Because Mr. Sanders has been on death row for 36 years and has never had discovery or an evidentiary hearing on his numerous claims of prosecutorial misconduct vis-a-vis the eyewitness identification and the criminal informants, and given the absence of

physical evidence linking him to the crimes, this is a perfect case to take up the *Lackey* issue once and for all.

Counsel need more time to competently prepare the petition for writ of certiorari. Verna Wefald, lead counsel, is a sole practitioner. My longtime co-counsel William Genego, unexpectedly passed away not long before oral argument. Gail Ivens was appointed co-counsel. Ms. Ivens has assisted me with preparing for oral argument, conducting legal research, and editing. However, I am the one who drafted the petition for rehearing and who will draft the petition for writ of certiorari.

In the past 30 days I have, inter alia, filed an opening brief in *People v. Bogdanos*, B268435. I am preparing to file an opening brief in *U.S. v. Hilt*, 17-50258 and a reply brief in *U.S. v. Mapuatuli*, 15-10312. In addition, this past two weeks I was struggling with a very bad head and chest cold, and was unable to work for several days. This illness has affected my schedule.

In the exercise of due diligence I have performed substantial legal research and have begun outlining the cert petition. However, we still need to research whether other states utilize California's summary denial procedure or whether it is an outlier, particularly in capital cases.

This application for extension of time is made for good cause and is being filed more than 10 days before the expiration of the time for filing a petition for writ of certiorari.

Rule 13(5). Under the circumstances, we would need an additional 30 days to prepare and file the petition for writ of certiorari. There is good cause to grant this request for more time.

Accordingly, petitioner respectfully requests that an order be entered extending his time to file a petition for writ of certiorari to and including October 4, 2018.

Dated: August 20, 2018 Respectfully submitted,

VERNA WEFALD

California State Bar No. 127104
65 North Raymond Avenue, Suite 320
Pasadena, California 91103

Telephone: 626-577-2658
Facsimile: 626-685-2562
Email: verna@vernawefald.com

Counsel of Record

GAIL IVENS

California State Bar No. 116806
Post Office Box 664
King City, California 93930
Telephone: 213-247-5282
Email: g.ivals.attorney@gmail.com

Counsel for Petitioner