**No. _____**

# IN THE SUPREME COURT OF THE UNITED STATES

**TY CLEVENGER**

***Petitioner*,**

**v.**

**WILLIAM C. CARTINHOUR, JR.,**

***Respondent*.**

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR WRIT OF CERTIORARI

Ty Clevenger
1095 Meadow Hill Drive
Lavon, Texas 75166
Telephone: 979-985-5289
*Pro Se*

## QUESTIONS PRESENTED

In the case below, a court of appeals sanctioned an attorney in a conclusory order, then referred him to a grievance committee for disciplinary action without explaining *why* the attorney was being sanctioned and referred. Can a court of appeals opinion or order be so conclusory that it infringes on the due process and equal protection rights of the parties? And is the supervisory power of this Court infringed when the court of appeals refuses to explain itself?

## LIST OF PARTIES

In addition to the parties on the cover page, Wade A. Robertson and W.A.R., LLP are also parties to this case.

**TABLE OF CONTENTS**



**INDEX TO APPENDICES**

**TABLE OF AUTHORITIES** **PAGE(S)**

**CASES**

**TABLE OF AUTHORITIES (Cont.)** **PAGE(S)**

**CASES**

**TABLE OF AUTHORITIES (Cont.)** **PAGE(S)**

**CASES**

**TABLE OF AUTHORITIES (Cont.)** **PAGE(S)**

**CASES**



**OTHER AUTHORITIES**

**OTHER AUTHORITIES (CONTINUED)**

**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

The judgment and memorandum opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The sanctions order of the appeals court appears at Appendix B.

The order referring Ty Clevenger to the grievance committee of the D.C. Circuit appears at Appendix C.

The order setting the amount of sanctions appears at Appendix D.

## JURISDICTION

Underlying this petition is a federal bankruptcy case, from which an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit. Numerous orders were entered by the United States Court of Appeals which are relevant here. An order addressing the merits of the underlying bankruptcy case was issued on December 4, 2012. *See* Appendix A. A timely petition for panel rehearing was filed, but was thereafter denied by the Court of Appeals on January 14, 2013. *See* Appendix B. On January 31, 2013, the Court of Appeals issued an order imposing sanctions on the appellants to the appeal, but not fixing the amount of said sanctions. *See* Appendix C. On March 27, 2013, the Court of Appeals issued an order finally setting the amount of sanctions that it was imposing by its earlier January 31, 2013 order. *See* Appendix D.

This petition is timely under 28 U.S.C. Section 2101 and Supreme Court Rule 13(1) because it is being filed within 90 days of the entry of the March 27, 2013 order finally setting the amount of sanctions imposed upon the appellants.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Moreover, the Court may consider any and all of the above-noted earlier orders of the Court of Appeals. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508, 121 S.Ct. 1724, 1727, 149 L.Ed.2d 740 (2001) (per curiam).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments V and XIV, United States Constitution

## STATEMENT

Introduction

> I'll be very candid. When I first learned about the [Foreign Intelligence Surveillance Act] court, I was surprised. It's not what we usually think of when we think of a court. We think of a place where we can go, we can watch, the lawyers argue, and it's subject to the glare of publicity. *And the judges explain their decision to the public and they can examine them*. That's what we think of as a court.

Chief Justice John Roberts (at his 2005 confirmation hearing), quoted by Peter Wallsten, Carol D. Leonnig, and Alice Crites, "For secretive surveillance court, rare scrutiny in wake of NSA leaks," *Washington Post*, June 22, 2013. While the underlying case does not arise from the FISA court, it nonetheless affords this Court an opportunity to settle a long-running debate about what one scholar described as the rapid growth of "private judging"[1] in the United States courts of appeal, *i.e.*, whether the appellate courts have any duty to explain their decisions to litigants and the public.

On December 4, 2012, the U.S. Court of Appeals for the District of Columbia Circuit issued a *per curiam* opinion dismissing various bankruptcy claims asserted by the Petitioner, an attorney, on behalf of his client, W.A.R., LLP. *See* Appendix A. On January 31, 2013, the court of appeals announced its intention to sanction the Petitioner by awarding double costs and all attorney fees

[1] *See* Penelope Pether, *Inequitable injunctions: the scandal of private judging in the U.S. courts*, 56 Stanford L. Rev. 1438 (May 2004).

to the Respondent, William C. Cartinhour, Jr. *See* Exhibit B. The court of appeals also threatened to enjoin the Petitioner and his client from any further filings in that court. *Id*. In a separate order, the court of appeals referred the Petitioner to its grievance committee for disciplinary action. *See* Appendix C. The basis for the sanction and the referral was that the appeal was "frivolous." *Id*. and Appendix B. That was the *entire* explanation offered by the court of appeals. On March 27, 2013, the court of appeals set the sanction award at $30,935.00. *See* Appendix D. At present, a disciplinary case is proceeding before the court of appeals and its disciplinary committee, yet neither entity has been able or willing to explain *why* the appeal was allegedly frivolous. *See* Exhibits E, F, G, and H (correspondence between the Petitioner and the grievance committee).[2]

In *Wolff v. McDonnell*, this Court held that a prison inmate who had been punished for disciplinary violations was entitled to a "written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action." 418 U.S. 539, 564 (1974). The Court reasoned as follows:

> Written records of proceedings will… protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others.

[2] The Petitioner is separately filing a petition for mandamus seeking relief in the grievance case.

*Id*. at 564. The same reasoning seemingly would apply to an officer of the court who was disciplined by the court. Yet the Respondent has been fined $30,935.00 and threatened with the loss of his career (via suspension or disbarment) with nothing more than a one-word statement that the underlying appeal was "frivolous." Thus a prisoner has stronger procedural due process protections in the D.C. Circuit than an officer of the court.

History[3]

The underlying case is one of several that arose from a limited liability partnership (*i.e.*, W.A.R., LLP) between Wade A. Robertson and William C. Cartinhour, Jr. While only the underlying case is before this Court, a brief discussion of the overall litigation history will provide some context and illustrate the need for this Court to exercise its supervisory authority. In 2009, Mr. Robertson filed a declaratory judgment action (Civil Action No. 09–1642) against Mr. Cartinhour in the U.S. District Court for the District of Columbia, and Judge

[3] The court below entered final orders pursuant to its jurisdiction under 28 U.S.C. § 1334(b). Those orders, subsequently appealed to the district court, included the final orders of the bankruptcy court, issued together and jointly on July 11, 2011 as Dkt. Nos. 207, 209, 210, and 213 in B.R.D.D.C. Case No. 11-00044. Joint Appendix ("JA") at 320, 324, 328, 329. A timely notice of appeal to the district court from those bankruptcy orders was filed in the bankruptcy court on July 25, 2011. JA337. The district court below exercised its intermediate appellate jurisdiction over the bankruptcy court pursuant to 28 U.S.C. § 158(a)(1). A final order of the district court on this bankruptcy appeal was entered on January 27, 2012 as Dkt. No. 22 in D.D.C. Case No. 11-cv-01574 by the Honorable Royce Lamberth. JA340. A timely notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was filed in the district court on February 4, 2012. JA351. The Court of Appeals exercised its jurisdiction over this bankruptcy appeal pursuant to 28 U.S.C. §158(d), which grants court of appeals jurisdiction over final decisions, judgments, orders and decrees under §158(a) and (b).

Ellen S. Huvelle was assigned to the case. The case concerned the ownership of more than $600,000 in disputed funds, namely, whether the funds belonged to Mr. Robertson, Mr. Cartinhour, or the partnership. Mr. Cartinhour counter-claimed individually and derivatively on behalf of the partnership. At the December 15, 2009 initial scheduling conference, with nothing more than the pleadings in front of her, Judge Huvelle suggested that Mr. Robertson was a "rat," stating as follows: "I mean, I have not sat on the bench for all these years and not got a sixth sense of a rat." She then declared – without having heard any evidence – that she was going to award the disputed funds to Mr. Cartinhour ("We're going back to go get it back to him"). She also froze everything that Mr. Robertson owned without notice or an opportunity to respond, and without any pretense of following the laws regarding injunctions or asset seizures. At the end of the hearing, she told Mr. Robertson's attorney at that time, "I hope your client knows that they have reported him to the Bar." Based in part on Judge Huvelle's brazen statement of prejudgment, the Petitioner, acting on behalf of Mr. Robertson, sought her disqualification in an interlocutory appeal, *see* 429 Fed.Appx. 1 (D.C. Cir. 2011), a petition for mandamus, 2010 U.S.App. LEXIS 19454, at *1 (D.C.Cir. Sept. 15, 2010), and a final appeal. 475 Fed.Appx. 767. In each instance, the court of appeals refused even to discuss the matter. *Id*.

Following the scheduling conference, Judge Huvelle conducted her own *ex*

*parte* judicial investigation and awarded interim relief based on her conclusions (which were later proven erroneous). At a March 26, 2010 hearing before Judge Huvelle, Mr. Cartinhour implicated his attorneys, Patrick Kearney and Michael Bramnick, in forging his signature onto a false affidavit. Around the same time, Mr. Cartinhour was forced to admit that he had filed false discovery responses in order to conceal the identity of an adverse witness. E-mails later revealed that Mr. Bramnick had been communicating with the adverse witness and thus knew the discovery responses were false. In each instance, however, Judge Huvelle turned a blind eye to the misconduct and criminal activity. Likewise, in each trip to the court of appeals, that court refused to discuss (much less resolve) the ongoing problems with Judge Huvelle.

The underlying case began in November 2010, when a creditor in Memphis filed an involuntary bankruptcy petition against W.A.R., LLP in the Western District of Tennessee. The case was later transferred to the District of Columbia Bankruptcy Court, where Judge Martin S. Teel, Jr. presided. The Petitioner argued, on behalf of the partnership, that the case before Judge Huvelle could not proceed because the bankruptcy estate held a contingent interest in all the funds that Judge Huvelle had seized from Mr. Robertson, as well as an interest in the claims being asserted against Mr. Robertson. Mr. Cartinhour, after all, had been asserting derivative claims on behalf of the partnership, which was now the debtor in

bankruptcy.

Thereafter, Judge Huvelle purported to allow Mr. Cartinhour to drop those derivative claims and proceed against the disputed funds (and Mr. Robertson) individually, rather than on behalf of the partnership. The Petitioner has always contended that this tactical maneuver was an unlawful attempt by Mr. Cartinhour to evade the bankruptcy court and defraud the other creditors, and that seemingly straightforward contention has led to sanctions at every level from the bankruptcy court to the court of appeals. Yet the lower courts have also failed at every level to explain *why* the Petitioner's argument is wrong. This fact was made clear to the court of appeals when the Petitioner responded to Mr. Cartinhour's motion for sanctions:

> Patrick Kearney, who purports to represent Apellee William C. Cartinhour, directs most of his attention to the fact that I was sanctioned by lower court judges, and indeed I was. I have attached a copy of my motion to amend Judge Teel's sanctions order, as well as its supporting declaration, and I incorporate them fully herein by reference. The same arguments apply now, but one portion is worth quoting here:
>
> > I am not the experienced bankruptcy practitioner that Mr. Kearney is, but I am not an idiot, either. If someone will explain to me why my analysis is wrong, then I will lay down my cards and walk away. What I will not do, however, is passively submit to baseless attacks on my motives and my character.
>
> As explained in that motion, I asked Mr. Kearney – before the sanctions arose – to explain why he thought my position was meritless, and he ignored me. In the motion itself, I asked Judge Teel to address the issues I raised, and he ignored me. Apparently, my inability to solve the puzzle on my own was a grave offense that merited a $10,000 *sua sponte* sanction (subsequently

> reduced to $5,000 based on my inability to pay).
>
> When the underlying case was appealed to Judge Lamberth, the same pattern ensued. I have attached my motion to amend Judge Lamberth sanctions order, as well as the supporting affidavit, and I incorporate both fully herein by reference. Like Judge Teel, Judge Lamberth piled on abuse, insults, and condescension, but he never addressed the issues I raised, much less corrected the misrepresentations in his order.
>
> That brings us to Mr. Kearney's present motion for sanctions, where the pattern starts anew. Mr. Kearney wants the Court to sanction me because the lower courts did, therefore I should have known that my arguments were meritless. But none of the lower courts addressed the issues I raised, and Mr. Kearney raises only the same recycled, conclusory allegations that he raised before. So how, exactly, am I to know whether my arguments have merit when the lower courts refuse to address them?

*In re W.A.R., LLP*, Case No. 12-7010 (D.C. Cir.) Document #1410326.

The most egregious example arose first, as suggested above, when the bankruptcy court sanctioned the Petitioner *sua sponte* and found that the Petitioner advanced the argument in subjective bad faith. *See In re W.A.R. LLP*, 2012 WL 1576002 (Bkrtcy.D.D.C.. May 4, 2012). The bankruptcy court reasoned that the Petitioner is a well-educated and well-trained lawyer, therefore he should have known that his argument had no merit. *Id*. From there, the bankruptcy court made the logical leap that because the Petitioner *should have* known the argument was frivolous, he actually *did* know the argument was frivolous, and therefore the Petitioner advanced the argument for an improper purpose. *Id*. The Petitioner filed a motion for reconsideration, Appedix I, and submitted a declaration explaining that he did not normally practice bankruptcy law, but that he genuinely believed

that his argument had merit. Appedix J.

> I remain convinced that the Debtor partnership had a legitimate legal claim to the funds held *in custodia legis*, for the reasons set forth in my motion for reconsideration. I may be wrong, but I have advanced that argument for one reason alone: I believe it. I have a duty to represent my client zealously, and until the foregoing issue is finally resolved on appeal, or until someone shows me reason to believe I am wrong, I will not sway from my duties because of threats or undue punishments.

*Id*. All that was to no avail. The bankruptcy court reduced the sanction based on the Petitioner's inability to pay, but maintained that the Petitioner had advanced the argument in bad faith. *See In re W.A.R. LLP*, 2012 WL 4482664 (Bkrtcy.D.Dist.Col., Sept. 26, 2012).

On appeal to the district court, the Petitioner and his client fared no better. This time, Mr. Cartinhour's attorney moved for sanctions, and Judge Royce Lamberth granted sanctions in an opinion that was grossly simplistic and even disingenuous. *See* Appendix K. Judge Lamberth also accused the Petitioner of filing a frivolous bankruptcy case in an "attempt to stall litigation in this district in front of Judge Ellen Huvelle." Order at 1, *In re: W.A.R. LLP*, No. 11–cv–1574 (D.D.C. June 25, 2012). The bankruptcy case, however, was the result of an involuntary petition filed *against* the Petitioner's client by William Wooten, an attorney in Memphis. In other words, the Petitioner had nothing to do with the filing of the bankruptcy case, therefore he could not have filed it for an improper purpose. The Petitioner asked Judge Lamberth to correct the false and defamatory

accusation, but Judge Lamberth refused, instead repeating it. Judge Huvelle got into the act shortly thereafter, citing Judge Lamberth for the proposition that the Petitioner "filed a frivolous bankruptcy case in an 'attempt to stall litigation in this district in front of Judge Ellen Huvelle.'" *Robertson v. Cartinhour*, 883 F.Supp.2d 121, 124 (D.D.C. 2012). The Petitioner asked her to correct the false statement, but she likewise refused.

Finally, the Petitioner sought review in the court of appeals. In the brief for the partnership, the Petitioner asserted three issues on behalf of the partnership. A copy of that brief is attached as Appendix L, and the Petitioner urges the Court to review the brief in its entirety. Despite sincere efforts, the Petitioner still cannot determine why his arguments were wrong, much less sanctionably wrong.

On December 4, 2012, the court of appeals affirmed the district court in a conclusory *per curiam* opinion that still managed to get the facts wrong. Appendix A. The opinion stated that the appellants had raised four issues on appeal when, in fact, they had only raised three. *Compare* Appendix A *with* Appendix L. The court further found that only one issue had been preserved for review, yet Mr. Cartinhour himself had never suggested that the issues had not been raised below. Mr. Robertson explained in his petition for rehearing that all the issues *had* been raised below, but the court of appeals brushed that aside in another conclusory order.

Meanwhile, the court of appeals granted Mr. Cartinhour's motion for

sanctions on January 31, 2013, simultaneously granting Mr. Cartinhour's motion to strike the Petitioner's response to the motion for sanctions. Appendix B. Significantly, Mr. Cartinhour filed his motion to strike only 10 days before the court of appeals granted it. According to the Federal Rules of Appellate Procedure, the Petitioner had 14 days to respond to the motion to strike, and he intended to do so, but the court of appeals denied him an opportunity to respond.

All of the foregoing facts cry out for an exercise of this Court's supervisory authority. If it was so exquisitely obvious that the Petitioner's arguments were wrong, then somebody somewhere along the way should have been able to explain *why* they were wrong, much less why they were *sanctionably* wrong. No litigant or attorney in any court should have to endure such abuse while seeking an honest and fair adjudication.

## REASONS FOR GRANTING THE PETITION

> "*If we are to keep our democracy, there must be one commandment: Thou shall not ration justice*." – Judge Learned Hand (1951).
>
> "*We have been forced to adopt ... shortcuts to cope with the rising volume: we hear fewer oral arguments, publish fewer opinions and rely more heavily on law clerks and staff attorneys. The heavy volume of cases threatens the ability... to give each case the attention and care it deserves*." – Judge J. Clifford Wallace (1995).

In 1986, Chief Judge William J. Holloway and two colleagues on the Tenth Circuit lamented a new rule that restricted citation to unpublished opinions:

> In light of our caseload, we are obviously driven to entering orders which are not the literary models that we would like to produce as opinions. Nevertheless, the basic purpose for stating reasons within an opinion or order should never be forgotten-that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law we must follow, and as to its consistency with our precedents. *Our orders and judgments, like our published opinions, should never be shielded from searching examination*.

*Re: Rules of U.S. Court of Appeals for Tenth Circuit Adopted Nov. 18, 1986,* 955 F.2d 36, 38 (10th Cir. 1992)(C.J. Holloway, dissenting)(emphasis added). Ironically, that dissent was not published until six years later. *Id*. In 2000, Judge Richard S. Arnold of the Eighth Circuit authored the opinion in *Anastasoff v. U.S.*, which famously held that all judgments and opinions of a court are precedential, like it or not, and that contrary rules are unconstitutional. 223 F.3d 898, 904 (8th Cir. 2000). He added the following observation:

> Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.

*Id*. at 904. Legal scholars have lamented the growth of unpublished and conclusory appellate opinions and orders at least since the early 1980s, *see, e.g.*, William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981), and that lament shows no sign of abating. *See, e.g., Kenneth F. Hunt, Note: Saving Time or Killing Time: How the use of Unpublished Opinions Accelerates the Drain on Federal Judicial Resources*, 61 Syracuse L. Rev. 315 (2011). The most recent data found by the Petitioner indicates that courts of appeal consistently resolve about 80 percent of their cases via unpublished and/or conclusory opinions. *Id*.

In 1975, this Court made a passing comment about its summary disposition practice, observing that "the reach and content of summary actions may itself present issues of real substance." *Hicks v. Miranda*, 422 U.S. 332, 345, 95 S.Ct. 2281, 2290 n. 14. Nonetheless, the Court has never considered the ramifications of its own summary disposition practices, much less the same practices within the

courts of appeal. In *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 425, 113 S.Ct. 2696, 2705 n.3 (1993), the Court deemed it "remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion," but the Court did not elaborate. Thus the present case affords the Court an opportunity to address an issue that it has never squarely addressed: what prudential and constitutional obligations do the courts of appeal have, if any, to explain their decisions? And under what circumstances? As set forth below, the courts of appeal frequently remand cases – including sanctions cases – to the district court when the lower court failed to state the reasons for its actions.

The appellate courts should be held to the same standard, and for reasons mandated both by pragmatism and the Constitution. A common-law legal system operates according to precedent, and precedent requires a reasoned explanation of a court's decision. From the litigant's perspective, due process and equal protection rights are infringed when appellate courts refuse to explain their decisions. From this Court's perspective, its supervisory role is thwarted when lower courts "hide the ball" in the form of conclusory opinions. Finally, from the public's perspective, a shadowy and opaque decision-making process invites distrust and even raises questions about the legitimacy of the courts.

Moreover, the debate is no longer limited to judges, lawyers, and academics. The public at large is beginning to question secretive decision-making in the federal judiciary. *See, e.g.*, Peter Wallsten, Carol D. Leonnig, and Alice Crites, "For secretive surveillance court, rare scrutiny in wake of NSA leaks," Washington Post, June 22, 2013. And while no citizen is likely to be party to a FISA court proceeding, any citizen can be a party to a case that winds up before a court of appeals. This case affords the Court an opportunity to consider, pursuant to its supervisory powers, whether the lower courts are denying "meaningful appellate review" to litigants in violation of the Due Process and Equal Protection Clauses.

1. <u>This case affords the Court an opportunity to determine – however broadly or narrowly it chooses – whether the Due Process and Equal Protection Clauses require reasoned, written explanations from the courts of appeal.</u>

This Court has long held that appellate review is not required by the Constitution. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590 (1956). However, where a right to appellate review is created by statute, that right is protected by the Due Process and Equal Protection Clauses. *M.L.B. v. S.L.J.*, 519 U.S. 102, 120, 117 S.Ct. 555, 566 (1996). This Court has further held in some contexts that a district court must explain its decisions in order to afford "meaningful appellate review." That phrase usually arises in cases concerning the death penalty or sentencing guidelines. *See, e.g., Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 739 (1991)(death penalty) and *Gall v. U.S.*, 552 U.S. 38, 50,

128 S.Ct. 586, 597 (2007)(sentencing guidelines). However, in 1988, the Court seemed to indicate that "meaningful appellate review" necessitated written findings any time a district court's decision was rooted in judicial discretion:

> This Court previously has recognized-even with respect to another statute the legislative history of which indicated that courts were to have "wide discretion exercising their equitable powers," 118 Cong.Rec. 7168 (1972), quoted in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975)-that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' " *Id.,* at 416, 95 S.Ct., at 2371, quoting *United States v. Burr,* 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.). Thus, a decision calling for the exercise of judicial discretion "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." *Albemarle Paper Co.,* 422 U.S., at 416, 95 S.Ct., at 2371.
>
> …Where, as here, Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review. Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress.

*U.S. v. Taylor*, 487 U.S. 326, 336-337, 108 S.Ct. 2413. (The sanctions order below was, of course, an exercise in judicial discretion. *See, generally, Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123(1991)). The Ninth Circuit has expressly held that an exercise of discretion necessitates a reasoned explanation:

> When the issue of whether to exercise its discretionary jurisdiction is raised before the district court, it "must make a sufficient record of its reasoning to enable appropriate appellate review." [*Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998)]. The rationale behind this requirement is that meaningful appellate review for abuse of discretion is foreclosed when the district court fails to articulate its reasoning.

*United Nat. Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 919 (9th Cir. 1998); *see also Gonzales v. Galvin*, 151 F.3d 526 (6th Cir. 1998)(If a deferential standard of review is to be applied, "[i]t has long been clear that [w]hen the court does not make findings which are sufficient to indicate the factual basis for its ultimate conclusion, the appropriate procedure is to vacate the judgment and remand for such findings"), citing *Stotts v. Memphis Fire Dep't*, 1985 WL 13722, at *2-3 (6th Cir. Sept. 11, 1985)(collecting cases). Other circuits have remanded cases to the district court for further explanation of its exercise of discretion, but without adopting a rule as broad as the Ninth Circuit's rule. *See, e.g., Interfaith Community Organization v. Honeywell Intern., Inc.*, --- F.3d ----, 2013 WL 2397338, *10 (3rd Circuit)(the trial court's "perfunctory statement" in support of an attorney-fee award did not "allow for meaningful appellate court review"); *see also Thule Drilling ASA v. Schimberg*, 290 Fed.Appx. 745, 747 (5th Cir. 2008).

Of particular relevance are the many instances where the circuit courts have remanded cases for an explanation of *why* an attorney or party was or was not sanctioned. According to the Tenth Circuit, "findings and conclusions, even if only brief, serve at least three useful purposes: (1) they assist in appellate review, demonstrating that the trial court exercised its discretion in reasoned and principled fashion; (2) they help assure the litigants, and incidentally the judge as well, that the decision was the product of thoughtful deliberation, and (3) their publication

enhances the deterrent effect of the ruling." *Braley v. Campbell*, 832 F.2d 1504, 1513 (10th Cir. 1987), quoting *Sanctions under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 199 (1985); *see also Coltrade Intern., Inc. v. U.S.,* 973 F.2d 128 (2nd Cir. 1992)(imposition of sanctions against party and his counsel based on finding that counsel's arguments on behalf of party were "frivolous," "without merit," "clearly inconsistent," and "irreconcilable" would be remanded for specification of authority on which court relied for imposition of sanctions and particular conduct meriting such sanctions); *Anderson v. Boston School Committee,* 105 F.3d 762 (1st Cir. 1997); *Topalian v. Ehrman,* 3 F.3d 931 (5th Cir. 1993); *Griffen v. City of Oklahoma City,* 3 F.3d 336 (10th Cir. 1993); and *Raylon, LLC v. Complus Data Innovations, Inc.*, 700 F.3d 1361 (Fed. Cir. 2012).

The Respondent submits that the courts of appeal should be held to the same standard that they apply to the district courts. In at least one instance, the Court has expressed a similar sentiment. In *Corcoran v. Levenhagen*, the district court granted habeas relief on a Sixth Amendment claim, but did not address any other claims because they were moot. 558 U.S. 1, 2, 130 S.Ct. 8, 9 (2009). The Seventh Circuit reversed, ordering reinstatement of the death penalty, but without allowing the district court to consider the remaining issues raised by the defendant. This Court reversed and remanded, holding that "[t]he Seventh Circuit should have permitted the District Court to consider Corcoran's unresolved challenges to his

death sentence on remand, or should have itself explained why such consideration was unnecessary." *Id*. Did the court below consider, for example, the evidence that the Petitioner does not normally practice bankruptcy law? Or did it conclude, as a matter of law, that that factor is not relevant for purposes of sanctions? No one can tell.

As a general matter, the courts of appeal should be required to give reasonable explanations for their decisions, particularly orders that *originate* in the court of appeals.

> However poor the quality of unpublished opinions, they are Cardozoesque in comparison to the practice of issuing mere "Orders" - dispositions that contain no explanation at all. Orders fail any quality test. Their proffered justification is that it is unnecessary "to explain even to the loser, why he lost." That statement is dead-wrong, even for the most frivolous cases. *Explanation is fundamental to our system of justice*. Its absence in the one-word Orders effectively converts the statutory appeal of right into a denial of a petition for certiorari; in both cases the decision maker has declined to explain its decision. The difference, of course, is that the Supreme Court has been given statutory discretion to deny certiorari without explanation, while the circuit courts are under a statutory duty to hear every appeal.

William M. Richman and William L. Reynolds, *Elitism, expediency, and the new certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 284 (1996)(emphasis added).

The need for such procedural due process protections is particularly great where, as here, an officer of the court may be facing the loss of his career. If someone is to be punished by the government, it seems self-evident that he has a

right to know *why* he is being punished. That much is evident in *Wolff*, where the Court noted that a written explanation helps protect the inmate from arbitrary punishment. And if punishment serves the purpose of deterrence, per *Braley*, then the "deterree" (and any other similarly situated person) should be told what he is being deterred from. Otherwise, the purpose of deterrence is not served at all. In the case below, the Respondent has been subjected to severe punishment, yet neither he nor any other lawyer can reasonably determine the reason for such punishment and, therefore, what to avoid.

The due process injury is also prospective, as is the equal protection injury. While no party is guaranteed a hearing before this Court, all parties are afforded the right by statute to petition this Court. As a practical matter, that right is severely circumscribed where, as here, there is no substantive opinion or order for this Court to review.

> Non-publication… diminishes the possibility of additional review. For all practical purposes, the courts of appeals are the courts of last resort in the federal system; fewer than one percent of their decisions receive plenary review by the Supreme Court. The limited appellate capacity of the Supreme Court makes it extremely unlikely that it will review an unpublished opinion. After all, a cogent explanation also makes it possible for a reviewing court to understand the case. Without that explanation, the likelihood of discretionary review by an en banc court or by the Supreme Court decreases to the vanishing point. Moreover, a reviewing court is far less likely to spend its own resources on a case already determined to be without precedential value. Although review is very unlikely anyway, a litigant should not have the chances of review further reduced merely because a panel did not think the case worthy of an opinion.

*Richman and Reynolds*, 81 Cornell L. Rev. at 283-284. The right to petition this Court is particularly important in a case like this one, where the order originates in the court of appeals, because this Court affords the only opportunity for appellate review.

2. Conclusory opinions and orders, such as the ones below, undermine the supervisory authority of this Court.

In *Cavazos v. Smith*, this Court dealt with the same case three times, finally reversing the Ninth Circuit after expressing its frustration that the lower court refused to heed the directions of this Court. 132 S.Ct. 2, 8 (2011). That case, and others like it, even prompted a national newspaper story about whether lower courts were defying this Court. *See* "Despite title, Supreme Court not always last word," November 13, 2011, *USA Today*, http://usatoday30.usatoday.com/news/washington/judicial/story/2011-11-13/supreme-court-rulings/51184484/1. The article noted a statement, widely attributed to Judge Stephen Reinhardt of the Ninth Circuit, that at least some of his rulings will evade this Court's review. *Id*.; *see also* Michael Dorf, "Hail to the Chief Justice of the Warren Court in Exile," December 2, 2010, http://www.dorfonlaw.org/2010/12/hail-to-chief-justice-of-warren-court.html (Professor Dorf, a former law clerk for Judge Reinhardt, attributes the statement to him).

One would like to think that such challenges to the Court's authority are rare, if not mythical. But how does one know? The lower court opinions in *Cavazos*,

for example, were at least published, and they were relatively detailed. *See* 508 F.3d 1256 (2007) and 624 F.3d 1235 (2010). A far easier way to avoid this Court's supervisory role, on the other hand, would be through the issuance of little or no opinion at all. According to Judge Richard S. Arnold, "the temptation exists" that if "a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser." Penelope Pether, *Inequitable injunctions: the scandal of private judging in the U.S. courts*, 56 Stanford L. Rev. 1438, 1485 (May 2004), quoting Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999). And there need be no improper motive, or even recklessness or negligence. A lower court may apply a rule of law in good faith but mistakenly, and it may also conclude in good faith that its rationale is not worth mentioning. Either way, this Court cannot exercise its supervisory role (or its role in settling the law) when lower courts routinely fail to explain their reasoning.

This is not unlike what the Third Circuit faced in *Forbes v. Township of Lower Merion*, for example, where that court cited its supervisory authority in requiring district courts to set forth their reasoning in qualified immunity cases. 313 F.3d 144 (2002). Similarly, this case affords the Court an opportunity to

exercise its supervisory authority to curtail a widespread practice that undermines that very authority.

3. Conclusory opinions and orders undermine the rule of law and the legitimacy of the federal judiciary.

This case affords the Court an opportunity to address a problem that threatens the rule of law and the legitimacy of the federal judiciary, a problem that has grown steadily over the last 50 years. *See* Penelope Pether, 56 Stanford L. Rev. at 1440 (tracking the origins of unpublished and conclusory opinions).[4]

> [Former Chief Judge Patricia Wald of the D.C. Circuit], arguing against the culture of unpublication, has written that it imperils the legitimacy of the judiciary, compromises transparency, and releases judges from the "discipline" of producing reasoned decisions. Scholars have added other "rule of law"-based criticisms of all three practices of private judging in the U.S. courts that strike at the core of the legitimacy of judicial decisions and the court system more generally. First, unpublication limits the quality of judicial decisionmaking and exacts the price paid by private judging's inevitable concomitant, the lack of judicial accountability. The bench, the courts, the law, and civil society all pay the price of these results, which have the additional problem that they both enable corruption and increase the public's suspicion that it may be occurring because scrutiny of what the courts are doing is made difficult in many cases and impossible in others. Even if there were no credible evidence of misconduct or structural inequality in the operation of unpublication, the lack of transparency it

[4] Judge Harry T. Edwards of the D.C. Circuit observed that the circuit courts were deciding a significant number of cases without opinion, even though two decades before those cases would surely have led to published opinions. *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 Iowa L. Rev. 871, 895 (1983). Chief Judge Patricia Wald later agreed: "Due to the pressure of accelerating caseloads, the majority of federal cases now get this unpublished treatment. Many would have been the subject of full-fledged opinions a few decades ago." *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1373 (1995).

> produces would damage the legitimacy of the judicial system; it is "destructive to law and respect for law." That disrespect can itself erode the rule of law.

*Id*. at 1483-84 (internal citations omitted). According to Judge Wald:

> [A] double-track system [of publication and unpublication] allows for deviousness and abuse. I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.

*Id*., quoting Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 Md. L. Rev. 766, 768 (1983).

> Publication… serves to hold judges accountable for their opinions. Accountability encourages well-reasoned decisions. When a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin. Perhaps few losing litigants will be persuaded by a carefully reasoned explanation, but that explanation will often reveal whether the judge treated the case seriously. Moreover, full publication helps to insure that judicial opinions are readily accessible, certainly a necessary condition for the realistic evaluation of either a judge or a court.

William M. Richman and William L. Reynolds, *Elitism, expediency, and the new certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 282-283 (1996). The Petitioner cannot possibly have confidence in what the court of appeals has done below, nor can any other observer. The decisions below were the product of a mere staff attorney, *see U.S. Court of Appeals for the District of*

*Columbia Circuit's Handbook of Practice and Internal Procedures (As Amended Through April 14, 2011)*, p. 49 and U.S. Court of Appeals for the District of Columbia Circuit's *Frequently Asked Questions As Revised Through July 2007*), p. 30 (both explaining the handling of summary dispositions), thus it is doubtful that any Article III judge ever bothered to read the briefs. *See* Penelope Pether, 56 Stanford L. Rev. at 1491-1492 (marshaling evidence from various sources "that judges often do not read any part of the record of an appeal before 'signing off' on an unpublished opinion written by a staff attorney.") Any litigant deserves better than a slipshod opinion written by a staff attorney who cannot even correctly calculate the number of issues on appeal. This case affords the Court an opportunity to protect the rule of law, and the moral authority of the federal judiciary, by making appellate decisions both lawful and transparent.

Conclusion

In *Major League Baseball Players Ass'n v. Garvey*, the Court held that it had "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." 532 U.S. 504, 509, 121 S.Ct. 1724, 1729 (2001), citing *Mercer v. Theriot*, 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964) (per curiam) and *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed. 629 (1916). Such is appropriate and even necessary where, as here, the sanctions order is

premised on an earlier decision on the merits. The merits brief filed by the Petitioner (on behalf of his client in the court of appeals) raised three issues and cited numerous authorities in support of each proposition. Notwithstanding all the authorities cited, neither the D.C. Circuit nor this Court has ever addressed the issues therein regarding contingent interests and a debtor's ownership of legal claims. Those issues alone may merit this Court's consideration, but that cannot reasonably be determined until the court of appeals develops the case below. Accordingly, if this case is reversed and remanded to the court of appeals by way of summary disposition, the merits decision should therefore be reversed and remanded. Likewise, the sanctions issued by the district court, *see* Order, *In re W.A.R., LLP*, Case No. 12–cv–1574 (D.D.C. Apr. 2, 2012) and the bankruptcy court, *see In re W.A.R.*, LLP, 2012 WL 4482664 (Bkrtcy. D.D.C., September 26, 2012), both of which are premised on this case being "frivolous," should be reversed pending a determination on the merits by the court of appeals.

Finally, the Petitioner would urge the Court to exercise its supervisory authority to reassign this case upon remand. In *Withrow v. Larkin*, the Court wrote that "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 421 U.S. 35, 95 S.Ct. 1456 (1975). "Among these cases are those in which the adjudicator has a pecuniary interest in the outcome

and in which he has been the target of personal abuse or criticism from the party before him." *Id*. The Petitioner has publicly and sharply criticized the court of appeals and the district court below regarding their actions in the related cases. *See, e.g.*, Ty Clevenger, "A federal judge who thinks she's above the law," September 5, 2012, http://lawflog.com/?p=80. Accordingly, the Petitioner requests that this case be reassigned to a panel whose members have not previously heard this case or any of the related cases concerning W.A.R., LLP, Wade Robertson, and William C. Cartinhour, Jr. Frankly, the Petitioner would prefer that the case be reassigned to the Sixth Circuit (it originated in the Western District of Tennessee) or a panel of judges from outside the D.C. Circuit, but the Petitioner is aware of no precedent for such a request. In any event, the Petitioner cannot reasonably have confidence in a panel that ignored the merits, did not even count the correct number of issues on appeal, struck his response to the motion for sanctions without an opportunity to respond (and did so in violation of the Federal Rules of Appellate Procedure), then issued a draconian sanction, threatened to enjoin him from further filings in the court, and referred him to its grievance committee without any explanation.

## CONCLUSION

The petition for a writ of certiorari should be granted so that this Honorable Court can consider the merits of the questions for review.

Respectfully Submitted,

_____

Ty Clevenger
1095 Meadow Hill Drive
Lavon, Texas 75166
Telephone: 979-985-5289
*Pro Se*

**No. _____**

# IN THE
# SUPREME COURT OF THE UNITED STATES

**TY CLEVENGER,**

***Petitioner*,**

**v.**

**WILLIAM C. CARTINHOUR, JR.,**

***Respondent*.**

## PROOF OF SERVICE

I, Ty Clevenger, do swear or declare that on this date, June 25, 2012, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Patrick J. Kearney
Selzer Gurvitch Rabin & Obecny, Chtd.;
4416 East West Highway, Suite 400
Bethesda, Maryland 20814-4568
*Counsel for Respondent William C. Cartinhour, Jr.*

I declare under penalty of perjury that the foregoing is true and correct.

_____

Ty Clevenger