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

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QUESTIONS PRESENTED

In the case below, the district judge used her position as chair of the local assignments committee to assign a transferred case to herself, notwithstanding the fact that the local rules required random assignment, and notwithstanding the fact that the complaint implicated her in serious judicial misconduct. She then dismissed the case on the pleadings and sanctioned the Petitioner, an attorney, $123,802.17. The Court of Appeals affirmed without explanation. May a district judge bypass the local rules and deliberately assign herself to a case that implicates her in judicial misconduct? And may a transferee judge sanction something that occurred in the transferor judge's courtroom, particularly where the transferor judge had declined to issue sanctions for that conduct? Finally, does the Court of Appeals have any obligation to explain its decisions? In particular, does the Court of Appeals infringe on the supervisory powers of this Court when it fails to explain itself?

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LIST OF PARTIES

In addition to the parties on the cover page, Wade A. Robertson was the plaintiff in the district court, and Michael Bramnick, Patrick Kearney, Carlton Obecny, Robert Selzer, Vesna Kustidic, Tanjya Milicevic, Aleksandar Popovic, Albert Schibani, James G. Dattaro, Neil Gurvitch, Andrew R. Polott, H. Mark Rabin, and Elyse Strickland were defendants.

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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The January 22, 2014 judgment of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The March 11, 2014 order of the United States Court of Appeals denying the petition for rehearing *en banc* appears at Appendix B.

The August 10, 2012 memorandum opinion of the U.S. District Court for the District of Columbia (adopted by the Court of Appeals) appears at Appendix C.

The August 10, 2012 sanctions order of the U.S. District Court for the District of Columbia appears at Appendix D.

The August 30, 2012 memorandum opinion and order of the U.S. District Court for the District of Columbia appears at Appendix E.

The September 27, 2012 memorandum opinion and order (Doc. No. 127) of the U.S. District Court for the District of Columbia appears at Appendix F.

The September 27, 2012 memorandum opinion and order (Doc. No. 128) of the U.S. District Court for the District of Columbia appears at Appendix G.

JURISDICTION

This petition arises from an appeal to the United States Court of Appeals for the District of Columbia Circuit from the United States District Court for the District of Columbia. An appellate judgment addressing the merits of the underlying sanctions order was issued on January 22, 2014. *See* Appendix A. A timely petition for panel rehearing was filed, but was thereafter denied by the Court of Appeals on March 11, 2014. *See* Appendix B. The judgment of the Court of Appeals incorporated an August 10, 2012 memorandum opinion of the U.S. District Court for the District of Columbia, and that memorandum opinion is attached as Appendix C.

This petition is timely under 28 U.S.C. Section 2101 and Supreme Court Rule 13(1) because it was originally mailed to the clerk within 90 days of the entry of the appellate court's March 11, 2014 order denying the petition for rehearing *en banc*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Moreover, the Court may consider any and all of the earlier orders of the courts below. *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

Article II, Clause 2, United States Constitution

Amendments V and XIV, United States Constitution

18 U.S.C. §4

28 U.S.C. §137

28 U.S.C. §455

28 U.S.C. § 1291

28 U.S.C. §1927

STATEMENT

Background

The Petitioner, an attorney, originally filed the underlying case in the U.S. District Court for the Southern District of New York, where Judge Laura Swain presided. A related case involving the same client was pending in the U.S. District Court for the District of Columbia, where Judge Ellen S. Huvelle presided. After Judge Huvelle entered a judgment that was adverse to the Petitioner's client, the Petitioner asked Judge Swain to stay the New York case until the appeal of the D.C. case was resolved, citing various Second Circuit authorities. Judge Swain did not formally rule on the motion to stay, but she left the case pending on her docket for seven months, then transferred it to the D.C. district court, where the case was originally assigned to Judge John Bates. In what appears to have been a violation

of the local rules, Judge Huvelle used her position as chair of the local assignments committee to assign the case to herself, notwithstanding the fact that the complaint implicated her in serious judicial misconduct. Specifically, the New York complaint noted that another party in the D.C. case had implicated his own attorneys in forging his signature onto a fabricated affidavit (that party's testimony occurred on the witness stand in a hearing before Judge Huvelle). The complaint further referenced e-mails showing that the same attorneys had knowingly filed perjured interrogatory responses in the D.C. case. In both instances, Judge Huvelle did nothing when these matters were brought to her attention. (An e-mail recently obtained via a state court proceeding indicates that Judge Huvelle was communicating *ex parte* with opposing counsel). In fact, when the Petitioner attempted to enter an appearance before Judge Huvelle in order to seek sanctions, Judge Huvelle blocked the entry of appearance.

After the New York case was ultimately transferred to Judge Huvelle, the Petitioner moved for Judge Huvelle's disqualification. Judge Huvelle denied the motion. Judge Huvelle then dismissed the underlying case on the pleadings and sanctioned the Petitioner $123,802.17. According to Judge Huvelle, the Petitioner should have dismissed the New York case as soon as the adverse judgment was entered in D.C. rather than asking Judge Swain for a stay pending its appeal, never mind the fact that Second Circuit case law clearly authorized a stay rather than a

dismissal under such circumstances. Though Judge Swain found no fault with the request for a stay, Judge Huvelle second-guessed that decision after the case was transferred to D.C. from New York. In the same sanctions order, Judge Huvelle falsely accused the Petitioner of filing a bankruptcy case to interfere with proceedings in her court. The Petitioner asked Judge Huvelle to correct the sanctions order, noting that, as a matter of public record, he did not file the bankruptcy case. Judge Huvelle refused. The Petitioner appealed the sanctions order to the United States Court of Appeals for the District of Columbia Circuit and, after briefing was completed, the Unites States Court of Appeals for the Second Circuit issued its opinion in *Ligon v. City of New York*, 736 F.3d 118 (2013) (reversing and reassigning a case sua sponte where the presiding judge manipulated the random assignment process to get a case assigned to herself), *vacated in part* by *Ligon v. City of New York*, 743 F.3d 362 (2014). In a Rule 28(j) letter and a petition for rehearing *en banc*, the Petitioner brought *Ligon* to the attention of the D.C. Circuit. The D.C. Circuit nonetheless denied oral argument, adopted the sanctions order without explanation, and denied the *en banc* petition.

History

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 seriousness of the misconduct below. In 2009, Mr. Robertson filed a declaratory judgment action (Civil Action No. 09–1642, hereinafter "*Robertson I*") against Mr. Cartinhour in the U.S. District Court for the District of Columbia, and Judge Ellen S. Huvelle was assigned to the case. At all times in the trial court, Mr. Robertson was represented by attorney Edward Griffin. 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. *See, e.g.*, Complaint for Declaratory Relief (Doc. No. 1, Case No. 09-1642). Mr. Cartinhour counter-claimed individually and derivatively on behalf of the partnership. *See* Answer and Counter-Complaint (Doc. No. 2, Case No. 09-1642). 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." December 15, 2009 Transcript, 5 (Doc. No. 77, Case No. 09-1642). 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"). *Id*. at 10. She also froze everything that Mr. Robertson owned *sua sponte*, without notice or an opportunity to respond, *see* December 16, 2009 Order (Doc. No. 19, Case No. 09-1642), and without any pretense of following the laws regarding

injunctions or asset seizures. *See* Appellant's Brief, Case No. 10-7033 (D.C. Circuit Doc. No. 1276376). 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 bias and misconduct below. *Id*.

Following the scheduling conference in *Robertson I*, Judge Huvelle conducted her own *ex parte* judicial investigation and awarded interim relief based on her conclusions (which were later proven erroneous). *See* Petition for Writ of Mandamus, Case No. 10-5231 (Doc. No. 1255850), 20-23. 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. *See* March 26, 2010 Transcript, 46-47 (Doc. No. 118, Case No. 09-1642). Around the same time, Mr. Cartinhour was forced to admit that he had filed false discovery responses in order to conceal the identity of Larry Ash, an attorney and an adverse witness who proved that, contrary to Mr. Cartinhour's counter-complaint, he had in fact obtained independent legal advice from an attorney (*i.e.*, from Mr. Ash). *See* February 1, 2011 Transcript, 120-123 (Doc. No. 85-10, Case No. 11-1919) and Plaintiff's Memorandum in Support of Motion to Recuse (Doc. No. 85, Case No.

11-1919). E-mails later revealed that Mr. Bramnick had been communicating with Mr. Ash and therefore knew that Mr. Cartinhour's discovery responses were false when he filed them. *See* July 14, 2010 Deposition of Larry Ash, (Doc. No. 1265024, Case No. 10-7033 (D.C. Cir.)). 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.

Partially as a result of all the litigation misconduct before Judge Huvelle, the Petitioner filed the underlying case (hereinafter "*Robertson II*") in the U.S. District Court for the Southern District of New York, where one of the defendants resided. *Robertson II* alleged a racketeering conspiracy involving Mr. Cartinhour and his attorneys, including Mr. Bramnick and Mr. Kearney, and the complaint detailed all of the misconduct that had happened before Judge Huvelle, although it did not mention Judge Huvelle by name. *See* Original Complaint at ¶¶79-80 (*Robertson II* Appellate Appendix 1:45, hereinafter "R2A 1:45," etc.). The case was assigned to Judge Laura Swain. Shortly thereafter, the Petitioner also attempted to enter an appearance before Judge Huvelle in *Robertson I*, hoping to persuade her to address all of the litigation misconduct. *See* February 8, 2011 Transcript, (D.D.C. Case No. 09-cv-1642) at pp.9-12 (Appx. H). Judge Huvelle blocked the appearance. *Id*. Judge Huvelle forged ahead with trial in *Robertson I* and, on August 10, 2012, she

entered a $7 million judgment in favor of Mr. Cartinhour. *See* August 10, 2012 Memorandum Opinion at 11 (R2A 3:1045).

Back in New York, the Defendants filed motions to dismiss the case before Judge Swain and motions to transfer the case to the D.C. District, and they repeatedly threatened the Petitioner with sanctions. *See, e.g.*, February 24, 2011 Letter from Cherish O'Donnell to Ty Clevenger (R2A 3:1031-1033). On March 16, 2011, the Petitioner filed a motion to stay the New York case pending resolution of the appeal from the case before Judge Huvelle, *see* Corrected Motion for Stay (R2A 1:139-142), and he repeatedly told the Defendants that, pursuant to Fed. R. Civ. P. 11, they needed to explain *exactly* what was sanctionable. *See* Supplement to Preliminary Pre-Trial Statement, 11-12 (R2A 1:183-184) and Reply in Support of Motion for Stay and Motion for Entry of Default, 4 (R2A 1:227). They never did. The Petitioner also told the Defendants they needed to explain why the case should not be stayed rather than dismissed. *Id*. They never did. On October 28, 2011, Judge Swain transferred the case to the D.C. District, *see* Memorandum Order (R2A 1:243), where it was assigned to Judge John Bates. (R2A 1:255).

The Plaintiffs notified Judge Bates that a related case was pending before Chief Judge Royce Lamberth. *See* Notice of Related Case (R2A 1:260-261). On November 17, 2011, the Defendants moved to transfer this case to either Judge Huvelle or Judge Lamberth, and they notified the Court that they had conferred

with the Plaintiff. *See* Motion to Reassign Case (R2A 1:262-268). The Defendants informed the court that Mr. Robertson consented to transferring the case to Judge Lamberth, but he objected to any transfer to Judge Huvelle. *Id*. at 1:262. Under Local Rule 7(b), the Plaintiff had 14 days to file a response in opposition that motion. Before he could respond, however, Judge Huvelle used her position as chair of the assignments committee to assign this case to herself. (R2A 1:269).

The Petitioner, on behalf of Mr. Robertson, filed a motion to recuse Judge Huvelle on February 12, 2012, as well as a supporting memorandum. (R2A 1:328-2:487). The Appellant argued, among other things, that Judge Huvelle was conflicted because *Robertson II* implicated her in judicial misconduct, namely, failing to protect the integrity of the court in *Robertson I* when Defendants Kearney and Bramnick fabricated evidence, forged a signature, suborned perjury, etc. *Id*. In support of that motion, the Appellant submitted transcripts and documents proving that Defendants Kearney and Bramnick had committed the foregoing crimes. *See, e.g.*, Memorandum Exhibit B (R2A 1:372-377) and Memorandum Exhibits I-K (R2A 2:428-444). Judge Huvelle denied the motion on March 16, 2012 (R2A 2:672-679). The Defendants presented motions to dismiss this case on January 10, 2012, (R2A 1:280-281), which the Plaintiff opposed. (R2A 1:286-327). Judge Huvelle dismissed the case on March 16, 2012 (R2A 2:712).

On April 13, 2012, Defendants Kearney and Bramnick purported to enter appearances on behalf of their co-defendant, Mr. Cartinhour. (R2A 2:713-716). On the same day, they moved for sanctions against the Petitioner under the authority of 28 U.S.C. §1927. The Petitioner responded in detail, explaining that *Robertson II* was not frivolous, nor was it foreclosed by the verdict in *Robertson I* (*e.g.*, *Robertson II* involved different parties, and many of its events occurred after *Robertson I* was filed). *See* Memorandum in Opposition to Motion to Dismiss Complaint (R2A 1:286). On August 10, 2012, Judge Huvelle sanctioned the Petitioner $123,802.17 in an order filled with misrepresentations and outright falsehoods. *See* Sanctions Memorandum (Appx. C) and *Robertson v. Cartinhour*, 883 F.Supp.2d 121 (D.D.C. 2012). For example, Judge Huvelle accused the Petitioner of filing a bankruptcy case for the purpose of interfering with *Robertson I*. 883 F.Supp.2d at 124. In reality, an attorney in Memphis filed the involuntary bankruptcy *against* the Petitioner's client. *See* Declaration of Ty Clevenger (R2A 3:1111-1112). Elsewhere, Judge Huvelle wrote that Judge Swain had "recognized" that the Petitioner filed *Robertson II* in New York "for the improper purpose of forestalling litigation in *Robertson I*." 883 F.Supp.2d at 126. In reality, Judge Swain never said anything of the sort. In a motion filed pursuant to Fed. R. Civ. P. 59, the Petitioner asked Judge Huvelle to correct her misrepresentations, including the objectively false allegation that the Petitioner filed the bankruptcy case. (R2A

3:1104). Judge Huvelle refused, claiming that she had correctly quoted another judge, *i.e.*, Judge Royce Lamberth,[1] about the bankruptcy. *See* September 27, 2012 Memorandum (Appx. F). The Petitioner appealed to the U.S. Court of Appeals and, after briefing, the Second Circuit issued its decision in *Ligon v. City of New York*. The Petitioner made the D.C. Circuit aware of *Ligon* in a Rule 28(j) letter, *see* December 9, 2013 Letter from Ty Clevenger to Mark Langer (Doc. No. 1469633), but the Court of Appeals canceled oral argument and affirmed the sanctions order, holding that "[t]he award of sanctions was appropriate for the reasons set forth in the District Court's opinion." *See* January 22, 2014 Judgment, *Robertson v. Cartinhour*, Case No. 12-7100 (Doc. No. 1476103)(Appx. A), citing *Robertson v. Cartinhour*, 883 F. Supp. 2d 121 (D.D.C. 2012)(Appx. C). The Petitioner filed a petition for rehearing en banc, again citing *Ligon*, but the Court of Appeals denied the petition. *See* March 11, 2014 Order (Appx. B).

[1] The Petitioner also asked Judge Lamberth to correct the false statement, but he likewise refused, even though it is a matter of public record that *In re W.A.R., LLP,* Case No. 10-32530-PJD (W.D. Tenn.) was the result of an involuntary bankruptcy petition filed *against* the Petitioner's client by attorney William Wooten of Memphis, Tennessee.

REASONS FOR GRANTING THE PETITION

> The Supreme Court "has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity." *Mesarosh v. U.S.*, 352 U.S. 1, 14 (1956).

This case cries out for an exercise of the Court's supervisory jurisdiction. While there are circuit splits regarding judicial disqualification and 28 U.S.C. § 1927 (discussed below), their significance pales in comparison to that of the gross judicial misconduct in the underlying proceedings. In *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), the Court noted that "the supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity." *Id.*, at 736, n. 8, 100 S.Ct., at 2446, n. 8.

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. *See McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124, 76 S.Ct. 663, 668.

Mesarosh, 352 U.S. at 14. Judge Huvelle had serious conflicts of interest, and the steadfast refusal of the Court of Appeals to acknowledge the evidence of misconduct – much less discuss or curtail the misconduct – only furthers the appearance of impropriety. That is so because the Court of Appeals had its own

supervisory duty, *see, e.g., U.S. v. Hasting*, 461 U.S. 499, 526 (1983) (acknowleding "the duty of reviewing courts to preserve the integrity of the judicial process"), and it appears that the Court of Appeals abdicated that duty time and again.

Here, the pattern of misconduct dates back to 2009, when Judge Huvelle announced at an initial scheduling conference – and without having heard any evidence – that she was going to procure a judgment for the opposing party. Thereafter, she went so far as to cover up felonies and frauds on the court, then she sought out and dismissed another case (*i.e.*, *Robertson II*) that threatened to expose her misconduct. The Court of Appeals only compounded the appearance of impropriety by turning a blind eye, at every turn, to the escalating pattern of misconduct. The "waters of justice" have indeed been polluted in the case below, and only this Court can fulfull "the 'twofold' purpose of deterring illegality and protecting judicial integrity."

(1) The circuits are divided about whether reassignment is necessary when a judge manipulates the random assignment process, but reversal and reassignment clearly are necessary when a judge assigns herself to a case that implicates her in misconduct.

As noted above, the Second Circuit recently disqualified a district judge on its own motion in light of evidence that the district judge bypassed the random case assignment process created by the local rules of the Southern District of New York. *See Ligon*, 736 F.3d at 122-130. This event was a matter of considerable public

interest, and not merely because the case involved allegations that the New York City Police Department's "stop and frisk" policy was unconstitutional. The Southern District of New York changed its local rules in response to *Ligon,* a fact noted by the *New York Times* as well as legal scholars. *See, e.g.*, Benjamin Weiser and Joseph Goldstein, "Federal Court Alters Rules on Judge Assignments," December 23, 2013, *New York Times* (Doc. No. 1481056).

In contrast, the Ninth Circuit has long held that local rules requiring random judicial assignment do not vest litigants with any right to random judicial assignment. *See U.S. v. Torbert*, 496 F.2d 154, 157 (9th Cir. 1974) and *U.S. v. Simmons*, 476 F.2d 33, 35 (9th Cir. 1973).

> The failure of the district court to follow the procedure for random assignment outlined in its General Order does not require the reversal of appellant's conviction. The General Order is a housekeeping rule for the internal operation of the district court which has 'a large measure of discretion in interpreting and applying' it. *Lance, Inc. v. Dewco Services, Inc.*, 422 F.2d 778, 784 (9th Cir. 1970). It does not give appellant a vested right to any particular procedure, so long as alternatives applied by the court are consistent with [28 U.S.C.] §144 and constitutionally permissible.

Torbert, 496 F.2d at 157. Similarly, the Ninth Circuit held in *Simmons* that a judge's non-random assignment – even though contrary to the local rules of the Central District of California – was not grounds for reversal. 476 F.2d at 35. "[W]e cannot be unmindful that Local Rules are promulgated by District Courts primarily to promote the efficiency of the court, and that the court has a large measure of discretion in applying them." *Id*.

The D.C. Circuit has now adopted the Ninth Circuit position, and it is plainly erroneous, because a federal statute *mandates* that the district court follow its own rules regarding case assignments:

> The business of a court having more than one judge *shall* be divided among the judges *as provided by the rules and orders of the court*. The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

28 U.S.C. § 137 (emphasis added). In other words, the district court has great latitude in writing the rules governing case assignments, but once those rules are written, the district court *shall* follow them. Moreover, this Court recently observed that district courts have discretion in adopting local rules, but once adopted, those rules "have the force of law." *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010), quoting *Weil v. Neary*, 278 U.S. 160, 169 (1929). The Ninth Circuit's position is a dangerous proposition indeed, because it allows district courts to create law and then disregard it willy-nilly.

Ironically, the district court below already had fairly well-developed case law that highlighted the importance of random judicial assignments:

> The fundamental rationale for the general rule requiring random assignment of cases is to ensure greater public confidence in the integrity of the judicial process. The rule guarantees fair and equal distribution of cases to all judges, avoids public perception or appearance of favoritism in assignments, and reduces opportunities for judge-shopping.

Tripp v. Executive Office of President, 196 F.R.D. 201, 202 (D.D.C. 2000). That

holding did not arise in a vacuum. Shortly before the opinion was issued, the chief judge of the D.C. District was twice accused of manipulating case assignments for political reasons, leading to Congressional outrage and the appointment of a special investigative committee. *See* Katherine MacFarlane, "The Danger of Nonrandom Case Assignment: How the S.D.N.Y's 'Related Cases' Rule Has Shaped the Evolution of Stop-and-Frisk Law," *Journal Articles,* Paper 115, pp. 6-8, http://digitalcommons.law.lsu.edu/faculty_scholarship/115 (citing sources). The case below perfectly illustrates all the dangers identified in *Tripp*. The defendants in New York could not get Judge Swain to dismiss the case or award sanctions, so they sought transfer back to D.C., where a biased and conflicted judge would use her position as chair of the assignments committee to skirt the local rules and give them what they wanted.

Even in the Ninth Circuit, that court has created an important caveat to its holding that local rules on case assignments do not create due process rights for litigants: "[A] party has no due process right to random case assignment or to ensure the selection or avoidance of any particular judge *absent a showing of bias or partiality in the proceedings*." *In re Marshall*, 721 F.3d 1032, 1040 (2013) (emphasis added), citing *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987) (explaining that "a [party] has no right to any particular procedure for the selection of the judge[,]" so long as the decision is made "in a manner free from bias or the

desire to influence the outcome of the proceedings"). Here, there is overwhelming evidence of bias and partiality in the proceedings. The district judge below had deep conflicts of interest, but she nonetheless sought out the case for herself, then retaliated against the attorney who filed it (*i.e.*, the Petitioner). That reeks of impropriety.

Even if Judge Huvelle had been randomly assigned to the case below, she would have been obligated to recuse herself. *Robertson II* alleged criminal litigation misconduct in *Robertson I*, including forgery, perjury, and obstruction of justice. And these were not merely allegations. Mr. Cartinhour implicated his own attorneys in the forgery during live testimony in front of Judge Huvelle, for example, and an undisputed e-mail chain proved that Mr. Cartinhour and his attorneys filed false interrogatories in order to conceal the identity of Larry Ash, an adverse witness who would conclusively disprove a central tenet of Mr. Cartinhour's claims. Incidentally, Mr. Kearney was forced to admit on December 19, 2013 in separate proceedings[2] that his firm could not produce the original

[2] The Petitioner asks the Court to take judicial notice of Mr. Kearney's December 19, 2013 filing (attached at Appendix I) in *Commission for Lawyer Discipline v. Ty Clevenger*, Case No. 29143M, Circuit Court of Montgomery County, Maryland, a foreign discovery proceeding that arises from a disciplinary case in Texas against the Petitioner. That disciplinary case, in turn, results partly from Judge Huvelle's sanctions order against the Petitioner. The Petitioner actually encouraged the Texas bar to file disciplinary charges so he could conduct discovery and prove that Judge Huvelle's allegations were false and were tainted by judicial impropriety. As a result of the Maryland proceedings, the Petitioner obtained additional evidence that the disputed affidavit was, in fact, a forgery. The Petitioner also obtained evidence that Judge Huvelle communicated *ex parte* with Mr. Cartinhour's attorneys. Those discovery proceedings are ongoing.

version of the allegedly forged affidavit that had been electronically filed in *Robertson I*. That was particularly significant in light of the fact that the local rules required him to retain the original, his own client had alleged in open court that the electronic version was a forgery, and the Petitioner had sent a spoliation letter demanding preservation of the original affidavit.

According to Canon 3(B)(5) of the Code of Conduct for United States Judges, "[a] judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct." Judge Huvelle was – by her own admission – personally aware of the crimes committed by lawyers in her courtroom, and she did nothing. In fact, Judge Huvelle did worse than nothing. The Court will recall that, when the Petitioner tried to enter an appearance in *Robertson I*, he explained to Judge Huvelle that he intended to seek sanctions based on the crimes committed in her courtroom. Judge Huvelle then responded by blocking the Petitioner's appearance. In other words, she did not want to hear about it. After all, Judge Huvelle had declared long before – and without hearing any evidence – that she was going to procure a judgment in favor of Mr. Cartinhour, and she obviously was not going to let felonies, frauds on the court, or anything else get in the way of her plans.

When *Robertson II* came along, it posed a direct threat to Judge Huvelle. If

its allegations were proven true (and some of them already had been), it would necessarily infer that she had violated Canon 3(B)(5). In fact, it could infer much more than that. As the Petitioner explained to Judge Huvelle in his memorandum seeking her recusal, 18 U.S.C. §4 criminalizes misprision of a felony, and she arguably misprisioned the felonies that occurred in her courtroom.

> [F]ederal civil litigants should be aware that unlike the privilege that attaches to disclosures made to priests, lawyers, and physicians, all federal judicial officers take a oath to "perform all the duties incumbent ... under the Constitution and laws of the United States." 28 U.S.C. § 453. Among those duties is an obligation to uphold and obey the laws of the United States, not the least of which is 18, United States Code, Section 4, which criminalizes misprision of a felony:
>
> > Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.
>
> 18 U.S.C. § 4. *There is no "federal judge" exception that the court can find to this felony.*

Suntrust Mortgage, Inc. v. Busby, 2009 WL 4801347, *3 (W.D.N.C.)(emphasis added). In other words, if the *Suntrust Mortgage* court is right, then a trial in *Robertson II* could have implicated Judge Huvelle in misprision of the felonies that were committed in her court in *Robertson I*. A reasonable observer could therefore conclude that Judge Huvelle sought out *Robertson II* and dismissed it on the pleadings in order to protect herself, then retaliated by issuing draconian sanctions against the attorney who filed it (*i.e.*, the Petitioner). 28 U.S.C. §455(a), of course, requires a judge to "disqualify himself in any proceeding in which his impartiality

might reasonably be questioned." *See also* 28 U.S.C. §455(b)(1)(judge must disqualify where "he has a personal bias or prejudice concerning a party") and §455(b)(5)(iii)(judge must disqualify where she has "an interest that could be substantially affected by the outcome of the proceeding"). If the foregoing facts do not call Judge Huvelle's impartiality into question, it is hard to imagine what would.

Moreover, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009), quoting *In re Murchison*, 349 U.S. 133, 136 (1955). Even if the Petitioner is the horrible person that Judge Huvelle portrayed him to be, he was nonetheless entitled to a hearing before an unconflicted and unbiased judge. An ax murderer is entitled to that much. And if the Petitioner had truly done something worthy of draconian sanctions, then another judge could have seen that just as readily as Judge Huvelle. However, Judge Swain had already declined requests to sanction the Petitioner over his refusal to dismiss *Robertson II*, almost certainly because she recognized that Second Circuit case law permitted the Petitioner to do exactly what he did, *i.e.*, request a stay of *Robertson II* pending the appeal of *Robertson I*. *See Curtis v. Citibank, N.A.*,226 F.3d 133, 138 (2nd Cir. 2000)(where cases are duplicative, the court may dismiss without prejudice, stay the second case, or transfer it). This only furthers the appearance that Judge Huvelle sought

out *Robertson II* in order to retaliate against the Petitioner, because no other judge would have sanctioned the Petitioner for doing something that another court permitted, particularly where that conduct was expressly authorized by the law governing that court. And Judge Huvelle's false claim that Judge Swain had "recognized" that the Petitioner filed *Robertson II* for an improper purpose when, in fact, Judge Swain never said such a thing, only adds to the appearance that Judge Huvelle was desperately trying to discredit and smear the Petitioner.

(2) A transferee judge has no authority to sanction parties or counsel pursuant to 28 U.S.C. § 1927 for conduct that occurred before the transferor judge, particularly where the transferor judge refused to sanction the conduct in question.

In *Grid Systems Corp. v. John Fluke Mfg. Co.*, the Ninth Circuit held that a district court could not grant §1927 sanctions based on proceedings in another court. 41 F.3d 1318, 1319-20 (1994), citing *Matter of Case*, 937 F.2d 1014 (5th Cir.1991). In the case below, Judge Huvelle opined rather disingenuously that the Ninth Circuit case was unpersuasive because the Fifth Circuit case that it cited (*i.e.*, *Matter of Case*) had since been modified by the Fifth Circuit. *See Robertson v. Cartinhour*, 883 F.Supp.2d 121, 130 n.28 (D.D.C. 2012). One must wonder how a Fifth Circuit case can modify a Ninth Circuit holding. Regardless, both *Matter of Case* and *Grid Systems* are still valid law in their respective circuits for the proposition that a judge cannot grant §1927 sanctions on the basis of events that occurred before another court. *See Travelers Ins. Co. v. St. Jude Hosp. of Kenner,*

La., Inc., 38 F.3d 1414, 1417 (5th Cir. 1994)(citing *Matter of Case*) and *In re USA Commercial Mortgage Company*, 462 Fed.Appx. 677, 679+ (9th Cir. 2011)(citing *Grid Systems*); *see also In re Galgano*, 358 B.R. 90, 104 (Bkrtcy.S.D.N.Y. 2007) (citing both *Matter of Case* and *Grid Systems*) and *Butcher v. Lawyers Title Ins. Corp.*, 2005 WL 2242881, at *1 (W.D.Mich. 2005)(same holding).

Nonetheless, the law is somewhat muddled in this area, even within the Ninth Circuit. In *Western Systems, Inc. v. Ulloa*, for example, the Ninth Circuit allowed a district court to sanction parties for their actions in a territorial court in Guam. 958 F.2d 864 (1992), citing *Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 2134, 115 L.Ed.2d 27 (1991). *Western Systems* can be distinguished from *Grid Systems*, however, because *Western Systems* and *Chambers* both deal with inherent-authority sanctions, whereas *Grid Systems* deals with 28 U.S.C. §1927 sanctions. The Fifth Circuit, on the other hand, has limited the application of *Chambers* to "actions taken in another forum 'in direct contravention of the District Court's orders.'" *Conner v. Travis County*, 209 F.3d 794, 800 (2000), quoting *Chambers*, 501 U.S. at 57, 111 S.Ct. at 2139. In the case below, however, neither the Petitioner nor his client ever violated any order from Judge Huvelle, *e.g.*, an order directing them to dismiss the New York action or a general anti-suit injunction, because Judge Huvelle never issued any such order.[3]

[3] In her August 10, 2012 sanctions order, Judge Huvelle hinted that the Petitioner's actions in New York had somehow defied her orders in *Robertson I*. This suggestion was grossly disingenuous. The Defendants had moved Judge Huvelle to enjoin the proceedings in New York, *and*

Ironically, another judge in the D.C. District had previously opined that sanctions for behavior in other courts were not just prudentially prohibited, but jurisdictionally prohibited, even under the court's inherent powers. *Healey v. Labgold*, 271 F. Supp. 2d 303, 305 (D.D.C. 2003)(Facciola, J.)("it would be an obvious usurpation of jurisdiction for this court to exercise its inherent authority to sanction behavior before another district court"). Jurisdictional or not, it was manifestly unjust for Judge Huvelle to second-guess decisions made by Judge Swain in matters of judicial discretion, then sanction the Petitioner on that basis. Perhaps there are some circumstances that might justify a transferee judge punishing actions before the transferor court, *e.g.*, where a fraud on the transferor court is not discovered until after the transfer. But that is a far cry from the circumstances of the underlying case. Second Circuit law clearly authorized a request for stay rather than dismissal, *see Curtis*, 226 F.3d at 138, the Defendants below had already sought sanctions on the grounds that the Petitioner should have dismissed the case, and Judge Swain had refused to grant sanctions.

Under the new rule stated by Judge Huvelle and adopted by the D.C. Circuit, any transferee judge in that circuit can now second-guess all of the decisions of the transferor judge. In particular, the transferee judge can sanction the parties and

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Judge Huvelle denied that motion. In fact, Judge Huvelle admitted as much elsewhere in the August 10, 2012 sanctions order. *See* August 10, 2012 Memorandum Opinion at 7-8 (Appx. C). To be perfectly clear, Judge Huvelle had never at any time ordered the Petitioner or his client to halt or dismiss the proceedings in New York (or anywhere else).

their counsel for actions that the first judge permitted, even where those actions were expressly authorized by the governing case law of the transferor court. Whether for prudential or jurisdictional reasons, this Court should not tolerate that kind of mischief and lawlessness.

(3) The Court of Appeals added to the appearance of impropriety, infringed the jurisdiciton of this Court, and violated the statutory rights of the Petitioner by refusing to explain its decision.

Judge Huvelle's actions in *Robertson I* and *Robertson II* were indefensible and, so it appears, the Court of Appeals swept them under the rug rather than try to defend them. That not only furthers the appearance of impropriety, it infringes the supervisory jurisdiction of this Court.

> 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.

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). In *TXO Production Corp. v. Alliance Resources Corp.*, Justice

O'Conner recognized the danger of lower courts effectively "hiding the ball" from this Court:

> While this Court has the ultimate power to interpret the Constitution, we grant review in only a small number of cases. We therefore rely primarily on state courts to fulfill the constitutional role as primary guarantors of federal rights. But the state courts must do more than recite the constitutional rule. They also must apply it, faithful to its letter and cognizant of the principles underlying it. Unfortunately, such review is not always forthcoming. Amici recite case after case in which review has been inadequate or absent altogether. *See, e.g.*, Brief for Phillips Petroleum Co. et al. as Amici Curiae 20–27. The Supreme Court of Appeals of West Virginia, at the same time it recognized *Haslip* as law, itself warned:
>
> > "[W]e understand as well as the next court how to ... articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. [All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *Garnes, supra*, 186 W.Va. at 666, 413 S.E.2d, at 907 (footnote omitted).
>
> I fear that the Supreme Court of Appeals followed such a course in this case. By affirming the judgment nonetheless, today's decision renders the meaningful appellate review contemplated in *Haslip* illusory; courts now may disregard the post-trial review required by due process at whim or will, so long as they do not deny its necessity openly or altogether.

509 U.S. 443, 499-500 (1993)(O'Conner, J., *dissenting*). In the case below, the Petitioner was denied any "meaningful appellate review" by the Court of Appeals, and that infringes a right created by statute. *See* 28 U.S.C. § 1291, *et. seq*.

> 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.

Richman and Reynolds, 81 Cornell L. Rev. at 284 (1996).

Since at least the early 1980s, judges and legal scholars have criticized the appellate courts' growing practice of issuing decisions with little or no explanation. Roughly 80 percent of cases in the federal courts of appeal are now resolved with an unpublished or unexplained decision, *see 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), and the practice shows no sign of abating.

> [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 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.

Penelope Pether, *Inequitable injunctions: the scandal of private judging in the U.S. courts*, 56 Stanford L. Rev. 1438, 1483-84 (May 2004)(internal citations omitted). According to the late 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." Pether, 56 Stanford L. Rev. 1438, 1485 (May 2004), quoting Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999). When a trial judge allows lawyers to commit crimes in her courtroom, and the Court of Appeals refuses (repeatedly) even to acknowledge the issue, that indeed "enable[s] corruption and increase[s] 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." In fact, any time judicial bias or misconduct is preserved for review, and the Court of Appeals affirms without explanation, that inevitably adds to the appearance of impropriety. Accordingly, the federal appellate courts should be required to explain their decisions whenever judicial bias or misconduct is preserved for review. Otherwise, it appears that the federal judiciary is "circling the wagons" to protect one of its own.

Moreover, the present culture of non-publication is unconstitutional. In *Anastasoff v. U.S.*, Judge Arnold famously wrote that unpublished opinions are precedential, like it or not, and that rules purporting to limit the precedential effect of unpublished opinions are unconstitutional. 223 F.3d 898, 904 (8th Cir. 2000), *vacated on other grounds* at 235 F.3d 1054 (8th Cir. 2000). According to Judge

Arnold, the practice of explaining decisions – and granting precedential effect to those explanations – was inherent to the legal system adopted by the Framers and established by Article III of the Constitution. Judge Arnold cited contemporary legal authorities of the Framers, among other sources, to prove his point:

> As Blackstone defined it, each exercise of the "judicial power" requires judges "to determine the law" arising upon the facts of the case. 3 Blackstone, Commentaries *25. "To determine the law" meant not only choosing the appropriate legal principle but also expounding and interpreting it, so that "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule...." 1 Commentaries *69.

Anastasoff, 223 F.3d at 901.

The issue here differs somewhat, but it overlaps the discussion in *Anastastoff* and raises a more fundamental question, *i.e.*, whether the appellate courts have any constitutional obligation to explain themselves in the first instance. Article III, Section II of the Constitution explains that the judicial power of the federal courts "shall extend to all cases, in law and equity..." This Court long ago recognized the significance of those three words, "law and equity," *i.e.*, that the legal system of the United States would mirror the legal *system* of England, if not its particular laws:

> The Constitution of the United States and the acts of Congress, recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles.

Thompson v. Central Ohio R. Co., 73 U.S. 134, 137 (1867) citing *Robinson v.*

Campbell, 16 U.S. 212, 213 (1818). In other words, the Constitution mandates a common-law system in the federal courts. That is relevant here because a common-law system, in turn, necessitates reasoned, written explanations from the appellate courts. Although he did not discuss the significance of the "law and equity" phrase (or *Thompson* or *Robinson*), Judge Arnold very amply demonstrated that precedent was essential to the understanding of the Framers and the early members of this Court. The Petitioner submits that the issue he proffers herein is equally essential to Article III and perhaps more so, because precedent does not develop (or even exist) in the absence of explanations. In other words, a common-law legal system necessitates reasoned opinions from the appellate courts.

A circuit split and a vigorous debate quickly followed *Anastasoff, see, e.g., Hart v. Massanari,* 266 F.3d 1155 (9th Cir. 2001) and *Symbol Technologies, Inc. v. Lemelson Medical*, 277 F.3d 1361 (Fed. Cir. 2002), and that split has never been resolved. Accordingly, the Petitioner submits that the related issue set forth herein, *i.e.*, whether federal courts have any Constitutional obligation to explain themselves, is ripe for this Court's resolution. As Professor Pether argues, the growing practice of issuing unexplained appellate decisions is fundamentally altering the legal system created by Article III, effectively transitioning the federal courts from a common-law system toward a civil-code system. Pether, 56 Stanford L. Rev. 1438, *et seq*.

If Article III mandates a legal system based on precedent and the common law, does that not limit the discretion of the federal appellate courts in issuing unexplained decisions? May the appellate courts, as a matter of routine, resolve most cases by perfunctory opinions or unexplained orders? The Petitioner is not so naïve as to think that this case could render a bright-line answer to that question, but then neither could any other case. Instead, the Cross-Petitioner submits that this case, as well as any other, would allow the Court to set forth the Article III, Clause II principles – or the prudential principles – that obligate the appellate courts to explain themselves.

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, both the decision to dismiss the underlying case and the decision to sanction the Petitioner were tainted by Judge Huvelle's bias and gross conflicts of interest.

If certiorari is granted, the Petitioner would urge the Court to exercise its

supervisory authority to reassign this case upon remand. As noted above, the Court of Appeals has repeatedly refused to acknowledge or address Judge Huvelle's escalating misconduct, so much so that the Court of Appeals itself has now created an appearance of impropriety. Under the unusual circumstances of this case, the Petitioner requests that the Court grant certiorari, reverse the Court of Appeals, and reassign the case to the Southern District of New York, where it originated.

Respectfully Submitted,

_____/s/_____
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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 9, 2014, 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
Purported Counsel for Respondent William C. Cartinhour, Jr.

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

_____/s/_____
Ty Clevenger

Certificate of Service