NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE DEANTE DRAKE,

APPELLANT,

V.

COURT OF APPEALS OF VIRGINIA,

FOURTH APPELLATE DISTRICT,

APPELLEE.

ON AN APPEAL FROM THE UNITED STATES

COURT OF APPEALS OF THE FOURTH CIRCUIT

PETITION FOR A WRIT OF MANDAMUS OR IN THE ALTERNATIVE A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The three substantial questions below that need to be determined by the Supreme Court pursuant to Supreme Court Rule 10(a) are compelling questions that have not ever been determined by the Supreme Court, or any United States Court of Appeals, and they are:

(1) Whether when a Fed.R.Crim.P. 18 U.S.C. § 3742(f)(1)(A) Brief is filed for rehearing en banc, that the Court of Appeals governed under Fed.R.App.P. 4(b)(3)(A) should be considered as untimely if not filed within fourteen (14) days even though § 3742(f)(1)(A)'s statutory construction is not in any subsection of Rule 4(b)(1)(A), and or any section of Rule 4(b)?

(2) Whether the Supreme Court's decision in Houston v. Lack, 487 U.S. 266 (1988) applies to incoming prison legal mail delays just like it does to outgoing legal mail delays by prison authorities as the Third Circuit held in United States v. Grana, 864 F. 2d 312; 1989 U.S. App (3rd Cir.)?

(3) Whether it is a violation of a movant's First Amendment Right under the petition clause when the Fourth Circuit Court of Appeals denied Drake's § 3742(f)(1)(A) Brief, Fed.R.App.P. 27(b)-(c) Motion, and Fed.R.App.P. 8(a)(2) Motion for Stay as final under Local Rule 40(b) when there was never an adjudication on the merits of the issues claimed?

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PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE
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Deante Drake respectfully petitions for writ of mandamus or in the alternative a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION AND ORDER BELOW

The judgment of the United States Court of Appeals for the Fourth Circuit, entered January 2, 2018, with an unpublished opinion (App. Doc. 17-7204). The Order of the United States Court of Appeals, entered January 25, 2018.

This case was the subject of two issues.
First: The 18 U.S.C. § 3742(f)(1)(A) Brief for a violation of law was filed pursuant to Fed. R. App. P. 4(b)(C)("A valid notice of appeal is effective - without amendment - to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)."). The Court of Appeals Circuit Judges King, shedd, and Harris, Judgment on January 2, 2018, was that Drake previously appealed from his 2008 Judgment, see United STates v. Drake, 318 F. Appx. 247 (4th Cir. 2009)(No. 08-4589), this Court is without jurisdiction to entertain a second appeal from the same judgment, and the Court of Appeals also held Drake's notice of appeal is inordinately late. See Fed.R.App.P. 4(b)(1)(Providing 30 days to file a notice of appeal in a criminal dase).

The Appellate Courts committed a Fed.R.Crim.P. 52(b) plain error, because the District Court in the Northern District of West Virginia dismissed without prejudice Drake's burrage v. United states, 134 S. Ct. 881 (2014) claim never ruling on the merits in the 28 U.S.C. § 2255 Motion on August 3, 2016, United

States v. Drake, 1:07-cr-00053 (4CCA Case No. 17-60-86), so it cannot be considered final in the Appellate Court not to have jurisdiction pursuant to Fed.R.App.P. 4(b)(C).

Second: The Appellate Court committed an abuse of discretion when it issued on January 25, 2018, an Order pursuant to Local Rule 40(C) holding that the Petition for Rehearing En Banc in this case is denied as untimely, and not changing it's decision after Drake filed Fed.R.App.P. 27(b)(C) Application for Relief with a Houston v. Lack, 487 U.S. 266 (1988) and United States v. Grana, 864 F. 2d 312; 1989 U.S. App (3rd Cir.) Claims of Receiving the January 2, 2018 Court Order on the due date due to prison authorities negligence of incoming legal mail, and in support of the Motion Drake filed with it an Affidavit pursuant to Fed. R.App.P. 4(C)(1) Declaration under 25 U.S.C. § 1746, and a subpeona to compel pursuant to Fed.R.App.P. 45(d)(3)-(C).

The Appellate Court committed an abuse of discretion because subsequent to the Rule 27(b)(C) Application for Relief Motion, Drake filed a Motion for Stay under Fed.R.App.P. 8(a)(2)(A)(i), and filing with a single Judge pursuant to Fed.R.App.P. 25(a)(3) ("Filing a Motion with a Judge. If a Motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk), and pursuant to Fed.R.App.P. 25(a)(4)("Clerk's refusal of documents. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these fules or any local rule or practice.). The Appellate Court on March 19, 2018, issued a Notice Pursuant

to the provisions of Local Rule 40(d) stating no further action will be taken in this matter by this court. For teh request of the court to issue an interlocutory order under 28 U.S.C. § 1291(a)(1) to the District Court to create a record pursuant to Fed.R.App.P. 10(a)(1)(the original papers and exhibits filed in the district court), for the Houston v. Lack, 487 U.S. 266 (1988) and United STates v. Grana, 864 F. 2d 312; 1999 U.S. App (3rd Cir.) Claims of prison authorities negligence of incoming legal mail, because the appellate court is not a fact finding court.

JURISDICTION

Jurisdiction is conferred upon this court by 28 U.S.C. § 1651(a)("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principle of law").

Jurisdiction is conferred upon this court by 28 U.S.C.§ 1254(1) ("By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"); and also jurisdiction is conferred upon this court by 28 U.S.C. § 2106("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. I

The First Amendment to the United States Constitution provides that: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.

Fed.R.Crim.P. 18 U.S.C. § 3742(a)(1) Violation of Law

(a). Appeal by a defendant states in part: A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence -- (1) was imposed in violation of law.

28 U.S.C. § 2072(a) Rules of procedure and Evidence; Power to Prescribe.

(B). The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United STates district court (including proceedings before Magistrates [Magistrate Judges] thereof) and Court of Appeals.

28 U.S.C. § 1292(e) Interlocutory decisions.

(C). The Supreme Court may prescribe rule, in accordance with Section 2072 of this title [28 U.S.C. § 2072], to provide for an appeal of an interlocutory decision to the court of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

Local Rule 40(d). Papers filed after denial of a Petition for Rehearing.

Except for timely petitions for rehearing en banc, cost and attorney fee matters, and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the office of the clerk shall not receive motions or other papers requesting further relief in a case after the court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.

Fed.R.App.P. 25(a)(3) Filing a Motion with a Judge.

(1). If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

Fed.R.App.P. 25(a)(4) Clerks Refusal of Documents.

(2). The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rule or practice.

A. Basis for Certiorari

This is an appeal from a 18 U.S.C. § 3742(f)(1)(A) Motion for violation of law and from a petition for rehearing en banc due to the fact the Court of Appeals of the Fourth Circuit held: (1). Because Drake previously appealed from his 2008 Judgment, see United States v. Drake, 318 F. Appx 247 (4th Cir. 2009)(No. 08-4589), this Court is without jurisdiction to entertain a second appeal from the same judgment. The court opinion is erroneous

because the Burrage v. United States , 134 S. Ct. 881 (2014) Claim that was the issue in a second and successive 28 U.S.C. § 2255 Motion was dismissed in the District Court without prejudice establishing it cannot be considered final, and the Court of Appeals created a piecemeal appeal when the court dismissed the 18 U.S.C. § 3742(f)(1)(A) with a Burrage v. United STates, 134 S. Ct. 881 (2014) and Mathis v. United States, 136 S. Ct. 2243 (2016) Claim based off the Court of Appeals dismissal in United States v. Drake, 689 Fed. Appx. 219; 2017 U.S. App (4th Cir.) because Drake never presented his Burrage and Mathis claim in the Court of Appeals from an adjudication so the § 2255 cannot be considered final by the District Court, and or considered final in his original criminal proceedings in 2008.

(2). The Court of Appeals held that Drake;s Petition for Rehearing En Banc was untimely for the court order entered January 2, 2018, pursuant to Rule 41(a) of Federal Rule of Appeallate Procedure, was erroneous, because Drake filed the Petition for Rehearing En Banc on January 19, 2018, and the court did not issue its Mandate until January 24, 2018. Drake then filed a Fed.R.App.P. 8(a)(2)(A)(i) Motion for Stay for an interlocutory order pending review in the District Court for his Houston v. Lack 487 U.S. 266 (1988) and United States v. Grana, 864 F. 2d 312; 1989 U.S. App (3rd Cir.) Mailbox Rule Claims to be adjudicated on the record pursuant to Fed.R.App.P.10(a)(1) so he may appeal in the Court of Appeals, its order of untimelyness because the Appellate Court is not a fact finding court, and teh Appellate Court denied the Fed.R.App.P.8(a)(2)(A)(i) Motion for stay pursuant to Local Rule 40(d).

B. APPELLATE COURT PROCEEDINGS BELOW.

Movant Drake filed a Notice of appeal pursuant to 18 U.SC. § 3742(a)(1) in the United States District Court for the Northern District of West Virginia at Clarksburg, and movant filed a 18 U.S.C. § 3742(f)(1)(A) Brief with a Burrage v. United States, 134 S. Ct. 881 (2014) and Mathis v. United States, 136 S. Ct. 2243 (2016) Claims in the Court of Appeals both on the same day of January 17, 2017. See (Appendix - A) § 3742 Brief.

The, January 23, 2017 the Appellate Court rejected movants 18 U.S.C. § 3742 Brief and sent his motion back to him and with the rejected brief provided movant with an application for a second or successive 28 U.S.C. § 2255 motion and misled movant by telling him in a letter from the Fourth Circuit, that his ("Proposed filings do not appear to fall within the jursidction of this court as outlined. Accordingly, we are unable to entertain the proffered papers and return them to you. Should you wish to file with this court a motion for authorization to file a second or successive § 2255 motion, you may do so on the enclosed forms. Finally, a review of this court's docket indicates you have a pending appeal from a dismissal order entered in the District Court on August 3, 2016 (4CCA Case No. 17-6086).").

Movant filed the § 2255 Motion without the Burrage and Mathis claims, and the Appellate Court dismissed the motion as untimely see (Appendix-B) Letter and § 2255 Motion, and Court Order of May 19, 2017.

Then on September 5, 2017, Movant filed a subsequent 18 U.S.C. § 3742(f)(1)(A) Motion with a Burrage and Mathis claims in the Appellate Court. Then on January 2, 2018, Circuit Judges

King, Shedd, and Harris, who were the same three judges who denied the § 2255 Motion also denied the subsequent § 3742(f)(1)(A) Brief holding: Because Drake previously appealed from his 2008 judgment, United States v. Drake, this Court is without jurisdiction to entertain a second appeal from the same judgment. see (Appendix C) Court Order of January 2, 2018 with § 3742(f)(1)(A) Brief.

Then after the Appellate Court issued its Order on January 2, 2018, movant did not receive the order until the due date of January 16, 2018 due to the delay of incoming legal mail by prison authorities. Movant filed his petition for rehearing en banc three days later with prison authorities January 19, 2018.

Then on January 24, 2018, the appellate court issued its Mandate and then the next day the court issued an order pursuant to Local Rule 40(c) holding: (The court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc in accordance with Local rule 40(C). The petition in this case is denied as untimely. See (Appendix-D) Petition for rehearing En banc and Mandate and Court Order.

Then on February 11, 2018, movant filed in the Appellate Court a F.R.A.P. 27(b)(C) Application for Relief Motion with a Grana and Houston claims and auxiliary filings for Affidavit pursuant to FRAP 4(C)(1), Declaration pursuant to 28 U.S.C. § 1746 and Motion for Subpeona to compel pursuant to FRAP 45(d)(3)-(C) production of extrinsic evidence for a copy of the face of the envelope showing the United States Postal Service postmark establishing if the authorities mailed the petition for en banc before the Appellate Court filed its Mandate before January 24, 2018. The Appellate Court denied the Motion pursuant to Local Rule 40(d) February 21, 2018. See (Appendix - E) Rule 27 Motion with Auxiliary

filings.

Then on March 13, 2018, movant in the Appellate Court filed a motion for stay under FRAP 8(a)(2)(A)(i) pursuant to RFAP 25(a)(3) filing with a singe judge and pursuant to FRAP 25(a)(4) Clerk's refusal of documents with a Grana and Houston claim requesting that the Appellate Court to grant an interlocutory order staying the mandate of January 24, 2018 pending review in the District Court so a judicial record would be created pursuant to FRAP 10(a)(1) original papers and exhibits filed in the District Court. For the claims of prison authorities "negligence" so after the disposition he could appeal the issues in the Court of Appeals. The Appellate Court denied the Motion for Stay pursuant to Local Rule 40(b) on March 19, 2018 see (Appendix - F) Motion for Stay.

MEMORANDUM OF LAW POINTS AND AUTHORITIES

A. REASON FOR GRANTING WRIT OF MANDAMUS OR ALTERNATIVELY CERTIORARI:

ISSUE I:

The Fourth Circuit Court of Appeals committed an abuse of discretion and created a piecemeal pursuant to 28 U.S.C. § 1291, and ruled contrary to Cohen v. Beneficial Indus. Loan Corp, 337 U.S. 541 (1949) because: When the Appellate Court denied movant's 18 U.S.C. § 3742(F)(!)(A) Brief for a violation of law, filed September 5, 2017, for lack of jurisdiction based on a previously filed appeal from his 2008 judgment. see Drake. When you look inside the case the Appellate Court cited above, it is clear that the case the Appellate Court is referring to is United STates v. Drake, 689 Fed. Appx. 219; 2017 U.S. App (4th Cir) which was an appeal based off a Rule 35(a) Motion that was construed in the District Court into a 28 U.S.C. § 2255 Motion that was dismissed in the District Court without prejudice August 3, 2016 subsequent to the District Court denying the August 3, 2016, construed 28 U.S.C. § 2255 Motion. Movant filed his first 18 U.S.C. § 3742(f)(1)(A) Brief for violation of law with a Burrage and Mathisclaims January 23, 2017. The Appellate Court rejected movant's January 23, 2017, § 3742(F)(1)(A) Brief filing, providing him with a letter on February 16, 2017, which held (internal letter quotation marks omitted):

> This acknowledges receipt of your proposed filings styled as a petition (to vacate sentence) and as a motion (for collateral review). Please be advised that this court has jurisdiction over matters appealed from federal district court with our circuit, established original proceedings arising from federal district court within our circuit, and appeals from certain

agencies. Your proposed filings do not appear to fall within the jurisdiction of this court as outlined. Accordingly, we are unable to entertain the proffered papers and return to you. Should you wish to file with this court a motion for authorization to file a second or successive § 2255 Motion you may do so on the enclosed forms. Finally, a review of this court's docket indicates you have a pending appeal from a dismissal order entered in the district court on August 3, 2016 (4 CCA Case No. 17-6086). If you believe the returned papers should be filed in the pending appeal, please return them to this court with the appeal case number on the front of each pleading.

The Appellate Court misled movant into believing that the August 3, 2016 dismissal still could be appealed, so movant filed the application for the second or successive § 2255 motion un Drake not with a Burrage and Mathisclaim, but only with issues in his discovery. Then on May 19, 2017 in movant Drake's case cited above, the court of appeals ruled in a (per curiam) opinion (internal case quotation marks omitted):

> Deante Drake seeks to appeal the district court's order denying relief on his motion construed as a 28 U.S.C. § 2255 (2012) motion. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed. When the United States or its officer or agency is a party, the notice of appeal must be filed no more than 60 days after the entry of the district court's final judgment or order, Fed.R.App.P. 4(a)(1)(B), unless the district court extends

the appeal period under Fed.R.App.P. 4(a)(5) or reopens the appeal period under Fed.R.App.P. 4(a)(b).

The timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Bowles v. Russell, 551 U.S. 205, 214 (2007). The District Courts order was entered on the docket on August 3, 2016. The notice of appeal was filed, at the earliest, on January 18, 2017. Because Drake failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we dismiss the appeal.

Subsequent to the dismissal stated above, movant then refiled his second 18 U.S.C. § 3742(f)(1)(A) brief for violation of law with his **Burrage and Mathis** claims. Due to the procedural history of this case, it is clear that the appellate court does have jurisdiction over the § 3742(f)(1)(A) brief, because the past filed appeals were never adjudicated on the merits of the Burrage and Mathis claims in the District Court or in the Appellate Court. The Appellate Court created a "piecemeal appeal" pursuant to 28 U.S.C. § 1291 when it committed an abuse of discretion dismissing the Burrage and Mathis claims, holding ("Because Drake previously appealed from his 2008 judgment this court is without jurisdiction to entertain a second appeal from the same judgment"). It is well established that claims are not considered final when they are rejected and removed from the court docket. The Fourth Circuit held in Penn-Am-Ins. v. mapp, 521 F. 3d 295, 2008 U.S. App (4th Cir.)(Internal quotation and case citations omitted)("An order administratively closing a case is a docket management tool that has no jurisdictional effect." Id. at 1294 (quoting Dees v. Rilly, 394 F. 3d 1290 (9th Cir. 2005); Lehman v. Revolution Portfolio LLC, 166 F. 3d 389,

1999 U.S. App (1st Cir.)(Internal quotation marks omitted)("[A]n administrative closing has no effect other than to remove a case from the court's active docket and permit the transfer of records associated with the case to an appropriate storage repository."), and also see WRS. Inc. v. Plaza Ent. Inc. 402 F. 3d 424, 427 (3rd Cir. 2005)(Internal quaotation marks omitted)("[A]n order adminstratively closing a case is not, in and of itself, a final order..."); Penn W. Assocs. Inc. v. Cohen, 371 F. 3d 118, 128 (3d Cir. 2009) (internal quotation marks omitted)("[A]n order merely directing that a case be marked closed constitutes an administrative closing that has no legal consequence other than to remove that case from the district court's active docket.")

As noted above, this clearly established that the Appellate Court's decision hold. (1) that the Appellate Court did not have jurisdiction based on a previously filed appeal from his 2008 judgment, and (2) movant's petition for en banc rehearing was untimely was a FRCP 52(b) Plain Error and an abuse of discretion because:

A. The District Court never adjudicated the Burrage claim on the merits, and only issued an order to dismiss the 28 U.S.C. § 2255 Motion without prejudice and order the clerk of courts to remove it from the court docket;

B. The Fourth Circuit Court of Appeals created a Piecemeal Appeal due to the fact it rejected movant's first 18 U.S.C. § 3742(F)(1)(A) Brief filed January 23, 2017 and removed it from the Appellate Court docket for lack of jurisdiction over the Burrageclaims without an adjudication on the merits, and then subsequently after the second 18 U.S.C. § 3742(F)(1)(A) Brief was filed September 5, 2017, the Appellate Court's January 2, 2018 Opinion reverses course

holding: The Appellate Court lacks jurisdiction based on a previously filed appeal, which was for movant's Burrage and Mathis claims for which the Appellate Court had already rejected prior.

C. The Fourth Circuit did not have jurisdiction for its January 25, 2018, order pursuant to Local Rule 40(C) holding movant's petition for en banc rehearing filed January 19, 2018, was untimely, because as noted above in subsection (A) and (B) clearly established that there was never an appeal taken for the claims with an adjudication on the merits and the January 2, 2018 court's opinion cannot be considered final, because the time continued to run when the petition for en banc rehearing was filed within 180 days, presenting the error of he "piecemeal appeal" to the Appellate Court.

Movant asserts that the Fourth Circuit cannot have it both ways of having its "cake" and "eating it too." The Appellate Court never remanded the January 23, 2017, 18 U.S.C. § 3742(f)(1)(A) Brief back to the District Court with the Burrage and Mathis claims to be adjudicated on the merits to be appealed back in the Court of Appeals, and nor did the District Court adjudicate the Burrage claim as final on the merits. As a general proposition, jurisdiction in the court of appeals is limited to the review of final decisions of the District Courts, see 28 U.S.C. § 1291, including certain otherwise interlocutory orders properly deemed to be final. see Cohen v. Beneficial Indus. Loan Corp("Recognizing right of Appellate review under collateral to, rights asserted in the action" and presents serious legal question not otherwise reviewable on appeal.").

MANDAMUS OR CERTIORARI REMEDY BY APPEAL

The Supreme Court should grant a Writ of Mandamus or in the alternative a Writ of Certiorari, because this is his only means

of redress to exercise his constitution First Amendment Right under the petition clause to be heard in the Fourth Circuit Court of Appeals. The Fourth Circuit held in Booker v. S.C. Dept't of Corr., 855 F. 3d 533 2017 US App ($th Cir.)(Internal headnote omitted)("The First Amendment's petition clause guarantees individuals the right to petition the Government for a redress of grievances. U.S. Const. Amend. 1."). The Fourth Circuit, is not following its own set precedent pursuant to the First Amendment's Petition Clause. The Supreme Court has the jurisdiction to stop the Fourth Circuit expansion of its erroneous appellate jurisdiction pursuant to the rules enabling Act 28 U.S.C. § 2071 et seq. gives this court the power to prescribe general rules of practice and procedur... for cases in the United States District Courts...and courts of appeals." 28 U.S.C. § 2072(a). In 1990, Congress added 28 U.S.C. § 2072(C), which authorizes the Supreme Court to prescribe rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under secton § 1291." Two years later, Congress added 28 U.S.C. § 1292(e), which allows the Supreme Court to prescribe rules in accordance with section 2072...to provide for an appeal of an interlocutory decision to the court of appeals that is not otherwise provided for under [§ 1292] (a),(b),(c), or (d).

The Supreme Court should exercise its jurisdiction, because if the court does not, movant will never be able to exercise his statutory right to appeal his claims in the Fourth Circuit Court of Appeals. Thus this Court should order a Writ of Mandamus and or a Writ of Certiorari.

B. REASON FOR GRANTING A WRIT OF MANDAMUS OR ALTERNATIVELY CERTIORARI:

ISSUE II.

The Circuit clerk of Appeals of the Fourth Circuit committed an abuse of discretion and violated Fed.R.App.P. 27(b)(c) Application for Relief. Fed.R.App.P. 25(a)(3) Filing with a single Judge, The collateral order doctrine in light of Cohen v. Beneficial, United States v. Grana, and Houston v. Lack, because:

When the clerk of court issued the January 24, 2018 mandate for the court's January 2, 2018, Judgment, and its January 25, 2018 court order holding movant's petition for rehearing en banc is untimely. Movant subsequently filed a Fed.R.App.P. 27(b)(c) Motion with a Grana and Houston claims. Because the statutory construction of FRAP 27(b)(c) holds:

(b) DISPOSITION OF A MOTION FOR A PROCEDURAL ORDER. The court may act on a motion for a procedural order - including a motion under Rule 26(b) - at any time without awaiting a response, and may, by Rule or by Order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the courts, or the clerk's action may file a motion to reconsider, vacate, or modify that aciton. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; A motion requesting that relief must be filed.

(C) Power of a single judge to entertain a motion. A Circuit Judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A Court of Appeals may provide by or by order in a particular case that only the court may act on any motion or class or motions. The court may review the action of a single judge.

The Clerk of Courts did not adhere to Congress' intent under Section (b) Disposition of a Motion for a procedural order and Section (C) Power of a Single Judge to entertain a motion, pursuant to Local Rule 40(d) notice filed, February 21, 2018. The clerk of court had no authority not to submit the FRAP 27(b)(c) Motion to a single Circuit Judge, because Local Rule 40(d) cannot have any effect on the Grana and Houston mailbox rule claims for the mere fact they were not a part of the issue adjudicated in the Panel's Opinion January 2, 2018.

The Supreme Court in a similar case held in United STates v. Schaefer Brewing Co., 356 U.S. 234 (1958)(Internal quotation and case citation omitted)("United States v. Cooke(CA9 Hawaii) 215 F. 2d 528, 530). and an opinion in such a case which does not either expressly or by reference determine the amount of money awarded reveals doubt.

At the very least, whether the opinion was a "complete act of adjudication" - to borrow a phrase from the court of appeals or was intended by the judge to be his final act in the case.")).

Movant's Grana and Houston claims of incoming legal mail delay due to prison authorities "negligence," and appeal time computation should count from the days of prison delay falls under the prongs of the "collateral order doctrine." Circuit Judge King who was one of the judges on the panel for the January 2, 2015 Opinion. made a precedented opinion, establishing how the Fourth Circuit would have jurisdiction under 28 U.S.C. § 1291 pursuant to the Collateral Order Doctrine prongs. see Campbell-McCormick Inc. v. Oliver, 874 F.3d 395, 2017 U.S. App

(4th Cir.)(internal opinion quotation and case citation marks omitted)("The collateral order doctrine, however provides another potential avenue for this court to possess § 1291 jurisdiction. Initially articulated in 1949 by the Supreme Court in Cohen, the collateral order doctrine identifies a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the Action, too "important to be denied review" And too "independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." see Cohen. In order to qualify for collateral order review, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment. see Will v. Hallock, 546 U.S. (2006)(Alterations in original)(internal quotation marks omitted). All three of those "stringent" requirements must be satisfied for the collateral order doctrine to apply. see S.C. State Bd. of Dentistry v. FTC, 455 F. 3d 436 441 (4th Cir. 2006)))).

Circuit Judge King's opinion makes clear that, had the clerk of court adhered to the FRAP 27(b)(c) Motions statutory construction as required, a Circuit judge would have easily recognized the affirmative duty of the court to exercise the authority conferred by 28 U.S.C. § 1291 jurisdiction pursuant to the collateral order doctrine, to review movant's "mailbox rule" claims under Grana and Houston.

The Fifth Circuit held that the clerk of court lacks the authority to refuse or to strike a pleading presented for filing. see McClellon v. Lone Star Gas Co., 66 F. 3d 98 195 U.S. App

(5th Cir.)(internal quotation marks omitted)("we hold that in the absence of specific instructions from a "judicial officer," the clerk of court lacks authority to refuse or strike a pleading presented for filing."). see also Moses H. Cone, 460 U.S. at 12 (explaining that "[a]n order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits."). Hence, the Local Rule 40(b) notice the clerk issued February 21, 2018, has no force on the separate claims in the FRAP 27(b)(c) Motion, because of all the facts stated above. The supreme Court should grant this Writ and Vacate the Local Rule 40(b) Notice and Remand this case back to the Court of Appeals by a Writ of Mandamus and or Writ of Certiorari, to protect movant's constitutional First Amendment Right to redress the Dourth Circuit's Appellate Court. see Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011)(internal quotation ks omitted)("The petition clause protects teh right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. The right of access to courts for redress of wrongs is an aspect of the First Amendment Right to petition the government.")

C. Fed.R.App.P. 8(a)(2)(A)(i) Motion for Stay.

Movant asserts, subsequent to teh FRAP 27(b)(c) Motion, he made another attempt in the Fourth Circui Appellate Court of Appeals, by filing a motion for stay pursuant to FRAP 8(a)(2)(A)(i) on March 15, 2018, and pursuant to FRAP 25(a)(3)-(4) under the jurisdiction of 28 U.S.C. § 1292(a)(1) seeking and interlocutory order to stay the appellate court's order of January 25, 2018, Holding ("The court strictly enforces time limits for filing petitions for rehearing and petitions for rehearing en banc

in accordance with Local Rule 40(C). The petition in this case is denied as untimely.") The relief sought in the FRAP * Motion for Stay was for the Appellate Court to remand the CAse to the District Court so the court can review the FRAP 27 Motion with Affidavit and exhibits for an initial disposition , after an evidentiary hearing pursuant to FRAP 10(a)(1), for his Grana and Houston claims, requesting a single Circuit Judge pursuant to FRAP 25(a)(3) to review his Motion after the clerk of court has docketed it pursuant to FRAP 25(a)(4). The clerk of court subsequent to that filing issued another final Local Rule 40(d) notice on March 19, 2018.

The clerk of court committed an abuse of discretion for two (2) reasons: (1) The clerk of court under procedural rule did not have the authority to issue a final Local Rule 40(d) notice for the Grana and Houston mailbox rule claims of incoming legal mail delay due to prison authorities "negligence." because these claims were never remanded to the District Court as requested pursuant to FRAP 8 and or ever determined in the Appellate Court and adjudicated on the merits. The Fourth Circuit has clearly established when Local Rule 40(d) should be applied in Terry v. Sparrow (In Re Terry), 2011 U.S. App. LEXIS 26832 (4th Cir) (internal quotation marks omitted)("The Court entered judgment in theses matters over five years ago. Since then the court denied three motions by Appellant to recall the mandate. Appellant now moves to disqualify the presiding judges on their ruling in his cases. The Motion is denied. The court having considered these appeals and having denied multiple motions to recall the mandate, further requests for relief will not be considered Local Rule 40(d).") Thus this clearly establishes movant's

claims are not considered final, and (2) The clerk of court committed an abuse of discretion when it did not adhere to Congress' statutory intent pursuant to FRAP 25(a)(3) and FRAP 25(a)(4) that was part of the relief sought in the FRAP 8 Motion for Stay filed March 15, 2018 on the Appellate Court's docket. Federal Rule of Appellate Proceedure 25 Filing and service states pursuant to:

(a)(3) Filing a Motion with a Judge. "If a Motion requests relief that may be granted by a single duge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk."

(a)(4) Clerk's Refusal of Documents. "The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any Local Rule or practice." What has been stated above in FRAP 25 makes it unequivocably clear that Local Rule 40(d) did not constitute the clerk of court's refusal to adhere to the statutory interpretation of FRAP 25 because Local Rule 40(d) cannot survive against its force.

Moreover, when the clerk refused to adhere to FRAP 25 and present the FRAP 8 Motion for Stay with a single judge as requested, the clerk of courts overstepped its statutory authority because it cannot refuse or strike a pleading "sua sponte" as a judicial officer. see In re McBryde., 120 F. 3d 519, 1997 U.S. App (5th Cir)(internal quotation marks omitted)("It has long been the practice of this court to interpret Rule 25(a)(4) according to its plain language. Permitting rejection of pleadings only on the order of a judge, not at the discretion of the clerk...").

Movant assets the clerk of courts decision to reject the FRAP 8 Motion effects his substantial right to appeal under statute, and the clerk of court's performance prejudiced movant from being heard, violating his First Amendment Right. The Fourth Circuit held in Willis v. Town Marshal, 426 F. 3d 251, 2005 U.S. App (4th Cir)(internal quotation and case citation marks omitted)("It is well established that the First Amendment protects expressive conduct as well as pure speech. Texas v. Johnson, 109 S. Ct. 2533 (1989). We recognized that the First Amendment protection does not end at the spoken or written word...conduct may be sufficiently imbued with elements of communication to fall within the score of the First Amendment...").

The mere fact, due to the documented evidence in Appendix (A) and (B) proving that there is a very high probability that a single Circuit Judge of the Fourth Circuit would have corrected the clerk of court's error for issuing the Local Rule 40(d) notice for the Grana and Houston claims of incoming legal mail delay due to prison authorities "negligence," and appeal time computation should count from the days of prison delay, remanding the case to the District Court with instructions for an initial disposition, after an evidentiary hearing pursuant to FRAP 10(a)(1), as requested in the relief sought in the FRAP 8(a)(2)(A)(i) Motion. see Shives v. CSX Transp. Inc., 151 F. 3d 168, 1998 U.S. App (4th Cir.)(internal quotation marks omitted)("if we have any doubt about the correctness of this analysis, we are authorized in these circumstances to issue a "writ of Mandamus" to avoid forfeiting the Federal Court's role of reviewing L.H.W.C.A. coverage issue is one of those extraordinary situations envisioned in Thermtron,[423 U.S. 336 (1976)] for exercise of the writs.").

Hence, this Fourth Circuit decision also applies to movant in this case.

Moreover, there are two (2) similar cases as movant's in the Supreme Court where the Supreme Court remanded the case back to the court of appeals with instruction to remand the case back to the District Court for further proceedings. see Pullman-Standard v. Swint, 456 U.S. 273 (1982)(internal quotation marks omitted)("[F]act finding is the basic responsibility of District Courts and...the court of appeals should not have resolved in first instance this factual dispute which had not been considered by the District Court."). Also see Demarco v. United States, 915 U.S. 450 (1974)(internal quotation marks omitted)("[T]his factual issue was dispositive of the case and it would have been better practice not to resolve it in the court of appeals based only on the materials then before the court. The issue have been remanded for initial disposition in the District Court after an evidentiary hearing. We therefore grant the petition for certiorari and the motion to proceed in forma pauperis, vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand the case to the District Court for further proceedings.").

The Supreme Court should grant a writ of mandamus or in the alternative a writ of certiorari, and apply the doctrine of "super-stare-decisis" to both Supreme Court's set precedented casess as stated above because those same principles fall into the "heart" and "body" of this instant case.

DISCUSSION

Movant asserts that the Supreme Court should grant a writ of mandamus and, or certiorari, because this case is an extraordinary

exceptional circumstance warranting the exercise of Rule 20.4(a) of the Supreme Court Rule that there be "exceptional circumstances" justifying the issuance of the writ. Adequate relief cannot be obtained in the court of appeals in the Fourth Circuit, and the Supreme Court is movant's only means of redress in any other form or from any other court. Moreover, as stated above in the first issue clearly established the Appellate Court's January 2, 2018 Opinion is erroneous holding: On September 5, 2017, Deante Drake filed a ntoice of appeal from his May 13, 2008, criminal judgment because Drake previously appealed from his 2008 judgment this court is without jurisdiction. In addition, Drake's notice of appeal is inordinately late. See FRAP 4(b)(1)(providing 30 days to file a notice of appeal in a criminal case.).

When you review the facts of this case, First, their is no established District Court record and or Appellate Court record showing an order from either court pursuant to FRCiv.P 54(b). FRCiv.P 58(a)(2), or FRCivP 79(a)(2)(C). showing an adjudication and an order from the court to docket movant's Burrage and Mathis claims and thus, pursuant to 28 U.S.C. 1291 Policy the claims cannot be considered final.

Second, there is no established Appellate Court record showing that a panel of Circuit Judges of the Fourth Circuit Court of Appeals adjudicated teh Grana and Houston claims as final under 28 U.S.C. § 1291, and ordered the clerk of court to enter its judgment on the Appellate Court docket pursuant to FRCivP 79(a)(2)(C) in order for the clerk of court to have the authority to issue a Local Rule 40(d) notice. The Fourth Circuit held in Terry v. Sparrow ("The Court entered judgment in these matters over five years ago since then, the court has

denied three motions by Appellant to recall the mandate. Appellant now moves to disqualify the presiding judges based on their ruling in his cases.

The motion is denied. The Court having considered these appeals and having denied multiple motions to recall the mandate further requests for relief will nto be considered Local Rule 40(d)."). Also see FRCP 79(a)(2)(C)("(a) civil docket. (2) Items to be entered. The following items must be marked with the file number and entered chronologically in the docket: (c) Appearances, Order, Verdicts, and Judgment.")

Movant asserts the Fourth Circuit Opinion and the Circuit Clerk of Court Local Rule 40(d) notice cannot survive a rational basis review, and because of this the Supreme Court should grant a writ of mandamus and or certiorari because if the court does not, movant's First Amendment Constitutional right under the petition clause will continue to be violated because he will never have the opportunity to be heard in the Fourth Circuit Appellate Court.

RELIEF SOUGHT

Movant seeks the relief from the Supreme Court to grant this petition for writ of mandamus or in the alternative a writ of certiorari, and Vacate the Fourth Circuit appellate court panels January 2, 2017 Opinion for the Burrage and Mathis claims, remanding it back to the Appellate Court with instructions, or in the alternative, movant seeks the relief from the Supreme Court to vacate teh Fourth Circuit Appellate Court's January 25, 2017 order for untimeliness, and remand the case back to the Appellate Court with instructions to remand the Grana and Houston claims to the District Court to create a record for an appeal pursuant to FRAP 10(a)(2) in the interest of justice.

CONCLUSION

In conclusion, movant asks the Supreme Court to protect his constitutional First Amendment Right to be heard in this extraordinary circumstance.

Respectfully Submitted,

Date: June 25, 2018

Deant Drake

Pro Se Movant
Deant Drake