

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Delmer M. Ackels - PETITIONER

**- PETITIONER**

VS.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

**PETITION FOR WRIT OF CERTIORARI**

Delmer M. Ackels

1725 Roosevelt Street

## Fairbanks, Alaska

907-474-0971

## QUESTION PRESENTED

Whether the Court of Appeals had jurisdiction to deny a default judgment when the defendant was untimely with its Answer without an excuse.

## **LIST OF PARTIES**

All parties appear in the caption of the case on cover page.

All parties **do not** appear in the caption of the case on the cover page.  
A list all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Goldrich Mining Company  
Mr. William Schara, President  
2607 Southeast Blvd., Suite B211  
Spokane Washington 99223

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## OTHER

IN THE  
SUPREME COURT OF THE UNITED STATED  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The memorandum of the United States court of appeal appears at  
Appendix .....A  
to the petition and is  
[ ] reported at \_\_\_\_\_; or  
[ ] has been designated for publication but is not reported; or,  
[X] is not published.

The opinions of the United States district court at  
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to the Petition and is  
[ ] reported at \_\_\_\_\_; or  
[ ] has been designated for publication but is not yet reported; or.  
[X] is unpublished.

**JURISDICTION**

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 23, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court Of Appeals on the following date: July 2, 2018 and a copy of the order denying rehearing appears at..... Appendix E

[ ] An extension of time to file the petition for writ of certiorari was granted to and including \_\_\_\_\_ (date) \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1)

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **Fourteenth Amendment United States Constitution**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

### **Procedural Due Process**

Procedural Due Process focuses primarily on a person's right to be heard, rather than a person's right to prevail in a dispute. Courts usually consider two broad questions in cases involving procedural due process. First, courts consider whether the government's action involves an interest in life, liberty, or property. Second, courts consider whether the procedures that the government has employed assure that a person receives fair treatment.

### **Federal Rule Civil Procedure 12(a)(1)(A), the Complaint as stated in the following:**

"A lawsuit has been filed against you. Within 21 days after service of this summons on you (not counting the day you receive it)-or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3)- you must serve on the plaintiff an answer to the attached complaint or motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or

motion with the court.” (As seen in the *United States District Court, Summons in a Civil Action*)

**Rule 55.Default; Default Judgment**

(a) “Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” See *Cornell Law School*

**STATEMENT OF THE CASE**

Mr. Ackels filed a complaint August 1, 2016 against Goldrich Mining Company, a large mining stock co, for the taking of Mr. Ackels' real and personal property by them without statutory authority or a hearing of any kind. Goldrich Mining Co. admitted taking Mr. Ackels' property to an Alaskan State Trooper that was explained in Mr. Ackels Complaint See Exhibit J.

Goldrich Mining Co. was untimely with their Answer without an excuse. Therefore Mr. Ackels filed Rule 55, default judgment October 21, 2016.

The Court of Appeals affirmed the district court decision February 23, 2018 on denying Mr. Ackels default judgment because they felt cases should be decided on the merits and it did not matter if the defendant was untimely with its Answer or have an excuse for being untimely.

Court of Appeals agreed with the district court and stated "the district court did not abuse its discretion in denying Ackels' motions for default judgment because several factors supported the denial of default".

When Mr. Ackels filed his Complaint August 1, 2016 against Goldrich Mining Co, the Complaint did not say it is up to a District Judge to supersede a Federal Rule Civil Procedure 12(a)(1)(A) at his discretion. By Federal Rule Civil Procedure 12(a)(1)(A) the Court of Appeals and the District Court lacked jurisdiction to review any merits Goldrich Mining Company had submitted to the courts. Therefore Goldrich Mining Co. could not have been a party to the originating case because the courts lacked jurisdiction, *See Melo v. United States* 505 F2d 1026 ( eighth circuit, 1974).

The United States Supreme Court stated “before a ....court may exercise personal jurisdiction over a defendant the procedural requirement of service must be satisfied.” *See Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 44-445 (1946). “Service of summons is the procedure by which a court...asserts jurisdiction over the person of the party served,” *See Murphy Brothers, Inc., Petitioner v. Michetti Pipes Stringing, Inc.*, Case No. 97-1909, U.S. (1999). When Goldrich was untimely with their Answer the District Court and the Court of Appeals could no longer assert jurisdiction over them under Fed. Rule Civ. Proc. 12(a)(1)(A).

The Court of Appeals overlooked the fact a default judgment pursuant to Rule 55 of the Federal Rule Civil Procedure would be proper when an untimely Answer was filed by Goldrich that was not within the statutory period to file *See Murphy Brothers, Inc. v. Michetti Pipes Stringing, Inc.* U.S. 1999.

Mr. Ackels is only asking “Fair Treatment” in this case that is afforded to him by the Fourteenth Amendment United States Constitution. Courts have a duty to enforce federal law, *See eg., Clafin v. Houseman*, 93 U.S. 130, 136-137. “Such a court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a “valid excuse” *See Douglas v. New York N.H. & H.R. Co.*, 279 U.S. 377, 387-389. “An excuse that is inconsistent with or violates federal law is not a valid excuse.” *See Howlett v. Rose*, 496 U.S. 356 (1990). Goldrich had no excuse for being untimely on their Answer therefore the Court of Appeal violated Mr. Ackels due process of having fair

treatment of procedural process when Federal Rule Civil Procedure 12(a)(1)(A) was not abided by.

The Court of Appeals overlooked Goldrich Mining Co. admitted being untimely with their Answer and had no excuse for being untimely with their Answer which was substantial “Prejudice to Mr. Ackels when his procedural due process was denied when Goldrich was allowed to proceed as if they were not untimely with their Answer *See Davis v. Alaska* 415 U.S. 308 (1974).

The Court of Appeals overlooked the fact that after Goldrich was untimely on its Answer they were allowed to file numerous motions to the District Court that the court lacked jurisdiction to hear and allowed the filings, *See Main v. Thiboutot*, 100 S. Ct 2502 U.S. (1980).

The following is Goldrich filings to the court:

On October 18, 2016 – Late Answer

On October 27, 2016 – Goldrich’s Opposition to Motion for Default Judgment

On November 2, 2016 – Memorandum in Support of Goldrich’s Motion to Strike Plaintiff’s Opposition to Goldrich’s Answer

On November 2, 2016 – Goldrich’s Motion to Strike Plaintiff’s Opposition to Goldrich’s Answer

On November 2, 2016 – [proposed] ORDER

On November 3, 2016 – Goldrich’s Motion to Strike

On November 3, 2016- Memorandum in Support of Goldrich’s Motion to Strike

On November 3, 2016 – Goldrich’s Motion for Order to Show Cause

On November 3, 2016 – Memorandum in Support of Goldrich’s Motion for Order to Show Cause

On November 3, 2016 – [proposed] ORDER

On November 8, 2016 – Goldrich’s Amended Untimely Answer

On November 10, 2016 – Goldrich’s Reply to Plaintiff’s Opposition Memorandum in Support of Goldrich’s Motion for Order to Show Cause

On November 11, 2016- Goldrich’s Combined Opposition to Plaintiff’s Motion to Strike Defendant’s Answer and Plaintiff’s Motion to Strike Opposition to Motion for Default Judgment.

On November 11, 2016 – [proposed] ORDER

On November 16, 2016 –Goldrich’s Opposition to Plaintiff’s Motion to Strike Defendant Goldrich’s Amended Answer

On November 28, 2016 – Goldrich’s Opposition to Motion to Amend Affidavit in Support of Motion for Entry of Default

On November 28, 2016 – [proposed] ORDER

On March 6, 2017 – Goldrich’s Response to “Memorandum to Show Cause”

On March 27, 2017 – Goldrich’s Opposition to Motion to Amend Complaint.

On August 29, 2017 - Memorandum in Support of Goldrich’s Motion for Attorney’s Fees

On August 29, 2017 – Goldrich’s Motion for Attorney’s Fees

After all was said and done Goldrich put in for attorney fees to the District Court of \$25,523.06 for being untimely on their Answer? The District Court denied Goldrich’s motion for attorney fees and stated “if the district court lacked jurisdiction over the underlying suit, it had no authority to award attorney’s fees” “(quoting *Latch v. United States*, 842 F. 2d 1031, 1033 (9<sup>th</sup> Cir. 1988)”

What is Mr. Ackels to think when he is pro se and can only go by Federal Rules Civil Procedure that is in front of him? If the District Court lacked

jurisdiction then how could the court hear the merits and then deny Mr. Ackels his default judgment then was affirmed by the Court of Appeals?

Federal Rule Civil Procedure 12(a)(1)(A) did not state anywhere in the Federal Rule that cases could be decided on the merits. A point of law was overlooked in the Court of Appeal decision that directly conflicts with this court's decisions that Federal Rules Civil Procedure 12(a)(1)(A) was decided by Congress and cannot be changed except by them. *See Steel Co. v. Citizens for Better Env't*, U.S. 83, 98 (1989) also *See Zenovida Love, et al., v. Wal-Mart Stores, Inc.*, No. 15-1520 (11<sup>th</sup> Cir. 2017); also *See DiBella v. United States*, at 369 U.S.; also *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); also *See Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 264 (1978); also *See United States v. Curry*, 6 How. 106, 113 (1848); also *See Bowles v. Russell, Warden*, No. 06-5306, U.S. (2007).

"A court lacks discretion to consider the merits of a case over which it is without jurisdiction and thus, by definition, a jurisdictional ruling may never be made prospective only. We therefore hold that, because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits." *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981)."

Mr. Ackels complied with the Federal Rules of Civil Procedure 55 in the two-step procedure: by step one (1) entry of default by Clerk of Court (Fed. R. Civ. P. 55(a) and (2) entry of default judgment by the Clerk of Court when the claim is for a sum certain (Fed. R. Civ. P. 55 (b) (2). In Mr. Ackels Complaint he stated the exact amount he would settle for. Mr. Ackels only wants his value of his real and personal property that was taken by Goldrich Mining Co.

Even if Goldrich was able to be in court the Court of Appeals overlooked that Goldrich did not put into evidence any affidavits which contradict the substantive facts set forth in Mr. Ackels complaint. "In the complaint and plaintiff's supporting material must be taken as true" *See Scheuer v. Rhodes*, 416 U.S 232, 236, 94 S Ct. 1683, 1686, 40 L Ed. 2d (1974); *Paul v. Davis*, 424 U.S. 693 *Also See Conley v. Gibson*, 355 U.S. (1957).

The Court of Appeals over looked that Goldrich Mining Co. displayed "a strong showing of willful disobedience of court process" when Amending their Answer of 4 pages to enlarge an Amended Answer of 115 pages after being untimely with their original Answer *See Pioche Mines Consol., Inc. v. Dolman*, 33 F. 2d 257, 270, (9<sup>th</sup> Cir. 1974)

How could Goldrich Mining Co. even amend their Answer that was untimely without an excuse when the District Court lacked jurisdiction to hear any merits Goldrich had? *See Basso v. Utah Power & Light Co.*, 495 F 2d 906, 910, (10<sup>th</sup> Cir. 1974)

By the Court of Appeals affirming the District Court decision it also affirmed that Goldrich could do what it pleased with Federal Rules Civil Procedure by being untimely on its Answer. After Mr. Ackels filed his default judgment, Goldrich immediately filed an opposition to Mr. Ackels default judgment October 27, 2016 that included 89 pages of exhibits. Goldrich's opposition to default judgment was absence of any reasons why they were untimely with their Answer which violated Federal Rule when a default judgement was in front of the District Court. "Default judgment for failure to

defend is appropriate when the party's conduct includes willful violations of court rules, contumacious conduct", *See United States v. Harre*, 983 F. 2d 128. 130 (8<sup>th</sup> Cir. 1983)

The Court of Appeals overlooked the District Court orders of briefings from the parties after the untimely filing of Goldrich's Answer and untimely Amended Answer. The Eleventh Circuit stated in *Zenovida Love, et al., v. Wal-Mart Stores, Inc.* (2017), "therefore, a later order purporting to dismiss the case would be shooting a dead horse". In their decision they confirmed they were without jurisdiction to hear the merits because of the untimely filings in the case, *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

The Court of Appeals overlooked the District Court lacked jurisdiction when allowing Goldrich Mining Co. to be untimely on their October 18, 2016 Answer and untimely on their November 8, 2016 Amended Answer, Briefs, Motions and Responses with no excuse under Fed. Rule Civ. Proc. 12(a)(1)(A). This statute requires the defendant "must serve an Answer within 21 days after being served," *See Bus. Guides, Inc. Chromatic Commc'n Enters, Inc.*, 498 U.S. 533. 540 (1981).

The Appeals Court overlooked that Goldrich Mining Co. had turned this case upside down with their relaxed attitude toward following Federal Rules Civil Procedure which has now prejudiced Mr. Ackels. Pleading deadlines must be strictly adhered to, otherwise the party who follows the timeline will be unfairly prejudiced by the party that did not follow the rules *See Brookhart v. Janis*, 384 U.S. Also *See Smith v. Illinois*, 390 U.S. 129, 131 (1968)

How could Goldrich file an untimely Amended Answer without an excuse? Federal Rule of Civil Procedure 15(a)(A)(3) as stated in (3) in the following:

*“(3) Time to Respond.* Unless the court orders otherwise, any required respond to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whatever is late.”

In this case Goldrich Mining Co. only had 21 days to respond which they did not do or comply with Federal Rules Civil Procedure 12(a)(I)(A). The rule require that the defendant “must serve an Answer within 21 days after being served.” Goldrich’s Answer was not in the 21 days that was due October 17, 2016.

According to Rule 15(3) Goldrich had to Amend it’s Answer within the “original Answer”. Goldrich lost its chance to amend its Answer when Goldrich untimely filed its Answer. Goldrich did not put a motion to the Court to be able to amend their Answer or have an affidavit why they were late. Goldrich, by Federal Rules could no longer be a party to the case because the court lacked jurisdiction,

*See H.F Livermore Corp. v. Aktiengesellschaft Gerbruder Loepfe*, 432 F. 2d 689, 691 (D.C. Cir. 1970).

“Motions to amend are typically granted in the absence of an improper motive, such as undue delay, bad faith, or repeated failure to cure a deficiency by amendments previously allowed.” Goldrich showed an improper motive when their original Answer was only four pages then they filed a 115 page enlarged Amended Answer that was also untimely. All of Goldrich’s motions were allowed to enter the record even through the court lacked jurisdiction, *See*

*Harless v. CSX Hotels, Inc.*, 389 F. 3d 444, 447 (4<sup>th</sup> Cir. 2004); *Ward Elec. Serv., Inc. v. First Commercial Bank*, 819F. 2d 496, 497 (4<sup>th</sup> Cir. 1987).

The general is that leave to amend an Answer under Federal Rule of Civil Procedure 15(a) should be freely given, see *Forman v. Davis*, 371 U.S. 178, 182 (1962), unless “the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile”. Goldrich’s Amended Answer was in bad faith when they had no excuse for being untimely with their original Answer that prejudiced Mr. Ackels and the Court of Appeals lacked jurisdiction to hear the Amended Answer, *See Laber v. Harvey*, 438 F. 3d 404, 426 (4<sup>th</sup> Cir. 2006).

**The Appeals Court overlooked Goldrich Mining Company was in default because of untimely filing their Answer and could not file motions to the court for the following reasons:**

Goldrich failed to demonstrate the late Answer filing was the result of “excusable neglect” Fed. R. Civ. P. 6(b)(2), see *Traguth v. Zuck*, 710 F. 2d 90. 93-94 (2d Cir. 1983). Goldrich admitted it was untimely with its Answer.

Goldrich failed to file a motion for leave for their Amended Answer pursuant to Fed. R. Civ. P. 15(a)(2) to accompany the Amended Answer which is a violation of Federal Rules. Goldrich’s enlarged 115 pages was very lengthy and was used to distract the courts attention when it had no excuse for being late. Goldrich’s original Answer was only 4 pages. When an Amended Answer was used for an improper motive, the court may not grant the filing. Here, the Amended Answer is not only a violation of Federal Rule of Civil Procedure

12(a)(I)(A) regarding timeliness, but the motive for filing an enlarged 115 page Amended Answer was suspect under a first impression, thereby Goldrich created an improper motive, *See Harless v. CSX Hotels, Inc.*, 389 F. 3d 444, 447 (4<sup>th</sup> Cir. 2004) “(citing *Ward Elec. Serv., Inc. v. First Commercial Bank*, 819 F. 2d 496, 497 (4<sup>th</sup> Cir. 1987).”

Goldrich’s Amended Answer was untimely when it did not stay within the 14 days under Federal Rule 15. Time to respond must be made within the time remaining to respond to the original pleading. *See Annette Walley v. Boston Scientific Corporation, U.S. District Court, Southern District of West Virginia, Charleston Division (December 31. 2013) also see Davenport v. Ralph N. Peters & Co.*, 386 F. 2d 199, 204 (4<sup>th</sup> Cir. 1997).

Goldrich’s failure to file on time is an undue delay. Untimely filing is a nonwaivable jurisdictional requirement under Federal Rule Civil Procedure 12(a)(I)(A) *See Pleblich v. Battery*, 181 f. 3d 1048, 1056 (9<sup>th</sup> Cir. 1999) also *see Disabled Rights Action Comm. v. Las Vegas Everts, Inc.*, 375 F. 3d 861, 869 (9<sup>th</sup> Cir 2004).

Goldrich did not sought additional time within to respond.

Goldrich is not active in the military service, an infant, or incompetent person.

The Court of Appeals overlooked the fact the District Court allowed Goldrich to file numerous motions to the District Court with over 204 exhibits after being untimely with their Answer. The Court of Appeals and the District

Court could no longer hear any merits from Goldrich Mining Co. when Goldrich had no excuse for being untimely thus the courts lacked jurisdiction.

Goldrich Mining Co. filed October 27, 2016 a motion for opposite default judgment based primarily on frivolous excuses, which did not excuse their violation of timely filed pleadings under Rule 12 of the Federal Rules of Civil Procedure. Mr. Ackels is pro se and is not an experienced attorney, or represented by an experienced law firm. Goldrich should know the timeliness of pleadings which is required under federal rules.

The Appellate Panel Of the Ninth Circuit stated, “[f]ailure to file within the time limit diverts the appellate court of jurisdiction” *See Preblich v. Battery*, 181 F. 3d 1048, 1056 (9<sup>th</sup> Cir. 1999); *See also Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F. Ed 861, 869 (9<sup>th</sup> Cir. 2004).

Goldrich lacked standing to oppose Mr. Ackels Default Judgement when facts of law have been established when they were untimely with their Answer. *See Nishimatu Constr. Co. v. Houston Nat'l Bank*, 515 F. 2d 1200, 1206 (5<sup>th</sup> Cir. 1995). “Default judgment is available when the adversary process has been halted because of an essentially unresponsive party.”(quoting S.E.C. Lawbough, 359 F. Supp. 2d 418, 421 (D Md. 2005).

The Court of Appeals over looked that Goldrich Mining Co. was not a party to this case when they were untimely with their Answer because “before a ...court may exercise personal jurisdiction over a defendant the procedural requirement of service must be satisfied.” Service of summons is the procedure by which a court...asserts jurisdiction over the person of the party served.”) *See*

*Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 44-445 (1946) also see *Murphy Brothers, Inc., Petitioner v. Michetti Pipes Stringing, Inc.*, Case No. 97-1909. U.S. (1999).

Goldrich Mining Co. was untimely on their Answer thus did not satisfy the service requirement and the Court of Appeals court no longer assert jurisdiction over them under Fed. Rule Civ. Proc. 12(a)(1)(A). Thus could not decide any merits to this case

### **REASONS FOR GRANTING THE PETITION**

The Reasons for granting the petition is “courts are supposed to read any rule of civil procedure according to it “plain meaning”, just like a statue.” *See Bus. Guides, Inc. v. Chromatic Commc’ns Enters. Inc.*, 498 U.S. 533, 533, 540 (1991). When the Court of Appeals ignore Federal Law Rule 12, it violates Mr. Ackels due process when he would not be afforded fair treatment. All the cards would be stacked against him. Mr. Ackels did not get equal protection of the law under the Fourteenth Amendment United States Constitution when Federal Law is not followed as did in this case.

There has been no scales of justice in Mr. Ackels case when the Court of Appeals did not follow Federal Rule 55, default judgment. When the defendant Goldrich Mining Co was untimely with their Answer and failed to show by affidavit why they were untimely *See H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 f 2D 689, 691 (D.C. Cir. 1970). Mr. Ackels procedural due process was violated when he did not get fair treatment.

Mr. Ackels case falls in the “public interest doctrine” when the Court of Appeals did not follow Federal Rule Civil Procedure it violated procedure due process.

This sets a precedent that it would be easily capable of repetition for others in the same situation when Rule 55 default judgment is filed by people and the lower courts ignore Federal Rule 12 to come up with their own interpretation of the law instead of what Congress stated in the rule that “if you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint” See Federal Rule Civil Procedure 12(a)(1)(A).

This would not be in the public interest when it is not constitutional. “Due process balances the power of the land and protects the individual person from it. When a government harms a person without following the exact course of the law, this constitutes a due process violation, which offends against the rule of law,” See *Carroll v. Greenwich Co.*, 199 U.S. 401, 410 (1905) See also *French v. Barber Asphalt Paving Co.*, 181 U.S. 328 (1901)

We have two sets of rules in this case one for Mr. Ackels the other for Goldrich Mining Co. The Scales of Justice has never been equal in this case, it has been tipped when the rule of law was not followed by Federal Statues AND when defendant Goldrich Mining Co was allowed by the Court of Appeals to violated Federal Rules Civil Procedure.

“Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process, and which can only be interfered with, or the enjoyment of which can be modified, by lawful regulations necessary or proper for the mutual good of all.” See *Slaughter-Houses Cases*, 83 U.S. (16 Wall.) 36, 116, 122 (187

**CONCLUSION**

The petition for writ of certiorari should be granted.

Respectfully submitted,

Debner M. Akels pro Se

Date: July 30, 2018