

\*pro se

JACOB W. DENG,  
Petitioner,  
v.  
UNITED STATES,  
Respondent.

PETITIONER'S MOTION AND INCORPORATED MEMORANDUM OF LAW REQUESTING THE COURT OR ONE OF ITS JUSTICES TO OVERRULE THE REJECTION OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI BY THE COURT'S CLERK, SCOTT S. HARRIS, WHO ERRONEOUSLY DETERMINED THAT PETITIONER'S PETITION WAS "OUT-OF-TIME" DESPITE PETITIONER'S SHOWING OF "GOOD CAUSE" DUE TO CIRCUMSTANCES FAR BEYOND PETITIONER'S CONTROL

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1. According to the Clerk's letter rejecting Mr. Deng's petition for writ of certiorari, the petition was postmarked August 9, 2018 and received August 14, 2018.

2. The Clerk's letter does not mention that sometime in early April 2018, Mr. Deng had mailed a letter to the Clerk of the U.S. Supreme Court requesting a copy of the forms and relevant Supreme Court rules so that he could file a petition for writ of certiorari with the Court. In response, sometime in early June 2018, more than thirty-days (30) from the date of Mr. Deng's letter to the Clerk requesting the forms and rules, a copy of the requested forms and rules were received via mail service by Mr. Deng.

3. The Federal Correctional Institution-Hazelton, where Mr. Deng is currently serving his federal sentence, has undergone multiple "EMERGENCY LOCKDOWNS" since January 2018 due to a rash of "inmate assaults on other inmates and on staff" at this institution. The Administration here has attributed the overwhelming majority of these "assaults" to an epidemic of drug use among inmates at this institution. The principal drug, "K2" (a synthetic form of marijuana), causes the inmates to experience some type of mental or psychotic episode which, in turn, causes the inmates to become erratic and extremely aggressive. As a result, both inmates and staff members have been injured by inmates using this drug. These multiple and very serious disturbances has caused the Administration here to place the institution under "EMERGENCY LOCKDOWN" status on many different occasions for various lengths of time since the beginning of the year. A

letter written by Mr. Deng's Case Manager, Mrs. Gyorko is attached as Appendix "A" is typical of the circumstances at this institution.

4. These occurrences -- the assaults and resulting lockdowns -- are beyond Mr. Deng's control. When the institution is placed on "EMERGENCY LOCKDOWN" status, Mr. Deng, along with the entire inmate population, is locked in his cell twenty-four hours a day, seven days a week. He does not have any access at all to his legal documents, the institution's law library and the Electronic Law Library, typewriters, or anything else that would aid him in preparing any type of legal pleading. Most often, these institution lockdowns last between two and four weeks, during which time Mr. Deng is virtually incapacitated.

5. Besides the disturbances and lockdowns, which has so far been recurrent at this institution, for reasons unexplained to Mr. Deng, the outgoing and incoming mail has been delayed for lengthy periods; particularly, the incoming mail is delivered to the inmate days after its arrival to the institution. It has been reported by several sources, though unofficially, that the delay in sending out mail, and in delivering incoming mail, is due to the drug epidemic at this institution. Apparently, mail is being searched and scrutinized very carefully by this institution's staff and, because the institution is "under staffed," the process is uncommonly slow. Whatever the reason, these circumstances, too, are beyond Mr. Deng's control.

6. Paragraph 5 under "Rule 13. Review on Certiorari: Time for Petitioning" states:

"For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances...." (emphasis added by Mr. Deng)

Mr. Deng contends that the situation here at this institution with respect to the assaults, lockdowns, mail delivery, all constitute "extraordinary circumstances," and matter beyond his control. He was unable to file an application for an extension of time in which to file his petition for writ of certiorari, just as he could not possibly have filed his petition on time due to the reasons explained above. The rules of lenity and fairness should apply in this case for those reasons, and the Court should allow Mr. Deng to file his petition for writ of certiorari out-of-time, as the fact that his petition is late is due to no fault of his own and circumstances far beyond his control.

7. Case law suggests that the "Supreme Court would waive predecessor to Rule 13 where petition for certiorari was supported by unchallenged affidavits showing that petitioner acted in good faith and that delay was brought about by circumstances largely beyond his control." Schacht v. United States, 398 U.S. 58, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (U.S. 1970). Mr. Deng has attached his affidavit showing that he has acted in good

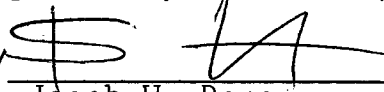
faith and that delay was brought about by circumstances totally beyond his control. See Schacht, supra. Although Mr. Deng's affidavit should have been provided to the Clerk along with an application to extend the time to file (meeting the requirements in the body of such an application) at least 10 days before the date his petition was due, he contends that the circumstances beyond his control, as explained above, prevented him from even accomplishing that.

8. For all of the above stated reasons, and in the interests of justice and judicial economy, Mr. Deng asserts that this Honorable Court should grant the instant motion and permit him to file his petition for writ of certiorari out-of-time.

WHEREFORE, Mr. Deng prays that the Court will grant the instant motion and any additional relief the Court deems required by the facts of this case.

Dated: September 10, 2018

Respectfully submitted,

/s/   
Jacob W. Deng

AFFIDAVIT OF JACOB W. DENG

I, Jacob W. Deng, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 the following:

1. I am the affiant and my signature is attached hereto below.

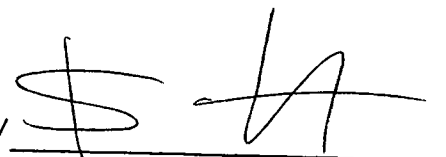
2. The statements presented in the attached petition requesting rehearing with suggestion for rehearing en banc were made by me, and each statement is true and correct to the best of my knowledge and belief. Furthermore, I am the petitioner in the attached petition.

3. The attached petition for rehearing contains truthful statements made by me establishing that circumstances beyond my control prevented me from timely filing my petition for writ of certiorari, and that at all time I acted in good faith in my efforts to timely file my petition for writ of certiorari.

4. If, as the Supreme Court Clerk states in his letter of August 22, 2018, my petition for writ of certiorari was filed "out-of-time" and, for that reason was rejected and returned to me by U.S. Postal Service, it was due to no fault of my own. The frequent inmate disturbances and assaults on other inmates and staff members resulting in the prison Administration placing the institution on "EMERGENCY LOCKDOWN(S)" prevented me from timely preparing and filing my petition for writ of certiorari. This includes the delay in the delivery of the inmate mail due to the searches of incoming and outgoing mail for evidence of drugs coming into the prison here.

5. All of this is the truth to the best of my knowledge and belief.

Done: September 10, 2016

/s/   
Jacob W. Deng

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No: 17-2522

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Jacob W. Deng

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

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Appeal from U.S. District Court for the District of Nebraska - Omaha  
(8:17-cv-00093-LSC)

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**JUDGMENT**

Before BENTON, MURPHY and KELLY, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

Appellant's motions for leave to proceed in forma pauperis and for appointment of counsel are denied as moot.

January 22, 2018

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

"APPENDIX A"

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 17-2522

Jacob W. Deng

Appellant

v.

United States of America

Appellee

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Appeal from U.S. District Court for the District of Nebraska - Omaha  
(8:17-cv-00093-LSC)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 26, 2018 ✓

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

"APPENDIX A"



**Additional material  
from this filing is  
available in the  
Clerk's Office.**