19-6537

CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER EVERSON-PETITIONER

VS

THERESA LANTZ,

CONNECTICUT COMMISSIONER OF CORRECTIONS, ET AL-RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

November 1, 2019

QUESTION(S) PRESENTED

The Petitioner presents two questions:

In *Neitzke v. Williams 490 U.S. 319 at 325 (1989)*, quoting from *Anders v. California, 386 U.S. 738 (1967),* The court stated, "There, we stated that an appeal on a matter of law is frivolous where "[none] of the legal points [are] arguable on their merits, "Id. At *386 U.S. 744.* By logical extension, a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact. As the Courts of Appeals have recognized, Section 1915(d)'s term "frivolous," when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation."

Question one is: If a civil action is filed in the district court and the district court finds that the violations as alleged in the party's complaint meet the standard for a "prima facia case" under the correct legal guidelines; can the frivolous standard of Title 28 U.S. Code section 1915 (e) (2) (B) (i) and (ii) (fails to state a claim on which relief may be granted); be applied to a subsequent appeal of a decision on a motion for relief from final judgment, order, or proceeding in the same case; filed by the plaintiff under Federal Rules of Civil Procedure, Rule 60 (b) (6)?

Question two is: If the trial court denies a motion for relief from final judgment, order or proceeding filed under Federal Rules of Civil Procedure, Rule 60 (b) (6); without first conducting a hearing to assess the movants evidence and composite circumstance of the case does that automatically constitute Abuse of Discretion?

LIST OF PARTIES AND RELATED CASES

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

Christopher Everson- Petitioner

John Armstrong, former Connecticut Commissioner of Corrections –Respondent

Theresa Lantz, former Connecticut Commissioner of Corrections-Respondent

Connecticut Commissioner of Corrections, Respondent

Nelvin Levester, Respondent

Robert Carbone, Respondent

Related cases are as follows:

EVERSON V. LANTZ, Docket No. 3:04-cv-387 (RNC) Connecticut District Court, Judgment entered February 4, 2009

EVERSON V. SEMPLE, Docket No. 3:16-cv-77 (RNC) Connecticut District Court, Judgment entered September 7, 2016

EVERSON V. LANTZ, Docket No. 09-0903-cv Second Circuit Court of Appeals, Judgment entered June 9, 2009

EVERSON V. SEMPLE, Docket No 16-3381 cv Second Circuit Court of Appeals, Judgment entered on September 8, 2017

EVERSON V. COMM'R OF CORRECTIONS, Docket No. 19-882 cv Second Circuit Court of Appeals, Judgment entered August 6, 2019

EVERSON V. SEMPLE, Case No. 17-7650 cv Supreme Court of The United States, Cert denied on April 16, 2018

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The opinion of the Second Circuit Court of Appeals appears at Appendix A the opinion is unpublished. The opinion of the United States District Court for Connecticut Appears at Appendix B the opinion is unpublished

JURISDICTION

The Second Circuit Court of Appeals issued its opinion on August 6, 2019 and a copy of decision appears at Appendix A. Petitioners timely Motion for panel reconsideration and reconsideration *en banc* was denied on September 18, 2019 and a copy of the order denying reconsideration and reconsideration en banc appears at Appendix C. The jurisdiction of this court is properly invoked pursuant to 28 U.S.C. section 1254(1)

STATUTORY PROVISIONS INVOLVED

28 U.S.C. section 1915 subsection (a)(1) and subsection (e)(2)(B)(i) and (ii) provides:

Section 1915 Proceedings informa pauperis; subsection (a) (1) Subject to subsection (b), any court of the United States may authorize the commencement prosecution or defense of any suit, action or proceeding , civil or criminal, or appeal therein, without prepayment of fees, or security therefor, by a person who submits an affidavit that includes a statement or all assets such prisoner possesses that the person is unable to pay such fees or give security therefor , Such affidavit shall state the nature of the action defense or appeal and affiant's belief that the

person is entitled to redress; Subsection (e)(2)Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that- (B) the action or appeal- (i) is frivolous or malicious (ii) fails to state a claim on which relief may be granted;

42 U.S.C. section 1983 provides:

Civil Action for Deprivation of rights: Every person who, under color of any statute, ordinance regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. section 1651(a) provides:

Section 1651 Writs, subsection (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 principles of law.

STATEMENT OF THE CASE

In 1984 the petitioner here began employment with the Connecticut Department of Corrections (hereinafter referred to as DOC). The petitioner was a stellar employee with an outstanding work record. In March of 2001 the petitioner was terminated from his employment with DOC, in March 2004 the petitioner by his Attorney, filed a lawsuit in Connecticut District Court against DOC, under Title 42 U.S.C. section 1983 alleging his termination by DOC violated numerous Constitutional Rights. The case was dismissed in February 2009 by the District Court after two separate summary judgments.

In March 2009 the petitioner filed a timely appeal of the District Court's decision with the Second Circuit Court of Appeals, the petitioner was incarcerated when he filed his appeal, the petitioner was incarcerated from May 2008 until April 2012 for a matter unrelated to the termination or the lawsuit, the petitioner's appeal cited that among other things: at summary judgment the plaintiff/petitioner's admissible evidence i.e. "the names of his similarly situated comparators" were excluded from the examination of the February 2009 ruling and order "case doc #131" for summary judgment, that is to say that in the petitioner's motion for summary judgment "case doc's # 121, 123 and 124, the petitioner listed the names of twenty eight named comparators, but the February 2009 ruling and order in error did not examine the plaintiff's named comparators, the ruling and order" doc # 131" examined a list of names from the defendant's motion for summary judgment and in error identifies and refers to the defendant's evidence I.e. names of individuals provided by the defendant as being the

plaintiff's named comparators, the plaintiff/petitioner's named comparators appear to have been overlooked.

While the petitioner was incarcerated "during the time of his appeal" he was not receiving his legal mail, specifically, notices sent to the petitioner from the Court of Appeals were not delivered to the petitioner, because the petitioner was not receiving his legal mail the petitioner was "effectively unable to protect his appeal and unable to monitor his appeal", this resulted in the petitioner missing important filings and missing important court imposed deadlines. The appeal was dismissed on June 9, 2009 after the petitioner failed to respond to two notices sent to him from the Court of Appeals, both notices instructed the petitioner to complete and return to the court an enclosed "in forma pauperis motion" forms for New York State, the petitioner did submit with his notice of appeal, a Connecticut "in forma pauperis motion" granted by the Connecticut District Court "case doc # 140". The petitioner was not aware that his appeal was dismissed. The petitioner learned that his appeal had been dismissed when he received a "bill of cost, case doc# 142" from the defendant's attorney. The petitioner immediately filed a request to have the case reopened, denied. For the remainder of the petitioner's incarceration his legal mail was often withheld. The petitioner filed Writ of Certiorari with this court, denied "as filed untimely", the untimeliness was attributed to ongoing delays of the petitioners incoming mail, the petitioner filed request for rehearing, denied, the petitioner filed an Extraordinary Writ, in late 2011 it was denied.

On or about April 3, 2012 the petitioner was released from his incarceration, on or about the same day as the petitioner's release from incarceration the petitioner met with an Attorney, that Attorney agreed to represent the petitioner in his wrongful termination case against DOC.

The petitioner made ongoing and frequent inquiries with his Attorney has to the status and any progress of his wrongful termination case, on every communication the petitioner's Attorney assured the petitioner that the wrongful termination case was being properly handled and going well, the petitioner relied on his attorney's representation from April 2012 until October 2015. On or about October 27, 2015 the petitioner's Attorney passed away, a few days before his attorney passed away the petitioner spoke by telephone to his attorney, during that telephone conversation the petitioner's attorney told the petitioner that he would be entering the hospital for a few days for some procedures and after his release from hospital he would be able to do a much better job on handling the petitioner's wrongful termination case, during that conversation the petitioner's attorney told the petitioner that he "the attorney" had been suffering with health problems and those health problems had been slowing him down and effecting his ability to work on the petitioner's case, but while in hospital he would have procedures that would help him get better "improve his health" and he would be able to work better.

After the sudden and unexpected death of his attorney the petitioner was upset, and disorientated about the death of his attorney, as a result of his attorney's death the petitioner was experiencing anxiety and emotional turmoil, the petitioner spoke with his attorney's office

about the death and about the case and the office instructed the petitioner that soon the court would authorize the release of his files from the office and he could pick up his files.

In January of 2016 the petitioner filed a new action in the district court as mandamus see *Everson v. Semple, Comm'r of Correction, Docket No. 3:16-cv-77 (RNC) Connecticut District Court*, the petitioner intended the mandamus to be given the same docket number as the first case 3:04-cv-387(RNC), citing Title 28 U.S. Code section 1651(a) all writs act to address and vacate the final judgment in the case, the petitioner also requested an attorney be appointed, the court assigned the new action a new docket number, the new action was dismissed citing "res judicata", and the request for an attorney was denied, the petitioner appealed the trial court's decision see *Everson v. Semple, Docket No. 16-3381cv Second Circuit Court of Appeals,* the court of appeals upheld the trial court's decision, the petitioner filed a Writ of Certiorari that was denied on April 16 2018 , the petitioner filed a petition for rehearing that was denied on June 11, 2018. On July 27 2018 the petitioner/plaintiff filed a Motion for Relief from a Final Judgment and Order under the first docket number, 3:04 cv-387(RNC) that motion was denied, the petitioner appealed the decision of the trial court the Court of Appeals upheld the trial court's decision citing; Appeal "lacks an arguable basis In law or fact", the petitioner filed a motion for panel reconsideration and reconsideration En banc, that was denied; this Petition followed.

REASONS TO GRANT THE PETITION

There are two opposing positions held within the circuit courts on, both the issues of: 1. the correct application of Title 28 U.S. Code section 1915 (d) now section 1915 (e)(2)(B) (i) "Frivolous" and (ii) "fails to state a claim on which relief may be granted"; conjoined with Federal Rules of Civil Procedure, Rule 12 (b)(6) "failure to state a claim upon which relief can be granted" as it specifically applies to pro se litigants who are proceeding "in forma pauperis"; and 2.the correct interpretation of the law on deciding motions filed pursuant to Federal Rules of Civil Procedure, Rule 60 (b) Relief from final judgment, order or proceeding; under clause (6) "any other reason that justifies relief". The two different approaches in the circuit courts on both of these issues contradict and conflict with each other. This necessitates the guidance of the Supreme Court.

For both doctrines of, "the correct application of "fails to state a claim on which relief may be granted", i.e., "lacks an arguable basis in law or fact'; and "the correct interpretation of the law on deciding motions filed pursuant to Federal Rules of Civil Procedure, Rule 60 (b) clause (6), there is a well recognized and entrenched conflict of authority on which approach reflects the correct interpretation of the governing law regarding both of these issues. The court should grant certiorari in this case to resolve both conflicts. The questions present are important and recur frequently.

Previous cases in this court have addressed defining and clarifying the meaning of "failure to state a claim on which relief may be granted", this instant case focuses on asking the court to

provide guidance on the correct application of 1915 (e)(2)(B) (i) and (ii), that clarity has been frustrated by the split of authority on when "lacks an arguable basis in law or fact" is applicable, moreover, the basic issue of "allowing an indigent litigant to appeal a decision of a trial court" should not be taken away improperly. Most of the circuits hold that 1915 (e)(2)(B) and Rule 12 (b)(6) applies exclusively to complaints and alleged claims within the complaint and any subsequent appeals of the ruling on the complaint itself, where as in this instant case the Second Circuit holds, "fails to state a claim on which relief can be granted", I.e. "lacks an arguable basis in law or fact", is also applicable to the appeal of a denial of a motion filed pursuant to Rule 60 (b) clause (6), filed, after a final judgment where the court found the claims of the complaint in the same case made a "Prima facia case" under the correct legal standard and the constitutional right that was alleged to have been violated in the complaint did exist under Title 42 U.S. Code section 1983. Furthermore, the legal remedy that the plaintiff's 60 (b)(6) motion requested also did exist. In this instant case here the appeals court dismissed the plaintiff/movant's appeal of the decision on a motion filed under Rule 60(b)(6), specifically because the movant/appellant's appeal was proceeding "in forma pauperis", other circuits hold this to be an invalid application of 1915 (e)(2)(B). In his 60 (b) (6) motion the plaintiff/movant asked the district court to re-enter it's final judgment in the case so as the plaintiff could file a timely appeal, because after the movant filed his first appeal he was "effectively unable to protect his appeal or monitor his appeal", most of the other circuits hold this is a legal remedy that exist and is available to a movant under 60 (b((6); see *Buckeye Cellulose Corp v. Braggs Electric Construction Co., (CA8th, 1975), 569 F.2d 1036 "no notice was sent to parties, ordered*

the judgment vacated and re-entered to preserve plaintiff's appeal"; and Fidelity Deposit Co. of Md. v. Usaform Hail Pool Inc. (CA5th 1975), 523 F.2d 744, "the trial court properly vacated and re-entered judgment under Rule 60(b)(6) so timely, appeal could be taken"; and Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, (CADC 1974) 500 F.2d 808, "ordered to vacate and re-enter judgment in order to preserve right of appeal." In this instant case the court of appeals cited *Neitzke v. Williams, 490 U.S. 319, 325 (1989)* "appeal lacks an arguable basis in law or fact."

In contrast to the approach followed here by the 2nd Circuit, the 7th Circuit along with several other circuits follow a different approach, that: "fails to state a claim on which relief can be granted" is correctly applied by following the approach as outlined in *Denton v. Hernandez, 504 U.S. 25 (1992); Denton* outlines the correct interpretation that 1915 (b), now 1915 (e) (2)(B) (i) and (ii); and Rule 12 (b) (6) are applicable to the complaint and claims within the complaint, *Denton at 30* "Judge Schroeder's lead opinion concluded that a district court could dismiss a complaint as frivolous only if the allegations conflicted with judicially noticeable facts, that is, facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id, at 1426* (quoting Fed. Rule Evid. 201)" quoting *Denton at 33* "An in forma pauperis complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely, Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age old insight that many allegations might be "strange , but true; for truth is always strange, Stranger than fiction." Lord Byron, Don Juan canto XIV, stanza 101 (T. Steffan, e.

Steffan, W. Pratt eds. 1977)"; *Denton at 34,* "the appeals court abused it's discretion, the court inappropriately resolved genuine issues of disputed fact, the court applied erroneous legal conclusions", also see, In *Castillo v. Cook County Mail Room Dept., 990 f.2d 304, 306, (7th Cir. 1993)* "We reverse and remand with instructions that counsel be appointed for Castillo", "An "arguable basis in law" is a very low standard to meet, as "a complaint filed in forma pauperis which fails to state a claim under Federal Rules of Civil Procedure 12(b)(6) may nonetheless have 'an arguable basis in law' precluding dismissal under section 1915 (d)" *Denton,112 S.Ct. at 1733, quoting Neitzke, 490 U.S. at 428", see (Castillo at 306 the 7th* Circuit court of appeals specifically discusses that the district court in deciding *Castillo* relied on the approach of the 2nd Circuit in deciding the case; and the 7th Circuit indicates that by the district court using that approach in applying 1915 (d) "fails to state a claim upon which relief can be granted", "no arguable basis in law or fact", and in regards to the case before them and in reviewing the 2nd Circuit's approach in which the district court relied upon in deciding the case before them, quoting the 7th Circuit, *Castillo at 306,* "we cannot, nor can anyone" make a determination", "a fact finder faced with this meager record has no way to determine"*);* the 9th Circuit follows the same approach as the 7th Circuit along with the 5th Circuit and the 6th Circuit and several other circuits follow the same approach as the 7th Circuit, in applying 1915 (e)(2)(B), "previously 1915 (d)"; see *Gilbert v. Arizona, 1992 U.S. App. Lexis 1043 (9th Cir. 1992);* (decision reversed, 1915 (d) is applicable to a complaint and the claims within a complaint); and *Fields v. City of Cleveland, 1995 U.S. App. Lexis 8540 (6th Cir. 1995),* (1915(d) is not applicable if alleged infringement is on a legal interest that does exist, or if facts do not appear to be delusional

Citing Denton, case can be properly disposed of by summary judgment after factual development, judgment vacated and remanded) *;and Abner v. SBC (lAmeritech), 86 Fed. Appx. 958 (6th Cir. 2004)(1915 (d) is applicable to complaint); and Bailey v. Turner, 149 Fed. Appx. 276 at 277 (5th Cir. 2005),* a claim, "lacks an arguable basis in law or fact, if it is based on a indisputably meritless legal theory or, if after providing the plaintiff the opportunity to present additional facts when necessary if the facts alleged are clearly baseless", (vacated and remanded in part), *and Parker v. Carpenter, 1992 U.S. App. Lexis 30768 (5th Cir. 1992)* (reversed, claims upon which relief can be granted); all those circuits hold that 1915 (d) and Rule 12 (b) (6) applies to the claims within a complaint and any subsequent appeals that may follow, when, after the trial court properly developed the facts of the case, and appropriately resolved genuine issues of disputed fact.

It is important to maintain the congressional intent of Title 28 U.S. Code section 1915 to ensure indigent litigants have meaningful assess to the federal courts; and to assure that indigent pro se litigant's ability to assess the courts is not diminished, or infringed upon by procedures deemed invalid, and steps are not put in motion towards creating a legal system where only those individuals with financial means will be able to exercise their constitutional rights and access the courts and indigent litigants are not compelled to abandon their proper diligence efforts to protect their civil rights simply because they lack the financial means to legally address redresses and moreover, to affirm whether appellate review is available to indigent litigants. Congress intended for indigent litigants to have meaningful assess to the judiciary; See *Anders v. California, 386 U.S. 738 at 741 (1967),* "For a decade or more a continuing line of

cases has reached this Court concerning discrimination against the indigent defendant on his first appeal. Beginning with *Griffin v. Illinois, 351 U.S. 12 (1956), where it* was held that equal justice was not afforded an indigent appellant where the nature of the review "depends on the amount of money he has," at *351 U.S. 19,* and continuing through *Douglas v. California, 372 U.S 353 (1963)* this Court has consistently held invalid those procedures."

In this instant case the appellate court applies 1915 (d) and Rule 12 (b)(6) "lacks an arguable basis in law or fact", to a motion filed under 60 (b) clause (6); where the district court never conducted a hearing to assess the facts and the composite circumstance of timeliness and the reason for requesting relief under 60 (b) (6), the facts of the case were not properly developed, the genuine issues of disputed facts that existed were never appropriately resolved and the plaintiff was never provided with an opportunity to present the facts of his circumstance, and furthermore, the appeals court never reviewed the case for "abuse of discretion".

During the time of the original appeal of this case, that is, following the same final judgment in which the petitioner's motion under 60 (b)(6) sought relief from, the petitioner a pro se litigant was incarcerated and was not receiving his legal mail sent to him from the appeals court; the petitioner was: "effectively unable to protect his appeal or monitor his appeal." After his release from incarceration the petitioner retained an Attorney to represent him in his wrongful termination case; the petitioner has several saved voicemail recordings of messages left for him by his Attorney during the time his attorney was working on the case, where his attorney speaks specifically and in detail about the wrongful termination case at issue here and the

petitioner requested that the court review those voicemail recordings "case doc# 147", the appellee/respondent argued to the appeals court that the movant/appellant's attorney never filed an appearance in the case and that amounted to the attorney never officially represented the movant/appellant in this matter; and the petitioner also requested the court authorize the release of his Attorney's medical records "case doc #163", which would verify the plaintiff's Attorney was suffering from the same health problems that the plaintiff pointed out in his 60 (b) (6) motion, all of these circumstance and resources go to the factual probability of the petitioner's circumstances of timeliness and reason for requesting relief under 60 (b)(6), whereas, the petitioner made frequent and ongoing inquires with his attorney about the status of his case at issue here and was met on each occasion by assurances from his attorney that the matter was in hand, illness led the petitioner's attorney to almost completely neglect his client's business while at the same time the attorney was assuring his client that he was attending to his client's business, these facts were never assessed by the court, these facts were never properly developed, the genuine issues of disputed facts that existed were never appropriately resolved, no hearing was conducted by the court to review the facts of the case.

All of the circuits agree that appellate review of a district court's decision on a motion filed under 60 (b) is only for abuse of discretion. Where the circuits diverge into opposing interpretations is as follows: 1. The position held here by the 2nd Circuit is 18 months after a final judgment is rendered by the district court, a motion filed under clause (6) of Rule 60 (b) is untimely, "as it is held by the Second Circuit, 18 months being the reasonable time within which a movant may file a motion under clause (6) of Rule 60 (b)"; see *Rowe Entertainment v. William*

*Morris Agency Inc., 2012 WL 5464611 *2 (United States District Court S.D. New York); citing Korelis v. Pennsylvania Hotel. No. 99-cv-7135, 1999 WL 980954 at *1 (2d Cir. Oct 8, 1999); citing Kotlicky v. United States Fidelity &Guar. Co. 817 F.2d 6, 9 (2d Cir. 1987);*, under this approach as in this instant case if more than 18 months has pasted since a final judgment a motion filed pursuant to Rule 60 (b) under clause (6) is untimely and "as it is applicable specifically to a litigant who is proceeding "In forma pauperis" is held to be frivolous within the meaning of 1915 (e) (2)(B)(i) and (ii), and Rule (12)(b); i.e. subject to: "fails to state a claim on which relief can be granted, i.e., "lacks an arguable basis in law or fact", and no hearing is required by the district court to assess the composite circumstance or facts involved. 2. In contrast, the position held by most other circuits is that, "Appellate review of a motion filed under Rule 60 (b) is only for 'abuse of discretion" and a hearing must be held by the district court to assess the facts and evidence and composite circumstances of the movant's timeliness and reason for requesting relief under 60 (b)(6) prior to making any determination on untimeliness and reason for requesting relief under 60 (b) clause (6) and the appeals court will review those same facts, evidence and composite circumstance of the movant's timeliness and reason for requesting relief under clause (6) in order to determine if the trial court did "abuse it's discretion" and if no hearing is held by the district court to assess the facts and evidence and composite circumstance of the movants timeliness and the reasons for filing the 60 (b) (6) that would constitute abuse of discretion by the district court, i.e. under this interpretation cases where no hearing was held the case is remanded by the Appellate Court for a hearing, see *United States v. Baus, 834 F.2d 1114, 1121 (1st Cir. 1987)* "In determining temporal reasonableness under

subsection (6), we must review "the specific circumstance of the case", while bearing in mind that subsection (6) relief "is reserved for extraordinary cases in which the unusual circumstance justify a party's delay". Also *Clarke v. Burkle, 570 F.2d [824] at 831-832 (8th Cir. 1978) at 831(*six year delay not unreasonable), at 832 "to have held the hearing would have consumed little time and effort, and In ruling upon the motion and amendments the district court would have had the benefit of all of the facts, and we would have had the benefit of those facts in reviewing the action of the trial court in failing to hold a hearing legally amounted to abuse of discretion, and we think that a hearing must now be held by the district court." The 9th Circuit, the 3rd Circuit and the D.C. Circuit along with several other circuits adhere to this same approach that, in determining the timeliness of a 60(b)(6) motion there must be a review of "the specific circumstance of the case" and a hearing is required; see *Washington v. Penwell, 700 F.2d 570, 572-573 ((9th Cir. 1983) (*Held four year delay not unreasonable, because of extraordinary circumstance*); and Mckinney v. Boyle, 447 F.2d 1091, 1093 (9th Cir. 1971) (*the moving party had a good reason for failing to take action sooner); *and Jackson v. Washington Monthly Co., (CA, D.C., 1977) 569 F.2d 119, (*the denial of the 60 (b)(6) was based on a record lacking relevant facts); *and Good Luck Nursing Home Inc. v. Harris, (CA. D.C. 1980) 636 F.2d 572,* (two hearings held to assess the circumstance)*; and FDIC v. Alker, (CA. 3d, 1956) 234 F.2d 113 (* abuse of discretion where no hearing was conducted)*; and Boughner v. Secretary of H.E.W. (CA, 3d 1978) 572 F.2d 976; Held,(* abuse of discretion there was no assessment of the circumstance).

It is particularly important to have a definitive answer on the correct application of the law in deciding motions filed under of Federal Rules of Civil Procedure rule 60(b), clause (6) "any other reason that justifies relief", for purposes of timeliness and assessing a movant's composite circumstance when the straightforward operation of conducting a hearing is thwarted when there are two conflicting legal approaches, creating two opposing rules regarding 'reasonable time" and whether or not the trial court should conduct a hearing to properly develop the facts and to appropriately resolve genuine issues of disputed facts.

The two different approaches in both of these legal doctrines yield two substantively and materially different outcomes depending upon the opposing interpretations, in one case two opposing applications of 1915 (e)(2)(B) and Rule 12 (b) (6) for litigants proceeding "in forma pauperis"; and in the other case two different interpretations of the correct law in deciding motions filed pursuant to Rule 60(b)(6). Consider two different litigants, first, "litigant one", who is indigent, and is proceeding pro se and "In forma pauperis" files a motion pursuant to 60 (b) under clause (6) with the district court and her reason for requesting relief and the evidence and circumstance to support her motion fits the correct legal criteria to proceed under clause (6), subsequently, under the "no Hearing required" approach, if her 60(b)(6) motion is filed in a district court within the 2nd Circuit, and if 18 months has passed after the final judgment in her case her 60 (b)(6) motion will be held to be untimely, and her 60 (b) (6) motion can be denied without a hearing to assess the facts and circumstances of her timeliness and reason for requesting relief under clause (6) and if she appeals a denial of her 60 (b) (6) motion, because she is proceeding "in forma pauperis" at the appellate level her case can be dismissed as

frivolous "lacks an arguable basis in law or fact", Pursuant to Title 28 U.S. Code section 1915 (e) (2) (B) conjoined with, Federal Rules of Civil Procedure, Rule 12 (b) (6); even though the district court never conducted a hearing to assess her evidence, or the facts and composite circumstance of her case. Whereas a different litigant, "litigant two" is not indigent, "litigant two" files a motion under 60(b)(6) in the same district court and his facts, evidence, composite circumstance and reason for requesting relief under Rule 60(b)(6) are the same as "litigant one" but, "litigant two" has sufficient financial means to afford to hire an attorney and/or pay the filing or Docket Fees; even though his reason for requesting relief and the supporting facts, evidence and composite circumstance of his case for proceeding under clause (6) are the same as the indigent litigant; if his 60(b)(6) motion is denied, and even if 18 months has passed after the final judgment in his case, he can appeal the trial court's decision and his appeal cannot be dismissed pursuant to section 1915 (e)(2)(B) (i) and (ii); because, in contrast, to the indigent litigant at the appellate level Title 28 U.S. Code section 1915 (e) (2) (B) is not applicable to the individual who has the financial means, his appeal will be allowed to proceed, the appeals court will review his case for "abuse of discretion"; the indigent litigant will not have her appeal reviewed for "abuse of discretion". The distinguishing factor between the two litigants being: "financial means to pay the fees";; effectively, creating a system where only those individuals with financial means will have appellate review available, and indigent litigants will not have meaningful access to the courts.

By contrast if these same two litigants filed their 60 (b)(6) motions in the 1st Circuit or the 8th Circuit or in one of the other Circuits that follow the "No Hearing constitutes abuse of

discretion" approach; having or not having "financial means to pay the fees" is not relevant to appellate review being available to the case or if a case will proceed in court or whether an appeal will be dismissed under "lacks an arguable basis in law or fact' being applicable, both the indigent litigant who is proceeding "in forma pauperis" and the litigant who has financial means to pay the filing and docket fees are treated equally, both litigants will have a hearing conducted to review the facts and their evidence, circumstances, timeliness and reasons for requesting relief from final judgment, order or proceeding under Rule 60 (b) (6), and if their reasons and composite circumstances are the same, both litigants will be allowed to proceed, providing their circumstance satisfy the correct legal criteria to proceed under clause (6). The distinction between the two opposing approaches being: not conducting a hearing to assess the facts, evidence and circumstances of the case constitutes "abuse of discretion" verses, the opposing approach of no hearing is required to assess the evidence and facts and circumstances of the case.

In 2016 the Petitioner filed a new action see Appendix J and Appendix K, *Everson v. Semple, Docket No. 3:16-cv-77 United States District Court for Connecticut,* the purpose of the new action was to achieve the same objective or result of a 60 (b) (6) motion, not to act as a substitute of an appeal, or to relitigate the same claim, but rather to allow the appeal to take place by addressing or vacating the final judgment, the petitioner cited in the new 2016 action Title 28 U.S. Code section 1651 (a) mandamus all writs act; also see Federal Rules of Civil Procedure Rule 60 (d) (Other Powers to Grant relief: This rule does not limit the courts Power to: (1) entertain an independent action to relieve a party from a judgment, order or

The text of the new action clearly indicated that the petitioner here was not trying to re-litigate the same lawsuit when he filed the new action in 2016, but rather, only wanted to address the final decision, and he was relying in the sua sponte authority of the district court to apply the correct label to his document. The petitioner not being an Attorney believed that the mandamus portion of the 2016 New Action, was a legitimate legal method of obtaining relief from the final judgment of his case, and the petitioner when filing his document for the 2016 new action also filed a motion requesting appointment of an Attorney, the petitioner was experiencing a great deal of emotional turmoil, anxiety and disorientation related to the recent and unexpected passing away of his Attorney who he had retained to represent the petitioner in his wrongful termination case and who the petitioner was in frequent communication with and during that time period the petitioner believed his attorney was properly handling his wrongful termination case.

Moreover, these two issues in which the Circuit Courts are in conflict over and contradicting each other are not merely hypothetical federal court puzzles, they can arise in every case where an indigent individual attempts to access the courts to exercise his or her constitutional rights and to protect his or her civil rights and it can continue to arise until it is resolved by this Court.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

Christopher Everson

Christopher Everson,

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