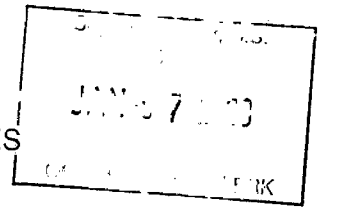
No. 19-7411

IN THE

SUPREME COURT OF THE UNITED STATES



In re LIONEL McCRAY - PETITIONER

ON PETITION FOR WRIT OF MANDAMUS TO THE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND TO THE HONORABLE CIRCUIT JUDGE AMALYA KEARSE, CIRCUIT JUDGE BARRINGTON PARKER, CIRCUIT JUDGE RICHARD SULLIVAN AND CIRCUIT CLERK CATHERINE O'HAGAN WOLFE.

Lionel McCray - Petitioner Pro se
Auburn Correctional Facility
P.O.Box 618, Auburn, New York 13024

QUESTION(S) PRESENTED

(1) Whether Mandamus should issue to the United States Court of Appeals for the Second Circuit compelling the Chief Clerk of that Court to issue a Writ of Sequestration pursuant to F.R.C.P. 70(c) against the Respondents, compelling the Second Circuit Court to enter a Finding of Contempt pursuant to F.R.C.P. 70(e) against the respondents for acting in bad faith, or in the alternative, render a decision in the McCray v. Lee proceeding ?

The Petitioner herein respectfully pray that, pursuant to 28 U.S.C.A. 1651(a), the All Writ Act, a Writ of Mandamus be issued to compel the United States Court of appeals for the Second Circuit, the Honorable Circuit Judge Amalya Kearse, Circuit Judge Barrington Parker, Circuit Judge Richard Sullivan and Circuit Chief Clerk Catherine O'Hagan Wolfe, to issue a Writ of Sequestration Pursuant to F.R.C.P. 70(c) and enter a decision in the McCray v. Lee Contempt proceeding Pursuant to F.R.C.P. 70(e).

LIST OF PARTIES

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

[X] 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:

Lionel McCray - Petitioner

Superintendent William Lee - Respondent - Defendant

Watch Commander Lt. Plimey - Respondent - Defendant

Sergeant Kutz - Respondent - Defendant

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF MANDAMUS

OPINIONS BELOW

The Anderson v. Coughlin action was commenced by several prisoners confined in several New York State presons as a Civil Rights Class action litigation. The Anderson et al. Class brought suit against defendants Coughlin et al. regarding inadequate access to exercise, among other Constitutional violations. Expert testimony was taken before the Southern District Court of New York on January 16th, 1984, entered two partial final Judgment consent Decrees against the defendants, that defendants shall keep outdoor exercise areas free of accumulations of Ice and snow. The Southern District Court in the consent Decrees made clear that defendants shall, throughout the stipulation of the Anderson v. Coughlin consent Decrees, mean those individuals named as defendants in the Anderson v. Coughlin action as well as their successors, agents, employees, assigns and those acting in concert with them. The District Court then granted the defendants motion for summary Judgment on the unresolved issues of prisoners use of indoor exercise areas and exercise equipments. The Anderson et al. Class appealed the summary Judgment. The Second Circuit Court of Appeals affirmed the summary Judgment in Anderson v. Coughlin, 757 F.2d 33(2d Cir. 1985). The Second

Circuit Court of Appeals interpreted the Anderson v. Coughlin consent Decrees by stating that outdoor exercise areas must be kept clear of snow and ice, and that prisoners were not entitled to indoor exercise areas nor exercise equipments. see Anderson v. Coughlin, 757 F.2d 33(2d Cir. 1985)

Petitioner filed his 1983 Civil Rights Complaint in the Southern District Court of New York on March 7th, 2016. On December 6th, 2016, Petitioner filed a motion for Injunctive relief in the Southern District Court. On May 24th, 2017, the Southern District Court dismissed the Petitioner's 1983 Complaint with Orders to file an amended Complaint in 30 days. On June 14th, 2017, Petitioner filed his second amended Complaint, which was dismissed with prejudice by the district court on March 29th, 2018. see McCray v. Lee, 2018 WL 1620976(S.D.N.Y.)

On April 16th, 2018, Petitioner timely filed a notice of Appeal to the Second Circuit Court of Appeals. On December 11th, 2018, Petitioner filed his primary appellate brief. On January 30th, 2019, Petitioner commenced a contempt proceeding by filing a motion to enforce the Anderson v. Coughlin enforceable consent decrees that was entered in the Petitioners favor and a finding of contempt against the defendants of the Anderson v. Coughlin Class action. On February 2nd, 2019, Circuit Judge Droney Ordered the defendants to respond to Petitioner's motion to enforce and finding of contempt. On February 20th, 2019, Petitioner filed an application for a Writ of Sequestration of the defendants Green Haven correctional facility. On February 27th, 2019, Circuit Judge again ordered defendants to respond to Petitioner's motion to enforce, finding of contempt and

application for a Writ of Sequestration. On March 7th, 2019, defendants filed their response opposition to contempt and Writ proceeding. On March 12th, 2019, defendants filed their response appellate brief. On March 19th, 2019, Petitioner filed his reply to defendants opposition to contempt and Writ proceeding. On April 3rd, 2019, Petitioner filed his reply appellate brief, closing the briefing schedule. Since the submission of the contempt and Writ of Sequestration proceeding in March of 2019, there has been no decision on the contempt proceeding nor has the Circuit clerk issued a Writ of Sequestration pursuant to F.R.C.P. 70(c). A contempt proceeding properly prosecuted and an application for Writ of Sequestration has languished without been addressed in the Second Circuit Court of Appeals for more than eight months. The inactions of the Circuit Court and the Circuit clerk has effectively precluded this Court from exercising it's appellate Jurisdiction.

Circuit Court in an abuse of discretion not located within the range of permissable federal rules, usurped power and began entering orders which indefinitely ignored the issuance of a Writ of Sequestration pursuant to F.R.C.P. 70(c) or the enforcement of the Anderson v. Coughlin consent decrees and finding of contempt against the defendants. The first such orders was entered on May 30th, 2019, appointing counsel for the Petitioner to reopen the briefing schedule with instructions to brief two issues already addressed at the contempt proceeding and Petitioner's briefs. Petitioner rejected panel appointed counsel and filed an objection to a reopening of the briefing schedule. Petitioner also filed a Judicial misconduct Complaint against Circuit panel for their badfaith intent in entering the May 30th, 2019, Order. On August 8th , 2019, a new Circuit panel

entered an order appointing rejected counsel as Amicus with orders to brief the record. Circuit clerk withheld serving Petitioner with a copy of the August 8th, 2019, Court order appointing Amicus until September 6th, 2019, on the same day Amicus filed his brief. On September 25th, 2019, Petitioner filed an objection to the Circuit Court's abuse of discretion, appointment of an unethical attorney as Amicus and Amicus brief and withholding of decision in the contempt and Writ proceeding. Petitioner also filed a Judicial misconduct Complaint against Circuit Chief Judge for allowing Circuit panel and Circuit clerk to violate multiple codes of Judicial and professional conduct and retaliating against the Petitioner. On October 24th, 2019, an other Circuit panel entered an order denying Petitioner's motion for stay of proceedings and stated that panel will consider Petitioner's motion for objection, enforcement, contempt finding and Writ of Sequestration. On November 14th, 2019, Petitioner filed a motion for Judicial Notice pursuant to this Court's decision in Frew v. Hawkins, 540 U.S. 431(2004), Taggart v. Lorenzen, 139 S.Ct. 1795(2019) Salazar v. Buono, 559 U.S. 700(2010). On November 25th, 2019, Circuit Court entered an order proposing Oral argument for the week of February 18th, 2020. On December 3rd, 2019, a member of the Circuit panel (Circuit Judge Jose Cabranes) that appointed counsel for Petitioner Amicus dismissed all of Petitioner's Judicial Misconduct Complaints in violation of Rule 19(a) of the Rules of Judicial Misconduct Proceedings.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. 1651(a) and the United States Supreme Court Rule 20.1. The Court has Jurisdiction over any decision of the Second Circuit Court of Appeals on the McCray v. Lee appeal pursuant to 28 U.S.C.A. 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment 8th to the Constitution of the United States prohibiting Cruel and Unusual punishment :

> Excessive bail shall not be required, nor excessive fines imposed, nor Cruel and Unusual Punishments inflicted.

made applicable to the States by Section 1 and 5 of Amendment 14 of the Constitution of the United States :

> Section 1. 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 wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within it jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 42, Section 1983, United States code.

STATEMENT OF THE CASE

A. JURISDICTION OF THE COURT's BELOW

The District Court had Jurisdiction over the McCray v. Lee 1983 Civil Rights Complaint pursuant to 42 U.S.C. 1331(a).

The Circuit Court has Jurisdiction over the McCray v. Lee appeal pursuant to 28 U.S.C. 1291 and 1292(a), although the Second Circuit has refused to exercise it Jurisdiction .

B. FACTS OF THE CASE

Petitioner recite only so much of the 40 years history of this matter as is necessary for a determination of the issues presently before this Court. Beginning in May of 1980, Prisoners at several New York State prisons brought a Class action Civil Rights lawsuit against New York State prison officials alleging inadequate access to exercise, amoung other issues. On January 16th, 1984, the Souther District Court of New York's Judge Brieant, after a full hearing with expert witnesses, entered a partial final Judgment enforceable consent decree against the defendants State prison officials, that defendants shall keep outdoor exercise areas free of accumulations of Ice and snow. The District Court then granted the defendants summary Judgment Motion on the unresolved issues of indoor exercise area usage in inclament weather and exercise equipments. The Plaintiff's of the Anderson v. Coughlin litigation appealed the summary Judgment to the Second Circuit Court of Appeals. The Second Circuit Court of

Appeals in Anderson v. Coughlin, 757 F.2d 33(2d Cir. 1985) affirmed the District Court's decision by interpreting the consent decrees that outdoor exercise areas must be kept clear of snow and Ice, and that prisoner were not entitled to indoor exercise areas or exercise equipments. On March 7th, 2016, Petitioner filed a section 1983 Complaint against the respondents for an alleged slip and fall injury that occurred in the Green Haven correctional facility G & H block exercise yard on February 20th, 2014. Petitioner in his 1983Complaint alleged that on February 20th, 2014, at approximately 10:10am, Petitioner was escorted by Sergeant Kutz to the doorway of the G & H block exercise yard of the Green Haven correctional facility. Sergeant Kutz gave Petitioner a direct order to proceed into the exercise yard to observe a limited one hour keeplock exercise. The Green Haven correctional facility outdoor exercise yards is a square prison yard with 80% grassy areas in the middle and concrete walkways on four sides, surrounded by walls of housing units and hallways. see Anderson v. Coughlin, 757 F.2d 33 at 34(2d Cir. 1985). Petitioner was walking down the snow and ice covered narrow path walkway between H block and the snow covered handball court when Petitioner tried to avoid frozen solid sheet of ice on the walkway floor, Petitioner slipped on the frozen sheet of ice and fell. In an attempt to save his face from injury, Petitioner folded himself and braced for impact with the walkway floor. Petitioner heard a pop from his ankle area and landed on his left shoulder and head. Petitioner in his amended Complaint also alleged that the conditions causing his injures were caused by the defendants custom and policy of no snow and ice removal from the facility's exercise yards and of not installing any winter

snow and Ice removal access ways from the closed-in facility exercise areas.

C. PROCEDURAL BACKGROUND

The procedural history of the Petitioner's 1983 action in the District Court and the Circuit Court is as follows. Petitioner filed his 1983 Complaint on March 7th, 2016. On December 6th, 2016, Petitioner filed a motion for Injunctive relief with the Southern District Court of New York. On January 4th, 2010, defendants filed a motion to dismiss Petitioner's Complaint pursuant to Rule 12(b), Petitioner filed a response on February 1st, 2017, and defendants filed a reply on February 16th, 2017. The District Court presided by Honorable Judge Karas entered a decision on May 24th, 2017, granting the defendants motion to dismiss and ordering Petitioner to amend his Complaint within 30 days. On June 14th, 2017, Petitioner filed his second amended Complaint. On August 4th, 2017, defendants filed a second motion to dismiss, Petitioner filed his opposition motion on September 19th, 2017, and defendants filed their reply on September 26th, 2017. On March 29th, 2018, the District Court entered it's final decision denying and dismissing Petitioner amended Complaint with prejudice. see McCray v. Lee, 2018 WL 1620976 (S.D.N.Y.). Petitioner filed a timely notice of appeal to the Second Circuit Court of Appeals on April 16th, 2018. On December 11th, 2018, Petitioner filed his primary appellate brief to the Second Circuit Court. On January 30th, 2019, Petitioner commenced a contempt proceeding by filing a Motion to enforce the Anderson v. Coughlin consent decrees and a finding of contempt against the defendants of

the Anderson v. Coughlin action. On February 20th, 2019, Petitioner properly filed an application for Writ of Sequestration of the Green Haven correctional facility. On March 3rd, 2019, defendants filed their opposition to Petitioner's motion to enforce, finding of contempt and Writ of Sequestration. On March 12th, 2019, defendants filed their appellate response brief. On March 19th, 2019, Petitioner filed his reply to the defendants opposition to motion to enforce and finding of contempt and sequestration. On April 3rd, 2019, Petitioner filed his reply appellate brief, closing the appellate and contempt proceeding briefing schedule. Since submission of the contempt proceeding, there has been no decision regarding the contempt proceeding nor has the Circuit clerk issued a Writ as authorized by F.R.C.P. 70 (c), only orders which indefinitely defer a decision has been entered by the Circuit Court. The first such order was on May 30th, 2019, without ruling on the contempt proceeding, Circuit Judge G. Lynch, Circuit Judge R. Lohier and District Judge B. Cogan entered an order appointing counsel for the Petitioner and instructed counsel in the order to brief two issues already addressed at the contempt and appellate briefings. When Petitioner rejected counsel and objected to a re-opening of the briefing record on June 25th, 2019. On August 8th, 2019, Circuit Judge J. Cabranes, Circuit Judge P. Hall and Circuit Judge D. Chin entered an order appointing rejected counsel for Petitioner as Amicus with instruction to brief the record on behalf of the Petitioner. Circuit clerk never served the Petitioner a copy of the August 8th, 2019, order until September 6th, 2019, the same day Amicus file his brief in false support of the Petitioer and without Petitioner's consent. On September 25th, 2019, Petitioner filed a motion to stay further proceedings and an

objection to Amicus appointment and Amicus brief. On October 24th, 2019, Circuit Judge A. Kearse, Circuit Judge B. Parker and Circuit Judge R. Sullivan entered an order denying Petitioner's motion for stay of proceedings. On November 27th, 2019, Petitioner filed a motion for Judicial Notice. On December 6th, 2019, defendants filed their response to Petitioner's motion for Judicial Notice. On December 12th, 2019, Petitioner filed his reply to defendants opposition to motion for Judicial Notice.

There are also included in the appendix the following papers which are essential to an understanding of the instant petition.

REASONS FOR GRANTING THE PETITION

A. INTRODUCTION

Pursuant to 28 U.S.C.A. 1651(a) and the United States Supreme Court Rule 20. Petitioner Lionel McCray now respectfully request this Court to issue a Writ of Mandamus directing the United States Court of Appeals for the Second Circuit, the Honorable Circuit Judge Amalya Kearse, Circuit Judge Barrington Parker, Circuit Judge Richard Sullivan and Circuit Chief Clerk Catherine O'Hagan Wolfe, to immediately, and within a time certain, issue a Writ of Sequestration pursuant to F.R.C.P. 70(c), enter a Contempt Finding against the defendants for acting in bad faith pursuant to F.R.C.P. 70(e), or in the alternative render a decision in the McCray v. Lee Contempt proceeding. Writ of Mandamus should be issued in this case because the Petitioner can clearly and indisputably demonstrate that: (1) Mandamus will protect this Court's prospective appellate (Certiorari) Jurisdiction over the Second Circuit's decision: (2) The Second Circuit's abdication of it's responsibility to a prompt decision in a contempt proceeding and failure of issue a Writ of Sequestration authorized by F.R.C.P. 70(c), demonstrates exceptional circumstance and precedent warranting the exercise of this Court's discretionary power; and (3) Petitioner cannot obtain adequate relief elsewhere.

The Supreme Court may issue Writ of Mandamus to inferior Courts pursuant to 28 U.S.C.A. 1651, the All Writs Act. see Kendall v. Stokes, 37U.S. 524(1838), Marbury v. Madison, 5 U.S. 137(1803). The authority of the Court to exercise Mandamus extends to those cases

that are within it's appellate Jurisdiction. Writ may be issued in the aid of this Court's appellate Jurisdiction, which might otherwise be defeated; which in this case will be a remand of the McCray v. Lee appeal back to the District Court to terminate the Anderson v. Coughlin consent decrees being enforced pursuant to the P.L.R.Act. Mandamus is appropriate both to confine an inferior Court to the lawful exercise of it's prescribed Jurisdiction and to compel the Court to exercise its authority when it has a duty to do so. see Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661(1978). Unquestionably, only exceptional circumstances amounting to Judicial usurpation of power will justify the invocation of Mandamus. see Will v. U.S., 389 U.S. 90, 95(1967), Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382(1953). The party seeking Mandamus has the burden of showing that the right to issuance of Writ is clear and undisputable. see Kerr v. U.S. Dist. Court for Northern Dist. of California, 426 U.S. 394, 403(1976).

This Court has consistently recognized that Mandamus remains appropriate when the Court has clearly abused its discretion. see La Buy v. Howes Leather Company, 352 U.S. 249(1957), Mallard v. U.S. Dist. Court for Southern Dist. of Iowa, 490 U.S. 296(1989). A determination regarding how long a decision may be delayed is subject to review for abuse of discretion. see Kendall v. Stokes, 37 U.S. 524, 622(1838)

Mandamus may be used only when the party requesting the Writ has no other adequate remedy. see Kerr v. U.S. Dist. Court for Northern Dist. of California, 426 U.S. 394(1976). It may not be used as a substitute for appeal. The Petitioner meet each of these criteria of issuance of a Writ of Mandamus to the Second Circuit Court of

Appeals. The default by the Second Circuit Court and Clerk in its duty to issue a Writ of Sequestration authorized by law and decide the McCray v. Lee contempt proceeding is exceptional and merits Mandamus relief. This Court offers the only available forum for redress of this abuse of discretion by the Second Circuit Clerk and Court. see kendall v. Stokes, 37 U.S. 524, 622(1838).

B. ISSUANCE OF A MANDATE WILL AID THIS COURT IN THE EXERCISE OF ITS APPELLATE JURISDICTION.

In Will v. Calvert Fire Ins Co., 437 U.S. 655(1978), this Court expressly recognized it's authority to issue a Writ of Mandamus to compel an inferior Court to decide a case. Also see Knickerbocker Ins. Co. of Chicago v. Comstock, 83 U.S. 258, 270(1872) and Thermtron products, Inc. v. Hermansdorfer, 423 U.S. 336(1976). Until the Second Circuit Clerk issues a Writ of Sequestration and the Second Circuit Court renders a decision in the McCray v. Lee contempt proceeding, this Court is deprived of the opportunity to exercise its power to review the McCray v. Lee case by way Certiorari. The substance of the McCray v. Lee contempt proceeding lies unattended before the Second Circuit, offering neither party the opportunity for a final decision and final review by this Court. No order entered by the Second Circuit to date has been a final decision or Judgment capable of review by way of Certiorari. Petitioner has objected to the Second Circuit's persistent, without reason refusal to issue a Writ of Sequestration pursuant to F.R.C.P. 70(c), and to enter a decision in the McCray v. Lee contempt proceeding and only a directive from this Court to the Second Circuit Clerk that a Writ be issued forthwith and that said

contempt proceeding be decide within a certain, will allow this Court to exercise it's review powers in a timely and meaningful fashion.

C. THE MCCRAY V. LEE CONTEMPT AND WRIT PROCEEDING PRESENTS EXCEPTIONAL AND PRECEDENT CIRCUMSTANCE WHICH WARRANTS THE ISSUANCE OF A MANDATE DIRECTING THE SECOND CIRCUIT CLERK TO ISSUE A WRIT OF SEQUESTATION AND THE COURT TO DECIDE THE CONTEMPT PROCEEDING IMMEDIATELY.

1) The Second Circuit's Clerk refusal to issue a Writ of Sequestration pursuant to F.R.C.P. 70(c) and New York State C.P.L.R. 6201(5) after a contempt and Writ hearing demonstrates the petitioner's clear and indisputable right to relief.

Sequestration is a proceeding In Rem. An In Rem proceeding is based on a Court's power over property within its territory including the power to seize and hold it. In Rem proceedings takes no cognizance of an owner or person with a beneficial interest. Any property of every description anywhere within the Jurisdiction of the Court is generally subject to Sequestration to satisfy an obligation pursuant to F.R.C.P. 70. State law also governs the availability and manner of applying for Sequestration. see New York State C.P.L.R. 6201(5). Since Sequestration is simply a procedural mechanism for enforcing an underlying obligation, issuance of Writ has no effect on legal title to property but merely transfers possession pending compliance with the underlying obligation. This Court in Mitchell v. W.T. Grant Co., 416 U.S. 600(1974) established the necessity for due process safeguards before a Writ of

Sequestration may issue. Petitioner here commenced a contempt proceeding to provide the defendants with the necessary due process notice and an opportunity to be heard before a Judicial officer to satisfy due process and obtain Quasi In Rem Jurisdiction over the defendants property. At the contempt and Writ proceeding Petitioner established facts sufficient to constitute an offence against federal law. It was the legal duty of the Second Circuit Clerk pursuant to F.R.C.P. 70(c) to issue Writ, and upon failure to act, it is proper to compel her to do so by Mandamus.

On January 30th, 2019, Petitioner filed a motion to enforce the Anderson v. Coughlin enforceable consent decrees against the defendants pursuant to the All Writs Act, F.R.C.P. 70 and 71, and a motion for a finding of contempt against the defendants. On February 20th, 2019, Petitioner filed an application for a Writ of Sequestration of the defendants property Green Haven correctional facility and affidavits in support. In Petitioner's motion to enforce, finding of contempt and application for Writ of Sequestration, Petitioner established that of the fifteen defendants Superintendents of the Anderson v. Coughlin consent decrees, only three have taken the objectively reasonable effort to keep their facility outdoor exercise areas clear of snow and ice during the winter months, by paving over entire outdoor exercise areas and creating egress to allow snow plow machinery to enter the outdoor exercise areas and remove the winter accumulations of piles of snow and ice from the regularly used facility exercise yards. Petitioner also established that paving facility outdoor exercise areas had a dial purpose of preventing inmate prisoners from

digging holes in the grassy areas of the exercise areas and burying weapons and drugs of which the defendants at Green Haven Correctional facility had knowledge of. see Affidavit in support of Writ of Sequestration. On February 27th, 2019, Circuit Judge Dowrny ordered the defendants to respond to Petitioners motion and application for Writ. On March 7th, 2019, defendants filed their response to Petitioner's motion and application for Writ of Sequestration. In the defendants response, defendants raised two arguments (1) that Petitioner lacked standing to enforce the Anderson v. Coughlin consent decrees that was entered in the Petitioner's favor. see F.R.C.P. 71 and this Court's decision in Salazar v. Buono, 559 U.S. 700, 712(2010) that a party that obtains a Judgment in its favor acquires a "Judicially Cognizable" interest in ensuring compliance with that Judgment and has standing to seek its vindication. (2) and quote " This Court has previously denied contempt sanction where .... defendants who were not complying with a Court order to the Court's satisfaction were not given the required opportunity to purge that contempt. This Court should apply the same analysis here". see Defendants Memorandum of law in opposition to contempt and Writ. Clearly this argument made by the defendants in their response memorandum was indeed an admission of contempt and a plead to be allowed time to purge after 35 years of intentional noncompliance. On March 19th, 2019, petitioner filed his reply to the defendants response to motion to enforce, finding of contempt and application for Writ of Sequestration. Petitioner re-established that defendants will continue to act in bad faith and will continue to create delay to avoid compliance. Since

Petitioner here has meet the requirement of F.R.C.P. 70(c) due process and New York State C.P.L.R. 6201(5), Circuit Clerk should have issued a Writ of Sequestration against the defendants property back in March of 2019. The provision remedies of F.R.C.P. 70(c) makes clear that the Clerk must issue a Writ of Sequestration against the defendants property to compel obedience.

2) The Defendants Bad Faith Attempt to Commit Fraud in the Circuit Court to Deny This Court Appellate Jurisdiction Over The McCray v. Lee Contempt and Writ Proceeding.

In La Buy v. Howes Leather Co., 352 U.S. 249(1957) this Court established the need for a superior Court to maintain supervisory control over the conduct of an inferior Court. The following events about to be discussed involves the defendants acting behind the scenes to coerce the Circuit Court into abusing its discretion through the Circuit Court's Clerk. Petitioner motion for enforcement, contempt and Writ of Sequestration proceeding concluded on March 19th, 2019, Petitioner's appellate briefings concluded on April 3rd, 2019. Circuit Clerk in refusing to issue or deny issuance of Writ denied this Court appellate Jurisdiction. On May 30th, 2019, two months after submission of contempt and Writ Proceeding, Circuit panel entered an order granting petitioner's motion for counsel with directions to brief two question already addressed by the Petitioner in his motions and appellate briefs. The Second Circuit in an attempt to relieve the petitioner of the power to enforce the Anderson v. Coughlin consent decrees appointed Attorney Kevin King as counsel for the Petitioner on June 7th,

2019. Attorney Kevin King on June 12th, 2019, sent the Petitioner a conflict of interest waiver engagement letter to sign. Attorney kevin King's appointment and his conflict of interest waiver engagement letter was meant to remove the Petitioner from the litigation and effectively put an end to the enforcement of the Anderson v. Coughlin consent decrees and contempt proceeding against the defendants. With the contempt proceeding complete and appellate briefings filed the Circuit Court's need to reopen the briefing schedule and appoint counsel for the petitioner was questionable. Indeed it was not only an effect to give the defendants another bite at the apple but to completely put an end to the Petitioner's power to enforce rights entitled to him and aid the defendants escape a contempt finding. Attorney Kevin King repeatedly pleaded to Petitioner to sign his conflict of interest waiver engagement letter, and when the petitioner refused, Attorney Kevin King asked the Court to appoint him Amicus without the Petitioner's consent. Attorney Kevin King's interest in the McCray v. Lee action became more questionable and the Circuit Court's intent in appointing Attorney Kevin King to represent the Petitioner after the contempt proceeding became much clearer. On June 27th, 2019, Petitioner file three Judicial misconduct Complaint against the Circuit panel that appointed Attorney Kevin King counsel for the Petitioner. On August 8th, 2019, a new Circuit panel granted Attorney Kevin King's request to be appointed Amicus in support of the Petitioner without Petitioner's consent. Circuit Clerk intentionally withheld serving Petitioner with Notice of the August 8th, 2019, Court order appointing Attorney Kevin King Amicus until September 6th, 2019, in

violation of F.R.A.P. 45(c). On September 6th, 2019, Attorney Kevin King filed his Amicus brief. Attorney Kevin King's Amicus brief raised weak arguments Amicus could easily abandon. Circuit panel's appointment of Attorney Kevin King as Amicus was an abuse of discretion, in civil rights cases, federal Court's often invite the United States Attorney General's office to participate as Amicus curiae and empower the Attorney General's office to initiate any further criminal proceeding. see Faubus v. U.S., 254 F.2d 797, 802(8th Cir. 1958). Petitioner filed an objection on September 25th, 2019, for a stay of further proceeding to appeal to the U.S. Supreme Court. The Petitioner motion for objection to Amicus appointment and stay of proceeding was file onto the docket record missing page 4 and 5 of the motion. When Petitioner discovered his motion for objection was missing two pages on the record on October 6th, 2019, Petitioner filed a Judicial misconduct Complaint against Circuit Chief Judge for allowing such misconduct as fraud and retaliation in his Court against the Petitioner. On October 7th, 2019, defendants filed their brief in opposition to Amicus brief. In the defendants October 7th, 2019, brief, defendants argued that they were entitled to qualified immunity for violation the Anderson v. Coughlin consent decrees that they consented to. On October 16th, 2019, defendants counsel filed a statement for oral argument pursuant to Circuit local rule 34.1, to engage in oral argument with a pro se inmate prisoner in the Circuit Court. On October, 21st, 2019, Amicus filed his statement for oral argument. On October 22nd, 2019, the Court entered an order deferring Amicus motion for oral argument. On October 24th, 2019, a new Circuit panel entered an order denying

Petitioner motion for stay of proceeding. On October 30th, 2019, Petitioner filed his statement for oral argument. On November 25th, 2019, Circuit panel proposed oral argument calendaring for the week of February 18th, 2020. On November 14th, 2019, Petitioner filed a motion for Judicial Notice of law citing this Court's decision in Frew v. Hawkins, 540 U.S. 431(2004). Circuit Clerk did not file Petitioner's motion for Judicial notice until November 27th, 2019, after Petitioner sent a second copy of said motion to Circuit Chief Judge's Office. On December 3rd, 2019, Circuit Judge Jose Cabranes whom was a member of the Circuit panel that appointed Attorney Kevin King Amicus, entered a decision dismissing all of Petitioner's Judicial misconduct Complaints against Circuit panel that appointed Attorney Kevin King counsel for Petitioner and Circuit Chief Judge. Circuit Judge Jose Cabranes should have disqualified himself as acting chief Judge pursuant to Rule 19(a) of the Rules of Judicial misconduct proceeding for his involvement in appointing Attorney Kevin King Amicus. On December 6th, 2019, defendants filed their response to Petitioner's motion for Judicial notice, defendants in their response motion made clear that they never sought an opportunity to purge and that they never violated any consent decrees. On December 12th, 2019, Petitioner filed his reply to defendants response to motion for Judicial notice, Petitioner cited this Court's resent decision in Taggart v. Lorenzen, 139 S.Ct. 1795(2019) and objected once again to the Circuit Court's abuse of its discretion in undermining Petitioner's right to enforce and vindicate Judgments entered in his favor pursuant to F.R.C.P. 70. This Court in Union Tool Co. v. Wilson, 259 U.S. 107, 112(1922) made

clear that in a contempt proceeding the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. Legal discretion in such a case does not extend to a refusal to apply well settled principles of law to a conceded state of facts. Indeed, the standard for the McCray v. Lee contempt and Writ proceeding has already been set by this Court in Hutto v. Finney, 437 U.S. 678(1978).

3) Comparative Convenience Test

Petitioner respectfully request that this Court invoke the Comparative Convenience test to compel the defendants to, once and for all, come forward with material evidence proof of their compliance with the terms of the Anderson v. Coughlin consent decrees in their response to this Petition for Writ of Mandamus. A comparative convenience test here will prove that the defendants sought an opportunity to purge at the contempt proceeding in bad faith and that the Second Circuit Court of Appeals should be compelled to enter a contempt finding against the defendants pursuant to F.R.C.P. 70(e).

Comparative Convenience test is well rooted in common law. see Morrison v. California, 291 U.S. 82(1934). Comparative Convenience test is based on the policy determination that it is fair to compel a defendant to come forward with evidence to which he has ready access where placing such a burden on the plaintiff would render the suit to difficult. Under the Comparative Convenience test, the defendant is in a better position to place before the Court the most significant facts relevant than the Petitioner is. In the matter before the Court, not only is the defendants required to

come forward with material proof of their compliance with the terms of the Anderson v. Coughlin consent decrees but the defendants have yet to come forward with any material evidence to show proof of compliance. Defendants continue to claim without proof that they abandoned their responsibility to Inmate prisoners with no ability to remove piles of snow and ice from the grassy areas of the facility's outdoor exercise areas. In fact, defendants have yet to produce any documental evidence to support their claim nor to defeat the Petitioner's prima facie case, that the defendants allowed piles of snow and ice to unreasonably accumulate in the Green Haven correctional facility outdoor exercise yards all winter long until it naturally melted away in the spring, that defendants never created any winter snow and ice removal access ways to remove piles of accumulating snow and ice from the facility's closed-in outdoor exercise yards, and that the defendants had knowledge of inmate prisoners burying weapons and drugs in the grassy areas of the facility outdoor exercise yards and refused to pave over the grassy areas of the facility exercise yards to cure both Constitutional violations.

This Court in it's resent decision in Taggart v. Lorenzen, 139 S.Ct. 1795(2019) quoted McComb v. Jacksonville Co., 336 U.S. 187(1949) and reestablished the need to place the burden of any uncertainty in the decree on the shoulder of a persistent violator. see Irvin v. Harris, 2019 WL 6121571(2d Cir 2019). The same defendants here at the contempt proceeding sought an opportunity to purge more than eight months ago, hence, the Second Circuit Clerk unlawfully withheld issuance of a lawful Writ of

Sequestration against the defendants, but to date defendants have yet to produce before the Second Circuit any proof of diligent compliance. In fact, defendants in their response to Petitioner's motion for Judicial notice dated December 6th, 2019, defiantly claimed they were not in violation of any consent decrees. Clearly the defendants will remain willful and continue to seek ways to evade compliance until a Judgment is entered. It is fair to once and for all compel the defendants to come forward with evidence to which they have ready access to; material evidence to defeat the Petitioner's allegation on affidavit that defendants are aware of inmate prisoners digging holes in the grassy areas of the Green Haven correctional facility outdoor exercise areas and burying weapons and drugs in the grounds of the facility's exercise yards, material evidence to defeat Petitioner's first hand witness affidavit statement and the operation Complaint's allegations that defendants knowingly ignored piles of winter ice and snow to remain unremoved in the Green Haven correctional facility outdoor exercise yards till it naturally melted away in the spring months in violation of the terms of the Anderson v. Coughlin consent decrees, material evidence to defeat the Petitioner's claim that defendants closed-in facility outdoor exercise yards at Green Haven correctional facility have no winter snow and ice removal egress or access ways to allow machinery to enter and remove piles of accumulating snow and ice as claimed by the District Court Judge on behalf of the defendants. The defendants is an information collecting State agency that have ready access to these material evidence and their failure to produce the necessary proof will be further evidence of their willful defiance and purposeful delay

tactic in bad faith. In the event that the defendants fail to meet the Comparative Convenience test in their response to this Petition for Writ of Mandamus, this Court should compel the Second Circuit Court to proceed pursuant to F.R.C.P. 70(e) and enter a contempt finding against the defendants for acting in bad faith. see Taggart v. Lorenzen, 139 S.Ct. 1795(2019).

D. THE PETITIONER HAS NO OTHER MEANS TO RECEIVE ADEQUATE RELIEF FROM ANY OTHER COURT.

It is apparent that the refusal of the Circuit Clerk to issue a Writ of Sequestration pursuant to F.R.C.P. 70(c) and the lack of decision by the Circuit Court in a contempt and enforcement proceeding, as well as the continue issuance of non final unreviewable orders leave the Petitioner with no avenue for relief other than Mandamus in this Court. The Second Circuit has neither rendered a final decision nor decided any question of law which would allow the Petitioner herein to seek review by Certiorari. The Second Circuit Clerk abdicated it's lawful duty to issue a Writ of Sequestration authorized by law and the Circuit Court's avoidance to decide a properly prosecuted and fully heard equitable contempt proceeding, ripe for decision, in favor of successive briefings is evidence of an attempt to deny this Court it's opportunity to exercise its appellate Jurisdiction of review. Only through this Court's intervention, compelling the Second Circuit Clerk to issue a Writ of Sequestration forthwith and compelling the Circuit Court to enter a decision or contempt finding against the defendants pursuant to F.R.C.P. 70(e) for acting in bad faith can there be an

end to the Circuit Court's avoidance practice. The issues involved in the McCray v. Lee contempt and Writ proceeding are of exceptional character and of great public importance. see Wagner v. Warnasch, 156 Tex. 334, 295 S.W.2d 890(1956)(consent decree requiring construction work enforced specifically). This Court has always held that a Writ of Mandamus may issue in aid of the appellate Jurisdiction which might otherwise be defeated by an unauthorized action of the Court below.

The Second Circuit Clerk's refusal to issue a Writ pursuant to F.R.C.P. 70(c) and the Circuit Court's avoidance to decide the contempt and enforcement of the Anderson v. Coughlin consent decree proceeding has obvious adverse effects on the Petitioner inmate prisoner, as well as the consent decrees sought to be enforced. The Circuit Clerk and Circuit Court's refusal to act directly abrogates the petitioner's strong interest to enforce the enforceable consent decrees on behalf of his Class in the interest of the rights sought to be protected, which is the ultimate goal of the contempt and Writ of Sequestration proceeding. The fundamental precept of an equitable contempt and Writ of Sequestration proceeding as provided by the Civil remedial provisions of F.R.C.P. 70 is that the Court will expeditiously review the matter before it. The Second Circuit Court's purposeful inactivity bespeaks a studied indifference to, even contempt for, the legitimate Eighth amendment interests of inmate prisoners embodied in institutional reform consent decrees, and the Circuit Court's preference to terminate said consent decrees and deny this Court appellate Jurisdiction warrants issuance of Mandamus. Petitioner respectfully request that this

Court intervene in the interest of the politically weak Petitioner and his Class of Similarly Situated and compel the Second Circuit Court and Clerk to perform its proper, lawful function in this case and Order Civil, remedial and coercive relief pursuant to F.R.C.P. 70(c) and (e) against the defendants, compelling Civil obedience and vindicate Rights entitled to the Petitioner. see Hutto v. Finney, 437 U.S. 678(1978), McComb v. Jacksonville Paper Co., 336 U.S. 187(1949) and Taggart v. Lorenzen, 139 S.Ct. 1795(2019).

CONCLUSION

FOR THE REASONS STATED ABOVE, Petitioner respectfully pray that this Court grant his request for a Writ of Mandamus to the United States Court of Appeals for the Second Circuit, the Honorable Judge Amalya Kearse, Circuit Judge Barrington Parker, Circuit Judge Richard Sullivan and Circuit Clerk Catherine O'Hagan Wolfe.

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

Dated: Auburn, New York

January 3rd, 2020

Respectfully Submitted,

Signature: McCray

Address: Auburn Correctional facility

P.O.Box 618, Auburn, New York

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