No. 21-5459

No. 20-4070; 12-CV-6180

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

BERNABE ENCARNACION — PETITIONER
(Your Name)

vs.

GLENN GOORD, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT OF NEW YORK
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BERNABE ENCARNACION
(Your Name) PETITIONER PRO SE

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ATTICA, NEW YORK 14011-0149
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N/A
(Phone Number)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at Encarnacion v. Goord, 2020 WL 6291473; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was May 21, 2012.

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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JURISDICTIONAL STATEMENT

Plaintiff Bernabe Encarnacion, an state prisoner, by pro se, aftre spended more than 11 years in solitary in the Specila Housing Unit (SHU) from February 17, 1998 thru to March 9, 2009, he timely filed this action on March 7, 2012 seeking relief pursuant to 42 USC § 1983, alleging that he was subjected to due process-double jeopardy and cruel and unusual punishment in violation of the Fifth and Eighth Amenfments.

On October 27, 2020, the District Court (Siragusa, J.) wrongful entered judgment in defendants favor and dismissed the case as untimely. Plaintiff timely appealed, filed notice of appeal and motions for in forma pauperi relief, appointed of pro bono counsel to represented him in this case, granted monetary awards as prevailing party in Encarnacion v. Rock, 580 Fed. Appx.19; Encarnacion v. Goord, 669 Fed. Appx. 61), and to leave to appeal.

By an May 21, 2021, the Court of Appeals for the Second Circuit of New York sua sponte denied plaintiff's motions and dismissed his appeal.

The Decision of the Second Circuit is dated May 21, 2012, mailed on May 25, 2021 and received by plaintiff on or about May 28, 2012, entered Mandated on July 6, 2021 (Appendix A1-2).

Pursuant to Rule 13(1) of the Supreme Court Rules, an appeal to final decision of a Circuit Court must be filed within ninety (90) days of ths date of said decision or order or judgment.

This appeal is authorized, and timely filed, given the Supreme Court judicial jurisdiction over both the case and the defendants.

STATEMENT OF MATERIAL FACTS

On August 11, 1996, while Plaintiff was incarcerated at Auburn C.F. (ACF) Special Housing Unit (SHU), he received a misbehavior report dated 8/10/96, charging him with fighting, assaulted on inmate, and contraband weapon (8/10/96 MR), after he was involved in a fist fight with inmate Daniel Roberts (Roberts) at ACF yard, who he later died accidentally by affixation (8/10/96 MR). See Appendix D6-8, which was issued just short period of time before Plaintiff was to be released on early parole with deportation only ordered by Federal Court (Levington, J.) in 1995. (See Appendix D1-3).

The contranband weapon and related charges were dismissed & expunged at the start of the disciplinary hearing and Plaintiff was released from SHU, thus to fact that: 1) Roberts death was accidental; and 2) that inmate Angel Hernandez were reponsible of Roberts' artificial stabs & cut wounds, after a prison disciplinary hearing, in August 1996 Hernandez was required to serve 5 years in the SHU. (see Appendix D1-17).

On 2/17/98, while incarcerated at Elmire C.F. (ECF), plaintiff was places SHU and on 2/19/98, he received a second MR dated 2/18/98 in connection with the 8/10/96 incident at ACF yard, charging him with murder & contraband weapon, after a prison disciplinary hearing he was sentened to 10 years in the SHU with lost of all privilegies and 5 years lost of goodtime on the second MR (see Appendix D4-6, 14-15).

On March 9, 2009, Plaintiff was released from SHU and his § 1983 was filed on March 7, 2012 within the New York 3 years period of statute of limitation (see Appendix C1-2). In this action for damages brought against 4 DOCS employed defendants pursuant to 42 USC § 1983, Plaintiff alleges

that he was sujected to Fifth Amendment due porcess-double jeopardy when defendants charged him twice (on 8/10/96 and 2/17/98) for the incident of 8/10/96 at ACF main yard (Appx. D4, 6, & 14): and Eighth Amendment clause of cruel and unusual punishment: more than 11 years confinement in SHU, with deprivations of hygiene products, daily meals, and daily outdoor excerses for more of the period of his over 11 years in the SHU at ECF, Southport CF (SCF), and Great Meadow CF (GMCF) among many many more other deprivations.

On August 27, 2012, the District Court (Larimer, J.) sua sponte dismissed with prejudice his 1983. Plaintiff appealed. The Second Circuit dismissed the district court's Aug. 12, 2012 dismissal decision and remanded on Sept. 23, 2014 (Appendix A7-8). On Nov. 6, 2014, the District Court (Larimer, J.) sua sponte dismissed the complaint in remanded and granted leave to filed amended complaint.

On Jan. 25, 2015, Plaintiff filed his amended complaint. On Aug. 20, 2015, The District Court (Larimer, J.) sua sponte dismissed with prejudice the amended complaint. Plaintiff appealed. On Oct. 7, 2016, the Second Circuit vacated in part the district court's Aug. 20, 2015 dismissal decision and remanded (Appendix A4-6). The district court disregarded the Second Circuit order in remanded, and on Oct. 27, 2020, the District Court (Siragusa, J.) wrongful granted judgment on defendants favor and dismissed with prjudice his § 1983 as untimely (Appendix B), Plaintiff's DOCS medical records refuted defendants allegation that Plaintiff was released from SHU on Aug. 15, 2008, and the district court unsupported finding that Plaintiff's SHU ended on Nov. 15, 2008 (see Appx. C1-2). Plaintiff timely appealed. On May 21, 2021, the Second Circuit denied plaintiff's motion for IFP relief, appointment of pro bono counsel, and to award costs as

prevailing party and dimissed his appeal wrongful. See Appx. A1-6, B and C1-2.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred on denied Plaintiff's motions and dismissed his appeals, ruling it "lacks an arguable basis either in law or in fact", contradiced its early finding in the case. See Appx. A4-8 & C1-2.

2. Whether the district court erred in entered judgment in defendants favor and dismissed his § 1983 as untimely, with records and evidences shown that this action was timely filed on 3/7/12. See Appx. C1-2.

3. Whether the district court erred in dismissed his double jeopardy claim and denied Plaintiff's motions for reexcussal of judge Siragusa from this case conflicte of interest ground and appointed of pro bono counsel.

BACKGROUND

While waiting on a court-ordered early paprole release with deportation only, on August 10, 1996, Roberts assaulted Plaintiff again in the main yard of ACF. Roberts later died by affixation when any air is getting into his lungs before and during CPR. After his death security and medical staffs found stuck in Roberts' throat a packket of drug he swolled to conseal it from COs during a pat frisk, three stab wounds and a cut. Appx. D4, 7-8. At not time did plaintiff possessing any weapon during the fist fight (Appx. D5, 9-10). Roberts had aasaulted Plaintiff before in the main yard of ACF in June 1996. See Appendix D21-22; Encarnacion V. Dann|| 80 Fed. Appx. 140 (C.A.2 (NY) 2003).

The investigations conduced by DOCS, Inspector Gen. and State Police investigators showd inmate J. Becker's friend(s) was responsible of Roberts' stabs wounds and cut. (Appendix D5, 9-13). Based on those findings all charges filed against Plaintiff in connection to the 8/10/96 at ACF main yard were dismissed & expunged at the start of the disciplinary hearing. Appx. D6. After five moths in the SHU, from 8/10/96 to 1/8/97, he was transferred to ECF and released to the generla population (GP).

Almost two later on 2/17/98, defendants palced plaintiff in the SHU, issued a second MR and sentenced to 10 years in the SHU in connection with the same incident of 8/10/96 at ACF main yard after all charges filed against him in connection with the 8/10/96 incident at ACF main yard in the fisrf MR were dismissed and expunged. Appx. D4, 6, 14-15).

In Howard v. Coughlin, 212 A.D.2d 852 (1995), the Supreme Court held: "Second determination of prisoner's guilt for violation of prison desciplinary rule could not be upheld after original determination was expunged due to lack of valid misbehavior report, even though prisoner was

later criminally convicted for the misbehavior; effect, of upholding second determination of guilt for rule violation would be to impose penalty on the inmate for actions expunged in first disciplinary proceeding, even though rules allegedly violated were diferent". Appendix D19-20, Howard, supra, Appx. D4,6, 14-15.

In Plaintiff's Article 78, the Supreme court (Castellino, J.) hold: "The Plaintiff seeks to have the determination of February 25, 1998, annulled and expunged on the basis of the holding in Matter of Howard v. Coughlin, 212 A.D.2d 852, the Court finds that said holding is not applicable to this proceeding since there is no evidence in the record that any prior disciplinary charges filed against the Petitioner in connection with the incident of August 10, 1996 at ACF were dismissed or expunged". Appx. D16-18. This finding was wrongful made based upon defendants false informations to the Court. See Appx. D4, 6 & 14-15.

Later in Plaintiff habeas corpus (Encarnacion v. McGinnis, 2002), defendants informed the District Court, the assault and related charges were dismissed and expunged at the start of the disciplinary hearing. (Appx. D4, 6). In dismissed his habeas corpus petition, The District Court (Siragusa, J.) ruled that state inmate have not due process right at prison disciplinary tier hearing and the double jeopardy is applies only on criminal proceeds, Encarnacion v. McGinnis. Wrong. Inmates do have due process and double jeopardy rights ai prison disciplinary tier hearing under Amendments 5th & 14th; Howard v. Coughlin, 212 A.D.2d 852, 622 NYS 2d 134 (A.D.3 Dept.1995); Wolff v. McDonnell, 418 US 539 (1974). Also see Tafari v. Rock, 2012. WL 1340799

Encarnacion was SHU for over 11 years from February 17, 1998 to March 9, 2009 when he was released to the general population at GNCF and timely filed his § 1983 on March 7, 2012 within New york 3 years period statute of limitation see December 16, 2008 Sick Call Response (SCR) and March 9, 2009 Interdepartmental Communication (IC). Appendix C1-2.

Encarnacion spent 132 months in SHU and all he did was sit and lay still all the time "it is not healthy" as the medical director Dr. Rao admitted in his 2015 responsed letter as well as many many other experts in the field found unpo studies SHU effect on inmates health physically and mentally. During his over 11 years in solitary in a 8X10 feet cell without window and any human contact other than DOCS officials, Plaintiff was denied of hygiene products, daily meals and daily out-door execises etc in daily basis, he suffers from chronic pains, lost of vision, stomach ulcer, spine hernic discs, results of deprivation of meals, out-door exercise daily etc in daily basis and many other mental and physical health problems.

In the complaint and amended complaint, Plaintiff alleges: 1) his 132 months SHU confined was illegal because it was upheld in second determination after all charges filed against him were dismissed and expunged in the first determination in connection with the 8/10/96 incident at ACF main yard (Appx. D4-6, 14-15). Violated the Supreme Court holding in Howard v. Coughlin, and the due process-double jeopardy of the Fifth Amendment; and 2) that the length and condition of his confinement in solitary for more than 11 years along with the deprivation of daily meals, hygiene products, outdoor excercises in daily basis and all human contact other than DOCS officials, all knew by defendants but fails to step in and fixed it after known it, was cruel and unusual punishment in violation of the Eighth Amendment. Farmer v. Brennan, 511 US 825 (1994).

In this case here, the Second Circuit agreed that Encarnacion was subjected to: a) to double jeopardy and cruel and unusual punishment in violations of the Fifth and Eighth Amendments and b) that the length of SHU confinement cannot be ignored and directing that district court should

consider the relevance of Encarnacion's 11 years confinement in SHU and deprivation of hygiene products and daily meals etc and should have considered those allegations as part of the overall conditions of his SHU confinement. Cite: Wlker v. Schult, 717 F.3d 119, 127 (2d Cir. 2013) ("[T]he failure to provide prisoners with toiletries and other hygiene materials may rise to the level of a constitutional violation."); Robles v. Coughlin, 725 F.2d 12, 16 (2d Cir. 1983) ("[U]nder certain circumstance a subtantial deprivation of food may well be recognized as being of constitutional dimension."). Finally, we cannot "discern from the district court's analysis whether it adequately considered the possibility that the [alleged condition] offends contemporary standards of decency." Harris v. Miller, 818 F.3d 49, 65 (2d Cir. 2016).(Encarnacion v. Rock, 280 Fed. Appx. 19 [2d Cir. 2014]; Encarnacion v. Goord, 669 Fed. Appx. 61 [2d Cir. 2016] Appx. A4-8).

The defendants had failed to protect[] Plaintiff froom: i) double jeopardy-due process as the defendants admitted to dismissed and expunged all the charges filed against Plaintiff in the first MR, but upheld the second determination for same 8/10/96 incident: and ii) an unusual cruel and punishment of lengthy SHU and conditions of his confinement all knew by defendants. At not time did Plaintiff agreed to the SHU confined or to a second determination or the deprivation of hygiene products, daily meals, daily out-door exercise etc.

The defendants and the district court knew that Plaintiff is an layman on matter of law who is limited in his ability to speak and read English and, in addition, suffers from a vision impairment see Appendix E1-4, who the district court did not afforded the opportunity "to deposed the defendants, the documentary evidences imedical records, memos etc oredered

in May 10, 2017 scheduling order, should have his motion to compel production of documents include plaintiff's medical records etc and appointed of pro bono counsel granted. (See Appx. E1-4).

STANDARD OF REVIEW

EXHAUSTAION: Plaintiff filed grievances, appeals, sent letters and complaints to prison officials& verbaly notified them of all of the above, not responsed, was sufficient to, satisfy the exhaustion requirement of the PLRA, 42 USC § 1997(e0; Encarnacion v. Dann, 80 Fed. Appx. 140 (C.A.2 2003).

STATUTE OF LIMITATION: The defendant incorrect alleged that Plaintiff was released from SHU on August 16, 2008 and the his § 19983 was untimely: a) Plaintiff was transferred from SCF SHU to GMCF SHU on Nov. 18, 2008 (Appx. B9), released from SHU on 3/11/09 & filed his § 1983 on 3/7/12 (Appx. C1-2). The District Court (Sicagusa, J.) incorrect held: 1) that plaintiff SHU ended on Nov. 15,2008; 2) that he was in keeplock between Nov. 15, 2008 and Mar. 9, 2009 (Appx. B6), the documents in Appendix C1-2 refuted that, there Dr. Karandy states: Dear Sir, ["W]hen you are released from SHU please notify the medical unit so your boots can be returned to you." Because inmates can not have boots in the SHU. On Mar. 11, 2009 plaintiff was released from SHU and Dr. Karandy returned his boots that day (see Appx. C2) and Plaintiff's § 1983 was timely filed on Mar. 7, 2012 within the New York 3 years statute of limitation from the date of his re;eased from SHU on 3/11/09. Appx. C1-2.

Applying the mailbox rule for statute of limitation purposes. See Houston v. Lack, 487 U.S. 266, 271 (1988) (pro se litigant's papers are deemed to have been filed when they are placed in the hands of a prison official for mailing); Johnson v. Coombe, 156 F. Supp.2d 273, 277 (S.D.N.Y. 2001). Plaintiff Encarnacion's papers was placed in the hands of a prison official for mailing on Mar. 7, 2012

from SHU on March 9, 2009 deemed the filed timely. See Appx. C1-2. Deemed both the District Court decision and order of October 27, 2020, granted judgment in defendants favor and dismissed the case with prejudice as untimely and the Second Circuit Order of May 21, 2021 denied plaintiff's motions for IFP relief and appointed of pro bono counsel and dismissed his appeal timely filed sua sponte wrongful made and should be reversed, vacated and remanded with direction. ouston v. Lack, 487 U.S. 266, 271 [1988]).

DOUBLE JEOPARDY CLAIM: The double jeopardy claim arosed from a second determination of prisoner Encarnacion's guilt for violation of prison disciplinary rules upheld after original determination were dismissed and expunged at the start of the disciplinary hearing in August 1996 (see Appx. D4, 6, 14-15). Violated both the Supreme Court decision in Howard v. Coughlin, 212 A.D.2d 852 and the due process double jeopardy clause of the Fifth Amendment. (See Appx. D4, 6, 14-20).

CONFLICT OF INTEREST CLAIM: The conflict of interest claim arosed from the District Court (Siragusa, J.) wrongful: 1) Upheld plaintiff second determination of guilt for violation of prison disciplinary rule after original determination were dismissed and expunged, holding that state prisoner do not have due process and double jeopardy right at prison disciplinary hearing (Encarnacion v. Mcginnis, No. 02-CV-6380): a) state prisoners do have due process and double jeopardy right at prison disciplinary hearing see Wolff v. McDonnel, 418 U.S. 539; Howard v. Coughlin, 212 .AD.2d 852; and b) that "prison officials correctly needed to protect the other prisoners from Encarnacion". Wrong, Encarnacion's institutional records shown that he have never been into any fight with any other prisoners before or after the fist fights with a serial killer inmate

Roberts in 1996, and he was released from SHU into GP with the other prisoners 5 months after 8/10/96 fist fight and again on 3/9/09; and 2) sua sponte dismissed with prejudice his § 19983: in August 2012, in remanded in November 2014, August 2015, in August 2018 and now in October 2020, holding the Court found untimely the March 7, 2012 filed because Encarnacion's SHU was ended on November 15, 2008 and he was in keeplock between November 15, 2008 and March 9, 2009 (Appendix B6), shows conflict of interest: a) Defendants informed the Court; "Encarnacion's term in the SHU concluded on March 11, 2009"; b) Appendix C1-2 shows Plaintiff was in the SHU between Nov. 18, 2008 and Mar. 11, 2009; and c) his § 1983 was timely filed on Mar. 7,2012 within the 3 years statute of limitation. See Appendix C1-2.

SUMMARY OF ARGUMENT

Encarnacion was in the SHU for five months from Aug. 10, 1996 to Jan. 8, 1997, agaun Encarnacion was in the SHU for 133 months, from Feb. 17, 1998 to Mar. 11, 2009 for the same incident of Aug. 10, 1996 at ACF main yard. During his 11 years in the SHU in solitary, Pliantiff was deprived of hygiene products, daily meals daily out-door exercises many many times in daily basis and all human contact other than prison officials for the 11 years in solitary confined in the SHU, after exhausted all his available administrative remedies, plaintiff timely filed this § 1983 on Mar. 7, 2012 within the 3 years statute of limitation of the date of his released from the SHU on Mar. 11, 2009, alleging double jeopardy and cruel and unusual punishment in violation of th Fifth and Eighth Amendmnets.

In Aug. 2012, the district court sua sponte dismissed with prejudice the cas. Plaintiff appealed. The Second Circuit dismissed and remanded. The District Court sua sponte dismissed with prejudice the case in remanded

in Nov. 2014 and Aug. 2015. Plaintiff appealed. The Second Circuit reversed, vacated and remanded with direction. The district court in Oct. 2020 granted judgment in defendants favor and dismissed with prejudice as untimely.

Plaintiff timely appealed. The Second Circuit sua sponte denied his motions for IFP relief and appointed of pro bono counsel and dismissed plaintiff's appeal held, because it "lacks an arguable basis either in law or facts." Cite Neitzka v. Williams, 490 U.S. 319, 325 (1989) (Appx. A1, also see Appx. A4-8).

Petitioner now petition for Certiorari asks this Court for review of both the Second Circuit sua sponte dismissa of plaintiff's timely appeal, because the Second Circuit have already reviewed his § 1983 twice in appeal on Sept 23, 2014 and on Oct. 7, 2016 (Appx. A4-8), hoding: "Upon review, we conclude that the district erred in dismissing Encarnacion's amended complaint sua sponte because it did not consider the overall conditions of confinement of his SHU sentence. In particular, the District Court failed to consider the relevance of Encarnacion's 11 years confinement in SHU. Moreover, Encarnacion alleged that he was deprived of hygiene products and "daily meals" while in SHU. The district court also should have considered those allegations as part of the overall conditions of his SHU confinement. The failure to provide prisoners with toiletries and other hygienic materials and foot may rise to the level of a constitutional violation." Cite Walker v. Schul, 717 F.3d 119, 127 (2d Cir. 2013); Robles v. Coughlin, 725 F.2d 12,16 (2d Cir. 1983), and directed the district court to do so (Appx. A4-8); and the District Court decision and order dimissed the his case finding that the March 7, 2012 filed untimely when the defendants on they own words have informed the Court that "Encarnacion's term of his SHU

concluded on March 11, 2009, and Plaintiff's Appendix C1-2 shown hi was in the SHU between Nov. 18, 2008 and Mar. 11,2009 when plaintiff was released fron the SHU on Mar. 11, 2009 and his § 1983 had been timely filed on Mar. 7,2012 within the 3 years statute of limitation of the date of his released from the SHU on Mar. 11, 2009 (Appx. C1-2); and the conflict of interest claims alleges by Encarnacionm as the case has been dismissed based on the statute of limitation without considered the merit of plainyiff's case directed by the Srcond Circuit in remanded to do so, and to and review said dismissals and each and every part thereof and every intermediate order made therein.

If this Court reaches the merits, and found pLaintiff's March 7, 2012 filed timely within the New York 3 years statute of limitation from the date of Encarnacion's released from the SHU on March 11, 2009. See Appendix C1-2. The Supreme Court had authrity to reversed the Second Circuit's sua sponte dismissal of plaintiff appeal timely filed, reversed and vacated the district court dismissal of his case and remanded the case with directions. Appointed pro bono counsel(s) to represent petitioner Encarnacion in this civil action and such other and further relief as the Court may deem just and proper. See Appendix E1-5 herein.

AUGUMENT

POINT I

THE COURT HAVE PERSONAL JURISDICTION OVER DEFENDANTS AND JUDICIAL JURISDICTION OVER THE CASE AS THE COURT OF APPEALS ORDER WAS A FINAL DECISION AND THIS PETITION TIMELY FILED. RULE 13(1).

The decision of the Second Circuit is dated May 21, 2021 and service of this decision was received by this plaintiff on May 27, 2021, and Pursuant to Rule 13(1) of the Supreme Court Rules, an appeal in a final decision to a Circuit Court must be filed within 90 days. This appeal is authorized and timely, give this Court jurisdicial jurisdiction over this appeal and personal jurisdiction over each defendants named herein. Personal jurisdiction in federal court id initially established by serving a summons. Covington Indus. Inc. v. Resitex A.G., 629 F.2d 730, 732 (2d Cir. 1980); Fed R. Civ. P. 4(k)(1).

Note, that the district court declined to considered the merits of Encarnacion's claims as directed to do so twice by the Second Circuit in remanded and wrongful dismissed this action as untimely. See Appx. C1-2 & 5. This Court have authority to review both the Court of Appeals sua sponte dismissal order and the District Court wrongful dismissal decision.

If this Court reaches the merits, and aggreed with plaintiff, it should reversed the Court of Appeals sua sponte dismissal of his appeal timely filed, reversed, vacated and dismissed the district court dismissal decision and order and remanded the action back to the District Court with direction. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Owong v. Okure, 109 S.Ct. 573 (1989); McDough v. Smith,139 S.Ct.1249 (2019)

POINT II

THE UNITED STATES COURT OF APPEALS LACKS AUTHORITY TO SUA SPONTE DISMISSED AN APPEAL TIMELY FILED

The Court of Appeals erred when dismissed plaintiff's timely appeal sua sponte. Owong v. Okure|| 109 S.Ct. 573 (1989).

On October 27, 2020 the district court greanted judgment on defendants favor and dismissed the action on a wrongful statute of limitation grounds. Plaintiff timely filed his appeal on November 24, 2020. Houston v. Lack, 487 U.S. 266, 271 (1988). By Order dated December 8, 2020, the Second Corcuit states: "On February 14, 2018 this Court entered an order in 17-2857, Encarnacion v. Walker requering appellant to file a motion seeking leave of this Court prior to filing any future appeals. A notice of appeal in the above referenced case was filed. The Court has no record that appellant sought the Court's permission to appeal prior to filing the notice of appeal. IT IS HEREBY ORDERED that this case is dismissed effective December 29, 2020 unless a motion seeking leave of this Court is filed by that time". (Appendix A2). On December 24, 2020, Plaintiff filed a motion seeking leave of this Court. (Appendix A2). On May 21, 2021 the Court of Appeals sua sponte dismissed Plaintiff's appeal, stated:

> Appellant, pro se, moves for leave to appeal, to proceed in forma pauperis, and for appointment of counsel. Upon due consideration, it is hereby ORDERED that the motion for leave to appeal is DENIED as unnecessary. "The leave-to-file sanction that this Court imposed on Encarnacion provides, "that the Clerk of the Court refuse to accept for filing any future submissions from Petitioner challenging his [1991] Onondaga County conviction, unless he first obtains leave of the Court to file such papers," but that conviction is not an issue in this appeal. 2d Cir. 17-2957, doc 29 (Or.). It is ORDERED that the remaining motions are DENIED and the appeal DISMISSED because it "lacks an arguable

basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); see 28 U.S.C. § 1915(e). (Appx. A1).

The Court of Appeals erred: 1) on dismissed sua sponte plaintiff's appeal timely filed. The Supreme Court already ruled that the Court of Appeals cannot dismissed sua sponte an appeals timely filed. See Owong v. Okure, 109 S.Ct. 573 (1989); McDonough v. Smith, 139 S.Ct. 2149 (2019); and 2) based on the wrongful untimely ground in the district court's dismissal decision, the Second Circuit held, the appeal dismissed because it "lacks an arguable basis either in law or in fact" (Appx. A1): a) the attorneys for defendants (Solicitor General Barbara Underwood, Deputy Solicitor General Andrew Bing, Assistant Solicitor general Martin Hotvet, Assistant Solicitor General of Cousel Frederick Brodie, and New York State Attorney General Eric Schneiderman in the Sept 23, 2016 attorney general's Amicus Curiae Brief), informed the Court that Encarnacion's ferm in the SHU concluded on March 11, 2009 and he filed his § 1983 on Mar. 7, 2012; and b) found an arguable basis in law and in fact and recommended the judgment be vacated and the case remanded for further proceedings without reaching the merits. Appx. C4-6).

On October 7, 2916, by summary order, the Circuiy panel held:

> Unpo review, we conlude that the district erred in dismissing Enarnacion's amended complaint sua sponte because it did not consider the overall conditions of confinement of his SHU sentence. In particular, the District Court failed to consider the relevance of Encarnacion's 11-years confinement is SHU. Moreover, Encarnacion alleged that he was deprived of hygiene products and "daily meas' while in SHU. The district court also should have considered those allegations as part of the overall conditions of his SHU confinement. See Walker v. Schult, 717 F.3d 119 (2d Cir. 2013) ("[T]he failure to provide prisoners with

> toiletries and other hygienic materials may rise to the level of a constitutional violation."); Robles v. Coughlin, 725 F.2d 12, 16 (2d Cir. 1983) ("[U]nder certain circumstances a substantial deprivation of food may well be recognized as being of constitutional dimension."). Finally, We cannot "discern from the district court's analysis whether it adequately considered the possibility that [the alleged violation] offends contemporary standards of decency." Harris v. Miller, 818 F.3d 49, 65 (2d Cir. 2016). Vacated and remanded the case. (Appx. A4-6).

But the Court of Appeals now in its sua sponte dismissal decision held it lacks an arguable basis either in law or in facf. Appx. A1. As the Court may seen, it is correction officials pattern to deprived prisoners of hygiene products, daily meals, daily out door exercise, even water while in SHU or keeplock, specially at SC, ECF and GMCF SHU where everythings get in or out the prisoners' cell is by correction officers. See Crichlow v. Fischer, 2017 WL 920753, where there inmate Crichlow states that while in keeplock, correction officer were told to not feed him. The same similar happen to Mr. Encarnacion while in SHU werethe correction officers told to the other officers to not feed him or go to out door exercise or to taken shower or given him any hygiene products etc. See Appx. A4-8, and Appx. B.

If this Copurt reaches the merits and agreed with plaintiff Encarnacion that the March 7, 2012 filed was timely and the Court of Appeals sua sponte dismissal of plaintiff's appeal which he timely filed, it should reversed same, reversed and vacated the district court dismissal decision nad order remanded the case for further proceeding (Owong v. Okure, 109 S.Ct. 573 (1989); McDonough v. Smith, 139 S.Ct. 2149 (2019); Supra, Encarnacion v. Goord, et al, 20-4070, 12-cv-6180.

POINT III

THIS COURT SHOULD VACATED THE JUDGMENT OF DISRICT COURT GRANTED THE DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND WITHOUT CONSIDER THE MERITS OF PLAINTIFF'S CLAIMS DISMISSED THE ACTION AS UNTIMELY AND THE CASE REMANDED FOR FURTHER PROCEEDING.

The district court erred in granted defendants' motion for summary judgment and dismissed the case as untimely without consider the merits of Plaintiff's claims with records and evidences includes the defendants and they attorneys own words in written showns this § 1983 action was timely filed on Mar. 7, 2012 Section 1983 3-year statute of limitation.

In support of their statute-of-limitations arguments, Defendants contend that Plaintiff was released from SHU on August 15, 2008. That assertion is False. Encarnacion was transferred from SCF SHU to GMCF SHU on November 17, 2008 and released from SHU on March 11, 2009 and his § 1983 timely filed on March 7, 2012 under Section 1983 3-year statute of limitation of date of his released from SHU on Mar. 11,2009. Appx. C1-8.

In support of its statute-of-limitation dismissal and grnated of defendants' motion finding, the District Court (Siragusa, J.) held: Plaintiff SHU sentence was supposed ended on February 17, 2009. However, for reasons that are unlcear in the record (evidently Plaintiff received a "time cut"), Consequentlly, the last of Plaintiff"s SHU sentences ended on or about November 15, 2008. Thereafter, Plaintiff serve a series of keeplock, between November 15, 2008 and March 11, 2009. The Court's finding is incorrect.

The records shows: 1) Encarnacion received any SHU time cut between February 17, 1998 and March 11, 2009 instead Defendant Rock without due process extended Plaintiff SHU terms in the SHU from February 15, 2009 to

March 11, 2009; 2) In Septmber 2016, Defendants and they attorneys in they own words in written informed both the Second Circuit and the District Court, "Encarnacion's terms in the SHU concluded on March 11, 2009 and he filed his § 1983 on March 7, 2012 (Appx. C5); 3) Great Meadow Health care provider Dr. David Karandy in his Sick Call Response dated December 16, 2008, Dr. Karandy states: Dear Sir, "when you are released from SHU please notify the medical unit so your BOOts can be returned to you." (Appx. C1), because as the Courts already knew inmates can not have boots in the SHU; and 4) Dr. Karandy returned his (Encarnacion) boots on March 11, 2009 date of his released from SHU. (Appx. C2). Deemed both the statute of limitation asserted by defendants and found the District Court incorrect as well as the granted of defendants' motion and dismissal of Plaintiff case upon statute of limitation grounds wrongful made and clearly have prediced plaintiff and this Court should reversed and vacated the District Court decision and order of October 27, 2020 and remaded the case for further proceeding. See attached Appendixs herein. Also see Encarnacion v. Rock, 580 Fed. Appx. 19 (2d Cir. 2014); Encarnacion v. Goord, 669 Fed. Appx. 61 (2d Cir. 2016); Gonzalez v. Hasty, 802 F.3d 212 (2015); Owong v. okure, 109 S.Ct. 573 (1989); McDonough v. Smith, 139 S.Ct. 2149 (2015). gant such other and further relief as may thi Court deem just and proper.

POINT IV

THIS COURT SHOULD REVERSED AND VACATED THE DISTRICT COURT DISMISSAL OF PLAINTIFF'S DOUBLE JEOPARDY CLAIM, OF HIS CONFLICT OF INTEREST CLAIM AND APPOINTED OF PRO BONO COUNSEL AND RE_INSTATED BECAUSE THE DISTRICT COURT ERRED IN ITS DENIAL AND DISMISSAL.

The disitrict court erred in dismissed plaintiff's denied his motions

for recusal upon conflict of interest grounds and appointed of a pro bono counsel to represented him in this case, as here exist the posibility of bias. See Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 865, 129 S.Ct. 2252 (2009), there the Supreme Court held that in all the circumstances of this case, due process require recusal, "the due process clause incorparated the commun-law rule require recusal when a judge has "a direct, personal, substantial, pecuriary interst" in a case, Tarney v. Ohio, 273 U.S. 510, but this Court has also identified additional instances which, of an objective matter, require recusal where "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerate." Withrow v. Larkin, 421 U.S. 35, two such instannces place the present case in proper content.

Here we have first, the Honorable judge Charles J. Siragusa in 2002 in Encarnacion v. McGinnis, No. 02-cv-6380CJS, dismissed his writ of habeas corpus petition challenging the prison disciplinary hearing on the second determination includes the double jeopardy claim, ruled that state prisoners do not have due process or double jeopardy rights at prison disciplinary hearing. Wrong, because state prisoners do have due process and double jeopardy rights at prison disciplinary hearing see Wolff v. McDonnell, 418 U.S. 539 (1974); Howard v. Coughlin, 212 A.D.2d 852 (1995); second, the district court in 2012 dismissed Plaintiff's § 1983 (Encarnacion v. Goord, et al., 12-cv-6180) sua sponte holding that his § 1983 is a duplication of his 2002 writ of habeas corpus petition in Encarnacion v. Mcginnis. the district court dismissed Plaintiff's 1983 again, in 2014, in 2015, and sua sponte dismissed his double jeopardy claim in 2018 and in 2020. Said wrongful dismissals clearly shown conflict on interst as well as established bias because the district court in its early

dismissal decision said thea his § 1983 is a duplication of his 2002 habeas corpus and Judge Siragusa wrongful dismissed again his double jeopardy claim sua sponte in 2018 and subsequent wrongful granted defendants motion and dismissed the case as untimely filed on March 7, 2012. See Appx. C1-6.

See Williams v. Pennsylvania, 136 S.Ct. 1899 (2016), The Supreme Court Justice Kennedy, held that: 1) under due process clause there is an impermissible risk of actual bias when judge early has significant, personal involvement as a prosecutor in critical decision regarding a defendant's case; 2) Pennsylvania Supreme Court justice, who as district attorney had given approval to seek death penalty against inmate, violated due process by not recusing himself and participating in decision to reinstate dath sentence; and 3) Pennsylvania Supreme Court Justice's due process violation was structural error not subject to harmless-error, regardless of whether has vote was dispositive. Granted and remanded.

Plaintiff Encarnacion, pro se, an layman on matter of law who is limited in his ability to speak and read English and, in addition, suffer from a vision impairment, and who the Honorable Judge Siragusa had appointed a pro bono counsels with Spanish-English speaker interpreter to represented him in the past in an unrelated civil case, as well as the United States District Court for the Northern District of New York based on the above, have appointed a pro bono counsel and interpreter to represent him in Encarnacion v. Annucci, et al.| No. 15-cv-1411 (pending) unrelated to this case (see Appendix E1-5). The court is authorized only to "request an attorney to represented any person unable to afford counsel." 28 U.S.C. § 1915(1); see Mallard v. U.S. Dist. Ct..| 490 U.S. 296, 298 (1989), Section 1915(1) does not, permit a federal court to require an unwilling attorney to represent an indigent litigant in a civil case. See Mallard,

490 U.S. at 298, 309. Appointment of pro bono counsel in a case such as this is therefore contingent upon the availability of an attorney willing to voluntarily accept and appointment. "If no [one] agrees to represent the palintiff, there is nothing more the court can do." Rashid v. McGraw, No. 01-cv-10996, 2002 WL 31427349, at *1 n.1 (S.D.N.Y. Oct. 29, 2002). Here in the instant case and this Plaintiff, the federal court did not requested or attempt to request an attorney to represent Mr. Encarnacion in this case who is unable to afford counsel to represent him in this case, § 1915(e)(1). Also see Rippo v. Baker, supra, 137 S.Ct. 905, upon granting certiorari, the Supreme Court held that standard for recusal was whether risk of bias was too high to be constitutionally tolerable. Certiorari granted vacated and remanded.

CONCLUSION

The Court of Appeals sua sponte dismissal of Plaintiff's appeal and the DistrictCourt's granted defendants' motion and dismissed the case without consider the merits of Plaintiff's claims as untimely should be reversed, vacated and the remanded back to the district court for further proceedings after this Court reaching the merits of the case and Plaintiff claims grant such other and further relief as the Court may deem just and proper.

Dated: August 10, 2021
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Respectfully Submitted,

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