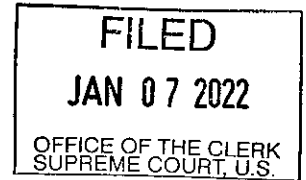


No. 21-6862

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



In re DANIEL JONES,

Petitioner,

v.

PETITION FOR WRIT OF MANDAMUS

Daniel Jones,
Petitioner, Pro se
9005 River Road
P.O. Box 300
Marcy, New York 13403-0300

PETITION FOR WRIT OF MANDAMUS
QUESTIONS PRESENTED FOR REVIEW

1. IS PETITIONER ENTITLED TO IMMEDIATE RELIEF, INCLUDING MANDAMUS FROM THIS COURT TO PROTECT HIS RIGHT TO PETITION THE COURTS WHERE A MANIFEST INJUSTICE WOULD OTHERWISE RESULT
2. IS THE FAILURE OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT TO REINSTATE PETITIONER'S APPEAL AND RECALL ITS MANDATE THE TYPE OF EXTRAORDINARY CIRCUMSTANCE CORRECTABLE BY THIS COURT'S ISSUANCE OF MANDAMUS

RELIEF SOUGHT

Petitioner prays for a writ of mandamus to be issued by this Court directing the United States Court of Appeals for the Second Circuit , under Jones v. Cuomo, et al., Case No. 20-3496, remanding this case, to recall its mandate, reinstate Petitioner's appeal, rule on his dispositive motions, and allow him to submit briefs on the issues to be raised on appeal.

UNAVAILABILITY OF RELIEF IN OTHER COURTS

No other court can grant the relief sought by this petition.

1. On February 24, 2021, the United States Court of Appeals for the Second Circuit dismissed Petitioner's appeal, for defaulting on filing the prisoner authorization form pursuant to 28 U.S.C. § 1915(b).

2. A mandate was issued on April 21, 2021. A copy of the order is Appendix at "E".

3. A motion to reinstate Petitioner's appeal and recall the mandate was denied by the Second Circuit Court of Appeals on October 26, 2021. Appendix "A"

UNSUITABILITY OF ANY OTHER FORM OF RELIEF

The Supreme Court is the only available court capable of granting the form of relief that will be sufficient to protect the rights of Petitioner or preserve the ability for him to seek review of the Court of Appeals and the district court decisions, such as an appeal or petition for certiorari from the final judgment. The writ

sought will be in aid of the Court's appellate jurisdiction pursuant to Supreme Court Rule 20.1, and authorized by 28 U.S.C. § 1651(a).

LIST OF PARTIES IN COURT BELOW

Petitioner

1. Daniel Jones

Respondents

1. Ann Marie T. Sullivan, MD
2. Danielle Tope, Psy.D
3. Jill Grant, LCSW
4. Deborah J. McCulloch
5. Jeff Nowicki
6. Danielle Dill, Dr.
7. Sarah Fallon, Director
8. Alyssa Moskal
9. Danielle Herman
10. Robert Schuyler
11. F. Tirado
12. Andrew M. Cuomo, NYS Governor
13. Barbara D. Underwood, NYS Attorney General
14. Patricia M. Bordonaro, Asst. Attorney General
15. Donna Hall
16. Tankersley, Psy. D.
17. Fontino
18. McCormick

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF MANDAMUS

Petitioner respectfully prays that a writ of mandamus issue to review the judgment/order below.

OPINION BELOW

Federal Courts

The opinion of the United States Court of Appeals for the Second Circuit at Appendix "A" to the petition and is unpublished.

The opinion of the United States Court of Appeals for the Second Circuit at Appendix "E" to the petition and is unpublished.

The opinion of the United States District Court , Northern District at Appendix "B" to the petition and is unpublished.

JURISDICTION

Federal Court

The date on which the United States Court of Appeals for the Second Circuit decided my case was October 26, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(a) and 1651(a).

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED

In relevant part, 28 U.S.C. § 1651(a) provides :

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

In relevant part, 28 U.S.C. § 1915(a)(3):

An appeal may not be taken in forma pauperis if

the trial court certifies in writing that it is not taken in good faith

In relevant part, 28 U.S.C. § 1915(c) Definition:

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program

In relevant part, 28 U.S.C. § 1915(2)(A)(B)(i)(ii)(iii)

(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:

- (A) the allegation of poverty is untrue; or
- (B) the action or appeal
 - (i) is frivolous or malicious
 - (ii) fails to state a claim on which relief may be granted; or
 - (iii) seeks monetary relief against a defendant who is immune from such relief

In rellevant part, Federal Rules of Appellate Procedure, Rule 24

(a) Leave to Proceed In Forma Pauperis

(1) Motion in the District Court. Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court

(a)(3) Prior Approval: A party who was permitted to proceed in forma pauperis in the district-court action or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court- before or after the notice of appeal is filed- certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and state in writing its reasons for the certification or finding;

(B) a statute provides otherwise

(4) Notice of District Court's Denial. The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis

(B) certifies that the appeal is not taken in good faith;

(C) find that the party is not otherwise entitled to proceed in forma pauperis

In relevant part, Federal Rules of Appellate Procedure, Rule 2

Rule 2 Suspension of Rules

On its own or a party's motion a court of appeals may- to expedite its decision or for good cause- suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)

In relevant part, Federal Rules of Appellate Procedure, Rule 45

Rule 45 Clerk's Duties

(b) The Docket. the circuit court must maintain a docket and an index of all docket cases The clerk must record all papers filed with the Clerk and all process, orders, and judgments

In relevant part, The United States Constitution, Amendments

First Amendment, in part:

Congress shall make no law respecting an established religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

Fourteenth Amendment, in part:

Amendment 14th Sec. 1 [Citizen of the United States]

* * * * nor shall any state deprive any person of Life, Liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws

STATEMENT OF FACTS

Petitioner, Daniel Jones, pro se, confined at Central New York Psychiatric Center (CNYPC) under Article 10 of the New York Mental Hygiene Law (MHL), brought an action under 42 U.S.C. § 1983 against Defendants for violations of his constitutional rights arising out of his confinement. Petitioner was not a prisoner and because of such did not submit inmate authorization form with his *in forma pauperis* application (IFP).

The Northern District Court of New York on April 1, 2019, did grant Petitioner's IFP Application pursuant to 28 U.S.C. § 1915. After some litigation between parties, on September 29, 2020 granted Defendants' motion to dismiss and dismissed Petitioner's Amended Complaint. His motion for preliminary injunction and motion for reconsideration was denied as moot. Petitioner's IFP status was not revoked, nor did the district court certify that the appeal would be taken in bad faith. Appendix "A"

A timely notice of appeal was filed on October 8, 2020 for the Second Circuit Court of Appeals.

On October 13, 2020, the clerk of the court for the Court of Appeals for the Second Circuit, in addition to other documents sent Petitioner a notice that an incarcerated appellant who files a civil appeal must submit a Prisoner Authorization Form when moving for *in forma pauperis* status pursuant to 28 U.S.C. § 1915(b). As Petitioner IFP status had not been revoked and he was not a prisoner according to 28 U.S.C. § 1915(b), he wrote several letter

to the court clerk advising such. After not receiving any response by letter dated December 13, 2020, addressed a letter to Catherine O'Hagen Wolfe, Clerk, relating these facts of his his status. Also that this matter also related to another case before the Court of Appeal, Jones v. Cuomo, et al, Dkt. No. 20-2174, surrounding him signing the Prisoner Authorization Form as he was not a prisoner, rather civilly confined. A request for updated docket sheets were likewise sought. **Appendic "C"**

Petitioner filed a motion seeking a restraining order and injunctive relief against Defendants on December 5, 2020. He alleged that his legal mail was still being tampered with and was having difficult receiving his legal mail from the Court of Appeals. Defendants submitted a response to the motion and was pending in the Court.

Numerous attempts were made by Petitioner to find out the status of his appeal after the filing of his motion. He made several attempts to reach the case manager by telephone, but his calls would not be accepted. Thus, on March 26, 2021 he requested a copy of the docket sheet.

On April 13, 2021, Petitioner received from the court clerk dated April 2, 2021 the status of his appeal. He was informed that his appeal had been dismissed for failure to sign a Prisoner Authorization Form. He was instructed on the process to reinstate his appeal by April 20, 2021. Based on the instructions Petitioner on April 14, 2021, placed in the facility mailbox at CNYPC his motion and supporting affirmation, the required forms and a signed Prisoner Authorization Form. The affirmation explained that he

never received any court's orders dated 10/29/2020, (No.8); 11/30/2020, (No. 12); 2/24/2021, (No. 37); and 3/30/2021, (No.43). Again reiterating the problems associated with sending and receiving his legal mail. Also that the lower court had not recinded his IFP status, nor certified that his appeal would not be taken in bad faith. That he was not a prisoner , civilly confined, thus the Authorization Form for him was inapplicable. Appendix "D" Petitioner's legal papers were sent certified mail return receipt requested. According to postal records : Certified Receipt No.: 7019.1120. 0002.0442.5392, the front desk at the Court of Appeals signed for Petitioner's papers on April 20, 2021. Appendix "D"

On April 29, 2021, Petitioner received a copy of a certified Order dated April 21, 2021, that a mandate was issued affirming the dismissal of his appeal. Appendix "E".

Petitioner that very same day, April 29, 2021, submitted a declarations seeking to recall the mandate that was issued on April 21, 2021. The declaration explained the issues petitioner had in getting his papers before the court and his attempts to speak to the case manager handling his case, with no success. At every juncture he was prevented from having meaningful access to the court to enable them to entertain his timely filed motions. Appendix "F"

By letter dated May 2, 2021, Petitioner directed a letter to the clerk of the court inquiring about his motion to reinstate his appeal dated April 14, 2021. Although it had been sent certified mail and signed for, it was reflected on the court's docket sheet as of his dated letter. Then on April 29. 2021, he received a

order that his appeal had been dismissed on the 21st of April, 2021. He also advised the clerk that he had submitted a motion and declaration seeking to recall the mandate that was issued on April 21, 2021. Reiterating again the problems he was being confronted with his legal mail being received and sent out from the facility at CNYPC. Appendix "G".

On May 10, 2021, Petitioner received a notice that his filing dated May 4, 2021 was defective. He was advised that his appeal was dismissed due to default and provided documents and procedures to correct. Once completed they had to be received by the Court by May 25, 2021. Based on the time constraints, a letter motion was submitted pro se by Petitioner dated May 17, 2021, seeking an extension of time to response to the court's directive.

Appendix "H".

The Court granted the extension of time to June 14, 2021.

Appendix "I".

Petitioner unaware that his extension of time had been granted, on May 19, 2021, placed in the facility mailbox at CNYPC, Priority Mail his motion with supporting declaration and the required documents to have the mandate recalled. He provided again a signed Prisoner Authorization Form, even though he was not a prisoner. Appendix "J". There still was no information provided by the court clerk's office regarding why his motion to reinstate his appeal had not been filed, even though it had been received by the court on April 20, 2021.

On June 2, 2021, Petitioner filed motion for extension of time, as he was unaware of the extension granted until June 14, 2021.

Although he had placed his motion and supporting papers in the facility mailbox on May 19, 2021, on Friday, May 21, 2021, his Priority Mail envelope was returned alleging that they could not locate his disbursement for postage and had to re-submit. Based on the delay and to protect his rights to timely file with the court, a request for extension of time was sought. Moreover it appeared like another tactic to prevent Petitioner from having his appeal reinstated as it was based on the Defendants tampering with his mail. **Appendix "K".**

The Court on by Order dated June 10, 2021, advised Petitioner tha this last motion for extension of time was unnecessary. That all the required forms for appeal had been submitted to recall the mandate and reinstate his appeal will be determined.

Appendix "L".

A Court of Appeals Panel by Order dated October 26, 2021, denied Petitionenr's motion to reinstate his appeal after the issuance of the mandate, dismissing the appeal, because he did not present "exceptional circumstances" as the appeal was frivolous because it "lacks an arguable basis either in law or in fact" Citing Neitzke v. Williams, 490 U.S. 319, 325 (1989). **Appendix "A".**

While the aforementioned matter was pending in the Court of Appeals, Petitioner had another case pending before the Court of Appeals in Jones v. Cuomo, et al., Dkt. No. 20-2174. In that proceeding on June 22, 2021, another Panel determined that Petitioner was no longer a prisoner within the meaning of the PLRA and therefore was not subject to the PLRA's provisions. The Panel further noted that the lower court had not revoked Appellant's IFP status.

(Fed. R. App. P. 24(a)(3)). Like in the matter before this Court, and this case, Petitioner was never permitted to submit briefs on the issues for appeal, yet, each appeal was dismissed as frivolous under 28 U.S.C. § 1915(e). Appendix "M"

With respects to Jones v. Cuomo, et al., a Petition for Writ of Certiorari is presently pending before the United States Supreme Court under Case No. 21A194. As both matter relate to Petitioner's appeal being denied as it related to him being considered a Prisoner under the PLRA, 28 U.S.C. § 1915(b) when he was not request, that both be in consider jointly.

REASON FOR GRANTING THE WRIT

Petitioner Is Entitled To Immediate Relief
Including Mandamus From This Court To Protect
His Right To Petition The Court Were A Manifest
Injustice Would Otherwise Result

The All Writs Act (28 U.S.C. § 1651 (a)) is meant to be used only in the exceptional case where there is a clear abuse of ~~discre~~ discretion or usurpation of judicial power. Petitioner submits he meets this demanding standard as expressed below.

Mandamus is reserved for extra ordinary circumstances. See, Kerr v. United States District Court, 426 U.S. 394, 403 (1976). And, "has traditionally been used in the federal courts only to confine an inferior court or to compel it to exercise its authority when it is its duty to do so." Will v. United States, 389 U.S. 90, 95 (1967) (internal quotation marks omitted). This Court has required that the party seeking issuance of the writ have no adequate means to attain the desired relief, and that he demonstrate that his "right to issuance of the writ is "clear and indisputable"". Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953).

Moreover, when a circuit court so obviously ignores its own jurisdiction and the clear directives of statutes, result in denial of meaningful review of appeal and forecloses such, those are extraordinary circumstances present for mandamus relief. As demonstrated below, unless this Court intervenes by way of mandamus, Petitioner has no other remedy available to avoid the damage he will suffer from this clear error of law and an abuse of its ~~discre~~ discretion.

5.

A. The Court Of Appeals Erred As A Matter
Of Law Acted Beyond Congress Intent Of
The Prison Litigation Reform Act (PLRA)

The Court of Appeals Panel plainly acted beyond its jurisdiction in that Congress did not intend that the filing fee requirement of Prison Litigation Reform Act (PLRA) that applied to a prisoner should also apply to a "civil detainee". See, 28 U.S.C. § 1915(b)(e); see also, Jones v. Cuomo, et al., Case No. 20-2174 (2d Cir. June 22, 2021), citing Gibson v. City Municipality of New York, 692 F. 3d 198, 202 (2d Cir. 2012). Appendix at "M".

Though, it had been established in the Second Circuit that a "civil detainee" was not a "prisoner" as defined by the PLRA, Petitioner's appeal was dismissed on February 24, 2021, being in default of filing the prisoner authorization form authorized by the PLRA. Appendix "E". Letters were written by Petitioner to the Clerk of the Court prior to dismissal of his appeal, informing the clerk he was not a prisoner, rather a civil detainee. None of those letters were placed on the court docket sheet. See, Appendix "C".

Upon finding out that his appeal had been dismissed for failure to submit the prisoner authorization form months later, Petitioner immediately filed a motion to reinstate his appeal, sending it certified mail receipt requested. The supporting papers explained that petitioner never received any of the court's orders for dismissal and that his legal mail continued to be an ongoing issues at the facility, which was a basis for the civil complaint filed under Jones v. Cuomo, et al, Case No. 20-2174 (supra).

It was further explained that the prisoner authorization form was inapplicable to petitioner, but submitted the requested signed form anyway. Appendix "D".

The Court of Appeals received the motion to reinstate the appeal with supporting documentation and signed for on April 20, 2021. Appendix "D". But, for some unknown reason, the motion to reinstate the appeal was never filed or entered into the court docket. On April 21, 2021, a mandate was issued affirming the dismissal of petitioner's appeal. Appendix "E".

When Petitioner eventually received a copy of the mandate on April 29, 2021, that very same day, he submitted a motion to recall the mandate and reinstate his appeal. In the motion it was reiterated the problem petitioner was encountering in receiving his legal mail and that the prisoner authorization form was in applicable to him as he was a civil detainee. Also, the unsuccessful attempts to contact the court clerks and how he had submitted a motion to reinstate his appeal that was mailed out on April 14, 2021, UPS certified mail. Appendix "F" and "J".

In response to the motion to recall the mandate, the court clerk informed petitioner that it was defective and provided instructions to cure the defects. On May 27, 2021, petitioner's motion to recall the mandate to reinstate the appeal was filed as the defects had been cured. The Circuit Court Panel on October 26, 2021, denied the motion, stating that petitioner did not present "exceptional circumstances" warranting the recall of the mandate and to reinstate the appeal. Appendix "J" and "A".

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An application for an extension of time to file a petition for panel rehearing and/or en banc hearing was filed with the circuit court. The application for an extension was returned by the court clerk stating that the appeal was closed and the court no longer had jurisdiction.

Mandamus relief is warranted as Petitioner has exhausted all available remedies in the circuit court and unless this Court intervene, he will be denied review of his appeal which he has a right to meaningful access to the courts.

B. Right To Petition The Court Were A
Manifest of Injustice Would Result

it is well established that prisoners as well as civil detainees have a constitutional right to "adequate, effective, and meaningful" access to the courts. This right is grounded in Article V, Privilege and Immunities Clause of the Constitution, the First Amendment's Petition Clause and the Due Process Clause of the Fifth and Fourteenth Amendments. See, Bounds v. Smith, 430 U.S. 817, 822 (1977); Lewis v. Casey, 518 U.S. 343, 346 (1996). These provisions provide tools for civil detainees to challenge the conditions of their confinement.

It is submitted that petitioner was not provided an adequate opportunity to present to the circuit court his claimed violations regarding the conditions of his confinement, thereby denying him the fundamental right to the court that is guaranteed. In Exparte Hull, 312 U.S. 546 (1941), this Court decided that a

prisoner who twice attempted to file a petition, held that the state and its officers may not abridge or impair a prisoner's right to apply to a federal court. As recognized in Williams v. Oklahoma, 395 U.S. 458, 459, the avenue of appellate review must be kept free of unreasonable distinctions that can impede and equal access to courts. See, also, Brewer v. Wilkenson, 3F.3d 816(5th Cir.)

Here, in petitioner's case he was impeded and denied equal access to the courts. One, dismissal of the appeal for failure to file a prisoner authorization form, even though he was not a prisoner: Two, never received a timely notice that his appeal would be dismissed for failure to submit the form. And, three, letter to the court clerk and motion to reinstate the appeal was never filed and placed on the court's docket.

The facts aforementioned amount to exceptional circumstances amounting to judicial usurpation of power and a clear abuse of discretion justifying issuing the writ of mandamus. Moreover, irreparable harm will ensue unless this Court act on a writ or a petition for certiorari, for failure to act will deprive this Court of this power. Will v. United States, supra, 389 U.S. at 95. As this Court pointed out in Los Angeles Brush Mfg. v. Jones, 272 U.S. 701 (1927) "....[w]here the subject concerns the enforcement of ... [r]ules which by law it is the duty of the [U.S. Supreme] Court to formulate and put in force" to prevent such action. Where the Court to find that the rule has been nullified the Court should not hesitate to correct. In such instances, the writ is appropriate "to remove obstacles to appeal". In re Trump, 858 F.3d 274 (4th Cir. 2020).

- 9
2. The Failure Of The Court Of Appeals For
The Second Circuit To Reinstate Petitioner's
Appeal And Recall Its Mandate, The Type
Of Extraordinary Circumstances Correctable
By Court's Issuance Of Mandamus

A. Mandamus Lies To Compell Performace

A writ of mandamus, generally speaking, issues where there is a clear legal right, and there is no other adequate and legal means to obtain it. In cases of public officers, court clerks, it issues to compel the performance of ministerial duties which are clearly enjoined as absolute and imperitive. A federal officer has a clear obligation to perform a ministerial duty, then a federal court may issue a writ of mandamus to compel the fulfillment of the obligation.

Rule 45(b) of Federal Rules of Appellate Procedure relating to court clerk duties states:

The Docket. The circuit court must maintain a docket and an index of all docket cases
The clerk must record all papers filed with the clerk and all process, orders, and judgments.

In direct terms, Rule 45(b) declares that the "clerk must record all papers filed with the clerk" (emphasis added). It leaves no doubt for the clerk to exercise discretion. Thus, the clerk and the clerk's staff must do what is required by law-perform the ministerial duties of filing all papers and docket them.

In Petitioner's case, the clerk and/or it staff did not perform their ministerial duties. Petitioner submitted letter to the court clerk regarding him not being a prisoner and should

not be required to submit a signed prisoner authorization form. Those letters were never filed on the court docket. Appendix "C" Also his motion to reinstate his appeal with supporting documents likewise was not entered into the court docket. Appendix "D". The failure to file these important documents by the clerk or its staff played a major part in the circuit court's decision in denying Petitioner request to recall its mandate and reinstate the appeal. Thereby denying Petitioner meaningful access to the court to entertain his appeal.

The clerk's duty to file petitioner's motion to reinstate his appeal was a ministerial duty. According to the federal "mailbox rule" the motion would have been consider filed on April 14, 2021, even though it was received by the court on April 20, 2021. Appendix "D". But the court clerk never entered the motion on the docket, which caused the issuance of the mandate on April 21, 2021. Appendix "E".

The aforementioned facts were brought to the circuit court panel in petitioner's motion to recall its mandate and reinstate the appeal. Appendices "F" and "J". Petitioner's contentions fell on death ears, as relief was denied as they were not considered "exceptional circumstances". Appendix "A".

It is submitted that the circuit court erred as a matter of law as "exceptional circumstances" existed based on the facts presented. The appeal should not have been dismissed for failure to submit a prisoner authorization form when the circuit court cases recognizes that a civil detainee is not a prisoner. The

failure of the court clerk to file a timely motion to reinstate petitioner's appeal neglected its ministerial duties. These facts alone were sufficiently "extraordinary" that warrant a writ of mandamus, otherwise irreparable harm will result as no other relief is available in any other court.

B. Recall Mandate The Type Of Extraordinary Circumstances Correctable By This Court's Issuance Of Mandamus

The Supreme Court has confirmed that the court of appeals do have the inferent power to recall their mandates, but that the power is one of last resort, to be held in reserve against grave, unforeseen contingencies. The power to recall its mandate also includes to correct a clerical error. See, Patterson v. Haskins, 470 F.3d 645, 661 (6th Cir. 2006)(court of appeals power to recall mandate, only in exceptional circumstances- demonstrate good cause through showing of fraud on court, clarification of outstanding mandate, or correction of clerical mistake); Northern Cal. Power Agency v. NRC, 393 F.3d 223, 224-225(granting to correct clerical error).

Petitioner brought to the court of appeals attention that the court clerk had not filed his timely motion to have his appeal reinstated and submitted a copy of that motion, Appendix "D" and also the two motions seeking to have the mandate recalled at Appendices "F" and "J" for this Court's review. Not only would the clerical error warrant reinstatement of the appeal, but also that the appeal should have never been considered in default. Petitioner

was not a prisoner and required to submit a prisoner authorization form requested by the court clerk. The court of appeals did not coonsider these factors "exceptional circumstances" that warranted the recall of its mandate and reinstatement of the appeal.

Appendix "A".

The court of appeals panel reliance on Sargent v. Columbia Forest Prods., Inc., 75 F.3d 86, 89 (2d Cir. 1996); and Calloway v. Marvel Ent. Grp., 854 F.2d 1452, 1475 (2d Cir. 1988) does not address all the factors present in petitioner's particular case. In Sargent the court outlined four factors that would weigh in favor of recalling a mandate. Based on these factors, Petitioner submits he met. (1) the governing law, PLRA, 28 U.S.C. § 1915(b)(c), relates to "prisoner" of which Petitioner was not, rather a civil detainee. Should not have been required to submit a prisoner authorization form.(2) Aside from the fact that the Second Circuit recognizes that PLRA was not applicable to civil detainees, Petitioner was confronted with this issue in another matter in Jones v. Cuomo, et al, Case No. 20-2174. That matter was decided in June 22, 2021, while the motion to recall the mandate was pending. The June 22nd order of the appeals court acknowledged that Petitioner was not a "prisoner" and affirmed the Second Circiut prior opinions that PLRA was inapplicable to civil detainees. (3) a substantial lapse of time had not transpired before a motion to reinstate the appeal, although not filed. The motion was filed prior to the issuamce of the mandate. (4) equities strongly favors relief. A right to meaningful access to the courts, to present issues on appeal in

the court of appeals and the U.S. Supreme Court. The right granted by the First and Fourteenth Amendments, relating to confinement and tampering with legal mail claims. Appendix "B". Also the right to have his papers filed in the court of record by the court clerk.

With respects to Calloway v. Marvel Ent. Grp., 854 F.3d1452 (2d Cir. 1988), some of the factors were applicable to petitioner's case, but there were significant facts that made Calloway not suitable as a basis to deny relief by the circuit court. Unlike Calloway, petitioner did file a motion to reinstate his appeal, although the court clerk did not file it. The issuance of "default" and dismissal of appeal for failure to submit form, was an error of law. Also petitioner was actively pursuing his appeal and had several motions pending, after which he would have been filing appellate briefs on the issues for review. Based on these facts, Fed. R. Civ. P. 2 , authorizes the court to relieve petitioner of the consequences of "default" as manifest injustice would otherwise result. Like in Calloway the appeals court, after review could have recalled its mandate and reinstated the appeal, ruled on the pending motions before the court and allowed the submission of of appellate briefs.

C. Reinstatement Of Appeal Warranted As
 Appeal Was Not Frivolous

In denying motion to reinstate appeal, the circuit court held that "[t]he appeal is frivolous because it 'lacks an arguable basis either in law or in fact'". Appendix "A" The appeals court reliance on Calloway v. Marvel Ent. Grp., 854 F. 2d 1452, is distinguished

from petitioner's case. There, Calloway did not submit brief on issues to be presented on appeal and had abandoned his appeal. Other appellant's to the appeal, did file briefs and argue their points of contention before the appeals court. It was based on these facts, the court saw a potential of such an injustice clearly exists and the appeal reinstated and the judgment remanded. Whereas, the court had before it a record to review and considered that a manifest of injustice would result as there was a meritorious claim.

Here, in the case at bar and the present case in Jones v. Cuomo, et al, No. 21-6508, before the U.S. Supreme Court, petitioner's appeals were dismissed under 28 U.S.C. § 1915(e) before he filed appellate brief as the district court had not revoked his IFP status in accordance with Fed. R. App. P. 24(a)(3). The appeals court determined that dismissal was warranted based on a "default" of failure to submit a prisoner authorization form. Prior to submitting appellate brief, dispositive motions for appointment of counsel and injunctive relief had been sought.

The district court has determined that petitioner's appeal involved legal points arguable on their merit and that the appeal could be taken in good faith. But, before petitioner submitted any legal issues for appeal the appeals court determined that the appeal was frivolous. This decision does not comport with the holding of Neitzke v. Williams, 490 U.S. 319, 325. The facts in Neitzke the district court dismissed the complaint sua sponte and plaintiff moved in the appeals court for leave to proceed in forma pauperis. In petitioner's case, the district court did not revoke his in forma pauperis status, nor certify that the appeal would not

be taken in "good faith". Fed. R. App. P. Rule 24(a)(3).

As petitioner did not submit a motion seeking leave to proceed on appeal in the appellate court, a motion or affidavit was submitted stating the issues that were intended to be raised on appeal. Thus, petitioner never submitted any facts or law that would warrant relief of judgment. Unlike in Calloway, supra, the matter was briefed before the court presenting facts and law to support their position. Petitioner was not afforded this right to present a meritorious argument before the appellate court.

More importantly, Petitioner respectfully submits, that the Second Circuit is continuously moving the goal post for pro se litigants who have been granted IFP in the lower court, and not certified that the appeal would not be taken in "good faith". Determining that the appeal is frivolous, even before briefs are filed with the court. This position is contrary to the legislative intent of Fed. R. App. P. Rule 24, and 28 U.S.C. § 1915(a)(3).

Based on the aforementioned, Petitioner requests that this Court review this matter as a manifest of injustice and rescind the court of appeals mandate and reinstate the appeal.

D. Writ Of Mandamus Not Proper, Except
 As Timely Petition For Writ of
 Certiorari For Review

In the event that a writ of mandamus is not the proper vehicle for seeking review by this Court, Petitioner would request that the court accept his papers for filing as a petition for a writ of certiorari. For the purpose of seeking review, the time to file

a petition for a writ of certiorari begins from the date of entry of the judgment or order sought to be reviewed. Finality attaches when the time for filing a certiorari petition expires. Supreme Court Rule 13(3).

A timely notice of appeal had been filed. On February 24, 2021, the clerk for the court issued order that appellant was in default of filing prisoner authorization form pursuant to 28 U.S.C. § 1915(b). A mandate issued on April 21, 2021. Prior to the issuance of the mandate, a motion to reinstate the appeal was filed on April 14, 2021, and received by certified mail on April 20, 2021. The motion was never filed by the court clerk. After the mandate was issued several motions were submitted to recall the mandate and reinstate the appeal. Relief was denied on October 26, 2021. A motion for reconsideration was returned as the appeals court no longer had jurisdiction.

Looking first at the motion to reinstate, which the court clerk never entered into the court docket. Had the motion to reinstate been timely filed, although not captioned "petition for rehearing" the motion sought to change the judgment. Fed. R. App. P. 40(a)(1). Until the motion is either properly filed, and resolved, finality had not occurred until the court acts upon it.

It is Petitioner's position that a timely filed petition/motion presented to the Federal Court of Appeals tolls the start of the period in which a petition for certiorari must be sought. Either until the motion is denied or a new judgment is entered on the rehearing, the time for applying for certiorari will be tolled. Missouri v. Jenkins, 495 U.S. 33, 46 (1990). Petitioner's motion

to reinstate his appeal has thus far not been considered or denied, warrants the tolling period and the filing of a writ of certiorari should be considered timely filed.

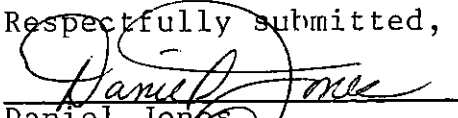
In Latham v. United States, 527 F.3d 651 (7th Cir. 2008) some guidance can be found to support petitioner position advanced. The motion to reinstate Latham's appeal was filed within the time to seek rehearing. Although not captioned "petition for rehearing" the court recognized that it sought to change the judgment. According to the court that was enough to put off "finalty" until the court acted. It seems reasonable that, if the court grants reconsideration the mandate can be recalled and the case reinstated. The court further held that, by doing such, Latham was entitled to argue to the appeals court and the Supreme Court that his appeal should have been reinstated because his waiver was involuntary.

Based thereon, the 90 days to seek certiorari should be tolled, and would be timely as the motion to reinstate petitioner's appeal has not been decided or a new judgment been entered on the motion.

CONCLUSION

This petition for a writ of mandamus should be granted.

Respectfully submitted,


Daniel Jones

Dated: December 27, 2021