CASE NO.

ORIGINAL

23-6239



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IN THE

SUPREME COURT OF THE UNITED STATES

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CHRISTOPHER EVERSON-PETITIONER

VS

THERESA LANTZ,

CONNECTICUT COMMISSIONER OF CORRECTIONS, ET AL-RESPONDENTS

---

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

December 9 , 2023

## QUESTION(S) PRESENTED

The Petitioner presents two questions:

Federal Rules of Civil Procedure, Rule 60 (d) (1) Provides: "Other powers to grant relief, This rule does not limit a courts power to, (1) entertain an independent action to relieve a party from a judgment, order or proceeding." and Rule 60 (d) clause (3) provides: "set aside a judgment for fraud on the court"; and In United States v. Beggerly, 524 U.S. 38 at 45 (1998) This Court said, "the advisory committee notes confirm this , indicating that , "if the right to make a motion is lost by the expiration to time limits fixed in these rules the only other procedural remedy is by new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action", Advisory committee notes, supra, at 787"

Question one: is the filing of an Independent Action by a litigant pursuant to Federal Rules of Civil Procedure Rule 60 (d) (1) grounded on Rule 60 (d) clause (3)" set aside a judgment for fraud on the court" distinguishable from Rule 60 (b) clause (3) also, "fraud, intrinsic or extrinsic", when applying Rule 60 (c) (1) "timing", which provides: Rule 60 (b) clause (3)'s "fraud", "must be made within one year after the entry of the judgment or order or the date of the proceeding"; or is application of Rule 60 (d) clause (3)'s "fraud upon the court", more likened to an exhaustion of other remedies rule where the litigant seeking relief from a final judgment must first exhaust other judicial remedies under Rule 60 (b) prior to using 60 (d) (1) and clause (3 "fraud upon the court", or wait until after the time limit to file Rule 60(b) clauses(1) thru (6) has expired?

Question two: In considering together, 28 U.S. Code section 1292(b) "certification of an order", and Federal Rules of Appellate Procedure Rule 5 "Appeals by Permission", and "law of the case" doctrine, "the mandate rule". At a later stage In litigation, after a mandate has been issued in a first appeal, If a decision in the district court denying an independent action in equity, filed by a litigant seeking to set aside the final judgment pursuant to Federal Rules of Civil Procedure Rule 60 (d) (1) is appealed, in the appeals court if the appeal is certified under Rule 5, is the additional "recall of the mandate" of the first appeal of the final judgment, necessary jurisdictionally for the appeal of the order denying the Rule 60 (d) (1) motion to be heard?

## LIST OF PARTIES AND RELATED CASES

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

Christopher Everson- Petitioner

John Armstrong, former Connecticut Commissioner of Corrections –Respondent

Theresa Lantz, former Connecticut Commissioner of Corrections-Respondent

Connecticut Commissioner of Corrections, Respondent

Nelvin Levester, Respondent

Robert Carbone, Respondent

**Related cases are as follows:**

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

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

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

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

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

EVERSON V. SEMPLE, Case No. 17-7650 cv Supreme Court of The United States, Cert denied on February 4, 2020

EVERSON V. LANTZ, COMM'R OF CORRECTIONS, Docket No. 3:04cv 387 (RNC) Connecticut District Court, Judgment denying "doc #'s 172 and 174" entered January 6, 2021

EVERSON V. LANTZ, COMM'R OF CORRECTIONS, Docket No. 21-228 cv Second Circuit Court of Appeals, judgment entered July 14, 2021

EVERSON V. LANTZ, COMM'R OF CORRECTION; Docket No. 3:04cv 387(RNC) Connecticut District Court, judgment denying "doc # 178", judgment entered April 10, 2023

EVERSON V. LANTZ, COMM'R OF CORRECTION, Docket No. 23-790cv, Second Circuit Court of Appeals, judgment entered September 11, 2023

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APPENDIX L; Letter from Second Circuit Clerk of Court Dated December 22, 2021, acknowledging receipt of petitioners' request recall of mandate in Case No. 09-0903, stating court no longer has jurisdiction to entertain request.

## TABLE OF AUTHORITIES

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

## JURISDICTION

The Second Circuit Court of Appeals issued its opinion on September 11, 2023 and a copy of decision appears at Appendix A. The jurisdiction of this court is properly invoked pursuant to 28 U.S.C. section 1254(1)

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. section 1983 provides: Civil Action for Deprivation of rights: Every person who, under color of any statute, ordinance regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this

section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. section 1292 (b) provides: When a district judge, in making in a civil action an order, not otherwise appealable under this section, shall be of the opinion such order involves a controlling question of law as to which there is a substantial ground for difference in opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The court of appeals which would have jurisdiction of an appeal of such action may thereupon, in it's discretion, permit an appeal to be taken of such order, if application is made to it within ten days after entry of the order.

28 U.S.C. section 1651(a) provides: The Supreme Court and all courts established by Act of Congress may issues all writs necessary or appropriate in aid of their respective jurisdictions an agreeable to the usages and principles of law.

28 U.S.C. section 1915 (e) (2) (B) (i) and (ii) provides: Notwithstanding any filing fee or portion thereof that may have been paid, the court shall dismiss the case at any time if the court determines that (B) action or appeal (i) is frivolous or malicious and (ii) fails to state a claim upon which relied can be granted

28 U.S.C. section 2244 (b) (1) provides: A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

Amendment 1 provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the

right of the people to peaceably assemble, and to petition the government for a redress of grievances.

Amendment 5 provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except In cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment 14, Section 1. provides: 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 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.

Article IV section 2 of The U.S. Constitution provides: The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

## STATEMENT OF THE CASE

This case is about: whether or not, a court that issues a final judgment can modify or refile that final judgment to allow for an appeal to be taken in an extraordinary instance where appellate review of the final judgment has not happened, but, a mandate was issued in the appeals court. Also, whether or not a mandate issued in an appeal of a final judgment jurisdictionally and immutably precludes the district court from modifying it's own judgment to allow for appellate review, moreover, does an adequate legal remedy exist under such extraordinary circumstances to preserve a litigants' substantive right to appeal a final judgment.

In 1984 the petitioner here began employment with the Connecticut Department of Corrections (hereinafter referred to as DOC). The petitioner was a stellar employee with an outstanding work record and all good evaluations. In March of 2001 the petitioner was terminated from his employment with DOC, the reason as stated by DOC for the petitioner's termination was: (disciplinary action against the petitioner for two arrest for off-duty conduct), in late 2000 the petitioner was arrested twice within a 60 day period, related to the same underlying circumstances, the petitioner had a dispute and argument with his girlfriend, ultimately all of the arrest charges against the petitioner were dismissed in Connecticut State Court in Meriden Connecticut.

In March 2004 the petitioner by his Attorney, filed a lawsuit Everson v. Lantz, et al., 3:04cv387 (RNC) in Connecticut District Court against DOC, under Title 42 U.S.C. section 1983 alleging his termination by DOC violated the petitioner's Constitutional Rights of:

among other things, equal protection of the law and due process. The petitioner's lawsuit cited that numerous other DOC employees were arrested and charged with comparable charges and were similarly situated and comparable to the petitioner, inthat those individuals "the plaintiffs' named comparators" were all subject to the same workplace rules, regulations, policies and disciplinary standards, the lawsuit further alleged that those same similarly situated individuals, had violated the same rules that DOC alleged that the petitioner had violated, but DOC did not discipline those named comparators, and those named comparators were not terminated by DOC and were allowed to continue working and/or return to work after their arrest, and all of those named comparators were outside of the petitioner's protected class, "the petitioner is African American and all of those similarly situation comparators were not African American." the case was dismissed in February 2009 by the District Court after two separate summary judgments, the final judgment was entered February 4, 2009. In March 2009 the petitioner filed a timely appeal of the District Court's final decision with the Second Circuit Court of Appeals see *Everson v. Lantz, Comm'r of Corrections*, case No. 09-0903cv. The appeal argued that the final judgment granted summary judgment in favor of "DOC" and dismissed the petitioner's lawsuit, where the correct legal standard governing Title 42 U.S. Code employment discrimination cases precluded the granting of summary judgment to "DOC", as the petitioners' named comparators were excluded from the examination and analysis of summary judgment, however, the court by mistake or accident substituted other names of individuals who were not the

plaintiffs' named comparators and mistakenly identified those names as the plaintiffs' named comparators.

The petitioner was incarcerated and in the custody of DOC at the time he filed his appeal. The petitioner was incarcerated from May 2008 until April 2012. The petitioner was arrested in early 2004 at his home in Hamden Connecticut by members of the Hamden Police Department for a domestic dispute that occurred at his home, involving the discharge of a firearm. The criminal case was assigned to Connecticut State Criminal Court in Meriden Connecticut, the case was referred to Connecticut Department of Children and Families "hereinafter referred to as "DCF"" and further proceedings were held at Connecticut Family and Juvenile Court in New Haven Connecticut. "DCF" conducted an extensive and complete investigation of the incident of the petitioner's 2004 arrest and all matters related to the arrest; the investigation included numerous interviews, psychological and medical evaluations of witnesses and individuals involved, and several court hearings held at Family and Juvenile Court in New Haven, at the conclusion of the "DCF" investigation "DCF" and Connecticut Family and Juvenile Court found that the petitioner lacked culpability and did not discharge the firearm; "DCF" and Family and Juvenile Court closed it's case and the matter was referred back to State Criminal Court in Meriden Connecticut. The Meriden Court transferred the criminal case to New Haven Criminal Court in New Haven Connecticut and the New Haven Court transferred the case back to Meriden Court, the Meriden Court held a trial in early 2008

and the petitioner was convicted for the charges of his early 2004 arrest and sentenced to prison time.

The petitioner was incarcerated when the 2009 final judgment was issued and "during the time of his appeal" and he was not receiving his legal mail; Prison/DOC officials were withholding the petitioner's legal mail, the petitioner was unable to file a motion for reconsideration of the final judgment with the district court because he did not receive notice of the final judgment until 3 weeks after the time to serve and file a motion for reconsideration expired. Furthermore, several notices sent to the petitioner from the Court of Appeals were not delivered to the petitioner; this resulted in: the appeals court being obstructed and prevented from corresponding or communicating with the petitioner, and the appeals court was obstructed and prevented from instructing the petitioner as court rules required, and this obstructed and prevented any process, proceedings and normal functioning of the appeals court related to the petitioners' appeal. The petitioner missed important filings and missed important court imposed deadlines, which resulted in the appeal being dismissed by default judgment without appellate review of the final judgment, however, a mandate was issued in the default judgment. The petitioner's appeal was dismissed on June 9, 2009 after the petitioner failed to respond to two notices sent to him from the Court of Appeals, both notices instructed the petitioner to complete and return to the court enclosed "in forma pauperis motion" forms for New York State; the petitioner did submit with his notice of appeal, an approved Connecticut "in forma pauperis motion" granted by the

Connecticut District Court "case doc # 140". The petitioner was not aware that his appeal was dismissed. The petitioner learned his appeal had been dismissed when he received a "bill of cost, case doc# 142" from the "DOC's" attorney. The petitioner immediately filed a motion requesting to have the case reopened, and requesting a recall of the mandate both were denied. The petitioner filed a Writ for Petition of Certiorari with this court, but due to withholding of legal mail, that petition was untimely. Immediately, upon his discharge from incarceration the petitioner retained an Attorney. On or about April 3, 2012 the petitioner met with an Attorney "Paul Reynolds of Wallingford Connecticut" Attorney Reynolds agreed to represent the petitioner in his wrongful termination case against DOC. The petitioner was not aware that Attorney Reynolds was suffering from serious and debilitating health problems that ultimately cause the attorney's death. The petitioner relied on his attorney's representation from April 2012 until October 2015, when his attorney passed away, during that time his attorneys' health problems hindered the attorney's ability to work on the petitioner's case; during that time period the petitioner made frequent inquiries with his Attorney has to the status and progress of his case, on every communication the petitioner's Attorney assured the petitioner that the wrongful termination case was being properly handled and going well, however, "illness caused" the attorney to almost completely neglect the petitioners business "wrongful termination case", while at the same time the attorney was reassuring the petitioner that the matter was in hand. After his attorney's death the petitioner filed the following: 1 a mandamus pursuant to

28 U.S.C. section 1651(a), the grounds were, summarizing the facts and asking the court to revisit its' final judgment; and 2 a motion to vacate, pursuant to Federal Rules of Civil Procedure Rule 60 (b)(6) the grounds were the final judgment was a mistake and granting of summary judgment was precluded and "the petitioner was unable to protect his appeal"; and 3 in 2020 an independent action pursuant to Federal Rules of Civil Procedure Rule 60 (d)(1) the grounds were the 2009 final judgment was "wrong on the merits, as a result of mistake or accident", and granting of summary judgment was precluded. All of the petitioners' requests were denied, the court citing; the 2009 final judgment precluded the requested relief and granting the request would violate the previous mandates and a new appeal would not raise a substantive issue that should be considered on appeal and the 60 (b)(6) was untimely, the appeals court affirmed the district courts' decisions citing the appeals were frivolous, as relief was precluded by the mandates and could not be granted.

In April 2022 the petitioner filed a new independent action Pursuant to Federal Rules of Civil Procedure Rule 60 (d)(1) clause (3). The petitioners' April 2022 new independent action ground was Fraud upon the court, Extrinsic Fraud and, Actions and misconduct effecting the integrity and functioning of the judicial process, the request was denied, citing; preclusive effect of the 2009 judgment and granting the request would violate the mandates previously issued in the appeals courts; the appeals court affirmed, citing the appeals were duplicative, vexation and frivolous as requested relief was precluded.

## REASONS TO GRANT THE PETITION

There is a significant and relevant amount of ambiguity, uncertainty and lack of clarity, creating a conundrum and opposing interpretations, furthermore, causing frustration and vexation in the courts on the correct application of "law of the case" doctrine to a request in the district courts seeking relief from a final judgment after a mandate has been issued in the court of appeals. Moreover, if, during continued litigation in the district courts under the mandate, whether or not, a judgment is under the control of the court that pronounced the judgment and whether that court may set aside or vacate or modify that judgment, solely for the purpose of re-entering the same judgment so a new appeal can be taken, based on information that came to light after the final judgment was entered and was not obtainable prior to the final judgment being entered, without a finding of grave unforeseen contingencies that would necessitate the need of a "recall of the mandate". Additionally, if the mandate was issued on a default judgment in the court of appeals without appellate review of the final judgment, i.e. if such offenses as "fraud on the court" has occurred that impacted the court proceedings, there are opposing interpretations on whether the mandate precludes relief from a final judgment. Also, exist a significant and relevant lack of clarity within the rules, creating opposing interpretations surrounding use of the independent action in equity to set aside a final judgment, order or proceeding, pursuant to Federal Rules of Civil Procedure, Rule 60(d)(1) and clause (3) "fraud upon the court" i.e. "extrinsic fraud"; partly because Rule 60 (b) (3) is also "fraud, intrinsic or extrinsic", creating ambiguity on whether or not Rule 60 (c)(1) providing: "timing and effect of the motion", specifically mentioning rule 60 (b) clauses (1),(2) and (3) being a one year limitation to file a motion after the entry of a judgment or order or

proceeding, is Rule (c)(1)'s timing for fraud also applicable to a motion pursuant to 60 (d) clause (3) "fraud upon the court"? On both of these issues: timing and effect of motion and whether the mandate precludes the relief requested, there are conflicting applications of the law within the courts, causing frustration in the courts; furthermore, one interpretation makes appellate review of a final judgment impossible, where the opposing interpretation protects and preserves the substantive right to appeal a final judgment.

In the absence of regularization within the rules on both subjects, guidance from this court would eliminate any frustration and lack of clarity in the lower courts; as well as promote stable and uniform adjudication and judicial administrative efficiency, while at the same time preserving a litigants' substantive right to appeal a final judgment and meaningful access to the courts. As this issue "set aside a final judgment without violating a mandate" now causes a myriad of litigation subsequent to the appeal of the final judgment, lasting years, that some courts as seen here in this Second Circuit's September 11, 2023 ruling, construe as duplicative, vexatious, meritless, and frivolous, indicating significant and genuine frustration; holding that, granting of such a request will violate the mandate from the appeals court, and further, construe the litigation or "pursuit of judicial remedies under the rules" seeking relief from a final judgment so an appeal can be taken, as frivolous under Federal Rules of Civil Procedure, Rule 12 (b)(6) "frivolous standard", "failure to state a claim upon which relief can be granted" and the "frivolous" standard of Title 28 U.S. Code section 1915 (e) (2)(B) (i) and (ii) "lacks an arguable basis in law or in facts" under *Neiztke v. Williams, 490 U.S. 319 at 325 (1989)*. Whereas, other courts hold a very different approach, that such requests to set aside a final judgment are appropriate and permitted to proceed in the district court for factual evaluation

of the composite circumstances of the request before any ruling is made so that the court will have a good understanding of all the facts and circumstances related to the request before reaching a decision. Some courts holding, depending on the facts and circumstances, granting such a request does not violate the mandate from the appeals court and may be granted.

Under the approach followed in the Second Circuit, an appeal of a final judgment is impossible, when, "because of a default judgment in the appeals court, the final judgment has never received appellate review", however, a mandate was issued on the default judgment. The Second Circuit holds, that any previous mandate issued by the court of appeals, related to a final judgment in question, cumulatively encompasses and, jurisdictionally and immutably precludes any future or new request seeking relief from the same final judgment, whether the request be, pursuant to Federal Rules of Civil Procedure Rule 60(b) "a motion to vacate" or pursuant to Federal Rules of Civil Procedure, Rule 60 (d) (1) a new independent action in equity, and that granting such a request may violate the original mandate or a mandate on a Rule 60 (b) clause (6) decision, issued prior to the filing of the independent action, further holding, a new independent action is treated as a successive motion to vacate and cannot be granted. The Second Circuit indicating that, both the mandate of the first appeal and the mandate of the subsequent appeal of a denial of a Rule 60 (b) (6) motion combined, cumulatively encompass, and immutably preclude any future or new independent action in equity, as the mandates are jurisdictional, even if, the ground upon which each request is predicated on and plead is different according to the codification of the rules, and regardless if, the ground argued in a new request, was not expressly articulated as part of the appellate ruling to which the previous mandates were issued. Other courts hold a significantly different and opposing interpretation,

making an appeal of the final judgment possible, holding that, a mandate is not so broadly applied to preclude every rule 60 (b) request, and granting a motion to vacate a final judgment or an independent action in equity seeking relief from a final judgment does not violate a mandate previously issued by the appeals court, if the ground in which the motion is predicated upon are based on information that was not obtainable until after the final judgment was entered, and was not expressly addressed as part of the ruling to which the mandate was issued in the court of appeals, furthermore, holding if the final judgment in question is contrary to existing law and should receive appellate review, permitting a motion seeking relief from the final judgment "is appropriate", to proceed for a full evaluation of the facts and circumstances in which the grounds of the request are predicated upon; further holding, a hearing to develop the factual circumstances of the case is necessary prior to issuing a ruling on the motion to vacate or independent action, and not conducting a hearing would be abuse of discretion. See Harte v. Board of Commissioners, 940 F. 3d 498 (10th Cir. 2019) at 510-511 (interpretation of a mandate) quoting "the holding of the court may be viewed as that position taken by the members who concurred in the judgment on the narrowest of grounds", also see United States v. Moore, 83 f. 3d 1231 at 1234-35 (10th Cir. 1996) "Most Importantly, the First Circuit further explained that the mandate rule is a rule of policy and practice, not a jurisdiction limitation, which thus allows some flexibility in exceptional circumstances" quoting United States v. Bell, 988 f. 2d 247, 251 (1st Cir. 1993); also see( Grigsby v. Barnhart, 294 f. 3d 1215, 1219 (10th Cir. 2002) (There are well recognized exceptions to both the law of case doctrine and the mandate rule) quoting Grigsby at 1219 n.4 "this court has recently summarized the grounds for departure from both the law of the case and the mandate rule. There are three "exceptionally

narrow' reasons to depart for the law of the case; " (1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice" With regard to the mandate rule, a deviation requires "exceptional circumstances, including (1) a dramatic change in controlling legal authority; (2) significant new evidence that was not earlier obtainable through due diligence but has since come to light; or (3) if blatant error from the prior decision would result in serious injustice if uncorrected." Id. quoting United States v. Webb, 98 f. 3d 585, 587 (10th Cir. 1996), also see F.D.I.C. v. United Pacific Ins. Co., 152 f. 3d 1266, 1273-1274 (10th Cir. 1998), "A district court may consider a 60(b) motion to reopen a decision that has been affirmed on appeal when the basis for the motion was not before the appellate court or resolved on appeal"). The approach followed by the Second Circuit opposes rulings by this court see Quern v. Jordan, 440 U. S. 332 (1979) footnote 18 "the doctrine of law of the case comes into play only with respect to issues previously determined, the circuit court may consider and decide any matters left open by the mandate of this court". Also see U.S. v. Hatter, 532 U.S. 557 (2001) at 558 and 565 quoting Quern at 347 "the law of case doctrine presumes a hearing on the merits." Also see Hall v. City of Los Angeles, "697 f. 3d 1059, 1066-1067 (9th Cir. 2012) "the opinion in the first appeal did not say anything about the issue addressed on remand, the district court did not depart from the law of case, nor violate the mandate by addressing it". Also see (Federal Practice and Procedure, (Wright and Miller) April 2023 Update, section 4478.3, Law of the case-Mandate rule, 18B Fed. Prac. & Proc. Juris. Section 4478.3 (3d ed.) beginning section 2 (Rule 60(b) relief rest on matters outside of the original record), "a showing of new facts that could not have

been presented earlier, after some uncertainty, it has been recognized that the Rule 60(b) motion may be made directly in the district court without asking leave of the appellate court"; also see Wright and Milller April 2023 update section 4478.3, footnote 6 quoting U.S. v. Thrasher, 483 f. 3d 977, 981-982 (9th Cir. 2007) 'there are **"very limited circumstances"**in which the district court may not be required to follow the directions we have given in our mandate, Several of our sister circuits have also considered the mandate jurisdictional, other circuits however have reached a different conclusion, holding that their mandates are not jurisdictional, the circuit appear to be split four to four on the issue". Also see Rochow v. Life Ins. Co. of North America, 737 f. 3d 415, 422 n.4 (6th Cir. 2013) "the mandate rule limits jurisdiction on remand, but the question decided on remand had not been decided on appeal, so the mandate was not violated") also, Webb v. Davis, 940 f. 3d 892, 896-897 (5th Cir. 2019) (Rule 60 attack) "the mandate rule is a matter of discretion, not jurisdiction, the district court could have granted the rule 60 (b) motion to vacate the denial of habeas corpus without running afoul of the mandate", also see Dejoria v. Meghreb Petroleum Exploration S.A., 935 F. 3d 381, 392-393 (5th Cir. 2019) (the mandate left open further proceedings on grounds not resolved on the first appeal) The 8th Circuit holds that a mandate does not preclude a Rule 60 (b) motion either grounded on a change in law or on arguments not previously before the appeals court, see Prudential Ins. Co. of America v. National Park Medical Center Inc., 413 f. 3d 897, 903-904 (8th Cir. 2005), also see Jones v. U.S., 255 f. 3d 507, 510-511 (8th Cir. 2001) "Certainly the district court could not use its' 60(b) authority to ignore or reverse this courts mandate, but that mandate does not prevent it from entertaining the merit of such a motion".

It is reasonable that, a conscientious and diligent litigant pursuing his or her judicial remedies after a first appellate decision and mandate, will genuinely believe it procedurally correct and appropriate according to the rules, if the circumstances necessitate, to file a motion to vacate a final judgment under Rule 60 (b) prior to using Rule 60 (d) (1) "independent action", as Rule 60 (b) clause (6) providing: (any other reason justifying relief) would be the available remedy under the rules of civil procedure to vacate the final judgment, as Rule 60 (b) clause (6) relief is mutually exclusive from rule 60 (b) clauses (1) thru (5) and pursuant to Rule 60 (c) (1) "timing and effect of motion" must be made within a reasonable time, and the time limit to file 60 (b) clause (6) relief is requisite upon the composite circumstances of the case, allowing the movant to present the facts to the court, moreover, a 60 (d) (1) "independent action" is reserved for, if the time to file a 60 (b) (6) has expired; see (Notes of the Advisory Committee on Rules, 1946 Amendment, cited in United States v. Beggerly, 524 U.S. 38 at 45 (1998). "the advisory committee notes, confirm this, indicating that , "if the right to make a motion is lost by the expiration of time limits fixed in these rules the only other procedural remedy is by new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action", Advisory Committee notes, supra, at 787", also see, Moores Federal Practice 60.27 [3] at R. 60 304 "A reasonable time has been held to depend upon the composite circumstance of the case, if the conduct of the attorney was such as to mislead the litigant into failure to take action"). In this case the petitioners' attorney, due to illness, convinced the petitioner not to take action sooner, the petitioners' attorney was suffering with serious and debilitating illness that ultimately caused the attorney's death and preventing the attorney

from working on the petitioner's case, while at the same time the attorney was on several occasions assuring the petitioner that the case was being properly handled.

It is particularly important to have a definitive answer on the correct application of 'law of the case" in deciding motions filed under of Rule 60(b), clause (6) "any other reason that justifies relief", for purposes of determining timeliness and assessing a movant's composite circumstance and whether a 60 (d)(1) "independent action" is appropriate as the correct judicial remedy, additionally, as the straightforward operation of conducting a hearing is thwarted when there are two conflicting legal approaches, creating two conflicting rules regarding 'reasonable time" and if "law of the case" would preclude the trial court from conducting a hearing to properly develop the facts and to appropriately resolve genuine issues of disputed facts; this goes straight to when is the rule 60(d)(1) independent action appropriate as a judicial remedy. All of the circuits agree that appellate review of a district court's decision on a motion filed under 60 (b)(6) or 60 (d)(1) is only for abuse of discretion. Where the circuits diverge into opposing interpretations is as follows: 1. The position held here by the 2nd Circuit is 18 months after a final judgment is rendered by the district court, a motion filed under clause (6) of Rule 60 (b) is untimely and cannot be granted, and no hearing is required, "as it is held by the Second Circuit, 18 months being the reasonable time within which a movant may file a motion under clause (6) of Rule 60 (b)"; see *Rowe Entertainment v. William Morris Agency Inc., 2012 WL 5464611 *2 (United States District Court S.D. New York); citing Korelis v. Pennsylvania Hotel. No. 99-cv-7135, 1999 WL 980954 at *1 (2d Cir. Oct 8, 1999); citing Kotlicky v. United States Fidelity &Guar. Co. 817 F.2d 6, 9 (2d Cir. 1987);*, under this approach as in this instant case, where the appellants' appeal of the final judgment was never heard and was dismissed

by default judgment, if more than 18 months has pasted since the district courts' final judgment has been entered, a motion filed in the district court pursuant to Rule 60 (b) clause (6), solely for purposes of vacating and reentering the final judgment to allow for appellant review of the final judgment, the request is barred as untimely regardless of the facts and circumstances of the request, and future use of an independent action under Rule 60 (d)(1) is precluded by the first mandate of the default judgment and cumulatively by the use of the prior Rule 60 (b)(6) motion, effectively, making appellate review of the final judgment impossible. Whereas, 2. In contrast, in other circuits, an appeal of the final judgment is possible, as the position held by most other circuits is that, a hearing must be held by the district court to assess and develop the facts and evidence and composite circumstances of the movant's timeliness and reason for requesting relief under 60 (b)(6), prior to making any determination on untimeliness and the movants' reason for requesting relief under 60 (b) clause (6) and the appeals court will review those same facts, evidence and composite circumstance of the movant's timeliness and reason for requesting relief under clause (6) in order to determine if the trial court did "abuse it's discretion", and if no hearing is held by the district court to assess and develop the facts and evidence and composite circumstance of the movants timeliness and the reasons for filing the 60 (b) (6) that would constitute "abuse of discretion" by the district court, i.e. under this interpretation cases where no hearing was held the case is remanded by the Appellate Court for a hearing, see *United States v. Baus, 834 F.2d 1114, 1121 (1st Cir. 1987)* "In determining temporal reasonableness under subsection (6), we must review "the specific circumstance of the case", while bearing in mind that subsection (6) relief "is reserved for extraordinary cases in which the unusual circumstance justify a party's delay". Also The 9th Circuit, the 3rd Circuit and

the D.C. Circuit along with several other circuits adhere to this same approach that, in determining the timeliness of a 60(b)(6) motion there must be a review of "the specific circumstance of the case" and a hearing is required; see *Washington v. Penwell, 700 F.2d 570, 572-573 (9th Cir. 1983)* (Held four year delay not unreasonable, because of extraordinary circumstance); *and Mckinney v. Boyle, 447 F.2d 1091, 1093 (9th Cir. 1971)* (the moving party had a good reason for failing to take action sooner); *and Jackson v. Washington Monthly Co., (CA, D.C., 1977) 569 F.2d 119,* (the denial of the 60 (b)(6) was based on a record lacking relevant facts); *and Good Luck Nursing Home Inc. v. Harris, (CA. D.C. 1980) 636 F.2d 572,* ( two hearings held to assess the circumstance).

There are conflicting and opposing decisions in the lower courts on "recall of the mandate" to allow a the district court to vacate or modify it's own final judgment; due to opposing approaches on whether or not, the mandate of the appeals court in the appeal of a final judgment encompasses and precludes all future request for relief from the final judgment at a later stage of litigation, necessitating "recall of the mandate" from the appeals court; regardless of whether the relief is requested under Federal Rules of Civil Procedure Rule 60 (b) or as an independent action in equity pursuant to Rule 60 (d)(1); and also, whether a successive or new independent action seeking to set aside a final judgment, is encompassed within the mandate issued in a previous appeal of a denial in the district court of a previous motion to vacate pursuant to Rule 60 (b) (6), where the grounds in which each request is premised and argued are different and not mentioned or expressly ruled upon within the previous mandate. Also, in light of, Federal Rules of Appellate Procedure, Rule 5 "appeals by permission", if the appeal is certified, under what circumstances is the additional "recall of the mandate" necessary from

the court of appeals for an independent action to proceed in the district court. Different circuits have completely different and opposing interpretations on application of the law on "recall of the mandate", yielding significantly different results for the litigant, and considering whether the litigants' constitutional rights are observed and preserved in the proceedings. On December 17, 2021 the petitioner here sent a motion to the Second Circuit Court of Appeals Clerks Office to be filed, requesting that the first mandate issued in case (2d Cir. No. 09-0903cv) be recalled to allow for his independent action in equity to proceed in the district court, so that it would allow for appellate review of the 2009 final judgment, on December 22, 2021 the Clerk of the 2d Circuit wrote the petitioner stating: acknowledgment of receipt of the petitioners request and that the motion could not be filed because, (the petitioner has previously requested "recall of the mandate" and that the appeals court no longer has jurisdiction to entertain the request. The Second Circuits' approach to "recall of the mandate" is contrary to the holding of this court and other circuits, as a successive motion to recall a mandate is only restricted or prohibited if construed as one pursuant to (28 U.S.C. section 2255, "as related to habeas corpus relief", (see Gonzalez v. Crosby, 545 U.S. 524, at 530-537 (2005) "as a textual matter section 2244(b), applies only where the court acts pursuant to prisoners' "application for a writ of habeas corpus"); in this case the petitioners' motion to recall the mandate was not related to a habeas petition pursuant to section 2255. The D.C. Circuit has adopted the approach with expressed "well recognized" uncertainty that to correctly allow the district court to hear or grant a Rule 60 (d) (1) independent action the appellate court needs to recall the mandate. (The D.C circuit held in *Greater Boston Television Corp. v. FCC., 463 F.2d 268 at 277-278 (D.C. Cir. 1971) "Particular grounds for recall of mandate, a need to show a special reason,*

*C. fraud on the court, or other misconduct effecting integrity of judicial process or functioning has been undercut , f. Other grounds of injustice, the recall of an appellate mandate to avoid injustice is a continuation, in the appellate sphere, of a deeply rooted equity jurisprudence",* Greater Boston at 279 *quoting,* "with well recognized uncertainty an independent action is available to avoid an unconscionable injustice and requires the recall of the mandate by the appellate court" quoting *Greater Boston Television Corp. at 279* "Historically there was an "independent" equity action to restrain enforcement of a judgment to avoid an unconscionable injustice, "fraud on the court" being the best known but not the exclusive ground for relief; Rule 60 expressly provides that it does not eliminate an "independent" action in the district court either "to set aside a judgment for fraud upon the court" or "to relieve a party from a judgment" on other grounds. (*7J. Moore, Federal Practice 60.36 et seq.* it is not clear whether the concept of an independent action is strictly limited to "extrinsic fraud," as was often said, but it is clear that the exception for equitable interposition by independent suit rests on "stringent" rules limited to circumstance "which render it manifestly unconscionable that a judgment be given effect." *7J. Moore Federal Practice 60.37[1], p. 623."* if a case involves the kind of injustice that would support an independent suit in the trial court, but presents an instance where action is needed from the appellate court, which cannot entertain a new "independent" action, the remedy of recall of mandate may well be appropriate.")) The recall of the mandate is, according to this Courts' holding on the rules, only used after diligent and active pursuit of other judicial remedies have been exhausted and to allow an independent action in equity to proceed, (see Calderon v. Thompson, 523 U.S. 538 at 549 (1998) "the court of appeals are recognized to have an inherent power to recall their mandates", and Calderon at

550 quoting 16. C. Wright. A. Miller. & E. Cooper. Federal Practice and Procedure section 3938 P. 712 (2d ed. (1996) "the sparing use of the power demonstrates it is on of last resort"; also see, Wright & Miller, Federal Practice and Procedure, section 3938, recall of mandate , 16 Fed. Prac & Proc. Juris section, 3938 (3d ed) April 2021 Update, footnotes 11 and 12 and 14 ("Courts of appeals power to grant relief from judgments through independent proceedings in equity to set aside a judgment, is suggested in, Hazel-Atlas Glass Co., v. Hartford Empire Co., 322 U.S. 238, 244-45 (1944) (in which the power to set aside a judgment for fraud upon the court of appeals was clearly recognized, as enacted in 1948, section 452, provided that the existence or expiration, of a "term" of court would have no effect). In Greater Boston Television Corp., at 276 the D.C. Circuit held: "the continued existence or expiration of a term of court in no way effects the power of the court, to do any act or take any proceedings" (see Miller & Miller 16 Fed. Prac. & Proc. (3d ed. ) April 2021 Update, footnote 14 "Although no statute or rule authorizes the Courts of Appeals to "recall mandates" the practice as long been recognized as an inherent part of the judicial power", "the assertion of this power "to recall mandates" fills a gap in the appellate rules and is well within the traditional authority of the courts, properly described as inherent, to regulate procedures in the absence of legislatively prescribes rules.") The 9th and 10th Circuits hold, "recall of the mandate" will avoid violating the mandate and allow relief from a judgment, see Planned Parenthood of Columbia Willamette Inc. v. American Coalition of Life Activiticies, 518 f. 3d 1013, 1020-1022 (9th Cir. 2008) and Ute Indian Tribe of the Uintah v. State of Utah, 114 f. 3d 1513, 1520-1521 (10th Cir. 1997). As held in this case the Second Circuit holds, at times it lacks jurisdiction to recall a mandate that it has previously issued, and it's mandate further precludes it from hearing an appeal of a decision in the district

court where the requested relief was interpreted to be precluded by the mandate; this is contrary to this courts' holding on "jurisdiction of collateral orders doctrine" see Cohen v. Beneficial industrial Loan Corporation, 337 U.S. 541, 546-547 (1949) "Appeals of collateral orders allowed"; and Digital Equip. Corp. v. Desktop Direct Inc., 511 U.S. 863, 866-868 (1994), "Collateral Order Doctrine is a practical construction of section 1291"; and Will v. Hallock, 546 U.S. 345 (2006), Also see (Wright & Miller 15A Federal Practice and Procedure, Juris section 3911 (2d ed.) Finality Collateral Orders, April 2021 Update note #7, "appeal of collateral orders allowed if: 1 the decision is not "tentative" , informal or incomplete, 2 the matter for review must "separate from and collateral to", rights asserted in the action, 3 there must be a risk of important loss if review is not available , 4 a serious and unsettled question). Furthermore, jurisdiction for appellate review is found in: 28 U.S.C. section 1292(b) and Federal Rules of Appellate Procedure, Rule 5(Appeal by Permission) which the petitioner here filed a motion pursuant to FRAP Rule 5 in this case; (section 1292(b) provides: when a district judge, In making in a civil action, an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order, the court of appeals which would have jurisdiction of an appeal of such action may thereupon, in its' discretion, permit an appeal to be taken from such order...); *the district courts' April 10, 2023 order "doc# 179" denying the petitioner's new independent action stated, "Plaintiff moves to vacate the judgment entered in this case on February 4, 2009, the arguments presented In support of the motion were previously presented to this court and the court of appeals in this*

*case to no avail. For this court to grant the motion would violate the mandate issued by the court of appeals following it's dismissal of plaintiff's last appeal in this case. granting the motion would also be at odds with decisions of the court of appeals In related litigation in which plaintiff sought to avoid the preclusive effect of the 2009 judgment". On May 8, 2023 the petitioner filed "doc# 180" a request the district court certify it's order, and on May 16, 2023 the district court issued an order #181 stating, "the attached docket is hereby certified as the entire index/Record on Appeal in this matter....".*

The petitioner was incarcerated from May 2008 until April 2012, and in the custody of Connecticut Department of Corrections hereinafter referred to as "DOC", during this time Prison "DOC" Officials had complete and exclusive control of the petitioner incoming and outgoing mail; and after the 2009 final judgment was issued "DOC" Officials began withholding the petitioners' legal mail sent to the petitioner from the courts, this obstructed the petitioners' access to the courts, during his time of incarceration the petitioner had a substantive right to access to the courts and to receive legal mail, see Tennessee v. Lane, 541 U.S. 509 (2004),(fundament right of access to the courts, "states must provide access for prisoners'), also see Wolf v. McDonnell, 418 U.S. 539, 556 (1974), ("prisoners retain right of access to the courts", "prisoners are protected under the equal protection clause of the 14th amendment". Other circuits preserve a prisoners' right to receive legal mail, see Hayes v. Idaho Corr. Ctr., 849 f. 3d 1204 (9th Cir. 2017) (prisoners protected by the 1st amendment to receive legal mail), also see Taylor v. Sterett, 532 f. 2d 462 (5th Cir. 1976), (inmates court access right outweighed prisons security interest), also see Brewer v. Wilkinson, 3 f. 3d 816 (5th Cir. 1993) (prisoners have a right to receive legal mail and access to the courts). The petitioner's April 2022 new

independent action in equity "doc #178" in this case, ground was Rule 60 (d) (3)'s "fraud upon the court", this ground was never previously argued by the petitioner and was never previously addressed or ruled upon by the court, the argument supporting the ground was that: withholding of the petitioner's legal mail obstructed and prevented any court process or proceedings and proper functioning of the courts related to the petitioners' case after the 2009 final judgment was entered and was the cause that resulted in: 1 obstructed and prevented the appeals court from communicating and corresponding with the petitioner while the appeal was pending, 2 obstructed and prevented the appeals court from instructing the petitioner as court rules required, 3 the petitioner not being able to file a motion for reconsideration with the district court after the final judgment was entered, 4 obstructed and prevented the appeals court from conducting any process and proceedings as they normally would function, and 5 the petitioner's appeal being dismissed by default judgment without appellate review. This ground was based on events that occurred after the February 4, 2009 final judgment was entered and this ground was separate from and not an ingredient of the underlying lawsuit. The appeal was dismissed by the June 9, 2009 default judgment, because the petitioner missed important court imposed deadlines. On July 30, 2009 the petitioner sent a one page motion information sheet to the appeals court requesting: "recall of the mandate", and for the appeal to be reopened, no grounds were stated, the request was denied, stating "no showing of manifest injustice", the petitioner requested this court grant certiorari, due to withheld legal mail that petition was untimely; On January 19, 2016, after his attorney's death, the petitioner filed a mandamus pursuant to 28 U.S.C. section 1651(a), see Everson v. Semple, Case No. 3:16 cv 77(RNC) Connecticut District Court, summarizing the facts of the case and explaining to the district court

that the final judgment was a mistake and granted summary judgment to "DOC" and summary judgment was precluded by the legal standards governing employment discrimination cases under Title 42 United State Code, and requesting the court to revisit the final judgment based upon the courts' mistake, the request was denied citing "claim preclusion"; see Ash v. Tyson Foods Inc., 546 U.S. 454, 457-58 (2006), (This Court held, "court will vacate and direct the lower court to apply the proper standard to the facts"). On July 27 2018, the petitioner filed a motion requesting relief from the final judgment pursuant to Rule 60 (b) (6), the ground of the motion was, the final judgment was a mistake and contrary to the correct legal guidelines in granting summary judgment where summary judgment was precluded, also, the petitioner was "unable to protect his appeal", the petitioner's 60(b)(6) motion was denied, (reasoning: *"the 60(b)(6) was untimely, and the petitioner's July 2009 request to recall the first mandate was denied, 60 (b) motion may be barred by "law of the case", and "even if that is not so" a new appeal would not raise a substantial issue that should be considered by the Court of Appeals").* On April 6, 2020 the petitioner filed an independent action pursuant to Rule 60(d)(1) the ground of the request was the 2009 final judgment was "wrong on the merits, as the result of accident or mistake, as summary judgment was granted to the defendants where the correct legal standard precluded granting of summary judgment", the request was denied, (reasoning: *"the arguments presented were previously presented to this court and the court of appeals in this case to no avail, to grant the request would violate the mandate issued by the court of appeals following the dismissal of plaintiffs' last appeal, granting the request would be at odds with decisions of the court of appeals in related litigation in which plaintiff sought to avoid the preclusive effect the 2009 judgment").* The Second Circuit has held each of the petitioners' filings to be a

duplicate of the previous filing and frivolous as they are barred by "claim preclusion and the mandates issued on each previous request".

Without guidance from this court under the Second Circuits approach if a litigant follows what rule 60 (d)(1) and the principles thereof provide, because of the ambiguity and lack of clarity the court construes the litigants' pursuit of his judicial remedies, solely to have a final judgment receive appellate review, as: duplicitous, vexatious and meritless and causing frustration, making appellate review impossible, where other circuits use a different approach construing the same litigation as appropriate, making appellate review possible. The Second Circuits treatment of an independent action in equity as being precluded by a mandate is contrary to past decisions of this court and other circuits as well, see Hazel-Atlas Co. v. Harford Co., 322 U.S. 238, 244 (1984) (a judgment final entered is not completely immune from impeachment). The Second Circuit holds a "three requirement" approach, in granting any independent action, see *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655 at 662 (2d Cir. 1997)* "claimants seeking equitable relief through independent actions must meet three requirements: claimants must, 1. Show that they have no other available or adequate remedy, 2. Demonstrate that the movant's own fault, neglect or carelessness did not create the situation for which they seek equitable relief, and 3. Establish a recognized ground such as fraud, accident or mistake... for the equitable relief". However, the 2nd Circuit applies the Rule 60 (c)'s (1) one year time limit on it's third prong's fraud, and that the mandate of a first appeal precludes an independent action at a later stage in litigation; and if, the litigant has previously been denied a Rule 60 (b) clause (6) motion, under "law of the case" a mandate affirming the 60 (b)(6) denial on appeal, additionally bars the litigant from subsequently pleading Rule 60 (d)

clause (3) "Fraud upon the court", even if the litigant has never argued fraud and fraud is not encompassed within the mandates coverage i.e. not expressly part of or addressed in the appellate rulings, furthermore, holding any future filing of rule 60 (d) (1) request and appeal of the rule 60 (d) (1) request denial is construed as duplicative, vexatious and frivolous, and "res judicata" bars any further judicial remedies related to the final judgment if the request requires any consideration of the underlying facts of the original lawsuit The Second Circuit has held: the preclusive effect of the doctrine of Res judicata bars an independent action, "if" the Independent action involves the same transaction or "common nucleus of operative of facts" as the prior original action and require considerations of the claims forming the basis of the court's prior decision previously litigated in the first action, See *AmBase Corp. v. City Investing Liquidating Trust, 326 F.3d 63, 73 (2d Cir 2003) and Waldman v. Village of Kiryas Joel, 207 F.3d 105, 108 (2d Cir. 2000);* and any appeal of a judgment in the district court dismissing an independent action under "res judicata" can be dismissed as frivolous "failure to state a claim upon which relief can be granted", and "lacks an arguable basis in law or in fact" of *Neiztke v. Williams, 490 U.S. 319 at 327 (1989)*.. The Tenth Circuit also holds to the three requirements approach same as the Second Circuit, but the Tenth Circuit allows the Independent action as a "motion to vacate the judgment, under the prior lawsuit" and with the original docket number and does not preclude the Independent action in equity under the doctrine of "res judicata" and allows a full evidentiary hearing, where the claimant is permitted to present evidence on every ground asserted and for consideration of the claims forming the basis for the court's prior judgment, See Winfield Associates Inc. v. W.L. Stonecipher, 429 F.2d 1087 at 1090 (10th Cir. 1970)(motion was denied after a hearing, no showing of "abuse of discretion' affirmed on

appeal). There is a recognized uncertainty on which approach reflects the correct interpretation of the governing law regarding whether a hearing is necessary in determining independent actions in equity. Other Circuits hold a different approach than the Second Circuit and Tenth Circuit, to an independent action in equity which focus more on the equitability of the independent action and in determining if *Beggerly's* "grave miscarriage of justice" is present, and identify five elements a claimant seeking relief through an independent action equity must show ; adding two additional elements not included in the Second and Tenth Circuits three prong approach, the two additional elements being: (1) a prior judgment "which in equity and good conscience" should not be enforced and (2) a meritorious claim in the underlying case, this "five element" approach also necessitates a full development of the facts of both the prior action and the new independent action in equity together and require full consideration of the claims forming the basis for the court's prior decision to determine if there was a meritorious claim in the underlying case and if the prior judgment in "equity and good conscience" should not be enforced, this approach conflicts with the approach in the Second Circuit, "as it necessitates consideration and examination of the original lawsuit, and the doctrine of "res judicata" must yield to a well plead "independent action in equity" which reveals a "grave miscarriage of justice" does exist. This "five element" approach of requiring "consideration of the claims forming the basis for the court's prior judgment" is followed in the Forth, Fifth and Sixth circuits. The five element approach creates an entirely different species of decisions that allow the prior underlying case to receive a full examination and make an appeal of the final judgment possible. The Forth circuit in *Asterbadi v. Leitess, 176 Fed.Appx. 426 at 430 (4th Cir. 2006)* "in order to sustain in independent action in equity....the five factors

set forth are: 1 the judgment in ought not, "in equity and good conscience" be enforced; 2 he had a good defense to the allege cause of action, underlying the judgment; 3 that fraud, accident or mistake prevented him from obtaining the benefit of his defense; 4 "the absence of fault or negligence" on his part; and 5 the absence of any adequate remedy at law", see *Great Coastal Express Inc., v. Int'l Bhd. of Teamsters, 675 F. 2d 1349 at 1358 (4th Cir. 1982)*. The Fifth Circuit has held under the "five element approach" that "res judicata" and Rule 12 (b)(6)'s frivolous "lacks an arguable basis in law or in facts" is not applied to an independent action filed pursuant to Rule 60 (d)(1) without first conducting a comprehensive development of the facts and circumstances and a Rule 60 (d) (1) independent action will be granted if: (The plaintiff presents facts indicating that the issues raised in the independent action were not open to litigation in the former action or that he was denied a fair opportunity to make his claim or defense in the original lawsuit) see *Turner v. Pleasant RPIA., 663 F.3d 770 at 775 (5th Cir. 2011)* "Res judicata at times must yield to a well pled independent action in equity, the Federal Rules preserved the court's power to hear an independent action to grant relief from a judgment, In our analysis, we identified five elements of an independent action in equity, *Turner at 776,* (citing *Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663 at 667-68 (5th Cir. 1981))* 1 a prior judgment which in "equity and good conscience" should not be enforced, 2 a meritorious claim in the underlying case, 3 Fraud, accident or mistake which prevented the party from obtaining the benefit of their claim, 4 the absence of fault or negligence on the part of the party, and 5 the absence of an adequate remedy at law." The Sixth Circuit in: *See Giasson Aerospace Science Inc. v. RCO Engineering Inc. 872 F. 3d 336 (6th Cir. 2017)* follows the five element approach, see *Giasson Aerspace Science Inc., at 339 "such an independent action is*

*available only under unusual and exceptional circumstances to prevent a "grave miscarriage of justice"; Relief is reserves for those cases of injustices which in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata.",* citing *Mitchell v. Rees, 651 F.3d 593 at 595 (6th Cir. 2011) "the indisputable elements of an Independent action are: 1 a judgement which, ought not, in equity and good conscience, to be enforced; 2. A good defense to the allege cause of action on which the judgment is founded; 3. Fraud, accident or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4. The absence of fault or negligence on the part of the defendant, and 5, the absence of any adequate remedy at law."* The two different approaches "for a litigant seeking relief from a judgment" , mean the difference of whether the Independent action in equity would be heard by the court or not and in certain instances whether an appeal of a final judgment is possible, under the five element approach the litigant will have an opportunity to be heard In court, but under the 3 prong approach that applies "res judicata', the litigant is "effectively shutout of court" as a bulwark is placed between the litigant and his right to appellate review of a final judgment.

Granting this petition would promote judicial efficiency in the lower courts and protect a litigants' right to appeal a final judgment, and alleviate a myriad of unnecessary filings and years of unnecessary litigation. As shown in the affirmation by the appeals court in the petitioner's 2023 appeal of the district courts' decision, the appeals courts' September 2023 ruling adamantly expresses frustration and vexation, including a warning to the appellant of sanctions if the appellant continues to pursue his judicial remedies, in efforts to protect, and, in exercise of his constitutional rights, and the sanctions described are *"obtain permission first to*

*file",* whereas the petitioner has already asked the court for permission to appeal by filing a May 10, 2023 petition pursuant to Federal Rules of Appellate Procedure Rule 5, and the courts' ruling states that (permission is not necessary except has a sanction), this approach simply perpetuates continued litigation, where appellate review of the 2009 final judgment would ultimately resolve litigation. This appears to be in opposition the correct legal standards of FRAP RULE 5, and frustrates the pursuit of judicial remedies by a litigant. As evidence of the courts frustration on these judicial remedies, the Appeal Courts' September 11, 2023 ruling refers to the appellants' pursuing of his judicial remedies as: *vexatious and duplicative and clearly meritless, and frivolous under the second circuits approach*; as the district courts' April 10,2023 decision states *"the arguments presented in the independent action were previously presented in this case to no avail and also related litigation created a preclusive effect"*, and apparently, the timing limitation of rule 60 (c) (1) being applied to rule 60 (d) (1) and clause (3), as it is encompassed in the previous mandate of the appeal of the appellants' 60 (b) (6) decision, along with, holding, the successive use of the judicial remedies available in the rules seeking to have his appeal heard, has being: duplicative, vexatious, and clearly meritless appeals, motions, or other papers related to the February 2009 final judgment, indicating any filing related to the February 2009 final judgment is precluded by the previous mandates. This conflicts with Burnett v. New York Central R. Co., 380 U.S 424 at 429-430 (1965) "Respondent could not have relied upon policy of repose embodies in the limitations statute, for it was aware that the petitioner was actively pursuing his judicial remedies."

The court abused it's discretion, other circuits hold that 1915 (d) and Rule 12 (b) (6) frivolous standard applies to the claims within a complaint and any subsequent appeals that may follow,

when, after the trial court properly developed the facts of the case, and appropriately resolved genuine issues of disputed fact, in this case the district court found that the petitioners' original complaint made a prima facie case. This court and other circuits in addressing the "frivolous" standard, "fails to state a claim on which relief can be granted", I.e. "lacks an arguable basis in law or fact" follow a different approach. *(The 7th circuit,* In *Castillo v. Cook County Mail Room Dept., 990 f.2d 304, 306, (7th Cir. 1993)* "We reverse and remand with instructions that counsel be appointed for Castillo", "An "arguable basis in law" is a very low standard to meet", *Castillo at 306 the 7th* Circuit court of appeals specifically discusses that the district court in deciding *Castillo* relied on the approach of the 2nd Circuit in deciding the case; and the 7th Circuit indicates that by the district court using that approach in applying 1915 (d) "fails to state a claim upon which relief can be granted", "no arguable basis in law or fact", and in regards to the case before them and in reviewing the 2nd Circuit's approach in which the district court relied upon in deciding the case before them stated: quoting the 7th Circuit, *Castillo at 306*, "we cannot, nor can anyone" make a determination", "a fact finder faced with this meager record has no way to determine.") In contrast to the approach followed in this case by the 2nd Circuit "where the district court found the plaintiff met a prima facie case", the 7th Circuit along with several other circuits follow a different approach, that: "fails to state a claim on which relief can be granted" is correctly applied by following the approach as outlined in *Denton v. Hernandez, 504 U.S. 25 (1992); as Denton* outlines the correct interpretation, that 1915 (b), now 1915 (e) (2)(B) (i) and (ii); and Rule 12 (b) (6) are applicable to the complaint and claims within the complaint, *Denton at 30* "Judge Schroeder's lead opinion concluded that a district court could dismiss a complaint as frivolous only if the allegations conflicted with judicially noticeable facts,

that is, facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id, at 1426* (quoting Fed. Rule Evid. 201)" quoting *Denton at 33* "An in forma pauperis complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely, Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age old insight that many allegations might be "strange , but true; for truth is always strange, Stranger than fiction." Lord Byron, Don Juan canto XIV, stanza 101 (T. Steffan, e. Steffan, W. Pratt eds. 1977)"; *Denton at 34*, "the appeals court abused it's discretion, the court inappropriately resolved genuine issues of disputed fact, the court applied erroneous legal conclusions", also see, , as "a complaint filed in forma pauperis which fails to state a claim under Federal Rules of Civil Procedure 12(b)(6) may nonetheless have 'an arguable basis in law' precluding dismissal under section 1915 (d)" *Denton,112 S.Ct. at 1733, quoting Neitzke, 490 U.S. at 428"*; the 9th Circuit follows the same approach as the 7th Circuit along with the 5th Circuit and the 6th Circuit and several other circuits follow the same approach as the 7th Circuit, in applying 1915 (e)(2)(B), "previously 1915 (d)"; see *Gilbert v. Arizona, 1992 U.S. App. Lexis 1043 (9th Cir. 1992);* ( decision reversed, 1915 (d) is applicable to a complaint and the claims within a complaint); and *Fields v. City of Cleveland, 1995 U.S. App. Lexis 8540 (6th Cir. 1995),* (1915(d) is not applicable if alleged infringement is on a legal interest that does exist, or if facts do not appear to be delusional Citing Denton, case can be properly disposed of by summary judgment after factual development, judgment vacated and remanded) *;and Abner v. SBC (lAmeritech), 86 Fed. Appx. 958 (6th Cir. 2004)( 1915 (d) is applicable to complaint); and Bailey v. Turner, 149 Fed. Appx. 276 at 277 (5th Cir. 2005),* a claim, "lacks an arguable basis in

law or fact, if it is based on a indisputably meritless legal theory or, if after providing the plaintiff the opportunity to present additional facts when necessary if the facts alleged are clearly baseless", (vacated and remanded in part), *and Parker v. Carpenter, 1992 U.S. App. Lexis 30768 (5th Cir. 1992)* (reversed, claims upon which relief can be granted).

The questions present are important, as preserving the substantive right of access to the courts may be at risk if a litigant's substantive right to appeal a final judgment is impossible without an independent action. See *Wright & Miller, section 2868 independent action for relief, 11 Federal Practice & Procedure, Civil section 2868 (3d ed.),(April 2021 update) n.7-8 "The Supreme Court . In United States v. Beggerly, a 1998 action, when it held that the remedy is only available to prevent a grave miscarriage of justice;...Independent actions must: if Rule 60 (b) in to be interpreted as a coherent whole, be reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of "res judicata."* The two different approaches yield two substantively and materially different outcomes depending upon the opposing interpretations.

This courts' guidance on these relevant issues would also ensure that hundreds or more litigants are not systematically shut out of court, as if a bulwark is placed before the litigant and his appeal, in violation of the 1st amendments "right to petition the government for redress of grievances", and the 5th and 14th amendments "due process" and 14th amendments "equal protection of the law" and Article IV section 2 of the U.S. Constitution "right to sue and defend", due to the obscurity that now exist See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 at 533 (1972), "that right, the right of access to the courts is part of the right of petition protected by the first amendment", also see Sure-Tan Inc. v. NLRB, 467 U.S.

883 at 897 (1984) "The court stressed that the right of access to the court for redress of wrongs is an aspect of the first amendment right to petition the government", also see Chamber v. Baltimore and Ohio R.R., 207 U.S. 142 at 148 (1907) "(under Article IV section 2 of the U.S. Constitution, the right to sue and defend is fundamental and conservative of all other rights", also see Christopher v. Harbury, 530 U.S. 403 at 415 (2002) n. 12 ("Recognition the the right to access the courts is ancillary to the underlying clam a plaintiff cannot be shutout of court, right of access to court is grounded in the 5th and 14th Amendment Due Process clause", also see Boddie v. Connecticut, 401 U.S. 371, 377 (1971) "Due process at a minimum requires , persons forced to settle their claims of right and duty through the judicial process, must be given meaningful opportunity to be heard" and Boddie at 383-84, "access to the courts is a substantive right under the Due Process Clause" also see Erwin Chemerinsky, Constitutional Law: Principles and Policies, 419-420 (1997)(Right of access to courts is grounded in 5th and 14th amendments, right to Due Process). Blacks law dictionary tenth edition p. 1529 defines "substantive right": (An essential right that potentially effects the outcome to a lawsuit and is capable of legal enforcement and protection). Under the approach followed by the Second Circuit a mandate is applied broadly and immutably to the final judgment itself, in this instant case a hearing would have revealed that summary judgment was granted, when the governing law precluded granting of summary judgment. Other Circuits treatment of a request to set aside a final judgment make an appeal of a final judgment possible, preserving the litigant's right to appeal a final judgment: *Buckeye Cellulose Corp v. Braggs Electric Construction Co., (CA8th, 1975), 569 F.2d 1036 "no notice was sent to parties, ordered the judgment vacated and re-entered to preserve plaintiff's appeal"; Clarke v. Burkle, 570 F.2d [824] at 831-832 (8th Cir.*

*1978) at 831(*six year delay not unreasonable), at 832 "to have held the hearing would have consumed little time and effort, and In ruling upon the motion and amendments the district court would have had the benefit of all of the facts, and we would have had the benefit of those facts in reviewing the action of the trial court in failing to hold a hearing legally amounted to abuse of discretion, and we think that a hearing must now be held by the district court." *Fidelity Deposit Co. of Md. v. Usaform Hail Pool Inc. (CA5th 1975), 523 F.2d 744, "the trial court properly vacated and re-entered judgment under Rule 60(b)(6) so timely, appeal could be taken"; and Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, (CADC 1974) 500 F.2d 808, "ordered to vacate and re-enter judgment in order to preserve right of appeal"; and, FDIC v. Alker, (CA. 3d, 1956) 234 F.2d 113 (* abuse of discretion where no hearing was conducted); *and Boughner v. Secretary of H.E.W. (CA, 3d 1978) 572 F.2d 976; Held,(* abuse of discretion there was no assessment of the circumstance).

**CONCLUSION**

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

Christopher Everson,

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