

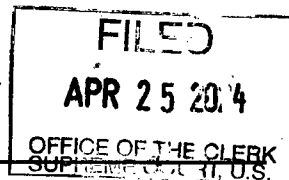
23-7399

Supreme Court of the United States

1 First St. NE  
Washington, DC 20543  
(202)479-3000

ORIGINAL

Docket No: \_\_\_\_\_



In re: Gilbert M. Martinez

vs.

THE UNITED STATES THIRD  
CIRCUIT COURT OF APPEALS

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ON PETITION FOR A WRIT OF MANDAMUS TO THE  
U.S. THIRD CIRCUIT COURT OF APPEALS  
APPEAL CASE NO. 23-3000

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**PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE  
ALL WRITS ACT, 28 U.S.C. 1651 AND DECLARATORY JUDGMENT  
ACT PURSUANT TO 28 U.S.C.A. § 2201**

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Pro Se Attorney at law  
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### **QUESTIONS PRESENTED**

a. Whether the Circuit court in an abuse of the courts discretion concluded relief under Rule 60(b)(6) could not be obtained because appellant could of sought the same relief by means of appeal ?

Suggested Answer: Yes

b. Whether the Circuit court in an abuse of the courts discretion concluded the district court was without jurisdiction to alter the mandate of their court on the basis of matters included or includable in [a] prior appeal ?

Suggested Answer: Yes

c. Whether the Circuit court in an abuse of the courts discretion failed to discuss the merits and give its reasons for rejecting appellants argument on appeal averring that the trial court judge violated F.P.R. 12(b)(2) when he dismissed the case for lack of subject matter Jurisdiction ?

Suggested Answer: Yes

d. Whether the Circuit Court in an abuse of the courts discretion held that plaintiff failed to exhaust the Commissioner's administrative remedies which was waivable under the statue 42U.S.C.405(g) ?

Suggested Answer: Yes

e. Whether the Circuit court abused the courts discretion by not finding the trial court judge was required to recuse himself in accordance with plaintiffs affidavit filed under 28 USC144 ?

Suggested Answer: Yes

f. Whether the Circuit court abused the courts discretion by not finding the trial court arbitrarily granted defendants motion for an enlargement of time that failed to show good cause ?

Suggested Answer: Yes

## **STATEMENT OF RELATED CASES**

On or about April 19, 2014 the petitioner filed a complaint for Social Security review in the Eastern district court of Pennsylvania against the Commissioner of Social Security docketed under case no. 14-1860. Jude Paul S. Diamond presided over my case. My appeal to the Third Circuit was docketed under case no. 16-1956 and was denied on 10/26/2016.

## **STATEMENT OF THE LOWER COURTS JURISDICTION**

The third circuit appeals court jurisdiction was invoked pursuant to 28 U.S.C. 1291. The District Court has jurisdiction pursuant to 42 U.S.C. § 405(g). The provision section 405(g), allows a claimant to seek review within sixty days of a post-hearing final determination. See Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966).

## **DECISIONS IN QUESTION**

The Circuit courts Per Curiam Opinion entered on March 1, 2024 affirming the district courts October 12, 2023 order denying plaintiffs motion to void judgment at doc. No. 38 The district courts Order dismissing the complaint with prejudice on 7/13/2022 for lack of subject matter jurisdiction at doc no. 29 ; The district courts Order granting defendant an enlargement of time on 6/2/2022 at doc no. 17; Publishing is unknown.

## **CERTIFICATE OF INTEREST FOR GILBERT M. MARTINEZ**

Pursuant to Federal Circuit Rule 47.4(a) and Federal Rule of Appellate Procedure 26.1, Petitioner Gilbert Martinez certifies the following identification of corporate parents, subsidiaries and affiliates: NONE

The names of all law firms and defendants that have an interest in this case but have not yet appeared are listed below:

Solicitor General of the United States  
Department of Justice, Room 5616  
950 Pennsylvania Ave. NW  
Washington, DC 20530-0001.

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## **JURISDICTION**

This court has jurisdiction pursuant to The All Writs Act, 28 U.S.C. 1651 U.S. Const. art. I, § 4. and the Declaratory Judgment Act of 1934 (28 U.S.C.A. § 2201 et seq.) The Judiciary Act of 1798 Section.3, Article III Section. 2 of the U.S. Constitution. The All Writs Act (28 U.S. Code § 1651) gave the "Supreme Court and all courts established by Act of Congress" the authority to issue writs of mandamus "in aid of their respective jurisdictions and agreeable to the usages and principles of law."

## **ISSUES PRESENTED**

The Petitioner Gilbert M. Martinez has commenced this Civil action seeking Mandamus against the Third circuit court Appellate court because they have misrepresented the law on repeat appeals in order to deprive appellant of an award of benefits, costs and attorney fees. On 3/1/2024 the circuit court affirmed the district courts judgment denying plaintiffs 60(b)(4)(5)(6) motion to void and or vacate the trial courts judgment. (case no.23-3000) There, the circuit court in an abuse of the courts discretion concluded that the district court is without jurisdiction to alter the mandate of the appeals court on the basis of matters included in a prior appeal, and that the relief under Rule 60(b)(6) could have reasonably been sought by means of appeal. Subsequently, the circuit court refused to entertain matters raised in appellants prior appeal for which the court intentionally misapprehended the law, the essential facts to the case, and deprived plaintiff of the district courts jurisdiction under 42 U.S.C. 405(g). There the third circuit court in an abuse of the courts discretion concluded: (1) That the appellant failed to exhaust the Commissioner's administrative remedies which was waivable in accordance with the statute because plaintiff had a final hearing before an Administrative Law Judge. (2) That there was no disqualifying bias pursuant to 28 USC 144 because the accusations against the trial judge were based on legal errors he made in the previous case he presided over that plaintiff filed for Social Security Review under docket no.14-1860. (3) That the district court judge did not

abuse the courts discretion by granting defendants motion for and enlargement of time, although they did not demonstrate good cause for the delay and a meritorious defense. Additionally, the circuit court in an abuse of the courts discretion never bothered to give appellant any reason for rejecting the due process issues raised about the trial judge not affording plaintiff an opportunity to respond to the defendants motion for enlargement of time, and the obvious violation of F.P.R.12(b)(2) which prohibits defendant from filing a motion to dismiss on the ground of lack of subject matter jurisdiction after they have defaulted in the case.

### **STATEMENT OF THE CASE**

1. On August 31 ,2011 plaintiff filed an application for supplement security income, denied on January 5 ,2012. Administrative Law Judge Jack Penca presided over the claim. A video hearing was held on July 23 2013, and he denied plaintiff's claims on August 15 ,2013.
2. At the evidentiary hearing ALJ Penca deprived claimant of a full, and fair hearing on the record by not affording him the right to cross examine doctor Richard which was testifying on behalf of the state. After doctor Richard testified ALJ Penca stated he wanted to get the vocational experts testimony in before allowing any cross-examination. He then concluded the hearing by stating, " Sorry were out of time."
3. The hearing record transcripts was edited to make it appear as if ALJ Penca gave claimant an opportunity to cross examine doctor Richard, and that I declined his offer.
- 4.. Petitioner filed for review in the U.S. Eastern District court on or about 3/24/2014 under docket no.14-cv-1860. However, the complaint was not officially filed until 5/19/2022 at doc.4
5. The case was originally assigned to judge James Gardner which allegedly passed away and then reassigned to Judge Paul S. Diamond.
6. Plaintiff asserted identical facts of fraud and abuse of process against ALJ

Penca in the pleadings before the district court. At the very bare minimum Judge Diamond should have held a hearing to review the SSA hearing video tapes which he purposely neglected to conduct being derelict of his duties, and to the best of petitioners recollection counsel did not refute the accusations of fraud.

7. At the time Judge Diamond had substantial medical evidence from Doctor Alexandra Etkin before him proving claimants disability. He refused to consider the medical evidence because the doctors report permanently disabled claimant. He used the excuse that the medical evidence was not presented to ALJ Penca at the time of hearing, although he was informed that the medical report did not become readily available until after the hearing because claimant did not see doctor Etkin until 10/3/2013.

8. On November 13, 2019 ALJ Paul Barker Jr, held a evidentiary hearing for a new disability application. and he deliberately deprived appellant of an award through fraud. He concluded, "the claimant has the following severe impairments: degenerative disc disease, status post gunshot wound to the right hand and rheumatoid arthritis (20 CER 416.920(c)).The above medically determinable impairments significantly limit the claimant's ability to perform basic work activities as required by SSR 85-28. He then contradicted his own findings by concluding that claimants impairments were not severe enough to prevent him from working at a medium exertional level.

9. While questioning the Social Security Administrations vocational expert witness (Ms. Pamela Nelligan)ALJ Barter asked her whether at the light or medium exertional level a person with claimants condition having to take two days a month off of work due to a flare-up of symptoms, if there could be a job in the National economy that petitioner could perform ? She stated, no there would not be based on her professional experience training and placing people in jobs.

10. ALJ intentionally did not discuss the vocational experts testimony in his decision order so he could deprive claimant of an award, and he purposely failed to identify her by name.

11. On 1/13/2021 Administrative Law Judge Elana Hollo held a new evidentiary hearing for a new application via telephone and wouldn't permit claimant to testify to the medical records which were relevant to proving claimants disability claim. After about five minutes of testimony she abruptly terminated the hearing in order to prevent taking in evidence that would implicate petitioners treating doctors of purposely misdiagnosing claimants disease.

12. ALJ Elana Hollo refused to subpoena medical records that petitioner requested for her to obtain from Berks Community Health Center and Dr. Sotomayer's medical office. These two medical facilities being directed by the government deliberately withheld claimants blood results containing (CCP) Cyclic Citrullinated Peptide Levels to prevent claimant from getting an award of benefits.

13. Claimant requested that the Social Security Administration incorporate medical records from past hearings in the file which they stated it would be included, but none of the C.D. files mailed to claimant on three separate occasions contained any of the medical evidence that were relevant to establishing claimants Rheumatoid arthritis.

14. On March 16 ,2022 ALJ Hollo entered a decision using the same malicious tactics as ALJ Barter did through fraud. She contradicted her own findings holding that claimants impairments were not severe enough to prevent him from working in order to deprive claimant of an award.

15. She concluded in her decision, " the claimant has the following sever impairments: rheumatoid arthritis, degenerative disc disease (DDD) of the cervical and lumbar spine, degenerative joint disease (DJD) of the right elbow, and status-post gunshot wound to the right forearm (20 CFR 416. 920 (c). The above medically determinable impairments significantly limit the ability to perform basic work activities as required by SSR 85-28."

16. Plaintiffs present case for Social Security review was filed in the district court on 3/18/2022 under docket no. 22-cv-1016. Id at doc. 2 The case was assigned to a unknown judge and then reassigned to Judge Paul S. Diamond.



17. On or about 4/9/2022 plaintiff filed a motion to recuse against judge Diamond which purposely misconstrued the accusations against him as a being legal errors he made in the previous case when the accusations clearly were not free from invidious discrimination.' See **Dandridge v. Williams, 397 U. S. 471 (1970)**

18. On April 12 ,2022 Judge Diamond arbitrarily entered a order denying plaintiffs motion to recuse and he instructed the clerks office to restrict the motion and his order from public access.

19. On 4/14/2022 I spoke to a clerk of the district court named Michelle Hummel and her supervisor Ann Murphy which told plaintiff that its not appearing on the docket because I filed the motion ex parte. The supervisor stated that ex parte means the filed documents are only available to the court, and not to the public. She refused to properly docket the motion and the judges corresponding order.

20. On or about 4/15/2022 I filed an affidavit pursuant to 28 USC 144 moving the district judge once again to recuse himself setting forth identical accusations of bias & prejudice. The trial court disregarded the affidavit and he never bothered to enter a decision on the matter. Section 144 makes a district judge's recusal mandatory upon a timely and sufficient affidavit accompanied by a certificate from counsel that the affidavit is made in good faith. See **United States v. Balistrieri, 779 F.2d 1191, 1202-03 (7th Cir. 1985)**.

21. On May 17,2022 the defendant defaulted in the case, and on May 28 2022, I duly served the respondent with a 14 day notice for default judgment.

22. On June 1 ,2022 the Social Security Administration filed a motion for an enlargement of time. Counsel did not demonstrate good cause and a meritorious defense to the trial court for not filling a timely defense which the judge granted a day later on June 2 ,2022 without affording plaintiff the opportunity to respond to defendants motion. See **Peters Creek Sanitary Auth. v. Welch,681 A.2d 167, 170 (Pa. 1996)**. Without just cause for the delay, it constitutes an abject indifference to

the [r]ules. Also See **Budget Blinds v. White, 536 F.3d 244 (3d Cir.**

**2008)**(citing Harad, 839 F.2d at 982) Elements required for extending time.

23. On 6/9/2022 plaintiff filed a 60(b) motion to void the trial courts order granting defendant an enlargement of time, and I responded to their motion to dismiss the complaint for lack of subject matter jurisdiction for which I argued was prohibited by FPR12(b)(2) because counsel defaulted in the case.

24. On 7/13/2022 Judge Diamond violated FPR 12(b)(2) by dismissing the complaint with prejudice for lack of subject matter jurisdiction. Id at doc.**22** See **Advanced Cardiovascular Systems, 988 F.2d at 1160** “A motion asserting any of the defenses [listed in Rule 12(b) must be made before pleading if a responsive pleading is allowed”); 5B Wright & Miller § 1357, p. 408.

25. On 8/1/2022 plaintiff filed his notice to appeal. Id at doc.**29**  
Notice of Appeal Case Number 22-2411.

26. On May 23 2023 the Third Circuit court affirmed the district courts judgment dismissing the case with prejudice for lack of subject matter jurisdiction, and modified the trial courts order to a dismissal without prejudice.Id at doc.**17**  
(See case no.22-2411)

27. On July 28, 2022, Plaintiff filed a Mandamus petition in the third appeals Court,which was docketed under 22-2372. (The circuit court denied the petition on September 13, 2022. See In re Martinez, 2022 WL 4180978, at \*1-2 & n.1.)

28. On 10/12/2023 The district court denied plaintiffs 60(b)(4)(5)(6) motion to void and or vacate judgment.Id at doc. **28**

29. On 11/07/2023 plaintiffs notice to appeal was filed. Id at doc. **39**  
Notice of Appeal Case Number 23-3000.

30. On March 1,2024 the Third circuit court affirmed the district courts judgment denying plaintiffs 60(b)(4)(5)(6) motion to vacate or void judgment. Id at doc.**21** (case no.23-3000)

### **REASONS FOR GRANTING WRIT:**

A writ is appropriate in matters where the applicant can demonstrate a “judicial usurpation of power” or a clear abuse of discretion. See *id.* at 380 (citations and quotations omitted); See **Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 26 (1943)**

The issues presented here is not whether the Third Circuit Appeals court and Eastern district court of Pennsylvania made errors of law but rather whether they intentionally misapprehended the law in order to deprive plaintiff of his constitutional rights, and an award of benefits. The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Ex parte Peru, supra*, p. 584, and cases cited; *Ex parte Newman*, 14 Wall. 152, 165-6, 169; *Ex parte Sawyer*, 21 Wall. 235, 238; **Interstate Commerce Comm’n v. United States ex rel. Campbell, 289 U. S. 385,394.** In this case both the circuit court and district court fraudulently misrepresented 28 USC 405(g) to deprive plaintiff of the courts jurisdiction knowing that the Commissioner’s exhaustive remedies is waivable because plaintiff had a final hearing before an administrative law Judge in accordance with the statute. “Section 405(g) “contains two separate elements: first, a jurisdictional requirement that claims be presented to the agency, and second, ‘waivable . . . requirement that the administrative remedies prescribed by the Secretary be exhausted.’” *Smith*, 139 S. Ct. at 1773 (quoting **Mathews v. Eldridge, 424 U.S. 319, 328 (1976)**) Also See **Steigerwald v. Commissioner of**

Social Security, 326 F.R.D. 469, 101 Fed. R. Serv. 3d 483 (6<sup>th</sup> Cir. 2018 ) The Circuit Court in an abuse of the courts discretion affirmed the district courts judgment denying plaintiffs 60 (b)(4)(5)(6) motion on March 1, 2024. The court concluded that district court is without jurisdiction to alter the mandate of their court on the basis of matters included or includable in [a] prior appeal, and that it is improper to grant relief under Rule 60(b)(6) if the aggrieved party could have reasonably sought the same relief by means of appeal.” Here the circuit courts appeal decision is fatally defective because there was no mandate made in lieu of the courts previous opinion on appeal that directed the trial court to take a specific action. See Appeal case no.22-2411 not precedential Per Curiam opinion.

See **Black’s law dictionary 8<sup>th</sup> edition (2004):**

**Mandate: 1. An order from an appellate court directing a lower court to take a specified action.**

Subsequently, no further appeal could be taken on the matter because the Appellate Court modified the district courts order to a dismissal without prejudice. An appeal lies only from a final judgment of a district court, since federal law limits appellate jurisdiction to review of "final decisions" of that court. 28 U.S.C. § 1291 (1994). See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). See Joseph Locurto v. Howard Safir Commissioner of the New York City 264 F.3d 154 (2nd Cir. 2001) “A decision without prejudice is not appealable since it is not a final judgment.” See Kelly v. Great Atlantic & Pacific Tea Co., 86 F.2d 296 (4th Cir.1936). Also See Management Investors v. United Mine Workers, 610 F.2d 384 (6th Cir.1979) Since the district court did not expressly

grant leave to amend the complaint by amendment, the plaintiff may move the district court to reopen the action or vacate the judgment rather than seek appellate review. See **Britt v. Dejoy 45 F.4th 790 (4th Cir. 2022)** Therefore, the only potential path to relief for plaintiff, then would have been through filing a 60 (b)motion to vacate the trial courts judgment dismissing the case for lack of subject matter jurisdiction.

The relief requested here cannot be sought through any other form or from any other court.because the lower courts have both fraudulently misrepresented the law in order to deprive petitioner of an award of Social Security benefits, and the right to due process of law. A final appeal decision was entered in on March 1, 2024 which leaves plaintiff without alternate remedy. Fraud on the Court occurs when the judicial machinery itself has been tainted. Fraud on the Court makes void the Orders and Judgments of that Court. See **Bullock v United States. 763 F.2d 1115,1121 (10th Cir. 1985)**. Not only the named applicant will benefit from the relief but also similarly situated impoverished citizens with a disability, and it will serve to restore and preserve the integrity of the United States courts justice system. It is in the public's interest that cases are tried in a fair, appropriate, and expeditious manner, with the full panoply of constitutional and due process rights according to the law. The indisputable facts are well settled in this case and remain uncontested by the Social Security Administration. The Federal government will not be irreparably harmed by the relief sought herein as it has no cognizable legal interest in supporting proceedings that violate the Constitution, and the due

process clause. As the United States Supreme Court recognized in Goss v. Lopez, unwarranted violations of constitutional rights promote no interests of the State. See Goss v. Lopez, 419 U.S. 565, 579 (1975). Additionally, a party may obtain a declaration of existing legal rights, duties, or status of parties by filing a petition under the Declaratory Judgments Act, The purpose of the Declaratory Judgments Act is to “settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.” See Bayada Nurses, Inc. v. Dep’t of Labor & Indus., 8 A.3d 866, 874 (Pa. 2010) (citing 42 Pa.C.S. § 7541(a)).

### CONCLUSION

Wherefore, the petitioner respectfully asks this court to issue a Writ of Mandamus directing the Third Circuit Appeals court to vacate its prior appeal decisions, and to direct the district court judge to enter a default judgment as a matter course awarding plaintiff Social Security disability benefits retroactive from August 31 ,2011 until present with costs and attorney fees for the obvious fraud in this case, violations of the constitution, and due process of law. Petitioner further asks the court to decree that the Social Security Administration violated plaintiffs fundamental right to due process of law and whatever other relief the court deem just & proper in the interest of justice.

I swear under penalty of the under United States laws that my statements in this petition are true and correct to the best of my knowledge. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Respectfully Submitted,

Dated: 4/24/2024



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