

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Steven Anthony Graham — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Steven Anthony Graham
(Your Name)

Post Office Box 2000
(Address)

Folkston, Georgia 31537
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

IS THE JUDGMENT OF THE COURT OF APPEALS INVALID BECAUSE OF THE FAILURE TO FOLLOW THE PROCEDURE NORMALLY FOLLOWED IN ADDRESSING THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS OF 28 U.S.C. §1651. AND, IF SO, DOES THE INVALID JUDGMENT APPROVED THE DISTRICT COURT'S REFUSAL TO FOLLOW THE PROCEDURES NORMALLY FOLLOWED IN FEDERAL RULE OF CIVIL PROCEDURE 16?

LIST OF PARTIES

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

☐ 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:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

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☒ is unpublished.

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

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☒ is unpublished.

☐ For cases from **state courts**:

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

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☐ is unpublished.

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

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☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 24, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 28, 2017, and a copy of the order denying rehearing appears at Appendix C.

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

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

☐ For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III Standing to bring Mandamus Action under 28 U.S.C. §1651(a).
2. First and Sixth Amendment rights to access the federal courts.
3. Fifth Amendment Substantive and Procedural Due Process rights to access the Federal Rules of Civil Procedure.
4. 28 U.S.C. §2254
5. 28 U.S.C. §2253
6. 28 U.S.C. §1346
7. 28 U.S.C. §§ 1404(a) and 1404(b)
8. 5 U.S.C. §552a
9. 5 U.S.C. §552a(g)(5)

STATEMENT OF THE CASE

(i) Course of Proceedings and Dispositions in the Courts Below

On August 18, 1997, after a jury trial, the district court for the Northern District of Florida adjudicated the petitioner guilty of conspiracy to possess with the intent to distribute cocaine and cocaine base and sentenced the petitioner to 420 months imprisonment. (Doc. 30). The petitioner appealed; the Court of appeals affirmed; and issued its mandate on November 8, 1999. (Doc 60). The petitioner filed a 28 U.S.C. § 2255 petition, which the district court denied on July 15, 2003. (Doc 83). The petitioner appealed the denial of his § 2255 petition and the Court of Appeals denied the petitioner's motion for a certificate of appealability. (Doc 101).¹

On October 15, 2015, in consideration of 18 U.S.C. §3582(c)(2), the district court sua sponte ordered the petitioner's sentence reduced two levels, to 341 months, under Amendment 782 and the only reasons the Statement of Reasons provided for the new sentence was that it was within the amended guidelines range. (Doc 320, 321). The district court denied petitioner's emergency motion to stay the Court's order pending a determination (in the United States District Court for the Middle District of Florida) on the accuracy of the petitioner's presentence report. (Doc 322, 323).

¹ The docket sheet reflects that between July 15, 2003, and May 11, 2015, the petitioner filed numerous motions and appeals that were denied by the lower courts.

On March 23, 2015, the petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2241, in the Middle District of Florida, with an attached supporting memorandum of law, in which he raised three grounds for relief:

(1) That his detention is being executed on inaccurate and false information contained in presentence report of Inmate Central File and Privacy Folder; (2) that petitioner's Custody violates Due Process and the United States Constitution; and (3) that petitioner is actually innocent of the charged conspiracy in the indictment and his 35-year sentence amounted to cruel and unusual punishment. (Doc. 1-Case No. 5:15-cv-142-Oc-10PRL).

On March 30, 2015, the district court directed the Warden of FCC Coleman to respond to the petition for habeas corpus relief. (Doc. 3). On August 3, 2015, the Warden responded to the petition, arguing that the district court lacks jurisdiction to consider the petition. (Doc. 10). On August 24, 2015, the petitioner filed a reply to the Warden's response, a motion for summary judgment and a request for preliminary injunction, arguing that, because the Warden mischaracterized the petition, he had no occasion to provide any answer to the allegations in the petition. (Doc 3, 10, 16).²

As the petition in Case No. 5:15-cv-142-Oc-10PRL, was voluntarily dismissed, prior to the Court of Appeals decision presently on review, the following background are related only to the Court of Appeals decision of the district court's Judgment and Order in Case No. 5:15-cv-390-Oc-10PRL.

² On June 14, 2017, the petitioner voluntarily dismissed his petition because the district court issued a new Order To Show Cause, recharacterizing the issues in the petition, from "execution of sentence" to "illegal sentence" and suspended and abated the petitioner's motion for summary judgment and his request for preliminary injunction.

Plaintiff, a prisoner at the Federal Correctional Complex, in Coleman, Florida, has submitted a Complaint under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346. In addition, plaintiff claims that his "detention is being executed on inaccurate and false information contained in presentence report of Inmate Central File and Privacy Folder," in violation of the Privacy Act, 5 U.S.C. § 552a. Compl. at 11. Plaintiff seeks monetary damages "for the negligence of government officials as stated in his Administrative Tort Claim," and an order to compel BOP to verify with the U.S. Probation Office the information contained in his presentence report. Id. at 13.

An FTCA Claim may be prosecuted "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. §1402(b). Although this venue may be proper for litigating the Privacy Act Claim, see 5 U.S.C. §552a(g)(5), the FTCA claim is based on plaintiff's confinement in Florida. Hence, in the interest of justice and judicial economy, this case will be transferred to a court properly situated to hear both claims. Accordingly, it is ORDERED that pursuant to 28 U.S.C. § 1404(a) and 1404(b), this case is TRANSFERRED to the United States District Court for the Middle District of Florida. The Clerk of this Court shall file and docket the complaint. Whether plaintiff should be permitted to proceed further without prepayment of fees is a determination to be made by the transferee court. (See Appx. D; Transfer Order from the U.S. District Court of the District of Columbia).

On August 7, 2015, the district court for the Middle District of Florida issued an order for the petitioner to:

either file a fully completed Prisoner Consent form and Financial Certificate (if Plaintiff desires to proceed as a pauper) or pay the \$400.00 filing fee (if Plaintiff does not desire to proceed as a pauper.)

On September 1, 2015, in compliance with the district court's order, the petitioner paid the required filing fee--not because he was not a pauper--but because prison officials had refused to sign the financial certificate which would have allowed the petitioner to proceed as a pauper. The petitioner was therefore responsible for service upon the Defendants pursuant to court order. On September 11, 2015, the petitioner prepared a completed summons for the

Clerk's signature and the Court's seal. The petitioner presented the summons to the Clerk of Court, along with a cover-letter and prepaid stamped envelope, for the return of the summons and the cover-letter.

On September 16, 2015, the summons was entered on the district court's docket as "one incomplete summons on AO Form with all Defendants listed." Out of concern that the case would be dismissed without any notice and, because prison officials had refused to sign the Financial Certificate for the petitioner to proceed as a pauper, the petitioner wrote the Clerk of Court and asked her to identify the incompleteness. In the letter, the petitioner notified the Clerk that her failure to answer would result in the filing of a writ of mandamus. The letter was construed as a motion for clarification of service of process. Petitioner subsequently filed motion for a writ of mandamus and/or motion to extend time to perfect service of process. (see Docket Entries). On November 13, 2015, the magistrate judge issued an order, recharacterizing the Complaint as a Bivens action and illegally modifying the Transfer Order of the District Court of Columbia. The magistrate judge's order granted 120 days to perfect service of process and directed the Clerk to "send Plaintiff blank summons forms." The Order also stated that, "Plaintiff must complete a copy of each of the enclosed form FOR EACH DEFENDANT." (See Docket Entries).

The petitioner subsequently filed "Objection to the Magistrate Judge's Order," arguing that pursuant to the Transfer Order of the District Court of Columbia, plaintiff has submitted a Tort Claim and a Privacy Act Claim, and that the magistrate judge exceeded his authority by rescreening the complaint. The petitioner had

further objected to the magistrate judge's conclusion that, "Plaintiff must complete a copy of each of the enclosed forms FOR EACH DEFENDANT." (See Dist. Ct. Doc. Entry).

On January 25, 2016, the magistrate judge issued an Order stating that:

The Clerk is directed to modify the cause of the case to reflect the correct basis for the suit and terminate all individually named defendants. Further, the Clerk is directed to return signed summons to the plaintiff.

In this Order, at page 3, the magistrate judge laid out a Pretrial Scheduling Order ("PTSO") that would control the course of action during the litigation by stating that:

If Defendants file a motion to dismiss, or a motion for summary judgment, Plaintiff shall have TWENTY-ONE(21)DAYS to file a response to the motion. Pro se Plaintiff is advised out of an abundance of caution that the granting of this motion would represent an adjudication of this case which may foreclose subsequent litigation on the matter. In preparing a response, Plaintiff should be aware of the provisions of Rule 56 of the Federal Rules of Civil Procedure.

Rule 56 provides that when a motion for summary judgment is supported by affidavits and/or other documents, the party opposing the motion may not depend upon the mere allegations in his pleading to counter it. Pursuant to Rule 56, the party opposing the motion must respond with counter sworn affidavits and/or documents to set forth specific facts showing that there is a genuine issue of material fact in dispute. If the opposing party fails to respond to the motion or responds, but the response does not comply with the requirements of Rule 56 as stated above, the Court may declare that the facts in the affidavit and/or documents supporting the motion are established as true and that there is no genuine issue of material fact in dispute. In that event, if the applicable law allows, the party or parties who filed the motion will be entitled to have the motion granted and final judgment entered in his/their favor based upon the pleadings, affidavits, and other documentation. If the motion is granted, there will be no trial, and the case will be terminated in this Court. IT IS SO ORDERED. (See Appx. E-- Pretrial Scheduling Order of January 25, 2016).

Thereafter, the summons and Complaint were served, and on February 24, 2016, the petitioner provided the district court with certification of service and an affidavit reflecting proper, completed service on the United States and its Agencies. Based upon the PTSO, on April 4, 2016, Attorney for the United States ~~appeared and filed a motion to dismiss~~, the petitioner's Complaint, which was supported by matters outside the pleading, e.g., a Declaration and numerous Attachments. (See Dist. Ct. Doc Entries).

In compliance with the court's PTSO, on May 26, 2016, the petitioner responded to the United States' Motion to Dismiss, with counter sworn affidavit and documents to set forth specific facts showing that there were genuine issues of material fact in dispute. Shortly thereafter, in light of the district court's PTSO, and the provisions of Rule 56 of the Federal Rule of Civil Procedure, on May 30, 2016, the petitioner served the United States with seven Requests for Admission. On June 30, 2016, the United States timely responded to these requests (but carelessly modified the court's PTSO), and objected to each request on the grounds that it is premature:

The Court has not approved discovery in this Track One case. As well, the United States' Motion to Dismiss is pending, the Court's granting of which would obviate the need for discovery. Accordingly, the United States will timely respond, and further object as appropriate, to discovery requests promulgated pursuant to the Court's Order.

To the extent a response is required at this time, the United States denies this request on the grounds that it is premature.

The petitioner subsequently filed a Motion to Compel and/or Motion for Summary Judgment, on July 13, 2016, based on the United States' failure to comply with the Admission Rule, arguing that:

Because the case management requirements in Track Three and Track Two Cases does not apply to Track One Cases, the United States' objections to requests for admission, on the grounds that they are premature, are **unjustified**, and the Court may order either that the matter is admitted or that an amended answer be served. Fed. R. Civ. P. 36(a).

Thereafter, on August 3, 2016, the United States filed a Response In Opposition to the petitioner's Motion to Compel and/or Motion for Summary Judgment, based upon its Responses to Requests for Admission, arguing that:

The Court has not yet entered a **scheduling** order governing the conduct of this case. Nor has Plaintiff sought leave to serve discovery in this case. Because the Court has not approved discovery, any discovery served prior thereto, including Plaintiff's requests, is premature, and the United States should not be compelled to answer these impermissible requests...

Even if, however, Plaintiff's Requests for Admission were properly served and the United States' objections fails to find support under the Rules, Federal Rule of Civil Procedure contemplates the withdrawal of an "admission" where, as here, "it would promote the presentation of the merits of the action and if the Court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. Fed. R. Civ. P. 36(b).

(See Appx. F--United States' Response in Opposition to Motion to Compel and/or Motion for Summary Judgment).

On December 15, 2015, the petitioner filed a "Motion for Expedited Ruling on Plaintiff's Pretrial Dispositive Motion and the United States Modification of the Court's Pretrial Scheduling Order, Without Good Cause and Without the Judge's Consent." The substance of the motion was that the United States violated Fed. R. Civ. P. 16(b)(4), by modifying the district court's PTSO and the

petitioner's Requests for Admission. In the motion, the petitioner argued that: "Rule 36(b) also states that a court's permission is 'subject to the provisions of Rule 16 governing amendment of a pretrial order.'" The petitioner further argued that:

Because the United States "carelessly modified" the Court's PTSO, without a showing of good cause and without the judge's consent, it also modified Plaintiff's Requests for Admission as premature. However, based upon the Court's PTSO, under Rule 16, it is crystal clear that Plaintiff's Requests for Admission are not premature as the United States wanted them to be. As a result thereof, the United States have yet to respond and, as such, have failed to timely served its responses to Plaintiff's Requests for Admission, in violation of Federal Rule of Civil Procedure 36(a). "A matter is admitted unless, within 30 days after being served, the party whom the request is directed serve on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." Fed. R. Civ. P. 36(a)(3).

Although the United States carelessly modified the Court's PTSO and Plaintiff's Requests for Admission, it declared that the "United States will timely respond, and further object as appropriate, to discovery request promulgated pursuant to the Court's Order." Now, even if the district court concludes that the United States was diligent, under Rule 16, the district courts generally allows amendment of Pretrial Orders if three criteria are met. Specifically, courts look to whether: (1) amendments of PTSO will result in substantial injury to the opposing party; (2) refusing to allow the amendment might result in injustice to the movant [United States]; and (3) amendment will inconvenience the court. Because the United States' motion to withdraw have modified the court's PTSO, it must show that the withdrawal is necessary to prevent injustice. The United States fell short of making this showing, which resulted in substantial injury to Plaintiff, by delaying the case for approximately six months and brought inconvenience to the court.

See Appx. G--Motion for Expedited Ruling on Plaintiff's Dispositive Motion. In the motion for expedited ruling, the petitioner also requested that the United States be sanctioned to the full extent, as authorized by Rule 37, for failing "to obey a scheduling or other pretrial order." Fed. R. Civ. P. 16(f)(1)(C). The motion was specifically directed at the United States, for carelessly

modifying the Court's PTSO, but the United States never answer or denied the allegation in the motion. Appx. G.

On January 9, 2017, the magistrate judge ignored the substance of the motion and instead took the opportunity to join the United States Attorney in the modification of the court's PTSO and the petitioner's motion for expedited ruling by tying then pending petition, for a writ of habeas corpus pursuant to §2241, to the United States Motion to Dismiss, with the "intent" of having the district court judge granting the Motion to Dismiss. The intended result would be that both cases, would be disposed of in a mandate from the Court of Appeals, in violation of the PTSO.

In his Order, the magistrate judge referred to "Plaintiff" as "petitioner," but the only petition that the petitioner had pending was the petition for a writ of habeas corpus pursuant to §2241. The magistrate judge also indicated, in a footnote, the Court's intention to grant "Defendant's Motion to Dismiss Plaintiff's Complaint," despite the fact that it was redundant based upon the Requests for Admission, pursuant to Rule 56:

Rule 56 provides that when a motion for summary judgment is supported by affidavit and/or other documents [in this case, Requests for Admission], the party opposing the motion may not depend upon the mere allegations in his pleading to counter it. (See Appx. E--PTSO).

The magistrate judge's Order stated that:

The Court endeavors to adjudicate all matters, including habeas corpus petition, in a timely manner, as justice ordinarily requires and as the pending caseload allows. In addition to petitioner's case, the court has a heavy habeas docket, as well as a heavy civil and criminal caseload. Petitioner should note that district courts have broad discretion in managing their cases. Accordingly, the motion is DENIED. The Court notes, however, that it will consider the petition and the motion for summary judgment as expeditiously as possible and as the Court's Calendar permits, as it does in every case. (See Appx. B).

In accordance with the magistrate judge's Order, that the Court "will consider the petition and the motion for summary judgment as expeditiously as possible....," the district court judge issued an Order on March 7, 2017, granting the United States' Motion to Dismiss the petitioner's Complaint and directed the Clerk to enter Judgment accordingly, terminate the petitioner's motion for summary judgment and close the file. The Civil Judgment had an attached Civil Appeals Jurisdictional Checklist, which invited the petitioner to appeal the district court judge's order granting the United States' Motion to Dismiss. However, based upon the PTSO and the record in this case, the illegal modification of the district court's PTSO rendered the granting of the United States' Motion to Dismiss and the accompanying Judgment non-final and unappealable. See Appx. B--Judgment and Order of District Court.

(ii) The Mandamus Proceedings in the Court of Appeals

The petitioner based his Petition for a Writ of Mandamus on 28 U.S.C. §1651(a) and Article III of the United States Constitution. First, the petitioner claimed that he was entitled to mandamus relief because the district court judge turned a **blind eye** to the United States' illegal modification of the court's PTSO. The mandamus petition also contended, based on the district court's PTSO, the illegal modification rendered the district court's Order granting the United States Motion to Dismiss and the accompanying Judgment non-final and unappealable; therefore, the district court judge illegally sought a mandate from the Court of Appeals to sustain the illegal modification of the district court's PTSO.

The mandamus petition also argued, with citation to Eleventh Circuit's precedent, that although district courts have broad discretion in managing their cases, the petitioner also have a **clear and indisputable right** for the district court to follow the PTSO because it "controls the course of action unless the court modifies it." Fed. R. Civ. P. 16(d). The mandamus petition further argued that the "schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The Eleventh Circuit's precedent stated, "this good cause standard precludes modification unless the schedule cannot be met despite the diligence of the party seeking the extension." Accordingly, the mandamus petition seeked an Order from the Court of Appeals directing the district court to comply with its own PTSO, under Fed. R. Civ. P. 16, in order to appropriately make a ruling on the petitioner's motion for summary judgment pursuant to Fed. R. Civ. P. 56, which is based upon the United States' "Admission" under Fed. R. Civ. P. 36(a), that has been pending in the petitioner's Complaint challenging his unlawful detention and the Bureau of Prisons staff negligence, and have now been terminated by the district court without any explanation. See Mandamus Petition filed in Court of Appeals.

Second, the mandamus petition also argued, with citation to this Court's precedent, that the district court judge's refusal to address the United States' illegal modification of the court's PTSO, has effectively **deprived** the petitioner of the opportunity to litigate his claims and **denied him access to the courts** regarding the underlying judicial proceedings, challenging his

unlawful detention and BOP's staff negligence, in violation of his constitutional due process rights as well as his substantive and procedural due process rights. This Court precedent stated, to state a claim for denial of access to the courts, the petitioner must identify a policy or practice that denies prisoners meaningful access to the courts and allege that the policy or practice **hindered** the prisoner from pursuing a legal claim. The petitioner was also required to show that the alleged denial of access caused actual injury. Actual injury occurs when a prisoner demonstrates that a "nonfrivolous" and "arguable" claim was lost because of the alleged denial of access to the court.

As evidence of the policy or practice that hindered the petitioner from pursuing his legal claims, the mandamus petition pointed to the following statements in the United States' Response in Opposition to Plaintiff's Motion to Compel and/or Motion for Summary Judgment, which stated that:

Because the Court has not approved discovery or entered deadlines governing the conduct of discovery, any discovery served prior thereto, including Plaintiff's request, is premature, and the United States should not be compelled to answer these impermissible requests. (See Appx. F at Pg. 4-5).

The mandamus petition also demonstrated that a "nonfrivolous" and "arguable" claim was lost because of the denial of access to the court by the United States:

Indeed, Plaintiff's claims would be **indefensible** if these requests are deemed admitted ...Plaintiff's requests for admission requires the United States to admit allegations that go to the very heart of Plaintiff's claims... Moreover, Plaintiff has filed a summary judgment motion based "undisputed material facts" that find their basis exclusively in the purported "admission" of these requests. There can be no question that the merits of this case would be promoted if these "admissions" were withdrawn. (See Appx. F at Pg. 6-7).

The mandamus petition argued that the petitioner has a substantive liberty interest in seeking relief from the unlawful detention, which is based upon inaccurate information in his presentence report and that it has been established that the United States have violated a federally protected right to access the Federal Rule of Civil Procedure.

Third, the mandamus petition also claimed that the district court judge, the magistrate judge, the district court clerk and the Assistant U.S. Attorney has engaged in a pattern of judicial bias and collusion, by illegally modifying the court's PTSO, and other court Orders in favor of the Government, in violation of due process under the Fifth Amendment. The mandamus petition contended that the bias was because of the petitioner's pro se status and also because of the "money" demanded in the Complaint. In support of those claims, the petitioner pointed to the "United States' Response In Opposition To Plaintiff's Motion To Compel and/or Motion for Summary Judgment," and the district court's Orders:

Plaintiff's Motion to Compel and/or Motion for Summary Judgment, fanciful in its recitation of "facts" and reckless with the conclusions it asks of this Court, seeks to co-opt the Court in a preposterous game of "gotcha." In this alternate reality, Plaintiff's propounded Requests for Admission would be deemed admitted (even though served before discovery opened and properly objected to) and these "admissions" would subsequently form the sole basis for his motion for summary judgment. Plaintiff's motion requires the Court not only to ignore the substance of the United States' responses but also the standards for deeming responses admitted and the high threshold required to grant summary judgment. (See Appx. F at Pg. 1).

The mandamus petition argued that, it was clear from the district court and the magistrate judges' Order, that, they share the same beliefs as the AUSA--that pro se prisoners are not entitled to the same TREATMENT under the Federal Rules of Civil Procedure--as the Government lawyers are. Accordingly, the mandamus petition further sought an Order, from the Court of Appeals, directing the district court judge, the magistrate judge, the district court clerk and the AUSA, to recuse themselves from the proceedings in light of their illegal modification of the court's PTSO, and the subsequent court Orders granting the Government's motion to dismiss over petitioner's motion for summary judgment.

Upon receiving the mandamus petition, the Clerk of the Court of Appeals notified the petitioner, in a procedural letter:

Your petition for a writ of mandamus (or other writ) and motion to proceed in forma pauperis has been received. The Prison Litigation Reform Act of 1995 (hereinafter "the Act"), 28 U.S.C. §1915 (as amended), requires, prior to filing of such a petition by a prisoner, payment of a docketing fee to the Clerk of this Court.

If you are unable to pay the docketing fee in full at this time, you may allow the institution of your confinement to pay the fee in installments from your prison account. To do so, you should read, complete and sign the enclosed CONSENT FORM which incorporates provisions authorized by the Act. The form should be returned to this office. Please read the enclosed CONSENT FORM carefully--it contains important information concerning the requirements of the Act in connection with the payment of the filing fee. If, within 30 days from the date of this notice, you HAVE NOT either: (1) complete, signed and returned to this office the enclosed CONSENT FORM, or (2) paid the docketing fee in full to the Clerk of this Court, this matter will be dismissed for want of prosecution, pursuant to 11th Cir. Rule 42-1(b). If we receive a completed and signed CONSENT FORM or if you pay the docketing fee in full, your petition for a writ will be submitted to the Court for a decision.

The consent form which was sent to the petitioner by the Clerk for the Court of Appeals stated:

By completing this form, which incorporates provisions of the Prison Litigation Reform Act of 1995, 28 U.S.C. §1915 (as amended), you are authorizing the Institution of your confinement ("the Institution") to pay the required \$505.00 Appellate filing fee ("filing fee") ~~from your prison account to the district court where~~ your notice of appeal was filed.

In order to avoid dismissal for want of prosecution, petitioner completed and signed the form, and included a statement, stating that:

Although he understands that this is a STANDARD FORM petitioner nevertheless notes that he does not sign this CONSENT based on the filing of a notice of appeal in the district court. A notice of appeal was not filed in this case because the district court's Order is non-final and unappealable. See Petition for Writ of Mandamus at page 17.

Upon receiving the completed and signed consent form, the Clerk of the Court of Appeals, in a second procedural letter, stated:

I am returning to you unfiled your consent form which you have submitted. The wrong consent form was sent to you in error. Please see correct consent form attached complete and submit. (See Appx. H-- Procedural Letters and CONSENT FORMS).

The Court of Appeals Order denying the Petition for a Writ of Mandamus stated:

To the extent Graham seeks a favorable ruling on, or any other relief relating to, his FTCA complaint, mandamus relief is not appropriate. Graham had the adequate alternative remedy of pursuing an appeal of the district court's dismissal of his FTCA action. See 28 U.S.C. §1291. He cannot use mandamus as a substitute for an appeal. (See Appx. A at Pg. 2).

The petitioner filed a motion for reconsideration in which he argued that the Court of Appeals erred by providing an answer/opinion, dismissing the mandamus petition without first receiving the benefit of any briefing from the Government on the question of the petitioner's entitlement to mandamus relief as required by Federal Rule of Appellate Procedure 21(b)(1)-(7).

The petitioner's motion for reconsideration also argued, with citation to this Court's precedent which rejected a similar departure from the usual procedure, that (1) because the Court of Appeals did not received the benefit of any briefing from the Government, it may not rule on the merits of the mandamus petition; (2) because the Court sidesteps [the Rule 21(b)] process by deciding the merits of the mandamus petition, and then justifying its denial of mandamus relief based on its adjudication of the actual merits, it in essence decided the writ without jurisdiction; and (3) because the Court inverted Rule 21(b)(1), it has placed too heavy a burden on the petitioner, while releaving the Government of its burden of proving that the petitioner is not entitled to mandamus relief.

The Court of Appeals Order denying the Petitioner's motion for reconsideration stated:

Graham has not shown any points of law or fact that we overlooked or misapprehended in previously denying his mandamus petition. While he argues that we were required to obtain a response from the government before ruling on his mandamus petition, Rule 21(b)(1) explicitly allows us to dispose of a mandamus petition without requiring a response. See Fed. R. App. P. 21(b)(1). Further, this situation is not like the COA requirement in §2254 appeals because we have original jurisdiction over mandamus petitions and thus, once a mandamus petition is filed, we need not take any additional steps to gain jurisdiction over the petition. See Fed. R. App. P. 21(a); 28 U.S.C. §1651. (Appx. C).

REASONS FOR GRANTING THE PETITION

THE JUDGMENT OF THE COURT OF APPEALS IS INVALID BECAUSE OF THE FAILURE TO FOLLOW THE PROCEDURE NORMALLY FOLLOWED IN ADDRESSING THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS OF 28 U.S.C. §1651. FURTHERMORE, THE INVALID JUDGMENT APPROVED THE DISTRICT COURT'S REFUSAL TO FOLLOW THE PROCEDURES NORMALLY FOLLOWED IN FEDERAL RULE OF CIVIL PROCEDURE 16.

The mandamus petition, in the Court of Appeals, primarily argued that the district court's Order granting the Government's motion to dismiss is non-final and unappealable because the district court turned a blind eye to the Government's illegal modification of the court's PTSO in violation of Fed. R. Civ. P. 16. In ignoring the issue of whether the district court's Order is non-final and unappealable, the Court of Appeals found that mandamus relief is not appropriate because the petitioner had the adequate alternative remedy of pursuing an appeal of the district court's dismissal of the FTCA action; and the privacy Act Claim. The Court of Appeal is incorrect because the district court did not dismiss the FTCA action, it **improperly** granted the Government's motion to dismiss and terminated the petitioner's **properly filed** motion for summary judgment without any explanation. Therefore, the FTCA action and the Privacy Act Claim are still pending in the district court pursuant to the district court's PTSO, under Fed. R. Civ. P. 16. See Sosa v. Airprint Sys., Inc., 133 F.3d 1418 (11th Cir. 1998). (Appx. E).

Furthermore, and critically important, the Court of Appeals approved the district court's **improper** action by failing to comply with Fed R. App. P. 21(b); 28 U.S.C. §1651. Rule 21(b) provides:

- (1) The court may deny the petition without an answer. Otherwise, it **must** order the respondent, if any, to answer within a fixed time.
- (2) The clerk must serve the order to response on all persons directed to respond.
- (3) Two or more respondents may answer jointly.
- (4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.
- (5) If briefing or oral argument is required, the clerk must advised the parties, and when appropriate, the trial-court judge or amicus curiae.
- (6) The proceeding must be given preference over ordinary civil cases.
- (7) The circuit clerk must sent a copy of the final disposition to the trial-court judge.

Pursuant to Rule 21(b), in a motion for reconsideration, the petitioner challenged the Court of Appeals authority to provide an answer/opinion, dismissing the mandamus petition without first receiving the benefit of any briefing form the Government on the question of the petitioner's entitlement to mandamus relief. Fed. R. App. P. 21(b)(1). In its Order denying the petitioner's motion for reconsideration, the Court of Appeals found that:

[The petitioner] has not shown any points of law or fact that we overlooked or misapprehended in previously denying his mandamus petition. While he argues that we were required to obtain a response from the government before ruling on his mandamus petition, Rule 21(b)(1) explicitly allows us to dispose of a mandamus petition without requiring a response.

The petitioner contends that this finding clearly misrepresents Rule 21(b)(1). See Appx. C at Pg. 3. Specifically, the first sentence in the Rule clearly allows the Court of Appeals to dispose of the mandamus petition without an answer from the Court itself.

However, the second sentence in the Rule clearly states that, if the Court is going to provide an answer, "it must order the respondent, if any, to answer within a fixed time." Therefore, the Court of Appeals lacked the authority to rule on the merits of the mandamus petition unless and until the Court issues an Order directing the Government to answer the mandamus petition within a fixed time. Fed. R. App. P. 21(b)(1).

In his motion for reconsideration, the petitioner also argued that the procedure used by the Court of Appeals in denying the mandamus petition was similar to a procedure which was recently rejected by this Court in Buck v. Davis, 580 U.S.____, 137 S.Ct. 759, 774, 197 L.Ed.2d 1 (2017). Relying on its previous precedent, Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed. 2d 931 (2003), this Court concluded that:

(1) Until the prisoner secures a COA, the court of appeals may not rule on the merits of his case; (2) when a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. Id. at 336-337, 123 S.Ct. 1029 154 L.Ed.2d 931; (3) when a reviewing court inverts the statutory order of operations and "first decid[es] the merits of an appeal, ... then justif[ies] the denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage. Miller-El, 537 U.S., at 336-337, 123 S.Ct. 1029, 154 L.Ed.2d 931. Miller-El flatly prohibits such a departure from the procedure prescribed by §2253.

Base upon its misrepresentation of Rule 21(b)(1), in its Order denying the motion for reconsideration, the Court of Appeals further found that:

This situation is not like the COA requirement in §2254 appeals because we have original jurisdiction over mandamus petitions and thus, once a mandamus petition is filed, we need not take any additional steps to gain jurisdiction over the petition. See Fed. R. App. P. 21(a); 28 U.S.C. §1651.

Appx. C at Pg. 3. The petitioner contends that there are no meaningful distinction between the COA requirement in §2254 appeals and the requirement for mandamus petitions in Rule 21 because, like Rule 21(a), the Court of Appeals also have original jurisdiction over §2254 appeals pursuant to 28 U.S.C. §1291. Thus, the additional step in a §2254 appeal would be from §1291 to the COA requirement. Likewise, the additional step in mandamus petitions would be from Rule 21(a) to Rule 21(b).

Furthermore, if the petitioner in a §2254 appeal secures a COA, and the petitioner in a mandamus petition satisfies Rule 21(a), as evident in Buck v. Davis, supra, then the government is required to brief the issues on appeal, or in the mandamus petition, before the Court of Appeals has the authority to Rule on the merits of the appeal or the mandamus petition. Moreover, like the COA requirement, only a finding that a petitioner failed to secure a COA or failed to satisfy Rule 21(a), would allow the Court of Appeals to deny a COA or a mandamus petition without requiring a response from the government. Here, the Court of Appeals did not find that the petitioner failed to satisfy Rule 21(a). Therefore, the petitioner maintains his argument that the Court of Appeals erred by providing an answer/opinion, dismissing the mandamus petition without first receiving the benefit of any briefing from the government on the question of petitioner's entitlement to mandamus relief as required by Federal Rule of Appellate Procedure 21(b)(1)-(7).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Steve A. Q. L.

Date: 12/15/2017