UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2335

IN RE: TRENTON JOHN TOMPKINS,
Petitioner.

Petition for Panel Rehearing

ARGUMENT

Point 1 - Even Conceding that a Showing for Mandamus Relief was Not Made, the Court Still Could and Should Have Considered His Outstanding Motion to Correct Error, both Origionally and Sua Sponte

In its opinion, the Court states: "Tompkins has not shown he has a clear and undisputable right to our consideration of his 'Motion to Correct Error', which was essentially a duplicate submission of his request for rehearing, which we denied." Applying the "clear and undisputable" standard after it was seen via Petition for Extraordinary Writ does not address why the motion was not considered when submitted origionally under F.R.A.P. 27.

A Motion to Correct Error is fundamentally different than a Petition for Rehearing, even where the content is "essentially a duplicate submission" (*quoting* opinion at 4). The grant of a Petition for Rehearing requires a two-thirds vote. But I.O.P. 10.6 "Summary action may be taken only by a unanimous vote of the panel" (*quoting* I.O.P. 10.6). So if that vote was affected by an undisputable mistake (ie: not reading the Argument in Support of Appeal or overlooking items in the record) the solution must be to correct the mistake and again require unanimous vote. To do otherwise is prejudicial and arbitrary, as it holds a mistake made by the court against the

appealing party in a manner dictated by luck.

By calling the content duplicatitive, without considering the purpose and standards applicable to each submission, the Court's opinion reaches the wrong legal conclusion, that "Court review of that motion would have had no effect on the disposition of his appeal" (at 4-5). If the Court actually believed that conclusion, it could have simply denied the motion on its merits then denied the Petition for Extraordinary Writ as moot. It couldn't, because ruling on the motion would require addressing its error, whereas denying a Petition for Rehearing requires no reasoning at all.

The Petition for Extraordinary Writ states "Each motion provides specific legal grounds for relief, as required by F.R.A.P. 27(a)(2)(A)." It also states "[that] not considering the petitioner's brief, appendix or motions violated his due process right to meaningful appellate review" (*see Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 892, 47 L.Ed.2d 18 (1976). *cited in motion*).

The right to have his Motion to Correct Error considered is the same as the right to the relief itself, and is stated at length in the motion. Ultimately the Court's error violated petitioner's 14th Amendment right to due process, and regardless of the vehicle used to present it, the Court has a duty to address an action which violated the Constitution.

Point 2 - Requiring Either the Grant of a Petition for Rehearing or a "Showing for Mandamus Relief" Improperly Treats Petitioner's Constitutional Right to De Novo Review as a Discretionary Act that the Court (or Supreme Court) can Refuse to Perform, Without Explanation or Consideration of the Underlying Merits

The Court never provided a reason that Petitioner's origional Petition for Rehearing was denied. It didn't need a reason, because granting a Petition for Rehearing is a discretionary act,

one almost never performed. Petitioner can't even know if anyone read that document, or if anyone will read this one.

Similiarly, a Petition for Writ of Certiorari is granted only under the rarest of circumstances. Petitioner did file for writ in the Supreme Court, but the Constitution is meaningless if it protects only the handful of prisoners granted review in a given year. "The purpose of the Supreme Court is not provide quality control by correcting simple errors. Addressing errors in the Court of Appeals where they are made is more certain and more efficient than relying on petitions for writs of certiorari" (*quoting* Petition for Writ of Certiorari at 6, copy provided).

Petitioner had a legal right to the relief in his motion, and the right to motion for it under the Federal Rules of Appellate Procedure. No other remedy adequately assured him relief. Even the Court's opinion concedes "A writ of mandamus is a drastic remedy available only in extraordinary cases. *See In re Diet Drugs Prods. Liab. Litig.*, 418 F.3d 372, 378 (3d Cir. 2005)". And by not providing relief, petitioner's Constitutionally protected right to Due Process was violated.

Point 3 - Granting Summary Affirmation Violated both Petitioner's 14th Amendment Right and I.O.P 10.6 Itself, in that a Substantial Question was Objectively Presented

I.O.P 10.6 allows summary affirmation "if it clearly appears that no substantial question is presented". This is an objective test. It can only check for the existence of a substantial question, because it is applied before appellants submit their briefs.

A substantial question was submitted in District Court on 12/21/20 with the notice of appeal, which declares under penalty of perjury "This appeal is taken in good faith and I intend to

raise the following issues: -whether the court errored as a matter of law in granting dismissal..." (cont.) (*see* Exhibit 2). More questions were submitted on 1/29/21 in the Argument in Support of Appeal (Exhibit 3). Despite being submitted solely for summary determination purposes, the opinion which granted summary affirmation (*Tompkins v. Hackett*, 841 Fed. App'x 367 (3d Cir. 2021) (No. 20-3590) (per curiam)) never once refers to the Argument in Support of Appeal. It appears whoever wrote the opinion never saw or never read the Argument in Support of Appeal. This is likely, as the order which requested it said its submission was optional. *What other reason would exist for not referring to the document at all?* It didn't merely present questions, it made a full argument, and stated "appellant's appendices are done" and "his brief is written" and that he only needed computer access to finish typing.

If the reality is that a portion of prisoner cases are simply denied review regardless of what is submitted, the Court ought to at least be honest about it, and change I.O.P. 10.6 to reflect the real practice in use.

Legally, the origional case (W.D. Pa. Civ. 2-20-cv-01141) is almost the same as *Grier v. Klem*, 591 F.3d 672 (3d Cir. 2010), especially since *Commonwealth v. Cosby*, 2021 Pa. LEXIS 2761 (2021) so favorably held deals to not prosecute are enforcible. But to understand that, the Court needed to follow the Federal Rules of Appellate Procedure, it needed to read Appellant's brief.

CONCLUSION

The Court should rule upon the Motion to Correct Error submitted in No. 20-3590. It can then **DENY** this Petition, and **DENY** the Petition for Extraordinary Writ, as **MOOT**.

Respectfully Submitted,

Trenton Tompkins, *Petitioner*
cert of service filed