No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT ANNABEL, II — PETITIONER
(Your Name)

vs.

MICHIGAN DEPARTMENT OF CORRECTIONS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Annabel, II, #414234
(Your Name)

Ionia Correctional Facility, 1576 W. Bluewater Hwy.
(Address)

Ionia, Michigan 48846
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

I. The Sixth Circuit is alone in its PLRA interpretation that a sua sponte dismissal for failure to state a claim at screening no longer affords a "full and fair opportunity" to object or amend the complaint but that res judicata applies.

II. Did the former facts combined with the new facts state viable claims for retaliation, conspiracy, deliberate indifference, RICO, Rehabilitation Act and ADA?

LIST OF PARTIES

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:

ROBERT ANNABEL, II,

Petitioner,

vs.

MICHIGAN DEPARTMENT OF CORRECTIONS; ARAMARK CORPORATION, INC.; DANIEL HEYNS; WILLIE SMITH; NANNETTE NORWOOD; ERICA HUSS; JOHN CHRISTIANSEN; KEVIN WOODS; CHRISTOPHER KING; UNKNOWN ZWIKER; S. RYKSE; E. SMITH; DENNIS GRANDY; J. VANNORTRICK; UNKNOWN SCOTT; UNKNOWN BERRINGTON; UNKNOWN BENNETT; UNKNOWN BURNS; UNKNOWN EYER; D. CHRISTIANSEN; JOSEPH NOVAK; JAMES APOL; W. YEE; ROBERT DAVIS; UNKNOWN SLEIGHT; UNKNOWN KRONK; J. DAUGHERTY; and C. CHENEY,

Respondents.

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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

[X] 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,
[X] is unpublished.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,
[X] is unpublished.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

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was October 2, 2017.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 11, 2018, 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

Prison Litigation Reform Act, 42 U.S.C. § 1997e(c):

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

STATEMENT OF CASE

A. Statement of Proceedings.

Petitioner Robert Annabel, II, a prisoner of the Michigan Department of Corrections, while at the Ionia Correctional Facility (ICF), originally filed claims in 2014. See, Annabel v. Mich. Dep't of Corr., et al. (U.S. Dist. W.D.Mich., No. 1:14-cv-756). District Judge Paul L. Maloney denounced a motion for preliminary injunction for access to the courts, holding that Petitioner's filings were per se "frivolous." In Prison Litigation Reform Act (PLRA) screening, Judge Maloney falsely accused him of having "3 strikes" (later another judge corrected Judge Maloney's false accusation, in Annabel v. Erichsen, et al. (U.S. Dist. E.D. Mich., No. 2:15-cv-10345). Without notice and opportunity to object to Judge Maloney's erroneous factual and legal findings, all M.D.O.C. employee defendants were dismissed with prejudice, while 3 non-employee defendants remained but with severe critism of the merits.

Coincidently, at the time of the ruling, defendants and their coworkers began a new campaign of harassment, legal mail tampering, denying photocopies, ect.—resulting in Petitioner missing the deadline to execute process of service upon the remaining 3 defendants, who were dismissed without prejudice for failure to prosecute. Petitioner was also prevented from timely filing a Notice of Appeal, and a subsequent motion to amend complaint was rejected by the district court without filing.

In 2016, he again filed the former claims but added new facts and claims in his 42-page Civil Complaint. (Annabel v. Mich. Dep't of Corr., et al. (U.S. Dist. W.D.Mich., No. 1:16-cv-543)). The

present Complaint also was revised to improve clarity of facts according to relevance. Again, Judge Maloney sua sponte dismissed at PLRA screening, without notice and opportunity to be heard, on grounds of res judicata and misjoinder of claims. And again, there were many personal attacks vehemently berrating Petitioner as a frequent litigant and finding no good cause for an appeal. However, the no good cause finding was vacated and Petitioner proceeded in forma pauperis on appeal. The district court's dismissal was filed October 14, 2016.

Petitioner filed timely Notice of Appeal. On October 2, 2017, the United States Court of Appeals for the Sixth Circuit granted his appeal in part, remanded in part. See, Annabel v. Mich. Dep't of Corr, et al. (U.S. COA 6th Cir., No. 16-2532). However, the district court findings of res judicata were upheld and the Sixth Circuit failed to address a conflict with its precedent and all other federal jurisdictions. On May 11, 2018, the Sixth Circuit denied panel rehearing and rehearing en banc.

This petition for a writ of certiorari now comes before the Supreme Court of the United States.

B. Statement of Facts.

Petitioner filed a very tediously detailed 42-page Civil Complaint in the district court offering numerous direct and circumstantial facts from which retaliation, conspiracy, deliberate indifference, and other federal and State claims could be infered. However, some of these facts and claims were based upon a former action dismissed with prejudice sua sponte at PLRA screening for which the Sixth Circuit

affords no notice and opportunity to object for a prisoner litigant, nor permits opportunity to amend the complaint. Moreover, as the present complaint alleges, he was prevented from timely appealing the prior action by prison officials. The present Complaint combines former facts with new facts to cure deficiencies in former claims and to support many new claims.

Petitioner never had an opportunity to cite controlling authorities or explain how the facts are relevant to state a claim. Rather, a callous district judge hasty to shun prisoner litigants inappropriately drew factual inferences against Petitioner and based the prior dismissal on disbelief of factual relevance. The district judge also made erroneous findings of, including facts not on the record, and misstated claims.

Because the Sixth Circuit held that res judicata applied per se, the Court never addressed the conflict with Sixth Circuit interpretation of PLRA screening procedures or whether those facts could properly state a claim upon which relief could be granted.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit is alone in its PLRA interpretation that a sua sponte dismissal for failure to state a claim at screening no longer affords a "full and fair opportunity" to object or amend the complaint but that res judicata applies.

> "As this Court and other courts have often recognized, res judicata and collateral estopple relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."

Allen v. McCurry, 449 U.S. 90, 94 (1980).

> "But one general limitation the Court has repeatedly recognized is that the concept of collateral estopple cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case."

Id. at 95. See also, U.S. v. Dominguez, 359 F.3d 839, 844-45 (6th Cir. 2004); Lau v. Meddaugh, 229 F.3d 121, 123 (2nd Cir. 2000). In Pack v. Artuz, 348 F.Supp.2d 63, 75-76 (S.D.N.Y. 2004), that court refused to apply res judicata when the pro se prisoner was deprived a fair opportunity to object to the judge's cursory treatment of his claims under aggressive interrogation tactics. See also, Thomas v. Evans, 888 F.2d 1234, 1242-44 (11th Cir. 1989).

The due process right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiese or contest." Richards v. Jefferson County, 517 U.S. 793, 799 (1996); Allen, 449 U.S. at 101; Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 400-01 (1986)("'free, calculated, deliberate [choice]' not to appeal").

Only the Sixth Circuit still holds that § 1915(e)(2) of the PLRA does not permit a prisoner opportunity to contest the grounds for a sua sponte dismissal, nor to amend his complaint. Grayson v.

Mayview State Hosp., 293 F.3d 103, 110-11 (3rd Cir. 2002); Lopez v. Smith, 203 F.3d 1122, 1128 (9th Cir. 2000)(en banc); Brown v. Johnson, 387 F.3d 1344, 1348-49 (11th Cir. 2004); Benson v. O'Brian, 179 F.3d 1014, 1016 (6th Cir. 1999). Ironically, the Sixth Circuit also held "the dismissal does not prejudice the filing of a paid complaint making the same allegations" — the same without prejudice standard that forbids res judicata and would allow leave to amend the complaint. Id. (citing Denton v. Hernandez, 504 U.S. 25, 34 (1992)).

Moreover, the dissenting opinion in Benson observed:

> "Such a holding would completely negate the policy of this and several other circuits that a plaintiff generally should be given notice and opportunity to respond prior to the district court's sua sponte dismissal of the complaint. ... We very much doubt that the drafters of the PLRA intended to effectuate such a sweeping change to our entire civil litigation practice...."

Id. at 1017. See, Lopez v. Smith, 203 F.3d at 1127; Giano v. Goord, 250 F.3d 146, 151 (2nd Cir. 2001); Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998).

When the Supreme Court overruled the Sixth Circuit's prior PLRA interpretations, this Court held: "We think that the PLRA's screening requirement does not--explicitly or implicitly--justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself." Jones v. Bock, 549 U.S. 199, 214 (2007).

Most courts hold that dismissal for failure to state a claim does not preclude amendment or refiling to cure the deficiencies. City of Plainesville, Ohio v. First Montauk Financial Corp., 178 F.R.D. 180, 185 ft.n. 8 (N.D.Ohio 1998); Lopez v. Smith, 203 F.3d at 1128 ft.n. 8; Giano v. Goord, supra; Bazrowx v. Scott, supra; Denton v. Hernandez, supra; Neitzke v. Williams, 490 U.S. 319, 328 (1989).

Nor does res judicata and failure to state a claim bar a plaintiff from adding more recent or new facts to the prior facts in order to cure deficiencies or to support new claims that had not previously exist. Ortman v. Thomas, 99 F.3d 807, 811 (6th Cir. 1996); Marvel Characters, Inc. v. Simon, 310 F.3d 280, 287 (2nd Cir. 2002); Wilson v. City of Chicago, 120 F.3d 681, 687 (7th Cir. 1997); Thomas v. Evans, 888 F.2d at 1241.

This issue is two-fold: (1) Should this Court overrule the Sixth Circuit's precedent holding that PLRA screening dismissal for failure to state a claim abolishes the usual procedure of full and fair notice with opportunity to respond or amend the complaint, and (2) Does res judicata apply to the present civil action since the district court followed that Sixth Circuit procedure, and Plaintiff pleaded that prison officials prevented process of service and appeal of the former civil action.

The Sixth Circuit alone holds that PLRA screening sua sponte dismissal implies a complete overhaul of civil procedure and that now "sua sponte" no longer requires due process full and fair notice with opportunity to respond or amend the complaint. Again, the Sixth Circuit has read into the PLRA statute what Congress has not written there.

Arbitrary or clearly erroneous dismissals are very common in pro se prisoner litigation, especially when a callous judge's surprise attack is final. "Hasty dismissal of prisoner cases only adds to the burden on the courts by increasing the amount of judicial resources spent at both the appellate and the trial level." Thomas v. Evans, 888 F.2d at 1244; Lopez v. Smith, 203 F.3d at 1130.

The Court of Appeals also failed to properly consider, given its PLRA screening proceedure interpretation and the case-specific circumstances that Petitioner was prevented from filing a prior timely appeal, whether the dismissal for failure to state a claim should have been with prejudice, and res judicata applicable.

First, and most critical to res judicata, is that sua sponte dismissal under the PLRA for failure to state a claim upon which relief can be granted is not a decision on the merits. By its very definition, there are no claims to even decide. Thus, Plaintiff was allowed to attempt to cure the deficiencies by refiling a new complaint.

Second, Petitioner was not given a "full and fair opportunity" to object to the prior sua sponte dismissal and to test the reliability of the grounds upon which it rested. This is not the proper functioning of the judicial adversarial process for which to give a man his day in court. Neither did the Court of Appeals consider that the district court's denial of a preliminary injunction led to prison officials preventing him from timely appealing the prior action.

Third, defendants were never served process in the prior action, thus, are not concerned with the time, costs, or vexation of multiple litigations.

Fourth, the usual procedural practice for a failure to state a claim is to dismiss without prejudice. The Court of Appeals failed to consider whether the district court callously abused its discretion by dismissing the prior action with prejudice.

Fifth, res judicata does not bar combining the former facts with new facts in order to cure deficiencies or support new claims.

II. Did the former facts combined with the new facts state viable claims for retaliation, conspiracy, deliberate indifference, RICO, Rehabilitation Act and ADA?

"The standard for determining whether a plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim." Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)(en banc). "When considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the trial court must accept all of the allegations in the complaint as true, and construe the complaint liberally in favor of plaintiff." Herron v. Harrison, 203 F.3d 410, 414 (6th Cir. 2000). See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Tolan v. Cotton, — U.S. —, —, 134 S.Ct. 1861, 1866 (2014).

The standard is not whether or not the district court believes the prisoner as "to dismiss [the allegations] 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.'" Denton v. Hernandez, 504 U.S. 25, 33 (1992). Accord, Lawler v. Marshall, 898 F.2d 1196, 1199 (6th Cir. 1990). "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Bell Alantic Corp. v. Twombly, 550 U.S. 544, 556 (2007). The decision to dismiss must not be based on whether or not a plaintiff will ultimately prevail on the merits. Skinner v. Switzer, 562 U.S. 521, 529-30 (2011). Facial plausibility exists when the factual content permits a reasonable inference of liability or offers more than a sheer possibility that additional facts likely will be discovered to support a claim. Ashcroft v.

Iqbal, 556 U.S. 662, 678 (2009).

A verified complaint carries the same weight as an affidavit. El Bey v. Roop, 530 F.3d 407, 414 (6th Cir. 2008). "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court abuses its discretion to "adopt[] a heightened proof standard in large part to reduce the availability of discovery in actions that require proof of motive ...." Crawford-El v. Britton, 523 U.S. 574, 595 (1998); Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

"Hasty dismissal of prisoner cases only adds to the burden on the courts by increasing the amount of judicial resources spent at both the appellate and the trial level." Thomas v. Evans, 888 F.2d 1234, 1244 (11th Cir. 1989); Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)(en banc).

a. Novelty of Some Claims.

The Supreme Court implicitly rejected the false logic that prisoners cannot bring viable claims under novel legal theories, holding in Lewis v. Casey, 518 U.S. 343, 353 ft.n. 3 (1996):

> "Depriving someone of an arguable (though not yet established) claim inflicts actual injury, because it deprives him of something of value--arguable claims are settled, bought, and sold."

In another prisoner case, the Supreme Court held: "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002). If a right is clearly established, dismissal is not proper simply because the appropriate test is still uncertain. P.B. v. Koch, 96 F.3d 1298, 1303 ft.n. 4 (9th Cir. 1996). Cf., Everett v. Beard, 290 F.3d 500, 513 (3rd Cir. 2002); Shaw v. Wilson, 721 F.3d 908, 917 (7th Cir. 2013).

a. Conspiracy and Retaliation Claims.

> "A civil conspiracy is an agreement between two or more persons to injure another by unlawful actions. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirators shared in the general conspiratorial objective, and that an overt act was committed in furtherence of the conspiracy that caused injury to the complainant."

Hooks v. Hooks, 771 F.2d 935, 943-44 (6th Cir. 1985). Such claims must be pleaded with some specificity. Farhat v. Jopke, 370 F.3d 580, 599 (6th Cir. 2004). "Conspiracies are by their very nature secret, and it is unreasonable to expect plaintiffs, particularly pro se prisoners, to be able to allege direct or concrete facts in support of a conspiracy claim." Haley v. Dormire, 845 F.2d 1488, 1490 (8th Cir. 1988). "Motive is often very difficult to prove with direct evidence in retaliation cases... Circumstantial evidence may therefore acceptably be the only means of establishing the connection ...." King v. Zamiara, 680 F.3d 686, 695 (6th Cir. 2012)(citations omitted). "For example, a showing that the alleged conspirators have committed acts that 'are unlikely to have been undertaken without an agreement' may allow a jury to infer the existence of a conspiracy." Mendocino Environment Ctr. v. Mendocino County, 193 F.3d 1283, 1301 (9th Cir. 1999). "The possibility that other inferences could be drawn that would provide alternate explanation for the appellants' actions does not entitle them to summary judgment." Id. at 1303. Prior unsuccessful claims "cannot influence our determination of whether these particular complaints are legally frivolous...." Haley v. Dormire, 845 F.2d at 1491.

In claims of conspiracy and retaliation, the courts must look

to "the-totality-of-the-circumstance" and not simply view each incident in isolation. Holzemer v. City of Memphis, 621 F.3d 512, 519 (6th Cir. 2010); Black v. Lane, 22 F.3d 1395, 1400 (7th Cir. 1994). See, dissent in Ashcroft v. Iqbal, 556 U.S. 662, 698 (2009). A chronology of events from which retaliatory harassment may be inferred will suffice, Black v. Lane, at 1399; Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012). Even incidents of harassment which alone do not rise to constitutional injuries may properly be evidence of retaliatory motive. Benison v. Ross, 765 F.3d 649, 661 (6th Cir. 2014); Surprenant v. Rivas, 424 F.3d 5, 22 (1st Cir. 2005); Ehrlich v. Kovack, 135 F.Supp.3d 638, 667 (N.D.Ohio 2015). Cf., Fed. R. Evid. 404(b).

Evidence that defendant gave a false reason for his actions or violated regulations and protocol under false pretenses may show improper motive. Hope v. Pelzer, 536 U.S. 730, 744 (2002); Tingle v. Arbors at Hilliard, 692 F.3d 523, 530 (2012); Paige v. Coyner, 614 F.3d 273, 283 (6th Cir. 2010); Phillips v. Roane County, 534 F.3d 531, 541 (6th Cir. 2008); Walker v. Johnson, 798 F.3d 1085, 1092 (D.C.Cir. 2015); Miller v. Leathers, 913 F.2d 1085, 1088 (4th Cir. 1990); Burton v. Donovan, 210 F.Supp.3d 203, 214 (D.D.C. 2016).

Close temporal proximity between the plaintiff's protected conduct and defendant's adverse action may show motive. Taylor v. Geithner, 703 F.3d 328, 339 (6th Cir. 2013); Paige v. Coyner, supra; Gayle v. Gonyea, 313 F.3d 677, 683 (2nd Cir. 2002)(prison case, 6 day interval).

Disparate treatment be similarly situated prisoners or harassment of a protected class plaintiff belongs to is troubling evidence of retaliatory motive. Clark v. State of Georgia Pardons and Paroles Bd., 915 F.2d 636, 639-40 (11th Cir. 1990); Walker v. Johnson, 798 F.3d at 1092;

Farid v. Goord, 200 F.Supp.2d 220, 238 (W.D.N.Y. 2002).

> "The argument that all of these trees do not add up to a forest, but should simply be viewed as a collection of trees, may contain merit at trial before a finder of fact, but it is unavailing at the summary judgment stage."

Curry v. Scott, 249 F.3d 493, 508-09 (6th Cir. 2001). Other courts have explained the "doctrine of chances" evidence showing recurrent incidents are not mere accident or coincidence. See, Westfield Ins. Co. v. Harris, 134 F.3d 608, 615 (4th Cir. 1998); United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991).

A government action need not independently violate the Constitution to state a claim for retaliation. Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999)(en banc); Mt. Health City Sch. Dist. Bd. v. Doyal, 429 U.S. 274, 283-84 (1977). "[A]n act [of retaliation] need not be egregious to be adverse. LaFountain v. Harry, 716 F.3d 944, 948 (6th Cir. 2013). Harrassment "might be tolerable for a few days and intolerably cruel for weeks or months." Hutto v. Finney, 437 U.S. 678, 686-87 (1978). The mere threat of harm is sufficiently adverse. Watison v. Carter, 668 F.3d at 1114; Scott v. Churchill, 377 F.3d 565, 571 (6th Cir. 2004).

Courts have held various action as adverse, such a seizure of legal property and frequent harassment. Hudson v. Palmer, 468 U.S. 517, 530 (1984); Bell v. Johnson, 308 F.3d 594, 604 (6th Cir. 2002). Legal mail interference. Sallier v. Brooks, 343 F.3d 868, 873-74 (6th Cir. 2003); Parrish v. Johnson, 800 F.2d 600, 604 (6th Cir. 1986). Denying law library access or photocopies. Nei v. Dooley, 372 F.3d 1003, 1007 (8th Cir. 2004); Thaddeus-X v. Blatter, 175 F.3d at 394; Giles v. Tate, 907 F.Supp. 1135 (S.D.Ohio. 1995). Denying or contaminating meals. Beckford v. Portuondo, 151 F.Supp.2d 204, 213 (N.D.N.Y. 2001). Transfer to a hostile environment and denying

the benefits of a lawsuit settlement. LaFountain v. Harry, 716 F.3d at 948. Placing false or malicious statements in prisoner's files. Surprenant v. Rivas, 424 F.3d at 14; Douglas v. Marino, 684 F.Supp. 395, 399-400 (D.N.J. 1988). Erecting barriers to timely filing grievances. Davis v. Goord, 320 F.3d 346, 353 (2nd Cir. 2003).

Retaliation must be a substantial or motivating factor behind the action but need not be the sole reason. Reynolds v. Green, 184 F.3d 589, 595 (6th Cir. 1999). The inquiry is whether a defendant would have taken the same action absent plaintiff's protected conduct not whether their was authority to act. Thomas v. Eby, 481 F.3d 434, 442 (6th Cir. 2007); Surprenant v. Rivas, 424 F.3d at 22; Toolaspashed v. Bureau of Prisons, 286 F.3d 576, 585 (D.C.Cir. 2002).

b. Deliberate Indifference.

An officer may not retaliate via deliberate manipulation of an unwitting proxy any more than by direct actions. Staub v. Proctor Hosp., 562 U.S. 411, 419 (2011); Walker v. Johnson, 798 F.3d at 1085; Surprenant v. Rivas, 424 F.3d at 14. Supervisors are liable for inciting others to participate in retaliation or setting in motion a chain of events. LaFountain v. Harry, 716 F.3d at 949. "But an official with no official authority over another actor can also be liable for that actor's conduct if he induces that actor to violate a third party's constitutional rights, provided that official possessed the requisite intent, such as retaliatory animus." Lacey v. Maricopa County, 693 F.3d 896, 916 (9th Cir. 2012)(en banc). Private parties acting in concert with State officials are also liable under § 1983. Memphis, Tenn. Area Local, Amer. Postal Workers Union v. City of Memphis, 361 F.3d 898, 905 (6th Cir. 2004).

Nor may officials use other prisoners to retaliate. LaFountain v. Harry, 716 F.3d at 948; Riley v. Smith, 570 F.Supp. 522, n.1 (E.D.Mich. 1983).

The Ninth Circuit explained, in Gomez v. Vernon, 255 F.3d 1118, 1127 (9th Cir. 2001):

> "Where the retaliatory acts are traceable to a custom or policy, however, it is unnecessary to demonstrate that the decision-making official directly ordered each act carried out under his edict.... Moreover, a policy-maker's pronouncement that he has not or will not discipline officers that retaliate against prisoner litigants is sufficient evidence of a policy or custom...."

See also, Brock v. Wright, 315 F.3d 158, 165-66 (2nd Cir. 2003); Berry v. City of Detroit, 25 F.3d 1342, 1354-55 (6th Cir. 1994). A policy or custom does not need be in writing to exist. Id. at 1345-46. "The Court agrees with Plaintiff that this 'code of silence' amount to deliberate indifference within the definition provided by the Supreme Court in Farmer." Skinner v. Uphoff, 234 F.Supp.2d 1208, 1215 (D.Wyo. 2002). See, Davis v. Delo, 115 F.3d 1388, 1395-97 (8th Cir. 1997)(supervisor concealing reports of misconduct and 'code of silence'). "That witnesses could not identify by name some of the subordinates whose acts she was charged with authorizing or condoning was irrelevant." Hicks v. Frey, 992 F.2d 1450, 1457 (6th Cir. 1993). It was further held in LaFountain v. Harry, 716 F.3d at 949 (citation omitted):

> "Although defendants are not responsible for adverse actions that they do not cause, they are responsible for 'those consequences that inextricably follow [their] alleged retaliatory conduct[.]'"

As held by the Supreme Court, in Farmer v. Brennan, 511 U.S. 825, 843 ft.n. 8 (1994):

> "[Officer] would not escape liability if the evidence shows that he merely refused to verify underlying facts that he strongly suspects to be true, or declined to confirm inference of risk he strongly suspects to exist."

A supervisor's knowledge in a breakdown in the proper workings of a prison shows liability if he ignored his duty or deligated it to the very personnel causing the harm. Taylor v. Michigan Dep't of Corr., 69 F.3d 73, 81 (6th Cir. 1995); Hill v. Marshall, 962 F.2d 1209, 1213 (6th Cir. 1992). While testimony that reports were sent to a warden factually support he received and knew their contents, warnings from the prisoner himself are not required to show knowledge of risk. Woods v. Lecureux, 110 F.3d 1215, 1223 (6th Cir. 1997). Indeed, the Supreme Court further held, in Farmer, at 843:

> "[I]t does not matter whether the risk comes from a single source or multiple sources any more than it matters whether a prisoner faces excessive risk of attack for reasons personal to him or because all prisoners in his situation face such risk."

c. RICO Claims.

Known as the civil Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964 permits claims to be brought. State law typically determines whether a particular interest amounts to property. Diaz v. Gates, 420 F.3d 897, 899-900 (9th Cir. 2005)(en banc). Intentional interference with contract and prospective business relationships using wrongful imprisonment are RICO injuries. Id. at 900. Courts must not "confuse[] the mere loss of something of value (such as wages) with injury to a property interest (such as the right to earn wages)." Id. at ft.n. 1. Whether the loss is legal entitlement to current employment or prospective future employment is immaterial. Id. at 900-01; Guerrero v. Gates, 442 F.3d 697, 707 (9th Cir. 2006). "There is similarly no room in the statutory language for an additional, amorphous requirement that, for an injury to be to business or

property, the business or property have been the "direct target" of the predicate acts." Diaz v. Gates, 420 F.3d at 901 (citing, Holmes v. Sec. Investor Prot. Corp., 503 U.S. 255, 265-68 (1992)). RICO applies to law enforcement agencies. Id. at 905-06 (concurring opinion). RICO includes extortions, robbery, and similar federal or State law crimes to gain something of value. Scheidler v. Nat'l Org. For Women, Inc., 537 U.S. 393, 409-10 (2003). Unlawfully forcing a prisoner to surrender federal claims deprives him of a valued property interest. See, Lewis v. Casey, 518 U.S. 343, 353 ft.n. 3 (1996). Retaliation is a form of extortion. See, Crawford-El v. Britton, 523 U.S. 574, 588 ft.n. 10 (1998).

d. Rehabilitation Act and ADA Claims.

"The plain language of the ADA demonstrates that the statute was designed to ensure that disabled persons are neither denied access to, nor the benefits of services based on their disability." Allah v. Goord, 405 F.Supp.2d 265, 280 (S.D.N.Y. 2005). See also, Randolph v. Rodgers, 170 F.3d 850, 852 (8th Cir. 1999).

"The prison law library, for example, is a service (and the use of it an activity)...." Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 211 (1998).

> "[M]ental health services and other activities or services undertaken by law enforcement and provided by correctional facilities to those incarcerated are 'services, programs, or activities of a public entity' within the meaning of the ADA."

Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001). See also, Tucker v. Tennessee, 539 F.3d 526, 532 (6th Cir. 2008); McNally v. Prison Health Servs., 46 F.Supp.2d 49, 58 (D.Me. 1999)(prescription medication a service).

"Plaintiffs who allege violations under the ADA, the FHA, and

the Rehabilitation Act may proceed under any or all of three theories: disparate treatment, disparate impact, and failure to make reasonable accommodations." Reg'l Econ. Comm. v. City of Middleton, 294 F.3d 35, 48 (2nd Cir. 2002)(citing, Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 790 (6th Cir. 1996)). See, Tennessee v. Lane, 541 U.S. 509, 532 (2004).

To allege misconduct that independently violated both Title II of the ADA and the Fourteenth Amendment it is sufficient that a prisoner was treated differently than similarly situated prisoners or prisoners with fewer, or less serious disabilities with no rational basis underlying the disparate treatment. Mingus v. Butler, 591 F.3d 474, 483 (6th Cir. 2010)(citing, U.S. v. Georgia, 546 U.S. 151, 159 (2006). Equal protection may be brought as a "class of one." Villiage of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). "Intentional discrimination 'can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questionable policies will likely result in a violation of federally protected rights.'" Tanny v. Boles, 400 F.Supp.2d 1027, 1047 (E.D.Mich. 2005)(citation omitted). The retaliatory provoking a prisoner to knowingly aggrevate his mental disability with intent to discipline is discrimination. See, Surprenant v. Rivas, 424 F.3d 5, 14 (1st Cir. 2005). "Unjust isolation, we hold, is properly regarded as discrimination based on disability." Olmstead v. L.C. ex rel Zimring, 527 U.S. 581, 597 (1999).

Under the ADA, disability need only be "a significant factor" behind the discrimination, but the Rehabilitation Act requires it to be the sole reason. Reg'l Econ. Comm. v. City of Middleton, 294 F.3d at 49.

This issue is inextricably intertwined with the first issue of this Petition. The district court and Court of Appeals have misconstrued the correct legal standards for Petitioner to state claims upon which relief can be granted. This issue also involves legal standards this Court needs to visit of great importance to prisoner litigation and civil litigation.

The lower courts based dismissal for failure to state a claim upon disbelief that a paramilitary organization could be so united in corruption that numerous employees would participate in various conspiracies to retaliate against marked frequent prisoner litigants. This should not seem so strange given hundreds of case laws of officers acting in retaliatory concert, 'code of silence' and failure to protect, and supervisors' deliberate indifference to officer misconduct. "[T]o dismiss [the allegations] 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.'" Denton v. Hernandez, 504 U.S. at 33. (emphasis added).

By disregarding circumstantial evidence and disbelieving the relevance of well-pleaded facts, the lower courts improperly drew inferences against Petitioner on his conspiracy and retaliation theories simply by removing the causal connection and stripping the claims down to isolated incidents of misconduct by independent employees, lacking motive and not rising to federal violations. The district court also misrepresented facts and injected facts of its own belief not in the record. This also is impermissible.

This Court has continually impressed upon the Anderson v.

Liberty Lobby, Inc., standard in prisoner and other cases. 477 U.S. at 255. See, Tolan v. Cotton, — U.S. at —, 134 S.Ct. at 1866. Instead of disbelieving the truth of Petitioner's facts (though such was implied), however, the district court subverted Supreme Court cases by disbelieving the relevance of facts. If facts can be rendered not relevant, they can be discarded as not protected by the Anderson standard. With critical facts dismissed as not relevant—cursory review of prisoner conspiracy and retaliation claims being tempting—the judge is no longer bound to draw any inferences in Plaintiff's favor when ruling a failure to state a claim.

This is particularly dangerous judicial reasoning in prisoner cases, since they are disadvantaged by harsh PLRA screening procedures and are usually forced to proceed pro se.

Since Ashcroft v. Iqbal, supra, this Court has placed a heavy burden on pleading conspiracy and retaliation claims, seeming to have overruled Crawford-El v. Britton, supra, sub silentio, by not setting forth evidentiary standards which could support inference of motive or intent showing plausibility. It has been left to the Courts of Appeals to inconsistently hold which facts are plausible on claims involving a subjective state of mind: conspiracy, retaliation, or deliberate indifference. Ashcroft has been used as a roadblock to the very discovery that is likely to produce supporting facts.

As the dissent in Ashcroft noted, the majority failed to acknowledge "the-totality-of-the-circumstances" standard applicable to conspiracy and retaliation claims. The Sixth Circuit and others hold this standard. See, Holzemer v. City of Memphis, 621 F.3d at 519; Black v. Lane, 22 F.3d at 1400. However, in Petitioner's case,

the lower courts viewed each incident in isolation and deemed similar incidents of misconduct irrelevant to hold that defendants acted independently or were not involved.

The lower courts also failed to accept universal holdings that conspiracy and retaliation motives are very difficult to plead with direct evidence, and, therefore, circumstantial evidence may acceptably be the only means of proving such claims. In particular, prisoners have greater disadvantage in alleging direct or concrete facts of conspiracies, which are secret by nature. Haley v. Dormire, 845 F.2d at 1490. The Supreme Court formally had disapproved of a heightened pleading standard in prisoner retaliation cases. Crawford-El v. Britton, 523 U.S. at 595.

Moreover, "Each conspirator need not have known all of the details of the illegal plan or all of the participants involved ...." Hooks v. Hooks, 771 F.2d at 943-44, The lower courts erred by requiring Petitioner to demonstrate all of numerous alleged conspirators knew every detail of the illegal plan and all other participants involved. This is impossible since conspiracies, especially larger ones, are never so thoroughly comminicated. Indeed, his so-called "global conspiracy theory" alternatively alleged several smaller conspiracies. Rejecting the inference that most of the alleged conspirators lacked motive because they were not named in any of his prior lawsuits is erroneous for two reasons. First, "a showing that the alleged conspirators have committed acts that 'are unlikely to have been undertaken without an agreement' may allow a jury to infer the existence of a conspiracy." Mendocino Environment Ctr. v. Mendocino County, 193 F.3d at 1301.

Second, it is not irrational to allege that paramilitary M.D.O.C. has engaged in a broad conspiracy. In Perry v. McGinnis, 209 F.3d 597, 606 (6th Cir. 2000), a former M.D.O.C. hearing officer sued and blew the whistle on M.D.O.C.'s secret policy to corruptly violate prisoner due process rights. There are consequences for comrades who resist the corrupt machinery, and that hearing officer was fired. Petitioner did allege a scheme to promote the most loyally corrupt officials to higher positions. And the M.D.O.C. indemnifies its employees and the Attorney General gives them free counsel—just like the mob. Closed-door paramilitary organizations are notoriously unified and subject to corrupt policies.

However, except for Daniel Heyns, all the alleged conspirators are at the notorious Ionia Correctional Facility. Petitioner alleged that this one facility has a long history of corruption and abuse of prisoners, that in 2014/2015 federal agents conducted an investigation that resulted in the retirement of Defendant Norwood and transfer of Defendant Huss—both were deputy wardens—and many corrections officers. Federal agents do not kick in the prison doors without probable cause. It was not Defendant Warden Smith's first time under investigation. And it can be inferred that some authority tried to break up the corruption.

Indeed, Petitioner also alleged that M.D.O.C. employees have daily access to communicate by statewide computer web sites and e-mail, including electronic files. To support that such systems were used to mark him as a litigator, he quoted entries in his M.D.O.C. electronic medical file by Defendants Apal and Dr. Yee critisizing his litigation activities despite that policy prohibits keeping records on

prisoner litigation activities. This is similar to Burton v. Donovan, 210 F.Supp.3d at 215:

> "Other evidence suggests that Stowe was concerned with Plaintiff's prior protected activities, suggesting retaliatory animus. For example, Plaintiff alleged that Stowe, unprompted, requested to see a copy of the settlement, an otherwise confidential document.... Such settlements are made confidential for the very purpose of minimizing any potential for retaliation, because a request to see one could be viewed as evidence of an improper concern with prior protected activity."

Such e-mails and computer files are rarely released to prisoners, but he quoted illicit documentation and alleged the M.D.O.C. marks other frequent litigators to justify at least some discovery.

Several high-ranking present defendant were previously sued by Petitioner: Daniel Heyns (Director), Willie Smith (Warden); Nannette Norwood (deputy warden); Erica Huss (deputy warden); Kevin Woods (captain); Christopher King (lieutenant); Dennis Grandy (sergeant). It is more effective when high-ranking officials to issue broad retaliatory mandates.

In fact, Heyns, Smith, and Norwood were defendants in Annabel v. Caruso, et al., in which Petitioner won a Kosher meals settlement and a small sum of money. He alleged that the Kosher meals were a direct target of retaliatory harassment. See, LaFountain v. Harry, 716 F.3d at 948-49.

The doctrine of chances and other evidence that his litigation activites were likewise direct targets shows a broader conspiracy. It is no coincidence that lawbooks, the Caruso files, all documents regarding incidents at the facility, and his legal notes were selectively stolen but not other legal property. It took significant time to locate some of those items. It extends to

denied photocopies and law library, numerous incidents of incoming/outgoing legal mail interference, impeding grievances, statements condemning access to the courts, and supervisory officials' habit of denying complaints and condoning such misconduct. Defendant Heyns also implimented policies to reduce legal access.

Petitioner was not required to be able to name every person involved in the conspiracy or quote their secret communications. Prior unsuccessful suits does not mean the discovery of new facts are Frivolous. Haley v. Dormire, 845 F.2d at 1491. Conspiracies often exist for years before enough new evidence comes to light to support the inference. Similarly, repeat incidents of misconduct, though not constitutional violations alone, may be used as evidence of conspiratorial or retaliatory motive. See, Benison v. Ross, 765 F.3d at 661; Mendocino Environment Ctr. v. Mendocino County, 193 F.3d at 1302-03. Cf., Fed. R. Evid. 404(b). The district court erred to hold that verbal harassment of a religious nature did not show a pattern of retaliatory animus aimed at an attack on the benefits of the Kosher meal settlement. The doctrine of chances supports that repeat incidents of legal mail interference was not coincidental. That certain prisoners lacked motive of their own and officials granted them immunity and also bypassed security regulations or policy to assist them supports the prisoners were acting under orders and in concert with officials.

The Courts of Appeals also inconsistently decide what is a sufficiently adverse action and whether "the-totality-of-the-circumstances" standard applies to a series of retaliatory motivated actions. This Court needs an adverse action test. First, an act

of retaliation need not be egregious to be adverse is consistent with the person of ordinary firmness standard. LaFountain v. Harry, 716 F.3d at 948. But it does not properly count for high stress and intimidating situations, such as prison. The mere threat of harm is adverse. Watison v. Carter, 668 F.3d at 1114. All acts of retaliation must be weighed together and not individually. See, Hutto v. Finney, 437 U.S. at 686-87.

Alternatively, Petitioner alleged a theory of deliberate indifference by a policy or custom that condones and encourages officials to retaliate and engage in other misconduct at the facility. Such claims require knowledge of risk but not a showing of improper motive. Neither does it require knowledge that Petitioner was specifically at risk or by which specific defendants. Defendants need not have directly ordered each act of misconduct carried out under their edict. Gomez v. Vernon, 255 F.3d at 1118. Petitioner sufficiently alleged many facts that there was longstanding corruption at the facility and defendants knew about it but chose not to act upon that information.

On Petitioner's RICO claim, the district court cited numerous unpublished cases to rule it impossible for any prisoner to state a RICO claim. However, a Ninth Circuit en banc case and another case hold otherwise. Diaz v. Gates, 420 F.3d 897 (9th Cir. 2005)(en banc); Guerrero v. Gates, 442 F.3d 697 (9th Cir. 2006). There is a lack of Supreme Court and published Counts of Appeals cases on prisoner civil RICO claims. Nonetheless, relying on Ninth Circuit cases, he stated a viable RICO claim.

The district court dishonestly held that he alleged he was

running a paralegal business inside prison, charging prisoners for services, and that his legal books were paid by prisoner clients. M.D.O.C. policy indeed prohibits prisoners from running a business. However, he alleged that the property and legal training was invested for preparing a paralegal career/business for post-release from prison. He never alleged charging other prisoners for services, and there is no evidence to support the arbitrary conclusion that the books were not legitimately purchased by friends and family per M.D.O.C. policy.

Petitioner alleged three RICO injuries: (1) actual or constructive loss of property; (2) loss of the Kosher meals settlement benefits; and injury to his prospective paralegal career/business by loss of training opportunities, capital assets, and access to the courts. The property need not relate to the business nor does it matter whether the business or employment is actual or prospective. He also alleged injury to federal claims which is the loss of a valued interest. See, Lewis v. Casey, 518 U.S. at 353 ft.n. 3. Though the property of business need not be the direct target of the underlying predicate action but can be so.

The alleged underlying violations were acts of extortion, assault and battery, intentional inference with contract and/or business relationships. Retaliation by nature is extortion. Crawford-El v. Britton, 523 U.S. at 588 ft.n. 10.

In any event, even if a RICO claim is novel in light of existing law, it may nonetheless state a claim.

RICO is a powerful incentive against indemnified prison officials who engage in organized retaliatory corruption.

For Petitioner's Rehabilitation Act and ADA claims he alleged: (1) that Daniel Heyns had a policy to discriminately reduce mental health services and warehouse mentally ill prisoners in segregation units; (2) that mentally ill prisoners spend more time in segregation that lesser disabled prisoners who may use the computerize legal research in the law library; and, (3) that he was denied the benefits of medication and mental health services in retaliation for prior lawsuits.

The lower courts held that Nos. 1 & 3 did not sufficiently allege discrimination based on disability. Daniel Heyns budget-cutting policies and crack down on mentally ill prisoners were applauded without inquiry while the latter retaliatory animus behind denying Petitioner psychotropic medications was not even considered discrimination.

The lower courts also failed to acknowledge Petitioner's alternate theories of disparate impact and failure to make reasonable accommodations for segregated computerized legal research. Contrary to the rulings below that he only complained of restrictions on law library services, he alleged primarily that this was the result of being denied medication benefits and services.

Petitioner and other menally ill prisoners are now segregated in START NOW program units but still are not reasonably accommodated with the same computerized legal research available to lesser on non-disabled prisoners.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Annabel II

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