18-7762

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM 2018

No._____

DOUGLAS FAUCONIER,

Petitioner,

v.

Harold Clarke, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Douglas L. Fauconier #1068864

Augusta Correctional Center

1821 Estaline Valley Road

Craigsville, Virginia 24430

QUESTIONS PRESENTED

1. What minimum showing of proof must prison officials establish on the record, to meet their initial burden of proof, in demonstrating that a prison regulation which impinges on prisoners' constitutional rights is reasonably related to legitimate penological interests?

PARTIES

The petitioner is Douglas L. Fauconier, a prisoner at Augusta Correctional Center (ACC), 1821 Estaline Valley Road, Craigsville, Virginia 24430. The respondents are Harold Clarke, the Director of the Virginia Department of Corrections (VDOC); David Robinson, the Chief of Corrections Operations of VDOC; John Woodson, Warden of ACC; and, T. McDougald, Publication Review Committee.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is unpublished. (**No. 17-6901**). A copy is attached as **Appendix A** to this petition (A.1). The order of the United States District Court for the Western District of Virginia, Roanoke Division is not reported. A copy is attached as **Appendix B** (A.5).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 12, 2018. The Honorable Court has jurisdiction to decide this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C.A. Federal Rules of Civil Procedure Rule 56 (a) and (c). Fed.R.Civ.Proc. Rule 56 states in pertinent part the following:

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense -- or the part of each claim or defense -- on which summary

judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion...

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of material in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection that a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

28 U.S.C.A. Fed.R.Civ.Proc. Rule 56.

STATEMENT OF THE CASE

In February of 2015, the legislative branch voted on a bill introduced by, Steven Landes, to prohibit prisoners for possessing "obscene materials." See **House Bill 1958** ("**HB 1958**") at **Appendix C** (A.26). Governor Terry McAuliffe approved HB 1958 March 17, 2015, becoming effective July 1, 2015. **Appendix C**. HB 1958 mandated the "State Board of Corrections to promulgate and the Director and Department of Corrections to enforce regulatory policies prohibiting the possession of obscene materials by prisoners incarcerated in state correctional facilities." **Id**.

While HB 1958 failed to define "obscene materials," the codified version of the bill under **Va. Code Ann. § 53.1-10(12)** has under **§18.2-372**.[1] Therefore, as part of his duties, **§ 53.1-10(12)** mandated

[1] §18.2-372. "Obscene" defined

that the Director of Corrections "enforce and direct the Department to enforce regulatory policies promulgate by the Board prohibiting the possession of obscene material...by prisoners...." See **Va. Code Ann. § 53.1-10(12)**.

In a Memorandum dated March 6, 2015, directed to facility unit heads from Chief of Corrections Operations, David Robinson, he gave notice of Virginia Department of Corrections' ("VDOC") plan to eliminate "from facilities all publication and commercial photographs that contain nudity." **Appendix D** (A.27). The Memorandum stated in pertinent part that beginning July 1, 2015, prisoners "will no longer be allowed to receive incoming material that contains nudity. Any publication or commercial photograph received at the facility that violates the new Specific Criteria for Publication Disapproval, Criterion I(Material that contains nudity will be disapproved and handled in accordance with Operating Procedure 803.2, Incoming Publications." **Id**. The Memorandum further stated, "[m]aterials that contain nudity are unauthorized" for prisoner possession. **Id**

The Petitioner filed a 42 U.S.C. § 1983 claim in the district court claiming that prison officials ban on all non-obscene nudity and descriptions of sexual acts impinged his First Amendment rights. The respondents filed a motion for summary judgment and the lower court granted them summary judgment.

In addressing the first **Turner** factor, the district court found that prison officials asserted "that the regulation was promulgated as a result of their statutory duty to maintain security, discipline, and good order in Virginia correctional facilities."[2] That court further found the prison officials averred that

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The word "obscene" where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.
Va. Code Ann. § 18.2-372.

[2] See **District Court Memorandum Opinion** at 6 (citing Affidavit of Robinson ¶ 4, Docket No. 33-1).

their "'decision to exclude sexually explicit materials and publications containing nudity is aimed at maintaining facility security, rehabilitating offenders, and reducing sexual harassment of female staff.'"[3]

The district court held that prison officials "need not show that specific incidents occurred."[4] Citing Ninth Circuit precedent, the court held that, [i]t is sufficient that a regulation's justification is based on anticipated security problems."[5] And as such, the court held that prison officials asserted "legitimate penological interest in jail security, rehabilitation, and reducing harassment of female staff." The district court found that the prison regulation was content-neutral,[6] and, that the prison policy was not "'so remote as to render the policy arbitrary or irrational.'"[7]

In making these determinations, the district court found that prison officials "could rationally believe that there is a connection between sexually explicit and nude images and rehabilitation, preventing harassment of female staff, and reducing various security concerns."[8] The United States Court of Appeals for the Fourth Circuit upheld the district court's ruling. See **Appendix A**.

BASIS FOR FEDERAL JURISDICTION

This case involves the question of how 28 U.S.C.A. Fed.R.Civ.Proc. Rule 56 should be applied in a 42 U.S.C. § 56 should be applied in a 42 U.S.C § 1983 action in which a state prisoner has claimed a prison regulation unreasonably impinges his constitutional rights. The district court had jurisdiction under 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

Issue 1.

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[3] Id.
[4] Id.
[5] Id. See also **Casey v. Lewis**, 4 F.3d 1516,1521(9th Cir.1993).
[6] Id at 7.
[7] Id. (citing **Turner v. Safley**, 482 U.S. 78,89-92,96 L.Ed.2d 64,107 S.Ct. 2254(1987)
[8] Id. (citing Amatel v. Reno, 156 F.3d 192,199(1998).

A. Conflicts with decisions between the United States Courts of Appeal, the Honorable Court, and, the interpretation of federal statutory law

In the context of summary judgment proceedings, the holdings of the lower courts that in satisfying the first **Turner** factor's requirement it is sufficient only that prison officials show "that a regulation's justification is based on anticipated security problems," and, that the policy was not so remote as to render it arbitrary or irrational because "corrections officials might reasonably have thought" that the policy would have advanced prison interests directly contradicts the Federal Rules of Civil Procedure Rule 56, and this Honorable Court. See **District Court for the Western District of Virginia Memorandum Opinion at 6-7, Civil Action No. 7:16cv301**. In its decision the district court cited precedent from the Ninth Circuit (**Casey v. Lewis,** 4 F.3d 1516,1521(1993)) and the Fourth Circuit upheld the district court's decision. In its per curiam opinion the Fourth Circuit found "no reversible error." See **unpublished opinion of United States Court of Appeals, Fourth Circuit** (**No. 17-6901**). The Fourth Circuit finding no reversible error in this case was in essence approval, at least in part, of the Ninth Circuit's treatment of the first **Turner** factor in the context of a motion for summary judgment filed by prison officials.

But the Ninth Circuit not only held that "[p]rison officials need merely put forward a legitimate government interest," it also held that those officials must also "provide some evidence that the interest put forward is the actual reason for the regulation." 4 F.3d at 1521. In interpreting the first **Turner** factor, the United States Court of Appeals, District of Columbia Circuit, appears to have seen no need for prison officials to produce some "record evidence" as the Ninth Circuit held in Casey in deciding whether a prison policy had a valid, rational connection to a stated penological interest. **Amatel v. Reno**, 156 F.3d at 199.

The holdings of the aforementioned courts are contrary to **the Federal Rules of Civil Procedure, Rule 56** and the Honorable Court's holding in **Turner v. Safley**.[9] **Rule 56 (a)** requires a movant to identify each claim on which summary judgment is sought. **See Fed.R.Civ.P. Rule 56**. Part (c) of this rule requires a "party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record...."**Id**. The Honorable Courts appears to have required no less of the movant in meeting their burden of proof under the first factor of **Turner v. Safley**. Although the Honorable Court has not specifically defined the parameters of how the term "rational" in the phrase "valid, rational connection" should be defined by courts in deciding whether there is a logical connection between the penological interest and the prison policy, the Court has nonetheless highlighted the importance of prison officials establishing a record showing the justification for their actions. See **Turner**, 482 U.S. at 98(in which the Court repeatedly referred to scrutinizing the "record" pertaining to a Missouri prison regulation that it found "not reasonably related to...penological interests."). The Petitioner, therefore posits, that it appears from the Court's **Turner** decision and **Rule 56** that prison officials must initially point to facts in the record that indicated to them that the prison regulation was necessary in light of its trampling prisoners' constitutional rights. The Petitioner therefore respectfully moves that the Court refine the **Turner v. Safley** first factor by clarifying what type of evidence prison officials must initially provide in demonstrating an actual basis for the implementation of a prison regulation that impinges prisoners' constitutional rights. In doing so, this would also require the Court to define the term "rational" in the first **Turner** factor.

[9] The four **Turner** factors are as follows, first, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it.'" 482 U.S. at 89. Second, "whether there are alternative means of exercising the right that remain open" to prisoners. **Id**. at 90. Third, is the consideration of "the impact accommodation of the asserted constitutional right will have" on guards and other prisoners, and on allocation of prison resources generally. **Id**. Fourth, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." **Id**.

B. Importance of the Question Presented

This case presents a fundamental question of the interpretation of the Honorable Court's, over thirty year old decision, in **Turner v. Safley**. This matter is substantially important to the public because it asks the Court to refine the multi-fold first factor of the Turner balancing test, asking that the Court define the term rational in this first factor's requirement that "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." **Id**. at 90, citing **Block v. Rutherford**, 468 U.S. 576,82 L.Ed.2d 438,104 S.Ct. 3227(1984). In addition, it requests that the Court settle what initial showing of proof officials must establish on the record before making such a rational connection. Moreover, it would control prisoners' challenges to the validity of prison regulations in prison systems in all 50 states, the District of Columbia, and the hundreds of city and county jails. In light of the large amount of litigation prisoners file using 42 U.S.C.A. § 1983 civil rights actions challenging restrictions to the exercise of their constitutional rights, it is important to prison jurisprudence because it can insure claims are fairly reviewed and the proper standards are employed, especially in summary judgment proceedings.

Turner does not provide sufficient guidance, regarding whether there is a specific standard of proof prison officials must initially meet to show that there is a "rational connection" between the prison regulation and the penological interest. As it stands, prison officials can label any goal as a legitimate correctional interest and establish a policy that may adversely affect prisoners' constitutional rights.[10] Since there is no definition of what constitutes a "valid, rational connection," the precise meaning of this phrase is impossible to pin-down because **Turner** has not defined how exacting this standard is, and, how narrowly or how broadly, the term "rational" in "rational connection" should be

[10] See **Overton v. Bazzetta**, 539 U.S. 126,132,128 S.Ct 2162,156 L.Ed.2d 162(2003).

interpreted. This uncertainty has led to the application of different standards from court to court regarding whether a prison regulation is justified at the expense of prisoners' rights.

In this case the only evidence the respondents provided to support their motion for summary judgment was an affidavit from the Chief of Corrections Operations of the Virginia Department of Corrections explaining why he believed depictions or descriptions of sexual acts or nudity should be banned. What prison officials did not provide was data or other information that they must have collected as part of any comprehensive study of the issue, that could have caused them to reasonably believe non-obscene nudity or graphic descriptions of sexual acts is a proximate cause of the decline in rehabilitation of prisoners, prison security, or increased sexual harassment of female staff. The Petitioner objected to the introduction of this affidavit as evidence because it contained inadmissible hearsay evidence, [11] and because it provided unreliable expert testimony from a prison official.

The prison official's expert testimony stated conclusions based on his opinion, and made predictions and assumptions about human behavior, particularly when the group in question (prisoners) is introduced to a specific stimuli (non-obscene nudity). The record reflected no information indicating that the official possessed specialized knowledge or training qualifying him to express such expert opinion. Typically this area of study the official testified to, is usually the domain of psychiatrist, psychologists and other clinicians. Hence the respondents provided nothing but bald and conclusory assertion in support of their motion for summary judgment, which under Rule 56(c) was insufficient to show that there was no genuine issue as to any fact, and that respondents were entitled to judgment as a matter of law.

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[11] Prison officials introduced hearsay evidence pertaining to why prison staff were uncomfortable reviewing certain incoming publications or considered their work environment hostile. See Respondent-Robinson's Affidavit at 4; **Fed.R.Civ.Proc. 56(c)(2)**; **Fed.R.Evid. 801(c)** and **Giles v. California**, 554 U.S. 353,365,171 L.Ed.2d 488,128 S.Ct.2678(2008).

If prison officials intended to submit expert testimony, Rule 56(c) required that they cite particular parts of materials in the record that would verify the reliability of the expert testimony. This was not a disputed matter of professional judgment but rather evidence of disputed facts which must have been weighed in the Petitioner's favor.

This Court's holdings in **Turner v. Safley** demands that the record is replete with facts to facilitate a reasonableness determination.[12] Without a proper record, determining reasonableness would be impossible. **Turner** has repeatedly referred to using the record of the case to decipher reasonableness. **Id**.

However, the Honorable Court has not sufficiently clarified how the first **Turner** factor must be evaluated in determining whether there is a valid, rational connection between a prison regulation and the constitutional right it restricts. Without such guidance it is difficult to determine whether there is a "rational connection" between the regulation that restricts a prisoner's constitutional rights and the penological interest.

Hence, it appears that at least two United States Courts of Appeal have treated this issue differently. In determining whether prison officials established a rational connection the Ninth Circuit held that prison officials must provide "some evidence" that the penological interest put forward is the actual reason for the regulation, and that, "a prison superintendent's affidavit which stated that certain regulated material, if not censored, 'could lead to violence...,' constituted a sufficient showing of a threat to prison security." **Casey**, 4 F.3d, at 1521 (citing **Harper v. Wallingford**, 877 F.2d 728,733(9th Cir.1989)

[12] 482 U.S. at 91 and 98.

The United States Court of Appeals, District of Columbia Circuit's interpretation of **Turner's** first factor is contrary to the Ninth Circuit's. In that, that court appears to have found it unnecessary to require prison officials provide some evidence to support an actual basis for the regulation after it was unpersuaded by scientific evidence introduced which raised credible doubt as to the reliability of the claims the Legislature made to justify implementation of the prison policy. The court has held "[t]he question for us is not whether the regulation in fact advances the government interest, only whether the legislature might reasonably have thought that it would." **Amatel v. Reno**,156 F.3d at 199.

In **Beard v.Banks** the Honorable Court appears to have required that prison officials set forth admissible facts that would justify the implementation of the policy in the context of their motion for summary judgment.[13] The instant case is distinguishable from **Banks** because officials were unable to provide admissible facts from the record to show that there was a valid, rational connection between the prison policy of banning non-obscene nudity and the interest prison officials stated was the reason for implementing the policy. Not only was the respondents' evidence unreliable and hearsay, but the clinical evidence the Petitioner introduced to the lower courts debunked any logical connection between the regulation and the interest.[14] To this end the respondents failed to meet their burden of proof under the first **Turner** factor; without such a showing the policy is clearly irrational.[15]

As it stands, the already relaxed standard of Turner creates an almost insurmountable hurdle for prisoners to get over in protecting their constitutional rights in lieu of onerous prison regulations.[16] Without defining the term "valid, rational connection" and requiring prison officials to provide evidence

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[13] 548 U.S.521,530,126 S.Ct 2572(2006).

[14] To rebut the respondents motion for summary judgment, in both the District Court and the United States Court of Appeals the Petitioner provided the courts with the following two studies: (1)**Edward Sonnerstein, Daniel Linz & Steven Penrod, The Question of Pornography** 177(1987), and, **Larry Baron & Murray A. Staus, Four Theories of Rape in American Society** 8(1989).

[15] 482 U.S. at 90.

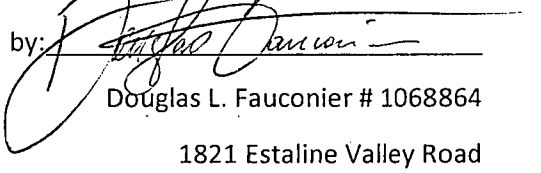
[16] 482 U.S. at 81.

to support the actual basis of the prison regulation, the current standard expresses a preference for the interests of prison officials over the constitutional rights of prisoners counter to the preponderance-of-the-evidence standard generally applicable in civil actions.[17]

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Submitted this 12th day of April 2018,

by: 

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[17] See **Herman & MacLean v. Huddleston**, 459 U.S. 375,390,103 S.Ct. 683,74 L.Ed.2d 548(1983).