

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL BOHANNAN — PETITIONER
(Your Name)

vs.

WESLEY W. GRIFFIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals - Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Bohannan #1841746
(Your Name)

2664 FM 2054
(Address)

Tennessee Colony, Texas 75886
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

1. DOES A UNITED STATES COURT OF APPEALS DEPUTY CLERK ABUSE THEIR DISCRETION/AUTHORITY WHEN THEY REFUSE TO TAKE ANY ACTION ON A LITIGANT'S TIME EXTENSION MOTION BECAUSE THAT DEPUTY CLERK REFUSED TO CONSIDER THE PROVISION OF RULE 26(b) OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN MAKING THAT NON-ACTION DETERMINATION, AND RELIED SOLELY UPON RULE 40 OF THOSE RULES?

And, if so,

DOES A UNITED STATES COURT OF APPEALS ABUSE ITS DISCRETION WHEN IT DENIES RECONSIDERATION OF A DEPUTY CLERK'S NON-ACTION ABUSE OF DISCRETION DETERMINATION?

2. DOES A UNITED STATES COURT OF APPEALS DEPUTY CLERK ABUSE THEIR DISCRETION/AUTHORITY WHEN THEY TAKE A PROPERLY FILED AND TITLED MOTION FOR RECONSIDERATION OF A DEPUTY CLERK'S PRIOR DETERMINATION AND (1) REFUSES TO PRESENT THAT MOTION FOR RECONSIDERATION TO THE COURT FOR ITS CONSIDERATION, (2) DECIDES TO RECLASSIFY THE RECONSIDERATION MOTION AND TREAT IT AS A MOTION TO FILE FOR REHEARING OUT-OF-TIME, AND (3) THEN REFUSES TO PRESENT THAT OUT-OF-TIME MOTION TO THE COURT UNLESS THE APPELLANT FILES THE ACTUAL REHEARING MOTION WITHIN WHAT IS ACTUALLY ONE SINGLE DAY?

And, if so,

DOES A UNITED STATES COURT OF APPEALS ABUSE ITS DISCRETION WHEN IT DENIES RECONSIDERATION OF A DEPUTY CLERK'S ABUSE OF DISCRETION IN DETERMINING TO RECLASSIFY A PROPERLY TITLED RECONSIDERATION MOTION AND/OR IN DETERMINING A TIME LIMIT FOR FILING FOR REHEARING THAT IN ACTUALITY IS A SINGLE DAY?

3. DOES A UNITED STATES COURT OF APPEALS ABUSE ITS DISCRETION IN ITS DECISION NOT TO APPOINT COUNSEL FOR A DETAINED INDIGENT APPELLANT, IN A CIVIL RIGHTS ACTION, WHERE (1) THE APPELLATE COURT FAILS TO EXERCISE ITS DISCRETION UNDER A PROPER ANALYSIS OF THE SITUATION; (2) THE CASE INVOLVES MULTIPLE CONSTITUTIONAL AND STATE CLAIMS; (3) THE DISTRICT COURT'S MEMORANDUM AND ORDER IS 39 PAGES LONG;

(4) THE RECORD ON APPEAL IS OVER 3,750 PAGES; (5) THE APPELLEE NEEDED, AND OBTAINED PERMISSION FROM THE APPELLATE COURT, TO FILE A DOUBLE-PAGE LENGTH BRIEF; (6) THE APPELLANT'S JAILERS INTERFERED WITH HIS ACCESS TO BRING THE APPEAL BY PLACING HIM ON A LEGAL REFERENCE MATERIAL RESTRICTION; (7) THE APPELLANT WAS UNABLE TO FILE A REPLY BECAUSE OF THE JAILERS' ACTIONS; (8) THE APPELLANT'S JAILERS SEIZED 12" OF THE APPELLANT'S FILES FOR THE CASE; AND (9) THE APPELLANT'S ABILITY TO RECEIVE REASONABLY TIMELY SERVICE OF LEGAL MAIL WAS SO IMPAIRED THAT HE WAS UNABLE TO FILE ANY REHEARING MOTION IN THE APPEAL?

LIST OF PARTIES

[x] 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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QUESTION ONE

Does A United States District Court Deputy Clerk Abuse Their Discretion/Authority When They Refuse To Take Any Action On A Litigant's Time Extension Motion Because That Deputy Clerk Refused To Consider The Provision Of Rule 26(b) Of The Federal Rules Of Appellate Procedure In Making That Non-Action Determination, And Relied Solely Upon Rule 40 Of Those Rules?

And, if so,

Does A United States Court Of Appeals Abuse Its Discretion When It Denies Reconsideration Of A Deputy Clerk's Non-Action Abuse Of Discretion

QUESTION TWO

Does A United States Court Of Appeals Deputy Clerk Abuse Their Discretion/Authority When They Take A Properly Filed And Titled Motion For Reconsideration Of A Deputy Clerk's Prior Determination And (1) Refuses To Present That Motion For Reconsideration To The Court For Its Consideration, (2) Decides To Reclassify The Reconsideration Motion And Treat It As A Motion To File For Rehearing Out-Of-Time, And (3) Then Refuses To Present That Out-Of-Time Motion To The Court Unless The Appellant Files The Actual Rehearing Motion Within What Is Actually One Single Day?

And, if so,

Does A United States Court Of Appeals Abuse Its Discretion When It Denies Reconsideration Of A Deputy Clerk's Abuse Of Discretion In Determining To Reclassify A Properly Titled Reconsideration Motion And/Or In Determining A Time Limit For Filing For Rehearing That In Actuality Is A Single Day? _____ 22

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To Bring The Appeal By Placing Him On A Legal Reference Material Restriction; (7) The Appellant Was Unable To File A Reply Because Of The Jailers' Actions; (8) The Appellant's Jailers Seized 12" Of The Appellant's Files For The Case; And (9) The Appellant's Ability To Receive Reasonably Timely Service Of Legal Mail Was So Impaired That He Was Unable To File Any Rehearing Motion In The Appeal? _____	24
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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

The January 12, 2018 opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A to the petition and is unpublished.

The appellate deputy clerk's February 12, 2018 refusal to take action on motion for extension of time to file for rehearing appears at Appendix B to the petition.

The appellate deputy clerk's March 6, 2018 mislabeling of the motion to reconsider the February 12, 2018 nonaction appears at Appendix C to the petition.

The April 11, 2018 order of the United States Court of Appeals for the Fifth Circuit denying reconsideration motions appears at Appendix D to the petition.

The district court's June 30, 2016 final judgment and memorandum opinion/order appear at Appendix E to the petition.

JURISDICTION

The date on which the United States Court of Appeals decided the issues raised in this petition was April 11, 2018. A copy of that order appears at Appendix D. On January 12, 2018, the United States Court of Appeals affirmed the district court's disposition of state and federal claims against defendant Griffin.

A copy of that order appears at Appendix A. On February 2, 2018, under the prison mailbox rule, petitioner filed his motion for an extension of time to file a petition for panel rehearing or rehearing en banc. On February 12, 2018, the appellate deputy clerk determined that no action would be taken on petitioner's time extension motion. A copy of that determination appears at Appendix B. On February 28, 2018, under the prison mailbox rule, petitioner filed a motion for the reconsideration of the deputy clerk's February 12th "no action" determination. On March 6, 2018, the appellate deputy clerk improperly converted petitioner's reconsideration motion into a motion to file for rehearing out of time. The deputy clerk then refused to provide petitioner's motion to the appellate court unless the deputy clerk received petitioner's rehearing motion - and received it by the next day after petitioner received notice of the deputy clerk's conversion. A copy of the deputy clerk's conversion appears at Appendix C. On March 19, 2018, under the prison mailbox rule, petitioner filed a motion for reconsideration of the deputy clerk's conversion of his February 28th reconsideration motion. On April 11, 2018, the United States Court of Appeals for the Fifth Circuit denied both of petitioner's reconsideration motions. A copy of that order appears at Appendix D.

On July 19, 2018, Justice Alito granted petitioner an extension of time in which to file this petition for a writ of certiorari, up to and including September 7, 2018. Petitioner is filing this petition within that time provided.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

The State of Texas illegally subjected Petitioner Bohannan to its Sexually Violent Predator ("SVP") Civil Commitment Program. In re Bohannan, 379 S.W.3d 293 (Tex.App. - Beaumont 2010), aff'd 388 S.W.3d 296 (Tex.2012). This cause of action arises from, in part, the treatment Bohannan was subjected to by the Defendant during AND AFTER that illegal civil commitment.

On January 22, 2009, a Texas jury found Bohannan suffered from a "behavioral abnormality" and Bohannan was subjected to the Texas SVP civil commitment program under Chapter 841, Texas Health & Safety Code. ROA. 16-11226.3031. On January 26, 2009, Bohannan was "released" from the TDCJ-CID and transported to the Geo Corp. "Fort Worth Community Correctional Facility" ("FWCC"), located at 600 N. Henderson Street, Fort Worth, Texas. ROA.2836-37. Defendant Griffin, a Texas civil commitment official began imprisoning/confining Bohannan in that facility on January 26, 2009. ROA.2837, 3417. Upon Bohannan's arrival at the FWCCF, he met with Griffin, who informed Bohannan he was a case manager and was acting on behalf of, and in accordance with the policies of the Texas Council on Sex Offender Treatment ("CSOT"). ROA.2836-38. Griffin, at that time, using CSOT forms, imposed approximately 100 rules/conditions upon Bohannan, informing Bohannan that a violation of any one of which (or even refusing to sign the forms) would subject Bohannan to prosecution and a 3rd degree felony punishment. Id. and 3034-40.

During Bohannan's imprisonment/confinement in the FWCCF, he

experienced a number of signal loss problems with the GPS electronic monitoring equipment Griffin had assigned and attached to Bohannan. ROA.3064-67. Griffin, and the civil commitment officials were aware that the 3-piece equipment (MTD, ankle bracelet, and charging stand) had a reputation for unreliability. ROA.775-76, 2840, 2844, 2847, 2863-64, 2869, 2871, 2874, and 3334 (most of these being false GPS alerts arising from signal interference causing "drift"). Bohannan filed a number of grievances with the civil commitment officials, which addressed the faulty equipment and Griffin's treatment of him. ROA.2943-45, 2947-55. On, or about, March 26, 2009, Griffin handed Bohannan the civil commitment officials' response to Bohannan's GPS-related grievance (which also addressed Griffin's treatment), which Griffin apparently had intercepted. ROA.781, 2956-57 [the undated response]. The very next day, on March 27, 2009, after Bohannan experienced another signal loss, for all of one minute and fifteen seconds, ROA.3065, at 1:16am, id., while Bohannan was asleep in his assigned FWCCF bed, ROA.2871, 3545, 3478-80, Griffin secured Bohannan's arrest, twice, alleging civil commitment violations arising from the signal losses. ROA.2985-86, 3356 £10 - 57 £4. Griffin provided law enforcement officials a statement containing false allegations and he withheld evidence from those officials which Griffin knew showed Bohannan's actual innocence of causing the equipment malfunctions. ROA.2985-86, 3279. The "documents related to the violations" Griffin withheld included all of his "Chronologicals" detailing the equipment's repeated false GPS alerts. ROA.2840, 2844, 2847, 2863-4, 2869, 2871, 2874, and 3334.

On March 31, 2009, when the D.P.S. officers arrived to arrest Bohannan for the first Griffin-secured arrest, Griffin asked those officers to not permit Bohannan to take his prescribed medications and legal papers with him to the Tarrant County Jail (items the jail allows and/or encourages incoming prisoners to bring with them). ROA.773-74, 787-88. Griffin then seized Bohannan's medications and legal work and Bohannan was taken to jail. Id., .2875 [noting the facility officials "will" [future tense] secure Bohannan's property - Bohannan had already been arrested prior to the statement being made]. Bohannan would remain in the Tarrant County Jail, for almost two years, because of Griffin's retaliatory accusations. ROA.2875, 2879. While in the Tarrant County Jail, Bohannan suffered permanent vision damage arising, in part, from Griffin's seizure of his prescription medications. ROA.773-74.

On July 22, 2010, the Ninth District Court of Appeals found Bohannan had been illegally civilly committed and reversed and remanded that determination. ROA.3123. Despite that reversal, Griffin continued to label Bohannan as a "SVP" and subject him to the civil commitment conditions. ROA.2878-80, 3334-36, 3355 §§14-23, 3417 §§20-24, 3424 §§6-16, 3528-29, and 3555. Griffin did so despite his awareness of the reversal. ROA.3441-42.

On December 8, 2010, the Tarrant County District Attorney moved to dismiss the criminal charge brought by Griffin. ROA.3161. On March 4, 2011, after three days of formal revocation hearings, the Texas Board of Pardons and Paroles found Bohannan was not guilty of committing a civil commitment violation, as
7.1

was alleged by Griffin, and was not under civil commitment. ROA.783.

Despite the commitment's reversal, the prosecutor's dismissal of the commitment-related criminal charges, and the state's parole board informing Griffin that Bohannan was not on civil commitment, Griffin continued to label Bohannan as a "SVP" and subject him to the consequences and conditions of civil commitment. ROA.2879-80, 3334-36, 3355 ¶¶ 14-23, 3417 ¶¶20-24, 3424 ¶¶6-16, 3528-29, and 3555.

On March 15, 2011, Griffin approached Bohannan while he was still confined in the Tarrant County Jail (awaiting his release) asking Bohannan to sign the paperwork agreeing to be on the civil commitment the appellate court had reversed. ROA.2879. Bohannan told Griffin "I am not going to sign away my rights" and reminded Griffin that "the appeals court stated I am not on Civil Commitment anymore." Id.

On March 17, 2011, Griffin approached Bohannan at the Avalon Transitional Center ("FWTC")¹, trying to get Bohannan to sign paperwork agreeing to be on the civil commitment the appellate court had reversed. ROA.3334. Bohannan once again reminded Griffin "I am not on Civil Commitment due to the latest Appeals Court's ruling" and told Griffin that he must first call an attorney before he signs any paperwork with Griffin or with

¹ The Geo Corp. had lost its contract with the TDCJ-PD and the facility had become the Avalon Corp. contracted, and renamed, "Fort Worth Transitional Center" ("FWTC").

anyone from the CSOT. Id. Also, on March 17, 2011, Griffin attempted to get the Tarrant County District Attorney to agree to prosecute Bohannan for refusing to sign the civil commitment paperwork. ROA.3335. The prosecutor declined to do so. Id. Griffin would then go to the Montgomery County District Attorney to obtain Bohannan's arrest and prosecution for the bracelet gone alarms and the refusals to sign the commitment paperwork. ROA.3356 §§10-25, 3357 §§1-4.

On March 24, 2011, Bohannan mailed his original 42 U.S.C. §1983 complaint while residing in the FWTC facility. ROA.92.

On April 24, 2011, Bohannan became involved in an incident at the FWTC arising from a facility official's refusal to provide Bohannan his medication, which the official had stolen. ROA.3355 §§1-5. Bohannan was accused by that official of violating the facility's rules and the state parole officials issued a parole revocation warrant. ROA.3007-10.

Sometime prior to July 12, 2011, the Texas Board of Pardons and Paroles determined the April 24, 2011 facility incident did not warrant a revocation of Bohannan's release and ordered Bohannan be continued on parole supervision, ROA.3336. Bohannan remained jailed in the Montgomery County Jail, on the Montgomery County warrant secured by Griffin. Id.

The Texas Legislature, being dissatisfied with the Council On Sex Offender Treatment's commitment-related responsibilities, created a new administrative agency, the Texas Office of Violent Sex Offender Management (OVSOM) and transferred those

responsibilities to it, effective September 1, 2011. 2011 Tex. S.B. 166: 2011 Tex.Gen.Laws 1201, 3197-98. Though having new Board officials, the policies and most of the employees remained the same. ROA.1599-1600.

On August 21, 2012, the Texas Supreme Court affirmed the appellate reversal of Bohannan's illegal civil commitment. In re Bohannan, 388 S.W.3d 296 (Tex.2012). Despite that affirmation, Griffin continued to label Bohannan as a "SVP" and subject him to the consequences and conditions of civil commitment. ROA.3336, 3555 . The Texas Supreme Court issued its mandate on January 18, 2013. ROA.3124-25. Griffin continued to subject Bohannan to the reversed civil commitment. ROA.3336.

In February of 2013, Bohanna was tried in Montgomery County for all the violation allegations raised by Griffin (bracelet gone alarms, refusals to sign paperwork, and the facility rule violation). ROA.3018, 3548-49. On February 13, 2013, the trial court found Bohannan guilty of the single April 24, 2011 facility rule violation incident. ROA.3550-52.

On May 5, 2014, the district court refused to allow Bohannan to file his third amended complaint and ordered him to file a different, modified, third amended complaint. ROA.723-31. On August 7, 2014, Bohannan filed his third amended complaint. ROA.764-96.

The Texas Legislature, being dissatisfied with the OVSOM's performance, renamed the agency the Texas Civil Commitment Office ("TCCO"), increased the size of the Board overseeing the renamed

office, decriminalized many of the civil commitment rules and conditions, and, for the first time, made provision for the provision of inpatient (imprisoned) treatment. 2015 S.B. 746; 2015 Tex.Gen.Laws 2700-11. While retroactively applying the decriminalization portion in a limited manner (it applies to the facility violation Bohannan was convicted of), the legislation became effective on June 17, 2015. See S.J. of Tex., 84th Leg., R.S. 3653 (2015). As with the 2011 legislative changes to the civil commitment officials' agency, once again the employees and most of the policies remained the same. ROA.1600-01.

DISTRICT COURT HISTORY

The district court notes how on December 3, 2015, it issued a sua sponte motion for summary judgment, and how the parties did not promptly respond to such. ROA.3204-05. The court notes how it imposed a May 27, 2016 deadline for Bohannan's response but then erroneously held that "Bohannan did not file a responsive document of any kind by the May 27, 2016 deadline, and has not sought to file one since then." ROA.3205. On May 23, 2016, the district court clerk filed Bohannan's "Motion To Modify The Court's April 27, 2016 Order Re Pending Motion Pertaining To Summary Judgment (DE #325) And Third Motion To Defer Consideration Of The Court's December 3, 2015 Sua Sponte Summary Judgment Motion (DE #249)". Under the prison mailbox rule it was actually filed on May 17, 2016. ROA.2638-46. In the filing, Bohannan notified the court that he was going to need an opportunity to conduct discovery from Griffin's newly revealed expert witness Christopher Poole. ROA.2639-40. In the motion, Bohannan notified the court of

of his inability to obtain the needed copies of summary judgment evidence, as well as his inability to tabulate and spiral bound his appendix, because of the limitations his jailers imposed upon him. ROA.2640-41. In that filing, Bohannan notified the court how he had been prevented from purchasing typing paper until four days before his response was due. ROA.2641-42. Bohannan noted how Griffin had twice submitted summary judgment motions which were held to be non-compliant and asked the court not provide him a third opportunity to do so. ROA.2642-43. Bohannan asked the court for 30 days, after Griffin filed his compliant motion, in which to file his response, detailing how that would enable Bohannan to use and cite the contents of Griffin's motion/appendix; much of which would be documents which Bohannan was unable to obtain copies of himself. ROA.2634-44. On May 24, 2016, the very next day, the court entered an order finding that "most of [Bohannan's filing] is devoted to [Bohannan's] complaints about the conduct of prison officials and counsel for defendant, Wesley Griffin, but the real goal of the document appears to be to gain for [Bohannan] an extension of time for the filing of this response to a sua sponte motion for summary judgment." ROA.2649. The court then denied Bohannan an extension of time, and did so without addressing the impediments which were being imposed upon Bohannan. Id. The court ordered the response be filed by May 27th, three days later, and long before Bohannan would receive mail notice of that order. Id.

The court had previously given both parties a page limit of 70 pages in their response to its sua sponte summary judgment motion, because of "the number of summary judgment issues that must be

dealt with by the parties". ROA.2562. On May 25, 2016, Griffin filed his third set of summary judgment documents and the court gave Bohannan a deadline of June 27, 2016 for replying to them. ROA.3167-68, 3205. Though the court noted that the grounds raised in its *sua sponte* motion, and those raised by Griffin in his motion are "exactly the same", ROA.3205 n.2, the court limited Bohannan to a 25-page reply. *Id.* Griffins motion was 67 pgs long. ROA.2819.

Previously, on October 23, 2015, Bohannan provided the court quotes from documents he was unable to copy, under penalty of perjury, for the court to consider. ROA.1465-66. The court refused to consider the quoted assertions because Bohannan failed to provide the court actual copies of the documents. ROA.1501. So, it appeared very clear to Bohannan, proceeding *pro se*, that the court was not going to accept his representation of the contents of documents (even when sworn to), but only copies of those documents - copies Bohannan could not obtain.

But then on May 23, 2016, four days before Bohannan's response to the court's *sua sponte* summary judgment motion was due. Bohannan received the court's May 17, 2016 Order wherein the court informed Bohannan he can call the court's attention to the contents of a document, expert Drake's deposition testimony, if he presents "it verbatim as it appears on the [document]". ROA.2627. Bohannan, perhaps incorrectly, understood this to mean that the court was providing him an opportunity to correct the copy-unavailability problem - that Bohannan could type out verbatim each document he needed to submit to the court.

Therefore, upon Bohannan's May 31, 2016 receipt of the court's

May 25th Order, Bohannan began the process of typing out verbatim page after page of the evidentiary documents Griffin failed to include in his summary judgment motion, including transcripts of Griffin's prior testimony.

On June 27, 2016, Bohannan mailed/filed his motion for an extension of time to respond to Griffin's summary judgment motion. ROA.3244-50. Bohannan noted how he had repeatedly informed the court that he was unable to make copies of legal documents, that because of that inability he had been unable to prepare and file a response to the court's sua sponte summary judgment motion, how Bohannan had requested the court's help in obtaining the copies he needed, how the court could have conducted a Spears-type hearing where the documents he had in his possession could have been shown to the court (and counsel present), how the court could have ordered the TDCJ to provide Bohannan access to copies, how it could have ordered the parties to meet and prepare a joint appendix, how the court instead chose to view the problems as "recurring complaints about the conduct of prison officials", and how this left him unable to respond to the summary judgment motions. ROA.3245-46. Bohannan informed the court that he was actively in the process of making the numerous typed copies of the evidentiary documents. ROA.3246-47. Bohannan also informed the court how, because of his medical condition and the fact the TDCJ's cells are unairconditioned, he was extremely limited in the amount of time he could stay in his dangerously hot cell (the TDCJ provides iced water and cold showers available to those who are in the dayrooms, not in their cells) and how the TDCJ

does not allow offenders to do any legal work in the dayrooms - it must be done in your cell. Id.

Bohannan asked the court for only a mere ten (10) additional days in which to complete all that typing and file his response. Id. The court refused to even provide Bohannan those ten days. ROA.3259-60. On June 30, 2016, the court granted summary judgment to Griffin, dismissing all claims asserted by Bohannan against him. ROA.3242.

On July 28, 2016, Bohannan mailed/filed his motion for a new trial. ROA.3263. To that new trial motion, Bohannan attached a copy of his response to Griffin's summary judgment motion; or rather, that which Bohannan had been preparing up to the day he received notice the court was not going to accept it, i.e. the denial of the 10 days he requested. ROA.3262, 3267-99. Bohannan provided that attachment as a proffer showing his need for the extra ten days and a greater page limit. Id. Bohannan also attached the 300-plus pages of summary judgment defense documents he had completed typing verbatim as of the date he received the ten-day denial order. ROA.3300-620. Once again, they were submitted as a proffer as to the vast number of pages Bohannan was having to type, page by page, because of the uncorrected copy-availability problem being imposed upon him. Id.

On August 5, 2016, the very next day after receiving Bohannan's 350-plus page new trial filing, the court determined it was "unmeritorious" and denied it. ROA.3623. In its order, the court claimed it "has reviewed the motion", id., yet it also made the

erroneous assertion that "the court has not been provided any documentation establishing that [the new trial motion] was placed in the prison mailsystem on [July 28, 2016]." ROA.3622. The entire third page of Bohannan's new trial motion contains that specifically stated sworn assertion. ROA.3263.

Bohannan timely filed a notice of appeal to the Fifth Circuit Court of Appeals on July 29, 2016. ROA.3626-27.

APPELLATE COURT HISTORY

The appellate record confirms that Bohannan had to request three extensions of time before he was able to present his appellant's brief. App. Motion For Extension I, II, and III. The first because the appellate clerk misdocketed the appeal, and the remaining two because the Texas prison officials had taken possession of Bohannan's legal files when Bohannan was benchwarranted to a Montgomery County court. *Id.*

The appellate record confirms that Defendant Griffin notified the appellate court that "this cause involves multiple constitutional and state claims" which necessitated Griffin's presenting a brief that exceeded the word-count permitted by Rule 32(a)(7)(B)(i), and which contained twice the number of pages allowed by Rule 32(a)(7)(A). Griffin Motion To Exceed Word Count. Bohannan, who believed he was required to comply with the page-limitation rules of the appellate court,² notified the court

² Bohannan's understanding came from FRAP Rule 35 [En Banc Determination] which makes provision for brief length extensions "by the court's permission", and FRAP 32(a)(7) [Form Of Briefs] which makes no such permission provision.

of how those page limitations, which were only applicable to him in this cause, forced him to incorporate large sections of the appellate record/arguments, by reference to their page numbers. App. Resp. to Griff. Motion To Exceed Word Count, p.3. The appellate court penalized Bohannan for that. Appendix A, p.2.

The appellate record confirms that because of factors beyond Bohannan's control, including the imposition of an improper legal reference material restriction upon Bohannan, he was unable to file a reply brief and was forced to ask the court to consider a summation of the issues Bohannan would have properly raised in that reply had he been able to do so. App. Motion For Court Intervention & App. Notice Of Inability To Comply w/ May 10th Ext.

On January 12, 2018, the appellate court affirmed the lower court's dismissal of Bohannan's claims. Appendix A. The mailing containing that order was not postmarked until January 16, 2018; and the prison officials did not provide it to Bohannan until January 26, 2018, fourteen (14) days after it had been entered - leaving Bohannan less than 12 hours in which to draft, type, and place any rehearing motion in the prison mail system. App. Motion For Ext. To File Rehearing, p.2. Bohannan informed the appellate court of this delay, and of the holidays and ice storm that obviously contributed to it. Id.

On February 2, 2018, Bohannan mailed his "Motion For An Extension Of Time In Which To File A Motion For Panel Rehearing Or Rehearing En Banc". Id. In that motion, Bohannan acknowledged that he was filing it after the time Rule 40 allowed and, to

show his "good cause" and "excusable neglect" under FRAP 26(b) and FRCP 6(b)(1)(B), detailed the late delivery, his being incapacitated due to illness, and how the prison officials had seized 12" of his legal files for the cause. Id.

On February 12, 2018, the appellate deputy clerk, relying solely upon FRAP 40, and failing to consider FRAP 26(b) and FRCP 6(b)(1)(B), refused to take any action on Bohannan's extension request motion, including refusing to present it to the court for its consideration, Appendix B. The prison officials did not provide Bohannan that refusal notice until February 21, 2018.

On February 23, 2018, two days after receiving notice of the deputy clerk's determination, Bohannan mailed his motion to reconsider the deputy clerk's non-action determination, as allowed by FRAP 27(b) and Local Rule 27.1. On March 6, 2018, the appellate deputy clerk took Bohannan's motion to reconsider the clerk's February 12th non-action determination and decided to file it as a motion to file a petition for rehearing out of time. However, the deputy clerk also required that Bohannan submit his motion for rehearing on or before March 16, 2018. Appendix C. The prison officials provided Bohannan notice of the deputy clerk's switch on March 15, 2018; leaving Bohannan a single day in which to file any prehearing motion.

On March 16, 2018, one day after receiving notice of the deputy clerk's determination, Bohannan mailed his motion to reconsider the deputy clerk's actual one-day time limit, as allowed by FRAP 27(b) and Local Rule 27.1.

On April 11, 2018, ninety (90) days after the appellate court upheld the district court's dismissal of Bohannan's claims, and when any petition for writ of certiorari was due in this Court, the appellate court ordered that both of Bohannan's reconsideration motions be denied. The prison officials provided Bohannan notice of that April 11th order on April 23, 2018.

Because the appellate court refused to allow Bohannan the 14 days provided to litigants who are able to afford counsel and/or who are not incarcerated (litigants who have immediate internet access to court orders), and prevented Bohannan from filing a delayed rehearing motion, Bohannan's Petition For A Writ Of Certiorari was due in this court on April 12, 2018, for matters arising from the January 12th panel dismissal. The court's taking until April 11th, to make a final determination that it was not going to permit Bohannan to request rehearing, meant Bohannan had no time in which to draft, type, and file his certiorari petition in this Court.

Therefore, in this petition, Bohannan seeks the Court's review of the impropriety of the rehearing denial which deprived Bohannan of the reasonable opportunity to seek this Court's review of the improper dismissal of his valid §1983 claims.

REASONS FOR GRANTING THE PETITION

Bohannan will seek to show that the United States Court of Appeals, and its deputy clerk's, refusal to provide him the fourteen days provided to other litigants for filing rehearing motions, under the circumstances present, has so far departed

from the accepted and usual course of judicial proceedings as to constitute as being an abuse of discretion, calling for an exercise of this Court's supervisory power and correction.

Bohannan's petition is seeking ONLY the Court's review of that 14-day denial.

QUESTION ONE

DOES A UNITED STATES COURT OF APPEALS DEPUTY CLERK ABUSE THEIR DISCRETION/AUTHORITY WHEN THEY REFUSE TO TAKE ANY ACTION ON A LITIGANT'S TIME EXTENSION MOTION BECAUSE THAT DEPUTY CLERK REFUSED TO CONSIDER THE PROVISION OF RULE 26(b) OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN MAKING THAT NON-ACTION DETERMINATION, AND RELIED SOLELY UPON RULE 40 OF THOSE RULES?

And, if so,

DOES A UNITED STATES COURT OF APPEALS ABUSE ITS DISCRETION WHEN IT DENIES RECONSIDERATION OF A DEPUTY CLERK'S NON-ACTION ABUSE OF DISCRETION DETERMINATION?

"Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment." Fed.R.App.Proc. Rule 40(c)(1).

"For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or permit an act to be done after that time expires." Fed.R.App.Proc. Rule 26(b).

"The court requires timely filing of all papers within the time period allowed by the rules, without extensions of time,

except for good cause." Fifth Circuit Local Rule 26.2.

The Fifth Circuit Panel's opinion was filed on Friday, January 12, 2018. However, no doubt because Monday the 15th was a federal holiday (Martin Luther King Day), the clerk's service of that opinion was not postmarked until Tuesday, January the 16th. Then, no doubt because ~~of~~ the state holiday of Confederate Heros Day occurred on Friday, January 19th, and an ice/snow storm stopped all non-security prison personnel from working (and disrupted U.S. Mail delivery as well) the first few days of the next week, Bohannan was not provided notice of the January 12th opinion until the prison officials provided it to him on Friday, January 26th. That, of course, being the last day under FRAP 40 for filing any rehearing motion. Bohannan, being incapacitated from the flu virus, and therefore unable to use the prison law library, still prepared and mailed his extension request the following Friday, February 2, 2018 - even after the prison officials spent that day "searching" Bohannan's legal materials and seizing 12" of legal files from this very case. Appellee Griffin did not contest the validity of these circumstances.

Though promptly providing the appellate court the uncontroverted evidence of good cause for an extension of time, the court's deputy clerk withheld the Rule 26(b)-warranted motion from the court itself, and made a determination that no action would be taken - prohibiting Bohannan from presenting the court his rehearing motion.

Then, when Bohannan tried to bring the deputy clerk's abuse of discretion to the court's attention, through the FRAP 27(b) and

Local Rule 27.1 process, the deputy clerk took Bohannan's properly filed and titled reconsideration motion, withheld it from the court, and mischaracterized it as something it was not - a motion to file for rehearing out of time. That, however, could have been a workable solution had the deputy clerk provided Bohannan something greater than a single day to file his rehearing motion.

On April 11, 2018, the appellate court denied reconsideration of the deputy clerk's refusal to consider Bohannan's Rule 26(b)-warranted time extension request. By so doing the appellate court approved the deputy clerk's denial of that extension Rule 26(b) justified. The deputy clerk's (and the appellate court's) actions resulted in the court's delayed April 11th determination to deny Bohannan an extension to file his rehearing motion, an extension he had requested on February 2nd. That delayed April 11th determination insured that Bohannan would not be able to present a Petition For A Writ Of Certiorari in this Court, challenging the court's January 12, 2018 opinion's contents, because that petition would have had to be filed long before April 23rd when Bohannan received notice of the April 11th denials.

Surely, this Honorable Court knows pro se prisoners are already at a severe disadvantage in litigating claims and appeals. This is being aggravated more and more as prison law libraries decrease their contents (or disappear altogether) and as "snail" mail delivery takes longer and longer. Holding prisoners to the very same time limits imposed upon trained attorneys, who have instant internet access to the court's activities, is patently unfair and only serves to further unlevel a playing field that already is

like a hurricane-tossed sea. But, in the matter before this Court, Bohannan was not asking for "extra" time above that which the rules make provision for. All he asked for was that he be given 14 days from when he knew about it, not one day and certainly not a few short hours.

QUESTION TWO

DOES A UNITED STATES COURT OF APPEALS DEPUTY CLERK ABUSE THEIR DISCRETION/AUTHORITY WHEN THEY TAKE A PROPERLY FILED AND TITLED MOTION FOR RECONSIDERATION OF A DEPUTY CLERK'S PRIOR DETERMINATION AND (1) REFUSE TO PRESENT THAT MOTION FOR RECONSIDERATION TO THE COURT FOR ITS CONSIDERATION, (2) DECIDES TO RECLASSIFY THE RECONSIDERATION MOTION AND TREAT IT AS A MOTION TO FILE FOR REHEARING OUT-OF-TIME, AND (3) THEN REFUSES TO PRESENT THAT OUT-OF-TIME MOTION TO THE COURT UNLESS THE APPELLANT FILES THE ACTUAL REHEARING MOTION WITHIN WHAT IS ACTUALLY ONE SINGLE DAY?

and, if so,

DOES A UNITED STATES COURT OF APPEALS ABUSE ITS DISCRETION WHEN IT DENIES RECONSIDERATION OF A DEPUTY CLERK'S ABUSE OF DISCRETION IN DETERMINING TO RECLASSIFY A PROPERLY TITLED RECONSIDERATION MOTION AND/OR IN DETERMINING A TIME LIMIT FOR FILING FOR REHEARING THAT IN ACTUALITY IS A SINGLE DAY?

"A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action." Fed.R.App.Proc. Rule 27(b).

On February 23, 2018, Bohannan promptly filed his motion for reconsideration of the deputy clerk's February 12th non-action determination as addressed in Question One above. On March 6, 2018, the deputy clerk, instead of presenting the properly filed and titled motion to the court for a single-judge determination, as was required, decided to prevent that from occurring by renaming the properly titled motion; calling it a "motion to file the petition for rehearing out of time."

Though Bohannan's February 23rd motion for reconsideration (1) specifically addressed the mail service delays he is subjected to, and (2) asked for the full 14 days the rules made provision for, i.e. fourteen days from when he received service of authorization to file that rehearing motion, the deputy clerk provided Bohannan only 10 days from the date of the clerk's renaming his motion and requiring the completed rehearing motion be filed; that being March 16, 2018. Because of the delayed mail service Bohannan is subjected to, and of which he notified the court of, Bohannan did not receive actual notice of the clerk's renaming and setting the March 16th deadline until March 15th, mere hours before that deadline expired.

Being unable to complete and file his rehearing motion within the few hours the deputy clerk provided Bohannan to do so, Bohannan hurridly drafted and filed a second reconsideration motion under FRAP 27(b) and Local Rule 27.1. This motion addressed the deputy clerk's abuse of discretion in renaming Bohannan's properly filed and named reconsideration motion and in failing to provide the same 14-day time period FRAP 40(a)(1)

provides other litigants.

On April 11, 2018, the appellate court denied reconsideration of the deputy clerk's March 6th abuse of discretion. The deputy clerk's (and the appellate court's) actions resulted in the delayed April 11th determination preventing Bohannan from being able to file his rehearing motion; which Bohannan had been trying to do since February 2nd. That delay insured Bohannan would not be able to present his Petition For A Writ Of Certiorari in this Court, challenging the court's January 12, 2018 opinion's contents, because that petition would have had to have been filed long before April 23rd when Bohannan received notice of the April 11th denials.

Surely this Honorable Court recognizes the fundamental unfairness that occurs when a Court of Appeals failes to take into account the mail delays prisoners, unlike other litigants who have immediate interent access, are subjected to in setting due dates and in making "good cause" determinations for needed extensions. Because that was not done in this cause, the Court's discretionary intervention is warranted and necessary, not only for correction but to clarify the matter for future considerations.

QUESTION THREE

DOES A UNITED STATES COURT OF APPEALS ABUSE ITS DISCRETION
IN ITS DECISION NOT TO APPOINT COUNSEL FOR A DETAINED
INDIGENT APPELLANT, IN A CIVIL RIGHTS ACTION, WHERE (1) THE
APPELLATE COURT FAILS TO EXERCISE ITS DISCRETION UNDER A
PROPER ANALYSIS OF THE SITUATION: (2) THE CASE INVOLVES

MULTIPLE CONSTITUTIONAL AND STATE CLAIMS; (3) THE DISTRICT COURT'S MEMORANDUM AND ORDER IS 39 PAGES LONG; (4) THE RECORD ON APPEAL IS OVER 3,750 PAGES; (5) THE APPELLEE NEEDED, AND OBTAINED PERMISSION FROM THE APPELLATE COURT, TO FILE A DOUBLE-PAGE LENGTH BRIEF; (6) THE APPELLANT'S JAILERS INTERFERED WITH HIS ACCESS TO BRING THE APPEAL BY PLACING HIM ON A LEGAL REFERENCE MATERIAL RESTRICTION; (7) THE APPELLANT WAS UNABLE TO FILE A REPLY BECAUSE OF THE JAILERS' ACTIONS; (8) THE APPELLANT'S JAILERS SEIZED 12" OF THE APPELLANT'S FILES FOR THE CASE; AND (9) THE APPELLANT'S ABILITY TO RECEIVE REASONABLY TIMELY SERVICE OF LEGAL MAIL WAS SO IMPAIRED THAT HE WAS UNABLE TO FILE ANY REHEARING MOTION IN THE APPEAL?

In a single sentence, citing Ulmer v. Chancellor, 691 F.2d 209, 212-13 (5th Cir. 1982), the appellate court refused to appoint Bohannan counsel "[b]ecause this case does not present exceptional circumstances". Appendix A, p.2. The record on appeal and the appellate record confirm that a proper analysis of the situations present in this case reveals ample exceptional circumstances are present.

Bohannan's claims addressed and arose from the treatment he was subjected to while illegally required to participate in a civil commitment program, In re Bohannan, 379 S.W.3d 293 (Tex. App. - Beaumont 2010), reversal aff. 388 S.W.3d 296 (Tex. 2012), which, by statute, required the committed person be "released" and subject to treatment and supervision that was only of an "outpatient" nature. The Texas Supreme Court, noting how the

Texas civil commitment scheme is unique among all the states in its "outpatient" requirement, held "[t]he Texas [Civil Commitment] Act imposes no physical restraint and, therefore, does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." In re Fisher, 164 S.W.3d 637, 648 (Tex. 2005)(quoting Smith v. Doe, 538 U.S. 84, 100 (2003)). The legislation required that the person committed be "released", as did Bohannan's illegal order of commitment. ROA.3031. Because of the unique nature of Texas' no-physical-restraint commitment scheme, the legality of the rules and conditions of the unique scheme had never previously been litigated in the federal courts and are, therefore, issues of first impression.

The Fifth Circuit has expressed the view that a case of first impression may well present the exceptional circumstance justifying appointment of counsel. Santana v. Chandler, 961 F.2d 514 (5th Cir. 1992)(concluding, however, that the presence of law in other circuits lessened the need for counsel); see also Duran v. Reno, 193 F.3d 82 (2d Cir. 1999)(counsel appointed on appeal because the case presented an issue of first impression). Here, the appellate court stated: "this case does not present exceptional circumstances". Appendix A, p. 2. The court's analysis failed to take into account the particular complexity and legal novelty of the case. This case is one of first impression - it is not the usual case. The exceptional first impression circumstances, in and of themselves, warranted the appointment of appellate counsel.

The appellate court's cursory analysis failed to take into consideration a number of other exceptional circumstances present in the case. Appellee Griffin informed the appellate court that (1) "[t]he appeal in this case involves multiple constitutional and state claims"; (2) "[t]he lower court's Memorandum and Order is thirty-nine pages"; and (3) "[t]he record on appeal is 3,765 pages". Griff. Motion To Exceed Word Count, p. 1 and P. 2 n.l. Even the appellee recognized this was not a usual case; with the appellate court obviously agreeing because it granted the extended-briefing motion.

The appellate record contains an uncontested declaration as to how Bohannan's jailers had interfered with his ability to present his appeal pro se by imposing a legal reference material restriction upon him - a restriction prohibited by agency policy. App. Motion For Court Intervention, pp. 2-3 and Attach. A & B to that motion. The record further verifies that Bohannan was unable to present his reply because of the interference. App. Notice Of Inability To Comply w/ May 10th Extension, pp. 2-3.

Finally, as already noted, the record confirms that Bohannan's jailers seized a sizeable portion of his legal files for this action and how his receipt of service has been abysmal and has resulted in the filing of this petition. All of which would have been of little impeding effect had counsel been appointed in this exceptional case.

Because the appellate court abused its discretion and failed to do so, this Honorable Court should exercise its supervisory

authority, noting the error and instructing appointment of counsel on remand.

CONCLUSION

The appellate court's refusal to provide Bohannan the 14-day time period provided under the Federal Rules of Appellate Procedure, after receipt of notice, in which to file a rehearing motion, and the refusal to appoint counsel to represent Bohannan in the appeal, were an abuse of discretion under the factual scenario present. These abuses should be corrected through this Honorable Court's oversight.

The Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,



Michael W. Bohannan #1841746
2664 FM 2054
Tennessee Colony, Texas 75886