

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Russell Berger — PETITIONER
(Your Name)

vs.

James Gibson, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eighth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Russell Berger
(Your Name)

P.O. Box 600
(Address)

Grady, AR 71644-0600
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1) Can a persons height be a disability under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12102 (1)(A)-(C)?
- 2) Can a "Strike" be accessed to a complaint filed by a pro se prisoner ~~After~~ being dismissed with-out prejudice?
- 3) Did the lower court correctly apply Bell Atlantic v. Twombly, 550 U.S. 544 (2007)
- 4) Is "Pain" and "unable to sleep" enough to state a claim under the Eighth Amendment to avoid dismissal upon "Screening" of the complaint before service?
- 5) Is the "Strike" provision of 28 U.S.C. § 1915 constitutional under the First Amendment?

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

James Gibson, Warden Varner Unit, Arkansas Dept. of Correction
Sgt. Hynes, Laundry/Clothing issue supervisor ADC
Wendy Kelley, Director, Ark. Dept. Correction
Jada Lawrence, Executive Asst., ADC
Dale Reed, Deputy Director, ADC
Randy Watson, Warden Varner Unit, ADC
COZ Noble, Laundry/Clothing Officer, ADC
Dexter Payne, Deputy Director, ADC
COZ Swope, Food Service, ADC
MS. Clark, Food Service Supervisor, ADC
John Doe, Warden Varner Unit, ADC

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION.....	12

INDEX TO APPENDICES

APPENDIX A Proposed Findings and Recommendations

APPENDIX B District Court Adoption and Dismissal

APPENDIX C 8th Circuit Court of Appeals Judgment

APPENDIX D 8th Circuit Court of Appeals Denial of Rehearing

APPENDIX E Amended Complaint

APPENDIX F *Newspaper Clippings*

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Torcasio v. Murray, 862 F.Supp. 1482 (E.D. Vir. 1994)	7
Erickson v. Pardus, 551 U.S. 194 (2007)	8
Bell Atlantic Corp. v. Twombly 550 U.S. 544 (2007)	8
Becker v. Montgomery, 532 U.S. 757 (2001)	8
Cal Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	10, 11
Wayne v. U.S.; 470 U.S. 598 (1985)	10
Legal Serv. Corp. v. Velazquez, 531 U.S. 533 (2001)	10
Thornburgh v. Abbott, 490 U.S. 401 (1989)	10
NACP v. Button, 371 U.S. 415 (1963)	10
N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)	10
Bill Johnson's Rests, Inc. v. NLRB, 461 U.S. 731 (1983)	11
Prof'l Real Estate Investors Inc v Columbia Pictures Indus., Inc, 508 U.S. 49 (1993)	11

STATUTES AND RULES

28 U.S.C. § 1915	5, 7
42 U.S.C. § 12102	5, 7

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from **federal courts**:

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

reported at Unknown to Petitioner; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

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

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

For cases from **state courts**:

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

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

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

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

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 29, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 10, 2018, and a copy of the order denying rehearing appears at Appendix D.

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

Sixth Amendment to the U.S. Constitution

First Amendment to the U.S. Constitution

Americans with Disabilities Act - Title II

28 U.S.C. § 1915

42 U.S.C. § 12101 et seq.

Eighth Amendment to the U.S. Constitution

Statement of the Case
~~REASONS FOR GRANTING THE PETITION~~

This is an important case nationally, not just for prisoners but also generally.

The petitioner is a prisoner in the Arkansas Dept. of Correction, one of the most punitive prison systems in the country. Petitioner is six foot eight inches tall, has had back surgery, has degenerative bone disease in the spine and shoulder, arthritis, neuropathy in the lower limbs, he also is an insulin dependent diabetic.

The mattress provided are foam rubber four inches thick and seventy-eight inches long when new; the foam rubber soon collapses to about one inch thick after use. The beds provided are metal frame exactly the length of the mats with a bar foot and head (making it impossible to allow the feet to over hang the end of the bed) The bedding, blankets & sheets are just long enough to cover the bed.

Since the petitioner was incarcerated in 1999, (he is serving life in prison without any opportunity to parole) the A.D.C. has provided a longer bed and mattress including longer sheets and blankets, until he was transferred to the Varner Super Max. The administration refused to provide longer mats, bedding and because the cells become extremely cold in the winter the ADC provides thermal underwear. They refused to give me any "thermals" that fit my height or weight (300 lbs)

Because of the above I was unable to sleep, experienced pain and injury because my feet would strike the concrete slab that serves as my bed in the super max - (the foam

mat sits on the slab in the super max rather then the metal
bed used in population)

Because of my diabetes I also filed complaints that I
was unable to get edible medically prescribed diet. (in my
original complaint I had several other issues. The Magistrate
order me to amend the complaint to contain one issue. In
my unschooled amended complaint I addressed what I thought
was one issue - the A.D.A. violations)

I filed action in the district court addressing American
with Disabilities Act violations concerning my height and the
inability to receive the medically prescribed diet.

The Magistrate, on screening as per 28 U.S.C. § 1915A,
recommended dismissal and a "strike" accessed. The magistrate
recommended dismissal of the diet issue because it was "factually
unrelated" and stated petitioner could refile it and pay
another filing fee.

The Magistrate further recommended dismissal of the
eighth amendment claim by characterizing my stated claim
of "pain" and "unable to sleep" as uncomfortable.

The Magistrate also found that no A.D.A. violation
occurred because height is not a disability and that
I did not allege that any limits to a ~~major~~ major life activities.

The Magistrate apparently is unaware that "sleep" is
a major life activity as defined by 42 U.S.C. § 12102(z).

The Magistrate stated the A.D.A. does not define ~~impairment~~
but said the Equal Opportunity Commission stated that it's

regulations specifically rule out height as a physical impairment.

The District Judge adopted the recommendations without comment, and dismissed without prejudice and accessed a strike.

The Eighth Circuit Court of Appeals affirmed without comment. They also denied a rehearing motion.

Reasons For Granting The Writ

Can Height be a disability under Title II of THE A.D.A

Although the Equal Employment Opportunity Commission (EEOC) has defined a physical impairment as specifically, excluding, *inter alia*, height and weight with regards to the Americans with Disabilities Act (42 U.S.C. § 12102(1)(A)) that defines a disability, the Department of Justice (the agency that sets regulations for Title II, the controlling authority for discrimination in public services) has made no definition.

The Magistrate erred in applying the E.E.O.C. definition to a state prisoner, where everything that is provided to him is by a state agency and therefore a disability excluded by the E.E.O.C. would be a disability when subject to state involved situations. For example I can think of no example in which the private employer would cause discrimination of the major life activity of sleep, but when your bed, mattress, and bedding all come from the state and you are too tall then your major life activity of sleeping is limited (sleep is defined as a major life activity in 42 U.S.C. § 12102(2))

It is important for this Court to grant this writ as disability is defined as a physical impairment, but other than the exclusions given by the E.E.O.C., there are no other guidance. Indeed although the court in this case dismissed this issue and ordered a "strike" (28 U.S.C. § 7915(g)) other courts have heard cases of weight as a disability. (See Torcasio v. Murray, 862 F.Supp 1482)

And since there is no ~~contrary~~ other opinion available

the issue raised by the Petitioner may have been novel, it was with enough merit that the Magistrate actually ruled, for the first time that I could find, that height is not a disability. So the case might have lost by my argument that height is a disability it did not fall under any distinction to qualify for a "strike"

So this Court should grant the writ to define "physical impairment."

2) Can a "Strike" be access to a complaint Dismissed as Without Prejudice

In the lower case the Magistrate found one issue that was unrelated and ordered that issue to be presented in another action with new filing fees and then dismissed the rest of the complaint rather than dismissing those issues and proceeding on the one that would pass the "screening" process.

This is ~~an~~ amount to punishment for being pro se and flies in the face of this Court's rulings that call for a "liberal reading," (see Erickson v. Pardus, 551 U.S. 194 (2007); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Becker v. Montgomery, 532 U.S. 757 (2001)).

3) Did the lower court correctly apply Bell Atlantic?

The Complaint alleged pain and the inability to (see App E pg 3 line 17)

Sleep, these allegation should have been sufficient to survive a screening if the complaint was liberally construed. Upon a Motion to Dismiss or Motion for Summary Judgment the weakness of those allegations would have prompted a showing of actual injury and sleep deprivation, but no chance was given to the pro se unschooled plaintiff.

This Court should remand to allow plaintiff to amplify his complaint.

4) Is "Pain" and "Unable to Sleep" enough to state a claim under the 8th Amend?

Petitioner alleged the pain he was constantly enduring when trying to sleep and was therefore unable to sleep. (See App. E, pg.3, Line 17)

The Magistrate re-characterized this as "Uncomfortable" (see App. A pg.4).

This pain and inability to sleep is not one occasion or even two - This is every night of incarceration for what appears to be the remainder of his life. (As he is sentenced to two consecutive life sentences in a state that does not offer parole to life sentences.)

This issue was blatantly dismissed by the Magistrate and ignored by the district court and the 8th Court of Appeals.

5) Is The "Strike" provision of 28 U.S.C. § 1915
Constitutional?

The right of access to courts "is part of the right of petition protected by the First Amendment" (see Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972)). As such, it is "generally subject to the same constitutional analysis" as is the right to free speech. (see Wayne v. U.S., 470 U.S. 598, 610 n.11 (1985)) Indeed this Court has said advocacy in litigation is speech. (Legal Services Corp. v. Velazquez, 531 U.S. 533, 542-43 (2001)) Because the three strikes provision addresses the conduct of litigation in court and not the internal operations of prisons, it is governed by the same First Amendment standards as other "free world" free speech claims. (Thornburgh v. Abbott, 490 U.S. 401, 403 (1989))

This body of law requires that restrictions on expression be narrowly tailored to the problem they are suppose to solve, (NAAACP v. Button, 371 U.S. 405, ⁴³⁸ (1963)). Applying that principle, this Court has said that public officials could not recover damages for defamation unless the statements they sued about were knowingly false or made with reckless disregard for their truth; the First Amendment requires "breathing space" and a margin of error is required for inadvertently false speech, or true speech will be deterred. (N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964))

This principle has been applied in cases where the government has sought to impose sanctions for litigation

because it allegedly violates antitrust (Cal. Motor Transp. Co., Supra)⁵¹¹ or labor law (Bill Johnson's Rests., Inc. v. NLRB 461 U.S. 731, 741 (1983)). This Court has said that sanctions may not be imposed against persons who bring litigation unless the litigation is both objectively and subjectively without basis. (Profi Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. 508 U.S. 49, 60-61 (1993))

Applied to the three strikes provision, the "breathing space" principle would mean that prisoners could only be sanctioned for lawsuits that were not only objectively without merit, but were also known by the plaintiff to be meritless, or were intentional abuses of the judicial system. The three strikes provision sweeps far more broadly than that. It imposes a penalty on lay persons proceeding pro se, which in some cases results in barring them from court, for honest mistakes of law as well as abuses of the legal system. Such a system risks deterring prisoners from filing meritorious claims, just as an overbroad law of defamation could deter true speech about public officials. The three strikes provision should therefore be found unconstitutional unless it is interpreted consistently with the "breathing space" principle, i.e., by limiting its application to malicious actions, or those that are clearly intentional abuses of the judicial system, as opposed to honest mistakes.

This Court Should Therefore find the "three strikes" provision is unconstitutional and remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald Bynum". The signature is written in a cursive style with a horizontal line underneath it.

Date: 9-11-18