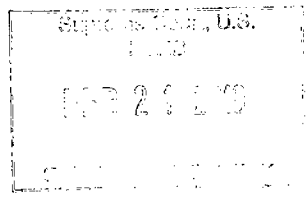
No. 18-8250

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Joel Marvin Munt --- PETITIONER
(Your Name)

vs.

MN DOC, et al. --- 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

Joel Marvin Munt
(Your Name)

5329 Osgood Ave N.
(Address)

Stillwater, MN 55082
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Did 8th Circuit incorrectly apply mootness standard and encourage prisons to utilize transfers to moot suits, at which point they are then free to transfer back the inmate after the suit is dismissed?

2. In hearing mootness assertion the first time on appeal, was it abuse of discretion to not hear evidence that claims were not actually moot?

3. Should the holding of mootness have rendered district court decisions void?

4. Was 8th Circuit holding of failure to exhaust contrary to precedents of this court and other circuits?

5. Did 8th Circuit inessence create a new standard for RLUIPA cases that is contrary to the decisions of this court, other circuits and the intent of Congress?

   a. JUDGE ADOPTED A STANDARD OF PROOF COUNTER TO THE PURPOSE OF THE RLUIPIA

   b. COURT DID NOT REQUIRE STATE TO PRESENT ANY EVIDENCE

   c. DISTRICT COURT RESOLVED DISPUTED FACTS IN DEFENDANT'S FAVOR

LIST OF PARTIES

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

[X] 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:

MN Department of Corrections,
Tom Roy
Gloria H. Andreachi
Bruce Julson
Steven Hammer
Bruce Reiser

All represented by
~~Lindsay Lavoie~~ Rachel Bell-Munger
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900 Bremer Tower
445 Minnesota Street
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TABLE OF AUTHORITIES CITED

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 B 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 United States district court appears at Appendix A 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

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

The date on which the United States Court of Appeals decided my case was December 18, 2018.

[ ] 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: 2/1/2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for 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 _____.

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

[ ] A timely petition for review was thereafter denied on the following date: _____, and a copy of the order denying review appears at Appendix _____.

[ ] An extension of time to file the petition for 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

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RLUIPA	1

STATEMENT OF THE CASE

1. Did 8th Circuit incorrectly apply mootness standard and encourage prisons to utilize transfers to moot suits, at which point they are then free to transfer back the inmate after the suit is dismissed?

For the first time on appeal, Defendants asserted mootness. At the same time they argued the court should not accept any factual allegations that the claims are not moot, despite the record being completely nondeveloped on this new issue.

The "[b]urden of demonstrating mootness on appeal is [a] heavy one." *Rezaq v. Nally*, 677 F.3d 1001, 1002, 1008 (10th Cir. 2012)(citing *Los Angeles County v. Davis*, 440 US 625, 631 (1979)). This burden is on the party asserting mootness. Id at 1008. "Defendants must prove the change completely and irrevocably eradicate effects of alleged violation" Id at 1002, 1009 (citing *Davis*, 440 US at 631). See also *Parkell v. Danberg*, 833 F.3d 313, 332 n.12 (3rd Cir. 2016)(Claim cannot be moot unless "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Citation omitted).

As with all burdens in this case, neither the Court of Appeals nor Judge Nelson held the Defendants to this burden.

Defendants have not met this burden, nor have they even tried to. They offer no assurances I will not be transferred back. By removing this burden, the 8th circuit has set up a

situation where prisons are free to transfer inmates to moot a suit and then transfer them back once the case is dismissed. In fact when the latest transfer occurred the appeal for another suit they had mooted was still pending, and the 8th circuit refused to reconsider that despite the transfer back eliminated what allegedly caused the mootness. Having not met their burden, Plaintiff should have been under no duty to plead further, but he nevertheless showed multiple reasons why the case is not moot.

Mootness is flexible discretionary doctrine, and generally requires situation arise rendering Court "unable to grant effectual relief". *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005); *State v. Barrientos*, 837 N.W.2d 294, 304 (2013). Crucial question for if case is moot is "whether granting a present determination of the issues will have some effect in the real world." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1303, 1311 (10th Cir. 2010). As the following argument will show, meaningful relief can still be granted.

a. Court can grant relief requested.

A claim is not moot where there is a reasonable chance of resolution affecting Plaintiff in the future. *Clarke v. U.S.*, 915 F.2d 699 (DC Cir. 1990). Nothing prevents this Court granting the relief requested. *Rezaq* at 1002, 1009-10 (citing

Church of Scientology v. U.S., 506 US 9, 12-3(1992))(not moot if some possible remedy can be granted). Injunctive relief is intended not only to stop current harm, but stop future harm as well. All of the situations in the suit will occur again and again over Plaintiff's lifetime if relief is not granted.

b. Mootness exception for issues capable of repetition but evading review

See *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989); *Clarke* at 704; *Murphy v. Hunt*, 455 US 478,482 (1982); *U.S. v. Sanchez-Gomez*, 798 F.3d 1204, 1204-5, 1206 (9th Cir. 2015) does apply. The court process is a long one and the DOC is at liberty to move inmates at will, and often does so deliberately in an attempt to moot suits.

The burden is on the party asserting mootness to prove it is not capable of repetition.

Because the low standard for transfers there is a realistic possibility Petitioner will be transferred again. See *Parkell v. Danberg*, 833 F.3d 313, 333 (3rd Cir. 2016). Defendants have made no attempt to assure the court that Plaintiff will never be transferred again, and any transfer would result in the conditions reoccurring and Plaintiff's religion being unlawfully violated again. The DOC moves inmates around a lot. I was at OPH before. It is a fact of life in DOC custody. No stability.

And some facilities have no single-cells, and worse privacy both for showers and cells that at STW.

Note that infringement of personal liberty for even a short period of time "cannot immunize constitutional deprivation" See *Pritchard v. Perry*, 508 F.2d 423, 424, 425 (4th Cir. 1975). "De minimis rule is not a limitation on right of action by individual for admitted violation of constitutional rights, nor are constitutional rights separable into redressable rights and nonredressable rights, or major and minor unconstitutional deprivations." *Pritchard* at 424, 425.

Mootness doctrine exception applies.

c. Relief not moot where defendants free to resume conduct.

Relief is not moot where "the resumption of the challenged conduct…depend[s] solely on the defendants' capricious actions by which they are 'free to return to [their] old ways.'" *Jones v. Federal Bureau of Prisons*, 2010 U.S. Dist. LEXIS 78912 (D.Minn.)(quoting *Steele v. Van Burden Public School Dist.*, 845 F.2d 1492, 1494 (8th Cir. 1988)(quoting *Allen v. Likins*, 517 F.2d 532, 535 (8th Cir. 1975))). See also *City News & Novelty, Inc. v. Waukesha*, 531 US 278, 284 n.1 (2001).

Clearly that is exactly the situation that exists here, as Defendants can and do transfer inmates at will and have made no

attempt to assure the court that such future transfer will not occur.

d. Will be returned to STW in near future.

The DOC has already conceded in an affidavit to the District Court in another case that Plaintiff's transfer from STW to OPH was retaliatory. Therefore it is very likely that the suit that I have filed over the retaliation will result in my transfer back to STW.

e. Summary

Clearly the 8th Circuit ruling is contrary to multiple rulings by this court, as well as 3rd, 4th, 9th, 10th, and DC Cir. The holding of the 8th circuit also dangerously encourages prisons to transfer inmates, moot claims and then transfer them back, at which point inmate is either totally barred or must relitigate the entire thing.

2. In hearing mootness assertion the first time on appeal, was it abuse of discretion to not hear evidence that claims were not actually moot?

The same issues with cell privacy exist at OPH as at STW. At OPH inmates tape up paper for privacy and guards use the same less restrictive alternative, simply asking if the inmate is

okay. As at STW, no issues have resulted from this practice. No opportunity was given for additional submission of evidence regarding this issue, raised by Defendants first time on appeal. Clearly atleast regarding the cell privacy issue the same issues exist at both facilities and the same less restrictive means are routinely employed.

3. Should the holding of mootness have rendered district court decisions void?

When the Court of Appeals held that the case was moot, rather than affirming the holdings of the District Court, shouldn't it have voided them?

4. Was 8th Circuit holding of failure to exhaust contrary to precedents of this court and other circuits?

Judge Nelson held "inmates routinely request single-cell assignments". Order at 17. She completely ignored that a single-cell request and a **single-cell restriction** are not the same thing. Defendants failed to submit anything to dispute Plaintiff's testimony that nothing in policy, the hand books nor anything else provided to inmates notifies them that such a restriction can be requested. That because Plaintiff and other inmates knew of a completely unrelated process and had filed many standard kites that he had to know of the special process

regarding single-cell restriction requests. Plaintiff's sworn affidavit asserted he did not know of it and even after they asserted its existence he had a hard time locating anyone who knew about it (no inmates and only 1 staff member) - facts the Defendants made no effort to dispute. Despite this, the court held "Certainly, knowledge of how to request a single-cell assignment is relevant to whether procedures for requesting a single-cell restriction are accessible or capable of being used by inmates." Nothing in the record supports this.

Nelson also ignored that single-cell restrictions are not available for religious accommodations. Thus, as the proper remedy, there was no remedy available. *Ross v. Blake*, 136 S.Ct. 1850, 1859 (2016)(not available if procedure not capable of providing relief sought). See also below.

The circuit court upheld the district court's holding of failure to exhaust the double bunking issue.

a. In *Ross v. Blake*, 136 S.Ct. 1850, 1859 (2016) this court specified instances where exhaustion is not required. This includes where the admin scheme is so opaque no "ordinary prisoner can discern or navigate it". The 8th Circuit has previously held the MN DOC's multilayered grievance policy complex and confusing. *Brooks v. Roy*, 776 F.3d 957, 961 (8th Cir. 2015). Clearly then the District Court erred when it held that Plaintiff failed to exhaust when the facts Plaintiff

testified to in his affidavit regarding the policy Defendants alleged was required for proper exhaustion. This directly conflicts with the holding of this court.

b. Eighth Circuit previously held "inmates cannot be held to the exhaustion requirement of the PLRA when prison officials prevented them from exhausting their administrative remedies." *Hammett v. Cofield*, 681 F.3d 948 (8th Cir. 2012)(quoting *Lyon v. Vande Krol*, 305 F.3d 806, 808 (8th Cir. 2002)(en banc)); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017). Here: a) policy itself gives no indication single-cell restriction can be requested, how, nor with whom, b) at no time during administrative process did Defendants mention "single-cell occupancy process" and c) it appears nowhere in the handbooks or other documentation given to inmates. It is impossible for inmates to use process they have no means of discovering. Plaintiff could not properly exhaust what Defendants only now assert was proper procedure.

c. Even if issue could have been denied for procedural reasons, it is considered exhausted if it is instead denied on the merits. *Hammett v. Cofield* at 946, 947. In this case the process ended with Defendants holding to their assertion that their proposed alternatives to accommodation provide enough privacy - despite Plaintiff's assertions the alternatives would still result in indecency. Defendants own pleadings have

asserted this covers the double-bunking claim[1]. At no time during process did they mention failure to exhaust. Defendants are barred from asserting this defense now.

d. Defendants did not assert failure to exhaust in their Answer. "To avoid waiver, defendant must assert all affirmative defenses in answer." *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 499, 505 (1st Cir. 1996); see also Fed.R.Civ.P. 8(a). Their vague assertion that PLRA provisions may apply is insufficient to provide notice of a claim of failure to exhaust.

e. Each of the preceding constituted a waiver of this defense.

NOTE: DOC deprived me of my caselaw, therefore I lack the rest of the caselaw regarding exhaustion nor am I at liberty to replace the research.

5. Did 8th Circuit in essence create a new standard for RLUIPA cases that is contrary to the decisions of this court, other circuits and the intent of Congress?

RLUIPA claims use burden shifting framework. *Chance v. Tex. Dept. of Crim. Justice.*, 730 F.3d 404, 410 (5th Cir. 2013). Plaintiff raising RLUIPA claim must show a) "relevant religious exercise is grounded in a sincerely held religious belief" and

[1] Defendants' Memorandum in Support of their Motion for Summary Judgment, page 4.

b) "government's action or policy substantially burdens that exercise by, for example, forcing the Plaintiff to engage in conduct that seriously violates his or her religious beliefs." *Holt v. Hobbs*, 190 L.Ed.2d 747, 135 S. Ct. 853, 862 (2015)(quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2775, 189 L.Ed.2d 675 (2014)); *Ali v. Stephens*, 822 F.3d 776, 782-3, 2016 U.S. App. LEXIS 7964,*8-9 (5th Cir. 2016). Government must then prove its action or policy c) "is in furtherance of a compelling governmental interest" and d) "is the least restrictive means of furthering that interest." *Holt* at 863; *Ali v. Stephens* at 783/*9.

On RLUIPA claim, **Plaintiff** has presumption of success on merits. See *Ali v. Quarterman*, 2012 U.S. Dist. LEXIS 2141 (E.D. Tex., Lufkin Div. 2012)(quoting *Ashcroft v. ACLU*, 542 US 656, 666 (2004))(Plaintiff "must be deemed likely to prevail" unless defendants show that proposed less restrictive alternatives are less effective than challenged regulations.).

It is not disputed that my beliefs were sincere or that they were substantially burdened. Order at 10. Therefore I focus on the government's burden. If this court wants I can present the entire RLUIPA argument as a supplemental pleading.

a. JUDGE ADOPTED A STANDARD OF PROOF COUNTER TO THE PURPOSE OF THE RLUIPIA

Once plaintiff has proven his burden, the state must prove the refusal to accommodate furthers a compelling interest and is the least restrictive means of furthering that interest. *Holt v. Hobbs*, 190 L.Ed.2d 747, 135 S. Ct. 853, 863 (2015); *Ali v. Stephens*, 822 F.3d 776, 783 (5th Cir. 2016). Simply saying "security" is not enough.

"Requiring a State to demonstrate … that it has adopted the least restrictive means of achieving [a compelling] interest is the most demanding test known to constitutional law." *Moussazadeh v. Texas Dept. of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012) (quoting *City of Boerne v. Flores*, 521 US 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)).

Judge Nelson's standard adopted by the Eighth Circuit means that if a prison suggests something to an inmate to do instead of the requested accommodation that there can never be an RLUIPA case even if the suggestion itself requires an indecent act the RLUIPA prohibits forcing an inmate to choose. She misses the point that the RLUIPA is about prisons accommodating religious beliefs, not religious beliefs being violated to accommodate prisons.

Privacy Sheets: Judge held that Plaintiff's assertion that a towel or blanket on his lap would be indecent was proof

Defendant's refusal was least restrictive means. Did not address the less restrictive means suggested by Plaintiff nor his testimony regarding it.

Showers: Rather than address the less restrictive alternative suggested by Plaintiff or the assertions it would further the alleged interests where the current method physically cannot, the Judge turned again to the assertion Plaintiff's refusal to accept a suggestion from them that violated his beliefs proved theirs the least restrictive means. This is particularly unjust as Plaintiff's assertions that the current means cannot actually further any of their interests is undisputed, as is Plaintiff's assertions of how his proposed alternative would further those interests.

RLUIPA is supposed to protect inmates from being forced to choose between discipline and something prohibited by their religion. Yet the Judge contends that the very fact that Plaintiff refused to accept a proposed alternative that also violated his religious beliefs was proof theirs was the least restrictive means.[2] RLUIPA is about prisons accommodating inmates, not inmates violating their religious beliefs to accommodate prisons. Plaintiff testified to a less restrictive means already in use for privacy and detailed one that could be

[2] Order at 14

used for showers that would better serve the alleged interests than the current (which they could not even dispute does not serve their interests at all).

The standard used is contrary to that used by this court in *Holt* as well as that used by other circuits.[3]

If this standard is allowed to remain then all prisons have to do is suggest the inmate make an accommodation, even if the accommodation itself violates the RLUIPA, and they can totally avoid the State's burden of proof under this statute.

b. COURT DID NOT REQUIRE STATE TO PRESENT ANY EVIDENCE

"To demonstrate a rational connection between prison policy…and a legitimate governmental interest advanced as its

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[3] Courts cannot abdicate responsibility conferred by Congress to apply RLUIPA's rigorous standard in favor of prison official expertise. *Holt* at 864; *Ali v. Stephens* at 783 ("Courts are not bound to defer to a prison system's assertions"); *Chance* at 418+419 (Courts must test "prison's asserted interest with regard to the risks and costs of the specific accommodation sought."); *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006)("court should not rubber stamp or mechanically accept the judgments of prison administrators" quoting *Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996)).

justification...prison administration is required to make a minimal showing that a rational relationship exists between its policy and stated goals." *Beerheide v. Suthers*, 286 F.3d 1179, 1181 (10th Cir. 2002). Even given deference, officials must present specific evidence supporting their concerns. *Murphy v. Missouri DOC*, 372 F.3d 979, 986 (8th Cir. 2004)(*Murphy*); *Holt* at 867. They "must do more than offer conclusory statements and post hoc rationalizations for their conduct" *Murphy* at 988-9. "The court does not ask if the challenged policy, in general, furthers a compelling governmental interest in security and costs." Instead, the Defendants are required to show those interests were furthered by the failure to accommodate ***Plaintiff***. *Ali v. Stephens*, 822 F.3d 776, 785, 2016 U.S. App. LEXIS 7964 (5th Cir. 2016); *Holt* at 863. No attempt was made to address accommodating **Plaintiff**.

"[I]n order to warrant deference, prison officials must present credible evidence to support their stated penological goals." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1318 (10th Cir. 2010)(*Calbone*)(quoting *Beerheide* at 1189); *Knowles v. Pfister*, 829 F.3d 516, 519 (7th Cir. 2016). Courts will not hold asserted interests compelling if government fails to support them with evidence. *Calbone* at 1319 (citing *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006)).

> "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." *Calbone* at 1318 (quoting 146 Cong. Rec. 16698, 16699 (July 27, 2000)).

Burden is on government to prove failure to accommodate furthers compelling government interest. *Lovelace* at 191.

It is not enough for Defendants to merely allege a connection to compelling interests, they must show the policies are reasonably related to those interests.

Prison policies "grounded on mere speculation" are insufficient to establish a compelling interest. *Holt* at 867; *Moussazadeh* at 794; *Bobby R. Brown v. Brad Livingston*, 17 F.Supp.3d 616 (SD Tex. 2014)(*Gonzales v. O'Centro Espirita Beneficiente Uniao Do Vegetal*, 546 US 418, 436, 126 S.Ct 1211, 163 L.Ed.2d 1017 (2006)(*Centro*)(Prison policies "grounded on mere speculation" are exactly the ones that motivated Congress to enact the RLUIPA)); *Calbone* at 1318; *Daywitt v. State of MN*, 2015 U.S. Dist. LEXIS 87951 (D.Minn. 2015)(RLUIPA was supposed to eliminate frivolous or arbitrary barriers to inmate religious exercise. *Cutter v. Wilkinson*, 544 US 709, 714 (2005)). Conclusory affidavits are insufficient to support summary judgment. *Fitzgerald v. Corrections Corporation of America*, 403 F.3d 1134, 1136, 1142-3 (10th Cir. 2005); *Morgan v. Willingham*, 424 F.2d 200, 201 (10th Cir. 1970)("[S]ummary judgment cannot

rest on purely conclusory statements either in pleading or affidavit form.").

Yet under the standard created by Judge Nelson and accepted by the Eighth Circuit prisons only need assert general interests. They have no duty to see they are furthered by the failure to accommodate a plaintiff. Further, she takes the bare assertions of Defendants over the testimony of Plaintiff.

Defendants were allowed to merely assert safety and security concerns.[4] The District Court did not require Defendants to present any evidence that there was a rational connection between their asserted interests the failure to accommodate Plaintiff. Plaintiff demonstrated that this was not the case and demonstrated through underinclusiveness that the asserted interests were not compelling.

Court also did not require Defendants to show that theirs was the least restrictive means of furthering those objectives.

Accepted without any proof that the old privacy boards harmed the alleged interests. Did not consider the arguments that privacy sheets are not apposite to the privacy boards and that their long use without a single incident proves this.

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[4] Insufficient to state "safety and security". *Holt* at 863.

Judge said remodeling a single cell as a shower would "place a substantial burden on [MCF-Stillwater] personnel and costs." Order at 14. She did not require Defendants to present any evidence or estimates of the cost of accommodation.[5] Nor was evidence offered of the cost to remodel the unit showers nor of any other accommodations at issue in this suit. Case law shows that the cost of accommodations are properly compared to the budget to determine if de minimis.[6] RLUIPA requires prisons to expend funds to accommodate religious beliefs.[7] Plaintiff demonstrated that all of their other alleged interests were not furthered by their current policy using their own admissions

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[5] *Ali v. Stephens* at 784 (RLUIPA "compels a fact-intensive inquiry into the particular costs and risks that the requested exemption engenders."); *Allen v. Sakai*, 48 F.3d 1082, 1084 (9th Cir. 1994) as amended (1995)

[6] DOC seized my case law from my cell.

[7] RLUIPA "may require the government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." *Ali v. Stephens* at 792/*35; *Garner v. Kennedy*, 713 F.3d 237, 245 (5th Cir. 2013)(quoting 42 USC § 2000cc-3(c))

(that staff do not face the showers so cannot see any of the things they claim to be trying to prevent and an assault occurred which they did not notice for quite some time, and that this would have been preventable with the proposed alternative).

Judge did not require showing that STW needs were different from those of OPH that they had to follow a different course regarding showering privacy. See *Holt* at 752.

The District Court holding[8] (affirmed by the 8th circuit) is thus inconsistent with the holdings of this court, as well as the holdings of the 4th, 5th, 7th and 10th circuits.

Failure on an element you have the burden of proof on entitles other party to summary judgment. *Celotex Corp. v. Catrett*, 477 US 317, 323 (1986). Yet if this court allows the decision to remain as is, prisons will be under no burden to prove either of the elements they have the burden for under the RLUPIA and the law will no longer provide any protection to inmates in the 8th Circuit. Having failed in their burdens under both elements, Plaintiff should have been granted summary judgment on all claims.

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[8] Judge holds DOC need not provide evidence of actual problems. Order at 11-12.

c. DISTRICT COURT TREATED PLAINTIFF'S AFFIDAVIT AS NO EVIDENCE

Consistently this judge has treated sworn statements from the Plaintiff's personal knowledge as no knowledge at all yet treated speculation from defendants without personal knowledge as hard evidence, claiming it is professional judgment. Factual disputes should be resolved at trial, and one must question the impartiality of a judge who gives no weight at all to testimony of a person's personal knowledge, particularly when weighed against that of staff who assert nothing to back up their statements. And Judge Nelson was not permitted to make credibility determinations or to weigh the evidence, thus it was fatal error for her to do so.

d. DISTRICT COURT RESOLVED DISPUTED FACTS IN DEFENDANT'S FAVOR

Summary judgment only proper if "no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 US 317, 322 (1986).

The Court may not weigh evidence, but instead must view evidence in light most favorable to nonmovant, draw all reasonable inferences in his favor, and eschew credibility assessments. *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir. 2004); *Troche v. Crabtree*, 814 F.3d 795, 798 (6th Cir. 2016); *Haywood v. Hathaway*, 842 F.3d 1026, 1030 (7th

Cir. 2016). The "judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 249 (1981).

Despite this, Judge Nelson resolved every disputed fact in the case in the Defendant's favor. In doing so she attempted to justify it by claiming the factual disputes were "tak[ing] issue with professional judgment of prison administrators". Order at 16. But staff making a statement allegedly of facts (such as whether feet can be seen or whether something occurs) are not professional judgments. Which she always deferred to Defendants on.

Privacy Sheets

The District Court held that the prison officials did not need to produce evidence that the failure to accommodate furthered their asserted interest.[9] Because Plaintiff has testified that the current less restrictive solution has been widely used for years without incident and Defendants have conceded that they have no knowledge of any issues that have resulted from this, the district court completely deviated both from the standard for summary judgment and the RLUIPA standard (where Defendants allegedly bear the burden of proof).

[9] Conflicting with this court's precedents and other circuits.

The court accepted the Defendants claim that past violence was related to the old privacy boards[10] without any evidence this was the case and despite evidence that it was not and that the situation is not apposite that posed by privacy sheets. She ignored that 1. All Minnesota's prisons used to be substantially more violent. 2. Both Rush City (Closed Custody like STW) and OPH (Max Custody) cells are enclosed other than a narrow window on the door. These cells are far more enclosed that STW's were with privacy boards (where a 2'x2' area was kept open on the doors - about 4X as large as OPH door windows). Defendants do not allege OPH cells violate PREA or compromise "safety and security", despite OPH as a max custody prison holds a greater proportion of violent prisoners. 3. Defendants offered no evidence the violence at the time was related to privacy. That OPH maintains a relatively low rate of violence despite its level of privacy is evidence Defendants' connection is misplaced, outdated and exaggerated. ***In fact Defendants have asserted they have no knowledge of any issues related to the use of the less restrictive method nor have they produced any evidence privacy sheets have actually facilitated any of the negative behavior.*** 4. STW and SCL have all doors unlock each morning, putting sleeping inmates at risk to be assaulted. At OPH even when the doors are unlocked they do not open until you

[10] Order at 12.

press the button to do so. 5. Unlike Privacy boards, privacy sheet requested is not permanent obstruction of the cell. Unsupported side effects of permanent obstructions hardly serve to provide a rational relationship between failure to accommodate and the temporary obstruction posed by privacy sheet. And the fact that defendants assert no knowledge of issues resulting from the less restrictive methods in use supports that Defendants are incorrect.

In response to Plaintiff's argument of underinclusiveness, the Judge held that security and safety are always compelling. But that is not the standard. Defendants have burden to show their asserted interests are furthered by the failure to accommodate. Judge said she was unaware of policies allowing inmates to hide illicit behaviors or obstruct their cells. She missed the mark on what underinclusiveness is. Underinclusiveness holds that a policy cannot be regarded as protecting a compelling government interest "when it leaves appreciable damage to that supposedly vital interest unprotected." *U.S. v. Secretary, Florida DOC*, 828 F.3d 1341, 1347-8 (11th Cir. 2016)(quoting *Church of the Lukumi Babula Aye, Inc. v. City of Hialeah*, 508 US 520, 547 (1993)). Includes the failure of rule "to cover significant tracts of conduct implicating the [rule's] animating and putatively compelling interest". Underinclusiveness of policy "can raise the

inference that the government's claimed interest isn't actually compelling after all." *Ali v. Stephens* at 785/*15; *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014); *Williams-Yulee v. Flo. Bar*, 135 S.Ct. 1656, 1668, 191 L.Ed.2d 570 (2015) ("Underinclusiveness can … reveal that a law does not actually advance a compelling interest."). Plaintiff showed the DOC permits and in fact forces conditions that facilitate the negative behaviors they allegedly want to stop and do so to a significant level at STW. See End Notes on Underinclusiveness in section that follows. Clearly this was a fact intensive inquiry that was improper for Judge to resolve in Defendant's favor.

Judge also claimed Plaintiff made only bare assertions of the widespread use of privacy sheets. Yet Plaintiff presented an affidavit attesting to his personal knowledge gained by personal experience and observation regarding this. Since an affidavit of your personal knowledge is evidence, it was improper for the judge to resolve this in the Defendant's favor.

Showers

Though Defendants presented no evidence of cost, the Judge concluded remodeling a cell as a shower.[11] Plaintiff explained

[11] "cost containment…was not a compelling governmental interest…in absence of any concrete evidence concerning how

the standard is the cost in comparison to the total budget and demonstrated that the cost would be deminimis.[12]

Despite Defendant's admission that staff do not face the showers and Plaintiff's sworn testimony that you can't see feet from the guard station, Judge resolved that current layout "prevent[ed] assaults, attacks, and provide[d] assistance in medical situations". Rather than address the less restrictive alternative suggested by Plaintiff or the assertions it would further the alleged interests where the current method physically cannot, the Judge turned again to the assertion the

She also ignored Plaintiff's testimony regarding OPH showers.

Forced Showers

For forced showers, Judge Nelson merely held they are the least restrictive means of furthering a compelling interest, despite Defendants having made no effort to establish this as the case. Order at n.4.

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other operations of prison would be affected by increased costs associated with [accommodation]" *U.S. v. Secretary, Florida DOC*, 828 F.3d 1341, 1342 (11th Cir. 2016)(*Florida DOC)*

[12] Though burden was not his.

Summary

The Judge's stance regarding factual disputes was well stated on Page 15 of her order. "every argument or 'factual dispute' that Plaintiff raises is clearly within the professional judgment of Defendants". But their allegations have no evidence to back them up. Her stance makes it so that Defendants can prevail on summary judgment no matter the facts of the case. It makes this court's standard for Summary Judgment and the RLUIPA meaningless. Defendants made no effort to keep their burdens of proof and summary judgment should have been granted to Plaintiff, instead it was granted to Defendants.

REASONS FOR GRANTING THE PETITION

I am not sure what is expected of this section above what the preceding one contained, but I will try. Much of this I believe was in the last section so I will try not to be repetitive.

S.Ct.R. 10 states a non-exhaustive list of reasons for which review may be granted. This list includes:

> (c) United States court of appeals decided a federal question [1] that has not been, but should be settled by this Court, or [2] in a way that conflicts with relevant decisions of this court.

It further states the list is "neither controlling nor fully measur[es] the Court's discretion".

1. Did 8th Circuit incorrectly apply mootness standard and encourage prisons to utilize transfers to moot suits, at which point they are then free to transfer back the inmate after the suit is dismissed?

If this court fails to hear this case prisons will continue to prevent remedying constitutional violations by utilizing transfers as weapons against inmate requests for injunctive relief. Inmates then will be denied complete solutions even if they prevail in the suit, and no problems will ever be solved. Defendants have demonstrated this with Plaintiff. Failure to hear this case is the same as affirming this practice and it, atleast in the 8th Circuit, virtually eliminates inmate abilities to enforce the Constitution.

2. In hearing mootness assertion the first time on appeal, was it abuse of discretion to not hear evidence that claims were not actually moot?

Again, if this court refuses to hear this they promote a new practice by prisons, whereby they can wait until after something goes to the appellate court, do a transfer, assert mootness and prevent Plaintiff from offering evidence it is not moot.

3. Should the holding of mootness have rendered district court decisions void?

This is a basic thing legal principle, if something is moot the court lacks further jurisdiction. Should this court fail to hear this case then a new practice is authorized in the 8th circuit. Plaintiff urges this court to reject that practice.

4. Was 8th Circuit holding of failure to exhaust contrary to precedents of this court and other circuits?

If this court fails to hear this case, then within the 8th circuit prisons will be able to fabricate procedures, with no evidence they actually exist and are known, and escape having to grant relief. You could hardly have a more clear situation where a procedure was unavailable, yet the district held inmates are expected to magically divine not only the existence of a procedure from the existence of an unrelated one, but also how to use it. An excellent strategy given that their standard interests of "security and safety" would be absurd to justify double-bunking.

Petitioner urges this court to hear this case rather than let inmate rights be eviscerated in the 8th circuit.

5. Did 8th Circuit in essence create a new standard for RLUIPA cases that is contrary to the decisions of this court, other circuits and the intent of Congress?

If this court allows the decision to remain as is, prisons will be under no burden to prove either of the elements they have the burden for under the RLUPIA and the law will no longer provide any protection to inmates in the 8th Circuit. They have nullified a federal law as well as the holdings of this court by this affirmation. ***Failure to review this case is the same thing as affirming the 8th Circuit holding and results in a law change for all prisoners.***

Given the RLUIPA as interpreted by Magistrate Rau and Judge Nelson: 1) if an inmate refuses any suggestion of staff he has no claim, even if that suggestion violates his beliefs. 2) staff need only allege compelling interests without attempting to show they are furthered by refusing the accommodation nor refute that it does not. 3) staff need not show a proposed accommodation would not work, need not refute that it does work. 4) any evidence from an inmate is ignored with all staff speculations given deference.

The holdings in this case conflict with this court's holdings in *Holt* as well as those of the other circuits. If you do not review this is becomes law of this circuit.

NOTE TO COURT

A note in closing. I am a pro se litigant. I have no idea what level of detail you required regarding the underlying case. Therefore I have tried to state the above issues as succinctly as possible. I beg this Court, should I have not provided enough details (particularly regarding the underlying RLUIPA claims) that you allow me to submit a supplemental pleading.

CONCLUSION

In all, this petition presents a number of practices that have just become precedent in the 8th circuit. Should this court not act then the RLUIPA will cease to have any meaning and prisons will be provided with powerful weapons to prevent enforcement of those rights inmates allegedly have.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joel Marvin Munt

Joel Munt

Date: 2/20/2018

END NOTES

Underinclusiveness

Inmates have plenty of opportunities to engage in behaviors Defendants allege accommodation would further. Double bunking[13], the time between rounds[14], cafeteria changes[15] and the mass unlocking of cells[16] are all things that have aided or even provoked the negative behaviors they allege they want to curtail. These are just a few examples of underinclusiveness indicating the DOC does not consider inmate safety a compelling interest. See *Ali v. Stephens* at 785-6/*15-16.

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[13] Where inmates are forced to share a cell with another inmate who can assault them when they are at their most vulnerable - sleeping. Also facilitates other illicit activities, like extortion, theft, and tattooing. It would also aid sexual behaviors.

[14] Which inmates use to facilitate fights, tattooing and other illicit activities.

[15] Which predictably resulted in many in cell fights.

[16] Which leaves sleeping inmates vulnerable to assault.

There are many areas without cameras at STW. If an inmate wants to attack someone they have no need of privacy sheet to do so (again proven by the fact that though privacy sheets are widely used there is no evidence of them being used in that fashion and assaults on both officers and inmates happen - often right on flag or in cells between rounds - with no need for privacy sheets).

As Related to Plaintiff

The Judge also ignored that each of these things is supposed to be judged by Defendants showing failure to accommodate **Plaintiff** furthered the alleged goals. Plaintiff has no tattoos, does not drink, he has not been involved in any fights, nor is he a risk for any of the other behaviors they worry about. He has never attempted an escape. He has never attempted to have a physical relationship of any sort with either a guard or another inmate (nor would he outside of marriage). Defendants made no attempts whatsoever to show failure to accommodate plaintiff furthered their interests.[17]

[17] As noted, they never even attempted to meet their burden to show the failure to accommodate furthered a compelling interest or that it was the least restrictive means.

Accommodations to Others Not Addressed

The Judge also ignored the accommodations granted to others.

That single-cell restrictions are granted for a variety of non-religious reasons, but not for religious purposes. This was also relevant as a second condition under *Ross* where administrative remedy is not "available".

That showering accommodations are provided to others for nonreligious reasons. It is irrelevant that Plaintiff is not asking for the same accommodation, only that they are willing to accommodate others.

Less Restrictive Alternatives not addressed

The Judge and Defendants failed to show how the less restrictive alternatives suggested by Plaintiff would not work.

Use of a privacy sheet. Plaintiff testified that this practice is already widely used, provided information on specific instances of staff encountering privacy sheets (and staff took further evidence of this), and is supported by the Memo from Andreachi that Plaintiff submitted[18]. Defendants

[18] Andreachi's memo that the practice was to be discontinued implies that the practice existed. And Plaintiff testified that it continued even after that point and that he witnessed Andreachi herself ignoring privacy sheets that were up.

themselves claimed ignorance of any issues having resulted from the use of a privacy sheet.

Private showers. Plaintiff's summary judgment pleadings and his appellate filings showed in detail that while it is impossible for the current practice to further legitimate objectives, the proposed alternative would actually further them.

Single-cell restriction. Are granted to others for other reasons. Defendants made no effort to show that they would be unreasonably burdened by granting one to Plaintiff and never attempted to show it furthers any legitimate interest.

No forced showers. Ignored by Defendants and Magistrate. Judge Nelson just made up her own justifications.

RLUIPA is all about granting exceptions to inmates for religious reasons. All but the showering accommodation would have had virtually no impact on the DOC, and that would have been de minimis expense and benefited their interests.[19] To not require them to meet their burden of showing why these would not work eviscerates the law.

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[19] See *Moussazadeh* at 795(a $13,000 expendature from a $8 million budget is not a compelling interest, nor $88,000 from a $183.5 million budget)

APPENDICES

APPENDIX A - Decision of the District of Minnesota

APPENDIX B - Decision of Eighth Circuit Court of Appeals

APPENDIX C - Denial of Petition for Rehearing

APPENDIX D - Constitutional and Statutory Provisions Involved

United States Court of Appeals
For the Eighth Circuit

No. 18-1844

Joel Marvin Munt

Plaintiff - Appellant

v.

Minnesota Department of Corrections; Tom Roy, Commissioner of Corrections; Gloria H. Andreachi, A East Lt.; Bruce Julson, CPD Operations; Steven Hammer, MCF-STW Warden; Bruce Reiser

Defendants - Appellees

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: November 15, 2018
Filed: December 18, 2018
[Unpublished]

Before BENTON, BOWMAN, and ERICKSON, Circuit Judges.

PER CURIAM.

Minnesota inmate Joel Marvin Munt appeals the adverse entry of judgment by the District Court[1] in his action claiming violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA). We conclude that Munt's RLUIPA official-capacity claims for declaratory and injunctive relief are moot because he has been transferred from the correctional facility where the alleged violations occurred. See Zajrael v. Harmon, 677 F.3d 353, 355 (8th Cir.) (per curiam) (recognizing that because the plaintiff "is no longer subject to the policies that he challenges, there is no live case or controversy"); Smith v. Hundley, 190 F.3d 852, 855 (8th Cir. 1999) (noting a previous holding "that an inmate's claims for declaratory and injunctive relief to improve prison conditions were moot when he was transferred to another facility and was no longer subject to those conditions"). We find no merit to Munt's arguments in his original and amended reply briefs that the narrow exception to the mootness doctrine applies in this case, i.e., that the challenged conditions at issue here are capable of repetition yet evading review. See id. (discussing the application of the exception). We also see no basis for overturning the court's judgment on Munt's other claims. Accordingly, we affirm.

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[1]The Honorable Susan Richard Nelson, United States District Judge for the District of Minnesota, adopting the report and recommendations of the Honorable Steven E. Rau, United States Magistrate Judge for the District of Minnesota.