

No. 18-8926

**In The
Supreme Court of the United States**

DONALD C. JACKSON,

Petitioner,

vs.

PRIYE T. MUKORO, CERSANDRA D. TEAGUE AND DANNY MYERS,

Respondents,

**ON PETITION FOR WRIT OF CERTIORARI TO THE
FIRST DISTRICT COURT OF APPEALS
HOUSTON, TEXAS**

PETITIOIN FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner Donald C. Jackson respectfully petitions for rehearing of the Court's order issued on June 24, 2019. **Donald C. Jackson v. Priye T. Mukoro, et al.**, No. 18-8926 (June 24, 2019). Petitioner Jackson ask this Court to rehear this case for a review of the entire record that would leave this Court with a definite and firm conviction that a mistake has been made by the Court of Appeals. This petition for rehearing is filed within 25 days of this Court's decision in this case.

GROUND FOR REHEARING

1. Should the *de minimis non curat lex* doctrine apply to a prisoner's 42 U.S.C. § 1983 lawsuit in conjunction with his First, Fifth, and Fourteenth Amendment rights for retaliation and due process against prison guards who confiscated and destroyed his typewriter and fan for filing a prison grievance over damages to the typewriter and fan caused by a prison guard while he was on medical leave?

I. Facts and Procedural History

Plaintiff, Donald Christopher Jackson, currently on parole, has during all times relevant to this action been incarcerated within the Texas Department of Criminal Justice, Institutional Division ["TDCJ"] at the Ramsey II Unit, now the A.M. "Mac" Stringfellow Unit, in

Rosharon, Texas. Plaintiff filed this civil rights action for punitive damages and injunctive relief pursuant to 42 U.S.C. § 1983, and the First, Fifth, and Fourteenth Amendments of the United States Constitution, as well as, Article I sections 17 and 19 of the Texas Constitution against the Texas Department of Criminal Justice ["TDCJ"], J. P. Guyton (Assistant Regional Director of Region III), Diana P. KuKua (Senior Warden), Priye T. Mukoro (Grievance Investigator), Cersandra D. Teague (Correctional Officer IV), and Danny R. Myers (Correctional Officer IV).

Plaintiff filed his original pro se civil rights complaint on April 18, 2005 (Cause No. 2005-25790) in the 55th Judicial District Court of Harris County, Texas. On January 9, 2006, this case was transferred to the 412th Judicial District Court of Brazoria County, Texas (Cause No. 37704). On April 11, 2006, the judge issued an order transferring venue.

C.R. 12. On September 21, 2006, the TDCJ filed a plea to the jurisdiction. A hearing on the plea was conducted on February 23, 2007, but the trial court took the matter under advisement. On May 2, 2007, the trial court granted TDCJ's plea to the jurisdiction on all claims except Jackson's claim that TDCJ took his property without due process. On

June 1, 2007, TDCJ filed its notice of appeal challenging the trial court's May 2nd order.

On May 2, 2008, the Court of Appeals for the First District of Texas reversed the interlocutory order of the trial court and render judgment dismissing Jackson's cause against TDCJ. Texas Department of Criminal Justice v. Donald C. Jackson, NO. 01-07-00477-CV, 2008 WL 2209350 at *1. (Tex. App.—Houston [1st Dist.] May 29, 2008, pet. denied) (mem. op., not designated for publication).

On May 4, 2015, Defendants Guyton, Kukua, Mukoro, Teague, and Myers filed their motion for summary judgment on the issue of qualified immunity. **C.R. at 152-178.** Then, on May 8, 2015, Jackson filed his motion for summary judgment seeking relief on all his claims. **C.R. at 269.** Subsequently, Defendants Guyton, Kukua, Mukoro, Teague, and Myers filed their amended motion for summary judgment on the issue of qualified immunity. **C.R. at 398.** On May 23, 2017, the trial court granted in part and denied in part Defendants Guyton, Kukua, Mukoro, Teague, and Myers' amended motion for summary judgment. **C.R. at 398.** The trial court denied Mukoro, Teague, and Myers' amended motion for summary judgment on the issues of retaliation and civil conspiracy.

C.R. at 398. On June 20, 2017, Mukoro, Teague, and Myers filed their Notice of Interlocutory Appeal. **C.R. at 593.**

However, on April 19, 2018, the Court of Appeals “regretfully” reached a different conclusion and reversed the judgment of the trial court and rendered judgment granting the Defendants’ motion for summary judgment based on qualified immunity and dismissing the claims against them. *Mukoro v. Jackson*, 01-17-00466-CV, 2018 WL 1864630 (Tex. App.—Houston [1st Dist.] Apr. 19, 2018).

The Court of Appeals held that “Jackson fails to raise a fact issue on the third element of retaliation, i.e., a retaliatory adverse act . . . even accepting the alleged acts as true, taking Jackson’s typewriter and fan ‘would not’ deter the ordinary person from further exercise of his rights.

Id.

II. Analysis

A. First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. The Fifth

Amendment of the United States Constitution in pertinent part provides that: “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) this Court held, “[l]ike others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.” *Id.* at 523. In *Farmer v. Brennan*, in making references to 42 U.S.C. § 1997e, this Court acknowledged, even apart from the demands of equity, an inmate would be well advised to take advantage of internal prison procedures for resolving inmate grievances. 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811, 1994 U.S. LEXIS 4274. Here, because Jackson obeyed § 1997e and this Court’s advice in *Farmer*, the Court of Appeals ruled that the authorities cited in *Jones v. Copeland*, No. 07-11-00437-CV, 2012 WL 3536764 (Tex. App. --- Amarillo, Aug. 16, 2012, no pet.) support [their] conclusions that, even accepting the alleged acts of retaliation as true, taking Jackson’s typewriter and fan “would not deter the ordinary person from further exercise of his rights.” Citing

Morris v. Powell, 318 S.W.3d 682, 686 (5th Cir. 2006). *Mukoro v. Jackson*, *supra*.

B. Fifth and Fourteenth Amendment

The Fifth Amendment of the United States Constitution in pertinent part provides: “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . without just compensation.

Parallel to the Fifth Amendment is the Fourteenth Amendment to the United States Constitution which provides in pertinent part that: “[no] State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”

In *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), this Court held that, Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law. *Id.* at 556. Until recently a claim of mere infringement of property rights, or theft or confiscation of property by prison officers, was not held to be actionable under 42 U.S.C. § 1983.

However, in light of this Court's decision in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), and

Weddle v. Director, Patuxent Institution, 405 U.S. 1036, 92 S. Ct. 1318, 31 L. Ed. 2d 577 (1972), vacating 436 F.2d 342 (4th Cir. 1970) which undercut the former distinction between "constitutional rights" and "property rights", some federal and state courts have begun to recognize that property rights of prisoners are entitled to protection under § 1983 from abuse by prison officers. In Russell v. Bodner, 489 F.2d 280 (3rd Cir. 1973) a prison guard's alleged action in entering a prisoner's cell and confiscating seven packages of cigarettes without justification was held to state a claim under § 1983. In Lathan v. Oswald, 359 F.Supp. 85, 88-89 (S.D.N.Y. 1973) a prisoner's allegations that prison guards had stolen from his cell a number of cartons of cigarettes, and a quantity of groceries was also held to state a § 1983 claim. In Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975) the Court has previously held that the confiscation of prisoners' typewriter and currency was subject to redress under Section 1983. In Hessel v. O'Hearn, 977 F.2d 299 (7th Cir. 1992) (Adams, Circuit Judge concurring) stated: "[h]aving been reluctantly persuaded that the ancient maxim '*de minimis non curat lex*' does not apply to civil rights actions such as the one presented here . . ." Even the Fifth Circuit Court of Appeals, in which the Court of Appeals relied on in Morris,

supra, to reverse the trial court denial of summary judgment, had at one time realized that “[i]t is also now clear that a civil rights action lies for wrongful confiscation or loss by prison officials of an inmate's property.” Watson v. Stynchcombe, 504 F.2d 393 (5th Cir. 1974); Clayton v. Wade, 487 F.2d 595 (5th Cir. 1973); Culp v. Martin, 471 F.2d 814 (5th Cir. 1973); Montana v. Harrelson, 469 F.2d 1091 (5th Cir. 1972).

C. RETALIATION

This case involves a question of the proper interpretation of Jackson's asserted claim of retaliation of his First Amendment right to use the prison grievance system. Although he properly stated a claim for relief, the Court of Appeals erroneously reversed the judgment of the trial court and rendered judgment granting the defendants' motion for summary judgment based on qualified immunity and dismissing Jackson's claims against them. Mukoro v. Jackson.

Prisoners have a First Amendment right to be free from retaliation for complaining about a prison official's misconduct, and a violation of this right is actionable under 42 U.S.C. § 1983. Inst'l Div. of Tex. Dep't of Criminal Justice v. Powell, 318 S.W.3d 889, 892 (Tex. 2010). To

state a valid claim for retaliation under Section 1983, a prisoner must allege the following elements: (1) a specific constitutional right; (2) the defendant's intent to retaliate against the prisoner for his exercise of that right; (3) a retaliatory adverse act; and (4) causation. Jones v. Greninger, 188 F.3d 322, 324-25 (5th Cir. 1999). Causation requires a showing that "but for" the retaliatory motive, the action complained of would not have occurred. Johnson v. Rodriguez, 110 F.3d 299, 310 (5th Cir.), cert. denied, 522 U.S. 995 (1997).

Although some federal and state courts have begun to recognize that property rights of prisoners are entitled to protection under § 1983 from abuse by prison officers, the Court of Appeals in Jackson's case hasn't. Here, the Court of Appeals in overturning the trial court's judgment was a clear abuse of discretion.

CONCLUSION

Petitioner Jackson ask this Court to rehear this case for a review of the entire record, which will clearly show that all the evidence disputes the assertions raised by the Defendants and thus support Jackson's claims, that would leave this Court with a definite and firm conviction that a mistake has been made by the Court of Appeals. In addition,

because there is a major basis to review the inconsistent holdings of the circuits and lower courts that a prisoners' retaliation claims are *de minimis*. Moreover, in addition to creating a split, the decision below is clearly incorrect, and, for the reasons already noted, the petition is significant, not only to Jackson, but to all prisoners who raises First Amendment retaliation claims. Therefore, the petition for rehearing should accordingly be granted in its entirety.

Respectfully submitted,

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