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18-9341

Supreme Court, U.S.
FILED

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No.

Cover Page

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY G. WHITTEN, 1138537, PRO SE, - Petitioner

VS.

WILLIAM A. GUNTER, et al, - Respondent(s)

ON PETITION FOR A WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS (4th Cir. Va.)

PETITION FOR WRIT OF CERTIORARI

ANTHONY G. WHITTEN, 1138537, PRO SE,

RED OXION STATE PRISON

10800 H. JACK ROSE HIGHWAY

POUND, VIRGINIA. 24279-0970

Questions Presented

- 1.) Whether 28 U.S.C. § 1732 was admissible, and reliable for proof and fact of my timely filed Motion for Spoliation?
- 2.) Whether the admission of the Emergency Room tape evidence, probative value outweighs its prejudicial effect if shown?
- 3.) Whether the denial of plaintiff's Spoliation motion not being addressed by the U.S. Ct. of Apps. was an abuse of discretion?
- 4.) Whether plaintiff's claim of his Fed. R. Civ. P. Rule 16 Pretrial Conference evidence agreement was violated and not addressed by the U.S. Ct. of Apps. was plain error?
- 5.) Whether the U.S. Ct. of Apps. failure to address my Fed. R. Civ. P. Rule 50 claim violated my 14th amend Due process of law rights under the U.S. Const.?
- 6.) Whether plaintiff's Fraud upon the Court claim was valid and required a response by the U.S. Ct. of Apps, became an abuse of discretion when overlooked?
- 7.) Whether defendants proved their case based on the preponderance of the evidence?

8.) Whether the U.S. Ct. of Appeals opinion conflicts with prior Supreme Court decisions, other court of Appeals and the conflict was not addressed and involved questions of exceptional importance?

9.) Whether the use of excessive force ruling was erroneous?

10.) Whether the official had actual knowledge of a substantial risk of serious harm to plaintiff?

LIST OF PARTIES

- 1) William A. Gunkler, (Wallens Ridge State Prison) K-9 Correctional officer (Strike Force).
- 2) D. T. Cook, (WRSP) Correctional officer (Strike Force).
- 3) Andrew Lawson, (WRSP) Correctional officer.

DEFENDANTS.

counsel: pro se, Anthony G. Whitten, 1138537

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Exhibits:

- #A. Whitten v. Gunter, 2018 U.S. App. Lexis 35303 (4th Cir. Va. Dec. 17, 2018).
- #B. Whitten v. Clarke, 7:16-cv-00195 & Whitten v. Gunter, 7:16-cv-00195, Judgments 1-23-2018
- #C. Whitten v. Gunter, Rehearing - unpublished, #18-6108 (7:16-cv-00195).
- #1 - Pretrial Conf. Proceedings 1-3-2018.

INDEX TO APPENDICES

- 1.) Judgment of the UNITED STATES COURT OF APPEALS at Appendix A, ... Exhibit # A.
- 2.) Judgment of the UNITED STATES DISTRICT COURT W.D. Va. at Appendix B, ... Exhibit # B.
- 3.) Judgment of the UNITED STATES COURT OF APPEALS - REHEARING at Appendix C, ... Exhibit # C.

Gen Compliance with 28 U.S.C. § 1254 and 1257.

Counsel Anthony Whitten, pro se.

TABLE OF AUTHORITIES

1
Lootes v. Johnson & Johnson, 756 F.2d 534, 551 (7th Cir. 1985). — 20
Dudley v. South Jersey Metal, Inc., 555 F.2d 96, at 99 (3d Cir. 1977). — 21
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully asks that a writ of
Certiorari issue to review the judgment below.

OPINION BELOW

[✓] For cases from Federal Courts:

The opinion of the United States Court of
Appeals appears at Appendix A to the petition
and is reported at: Whitten v. Gunter, 2018
U.S. App. Lexis 35303 (4th Cir. Va. Dec. 17, 2018).

The opinion of the United States District
Court appears at Appendix B to the
petition and is reported at: Whitten v. Clarke,
7:16-cv-00195 and Whitten v. Gunter, 7:16-cv-00195
Judgment Entered, Jan. 22, 2018 unpublished per curiam.

JURISDICTION

For cases from Federal Courts:

The date on which the UNITED STATES COURT OF APPEALS decided my case was DECEMBER 17, 2018, case NO. Whitten v. Gustaf, 2018 U.S. App. Lexis 35323 (4th Cir. Va. Dec. 17, 2018).

[✓] A timely petition for rehearing was denied by the UNITED STATES COURT OF APPEALS on the following date: January 28, 2019, and a copy of the order denying rehearing appears at Appendix C unpublished NO. 18-6108 - (7:16-CV-00195-ERD-RSB).

The jurisdiction of this court is invoked under U.S.C. §1254(1) and 1257.

Constitutional AND Statutory Provisions Involved

Const. Amend.

8th AMENDMENT - Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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.16

14th Amend. - Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

218, 21

Statutes and Rules

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28 U.S.C. § 1746.	.26A

STATEMENT OF THE CASE

- 1.) Petitioner civil complaint alleged the use of Excessive Force and Bystander Liability by prison officials at Wallens Ridge State Prison on October 31, 2015 without justification.

I was mauled by the prison's K-9 at the hands of Defendant Gb Genter as I lay on my stomach begging him to pull his dog off of me. I was repeatedly hit in my head, back, and underarm, which required over 58 sutures at a local hospital.

- 2.) I requested the security surveillance video in the housing area in order to prove my claim.

I reviewed the security Rapid eye video tape as part of discovery on October 24, 2016 and it showed clear and would dispute defendant's claim of me repeatedly stabbing my cellmate.

On January 9th, 2018 I reviewed the security Rapid eye video days before trial as part of the pretrial conference agreement and the tape was completely destroyed so, I filed a spoliation motion on January 10th, 2018, it was docketed on the civil docket sheet on

January 16, 2018 @ Doc. #110, pg. 10. The trial began on January 17-18th, 2018 and the clerk of Court and U.S. Dist. Ct. Judge, E. K. Wilton claimed the Spoliation motion was not on the cv. Docket sheet. This ruling/statement goes against Fed. R. Civ. P., Rule 79 - "Records Kept by the Clerk @ Rule 79 (2)(1)(2)(A) & (B). Also the Fed. Shop-book rule §1732, 28 USC. Petitioner was denied Due process of law as his right to be heard was denied as the Rapid eye security tape was part of my case in chief. It was also evidence not objected to at the Fed. R. Civ. P. Rule 16 - Pretrial Conference proceedings. See: the 1-3-2018 exhibit #1 For plaintiff and Counsel memorandum proceedings.

- 3.) On Day 1 of trial defendant's counsel objected to the use of the Rapid eye security tape being tampered with and my Spoliation motion/claims were rejected by the bench. The Clerk has me introducing my motion on Day 2 of trial, which is not true. I did so on Day 1 on page 25 of trial tran. @ #15-19, Vol. 1, Jan 17, 2018. The transcripts are altered and inaccurate. I was told to hold my motion by the bench.

4.) The Rapid eye security tape was played and operated by the defendants thus was an abuse of discretion by the bench and as the tape was being operated it was not in any condition to prove or disprove claims. It was manipulated as it prejudiced my case and caused the jury to rule in favor of defendant Gurter. The Tape never showed him or anyone else enter the cell, nor the dog. It did not show faces to identify whom was whom but, U.S. Dist. Court Judge, Dillon made a Rule 50 decision in favor of defendants Cooke and Lawson even though nothing they stated could be proven.

5.) The trial held me on defense the way it was conducted vs. the defendants having to prove they were not guilty. The trial was a sham. The stipulations and admissions of all matters that were reasonably anticipated for trial were agreed upon and on day of trial objected to which was a surprise on plaintiff and, once the bench ruled in favor of defendants the integrity of the Court was questioned. See: Civ. Doc. #100, pg. 9, on 1-3-2018. A Fraud upon the Court was committed by the bench.

6.) No evidence was presented by defendants which could conclude they were innocent thus, the improper rulings from the bench dictated the juror's decision on the excessive force claim.

7.) Once the U.S. Ct. of Appeals failed to consider my evidence it denied me due process and ignored the exceptional importance involved with the questions of the legal rights of the plaintiff. The pretrial order, Rule 16, Fraud upon the Court, Exclusion, Fed. R. Evid. Rule 803(6), Fed. Shop-bulk rule §1732, the failure to admit the E.R. Tapes, and the 14th amended claims, it was an abuse of discretion.

The (E.R.) emergency room tapes had Governor Brown and petitioners making statements which fell under the exceptions to the hearsay rule 803, Fed. R. Evid. 502. The bad faith destruction of the Rapid eye tape along with inconsistent statements and willfulness in failing to comply with the pretrial court order was reversible error not addressed by the (3) Judge Panel. The self-serving statements was not the preponderance of the evidence standard without evidence by defendants.

8.) Trial transcripts on day 1 & 2 January 17-18, 2018 will Prove legal errors made by the bench & prosecution which influenced the jury's decision. SEE: pg. 151, @ 7-25 & 152 @ 1-5 for Volume 1, Jan. 17, 2018 for improper application of law. SEE: pg. 279 vol. II, @ 4-14 & pg. 280 @ 1-25, pg. 281 @ 1-25, pg. 282 & 283 for trial error, plain error. Pages 148 @ 9-19 & 24-25, pg. 150 @ 16-25 & pg. 151 @ 1-4 all Vol. I, Jan. 17, 2018. On page 157 @ 10-11 & 12-21 I moved for judgment as a matter of law and, it was ignored. SEE: Vol. I, Jan. 17, 2018.

9.) The U.S. Ct. of App. (4th Cir. Va.) also failed to make a ruling on this Claim. A violation of clearly established law, U.S. Const. 14th due Process of law violation. Details are in Appeal case No. 18-6108-7:16-CV-00195 July trial Jan. 17, 2018 Vol. I to Tran. & Petition for Rehearing Notice of Judgment decided Dec. 17, 2018, written V. Barker, No. 18-6108 - (7:16-CV-00195) decision by: Judge, Wilkinson, Judge, Floyd, and Judge, Thacker, per curiam opinion.

10.) There was a willful deception and flagrant disregard of Plaintiff's U.S. Const. rights to due process and Once the U.S. Dist. Judge sustained defendant's objection and excluded the pretrial evidence tapes it constituted

an abuse of discretion and the failure of the U.S. Ct. of App. (4th Cir. Va.) to correct said plain error was an abuse of discretion. The stipulations made at the pretrial conf. did not produce any objections to the (E.R.) emergency room tapes thus, the day of trial exclusion of this evidence was critical and violated the court's Fed. R. Civ. P. 16, court order and, its prejudice and surprise could not be cured by plaintiff. My own statement as well as inmate Brown's statements on these tapes are not hearsay as we both spoke on personal knowledge, not hearsay as we both stated what took place between us on the same day of the incident. It fell under Fed. R. Evid. 803(1)(2) excited utterance. Our statements were spontaneous and trustworthy at the time they were made and, would have proved no (dog) entered the cell during the altercation. All defendant's changed their stories from institutional witness, investigative and their under oath Affidavits in order to help each other out of culpability. All committed perjury on the stand.

REASON FOR GRANTING OF THE WRIT OF CERTIORARI

11.) The UNITED STATES COURT OF APPEALS (4th Cir. Va.) entered a decision in conflict with decisions of the UNITED STATES SUPREME COURT, their circuit and, other U.S. Ct. of App's. on the same important matters and have departed from the accepted and usual course of judicial proceedings and have sanctioned such a departure by the lower court (U.S. Dist.), as to call for an exercise of this court's supervisory power, and all relevant case laws, rules, statutes, and constitutional provisions involved are as follows:

A. - Conflicts with decisions of other courts -

12.) The holding of the courts below is whether officer Gunter defendant gave a verbal warning stating he would release or use his (K-9) before effecting seizure of Plaintiff, through said use which resulted in this 42 U.S.C. A § 1983 action alleging use of excessive force,

SEE: Vathekan v. Prince George's County, 154 F.3d 173 (4th cir. 1998); Kopt v. Wing, 942 F.2d 265 (4th cir. 1991).

This court's decision conflicts with these (two) (4th cir.) rulings which states: Attacks by police dogs improperly deployed by their handlers without loud verbal warning (K-9) will be released if commands not obeyed is illegal and the use of excessive force.

13.- B - The holding of the courts below states:

The subjective component requires the plaintiff to show that the force was not applied in a good faith effort to maintain or restore discipline, but was applied maliciously and sadistically for the very purpose of causing harm.

Hudson v. McMillian, 503 U.S. 1, 6-7, 112 S.Ct. 995 (1992); Whitley v. Albers, 475 U.S. at 32, 106 S.Ct. 1078 (1986).

Plaintiff met his burden that the wrongdoing was objectively harmful enough to establish a const. violation of the Eighth Amend. Excessive force standard.

14.) C - The holding of the courts below states:

14.) Proof of official records become admissible to all parties under 28 U.S.C.S. §1732 when made in the regular course of business as an accurate reflection of their daily transactions and, to extent that record describes usual operations, it is considered trustworthy. The Federal shop-book statute. 888: Thomas v. Hogan, 308 F.2d 355 (Sept. 12, 1962), as the U.S. Ct. of Appls. (4th Cir. Va.) is in direct contradiction with this U.S. Ct. of Appls. when it failed to address my claim Spoliation Motion submitted on 1-16-2018, @ #110, page 10, to the U.S. Dist. Ct. in my "Retaining argument" on pg. 4 @ #6, 12-26-2018.

15.) C.B. - A question of exceptional importance is - Reception of evidence rule making admissible in federal courts all evidence admissible under United States Statutes or rules of evidence previously applied in federal courts in suits in equity is applicable to diversity cases. Fed. R. Civ. Proc., Rule 43(a), 28 U.S.C.A.
When the U.S. Ct. of Appls. (4th Cir. Va.) stated this civ. doc. entry was not deleted, it was an abuse of discretion in agreement with the

U.S. Dist. Ct. (W.D. Va.) The issue was not addressed. A U.S. Const. violation also occurred, under the 14th amend due process of law, failure to be heard. A conflict with the U.S. Sup. Ct., also: Fed. R. Civ. P., Rule 79.

- 16) D-: Spoliation of Evidence holding of the courts below: An entitlement to a favorable inference under the spoliation doctrine applied to me but, the U.S. Ct. of App. (4th Cir. Va.) failed to address my claim. See: Foster v. Lawrence Memorial Hosp., 809 F.Supp. 831 (D. Kan. 1992); "Intentional spoliation" and, bad faith destruction of a document/evidence relevant to proof of an issue at trial gives rise to an inference that production of the document/evidence would have been unfavorable to the party responsible for its destruction. Coates v. Johnson & Johnson, 756 F.2d 524, 551 (4th Cir. 1985); West v. Goodyear Tire & Rubber Co., 167 F.3d 776 (C.A.2. N.Y. 1999); Kronish v. United States, 150 F.3d 112, 126 (2d Cir. 1998). The exceptional questions involved legal rights and U.S. Const. 14th

Due process of law liberty interest to be heard conflicts with the aforementioned Cts.
see: Petition for Rehearing pp. 3 @ #5 and Argument pp. 1, @ #11, para. 1-3 for error of law by the U.S. Ct. of App., dated 12-26-2018.

- 18.) E.- Conflict with Fed. R. Civ. P., Rule 16,
and Decisions of other Courts below holdings-
A pretrial Conference order exclusion of evidence ruling because of failure of counsel to adhere to said order is an abuse of discretion on appeal see: Dudley v. South Jersey Metal, Inc, 555 F.2d 96, at 99 (3rd cir. 1977); Pakech v. American Export Isbrandtsen Lines, Inc, 69 F.R.D. (E.D. Pa. 1967) as the 4 Elements were met in my claim but, not addressed by the U.S. Ct. of App. (4th cir. Va.), Fed. R. Civ. P., Rule 16, 1-5, and (B) (iv) and (F) sanctions (D)(C); and the Fed. R. Evid. Rule, 50a. see: civ. doc. #100, pp. 8, 1-3-2018 and, Petition claim @ #8, pg. 5, 12-26-2018 for proof of the U.S. Ct. of App.
failure to address my claim which denied due process of law, 14th amend rights to be heard.

SEE: SEE: Rehearing Argument pg. 4, @ # 7, 12-26-2018 for factual legal issue overlooked, Also SEE: Fed. R. Evid. Rule 803 (1) (2) (3) and (5) (B) (C), & (6) (B) (C) - Records of a regularly conducted activity, not addressed by the U.S. Ct. of App and is in conflict with the above mentioned rule of law. SEE: pg. 4, @ 9 Rehearing on 12-26-2018, Also: Exhibit # 1 attached.

10.) F - Conflicts with Decisions of other Courts -

The holding of the courts below concerning Fed. R. Civ. P. Rule 50 - Judgment as a matter of law states (1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for the party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim that cannot under controlling law be maintained without a favorable finding on that issue.

The trial Judge ruling was in error thus, the U.S. Ct. of Appeals (4th Cir. Va) decision is in direct conflict with Rice v. Lampert Yacht, Inc.

761 F.2d 1210, 1213 (7th Cir. 1985). Also see: *Banner v. Brennan*, 178 F.2d 811, 114 S.Ct. 1970 (1994), the proper standard for deliberate indifference...
Amund. Due process violation of law is also implicated as I was denied the liberty of being heard.

5- The holding of the court below - Hazel - *Harris Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944). The most egregious conduct involving a corruption of the judicial process itself and when an attorney or an officer of the court has subvert deliberately to mislead the court its a direct assault on the integrity of the judicial process. The (3) Judge panel of the U.S. Ct. of App. (4th Cir. Va.) has not addressed this claim which is a conflict of an important question of exceptional importance of my substantive due process rights, 14th Amend U.S. Const. See: *Lehman* pp. 10, 12-21-2018. Also: *End R. v. F. Lyle*, \$3870 - Found upon the court. *Lockwood v. Bailes*, 416 F.2d 625, 632 (D.C. 1969), Corruption of judicial process requires correction. Conflict not addressed. Found upon the court claim.

20.) Petitioner request of this court to review his trial Appeal, rehearing for substantial legal questions that were overlooked and not addressed as a conflict exist. Prejudice affected the outcome and rulings on the merits of petitioners claims.

The United States Court of Appeals (4th Cir. Va.) decision is in direct conflict and contrary to the holdings of other U.S. Ct. of Apps. and the UNITED STATES SUPREME COURT'S clearly established Federal law.

21.) Petitioner prays this court will grant this writ of Certiorari for the aforementioned legal grounds presented.

Respectfully Submitted,

Pro se, Counsel: Antwan G. Whitten

Antwan G. Whitten, 1138537, pro se,

Red Onion State Prison

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Dated: 4/7/2019

Conclusion

The petition for a writ of Certiorari
should be granted.

Respectfully Submitted,

Arthur G. Whitten

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Dated: 4/7/2019