

No. 19-5365

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
APR 25 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MICHAEL J DEMARCO JR.,
PETITIONER,

VS.

LORIE DAVIS et al.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL J DEMARCO JR. 1564162

ALLRED UNIT

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QUESTIONS PRESENTED

1. Whether a prisoner has due process and equal protection under the Constitution when a guard deliberately, willfully and maliciously seizes a prisoner's legal and religious property while working directly for the government under color of state law in his individual capacity? Then, while directly under that power and on that same day accuses offender of a major case then is allowed by superiors to destroy the property that is the basis for the major case.

2. Whether a prisoner has due process and equal protection under the Constitution to call witnesses in his defense when issued a false, quota filling case that prisoner will automatically be found guilty of without his constitutional right to call witnesses on his behalf and to have those witnesses present? And whether superiors who oversee this biased, completely unfair process should be held accountable in their individual capacities and not granted sovereign immunity?

3. Whether a prisoner has equal protection under the Constitution when Defendants who are superiors and personally and directly involved in their individual capacities do not address and manage subordinates illegal behavior?

4. Whether a prisoner has equal protection under the Constitution when the property is legal material while trying to appeal to this very court, The Supreme Court Of The United States, causing "actual injury". Legal property and religious property was not frivolous and insequential. Actions by Defendants directly

hindered, impeded and burdened Plaintiff's constitutional right to file in this very court, The Supreme Court.

LIST OF PARTIES

[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:

Michael J DeMarco Jr., Petitioner

William Stephens, former TDCJ-Correctional Institutions Director

Lorie Davis, TDCJ-Correctional Institutions Director

Jeremy J Bynum, Officer

Joseph C Boyle, Disciplinary Captain

Richard E Wathen, Head Warden

Petitioner requests to add Head Warden Richard E Wathen who has had direct involvement in his individual capacity involving seizures of legal property in previous lawsuits. Lueck v. Wathen, 262 F. Supp. 2d 690, 694 (N.D. Tex. (2003)).

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DECISIONS BELOW:

The decision of the United States Court of Appeals for the Fifth Circuit is unreported to the best of my knowledge. It is No.17-11230 and a copy is attached as Appendix A to this petition (A-1). The order of the United States District Court for the Northern District of Texas is unreported to the best of my knowledge. A copy is attached as Appendix B to this petition (A-2).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 28, 2019. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I [1791] of the United States Constitution

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 of the right of the people peaceably to assemble; and to petition the Government for a redress of grievances.

Amendment XIV [1868] of the United States Constitution

... 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 laws.

The Amendments are enforced by Title 42 U.S.C. § 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a civil rights case filed under 42 U.S.C. § 1983 by a state prisoner and asserting claims for the unconstitutional seizure and destruction of legal and religious property. Plaintiff also asserts a blatantly biased disciplinary hearing stemming from the seizure and destruction of said property. Plaintiff seeks "actual damages" as to all claims against William Stephens, former Director TDCJ-CID; Lorie Davis, Director TDCJ-CID et al., in their individual capacities under color of state law. All Defend-

ants are acting in their capacity as a state official delegated power to them personally and exclusively by the government.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of free exercise of religion and to petition the Government for a redress of grievances of the First Amendment and a prisoner's constitutional right to due process and equal protection of the laws of the Fourteenth Amendment. The district court had subject matter jurisdiction under 42 U.S.C. § 1331 because the complaint raises a question whether the Defendants violated the Plaintiff's rights under the United States Constitution.

REASONS FOR GRANTING THE WRIT

This civil suit presents the fundamental constitutional rights of a prisoner who is incarcerated and under the "equal protection" of the laws. The Defendants in this case deliberately, willfully and maliciously confiscated legal and religious property then allowed that property to be destroyed without due process.

A. DISPUTED FACTUAL ISSUES AND OBFUSCATION BY LOWER COURTS

The lower court severed because claim of constitutionally protected legal and religious property were "potentially" cognizable under 28 U.S.C. § 2254. However, Plaintiff isn't challenging the fact or duration of my confinement or do I seek immediate or speedier release, the basis for a 2254 and criminal appeals. I have

maintained throughout that Ofc. Bynum seized legal and religious property in his individual capacity under color of law and that his superiors were well aware of his actions and that those superiors should be held accountable in their individual capacity through a jury trial and with the availability of discovery. Moreover, Texas's tort limits punitive damages and a jury trial when systemic failures occur regarding abuse of power delegated to them by the state and government under color of law.

Additionally, lower court's claim that my constitutional right to possess legal and religious material is frivolous and baseless and then citing LLEH, Inc. v. Wichita Cty., 289 F.3d 358, 364 (5th Cir. 2002) as suffering "no harm" because I was represented by counsel is not only insulting it's obfuscation. It isn't unreasonable to expect the lower court to at least try to find compatible case law. To say that it's o.k. for a prison guard to seize and confiscate a prisoner's legal and religious property then maliciously and callously destroy that property not knowing whether I did or did not have a lawyer at that time or even care is unjust. This is only after the fact that the lower court could even consider this line of reasoning and it's extremely unfair.

Additionally, the lower court insists that the soul basis for this claim is because of retaliation and incorrectly states that "he claims that they caused the violation by failing to train their subordinates." I've always maintained that no amount of training can prevent any officer, whether COI all the way up to

Warden or Director, from seizing a prisoner's legal and religious material then callously and wantonly destroying it as nothing but cold-hearted and hate-filled. The lower court does agree that there are "elements" of retaliation to my claim, however then slams the door and bolts it shut denying Plaintiff's access to the tools of discovery and a jury trial to ferret out other "elements".

Plaintiff does not "contend" that property was seized in violation of TDCJ policy in and of itself. However, I do contend that Defendants acts were illegal and in violation of constitutionally protected rights. Plaintiff has always maintained that property was seized by Defendants (and not just any property) and that Defendants were well aware that property was legal and religious. Furthermore, Defendants ignored all reasonable protocol, directives and procedures for confiscated property, let alone legal and religious property and deliberately allowed property to be destroyed. TDCJ does in fact state, "The program offers the offender a less formal alternative to litigation, thus saving taxpayers the cost of defending the agency in court." Also, "It involves an ongoing commitment to solving problems by each staff member at every unit." Additionally, "To promote awareness and positive intervention between staff and offenders to identify and resolve issues at the lowest possible level, and to facilitate the flow of information afforded units and agency leaders." Offender Grievance Operations Manual (OGOM). None of these safeguards was afforded Plaintiff.

B. IMPORTANCE OF THE QUESTIONS PRESENTED

1. Whether a prisoner has equal protection under the Constitution when a guard deliberately, willfully and maliciously seizes a prisoner's legal and religious property while working directly for the government under color of state law in his individual capacity? Then while directly under that power and on the same day of the seizure in his individual capacity accuses offender of a major case then is allowed by superiors to destroy the property that is the basis for the major case.

Ofc. Bynum has no power except that which is delegated to him in his individual capacity by the government. This is not "random and unauthorized" but definitely intentional and authorized by superiors. This abuse of power is systemic by TDCJ and oppression by a guard over a prisoner and the only power this guard has is given to him by his superiors and both are individually responsible and accountable. Ofc. Bynum was not assigned to work in Dorm 19, however was sent in by superiors to confiscate property while prisoners were at lunch and that is exactly what he did.

"[But] when inmates are afforded the opportunity... to possess property, they enjoy a protected interest in that property that cannot be infringed without due process."

McCrae v. Hankins, 720 F.2d 863, 869 (5th Cir. 1983).

Ofc. Bynum took my property and destroyed it without due process; confiscation papers, etc. and on that same day charged me with a major case with major punishment. This is absolute

intentional abuse of power and Ofc. Bynum was the only witness allowed to testify under the authority of his immediate supervisor, Disciplinary Captain Boyle, acting also in his individual capacity to conduct disciplinary hearings.

2. Whether a prisoner has due process and equal protection under the Constitution to call witnesses in his defense when issued a false, quota filling case that prisoner will automatically be found guilty of without his constitutional right to call witnesses on his behalf and to have those witnesses present? And whether superiors who oversee this biased, completely unfair process should be held accountable in their individual capacities and not granted sovereign immunity?

TDCJ writes so many cases, my case # [2013]360380 (plus more) each and every year and with a stratospheric guilty conviction rate, the only possible recourse a prisoner has is the ability to have his witnesses present, especially a major case with major punishment. Disc. Capt. Boyle, a convicted felon, corruptly, intentionally and deliberately denied my witnesses to be present during my hearing, against my constitutional right to have them present for my defense. Wolff v. McDonnell, 418 U.S. at 566. The only power he has was delegated to him by the government in his individual capacity. He most definitely new about my predicament with my legal and religious property because that was the entire basis of the hearing and with deliberate indifference he chose to

ignore my requests and pleas to get my legal and religious materials returned back to me.

The only power Capt. Boyle had was given to him by the government in his individual capacity and he willfully chose to abuse that power. Disc. Capt. Boyle, a disgraced convicted felon, maliciously and willfully violated my constitutional right to call witnesses on my behalf. With the amount of false, quota filling cases issued by TDCJ and no "attempt at informal resolutions" it's imperative that prisoners be allowed their witnesses to be present on their behalf. Therefore, Disc. Capt. Boyle is accountable in his individual capacity and as a supervisor is directly involved in the destruction of my legal and religious property. His actions are intentional and deliberate and he and other Defendants are not autonomous and sovereign.

Guidance on this by the Supreme Court is also of great importance to prisoners because it affects their ability to receive fair decisions in major cases with major punishment and major consequences. This is so incredibly important especially here in Texas (and throughout the country) concerning the denial of parole in the form of set-offs because of these false, quota filling disciplinary cases (one of the main elements of parole) and the harsh punitive confinement administered by Defendants in their individual capacities.

3. Whether a prisoner has equal protection under the Constitution when Defendants who are superiors and who are personally

and directly involved do not address subordinates unconstitutional acts?

Defendant Boyle participated directly in the violations of my due process rights to possess legal and religious property and to safeguard this property because he was the superior in charge of the disciplinary hearing. He was, before he went to prison, completely and personally involved in administrating major disciplinary cases with major punishment. His decisions were absolute and final and he wielded that power without question showing deliberate indifference to injury. Furthermore, Boyle had actual knowledge of this serious risk and loss of legal material and most definitely failed to act reasonably to avert it. Logan v. Zimmerman Brush Co., 455 U.S. 422, 436, 102 S.Ct. 1148 (1982); accord, Allen v. Thomas, 382 F.3d 147, 149 (5th Cir. 2004) (confiscation of property under authority of a prison administrative directive was not random and unauthorized).

Also, Head Warden Richard E Wathen has been sued before for the confiscation of constitutionally protected legal property. He has prior history and is liable in his individual capacity, Lueck v. Wathen, 262 F.2d 690, 694 (N.D. Tex. 2003). And for purposes of discovery, requesting to add him as a Defendant to find out what role he and other supervisors played. He had personal involvement because I had family members calling to speak specifically with him in the Warden's office to find out what happened. He showed deliberate indifference by having had actual know-

ledge of a serious risk (action) and to have failed to act reasonably to avert it.

Additionally, Directors Stephens and Davis should be retained in their individual capacities for the purposes of discovery. Bynum, Boyle and Wathen were all promoted in rank under their watch and they most certainly knew or should have known prior unconstitutional acts by these Defendants. There is systemic failures in TDCJ from the top down and it starts with the Director's personal responsibility to supervise their subordinates, especially high ranking subordinates.

Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence — (to comply silently or without protest) in the constitutional deprivation by subordinates; or (4) for conduct that shows "reckless or callous indifference to the rights of others." Pleading Personal Involvement — this standard can be met by a reasonable expectation that evidence to the effect will be obtained in discovery. Satchell v. Dillworth, 745 F. 2d 781, 786 (2nd Cir. 1984).

4. Whether a prisoner has equal protection under the Constitution when the property is legal material while trying to app-

eaL to this very court, The Supreme Court of the United States, causing "actual injury". Legal and religious property was not frivolous and insequential. Actions by Defendants directly hindered, impeded and burdened Plaintiff's constitutional right to file in this very court, The Supreme Court.

The evidence that I had been gathering to send with my writ of certiorari was confidential, specific, privileged and protected by the Constitution. It included exculpatory evidence and evidence of prosecutorial misconduct that I needed to include and send. It also included the grounds that the lower courts ignored in the appeals process and new evidence regarding statements made by witnesses and coercion resulting in an involuntary plea.

Because my legal property was confiscated and then destroyed, I didn't have the most important documents to file my certiorari, Courts Final Opinion(s) that must be amended and required by Rule 14.1(i). This created a hindrance and impeded Plaintiff from filing my certiorari beyond what I could have imagined and I've yet to recover from. After contacting the U.S. District Court Amarillo Division, they respond that since I had an attorney listed, I would need to contact him. After repeated attempts to contact my attorney were unsuccessful, I wrote the Supreme Court Clerk and explained that I was having an extraordinarily difficult time getting court's final opinions and that I would need some more time. I explained that my legal property was confisc-

ated and destroyed. The Supreme Court Office of the Clerk responds with, The Rules of this Court make no provision for filing an extension of time to file a corrected petition for writ of certiorari. Road blocks are immediately put up for pro se petitioners including Government Code 552.028. (a) a governmental body is not required to accept or comply with a request for information for (1) an individual who is imprison or confined in a correctional facility;... By the time I correspond and track down court required paperwork, get copies made from outside of prison then sent back to prison, accumulate stamps to mail out and process the money order, and request an extension of time, I've been time-barred as out-of-time by the Supreme Court Rule 14.5.

The willful and deliberate confiscation and destruction of my legal property hindered my redress of government and "denial-of-access to court" causing "actual injury" with this very court.

Here is more evidence of "denial-of-access" that I desperately needed to have the Supreme Court hear but didn't get the opportunity because legal materials were seized then destroyed. An accusation was made against me at The Amarillo Town Club in a public area by a minor, Andrew Anderson, who just happened to be the alleged grandson of an ex-FBI agent, Ron Jannings, turned independent contractor for the D.A. in Amarillo, James Farren, an ex-U.S. Assistant Attorney. Ron Jannings has been involved in numerous cases for the District Courts. Upon challenging Ron Ja-

nnings and who he worked for, Judge Hal Minor denied and disallowed this extremely important exculpatory evidence to be heard by the jury. This is recorded in the record of report. I needed the Supreme Court to hear this in complete detail in a writ of certiorari but was denied.

And more evidence of "denial-of-access". Five days before trial I was arrested and falsely charged by accusations made from two jail house snitches who were "begging" to get out of prison and making deals with the prosecution and D.A. In December of 2001, these two habitual career criminals had ransacked and burglarized my home and in doing so, stole my pick-up and left the back gate wide-open killing my two dogs while I was working as an over-the-road truck driver. These seriously false accusations were filed and between conviction and sentencing under complete duress and without the ability to conduct an adequate investigation and Bailiff Parker informing me that the court would stack my sentences, I was coerced into pleading to these false charges. Six months after the trial, I found out that the prosecution had changed one of the names on the pleadings to Codey Anglin who was to testify on my behalf at the trial.

Additional evidence and these notes, criminal case citations and information as to arrest records and related prosecutorial misconduct, false testimony, malicious prosecution and reckless professional misconduct were items that were seized then destroyed and thus hindered my ability to get this information with evidence to the Supreme Court in time.

These examples are just some of the instances among others in which I was hindered and impeded in complying with court orders and filing pleadings with the Supreme Court. They most certainly are "nonfrivolous" and establish the "actual harm" necessary to support Plaintiff's denial-of-access claim and are most definitely "more than just hope." Christopher v. Harbury, 536 U.S. 403, 415-16, 122 S.Ct. 2179 (2002).

All Defendants above are acting in their individual capacity and under color of state law. The deliberate destruction of legal and religious property, the unjustified denial of witnesses, and conviction of a major disciplinary offense with no supporting evidence are all violations of clearly established due process principles; Ponte v. Real, 105 S.Ct. 2192 (1985); Superintendent v. Hill, 105 S.Ct. 2768 (1985); Wolff v. McDonnell, 94 S.Ct. 2963 (1974).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Signed this 22nd day of

April, 2019. Michael J. DeMarco Jr.

CERTIFICATE OF COMPLIANCE

I, Michael J DeMarco Jr declare that to the best of my ability and knowledge that this Writ of Certiorari to the United

States Supreme Court is within compliance of rule limitations set. It is within 40 pages and type-volume rule limitations for pro se prisoners.

Respectfully submitted,

Signed this 22nd day of

April, 2019. Michael J. DeMarco Jr.

Pursuant to U.S.C. § 1746; "I declare under penalty of perjury that the foregoing is true and correct."

Signed this 22nd day of

April, 2019. Michael J. DeMarco Jr.

Michael J DeMarco Jr 1564162

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