No. _____

19-5844

SUPREME COURT OF THE UNITED STATES

_____

JAMES ARTHUR ROSS – PETITIONER

VS.

BRIGITTE AMSBERRY, et al. - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES ARTHUR ROSS S.I.D.#12599830
TWO RIVERS CORRECTIONAL INSTITUTION
82911 BEACH ACCESS RD.
UMATILLA, OR 97882

QUESTION(S) PRESENTED

1. Did the District Court error in determining that a 9th Circuit Appellate ruling from almost two decades ago in *Bahrampour v. Lampert*, 356 F.3d 969, 976 (9th Cir. 2004), outrightly barred any litigation on the matters no matter how similar or different and especially when the passage of time has produced evidence that is in direct conflict with the decision in that case?

2. Did the District Court error in not allowing the plaintiff to proceed to trial to present evidence as noted by the 6th Circuit that pertains to new evidence and expert testimony backed by actual studies that have been done recently that directly conflict with rulings in *Bahrampour*, which was not based off of such studies?

3. Did the District Court error in dismissing the Plaintiff's case before and without ever hearing or ruling on his Motion(s) for Expert Testimony and Discovery? Alternatively, did the district court error in not allowing a pro se litigant any discovery or expert witness?

4. Did the District Court error by not appointing counsel to represent the plaintiff in this complex case? Alternatively, did the District Court abuse it's discretion in not even requesting the appointment of counsel? Alternatively, does a District Court have "inherent authority" to appoint counsel despite what the FRCP may or may not authorize?

5. Did the District Court error by ignoring the wording of OAR 291-131-0035(1)(e), which does allow for such material as it does contain language that specifically states that "such material shall be permitted if it obtains literary, social or educational value"?

6. Are the Defendants intentionally violating the rules and the Plaintiff's Constitutional rights to impose their own moral presumptions on him as in *Pepperling v. Crist*, 678 F.2d 787, 790 (9th Cir. 1982)? Alternatively, did the District Court error in not allowing the petitioner to bring this issue to a jury?

7. Did the District Court error in determining that Plaintiff's magazine rose to the level of a penological interests as required by law in order for the defendants to infringe upon his Constitutional rights? Alternatively, did the District Court error in determining that the defendants proved that threshold in this particular case and circumstances?

8. Does allowing Transgender inmates in a men's prison to wear eyeliner, eye shadow, lipstick, hairspray, nail polish, bras, panties and so much more, all of which is sold to everyone freely through the Prison's commissary, in order to portray themselves as the female figure, which some do so specifically to entice men sexually, does this not by itself usurp any assertion of penological interests that the defendants could possibly raise or alternatively, is this not genuine issues of fact suitable for trial?

9. Did the District Court error in determining that the defendants had met their threshold to satisfy summary judgment, especially before shifting the burden onto the plaintiff?

10. Did the District Court error in determining that plaintiff received a fair administrative review?

11. Did the District Court error in determining that Plaintiff's case had no genuine issues of fact suitable for trial?

LIST OF ALL PARTIES

*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:

*Brigitte Amsberry, Superintendent of TRCI;
*Kelly A. Raths, Inmate & Community Services Manager;
*Kelly L. Arrington, Assistant to the Inmate & Community Services Manager;
*C. McMillen, TRCI Mailroom;
*S. Deacon, OS2, TRCI;
*David J. Pedro, Operations Captain of TRCI;
*Sherry L. Iles, Assistant Superintendent of Rehabilitation, TRCI.

(Please Note: That the titles listed above may have changed since the time of incident.)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

OTHER

There is more in depth arguments and facts to this case, with Statutes, Rules, Constitutional and Statutory Provisions and Case Laws to cite, however, petitioner believes all of that is for the briefing process and thus, petitioner was afraid as he does not know this process and is trying to do his best to just have this Honorable Court accept this case for further proceedings.

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

Federal Courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is:

[x] reported at: *Ross v. Amsberry*, 2019 U.S. App. LEXIS 1893 (January 18th, 2019).
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is:

[x] reported at: *Ross v. Amsberry*, 2018 U.S. Dist. LEXIS 118965 (July 17th, 2018).
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

Federal Courts:

The date of which the United States Court of Appeals decided my case was January 18th, 2019:

[ ] 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: April 23rd, 2019, and a copy of the order denying rehearing appears at Appendix D.
[ ] 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. § 1245(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Oregon Constitution Article 1, Section 10

Oregon Constitution Article 1, Section 20

STATEMENT OF THE CASE

On November 01st, 2016, petitioner received a memo from C. McMillen of the Two Rivers Correctional Institution's Mailroom, that a magazine (Gallery, Nov. 1993 issue) he had purchased through a vendor was being submitted for review due to it's content.

On November 15th, 2016, approximately (2)two weeks later, petitioner then received a mail violation from C. McMillen for the publication. Petitioner immediately filed for administrative review.

On November 30th, 2016, the petitioner was called down to the security ops of the Institution by Mrs. Deacon for his administrative review. At this point, Mrs. Deacon presented the petitioner with a copy of a 2 page article from the magazine[1]. The article was explaining how to perform satisfactory cunnilingus on your female partner. It also contained at the bottom of the page, an obscure "connect-the-dot" picture of the act approximately 2 inches in diameter.

The petitioner argued that the article was itself of "scholarly value, or general social or literary value" and as for the "connect-the-dot" picture at the bottom of the page, it was soo obscure that it was ridiculous as a standard for violation. Mrs. Deacon, stated that she agreed. She did not see anything wrong with the publication and that "staff need to be more mature about these things". That if it were up to her, she "would allow the publication". She even stated that the Institution's own Superintendent, Mrs. Amsberry, agreed with her and would have allowed the publication as well.

However, they had both been contacted by Kelly Raths and Kelly Arrington from the Dome Building in Salem, Oregon, and they said that it was denied, no discussion. Mrs. Deacon specifically stated that "these things are now done in Salem and it's above all of their heads here at the Institution" and that there is nothing that she could do.

Petitioner then filed his §1983 Civil Suit in the District Court of Oregon raising his constitutional claims of violation for the publication and the denial of an administrative review. On July

1 Later, in the District Court proceedings, the defendants presented an additional page from the back of the publication that contained advertisements. One of which, the defendants asserted that it contained acts of sexual content. However, the petitioner was never showed this at the administrative review process, which he contested to no avail.

17th, 2018, United States Magistrate Judge Youlee Yim You dismissed the Petitioner's case finding no constitutional violation had occurred. On August 13th, 2018, petitioner filed his appeal to the 9th Circuit Court of Appeals, which denied his appeal on January 18th, 2019. The petitioner filed a timely Petition for Rehearing on February 01st, 2019, which was denied on April 23rd, 2019.

REASON(S) FOR GRANTING THE PETITION

As everyone knows, time has a way of changing things. This includes evidence that may not have been available to us before or how people perceive things now as compared to decades ago or, maybe, as the petitioner has pointed out in this case, just maybe the Defendants' own actions now allow something that would undermine and be completely contradictory as to what they claim as a defense or excuse for their actions guised as penological interests in order to impose their own moral views in infringing upon one's Constitutional rights. Thus, the reasoning and expert testimony used in the 9th Circuit's Appellate ruling in *Bahrampour* may have had some legitimacy almost two decades ago, however, it no longer carries the same relevency to every aspect of the issue today. Alternatively, the petitioner should have been allowed to proceed and on the issues in this multi-issue case. Especially so, as many States have begun to mature on the issues due to new studies and understandings, while others are still in the dark or are still implementing unreasonable practices as explained below:

For example, maybe these new somethings/actions are somethings/actions that they did not allow back at the time of *Bahrampour*, thus, the plaintiff in that case could not have reasonably been able to raise these somethings as issues or rebuttals to that court or to the expert witness that was used in that case when making conclusatory findings or opinions to override or infringe upon one's Constitutional rights. Especially so, since it is the responsibility of prison officials to prove that an actual penological reason of substantial weight does exist.

In this case, the petitioner wishes to show that no such interest actually exist or, altenativley,

such interests are now unreasonable and in fact studies have shown the complete opposite, which would have implications of it's own and the fact that it is completely hypocritical for prison officials to applaud penological interests on such issues when they actually provide no programs or rehabilitation of any kind to back that applaud.

Therefore, how can a court simply bar all and any litigation like this. For example, a 9th Circuit ruling is not binding on any other circuit and vice versa. It is only this Courts' rulings that matter and may be binding on all. So, this bears importance as an issue for this Honorable Court, especially since it seems to be the only available avenue for the petitioner to challenge *Bahrampour,* let alone show that *Bahrampour* should not have even been an issue in the first place as the article of the publication that was violated itself fell within the rules. However, this was ignored or overlooked with the District Courts' eagerness to apply *Bahrampour* as a stopgate for any and all.

Furthermore, the 6th Circuit Court of Appeals made an opinion in 2016 that new studies show that, despite the belief that allowing such sexually explicit material in prison fosters rape, it is actually the opposite. That it is actually the deprivation of such material that promotes such actions and behaviors as rape and homosexuality amongst inmates.

In fact, it may be founded based off of that reasoning and finding that it may also be a cause of gender disorder and mental illness amongst inmates serving long term sentences. This is not unfetched as one might believe as their are breeds of frogs that actually turn from male to female and vice versa when facing extinction. Everyone that has watched Jurassic Park knows that. Even other States have started coming to this conclusion. Some States have even turned sections of their prisons into sexually explicit viewing areas for it's inmate population.

However, it appears that the 9th Circuit refuses to look beyond it's own rulings and evidence no matter how old or unfounded they may be today. So much so, that the petitioner in this case was denied all discovery, any expert witnesses, in fact, his motions/requests for such, were never even ruled on before summary judgment was issued.

The District Court refused to appoint petitioner counsel and even abused it's discretion in refusing to "request" the appointment of counsel before granting summary judgment in favor of the defendants.

However, it does not simply stop there. The issues are even bigger as the District Court further refused to acknowledge the Oregon Administrative Rules on the matter or even it's own Circuits' prior court rulings. See Perez v. Peters, 2017 US Dist. LEXIS 17026, acknowledging that OAR 291-131-0035(1)(e) does have alternative means for the exercise of inmate free speech rights are available (as, for example, reading or viewing materials with nude images but no sexually explicit content, "or" materials with sexually explicit content that also have "scholarly value, or general social or literary value" and on that basis may be mailed to inmates pursuant to Rule 291-131- 0035(1)(e), supra).

However, the District Court simply determined that *Bahrampour* barred any further litigation on any aspect of the matter no matter if it was related or not despite the circumstances of the individual case and issues before it. That in and of itself is like creating a "blanket" ban on the issues. The problem with that here is the fact that the "rule" itself actually allows such publications, however, that wording of the OAR is being ignored and instead. Treated as a blanket ban, which is compounded and made effective by the District and 9th Circuit's blanket ban on the issues through the use of *Bahrampour.*

As at hand, this was a publication that in most cases is commonly sold to the public on the shelves of mini-markets. The article attached itself contained "scholarly value, or general social or literary value" as defined by the rule. And, any "sexually explicit" material contained in the form of a miniature ad in the back of the magazine, does not outweigh the totality of the constitutional value of the entire magazine, or, does it?

Furthermore, because the petitioner was unable to examine the entire magazine as it was already sent back to the vendor before the supposed "administrative review", there may have been more articles in it containing such "scholarly value, or general social or literary value" as defined by the rule, which

the petitioner may have been able to point to. Even Playboy has many articles of "scholarly value, or general social or literary value", which is a publication allowed by the Oregon Department of Corrections as noted arguments in *Pepperling v. Crist*, 678 F.2d 787, 790 (9th Cir. 1982).

The reality here is that there is "a lot of meat on the bones" per say in this case before this Honorable Court to be able to bring some understanding to all States of the United States of America and it's litigants, especially incarcerated ones, which is very important for the obvious reasons.

Therefore, this is not just a simple "is porn constitutional?" issue. This is a pro se litigant whom was not only denied the assistance of counsel, however, the Court refused to even request the assistance of counsel for him. This is after the Court's initial screening of the case, which the court passed and allowed to proceed to further proceedings, in this instance, summary judgment proceedings. At which point, the court failed or refused to rule on the Petitioner's motions for discovery and expert witness, ultimately, denying him any resources whatsoever to defend himself or even present his case through the summary judgment proceedings, see *Simmons v. Jackson*, 2016 U.S. Dist. LEXIS 146942 (Oct. 24th, 2016): A court abuses its discretion by not considering a "series" of factors when determining whether there are exceptional circumstances to justify the appointment of counsel. See *Ulmer*, 691 F.2d at 212.

In determining whether to appoint counsel for an indigent plaintiff, the court must consider: (1) the type and complexity of the case; (2) whether the plaintiff can adequately present the case; (3) whether the plaintiff can adequately investigate the case; and (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and cross examination. *Pinson*, 2015 U.S. Dist. LEXIS 27787, 2015 WL 1000914, at *1 (citing *Ulmer*, 691 F.2d at 213).

See also, *SEC v. Stanford Int'l Bank Ltd*, 2018 U.S. Dist. LEXIS 135690 (May 10th, 2018): In determining whether to exercise its discretion to appoint counsel for an indigent person, a court must consider: (1) the type and complexity of the case; (2) the indigent person's ability to present and investigate her case; (3) the presence of evidence that will largely consist of conflicting testimony so as

to require skill in the presentation of evidence and in cross-examination; and (4) the likelihood that appointing counsel will benefit the parties and the court by shortening the trial and assisting in a just determination.

And, *United States v. 30.64 Acres of Land*, 795 F.3d 796 (1986): A federal court has a duty under 28 U.S.C.S. ⊏ 1915(d) to assist a party in obtaining counsel willing to serve for little or no compensation. The court does not discharge this duty if it makes no attempt to request the assistance of volunteer counsel or, where the record is not otherwise clear, explain its failure to do so.

Therefore, it appears that there is actually five(5) factors for determining the appropriateness for appointment of counsel in this case: (1) the type and complexity of the case; (2) the indigent person's ability to adequately present his or her case; (3) the indigent person's ability to adequately investigate his or her case; (4) the presence of evidence that will largely consist of conflicting testimony so as to require skill in the presentation of evidence and in cross-examination; and (5) the likelihood that appointing counsel will benefit the parties and the court by shortening the trial and assisting in a just determination.

Furthermore, it appears that these precedent cases, in determining to appoint or not appoint counsel in any specific case, set out their facts and conclusions somewhat "categorically" as listed in the previous paragraph, none of which happened in this case.

The court further failed to or refused to acknowledge the complete wordings of the OAR as stated above.

It also failed to acknowledge that petitioner did not actually receive a fair administrative review, whereas, the person performing the administrative review, Mrs. Deacon and even the Prisons' own Superintendent, Mrs. Amsberry, both stated that they would have allowed the publication as they felt that it did fall within the OAR as stated above.

For example, see the case of Aikens v. Lash, 96 relying on *Procunier* standards, held that prison

officials must afford prisoners minimal due process when publications are prohibited. The liberty interest required the following form of review: (1) written notice to the prisoner of the denial and reason for denial of the publication; (2) opportunity to object to the denial; and (3) prompt review by a prison official other than the one who made the original denial to forward the publication. Magazines addressed to a prisoner were rejected as either being sexually explicit or featuring nudity. To uphold the policy, a factual record is necessary to determine the rationality of the policy's overall connection to rehabilitative interests. A district court is required to first identify the specific rehabilitative goals advanced by the government to justify the restriction, and then give the parties the opportunity to adduce evidence sufficient to enable a determination as to whether the connection between these goals and the restriction was rational, which none of this was afforded to the petitioner in this case. Thus, this Honorable Court would also have a chance to clarify the meaning of an administrative review as this case has a lot to work with on this issue, which the lower courts have failed to acknowledge.

The court also failed or refused to take into consideration the evidence that the petitioner did submit in this case by way of copies of the "in-house" emails between the defendants warning each other to not retaliate or impose their own moral views on the inmate populations' publications, which would be in conflict with it's own Circuits' prior rulings such as in *Pepperling v. Crist*, 678 F.2d 787, 790 (9th Cir. 1982). Thus, showing at least a plausible theory that such actions were taking place at the Two Rivers Correctional Institution.

Yet, the District Court just simply determined that *Bahrampour* was the last word and outrightly barred any and all arguments on the matter. So much so, that it literally prevented the petitioner from any real resources to litigate his case fairly. So, why did the lower court allow the case to be initiated in the first place? To simply burden and punish the petitioner, a pro se, indigent and incarcerated inmate, with a substantial filing for even pursuing the case?

The petitioner prays that this Honorable Court will find merit in hearing this case. Even if the ruling turns out to not be in the Petitioner's favor, it would still be valuable to the United States as a

whole to know this Court's opinions on some of these matters.

Especially, when concerning the actions or failures of the District Court concerning the unfairness of the lower court proceedings and failing to even request the appointment of counsel in this case, which would have undoubtedly been of significance on many of these issues. Especially, the defendants' intentions on these matters as outlined in the emails submitted as evidence and their own actions to accommodate and even promote homosexuality in the prison system to the extent that they even sell Womens' makeup, bras, panities, hygiene products, ect. to men in a Mens' prison.

Even this Honorable Court has ruled in *Beard v. Banks*, 548 U.S. 521, 530-33, 126 S.Ct 2572 (2006) that "it is not inconceivable that a Plaintiff's counsel, through rigorous questioning of officials by means of depositions, could demonstrate genuine issues of fact for trial." 548 US at 536.

However, it does not stop there, another aspect of this has arisen since District Courts have recently ruled and the States are mixed on this, that even if the FRCP does not give authority to the courts to appoint counsel, that courts nonetheless, have inherent authority to do so and in the very least, if a court fails to even try and request counsel to accept appointment, it abuses it's discretion in that failure, See, *Garcia v. Davis*, 2018 U.S. Dist. LEXIS 192801 (Nov. 09th, 2018): *Naranjo v. Thompson*, 809 F.3d 793, 802 (5th Cir. 2015) (Federal courts' inherent powers undoubtedly encompass the appointment of counsel).

The Court noted in *Naranjo v. Thompson*, 809 F.3d 793, 799 (5th Cir. 2015):

> 1) The federal courts have inherent authority to order attorneys to represent litigants without pay. Simply by virtue of having been created, federal courts are vested with inherent power to take action essential to the administration of justice;
>
> 2) Accordingly, courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Action taken by a federal court in reliance on its inherent powers must somehow be indispensable to reaching a disposition of the case;
>
> 3) When a pro se litigant proceeds to trial after having been denied appointed counsel, his performance at trial is affected by that denial, and the denial is held erroneous on appeal, the ordinary remedy is remand for retrial with the assistance of recruited pro bono counsel. Similarly, where a denied motion for appointment of counsel is followed by a denied motion to

amend the complaint, the Eleventh Circuit has indicated that a plaintiff should be afforded a renewed opportunity to amend his complaint on remand with the aid of counsel;

4) During discovery, a pro se plaintiff's lack of resources and his unfamiliarity with discovery rules and tactics put him at a significant disadvantage;

5)Because summary judgment's consequences are so severe, courts must always guard against premature truncation of legitimate lawsuits merely because of unskilled presentations.

If you compile this with other issues listed above, especially pertaining to the appointment of counsel, I would pray that there is enough here in this instant case for this Honorable and Highest Court of our nation to take interest in considerations for some of it's lowest citizens, America's Prisoners and at least find one issue to address to bring some light and justice to us.

Finally, I pray for this Honorable Courts' understandings as to any errors that I have made in trying to present these Constitutional issues to this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 22nd day of July, 2019.

Respectfully Submitted By:

James Arthur Ross, Pro Se'
S.I.D.#12599830
Two Rivers Correctional Institution
82911 Beach Access Rd.
Umatilla, OR 97882