

No. _____

19-6342

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

MICHAEL SHANERS

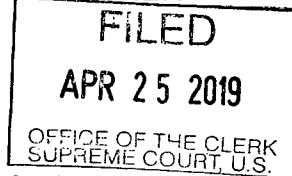
(Your Name)

— PETITIONER

vs.

LAVERN SHARP, ET AL

— RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL SHANERS # 378021

(Your Name)

CHIPPEWA CORRECTIONAL FACILITY

4269 WEST M-80

(Address)

KINCHELOE, MI. 49784

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

I.

WHETHER PLAINTIFF IS ENTITLED TO RELIEF FROM JUDGMENT IN LAWSUIT SHIVERS V BERGH (EXCESSIVE USE OF FORCE CLAIMS DISMISSED ON THE NATURE OF THE SUSTAINED INJURY AND NOT ON THE APPLIED FORCE) UNDER WILKINS V GADDY, 559 U.S. 34 (2010) (REVERSING DISMISSAL OF PRISONERS EXCESSIVE USE OF FORCE CLAIMS BASED ON THE NATURE OF THE SUSTAINED INJURY AND NOT ON THE APPLIED FORCE) ALSO UNDER ALLEN V HARDY, 106 S. CT. 2880 FN. 1 (1986) (THAT APPEAL IS NOT FINAL UNTIL TIME FOR CERTIORARI HAS PASSED) SINCE BERGH WAS NOT FINAL AND PENDING ON CERTIORARI WHEN THIS COURT HANDED DOWN WILKINS.

II.

WHETHER SIXTH CIRCUIT COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER COURT OF APPEALS WHEN IT RULED THAT DISMISSAL OF A PRISONER EXCESSIVE USE OF FORCE CLAIMS SOLELY BASED ON THE APPROACH AND DETERMINATION THAT PRISONER FAILS TO ALLEGE MORE THAN A DE MINIMIS INJURY FAILS TO STATE A VIABLE EXCESSIVE USE OF FORCE CLAIMS.

III.

WHETHER SIXTH CIRCUIT COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER COURT OF APPEALS WHEN IT RULED THAT DENIAL OF PETITIONER APPLICATIONS FOR ENTRIES OF DEFAULT AGAINST FIVE OF THE DEFENDANTS BASE ON IMPROPER SERVICE WAS APPROPRIATE WHEN DEFENDANTS ACCEPTED SERVICE OF SUMMONS AND COMPLAINTS DID NOT FILE AN ANSWER, NOR MOTION TO DISMISS FOR IMPROPER SERVICE, OR ADVISE DISTRICT COURT OF ANY PREJUDICE AND THEREBY WAIVE THE STATUTORY RIGHT TO NOT HAVE ENTRIES OF DEFAULT AGAINST DEFENDANTS.

LIST OF PARTIES

THE PETITIONER (S) ARE MICHAEL SHAVERS, THE NAMED PLAINTIFF (S) IN THE COURT (S) BELOW IN HIS OWN BEHALF.

THE RESPONDENT (S) MICHIGAN DEPARTMENT OF CORRECTIONS PRISON EMPLOYEE (S) ARE DEFENDANT (S) LAVERN SHARP, DEPUTY WARDEN; JEFFREY CLOUSE AND ROBERT PARISH, LIEUTENANTS; JASON THOMAS AND ROBERT SANDERS, PRISON COUNSEL; ALSD, LARRY WEAVER, KEVIN BROMLEY, SERGEANT; ROBERT ARON, ERIC RIGGS, KENNETH DLENICZAK, MICHAEL MEYER, RON NALLEY, AND NATHAN SEIBERT, PRISON CORRECTIONER OFFICER (S).

OPINIONS BELOW

PETITIONER RESPECTFULLY PRAYS THAT A WRIT
OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT
BELOW.

FOR CASES FROM FEDERAL COURTS:

THE OPINIONS OF THE UNITED STATES COURT OF
APPEALS AT APPENDIX'S A AND B

APPENDIX A REPORTED AT SIXTH CIRCUIT
NO. 17-1573, SHAYERS V SHARP,

APPENDIX B REPORTED AT SIXTH CIRCUIT
NO. 17-1573, SHAYERS V SHARP,

OR

IS UNPUBLISHED

THE OPINION OF THE UNITED STATES DISTRICT
COURT APPEARS AT APPENDIX'S C AND D

APPENDIX A AND B AT SIXTH CIRCUIT, IS
UNPUBLISHED

JURISDICTION

FOR CASES FROM FEDERAL COURTS:

THE DATE ON WHICH THE UNITED STATES COURT
COURT OF APPEALS DECIDED MY CASE WAS

MARCH 28, 2018 AND DECEMBER 17, 2018

A TIMELY PETITION FOR REHEARING WAS DENIED
BY THE UNITED STATES COURT OF APPEALS ON THE
FOLLOWING DATE:

FEBRUARY 26, 2019

AND A COPY OF THE ORDER DENYING
REHEARING APPEARS AT APPENDIX

AN EXTENSION OF TIME TO FILE THE PETITION
FOR A WRIT OF CERTIORARI WAS GRANTED TO AND
INCLUDING JULY 21, 2019 (DATE) ON MAY 21, 2019
(DATE) IN APPLICATION NO. A

THE JURISDICTION OF THIS COURT IS
INVOKED UNDER 28 U.S.C. § 1257(A).

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CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

THIS CASE INVOLVES AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES PROHIBITING CRUEL
AND UNUSUAL PUNISHMENT:

"EXCESSIVE BAIL SHALL NOT REQUIRED, NOR
EXCESSIVE FINES IMPOSED, NOR CRUEL AND
UNUSUAL PUNISHMENT"

.... MADE APPLICABLE TO THE STATES BY
SECTIONS 1 AND 5 AMENDMENT XIV TO THE CONSTITUTION
OF THE UNITED STATES.

SECTION 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 LAWS WHICH SHALL ABRIDE 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 LAWS.

SECTION 5. THE CONGRESS SHALL HAVE POWER
TO ENFORCED, BY APPROPRIATE LEGISLATION, THE
PROVISIONS OF THIS ARTICLE.

AND ENFORCED BY TITLE 42 SECTION 1983,
UNITED STATES CODE:

3.

"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 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.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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STATEMENT OF THE CASE

I RECITE ONLY SO MUCH OF THE HISTORY OF THE PETITIONER'S PRIOR FILED 42 U.S.C. § 1983 LAWSUITS, SHAVERS V. BERGH, ET AL, NO. 2:07-CV-173 (W. D. MICH. MAY 22, 2008) (DISMISSING FOR FAILURE TO STATE A CLAIM), AFF'D, NO. 08-1860 (6TH CIR. JUNE 18, 2009); S. CT. NO. 09-8473 (CERT. DENIED, 559 U.S. 1010 (2010)); ALSO OF THE HISTORY OF THE PETITIONER PRIOR FILED RULE 60(B) MOTION FOR RELIEF FROM DISTRICT COURT'S JUDGMENT IN SHAVERS V. BERGH, NO. 2:07-CV-173 (W. D. MICH. AUG. 4, 2011), AFF'D, NO. 11-2079 (6TH CIR. APR. 4, 2012); S. CT. NO. 12-8521 (CERT. DENIED, 569 U. S. 909 (2013); AND OF THE HISTORY OF THE PETITIONER INSTANT 42 U.S.C. § 1983 LAWSUIT, SHAVERS V. SHARP, ET AL, NO. 1:15-CV-222 (W. D. MICH. MARCH 14, 2017) (DISMISSING EXCESSIVE USE OF FORCE, FAILURE TO PROTECT CLAIM'S AND DENYING MOTION'S FOR EXTENSION OF TIME TO SERVE DEFENDANTS, TO FIND DEFENDANTS EVADED SERVICE AND FOR ENTRY OF DEFAULT AGAINST DEFENDANT'S FOR IMPROPER SERVICE PURSUANT FED. R. CIV. P. RULE 4 (M)), AFF'D, NO. 17-1573 (6TH CIR. MARCH 28, 2018 AND 6TH CIR. DECEMBER 17, 2018). EACH OF WHICH LITIGATION'S IS RELEVANT AND NECESSARY FOR THE PROPER CONSIDERATION AND DETERMINATION BY THIS COURT OF THE HEREIN QUESTION(S) PRESENTED.

BEGINNING WITH STATING THAT PETITIONER IN HIS ABOVE SAID PRIOR FILED LAWSUIT SHAWERS V BERGH, ET AL ALLEGED 'EXCESSIVE USE OF FORCE RESULTING IN SERIOUS BODILY INJURY CLAIM.' DISTRICT COURT IN DISMISSING BERGH STATED IN PERTINENT PART, 'THAT BECAUSE PLAINTIFF FAILED TO ALLEGE MORE THAN A DE MINIMIS INJURY THAT IS PLAINTIFF FAILED TO STATE A VIABLE EXCESSIVE USE OF FORCE CLAIM.' ON APPEAL, SIXTH CIRCUIT AFFIRMED DISTRICT COURT STATED REASON AND DISMISSAL OF BERGH. PETITIONER PETITION FOR CERTIORARI THIS COURT DENIED.

UNKNOWINGLY TO PETITIONER AT THE TIME BERGH WAS PENDING ON CERTIORARI BEFORE THIS COURT FROM ON ABOUT OCTOBER 2009 UNTIL DECIDED ON MARCH 28, 2010. THAT IS, AT THE SAME TIME BEFORE THIS COURT ON CERTIORARI WERE WILKINS V GADDY, 559 U.S. 34 FROM ON ABOUT OCTOBER 2009 UNTIL DECIDED ON FEBRUARY 22, 2010. (NOTING IMPORTANTLY: WILKINS WAS DECIDED UPON FEBRUARY 22, 2010 MORE THAN 30 DAYS BEFORE BERGH WAS DENIED UPON MARCH 28, 2010)

IN WILKINS V GADDY, THE QUESTION PRESENTED WAS THE FOURTH CIRCUIT APPROACH AND INTERPRETATION OF THIS COURT EARLIER DIRECTION IN HUDSON V MEMILLIAN, 503 U.S. 1 (1992) THAT IS, "A PRISONER MUST ALLEGE HE OR SHE SUSTAINED MORE THAN A

DE MINIMIS INJURY IN ORDER TO STATE A VIABLE
EXCESSIVE USE OF FORCE CLAIMS.

THIS COURT FOUND THAT THE FOURTH CIRCUIT
APPROACH AND INTERPRETATION OF HUDSON V McMILLIAN
DIRECTION WAS SQUARELY IN CONFLICT, NOT ONLY, WITH
FIVE OTHER CIRCUITS APPROACH AND INTERPRETATION OF
HUDSON, "THAT THE EIGHTH AMENDMENT ANALYSIS MUST BE
DRIVEN BY THE EXTENT OF THE FORCE AND CIRCUMSTANCES
IN WHICH IT IS APPLIED; NOT BY THE RESULTING
INJURIES" (SEE WRIGHT V GARDY, 554 F. 3d 255 (CA 2
2009); SMITH V MUNSINGER, 293 F. 3d 641 (3RD CIR.
2002); UNITED STATES V LAVALLEE, 439 F. 3d 1070 (10TH
CIR. 2006); AND BROWN V LIPPARD, 472 F. 3d 384 (2006)*
AND SQUARELY IN CONFLICT WITH THIS COURT EARLIER
DIRECTION IN HUDSON V McMILLIAN, "TO DETERMINE
EXCESSIVE USE OF FORCE CLAIMS ON THE NATURE OF
THE FORCE."

BUT ALSO, THIS COURT FOUND THE FOURTH
CIRCUIT STRAINED READING OF THIS COURT DIRECTION
IN HUDSON V McMILLIAN, "TO DETERMINE EXCESSIVE USE
OF FORCE CLAIM ON THE EXTENT OF THE INJURY TO BE
INDEFENSIBLE AND REVERSED." INDICATING AS A
GUIDANCE TO THE SAID REMAINING CIRCUITS AND THEIR
DISTRICT COURTS.

* OLIVER V KELLER 289 F. 3d 623 3 (9TH CIR. 2002)

WITH THE PETITIONER HAVING COME TO LEARN FOR THE FIRST TIME AND NINE MONTHS AFTERWARDS THAT IS OF THE FILED LAWSUIT WILKINS V GADDY, THE RAISED ISSUE, ARGUMENTS AND OF THIS COURTS DECISION HANDED DOWN ON FEBRUARY 22, 2010. ALSO WITH THE PETITIONER HAVING COME TO LEARN AT THE SAME POINT AND TIME THAT IS THE PETITIONER FILED LAWSUIT SHAYERS V BERGH WAS STILL PENDING ON CERTIORARI AND WAS NOT FINAL OR DECIDED UPON BY THIS COURT UNTIL MARCH 24, 2010 (NOTINGLY: MORE THAN 30 DAYS AFTER THIS COURT FEBRUARY 22, 2010 DECISION HANDED DOWN IN WILKINS V GADDY).

THUS DID THE PETITIONER COME TO LEARN AND UNDERSTAND THAT BECAUSE PETITIONER LAWSUIT SHAYERS V BERGH WAS NOT FINAL ON CERTIORARI BEFORE THIS COURT WHEN THIS COURT HANDED DOWN IT'S DECISION IN WILKINS V GADDY THAT UNDER WILKINS AND ALLEN V HARDY, 106 S. CT. 2880 FN 1 (1986) (HOLDING THAT BY FINAL WE MEAN WHERE THE JUDGMENT OF CONVICTION WAS RENDERED THE AVAILABILITY OF APPEAL EXHAUSTED AND TIME FOR PETITION FOR CERTIORARI HAD ELAPSED) WAS AVAILABLE AND APPLICABLE FOR THE PETITIONER TO ARGUE AND SEEK RELIEF FROM THE JUDGMENT IN SHAYERS V BERGH BASED ON THE NON-FINALITY OF BERGH ON CERTIORARI AND IMPROPER DETERMINATION AND DISMISSAL OF BERGH

EXCESSIVE USE OF FORCE CLAIM BASE ON THE NATURE OF THE SUSTAINED INJURY AND NOT THE APPLICATION OF THE FORCE ALSO IMPROPERLY COUNTING DISMISSAL OF BERGH AS THIRD STRIKE FOR PURPOSE OF 28 USC § 1915 (G).

NOW, THE ABOVE SAID ARGUMENTS BASE ON THE THIS COURT'S HOLDINGS IN WILKINS V GADDY AND ALLEN V HARDY, FOR RELIEF FROM PRIOR JUDGMENT IN SHAVERS V BERGH NO. 2: 07-CV-173 (MAY 22, 2008 ORDER DISMISSING EXCESSIVE USE OF FORCE CLAIM BASE ON THE NATURE OF THE SUSTAIN INJURY AND COUNTING DISMISSAL OF BERGH AS A THIRD STRIKE FOR PURPOSE OF 28 USC § 1915 (G)) THAT IS, A COUPLE OF MONTHS LATER ON JANUARY 20, 2011 THOSE VERY ABOVE SAID ARGUMENTS PETITIONER HAD REITERATED IN HIS FILED FED. R. CIV. P. RULE 60(B)(6) MOTION IN DISTRICT COURT. DISTRICT COURT CONSTRUCTIVE PETITIONER RULE 60(B)(6) MOTION AS A MOTION FOR RECONSIDERATION OF SHAVERS V BERGH UNDER FED. CIV. LOCAL RULE 7.4 (A) AND DENY THE MOTION STATING IN PERTINENT PART, "THAT PETITIONER MOTION WAS FILED MORE THAN TWO YEARS AFTER THAT CASE (SHAVERS V BERGH) WAS CLOSED AND THAT DISTRICT COURT DOES NOT HAVE AUTHORITY TO REOPEN BERGH OR TO RECONSIDER THE SIXTH CIRCUIT (JULY 15, 2009 ORDER) AFFIRMING DISTRICT COURT DISMISSAL OF BERGH. (DIST. CT. AUGUST 4, 2011 ORDER)."

ON APPEAL, THE SIXTH CIRCUIT NO. 11-2079 IN A APRIL 4, 2012 ORDER AFFIRMED THE DISTRICT COURT DISMISSAL STATING IN PERTINENT PART, "BECAUSE DISTRICT COURT'S JUDGMENT IN BERGH REMAIN INTACT, ALSO DISMISSAL COUNTS AS A STRIKE FOR PURPOSE OF § 1915(G)". THIS COURT DENIED PETITIONER'S PETITION FOR CERTIORARI NO. 12-8521 (2013).

NOW REGARDING THE PETITIONER INSTANT CASE BEFORE THIS COURT ON CERTIORARI, SHAVERS V. SHARP, ET AL. PETITIONER FILED HIS LAWSUIT IN DISTRICT COURT ON MARCH 2, 2015 (R.1) AND AWARE OF THE IMPOSED THIRD STRIKE AGAINST HIM UNDER § 1915(G), PETITIONER SISTER PAID THE DISTRICT COURT FILING FEE. (R.3) PETITIONER ALLEGED EXCESSIVE USE OF FORCE CLAIMS AGAINST SOME OFFICIALS AND FAILURE TO PROTECT A CLAIMS AGAINST OTHER PRISON OFFICIALS. ON MAY 12, 2015 DISTRICT COURT ISSUED SUMMONS FOR SERVICE WITH COMPLAINT UPON DEFENDANTS (R.6)

BECAUSE PLAINTIFF HAD HIMSELF IMPROPERLY MAILED THE SUMMONS AND COMPLAINTS TO AND RECEIVED BY THE DEFENDANTS. ON JULY 6, 2015 ATTORNEY FOR DEFENDANTS FILED A FED. R. CIV. P. 12(B)(5) MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS BASE ON FED. R. CIV. P. RULE 4 (C) (2) (... NOT A PARTY MAY SERVE A ~~DO~~ SUMMONS AND COMPLAINTS) (R. 9, R. 10) ON SEPTEMBER 23, 2015 THE

CONCEDING HIS IMPROPER SERVICE UPON DEFENDANTS HAD FILE A COMBINED MOTION FOR EXTENSION OF TIME TO SERVE COMPLAINTS AND FOR RE-ISSUANCE OF SUMMONS (R. 14).

ON NOVEMBER 20, 2015 MAGISTRATE JUDGE REPORT AND RECOMMENDATION ACKNOWLEDGE RECEIPT OF PETITIONER ABOVE SAID FILED COMBINED MOTION AND ^{HE} ADDRESSES AND STATES TO HAVE GRANTED IN PART, PETITIONER MOTION FOR EXTENSION OF TIME (NOTEDLY: ADDITIONAL 60 DAYS NOT TO SERVE AGENTS OF THE DEFENDANTS) BUT TO SERVE SUMMONS AND COMPLAINTS UPON THE DEFENDANTS. AS TO THE OTHER PART OF PETITIONER COMBINED MOTION FOR RE-ISSUANCE OF SUMMONS, MAGISTRATE JUDGE DID NOT ADDRESS OR STATED TO HAVE GRANTED OR DENIED THE LATTER PART OR PETITIONER MOTION (R. 19 PP 1-2; 3-7).

IN LIGHT OF THE MAGISTRATE JUDGE HAVING IN HIS R & R ADDRESS AND STATED ONLY TO GRANTED PETITIONER COMBINED MOTION FOR EXTENSION OF TIME TO SERVE COMPLAINTS (I.E. ADDITIONAL 60 DAYS) AND MAGISTRATE JUDGE DID NOT ADDRESS OR STATE TO HAVE GRANT OR DENY PETITIONER OTHER PART OF THE MOTION FOR REISSUANCE OF SUMMONS, THIS PETITIONER PRO SE REASONABLY CONSTRUCTED TO BE FOR THE FOLLOWING REASON(S):

(A) MAGISTRATE JUDGE WAS SAYING WITHOUT SAYING AND/OR NOT APPEARING TO BE GIVING PLAINTIFF LEGAL ADVICE;

(1) THAT REISSUANCE OF SUMMONS (WITH COMPLAINT) FOR SERVICE UPON DEFENDANTS WAS NOT NEEDED OR NECESSARY; IF SO,

(2) THAT MAGISTRATE JUDGE WOULD HAVE STATED OR RECOMMEND THE REISSUANCE OF SUMMONS IN HIS R&R AND OR WOULD HAVE MAILED TO PETITIONER ALONG WITH THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION;

(3) BECAUSE NOT, THEN THE DISTRICT COURT MAY 12, 2015 ISSUED SUMMONS IN WHICH PETITIONER HAD ALREADY RECIEVED WAS IN FACT GRANTED THE EXTENSION OF TIME TO SERVE UPON DEFENDANTS AND WITHIN 60 DAYS FROM THE MAGISTRATE JUDGE NOVEMBER 20, 2015 R&R;

(4) THAT IF NOT, PETITIONER COMPLAINT WOULD BE DISMISSED FOR FAILURE TO SERVE DEFENDANTS WITHIN THE GRANTED ADDITIONAL EXTENSION OF TIME 60 DAYS; THEREFORE;

(5) PLAINTIFF HAD THE DISTRICT COURT ORIGINAL ISSUED MAY 12, 2015 SUMMONS PHOTOCOPIED AND PROVIDED

THE PHOTOCOPY OF SUMMONS UPON A NON-PARTY (I.E. PETITIONER SISTER KATHERINE RIVERS) FOR SERVICE OF SUMMONS AND COMPLAINTS UPON THE DEFENDANTS;

(A) PURSUANT TO PLAINTIFF FILED MOTION FOR AN EXTENSION OF TIME PROPOSAL TO HAVE A THIRD PARTY (HIS SISTER) SERVE DEFENDANTS VIA CERTIFIED MAIL AND RETURN RECEIPT PROCESS, AS ALLOWED UNDER FEDERAL LAW FED. R. CIV. P. (4)(E) AND MICHIGAN STATE LAW MCR 2.105 (A) (1) (2) (R. 14); THAT IS,

(B) ON JANUARY 14, 2016 PETITIONER SISTER KATHERINE RIVERS VIA CERTIFIED MAIL AND RETURN RECEIPT HAD COPY OF THE DISTRICT COURT MAY 12, 2015 ISSUED SUMMONS WITH COMPLAINTS SUCCESSFULLY SERVED UPON FIVE DEFENDANTS AND HAD REPEATED ATTEMPTS OF SERVE (BY UNITED STATES MAIL CARRIER EMPLOYEE) UPON SEVEN OTHER DEFENDANTS WHO EVADED SERVE; AND

(4) THAT WITHIN 60 DAYS FROM MAGISTRATE JUDGE NOVEMBER 20, 2015 REPORT AND RECOMMENDATION ~~WAS~~ SERVICE WAS MADE AND ATTEMPT TO BE MADE UPON THE DEFENDANTS.

NOW IN NOT DISREGARDING THE MAGISTRATE JUDGE FAILURE IN HIS RER TO HAVE SPECIFICALLY

ADDRESS AND TO STATE WHETHER HE GRANTED OR DENIED PLAINTIFF FILED COMBINED IN PART, "MOTION FOR RE-ISSUANCE OF SUMMONS (R. 14) AND HOW OR IF AT ALL THE MAGISTRATE JUDGE SAID FAILURE MAY POTENTIALLY PREJUDICE PETITIONER PROPER SERVICE UPON DEFENDANTS.

THAT IS, ON DECEMBER 4, 2015 PETITIONER FILED OBJECTION TO THE DISTRICT COURT JUDGE, ONLY AS TO AND ON THE POINT THAT MAGISTRATE JUDGE ABOVE SAID FAILURE TO HAVE ADDRESS AND STATE IN HIS R&R TO HAVE GRANT, OR DENY, OR RECOMMEND PETITIONER MOTION FOR RE-ISSUANCE OF (NEW) SUMMONS. (R. 20)

BUT EVIDENCE OF THE PETITIONER ABOVE SAID LIBERAL CONSTRUCTION OF THE MAGISTRATE JUDGE ABOVE SAID FAILURE IN HIS R&R TO HAVE ADDRESS OR STATE TO HAVE GRANT, OR DENY, OR RECOMMEND PETITIONER FILED MOTION FOR RE-ISSUANCE OF SUMMONS AND HOW SAID FAILURE PREJUDICE PETITIONER IN THINKING THAT HIS SISTER JANUARY 2016 SERVICE (I.E. DISTRICT COURT MAY 12, 2015 ISSUED SUMMONS WITH COMPLAINTS UPON DEFENDANTS) WAS ANYTHING BUT PROPER, TIMELY AND IN COMPLIANCE WITH MAGISTRATE JUDGE R&R, IS CLEARLY ESTABLISH, "WHEN PETITIONER FILED FEBRUARY 8, 2016 NOTICE OF SERVICE UPON DEFENDANTS AND PETITIONER INTENT TO PROVIDE PROOF OF SERVICE WITH DISTRICT COURT." (R. 21) WHEN HIS SISTER (KATHERINE RIVERS) RETURN FROM OUT-OF-STATE.

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IN A MARCH 14, 2016 ORDER APPROVING AND
ADAPTING REPORT AND RECOMMENDING AND AFFIRMING
MAGISTRATE JUDGE'S DECISION STATED IN PERTINENT PART,

"... THE MAGISTRATE JUDGE ALSO RECOMMENDS THAT
PLAINTIFF'S MOTION FOR AN EXTENSION OF TIME
TO SERVE DEFENDANTS BE GRANTED... MAGISTRATE
JUDGE RECOMMEND GIVING PLAINTIFF AN ADDITIONAL
60 DAYS IN WHICH TO SERVE DEFENDANTS...

P.

... PLAINTIFF OBJECTS ONLY THAT THE MAGISTRATE
JUDGE SHOULD HAVE ORDERED EXPLICITLY THAT A
NEW SUMMONS ISSUE REFLECTING THE EXTENSION
OF THE DEADLINE FOR SERVICE. THE REPORT AND
RECOMMENDATION ADDRESSES THE ISSUE IMPLICITLY
BY RECOMMENDING AN EXTENSION, AND THE COURT
WILL ORDER THAT A NEW SUMMONS ISSUE TO
REFLECT THE RECOMMENDED EXTENSION...

... IT IS FURTHER ORDERED... THAT PLAINTIFF
MOTION FOR AN EXTENSION OF TIME TO SERVE
DEFENDANTS (DOCKET # 14)... AND THAT THE CLERK
OF THE COURT SHALL REISSUE SUMMONSES
HAVING AN EXPIRATION DATE OF 60 DAYS FROM
THE DATE OF ISSUANCE...

(R. 22 PP 2, 3-4) MINDFUL THAT WHEN PLAINTIFF RECEIVE

THE DISTRICT COURT MARCH 14, 2016 ORDER THAT THAT
IS WHEN PETITIONER HAD LEARNED FOR THE FIRST TIME:

(1) THAT PLAINTIFF SISTER (I.E. KATHERINE RIVERS)
ALREADY SERVICE (I.E. PHOTOCOPIED OF DISTRICT COURT
MAY 12, 2015 ISSUED SUMMONS WITH COMPLAINTS) VIA
CERTIFIED MAIL AND RETURN RECEIPT UPON 5 DEFENDANTS
AND POSTAL SERVICE REPEATED ATTEMPTS UPON 7 OTHER
EVADING SERVICE, IN JANUARY 2016 WAS IMPROPER;

(2) THAT DISTRICT COURT JUDGE ISSUANCE OF NEW
SUMMONS (I.E. MARCH 14, 2016) TO SERVE UPON DEFENDANTS;
AND,

(3) THAT DISTRICT COURT JUDGE ORDER SERVICE OF
NEW ISSUED SUMMONS UPON DEFENDANTS WITHIN 60 DAYS
FROM THE DATE OF THE DISTRICT COURT MARCH 14, 2016
ORDER.

ALSO MINDFUL THAT 5 OF THE DEFENDANTS (I.E.
LARRY WEAVER, ERIC RIGGS, RON NALLY, JEFFERY CLOUSE,
AND KENNETH BLINCZAK) HAVING ALREADY ACKNOWLEDGE
RECEIPT OF THE DISTRICT COURT MAY 12, 2015 ISSUED
SUMMONS AND COMPLAINTS IN JANUARY. THAT IS, BY WAY
OF THE DEFENDANTS EACH HAVING DATED AND SIGNED

THE CERTIFIED MAIL AND RETURN RECEIPT, HOWEVER
BECAUSE NEARLY FIVE MONTHS LATER IN MAY 2016,

NEITHER ONE OF THE NAMED SERVED DEFENDANTS HAD NOT
FILED AN ANSWER, NOR DID THEY FILE A FED. R. CIV.
P. 12(B) MOTION TO DISMISS OR FOR INSUFFICIENT SERVICE
AND THAT DEFENDANTS FAILURE TO DO SO WITHIN THE
PRESCRIBE TIME HAD WAIVE THEIR STATUTORY RIGHTS TO
DO UNDER FED. R. CIV. P. 12(H)

THEREFORE PLAINTIFF IN MAY 2016 FILED IN

DISTRICT COURTS APPLICATIONS/ AFFIDAVITS FOR ENTRY AT

DEFAULTS AGAINST DEFENDANTS JEFFERY CLOUSE AND

KENNETH DLINZAK (R. 26, R. 27) LARRY WEAVER, ERIC RIEGS,

AND RON NALLEY (R. 28, R. 29) AND IN JUNE 2016 PLAINTIFF

PROVIDED DISTRICT COURT WITH SAID (I.E. CERTIFIED MAIL

AND RETURN RECEIPTS AND POSTAL SERVICE PURCHASE

RECEIPTS) AND UNCONTESTED PROOF OF SERVICE UPON THE

5 NAMED DEFENDANTS. (R. 36)

SUBSEQUENTLY IN FEBRUARY 23, 2017 MAGISTRATE

JUDGE REPORT AND RECOMMENDATION STATES IN PERTINENT

PART,

"... ON MAY 26, 2016, PLAINTIFF FILED MOTIONS

SEEKING ENTRY OF DEFAULT AGAINST DEFENDANTS CLOUSE

AND BRINZAX (DOCKET NO. 26) AND DEFENDANTS WEAVER, RIGGS AND NALLEY (DOCKET NO. 28)... PLAINTIFF FILED THESE MOTIONS BECAUSE HIS SISTER, MRS. KATHERINE RIVERS, REPORTEDLY SERVED THESE DEFENDANTS WITH COPIES OF THE SUMMONS AND COMPLAINT VIA CERTIFIED MAIL. SEE KATHERINE RIVERS DECLARATION (DOCKET NO. 27-3) (R. 39.P. 2)

HOWEVER, MRS DID NOT SERVE DEFENDANTS WITH THE SUMMONSES REISSUED ON MARCH 14, 2016. RATHER, MRS. RIVERS STATED THAT SHE MAILED COPIES OF THE SUMMONS AND COMPLAINTS TO DEFENDANTS IN JANUARY 2016 (WHILE THE UNSIGNED'S REPORT AND RECOMMENDATION ON DEFENDANTS MOTION TO QUASH WAS PENDING BEFORE THE DISTRICT JUDGE). Id.

MRS RIVERS' SERVICE WAS INEFFECTIVE FOR TWO REASONS. FIRST, IN HER DECLARATION, MRS. RIVERS STATED THAT SHE MAILED DEFENDANTS COPIES OF THE SUMMONS, AS OPPOSED TO THE ORIGINAL SUMMONSES. SEE FED. R. CIV. P. 4(B) (IF THE SUMMONS IS PROPERLY COMPLETED, THE CLERK MUST SIGN, SEAL, AND ISSUE IT TO THE PLAINTIFF FOR SERVICE ON THE DEFENDANT); UNITED STATES V NATIONAL MUFFLER MANUFACTURING, INC., 125 F. R. D. 453, 455 (N. D. OHIO 1989) (IT IS APPARENT TO THIS COURT THAT THE CONTENT OF THE SUMMONS ISSUED TO DEFENDANT DID NOT CONFORM TO THE REQUIREMENT OF RULE 4(B) ALTHOUGH

THE ORIGINAL SUMMONS WAS DULY SIGNED BY THE COURT, THE [UNSIGNED AND UNSEALED] SUMMONS RELIEVED BY DEFENDANTS BORE NEITHER INDICIA OF AUTHENTICITY)

SIMILARLY, THE COPIES OF THE SUMMONSES MAILED BY MRS. RIVERS WOULD NOT HAVE BORN AN ORIGINAL SIGNATURE OR SEAL.

SECOND, EVEN IF MRS. RIVERS HAD MAILED THE ORIGINAL SUMMONSES (I.E. THAT PLAINTIFF DID NOT MAIL DEFENDANTS THE ORIGINAL SUMMONSES BACK IN 2015), THOSE SUMMONSES WERE INVALID, HAVING EXPIRED ON SEPTEMBER 9, 2015 (120 DAYS AFTER ISSUANCE ON MAY 12, 2015). SEE FED. R. CIV. P. 4 (M) (IF A DEFENDANT IS NOT SERVED WITHIN 120 DAYS AFTER THE COMPLAINT IS FILED, THE COURT -- ON MOTION OR ON ITS OWN AFTER NOTICE TO THE PLAINTIFF -- MUST DISMISS THE ACTION WITHOUT PREJUDICE AGAINST THAT DEFENDANT OR ORDER THAT SERVICE BE MADE WITHIN A SPECIFIED TIME.)²

FOR HIS PART, PLAINTIFF WAS AWARE THAT HIS SISTER WAS ATTEMPTING TO SERVE EXPIRED SUMMONSES IN JANUARY 2016. THE COURT REACHES THIS CONCLUSION BECAUSE PLAINTIFF HAD FILED A MOTION BACK ON SEPTEMBER 23, 2015 SEEKING TO EXTEND TIME TO SERVE

THE COMPLAINT AND REISSUE THE SUMMONSES, STATING IN PERTINENT PART THAT HE WAS "MINDFUL OF FED. R. CIV. P. (4)(M) 120 DAYS EXPIRATION DATE FOR SERVICE OF SUMMONS AND COMPLAINT UPON THE DEFENDANTS' MOTION (DOCKET NO. 14, PAGE 10, 220)...

A. MOTION FOR ENTRY OF DEFAULT

SINCE NO DEFENDANTS HAVE BEEN SERVED WITH EITHER THE ORIGINAL OR RE-ISSUED SUMMONSES, PLAINTIFF IS NOT ENTITLED TO ENTRIES OF DEFAULT UNDER FED. R. CIV. P. 55(A) (WHEN A PARTY AGAINST WHOM A JUDGMENT FOR AFFIRMATIVE RELIEF IS SOUGHT HAS FAILED TO PLEAD OR OTHERWISE DEFEND, AND THAT FAILURE IS SHOWN BY AFFIDAVIT OR OTHERWISE, THE CLERK MUST ENTER THE PARTY'S DEFAULT). ACCORDING, PLAINTIFF'S MOTIONS FOR ENTRIES OF DEFAULT (DOCKET NOS. 20, 28 AND 30) SHOULD BE DENIED....

(R. 39 P 3-5) HERE, PLAINTIFF'S FIRST ATTEMPT AT SERVICE EXHIBITED A TOTAL DISREGARD FOR THE FEDERAL RULES OF CIVIL PROCEDURE AND WAS QUASHED. PLAINTIFF'S SECOND ATTEMPT TO HAVE HIS SISTER SERVE SOME OF THE DEFENDANTS IN JANUARY 2016 WAS NOT TAKEN IN GOOD FAITH. AS DISCUSSED, PLAINTIFF KNEW THAT THE SUMMONSES WERE EXPIRED AT THAT TIME AND NEEDED TO BE RE-ISSUED, YET HE ATTEMPTED TO HAVE HIS

SISTER SERVE DEFENDANTS BEFORE THE COURT RULED ON THE MOTION TO QUASH. FINALLY, THERE IS NO EVIDENCE THAT PLAINTIFF TRIED TO SERVE DEFENDANTS IN ACCORDANCE WITH THE COURT'S MARCH 15, 2016 ORDER. THE FACT THAT PLAINTIFF'S SISTER WAS AWAY FROM HER HOME DURING SOME OF THE 60 DAY SERVICE EXTENSION PERIOD DOES NOT ABSOLVE PLAINTIFF OF HIS RESPONSIBILITY TO SERVE DEFENDANTS WITHIN THE TIME ORDERED BY THE COURT. PLAINTIFF COULD HAVE HIRED A PROCESS SERVER RATHER THAN RELY ON HIS SISTER. (R. 39 P 6)...

III. RECOMMENDATION

FOR THE REASON SET FORTH, I RESPECTFULLY RECOMMEND THAT PLAINTIFF'S MOTIONS FOR ENTRY OF DEFAULT (DOCKET NOS. 26, 28 AND 32) BE DENIED...

I FURTHER RECOMMEND THAT ALL OF PLAINTIFF'S CLAIMS BE DISMISSED WITHOUT PREJUDICE PURSUANT TO FED. R. CIV. P. 4(M)

(R. 39 P. 7-8) IN A MARCH 16, 2017 ORDER DISTRICT COURT JUDGE STATED IN PERTINENT PART,

"... NO OBJECTIONS HAVE BEEN FILED UNDER 28 U.S.C. 636 (B) (1) (C)... PLAINTIFF HAD NOT FILED OBJECTION (I.E. TO MAGISTRATE JUDGE FEBRUARY 23, 2017 REPORT AND

RECOMMENDATION)... IT IS FURTHER ORDERED BOTH... THAT PLAINTIFF'S MOTIONS FOR ENTRY AT DEFAULT (R. 26, 28 AND 32) ARE DENIED... AND THAT ALL OF PLAINTIFF CLAIMS ARE DISMISSED WITHOUT PREJUDICE PURSUANT TO FED R. CIV. P. 4 (M)..."

(R. 41, R. 42) IN RESPONSE PLAINTIFF FILED A MARCH 29, 2017 COMBINED MOTION TO ALTER OR AMEND DISTRICT COURT MARCH 16, 2017 ORDER (WITH MOTION TO PERMIT PLAINTIFF'S DATED MARCH 8, 2017 OBJECTIONS TO MAGISTRATE JUDGE FEBRUARY 23, 2017 REPORT AND RECOMMENDATION) STATING IN PERTINENT PART,

"... THAT PLAINTIFF PRISON COUNSEL, LECLAIRE REFUSE TO PICK UP AND PROCESS VIA PRISON INTERNAL EXPEDITED LEGAL MAIL SYSTEM PLAINTIFF LEGAL MAIL (I.E. PLAINTIFF'S OBJECTION TO MAGISTRATE JUDGE FEBRUARY 23, 2017 R & R ON THE FILING DEADLINE DATE MARCH 8, 2017. AND THAT IS THE ARBITRARY AND UNCONTROLLABLE REASON FOR THE LATE MAILING/ FILING OF PLAINTIFF ABOVE SAID LEGAL MAIL... PLAINTIFF ATTACHED TO HIS MOTION ORIGINAL MARCH 8, 2017 PRISON FILED STEP I GRIEVANCE AGAINST PRISON COUNSEL ALLEGING THE ABOVE FACTS DENY PLAINTIFF RIGHTS TO ACCESS TO THE COURT, AND PREVENTED THE TIMELY MAILING OF HIS SAID LEGAL MAIL... AND FOR THOSE REASONS DISTRICT COURT SHOULD GRANT PLAINTIFF MOTION...

(R. 43, R. 44) IN A APRIL 13, 2017 ORDER DISTRICT COURT RESPONDED IN PERTINENT PART,

"... THE COURT IS NOT SATISFIED THAT THERE IS GOOD CAUSE OR EXCUSABLE NEGLECT FOR PLAINTIFF UNTIMELY FILING. PLAINTIFF STATES THAT HE ATTEMPTED TO MAIL HIS OBJECTIONS BEFORE THE DEADLINE AND THAT PROBLEM IN THE MAIL DELIVERY SYSTEM CAUSED THE DELAY, BUT HIS STATEMENT IS NOT UNDER OATH. MOREOVER, IT IS CLEAR THAT THE PRISON SYSTEM HAS GENERALLY BEEN EFFECTIVE IN HANDLING PLAINTIFF LEGAL MAIL...

(R. 48 P. 1, 2) PLAINTIFF RESPONDED WITH FILING A MAY 15, 2017, "MOTION TO AMEND OR ALTER COURT'S APRIL 13, 2017 ORDER STATING IN PERTINENT PART,

"... THAT PLAINTIFF HAVE CURE THE COURT STATED DEFECT IN PLAINTIFF ABOVE SAID STATEMENT IS NOT (MADE) UNDER OATH. BY WAY OF PLAINTIFF HAVING MADE THE SAID STATEMENT UNDER OATH AND REFILED THE STATEMENT FOR RECONSIDERATION OF DISTRICT COURT ~~ON~~ APRIL 13, 2017 ORDER NOT PERMITTING AND DECIDING THE MERITS OF PLAINTIFF LATE FILED OBJECTIONS TO MAGISTRATE JUDGE FEBRUARY 23, 2017 REPORT AND RECOMMENDATION... BECAUSE STATEMENT NOW UNDER OATH ESTABLISHES GOOD CAUSE..."

(R. 51 P. 11) NOW WHILE PLAINTIFF WAS PREPARING HIS APPEAL TO FILE FROM THE DISTRICT COURT TO THE SIXTH CIRCUIT. THAT IS, PRISON LEGAL WRITER PROGRAM PRISONER ASSISTANCE HAD RESEARCH THIS COURTS' HOLDING IN WILKINS V GADDY, 559 U.S. 34 (2010), HUDSON V. McMILLIAN, 503 U.S. 1 (1992); AND ALLEN V HARDY, 106 S. CT. 2880 FOOTNOTE 1 (1986) FOR THE PURPOSE OF DETERMINE IF UNDER THE HOLDING IN THESE CASES - IF THE DISTRICT COURT AND SIXTH CIRCUIT PRECEDENT IN DISMISSING THE PETITIONER PRIOR LAWSUIT SHIVERS V BERGH EXCESSIVE USE OF FORCE CLAIMS BASE ON THE NATURE OF THE SUSTAINED INJURY AND NOT ON THE APPLIED FORCE, AND IF SHIVERS V BERGH WAS NOT FINAL FINAL ON CERTIORARI - WHEN THIS COURT DECIDED AND HANDED DOWN IT'S DECISION IN WILKINS V GADDY THAT PETITIONER WAS ENTITLED TO SEEK FROM THE JUDGMENT IN SHIVERS V BERGH, ON THE GROUNDS IN BOTH WILKINS V GADDY AND ALLEN V HARDY. THUS PETITIONER THIRD STRIKES UNDER § 1915(E) WOULD BE REDUCE TO TWO STRIKES AND ALLOWED TO PROCEED IN FORMA PAUPERIS ON APPEAL.

CONSEQUENTLY AND ON THE ADVICE OF THE ABOVE SAID PRISONER LEGAL WRITER ASSISTANCE. IN THIS INSTANT CASE SHIVERS V. SHARP, ET AL ON APPEAL, THAT IS, ON MAY 18, 2017 PETITIONER FILED IN DISTRICT

COURT A FED. R. CIV. P. RULE 60 (B) 10, "MOTION TO REVIEW AND REVERSE HIS STATUS UNDER THREE STRIKE RULE TO TWO STRIKES AND TO GRANT PLAINTIFF IN FORMA PAUPERIS ON APPEAL IN THIS INSTANT CASE." (R. 55) STATING IN PERTINENT PART,

"... THAT IN LIGHT OF THIS COURT ANNOUNCEMENT IN WILKINS V GADDY AND THAT AT THE TIME WILKINS ~~WAS~~ DECISION WAS HANDLED DOWN IN FEBRUARY 2010, THAT IS, THE PETITIONER LAWSUIT SHAYERS V BERGH (I.E. DISMISSING PETITIONER EXCESSIVE USE OF FORCE CLAIMS BASE ON THE NATURE OF THE SUSTAINED INJURY AND NOT ON THE APPLIED FORCE, ALSO COUNTING THE DISMISSAL AS A THIRD STRIKE AGAINST PETITIONER) WAS STILL PENDING ON CERTIORARI AND NOT FINAL AND OR DECIDED UPON BY THIS COURT UNTIL MARCH 2010. THUS WILKINS V GADDY HOLDING AND THIS COURT HOLDING IN ALLEN V HARDY (I.E. THAT BY FINAL WE MEAN WHERE THE JUDGMENT OF CONVICTION WAS RENDERED THE AVAILABILITY OF APPEAL EXHAUSTED AND TIME FOR PETITION FOR CERTIORARI HAD ELAPSED) WAS AVAILABLE AND APPLICABLE FOR PETITIONER TO ~~WE~~ ARGUE HE IS ENTITLED TO RELIEF FROM JUDGMENT IN SHAYERS V. BERGH ON THE GROUNDS IN BOTH WILKINS V GADDY, AND ALLEN V. HARDY, INCLUDING THE REVERSAL OF SHAYERS V BERGH COUNTED AS A THIRD STRIKE. (R. 55)

IN A JULY 6, 2017 ORDER DISTRICT COURT
MAGISTRATE JUDGE IN DENYING PETITIONER ABOVE SAID
FILED RULE 60(B)(6) MOTION STATING IN PERTINENT
PART,

"... NONE OF THE CASES LISTED IN SHIVERS V BAUMAN,
2: 10-CV-52 (W. D. MICH. APRIL 19, 2010) AFF'D NO. 10-1817
(6TH CIR. FEB. 4, 2011) (AFFIRMING DISMISSAL OF COMPLAINT
FOR FAILURE TO PAY THE FILING FEE AFTER DENIAL OF
LEAVE TO PROCEED IN FORMA PAUPERIS PURSUANT TO THE
THREE-STRIKE RULE) WHICH FORM THE BASIS FOR PETITIONER
"THREE STRIKES" HAD NOT BEEN REVERSED ON APPEAL. (I.E.
SHIVERS V BERGH, NO. 2: 07-CV-173 (W. D. MICH. MAY 20, 2008
(DISMISSING FOR FAILURE TO STATE A CLAIM), AFF'D NO. 08-
1860 (6TH CIR. JUNE 18, 2009); SHIVERS V. LIEFER, NO. 1: 06-
CV-196 (W. D. MICH. MAY 15, 2006) (DISMISSING FOR
SEEKING RELIEF FROM A DEFENDANT IMMUNE FROM SUIT AND
FOR FAILING TO STATE A CLAIM) AFF'D NO. 06-1832 (6TH CIR.
JAN. 24, 2007); AND SHIVERS V STAPLETON, NO. 03-CV-134
(W. D. MICH. AUG. 18, 2003) (DISMISSING FOR FAILURE TO
STATE A CLAIM), AFF'D NO. 03-2210 (6TH CIR. JUNE 9, 2004)..."

(R. 57) ON JULY 10, 2017 DISTRICT COURT AFFIRM
MAGISTRATE JUDGE ABOVE SAID RULING AND DENIED PLAINTIFF
RULE 60(B)(6) MOTION. AS DID SIXTH CIRCUIT AFFIRM DISTRICT
COURT RULING ON MOTION... NO. 17-1573 (6TH CIR. MAR. 28, 2018)

REASON FOR GRANTING THE PETITION

A. CONFLICTS WITH DECISIONS OF THIS COURT AND
OF OTHER CIRCUITS

THIS CASE IS IMPORTANT FOR THE ISSUES IT
RAISES AS TO THE PROPER ALLOCATION OF FUNCTIONS BETWEEN
THE FEDERAL DISTRICT COURTS AND FEDERAL COURT OF APPEALS.
THIS COURT HAS CONSISTENTLY RECOGNIZED THAT "THE PROPER
OBSERVANCE OF THE DIVISION OF FUNCTIONS BETWEEN
FEDERAL TRIAL COURTS AND THE FEDERAL APPELLATE COURTS
IS IMPORTANT IN EVERY CASE," ESPECIALLY IN CASES WHERE
THE DISTRICT COURT HAS BEEN ASKED TO ISSUE AN
EFFECTIVE REMEDY TO CURE UNCONSTITUTIONAL CONDITIONS
IN PUBLIC INSTITUTIONS. DAYTON BOARD OF EDUCATION V.
BRINKMAN, 433 U.S. 406, 410 (1977), MILLIKEN V BRADLEY,
433 U.S. 267 (1977) (MILLIKEN II) (PUBLIC SCHOOLS);
HUTTO V FINNEY, 437 U.S. 678 (1978) (STATE PRISON).

THE OPINION AND ORDER OF THE SIXTH CIRCUIT
COURT OF APPEALS AFFIRMING THE REMEDIAL ORDER OF
THE DISTRICT COURT ARE CONTRARY TO THE GENERAL
PRINCIPLES WHICH THIS COURT HAS ENUNCIATED
GOVERNING THE EQUITABLE POWERS OF DISTRICT COURT
TO FASHION REMEDIES FOR CONSTITUTIONAL VIOLATIONS
AND RAISE IMPORTANT QUESTIONS ABOUT THE PROPER

FUNCTIONS OF APPELLATE COURTS IN REVIEWING REMEDIAL ORDERS.

IN THIS CASE, THE SIXTH CIRCUIT APPELLATE COURT PRECEDENT HELD THAT FEDERAL JUDGES IN DETERMINING PRISONERS EXCESSIVE USE OF FORCE CLAIMS "THAT EVERY MALEVOLENT TOUCH BY A PRISON GUARD DOES NOT GIVE RISE TO AN EIGHTH AMENDMENT CAUSE OF ACTION. SEE HUDSON V. McMILLIAN, 503 U.S. 1, 9, 112 S. CT. 995, 117 L. ED. 2D 156 (1992), AND THE PRISONER MUST ALLEGE THAT HE SUSTAINED MORE THAN DE MINIMIS INJURY TO STATE A VIABLE EXCESSIVE FORCE CLAIMS ID. 9-10; THADDEUS-X V BLATTER, 175 F. 3D 378, 402 (6TH CIR. 1999) (EN BANC)."

THE SIXTH CIRCUIT ABOVE SAID APPROACH AND INTERPRETATION OF HUDSON V. McMILLIAN IN DETERMINING AND DISMISSING PETITIONER ALLEGE EXCESSIVE USE OF FORCE CLAIMS IN SHAVERS V BERGH, ET AL, 2:07-CV-173 (W. D. MICH. MAY 22, 2008), AFF'D NO. 08-1860 (6TH CIR. JUNE 18, 2009), IS SQUARELY IN CONFLICT* WITH THIS COURT EARLIER AND LONGSTANDING DIRECTION IN HUDSON V McMILLIAN, "THAT THE EIGHTH AMENDMENT ANALYSIS MUST BE DRIVEN BY THE EXTENT OF THE FORCE AND THE CIRCUMSTANCES IN WHICH IT IS APPLIED, AND NOT BY THE RESULTING INJURIES" THAT WAS AFFIRMED IN

WILKINS V GADDY, 559 U.S. 34, 130 S. CT. 1175 (FEB. 2010) BY THIS COURT AND HANDED DOWN AS GUIDANCE TO THE SAID REMAINING FEDERAL APPELLATE CIRCUIT COURTS AND THEIR DISTRICT COURTS. BUT ALSO, IS SQUARELY IN CONFLICT WITH THE APPROACH AND INTERPRETATION OF THIS COURTS EARLIER DIRECTIONS IN HUDSON V McMILLIAN BY FIVE OTHER APPELLATE CIRCUITS COURTS (I.E. WRIGHT V BODDY, 554 F. 3d 255 (CA. 2, 2009); SMITH V MUNSINGER, 293 F. 3d 641 (3RD CIR. 2002); OLIVER V KELLER, 289 F. 3d 623 (9TH CIR. 2002); UNITED STATES V LAVALLEE, 439 F. 3d 670 (10TH CIR. 2006) ; AND BROWN V LIPPARD, 472 F. 3d 384 (2006)).

THE ISSUE IMPORTANCE IS ENHANCED BY THE FACT THAT THIS COURTS DECISION IN WILKINS V. GADDY WAS DOWN IN FEBRUARY 2010 AND THAT FOR MORE THAN ANOTHER MONTH THIS PETITIONER FILED PETITION FOR CERTIORARI NO. 09-8473 WAS STILL PENDING, NOT FINAL, OR DECIDED UPON THIS COURT UNTIL MARCH 2010, WHICH THEN TURNS ON THE QUESTION OF THIS COURT HOLDING IN ALLEN V HARDY (I.E. A JUDGMENT IS NOT FINAL UNTIL THE AVAILABILITY OF APPEAL EXHAUSTED AND TIME FOR PETITION FOR CERTIORARI HAD ELAPSED) THE AVAILABILITY AND APPLICABILITY FOR PLAINTIFF TO SEEK RELIEF FROM BERGH JUDGMENT BASE ON GROUNDS IN WILKINS AND ALLEN.

IN THIS CASE, THE SIXTH CIRCUIT APPELLATE COURT HELD THAT FEDERAL JUDGES IN DETERMINING DISMISSAL OF ALL CLAIMS UNDER 42 USC § 1983 AND DENYING FILED APPLICATIONS FOR ENTRIES OF DEFAULTS UNDER FED. R. CIV. P. 55(A) AGAINST FIVE OF THE DEFENDANTS (I.E. JEFFERY CLOUSE AND KENNETH OLINCZAK (R. 26) LARRY WEAVER, ERIC RIGGS AND RON NALLEY (R. 28)) BASE UPON IMPROPER SERVICE AND THE FEDERAL JUDGE'S NOT CONSIDERING AND OR NOT FINDING DEFENDANTS WAS PREJUDICE BY THE IMPROPER SERVICE WAS AN APPROPRIATE DISMISSAL AND DENIAL UNDER FED. R. CIV. P. 4(M) AND 55(A).

EVEN THOUGH WHEN THE DEFENDANTS ACCEPTED SERVICE OF SUMMONS AND COMPLAINTS BY WAY OF SIGNING AND DATING THE CERTIFIED MAIL RETURN RECEIPTS AND THAT UNCONTESTED PROOF OF SERVICE WAS FILED WITH THE DISTRICT COURT (R. 30) DEFENDANTS HAD NOTICE OF THE LAWSUIT, THEY DID NOT FILE AN ANSWER, NOR FILED A FED. R. CIV. P. 12(B) (1)-(5) MOTION TO DISMISS OR FOR IMPROPER OR INSUFFICIENT SERVICE OF PROCESS, THEY DID NOT OTHERWISE ADVISE DISTRICT COURT OF ANY PREJUDICE BY THE IMPROPER SERVICE. INDEED DEFENDANTS DID NOT RESPOND TO PLAINTIFF'S FILED APPLICATIONS FOR ENTRY OF DEFAULTS AGAINST THEM. (R. 26, 28 AND 30)

THE SIXTH CIRCUIT ABOVE SAID DETERMINATION IS SQUARELY IN CONFLICT, NOT ONLY, WITH THE DETERMINATION OF FIVE OTHER CIRCUIT COURTS "ON THE SAME ISSUE" (I.E. WILLIAMS V GENERAL SERVICE ADMINISTRATIVE, 582 F. SUPP. 442 (E.D. PA. 1984); JORDAN V. UNITED STATES, 694 F. 2d 833 (D.C. CIR. 1982); DONAGHY V ROEBUSH, 614 F. SUPP. 585, 587 (D.C. N.J. 1985); AND, MINEE V UNITED STATES, 490 F. SUPP. 768 (N. GA. 1980) (FINDING THAT A CASE SHOULD NOT BE DISMISSED FOR INSUFFICIENT SERVICE UNLESS THE DEFENDANT HAS BEEN SERIOUSLY PREJUDICE AS A RESULT OF THE MISTAKE OR OF THE DELAY IN FIXING IT)

BUT ALSO, WHEN ~~AND~~ DEFENDANTS ABOVE SAID FAILURES TO HAVE EXERCISE THEIR STATUTORY RIGHTS UNDER FED. R. CIV. P. 12(A)(1)(A) (TO HAVE ACT AND OR RESPOND TO THEIR ACCEPTED SERVICE OF SUMMONS AND COMPLAINTS) AMOUNTS TO DEFENDANTS WAIVER OF THEIR STATUTORY RIGHTS UNDER FED. R. CIV. P. 12(H)(1) (TO OBJECT TO THE MERITS OF THE COMPLAINT ALLEGATION, TO ANY DEFENSES, OR DEFECTS IN THE SERVICE OF VALID SUMMONS AND COMPLAINTS) AS WELL AS WAIVER OF ARGUING DISTRICT COURT HAVING^{*} EITHER SUBJECT MATTER JURISDICTION OR PERSONAM JURISDICTION OVER THE FIVE NAMED DEFENDANTS.

THUS THE SIXTH CIRCUIT DETERMINATION THAT PLAINTIFF IS NOT ENTITLED TO ENTRIES OF DEFAULTS AGAINST THE FIVE NAMED DEFENDANTS (R. 26 AND R. 28) BASED ON IMPROPER SERVICE IS AN APPROPRIATE DENIAL OF ENTRY OF DEFAULTS, IS A DETERMINATION THAT IS SQUARELY IN CONFLICT WITH FED. R. CIV. P. 55(A) (WHEN A PARTY AGAINST WHOM A JUDGMENT FOR AFFIRMATIVE RELIEF IS SOUGHT HAS FAILED TO PLEAD OR OTHERWISE DEFEND AND THAT FAILURE IS SHOWN BY AFFIDAVIT OR OTHERWISE, THE CLERK MUST ENTER THE PARTY'S DEFAULT).

CONCLUSION

CERTIORARI SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS APPROACH AND INTERPRETATION IN SHAWERS V BERGH OF THIS COURT'S DIRECTION IN HUDSON V McMILLIAN, "THAT A PRISONER MUST ALLEGE HE OR SHE SUSTAINED MORE THAN A DE MINIMIS INJURY IN ORDER TO STATE A VIABLE EXCESSIVE USE OF FORCE CLAIMS," WAS CONTRARY TO THE DECISION IN AND WAS THE SAME AND EXACT APPROACH AND INTERPRETATION OF HUDSON V McMILLIAN, BY THE FOURTH CIRCUIT IN WILKINS V GADDY THAT THIS COURT FOUND WAS INDEFENSIBLE AND REVERSED WILKINS, BY MERELY AFFIRMING THIS COURT EARLIER

DIRECTION IN HUDSON V McMILLIAN, " THAT THE EIGHTH AMENDMENT ANALYSIS MUST BE DRIVEN BY THE EXTENT OF FORCES AND CIRCUMSTANCES IN WHICH IT IS APPLIED NOT BY THE RESULTING INJURIES" AND THAT WILKINS IS TO BE A GUIDE TO THE REMAINING CIRCUITS, AS OF THE DATE (FEBRUARY 22, 2010) THIS COURT HANDED DOWN WILKINS V GADDY.

WHICH THEN TURNS ON THE QUESTION OF THIS COURT HOLDING IN ALLEN V HARDY (THAT APPEALS OF CONVICTION/JUDGMENT IS NOT FINAL UNTIL TIME FOR CERTIORARI HAS PASSED) AND ALLEN APPLICABLE IN SHAVERS V BERGH THAT WAS NOT FINAL ON APPEAL AND PENDING AN CERTIORARI BEFORE THIS COURT AT THE TIME THIS COURT HANDED DOWN WILKIN, ENTITLE PLAINTIFF TO RELIEF FROM JUDGMENT IN SHAVER V BERGH (DISMISSAL OF EXCESSIVE USE OF FORCE AND COUNTED AS THIRD STRIKE UNDER § 1915(G)) ON THE GROUND ~~THAT~~ IN WILKINS V GADDY THAT SAID REASON FOR DISMISSAL OF EXCESSIVE USE OF FORCE CLAIM WAS UNCONSTITUTIONAL UNDER WILKINS.

THIS CASE PROVIDES PROVIDES THE PROPER VEHICLE FOR DETERMINATION OF ALL PRISONER'S AND ALL LITIGANTS LAWSUITS AND CASES THAT

THAT WHILE ON APPEAL FROM A CIRCUIT APPELLATE COURT AND NOT FINAL ON CERTIORARI/ BEFORE THIS COURT UNDER ALLEN V HARDY IS ENTITLED TO SEEK RELIEF FROM A CONVICTION/ JUDGMENT. IN ADDITION FOR THIS COURT TO DETERMINE IF WILKINS V GADDY IS APPLICABLE IN SHAVERS V BERGH AND OR IS RETROACTIVE TO ALL APPEALS FROM A CIRCUIT APPELLATE COURT AND NOT FINAL ON CERTIORARI BEFORE THIS COURT.

PETITIONER INFORM THIS HONORABLE COURT THAT HE DOES NOT INTEND TO PURSUE THE ALLEGATIONS IN SHAVERS V BERGH LAWSUITS ON TO HAVE THE UNCONSTITUTIONALITY OF THE DISMISSAL ~~AND~~ UNDER WILKINS V GADDY AND COUNTING DISMISSAL AS A STRIKE UNDER § 1915(G) SHOULD BE RESCINDED BY THE LOWER COURTS.

THIS CASE PROVIDE THE PROPER VEHICLE FOR DETERMINATION OF SIXTH CIRCUIT DISMISS OF PETITIONER LAWSUIT SHAVERS V SHARP FOR IMPROPER SERVICE AND DENYING ENTRIES OF DEFAULT AGAINST FIVE DEFENDANTS IN BOTH RESPECTS WAS IMPROPER. AND CERTIORARI SHOULD BE GRANTED.

DATED: JULY 22, 2019

RESPECTFULLY,

CS/ MICHAEL SHIVERS
MICHAEL SH