19-6708

ORIGINAL

UNITED STATES SUPREME COURT
OCT TERM 2019

NO.:_____

DANIEL WERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

On Appeal from the Court of Appeals for the Third Circuit

CA3 No.: 19-1350/D.Ct Civ # 18-00963

Daniel Wert
Reg # 20919-018
USP Allenwood
Box 3000
White Deer, Pa 17887

Pro-se Litigant

QUESTION PRESENTED

A Writ of Certiorari should be granted to address the important and novel question of whether the district court had jurisdiction over the actual-innocence claim, pursuant to 28 U.S.C. Section 2241, even though no good time credit was taken, but only a loss of privileges which imposed atypical and significant hardship on Petitioner. Sandin v. Conners, 515 U.S. 472 (1995).

TABLE OF CONTENTS

UNITED STATES SUPREME COURT
OCTOBER TERM 2019
NO.: _____

DANIEL WERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

On Appeal form the Third Circuit Court of Appeals
CA3 No.: 19-1350/D.Ct Civ.No.: 18-00963

I. Jurisdiction:

On January 11, 2019, the United States District Court for the middle District of Pennsylvania denied Petitioner's 28 U.S.C. Section 2241 Motion (Appendix 1, District Court Order). In July 10, 2019, the Court of Appeals for the Third Circuit affirmed the judgment of the district court (Appendix 2, Judgment of Court of Appeals). As a result, this Court retains jurisdiction over the matter in controversy pursuant to 28 U.S.C. Section 1251 (See also Supreme Court Rule 10(b)).

II. Constitutional Provision:

Fifth Amendment to the Constitution provides "nor shall any person be deprived of life, liberty or property, without due process of law."

III. Statement of The Case:

A. The incident report:

On July 19, 2017, at approximately 4:40 P.M., Petitioner Daniel Wert ("Petitioner") reported to Health Services where he, including other prisoners, waited in-line in order to provided a prisoner officer with urine samples. After inmate C. ironfield finished providing his urine sample, the prison officer did not change his surgical gloves but called Petitioner to provide his urine sample. *

On August 1, 2017, an incident report was issued reading: "On August 1, 2017, at 1:47 P.M., a confirmed laboratory report was received from Phamatech Laboratories, which indicated urine sample BOP003096852 tested positive for BUPRENORPHINE (SUBOXONE). Urine sample BOP003098652 was collected from Inmate Wert, Daniel, Reg # 20919 -018 in Health Services on July 19, 2017, at 5:06 P.M.. A review of Inmate Wert's medical records, by medical staff, indicated he was not on any prescribed medications which would cause a positive reading for BUPRENOPHINE (SUBOXONE) when the samples was collected.

B. The Disciplinary Hearing:

On August 7, 2017, Petitioner appeared before the Disciplinary Hearing Officer ("DHO"). Petitioner asserted that he was innocent and did not use drugs. The DHO, however, relied on the inculpatory evidence supplied by the reporting officer, medical staff, and chain of custody for the urine sample. ** The DHO next imposed the following sanctions upon Petitioner, sanctioning:

---

* It is important to note that Petitioner later learned that Inmate Ironfield tested positive for Buprenorphine (Suboxone). Since the collector of the sample for Ironfield negligently failed to change his surgical gloves, it is highly probable that he contaminated the collection cup of Petitioner when handling it which in turn made his sample test positive for Buprenorphine (Suboxone). petitioner, among other things, challenged the officer's failure to change his surgical gloves in the administrative remedy at every stage.

** After the administrative remedy process had been concluded, Petitioner Wert received exculpatory documents from the Bureau of Prisons under the freedom of Information Act, 5 U.S.C. Section 552, which indicated that the urine sample collected from him was received by the Phamatech Laboratories unsealed and thus his chain of custody argument would have prevailed at the DHO hearing since it was part of the reason relied upon by the DHO.

Disciplinary Segregation ..... 30 days

Loss of Phone.....8 months

Loss of Visit.....8 months

Loss of Contact Visit.....8 months *

C. The Administrative Remedy:

(1) The Regional Director:

On August 24, 2017, Petitioner timely filed an administrative remedy with the Regional Director, and among other arguments, argued that the processor for the urinalysis test did not change his surgical gloves after collecting urine from inmate Ironfield who tested positive for Suboxone. Afterwards, with the same surgical gloves, the collector took a urine specimen from Petitioner Wert which was contaminated by the collector's tainted gloves. Petitioner Wert requested that based on this fact that the DHO decision be overturn and the sanctions vacated and the incident report be expunged from his inmate file. Petitioner also continued to maintain his actual innocence to the Regional Director and asked for the re-testing of the urine collected from him since it could have given a false positive. Petitioner also challenged the chain of custody.

On September 25, 2017, the Regional Director responded to Petitioner's appeal, in relevant part, holding the DHO reasonably determined you committed the prohibited act based on the following: On August 1, 2017, a laboratory report was received from Phamatech Laboratories which indicated a urine sample you provided on July 19, 2017, tested positive for Buprenorphine (Suboxone). In addition to the written report, the DHO relied upon the Lab Result Report, a staff memorandum, and a chain of custody form to support his finding. Based on this response, Petitioner appealed to the next level.

---

* Additionally the DHO imposed that all sanctions are imposed consecutive to like sanctions previously imposed.

(2) The General Counsel: *

On October 14, 2017, Petitioner appealed to the General Counsel in the Central Office in Washington, .D.C., and Petitioner basically relied on his appellate argument for vacation of the sanctions and expungement of the disciplinary record and incident report from his inmate file. Petitioner also requested additional relief asking to be permitted to submit to a drug test using his hair follicle to prove his innocence. On December 21, 2018, the National Inmate Inmate Appeals Administrator denied Petitioner's appeal including his request for retesting. (Central Off Appeal, Appendix 4).

(3) The Regional Director:

On March 11, 2018, Petitioner attempted to reopen his administrative remedy with ExperTox Lab Report arguing his actual innocence which he always maintained throughout all the proceedings held in relation to the incident report. The Regional Director decided not to reopen the administrative appeal on a timeliness issue. **

D. The District Court:

On May 8, 2018, Petitioner wert filed a Section 2241 Habeas-Corpus Petition in the District Court for the Middle District of Pennsylvania in which he challenged a violation of his due process rights in regard to sanctions imposed by DHO because he was actually innocent of the misconduct. Petitioner Wert, with warden approval, was tested by Exper

---

* On December 12, 2017, Petitioner received permission from Warden Oddo to have an additional drug screening test don on his hair follicle. Under the supervision of prison staff an employee of ExperTox Laboratories collected hair follicle samples from Petitioner's armpit on December 12, 2017. On December 21, 2017, the test for Buprenorhine was completed which met with negative results. A copy of the Lab report was sent to the National Appeal Office to be included as evidence of Petitioner's innocence; Petitioner also spoke to Executive Assistant Brown and Warden Oddo to try and vacate the sanctions because of the exculpatory ExperTox Lab Report. They advised Petitioner to contact the Regional Office which he did and the regional Office instructed him to contact the Central Office. (ExperTox Lab Report & USPS Tracking History, Appendix 3)

** The warden's approval for additional testing should have placed the whole administrative remedy process in abeyance pending the outcome of the testing, or permitted the reopening of the case if the additional testing resulted in negative results. Furthermore, prison staff made tonal wait until early December 2017 before approving a date to enter the prison to collect specimens from Petitioner for testing on December 11, 2017. The test result then met with negative results for Buprenorphine on December 20, 2017, which just happened to be the same day the Central office denied Petitioner's administrative remedy.

Tox Laboratories for drug usage and the test results met with negative results for the detection of Buprenorphine. Petitioner argued he was actually innocent based on the Exper Tox Lab report and his sanctions should be vacated and the misconduct notations expunged from his prison file. Petitioner spoke to the warden who advised him to contact the Regional Director and Central Office in regard to the exonerating test results. Both of these components of the BOP denied Petitioner's request to vacate the sanctions and to wipe clean his inmate file of any reference to the drug infraction sanction.

Petitioner also argued to the district court that the sanctions imposed created atypical and significant hardship upon him because he was actually innocent of the misconduct and therefore any departure from the ordinary conditions of daily prison life generated such a hardship. Petitioner Wert in his pleadings gave a list of connected hardships he endured as a result of the unjust sanctions.

On January 11, 2019, based on the warden's argument, the district court dismissed the petition for lack of subject matter jurisdiction because the Petitioner did not challenge either the fact or the length of his sentence or confinement.**

E. The Third Circuit:

Petitioner appealed to the Court of Appeals for the Third Circuit, and on July 10, 2019 the appellate court held "Wert has cited no legal authority for his argument that a prisoner's 'actual innocence' of the misconduct constitutes an exception to the threshold habeas requirement of the loss of good conduct time, and we are aware of none."

"To be clear, had the DHO followed the recommendation of the Unit Disciplinary Committee and sanctioned Wert to a loss of good conduct time (in any amount), the threshold requirement would be met and we could consider the novel question presented by Wert's petition, namely, whether the procedural due process requirements applicable under Wolff include the opportunity to have exculpatory evidence considered where the warden himself approved independent testing but the results of the testing were not received until one day after the National Inmate Appeals Administrator rendered his adverse decision. For better or worse (from his perspective), Wert was not sanctioned with the loss of good conduct time and thus he cannot maintain this habeas corpus action."

"For the foregoing reasons, we will affirm the order of the District Court dismissing Wert's Section 2241 petition for writ of habeas corpus." (See Appendix 2, Third Circuit Opinion, @ pgs 6-7).

IV. Reasons for Granting the Writ:

A. The Atypical & Significant Hardship Standard:

This case presents the novel question of whether the district court had jurisdiction over the actual innocence claim, pursuant to 28 U.S.C. Section 2241, even though no good time credit was taken, but only a loss of privileges which imposed atypical and significant hardship on the Petitioner. See Sandin v. Conners, 515 U.S. 472 (1995).

The district court and third circuit answered the question in the negative finding that the district court lacked jurisdiction because the disciplinary hearing office sanction Petitioner to no good time loss but only a loss of privileges. In Sandin v. Conners, 515 U.S. 472 (1995), the Supreme Court held that Prisoners are entitled to due process protection only when the disciplinary action results in the loss of good conduct time [o]r when the penalty "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." (Id., @ 484).

The lower courts seem to attach the loss of good conduct time also to "or when the penalty imposes atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life." The atypical and significant hardship inquiry has two alternative standards: One deals with loss of good conduct time which no doubt creates a liberty interest for the prisoner; whereas, the other deals with the conditions of confinement which creates a hardship for the prisoner.

Any sanctions imposed on an actually innocent inmate is a gross miscarriage of justice and every sanction created an atypical and significant hardship concerning the conditions of his confinement which was based on untrue facts.

A vast majority of the prison population adheres to the prison rules. Less than 10% of the prison population annually are placed at some point in administrative detention or disciplinary segregation. of these prisoners, 8 out of 10, are recidivists who are continuously a management problem and jeopardize the orderly running of the facility. However, Petitioner Wert does not fall into this small percentage of delinquent prisoners. Petitioner is actually innocent, and, therefore, his placement in the special housing unit and the severe sanction imposed upon him created an atypical and significant hardship upon him as it was out of the ordinary incidents of prison life. Sandin v. Conners, 515 U.S. 472, 484 (1995).

The bottom line is that the sanctions imposed upon Petitioner Wert meet the Sandin standard for the atypical and significant hardship. He spent 30 days in disciplinary segregation, loss in total 16 month of visitations, and

8 months loss of phone privileges.

As Petitioner Wert articulated in his habeas corpus motion that these sanction prevented him from having meaningful contact with his family. His grandparents, both of whom were very ill and elderly, could not visit with him and one grandparent passed away while the other's health depreciated so much until she is unable to travel any longer. For an actually innocent person, such as Petitioner Wert, this is an extreme atypical and significant hardship which is certainly a immense departure from the ordinary incidents of prison life. When we take the above-noted statistics into consideration concerning the minority of prisoners, who are recycled through the segregation unit, we can only reach one conclusion that under Sandin Petitioner Wert suffered a constitutional deprivation base don his actual innocence and his prison record should be eradicated of the disciplinary information, since the sanctions have been fully satisfied. Petitioner Wert's actual innocence is factual and not mere legal innocence. We next turn to the law dealing with actual innocence claims.

B. Actual Innocence

The Petitioner must demonstrate (1) by previously unavailable and reliable evidence that he is innocent; (2) by a preponderance of evidence that the fact-finder, in light of the new evidence, would have found him not guilty; and (3) by the new evidence he is factually innocent, not legally innocent. Although the miscarriage of justice exception is generally applied in a criminal context, Petitioner contends that it should apply with equal force in a civil context as in a prison disciplinary proceeding. pine v. Holt, 316 F. App'x 169, 171 n. 3 (3rd Cir 2009).

1. Reliable Evidence:

Petitioner, who has constantly maintained his innocence, was previously unable to present reliable evidence until December 20, 2017, the very day the administrative remedy process concluded. Petitioner challenged that the reliability of the test performed by Phamatech Laboratories was unreliable because the specimen collected from him was contaminated by the collector -- who never changed his surgical gloves -- after he had collected a specimen from inmate Ironfield who later Petitioner learned tested positive for Buprenorphine. Subsequent to processing Ironfield, the collector then handled Petitioner's cup and specimen which no doubt contaminated the collection for testing.

To-date Petitioner has never received the Phamatech Laboratories report although he has properly requested a copy since the inception of the disciplinary process. For example, Petitioner has made requests on Warden Oddo, the Captain, the Medical Department and the Records Officer without any success. (See Request to Warden & his Response, Exhibit 15); see also (Request to Captain & his Response, Exhibit 14); also see (Request to Records Officer & his response, Exhibit 13). In early November of 2017, Petitioner filed a Freedom of Information and Privacy Act request with the BOP's N.E. Regional Office requesting release of the Phamatech Laboratories report. On November 20, 2017, the Regional Office responded that it has began to process his request which to-date still has not been decided, even though the statutory requirement allots only 30 days in which to release or not release the document and to provide exemption clauses justifying non-disclosure. (See Title 5 U.S.C. Sections 552 & 552a) (See FOIA Request, Exhibit 11); see also (Region Office Response, Exhibit 12).

Without the Phamatech Lab report Petitioner could not adequately represent himself before the DHO. In fact, to-date there has been no proof offered by the BOP that the Phamatech Lab report even actually exists. Petitioner's efforts to receive a copy of it have been stone walled by the Medical Department, the Warden, the Captain and the Regional Office. Minus the lab report, the detectable level of the alleged Buprenorphine is unknown to Petitioner. As a result, petitioner could not sufficiently argue his plausible contaminated-defense theory to the DHO.

On the opposite side of the coin, petitioner was prevented from receiving information that undermined the reliability of the urinalysis process used by Phamatech Laboratories. On August 15, 2017, Warden Oddo rejected an in-coming publication citing it would jeopardize the orderly running and security of the facility to permit Petitioner to have the information. The information provided the fallibility of Phamatech's urinalysis testing. (See Warden Oddo's Rejection Notice, Exhibit 10).

Petitioner could not present this information during the administrative remedy process and more importantly the DHO should have been appraised of the drug screenings unreliability for the cases he would have to make adverse determination against prisoners. Needless to say, the DHO has for years been adjudicating prisoners guilty of drug-using infractions who have not committed such offenses.

Finally, at his own expense and approval of Warden Oddo, Petitioner secured the services of ExperTox Laboratories which tested hair samples of Petitioner for Buprenorphine. The hair follicle test, which is more accurate than a faulty

urinalysis test, tested negative for Buprenorphine.

The evidence relative to the Phamatech Lab is still unavailable to Petitioner. However, the ExtperTox Lab results exonerate Petitioner of all wrong-doing as his hair follicles tested negative for Buprenorphine which drug would have been clearly detectable in hair follicles for up to six months. ExperTox test results fall within the ambit of the six month timeframe for drug detection. *

The bottom line is that Phamatech's testing is totally unreliable. The publication information rejected by Warden Oddo provided critical information on the untrustworthiness of Phamatech's drug-screening testing. Without just cause, Warden Oddo blocked the receipt of this information because it would have jeopardized the reliability of Phamatech's drug screening for Petitioner's false-positive test results, including many other prisoners' cases.

Since the new evidence was previously unavailable to Petitioner, and since the new evidence is reliable evidence, Petitioner has met the first prong of the miscarriage-of-justice exception for habeas-corpus relief of his actual innocence claim.

2. Preponderance of Evidence:

Next, Petitioner must demonstrate by a preponderance of evidence that the fact-finder would not have found him guilty in light of the new reliable evidence.

If the DHO had the ExperTox Lab results, he would have determined that Petitioner was innocent of the alleged offense and dismissed the case altogether. The reliable evidence would have undermined the evidence presented to the DHO by the reporting officer, the prison medical department, and Phamatech Laboratories.

According to the United States Supreme Court, the court examines not just the new evidence but the old evidence as well. See House v. Bell, 547 U.S. 518, 538 (2006).

If the Court indulges in this examination, then it must look at the old evidence from the view that it is unreliable. The court must take into consideration the drug screening procedure of Phamatech, which was highly criticized for its unreliability in the rejected publication, is fatally defected and should not be used for all drug-screening by the BOP.

---

* The urine collection of Petitioner was collected on July 19, 2017. On December 11, 2017, ExperTox took hair samples from Petitioner for testing for Buprenorphine. On December 21, 2017, the ExperTox Lab stated that the test results for Buprenorphine met with negative results. This timeframe falls within the 6-month window for the testing process to be done.

The hair follicle test is a more reliable scientific test with absolute total elimination of false-positives which generally occur with the urinalysis testing for drug screening. Thus, the ExperTox-test results should be more convincing to this Court than the opposing evidence relied upon by the DHO. *

Therefore, Petitioner has satisfied the preponderance of evidence prong of the miscarriage-of-justice exception for his actual innocence claim which could not be presented sooner at no fault of the Petitioner. If the DHO could have had both forms of evidence before him (i.e. Phamatech v. ExperTox) with the statistical scientific data on reliability, the DHO would have no doubt ruled in Petitioner's favor finding he did not commit the prohibited offense.

3. Factual Innocence:

Finally, Petitioner must demonstrate by new evidence that he is factually innocent. (See Sweger v. Chesney, 294 F.3d 506, 523 (3rd Cir. 2002)). Petitioner argues that his aforementioned argument and facts successfully show his actual innocence of the disciplinary offense of use of a non-prescribed drug, namely Buprenorphine, because he has produced new evidence; that is, reliable evidence. The heart of the new evidence goes to factual innocence not legal innocence, and, therefore, the fundamental miscarriage-of- justice exception should be invoked by this Court to grant habeas-corpus relief to Petitioner. He deserves to have his name cleared and record cleared of this adverse information which is used to manipulate his custody level among other things.

RELIEF REQUESTED:

WHEREFORE, Petitioner requests that based on the foregoing that his Petition for a Writ of Certiorari should be granted.

Dated: October 7th, 2019

Respectfully submitted

Daniel Wert

Daniel Wert Pro-se
Reg. # 20919-018
USP Allewnood, Box 3000
White Deer, Pa 17887

[redacted]