

19-7602

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

JAN 30 2020

OFFICE OF THE CLERK

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Joshua Neil Harrell — PETITIONER  
(Your Name)

vs.

Walmart, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeal For The Ninth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joshua Neil Harrell, CDCR# BH7394  
(Your Name)

P.O. Box 950  
(Address)

Folsom, CA 95763  
(City, State, Zip Code)

(916) 985-8610 (Ext. 4444)  
(Phone Number)

ORIGINAL

## QUESTION(S) PRESENTED

I. Is it unfair to the Petitioner for the Court of Appeal to make a ruling that it lacked jurisdiction over the appeal, because the Notice of Appeal was not filed or delivered to Prison officials within 30 days after the judgment was entered, when there was excusable neglect causing the delay?

II. Did the District Court err in premature Findings and Recommendations, affecting Petitioner's Constitutional Right to Procedural due process?

III. Did the Plaintiff waive compliance with the time provisions of Rule 56(b) for defendant Belyea's untimely motion for summary judgment/adjudication that was filed almost four months after the District Court's deadline?

IV. Did defendant Belyea's motion for summary judgment/adjudication itself have any merit?

a. Did it lack foundation?

V. Should the petitioner be entitled to a judgment in his favor for the following causes of action?

1. Fourth Amendment - Unlawful Arrest

2. Fourth Amendment - Due Process (based on false imprisonment)

3. Fourteenth Amendment - Malicious Prosecution

## LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

☒ 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:

1. Michelle Belyea
2. Rebecca Belk
3. City of Fairfield

## RELATED CASES

Case No. 2:15-cv-00576-JAM-AC "Harrell v. Walmart, et al.,"  
In the United States District Court For the Eastern District of California

Case No. 19-16407 "Harrell v. Belyea, et al.,"  
In the United States Court of Appeal For the Ninth Circuit

## TABLE OF CONTENTS

|                                                        |      |
|--------------------------------------------------------|------|
| OPINIONS BELOW .....                                   | 1    |
| JURISDICTION.....                                      | 2    |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... | 3    |
| STATEMENT OF THE CASE .....                            | 4-7  |
| REASONS FOR GRANTING THE WRIT .....                    | 8-13 |
| CONCLUSION.....                                        | 14   |

## INDEX TO APPENDICES

|            |                                         |
|------------|-----------------------------------------|
| APPENDIX A | Order (Dated: November 6, 2018)         |
| APPENDIX B | Order (Dated: February 13, 2019)        |
| APPENDIX C | Order (Dated: May 17, 2019)             |
| APPENDIX D | Notice of Appeal (Dated: July 15, 2019) |
| APPENDIX E | Order (Dated: September 16, 2019)       |
| APPENDIX F | Order (Dated: January 21, 2020)         |

## TABLE OF AUTHORITIES CITED

### CASES

### PAGE NUMBER

|                                                                                                                                                            |      |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Long v. Atlantic Police Dept., 670 F.3d at 444 n. 16                                                                                                       | 8    |
| United States v. Thomas, 713 F.3d at 174                                                                                                                   | 8    |
| Pabon v. Mahony, 654 F.3d 385, 399 (3d Cir. 2011)                                                                                                          | 8    |
| In re Vitamins Antitrust Class Action, 327 F.3d 1207, 356 U.S. App. DC 70, 55 Fed. R. Serv. 3d (Callahan) 608, 2003-1 Trade Cas. CCH P74024 (DC Cir. 2003) | 8, 9 |
| Hanson v. Polk County Land, Inc. 608 F.2d 129, 52 ALR. Fed. 561 (5th Cir. 1979)                                                                            | 9    |
| Gervario v. Zell, 345 Fed. Appx. 638 (2d Cir. 2009)                                                                                                        | 12   |

### STATUTES AND RULES

|                              |                 |
|------------------------------|-----------------|
| Fed. R. App. P 4(a)          | 8.              |
| Fed. R. Civ. P 53 (f)(1)     | 9               |
| Fed. R. Civ. P. 56           | 10, 11          |
| Fed. R. Civ. P 52(a)         |                 |
| 42 U.S.C. § 1983             | 12              |
| 28 U.S.C. § 2107(a)          | (Appendix E, F) |
| 9th Cir. R. 27-10            | (Appendix F)    |
| Fed. R. Evid. 803 (8)(A)(ii) | 12              |

### OTHER

|                            |           |
|----------------------------|-----------|
| Procedural Due Process     | 3, 9, 10  |
| State-Of-Mind Statements   | 3, 11, 12 |
| Exclusionary Hearsay Rules | 11, 12    |

# Table Of Authorities Continued.

| Cases                                                                                                                                                                                                                                            | Pages |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Powell v. U.S., 849 F.2d 1576, 11 Fed.R.Serv. 3d 1008 (5 <sup>th</sup> Cir. 1988)                                                                                                                                                                | 9     |
| Osbacken v. Venable, 931 F.2d 36, 19 Fed.R.Serv. 3d 1122 (10 <sup>th</sup> Cir. 1991)                                                                                                                                                            | 10    |
| Berggren v. Metropolitan Life Ins. Co., (Feb. 03, 1978) 77 F.R.D. 496 CIV                                                                                                                                                                        | 11    |
| Friedman v. Live Nation Merchandise, Inc., (Aug. 18, 2016) 833 F.3d 1180, 2016 WL 4394585                                                                                                                                                        | 12    |
| Gordon v. County of Orange, (April 30, 2018) 888 F.3d 1118, 2018 WL 19998296                                                                                                                                                                     | 12    |
| Castro v. County of Los Angeles, (Aug. 15, 2016) 833 F.3d 1060, 2016 WL 4268955                                                                                                                                                                  | 12    |
| Maddox v. City of Los Angeles, (June 26, 1986) 792 F.2d 1408 21 Fed.R.Evid.Serv. 20                                                                                                                                                              | 12    |
| Board of County Commrs of Bryan County, Okl. v. Brown, (April 28, 1997) 520 U.S. 397 117 S.Ct. 1382 (12)                                                                                                                                         |       |
| Baker v. City of Detroit, (E.D. Mich., 1978) 458 F.Supp. 379, affirmed 704 F.2d 878, on rehearing, 712 F.2d 222, certiorari denied 104 S.Ct. 703, 464 U.S. 1040 79 L.Ed. 2d 168, rehearing denied 104 S.Ct. 1431 465 U.S. 1074, 79 L.Ed. 2d 754. | 13    |

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**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix E to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 16, 2019.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 21, 2020, and a copy of the order denying rehearing appears at Appendix F.

☐ An extension of time to file the petition for a 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. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, 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 \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Procedural due process guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution

Fourth Amendment - unlawful arrest

Fourth Amendment - Due Process based on (false imprisonment)

Fourteenth Amendment - Malicious Prosecution

42 U.S.C. § 1983

28 U.S.C. § 2107 (Appendix E, F)

### STATEMENT OF THE CASE

On April 16, 2014, around 11:00-11:30 P.M., Petitioner went to Walmart (located: 2701 N. Texas St. Fairfield, CA) to exchange black Dickie cargo pants Petitioner purchased on April 14, 2014. The Petitioner did not like how the pockets were at the knees and intended to exchange them for regular Dickie work pants.

Petitioner did not realize how late it was, and soon found out that the clothing departments, dressing rooms, and the Customer Service Center were all closed. Petitioner was unable to exchange the Dickie pants as intended and loomed the store for some time.

At approximately 12:30 a.m., April 17, 2014, Petitioner was leaving the store and detained by Walmart security "Figaro" who was accusing him of stealing. Petitioner was resistant not understanding why he was being accused of stealing by security. Walmart staff called the Fairfield Police Dept.

Officer Michelle Belzeca of the Fairfield Police Dept. was the officer responding to the call. Petitioner had prior run-ins with Belzeca and quickly became the subject of profiling.

Belzeca falsified a police report by swearing under the penalty of perjury that the report was made based on her personal knowledge when she was not there at any time to witness the statements she made in the report. Belzeca, further falsified the police report by stating Petitioner was stealing in a dressing room at 12:30 a.m. April 17, 2014, and that Petitioner made confessions he did not make. The dressing rooms were closed and locked to customers at 12:30 a.m., and impossible to have been in one. Belzeca even falsified a statement from "Figaro" that Figaro did not make.

Based on the falsified police report, Petitioner was arrested and incarcerated in the Solano County Jail, liberty stripped from him. Petitioner was arrested for commercial burglary Penal Code § 459 and Probation violation Penal Code § 1203.2. It was determined Petitioner was not on Probation and Petitioner was Prosecuted for commercial burglary alone.

The Petitioner remained in custody in the Solano County Jail to face the charge in the Solano County Superior Court Case No. FCR306936. On or about May 2, 2014, at the preliminary hearing, the sole witness Michelle Belyea appeared giving false testimony that Petitioner was stealing in a dressing room at 12:30 a.m., April 17, 2014, and that Petitioner made confessions he did not make.

Based on Michelle Belyea's false testimony at the preliminary hearing, the case was bound over to Superior Court where the Petitioner was held to answer for a burglary he did not commit.

On or about July 29, 2014, Petitioner posted a \$20,000.00 bail and was released from custody.

On or about September 3, 2014, Petitioner's bail was revoked and he returned to custody in the Solano County Jail.

The criminal proceedings were suspended when the attorney representing the Petitioner questioned his competency against the Petitioner's objection. The Petitioner was held without process in the Solano County Jail to be evaluated by doctors to determine if he was competent to stand trial. Petitioner was seen by three doctors, of which two of them agreed he was competent to stand trial. Without a trial on the competency issues, the criminal proceedings were reinstated.

On or about February 4, 2015, the legal process ended and the charges were dismissed. The case was closed without a trial by judge or jury. The Petitioner suffered a total of 259 days false imprisonment based on Michelle Belyea's falsified police report and false testimony at the preliminary hearing.

# Procedural History

The operative first amended complaint "FAC" was filed on June 2, 2015 (Dkt. No. 15). The "FAC" stated three cognizable claims: 1.) Fourth Amendment - unlawful arrest; 2.) Fourth Amendment - Due Process (based upon false imprisonment); and 3.) Fourteenth Amendment - Malicious Prosecution. The Honorable District Court Judge John A. Mendez affirmed this on June 23, 2016.

On January 18, 2018, the District Court issued a revised discovery and scheduling order. Setting a discovery deadline of May 9, 2018, and a dispositive motions deadline of July 9, 2018.

Defendant Beluea's initial motion for summary judgment (ECF No. 76) was vacated for procedural noncompliance - Filing to file a "Read Notice" with it (Appendix A)

Defendant Beluea re-filed her motion for summary judgment on November 7, 2018, almost four months after the dispositive motions deadline. The petitioner never waived compliance of the time provisions and the judge never granted an extension of time (Appendix A). The motion itself lacked foundation. The motion was supported by a declaration of Beluea that was not made based on personal knowledge, she just recited her falsified police report.

On February 6, 2019, Petitioner timely filed responsive pleadings in opposition to Beluea's motion for summary judgment. (Judicial Notice Exhibit "A & B") (ECF No. 110-119)

Before the defendant Beluea could file a reply to the petitioner's opposition, the Magistrate Judge Alison Claire issued a Premature Order and Findings and Recommendations on February 13, 2019. (Appendix B)

The Petitioner timely filed an objection to the Magistrate's Order and Findings and Recommendations (Judicial Notice Exhibit C)

On May 17, 2019, the Honorable District Court Judge John A. Mendez issued an order adopting the Premature Order and Findings and Recommendations (Appendix C)

The District Court erred in addressing correspondence to the Petitioner (Judicial Notice Exhibit "A") The correspondence was addressed using Petitioner's Solano County Jail inmate number "194137" and not the proper CDCR# "BH7394."

The Petitioner did not receive the judgment entered on May 17, 2019, until the end of June 2019. It took the Petitioner a few more weeks to schedule time in the Prisons law library to make the Notice of Appeal. The Petitioner made the Notice of Appeal at the earliest date he possibly could July 10, 2019. (Appendix D)

The U.S. Court of Appeals for the Ninth Circuit issued an order that it lacks jurisdiction over the appeal on September 16, 2019. (Appendix E)

The Petitioner timely filed a motion for a re-hearing on or about September 30, 2019. (Judicial Notice Exhibit "G") It was denied January 21, 2020 (Appendix F)

## REASONS FOR GRANTING THE PETITION

I. It was unfair to the petitioner for the U.S. Court of Appeal for the Ninth Circuit to make a ruling it lacked jurisdiction over the appeal, because the Notice of Appeal was not filed or delivered to prison officials within 30 days after the judgment was entered, when there was excusable neglect causing the delay. (See Exhibit "G") (Appendix E, F)

The District Court erred in addressing correspondence to me. They were addressed using my Solano County Jail inmate number "194137" (Exhibit "A") instead of properly addressing it with my assigned CDCR# "BH7394."

I did not receive the judgment entered May 17, 2019, until the end of June 2019. It still took me a few more weeks thereafter, to schedule time in the Law Library to make the Notice of Appeal. I made the Notice of Appeal at the earliest date I possibly could on July 16, 2019.

"District Courts should of course heed that direction and hew strictly to the stated time limits unless there is a prison delay that serves as a basis for treating an untimely motion as timely." *Long v. Atlantic Police Department*, 670 F.3d at 444 n. 16 (emphasis added)

This law should apply in this instant matter. The delay in filing the Notice of Appeal is excusable neglect caused by a "Prison delay."

In *United States v. Thomas* 713 F.3d at 174 (citing *Pabon v. Mahony*, 654 F.3d 385, 399 (3d Cir. 2011)) "Equitable tolling should be granted sparingly and only when the principles of equity would make the rigid application of a time limitation unfair." (Id.)

The Petition should be granted also, because the delay in filing the Notice of Appeal did not prejudice the opposing party, the length of the delay was short (29 days), it did not impact the judicial proceedings, and there is no indication that petitioner was acting in Bad Faith. The Court should grant relief under Fed. R. App. P. 4(a)(5); e.g. *In re Vitamins Antitrust Class Actions* 327 F.3d 1207, 356, U.S. App. DC 70, 55 Fed. R. Serv. 3d

(Callahan) 608, 2003-1 Trade Cas. CCH P74024 (DC Cir. 2003).

II. The District Court Magistrate Judge Allison Claire's Findings and Recommendations (Appendix B) were premature, effecting Petitioner's Constitutional right to procedural due Process.

Defendant Belyea's re-filed motion for summary judgment on November 7, 2018. (ECF No. 101). On February 6, 2019, Petitioner timely filed responsive pleadings to Belyea's motion for summary judgment (ECF No. 110-119). On February 13, 2019, the Magistrate Judge Allison Claire prematurely issued an Order and Findings and Recommendations before Belyea had the opportunity to reply violating Rule 53(f)(1) "opportunity to be heard" (ibid.).

### Standard Of Review:

"A Party may move for summary judgment at any time until 30 days after the close of all discovery, a party opposing the motion must file a response within 21 days after the motion is served or a response pleading is due, whichever is later and the movant may file a reply within 14 days after the response is served." *Hanson v. Polk County Land, Inc.*, 608 F.2d 129, 52 A.L.R. Fed. 561 (5th Cir. 1979); *Powell v. U.S.*, 849 F.2d 1576, 11 Fed. R. Serv. 3d 1008 (5th Cir. 1988).

The point is that the District Court Judge Allison Claire issued the Order and Findings and Recommendations only 1 week after the Petitioner's responsive pleadings were filed, before the movant had the opportunity to file a reply. (See ECF No. 110-119 & Appendix B). The premature Order and Findings and Recommendations violated both Parties rights to procedural due Process, giving a good reason why this petition should be granted.

III. The Petitioner never waived compliance with the time provisions of scheduling order and the Court never granted enlargement of time for dispositive motions.

On January 18, 2018, the District Court issued its revised discovery and scheduling order and the deadline for dispositive motions was July 9, 2018.

Belyea's initial motion for summary judgment (ECF No. 76) was vacated for procedural noncompliance by failing to file a "Read Notice" with it, (Appendix A) without prejudice in re-filing a procedurally compliant motion for summary judgment. The District Court did not grant enlargement of time for the dispositive motions deadline and the Petitioner never waived compliance with the time provisions either.

Belyea's re-filed motion for summary judgment was filed on November 7, 2018, almost four months after the dispositive motions deadline.

"Consequently, it has been held that noncompliance with the time provisions of Rule 56(b) deprives the Court of the authority to grant a motion for summary judgment unless the opposing party has waived compliance." e.g. *Osborne v. Venable*, 931 F.2d 36, 19 Fed. R. Serv. 3d 1122 (10th Cir. 1991).

The District Court should not have had the authority to grant Belyea's motion for summary judgment. Another good reason this petition should be granted.

IV. The defendant Michelle Belyea's motion for summary judgment itself was procedurally noncompliant, lacking foundation, and merit.

The declaration of Michelle Belyea that supported her motion for summary judgment realleged her fabricated police report. The declaration itself, was not made based on personal knowledge. It was made, based on at best, inadmissible hearsay and third-party hearsay. Federal Rules of Civil Procedure Rule 56(c)(4) states that: "An affidavit or declaration used to support... a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Belyea's declaration did not meet these requirements. The District Court erred in allowing it not to be stricken and the motion for summary judgment should have been denied for this reason.

Petitioner realleges and incorporates by reference, the objection to the declaration of Michelle Belyea (ECF No. 115), as well as the motion to strike the declaration of Michelle Belyea (ECF No. 112). The District Court erred in the Premature Findings and Recommendations (Appendix B) and by denying the motion to strike the declaration.

The District Court determined that the declaration of Michelle Belyea was made demonstrating her state of mind because it is not used for the truth of the matter asserted, which raises another valid point:

The declaration of Michelle Belyea was used to lay a foundation of facts (Facts 1-24) that supported the motion for summary judgment. Then, a declaration demonstrating state of mind perception can not be considered a fact and the motion for summary judgment lacks foundation and merit. There are other cases dealing with the same issue: "Summary judgment was not proper where state of mind was an important factor, hence, summary judgment is not appropriate." *Berggren v. Metropolitan Life Ins. Co.*, (Feb. 03, 1978) 77 F.R.D. 496 CIV.

"Questions involving a Person's state of mind are generally Factual issues inappropriate for resolution by summary judgment." *Friedman v. Live Nation Merchandise, Inc.*, (Aug. 18, 2016) 833 F.3d 1180, 2016 WL 4394585.

It has also been determined in numerous cases that Section 1983 itself "contains no state-of-mind." See *Gordon v. County of Orange* (April 20, 2018) 888 F.3d 1118, 2018 WL 19998296; *Castro v. County of Los Angeles* (Aug. 15, 2016) 833 F.3d 1060 2016 WL 4268955; *Maddox v. City of Los Angeles* (June 26, 1986) 792 F.2d 1408 21 Fed. R. Evid. Serv. 20; *Board of County Com's of Bryan County, Okl. v. Brown*, (April 28, 1997) 520 U.S. 397 117 S.Ct. 1382.

Another error of the District Court was granting Belyea's motion for summary judgment. (Appendix B) The motion was noncompliant with Rule 56(c)(4) by the declaration of Belyea in support of it, is inadmissible evidence because it was not made based on her personal knowledge. It primarily consisted of third party recitations of how the events occurred. Federal Rules of Evidence 803(8)(A)(ii) does not authorize these kind of statements of a "description of how the incident occurred according to another eyewitness or even one of the parties" (ibid) e.g. *Gervario v. Zall* 345 Fed. Appx. 638 (2d Cir. 2009).

To protect the Petitioner's Due Process this petition should be granted.

v. The Petition for a Writ of Certiorari should be granted because the Petitioner is rightfully entitled to summary judgment according to Law.

Since the defendants motion for summary judgment was procedurally noncompliant, the summary judgment obtained is in error. Thus, the Petitioner is entitled to summary judgment according to law, for the following causes of action:

1. Fourth Amendment - Unlawful Arrest.
2. Fourth Amendment - Due Process (based on false imprisonment.)
3. Fourteenth Amendment - Malicious Prosecution.

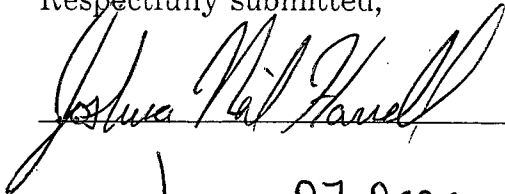
See e.g. *Baker v. City of Detroit*, (E.D. Mich. 1978), 458 F.Supp. 379, affirmed 704 F.2d 878, on rehearing 712 F.2d 922, certiorari denied 104 S.Ct. 703, 464 U.S. 1040 79 L.Ed. 2d 168, rehearing denied 104 S.Ct. 1431, 465 U.S. 1074, 79 L.Ed. 2d 754.

In support of this Petition for a writ of certiorari, Petitioner submits into evidence all documents of discovery in Judicial Notice and realleges and incorporates by reference all briefs, objections and motions that are all related to my claim. (Exhibits A-G)

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
\_\_\_\_\_

Date: January 27, 2020