

No. 20-5291

IN THE
SUPREME COURT OF THE UNITED STATES

Dexter Leemon Johnson — Petitioner

VS.

John Marlar — Respondent

PETITION FOR REHEARING

Dexter Leemon Johnson

P.O. Box 97

McAlester, Oklahoma 74502

Phone #: (918) 423-4700

QUESTION(S) PRESENTED

1. BOTH LOWER FEDERAL COURTS,
OPPOSING COUNSEL, AND
RESPONDENT "SUCCESSFULLY"
CONSPIRED TO DEPRIVE ME OF
MY RIGHTS UNDER 8TH AND
14TH AMENDMENTS, IN
VIOLATION OF 42 U.S.C. § 1985(3)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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42 U.S.C. § 1981(a)

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QUESTION I

To make out a violation of 42 U.S.C. § 1985(3), as construed in *Griffin v. Breckenridge*, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 1798 (1971), the plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an overt act in the furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States...

On 10-14-2016 my § 1983 complaint was filed against Respondent in U.S.

District Court for the Eastern District of Oklahoma, Case No. CIV-16-440-JHP-SPB. See Exhibit A: Civil Docket.

U.S. District Judge James H. Payne and Magistrate Judge Steven P. Shreder presided over my case.

The civil docket shows that Respondent was served on 11-28-2016. See Exhibit A, p. 2, Dkt. 12.

On 1-3-2017 I filed a default motion, pursuant to FRCP 55(a)(b), asking the district court to rule against Respondent due to his failure to appear, answer, or otherwise defend within 21 days as required by FRCP 12(a). See Exhibit A, p. 2, Dkt. 14.

Contrary to FRCP 55(a)(b), Judge Payne and the court clerk failed to enter default judgment against Respondent upon my showing of his default by motion.

The district court and its clerk's failure to enter default judgment against Respondent, as required by FRCP 55(a)(b), evinced that they planned, participated, and carried out a conspiracy designed to deprive me of equal protection and benefit of the laws by denying me the default judgment that the record evidence shows I was entitled to by FRCP 55(a)(b), which was a flagrant violation of my rights under the 14th Amendment and under 42 U.S.C. § 1981(a).

Further proof of the existence and operation of the above-said conspiracy to deny me equal protection and benefit of the laws, is the fact that neither the court clerk, Judge Payne, nor Magistrate Steven P. Shreder entered default judgment against Respondent after he outright disobeyed and disregarded Judge Payne's

first show-cause order(DKt. 16).

On 3-13-2017 Judge Payne issued an order directing Respondent to show cause, in writing, within 14 days why my default motion should not be granted; said order even warned that failure to respond could lead to or result in my default motion being granted. See Exhibit A, pgs. 2-3, DKt. 16.

Respondent failed to answer or show cause within 14 days as directed by Judge Payne. So on 4-5-2017 I filed a second motion for default judgment (see Exhibit A, p. 3, DKt. 19) and about a month there after filed a motion for confession of judgment against Respondent pursuant to Local Civil Rule 7.1(g). See Exhibit A, p. 3, DKt. 21.

Opposite of what is to be expected under the circumstances of my case, neither the district court nor its clerk entered default judgment against Respondent upon my showing that he failed to appear, answer or otherwise defend — over 6 months after he

was served on 11-28-2016.

Under the Tenth Circuit's "firm waiver rule," a party's failure to contest constitutes waiver. See, e.g., *U.S. v. One Parcel of Real Property*, 73 F.3d 1057, 1059 (10th Cir. 1996). As indicated or evinced, Respondent waived his right to plead insufficient service of process by first failing to answer within 21 days after he was served on 11-28-2016; and then by disregarding and disobeying Judge Payne's first show cause order (DKt. 16).

But instead of entering default judgment against Respondent on a showing of BAD FAITH default (ascertainable from the record), Judge Payne "rewarded" him by allowing him to proceed on the waived defense of insufficient service of process and by granting him summary judgment on a record that shows the existence of at least one genuine dispute of material fact.

In his motion for summary judgment Respondent's attorney stated that hemorrhoids did not cause my hospitalization for anemia. But on pages 230 and 231 of the Special

Report (referring to boldfaced) Bates Numbering at bottom of pages of Special Report) submitted by Respondent, he himself asserted: "i/m had bleeding from his internal hemorrhoids and was causing i/m to be anemic." See Exhibit C attached hereto.

In my complaint (DKt. 1) and in my response to Respondent's summary judgment motion (DKt. 44) I argued that hemorrhoids did cause my hospitalization for anemia.

Due to the two above cited opposing opinions regarding the crucial issue of whether or not hemorrhoids caused my hospitalization for anemia, there was at least one genuine dispute of material fact in the record, thereby making summary judgment inapplicable.

Yet the district court committed the overt act of granting Respondent summary judgment despite the record showing a genuine dispute of material fact as to the crucial issue of whether hemorrhoids caused my hospitalization for anemia, which proved to further or advance the herein stated conspiracy designed to deny me equal protection and benefit of the laws.

I was discriminated against because I am a prisoner and 'cause i'm BLACK and 'cause I have
6.

two life sentences.

Neither Judge Payne, Magistrate Shreder nor the court clerk could stand to see a Black prisoner with two life sentences be awarded a 3 million dollar default judgment—despite the fact the evidence shows that the default was patently in BAD FAITH and thus entitled to be ruled in my favor as a matter of law.

Judge Payne committed yet another overt act in the furtherance of said conspiracy by allowing my case to proceed (after Magistrate Shreder held that service was not proper) without Respondent ever being re-served.

If Respondent was not properly served and was never re-served, then the district court was without personal jurisdiction over him. See, e.g., *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd.*, 108 S.Ct. 404, 409, 484 U.S. 97, 104 (1981) (Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons MUST be satisfied); *Mexican Cent. Ry. Co. v. Pinkney*, 13 S.Ct. 859, 865, 149 U.S. 194, 209 (1893) (It is well settled that no court can exercise, at common law, jurisdiction over a party unless he is served with the process).

Judge Payne's decision to proceed with my case after Magistrate Shreder held that service was not proper and without Respondent being re-served, constituted an overt act in the furtherance of the conspiracy to deny me equal protection and benefit of the laws (based on the fact I am a BLACK Prisoner with two LIFE SENTENCES).

Because he proceeded without re-service despite the fact he in effect affirmed the Magistrate's holding of improper service, which proves he knew that the Magistrate's improper service holding was a legally defective adjudication made with the specific intent to deny me equal protection, equal benefit, and due process of law. In other words, he knowingly affirmed a ruling he knew was legally defective as part of the conspiracy to deny me equal protection and benefit of the laws.

Magistrate Judge Shreder showed himself to be part of the conspiracy by holding that service had not been made or was not proper BEFORE Respondent ever appeared and pleaded insufficient service of process.

On 11-16-2016 I filed a motion requesting a Special Report to be prepared by Respondent. See Exhibit A, p. 2, Dkt. 8. On 11-28-2016 Respondent was served, See Exhibit A, p. 2, Dkt. 12. On 7-26-2017 Magistrate Shreder denied my request for a special report on the ground that I had not yet served Respondent. See Exhibit A, p. 3, Dkt. 25. But Respondent did not appear and plead insufficient service of process UNTIL 8-9-2017, which was 13 days AFTER the Magistrate held that service had not been made. See Exhibit A, p. 4, DKts. 29 & 30. Thus, in effect and actuality, Magistrate Shreder pleaded insufficient service "FOR AND ON BEHALF OF RESPONDENT," which proved to be a bias act that furthered the conspiracy to deny me equal protection and benefit of the laws. In addition to showing him to be bias toward(s) me because I am an indigent BLACK

PRISONER with two Life Sentences whom he feels does not deserve a \$3 million dollar default judgment (on a clear showing of BAD FAITH default), the Magistrate's overt act of pleading insufficient service "FOR AND ON BEHALF OF Respondent" was an egregious excess and abuse of discretion.

Respondent and his attorney (Asst. OK. A.G. Kari Y. Hawkins) showed themselves to be co-conspirators (with other co-conspirators) by presenting a fraudulent, perjured sworn affidavit in an attempt to cover-up Respondent's deliberate BAD FAITH default.

In Dkt. 30 and 30-1 Respondent claimed he never received the summons and copy of petition served to him on 11-28-2016. See Exhibit B, pgs. 1-2: Sworn Affidavit by Respondent. But the second show cause order (Dkt. 26) issued by Judge Payne did not have any documents attached to it. Nor did the U.S. Marshal re-serve Respondent with another summons and copy of complaint. Yet Respondent's lawyer made several

references to and from my complaint in Respondent's motion for summary judgment (Dkt. 42), which proves he DID receive the summons and copy of complaint served to him on 11-28-2016 (absent re-service, the copy and summons served on 11-28-2016 was the only summons and copy issued or served on Respondent). Further proof thereof is the fact the district court received from Respondent a Certified Mail Return Receipt on 8-2-2017 (see Exhibit A, p. 4, Dkt. 28), was 7 days prior to him appearing on 8-9-2017. Accordingly, said mail receipt was the same one he received on 11-28-2016, thereby proving that Respondent's sworn affidavit was perjured and fraudulent.

Respondent and his lawyer's knowing submission of a fraudulent, perjured sworn affidavit plainly showed that they conspired to commit a criminal act in court in order to deny me equal protection and benefit of the law as stated in FRCP 55(a)(b) and in

42 U.S.C. § 1981(a).

Judge Payne furthered the conspiracy by committing the overt act of granting Respondent summary judgment on a record that shows a genuine dispute of material fact as to whether or not hemorrhoids caused my hospitalization for anemia.

Respondent's lawyer argued that hemorrhoids did not cause my hospitalization for anemia. Judge Payne agreed. But in Dkt. 47 I cited a document from the Special Report wherein Respondent stated on the record: "i/m had bleeding from his internal hemorrhoids and was causing i/m to be anemic." See Exhibit C. Respondent himself showed or created a genuine dispute of material fact. Yet Judge Payne granted Respondent summary judgment because he felt it unjust to award an indigent BLACK PRISONER with 2 life sentences monetary damages against a white defendant.

The three-judge panel in the 10th Circuit engaged in and furthered the

conspiracy by committing the overt act of "ruling on the merits of my appeal without first performing its 'duty to satisfy of the lower court's jurisdiction,'" which was contrary to clearly established federal law as determined by U.S. Supreme Court. See, e.g., *Mitchell v. Maurer*, 55 S.Ct. 162, 165, 293 U.S. 237, 244 (1934) (An appellate federal court MUST satisfy itself not only of its own jurisdiction, but also that of the lower court in a cause under review); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 4 S.Ct. 510, 511, 111 U.S. 379, 382 (1884) (same); *Capron v. Van Noorden*, 2 Cranch, 126 (1804) (same).

Said three-judge panel deliberately avoided satisfying itself of the district court's jurisdiction because it knew doing so would reveal that the district court's finding of insufficient service was part of a conspiracy to deny me equal protection and benefit of the laws by depriving me of a default judgment on a Patently BAD FAITH default. So instead of acknowledging and rectifying the conspiracy, the 10th Circuit panel

rendered itself participant in the conspiracy by ignoring its existence in an endeavor to cover it up.

In the process of covering up the herein stated 42 U.S.C. § 1985(3) conspiracy the 10th Circuit panel exceeded its discretion and jurisdiction by disregarding circuit precedent, which amounted to overruling circuit precedent. See *U.S. v. Foster*, 104 F.3d 1228, 1229 (10th Cir. 1997) ("A three-judge panel cannot disregard or overrule circuit precedent.").

In *U.S. v. One Parcel of Real Property*, 73 F.3d 1057, 1059 (10th Cir. 1996), the 10th Circuit announced its "firm waiver rule." Under said rule "a party's failure to contest" constitutes waiver. Respondent waived the affirmative defense of insufficient service of process by failing to comply with and contest Judge Payne's first show cause order (Dkt. 16). I pointed this out to the 10th Circuit panel on pages 14-16 of my opening brief on appeal. But the panel disregarded my substantiated claim of Respondent waiving defense of insufficient service (by failing to comply with... first show cause order), which resulted in it disregarding and thus overruling the circuit precedent (firm waiver rule) announced in *U.S. v. One Parcel of Real Property*, *supra*. It exceeded its discretion and jurisdiction as an overt

to further the conspiracy to deny me equal protection and benefit and privileges under the laws.

For the foregoing reasons, I respectfully ask this honorable Court to grant me a rehearing to consider the 42 U.S.C. § 1985(3) violation stated herein.

IT IS SO PRAYED.

Respectfully Submitted,

Dexter L. Johnson
Pro Se Petitioner

Declaration Under Penalty of Perjury

The undersigned states under penalty of perjury that he is the plaintiff in this action, that he has read this document and that the information contained herein is true and correct, 28 U.S.C. § 1746, 18 U.S.C. § 1621.

Executed at OK. St. Penitentiary on Nov. 15, 2020.

Dexter L. Johnson
Signature