20-5715

No. ____________ ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
AUG 07 2020
OFFICE OF THE CLERK

Bradley W. Monical — PETITIONER
(Your Name)

vs.

Christina Towers et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COORT OF APPEALS FOR THE 9th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Bradley William Monical
(Your Name)

2605 State Street
(Address)

Salem, Oregon, 97310
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

* Is Due Process Violated in the prison setting when government employee's hold disciplinary hearing in Violation of Clearly established prior court orders, in violation of clearly established Administrative Law and without statutory Authority to punish an inmate under the circumstances?

* Is Qualified Immunity extended to government employee's whom violates clearly established Administrative law that have clear directives that they "shall not" do an action but do so anyway, and continue to disregard such laws when notified of their errors and refuse to correct them? These violations of law resulting in the denial of constitutional rights to both procedural and substantive due process?

* Can Government employee's ignore the law, deny due process, as long as the resulting harm is not above the atypical and significant bar, are government employee's simply free to violate laws as the 9th Circuit has determined?

LIST OF PARTIES

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

[X] 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:

Christina Towers

Derek D. McCorkhill

Micheal F. Gowers

Jerry Taylor

Sam Nagy

John and Jane Does

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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

The opinion of the United States court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is reported at 3:17-CV-00501-YY.

Jurisdiction

The date on which the United States Court of Appeals decided my case Feb, 7, 2020.

A timely petition for rehearing was denied by the United States Court of Appeals on May 11, 2020, and a copy of the order denying rehearing appears at Appendix C.
The jurisdiction of this Court, invoked, 28 USC 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process: Federal Due Process Clause

A. Administrative Laws:

- Oregon Administrative Rules - Policy

OAR 291-105-0005 (3)(b), " Inmates in Department of Corrections facilities shall be disciplined for violation of specified Rules of prohibited inmate conduct ... " Appendix E, 13
Appendix D, 3, 4

OAR 291-105-0005 (3)(b)(A), " To provide for the safe, secure, efficent, and orderly management of Department of Corrections facilities, ... Appendix E page 13, Appendix D pg 3, 4

OAR 291-105-0010 - Definitions

(11) Department of Corrections Facility: " Any institution, facility, or staff office, including the grounds, operated by the Department of Corrections ... " Appendix E page 14

OAR 291-105-0021(2)(9)(B), " The written description [of rule violation] provided by the temporary custody jurisdiction shall accompany the misconduct report. A misconduct report shall not be submitted absent a written description of the allegation from the temporary physical custody jurisdiction.

OAR 291-105-0021(2)(9)(C), " If it is determined that the other jurisdiction maintained the inmate in a similarly restrictive status, [segregation] the inmate shall be credited with the number of days he/she was held in segregation type status by the other jurisdiction." Appendix E, pages 21, 22, 23.
Appendix B pages 9,

OAR 291-105-0021(5)(a), " A hearing shall be initiated within ten calendar days if the inmate is placed in temporary custody/segregation status."

OAR 291-105-0028 - Punishment for escape

: 0-1 prior major - 60-120 days segregation ...) · Appendix E pages 23, 24.

B. STATE LAW DUE PROCESS VIOLATIONS

Alexander v. OSP, 99 Or. App. 659, 663-64, 783 P.2d 1034 (1989) - (Holding that The Oregon Department of Corrections can not punish inmates for Rule violations committed outside of ODOC facilities.

ORS 135.767(1) Presence of Prisoner ...
(a) Issue an order directing the Director of the Department of Corrections .... to surrender the inmate to the sheriff of the county where the inmate is to be tried.

ORS 135.767(2)(a) "The county where an inmate is to be charged with commission of a crime shall pay the costs of (a) Transportation and maintenance of the inmate removed under this section..."

ORS 169.660, " Status of persons confined in facility operated by Department of Corrections: Assignment to regional facility.

(1) Persons confined in a regional correctional facility operated by the Department of Corrections, shall be considered to be in the custody of the department and shall be subject to such rules as the department may prescribe.

(2) Persons committed to the custody of the Department of Corrections may be assigned to Department of Corrections bed space at a regional correctional facility when the department is a party to the operation of the facility. ...

Appendix E, pages 11, 12.

Doyle v City of Medford, 347 Ore 564; 227 P.3d 683; 2010 Ore Lexis 51, " Legislative Administration Committee, Form and Style Manual for legislative measures, ("To impose an obligation to act, use 'shall'").

C. Federal Due Process Violations under procedural and substantive precedent

Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972) Appendix E page 16. (Note 2) " It is clearly established that due process requires prior notice, or "fair warning" of proscribed conduct before a sanction may be imposed"

Frazier v Coughlin, 850 F.2d 129, 130 (2nd 1988) (if prisoner can prove he lacked notice of the rules of which he was charged with violating, he may have a valid due process claim)

Carr v Cate, 586 Fed. Appx 343; 2014 U.S. App. Lexis 23377 (" Carr was not on notice that his conduct violated [Prison Rules] therefore, the prison violated Carr's Due process rights") See also Newell v. Sauser, 79 F.3d 115, 117 (9th Cir 1996)

Above cases cited Appendix E pages 14, 15 and 16

Chestnut v. Mosley, 2018 U.S. Dist Lexis 103991

"Due process requires prisoners receive some advance notice of prison rules and regulations prior to imposing a "severe" sanction." Appendix E pg 18.

Qualified Immunity:

A. Federal Case Cites.

Hamby V. Hammond, 821 F.3d 1085, 1090 (9th Cir 2016)

(for a right to be clearly established" for the purpose of qualified immunity, " A right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right" Appendix A, page 3

Anderson V Creighton, 483 U.S. 635 (1987)

[stating that qualified immunity also rested upon] (whether a reasonable officer could have believed their actions to be unlawful, in light of clearly established law.)

Cousins V Lockyer 568 F.3d 1063 (9th - 2009)

[Qualified immunity] " Does not protect against [violations] ~~AG~~ clearly established Rights

Appendix E pg 35

Johnson V. Duffy, 588 F.2d 740 (9th Cir 1978)

" A person may be held liable under [42 USC] 1983 if he " omits to perform an act which he is legally required to do that causes the depreviation of which plaintiff complains"

Appendix E, page 35

* Howard v Adkinson, 887 F.2d 134 (8th 1989)
"prison guards / defendants that act against prison policy are not immune" [or given qualified immunity] Appendix E page 35

* Ashcroft v Al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 2088, 179 L. Ed 2d 1149 (2011)
"A law is clearly established," so long as existing precedent [has] placed the statutory or constitutional question beyond debate"
Appendix E page 36

B. STATE CASE CITES

* Bronson v Moonen, 270 Or 469, 476, 528 P.2d 82 (1974) ("[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute.")
Appendix E page 34

* Meltebeke v. Bureau of Labor and Industries, 322 Or 132, 157, 903 P.2d 351 (1995) ("[T]he [administrative] rules have the effect of statutory law.") Appendix E page 34

State created Liberty interests

Sandin v Conner 515 U.S. 472 (1995) "State regulations give rise to liberty interests ~~prot~~-~~ected~~ by the Due process clause of the Federal Constitution only if those regulations pertain to "freedom of restraint" that impose atypical and significant hardship on the inmate in relation to the incidents of Prison life" Appendix E, page 37

Hewitt v. Helms, 459 U.S. 460, 103 S. Ct 864, 74 L. Ed 2d 675 (1983) Appendix E, page 39

" statutes or regulations Require, in 'language of an unmistakably mandatory character.' that a prisoner not suffer a paticular deprivation absent specified predicates.

OAR 291-105-0021 (2)(9)(B), "... A misconduct Report shall not be submitted absent a written description from ..."

Appendix E page 22; Appendix B page 9.

OAR 291-105-0021(2)(9)(c), " If it is determined that the other jurisdiction maintained the inmate in a similarly restrictive status, the inmate shall be credited with the number of days he/she was held in segregation..."

Appendix B, pages 9, 10; Appendix E page 22, 23
Appendix D pages 2, 3, 4, 5

OAR 291-105-0066(11)(b), " If it is determined that ..... inmate held in [segregation]... inmate shall be credited day for day...

Equal Protection Clause

Similarly situated individuals were intentionally treated differently.

Engquist v Oregon Dept of Agriculture, 553 U.S. 591, 601-02, 128 S. Ct. 2146, 170 L. Ed 2d 975 (2008) Appendix E. page 27

Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L. Ed. 2d 1060 (2000)
Appendix E. page 27

Lazy Y Ranch Ltd. v. Behrens, 546 F. 3d 580 592, (9th Cir 2008) Appendix E page 27

Monteiro v. Tempe Union High School Dist. 158 F.3d 1022, 1026 (9th Cir 1998) (to state an equal protection claim, the plaintiff "must plead intentional unlawful discrimination or allege facts that are at least suseptible of an inference of discriminatory intent)
Appendix E page 28.

Statement of the case

This case involved multiple violations of Constitutional Due Process by employees of the Oregon Department of Corrections.

The Oregon Courts had ruled against the Oregon Department of Correction on multiple occassions, informing them that they could not hold diseiplinary hearings and punish inmates, for violations of Oregon Administrative rules, that were alleged to have occurred outside of the Oregon Department of Correction facilities. <u>See Alexander v OSP, 99 Or. App. 659, 663-64</u>

The Oregon Department of Corrections own Administrative Rules, limited the defendants punishing of inmates for rule violations, to only include facilities operated directly be the ODOC. The Oregon Administrative rules did not make any allowances for alleged rule violations committed outside of the ODOC facilities or with non ODOC employee's. See OAR 291-105-0005(3)(b) and OAR 291-105-0005(3)(b)(A), Appendix E page 13. The law was clearly established that ODOC employee's could not, write up disciplinary report and then punish an inmate for infractions that occurred away from ODOC facilities.

Despite this clear legal direction set both by the state court and administrative law for decades, the defendants proceeded to write plaintiff up, hold a hearing and then punish plaintiff for an ODOC rule violation that had occurred three years previously, while plaintiff was in the custody and facilities of the Jackson County Sheriff. Plaintiff had been removed from the custody of the Oregon Department of Corrections by court order, See ORS 135.767, in August of 2011. Plaintiff had been under the rules and regulations of the county sheriff while at the jail, See ORS 169.076(1: not the rules and regulations of the ODOC.

Prior to being transferred back to the Oregon Department of Corrections on September 28, 2015, plaintiff had been in continuous punishment for the previous 22 plus months in solitary confinement at the county jail, for the same rule infraction the ODOC employees would charge me with when I arrived there. I had been away from the ODOC on court order from 8/16/2011 to 9/28/2015. At no time during that period was I subject to the Oregon Department of Corrections Rules, Regulations or Administrative procedures. The Jackson County Jail was not operated by the ODOC nor was plaintiff their under contract. The ODOC had no statutory authority under clearly established law to punish me while there.

Upon arrival to the ODOC intake center, plaintiff was placed into segregation without notice as to why, no documentation, no notices period. At 16 days I was given a disciplinary hearing for violated ODOC rules while at the county jail three years prior. Despite the fact that the ODOC employees could not hold a hearing in the first place, they set up a series of acts that continued to violate any chance of due process being obtained.

Under very specific senarios, the ODOC claims to have authority to punish for ODOC rule violations committed "outside" their facilities. But these exceptions are only for facilities that are still operated or a party to operations by the Oregon Department of Corrections. See ORS 169.660 (1); (2) Appendix E page 11, 12. Plaintiff had been removed from ODOC custody be court order. Not "Assigned" to a regonal correctional facility.

The defendants in this case treated plaintiff as if he was returning from a regional corrections facility under ORS 169.660, which was clearly not the case, but if it had been, then the defendants were required to follow the clearly established administrative laws with regards to filing disciplinary reports on inmates returning, and arriving with written reports from the sending institution detailing possible ODOC rule violations.

In this case there were no written reports sent to the ODOC, with plaintiff, from the Jackson County Jail. Under this circumstance, the ODOC employee's were implicitly instructed on what to do by clearly established law that had been in force in Oregon Prisons for over 40 years. See OAR 291-105-0021(2)(g), " when the alleged misconduct occurs while the inmate is in the temporary physical custody of a jurisidiction other then the DOC, employees from other jurisdiction may provide a written description of the misconduct ..."

<u>Appendix B at 9; Appendix D; Appendix E 22, 23</u>

It is the following law that demands a praticular action by the defendants so that plaintiff would have been free of further "atypical and significant" restraint of freedom.

<u>See OAR 291-105-0021(2)(9)(B)</u>, "The written description provided by the temporary custody jurisdiction <u>shall</u> accompany the misconduct report. A misconduct report <u>shall not be submitted absent a written description</u> of the allegation <u>from the temporary physical custody jurisdiction</u>.

<u>Appendix B page 9; Appendix D pgs 2, 5, 6, 7</u>
<u>Appendix E pages 20, 21, 22 and 23</u>

This clearly established law, that clearly created a liberty interest to be free from restraint, was disregarded by the ODOC employees and thus again denied due process in the disciplinary hearing they were not legally allowed to have in the first place.

Had the ODOC employee's had the statutory authority to discipline and punish plaintiff, and then followed the OAR 291-105-0021(2)(9)(B) section, and had a report from the Jackson County Jail, then they would have had the required information to fullfill the very next law OAR 291-105-0021(2)(9)(c (see Appendix B pg 9); Appendix D pg 6; Appendix E page 8, 22, 23, 24, 25, 26

, " ..., the inmate shall be credited with the number of days he/she was held in segregation type status by the other jurisdiction"

Here, plaintiff had been in solitary confinement at the Jackson County

Jail for over 700 days at the time of the disciplinary hearing held at the ODOC for the same rule infraction. The maximum time by law that the ODOC staff could punish was 120 days. The ODOC Rules, clearly established law, stated ," OAR 291-105-0064(5)," ... In no case shall the inmate be retained in disciplinary segregation for a period longer then that permitted by the sanction ... "

Plaintiff had already spent 5x the legal allowable time in segregation but the ODOC staff assigned an additional 90 days on top of the 700 plus days. This was clearly atypical and signif-cant treatment and in violation of the equal protections clause.

The remaining claims in the 42 USC 1983 involved the continuous due process violations by supervising employee whom rubber stamped the wrong actions of their subordinates, that they were required by statute to correct, when given additional proof of errors, but chose to ignore.

It is not quite clear why the U.S. District Court of Oregon and the 9th Circuit Court of Appeals, refused to acknowledge the clear Due Process violations of the ODOC staff, with regards to their not having statutory authority to hold a disciplinary hearing and punish plaintiff in the first place. It was clearly established that the ODOC could not hold a hearing, let alone punish for, rule violations of the ODOC that were committed outside their facilities. See Alexander v OSP, 99 Or. App 659, 663-64, 783 P.2d 1034 (1989); OAR 291-105-0005(3)(b); (3)(b)(A) Appendix E page 13. By holding a hearing in the first place they denied Due Process by not following the existing established law.

It is also not clear how either of the courts could conclude that plaintiff had been punished for rule violations that he had never been given notice of existing until after being charged. It was undisputed fact that plaintiff had been sent to the ODOC intake on July 11, 2011, was in solitary confinement, then transferred to another prison and removed from ODOC custody on 8/16/2011, for the next four years. Plaintiff had never seen a single rule or regulation of the ODOC and yet was punished for violating those rules. This was in clear contradiction to clearly established law in dozens of cases and multiple circuits. See Newell v Sauser, 79 F.3d 115; 1996 U.S. App. Lexis 4065 (9th 1995) ,(" It is clearly established, both by common sense and by precedent, that due process requires fair notice of what conduct is prohibited before a sanction can be imposed") Williams v Nix, 1 F.3d 712, 716 (8th Cir 1993) .(" noting that it is "axiomatic that due process requires fair notice of prohibited conduct before a sanction can be imposed.").

Forbes v. Trigg, 976 F.2d 308, 314 (7th Cir 1992) ("Due process requires that inmates recieve fair notice of a rule before they can be sanctioned for its violation")
Frazier v. Coughlin, 850 F.2d 129, 130 (2nd Cir 1988) (If prisoner can prove that he lacked notice of rules of which he was charged with violating, he may have a valid due process claim)
Robles v. Coughlin, 725 F.2d 12, 16 (2nd Cir 1983)
("[C]onsideration should be accorded those cases which had that the failure to provide notice of prison rules to inmates is a violation of Due Process.")

It is and was without question, that the defendants knew that plaintiff had never been in the ODOC custody to have been made aware of ODOC rules prior to being charged. This knowledge, precluded qualified immunity on this Due process violation alone as it was clearly established that you could not punish inmates for rule violations they had never seen.

The U.S. district court instead chose to ignore addressing these clear due process violations at all and made no comment on the issue despite there being clearly established case law, as just briefed. In the Courts Opinion and Order of the Defendants Motion for Summary Judgment, See Appendix B, page 6, the court focused on the hearing that should not even have taken place, and addressed the claims of due process violations in a vacuum of the actual facts.

The court ruled that 16 days of pre-hearing segregation, was the standard to compare the Sandin V Connor, "atypical and significant" test to. The court did not acknowledge the facts in the record of 700 plus days already spent in segregation on the charge, nor the additional 90 days the hearings officer assigned for ODOC rule violation that he could not give out under the clearly established law. The Court intentionally disregarded the clear fact that 800 plus days spent in solitary confinement, for an 120 day, maximum sanction allowed under the law, was atypical and significant.

The Court was and did blatantly sanction government employee's the right to violate clearly established due process rights.

Most bizarrely, the district court, intentionally refused to apply clearly established Due process law to this case. See Appendix B, page 9. The judge goes out of her way to detail the requirements of Oregon Administrative law under OAR 291-105-0021(2)(9), that gives a "may" permissiveness to "non-ODOC" employees Id. Appendix B, pg 10. The court then recognizes that in order for a disciplinary report to be written that a report must be attached, but predicates this requirement on the non-ODOC personell not providing a report in the first place because they "may" provide one. Yet the Judge then just skips and or ignores the second part of that Oregon Administrative Rule that clearly creates a liberty interest from being free from "atypical and significant" retraint. The second part of OAR 291-105-0021(2)(9)(B), See Appendix B, page 9, says, (" A misconduct report shall not be submitted absent a written description of the allegation from the temporary physical custody jurisdiction)

The court just jumps passed that clearly established due process requirement. The case should have been settled there, summary Judgment should have been denied. Case law is clear. See Bronson v. Moonen, 270 OR 469, 476 (1974) ("[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute."); Olim v. Wakinekona, 461 U.S 238, 249, 103 S. Ct. 1741, 1747-48, 75 L.Ed. 2d 813 (1983), (" A state creates a protected liberty interest by placing substantive limitations on official discretion

Here, the OAR 291-105-0021(2)(9)(B), specifically says, " A misconduct report shall not be submitted absent a written description ...." Any action past that clearly established directive is a violation of Due process.

The District Court was clearly aware of this clearly established law, and the facts in the case that there never existed such a required report attached to the disciplinary report — that couldn't be written without it. The judge obviously denied to apply the law and instead jumped to Plaintiffs claim that he should have been given credit for his prior time in segregation. See Appendix F pgs 11, 12, 13 (Reply Brief Argument to the 9th Circuit Court of Appeals detailing the District Courts refusal to follow clearly establish law.)

The court then uses circular logic to deny the requirement that the ODOC defendants were required by law to give credit for the plaintiffs time already spent in segregation. See OAR 291-105-0021(2)(9)(c) Appendix B, pg 9; Appendix E, pg 22, 23; Appendix F, pg 11, 16, 17. The Court concludes, Id Appendix B pg 10, 11, That because the Jackson County Jail wasn't required by law to provide the ODOC with a report, that the ODOC staff was required to credit that time because it had made no determination that plaintiff had spent 22 months in solitary confinement. This conclusion was despite the fact that testimony at the illegally held disciplinary hearing informed the defendants of the segregation time spent at the jail and inquired about it being applied towards the time sanctioned at the ODOC.

The court finally ruled to summarily dismiss the rest of the complaints due process violations for all named defendants, based on it's denial of applying law, even though these defendants were repeatedly given additional notice of their errors.

The court further ruled, prior to the motion for summary judgment, to deny plaintiff all discovery, admissions to facts, thereby keeping plaintiff from being able to argue additional facts, present evidence, of the defendants knowledge, that they were in violation of both state and federal law by going outside their statutory authority to bring charges against plaintiff in the first place.

The district court went out of its way to act as an advocate for the State defendants, deny application of clearly established Due process rights to the State defendants and denied Plaintiff the tools of discovery to substantiate his claim and adequately argue against summary Judgement.

The 9th Circuit Court of Appeals failed to similarly acknowledge the initial Due process violation claims that the Defendants did not have the statutory authority to punish plaintiff in the first place and even if they did, were required to follow the law. The Affirmation by the 9th Circuit, of the district Courts Opinion and Order, Case # 3:17-CV-00501-YY [DKT # 88] is and was setting court presedent that government employees do not have to follow clearly established Administrative Law, this is obvious error and requires reversal

Reasons for granting the petition

Across the nation, protests and riots have ensued unabatted, in part due to the belief that government employee's do not have to follow the laws that the everyday citizens do. When the courts make blatant biased rulings in favor of government defendants, they enforce this public belief that there is no accountability for the wrong and illegal actions of those same government employee's.

In this case, the district court blatantly disregarded clearly established law that government employee's are required to follow the law by intentionally ignoring the clear directives of OAR 291-105-0021(2)(g)(B), " ... A misconduct report shall not be submitted ... . The district court blatantly ignored this clearly established law and turned around and gave the defendants qualified immunity for doing so. This is clear law now in

The US District of Oregon and 9th Circuit of the United States. Any litigant can now cite the 3:17-CV-00501-YY, Monical v. Towers case, and use it to deny clearly established due process rights of prisoners in the sister circuits.

As long as the courts continue to rule for government employee's wrong and illegal actions, and not enforce the rule of law that everybody must follow the law, then government employee's will see these type of court rulings as a license to continue to not follow their own clearly established Administrative law. If government employee's are not required to follow the laws, and the courts go out of their way to excuse these violation of law, then why should anyone follow the law. The protests will continue and the court itself will become the focus because it is the courts that have decided that government employee's are

Above the Law of the average citizen.

In fact, In the State of Oregon, the ODOC staff, less then a year after the events in this case, again decided that they did not have to follow clearly established law and punished plaintiff again for rule violations committed outside their facility, See Monical v Nofziger, 6:18-cv-02214-YY, the difference in this case being that plaintiff elicted help from the investigators at the Legal publication of the U.S. Observer, and these government actors actions will be publicized across the United States to bring attention to the issue.

The facts of this case can not be viewed in the vacuum that the defendants and courts wished to frame it. They cite the Sandin v Conner, standard for atypical and significant treatment but only apply it to 16 days out of 800 days of atypical and significant confinement as if it did not matter. The 9th Circuit has repeatedly over the years attempted to make the Supreme Courts ruling in Sandin v Conner, apply to the most aggregious conditions of confinement. In Sandin v. Connor, the comparison was between 30 days segregation and everyday population in the general prison complex. The court found at that time that there was not much difference between the two so there was no "atypical and significant" issue that would trigger due process requirements.

Todays prisons are completely different then those in Sandin. In Oregon every prisoner has Cable TV, video games, exercise yard 3x per day, food fundrasers from local resturants every week. The difference between segregation and general population is so stark that it can be likened to actual freedom and prison. (See Monical v. Nofziger 6:18-cv-02214-YY; 1st Amended Complaint declartion for comparison) In Oregon, any segregation time is "atypical and significant" to everyday prison life. This is the result of the ever changing standards of a society.

The district court only looked at the 16 days of pre-hearing segregation. It did not include or consider the 700 plus days of confinement already spent in segregation, nor the 90 days on top of that 700. This was in conflict with the "atypical and significant" considerations from other circuits. See Giono v Selsky, 238 F.3d 223, 226 (2d Cir 2001) (holding that 92 days in administrative segregation was atypical and significant since it followed 670 days segregation at another prison); Sims v Artuz, 230 F.3d 14, 23-24 (2d Cir 2000) (noting that some or all of plaintiffs multiple disciplinary proceedings might properly be aggregated for determining atypical and significant question.)

So even if the court could rightly conclude that the defendants did not have to credit plaintiff with his 700 days in solitary confinement (See OAR 291-105-0021(2)(9)(c)). It should have at least considered that 700 days as part of

"Atypical and significant" determination when applying the Due process claims. This is especially True given the fact that this same court was personally aware of the plaintiffs 700 days of solitary confinement and how they were "Atypical and significant" themselves, due the conditions of confinement at the Jackson County Jail, (see Monical v. Winters, 1:17-CV-00476-44 - 22 months 8th Amendment violations)

These decisions of the U.S. district court of Oregon and the Affirmation by the 9th Circuit court of Appeals, is in such blatant error of law, that allowing the findings to stand would be an injustice of law for all future litigants with valid cases involving violations of Due process such as those complained of here.

The 9th circuit has decided in Nonnette v. Small, 316 F.3d 872, 878-79 (9th Cir 2000); and Burnsworth v. Gunderson, 179 F.3d 771, 775 (9th Cir 1999) that a disciplinary charge that is unsupported by evidence, is always a violation of due process regardless of whether there is a liberty interest under the atypical and significant test of Sandin. How much more then is due process violated when the defendants can not even bring a disciplinary charge because the alleged violation occurred outside their facilities and of their statutory authority to punish. These courts deciding the issues of this suit differently, appears to be in direct conflict with its own president as well as that of every other circuit.

The court should consider granting this petition on the issue of qualified immunity. As the U.S district court of Oregon and 9th Circuit Court of Appeals allowed the defendants qualified immunity in direct conflict to its sister circuits.

The defendants could not punish inmates for rule violations outside their facilities. (See Alexander v OSP 99, OR. App. 659, 663-64; OAR 291-105-0005(3)(b); (3)(b)(A). They did anyway. The defendants could not write up a disciplinary report under the facts of this case, OAR 291-105-0021(2)(9)(B), they did anyway. The defendants should have applied and credited time plaintiff was in segregation, if they could have charged plaintiff, (See OAR 291-105-0021(2)(9)(C). They did not. And none of the following defendants, after those initial due process violations, corrected the earlier errors. (See Appendix E pgs 19-29; Appendix F. pg 13-19).

Every circuit has clearly stated, that what these defendants did, denies them being given qualified immunity. Howard v Adkinson, 887 F.2d 134 (8th 1989) (Prison Guards/defendants that act against prison policy are not immune). Johnson-el, 878 F.2d 1048 ("Actual knowledge of the law is not required; if the law is clearly established, the qualified immunity defense will fail"). Al-Kidd v. Ashcroft, 580 F.3d 949 (9th-2009) ([If] supervisors] knew of violations and failed to act to prevent them " or for" their own culpable actions..." they can be held liable.

Was it clearly established that government employees couldn't punish ODOC rule violations for acts outside their facility? Yes. Was it clearly established that government employees have to follow Administrative laws that limit their actions which inflict atypical and significant hardships upon a prisoner? Yes.

Under all court precedent, the defendants in this case were not entitled to qualified immunity. They each knew that their actions were against clearly established law.

For all of these reasons the Court should accept this petition and reverse the lower courts rulings so that such blatant injustice of the law is not repeated.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully Submitted August 7, 2020

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