

20-8274

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

MAY 26 2021

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Ray Sean Barber

— PETITIONER

(Your Name)

vs.

Scott Frakes, et al.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Eighth Circuit

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

PETITION FOR WRIT OF CERTIORARI

Ray Sean Barber

(Your Name)

P.O. Box 22800

(Address)

Lincoln, NE 68242

(City, State, Zip Code)

N/A

(Phone Number)

RECEIVED

JUN - 8 2021

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1.) Whether the district court's finding with regard to Mr. Barber's equal protection claim conflicted with this Court's governing determinations.

2.) Whether the district court gave Mr. Barber a meaningful and fair chance to cure the deficiencies of his Complaints; and whether there should be a requirement that the district court discuss each of the indigent or prisoner claims before allowing leave to amend on initial review of the complaint.

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:

Scott Frakes, Taggart Boyd, Ted Hill, Mike Hollister,
Kristina Milburn, Nate Shwab, Dr. Mark Lukin, Dr. Megan Ford,
Betty Gergen, Jacquie Gooding, Amy Reaney, and Robin Church.

RELATED CASES

- Barber v. Frakes, No. 8:18-cv-00410, U.S. District Court for the district of Nebraska. Judgment entered October 1, 2020.
- Barber v. Frakes, No. 20-3406, Court of Appeals for the Eighth Circuit. Judgment entered Jan. 20, 2021.

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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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A 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☒ is unpublished.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 B & 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☒ is unpublished.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 January 20, 2021.

☐ 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: March 12, 2021, and a copy of the order denying rehearing appears at Appendix D.

☐ 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

Equal Protections of the Law: No State shall "deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. §1983: Appendix E

STATEMENT OF THE CASE

Mr. Barber filed a 42 U.S.C.A. §1983 complaint on August 27, 2018 to the U.S. District Court of Nebraska, alleging that 12 state officials working for the Nebraska Department of Correctional Services (NDCS) violated multiple rights guaranteed him pursuant to the U.S. Constitution. However, Barber failed to sue the officials in their individual capacity when he didn't state what capacity the officials were sued in. So the court reviewed the complaint to determine if the officials could be sued in their official capacities for injunctive and declaratory relief. The court determined that Mr. Barber could not sue the officials in their official capacities and gave Mr. Barber 30 days to amend his complaint to sue the officials in their individual capacities. The court did not discuss Barber's constitutional claims to indicate whether there were any deficiencies that he should try and cure in his amended complaint.

Mr. Barber filed an Amended Complaint, making the same claims and using the same facts as the original complaint. But this time he indicated that he was suing 11 of the 12 officials in their individual capacities as the court had ordered. He mistakenly missed suing 1 official in her individual capacity while typing the Amended Complaint.

The court conducted another review of Barber's claims, as he is an inmate proceeding in forma pauperis. The court discussed Barber's constitutional claims and found that he failed to state a claim with respect to each constitutional claim. ~~Regarding the equal protection claim, the court found that~~
equal protections required an allegation by Barber that he was "treated differently than a similarly situated class of inmates, that the different treatment burdened one of his fundamental rights, and that the different treatment bears

no rational relation to any legitimate penal interest."

The court dismissed Barber's case without leave to amend on the basis that amendment would be futile. Barber then appealed the district court's order, and upon review, the Eighth Circuit Court of Appeals (Eighth Circuit) summarily affirmed the district court's order on January 20, 2021.

Mr. Barber argued below that the district court unfairly deprived him of a meaningful opportunity to cure the deficiencies of his Complaint and that the Court's finding on equal protection conflicts with relevant decisions of this Court.

Mr. Barber requests this Court to grant his petition for certiorari and review his case or vacate the judgment and remand for further proceedings.

REASONS FOR GRANTING THE PETITION

A. The District Court Erred In Using An Improper Standard When Discussing Mr. Barber's Equal Protection Claim.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." See U.S. Const. Amend. XIV, §1. "The purpose of the[se] equal protection clause[s] ... is to secure every person within the states jurisdiction against intentional and arbitrary discrimination." Walker v. Hartford Life and Accident Insurance Company, 831 F.3d 968, 976 (8th Cir. 2016)(quoting Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918)). "Equal protection 'does not guarantee that all persons must be dealt with in an identical manner,'" Walker, at 976 (quoting Mills v. City of Grand Forks, 614 F.3d 495, 500 (8th Cir. 2010)), "and 'does not forbid [all statutory] classifications,'" Walker, at 976 (quoting In re welfare of M.L.M., 813 N.W.2d 26, 37 (Minn. 2012) and Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)). "Rather, '[i]t simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike.'" Walker, at 976 (quoting In re welfare of M.L.M., 813 N.W.2d at 26, 37, and Nordlinger, 505 U.S. at 10).

"Unless a law places a burden on a fundamental right or focuses on a suspect class, it is subject to a rational basis standard of scrutiny" with respect to review of an equal protection claim. Knapp v. Hansen, 183 F.3d 786, 789 (8th Cir. 1999) (citing Weiler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998)). "Weiler" cited a Supreme Court decision in Romer v. Evans, 517 U.S. 620, 631 (1996). This standard has been firmly used in the Eighth Circuit. See

Prostrollo v. University of South Dakota, 507 F.2d 775 (8th Cir. 1974); Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp., 21 F.3d 237, 240 (8th Cir. 1994); Batra v. Board of Regents of University of Nebraska, 79 F.3d 717 (8th Cir. 1996); Birchansky v. Clabaugh, 955 F.3d 751 (8th Cir. 2020).

In fact, in "Batra" the Eighth Circuit explicitly held that the "Equal protection clause does not only protect 'fundamental rights,' and does not only 'protect against 'suspect classifications' such as race, but rather it also protects citizens from arbitrary or irrational state action.'" Batra, supra, at headnote 7. But despite this law and the district court's apparent understanding of this law (see Remmen v. City of Ashland, Not Reported in F.Supp.2d at *5 (D. Neb. Sept. 18, 2009); Doe v. Nebraska, 734 F.Supp.2d 882, 933 (D. Neb. Aug. 16, 2010); Doe I v. Peterson, 2021 WL 1102976 at *6 (D. Neb. March 23, 2021)) the court found that in order to violate equal protections, the treatment must burden a fundamental right **and** that the different treatment bears no rational relation to any legitimate penal interest. The court cited Murphy v. Missouri Dept. of Corrections, 372 F.3d 979, 984 (8th Cir. 2004), which essentially makes such a holding, citing "Weiler." But, as indicated above, this holding conflicts with well established Supreme Court determinations. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985); Nordlinger, supra, at 10; Armour v. City of Indianapolis, Ind., 566 U.S. 673, 680 (2012).

B. The District Court Did Not Give Mr. Barber A Meaningful Opportunity To Amend His Complaint.

When a plaintiff is proceeding in forma pauperis or is an inmate in prison the district court conducts an initial review of the complaint to make certain determinations as required by statute. Upon initial review of an original complaint the court gives a detailed discussion regarding the claims and explains the deficiencies of the complaint. The court then grants the plaintiff an opportunity to amend the complaint within 30 days. See Villarreal v. Bigsby, 2021 WL 92701 (D. Neb. Jan. 11, 2021); Ramose v. Tyson Fresh Meats, Inc., 2021 WL 258957 (D. Neb. Jan. 26, 2021); Ellis v. Grahm, 2021 WL 351479 at *1 (D. Neb. Feb. 2, 2021); Wilson v. Wilhelm, 2021 WL 719662 (D. Neb. Feb. 24, 2021). But in Mr. Barber's case, the court, on initial review of the original complaint, only discussed some of Mr. Barber's claims; specifically the claims regarding injunctive and declaratory relief. After finding that Petitioner failed to state a claim because the defendant's could not be sued in their official capacities, the court gave Petitioner 30 days to amend his complaint to sue the officials in their individual capacities. The court did not address Mr. Barber's constitutional claims. The court could have discussed whether Mr. Barber could state a claim against the officials in their individual capacities even though Mr. Barber didn't state that he was suing the officials in their individual capacities. See Tyrus Tenell Shelly v. State Employee Jukovic, and Nebraska State Penitentiary, 2021 WL 1789217 (D. Neb. May 5, 2021). "Tyrus Tenell Shelly" indicates two things: 1) that the court could have held a discussion on Mr. Barber's constitutional claims despite his failing to show that he was suing the officials in their individual capacities, and 2) even upon finding that he failed to state a claim, the court would have granted Mr.

Barber 30 days to amend his complaint to cure -- or attempt to cure -- the deficiencies of the complaint.

By not going into a detailed discussion regarding Mr. Barber's constitutional claims in the initial complaint before ordering Mr. Barber to make a plausible claim against the officials in their individual capacities and upon review of the Amended Complaint dismissing the action without allowing Mr. Barber to file a Second Amended Complaint to attempt to cure the deficiencies first discussed in the Amended Complaint, the court abused its discretion. It gave Mr. Barber no reason to believe that his constitutional claims were deficient in its initial review of his original complaint, and when the facts were exactly the same in the Amended Complaint it dismissed the action without allowing leave to amend. It essentially swindled Mr. Barber out of a lawsuit.

Moreover, the Eighth Circuit essentially established that the district court could do this to indigent and inmate plaintiffs when it summarily affirmed the district court's ruling. But this is clearly wrong given the usual course of the district court proceedings as shown above indicates that the court should have done it a different way. Therefore, this Court should establish a standard which requires the district court to give indigent and prisoner plaintiffs a meaningful opportunity to cure his or her deficient claims by going into a detailed legal discussion of each claim -- including constitutional claims where it is apparent that the plaintiff may be making or could make constitutional claims but failed to specify that the defendants are being sued in their individual capacities -- and allows at least one chance to amend their complaint.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Raymond B. Berman 78889

Date: 05/25/21