No. 21-1032

In The

Supreme Court of the United States

JASON T. BERRY,

Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION; and
AGENT MARK HASTBACKA, Special Agent, FBI,
in his individual and official capacities,

Respondents.

On Petition For Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether additional evidence of claims occurring while a judgment is pending and immediately after case closure merit recall of a mandate.

2) Whether Fourth Amendment concerns over cell phone intrusion and current public debate over FBI abuses of power embody the "exceptional importance" criteria for en banc review.

3) Whether a petitioner proceeding *Pro Se* throughout his litigation be held to stringent standards of pleadings to justify dismissal of his claims, even with relevant evidence submitted.

LIST OF PARTIES

1) JASON T. BERRY, Petitioner
2) FEDERAL BUREAU OF INVESTIGATION ("FBI") Respondent
3) AGENT MARK HASTBACKA, Special Agent, Respondent

RELATED CASES

The U.S. District Court Case Opinions are under *Berry v. FBI*, No. 17-cv-143, dated September 6, 2018.

The Opinions of the U.S. Court of Appeals are under case number 18-1926 and 18-1954, dated August 18, 2021 and January 29, 2021, respectively.

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The opinions of the U.S. Court of Appeals are under case number 18-1926 and 18-1954. The orders are reprinted in the Appendix ("App.") at 1-5.

JURISDICTION

The First Circuit opinion was filed on February 27th, 2020. A petition for Panel Rehearing under Rule 40 was filed by the appellant on April 9th, 2020. The First Circuit denied the petition on July 9th and July 16th of 2020. The Appellant petitioned for Rehearing En Banc under Rule 35 on August 20th, 2020. The First Circuit denied the request on January 29th, 2021. On March 13th, 2021, the appellant filed a motion for consideration under Federal Rule of Civil Procedure 60(b)(2) citing "newly discovered evidence" and "extraordinary circumstances". Two other motions citing new evidence and new circumstances supporting the petitioner's original claims were filed on March 22nd and April 6th of 2021. The First Circuit denied the motion on August 18th, 2020. The honorable Court's jurisdiction is invoked in a timely petition under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND POLICIES AT ISSUE

Fourth Amendment of the U.S. Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"

Federal Rule of Civil Procedure 8(e)

"Pleadings must be construed as to do justice."

Federal Rule of Appellate Procedure 35

"When Hearing or Rehearing En Banc may be ordered"

STATEMENT OF THE CASE

1. Facts giving rise to the case

The appellant's suit was brought under the Privacy Act, the Fourth Amendment, and the "Bivens Remedy" for constitutional violations under *Bivens v. Six*, 403 U.S. 388 (1971).

The appellant is a former probation and parole officer with the New Hampshire Department of Corrections (NHDOC). The facts of the case are based on legal actions dating back several years involving the conduct of FBI Task Force Officer Thomas Harrington, who was named in the appellant's complaints to NHDOC in 2012 and 2013. In May of 2016, the appellant sent

requests for information under the FOIA to the Record/Information Section of the FBI in Winchester, Virginia. The requests were sent in compliance with all documented guidelines and procedures, but the appellant received no response.

On February 17th, 2017 the appellant filed a civil suit in New Hampshire courts naming FBI Task Force member Harrington as a party. On February 23rd, 2017, appellant sent a request under the Privacy Act directly to the Bedford, New Hampshire Office of the FBI requesting any documentation containing his name or any information related to his past assistance with the FBI Safe Street Task force while working as a state probation and parole officer. The February 23rd, 2017 request disclosed that the requested information was for the purpose of "pending legal matters", acknowledging the previous and pending legal matters. The February 23rd request was sent with guaranteed next day delivery, and included the appellant's home address for return correspondence.

In the early afternoon of February 24th, 2017, the appellant was contacted by his parents, who stated that the FBI had contacted them and were looking for him. The appellant had not included any information about his parents or their contact information in his request, and had not disclosed to them he was sending the FBI a request for information. The appellant subsequently retrieved a voicemail message that FBI agent Mark Hastbacka left for his parents regarding him, which was submitted to the record in the court proceedings. Curiously, in his voicemail Agent

Hastbacka stated that he had tried to call the appellant's cell phone and there was no voicemail capability. The appellant had never received any calls from Agent Hastbacka and had an active voicemail system that was accepting messages and not full. The appellant sent a number of polite letters to Agent Hastbacka requesting to know why he took these actions instead of responding in writing. Agent Hastbacka never responded. As the Appellant stated in his December 10th, 2018 opening brief to the First Circuit, it is "crucial to consider that a simple answer from the appellees to the appellant's March 9th, 2017 inquiry about how and why Agent Hastbacka had obtained so much information would have precluded any litigation". A civil suit was filed on April 18th, 2017.

2. District Court Proceedings

On April 18th, 2017 the appellant filed a civil complaint with jury demand against the respondents in the U.S. District Court of New Hampshire requesting damages, a permanent injunction against any further contact of the appellant or his family by the appellees, and specifically citing "violations of the Plaintiff's constitutional rights". On the morning of July 3rd, 2017, the plaintiff requested a preliminary injunction forbidding any further FBI contact with his family, and citing "serious illnesses" suffered by his parents immediately after the appellees initial unexplained contact. The appellees filed a motion to dismiss the entire case sometime that same day. The record would later indicate that the appellant's July 3rd request for injunction was

not entered until July 5th, while the appellees motion to dismiss the entire case was entered on that same day, July 3rd. On July 24th, 2017, the Magistrate Judge recommended the appellant's motion for preliminary injunction be denied, stating the appellant filed "after the defendants moved to dismiss". The appellant objected to the Magistrate Judge's recommendation on August 7th, 2017, and submitted proof in the form of a parking receipt that his motion for preliminary injunction was filed on the morning of July 3rd. On August 7th, 2017, the Court ordered that no pretrial conference would be scheduled until after the motion to dismiss was resolved. On August 10th, the Court approved the Magistrate Judge's recommendation to deny the appellant's request for preliminary injunction.

On August 21st 2017, the appellant filed a motion to allow limited submission of evidence prior to pretrial conference and discovery planning, in the form of an audio recording of Agent Hastbacka's voice mail to his parents. On August 22nd, 2017, the appellant filed a motion to reconsider the order denying preliminary injunction based on the submission of physical evidence, if allowed. On September 27th, 2017, the Court granted appellant motion to submit the audio recording of Agent Hastbacka, but denied the preliminary injunction. The order instructed an amended complaint by the appellant, which was filed on October 4th, 2017 with a copy of the recording of Agent Hastbacka contacting the appellant's parents. The appellant filed an amended complaint with jury demand on October 4th,

2017, including the audio recording. The court dismissed the complaint. The appellant filed another amended complaint with jury demand on March 5th, 2018. The complaint included exhibits of the original unanswered requests to Agent Hastbacka as to how he acquired personal information about the appellant and his parents. Another exhibit was a publicly accessible memo demonstrating that the Bedford Office of the FBI the appellant had written to for information directly oversaw the FBI Task Force that employed the individual he was suing. The complaint was dismissed by the Court on July 17th, 2018.

On August 14th, 2018 the appellant filed a motion for reconsideration under Federal Rule of Civil Procedure 60(b)(6), citing the unique circumstances of the case that "although discussed in the original complaint as well as the proceedings following, are not at all referenced in the recent or past orders". Specifically, it cited that "plaintiff has on multiple occasions used the precedent of *Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004) to establish the legal principle of 'plausible inference' that there is a considerable reason to believe all of the aforementioned FBI employees and associates, including Agent Hastbacka, were aware of the plaintiff's pending legal actions naming Officer Harrington, and that this is an important factor in examining the unique response to a simple FOIA and Privacy Act request." The appellees responded on August 28th, 2018. Appellant replied on September 6th, 2018 within the deadline for his response. Upon filing his reply on September 6th, the appellant observed that the case had

already been closed the preceding day prior to his deadline for a response to the appellees. The court issued another order on September 6th, 2018 acknowledging that it had "erroneously deemed ripe" his deadline for reply, and closed the case nonetheless.

3. Appellate Court Proceedings

The appellant filed a timely notice of Appeal to the dismissal of his case and paid for its processing on September 14th, 2018. The appellant subsequently filed a timely notice of appeal to the September 6th, 2018 Order on his post-judgment motion for relief on September 17th, 2018. The appellees moved to consolidate the two appeals on October 11th, 2018. The appellant assented to the motion to consolidate on October 15th, 2018 but also discussed that the appellees had presented "an inaccurate time line and fact pattern of the events leading up to the Appellant's appeals" and objected to the presentation of facts. On November 1st 2018 the First Circuit consolidated both appeals, and the Appellant filed his opening brief on December 10th, 2018. On December 27th, 2018, appellees motioned for a stay of all briefing deadlines due to a contemporaneous lapse of appropriations and funding for the Justice Department, to which the appellant assented.

The Appellees filed a motion for summary affirmance on February 13th, 2019, to which the appellant objected on February 25th. On March 21st, 2019, the First Circuit granted the appellees motion to stay

briefing. On February 27th, 2020, the First Circuit granted the appellees motion for summary disposition.

The appellant filed a motion for panel rehearing under Local Rule 40 on April 9th, 2020, citing *pro se* considerations, extraordinary circumstances, and public interest. The motion was denied on July 9th, 2020 and the First Circuit issued a Mandate on July 16th, 2020.

The appellant filed a motion for Rehearing En Banc under Rule 35 on August 20th, 2020. Within a few weeks of the petition for Rehearing En Banc, the appellant's father unexpectedly passed away. On September 12th, 2020, acknowledging his late father as "a party to the litigation as a victim and witness", the appellant notified the First Circuit and all parties of his unexpected passing.

The First Circuit denied the petition for En Banc Rehearing on January 29th, 2021. Appellant filed a motion for reconsideration of "newly discovered evidence" on March 13th, 2021. The request discussed how the appellant's father also observed that the January 29th, order was issued the same day as the sentencing of FBI lawyer Kevin Clinesmith who was discussed in the earlier motion, and that the First Circuit may not have had "adequate opportunity to give consideration to the eventual adverse ruling of the Clinesmith case." On March 22nd and April 6th, 2021, appellant filed supplemental motions indicating further evidence of his claims, including the disabling of his cell phone in early February, the inability to

successfully send certified mail, and other evidence of intrusions into privacy. The petitioner attached a Freedom of Information Act response from the U.S. Postal Service for the petitioner's early May 2016 (prior to this litigation) request for information about delays with his mail. The 2016 response revealed at that time that the petitioner's mail was being monitored by law enforcement for reasons unknown. The March 22nd motion indicated that difficulties "involving the U.S. Mail began in 2013 directly following appellant's submission of an incident report related to an FBI Task Force member". App.71. The motion also asserted that "facts and evidence from 2013 until the present all point toward the FBI as an active party in these issues." Id. The April 6th, 2021, motion discussed incidents occurring in "proximity to lawsuit and prior litigation". App.80.

The First Circuit denied all motions on August 18th, 2021.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Review is warranted because the appellant has established new evidence that meets the standards for recall of a previous mandate.

The recall of a previous mandate is "one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538,

550 (1998). Mandates have historically been recalled in "only the most extraordinary circumstances". *Kashner Davidson Securities Corp. v. Mscisz*, 601 F.3d 19, 22 (2010) Rule 60(b) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice". *Klapprott v. United States*, 335 U.S. 601, 615 (1949). In order for a petitioner "to prevail on this 'newly discovered evidence' claim under Rule 60(b)(2)" a petitioner must establish "(1) the evidence was discovered after trial; (2) due diligence was exercised to discover the evidence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence is such that a new trial would probably produce a different result". *In Re Levaquin Products Liability Litigation*, 739 F.3d 401, 404 (8th Cir. 2014). Any petitioner utilizing Rule (60)(b) has the "burden to prove" the existence of "clear and convincing evidence." *J.P. Morgan Chase v. First American Title Ins.*, 750 F.3d 573, 585 (6th Cir. 2014) Any form of "newly discovered evidence must 'be both admissible and credible'". *F.D.I.C. v. Arciero*, 741 F.3d 1111, 1118 (10th Cir. 2013).

The appellant's March 13th, 2021 motion for consideration recounted his original District Court complaints indicating that his "parents were confused and concerned about being contacted by the Federal Bureau of Investigation" and cited "serious illnesses, including a prolonged hospitalization, suffered by his parents in months that followed the contact". The appellant's sworn affidavit, attached as an exhibit to the 2021 motion, also affirms that the appellant's father

consistently verbalized a fear of retaliation because of this lawsuit throughout litigation, even "in appellant's last conversation with him mere hours before his death". The affidavit affirms that "the natural causes listed on the certificate of his death could be considered 'stress related'". Accordingly, as stated in March, no "reasonable third party would argue that the untimely death of a material witness and victim would not definitively represent a "grave, unforeseen contingenc[y]". *Calderon*, 523 U.S. at 550. The appellant's father was still alive when the August 20th, 2020 petition for en banc rehearing was filed, and the court was notified of his untimely death just weeks later "before the entry of judgment". *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19 (1st Cir. 2002). It is noteworthy that the appellant's father was home when the FBI left his parents a voicemail at their home. The Supreme Court has historically established a recognized privilege against Government invasion into familial relationships. *Trammel v. U.S.*, 445 U.S. 40 (1980).

On March 22nd, and April 6th of 2021, the appellant cited "further intrusions into the appellant's privacy that merit grounds for relief under his Fourth Amendment claims". App.67. The March 13th motion had already indicated that directly following the First Circuit's January 2021 denial for rehearing "appellant's cell phone has been completely disabled since the first week of February". App.61. The appellant had previously "utilized his phone in paying bills" but after the disabling of his cell phone in February, he was "forced to utilize U.S. mail for bill payments for the first

time in years." App.73. The appellant utilized certified mail for credit card and loan payments, and subsequently received notice that they were never received. Other mail anomalies were cited that display "evidence of more possible intrusion or delay into his mail by a third party". App.77. A Freedom of Information Act response from the U.S. Postal Service for the petitioner's early May 2016 (prior to this litigation) request for information about delays with his mail revealed that the petitioner's mail was being monitored by law enforcement for reasons unknown. App.86. It is legally established that any U.S. citizen has a "reasonable privacy interest in mail" in which they are "listed as addressee or addressor." *U.S. v. Stokes*, 829 F.3d 47, 52 and 53 (1st Cir. 2016). The facts and material evidence from 2013 until the present day all implicate the FBI as the active party in all of these difficulties.

II. Review is warranted because the circumstances are "exceptional" and a matter of public interest.

Federal Rule of Appellate Procedure 35(a)(2) establishes that a rehearing en banc will only be ordered when "the proceeding involves a question of exceptional importance." Based on Agent Hastbacka's own audio-recorded statements, he acquired the appellant's undisclosed cell phone number, as well as information about his cell phone account. The Supreme Court has established that "whether the Government employs its own surveillance technology" or "leverages the

technology of wireless carrier, we hold that an individual maintains a legitimate expectation of privacy." *Carpenter v. U.S.*, 138 S.Ct 2206, 2217 (2018). The appellant stated in his April 9th, 2018 District Court Objection to dismissal that the "FBI and Agent Hastbacka have not at any time cited any legal, procedural, or statutory authorization for acquiring the plaintiff's cell phone information and contacting his parents". As of the date of this legal filing, these unprecedented circumstances continue to remain unexplained. In the same 2018 objection the appellant stated that "the implication an FBI agent may access any information about a petitioner (or perhaps a complainant), in whatever manner they decide, and use that information however they want, and are subsequently not to be held accountable".

"Under the Fourth Amendment of the Constitution, a citizen has a 'constitutionally protected reasonable expectation of privacy.'" *Katz v. U.S.*, 389 U.S. 347, 360 (1967). The Court established institutional safeguards against abuse of power over a century ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Court in *Yick Wo* held that "when we consider the nature and the theory of our institutions of government . . . we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Id* at 370. Protection against arbitrary invasions of privacy and abuses of power by those with law enforcement authority are inherent in the Constitution and are therefore fundamentally matters of public interest.

There is a current and relevant public interest in abusive FBI "targeting" of citizens. App.81. The August 20th, 2020 request for rehearing en banc cited the contemporaneous criminal case of FBI lawyer Kevin Clinesmith, who had altered documentation in order to justify continued surveillance of U.S. citizen Carter Page, who worked for a political campaign. The motion for rehearing en banc cited that Clinesmith had "plead guilty yesterday, August 19th, 2020 to making a false statement." The Judge in the Clinesmith case specifically described U.S. citizen Carter Page as a "target" of the F.B.I. in a January 19th, 2021 order. *U.S. v. Clinesmith*, No. 20-165, Order of January 19th, 2021 (U.S. District Court, District of Columbia). Appellant's previous April 2020 motion had established that "defendants have not at any time provided statement or affidavit, and have therefore never denied that they targeted the appellant and his family". As the motion for rehearing en banc illustrated, the targeting of the appellant and his parents "occurred contemporaneously to ongoing legal circumstances that are 'very important and very complex'" in terms of the "exceptional" standard for rehearing en banc. (Citing *U.S. v. Wurie*, 724 F.3d 255 (1st Cir. 2013) Mr. Clinesmith was sentenced on January 29th, 2021, and the "appellant's motion was denied the same day". The "contemporaneous resolution of these cases that are based on similar facts suggests that the court did not have adequate opportunity to give consideration to the eventual adverse ruling in the Clinesmith case." App.57.

III. Review is warranted because the petitioner has proceeded *Pro Se* throughout litigation, but his claims have been held to stringent standards in the Court's continued dismissals despite his submission of favorable and relevant evidence supporting his claims.

Federal Rule of Civil Procedure 8(e) states that pleadings "must be construed so as to do justice." This Court has consistently held that a *Pro Se* complaint, "however inartfully pleaded", is to be held to "less stringent standards than formal pleadings drafted by lawyers" *Haines v. Kerner*, 404 U.S. 519 (1972). Accordingly, the construction of claims in "a document filed *Pro Se* "is to be liberally construed." *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). The court has held that any "departure from the liberal pleadings standards" will be "even more pronounced" if a petitioner "has been proceeding, from the litigation's outset, without counsel." *Id.* at 2200. It is a matter of record that the appellant has proceeded without any counsel at his own expense.

As cited in the appellant's April 9th, 2020 request for appeal rehearing, the procedural standard for the federal courts is that its "system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes". *Federal Exp. Corp. v. Holowecki*, 128 S.Ct. 1147, 1158 (2008). The Supreme Court has consistently affirmed that "even in the formal litigation context, *pro se* litigants are held to a lesser pleading standard than other parties." *Id.* Therefore, any "parsimonious reading" of *pro*

se motions will run "contrary to our longstanding instruction that *pro se* filings must be 'liberally construed.'" *Simmons v. United States*, Supreme Court of the U.S., No. 20-1704 (November 1st, 2021). The Courts in this case have continued to apply an incorrect and overly stringent standard to a *pro se* litigant despite his ongoing submission of "sufficient factual matter" in the form of material evidence both during litigation and even after the final decision, evidence which demonstrates "a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Additionally, as stated in the April 2020 motion for panel rehearing, the "litigation is a civil law matter", but the judgments "exclusively rely on case law from criminal prosecutions to dismiss the Appellant's Fourth Amendment complaint". App.91.

CONCLUSION

Based on the aforementioned legal issues, the petitioner respectfully requests that this Petition for Writ of Certiorari should be granted. The Court may wish to consider reversal of the decision of the First Circuit Court of Appeals, and remand the case for further proceedings.

Respectfully submitted,

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