

Case No. 21-5414

ORIGINAL

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

JOHNNY TIPPINS, - Petitioner

vs.

ANTHONY IMMEL, Deputy Warden., et.al. - Respondents

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT BY THE SIXTH CIRCUIT
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

By: JOHNNY TIPPINS #342855
Oaks Correctional Facility
1500 Calverface Highway
Manistee, Michigan 49660

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(Error in Petition acknowledging Exhibits instead of Appendices)

APPENDIX A:

Order of Judgment on direct
appeal dated April 20, 2021.

APPENDIX B:

Order of Judgment on Petitions
for Panel Rehearing and Rehearing
En banc dated June 17, 2021

Questions Presented

I.

DID THE COURT OF APPEALS ABUSE THEIR DISCRETION WHEN IT FAILED TO VIEW THE EVIDENCE AT SUMMARY JUDGMENT IN THE LIGHT MOST FAVORABLE TO PETITIONER AND DENIED HIS RULE 56(d) MOTION, WITH RESPECT TO THE CENTRAL FACTS OF CASE, WHERE ADDITIONAL DISCOVERY REQUESTED WOULD SHOW DEFENDANTS WAS DELIBERATELY INDIFFERENT TO HIS SAFETY; DID THE SIXTH CIRCUIT IMPROPERLY WEIGH EVIDENCE AND RESOLVE DISPUTED ISSUES IN FAVOR OF THE MOVING PARTY?

II.

BECAUSE THE SIXTH CIRCUIT FAILED TO MAKE PROPER DETERMINATION TO VIEW THE EVIDENCE IN LIGHT MOST FAVORABLE TO PETITIONER THAT SUPPORTS AN EIGHTH AMENDMENT VIOLATION. PETITIONER PRESENTED ARGUMENTS IN REPLY BRIEF APPEALING SEVERAL NON-DISPOSITIVE MOTION DENIED THAT IN WHICH WAS NOT CONSIDERED ON APPEAL; THOUGH THE WAIVER INFRINGES ON HIS CONSTITUTIONAL RIGHTS. DID THE WAIVER ON APPEAL PRODUCE A PLAIN MISCARriage OF JUSTICE?

III.

DID THE COURT OF APPEALS FAIL TO CONSIDER EVIDENCE AND ARGUMENTS THAT MERITS THE LIKEILHOOD OF SUCCESS ON PETITIONER'S EIGHTH AMENDMENT CLAIM. WHERE ARGUMENT WAS MADE PETITIONER WAS IMPROPERLY PLACED IN THE START NOW PROGRAM FOR PRISONERS DIAGNOSED WITH SERIOUS MENTAL ILLNESS VIOLATES HIS CONSTITUTIONAL RIGHTS. BECAUSE THE RECORD EVIDENCE SHOWS A LIKEILHOOD OF SUCCESS ON HIS EIGHTH AMENDMENT CLAIM WAS THE SIXTH CIRCUIT REQUIRED TO GRANT PRELIMINARY INJUNCTION?

List of Parties

All parties do not appear in the caption of the case.
On the cover page, a list of all parties to the proceedings
in the court whose judgment is the subject of this petition is
as follows:

II

JOHNNY TIPPINS - Petitioner
HEIDI WASHINGTON, MOOC Director - Defendant
CATHERINE BAUMAN, Warden - Defendant
ANTHONY DIMMEL, Deputy Warden - Respondent
GREGORY SCHRAM, Resident Unit Manager - Respondent
KEITH CHAMBERLIN, Prison Counselor - Respondent
SCOTT SPADER, Deputy Warden - Respondent

III

THE COURT OF APPEALS TO CONSIDER EVIDENCE AND ARGUMENTS
THAT WERE THE SUBJECT OF SUCCESS ON PETITIONERS EIGHTH
LAW ENFORCEMENT CLAIM WHERE ARGUMENT WAS MADE PETITIONERS
IMPROPERLY PLACED IN THE STATE PRISON FOR PRISONERS DISPOSED
WITH EVIDENCE THAT VIOLATED HIS CONSTITUTIONAL RIGHTS.
BECAUSE THE RECORD EVIDENCE SHOWS THAT THE EIGHTH
ON HIS EVIDENCE CLAIM WAS THE SIXTH CIRCUIT REQUIRED
TO PRESENT EVIDENCE THAT

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Johnny Tippins, respectfully prays that a writ of certiorari is issued to review the judgment below.

OPINION(S) BELOW

For cases from federal courts:

The opinion(s) of the United States Court of Appeals appears at Appendix A and Appendix B to the petition and is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided the original matter was April 20, 2021.

After Piling Petitions for Panel Rehearing and Rehearing En banc, the date in which the United States Court of Appeals decided Petitions for Panel Rehearing and Rehearing En banc was June 17, 2021.

Thus the jurisdiction of this Court is invoked under 28 U.S.C.S. § 1254 (1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

FIRST AMENDMENT RIGHT

EIGHTH AMENDMENT RIGHT

42 U.S.C.S. § 1983

Fed. R. Civ. Pro. 56(d)

Fed. R. Civ. Pro. 56(e)

Fed. R. Civ. Pro. 56(f)

Fed. R. Civ. Pro. 56(c)

REASON FOR GRANTING THE PETITION

The Court is asked to apply its discretion, in terms of granting this petition for writ of certiorari under Supreme Court, Rule 10, ... United States Court of Appeals has departed from the accepted and usual course of judicial proceedings, ... Call for an exercise of this Court's supervisory powers."

Argument I

THE COURT OF APPEALS ABUSED THEIR DISCRETION WHEN IT FAILED TO VIEW THE EVIDENCE AT SUMMARY JUDGMENT IN THE LIGHT MOST FAVORABLE TO PETITIONER AND DENIED HIS RULE 56(d) MOTION, WITH RESPECT TO THE CENTRAL FACTS OF CASE, WHERE ADDITIONAL DISCOVERY REQUESTED WOULD SHOW DEFENDANTS WAS DELIBERATELY INDIFFERENT TO HIS SAFETY; THE SIXTH CIRCUIT IMPROPERLY WEIGH EVIDENCE AND RESOLVE DISPUTED ISSUES IN FAVOR OF THE MOVING PARTY.

In deciding a motion for summary judgment under Fed. R. Civ. Pro. 56, courts look at whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Additionally, a court must consider all pleadings, depositions, answers to interrogatories, affidavits and admissions on file and draw all justifiable inference in favor of the ~~party~~ non-moving party. See

Tolan v. Cotton, 572 U.S. 650 (2014); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); and Huckaby v. Priest, 636 F.3d 211, 216 (6th Cir 2011).

Once the movant shows that "there is an absence of evidence to support the nonmoving party's case," the non-moving party has the burden of coming forward with evidence raising a genuine issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

A motion for summary judgment forces the non-moving party to present evidence sufficient to create a genuine issue of fact for trial. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1990). In opposing a motion for summary judgment, the non-moving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but [rather] must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Bainhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

When reviewing a motion for summary judgment, it is important to note that the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to avoid summary judgment]. *Anderson*, 477 U.S. at 252. Instead, "there

must be evidence [presented] on which the jury could reasonably find for the plaintiff." *Id.* Ultimately, "when opposing party tells two different stories, one of which is blatantly contradicted by the record, so that no reasonably jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

"Courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau v. Haugen*, 542 U.S. 194, 195 n.2, 125 S.Ct. 596, 160 L.Ed. 2d 583 (2004) (per curiam); *Saucier*, *supra*, at 201, 121 S.Ct. 2151, 150 L.Ed. 2d 272; *Hope*, *supra*, at 733, n.1, 122 S.Ct. 2508, 153 L.Ed. 2d 666. An application of a more general rule that a "judge function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. 249, 106 S.Ct. 2505, 91 L.Ed. 202. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). In making that determination, a court must view the evidence "in the light most favorable to the opposing party."

Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970); see also *Anderson*, *supra*, at 255, 106 S.Ct. 2505, 91 L.Ed. 2d 202.

On direct appeal, the Court of Appeals for the Sixth Circuit had determined Tippins did not point to evidence that could establish Defendants knew of a serious risk to his safety yet failed to take reasonable steps to abate it. (See Exhibit A at p.g. 4)

Petitioner argued the district court failed at considering his reply briefs, particularly, "Plaintiff's Reply to Defendants' Response to Plaintiff Objection to the Magistrate Judge's Report and Recommendation (See R.E. 168 pgs. 1-9) where the claim was made, in Defendants' first interrogatories it was identified Defendants "knew of and disregarded a serious threat to his safety. (See R.E. 168 p.g. 2) The magistrate judge, the district court, and the Sixth Circuit failed to consider the answers to interrogatories as required pursuant to Fed. R. Civ. Pro. 56(c), when determining summary judgment.

The following interrogatories were given to each Defendants, and the answers from each Defendant appears as follows (regarding first interrogatories):


"2. Were you aware of the "Kite" that was attached to the request for protection that was written by Plaintiff Johnny Tippins? Explain your description of the words expressed in the "Kite."

Def. Chamberlin's Answer

Subject to and without waiving the above objection, I was aware that a Kite was attached to the request for protection filled out by Arus Salo, but do not recall the specifics of the Kite.

Def. Schram's Answer

Subject to and without waiving the above objection, the answer to the question is "yes." The Kite explains what Tippins #342855 alleges is a threat is to his safety.

Def. Immel's Answer

Subject to and without waiving the above objection, the answer to the question is "yes."

Def. Sprader's Answer

Subject to and without waiving the above objection, the answer to the question is "No."

"7. In the investigation narrative it states that Plaintiff Johnny Tippins claim while sitting in the dayroom he overheard guys talking about guys moving upstairs to get to the guy that locks in 242-L. Are the same claims mentioned in the Kite attached to the request for protection made by the Plaintiff? Explain.

Def. Chamberlin's Answer

As previously answered, I do not recall the specifics of the Kite, but this statement was made by prisoner Tippins during the interview I had with him.

Chamberlin's
Def. Answer

As previously answered, I do not recall the specifics of the Kite, but this statement was made by prisoner Tippins during the interview I had with him.

Def. Schram's Answer

Subject to and without waiving the above objection, the answer to the question is "No." The investigation narrative states that Tippins was sitting in the dayroom and heard this. The Kite states that Tippins had not been to the dayroom since February 16, 2018, but that the plan was for two prisoners to move to Tippins wing to get him with a weapon and hands.

Def. Immel's Answer

Objection. Defendant objects to the interrogatory for the reason that it asks Defendants to testify to events of his personal knowledge.

Def. Sprader's Answer

Subject to and without waiving the above objection, I did not take part in the investigation process of prisoner Tippins' claim.

Although Defendant Chamberlin claims in his first interrogatories that he could not find a prisoner with last name Raymond incarcerated at URF on February 1, 2018, after reviewing Tippins' file where URF had made such determination and transferred Petitioner to LMF. (See Def. Chamberlin's First Interrogatories)

These Defendants had agreed to force Tippins to go back to general population at LMF without investigating allegations that in which he claim he heard regarding an assault pertaining to himself. Defendants disregarded such risk of harm to Tippins because of claims of no Raymond at URF on February 1, 2018. Defendants disregarded the threat at LMF and failed to protect Petitioner by law.

it unlikely that the defendants omitted the second page in bad faith. The district court also noted that the system is open to the public, and the court performed its own search, which confirmed that the missing record was on the second page of results. (See Exhibit A pg. 5)

The finding at the spoliation-hearing motion was relied on in the magistrate judge's report and recommendation regarding Tippins Rule 56(d) motion and opposing defendants summary judgment. (RE 155, November 20, 2019, at pg 6-7) The argument was made on appeal, the district court failed to consider unredacted OTIS screenshots Petitioner submitted disputing Defendants argument at summary judgment ~~that there was~~ no ~~Raymond~~ at URF on February 1, 2018. Tippins pointed to the fact, after submitting unredacted OTIS screenshots ~~for~~ the months of June and July 2019, Thomas Raymond #452014 was not found on the second page of those searches. (See RE 130, Reply to Response to motion 112 & 114, Attachment Ex. A and RE 181 # Exhibit B)

The district court denied Tippins notice of appeal non-dispositive motion without addressing his argument regarding the unredacted screenshots he submitted. Whereas the second page in those documents Tippins submitted did not identify the finding the magistrate judge had found October 18.

2019, 30 individual inmates with the last name Raymond appearing on OTIS database. Where the magistrate judge weighed the evidence and credibility in favor of the moving-party.

In *Anderson*, this Honorable Court noted under Rule 56(e)'s provision, a party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." It was observed further that, "it is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial," 391 U.S. at 288-289.

The magistrate judge had determined that the 5 added names to OTIS under Raymond were included after Chamberlin's search. (See RE, 154 Order pg. 4 n.2) The district court followed same finding of Petitioner objection, the Magistrate Judge incorrectly found certain inmate information on second page of the screenshot from the OTIS website. The district court ruled Tippins without any supporting evidence, that Defendants tampered with the OTIS database. (RE, 177, February 10.

2020, Objection Two on pg. 3)

Petitioner demonstrated before the Court of Appeals that there were five deleted names from the OTIS screenshot that was not provided; had shown a total of 25 individual active offenders that has the last name Raymond. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. This Court reversed, pointing out that the moving party's submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury... to infer from the circumstances" that there had been a meeting of the minds. *Id.* at 158-159.

At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. The Court of Appeals erred affirming the lower court's ruling.

The material before the Magistrate Judge shown a total of 30 active offenders with last name Raymond. The argument is made, that in which, Tippins had long claimed that there were ~~the~~ five deleted names from the OTIS database and the screenshot submitted by defendants clearly supports such conclusion.² (See RE 103-1, pg 1D# 482)

The Sixth Circuit has precedent case that requires the district court to view the evidence in the light most favorable to the non-moving party, when reviewing a summary judgment motion. *Huekaby v. Priest*, 636 F.3d 211, 214 (6th Cir. 2011) where it determined:

"The district court inappropriately granted the officer's summary judgment based on qualified immunity as to the house guest's unlawful seizure claim because the district court erroneously interpreted the disputed factual issues in the light most favorable to the officers," at 216-17

The district court and the Sixth Circuit erred in failing to view the evidence sought by the Magistrate Judge that there was a Raymond on OTIS database that could have been housed at URF on February 1, 2018. But instead this evidence was favorable to the Defendants and a jury may find the evidence in favor of the Petitioner.

² Tippins claims that the external system of OTIS has been compromised by Defendants and the Internal system which the Magistrate Judge had viewed was never compromised being Defendants are not able to hack into that system to manipulate data as done externally. Viewing the evidence in favor of Tippins, inmates with last name Raymond shown internally demonstrates a genuine ~~and~~ dispute for trial.

Tippins argues that there is a contradiction in view of the ~~information~~ ^{information} compared to OTIS database ~~to the public's and~~ ~~and~~ obtaining the same information the magistrate judge had found. (If worded the proper way) Meaning, those unredacted OTIS screenshots Petitioner submitted to the Court contradicts the Court's finding 30 inmates with last name Raymond on OTIS database. Again, because of this contradiction and the fact that Tippins presented a genuine dispute of material fact that there was a ("Ray-Ray") Raymond housed at URF on February 1, 2018, ~~the~~ summary judgment granted in favor of Defendants should be reversed and remanded to district court for further proceedings.

To belietly add, the magistrate judge erroneously denied Tippins Rule 56(d) motion, finding that non-dispositive Motion to Compel (R.E. 127) required that Petitioner file Defendants response and/or objections to the request ~~to~~ to Compel and those requirements were not met.³ (See R.E. 154 Pg. 9) Petitioner's Motion to Compel Production of Electronic Stored Information (R.E. 127) was filed within the discovery period, that was extended to July 5, 2019, (See R.E. 123 Order dated June 25, 2019) which the motion was filed July 3, 2019, filed in the respectful time allowed by the Court.

Tippins argue Defendants did not file a response and or objections with him within the 30 day requirement. Further,

³Tippins relies on *Casc v. Unified Sch. Dist. No. 233*, 162 F.R.D. 147, 32 Fed. R. Serv. 3d (Callaghan) 1224 (D. Kan. 1995), Order granting motion to compel production of documents... failure to serve written response to request for production of documents and sanctions were appropriate...

In comparison to the previous request for Production of documents, Petitioner submitted ~~request~~^{Certificate} of Service and request to Defendants and filed Certificate of Service with the Court. (See RE 38, January 9, 2019) In response, Defendants filed their Certificate of Service with Court, (See RE 43, February 7, 2019) and same to Petitioner.

In ~~the~~ request for Production of Electronic Stored Information (RE 106, May 23, 2019) Petitioner forwarded those request attached to Reply brief regarding Appointment of a Special Master. (See RE 95, May 3, 2019) The docket entries below fails to show that Defendants filed the required Certificate of Service, responding to Petitioner's request. The Court of Appeals disregarded Tippins' argument recognizing Defendant's failure to file a response and/or objection in his Notice of Appeal of Magistrate Judge's Decision to District Judge. (See RE 156, November 27, 2019, Pg. 7) The Court of Appeals cited "Tippins repeatedly failed to abide by discovery rules," (See Exhibit A) Because this ruling effected the ruling regarding Petitioner's Rule 56(d) motion and granting summary judgment. The additional discovery described in Tippins Amended declaration meets the requirement in *Cardinal v. Metrish*, 564 F.3d 794, 797 (6th Cir. 2009)

The Sixth Circuit generally applies the abuse of discretion standard to the district court's decision to deny discovery

whether such request was made on a motion or by a Rule 56(f) affidavit. See *Plott*, 71 F.3d at 1196-97. It is not an abuse of discretion for the district court to deny the discovery request when the party "makes only general and conclusory statements [in its affidavit] regarding the need for more discovery and does not show how an extension of time would have allowed information related to the truth or falsity of the document to be discovered. *Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 354 (6th Cir. 1999). It is also not an abuse of discretion to reject a Rule 56(f) affidavit as insufficient to support further discovery when the affidavit lacks any details or specificity. *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989).

The Sixth Circuit analyzed the previous version of the rule in Federal Rule of Civil Procedure 56(f) in *Cardinal v. Metrish*, 564 F.3d 794, 797 (6th Cir. 2009). Tippins argues the Sixth Circuit abused their discretion following the precedent of the district court denying additional discovery; after Petitioner presented well detailed declaratory explaining the need for discovery. (See RE 148, September 12, 2019, Exhibit A, Plaintiff's Amended Declaration) The required standard was met, the Court found no abuse

of discretion "because the additional evidence that Tippins sought would not tend to show that the defendants were deliberately indifferent to his safety." (See Exhibit A pg. 5)

Petitioner request for the 2017 Incident Report regarding the homicide that occurred in Pine Unit among two African-American inmates who were denied protection and forced to reside in the same cell after advising LMF employees that there was tension between the two. (See RE 148 at pgs 4-6) Tippins request for URF's count board sheet to determine individual inmates ~~with~~ last name Raymond that was incarcerated at the facility on February 1, 2018. (See RE 148 at pgs. 5-6)

These request for additional discovery ~~to~~ to oppose Defendants summary judgment, that there is a genuine dispute of material fact that there was a Ray-Ray Raymond at URF on February 1, 2018. A jury could have ~~inferred~~ inferred such finding from the October 18, 2019 search of OTIS database that shown 30 active offenders with the last name Raymond. The Court of Appeals failed to apply these admissions in viewing the evidence in the light most favorable to this Petitioner.

But to stay on focus, the additional discovery were requested to show Defendants were deliberate indifferent to Tippins' safety. And the request for the 2017 Incident Report supports the claim that LMF does not provide protection to African-American inmates. The answers to the interrogatories demonstrates that Defendants knew of a threat and disregarded by unreasonably concluding that there was no Raymond at URF on February 1, 2018 but did not investigate whether there was a prisoner incarcerated at LMF name A-1 or sought to determine whether any inmates in Cedar unit Cwing were attempting to move on Dwing to assault the Petitioner.

The Sixth Circuit failed to view the evidence in the light most favorable to this Petitioner and saw that a jury could find that Defendants was deliberate indifferent to Tippins' safety on that front simply, because they were advised that a prisoner A-1 was planning an attack ordered by Ray-Ray Raymond from URF. The Defendants were required to investigate those claims. Because Tippins did not know the persons who he heard discussing this was not enough for the Defendants to halt with investigating allegations at their facility.

Petitioner relies on the concurring opinion of Justice Alito and Justice Scalia in *Tolan v. Cotton*, 572 U.S.

at 661 and ~~662~~ it was written.

"... the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. See e.g., this Court's Rule ('A petition for a Writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.'). S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed 2013) ('[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons'... that govern the grant of certiorari.').

As Justice Alito points out, "There is no confusion in the Court of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here. See 713 F.3d 299, 304 (CA 5, 2013)." Thus, the only issue is whether the relevant evidence, viewed in the light most favorable to the non-moving party, is sufficient to support a judgment for that party."

Tippins presented the relevant evidence, unredacted OTIS screenshots if viewed in the light most favorable to him, is sufficient to support a judgment for Petitioner. Also the Magistrate Judge's October 18, 2019

finding 30 active offenders with the last name Raymond is sufficient to support a judgment in favor of Tippins. The Court is asked to ~~re~~ reverse the Court of Appeals decision because there are genuine issues of material fact and summary judgment should not have been granted.

Argument II

BECAUSE THE SIXTH CIRCUIT FAILED TO MAKE PROPER DETERMINATION TO VIEW THE EVIDENCE IN LIGHT MOST FAVORABLE TO PETITIONER THAT SUPPORTS AN EIGHTH AMENDMENT VIOLATION. PETITIONER PRESENTED ARGUMENTS IN REPLY BRIEF APPEALING SEVERAL NON-DISPOSITIVE MOTIONS DENIED THAT IN WHICH WAS NOT CONSIDERED ON APPEAL; THOUGH THE WAIVER INFRINGES ON HIS CONSTITUTIONAL RIGHTS. THE WAIVER ON APPEAL PRODUCED A PLAIN MISCARRIAGE OF JUSTICE.

The Sixth Circuit has traditionally prohibited for the first time in reply brief, raises issues that were not raised in the opening brief. Arguments made for the first time in a reply brief are waived. *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010), "It is the general rule ... that a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). This rule is not jurisdictional, the Supreme Court has referred to it as a "practice", and a "rule of procedure." *Hornel v. Helvering*, 312 U.S. 552, 557, 85 L. Ed. 1037, 61 S. Ct. 719 (1941). Deviations are permitted in

exceptional cases or particular circumstances," *Id.*, or when the rule would produce "a plain miscarriage of justice." *Id.* at 558.

In *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997), the Sixth Circuit held, "While Rohner mentions the Government's failure to provide evidentiary support for the assessments at certain points in his opening brief, these 'references' were, at most, made in passing, and he did not develop the argument. Matters adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived, and it is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to... put flesh on its bones." *United States v. Robinson*, 390 F.3d 853, 886 (6th Cir. 2004)

Petitioner makes the argument that because the magistrate judge had searched OTIS database on October 18, 2019 and found 30 active offenders with the last name Raymond. Where there are a showing that at least five of those named inmates looked at URF on February 1, 2018. Which demonstrates that Tippins satisfied the subjective component in *Farmer*, Defendants perceived facts from which Petitioner explained that there was a Ray-Ray Raymond at URF related to the victim in his murder conviction case that plan to attack him in retaliation. Defendants saw that there were

in fact several inmates with last name Raymond that was incarcerated at URF on February 1, 2018 and disregarded the risk after Tippins explained that a prisoner "A-1" was continuing to plan the attack while at LMF. (See Defendants First Interrogatories R.E 59) Defendants was deliberately indifferent ~~in~~ to Petitioner's safety, his Eighth Amendment right was violated.

Because there is a showing that Defendants violated Tippins Eighth Amendment right, it would be a plain miscarriage of justice if Petitioner is not allowed to appeal the district court's denial of several non-dispositive motions. As mentioned, the district court adopted the magistrate judge's November 15, 2019 order denying Petitioner's Motions for hearing on spoliation of the evidence. (See R.E. 156 pgs. 2-5)

Although the magistrate judge found on October 18, 2019, that OTIS database contained 30 active offenders with last name Raymond, the OTIS screenshot submitted by Defendants May 23, 2019 did ^{not} reflect the same. (See RE 103-1 Pg 482) The argument was made in Tippins motion, Defendants altered OTIS screenshots, hiding ~~the~~ inmates names in order for Petitioner not to establish his claim that an inmate Ray-Ray Raymond was at URF on February 1, 2018. From the magistrate judge's findings, it is ^{proven} ~~proven~~ that Defendants had hidden names from

Tippins. This argument on appeal in Petitioner's reply brief is somewhat different but the facts remain. The internal system the magistrate judge viewed may be unchangeable, while the external system of OTIS was compromised. The fact that the magistrate judge relied on the internal system (OTIS) in determining or deciding the motion for hearing on spoliation is all together different than analysis ~~of~~ OTIS screenshot submitted by Defendants.

While the Court of Appeals found the district court did not abuse its discretion in holding Tippins had failed to show that Chamberlin tampered with the screenshot or destroyed evidence. (See Exhibit A Opinion) The simple fact that the OTIS screenshot Chamberlin provided only contained 25 active offenders and search conducted by the Court contained 30 active offenders. The Court of Appeals did not review this argument on appeal because Petitioner did not place it in his opening brief. If the Court allows this ruling to stand, it violates Tippins' constitutional rights under due process.

Petitioner argues that the Court of Appeals is required to review the district court's decision denying Motion to Amend his complaint. (RE 156 pgs 5-8 and RE 177 pg 6-7)

The district court applied the law in *Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995) inadequately. Petitioner claims: The magistrate judge stated, "...allowing Tippins to amend the complaint would result in undue delay and prejudice Defendants." (See RE 156 at pg. 6) The Court had acknowledged the deadline to file motion was extended to July 10, 2019 and Petitioner filed his motion to Amend July 3, 2019. (See RE 125, July 3, 2019)

Although the Court says that if Tippins' motion was granted it ~~will~~ ^{would} prejudice the Defendants. But the fact that his motion was timely filed should ~~not~~ have any effect on Defendants ability to perfect a new summary judgment. The district court did not recognize this argument in Tippins Notice to Appeal. (See RE 156 pgs. 4-6) Also the district court did not correctly acknowledge Petitioner's argument that granting the motion to Amend Complaint would not be futile in his reply brief. (See RE 165 at pgs. 3-5) Which the retaliatory transfer to Oaks' Start Now Program is the subject of the preliminary injunction, The Court of Appeals had denied because it had determine the Petitioner's Eighth Amendment right was not violated. Defendants placed Petitioner in the Start Now Program after refusing him protection where the ~~record~~ ^{record} demonstrate that there was a Raymond at URF on February 1, 2018.

Tippins argued that he was placed in mental illness program is the type of foreseeable consequences that would deter a person of ordinary firmness from continuing to engage in protected conduct activity. The district court erroneously concluded Petitioner did not endure an adverse act. Whereas Tippins remains in the Start Now Program, his First Amendment Right continues to be violated.

Defendant Spader had stated in his second interrogatory that Tippins was placed in the Start Now Program because "Plaintiff, for a significant period of time, had refused to follow orders to return to the general population at Alger Correctional Facility, and as a result ~~he~~ he resided in administrative segregation as opposed to general population. Because Plaintiff was unable to be effectively managed in Alger's general population, he was transferred to the Oaks Correctional Facility in order to participate in that facility's "START program." Spader continues, "And the START program at Oaks is designed to provide prisoners with a secure general population alternative to administrative segregation...."

Pursuant to MDOC Director's Office Memorandum (DOM) 2020-20 (eff. Jan. 1, 2020), "the START Now Program is an alternative-to-segregation program for prisoners diagnosed with a serious mental illness." This section of the Director's Office Memorandum ~~does~~ is not

included in Defendant Spader's interrogatories. (See RE 127 Exhibits A-D) From Defendant Spader's second interrogatory, it clearly establishes that Petitioner was transferred to Oaks' START Now Program, where he is not a mental ill prisoner. Therefore this placement was in retaliation for engaged in protected conduct activity. Whereas Defendants denied him protection and Petitioner sought protection in administrative segregation. Tippins claims it is a plain miscarriage of justice if the Sixth Circuit does not review his appeal regarding the claim of amending his First Amendment retaliatory transfer claim.

Petitioner sought an appointment of counsel being that he was unable to obtain adequate documentation regarding "Ray-Ray" Raymond at URF on February 1, 2018. Because the magistrate judge's judicial notice has established that there is/was a Raymond ~~on~~ at URF on the above date, appointment of counsel is necessary for further proceedings. Petitioner argues it would be a plain miscarriage of justice if this argument is not considered on direct appeal. Being that summary judgment would be reversed and possibly granted in Petitioner's favor, damages would need be assessed. Because Defendants did violate Petitioner's Eighth Amendment right; caused him to stay or seek protection in administrative segregation, caused him to loose weight; & a

2) Although the declaratory relief was not included in Petitioner's Complaint; because Tippins ~~described~~ imminent danger at the time he had filed complaint; the Court is asked to consider making an exception being that the function of LMF had caused a homicide and fail to recognize African-American right; 3) Because the risk of harm continued after transferring Tippins to Oaks' START Now Program (See Colvin v. Caruso, 605 F.3d 282, 295 (6th Cir. 2010) and 4) the solution of prisons that are operated with 98% white employees is clearly a violation of the equal privileges under the United States Constitution.

This argument comes in the wake of our liberties being tested with the insurrection on the United States capital, the white extremist groups employed in local state jobs who uses their state jobs to carry out their racial agenda. The argument is supporting the big picture that this country is faced with daily. Some has voiced their bias opinions in support of another civil war with hopes of the other side to prevail and change the laws and constitution of this great nation. This petition is apart of the fight, the good fight where so many lost and unknown names sacrificed their lives to assure that Petitioner is able to exercise his freedoms, in this Honorable Court.

disconnection from family, not able to maintain a prison lifestyle and other. It would be a plain miscarriage justice, record evidence supports such finding.

Petitioner filed a declaratory relief motion in the district court and it was denied after requesting because there was a homicide among two African-American inmates just prior to Tippins' transfer a LMF. Where prior to the fatal assault, both inmates requested to LMF employees that because they did not get along they did not want to lock in the same cell. The protection request was denied and the homicide ensued thereafter. The fact that the population at LMF, URF, and ECF is mostly African-Americans, the argument was made particularly at LMF that 21 African-Americans should be employed there to ensure transparency. (See RE 150 at pg. 1)

This motion was denied (1) Tippins did not overcome or establish a showing of an Eighth Amendment violation; (2) The declaratory relief was not in his original complaint; (3) Petitioner is no longer at LMF; (4) Courts general do not interfere with hiring of prison employees.

Petitioner points and says it would be a plain miscarriage of justice not to be allowed to appeal this motion's denial. 1) Tippins claims the record evidence shows an Eighth Amendment

Therefore, this Honorable Court is not asked to rule on the merits of any of the non-dispositive motions. But find because there is a showing that Petitioner's failure-to-protect claim is supported by the record that his Eighth Amendment rights was violated; it would be a plain miscarriage of justice if the Sixth Circuit would not hear Tippins' arguments regarding non-dispositive motions. The Court is asked to remand the matter pursuant to Argument I hereof with instructions to the Court of Appeals to hear arguments regard non-dispositive motions.

Argument III

THE COURT OF APPEALS FAIL TO CONSIDER EVIDENCE AND ARGUMENTS THAT MERITS THE LIKEHOOD OF SUCCESS ON PETITIONER'S EIGHTH AMENDMENT CLAIM. WHERE ARGUMENT WAS MADE PETITIONER WAS IMPROPERLY PLACED IN THE START NOW PROGRAM FOR PRISONERS DIAGNOSED WITH SERIOUS MENTAL ILLNESS VIOLATES HIS CONSTITUTIONAL RIGHTS. BECAUSE THE RECORD EVIDENCE SHOWS A LIKEHOOD OF SUCCESS ON HIS EIGHTH AMENDMENT CLAIM THE SIXTH CIRCUIT WAS REQUIRED TO GRANT PRELIMINARY INJUNCTION.

"An inmate seeking an injunction on the ground that there is a contemporary violation, of a nature likely to continue must adequately plead such a violation. To survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at

the time of summary judgment, knowingly and unreasonably disregarding an objective intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future. If the Eighth Amendment's subjective and objective requirements are satisfied the court can grant appropriate injunctive relief." *Farmer v. Brennan*, 511 U.S. 825, 845-46 (1994).

A prisoner may obtain injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm "if the prisoner is able to establish that the prison personnel were, and are continuing, to 'knowingly and unreasonably disregard an objectively intolerable risk of harm.'" *Farmer, supra*.

The Sixth Circuit has held, "generally, a panel entertaining a preliminary injunction appeal decides only whether the district court abused its discretion in ruling on the request for relief and does not go into the merits any further than necessary to determine whether the moving party established a likelihood of success." *Rogers v. Corbett*, 468 F.3d 188, 192 (3rd Cir. 2006); see also *Wright & Miller*, 11A Fed. Prac. & Proc. Civ. 2d § 29.62 West 2009) ("In general, when the appellate court determines that

the trial court's order denying injunctive relief was erroneous, it will reverse and remand the case for further proceeding below."); Able v. United States, 44 F.3d 128, 132 (2nd Cir. 1995)

Because the instant case had decided the preliminary injunction motion as a dispositive motion, the district court required Petitioner to establish the four prongs in *Frisch's Rest., Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985). Tippins was unable to overcome the first prong, "a strong or substantial likelihood of success on the merits," that Defendants violated his Eighth Amendment right.

Throughout this Petition, Petitioner establishes the record evidence that the Sixth Circuit viewed the evidence in the light most favorable to the Defendants. Where this instant matter begun at Alger Correctional Facility, Tippins requested for protection after overhearing prisoners discussing that a prisoner "A-1" had plan to have other prisoners from C-wing in Cedar Unit move upstairs to D-wing where Tippins' cell was located and assault him.⁴

The affidavit Defendant Chamberlin submitted to the Court demonstrates the subjective component in *Farmer*, "defendants perceived facts from which to infer a substantial risk to" Tippins

⁴(See R.E. 117, Motion to Supplement, June 14, 2019, pgs. 1-3)

and that Defendant disregarded that risk."

"Plaintiff request for protection which was filed after he claimed to hear several prisoners discussing a potential attack on the prisoner that locks in 242-L, the cell in which Plaintiff locked at the time. Plaintiff also stated that he overheard that these prisoners were receiving orders from a prisoner with the nickname "Al." " 5. After speaking with Plaintiff I made the decision to investigate the accuracy of Plaintiff's statement that a prisoner name "Ray-Ray" who locked with Plaintiff in URF is out for revenge..." (See RE 103, May 23, 2019, Pg ID# 478)

Defendant Chamberlin disregarded investigating the potential threat at LMF regarding prisoner Al which is the facility Defendant was employed. Chamberlin states he did not investigate those claims because Tippins did not provide other specific details. That decision was deliberate indifference to Petitioner's safety. Where Defendants was told about the potential attack and ordered Tippins to return to Cedar unit without investigating or removing him from potential harm. (The 2017 homicide in Pine unit at LMF shows same similarities.)

The Sixth Circuit did not view the evidence in the light most favorable to Petitioner and made the determination that a

jury or judge trier of fact could issue a judgment in ~~favor~~ favor of Petitioner. Tippins argues same regarding unredacted OTIS screenshots that did not contain 30 active offenders, the that magistrate judge had founded without considering that evidence in a light most favorable to Petitioner.

Tippins opines that the record evidence demonstrates a likelihood of success on the merits of his Eighth Amendment claim, the ~~the~~ Sixth Circuit abused their ~~discretion~~ ~~discretion~~ affirming the district court ruling. Where the record pleadings shows that Tippins did plead that he was incorrectly placed in the Start Now Program because he is not a mental illness prisoner.

"The attached ECF Start Unit describes what is required from prisoners that are placed in this program. Mr. Tippins argues that he was not interviewed by a psychiatrist and there was no recommendation asserted to place Plaintiff in such program." (See RE 78, "Motion for temp. restr. order regarding transfer," April 17, 2019) (This particular pleading was granted to include in findings by the district court, February 10, 2020, RE 177, at pg. 10)

On appeal Petitioner argued the Supreme Court's "All Writs Act" in *United States v. New York, Tel. Co.*, 434 U.S. 159, 54 L.Ed. 2d 376, 98 S. Ct. 364 (1977). And stated ECF employees continue to violate his First Amendment right. The focus of the Sixth Circuit's

ruling regarding petitioner's preliminary injunction, after Tippins argued on appeal the district court did not review his spoliation argument before denying his injunction motion." (See Exhibit A) The defendants had argued that petitioner did not raise this argument in his motion for an injunction. Tippins claims to the contrary, in principle motion for an injunction it is true this was not apart of Tippins' argument. Reason being, the spoliation issue was acknowledged after defendants filed Defendant Chamberlin's ~~affidavit~~ affidavit, May 23, 2019, whereas the ~~original~~ ~~original~~ ^{original} injunctive pleading was filed April 17, 2019 (See R.E 77) Petitioner did raise this argument in his "Motion to Supplement Plaintiff's Objection to Magistrate Judge's Report and Recommendation." (See RE 117, June 14, 2019, pg 3)

"The attached OTIS screenshots sheet indicates Def. Chamberlin fraudulently conceals the identity of several inmates with the last name Raymond. Which gives the notion that there is/was a prisoner with the last name Raymond had locked at URF on February 1, 2018. And Def. Chamberlin had fabricated all the documents and failed to investigate the situation at LMF in order to give Mr. Tippins the proper protection necessary."

This particular pleading presented arguments Defendants failed to address and the Sixth Circuit erred in viewing the pleadings in a light most favorable to the petitioner. Which shows a likelihood of success on the merits. This Honorable Court is respectfully

asked to reverse the Sixth Circuit's April 20, 2021 order finding ~~that~~ pursuant to Tolan v. Cotton, 572 U.S. 650 (2014) the Court of Appeals erred in failing to view the evidence in a light most favorable to Petitioner. Reverse the Sixth Circuit ruling regarding the preliminary injunction and waiver issues regarding not considering non-dispositive motions on appeal, due to the fact that Tippins demonstrated that Defendants had violated his Eighth Amendment right and there are genuine disputes of material facts that a jury could find in his favor.

CONCLUSION

Petitioner Johnny Tippins respectfully ask this Honorable Supreme Court grant this petition for writ of certiorari and reverse the Sixth Circuit's April 20, 2021 and remand for further proceedings consistent with argument herof. And grant any available relief this Court deems appropriate and just.

Petitioner Johnny Tippins prays that this Court grants this petition and relieve him from continuing incarceration in the Start Now Program. Ask the Court to place him in ~~the~~ proper level II setting. Where Tippins respectfully ask for an immediate response to this petition because he has been in the Start Now Program 27 months, continuing placement in segregation. MOOC did not honor the protection request required by law.

Respectfully submitted,

Mr. Johnny Tippins
MR. JOHNNY TIPPINS #342855
Oaks Correctional Facility
1500 Caberfae Highway
Manistee, Michigan 49660

Dated: July 10, 2021