U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

March 2, 2022

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Mark Stinson v. K. Cauley, et al., No. 21-6517

Dear Mr. Harris:

The petition for a writ of certiorari in the above-captioned case was filed on November 9, 2021, and placed on the docket on December 7, 2021. A response was due on January 6, 2022, but none was filed. The petition was circulated for the conference of February 18, 2022, but the Court directed your Office to request that a response be filed, and that request was sent to this Office. The unusual procedural posture of the case, however, precludes this Office from filing a response. As explained below, petitioner's suit was dismissed by the district court before the defendants named in the complaint were served, and the named defendants in this matter are represented by neither the Department of Justice nor, to our knowledge, any other counsel.

Petitioner is a federal prisoner who filed, *pro se* and *in forma pauperis*, a civil suit against several officials of the Federal Bureau of Prisons under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See Pet. App. B15.[1] Petitioner's complaint alleged that the officials had violated his First, Fifth, and Eighth Amendment rights by sending him to a special housing unit on multiple occasions and denying him access to visitors. D. Ct. Doc. 2, at 1-12 (Apr. 9, 2021).

Petitioner's suit was subject to the screening requirement of the Prison Litigation Reform Act of 1995 (PLRA), which provides that the district "court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. 1915A(a). When reviewing a complaint at the screening stage, the court is required to "dismiss the complaint" if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. 1915A(b)(1); see generally *Jones* v. *Bock*, 549 U.S. 199, 214 (2007) ("In the PLRA, Congress * * * provided for judicial screening and *sua sponte* dismissal of prisoner suits[.]"); *id.* at 223 ("The PLRA mandated early judicial screening to reduce the burden of prisoner litigation on the courts[.]").

[1] The petition appendix has page numbers that continue from the petition itself, though petitioner has designated the court of appeals' judgment as Appendix A (at page 14) and district court documents as Appendix B (at pages 15-19). Our citations to the appendix combine those letters with the continuous page numbers.

Consistent with the PLRA's screening requirements, the district court dismissed petitioner's suit after petitioner filed the complaint but before any named defendant was served. See D. Ct. Doc. 13, at 1 (July 26, 2021) ("NOA [notification of appeal] SUPPLEMENT," prepared by the district court clerk's office, specifying, on the line for identifying "Appellee's Attorney(s)," that the case was "Dismissed pre-service"). Five days after the complaint was filed, a magistrate judge issued a recommendation that the complaint be dismissed. Pet. App. B15-B18 (Apr. 14, 2021). In the recommended disposition, the magistrate judge explained that (1) some of petitioner's claims were duplicative of retaliation claims that petitioner had asserted in a previous suit that had been dismissed, *id.* at B15-B16; (2) retaliation claims arising from newer events were not duplicative but, as a legal matter, still "cannot be brought in a *Bivens* action," *id.* at B17; and (3) for purposes of his due process claims, petitioner "had no liberty interest at stake," *ibid.* Petitioner filed a response to the magistrate judge's recommendation, in which he claimed to make an "AMENDMENT OR REVISEMENT," reiterating claims under the Fifth and Eighth Amendments but stating: "At this time the petitioner is NOT filing a retaliation claim." D. Ct. Doc. 4, at 1 (Apr. 30, 2021).[2] A few days later, the district court issued an order stating that, after "review[ing] the entire record *de novo*," it was adopting the magistrate judge's recommendation and dismissing the complaint without prejudice. Pet. App. B19 (May 4, 2021). The court also noted that the dismissal would be considered a "strike" under 28 U.S.C. 1915(g) for purposes of future *in forma pauperis* filings by petitioner as a prisoner.

Petitioner appealed the dismissal. The court of appeals did not set a briefing schedule; instead, it referred the appeal "to a panel of judges for initial review." C.A. Doc. 1, at 1 (July 27, 2021). The letter to petitioner from the Clerk of Court about the docketing of the case and its referral for initial review expressly noted that, because "defendants were not served in the district court," petitioner was "the only party to this appeal," although the full case caption in the letter still included "Defendants-Appellees." *Id.* at 1, 2. The court of appeals summarily affirmed the judgment of the district court. Pet. App. A14.

The cover of the petition for a writ of certiorari identifies the defendants named in the complaint as respondents in this Court. As explained above, however, those defendants were never served with process, and they did not participate in the proceedings in either the district court or the court of appeals. See D. Ct. Doc. 13, at 1; C.A. Doc. 1, at 1; see also *Murphy Bros.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) ("In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant.").

[2] In this Court, the questions presented do not mention retaliation or the First Amendment, but the body of the petition does. See, *e.g.*, Pet. 6, 7, 8, 12. In another case expressly presenting a question involving a retaliation claim against a Bureau of Prisons official, this Office recently filed a brief opposing certiorari, explaining, *inter alia*, that every federal court of appeals to consider the issue since *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), has declined to extend *Bivens* to a prisoner's First Amendment retaliation claim and, further, that it was not necessary to hold that case pending this Court's resolution of *Egbert* v. *Boule*, No. 21-147 (argued Mar. 2, 2022). See U.S. Br. in Opp. at 16-17, *Patton* v. *Kimble*, No. 21-5780 (Feb. 2, 2022).

When a federal employee is sued in an individual capacity concerning actions that "reasonably appear to have been performed within the scope of the employee's employment," the employee may seek representation from the Department of Justice by submitting "a written request for that representation, together with all process and pleadings served upon him." 28 C.F.R. 50.15(a)(1). In this case, the individuals named as defendants in petitioner's complaint were never served with process, and they did not submit a written request for representation by the Department. *Ibid.* The Department has therefore not had occasion to determine whether to offer to provide such representation. See 28 C.F.R. 50.15(a)(2). Nor have defendants affirmatively "elect[ed] representation by Department of Justice attorneys" after being notified of their "right to retain private counsel." 28 C.F.R. 50.15(a)(8). Accordingly, the Department has no attorney-client relationship with the named defendants. Cf. 28 C.F.R. 50.15(a)(3).

Because the Department does not represent the named defendants in petitioner's suit, we are not in a position to file a response on their behalf. Nor, to our knowledge, are they currently represented by any other counsel, since they have not yet had to appear in the case in either of the courts below.

Sincerely,

Elizabeth B. Prelogar
Solicitor General

cc: See Attached Service List

21-6517
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