No. 21-7247

IN THE
SUPREME COURT OF THE UNITED STATES

Kevin E. Herriott — PETITIONER

vs.

Lieutenant Jackson — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
United States Court of Appeals, Fourth (4th) Circuit

PETITION FOR WRIT OF CERTIORARI

Kevin E. Herriott
Post Office Box 8000
Shirley, MA 01464

QUESTION(S) PRESENTED

1) WHETHER THE CLAIMANT IS ENTITLED TO OFFER EVIDENCE TO SUPPORT HIS CLAIMS?

LIST OF PARTIES

Mr. Jackson Defendant, Respondent
Kevin E. Herriott, Petitioner

RELATED CASES

Kevin Herriott vs. Mr. Jackson
Case No.: 6:20-cv-03365-DCN-KFM
Appellate No.: 21-6085

LEGAL MAIL
MAIL ROOM

TABLE OF AUTHORITIES CITED

PG.(S)

CASES

Federal Rules of Civil Procedure

Rule 8
Rule 9 (b)
Rule 12 (e)
Rule 56

TABLE OF CONTENTS

INDEX TO EXHIBITS

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 at Exhibit 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[✓] is unpublished.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 at Exhibit A to the petition and is

[ ] reported at ______________; or,

[ ] has been designated for publication but is not yet reported; or,

[✓] is unpublished.

JURISDICTION

[✓] For case from federal courts:

The date on which the United States Court of Appeals decided my case was May 3, 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: September 8, 2021, and a copy of the order denying rehearing appears at Exhibit A.

[✓] An extension of time to file the petition for a writ of certiorari was granted to and including February 5, 2022 (date) on December 6, 2021 (date) in Application No. 21 A 202.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Code Annotated Title 18 Crimes And Criminal Procedure § 1702 provides:

Whoever takes any letter, postal card, or package out of any post office, or authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined under this title or imprisoned not more than five years, or both.

2. United States Code Annotated Title 28 Judiciary and Judicial Procedure § 636 (b) (1) provides:

Notwithstanding any provision of law to the contrary —

(A) a judge may designate a magistrate [magistrate judge] to hear and determine any pretrial matter pending before the Court except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the Court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate [magistrate judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the Court, or any motion excepted in subparagraph (A), of posttrial [post-trial] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging **conditions** of confinement.

(C) the magistrate [magistrate judge] shall file his proposed findings and recommendations under subparagraph (B) with the Court and a copy shall forthwith be mailed to all parties. Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the Court may accept, reject, or modify, in whole or in part, the findings, or recommendations made by the magistrate [magistrate judge]. The judge may also receive further evidence or recommit the matter to the magistrate [magistrate judge] with instructions.

3. United States Code Annotated Title 42, The Public Health and Welfare Civil action for deprivation of rights [Statutory Text & Notes of Decisions Subdivisions I to IX] § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTERTEST OF THE UNITED STATES

This case presents an important question concerning the application of Federal Rule of Civil Procedure 9, which out-lines the required content of a complaint to mail fraud, obstruction of justice, mail tamperance, mailing interferences, and due process claims arising under Title 42 of the Civil Rights Act of 1983, 42 U.S.C. 1983. The department of corrections (doc) and named Respondent share responsibility for enforcing customs and procedures against prisoners within the (doc). In addition, the Respondent has primary responsibility for administering and enforcing such practices in procedure. The court's decision in this case thus is likely to affect the enforcement responsibilities of the (doc) and their employees.

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STATEMENT OF THE CASE

1. This case concerns the adequacy of a complaint alleging mailfraud, obstruction of justice, mail temperance, mailing interferences, and an procedural due process in violation of Title 42 of the Civil Rights Act of 1983, 42 U.S.C. §1983. In relevant part, Title 42 makes it unlawful for an person to deprive the petitioner of a liberty protected interest.

Federal Rule of Civil Procedure 9 governs the content of pleadings in all suits of a civil nature in the United States district courts. See Fed. R. Civ. P. 1, and 9. Rule 9 directs that a complaint must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Lastly Rule 8(e) instructs that "all pleadings must be construed so as to do justice..

2. Petitioner is a state's prisoner confined to the South Carolina Department of Corrections. Respondent is the defendant named in the civil suit who is a United States citizen that is an employee of the department of corrections.

Petitioner filed suit under §1983 claiming that Respondent unlawfully committed mail fraud, obstruction of justice, mailing interference, mail temperance, and deprived Petitioner of an procedural due process. According to the complaint, Respondent took plaintiff's mailing correspondences that were addressed to the

LEGAL MAIL
MAIL ROOM

court. The legal correspondences contents enclosed were a(n) Federal Writ of Certiorari that was submitted by the Petitioner giving the correspondences to the Respondent to be process for service at Lieber Corrections Mailroom while Petitioner was housed at Lieber Corrections, located in the Restrictive Housing Unit (RHU). However, before the mailing legal correspondences made it to the RHU's mailbox so that Lieber mail personnel could pick up the correspondences Respondent had interfere by committing mail fraud.

Respondent had attempted to hinder plaintiff's legal existing action, that found in case action Herriott vs. Joyner, et al., 6:19-cv-626-DCN-KFM, with the design to obstruct the legal correspondeces by interferring with the Writ of Certiorari. Also, during that time the Respondent's conduct had delayed Petitioner's reply to summary judgment in case action Herriott vs. McCabe, 6:19-cv-803-DCN-KFM, by swapping the Petitioner's reply to summary judgment seizing the writ of certiorari to make it look like the writ was process for service when it was not. Three days prior to the federal writ was supposed to be process, the Petitioner submitted his reply to summary judgment, but the Respondent withheld that correspondence until the writ of certiorari was submitted delaying the reply to summary judgment.

3. On May 26, 2020, the Plaintiff was notified

LEGAL MAIL
MAIL ROOM

from defendant's Counsel in action Herriott vs. Joyner, et al., 6:19-cv-626-DCN-KFM, that there is no record of Plaintiff filing a petition for writ of certiorari with the U.S. Supreme Court. (doc. 145).

On May 29, 2020, the Plaintiff contacted United States Court of Appeals, For the Fourth (4th) Circuit, Clerk's Office to receive case history report for the case action Herriott vs. Joyner, et al. According to the report, the Writ was received to the U.S. Court of Appeals in which was returned to the Plaintiff. The Plaintiff sent the writ to the wrong court. After fixing the correct address, the Plaintiff gave the defendant the mailing correspondence to place the legal correspondence into the RHU's mailbox.

Then, the Plaintiff exhausted his available administrative remedies before filing § 1983 Complaint that was docketed for judicial screening on September 23, 2020. On October 21, 2020, the court instructed the Plaintiff to correct the errors within the complaint and to amend the complaint in proper form (doc. 7)

— On November 04, 2020, the Plaintiff's § 1983 amended complaint was docketed for judicial screening. On December 01, 2020, the U.S. Magistrate report and recommendation (hereinafter "R&R") was entered followed by an timely objection by the Plaintiff. On December 16, 2020, the district court affirmed the U.S. Magistrate's R&R and dismissed the action with prejudice without issuance for service of process the Plaintiff's summons and § 1983 amended complaint (doc. 20)

The Plaintiff has decided to appeal to the Fourth Circuit determination and decision whereby issuing a(n) order in error.

REASONS FOR GRANTING THE PETITION

The reason(s) for granting the petition are submitted hereto and attack herein below:

1) The ways the decision of the lower court in Petitioner's case was clearly erroneous.

2) The opinion conflicts with a decision of the U.S. Supreme Court, and the conflict was not addressed.

- WHETHER THE CLAIMANT IS ENTITLED TO OFFER EVIDENCE TO SUPPORT HIS CLAIMS?

The Appellant Kevin E. Herriott in PRO SE, (Petitioner) submits that he is entitled to offer evidence to support his claims in respect to averring meritorious substantial claims of mail fraud, obstruction of mailing correspondences, denial of direct access to the courts, and denial of an procedural due process while resting upon the grounds of his First and Fourteenth Amendments of the United States Constitution of America.

Assuming Arguendo that the court's legal conclusions and findings of fact are clearly erroneous when it had impermissibly applied what amounted to a hightened pleading requirement by insisting that the Appellant allege "specific facts" beyond those necessary to state his claims and the grounds showing entitlement to relief. (doc. 16).

On November 4, 2020, the Appellant amended his §1983 complaint averring fraud stating with particularity the circumstances of defendants adverse conduct. See Federal Court Rules of Civil Procedure, Rules 8, 12(e), & 56, 28 U.S.C.A.

Under the simplified standard for pleading set forth in Federal Rules of Civil Procedure, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations; if a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement before responding, and moreover, claims lacking merit may be dealt with through summary judgment. Fed. Rules Civ. P., Rules 8, 12 (e), & 56.

The Appellant directs the Court's attention to this "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings. See Continental Collieries, Inc. v. Shober, 130 F. 2d 631, 635 (C.A. 3 1942) (No matter how likely it may seem that the pleader will be unable to prove his case he is entitled upon averring a claim, to an opportunity to try to prove it.)

None theless, the Appellant Herriott demonstrates that his § 1983 Amended Complaint avers:

Statement of the Claim

1) Since Approximately, on September 25, 2019, defendant named Mr. Jackson, acted under color of state law, in order to hinder the Plaintiff Herriott's ability to litigate pending civil lawsuit and by defendant Mr. Jackson's action has frustrated or is impeding the plaintiff's attempt to bring a non-frivolous legal claim.

2) On or before September 26, 2019, defendant Mr. Jackson were in the custody of Plaintiff Herriott's mailing correspondences before it has been delivered to the person to whom it was directed, with design to obstruct the correspondences or to pry into the business or secrets of another, or opens or destroys the same in violation of statute 18 U.S.C.A. §1702.

3) On or before September 26, 2019, defendant Mr. Jackson took or was responsible for actions that hindered Plaintiff's efforts to pursue a legal claim and as a result of defendant's alleged conduct was deliberate and malicious creating, causing, and/or subjecting the Plaintiff to actual damages such as the dismissal of an otherwise meritorious legal claim

or appeal, intentional infliction of emotional distress, depression, and mental anguish. Accord 14th Fourteenth Amendment, U.S. CONST.

4) On or before September 26, 2019, defendant Mr. Jackson's deliberate and malicious interference actually impeded the plaintiff's access to the courts or prejudiced an existing action violating the Plaintiff's First Amendment Right, the right of access to the courts, and the right to the free flow of incoming and out-going mail.

5) The Plaintiff Herriott possessed a liberty or property interest protected by the United States Constitution and Federal Statutes, and the requisite process was not provided before he was deprived of that interest, whereby, upon defendant Mr. Jackson's actions with an invidious intent to sabotage, hinder, interfere by theft and obstruction by mail tamperance Plaintiff's legal existing action was dismissed causing actual damages.

Nonetheless, the U.S. Magistrate R&R (doc. 16 pg. 1) specifically states, that "Plaintiff's amended complaint likewise fails to state a claim upon which relief may be granted."

Howbeit, an failure to state a claim means even if all facts in your complaint are, they still could not possibly establish a violation of law the court could remedy. See Jones v. Bock, 549 U.S. 199, 212-13, 127 S.Ct. 910, 920-21, 66 L.Ed. 2d 798, 812-13 (2007); Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80, 84 (1957) (holding a case should not be dismissed for failure to state a claim unless it is "beyond doubt that the plaintiff can prove no set facts in support of his claims would entitle him to relief.")

Meanwhile, the Court under the liberal construction, constructed the §1983 complaint to assert "The plaintiff's amended complaint alleges that on September 25 and 26, 2019, the defendant, who works at Lieber, violated his rights by interfering with a piece of outgoing mail." (doc. 16 pg. 2)

On or before December 11, 2020, the Appellant raised objections to the portions in part of the U.S. Magistrate's R&R to which specific objections is registered that specifically states:

(1) the Magistrate Judge re-characterizing his constitutional claims by rephrasing the claims and then addressing ONLY part of the claim and/or an entirely different claim then what was raised by the Appellant in his pleading; (2) the magistrate's finding of fact; (3) the magistrate's addressing claims not raised in Appellant's §1983 Complaint.

The district court improperly conducted what amounted to de novo in determining the portions of the magistrate judge's R&R to which specific objections is registered. The Court held that the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law ordering a(n) dismissal and a strike.

In Accordance to Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974) "When a federal Court reviews the sufficiency of a complaint before the reception of any evidence either by affidavit, its tasks is necessarily a limited one."

Under the governing rule of law that found in 28 U.S.C.s 636 (b)(1) provides, in relevant part, that when a magistrate has made proposed findings and recommendation --

(a) "judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."

An "de novo determination" in this context has been interpreted to require a review of the magistrate's proposed findings and an exercise of sound discretion with respect to whether reliance should be placed on those findings. American Exp. Intern. Banking Corp. v. Sabet, 512 F.Supp. 472. But when the objections simply reiterate previous arguments or make only conclusory statements, the court should review the R&R for clear error even in a case of a pro se plaintiff, see Parlin Funds LLC v. Gilliams, No. 11 Civ. 2534 (ALC)(MHD), 2012 WL 5258984, at *1 (S.D.N.Y. Oct. 23, 2012)(quoting Molete v. KLM Royal

Dutch Airlines, 602 F. Supp. 2d 485, 487 (S.D.N.Y. 2009)).

Herein this case, the Appellant Herriott directed the Court's attention to the Factual pleading upon showing that the Court may not rewrite a petition to include claims that were never presented nor addressing in part partial of the Appellant's above aforementioned claims. In doing so, the Court prejudice the Appellant by denying him of the substantial right that would entitle Appellant to proceed in futher proceedings while subjecting his underlying claims to dismissal.

The Appellant Herriott submits that the court was allowed to draw to the reasonable inference that the defendant is liable for the aforesaid misconduct of his actions. The Appellant has shown the Court that the defendant was put on specific notice of the Appellant's particularized claims that are not frivolous, or malicious; nor failed to state a claim upon which relief may be granted. The Appellant's §1983 amended complaint presented injury in fact, that as required for standing by showing a(n) invasion of a legally protected interest which is concrete and particularized (FRCP, Rule 9(b))) and actual or imminent danger, not conjectural nor hypothetical, see Davison v. Facebook, Inc. 370 F.Supp. 3d 621, 2019 WL 1306206; Davison v. Randall, 912 F.3d 666, 2019 WL 114012; (Kenny v. Wilson, 885 F.3d 280, 2018 WL 1321983).

Therefore, the Appellant Herriott should not have been given a(n) strike. Furthermore, dismissals will not count against the petitioner until he has exhausted or waves all of his appeals. Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996). At that point, if the court decides to dismiss the case as frivolous, malicious, or failing to state a claim upon which relief may be granted the petitioner will receive a(n) Strike. ibid. Also, the Court did not explain by not giving reasons for the strike. (doc. 20) See Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005); Freeman v. Lee, 30 F. Supp. 2d 52, 54 (D.D.C. 1998).

Moreover, this case action should not be dismissed because the court focused on whether the Appellant could prevail on his claims rather than whether the claimant is entitled to offer evidence to support his claim. The Court did err in its determination as well as abusing its discretion. This plain error affected the Appellant's substantial rights that accorded to him, the Appellant would have been entitled to proffer evidence to support his claims. See In re Under Seal, 749 F.3d 276 (4th Cir. 2014) "When a party in a civil case meets the plain error standard upon showing an established fundamental error the requirement is for reversal." The district court in its discretion failed to correct the plain error for which seriously affected fairness, integrity, or public reputation of judicial proceedings.

Conclusion

WHEREFORE UPON, the Appellant asks that the Court grant the following relief as follows: Vacation of Final Judgment, to remand back to the lower courts that's consistent with this Court's decision, or any other relief to which the Appellant may be entitled to.

/s/ K. E. Herriott
Kevin E. Herriott