No. 22-24

In the

Supreme Court of the United States

VINCENT GABRIEL,

Petitioner,

v.

EL PASO COMBINED COURTS, DAVID LEE SHAKES individually and in his official capacity as Judge of EL PASO COMBINED COURTS, DANIEL H. MAY individually and as District Attorney, DAVID GUEST individually and as employee, JOHN PARCELL individually and as employee, BECCA KINIKIN individually and as employee, ADAM BAILEY individually and as employee, GWEN PRATOR individually and as employee,

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Petition for Writ of Certiorari

ORIGINAL

s/Vincent Gabriel
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QUESTIONS PRESENTED FOR REVIEW

The Constitution provides in the Fifth Amendment that as to the federal government no one shall be "deprived of life, liberty or property without due process of law" and then the Fourteenth Amendment, ratified uses the same eleven words to describe a legal obligation of all the states in our Republic. The following questions are presented before the Supreme Court in this appeal/Writ of Certiorari:

1) Is it appropriate for a trial court to dismiss a complaint with prejudice prior to allowing an individual at least one opportunity to amend the complaint in order to attempt to defeat a motion to dismiss?
2) Is it appropriate for a trial court to refuse to provide an indigent pro se individual with appointed counsel for the purpose of assisting with amending a complaint in order to defeat a motion to dismiss?
3) Is a judicial officer and/or his clerk entitled to absolute immunity when one or both of them violate an individual's due process rights under the Constitution?
4) Is a prosecutor and/or prosecutorial employees entitled to absolute immunity when one or both of them violate an individual's due process rights under the Constitution?
5) Shall a trial court or an appeal court look away when respondents do not address the issues/charges put forward in the case.
6) Is it appropriate for honest citizens to be oppressed by officials who depend on their "immunity" in order to deprive others of justice even by their intentional addition of fabricated crimes placed into court records and unwarranted labels such as "prostitute"?

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PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

Plaintiff is a natural person, so a corporate disclosure statement is not required pursuant to Rule 29.6.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

The following proceedings are "directly related" to the case before this Court: a) United States District Court for the State of Colorado – case number 19–cv–02248–DDD–KMT, same case caption as in this petition; on December 17, 2019, the district court entered an order dismissing Appellant's case with prejudice and b) United States Tenth District Court of Appeals – case number 20-1020, same case caption as in this petition; district court order dismissing the case was Affirmed on January 8, 2021.

JURISDICTION

On January 8, 2021, the Tenth District Court of Appeal Affirmed the district court's December 17, 2019 order dismissing Appellant's case with prejudice. On December 27, 2019, Appellant filed a Motion for Reconsideration in the district court which was denied on January 15, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1)

STATEMENT

In reviewing Appellant's Petition, he requests that this Court consider that " EQUAL JUSTICE UNDER LAW " are the words written above the main entrance to the Supreme Court Building expressing the ultimate responsibility of the Supreme Court – which is the highest tribunal for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, this Court is charged with ensuring that the American people regardless of race or religion will receive the equal justice promised *under law*.

Our Constitution is a carefully balanced document that our Founders intentionally designed to provide a national government which is sufficiently strong and flexible to meet the needs of our Republic. Our Constitution protects the guaranteed rights of all citizens to freedom, especially the freedom to prosper through education, hard-work and to raise one's children without being prejudiced to the whole world while innocent. This Plaintiff is among the large number of Blacks who strive for the price of hard work, love of country, dedication, and resilience (No crime and No convictions, an Army Veteran with MBA and striving for higher achievements). He should be taken

seriously to protect many others as well as to protect the American ideal among all peoples.

This case presents the question of when a district court should grant a motion to dismiss *with prejudice*; when a pro se plaintiff, an example of those without access to justice should be appointed counsel in a civil case; and what is required in order to defeat the absolute immunity of judicial officers, malicious clerks, prosecutors and careless district attorneys.

On July 15, 2013, Appellant, who is educated and has an impeccable record of good citizenship, a black man was falsely accused of shoplifting by a Wal-Mart employee that resulted in Appellant being stopped by a law enforcement officer and subsequently arrested for four different charges in Colorado Springs, Colorado. The dismissal of the Wal-Mart employee did not make that situation right. The prosecutors discovered the truth but would rather add charges to justify their own error in prosecuting an innocent man as well as justifying the police error in stopping and assaulting an innocent man (See attached Police report, Exhibit 6 and court record Exhibit 5, line 5). In Exhibit 5, the prosecutors tagged a none-existent charge "prostitution."

On December 16, 2018, Appellant, now an MBA holder filed a Petition to Expunge or Seal Unwarranted Arrest and Criminal Records other than Convictions Pursuant to §24-72-702, C.R.S. in the State of Colorado District Court cases 15 CV 471 and 13 CV 2749. (Comp para 12). On January 18, 2019, Appellant filed a Motion to Reopen Expunge/Seal Unwarranted Arrest in District Court cases 15 CV 471 and 13 CV 2749 para 12.

On February 27, 2019, Appellee District Attorney Daniel H. May filed People's Objection against the Petition to Seal records. On March 1, 2019, Appellee District Court Judge David Lee Shakes entered an Order re: Motion to Reopen Expunge/Seal Unwarranted Arrest which denied Appellant 's motion to expunge/seal the dismissed charges and records. para 13 b.

In the March 1, 2019 Order, the El Paso County District Court failed to expunge/seal the three charges that were dismissed and not part of the Deferred Prosecution Agreement and the absurd *Prostitution* charge which was never in the picture but was tagged on to discredit the Appellant to the whole world whereas the Appellant had not been arrested for such a charge.

On August 7, 2019, Appellant filed a Complaint against the Appellees, both individually and in their official capacities. On September 12, 2019, Appellees Guest, Kinikin, May and Parcell filed a Motion to Dismiss for Lack of Prosecution and Failure to State a Claim.

On September 16, 2019, Magistrate Judge Kathleen M. Tafoya entered an Order denying Motion/Request for Appointment of Counsel. On September 23, 2019, Appellant filed an Objection/Appeal of Magistrate Judge Kathleen M. Tafoya September 16, 2019 Order denying Appellant's Motion/Request for Appointment of Counsel.

On October 17, 2019, Appellant filed a Motion for Extension of Time to enable him to receive a ruling for the appointment of counsel, and then be able to effectively File an Answer or Otherwise Respond to Appellee's Motion to Dismiss and requested a 60-day extension in order to receive the

appointment of counsel, amend his affidavit and to present the appropriate financial statement to the court to support his request for the appointment of counsel. The requested time extension would have also enabled his counsel to come up to speed once appointed. On October 22, 2019, Magistrate Judge Kathleen M. Tafoya filed a Minute Order which refused to grant the 60-days' time extension but instead extended the time to respond to the motion to dismiss only until November 12, 2019 which was not enough time; and she denied all other requests including the appointment of counsel.

On October 24, 2019, Appellee Shakes filed a Motion to Dismiss for Lack of Prosecution and Failure to State a Claim. On December 17, 2019, Judge Daniel D. Domenico entered an Order Granting both pending Motions to Dismiss with Prejudice.

On December 27, 2019, the Appellant filed a Motion for Reconsideration of the December 17, 2019 dismissal Order. On January 15, 2020, the District Court entered an Order Denying Reconsideration even the manufactured charge of prostitution was ignored and will encourage prosecutors to continue to hurt African American families and other minorities whom prosecutors want to eliminate from society and from prosperity.

REASONS FOR GRANTING THE PETITION

The six reasons which Appellant listed as a basis for this court to grant certiorari are all intertwined when it comes to pro se litigants. Obviously, Appellant would desire to have been able to hire counsel. But the fees that

attorneys command in today's society make it almost impossible for a certain class of individuals to be able to afford retainers. This is especially true with the current situation in our great country. Further, appellant is a father of 4 young men and a daughter. He is currently attempting to obtain his Ph.D. and therefore he has no discretionary income for the purpose of hiring legal counsel. Appellant would suggest that there are many people who also have a lack of the discretionary income that is necessary to retain legal counsel to seek redress against wrongs done against them. Fortunately, Appellant is well educated and can at least put together a complaint and prepare a brief. But even as educated as I am, I do not have the legal training that is necessary to place me on an equal footing with those who Appellant is suing to redress his wrongs.

All six issues are related in the sense that each issue affects a certain class of individuals in our society and are *not* only at issue with the Appellant. A close look at the listed issues will define the hostile and oppressive environment not only in Colorado Springs but elsewhere in our Republic where honest citizens are implicated because of their race.

The class of individuals who are impacted by the questions presented in this petition are not criminals, but instead are law abiding citizens who believe in their Constitutional right of unfettered access to our courts of justice. However, there are prosecutors and judicial officers including clerks who treat this class of individuals as if they are criminals so they go forward to fabricate charges such as "prostitution" which will fulfill their wrong

prophecies and prejudices. This constitutes a systematic elimination of true hope for families and progressive groups in the Republic.

A. This Court should clarify when a district court should grant a motion to dismiss *with prejudice.*

The Supreme Court has made it clear that *pro se* complaints must be liberally construed, and all possible inferences must be drawn in favor of a *pro se* plaintiff. *See, e.g., Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972)

"We recently gave fuller meaning to our standard for Rule 12(b)(6) motions in light of the Supreme Court's 2007 decisions in *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1970, 167 L.Ed.2d 929 (2007), and *Erickson v. Pardus,* 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007). In the Rule 12(b)(6) context, "[w]e look for plausibility in th[e] complaint." *Alvarado v. KOB–TV, L.L.C.,* No. 06–2001, 493 F.3d 1210, 1215 (10th Cir.2007). In particular, we "look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Id.* at 1215 n. 2. Rather than adjudging whether a claim is "improbable," "[f]actual allegations [in a complaint] must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp.,* 550U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007)." *Kay v. Bemis,* 500 F.3d 1214, 1218 (10th Cir. 2007).

"Under Rule 8, a plaintiff "need not use particular words to plead in the alternative" as long as "it can be reasonably inferred that this is what [he was] doing." *Holman v. Indiana,* 211 F.3d 399, 407 (7th Cir.), *cert. denied,* 531 U.S. 880, 121 S.Ct. 191, 148 L.Ed.2d 132 (2000); *see also Pair–A–Dice Acquisition Partners, Inc. v. Board of Trustees of the Galveston Wharves,* 185 F.Supp.2d 703, 708 n. 6 (S.D.Tex.2002)" *Coleman v. Standard Life Ins. Co.,* 288 F. Supp. 2d 1116, 1120 (E.D. Cal. 2003).

"Fed.R.Civ.P. 8(a)(2) requires that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Moreover, "[e]ach averment of a pleading shall be simple, concise, and direct." Fed.R.Civ.P. 8(e)(1). These requirements are designed to compel a plaintiff to identify the relevant circumstances which he claims entitle him to relief in such a manner that the defendant is provided with fair notice so as to enable him to answer and prepare for trial. *See Salahuddin v. Cuomo,* 861 F.2d 40, 42 (2d Cir.1988); *see generally* 5 Wright & Miller, Federal Practice & Procedure: Civil, § 1217, at 166–78 (2d ed. 1990)." *Barsella v. United States,* 135 F.R.D. 64, 65-66 (S.D.N.Y. 1991).

The facts which Appellant alleged in his complaint establish that Appellants claim(s) in his complaint should not have been granted with prejudice. In *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1969 (2007), this Court stated that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. See *Sanjuan,* 40 F.3d, at 251 (once a claim for relief has been

stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint")".

In the instant matter, Appellant clearly and succinctly set forth a series of facts which if proven true would establish Appellant's right for relief for each of the causes of action that were alleged. By dismissing Appellant's complaint with prejudice, Appellant was handcuffed in seeking redress.

"The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct.

Appellant suggests that by dismissing with prejudice, the District Court created manifest injustice. Therefore, it is apparent that this Court (The Supreme Court) should establish specific guidelines as to when a district court should grant a motion to dismiss *with prejudice.*

B. This Court should also clarify when a pro se plaintiff should be appointed counsel in a civil case.

As Appellant argued above, with the pandemic our country has dealt with for almost the entire past year, most people cannot afford legal counsel. I suggest that it is a shame because the foundation of our society is based on the "rule of law"! This Court has been instrumental in protecting the rights of all citizens including the poor and average citizens – all we have to look to are decisions that this Court handed down in cases like *Miranda* and *Gideon*

v. Wainwright. The average citizen of the United States deserves the right to counsel in certain civil cases.

As stated above, the District Court summarily denied Appellant's Objection with respect to his request to appoint pro bono legal counsel just as it did with respect to his motion for an extension of time – even though Appellant had more than sufficient proof to establish entitlement to the appointment of counsel.

A trained legal mind such as an attorney would be way more likely than a pro se party to review the Appellee's Motions to Dismiss and then amend Appellant's Complaint with sufficient facts to show that *each and every* named Defendant faces civil liability in the instant matter. The failure to appoint counsel has essentially barred Appellant from access to justice. This is not consistent with the intent of the Supreme Court.

The District Court had previously attempted to "hang it's hat" on the premise that an Appellant failed to show a "financial need" for the necessity of counsel being appointed. But, by refusing to address Appellant's motion for extension of time, he wasn't able to present the District Court with an Affidavit which shed much light on the Appellant's financial need. The Order Denying Reconsideration completely ignored the Affidavit which was attached to the Motion to Reconsider and the motion to amend.

For a specific class of individuals, the total fees charged by legal counsel (especially in Federal Court) far exceeds the person's annual income. For this class of individuals, proceeding as a pro se litigant truly

disadvantages the pro se party to the extent that this party is equivalent to not having the real ability to have access to the courts of our Republic.

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship in the United States, but when a class of individuals are unable to afford legal counsel and are unable to effectively represent themselves these individuals do not truly have access to our courts.

C. In addition, this Court should determine exactly what is required in order to defeat the absolute immunity of judicial officers, prosecutors and district attorneys. (***For clarity purposes of this petition, questions presented 3 and 4 are combined).***

The placement of the word "absolute" immediately before "immunity" gives the wrong impression to trial court judges just based on the definition of "absolute" – which Black's Law Dictionary defines as "something that is unconditional, final, complete and without any restrictions or conditions". Black's Law Dictionary (2d Edition) Therefore, just by using the word "absolute" makes for a difficult burden for individuals to overcome before they even start their lawsuit.

Just as with the two reasons stated above, this issue affects a certain class of individuals = many of whom have to proceed as pro se litigants due to the cost of retaining legal counsel.

In *Forrester v. White,* 484 U.S. 219, 229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) this Court stated that "in determining immunity, we examine the nature of the function performed, not the identity of the actor who performed

it." However, the nature of the function performed standard is insufficient to protect those classes of litigants who are subjected to prejudicial treatment from judges, clerks, prosecutors and other state or federal actors. When questions arise about the propriety and/or motives that judges, clerks, prosecutors and other state or federal actors have in handling their sworn duties, at the present time, individuals are unable to properly seek redress for their alleged wrongs due to "absolute immunity".

While "state officials sued in their individual capacities are 'persons' for purposes of [Section] 1983" *Hafer v. Melo*, 502 U.S. 21, 23 (1991), "absolute immunity" is used to deny individuals the ability to sue under section 1983.

This Court has stated that "[T]he opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a ***fundamental due process requirement***. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975)" *Cleveland Bd. Of Ed. V. Loudermill*, 470 U.S. 532, 546 (S. Ct. 1985) (Emphasis added by Appellant.

However, when it comes to judges, clerks, prosecutors and other state or federal actors, a class of individuals are forced to forfeit their fundamental due process rights.

It is patently clear that this Court needs to determine exactly what is required in order to defeat the immunity of judges, prosecutors and other state or federal actors while weighing classes of individuals'/citizens' fundamental due process rights.

D) Is it appropriate for honest citizens to be oppressed by officials who depend on their "immunity" in order to deprive others of justice even by their intentional (wanton and willful) addition of fabricated crimes to court records and unwarranted labels such as "prostitute"?

Our nation was founded on the premise that all men are created equal. Our Declaration of Independence states in part that "all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

In addition, the preamble to our Constitution states that "**We the People** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

If this Court looks back to the historical underpinnings that form the backbone of our great nation, it is evident that every individual is "supposed" to have the same rights as not only to each other but also as those afforded to elected and appointed officials and judicial officers. Otherwise, our Republic would be more akin to the *aristocratic class of nobility* of Great Britain that this great country defeated in the Revolutionary War and led to the

documents cited immediately above which this Court interprets every day that this Court is in session.

The inability of citizens of our nation to seek redress wrongs against judicial officers, clerks, prosecutors, district attorneys and other government officials creates the appearance that these "officials" have been afforded their own "aristocratic" status and can do as they please as long as they can establish that "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns* v. *Reed,* 500 U. S., at 486; *Antoine* v. *Byers & Anderson, Inc.,* 508 U. S. 429, 432, and n. 4 (1993). Indeed, the respondents in this instant matter did not even do as little as responding to the issues of the case and yet they were granted dismissal of the case with prejudice.

Just what does the word "justified" mean? This makes it way too simple for judicial officers, prosecutors, district attorneys and other government officials to allegedly do justice while stepping all over a class of individuals who try to assert their legal rights.

As a citizen of our great nation, Appellant as well as all individuals who are similarly situated as members of the same class of those oppressed are entitled to "EQUAL JUSTICE UNDER LAW" otherwise the words inscribed over this Court that you pass under on a daily basis do not apply to people such as the Appellant and Appellant is again reminded about how black Americans have been historically treated in this country as well as in the early rulings of this Court.

Appellant respectfully requests that this Court provide him with equal justice under the law.

CONCLUSION

The petition for certiorari should be granted to ensure equal justice under law. It will provide redress to a hardworking class of minorities who become sidelined by false accusations and bad records which are falsely fabricated by clerks and prosecutors.

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I HEREBY CERTIFY that this brief complies with the applicable font, Century Schoolbook 12 Font, and word count requirements.

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