

JUN 29 2022

OFFICE OF THE CLERK

No. _____

22-5124

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL J. IBENYENWA — PETITIONER
(Your Name)

vs.

ELRONDAICK B. WELLS, ETAL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael J. Ibenyenwa
(Your Name)

3872 FM 350 South
(Address)

Livingston, Texas 77351
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

QUESTION: ONE

WHETHER A DEFENDANT SUFFICIENTLY AND PROPERLY INVOKES ENTITLEMENT TO QUALIFIED IMMUNITY DEFENSE IN A 42 U.S.C. § 1983 CIVIL RIGHTS ACTION LAWSUIT THROUGH BROAD AND GENERAL ASSERTIONS OF ENTITLEMENT. WHEN A PRO SE PRISONER SUBSTANTIALLY MEETS IQBAL, TWOMBLY AND FED. R. CIV. P. 8, AND WHETHER THE ISSUE IS ARGUABLE ON THE MERITS?

A) IF SO, DID THE FIFTH CIRCUIT ERR EGREGIOUSLY AS A MATTER OF FACT AND LAW IN DENYING THE PETITIONER'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL, AS "FRIVOLOUS" AND "FAILURE TO STATE A CLAIM"? ("MIFPA")

QUESTION: TWO

WHEN A DISTRICT COURT CONCLUSORY AND GENERALLY ANALIZES EACH "TYPE" OF CLAIM IN A BUNDLE RATHER THAN EACH "INDIVIDUAL CLAIM AS A WHOLE" WITHOUT CONSIDERATION OF THE PLEADINGS IN FULL, AS VOLUNTATIVE OF IQBAL AND TWOMBLY - DOES A APPELLATE COURT ERR EGREGIOUSLY IN DENYING THE ISSUE WITHIN APPELLANT'S MIFPA AS "FRIVOLOUS" AND NOT ARGUABLE ON THE MERITS?

A) IF SO, DID THE DISTRICT COURT'S DECISION REFLECT AN EXERCISE OF DISCRETION UNDER 28 U.S.C. § 636(b)(1) AND FED. R. CIV. P. 72(b)(3)?

QUESTION: THREE

WHEN A DISTRICT COURT POST-HOC REVOKES INCORPORATION OF CLAIMS APPEARING WITHIN A PRIOR DEFECTIVE PLEADING AFTER APPROVING THE INCORPORATION IN A CURATIVE SECOND AMENDMENT - AT THE ELEVENTH-HOUR AND SUBSEQUENTLY REPEATEDLY REFUSES A CURATIVE AMENDMENT TO CORRECT THE TECHNICALITY, DOES A LOWER COURT COMMIT REVERSIBLE ERROR IN LIGHT OF EDMAN, FED. R. CIV. P. 1 AND 15(a)?

A) IF SO, DID THE FIFTH CIRCUIT ERR EGREGIOUSLY IN DENYING PETITIONER'S MIFPA AS "FRIVOLOUS" AND NOT "ARGUABLE ON THE MERITS" ON THIS ISSUE?

QUESTION: FOUR

WHETHER A PRISONER-PLAINTIFF MAY AMEND A COMPLAINT TO CORRECT A TECHNICALITY NOTIFIED 23-DAYS PRIOR-ON THE DATE FINAL JUDGMENT ISSUES AND/OR VIA A FED. R. CIV. P. 59(e) OR 60(b) MOTION TO CORRECT A MANIFEST ERROR OF LAW THAT THE DISTRICT COURT OVERLOOKED REGARDING THE AMENDMENT? see DUSSOUY V. GULF COAST INV. CORP., 660 F.2d 594 (5th Cir. 1981); LEISURE CAVIAR, LLC V. U.S. FISH & WILDLIFE SERV., 616 F.3d 612 (6th Cir. 2010)

A) IF SO, DID THE FIFTH CIRCUIT ERR EGREGIOUSLY IN DENYING PETITIONER'S MIFPA AS "FRIVOLOUS" AND NOT "ARGUABLE ON THE MERITS" ON THIS ISSUE?

QUESTION: FIVE

WHEN A PLAINTIFF SEEKING IFP STATUS ON APPEAL PURSUANT TO FED. R. CIV. P. 24, IS IT ~~CONSTITUTIONALLY~~ PERMISSIBLE FOR THE DISTRICT COURTS TO DECERTIFY AN APPEAL BY EXCLUSIVELY RELYING ON ITS DISMISSAL ORDER PURSUANT TO BAUGH V. TAYLOR, 117 F.3d 197, 202 n.21 (5TH CIRCUIT 1997), IN LIGHT OF LEWIS V. CASEY AND CHRISTIAN-BURG CO. V. EEOC, WITHOUT FAIR CONSIDERATION OF PLAINTIFF'S OBJECTIONS IN THE RECORD? See PATE V. STEVENS, 163 F.3d 437 (7TH CIRCUIT 1998), CELSKE V. EDWARDS, 164 F.3d 396 (7TH CIRCUIT 1999)?

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

ELADDORICK B. WELLS, SR., Librarian at Telford Unit; TRACY L. SMITH, Correctional officer at Telford Unit; SAMUEL W. NATIONS, Correctional officer at Telford; CHAD DODDY, Correctional officer at Telford Unit; MICHAEL E. ALSOBROOK, Assistant Warden at Telford Unit; OFFICE OF THE ATTORNEY GENERAL; FREDORICK GOODEN; SANDRA CLARK; CARL MCKELLAR; LONNIE TOWNSEND; WADE ALEXANDER; TEXAS BOARD OF CRIMINAL JUSTICE; TODD E. HARRIS

RESPONDENTS.

RELATED CASES

Ibenyenwa v. Wells, et al, No. 5:18-cv-0068, U.S. District Court for the Eastern District of Texas. (Judgment entered Mar. 13, 2020)

Ibenyenwa v. Wells, et al, No. 21-40741, U.S. Court of Appeals for the Fifth Circuit (Judgment entered Feb. 10, 2022)

Ibenyenwa v. Wells, et al, No. 21-40741, U.S. Court of Appeals for the Fifth Circuit (Reh'g En Banc Denied Apr. 19, 2022)

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	14
CONCLUSION.....	36

INDEX TO APPENDICES

- APPENDIX A - Fifth Circuit decision (Denial of Motion^{for Leave} to Proceed In Forma Pauperis on Appeal)
- APPENDIX B - Fifth Circuit decision (Denial of Petition for Rehearing En Banc)
- APPENDIX C - United States Magistrate Judge Report and Recommendations
- APPENDIX D - United States District Judge Order adopting M.J. Report and Recommendations and Final Judgment
- APPENDIX E - United States District Judge Order denying leave to Proceed In forma Pauperis on Appeal
- APPENDIX F - United States District Judge Order denying Fed. R. Civ. P. 59(c) Motion
- APPENDIX G - United States District Judge Order denying Fed. R. Civ. P. 60(b) Motion
- APPENDIX H - Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6)

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Ahmed v. Dragorich, 297 F.3d 201, 209 (3d Cir. 2002)	31
Ashcroft v. Iqbal, 556 U.S. 662, 675, 677-78, 678, 679, 129 S.Ct. 1937 (2009)	7, 11, 14, 16, 19, 20
Barefoot v. Estelle, 463 U.S. 800, 893, 103 S.Ct. 3383 (1983)	34
Baugh v. Taylor, 117 F.3d 197, 202 n.21 (5th Cir. 1997)	33, 34
Bediako v. Stein Mart, Inc., 354 F.3d 835, 841 (8th Cir. 2004)	33
Behrens v. Pelletier, 516 U.S. 299, 309, 116 S.Ct. 834 (1996)	12, 17
Bell v. Atlantic Corp. v. Twombly, 550 U.S. 544, 557, 570, 577-78, 127 S.Ct. 1955 (2009)	11, 14, 19, 20
Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990)	30
Brower v. Cnty of Inyo, 489 U.S. 583, 109 S.Ct. 1378 (1989)	19
Brown v. Taylor, 411 F.3d 235, 246, 247 (5th Cir. 2018)	20, 28
Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 126 (2d Cir. 2008)	25
Carson v. Polley, 689 F.2d 562, 584 (5th Cir. 1982)	32
Celske v. Edwards, 164 F.3d 396, 397, 398 (7th Cir. 1999)	33, 34, 35

STATUTES AND RULES

28 U.S.C. § 636 (B)(1)(C)	3, 12, 23, 24
28 U.S.C. § 1915 (g)	12, 35
42 U.S.C. § 1983	3, 4, 6, 14
Fed. R. App. P. 24 (a)(2)	18, 19, 22, 35
Fed. R. App. P. 24 (a)(3)(A)	29, 35
Fed. R. App. P. 28 (a)(4)	16
Fed. R. Civ. P. 1	6, 25, 26, 27
Fed. R. Civ. P. 8(a)	4, 14, 19
Fed. R. Civ. P. 12(b)(1)	4, 15
Fed. R. Civ. P. 12(b)(6)	11, 12, 15, 19
Fed. R. Civ. P. 15(a)	25, 26, 27, 31, 32
Fed. R. Civ. P. 59(e)	8, 9, 10, 11, 29, 30, 31, 32, 33
Fed. R. Civ. P. 60(b)(1) and (6)	9, 10, 11, 29, 30, 31, 32, 33
Fed. R. Civ. P. 72(b)(3)	12, 23, 24

OTHER

U.S. CONST. amend 1	3, 16, 21
U.S. CONST. amend 14	3, 20, 21

TABLE OF AUTHORITIES CITED CONT'

CASES	PAGE NUMBER
Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)	18, 33, 35
Commander v. BASE Wyandotte Corp., 978 F.2d 924, 924 n.4 (5th Cir. 1992)	17-18
Connolly v. Lane Const. Corp., 809 F.3d 780, 786, 789 (3d Cir. 2016)	19-20
Coppedge v. U.S., 369 U.S. 438, 447, 82 S.Ct. 917, 922 (1962)	17
Crawford-EL v. Britton, 523 U.S. 574, 588 n.10, 118 S.Ct. 1584 (1998)	22
Cruz v. Hawk, 404 U.S. 59, 92 S.Ct. 313 (1971)	35
Doe v. Neveleff, 751 F.3d 383, 388 (5th Cir. 2014)	21
Douglass v. Uni. Servs. Auto. Assc., 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc)	24
Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 n.1 (5th Cir. 1987)	29, 31
Ellis v. U.S., 78 S.Ct. 974 (1958)	29
Foman v. Davis, 371 U.S. 178, 181, 182, 83 S.Ct. 227 (1962)	11, 25, 26, 27
Gomez v. USA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999) (per curiam)	27
Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002)	28
Guy v. Crown Equip. Corp., 394 F.3d 320, 325 (5th Cir. 2004)	32
Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)	12, 17
Harrison v. Byrd, 765 F.2d 501, 503 (5th Cir. 1985)	32
Harrison v. Rubin, 174 F.3d 249, 253 (D.C. Cir. 1999)	33
Hartman v. Moore, 547 U.S. 250, 256, 126 S.Ct. 1695 (2006)	22
Hart v. O'Brien, 127 F.3d 424, 454 (5th Cir. 1997)	15
Henderson v. Norris, 129 F.3d 481, 485 n.4 (8th Cir. 1997)	35
Hill v. Lappin, 630 F.3d 468, 473-74 (6th Cir. 2010)	21
Houston v. Lack, 487 U.S. 266, 270 (1988)	30
Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983) (per curiam)	21
In re Life Partners Holding, Inc., 926 F.3d 103, 126 n.12 (5th Cir. 2019)	27-28
Johnson v. Jones, 515 U.S. 304, 314, 115 S.Ct. 2151 (1995)	15
Johnson v. U.S., 352 U.S. 565, 566, 77 S.Ct. 550, 551 (1957) (per curiam)	35
Leber v. Harvey, 438 F.3d 404, 426-27 (4th Cir. 2006)	33
Lavespere v. Niagara Mach & Tool Works, Inc., 910 F.2d 167, 174 (5th Cir. 1990)	30
Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv., 616 F.3d 612, 615-16 (6th Cir. 2010)	29, 30, 31
Lewis v. Casey, 518 U.S. 343, 353, 353 n.2, 3 (1996)	18, 33, 35
Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)	25, 28
Mayeux v. La. Health Serv. and Indem. Co., 376 F.3d 420, 426 n.12, 427 (5th Cir. 2004)	28, 32, 33
Morris v. Powell, 449 F.3d 682, 684-86 (5th Cir. 2006)	22
Moss v. Secret Service, 572 F.3d 962, 970 (4th Cir. 2009)	20

Muhammed v. Close, 124 S.Ct. 1303 (2004)	21, 24
Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 1832 (1989)	18
N. Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co., 898 F.3d 461, 477 (5th Cir. 2008)	26
Obiegbu v. Werlinger, 581 Fed. Appx. 119, 122 (3d Cir. 2014)	24
Omega Hosp., LLC v. Univ. Health Care Servs., 389 F.Supp.3d 412, 425 (M.D. La. Apr. 30, 2019)	31
Pate v. Stevens, 163 F.3d 437, 439 (7th Cir. 1998)	33, 34, 35
Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005)	22
Russel v. Oliver, 552 F.2d 115, 116 (4th Cir. 1977)	22
Scarlan v. Texas A&M Univ., 343 F.3d 533, 536 (5th Cir. 2003)	21
Stevenson v. Anderson, 139 Fed. Appx. 603 (5th Cir. 2005)	30
Taylor v. Stephens, 946 F.3d 211, 221 n.16 (5th Cir. 2019)	21
Thomas v. Arn, 474 U.S. 140, 154 (1985)	24
Torres v. Oakland Scavenger Co., 487 U.S. 312, 316-17, 108 S.Ct. 2405 (1988)	26
Travelers Indem. Co. v. Damman & Co., 594 F.3d 238, 256 n.14 (3d Cir. 2010)	33
U.S. v. Humana Health Plan of Tex., Inc., 336 F.3d 375, 387 (5th Cir. 2003)	18, 25
U.S. v. Raddatz, 417 [447] U.S. 667 (1980)	24
U.S. v. Wilson, 864 F.2d 1219, 1222 (5th Cir. 1989) (per curiam)	24
Villarreal v. Wells Fargo, N.A., 814 F.3d 763, 767 (5th Cir. 2016)	28
Walkers v. Savers, 583 Fed. Appx. 474 (5th Cir. Nov. 10, 2014)	24
Whitaker v. City of Houston, 963 F.2d 831, 832 (5th Cir. 1992)	30, 31
Whitneys v. Guys, Inc., 700 F.3d 1118, 1128 (8th Cir. 2012)	20, 21
Yohey v. Collins, 985 F.2d 222, 224-25, 225 (5th Cir. 1993)	16-17

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 appears at Appendix 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 appears at Appendix D to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ 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 _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was Feb. 10, 2022.

☐ 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: April 19, 2022, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONST. AMEND. 1

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

CONST. Amend. 14

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 ~~same~~ party injured in an action at law. . . ."

28 U.S.C. § 636(b)(1)(C)

"The 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."

STATEMENT OF THE CASE

On May 7, 2018, the United States District Court, Texarkana Division ("USDC") filed Petitioner's Original complaint with attachments against the Respondents pursuant to a 42 U.S.C. § 1983 Civil Rights Complaint. See Record on Appeal ("ROA") at 11, Ibenyewa v. Walls, et al., Appeal No. 21-40241. Magistrate Judge Caroline Craven ("M.J.") presiding over pretrial matters, subsequently ordered the Respondents to Answer the complaint and effected service, ROA 324, however, ^{prior to receipt of} ~~after~~ service and prior to an Answer filed Petitioner filed for leave to file an Amended Complaint (fourteen days later) while explicitly not waiving his "absolute right" to amend the complaint (ROA 339) accompanied by the amended pleading and attachments (ROA 341), seeking to add additional claims against the existing Defendants and new ones and claims. Id. The M.J. denied leave to file this amended pleading for Petitioner failed to explicitly ^{invoke and} "seek or previously received" leave of court to exceed the [30] page limit of the Local Rules "(Rule CV-3(d))", ROA 639, giving Petitioner 30 days to correct the error. Id. Petitioner timely sought "leave to file" his "Second Amended complaint in excess of 30 pages" - the curative amendment, notifying the court that its failure to grant leave would "effectively jettison claims 19 through 36" ~~ROA~~ (ROA 657) for the Second Amended Complaint incorporated portions of the denied amended complaint. ROA 665, 676. The M.J. granted ^{leave to file} the ~~ESB~~ ^(USAC) Second Amended Complaint, Doc. 26 (ROA 661) for it being "meritorious." ROA 691.

The Respondents subsequently filed their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) broadly, generally and expansively ^{arguing} ~~arguing~~ Petitioner

failed to meet the elements of the claims with the facts presented in isolating random statements from unspecified counts, while misstating these same statements, posited as purported facts, subsequently stating and declaring arguendo-style, Petitioner failed to allege any constitutional violation and to the extent he did, they are entitled to the qualified immunity defense because they acted "objectively reasonable" in its one-page invocation. See ROA 711-712; Appx. H at 9-10. The motion to dismiss address all claims including incorporated counts. Id at 1 n.1.

On February 5, 2020, the M.J. issued its Report and Recommendations notifying all parties for the first instance that it were post-hoc revoking the incorporation of claims from the "unfiled" and "denied" (FAC) into the approved SAC, which were the operative pleading, Appx. C at 7-8. After loosely providing a summary of the eighteen (18) claims with enormous detail (Id at 2-7), the M.J. conclusory addressed each "type" of claim in a "bundle" without individually analyzing each claim separately - finding the retaliation claims were all "conclusory" and failed to establish the causation and deterrent element by relying on temporal proximity between ~~advers~~ protected conduct and adverse action and conclusory allegations which are insufficient to state a claim (Id at 11-15) and isolating ^{two of} Petitioner's stated adverse acts as independent constitutional violations (Id at 15-17); ^{analyzing} ~~addressing~~ the failure to properly supervise claim, the report referenced no allegation ^{appearing} ~~again~~ in the operative complaint (see ROA 675 ^{Appx. C at 18} the M.J. isolated a snippet from the relief section pertaining to the failure to supervise count ^(Id at 676) in determining the stated allegations failed to state a claim, Appx. C at 18; addressing the conspiracy claim (to which the Respondents did not seek dismissal of) the report generally dismiss the allegations as ^{"entirely"} "conclusory" and barred by

the intra-corporate conspiracy doctrine, thereby, patently ignoring the exception to the doctrine, paralled activity by the conspirators and relevant TDCJ policy prohibiting reprisals for exercising First Amendment rights as laid out in the claim and attached memorandum of law, and, finally, no conspiracy could be actionable without a § 1983 violation. *Id* at 18-19. The M.J. granted the Respondents' 12(b)(1) motion for Texas Board of Criminal Justice (TBCJ) is ~~barred~~ immune from suit under the Eleventh Amendment, in response to the Petitioner's injunctive relief and this failed to state a claim (*Id* at 20); finding that the Respondents properly invoked entitlement to qualified immunity defense, the M.J. granted the defense finding the Petitioner's allegations were "conclusory" and insufficient to overcome the defense. *Id* at 21. With regard to ~~Plaintiff's~~ ^{Petitioner's} Supplemental due process, property claim upon a unauthorized \$ 25.00 from his "Inmate Trust Fund Account," the M.J. declined to exercise jurisdiction over the claim for all federal claims have been dismissed and found despite Respondent Wells' ^{only} receiving authorization to deduct "\$19.60" pursuant to TDCJ's "Postage Deduction Authorization" form (ROA 182), the deprivation were merely random and unauthorized warranting relief in State Court. *Id* at 21-23.

On ~~May~~ ^{March} 3, 2020, thirteen-days after receipt of said report (ROA 812) Petitioner requested a copy of ^{material} exhibits appearing in the ^{denied} amended complaint's attachments, for the court's announcement on Feb. 5, 2020 that the incorporation of claims and defendants would be revoked, which Petitioner would file in a subsequent "amended pleading to cure three 'procedural' error" (ROA 815) to which the Court quietly denied; also on May 3, 2020, Petitioner submitted ^{lengthy} filed his objections to the report and recommendations, objecting to the M.J.'s post-hoc revocation of

- claims for the first instance after all parties understood their inclusion and
- failing to ~~permit~~ pre-authorize leave to cure the technicality, resulting
in the jettison of incorporated claims 19 through 36; addressed at length
each element of each claim with "non-conclusory" facts and circumstantial evidence
appearing in the operative pleading, specifically addressing the causation and
ordinary firmness element of the retaliation claims; objected to M.J.'s Report
that TBCJ is not immune from suit for prospective relief and the decision
were premature; objected to the Report granting the Respondents' qualified immu-
nity defense premised on a "broad," "general," and "bare bones invocation"
and the M.J. failed ^{in its duty} to comply with label and to ^{individually} identify conclusory allegation
and ~~assumed~~ assume as truth plausible factual allegations that support a claim
to relief, on each count - and failed to consider each Respondent's entitlement
to relief separately; lastly, Petitioner requested preauthorized leave to correct
the "procedural" technicality" which resulted in the revocation of "claims
19 through 36". See ROA 819-846.

On March 13, 2020, District Judge Robert Schroeder ("D.J.") adopted
the Report in its entirety, overruling Petitioner's objections and dismissed the
civil action without prejudice on the M.J.'s Findings, ^("order") in its eight-page Order.
See Appx. D. With deference to the M.J. Report, the D.J. glossed over an immen-
se amount of Petitioner's Objections to the Report without fair consideration
of them determining the M.J. were correct that Petitioner could not incorper-
ate ~~ob~~ arguments from denied pleadings; without identifying a specific ^{retaliation} claim
it were addressing, the D.J. arguably addressed two of these in a unclear and obfur

scating manner ignoring and misapplying the facts and law presented in the objections and following this same line of rationale in discounting plausible facts of Respondent Alsbrook^{explicitly} condoning the reprisals as "without merit" ~~in~~ regarding the failure to supervise claim and to ~~take~~ ^{being met} ~~mis~~ apprehended Petitioner's objections to the exception to intra-corporate conspiracy doctrine and the Respondents' "conclusory" qualified immunity defense as being without merit. Id. The D.J. also explicitly denied Petitioner's request for pre-authorize leave to amend the operative pleading ^{to correct the technicality} (to include the jettisoned "19 through 36" claims for relief finding Petitioner was previously permitted leave to amend to file the Second Amended Complaint (but not this technicality), and, thus the objection is without merit. Id. at 8.

Moreover, on the same date the Order and Final Judgment issued, unbeknownst to Petitioner, on March 13, 2020, he forwarded^{his} leave to file a third amended complaint^(TAC), encompassing a memorandum, exhibits and a supplement^{al} ~~the~~ declaration and the third amended complaint - the clerk for the USDC refused to file the documents and returned the documents ^{to petitioner} ~~for~~ postmarked "MAR 14 2020" (ROA 871) containing the sent documents with the note enscribed on Petitioner's package - Return to Sender as 5:18CV68 CLOSED" (ROA 870), that the Respondents^{actually} received. The TAC were clarified and ~~corrected~~ added the claims appearing within the denied FAC and ^{the} revoked incorporation appearing in the SAC and added liability to Brad Livingston, Exec. Dir. TDCJ, to resolve the Eleventh Amendment issue.

On April 6, 2020, Petitioner submitted/filed his Rule 59(c) motion seeking to alter/amend the order and final judgment, notifying the EDSAC of manifest errors of law

And fact in: failing to consider Petitioner's objections de novo, applying a higher ^{leave-to-file} ordinary firmness test of actually being chilled; denying the FAC for failing to invoke a local rule; failing to consider the timely submitted but late-received leave to file TAC by the Clerk of Court returning the documents unfiled; depriving Petitioner a de novo review on all of his objections, most egregiously ~~it~~ failing to clearly address/analyze all of his claims, and at minimum his objections to the M.J. and the D.J. failing to analyze counts 3-7, 9-16; failing to consider all attachments ^{within} to the operative pleading; not specifically identify all non-conclusory allegations and considering the remaining non-conclusory ^{plausible} factual matter accepted as truth that states an entitlement to relief and consider each claim separately as a whole and individually, prior to granting the Respondents' ^{brood} qualified immunity defense. ROA 859, *passim*. Petitioner also sought pre-authorize leave to file the TAC ^(unfiled) that were returned unfiled by the clerk for the USDC. Id. at 867.

On Feb. 26, 2021, on consideration of the 59th motion, the D.J. found Petition failed to meet the standard for relief pursuant to the motion, noting he failed to demonstrate a "manifest error of law or fact"; it conducted a "lengthy and thorough" de novo review of ^{each of} his objections to the M.J.'s report and only addressed Petitioner's "non-credible" assertion that he mailed his leave to file TAC on Mar. 13, 2020 that the clerk returned unfiled, which ~~most~~ TDCJ mail logs don't support; and, lastly, the D.J. found even if the amended pleading were timely received it would have been denied for "unjustified delay" and no amendment can be made after a lawsuit has been dismissed, in denying relief in its five-page order. See Appx. F, *passim*.

On March 15, 2021, Petitioner submitted/filed his Rule 60(b) in "continuing" to ^{alert} ~~raise~~ the [USDC] about the manifest errors made as a matter of law

and fact," that were consistent with Petitioner's 591es motion that the D.J. "summarily rejected"; Petitioner addressed the D.J. promulgation^{in the 591es order} that the leave to file the TAC would have been denied for "unjustified delay," urging the USAC it overlooked controlling law that "delay without prejudice to the defendants whom did not oppose leave... is patent error" and he submitted the leave motion within one month after notification of the revocation of incorporation of claims appearing in the denied FAC; lastly, Petitioner sought^{preauthorized} leave to file TAC by forwarding said motion and ~~become~~^{attachments} to the USAC without ~~another~~^{other} copy sent to Respondents whom previously received the same. See RDA 907, *passim*.

On March 23, 2021, Petitioner sought filed notice of appeal and leave to proceed *In forma Pauperis* on Appeal ("MIFPA"). RDA 924; 928. The Fifth Circuit Court of Appeals ("Fifth Circuit") filed docketed the appeal, on April 6, 2021. See Ibenyewa v. Wells, et al, Appeal No. 21-40241 in general referred to as "5th Cir. Appeal".

On April 16, 2021, the D.J. denied Petitioner's Rule 60(b) motion, merely dismissing without merit each issue presented as rehashing prior arguments on the basis of disagreements of the resolution of the case and specifically rejecting his contention that the D.J. did not consider all the pleadings and documents filed (e.g. operative complaint, memorandum, exhibits and a declaration) assenting his the "substance" of his "individual grievances" were not the "relevant question in considering whether he "adequately stated a claim"; and, finally conceded Petitioner mailed his leave to file TAC and attachments to the USAC on March 13, 2020 and returned six (6) days later the complaint would have been still denied for the

the "extraordinary delay" for Petitioner allegedly failed to provide an explanation for the lengthy delay in seeking the leave ~~of~~^{for} year after the Respondents filed their motion to dismiss, in its seven(7) page order denying relief. See Appx.

Grossin. ~~Broad~~

On the same date the D.J. issued an order denying Petitioner's MIFPA by incorporating by reference the M.J.'s Report and Order adopting the same (Appx. C and D) finding any all issues or claims to be "frivolous" and "no arguable legal or factual basis" "arguable on the merits." Appx. E. Petitioner subsequently filed an amended notice of appeal to include the denial of the Rule 60(b) motion within the 5th Cir. Appeal, to which MIFPA was likewise denied.

On May 24, 2021, Petitioner submitted his MIFPA with the 5th Circuit setting out an overview of the claims within the operative complaint presenting multiple arguable issues on the merits of: whether the USOC abused its discretion in denying the ^{leave to file} FAC without exercising its discretion to accept the pleading for a technicality (traversing local rule page limitations) under Forman, revoking post-hoc Petitioner's incorporation of claims ^{from} ~~within~~ his denied FAC into his SAC, after approving leave without permitting leave to correct the technicality, and in refusing to file Petitioner's leave to file TAC to correct a technicality for extraordinary delay with no prejudice to Respondents; the misapplication of Ex Parte Young in granting TBCJ Eleventh Amendment immunity from prospective relief on a unraised defense without permitting leave to correct the technicality; whether the USOC misapplied Twombly and Iqbal in granting the Respondents broad 12(b)(6) motion, and whether it were sufficient enough to sustain; erroneously applied the facts in painting the claims as "conclusory" ~~and~~ ^{not} ~~lacked~~ without assessing each claim as a whole; and

failing to properly consider all Petitioner's attachments in review of the claims; whether the USDC erroneously applied Harlow and Behrens in granting Respondents' ^{broad} qualified immunity ^{defense} that were not properly and sufficiently made and the USDC "conclusory" ruling fatally affected its decision to grant the defense; whether the USDC properly afforded Petitioner a full de novo review on each of his objections under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(3) in proper exercise of its discretion; Did the USDC abused its discretion in denying Petitioner's 59(c) and 60(b) motion; and, if the USDC erred in the dismissal of the suit can the D.C. exercise supplemental jurisdiction of Petitioner's State claim?

On Feb. 10, 2022 a panel of the Fifth Circuit issued its order ^{dismissing} ~~denying~~ Petitioner's MIFPA through a blistering opinion upon his use of Protected First Amendment rights while incarcerated, stating he "essentially 'dared' Respondents to respond" to his exercised of rights so he could file a "actionable retaliation" claim ~~finding~~: all of his claims "conclusional" and inadequate to state a claim under Fed. R. Civ. P. 12(b)(6) and presents no nonfrivolous issue on appeal; his claim of being "chilled" is belied by his abusive grievances and complaints "continuing unabated"; even if he stated a plausible claim of retaliation the USDC alternative basis for judgment of granting qualified immunity prevails - ^{him} for vaguely challenging the USDC qualified immunity ruling in failing to allege he had a "clearly established" right to utilize his First Amendment activities ~~and~~ or the Respondents' response were "objectively unreasonable"; ~~thus, frivolous~~ and, the USDC refusal to allow the FAC and SAC and declining to exercise supplemental jurisdiction "presents no nonfrivolous issue for appeal" in ^{dismissing} ~~denying~~ the motion as frivolous and slamming him with the 28 U.S.C. § 1915(g) bar. See Appx. A

On April 14, 2022, the Fifth Circuit ^{panel} denied Petitioner's petition for re-

hearing en banc and panel rehearing. Appx. B at 2.

REASONS FOR GRANTING THE PETITION

QUESTION ONE:

whether a defendant sufficiently and properly invokes entitlement to qualified immunity defense in a 42 U.S.C. § 1983 civil rights action lawsuit through broad and general assertions of entitlement, when a pro se prisoner substantially meets Iqbal, Twombly and Fed. R. Civ. P. 8, and whether the issue is arguable on the merits?

The issue or question presented for review is of immense importance as the Fifth Circuit determined Petitioner's MIFPA raising this issue were "vague". See Appx. A at 3. And, thus, this decision warrants the Court to exercise its supervisory powers as the Appellate court clearly subjected Petitioner to excessive and elevated, applicable standard for review and egregiously misapplied well-established and settled law on the Respondent's invocation of ^{the} qualified immunity defense, contrary to this court's precedence.

This question has extreme jurisprudence value as it is necessarily vital that all citizens, incarcerated or not get a fair shake at receiving review of a controversy warranting consideration by a fair and impartial trier of fact, in accordance with the Fourteenth Amendment, when procedural requirements are met.

It is abundantly clear Petitioner met the Fed. R. Civ. P. 8(a) which requires him to state "a short and plain statement of the claim showing the pleader is entitled to relief" Id., and though "detailed factual allegations" are not required, see Iqbal, 556 U.S. 662, 677-78, 129 S.Ct. 1431 (2009), he included those minute and relevant details to lessen the risk of ^{inappropriate} dismissal and as discussed infra at 15 and 21, his plausible facts were more than "unadorned, the-defendant-unlawfully-harmed-me accusations" Iqbal, 556 U.S. at 677-78, see also Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974 (2009). Even when viewed through

the USDC's scant and broad summary of the claims (See Appx. ~~at~~ [§] at 2-7) he clearly meets his burden.

A cursory review of the Respondents' Motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) clearly reveal their erratic, broad and expansive arguments revolve around whether Petitioner met the elements of his ^{type of} claims, without identifying ^a specific claim, but isolating random facts, in isolation from the context and the unidentified claim as a whole - a "nitpicking feast" - subsequently stating a legal conclusion of "conclusory" that is insufficient to meet the elements, see Appx. H, passim, and in the final two-pages invoking in general it were entitled to qualified immunity defense, by merely stating ~~the~~ the qualified immunity standard and arguing "arguendo" ~~that~~ acted reasonably objective in responding to Petitioner's "grievances". Id at 9-10.

This Court has made it clear as has the Fifth Circuit, a public official who attacks a plaintiff's ability to prove her case is not raising a qualified immunity defense, which is "conceptually distinct from the merits of the Plaintiff's claims." See Johnson v. Jones, 515 U.S. 304, 314, 115 S.Ct. 2151 (1995); Hart v. O'Brien, 127 F.3d 424, 454 (5th Cir. 1997) (same).

Thus, it is necessary for the Court to activate its supervisory powers to ensure Plaintiffs filing arguable claims are not being gas-lit upon government officials invocation of qualified immunity defense premised on vague-entitlements and standalone, ~~assertions~~ general assertions of the defense without any legal support, at the pleading stage of a civil action.

a) If so, did the fifth circuit err egregiously as a matter of

fact and law in denying the Petitioner's motion for leave to proceed in forma pauperis on appeal ("MIFPA") as "frivolous" and "failure to state a claim"?

On this issue, the panel held Petitioner's purported "vague" and "conclusional challenge" ~~on this issue~~ to the Respondents' being granted qualified immunity because he failed to rebut the standards for qualified immunity, thus presenting no nonfrivolous issue for appeal, See Appx. A at 3-4; supra at 12, after providing a "circular" decision that if Petitioner were "to have stated a plausible claim of retaliation," "qualified immunity provided an alternative basis for judgment." Appx. ^A at 3.

It is clearly in this court's interests to review this wholesome and egregious misstep in depriving Petitioner and any individual of judicial review by simply declaring the motion as "frivolous" as this Court has also cut out, as with appeals, "frivolous" when applied to a complaint, embraces not only the inarguable legal conclusions, but also fanciful allegations, See Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 1832 (1989); see also Id., supra at 14. Moreover, Petitioner complied with Fed. R. ^{App} Civ. P. 28(a)(4) arguing with relevant facts and law why he deserves the requested relief with citations to the authorities, statutes and parts of the record relied upon. See Id.; Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993). The ^{arguable} issue relied upon were clearly adequately brief and not "vague" and he did not "offer a bare recitation of his claims" but specifically addressed the district court's reason for dismissal and [de] certification." See Id. at 224-225 (brackets added

; alterations on original).

Jurisprudence begs the Court to consider ^{granting} this petition for Petitioners seeking in forma pauperis status on appeal were unceremoniously held to a cryptic higher standard which impairs the roots of due process and access to the courts that Congress sought to fix with the in forma pauperis statute "to assure equality of consideration for all litigants," see Coppedge v. U.S., 369 U.S. 438, 447, 82 S.Ct. 917, 922 (1962).

Broad, expansive and vague assertions of entitlement to the affirmative defense of qualified immunity does not ^{properly and sufficiently} ~~properly~~ demonstrate entitlement to the defense; jurisprudence does not require a Plaintiff to rebut the application of the defense with the summary judgment standard of review; see Appx. D at 21, at the pleading stage; requiring ^{Appellants} ~~Appellants~~ to rebut a basic, broad and insufficient qualified immunity defense "statement" is likewise inappropriate, see Appx. A at 4, ^{and} is not the a legitimate basis for denying him appellate review, through a MIFPA, for ~~that~~ ^{the} defenses invocation on a motion to dismiss "it is the defendants conduct as alleged in the complaint that is scrutinized for objective reasonableness," Behrens v. Pelletier, 516 U.S. 299, 309, 116 S.Ct. 834 (1996) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)), and Petitioner issue concerns the Respondents ~~and~~ failure to sufficiently and properly invoke the defense (through generic, broad statements of entitlement to the defense and ^{unsupported} allusions the complaint allegations were "conclusional," Appx. H at 9). The Respondents failed to meet their burden. See Commander v. BASE Wyandotte Corp., 978 F.2d 924, 924 n. 4 (5th Cir 1992) ("Before the

non-moving party is required to produce evidence in opposition to the motion, the moving party must first satisfy its obligation of demonstrating that there are no factual issues warranting trial."); U.S. v. Humana Health Plan of Tex., Inc., 336 F.3d 375, 387 (5th Cir. 2003) (same).

Thus, the Fifth Circuit erred egregiously on this "arguable issue of law and fact." see Neitzke, 490 U.S. at 325, in determining the appeal as "frivolous" (see Appx. A at 3, Appx. E at 1, merely because Petitioner was not successful in the USDC - by ^{blindly} regurgitating unsupported conclusions by the Respondents (Appx. H at 9-10) and the USDC, whom characterized sweepingly the ~~the~~ forty (40)-plus page complaint were "conclusory" and insufficient to overcome the defense, Appx. D at 21, which Petitioner seeks to challenge. See Lewis v. Casey, 518 U.S. 343, 353 and n. 2-3 (1996) (A claim need not be successful to be non-frivolous). The Fifth Circuit sought to further shelter and shield the USDC decision in providing a circular decision, see supra at 12, therefore, if Petitioner "plausibly" stated a claim (Appx. A at 3), then it were error for the USDC to ~~dismiss~~ ^{the action} dismiss and grant the Respondents' motion and entitlement to said defense for the USDC determined Petitioner's claims were allegedly "conclusory" (Appx. D, supra). And, Petitioner correctly set out arguable legal points on the merits and the briefed issues were not "groundless and without foundation," see Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) and though Petitioner met ~~the~~ ^{App} Fed. R. Civ. P. 24 - he has been systemically obstructed from having his claims adjudicated. see Appx. E at 1; Appx. A at 3, warranting this court to establish a brighter line of "frivolity" for the purpose of unapp.

QUESTION TWO:

When a district court conclusory and generally analyzes each "type" of claim in a bundle rather than each "individual claim as a whole" without consideration of the pleadings in full, as violative of Iqbal, Twombly and Fed. R. Civ. P. 8 - does a appellate court err egregiously in denying the issue within appellants MIFPA as "frivolous" and not arguable on the merits?

This issue were raised in Petitioner's MIFPA, however the Fifth Circuit strategically refused to address this "arguable" question of law and fact after castigating him for utilizing his ^{actionable} First Amendment rights, the court adopted equivocal language of Petitioner's failure to meet Fed. R. Civ. P. 12(b)(6) and ten-lines later equivocating once more "even if" he stated "a plausible claim of retaliation...", see Appx. A at 3, which is a higher standard than announced under Fed. R. App. P. 24 and tantamount with a unsanctioned standard - a claim and issue is not arguable on the merits if one looses within the USDC, see ^{Lewis} supra at 18; see also Brower v. Cnty of Inyo, 489 U.S. 593, 109 S.Ct. 1378 (1989) (a finding of failure to state a claim does not invariably mean that the claim is without arguable merit).

This petition warrants review on the merits for the Fifth Circuit's ~~denial~~ dismissal of Petitioner's MIFPA prematurely clearly contravenes this Court's well-settled holdings, but directly conflict with other ^{Federal} Circuit Appellate Courts (and its own; and Fed. ~~App. P.~~ Fed. R. App. P. 24).

This court has affirmatively decided Twombly pleading requirements only require "enough facts to state a claim to relief that is plausible on its face." Id., 127 S. Ct. 1974; Fed. R. Civ. P. 8, supra at 1 (Same).

The USDC court was required to: First, take note the elements the

Plaintiff must plead to state a claim; second, identify allegations that because they are no more than conclusions, are not entitled to the assumption of truth, and finally when there are well pleaded factual allegations the court should assume their veracity and then determine whether they plausibly give rise to entitlement to relief. See Connolly v. Lane Const. Corp., 809 F.3d 780, 786, ¹⁸⁹ (3d Cir. 2016) (See also Iqbal, 556 U.S. at 675, 678, 679 (same); Twombly, 550 U.S. at 557 (same); Brown v. Taylor, 911 F.3d 235, 246 (5th Cir. 2018) (noting the district court did not engage with the factual allegations, much less take them as truth as it was bound to do at the pleading stage); Mass v. Secret Service, 572 F.3d 962, 970 (4th Cir. 2009) (same); Whitneys v. Gups, Inc., 700 F.3d 1118, 1128 (8th Cir. 2012) (same).

It is inherently emergent and necessary that this Court require USDC to "show their work" ^{when} ~~after~~ analyzing a Plaintiff's claims at the pleading stage and imposing a "duty" upon the ~~ex~~ USDCs to "individually set out and analyze each individual count claim for relief" with demarcations (Count one, count two...), that are "material facts" consistent with elements of each type of claim (conclusory and non-conclusory allegations) which fairly apprise plaintiffs of deficiencies within each individual claim, reducing the likelihood an analysis ^{could} ~~can~~ be couched in general statements of a "conclusory" designation and "failure to state a claim," obscured with statements of caselaw, miserably leaving Plaintiffs holding a empty bag and engaging in a unclear guessing game of what facts ^{and} ~~the~~ evidence were considered upon the dismissal, that is consistent with the Fourteenth Amendment.

And, intertwined with the USDC isolated "conclusory" designations upon Petitioner's ^{claims containing well-pleaded} detailed and material facts, encompassing attachments containing grievances of the retaliatory chain of events and statements made by Respondents in response to Petitioner's exercise of rights (1-60s) detailing their circumstances and motivations underlying ^{causation and} their adverse actions, scrupulously laid out within the memorandum that were all ^{ignored,} overlooked and discounted and minimized, ^{see} Appx. A at 6; Appx. C at 14; Appx. G at 3. Clearly contrary to this ^{multiple} court's holdings, which proved fatal to the civil action. See Muhammed v. Close, 124 S.Ct. 1303 (2004) (District Court failed to consider and/or overlooked key piece of evidence relating to causation (to wit: temporal proximity, affidavit of first-hand witnesses and/or both, in remanding to the USDC for consideration of evidence); Scurian v. Texas A&M Univ., 343 F.3d 533, 536 (5th Cir. 2003) (Court must consider a document that is central to claim and is attached or incorporated by reference to the complaint); Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983).

There was an explicit danger of the USDC analyzing ~~some~~ random allegations in isolation from the unidentified count or claim - instead of "reviewing the plausibility of [Petitioner's] claim as a whole," rather than the plausibility of each individual allegation," see Whitney, 700 F.3d at 1128 (citations omitted); Taylor v. Stephens, 946 F.3d 211, 211 n.16 (5th Cir. 2019) (Plaintiff pleadings included conclusional language, they also teamed with specific factual allegations); Doe v. Neveleff, 751 F.3d 383, 388 (5th Cir. 2014) (Same); Hill v. Lappin, 630 F.3d 468, 473-74 (6th Cir. 2010).

To further contravene multiple circuit holdings and this court, the Fifth

Circuit the opined Petitioner could not meet the "ordinary firmness" test because he continued unabated his exercise of rights despite the ^{illegal,} adverse acts by respondents, see Appx. A at 3, clearly contrary to the law. See Crawford v. E.I., Britton, 523 U.S. 574, 588 n.10, 118 S.Ct. 1584 (1998) (Official reprisals for protected speech offends the Constitution for it threatens to inhibit exercise of the protected speech for the First Amendment prohibits government officials from subjecting an individual to retaliation for speaking ^{out}); Hartman v. Moore, 547 ^{U.S.} ~~538~~ 250, 256, 126 S.Ct. 1695 (2006) (same); Morris v. Powell, 449 F.3d 682, 684-86 (5th Cir. 2006) (within a prison context a retaliation against a prisoner is actionable only if it is capable of deterring a "person" of ordinary firmness from further exercising his constitutional rights); Russell v. Oliver, 552 F.2d 115, 116 (4th Cir. 1977) (Plaintiff does not have to succumb to the retaliation to have an actionable claim); Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005) (same). And despite the respondents ^{conceiving} ~~adverse~~ ^{erroneous and flighty legal} this (plaintiff must be sufficiently chilled) argument the lower courts repeatedly adopted it. See Appx. H at 7; Appx. C at 14-15; see also Appx. F at 2; Appx. A, supra.

Thus, remand is warranted to maintain consistency and uniformity with this court's holdings to which the Fifth Circuit curtailed Petitioner's right to a judicial review on these host of "arguable, non-frivolous" issues originating from the USDC not analyzing each individual claim but each "type" of legal claim, to which the Fifth Circuit relied erroneously upon in denying his ^{Appx. E at 1} MIFPA. See Appx. A at 3, Fed. R. App. P. 24.

- a) If so, did the district court's decision reflect an exercise of discretion under 28 U.S.C. § 636(B)(1) and Fed. R. Civ. P. 72(b) (3)?

This "arguable" issue on the merits "were explicitly not addressed though sufficiently briefed within the MIFPA. Review on the merits is warranted for it is urgently necessary that the lower courts, specifically a USDC whom appoints a magistrate judge to preside over prose litigants "pretrial" issues by "standing order" are afforded de novo review of the M.J. decisions, absent explicit consent by the Plaintiff to proceed before a M.J., as the D.J. has jurisdiction ^{over} of all matters presented to the court that is consistent with 28 U.S.C. § 636(B)(1) and Fed. R. Civ. P. 72(b). See supra at 7-8. Ultimately it is the role of the appellate court to ensure the Constitution and federal law is upheld.

in a devastating blow to the Petitioner, whom adequately set out claims ^{demonstrating entitlement to} ~~for~~ relief, the M.J. never analyzed "any" of his claims-in generally referencing ^{isolated legal} ~~unidentified~~ conclusions ~~and for facts~~ from a unidentified court claim, see Appx. C at 11-20, upon multiple and specific objections to the M.J. report concerning the failure to address Petitioner's claims (on each and every claim) and for in compliance with label and Twombly, see supra at 6-7, 19-20; ignoring the law on the "ordinary firmness" test, see supra at 5, See Appx. E at 14-15, qualified immunity, see supra at 1-5, 14-18, considering the pleadings and attachments filed, see supra at 14, 21, see also

Conducting a purported de novo review of the objections the D.J. practically overlooked and ignored the objections' and their substance having deference

for the M.J.'s Report in violation and contrary to the "Magistrate Judge Act"
 28 U.S.C. § 636(b)(1)^(C) and Fed. R. Civ. P. 72(b)(3), and other circuit holdings,
 to which is at conflict with ^{See Appx. D, passim} ^{also} U.S. v. Reddatz, 417 [447] U.S. 667 (1980) (de
 novo review signifies the Magistrate Judge's findings are not protected by the
 clearly erroneous doctrine); Douglass v. United Ser. & Auto. Assn., 79 F.3d 1415, 1430
 (5th Cir. 1996) (en banc) (movant is entitled to de novo review of those findings, conclusions
 , and recommendations if objections are timely made); Walker v. Savers, 583
 Fed. Appx. 474 (5th Cir. Nov. 10, 2014) (noting the "review does not satisfy the in-
 dependent determination based upon the record . . . unconstrained by the findings
 and conclusions of the magistrate" that de novo review entails," citing U.S. v.
Wilson, 864 F.2d 1219, 1222 (5th Cir. 1989) (per curiam); Obiagbu v. Werlinger, 581
 Fed. Appx. 119, 122 (3d Cir. 2014) (Magistrate Judge did not analyze claim in
 report and recommendations and the district court erred by not referencing the
 claim in its order); Muhammed, ²¹ supra at 18; see also Thomas v. Arn, 474 U.S. 140,
 154 (1985)

This issue were clearly arguable on the merits and Petitioner should not be
 obstructed from appealing an actionable ^{and reversible} legal error for he need not prove he will prevail
 on the merits, see supra at 18, warranting remand for the ^{egregious} error in dismissing the NIFPA
 as "frivolous." See Appx. A at 3.

QUESTION THREE:

When a district court post-hoc revokes incorporation of claims appearing within a prior defective pleading after approving the incorporation in a curative second amendment at the eleventh hour and subsequently repeatedly refuses a curative amendment to correct the technicality, does a lower court commit reversible error in light of Foman, Fed. R. Civ. 1 and 15(a)?

This issue warrants review on the merits by the court on this novel and case of first impression for the USDC denied Petitioner's FAC for his failure to invoke a specific local rule within his motion for leave to file amended pleading that comports with the requisites^{and substance} of the local rule but failed to cite and request permission to explicitly exceed the thirty (30) page limitations, See supra at 4, which encompass critical claims and documentary evidence. It is in the interest of jurisprudence of whether a local rule ~~may~~ override the rigors of controlling law regarding amendments. See Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227 (1962) (holding courts are to consider undue delay, bad faith or dilatory motive, undue prejudice to opposition party and futility of the amendment when considering whether to deny leave), This court has stated this mandate is to be heeded. Id.; see also Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 126 (2d Cir. 2008) (same); U.S. v. Humana Health Plan of Texas, Inc., 336 F.3d 375, 387 (5th Cir. 2003) (holding "a formal motion is not always required, so long as the requesting party has set forth with particularity the grounds for the amendment and the relief sought."); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations and quotation marks omitted) (The underlying purpose of Rule 15 is to facilitate decisions on the merits, rather than on the pleadings or technicalities);

Torres v. Oakland Scavenger Co., 487 U.S. 312, 316-17, 108 S.Ct. 2405 (1988) (citations omitted) (quoting Foman, 371 U.S. at 181) (rules of procedure should be liberally ^{construed} ~~construed~~ and . . . "mere technicalities" should not stand in the way of considerations of a case on the merits. Thus, if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." See also N. Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co., 898 F.3d 461, 477 (5th Cir. 2008) (emphasis added) (quoting Fed. R. Civ. P. 15(a)) ("Rule 15(a) requires a trial court to 'freely give leave when justice so requires,'"").

Yet, the M.J. denied the motion for leave without further consideration of Fed. R. Civ. P. 1 which requires "rules" to be "construed, administered and employed by the court" to secure a "just, speedy, and inexpensive determination" of every action. Id. This court is in a unique position to balance ^{whether} said rules and Foman trumps a local rule, for pro se litigants would be compelled to resend all documents and exhibits ^{in a subsequent amendment} on account of technicality of failing to explicitly invoke the "magic word" to exceed page limitations, out of oversight. See supra at 8.

Moreover, a serious question of law necessitates this court's attention on the legality of the M.J. ^{post-hoc revokes} ~~when approved~~ Petitioner's incorporation of claims ^{appearing} within the ~~procedural~~ technically defective FAC - within his SAC, after being warned of the serious ramifications of failure to approve it, ~~grants~~ ^{grants}

- the SAC and despite ^{all} parties att understanding the incorporation of the FAC
- claims "19-36," the M.J. in effectively rescinded the granting of the SAC (see ^{supra} at 15)
- and the ^{M.J.} D.J., while acknowledging Petitioner seeking ^{specifically} to correct the incorporation technicality sought to preempt and denied him a ^{timely} opportunity to correct the error, respectively. See supra at 8, 10-11; Appx. C at 24; Appx. D at 8; see also infra at 29, 31.

Without proper consideration for the Due Process of Law under the Fourteenth Amendment, Fed. R. Civ. P. 1 and 15 and Foran, see supra at 8, 10-11, the lower courts ruling clearly contradicts to this Courts rule of law, other circuit appellate courts and its own body of case law, see Id.; Gomez v. USA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999) (per curiam) ("[A] pro se plaintiff who is proceeding *informa pauperis* should be afforded the same opportunity as a pro se fee-paid plaintiff to amend his complaint prior to its dismissal for failure to state a claim, unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim."); Lopez, 203 F.3d at 1126-30, 1130-31 (If a court finds the complaint should be dismissed for failure to state a claim, the court has discretion whether to dismiss with or without leave unless it appears the defect in the complaint could not be cured, especially if the Plaintiff is pro se); In re Life Partners Holding, Inc., 926 F.3d 103, 126 n.12 (5th Cir. 2019) (In response to objections to the bankruptcy judge's report and recommendation, the movant asked the district ^{court} ~~judge~~ to accept the recommendation to grant leave to amend and

offered to file a more detailed chart); Thomas v. Chevron U.S.A. Inc., 832 F.3d 586, 590 Brown v. Taylor, 911 F.3d 235, 241 (5th Cir. 2018) (District court abused its discretion in denying leave to amend where Plaintiff explained why he believed his First Amended Complaint is sufficient, offered a proposed amendment, and had not repeatedly failed to cure deficiencies); Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002) (DC often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing case). This is clearly a reversible error, see Mayeux v. La. Health Serv. and Indem. Co., 376 F.3d 420, 426 n.12 (5th Cir. 2004) (collecting cases) (a district court's failure to provide an adequate explanation to support its denial justifies reversal), for it is an abuse of discretion - for the USDC relied upon Petitioner were previously given an opportunity to correct a separate and unrelated technical error. See supra at 4; Appx. C at 24, Appx. D at B; see also Villarreal v. Wells, N.A., 814 F.3d 763, 761 (5th Cir. 2016) (citations omitted) ("A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts."); Brown, supra;

- a) If so, did the Fifth Circuit err egregiously in denying petitioner's ~~motion~~ MIFPA as "frivolous" and not "arguable on the merits" on the issue?

As demonstrated above the USDC committed a web of "arguable" errors demonstrating it egregiously misapplied settled law on its face and to maintain uniformity among the lower courts with this court Petitioner should be given a meaningful opportunity to adequately challenge the USDC pernicious application of controlling law and not be thwarted in that attempt by a app-

allate writing^{off} the well-briefed issues as "frivolous" by misapplying his legal issue of the USDC denying his FAC premised on a technicality and revoking incorporation at the eleventh-hour and refusing his attempt to correct the technicality through the TAL, see Appx. A at 3, contravening this court's law on "good faith," see Ellis v. U.S., 78 S.Ct. 974 (1958) ("In the absence of some improper motive, the applicant's good faith is established by the presentation of any issue that is not frivolous."), that would inherently result in litigants, particularly unrepresented, pro se prisoners being deprived review-through the Fed.R.App.P. 24 - premised upon not being the prevailing party. See supra at 18.

QUESTION FOUR:

whether a prisoner-plaintiff may amend a complaint to correct a technicality notified 23-days prior - on the date final judgment issues and/or via a Fed.R.Civ.P. 59(a) or 60(b) motion to correct a manifest error of law that the district court overlooked regarding the amendment? See Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981); Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv., 616 F.3d 612 (6th Cir. 2010).

This question raises several important questions of law to wit: after a USDC repeatedly swatted Petitioner's attempts to correct a technicality in seeking preauthorized leave to file a amended pleading that apprised the court of the basis for the motion, see supra at 6 and 8, within ^{after receipt of the M.J. revocation of incorporation,} 23-days[^] the motion accompanied with the Third Amended Complaint (TAC) with attachments - were deposited within the mailbox^{to the USDC} coincidentally on the same date final judgment issues, should it if the mailbox rule applies to all pro se prisoner

filings, see Houston v. Lack, 487 U.S. 266, 270 (1988), Stevenson v. Anderson, 139 Fed. Appx. 603 (5th Cir. 2005), ^{should} ~~should~~ ^{timely filed, but} the USOC be mandated to reconsider its final judgment in light of the late-received evidence, at least two courts has addressed this issue. See Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990) (the court may be allowed to "enforce some limit on the timely submission of appropriate evidence"). However, the court must strike a proper balance between "the need to bring litigation to an end and the need to render just decisions on the basis of all facts." See Lavespere v. Niagra Mach. & Tool Works, Inc., 910 F.2d 167, 174 (5th Cir. 1990) (citations omitted); Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv., 616 F.3d 612, 615-16 (6th Cir. 2010) (same; trial court must consider factors of finality and rendering expeditious terminations). This court should have the final ^{say on this} ~~law~~ ^{of law} question on this matter. Complicating the matter and interwoven with:

2. Though Petitioner complied with the rigors of indisputable ^{and credible} ~~arguable~~ evidence within his Fed. R. Civ. P. 59(c) demonstrating a "manifest error of law ~~or~~ fact" regarding his ^{timely} curative TAC rejected by the Clerk with demonstrable evidence, the D.J. discredited the evidence and ruled alternatively there were "unjustified delay in submitting the pleading warranting denial of leave" and once a lawsuit has been dismissed Petitioner could not amend his lawsuit, citing Whitaker v. City of Houston, 963 F.2d 831, 832 (5th Cir. 1992). See supra at 9

Within Petitioner's Fed. R. Civ. P. 60(b)(1) and (6) motion he argued the D.J.

overlooked controlling principles of law in denying the 59(c) motion and refusing to and rejecting his leave to file motion for "unjustified delay." See supra 9.

And, after conceding to his version of facts on the above on consideration of the 60(b) motion the D.J. ruled leave would have been denied for the "extraordinary delay" and no justification provided for the ^{"lengthy"} delay that sought to resolve a new revelational technicality.

See Appx. G at 5, 7. Though Petitioner repeatedly provided basis for the so-called "delay," See supra at 5, 9, 10.

This court should resolve this conflict presented by the Fifth Circuit's Whitaker case, see supra at 30. See The Sixth Circuit has opined "When a party seeks to amend a complaint after an adverse judgment... the claimant must meet the requirements for reopening a case as established by [Rule] 59 or 60," Leisure Caviar, LLC, 616 F.3d at 615-16; when denying a Rule 15 and a Rule 59 motion on account of undue delay the court "ought to pay particular attention" to the movant's explanation for failing to seek leave to amend prior to the entry of judgment. Id. See also Omega Hosp., LLC v. Univ. Health Care Servs., 389 F.Supp. 3d 412, 425 (M.D. La. Apr. 30, 2014) (When district court issues final judgment a party may amend by either appealing or reopening the case via FRCP 59 or 60). But see Russow v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 n.1 (5th Cir. 1987) (On consider for a 59(c) governed by 15(c), when judgment has been entered on the pleadings, a holding that the trial court should have permitted amendment necessarily implies that judgment on the pleadings was inappropriate and that therefore the motion should have been granted...).

See also Ammed v. Dragovich, 297 F.3d 201, 209 (3d Cir. 2002) (When a party requests post-judgment amendment of a pleading, a court will normally conjoin the FRCP 60(b) and 15(c) motion to decide them simultaneously).

Therefore, this Court should consider this intriguing issue/question of law and split among circuits and if the mailbox rule truly applies Petitioner's leave to file the TAC should be governed ^{by} Rule 15(c), isolated from the escalating burdens of Rules 59(c) and 60(b), to maintain uniformity within the lower courts. See also Guy v. Crown Equip. Corp., 394 F.3d 320, 325 (5th Cir. 2004) (Manifest error of law is one that is plain and indisputable, and that amounts to a complete disregard of the controlling law); Harrison v. Byrd, 765 F.2d 501, 503 (5th Cir. 1985) (same for standard rather than considering a rule 60(b)).

- a) If so, did the Fifth Circuit err egregiously in denying Petitioner's MIFPA as "frivolous" and not "arguable on the merits," on this issue?

The above issues were clearly and individually briefed as arguable issues and it is indisputably unfathomable the Fifth Circuit would rubber-stamp the denial of Petitioner's MIFPA which were clearly arguable "on its face" warranting this court to step in and exercise its supervisory authority to right the wheels of justice as the above issue clearly reflect an "abuse of discretion." See Carson v. Polley, 689 F.2d 562, 584 (5th Cir. 1982) ("Merely because a claim was not presented as promptly as possible, however does not vest the district court with the authority to punish the litigant."); Mayeaux, 376 F.3d 420, 426 n.12 (inadequate explanation for denying leave justifies reversal).

Though there were no delay, Petitioner provided evidence that any delay ^{in the leave motion} were a consequence of the USCA, see supra at 5, 9-10, for Petitioner were "diligent in seeking the amendment," Id., which the lower courts did not consider, see supra at 30 and 31.

even more remarkable, though the USDC relied upon flavors of "delay," see Supra at 9-10, the court clearly ignored delay without prejudice is an abuse of discretion. See Harrison v. Rubin, 174 F.3d 249, 253 (D.C. Cir. 1999) (where amendment would make technical corrections, delay without prejudice is not a sufficient ground to deny the motion); Travelers Indem. Co. v. Damman & Co., 594 F.3d 238, 256 n.14 (3d Cir. 2010) (same); Bediako v. Stein Mart, Inc., 354 F.3d 835, 841 (8th Cir. 2004) (there must be more than delay alone to deny motion to amend; there must be also prejudice to nonmovant); Laber v. Harvey, 438 F.3d 404, 426-27 (4th Cir. 2006) (same); Mayeaux, 376 F.3d at 427 (undue delay means it must prejudice the nonmoving party or impose unwarranted burdens on the court).

In spite of these clearly arguable issues of fact and law, the Fifth Circuit egregiously ignored or overlooked Petitioner's MIFPA concerning the denials of his Rule 59(e) and 60(b) and objectively unreasonable misconstrued his appeals regarding the denial of his FAC and TAC as "[f]rivolous." See Appx. A at 3, in the face of a plethora of arguable issues on the merits.

QUESTION FIVE:

When a plaintiff seeking IFP status on appeal pursuant to Fed. R. App. P. 24, is it permissible for the district courts to decertify an appeal by exclusively relying on its dismissal order pursuant to Baugh v. Taylor, 117 F.3d 197, 202 n.21 (5th Cir. 1997), in light of Lewis v. Casey and Christianburg Co. v. EEDC, without fair consideration of plaintiff's objections in the record? See Pate v. Stevens, 163 F.3d 437 (7th Cir. 1998), Celske v. Edwards, 164 F.3d 396 (7th Cir. 1999)?

This question has serious ramifications for in forma pauperis, pro se individuals seeking to appeal their case to the Fifth Circuit after a final judgment dismissing the case in the district court.

When evaluating a MIFPA within the district court pursuant to FRAP 24(a) the court must provide its reasons in writing and may deny authorization if the motion is not taken in "good faith." Id. at 24(a)(3)(A). Relevant here, the Fifth Circuit conflicts with other Circuit appellate courts, in that pursuant to Baugh, supra at ³³~~20~~, it permits district courts to incorporate by reference its order dismissing an appellant's claims to comply with Fed. R. App. P. 24(a)(2) and (a)(3)(A). See Id. As applied in this case, it directly conflicts with this Court's decisions in Lewis and Christianburg Co., supra at 18, for in determining "bad faith" and "frivolousness" should not be overly dependent ^{exclusively} upon an unsuccessful suit, or in this case the district courts dismissal orders, see Appx. E at 2. Under this matrix pragmatically, all prospective appeals would be deemed "frivolous" and "lacking ^{good} ~~bad~~ faith."

Good faith is a "subjective inquiry while 'frivolousness' is an objective one and the USDC failed to conduct a reasonable inquiry/assessment as part of its determination of "nonfrivolous" issues arguable on the merits by at the very minimum examining Petitioner's objections and post-judgment motions, ^{id.} ~~the~~; in apply a "inappropriately high standard when making good faith determinations," See Pate v. Stevens, 163 F.3d 437, 439 (7th Cir. 1998), citing Barefoot v. Estelle, 463 U.S. 800, 893, 103 S.Ct. 3383 (1983). And, the Seventh Circuit has addressed this serious issue. See Celske v. Edwards, 164 F.3d 396, 397, 398 (7th Cir. 1999) (citation omitted) (Judge's

Statement of the basis on Plaintiff's claims suggested his claims were frivolous or that an appeal would be futile; it is the judge's responsibility to provide "adequate reasons" for the certification and provide him with an opportunity to submit a statement of his grounds for appealing, so that the judge can make a "responsible assessment of the issue of good faith" - in remanding back to the district court); Pate, 163 F.3d at 439 (Plaintiff's judgment as a matter of law and new trial presented clear arguments as to why he believed he was entitled to judgment, therefore the district court was put on sufficient notice as to the issues Plaintiff intended to raise on appeal, he need not repeat what was sufficiently clear - in remanding back to the district court); see also Henderson v. Norris, 129 F.3d 481, 485 n.4 (8th Cir. 1997) (Affirming a district court's dismissal of a complaint does not automatically make the appeal frivolous).

Thus, this court should curb the Fifth Circuit's district courts practice of determining a prospective appellant's good faith by its previous orders rather than the record when it is not absolutely clear the appellant's claims are foreclosed, which proved fatal to ~~Appellant's~~ MIFPA in the Fifth Circuit whom essentially ratified the USDC half-baked determination, with deference and without a de novo review of the clearly arguable issues on the merits, See Johnson v. U.S., 352 U.S. 565, 566, 77 S.Ct. 550, 551 (1957) (per curiam) (Court of appeals has a duty to displace certification when there is a showing that appeal is taken in good faith); Cruz v. Hawk, 404 U.S. 59, 92 S.Ct. 313 (1971). Furthermore, the Fifth Circuit "Frivolous" determination has egregiously affected Petitioner's ability to lodge any ^{future} ~~other~~ civil action or appeal, warranting review. See Appo. A at 3-4; 28 U.S.C. § 1503

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Date: June 28, 2022