22-5570

ORIGINAL

No. USCA2 No. 21-3024

FILED
JUL 13 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

BERNABE ENCARNACION — PETITIONER
(Your Name)

vs.

GLENN GOORD, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BERNABE ENCARNACION, 91-B-0943
(Your Name)

639 Exchange Street, P.O. Box 149
(Address)

Attica, New York 14011-0149
(City, State, Zip Code)

NONE
(Phone Number)

TABLE OF CONTENT PAGE NUMBER

QUESTION PRESENT FOR REVIEW:

TABLE OF AUTHORITIES

PAGE NUMBER

CONSTITUTIONAL RIGHTS:

QUEATIONS PRESENT FOR REVIEW

Whether the Supreme Court had jurisdiction to directly review merits of decision of district judges that three judge court should be convened.

Whether prisoner had liberty interest to be free of disciplinary segregation uphold on second misbehavior report almost two later after original action was expunged in first disciplinary proceeding, and whether Plaintiff incarceration in the SHU solitary confinement for more than 11-years, and denied hygeene products and food in daily basis from 2/17/98 thru his released on 3/11/09 was typics harship violates the Eighth Amendment (Trop v. Dulles, 356 U.S. 58, 101 [1958]), and that there was disputed question of facts as to whether he had received all process due.

Whether his Eighth Amendment rights were violated when he was placed in the more retrictive levle of prison long-term segregation for more than 11-years from 2/17/98 thru 3/11/09, and denied hygiene products and food in daily basis, was cruel and unusual punishment is sufficiently serious that he was denied the minimal civilized measure of life's necessities. (Harris v. Miller, 818 F.3d 49, 65 (2d Cir. 2016); Encarnacion v. Goord, 15-2980, 2016 WL (2d Cir. 2016)).

Whether incarceration in the Segregation Housinh Unit ("SHU") for more than 11 years, and deprived of hygiene products and meals in daily basis was a typics harship was cruel and unusual punishment in violation of the Eighth Amendment, whether the district court failure to identified the untimely and unexhausted claims and the timely and exhausted claims and reaching the merits of the timely and exhausted claims deprived plaintiff of fair trial and Equal Protection of the Law.

JURISDICTIONAL STATEMENT

Plaintiff was sentenced to 10-years in SHU with loss of all privilegies for 10 years in 1998 on a second prison disciplinary hearing in connection with the 1996 incident almost two later after the contraband and related charges were dismissed and expunged at the start of the disciplinary hearing in 1996. After confined in SHU for over 11-years Encarnacion's term in the SHU concluded on March 11, 2009 and March 7, 2012 timely filed his 1983 for damages against 4-DOCS officials. Wrongful dismissed as untimely without reach the merit of the case in remanded (Encarnacion V. Goord, 12-CV-6180, 2020).

The currect motion was presented to the Second Circuit Court of Appeals of New York.

The Decision of the Second Circuit is dated April 21, 2022 and Mandate issued on May 26, 2022. (Copy enclosed).

Pursuant to Rule 13(1) of the Supreme Court Rules, an appeal to a final decision to a CircuitCourt must be filed within 90 days.

The appeal is authorized and timely.

BACKGROUND

On August 10, 1996, a fist fight broke out between Plaintiff and inmate Daniel Roberts in the main yard of Auburn Correctional Facility. Roberts swallowed a packet of drug that he want concealed from prison officials had stuck in his throat blocking his airway and died by lack of oxigen, also three superficial puntures wounds and a cut was found. The very next day Plaintiff received a misbehavior report charging him with violating prison rules: fighting, assault on inmate and contraband weapon. The contraband weapon and related charges were dismissed and expunged at the statr of the disciplinary hearing in 1996.

Encarnacion's term of SHU concluded on March 11, 2009 after he expended more than 11 years in SHU and in timely on March 7, 2012 filed his civil sue.

In this action for damages brought against four DOCS officials pursuant to 42 U.S.C. § 1983, Encarnacion alleges among other things that his more than 11 years confinement in the SHU and denied of hygiene products and food in daily basis is hardship violated the Eighth Amendment's prohibition against cruel and unusual punishment, and that his confinement in Segregation Housing Unit for more than 11-years violated the due process because it toock place on second prison disciplinary hearing almost two later after the contraband weapon and related charges in connection with the same incident of August 10, 1996 at Auburn CF were dismissed and expunged at the start of the prison disciplinary hearing in August 1996. At time of the 1998 disciplinary proceeding, Matter of Howard v. Coughlin, 212 A.D.2d 852 (3rd Dept. 1995) was the State presedent case in prison disciplinary proceeding, where the State Supreme Court, hold:

> Second determination of prisoner's guilt for violation of prison disciplinary rules could not be upheld after original determi nation was expunged due to lack of valid misbehavior report, even though prison prisoner was later criminally convicted for the misbehavior; effect of upholding second determination of guilt for rule violation would to be impose penalty on the inmate for action expunged in first disciplinary proceeding "even though rules allegedly violated were different". Howard v. Coughlin, Supra, 622 NYS.2d at 135; Wolff v. McDonnell, supra, 418 US 539, 94 S.Ct. 2963.

In its memorandum of law (02-CV-6380), defendants acknowledge the contraband and related charges in connection with the August 10, 1996 incident at Auburn C.F. was expunged in the first disciplinary proceeding, Brief of New York State Office of the Attorney General as amicus curiea's Addendum 1 A3; Encarnacion v. Goord, 15-2980. The U.S. Supreme Court in Sendin v. Conney, 515 US 472, 115 S.Ct. 2293, held that: prisoner had liberty interest in remaining free of disciplinary segregation and that there was disputed question of facts as to whether he had received all process due, citing Wolff v. McDonnell.

Here in this instant case, the district court entered judgment in defendants favor and dismissed the 1983 without reaching the merit of the case holding that some of plaintiff's claims was unexhausted and some was untimely (Encarnacion v. Goord, 12-CV-6180, 2020). Petitioner sought certificate of probable cause. The district court declined to issue certificate. Moreover, the district court failed to identifies which-one of plaintiff's claims were unexhausted and untimely and which-one were exhausted and timely and or reaching the merit of plaintiff's exhausted and timely claims in plaintiff's action.

In Jones V. Bock, 127 S.Ct. 910 (2007), the Supreme Court, Chief Justice Roberts, held that: 1) Inmate failure to exhausted under PLRA is affirmative defense, i.e. inmate is not required to specially plead or demonstrate

exhaustion in his complaint, abrogating, Knuckles V. Toombs, 215 F.3d 640; State V. Fed. Bureau of Prisons, 355 F.3d 204, Brown V. Toombs, 137 F.3d 1102, and Rivera V. Allin, 144 F.3d 719; 2) inmate's 1983 actions were not authomatically rendered noncomplints with PLRA exhaustion requirement by fact that not all defendants named. Here in this case, all claims in plaintiff's 1983 action is exhausted and timely.

As a punishment, DOCS defendants placed inmate Bernabe Encarnacion in Southport Correctional Facility Special Housing unit, State of New York worse and must restritive segregation unit in insolation from September 1999 thru November 2008. While in SHU, Plaintiff was deprived of hygiene products, food and outdoor or out-of-cell exercise in daily basis which DOCS officials defendants using as a punishment tools against inmates in segregation unit. After Mr. Encarnacion released from SHU on March 11, 2009 and while his 1983 action was pending in the district court, in August 2012 NYS-DOCCS Officials had publicly acknowledged and recognized that its use of long-term segregation confinement and restricte diet (known as "Loaft" hard bread and raw cabbage three times a day daily for an indefinally period of time) as a punishment against inmates, is inhumano and cruel against Eighth Amendment clause of cruel and unusual punishment, at New York, state Bar Association Panel on Solitary confinement ("NYSBAPSC") Commissioner Brian Fischer said: "...I'll be the first to admit - we overuse it."...."A fair critocisn that can be made is whether or not we're placing the right inmate in disciplinary segregation and we keeping them there longer than necessary." Albany Times Union newspaper, January and August 2012. Baned the use of food - restricte diet "Loaft" as a punoshment against inmates, reduced to a 30-days maximum term of inmate in SHU confinement and closed 98% of all NYS - SHU facilties. Remedies that came to late for Plaintiff Bernabe Encarnacion. (Beard V. Banks, supra, 548 US 521, 126 S. Ct. 2572 (2006) by placed inmate in must

restrictive level of prison - long-term segregation unit; Wolff V. McDonnell, supra, 94 S.Ct. 2963 (1974) inmate had due process at prison disciplinary proceeding; Sendin V. Conney, supra, 115 S.Ct. 2293 (1995) prisoner had liberty interest in remaining free of disciplinary segregation.

In appeal, the Office of the Attorney General submitted an amicus brief where among other things the Attorney General informing the Court: 1) "Encarnacion's term in the SHU concluded on March 11, 2009, and on March 7, 2012 his filed his 1983 action; and 2) the judgment may be vacated and the case remanded for proceedings without reaching the merits". See amicus curiae's brief, Encarnacion V. Goord, 15-2980. Based on the Attorney General's informations, the Circuit Court issued a summary order states, "We have appellate jurisdiction over an appeal on the sua sponte dismissal under McEachin v. McGuinnis, 357 F.3d 197, 200-01 (2d Cir. 2006), vacated in part, and remanded the case back to the district court with directions without reaching the merits of the case, holding:

> Upon review, we concl,ude that the district erred in dismissing Encarnacion's amended complaint sua sponte because it did consider the overall conditions of confinement of his SHU sentence. In particular, the District Court failed to consider the relevance of Encarnacion's 11-year confinement in SHU. Moreover, Encarnacion alleged that he was deprived of hygiene products and "daily meals" while in SHU. The district court also should have considered those all,egations as part of the overal,l condition of his SHU confinement. See Walk,er v. Schul, 717 F.ed 119, 127 (2d Cir. 2013) ("The failure to provide prisoners with toiletries and other hygienic materials may rise to the level of a constitutional violation."); Robles v. Coughlin, 725 F.2d 12, 16 (2d Cir. 1983) ("[U]nder certain circumstances a substantial deprivation of food may well be recognized as being of constitutional dimention."). Finally, we cannot "discern from the district court's analysis whether it adequately considered the possibility that [the alleged violation] offends contemporary standards of decency." Harris v. Miller, 818 F.3d 49, 65 (2d Cir. 2016). Encarnacion v. Goord, 15-2980 and 22-719; Encarnacion v. Rock, 12-3953.

Justice for this Plaintiff is embodied in the 5th, 6th, 8th, and 14th Amendments of the U.S. Constitution where he had a righgta: 1) right to a fair and impartial trial; 2) right to be free from cruel and unusual punishent; and 3) right to Equal Protection of the Law and due process, as well he had liberty interest in remaing free of disciplinary segregation and that there was disputed questions of federal law and of facts as to whether he had received all process due. Sendin, v. Conney, supra. The Eighth Amendment protect prisoners from "cruel and unusual punishment." Wilson v. Seiter, supra, 501 US 294 (1991); Estelle v. Gamble, supra, 429 US 97 (1976).

Accordingly, the district court makes note of that some of Plaintiff's claims were "unexhausted and untimely. The District Court erred in failed to identified any unexhausted and untimely claims and or claims accrued after the cutoff date, and reaching the merits of Plaintiff's claims that were exhausted and timely, and dismissed the action as untimely, such a errors, not only had prejudiced him, but had also denied him of a fair and impartial trial and Equal Protection of the Law and due process. Amends. 5th, 6th, & 14th; Gonzalea v. Hasty, supra, 802 F.3d 212 (2d Cir. 2015), "(the district court fails to determine in the first instance of what point, if any, a protected liberty interest attached under the facts of this case, and what point, if any, of Gonzalez's 5, 6, 8 & 14 Amends.

As explained more fully in the accompanying documentary evidence includes September 23, 2016 Brief of the New York State Office of the Attorney General as Amicus Curiae (Encarnacion v. Goord, Dkt. No. 15-2980, 2016 WL 5867213 (22d Cir. 2016), 2014 WL 4694681 (2d Cir. 2014).

The U.S. Supreme Court had jurisdiction to directly review merits of decision of district judges. Brown v. Flata, 563 US 493, 131 S.Ct. 1910 (2011), where Supreme Court, Justice Kenney held that Supreme Court had

jurisdiction to directlyreview merits of decision of district judges that three judge district court should be convened. Brown v. Flata, supra.

Petitioner Bernabe Encarnacion, are appearing pro se, as his Court's appointed pro bono counsels informed him that their could not be represent in this action after the trial, he respectfully asks and prays the Court to excused to overlook technically errors and mistake herein, because Petitioner Bernabe Encarnacion is a layman on matter of law who is limited to his ability to speak and read English very well, and, in addition, suffers from a vision impairment (see Exhibit 1-4), and he depend on other layman on matter of law inmates, who have been helping him and do his "law works" for him including this petition for a writs of Certiorari herein, which said limitations and impairment, the Courts below already recognized, and, had appointed him pro bono counsel, Attorney at law Miguel A. Reyes, and John M. Regan, Jr., Encarnacion v. Goord, 08-CV-6035 CJS/MWP, WDNY, and Elmer Robert Keach, III, Maria Dyson; Sarah E. Howland, and Perkins Coie, Encarnacion v. Spinner, 15-CV-1411 (BKS/ML) NDNY, pending for jury trial). Moreover, state prisoner are state property, the question here before the Supreme Court is whether the State Attorney General Office should represnt all State properties, include inmate Bernabe Encarnacion an State property, which New York State Office of the Attorney General, Letitia James, refused and failed to do so here, clearly have prejudiced Petitioner inmate Bernabe Encarnacion further.

CONCLUSION

For the foregoings facts, law, and circumstances this Court should granted Certiorari reversed the Court below decision and order, reaching the merits of the claims and appointed pro bono counsel to assists both the Court and Petitioner Mr. Encarnacion; alternatively, vacated the judgment and the case remanded with direction for further proceeding in consistence with this Court's decision grant such other and further relief as the Court may deem just, proper and equitable.

Dated: August 30, 2022
Attica, New York

Respectfully Submitted,

Bernabe Encarnacion

Bernabe Encarnacion, 91B0943
Petitioner/Plaintiff Pro Se
P.O. Box 149
Attica, New York 14011-0149