

22-7387

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

FEB 13 2023

OFFICE OF THE CLERK

Daniel Avella — PETITIONER
(Your Name)

vs.

Brian Collier — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Texas
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Daniel Avella
(Your Name)

C.T. Terrell Unit 1300 FM 600
(Address)

Rosharon, Tx 77583
(City, State, Zip Code)

11
(Phone Number)

Supreme Court of the United States

Petition for Writ of Certiorari

Questions Presented For Review

- (1) Does the mandatory language "SHALL" in the text of Texas Government Code Ann. 501.099(B) create a protected Liberty Interest?
- (2) Does a legitimate claim for injunctive prospective relief exist?
- (3) Is a Dismissal Without Prejudice Required for failing to exhaust "available" administrative Remedies, since the dismissal was not on the merits, but an exercise of discretion?

List of Parties

Petitioners

Daniel Aiello T.O.C. # 2176225
C.T. TERREL UNIT
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Rossharon, Texas 77583
(281) 595-3481

Respondents

Brian Collier
Donna Bell
Johnny Armstrong
R. Semaniego
Attorney for Respondent
Attorney Ann Hahn
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*Daniel Cull
Petitioner*

TABLE OF AUTHORITIES.

TEXAS STATE LAWS

(1) Tx. Gov't. Code Ann. 311.016-Definitions.....pg.6
(2) Tx. Gov't. Code Ann. 501.099 SECTION-(B).....pg₁ & 4
(3) TX. Gov't. Code Ann. 501.099 SECTION-(A).....pg.4
(4) Tx. Civ. Prac. & Rem. Code Chapter 14-Inmate litigation.....pg.5
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FEDERAL LAWS

(1)United States Constitution Fourteenth Amendment.....	pg.1&2&5
(2)Prison litigation Reform Act 42 U.S.C.1997(e).....	pg1&4
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Citations of the Official and Unofficial Reports
of Opinions and Orders in the Case

Supreme Court of Texas - case no: 22-0591 - unreported

cited as Aiello v. Collier 2022 Tex. Lex 940.

See Appendix (A-1)

Rehearing entered October 21, 2022. Denied December 9th 2022

See Appendix (A-2)

Case Closed December 22, 2022 - see Appendix (A-3)

Thirteenth Court of Appeals, Southern District of Texas

cited as Aiello v. Collier 2022 Tex App Lexis 2721/2022 WL 1250850
(Tex. App. Corpus Christi April 28 2022)

See Appendix (B-1)

Judgement entered May 17, 2022 see Appendix (B-1)

Order denying Rehearing entered May 31, 2022 - Appendix (B-2)

Rehearing entered June 22, 2022 - Appendix (B-3)

Order denying Rehearing entered July 5, 2022 - Appendix (B-4)

Mandate letter issued December 15, 2022. - Appendix (B-5)

Basis For Jurisdiction

This case raises the question of a state statute creating a protected liberty interest, that is being deprived.

Rule 10 Considerations Governing Review on Certiorari

(c) A state court has decided an important question of federal law that has not been, but should be, settled by this court and has direct conflicts with relevant decisions of this court.

Constitutional Provisions

This case involves Amendment XIV to the United States Constitution which provides

Section 1 - All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 laws.

(2)

Constitutional Provisions (cont)

Section 5--The Congress SHALL have the power to enforce by appropriate legislation, the provisions of this article.

The amendment is enforced by Title 42 Section 1983 US code

Every person who, under color of any statute, ordinance, regulation, custom OR usage of any State, TERRITORY OR the District of Columbia, subjects OR causes to be subjected any citizen of the U.S OR other persons within the jurisdiction thereof to the deprivation of any Rights, privileges OR immunities secured by the Constitution and Laws SHALL be liable to the party injured in an action at law, suit in equity OR other proper proceedings for Redress.

STATEMENT OF THE CASE

The Texas State Courts adjudication of the claim resulted in a decision that is contrary to, involved an unreasonable application of, clearly established Federal Law, and was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

To demonstrate that at the state court level adjudication of Petitioners claim was based on an unreasonable determination of the facts. Petitioner rebuts the state courts findings with factual findings with clear and convincing facts, TEXAS STATE LAWS.

The reviewing court should take into consideration the nature of the challenged action, involving a significant departure from the mandatory language construction and legislative directive. The Texas Laws provided require a course of action and places a substantive limit on Respondents discretion.

28 U.S.C.S 1257 (a) Final judgements rendered by the Highest Courts of a state in which a decision could be had, may be reviewed by the Supreme Court by "writ of certiorari" where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to the constitution or laws of the United States or (WHERE ANY RIGHT PRIVILEGE IS SPECIALLY SET UP OR CLAIMED UNDER THE CONSTITUTION OR STATUTES OF, OR ANY COMMISSION HELD OR AUTHORITY EXERCISED UNDER THE UNITED STATES.)

The Supreme Court has determined that statutes use of mandatory language "SPECIFICALLY THE WORD SHALL CREATES A PRESUMPTION. Board of Pardons v. Allen 482 US 369. Recognizing that by using "SHALL" Congress could not have chosen stronger words to express its intent to impose a mandatory requirement, United States v. Monsanto 491 US 600, 607 109 S.Ct.2657, 105 L.Ed.2d 512(1989) and recognizing that "SHALL" normally creates an obligation impervious to judicial discretion, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Letach 523 US 26, 35 118 S.Ct.956, 140 L.Ed.2d 62 (1998).

(Pg 3)

*Daniel Civil
Petitioner*

STATEMENT OF THE CASE (con't)

Petitioner contends he is being deprived a "liberty interest" created in Texas Government Code Ann. 501.099 (B) that contains mandatory language the "WORD SHALL" that places a substantive limit on the Respondents Official discretion. Richardson v. Joslin 501 F3d.415,419 (5th.Cir.2007)

TEXAS GOVERNMENT CODE ANN.501.099 SECTION (B)quotes-The department when determining in which correctional facility to house an offender "SHALL" consider the best interest of the offenders family and,if possible house the offender in, or in proximity to, the county in which the offenders family resides.

The Mandatory Language in the abovementioned statute creates a presumption the Petitioner will be housed in proximity to his family.

Respondents deprivation of this statute created liberty interest creates a direct conflict and reckless disregard to another Texas state law.TEXAS GOVERNMENT CODE ANN. 501.099 SECTION (A)quoting that

The department "SHALL" adopt and implement policies that encourage family unity while the offender is confined.In adopting the policies, the dept. "SHALL" consider the impact of dept.visitation policies on the ability of the offenders child to maintain ongoing contact with the offender.

Petitioner sought relief is mandated in the abovementioned laws and no more.

PLRA EXHAUSTION

Respondents raised the defense,Petitioner did not exhaust administrative remedies required by PLRA 42 USC 1997(e).

Petitioner contends when the statement "NO FURTHER ACTION IS WARRANTED BY THIS OFFICE" that definitive statement thereby ended all available administrative remedies.An exceptionnto the exhaustion requirement is baked into 1997(e) (a)'s text.An inmate need only exhaust only such administrative remedies as are available. Varner v. Shepard 11 F.4th. 1252(11th.Cir.2021) and Fordley v. Lizarraga 18 F4th.344(2021 US App. Lexis 33395 (9th.Cir.2021)

At the Texas State level in Crain v. Prasifka 97 SW3d 860,870 (Tex-APP+Corpus Christi-Edinburg 2003)The court held that the dismissal of an

PLRA EXHAUSTION (con't)

inmates suit under Tx.Civ.Prac.& Rem.Code Chapter 14.005-Inmate Litigation for the failure to exhaust administrative remedies should have been "WITHOUT PREJUDICE" because a dismissal for failure to comply with the conditions in chpt 14.005 is not a dismissal on the merits, but rather an exercise of the trial courts discretion. Aiello v. Solis 2022 Tex App Lexis 2773, 2023WL 1250849 and Ritchey v. Vasquez 986 SW2d 611,612 (tex1999)

Dismissal with prejudice constitutes an adjudication on the merits and operates as if the case had been fully tried and decided. Mossler v. Shields 818 SW2d 752,754(Tex1991) and Pitts v. Tex. Dept. of Crim. Justice 2002 Tex-App Lexis 8461 (13th.Dist.2002)

Thereby by the lower courts judgement should be modified. A DISMISSAL OF ACTION WITHOUT PREJUDICE, FOR FAILURE TO EXHAUST THE ADMINISTRATIVE REMEDIES IS REQUIRED.. Sefiane v. Comm'r of the SSA 2021 US Dist.Lexis 243571/ 2021 WL 5989758 (Southern Dist. of Texas Nov.2,2021) and Young v. Lumkin 2021 US Dist.Lexis 150786/ 2021 WL 3556204 and see Ann Phan v. Cl Invs.LLC 2022 Tx-App Lexis 346 (1st.Dist.Hou-App 2022)

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Rule 10 Considerations Governing Review on Certiorari

- (c) A state court has decided an important question of federal law that has not been, but should be, settled by this court that conflicts with relevant decisions of this court.

ARGUMENT IN SUPPORT OF GRANTING
CERTIORARI

A.CONFLICTS with Decisions of Other Courts

The holding of the courts below that mandatory language "SHALL" does not create a protected liberty interest and the failure to exhaust administrative remedies should be with prejudice is directly contrary to the holdings of their own state court cases and the federal courts. SEE ABOVEMENTIONED CASE LAWS...The Supreme Court in copious of adjudication in cases before them ruled contrary to the lower courts decisions.

(PSS)

*Douglas Keeler
Petitioner*

ARGUMENT IN SUPPORT OF GRANTING
CERTIORARI

The law of Texas State at Tex. Gov't Code 311.016 enacted by Acts 1997, 75th Leg., ch. 220 (S.B.) 1 effective May 23, 1997

Sec. 311.016 "MAY", "SHALL", "MUST", Etc. states,

The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute.

(2) "SHALL" imposes a duty.

Texas Constitution Article 1, Sec. 28. Suspension of Laws, states
No power of suspending laws in this State Shall
be exercised except by the Legislature

The courts of Texas do not have authority to set aside state and constitutional mandates. Because the dismissal was defective and on the basis of judicial discretion and not the merit the case should be remanded or the judgement modified to a "DISMISSAL WITHOUT PREJUDICE".

B. IMPORTANCE OF THE QUESTION PRESENTED

This case presents a fundamental question of law. The question presented is of great public importance because it affects visitation which the Texas Department of Criminal Justice encourages and visitation is an important factor in rehabilitation.

Visitation is an integral part of the process of rehabilitation. The Bureau of Prisons encourages visitation by family, friends and community groups to maintain the morale of the inmates and to develop closer relationships between the inmate and family members. The guidance on the question is of great importance to Texas State Judiciary.

The issue's importance is enhanced by the fact that the lower courts in this case have seriously misinterpreted the law.

A State Court can not, by omitting to pass upon evidence, or to make findings of fact, that deprive a litigant of the benefit of a federal right.

The Court should correct the judicial error and make it clear that the word "SHALL" is mandatory duty to be performed by officials and or modify the lower courts judgement to a "DISMISSAL WITHOUT PREJUDICE".

(PS6)

*Dan A. Clegg
Petitioner*

CONCLUSION

For the foregoing reason, certiorari should be granted in this case.

March 9th 2023 corrected
February 13th 2023

Respectfully Submitted,

Donald Cato #2176225
Petitioner

28 U.S.C 1746 unsworn declaration

= I Declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON THIS THE 13th DAY OF February 2023.
corrected 9th Day of March 2023

(PS 7)