NO._____

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR GAVILLAN- MARTINEZ
Petitioner

v.

SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent

ON PETITION FOR CERTIORARY TO THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Victor Gavillan-Martinez
DC#135908
3189 Col. Greg Malloy Road
Crestview, Florida 32534

QUESTION PRESENTED

WHETHER EVIDENCE PRESENTED IN THE DISTRICT COURT PROCEEDING WAS SUFFICIENT TO AVOID SUMMARY JUDGMENT PERTAINING TO CLAIMS THAT THE LEGAL PAPER RULE VIOLATED PETITIONER'S RIGHT TO RECEIVE INFORMATION WHILE IN PRISON UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT, ACCESS TO COURT UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, AND EQUAL PROTECTION OF LAW OF THE FOURTEENTH AMENDMENT OF UNITED STATES CONSTITUTION

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 the parties to the proceeding in the court whose judgment is subject of this petition is a follow:

PARTIES

1. Dixon, Ricky D Secretary Florida Department of Correction, Defendant/ Respondent.
2. Frank, Michael J. Honorable U. S. Magistrate Judge for the Northern District of Florida, Pensacola Division.
3. Gavillan-Martinez, Victor Petitioner.
4. Grepe, Marcus D Chief Assistant Attorney General prior counsel, respondent
5. Huskinson, Lori – former Assistant Attorney General, former counsel for Respondent
6. Kverne, Rrick former Assistant Attorney General, former counsel for Respondent
7. Sharma, Ravi Assistant Attorney General counsel for Respondent
8. Stampelos Charles J Honorable U.S. Magistrate Judge for the Northern District of Florida Tallahassee Division
9. Walker, Mark Honorable U. S Chief District Judge for the Northern District of

Florida

To the best of Petitioner knowledge, the corporate disclosure statement is not applicable.

TABLE OF APPENDICES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

AMENDED

PETITION FOR WRIT OF CERTIORARI

Petitioner Victor Gavillan - Martinez respectfully prays that a writ of Certiorari be issue to review the judgment below.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeal denying Petitioner's appeal of the grant Respondent's Motion for summary judgment which is not for publish, is herein attached as appendix A.

JURISDICTION

The Eleventh Circuit Court of Appeal enter Judgment on November 8, 2022. Wherein the Court affirm the lower court decision. Petitioner did not sought rehearing. Thus, February 6, was the last day to file his Petition. Pursuant Rule 6 (d) Fed. R. Civ. Proc. Petitioner delivery his Petition an February 9, 2023 in accordance with the "Mail box" rule.

Therefore this Honorable Court have jurisdiction and is confined by 28 U.S.C. §1254 (1).

CONSTITUTION AND STATUTORY PROVISION INVOLVED

FIRST AMENDMENT

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

FIFTH AMENDMENT

... No person shall be ... deprived of life, liberty, or property, without due process of law.

FOURTEENTH AMENDMENT

Section 1. All person 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 to privilege 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 law.

Section 5. The Congress shall have power to enforce, by appropriate legislation. The provision of this article.

The Amendment is enforced by Title 42. Section 1983 United States Code

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia subjects or cause to be

subject any citizen of the United States or other person within jurisdiction thereof to the deprivation of any right, privileged or immunities secured by the Constitution and law, shall be liable to the party involved in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial official for an act or omission taken in such officer's judicial capacity, injuctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Florida Statute Chapter 119

(1) It is the policy of the State that all state, county, and municipal record are open for personnel inspection and copying by any person. Providing access to public record is a duty of each agency.

(2) (a) Automation of public records must not erode the right of access to records. As each agency increases it use of and dependence on electronic record keeping, each agency must provide reasonable public access to records electronically maintained....

Florida Administrative Code Chapter 33-210.102 (6)

(b) The following item are prohibited from receipt in routine mail are also not permissible for inclusion in or attachment to legal mail.

1. Non-paper items:

STATEMENT OF THE CASE AND FACT

Petitioner did file a 28 U.S.C. Section §1983 Civil Right Complaint alleging that he cannot receive information that come from his pre-trial counsel in the fashion provide to him, in digital format contained in CD's/DVD's. According with the complaint, Respondent's rule chapter 33-210.102 (6)(b)1. FAC which state that inmate are not allow to receive "non-paper item" through legal mail or regular mail, violate Petitioner's right to receive information while in prison, access to the Court and equal protection under law.

After Petitioner was sentence he did file a Motion for Ineffective Assistance of Counsel Rule 3.850 Fla. R. Crim. Proc. With one claim for relief. Thereafter he make a public record request pursuant Chapter 119 Fla. Stat. To his former pre-trial counsel the Public Defender Office which promptly response that their were willing to provide the record requested in digital format contained in a CD's/DVD's. They also cataloged those records as "attorney-client confidential material."

Petitioner sough permission for the institution for which he was assigned and was unresponsive. Petitioner initiate the grievance process to resolve the inconvenience. The Respondent answer to the appeal of the denial of his grievance that "CD's/DVD's are not permitted in the Florida Correction Institution and that "[Petitioner]" are welcome to mailed to [Petitioner's] family to place in a CD's/DVD's at [Petitioner's] expense and mailed to the Court. [sic]

Petitioner amended his motion 3.850 Fla. R. Crim. Proc. with three more claim of ineffective assistance of counsel even Respondant preclude Petitioner to have access to his legal records. The states post-conviction court for the Fourth Judicial Circuit, Duval Co. Florida deny all Petitioner claim where he was unable to present evidence at the evidence hearing held by that Court, to support his claim of failing file a Motion to Suppress, and Motion to Dismiss §776.032 F.S. by Petitioner pre-trial counsel Ms. Portis Public Defender Assistance at the evidentiary hearing.

During that said evidentiary hearing Petitioner become in possession of Ms. Portis "personal note" provided by the Public Defender Office relevant to the investigation of Petitioner criminal charge. The state post-conviction court deny postpone the evidentiary hearing for Petitioner could have review those "personal note" which Petitioner did take with him to his cell after the hearing and the court make, on it own, part of the record of the evidentiary hearing.

A search through the "note" reveal that Petitioner co-defendant mother Ms. Debbie Roach's statement to the Detective placing Petitioner's co-defendant Ms. Erica Roach sleeping at her residence the weekend previous the Monday November 19, 2012 warrantless search of Petitioner and Ms. Erica Roach residence.

Petitioner assert in his §1983 cause of action that Respondant interpretation and enforcement of Chapter 33-210.102 (6)(b)1. preclude Petitioner from present this statement/evidence to rubut Ms. Porties testimony that she believe that the Police does

not need warrant because Petitioner has been evictive and abandonment his residence and therefore has no standing to file a motion to suppress the evidence finding in the warrantless search. Apparently, blindly relying on the Police Arresting Report witness statement and/or Mr. Napoli statement manager of the mobile home community where Petitioner was tenant without make her own investigation and provide false testimony.

Respondent contend in this case that summary judgment was properly granted in the District Court. Respondent argues that Petitioner failed to establish that he suffered any constitutional violation, or that the Department of Correction rule was in any way unconstitutional, and that he is not obligated to allow Petitioner receive the requested records contained in CD's/DVD's because those item constitute a security concern as it can be fashioned in to a stabbing weapon. Respondent only supporting data of this contention is Mr. Hawell, security chief, declaration; The respondent has not submitted any scientific proof to support this contention.

The Magistrate Court Report and Recommendation hold that petition has "failed to allege a plausible claim of denial of access to the courts." That he has failed to allege "sufficient" injury and has not create a genuine issue of material fact as to that element and that Petitioner has not demonstrate the existence of a genuine issue regarding the constitutionality of the Florida regulation that prohibit inmates from receiving and "possessing" CD's.

Likewise, the Eleventh Circuit Court of Appeals hold that Petitioner "has not

show that his equal protection right were violated because he was treated less favorably than others inmates within the prison and "could still access his legal material." [?]. That's nor are there any genuine issue of material fact relate to what security measures the prison has in place for CD's. That Petitioner has present no evidence to counter those statements, and that "the District Court properly found that [Petitioner] was not denied access to the court because he managed to file his 28 USC §2254 petition and could not specifically state how the CD would have aided his claims in that petition. Finally, the legal paper rule is constitutional because is further the prison's legitimate interest of security and alternatives to the rule are too costly." Those holding are not only wrong, there are contrary to the record.

Therefore Petitioner seek Certiorari.

REASON FOR GRANTING CERTIORARI

The issue involved in this case affect thousand of inmates in the state of Florida and their families situate as Petitioner, and other thousand of inmates in future generation to come, as well as several judicial government agency, like courts, and criminal attorney, as it related to criminal records and files, provide by former pre-trial counsel the Public Defender Office, Clerk of Courts, State Attorney offices, and Sheriff Offices, in digital format contained in CD's/DVD's which the Defendant prohibit receive in the Correctional Institution. At the same time the Florida Department of Correction utilize those item, CD's/DVD's to promote good behaviors and rehabilitation with

movies for entertained, religious programs and educational classes.

Petitioner assert to this Honorable United States Supreme Court that this is an issue of great importance of public interest.

ARGUMENT

WHETHER EVIDENCE PRESENTED IN THE DISTRICT COURT PROCEEDING WAS SUFFICIENT TO AVOID SUMMARY JUDGMENT PERTAINING TO CLAIMS THAT THE LEGAL PAPER RULE VIOLATED PETITIONER;S RIGHT TO RECEIVE INFORMATION WHILE IN PRISON UNDER THE FREE SPEECH CLAUSE OF THE THE FIRST AMENDMENT ACCESS TO COURT UNDER THE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND EQUAL PROTECTION OF LAW OF THE FOURTEEN TH AMENDMENT OF UNITED STATES CONSTITUTION

Petitioner's cause of action argued and demonstrated that his constitution right to receive information while in prison, access to court and his due process right to be able to defend himself and prove his allegation in the state post-conviction court has been violated by the Respondent Rule. Also Petitioner has argued and show with evidence that the present of CD's/DVD's do not constitute a security threat and that Respondent response is an exaggerated response. Petitioner has argued that he was denied equal protection of law when the Respondent enforced against him chapter 33-210.102 (6) (b)1. but permitted the Department to use CD's/DVD's as entertainment, religious and education for inmates and that evidence in the record do created a genuine issue of

material fact.

FIRST AMENDMENT RIGHT VIOLATION

Petitioner assert that neither the Magistrate Court, the District Court not the Circuit Court of Appeal has passed must on this violation of receive information while incarcerated under the free speech clause of the First Amendment Right of United State's Constitution.

Petitioner did made a Public Record request pursuant Chapter 119 Fla. Stat. And Respondent deny Petitioner from receive his requested Public Records. Petitioner did not has to show an actual injury for this violation. Just the violation itself. See *Al-amin v. Smith* 511 F. 3d 1317 (11th Cir.). Further, it well established that a prisoner inmate retain those First Amendment right that are not inconsistent with his status as a prisoner or with the legitimate penological objective of correctional system." *Pell v. Procunier* 717 U.S. 817, 822 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495 (1974) See *Turner* 482 U.S/ at 95 107 S. Ct. 2254.

As the Eleventh Circuit explained, Al-Amin use of the mail to communicate confidentially with attorney about his cases is not inconsistent with prisoner status or legitimate penological objective, but promote the states interest in institutional order an security.

... "Prisoner's use of mail to communicate with their attorney about their criminal cases may frequently be a more important free speech right that use their tongues."

"Thus, we conclude that Al-Amin has a First Amendment free speech right to communicate with his attorney by mail, separate and apart from his constitutional right to access to the Court." (Id. at 511 F.3d 1333)

Bell v. Wolfish 441 U.S. 520 99 S. Ct. 1861 (The individual have a fundamental First Amendment right to receive information... beyond dispute.

FIFTH AMENDMENT RIGHT OF ACCESS TO COURT

To show violation to access to the court under the due process clause of the Fifth Amendment Petitioner have to demonstrate that he suffer actual injury by proving that prison official or prison policy stopped Petitioner from being able to assert a non-frivolous claim. (See *Lewis v. Casey* 518 U.S. 343, 116 S. Ct. 2174 (1996).

Petitioner's entire cause of action argued and demonstrate that his constitutional right to access the court and his due process right to be able to defend himself and prove his allegation were frustrate by the Respondent's Rule. Petitioner present his right of access claim correctly, that was backed up by specific evidence, facts, and allegation of wrong doing by the Respondent.

Here, Petitioner satisfied his requirement. He alleged that the Respondent's Rule was unconstitutional because it failed to allow Petitioner access to his legal paper work provided to him by his former pre-trial counsel in digital format contained in CD's/DVD's. This deprivation cause Petitioner to be unable to satisfy his burden at the evidentiary hearing that was held in his criminal post-conviction state court, pursuant to

Rule 3.850 (f)(8)(B) Fla. R. Crim. Proc.

In this case, Petitioner did file timely Motion for Post-Conviction Relief, even though, he did not have access to his legal records CD's/DVD's that include the discovery in his criminal conviction. Therein Petitioner raised four claim of ineffective assistance of counsel: (1) failure to file a motion to dismiss under §776.032, (2) failure to file a motion to suppress evidence on illegal seized item, (3) affirmative misadvice by counsel regarding 28 year plea offer, and (4) failure to order PSI prior to sentencing. The evidentiary hearing consisted of former pre-trial counsel testifying that Petition statement to the police did not support a motion to dismiss under §776.032 (Stand your ground) Petitioner has demonstrate that there are evidence in the pre-trial counsel "personal note" that indicate Petitioner's: statement to the Police did support a motion to dismiss. Also there is information by the lead Homicide Detective report stated that Martinez... then said, "what do you expect me to do when he is coming at me with a knife?" (Appx. C Ex. DOC 114 at 37))

Pre-trial counsel Ms. Portis also testify that Petitioner was no longer reseeding at the place search when it was searched so he lack standing to challenge the search. The record show that Petition has alleged and demonstrate that there are witness statement placing Petitioner co-defendant sleeping in his residence the weekend prior to the Monday. November 19, 2012 warrantless search Appendix C (DOC 23 at 18-19). Also, Petitioner alleged that the evidence in possession of pre-trial counsel confirm that

Petitioner nor Ms. Erica Roach has not been evicted more less abandon their resident. (Appx C Ex DOC 23 at 18-19 Ex. I). .

This information necessary to be submitted at the state post-conviction evidentairy hearing was in possession of the Public Defender Office. Also their were willing to provide the information in digital format contained in CD's/DVD's. Petitioner could have research, and review this information long before evidentiary hearing take place when Petitioner make his Public Record Request (two years before) and filed the needed detail of the witness statement at the evidentiary hearing.

Nevertheless, due to the arbitrary and capriciously application of Chapter 33-210.102 (6)(D)1. preclude Petitioner of due process of law.

The Magistrate Court hold that Petitioner's access to court was not violated because he managed to file a 28 USC §2254. However, Petitioner claim of access to court violation, is that, the Respondent's Rule render ineffective the state post-conviction court remedy that the Petitioner previously had. (see *Swekel v. City of River Rouge* 119 F.3d 1259, 1263-64 (6th Cir. 1987).

The United States District Court for the Middle District of Florida, Jacksonville Division deny Petitioner request for evidentiary hearing where Petitioner could develop the above mentioned substantial evidence, and fact as well as subpoena duces tecum, leaving Petitioner with no other remedy at law. The United States District Court § 2254 also deny Petitioner's petition for Habeas Corpus relying on the correctness of the State

post-conviction court which is already demonstrate was ill advice based on incomplete information.

"an actual injury is show when [Petitioner] alleged sufficient fact the he was prejudice in a criminal prosecution, post conviction motion or civil right action in which he sought to vindicate basic constitutional right" *Ferguson v. Warden Everglade Re-entry ctr.* 714 F. Appx 966 (11th Cir 2018).

HASEN REQUIREMENT

In *Hasen v. United States* 956 F. 2d 245 (11th Cir. 1992) the Eleventh Circuit Court of Appeal held that:

"we agree with the Seventh Circuit that prisoners have a right to the Court files of their underlying criminal proceeding. we do not agree, however, that this right extends to access to the records for the purpose of preparing a collateral attack on a conviction, we hold that a request by a prisoner for access to the court files of his underlying criminal conviction is premature prior to the filling of a collateral attack of the conviction; a prisoner is entitle to access to the court files only after he has made a showing that such files are necessary to the resolution of an issue or issues he has presented in a non-frivolous pending collateral proceeding. It is only when prisoner has made such a showing that the constitution right to access to court is implicated (Id 956 F. 2d 248)

Petitioner did file his motion for ineffective assistance of counsel attacking his

conviction Rule 3.850 Fla. R. Crim. Proc. Thereafter he sought his discovery to prove his allegation, and that is the core of Petitioner claim of violation of access to the court. The Respondent deny access to the discovery information in digital format contained in CD's/DVD's – Information needed to prove Petitioner allegation at his state post-conviction court stage, and that is how he suffered actual injury.

While the right to counsel, or in this case receive communication originated from former pre-trial counsel, and the right to access to court are "interrelated" since the provision of counsel can be means of access the court they are not the same.

Because the right to counsel is an independent constitutional requirement separate from the right of access to the court, the "actual injury" requirement need not be satisfied in order to show violation. To protect and faster the relationship, prisoner are entitle to receive information from attorney under condition ensuring the preservation of "attorney-client relationship" See *Benjamin v. Fraser* 264 F. 3d 175 186 (2nd Cir. 2001).

FOURTEENTH AMENDMENT VIOLATION

"The Equal Protection Clause provide a basis for challenging legislate classification that treat one group of person as inferior or superior to other... and for contending that general rules are being applied in an arbitrary and discriminatory way." *Jones v. Helms* 452 U.S. 412, 423-24, 101 S. Ct. 2434, 69 L. Ed 2d 118, (1981).

Petitioner argue that he was denied equal protection of law when the Respondent enforced against him Chapter 33-210.102 (6)(b)1. F.A.C. but at the same time permitted

the Department to use of CD's/DVD's as for entertainment, religious and education to promoting good behavior and rehabilitation.

Petitioner cites to his own sworn declaration as well as specific security cameras footage that show the contradiction of the Respondent's factual assertion that CD's/DVD's are not allow to be introduced in the Florida Corrections Institutions (Appx B Ex 1 DOC 114 Ex. D) Appx. B Defendant's Responses and objection to Plaintiff's first set of interrogatories to Defendant.)

However, after Petitioner did file his motion for Summary Judgment in which he brought first- hand information of the use of CD's/DVD's in the Faith Base Program which is approved by Fla. Dept. of Corrections Head Quarter, (Appx B Ex 3), Mr. Harrell amended his response to the interrogatories the very next day. (App. B. Ex. 4), and now claim that CD's/ DVD's are used under "tight control" an that CD's/DVD's are house off-side and strictly supervised by staff. (App. B. Ex. 5).

Moreover, these same video recording supporting Petitioner allegation that CD's/DVD's are operated controlled and handled by inmate facilitators, inmate library clerks and inmate in general population, not by correction officer or any staff. Appx. B (DOC 114 at 39-40).

The record contain a condensed description of factors which serve as the basis that create a genuine issue of material facts. The Respondent contradiction and discrepancies prevent the granting of summary judgment period.

Further, " A non-conclusory affidavit which comply with Rule 56 can create a genuine disputed concerning an issue of material fact even if it is self-serving and/or uncorroborated" United States v. Stein 881 F. 3d 853, 858- 59 (11th Cir. 2018).

The Eleventh Circuit hold in *Cole v. Psoly* 2022 Dist Lexis 13466 "The [*Cole's*] evidence consists mainly of his own testimony in his verified complaint.. that does not preclude a finding that genuine dispute of material fact exist." Id.

The Eleventh Circuit cases correctly explain that a litigant's self-serving statement based on personal knowledge or observation can defect summary judgment. (Stein 881 F. 3d at 857). "An affidavit cannot be conclusory see eg *Lujan v. Nat' wild life* Fed 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) but nothing in Rule 56 (or for the matter, in the Federal Rule of Civil Proc.) prohibit an affidavit from been self-service." *Payne v. Pauley* 337 F. 3d 767, 772 (7th Cir. 2003).

"Not surprisingly most of our cases correctly explain that a litigant's self-serving statement based on personal knowledge or observation can defeat summary judgment." see eg *Feliziano v. City of Miami Beach* 707 F.3d 1244, 1253 (11th Cir. 2013) (To be sure, Feliziano Sworn statement are self-serving, but that allow does not prevent us to disregard them at summary judgment.) *Price v. Time Inc*, 416 F. 3d 1327 (11th Cir.). ("Court routinely and properly deny summary judgment on basis of a party's sworn testimony even though it is self-serving) (Id. 1345)

In this litigation's record there are different sworn-affidavit submitted by

Petitioner as an eye witness. Notwithstanding those affidavit in the record neither the Magistrate Court, the District Court, nor the Circuit Court of Appeals acknowledge any of them. These affidavit in the record, Petitioner assert, create dispute genuine issue of material fact that prevent summary judgment.

TURNER v. SAFLEY ANALYSIS

The lower court did not address Petitioner analysis of the four factors under Turner v. Safely nor the Respondent.

The Petitioner has identify and trying to use the procedure already in place pursuant Chapter 33 FAC to receive and review his legal record in digital format contained in CD's/DVD's (Appx. C) (See DOC 23 at 7 to 13).

ELEVENTH CIRCUIT DECISION IN CONFLICT WITH IT OWN DECISION

The Eleventh Circuit Court of Appeal decision, in this case, state that prisoner authorities "need not present evidence of casual links between a prison policy and incident of violence" (Prison Legal *New v. Sec'y Fla. Dept.* of Corr, 890 F. 3d 854 (11th Cir. 2018) (Compare with *Gordon v. Terry* 684 F. 2d 736 (11th Cir. 1992) (This Court has consistently held that allegation without specific supporting fact have no probative value. (Id. 744) (*E Kors v. General Motors Corp*, 770 F. 2d 984 (11th Cir. 1985).

Therefore, Petitioner assert that with his holding the Eleventh Circuit is essentially reinstating the "hand off" doctrine and is giving to the prison authorities a "blank check" to violate prisoners constitutional right without the necessity of present any evidence or

provide any experience based conclusion based conclusion to justify that their rule compelling a governmental inters. (Beard v. Bank 548 U.S. 521, 533, 1256 S. Ct. 2572 (2006)).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been placed in the hands of an institutional officer for mailing through U.S. mail first class pre paid postage on this 27 day of April 2023 to the follow:

Attorney General Offices:
The Capitol PL- 01
Tallahassee, Florida 32399

Respectfully Submitted,

/s/ _____
Victor Gavillan- Martinez
DC# No. 135908

OATH

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge see USC § 1246; 18 USC §1621.

Respectfully Submitted,

/s/ _____
Victor Gavillan- Martinez
DC# No. 135908
Okaloosa Correctional Institutional
3189 Colonel Greg Malloy Road

Crestview, Florida 32539

APPENDIX A

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-10444

Non-Argument Calendar

VICTOR GAVILLAN MARTINEZ,

Plaintiff-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:17-cv-00210-MW-MJF

Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Victor Gavillan-Martinez appeals *pro se* from the district court's order granting summary judgment in favor of the Secretary for the Department of Corrections, Mark Inch, and dismissing his 42 U.S.C. § 1983 civil rights complaint with prejudice. Gavillan-Martinez argues that the district court erroneously found that his equal protection rights were not violated by Secretary Inch not permitting Gavillan-Martinez to receive his legal materials in compact disc ("CD") format. He also argues that the district court erroneously found there was no factual dispute regarding the security measures used by the prison for CDs, that the Legal Paper Rule had not impeded his access to the courts, and that the Legal Paper Rule prohibiting prisoners from receiving legal files in CD format was constitutional. Gavillan-Martinez also argues that the district court abused its discretion when it found that the argument that CDs pose a security risk was not frivolous and denied the motion for sanctions. For the following reasons, we affirm.

I.

We review a district court's ruling on summary judgment *de novo* and apply the same legal standard as the district court. *Brannon v. Finkelstein*, 754 F.3d 1269, 1274 (11th Cir. 2014). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(a). We draw all factual inferences in a light most favorable to the non-movant. *Brannon*, 754 F.3d at 1274. A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. And "[a]n issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259 (11th Cir. 2004) (quoting *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997)). "A non-conclusory affidavit which complies with Rule 56 can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated." *United States v. Stein*, 881 F.3d 853, 858-59 (11th Cir. 2018) (en banc).

"*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). Issues raised for the first time on appeal are deemed waived and we do not review them. *Id.*

When a prisoner alleges a violation of his equal protection rights, he "must demonstrate that (1) 'he is similarly situated with other prisoners who received' more favorable treatment; and (2) his discriminatory treatment was based on some constitutionally protected interest such as race." *Jones v. Ray*, 279 F.3d 944, 946–47

(11th Cir. 2001) (quoting *Damiano v. Fla. Parole & Prob. Comm'n*, 785 F.2d 929, 932–33 (11th Cir. 1986)).

To succeed on a claim of lack of access to the courts, an inmate must first establish the threshold requirements of (1) standing (actual injury) for (2) a colorable underlying claim. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Barbour v. Haley*, 471 F.3d 1222, 1225–26 (11th Cir. 2006); *Bass v. Singletary*, 143 F.3d 1442, 1445 (11th Cir. 1998). "The injury which the inmate must demonstrate is an injury to the right asserted, i.e.[,] the right of access." *Bass*, 143 F.3d at 1445. An inmate can show actual injury by showing that prison officials' actions frustrated or impeded the inmate's efforts to pursue a nonfrivolous legal claim. *Id.* at 1445–46 (upholding summary judgment against inmates who failed to establish that actual injury resulted from prison officials' confiscation of legal material passed between inmates without authorization).

Once the threshold requirements are met, the Supreme Court has applied the reasonableness standard of review set forth by *Turner v. Safley*, 482 U.S. 78 (1987), to prison regulations that restrict inmates' access to the courts. *See Johnson v. California*, 543 U.S. 499, 510 (2005). "[W]hen a prison regulation or practice impinges on an inmate's constitutional rights, the regulation or policy is valid if it is *reasonably related to legitimate penological interests*." *Turner*, 482 U.S. at 89 (emphasis added). However, "courts . . . owe 'substantial deference to the professional judgment of prison administrators.'" *Beard v. Banks*, 548 U.S. 521, 528 (2006) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)). If there is

a rational connection to a legitimate penological interest, the prison policy will be upheld. *Rodriguez v. Burnside*, 38 F.4th 1324, 1331 (11th Cir. 2022). In order to help determine whether the relationship exists, we consider whether there are alternative ways for the prisoner to exercise their right, whether accommodation of the prisoner's request will have a large effect on the prison, and whether the policy is an "exaggerated response." *Turner*, 482 U.S. at 89–91; *Rodriguez*, 38 F.4th at 1330. In order to show a valid interest, a prison need not present evidence of an actual security breach or specific evidence of a causal link between a prison policy and incidents of violence, as prison officials must be free to anticipate and prevent security problems. *Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 968 (11th Cir. 2018).

Here, Gavillan-Martinez has not shown that his equal protection rights were violated because he was not treated less favorably than other inmates within the prison and could still access his legal materials. Nor are there any genuine issues of material fact related to what security measures the prison had in place for CDs. Secretary Inch included statements from the Chief of Security outlining the risks CDs pose and measures taken to mitigate those risks. Gavillan-Martinez presented no evidence to counter those statements. Further, the district court properly found that Gavillan-Martinez was not denied access to the courts because he managed to file his 28 U.S.C. § 2254 petition and could not specifically state how the CD would have aided his claims in that petition. Finally, the Legal Paper Rule is constitutional because it furthers the

prison's legitimate interest of security and alternatives to the rule are too costly. We thus conclude that the district court properly granted summary judgment for Secretary Inch, and we affirm.

II.

We review a district court's ruling of sanctions under Federal Rule of Civil Procedure 11 for an abuse of discretion. *Massengale v. Ray*, 267 F.3d 1298, 1301 (11th Cir. 2001). Federal Rule 11 sanctions exist to limit frivolous and costly maneuvers. *Id.* at 1302. In considering a motion for sanctions under Rule 11, we conduct a two-step inquiry, asking: "(1) whether the party's claims are objectively frivolous, and (2) whether the person who signed the pleadings should have known that they were frivolous." *Peer v. Lewis*, 606 F.3d 1306, 1311 (11th Cir. 2010) (quoting *Byrne v. Nezhat*, 261 F.3d 1075, 1105 (11th Cir. 2001)). A claim is frivolous when there is no "reasonable factual basis" for the claim. *Gulisano v. Burlington, Inc.*, 34 F.4th 935, 942 (11th Cir. 2022).

Here, the district court properly found that the argument that CDs pose a security risk within the prison was not frivolous because it was supported by statements from the Chief of Security for the Department of Corrections and was not rejected by the district court in orders prior to the motion for summary judgment. Thus, we conclude that the district court properly denied the motion for sanctions.

AFFIRMED.

Additional material from this filing is available in the Clerk's Office.