No. 23-6847

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

TYRONE ANTHONY BELL — PETITIONER
(Your Name)

vs.

HEIDI E. WASHINGTON, et. al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Tyrone-Anthony Bell #240434
(Your Name)
G. Robert Cotton Correctional Facility
3500 N. Elm Road
(Address)
Jackson, Michigan 49201
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1.] Whether the state of mind of the author should be considered when the receiver understood the threat or intimidation to be true.

2.] Whether C.O. West's statement which misrepresented the facts to Petitioner was intentional to cause Petitioner to abandon his grievance process thereby making the administrative remedies unavailable.

3.] Whether C.O. Weems statement to Petitioner, that if he stopped writing grievances he would ride out was enough to intimidate a person of ordinary firmness to abandon his constitutional right to redress a grievance in order to get out of segregation.

4.] Can a true threat occur or be received without including the act of violence.

5.] Did the Sixth Circuit Court of Appeals misinterpret the Supreme Court's new precedence set by Counterman v Colorado 143 SCt 2106, 2110 (2023).

6.] Did the Sixth Circuit Court of Appeals misinterpret the Supreme Court's precedence set by Ross v Blake 136 SCt 1850, 1853-54, 1860 (2016), where Mr. Bell was faced with machincation, misrepresentation of facts and intimidation thwarting his ability to the proper usage of the Michigan Department of Corrections grievance process.

7.] Did the Sixth Circuit Court of Appeals overlook the evidence of machination, where numerous grievances filed by Mr. Bell were never processed, therefore the remedy was routinely available, causing the issue to be exhausted.

8.] Did the Sixth Circuit Court of Appeals fail to recognize that Mr. Bell addressed the Alleged unexhausted claim in a Declaratory Ruling under Michigan Adminstrative Code 791.1115 to the MDOC's Director's Office and the MDOC addressed the Declaratory Ruling, thereby accepting Mr. Bell process, and therefore making the issues exhausted in accordance with Woodford v Ngo 548 US 81, 90 (2006).

9.] Did Mr. Bell provide the MDOC with an opportunity to correct a wrong by filing the Declaratory Ruling.

10.] Did the Sixth Circuit Court of Appeals misinterpret the Supreme Court's precedence set by Anderson v Liberty Lobby, Inc 477 US 242, 250 n.5 (1996), where Plaintiff was not afforded the opportunity to complete discovery before prematurely granting Defendants' summary judgment.

11.] Did the Sixth Circuit Court of Appeals misinterpret the Supreme Court's prcedence set by Lewis v Casey 518 US 343, 384 (1996) and Bounds v Smith 430 US

817, 828 (197) where Mr. Bell lost the ability to send and receive communications from the judge and court and where Mr. Bell's did not have adequate assistance from a person trained in the law to prepare his legal documents.

12.] Did the Sixth Circuit Court of Appeals wrongfully uphold the dismissal of David Theut where David Theut was a direct participant to Petitioner's substantial and procedural due process violaitons.

PARTIES

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:

1.] Petitioner, Tyrone Bell, a prisoner at G. Robert Cotton Correctional Facility located at 3500 N. Elm Road, Jackson, Michigan 49201.

Respondents

2.] Heidi E. Washington, Director of Michigan Department of Corrections (MDOC), her office is located at MDOC Headquarters, 206 E. Michigan Avenue, P.O. Box 30003, Lansing, Michigan 48909, 517-355-2243. As the Director; Cheif Administrative Office of the Department she is responsible for the overall operation of the Department. The Director's Office supervises the following:

(i) The Office of Public Information and Communications; (ii) The Legislative Affairs Section; (iv) The Office of Executive Affairs.

3.] Robert Naples, Assistant Director of MDOC, also works at MDOC Headquarters. He is responsible for oversight of CFA institutions within geographic regions as determined by the CFA Deputy Director.

4.] Connie Horton, warden of Chippewa Corrrectional Facility (URF) located at 4269 W M-80, Kincheloe, Michigan 49784, 906-495-2275, Thomas O'Bell Winn, warden of Saginaw Correctional Facility (SRF), located at 9625 Pierce Road, Freeland, Mihcigan 48623, 989-695-9880. As a warden they are responsible for the institution. The warden shall do all of the following:

(a) Control and govern the institution and be responsible for discipline at the institution.

(e) Respond to prisoner grievances.
(g) Ensure that department standards of safety, security, and humane treatment are met.
(h) Develop procedures to implement, and ensure compliance with, department policy.
(i) Carry out such other duties and responsibilities as mat be assigned.
See Administrative Rule R791.2205

5.] James Corrigan, Deputy Warden at URF, and Duncan Mclaren, Deputy Warden at URF. As a deputy warden they are responsible for the institution when the warden is not around they have the same responsibilities to ensure that prisoners receive all of the protections of the State and Federal Constitution; State and Federal Court holdings; to ensure that all staff are following, upholding and enforcing these protections awarded to prisoner as outlined in the MDOC's rules, regulations, policies and procedures!!

6.] Carrole Walker, assistant deputy warden of SRF, and David Lalonde, assistant deputy warden at URF. As a assistant deputy warden their responsibities are delegated by the Warden and Deputy Warden of the institution, but are also responsible to ensure that all their subordinate follow, enforce and uphold all rules, regulations, policies and procedures of MDOC.

7.] Daniel Eicher, Arnulf Ortiz, Lawney Libby, Kody Babcock, Robert Miller, Mitchell, and Billy Weems, are Correctional Officers, at URF, Matthew Aldrich, Jeffrey Bond, and Brian Trombley, are Correctional Officers, at SRF. As a correctional officer, they are responsible for maintaining the safety of staff and prisoners. They are entrusted with following, upholding and enforcing all rules, regulations, policies and procedures. They are entrusted to be rolemodels.

8.] David Berry, quatermaster at SRF. Is responsible for distributing clothes to prisoners and enforcing rules, regulations, policies and procedures of MDOC.

9.] Teresa Corey-Spiker, and James Bischer, are Resident Unit Managers at URF, Jodie Anderson, Resident Unit Manager at SRF. They are responsible for housing prisoner in cells and housing units. They are also responsible for ensuring the correctional officers under their supervision follow, enforce, and uphold all rules, regulations, policies and procedures of MDOC.

10.] Dustin Plumm, Assistant Resident Unit Manager at URF. Are responsible for assisting the Resident Unit Manager in their duties and share the same supervisory powers.

11.] John McCollum, Hearing Investigator at URF. Is responsible to conduct unbias investigations into rule, regulation, policy and/or procedure infractions, and providing reports of his findings to appropriate staff.

12.] David Theut, Hearing Officer at URF. Is responsible to conduct unbias hearings and ensuring that prisoner receive Due Process and Equal Protection of the laws as outlined by the State and Federal Constitution; the explicit mandatory and controlling language of the MDOC's hearings handbook; MCL 791.251; MCL 791.252; Administrative Rule 792.11902 and 792.11903.

13.] John Doe #1, Sergeant at URF. Is responsible for conducting screening of misconducts with prisoners. To ensure that the reporting officer followed all the appropriate procedures as outlined in the MDOC's Hearings Handbook. The Sergeant is also entrusted with ensuring that correctional officers follow, enforce, and uphold the rules, regulations, policies and procedures of MDOC.

14.] John Doe #2, and John Doe #3 are Inspectors at URF. Are responsible for conducting investigations into report of violations of rules, regulations, policies and procedures of the MDOC as well as constitutional rights of prisoners.

15.] Ressie Stranaly, Bethany Stain, and Amy Macdowell, are nurses at URF. As medical personnel they are responsible for ensuring that prisoners receive the ordinary standard of decency and medical care. And act as a buffer between prisoners and correctional staff when it come to medical affairs, conditions, and incidents. They are entrusted to provide all medical needs and protections as outline by MDOC policy directives and any mandates of CDC and MDHHS.

16.] Richard Russell, Legal Administrator of MDOC. As the head of the Office

of Legal Affairs. His office is responsible for legal matters, on the coordination of Department communications with the Department of Attorney General regarding litigation that affects the Department. Included in the Office are the following:

(i) The Grievance Section that is responsible for coordinating investigations and decisions of prisoners grievances at the third step;

(ii) The Policy Section that is responsible for developing and maintaining the Department's administrative rules, Director's Office Memoranda, policy directives, variances, and operating procedures issued by the Director;

(iii) The Rehearing Section that is responsible for review of appeals from all formal admministrative hearings. And declaratory ruling pursuant to administrative rule 791.1115

17.] Micheal Mclean, Grievance Coordinator at URF, Angela Pratt, Grievance Coordinator at SRF. Shall provide prisoners with an effective method of seeking redress for alleged violations of policy and procedure or unsatifactory conditions of confinement.

18.] Melissa Laplunt, Health Unit Manager at URF. Shall be responsible for the operations of the health care clinic, except for issues that requires medical judgment. The Health Unit Manager shall meet with the Warden of his/her facility as often as necessary but at least quarterly regarding the facility's health care delivery system and health envirnment.

19.] David Theut, Administrative Legal Judge/Hearing Officer at URF. He is responsible for conducting administrative hearings pursuant with MCL 791.251; MCL 791.252; MDOC's hearings handbook; Wolff v McDonnell 418 US 539 (1974)and Edwards v Balisok 520 US 641, 646-67 (1997).

DECISIONS BELOW:

The decisions of the U.S. Court of Appeals for the Sixth Circuit is unreported. It is cited on the table as 2023 US App Lexis 25997 (6th Cir 2023) and a copy is attached as Appendix A to this petition (A.1). Plaintiff petitioned for a rehearing en banc, which was decided by the court on Nov. 28, 2023 a copy is attached as Appendix A to this petition (A.9). The order of the U.S. District Court for the Eastern District of Michigan is unreported. It is cited on the table as 2022 U.S. Dist LEXIS 198303; 2022 WL 16571300 (E.D. Mich., Oct. 31, 2022) and a copy is attached as Appendix A to this petitioner (A.10)

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on Sept 29, 2023. (A.1) An order denying a petition for rehearing was entered on November 28, 2023, a copy of that order is attached as Appendix A to this petition (A.9). Jurisdiction is invoked under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment XIV to the U.S. Constituton, which provides:

> Section 1. All person born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States and of the State; 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.

The Amendment is enforced by 42 USC § 1983:

> "Every person who, under the color of any statute, ordinace, regulation, custom, or usage, of any State or Territory or District of Columbia, 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 party injuried in an action by law, suit in equity, or other proper proceedings for redress, except that in any action brough against a judicial officer, for an act or omission taken in such officer's judicial capacity, injunctive 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.

TABLE OF CONTENT

Pages:

TABLE OF AUTHORITIES.....ii

QUESTION PRESENTED.....vi

PARTIES.....viii

DECISIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLDED.....1

STATEMENT OF THE CASE.....2

BASIC FOR FEDERAL JURISDICTION.....3

REASON FOR GRANTING THE WRIT.....4

A. Conflict With Decision Of Other Appellate Courts.....4

B. The Court Granted Summary Judgment Prematurely.....7

C. Importance Of The QUESTION Presented.....9

D. Can A True Threat Occur Without An Act of Violence.....11

E. Mr. Bell Had Exhausted Administrative Remedies With A Declaratory Ruling...12

F. Mr. Bell Faced Machination.....13

G. Mr. Bell Presented Tangible Evidence Of MDOC's Grievance Process Is Simple Dead End.....15

H. Mr. Bell HAs Been Denied Due Process and Equal Protection of Law.....16

1. Procedural Due Process.....16

i. MDOC's hearings handbook creates a liberty interest.....16

2. Substantive Due Process violation.....18

Conclusion.....18

Prays For Relief.....18

TABLE OF AUTHORITIES

Cases: Pages:

Anderson v Liberty Lobby Inc. 477 US 242, 250 n.5, 257 (1996).....7,8

Amador v Andrews 655 F3d 89, 103 (2nd Cir 2011).....6

Baker v McNeil Island Corrections Center 859 F2d 124, 127 (9th Cir 1998).....8

Baker v Schiro 2008 WL 62202 *8 (D.Ariz Mar. 4, 2008).....4

Bell v Washington 2022 US Dist Lexis 198303; 2022 WL 16571300 1

Bell v Washington 2023 US App Lexis 26997 (6th Cir 2023).....1,4,13

Celtox Corp v Catrett 477 US 317, 322 (1986).....8

City of Miami Gardens v Wells Fargo & Co 931 F3d 1274, 1286 (11th Cir 2019)....7

Costlow v US 552 F2d 560, 564 (3d Cir 1977).....8

Counterman v Colorado 143 SCt 2106, 2110 (2023).....9,10,11

Crouch v Brown 27 F4th 1315, 1321 (7th Cir 2022).....6

Davis v Hernandez 798 F3d 290, 295 (5th Cir 2015).....5

de la Torre v Continental Ins Co 15 F3d 12, 15 (1st Cir 1994).....7

Edwards v Balisok 520 US 641, 646-7 (1997).....4

Elonis v United States 575 US 723, 733 (2015).....11

Foster v Delo 130 F3d 307, 308 (8th Cir 1997).....8

Gates v Cook 376 F3d 323, 331 n. 6 (5th Cir 2004).....13

Gosbert v Lee County 510 F3d 1312, 1323 (11th Cir 2007).....5

Hammet v Coffield 681 F3d 945, 947 (8th Cir 2012).....13

Harcum v Shaffer 2007 WL 4190688 *5 (E.D. Pa. Nov. 21, 2007).....5

Hemphill v New York 380 F3d 680, 688 (2d Cir 2004).....4

Hewitt v Helm 459 US 460, 471-72 (1983).....16

Hill v Curcione 657 F3d 116, 125 (2d Cir 2011).....13

Ingle v Yelton 439 F3d 191, 196 (4th Cir 2006).....8

Jackson v Procunier 789 F2d 307 , 312 (5th Cir 1986).....8

Johnson v California 543 US 499, 506-07, 509-15 (2005).....17

Jones v Blanas 393 F3d 918, 936 (9th cir 2004).....8

Kentucky Dep't of Corr v Thompson 490 US 454, 460 (1989).....15,16

Klingele v Eikenberry 849 F2d 409, 412-13 (9th Cir 1988).....8

LaBounty v Coughlin 137 F3d 68, 71-2 (2d Cir 1998).....8

Leigh v Warner Bros. Inc 212 F3d 1210, 1218 (11th Cir 2000).....8

Lucente v Cty of Suffolk 980 F3d 284, 311-12 (2nd Cir 2020).....6

Matushita Electric Industrial Co Ltd. v Zenith Radio Corp 475 US 574, 587 (1986).....8

McBride v Lopez 807 F3d 982, 986 (9th Cir 2015).....6

Meyer v Dans un Jardin SA 816 F2d 533, 536 (10th Cir 1987).....7

Pavey v Conley 663 F3d 899, 906 (7th Cir 2011).....5

Paynes v Runnels 2008 WL 4078740 *6 (E.D. Cal. Aug. 29, 2008).....5

Phillips v General Motors Corps 1990 US App Lexis 14276 at *2 (4th Cir Aug 16, 1990).....7

Porter v Nussle 534 US 516, 524-25 (2002).....14

Reyes v Smith 810 F3d 654, 658 (9th Cir 2016).....13

Rinaldi v United States 904 F3d 257, 271 (3d Cir 2018).....13

Rodriguez v Cty of Los Angeles 891 F3d 776, 792 (9th Cir 2018).....6

Ross v Blake 136 SCt 1850, 1853-54, 1860 n.3 (2016).....3,6,9,10,11,12,13,14,15

Schultz v Pugh 728 F3d 619, 620 (7th Cir 2013).....5

Smith v OSF Healthcare Sys 933 F3d 859, 866 (7th Cir 2019).....7

St Surin v VI Daily News 21 F3d 1309, 1315 (3rd Cir 1994).....7

Tocco v Marquette Prison Warden 123 Mich App 395; 333 NW2d 295 (1983).....4

Tuckel v Grover 660 F3d 1249, 1252-53 (10th Cir 2011).....5,6

Turner v Burnside 541 F3d 1077, 1084-85 (11th Cir 2008).....4,6,7

United States v Bailey 444 US 394, 404 (1980).....12

Voisine v United States 579 US 686, 691 (2016).....12

West v Atkins 487 US 42, 49 (1998).....4

Whatley v Smith 898 F3d 1072, 1083 (11th Cir 2018).....13

Williams v Priatno 829 F3d 118, 124 (2d Cir 2016).....13

Wolff v McDonnell 418 US 539, 564-66 (1974).....4,15,16

Woodford v Ngo 548 US 81, 90 (2006).....12,13,14

Zinermon v Burch 494 US 113, 125 (1990).....4

U.S. Constitutions

Amendment XIV.....1,3

Statutes

28 USC 1254(1).....1

28 USC 1331.....3

42 USC 1983.....1

MCL 791.251.....4

MCL 791.252.....3,4

Rules

Supreme Court Rule 10 (a).....7,10,13,18

Supreme Court Rule 10 (c).....7,10,18

Fed.R.Civ.P. 56(d).....7,8,9

Fed.R.Evid 401(a).....4,5,15

Fed.R.Evid 401 (b).....4,5,15

Other Sources

MDOC Hearings Handbook

Section (A)(2).....16

Section (B).....16

Section (C)(1).....16

Section (D)(5).....16

Section (E)(1).....17

Section (F)(1).....16,17

Appendices

Appendix A- Court Decsions

U.S. Court of Appeals .....(A.1-8)

U.S. Court of Appeals (en banc).....(A.9)

U.S. District Court for the Eastern District of Michigan.....(A.10-17)

Appendix B

Bruce-X Parker.....(B.1)

Michael Blakeman.....(B.2)

Michael Smith.....(B.3)

Appendix C-Affidavit of Invidious Discrimination

Forrest Johnson.....(C.1-2)

Appendix D

Lorenzo Murray.....(D.1)

Darnell McBride.....

Jeremy Russell.....

STATEMENT OF THE CASE

Tyrone Bell, Petitioner complaint alleged that Mr. Bell was charged with assault on an inmate, and for destruction or lost of state property without any supporting evidence. Mr. Bell was denied the constitutional right to due process and equal protection of the laws. Petitoner suffered cruel and unusual punishment where Mr. Bell's heat was turnoff from Oct. 19 til Nov 4 of 2019, Mr. Bell was deprived outside exercise for 45 days, and Mr. Bell as an American with a Disability was deprived a chair for lumbar support for 45 days causing unncessary and wanton pain. While at URF Petitioner experienced invidious discrimination based on race by numerous actors, agents, and employees, see affidavit of Forrest Johnson, (Appendix C.1). Mr. Bell was wrongfully charged for lost and destruction of state property where inmate Lorenzo Murray 440309 had admitted to placing the bedroll in the hallway. (Appendix D.1) Mr. Bell was retaliated against for exercising his First Amendment right where C.O. Weems came to Mr. Bell's cell and stated if you stop writing grievances maybe they will ride you out. C.O. West came to Mr. Bell's housing unit and misrepresented facts telling Mr. Bell that he would not be charged for the destruction or lost of state property (bedroll) see ECF 39-3, PageID 484, entitled Explanation For Delay where Plaintiff detailed the misleading events, where it reads:

> 1. On Aug. 31, 2020, I spoke with C.O. West on the walkway at 2:00 p and talked with him about the bedroll incident.
>
> 2. He informed me that he had never been interviewed on the issue.
>
> 3. C.O. West took down my information (name, number and unit). This was on the walk on the commons area in front of the chow hall, on the sidewalk leading to 700 unit pass the guard shed.
>
> 4. C.O. West came to 700 unit at or around 3:00 p and spoke with someone on the phone.
>
> 5. C.O. West called me to the desk and said that they will be pulling my file and I will not be charged for the bedroll.
>
> 6. The United States Supreme Court held: that when an employee's

action "thwart inmate's from taking advantage of a grievance process through misrepresentation" that there is an excuse for not exhausting remedies. Ross v Blake 136 SCt 1850, 1860 (2016)

7. All of the abovementioned are supported by the security surveillance footage on Mon., Aug. 31, 2020 (commons area and 700 unit base).

8. Grievant ask that all related security surveillance footage be preserved for future litigation purposes.

9. Grievant had believed C.O. West when he stated that he would not be charged, so he believed that his grievance was resolved.

10. On 9-13-20 grievant reviewed his banking and noticed that there was still a pending charge for lost or destruction of property.

11. This is why grievant is filing his step III late he was mislead by an officer of the state to believe that there was no need to continue with the grievance process.

BASIC FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Due Process and Equal Protection of the laws Clause of the Fourteenth Amendment to the U.S. Constitution. The district court had jurisdiction under the general federal question jurisdiction conferred by 28 USC § 1331

Under Michigan statute MCL 791.252

> (d) "Each party shall be given an opportunity to present evidence and oral and written arguments on issue of fact." (e) "A prisoner may not cross-examine a witness, but may submit rebuttal evidence." (g) "The reason for exclusion of the evidence shall be entered into the record." (h) "Evidence including records and documents in possession of the department of which the hearing officer wishes to avail himself...shall be offered and made a part of the record. A hearings officer may deny access to the evidence to a party if the hearings officer determines that access may be dangerous to a witness or disruptive of normal prison operations. The reason for the denial shall be entered into the record." (i) "The hearings conduct under this chapter shall be conducted in an impartial manner."

P.C. Bisher did not provide Plaintiff an impartial hearing, MCL 791.252 (i) nor did he call C.O. West and present the relevant question of "did you provide Mr. Bell with half a bedroll?" MCL 791.252(e) Therefore Plaintiff was denied Due Process and Equal Protection of the law. A decision of a hearing officer at a

department of corrections' prisoner misconduct hearing must be based on a preponderance of the evidence and the officer's findings of fact must be accompanied by a concise and explicit statement of the underlying facts supporting the findings, MCL 791.252(k). A prisoner in Michigan is entitled the opportunity to call witnesses and present documentary evidence, Tocco v Marquette Prison Warden 123 Mich App 395; 333 NW2d 295 (1983); MCL 791.251; MCL 791.252(e); Wolff v McDonnell 418 US 539, 566 (1974). Where Mr. Bell were given alleged "sham" hearing Mr. Bell's alleging deprivation of federal constitutional rights under color of state law was sufficient, West v Atkins 487 US 42, 49 (1998). Mr. Bell was not provided the opportunity to call C.O. West nor was C.O. West interviewed to determine if C.O. West had only given Mr. Bell half a bedroll, both actions deny Mr. Bell due process and equal protection of law where P.C. Bisher was not impartial, Edwards v Balisok 520 US 641, 646-7 (1997). See ECF NO 39-3 PageID 480 Mr. Bell had provide tangible relevant evidence, Fed.R.Evid 401 (a) and (b) as to who placed the bedroll in the hallway and that C.O. Trombley never instructed Mr. Bell to take his bedroll, See ECF No. 39-3 PageID 488 Plaintiff raises a procedural and substantial due process claim. Zinermon v Burch 494 US 113, 125 (1990)

REASON FOR GRANTING THE WRIT

A. Conflict With Decision Of Other Appellate Courts

1. Threat or Intimidation Thwarting a grievance

The holding of other federal appellate courts below differ from the Sixth Circuit's interpretation in Bell v Washington 2023 US App Lexis 26997 (6th Cir 2023)(unpublished) in how "threats" or "intimidation" would cause a similarly situated individual of ordinary firmness to not have continued their protected conduct, Hemphill v New York 380 F3d 680, 688 (2d Cir 2004); Turner v Burnside 541 F3d 1077, 1084 (11th Cir 2008); Baker v Schriro 2008 WL 622020 *8(D.Ariz.,

Mar. 4, 2008); Harcum v Shaffer 2007 WL 4190688 *5(E.D. Pa., Nov. 21, 2007); Paynes v Runnels 2008 WL 4078740 *6 (E.D. Cal., Aug. 29, 2008)(threatened to withdraw grievances); Davis v Hernandez 798 F3d 290, 295 (5th Cir 2015)("Grievance procedures are unavailable...if the correctional facility's staff misled the inmates as to the existence ...so as to cause the inmate to fail to exhaust such process"); Schultz v Pugh 728 F3d 619, 620 (7th Cir 2013)("A remedy is not available, therefore to a prisoner prevented by threats or other intimidation by prison personnel from seeking an administrative remedy."); Pavey v Conley 663 F3d 899, 906 (7th Cir 2011)("[I]f prison officials misled [a prisoner] into thinking that...he had done all he needed to initiate the grievance proces," then "[a]n administrative remedy is not 'available'"); Tuckel v Grover 660 F3d 1249, 1252-53 (10th Cir 2011)("[W]hen a prison official inhibits an inmate from utilizing an administrative process it can no longer be said to be available.'"); Goebert v Lee County 510 F32d 1312, 1323 (11th Cir 2007)(If a prison "play[s] hide-and-seek with administrative remedies," then they are not "available.")

In the case at bar, Mr. Bell experienced all of the abovementioned exceptions at one point or another. While at URF staff were either destroying grievances or not processing them. Please see Appendix B and the Declarations of Darnell McBride #192829, Jeremmy Russell #408509, Bruce-X Parker #593090, Forrest Johnson #669047, Mitchell Smith #188215, Michael Blakeman #581370 if nothing else these Declarations show that if Plaintiff was allowed to complete discovery, Plaintiff would have successfully provided tangible relevant evidence, Fed.R.Evid 401 (a) and (b) on a systemic problem with the MDOC's grievance process (system). C.O. Weems came to Mr. Bell's cell in segregation and threaten and intimidated Mr. Bell that if he continued to file grievances that Mr. Bell would stay in segregation longer. This action would cause a person

of ordinary firmness to abandon their First Amendment right to redress a grievance. While at SRF C.O. West came to Mr. Bell's housing unit and after making phone calls in Mr. Bell's presence misled Mr. Bell, Ross, Id. at 1860 n.3, that the issue was resolved and that Mr. Bell would not be charged for the destruction or lost of state property, ECF No. 39-3, PageID 484. If was not until Mr. Bell had checked his MDOC trust account sometime later that Mr. Bell had discovered C.O. West had misled him in order to cause Mr. Bell to abandon his grievance process. Ross Id. These are the exact actions which make a grievance process unavailable. The Sixth Circuit's decision is in conflict with other federal appellate courts, but more important is in conflict with precedence set by this Court in Ross v Blake 143 SCt 1850, 1860 n.3 (2016)

Amador v Andrews 655 F3d 89, 103 (2nd Cir 2011)(A prisoner may have invoked the doctrine of estoppel when "defendants took affirmative action to prevent him from availing himself of grievance procedures" Prior cases have held that verbal and physical threats of retaliation,...denial of grievance forms ...and transfers constitute such affirmative action.) Lucente v Cty of Suffolk 980 F3d 284, 311-312 (2nd Cir 2020); Crouch v Brown 27 F4th 1315, 1321 (7th Cir 2022)(Illinois male's claim that administrative remedies were unavailable because his case manager "denied him grievance forms, threatened him, and solicited other inmates to attack him in retaliation for filing grievances."); McBride v Lopez 807 F3d 982, 986 (9th Cir 2015)(when a prisoner reasonably fears retaliation for filing a grievance, the administrative remedy is effectively rendered unavailable and the prisoner failure to exhaust excused); Turner v Burnside 541 F3d 1077, 1084-85 (11th Cir 2008)(holding that remedies "that rational inmates cannot be expected to use" because of threats are not available and adopting a two part test); Tuckel v Grover 660 F3d 1249; 1254 (10th Cir 2011); Rodriquez v Cty of Los Angeles 891 F3d 776, 792 (9th Cir 2018)(a prisoner

is excused from the exhaustion requirement in circumstances where administrative remedies are effectively unavailable, including circumstances in which a prisoner has reason to fear retaliation for reporting an incident.) The Eleventh Circuit states:

> "We conclude that a prison official's serious threats of substantial retaliation against an inmate for lodging in good faith a grievance make the administrative remedy "unavailable", and thus lifts then exhaustion requirement as to the affected parts of the process if both of these conditions are met. (1) the threat actually did deter the plaintiff inmates from lodging a grievance or pursuing a particular part of the process; and (2) the threat is one that would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance process that the inmate failed to exhaust.

Turner, Id. The actions of C.O. Weems coming to Mr. Bell's cell actual detered Mr. Bell from filing any new grievances. And the threat of retaliation caused Mr. Bell; a person of ordinary firmness and fortitude, from lodging a grievance again while in segregation at URF. SCt Rule 10(a) and (c)

B. The Court Granted Summary Judgment Prematurely

The district court prematurely granted summary judgment before Mr. Bell could complete discovery, Anderson v Liberty Lobby, Inc. 477 US 242, 250 n.5 (1996)

Allan J. Soros had requested a stay of discovery, ECF No. 52. Mr. Bell was granted the right to continue discovery, ECF No. 58

Pursuant to Rule 56(d) a party opposing a motion for summary judgment is allowed to state that he is unable to present facts essential to justify the party's opposition, Smith v OSF Healthcare Sys 933 859, 866 (7th Cir 2019); Phillips v General Motors Corps 1990 US App Lexis 14276 at *2(4th Cir Aug 16, 1990); City of Miami Gardens v Wells Fargo & Co 931 F3d 1274, 1286 (11th Cir 2019); St Surin v V.I. Daily News 21 F3d 1309, 1315 (3rd Cir 1994); de la Torre v Continental Ins Co 15 F3d 12, 15 (1st Cir 1994); Meyer v Dans un Jardin S.A 816 F2d 533, 536 (10th Cir 1987). Before ruling on a summary judgment motion, a

district judge must afford the parties adequate time for discovery in light of the circumstances of the case, Anderson, Id 250 n.5, 257. Parties who suffer an adversary judgment may base their appeal on the lack of opportunity to discover evidence necessary to establish a genuine issue of material facts, Celotex Corp v Catrett 477 US 317, 322 (1986). See Plaintiff-Appellant Brief pages 7-10

The court must view all facts and make all reasonable inferences in favor of the nonmoving party, Matushita Electric Industrial Co|| Ltd. v Zenith Radio Corp. 475 US 574, 587 (1986). Mr. Bell was the nonmoving party and had not completed discovery. A court should not grant summary judgment against a party who has not had an opportunity to pursue discovery or whose discovery requests have not been answered, Ingle v Yelton 439 F3d 191, 196 (4th Cir 2006)("denial of Rule 56[d] motion is particularly inappropriate when...'the materials sought are the object of outstanding discovery'"); Leigh v Warner Bros., Inc 212 F3d 1210, 1219 (11th Cir 2000)(summary judgment is generally inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests); LaBounty v Coughlin 137 F3d 68, 71-72 (2d Cir 1998); Klingele v Eikenberry 849 F2d 409, 412-13 (9th Cir 1988)

Where the facts are in the possession of the moving party, a continuance of a motion for summary judgment should be granted as a matter of course, Costlow v U.S. 552 F2d 560, 564 (3d Cir 1977); accord, Ingle v Yelton 439 F3d 191, 196 (4th Cir 2006); Baker v McNeil Island Corrections Center 859 F2d 124, 127 (9th Cir 1988); Jackson v Procunier 789 F2d 307, 312 (5th Cir 1986); Jones v Blanas 393 f3d 918 (9th Cir 2004)(summary judgment was improperly granted on plaintiff's strip search claim without allowing discovery); Foster v Delo 130 F3d 307, 308 (8th Cir 1997)(Summary judgment should not have been granted where prisoner said he could not get affidavits from prisoners because they were afraid of retaliation)

In the case before this panel, Mr. Bell had requested that the Court defer or deny summary judgment, see ECF Nos. 49 and 50, in PLAINTIFF'S OBJECTIONS TO DEFENDANT'S ATTORNEYS REQUEST FOR SUMMARY JUDGMENT pursuant to Fed.R.Civ.P. 56(d)(1) where it reads:

> "11.] Plaintiff ask that this Honorable Court defer consideration on Defendants' Motion For Summary Judgment, pursuant to Fed.R.Civ.P. 56(d)(1), until after discovery is complete, pursuant to Fed.R.Civ.P. 56(d)(2).

Also within PLAINTIFF'S AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT plaintiff states:

> "1.] That I make this affidavit pursuant to Fed.R.Civ.P. 56(d) due to the facts not being available to Plaintiff.
>
> 2.] That I cannot proper[ly] oppose Defenasnts' Motion For Summary Judgment without the discovery materials demand[ed].
>
> 3.] That the materials requested in Plaintiff's discovery are relevant to the case and claim raised in Plaintiff's Amended Verified Complaint.
>
> 4.] That the information requested will lead to admissible evidence that further prove there is material facts at dispute.
>
> 8.] That while SRF his step II was given to him pass the date due.
>
> 9.] That besides grievances which were not all being processed Plaintiff wrote complains directly to the Inspector's Office and Warden's office on October 23, 2019
>
> 14.] That while Plaintiff was in segregation at URF he was not the only person complaining about staff not processing all of his grievances.
>
> 18.] That plaintiff has not had an opportunity to obtain discovery before Defendants' filed their motion for summary judgment.

Mr. Bell had requested and was granted discovery, but Allan J. Soros of the Michigan Attorney General's Office never provide Mr. Bell with the requested discovery materials.

C. Importance Of The Question Presented

This case presents a fundamental question of the interpretation of this Court decision in Counterman v Colorado 143 SCt 2106, 2110(2023) and Ross Id. at 1859-60. The question is of great public importance because it affects the

operations of the prison system in all 50 states, the District of Columbia, and hundreds of city and county jails. In view of the large amount of litigations over retaliatory threats or intimidations, guidance on the question is also of great importance to prisoners, because it affects their ability to pursue the right to redress a grievance free of true threats of retaliation and retaliatory intimidating behavior that would thwart a grievance process making it unavailable for exhaustion. Sct Rule 10(c)

This issues importances are enhanced by the fact that the Sixth Circuit Court of Appeals has seriously misinterpreted both Counterman and Ross. This Court held in Ross that instances where the remedy presents no actual potential for relief, where officials thwart exhaustion through "machination, misrepresentation, or intimidation" Id. at 1859-60. Mr. Bell contends that this Court provided greater guidance for the understanding of "intimidation" mentioned in Ross with Counterman Id at 2110, when it defined that a "true threat" does not take its interpretation from the author's state of mind, but from how it was received by the other party. Id.; SCt Rule 10(a) and (c)

Common sense and logic dictates that "intimidation" and "a true threat" are synonymous, nothing in Ross or Counterman suggests otherwise. Both cases acknowledge that an author can cause the receiver to react to what is being conveyed to them by the author regardless of the author's state of mind when it was said. As this Court has recently held in Counterman Id. at 2110.

The Sixth Circuit stated that Mr. Bell continued to file grievances after Mr. Bell was threaten by C.O. Weems, but failed to recognize that Mr. Bell didn't file any new grievances while in segregation at URF after being threaten by C.O. Weems. And that Mr. Bell had ceased to pursue his grievance at SRF after C.O. West had misrepresented facts, until Mr. Bell knew that the misrepresentation of facts given by C.O. West was meant to thwart Mr. Bell's

ability to continue filing his grievances about the lost or destruction of state property.

Thus the lower court seriously misinterpreted both Counterman and Ross by failing to recognize the precedence set by this Court. Without granting this Writ of Certiorari the U.S. Court of Appeals for the Sixth Circuit and other circuits will remain in conflict based on this decision. Mr. Bell no longer had to exhaust administrative remedies after Mr. Bell received "true threat" of retaliation from C.O. Weems that if Mr. Bell continued to file grievances Mr. Bell could remain in segregation longer. Mr. Bell had every reason to believe C.O. Weems based on his prior treatment toward Plaintiff, See URF-19-12-3065-28E, ECF No 39-3, PageID 495 as well as the actions of other URF staff, URF-19-11-3064-03E, ECF No. 39-3, PageID 497, Segregation is a punishment not a vacation that prisoners wish to voluntarily prolong. And had C.O. West not misrepresented the facts about Mr. Bell being charged, Mr. Bell would have continued to timely file his Step II grievance. Therefore Mr. Bell was thwarted on both occasions which excuses exhaustion under Ross.

D. Can A True Threat Occur Without An Act Of Violence.

The existence of a threat depends not on "the mental state of the author," but on "what the statement conveys" to the person on the receiving end. Elonis v United States 575 US 723, 733 (2015); Counterman v Colorado 143 SCt 2106, 2110(2023). When C.O. Weems made his statement to Mr. Bell he knew of should have known from the experiences of Mr. Bell and other prisoners at URF that the threat of retaliation was not hollow, and that U.R.F. has been upheld and stressed by staff at URF to stands for (YOU ARE FUCKED) which caused Mr. Bell to immediately cease and desist with his First Amendment right to redress grievances in order to gain release from segregation. This Court had addressed the state "mental-state" of an author where in Counterman it reads:

> "Purposes is the most culpable level in the standard mental-state heirarchy, and the hardest to prove. A person acts purposefully when he consciously desires a result. Next down, though not often distinguished from purposes, is knowledge. A person acts knowingly when he is aware that a result is practically certain to follow. A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another. That standard involves insufficient concerns with risk, rather than awareness of impeding harm. But still, recklessness is morally culpable conduct, involving a deliberate decision to endanger another. In the threats context, it means that a speaker is aware that others could regard his statement as threatening violence and delivers them anyway.

Although neither C.O. Weems or C.O. West statements were made to convey any form of violence their statements were made to cause Mr. Bell to abandon his grievance process thereby making the administrative remedy unavailable to Mr. Bell out of either fear of retaliation or by misleading Mr. Bell to think that the issue in fact had been resolved in Mr. Bell's favor, for which there was no further need to use the grievance process. C.O. Weems knew or should have known that Mr. Bell would take his statement as a true threat, United States v Bailey 444 US 394, 404 (1980). C.O. West knew or should have known after his action that Mr. Bell would have no need to pursue a grievance if Mr. Bell thought that the issues was resolved in his favor. C.O. West's actions, whether intentional or not, thwarted Mr. Bell's ability to exhaust administrative remedies, thereby making them unavailable. Ross Id. at 1860, see also Voisine v United States 579 US 686, 691 (2016)

E. Mr. Bell Had Exhausted Administrative Remedies With A Declaratory Ruling

Before and after Woodford v Ngo 548 US 81, 90 (2006), courts have consistently held that if prison officials decide the merits of a grievance rather than rejecting it for procedural noncompliance, they cannot rely on the noncompliance to seek dismissal of subsequent litigation for non-exhaustion. Mr. Bell had filed several Declaratory Rulings pursuant to Michigan Administrative

Rule R791.1115 to the office of Def. Washington which was addressed and accepted by Richard Russell. This declaratory ruling raised the issue of violations of the MDOC policy directive and Mr. Bell's constitutional rights.

Numerous other federal appellant courts agree with Woodford, Rinaldi v United States 904 F3d 257, 271 (3d Cir 2018); Whatley v Smith 898 F3d 1072, 1083 (11th Cir 2018); Reyes v Smith 810 F3d 654, 658 (9th Cir 2016); Hammet v Coffield 681 F3d 945, 947 (8th Cir 2012); Hill v Curcione 657 F3d 116, 125 (2d Cir 2011); Gates v Cook 376 F3d 323, 331 n.6 (5th Cir 2004)

The Sixth Circuit recent decision in Bell v Washington 2023 US App Lexis 25997 (6th Cir 2023)(unpublished) is in direct conflict with the decision of other U.S Court of Appeals decision on this matter, SCt Rule 10 (a), binding precedence set by this Honorable Court.

F. Mr. Bell Faced Machination

In the case at bar, Mr. Bell was thwarted by actors, agents, and employees of URF from using the grievance process. Ross, Id. at 1860 n.3 Mr. Bell had filed several grievances that were either never processed or never delivered. Ross, Id. at 1853-54. This is due to the way the prisoners are forced to process/file their grievances while in segregation. Prisoners no matter who they write their grievances on, must place the grievance in their cell door without an envelope. Any MDOC staffer can take the grievance out of the cell door. The Second Circuit held that the remedy was not available to a prisoner whose grievance was handed to a correction officer who never actually filed it, since the grievance policy; even though prisoners can appeal the lack of response, provided no means of doing so for prisoners who never obtained acknowledgement that this grievance was received, Williams v Priatno 829 F3d 118, 124 (2d Cir 2016).

Prisoners must hope that the staff member will mail it to the grievance department and not throw the grievance in the trash which is common practice at URF. Ross Id at 1853-54

> "an administrative procedure is unavailable when it operates as a simple dead end -- with officers unable or consistently unwilling to provide any relief to aggrieved inmates."
>
> "a grievance process is rendered unavailable when prison administrators thwarts inmates from taking advantage of its machination, misrepresentation, or intimidation."

Mr. Bell was threatened by Def[illegible] Weems that if he continued to file grievances that Mr. Bell might not leave segregation. Mr. Bell took this as a true threat to his ability to leave segregation and did not dare to file any additional grievances at URF. Ross, Id. at 1860 n.3 Once Mr. Bell was safe from C.O. Weems' threat of retaliation at SRF. Mr. Bell filed a declaratory ruling naming all the defendants and describing their unconstitutional conduct. This was presented to the Sixth Circuit as Exhibit A of Point VI in Mr. Bell's Appellant Brief. Therefore MDOC had an opportunity to correct the actions. Woodford v Ngo 548 US 81,94-95 (2006). Mr. Bell received a response from Richard Russell informing Mr. Bell that his Declaratory Ruling was being investigated and that if Mr. Bell does not receive a response in 30 days to consider the matter denied. This was attached as Exhibit B of Mr. Bell's Appellant Brief.

This action was addressed by the court prior in Woodford but it appears that the Sixth Circuit needs new clarification. For the purpose of the PLRA exhaustion requirments have been fully served: prison officials have had a fair opportunity to correct, Porter v Nussle 534 US 516, 524-25 (2002), any claimed deprivation and administrative records supporting the prison's decision has been developed. Dismissing Mr. Bell's claim for failure to exhaust under these circumstances does not advance the statutory goal of avoiding unnecessary interference in prison administration. Rather it prevents the courts from

considering the claim that has already been fully vetted within the prison system.

G. Mr. Bell Presented Tangible Evidence of MDOC's Grievance Process is "simple dead end"

Mr. Bell had provide numerous declarations of MDOC's staff at Chippewa Corectional facility not processing numerous prisoners' greivances. Please see Appendix B and the Declarations of Darnell McBride #192829, Jeremmy Russell #408509, Bruce-X Parker #593090, Forrest Johnson #669047, Mitchell Smith #188215, Michael Blakeman #581370 if nothing else these Declarations show that if Plaintiff was allowed to complete discovery, Plaintiff would have successfully provided tangible relevant, Fed.R.Evid 401 (a) and (b) information on a systemic problem with the MDOC's grievance process (system). Especially at URF where prisoners are forced to place their grievances in a cell door. Where the officer; or his friends for whom the grievance is being written, can at their leisure choose to destroy the grievance without any form of repercussions. An administrative procedure is unavailable when it operates as a simple dead end--with officers unable or consistently unwilling to provide any relief to aggrieved inmates. Ross Id at 1853.

H. Mr. Bell Has Been Denied Due Process and Equal Protection Of Law

1. Procedural Due Process

MDOC Hearings Handbook outlines the Due Process afford prisoner which is drawn from Wolff v McDonnell 418 US 539 (1974). Questions of procedural due process involves two prongs (i) whether there exists a liberty or property interest which has been interfered with a State; (ii) whether the procedures attendent upon that deprivation were constitutionally sufficient. Kentucky Dep't of Corr'l v Thompson 490 US 454, 460 (1989)

i. MDOC's hearings handbook creates a liberty interest

A liberty interest is created by the MDOC's hearings handbook where it uses

"mandatory language", Hewitt v Helm 459 US 460, 471-72 (1983) where it reads:

> "A major misconduct hearing involves much more than the hearing itself, which is really one of the last stages in the process. Before a hearing officer becomes involved in a major misconduct case, misconduct has been charged by reporting officer, screened by the reviewing officer, and usually investigated by the hearing investigator.
>
> Each of these people has functions to perform which are essential to the proper outcome of the hearing process. The hearing officer can base his/her decision only on the evidence presented at the hearing. If the prisoner is mischarged, or the misconduct report is carelessly reviewed or poorly investigated, the hearing officer may have no choice but to find the prisoner not, guilty, or to dismiss the charge(s)."
>
> (A)(2) "The reporting officer shall recite exactly what happened, without making assumptions or conclusion."
>
> (B) "The reviewing officer also provides the opportunity to double check the body of the misconduct report to make sure it conforms to the charges."
>
> (C)(1) "The full investigation of a case is absolutely essential to a fair hearing. Investigators are essential for those who are in segregation...pending their hearing ..."
>
> "Unless a case is thoroughly investigated with particular attention to points of discrepancy between the misconduct report and prisoner's version, the hearing office may not have sufficient information on which to make a decision."
>
> "the hearing investigator must be an active interviewer, not a passive recipient of information. The investigator must analyze the misconduct report and the accused prisoner's statement and then ask specific questions of the witnesses regarding any discrepencies."
>
> (D)(5)"It is always necessary to produce copies of videotapes at a hearing unless they have been requested by the charged prisoner..."
>
> (F)(1) "The maximum range of sanctions should be reversed for only the most serious or persistent violators. Major misconducts are of differing relative seriousness, not all of which warrant a severe sentence. The maximum sentence should not be the norm. An exception is where the prisoner has previously been found guilty of a major misconduct violation that occurred within 60 days of the violation for which the hearing officer is imposing a sanction."

See MDOC Hearings Handbook Section IV

In the case before the panel, Mr. Bell was wrongfully charged. The title of the infraction was Assualt on an inmate (007), but the body of the miscoduct was accessory to an assault which is a different charge. Mr. Bell was denied due

process where: (i) the reporting officer did not "recite exactly what happened, without making assumptions or conclusions"; (ii) "reviewing officer" did not "double check the body of the misconduct report to make sure that it conforms to the charge;"(iii) the hearing investigator did not pay "particular attention to points of discrepancy" In accordance with the MDOC's hearing handbook, "[i]f the prisoner is mischarged, or the miconduct report is carelessly reviewed of poorly investigated, the hearing officer may have not choice but to: (i) find the prisoner not guilty; (ii) dismiss the charge(s). Def. Theut did not following the process due Mr. Bell in accordance with the MDOC's hearings handbook.

2. Substantive Due Process violation

In the case before the panel, Mr. Bell was not suppose to receive the "maximum range of sanction" unless "a major misconduct violation...occurred within 60 days of the violation" Mr. Bell was twenty-two months misconduct free, therefore Mr. Bell avers that he did not conform to the criteria for an exception to the "maximum range of sanction" outlined in (F)(1). Mr. Bell is afforded an impartial where the MDOC's hearings handbook reads:

> "The hearing officer's role is somewhat like that of a judge--an impartial decision-maker..."(E)(1)

MDOC's Hearing Handbook section IV

Mr. Bell was not heard before an impartial decision-maker, where Def. Theut displayed invidious discrimination based on race, Johnson v California 543 US 499, 506-07, 509-15 (2005), where Mr. Bell an African-American who was twenty-two months misconduct free was given the maximum range of sanctions for an assualt on inmate, but Forrest Johnson an European-American was given a less serve sentence for assault on staff. Mr. Johnson was two-months misconduct free which means that Mr. Johnson did conform to the criteria for the maximum range of sanctions.

CONCLUSION

Petitioner filed the petition for writ of certiorari within 90 days of the U.S Court of Appeals for the Sixth Circuit final deicion (A.9) of November 28, 2023, denial of petition for en banc hearing, Supreme Court Rule 13. The decision of the U.S Court of Appeals for the Sixth Circuit is in direct conflict with the binding precedence set by this Honorable Court in Ross v Blake 136 SCt 1850, 1860 n.3 (2016); Supreme Court rule 10(a). The Decision of the U.S. Court of Appeals for the Sixth Circuit is in direct conflict with the binding precendence set by this Honorable Court in Counterman v Colorado 143 SCt 2106, 2110 (2023); Supreme Court Rule 10(a). The decision of the U.S. Court of Appeals for the Sixth Circuit is in direct conflict with the binding precedence set by this Honorable Court in Woodford v Ngo 548 US 81, 90 (2006); Porter v Hussle 534 US 516, 524-25 (2002); Supreme Court Rule 10(a). The decision of the U.S. Court of Appeals for the Sixth Circuit is in direct conflict with the decisions of its sister circuits. Supreme Court Rule 10(a). The U.S. District Court for the Eastern District of Michigan allowed petitioner to pursue discovery, ECF No. 58, but granted summary judgment prior to allowing petitioner to complete discovery in direct violation of the binding precedence set by this Honorable Court in Anderson v Liberty Lobby Inc. 477 US 242m 250 n.5, 257 (1996). Petitioner has suffered violations of his substantial and procedural constitutional rights of Due Process and Equal Protection of the laws. Zimmermon v Burch 494 US 113, 125 (1990); County of Sacramento v Lewis 523 US 833, 840 (1998). The U.S. Court of Appeals for the Sixth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court, Supreme Court Rule 10(c), as to whether a true threat can be received that does not include an act of violence, but does include an act or

retaliation.

PRAYS FOR RELEIF

The petition for writ of certiorari is granted.

Respectfully Submitted,

Tyrone-Anthony: Bell, In Pro Per
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Jackson, Michigan 49201

Date: 1/25, 2024