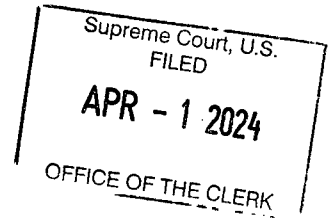


No. **23-7359** **ORIGINAL**

OCTOBER 2023 TERM
IN THE
SUPREME COURT OF THE UNITED STATES



ELVERT S. BRISCOE, JR. - PETITIONER

vs.

GARY MOHR, ET AL. - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
PETITION FOR WRIT OF CERTIORARI

ELVERT S. BRISCOE, JR. #A368171
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QUESTIONS PRESENTED

State Actor

1. Can a prison confidential informant be described in all fairness as a state actor for retaliation when it resulted from the exercise of a right or privilege having its source in state authority; with "the overt, significant assistance of state officials"; and involves the traditional government function of prison management?

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S. Ct. 2077 (1991); Lugar v. Edmonson Oil Co., 457 U.S. 922, 102 S. Ct. 2744 (1982); Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n. 531 U.S. 288, 121 S. Ct. 924 (2001).

Due Process

2. Should a transcript be provided to an In Forma Pauperis appellant on appeal who has won his case in the district court and raises substantial questions of state action which is a "necessarily fact-bound inquiry" and Rule 50 sufficiency of evidence assignment of errors?

Richard v. Henry, 902 F.2d 414 (5th Cir. 1990); Parsell v. United States, 218 F.2d 232 (5th Cir. 1955); Stanley v. Henderson, 590 F.2d 752 (8th Cir. 1979); Thomas v. Computax Corp., 631 F.2d 139 (9th Cir. 1980); Lugar v. Edmonson Oil Co., 457 U.S. 922, 102 S. Ct. 2744 (1982); 28 U.S.C. § 753(f); Rule 50(a).

LIST OF PARTIES

Gary Mohr, former Director Ohio Dept. of Rehab. & Corr.

Lashann Eppinger, Warden;

Keith Foley, former Deputy Warden;

Jennifer Gillece, former Deputy Warden;

Steve Weishar, Investigator;

Nicholaus Costello, Rules Infraction Board (RIB), Chairman; and

Mark "Marcello" Hurayt, inmate #A523727*

* Respondent Hurayt had not appeared after being served.

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IN THE
SUPREME COURT OF THE UNITED STATES

Petition for Writ of Certiorari

Petitioner respectfully prays that a Writ of Certiorari issues to review the judgment and questions below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished-Briscoe v. Mohr, et al., Case No. 22-3155, 2024 U.S. App LEXIS 524 (6th Cir.);

The opinions of the United States District Court appears at Appendix B and Appendix C to the petition and is unpublished-Briscoe v. Mohr, Case No. 1:18CV02417, U.S. Dist. LEXIS 7195 (N.D. Ohio Jan. 13, 2022); Briscoe v. Mohr, Case No. 1:18CV02417, U.S. Dist. LEXIS 209813 (N.D. Ohio Nov. 1, 2021),

JURISDICTION

The date on which the United States Court of Appeals decided this case was January 8, 2024.

A petition for rehearing was not taken.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. First Amendment

Congress shall make no law respecting. . .or abridging the freedom of speech. . .and to petition the Government for a redress of grievances.

U.S.C.A. Fifth Amendment

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

U.S.C.A. Fourteenth Amendment

Sec. 1. [Citizens of the United States.] All persons born . . .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 the laws.

28 U.S.C.S. §753

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. . .Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). . .

42 U.S.C.S. §1983

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 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 injured in an action at law, suit in equity, or other proper proceeding for redress. . .

Fed. R. App. P. 30(c)

(1) Deferral Until After Briefs Are Filed. The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served.

Ohio Adm. Code 5120-9-08(G)

Confidential information. If the RIB panel uses information from a confidential source in its determination, the panel shall evaluate the credibility of the confidential source prior to reaching a decision on the rule violation. The RIB shall also determine whether the statement is confidential in its entirety or if any of the information can be disclosed to the inmate charged with the violation without disclosing the identity or jeopardizing the safety of the confidential source. The inmate charged with the offense shall not be present when the RIB considers and evaluates the confidential information. The panel shall record its evaluation on the appropriate form.

Ohio Adm. Code 5120-9-08(M)(1)

The form shall also include whether the panel relied on confidential information in reaching its determination and the panel's evaluation of the informant's credibility. The form shall not contain the name of any confidential informant or the nature of the confidential information.

STATEMENT OF THE CASE

Elvert S. Briscoe, Jr., an Ohio prisoner proceeding pro se, Petitions for a Writ of Certiorari from the judgment of the United States Court of Appeals for the Sixth Circuit affirming the district court's ruling after a jury trial.

In October 2018, Briscoe brought this action against the Respondents. Briscoe's complaint originates from a 2016 Rules Infraction Board ("RIB") decision finding him guilty of attempting or planning an escape, which resulted in injury, raised security status and transfer to a maximum security prison. Briscoe alleged the charge was based on retaliation from the Respondents after reporting Hurayt for inappropriate uses of a flash drive, computers and for making false reports. Briscoe claimed violations of due process; the First Amendment; Equal Protection; and the Eighth Amendment.

The district court dismissed sua sponte pursuant to 28 U.S.C. §1915(e)(2)(B). *Briscoe v. Mohr*, 2019 U.S. Dist. LEXIS 37734 (N.D. Ohio Mar. 8, 2019). Briscoe appealed to the Sixth Circuit, Case No. 19-3306, that affirmed the dismissal of the equal protection and excessive-force claims, but vacated and remanded dismissal of procedural due process and retaliation claims. *Briscoe v. Mohr*, 2020 U.S. App. LEXIS 8343, cert.denied sub. nom. *Briscoe v. Chambers-Smith*, Case No. 20-5858, 2020 U.S. LEXIS 5949 (2020).

The Respondents were then served and Respondent Hurayt failed to file an answer or appearance. Respondent Mohr filed

a Rule 12(B)(6) motion to dismiss him from the case which was granted by the court. Briscoe filed a Civ. R. 55 default judgment against Respondent Hurayt that was summarily denied at pretrial. The case proceeded to trial in which a jury verdict was returned for Briscoe against Respondent Weishar for a First Amendment violation for \$1,000 compensatory, and \$2,000 punitive damages. The district court granted Respondents Rule 50 motion for Respondents Foley, Gillece, Eppinger and Costello; and the procedural due process claim. Appendix C. The district court denied default judgment on the ground that Briscoe waived the state law IIED claim against Hurayt. Id.

Briscoe filed a Rule 59(e) motion arguing erroneous finding of facts because the claim against Hurayt was a First Amendment violation for retaliation by "joint participation" with state agents in prohibited action; had obtained significant aid from state officials and conspired with state officials in the "public function" of a prison disciplinary function as a confidential informant. The district court denied applying the "public function"; the "state compulsion"; and "nexus" tests. Appendix B. Briscoe filed a Notice of Appeal and asked the district court for permission to appeal in forma pauperis that was granted.

Briscoe filed a motion in the Sixth Circuit for transcripts pursuant 28 U.S.C. §753(f), claiming that because the jury had found retaliation by Respondent Weishar, a substantial question of state action against Hurayt exists by "joint participation", having significant aid or conspiracy; and the "necessarily fact-

bound inquiry" of state action requires the transcript on appeal. Briscoe further argued that a transcript was needed to refute the Rule 50 motion that sufficient evidence was presented to show Respondents each had "overt acts" in a conspiracy to cover up being "duped" into an escape investigation. The Sixth Circuit denied the motion and a second motion; then affirmed the district court's rulings. Appendix A.

Statement of Facts

At trial Respondent Hurayt testified to writing the August 29, 2016 letter describing events of the escape investigation by dates and with Respondents Foley and Gillece looking at camera footage for someone planting a flash drive at his bunk. He admitted to being the informant and writing the statement because Briscoe had planted the flash drive and then told when he found out too much about the plan to escape. Briscoe wrote emails to the TIPS Line. He was housed at Toledo Correctional during the same time Foley was the Major. Never told anyone Gillece wanted him to work at the One Stop.

Respondent Gillece testified she supervised investigation of computers alleged used in escape when Hurayt told her on July 13, 2016 that Briscoe planted the flash drive and how computers were being compromised for use in plan, she called Mohr for a forensic information technology specialist.

Respondent Eppinger, testified to writing the reply on the July 25, 2016 kite, to the charge has been "investigated can appeal" and intentionally appointed Foley to RIB for tied vote.

Respondent Foley testified he did come to work about the time in the letter and looked at Hurayt's bed. That Grafton had fifty to seventy staff members qualified for the RIB. He came to Grafton as security staff supervisor in 2016 and first thing he did was put up stun fence because murder/rape offenders housed there. Security at Grafton why sent there, specifically was computer access problems in Hope Center. This was because had "spoiled" an escape plan at Mansfield just before coming. He was the Major at Toledo from 2007-2009.

Respondent Weishar testified that Hurayt mentioned of a Vick and Starks involved in the escape, but not charged. The first time being told about the escape was on July 13, 2016 when investigating the flash drive. He had Briscoe's July 11, 2016 kite warning of Hurayt's retaliation. That he crossed out Starks name in his July 13, 2016 report because Hurayt got the name wrong, but three documents authored later on July 13, 2016 and August 16, 2016 still listed Starks involved. The August 16, 2016 CVSA of Hurayt matched the August 29, 2016 letter and the Hurayt was **deceptive** for hiding "handcuff key and a bullet" found in the ceiling and for planning to escape. Weishar stated that a computer investigation was going on in May 2016 about porn being on computers and he never investigated any information given by Briscoe or others. He never stated to other staff there was no escape plan.

Respondent Costello testified that the librarian was not called as a witness because not at work all day, but the library

was closed when he was not there. Hope Center officers, Weber and Meade, testimonies would be relevant if the planning took place in a room there. Knew Hurayt's stated planning took place in Hope Center rooms. Sgt. Andrew Wurstner was called, but could not be reached. Costello knew flash drive was connected to the escape and checked Hurayt bunk area also. He reviewed Hurayt's whole CVSA test for credibility and that inconsistent question results would have determination on credibility, and found Briscoe's testimony creditable.

Cindy Williams, testified to being the Hope Center Supervisor and Grafton Victim Coordinator. She suspected Hurayt had a flash drive being caught doing legal work in the area and told her Gillece had assigned him to work there. On July 13, 2016 told Staff Hurayt was lying about escape. She overheard Weishar tell another Staff there was no escape plan and also, Costello state during the RIB, "I need my job, I need my job."

Briscoe, and two codefendants, testified to the emails and letters sent to other inmates by Hurayt asking them to lie at the flash drive RIB hearing for him; did not associate with one another; that Hurayt bragged about "Foley and Weishar's CI" and Foley is his friend that would bring pictures on phone of Hurayt's family; or Gillece's was Hurayt's friend. Briscoe further testified that he reached out to Respondent Staff for help and no one did anything, but sit back, watch it happen, and did everything to help prove Hurayt's story real, even after having letters, emails, Staff and the July 11, 2016 kite.

Complaint

Briscoe's complaint sufficiently plead that Hurayt used a state procedure with "the overt, significant assistance of state officials." Briscoe alleged that Hurayt retaliated because of being reported of having a flash drive and doing illegal acts in computer labs. (R. 1 Complaint ¶¶3, 13-18) On July 11, 2016 Staff initiated a search of Hurayt's bunk finding a flash drive and the "Church CD" software. Hurayt tells Staff "He got it from [Briscoe]!" Its his. (Id. at ¶19) Briscoe was stripped and searched and cleared. Prison Staff approached and explain why, then Briscoe explains why, then suggestion of sending a kite to Respondent Weishar is made dated July 11, 2016. (Id. at ¶¶20-22, 77)

On July 13, 2016 Briscoe and codefendants were placed under investigation by Weishar from Hurayt's confidential statement. (Id. at ¶13) By the end of July 2016, there were two letters wrote by Hurayt asking inmates to say they put the flash drive at his bunk when an African American inmate approached them to do so. Respondent Weishar had these letters. (Id. at ¶¶27-30). Hurayt offered to pay for this testimony. Id.

A further letter by Hurayt, dated August 29, 2016, was e-mailed to Respondent Weishar. Hurayt states to calling Respondent Foley and pleads for help. Just when Hurayt "thought I would Lose. My friend" Foley calls the prison to set up a lie detector test, taken twice on August 16, 2016. Hurayt's ticket is dismissed and Respondent Gillece starts an investigation into

"why someone would want to 'set Him up'". Between August 26-29, 2016, Respondents Weishar, Foley, Gillece, Eppinger, Costello and Hurayt were investigating and reviewing video of Hurayt's bunk and Ms. Long's office. Hurayt then tells the inmate that "today" (August 29, 2016), all got tickets for escape and "guess who is the main witness?" Ironically, on this same day Weishar asks Briscoe and codefendants do they want to "get this over with" by taking CVSA tests. (Id. at ¶¶32-40)

On September 15, 2016 Briscoe has seen Hurayt's JP5 e-mails from September 3-12, 2016 to Weishar. Hurayt states, "RECAP." "I had to. Because Brisco, Duce and Vic went to Ms. Long and said Hurayt had a flashdrive." Then Hurayt threatens Weishar to going to an outside source and telling everything he has told. (Id. at ¶¶48, 50-52)

At the RIB hearings camera footage, phone records, and Hurayt's letters and e-mails were asked to be submitted by Weishar, but were not. A splint vote and then Foley was appointed intentionally by Eppinger for the deciding vote. (Id. at ¶¶55, 57-63, 70) At no time did the prison Respondents investigate any evidence for Briscoe after all were asked. (Complaint)

REASONS FOR GRANTING THE WRIT

This Court should grant discretion review of the Sixth Circuit's ruling that Briscoe was not entitled to default judgment against Respondent Hurayt for failing to state a claim for relief under FRCP 12(b)(6), holding "as a private individual, Hurayt was not liable under § 1983 for falsely informing corrections officers that Briscoe was planning an escape." Appx. p. 5-6. The Court's cases have made clear that "the criteria lack simplicity." *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001). There is a range of circumstances that could point to the State behind an individual face, no one fact can function as a necessary condition. *NCAA V. Tarkanian*, 488 U.S. 179, 196 (1988).

Hurayt's actions must be looked at in the context of prison management and administration. *West v. Atkins*, 487 U.S. 42, 56 (1988). It is his function as a informant under prison rules that are state law. *Id.* at fn. 15. "If an individual is possessed of state authority and purports to act under the authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity..." *Griffin v. Marland*, 378 U.S. 130, 135 (1964). This is "the necessarily fact-bound inquiry." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.*, quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

That the "[misuse] of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Lugar*, 457 U.S. at 929, quoting *United States v. Classic*, 313 U.S. 299, 326 (1941), quoting *Exparte Virginia*, 100 U.S. 339, 346-47 (1880).

The Sixth Circuit Court of Appeals has decided the important federal question of an prison confidential informant is not a state actor and should be held to constitutional constraints when the prison disciplinary system is an activity dominated by the governments authority. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991). Further, the use of an informant in the "prison context" has no significance outside of prison management and administration which is a traditional state function. *Id.*; *Lugar* 457 U.S. at 939.

Petitioner Briscoe is a pro se litigant that the documents filed are entitled "to be liberally construed" and "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Specific facts are not necessary, only needs to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.* at 93, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); Fed. R. Civ. P. 8(a)(2).

Briscoe alleged, and Respondent argued that the Sixth Circuit or this Court, does not recognize the *Lugar/Edmonson*

Rule that a private party's misuse of a state statute with "something more" would convert the private party into a state actor. *Lugar*, 457 U.S. at 939. This Court set out the test in *Edmonson*: 1) whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, *Id.* at 500 U.S. 620; 2) the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority. *Id.* at 621-22. See also *Tarkanian*, 488 U.S. at 192, fn. 12.

This Court should also grant discretionary review of the Sixth Circuit's denial of transcripts for an *In Forma Pauperis* litigant who has won a jury trial in the district court and the denial of a second request for transcripts and deferred appendix. *Richard v. Henry*, 902 F.2d 414 (5th Cir. 1990); *Parsell v. United States*, 218 F.2d 232 (5th Cir. 1955); *Stanley v. Anderson*, 590 F.2d 752 (8th Cir. 1979); Fed. R. App. P. 30(c).

Briscoe was denied a meaningful appeal to challenge the sufficiency of evidence to the district court's granting of the Fed. R. Civ. P. 50 and Motion in Limine by Respondents. U.S.C.A. Fifth Amendment. Briscoe cannot supply transcripts when indigent and prepare Exhibits that are confidential.

1. Can a prison confidential informant be described in all fairness as a state actor for retaliation when it resulted from the exercise of a right or privilege having its source in state authority; with "the overt, significant assistance of state officials"; and involves the traditional government function of prison management?

Respondent Hurayt was vested with state power delegated to him as a "prison" confidential informant. It does not make a difference if this function of an informant is traditionally performed by private individuals, the context Hurayt performed his services was for the State. *West*, 487 U.S. at 56, fn. 15. He does this act in "close cooperation and coordination" in a "joint effort" with and his obligations function not as "the State's adversary." *Id.* at 51; *Tarkanian*, 488 U.S. at 196.

At no time has prisons been delegated, without strict governed regulations to the private realm. It has always been Government's role to tax and build prisons or houses of correction. *Alexander v. Alexandria*, 9 U.S. 1, 7 (1809); Ohio Revised Code ("ORC") 5120.03(C). One primary function of government is the preservation of societal order through enforcement of criminal law, and the maintenance of penal institutions is an essential part of that task. *Procunier v. Martinez*, 416 U.S. 396, 412 (1974).

Prison Administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access and escape, and for rehabilitating to the extent that human nature and inadequate resources allow. *Procunier*, 416 U.S. at 404. Federal courts have a broad hands-

offs attitude toward problems of prison administration. As the Court recognizes, "the relationship of state prisoners and state officers who supervise their confinement is far more intimate than that of a State and a private citizen." *Pell v. Procunier*, 417 U.S. 817, 825-26 (1974) ("Pell").

The proceedings to ascertain or sanction misconduct plays a major role in furthering the institutional goal of modifying the behavioral and value systems of prison inmates to sufficiently permit them to live within the law when they are released. *Wolff v. McDonnell*, 418 U.S. 539, 562-63 (1974). That is why the disciplinary process is a tool to advance the rehabilitative goals of the institution. *Id.* at 563.

The continuous development of measures to review adverse actions affecting inmates are left to the "sound discretion" of corrections officials administering the scope of such inquiries. *Id.* at 568. The procedures are necessitated by the obvious that "a prison needs informants in order to maintain a system of order, [and] an institution must protect those who accuse their fellow inmates." *Hensley v. Wilson*, 850 F.2d 269, 274 (6th Cir. 1988) (emphasis and insertion added); *Wolff*, 418 U.S. at 562 ("Retaliation is much more than a theoretical possibility"). See also *Ponte v. Real* 471 U.S. 491, 497 (1985), citing *Wolff*, 418 U.S. at 563 ("some might attempt to exploit the disciplinary process for their own ends").

No activity "in which a State has a stronger interest, or one that is more intricately bound up with state laws, regula-

tions, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). Hurayt's actions are so critical to institutional goals they "entwined" in administrative rules (OAC 5120-9-08(G), (M)(1); policies (Ohio DRC Policy 09-INV-04(VI)(B)(3), (8) and 56-DSC-01(VI)(H)); and benefits system.

Other Circuits have generally held that correctional facilities perform a traditionally exclusive public function. The Fifth Circuit allowed state prisoners to bring § 1983 claims against privately owned prison. *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460-61 (5th Cir. 2003). The Eighth Circuit held that a juvenile facility that could detain a juvenile exercises the power to incarcerate, a power exclusively held by the state. *Doe v. N. Homes Inc.*, 11 F.4th 633, 637-38 (8th Cir. 2021). "[P]ersons to whom the state delegates its penological functions, which include the custody and supervision of prisoners, can be held liable for violations of the Eighth Amendment." *Smith v. Cochran*, 339 F.3d 1205, 1215-16 (10th Cir. 2003).

The First Circuit held, "the provision of education, police protection, and prisons are public functions that, when privatized, still retain their public nature, and action under color of law may still be found." *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 98 (1st Cir. 1990); cf. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996) (defendant conceded that incarceration is a traditionally exclusive state function).

The first part of state-action analysis of Lugar/Edmonson is satisfied, the very nature of an confidential informant in the **prison context is** to assist the government in prison management and administration. Edmonson, 500 U.S. at 620. The rehabilitative goals of criminals have no significance outside of prison. Respondents use of informants "has become an integral part, indeed the effective part," of the rehabilitative goals of prison administration that is part of the state's control. Terry v. Adams, 345 U.S. 461, 469 (1953).

Second Part Lugar/Edmonson

The second part of Lugar is whether Hurayt in all fairness a government actor in the use confidential informant. This is often a factbound inquiry and the general principles to apply are: 1) the extent to which the actor relies on governmental assistance and benefits; 2) whether actor is performing a traditional governmental function; and 3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority. Edmonson, 500 U.S. at 621-22 (citations omitted).

The private use of state-sanctioned private remedies or procedures do not rise by itself to the level of state action. Tulsa Professional Coll. Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988). State action is found when private parties make extensive use of state procedures with "the overt, significant assistance of state officials." Id. at 486; Edmonson, 500 U.S. at 622.

As discussed above, in the prison context informants could

not retaliate without "the overt, significant assistance of state officials" to investigate and charge misconduct in the RIB system of which it is a part of could not exist. Edmonson, 500 U.S. at 622; Hensley, 850 F.2d at 274. The prison investigator, a state actor, has complete control over the informant, investigation and evidence submitted to the RIB. Edmonson, 500 U.S. at 623. All Respondents in this case had complete control.

The informant, like Hurayt in a prison context, invokes the formal authority of state officials, like Weishar the institution investigator, which must investigate in this case a report of a plan to escape, prison context. Then by finding that the informant has given credible evidence before or invalid CVSA test or handcuff key and bullets in the ceiling the "some evidence" to charge and find guilty. Hensley, 850 F.2d at 274-75, 277; Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 455-56. By enforcing the retaliation, the prison "has not only made itself a party to the [retaliation], but has elected to place its power, property, and prestige behind the [alleged] [retaliation]," and in doing so, the government has "created the legal framework governing the [challenged] conduct." Edmonson, 500 U.S. at 624; Tarkanian, 488 U.S. at 192.

Traditional function

As already addressed, the prison informant is a need "to ascertain or sanction misconduct" and that the "internal problems of state prisons involve issues. . .peculiarly within state authority and expertise," which informants plays a part. Wolff,

418 U.S. at 563; Pell, 417 U.S. at 826, quoting Preiser, 411 U.S. at 492. If the prison has conferred on a private body this power in management and administration, "any 'part of the machinery for security]' becomes subject to the Constitution's constraints". Terry, 345 U.S. at 481.

Aggravated

The injury caused here is aggravated, by the fact that it is the state that has carried out the retaliation by an informant. It is the direct result of governmental delegation and participation. Edmonson, 500 U.S. at 627-28.

The facts and circumstances of this case are made more severe by the "joint participation" of Respondent Weishar also retaliated when Briscoe sent the July 11, 2016 kite warning of Hurayt's plan, Hurayt's letters and e-mails, multiple one-sided investigations by Respondents, and suspect RIB hearings and appeals by Respondents. **United State v. Price, 383 U.S. 787, 794 (1966); Adickes v. S.H. Kress & Co., 398 U.S. 144,152 (1970).** The retaliation by an informant in the "prison context" is nothing more than "entwinement." Brentwood Acad., 531 U.S. at 296, 303-04.

Under the Lugar/Edmonson test, in all fairness in the prison context, a informant's retaliation from the exercise of a right or privilege having its source in state authority; with "the overt, significant assistance of state officials; involves the traditional government function of prison management and administration, and the injury is aggravated in a unique way by the

incidents of governmental authority states a claim for relief under Fed. R. Civ. P. 12(b)(6) for state action pursuant to 42 U.S.C. § 1983. Twombly, 550 U.S. at 555.

2. Should a transcript be provided to an In Forma Pauperis appellant on appeal who has won his case in the district court and raises substantial questions of state action which is a "necessarily fact-bound inquiry" and Rule 50 sufficiency of evidence assignment of errors?

Briscoe was allowed to proceed on appeal in forma pauperis by the district court after a jury verdict in his favor against Respondent Weishar. Respondents Foley, Gillece, Eppinger, and Costello moved for a Rule 50 dismissal which the court granted before submission to the jury on claims of retaliation and due process. Respondents also filed Motions in Limine to the proffer evidence to injury and mental suffering that was granted. Briscoe moved the Sixth Circuit for transcripts at government expense pursuant to 28 U.S.C. § 753(f). The Sixth Circuit denied that motion holding Briscoe was on a search of the record for errors. Briscoe plainly stated that transcripts were needed to show evidence of support to abuse of discretion on the Rule 50 motions and conspiracy. (Docs. 7, 10).

Respondents filed a Motion to Dismiss the appeal for failing to file the transcripts and joint appendix. (Doc. 34 Motion) Briscoe replied arguing that he is prevented from filing the Joint Appendix because of denial of transcripts and Exhibits are Confidential State records. Briscoe moved for Second Motion for Transcripts. (Doc. 39). The Motion was sent for panel decision with the merits of the appeal.

Briscoe is entitled to appeal a district court's ruling, thereby guaranteeing a right to a meaningful appeal. 28 U.S.C. § 1291. An appeal from a district court is taken "as a matter of right." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 407 (2015). This Court has stated that at all stages of an appeal Due Process and Equal Protection protects persons from invidious discriminations and "denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

Here the Sixth Circuit has held Briscoe has forfeited the review of claims properly raised because Briscoe failed to file a Joint Appendix with transcripts and Exhibits to challenge the district court's ruling granting Respondents' FRCVP 50 Motion and Motions in Limine. (Appx. P. 4-5)

Briscoe sought transcripts as a In Forma Pauperis litigant at government expense and the Sixth Circuit denied. *Briscoe v. Mohr*, 2022 U.S. App. LEXIS 13228 (6th Cir. Mar. 16, 2022). Briscoe then sought a second transcript when the Respondents filed to have the appeal dismissed under FRAP 30 and 6th Cir. R. 30. (Doc. 39 Response to Dismiss p. 4) Briscoe urged that the transcripts "are needed for proper review," and a statement under Fed. R. App. 10(c) was not proper when inability to pay makes them unavailable. *Id.*

The Sixth Circuit's ruling, although error, is in conflict with this Court and other Circuits as to meaningful appellate review and the granting of transcripts. Sup. Ct. R. 10(c).

The "necessarily fact-bound inquiry" of state action by this Court shows that a transcript should have been granted to review the First Amendment claims of Retaliation in the Rule 50 motion. *Lugar*, 457 U.S. at 939; *Brentwood Acad.*, 531 U.S. at 298; *Adickes*, 398 U.S. at 158 ("infer from the circumstances" conspiracy).

The Eighth Circuit held that a in forma pauperis inmate who had won there case in the district court for a de minis amount should be allowed transcripts at government expense on appeal. *Stanley v. Henderson*, 590 F.2d 752, 753-54 (8th Cir. 1979).

The Fifth Circuit has held with the Ninth Circuit that the failure to provide transcripts under FRAP 10(b)(2) on a challenge to sufficiency of evidence is proper grounds for dismissal. *Richard v. Henry*, 902 F.2d 414, 416 ((5th Cir. 1990); *Thomas v. Computax Corp.*, 631 F.2d 139 (9th Cir. 1980). The inability to pay for transcripts does not make the transcript unavailable within the meaning of Rule 10(c). *Richard*, supra at 416; *Thomas*, supra at 142. Having denied his motion at government expense, *Richard* should have reurged a motion again. *Id.*

Again, the Fifth Circuit held that,

"where it is proper to allow an appeal in forma pauperis, to direct that a stenographic transcript not be furnished at the expense of the United States, we are of the opinion that if the order allowing the appeal in forma pauperis was correctly and validly entered, appellants were, and are entitled under Sec. 753(f), supra, to have the stenographic transcript prepared at the expense of the United States and the order directing that it not be furnished was erroneous.

Parsell v. United States, 218 F.2d 232, 235 (5th Cir. 1955). The district court granted *Briscoe's* appeal in forma pauperis without

any ruling of "no substantial question" or "not taken in good faith." Id. at 236.

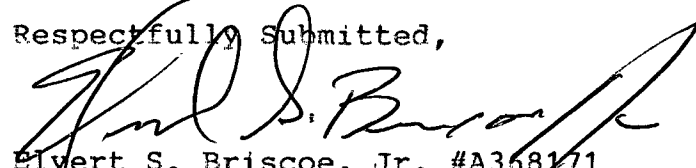
An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Briscoe has not had that in conflict with this Court and other Circuits' rulings.

CONCLUSION

For these reasons, Briscoe prays this United States Supreme Court grants the Writ of Certiorari to review the questions that have significance, not only for the Sixth Circuit, but every other Circuit under the Jurisdiction of this Court.

Respectfully Submitted,



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