No. 24-5884 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

SHENG-WEN CHENG,

PETITIONER,

vs.

P.GRENIER, and UNITED STATES OF AMERICA,

RESPONDENTS,

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should a prisoner's Bivens claim againt a prison counselor for denial of right to petition be dismissed, when the District Court at the same time found the prison counselor denied the prisoner's right to petition?

2. Can the prison counselor's act of violating a prisoner's constitutional right be deterred from recurring in the future absent a Bivens claim?

LIST OF PARTIES IN COURT BELOW

1. Sheng-Wen Cheng ("Mr. Cheng"), Petitioner.

2. P.Grenier, and United States of America, Respondents.

LIST OF CASES DIRECTLY RELATED TO THIS CASE

1. Sheng-Wen Cheng v. P.Grenier, and United States of America
   No.23-cv-00485-WMW-DLM
   U.S. District Court for the District of Minnesota
   Judgement entered on January 16, 2024.

2. Sheng-Wen Cheng v. P.Grenier, and United States of America
   No.23-1796
   U.S. Court of Appeals for the Eighth Circuit
   Judgement entered on August 21, 2024.

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The opinion and judgement of the United States Court of Appeals for the Eighth Circuit is reported as Appendix A.

The Opinion and judgement of the United States District Court for the District of Minnesota is reported as Appendix B.

JURISDICTIONAL STATEMENT

The judgement of the United States Court of Appeals for the Eighth Circuit (reported as Appendix A), was entered on August 21, 2024. On September 5, 2024, the same Appeals Court denied Mr. Cheng's Motion to Stay the Mandate, which is reported as Appendix C.

This petition for certiorari is filed within 90 days of the Appeals Court's entry of judgement, so that this Court has jurisdiction to review the judgement of the Eighth Circuit Appeal Court on petition for certiorari rests by virtue of 28U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law ... prohibiting ... to petition the governemnt for a redress of grievances.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

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

STATEMENT OF THE CASE

While Mr. Cheng was serving his sentence at Federal Correctional Institution ("FCI") Sandstone, Mr. Cheng's assigned counselor -Respondent P. Grenier ("Grenier")- was intentionally thwarting Mr. Cheng's attempts to use the administrative remedy process ("ARP") within the Federal Bureau of Prisons ("BOP"), and limited his access to the courts (R.Doc.74,p.2).

Therefore, with no avaliable means to petition for any redress caused by Grenier's actions, Mr. Cheng filed a complaint and a motion for a Temporary Restraining Order ("TRO") and a

Preliminary Injunction ("PI") at the Federal District Court of Minnesota (R.Docs.1, and 6-10), seeking to restrain Grenier from continuing violating his constitutional rights, and to seek monetary compensations for the harms caused by Grenier.

However, a month after Mr. Cheng filed his complaint, and a day after Mr. Cheng filed his motion for TRO and PI, Mr. Cheng was transferred to another facility. Weeks later, Mr. Cheng's In Forma Pauperis application was granted (R. Doc.15). Subsequently, Mr. Cheng filed an amended complaint with identical claims except dropping an abuse of power claim (R. Doc.19), as Mr. Cheng found that the claim is not valid in the State of Minnesota after regaining access to law library at the new facility.

After the Respondents were served by the U.S. Marshals, Respondents requested an enlargement of time and for one deadline to answer or otherwise respond to Mr. Cheng's amended complaint, using waiting on Washington D.C. to determine whether Grenier acted outside his employment as the reason for the delay (R. Docs.34-38). Then, Mr. Cheng's motion for TRO and PI was denied because he had been transferred to another facility, which rendered the motion to be moot (R. Doc.42).

Months later, Respondents filed the motion to dismiss or in the alternative summary judgement (R.Doc.48), mainly arguing that Mr. Cheng's amended complaint should be dismissed because Mr. Cheng's Bivens claims are not cognizable, and Mr. Cheng failed to exhaust his ARP (R.Doc.48,p.1-3), which were arguments based on

questions of law that have no relation to Grenier's actions.

Afterward, the District Court denied the Respondents' motion for summary judgement for failing to follow the District Court's procedure (R.Doc.59). Mr. Cheng then submitted his opposition to the Respondent's motion to dismiss (R.Doc.63), and the Respondents filed their reply (R.Doc.66). However, in the Respondents' reply brief, they admitted and failed to respond to Mr. Cheng's certain arguments made in his opposition brief; and thus Mr. Cheng filed a motion to leave to file a Surreply to highlight those conceded arguments (R.Docs. 69-70), which the District Court granted (R. Doc.73).

Nevertheless, the District Court granted the Respondents' motion to dismiss on January 16, 2024, and dismissed Mr. Cheng's Bivens claim with prejudice. As a result, Mr. Cheng appealed the District Court's judgement on Feburary 5, 2024 (R.Doc.76). However, on August 21, 2024, the U.S. Court of Appeals for the Eighth Circuit affirmed the District Court's dismissal with little explanations.

Accordingly, this petition for a writ of certiorari follows.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the District of Minnesota had jurisdiction under 28U.S.C.1331.

The United States District Court's final judgement was duly appealed to the United States Court of Appeals for the Eighth Circuit, which had jurisdiction over the appeal under 28U.S.C.1291.

ARGUMENT FOR ALLOWANCE OF WRIT

This Court should review and reverse the decisions made by lower courts in this case, because both the District Court and the Eighth Circuit appeals court failed to consider that there is no other remedy for the present case except for a Bivens claim.

Most importantly, this Court has never reviewed the questions presented in this petition, in regards to a constitutional right to petition Bivens claim, and whether only a Bivens claim can deter federal employees from future misconducts. Therefore, the Eighth Circuit's decision, if not reversed, will render the Constitution to be just a piece of paper, and will cause future victims in the hands of federal employees' violations without any redress.

I. MR.CHENG'S BIVENS CLAIM FOR DENIAL OF RIGHT TO PETITION IS VALID.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), this Court held that injured party can pursue claims for damages against U.S. federal employees for conduct disregarding constitutional protection. Accordingly, because the present case presents a violation of the constitutional right, allowing the Bivens claim to proceed would not intrude the functioning of the prison, and there are no special factors counselling against the authorizations of a Bivens claim, the lower courts erred in dismissing Mr. Cheng's Bivens claim for denial of right to petition.

A. Mr. Cheng's Bivens Claim Would Not Intrude the Functioning of the Prison.

The lower courts stated that allowing Mr. Cheng's Bivens claim to proceed would intrude the functioning of the executive branch (BOP in this case). However, "Prison walls do not form a barrier seperating prisoners from the protection of the Constitution", Turner v. Safley, 482 U.S. 78, 84-85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1982). Also, trying a front line prison counselor's action poses little if any risk of disrupting an executive or legislative power, as it does not involve issues

of national security, international comity, or investigative and prosecutive functions of the executive branch presented in Ziglar v. Abbasi, 582 U.S. 120, 131-32, 135, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017); Hernandez v. Mesa, 140 S. Ct. 735, 206 L. ED. 2d 29 (2020); and Egbert v. Boule, 596 U.S. 482, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022).

Additionally, this Court has found that federal prison officials do not enjoy such independent status in the constitutional scheme as to suggest that judicial created remedies againt them might be inappropriated, and qualified immunity continues to protect them such that the avaliability of a Bivens claim would not overly interfere with their ability to do their jobs, see Carlson v. Green, 446 U.S. 14, 20, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), which the Respondents never dispute (R. Doc. 66).

Moreover, allowing a Bivens claim to proceed in this case would not impose significant administrative or financial costs on the BOP for other future similar litigations, because when a prisoner initiates his or her complaint In Forma Pauperis -as in most prison litigations- his or her complaint is subjected to the additional requirements of 28U.S.C.1915 and 1915A, which include the three-strike rule, see 1915(g), and pre-docket screening, see 1915A. Thus, if a prisoner's complaint were to be frivolous, the prison officials would not have to litigate at all.

Furthermore, the District Court has already found Grenier made the ARP unavaliable to Mr. Cheng, a denial of Mr. Cheng's constitutional right to petition (R.Doc.74,p.6). Thus, there is no risk of disrupting BOP operations as the judicial branch routinely makes the determination of exhaustion of administrative remedy at the early phrase of a litigation. Finally, Mr. Cheng is not using a Bivens claim to reform a prison management or a prison policy, compare Abbasi, 137 S. Ct. at 1860-61 (Denying a Bivens remedy when the prisoner challenged a policy).

Accordingly, allowing Mr. Cheng's Bivens claim for denial of right to petition to proceed would not intrude the functioning of the prison/BOP.

B. Special Factors Favor the Authorization of Mr. Cheng's Bivens Claim.

This Court has said that lower courts should hesitate to extend the Bivens claim into a new context when "legislative action suggests that Congress does not want a damage remedy", Abbasi, 582 U.S. at 149. However, unlike statutory rights, constitutional rights do not stem from Congress. The Bill of Rights were enacted to protect the interests of the individuals in the face of the popular will as expressed in legislative majorities. Thus, there is no reason why the remedies for such

constitutional rights must come from Congress.[1]

Additionally, even if this Court were to defer to Congress -which should not- when Congress passed the Prison Litigation Reform Act ("PLRA") of 1995, its focus was on imposing other gatekeeping requirements to reduce the flow of prison litigations, and was not upon the avaliability of damages remedies for prison suits, see Woodford v. Ngo, 548 U.S. 81, 93, 94, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006). Indeed, if the PLRA were such a clear manifestation of congressional intents to deny prisoners an implied private right of actions for money damages, this Court's statements in Corr. Servs. Corp v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001), a post-PLRA decision, that "a federal prisoner in a BOP facility alleging a constitutional deprivation ... may bring a Bivens claim againt the offending individual officers", and in Hartman v. Moore, 547 U.S. 250, 254 n.2, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006), another post-PLRA decision that "a Bivens action is the federal analog to suits brought against state officials", would not make any sense.

Most importantly, this Court also said the PLRA exhaustion requirement would apply to Bivens claim as well, see Abbasi, 137 S. Ct. at 1865. Thus, the very statute that regulates how

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1. This Court has found that its authority "to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases rising under the constitution, laws, or treaties of the United States", Malesko, 534 U.S. 61.

a Bivens claim can be brought cannot be seen as dictating that a Bivens claim should not exist at all. Therefore, if anything, Mr. Cheng's case demonstrates that the Congressional intent behind the passage of the PLRA has been correctly applied.

Finally, the ARP was found to be unavaliable to Mr. Cheng by the District Court already because of Grenier's actions; thus, there is no alternative relief for Mr. Cheng except than a Bivens claim.[2] Compare Egbert, 142 S. Ct. at 1806 (the avaliability of the BOP ARP forecloses a Bivens claim).

Accordingly, the special factors favor the authorization of Mr. Cheng's Bivens claim.

II. ONLY THE BIVENS CLAIM CAN DETER RESPONDENT GRENIER FROM REPEATING HIS BEHAVIOR.

Moreover, Bivens claim offer an effective remedy where federal employees violate clearly established constitutional rights. See, e.g., Malesko; FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). Indeed, this Court stated that absent a Bivens remedy there will be insufficient deterrence to prevent federal employees from violating the Constitution, because a Bivens claim is outside the control of the executive branch, see Abbasi, 582 U.S. 120.

2. Even though the District Court dismissed Mr. Cheng's FTCA claim for another reason, Mr. Cheng's FTCA tort claim administrative remedy was also unavaliable to him due to Grenier's action during the same period (R.Doc.19,p.4-5). Furthermore, even if the FTCA tort claim administrative remedy were avaliable to Mr. Cheng, FTCA cannot provide any redress to Mr. Cheng as FTCA bars the United States from being sued for constitutional violation. See 28U.S.C.2679(b)(2)(A).

The United States is proud of its constitutional protections on individual rights. However, the declaration of those rights in the Bill of Rights and the Amendments is not sufficient protection of those rights, as many other countries declare similar protection of individual rights in their constitution[3]; instead, it is the mechanisms that can enforce those rights made them meaningful. "The very essence of civil liberty certainly consists in right of every individual to claim the protection of the law, whenever he receives an injury." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 163, 2L. Ed. 60 (1803).

Also, even though an independent judicary's power to issue injunctions against federal employees to ensure compliance is something that can make those declared constitutional rights real sometimes, in many prison cases -as in Mr. Cheng's situation- the BOP can avoid the injunction simply by tranferring the prisoner to another facility. Thus, for victims of government abuse who does not see prosecution of the abuser, or face imminent repetition of the abuse -as in the present case- it is "damages or nothing." Bivens, 403 U.S. at 410 (1971).

Most importantly, Bivens is not a new invention. The United States federal courts already have a long history of

3. For example, Article 29 §1 of the Constitution of the Russian Federation, Article 35 of the Constitution of the People's Republic of China, and Article 67 of the Socialist Constitution of the Democratic People's Republic of Korea, all provide the right to freedom of speech.

providing damages against federal employees who violates someone's constitutional rights. See, e.g., Bell v. Hood, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946); West v. Cabell, 153 U.S. 78, 14 S. Ct. 752, 38 L. Ed. 643 (1894). Furthermore, scholars have pointed at that the roots of Bivens are far deeper, see Professor James F. Pfander, Constitutional Torts and the War on Terror (Oxford 2017), Chapter 1, which reviewed several cases from the early years of Republic in which federal courts award damages against federal employees for their wrong doings.

In the usual pattern for such cases, Congress would then enact special legislation to indemnify the federal employees for the damage award. See, e.g., Little v. Bareme, 6 U.S. (2 Cranch) 170, 2 L. Ed. 243 (1804); Act for the Relief of George Little, ch.4,6, Stat. 63 (1807); Act of March 2, 179, ch. 28, 1 Stat, 723, 724; James F. Pfander and Jonathan L. Hunt, Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic, 85 N.Y.U. L.Rev. 1862, 1932-39 (2010). Therefore, if Congress were to find the Bivens claim against prison counselors like Grenier to be unjust, it can passes bills to indemnify Grenier for the damage awards instead.

Indeed, Chief Justice John Marshall of this Court said that the government has been emphatically terned a government of laws, and not of men. It will certainly cease to deserve

this high application if the laws furnish no remedy for the violation of a vested constitutional right. See Madison, 1 Cranch 137. Here, the filing of prison grievance and access to courts are protected constitutional rights, and the District Court already found that Grenier made them unavaliable to Mr. Cheng. Nevertheless, Mr. Cheng is currently being left with no remedy for the injuries he had suffered that were caused by Grenier; meanwhile, Grenier continues to repeat his behaviors at FCI Sandstone with no consequences.

Accordingly, only a Bivens claim can deter prison counselors like Grenier from repeating his behavior of denying a prisoner's right to petition.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Mr. Cheng respectfully requests that this Court grants this Petition for Certiorari.

Dated: Rochester, Minnesota
16th of October, 2024

Respectfully Submitted,

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