

24-6745
No. 25

ORIGINAL

In The
SUPREME COURT OF THE UNITED STATES

ROBERT LEE FOSTER,
Petitioner-Plaintiff

FILED
FEB 27 2025
OFFICE OF THE CLERK
SUPREME COURT, U.S.

v.

JEREMY BUSH,
Respondent-Defendant.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert L. Foster, #151207
Petitioner-Plaintiff, *in pro per**
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* This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

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QUESTIONS PRESENTED

DID THE DISTRICT COURT IMPROPERLY GRANT SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS?

DID PETITIONER-PLAINTIFF SUFFICIENTLY SATISFY THE EXHAUST OF AVAILABLE ADMINISTRATIVE REMEDIES REQUIREMENT??

DID PLAINTIFF MAKE A SUFFICIENT SHOWING ON EACH ELEMENT OF HIS EIGHTH AMENDMENT CLAIMS TO SURVIVE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT?

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner-Plaintiff Robert L. Foster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The final order of the United States Court of Appeals, 6th Circuit, Affirming the Judgment of the District Court (Dec. 9, 2024), appears at APPENDIX A1-A3 to the petition and is reported at *Foster v. Bush*, 2024 U.S. App. LEXIS 31279, No. 24-31279, (6th Cir., Dec. 9, 2024). The final opinion and order of the United States District Court - E.D. Mich., denying Plaintiff's Motion for Relief from Judgment and denying Motion to Expedite appears as APPENDIX B1-B5 to the petition and is reported at *Foster v. Bush*, 2024 U.S. Dist. LEXIS 74224, 2024 WL 1729831, Dk. No. 20-cv-11103, (E.D. Mich., Mar. 19, 2024). The final opinion and order of the United States District Court - E.D. Mich., OVERRULING Plaintiff's Objections and ADOPTING the Report and Recommendation and GRANTING Defendant's Motion for Summary Judgment and DISMISSING WITHOUT PREJUDICE Plaintiff's case, appears as APPENDIX C1-C3 to the petition and is reported at *Foster v. Bush*, 2022 U.S. Dist. LEXIS 159446, 2022 WL 4009177, Dk. No. 20-cv-11103, (E.D. Mich., Sept. 2, 2022). The final opinion of the United States District Court - E.D. Mich., issuing a Report and Recommendation, appears as APPENDIX D1-D20 to the petition and is reported at *Foster v. Bush*, 2022 U.S. Dist. LEXIS 159453, 2022 WL 6563896, Dk. No. 20-cv-11103, (E.D. Mich., Aug. 4, 2022) (See Appendix, filed under separate cover).

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its final order on December 9, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The

Sixth Amendment of the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense." "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *People v Williams*, 470 Mich. 634, 641; 638 N.W.2d 597 (2004) (citing *Gideon v Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)).

28 U.S.C. 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment or decree.

28 U.S.C. 1915(a)(1): Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

STATEMENT OF THE CASE

PROCEDURAL HISTORY AND STATEMENT OF FACTS

INTRODUCTION

SUMMARY

Petitioner-Plaintiff Robert L. Foster (hereinafter “Petitioner-Plaintiff”) commenced this action as a State prisoner in the United States District Court pursuant to 42 U.S.C. § 1983, by filing a Civil Rights Complaint against Respondent-Defendant Jeremy Bush. Petitioner-Plaintiff was at all times relevant to this action a prisoner incarcerated under the jurisdiction of the Michigan Department of Corrections, being housed in a Department operated prison at the G. Robert Cotton Correctional Facility (JCF), 3500 N Elm Road, Jackson, MI. 49201. On August 4, 2022, Magistrate Judge Anthony P. Patti issued a Report and Recommendation to Grant Defendant’s Motion for Summary Judgment on the Basis of Exhaustion (ECF No. 44). (See APP. D1-D20, Judge Patti’s Report and Recommendation).

On September 2, 2022, District Court Judge Laurie J. Michelson issued an Opinion and Order overruling [Petitioner-Plaintiff’s] objections, adopting the Report and Recommendation, and Granting [Respondent-Defendant’s] motion for summary judgment. (See, APP C1-C3, Judge Michelson’s Opinion and Order).

In September 2019, Petitioner-Plaintiff filed a formal prisoner grievance¹ against Respondent-Defendant asserting a constitutional right violation under the Eighth Amendment to the United States Constitution. Petitioner-Plaintiff asserted personal safety and a right to be protected from harm while incarcerated, and Respondent-Defendant's obligation to take reasonable measures to guarantee the safety of Petitioner-Plaintiff. More, specifically, Petitioner-Plaintiff claimed that the absence of any form of "emergency lighting or intercom system" which can be used by prisoners lock in their cells to alert prison staff in case of an emergency, was in direct violation of his Eighth Amendment protections. Respondent-Defendant took no action to address Petitioner-Plaintiff's concerns.

Summary of Step I Response:

"The Step I Response indicates the grievant states he has medical issues and is afraid that something could happen to him and there would be no way to notify staff if there is an emergency. Grievant is correct that there are no emergency lights or an intercom system but staff conduct their rounds as required. Staff will be advised of Grievant's medical issue."

Petitioner-Plaintiff filed a timely appeal reiterating his complaint at Step I, and again no action was taken to address Petitioner-Plaintiff's concerns.

Summary of Step II Investigation:

"Upon review of the Step I grievance, Step II grievance appeal form and investigation information, Step I response was Appropriate. No policy violation.

The grievance was denied in accordance with PD 03.02.130 Prisoner/Parolee Grievances and there was no policy violation of PD 03.03.130 Human[e] Treatment and Living Conditions for Prisoners.

¹ Grievance Id # JCF-2019-09-1632-03e was changed to JCF-2019-09-1632-28e

Extension 11/15/19

Based on the above, your grievance is considered ---- Denied at Step II.

/s/ Jeremy Bush, Warden 11/9/19"

(See Exhibit 1, Step II Grievance Appeal Response)

The Step II response failed to address the core of Petitioner-Plaintiff's claim, this was never a simple MDOC "policy violation" complaint. Petitioner-Plaintiff "felt his life was in danger." This assertion activates Eighth Amendment protections. As, such Petitioner-Plaintiff sought relief at the final stage of the administrative remedies process by filing a timely Step III (dated received: 12/20/2019), and on March 30, 2020 the Grievance Section of the Office of Legal Affairs for the MDOC issued its decision.

Step III Grievance Decision:

THE REJECTION IS UPHELD.

(See Exhibit 2, Step III Grievance Decision)

It is unclear from the decision on what basis was "the rejection upheld" however, it does not appear that the grievance was rejected because it was untimely. In fact, it would appear that the Step III decision was in response to the Step II Grievance Response. Having no other option for redress Petitioner-Plaintiff filed a civil rights complaint against Respondent-Defendant under 42 U.S.C. §1983 for violation of his Eighth Amendment protections to be free from cruel and unusual punishments and to be protected from harm while incarcerated.

On August 4, 2022 Magistrate Judge Anthony P. Patti issued a Report and Recommendation to grant [Respondent-Defendant's] motion for summary judgment on the basis of exhaustion. The court failed to address Petitioner-Plaintiff's Eighth Amendment claim. Petitioner-Plaintiff filed timely objections to Judge Patti's R & R.

On September 2, 2022, District Court Judge Laurie J. Michelson issued an Opinion and Order Overruling Petitioner-Plaintiff's Objections, Adopting the Report and Recommendation, and Granting Respondent-Defendant's Motion for Summary Judgment. (See APP. C1-C3, Opinion and Order OVERRULING Plaintiff's Objections and ADOPTING the Report and Recommendation and GRANTING Defendant's Motion for Summary Judgment and DISMISSING WITHOUT PREJUDICE Plaintiff's case). Judgment was entered on the same date.

The final order of the United States Court of Appeals, 6th Circuit, Affirming the district Court's order was issued on December 9, 2024. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

SUMMARY OF THE ARGUMENTS

Plaintiff filed a civil action pursuant to 42 U.S.C. § 1983 against Defendant for violation of his Eighth Amendment U.S. Constitutional right on 3/20/20, which did survive the initial screening and found not to be frivolous.

Contrary to the Court's primary finding for granting Defendant's Motion for Summary Judgment that; "JCF-1632 pre-dates the October 20, 2019 attack." Plaintiff's JCF-1632 grievance was filed in response to the facility's "**lack of an emergency lighting system or intercom system**", which could provide prisoners who may be experiencing an emergency situation direct access to housing unit staff in between housing unit staff's normal routine rounds. (ECF No. 27-3, PageID.223)

The very fact that the October 20, 2019 attack on Plaintiff happened subsequent to JCF-1632, and resulted in significant injuries to Plaintiff goes to the very heart of the complaint. If the facility had addressed the emergency lighting system and/or intercom system complained about in Plaintiff's JCF-1632 grievance filed on September 3, 2019, the attack may have been prevented.

Plaintiff properly exhausted his available state administrative remedies as it relates to the primary issue complained of in grievance JCF-1632 "lack of an emergency lighting system and/or intercom system."

Michigan Department of Corrections Policy Directive 03.02.130 "Prisoner/Parolee Grievances" require that prisoners seeking redress for alleged violations of policy and procedure or unsatisfactory conditions of confinement must complete and submit a CSJ-247A "Prisoner/Parolee Grievance Form."

“Complaints filed by prisoners regarding grievable issues as defined in this policy serve to exhaust a prisoner’s administrative remedies only when filed as a grievance through all three steps of the grievance process in compliance with this policy.” (M.D.O.C. Policy Directive 03.02.130(C)).

Plaintiff complied with the grievance process as defined in PD-03.02.130, as it relates to JCF-1632 which the Court acknowledges is the only grievance relevant in this matter. Petitioner-Plaintiff filed his Step III grievance on November 18, 2019 well ahead of the December 3, 2019 deadline. Mr. Foster met his exhaustion requirement despite the fact that Respondent-Defendant wanted one hundred and twenty-eight days to send him the Step II decision and Step III appeal form. JCF-1632 was received at Step III and filed on 12/20/2019. (ECF No. 27-3, PageID.213).

Plaintiff contends that he has met the exhaustion requirements of both PD-03.02.130 and 42 U.S.C. § 1997e(a), by alleging that the Defendant failed to provide an emergency lighting system and/or intercom system”, which could provide prisoners who may be experiencing an emergency situation direct access to housing unit staff in between housing unit staff’s normal routine rounds.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON PETITIONER-PLAINTIFF'S CLAIMS.

ARGUMENT

The very fact that the October 20, 2019 attack on Plaintiff happened subsequent to JCF-1632, and resulted in significant injuries to Plaintiff goes to the very heart of the complaint. Plaintiff's JCF-1632 grievance was filed in response to the facility's "lack of an emergency lighting system or intercom system".

Petitioner-Plaintiff, asserts that the District court's findings regarding the facts giving rise to Petitioner-Plaintiff's complaint are misplaced. Petitioner-Plaintiff, initiated his grievance in response to the prison's lack of an emergency lighting system or intercom system, as a means to alert housing unit staff of an immediate emergency or danger. The fact that he was subsequently assaulted at the hands of another inmate (inside his own cell) went only to illustrate his complaint about the lack of an emergency response system. Judge Petti's Report and Recommendation attempts to make this a case about the "assault" [fight] rather than the real issue of a lack of an emergency response system.

As Judge Patti explained:

"[h]owever legitimate [the plaintiff's] fears may have been, . . . it is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment. [A] claim of psychological injury does not reflect the deprivation of 'the minimal civilized measures of life's necessities,' that is the touchstone of a conditions-of confinement case". (ECF No. 56, PageID.380).

“The constitution does not mandate comfortable prisons,” but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.

The Amendment also imposes duties on these officials, who must provide humane conditions of confinement: prison officials must ensure that inmates “take reasonable measures to guarantee the safety of the inmates.” *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984) In particular, courts have uniformly held, “prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.”

II. PETITIONER-PLAINTIFF SUFFICIENTLY SATISFIED THE EXHAUSTION OF AVAILABLE ADMINISTRATIVE REMEDIES REQUIREMENT.

The district court observed that "the record before the court does not clarify the reason for the rejection of Plaintiff's Step III grievance appeal, nor does it clarify the timeliness of Plaintiff's Step III grievance appeal." (Dist. Ct. R&R, p. 16, ECF No. 44). How then can the court find that Plaintiff's Step III grievance appeal failed to satisfy

The exhaustion requirement. The exhaustion of remedies doctrine will be departed from when compliance with the rule would be futile, as when an administrative body arbitrarily delays in taking action on a party's case or simply refuse to act as required by law. [Petitioner-Plaintiff's] Step III grievance appeal was submitted on November 18, 2019 (ECF No. 27-3, PageID.221), which made it timely. However, after Petitioner-Plaintiff file his appeal a delay in processing it occurred and Grievance JCF-1632 was not received at Step III until December 20, 2019 (ECF No. 27-3,PageID.213). As the District Court observed:

"The record does not make clear why it would have taken nearly one month for acknowledgment of the Step III grievance appeal (e.g., did Plaintiff actually submit the appeal on November 18th or was the delay the MDOC's fault?). To complicate matters, the reason for the rejection is not clear from the record, and the fact that the March 30, 2020 Step III Grievance Decision states 'the rejection is upheld' (ECF No. 27-3, PageID.220) (emphases in original)) suggests the Step III grievance appeal was originally rejected sometime prior to March 30, 2020.

[To sum up] the record before the Court does not clarify the reason for the rejection of Plaintiff's Step III grievance appeal, nor does it clarify the timeliness of Plaintiff's Step III grievance appeal."

There were no findings by the Grievance Division that Petitioner-Plaintiff's Step III appeal was submitted untimely. In fact, it would appear from the record that Petitioner-Plaintiff did in fact submit his Step III appeal timely and the delay came during the "processing stage". The exhaustion of remedies doctrine will be departed from when compliance with the rule would be futile, as when an administrative body arbitrarily delays in taking action on a party's case or simply refuse to act as required by law. (The general requirement that a grievant must exhaust his or her . . . remedies is excused if the . . . breaches its duty . . . *Williams v Molpus*, 171 F.3d 360 (6th Cir. Mich. 1999).

Michigan Department of Corrections (hereinafter M.D.O.C.), policy requires that a prisoner who is seeking redress for alleged violations of policy and procedure or unsatisfactory conditions of confinement to do so through established "grievances procedure". The M.D.O.C. grievance procedure consist of three step;

M.D.O.C. Policy Directive 03.02.130 in relevant part:

- a). Step I requires that the grievance be filed within five business days after attempting to resolve the issue with appropriate staff. (this step is filed with the facility's Grievance Coordinator).
- b). Step II permits an appeal of an unsatisfactory response from Step I, this must be done within ten business days. (this step is filed with the facility's Warden).
- c). Step III provides for an appeal if the grievant is dissatisfied with the Step II response or does not receive a timely response. This step must be done within ten business days. (this step is filed with Grievance Section, of the Office of Legal Affairs (OLA)

Petitioner-Plaintiff states that his grievance was timely filed at each stage of the grievance process and that any delay was “procedural.” The District court’s findings that Petitioner-Plaintiff failed to exhaust his available administrative remedies is inconsistent with the findings in the report. How can the court find that on the one hand that, “the record does not make clear why it would have taken nearly one month for acknowledgement of the Step III grievance appeal (e.g., did Plaintiff actually submit the appeal on November 18th or was the delay the MDOC’s fault?), or that the record is not clear as to the reason for the rejection of Petitioner-Plaintiff’s Step III grievance appeal, or that the record is not clear as to the timeliness of Petitioner-Plaintiff’s Step III grievance appeal. But then still grant Defendants’ motion for summary judgment, the basis of which is that Petitioner-Plaintiff failed to exhaust his administrative remedies?

This Court should find that the District court did not have a sufficient basis in which to grant Defendants’ motion for summary judgment.

III. PETITIONER-PLAINTIFF'S MAKE A SUFFICIENT SHOWING ON EACH ELEMENT OF HIS EIGHTH AMENDMENT CLAIMS TO SURVIVE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

"The constitution does not mandate comfortable prisons," but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment, *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475, 1993 U.S. LEXIS 4210 (1993). The Amendment also imposes duties on these officials, who must provide humane conditions of confinement: prison officials must ensure that inmates "take reasonable measures to guarantee the safety of the inmates." *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984) In particular, courts have uniformly held, "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners."

Thus, the "fear of assault" may give rise to a compensable claim under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25; 113 S. Ct. 2475 (1993). This is particularly so where prison officials could have, but fail to, adopt or put into place safety measures designed to protect vulnerable inmates. A prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the eighth amendment. *Farmer v. Brennan*, 511 U.S. 825; 114 S. Ct. 1970 (1994).

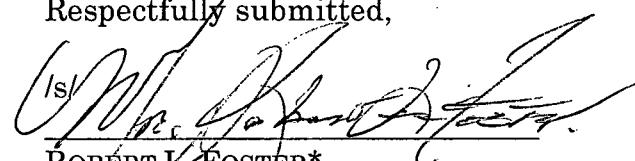
The Fourteenth Amendment is not "trivialized," (internal citation omitted), by recognizing that in some situations negligence can lead to a deprivation of liberty. On the contrary, excusing the State's failure to provide reasonable

protection to inmates against prison violence demeans both the Fourteenth Amendment and individual dignity. *Davidson v. Cannon*, 474 U.S. 344; 106 S. Ct. 668 (1986).

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Petitioner-Plaintiff submits that he has presented the Court with compelling reasons for consideration and ask that this Court grant the petition for a writ of certiorari.

Respectfully submitted,



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Dated: February 27, 2025