No. ________________

IN THE
SUPREME COURT OF THE UNITED STATES

David Pilver,
Petitioner,

vs.

Hillsborough County, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Essentially:

1. Does the Eleventh Circuit's "discharge or more" rule in public employee defamation cases, which conflicts with other circuits' due process decisions, too narrowly restrict the 14^{th} Amendment via 42 U.S.C. § 1983?

2. Can a circuit ignore an explicit state law property interest in deference to its own severity measure rule when deciding if due process has been violated?

3. Does a court's refusal to entertain First Amendment arguments after a plainly stated claim of retaliation after whistle-blowing, or to engage a *custom or policy* examination despite a robust fact pattern, meet the obligations of a "liberally construed" and "less stringent" standard and Federal Rule 8(e)?

4. Should agency action taken without the jurisdictional authority to act trigger substantive due process review, acting as a threshold question before further precedential metrics can be reached?

LIST OF 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. Hillsborough County, a subdivision of the State of Florida.

2. Human Resources Department, an agency of Hillsborough County.

3. Law Library Board, an agency of Hillsborough County.

4. Norma J. Wise, individually.

5. Bill C. Spradlin, individually.

6. Lori Krieck, individually.

7. Bobbie Aggers, individually.

8. Angeleah Kinsler, individually.

9. William Featheringill, individually.

Norma Wise, Bill Spradlin, Lori Krieck, Bobbie Aggers, Angeleah Kinsler, and William Featheringill were voluntarily dismissed as individual defendants following a partial settlement agreement in the early stages of litigation. A breach of contract claim by the same plaintiff against the same defendants regarding that settlement agreement is pending in state court.

Norma Wise and Bill Spradlin remain also as "official capacity" defendants but are therefore probably subsumed under Hillsborough County.

Human Resources Department and Law Library were dismissed as defendants by the same trial court ruling that granted summary judgment and which was the subject of the appeal to the Eleventh Circuit.

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STATUTES & RULES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished in the traditional hard copy reporter. It is available via internet at https://scholar.google.com/scholar_case?case=6511631602398733499 .

The opinion of the United States District Court for the Middle District of Florida appears at Appendix B to the petition and is unpublished in the traditional hard copy reporter. It is available via internet at https://scholar.google.com/scholar_case?case=948037381319668763 .

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided the appeal below was 3rd October 2017.

A timely filed petition for rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on 7th November 2017 and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 :

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.

42 U.S.C. § 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, except that in any action brought 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 purposes 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.

Laws of Florida 2000-445 § 5; § 10-12 :

[appears in Appendix D].

STATEMENT OF THE CASE

The case is a suit for defamation and denial of due process following whistle-blower reports to government officials. The defendants are accused of deliberately bringing false disciplinary allegations and engaging in a disciplinary process when they lacked any authority to act, and repeatedly failing to correct those deprivations when challenged to do so, all the way up the chain of command.

In September 2013, seventeen years into my stint with the Hillsborough County Law Library, after noticing an increasing number of financial irregularities with regards to vendor invoices, I anonymously asked for guidance from the County Administrator, who failed to respond. Nineteen days later I informed my supervisor (Wise) that I would be reporting the matter to her superiors, and did so that evening. Within hours, false disciplinary complaints had been filed against me by Wise and her close friend (Spradlin), who was my coworker at the time and had been implicated in the report I filed. Despite having no authority over the agency I worked for, Human Resources Department, via and in tandem with Wise, forbade me from approaching my job site and demanded my appearance at what amounted to an interrogation with an hour or less verbal notice. HR Dept. agents resisted my version of events and actively advocated for Wise. I was suspended from work, and later in the week a formal reprimand was published in my personnel file (a public record). The document made clear that I was now effectively a probationary employee again. There was no hearing before an impartial decision-maker, either before or after the alteration of my status. Attempts to achieve a hearing, present evidence, or appeal the outcome were rebuffed or met by silence.

The work environment became hostile, and amid signals that termination was imminent I was transferred to another agency with significantly different employment conditions.

Efforts to avoid litigation by correspondence to policy-makers proved futile. A five-count suit was filed at the Middle District of Florida on 2nd October 2015. Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1391 and 42 U.S.C. § 1983; and pursuant to 28 U.S.C. § 1367 for evaluation of state law claims, with Declaratory relief authorized pursuant to 28 U.S.C. § 2201 & 2202.

A mediation was held 11th February 2016 and resulted in a partial settlement (which I allege was breached and is the subject of a continued state case). The federal complaint was dismissed by order on 22nd June 2016 with leave to amend, and the amended complaint was filed 8th July 2016. A second amended complaint was filed with permission on 15th July 2016. My motion to compel discovery responses was granted in part by order on 3rd August 2016.

I replied to defendants' motion for summary judgment with a detailed and vigorous response in opposition, incorporating my testimony by affidavit. This evidence detailed the mutual expectation of the parties via the county's tenure system, the reprimand's clear imposition of heightened scrutiny on my employment from that point forward, and the physical impossibility of HR Dept. having any properly delegated authority, among others. Nevertheless the trial court granted defendants' motion for summary judgment by order on 7th December 2016.

The trial court's opinion:

- Concludes that the harms did not "shock the conscience" to a sufficient degree, citing even a physical battery that resulted in a dislodged eyeball as not enough to trigger substantive due process review (a reading I believe is flawed from the outset ... the cited case does not seem to state such a formulation). The court seemed unnaturally focused on just one aspect -- the increased working hours (i.e. decreased effective rate of pay) after the transfer -- rather than appreciating the full suite of harms as a whole entity.;

- Finds that the complaint contained no allegation that defendants had deprived a liberty or property interest, despite explicit counter-examples there ("protected right to his continued and undiminished employment"; "violated Plaintiff's liberty right to his continued and undiminished employment "; etc.).;

- Interprets a suspension (with or without pay) to fail the threshold of *discharge or more* used in Eleventh Circuit.; and

- Specifically declines to hear First Amendment arguments, finding that the issue was "raised for the first time in opposing summary judgment." This was despite my complaint's explicit references to retaliation for whistle-blowing and a multitude of corresponding fact allegations.

A notice of appeal was timely filed. The Eleventh Circuit appellate panel rendered their decision affirming the summary judgment on 3rd October 2017.

The circuit's opinion:

- Concludes that I had failed to allege *custom or policy* by defendants, despite the complaint's thorough fact allegations regarding the various ranks of officials who oversaw and approved the behaviour(s).;

- Entirely fails to take up the matter of a property interest based on tenure, despite my urging in the briefs to take judicial notice of the Civil Service Act (i.e. Laws of Florida 2000-445) and its explicit provisions regarding enhanced process expectations.;

- Entirely fails to examine the defendants' lack of authority to act in the matters described, despite excruciatingly detailed analysis provided in the briefs.;

- Entirely fails to examine the First Amendment implications of the case, despite prominent coverage in the briefs.; and

- Finds that the circuit's bright line of *discharge or more* had not been reached.

A motion for panel rehearing was denied 7th November 2017. This petition follows.

REASONS FOR GRANTING THE WRIT

1. As a bright line threshold, the Eleventh Circuit's

"discharge or more" rule, articulated in *Cannon v. City of West Palm Beach*, 250 F. 3d 1299 (11 Cir. 2001), is in conflict with the decisions of other circuits as regards employment due process cases.

Although it is not unusual for federal circuits to differ on points of law to some degree for periods of time, this overly-strict standard has stubbornly kept the landscape of employment due process in ambiguity for most of two decades. Other circuits have implicitly or explicitly declined to follow the Eleventh Circuit down this perilous track. A mere handful of trial courts outside the boundaries of the Eleventh Circuit (my research turned up only three) have looked to the *Canon* decision as persuasive, meaning that citizens of other states have distinctly different access to remedies. Within Alabama, Georgia, and Florida, plaintiffs victimized by brazen due process violations but still employed by the victimizer are rebuffed from justice in the courts over and over again. Citations to *Cannon* in any capacity outside the Eleventh number about two dozen, while within more than 150.

A survey of decisions from other circuits on similar matters is illustrative:

"Although the Supreme Court has not decided whether procedural due process protections extend to employee discipline short of termination ... we have done so in the case of a tenured state employee's suspension without pay ..." *O'Connor v. Pierson*, 426 F.3d 187 @ 197 (2nd Cir. 2005; citations omitted).

> "The fact that we are dealing with a suspension and not a termination is of no moment at this point in our analysis. It is the Pennsylvania statute that defines the property interest, and the statute explicitly states that it applies to those 'suspended, removed or reduced in rank.' ... we reject any argument that Dee lacks a property interest because suspension appears to be a less drastic form of discipline than termination. We find no legal basis for such an argument ..."

Dee v. Borough of Dunmore, 549 F.3d 225 @ 230 (3rd Cir. 2008; footnote omitted).

"To state this type of liberty interest claim under the Due Process Clause, a plaintiff must allege that the charges against him ... were made in conjunction with his termination *or demotion*." *Sciolino v. City of Newport News, Va.*, 480 F. 3d 642 @ 646 (4th Cir. 2007; internal citations omitted; emphasis added)

Due process protections apply if defamation "is made in connection with the termination of employment *or the alteration of some right or status recognized by state law.*" *Wenger v. Monroe*, 282 F. 3d 1068 @ 1074 (9th Cir. 2002; emphasis added; internal citations omitted).

"A plaintiff may be able to state a due process claim based on the allegedly defamatory actions of government officials if the defamation is accompanied by a discharge from government employment *or at least a demotion in rank and pay.*" *Amobi v. District of Columbia Dept. of Corrections*, 755 F. 3d 980 @ 994 (D.C. Cir. 2014; internal citations and quotations omitted; emphasis added).

Et cetera.

Moreover, the Eleventh Circuit's ultra-strict requirement of termination for evaluation of due process claims conflicts with its own broader definition of adverse employment action in claims that also involve First Amendment retaliation:

> "We have decided that, as a matter of law, important conditions of employment include discharges, demotions, refusals to hire or promote, and reprimands ... [and] any other

> conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee qualifies as an adverse employment action. ... Thus, if an employer's conduct negatively affects an employee's salary, title, position, or job duties, that conduct constitutes an adverse employment action."

Akins v. Fulton County, Ga., 420 F. 3d 1293 (11th Cir. 2005; internal citations omitted). Whatever logic may lie in having the broader definition apply only in certain subsets of section 1983 liability escapes me.

Without resolution, this conflict amongst the circuits will continue. The recurring question of whether outright termination is the only change in status that merits federal due process consideration is not likely to vanish from new case filings any time soon, so a definitive ruling that can rectify the ambiguity seems warranted.

2. Both the trial and appellate courts have failed to acknowledge the property interest arising from state law.

Where a trial or appellate court has failed (refused? neglected?) to address arguments or facts present in the litigant's pleadings, briefs, etc., we must, I reckon, assume findings by implication. "Although the district court made no express finding ... we infer an implied finding because that is consistent with the conclusion of the district court ... ." *US v. Robertson*, 493 F. 3d 1322 (11th Cir. 2007). While higher courts are loathe to intervene in findings of fact, reviewing how those facts have been arranged to support a legal conclusion is certainly valid.

In the case I bring today, the trial court did not address the mutual expectations of the parties with regards to tenure and locally prescribed disciplinary procedures, despite my arguments advocating such an examination. I had described in my Response in Opposition to summary judgment (which, rendered as an affidavit, was also testimony) the protected nature of tenured Hillsborough employees: "County's system is like enough to tenure that it should be treated as such ... As a *de facto* tenured employee, I argue I had not only a liberty interest but also a property interest via my legitimate expectation of continued and undiminished employment." Trial Doc. #69, p.16-17. Since the opinion of the trial court never mentions the topic, we must assume such an argument as a basis for process due was rejected. Yet it should have figured prominently in the analysis.

Likewise, the appellate court has also completely omitted any reference to Hillsborough County's tenure system, despite a much more thorough view of the topic relayed in my principal brief. There I had specifically directed the court's attention to the basis in Florida Law for specific protections afforded to Hillsborough's classified employees: "County does, in fact, have eponymous *tenure* ... it is a fact in the public domain for which I urge judicial notice. It is ensconced as Laws of Florida 2000-445, the 'Civil Service Act of 2000' for Hillsborough County, at Section 5(31) ... ." Again, that tenure, and the procedural safeguards it mandates (Act at §10-12), should have played a significant role in the appellate decision. Instead there is no trace of its having played any part in the ruling.

With the lack of overt analysis, we are left to conclude that neither the district court nor the circuit found any merit in the idea of a property interest for civil servants in Hillsborough County derived either from state law or the valid mutual expectations of the parties, my prompts notwithstanding. Without explicit deconstruction, however, their reasoning in this regard is inscrutable. How do they avoid the guidance from cases such as *Board of Regents of State Colleges v. Roth*, 408 US 564 (1972) regarding the source and boundaries of 14th Amendment property? A consistent reading of the Supreme Court's cases in this area would seem to demand some deference to state law sources, but the courts below have given none. They have seemingly dismissed the idea out of hand, and their rulings thus have elements that run contrary to controlling precedent.

A headlong rush to reach the bright line afforded by *discharge or more* seems to have clouded the thinking, conflating a lack of outright termination with a lack of property interest overall. The state law source, however, implicates not only termination procedures but also those for discipline of any kind (Act at §10-12), and the procedures described become a property interest as well, such that the defendants' refusal to follow them *becomes a part of the injury* in addition to the suspension, reprimand, et al. -- a deprivation that goes at least some ways towards the plus of "stigma-plus" analysis. Especially for states with weak or nonexistent civil due process causes of action of their own (like Florida), a refusal by the federal court system to recognize the entitlement grounded in state law effectively renders such legislation meaningless.

3. Neither the trial court nor the appellate panel deigned to analyze the First Amendment implications of my attempts to blow the whistle regarding financial shenanigans at a public agency.

The district explicitly declined to do so with the admonition that the basis had not been laid in the complaint. I dispute this now as I did on appeal to the circuit -- the complaint quite plainly made the assertion that the actions complained of had been in retaliation for whistle-blowing, and the corresponding facts alleged paint that picture with clarity (e.g.: the time between the utterance and the retaliatory backlash, the inconsistency and obvious inaccuracy of the disciplinary complaints, etc.). While it is true that the complaint does not use the phrases "First Amendment" or "free speech", pleadings are not magical incantations for which every word must be precisely thus and such in order for the spell to work. Where the idea has been adequately conveyed, the courts should not dither about the phrasing used to effectuate that conveyance, especially when the pleading is that of a *pro se* litigant.

Supreme Court precedent is quite clear that papers from non-professionals should be given wide latitude when parsing them for cause of action frameworks. The usual citations are to *Haines v. Keaner, et al.* 404 US 519 (1971) and *Estelle v. Gamble*, 429 US 97 (1976). Even after the enhanced pleading standard of *Bell Atlantic v. Twombly* 550 US 544 (2007), necessitating plausibility and not just possibility, a complaint such as the one in this case should pass through to trial with its claims intact. *Erickson v. Pardus*, 551 US 89 (2007), shows that *Twombly* and its progeny did not kill *Haines* and *Estelle*. Rather than being heavy on labels and conclusions, my complaint is, if anything, fact-heavy and somewhat light on labels ... to its apparent detriment at the hands of the trial court.

Similarly, the appellate panel found that the complaint had failed to allege the necessary *custom or policy* of the government defendants. This finding came despite factual averments about the various officials I had contacted all through the ranks and the silence or outright refusal to remedy that I received in return. An honest reading can hardly conclude anything but that the treatment I received at the hands of Hillsborough County was fully authorized by competent policy-makers. Yet here again apparently because I neglected to add a numbered paragraph that articulated precisely "it is the custom and/or policy of the county to deprive me of these property and liberty interests" the courts have seen fit not to credit any of those assertions.

In short the courts below have not followed the spirit of the "liberally construed" and "less stringent" precedents, nor Rule 8(e), resulting in conflict with the Supreme Court's prior holdings. This bodes ill for future cases with equally valid claims.

4. A significant aspect of the case which is mysteriously missing in action from the rulings below is defendants' lack of capacity to sit as disciplinarian in the first place. The claim is simply absent from the lower courts' analyses, as if I never made it, but it should have been at the foundation of the legal inquiry. The HR Dept. was not my *appointing authority* as defined in the Civil Service Act of 2000, and had no properly delegated permission to act as such.

If lack of jurisdiction can act to nullify an entire proceeding in the courts, it would seem to follow that it should play an important role in evaluating the validity of administrative process for a governmental entity. This "first and fundamental question" of jurisdiction, see *Mansfield, C. & LMR Co. v. Swan*, 111 US 379 @ 382 (1884), should have garnered a significant discussion. Like First Amendment implications, a lack of jurisdiction should evoke substantive due process review, or something like enough to it that it serves the same function. Without the legal authority to act, it doesn't matter what process was used; the particular mechanics by which the deprivations were accomplished are irrelevant when the very endeavour to act is illegal on its face. Proceedings without jurisdiction "do not constitute due process of law." *Pennoyer v. Neff*, 95 US 714 @ 733 (1878). Examination of this jurisdictional issue should be the threshold for further inquiry -- before determining which *parts* of an entity's suite of deprivations may stand (via "conscience shock" test, etc.), the courts should first figure *whether* any such action may stand at all.

CONCLUSION

I will not burden this petition with a multitude of attached exhibits, but would caution that, for the quantity of significant material that had been argued in my opposition to summary judgment and appellate filings that evoked not a whit of discussion from the courts below, to read only their rulings out of the context of the whole Record would produce a skewed picture. Those relevant documents are all presumably still available electronically via PACER.

While the flaws in the lower court rulings obviously affect me personally in the unique context of my litigation circumstances, the legal ambiguities presented by those rulings are much broader than my case alone. Balancing the need to weed out merit-less claims from an overburdened docket with delivery of justice where it has been denied requires establishing and enforcing consistent thresholds in the federal courts where *pro se* pleading standards, First Amendment considerations, administrative jurisdiction, property rights via state law, and due process limitations are properly evaluated. For want of clarity and consistency, these questions will continue to arise in future cases, and their multiplicity will sap finite court resources.

For the reasons elaborated, I ask that the petition for a writ of certiorari be granted.

Respectfully submitted,

David Pilver

5th February 2018