

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Joseph Emil Klug

(Your Name) — PETITIONER

vs.

Warden English, et al.,

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eleventh Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph Emil Klug 08578-025

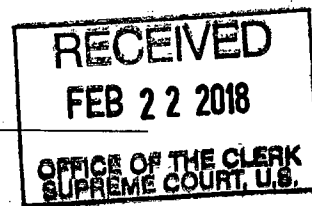
(Your Name)
Marianna FCI - Inmate Legal Mail
P.O. Box 7007

(Address)
Marianna, FL 32447

(City, State, Zip Code)

N/A

(Phone Number)



QUESTION(S) PRESENTED

1. Does a federal inmate have standing to argue against a new "BOP Policy" when he has been affected by it and exhausted administrative remedies?
2. Does the Marianna FCI blanket ban on all role playing game materials (including books) violate the rules, laws and procedures set forth in *Thornburgh v Abbott* 490 US 401, 28 CFR §540.71 (c)(d) and the BOP Program Statement Incoming Publications (see doc 38-4 page 22)?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

☒ 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:

Joseph Emil Klug, **Petitioner**

Warden English, Respondent

Associate Warden of Programs Lowe, Respondent

Associate Warden of Operations, Robinson

Supervisor of Education Thompson, Respondent

Captain Pryor, Respondent

Captain Perez, Respondent

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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 issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at Klug v English 2017 U.S. App. LEXIS 23759; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at Klug v English 2016 U.S. Dist LEXIS 149214; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 10-17-2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 12-20-2017, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution First Amendment - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances.

28 C.F.R. § 540.71 (c)(d)

(c) The warden may not establish a list of excluded publications. This means the warden shall review the individual publication prior to the rejection of that publication. Rejection of several issues of a subscription publication is not sufficient reason to reject the subscription publication in its entirety.

(d) Where a publication is found unacceptable, the warden shall promptly advise the inmate in writing of the decision and the reasons for it. The notice must contain reference to the specific article(s) or material(s) considered objectionable. The warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the Administrative Remedy Program unless such a review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.

STATEMENT OF THE CASE

1. STANDING

When a prison implements or states that it will implement a new policy that bans a specific genre of books, all inmates located at that prison are affected by it. When the same policy requires that all books of that genre need to be mailed out of the institution or they will be declared contraband, any inmates whom mailed out 32 books of that genre, was affected by that ban. When an inmate has 6 books from 2 different book orders rejected and they were all subject to the ban, that inmate was directly affected by that same policy. When an inmate was affected in all of the 3 above ways, should he also have standing to argue against the ban?

When the same inmate completed the Administrative Remedy Program four different times on the subject of the blanket ban on RPG books, he has fully exhausted as per the PLRA. When regional and national counsel complain of that inmate's repeated use of the remedy program for said ban, it should be clearly evident that the inmate has exhausted on that subject. When that inmate is also threatened by those same offices if he uses the remedy program again on that subject he will be subject to discipline, which can include loss of good time credits, he has no other source to air the grievance except for the courts. What else must an inmate do to have standing to argue against the blanket ban on all RPG books in a federal civil suit?

When the District Court for the Northern District of Florida, Panama City Division, the Eleventh Circuit, ruled in the case they said,

"For the purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin* 95 S. Ct. 2197, 46 L. Ed. 2d 343 (1975). "The essence of a standing question is whether the plaintiff has alleged 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for the illumination of difficult constitutional questions.'" *Saladin v. City of Milledgeville*, 812 F.2d 687, 690 (11 Cir 1987) quoting *Baker v Carr*, 339 U.S. 691, 703 L. Ed. 2d 663 (1962).

"[T]he irreducible constitutional minimum of standing contains three elements. *Lujan v. Defenders of Wildlife* 112 S. Ct. 2130, 119 L. Ed. 351 (1992). First the plaintiff must have suffered an injury in fact-

an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second there must be a casual connection between the injury and the conduct complained of- the injury has to be fairly traceable to the challenged action of the defendants, and not the result of the independant action of some third party not before the court. Third it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id at 560, 61.

SPO MEMO

The December 10, 2013 memo, doc 38-1, page 20 (SPO memo)(note: all references to documents relate to Klug v. English 5:15-cv-00237-MP-CJK llcir), stated that it only banned Role Playing Game (RPG) materials purchased via Special Purpose Orders (SPO). However, as applied, it began the blanket ban on all incoming RPG books regardless of funding source or ordering method (SPO, BP 199, or as gifts from family or friends).

Prior to the SPO memo, the petitioner ordered and received 32 RPG related books and received all 32, with none being rejected. After the SPO memo was issued, the petitioner ordered 5 RPG books using a BP 199, and all 5 were rejected, citing they werer RPG books and contrary to the safety, security, and good order of the institution. see doc 38-1 page 6. This shows that the petitioner was affected by the SPO memo, as it was applied. Would petitioner's discovery request been granted, the facts would show that prior to the SPO memo's publication, few, if any, RPG books were rejected, but after the memo, most, if not all, were rejected.

VERBAL ISSUANCE OF THE BLANKET BAN

In early February 2014, 3 Marianna FCI staff members (SOE Thompson, Warden English, and Ms. Smith of the mail room) tole the plaintiff that all RPG books were being banned and that a new memo would be issued stating that all RPG books would be declared contraband. See complaint ¶7, ¶8, ¶9, see also doc 38-2 page 16 the BP 9 where the petitioner cites this conversation of the upcoming memo in the underlined portion.

SECOND MEMO (MARCH MEMO)

The petitioner was also affected by the March 2014 memo, doc 38-1 page 16, both facially and as applied. The petitioner was forced to mail out all 32 RPG books in his possession without an individualized review. The loss of property was a direct result of the March memo that made possession of said books subject to an incident report, which can lead to loss of earned good time credits.

The petitioner sent them to a vendor whom was going to purchase them, however USPS tracking data showed that the prison never delivered them to the local post office for an initial tracking scan. See "Opposition to Defendants Consolidated Motion..." Exhibits 4a and 4b. The books were lost and never delivered or returned. This loss of property was directly linked to the March Memo banning all RPG books.

REMEDIES

The petitioner fully complete the Administrative Remedy Program 4 times on the subject of the RPG book blanket ban. In short, when an inmate submits an informal remedy (BP 8) it is answered by local prison staff. The BP 9 is an appeal of the BP 8, which is sent to the local warden. A copy of the BP 8 and its response must be attached to the BP 9. The inmate may then appeal the warden's decision by sending a BP 10 to Regional Counsel. A copy of the Bp 8, BP 9 and their responses must be included. Finally, an inmate may appeal to the National Office of the BOP via a BP 11. They must also include a copy of the BP 8, BP 9, BP 10 and their repsonses. Once the National Office responds, or runs out of time to respond, the inmate has exhausted the remedy system. As a final note, the BP 8 has no page length limitation, which the BP 9, BP 10, and BP 11 are limited to a length of the provided form and one continuation page. This allows the inm,ate to tell the full complaint on the BP 8 and have it become part of the administrative record. The subsequent appeals do not require a full rehash of all arguments. See Administrative Remedy Program Statement Doc 38-4 pages 2-18, citing 28 C.F.R. § 542.10.

REMEDY 772436 (DOC 38-2 PGs 7-20)

This remedy was submitted in the context of the SPO memo, doc 38-1 pg 20, being applied to book orders that used the BP-199 method (a treasury check sent using the inmate's funds). The pettioner also argued "that books and publications must be rejected individually, not via a blanket ban 'no role-playing books' rule." see Doc 38-2 page 18. Staff's reply was that books are reviewed individually, see doc 38-2 pg 17. The BP 9, doc 38-2 pg 16, countered by stating that a ban on all RPG books means that they are not being reviewed individually as any RPG book, regardless of actual content is banned prior to its review. Warden English acknowledged that all RPOP books are banned; "Accordingly, materials associated with role playing games and the

supplemental publications have been deemed as detrimental to the security of the institution and are not permissible." doc 38-2 pg 15. Thus, all RPG books are banned, period.

The BP 10 sent to region appealed the application of the SPO memo to all RPG books, regardless of ordering method or funding source. Region's reply stated that the warden provided a detailed response explaining why the RPG materials are banned. Doc 38-2 pg 12. This shows that region has included in the administrative record and was given fair notice of the petitioner's complaint against the blanket ban on all RPG books. The national office was sent an appeal in the form of a BP 11. Their response was that the warden's decision was appropriate. Doc 38-2 pg 7. All levels were included in the administrative record and given a chance to correct the alleged violation. The petitioner completed his requirement under the PLRA to exhaust and has standing to argue the ban in context of the SPO memo, as applied.

REMEDY 804953 (DOC 38-2 PGS 24-41)

In order to more fully and clearly exhaust the alleged constitutional violations of the March 2014 memo, the petitioner filed this remedy to ensure exhaustion was clearly completed. While the remedies were filed outside of the 20 days of a book rejection or the loss of the 32 books, the petitioner was still being affected by the March 2014 memo as it was still posted and enforced. Had staff felt that the 20 day window to file a remedy was violated, they could have raised this procedural error at the time of the remedy's filing. However, they waived that right, by responding to the remedy.

"A prisoner has exhausted his administrative remedies when prison officials decide a procedurally flawed grievance on the merits." *Whatly v. Warden* 802 F. 3d 1205 (11 cir). see also *Reyes v. Smith* 810 F. 3d 654 9 cir 2016. The defendants cannot accept and respond to a procedurally flawed grievance, and then claim the remedy is faulty and require the inmate to file a remedy after the deadlines have elapsed. The time to plead a procedural default is at the time the default occurs, not years after the remedy was accepted and responded to. This remedy was accepted, reviewed and replied to at every level and the administrative record shows that all levels were made aware of and given a chance to correct the alleged violation of books not being reviewed individually. This the petitioner exhausted his remedies in terms of the March 2014 memo and has standing to argue against it both facially and as applied.

REMEDIES 809217 and 809218 (DOC 38-2 PGs 43-58)

In preparation for a civil complaint, the petitioner filed the 2 above remedies to get an official definition of "addictive escape behavior" and to learn what policy was being used as the source of the blanket ban on all RPG books. Both regional and central office responded by threatening the plaintiff with an incident report if he filed another RPG related remedy. See doc 38-2 pgs 45 and 53 (the National Office replied were not included in the record). The petitioner has no further ability to exhaust remedies in the context of the RPG book blanket ban. To file a remedy on the subject is to open himself up to an incident report and loss of good time credits. The petitioner has no administrative remedy system available with which to use for RPG material issues, and thus cannot further exhaust per the PLRA. The PLRA requires that inmates use the system that is available, and the petitioner has such such system available for this topic.

STANDING SUMMARY

1. Petitioner has suffered a concrete and actual injury in fact. He was forced to mail out 32 books without an individualized review and had 6 books rejected for being RPG books (see appendix D). The rejection slips contained no book titles, quantity of books, nor any objectionable context cited.

2. The injuries are clearly traceable to the SPO memo and the March 2014 memo and the defendants signed either, or both, memos. The remedies mentioned also bear the words of the defendants that they are traceable to the ban and the resultant injuries.

3. The injury can be redressed by the courts by overturning the ban, requiring an individualized book assessment, and awarding damages to the petitioner for loss of property, loss of funds, and for the violation of constitutional rights.

4. The petitioner has exhausted remedies on the subject of the RPG blanket ban and has shown that he cannot further use the remedy system for RPG related complaints. As such the remedy system is not usable to the petitioner for RPG related complaints. The PLRA requires that all such available remedies be exhausted. The petitioner has none available.

2. BLANKET BAN ON RPG BOOKS

There has been an attempt to cloud the issue at hand. The petitioner is not claiming that prison officials improperly denied him the right to play RPGs. No such right exists. The ban is on possession of books. All RPG books are banned regardless of actual content. The defendants contend that all RPG materials contain dangerous content and therefore, all are banned. The petitioner simply contends that books should be opened and, if rejected, it be on account of that book's actual, rather than perceived, content. In order for the blanket ban on all RPG materials to be held valid, prison staff has to prove either (a) all RPG materials, whether published yet or not, are dangerous, or (b) that all of the rejected books were in fact, reviewed on an individualized basis. Prison staff can not reject thousands of books solely based on their cover.

While called games, RPGs are a set of rule books. One does not need the books to play RPGs nor does one have to play RPGs to get use of the books. See *Wilson v. Midway Games*, 198 F. Supp. 2d 167, Dist of Ct, 2002 (while called games RPGs are free speech), *TSR v Mayfair* 1993 US Dist LEXIS 3355, ND of IL Eastern Div, 2993 (RPGs do not require the use of books, this directly contradicts the defendants' claims that RPGs require the use of books in doc 37 section B pg 5).

The rule books contain information on world building and character building. They can be used by inmates as aids to writing novels. Best selling fantasy authors Margaret Weis and Tracey Hickman used RPGs to write many of their novels. See "Opposition to Defendants' Consolidated Motion..." exhibit 15, Preface from the *Rastlyn Chronicles* by Weis and Hickman).

If one were to review their actual content, they would see statements such as "do not act out combats". This directly contradicts the defendants' claims that the books encourage violence. Additionally the role of the GM (Game Master also called a DM for Dungeon Master), and his role as a rules arbiter is clearly defined. The defendants allege that the GM is akin to a gang leader. However, the RPG books describe the opposite. The players tell the GM what they want their characters to do when interacting with the world and the GM converts those requests into dice rolls in accordance with the rules. The randomness of the dice determine the outcome. In a gang the opposite occurs.

The gang leader tells everyone what to do and the outcome does not rely on any randomness. See Plaintiff's Opposition to Defendants' Motion to Dismiss exhibit 14 (Role of a DM/GM pgs 1-2, 8-10, 15, sample game play pgs 3-7, 11-14 These examples were taken from various RPG books. Petitioner was denied access to photocopy the books.)

The defendants also cite possible gambling. see doc 38-1 pg 6 and appendix D. While dice are used, the books do not encourage gambling. Banning RPGs for the use of dice would also require the BOP to ban Monopoly and playing cards. Both can be misused for gambling. However both of these are supplied by the BOP at every prison, despite the fact that cards and dice can be used for gambling.

"Addictive escape behavior" is also stated as a reason to ban all RPG materials. The defendants defined it as "changes in attitude, values, and an altered perception of reality." See doc 38-2 pg 48. Everytime a person reads a book, discusses a political view, or moral quandry, their attitude, values, or perception of reality is altered. The defendants also stated that their own psychiatry department had no issues with RPGs being played. See doc 38-2 pg 44. (Note SOMP Coordinator refers to the psychologist whom is in charge of the Sex Offender Management Program. At the time of authorship this was Dr. Pistro, whom was also the acting head of the psychology department).

In a similar suit, the Supreme Court ruled that prison officials had to review each book on a case by case basis and that prison wardens could not create a list of excluded publications. See *Thornburgh v. Abbott* 109 S. Ct. 1874. this decision was used to draft 28 C.F.R. § 540.71 (c) and (d). The defendants also seem to disobey this guidance. Their memos clearly state that all RPG books are banned. see doc 38-1 pg 16 and 20. Also the book rejections contain no book titles, quantity of books rejected, or any citations to actual objectionable content. See exhibit D. (Note: the vendor Noble Knight was not sent a copy of the book rejection). If the defendants are correct in their postulation that all RPG books are dangerous, why do they not cite any actual content in their book rejections? See appendix D.

Only once can they prove that they even opened a book when it was rejected. The petitioner ordered a novel that contained some game related data. The book was rejected not because the content was dangerous, but because it was "RPG related". See doc 38-1 pg 4 ¶15. ("I explained in my response to this request that this publication contained a section titled 'Dungeons & Dragons: Comic

and Game Adventure' This section included 'descriptions of points, levels, and quests' and could therefore be used to create a role playing game.")

Lastly schools and libraries use RPGs as instructional aides. They teach math skills, writing skills, creative problem solving, and help people overcome social issues. In terms of prison security, several prisons such as Tuscon Federal Penetentiary and Talladega Federal Correctional Institution have RPG classes. Here they teach inmates the basic rules so that they can receive the benefits of game play and give inmates game dice or the ability to purchahse them. (See Plaintiff's Opposition to Defendnats' Motion..." Exhibit 1d ¶3, ¶8 and certificates as well as exhibit 1b ¶3 and gaming pass re: programs at federal prisons) see also Watters v. TSR 904 F. 2d 378 (6th cir 1990) re: schools and libraries use RPGs

CONCLUSION

In conclusion the defendants have not proven their case. "[T]he blanket prohibition against the receipt of ... publications by any prisoner carries a heavy presumption of unconstitutionality!" Pepperling v. Crist, 678 F. 2d 787, 791 (9th cir 1982)1 (see also Thornburgh 490 U.S. at 416. The defendants have not proven that all RPG materials are dangerous in a prison setting nor that they review all books individually. (see Bruce V. Gomez CIV S-96-2227-JFM-P E.D. CA (2000) doc 106; blanket ban on all RPG books in prison overturned) See Also appendix D for book rejections that lack book titles, citation to content or quanities of books rejected in the order. No indication is given that the books are opened prior to rejection.

Also the petitioner has exhausted his remedies in respect to the RPG book blanket ban and is not able to file any more remedies on the subject. Thus all available remedies under the PLRA have been exhausted. Also he he able to show that he has suffered an injury and has standing to challenege the blanket ban.

Finally in Beard v. Banks, Justice Stephens in his dissent, noted that the rationale of rehabilitation was too broad and could be used to justify taking away any right ot priveledge in prison. See Beard v. Banks 548 US 521 126 S. Ct. 2572 (2006). If allowed to stand, this case would allow staff to ban nay book without an individualized review or citing any objectionable content. This gives their power too broad of a scope.

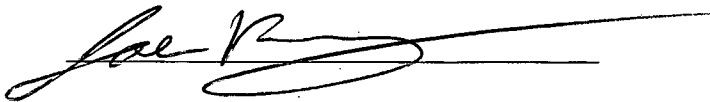
REASONS FOR GRANTING THE PETITION

Prisons in the BOP are exercising vastly different views on inmates and the books that they are allowed to possess. The rules set for in Thornburgh and in 28 CFR § 540.71 (c)(d) keep their power to restrict information in check,.By requiring that books be individually reviewed it forces prison staff to cite actual content that is objectionable and gives inmates a method to protest thos eobjections. If not remanded to the district court for individulized review, prison staff's power would go unchecked and allow them to reject any book solely based on its cover or perceived content.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Joe R.", written over a horizontal line.

Date: 2-13-2018