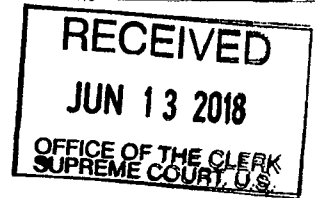


In The Supreme Court Of The United States

No. _____



Benny R. Smith,
Petitioner,

(D.C. No. 5:18-CV-03022-SAC)
(D. Kan.)

vs.

(C.O.A. No. 18-3051)
(10th Cir.)

Sam Cline, Warden of
Lansing Correctional Facility, et al.,
Respondents.

Petition For A Writ Of Certiorari To
The United States Court of Appeals
For The Tenth Circuit

Benny R. Smith
Prisoner of Lansing
Correctional Facility
P.O. Box 2
Lansing, Ks, 66043
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Questions Presented

Whether there is a threat to the balance of power doctrine, because the U.S. Court of Appeals, 10th Circuit are using a Mandamus statute 28 U.S.C. §1361 to penalize inmates with strikes, and several of the Circuits are referring to this remedy as a Mandamus, when the Congress / legislature has stated unequivocally it has abolished the Mandamus statute and remedies in favor of the Federal Rules of Civil Procedures 81 (b); in other words, due process is not some legal technicality; it's a matter of fairness that lies at the heart of America's justice system?

Whether the U.S. Court of Appeals or The 10th Circuit should have exercised its jurisdiction 28 U.S.C. §1291 to do more than give effect to the legitimate expectations of the Rule 12 (b) (1), and Fed. R. Civ. Proc. 82, by specifically enforcing the forum clause; By ruling a Mandamus 28 U.S.C. §1361 a strike knowing this type of Mandamus is not a strike, *Green v. Nottingham*, 90 F.3d 417 (10th Cir. 1996); and the Mandamus do not exist?

Whether there is a conflict between the Circuits?

Parties Involved

Employed by the U.S. Court of Appeals For The 10th Circuit. Elisabeth A. Shumaker, Clerk; Ellen Rich Reiter, Jurisdictional Attorney. Matheson and Bacharach, Circuit Judges. Sam Crow, U.S. District Court Judge. Warden Sam Cline, Lansing Correctional Facility; Colette Winkelbauer; James Skidmore, administrator,

Medium Unit, Lansing Correctional Facility; Brett Peterson, Policy Compliance Manager, Lansing Correctional Facility, Defendants-Appellees.

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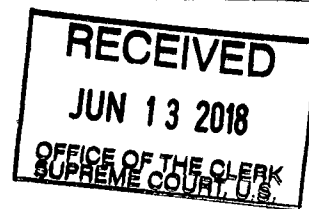
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The United States Court of Appeals
For The Tenth Circuit

Decisions Below

The decision of the U.S. Court of Appeals, 10th Circuit is not reported, copy is attached hereto as appendix B. (A.2). The order of the U.S. District Court, Kansas is not reported, copy is attached hereto as appendix A. (A.1).

Jurisdiction

The judgment of the U.S. Court of Appeals, 10th Circuit was entered on April 25, 2018; May 22, 2018.

Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved

Involves 8th and 14th Amendment. Prohibition against Cruel and Unusual punishment; prohibits denial of equal protection and due process of law; Article I-III Separation of Powers. The U.S. Constitution grants powers separately to each department of the government: lawmaking to the legislature (Supreme Court) with the initiative to create and modify Statutes (Rules).

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens; nor deprive them of life, liberty, or property, without due process of law; nor deny equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Statement of the Case

This case involves the U.S. District Court, Kansas and the Tenth Circuit Court of Appeals rulings that denied me access to proceed in forma pauperis on the merits of my 1983 Complaint. Claiming I have three (3) strikes against me. Under the Prison Litigation Reform Act (PLRA) restrictions, 28 U.S.C. §1915(g). and I have to pay the full filing fees of \$505.00,

and the third (3rd) strike the Courts relied on was a mandamus, 28 U.S.C. §1361. That the footnotes of the Mandamus statute factually states the Mandamus has been abolished. A Violation of the Separation of powers doctrine. Because the legislature and this Court only, has the power,

To Create and modify Statutes and Rules. No branch of government may exercise another branch's power - the president does not have the power to introduce a bill into Congress, he must convince a senator or representative to introduce it - And the Courts Claims,

petitioner shows no credible issues of imminent danger.

The P.L.R.A three strikes provision do not apply against me, because: Seek emergency transfer.

1. Imminent Danger. I mailed a multitude of Complaints to outside agencies (Prison Rape Elimination Act (PREA)), et al., because the prison officials of Lansing Correctional Facility (L.C.F.) had a multitude of flunky inmates to continuously sexually assault me. And the L.C.F. officials

retaliated against me. See 1983, pgs. 2-3(h), 4(b)-4(d), 4(i)-4(j). With severe ongoing torture. And ongoing to date outside communication censorship, to prevent me from telling my family and other agencies about the torture. From April 25, 2017 my foods and drinks was ongoing spiked causing severe health issues. It tapered off.

as recent as to date, my food trays / drinks are periodically spiked and fumigation of pepper spray and other chemicals into the vent, cracks and crevices of my cell. Causing me severe pains, breathing complications (Use two types of inhalants) and other complications.

any reputable doctor knows that the medication I took for these symptoms is not prescribed for food poison. See 1983, Sick Call Slip, June 14, 17, Attachment ("Att") 8, and I did not get colds until I kept receiving threats of getting sick. See 1983, Att. 42 a; 1983, Part 4, Att. 7 b.

Fumigation Causing gagging Choking Coughs, head aches, Nauseated, Constant mucus from eyes, nose, mouth, dizziness, and other serious symptoms. Ongoing death threats from E A I Tinsley; Officer in Charge ("OIC") Payne; Englis; Chapman; Backs; Matt; Lord; Hopkins; Official Hattely;

Wentz; Gandy; Kennedy; Hamilton; et al. in A-1 and C-1 cellhouses on all three shifts. Violation of Mandela Rules against Torture. The officials have inmates calling me a snitch ongoing to date. ("Labeling an inmate a snitch satisfies the Turner Standard and constitutes

deliberate indifference to the safety of that inmate.") Benefield v. Mc Dowall, 241 F.3d 1267, 1271 (10th Cir. 2001). Also relying on surveillance footage for all above. Moreover, threats of planting hepatitis C virus in me. See appendix C. (A.3). They sprayed my vent with mace this day.

Farmer v. Brennan, 511 U.S. 825 (1994) According to *Farmer*, if a plaintiff shows that he was "incarcerated under conditions posing a substantial risk of serious harm," and that "the official knows of and disregards an excessive risk to inmate health or safety," then a

Viable Eighth Amendment Claim has been presented. See *Prison Legal News* [PLN, July 1994, p. 1]. "The Constitution protects prisoners not only against ongoing harms, but also against the risk of future harm," quoting *Helling v. Mc Kinney*, 509 U.S. 25 (1993) [PLN, Nov. 2017, p. 56].

Argument in Support of Granting Certiorari

A. Conflicts with decisions of this Court.

This case is important for the issues it raises. Because I have stated a Compensible Claim of imminent danger; and I only have two strikes against me; and the lower courts are in violation of the separation of powers doctrine; and the 10th Circuit decisions conflict

with five (5) other Circuits. The exceptional circumstance of this case warrants the Court to intervene in this matter, to revise or correct the proceedings in this cause instituted by the U.S. District Court, Kansas and Tenth Circuit Court of Appeals.

and an order compelling the Courts to perform their ministerial duties. And an order declaring what their duties are in these matters. A binding adjudication of the rights and status of the Petitioner. To announce clearly an opinion or resolution. The

progenitor of *Marbury v. Madison*, 5 U.S.

(1 Cranch) 137 (1803) this Court upheld the Supremacy of the Constitution and stated unequivocally it had the power of "judicial review" to strike down actions taken by federal or state

legislative bodies which offended the Constitution.

2. I only have Two (2) Strikes Against me.

a. Case no. 03-32142, *Smith v. Bruce*, and

b. Appeal No. 04-30143, (10th Cir.)

The 3rd strike the Court relied on was a "Petition for a Writ of Mandamus, Benny R. Smith, Petitioner v. Debra Peterson; Margaret McIntire, Sedgwick County ("Sedg. Co.") Attorneys, Respondents," of Sedg. Co. District Court. Case no. 04-3025-GTV;

Appeal No. 04-3068, (10th Cir.) Construed as a mandamus. Concerning my pending Criminal Conviction, Kansas Supreme Court, *Smith v. State*, Case No. 01-87294-5.

The requirement of judgment or choice is not satisfied if federal statute, regulation, or policy specifically prescribes course of action for employee to follow, because employee has no rightful option but adhere to the directive. *U.S. v. Gaubert, Tex.*, 1991, 499 U.S. 315,

On remand, 932 F.2d 376. "Any problem that raise a question involving the interrelationship between federal and state regulation - the regulatory scheme of the state has priority. *K.S.A. 60-801. Mandamus, Article 8. See Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S.

190, 203-204 (1983). "Under the PLRA strikes has to be assessed in a chronological order to be Constitutional - When part of the same case, i.e., the district court filing, then the appeal process. If the appeal process is ruled a strike, then the initial district court process before it,

has to be a strike first to count as strike three, before reaching the appeal process, cld., as the two strikes against me above. The petition for a Writ of Mandamus was dismissed in the district court for lack of jurisdiction over state officers or state court. *Coleman v. Tollefson*,

135 S. Ct. 1759 (2015) Coleman held "that Courts must count as strikes the dismissal (district court) even though it remains pending on appeal,"

If the district Court's dismissal is not a strike, neither can the appeal dismissal be a strike. And if the Court has no jurisdiction over state officers or state Court, it can not have jurisdiction over me also - it can not play favoritism and pick and choose to have

jurisdiction over me and penalize me with a strike. Discriminate - 2: To make a difference in treatment on a basis other than individual merits. Webster dictionary, 11th Edition, 2005, pg. 140. Not to mention I am Black. "The case are gagged, denied file stamped copy, to cover up these deplorable crimes." B.(A.2).

The three strikes provision was ignored in the district Court and skipped over. And the appeal process - that was not prosecuted - was assessed as a strike, for strike three to bar me from proceeding in forma pauperis. The Writ of Mandamus of this type, most Circuits

considers it a form of appeal of the ongoing case, 2nd; 3rd; 5th; 7th; and 8th Circuits. And Green v. Nottingham, 90 F. 3d 415, 417 (10th Cir. 1996)

Similarly characterized it as "an aid of appellate jurisdiction," and "part of the litigation of a

case." See 1983, pg. 4 K, Count VIII. The nature of the underlying action determines the applicability of the PLRA, 28 U.S.C. § 1915 (9).

The mandamus directed toward Court officials in my Criminal Conviction is not an independent Civil action, and cannot be counted as a strike. And yet the 10th Circuit found some magic potion to skip pass the initial filing in the district court and assessed the Appeal that was not

prosecuted as strike three. The PLRA considers the dismissal of a lawsuit or appeal a strike if it is "frivolous," "malicious" or fails to state a claim upon which relief may be granted." The Court of Appeals, 11th Circuit, found that "[n]either 'lack of jurisdiction,' nor 'want of

prosecution' are enumerated grounds, so a dismissal on either of those bases, without more, cannot serve as a strike." The D.C. and Tenth Circuits, which held a strike could be assessed where an appeal would have been found frivolous "but for" the dismissal, the Court of Appeals

determined the PLRA precludes such an interpretation. The Appellate Court acknowledged its interpretation of the statute "means that a prisoner can file unlimited frivolous appeals and avoid getting strikes by declining to prosecute the appeals after his petitions to proceed in forma pauperis

are denied." The plain text of the PLRA, however, requires such an outcome. The District Court's order was vacated. See *Daker v. Commissioner, Georgia Dept. of Corrections*, 820 F.3d 1278 (11th Cir. 2016). [PLN, Jan. 2015 p. 53] [PLN, Oct. 2017 p. 55].

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By the Court having No mandamus jurisdiction over State officers or the State Courts - then it had No power to proceed by granting in forma pauperis, only to deny it and dismiss the case. The Court lack "Subject Matter jurisdiction" to prosecute by granting in forma pauperis

then dismissing the action. And lack "personal jurisdiction over me" to dismiss the action and penalize me with a strike - abuse of discretion - an ineffective proceedings that can rise to no legitimate binding judgment and that can therefore be ignored

with impunity - yet I was penalized as not prosecuting. The parties to a lawsuit may not waive a requirement of subject matter jurisdiction - the Court officials are just as much a party as the Plaintiff and Defendant - The Court makes it clear

it has no mandamus jurisdiction over state officers or state court - and the footnotes of the Mandamus statute, 28 U.S.C. §1361 states the mandamus has been abolished, as well as Black's Law dictionary, 6th edition, pg. 961 - and my petition was construed

by the Court as a mandamus that has no subject matter jurisdiction - and the state has its own mandamus remedy, K.S.A. 60-801, Article 8. The Court's statutory interpretation of granting in forma pauperis -

then dismissing the action for lack of Subject Matter jurisdiction is a misinterpretation of controlling Statute that are Capricious, Arbitrary and Manifestly Contrary to the Statute. By granting in forma pauperis status the Court commenced the action which is

Compellingly wrong. The interpretation is Contrary to the statutory mandate and frustrates Congress policy objectives. When the Court realized it had "no" jurisdiction, it can only dismiss the action and it can do no more. Because "no" Court can act

Beyond its Subject Matter Competence, a Court will dismiss whenever the lack of jurisdiction is called to its attention. Civil Procedure, 4th Edition, Examples & Explanations, by Joseph W. Glannon, pg. 320. Hudson United Bank v. Litenda Mortg. Corp., 142 F.

3d 151 (3rd Cir. 1998) Federal jurisdiction cannot be "lost" by the district court one day and then "found" by the Court of Appeals later on. As the Court stated itself: It is settled law that the federal courts "have no authority to issue a writ of man-

damus to a state court or to other state officers." Olson v. Hart, 965 F. 2d 940, 942 (10th Cir. 1992). See 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature -

of mandamus to compel an officer or employee of the U.S. or any agency thereof to perform a duty owed to the plaintiff." (emphasis added) p. 1-2. Abolish - To do away with; Anul. Webster dictionary, 11th Edition, pg. 2. The "mandamus do not exist, then the Appeal

Construed as a Mandamus cannot and does not exist." "as well as the strike." See Black's Law dictionary 6th Edition, 1990, pg. 961. See Answer and Counter Response, pgs. 3 & 10 of 12, Att. A-16, U.S.D.C., Mandamus Statute, 28 U.S.C. § 1361, footnotes, pg. 727,

Cross References (Writ of Mandamus abolished in U.S. District Court, but relief available by appropriate action or motion. See Fed. R. Civ. Proc. Rule 81, 28 U.S.C.A.). And Black's Law dictionary, 6th Ed., 1990, pg. 961, cl. "The Legislature and Congress has stated

unequivocally that the federal Mandamus statute, 28 U.S.C. § 1361 and its remedies are abolished (revoked), "do not exist." When the Court lacks subject matter jurisdiction over the action (Rule 12 (b) (1)), it has no power to render a "Valid"

judgment - A strike ruling is a "Valid" judgment. Examples & Explanations, Civil Procedure, Fourth Edition, Joseph W. Glannon, pg. 314. Valid - 1: having legal force -

2. founded on truth or fact: Capable of being justified or defended: Sound. Webster dictionary, new Edition, 2005, pg. 547.

" Under Equal access to Justice Act, statutes are to be fairly and reasonably construed, and will not be given such a narrow and strained construction as to exclude from their operation cases plainly within their scope and meaning."

all federal jurisdiction must be found in the Article III store-house. and it is up to Congress to confer all or part of that jurisdiction on the lower Courts. The federal Rules, on the other hand, are promulgated by the Supreme Court. While the

Court has the power to make rules to assure the orderly conduct of business in the federal Courts (See 28 U.S.C. §2072), it may not use its rule-making power to expand their jurisdiction.

Thus, though the 10th Circuit has authorized Mandated

a strike against me under the PLRA Under a mandamus statute 28 U.S.C. §1361 that does not exist, the need for subject matter jurisdiction provides an implicit limitation on subject matter jurisdiction.

The Court itself reaffirmed this limitation in Fed. R. Civ. P. 82,

which provides in part that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the U.S. district courts." This provision is designed to affect the construction of every Rule in order to ensure that subject matter jurisdiction and Venue

are unaffected by the application of the Rule. See Moore's Federal Practice - Civil, Chapter 82. Syn, Vol. 14, Chapter 82 Jurisdiction and Venue. Rule 14-82. By ruling the mandamus a strike the Court "ratified and promulgated subject matter

jurisdiction." The Court had no "authoritative" power to act on a lack of subject matter jurisdiction and penalize me with a strike - as well as under a mandamus statute, 28 U.S.C. §1361, that do not exist. "A strike cannot be assessed from nothingness."

"Under 28 U.S.C. §453. Oaths of justices and judges of the U.S., shall administer justice without respect to persons, and do equal right to the poor."

"Safety-Valve provision which states, "[i]n no event shall a prisoner be prohibited from bringing a civil action... for the reason that the prisoner has no assets and means by which to pay the initial partial filing fee." 28 U.S.C. §1915 (b) (4).

The Supreme Court should exercise its inherent supervisory power to ensure that local rules are consistent with principles of right and justice. See, e.g., *Trazier v. Heebe*, 482 U.S. 641 (1987), on remand, 825 F.2d 89 (5th Cir. 1987) (prohibiting Eastern District of Louisiana from requir-

ing that a member of its bar live or maintain an office in Louisiana). In denying pauperis, Court must not act arbitrarily, or pretend on erroneous grounds. If with the assistance of Counsel and a record of sufficient completeness and the Appellant presents any issue for the

Court's consideration not clearly frivolous, leave to proceed in forma pauperis must be allowed. *Coppedge v. U.S.*, 369 U.S. 438 (1962) On Certiorari United States Supreme Court Vacated the judgment of the D.C. Circuit and remanded. D.C. Cir. 1962 Lexis 1356. In all due respect,

I "only" have two strikes. I am in protective custody (segregation), extremely indigent (see 6 month financial statement att.). I receive (5) indigent envelopes a month for personal and legal. And are not allowed to put but (6) pages in each envelope, and are not extended any indigent legal credit postage because I am over a \$50 limit. According to Internal Management Policy Procedures IMPP 12-127; General Order G.O. 16-105. This petition is mailed in the only stamps I have in 8 envelopes. This is the best I can do. My petition should be liberally construed. *Haines v. Kerner*, 404 U.S. 519 (1972). If you are gonna judge me for some technicality, then go ahead. All issues are related to the lower courts filings.

Conclusion

Certiorari should be granted and an immediate order issued for a Restraining Order or Injunction, enjoining the Kansas prison system from the ongoing torture and unlawful mail and phone censorship to the outside world - Letter of April 26, 18 My 83 years old Mom had open heart surgery; daughter Breast Cancer; son tumor of bladder, denied phone calls; and to grant me in forma pauperis status to proceed on the merits of my §1983 Complaint in light of *Marbury v. Madison* above.

Respectfully Submitted,
Benny R. Smith #23865

I declare under penalty of perjury that the foregoing is true and correct. Executed on: Tuesday, June 5, 2018

Benny R. Smith #23865

Certificate of Service

I hereby Certify that this original handwritten Motion For Leave To Proceed In Forma Pauperis, 16 page Petition For A Writ Of Certiorari and 3 page Motion For File Stamped copy was mailed in the U.S. Mail - Not faxed - first class postage prepaid, from Seg. protective Custody, for delivery within 3 Calendar days, to the U.S. Supreme Court, Washington, D.C. 20543-0001, and copy to Warden Sam Cline, L.C.F., P.O. Box 2, Lansing, Ks. 66043, on this 5th day of June 2018. In 5 indigent envelopes and 3 U.S. stamps.

Benny R. Smith #23865