No. 21-5780 ORIGINAL

Supreme Court, U.S.
FILED
SEP 24 2021
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IN THE

SUPREME COURT OF THE UNITED STATES

Omari H. Patton — PETITIONER
(Your Name)

vs.

Crystal Kimble — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Omari Patton #743161
(Your Name)

Allegheny County Jail, 950 2nd Ave
(Address)

Pittsburgh, PA 15219
(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

CAN Federal Prisoners Use A Bivens Action For A First Amendment Retaliation Claim

✓ Does A First Amendment retaliation Claim Present a New Bivens context that raises Special factors that Counsel hesitation in recognizing A New remedy in the Absence of Affirmative Action by Congress

Do Prisoners have an Alternative Basis in the Prison Litigation Reform Act from which to seek remedy for A Retaliation Claim

LIST OF PARTIES

[X] 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:

RELATED CASES

Earle v. Shreves, No. 19-6655, U.S. Court of Appeals For the Fourth Circuit. Judgment entered March 10, 2021

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TABLE OF AUTHORITIES CITED

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

[X] For cases from **federal courts:**

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

[X] reported at Patton v. Kimble, 847 Fed. Appx. 196; 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[ ] is unpublished.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

[X] reported at Patton v. Kimble, 717 Fed Appx 271, 2018; 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[ ] is unpublished.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 May 13, 2021.

☒ 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: _____, 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 March 19, 2020 (date) on _____ (date) in Application No. ___A_____.

On March 19, 2020, the Supreme Court issued an order extending the time for a Cert petition to 150 days from the lower court Judgment.

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

First Amendment Constitutional Rights

STATEMENT OF THE CASE

Plaintiff-Appellant, Omari Patton ("Plaintiff"), is a federal inmate confined at the Northeast Ohio Correctional Center located in Youngstown, Ohio. He is currently serving a 30-year prison sentence based on his conviction in the United States District Court for the Western District of Pennsylvania for conspiracy to distribute cocaine and heroin. Plaintiff was convicted by a jury of the conspiracy count and twenty-seven substantive counts.

On September 5, 2008, the Third Circuit Court of Appeals affirmed Plaintiff's conviction and sentence. He subsequently filed a motion under 28 U.S.C. § 2255 for post-conviction relief in which he raised the claim of ineffective assistance of counsel. The district court denied the motion on August 11, 2010 and declined to issue a certificate of appealability. On October 23, 2012, the Third Circuit affirmed the district court's decision.

While Plaintiff was confined at the Federal Correctional Institution in Bruceton, West Virginia ("FCI Hazelton"), on February 9, 2016 he commenced this civil action under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) in the United States District Court for the Northern District of West Virginia. The suit alleges that on August 14, 2014, Correctional Officer Crystal Kimble (hereinafter "Defendant Kimble") conducted a search of Plaintiff's prison cell and confiscated a binder that contained some of his legal documents without any justification for the confiscation. The following day, according to Plaintiff, he verbally complained to a lieutenant (Lieutenant Williams) about Defendant Kimble's search of his cell and confiscation of his legal documents. Plaintiff also alleges that he later questioned Defendant Kimble about the search of his cell and confiscation of his legal papers and that Defendant Kimble responded stating that "since you want to complain, next time I will make sure I take more," referencing his complaint to Lieutenant Williams.

Plaintiff went on to state that on August 19, 2014, Defendant Kimble, who worked his housing unit that day, upon arriving in the unit, stated that "since you guys want to complain I'll take everything,"

which he alleges was in response to him complaining to Lieutenant Williams about Defendant Kimble's conduct on August 14, 2014.

The following day, August 20, 2014, Plaintiff alleges that he was "harassed" by Defendant Kimble and that she again searched his cell and confiscated his sentencing transcript and portions of his trial transcript in retaliation for him complaining to her superior about her previous search of his cell and confiscation of his legal material. Plaintiff contended that he had a pending case before the Court of Appeals for the Third Circuit and needed the confiscated legal documents to adequately litigate the case, which he was not able to do.

On August 21, 2014, Plaintiff filed a request for administrative remedy against Defendant Kimble for harassing him, for retaliating against him for complaining to her superior about her conduct, and for confiscating his legal papers without justification. The administrative remedy process ultimately ended in favor of Defendant Kimble.

In his lawsuit against Defendant Kimble, Plaintiff alleges violation of his First, Fourth, Sixth and Fourteenth Amendment rights. The suit also seeks monetary damages and an order directing Defendant Kimble to return the legal documents that she confiscated.

On November 28, 2016, Defendant Kimble, represented by the United States Attorney's Office for the Northern District of Virginia, moved to dismiss Plaintiff's complaint on the grounds that the complaint failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Dist. ECF No. 49). Defendant Kimble's motion also sought summary judgment pursuant to Rule 56(a). Id. In the motion, Defendant Kimble conceded to searching Plaintiff's cell as indicated in Plaintiff's complaint but denied that she ever confiscated Plaintiff's legal materials as he alleged. She also denied that she harassed or retaliated against Plaintiff, or that she violated his constitutional rights as he alleged. In response, Plaintiff submitted affidavits in support of his allegations, including affidavits submitted by inmates Edward Washington and Kintrell Todd McEachern. Mr. McEachern attested that he observed Defendant Kimble

enter Plaintiff's cell on August 20, 2014 and emerged with "a medium size clear plastic bag in her hand which appear[ed] to be papers and other items in the bag." (Affidavit of Kintrell Todd McEachern).[1]

The case was subsequently referred to a Magistrate Judge for analysis and findings of law. In a report and recommendation filed on July 11, 2017, the Magistrate Judge recommended that Defendant Kimble's motion "be granted to the extent [that] it seeks a Motion to Dismiss, and be denied as moot to the extent that it seeks a Motion for Summary Judgment," and recommended that Plaintiff's "complaint be dismissed" for failure to state a claim. (*See*, Dist. ECF No. 65) (. In arriving at this conclusion, the Magistrate determined that "genuine issues of material fact ... [exists as to] whether [] Defendant [Kimble] did, in fact, remove a legal binder and Plaintiff's trial and sentencing transcripts from his cell." Id. at 7. The Magistrate, however, concluded that Plaintiff failed to make a cognizable retaliation claim under the Constitution's First Amendment because, based on this Court's holding in Daye v. Rubenstein, 427 Fed. Appx. 317, 319 (4th Cir. 2011), Plaintiff's *verbal complaint* to Lieutenant Williams regarding Defendant Kimble's conduct which led to her retaliating against him by confiscating his legal papers "cannot support a retaliation claim" because under Daye, "a federal inmate's verbal complaints are not constitutionally protected conduct." Id. at 8. The Magistrate also concluded that Plaintiff's First Amendment claim regarding the denial of his right to access the courts "when [] Defendant [Kimble] retaliated [against him] by confiscating his legal documents" (id. at 9) was also deficient because even though an inmate is guaranteed "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts," Id., *citing* Bounds v. Smith, 430 U.S. 817, 925 (1977)), the alleged harm that Plaintiff put forth that he "was unable to prosecute his application to the Third Circuit to file a second or successive motion" failed to disclose what the newly discovered evidence was, particularly given the fact that the alleged confiscated trial and sentencing transcripts "existed at the time

[1] Kintrell Todd McEachern's affidavit clearly contradicted Defendant Kimble's assertion that she did not confiscate Plaintiff's legal material as he alleged. In that sense, Mr. McEachern's account corroborated Plaintiff's allegation that Defendant Kimble confiscated his legal documents which, in turn, established that clearly disputed facts exist.

of his first appeal and are not new evidence." Id. at 9.[2] Based on these findings, the Magistrate recommended that Plaintiff's suit against Defendant Kimble be dismissed in its entirety.

On July 27, 2017, Plaintiff filed objections to the Magistrate's Report and Recommendation. (Dist. ECF No. 67). On that same day the district court adopted the Report and Recommendation in its entirety and entered an order dismissing Plaintiff's complaint with prejudice for failure to state a claim. (Dist. ECF No. 68). Plaintiff timely appealed.

On appeal, Plaintiff argued that the district court erred in dismissing his complaint. Specifically, the district court concluded that Plaintiff's retaliation claim failed because, relying on this Court's decision in Daye v. Rubenstein, 417 Fed. Appx. 317, 319 (4th Cir. 2011), Plaintiff's verbal complaint to Defendant Kimble's supervisor about her acts of reprisal against him is not a constitutionally protected conduct and therefore cannot support a retaliation claim. Plaintiff countered by arguing that under Booker v. South Carolina Department of Corrections, 855 F.3d 533 (4th Cir. 2017), his verbal complaint to Defendant Kimble's supervisor was a constitutionally protected conduct that properly supported a retaliation claim. A panel of this Court agreed and vacated the district court's order in part and remanded for further proceedings on Plaintiff's First Amendment retaliation claim. (*See* Patton v. Kimble, 17-7032, March 30, 2018) ( ). In doing so, the panel rejected the district court's finding that "[Plaintiff] did not state a cognizable First Amendment retaliation claim because the antecedent activity—[Plaintiff's] verbal complaint to [Defendant] Kimble's supervisor regarding the initial seizure of his legal binder—was not protected First Amendment speech." ( ). The panel determined that the district court's finding ran "contrary to Booker, in which [the Court] held that prisoners have a clearly established First Amendment right 'to file a prison grievance free from retaliation.'" Id., *citing* Booker, 855 F.3d at 545.

[2] The Magistrate also recommended dismissal of Plaintiff's Fourth and Sixth Amendment claims, both of which stemmed from the retaliation dispute that Plaintiff alleged and from Defendant Kimble's confiscation of his legal material. However, during the initial appeal in this case Plaintiff ultimately conceded that these claims were properly dismissed, and for that reason, he did not challenge them. (CA 4th Cir. No. 17-7032).

Following remand, the district court, on July 25, 2018, issued an order and notice regarding discovery and scheduling. (Dist. ECF No. 94). Thereafter, on August 28, 2018, Defendant Kimble filed a motion requesting that the district court stay its first order of discovery and notice regarding discovery and scheduling. (Dist. ECF No. 96). The following day, August 29, 2018, the district court denied Defendant Kimble's motion to stay discovery. (Dist. ECF No. 97).[3]

On September 4, 2018, Plaintiff filed a motion to extend the discovery deadline, (Dist. ECF No. 99), which the district court granted on September 10, 2018. (Dist. ECF No. 102).

A scheduling order was issued on September 17, 2018, (Dist. ECF No. 104), which set a deadline for discovery on May 1, 2019. The order also set a final pretrial conference for July 18, 2019, and jury selection for July 30, 2019.

On September 14, 2018, Plaintiff presented Defendant Kimble with his First Set of Interrogatories, Production of Documents, and Request for Admission. In her response to Plaintiff's discovery requests, Defendant Kimble presented Plaintiff with a document entitled "Declaration of Crystal Kimble," which declared the following under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I have been sued in my personal, individual capacity in the above-captioned case.
2. I am aware that Plaintiff Omari Patton has requested certain discovery from me.
3. In my personal capacity, no official records of the Federal Bureau of Prisons are in my custody and control. Therefore, I do not have custody or control over any documents or records requested by Patton.
4. Any responsive, relevant and available information requested by Patton has already been provided in conjunction with previous filings in this case.

[3] Plaintiff did file objections to Defendant Kimble's motion to stay discovery which was entered in the docket on September 4, 2018. (Dist. ECF No. 98). His objections, however, became moot because the district court, on August 29, 2018, had already denied Defendant Kimble's motion to stay discovery. At the time when Plaintiff filed his objections to Defendant Kimble's motion to stay discovery, he was not aware that the district court had already issued an order on August 29, 2018 denying Defendant Kimble's motion.

In addition, Defendant Kimble, through counsel, also filed a "Certificate of Service" with the district court on October 16, 2018 (Dist. ECF No. 110) in which she claimed to have "sent responses to Plaintiff's discovery requests via United States Postal Service to Plaintiff Omari Patton at [Plaintiff's] last known address provided by Plaintiff and reflected on the docket." Id. Because this assertion is false, on October 29, 2018, Plaintiff filed a motion urging the district court to compel Defendant Kimble to comply with his discovery requests. (Dist. ECF No. 111) (Appendix 34-48). As basis for the motion, Plaintiff explained that he did not "receive any response from Defendant [Kimble] regarding his discovery requests as Defendant claimed to have provided him." (ECF No. 111 at 3). Plaintiff also explained that Defendant Kimble's sworn declaration that "[a]ny responsive, relevant and available information requested by Patton has already been provided in conjunction with previous filings in this case," is also not true.[4] On that basis, Plaintiff asked the district court to "take judicial notice of Defendant [Kimble's] attempt to circumvent the discovery process and order [her] to fully comply with [the court's discovery order]." (ECF No. 111 at 3).

On January 24, 2019, the court issued an order denying Plaintiff's motion to compel Defendant Kimble to comply with his discovery requests. (Dist. ECF No. 113).[5]

Finally, on May 15, 2019, Defendant Kimble filed a renewed motion for summary judgment (ECF No. 121) and memorandum of law in support thereof. (ECF No. 122). As basis for her summary judgment motion, Defendant Kimble asserted that "[c]ontemporaneous BOP records reflect that [she] documented both searches and that she removed only nude photographs, no legal documents, from Patton's cell." (ECF

[4] The bulk of Plaintiff's interrogatories focused on questions that are unique to Defendant Kimble and are well within the scope of her knowledge and personal experience. (Plaintiff's Mot. to Compel, *citing* Fed.R.Civ.P., Rule 26(b)(1)). As to Plaintiff's request for production of documents, he focused on documents that Defendant Kimble claimed to have possessed and examined in her previous motion for summary judgment. Yet, in the case of Plaintiff's discovery requests, Defendant Kimble stated that those documents and information requested by Plaintiff were no longer in her "custody" or "control."

[5] During that time, Defendant Kimble, through counsel, filed a motion on December 26, 2018 to temporarily stay the case in light of lapse in government funding appropriations, (Dist. ECF No. 112), which the district court granted. (Dist. ECF No. 118).

No. 122 at 1). It is important to note that in her previous motion for summary judgment, (ECF No. 49 at 2), Defendant Kimble made the exact same assertion[6] which was ultimately rejected by the Magistrate's Report (ECF No. 65) which the district court later adopted. (ECF No. 68). Defendant Kimble further argued that, (a) Plaintiff provided no facts to support his claims, (ECF No. 122 at 2)—again, the same argument made in her previous motion for summary judgment, (ECF No. 49 at 6-7); (b) the United States Supreme Court's decision announced in Ziglar v. Abbasi, 137 S.Ct. 1843, 1854-58 (2017) limits Plaintiff's reliance on Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), (ECF No. 122 at 4-7), and therefore, no cause of action exists because the retaliation claim raised by Plaintiff "present[s] a new context where the Supreme Court has not authorized Bivens liability," id. at 8; (c) Plaintiff "has an alternative process [*i.e.*, the Prison Litigation Reform Act] to pursue his allegations, which cautions against allowing him to pursue a Bivens lawsuit," id. at 9; (d) the doctrine of "separation of powers" caution against expanding Bivens liability in this case, id. at 10; and (e) the defense of qualified immunity shields her from the claim raised in Plaintiff's Bivens lawsuit, id. at 15, which is the exact same claim that she raised in her previous motion for summary judgment. (*See* ECF No. 49 at 13).

On June 10, 2019, Plaintiff filed his response in opposition to Defendant Kimble's motion for summary judgment. (ECF No. 127, 130). In his response motion, Plaintiff argued that Defendant Kimble's attempt to obtain summary judgment is essentially a repackaging of arguments that she previously made in her initial motion for summary judgment which the Magistrate's report rejected, and she therefore should not be allowed "a second bite at the apple." (ECF No. 127 at 3, 6). Plaintiff also argued that any question as to whether there are disputed facts in this case has already been resolved by the Magistrate's report filed on July 11, 2017 (ECF No. 65) wherein the Magistrate Judge found that "there are genuine issues of material fact, specifically, whether Defendant [Kimble] did, in fact, remove a legal binder and []

[6] The reason why this assertion is important to note is because in responding to Plaintiff's discovery requests, Defendant Kimble also claimed in the declaration that she filed that "[i]n her personal capacity, no official records of the Federal Bureau of Prisons are in my custody and control. Therefore, [she does] not have custody or control over any documents or records requested by Patton

Plaintiff's trial and sentencing transcripts from his cell." (ECF No. 65 at 7) (Appendix 7). In addition, Plaintiff argued that the discovery of new documents that Defendant Kimble alluded in her second motion for summary judgment (ECF No. 49 at 2, 5) is a disingenuous argument that the district court should readily reject because the "so-called 'contemporaneous search' that was conducted three years *after* the initial search [of the record] was conducted [now conveniently] revealed information that [supposedly was not among the initial record and which now] either refute or undermine Plaintiff's claim." (*See* Plaintiff's Opp. Mot., ECF No. 127 at 7).

Finally, as to Defendant Kimble's reliance on Ziglar v. Abbasi, 137 S.Ct. 1843, 1854-58 (2017), Plaintiff argued that given the fact that Abbasi was decided in June of 2017—more than a month *before* the Magistrate's initial report in this case was filed, (ECF No. 65), more than a month *before* the district court's order adopting the report was filed, (ECF No. 68), and more than nine months *before* this Court's decision vacating the district court's judgment was filed, (ECF No. 85), if it were true that Abbasi does in fact bar Plaintiff from pursuing his retaliation claim under Bivens, then either the Magistrate Judge, the district court, or the panel that heard Plaintiff's appeal would have reached that conclusion because, as Plaintiff explained in this opposition to Defendant Kimble's motion for summary judgment, "the Magistrate, like all judges, are bound to properly follow and apply the law." (*See* ECF No. 127 at 9), *citing* Sheeler v. United States, 2008 U.S. Dist. LEXIS 118134, *16 (D.C., S. Dakota, 2008) (explaining that "[t]he Court [] carefully reviewed the allegations of Petitioner, the magistrate judge's conclusions and recommendations, *relevant caselaw*, and Petitioner's objections, and after this de novo review it adopts the magistrate judge's recommendations.") (emphasis added).

On June 17, 2019, the district court issued an order granting Defendant Kimble's motion for summary judgment. (ECF No. 134) (;). In doing so, the district court focused on two main issues: "(1) whether [] Plaintiff's Bivens claims is viable under recent Supreme Court case law [*i.e.*,

Abbasi]; and (2) whether [Defendant Kimble] is entitled to qualified immunity from this action." (ECF No. 134 at 3-4).

This appeal now follows.

REASONS FOR GRANTING THE PETITION

Because the circumstances underlying Plaintiff's First Amendment retaliation claim fall within the ambit of Bivens core purpose, and because Abbasi has neither limited nor disavowed Bivens' goal to deter, the reasoning provided by the district court for dismissing Plaintiff's Bivens suit is flawed, and the district court's decision should therefore be reversed.

In addition to that, the district court further reasoned that the opinion issued by this Court when it remanded the case "did not address Abbasi either because a more recent case, Booker v. South Carolina Dep't of Corrections, 855 F.3d 533 (4th Cir. 2017), fatally undermined the reasoning in Daye." (Appendix 20). The district court then went on to state that "the Fourth Circuit was tasked with simply remanding this case back to the undersigned *in order to consider how this change in case law affected Patton's case*." Id. (emphasis added). But the Abbasi ruling, as Defendant Kimble and the district court now contends, imposes a "*change in case law [that] affect[s] [Plaintiff's] case.*" ( ) (emphasis added). Therefore, if this Court believed that to be true during its previous appellate review of the facts and circumstances driving this case, it would have said so and affirmed the district court's dismissal on that basis. But it did not. Nevertheless, here we are.

Simply put, notwithstanding to the district court's finding, the Abbasi ruling does not limit Plaintiff's First Amendment retaliation claim. For starters, Plaintiff's First Amendment retaliation claim is not a "new" context for Bivens which special factors counsel against allowing such a claim to proceed forward as the district court determined. In light of this Court's view in Attkisson v. Holder, 2019 WL 2147243, at *11 n.6 (4th Cir. May 17, 2019) where it stated that the "Supreme Court may have recognized a fourth Bivens context in Farmer v. Brennan which sustained a prisoner's Eight Amendment claim for damages against federal prison officials for failure to protect," the retaliation claim at issue in this case is not unlike the claim (and circumstance) raised in Farmer v. Brennan, particularly in context. Cf. Farmer v. Brennan, 511 U.S. 825 (1994).

Plaintiff, a federal prisoner, believed that he was wronged when a prison guard (Defendant Kimble) conducted a search of his cell and confiscated portions of his legal documents without justification. While

Plaintiff does not have a privacy right in the random search of his cell, BOP policy allows him to possess his legal documents, (PS 5580.08 Inmate Personal Property, § 553.10), and it further precludes prison staff from confiscating his legal documents without justification. *See* BOP Program Statement 1315.01. *See also* Cook v. New York, 578 F.Supp. 179, 183 (S.D.N.Y. 1984) (explaining that "[a] prisoner has a protectable interest in items of personal property that he legitimately possesses, and this interest may be infringed if officials seize his property in an unreasonable manner or without justification."); O'Rourke v. Smith, 1983 U.S. Dist. LEXIS 13496 (S.D.N.Y. Sept. 23, 1983) (concluding that "'a prisoner has protectable privacy and property interests in items of personal property he legitimately possesses,' and that those interests are infringed when prison officials seize such property in an unreasonable manner or without a legitimate justification."). Because Defendant Kimble improperly confiscated Plaintiff's legal documents and, according to Plaintiff, was harassing him,[16] he decided to exercise his First Amendment right to voice his grievance by complaining to Defendant Kimble's supervisor about her conduct. Cf. Boxer-X v. Harris, 437 F.3d 1107, 1112 (11th Cir. 2006) ("First Amendment right to free speech and to petition the government for a redress of grievances are violated when a prisoner is punished for filing a grievance ..."); Toolasprashad v. Bureau of Prisons, 286 F.3d 576, 584-85 (D.C. Cir. 2002) (recognizing that prisoners "undoubtedly" exercise First Amendment petition right when filing grievances and stating that prison "officials may not retaliate against prisoners for filing grievances"); Herron v. Harrison, 203 F.3d 410, 414 (6th Cir. 2000) (recognizing claim where inmate alleged that prison officials "impermissibly retaliated against him for exercising his First Amendment right to file grievances and petition the courts for redress"). Plaintiff's complaint to Defendant Kimble's supervisor clearly angered her,[17] and in response, she decided to retaliate by striking Plaintiff where she believed it would hurt the most—confiscating more of his legal documents. As evidence that Defendant Kimble did not fear any reprisal

[16] This falls within the scope of the "failure to protect" claim addressed in Farmer v. Brennan, *supra*.

[17] In fact, that was the cogent behind her decision to retaliate. Cf. Farmer v. Brennan, *supra*.

for her planned course of action, upon entering Plaintiff's housing unit prior to searching his cell, she announced that "since you guys want to complain, I'll take everything." Plaintiff alleged that this remark was made in response to him complaining to her supervisor about her conduct.[18]

Without question, this is the precisely the kind of circumstance that Bivens was designed to prevent—the wanton, callous, and retributive conduct of prison officials who abuse the authority bestowed upon them without any fear of punishment. Unlike the First Amendment retaliation claim that the Third Circuit confronted post-Abbasi when it decided Bistrian v. Levi, 912 F.3d 79, 95 (3rd Cir. 2018), the situation in this case demonstrates a clear consistency with Bivens core purpose, which is to *deter* federal officials from abusing their authority. *See* Malesko, 534 U.S. at 71 (explaining that Bivens "is concerned solely with deterring the unconstitutional acts of individual officers."). In Bistrian, the plaintiff "allege[d] that his fourth placement in the [special housing unit] was punishment for complaining about his treatment by prison officials." Id. at 96. The Court rightfully observed that "[w]hether to place an inmate in more restrictive detention involves real-time and often difficult judgment-calls about disciplining inmates, maintaining order, and promoting prison officials' safety and security," id., and that "[t]hat strongly counsels [judicial] restraint" because "[s]uch claims must be approached 'with skepticism and particular care' because they are '*easily fabricated* and ... may cause unwarranted judicial interference with prison administration.'" Id. at 96 (emphasis added). But that is not the same situation in this case.

Here, Plaintiff lodged a legitimate complaint against a correctional officer who was harassing him and who improperly confiscated his important legal documents. Nothing about that was fabricated.[19] The officer then retaliated against Plaintiff for complaining to her superior about her conduct. Plaintiff

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[18] Plaintiff also alleged that after Defendant Kimble confiscated his legal documents, he questioned her about the confiscation and she responded by stating that "since you want to complain, next time I will make sure I take more." (*See* Plaintiff's Previous Appeal Br. at 1) (No. 17-7032, 4th Cir.).

[19] Nor is there any potential for fabrication because the issue complained about is readily verifiable, particularly at the pleading stage of a civil action which require some evidence to support the claim(s) raised. Furthermore, assuming that a lie was told, the inmate plaintiff would then be subjected to sanctions and perhaps even criminal prosecution for presenting a false claim.

provided evidence (affidavits from other inmates who observed Defendant Kimble enter his cell and "emerged with 'a medium size clear plastic bag in her hand which appear[ed] to be papers and other items in the bag") demonstrating that he was retaliated against and that he lost his legal documents as a result.

Again, there is no potential fabrication there because the situation is driven by specific facts that are readily verifiable. For those reasons, contrary to the analysis made in Bistrian, *supra*, the circumstances of this case conclusively show that "special factors" do not counsel against allowing Plaintiff's particular First Amendment retaliation claim from pursuing under Bivens.[20]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Omar Patton

Date: September 7, 2021