No. 25-6304

ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN CLEMONS — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, ET AL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOHN CLEMONS
(Your Name)

810 FM 2821
(Address)

HUNTSVILLE, TX 77349
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1) When considering the suppression of a prisoner's First Amendment right to freedom of expression and association by a prison policy, is it possible to guage if the policy is too broad sweeping without determining what the policy covers?
2) Did the United States Court of Appeals for the Fifth Circuit determine what new material was covered by the broadened definition of sexually explicit image in the newly revised prison policy as its colleagues did in the Ninth Circuit Court of Appeals with a materially and factually indistinguishable prison policy?
3) If a prisoner possesses personal property, whether by right or privilege, does he enjoy a protected interest in that property that cannot be infringed on without due process under the Due Process Clause of the Fourteenth Amendment?
4) If prison administrators implement a new policy that retroactively makes legally possessed property contraband, does the prisoner retain ownership of the property if it is ultimately confiscated by prison officials?
5) If a prisoner's protected interest in legally possessed property translates to ownership, and cannot be infringed upon without due process, should there be additional safeguards in regards to the disposition of the property if it is confiscated pursuant to prison policy?
6) If a supervisory official may be held liable under §1983 for his personal involvement in a constitutional deprivation, is his role as a top official that created and/or implemented prison policy which unconstitutional practices occurred enough to establish a sufficient causal connection?

LIST OF PARTIES

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

[x] 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: Bobby Lumpkin; Patrick O'Daniel; Larry Miles; Derrelynn Perryman; E.F. Deayala; Molly Francis; Faith Johnson; Sichan Sid; Eric Nichols; Rodney Burrow; Miriam Gitau; and Joseph Kuguma

RELATED CASES

None

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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

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

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

[x] reported at 2025 U.S.App.LEXIS 4227*; 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 C to the petition and is

[x] reported at 2023 U.S.Dist.LEXIS 129816(S.D.Tex.,July 2023); 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

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

The date on which the United States Court of Appeals decided my case was February 24, 2025.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 18, 2025, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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

This is a civil action challenging the constitutionality of a provision of Board Policy(BP)-03.91, a Texas Department of Criminal Justice regulation that infringes on a prisoner's protected rights. BP-03.91 is too broad sweeping and ambiguosly strips a prisoner's right to association and expression, and economically motivated expression and association is not disqualified from protection under the First Amendment of the United States Constitution.

The Due Process Clause under the Fourteenth Amendment is also implicated, where Clemons enjoyed a property interest, and that property was confiscated pursuant to BP-03.91 new revision with no regard for prisoner ownership of property or the disposition thereof.

STATEMENT OF THE CASE

FIRST QUESTION

When considering the suppression of a prisoner's First Amendment right to freedom of expression and association by a prison policy, is it possible to guage if the policy is too broad sweeping without determining what it covers?

Wynne Unit is a basic general population with no unique criteria to require intense regulation. Clemons is only required to show that BP-03.91 is not reasonably related to penological interests to raise First Amendment concerns. The United States District Court for the Southern District-Houston Division, and the United States Court of Appeals for the Fifth Circuit did not display that either took measures to determine if the policy was too broad sweeping. Neither Court demonstrated that a factual determination had been made as to what the policy covered materially.

In Clemons' Brief with Memorandum in support of COA to the United States Court of Appeals for the Fifth Circuit, he requested that the Court take Judicial Notice of former BP-03.91 because a provision in that version of the policy banned "sexually explicit" images in the year 2004, pursuant to parameters of judicial precedent. **See Brief With Memorandum, pg. 5.** "So long as the content at issue meets the narrow definition of 'sexually explicit,' prohibiting it can be rationally related to the Department's objectives." (Quoting: Prison Legal News v. Ryan, 39 F.4th 1121 (9th Cir.2022). The newly revised BP-03.91 covers something else because the Department banned sexually explicit material back in 2004.

On November 4, 2021 officers Kuguma and Gitau conspired to confiscate Clemons' property pursuant to revised BP-03.91. Clemons was allowed to retain some of his property, and later used photos as exhibits in his original complaint. See Exhibits A-J. During another systematic search for contraband on April 8, 2024, some of the property Clemons was allowed to keep by Kuguma and Gitau

was subsequently confiscated as sexually explicit by another officer. See Brief With Memorandum to the Fifth Circuit, pg. 5; also Disposition of confiscated Offender Property Form submitted with Brief. There is a discrepancy as to what the revised policy covers. It broadened the narrow definition of "sexually explicit image." See United States Court of Appeals for the "Fifth Circuit Order an Opinion, p. 2. By expanding the definition of "sexually explicit image," the TDCJ has made that portion of BP-03.91 too broad sweeping without a signal what material falls within its scope. There must be some scope attached to the discretion afforded prison adminstrators; otherwise, the already limited First Amendment rights of prisoners will be guided solely by the whims of those administrators. The United States Court of Appeals for the Ninth Circuit found, "[I]t is impossible to determine whether a statute reaches too far without knowing what the statute covers." See Prison Legal News v. Ryan, 39 F.4th 1121, 1129 (9th Cir.2022). The Ninth Circuit has weighed heavily on the subject of sexually explicit material being allowed in prisons. Their record is resounding; Mauro v. Arpaio, 188 F.3d 1054,1057 (9th Cir. 1999)(upholding ban on materials that show frontal nudity); also Bahrampour v. Lampert, 356 F.3d 969,972 (9th Cir.2004)(upholding ban on mail containing sexually explicit material...); Frost v. Symington, 197 F.3d 348,357-38 (9th Cir.1999) (upholding ban on explicit depictions of certain sexual acts). When the Ninth Circuit addressed the issue of prison policy "Order 914" being constitutional, it allowed "explicit" to retain its meaning and inform the prison order's scope. The PLN Court went through a special process to make a factual determination of what Order 914 covered. PLN, 39 F.4th at 1129-30; also Reply to Appellees' Response Brief, p.8-9. The Ninth Circuit stayed true to form, and found Order 914 was facially constitutional, [with one exception]; Section 1.2.17. of Order 914 was overreaching where its ban on

content "...that may, could reasonably be anticipated to, could reasonably result in, is or appears to be intended to cause or encourage sexual excitement or arousal or hostile behaviors, or [depicts sexually suggestive settings, poses, or attire]." Prison Legal News v. Ryan, 39 F.4th at 1133-34; also BP-03.91, p.3. The Ninth Circuit held that provision is not rationally related to the Department's interests. PLN, at 1133-34. They decided that a prisoner's rights should not be left to the whims of prison officials. "There is no apparent connection between restricting all content that may cause sexual arousal or be suggestive of sex-in the [subjective judgment] of the prison employee reviewing incoming mail-and the penological interest at stake." PLN, at 1134. The Third Circuit Court of Appeals summed it up thus: "...the interest of rehabilitation has never been defined by the Supreme Court. Policies targeting the specific behavioral patterns that led to a prisoner's incarceration or that emerge during incarceration and present a threat of law breaking, are certainly legitimate...(but warned)...To say, however, that rehabilitation legitimately includes the promotion of 'values,' broadly defined, with no particularized identification of an existing harm towards which rehabilitation efforts are addressed, would essentially be to acknowledge that prisoner's First Amendment rights are subject to the pleasure of their custodians." See Ramirez v. Pugh, 379 F.3d 122 at 128 (3d Cir.2004). Section 1.2.17 of Order 914 is facially and factually indistinguishable from revised BP-03.91. The Ninth Circuit could not apply the Turner Framework until it placed scope on Order 914 to discern what the policy actually covered. Then, and only then did it make a factual determination that section 1.2.17 was in fact too broad sweeping. The Supreme Court should issue Certiorari because the Southern District Court or the Fifth Circuit never determined what BP-03.91

covers,.and without doing so, other courts have determined it is impossible to guage if the policy is too broad sweeping.

SECOND QUESTION

Did the United States Court of Appeals for the Fifth Circuit determine what new material was covered by the broadened definition of sexually explicit image in the newly revised prison policy as its colleagues did in the Ninth Circuit Court of Appeals with materially and factually indistinguishable prison policy? The Fifth Circuit did not make a factual determination of what material revised BP-03.91 covers. It relied on the language in Guajardo v. Estelle, 580 F.2d 748 (5th Cir.1978); Thompson v. Patteson, 985 F.2d 202 (5th Cir.1993); and Stroble v. Livingston, 538 F.Appx. 479 (5th Cir.2013). The three cases rely primarily on the precedent set in Guajardo. Clemons' case is distinguished from the precedent relied upon by the Respondents for multiple reason: All the designated publications at issue had not been delivered to prisoners in the relied upon cases, they were going through initial screening by TDCJ officials. none of those plaintiffs possessed the material at issue. All the content at issue met the narrow definition of "sexually explicit," and was rationally related to the Department's objectives. Prison Legal News v. Ryan, 39 F.4th 1121.

The Fifth Circuit acknowledged that revised BP-03.91 broadened the definition of "sexually explicit image." See Fifth Circuit Dismissal and Opinion. p. 2. It also states on p. 5 that Clemons has to show that the policy is, "... uniquely unrelated to legitimate penological objectives." Clemons disagrees. The language of Turner and Thornburg does not enlist such a standard. It does call for prisoners to show a regulation is not rationally related to

the Department's penological interests. The Thornburg Court specifically barred censorship when it is solely "...because the publication's content is religious, philosophical, political, or sexual, or because its content is unpopular or repugnant." Thornburg v. Abbott, 490 U.S. 401,408 (1989). The onus is on the Department to, "...review the particular issue of the publication in question and make a specific, factual determination that the publication is detrimental to prisoner rehabilitation." Guajardo, 580 F.2d at 762.

Clemons has demonstrated that his property was confiscated pursuant to revised BP-03.91. However, property he was allowed to retain was later confiscated by another officer some three years later. The ambiguity of how the policy is being applied raises a cognizable as-applied claim. See Drake v. Ibal, 2022 U.S. Dist.LEXIS 233730, *9 (December 30,2022, E.D.Cal.) The subjective judgment of a prison employee in no way informs what is covered by BP-03.91. PLN, 39 F.4th at 1134. There has been no overbreadth analysis of revised BP-03.91 by the United States District Court for the Southern District or the United States Court of Appeals for the Fifth Circuit because "...it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." United States v. Williams, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 2008 U.S.LEXIS 4314. The Supreme Court should issue Certiorari because a proper analysis of revised BP-03.91 has not been conducted.

THIRD QUESTION

If a prisoner possesses property, whether by right or privilege, does he enjoy a protected interest in that property that cannot be infringed on without due process under the Due Process Clause of the Fourteenth Amendment?

The Supreme Court established that to receive notice and to be heard are only the "root requirement" of the Due Process Clause. Boddie v. Connecticut, 401 U.S. 371,379, 91 S.Ct. 780,786 28 L.Ed.2d 113 (1971). Clemons' ownership and possession of the property at issue has never been contested by Respondants. The only question at bar is what process was due once his property was confiscated pursuant to BP-03.91? The Supreme Court, as well as other courts, have stated, "...due process is flexible and calls for such procedural protections as the particular situation demands." See Morrissey v. Brewer, 408 U.S. 471,481 (1972); also Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886,895 (1961). The flexibility of due process can be measured once it is determined what process is due; "...it is a recognition that not all sittuations calling for procedural safeguards call for the same kind of procedure." Morrissey, at 481. Multiple courts have held that when an inmate owns, but do not possess property in prison, the inmate still retains the choice of disposition of that property. When Clemons was not allowed the choice of disposition of legally owned property that was taken pursuant to a prison regulation, he suffered a deprivation that should implicate protections under the Due Process Clause. See Pyor-El v. Kelly, 892 F.Supp 261, 271 (D.D.C.1995). There were no additional safeguards afforded Clemons in the disposition of his property. Respondants maintained such control over Clemons' property that they "...effectively vanquished any meaningful ownership interest..." See Searcy v. Simmons, 299 F.3d 1220,1229 (10th cir.2002). The Supreme Court should grant Certiorari because Clemons made a substantial showing under the two-part analysis to implicate a deprivation as to the Due Process Clause under the Fourteenth Amendment. See Logan v. Zimnerman Brush Co., 455 U.S. 422,428, 102 S.Ct. 1148, 71 L.Ed. 265(1982).

FOURTH QUESTION

If prison administrators implement a new policy that retroactively makes legally possessed property contraband, does the prisoner retain ownership of the property if it is ultimately confiscated by prison officials? Clemons asserts that because his property had been screened by TDCJ officials and he was allowed to receive it; to the point where he legally owned and possessed the property, he enjoyed a substantive property interest created by TDCJ administrators that may not be infringed upon without due process. See Parrat v. Taylor, 451 U.S. 527,536 (1981); also Searcy, 299 F.3d 1220, 1229 (10th Cir.2002). When the TDCJ and its agents allowed Clemons to possess property he rightfully owned, it and they assumed an obligation to justify any deprivations of his interest in the property under applicable constitutional norms. Couch v. Jabe, 737 F.Supp.2d 561,571, 2010 U.S.Dist. LEXIS 90812 (W.D.V). The Supreme Court should issue Certiorari because when there is an established property interest, and that property is subject to confiscation witout the applicable norms of due process being tailored to the facts of the case, a deprivation has occurred.

FIFTH QUESTION

If a prisoner's protected interest in legally possessed property translates to ownership, and cannot be infringed upon without due process, should there be additional safeguards protected under the Due Process Clause in regards to the disposition of the property if it confiscated pursuant to prison policy? The basis of this question is predicated on the fact that a prisoner has shown a substantive property interest pursuant to the Due Process Clause.

Clemons' property was screened by prison employees for "sexually explicit images" upon entry to the TDCJ pursuant to prior BP-03.91. All the property passed the screening process. All the property was owned and possessed by Clemons outright, either by privilege or right. Any reasonable juror would come to the conclusion that Clemons had an interest in property that he or family and friends purchased and he received through legitimate channels. Yes, Clemons has maintained that the property was confiscated pursuant to prison policy but the Supreme Court made clear in Hudson that the Doctrine that governs negligent deprivations of property implemented in Parrat also applies to intentional deprivations. Hudson v. Palmer, 468 U.S.,517,533, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

In the Fifth Circuit's Order to Dismiss, the Court stated that even if Clemons did have a property interest, he acknowledged items were taken pursuant to policy 03.91...and he never alleged that the Policy was inconsistently inforced. See Order to Dismiss, p. 6. The entire premise of this claim is ambiguity and arbitrariness of how revised BP-03.91 is being applied, the subjective decision-making of TDCJ personnel is too inconsistent and there is no uniformity in the policy's enforcement.Clemons has iterated this throughout his claim. See Step 1 & 2 Grievance; Original Complaint, p. 4.V.; Reply to Defendants' Response Brief, p. 9,11,13; Motion for Reconsideration, p.6; Brief With Memorandum to Fifth Circuit, p. 7-8; and Petition for Panel Rehearing, p. 2,5-6. The Fifth Circuit is skirting the facts if not outright ignoring them. Clemons owned and possessed the property, he had an interest in the property, he has conveyed at every stage of litigation that revised BP-03.91 is ambiguous and being applied arbitrarily, and no reasonable juror would disagree.

The Supreme Court should grant Certiorari under the premise that Due Process is flexible, and Clemons has adhered closly to the facts of the case and only requested additional safeguards where the circumstances of his claim logically needed them.

SIXTH QUESTION

If a supervisory official may be held liable under §1983 for his personal involvement in a constitutional deprivation, is his role as a top official that created and/or implemented prison policy which unconstitutional practices occurred enough to establish a sufficient causal connection?

A supervisory official may be held liable under §1983 only "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir.2011)(quoting: Hanson v. Black, 885 F.2d 642,646 (9th Cir.1989).

Clemons has discussed Respondant Lumpkin's causal connection to revised BP-03.91 and the injury brought on by the policy at basically every level of this claim. Lumpkin understood the parameters of sexually explicit as pertaining to former TDCJ Director, Doug Dretke's affidavit justifying the banning of sexually explicit images in the year 2004. Yet, Lumpkin worked in tandem with the Texas Board of Criminal Justice (TBCJ) to circumvent long established precedent put in place by the Supreme Court. Although Lumpkin is not liable under respondeat superior, he is liable pursuant to §1983 because of his direct participation in the implementation of a prison policy under which unconstitutional practices occurred. Lumpkin was one of two Directors that had to approve revised BP-03.91 before it could be implemented at the institutional level.

REASONS FOR GRANTING THE PETITION

Since a prisoner has limited constitutional rights, these rights are considered important by the United States Supreme Court. The establishment of the **Turner** Framework is evident that the Supreme Court wanted the lower courts to consider certain factors when answering constitutional questions regarding a prisoner's rights.

BP-03.91 is being challenged facially and as it is being applied in the Texas Department of Criminal Justice (TDCJ). The United States Court of Appeals for the Fifth Circuit ruled that the challenged section of BP-03.91 is constitutional without determining what exactly it covers. This decision is in direct conflict with the decision of another United States Court of Appeals. The Ninth Circuit Court of Appeals employed a particular process to determine what material the Arizona Prison Policy covered before being able to establish whether the policy or a section thereof was overreaching. The discretionary jurisdiction of the Supreme Court is needed because these two federal appellate courts are in direct conflict concerning a prisoner's constitutional right to freedom of expression and association.

The 5th Circuit Court was erroneous to rule in favor of the respondents without employing any cautionary parameters to determine what BP-03.91 covers. It relied solely on its prior precedent that properly banned "sexually explicit images" pursuant to the narrow definition of the courts. The 9th Circuit also has an abundance of precedent that properly bans "sexually explicit images" pursuant to that same definition. However, the section of the new Arizona Prison Policy that the 9th Circuit determined was overreaching contained language that altered the contextual meaning of "sexually explicit image" within the Policy. The 9th Circuit Court recognized this and decided that their prior precedent on banning "sexually explicit images" did not embody the proper range to cover

the newly incorporated language of the Arizona Prison Policy. So, it set out to guage what the policy covered. The 9th Circuit found that the language was too vague and relied to heavily on the subjective decision-making of prison employees screening incoming mail. In essence, the new Arizona Policy covered whatever the prison employee reviewing incoming mail said it covered. The 5th Circuit was faced with this exact scenario when Clemons entered evidence in the form of confiscation papers for property that had been previously screened under the newly revised BP-03.91. The 5th Circuit states in its Opinion that Clemons' disagreement with the broadened definition of "sexually explicit images" is not enough to overturn its precedent. The prior 5th Circuit precedent does not embody the range to cover the language in the newly revised BP-03.91. Because the Arizona Policy and the Texas Policy are so similar in context concerning the challenged section, the 9th Circuit ruling moves Clemons' factual allegations to a pleading that raises his right to relief above the speculative level; even more so because he was already in possession of the property and enjoyed a propety interest.

First Amendment prisoner rights is not a new topic of contention between prisoners and prison administrators, but the newly broadened definition of "sexually explicit images" is, and it will remain a point of contention throughout the prison apparatus across the United States until the Supreme Court intervenes and provides guidance as to which Federal Appellate Court got it right or at the least made a judicial attempt to get it right. The **Turner Test** was established specifically for situations like this, yet the 5th Circuit Court of Appeals failed to implement it when a new prison policy was challenged because its contextual meaning of "sexually explicit image" had been broadened to the point of ambiguity. The 5th Circuit was in error because it never determined what BP-03.91 covered.

Although the judicial process of determining what the challenged section of BP-03.91 covered should have been the same, the United States District Court for the Southern District also failed to employ the **Turner Framework** on the newly revised BP-03.91. At the time of the 9th Circuit Decision it searched the Federal Circuit for another appellate court ruling in favor of such a broad policy and found none. The 5th Circuit had not yet decided the issue. So, with no precedent of its own or throughout the Federal Circuit, the 9th Circuit took every precautionary measure it could in determining the meaning of section 1.2.17 of Arizona Prison Order 914; what it covered, was it too far reaching, and was it rationally related to penological interests. The 5th Circuit Decision was contrary to each step engaged by the 9th Circuit to ensure the constitutional soundness of the challenged Arizona Policy, which is facially indistinguishable from BP-03.91. The Arizona Policy was before the Court at Prison Legal News v. Ryan, 39 F.4th 1121 (9th Cir.2022). The Arizona Department Order 914.sec.1.2.17. has been severed and rescinded. See Mouser v. Ryan, 2022 U.S.App.LEXIS 23615 (9th Cir.2022). The 5th Circuit was in error because it failed where it was faced with a policy that was indistinguishable from the Arizona policy and neglected to apply an ordinary textual analysis to even see if BP-03.91 was susceptible to more than one construction. Even when Clemons had submitted new property confiscation evidence supporting the fact that prison employees were applying BP-03.91 with different construed constructs, the 5th Circuit still ruled in contrast to every safeguard the 9th Circuit applied to ensure that the repective policy before them could withstand the rigors of the **Turner Framework.**

Fianlly, the 5th Circuit, along with the U.S. District court for the Southern District, erred in not recognizing Clemons' property interest claim pursuant to the Due Process Clause of the Fourteenth Amendment.

None of the property confiscated from Clemons was at the mail-review stage. All of the property was TDCJ approved pursuant to the judicially accepted definition of "sexually explicit image." Newly revised BP-03.91 retroactively made Clemons' property contraband. Clemons demonstrated that multiple courts assert that under these circumstances, the prisoner maintains ownership of the property and should be afforded the disposition of it. Clemons requested such disposition at the Unit grievance level and was denied. Neither court addressed the matter. Clemons was effectively denied any ownership rights, and the 5th Circuit erroneously decided the matter. Because the Due Process Clause is flexible, the Supreme Court is needed to decide if ownership of legal property extends to its disposition if it is feasible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John Clemons

Date: November 21, 2025