

No. 08-0345

IN THE SUPREME COURT OF TEXAS

**INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT
OF CRIMINAL JUSTICE AND MIGUEL MARTINEZ**

Petitioners,

v.

ARTHUR POWELL,

Respondent.

**On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi, Texas**

RESPONDENT'S MOTION FOR REHEARING

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POINTS RELIED ON FOR REHEARING

- (i) The Court's stated understanding and description of the factual record is inconsistent with, and contrary to, the record itself.
- (ii) The Court's misunderstanding of the record resulted in a decision that is not supported by the actual facts of this case.
- (iii) The Court's application of the law to facts that are not supported by the record resulted in an incorrect decision that warrants rehearing.

ARGUMENT

A. The Court's Stated Understanding And Description Of The Factual Record Is Inconsistent With, And Contrary To, The Record Itself.

1. *Respondent's Constitutional Claim Is Based On A Deprivation Of His Own Constitutional Rights, Not Those Of His Family.*

From his first pleading in district court, through his briefing in the court of appeals, and in briefing on the merits before this Court, Respondent has always asserted a violation of his own “constitutional rights under the 14th Amendment to the United States Constitution to be free from retaliation in the exercise of his constitutional rights under the 1st Amendment to the United States Constiution[.]” CR at 006; *see also Powell v. Tex. Dep’t of Crim. Justice et al.*, 251 S.W.3d 783, 786-89 (Tex. App.—Corpus Christi 2008) (noting and analyzing Powell’s claim for violations of his First Amendment rights), *rev’d*, 53 Tex. Sup. Ct. J. 953 (Tex. 2010); Respondent’s Brief on the Merits at 19 (“Mr. Powell, under the heading ‘Cause[s] of Action[.]’ requested ‘a declaratory judgment against Defendant Martinez declaring that the said Defendant violated Plaintiff’s constitutional rights under the 14th Amendment to the United States Constitution to be free from retaliation in the exercise of his constitutional rights under the 1st Amendment to the United States Constitution.’”) (citing CR at 005). *But see Institutional Division of Tex. Dep’t of Crim. Justice et al. v. Powell*, 53 Tex. Sup. Ct. 953, 2010 WL 2636082, at *2 (Tex. July 2, 2010) (hereafter cited as “*Powell*”) (“Even assuming that Powell may assert a § 1983 claim based on deprivation of his family members’ constitutional rights . . . we hold that Powell has failed to state a valid claim against Martinez.”) (emphasis added).

2. ***Respondent's Retaliation Claims Is, And Always Has Been, Based On Being Charged With, Convicted Of, And Punished For A Bogus Disciplinary Infraction.***

One basis of Respondent's constitutional claim is, and always has been, that he was "charged with and convicted of a disciplinary infraction solely for speaking out 'about [his] mistreatment [] by prison officials[,] including [Officer] Martinez.'" Respondent's Brief on the Merits at 12 (quoting CR at 004). The uncontested record evidence bears out his assertions that he was, in fact: (i) charged with; (ii) convicted of; and (iii) punished for a major disciplinary infraction, and it is those disciplinary actions that form the basis of his underlying lawsuit. (CR at 008) ("A review of disciplinary case #20050061811 has been completed . . . the evidence substantiates the finding of guilt and punishment imposed.").

B. The Court's Misunderstanding Of The Record Resulted In A Decision That Is Not Supported By The Actual Facts Of This Case.

In its July 2, 2010 per curiam opinion dismissing Respondent's claims, the Court offered three principle justifications for reversing the court of appeals's judgment:

- (i) Respondent "has abandoned his sufficiency of the evidence and witness exclusion arguments on appeal";
- (ii) Respondent's "petition stated no other constitutional claims against the Department"; and
- (iii) Respondent "cannot recast his claim as a retaliation claim."

Institutional Division of Tex. Dep't of Crim. Justice et al. v. Powell, 53 Tex. Sup. Ct. 953, 2010 WL 2636082, at *2 (Tex. July 2, 2010) (hereafter cited as "*Powell*"). While the Court correctly observes that Respondent is no longer pursuing his witness exclusion

argument, it incorrectly concludes that Respondent's Original Petition did not, and cannot be construed to, assert other viable constitutional claims against Petitioners.

1. Respondent Has Consistently Maintained A Constitutional Violation Separate And Apart From His Evidentiary Due Process Challenges.

First, as noted above, as is clear from the record, and as set forth fully in Respondent's Brief on the Merits, Respondent has always maintained that Petitioners retaliated against him for exercising his First Amendment right to free speech; specifically, his reporting his mistreatment by prison officials, including specifically Petitioner Martinez. *See* discussion *supra* Part A.2 (citing Respondent's Brief on the Merits at 12 (quoting CR at 004)). Respondent's Original Petition expressly requested a declaratory judgment that the disciplinary action instituted against him constituted impermissible retaliation for the exercise of his free speech rights. *See* CR at 004; Respondent's Brief on the Merits at 2, Part II.B. This allegation of retaliatory disciplinary proceedings gives rise to an independent section 1983 action, separate and apart from the due process challenges Respondent also asserted. *See Woods v. Smith*, 60 F.3d 1161, 1165 (5th Cir. 1995) (“[A]n allegation of retaliatory disciplinary charges [can] give rise to either an independent section 1983 action or be part of a procedural due process review of the disciplinary hearing.”). Moreover, because this allegation of retaliatory disciplinary proceedings has been a part of Respondent's pleadings since he first filed suit, and because Respondent has consistently and expressly maintained throughout the entire appellate process that such proceedings violated his First Amendment free speech rights, he cannot fairly be described as merely attempting to

“recast” that claim now. *But see Powell*, 2010 WL 2636082, at *2 (“[B]ecause Powell cannot recast his claim as a retaliation claim, the trial court correctly granted the Department’s plea to the jurisdiction.”)

2. *Respondent’s Retaliation Claim Is Not Limited To Just The Initiation Of Disciplinary Proceeds; It Encompasses His Resulting Conviction And Punishment—Proof Of Which Is Undisputed And In The Record.*

Second, Respondent’s Original Petition and the record created below support the validity of Respondent’s retaliation claim and his right to go forward with it. The Court reached a contrary conclusion based on two mistaken assumptions: (i) that he was “assert[ing] a § 1983 claim based on deprivation of his family members’ constitutional rights”; and (ii) that he failed to allege a “retaliatory adverse act” insofar as he “asserts only that disciplinary proceedings were instituted” and the record contains “no evidence of any punishment threatened or imposed for the alleged infraction.” *Powell*, 2010 WL 2636082, at *2, 3 (first emphasis added, second emphasis in orig.).

As demonstrated above, Respondent not only asserted a violation of his own constitutional right to be free from retaliation for exercising his First Amendment speech rights (a constitutional violation different from and in addition to his inability to present testimony from certain witness), he adduced evidence (which he attached to his Original Petition and which is included in the record on appeal) that Petitioners committed an actual adverse retaliatory act beyond the mere initiation of a disciplinary proceeding: the proceeding was prosecuted to conclusion and resulted in the imposition of a conviction and punishment against Respondent. *See* discussion *supra* Part A.2.

3. ***The Existence Of Record Evidence Establishing Respondent's Conviction And Punishment Necessarily Presents A Different Question Than The One Addressed In The Court's July 2, 2010 Opinion.***

The Court expressly acknowledged in this Court's July 2, 2010 opinion that the existence of these additional facts—*i.e.*, a completed disciplinary proceeding resulting in a finding of guilt and imposition of punishment—“necessarily present[s] a completely different question than the one” the Court actually answered—*i.e.*, whether initiating disciplinary proceedings, “without more,” is sufficient to satisfy the third prong of a retaliation claim. *See Powell*, 2010 WL 2636082, at *3, 4.

Both the case law referenced in the Court's opinion, and that cited in Respondent's Brief on the Merits supports, if not compels, the conclusion that the imposition of a conviction and punishment in retaliation for the exercise of one's free speech rights is not simply *de minimis*. *See id.* at *3 (“Under the third prong of this test, acts of retaliation that are *de minimis* do not satisfy the ‘retaliatory adverse act’ requirement.”). Though the Court correctly notes that Respondent's Original Petition does not identify the specific nature of the punishment imposed (it was the revocation of his “good time” credit), that is the very type of factual allegation that Respondent could, and should be allowed to, cure by pleading amendment. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004) (“If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial courts jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs*227 should be afforded the opportunity to amend.”).

But even without regard to Respondent's right to replead such factual allegation, dismissal would nonetheless be inappropriate because Respondent is not required to identify the specific punishment imposed in order to maintain his retaliation claim. That is so because it is the retaliatory nature of the acts alleged, not the actual punishment imposed, which gives rise to Respondent's right to seek redress for the Petitioners' retaliatory actions. *See Woods v. Smith*, 60 F.3d at 1165 ("We emphasize that our concern is whether there was retaliation for the exercise of a constitutional right, separate and apart from the apparent validity of the underlying disciplinary report. An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate.").

C. The Court's Application Of The Law To Facts That Are Not Supported By The Record Resulted In An Incorrect Decision That Warrants Rehearing.

The only issue the Court considered in its opinion was, respectfully, incorrectly decided based on an incomplete understanding of the record evidence. Under such circumstances, it is Respondent's contention that rehearing of the Court's July 2, 2010 opinion is warranted, and for the reasons expressly set forth in Respondent's Brief on the Merits, the Court should either deny review or, in the alternative, affirm the court of appeals's judgment.

CONCLUSION AND PRAYER

For the foregoing reasons, Respondent requests that the Court withdraw its July 2, 2010 opinion reversing the court of appeals's judgment and dismissing Respondent's claims, and deny Petitioners' request for review. In the alternative, Respondent requests

that the Court withdraw its July 2, 2010 opinion, enter a judgment affirming the court of appeals's judgment on the ground specified therein, and remand this case to the district court for further proceedings consistent with the court of appeals's judgment. In the further alternative, Respondent requests the Court to withdraw its July 2, 2010 opinion reversing the court of appeals' judgment and dismissing Respondent's claims, and remand this case to the district court with instruction that he be permitted to amend his Petition. Respondent further requests all additional relief to which he is entitled.¹

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¹ Respondent suggests that, given the parties' familiarity with the record, in the event the Court grants Respondent's Motion for Rehearing, oral argument may assist in the Court's resolution of the case's underlying merits.

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I certify that a true and correct copy of this Motion for Rehearing was served upon the following counsel of record, by facsimile and regular mail on August 18, 2010:

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