IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,018
L.T. NO. 94-2627

JUAN LUIS GARCIA JR., and DARLENE GARCIA, minors and next friend, JUAN LUIS GARCIA SR.,

Petitioners,

v.

CRISTOBAL REYES, et al.,

Respondents.

FILED
SID J. WHITE
MAR 3 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ON REVIEW OF CERTIFIED QUESTION FROM THE COURT OF APPEAL, FOURTH DISTRICT

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THE GARCIA CHILDREN HAVE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN FAMILY COMPANIONSHIP UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT IS ACTIONABLE UNDER 42 U.S.C. § 1983 WHEN THE STATE UNLAWFULLY IMPRISONS THEIR FATHER FOR 30 MONTHS.

The Brief of Respondents cites many cases, some of them relevant, and spends pages of argument on non-issues. Despite its lengthy attempt to de-construct the Supreme Court's constitutionally based family law jurisprudence, Respondents fail to lay a glove on the essential legal underpinnings of Petitioners' claim: that the Supreme Court and the lower federal courts have developed a body of case law that articulates a clear vision of the central role of the family in civil society. These cases, spanning seven decades, recognize the right of familial association, deem it fundamental, and provide for vindication of violations by damage actions.

The right of familial association between parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment. Its violation gives rise to a cause of action under 42 U.S.C. § 1983. Four circuit courts of appeals have recognized the right of familial association as a constitutionally protected liberty interest in the specific context of physical injury to parent or child. The Ninth Circuit has expressly held that a child can maintain a cause of action under §1983 for death of a parent.

The only real point made by Respondents in this regard is that other circuits disagree. But circuit disagreement is

precisely what makes this case worthy of being heard and decided by this court on the merits. In truth, none of the cases confronts the precise question posed here: whether police misconduct that deprives children of parental presence and financial support in a serious but nonfatal manner is actionable under §1983. The majority decision below offers no sound reason of law or social policy why death is a necessary element of the cause of action. Nor do Respondents.

The cases speak not to death, but to "loss of support or loss of society and companionship of a parent," Bell v. Citv of Milwaukee, 746 F.2d 1205, 1244 (11th Cir. 1988). Bell is followed by Estate of Bailey v. County of York, 768 F.2d 503, 509 n.7 (3d Cir. 1985), rev'd on other grounds, Deshanev v. Winnebago Countv Dept. of Social Services, 489 U.S. 189 (1989). The Ninth Circuit reached the same result: Smith v. City of Fontana, 818 F.2d 1411, 1417-18 (9th Cir. 1987),

> We now hold that this constitutional interest in **familial companionship and society** logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal . . . .

See also Greene v. City of New York, 675 F. Supp. 110 (S.D.N.Y. 1987).

For these reasons, the correct view of Supreme Court doctrine is reflected in the dissenting opinion of Judge Pariente that the children's losses should be actionable. Garcia v. Reves, 677 So. 2d 1293, 1295 (4th DCA 1996).

A. STATE ACTION DOES NOT HAVE TO DELIBERATELY INTERFERE WITH PLAINTIFFS.

Respondents argue that where the state action does not deliberately interfere with the person seeking redress, a claim under § 1983 is improper. Respondents' Brief at 12.[1] This argument is without merit. Four federal circuits have concluded that the right of parents and children to associate together as a family--to be together as a unit--is violated and actionable by the parent under § 1983 when a state actor unlawfully kills a child, In addition to Bell, Estate of Bailey, and Smith cited above, there is Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974). Clearly, it is not necessary for there to be deliberate action against plaintiff in order for there to be a valid claim under § 1983.

B. PETITIONERS HAVE SUFFERED A PERMANENT LOSS.

Respondents' Brief at 6 argues that "[n]o Court ever has

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[1] They also make the related argument that the wrong must be intentional, citing Daniels v. Williams, 474 U.S. 327 (1986). Respondents Brief at 11. The facts in Daniels, however, deal with a slip and fall in a state prison:

> the action of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

Id. at 332. In the present case, there was an " abuse of power" by the state, as found by the court that acquitted Mr. Garcia.

recognized a civil rights claim under section 1983 for temporary loss of companionship." The crux of their argument is that Petitioners cannot prevail unless they "convince this Court to recognize a civil rights damages claim for loss of companionship . . , and further, to stretch the claim beyond where even the minority of courts have gone -- to a temporary, as opposed to a permanent, loss of companionship." Respondents' Brief at 6-7.

Respondents misstate the nature of the claim, The loss suffered by the children is not temporary at all. It is permanent in at least two respects. First, as Judge Pariente aptly pointed out, to call this deprivation temporary does not do justice to the harm that was done: "the effects of the separation during the children's formative years may very well be permanent." Garcia v. Reves, 677 So. 2d 1293, 1295 (4th DCA 1996). Second, the children lost, as the complaint alleged, the child support that had been paid weekly by the father just before he was unlawfully imprisoned. The loss recurred weekly for two and one half years. That support money, for their particular needs at that particular time in their lives, is forever lost. That constitutes a concrete and permanent injury,

II. PETITIONERS' CLAIM IS NOT BASED UPON ENTRAPMENT BUT UPON THE VIOLATION OF THEIR LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Respondents argue that claims under § 1983 must allege that the deprivation was without due process in order for the claim to be valid, citing Burch v, Apalachee Communitv Mental Health Services, Inc., 840 F.2d 797 (11th Cir. 1988). Respondents'

Brief at 21. In Burch, however, the plaintiff's claim was based upon a procedural due process violation. Therefore, the plaintiff had to prove that his procedural due process rights were violated by the state. As the Eleventh Circuit stated, "[t]he Due Process Clause is the source of three types of Section 1983 claims: (1) violations of incorporated provisions of the Bill of Rights; (2) violations of its substantive component; and (3) violations of its procedural component." Id. at 800 In the present case, the "substantive component" was violated when the state unlawfully imprisoned their father for over 30 months. The Petitioners do not have to allege a procedural due process violation.

The Respondents also argue that the Petitioners should be denied relief because entrapment does not constitute a violation of due process rights under the United States Constitution.[2] Respondents' Brief at 21. As a preliminary matter, cases cited by the Respondent would seem off the point, See Respondents' Brief at 22. Vennes v. An Unknown Number of Unidentified Agents, 26 F.3d 1448 (8th Cir. 1994), for example, is one in which plaintiff pled guilty; other cases involve the question of the defendant's predisposition rather than due process based police misconduct of the type found by the Court of Appeal in Garcia v.

[2] Respondents cite Mullinax v. McElhenney, 672 F. Supp. 1449 (N.D. Ga. 1987), as an authority for this proposition. In Mullinax, however, the court stated that "the acts which could constitute . . . entrapment can, on their own, state a claim under § 1983 if they allegedly resulted in deprivation of plaintiff's constitutional rights." 672 F. Supp. at 1453 n.3.

State, 582 So. 2d 88 (Fla. 4th DCA 1991).

Passing those significant differences, Respondents' argument completely misconceives the nature of the Petitioners' claim based on the loss of family companionship. The essence of the claim is this: Petitioners' father was taken from them by the State. This sundering of the family unit, is unconstitutional unless justified by a compelling governmental interest. A lawful conviction would be such a compelling interest. An unlawful conviction is not. This is the role of the Florida Constitution in this case: it establishes that the state's taking of the Petitioners' father was unlawful and thus not justified by a compelling governmental interest or need.

Related to the foregoing is Respondents' argument that a violation of the Florida Constitution cannot give rise to a federal civil rights claim, Respondents' Brief at 23. This likewise misunderstands or misstates Petitioners' claim. It is not the violation of the Florida Constitution that is the Federal claim. Rather, it is the violation of the Florida Constitution that renders the separation of father and children unlawful and thus a violation of their federal liberty interest. Because the separation of father and children is unlawful, it necessarily fails the compelling interest test. The § 1983 claim thus focuses on the unlawful separation and its damage to the right of family association.

> The parent's liberty interest in the "companionship, care, custody, and management of his or her children" [citations omitted] under most circumstances runs parallel to the child's interest in a continued

> relationship and association with its parent, upon whom the child is dependent for custody, care, and nurture.

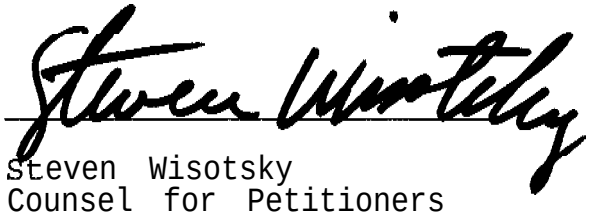
Espinoza v. O'Dell, 633 P.2d 455, 463 (Colo. 1981). Petitioners have a claim independent of the Florida law[3] because their "liberty" interest under the Fourteenth Amendment has been violated by the Respondents.

The only real question is whether § 1983 provides recovery where the father is not killed. The dissent in the court below reached the right conclusion for the reasons stated above.

CONCLUSION

Based on the foregoing points and authorities, this Court should accept jurisdiction over this case, answer the certified question affirmatively, and remand for further proceedings.

Respectfully Submitted



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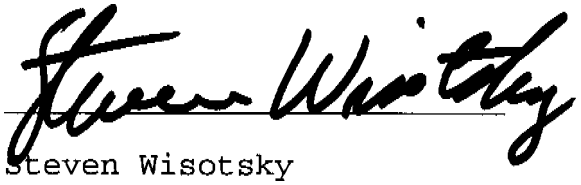
[3] In fact, there is no remedy for Petitioners under Florida law. In Florida, a child cannot maintain an action for loss of "services, comfort, companionship and society" unless the parent suffers "permanent total disability." FLA. STAT. ch. 768.0415 (1993).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of February, 1997 to Raoul G. Cantero, III of Adorno & Zeder, Attorneys for Respondents, 2601 S. Bayshore Dr., #1600, Miami, Fl. 33133



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