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In The OFFICE OF THE CLERK
Supreme Court of the United States

JEANNE WOODFORD, DEWEY WOOTEN,
ANTHONY P. KANE, H. WILLIAMS,
D.A. DACANAY, AND I.A. NIENHUIS,
Petitioners,

v.

ROMIRICO REMEIDIO,
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can an inmate proceed on a civil-rights claim that prison officials retaliated against him for First Amendment expression if the action taken against the inmate objectively served a legitimate penological purpose?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jeanne S. Woodford, Dewey Wooten, Anthony P. Kane, H. Williams, D.A. Dacanay, and I.A. Nienhuis – who are current and retired employees of the California Department of Corrections and Rehabilitation – respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.



OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1-4) is unpublished but reported at 173 F. App'x 636. The district court's opinion granting summary judgment (App. 5-32) is also unpublished but available at 2004 WL 1635561.



JURISDICTION

The court of appeals entered judgment on April 5, 2006 (App. 1) and denied a timely petition for rehearing on May 1, 2006 (App. 33). This Court may exercise jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975), states that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the

people . . . to petition the Government for a redress of grievances.”

◆

STATEMENT

The Respondent, Romirico Remeidio, is a former inmate from San Quentin State Prison, who contends that various prison officials retaliated against him for his First Amendment expression. Specifically, he alleges that after he complained about the prison's College Program, officials searched his cell and found prohibited gambling and pornographic materials, and that this discovery led to disciplinary action against Mr. Remeidio, the eventual denial of his parole, his confinement in administrative segregation, and transfer to another prison. (App. 5-11.)

The complaint, which was filed under 42 U.S.C. § 1983, alleged retaliation, due-process, and equal-protection claims. (*Id.* at 14-15.) The retaliation claim alleged only that the search and administrative segregation were retaliatory. (*Id.* at 21.) The complaint demanded compensatory damages, punitive damages, and declaratory and injunctive relief, including expungement of all adverse reports from Mr. Remeidio's prison central file.

A. The Cell Search and Eventual Disciplinary Action Stemmed from an Investigation into Illicit Activities Among Inmates in the College Program.

San Quentin's College Program allows volunteers to enter the prison and provide college-level courses to inmates. In 2001, Defendant Nienhuis, the former Community

Resource Manager at San Quentin, learned of conflict that was developing among some inmates, volunteers, and the program's coordinator about the leadership and direction of the program. (App. 5-6.)

As Mr. Nienhuis looked into the issue, several members of the College Program expressed concern to him about the program's stability and safety, and that some inmates may have been creating conflict within the College Program. (*See id.* at 6.) In particular, Mr. Nienhuis learned that inmates may have been trying to change the nature of the program and remove its coordinator in order to gain freer access to the program volunteers and thereby engage in illicit activity with them. (*Id.* at 6-7.)

Mr. Nienhuis was also aware that two inmates involved in the College Program were previously investigated for fostering inappropriate romantic relationships with volunteers in other prison programs. (*Id.*) After reviewing a proposal by several inmates within the College Program, including Mr. Remeidio, that used harsh and discrediting language regarding the College Program coordinator, Mr. Nienhuis began working with San Quentin's Investigative Services to determine if any unauthorized or illegal activities were occurring within the College Program. (*See id.*)

With the consent of San Quentin's warden at the time, Jeanne Woodford, Mr. Remeidio's cell was searched and documents were seized. (*Id.* at 7.) When Mr. Nienhuis reviewed the documents, he found no evidence that Mr. Remeidio was engaging in illicit activity connected to the College Program. But he did find gambling materials, hardcore pornographic photographs depicting bestiality, and several loose magazine pages of other hardcore

pornography. (*See id.* at 7-8.) All of these items are contraband under prison regulations. (*Id.* at 8.)

Before the cell search, Mr. Remeidio had been recommended for parole. (*Id.* at 7.) Following discovery of the prohibited materials, a classification committee headed by Defendant Dacanay anticipated that if Mr. Remeidio was denied parole because of the contraband, he might react unfavorably and create a security threat as a possible escape risk. (*Id.* at 8.) Thus, the committee placed him in administrative segregation pending the disciplinary charges. (*Id.*)

Eventually, Mr. Remeidio was only reprimanded for possessing gambling materials after the rules-violation charge was reduced to a "counseling chrono" (*id.* at 11), but he was found guilty of a prison-rules violation for possessing the pornography (*id.* at 8.) His parole was denied (*id.* at 10), and out of continuing concern that he might pose a security threat, a classification committee headed by Defendant Kane recommended that Mr. Remeidio be retained in administrative segregation and considered for transfer to a more-secure prison (*id.* at 10.) Later, Defendant Wooten headed a classification committee that also recommended transfer to another prison, citing Mr. Remeidio's two disciplinary charges within recent months, the parole denial, possible future parole denials, and San Quentin's lack of modern security features. (*Id.*)

Although Mr. Remeidio was not personally linked to improper activity within the College Program, the investigation uncovered threats to San Quentin's security caused by prohibited activities between program volunteers and two other inmates, Mike Viet Ngo and Eddy Zheng. (*See*

id. at 9-10.) According to the record, officials found that Mr. Ngo was involved in an illicit romantic relationship with a female volunteer, both of whom shared violent ideologies that advocate governmental overthrow. In their correspondence, the two spoke of revolution and effecting change through violence. The volunteer spoke of whether she had “resolve to hold the gun,” and Mr. Ngo believed that he would be killed while in prison. The officials also found that Ngo and the volunteer smuggled items through prison security, as did Mr. Zheng and another female volunteer.

B. The District Court Granted Summary Judgment on the Retaliation Claim, but the Ninth Circuit Reversed, Holding that Regardless of the Legitimate Bases for the Action Against Mr. Remeidio, Summary Judgment Was Improper Because of a Dispute Over the Officials’ Motivation.

The district court granted summary judgment to the officials on all of the claims, including retaliation, based on the above facts. (App. 31.) As to the retaliation claim, the court noted that officials are entitled to appropriate deference concerning their asserted legitimate penological reasons for conduct alleged to be retaliatory. (*Id.* at 22.) Finding that Mr. Remeidio failed to show that there was “no legitimate penological objective to defendants’ actions,” the court ruled that the retaliation claim failed as a matter of law. (*Id.* at 22-23.) Further, the court reasoned that the officials provided significant evidence that the search advanced legitimate penological goals. (*Id.* at 23-24.) And it held that although Mr. Remeidio presented some evidence that “may tend to support defendants’ intent to retaliate,” the officials showed that the administrative

segregation and later transfer “were made pursuant to legitimate penological goals.”

On appeal, the Ninth Circuit affirmed summary judgment on the due-process and equal-protection claims but reversed on the retaliation claim. (*Id.* at 1-4.) The court specifically confirmed that the “defendants were within their rights to search Remeidio’s cell,” but held that summary judgment was improper because there was a dispute over the officials’ actual motivation for their conduct. (*Id.* at 2.) As the court noted, Mr. Remeidio contended that no other inmate was similarly punished for possession of similar contraband or had been placed in administrative segregation after a denial of parole. (*Id.*) Further, the verified complaint alleged that before the contraband was discovered, Mr. Remeidio’s correctional counselor told him that he would be transferred because he complained about the College Program. (*Id.*) Although the court conceded that the evidence of improper motive may be of limited force, it was enough to create a dispute of material fact about motive. (*Id.*) Thus, in line with the Ninth Circuit’s retaliation precedent, the court held that summary judgment could not be granted. *See Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003) (holding that summary judgment on a prisoner’s retaliation claim is improper if there is a dispute over the official’s motive).

In addition, the Ninth Circuit ruled that the officials could not receive qualified immunity. (*Id.* at 2-3.) Rather than examining whether a reasonable official in Defendants’ position could have believed that the conduct was lawful, the court held generally that retaliatory punishment is clearly unlawful within the Ninth Circuit. (*Id.* at

2-3.) It then remanded the case for further proceedings.
(*Id.* at 3.)

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided on Whether an Inmate's Retaliation Claim Is Defeated by Objectively Legitimate Penological Goals for the Adverse Action, and If Not, What the Proper Standard of Pleading and Proof Is for Deciding the Claim.

There is conflict among the circuits over the proper standard for deciding a prisoner's retaliation claim when the defendant-official's subjective motive is disputed. First, the circuits disagree about whether a retaliation claim is defeated if the official puts forth an objectively legitimate reason for taking adverse action against the inmate. Second, the circuits that allow a claim to proceed despite an objectively legitimate reason disagree over what standards of pleading and proof apply to establish a retaliatory motive.

The Eighth Circuit focuses on whether the action against the inmate was objectively legitimate, and not on any dispute over the officials' subjective motive, when considering retaliatory-discipline cases. *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994). The court holds that such claims fail if the disciplinary action is objectively legitimate. *Id.* (stating that an adequate evidentiary basis for a disciplinary conviction "essentially checkmates" the claim); see also *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990) (holding that "no claim can be stated when the alleged retaliation arose from discipline imparted for

acts that a prisoner was not entitled to perform”). And to be objectively legitimate, the conviction must simply satisfy the some-evidence test under *Superintendent v. Hill*, 472 U.S. 445, 454-56 (1985), which holds that disciplinary findings satisfy due-process standards if they are supported by some evidence. As the Eighth Circuit explains, applying any other rule would allow a prisoner to file an inmate grievance or lawsuit, “openly flout prison rules,” and then file suit under § 1983 alleging that the prison officials disciplined him in retaliation. *Orebaugh*, 910 F.2d at 528.

The Second Circuit declines to apply such an approach. *Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996). The court reasons that an objective inquiry like the some-evidence test does not fit into the analysis of a claim that concerns subjective motivation. *Id.* Of course, this reasoning assumes that a prisoner who brings a retaliation claim need not show both improper subjective motive and a lack of an objectively legitimate penological interest. Whether the latter must be shown is the question presented here.

The Ninth Circuit has vacillated between the Eighth and Second Circuit’s approaches. Generally, the Ninth Circuit holds that the objective some-evidence test does “not apply to retaliation claims.” *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003). Thus, in a case alleging retaliation because an inmate was classified as a gang member and placed in administrative segregation, the court held that the inmate was entitled to proceed to trial as long as there was a dispute over the officials’ intent, “even though [the inmate] may have *arguably* ended up where he belonged.” *Id.*

In other cases, however, the Ninth Circuit has given at least some of the defendants the benefit of an objective-legitimacy inquiry. For example, the court held in a case alleging retaliatory reclassification that the officers were entitled to judgment because there was some evidence to support the reclassification, which "served the legitimate penological purpose of maintaining prison discipline." *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994). And in a retaliatory-discipline case, the court held that a disciplinary-board member was entitled to judgment as a matter of law after trial because there was evidence to support the guilty finding, but that the officer who brought the same charge was not entitled to judgment. *Hines v. Gomez*, 108 F.3d 265, 268-70 (9th Cir. 1997). The court's only explanation for this distinction was that a disciplinary board is required to provide inmates due-process protections like notice and a hearing, which apparently help to prevent retaliation, but the charging officer need not provide such protections. *Id.* at 268-69.

Other circuits also allow an inmate to proceed on a retaliation claim despite the existence of objective legitimacy, but there is a further split over the standards of pleading and proof to determine whether the official was actually motivated by retaliatory animus. As previously discussed, the Ninth Circuit allows the inmate to proceed to trial as long as there is a dispute over motivation. *Bruce*, 351 F.3d at 1289. Other circuits – the Second, Third, Sixth, and Seventh – follow the standard used in employment-retaliation cases, as set forth in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996); *Rausser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001); *Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996). Under

this standard, the inmate must first raise an inference that the protected conduct was a substantial or motivating factor for the adverse action. *Graham*, 89 F.3d at 80. Then the burden shifts to the official to show that he *would have* taken the same action absent the protected conduct. *Id.* The Eighth Circuit criticizes the application of *Mt. Healthy* to prisoners' retaliation cases, noting that *Mt. Healthy* was not a prison-retaliation case, *Goff v. Burton*, 7 F.3d 734, 738-39 (8th Cir. 1993), and that its application in the prison context allows an inmate to disobey prison regulations and then file suit when he receives the discipline he deserves, *Orebaugh*, 910 F.2d at 528.

The rest of the circuits to address the issue – the First, Fifth, and Tenth, along with the Eighth in relation to retaliatory-transfer cases – decline to apply the *Mt. Healthy* test for prison-retaliation cases and have adopted a “but for” test. *Layne v. Vinzant*, 657 F.2d 468, 475 (1st Cir. 1981); *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995); *Cornell v. Woods*, 69 F.3d 1383, 1388-89 (8th Cir. 1995); *Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1998). These circuits, in apparent recognition of the burden that retaliation suits impose on prison officials, place on the inmate the burden of showing that the official would not have taken the adverse action “but for” the protected conduct. *E.g.*, *Layne*, 657 F.2d at 475.

II. The Circuits that Allow a Prisoner to Challenge an Objectively Legitimate Action As Retaliatory Are in Conflict with *Turner v. Safley* and Out of Step with *Hartman v. Moore*.

Because this Court has held that a restriction on an inmate's First Amendment rights is legitimate as long as it is objectively reasonable, inmates should not be able to

challenge objectively legitimate conduct as retaliatory. In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Court balanced its competing goals of protecting inmates' constitutional rights and providing substantial deference to prison administrators' professional judgment, by holding that burdens on inmates' fundamental rights are constitutional if they are "reasonably related to legitimate penological interests." Key to this inquiry is whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* This consideration does not analyze the official's subjective motive, but whether there is a "logical connection between the regulation and the asserted goal." *Id.* (emphasis added).

Thus, if an official accused of retaliation can put forth a legitimate basis for taking adverse action against an inmate, and that basis is *logically* connected to the action, the official should not be burdened by a retaliation suit simply because the inmate challenges the officer's motive. As this Court recognized in *Hewitt v. Helms*, 459 U.S. 460, 474 (1983), the prison atmosphere is a volatile one, with ever-present safety and security threats. Prison officials should not be deterred from making objectively reasonable decisions, which may have important safety and security implications, because they are fearful that their action may be construed as retaliatory, subjecting them to burdensome litigation. Because it is all too easy for a prisoner to claim retaliatory motive, and even present circumstantial evidence of one, but very difficult for an officer to conclusively refute such claims, *Turner's* objective reasonableness standard should apply to prisoners' retaliation claims.

This Court's recent decision in *Hartman v. Moore*, 126 S. Ct. 1695 (2006), also counsels that objective legitimacy

should be sufficient to defeat a prisoner's retaliation claim. *Hartman* holds that a plaintiff who alleges that governmental officers induced criminal charges out of retaliation must plead and prove an absence of probable cause. *Id.* at 1707. This decision is based on two factors with ready analogies to the prison context.

First, *Hartman* explained that in retaliatory-prosecution cases, there is a "distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Id.* at 1704. Likewise, in the prison context, records exist to prove whether there was an objectively legitimate basis for the action taken against the inmate. Prisons regularly document both monumental and mundane events concerning inmates. And because of the Prison Litigation Reform Act's administrative-exhaustion requirement, 42 U.S.C. § 1997e(a), inmates cannot bring a claim to court without first exhausting available administrative remedies – a process that typically documents any legitimate basis for the action about which the inmate complains.

Second, *Hartman's* decision was based on the "presumption that a prosecutor has legitimate grounds for the action he takes." *Hartman*, 126 S. Ct. at 1706. In the prison context also, an official's decision is entitled to a high presumption of legitimacy. *Turner*, 482 U.S. at 84-85. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.* When state prisons are involved, deference is further required under federalism concerns. *Id.* at 85.

Thus, the rationale of both *Turner* and *Hartman* dictate that prison officials should not be held to answer a retaliation suit for objectively legitimate conduct. In line with these decisions, an inmate alleging retaliatory action should be required to allege and prove that the adverse action did not further any legitimate penological interest.

III. The Dispute Among the Circuits Potentially Impacts a Substantial Portion of the Federal Docket.

The issue in this case potentially affects a great number of cases before the federal judiciary. Over the last six years, inmates have filed an average of over 24,000 prisoner-civil-rights and prison-conditions suits against state and federal correctional officials. See Administrative Office of the U.S. Courts, Judicial Facts and Figures: U.S. District Court – Civil Cases Filed by Nature of Suit, Table 4.6 (2005), available at <http://www.uscourts.gov/judicialfactsfigures/Table406.pdf>. In 2005, there were 24,614 such cases, see *id.*, accounting for 9.7% of all civil cases nationwide, see *id.* Table 4.4 (noting that there were a total of 253,273 civil cases filed). In the Ninth Circuit, the percentage is even higher than the national average. In 2005, 16.5% of all civil filings in the Ninth Circuit were prisoner-civil-rights and prison-conditions cases. See Administrative Office of the U.S. Courts, Judicial Business of the United States Courts 2005, Table C-3 (Sept. 30, 2005), available at <http://www.uscourts.gov/judbus2005/appendices/c3.pdf> (showing that there were 6,890 civil prisoner suits against state and federal officials and a total of 41,662 civil cases).

Available statistics do not show the number of inmate cases that include retaliation claims. But whenever an inmate alleges some harm that is sufficient to state a constitutional violation, whatever the claim might be, he almost certainly has alleged sufficient harm for a retaliation claim. In fact, alleged retaliatory action need not independently violate the Constitution in order to be cognizable. *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Rather, an inmate need only show some adverse action that would chill an inmate of ordinary firmness from exercising First Amendment rights in the future. *See, e.g., Morris v. Powell*, 449 F.3d 682, 685-86 (5th Cir. 2006) (citing cases from the Second, Sixth, Seventh, and D.C. Circuits); *Rhodes v. Robinson*, 408 F.3d 559, 568-69 (9th Cir. 2005). Thus, courts have allowed inmates to proceed on a variety of retaliation claims, relating to all aspects of prison life. *See, e.g., Marshall v. Knight*, 445 F.3d 965, 970-71 (7th Cir. 2006) (allowing inmate to allege claims that he was put on idle status from his prison job without pay, restricted from proper law-library access, denied educational and vocational opportunities, denied a transfer to minimum security, and celled with violent inmates); *Allen v. Thomas*, 388 F.3d 147, 150 (5th Cir. 2004) (holding that inmate could proceed on a claim that his typewriter was confiscated); *Davidson v. Flynn*, 32 F.3d 27, 30 (2d Cir. 1994) (holding that the plaintiff stated a claim by alleging that he was handcuffed too tightly); *Hall v. Sutton*, 755 F.2d 786, 788 (11th Cir. 1985) (allowing prisoner to proceed on a claim that his tennis shoes were confiscated).

Moreover, inmates frequently engage in First Amendment expression that might be construed as the

basis for adverse action. *See, e.g., Hines v. Gomez*, 108 F.3d 265, 268 (9th Cir. 1997) (holding that evidence of an inmate's reputation for filing grievances was relevant to whether the officer had a retaliatory motive). Inmates file appeals to challenge their convictions, administrative grievances to address virtually every aspect of prison life, and lawsuits to contest their conditions of confinement. With such frequent First Amendment exercise, inmates will often be able to point to factors suggesting that an official might have had a retaliatory motive. *See, e.g., Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (holding that circumstantial evidence, such as the timing of events or disparate treatment of prisoners, is sufficient to demonstrate retaliatory motive).



CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 31, 2006

Respectfully submitted,

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App. 1

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROMIRICO REMEIDIO,
Plaintiff-Appellant,

v.

J. WOODFORD; et al.,
Defendants-Appellees.

No. 04-16427

D.C. No. CV-03-02212-SI

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding.

Argued and Submitted February 14, 2006.
San Francisco, California

(Filed Apr. 05, 2006)

Before: SILVERMAN, GRABER, and CLIFTON,
Circuit Judges.

Romirico Remeidio appeals the district court's grant of summary judgment in his 42 U.S.C. § 1983 action against several California prison officials. We review the district court's decision *de novo*, drawing all reasonable inferences in favor of the non-moving party. *Porter v. California Department of Corrections*, 419 F.3d 885, 891 (9th Cir.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

2005). We affirm in part and reverse in part, and remand for further proceedings on the retaliation claim.

We conclude that summary judgment should not have been granted on the retaliation claim. To establish a First Amendment retaliation claim, a prisoner must show "that he was retaliated against for exercising his constitutional rights and that the retaliatory action does not advance legitimate penological goals." *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003) (citation omitted). On the current record, there is a genuine issue of material fact as to whether the discipline imposed was retaliatory and not motivated by a legitimate correctional purpose. Even though the defendants were within their rights to search Remeidio's cell (which search led to the discovery of contraband), Remeidio's verified complaint asserts that no other inmate within his cell block has ever been similarly punished – in particular, issued a rules violation report – for the possession of such contraband. The complaint also contends that no other inmate serving a life sentence has been placed in administrative segregation when his parole date was rescinded. Although the persuasive force of Remeidio's assertions on information and belief might be limited, the defendants have offered no evidence to rebut these allegations, thus permitting an inference that the consequences he suffered were motivated in part by retaliation and not by legitimate penological concerns. Remeidio further alleges in his verified complaint that even before the contraband was discovered, his correctional counselor told him that he would be transferred because he had signed the College Program petition, thereby further bolstering the claim. The defendants are not entitled to qualified immunity for this claim, because "the prohibition against retaliatory punishment is 'clearly

established law' in the Ninth Circuit, for qualified immunity purposes." *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (citation omitted).

Summary judgment was proper on Remeidio's equal protection claim, which alleges that he was targeted because of his Asian background. To the extent that his claim alleges disparate treatment between himself and other inmates in his cell block, that claim fails, because he has not shown that the defendants' actions "result[ed] in members of a certain group being treated differently from other persons based on membership in that group." *McLean v. Crabtree*, 173 F.3d 1176, 1185 (9th Cir. 1999) (citation omitted). To the extent that his claim is based on disparate treatment among the petition signatories, that claim is also deficient because incriminating materials were not found in the cell of the non-Asian signatory. Therefore, Remeidio cannot show "that the defendant[s] acted with an intent or purpose to discriminate against him based upon his membership in a protected class." *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003).

The district court properly granted summary judgment on Remeidio's due process claim. This claim falls short because Remeidio has not shown that due process standards were violated. Although he claims that he was prevented from introducing documentary evidence at the hearing, *cf. Serrano*, 345 F.3d at 1077, he apparently only wanted to present the letter and envelope that contained the contraband. These documents would have apparently been used to show that prison staff inspected the contraband materials when they were delivered to Remeidio, and to demonstrate that the materials were not openly displayed. Because Remeidio had a chance to testify and thus

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to make these points, the papers themselves would not have affected the outcome of his hearing.

Each party to bear its own costs.

**AFFIRMED in part; REVERSED and RE-
MANDED in part.**
