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10-14-1977 Correspondence from Marshall to Rehnquist

Thurgood Marshall
US Supreme Court Justice

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HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 14, 1977

Re: No. 75-812, Codd v. Velger

Dear Bill:

Your opinion for the Court faithfully reflects the conclusions of the Conference majority, of which I was a part. Seeing it in writing, however, has suggested some problems with which we did not deal.

The basic problem involves the relationship among the burdens of pleading and proof and the nature of the available remedy. The opinion holds, I take it, that a plaintiff seeking a federal court order that he be given a Roth hearing must allege that the stigmatizing information in his file is false or substantially misleading. This requirement is justified because there is no sense in a court ordering a hearing which it has no reason to believe will accomplish anything. On the other hand, if the accuracy of the plaintiff's allegation of falsity is considered at issue before the district court, the court proceeding will cover the same ground as the Roth hearing would cover. Litigating the accuracy of information in order to establish a right to a hearing on the accuracy of that same information makes no sense to me.

These considerations lead me to conclude that when a plaintiff seeks a belated Roth hearing, the burden of pleading discussed in your opinion must carry with it no concomitant burden of production or persuasion. If this conclusion is correct, I think the opinion should say so explicitly since ordinarily a plaintiff must prove what he must plead.

A different conclusion follows in this case since the plaintiff seeks not a hearing but rather damages and injunctive relief under § 1983. (Presumably, the only appropriate equitable relief would be expungement.) Such relief is available because the limited

✓ purpose of the hearing required by the Fourteenth Amendment does not limit the remedies provided by § 1983 to compensate for injuries caused by an earlier denial of that Fourteenth Amendment right. But to prove his claim to that relief, a plaintiff would have to show that the stigmatizing material whose circulation injured him was false or substantially misleading. Otherwise, he would not have suffered injury from denial of the Roth hearing.

If you can accommodate these suggestions, I will be glad to join.

Sincerely,



T. M.

Mr. Justice Rehnquist

cc: The Conference