18-9052

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

NEIL GRENNING,

Petitioner,

-against-

MAGGIE MILLER-STOUT, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Neil Grenning
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P.O. Box 2049 - 872019
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QUESTION PRESENTED

Should this Court grant writ of certiorari where lower courts have no guidance on what level of 24-hour lighting is appropriate in prisons so as not to violate the Eighth Amendment, and have therefore upheld bright lighting conditions in spite of serious harms, including sleep deprivation recognized as a form of torture?

PARTIES

The petitioner is Neil Grenning, a prisoner at the Airway Heights Corrections Center in Airway Heights, Washington. The defendants are Maggie Miller-Stout, former superintendent at Airway Heights Corrections Center, and Fred Fox, an employee at Airway Heights Corrections Center.

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DECISIONS BELOW:

The decision of the United States Court of Appeals for the Ninth Circuit is unreported. It is cited in the table at Grenning v. Miller-Stout, ___ Fed. Appx. ___, 2018 U.S.App. LEXIS 27138, no. 16-35903 (September 21, 2018) and a copy is attached as Appendix A to this petition. The order denying rehearing en banc was filed January 3, 2019, and is attached as Appendix B. The Decision of the United States District Court for the Eastern District of Washington is not reported. A copy is attached in Appendix C. The decision of the United States Court of Appeals for the Ninth Circuit overturning the district court's grant of summary judgment and remanding for trial is published at Grenning v. Miller-Stout, 739 F.3d 1235 (9th Cir. 2014). A copy is attached as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 21, 2018. An order denying a petition for rehearing was entered on January 3, 2019, and a copy of that order is attached as Appendix B to this petition. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VIII to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This Amendment applies to the States through the provisions of Amendment XIV to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

The Amendments are enforced by Title 42, section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner was held for 13 days in a segregation (SMU) cell and released with no infraction or sanction. While in segregation he suffered chronic sleep deprivation, migraine headaches, and other serious harms caused by the

use of continuous, 24-hour-a-day light in the cell. Discovery revealed the light was a 4-foot, 32-watt fluorescent tube sold for office lighting, and which produced 2850 lumens of light (equivalent to two 100-watt incandescent bulbs). The net effect was, an inmate sleeping on the bed was subjected to anywhere from 9.9 to 12.6 foot-candles of light. Petitioner sought only injunctive and declaratory relief.

At trial plaintiff's witness, a board certified physician in behavioral sleep medicine specializing in circadian rhythm disorders and how light impacts sleep, testified the 24-hour lighting "poses a definite risk of sleep deprivation," and those levels caused the harms to plaintiff. She testified, "In my medical opinion, it would be cruel and inhumane to subject Mr. Grenning to those same conditions." She testified the medical literature found that harm of sleep deprivation continued to be a risk even at 7 to 8 foot-candles. Shown a photo of the cell with only the 24-hour light on, Dr. Aronsky stated, "I was shocked by this photo. I was horrified that a person would be placed in this type of environment and be expected to sleep."

Defendants did not offer any medical expert or opposing evidence disputing the conclusions of plaintiff's expert. In fact, both plaintiff's and defendants' electrical lighting experts agreed the lighting was excessive. Plaintiff's witness, Tracy Rapp, a lighting electrical engineer, testified 1 foot candle would be sufficient, and that ten times as much was "far in excess of what is necessary for the task of security guards making their welfare checks by looking through the window of the door that enters into the SMU cell."

Both Rapp and defendants' lighting expert (Keith Lane) agreed there was

little guidance and no standard available. Rapp made comparisons to safety standards for parking lot lighting (3 foot-candles directly under pole), security for public spaces (1 foot-candle), doing dangerous construction work (3 foot-candles), and that required by emergency lighting to safely exit a building (0.1 foot-candles). Lane found a Department of Michigan standard for health care observation of patients' welfare of 3 foot-candles. In no situation could they find welfare observation would require a sleep-depriving 4-foot fluorescent tube used for office lighting was safe or advisable, where it would be 12 times a 1 foot-candle security standard, and as much as 99 times the 0.1 standard to exit a building in an emergency. When asked if a lower wattage bulb could be used to do welfare checks, defense witness McCallum unhesitatingly answered, "Yes."

Other defense witnesses opined the bright lights were needed based on myriad boilerplate concerns renewed despite the fact they were rejected by the Ninth Circuit in a published remand decision: the need to observe aggressive behavior, fashioning of weapons, saving lives (not clear what this means), and general observation of the cells at all time because they claimed that was simply how the building was operated.

The district court ruled that defendants' security concerns justified the use of 24-hour bright lights, that the lighting did not violate the 8th Amendment, and defendants were not deliberately indifferent. Appendix C. On appeal to the 9th Circuit, plaintiff pointed out the defendants had offered no new evidence in trial beyond what the 9th Circuit previously remanded the case upon, and the court denied relief based on the same grounds as the district court. Appendix A.

BASIS FOR FEDERAL JURISDICTION

This case raised a question of the Eighth Amendment standard (applied to the states through the Fourteenth Amendment) to the United States Constitution. The district court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

Petitioner believes his case presents an important question: How can an inmate protect himself from violations of the Eighth Amendment caused by bright 24-hour lighting sufficient to cause him sleep deprivation, when higher courts provide no guidance on what level of light violates the Eighth Amendment?

Petitioner's case is the opportune vehicle for addressing this void of guidance, in that his trial record has exhaustive light meter testing, photographs, and empirical medical and lighting professional testimony.

A. Constitutional importance of prohibiting sleep deprivation by bright 24-hour lights

This Court has never squarely addressed the harms of bright lighting as a form of torture, or embarked upon guiding standards usable by inferior courts to proscribe threshold levels for torture. In a 1981 decision reference is made to how conditions, such as "lighting, heat, plumbing, ventilation, living space, noise levels, recreation space" affect prisoners. Rhodes v. Chapman, 452 U.S. 337, 364, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)(separate opinion by Justice Brennan). In a recent decision the Court acknowledged "[l]ights in

the cells were left on 24 hours" in the detention of certain illegal aliens, but this was one of myriad abuses, and the Court did not address a remedy or standard for lighting. Ziglar v. Abbasi, 582 U.S. ___, 137 S.Ct. ___, 198 L.Ed.2d 290, 304 (2017)(the dissenting opinion by Justice Breyer added qualification that they were "subjected to continuous lighting (presumably preventing sleep)" at 326).

This does not suggest the Court doesn't take sleep deprivation torture seriously:

> It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.

Ashcraft v. Tennessee, 322 U.S. 143, 150 FN6, 64 S.Ct. 921, 88 L.Ed. 1192 (1944)(cited in conjunction with lighting as sleep deprivation torture in Shepherd v. Ault, 982 F.Supp. 643, 648 (N.D.Id. 1997)). Article VI of the United States Constitution also makes law of the land the numerous treaties signed proscribing torture. These include Article 7 of the International Covenant on Civil and Political Rights (signed in 1992, proscribing subjection to "torture or to cruel, inhuman or degrading treatment or punishment"); Article 1 and 16 of the Convention Against Torture (signed in 1994, addressing suffering, "whether physical or mental" as well as preventing "acts cruel, inhuman, or degrading treatment or punishment"; a U.S. signing statement limited its agreement "only insofar as the [terms are] prohibited by the Fifth, Eighth, and/or Fourteenth Amendments"); Article 5 of the Universal Declaration of Human Rights (proscribing the same). The European Convention on Human Rights acknowledged as cruel and degrading "techniques of sensory deprivation" as applicable in the CAT treaty. Ireland v. United Kingdom, 1977 (case no. 5310/71).

Despite broad condemnation of sensory deprivation, cruel, unusual, and degrading treatment—particularly in light of recent history where bright 24-hour lighting was used on detainees in American custody—the use of it persists on a routine basis because courts have never been told simply, "this is too much."

Petitioner's case, due to the extensive record of lighting measurements and uncontested medical testimony of the threshold for sleep deprivation, is the best case for this Court to provide the guidance to lower courts that is needed.

B. Below 1 foot-candle is generally deemed to be acceptable

Despite medical science establishing what level of light causes sleep deprivation, inferior courts seldom defer to science with no guidance on where the science and the Eighth Amendment meet. Unlike other Amendment rights inmates don't enjoy, the Eighth Amendment is unique in that it only applies to inmates. While prisons vary, 24-hour lighting in segregations tends to be less than 1 foot-candle. See generally:

Walker v. Woodford, 454 F.Supp.2d 1007, 1020 (S.D.Cal. 2006) and 593 F.Supp.2d 1140, 1147 (S.D.Cal. 2008)(7-watt compact fluorescent bulb equivalent to a 40 to 60 watt incandescent bulb, and producing .08 to .12 foot-candles); Wills v. Terhune, 404 F.Supp.2d 1226, 1229 (E.D.Cal. 2005)(6-inch, 13-watt fluorescent "security light" not bright enough to read or write by); King v. Frank, 371 F.Supp.2d 977, 981 (W.D.Wis. 2005)(9-watt fluorescent night light); Hull v. Aranas, 2016 U.S.Dist. LEXIS 181061 at *11 (D.Nev. Nov. 4, 2016)(0.3 foot-candles at night); Jacobs v. Quinones, 2015 U.S.Dist. LEXIS

105505 at *19 (E.D.Cal. 2015)(13-watt bulb putting out 1 foot-candle of light); Mable v. Beard, 2011 U.S.Dist. LEXIS 44801 at *7 (M.D.Pa. 2011)(9-watt bulb measured between 1 and 2 foot-candles); Hampton v. Ryan, 2006 U.S.Dist. LEXIS 88062 at *36 (D.Ariz. 2006) affirmed at 288 Fed.Appx. 404 (9th Cir. 2008)(7-watt bulb measured at 0.21 to 0.29 foot-candles at bunk level); Cole v. Caul, 2010 U.S.Dist. LEXIS 105226 at *5 (E.D.Wis. 2010)(safety light measured at 1 foot-candle); Shanks v. Litscher, 2003 U.S.Dist. LEXIS 24590 at *11 (W.D.Wis. 2003)(7-watt bulb measured between 1.6 and 2.1 foot-candles); Walker v. Hurd, 593 F.Supp.2d 1140, 1143, 1147 (S.D.Cal. 2008)(Level IV supermax facility, 7-watt night light measured between .08 and .12 foot-candles); Baptisto v. Ryan, 2006 U.S.Dist. LEXIS 99276 at *1-2, *29-30 (D.Ariz. 2006)(maximum security housing, security lights measured between 0.20 and 0.85 foot-candles); McBride v. Frank, 2009 U.S.Dist. LEXIS 74284 at *3 (E.D.Wis. 2009)(9-watt fluorescent tube); Cadet v. Owners of Berks Cnty. Jail, 2017 U.S.Dist. LEXIS 170235 at *10 (E.D.Penn. 2017)(5 to 7-watt fluorescent bulb); Murray v. Keen, 2017 U.S.Dist. LEXIS 146296 at *6 (M.D.Penn. 2017)(7-watt bulb); Wilson v. Wetzel, 2017 U.S.Dist. LEXIS 9011 at *16 (M.D.Penn. 2017)(5-watt red bulb); Matthews v. Raemisch, 2012 U.S.Dist. LEXIS 188804 at *13 (W.D.Wis. 2012)(5-watt bulb); Cole v. Litscher, 2005 U.S.Dist. LEXIS 4160 at *41-42 (W.D.Wis. 2005)(started with 7-watt but replaced with 5-watt bulbs).

Metrics above vary based on the information available in the case, but the highest CFL wattage is 13 watts, with an average of 7.625 watts; highest foot-candle measurement is 2.1 foot-candles, with an average of 0.73 foot-candles. Every one of them is well below the safe medical limit to sleep under without causing sleep deprivation, while allowing officers to do welfare checks.

By comparison, defendants' SMU employs 24-hour a day 32-watt, 4-foot fluorescent office lights producing 2850 lumens (equivalent to twin 100-watt incandescent bulbs), and measured at 9.9 to 12.6 foot-candles at bunk level. At the most conservative end, that's 2.5 times the largest wattage above, and 4 times the average; foot-candles is over 5 times the highest above, and over 14 times the average. It is 50 times the light deemed sufficient at a supermax segregation facility (Walker v. Hurd, supra).

The above should counsel that the SMU light is grossly excessive. Coupled with the uncontroverted medical testimony of harm, there would appear to be grounds for injunction, but there is no higher court—including this Court—that has declared "this is too much." Without directive, nothing will be found to violate the Eighth Amendment.

Petitioner's case has precisely the record allowing this Court to be decisive in its guidance: the lighting is heavily documented by all metrics (foot-candles, wattage, extensive light-meter tests, lumens, and photographs), and the record includes precise medical authority establishing limits of humane exposure. Few, if no cases, nationwide have the extensive record providing unparalleled opportunity for examination than petitioner's case.

C. How lack of guidance allowed bright 24-hour lights in the Ninth Circuit

In 1996 the Ninth Circuit wrote, "there is no legitimate penological justification for requiring [inmates] to suffer psychological harm by living in constant illumination. This practice is unconstitutional." Keenan v. Hall, 83 F.3d 1083, 1090-91 (9th Cir. 1996). It drew this assertion from reliance on medical harms described in LeMaire v. Maass, 745 F.Supp. 623, 636

(D.Or. 1990)(continuous bright lights "disturbs [inmates'] sleep" and "can cause psychotic symptoms and aggravate preexisting mental disorders [and] makes sleep difficult and exacerbates the harm.").

While both cases involved bright lights akin to (if not less bright) than in petitioner's case, the authority of them has been eroded under the auspices of 'justification': "Keenan did not clearly establish that constant illumination violates the Eighth Amendment when done for a legitimate penological purpose." Chappell v. Mandeville, 706 F.3d 1052, 1058 (9th Cir. 2013). The Eighth Amendment may be violated if the the prison thinks it's justified.

The net effect is prisons always believe bright lights are justified, as evidenced by the myriad omnibus suggestions proffered by defendants in petitioner's case.

The Ninth Circuit appeared to protect against this by noting that the penological purpose was specific to Chappell: he was on 'contraband watch' where an observer monitored him 24 hours a day. Id., at 1058. The circuit court when previously remanding petitioner's case for trial emphasized that distinction:

> The record shows that an individual may be placed in the SMU for a number of reasons, including reasons that do not appear to support a blanket policy of continuous lighting.
>
> . . .
>
> There is no indication the 'Defendants' proffered justifications for constant illumination were relevant to Grenning.

Grenning v. Miller-Stout, 739 F.3d 1235, 1240-41 (9th Cir. 2014)(reiterating the Keenan 'constant illumination practice is unconstitutional' holding, at

1238).

Yet the Ninth Circuit, later reviewing the trial record, could clearly see that defendants again proffered nothing but "blanket" security concerns not specific to petitioner, and decided bright lighting was justified. Appendix A.

The court arrived at this result through any number of flawed misconceptions: (1) Perhaps it didn't give enough regard to the medical science (that lighting approaching 7 foot-candles and up aggravates sleep and causes sleep deprivation), and thus decided maybe a room lit like and office didn't violate the Eighth Amendment? (2) Without clear guidance, it backed away from a belief there's no penological justification for constant illumination, and decided (due to a general policy of non-interference) to allow prisons to offer blanket justifications for the use of formally prohibited lighting, no matter how attenuated or absurd those justifications? (3) The court reasoned that an Eighth Amendment violation may persist if the defendants weren't deliberately indifferent because maybe they could be said not to have known it was wrong?

In all of these is a common problem: Either the inferior courts don't know what light levels violate the Eighth Amendment, or the defendants are excused because they don't either. It's an easy path to ambivalence, despite undisputed medical evidence it's "cruel and inhumane," because no higher court has set a threshold. No court has said, "This is too much, this is wanton infliction violating the Eighth Amendment."

Without guidance, no inmate in America may challenge being made to sleep in solitary under lighting doctors know is well above what causes sleep deprivation. While this Court benefits from having a record with definitive

medical guidance, the level is such orders of magnitude above exampled night-lights elsewhere (including supermax segregations), that common sense is enough: would any member of this Court want to sleep under a 32-watt, 4-foot fluorescent office lighting tube that is equivalent to twin 100-watt incandescent bulbs?

Petitioner's case has the record of metrics and empirical medical testimony precision that is an unprecedented opportunity for this Court to finally speak on a growing issue of Eighth Amendment lighting violations, one that has left inferior courts across the U.S. without impetus or authority to remedy the standard sleep deprivation mechanism in prisons.

Without this Court's guidance, we become a society that tacitly accepts sleep deprivation torture and renders the Eighth Amendment in this regard a nullity. Physicians specializing in light afflicted circadian rhythm medicine can look at similar bright 24-hour lighting, be "horrified that a person would be placed in this type of environment and be expected to sleep" (Dr. Aronsky, finding it "cruel and inhumane"), and yet the lighting practice persists.

Petitioner urges this Court to grant the writ and restore teeth to the Eighth Amendment. Where "[i]t has been know since 1500 at least that deprivation of sleep is the most effective torture" (Ashcraft, 322 U.S. 143, 150 FN6), this Court can take the opportunity to end the ambivalence and say, "This is too much."

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CONCLUSION

Upon the foregoing reasons and arguments, petitioner respectfully requests certiorari be granted in this case.

Respectfully submitted this 1 day of April, 2019.

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