No. 20A

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES HAMNER,
Applicant,

v.

DANNY BURLS, ET. AL,
Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

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February 18, 2020

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To the Honorable Neil M. Gorsuch, Associate Justice of the United States and Circuit Justice for the Eighth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.5, applicant Charles Hamner respectfully requests a 60-day extension, to and including May 8, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit. Over three dissents, the Eighth Circuit denied applicant's petition for rehearing en banc on December 9, 2019. Unless extended, the time to file a petition for a writ of certiorari will expire on March 9, 2020.

1. Applicant, a seriously mentally ill Arkansas prisoner, was thrown in solitary confinement after he "alerted prison authorities to a potential attack by another inmate against a prison guard." Slip Op. 2. (attached hereto at Attachment A). Solitary confinement negatively "impacted [applicant's] mental health," including

by provoking suicidal ideations, hallucinations, and panic attacks. Slip Op. 3. And applicant was denied any "meaningful" opportunity to challenge his social and environmental isolation. Slip Op. 2-3.

2. Applicant filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983, asserting that respondents, prison personnel, had violated his Fourteenth Amendment rights by subjecting him to solitary confinement without procedural due process protections. Slip Op. 3. Applicant also complained that prison personnel had retaliated against him for filing grievances. *Id*.

3. The district court screened applicant's complaint under 28 U.S.C. 1915A and ordered the retaliation claim served, but dismissed the procedural due process claim, having concluded that approximately seven months of solitary confinement "did not implicate a protected liberty interest" as a matter of law. Slip Op. 4. Respondents then moved to dismiss the retaliation claim for damages on the basis that they were entitled to qualified immunity. ECF 16 at ¶¶ 5-8. The district denied respondents' motion and permitted the retaliation claim to proceed. ECF 22.

4. Applicant subsequently filed an amended pro se civil rights complaint, in which he expanded upon his due process claim, renewed his retaliation claim, and added two Eighth Amendment claims alleging unconstitutional conditions of confinement and medical care, respectively. Slip Op. 4. Respondents moved to dismiss, arguing pursuant to Federal Rules of Civil Procedure 12(b)(6), that applicant had failed to state any claim. ECF 37 at ¶ 5. Notably, respondents did not claim

entitlement to qualified immunity from any claim. *See* ECF 37. The district court granted respondents' motion and dismissed the case in its entirety. Slip Op. 4.

5. Applicant timely appealed. *Id.* On the papers and at oral argument, applicant and respondents took divergent views of the merits, but none of the parties raised qualified immunity. Slip Op. 5. At oral argument, however, the Eighth Circuit raised the affirmative defense *sua sponte*. And after argument, the panel ordered supplemental briefs "address[ing] whether any or all of the district court's judgment should be affirmed based on qualified immunity." Slip Op. 5.

6. Applicant argued in his supplemental brief that respondents had waived or forfeited the affirmative defense for purposes of the pleading stage by claiming entitlement to qualified immunity from the First Amendment retaliation claim but not from the Eighth or Fourteenth Amendment claims. Applicant's Supplemental Br. 2-5. Respondents conceded that they had not previously argued that qualified immunity was a defense to applicant's Eighth or Fourteenth Amendment claims, but nonetheless argued that the Eighth Circuit should take the first crack at the question. Resp'ts' Supplemental Br. 1-3. Even then, respondents did not claim entitlement to qualified immunity from applicant's claim of constitutionally inadequate medical care.

7. The court of appeals affirmed "on the alternative ground that the complaint does not adequately allege a violation of [applicant's] clearly established constitutional rights, so the [respondents] are entitled to qualified immunity." Slip Op. 2. Although acknowledging that respondents had not raised qualified immunity

below or on appeal, the majority reasoned that "[w]hether the allegations show a violation of clearly established right is a purely legal issue that is amenable to consideration for the first time on appeal." Slip Op. 6. Because respondents would raise qualified immunity on remand, there would be "nothing to be profited by [the] procedural roundabout" of reaching the merits of applicant's claims. *Id*. The majority then held that no clearly established law prohibited respondents' conduct. Slip Op. 7-13.

8. Judge Erickson "reluctantly conclude[d] that [Eighth Circuit] precedent precludes a finding of the existence of a clearly established constitutional right." Slip Op. 15. (Erickson, J., concurring). Nonetheless, Judge Erickson implored that "the time has come to revise our precedent that ignores the known negative effects of segregation and isolation." Slip Op. 13-14. (Erickson, J., concurring). Accordingly, Judge Erickson expressed that "the time has come to consider [scientific] literature and reverse the precedent that stands for the proposition that isolation is not a significant hardship with constitutional implications." Slip Op. 15. (Erickson, J., concurring).

9. Applicant timely petitioned for rehearing by panel and en banc. Applicant's Pet. for Reh'g by Panel and Reh'g En Banc, Oct. 16, 2019. While the petition was pending, the majority amended its opinion. Slip Op., Nov. 26, 2019. Subsequently, applicant's petition was denied over dissents from Judges Grasz, Kelly, and Erickson. Order Den. Pet. for Reh'g En Banc, Dec. 9, 2019 (attached hereto at Attachment C).

10. The petition for certiorari will demonstrate that review is warranted on at least the following questions: (1) whether the affirmative defense of qualified immunity can be waived or forfeited; and (2) whether *Pearson v. Callahan*, 555 U.S. 223 (2009), which permits courts to default to the clearly established prong of the qualified immunity analysis, should be reconsidered.

11. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. In addition to undersigned counsel's teaching responsibilities at Northwestern University Pritzker School of Law, other substantial commitments include:

- A reply brief in the U.S. Court of Appeals for the Seventh Circuit in *Johnson v. Prentice*, No. 18-3535, filed on February 10, 2020;
- An amicus brief in the U.S. Court of Appeals for the Seventh Circuit in *Henry v. Hulett*, No. 16-4234 (en banc), filed February 11, 2020;
- An opening brief in the U.S. Court of Appeals for the Ninth Circuit in *Thomas v. Quintana*, No. 19-55937, due February 26, 2020;
- Oral argument in the U.S. Court of Appeals for the Seventh Circuit *Johnson v. Prentice*, No. 18-3535, scheduled for March 30, 2020;
- An opening brief due in the U.S. Court of Appeals for the Ninth Circuit in *Chavez v. Peters*, No. 19-35244, due April 6, 2020; and
- An opening brief due in the U.S. Court of Appeals for the Fourth Circuit in *DePaola v. Clarke*, No. 19-7199, due April 6, 2020.

12. An extension of time would permit undersigned counsel to provide the sort of comprehensive analysis that that would aid this Court in determining whether to grant certiorari.

13. Applicant has not previously sought an extension of time from this Court.

14. For the foregoing reasons, the application for a 60-day extension of time, to and including May 8, 2020, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

/s/ Daniel M. Greenfield
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