

IN THE
Supreme Court of the United States

THOMAS P. LAMB, A/K/A MICHELLE RENEE LAMB,

Petitioner,

v.

JOHNNIE GODDARD, KANSAS SECRETARY OF CORRECTIONS, KANSAS DEPARTMENT OF
CORRECTIONS CORIZON HEALTH SERVICES, INC., PAUL CORBIER, M.D.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Tenth Circuit

RESPONDENT PAUL CORBIER, M.D.'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Petition for Writ of Certiorari submitted out of time, thereby depriving this Court of jurisdiction to hear the Petition?
2. Has Petitioner shown an unsettled question of federal law and/or a legitimate conflict among the Circuits regarding the standards applicable to Eighth Amendment deliberate indifference claims by state prison inmates?
3. Could Petitioner establish an entitlement to the relief sought in the lower courts, where Petitioner requested injunctive relief mandating the provision of specific medical treatments, irrespective of whether the requested treatment was medically indicated and justified by a medical risk-benefit analysis?

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STATEMENT OF THE CASE

I. Factual Background

Petitioner is a now 78-year old inmate in the custody of the Kansas Secretary of Corrections, having been convicted of First Degree Murder, Aggravated Kidnapping, Robbery, and Aggravated Escape. ROA at 81.¹ Petitioner's biological sex is male, and Petitioner's name at the time of conviction was Thomas P. Lamb. *Id.* at 92. At some point during the term of incarceration, Petitioner received a legal name change to "Michelle Renee Lamb." *Id.* Petitioner now self-identifies as a "male-to-female transsexual," and has been diagnosed with the psychiatric condition of "Gender Dysphoria." *Id.* at 38, 45. Petitioner contends that Gender Dysphoria is an objectively serious medical need requiring medical treatment, and this allegation was not contested in the lower courts for purposes of a summary judgment analysis of the Eighth Amendment claim.

Petitioner concedes that the Respondents, including Dr. Corbier, have acknowledged the diagnosis of Gender Dysphoria and have provided treatment for the same. *Id.* at 30. Petitioner concedes that the Respondents have provided outside medical consults, hormone suppression and replacement therapies, and mental health counseling, all in furtherance of treating Petitioner's Gender Dysphoria. *Id.* at 29-30. Petitioner even concedes that the treatments provided are valid treatments for Gender Dysphoria. *Id.* at 16.

¹ Citations beginning with ROA refer to the Court of Appeals' electronic record on appeal.

Despite the ongoing treatments, Petitioner filed suit on April 4, 2016. *ROA* at 10. Petitioner asserted that the Respondents were actively violating the Eighth Amendment's prohibition on cruel and unusual punishments by failing to provide Petitioner with additional, alternative treatments for Gender Dysphoria. *Id.* at 27. Specifically, Petitioner asked the District Court to issue an injunction requiring prison officials to provide higher doses of hormone therapy, sex reassignment surgeries to change the genitals from male to female, "female voice therapy," and electrolysis. *Id.* Petitioner also asked the District Court to issue an injunction requiring prison officials to transfer his housing to the Kansas prison for female inmates. *Id.*

Respondent Paul Corbier, M.D., is a licensed medical physician who served as Regional Medical Director for the entity contracting to provide medical care to Kansas prison inmates. *Id.* at 131. Dr. Corbier authorized and approved Petitioner's treatment plan with the assistance of experts in psychiatry and mental health, and the care plan is reviewed frequently. *Id.* at 132. Dr. Corbier offered a qualified medical opinion that rebutted Petitioner's unqualified contention that additional treatments were necessary and medically indicated to effectively treat Gender Dysphoria. *Id.* In addition, Dr. Corbier explained that the risks associated with such radical surgical procedures were unwarranted in a patient of Petitioner's age and condition, therefore a referral for the procedure was unjustified and unnecessary. *Id.* Effective treatment for Gender Dysphoria can clearly be provided

without resorting to surgery in all cases, as some patients will simply not be surgical candidates for any number of medical reasons.

II. Prior Proceedings

On December 22, 2019, Respondent Dr. Corbier moved for summary judgment, as Petitioner failed to establish the essential elements of an Eighth Amendment claim based on a deprivation of medical care. ROA at 197. Specifically, there was no evidence whatsoever that Dr. Corbier acted with deliberate indifference to Petitioner's diagnosis of Gender Dysphoria, because he authorized a treatment plan that was medically appropriate and approved by specialists. The other Defendants filed similar motions at or around the same time. The District Court ruled that no deliberate indifference had been demonstrated by Petitioner, and on July 6, 2017, summary judgment was granted. *Id.* at 471-486.

Petitioner appealed to the Tenth Circuit Court of Appeals, and the judgment of the District Court was affirmed. *Id.* at 18-27. On September 6, 2018, the Tenth Circuit's mandate was issued.

It is unclear to Respondent when Petitioner submitted the instant Petition for Writ of Certiorari to the United States Supreme Court. On July 22, 2019, the Clerk of the United States Supreme Court docketed the Petition and designated the filing date to have been November 9, 2018. A stamp on the face of the Petition states that it was received by the Clerk of the Supreme Court on December 11, 2018. There does not appear to be a docket entry showing the Petition's postmark date.

**ARGUMENT AND AUTHORITY IN SUPPORT OF RESPONDENT'S
OPPOSITION TO ISSUANCE OF WRIT**

- I. **Petitioner appears to have submitted the Petition for Writ of Certiorari out of time, which deprives this Court of jurisdiction to hear the case.**

28 U.S.C. 2101(c) states that a Petition for Writ of Certiorari submitted in a civil action must be applied for within 90 days of the entry of the ruling at issue. Similarly, Sup. Ct. R. 13.1 states that a Petition is timely when filed not more than 90 days after the entry of judgment. In this case, the Petition itself does not state a date of mailing and does not state a date of service.

Sup. Ct. R. 29.2 states that a document submitted by a prison inmate may be considered timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. However, Rule 29.2 states that the filing must be accompanied by a notarized statement or declaration setting out the date of deposit and stating that postage was prepaid. In this case, Respondent cannot determine the course of events leading up to the Petition being docketed on July 9, 2019. It would appear from the face of the Petition and the Court's docket entries that the Petition is time-barred and the Court is without jurisdiction for review, as it was apparently received by the Clerk on December 11, 2018, more than 90 days after the Tenth Circuit's mandate was issued. Respondent urges dismissal for lack of jurisdiction on this basis.

- II. Petitioner has not established an unsettled question of Federal law or a conflict among the circuits that requires resolution by this Court, as the standards governing Eighth Amendment claims for deliberate indifference to serious medical needs are well established by prior decisions issued by this Court.

This Court set out the standard for an Eighth Amendment claim involving an alleged deprivation of medical care in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976):

“[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.”

To meet the objective component of this standard, a prisoner must show that he suffered from a “sufficiently serious” medical need. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To meet the subjective component, the prisoner must show that the defendant had a “sufficiently culpable state of mind.” *Id.* A state actor cannot be liable on an Eighth Amendment claim related to medical care “unless [the state actor] knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* at 837.

Petitioner contends that the Tenth Circuit opinion in this case creates a split amongst the circuits, because it “could be interpreted as a permanent, categorical bar on Eighth Amendment claims based on the denial of hormones, transitional

therapy, and surgery to treat gender dysphoria...” Pet. 5. This contention misunderstands the Tenth Circuit’s holding, which was that Petitioner failed to show any evidence of deliberate indifference in this case:

“We have consistently held that prison officials do not act with deliberate indifference when they provide medical treatment even if it is subpar or different from what the inmate wants. These holdings apply here because Michelle is obtaining psychological counseling and hormone treatments, including estrogen and testosterone-blocking medication. *Though prison officials have not authorized surgery or the hormone dosages that Michelle wants, the combination of the existing treatment and sparseness of the summary judgment record precludes a reasonable factfinder from inferring deliberate indifference.*” *Lamb v. Norwood*, 899 F.3d 1159, 1162-63 (10th Cir. 2018), (emphasis added).

This holding is far from a categorical bar on Eighth Amendment claims by those suffering from Gender Dysphoria; it merely re-affirms the long-standing principle that federal courts are ill-suited to second guess the medical expertise of licensed health care providers making medical decisions about the appropriateness of specific treatments. *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir. 1976). Even after the holding in this case, the Tenth Circuit has indicated that an Eighth Amendment claim may be made where an inmate with Gender Dysphoria demonstrates that no treatment is being provided. See *Hardeman v. Smith*, 764 Fed. Appx. 658, 2019 U.S. App. LEXIS 5163 (10th Cir. Unpublished February 22, 2019).

In this case, it was clearly demonstrated that considered medical judgment has been applied to evaluate Petitioner’s plan of care, including an appropriate risk-benefit analysis as to the potential treatment options, and that Petitioner’s claim is merely an unfounded disagreement with that medical decision-making. There is no

conflict among the circuits on this issue, as this Court has long held that no Eighth Amendment claim is stated when the factual basis for the claim is an inmate's disagreement with the selected course of treatment. This is controlling authority that the appellate courts must follow, the Tenth Circuit did so here, and there is no request to depart from that precedent.

III. The relief Petitioner requested in the District Court could not have been granted, as it would have required the District Court to enter an injunction mandating the performance of a specific surgical procedure without medical basis.

As to the health care provider defendants, Petitioner requests a permanent injunction ordering them to provide specific medical treatments that Petitioner claims are the only adequate methods of treating Gender Dysphoria. Principally, Petitioner demands an injunction compelling the provision of specific surgical procedures designed to alter the outward manifestations of biological sex, and he contends that nothing less will satisfy the Eighth Amendment. The relief Petitioner requests involves the removal of the male genitalia and creation of female genitalia over a series of significant surgical procedures, among other things. At the District Court level, Respondent Dr. Corbier set out his disagreement with Petitioner's medical conclusions, and asserted that the procedures were not medically indicated under the circumstances. Notably, Petitioner did not submit any evidence suggesting that a surgeon had actually agreed to perform these procedures on a person over the age of 75, nor did Petitioner submit evidence supporting a medical risk-benefit analysis that takes into account Petitioner's medical history and clinical

condition. Accordingly, there was no evidentiary foundation supporting the entry of an injunction, even presuming the District Court was empowered to do so.

Apart from the lack of evidence supporting the relief sought, Respondent contends that a district court is not empowered to enter mandatory injunctions commanding the performance of specific medical procedures, as medicine may only be practiced by those with the proper license to do so. Petitioner clearly requested a mandatory injunction, and mandatory injunctions are disfavored in general because they constitute “an extraordinary remedial process which commands the performance of some positive act.” *United States v. Texas*, 601 F.3d 354, 362 (5th Cir. 2010); see also *Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978). Upon stating an Eighth Amendment claim, the most relief that could be afforded Petitioner “would be an injunction against practices that are in violation of the Eighth Amendment, or a mandatory injunction to bring his treatment up to constitutional standards.” *Gomez v. United States*, 899 F.2d 1124, 1126-27 (11th Cir. 1990). This Court has never held that a district court would be entitled to issue a mandatory injunction commanding a medical provider to administer a *specific* form of treatment that the defending provider had previously concluded was medically inappropriate, and it is not hard to foresee the likely disasters that would result from the practice of medicine by judicial decree.

Because Petitioner failed to establish that the District Court was empowered to institute the relief sought, and because Petitioner failed to establish an evidentiary basis for a mandatory injunction, the lower courts would have been

justified in denying Petitioner's requested relief, irrespective of the dispute as to the legitimacy of Petitioner's Eighth Amendment claim. Accordingly, there is no compelling reason to review the lower courts' orders.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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