No. 19-7668

IN THE
Supreme Court of the United States

DARLENE KAY HERRAN,
Petitioner,
v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Indiana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Darlene Kay Herran may challenge a trial court's observation that it might consider ordering her counsel to repay costs.

II. Whether Darlene Kay Herran may challenge a term of probation that no longer applies to her.

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INTRODUCTION

Darlene Kay Herran pleaded guilty to an Indiana felony and, pursuant to the terms of her plea agreement, was ordered to serve three years of home detention followed by two years of probation. The same day she was sentenced, she signed an agreement that outlined the terms of her home detention, averring that she had read and agreed to comply with all the agreement's terms. About a week later, Herran asked the trial court to remove one of the standard terms of her home detention—the requirement that she refrain from living with any person convicted of a felony and refrain from allowing such a person to visit her house. She claimed that she had not realized that the requirement would prohibit her husband—a paroled, convicted felon—from living with or visiting her.

The trial court denied her request, and Herran then sought production of the trial-court record for use in her appeal of the denial. The trial court ordered production of the record with public funds, but observed that it might in the future consider ordering Herran's counsel to reimburse the record-production costs. Herran's counsel objected to this suggestion, and included this argument in the appellate briefing along with the merits of Herran's appeal.

The Indiana Court of Appeals subsequently held that Herran's counsel's complaints about reimbursement were not ripe (because the costs were never actually assessed), and that the term of her home detention did not infringe her constitutional right to marry (because it did not require her to divorce her husband or alter her legal status as to him in any way).

Herran now seeks review of each of these aspects of the Court of Appeals' decision, but—even putting aside her failure to explain why these issues merit this Court's attention—neither of the questions Herran raises is properly before the Court.

First, Herran's challenge to the potential reimbursement of record costs is not ripe. As the Court of Appeals properly concluded, because no court has ordered Herran's counsel to do anything, no live dispute concerning the costs of producing the record exists.

Second, Herran's challenge to the terms of her home detention is moot because she, by counsel, has admitted to violating the terms of her home detention. Her home detention has therefore been revoked, and she has now been released from the Department of Correction to the custody of her parole officer. The terms of Herran's parole now govern her living arrangements, not the home-detention terms originally ordered by the trial court, which means her objection to those original terms is now irrelevant. In addition, state law by itself affords sufficient reason to deny her modification request because, by entering into a fixed-term plea agreement, Herran waived her right to seek modification of the conditions of her home detention. Accordingly, even a favorable decision on the merits would not help Herran.

The questions Herran asks the Court to answer do not affect Herran herself, much less anyone else. She has not come close to establishing that these questions justify the Court's attention, and the Court lacks jurisdiction to consider them in any event. Her petition should be denied.

STATEMENT OF THE CASE

On November 29, 2018, Herran pleaded guilty to driving a car after her license had been permanently suspended—a level 5 felony under Indiana law, Ind. Code § 9-30-10-17(a)(1). *See* Pet. App. 2. The plea agreement provided for her to receive a five-year sentence, with three years served through home detention and two years suspended to probation, and further provided that she could seek a modification of her placement after completing one-and-a-half years of her home detention. *Id.* The trial court accepted the plea agreement and sentenced Herran according to its terms. *Id.*

The same day, the trial court entered a home detention order and agreement that imposed the standard terms for such agreements. *Id.* These standard terms included the requirement that "No person convicted of a felony will be allowed to live at or visit your residence." *Id.* at 2, 11. Herran signed the agreement that day and in doing so averred her agreement with the following statement, which was placed directly above the agreement's signature line: "I have read the above terms and conditions of home detention and had those terms and conditions fully explained to me. I have received a copy of said terms. I agree to comply with all terms and conditions specified." *Id.* at 2.

About a week after the Herran's sentencing, she wrote the trial court an unverified letter expressing her desire to live with her husband and asserting that, because he was a convicted felon on parole, the terms of her home detention precluded her from living with him. *Id.* at 2, 7–8. Approximately a week-and-a-half later, Herran appeared by counsel and filed a formal motion to remove the requirement. The

motion recited Herran's desire to live with her husband and claimed she was prevented from living with him, but was not accompanied by sworn evidence. *Id.* at 9–10. The trial court denied Herran's *pro se* motion and the motion filed by her attorney without a hearing. *Id.* at 2.

In order to appeal the trial court's decision, Herran's counsel requested the preparation of a transcript of Herran's guilty plea and sentencing hearing. *Id.* at 18. Shortly thereafter, the trial court made an entry stating that it had "just recently" been told that Herran expected the record to be paid for with public funds. *Id.* at 20. The trial court had not been given prior notice of this request, and so the court ordered payment from public funds while observing that Herran's attorney "is put on notice that the Court may assess such costs against" counsel. *Id.* Herran's counsel objected to the suggestion that he could be assessed such costs, and he raised this objection—together with the merits of Herran's claim that the denial of her motion to modify violated her constitutional right to marry—in Herran's briefing before the Indiana Court of Appeals. *Id.* at 3.

On June 27, 2019 the Court of Appeals issued its decision rejecting Herran's arguments. The Court first held that her complaints about record costs were not ripe because the record "was paid for with public funds, and this appeal has proceeded in due course." *Id.* Accordingly, "[n]either Herran nor Appellate Counsel have sustained any injury," and thus the issue was not properly before it. *Id.*

The Court also rejected Herran's challenge to the trial court's denial of her motion to modify the terms of her home detention. *Id.* at 5. It acknowledged an argument that by entering into a fixed-term plea agreement, Herran had waived her right to seek any modification. *See id.* at 4 (noting that this question was then pending before the Indiana Supreme Court in *State v. Stafford*, No. 39S04-1712-CR-749 (Ind.)). But it declined to address the waiver-by-plea issue because "even if Herran had the ability to seek modification of her sentence, she is not entitled to relief on the merits of her claim." *Id.* The Court concluded that Herran's claim failed on the merits because the requirement that she not reside with felons did not require her to alter her marital status or forego contact with her husband. *Id.* at 4–5. The Indiana Supreme Court declined Herran's request for the Court's discretionary review. *Id* at 5a.

Meanwhile, on February 12, 2019, the State filed a petition to revoke Herran's placement in home detention. Resp. App. 1. The petition explained that over the course of two months Herran had violated the terms of her home detention ten times, including by failing to answer her phone and failing to report for required programs, as well as having a felon in residence. *Id.* at 1–4. After receiving appointed counsel, Herran admitted to the allegations in the petition, and the trial court revoked her home detention and ordered her to serve her sentence in the Department of Correction *Id.* at 15. Herran was released from the Department of Correction to parole on February 20, 2020. *Id.* at 16.

REASONS TO DENY THE PETITION

I. Herran's Complaint About Record Costs Is Not Ripe

The Indiana Court of Appeals was correct to dismiss Herran's complaint about record costs as moot: The issue was not properly before that court, and it is not properly before this Court either.

Herran's counsel claims that the independent court reporter who prepared the trial-court record sent him an invoice and argues that this invoice "chilled" Herran's right to counsel. Pet. 5. But the costs of the record have already been paid—from public funds. The trial court has not ordered Herran's attorney to repay those public funds, and it did not find Herran or her attorney were liable for those costs. Pet. App. 20. The trial court merely indicated—more than a year ago—that it might, perhaps, consider assessing costs against Herran's counsel at a later date. *Id.*

Such a hypothetical possibility is not sufficient to create a live case or controversy: "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks and citation omitted). This Court has "repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury" are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal brackets, quotation marks, and citation omitted). A court's suggestion that it might *consider* assessing costs at an unidentified future date does not create a "certainly impending" injury and is therefore insufficient to establish jurisdiction. *Id.*

Furthermore, even if Herran had cleared this jurisdictional hurdle, the issue is not fit for consideration and does not represent an injury to her or her counsel. *See Nat'l. Park Hosp. Ass'n. v. Dep't. of Interior*, 538 U.S. 803, 808 (2003). The trial court explained in its order that it was reacting to a last-minute notification by Herran's counsel that he expected the court to pay costs—without having asked the trial court to find Herran indigent. Pet. App. 20. If the trial court were to conclude that assessing costs against Herran's counsel was an appropriate response to his failure to follow procedures for securing public funding, the issue becomes a question of proper attorney sanctions rather than burdens on appellate rights. *Cf. Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991) (court may assess fees in response to vexatious or oppressive conduct). But of course the trial court has not made any such conclusion, for it has not assessed any record costs at all. Herran asks this Court to consider a question that it lacks the necessary trial-court findings to answer and that has not yet—and may never—arise in the first place. The Court should decline to do so.

II. Herran's Challenge to the Terms of Her Home Detention Is Moot

Herran's challenge to the terms of her home detention is similarly unfit for the Court's review. "The federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (internal brackets, quotation marks, and citation omitted).

Among other things, Article III's limitation of jurisdiction to concrete cases means that where a favorable decision would not redress the plaintiff's injury, a federal court lacks authority to hear the case at all. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And that is precisely the circumstance Herran presents here: Because even a favorable decision on the merits of her claim would now be of no help to her, the claim is moot and thus outside the Court's jurisdiction. *See, e.g., United States v. Juvenile Male*, 564 U.S. 932, 937 (2011) (explaining that an appeal was moot because the appellant failed to "show that a decision invalidating the District Court's order would likely redress" his injury); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ('The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time [a complaint is lodged]." (internal quotation marks and citation omitted)).

Crucially, the home-detention requirement to which Herran objects no longer applies to her. On June 13, 2019, following Herran's failure to comply with the terms of her home detention, the trial court revoked her home detention and ordered her to serve her sentence in the Department of Correction. Resp. App. 15. At that moment her objection to the terms of her home detention became moot.

Today, Herran has been released on parole and is now in the custody of her parole agent and the warden of her prior facility in the Department of Correction. *See* Resp. App. 16; *Bleeke v. Lemmon*, 6 N.E.3d 907, 938 (Ind. 2014). The place and arrangement of her household is now subject to individual approval by her parole officer, not by terms ordered by the trial court. Ind. Code § 11-13-3-4(e); 220 Ind. Admin.

Code §§ 1.1-2-1, 1.1-3-2. Under Indiana law, "'probation' relates to judicial action taken before the prison door is closed, whereas 'parole' relates to executive action taken after the door has closed on a convict." *Gaither v. Indiana Dep't. of Corr.*, 971 N.E.2d 690, 694 (Ind. Ct. App. 2012) (internal quotation marks and citation omitted omitted). That is why the trial court terminated Herran's release on home-detention in its revocation order. *See* Resp. App. 15.

Furthermore, even apart from the termination of Herran's home detention, an order in her favor on the merits would not provide relief because Indiana law separately forecloses modification of the conditions of her detention. In its decision below, the Indiana Court of Appeals observed that the Indiana Supreme Court was then considering whether a fixed-term plea agreement waives a defendant's right to seek modification of the conditions of detention. Pet. App. 4. The Indiana Supreme Court has since issued its decision: Where the defendant has accepted a plea agreement that "call[s] for a fixed sentence, the trial court [is] bound by these terms and ha[s] no discretion to modify [the] sentence." *State v. Stafford*, 128 N.E.3d 1291, 1292 (Ind. 2019). Accordingly, because Herran entered into a fixed-sentence plea agreement, state law barred the trial court from modifying the terms of her detention, regardless of the merits of her constitutional argument.

In sum, Herran is asking the Court to decide a question "that cannot affect the rights of litigants in the case." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). Yet "Article III denies federal courts the power" to decide such questions. *Id.* The Court should decline her invitation to do so.

CONCLUSION

Herran's petition for a writ of certiorari should be denied.

Respectfully submitted,

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