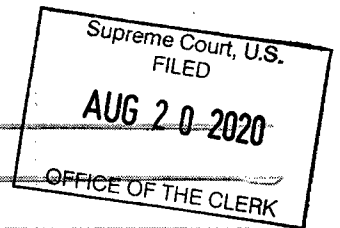


No.

20-247



In The
Supreme Court of the United States

Duane Ronald Belanus - Petitioner,

VS.

Leo Sutton, et al., - Respondent.

On Petition For A Writ Of
Certiorari To The United States Court
Of Appeals For The Ninth Circuit

Petition For A Writ Of Certiorari

Pro Se

Duane Ronald Belanus

AO #3003449

Montana State Prison

200 Conley Lake Road

Deer Lodge, MT 59722

I) Questions Presented

1) As a matter of first impression before this Court where the Circuit Court decisions are split, does the designation of a pretrial detainee and a convicted prisoner fall upon State law?

2) Does the omission of the failure to act for causation of injury instruction affect a jury's decision-making capabilities in a failure to act case, when the jury instruction required that the acts caused the injury in order to constitute a claim?

II) List of Parties

All parties appear in the caption of the case on the cover page and are represented by MAB Defense Services.

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Appendix B - Ninth Circuit Court of Appeals Denying Appeal

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Appendix D - Jury Instruction for Causation of Injury

VI) Petition for Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

VII) Opinions Below

The opinion of the United States Court of appeals appears at Appendix B to the petition and is reported at Case No. 18-35474. The opinion of the United States district court appears at Appendix C to the petition and is reported at Case No. CV 12-00065-H-DLC.

VIII) Jurisdiction

The date on which the United States Court of Appeals decided my case was March 20th, 2020. A timely petition for rehearing was denied by the United States Court of Appeals on June 30th, 2020, and a copy of the order denying rehearing appears at Appendix A. A copy of the United States Court of Appeals deciding my case appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

IX) Constitutional and Statutory Provisions Involved

(1) Constitutional:

5th Amendment

8th Amendment

14th Amendment

(2) Statutory:

28 U.S.C. 1254 (1)

42 U.S.C. 1983

MCA 46-1-202(7)

MCA 46-1-202(11)

MCA 46-1-202(25)

MCA 46-9-401(2)

MCA 46-20-204(2)

X) Statement of the Case

On July 1st, 2009, Mr. Belanus was seriously assaulted at the Lewis and Clark County Detention Center after informing the unsworn detention officers that he was in fear of being harmed. This case originates as a failure to protect claimed against state officers acting under color of state by failing to act while Mr. Belanus was housed in the County jail/prison for safe keeping. Mr. Belanus was unsentenced and was not housed in the County jail/prison for punishment, as Mr. Belanus was still bailable.

During litigation before and after trial, Mr. Belanus argued that he

was a pretrial detainee at the time of his Constitutional violation claim and therefore was protected by the 14th Amendment to be free from harm by the hands of others; but the Ninth Circuit Court of Appeals and the trial Court ruled that although Mr. Belanus was unsentenced he was a convicted prisoner subject to the 8th Amendment protections, using case authority pertaining to a federal prisoner under federal jurisdiction. In the Ninth Circuit, pretrial detainees protected under the 14th Amendment have greater Constitutionally Protected Rights to be free from harm than convicted prisoners protected under the 8th Amendment.

Pursuant to Order 2020 U.S.
LEXIS 1643, it is ordered that the
deadline to file any petition for a
writ of Certiorari due on or after the
date of this order is extended to 150
days from the date of the lower court
judgment, order denying discretionary
review, or order denying a timely
petition for rehearing.

XI) Reasons For Granting The Writ.

The Ninth Circuit Court of Appeals has entered a decision in conflict with the decision of other United States Court of Appeals on the exact same important matter (i.e. the Third Circuit Court of Appeals); and the Ninth Circuit Court of Appeals has decided an important federal question that conflicts with decisions by Montana's State Court of last resort, the Montana Supreme Court. The Ninth Circuit's ruling is contrary to relevant decisions of this Court, The United States Supreme Court. The arguments, are as follows:

XII)

Arguments

(1) By clearly established Montana State law, M. Belanus was a Pretrial Detainee until he was sentenced.

"When interpreting state law, federal courts are bound by decisions of the state's highest court" quoting *Trishan Air, Inc. v. Federal Ins. Co.*, 635 F.3d 422, 427 (9th Cir. 2011).

"The highest court of each state, of course, remains 'the final arbiter of what is state law'" quoting *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011); see also *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

In *State v. Tomashie*, 2007 MT 103, P.12, the Montana Supreme Court ruled,

"Thus, in order for there to be a conviction, a sentence must be imposed" see also *State v. Stone*, 2017 MT 189, P.21; *Vondal v. State*, 2015 MT 345N, P.9; *State v. Mosser*, 2010 MONT. DIST. LEXIS 296, *8; *State v. Wolf*, 2010 MT 24, P.16.

MCA 46-1-202(7), a conviction is defined as:

"Conviction" means a judgment or sentence entered upon a guilty or ~~nolo contendere~~ plea or upon a verdict or finding of guilty rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury", Tomaskie, P. 9.

MCA 46-1-202(11), a judgment is defined as:

"Judgment" means an adjudication by a court that the defendant is guilty or not guilty, and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court", Tomaskie, P. 10.

MCA 46-1-202(25), a sentence is defined as:

"Sentence" means the judicial disposition of a criminal proceeding upon a plea of guilty or ~~nolo contendere~~ or upon a verdict or finding of guilty", Tomaskie, P. 11.

In Montana, an individual is bailable (if the offense is bailable) and designated as a pretrial detainee until

the defendant is sentenced (i.e. MCA 46-9-401(2); Tomaskie, P.9, P.10, P.11); and provided by Montana's Statutory law, the sentencing Court is provided discretion to keep the defendant available until the appeal has been determined and must stay the sentence to be imposed during that time (MCA 46-20-204(2)). This is Montana's enhanced liberty interest guarantee provided to all of its citizens, where an individual has and retains his liberties until the sentence of punishment is imposed.

"When interpreting state law, federal courts are bound by decisions of the state's highest court," quoting *Trisham Air, Inc. v. Federal Ind. Co.*, 635 F.3d 422, 427 (9th Cir. 2011).

(a) The Fourteenth Amendment Guarantees

The Fourteenth Amendment prohibits any deprivation of life, liberty, or property without due process of law, reasoned by *Ingram v. Wright*, 430 U.S. 651, 672 (1977).

A liberty interest may arise from the Constitution or "from an expectation or interest created by state laws," quoting *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

The question is not merely the "weight" of Mr. Belam's interest in liberty, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. The nature of liberties

between a Montana Pretrial Detainee

(one who is not yet sentenced) and a Montana Convicted and Sentenced Prisoner are within the contemplation of the guaranteed language under the Fourteenth Amendment and far too long to brief in this Petition; however, the most obvious and notable difference is where the Pretrial Detainee retains most of his Fundamental Constitutional Rights and Liberties, where a Convicted and Sentenced Prisoner does not (i.e. punished to imprisonment and deprived of way of life, liberty and property and has a narrowly limited Constitutional Right to Counsel (i.e. Direct Appeal) versus not yet being

punished to imprisonment and retaining way of life, liberty, and property and has the Constitutional Right to Counsel in all proceedings (i.e. Motion for a New Trial, Pre-Sentence Investigations, the Sentencing Hearing, the Continuing Right to Bail)).

The Federal Courts turn to state law for Property Right guarantees, see *Bishop v. Wood*, 426 U.S. 341, 344-345 (1976) (deciding whether North Carolina had created a property interest cognizable under the Due Process Clause by reference to state laws as interpreted by the North Carolina Supreme Court); therefore, the Federal

Courts must turn to state law for
liberty interest rights pertaining to
whether an individual is a Pretrial
Detainee or a Convicted Prisoner pursuant
to State law, as Federal Courts,

"are bound by the pronouncements
of the state's highest court on
applicable state law," quoting *Applying*
v. State Farm Mut. Auto Ins. Co.,
340 F.3d 769, 778 (9th Cir. 2003) (quoting
Picknor v. Choice Hotels Int'l, Inc.,
265 F.3d 931, 939 (9th Cir. 2001)).

(b) The Interstate Agreement On
Detainers Act Designates A Convicted
Unsentenced Individual As A Pretrial Detainee.

An unsentenced but convicted
individual is not committed to the County
jail for punishment; in opposite, a convicted
and sentenced individual is committed to
the County jail or prison for punishment,

see *Kingsley v. Hendrickson*, 576 U.S. 389, 401 (2015) ("If the offence be not bailable, or the party cannot find bail, he is to be committed to the County Jail... [b]ut... only for safe custody, and not for punishment").

The Interstate Agreement on Detainers Act (IAD) establishes that a convicted (adjudged guilty) but unsentenced individual is a Pretrial Detainee, see *United States v. Saffels*, 982 F.2d 1199, 1204 (8th Cir. 1992); *United States v. Muhammad*, 948 F.2d 1449, 1453 (6th Cir. 1991); *United States v. Jones*, 341 Fed. Appx. 275, *276-277 (9th Cir. 2009); *United States v. Reed*, 620 F.2d 709, 711-712 (9th Cir. 1980) (a pretrial detainee is not a prisoner serving a "term of imprisonment" within the meaning

of the IAD).

(C) The Conflict Between Circuit Courts As To The Designation of A Convicted But Unsented Individual.

There is conflict and division among the Circuit Courts pertaining to the Fundamental Constitutional protections of a convicted unsentenced individual, see *Ngala v. Hasty*, 490 F.3d 143, 163 n.8 (2nd Cir. 2007). (Circuits are divided as to whether to treat convicted but unsentenced inmates as pretrial detainees).

The Ninth Circuit's holding of *Resnick v. Hayes*, 213 F.3d 443, 448-449 (9th Cir. 2000), where a convicted prisoner awaiting sentencing is governed by the 8th Amendment, aligns with the holdings of *Whitnack v. Douglas County*,

16 F.3d 954, 957 (8th Cir. 1994) and *Berry v. City of Muskegon*, 900 F.2d 1489, 1493 (10th Cir. 1990); see also *Tilmon v. Proctor*, 368 F.3d 521, 523-524 (5th Cir. 2004). The basis for these Circuit's decisions rests upon the point at which the State acquires the power to punish by way of the conviction; whereby the Eighth Amendment becomes implicated, not the Fourteenth Amendment.

Contrary to, other Circuits hold that the Eighth Amendment's Cruel and Unusual Punishment Clause applies "after sentence and conviction," see *Hubbard v. Taylor*, 399 F.3d 150, 164 (3rd Cir. 2005); *Cobb v. Aytch*, 643 F.2d 946, 957, 962 (3rd Cir. 1981); *Fuentes v. Wagner*, 206 F.3d 335, 341-343 (3rd Cir. 2000); see also *Johnson v. Glick*,

481 F.2d 1028, 1032-1033 (2nd Cir. 1973); Iqbal at 163n.8. The Third Circuit's longstanding holding derives from the State laws of Pennsylvania, which mandates that an unsentenced convicted individual is a Pretrial Detainee until they are sentenced for punishment, see Aytch at 952, 962; Iqbal at 165n.8; Fuentes at 341-343. Just as Pennsylvania's Statutory and Common law commandments establish a liberty guarantee, a convicted unsentenced individual is a pretrial detainee protected under the 14th Amendment and becomes a convicted prisoner protected under the 8th Amendment when sentenced, Montana's Statutory and common law commandments also provide a liberty

guarantee for a convicted unsentenced individual designating them as a pretrial detainee protected under the 14th Amendment until they are sentenced; once sentenced, they become a convicted prisoner protected under the 8th Amendment.

The Ninth Circuit's decision of *Resnick v. Hayes*, 213 F.3d 443, 448 (9th Cir. 2000), is in conflict with Montana Supreme Court rulings and holdings upon its own State laws, thereby depriving individuals of a liberty interest guaranteed by Montana. *Resnick v. Hayes* conflicts with the Third Circuit's 29-year holding following Pennsylvania's Supreme Court rulings and holdings upon its

State laws; and conflicts with the Second Circuit's holding in *Johnson* at 1032-1033, which also ruled that the 8th Amendment applies after sentence and conviction. This Honorable Court has not directly ruled upon this matter of first impression, but has reasoned that the 8th Amendment applies after the sentence of punishment has been imposed, see *Ingraham*, 671 A.40 and *Graham v. Connor*, 490 U.S. 386, 392 A.6 (1989).

(d) *The Eighth Amendment Applying To Convicted Unsentenced Individuals Implicates Fifth Amendment Double Jeopardy Issues.*

This Honorable Court confirming *Johnson* at 1032-1033 in *Ingraham* at 671 A.40 (quoted in *Graham* at 392 A.6), where the 8th Amendment applies when an individual is

convicted and sentenced, Comports with highly probable 5th Amendment Double Jeopardy Guarantee deprivations when the 8th Amendment applies after an individual has been adjudged guilty but unsentenced; thereby authorizing forms of punishment that are not violative of the 8th Amendment but violative under the 14th Amendment (as the Pretrial Detainee cannot be punished at all) (Kingsley, supra), as the convicted unsentenced individual is being subjected to punishment before the individual is sentenced to punishment (a form of double punishment when the sentence of punishment has not yet been imposed).

The 8th Amendment's Cruel and

Unusual Punishment Clause pertaining to a sentence of punishment imposed by a sentencing court, does not attach until after the sentence of punishment has been imposed by the sentencing court; therefore, it stands to reason that an unsentenced convicted individual is protected by State law designating them as either a Pretrial Detainee or a Convicted Prisoner, which distinguishes between the Constitutional Right they are protected under, when the claim of a State official acting under color of State law has violated or deprived a Constitutionally Protected Right (as required by 42 U.S.C. 1983).

The distinction between being a convicted prisoner protected by the 8th Amendment and a pretrial detainee protected by the 14th Amendment is notable where a pretrial detainee is "entitled to more extensive protections of the Due Process Clause of the Fourteenth Amendment," quoting *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1246 n.5 (9th Cir. 2016); (see also *Kingsley* at 400-402).

(c) The Requirements Of 42 U.S.C. 1983, Establishing How State Law Determines An Individual As A Pretrial Detainee Or A Convicted Prisoner Protected By The 8th Or 14th Amendment.

"1983 generally is thought of as a vehicle for the assertion of Constitutionally protected rights against state officials" acting under color of state law. See *Construction Aggregates Corp. v. Rivera de Vicenty*, 573 F.2d 86, 94 n.6 (1st Cir. 1978); see also *West v. Atkins*, 487 U.S. 42, 48 (1988);

Waffe v. Frey, 789 F.3d 1030, at 1036 (9th Cir. 2015).

The officers in this case were acting under color of Montana State Law. Under color of Montana State Law, Mr. Belanus was a Pretrial Detainee until he was sentenced (just as held in *Ayton*, 957, 962; *Fuentes* at 341-343; *Togbal* at 163 n.8; and *Hubbard* at 164). Mr. Belanus claimed a Federal Constitutional violation of the 14th Amendment by officers acting under color of Montana Law for a failure to protect, claiming he was a Pretrial Detainee at the time of the violation pursuant to State Law, where the 14th Amendment, not the 8th Amendment, governed the standard of law and duty owed to

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Mr. Belanus by the officers involved.

Mr. Belanus's 14th Amendment argument claiming that a convicted but unsentenced individual is a Pretrial Detainee, is Conducive to 42 U.S.C. 1983; where a state official acting under color of state law, has violated a Constitutionally protected Right, an individual has the availability for redress caused by the violation by the officer(s) acting under color of state law. Under color of Montana law, Mr. Belanus was a Pretrial Detainee when he was convicted but not yet sentenced protected under the 14th Amendment; as he was not yet sentenced to punishment, where

the 8th Amendment controls once a sentence of punishment is imposed and by Montana law becomes a convicted prisoner.

Conclusion

In accordance with State law liberty guarantees and officers/individuals acting under color of state law when implicating Constitutionally protected rights, the State law determinations designating an individual as either a Pretrial Detainee or a Convicted Prisoner, (when they are found guilty and have not yet been sentenced), should control as to how the Federal Courts apply the Constitutional protections of either the 14th or 8th Amendments;

as a Pretrial Detainee cannot be punished at all (as no sentence of punishment has been imposed) and a Convicted Prisoner can be punished as long as it does not offend the Cruel and Unusual Punishment Clause of the 8th Amendment (as it's part of the sentence of punishment imposed).

Federal Courts strictly adhere to a State's sentencing laws, as it's a matter of State law; it then should follow that Federal Courts strictly adhere to a State's designation of whom is a pretrial detainee and whom is a convicted prisoner, a matter of State law.

(2) Requiring the element of a defendant's act causing an injury in a failure to act case, in order to constitute a claim, deprives Mr. Belanus of the Fundamental Right to be free from harm, establishing a Cause of Suit.

The district trial court required Mr. Belanus to prove that the defendant's acts caused his injuries under Jury Instruction No. 12 in this failure to protect case caused by the defendant's failure to act. The Ninth Circuit Court of Appeals failed to rule upon Mr. Belanus's challenge upon Jury Instruction No. 12 and the defendant's did not submit an argument against Mr. Belanus's challenge. Jury Instruction No. 12 deprives Mr. Belanus of his Fundamental Right to be free from harm caused by either a defendant's

acts or failure to act, see *Farmer v. Brennan*, 511 U.S. 825, 834, 847 (1994) ("a prison officials act or omission"); see also *Clem v. Comeli*, 566 F.3d 1177, 1182 (9th Cir. 2009).

The omission of the defendants' failure to act as an element causing Mr. Belamusi's injuries to constitute a claim of suit is Constitutional Error, see *United States v. Killbride*, 584 F.3d 1240, 1247 (9th Cir. 2009); as it directly affected the jury's decision - making possibilities when they could not consider Mr. Belamusi's argument that the defendants' failure to act caused his injuries. The silent denial of Mr. Belamusi's

Jury Instruction No. 12 argument is
Contrary to Farmer at 834, 847 and
Clem at 1182, requiring review.

Conclusion

Jury Instruction No. 12 deprives
Mr. Belanus of legal redress from
violation of the 14th and 8th Amendments
for causation of injury by the defendants
failure to act, as the jury were not
allowed to consider Mr. Belanus's assertion
of the defendants failure to act causing
injury. Jury Instruction No. 12 required
Mr. Belanus to prove that the defendants
acts caused his injuries in this failure to
act case, when the law of the case doctrine
was sound in a failure to act prior to

the submission of Jury Instruction No. 12,
and thereby requiring review of Mr. Belanus's
Fundamental Right Protection deprived by
Jury Instruction No. 12, from the
omission of the defendant's failure to act
causing Mr. Belanus's injuries.

XIII) Conclusion

Mr. Belanus has shown how the Circuit Courts are split and render different decisions upon a Fundamental Question of Constitutional dimension; a matter of first impression brought before this Court requiring clarification, as it affects all who file and seek protection under the Rights of the United States Constitution.

Therefore, the petition for a writ of *Coramari* should be granted.

Respectfully submitted this 20th
day of August, 2020.

Duane Ronald Belanus

Duane Ronald Belanus