

No.

20-7157

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

David Smith-Garcia — PETITIONER
(Your Name)

vs.

Paula Burke — RESPONDENT(S)

FILED

DEC 15 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. District Court for the Southern District of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David Smith-Garcia, #07954-043
(Your Name)

U.S.P. Tucson P.O. Box 24550
(Address)

Tucson, AZ 85734
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does an Eighth Amendment claim for deliberate indifference to a serious medical need against a U.S. Probation officer present a new Bivens context in violation of *Ziglar v. Abbasi*?

2. If it does present a new Bivens context, is a criminal supervised release statute (18 U.S.C. 3583) an adequate alternative remedy to a Bivens money damages remedy?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 8/6/2020.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 11/2/2020, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment right to receive adequate medical care under the U.S. Constitution.

STATEMENT OF THE CASE

This is a simple Bivens claim for deliberate indifference to a serious medical need under the Eighth Amendment, a Bivens right recognized by this Court in *Carlson v. Green*, 446 U.S. 14, 19 (1980).

The respondent, Paula Burke, a U.S. Probation officer, argues that a Bivens claim against a probation officer, specifically, presents a new Bivens context.

The district court initially dismissed this case during statutory screening. But a Ninth Circuit panel reversed and held that Smith could bring a Bivens claim against a U.S. Probation officer. (See 8/21/2018 Ninth Circuit decision in Appendix D).

Despite the Ninth Circuit ruling that the Petitioner could bring a Bivens deliberate indifference claim against a U.S. Probation officer, Burke immediately filed a Rule 12 motion to dismiss raising the exact same defenses as she had previously raised on appeal.

The district court ignored the Ninth Circuit's 8/21/2018 opinion and Smith's res judicata, collateral estoppel, and law of the case doctrine arguments, and dismissed this case for a second time, ruling, in part, that Smith's Eighth Amendment deliberate indifference to a serious medical need claim against Officer Burke arose in a new Bivens context and that Smith had an adequate alternative remedy in the 18 U.S.C. 3583 supervised release statute. (See District Court's 3/29/2019 opinion; Appendix B).

Smith again appealed. A second panel of the Ninth Circuit issued an opinion on 8/6/2020, which was in conflict with the first panel's 8/21/2018 opinion, and held that an Eighth Amendment claim against a probation officer for deliberate indifference to a serious medical need presented a new Bivens context and that the 18 U.S.C. 3583 criminal

Supervised release statute provided an adequate alternative remedy to a Bivens money damages remedy.

The facts of this case are simple. While on federal supervised release, Smith was diagnosed with an extremely rare form of bone disease known as idiopathic, avascular necrosis (AVN).

Due to the rarity of the disease, the need for specialized surgery, and the need for very individualized treatment, which Smith's physicians in Mississippi could not provide, he was referred to Scripps Hospital in San Diego for emergency surgery and to Stanford University for specialized treatment to try and determine the cause of the AVN disease.

Smith's probation officer in Mississippi granted him permission to go to California for the emergency surgery and specialized treatment. However, Officer Burke, a probation officer in San Diego, refused to grant Smith permission to come to the Southern District of California for the emergency surgery and treatment, citing her extensive case load and lack of desire to supervise another offender.

Because Smith could not leave his judicial district and go to San Diego without Officer Burke's permission - which she refused to give - Smith was unable to obtain surgery and treatment and has now suffered severe physical injuries, including permanent disability.

REASONS FOR GRANTING THE PETITION

1. Does an Eighth Amendment claim for deliberate indifference to a serious medical need against a U.S. Probation officer present a new Bivens context in violation of *Ziglar v. Abbasi*?

A deliberate indifference to a serious medical need claim under the Eighth Amendment cannot present a new Bivens context because this Court recognized that exact type of Bivens claim in *Carlson v. Green*, 446 U.S. 14 (1980).

Furthermore, *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017) does not preclude this kind of Bivens claim. In fact, this case is exactly the type Bivens case that the *Abbasi* Court distinguished.

Smith-Garcia is suing a rank-and-file federal law enforcement officer — not a policy-making official. He does not challenge a government policy. And this lawsuit involves “standard law enforcement operations” and “individual instances of law enforcement overreach.” (See *Abbasi* at 1860).

This Court should conclude that an Eighth Amendment claim for deliberate indifference to a serious medical need does not present a new Bivens context and remand for further proceedings.

2. Is a criminal supervised release statute an adequate alternative remedy to a money damages remedy under Bivens?

Because the district and appellate courts concluded that an Eighth Amendment claim for deliberate indifference to a serious medical need presented a new Bivens context, they then conducted a “special factors” analysis and concluded that Smith-Garcia had an adequate alternative remedy in a criminal supervised release statute to have his supervised release transferred.

But Smith-Garcia suffered physical injuries and permanent disability when he was denied permission to go to San Diego for emergency surgery and medical treatment. A federal

Supervised release statute cannot provide him monetary relief for the physical injuries he suffered. So, just like *Bivens*, this is a "damages or nothing" case.

Lastly, this Court in *Bivens* rejected criminal statutes as an adequate alternative remedy (*Bivens*) and the Ninth Circuit has done the same in *Rodriguez v. Swartz*, 899 F.3d 719, 741-42 (CA9 2018).

Smith-Garcia does not believe that this case presents a new *Bivens* context. However, if it does, he requests that the Court grant certiorari to determine if criminal supervised release statutes provide an adequate alternative remedy to a *Bivens* action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David South Gavin

Date: 1/20/2021