

Supreme Court, U.S.
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No. 21-7498

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC LLOYD HERMANSEN, Petitioner

v.

ANNA VALENTINE, Warden, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

Eric Lloyd Hermansen
Petitioner, KSR #126673
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QUESTIONS PRESENTED

- I. Are State prisoners protected under this Court's decision in Helling v. McKinney from being forcibly subjected to COVID-19 - its unknown health complications, exacerbation of high risk medical issues and death?
- II. Does forcibly subjecting a State prisoner to COVID-19 - its unknown health complications, exacerbation of high risk medical issues and death - constitute an "atypical and significant hardship" held by this Court in Wilkinson v. Austin?
- III. Are State prisoners protected under the Due Process of the Fourteenth Amendment to the U.S. Constitution from being forcibly subjected to COVID-19 - its unknown health complications, exacerbation of high risk medical issues and death - authorizing habeas corpus relief pursuant to 28 U.S.C. § 2241?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Eric Lloyd Hermansen respectfully prays that a Writ of Certiorari issue to review the United States Court of Appeals for the Sixth Circuit Order denying Certificate of Appealability under the mistaken belief that State prisoners are not protected under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution from being forcibly subjected to COVID-19 - its unknown health complications, exacerbation of high risk medical issues and death.

OPINIONS BELOW

The Order of the U.S. Court of Appeals for the Sixth Circuit Order denying Certificate of Appealability (COA) appears at Appendix A to the petition and is unpublished.

The Memorandum Opinion and Order of the U.S. District Court appears at Appendix B to this petition and is unpublished.

The Magistrate Judge's Findings, Conclusions and Recommendation appears at Appendix C to this petitioner and is unpublished.

JURISDICTION

The date on which the U.S. Court of Appeals for the Sixth Circuit denied COA was December 3, 2021, and appears at Appendix A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. U.S. Constitution Amendment

The Fourteenth Amendment to the United States Constitution, Due Process and Equal Protection of the Law Clause, provides in relevant part:

... No State shall ... deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend XIV, sec. 1

II. Statutory Provisions

Title 28 United States Code, Section 2241 provides:

- (c) The writ of habeas corpus shall not extend to a prisoner unless -
 - (3) He is in custody in violation of the Constitution or laws ... of the United States;

Title 28 of the United States Code, Section 2253(c)(2) provides in relevant part:

A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Hermansen's Fourteenth Amendment Due Process right was, and is continuing to be violated as there is no process due that can legally be employed by the State to forcibly subject him to contracting COVID-19 knowing he has a high risk health factor set by the National Center for Disease Control and Prevention (CDC), thus, the State cannot legally, continually or otherwise require his sentence to be executed under the real and imminent threat of contracting COVID-19 along with its unknown associated health complications and potential death.

In July 2020, Hermansen filed a § 2241 petition, seeking his immediate release from prison because he was allegedly being housed in unconstitutional conditions given the COVID-19 pandemic. He noted that staff and inmates at the prison had contracted the virus and that it was likely to spread in that environment, and he asserted that he was particularly susceptible to serious illness or death were he to contract COVID-19 given his age - [] - and the fact that he has stage 4 hepatitis C and advanced cirrhosis. Hermansen also argued that his release was warranted given that state officials had released other prisoners over concerns about COVID-19. As for the constitutional basis for his petition, Hermansen stated that "no where under the U.S. Constitution or the 14th Amendment are Respondents authorized to subject him to a death sentence without due process of law - and - there is no process due that can legally be employed by Respondents to forcibly subject him to COVID-19. Sixth Circuit

Opinion, App. A, pp.1-2

The Commonwealth responded to his petition, arguing that, because it had taken reasonable precautions to protect inmates like Hermansen, he did not allege a colorable claim for cruel and unusual punishment under the Eighth Amendment. In reply, Hermansen asserted that he was not making a claim under the Eighth Amendment's Cruel and Unusual Punishments Clause but under the Fourteenth Amendment Due Process Clause. Id., p.2

Factual Background

In June 1997, Hermansen was convicted for murder without aggravators in a State court of Kentucky, and is currently incarcerated in the Kentucky Department of Corrections (KDOC) at the Kentucky State Reformatory in LaGrange, Kentucky where he is serving a parolable life sentence.

In early 2020, the United States became hostage to SARS-CoV-2, or Coronavirus, otherwise known as COVID-19.

The COVID-19 virus is highly infectious and can be easily transmitted from person to person. COVID-19 fatality rates increase with age and underlying health conditions such as cardiovascular disease, respiratory disease, diabetes, immune compromise, cancer and cirrhosis of the liver, causing severe complications or death. See: www.cdc.gov/coronavirus/2019-ncov

Prisons and jails have long been associated with inordinately high transmission probabilities for infectious diseases. Early on physicians, public health officials and the

CDC sounded alarm that prisons and jails could become the epicenter of the COVID-19 pandemic. See: Klonsky, An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues, N.Y. Times (March 16, 2020).

Infections transmitted through droplets, like COVID-19, are particularly difficult to control in correctional facilities, as adequate physical distancing and decontamination of surfaces is usually impossible. Prison populations are at additional risk due to double celling and the existence of dormatories, dining halls, reception centers, gymnasiums, and other congregate spaces are accessible to most prisoners, including the aged and chronically ill - all factors present at KSR where Hermansen was and is still housed.

Hermansen has from the very beginning of this pandemic feared being infected with COVID-19 due to overcrowding and limited access to socially commensurate health care, being a CDC high risk candidate for its unknown associated complications and potential death due to his cirrhosis of the liver.

Hermansen was fifty-eight (58) years old at the time falling within the ambit of the aging prison population at KSR

In April 2020, Hermansen's fears became exacerbated when prisoners and staff at another KDOC facility became infected with COVID-19.

In April 2020, Kentucky Governor Andy Beshear signed an executive order commuting the sentences of 186 prisoners that fell within the CDC's high risk guidelines and was working with the KDOC to facilitate the release of another 743 prisoners.

Hermansen hearing of the release of almost a thousand prisoners who were low level felons wrote a letter to Governor Beshear expressing his concerns about only considering low level felons with higher recidivism rates, rather than aging prisoners with lower recidivism rates, for commutation of their sentences in light of COVID-19, as COVID-19 does not discriminate between the two.

In the months to come COVID-19 started hitting all KDOC prisons, and on July 8, 2020, Hermansen's fears became a reality when COVID-19 hit KSR.

On July 10, 2020, Respondent Valentine placed KSR on medical lockdown and on July 13, 2020, informed the KSR prison population that forty-five (45) prisoners and five (5) staff had been infected with COVID-19, and there had been one (1) prisoner death.

On July 16, 2020, Hermansen filed a petition for writ of habeas corpus ad subjiciendum pursuant to §2241 stating his cause of action against Respondent Valentine and Governor Beshear - that his Fourteenth Amendment Due Process right was being violated as there is no process due that can legally be employed by them to forcibly subject him to contracting COVID-19 knowing he has a high risk health factor set by the CDC, thus, they cannot legally, continually or otherwise require his sentence to be executed under the real and imminent threat of contracting COVID-19 along with its unknown associated health complications and potential death.

While Governor Beshear elected not to respond, Respondent

Valentine did, arguing that there can be no deliberate indifference by prison officials under the Eighth Amendment if they did anything at all in response to the COVID-19 pandemic, and that Hermansen had failed to exhaust administrative remedies.

Hermansen responded asserting that he did not raise any Eighth Amendment argument and that he did not have exhaust any administrative or state remedy, thus, Respondent Valentine's response in argument was not relevant and should be stricken.

On August 31, 2020, the Magistrate issued his Findings, Conclusions and Recommendation (FCR) stating that Hermansen's claims are without merit and he failed to exhaust an available state court remedy.

Hermansen filed Objections to the FCR addressing each point of error contained therein.

On November 24, 2020, Hermansen noticed the district court that he had become infected with COVID-19 and was experiencing extreme chills and cold sweats, and now had to fear, and still fears, being forced to endure all the unknown associated complications infected persons experience after contracting COVID-19, including death and that none of these were ordered to be part of his sentence, violating his Fourteenth Amendment Due Process right to be protected against such an "atypical and significant hardship."

On March 10, 2021, the district court ignoring and rejecting Hermansen's objections, simply adopted the FCR, dismissed his petition and denied COA.

Proceedings Below

On July 16, 2020, Hermansen filed a Petition for Writ of Habeas Corpus Ad Subjiciendum pursuant to 28 U.S.C. § 2241 stating the following cause of action against Warden Anna Valentine and Governor Andy Beshear:

That his 14th Amendment Due Process rights were being violated as there is no process due that can be legally employed by them to forcibly subject him to contracting COVID-19, thus, they cannot legally, continually or otherwise require his sentence to be executed under the real and imminent threat of associated health complications and death by contracting COVID-19.

While Governor Beshear was properly served, he elected not to respond. Counsel for Warden Valentine filed a response asserting in light of the trending perspective of the several federal courts, "there can be no deliberate indifference by prison officials under the Eighth Amendment if they did anything in response to the COVID-19 pandemic, and that Hermansen had failed to exhaust administrative remedies."

Hermansen responded contending that he did not assert an Eighth Amendment claim, and under the Prison Litigation and Reform Act, he was not required to exhaust any state or administrative remedies for a § 2241 petition; thus, Warden Valentine's response was not relevant and should be stricken.

On August 31, 2020, the Magistrate issued his FCR stating that Hermansen's claims are without merit and he failed to exhaust an available state court remedy.

Hermansen filed Objections to the FCR addressing each point of error contending:

- * That his medical exhibits must be accepted as true, as there was no evidence presented by Respondent that he did not have cirrhosis of the liver or refute his medical documents;
- * It was error to state "there is no authority for his claim that Due Process is offended by the fact that there is a substantial chance he might contract COVID-19 as a result of being incarcerated and that he might die as a result," because this Court made clear in Wilkinson v. Austin, 545 U.S. 209, 222-23 (2005) that "prisoners retain due process right to freedom from restraint that imposes 'atypical and significant hardship' on the inmate in relation to the ordinary incidents of prison life;" and, "prison conditions [that] exceed ... the sentence in such an unexpected manner ... give rise to protection by the Due Process Clause of its own force," Sandin v. Conner, 515 U.S. 472, 477-78 (1995) – and that being forcibly subjected to contracting COVID-19 and associated health complications and potential death was the very epitome of an "atypical and significant hardship;"
- * It was error to apply the Sixth Circuit's decision in Cameron v. Bouchard, 2020 U.S. App. LEXIS 21480 (July 9, 2020) to deny his Due Process claims pursuant to a deliberate indifference framework;
- * That hundreds if not a thousand prisoners had been released in Kentucky due to COVID-19 so there was precedent for releasing him as well as a similarly situated prisoner and the fear of releasing prisoners is not a valid factor for consideration if the law is being violated and a prisoner is entitled to release, the law equally requires relief to be granted regardless of any perceived hypothetical consequences;
- * COVID-19 does not distinguish between low level felons and other felons establishing that such policy is offensive because all prisoners are similarly situated and the "atypical and significant hardship" standard must apply;
- * There is no requirement for exhaustion of administrative remedies under § 2241, and he was not required to pursue state court remedies that did not apply in such a case here.

On November 24, 2020, Hermansen noticed the District Court that he had become infected with COVID-19, and now had to fear being forced to endure all the unknown associated health complications infected persons experience after contracting COVID-19, including death, and that none of these were ordered to be a part of his sentence, and violate the 14th Amendment Due

Process Clause's protection against an "atypical and significant hardship," asserting that he was entitled to summary judgment as a matter of law.

On March 10, 2021, the District Court ignoring and rejecting Hermansen's objections, simply adopted the FCR dismissing his petition and denying COA.

On June 17, 2021, Hermansen requested the Sixth Circuit to issue a COA on the following:

- I. Whether the District Court correctly determined that Hermansen's § 2241 petition had to be dismissed for failure to exhaust administrative and state court remedies.
- II. Whether the District Court correctly determined that Hermansen's § 2241 petition was without merit because the 14th Amendment Due Process Clause only applies to pre-trial detainees and he is a state prisoner.
- III. Whether the District Court correctly determined that Hermansen's claim was subject to Eighth Amendment deliberate indifference standards instead of the 14th Amendment's Due Process "atypical and significant hardship" standard.
- IV. Whether the District Court's rejection of Hermansen's unrefuted medical documents attesting that he has cirrhosis placing him in the CDC's high risk category for COVID-19 was an abuse of discretion.
- V. Whether the District Court correctly determined that it is constitutionally permissible to release at-risk non-violent felons and not violent felons who are equally at-risk for COVID-19 complications because COVID-19 does not discriminate between the two.

On December 3, 2021, the Sixth Circuit denied COA despite remarkably recognizing that: Section 2241 authorizes federal courts to grant habeas relief to a prisoner who is "in custody in violation of the Constitution of the United States." 28 U.S.C. § 2241(c)(3). A constitutional claim that seeks release from confinement as the only adequate remedy, as Hermansen does, is properly brought in a habeas petition under § 2241. See, Wilson

v. Williams, 961 F.3d 829, 838 (6th Cir. 2020). Ex. A, p.3

The Sixth Circuit elected not to address the exhaustion issue under the district court's finding that "Hermansen's petition fails on the merits." Id. Proceeding haphazardly in addressing the merits the Sixth Circuit stated:

Hermansen's main argument in his COA application concern the alleged misunderstanding of his claim by the district court and Commonwealth. Hermansen seemed to be claiming that his prison conditions were unconstitutional. Usually, that is a claim brought under the Eighth Amendment's Cruel and Unusual Punishments Clause. [] But Hermansen repeatedly stated that he was not raising an Eighth Amendment claim and was instead asserting a claim under the Due Process Clause. A conditions-of-confinement claim may be brought under the Due Process Clause, but only by pretrial detainees []. Consequently, the magistrate judge and the district court both believed that Hermansen had mistakenly raised a conditions-of-confinement claim under the Due Process Clause, which could not provide him - a convicted prisoner - relief. Id., pp.3-4

Insofar as Hermansen raised a conditions-of-confinement claim under the Eighth Amendment, it is not adequate to deserve encouragement to proceed further. [] Accordingly, no reasonable jurist could debate that he did not establish an Eighth Amendment violation. Id., p.4

Hermansen's petition and subsequent filings also could be seen to raise a procedural-due-process claim under the Fourteenth Amendment. [] Hermansen notes that, in his objection to the magistrate judge's report and recommendation, he cited Wilkinson v. Austin ... and Sandin v. Conner ... both of which provide that inmates may not be deprived of a liberty interest without due process. Prisoners have a liberty interest in "freedom from restraint which ... imposes atypical and significant hardship .., in relation to ordinary incidents of prison life. [] Hermansen argues that the pandemic, his health, and the circumstances at his prison combine to make his continued incarceration a violation of that liberty interest. Id., pp.4-5

But even if Hermansen has some liberty interest in not being imprisoned in conditions which he is allegedly likely to contract COVID-19, he has not made a substantial showing that he has been deprived of that liberty without due process. [] In short, Hermansen has not made a substantial showing that his rights under the Due Process Clause have been violated. Id., p.5

[] In any event, given that Hermansen's Eighth Amendment claims fails because he did not make a substantial showing that prison officials neglected to take reasonable steps to reduce the risk to his health from COVID-19, medical evidence would not save his claim. And the same holds true for his procedural-due-process claim: his medical evidence does not affect his failure to show that prison officials did not provide him adequate process. Id.

In sum, Hermansen has not made a substantial showing that he was denied a constitutional right by not being released from prison during the COVID-19 pandemic. His claims do not deserve encouragement to proceed further. Id., p.6

This petition for writ of certiorari seasonably follows.

REASONS FOR GRANTING CERTIORARI

The COVID-19 pandemic has engulfed this world, our nation, society and its citizens with panic, death and what is now known as Long COVID disability.

There is no area of our lives it has not affected - corporations, businesses, means of transportation, religious institutions, schools or politics - permanently. In fact, in this term the Court stated, "No one doubts that the COVID-19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease," National Federation of Independent Business v. Department of Labor, 2022 U.S. LEXIS 496 *12 (January 13, 2022).

However, while this Nation reals under this pandemic and the political climate in its wake, there are a group of American citizens that have all but been forgotten - State prisoners.

When interpolating the words "prisoners and prisons" over "workers and workplace" in the dissenting Justice's opening factual summation, Id. **20-21 - one hears an echoe of a haunting reality that is being ignored.

The Sixth Circuit has equally ignored this haunting reality, finding here, that Hermansen can make no substantial showing that he is being denied a constitutional right by not being released from prison during the COVID-19 pandemic.

This is not a correct interpretation of Hermansen's claim. Hermansen asserted that he has a protected due process right not

to be forcibly subjected to COVID-19, its unknown health complications and potential death, and thus, for this reason a § 2241 writ should issue.

Moreover, Hermansen being forcibly subjected, was in fact infected with COVID-19, and now, due to the substandard nature of the medical care being provided by a for-profit provider, is in a perpetual state of fear of what happens next, as his cirrhosis can decompensate at any time from the combination of COVID-19, vaccinations and a booster's impact on his compromised health.

Hermansen and other State prisoners do have a substantial and clearly established right "to be free from heightened exposure to a serious communicable disease," Helling v. McKinney, 509 U.S. 25, 33 (1993).

In other words, Hermansen and every other State prisoner who the CDC has determined to be at high-risk, have a clearly established right to the protection from a heightened exposure to COVID-19 and all its unknown post-infected ramifications - that do constitute the very meaning of the phrase "atypical and significant hardship" that cannot be found as an incident to prison life and, exceeds their sentences in such an unexpected manner, giving rise to protection under the 14th Amendment's Due Process Clause of its own force.

The significant difference and reality here is that American citizens can run and protect themselves, while State prisoners have no where to run, having no way to protect or defend themselves from wave after wave of COVID-19 introduction by daily ingress and egress of prison staff.

I. State prisoners are protected under Helling v. McKinney from being forcibly subjected to COVID-19, its unknown health complications, exacerbation of high risk medical issues and death.

Our constitutional rights are not suspended during a crisis. On the contrary, during difficult times the Courts must remain the most vigilant in protecting the constitutional rights of the powerless.

Here, Helling clearly established the right of an individual in custody to protection from heightened exposure to a serious communicable disease. While Helling was an Eighth Amendment case, the principle this Court announced is no less applicable here in the context of the 14th Amendment's Due Process Clause.

The phrase heightened exposure easily equates to forcibly subjecting in the context of COVID-19. In other words, State prisoners clearly established right to be protected from a heightened exposure to COVID-19, is the right not to be forcibly subjected to catching COVID-19.

Clearly established that State prisoners in governmental custody have a constitutional right to be protected against a heightened exposure to serious, easily communicable diseases, extends equally the right to protection from being forcibly subjected to a heightened exposure to COVID-19 by prison officials. It is undisputed that COVID-19 is easily communicable. In addition to the known mortality rate, hospitalizations, and medical consequences, there can be no dispute that COVID-19 exposes Hermansen and all State prisoners

to a sufficiently substantial risk of harm, that this Court in National Federation referred to as "grave dangers." **20,25

Hermansen has cirrhosis of the liver and was at stage 4 when he received treatment in 2003. Although Hermansen received a sustained viral rate and no longer has HCV, the irreparable and permanent damage it caused to his liver was established by his liver biopsy that showed: chronic hepatitis C with moderate portal inflammation with focal necrosis (grade 3 inflammation) with prominent periportal and septal fibrosis with architectural distortion and focal early changes of micronodular cirrhosis (grade 3-4 fibrosis); moderate microvesicular fatty change; [].

The CDC issued a document on July 17, 2020, entitled People with Certain Medical Conditions and under the subtitle "Liver Disease" it stated "having chronic liver disease, especially cirrhosis (scarring of the liver), may increase your risk for severe illness from COVID-19. See: www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions

On July 28, 2020, the CDC issued another document that listed evidence used to update the list of underlying medical conditions that increase a person's risk of severe illness from COVID-19, with the caveat that it could rapidly change as the science evolves. See: www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions

Therein, under the subtitle "Limited Evidence" regarding liver disease the CDC referred to Cohort Study by Moon, A.M. et al., High Mortality Rates for SARS-CoV-2 Infection in Patients with Pre-existing Chronic Liver Disease and Cirrhosis:

Preliminary Results from an International Registry. Journal of Hepatology, 2020.

The American Association for the Study of Liver Disease has circulated evidence in relation to COVID-19 further supporting the Moon Study: People with underlying cirrhosis of the liver are at a higher risk of developing severe COVID-19 illness and/or more problems from existing liver disease if they get a COVID-19 infection, with prolonged hospitalization and increased mortality.

COVID-19 is highly contagious as the Omicron variant has proven of late. It is not bound to a geographical area, and a societal consensus has emerged regarding its danger. There can be no dispute that the virus presents a sufficiently substantial risk of harm to Hermansen and other State prisoners who find themselves in the CDC's high risk category due to underlying health issues, and it should come as no surprise that Respondent has a duty to protect Hermansen from the repeated exposure to COVID-19, exacerbated health complications and potential death, despite the novelty of the virus - which is an impossibility and a § 2241 writ must issue for the continued violation of the Due Process Clause of the 14th Amendment.

For these reasons, the Court should exercise its jurisdiction to clearly establish that prisoners have an equal right under Helling to be free from being forcibly and subjected to the repeated exposure to COVID-19 and its post-infection ramifications.

II. Forcibly subjecting a State prisoner to COVID-19, its unknown health complications, exacerbation of high risk medical issues and death does constitute an "atypical and significant hardship" as held by this Court in Wilkinson v. Austin.

While this Court has never defined what constitutes "atypical and significant hardship," it has stated that "prison conditions [that] exceed ... the sentence in such an unexpected manner ... give rise to protection of the Due Process Clause of its own force," Sandin at 477-78, and that "prisoners retain due process right to freedom from restraint that imposes 'atypical and significant hardship' on the inmate in relation to the ordinary incidents of prison life," Wilkinson at 222-23.

It is a fundamental principle that the meaning of a word cannot be determined in isolation, but must be drawn from the context it is used. Ordinarily, a word's usage accords with its dictionary definition. See, Yates v. U.S., 574 U.S. 528, 537 (2015).

Having never defined the contours of what an "atypical and significant hardship" is, the Court has defined it as not being those ordinary incidents of prison life, i.e.: time in segregation, lost of privileges, housing classifications, visiting restrictions and the like.

So here, the contextual and judicial import of this phrase and standard must be understood as Merriam-Webster states in the 11th Ed. (2009) Collegiate Dictionary: "atypical" means: not typical; irregular, unusual, p.80; "significant" means: having

meaning; having or likely to have influence or effect, p.1158; and, "hardship" means: 1) privation, suffering; 2) something that causes or entails suffering or privation, p.568.

Hermansen contends here, as he did in the courts below that the simple meaning is: COVID-19 is an unusual circumstance, that has and will continue to, influence and effect suffering upon him.

Forcibly subjecting Hermansen and other State prisoners to contracting COVID-19, with its known "Long COVID" and unknown health complications and potential death is the very epitome of what constitutes an "atypical and significant hardship" envisioned by Wilkinson that is protected by the Due Process Clause of the 14th Amendment of its own force as declared in Sandin.

This Court should exercise its jurisdiction to define whether State prisoners' exposure and repeat exposure to COVID-19 constitutes an "atypical and significant hardship" under Wilkinson.

III. State prisoners are protected under the Due Process Clause of the 14th Amendment to the U.S. Constitution from being forcibly subjected to COVID-19 - its unknown health complication, exacerbation of of high risk medical issues and death - authorizing habeas corpus relief pursuant to 28 U.S.C. § 2241.

As elucidated in Sections I and II, State prisoners have a clearly established right not to be forcibly subjected to a

heightened exposure to COVID-19 and, such constitutes an atypical and significant hardship, as it is not, an ordinary incident to prison life and unexpectedly exceeds one's sentence giving rise to protection under the Due Process Clause of the 14th Amendment of its own force.

No matter how hard Respondent, or for that matter, any State prison Warden trys, it is an impossibility not to forcibly subject State prisoners to a heightened and repetitive exposure to COVID-19, its unknown health complications exacerbation of high risk medical issues and death, whom the CDC has determined are most vulnerable to these significant sufferings.

This is a fact, because prison environments are closed communities and the only way a serious communicable disease like COVID-19 can be introduced into the prison is by the daily ingress and egress of prison officials. Moreover, once introduced, it spreads like a conflagration from prisoner to prisoner who are forcibly subjected to the heightened exposure to COVID-19 due to confinement in close living, working and eating quarters, exceedingly poor ventilation, and inadequate sanitation. Social distancing is impossible, not only between prisoner and prisoner, but prisoner and staff. Mask mandates are futile as recently expressed by the CDC.

The continued use of double cells and congregate living spaces is not merely negligent, it is reckless. The recklessness is aggravated by the refusal to consider expedited release of State prisoners like Hermansen who are serving time for non-aggravated murder, who have also aged out of a propensity for

violence, who are more vulnerable to COVID-19 and less likely to recidivate.

Title 28 U.S.C. § 2241(c)(3) provides that "the writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or laws ... of the United States.

Hermansen has made a substantial showing that these circumstances of his incarceration by being forcibly subjected to the heightened and repetitive exposure to COVID-19, its unknown health complications, exacerbation of his high risk medical issues and potential death - exceed his sentence and are an atypical and significant hardship that continues to effect suffering on him in violation of his rights under the Due Process Clause of the 14th Amendment for which cannot be rectified absent the grant of a § 2241 writ of habeas corpus.

This Court's statement in Brown v. Plata, 562 U.S. 493, 511 (2011) that "in [the] prison administration context, that '[courts] must not shrink from their obligation to "enforce the constitutional rights of all 'persons' including prisoners.'" Courts may not allow the constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration,'" resonates loudly here.

The facts here, when analyzed pursuant to the applicable standards of Helling/Wilkinson/Sandin demonstrate that the Sixth Circuit erred when denying Hermansen a COA, compounding the continual violation of his 14th Amendment right to Due Process by refusing remand to the district court to issue the writ as

mandated pursuant to 28 U.S.C. § 2241(c)(3).

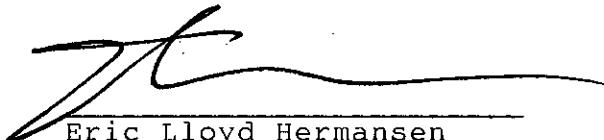
For these reasons this Court should exercise its jurisdiction to declare that State prisoners who make the substantial showing as here, are entitled to a writ of habeas corpus pursuant to 28 U.S.C. § 2241(c)(3).

CONCLUSION

For the foregoing reasons Eric Lloyd Hermansen respectfully requests that the Court grant his petition for writ or certiorari.

This 24th day of February 2022

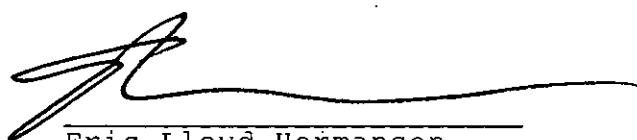
Respectfully submitted,



Eric Lloyd Hermansen
Petitioner, KRS #126673
3001 W. Hwy 146
LaGrange, Kentucky 40032

NOTICE

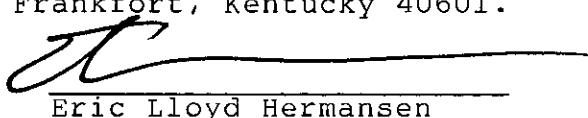
Notice is hereby given that the original plus (9) copies of the foregoing were mailed postage prepaid this 24th day of February 2022; to the U.S. Supreme Court Clerk, 1st Street NE, Washington, D.C. 20543-0002.



Eric Lloyd Hermansen

CERTIFICATE OF SERVICE

I certify pursuant to Rule 29 of the Supreme Court Rules that a true copy of the same was mailed postage prepaid this 24th day of February 2022; to Hon. Edward A. Baylous, II, Counsel for Respondent, 125 Holmes St., 2nd Fl., Frankfort, Kentucky 40601.



Eric Lloyd Hermansen