

MAR 14 2022

OFFICE OF THE CLERK

No. 21-7547

IN THE
SUPREME COURT OF THE UNITED STATES

Gabriel Gonzalez — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gabriel Gonzalez
(Your Name)

Forrest City Low, P.O. Box 9000
(Address)

Forrest City, Arkansas 72336
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

- I. Does continued imprisonment under unconstrained exposure to a lethal contagion, such as COVID-19, violate his Eighth Amendment right to be free from inflicted punishment that is both cruel and unusual?
- II. Did the Eighth Circuit err by expanding the scope of 18 U.S.C. § 3553(b) to include exposure and infection to disease as a legitimate means of punishment, through his imprisonment, despite the absence of this factor being addressed by the United States Sentencing Commission?

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:

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 E to the petition and is

☒ reported at Unknown; 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☐ is unpublished.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 _____ 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☐ is unpublished.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☐ is unpublished.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☐ is unpublished.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 12/23/21

☐ 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: _____, 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. § 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

Constitutional provisions

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Statutory provisions

18 U.S.C. § 3553(b)(1)- Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

United States Sentencing Guidelines 5K2 commentary 3(A)(ii):Unidentified Circumstances- A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

STATEMENT OF THE CASE

On or about March, 2020 the Bureau of Prisons initiated precautionary emergency measures to protect inmates and prison staff members from exposure to, and conveyance of, the COVID-19 virus. Prisons across the nation, including the Forrest City-Low facility in Arkansas, initiated a modified lockdown procedure and limited prisoner movement(s) across and within its prison boundaries. By March 31, 2020, the prison at Forrest City, et alia, instituted a total lockdown due to exponential increases of infected persons and deaths within, and external to, the prison system.

The communal setting and environment of the prison made sheltering in place and social distancing insurmountable. The numbers of infected prisoners exceeded the anticipated dormitory capacities to adequately segregate and quarantine the sick from those not yet infected. Overflow areas were created using the prison's woodshop, chapel, education classrooms, recreation, and visitation room to triage and board the most serious cases.

On or about May, 2020, the Centers for Disease Control (CDC) initiated a special-interest medical research project at the prison to observe and report on the effects and duration of the infections contracted by the prisoners. (Appendix A);(see also report by U.S. Department of Health and Human Services-Appendix B). This research project was performed without the informed consent of the prisoners involved.

M.A.S.H.-style tents were erected in the center of the prison's internal compound area. Secluded prisoners were rearranged into groups of infected organized by virtue of their degree of illness so that they could be studied and reported upon. This research project was featured in the United States Department of Health and Human Services Morbidity and Mortality Weekly Report (MMWR) vol.69, No.33 of August 21, 2020. (Appendix C).

During the course of the year-long BOP/COVID lockdown, prisoners including

those most severely infected, were provided with temperature checks as their sole provision of medical treatment for their infection(s).

On or about April 5, 2020, Mr. Gonzalez filed a motion with his sentencing court seeking relief pursuant to 18 U.S.C. § 3582 in order that he may avoid contracting COVID-19 by obtaining a grant of Compassionate Release.

A concurrent petition for relief was submitted to the District Court for the Eastern District of Arkansas pursuant to 18 U.S.C. § 2241 challenging the execution of his sentence as constitutionally violative under conditions including unavoidable COVID-19 exposure. Neither court addressed Gonzalez's contention that imprisonment, inclusive of forced exposure to disease, exceeds the traditionally accepted and legislated parameters of incarceration.

On May 13, 2020, however, Mr. Gonzalez tested positive for the Coronavirus and was relocated to an isolation dorm with approximately 160 other COVID-19 positive prisoners. Mr. Gonzalez received no meaningful pharmaceutical or radiological medical care from prison medical staff for his infection or symptoms.

Mr. Gonzalez believes the Eighth Circuit erred by expanding the scope of imprisonment to include exposure to disease as a legitimate punishment for a criminal conviction. Without the benefit of sufficient medical care, the inability to social distance as a protective measure, and the forced, nonconsensual participation in a government sanctioned medical research study of the disease and its progression, the Eighth Circuit's precedent here is overly broad.

REASONS FOR GRANTING THE PETITION

- I. Continuing imprisonment with unconstrained exposure to COVID-19 and its progeny, violated his Eighth Amendment right against the infliction of punishment that is both cruel and unusual.

On or about April, 2020, Mr. Gonzalez petitioned the prison's Warden to grant him home confinement in order that he may avoid unnecessary and unavoidable exposure to COVID-19 infection, which was rampant throughout the prison. Mr. Gonzalez additionally sought Compassionate Release with his sentencing court, and also challenged the lawfulness of the execution of his sentence with the District Court for the Eastern District of Arkansas. Mr. Gonzalez contended throughout, that continuation of his imprisonment with the addition of the post hoc exposure to disease factor, created an illegitimate expansion of carceral punishment not decreed as part of his original sentence.

On May 13, 2020, Mr. Gonzalez tested positive for the Coronavirus infection, rendering his pleas for custodial protection, too little, too late. As a result of his positive test for the infection, Mr. Gonzalez continues to suffer Long-COVID effects that remain untreated by the prison's medical staff.

- a. American history demonstrates incarceration including exposure to disease is intolerable and violative of the Eighth Amendment.

American history has shown that this country has remained steadfast in its opposition to punishment(s) that are both cruel and unusual. Our founding fathers created the Eighth Amendment to our constitution to provide prisoners with an exceptional right of protection that did not exist from the foundations of English law governing the treatment of prisoners. The Supreme Court of the United States has remained faithful to this conception.

American Supreme Court Justice Jackson, et alia, participated in the Nuremberg trials against Nazi war criminals who violated multi-national universal human rights protections under their regime of maintaining millions of human prisoners in "protective custody." Among their atrocities was the use of these prisoners as human medical research subjects where, in part, the study participants were exposed to disease in order that their responses could be recorded for posterity. America, among most every other country in the world, found these abuses against prisoners to be criminal atrocities of the worst kind, and ultimately condemned this conduct by sentence of death against those responsible. Our country has followed this precedent with the same vehemence and fervor to the present day. (see 45 C.F.R. part 46). Now, this court is confronted with a parallel consideration under the COVID-19 pandemic and the BOP's use of prisoners, like Mr. Gonzalez, to study the infection of prisoners under forced exposure.

- b. **Prisoner incarceration, in some instances, is greater than necessary under § 3553(a) analysis and is unjustifiable under COVID-19 circumstances.**

The Sentencing Reform Act (SRA) of 1984 has expressly forbidden harsh imprisonment that is greater than that required statutorily. The SRA has explicitly delineated the purposes of criminal sanctions pursuant to section 3551(a) and subparagraphs (A) through (D) of section 3553(a)(2) to the extent they are applicable in light of the circumstances of imprisonment relating to COVID-19 exposure.

Additional guidance exists in the Sentencing Guidelines Manual governing departures for sentencing based on unidentified circumstances not adequately taken into consideration. In short, the Sentencing Commission claims a departure may be warranted where there is a present circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence. (U.S.S.G. ch.5K2(a)(2)(B); see also commentary 5K2 3(A) and (B).

- c. 18 U.S.C. § 3553(b) provides that a sentence inclusive of a mitigating or aggravating circumstance, such as exposure to COVID-19, may involve a formulation of sentence different from that originally prescribed warranting resentencing to include consideration of the previously unaccounted circumstance.

Congress has created a safety-valve to account for circumstances such as the type now presented to this Court. § 3553(b) affords relief from the "heartland" of typical case sentencing when aggravating or mitigating circumstances warrant departure from the original sentencing structure. This provision further shows our government's intolerance to sentences and imprisonment that are violative of the Eighth Amendment because this provision enables lower courts the ability to relieve such disparities in light of new, intervening information relative to the changed circumstance of one's confinement.

Mr. Gonzalez finds that his COVID exposure and infection, including other hazard factors, create several layers of circumstance making his case tenable warranting departure. The COVID factual difference in his sentencing structure should result in an adjusted sentence consistent with the rational normative order of the types of sentence options available. This modification is necessary to avoid the unreasonable dimension to which he is exposed to lethal diseases while incarcerated. (see also, Departures for HIV-infected defendants; An analysis of current law and a framework for the future 91 N.W. U.L. Rev. 1147, 1154 (1997; and U.S.S.G. Ch.1, pt. A(4)(b)).

- d. Present legislation expounds Congressional statutory safeguards under the FIRST STEP ACT to include Compassionate Release as a means to overturn or correct an otherwise lawfully inappropriate sentence.

Several Circuits have recently opined there exists substantial evidence that incarceration with the BOP places prisoners at unreasonably extreme risk of death or injury warranting wide latitude in deciding RIS relief. (see U.S. v. Anello

USDC W.D. Wash., LEXIS 124133, July 14, 2020; Torres et al. v. Milusnic, 472 F.Supp. 3d 713, July 14, 2020, USDC C.D. Calif.).

As a result of the Torres court holding, the BOP has disseminated an informational memorandum to all federal prisoners indicating court-ordered eligibility exists for those who have recieved class certification. This certification applies to all current and future people in post-conviction custody at FCI Lompoc and USP Lompoc over the age of 50. Class certification also exists for those prisoners of any age with underlying health comorbidities. (Appendix D).

II. The District Court erred by failing to find that exposure to a lethal contagion, under forced exposure and medical experimentation, exceeds the scope of lawful incarceration under an Eighth Amendment analysis.

The cruel and unusual punishment clause has primarily been used to constrain the bounds of government-sanctioned criminal punishment in three ways; it limits the kinds of punishment that can be imposed on those convicted of crimes, it proscribes punishment grossly disproportionate to the severity of the crime, and it imposes substantive limits on what can be made criminal and punished as such.

In determining what constitutes 'Cruel and Unusual' punishment, the Court has looked to objective indicia to determine the punishment at issue. Yet, this Court has recognized that such ideals cannot be defined by rigid boundaries, and therefore has opined that the Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society. (Trop v. Dulles 356 U.S. at 100-101). This consideration includes analyses of unconstitutional prison conditions that amount to disproportionate punishment for the criminal offense at issue.

a. The Supreme Court's standard for unconstitutional prison conditions.

The Court in Wilson v. Seiter (501 U.S. 294, 1991) held that while the Eighth

Amendment applies to conditions of confinement that are not formally imposed as a sentence for a crime, such claims require proof that where the claim alleges inhumane conditions of confinement or failure to attend to a prisoner's medical needs, the deliberate indifference standard must also be met. (citing *Estelle v. Gamble* 429 U.S. 97 (1976)). This test became known as the Subjective Component standard.

Then, the Court in *Helling v. McKinney* (509 U.S. 25, 1993) was confronted with the question whether the injury, or potential future injury, can be deemed sufficiently substantial to overcome the objective standard of review. The Court resolved this issue in holding that the creation of a substantial risk of serious harm to [the prisoner's] future health was sufficient to satisfy the objective prong of the standard.

These standards were repeated and further shaped in *Farmer v. Brennan* (511 U.S. 825, 1994) in clarifying the deliberate indifference standard in order to safeguard the ever-evolving dignity of man. This case presents a novel question to the Court in that it includes consideration of a condition that the government is obligated to safeguard against, but is unable to contain and is unwilling to provide alternative means of imprisonment for the duration of the unabated crisis.

b. The history of Eighth Amendment application is broad.

Prisoners are uniquely vulnerable to the environmental conditions around them for the simple reason that they cannot choose where they live, nor are they able to simply remove themselves from exposure to hazards. Perhaps that is part of the reason why the Helling Court suggests that prisoners could also successfully complain about demonstrably unsafe environmental or contagion hazards without waiting for an illness or injury to materialize. For instance, if the prisoner has a current injury from the allegedly unconstitutional condition, evidence of

that injury may suffice to prove this element. If however, the prisoner fears of a future injury from the allegedly unconstitutional condition, the prisoner must demonstrate the future injury is (1) serious, (2) likely to occur, and (3) that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.

Continued exposure to COVID-19, and its progeny, under present conditions cause or contribute to: skin, eye, nose, and throat irritation, asthma, emphysema, hypertension, anemia, heart problems, nervous system damage, brain damage, liver damage, stomach and intestinal ulcers, and many forms of cancer including skin, stomach, lung, urinary tract, and kidney, to name a few.

The Helling Court made clear that a remedy for unsafe conditions need not await a tragic event. Exposure and deficient medical care for Coronavirus infections falls squarely upon the Helling Court standard. In accord with this conclusion, the United States Department of Health and Human Services and the Department of Justice declared Long-COVID to be a disability under the Americans with Disabilities Act of 1990. (42 U.S.C. Ch.126, Title(s) II, III; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.; and section 1557 of the Patient Protection and Affordable Care Act, 119 through 124 U.S.C..

The Eighth Circuit's precedent in this matter is inconsistent with the provisions of the Eighth Amendment and incompatible with the sentencing severities identified by its sister-Circuits. Had Mr. Gonzalez sentence been subject to a mandatory minimum threshold the resolution of this matter would also affect that punishment including the minimum sentencing parameter prescribed.

The introduction of a new sentencing factor, here-exposure to a lethal contagion while imprisoned, has changed the sentencing parameters to be excessive in light of its inherent harshness. The magnitude of this increase cannot be adequately resolved under § 3553(a) analysis because such consideration is weighed against

the original sentence imposed before this factor was introduced.. A new model is therefore necessary to resolve the disparity between conditions of imprisonment pre-pandemic, and the harshness of conditions that exist now under the inescapable conveyances extant in the present system.

The constitutional vagaries inherent in the novel sentencing disparities created by the COVID contagion require resolution by this Court's Eighth Amendment analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Gabriel Gonzalez

Date: 3/08/22