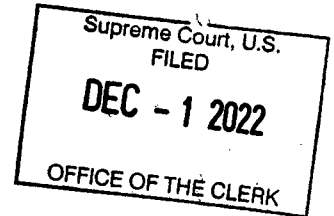


22-6257
NO. _____

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH RAY BORDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the

United States Court of Appeals

For the Eighth Circuit

No. 22-2920

PETITION FOR WRIT OF CERTIORARI

Kenneth Ray Borders, *pro se*,

Reg. No. 15702-045

Federal Correctional Complex (Low)

Forrest City, Arkansas 72336-9000

QUESTIONS PRESENTED

- 1. SHOULD THIS COURT GRANT THE WRIT WHERE THE LOWER COURT ERRED IN VIOLATION OF THE EIGHTH AMENDMENT IN DENYING COMPASSIONATE RELEASE WHEN THE LOWER COURT DID NOT CONSIDER PETITIONER'S NUMEROUS HEALTH CONDITIONS WHEN CONSIDERING HIS MOTION?**
- 2. SHOULD THIS COURT GRANT THE WRIT WHERE THE LOWER COURT ERRED AND COMMIT FURTHER MISCONDUCT BY NOT RECUSING ITSELF FROM PETITIONER'S SECOND COMPASSIONATE RELEASE MOTION?**
- 3. SHOULD THIS COURT GRANT THE WRIT WHERE THE EIGHTH CIRCUIT DENIED PETITIONER'S APPEAL UNDER LOCAL RULE 47A(a), WHERE IT IS THE ONLY CIRCUIT WAS SUCH A RULE?**

INTERESTED PARTIES

All parties appear in the caption of the case on the cover page.

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A – Eighth Circuit Judgment, Case No. 22-2920, dated September 14, 2022

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STATUTES AND RULES

18 U.S.C. Section 3142(g)(1)-(4)

18 U.S.C. Section 3553

18 U.S.C. Section 3582(c)

18 U.S.C. Section 4042(a)(2) and (a)(3)

28 U.S.C. Section 455(a)

28 U.S.C. Section 1254(1)

Title 28, CFR 542, subpart B

Eighth Circuit Local Rule 47A(a)

OTHER AUTHORITIES:

Eighth Amendment to the United States Constitution:

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

Note: The Cruel and Unusual Punishment section provides constitutional protection against grossly disproportionate punishment for capital sentences. In the case of non-capital sentences, gross disproportionate requirements are only available in “exceedingly rare” and “extreme cases,” as discussed in Lockyer v. Andrade, 538 U.S. 63 (2003). This section also provides constitutional protection against inhumane conditions of confinement, discussed in Whitley v. Albers, 475 U.S. 312 (1986).

STATEMENT OF THE CASE

Kenneth Ray Borders, hereinafter, (*Petitioner* / *Borders*), filed for his Compassionate Release Motion “CR” dating back to 2020. Since Borders filed for a CR he has been denied twice at the lower courts. Title 28, CFR 542, subpart B and Title 18, U.S.C. Section 4042(a)(2) and (a)(3) secured Borders rights to file for a CR/RIS Motion.

Pursuant to Title 18, U.S.C. Section 3582(c) Borders requested to be released from his place of incarceration to protect his health and his life. Borders vulnerability to developing serious illness due to his underlying conditions are of high risk for severe illness or death. Borders is over 50 years of age with hypertension, gout, chronic kidney disease, Type II diabetes, peripheral vascular disease, hyperlipidemia and additional heart conditions. These are extraordinary circumstances surrounding borders as life concerning Covid-19, its multiple variants and sub-variants.

OPINION BELOW

These are thoroughly provided in Borders' Appendices and Table of Authorities. The opinion of the Eighth Circuit Court of Appeals (Case No. 22- appears at Appendix A to this petition.

STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals (Case No. 22-2920) issued its opinion on September 14, 2022. A copy is attached at Appendix A. The Eighth Circuit Court of Appeals and Denied a Rehearing on October 17, 2022. A copy of the denial is attached at Appendix B. The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1) and part III of the rules of the Supreme Court of the United States.

REASONS FOR GRANTING THE PETITION

- 1. THE SUPREME COURT SHOULD GRANT THE WRIT WHERE THE LOWER COURT ERRED IN VIOLATION OF THE EIGHTH AMENDMENT IN DENYING COMPASSIONATE RELEASE WHEN THE LOWER COURT DID NOT CONSIDER PETITIONER'S NUMEROUS HEALTH CONDITIONS WHEN CONSIDERING HIS MOTION.**

- A. The Lower Courts has the Authority to Reduce Sentence Under CR/RIS:

The lower court in Borders' CR failed to exercise 18 U.S.C. 3582 justly.

The lower court should have reduced Borders' sentence. Borders stated numerous underlining health and medical conditions throughout his lower Court proceedings, where the lower court ignored Borders' complaints. These were extraordinary, compelling and overwhelming reasons to release Borders from prison. Borders age, declining conditions, family circumstances, home

plan, and other numerous reasons were the extraordinary and compelling reasons to release Borders. The lower court failed to use its wide latitude to release Borders to a clean, healthy, and safe environment from the disgusting sub-human conditions and further dangers of the Federal Bureau of Prisons located at Forrest City, Arkansas. In the case of non-capital sentences, gross disproportionate requirements are only available in “exceedingly rare” and “extreme cases,” as discussed in Lockyer v. Andrade, 538 U.S. 63 (2003). This section also provides constitutional protection against inhumane conditions of confinement, discussed in Whitley v. Albers, 475 U.S. 312 (1986).

B. Borders has Extraordinary and Compelling Reasons to Reduce His Sentence:

As Borders states within the Eighth Amendment Constitutional provisions involved he continues to suffer violations day-after-day he remains in prison due to the novel and dangerous Covid-19 virus. The CDC has considered all of Borders’ conditions to be at high risk of serious illness and even death. Borders has at least seven of those qualifying conditions. The lower court simply ignored these conditions and denied orders relief twice. The fact that Borders exceeds the age of 50 years puts him in great danger of death from Covid-19. See United States v. Alvarado, 2021 U.S. Dist. LEXIS 219089 (S.D. Cal); United States v. Brooks, 2020 U.S. Dist. LEXIS 85671

(C.D. Ill); United States v. Estrada-Elias, 2021 U.S. Dist. LEXIS 35023 (6th Cir.. Nov 24, 2021); United States v. Moe, 2021 U.S. Dist. LEXIS 218995 (D. NJ); United States v. Spencer, 2021 U.S. App. LEXIS 33436 (4th Cir. 2021); United States v. Tran, 2021 U.S. Dist. LEXIS 218083 (W.D. Wash), and United States v. Wessels, 2021 U.S. Dist. LEXIS 226691 (D. Minn).

C. Borders Lives in an Unsafe Environment at FCC Forrest City Low:

The FCC Forrest City prison is a hot bed for Covid-19. The virus is highly contagious and symptoms spread rapidly in an open bay environment which makes it difficult to stop or reduce transmission within the FCC Forrest City facility. Studies have proven time and time again that the Covid-19 rate is around 5.5 percent higher than the US general population. The death rate is around three times higher than the general population.

The Forrest City prison facility has serious concerns ranging from corrupt staff that refuse to wear masks and follow the rules. Forrest City is known for empty soap dispensers, broken and non-working urinals, mold and mildew, inmates sleeping over each other, unreliable hot water issues, trash

thrown everywhere, guards sleeping on duty, guards bringing in contraband, such as drugs, cell phones and through flying drones, etc. This activity alone undermines confidence that Borders is receiving proper social distancing, mask, safe sleeping quarters, proper medical treatment, and proper care, custody and control of his own life.

The Forrest City prison is not a safe environment for Borders from Covid-19. Staff members have proven to be the greatest spreaders of Covid-19 because they enter and leave the facility every day of the week. The CDC has found that the prevalence of Covid-19 is three times higher in dormitory style prisons like Forrest City.

D. 18 U.S.C. 3553 Supports a Time Served Sentence:

Borders is a non-violent offender and his house at a low security prison. Releasing Borders will not pose any risk to public safety. Borders' recidivism rate is substantially low being over 50 years of age.

Borders is in fear of dying from Covid-19. This warrants a deterrence. Borders has spent a decade incarcerated, and his sentence could be his death sentence. Borders has respect for the law and is deterred from committing any further misconduct or crimes. Borders has already established an adequate

release plan with his wife and children at their family home in Kansas City, Missouri. Borders is not a danger to the community under 18 U.S.C. Section 3142(g)(1)-(4).

E. *Pepper v. United States*:

Pursuant to *Pepper v. United States*, 562 U.S. 476 490-493 (2011) the lower court failed to consider the most up-to-date picture of Borders' history and characteristics which sheds light that Borders would not engage in further criminal conduct. The lower court failed to apply this as the *Pepper* court states. The lower court did not consider any post – sentencing developments and rehabilitations of Borders. *See also, United States v. Brooks*, Case No. 07-cr-20047-JES-DGB (C.D. Ill. May 15, 2020) As the “just punishment” does not want a cruel and unusual punishment or one that includes being placed in a prison or facility with a life-threatening virus like Covid-19.

2. THE SUPREME COURT SHOULD GRANT THE WRIT WHERE THE LOWER COURT ERRED AND COMMIT FURTHER MISCONDUCT BY NOT RECUSING ITSELF FROM PETITIONER'S SECOND COMPASSIONATE RELEASE MOTION.

On July 27, 2022, Borders filed a Second Motion for Compassionate Release with the Clerk of the Court where Borders specifically requested that Judge Kays recuse himself from the matter due to several past issues of prejudice and bias against Borders. (D.C.D.E.'s 544, 545, 548, 548-2, & 549).

28 U.S. Code § 455 – Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

On September 1, 2022, Judge Kays, for a second time, denied Borders a Compassionate Release without any reasonable justification given Borders overwhelming evidence of serious medical conditions and high risk of death. The order primarily states that Borders would be a “danger” to the community but Judge Kays gives absolutely no reasons whatsoever to justify why Borders would specifically remain a danger to the community given Borders’ serious declining health conditions while he is incarcerated in a federal prison (FCC Forrest City) that is plagued by inadequate medical care, overcrowding, staff shortages, unsanitary conditions, violence, corruption, staff misconduct, mental abuse, and physical abuse. Moreover, Borders has overwhelming family support in order to be released into the community. (D.E.’s 545 & 549).

Borders sought-after the recusal of Judge Kays due to previous misconduct by Judge Kays involving Borders’ jury selection and later his criminal trial. In February of 2014, during the jury selection process, Judge

Kays actually stated he was going to cut Borders' trial time in half due to Judge Kays's upcoming son's college graduation. The attorneys during this process actually laughed in the courtroom concerning this statement and blatant misconduct committed by Judge Kays. Judge Kays obviously found it more important that he attend his son's graduation diminishing Borders' upcoming trial by stating in open court of reducing the trial time in half. Borders felt embarrassed, at a loss, humiliated, and further as a laughing stock in front of his lawyer and the others in the courtroom because of Judge Kays's misconduct concerning this.

Borders further tried to have his attorney Alex Scott McCauley withdrawal from his criminal case due to a conflict of interest over ongoing discovery issues. Judge Kays flat out refused to allow Mr. McCauley to withdrawal from the criminal matter when there was a serious conflict of interest between both Borders and Mr. McCauley, (which had obviously ruined the attorney-client relationship in its entirety).

Borders' former appellate counsel, Clayton Gillette, actually stated that he felt that Borders was going to "*win his appeal*" and "*be going home*" due to the "*misuse of the jury instructions.*" After this was stated by Mr. Gillette,

and the affirmation by the Eighth Circuit, Borders later had hired an attorney out of Florida, a Robert Malove, that further assisted Borders concerning this matter on a COA and Writ of Certiorari. Upon the denial of a COA, Mr. Malove actually stated to him that Borders had suffered a “*serious miscarriage of justice*” by Judge Kays concerning the previous handing of his criminal case. Mr. Malove further stated that an “*interlocutory appeal should have been filed*” by Attorney Alex McCauley resulting from Borders’ previous criminal case of the misconduct that took place during Borders’ trial concerning the perjury of a government witness, ongoing government misconduct, and further judicial misconduct surrounding Judge Kays because of this.

Due to the past judicial and professional misconduct of Judge Kays resulting from Borders previous criminal proceedings and his trial, Borders cautiously and respectfully requested that Judge Kays recuse himself from his Second Compassionate Release Motion and that the case be assigned to a different Judge. To make matters even worse Judge Kays completely ignored his request for recusal and ruled biasedly against Borders around one day after Borders filed his reply without further addressing the recusal issue whatsoever. (D.E. ##548 & 549). On September 15, 2022, the Eighth Circuit Court of Appeals, No. 22-2920, affirmed Judge Kays’s order in that matter.

Any adverse adjudication against Borders from a decision rendered by Judge Kays is biased, destructive, devastating, and prejudicial towards Borders. The adverse ruling against Borders has resulted and undergone scrutiny due to Judge Kays ignoring the request of recusal, as previously requested in Borders' previous Second Compassionate Release motion. Judge Kays is well-connected within the surrounding Kansas City community by his position that requires political decisions, interactions, and favors with members of the community. This includes federal prosecutors and various attorneys within the Western District of Missouri and surrounding areas.

Borders was harmed and prejudiced as a result where his Second Compassionate Release Motion was dismissed by Judge Kays on September 1, 2022. (D.E. 549). Judge Kays failed his duty and obligation to maintain public confidence in the integrity and impartiality of the judiciary while conducting Borders' Second Compassionate Release Motion that was against Borders and in favor of the Government. That Judge Kays further failed to recuse or disqualify himself under 28 U.S.C. Section 455 from the Second Compassionate Release Motion, and further allowed himself to continue to adjudicate Borders' case. That Judge Kays, as a result, has violated Legal Ethics, Judicial Conduct Standards, and Judicial Canons by not recusing himself from Borders's Second Compassionate Release Motion. This reflects

adversely on Judge Kays's impartiality and official duties as a United States District Court Judge who sworn an oath thereof. That Judge Kays's lack of impartiality reflects adversely of inappropriate conduct, prejudice, and bias against Borders as a result. That Judge Kays's Order, and Judgment rendered in Borders' Second Compassionate Release Motion reflects bias and impartiality against Borders. That Judge Kays has been subject to various complaints regarding impartiality and inappropriate conduct as a Federal Judge over various judicial rulings during his judicial tenure by litigants and/or Defendants. A sitting United States Judge intentionally skewed vital trial time and testimony after discussing that he would cut the trial time in half so that he (Judge Kays) could attend his son's graduation. This, without any doubt, was biased and prejudicial towards Borders by Judge Kays in violation of Borders' Constitutional right to a fair and impartial trial.

Judge Kays has engaged in a pattern of misconduct which has caused a culture of constitutional vacancy in the life of Borders, and even others, resulting in utter travesty and lawlessness. The misconduct displayed by Judge Kays has involved or led to witness tampering, jury tampering, blocking access to certain legal information and evidence, electronic eavesdropping, intimidation, humiliation, embarrassment, refusal to honor or comply with laws, intimidation to neutralize innocent parties involved, suborning perjury,

allowing direct perjury, withholding of evidence, holding kangaroo court proceedings, and further violations of attorney-client relationship and privileges. Borders has never been given a fair opportunity or chance in either his criminal proceedings or within his Compassionate Release Motions before Judge Kays due to the obvious bias and prejudice against Borders.

Borders actually addressed this very issue with his previous court appointed attorney, Ms. Carrie Allen in complete detail. Ms. Allen actually informed Borders that she and the Public Defender's Office was representing him due to the overwhelming merits based upon Borders' underlining medical conditions. Ms. Allen truly believed that Borders was a "*prime candidate*" for a Compassionate Release. During a discussion between Borders and Ms. Allen, Borders made it abundantly clear that he would need a new Judge based upon the overwhelming bias and prejudice he previously faced during pre-trial and during trial with Judge Kays. Ms. Allen believed Borders' Compassionate Release Motion was actually so strong, that remaining with Judge Kays would not be an issue, and therefore she did not request Judge Kays's recusal. Borders made it clear to Ms. Allen that he would suffer additional bias and prejudice by Judge Kays, no matter what, and that the Compassionate Release Motion would be denied without question because of this. Ms. Allen reassured Borders that his Compassionate Release Motion

“would more than likely be granted” based upon the merits and seriousness of Borders’ overall health conditions. Instead, as Borders previously complained, and as predicted, his Compassionate Release was quickly denied by Judge Kays.

As a result of the misconduct committed by Judge Kays, Borders has had his reputation destroyed, along with recent false charges brought against him by an official in the Bureau of Prisons while having his various Constitutional rights and protections removed further depriving Borders of those rights and protections due to Judge Kays unequivocal bias and prejudice against Borders.

3. THE SUPREME COURT SHOULD GRANT THE WRIT WHERE THE EIGHTH CIRCUIT DENIED PETITIONER’S APPEAL UNDER LOCAL RULE 47A(a), WHERE IT IS THE ONLY CIRCUIT WAS SUCH A RULE?

The Eighth Circuit is the only circuit that exercises this Local Rule 47A(a) out of all circuits in the United States. This specific rule is literally foreclosing Constitutional Due Process for litigants, such as Borders, on meritorious claims. At a minimum, the decision of the Eighth Circuit should be reversed and remanded for further proceedings in Borders’ cause. Contrary to the Eighth Circuit’s conclusion

by affirming the case, by using Local Rule 47A(a), there was no deficiency in Borders' Compassionate Release Motion that could justify a denial of an evidentiary hearing and the required recusal of Judge Kays under 28 U.S. Code § 455(a) – Disqualification of justice, judge, or magistrate judge as previously requested on the merits presented. See Jones v. Hendrix, Case No. 21-857 (S. Ct.)

CONCLUSION

WHEREFORE, this petition for a Writ of Certiorari should be granted.

EXECUTED on: *November 30, 2022*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kenneth R. Borders", written in a cursive style.

KENNETH RAY BORDERS, Petitioner, *pro se*

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