

Docket No. _____

SUPREME COURT OF THE UNITED STATES

ALFREDO GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. May a district court rely upon its own medical or scientific assumptions about the risks associated with a novel virus such as SARS-CoV-2 to conclude that a medically vulnerable, incarcerated person has not proven extraordinary and compelling circumstances meriting compassionate release?

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OPINION BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported as follows: *United States v. Gonzalez*, 68 F.4th 699 (1st Cir. 2023). It is reproduced in the Appendix at pp. 1 to 7. The District Court for the United States District of New Hampshire's Memorandum and Order denying, in part, and allowing in part, Alfredo Gonzalez's motion for compassionate release is not published. It is reproduced in the Appendix at pp. 50 to 59. The Amended Judgment of the United States District Court for the District of New Hampshire is not published. It is reproduced in the Appendix at pp. 107 to 113.

STATEMENT OF BASIS FOR JURISDICTION

On May 25, 2023, the United States Court of Appeals for the First Circuit entered the Judgment which Petitioner Alfredo Gonzalez seeks to be reviewed. (Appendix ("App.") 114). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS

I. 18 U.S.C. § 3582 is reproduced in the Appendix at pp. 163-166.

STATEMENT OF THE CASE

I. Procedural history

After a jury trial, Alfredo Gonzalez was convicted of one count of conspiracy to distribute and to possess with intent to distribute controlled substances in violation of 18 U.S.C. § 922(g)(1). (App. 51). The district court (Barbadoro, J.) sentenced Gonzalez to 240-months imprisonment followed by ten years of supervised release. (App. 51-52). After affirmance of Gonzalez's conviction and sentence, on January 19, 2021, Gonzalez filed his pro-se motion for a sentence reduction under the First Step Act and requested the appointment of CJA counsel. (App. 115-128). On February 26, 2021, he filed a counseled motion for compassionate release or alternatively, a sentencing reduction pursuant to 18 U.S.C. § 3582(c)(1)(A). (App. 129-150).

On March 25, 2021, the district court (Barbadoro, J.) held a motion hearing. (App. 8). On August 31, 2021, the court issued a memorandum and order denying the compassionate-release motion with respect to Gonzalez's claims concerning the COVID-19 pandemic and his medical conditions. (App. 50, n.1). However, the court allowed the motion with respect to Gonzalez's other claims. (App. 53-59). On November 22, 2021, after holding a resentencing hearing, the court (Barbadoro, J.) resentenced Gonzalez to 180-months imprisonment, followed by five years of supervised release. (App. 100-102). Gonzalez timely appealed the court's judgments. (App. 4). On May 25, 2023, the United States Court of Appeals for the First Circuit affirmed the judgment of the district court through a published opinion. (App. 1-7).

II. The compassionate release litigation and hearing

On December 26, 2020, amidst the ongoing COVID-19 pandemic, Gonzalez alerted the district court to his emergency. He was trapped in a facility, FCI Cumberland, that “recently had an outbreak of COVID-19 positive cases this month with over 214 inmates testing positive for the disease along with 14 staff members. As such, the prison is on lockdown[.]” (App. 115-116, 126). As he was in serious danger, he provided “two issues justifying immediate reduction in sentence: (1) Movant has numerous underlying medical conditions, according to the CDC, renders him extremely vulnerable to the COVID-19 virus which now permeates the prison of his confinement creating a deadly ordeal for Movant; and (2) the sentencing disparity between Movant and defendants with similar records who have been found guilty of similar conduct as Movant.” (App. 116). As to the former claim, he described his chronic conditions of obesity and diabetes “among other serious medical issues.” (App. 125). The court appointed him counsel who filed a motion for compassionate release or alternatively, a sentencing reduction pursuant to 18 U.S.C. § 3582(c)(1)(A). (App. 129-150).

Gonzalez argued that “while [he] has previously contracted COVID-19, his chronic medical conditions put him at high risk of serious illness or death should he contract COVID-19 again.” (App. 132). He highlighted his Type 2 diabetes and obesity (with a BMI of 38.7) both of which are conditions that place him at increased risk of severe illness from a COVID-19 infection as well as his hypertension which may increase risk for severe illness according to guidance from the Centers for

Disease Control and Prevention (CDC) which in turn relies upon an array of scientific studies. (App. 132-133). Also, according to at least one study at the time, Gonzalez's sleep apnea places him at increased risk for COVID-19. (App. 131, 133 n.9). "Sleep apnea—prevalent in older, obese, and minority individuals—increases risk for COVID-19 comorbidities and may contribute to poor outcomes by exacerbating or causing endothelial dysfunction, inflammation, oxidative stress, microaspiration, and lung injury." Cade et al., *Sleep Apnea and COVID-19 Mortality and Hospitalization*, American Journal of Respiratory and Critical Care Medicine Volume 202 Number 10 (Nov. 15, 2020).

By the time of his motion hearing on March 25, 2021, Gonzalez had been infected with COVID-19. (App. 131). By that time, multiple vaccines had also been approved for use against COVID-19; however, "the availability and distribution of these vaccines to BOP staff and inmates ha[d] not yet been finalized[.]" (App. 154). Faced with Gonzalez's dire circumstances, which the Government conceded were "extraordinary and compelling" pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)¹ (App. 151-155), the district court embarked on its own medical and scientific assessment regarding the risk of reinfection.

Let's turn to the medical issue very briefly. I think the medical issue is reasonably well set out and I'm more familiar with dealing with it.

¹ The Government's objection to his COVID-19 compassionate-release motion was based upon its contentions that Gonzalez posed a danger to the community pursuant to U.S.S.G. § 1B1.13 and 18 U.S.C. § 3142(g) and that the § 3553(a) factors "militate[d] against a sentence reduction." (App. 156-161).

I do have a couple of questions for defense counsel. This is the first case I've had with someone who has already had COVID presenting a medical argument for compassionate release based on vulnerability to COVID and the potential for serious complications or death because of preexisting conditions.

You make the assertion that there's enough of a risk of reinfection so that I should assume that there is some unspecified risk of reinfection and treat him just like he had never gotten COVID, but I'm not aware -- I am aware of reports of reinfections. They do occur. The reporting that I'm aware of is that they are rare.

There is evidence to suggest that the report of reinfection with particularly the Brazil variant and possibly the South African variant may be somewhat higher but that those are largely ant[ec]dotal reports, and that the best scientific evidence at this point suggests that the immunity conferred by developing COVID is robust and while not complete substantially reduces a risk of acquiring COVID when comparing two people; one of whom has had COVID and one who has not.

And so, you know, my take on the generally available information about reinfection is that reinfection does occur but it is very -- it is a rare event at least for the first six to nine months after you acquire the disease, and I don't see in your materials anything that causes me to form a different view about the risk of reinfection.

(App. 35-36).

Defense counsel pointed to Gonzalez's motion which relied upon two authorities, CDC guidance and an article from the *Journal of Nature*,² warning of reinfection risks especially for people who are continually exposed to the virus as it mutates and produces more variants. (App. 36, 135-136).

² CDC, *Duration of Isolation & Precautions for Adults* (updated Feb. 13, 2021), available at: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html> and Callaway, Ewen, *Fast-spreading COVID variant can elude immune responses*, *Nature* (Jan. 21, 2021), available at: <https://www.nature.com/articles/d41586-021-00121-z>

Other than a single Lancet article³, the court did not specify which scientific studies, articles or “generally available information” it was using to draw its contrary conclusions.

The bottom line -- my reading of that study is that it shows a very low risk of reinfection. Now, that was in a population in Denmark where it had not been demonstrated say that the Brazilian variant strain was prevalent. To the extent there were variants in Europe at that time, they were predominantly what people are referring to as the English variant, and neither the South African variant nor the Brazilian variant were common.

But that Lancet study -- again, it's an observational study, it's in only one country's population, but it suggests a very low rate of -- the immunity conferred by COVID appears to be robust. That's my take on it.

So I get the point. I will assume for purposes of analysis that reinfection is possible, but absent better evidence from you than you have provided to date, I'm going to assume that reinfection is relatively rare.

I think that that matters because there's inherent risk in everything. The risk of acquiring AIDS at a prison is probably greater than it is in the general population. There are many, many risks of death that are probably higher in a prison than they are in other places.

Simply because you have a risk that's increased by incarceration is not ordinarily sufficient to consider it a medical extraordinary circumstance.

And so the fact that your client has COVID -- has had COVID suggests to me that he's at lower risk than most other people in the prison of reacquiring COVID.

He does have conditions that present and cause him

³ Hansen, Christian, *Assessment of protection against reinfection with SARS-CoV-2 among 4 million PCR-tested individuals in Denmark in 2020: a population-level observational study*, The Lancet (March 17, 2021).

to be at risk of severe complications and/or death as a result if he doesn't reacquire COVID, but even in cases where it's reacquired it tends to be a milder form of the disease.

So my assessment is probably that he's at reduced risk compared to the rest of the population about acquiring COVID, but if he does reacquire it, he's at somewhat greater risk of severe complications or death.

(App. 37-38).

Although defense counsel stated he had a similar understanding with respect to the original SARS-CoV-2 strain, he reiterated that the CDC guidance and the *Nature* study "raise real concerns that those protective factors may not extend to the variant strains" and there "are grave concerns regarding whether he could be exposed to a variant." (App. 39). The court then inquired as to the status of COVID-19 cases at the facility (FCI Cumberland) where Gonzalez was incarcerated. Defense counsel emphasized that COVID-19 presents a "dynamic situation" at any prison, that FCI Cumberland "had a fairly widespread outbreak...in the late fall towards the holidays [when] the case numbers got pretty high" and that as of that date, according to the Federal Bureau of Prisons (BOP) website⁴, six inmates and three staff were currently infected with COVID-19. (App. 40). The prosecutor did not dispute defense counsel's report of this evidence or Gonzalez's previous report of the specific number of COVID-19 cases during the holiday

⁴ See *Interactive COVID-19 Dashboard*, Department of Justice Office of the Inspector General, available at:
<https://experience.arcgis.com/experience/ab22fb4c564e4f4b986e257c685190e8/>

outbreak. (See App. 8-49). The court then inquired about the BOP's vaccination distribution program and directed the prosecutor to "offer[] the vaccine to the defendant as early as possible to mitigate as much as possible the risk that he could reacquire COVID." (App. 41). It stated that "[a]s low as that risk [of reinfection] is, he does have conditions that would place him at greater risk and he is scheduled to serve a long sentence." (App. 41).

After defense counsel argued that the 18 U.S.C. § 3553(a) factors also favored compassionate release, the court responded:

...I mean, your position is outright release him so he doesn't have to serve anymore time in prison even though he's got more than a decade left on his sentence because – I mean, if I were to buy your first argument, I could knock five years off his sentence and just leave him in prison unless I also bought your second argument, in which case I would – I'm describing it as your second because we discussed it second here -- I would have to release him immediately and permanently. I can't yo-yo people back and forth out of prison, like furlough him for twelve months and then come back and serve the remainder. I have to cancel the whole sentence. The question is, is that really consistent with the sentencing guidelines?

(App. 44). The court thus remained skeptical that "releasing the defendant now in any world would be a just sentence apart from the fact that he might face a serious risk of death or a complication because of COVID." (App. 45).

The court eventually found that Gonzalez merited a sentence reduction on his other claims. "[B]ecause of the timing of his conviction and sentence, Gonzalez was subject to a 20-year mandatory minimum sentence that is disproportionately harsh when compared to the sentences given to other defendants. The proper remedy for this injustice is to hold a further hearing

to determine an appropriate new sentence." (App. 59). However, as it had already determined during the motion hearing, the court denied the compassionate release motion insofar as it related to his medical vulnerabilities to COVID-19:

Gonzalez alternatively contends that he is entitled to immediate release because he suffers from several medical conditions that leave him at increased risk of severe illness or death if he were to contract COVID-19. I am unpersuaded by this argument. The Bureau of Prisons has adopted mitigation measures that reduce the risk of transmission within prisons, and Gonzalez is eligible to receive a vaccine that will further reduce his risk of serious illness if he were to contract COVID-19. In any event, he committed a serious crime that warrants a lengthy prison sentence. Given the circumstances, I am not persuaded that Gonzalez's health status qualifies as an extraordinary and compelling circumstance that justifies his immediate release.

(App. 50, n.1).

During the motion hearing, the court previewed that if it were to reduce Gonzalez's sentence, the risks posed to him from COVID-19 would likely not feature into its rationale.

[T]here's no place on earth that I would think given this Defendant's criminal history and his crime of conviction that five years would be enough for him.

You know, I've sentenced thousands of drug dealing defendants to prison. He's very much in the category that would be serving over ten years for their term of imprisonment.

You can debate whether twenty years, but he definitely falls in the category of defendants who typically receive a sentence longer than ten years from me. So releasing him after five would be only justifiable in my view

because I conclude there's a very significant risk of death or serious complication because of a sufficiently high risk of acquiring COVID. Otherwise, the sentence would be unjustly lenient and inconsistent with the purposes of the sentencing statute.

(App. 45-46).

The court decided upon a 180-month sentence. (App. 100-101). In its rationale supporting this sentence, the court did not mention Gonzalez's age or his multiple medical conditions that place him at serious risk should he become reinfected with COVID-19. It referred to the COVID-19 pandemic as simply making his life "all the more difficult" in terms of his prison record. (App. 85).

III. The First Circuit's treatment of Gonzalez's claim that the district court clearly erred in adopting the role of expert to dismiss COVID-19 risks.

In his appeal to the First Circuit, Gonzalez argued that the district court clearly erred and abused its discretion in making its own scientific and/or medical assessments as to the risk and seriousness of any COVID-19 reinfection. (App. 4-5). Relying upon its prior decision, *United States v. Canales-Ramos*, 19 F.4th 561, 567 (1st Cir. 2021), the First Circuit determined that the district court had not clearly erred in how it appraised "a defendant's health status in the context of a compassionate release motion." (App. 4). It also "glean[ed] from this record that the court came to a defensible, if debatable, conclusion based on the as-yet-emergent body of evidence before it." (App. 4).

ARGUMENT

- I. This Court should take this case to restore the proper role of the judiciary which does not extend to scientific or medical expertise.**
 - A. A judge should not assume the role of expert especially when the issue pertains to a novel virus that has triggered a deadly global pandemic.**

The district court clearly erred by making its own “scientific” and epidemiological judgments about risks of COVID-19 reinfection to Gonzalez despite plain, contravening evidence. *See United States v. Camacho*, 661 F.3d 718, 723 (1st Cir. 2011) and (App. 132-136). Based upon its speculative assessments, the court found that Gonzalez presented no extraordinary and compelling circumstances despite his multiple medical conditions that placed him at increased risk of serious illness or death from COVID-19. It dismissed reinfection risks as “relatively rare” and assumed any reinfection would be milder. When the court did acknowledge the uncertainty about reinfection risks, it effectively put the brunt of that “unknown” upon a chronically ill man trapped in prison. In speculating that Gonzalez did not really face harm any longer from COVID-19, the court assumed the role of scientific expert with the power to dismiss CDC guidance. However, “[j]udges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences.” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984).

As defense counsel had briefed, on February 13, 2021, the CDC alerted the public about reinfection risks with the then-circulating variants:

The risk of reinfection may be increased in the future with exposure to SARS-CoV-2 variant virus strains that are not neutralized by immune antisera, such as one recently described in South Africa. The risk of reinfection also depends on the likelihood of re-exposure to infectious cases of COVID-19. Continued widespread transmission makes it more likely that reinfections will occur.

(App. 135)⁵. The leading science journal Nature also had published an article⁶ with similar findings that “[e]vidence is growing that some coronavirus variants could evade immune responses triggered by vaccines and previous infections.” (App. 135). From February to September 2020, “[t]he Federal Bureau of Prisons COVID-19 case rates and standard mortality ratio were approximately 5 and 2.5 times those in U.S. adults, respectively, consistent with those of prisons nationwide.” Toblin, Robin and Hagan, Liesl, *COVID-19 Case and Mortality Rates in the Federal Bureau of Prisons*, Am. J. Prev. Med. 2021;61(1):120-123, at p. 120 (July 2021).

Presumably, the CDC had the best insight into the current scientific information and understanding of this virus when it warned of the risks of reinfection especially in high exposure settings. Yet the court did not explain why it would not use the CDC as the reliable authority as to these risks. It rather supplanted its own assumptions for a fact-bound assessment. Given the unprecedented level of harm that COVID-19 has wrought, the court’s analysis should have been simple and direct. “To determine whether [a defendant] has

⁵ CDC, *Duration of Isolation & Precautions for Adults* (as updated Feb. 13, 2021), available at: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html>

⁶ Callaway, Ewen, *Fast-spreading COVID variant can elude immune responses*, Nature (Jan. 21, 2021), available at: <https://www.nature.com/articles/d41586-021-00121-z>

demonstrated a particularized susceptibility to COVID-19, the court should have only assessed whether his particular health conditions placed him at an increased risk of severe illness from COVID-19...And to determine whether a particular condition places a person at an increased risk of a severe COVID-19 illness, a court should...look to the CDC for guidance.” *United States v. Petway*, 2022 U.S. App. LEXIS 1537 at *8 (4th Cir. Jan. 19, 2022) (Unpub.) (per curiam) (vacating the sentence and remanding where the district court had deemed the defendant’s medical conditions not “rare” and thus not “extraordinary”). *See also United States v. Bethea*, 54 F.4th 826, 832 (4th Cir. 2022) (approvingly citing *Petway*).

It appears that, even in the face of a novel, deadly virus, the district court demanded near certainty that Gonzalez would both become infected again with COVID-19 and that any reinfection would send Gonzalez to death’s door. Towards the end of the motion hearing, it concluded that it would only release Gonzalez if it found he had a “very significant risk of death or serious complication because of a sufficiently high risk of acquiring COVID [.]” (App. 46). Of course, the CDC cannot predict which particular individual within a high-risk group will have a “very significant” as opposed to an “increased” risk from COVID-19. Some medically vulnerable people will have the good fortune of avoiding death and the hospital upon acquiring COVID-19. Others not. Whether Gonzalez ultimately received good or bad fortune from another SARS-CoV-2 infection was anyone’s guess and that should have brought no solace.

B. This Court should resolve the split between the First Circuit and the Seventh Circuit as well as the Massachusetts Supreme Judicial Court where the latter courts appropriately defer to CDC guidance and COVID-19's demonstrated harm.

Unlike the First Circuit, the Seventh Circuit and the Massachusetts Supreme Judicial Court take no comfort in acknowledging that the trajectory of a virus that has already killed and harmed many people is unknown. Rather than render speculative scientific or medical assessments in this fraught time, judges should hold fast to their legal and fact-finding role. The Seventh Circuit has likewise held that a district court abuses its discretion by failing to adequately weigh the defendant's medical conditions and engaging in a deeply flawed methodology.

[I]t appears likely that the district court drew medical conclusions about the ramifications of a future infection without any supporting medical evidence in the record. In other contexts, we have cautioned that '[c]ommon sense can mislead; lay intuitions about medical phenomena are often wrong.' Cf. *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990). We think that same prudence applies to compassionate release motions involving a novel virus. District courts must base factual conclusions on record evidence; they cannot render unsupported medical opinions.

United States v. Newton, 996 F.3d 485, 490 (7th Cir. 2021).

The First Circuit has taken a different tack when it reasoned in *Canales-Ramos* that the district court "made a reasonable risk assessment" when, based on the defendant's prior asymptomatic COVID-19 infection and the facility's monitoring of his condition, it found he had not presented extraordinary and compelling circumstances. *Canales-Ramos*, 19 F.4th at 567. It "was not persuaded" that Canales-Ramos could nevertheless become seriously ill upon reinfection. *Id.* The Seventh Circuit has the more persuasive rationale since district courts should

not be making rulings based upon nonexpert assumptions, particularly about how a novel, incredibly dangerous and mutating virus will behave in a particular individual. Before a court can confidently declare that a diabetic, obese, older man trapped in a congregate facility is no longer in extraordinary danger from this airborne virus, it needs substantial and reliable evidence to form that conclusion. As the Sixth Circuit Court of Appeals has also recognized in the context of weighing the 18 U.S.C. § 3553(a) factors in a compassionate release motion: “We must strike the proper balance under the abuse-of-discretion standard, which demands that we both accord due deference to district judges and correct their factual and legal errors.” *United States v. Jones*, 980 F.3d 1098, 1112 (6th Cir. 2020).

“Assessing the effect of comorbidities necessarily involves an estimation of probabilities, not certainties, and, in the case of a novel disease, we cannot expect more from the medical profession...We cannot demand certainty where there is no certainty.” *Newton*, 996 F.3d at 489. The court should have then deferred to the CDC’s findings that older people like Gonzalez with weakened immune systems and multiple chronic conditions have accumulated, increased risks upon a SARS-CoV-2 infection. A judge is in no better position than the CDC to scientifically assess the level of risk COVID-19 poses to certain groups of people.

The Massachusetts Supreme Judicial Court has also recognized that the state of uncertainty about COVID-19 cannot be used against the defendant seeking release. “We do not yet know whether a previous COVID-19 infection would provide the defendant with complete immunity or for how long. Although vaccinations have

proved to be highly effective at protecting vaccinated people against symptomatic and severe COVID-19, breakthrough infections can occur and have occurred.”

Commonwealth v. McDermott, 171 N.E.3d 1136, 1141 (Mass. 2021). “As long as the virus can continue to spread anywhere in the world, no one is safe from mutations that have the potential to render current vaccines and treatment regimens less effective or even ineffective.” Osterholm, Michael and Olshaker, Mark, *The Pandemic That Won’t End: COVID-19 Variants and the Peril of Vaccine Inequity*, Foreign Affairs (March 8, 2021). Dr. Osterholm’s warning is now fully realized. The rise of the Omicron subvariants and the reality of waning immunity have dashed our collective hopes that vaccination would provide the silver bullet against reinfection and/or that vaccination would fully protect even medically vulnerable people against severe illness, hospitalization or death from COVID-19. In light of these developments, the Seventh Circuit has directed its district courts to “consider[] the applicant’s individualized arguments and evidence” and not simply rely upon vaccination as the beginning and end of a prisoner’s compassionate-release claim. *United States v. Rucker*, 27 F.4th 560, 563 (7th Cir. 2022). Judges would be wise to adopt this precautionary approach, keeping its role appropriately limited only to what they know when determining whether a novel virus’s threat to the defendant constitutes extraordinary and compelling circumstances.

CONCLUSION

For all the foregoing reasons, Petitioner Alfredo Gonzalez respectfully requests that this Court GRANT the within petition and ISSUE a writ of certiorari to the United States Court of Appeals for the First Circuit.

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