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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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MUKADIN GORDON,
Petitioner/Plaintiff-Appellant,

vs.

JODIE F. MAESAKA-HIRATA; PETRA CHO; and STATE OF HAWAI'I,
Respondents/Defendants-Appellees.

SCWC-14-0000914

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-14-0000914; CIV. NO. 11-1-2482)

NOVEMBER 2, 2018

DISSENTING OPINION BY WILSON, J.

Petitioner/Plaintiff-Appellant Mukadin Gordon (Mr. Gordon) was arrested for fourteen felony offenses, and, prior to his trial, immediately placed in solitary confinement for nine months. There was ample evidence at the time of his pretrial incarceration that he would be a cooperative inmate because he

had previously been incarcerated for other offenses without incident. Nonetheless he was placed in the strictest form of detention, normally reserved for dangerous inmates or those with a history of disciplinary problems. After thirty days of solitary confinement, his behavior was reviewed and, again, he proved to be a model inmate. During the first thirty days of his solitary confinement he had no opportunities to engage in rehabilitative programs. Yet he complied with all requirements while he was housed alone in a cell in an environment emblematic of loneliness, depression, and suffering. He was compliant and obedient to the rules. Nonetheless, his unblemished history of complying with prior incarcerations and thirty days of solitary confinement did not, in the opinion of prison officials, entitle him to a lesser degree of confinement. Instead he was put back in solitary confinement for eight more months. The group of prison officials who consigned Mr. Gordon to solitary confinement did not do so based on the nature of his charges. They did not know the factual basis for his charges, nor did they endeavor to explain how his charges could indicate a threat to institutional order and security. The purported reasons given for his relegation to solitary confinement were his failure to complete court ordered drug treatment programs, his unpermitted relocation outside the court jurisdiction while he was on probation, and, inexplicably, the amount of bail set for

the crimes for which he was arrested. No justification cited by the correctional officials was reasonably related to the security and order of the Oahu Community Correctional Center where he was incarcerated. His jailors identified no "legitimate goal" served by his placement in solitary confinement. Thus, their action was an "arbitrary and purposeless" imposition of punishment, in violation of Mr. Gordon's due process right under the Fourteenth Amendment to the United States Constitution to be free from punishment until convicted of a crime. Bell v. Wolfish, 441 U.S. 520, 538-39 (1979).

To recover pursuant to Title 42, Section 1983 of the United States Code (U.S.C.) for violation of his constitutional right to be free from punishment without trial or conviction, Mr. Gordon must establish that "at the time of the challenged conduct . . . every 'reasonable official would have understood that what [they were] doing violates that right.'" Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). It is self-evident that the decision made to place Mr. Gordon in solitary confinement constituted a wholly arbitrary one, devoid of any reasonable explanation and, thus, would not qualify as a decision reasonably made by a correctional official empowered to place men and women in solitary confinement. The reasons given for

his punishment were not related to institutional security. Instead, he was punished for being arrested, having high bail set for his charges, and not complying with probation in previous cases. Either animus toward Mr. Gordon or sheer incompetence are the inescapable conclusions available to explain his punishment. Neither conclusion would be that of any reasonable correctional official in Respondents' position.

Ample authority establishes that the placement of Mr. Gordon in solitary confinement prior to conviction was without a justification reasonably related to a legitimate correctional goal. The United States Supreme Court provided seminal authority for the proposition approximately forty years ago when it held,

Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Bell, 441 U.S. at 538-39 (citations and footnotes omitted).

Pursuant to the standard established in Bell, any reasonable correctional officer employed in 2010 would be aware it is necessary to provide a justification reasonably related to

a legitimate government objective in order to place a pretrial detainee in solitary confinement. The case law (prior to Mr. Gordon's arrest on August 22, 2010) affirms the standard clearly established in Bell. As an example, the policy of placing pretrial detainees in administrative detention without evidence to support prison officials' security concerns was deemed to be without a legitimate government purpose over twenty years ago. In United States v. Gotti, the United States District Court for the Eastern District of New York stated:

The essence of the issue before me is whether it is enough to justify placing a pretrial detainee in administrative detention for a stated reason without providing any basis for the reason. The cases are legion which caution that courts must give due deference to the expertise of corrections officials in operating their institutions in a manageable fashion. But surely due deference does not mean blind deference. If it were otherwise, then any statement of reason offered by a correction official, whether well-founded or not, would justify the imposition of any condition or restriction of confinement and leave the detainee completely vulnerable to arbitrary governmental action. "Prison authorities are not afforded unbridled discretion" because the detainee is either notorious or newsworthy or both.

United States v. Gotti, 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991) (quoting Boudin v. Thomas, 533 F. Supp. 786, 791 (S.D.N.Y. 1982)). Approximately ten years before Mr. Gordon was placed in solitary confinement for non-death penalty charges, the automatic placement in administrative segregation of defendants charged with an offense punishable by death was found to be unconstitutional punishment. United States v. Lopez, 327 F. Supp. 2d 138, 142-43 (D.P.R. 2004). Thus, the employment of the

Bell standard in Gotti and Lopez both serve as notice to correctional officials that pretrial inmates cannot be placed in solitary confinement based on criteria unrelated to correctional security, including the seriousness of a pending charge. Mr. Gordon was neither a notorious criminal nor one charged with an offense punishable by death.¹ He had established a history of good conduct during prior incarceration—and during the one-month review of his solitary confinement. Any reasonable correctional official was on notice by the time of Mr. Gordon's 2010 arrest that, based on his charges and his performance on probation in prior cases, his imprisonment in solitary confinement for nine months would be unconstitutional punishment.² Mr. Gordon proved,

¹ The majority seeks to distinguish Lopez and Gotti by noting that additional reasons were given for Mr. Gordon's placement in solitary confinement. Namely, the large bail amount for his charges and his performance on bail. Respectfully, the additional reasons given only compound the arbitrariness of the decision to keep him in solitary confinement because they are so patently unrelated to security concerns at the Oahu Community Correctional Center as to suggest decision-making based on incompetence or animus. Mr. Gordon's previous history of proven compliance while incarcerated for prior offenses and his month in solitary confinement are facts rendering his punishment less reasonable than the punishment found unreasonable in Gotti and Lopez.

² The circuit court incorrectly applied "knowingly" as the legal standard applicable to determine whether Respondent/Defendant-Appellee Petra Cho ("Cho") is immune from her violation of Mr. Gordon's constitutional right to be free from punishment without trial. The majority acknowledges the error, and reaches the conclusion that, under the correct standard, it was reasonable for a correctional official to commit such a violation:

Upon a careful review, with respect to the first prong of the qualified immunity inquiry, we have concluded for the reasons stated in Part IV, Section A, subsections 2 and 3 above, that Cho's conduct violated Gordon's Fourteenth Amendment due process right to be free from pretrial punishment. With respect to the second prong of

(continued . . .)

pursuant to 42 U.S.C. § 1983, that Respondent Cho violated his right under the Fourteenth Amendment to the United States Constitution to be free from punishment before trial.

Accordingly, based on the instant record, I would vacate the ICA's judgment and remand to the circuit court for a trial by jury to determine Mr. Gordon's lawful damages.

/s/ Michael D. Wilson



(. . . continued)

the inquiry, however, we conclude that Cho was entitled to qualified immunity because Gordon's rights were not sufficiently clear at the time Cho acted in 2010 so that every reasonable official in Cho's position would have understood that Gordon's constitutional rights were being violated.

Majority Opinion at 40-41.