

In the case at hand, the Ninth Circuit found no logical reason not to extend *Castro's* objective indifference standard to medical claims because 42 U.S.C. § 1983 contains no state-of-mind requirement independent of what is necessary to state a violation of the underlying federal right. The Ninth Circuit noted that *Kingsley* was broadly worded such that its holding was not limited to force but applied to the “challenged governmental action” generally. Furthermore, the U.S. Supreme Court had a history of treating “medical care claims substantially the same as other conditions of confinement violations” (*Gordon*, p 1124). Similarly, the Ninth Circuit had long analyzed claims of failure to address pretrial detainees’ medical needs under the same standard as alleged failure-to-protect cases for pretrial detainees. Therefore, a medical care claim against an individual defendant brought under the Due Process Clause of the Fourteenth Amendment must be evaluated under an objective deliberate indifference standard.

The requisite elements of the claim are as follows: First, the defendant made an intentional decision regarding the conditions in which the plaintiff was confined. Second, those conditions put the plaintiff at substantial risk of serious harm. Third, the defendant did not take reasonable measures that were available to address that risk, even though a reasonable individual in said circumstances would have appreciated the high level of risk involved. This conduct must be objectively unreasonable. Finally, due to not taking such measures, the defendant caused the plaintiff’s injuries.

Discussion

In general, a prison official can only be found liable under the Eighth Amendment for denying a prisoner humane conditions of confinement if the official knew of and disregarded (i.e., was subjectively aware of) an excessive risk to the prisoner’s health and safety. In contrast, the Ninth Circuit’s ruling in *Gordon v. County of Orange* allows a case to proceed under 42 U.S.C. §1983 for failure to provide adequate medical care under the Fourteenth Amendment Due Process clause upon showing that “a reasonable official in the circumstances would have appreciated the high degree of risk” (*Gordon*, p13), (i.e., the conduct was objectively unreasonable). Under *Gordon*, the claimant must “prove more than negligence but less than subjective intent—something akin to reckless disregard” (*Gordon*, p 1125).

The *Gordon* ruling may make it easier for pretrial detainees to succeed on 42 U.S.C. § 1983 claims of failure to provide adequate medical care because they will not have the burden of proving the subjective state of mind of the defendant.

The ruling in *Gordon* relied heavily on the U.S. Supreme Court decision in *Kingsley*. It is worth noting that the dissenting opinion in *Kingsley*, written by Justice Scalia, raised concern that the majority opinion served to “tortify” the Fourteenth Amendment. He referenced the immense body of state and statutory law under which abused individuals can seek relief, rather than via a constitutional claim. In terms of implications for psychiatry, considering this ruling under the lens of Scalia’s *Kingsley* dissent raises concern for increased frequency of successful 42 U.S.C. § 1983 claims against correctional psychiatrists for failure to provide adequate medical care.

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Sex Reassignment Surgery for Inmates with Gender Dysphoria

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Refusal of Sex Reassignment Surgery for Inmates with Gender Dysphoria Does Not Constitute Deliberate Indifference

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In *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), the Fifth Circuit Court of Appeals affirmed the district court’s decision to grant summary judgment for the director of the Texas Department of Criminal Justice, Bryan Collier, who had refused sex reassignment surgery (SRS) for Scott Gibson (also known as Vanessa Lynn Gibson), who was a transgender prison inmate. The Fifth Circuit considered the opposing views about SRS in the medical community and concluded that refusal of SRS did not constitute deliberate indifference.

Facts of the Case

Mr. Gibson was a transgender prison inmate in Gatesville, Texas. (The court referred to Mr. Gibson in the male gender.) He was originally convicted of two counts of aggravated robbery. While in prison, he was convicted of subsequent offenses, which included aggravated assault, possession of a deadly weapon, and murder. He was sentenced to serve through 2031 with parole eligibility in 2021. Mr. Gibson was born male but had been diagnosed with gender dysphoria, and he lived as female since the age of fifteen.

Mr. Gibson reported depression and attempted to castrate and harm himself. He had also attempted suicide on three occasions, but he said that his gender dysphoria was not the sole cause of his suicide attempts. The prison started mental health counseling and hormone therapy for Mr. Gibson's gender dysphoria. He repeatedly requested SRS, explaining that counseling and hormone therapy did not fully ameliorate his gender dysphoria. If he did not receive SRS, Mr. Gibson intended to castrate himself or commit suicide.

Texas Department of Criminal Justice (TDJC) Policy G-51.11 provided that transgender inmates must be "evaluated by appropriate medical and mental health professionals and [have their] treatment determined on a case by case basis" (*Gibson*, p 217). It was unclear if the policy forbade SRS or was silent about SRS. Mr. Gibson's requests for SRS were denied because SRS was not part of the treatment protocol for gender dysphoria.

Mr. Gibson proceeded *pro se* and sued the director of TDJC, Mr. Collier, challenging TDJC Policy G-51.11 in district court. Mr. Gibson asserted that the policy was unconstitutional under the Eighth Amendment, and he believed the policy amounted to systematic deliberate indifference to his medical needs because the policy prevented TDJC from considering whether SRS was medically necessary. Mr. Gibson requested injunctive relief and wanted an evaluation for SRS.

Mr. Collier moved for summary judgment on the grounds of both qualified immunity and sovereign immunity. Mr. Gibson argued that the policy prohibited potentially necessary medical care, and he attached the Standards of Care issued by the World Professional Association for Transgender Health (WPATH). These WPATH standards stated that

SRS may be essential and medically necessary for many transgender people with gender dysphoria.

The district court rejected Mr. Collier's two immunity defense claims, but granted summary judgment to the defense based on Mr. Gibson's Eighth Amendment claim. Mr. Gibson appealed *pro se*, and the Fifth Circuit appointed counsel to advocate on Mr. Gibson's behalf. With assistance of counsel, Mr. Gibson did not protest any procedural problems, but asked for a reversal based on his Eighth Amendment claim and a remand for further proceedings.

Ruling and Reasoning

The Fifth Circuit affirmed the summary judgment ruling of the district court because there was no evidence of deliberate indifference by TDCJ. The Fifth Circuit supported the ruling by stating that there was no dispute of the material facts as related to the Eighth Amendment claim and held that a state does not inflict cruel and unusual punishment by declining to provide SRS to an inmate with gender dysphoria.

The Eighth Amendment forbids cruel and unusual punishment, and the U.S Supreme Court has included the prohibition of deliberate indifference to serious medical needs of prisoners within the Eighth Amendment under *Estelle v. Gamble*, 429 U.S. 97 (1976). To establish deliberate indifference, one must demonstrate a serious medical need and that the respondent acted with conscious disregard to medically necessary care. The Fifth Circuit gave examples of malicious intent, which included refusing treatment, ignoring complaints, intentionally providing incorrect treatment, or any other conduct that clearly demonstrated a wanton disregard for a serious medical need. Texas did not contest that Mr. Gibson had a serious medical need but contested that TDJC was deliberately indifferent to his medical needs.

The Fifth Circuit also stated that intentional or wanton deprivation of medical care cannot exist if there were differing opinions among respected members of the medical community about the necessity or efficacy of SRS. The Fifth Circuit supported this argument by referring to a First Circuit case also involving SRS, *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014). In *Kosilek*, the First Circuit relied on expert testimony by multiple professionals who expressed concern about the lack of medical consensus about the necessity and efficacy of SRS. They noted that the WPATH stance presented by Mr. Gibson

was part of a contested debate and did not reflect universal consensus.

Finally, the Fifth Circuit emphasized the “and” in the Eighth Amendment prohibition of cruel and unusual punishment. Both arms must be met to violate the Eighth Amendment. A policy cannot be unusual if it is widely practiced in prisons across the country.

Dissent

The dissenting opinion, authored by Justice Barksdale, was based on two main arguments: the unfair procedure employed by the district court and the lack of consideration of Mr. Gibson’s individual medical needs. Regarding the procedural unfairness, the district court improperly addressed the merits of the Eighth Amendment, which was beyond the claim addressed in the summary judgment, which referred to qualified immunity. The district court also incorrectly placed the burden of production on Mr. Gibson, as opposed to Mr. Collier, who moved for summary judgment. Justice Barksdale noted that the summary judgment ruling prevented evidence about the medical community’s current opinion about the necessity of SRS.

Justice Barksdale noted that the Eighth Amendment requires individualized assessments to determine the medical necessity of a particular treatment in the specific case. Mr. Gibson did not receive an assessment for SRS, despite an order by a TDCJ doctor, and his individual medical needs were unknown. In *Kosilek*, the holding was based on Mr. Kosilek’s specific circumstance, but Mr. Gibson was denied a determination about the personal necessity of SRS. If not based on medical judgment, refusing to evaluate Mr. Gibson for SRS or deciding to deny SRS could equate to deliberate indifference. The dissent stated that the focus should be on the efficacy of SRS for a particular prisoner, rather than questioning if there was varying medical opinion. Consequently, Mr. Gibson should be allowed to have a medical evaluation to determine if SRS is medically necessary for him.

Discussion

In this case, the Fifth Circuit found that the TDJC did not act with deliberate indifference when they declined a transgender inmate SRS, which was not considered to be medically necessary for the treatment of gender dysphoria.

There is a growing lineage of landmark cases in this arena. As mentioned, in *Estelle*, the U.S. Supreme Court ruled that deliberate indifference to an

inmate’s serious medical needs violates the Eighth Amendment. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the U.S. Supreme Court rejected an objective rule for deliberate indifference, rather finding that subjective knowledge and deliberately failing to act on that knowledge is required to violate the Eighth Amendment. According to Simopoulos and Khin Khin, correctional facilities have not been required historically to approve surgical procedures for inmates with gender dysphoria, or even to provide hormone treatment for inmates who have not received hormone treatment prior to incarceration (Simopoulos EF, Khin Khin E: Fundamental principles inherent in the comprehensive care of transgender inmates. *J Am Acad Psychiatry Law* 42:26–36, 2014). For example, in *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987), the Seventh Circuit ruled that that a transgender inmate is constitutionally entitled to treatment but does not have a right to any particular type of treatment.

Gibson v. Collier highlights the unique challenges and opposing views in the treatment of gender dysphoria. The research in gender dysphoria treatment is in the infancy stage, and the efficacy of treatments, such as SRS, is yet to be determined. With increasing advocacy for transgender individuals, more questions are likely to be raised about the treatment of transgender inmates. As more research is completed in the area of gender dysphoria treatment, evidence-based treatment protocols will likely be developed to better address the approach to the medical needs of inmates with gender dysphoria.

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Access to Treatment Records in Proceedings for Evaluation and Potential Commitment of Sexually Violent Predators

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