


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-38570

**TOBBY ANDERSON; BRYN ARNOLD;
ANITA CARRILLO; AMANDA ELLER;
SEAN GODKIN; PAMELA
HOFFSCHNEIDER; HEIDI
MACHACEK; EDUARDO TRISTE; NEW
MEXICO CRIMINAL DEFENSE
LAWYERS ASSOCIATION; and
AMERICAN CIVIL LIBERTIES UNION
OF NEW MEXICO,**

Plaintiffs-Appellants,

v.

**STATE OF NEW MEXICO; MICHELLE
LUJAN GRISHAM, Governor, STATE
OF NEW MEXICO; ALISHA TAFOYA
LUCERO, Secretary, New Mexico
Corrections Department; and
MELANIE MARTINEZ, Director, New
Mexico Probation and Parole,**

Defendants-Appellees.

Original Appeal from the Santa Fe County, First Judicial District Court,
Honorable Judge Matthew Wilson, Presiding

**PETITIONER'S REPLY TO GOVERNOR MICHELLE LUJAN
GRISHAM'S
ANSWER BRIEF**

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The only issue addressed by the district court, certified by the court of appeals, and accepted by this Court is whether the district court erred by dismissing Appellants’ amended complaint for failure to exhaust administrative remedies. In her Answer Brief, the Governor attempts to argue an issue that is not properly before this Court—specifically, whether the Appellants’ habeas corpus and declaratory judgment action on behalf of incarcerated individuals in the Governor’s custody is barred by separation of powers principles. The Governor’s argument is beyond the scope of the issues certified for appeal and relies on a gross mischaracterization of Appellants’ lawsuit.

I. The Governor’s attempt to re-characterize appellants’ lawsuit as an action solely based on her refusal to exercise her clemency powers is untrue and is a matter not properly before this Court.

Appellants’ amended complaint below alleged eight counts seeking injunctive and declaratory relief for violations of state constitutional rights, none of which hinged on the exercise of the Governor’s clemency power. [**1 RP 59-116**]. In Appellants’ ten-page prayer for relief, nowhere do they request the court require the Governor to exercise her clemency power. [**1 RP 105-115**] To be sure, the prayer asks the court to declare that appellees “must reduce the number of incarcerated individuals in ...[the] facilities to safeguard the health and safety” of Appellants. [**1 RP 104**] And some of the requests for relief ask to release certain classes of inmates as a remedy for certain constitutional

violations. [**1 RP 108-111**] However, there is no fair or reasonable interpretation that this has anything to do with the Governor's clemency power. Simply because the Governor has the power of clemency to release inmates and because she is named in this suit, does not mean the suit has anything to do with clemency.

The issue raised in the Governor's brief is nothing more than a red herring. And while it was raised in the district court below, the district court never had the opportunity to rule on it in the first instance as it dismissed the suit on exhaustion grounds before reaching any other issue. This Court should simply address the exhaustion issue, which was the only issue certified by the court of appeals and accepted by this Court.

The Governor was named in the suit because as the chief executive in the state, she can be ordered to remedy unconstitutional violations in the state prison system. All eight counts in the Amended Complaint sought relief based on violations of state constitutional rights including two counts for cruel and unusual punishment [**1 RP 97, 102**], two counts of denial of substantive due process [**1 RP 98, 103**], two counts of denial of procedural due process [**1 RP 99, 104**], and two counts of denial of freedom of speech. [**1 RP 101, 105**]. If proven at trial, whether release of inmates is an appropriate and legal remedy for some or all of these violations is an issue that should be addressed first in

the trial court. However, assuming release is ordered as a partial remedy, it would not be an order to the Governor to exercise clemency power. That is simply nonsensical. The order would be to remedy unconstitutional violations of conditions of confinement, including unnecessarily placing inmates at risk of contracting a deadly disease in congregate housing where they cannot socially distance or take measures to protect themselves.

The Governor's executive order releasing some inmates is referenced in the suit, but only to allege that the New Mexico Corrections Department ("NMCD") is not adequately implementing the order and that this action is insufficient to remedy the unconstitutional violations occurring in the prison. [1 RP 88-89] This does not mean that the lawsuit has anything to do with the Governor's exercise of clemency power. By the same token, this Court's Order No. 20-8500-012—providing that the deadline for filing a motion to reduce a sentence under Rule 5-801(A) NMRA may be waived by a trial court upon a showing of an extraordinary change in circumstances caused by the pandemic—is referenced in the Amended Complaint to demonstrate that it is an insufficient remedy for the ongoing constitutional violations. [1 RP 90] That does not mean Appellants are seeking some type of order to this Court to exercise its authority to change the rules of procedure. The Governor's attempts to recast this suit as

something it is not should be rejected for what it is—nothing more than a poor attempt at tearing down the flimsiest of straw men.

Accordingly, even if this Court chooses to address this issue, the Court can simply reject the Governor’s argument because Appellants are not seeking to have the Governor use her clemency power as a remedy in this suit and are not alleging that the failure of the Governor to use clemency is unconstitutional.

II. The judiciary’s exercise of jurisdiction over this habeas corpus action does not infringe on the Governor’s exercise of her clemency powers, and therefore the Court should deny the Governor’s request for affirmation of the dismissal on this basis.

Appellants do not seek a writ of mandamus ordering the Governor to exercise her discretionary powers in some particular manner. Rather, Plaintiffs seek a writ of habeas corpus ordering the Governor to remediate her violations of the constitutional rights of incarcerated individuals.¹ In the face of 28 deaths

¹ In this sense, the current case is distinguishable from *New Mexico Law Offices of the Public Defender v. State of New Mexico* (“LOPD”), No. S-1-SC-38252 (N.M. Sup. Ct. April 14, 2020), which involved a request for writ of mandamus against the Governor. Notably, in response to that petition, the Governor similarly asserted that the Court should dismiss the petition on the basis of separation of powers. *See* Governor’s Response to Emergency Petition for Writ of Mandamus and/or Habeas Relief, at 17-19, *LOPD*, No. S-1-SC-38252 (N.M. Sup. Ct. April 14, 2020). Despite that argument, this Court nonetheless reached the merits of petitioners’ claims. *See* Order, *LOPD*, No. S-1-SC-38252 (N.M. Sup. Ct. May 4, 2020). Indeed, by reaching the merits of the petition and ruling on the Eighth Amendment and Article 2, Section 13 claims, the Court implicitly held that it had jurisdiction over the case.

and 94 active outbreaks of COVID-19 in New Mexico prisons, the Governor's failure to exercise her executive and supervisory authority over NMCD rises to the level of deliberate indifference to the wellbeing of individuals in her custody. For these reasons, the Governor's arguments related to her use of clemency powers and the out-of-state cases cited in her Answer Brief are irrelevant to the issues before this Court.

The Governor primarily relies on two out-of-state cases in her Answer Brief: *Foster v. Comm'r of Correction (No.2)*, 146 N.E.3d 408 (Mass. June 2, 2020), and *Colvin v. Inslee*, 467 P.3d 953 (Wash. July 23, 2020). Neither case involved a habeas action on behalf of incarcerated individuals seeking redress of unconstitutional conditions of confinement. For instance, in *Foster*, the plaintiff brought a declaratory judgment and Section 1983 action. 146 N.E.3d at 410-11. The complaint in that case explicitly sought an order compelling the Governor's exercise of commutation, clemency, and emergency powers as a remedy—no such remedy is sought here. *Id.* at 411. Moreover, with respect to the declaratory judgment action, the Massachusetts Declaratory Judgment Act expressly states that it does not apply to that state's governor. *Id.* New Mexico law does not provide for any such exclusion.

Colvin, like *Foster*, did not involve any habeas claims; in fact, the court in *Colvin* said that a personal restraint petition—the Washington state equivalent

of a petition for writ of habeas corpus—was the appropriate vehicle for seeking relief. 467 P.3d at 957, 964. Unfortunately, the plaintiffs in *Colvin* had not filed a personal restraint petition, but instead sought a writ of mandamus ordering the Governor to exercise emergency and commutation powers. *Id.* at 963. No such writ of mandamus is sought in this action.

There is a very real difference between the exercise of clemency powers to commute the sentence of an incarcerated individual out of mercy and the judiciary's duty to hold other branches of government accountable for violations of constitutional rights. What if NMCD decided tomorrow to summarily execute all incarcerated individuals in its custody over the age of 65, and the Governor did nothing to stop it? Or what if the Governor decided to round up and imprison her political opponents without even pretending to bring legitimate charges or presenting them to a judge for arraignment? If, in response, this Court ordered reforms or releases to protect the constitutional rights of such individuals, would those actions infringe on the Governor's clemency powers? Surely it cannot be the case that this Court would be powerless to check such arbitrary abuses of power.

The New Mexico Constitution grants the judiciary authority to issue the relief requested by Appellants to remediate their unconstitutional conditions of confinement. Under Article VI, Section 13 of the New Mexico Constitution, the

district courts have “original jurisdiction in all matters and causes not excepted in the Constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts.” *Smith v. City of Santa Fe*, 171 P.3d 300, 304 (N.M. 2007). The Declaratory Judgment Act is a special proceeding that grants district courts the “power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” *Id.* (citing N.M. Stat. Ann. § 44-6-2). New Mexico courts recognize that the Act “[is] intended to be liberally construed and administered as a remedial measure.” *Id.* at 305 (quoting *San Juan Water Comm'n v. Taxpayers & Water Users of San Juan Cty.*, 116 N.M. 106, 109 (1993)) (internal quotes omitted). Moreover, under Article VI, Section 13 of the New Mexico Constitution, “The district courts, or any judge thereof, shall have power to issue writs of habeas corpus . . . and all other writs, remedial or otherwise, in the exercise of their jurisdiction” Accordingly, the power conferred by the Act permits district courts to determine whether the constitution or individual civil liberties have been violated by either of the other two branches of government. *See, e.g., Chronis v. State ex rel. Rodriguez*, 670 P.2d 953, 955 (N.M. 1983) (“because the Act does not appropriate money, we hold that the Governor’s veto power was invalidly exercised in violation of Article IV, Section 22”).

The Governor has failed to protect the health and lives of incarcerated individuals in her custody from the unchecked spread of COVID-19. The lack of a system-wide response requires a system-wide remedy—one the Governor must be compelled to provide. This habeas corpus action in no way implicates the Governor’s clemency powers. Quite the opposite—it invokes this Court’s most intrinsic duty to interpret New Mexico constitutional law and determine whether other branches of government have violated the constitutional rights of New Mexican individuals. *See State ex rel. Haragan v. Harris*, 968 P.2d 1173, 1180 (N.M. 1998) (“The judiciary serves a vital, though somewhat circumscribed, role in ensuring that laws comply with the New Mexico Constitution. Certainly, ‘[i]t is, emphatically, the province and duty of the judicial department, to say what the law is.’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (explaining that the U.S. Constitution “most assuredly envisions a role for all three branches when individual liberties are at stake” in times of emergency). The Court should reject the Governor’s attempt to obtain affirmation of the district court’s dismissal on the grounds outlined in her Answer Brief.

Conclusion

Appellants' habeas corpus and declaratory judgment action does not implicate the Governor's clemency powers, and therefore, the judiciary's exercise of jurisdiction over the case does not violate separation of powers principles. Indeed, this action falls squarely within the Court's jurisdiction and authority to decide whether the Governor's actions have violated the constitutional rights of New Mexican individuals. Moreover, the issue raised in the Governor's Answer Brief is not properly before the Court. Accordingly, the Court should grant Appellants' Petition.

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CERTIFICATE OF COMPLIANCE

According to Rule 12-318(F) NMRA, this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure. For the body of this brief, Counsel used Georgia, a proportionally-spaced type style / type face. As required by Rule 12-318(F) NMRA, I certify that the body of the brief contains **2,040** words, not to exceed 4,400. This brief was prepared using Microsoft Word, version 2016.

Dated: February 22, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon all counsel of record via E-file on this 22nd day of February, 2021.

By: /s/ Ryan J. Villa
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