In the Matter of the Personal Restraint Petition of Gentry (Jonathan Lee)

No. 84039-3

Stephens J. (dissenting)—I dissent because we do not have enough information to resolve Jonathan Gentry's claim at this early stage. I would remand this case to a superior court for a reference hearing to make determinations as to several factual questions that are unanswered here.

The majority fails to see the relevance of the facts missing here because it mischaracterizes Gentry's argument. He is not claiming that he has a liberty interest in housing conditions or a particular housing unit in the Washington State Penitentiary (WSP). In fact, neither he nor the Department of Corrections (DOC) even mentions the analysis from *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), that features so prominently in the majority opinion. Majority at 4-7. Instead, Gentry's claim is that his present custody of indefinite solitary confinement, without the opportunity for human contact with other inmates and visitors, constitutes an ex post facto punishment. The majority opinion indicates that solitary confinement is synonymous with the intensive management unit (IMU) and thus reasons that the housing unit in which Gentry is now confined and the unit

in which he was confined upon his initial entry into prison are essentially the same. *Id.* at 4-5. But, we do not know this from the DOC literature cited by the majority. There is no question that the IMU was and is more restrictive than the special housing unit (SHU) that was closed in 2009, prompting this personal restraint petition. There is no question that placement in the IMU has always involved single-person cells. RCW 10.95.170. But, the argument is that the custody situation for death row inmates today is entirely new because it eliminates the structured system that accompanied the former IMU placement, which offered the opportunity for interaction on a daily basis and contact visits with family members.

Gentry relies on *In re Medley*, 134 U.S. 160, 10 S. Ct. 384, 33 L. Ed. 835 (1890), to argue that his confinement is unconstitutional. In *Medley*, the United States Supreme Court found an ex post facto violation when, after a prisoner was sentenced to death, a Colorado law was passed mandating solitary confinement for death row prisoners until execution. *Id.* at 171.

Whether Gentry is entitled to relief under *Medley* and the ex post facto clause depends on how his confinement is properly understood. As noted, the only statutory requirement is that death row inmates be placed in single cells in the segregation unit of WSP. RCW 10.95.170. At the time Gentry was convicted, sentenced, and incarcerated, DOC rules pursuant to this statute required a death row inmate to be housed in the IMU for one year, at which time he could "graduate" to the less-restrictive SHU if his disciplinary record was satisfactory. Pet. at 3. Thus,

on one hand, IMU inmates once had the opportunity to graduate to the SHU on good behavior. Now, it appears IMU inmates are denied the graduation option, which is akin to the situation the United States Supreme Court invalidated in *Medley*. 134 U.S. at 164. On the other hand, it could be argued that the petitioner's current IMU confinement is not any more restrictive than his initial confinement because he was first placed in the IMU. In fact, now he is at level five in the IMU, which comes with more privileges than other IMU residents enjoy and is less restrictive than Gentry's initial placement in the IMU when his incarceration began. This is the characterization the majority favors. Majority at 5-6.

But of the two possible characterizations, the first seems most consistent with *Medley*. The conditions at initial confinement must be reviewed in toto. At the time of his crime and sentence, Gentry was not confined in the IMU permanently, as now, but rather the initial IMU placement included the promise of graduating to the SHU upon good behavior. Indeed, Gentry argues the current confinement is worse than in *Medley* because death row inmates in the IMU are denied family contact visits, which were allowed under the terms of confinement at issue in *Medley*. 134 U.S. at 164. The majority notes that the ex post facto loss of "good behavior incentive programs" is permissible if justified by "valid administrative reasons." Majority at 6 (citing *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 396-97, 20 P.3d 907 (2001)). But, a record of those valid administrative reasons is exactly what we lack here. The State claims that the closure of the SHU was prompted by budget

cuts, which is arguably a valid administrative reason. However, budget cuts do not necessarily explain why the graduated system of prisoner benefits, most notably contact visits with family, had to be cut as well.

In sum, Gentry raises a significant question as to whether there is an ex post facto violation here. This question apparently affects all death row inmates. But, it is not clear what constitutional limits exist on DOC's ability to modify terms of confinement without violating the prohibition on ex post facto punishments. It is necessary to have a more complete factual record as to DOC's policies regarding conditions of confinement as they presently exist and as they existed at the time of Gentry's crime and sentence. Gentry recognizes as much when he asks, in the alternative, that we refer this matter to a superior court judge to resolve any disputed issues of fact. Pet. at 13. RAP 16.12 allows us to order such a hearing. I would therefore order a reference hearing and in doing so, grant Gentry's request to proceed in forma pauperis and his request for appointment of counsel.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Richard B. Sanders