

**EXTENSION OF TIME REQUEST FOR
A PETITION FOR WRIT OF CERTIORARI**

No. 17A-_____

IN THE SUPREME COURT OF THE UNITED STATES

Steve Spencer,

Petitioner,

v.

Chris Abbott, P.A., Craig Jensen, and Rodger MacFarlane,

Respondents.

**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

To the Honorable Sonia Sotomayor of the Court of Appeals for the Tenth Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for Petitioner Steve Spencer, respectfully requests a 30-day extension of time to file his Petition for Writ of Certiorari, to and including April 4, 2018. The Court of Appeals for the Tenth Circuit issued its final judgment on December 5, 2017, App *infra* at 1a-37. Unless extended, the time for filing a petition will expire on March 5, 2018. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. Petitioner's Writ of Certiorari involves the application of the Eighth Amendment's proscription on cruel and unusual punishment in the context of prisoner medical neglect. In July 2008, Brian Maguire, an inmate in the Utah State Penitentiary, began exhibiting signs of a stroke, including the loss of control over the left side of his body, prompting him to request a visit with the prison doctor. A physician's assistant, Chris Abbott, saw that Mr. Maguire had lost control over the left side of his body—to the point where he was dragging his leg on the way to the prison infirmary. Yet Abbott responded by giving Maguire a shoulder massage, which appeared to relieve some of the pain, and telling Maguire that he was suffering

from a simple muscle spasm in his shoulder. Without inquiring why Maguire's left side was weakened, Abbott sent Maguire back to his cell having prescribed some muscle relaxants and instructions for physical therapy exercises.

Shortly after returning to his cell, several inmates called out "man down" as Maguire lost control of his body and began slipping from his bed onto the floor. Medical technicians, Craig Jensen and Rodger MacFarlane, and one guard, Jerry Miller, approached the cell. Maguire lay on the floor, pleading for medical help, telling the responders that he was scared, that nothing like this had ever happened to him before, and that he believed that something was very seriously wrong. The responders told Maguire that there was nothing they could do for him that night, that he was probably suffering from seizures, and that if he needed assistance during the night, he could call a guard for help. Maguire disagreed with the diagnosis, telling them that he remained lucid throughout the event, which was inconsistent with a seizure, and he again pleaded for a doctor. The medical technicians and the guard then placed Maguire's mattress on the floor to prevent him from falling off his bed in the night and left Maguire in his cell.

Throughout the night Maguire pleaded for assistance each time a guard walked by his cell. No medical personnel ever responded during the night. By morning, still on the floor, Maguire had urinated in his jumpsuit because he could not stand on his own. When he was finally taken to a hospital, a few hours later, physicians determined that Maguire had suffered a massive stroke the day before.

2. In 2010, Maguire filed a complaint under 42 U.S.C. § 1983, alleging violations of Eighth Amendment. In 2014, the U.S. District Court for the District of Utah appointed counsel for him. Sadly, Maguire died the following year and Steve Spencer, his personal representative, was substituted as the Plaintiff in this case.

In 2015, Defendants filed a motion for summary judgment, asserting qualified immunity for each of the named defendants. The District Court denied the motion relative to Abbott, Jensen, MacFarlane, and Miller. Defendants then appealed. The Court of Appeals for the Tenth Circuit reversed on Maguire's Eighth Amendment claim. App., *infra*, 3a.

3. The Court of Appeals for the Tenth Circuit reviewed the Supreme Court's discussion of Eighth Amendment medical neglect claims as found in *Estelle v. Gamble*, 429 U.S. 97 (1976). Specifically, the court noted that *Estelle* held that deliberate indifference to a serious medical need amounts to a violation of the Eighth Amendment and that the Court of Appeals for the Tenth Circuit has determined that so long as medical professionals provide some level of care that is not "patently unreasonable," they have not acted with deliberate indifference and have therefore met their constitutional burden under the Eighth Amendment.

Reviewing the facts of Maguire's case under the standard articulated by the Court of the Appeals for the Tenth Circuit, the court concluded that Maguire was afforded care when Abbott massaged his shoulder and prescribed muscle relaxants and physical therapy exercises, and when medical technicians took Maguire's vitals and placed his mattress on the floor. Considering these responses from Abbott and the medical technicians, the court concluded that Maguire "cannot argue he was denied medical treatment. He was not." App *infra* at 33a. Determining that Maguire had received care that was not "patently unreasonable," the court held that he had not stated a deliberate indifference claim, sufficient to overcome qualified immunity.


4. The decision below is a serious candidate for review. Circuits are divided over when a state prison's medical treatment of an inmate satisfies the subjective prong of the Eighth Amendment's "deliberate indifference" standard. The Court of Appeals for the Tenth Circuit concludes that state actors have met their constitutional burdens to provide inmates medical care

as long as they provide some level of care that is not “patently unreasonable”—i.e., providing a band aid to treat chest pains. *See Self v. Crum*, 439 F.3d 1227, 1232–33 (10th Cir. 2006) (holding that if care is provided and it is not “patently unreasonable” “an inference of deliberate indifference is unwarranted under our case law”); *see also Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754 (3rd Cir. 1979) (holding that deliberate indifference is only shown when “prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating the need for such treatment”); *Petties v. Carter*, 836 F.3d 722, 735 (dissent, J. Easterbrook) (arguing for a standard that “[w]hen the prison provides *no* care for a serious medical condition, that counts as cruel and unusual punishment if the physicians or other responsible actors are deliberately indifferent to the condition”). Some other circuits review the care supposedly provided to determine whether it was so ineffective that it amounts to recklessness—i.e., providing an aspirin to treat chest pains, but otherwise refusing access to a doctor. *See Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (“A prisoner need not prove that he was completely denied medical care” in order to prevail on his medical neglect claim.); *Petties*, 836 F.3d at 731 (“[R]epeatedly, we have rejected the notion that the provision of some care means the doctor provided medical treatment which meets the basic requirements of the Eighth Amendment.”).

This application for a 30-day extension seeks to accommodate Petitioner’s legitimate needs. Following the Tenth Circuit decision in December, Petitioner earnestly sought to resolve his remaining claim at the district court level without seeking this Court’s review. But Respondents have recently disclosed the existence of contrary evidence as to that claim and communicated what appears to be an unwillingness to resolve Petitioner’s claims voluntarily. Under these circumstances, plenary review by this Court offers Petitioner his only recourse to

vindicate his Eighth Amendment rights. Petitioner therefore seeks additional time to develop and prepare an adequate petition to fully address the important constitutional issue at stake.

Respectfully submitted,



R. Shawn Gunnarson

Counsel for Petitioner

Alexander Dushku

Benson L. Hathaway

Eli W. McCann

KIRTON McCONKIE

50 E. South Temple, 4th Floor

Salt Lake City, UT 84145-0120

801.328.3600

sgunnarson@kmclaw.com

February 12, 2018.

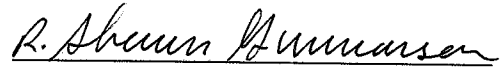
CERTIFICATE OF SERVICE

Pursuant to Rule 29, I hereby certify that on this 12th day of February, 2018, a true and correct copy of the foregoing **EXTENSION OF TIME REQUEST FOR A PETITION FOR WRIT OF CERTIORARI** was served on the following counsel by the method(s) indicated below:

KYLE J. KAISER
Assistant Utah Attorney General
SEAN D. REYES
Utah Attorney General
160 E 300 S, Sixth Floor
P.O. Box 140856
Salt Lake City, UT 84114-0856
Telephone: (801) 366-0100

Attorney for Respondents

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ eMail
kkaiser@agutah.gov
☐ E-Filer


R. Shawn Gunnarson
Counsel for Petitioner