No._____

IN THE SUPREME COURT OF THE UNITED STATES

James Bennett and Pamela Bennett

vs.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO

THE

NINTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. The Question before the Court is Whether the Eight Amendment under Estelle vs Gamble allows a Court to create a Constitutional Defense to an admitted Eight Amendment Violation which requires a prisoner plaintiff alleging deliberate indifference to serious medical needs to prove that he was *denied all medical care before he can prevail on an Eight Amendment violation* at the Summary Judgment level of the proceedings? See Lopez v. Smith, 203 F.3d 1122, 1132 (9th Cir. 2000)

Prison Medical Officials knew the Prisoner was infected with Tuberculosis and thereafter claimed the Prisoner was faking his disease and instructed him not to return for further medical attention but reluctantly continued to see him and did not provide treatment for the Tuberculosis they knew he had until after the Prisoner became paralyzed. They then allowed the Prisoner to be hospitalized for Tuberculosis Treatment the Medical Officials initially refused to provide.

Imagine being locked up and having to depend on one source for medical attention then being diagnosed with Tuberculosis in one institution only to be transferred to another where the Medical Director announces that you are faking your diagnosed disease, instruct you not to return for medical attention, and ultimately after you become paralyzed from the disease he allows you to obtain the medical attention to which he knew you were entitled to from the beginning.

Further imagine after filing legal actions against these Medical Professionals, the District and the Appellate Court rules that the fact that the Medical Professionals ran irrelevant and unnecessary test but still allowed you to be hospitalized after paralysis served as a defense for the Medical Official's initial Indifference of calling the Prisoner a fake and demanding he not return for additional medical attention.

A Prison Medical Official violates the Eight Amendment when he has knowledge that a Prisoner has a serious Medical Problem and is indifferent to the Prisoner's Medical Treatment. His subsequent conduct has no bearing on his initial Indifference.

The District and Reviewing Courts were of the opinion that these Doctors and Professionals earned a Constitutional Defense to the Eight Amendment violation

because they subsequently allowed the Prisoner to be seen while never providing Treatment for the Tuberculosis until after the Prisoner became Paralyzed by the disease. Their holding places the burden that an Eight Amendment Prisoner Plaintiff is required to prove that he was denied all medical care in order to prevail against a Motion for Summary Judgment.

2. Is it a violation of the Fifth Amendment's Due Process Clause for an Appellate Court to refuse to review Questions of Federal Law under the Federal Rules of Appellate Procedures, Rule 4?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

PETITIONERS/APPELLANTS:

1. James Davis Bennett and
2. Pamela Bennett.

RESPONDENTS/APPELLEES:

1. The United States of America;
2. Jaspal Dhaliwal, MD;
3. Richard Gross, MD;
4. Annabel Rivera; MLP;
5. Vincente Tejada, MLP and
6. Marsha Pinnell.

All Respondent Parties are represented by the United States of America.

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OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix C to the petition and is unpublished.

The opinions of the United States district court appears at Appendices B & F to the petition and is unpublished.

JURISDICTION

This Court's Jurisdiction is invoked under the Provisions set forth in the Eight Amendment and the Fifth Amendment to the United States Constitution.

In addition, Jurisdiction is also invoked Under Title 28, United States Code, Section 1346 - The Federal Tort Claim Act - for exposing an incarcerated Prisoner to another Prisoner known by the Prison Institution to be a Tuberculosis Carrier and the Defendants' acts of negligent in their response thereto.

On December 5, 2017, the Ninth Circuit Court of Appeals filed its combined decision in respects to the two above complaints (Eight and Section 1346).

On January 19, 2018 the Petitioner filed for Rehearing and Rehearing En Banc. The Petition for Rehearing and Rehearing En Banc was denied on March 5, 2018. This Petition is timely as it is presented under Supreme Court Rules 29(2) and 30(1) within the Ninety Day Petition requirement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

On June 18, 2014 the Petitioner filed what is commonly known was a Bivens Claim Against Federal Prison Medical Personnel. "A Bivens claim, which is derived from an eponymous Supreme Court decision, allows a private right of action for a citizen whose constitutional rights have been violated by federal officials acting under color of government authority. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

The constitutional provision at issue in the present Bivens action is the Eighth Amendment, which prohibits cruel and unusual punishment as it relates to "deliberate indifference to serious medical needs of prisoners." Estelle v. Gamble, 429 U.S. 97, 104 (1976). The Eight Amendment states "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*".

In addition to the above, on March 16, 2015, Petitioner filed a Complaint against the United States of America ("the Government") seeking damages under the Federal Tort Claims Act ("FTCA" 28 U.S.C.A., Section 1346) for actions related to the Bivens Claim above. The delay in the filing of these two complaints result from the requirement that Petitioner, as an incarcerated inmate, was required to exhaust administrative remedies prior to filing the FTCA Complaint.

Moreover, as a result of the Appellate Panel's refusal to address Questions presented relative to the FTCA Complaint under the Federal Rules of Appellate Procedures, Rule 4, Petitioner invokes review of this refusal under the provisions of the Fifth Amendment's Substantive and Procedural Due Process.

The Eight Amendment Bivens violation as well as the FTCA's Section 1346 and Fifth Amendment Violations comprise the Constitutional and Statutory Provisions involved in the instant case. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. The Bivens Eight Amendment Complaint.

After being told by the Petitioner in addition to reviewing his Medical Records confirming he had contracted Tuberculosis at his prior Institution, the Defendant Medical Professionals concluded he was faking and issued a stern mandate for him not to return for additional Medical Attention. Thus, each Defendant had Knowledge of Petitioner's deadly Tuberculosis Disease and responded with the lack of interest, concern, and or sympathy that defines Indifference (Appendix 1, page 5-para. #2).

Petitioner James Davis Bennett, a 64-year-old veteran of the U.S. Army, is married with one child. He has an MBA from USC and a long employment history in real estate. PAE (Petitioner's Appellate Excerpts of Records) 606, 611-15. In 2006, he began serving a 120-month sentence resulting from a federal conviction for bank fraud and related charges. PAE 1012-14. For most of the time between 2006 and 2012, Mr. Bennett was incarcerated at FCI Safford ("Safford") in Safford, Arizona. Id. And, throughout 2009 and 2010, Mr. Bennett was exposed at Safford to an inmate with active tuberculosis. PAE 1014-20.

His PPD (purified protein derivative) testing in September 2010 confirmed Bennett had contracted tuberculosis. PAE 204-05, 1016. Mr. Bennett's reaction to the test was severe. He had a nearly 30-millimeter induration, which turned into a bloody abscess, and he developed lesions inside his lips. PAE 202-03, 206-07, 1022. Medical staff at Safford diagnosed Mr. Bennett with latent tuberculosis—tuberculosis without active symptoms—and they prescribed medication and placed him on Tuberculosis Watch.

In March 2012, Mr. Bennett was transferred to Lompoc Prison Facility. He traveled there by bus and, during the 24- hour ride, his back pain was seriously aggravated, reaching a level of 8 on a 1-to- 10 scale.

On March 13, the day after he arrived at Lompoc, Mr. Bennett had a "health screen" with defendant Nurse Pinnell. From that health screen, defendant Pinnell learned of both Mr. Bennett's previous contraction of tuberculosis and his back pain. PAE 243-47, 261-62, 984-86, 997-1000, 1027-28.

Nurse Pinnell is the Infectious Disease Coordinator for the Prison. It was at this time that Nurse Pinnell formed her first impression of Bennett. That impression was a negative one because she believed Bennett was in someway faking his

disease and thereafter had his Medical Tuberculosis Follow-up discontinued (Appendix A).

Three days later (March 16, 2012), Mr. Bennett's pain resulting from the Spinal Tuberculosis was extreme, and he sought care from defendant MLP Tejada. Mr. Bennett reported that his pain was a level 9 on a 1-to-10 scale, that the pain was radiating into his buttocks, and that it had been present since January. PAE 239-42, 796-97. Tejada provided him with an injection and ordered an x-ray. PAE 242, 803.

Although Tejada did not review Mr. Bennett's prior medical records, PAE 795-99 (in conflict with his duty of continuity of care, PAE 765), defendant Dr. Dhaliwal, who, as part of his supervisory role, cosigned Tejada's note, did review the records. PAE 199-207, 260, 679-80, 682-93.

Dhaliwal was thus aware as of March 16, four days after Mr. Bennett's arrival at Lompoc, that he had a three-month history of back pain and was diagnosed as having contracted Tuberculosis. Tejada advised Bennett to return to sick call if the pain did not cease. Bennett did.

Upon his return to sick call Bennett again encountered Infectious Disease Coordinator Defendant Nurse Pinnell who instructed Bennett to come back in a couple of hours after sick call. As Bennett left the sick call building Nurse Pinnell followed him outside the building and after observing him walk yelled Mr. Bennett "you're faking don't come back". Being puzzled Bennett left and was afraid to return for fear he might be punished for disobeying the order of a Prison Official (Appendix B, page 5, para. #2).

From that moment in March, Pinnell's view influenced the other defendants. Indeed, on one occasion shortly after Pinnell's accusation, Mr. Bennett observed defendant Medical Director Doctor Dhaliwal, in an effort to surreptitiously evaluate his condition, watching him walk. PAE 1041-42. After this, Defendant Nurse Pinnell confirmed her views that Bennett was a faker and that he had figured out a way to fake a disease.

She put this in writing on April 4, in response to an e-mail from a correctional officer who supervised Mr. Bennett's work detail and reported he "was barely able to walk," because of his Medical Disease. Pinnell wrote back that Mr. Bennett was "walking fine when nobody is watching." PAE 388, 946-53, 1077. She echoed this

view the next day in a note of an encounter with Mr. Bennett, reporting that he continued to complain of back pain but "is walking normal."

On April 9, defendant Medical Director Doctor Dhaliwal, who had been cosigning notes concerning Mr. Bennett for nearly four weeks, saw Mr. Bennett for the first time. PAE 229-32, 713-16, 1039-40. He conducted no physical examination or test of Mr. Bennett's strength and reflexes. PAE 198, 230, 252, 401-02, 715-16. He recorded Mr. Bennett's weight as 183 pounds, a loss of 8 pounds from three weeks earlier and a loss of 36 pounds from December 2010. Id.

Significantly, although Dhaliwal made no mention of this extreme weight loss in his note, id., he testified in his deposition that, as a result of the April 9 encounter, he was aware based on Mr. Bennett's symptoms that there was a "pathology in the back" or "on his...spine" which could have been caused by serious infectious or inflammatory diseases such as cancer or tuberculosis. PAE 716-18.

Dhaliwal thus admittedly knew from this very first encounter that Mr. Bennett had a condition which could "either be fatal or very harmful to [Mr. Bennett's] health and well-being." Id.

That same day, the x-ray ordered on March 16 by Tejada was conducted and was found to show "partial compression" in Mr. Bennett's thoracic spine (T11). PAE 263, 717- 20, 400-01, 807-08, 1039-40. Compression in an x-ray, in the context of severe back pain, is an abnormal result which "can be an early finding in cancer and infection of the spine," including Pott's disease. PAE 401, 737, 749-50. Despite the Compression in thoracic spine, none of the Medical Professionals attending to Mr. Bennett provided Bennett with a Body Cast, Back Brace, not even a cane to help reduce his pain. This while they continued to call him a faker.

The x-ray report was issued on April 11; on that same date, defendant Tejada saw Mr. Bennett and noted that Mr. Bennett reported his pain was unchanged, and, further, that he had lost 25 pounds since November 2011. PAE 226-28, 808-10.

Despite records documenting Mr. Bennett's dramatic weight loss, see PAE 198, 230, 252, 400-02, 715-16, 877-78, Tejada did not believe Mr. Bennett's report of weight loss. PAE 808-16. Nor did he make any effort to determine whether Mr. Bennett had in fact lost weight. Id.

Defendant Dhaliwal, who cosigned the report, likewise, made no effort to further investigate Mr. Bennett's reported weight loss, despite the fact that, as noted

above, he knew that the weight loss and back pain were symptoms of a potentially fatal pathology which he now had Medical Proof of through the X-Ray results mentioned supra. PAE 228, 721-24.

By April 16, Dhaliwal had reviewed the April 9 x-ray showing compression in the spine. PAE 263, 719-20, 807-08, 1039-40. He knew Mr. Bennett complained of persistent and severe back pain, that he had lost substantial weight, and that he had tuberculosis, all of this information corroborated his earlier conclusion that Mr. Bennett had a serious and dangerous spinal pathology. PAE 682-83, 709-10, 716-19.

On that same date, he received even more evidence of a serious illness. Laboratory results showed Mr. Bennett had elevated levels on two measures, Erythrocyte Sedimentation Rate (ESR) and C Reactive Protein (CRP). PAE 264, 402. These results were clear evidence of a condition involving inflammation or infection. PAE 402.

The laboratory results also showed mild anemia, a condition associated with "chronic infection." Id. None of the Medical Professional at Lompoc offered Bennett any antibiotic or suggested that he should be placed back on Tuberculosis

Medication to which Nurse Pinnell removed him from upon entry into the institution.

Remarkably, despite his knowledge of Mr. Bennett's dangerous spinal pathology, Dhaliwal saw Mr. Bennett just four days later and explicitly accused him of faking his pain. He wrote in his April 20 note that Mr. Bennett reported his pain was 15 out of 10, but that he did not appear in acute distress...Says he cannot stand. Appers [*sic*] to be manipulative....Sitting comfortably in the clinic. These notation gives a clear indication that Defendant Doctor Dhaliwal was in agreement with Nurse Pinnell that Bennett was faking his disease and symptoms and that Bennett had no business returning for additional Medical Attention as Pinnell originally suggested.

One week later, on May 9, Dhaliwal saw Mr. Bennett again for continued complaints of back pain. Consistent with his April 20 note, he conducted no examination but wrote a note yet again accusing Mr. Bennett of faking disease and its related pain, stating that Mr. Bennett "[r]equests strong mediaction [sic] for pain" but that he "[d]oes not appear in acute pain." Again, he stated: "Inmate manipulative" and added that Mr. Bennett "[h]as seen several providers for strong medication."

While Mr. Bennett was desperately seeking care for his deteriorating condition, he was in frequent telephone contact with his wife, Pamela Bennett. PAE 1043-44, 1066-80. He told her he was losing weight and that he had extreme back pain. Id.

Mrs. Bennett went to great efforts to assist her husband, PAE 173-77, 1043-44, 1087-89, including contacting a neighbor, Barbara Llorente, who was a nurse. PAE 1043-44, 1087-89. Mrs. Bennett described the symptoms, and Mrs. Llorente asked her husband, Dr. Jorge Llorente, a surgeon, for his opinion; he responded immediately that Mr. Bennett likely had Pott's disease, tuberculosis of the spine. Id. Mrs. Llorente relayed this information to Mrs. Bennett, who, in turn, provided it to Mr. Bennett at some point in May. Id.

After receiving this information, Mr. Bennett told defendants Pinnell, Rivera and Tejada of his belief that his Tuberculosis had turned into Pott's disease, which is Tuberculosis of the Spine, and that he needed to be taken for an emergency MRI. Bennett provided the Defendants with a internet print out given to him by his wife after she was informed by the Llorentes that Bennett had Potts Disease.

It was at this point that the Defendants told Mr. Bennett he would have an MRI at some point, but they took no further action, not even to give Bennett the Tuberculosis Medication which he received at the Stafford Institution to which he transferred from. PAE 1043-44. They made clear to Mr. Bennett they were aware of his condition, as Defendant Nurse Pinnell told him "we know you got some type of infection." PAE 1043. Still, they conducted no investigation of that infection or provided any medication whatsoever except pain pills. Id.

By the beginning of June, Mr. Bennett had received no response from any of the defendants after he repeatedly told them that, based on the information he received from his wife, he believed the Tuberculosis was now Pott's disease - Tuberculosis in the Spine. His wife researched the condition on the Internet and printed out materials which she then sent to Mr. Bennett. Mr. Bennett then provided to Pinnell what his wife sent him: a detailed Internet printout documenting symptom of Pott's disease. PAE 168-71, 1045-46.

The documents described symptoms mirroring those experienced by Mr. Bennett: Pott's disease is often experienced as a local phenomenon that begins in the thoracic section of the spinal column. This is the same area revealed on the X-Ray to have the Compression Fracture.

The documents instructed that the presence of Pott's disease could be confirmed through imaging of the spine, including an MRI. PAE 168, 171. Pinnell ignored the information and took no additional remedial Medical Actions. PAE 1045-46.

Mr. Bennett saw defendant Tejada next on June 22. Again, Tejada noted Mr. Bennett had inflammatory and toxic neuropathy in his spine area, again he confirmed that Mr. Bennett reported extreme back pain, and again he noted Mr. Bennett was awaiting an MRI. PAE 287-88, 408, 822. He ordered a new medication for pain only but did not order any follow up medication to address either the Blood Results or the X-Ray Results which he knew required antibiotics, Tuberculosis Medication, and back support such as a brace or cast. Both of which proved that the entry in Bennett's Medical Records that he had contracted Tuberculosis was not a fake job but was in fact true. Id.

Defendant Gross cosigned the report, and, despite his knowledge a month earlier that he was responsible for ensuring that Mr. Bennett would receive a timely MRI, he took no action. PAE 934. With no follow-up ordered, Mr. Bennett was not seen again for three weeks. PAE 284-86, 894-95.

On July 11, Bennett saw defendant Rivera who, just like Tejada on June 22, ordered new pain medication for Mr. Bennett but nothing to address the negative results of the Blood or X-Ray Test. Id. Once again, Gross endorsed this action and failed to ensure an emergency MRI or other Blood and X-Ray Treatment were provided. PAE 300.

The next morning, Mr. Bennett was paralyzed from his Spinal Tuberculosis. PAE 270-83, 647, 794, 824- 26, 759-64. When he woke, he could not move his legs. Defendant Tejada went to Mr. Bennett's dormitory and confirmed he could not lift his lower extremities and had no reflex responses. Id. He ordered an emergency MRI, something he could have done months earlier. PAE 270-83, 824-26.

Mr. Bennett was taken out immobile from the waist down for an MRI and then returned to the prison where he remained, paralyzed, for 24 hours. PAE 273-74, 294-301, 762-63, 827-29, 1047-48, 1052-55. For 24 hours Bennett was left in his Prison Bed without any assistance and unable to even make it to address his most basic bathroom needs or to be fed in the Prison Kitchen.

The next day after the 24 hours Bennett was taken by ambulance to the hospital where Physicians reviewing the MRI confirmed he had a destructive lesion

attached to two vertebrates, T11 and T12. Id. These are the same vertebrate that demonstrated a Compression Facture on the X-Ray which was reviewed by all Prison Medical Professionals supposedly attending to Mr. Bennett. It was also consistent with the negative Blood Test mentioned supra.

After three surgeries and a long convalescence Bennett filed what is commonly known was a Bivens Claim. "A Bivens claim, derived from an eponymous Supreme Court decision, allows a private right of action for a citizen whose constitutional rights have been violated by federal officials acting under color of government authority. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

2. The FTCA Complaint.

There is not much to say about the Ninth Circuit's handling of the Petitioners' appeal in their FTCA Complaint except that the Court refused to adhere to the Federal Rules of Appellate Procedures, Rule 4 by refusing to answer, or review Questions related to issues presented. They continued in this refusal even after the Petitioner filed a Petition for Re-hearing and Re-hearing En Banc.

Put simply, the Petitioner presented Four Questions in his Opening Brief related to the District Court's handling of the Petitioners' FTCA Complaint. The Defendant

Presented their Opposition and the Petitioners' Presented their Reply thereto. The Ninth Circuit refused to review or rule on Three of the Four Questions.

This violates the Petitioner's Due Process under the Fifth Amendment to the United States Constitution to avail himself of Rule 4 of the Federal Rules of Appellate Procedures.

This type of behavior leaves no room for a Petitioner to the Supreme Court to argue because the Appellate Court refuses to address the issues presented to them. This is something which needs to be reviewed as it prevents a Petitioner from intelligently presenting anything except the Appellate Court's Refusal.

The Petitioners are entitled to have their Questions reviewed under Rule 4 of the Federal Rule of Appellate Procedures.

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant the Writ to provide guidance whether a Prisoner Plaintiff must prove he was denied all medical care in order to survive a Summary Judgment Motion in an Eight Amendment violation.

A. The Bivens Eight Amendment Complaint.

When judges, both lower and reviewing courts, ignore the basic interpretation of Constitutional Amendments in clear instances of violations in favor of establishing defenses which pose serious problems for the enforcement of those Amendments it diminishes the trust most citizens afford to all judicial decisions, dilutes the ability of future decisions to garner citizen trust, and destroys the overall confidence necessary for the system to survive.

This case presents one of the greatest opportunities for the court to specify whether a Eight Amendment deliberate indifference Prisoner Plaintiff is required to prove that he was denied all medical care in order to survive an Motion for Summary Judgment by the Violating Defendants.

The Crux of this Petition is the fact that Medical Officials at this Prison did the unthinkable for any Medical Professional. That is to tell a Prisoner Patient *that he is faking and do not come back for additional medical help - ever*! And, if faced

with a similar situation, a non-Prisoner would have the option to seek additional Medical Attention from a reputable Physician from which to obtain real Medical Attention. But being under the conditions present in an incarcerated environment, the Prisoner Patient does not have such options. Moreover, a Medical Professional making such statements outside of a Prison Setting would never get away with calling a Patient a faker and refusing to provide the needed medical attention a Patient deserves.

While the above is unconscionable, it is not as repulsive as the conclusions which form the basis of the District and the Appellate Court Decisions. Those decisions hold that because these Medical Professionals ran a few fast test, to which they never provided the treatment mandated by the test, but nevertheless allowed the Prisoner to be hospitalized after he was paralyzed from the disease to which the Professionals knew he had from the very beginning, this constitutes a defense to the indifference the Professionals surely demonstrated when they claimed the Prisoner was faking his illness and do not return for help.

The Ninth Circuit appears to be moving in a direction that creates a Defense for Defendants at the Summary Judgment Stage that a Prisoner Plaintiff must prove he

was *denied all medical care before he can prevail on an Eight Amendment violation at this point in litigation.*

If the Court allows this Defense to an Eight Amendment Violation to stand every Prison Medical Professional will become as the ones mentioned herein. That is to say their jobs will become a joke because they will know that no matter what level of treatment they provide they can always defend a Violation of the Eight Amendment by simply seeing a Prisoner and running a few irrelevant test to cover themselves. This I suspect is already occurring on some level in Prisons today.

On the other hand numerous decisions from other courts across the country demonstrate the breadth of circumstances where a medical professional's conduct has been found deliberately indifferent even if the professional provided partial treatment to a prisoner plaintiff. See Gonzalez v. Feinerman, 663 F.3d 311, 314-15 (7th Cir. 2011) (finding in case where defendants treated plaintiff for hernia condition on multiple occasions but where defendants "never altered their response to [plaintiff's] hernia as the condition and associated pain worsened over time" that alleged conduct was deliberately indifferent); Keller v. County of Bucks, 209 Fed. Appx. 201, 204-05 (3d Cir. 2006) (affirming jury verdict in favor of two prisoner plaintiffs who claimed prison medical staff failed to properly treat MRSA

conditions even though one of the plaintiffs had been seen by medical staff "promptly" after his request for medical attention and had been seen on multiple follow-up occasions where he was provided with antibiotics); Carswell v. Bay County, 854 F.2d 454, 457 (11th Cir. 1988) (affirming jury verdict for plaintiff even though defendants had provided medication and made diagnosis of plaintiff's condition on ground that plaintiff's condition worsened and defendants failed to respond to condition ultimately diagnosed as diabetes); Ford v. Ghosh, No. 12-cv-4558, 2014 WL 4413871, at *8-9 (N.D. Ill. Sept. 8, 2014) (denying summary judgment based on doctor's failure over five-month period to provide prison administration with necessary information in support of order for MRI on plaintiff's back where delay caused the plaintiff's "acute radiculopathy [to become] a chronic radiculopathy," making it "much more difficult to treat"); Madera v. Ezekwe, No. 10-CV-4459, 2013 WL 6231799, at *16 (E.D.N.Y. Dec. 2, 2013) (denying summary judgment on claim that failure to follow-up on appointments led to a delay in eye surgery, which resulted in "significant loss of vision," even though "[s]ome of the delays were attributable...to scheduling difficulties, to the review process for outpatient referrals" and to the plaintiff's other medical conditions); D'Agostino v. Montgomery County, No. 11-cv-7728, 2012 WL 425071, at *3 (E.D. Pa. Feb. 9, 2012) (holding defendants' failure to treat plaintiff's spinal abscess condition could constitute deliberate indifference,

even though defendants diagnosed condition as urinary tract infection and gave treatment consistent with that diagnosis, on ground that plaintiff's deterioration "clearly warranted a change in the treatment plan" and that "failure to engage in further diagnostic efforts in the face of Plaintiff's worsening condition" showed lack of "regard to the readily apparent risk of harm to the inmate's health").

Petitioners assert that the panel's decision in this matter conflicts with decisions not only of this Court and the Circuit Courts presented supra but also the same Circuit to which the Panel currently sit.

Those decisions establishes that a prisoner plaintiff alleging deliberate indifference to *serious medical needs is not required to prove that he was denied all medical care*. See Lopez v. Smith, 203 F.3d 1122, 1132 (9th Cir. 2000) ("A prisoner need not prove that he was completely denied medical care."); see also Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (reversing summary judgment where defendant delayed "routine" referral to orthopedist for follow up care for fractured thumb even though defendant had provided some level of care by ordering X-rays, prescribing medication, and repeatedly meeting with plaintiff); Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989) ("[A]ppellants need not prove

complete failure to treat Ortiz....'[A]ccess to medical staff is meaningless unless that staff is competent and can render competent care.'") (citation omitted).

Accordingly, Petitioners request that this Court activate this Petition for a Writ of Certiorari for the Review of the Ninth Circuit's ruling in this case. Especially considering the following undisputed facts which the District Court concluded.

Appendix B tells a complete story of what happened to Bennett upon arrival at Lompoc. First, "On March 12, 2012, [Bennett] was transferred from Safford to Lompoc [and] The health services inmate transfer form accompanying [Bennett's] transfer reflected his prophylactic tuberculosis treatment and stated that he had no tuberculosis symptoms for the previous 30 days" (See Appendix A and Appendix B, page 2, para. 2).

"On March 13, 2012, Defendant Pinnell conducted a health screen of [Bennett] upon his arrival at Lompoc" (See Appendix B, page 2, para. 2). Pinnell was the very first Medical Practitioner who saw Bennett.

After Pinnell's Health Screen, she determined that Bennett was faking his TB and its related back pain. At some point later, Infectious Disease Coordinator

Defendant Nurse Pinnell shouted to Bennett, "You're faking. Don't come back" (See Appendix B, page 2, para. 7 and page 5, para. 2). When a Medical Professional Examines a Patient and concludes they are "faking", that conclusion is their Professional Diagnosis.

On March 19, 2012, Pinnell's Medical diagnosis of faking is first reflected in Appendix A. Appendix A is Dated March 19, 2012 some 6 days after Pinnell "Health Screen of Bennett". Appendix A lists "No" "TB Follow-up Recommended". This Diagnosis, based on Pinnell's assessment that Bennett was faking, ended Bennett's Preventive Prophylactic TB Treatment and its related Supervision (See Appendix A and Appendix B, page 2, para. 2).

Even in face of Bennetts' deteriorating health related to Lompoc's Medical Staff's decision to end Bennett's TB follow-up and preventive "Prophylactic Regimen", Lompoc's Indifference continued even though Bennett provided an internet printout which confirmed TB and listed specific proven Medical Procedures designed to remedy the Disease. See Appendix D.

Appendix D contains the Internet Printout Bennett presented from his Wife to Nurse Pinnell. It identifies and confirms that Bennett did in fact have Tuberculosis

as was diagnosed at the Safford Prison Facility. Bennett presented this printout on June 11, 2012 one month prior to him becoming paralyzed by the Tuberculosis. However, on July 12, 2012 these Indifferent Medical Professionals continued to ignore and allowed Bennett to deteriorate to paralysis (See Appendix B, page 2, para. 6 - 7).

The above proves Indifference that cannot be denied. When you label a Patient as a Faker and instruct him not to bring up is Medical Problems and tell him not to come back, this can only mean that you do not care about him or his medical problems. What we see happening here is what happened in the fables of Chicken Little and the Boy who Cried Wolf. These two were labelled as fakes and the townspeople were so indifferent to their cries for help that they told them to never come back. But, to the surprise of all the towns people, the indifference came back to haunt them just as the TB came back to haunt Bennett.

The true question is not what the Defendants' did - as is suggested by the Ninth Circuit Panel's Conclusions - (Appendix C, pages 4-5) but, for an Eight Amendment Violation, it is what the Defendants' knew and what they did not do. And, the above are the facts demonstrating that the Medical Officials knew Bennett was suffering from Tuberculosis.

The constitutional provision at issue in the present Bivens Claim is the Eighth Amendment, which prohibits "deliberate indifference to serious medical needs of prisoners." Estelle v. Gamble, 429 U.S. 97, 104 (1976). "A prison official is deliberately indifferent to the [plaintiff's medical] need if he 'knows of and disregards an excessive risk to inmate health.'" Peralta v. Dillard, 744 F.3d 1076, 1082 (9th Cir. 2014) (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)). In essence, a constitutional claim of deliberate medical indifference comprises two prongs: (1) defendant's subjective knowledge and disregard of (2) an objectively excessive risk to plaintiff's health and safety. Hudson v. McMilliam, 503 U.S. 1, 8 (1992).

The District Court Order states: Defendants' Motion for Summary Judgment focuses exclusively on the subjective prong and does not dispute the objective prong. Thus, the Court stated that it assumes without deciding that the objective prong of the deliberate medical indifference test has been satisfied and focuses its analysis solely on the subjective prong of the test. Appendix B, page 3.

The subjective prong of the deliberate indifference test imposes a high burden, requiring a plaintiff to "prove that prison officials were aware of [a serious

medical] condition and deliberately denied or delayed care . . . ." Shinault v. Hawks, 782 F.3d 1053, 1061 (9th Cir. 2015). "Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights." Hutchinson v. U.S., 838 F.2d 390, 394 (9th Cir. 1988) (citing Estelle, 429 U.S. at 106). "Even if a prison official should have been aware of the risk, if he 'was not, then [he] has not violated the Eighth Amendment, no matter how severe the risk.'" Peralta, 744 F.3d at 1086 (citing Gibson v. Cnty. of Washoe, 290 F.3d 1175, 1188 (9th Cir. 2002)) (emphasis in the original).

Petitioner points to his previous diagnosis of Tuberculosis at the Safford Facility which was revealed on March 13, 2012 at his initial health screen. On April 9, 2012, at his first examination with Defendant Dhaliwal blood tests revealed inflammation or infection, Defendant Dhaliwal prescribed another pain medication to supplement the ibuprofen as well as eight lab tests and an abdominal x-ray. The x-ray scans revealed partial compression of one vertebra. Blood tests also revealed elevated levels of two different proteins, which could be associated with infection or inflammation. In light of these test results, Defendant Dhaliwal added another prescription to treat the pain, authorized five additional tests, and ordered a consultation with an outside orthopedist. Page 2, ¶# 2 District Order-See Appendix

B. Despite this he never prescribed antibiotics to address the infection or a Back Brace for the Compressed Vertebra.

The Court Held the following: "The Court finds that the evidence of Defendants' skeptical remarks does not create a triable issue of fact as to deliberate indifference. As discussed above, Defendants responded attentively throughout the treatment process and attempted various remedies to alleviate Plaintiff's pain. Moreover, Defendants did not possess the subjective knowledge necessary for deliberate indifference. Thus, despite the doubts Defendants may have harbored about Plaintiff's genuineness, they continued to provide treatment and did not withhold medical attention because of their skepticism. In light of Defendants' continued medical care and lack of subjective knowledge about Plaintiff's spinal pathology, a reasonable jury could not conclude, simply based on the skeptical remarks recited above, that Defendants wantonly disregarded Plaintiff's serious medical needs". See Appendix B, page 5, para # 2.

As it relates to the instant Eight Amendment Violation, it appears the Court believes that despite a Defendant's Indifference throughout a Prisoner's Treatment, even specific designation of a Prisoner as Faking and issuing a mandate for him to never return for Medical Attention, that as long as an Eight Amendment Defendant

sees a Prisoner Patient and runs test whether they take the appropriate actions dictated by those test, he can be successful using this defense as the basis and foundation for a successful Motion for Summary Judgment because the instant court confirms that holding that a Prisoner Patient is required to prove that he was denied all medical care before he may prevail at the Summary Judgment Stage of Litigation.

The Ninth Circuit Court of Appeals upheld the District's holding and judgment in the Eight Amendment Bivens Case. Thus, providing a here to now unknown Constitutional Defense to an Eight Amendment Bivens Case where Prisoners depend exclusively on Prison Medical Officials for all their Medical Needs. See Appendix 3.

B. The Panel's Affirmance Of Summary Judgment For The Bivens Defendants Contradicted Clearly Established Circuit Law.

Mr. Bennett's claims against Dhaliwal, Tejada, and Pinnell are brought under straightforward Eighth Amendment principles: that (1) he had a serious medical need and (2) defendants were deliberately indifferent to that need. Estelle v. Gamble, 429 U.S. 97, 104 (1976); see also Jett v. Penner, 439 F.3d 1091, 1096

(9th Cir. 2006) (citing McGuckin v. Smith, 974 F.2d 1050 (9th Cir. 1991),overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc)).

Although deliberate indifference requires showing a defendant's subjective knowledge of a substantial risk, Peralta v. Dillard, 744 F.3d 1076, 1082 (9th Cir. 2014) (en banc), on summary judgment, there is no requirement that plaintiff proffer direct evidence of knowledge. "Much like recklessness in criminal law, deliberate indifference to medical needs may be shown by circumstantial evidence when the facts are sufficient to demonstrate that a defendant actually knew of a risk of harm." Lolli v. County of Orange, 351 F.3d 410, 421 (9th Cir. 2003). That a plaintiff was "seriously harmed by the defendant's action or inaction" is probative of deliberate indifference; if a medical professional "sat idly by as another human being was seriously injured despite the defendant's ability to prevent the injury [that] is a strong indicium of callousness and deliberate indifference to the prisoner's suffering." McGuckin, 974 F.2d at 1060 (citing Estelle, 429 U.S. at 106). Once a plaintiff offers evidence supporting such inferences at summary judgment, "it is up to the factfinder to determine whether or not the defendant was 'deliberately indifferent' to the prisoner's medical needs." Id. at 1060.

Most importantly, this Court's precedents confirm the provision of some medical treatment is not a defense to a deliberate indifference claim."A prisoner need not prove that he was completely denied medical care." Lopez v. Smith, 203 F.3d 1122, 1132 (9th Cir. 2000); see also Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989) ("[A]ppellants need not prove complete failure to treat Ortiz...'[A]ccess to medical staff is meaningless unless that staff is competent and can render competent care.'") (citation omitted).

2. The Court Should Grant the Writ to preserve the Right to have lower Court Decisions reviewed under Rule 4 of the Federal Rules of Appellate Procedures and to Uphold The Fifth Amendment's Due Process Clause.

A. The FTCA Complaint.

(i). Appellant presented four issues for Panel Review. The Panel Failed to address three with the most important being the Granting of Summary Judgment on Statute of Limitation Grounds.

The Appellant presented four issues for resolution by the Panel (AOB). The Panel overlooked and failed to address three of the four Issues raised. The Panel's failure to address more than half of the Combined Issues leaves these Appeals unresolved.

Out of the four issues presented the Petitioners feel that the most important one relates to the District Court's granting of Summary Judgment in the FTCA Complaint on Statute of Limitation grounds.

The Fifth Amendment to the United States Constitution ensures that all American can prevail themselves of Due Process of Law. The guarantee of due process for all persons requires the government to respect all rights, guarantees, and protections afforded by the U.S. Constitution and all applicable statutes before the government can deprive any person of life, liberty, or property. Due process essentially guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding.

Courts have come to recognize that two aspects of due process exist: procedural due process and substantive due process. The procedural due process aims to ensure fundamental fairness by guaranteeing a party the right to be heard, ensuring that the parties receive proper notification throughout the litigation, and ensures that the adjudicating court has the appropriate jurisdiction to render a judgment. Meanwhile, substantive due process has developed during the 20th century as protecting those substantive rights so fundamental as to be "implicit in the concept of ordered liberty."

The Ninth Circuit's refusal to address questions presented under Rule 4, which guarantees an Appeal, is a violation of both Procedural Due Process and Substantive Due Process because it deprives the Petitioners of the right to be heard and also violates Substantive Rights so fundamental as to be implicit in the concept of ordered liberty.

Because the Ninth Circuit Panel Refused to address the Questions presented the Petitioner ask that the Writ be activated.

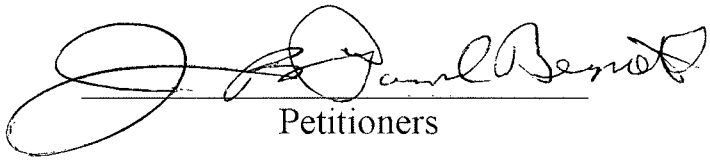
CONCLUSION

Because Medical Attention can cover various activities over the course of treatment, you might see some treatment that is Indifferent and some that is not. The Treatment that is not indifferent should never be a foundation for a Defense of the Treatment that was indifferent.

Moreover, Due Process dictates that each litigant should be allowed to present their observations of Error in the Trial or District Court Proceedings under Rule 4 of the Federal Rules of Appellate Procedures. The Reviewing Court in the instant matter has not shown there is a legitimate reason to allow them to answer the questions they want and to not answer the questions they do not want. To conform to this type of Review is no true review at all.

DATE: June 3, 2018

James Bennett and Pamela Bennett



Petitioners