18-8326

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Dana Gray, W76776 – Petitioner

v.

V. Romero, M.D.
A. Comelli, M.D.
N. Loadholdt, F.N.P.
C. Rebel, M.D.
V. Mundunuri, M.D.
J. Ziomek, D.P.M.

- Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Dana Gray: W76776
Petitioner Pro se
Central California Women's Facility: 512-17-01L
P.O. Box 1508
Chowchilla, CA 93610

February 28, 2019

QUESTIONS PRESENTED

I.

UNITED STATES DISTRICT COURTS NEED TO RELIABLY APPOINT NEUTRAL MEDICAL EXPERTS IN INDIVIDUAL PRISONER PRO SE §42 USC 1983 MEDICAL CARE CASES WITH COGNIZABLE CLAIMS IN WHICH DISPUTED MEDICAL FACTS HAVE BEEN PRESENTED TO THE COURT IN ORDER TO PREVENT PREORDAINED NEGATIVE OUTCOMES. THESE EXPERTS WILL ASSURE THE PRISONER PLAINTIFFS' ACCESS TO COURT UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ACCESS TO A CIVIL JURY UNDER THE SEVENTH AMENDMENT.

II.

INDIVIDUAL PRISONER PRO SE §42 USC 1983 MEDICAL CARE CASES WITH COGNIZABLE CLAIMS IN WHICH DISPUTED MEDICAL FACTS HAVE BEEN PRESENTED TO THE COURT ARE EXTRAORDINARY. THEY ARE EXTRAORDINARY BECAUSE THEY ARE RARE; AND BECAUSE THEY HAVE SURVIVED 28 USC §1915 A(a-b(1)) SCREENING, PRISON LITIGATION REFORM ACT EXHAUSTION AND FAILED ATTTEMPTS AT SETTLEMENT. NEUTRAL MEDICAL EXPERT OPINION IS REQUIRED TO ADVISE DISTRICT COURTS CONCERNING THE VIABILITY OF THE MEDICAL POSITIONS OF BOTH SIDES IN THE FACE OF MOTIONS TO DISMISS AND/OR MOTIONS FOR SUMMARY JUDGMENT.

LIST OF PARTIES

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OPINIONS BELOW

Petitioner's U.S. District Court case, Eastern District of California, is #1:13-cv-01473-DAD-GSA.

The Ninth Circuit U.S. Court of Appeals Appellate number is #18-15816.

The final order of the U.S. Court of Appeals following Petition for Panel Rehearing is in Appendix A, and is unpublished.

The initial denial of the U.S. Court of Appeals (Ninth Circuit) is found in Appendix B.

The initial U.S. District Court order denying a neutral medical expert is in Appendix C and is interlocutory and dispositive.

Petitioner's 72(a) objections to the initial denial order are in Appendix D.

The U.S. Magistrate Judge's conversion of the 72(a) objections into a motion for reconsideration and denial are in Appendix E.

Petitioner's follow-up 72(a/b) objections are in Appendix F.

Petitioner's Notice of Appeal is in Appendix G.

U.S. District Court Judge Drozd's delayed ruling on a 72(a) objection as "frivolous" and denying expert is in Appendix H.

JURISDICTION

The United States Court of Appeals decided this case (Appendix B). A timely Petition for Rehearing was denied 12/4/2018 (Appendix A). Review of cases destined to preordained negative outcomes is reason to grant a writ of certiorari [Pierce Cty, WA v. Guillen, 537 US 129 (2003)].

The Ninth Circuit United States Court of Appeals implicitly agrees that this appeal #18-15816 is of a dispositive motion by not mentioning jurisdiction in the denial of the Petition for Panel Rehearing (Appendix G2).

The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL & STATUATORY PROVISIONS INVOLVED

U.S. CONSTITUTION

FIRST AMENDMENT

"Congress shall make no law...abridging the freedom of speech...or the right of the people... to petition the government for redress of grievances"

SEVENTH AMENDMENT

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved..."

FOURTEENTH AMENDMENT

"nor shall any state deprive any person of life, liberty, or property, without due process of law..."

STATUTES

28 USC §1254 (1)

"Cases in the courts of appeals may be reviewed by the Supreme Court...(1). By writ of certiorari granted upon the petition of any party to any civil...case, before or after rendition of judgment or decree.

28 USC §1915(d)

"the officers of the court shall issue and serve all process, and perform all duties in [in forma pauperis] cases. Witnesses shall attend as in other cases..."

28 USC §1915 A(a-b(1))

"(a) screening – The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. (b) Grounds for dismissal – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted..."

FEDERAL RULES

FRCP 72(a/b)

"(a) Non-dispositive Matters - ...The magistrate judge must promptly conduct the required proceedings...A party may serve and file objections to the order within 14 days...(b) dispositive Motions and Prisoner Petitions. (1)...A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement...The magistrate judge must enter a recommended disposition...(2)...Within 14 days..., a party may serve and file specific written objections to the proposed findings and recommendations...(3)...The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions."

Federal Rules Evidence 706

"(a)...On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed...The court may appoint any expert...of its own choosing. ...(c)...the expert is entitled to a reasonable compensation, as set by the court...(2) in any other civil case by the parties in the proportion and at the time that the court directs..."

STATEMENT OF THE CASE

1. 1.5 cm. leg length discrepancy diagnosed in Petitioner by Dr. Pace while in Riverside County Jail, 8/21/1997. (See Appendix I)
2. Petitioner arrived at CCWF prison 10/28/1998.
3. Petitioner wore heel lift 1998-2005 at CCWF.
4. Serial lumbar spine X-rays and MRI's document Petitioner's progression from "normal L/S spine" in 1999 to lumbar scoliosis with nerve root compression in 4/19/2011 because heel lift and/or orthopedic shoes were denied by all of the respondents beginning in 2006.
5. Respondent Dr. Rebel, Orthopedist of record 10/19/2006 – 4/19/2011 opined "no leg length discrepancy" in 2006 with no physical exam or review of imaging studies and denied Petitioner heel lifts or orthopedic shoes (See Appendix J, Claim I).

6. Respondent Dr. Ziomek, DPM, Podiatrist of record from 6/10/2008 until 2017 also opined "no leg length discrepancy" without X-ray or measurement, also denied Petitioner heel lift and/or orthopedic shoes (See Appendix J, Claim II)..
7. Respondent Dr. Romero, Primary Care Physician from 2006 to 2010 followed these specialty opinions and stopped all pain medication and ADA accommodations on 5/3/2010 without any measurement for leg length discrepancy or evaluation of lumbar spine (See Appendix J, Claim III).
8. Respondent Dr. Comelli gave second opinion to Dr. Romero 6/16/2010. Fully agreed with her with no exam or testing of Petitioner (See Appendix J, Claim IV).
9. Respondent NP Loadholdt answered healthcare grievance in place of supervisory M.D. No exam. Agreed with Dr. Romero and Dr. Comelli 8/2/2010 (See Appendix J, Claim V).
10. Referred to neurosurgeon 4/19/2011 for lumbar scoliosis with nerve root compression (MRI 3/15/2011) due to no treatment for leg length discrepancy.
11. Respondent Dr. Mundunari, Primary Care Physician 2011-2015 refused to provide heel lift or orthopedic shoes causing lumbar scoliosis with nerve root compression to worsen by 11/19/2012 (See Appendix J, Claim VI).
12. Petitioner became aware of deliberate indifference and medical negligence 1/4/2013 when she saw a non-surgical neurologist for a second opinion who opined that her pain was likely unrelated to her spinal deformity further delaying surgical treatment of Petitioner's lumbar spine.
13. Final healthcare grievance submitted 6/9/2012.
14. Government Claim form #608835 submitted 12/30/2012 and denied 3/1/2013.
15. 42 USC §1983 lawsuit filed 9/12/2013.

16. Pleading stage of lawsuit 9/12/2013 - 2/4/2016 when all claims of deliberate indifference and medical negligence found cognizable against all defendants (See Appendix K, ECF 47).
17. All defendants served Fourth Amended Complaint 2/24/2016 (See Appendix K, ECF 50).
18. Jury trial requests by five (5) respondents (See Appendix K, ECF 58, ECF 63-65, ECF 82).
19. Discovery 5/2/2016 – 1/31/2017 (See Appendix K, ECF 60, 148).
20. Motions to dismiss and for judgment on the pleadings granted with leave to amend 3/28/2017 (See Appendix K, ECF 184).
21. Fifth Amended Complaint filed and stricken for excess pages without leave to amend 5/2/2017 (See Appendix K, ECF 205, 206).
22. Petitioner filed "Word-Condensed Fifth Amended Complaint" 5/26/2017, (See Appendix K, ECF 214).
23. Petitioner filed motions to determine status of "Word-Condensed Fifth Amended Complaint" which were denied in reverse order (9/11/2017) (ECF 268-272) to essentially eviscerate any complaint; appeal filed 10/6/2017 (#17-17017) (ECF 276).
24. Sixth Amended Complaint ordered to prove timeliness of claims 12-12-2017 (See Appendix K, ECF 296).
25. Sixth Amended Complaint filed 2/12/2018 (See Appendix J).
26. Respondents filed motions to dismiss 3/5/2018 and for summary Judgment 2/28/2018 (See Appendix L1 and L2).
27. Petitioner requested expert witness 3/14/2018 (See Appendix M).
28. Petitioner statement of disputed facts 4/2/2018 proving need for neutral expert (See Appendix N).
29. Denial expert witness 3/19/2018 (See Appendix C).

30. 72(a) objections 4/2/2018 (See Appendix D).

31. Conversion to motion for reconsideration 4/3/2018 plus denial (See Appendix E).

32. 72 (a/b) objections to conversion and denial 4/20/2018 (See Appendix F).

33. Notice of appeal #18-15816 5/2/2018 (See Appendix G).

34. Findings/Recommendations 4/30/2018 by U.S. Magistrate Judge to "rescreen" Sixth Amended Complaint and deny that claims are cognizable (See Appendix K, ECF 328).

35. Petitioner's objections 5/24/2018 to Findings and Recommendations to essentially deny Sixth amended Complaint (See Appendix O).

36. Petition for Panel Rehearing #18-15816 (See Appendix G2).

37. Petitioner's request for stay of proceedings 6/12/2018 until Appeal #18-15816 completed (See Appendix P).

38. Petitioner's urgent filing for TRO/preliminary injunction 6/28/2018 to prevent transfer of jailhouse lawyer to another institution (See Appendix K, ECF 339-345).

39. U.S. District Court Judge Drozd's ruling finding "frivolous" 7/3/2018 (See Appendix H).

40. Motion for reconsideration 7/19/2018 to object to frivolous filings (See Appendix K, ECF 347).

41. Terminating sanctions for "frivolous" motion for reconsideration 8/20/2018 (See Appendix K, ECF 353).

42. Motion (in #18-15816) to rescind and stay mandate pending this writ of certiorari 12/20/2018 (See Appendix A2).

43. Appeal #18-16787 pending oral argument and/or decision regarding terminating sanctions (Petitioner's reply brief Appendix Q).

REASONS TO GRANT THIS PETITION

ARGUMENT I

UNITED STATES DISTRICT COURTS NEED TO RELIABLY APPOINT NEUTRAL MEDICAL EXPERTS IN INDIVIDUAL PRISONER PRO SE §42 USC 1983 MEDICAL CARE CASES WITH COGNIZABLE CLAIMS IN WHICH DISPUTED MEDICAL FACTS HAVE BEEN PRESENTED TO THE COURT IN ORDER TO PREVENT PREORDAINED NEGATIVE OUTCOMES. THESE EXPERTS WILL ASSURE THE PRISONER PLAINTIFFS' ACCESS TO COURT UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ACCESS TO A CIVIL JURY UNDER THE SEVENTH AMENDMENT.

A. PETITIONER'S MOTION FOR APPOINTMENT OF A NEUTRAL MEDICAL EXPERT IS DISPOSITIVE.

Rule 60 Motions for Reconsideration follow a final judgment. Petitioner first objected to the United States Magistrate Judge's denial of the medical expert witness with Rule 72(a) objections [Appendix D]. However, after the magistrate judge converted these to a "Motion for Reconsideration," she reasoned it would have been more appropriate to call them Rule 72(b) objections. She resubmitted "72(a/b) objections" [Appendix F].

When the United States District Judge finally ruled three months later, he stated the objections to the denial of the expert witness were "not clearly erroneous or contrary to law" implying the order was not dispositive [Appendix H, p.2]. However, Judge Drozd ignored the Magistrate Judge's conversion of the objections to a motion for reconsideration indicating the order <u>is</u> dispositive (Appendix H).

Petitioner filed this appeal #18-15816. The United States Court of Appeals did not deny the Petition for Panel Rehearing for lack of jurisdiction implying the order to deny the expert witness <u>is</u> appealable and dispositive [Appendix A1, p.1].

B. NEED FOR A NEUTRAL MEDICAL EXPERT IN PETITIONER'S CASE

Petitioner's case requires a neutral medical expert because the order is dispositive. Thus this case is capable of serving as an example of similarly situated cases. Petitioner made the District Court aware of her reasons for the court to appoint the medical expert in her initial request (Appendix M) and in her "Disputed Facts" (Appendix N).

The neutral medical expert is also required to opine whether a "specialist of record" in still an "active contributor" to a patient's care (in response to Respondent Ziomek's claim in motion to dismiss that a specialist's report is past history once the visit is completed (see Appendix L2, p.7).

Respondents want the Court to believe that each of them acted independently. This is not true in Central California Women's Facility (CCWF) Medical Department; now headed by three Medical Chief Executives in 2019. In 2013 it was headed by one Chief Medical Officer. These medical administrators all use "utilization management" to guide medical provider professional decision-making. The neutral medical expert can elaborate on this process. Because of "utilization management," the acts of all of the Respondents in Petitioner's case constitute one "continuing course of conduct."

While intentional concealment of the diagnosis of leg length discrepancy and failure to provide orthopedic shoes to protect Petitioner's back may appear "easy to understand" by lay people as the District Court infers (Appendix C, p.2); the coordinated activities of six prison Medical Respondents are very complex and require explanation by a neutral medical expert witness. Reliable appointment of neutral medical experts in Petitioner's case and similarly situated cases will allow the cases to proceed through contested motions to dismiss and motions for summary judgment with medical authenticity and fairness.

C. CONGRESSIONAL INTENT

Congress sets forth the ideal standard in the IFP Statute 28 USC 1915(d) when they state, "witnesses shall attend as in other cases..." (emphasis added). Petitioner discusses this with the District Court in Appendix D (p.3).

Congress did not, however, authorize independent funding. Court-appointed expert witnesses are ultimately paid by the losing party. The District court will pay the bill if the indigent prisoner pro se loses. Why would Congress make it mandatory for witnesses to attend these cases but not provide separate funding for expert witnesses? Perhaps Congress felt it was the duty of the Federal courts to provide accountability to the medical profession in prisons with their own funds. This has led to the present situation: preordained negative outcomes for deserving pro se prisoners in medical care cases.

Once disputed medical facts are presented to the District Court, the Court will know whether the prisoner has the evidence needed to make their case. Non-medical personnel cannot fully comprehend the medical evidence once it is available. As in Predraza v. Jones, only a neutral medical expert can knowledgably evaluate the medical positions of both sides [71 F.3d 194, 197 (5th Cir. 1995)]. In Predraza v. Jones a prisoner pro se wanted a neutral medical expert to evaluate whether or not heroin withdrawal was an understandable reason for delay in filing. Heroin withdrawal is a serious medical condition and only a neutral medical expert can opine about its symptoms, duration, etc. [Id.].

Predraza in the alternative asked the District Court for a "jailhouse expert witness" [Id.]. It was denied. Petitioner tried this option. The declaration of Donna M.B. Anderson, M.D. introduced Petitioner's medical theory of the case to the District Court but was ultimately stricken because Dr. Anderson is a prisoner (see Appendix K, ECF 219).

Even though Congress did not authorize separate funds for neutral medical expert witnesses; justice demands that the Courts use medical experts reliability with disputed medical facts. Prison medical officials currently expect accountability primarily in class action suits (upon information and belief). Individual prisoners are subject to extremes of physical suffering and pain (personal experience). Evidence shows that this set of medical care cases requires the District Courts to utilize expert witness expertise that may not be required in non-medical cases.

D. CONSTITUTIONALLY ADEQUATE ACCESS TO COURT.

Prisoners are guaranteed "meaningful access to court" [Bounds v. Smith, 430 US 817, 822 (1977)]. This right has been limited by the requirement of an "actual injury" to the prisoners before bringing a claim [Lewis v. Casey, 518 US 343, 351-353 (1996)]. Narrowly interpreted, these cases pertain to prison officials "impeding" prisoner access to courts [Id.].

Petitioner, however, humbly asks this High Court to look at constitutional access to court under the First and Fourteenth Amendments through a wider lens. In Petitioner's case and in similarly situated cases, it is the United States District Court that is limiting "access to court" and "impeding" prisoners pro se from obtaining deserved damages.

In Turner v. Safley, the Supreme Court held "when a prison regulation impinges on inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests..." [482 US 78, 89 (1987)]. Analogously, in this set of prisoner pro se medical cases, the District Court's denial of expert witnesses is only valid if it is related to legitimate District Court interests. Petitioner believes that "saving money" is not a valid reason to deny justice.

There is no legitimate government interest in maintaining unconstitutional medical care in prisons. Pro se prisoners have no other means for legal relief other than 42 USC §1983 Federal cases (Prisoners have no right to litigation unrelated to their criminal sentences or conditions of confinement) [Lewis v. Casey, 518 US 343, 355 (1996)]. The ripple effect of opening the door to some of these deserving lawsuits to win damages will be positive for the state of health of American prisoners. Unfortunately, the cost will not be de minimus [Turner v. Safley, 482 US 78 (1987)].

Petitioner's need for a neutral medical expert witness and the need for reliable appointment of neutral medical experts in similarly situated cases meets the Lewis v. Casey criteria [518 US 343,353 (1996)]. These pro se prisoner plaintiffs are suffering "actual injury" by losing cases due to preordained negative outcomes. The medial care claims are about conditions of confinement. They are definitely not "frivolous" once claims have been ruled cognizable.

"Access to court" is meaningless unless it confers the ability to win meritorious lawsuits. Lewis has been interpreted by some courts to mean that pro se prisoners are only required to be able to file a complaint [Benjamin v. Jacobsen, 935 F. Supp 332, 352 (S.D.N.Y. 1996)]. Others, however lean on the Lewis Court's comment that "It is the role of courts to provide relief to claimants, in individual or class actions, who suffered, or who will imminently suffer, actual harm..." [Lewis v. Casey, 518 US 343, 249 (1996) (emphasis added]. The Eleventh Circuit United States Court of Appeals held that the right of access to court was not satisfied "[merely] by permitting the prisoner to file a complaint" [Bonner v. City of Pritchard, Ala., 661 F.2d 1206, 1212-1213 (11th Cir. 1981) (en banc)].

This High Court has addressed litigants ability to win cases in 2002 in an non-prisoner case [Christopher v. Harbury, 536 US 403, 414 (2002)]. Petitioner humbly asks this Court to revisit this issue and to advise District Courts that neutral medical experts routinely be obtained in prisoner pro se 42 USC §1983 medical care cases after disputed facts have been presented to the Court to prevent preordained negative outcomes.

E. RIGHT OF ACCESS TO A CIVIL JURY

This High Court has never accepted the "total incorporation theory" of the Fourteenth Amendment whereby the amendment "[would be] deemed to subsume the provisions of the Bill of Rights en masse" [McDonald v. Chicago, 561 US 742 (2010)]. Gatekeeping judicial functions that prevent a case from reaching a civil jury are allowed without violating the Seventh Amendment [Daubert v. Merrell Dow Pharm, 509 US 579 (1993)] (regarding appointment of an expert witness)]. On the other hand, the Seventh Amendment right to a jury trial has been affirmed in Federal cases "in suits at common law" [Curtis v. Loether, 415 US 189 (1974)].

In one case where the right to a jury trial based on the Seventh Amendment was upheld, the Court concluded that 42 USC §1983 lawsuits dealt with "Causes and Actions analogous to those tried at the time of [the United States Constitution's] founding and that the particular trial decision must fall to the jury in order to preserve the substance of the common law right as it existed in 1791" [Monterey v. Del Monte Dunes, 526 US 687 (1999), HN 11].

Medical care cases fall within the substance of common law in 1791. Court appointment of neutral medical expert witnesses in cases discussed in this Petition is necessary to preserve all party's right to a jury trial under the Seventh Amendment of the United States

Constitution. Respondents requested a jury trial in Petitioner's case when they answered the Fourth Amended complaint (Appendix K, ECF 58, 63-65, 82).

ARGUMENT II

INDIVIDUAL PRISONER PRO SE §42 USC 1983 MEDICAL CARE CASES WITH COGNIZABLE CLAIMS IN WHICH DISPUTED MEDICAL FACTS HAVE BEEN PRESENTED TO THE COURT ARE EXTRAORDINARY. THEY ARE EXTRAORDINARY BECAUSE THEY ARE RARE; AND BECAUSE THEY HAVE SURVIVED 28 USC §1915 A(a-b(1)) SCREENING, PRISON LITIGATION REFORM ACT EXHAUSTION AND FAILED ATTTEMPTS AT SETTLEMENT. NEUTRAL MEDICAL EXPERT OPINION IS REQUIRED TO ADVISE DISTRICT COURTS CONCERNING THE VIABILITY OF THE MEDICAL POSITIONS OF BOTH SIDES IN THE FACE OF MOTIONS TO DISMISS AND/OR MOTIONS FOR SUMMARY JUDGMENT.

A. NO NEED FOR MANDAMUS; APPEAL SUFFICIENT

The Ninth Circuit of the United States Court of Appeals denies Petitioner's Petition for Panel Rehearing (which it reframed as a motion for reconsideration) in this Appeal #18-15816 because Petitioner "has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus" (Appendix A, p.1). Petitioner believes she erred in requesting the mandamus in the Petition for Panel Rehearing (Appendix G2, p.15). Mandamus is not a substitute for an appeal [In re Westin, 18 F.3d 860, 864 (10th Cir. 1994)]. Mandamus is inappropriate as long as this appeal is based on an appealable order [Id.]. The Court of Appeals could have given relief by reversing District Court orders denying the expert witness (see Appendix C, E, F, & H).

B. THESE CASES ARE EXTRAORDINARY

Despite the denial of this appeal at the Appellate Level, individual prisoner pro se 42 USC §1983 medical care cases in which disputed medical facts have been presented to the District Court are extraordinary. They are extraordinary because they are rare and because

they have survived 28 USC §1915 A(a-b(1)) screening, Prison Litigation Reform Act exhaustion and failed settlement attempts.

These cases are rare. Most prisoner pro se medical care cases fail before reaching this point. Petitioner knows of only one case in the past ten years that has reached settlement [Crooker v. United States, U.S.D.C. (D. Mass) Case No. 3:13-cv-30199-FDS, 2015, U.S. District LEXIS 12386]; and one where summary judgment reversed in favor of plaintiff [James v. Eli, 889 F.3d 320 (7th Cir. 2018)]. Statistically, these few are not enough.

There are over 2 million prisoners in the United States. In the 1990's, at least 200,000 serious medical errors occurred in the United States' general population in one year [Institute of Medicine]. At that time, the population was approximately 250 million people. Calculation gives a serious error rate of 1/1250 persons. Using this rate to apply to prisoners, one would expect a minimum of 1300 serious medical errors per year among the United States' prison population. There clearly have not been 13,000 medical care lawsuits settled in favor of prisoner plaintiffs in the last ten years.

Prisoner pro se cases in which disputed facts have been presented have survived 28 USC §1915 A(a-b(1)) screening. The prisoner has stated cognizable claims under the Eighth Amendment to the United States Constitution and the defendants have been served process. All "frivolous" claims have been dismissed.

These cases have also survived exhaustion of administrative remedies under Prison Litigation Reform Act. The Prison Litigation Reform Act has been very effective at reducing the number of prisoner pro se cases filed [Constitutional Rights of Prisoners, p.413-414].

In these cases, disputed medical facts have been presented to the Court. Often the prisoner plaintiff has been served with motion for Summary Judgment by the Respondents as

Petitioner was. In the alternative, objections to motions to dismiss contain disputed facts or preparatory documents for settlement conferences. In one way or another, the District Court has become aware that the prisoner can articulate and substantiate the pertinent factual details from their point of view.

These four qualities – rarity, survival of screening, survival of exhaustion, and survival of failed settlement attempts – make this small set of prisoner pro se medical care cases "extraordinary." For this reason, these cases all deserve to have neutral medical expert witnesses appointed by the District Courts to opine for the Court concerning the medical facts. The District Court will then be better able to exercise its discretion in interpreting the law while allowing for the liberal construction of pro se pleadings [Erickson v. Pardus, 551 US 89, 94 (2007) (per curiam)]. Court appointed neutral medical expert witnesses should be reliably given to these cases that have become extraordinary by reaching the "disputed facts" stage of the proceedings.

PRAYER FOR RELIEF

Petitioner humbly prays that:

1) This High Court grant this Petition for Writ of Certiorari concerning the Ninth Circuit United States Court of Appeals, case #18-15816;
2) This High Court advise lower courts to obtain court appointed medical expert witnesses in all individual prisoner pro se 42 USC §1983 medical care cases in which the District Court has been presented with disputed medical facts;

3) This High Court advise lower courts that all prisoner pro se 42 USC §1983 medical care cases in which the District Court has been presented with disputed medical facts are "extraordinary"; and

4) Any other relief deemed appropriate by this auspicious Court.

CERTIFICATE OF COMPLIANCE

This petition contains 518 lines of monospaced type.

VERIFICATION

I, Dana Gray, W76776, Petitioner, declare under penalty of perjury under the laws of the United States Government, that the foregoing is true and correct to the best of my information and belief.

Executed the 28th day of February, 2019 at Chowchilla, California

Respectfully Submitted,

Dana Gray, W76776

Petitioner Pro Se