

18-8552

No. _____

Supreme Court, U.S.
FILED

SEP 12 2018

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

HERMAN GAINES — PETITIONER
(Your Name)

vs.

BRAD BUSNARDO, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Third Circuit US Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Herman Gaines #429989/233523C
(Your Name)

Northern State Prison, PO Box 2300
(Address)

Newark, NJ, 07114
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

I) In New Jersey, to proceed with a state-based negligence lawsuit one must provide an Affidavit of Merit. It costs roughly \$3,000 to pay an expert to provide the affidavit. Is it unconstitutional in violation of the Due Process Clause to exclude indigent prisoners from pursuing negligence-based lawsuits solely because we cannot afford to pay for an Affidavit of Merit? USCA 5,14

II) In Issue VI of my January 17, 2018 dated Informal Brief to the Court of Appeals, I specifically wrote, "As an impoverished prisoner, the court system essentially says I have no right to a malpractice claim of action (unless I can afford to pay an expert to provide an Affidavit of Merit) and I believe that's unconstitutional. USCA 5,6,8,14." Did the US Court of Appeals violate my constitutional right to Due Process when it declined to consider Issue VI by claiming that I never challenged the constitutionality of the Affidavit of Merit requirement? USCA 5,6,8,14

III) I accused Nurse Green of violating my 8th Amendment right when she refused to give me crutches and forced me to walk on my Achilles rupture, which I alleged caused me to experience intensified pain further injury in the form of an additional "pop" of my Achilles tendon, despite her awareness of my Achilles injury. USCA 5,6,8,14 However, Nurse Green did provide partial treatment in the form of scheduling a doctor visit, providing Motrin and an ankle sleeve, and restricting me from work and recreational activities. If prison officials schedule inmates for doctor visits, are in-

mates entitled to trials if their accusations allege that the prison officials provided cruel and unusual medical treatment which causes inmates to experience additional injury and harm? USCA 5,6,8,14

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☒ 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:

Brad Busnardo, RN

Mary Ellen Green, RN

John Doe

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 29, 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 25, 2018, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 1) N.J.S.A. 2A:53A-29 appears on pages 5-6 of the US District Court's Opinion (December 23, 2014) at Appendix C of this petition's appendix.
- 2) USCA 8
- 3) USCA 5
- 4) USCA 6
- 5) USCA 14

STATEMENT OF THE CASE

Initially, I filed action in Cumberland County Superior Court (L-784-13) (Exhibit A) on August 28, 2013. While in that court, I submitted a motion requesting that court's assistance with obtaining an Affidavit of Merit which was denied. On October 31, 2013, the respondents filed a Notice of Removal which transferred this action from Cumberland County to the US District Court. On December 23, 2014, Chief Judge Jerome B. Simandle issued an Order granting respondents' motion for summary judgment regarding my state-based negligence claims (because I couldn't afford financially to provide an Affidavit of Merit) but denied it concerning my 8th Amendment claims. However, respondents' subsequent motion for summary judgment was granted on June 5, 2017. I filed an appeal to the Court of Appeals, and on May 29, 2018, it vacated the District Court's Order concerning respondent Busnardo, affirmed it concerning respondent Green, and refused to consider whether New Jersey's Affidavit of Merit requirement was constitutional. On June 25, 2018, the Court of Appeals denied my petitions for rehearing and hearing en banc.

The following represents the facts on which this matter is based. On September 10, 2011, I was a prisoner when I was

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Subjected to cruel and unusual abuse by Respondents Brad Busnardo (Busnardo) and Mary Ellen Green (Green). After rupturing my Achilles tendon while playing basketball, I immediately alerted Busnardo, a nurse employed at South Woods State Prison (SWSPP), of the seriousness of my medical condition by informing him that I believed I injured my Achilles tendon because I experienced intense pain when I pivoted and then felt a pop at the back of my left ankle, and that I couldn't feel my tendon at the back of my left ankle. Although the injury was a rupture to the Achilles tendon, Busnardo misdiagnosed the injury as a mild ankle sprain. (See Exhibit B, 2nd page, top paragraph) The wrong diagnosis was reckless in and of itself because he ignored both my statements and symptoms which clearly presented an Achilles tendon injury. Busnardo's recklessness and indifference were clearly evident given his failure to provide the protocol treatment for even his mistaken diagnosis.

The NJDOC Nursing Protocol for Sprains states that crutches are the mandatory treatment for an ankle sprain. (See Exhibit C, 1st page, sentence #3 of last paragraph entitled "Nursing Intervention") So not only did Busnardo ignore my protestations of an Achilles injury, but he was also so indifferent and reckless to go as far as refusing to provide me with the protocol treatment for a sprain.

Busnardo did offer Motrin but he wasn't authorized to prescribe anything of prescription strength to address my pain. He also advised me to put ice on the ankle while adding that he didn't know where I would get ice from. Busnardo would later admit that ice was available at the Medical Unit where our encounter occurred. Busnardo

Busnardo also offered me an ankle sleeve but it was too tight and painful to slip on so he offered me an ACE wrap which I accepted. Busnardo then ordered me to return back to my housing unit. Busnardo refused to include in the medical records which he prepared any mention that he initially offered me an ankle sleeve and witnessed that it was too painful to slip on. (See Exhibit B, pages 1-4)

Because Busnardo's medical treatment didn't include crutches or any other alternative which did not force me to bear my full weight while walking on my ruptured Achilles tendon, I was forced to bear my full weight while walking on my ruptured tendon and I limped, hopped, and at times, drug my leg approximately 100 yards and then up four flights of stairs back to my housing unit. Additionally, I was also forced to bear my full weight on my ruptured tendon while walking to obtain my meals and shower.

Proof that I never agreed with nor understood Busnardo's medical treatment plan was indicated in my surprise that Busnardo didn't schedule me to see a doctor. Upon discovering that Busnardo's treatment plan didn't include a ~~scheduled~~ doctor visit, I immediately submitted a September 12, 2011 dated two-paged MR-007 form. (See Exhibit D) In the two-paged MR-007, I expressed concern about my Achilles injury, listed my symptoms, explained the extreme pain and difficulty associated with bearing my weight on my injury in order to get my meals and shower, expressed that my injury was getting worse, expressed dread and doubt about having to walk all the way back to the Medical Unit on my injury, stated some details of my encounter with Busnardo, expressed that I felt my injury wasn't being

taken seriously, and I also mentioned I was surprised Busnardo didn't schedule me for a doctor. (See page 2 of Exhibit D) Despite all of the symptoms I expressed and my protestations of extreme pain and difficulty I had with being forced to walk and bear my weight on my injury; on September 14, 2011 I was ordered by Green to limp on my Achilles injury down the four flights of stairs and the 100 yards back to the Medical Unit.

During my encounter with Green, I reiterated all of the symptoms and conditions which I stated in the two-paged MR-007. I informed Green that on a scale of 1-10, my pain was at an 8 or 9 (See page 3 of Exhibit E under Musculoskeletal section), she observed a 3x7 cms bruise on my ankle (See 3rd page of Exhibit E under Musculoskeletal section), and she also observed that my walking gait was abnormal (See 3rd page of Exhibit E under Nurse Physical Exam section). Despite my written account of extreme pain and difficult conditions I experienced by being forced to walk on and bear my full weight on my ruptured tendon, and despite the danger and risk of additional injury created by walking on my ruptured Achilles tendon; Green refused to give me crutches and forced me to limp, hop, and at times, drag my leg the 100 yards and up four flights of stairs all the way back to my housing unit. Green did offer Motrin which I begrudgingly accepted and hoped would lessen the pain, but it didn't. (See 3rd page of Exhibit E under Musculoskeletal section) She also gave me an ankle sleeve to replace the ACE bandage. (See 3rd page of Exhibit E under Musculoskeletal section) It should be noted that Green lied and said she gave me a brace but it was an ankle sleeve she gave me; not a brace. I listed the actual ankle

sleeve as evidence that I wanted to introduce at trial to prove that Green gave me an ankle sleeve and not a brace. [See Plaintiff's Exhibit #18 on page 29 of Joint Final Trial Order (JFTO isn't included in this appendix)] Green also restricted me from work and recreational activities. (See 4th page of Exhibit E under Orders/Referrals section which is located directly above Comments section)

The next day I was ordered to walk to the Intake Unit. My housing unit and the Intake Unit were located on opposite sides of the prison away from each other. The Intake Unit was probably about $\frac{3}{4}$ of a mile away from my housing unit. To give some perspective as to how far away the two are away from each other, the civilians and officers take electric carts (or golf cart) rides to and from Intake to the section of the prison where my housing unit was located. I was ordered to hobble down the four flights of stairs, 100 yards past the Medical Unit, and then $\frac{3}{4}$ of a mile on my ruptured Achilles tendon to Intake. The reason I was ordered to Intake was to give a witness' account on behalf of another inmate, and while there Officer Mosley, a layman, noticed my apparent serious medical need and asked the physical therapist, Robert Capri, PT (Capri), to treat my serious medical need.

Capri examined my Achilles ~~tendon~~ and confirmed that it was a rupture. He then explained the consequences of bearing my weight on the ruptured tendon while walking and I believe Capri discussed some of the post-surgery effects which can potentially ensue as a result of someone bearing their weight on the ruptured tendon while walking. Capri then provided me with

crutches and showed me how to use them.

On September 16, 2011, I walked to the Medical Unit, on the crutches provided to me by Capri, to attend a dental appointment. At the appointment's conclusion, I was informed by an officer that a nurse wanted to speak with me. I walked into an office and discovered it was Green whom had summoned me. She stated to me, "I heard you fell at Intake yesterday and that Dr. Bob gave you crutches." Green asked how I was walking with the crutches to which I responded, "Fine." Green catalogued her version of this encounter on September 16, 2011 at 9:29 AM. (See Second page of Exhibit E) Six minutes later at 9:35 AM, Green culpably submitted an order for crutches under my medical record despite her knowledge that Capri had already given me crutches. (See 1st page of Exhibit E the last sentence under paragraph entitled "Orders to be Processed and/or Transcribed" for the order which Green submitted; See 2nd page of Exhibit E the top sentence for Green's signature, the date, and time which she submitted the order) Six minutes earlier at 9:29 AM, Green literally wrote that I had already been given crutches. (See the 2nd page of Exhibit E under Chart Note section and Green's signature, date, and time) Why would she submit an order for crutches if she already knew I possessed crutches unless that was an admission that she knew she was guilty for not giving me crutches when I encountered her two days earlier? Green's order was made two days after our medical appointment, and I never even received the crutches which she ordered.

From September 10, 2011 to September 15, 2011 (for 6 day counting the 10th), I was exposed to excruciating pain and

additional injury. My tendon tore, rended, and ruptured every time I put weight on it by walking on it, and on one occasion I even experienced an additional pop of the tendon. I believe at trial the evidence would've supported an inference to be drawn that initially my tendon was partially torn but the additional injury which ensued by being forced to walk on it exacerbated my injury to a full rupture. What Busnardo and Green did to me was cruel and unusual and ultimately amounted to torture, and they dared commit these acts because they believed no one would hold them accountable. Not their supervisors, not the NJDOC, and as it turns out, not even the Court of Appeals. How was I not entitled to a trial to prove Green's refusal to give me crutches despite her awareness of my Achilles injury? Especially, given that my two-paged MR-007 (form requesting medical attention), which Green signed and dated, indisputably proves that Green was informed of an Achilles injury and refused to give me crutches. (See 1st page of Exhibit D)

REASONS FOR GRANTING THE PETITION

Deliberate indifference to serious medical need(s) of prisoners constitutes cruel and unusual punishment and is proscribed by the Eighth Amendment. Estelle v. Gamble, 429 US 97, 97 S.Ct. 285 (1976) A prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health and safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. Farmer v. Brennan, 511 US 825, 114 S.Ct. 1970 (1994) According to Farmer, "Deliberate indifference entails something more than negligence, but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." "Deliberate indifference" is a state of mind equivalent to reckless disregard of a known risk of harm. See Farmer v. Brennan, 511 US 825, 837-838 A serious medical need has been defined as "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attentions." Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3rd Cir. 1987) If knowledge of the need for medical care is accompanied by an intentional refusal to provide that care, or

medical treatment is delayed for nonmedical reasons, deliberate indifference has been established. Lanzaro, supra, 834 F.2d at 346

After Defendant Green was informed of my Achilles injury she failed to take reasonable measures to abate the substantial risk of harm because her omission in recklessly refusing to follow protocol and provide crutches caused me harm in the form of not only heightened intensified pain but also the additional injury which was caused when I experienced an "additional pop" of my Achilles tendon. Farmer v. Brennan, 511 US 825, 114 S.Ct. 1970; USCA 8

The subjective element of deliberate indifference "entails something more than mere negligence... [but] something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." Farmer v. Brennan, 114 S.Ct. 1970, 1978 (1994) The subjective element requires a state of mind that is the equivalent of criminal recklessness; namely, when the prison official "knows of and disregards an excessive risk to inmate health or safety, the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 1979 Prison officials have a duty to prevent further injury and reckless exacerbation of an injury. Farmer v. Brennan, 114 S.Ct. 1970, 511 US 825

Additionally, the facts of this matter establish the conditions of deliberate indifference enumerated in Parkell v. Danberg, 833 F.3d 313 (3d Cir. 2016) because

- 1) Defendant Green knew it was an Achilles injury and was aware of the risk of additional injury and harm

when she refused to give me crutches and forced me to walk on my Achilles injury in order to eat, shower, and limp wherever else I was ordered, 2) Defendant Green delayed giving me crutches for a nonmedical reason because she wanted the incentives associated with sparing her employer the surgical expenses of treating my Achilles injury, and 3) Defendant Green prevented me from receiving the needed and recommended treatment of crutches in her refusal to comply with the protocol to treat even a sprain with crutches.

This petition presents questions of exceptional importance because it engages both the standard of humane treatment of prisoners and scrutinizes our courts' responsibilities to ensure fairness and equity when those courts are presented with situations in which a prisoner cannot afford to pay for an Affidavit of Merit in order to proceed with state-based negligence claims of actions. These are critical matters of the mass incarceration crisis which are being exploited by corrections corporations to boost and protect their profits by administering inhumane medical treatment. Lower courts, such as the Third Circuit Court of Appeals, appear to be protecting the corrections corporations from being challenged by negligence lawsuits since that court refused to even consider the dismissal of my state-based negligence issue, although I was entitled by constitutional right to a ruling in that court. USCA 5, 14

The Court of Appeals's panel judges radicalized their posts when they claimed I didn't challenge the District Court's dismissal of my medical malpractice claim and by using that Trumped-up reasoning as a pretense to avoid

giving legal consideration regarding that claim's dismissal. USCA 5, 6, 8, 14 The Court of Appeals's panel of judges wrote, "In his briefs, Gaines does not challenge the District Court's dismissal of the medical malpractice claim for failure to comply with New Jersey's affidavit of merit statute, so we do not consider that matter here." The next paragraph will prove that court's claim was unquestionably untrue.

Indisputably, I literally wrote to the Third Circuit Court of Appeals, "My state-based claims were dismissed solely because I couldn't afford to pay an expert to provide an Affidavit of Merit. That was unconstitutional because without money to pay for an **expert** there's no way I could have proceeded on my malpractice negligence-based claims which is a less arduous burden to prove than the deliberate indifference standard. As an impoverished prisoner, the court system essentially says I have no right to a malpractice claim of action (unless I can afford to pay an expert to provide an Affidavit of Merit) and I believe that's unconstitutional. USCA 5, 6, 8, 14" (See last paragraph of Issue 6 of the January 17, 2018 Informal Brief which I submitted to the Third Circuit Court of Appeals) The Court of Appeals's claim was devoid of logical, rational, and justifiable credibility because the records prove that I clearly challenged the unconstitutionality of my malpractice suit's dismissal.

This matter should also be heard by your Court because the Court of Appeals's decision conflicts with Farmer v. Brennan, 511 US 825, 114 S.Ct. 1970 and consideration by your Court is necessary to maintain uniformity regarding whether reckless medical mistreatment that causes

additional injury is a violation of a prisoner's constitutional right to be free from cruel and unusual punishment.

USCA 5, 6, 8, 14

I'm petitioning for your Court's attention to consider whether an 8th Amendment violation occurred when Nurse Green caused me to experience an additional "pop" of my Achilles tendon by refusing to provide me with crutches and by forcing me to walk on my ruptured tendon for that extended period of five days, although I informed her that I felt my Achilles tendon pop while playing basketball. USCA 5, 6, 8, 14 The Court of Appeals found no 8th Amendment violation concerning Nurse Green because "*** it is key that she put Gaines on the list to see the doctor ***." That court went on to hold that Green undisputably indicated that she employed professional judgment and did not act with the obduracy and wantonness necessary to sustain an 8th Amendment violation. That court's reasoning is a radical departure from legal, medical, and humane standards of treatment. USCA 5, 6, 8, 14 Both Mr. Robert Capri, PT and Dr. Gerald Packman are medical professionals whom have both confirmed that a person suffering from an Achilles injury should not be forced to walk on the injury. (See paragraph entitled "Robert Capri" in bold print of page 15 of Joint Final Trial Order; See first sentence of last paragraph of Exhibit F)

To cause an inmate to experience an additional "pop" of his Achilles tendon by forcing that person to walk on an Achilles injury is cruel, unusual, and ultimately amounts to torture. USCA 8 Green's reckless abandon of protocol and human decency is legally inconsoleable because it conflicts

with her legal obligation to avert the substantial risk of further ruptures to my Achilles tendon. Farmer v. Brennan, 511 US 825, 114 S.Ct. 1970 Accordingly, the Third Circuit Court of Appeals's pardon of Green's reckless abandon of my health and safety conflicts with your Court's legal standard regarding cruel and **unusual** punishment set forth in Farmer v. Brennan.

In his book "Between the World and Me", Ta-Nehisi Coates describes prisons as the warehousing of black bodies into a jobs program for Dreamers. Judicial radicalism is what both supports and exacerbates the crises associated with and produced by mass incarceration. Our judicial system has become so radicalized that segments of it pervert the law to protect prison officials' cruelty in the name of corporate greed. It would've taken either one of the nurses 30 seconds to give me crutches. So why would they opt to force me to walk on my Achilles injury instead of giving me crutches? The reason was because they wanted to conceal the seriousness of my injury in an attempt to save their employer, Rutgers Biomedical and Correctional Services, the cost of having to pay for surgery. It is cheaper to let an Achilles injury heal on its own. How does an impoverished prisoner fight back against this cruelty? It should be the court system but that equality isn't extended to me nor my kind.

I was taught to believe the American flag is a symbol of liberty, equality, and justice for all. That simply isn't true for impoverished minorities and the disenfranchised. Former NFL quarterback Colin Kaepernick protested because our flag doesn't extend the same rights to everyone equally. He wouldn't stand for injustice. He knelt to

expose unfairness, oppression, and inequality. I saw former NFL coach Mike Ditka proclaim he didn't see the injustice which minorities claim we are experiencing. If he hasn't realized it yet, it's about to get a lot worse for us.

President Trump is rapidly selecting federal judges at a historic pace. These are life-long posts so our country will be shaped by these selections for the next 30 or 40 years. Obviously, another of our president's nominees is likely going to become a Supreme Court Justice. Incidentally, it's probably not exactly tactful of me to voice my concerns regarding our president's judicial selections. However, our president's judicial selections and the existence of judicial radicalism threatens the security of impoverished minorities' constitutional rights. If the Third Circuit Court of Appeals could radically find that I never challenged the affidavit requirement; although that court's own records prove that I did, what's to stop our president's judicial picks from forming into cabals to practice judicial radicalism?

This matter is particularly critical for impoverished minorities because it removes accessibility to our courts, such as what occurred when I challenged New Jersey's affidavit requirement in the Third Circuit, to challenge the prison corporations' cruel treatment of our medical needs. One cannot say this isn't a matter of race and inequality when the Third Circuit clearly devised a Trumped-up reason as a pretext to refuse ruling on an issue which bars the impoverished, overwhelmingly comprised of minorities, from pursuing malpractice actions against corrections corporations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James H. Quinn", written over a horizontal line.

Date: September 3, 2018