

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NEXIS RENE GOMEZ, — PETITIONER
(Your Name)

VS.

D. BRAUN, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

NEXIS RENE GOMEZ
(Your Name)

SOLEDAD STATE PRISON, P.O.BOX 705
(Address)

SOLEDAD, CALIFORNIA 93960
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Did the Court of Appeals Err in Affirming Summary Judgment In Respondents' Favor When There is Evidence in Petitioner's Medical Record Demonstrating That Dr. Braun and Dr. Majumdar Were Deliberate Indifferent to Petitioner's Medical Needs and Condition in Violation of the Eighth Amendment?

Did the Court of Appeal Err in Holding That the District Court, Did Not Abuse Its Discretion By Denying Gomez's Amended Motion For Leave to Amend As Untimely, On the Grounds That He Failed to Show Good Cause?

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:

Petitioner, NEXIS RENE GOMEZ, is representing himself in this action.

Respondents, D. BRAUN and N. MAJUMDAR are represented by the California's Attorney General Office. Last representative of record.

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APPENDIX C: The Opinion of the United States Court of Appeals Denying Petitioner's Petition for Rehearing en Banc Issued on December 3, 2019.

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 Gomez v. Braun, 776 F. App. 460, ; 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 is unpublished.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 B 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 is unpublished.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 August 27, 2019.

[] 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: December 3, 2019, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including May 1, 2020 (date) on February 24, 2020 (date) in Application No. 19 A 935.

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

The Eighth Amendment provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Petitioner, a state prisoner who was suffering from a very serious mental health illness and experiencing suicide attempts in February 2012, while imprisoned in High Desert State Prison in California, claims Eighth Amendment deliberate indifference against prison doctors, his primary mental health provider Doctor D. Braun and his psychiatrist Doctor N. Majumdar for failing to provide adequate medical care.

On January 4, 2017, the United States District Court for the Eastern District of California issued a discovery and scheduling order. (See Exhibit 1.)

According to this order, all discovery was to be completed by April 21, 2017, including any motion necessary to compel discovery. All pretrial motions except motions to compel discovery, were to be filed on or before July 14, 2017. (U.S. Dist. Court Docket Entry No. 34.)

On May 11, 2017 the district court issued a new order modifying its prior discovery and scheduling order. (See Exhibit 2.)

According to the new order, discovery closed on June 14, 2017, and any motion to compel discovery, were to be filed on or before that date. Additionally, all pretrial motions except motions to compel discovery, were to be filed on or before September 14, 2017. (U.S. Dist. Court Docket Entry No. 37.)

On September 14, 2017, deadline for filing all pretrial motions, Respondents Doctor Braun and Doctor Majumdar filed in the United States District court a motion for summary judgment. (See Exhibit 3.)

In their motion for summary judgment, Respondents, in an attempt to escape liability under § 1983, disclosed for first time to

petitioner, relevant information stating that the "scheduler" was the responsible in delaying petitioners mental health treatment for 57 days, which resulted in a further significant suicide attempt that almost ended petitioner's life if no discovered by prison staff. (See Exhibit 3 at pp., 8-9, 14, 19, 20, 26-27.)

The motion for summary judgment filed by Respondents in the United States District court the very same day when the deadline to file all the pretrial motions expired, was delivered to petitioner by a California Correctional Officer on September 21, 2017, seven days after the expiration of the scheduled deadline issued by the district court. The date when petitioner received the motion for summary judgment is reflected in the prison's legal mail logs requested by petitioner in the prison. (See Exhibit 4.)

On July 19, 2018, the magistrate judge assigned to this case, issued findings and recommendations. (U.S. Dist. Court Docket Entry No. 53); (See also Appendix B.)

On September 10, 2018, petitioner timely filed objections to the magistrate judge's findings and recommendations, at the same time he filed a motion for leave to amend his complaint to include the "scheduler". (See Exhibit 5.)

On September 14, 2018, petitioner filed in the United States District Court an amended motion for leave to amend his complaint, reopen discovery and to vacate any pending motion to include the scheduler, that according to the new information disclosed for first time by Respondents in their motion for summary judgment, he was the responsible in delaying petitioner's mental health treatment for 57 days. (See Exhibit 6.)

On September 26, 2018, the United States District court denied petitioner's amended motion for leave to amend his complaint as untimely, citing the September 14, 2017 deadline for filing all pretrial motions, and finding that petitioner failed to show "GOOD CAUSE" because he failed to exercise due diligence, he did not move to amend the pretrial motions deadline, or to amend his pleading as soon he learned on or about September 14, 2017 about the scheduler's alleged involvement in the delay of his mental health treatment. (See Exhibit 7.)

On September 28, 2018 the district court adopted in full the magistrate findings and recommendations, and granted Respondents's motion for summary judgment. (See Appendix B.)

Petitioner timely appealed to the United States Court of Appeals for the Ninth Circuit, Case No. 18-16991.

On August 27, 2019, the United States Court of Appeals for the Ninth Circuit, issued a memorandum affirming summary judgment in Respondent's favor, and holding that the district court did not abuse its discretion in denying petitioner's amended motion for leave to amend on the grounds that he failed to demonstrate "GOOD CAUSE", citing Johnson v. Mammoth Recreations Inc., 975 F.2d 604, 607-609 (9th Cir. 1992) (setting forth standards of review and grounds for denial to leave to amend.) (See Appendix A.)

Petitioner filed a timely petition for rehearing in banc, which was denied on December 3, 2019. (See Appendix C.)

In the instant petition, petitioner contends that certiorari should be granted because the Court of Appeals for the Ninth Circuit

erred in holding that the district court properly granted summary judgment in favor of Dr. Braun and Dr. Majumdar, because there is evidence in petitioner's medical record indicating that prior to the consultations that petitioner had with Dr. Braun on January 3, January 30, and February 21, 2012, Dr. Braun was sufficient aware that petitioner was struggling with a serious mental health illness and experiencing suicide attempts to the point of incompetence, and despite knowing that petitioner faced a substantial risk of serious harm, he disregarded that risk by failing to take reasonable measures to abate it, which resulted in the delay of petitioner's mental health treatment for 57 days, and consequently in a further suicide attempt due to lack of medications, which constitutes deliberate indifferent under the Eight Amendment.

With respect to Dr. Majumdar, petitioner contends that there is sufficient evidence in his medical record indicating that Dr. Majumdar intentionally caused the delay of petitioner mental health treatment, which resulted in an imminent significant suicide attempt on February 29, 2012, in violation of the Eight Amendment.

Lastly, petitioner claims in this petition that the Court of Appeals erred in holding that the district court did not abuse its discretion by denying his amended motion for leave to amend the complaint, because the untimeliness in filing the amended motion, was not caused for petitioner's lack of due diligence, instead, the delay was intentionally thwarted by Dr. Braun in an attempt to escape liability, because when Dr. Braun disclosed for first time all the facts about the alleged involvement of the scheduler in the case, it was late and impossible for petitioner to move to amend the complaint or the scheduling order and the pretrial motions in timely fashion.

REASONS FOR GRANTING THE PETITION

I

DID THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT IN RESPONDENTS' FAVOR WHEN THERE IS EVIDENCE IN PETITIONER'S MEDICAL RECORD DEMONSTRATING THAT DR. BRAUN AND DR. MAJUMDAR WERE DELIBERATE INDIFFERENT TO PETITIONER'S SERIOUS MEDICAL NEEDS AND CONDITION IN VIOLATION OF THE EIGHT AMENDMENT?

Background Information

A. Facts Regarding Doctor Braun.

On or about January 3, 2012 petitioner requested a mental health evaluation with his primary mental health provider Doctor Braun for issues relating to depression.

During this evaluation, petitioner reported to Doctor Braun that he feels low, having depression throughout the day. Petitioner informed to Doctor Braun that he has showed some instability over the past few months and wishes to start his medications. (See Exhibit 3 at p. 30.)

Doctor Braun informed to petitioner that he is going to schedule him an appointment with the psychiatrist as reflected in Doctor Braun's notes dated January 3, 2012. (Exhibit 3 at 30.)

On January 30, 2012, petitioner saw Doctor Braun again for a follow up mental health evaluation. During this evaluation, petitioner expressed to Doctor Braun that he need to go back on medications because he continued complain of no feeling right. In that consultation petitioner expressed to Doctor Braun: "I feel down and depressed all the time." (See Exhibit 3 at p. 31.)

Doctor Braun responded to petitioner's complain asking him the question. Did you see the psychiatrist? -- Petitioner responded to him "no." Doctor Braun finish his mental health evaluation that day promising to petitioner that he will call the psychiatrist to find out what was happening with his referral.

On February 21, 2012 petitioner met Doctor Braun again for therapeutic contact. During this visit petitioner continued complain of issues related to depression, agitation, and trouble sleeping. (Exhibit 3 at p. 32.)

At this visit petitioner again expressed to Doctor Braun his concerns about medication. Doctor Braun asked to petitioner. Did you see the psychiatrist? Petitioner responded, "no". Doctor Braun ended his meeting with petitioner promising him one more time, that he will call the psychiatrist to see what was happening with the delay with petitioner's medication.

As a prisoner suffering from a serious mental health condition, petitioner was at the mercy of Doctor Braun and Doctor Majumdar who were responsibles to provide him adequate medical treatment. However, since January 3, 2012, until February 27, 2012, petitioner had not seen a psychiatrist. Moreover until February 29, 2012, petitioner's medications never were dispensed to him, and in an attempt to escape of the pain and suffering caused for his severe mental health illness, he give up all the hope in Doctor Braun and Doctor Majumdar, and decided to harm himself by jumping off from a second tier (approximately 20 ft), using a bed sheet with a noose strongly secured around his neck, which almost ended with his life if no discovered by prison staff. (See Exhibit 8.)

Is petitioner's contention that Doctor Braun's failure to take reasonable steps to ensure petitioner was seen by the psychiatrist ASAP, in order to expedite him the administration of medication, constitutes deliberate indifferent under the Eight Amendment.

On appeal, Doctor Braun concedes that he evaluated petitioner for psychological complaints on January 3, 2012.

In Dr. Braun's medical opinion, petitioner needed to see a psychiatrist to reinstate his prior antidepressant medication because Dr. Braun was not authorized to prescribe antidepressant medication.

Dr. Braun contends that he referred petitioner to a psychiatrist by including the referral in his visiting notes, and by contacting the scheduler at the prison to request that petitioner be seen by a psychiatrist.

Dr. Braun admits that he saw petitioner on January 30, 2012, at which time petitioner complained that he had not seen a psychiatrist since their previous visit, and he told Dr. Braun that he was still feeling depressed.

Dr. Braun contends on appeal that on January 30, 2012, he again made the referral for petitioner to see a psychiatrist ASAP by both including it in his visit notes and contacting the scheduler after the visit to specifically request the referral.

Dr. Braun admits that he saw petitioner again on February 21, 2012. At that visit, petitioner claimed that he still had ongoing depression, but had not seen a psychiatrist.

Dr. Braun contends that "he was frustrated" that despite his attempts to get petitioner an appointment with a psychiatrist, petitioner had not received the appointment.

Dr. Braun contends that on February 21, 2012, he referred petitioner to a psychiatrist by including ASAP referral in his notes, and contacting the scheduler.

Dr. Braun contends that he had no control over the referrals to psychiatry. Whether the referral was processed was up to the scheduler, over whom Dr. Braun had no control.

Dr. Braun contends that he does not know why petitioner was unable to see a psychiatrist until February 27, 2012, even though Dr. Braun made three referrals for him to see one.

Dr. Braun further contends that he gave petitioner all of the treatment that he deemed was medically necessary for petitioner's depression. (See Exhibit 10 at pp., 7-9.)

B. Facts Regarding Doctor Majumdar.

On or about February 27, 2012 petitioner met Doctor Majumdar in High Desert State Prison. Doctor Majumdar is the psychiatrist that should have seen petitioner early on January 2012, to prescribe his mental health treatment per Doctor Braun's referrals dated January 3, January 30, and February 21, 2012. (See Exhibit 3 at pp., 30-32), in fact Doctor Majumdar was the psychiatrist who saw petitioner on December 21, 2011, for a psychiatrist consultation according to Doctor Majumdar's notes dated December 21, 2011. (Exhibit 9.)

Nevertheless, on February 27, 2012, the date when Doctor Majumdar showed up to prescribe petitioner's mental health treatment, was unreasonable late because in the period of 57 days without medication,

petitioner's mental health status had been exacerbated to the point of incompetence due to lack of medications, here is when he committed a significant unsuccessfully suicide attempt, as charted by Dr. Braun in his notes dated March 22, 2012. (see Exhibit 11.)

On appeal Dr. Majumdar contends that he did not intentionally or deliberately avoid treating petitioner, and he did not contribute to the delay in petitioner's medical visit with Dr. Majumdar. (See, Exhibit 10 at p. 11.)

However, petitioner contends that there is evidence in his medical record, demonstrating that Dr. Braun and Dr. Majumdar were aware in the time frame of the incidents, that petitioner was struggling with a mental health illness and experiencing suicide attempts, and that they failed to take reasonable measures to abate the risk of serious harm that petitioner was exposed without taking his medications in violation of the Eighth Amendment.

C. The Court of Appeals Erred in Affirming Summary Judgment in Favor of Dr. Braun Because There is Sufficient Evidence of Deliberate Indifference To Petitioner's Medical Needs and Condition

Deliberate Indifference Standard

Deliberate indifference requires a showing that the official knows of and disregard an excessive risk to inmate health and safety. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

In order to be considered deliberate indifference the actions or inactions must rise to a level that are "repugnant to the conscience of mankind." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

"The Eighth Amendment's prohibition against cruel and unusual punishment protects prisoners not only from inhumane methods of punishments but also from inhumane conditions of confinement. Farmer, 511 U.S. at 825, 832. In order to prevail on a claim of cruel and unusual punishment, a prisoner must allege and prove that objectively he suffered a sufficiently serious deprivation and that subjectively prison officials acted with deliberate indifference in allowing or causing the deprivation to occur. Wilson v. Seiter, 501 U.S. 294, 298-99 (1991).

To prevail on an Eighth Amendment claim predicated on the denial of adequate medical care, a prisoner must show that: (1) he had a serious medical need; and (2) the prison officials response to the need was deliberately indifferent. Estelle v. Gamble, 429 U.S. 97, 106 (1976). To establish a serious medical need, petitioner must show that the "failure to treat [the]...condition could result in further significant injury or the unnecessary and wanton infliction of pain."

D. Deliberate Indifference

1. Dr. Braun

To began with, the District court found, that based upon the evidence presented by the parties during the summary judgment proceedings, a reasonable juror could conclude that petitioner's mental health issues constitutes an objective, serious medical need, citing McGuckin v Smith, 974 F.2d 1059-60 (9th Cir. 1992); (U.S. Dist. Court Docket Entry No. 53 at p. 12.)

On appeal, Dr. Braun contends that petitioner did not tell him that he was experiencing suicidal thoughts during the meetings with

Dr. Braun on January 3, January 30, and February 21, 2012. Dr. Braun opined that during the relevant time frame January 3- February 27, 2012, petitioner did not pose a danger to himself, and he was not gravely disabled to justify an involuntary commitment. Dr. Braun further argues that petitioner failed to demonstrate that either Dr. Braun or Dr. Majumdar were aware of petitioner's prior suicide attempts while he was incarcerated in state prison, or that such evidence was included in his mental health records. (See Exhibit 10 at p. 18.)

The District Court found that petitioner failed to adduce evidence that Dr. Braun was subjectively aware that petitioner was at substantial risk of harm or imminent suicide. (Exhibit 10 at p. 19.)

Nevertheless, petitioner claims that there is evidence in Dr. Braun's medical record demonstrating that in fact Dr. Braun knew that prior to the timeframe of the incident, petitioner was experiencing suicide attempts.

Specifically, on November 22, 2011, Dr. Braun had made an emergency referral to Dr. Lewis, telemedicine psychiatrist to evaluate petitioner. During this emergency evaluation, Dr. Lewis placed petitioner in B-Program cage after he stated that he has attempted to choke himself a week prior to the encounter with Dr. Lewis.

Petitioner claims that when Dr. Braun made this emergency referral he immediately became aware on that date of petitioner's suicide ideation as reflected in his notes dated November 22, 2011. (See Exhibit 12.)

Petitioner claims that this evidence proves that Dr. Braun was

subjectively aware of petitioner's prior suicide attempts during the consults with petitioner on January 3, January 30, and February 21, 2012, and despite his knowledge, he failed to expedite the administration of medication, failed to place petitioner in constant observation while waiting for medication, and failed to arrange for an emergency mental health consultation with a psychiatrist, as he did with Dr. Lewis on November 22, 2011, which would have prevented petitioner's multiple suicide attempts occurred in his cell, including the significant suicide attempt occurred on February 29, 2012, due to lack of medication.

As to the objective standard, the district court found that petitioner adduced no evidence to rebut Dr. Braun's declaration filed in the district court on September 14, 2017 the very same date when the deadline issued by the district court to file all the pretrial motions expired (see Exhibit 3 at 26-27), such as declaration from the scheduler denying Dr. Braun's statements provided in his declaration that in relevant part states:

I recall Mr. Gomez. I recall providing him treatment on January 3, 2012, at which time he complained of feeling depressed. He told me that he tried to "choke myself out" a few weeks earlier, but denied any suicidal ideation. In my medical opinion, he needed to see a psychiatrist to reinstate his prior anti-depressant medication, which I could not prescribe. He was in not immediate danger of harming himself or others. I referred him to a psychiatrist by including the referral in my visit notes, and by contacting the scheduler at the prison to request that Mr. Gomez be seen by a psychiatrist. (See Exhibit 3 at p. 26, ¶ 3.); (bolds added.)

CDCR's policy in the early-2012 timeframe was to follow-up with patients every ninety (90) days. Given Mr. Gomez's complaints of depression, I made the medical decision to follow-up with him every thirty (30) days. I recall seeing him on January 30, 2012, at which time he complained that he had not seen a psychiatrist since our previous visit. He told me that he was still feeling depressed. As a result, I again made a referral for him to see a psychiatrist by both including it in my visit notes and contacting the scheduler after the visit to specifically request the referral. (See Exhibit 3 at p. 26, ¶ 4.); (bolds added.)

I saw Mr. Gomez again on February 21, 2012. At that visit, he claimed that he still had ongoing depression, but had not seen a psychiatrist. I was frustrated that despite my attempts to get him an appointment with a psychiatrist, he had not received the appointment. Once again, I referred him to a psychiatrist by including it in my notes and contacting the scheduler. (Exhibit 3 at pp., 26, 27 ¶ 5.); (bolds added.)

I had no control or influence over the referrals to a psychiatry. As a clinical psychologist, all I could do was make the referrals and follow-up with the patient to counsel him about his mental health issues. Whether the referral was processed was up to the scheduler, over whom I had no control. (Exhibit 3 at p. 27, ¶ 7.); (bolds added.)

As a clinical psychologist, I was at the mercy of the scheduler and the contract psychiatrist. These psychiatrist were not CDCR employees and typically only worked on weekends. They would see 40-50 patients per day, and they were generally far more than 100 patients per weekend who needed treatment. I do not know why Mr. Gomez was unable to see a psychiatrist until February 27th, even though I made three referrals for him to see one, but it was not for lack of trying on my part. (Exhibit 3 at p. 27, ¶ 8.); (bolds added.)

However, petitioner claims that the district court was incorrect in its ruling, holding that petitioner did not provide evidence to

refute Dr. Braun's statements provided in his declaration, which were used to win summary judgment, because before making its ruling the district court failed to consider that all the facts involving the alleged participation of the "scheduler" in the delay of petitioner's mental health treatment as stated by Dr. Braun, were disclosed by Dr. Braun to petitioner until September 14, 2017, the very same day when the deadline to file all the pretrial motions expired. (See Exhibit 2 and 3.)

Petitioner claims that it was not until September 21, 2017, seven days after the September 14, 2017 court deadline had expired that he learned of the existence of this relevant information of the alleged involvement of the scheduler in the delay of his mental health treatment, which was provided by Dr. Braun in his motion for summary judgment and documents filed in the district court connected with that motion. (See Exhibit 3 at pp., 8-9, 14, 19-20, 26-27.)

Under these circumstances, the only meaningful opportunity that petitioner had to discover facts about the alleged involvement of the scheduler, to refute Dr. Braun's declaration, was thwarted by Dr. Braun in an attempt to escape liability.

Nevertheless, before making such incriminatory statements involving the scheduler, Dr. Braun intelligently waited until September 14, 2017, to make sure that the court deadline expires. Once this occurred, Dr. Braun intelligently disclosed to petitioner that the scheduler was the only responsible of delaying petitioner's mental health treatment, because he knew, that once the discovery close and the deadline to file all pretrial motions expires, petitioner will not be able to produce any evidence to refute his statements provided in his declaration, for

example a declaration of the scheduler specifying whether or not Dr. Braun contacted him regarding petitioner's appointment with Dr. Majumdar.

Petitioner further contends that as a clinician psychologist Dr. Braun could and should have taken additional steps to prevent any further risk of harm, when petitioner informed him on January 3, 2012 that he tried to "choke himself out" a few weeks ago. (Exhibit 3 at p. 30.) Dr. Braun just reported that petitioner denied it being a suicide attempt. However, petitioner contends that a reasonable juror could conclude that Dr. Braun exercised poor professional judgment in perceiving such information, or petitioner's opinion. As a patient suffering from a mental health illness, petitioner was no mentally competent to give to Dr. Braun such opinion.

Petitioner contends that Dr. Braun should have taken additional steps to prevent the multiple suicide attempts committed by petitioner in his cell, including the significant suicide attempt occurred on February 29, 2012. For example, petitioner contends that when Dr. Braun learned on January 3, 2012, that petitioner tried to choke himself out, a few weeks ago, he could and should have made an emergency referral similar to the one he made to Dr. Lewis on November 22, 2011. (Exhibit 12), or he could have placed petitioner on constant observation which is a common practice used by the mental health professionals in the California Department of Corrections and Rehabilitation (CDCR), when a patient is experiencing such symptoms.

Instead, Dr. Braun, after learning of petitioner's condition, he just left him without constant observation for 57 days, which gave him sufficient time to commit multiple suicide attempts in his cell

using a towel as he testified in his deposition, and gave him sufficient time to plan the further significant unsuccessfully suicide attempt, which almost ended with his life on February 29, 2012 due to lack of medications.

Accordingly, the Court of Appeals erred in affirming summary judgment in favor of Dr. Braun, a fact finder may conclude that Dr. Braun knew of the substantial risk that petitioner was exposed without medications for 57 days, from the very fact that the risk was obvious, and that Dr. Braun's conduct amounts to deliberate indifference, *Farmer*, 511 U.S. at 847.

WHEREFORE, the petition for writ of certiorari should be granted.

2. Dr. Majumdar

On appeal Dr. Majumdar argued that he did not intentionally or deliberately avoid treating petitioner, and that he did not contribute to the delay in petitioner's medical visit with Dr. Majumdar. (Exhibit 10 at p. 11.)

Dr. Majumdar also argues that during early 2012, contract psychiatrist did not see the referral notices unless they were appended to the prisoner's chart on the day of the scheduled appointment. Rather, as contractor, Dr. Majumdar reported to the prison and saw the prisoners scheduled for him that day. (Exhibit 10 at pp., 21-22.)

The district court found that petitioner did not provided any evidence contradicting such practice for contract psychiatrist.

Dr. Braun on his part declared that as clinician psychologist, he was at the mercy of the "scheduler" and the contract

psychiatrist. He further declares under oath in an effort to save Dr. Majumdar of any responsibility that these contract psychiatrist were not CDCR employees and typically only worked on weekends. They would see 40-50 patients per day and there were generally far more than 100 patients per weekend who needed treatment. (See Exhibit 3 at p. 27, ¶ 8.)

Nevertheless, petitioner has obtained evidence from another Dr. Majumdar's patient in the early 2012, and with this inmate's authorization petitioner is demonstrating before this Court that Dr. Braun provided in his declaration a false statement, because during the timeframe when the incidents occurred Dr. Majumdar in fact worked in the prison, in the same unit "B" Yard, Sunday, Monday, Wednesday, and Friday.

Specifically, on Friday, December 16, 2011 Dr. Braun had an encounter with Mr. Palaminos in High Desert State Prison, in the same Facility, where petitioner was housed, "B" Yard. (See Exhibit 13 at p. 1.)

Five days later on Wednesday, December 21, 2011, Dr. Majumdar saw petitioner in the same "B" Yard. (See Exhibit 13 at p. 2.)

On Monday, January 16, 2012, Dr. Majumdar saw Mr. Palaminos at the same Facility "B" Yard. (See Exhibit 13 at p. 3.)

On Wednesday, February 29, 2012, the date when petitioner committed a significant suicide attempt, Dr. Majumdar saw Mr. Palominos in the same Facility "B" Yard. (See Exhibit 13 at p. 4.)

On Sunday May 6, 2012, Dr. Majumdar again saw Mr. Palaminos in the same Facility "B" Yard. (Exhibit 13 at p. 5.)

Finally, on Wednesday, July 3, 2013 Dr. Majumdar saw Mr. Palaminos one more time. (Exhibit 13 at p. 6.)

Petitioner claims that such evidence clearly indicates that the contract psychiatrist, specifically Dr. Majumdar did not worked only the weekends as declared by Dr. Braun under oath. (Exhibit 3 at p. 27, ¶ 8.)

The evidence indicates that if Dr. Majumdar saw 40-50 patients per day, and if he worked Sunday, Monday, Wednesday and Friday, he probably saw an estimated of 200 patients per week, 800 patients a month. Now, there were about 800 inmates housed in B Yard in 2012, and no every one was depressed or needed psychiatrist evaluations. Thus according to this facts, the probability that Dr. Majumdar saw Dr. Braun's referrals on time is very substantial.

Moreover, there is evidence indicating that on December 2011, Dr. Majumdar was well aware that petitioner had a prior incident of choking himself out after receiving bad news in the mail, which constitutes a suicide attempt. Specifically, on December 21, 2011, during a follow-up evaluation with Dr. Majumdar, petitioner reported to Dr. Majumdar that he has low energy. "Like I don't want to do nothing." However, at the end of this evaluation, and despite that petitioner reported to Dr. Majumdar that he had symptoms of depression, Dr. Majumdar just made the medical decision to continue petitioner's treatment without medications. Pertinent labs were ordered. On December 21, 2011, Dr. Majumdar made the medical decision that petitioner does not need further psychiatrist appointment unless labs show need for treatment that the health clinic does not provide

or his symptoms worsen to the point of requiring psychotropic medications. (emphasis added) (See Exhibit 9, Dr. Majumdar's notes dated 12-21-2011.)

Such evidence indicates that prior to the evaluation that petitioner had with Dr. Majumdar on February 27, 2012 (Exhibit 3 at, pp., 35, 41), Dr. Majumdar was previously aware that petitioner was struggling from a mental health illness and experiencing suicide attempts and despite knowing this information he failed to meet with petitioner ASAP to prescribe his mental health treatment even though when the circumstances of petitioner's mental health illness changed to the point of requiring psychotropic medications. The evidence suggest that Dr. Majumdar in fact could have received the referral information provided by Dr. Braun on January 3, January 30 and February 21, 2012, and it is strongly suggesting that Dr. Majumdar could have intentionally refused to see petitioner ASAP, because on December 21, 2011, Dr. Majumdar has made an early medical decision to continue petitioner's treatment without medications, and he had made the early determination that petitioner does not need further psychiatrist appointments as he wrote in his notes dated 12-21-2011 (Exhibit 9.)

Based on this evidence which is in petitioner's medical record, as well in Dr. Majumdar's and Dr. Braun's possession, petitioner contends that the Court of Appeals erred in affirming summary judgment in favor of Dr. Majumdar, because the evidence indicates that Dr. Majumdar intentionally delayed petitioner's mental health treatment for 57 days, which resulted in a further, significant suicide attempt in violation of the Eighth Amendment.

Accordingly, certiorari should be granted.

DID THE COURT OF APPEAL ERRED IN HOLDING THAT THE DISTRICT COURT, DID NOT ABUSE ITS DISCRETION BY DENYING GOMEZ'S AMENDED MOTION FOR LEAVE TO AMEND AS UNTIMELY, ON THE GROUNDS THAT HE FAILED TO SHOW GOOD CAUSE?

As explained earlier, all the facts regarding the alleged participation of the scheduler in the delay of petitioner's mental health treatment, were introduced for first time in the district court by Dr. Braun on September 14, 2017, when he filed in the court his motion for summary judgment, the very same day when the September 14, 2017 deadline to file all the pretrial motions expired. (Exhibit 2 and 3.)

But it was not until September 21, 2017, seven days after the expiration of the deadline that petitioner received in the prison the legal correspondence from the Department of Justice Attorney General Office, Sacramento, CA (Exhibit 4), here is when petitioner learned for first time about the alleged participation of the scheduler in the case according to the information provided by Dr. Braun in his verified declaration and documents connected with his motion for summary judgment filed in the district court. (Exhibit 3 at pp., 8, 9, 14, 19-20, 26-27.)

However, as soon petitioner learned on or about September 21, 2017 about the alleged participation of the scheduler in the case, and despite that discovery was closed, and the deadline to file all the pretrial motions had expired on September 14, 2017, petitioner made two things in an effort to secure any evidence about the

scheduler's involvement in the case to refute Dr. Braun's evidence submitted for first time in their motion for summary judgment: (1) on October 1, 2017, petitioner wrote a letter to Respondents' counsel requesting from him among other things information of the CDCR's policies in the early 2012, where petitioner expected to find any information about the scheduler's involvement in the case, but on October 30, 2017 Respondents' counsel sent to petitioner a letter denying his request stating that discovery closed on June 14, 2017 pursuant to court order. (See Exhibit 14); (2) after Respondents' counsel denied petitioner's request then on October 30, 2017 he filed in the district court a document styled, "Request for Production of Documents Necessary to Effectively Oppose Defendants' [sic] Motion for Summary Judgment." In his request for production of documents under Federal Rules of Civil Procedure 56(d), petitioner seeks among other things any record containing information regarding the alleged contacts that Dr. Braun made to the scheduler mentioned in Defendants' Statement of Undisputed Facts 8, 12, and 18, including the scheduler's name and present address of employment. (U.S. Dist. Court Docket Entry No. 46 at 1-2.)

On November 14, 2017, the district court denied petitioner's request for production of documents as untimely, citing the September 14, 2017 deadline. (U.S. Dist. Court Docket Entry No. 48.)

On September 10, 2018 petitioner filed in the district court a motion to amend his complaint, Dr. Braun and Dr. Majumdar filed their opposition to petitioner's motion to amend on September 14, 2018. (U.S. Dist. Court Docket Entry Nos. 56, 58.)

On September 14, 2018, petitioner filed an amended motion for

leave to amend his complaint under Federal Rules of Civil Procedure 15 (a)(2), with the purpose to reopen discovery to discover facts about the alleged involvement of the scheduler in the case to refute Dr. Braun's evidence used in their motion for summary judgment, petitioner also indicates in his amended motion to amend that he want to include the scheduler as a defendant in a Third Amended Complaint. (Exhibit 6.)

On September 17 and 26, 2018, the district court denied petitioner's motions to amend as untimely, citing the September 14, 2017 deadline for filing all pretrial motions, and holding that petitioner failed to establish GOOD CAUSE under Federal Rules of Civil Procedure 16, and because he failed to exercise the required due diligence in order to amend his pleading, and failed to move to amend the pretrial motions deadline as soon as he learned on or about September 14, 2017 about the scheduler's alleged involvement in the case, citing Johnson v. Mammoth Recreations, Inc., 975 F.2d 607-08. (9th Cir. 1992), (the primary consideration of the GOOD CAUSE analysis is the diligence of the party seeking amendment.) (See Exhibit 7 at p. 3.)

Accordingly, there is evidence in the record of this case demonstrating that petitioner in fact exercised the required due diligence in order to secure any evidence about the scheduler's alleged involvement, despite that discovery was closed and the deadline to file all the pretrial motions had expired when he learned the facts about the scheduler. Moreover, petitioner contends that the untimeliness in filing court documents in order to secure any evidence incriminating the scheduler in this case, was intentionally

caused by Dr. Braun as discussed below.

A. Dr. Braun Intentionally Caused the Untimely Filing Of Petitioner's Court Documents Seeking Evidence About the Scheduler's Alleged Involvement In The Delay of Petitioner's Mental Health Treatment

In this argument, petitioner contends that he had established that the district court abused its discretion by denying his amended motion for leave to amend the complaint, because there is evidence that as soon after petitioner learned on or about September 21, 2017 about the involvement of the scheduler in the case, petitioner tried to secure evidence about the scheduler by writing a letter to Respondents' counsel on October 1, 2017, and by filing a document styled, "Request for Production of Documents Necessary to Effectively Oppose Defendants' [sic] Motion for Summary Judgment, despite that discovery close on June 14, 2017, and the deadline to file all pretrial motions had expired on September 14, 2017, after petitioner learned on September 21, 2017, about the scheduler.

Petitioner further claims that the delay in the filing of his Request for Production of Documents Necessary to Effectively Oppose Defendants' Motion for Summary Judgment, and the delay in filing the untimely amended motion for leave to amend the complaint, was intentionally caused by Dr. Braun in an attempt to escape liability, because when he introduced for first time the evidence about the alleged participation of the scheduler in the district court, was on September 14, 2017, and on September 21, 2017, the information was disclosed for first time to petitioner when he received their motion

for summary judgment in the prison. (Exhibit 4.)

Nevertheless, when petitioner learned on September 21, 2017, about the scheduler's alleged involvement in this case, it was late for him to obtain evidence about the scheduler, and it was late to petitioner to make a successfully move in order to modify the scheduling order or the pretrial motions, because the deadline to do so, had expired on September 14, 2017.

In other words, petitioner's meaningful opportunity that he had to amend his complaint to include the scheduler, or the opportunity that petitioner had to modify the scheduling order or the pretrial motions, was thwarted by Dr. Braun by disclosing all the evidence about the alleged involvement of the scheduler, late, which resulted in petitioner's untimely filings.

Accordingly, the Court of Appeals erred in holding that the district court did not abuse its discretion by denying Gomez's Amended motion to amend his pleading, because the "GOOD CAUSE" standard required under Federal Rules of Civil Procedure 16, is not applicable to petitioner's case, and because the untimeliness in filing the amended motion to amend, was intentionally frustrated by Dr. Braun by disclosing all the evidence about the scheduler's involvement, late, when discovery and the deadline to file all pretrial motions expired.

WHEREFORE, certiorari should be granted.

CONCLUSION

WHEREFORE, petitioner contends that he had made the showing, that the Court of Appeals erred in affirming summary judgment in favor of Respondents because he had provided sufficient evidence of deliberate indifference against Dr. Braun and Dr. Majumdar, which is in his medical record.

Petitioner further contends that he had established that the Court of Appeals erred in holding that the district court did not abuse its discretion by denying his amended motion for leave to amend the complaint, because there is evidence demonstrating that petitioner in fact exercised due diligence in order to seek any incriminatory evidence as soon he learned on or about September 21, 2017, about the alleged involvement of the scheduler in the case. Petitioner lastly, contends that he has demonstrated that the only possibility he had to make a successfully move in order to amend the complaint or to amend the pretrial motions deadline on time, was thwarted by Dr. Braun by disclosing to petitioner evidence about the scheduler's alleged participation in the case, late until September 21, 2017, when discovery and the deadline to file all pretrial motions was closed, in an attempt to escape liability, thus resulting in the untimely filing of the amended motion for leave to amend, and other documents seeking evidence about the scheduler filed in the district court.

Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,



Date: April 23, 2020