No. 20-5572

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL WITKIN — PETITIONER
(Your Name)

vs.

MARIANA LOTERSZTAIN, 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

MICHAEL WITKIN
(Your Name)

DVI, 23500 Kasson Road
(Address)

Tracy, CA 95304
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

The Eighth Amendment prohibition of cruel and unusual punishment prohibits the unnecessary and wanton infliction of pain. Prison officials violate the Eighth Amendment when they act with deliberate indifference to a prisoner's serious medical needs by refusing to provide minimally adequate medical care. Eighth Amendment cases arising under 42 U.S.C. §1983 are acute and recurring in the State of California where the state maintains a prison population of some 120,000 souls, and as the Court has observed in passing, the "prison medical care system is broken beyond repair." Brown v. Plata, 179 L.Ed.2d 969, 985 (2011). The dispositive question in these cases is often whether the medical care provided violates professional standards of care.

In California prison officials' standard response to such allegations is to move for summary judgment, having their employee expert witness physician summarily declare to the federal court that the care provided met minimal professional standards, which he admittedly declares in 100% of such cases. Assuming the prisoner plaintiff lacks there wherewithal to secure a medical expert with a conflicting opinion, that concludes the Eighth Amendment matter, as this case illustrates. The net effect is to nullify this Court's Eighth Amendment jurisprudence and to embolden prison officials to continue to refuse to provide minimally adequate medical care.

There is a decades long circuit split on the question of law of whether expert medical testimony is necessary for an inadequate medical care deliberate indifference claim to survive a motion for summary judgment.

The questions presented are:

(1) At the summary judgment stage, is the plaintiff's failure to produce expert medical testimony condemning the care provided fatal to an inadequate medical care deliberate indifference claim?

(2) Do the standards of Federal Rule of Evidence 702 for expert opinon testimony apply at the summary judgment stage to an expert opinion that is unopposed by a conflicting expert opinion?

///

LIST OF PARTIES

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

[x] 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: Respondents were the defendants in the District Court

Mariana Lotersztain is a primary care physician at California State Prison Solano ("SOL").

Martin Kuersten is a physician and chief medical executive at SOL.

Ashley Pfile is a physician and surgeon at SOL.

RELATED CASES

Witkin v. Lotersztain, No. 18-16040, U.S. Court of Appeals for the Ninth Circuit. Panel rehearing denied and Judgment entered March 25, 2020.

Witkin v. Lotersztain, No. 2:15-cv-00638-MCE-KJN, U.S. District Court for the Eastern District of California. Judgment entered May 25, 2018.

TABLE OF CONTENTS

///

INDEX TO APPENDICES

///

TABLE OF AUTHORITIES

///

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

[X] 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,
[X] 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,
[X] 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

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was May 28, 2019.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 25, 2020, and a copy of the order denying rehearing appears at Appendix D.

[ ] 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

United States Constitution Eighth Amendment:

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

Federal Rule of Evidence 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Federal Rule of Civil Procedure 56:

The full text of Rule 56 is set out at Petition Appendix F.

STATEMENT OF THE CASE

In early December 2012, the then 35 year old petitioner, a California state prisoner described by a defendant physician as "very athletic," (ECF No. 11 at 2)[1], and "extremely well built with high muscular mass," (ECF No. 11-2 at 2), sustained a debilitating injury to his lumbar spine while exercising on the prison yard. Petitioner was "unable to ambulate or stand," (ECF No. 30-9 at 9, see Pet. App. L), and was transported to the prison clinic where staff physicians including defendant Kuersten, discussed "transfer to [an] outside hospital for further evaluation." (ECF No. 30-9 at 10, App. L).

Defendant Dr. Kuersten ultimately decided to give the petitioner a series of pain-killing injections, and return him to his prison housing unit in a wheelchair. Upon arriving in the barracks style dormitory petitioner needed assistance from other inmates to perform basic daily tasks such as showering and using the bathroom. (ECF No. 72 at 64).

Petitoner continued to experience difficulty walking, accompanied by shooting pain in his right leg and requested additional medical care on December 9, 2012 complaining of "extremely severe back pain." (ECF No. 30-9 at 14, App. L.) Plaintiff was treated on December 12 by defendant Dr. Pfile who lied about petitioner's condition, placing into the medical records that he was "90% recovered." (ECF No. 30-9 at 15, App. L.)

Petitioner's symptoms did not improve and he continued to experience severe pain and mobility loss. On December 21, 2012 non-party physician Dr. Hsieh reviewed initial diagnostic test results of petitioner's lumbar spine and determined that the injury required "chronic care." (ECF No. 72 at 195, see Pet. App. K.) Petitioner was a new arrival at that institution as of September 7,

---

1) ECF References are to the District Court Electronic Court File docket entries.

2012, (ECF No. 72 at 189, App. K), and had recently been found to be a "[h]ealthy adult male" by defendant Pfile. (ECF No. 30-9 at 2, App. L). On January 9, 2013 petitioner had a medical encouter with defendant Kuersten who terminated the encounter for the non-medical reason of his personal animosity towards petitioner. (ECF No. 30-9 at 19, App. L). Petitioner continued to struggle with severe pain and mobility loss. On April 4, 2013 defendant Pfile diagnosed him with chronic lower back pain ("CLBP"). (ECF No. 72 at 197, App. K).

Petitioner's condition did not improve and in June of 2013 he had a medical encounter with defendant Dr. Lotersztain who informed him that he "probably had a collapsed or ruptured disc in his lumbar spine."(ECF No. 1 at 8). After receiving that information petitioner began requesting further diagnostic testing, including an MRI study, and referral to a specialist, as well as prescription strength medication for the pain. Defendant Lotersztain denied petitioner's requests repeatedly, in spite of his diminished condition, over an approximately two year period that included over 30 medical encounters. In August of 2013 defendant Lotersztain diagnosed CLBP which she identified at numerous subsequent encounters. (ECF No. 30-9 at 43, App. L). Defendant Lotersztain repeatedly "educated" petitioner about the risk of prolonged pain and mobility loss. (Id., see ECF No. 30-9 at 53).

Petitioner filed administrative appeals concerning the denials of diagnostic imaging studies, a specialist referral, and prescription strength medication. Those appeals were reviewed by defendants Pfile and Kuersten and denied. (ECF No. 1 at 15-37).

Petitioner suffered at least 30 months of chronic pain, dramatic mobility loss and assorted neurological symptoms. (App. L). In March of 2015 petitioner brought an action under 42 U.S.C §1983 claiming that the defendants were deliberately indifferent to his medical needs for diagnostic care, a specialist referral,

and prescription strength medication, in violation of the Eighth Amendment. (ECF No. 83 at 43-47, App. B). Petitioner also brought state law claims for medical malpractice. (Id. at 49).

In April of 2016 the defendants moved for summary judgment, basing the motion exclusively on the expert medical opinion of former California Department of Corrections and Rehabilitation ("CDCR") staff physician Dr. Bruce Barnett. (See ECF No. 30; see also ECF No. 30-7, App. G). Dr. Barnett admittedly opines that CDCR defendant physicians did not violate professional standards 100% of the time. (Barnett Dep. at 54:21-55:7, 56:11-24, 69:6-13, App. J)[2]. As he always does, Dr. Barnett opined that there was no deliberate indifference because "Defendants' treatment of P[etitioner's] pain complaints was appropriate and consistent with all authoritative standards of care." (ECF No. 30-7 at 16; see Barnett Dep. at 30:2-5).

Dr. Barnett purported to rely on his experience as a CDCR physician as the basis for his opinion. (ECF No. 30-7 at 3). Dr. Barnett's opinion testimony featured none of the methodology or analytical strategies normally found in expert medical testimony. Dr. Barnett did not provide a differential diagnosis, or any basis for his opinion in medical literature. His declaration testimony offered no articulation of the relevant professional standard of care or explanation of how and why he reached the conclusion the defendants' care met it. Dr. Barnett's conclusion was supposedly based on his review of pertinent medical records, (ECF No. 30-7 at 3), but his conclusion rested on his mistaken assumption that the injury causing petitioner's CLBP had occurred some 15 moths later then it actually did. (Id. at 15-16).

---

2) For ease of review references to the Barnett Deposition are to the pagination of the deposition itself.

In reaching his conclusion Dr. Barnett relied largely on speculation about petitioner playing basketball during his prison term, which he cited 6 times as a basis for his opinion in his declaration testimony. (ECF No. 30-7 at 13-16.) At his subsequent deposition Dr. Barnett conceded that he had no evidence or information to support that speculation and that the sole medical record reference to basketball predated petitioner's lumbar injury. (Barnett Dep. at 92-93, 96:11-14).

Petitioner initially responded to the defendants' summary judgment motion with motions to attempt to develop his factual case through additional discovery under FRCP 56(d), and amendment of his original complaint. The District Court denied both motions. (ECF Nos. 46, 62).

On March 28, 2017 petitioner deposed Dr. Barnett with regard to his medical opinion on the standard of care. (Barnett Dep. at 51:18-20). The medical testimony adduced at Dr. Barnett's deposition clearly shows that there is a genuine issue of fact with regard to the adequacy of the medical care provided to petitioner by the defendants.

Dr. Barnett's deposition research into the "authoritative," (Barnett Dep. at 70), standard of care revealed that "all patients" suffering from CLBP should be evaluated by a spine specialist, (App. I), and he provided the research documents at the deposition. (Barnett Dep. at 70:2-11). Dr. Barnett also testified that an MRI was required after 6 weeks of chronic pain. (Id. at 139-40). Dr. Barnett conceded that petitioner's chronic pain lasted much longer than 6 weeks. (Id. at 244:18-24, 255:5-22). He further testified that prescription strength medication was appropriate for herniated disc pain. (Id. at 186). Dr. Barnett confirmed that there were no objective diagnostic tests in the record ruling out petitioner's subjective complaints of severe pain. (Id. at 158).

When confronted on deposition with the fact that an eyewitness observed

petitioner in a physical condition that Dr. Barnett had testified would require a number of diagnostic tests the defendants never performed, Dr. Barnett delivered this telling line:

> So I don't really know exactly what I'm talking about, but generally speaking, those kind of impairments over time could reasonably lead someone to another study. (Barnett Dep. at 197:20-23).

Dr. Barnett had become visibly upset at that point, and revealed that his entire opinion rested on disputed facts about petitioner's symptoms and condition. (Barnett Dep. at 194-203).

Dr. Barnett conceded that "[f]or any condition and complaint, you have to be able to make a diagnosis because otherwise you can't treat." (Barnett Dep. at 171:11-12). In his opinion testimony Dr. Barnett was unable to point to any diagnosis of petitioner's medical condition. He was able to identify the symptom CLBP, but could only surmise that it was "possibly related to DDD," (ECF No. 30-7 at 15), which he tells us is simply "normal aging of the spine." (Id. at 5 n. 3). Dr. Barnett's apparent inability to point to a diagnosis of plaintiff's medical condition gravely undermined his opinion that the defendants' treatment of petitioner met professional standards of care. Per Dr. Barnett's own testimony "you can't treat," (Barnett Dep. at 171:12), until you "make a diagnosis." (Id.) Dr. Barnett's deposition testimony appeared to confirm the merit of petitioner's three Section 1983 claims.

Following the Barnett deposition, the defendants re-noticed their motion for summary judgment, (ECF No. 63),and submitted an "Amended" declaration from Dr. Barnett. (ECF No. 63-1, App. H). The Amended declaration included some revised premises for Dr. Barnett's conclusions. (ECF No. 63-1 at 15 n. 12, 16 n. 13).

On June 1, 2017 petitioner filed a verified Opposition to the motion for summary judgment and moved to exclude Dr. Barnett's opinion testimony under Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) as being

unreliable and irrelevant because it had "no foundation" and was "utterly unexplained." (ECF No. 72 at 52).

The District Court denied petitioner's motion to strike and disagreed with petitioner that it should act as a Daubert reliability "gatekeeper." The District Court held that petitioner "may only rebut Dr. Barnett's expert medical opinion with the opinion of another medical expert." (ECF No. 83 at 6). The District Court did not enter any Daubert findings into the record. (Id.)

The District Court believed that the failure to produce a conflicting medical opinion was fatal to petitioner's §1983 claims eliminating the need for application of Daubert or Fed. R. Evid. 702, and precluding consideration of petitioner's "specific facts" in opposition to summary judgment.

Relying on a line of district court cases from the Ninth Circuit the District Court held that petitioner's failure to provide an "expert medical opinion to support his claim," obviated the need to consider his evidence opposing summary judgment. (ECF No. 83 at 43-44). Petitioner introduced a variety of opposition evidence including expert medical testimony from Dr. Barnett's deposition, medical records and literature, and lay testimony from himself and other witnesses about his actual physical condition. (ECF No. 72). Petitioner's evidentiary showing merited over 20 pages of objections from the defendants indicating that it was far from insubstantial. (ECF No. 77-1).

The District Court refused to credit petitioner's evidence or acknowledge its presence in the record. The dispositive facts regarding deliberate indifference and the standard of care were set out by the defendants as fact Nos. 114-127 (ECF No. 30-3 at 21-24). Petitioner's Statement of Disputed Facts used the same 114-127 numbering. (ECF No. 72 at 136-42). Without explanation, the District Court concluded its factual analysis at fact No. 113 and never even acknowledged that petitioner disputed all the dispositive facts, Nos. 114-127. (ECF No. 83

at 40 n. 19). Then, drawing multiple inferences in favor of the defendants, all based on Dr. Barnett's opinion, the District Court granted the defendants' motion for summary judgment. (ECF No. 83 at 42-48).

The Ninth Circuit summarily affirmed in a memorandum disposition that did not meaningfully address petitioner's assignments of reversible error. (App. A). Significantly, the Ninth Circuit held that the District Court "did not abuse its discretion" by abdicating its Daubert gatekeeping function. (Id. at 3).

Less than 60 days before petitioner's case was decided this District Court decided a strikingly similar deliberate indifference and medical malpractice case. The case even featured the same magistrate judge, but with one key difference. The plaintiff in that case produced an opposing expert medical opinion at the summary judgment stage. There the Court held, as petitioner has urged throughout, (see ECF No. 90 at 48-53), "whether the standard of care was met -- or whether [the defendants'] conduct fell so far below the standard of care as to constitute a constitutional violation -- is a question for the jury, not for the court on summary judgment." Staggs v. Doctors Hospital of Manteca, 2018 U.S. Dist. LEXIS 46689 at 25 (E.D. Cal.).

///

///

REASONS FOR GRANTING THE PETITION

I. THIS CASE OFFERS A SUPERB VEHICLE FOR THE COURT TO RESOLVE THE CIRCUIT SPLIT BECAUSE THE EXPERT OPINION IN THIS RECORD IS THE SOLE BASIS FOR THE JUDGMENT.

The Court has understandably not looked favorably on the idea of "experts," as opposed to federal judges, deciding what the Constitution requires. See Bell v. Wolfish, 441 U.S. 520, 543-44 n. 27 (1979) (Expert opinions "are not determinative of the requirements of the Constitution."). The Court also teaches that such opinions do not have "conclusive force." Sartor v. Arkansas Nat. Gas Corp., 321 U.S. 620, 627 (1944). Such opinions add nothing to the scienter analysis of Farmer v. Brennan, 511 U.S. 825, 836-44 (1994).

Contrary to these principles however, the Courts below relied exclusively on Dr. Barnett's opinion in holding that the Eighth Amendment was not violated, without any consideration of petitioner's evidence that it was. As illustrated by this District Court's decision in Staggs, 2018 U.S. Dist. LEXIS 46889, in the Ninth Circuit the constitutional question perches precariously on the question of law of whether an expert medical opinion is necessary to sustain an adequacy of care deliberate indifference claim at the summary judgment stage.

The Circuit Courts of Appeals have reached divergent holdings on this question. As this record shows this legal question is of supreme importance because the answer has the power to displace normal summary judgment standards. If the federal court determines that an expert medical opinion is required, not only will inferences not be drawn in the nonmoving party's favor, his evidence will not be considered at all. As it was here, that was the course taken by the Eighth Circuit in Alberson v. Norris, 458 F.3d 762 (8th Cir. 2006) over the dissent of Circuit Judge Heaney, where the majority held that the "failure to produce expert testimony...is 'fatal to [the] deliberate indifference claim as a matter of law.'" Id. at 766 (quoting Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1210 (8th Cir. 2000)). Judge Heaney asserted that the majority should have

considered the nonmoving party's evidence, finding that it was "sufficient...for a jury to hold that the corrections employees were deliberately indifferent." Alberson at 768.

The Sixth Circuit has also held similarly to the Courts below here, that a deliberate indifference claim premised on inadequate medical care, requires expert medical testimony to survive a motion for summary judgment. Anthony v. Swanson, 701 Fed.Appx. 460, 464 (6th Cir. 2017). Without discussion of the prisoner plaintiff's FRCP 56(c) specific facts, that panel held that the "absence of such medical testimony is fatal to [petitioner's] claim under our precedents." Id. at 464 (citing Santiago v. Ringle, 734 F.3d 585, 591 (6th Cir. 2013)).

On the other side of the question are the holdings of the Second, Third, Fourth, and Eleventh Circuits which hold that deliberate indifference claims have no such requirement. In Hathaway v. Coughlin, 37 F.3d 63, 68 (2d Cir. 1994) the Court held that:

> [w]e have never required plaintiffs alleging a denial of adequate medical care in a Section 1983 action to produce expert medical testimony. The inquiry remains whether the treating physician or other prison official was deliberately indifferent to a prisoner's serious medical needs, not whether the doctor's conduct is actionable under state malpractice law.

That holding directly conflicts with the judgment of the Courts below.

In 1999 the Eleventh Circuit addressed the issue and held that an expert testimony requirement would nullify the Farmer, 511 U.S. 825 standard "of subjective mental intent." Campbell v. Sikes, 169 F.3d 1353, 1371 (11th Cir. 1999). Facing a district court decision granting summary judgment in a §1983 action, for a "failure to offer expert medical testimony," the Fourth Circuit held that there is no requirement "that a plaintiff alleging deliberate indifference present expert testimony to support his allegations of serious injury or substantial risk of serious injury." Scinto v. Stansberry, 841 F.3d 219, 229-30 (4th Cir. 2016). The panel also pointed out that Fed. R. Evid. 702(a) provides

the proper standard for determining the necessity of such testimony. Id.

Even more recently the Third Circuit weighed in, holding that expert testimony is "not necessarily required where other forms of extrinsic proof" such as a training manual, photograph, or medical records "could have permitted a reasonable jury to find that [the] medical care was inadequate." Pearson v. Prison Health Serv., 850 F.3d 526, 536 (3d Cir. 2017). The panel went on to conclude that "medical expert testimony may be necessary in some adequacy of care cases when the propriety of a particular diagnosis or course of treatment would not be apparent to a layperson." Id. at 537.

The Circuit Courts of Appeals are unanimous in holding that Farmer, 511 U.S. 825, provides the appropriate standard. How to properly apply Farmer to an adequacy of care deliberate indifference claim, and synthesize its legal standard with a possible need for expert medical testimony is a legal question on which their holdings are widely divergent. That question clearly demands the Court's guidance. Hence the Court's review of this question of law is warranted.

A. The Legal Question Presented Is Of National Importance, Recurs Constantly, And Speaks To The Conscience Of The Nation.

Although the holdings of the Sixth and Eighth Circuits are not "controlling" in the Ninth Circuit, district courts in the Ninth Circuit have been recycling those holdings, albeit often without acknowledgment, just as the Courts below did, for at least a decade. See e.g. Watson v. Sisto, 2011 U.S. Dist. LEXIS 125171 at 20-22 (E.D. Cal.) (holding that a plaintiff challenging the adequacy of medical care has the burden at the summary judgment stage "to provide expert evidence that the treatment he received equated with deliberate indifference."). So while it was well known to the Public, and to this Court, that the medical care in California prisons did not meet Eighth Amendment minimums during the last decade, only the wealthiest of prisoners stood a chance of vindicating their Eighth Amendment rights. As the Court is also aware, prisons generally house the poor,

not the rich. In other words, this question of law speaks directly to the conscience of the nation. Are we as a society willing to continue to allow prison officials to so easily sidestep the Constitution?

In Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) the Court held that prison officials violate the Eighth Amendment when they are deliberately indifferent to a prisoner's serious medical needs by "intentionally denying or delaying access to medical care or interfering with the treatment once prescribed." For over a decade prison officials in California have set aside the Court's Eighth Amendment jurisprudence. And quite frankly, by resorting to the holdings of the Courts below, local district courts have been complicit in allowing such cruel punishments to remain commonplace. For prison officials denying and interfering with adequate medical care is as simple as tagging in Dr. Barnett. As he testified, (Barnett Dep. at 55-56), 100% of the time he will absolve prison officials from liability. Untold Eighth Amendment transgressions have been wiped away with a single brush stroke from Dr. Barnett. It is in the hands of this Court to decide whether Eighth Amendment decisions should be turned over to such designated hitters.

B. The Decision Below Is Erroneous And Warrants Review For Its Cavalier Treatment Of Summary Judgment Standards.

The decision below completely disregarded nonmoving party summary judgment evidence so substantial it merited 20 pages of objections from the defendants. (See ECF No. 77-2). In Tolan v. Cotton, 134 S.Ct 1861, 1866 (2014) this Court recently cautioned against a refusal to "credit directly contradictory evidence" from a nonmoving party. Such is the impact of the holding petitioner asks the Court to review. It is unclear what exactly triggered the District Court's legal determination that a lack of expert medical testimony was fatal to petitioner's adequacy of care deliberate indifference claim. What is clear, however, is that once that determination is made, none of the nonmoving plaintiff's evidence need

even be acknowledged.

The only authority cited in support of this proposition of law is two Arizona district court decisions. (ECF No. 83 at 43). The District Court could have cited to the similar holdings from the Sixth and Eighth Circuits, but even in the Sixth Circuit petitioner would have defeated the defendants' summary judgment motion. Consistent with FRCP 56(c) the Sixth Circuit would have permitted petitioner to oppose the motion with the Barnett deposition. See Anthony, 701 Fed.Appx. at 464. The Courts below refused to acknowledge any of the expert medical testimony adduced by petitioner at Dr. Barnett's deposition. Their judgment directly conflicts with the text of Rule 56(c).

In the form of the decision below, a determination of the necessity for expert medical testimony in a Section 1983 adequacy of care medical indifference action appears completely arbitrary. The ascertainment of truth and just determinations, which are the hallmarks of the federal courts, demand more than random, unexplained results. What triggers the need (if any) for expert medical evidence in this type of case is a legal question demanding the Court's wisdom. The Court's review is warranted.

II. THIS CASE OFFERS A SUITABLE VEHICLE TO ADDRESS THE QUESTION PRESENTED BECAUSE THE EXPERT'S DEPOSITION ILLUSTRATES THAT HIS OPINION IS THE QUINTESSENTIAL PIECE OF JUNK SCIENCE.

Allowing an expert opinion as wholly lacking as the one offered by Dr. Barnett in this record to decide federal constitutional questions would gravely impair the dignity and institutional integrity of the federal courts. Dr. Barnett's deposition testimony reveals the medical knowledge he actually possesses. That testimony makes it abundantly clear that the defendants did not meet professional standards of care in their treatment of petitioner. His opinion to the contrary should not be unexpected from an individual who delivers such opinions 100% of the time. Dr. Barnett's opinion does not satisfy the requirements of any of the

subsections of Fed. R. Evid. 702. Dr. Barnett provided an opinion, but it is not a scientific one, and it is not one supported by any kind of proper validation.

By the end of his deposition even Dr. Barnett had disavowed the opinion upon which the judgment below rests. Dr. Barnett's vociferous "no chance," (ECF No. 30-7 at 15), that a person with a lumbar disc injury could play basketball had been replaced by the scientific knowledge that he actually has. He informs us that a nerve root injury can "still allow you to engage in a number of activities with or without symptoms that follow from activities." (Barnett Dep. at 309). Dr. Barnett even goes so far as to inform us that it is possible, although "unlikely" that an individual with a "massive herniated disc....can engage in vigorous physical activities." (Id.)

An opinion that directly contradicts the "specialized knowledge," (Fed. R. Evid. 702(a)), that the witness actually has, does not meet "exacting standards of reliability," and should have been deemed inadmissible by the Courts below. Weisgram v. Marley Co., 528 U.S. 440, 455 (2000) (citing Daubert, 509 U.S. at 590).

A. The Ninth Circuit's Holding Makes Junk Science, The Primary Concern Of Daubert, Decisive Of Federal Constitutional Questions And Warrants Summary Reversal.

In response to petitioner's Daubert challenge to Dr. Barnett's opinion the District Court abdicated its "gatekeeper" role, and ruled that petitioner could only "rebut Dr. Barnett's expert medical opinion with the opinion of another medical expert." (ECF No. 83 at 6). It made no Daubert findings or mention of Rule 702. It did not mention the defendants' burden of establishing the admissibility of the opinion. Daubert, 509 U.S. at 592 n. 10. It provided no analysis or explanation for its decision to admit the opinion. There is no indication in the record that it found the opinion reliable other than the fact

it was admitted over petitioner's reliability objections.

According to the Ninth Circuit the District Court "did not abuse its discretion," with such handling of petitioner's Daubert and Rule 702 objections. (App. A at 3). This is an example of the type of extreme legal error that calls for the Court's summary reversal powers.

The Ninth Circuit's holding conflicts with the Court's decisions, and the decisions of all the Circuit Courts of Appeals. Before a need to "rebut" Dr. Barnett's opinion arises that opinion must survive exacting threshold standards of reliability. It cannot.

The gatekeeping role of district courts is mandatory. There is no discretion to abandon the gatekeeping function. Kumho Tire v. Carmichael, 526 U.S. 137, 158-59 (1999) (SCALIA, J., concurring); General Electric v. Joiner, 522 U.S. 136, 142 (1997). When faced with a party's objection a district court "must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper. In the absence of such findings we must conclude that the district court abused its discretion in admitting such testimony." Dodge v. Cotter Corp., 328 F.3d 1212, 1223 (10th Cir. 2003). The abuse of discretion here should have been obvious to the Ninth Circuit. See Kumho at 147-49.

Dr. Barnett provided a "medical" opinion that the Courts below deemed automatically dispositive of an Eighth Amendment claim. The opinion was inaccurate by over 15 months with regard to petitioner's lumbar spinal injury, the treatment of which Dr. Barnett was supposed to be opining upon. (See ECF No. 30-7 at 15-16, It "does not appear that he suffered any physical impairment for the 18 months from admission to SOL until some later time."); (See App. K, Medical Records excluded from defendants' motion for summary judgment, ECF No. 72 at 195, revealing "L-SPINE" injury requiring "chronic care" sustained within 3 months of admission to SOL.).

Dr. Barnett confirms at deposition what all medical experts know, "you can't treat," until you "make a diagnosis." (Barnett Dep. at 171:12). His opinion confirms that there is no diagnosis of petitioner's medical condition in this record. Quite apparently then, the defendants failed to make one. It is long established in federal law that pain is a symptom not a medical condition. See e.g. Smith v. Office of Personnel Management, 784 F.2d 397, 398 (Fed. Cir. 1986) ("[H]e has experienced pain, muscle spasm, and other symptoms associated with back injuries."). The most Dr. Barnett can offer the Court with regard to petitioner's medical condition is the unhelpful assertion that his CLBP is "possibly related" to normal aging. (ECF No. 30-7 at 15; see id. at 5 n. 3).

Hence, his conclusion, upon which the judgment rests, that the defendants' "treatment" of petitioner met authoritative professional standards is completely unfounded.

Dr. Barnett provides the federal court with no recognized methodology, no differential diagnosis, and no information whatsoever about the appropriate standard of care. There was no basis in medical knowledge or connection to medical literature provided. There was not even a suggestion that his opinion reflects the views of the relevant scientific community.

Dr. Barnett's opinion testimony is nothing more than the bald assurance he provides 100% of the time that the defendants did a great job. The admission of such "evidence" by the Courts below was an extreme departure from the exacting requirements of federal law.

B. The Ninth Circuit's Holding Is Truly Indefensible And Poses A Sinister Threat To The Institutional Integrity Of The Federal Courts.

Dr. Barnett's opinion testimony could not have survived even the most rudimentary of Daubert inquiries. For obvious reasons Dr. Barnett almost never testifies at trial. (Barnett Dep. at 20). What assurance does the Court have that the Ninth Circuit's unpublished affirmance of a total abdication of the

trial court's gatekeeping obligation was a one-time blunder? The fact that local district courts have utilized this same holding for over a decade indicates a long-term, and unacceptable, degradation of the integrity of federal judicial proceedings in the Ninth Circuit.

This holding has exacted a terrible price on the dignity of man in the face of known "longstanding, continuing constitutional violations." Plata, 179 L.Ed.2d at 994. The Eighth Amendment has been indefinitely nullified in the Ninth Circuit where it is needed the most. The Court should not tolerate such corruption of the judicial institution. It should certainly not allow what is shown by this record to ever happen again. The Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL WITKIN

Date: August 4, 2020