

20 - 7888
No. _____

SUPREME COURT OF THE UNITED STATES

JAMES ARTHUR ROSS – PETITIONER

VS.

STEVEN SHELTON, et al. - RESPONDENT(S)

ORIGINAL

ON PETITION FOR WRIT OF CERTIORARI TO

FILED
APR 02 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES ARTHUR ROSS S.I.D.#12599830
TWO RIVERS CORRECTIONAL INSTITUTION
82911 BEACH ACCESS RD.
UMATILLA, OR 97882

James Ross S.I.D.#12599830

QUESTION(S) PRESENTED

1. Did the District Court abuse it's discretion by refusing to even request the appointment of counsel in this case?
2. Was the District Court wrong in it's determination that it had no authority to appoint counsel in this case?
3. Did the District Court error or abuse it's discretion in not allowing the petitioner any discovery in this case, especially so, while allowing the defendants such discovery?
4. Did the District Court error or abuse it's discretion in not granting the Petitioner's request for an expert witness(Orthopedic Surgeon) in this case, if, for nothing else to clarify or set out actual injury and the proper course of treatment? Alternatively, second opinion?
5. Did the District Court error or abuse it's discretion in determining that the petitioner received satisfactory medical treatment for his knee injury, especially, without expert witness and based solely off of the Defendants' own word, whom was not an Orthopedic specialist?
6. Did the District Court error or abuse it's discretion in failing to acknowledge that the petitioner had repeatedly tried to seek further medical help for his continued knee pain over the course of years and that it was not that the petitioner failed to seek such medical treatment, rather, it was the Defendants' failures, neglect and deliberate indifference to provide such further treatment?
7. Did the District Court error or abuse it's discretion in lopsiding the case extremely in the favor of the defendants, extremely limiting the Petitioner's ability to respond to, let alone survive summary judgment, especially when taking the Defendants' statements and statements of facts as true and absolute? Would that not be the role of a jury?
8. Was the District Court bias towards the Petitioner's complaint?
9. Did the District Court error or abuse it's discretion in determining that the defendants had in fact met their necessary and mandatorily required burden of establishing the absence of a "genuine dispute of material fact" before transferring such burden onto the petitioner in this case?
10. Did the District Court error or abuse it's discretion in concluding that the petitioner did not provide even a single genuine issue suitable for trial in support of any one of his claims?
11. Did the District Court error or abuse it's discretion in granting the Defendants' requests to inspect and copy the Plaintiff's medical file, especially so, while at the same time, denying the plaintiff any discovery?
12. Did District Court error/abuse it's discretion granting summary judgment to defendants?

LIST OF ALL PARTIES

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

- * Brigitte Amsberry, Superintendent of TRCI;
- * J. Dafoe, RN, MSN, MHA, Health Services Administrator of O.D.O.C.;
- * B. Whelan, RN, Medical Director of O.D.O.C.;
- * Shannon Johnston, RN, Medical Services Manager at T.R.C.I.;
- * M. Whelan, RN, Nurse Manager at T.R.C.I.;

(Please Note: That the titles listed above may have changed since the time of incident.)

TABLE OF CONTENTS

OPINIONS BELOW.....	6
JURISDICTION.....	6
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	7
STATEMENT OF THE CASE.....	8
REASONS FOR GRANTING THE WRIT.....	10
CONCLUSION.....	26

INDEX TO APPENDICES

APPENDIX A -	The opinion of the United States Court of Appeals on Re-Hearing;
APPENDIX B -	The opinion of the United States Court of Appeals;
APPENDIX C -	The opinion and Order of the United States District Court on Petitioner's/Plaintiff's Motion for Reconsideration in the United States District Court;
APPENDIX D -	Petitioner's/Plaintiff's Motion for Reconsideration in the District Court;
APPENDIX E -	The Judgment of the United States District Court;
APPENDIX F -	The Opinion and Order of the United States District Court;

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER(S)
<i>Simmons v. Jackson</i> , 2016 U.S. Dist. LEXIS 146942 (Oct. 24 th , 2016).....	12
<i>Ulmer</i> , 691 F.2d at 212.....	12
<i>Pinson</i> , 2015 U.S. Dist. LEXIS 27787, 2015 WL 1000914, at *1.....	12
<i>SEC v. Stanford Int'l Bank Ltd</i> , 2018 U.S. Dist. LEXIS 135690 (May 10 th , 2018).....	12
<i>United States v. 30.64 Acres of Land</i> , 795 F.3d 796 (1986).....	12
<i>Beard v. Banks</i> , 548 U.S. 521, 530-33, 126 S.Ct 2572 (2006).....	13
<i>Garcia v. Davis</i> , 2018 U.S. Dist. LEXIS 192801 (Nov. 09 th , 2018).....	14
<i>Naranjo v. Thompson</i> , 809 F.3d 793, 802 (5 th Cir. 2015).....	14
<i>McAdoo v. Martin</i> , 899 F.3d 521 (8 th Cir. 2018).....	22
<i>Brown v. Perez</i> , No. EDCV 14-2421-CJC JEM, 2015 WL 2153451, at *3 (C.D. Cal. May 7, 2015)....	22
<i>McGuckin v. Smith</i> , 974 F.2d 1050, 1059 (9 th Cir. 1992).....	22
<i>Toguchi v. Chung</i> , 391 F.3d 1051, 1058 (9 th Cir. 2004).....	22

STATUTES AND RULES

28 U.S.C. § 1245(1).....	6
28 U.S.C.S. § 1915(d).....	13
FRCP.....	2 and 15

OTHER

There is more in depth arguments and facts to this case, with Statutes, Rules, Constitutional and Statutory Provisions and Case Laws to cite, however, petitioner believes all of that is for the briefing process and thus, petitioner was afraid as he does not know this process and is trying to do his best to just have this Honorable Court accept this case for further proceedings.

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

Federal Courts:

The opinion of the United States Court of Appeals appears at Appendix B to the petition and is:

reported at: *Ross v. Shelton*, USCA9#19-35247 (2020).
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States District Court appears at Appendix F to the petition and is:

reported at: *Ross v. Shelton*, (D. Or. 2019).
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

Federal Courts:

The date of which the United States Court of Appeals decided my case was August 07th, 2020:

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: November 21st, 2020, and a copy of the order denying rehearing appears at Appendix A.
 An extension of time to file the petition for 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. § 1245(1).

James Ross S.I.D.#12599830

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution

Eighth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Oregon Constitution Article 1, Section 10

Oregon Constitution Article 1, Section 16

Oregon Constitution Article 1, Section 20

STATEMENT OF THE CASE

Good morning Your Honors and may it please the Court, the petitioner in this case, James Arthur Ross, has been, and, continues to be, incarcerated since February of 2004. During this time the petitioner has been transferred to multiple prisons throughout the State of Oregon. During these times, petitioner has been engaged in athletic sports that have been offered by the Institutions in which he has been incarcerated such as basketball, soccer and softball. He has also used the Institution's weight piles and has been involved in altercations with other prisoners.

During all of these events, the petitioner has experienced multiple injuries to his knees and ankles from landing on them wrong, tripping, falling, hyper-extending or injury from assault. One time an institutional officer was breaking apart a fight between the petitioner and another prisoner at which point the officer jolted from across the pathway and tackled the petitioner without warning at which point the Petitioner's knee was bent backwards underneath him, tearing his knee into the pavement and gravel. This not only severely damaged the Petitioner's knee, it has left scars and gravel still embedded into his knee that you can visually see with the naked eye and physically feel with the touch. This injury resulted in staff infection as well. There were also times that the Petitioner's ankles were so swollen and black and blue that officers made him report to medical through direct order.

However, the petitioner never received any MRIs or evaluations from any orthopedic specialists despite the Petitioner's repeated requests for continued medical treatment from ongoing pain from the injuries. There was always an initial screening with a promised follow up that never occurred. This happened on a multitude of occasions all the while the petitioner still suffering from the pains of his injuries with no treatment in sight.

In fact, after each time the petitioner would report to medical, he would always be placed on 'sports restrictions' that literally and severely limited his activity to nothing more than walking in lieu of punishment resulting in disciplinary action. A true form of retaliation as no medical follow up ever

occurred after any of these actions. If it had, then, the defendants might have a plausible defense, however, it never did.

The petitioner has filed multiple grievances raising all of these issues, which were all denied and still without any follow up medical treatment to this day. The petitioner is left suffering from the pain of his injuries.

Finally, the petitioner filed his §1983 Civil Suit in the District Court of Oregon raising his constitutional claims of violation for the denial of medical treatment and retaliation in the guise of “sports restrictions” for seeking medical treatment.

On February 21st, 2019, United States Magistrate Judge Youlee Yim You dismissed the Petitioner's case finding no constitutional violation had occurred.

On May 07th, 2019, petitioner filed his Motion for Certificate of Appealability with the 9th Circuit Court of Appeals, which denied his request for a COA on August 07th, 2020.

Finally, the petitioner filed a Petition for Rehearing on August 21st, 2020, which was treated as a Motion for Reconsideration and a Motion for Reconsideration En Banc, and, was ultimately denied on November 05th, 2020.

REASON(S) FOR GRANTING THE PETITION

Good morning Your Honors and may it please the Court, the petitioner brings forth this petition in hopes that this Honorable Court will bring clarity and justice to all incarcerated persons across this Country whom are trying to litigate their cases for medical neglect and wrongful actions taken by prison officials while incarcerated.

It is the Petitioner's hopes that this Honorable Court will be able to conclude from the circumstances and injuries of this case that lower courts have unconstitutionally burdened pro per incarcerated litigants in forcing them to have to prove their cases in their totality, and, without any resources, discovery or assistance of counsel, nor any help from the lower courts to attempt to obtain such help, in dismissing their cases in a preliminary stage known as a Summary Judgment proceeding.

Every weekend, during the football season, Your Honors may watch the sports networks on television and see athletes get hurt, twist an ankle, etc., and every time the broadcasters and the tickers at the bottom of the screen will say, "It appears that Ben Rothlisberger of the Pittsburgh Steelers twisted his ankle today and may have torn some ligaments, however, we will not know until he gets an MRI, which he is scheduled to do so on Monday".

Then, on Monday it will say if the MRI came back negative or that he actually has damage done to his ligaments, etc. Every injury you see, whether it be ankle, knee, shoulder or other, there is always an MRI that follows, and, yes, on top of the initial x-ray as an x-ray cannot detect such severe damage done to the ligaments, ACL, MCL, etc., only an MRI can do so. (Please note: The defendants have never contested this statement of fact, not once throughout any grievance or court process)

Yet, despite the mass multitude of severe injuries to the Petitioner's knees and ankles that he suffers painfully from everyday, one of which, obviously visible to the naked eye and physically touchable as the gravel is still embedded in his skin and knee to this day, he has never once been

afforded an MRI. Every time he has pressed to do so, the defendants have only tried to derail him through promises of follow up treatment and review, which never came and only punishment and retaliatory actions through the guise of their so-called course of treatments through 'sports restrictions' subjecting the petitioner to threats of severe punishments as a result.

Furthermore, the petitioner has been subjected to extreme amounts of radiation through the Defendants' over jealous use and reliance on x-rays to diagnosed possible injuries that an x-ray cannot diagnose. One x-ray is equivalent to approximately 10 MRIs and it is not cost effective either.

Therefore, it is high time that this Highest and most Honorable Court enlighten the defendants and other prisons across this country that they are obligated on a Constitutional Magnitude to provide medical treatment to the citizens and human beings whom they incarcerate. Medical treatment that is proper and in line with the necessary fields pertaining to the injuries sustained requiring medical treatment and that cough and cold doctors are not qualified to treat every possible injury and sickness in prison, and, that prisons are required to provide the proper medical professionals in the proper associated medical field of concern as to the nature of the injury to asses and diagnose the proper diagnosis and course(s) of treatment(s), and, to do so without retaliatory actions intended to only derail those whom are seeking medical treatment while incarcerated. Human beings should not be left suffering nor in fear of seeking such medical help from the ones whom incarcerate them.

It should also be noted that the petitioner was denied any and all discovery as well as any assistance of expert witness(Orthopedic Surgeon) or counsel in this case. This is discussed more below, however, this Court should take into consideration that the petitioner has obvious injuries as described above, which this Court could see for itself through Order, and, the fact that the Petitioner's injuries may be irreparable through the neglects of the defendants and their failures to treat the Petitioner's injuries over the course of decades, and, in the first place.

Thus, it is the Petitioner's position that the district court denied him the assistance of counsel

citing that it did not have to appoint counsel in civil cases nor did it have the authority to do so.

However, the district court failed to acknowledge that its outright refusal to even request the assistance of counsel would amount to an abuse of discretion. In fact, the lower court failed to even engage the full scope of an inquiry as required by such cases as *Simmons v. Jackson*, 2016 U.S. Dist. LEXIS 146942 (Oct. 24th, 2016): A court abuses its discretion by not considering a “series” of factors when determining whether there are exceptional circumstances to justify the appointment of counsel. See *Ulmer*, 691 F.2d at 212.

In determining whether to appoint counsel for an indigent plaintiff, the court must consider: (1) the type and complexity of the case; (2) whether the plaintiff can adequately present the case; (3) whether the plaintiff can adequately investigate the case; and (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and cross examination. *Pinson*, 2015 U.S. Dist. LEXIS 27787, 2015 WL 1000914, at *1 (citing *Ulmer*, 691 F.2d at 213).

See also, *SEC v. Stanford Int'l Bank Ltd*, 2018 U.S. Dist. LEXIS 135690 (May 10th, 2018): In determining whether to exercise its discretion to appoint counsel for an indigent person, a court must consider: (1) the type and complexity of the case; (2) the indigent person's ability to present and investigate her case; (3) the presence of evidence that will largely consist of conflicting testimony so as to require skill in the presentation of evidence and in cross-examination; and (4) the likelihood that appointing counsel will benefit the parties and the court by shortening the trial and assisting in a just determination.

And, *United States v. 30.64 Acres of Land*, 795 F.3d 796 (1986): A federal court has a duty under 28 U.S.C.S. § 1915(d) to assist a party in obtaining counsel willing to serve for little or no compensation. The court does not discharge this duty if it makes no attempt to request the assistance of

volunteer counsel or, where the record is not otherwise clear, explain its failure to do so.

Not only is this a long line of precedent throughout many Courts, it appears that there is actually five(5) factors for determining the appropriateness for appointment of counsel in any case: (1) the type and complexity of the case; (2) the indigent person's ability to adequately present his or her case; (3) the indigent person's ability to adequately investigate his or her case; (4) the presence of evidence that will largely consist of conflicting testimony so as to require skill in the presentation of evidence and in cross-examination; and (5) the likelihood that appointing counsel will benefit the parties and the court by shortening the trial and, probably very important, assisting in a just determination.

Furthermore, it appears that these precedent cases, in determining to appoint or not appoint counsel in any specific case, have actually set a standard in which they lay out their facts and conclusions somewhat “categorically” as listed in the previous paragraph and on record.

It should also be noted that each “factor” or “step” as listed above should be considered and that a court only need find the conditions of one of these factors to justify a request for counsel, not all five.

At the same time, just because the plaintiff does not meet one of the conditions, does not mean that a court is relieved from making such a request for counsel. The court needs to look at all five categories, steps or factors to see if the plaintiff falls under one of them, thus, granting such a request from the court.

Even this Honorable and High Supreme Court has itself stated in *Beard v. Banks*, 548 U.S. 521, 530-33, 126 S.Ct 2572 (2006) “it is not inconceivable that a Plaintiff's counsel, through rigorous questioning of officials by means of depositions, could demonstrate genuine issues of fact for trial.” 548 US at 536.

However, one would first have to appoint counsel for this assertion to carry any merit whatsoever.

Also, the petitioner believes that the district court is in error in strictly limiting the consideration

of appointment of counsel to § 1915 and concluding that it had no authority outside of such to appoint or even request the appointment of counsel to aide the appellant in those proceedings. See, *Garcia v. Davis*, 2018 U.S. Dist. LEXIS 192801 (Nov. 09th, 2018); *Naranjo v. Thompson*, 809 F.3d 793, 802 (5th Cir. 2015) (Federal courts' inherent powers undoubtedly encompass the appointment of counsel).

The Court noted in *Naranjo v. Thompson*, 809 F.3d 793, 799 (5th Cir. 2015):

- 1) The federal courts have inherent authority to order attorneys to represent litigants without pay. Simply by virtue of having been created, federal courts are vested with inherent power to take action essential to the administration of justice;
- 2) Accordingly, courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Action taken by a federal court in reliance on its inherent powers must somehow be indispensable to reaching a disposition of the case;
- 3) When a pro se litigant proceeds to trial after having been denied appointed counsel, his performance at trial is affected by that denial, and the denial is held erroneous on appeal, the ordinary remedy is remand for retrial with the assistance of recruited pro bono counsel. Similarly, where a denied motion for appointment of counsel is followed by a denied motion to amend the complaint, the Eleventh Circuit has indicated that a plaintiff should be afforded a renewed opportunity to amend his complaint on remand with the aid of counsel;
- 4) During discovery, a pro se Plaintiff's lack of resources and his unfamiliarity with discovery rules and tactics put him at a significant disadvantage;
- 5) Because summary judgment's consequences are so severe, courts must always guard against premature truncation of legitimate lawsuits merely because of unskilled presentations.

Thus, such a conclusion as cited in the District Courts' previous Opinions, Orders and Judgments in this case would only extremely undermine the Federal Courts' own inherent authority and substantially prejudice the petitioner and his abilities to prepare and present his case to the court.

Furthermore, the District Court should have also ruled on the Petitioner's motions for expert testimony and discovery before dismissing the Petitioner's case as being frivolous. It seems to be contradictory, hypocritical, unfair and unjust to demand that a pro per, indigent and incarcerated plaintiff must respond to and survive summary judgment when the Court has extremely lopsided the

resources in the Defendants' favor.

This especially so, where the District Court suspended all discovery for the petitioner, yet, granted the Defendants' motions to inspect and copy the Petitioner's entire medical file, including parts that did not even pertain to the injuries at question. The court even noted some of this other evidence in its opinion and order by stating and referring to these other visits obtained by that discovery that it granted to the defendants in stating that the petitioner had sought medical treatment for other reasons not related to his knee injuries.

Thus, the court unequally, unfairly, biasedly and unconstitutionally granted the defendants discovery, while at the same time, refusing the petitioner any such benefit. An extreme abuse of discretion and fairness.

However, the district court went even further to deny the petitioner any discovery by outrightly refusing or failing to rule on the Petitioner's request for discovery and expert testimony, which the appellant asserts would have proved that for an initial screening during the course of treatment for a knee injury, yes, a brief examination and an X ray may have been proper, initially, however, further treatment to truly be able to ascertain truthfully a seriousness or actual existence or non-existence of an injury, would demand an M.R.I. (Magnetic Resonance Imaging) – A noninvasive diagnostic technique that produces computerized images of internal body tissues based on electromagnetically induced activity of atoms within the body, in order to determine if any real damage had occurred to the tendons and ligaments, more specifically, the A.C.L. and M.C.L., which the petitioner believes that he is suffering from a damaged or torn M.C.L., which left untreated will result in irreparable and permanent damage to the Petitioner's knee.

Furthermore, the expert witness, to wit an orthopedic surgeon, not a physician whom is not trained in such fields, could have given his or her expert and specialized opinion on at least the proper course of treatment and the necessary test(s) to be performed. This is important, because the limits,

usages and intents of the capabilities of such tests when compared to each other such as an X ray, M.R.I. or an orthopedic procedure, is not a question of debatable treatment, rather, scientific fact of what each test is capable of, or, rather, limited to. Such expertise could have been obtained through a simple affidavit from such a local expert requested by the Court. It would have been at minimal expense, time and effort for the Court to be able to request such or grant the petitioner such, especially since, O.D.O.C. and T.R.C.I. both explicitly contract with several such Orthopedic Surgeons locally and all across the State of Oregon.

The reality is that doing so would have proven the Petitioner's assertions enough to prevent the Defendants' motion summary judgment. This would have also given genuine facts of debate for a jury to decide and not a Judge acting *sua sponte* as a fact finder in a pre-trial proceeding such as a summary judgment. And, if the expert testimony did prove the Petitioner's assertions on the treatment, then, it could further the Courts' determination in the allegations claimed by the petitioner against the defendants.

For example, if, as the petitioner contests, the court would have asked the expert witness if an X ray is unable to determine such injuries and the response came back as yes, and, that in fact, an x-ray is limited to bony abnormalities and soft tissue damage (such as a bruise) as the petitioner has asserted since the beginning, then, there is an issue as to why the defendants have not taken this next step to ensure that the petitioner does not have a more serious injury or damage, which left untreated, as they have done so, would lead to serious irreparable and permanent damage?

This is especially so, after the Petitioner's repeated attempts over the years, literally, to be treated as he was and is in substantial pain, which the district court repeatedly cited, yet, it failed to, or, refused to, acknowledge or recognize these facts as evidence supporting the Petitioner's position in this case or, in the very least, as genuine issues of disputable facts to survive summary judgment and only proper for a jury to decide at trial.

Instead, the district court appeared to be in the position as if the petitioner never followed up with any medical treatment, when the fact of the matter is, as the petitioner has previously laid out, uncontested, that petitioner had repeatedly, almost in a timely graphed timeline over a period of several years, sought medical treatment for his knee injuries only to receive the exact same response each time, which led to him being placed on sports restrictions with X rays and false promises of follow up treatment that never came about¹.

Furthermore, the petitioner would be left waiting for an extreme period of time until he had no choice, but to sign up again seeking medical treatment for the same exact issues, only to repeat the same exact process and lies as to follow up treatment. The only thing changing was the length of the amount of time in which he was placed on “sports restrictions” status, which the petitioner has consistently asserted, was nothing more than a form of punishment and retaliation meant to deter him from seeking medical treatment. Maybe this is a way to save them expense and time, and, possibly, liability, as most prisoners do not know their rights or are afraid to assert them out of fear of retaliation.

Explanation, “sports restrictions” means that the person whom is placed on such status cannot do nothing more than walk. The person cannot do any exercise no matter what. Even if it does not involve the use of the area of medical concern. The person cannot be caught participating in any way, shape or form of any activity.

For example, if a soccer ball or basketball rolls your way and you pick it up and toss it back to the AICs(Adults In Custody) whom are using it, you are now in violation of your restrictions and can and will be subject to disciplinary punishment. This may seem extreme, however, the petitioner has seen this happen with his own eyes.

The bottom line is that it is an easy way for the defendants to retaliate under the false premises

¹ This is very important as the defendants do not contest these facts. Instead, they argue in favor of these facts as a proper course of medical treatment. To promise a follow up and never follow up. Only punish you again the next time you request more treatment for the same exact issues, is nothing more than punishment, retaliation, and, in fact, no treatment at all.

of providing “proper” medical treatment to bypass the laws against such retaliation, while actually providing no treatment at all.

In fact, it allows them to push you off down the road in hopes that you will not come back and that they will not have to treat you as they have obviously done in the Petitioner's instant case repeatedly, (This statement should have provided more genuine issues suitable for trial).

Another example, ask yourself, would it be ok if you went to your doctors office for the flu and he told you to stay in bed and take some cold and flu medicine. However, while at home, you go outside to check your mail. The next thing you know, you are being arrested and taken to jail, because your doctor found out that you were out of your bed?

Now, you are subject to losing your job and interfering with countless other reparations in your life as a result. Would this court say that such a standard would be ok? That such treatment, which is subject to punishment, is a proper course of medical treatment and not unreasonable in order for you to obtain medical treatment? If not, then, the district court was in error.

Also, the district court had acknowledged that since 2016, the petitioner had not signed up again for treatment, as if that is of some factual importance in support of the defendants. When the fact of the matter is, it is nothing more than clear, precise and reasonably convincing evidence to the contrary suitable for jurist of reason to determine. The reality is that the petitioner did not want to be punished anymore for seeking medical treatment, nor put himself in a position with an active lawsuit pending to give them a chance to retaliate against him and, in fact, he was in fear of it². In fact, as proof to this, the petitioner had just settled a case in Ross v Horton, that was a direct result from retaliation through medical at the Snake River Correctional Institution where the petitioner was incarcerated at before

2 As stated previously in this case, which was again, barely noted by the district court, the petitioner has a heart condition, which he was told by the same defendants, that he needs to exercise and be more healthy. The Petitioner's condition could end in cardiac arrest. This is a serious issue. In fact, the petitioner has been battling these issues along with an enlarged liver and other unknown medical issues that he is being currently treated for, which all require better exercise and healthier living, not restrictions subject to disciplinary sanctions. This is further reasonable evidence in support of the Petitioner's case suitable for trial.

being transferred to TRCI. These are more than reasonable and logical reasons and nothing in the record would suggest otherwise. The reality is that the district court has failed the petitioner in recognizing all of this as such. That it is as the petitioner had claimed, a denial of medical treatment and effective retaliation.

Also, how many times does the petitioner have to go through such a "time loop" of circular proportion leading him back to square one every time before seeking intervention from the grievance process and courts? It's not like any of these processes has given any ray of hope that the petitioner would finally receive treatment if he just kept blindly requesting treatment while only receiving 'sports restrictions' in return. It's absurd to insist such.

Furthermore, each time the petitioner was placed on such restrictions, he gained great amounts of weight and was very depressed affecting his daily activities, duties and responsibilities. His only option was to seek litigation in hopes the court would intervene and that he would finally receive the help that he needs. The mere fact that he has stopped seeking medical treatment from the defendants for his knee injuries is nothing more than absolute proof that the defendants had successfully interfered in the his attempts to seek medical treatment and exercise his constitutional rights to medical care, thus, violating his constitutional rights as a result and causing him extreme prejudice as a result.

The only way any of this could be deemed reasonable giving the defendants any shroud of evidence to the contrary, would have been if they had actually followed up with continued medical care as they promised in the first place, repeatedly.

However, this never did happen and the district court failed to or refused to acknowledge this and the fact that the Petitioner's injuries did not stop hurting and causing him pain, even to this day. The only thing that happened was the passage of time³ while the petitioner was waiting to be followed up

³ If it truly is nothing more than a bruise, then, how long would this court suggest that petitioner should have to wait for the pain to resolve, weeks, months, years, because as the district court so laid out in it's order, that is exactly what the petitioner went through. Years of suffering with no extended treatment. If an X ray did not show you the first time, it is not going to show you the second or third or fourth time either. All you are doing is subjecting the petitioner to extreme

with until eventually he got tired of waiting and suffering and, as stated above, and, started the whole process over again.

Not once, did the defendants say or come to the medical conclusion that the Petitioner's injuries were an ongoing issue and that their may be something more serious entailed. Nor did they take any further follow up steps to ensure such. Especially so after the petitioner specifically stated such to the defendants. That "this is not a new injury"; "Please do not retaliate against me by placing me on sports restrictions again"; all of which is stated in the Petitioner's grievances, pleadings, exhibits and all uncontested by the defendants making them facts of the case or in the very least, genuine issues suitable for trial. All of which, the district court failed the petitioner on.

Yet, the petitioner was given no further treatment beyond which he had been receiving for years, which did not resolve the issues nor relieve the petitioner from his continued suffering. This is the epitome of deliberate indifference, medical negligence and the district court has failed and/or refused to acknowledge such⁴, let alone, any fact in support of the Petitioner's case. They have all been misconstrued or twisted in favor of the defendants, which in that stage of the proceedings, especially with all the limitations that the district court had placed on the petitioner, such is supposed to be construed in the favor of the non-moving party, to wit, the petitioner, especially before transferring the burdens to the petitioner in the first place.

Furthermore, the district court stated that "Ross has not reported any knee pain since, although he has complained on different occasions about the flu, a rash, and a sore on his third right toe".

This is extremely confounding to the petitioner, because not only had the district court looked

amounts of radiation for no reason, especially when their are other tests that have absolute and undeniable results.

4 The district court even cited the Defendants' statement from J. DaFoe "I see that your knee pain is something that you have been dealing with for quite some time...." *Id.*, Ex. 10. Instead of the district court applying such as evidence to the Defendants' deliberate indifference and medical negligence, the court cited it as evidence in favor of the defendants. As stated above, how long does the petitioner have to suffer before the medical treatment and concern is elevated? This at least should have been genuine issues of fact suitable for trial. Not for the district court to determine at such a stage. This is not a mere scintilla of evidence and the petitioner needed not show more than one genuine issue suitable for trial. Especially, when it is the Defendants' responsibility and burden to begin with to prove that no triable issues existed.

into the records to make such a statement, it appears to be insinuating that since the petitioner went to medical for other, minor issues as listed, that that is somehow evidence against him.

First, even if it was, that would have been another genuine issue of fact suitable for trial.

However, for arguments sake, one is not placed on such restrictions as the petitioner has raised and suffered from in this case for seeking such minuscule treatment as listed by the district court, which is why the petitioner was not in fear of seeking treatment for such minuscule issues.

Therefore, unless the lower court is insinuating that when a litigant is seeking litigation in such a case, that said litigant should not seek any other treatment whatsoever, no matter how serious or not, while litigating on another issue that has nothing to do with one or the other, even as a course of treatment, then, the petitioner cannot understand any relevancy for the lower court to make such a statement other than to further define it's biasness towards the Plaintiff's case⁵.

It should also be noted that Under section II (A) of the District Courts' opinion and order, the court stated that the petitioner "complained of right knee pain, which he has been experiencing since childhood". That statement was false. The petitioner was, as stated above, following up on his right knee pain from the injury he suffered the previous year, which the district court cited in the sentences just above that statement. The District Courts' failure to acknowledge such and misconstrue the facts extremely prejudiced the petitioner in those proceedings and is nothing more than evidence that the lower Court had abused it's discretion in not, in the very least, try to request that counsel represent the petitioner in those proceedings.

The lower court also failed to recognize that the petitioner did not, and, never has, contradicted or argued against such statements or assertions made by the petitioner. Instead, they argue that they had given the proper course of treatment. They do not argue the limits of an X ray or the importance of an M.R.I. as the petitioner asserts, and, instead, they literally do nothing more than argue that a brief

⁵ In fact, their are other statements made in the District Courts' Opinion and Order that, with all due respect to this court, make the petitioner feel that the lower court had biasedly tilted this case in favor of the defendants.

examination of the injury and an X ray followed by the “prescriptions” of “sports restrictions” over and over, every time, over the course of years, as the proper and only course of treatment, while providing absolutely no other evidence, second opinion or expert opinion from an actual orthopedic surgeon, nothing other than their own affidavits. This was an abuse of discretion and miscarriage of justice by the district court in the summary judgment proceeding. At best, two opposing affidavits that are not supported by expert and outside opinion, should have provided genuine issues for trial and not summary judgment for the district court to make it's own factual opinions as to whom is correct and whom is not. This, especially so when the Plaintiff's claims and affidavits are to be taken as true to begin with.

For example, their is nothing “initial” about the Petitioner's repeated requests for medical treatment over the course of years, which the district court failed to take into account as evidence. The reality is that the petitioner has been suffering and experiencing extreme pain from these injuries for years and the defendants have been negligent and indifferent to his serious medical needs, see McAdoo v. Martin, 899 F.3d 521 (8th Cir. 2018) pain from an injury is sufficient to establish deliberate indifference; “A serious medical need exists if failure to treat the condition could result in further significant injury or the unnecessary and wanton infliction of pain.” Brown v. Perez, No. EDCV 14-2421-CJC JEM, 2015 WL 2153451, at *3 (C.D. Cal. May 7, 2015) (citing McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992).

Furthermore, the district court stated that a “difference of medical opinion...[is] insufficient, as a matter of law, to establish deliberate indifference.” *Id.* (citation and quotations omitted). “[N]or does a dispute between a prisoner and prison official over the necessity for or extent of medical treatment amount to a constitutional violation.” Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004).

Again, the petitioner was troubled by that citation. Was the lower court stating that no matter the prison official, whether medically trained or not, makes any determination that any treatment provided,

or not provided, is sufficient treatment, and, as such, would be beyond contestation? What are specialists for then? Why have different medical fields, doctors and the need for expert witnesses to exist in the first place? Why even bother with any proceeding brought by a prisoner if all that has to happen is for the lower court to outrightly deny said prisoner any resources, counsel, discovery while simply taking the Defendants' testimony as the only truth?

Apparently, the lower court appears to be stating that a nurse or even a person not trained in any medical field is sufficient to evaluate and treat any injury or illness regardless even if they are giving that opinion as defendants in a civil suit. That the Courts will take it as absolute. Such would be nothing more than an absolute miscarriage of justice. The above cases are in conflict with eachother.

More specifically, the petitioner specifically pointed out that he has never been examined by a doctor, orthopedic surgeon or even a physician. That it was a nurse who had "treated" the him with promises of seeing his care provider in 6-12 weeks, which never happened, again and again, and, again.

The district court repeatedly misconstrued the Petitioner's pleadings and the facts of the case and unbelievably in favor of the defendants every time. Such as the retaliation issue. Their is no legitimate correctional goal in telling the petitioner, whom was previously directed by the same defendants to exercise and be healthy due to his heart condition, to not do so under the threat of extreme punishment, it is completely absurd.

Another statement is the District Courts' statement that "even assuming that other inmates with similar injuries are receiving unnecessary MRIs".

This statement is extremely prejudicial and bias not only to the petitioner, however, to every incarcerated person. Unless the lower court is diverse in the medical field, an orthopedic surgeon or has direct and personal knowledge of everyone else's case whom have received such MRIs, how can that Court come to the conclusion that other inmates with similar injuries are receiving unnecessary MRIs?

This is proof in and of itself of the the District Courts' extreme biasness in this case.

And, again, the lower court had taken the Defendants' statements that the petitioner "received appropriate treatment for his condition" as facts of the case, which the lower court had not allowed the petitioner to contest. The defendants may be trained in some parts of the medical fields, however, that does not mean that they are trained in the fields of the Petitioner's injuries, nor to the extent of such and the defendants have not provided any evidence as to such. And, the district court itself never asked nor conferred with the defendants as if they were even trained or licensed to treat or even give a medical opinion on the relation of a knee injury and possible internal ligament damage as they would not have been able to as that would be for an orthopedic surgeon to determine and opinion on.

Thus, the Petitioners' statements should have carried even more weight as the facts are supposed to be taken in light most favorable to the non-moving party in the summary judgment proceeding.

More specifically, if the petitioner is the non-moving party in the summary judgment, and his claims were to be taken as true to begin with and it was the responsibility of the moving party to prove it's case that no genuine issue of fact exist for trial, then, how can the defendants file nothing more than their very own affidavits to overcome the Petitioner's claims and case? Should not have the defendants had to get their own expert witness testimony to provide to the court that their assertions are correct and not the Petitioner's? Despite the fact that one of the defendants is a doctor, he is not trained, nor practicing as an orthopedic surgeon. Nor has he ever evaluated the petitioner himself, however, the District Court not only noted and cited the opinion by said defendant, the district court took it a factual and expert evidence. That would be like a suspected robber being released simply because he says "I am not a robber" despite the fact that the little old lady across the street is pointing at him saying "He robbed me". It's absurd.

Then, the lower Court continuously stated that the petitioner had failed to show this or prove that or submit evidence to the contrary, while providing him none, nor allowing him any assistance of any kind to present his case to the lower Court. If the District Court was going to put the petitioner

through such extreme conditions in trying to bring his case to a trial, then, that Court should have allowed the petitioner discovery⁶, expert witness and in the very least requested the assistance of counsel to aide him. As stated previously, a blind person can see the injury to the Petitioner's knee and discovery, in the very least, would have allowed the petitioner to take pictures of his knee to supply as evidence with the Court. Another bright line fact on discovery is the fact that the petitioner also wanted to bring claims against Linda Gruenwald, the Petitioner's Care Provider whom has recently lost a \$1.5 million dollar lawsuit for medical neglect as the petitioner has claimed in this case. Substantial!

It is for all of these reasons that the petitioner believes that the lower Court had wrongfully tilted those proceedings in favor of the defendants from the start and even in a biased manner as that Court appears to lean so heavily on the Defendants' statements, right from the start, as true and absolute while technically barring the petitioner any means of which to contest them.

A real detrimental effect that is taking place and that has truly already foundationalized itself in these proceedings in the lower Courts in cases such as the Petitioner's here, is that the summary judgment stage has become the Prisoner's only trial proceedings.

The further fact that Courts are refusing the assistance of counsel, discovery, expert witness and the like to pro se prisoners, especially, while allowing such to the most powerful and resourced entity as prison officials whom are always represented by the State whom has somehow determined that they are always the victims instead of the prisoners, is truly, unfair, unconstitutional and usurps the entire purpose of a prisoner even seeking justice while incarcerated. Hopefully, this Honorable and High Court will see this, as it is not a matter of if you can, it is obvious. Rather, it is a matter of if you will choose to do so. And, hopefully, you will take action to make the process fair in protecting prisoner's Constitutional rights that are far too often being ignored, denied and dismissed due to failures and technicalities that could and would have been corrected through the representation of counsel,

6 The petitioner touched basis in his motions to the district court about the discovery he was seeking and why and wishes to incorporate them here through reference.

allowance of discovery and expert witness, and, telling the lower courts that the summary judgment proceedings are not trial proceedings and that prisoners should not have to actually prove their cases at such a stage before they can actually advance to a trial jury proceeding. After all, even if they did prove their case at such a stage, you are only forcing the petitioner to give his entire trial strategy evidence to the opposing party before the trial was to ever take place completely and unfairly shifting the balance of power to the other party, which the Courts are doing far too often and that is not whom the Constitution was ever intended to protect. It was intended to protect the weak from the strong arm of the King.

If you compile this with other issues listed above, especially pertaining to the appointment of counsel, I would pray that there is enough here in this instant case for this Honorable and Highest Court of our nation to take interest in considerations for some of it's lowest citizens, America's Prisoners and at least find one issue to address to bring some light and justice to us. I would also request that this Honorable Court address the proper dissolution of prisoner civil suits where no representation and/or discovery and expert witnesses were provided.

More specifically, if a Prisoner's case is denied such resources over their assertions that such would benefit their case, then, that case, if it is to be dismissed, should be dismissed without prejudice for the plaintiff to re-file at a later time when they are either released or able to obtain such on their own behalf. For example, it is undeniable that I have suffered a severe injury. You can literally see and feel it. Visible and touchable gravel still inbedded into my knee with swelling that has been constant for years now. And I believe beyond a shadow of a doubt that once I am released, I will be notified by an orthopedic surgeon of severe and unrepairable damage specifically due to the failure to treat my injury early on. Stripping me of every resource and dismissing my case as such is a miscarriage of justice.

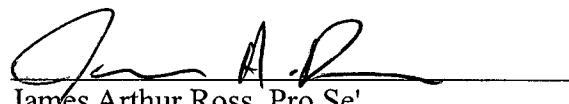
Finally, I pray for this Honorable Courts' understandings as to any errors that I have made in trying to present these Constitutional issues to this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 26th day of February, 2021.

Respectfully Submitted By:



James Arthur Ross, Pro Se'
S.I.D.#12599830
Two Rivers Correctional Institution
82911 Beach Access Rd.
Umatilla, OR 97882

James Ross S.I.D.#12599830