

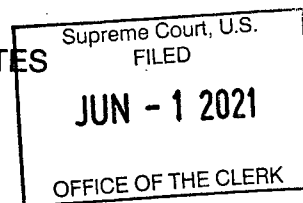
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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



JOEL BARCELONA — PETITIONER
(Your Name)

vs.

JULIE L. JONES, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

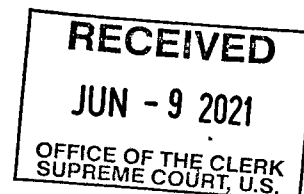
PETITION FOR WRIT OF CERTIORARI

JOEL BARCELONA
(Your Name)

Madison Correctional Inst.
(Address)

382 S.W. MCI Way, Madison, FL 32340
(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

1. WHETHER THE RESPONDENTS, JULIE L. JONES, et al., a non-medical officials acted with deliberate indifference WHEN THEY REFUSED TO AUTHORIZED PAYMENTS FOR A HEARING aid, a medically device - a REMEDY FOR A HEARING loss in MY RIGHT EAR - a SERIOUS medical needs prescribed by an Audiologist - Dr. A. Zinaman in violation OF THE EIGHT Amendments proscription against CRUEL and UNUSUAL PUNISHMENT. amend. VIII.
2. WHETHER THE RESPONDENTS, JULIE L. JONES, et al., a non-medical officials violated a statutory or constitutional RIGHTS THAT WAS CLEARLY ESTABLISHED AT THE TIME THE ALLEGED VIOLATION TOOK PLACE in 2014 WHEN THE RESPONDENTS, JULIE L. JONES, et al., a non-medical officials REFUSED TO AUTHORIZED PAYMENTS FOR A HEARING aid - a medically device - a REMEDY FOR A HEARING loss in ONE EAR - a SERIOUS medical needs prescribed by an Audiologist - Dr. A. Zinaman in violation OF THE EIGHT Amendments proscription against CRUEL and UNUSUAL PUNISHMENT. amend. VIII.
3. WHETHER a significant and substantial HEARING loss in ONE EAR THAT leads to an Audiologist - Dr. A. Zinaman TO PRESCRIBED a HEARING aid - a medically device - a REMEDY FOR A HEARING loss in ONE EAR CAN PRESENT an objectively SERIOUS medical needs?
4. WHETHER THE RESPONDENTS, JULIE L. JONES, et al., a non-medical officials WERE acting WITHIN THE SCOPE OF THEIR discretionary AUTHORITY WHEN THEY

REFUSED TO AUTHORIZED PAYMENTS FOR A HEARING
AID - A MEDICALLY DEVICE - A REMEDY FOR A HEARING LOSS
IN ONE EAR PRESCRIBED BY AN Audiologist Dr. A. Zinman
TO TREAT A HEARING LOSS OF PETITIONER'S RIGHT EAR?

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:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

☒ reported at 657 F. Appx. 896 (11TH Cir. 2016); 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 D 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 MARCH 2, 2021.

☒ 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

☐ For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner was diagnosed with a hearing loss in his right ear by Dr. A. G. Zinaman - Audiologist. Dr. R. Herr - Chief Medical Officer at Corrections Health Care (C.H.C.), refused to authorize payments for a hearing aid, despite Dr. A. G. Zinaman's recommendations to the contrary. Dr. R. Herr stated that I do not need a hearing aid because "one ear is enough to hear". My condition could have been remedied with a hearing aid.

A hearing aid was recommended and ordered by not one but two separate doctors and Dr. T. Heller agreed that I received a hearing aid. Nevertheless, Dr. R. Herr defied both doctors' orders and refused to authorize payments for a hearing aid. Thus, I have been treated with deliberate indifference by the named respondents, Julie L. Jones, et al... The Eighth Amendment strictly prohibits cruel and unusual punishment which includes deliberate indifference to prisoner's serious medical needs. Amend. VIII.

STATEMENT OF THE CASE

On May of 2014, the Petitioner informed Dr. J. Heller - Medical Director at South Bay C.F. that I had lost all of my hearing in my right ear.

On June 6, 2014, Dr. J. Heller ordered a hearing test at Lakeside Medical Center performed by Dr. A. Zinaman - Audiologist. Following a hearing test, Dr. A. Zinaman ordered an MRI and Dr. J. Heller agreed.

On July 11, 2014, Dr. J. Heller ordered an MRI in which was performed at Palm West Hospital. Following MRI, the Doctor at Palm West Hospital ordered that I be scheduled to get a mold for a hearing aid. Dr. J. Heller agreed and ordered that I be scheduled to get a mold for hearing aid.

On August 5, 2014, I was transported to Lakeside M.C. to get a mold for hearing aid by Dr. A. Zinaman.

On September 4, 2014, I had a medical call-out. Dr. J. Heller informed me that Dr. R. Herr - Chief Medical Officer at Corrections Health Care (C.H.C.) in spite of his recommendation that I received a hearing aid. Dr. R. Herr has refused to authorize payment for a hearing aid. Dr. J. Heller told me that Dr. R. Herr told Dr. J. Heller that "one ear is enough to hear". Dr. J. Heller suggest that I have to file a grievance concerning the matter.

On September 11, 2014, I was again had a medical call-out for a follow-up at which time Dr. J. Heller again informed me that Dr. R. Herr - Chief Medical Officer at Corrections Health Care (C.H.C.) refused to authorize payment for a hearing aid, despite his recommendations to the contrary. Dr. J. Heller again told me that Dr. R. Herr said that

"I do not need a hearing aid because one ear is enough to hear". My condition could have been remedied with a hearing aid. A hearing aid was recommended and ordered by not one but two separate Doctors and Doctor J. Heller agreed that I received a hearing aid. Nevertheless, Dr. R. Herz - Chief Medical Officer at Corrections Health Care (C.H.C.) defied both Doctor's orders and refused to authorize payment for a hearing aid. Thus, I have been treated with deliberate indifference by the named respondents, Julie L. Jones, et al.. The Eighth Amendment strictly prohibits cruel and unusual punishment which includes deliberate indifference to a prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976).

On September 24, 2014, Petitioner filed a Grievance to D.L. Stine - Warden - South Bay C.F. regarding the matter. Appendix

On October 21, 2014, Petitioner filed an appeal to Julie L. Jones - Secretary - F.D.C. Appendix

On November 16, 2014, Petitioner filed a second Grievance to Mr. Bassett - Asst. Warden - South Bay C.F. Appendix

"Records indicate you were seen by Audiologist on 8-12-14 and it was determined your hearing loss in the right ear. This record is false because I have not seen an Audiologist on 8-12-14 because I did not get out of prison on this date. This claim is misplaced."

"A REFERRAL REQUEST FOR A HEARING AID WAS ORDERED ON 8-19-14. THE REFERRAL WAS SUBMITTED TO THE UTILIZATION DEPARTMENT FOR A DECISION AND THE CONSULT WAS DEFERRED BY UTILIZATION MANAGEMENT. PER FLORIDA DEPT. OF CORRECTIONS GUIDELINES A RECIPIENT FOR HEARING AIDS MUST HAVE A BILATERAL (BOTH EARS) HEARING LOSS. A PERSON WHO HAS A UNILATERAL (ONE EAR) HEARING LOSS IS NOT ELIGIBLE FOR SERVICES."

THE PETITIONER ALLEGED THAT THE NAMED RESPONDENTS, JULIE L. JONES, et al., HAD A POLICY AND PRACTICE OF DOING THIS AND THAT THIS ALLEGED POLICY VIOLATED THE EIGHT AMENDMENT TO THE U.S. CONSTITUTION.

PETITIONER WAS DIAGNOSED BY DR. A. ZIMMAN - Audiologist WITH A HEARING LOSS IN THE RIGHT EAR AND PRESCRIBED A HEARING AID TO TREAT HIS HEARING IMPEDIMENT ON 8-19-14 - A MEDICALLY DEVICE - A REMEDY FOR A HEARING LOSS. NEVERTHELESS, DR. R. HERR - CHIEF MEDICAL OFFICER AT CORRECTIONS HEALTH CARE (C.H.C.) DEFIED BOTH DOCTORS ORDERS AND REFUSED TO AUTHORIZED PAYMENT FOR A HEARING AID. THUS, I HAVE BEEN TREATED WITH DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEEDS BY THE NAMED RESPONDENTS, JULIE L. JONES, et al..

ON JANUARY 29, 2015, COMPLAINT PURSUANT TO 42 U.S.C. 1983 WAS FILED.

THE HONORABLE KENNETH L. RYSCAMP, SENIOR U.S. DIST. JUDGE WAS ASSIGNED IN THIS CASE.

On September 9, 2015, Magistrate White issued a Report and Recommendations recommending that the case be dismissed for failure to state a claim. DE 8. Petitioner filed objections to the Report and Recommendations. DE 9. The Court adopted the Magistrate's Report and Recommendations and dismiss the case.

On March 30, 2015, Petitioner filed a Notice of Appeal to the U.S. Court of Appeals for the Eleventh Circuit.

This cause is currently on remand from the Eleventh Circuit Court of Appeals. Barcelona v. Sec'y, Florida Dep't of Corr., 657 Fed. Appx. 896 (11th Cir. 2016).

The Court of Appeals found that Petitioner's allegations that he lost hearing in his right ear and that two doctors who examine him prescribed a hearing aid to treat his hearing loss, were sufficient to state a non-frivolous claim in light of Gilmore v. Hodges, 738 F.3d 266, 276 (11th Cir. 2013), where the court opined that "[s]ubstantial hearing loss that can be remedied by a hearing aid can present an objectively serious medical need." The court concluded that the district court erred in dismissing Petitioner's complaint before the state filed a response and the parties conducted discovery in the case. *Id.* at 898.

On December 21, 2016, the district court ordered Petitioner to file an amended complaint.

On January 20, 2017, Petitioner filed an amended complaint. DE # 33-1. The case was reassigned to the U.S. District Judge Robin L. Rosenberg. DE 27.

Petitioner's complaint filed pursuant to 42 U.S.C. 1983 alleging that the named Respondents, Julie L. Jones, et al., violated the Eight Amendment to the U.S. Constitution by being deliberately indifferent to Petitioner's hearing aid in my right ear. DE 36.

Petitioner sued all three named Respondents, Julie Jones, et al., in their individual and official capacity.

DE 36. Petitioner identified Dr. R. Herr - Chief Medical Officer at Corrections Health Care (C.H.C.) who refused to authorize payment for the hearing aid prescribed, recommended and ordered by Dr. A. Zinaman - Audiologist to treat Petitioner's hearing loss. DE 78.

On October 6, 2017, defendant Julie L. Jones filed a motion to dismiss and on October 31, 2017 filed a motion to dismiss by defendant D.L. Stine.

On October 24, 2017, Petitioner filed a response on motion to dismiss filed by defendant Julie L. Jones.

On November 14, 2017, Petitioner filed a response on motion to dismiss filed by defendant D.L. Stine.

After Respondents, Julie L. Jones and D.L. Stine's motion to dismiss were denied, they each filed an answer and affirmative defenses on August 24 and August 28, 2018, respectively. DE 75, 90, 92. On October 4, 2018, FNU Ewood filed an Answer and Affirmative Defenses, later identified as Dr. R. Herr. DE 96.

On March 13, 2019, Respondents Julie L. Jones and D.L. Stine filed a Motion for Summary Judgment. DE 114.

On June 18, 2019, Magistrate Judge L. Reid issued a Report and Recommendation recommending that Julie L. Jones and D.L. Stines Motion for Summary Judgment be denied. DE 125. Before the Court could rule, the Respondents filed a Motion to Withdraw the Motion for Summary Judgment. DE 130. The Court then dismissed the Motion for Summary Judgment as moot. DE. 131

On June 19, 2019, Order Setting Status Conference, Trial Date, and Pretrial Deadlines. By Judge Rosenberg.

On June 19, 2019, Order Referring Case to Volunteer Program. By Rosenberg, Judge.

On July 22, 2019, at Pretrial Conference, Petitioner requested the Court to appoint a Lawyer to assist in the proceeding because of my hearing loss problem.

The Court noted that I am not entitled to have a Lawyer because this is not a Criminal Case. T. P. 30.

District Judge Rosenberg noted in her order that: The Court has reviewed the case file and has determined that there is good cause to refer this case to the "Court's Volunteer Attorney Program", given the advance stage of this litigation. Nevertheless, Judge Rosenberg refused to appoint counsel on behalf of the Petitioner. DE 129. Appendix B.

During the Pretrial Conference, the Court identified Dr. R. Herz - Chief Medical Officer at Corrections Health Care (C.H.C.) in place of Exood an individual

WHO REFUSED TO AUTHORIZED PAYMENT FOR HEARING aid RECOMMENDED AND ORDERED by Dr. A. G. Zinaman. Audiologist on August 19, 2014.

In 2014, WHEN THE NAMED Respondents, Julie L. Jones, et al., DENIED THE RECOMMENDED HEARING aid, THE LAW WAS WELL SETTLED THAT THE FAILURE TO PROVIDE AN INMATE WITH MEDICAL DEVICE NECESSARY TO REMEDY "SIGNIFICANT AND SUBSTANTIAL HEARING LOSS IS A SERIOUS MEDICAL NEED", THEREBY PROVIDING THE Respondents WITH FAIR WARNING THAT THEIR ACTIONS VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS. See BARCELONA V. SEC'y, FLA. DEPT. OF CORR'S, 657 F. App'x at 898 (citing GILMORE V. HODGES, 738 F.3d 266 (11th Cir. 2013) (FINDING a "[s]ubstantial hearing loss that can be remedied by a hearing aid can present an objectively serious medical needs"). DE 125. P. 27.

AGAIN, DURING THE PRETRIAL CONFERENCE, THE COURT, ORDERED Respondents' COUNSEL TO FILE A SECOND SUMMARY JUDGMENT. ORDERED PETITIONER TO RESPOND WITHIN 7 DAYS WITHOUT ACCESS TO LAW LIBRARY AND WITHOUT THE ASSISTANCE OF COUNSEL. THIS IS PREJUDICE.

ON JULY 25, 2019, THREE DAYS, SUMMARY JUDGMENT WAS "HAND-DELIVERED NOT BY MAIL".

ON AUGUST 14, 2019, STATUS CONFERENCE AND Calendar Call WAS HELD. DURING THE STATUS CONFERENCE, JUDGE ROSENBERG ASK PETITIONER WHY I DID NOT RESPOND TO THE SUMMARY JUDGMENT FILED BY THE Respondents, I REPLIED! YOUR HONOR, NO REPORT AND RECOMMENDATION FROM MAGISTRATE L. REID.

was filed. Judge Rosenberg said, no Report and Recommendation is needed. Judge Rosenberg, I will grant summary judgment in favor of Respondents in open court because you failed to respond. Again, Judge Rosenberg, I'm giving you 7 days to respond, if you fail to respond, the case is dismissed.

Petitioner is unable to adequately file a proper response for lack of access to Law Library and without the assistance of counsel.

Judge Rosenberg told Respondents counsel that the case is scheduled for Trial on September 11, 2019, counsel's response, Your Honor, my clients are not here. The case is scheduled for Trial. I was remove from the court room. On September 11, 2019, I was in court, the Clerk of Court informed me that the Trial is cancelled and to be re-scheduled.

On September 10, 2019, Judge Rosenberg issued an Order Granting Respondents' Motion for Summary Judgment on the basis of Dr. R. Heller's medical Judgment that "Petitioner was not eligible for hearing aid" and ordered to close the case. Appendix C.

In the instant case, Petitioner's constitutional rights was being violated by the named Respondents where the petitioner was diagnosed with "asymmetrical hearing loss" in his right ear. My condition could have been remedied with a hearing aid. A hearing aid recommended and ordered by not one but two separate doctors and Doctor J. Heller agreed that I received a hearing aid.

NEVERTHELESS, DR. R. HERR - CHIEF MEDICAL OFFICER AT CORRECTIONS HEALTH CARE (C.H.C.) DEFIED BOTH DOCTORS' ORDERS AND REFUSED TO AUTHORIZE PAYMENTS FOR A HEARING aid. THUS, I HAVE BEEN TREATED WITH DELIBERATE INDIFFERENCE TO MY SERIOUS MEDICAL NEEDS BY THE NAMED RESPONDENTS, JULIE L. JONES, et al... THE EIGHT AMENDMENTS PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT WHICH INCLUDES DELIBERATE INDIFFERENCE TO PRISONER'S SERIOUS MEDICAL NEEDS.

"TO PREVAIL ON A CLAIM OF DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS IN VIOLATION OF THE FOURTEENTH AMENDMENT, A PETITIONER MUST SHOW: (1) A SERIOUS MEDICAL NEED; (2) THE RESPONDENT[S] DELIBERATE INDIFFERENCE * 274 TO THAT NEED; (3) CAUSATION BETWEEN THAT DIFFERENCE AND THE PETITIONER'S INJURY." Yountans v. Gagnon, 626 F.3d 557, 563 (11TH CIR. 2010) (QUOTING Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1306-7 (11TH CIR. 2009)). THIS ANALYSIS CONTAINS BOTH AN OBJECTIVE AND A SUBJECTIVE COMPONENT. SEE Thomas v. Bryant, 614 F.3d 1288, 1304 (11TH CIR. 2010). A PETITIONER MUST FIRST SHOW AN OBJECTIVELY SERIOUS MEDICAL NEED THAT, IF UNATTENDED, POSED A SUBSTANTIAL RISK OF SERIOUS HARM, AND THAT THE OFFICIAL'S RESPONSE TO THAT NEED WAS OBJECTIVELY INSUFFICIENT. SEE Bingham v. Thomas, 654 F.3d 1171, 1175-76 (11TH CIR. 2011). SECOND, THE PETITIONER MUST ESTABLISH THAT THE OFFICIAL ACTED WITH DELIBERATE INDIFFERENCE, I.E., THE OFFICIAL SUBJECTIVELY KNEW OF AND DISREGARDED THE RISK OF SERIOUS HARM, AND ACTED WITH MORE THAN MERE NEGLIGENCE.

See *id.*; Taylor v. Adams, 221 F.3d 1254, 1258 (11th Cir. 2000).
First, "[a] serious medical need is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" Youmans, 626 F.3d at 564 (quoting Mann, 588 F.3d at 1307). "In general, serious medical needs are those requiring immediate medical attention." *Id.* (quoting Hill v. DeKalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1190 (11th Cir. 1994)).

Second, to prove "deliberate indifference" to serious medical need, a petitioner must show "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence." Townsend v. Jefferson Cnty., 601 F.3d 1152, 1158 (11th Cir. 2010). (alteration in original) (quoting Bozeman v. Orum, 422 F.3d 1265, 1272 (11th Cir. 2005)). "Under section 1983, knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference." Carswell v. Bay County, 854 F.2d 454, 457 (11th Cir. 1988) (quoting Anast v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11th Cir. 1985)); see also Bingham, 654 F.3d at 1176 ("A complete denial of readily available treatment for a serious medical condition constitute deliberate indifference."). There was sufficient record evidence of deliberate indifference to a serious medical need to send

THAT QUESTION TO A JURY. AS THE DISTRICT COURT FRAMED THE ISSUE: [S]OMETIMES A HEARING LOSS IS A SERIOUS MEDICAL NEED THAT CAN BE REMEDIED WITH A HEARING AID. WHETHER THAT WAS SO HERE, AND WHETHER THE NAMED RESPONDENTS, JULIE L. JONES, et al., WERE DELIBERATELY INDIFFERENT TO THAT NEED, ARE DISPUTED ISSUES OF FACTS. PETITIONER ASSERTED A CLAIM ON THIS BASIS. PETITIONER PROVIDED FACTUAL SUPPORT FOR THE CLAIM THAT WOULD BE SUFFICIENT - BUT FOR QUALIFIED IMMUNITY - TO GO TO A JURY.

THE ELEVENTH CIRCUIT HAVE NOT PREVIOUSLY ADDRESSED THE QUESTION OF WHETHER SEVERE, TREATABLE HEARING LOSS AMOUNTS TO AN OBJECTIVELY SERIOUS MEDICAL NEED. WE HAVE, HOWEVER, LONG HELD THAT DEPRIVATION OF NEEDED EYEGLASSES OR PROSTHETIC DEVICES *275 STATED AN EIGHT AMENDMENT VIOLATION BECAUSE THE UNAVAILABILITY OF EYEGLASSES OR PROSTHESES MAY LEAD TO "SEVERE HARM". NEWMAN V. ALABAMA, 503 F.2d 1320, 1331 (5TH Cir. 1974); [2] see also FARROW V. WEST, 320 F.3d 1235, 1243-44 (11TH Cir. 2003)

("IN CERTAIN CIRCUMSTANCES, THE NEED FOR DENTAL CARE [INCLUDING DENTURES] COMBINED WITH THE EFFECTS OF NOT RECEIVING IT MAY GIVE RISE TO A SUFFICIENTLY SERIOUS MEDICAL NEED TO SHOW OBJECTIVELY A SUBSTANTIAL RISK OF SERIOUS HARM").

WE CAN FIND PRECIOUS LITTLE CASE LAW ADDRESSING AN OFFICIAL'S FAILURE TO SUPPLY A SEVERELY HEARING IMPAIRED INMATE WITH HEARING AIDS. THREE OF OUR SISTER

CIRCUITS, HOWEVER, HAVE RECOGNIZED THAT SEVERE HEARING LOSS MAY BE A SERIOUS MEDICAL NEED FOR THE PURPOSE OF THE EIGHT OR FOURTEENTH AMENDMENTS - ALBEIT IN UNPUBLISHED OPINIONS. See COOPER v. JOHNSON, 255 Fed. Appx. 891, 892 (5TH Cir. 2007) (UNPUBLISHED) (CITING NEWMAN, 503 Fed. 2d AT 1331) (VACATING DISTRICT COURT'S DISMISSAL OF PRISONER'S COMPLAINT AS FRIVOLOUS, BECAUSE PRISONER'S ALLEGATIONS THAT OFFICIALS REFUSED TO PROVIDE HIM WITH A HEARING AID WERE "SUFFICIENT TO RAISE A NONFRIVOLOUS ISSUE REGARDING WHETHER THE PROVISION OF A HEARING AID IS A SERIOUS MEDICAL NEED AND WHETHER THE RESPONDENTS WERE DELIBERATELY INDIFFERENT TO THIS NEED"); WHEELER v. BUTLER, 209 Fed. Appx. 14, 15 (2d Cir. 2006) (UNPUBLISHED) (VACATING DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT AND REMANDING FOR FURTHER PROCEEDINGS BECAUSE "THE DISTRICT COURT ERRED IN FAILING TO CONSIDER WHETHER THE DEPRIVATION OF WHEELER'S HEARING AIDS COULD, IN AND OF ITSELF, AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT"); LARGE v. WASH. CNTY. DET. CTR., 915 F.2d 1564 (4TH Cir. 1990) (TABLE) (UNPUBLISHED) (CITING NEWMAN, 503 F.2d AT 1331) (REMANDING TO DISTRICT COURT TO CONSIDER IN THE FIRST INSTANCE DELIBERATE INDIFFERENCE CLAIM BASED ON DEFENDANT'S FAILURE TO PROVIDE PLAINTIFF WITH A HEARING AID, NOTING THAT ALTHOUGH THERE WAS "NO SPECIFIC AUTHORITY DEALING WITH THE REFUSAL TO PROVIDE HEARING AIDS AS A POSSIBLE EIGHT AMENDMENT VIOLATION, THERE IS AMPLE AUTHORITY RECOGNIZING THAT THE FAILURE TO PROVIDE COMPARABLE BASIC CORRECTIVE / MEDICAL DEVICES MAY AMOUNT TO DELIBERATE INDIFFERENCE

TO A SERIOUS MEDICAL NEED"); see also Hicks v. Keller, No. 11-cv-0422-WJM-KMT, 2012 WL 1414935, at *4 (D. Colo. Apr. 24, 2012 ("Plaintiffs' allegations of intentional deprivation of his hearing did, a necessary medical device, sufficiently state a claim that Defendant Nelson was deliberately indifferent to Plaintiffs' serious medical needs"). We agree with this view, and find the analogy to the holding in Neuman persuasive. The ability to hear is a basic human need materially affecting daily activity and a substantial hearing impairment plainly requires medical treatment by a physician. Indeed, Weinberg's Audiologist evaluated him and diagnosed him with hearing loss that would "interfere in all communication except face to face in quiet" and "strongly recommended" amplification in both ears. Cf. Mann, 588 F.3d at 1307 ("A serious medical need is 'one that has been diagnosed by a physician as mandating treatment...' (quoting Hill, 40 F.3d at 1187)).

Petitioner was unable to hear the TV for over 7 years, and "he understood less than [n] 100 words during that time period". Petitioner's evidence allows inferences that he could have had trouble hearing a fire or other alarm, responding to commands issued by guards, and reacting *276 to a fight behind him or to prisoner's threatening his safety. Much like the inability to see, an inmate's inability to hear may render him exceedingly vulnerable to danger and harm from his unperceptive surroundings. See Koehl v. Dalsheim, 85 F.3d 86, 87-88 (2d Cir. 1996).

(inmate's unmet need for prescription eyeglasses constituted a serious medical condition where the inmate suffered headaches, his vision and depth perception deteriorated, and his visual deficiencies caused him to fall or walk into objects). Although Weinberg did not allege that his hearing loss caused him physical pain, other inmates with hearing loss have alleged that the deprivation of hearing aids caused them pain and interfered with their ability to sleep. See COOPER, 255 Fed. Appx. 47891. It takes no great leap of logic to suggest that "NEARLY SEVEN (7) YEARS" of isolation caused by "UNTREATED HEARING LOSS could do serious harm to physical and mental health."

AFTER all is said and done, THE inability to hear" means THE loss of the most vital stimulus - THE sound of the voice that brings language, sets thoughts astir and keeps us in the intellectual company of man." [3] Substantial hearing loss that can be remedied by a hearing aid can present an objectively serious medical need.

Petitioner contends that he was refused to provide a hearing aid based on "F.D.C." policy or custom that an inmate who is able to hear out of one ear will not be provided with a hearing aid. Petitioner contends that this was solely a financial decision. Petitioner asserts that the tinnitus on my right ear causes a constant and severe loud ringing. Petitioner contends that the condition is correctable with a hearing aid as evidenced by the facts that the hearing aid was

recommended and ordered by Dr. A. G. Zinaman - Audiologist. Nevertheless, the named respondents, Julie L. Jones, defied both Doctors orders and refused to authorized payments for a hearing aid.

Prison officials violate the constitutional prohibition against cruel and unusual punishment when they demonstrate deliberate indifference to a prisoner's serious medical needs, constituting an unnecessary and wanton infliction of pain. Wilson v. Seiter, 501 U.S. 294, 297 (1991). Petitioner assert before the Eleventh Circuit that the denial of hearing aid causes him pain and suffering for nearly seven (7) years, dizziness, interferes with his sleep, and has caused to become depressed by denied relief. Petitioner contends that the denial of hearing aid based on prison policy and financial concerns rather than based on his serious medical needs. Petitioner's allegations are sufficient to raise a nonfrivolous issue regarding whether the provision of a hearing aid is a serious medical need and whether the respondents were deliberately indifferent to this need. See Wilson, 501 U.S. at 301-03.

In Gilmore v. Hodges, 738 F.3d 266 (11th Cir. 2013), is distinguishable in the instant case where Gilmore had already have his hearing aid and the Defendants refused to supply hearing aid Batteries. The refusal to supply Batteries was not clearly established.

In the instant petition, in 2014, when the Respondents denied the recommended hearing aid, the law was well settled that the failure to provide an inmate with a medical device necessary to remedy a "significant and substantial hearing loss is a serious medical need," thereby providing the Respondents with fair warning that their actions violated the Petitioner's constitutional rights". See Barcelona v. Sec'y, Fla. Dep't of Corrections, 657 Fed. Appx. at 898 (citing Gilmore v. Hodges, 738 F.3d 266 (11th Cir. 2013)) (finding a "[s]ubstantial hearing loss that can be remedied by a hearing aid can present an objectively serious medical need. DE # 125.

The Respondents argue they are entitled to qualified immunity because they were performing a discretionary function. [ECF No. 114, p. 19]. Petitioner argues they are not entitled to qualified immunity.

"To establish that the challenged actions were within the scope of their discretionary authority, the Respondents must show that those actions were (1) undertaken pursuant to the performance of his [their] duties, and (2) within the scope of his [their] authority. See Estate of Cummings v. Davenport, 906 F.3d 934, 940 (11th Cir. 2018), Pet. for cert. docketed by Davenport v. Estate of Cummings, No. 18-1191 (May 23, 2019) (quoting Harbert Int'l. Inc. v. James, 157 F.3d 1271, 1281 (11th Cir. 1998)). Courts must determine "whether the government employee

was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize. See *Id.* at 940 (quoting Holloman ex rel. Holloman v. Harland, 370 F.3d 1262, 1265 (11th Cir. 2004)). To apply each prong of the test, courts "look to the general nature of the respondents' action, temporarily putting aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances". *Id.* at 940 (quoting Milko v. City of Atlanta, 857 F.3d 1136, 1144 (11th Cir. 2017) (quoting Holloman v. Harland, 370 F.3d at 1266)).

However, "[a] government official can prove he acted within the scope of his discretionary authority by showing 'objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority'" *Id.* at 940 (quoting Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir. 1988) (quoting Barker v. Norman, 651 F.2d 1107, 1121 (5th Cir. Unit A July 1981))).

In any event, as is the case here, the respondents' conclusory or "bald assertion" that the complained-of actions were "... within the scope of his discretionary authority" is insufficient to demonstrate that they were acting within the scope of their discretionary authority. See *Id.* at 940 (quoting Barker v. Norman, 651 F.2d at 1124-25). When viewing the evidence in the light most

FAVORABLE TO THE PETITIONER. AS THE NON-MOVANT, THE RESPONDENTS HAVE NOT DEMONSTRATED THAT THEY WERE ACTING WITHIN THE SCOPE OF THEIR DISCRETIONARY FUNCTION. DE #125.

THE COURT CLAIM THAT PETITIONER FAILED TO RAISE THIS ARGUMENT BELOW IN RESPONSE TO THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND HAS THUS FORFEITED THE ARGUMENT. APPENDIX

PLAINTIFF INMATE PREYDAILED ON CIVIL RIGHTS CLAIMS PURSUANT TO 42 U.S.C.S. § 1983 FOR DELIBERATE INDIFFERENCE TO HIS SERIOUS MEDICAL CONDITION IN VIOLATION OF THE EIGHT AMENDMENT WHILE CONFINED, RECEIVING \$ 700,000. IN COMPENSATORY DAMAGES AND \$ 500,000. IN PUNITIVE DAMAGES. Citing Fields v. Corizon Health Inc., U.S. Dist. LEXIS 5921 (11TH CIR. 2012).

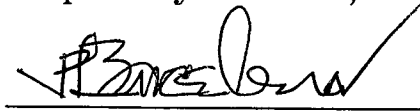
REASONS FOR GRANTING THE PETITION

PETITIONER WAS DEPRIVED OF A RIGHT SECURED UNDER THE U.S. CONST. OR FEDERAL LAW; AND SUCH DEPRIVATION OCCURRED UNDER COLOR OF STATE LAW OR LOCAL LAW THAT IN 2014, WHEN THE NAMED RESPONDENTS, JULIE L. JONES, et al., DENIED THE RECOMMENDED HEARING AID, THE LAW WAS WELL SETTLED THAT THE FAILURE TO PROVIDE AN INMATE WITH A MEDICALLY DEVICE NECESSARY TO REMEDY A "SIGNIFICANT AND SUBSTANTIAL HEARING LOSS IS A SERIOUS MEDICAL NEED", THEREBY PROVIDING THE RESPONDENTS WITH FAIR WARNING THAT THEIR ACTIONS VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS. See BARCELONA V. Sec'y, Fla. DEPT OF CORRS, 657 F. App'x. 878 (Citing GILMORE V. HODGES, 738 F.3d 266 (11TH Cir. 2013)) (FINDING A "[S]UBSTANTIAL HEARING LOSS THAT CAN BE REMEDIED BY A HEARING AID CAN PRESENT AN OBJECTIVELY SERIOUS MEDICAL NEED").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: JUNE 1, 2021