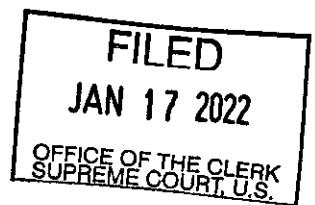


ORIGINAL

21 - 6997



IN THE
SUPREME COURT OF THE UNITED STATES

LUKE W. CAIN — PETITIONER
(Your Name)

VS.

M. INTERIAN, D.D.S. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

LUKE W. CAIN
(Your Name)

P.O. BOX 92
(Address)

CHOWCHILLA, CA. 93610
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- (1). WHETHER DELIBERATE INDIFERENCE SHOULD BE ANALYZED UNDER THE BALANCING FRAMEWORK OF THE SUBSTANTIAL RISK OF HARM TEST ANNOUNCED BY THIS COURT RATHER THAN THE SUBSTANTIAL INJURY REQUIREMENT TEST ANNOUNCED IN WOOD V. HOUSEWRIGHT, 900 F.3D 1332
- (2) WHETHER THE COURTS DECISION IN TOGUCHI V. CHUNG INVALIDATES A PRISONER'S RIGHT TO BE FREE FROM THE "RISK OF HARM" AND THE REGULATIONS THAT PROTECT A PRISONER'S HEALTH AND SAFETY.
- (3). WHETHER THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRORED IN HOLDING THAT CAINES HAD NOT STATED AN EIGHTH AMENDMENT CLAIM IN WHICH RELIEF COULD BE GRANTED BY ALLEGING THAT DR. M. INTERIAN, D.D.S. WAS DELIBERATELY INDIFERENT TO HIS SERIOUS MEDICAL NEEDS.

QUESTIONS PRESENTED

- 1 1). WHETHER DELIBERATE INDIFFERENCE SHOULD BE ANALYZED UNDER THE BALANCING FRAME WORK
2 OF THE SUBSTANTIAL RISK OF HARM TEST ANNOUNCED BY THIS COURT RATHER THAN THE SUBSTAN-
3 TIAL INJURY REQUIREMENT TEST ANNOUNCED IN WOOD V. HOUSEWRIGHT, 900 F. 2D 1332.
- 4
- 5 2). WHETHER THE COURTS DECISION IN TOGUCHI V. CHUNG INVALIDATES A PRISONER'S RIGHT TO
6 BE FREE FROM THE "RISK OF HARM" AND THE REGULATIONS THAT PROTECT A PRISONER'S HEALTH
7 AND SAFETY.
- 8
- 9 3). WHETHER THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRORED IN HOLDING THAT CAINES
10 HAD NOT STATED AN EIGHTH AMENDMENT CLAIM IN WHICH RELIEF COULD BE GRANTED BY ALLEGING
11 THAT DR. M. INTERIAN, D.D.S. WAS DELIBERATELY INDIFFERENT TO HIS SERIOUS MEDICAL NEEDS.
- 12
- 13

14 PARTIES TO THE PROCEEDING

15 PETITIONER IS LUKE W. CAIN, JR., ON BEHALF OF HIM-SELF AS A PRO-PER LITIGANT.

16
17 THE RESPONDENT IS DR. M. INTERIAN, D.D.S., IN HIS INDIVIDUAL AND OFFICIAL CAPACITY HE
18 IS REPRESENTED BY BETTY CHU FUJITA OF LOS ANGELES COUNTY .

19
20
21 LIST OF ALL PROCEEDINGS

22 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, NO. 20-55597, LUKE WAIN CAINES
23 JR., V. M. INTERIAN, DR., DDS, MANDATE FILED AUGUST 30, 2021. MOTION TO RECALL MANDATE
24 FILED SEPTEMBER 3, 2021. PETITION FOR REHEARING AND EN BANC HEARING FILED SEPTEMBER
25 3, 2021. DENIED DECEMBER 19, 2021. MEMORANDUM FILED AUGUST 6, 2021. APPELLANTS INFOR-
26 MAL REPLY BRIEF FILED DECEMBER 21, 2020., APPELLANTS INFORMAL OPENING BRIEF FILED
27 OCTOBER 26, 2020., NOTICE OF APPEAL FILED MAY 30, 2020.

28 ////

LIST OF ALL PROCEEDINGS CONTINUED

1 UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, NO: 5:19-CV-666-
2 PA-KS, FINAL JUDGMENT ENTERED ON APRIL 1, 2020, ORDER ACCEPTING FINDINGS AND RECOMME-
3 NDATION OF THE UNITED STATES MAGISTRATE JUDGE FILED APRIL 1, 2020, OBJECTIONS TO THE
4 REPORT AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE FILED MARCH 27, 2020, REPORT
5 AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE FILED MARCH 4, 2020, NOTICE
6 OF OBJECTIONS AND OBJECTIONS TO MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED JANUARY
7 6, 2020, NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED NOVEMBER 6
8 2019, CIVIL RIGHTS COMPLAINT FILED BY LUKE W. CAINES APRIL 10, 2019.

9

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18 INTRODUCTION

19 STATEMENT OF THE CASE

20 A. FACTS PRESENTED BY THE PETITIONER

21 B. DISTRICT COURT RULINGS

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23 REASONS FOR GRANTING THE WRIT

24 1. THE COURT SHOULD GRANT CERTIORARI AND CLARIFY WHETHER THE RISK OF HARM TEST ANNOUNCED
25 BY THIS COURT INVALIDATES THE SUBJECTIVE HARM TEST DEVELOPED BY WOOD V. HOUSERIGHT.

26

27 A. REASONS WHY THIS COURT SHOULD REJECT THE SUBSTANTIAL HARM TEST BASED ON A DELAY.

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:

RELATED CASES

NONE

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2. REASONS WHY THE SUBSTANTIAL HARM TEST EMPLOYED BY THE NINTH CIRCUIT COURT OF APPEALS IN THIS CASE IS NOT THE APPROPRIATE TEST FOR ACCESSING DELIBERATE INDIFERENCE AND SHOULD BE REJECTED.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE STANDARDS ANNOUNCED IN TOGUCHI V. CHUNG INVALIDATES A PRISONERS EIGHTH AMENDMENT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT AND THE REGULATIONS THAT PROTECT A PRISONERS HEALTH AND SAFETY.

REASONS THIS COURT SHOULD INVALIDATE TOGUCHI.

III. THIS COURT SHOULD GRANT CERTIORARI AND CLARIFY WHETHER THE NINTH CIRCUIT ERRORED IN ANALYZING THE LEGAL AND FACTUAL ASPECTS OF THE DELIBERATE INDIFERENCE CLAIM.

A. FIRST LEGAL AND FACTUAL ISSUES THE COURT CONSIDERED.

1. SUBSTANTIAL DOCUMENTATION WAS SUBMITTED TO SHOW DR. INTERIAN WAS AWARE OF THE FACTS AND DREW THE INFERENCE.

B. SECOND LEGAL AND FACTUAL ISSUES THE COURT CONSIDERED.

1. DEFENDANTS CONDUCT CONSTITUTED DELIBERATE INDIFERENCE UNDER THE FARMER STANDARDS.

2. DEFENDANTS CONDUCT CONSTITUTED DELIBERATE INDIFERENCE UNDER THE TOGUCHI STANDARD.

C. THIRD LEGAL AND FACTUAL ISSUES THE COURT CONSIDERED.

1. SUBSTANTIAL HARM IS NOT REQUIRED TO STATE AN EIGHTH AMENDMENT CLAIM.

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2. PER SE SUBSTANTIAL HARM FROM THE DELAY REQUIREMENT OF HOUSEWRIGHT MET.

3. DR. INTERIAN WAS DELIBERATELY INDIFERENT.

IV. THIS CASE IS THE IDEAL VEHICLE TO RESOLVE THE QUESTIONS PRESENTED.

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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 B to the petition and is

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

The opinion of the United States district court appears at Appendix L 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**: N/A

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

[] reported at _____ N/A _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

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

[] reported at _____ N/A _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was AUGUST 06, 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: AUG. 19, 2021, and a copy of the order denying rehearing appears at Appendix B.

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

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

For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- (1). EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION
- (2). CIVIL CODE § 17414 (a)
- (3). 28 U.S.C. § 1254 (1)
- (4). 28 U.S.C. § 1291
- (5). 28 U.S.C. § 1331
- (6). 28 U.S.C. § 1342 (a)(3)(4)
- (7). SUP. CT. RULE 10(a)

STATEMENT OF THE CASE

PLEASE SEE ATTACHED

DECISIONS BELOW

1 THE DISTRICT COURTS DECISION IN DENYING RESPONDENT'S MOTION TO DISMISS IS REPORED AT
2 LUKE W. CAINES, JR., V. M. INTERIAN, DDS ., NO. 5:19-CV-666-PA-KS AND THE COURT'S OR-
3 DER DISMISSING PETITIONER'S CLAIM IS REPORTED AT PET. APP.

4

5 THE NINTH CIRCUIT COURT OF APPEALS DECISION'S AND THE MOTIONS FILED BY PETITIONER IS
6 REPORTED AT LUKE W. CAINES, JR., V. M. INTERIAN, DDS., NO. 20-55597 PET. APP.

7

8 STATEMENT OF JURISDICTION

9 ON AUGUST 06, 2021, THE NINTH CIRCUIT COURT OF APPEALS ISSUED ITS OPINION AFFIRMING
10 THE DISTRICT COURTS DISMISSAL OF PETITIONER'S DELIBERATE INDIFFERENCE CLAIM AND DECIS-
11 ION TO EXERCISE JURISDICTION OVER HIS STATE LAW CLAIMS, ON AUGUST 30, 2021, THE NINTH
12 CIRCUIT COURT OF APPEALS ISSUED ITS MANDATE, ON DECEMBER 19, 2021, THE NINTH CIRCUIT
13 COURT OF APPEALS DENIED REHEARING AND REHEARING EN BANC. THE HAD JURISDICTION UNDER
14 28 U.S.C. § 1291. THE DISTRICT COURT OF CALIFORNIA CENTRAL DISTRICT ISSUED ITS JUDG-
15 MENT DENYING PETITIONER'S § 1993 PETITION FOR DELIBERATE INDIFFERENCE ON APRIL 1, 2020.
16 IT ALSO ISSUED ITS ORDER ACCEPTING THE REPORT AND RECOMMENDATIONS OF THE MAGISTRATE
17 ON THE SAME DAY. THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. § 1331 AND 1342
18 (a)(3)(4). THIS COURT NOW HAS JURISDICTION UNDER 28 U.S.C. § 1254(1).

19

20 PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

21 THIS CASE INVOLVES UNITED STATES CONSTITUTIONAL AMENDMENT VIII AND SUPREME COURT RULE
22 10 (a) AND CIVIL CODE § 1714(a).

23

24 INTRODUCTION

25 A PRISON OFFICIALS " DELIBERATE INDIFFERENCE " TO A A SUBSTANTIAL RISK OF HARM TO AN
26 INMATE VIOLATES THE EIGHTH AMENDMENT. THE SUPREME COURT HAS HELD THAT A PRISONER DOES
27 NOT HAVE TO SUFFER A " SERIOUS INJURY " TO PREVAIL ON AN EIGHTH AMENDMENT CLAIM. (SEE
28 HUDSON V. MCMILLIAN, 503 U.S. 1 n5). THEREFORE, THE TEST FOR DELIBERATE INDIFFERENCE

1 AS DETERMINED BY THIS COURT IS " WHETHER THERE EXIST A 'SUBSTANTIAL RISK' OF SERIOUS
2 HARM, (SEE FARMER V. BRENNAN, 511 U.S. 825). THIS COURT HAS CONSISTANTLY HELD THAT A
3 PRISONER MUST SHOW THE OFFICIAL WAS DELIBERATELY INDIFFERANT TO INMATE HEALTH AND SAF-
4 EITY (ID AT 834). TO ESTABLISH THIS STATE OF MIND, THE PLAINTIFF MUST SHOW THAT THE PRI-
5 SON OFFICIAL KNEW OF AND DISREGARDED AN EXCESSIVE RISK TO INMATE HEALTH OR SAFETY; THE
6 OFFICIAL MUST HAVE BEEN AWARE OF THE FACTS THAT COULD GIVE RISE TO AN INFERENCE THAT
7 A SUBSTANTIAL RISK OF HARM EXISTED, AND THE OFFICIAL MUST DRAW THE INFERENCE (ID.).
8 A PRISON OFFICIAL IS DELIBERATELY INDIFFERENT IF HE KNOWS OF A SUBSTANTIAL RISK OF
9 HARM TO AN INMATES HEALTH AND SAFETY AND DISREGARDS THAT RISK BY FAILING TO TAKE REA-
10 SONABLE MEASURES TO ABATE IT. (ID.) IF A PERSON IS AWARE OF A SUBSTANTIAL RISK OF SER-
11 IOUS HARM, A PERSON MAY BE LIABLE FOR NEGLECTING A PRISONERS SERIOUS MEDICAL NEEDS ON
12 THE BASIS OF EITHER HIS ACTION OR INACTION (FARMER, 511 U.S. AT 824).

13
14 DELIBERATE INDIFFERENCE CONSTITUTES THE UNNECESSARY AND WANTON INFILCTION OF PAIN,
15 DELIBERATE INDIFFERENCE MAY APPEAR WHEN PRISON OFFICIALS DENY, DELAY OR INTENTIONALLY
16 INTERFERE WITH MEDICAL TREATMENT. (SEE WILHELM V. ROTMAN, 680 F. 3D 1113,1122). DELAY
17 IN TREATMENT RESULTING IN PAIN AND SUFFERING IS SUFFICIENT TO ESTABLISH THE STANDARDS
18 SET FORTH IN ESTELLE V. GAMBLE, 429 U.S. 97, HOLDING THAT SUBSTANTIAL HARM CAN BE THE
19 PAIN EXPERIENCED WHILE AWAITING TREATMENT. GIVEN THESE IMPORTANT HOLDINGS, THIS CASE
20 BRINGS INTO SHARP FOCUS THE CONFLICT BETWEEN THE UNITED STATES SUPREME COURT DECI-
21 SIONS AND THE NINTH CIRCUIT COURT OF APPEALS DECISIONS ON THE SAME ISSUES. FIRST,
22 DELIBERATE INDIFFERENCE IS BASED ON THE 'SUBSTANTIAL RISK' OF SERIOUS HARM (FARMER,
23 511 U.S. 825) RATHER THAN ON 'SUBSTANTIAL HARM' SUSTAINED BY A PETITIONER AS DISCU-
24 SSED IN HOUSEWRIGHT, 900 F.2D 1332. THOUGH THE EIGHT AMENDMENT VIOLATION IS NOT PRE-
25 MISSED ON THE HARM CAUSED BY THE DELAY IN MEDICAL CARE, AS SUGGESTED BY THE NINTH CIR-
26 CUIT COURT OF APPEALS, THE SUBSTANTIAL HARM CAN BE AN INTERMEDIATE INJURY, SUCH AS
27 THE PAIN EXPERIENCED INBETWEEN TREATMENTS (SEALOCK V. COLORADO, 218 F. 3D 1205,1209-
28 1210).

1 SECOND, THE HOLDING IN TOGUCHI RELIEVES A DEFENDANT FROM HIS DUTIES IMPOSED ON HIM BY
2 THE EIGHT AMENDMENT NOT TO CAUSE THE UNNECESSARY AND WANTON INFILVTION OF PAIN, THE
3 DUTY TO PROTECT FROM A RISK OF HARM, AND THE STATUTE OF CIVIL CODE § 1714(a) DUTY TO
4 USE REASONABLE CARE AND NOT TO CAUSE AN UNREASONABLE RISK OF HARM TO OTHERS. (SEE
5 KIM V. COUNTY OF MONTEREY, 43 CAL. APP. 5TH). DOCUMENTATION THAT THE RISK WAS KNOWN IS
6 SUBSTANTIAL EVIDENCE AND MUST NOT BE DOWNPLAID, FAILURE TO REASONABLY RESPOND HAS AL-
7 WAYS BEEN THE STANDARD SET FORTH IN FARMER. BECAUSE OF THESE CONFLICTS, GOOD REASONS
8 EXIST FOR THE COURT TO REEVALUATE THE NINTH CIRCUITS COURT OF APPEALS JURISPRUDENCE.
9 THIS CASE PRESENTS THE OPPORTUNITY TO RECOGNIZE CONFLICTING STATEMENTS BETWEEN FARMER
10 AND HOUSEWRIGHT REGARDING THE TEST TO BE APPLIED WHEN ANALYZING THE HARM FACTORS OF
11 DELIBERATE INDIFFERENCE. TO BE CLEAR, THE QUESTIONS PRESENTED IN THIS PETITION MERELY
12 ASK THE COURT TO RECONCILE THE CONFLICTS BETWEEN ITS PRECEDENTS AND THE NINGHT CIR-
13 CUITIS SO THAT A DETERMINATION MAY BE MADE WHETHER THE DISTRICT COURT ERRORED IN ITS
14 HOLDINGS DUE TO THE CONFLICT AMONG THE STATUTES, AND TO PROMOTE UNIFORMITY OF DECISI-
15 ONS.

16 STATEMENT OF THE CASE

17 PLAINTIFF DUKE W. CAIN, FILED AN § 1983 ALLEGING A VIOLATION OF HIS EIGHT AMENDMENT
18 RIGHTS, SPECIFICALLY THAT DR. INTERIAN, DDS., WAS DELIBERATELY INDIFFERENT TO HIS SER-
19 IOUS MEDICAL NEEDS. CLAIMS BY PRISONERS FOR DENIAL OF MEDICAL CARE ARE REVIEWED UNDER
20 AN EIGHT AMENDMENT STANDARD, SEE ESTELLE V. GAMBLE, 429 U.S. 97,104 (1976). WHICH ALSO
21 COVERS CLAIMS REGARDING INADEQUATE DENTAL CARE, HUNT V. DENTAL DEPT, 865 F.2D 200 (9.
22 TH CIR. 1989). TO SUPPORT SUCH A DELIBERATE INDIFFERENCE CLAIM, A PLAINTIFF MUST ALLEGE
23 BOTH THAT A DEPRIVATION OF MEDICAL CARE WAS OBJECTIVELY SERIOUS, AND THAT A DEFENDANT
24 ACTED WITH A SUBJECTIVELY CULPABLE STATE OF MIND AMOUNTING TO AT LEAST "DELIBERATE
25 INDIFFERENCE." SEE WILSON V. SEITER, 501 U.S. 294,297 (1991). THE DISTRICT COURT HELD
26 THAT DUE TO THE HOLDINGS IN JETT V. PENNER, 439 F.3D 1091,1096 (9TH CIR. 2006) AND
27 MCGUCKIN V. SMITH, 974 2D 1050,1059-60 (9TH CIR. 1992) PLAINTIFF HAD ADEQUATELY STA-
28 TED THE EXISTENCE OF A SERIOUS MEDICAL NEED. HE ALLEGED THAT HE EXPERIENCED SEVERE

1 PAIN IN HIS TEETH AND FACE, PERSISTENT BLEEDING AND CONGESTION AND INFECTION AT THE
2 EXTRACTION SITE, DIARRHEA, AND HEMMORROIDS, EMOTIONAL AND MENTAL SUFFERING, (SER 55).
3 DELIBERATE INDIFFERENCE MEANS THAT A DEFENDANT "KNEW OF AND DISREGARDED " A SUBSTA-
4 NTIAL RISK OF SERIOUS HARM. FARMER V. BRENNAN, 511 U.S. 825,837 (1994). THE OFFICIAL
5 MUST BE BOTH AWARE OF FACTS FROM WHICH THE INFERENCE COULD BE DRAWN THAT A SUBSTANTIAL
6 RISK OF SERIOUS HARM EXIST, AND HE MUST ALSO DRAW THE INFERENCE." THE DISTRICT COURT
7 HELD THAT AFTER CAREFULLY CONSIDERING THE DOCUMENTATION THAT PLAINTIFF SUBMITTED, THAT
8 PLAINTIFF HAD SHOWN THAT DEFENDANT KNEW OF A SUBSTANTIAL RISK OF HARM TO PLAINTIFF(SER
9 58) BUT CONCLUDED THAT BECAUSE THE DEFENDANT RESPONDED TO PLAINTIFF'S COMPLAINTS AND
10 REFERRED HIM TO A SPECIALIST WHO PERFORMED ORAL SURGERY CITING LOPEZ V. SANTOYO, 2010
11 WL 3733024, AT ¶ 14(S.D. CAL. JUNE 17)(FINDING THAT DEFENDANT DOCTOR KNEW THERE WAS A
12 SUBSTANTIAL RISK OF HARM TO PLAINTIFF BECAUSE HE REQUESTED URGENT CARE BY REFERRING
13 HIM TO AN ORAL SURGEON) THAT PLAINTIFF HAD NOT STATED SUFFICIENT FACTS TO RAISE A PLA-
14 USIBEL INFERENCE THAT DEFENDANT DISREGARDED THE RISK OF HARM, EVENTHOUGH PLAINTIFF HAD
15 SUBMITTED DOCUMENTATION THAT EVENED THAT FOR 35 DAYS DEFENDANT DID NOTHING TO ABATE
16 THE CONSTANT BLEEDING OR DIARRHEA PRIOR TO SURGERY AND DID NOTHING TO ABATE THE SEVERE
17 CONGESTION FOR 28 DAYS PRIOR TO SURGERY NOR ANYTHING TO ABATE THE BONE SPICULE THOUGH
18 HE KNEW THESE HARMS EXISTED AND WORSENERD. PLAINTIFF APPEALED TO THE UNITED STATES
19 COURT OF APPEALS WHO DENIED HIS PETITION. THE NINTH CIRCUIT IN CONTRAST TO THE DIST-
20 RICT HELD (1). DEFENDANT DID NOT KNOW OF THE FACTS THAT A SUBSTANTIAL RISK OF HARM HAD
21 EXISTED, NOR DID THE DEFENDANT DRAW THE INFERENCE, CITING FARMER V. BRENNAN, 511 U.S.
22 825,837 (1994). (2). NOR DID THE DEFENDANT KNOW THAT THE MEDICATION HE PRESCRIBED
23 WOULD HAVE AN ADVERSE EFFECT, CITING TOGUCHI V . CHUNG, 391 F.3D 1051,159-60 (9TH CIR
24 2004)!! (3). THE COURT HELD THAT CAINES ALLEGATIONS OF A DELAY IN SURGERY, WITHOUT ANY
25 EVIDENCE THAT THE DELAY "CAUSED SUBSTANTIAL HARM," DID NOT SUPPORT HIS DELIBERATE
26 INDIFFERENCE CLAIM. CITING AND QUOTATIN WOOD V. HOUSE WRIGHT, 900 F.2D 1332,1335 (9TH
27 CIR. 1990). AND LAST (4). HOLDING THAT CAINES MENTAL AND EMOTIONAL CLAIM WAS A STATE
28 CLAIM AMOUNTING TO MERE NEGLIGENCE AND HIS MENTAL AND EMOTIONAL INJURY DID NOT RISE

1 TO THE LEVEL OF A SERIOUS MEDICAL NEED. CITING DOTY V. CTY. OF LASSEN, 87 F.3D 540,
2 546 & n.3. DESPITE THE FACT THAT CAINES SUBMITTED DOCUMENTATION THAT SHOWED THAT THE
3 DEFENDANT WAS AWARE OF THE FACTS AND DREW THE INFERENCE AS HELD IN FARMER, DESPITE THE
4 FACTS THE DISTRICT COURT HELD PLAINTIFF HAD SATISFIED THE SUBJECTIVE PRONG THE NINTH
5 CIRCUIT HELD OTHERWISE. DESPITE THE PLAINTIFF SUBMITTED DOCUMENTATION THAT HE SUFFERED
6 FROM SEVERE PAIN, PERSISTANT BLEEDING AND CONGESTION, TOOTH PARTICLES PERTRUDING FROM
7 THE EXREACTION CIT ADVERSE REACTIONS TO THE PRESCRIBED MEDICATIONS, BONE SPICULE WHICH
8 IS BROKEN PARTICLES OF BONE LEFT IN THE SOCKET, EDEMATOUS TISSUE WHICH IS AN INFECT-
9 ION, AND AN ORAL ANTRUAL FISTULA (O.A.F.) WHICH REFERS TO AN OPENING OF CHANNEL BET-
10 WEEN THE MAIN SINUS NEAR THE NOSE THAT LIES DIRECTLY ABOVE THE ROOTS OF THE TEETH AT
11 THE BACK OF THE MOUTH THAT CAN AND DID BECOME INFECTED AND CAUSED CONGESTION TO THE
12 POINT WHERE CAINES COULD NOT BREATHE ON THE LEFT SIDE FOR 35 DAYS AND BLEED CONSTANTLY
13 FOR 35 DAYS AND REQUIRED TWO PAINFULL SURGERIES TO REPAIR AND A CONSTANT USE OF NASAL
14 SPRAY THE NINTH CIRCIUT HELD THAT CAINES DID NOT SHOW THAT THE DELAY CAUSED SUBSTAN-
15 TIAL HARM TO EVINCE DELIBERATE INDIFFERENCE. DESPITE THE FACT PLAINTIFF SUBMITTED THE
16 DEFENDANTS NOTES (CDCR FORM 237-C-1) WHICH SHOWS THAT HE RECIEVED NO TREATMENT FOR THE
17 BLEEDING OR CONGESTION TO ABATE THE HARM NOR ANY EXCUSE FOR NOT TREATING IT, THE FORMS
18 SHOW NO REAONABLE MEASURES TAKEN TO ABATE THE ABOVE HARMS, NOR ANY REASONABLE MEASURES
19 TAKEN TO ABATE THE ADVERSE REACTIONS TO THE MEDICATION THE NINTH CIRCUIT DENIED PLAINTIFF'S § 1983 CLAIMS,. THIS PETITITION FOR WRIT OF CERTIORARI FOLLOWS.

21
22 A CONFLICT AMONG THE CIRCUITS IS AN ACCEPTED BASIS FOR THE GRANTING OF THE WRIT OF
23 CERTIORARI (SUP. CT. R. 10 (a), A UNITED STATES COURT OF APPEALS HAS ENTERED A DECI-
24 SION THAT IS IN CONFLICT WITH ANOTHER UNITED STATES COURT OF APPEALS AND THE UNITED
25 STATES SUPREME COURT ON THE SAME IMPORTANT ISSUES BASED ON THE ABOVE FINDINGS THIS
26 COURT SHOULD GRANT CERTIORARI.

27 //
28 //

{

REASONS FOR GRANTING THE PETITION

PLEASE SEE ATTACHED

DISTRICT COURT PROCEEDINGS

1 THE DISTRICT COURT HELD THAT THE PLAINTIFF HAD PLAUSIBLY ALLEGED THAT HE HAD A SERIOUS
2 MEDICAL NEED AS REQUIRED BY THIS COURT IN A DELIBERATE INDIFERENCE CLAIM, THEY FURTHER
3 HELD THAT HE HAD PLAUSIBLE ALLEGED THAT DR. M. INTERIAN, DDS., WAS AWARE OF THE FACTS
4 FROM WHICH THE INFERENCE COULD BE DRAW THAT A SUBSTANTIAL RISK OF SERIOUS HARM EXISTED
5 AND THAT THE DEFENDANT DREW THE INFERENCE BUT NEVERTHELESS HELD HE WAS NOT DELIBER-
6 ATELY INDIFFERENT BECAUSE HE REFERRED PLAINTIFF TO SURGERY. THIS HOLDING IS IN CON-
7 FFLICT WITH CLEARLY ESTABLISHED SUPREME COURT LAW AND DECISIONS.

8

9 NINTH CIRCUIT PROCEEDINGS

10 THE NINTH CIRCUIT DENIED THE PLAINTIFF'S CLAIMS, DESPITE THE EVIDENCE PRESENTED THEY
11 HELD THAT THE PLAINTIFF DID NOT SATISFY THE STANDARDS SET FORTH FOR DELIBERATE INDI-
12 FERENCE. THEY REFUSED TO TAKE INTO ACCOUNT THAT THE DISTRICT COURT ACKNOWLEDGED THAT
13 PLAINTIFF HAD ALLEGED SUFFICIENT FACTS TO EVINCE DEFENDANT WAS AWARE OF THE FACT AND
14 DREW THE INFERENCE AND THAT PLAINTIFF HAD SUFFICIENTLY ALLEGED A SERIOUS MEDICAL NEED.
15 IN DOING SO THE NINTH CIRCUIT COURT OF APPEALS MISSAPPLIED THE PROCEEDINGS OF THIS
16 COURT AND THEIR DECISION IS IN CONFLICT.

17

18 REASONS FOR GRANTING THE WRIT

19 IN FARMER, THIS COURT RECOGNIZED THAT THE TEST FOR DELIBERATE INDIFERENCE IS " THE SUB-
20 STANTIAL RISK OF HARM", FARMER V. BRENNAN, 511 U.S. 825, 837. THIS COURT HAS ALSO HELD
21 THAT A PRISONER DOES NOT HAVE TO SUFFER SIGNIFICANT OR SERIOUS INJURY OR NO INJURY AT
22 ALL TO PREVAIL ON AN EIGHT AMENDMENT CLAIM, HUDSON V. MCMILLIAN, 503 U.S. 1 n.5. THIS
23 COURT HAS ALSO HELD THAT DOCUMENTATION AND NOTES ARE SUFFICIENT TO SATISFY THE STAN-
24 DARDS ESTABLISHED IN FARMER TO SHOW THAT A DEFENDANT WAS AWARE OF THE RISK, DREW THE
25 INFERENCE AND WAS DELIBERATELY INDIFFERENT BY FAILING TO TAKE REASONABLE MEASURES TO
26 ABATE THE HARM, FARMER V. BRENNAN, 511 U.S. 825, 834, 837, 842, 847. CONVERSELY, THE REA-
27 REASMING IN WOODS V. HOUSEWRIGHT, 900 F.2D 1332, 1335 THAT SIGNIFICANT INJURY IS RE-
28 QUIRED IS FLAWED. IT MAKES LITTLE SENSE TO REQUIRE THAT SIGNIFICANT OR SUBSTANTIAL

1 INJURY BE REQUIRED WHEN ONE DOES NOT HAVE TO WAIT FOR INJURY TO BEFALL HIM, AND ALTH-
2OUGH THE EXTENT OF THE INJURY IS TAKEN INTO CONSIDERATION, THE TEST IS NOT BASED ON
3 THE EXTENT OF THE INJURY BUT RATHER IF ONE WAS EXPOSED TO A SUBSTANTIAL RISK OF HARM.
4 FARMER, 511 U.S. 825. SEVERAL CIRCUITS INCLUDING THE NINTH CIRCUIT IT SELF HAS REJE-
5CTED THE SIGNIFICANT INJURY REQUIREMENT AND ITS TEST, SEE JETT V. PENNER, 439 F. 3D
6 1091 (9TH CIR. 2006), SEE ALSO SMITH V. CARPENTER, 116 F.3D 178,188 (2D CIR. 2003);
7 HELLING V. MCKINNEY, 509 U.S. 25. THE HOLDINGS IN TOGUCHI V. CHUNG, 391 F. 3D 1051,
8 1059-60 (9TH CIR. 2004) THAT A DEFENDANT IS NOT DELIBERATELY INDIFFERENT FOR PRESCRI-
9BING MEDICATIONS THAT HE HAS NO REASON TO BELIEVE WILL RESULT IN ADVERSE REACTIONS
10 CLEARLY UNDERMINDS THIS COURTS HOLDING THAT AN OFFICIAL NEED NOT ACT OR FAIL TO ACT
11 BELIEVING THAT HARM WOULD BEFALL AN INMATE (ID AT 842).IT WOULD ALSO ALLOW THE DEFE-
12 NDANT TO PRESCRIBE MEDICATIONS WITHOUT REGARDS TO THE SUBSTANTIAL RISK OF HARM IT
13 POSES AND REMOVES THE RESPONSIBILITY IMPOSED ON ONE TO TAKE REASONABLE MEASURES TO
14 ABATE THE RISK OF HARM, TO GUARANTEE THE SAFETY OF THE INMATE AND NOT CAUSE HARM, WH-
15ICH INVALIDATES A PRISONERS RIGHT TO BE FREE FROM THE UNNECESSARY AND WANTON INFIL-
16CATION OF PAIN AND THE PRINCIPLES AND REGULATIONS THAT PROTECT A PRISONERS HEALTH, SEE
17 ESTELLE V. GAMBLE 429 U.S. 97. GIVEN THE CONFLICT BETWEEN THIS COURTS PRECEDENTS AND
18 THE NINTH CIRCUITS HOLDINGS ON WHAT TEST IS TO BE EMPLOYED WHEN DETERMINING DELI-
19BRETE INDIFFERENT AS FAR AS HARM GOES, WHAT DOCUMENTATION IS SATISFACTORY TO DETERMINE
20 WHETHER AN OFFICIAL DISREGARDED A SUBSTANTIAL RISK OF HARM, THIS COURT SHOULD GRANT
21 THE PETITION AND IN DOING SO, THE COURT SHOULD CLARIFY WHETHER THE TEST ANNOUNCED IN
22 HOUSEWRIGHT, 900 F. 2D 1332, REQUIRING SUBSTANTIAL INJURY OR THE BALANCING FRAMEWORK
23 OF THIS COURT REQUIRING THE SUBSTANTIAL RISK OF HARM TO BE PRESENT IS THE APPROP-
24IATE TEST. BRINGING STANDING DELIBERATE INDIFFERENCE CASES INTO CONFORMANCE WITH ALL
25 AREAS OF ITS LAW.

26 *III-

27 I. THIS COURT SHOULD GRANT CERTIORARI AND CLARIFY WHETHER THE RISK OF HARM TEST ANN-
28 OUNCED BY THIS COURT INVALIDATES THE SUBSTANTIAL HARM TEST ANNOUNCED IN HOUSEWRIGHT.

A. THE NINTH CIRCUIT DECIDED THE ISSUE OF PLAINTIFFS CLAIM BASED ON THE WRONG STANDARD. THEY HAVE DETERMINED THAT IN ORDER TO SUSTAIN A DELIBERATE INDIFERENCE CLAIM BASED ON DELAY, THERE MUST BE EVIDENCE THAT THE DELAY OF SURGERY CAUSED "SUBSTANTIAL HARM," CITING WOOD V. HOUSEWRIGHT, 900 F. 3D 1332 (9TH CIR. 1990). THIS DECISION IS IN CONFLICT WITH DECISIONS MADE IN OTHER CIRCUITS AS WELL AS THIS COURT.

1. REASONS WHY THIS COURT SHOULD REJECT THE SUBSTANTIAL HARM TEST BASED ON A DELAY IN SURGERY.

THE SIXTH CIRCUIT COURT OF APPEALS AS WELL AS OTHER CIRCUITS HAVE EXPLAINED: THE VIOLATION IS NOT PREMISSED UPON THE DETRIMENTAL EFFECTS OF DELAY, BUT RATHER THE DELAY ALONE IN PROVIDING MEDICAL CARE CREATES A "SUBSTANTIAL RISK OF SERIOUS HARM." (ID AT 899n.10). IT IS SUFFICIENT THAT THE OFFICERS DELAY IN TREATMENT OF AN OBVIOUS MEDICAL EMERGENCY POSED A SUBSTANTIAL RISK OF SERIOUS HARM TO AN INMATE BY SUBJECTING HIM TO UNNECESSARY INFILCTION OF PAIN, (ID AT 899 n.11), SEE BLACKMORE V. COUNTY OF KALAMAZOO 390 F.3D 890,899 (6TH CIR. 2004).

2. REASONS WHY THE SUBSTANTIAL HARM TEST EMPLOYED BY THE NINTH CIRCUIT IN THIS CASE IS NOT THE PROPER TEST FOR ACCESSING DELIBERATE INDIFERENCE AND SHOULD BE REJECTED

FARMER V. BRENNAN, 511 U.S. 825 HELD THE APPROPRIATE TEST FOR DELIBERATE INDIFERENCE IS WHETHER THERE EXIST A SUBSTANTIAL RISK OF SERIOUS HARM, AND DOES NOT REQUIRE ACTUAL HARM TO BE SUFFERED (ID). THE NINTH CIRCUIT SUBSEQUENTLY REJECTED THE SUBSTANTIAL HARM TEST. SEE MCGUCKIN V. SMITH, 974 F.2D 1050,1060 (9TH CIR. 1992) HOLDING A FINDING THAT THE DEFENDANT'S ACTIVITIES RESULTED IN 'SUBSTANTIAL HARM TO PRISONER NOT NECESSARY. THE SECOND CIRCUIT IN SMITH V. CARPENTER, 316 F.3D 178,188 (2D CIR. 2003) OBSERVED THAT ACTUAL PHYSICAL INJURY IS NOT NECESSARY IN ORDER TO DEMONSTRATE AN EIGHTH AMENDMENT CLAIM AND REFUSED TO ADOPT THE PER SE RULE THAT SUCH AN INJURY IS REQUIRED. UNCERTANTIES IN THE LAW WERE PUT TO REST IS HUDSON. A PRISONER TESTIFIED HE SUFFERED MINOR BRUISES, FACIAL SWELLING, LOSSED TEETH AND CRACKED DENTAL PLATE AS A RESULT OF A

BEATING BY THE GUARDS. THE COURT OF APPEALS HELD A PRISONER ALLEGING AN EIGHT AMENDMENT VIOLATION MUST PROVE "SIGNIFICANT INJURY" AND THAT THE PRISONER COULD NOT PREVAIL DUE TO HIS INJURIES BEING MINOR AND REQUIRED NO MEDICAL TREATMENT. THIS COURT REVERSED, REJECTING THE SIGNIFICANT INJURY REQUIREMENT, IT HELD THAT A PRISONER DOES NOT HAVE TO SUFFER A SERIOUS INJURY TO PREVAIL ON AN EIGHTH AMENDMENT CLAIM, SEE HUDSON V. McMILLIAN, 503 U.S. 1 n.1. THERE WAS NO MERIT TO THE ASSERTION THAT A SIGNIFICANT INJURY REQUIREMENT IS MANDATED BY WHAT THE SUPREME COURTS TERMED IN WILSON V. SEITER, 501 U.S. 294, 297-303, AS THE OBJECTIVE COMPONENT OF THE EIGHTH AMENDMENT ANALYSIS: NAMELY WHETHER THE ALLEGED WRONG DOING WAS OBJECTFULLY HARMFUL ENOUGH TO ESTABLISH A CONSTITUTIONAL VIOLATION.

IN WHITELY V. ALBERS (1986) 475 U.S. 312, THE COURT HELD THAT A SIGNIFICANT INJURY IS NOT REQUIRED TO STATE AN EIGHTH AMENDMENT CLAIM. IN ESTELLE V. GAMBLE, 429 U.S. 97, THE COURT REJECTED THE SIGNIFICANT INJURY REQUIREMENT. IN HELLING, A NEVADA PRISONER CLAIMED THAT HIS COMPELLED INVOLUNTARY EXPOSURE TO ENVIRONMENTAL SMOKE POSED A UNREASONABLE RISK TO HIS HEALTH. THE DISTRICT COURT DENIED THE PETITION, HOLDING THAT HE SHOWED NO EVIDENCE HIS MEDICAL CONDITION WAS DUE TO CIGARET SMOKE OF DELIBERATE INDIFERENCE. THE COURT OF APPEALS IN DENYING HELD THAT HE COULD NOT PROVE THAT HE WAS CURRENTLY SUFFERING FROM SERIOUS MEDICAL PROBLEMS CAUSED BY EXPOSURE TO ETS AND AS SUCH THERE WAS NO EIGHTH AMENDMENT VIOLATION. THIS COURT REJECTED THE SIGNIFICANT INJURY REQUIREMENT, HOLDING THAT THE EIGHTH AMENDMENT PROTECTS AGAINST IMMINENT DANGERS AND NO INJURY AT ALL IS REQUIRED, HELLING V. MCKINNEY, 509 U.S. 25.

IN WILKINS V. GADDY, (2010) 559 U.S. 34, THIS COURT HELD THAT THE INJURY SUSTAINED BY A PRISONER NEED NOT BE SIGNIFICANT OR PERMANENT, AND MAY BE DE MINIMIS. THIS COURT HAS DETERMINED CASE AFTER CASE THAT SUBSTANTIAL HARM OR ACTUAL HARM IS NOT REQUIRED AT ALL AND THE NINTH CIRCUIT ERRORED IN REQUIRING PLAINTIFF TO SHOW SUBSTANTIAL HARM TO STATE A CLAIM AND THIS COURT SHOULD REJECT THIS REQUIREMENT IN THIS CASE.

11. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE STANDARDS ANNOUNCED IN
TOGUCHI V. CHUNG INVALIDATES A PRISONER'S EIGHTH AMENDMENT RIGHT TO BE FREE FROM
CRUEL AND UNUSUAL PUNISHMENT AND THE REGULATIONS THAT PROTECT A PRISONERS HEALTH
AND SAFETY.

A. IN TOGUCHI, THE LEGAL FACTORS THE COURT CONSIDERED WERE THE DEFENDANTS AWARENESS OF
A PRISONERS RISK OF HARM, THE DEFENDANT HAD BEEN TREATING THE INMATE FOR SEVERAL YEARS
AND KNEW THE EXTENT OF HIS MEDICAL HISTORY, KNEW THAT AS A PROFESSIONAL SHE OWED A
DUTY TO ENSURE THE INMATES SAFETY BY EXAMINING HIM AND ACCESSING HIS CONDITION PRIOR
TO PRESCRIBING MEDICINE. BUT FAILED TO RENDER THIS STANDARD OF CARE AND PRESCRIBED THE
INMATE MEDICATIONS WITHOUT DIAGNOSING HIM WHICH CAUSED HIS DEATH, THE COURT HELD THAT
BECAUSE CHUNG HAD NOT EXAMINED THE INMATE SHE HAD NO REASON TO KNOW THE MEDICATION
SHE PRESCRIBED WOULD HAVE AN ADVERSE EFFECT. AND WAS NOT DELIBERATELY INDIFERENT.

I. REASONS WHY THIS COURT SHOULD REJECT THE HOLDING IN TOGUCHI.

AS A GENERAL PROPOSITION, ONE IS REQUIRED TO EXERCISE THAT CARE A PERSON OF ORDINARY
PRUDENCE WOULD EXERCISE UNDER THE CIRCUMSTANCES, SEE KIM V. COUNTY OF MONTEREY, 43
CAL. APP. 5TH . UNDER CIVIL CODE § 1714(a), ONE OWES A DUTY OF ORDINARY CARE NOT TO
CAUSE HARM TO OTHERS. ESTELLE V. GAMBLE, 429 U.S. 97, 104-105 HOLDS THAT THE EIGHTH
AMENDMENT PROTECTS AGAINST CRUEL AND UNUSUAL PUNISHMENT. SEE ALSO U.S. CONSTITUTION
VIII AMENDMENT; GREGG V. GEORGIA, 428 U.S. 153, HOLDING THE EIGHTH AMENDMENT PROHIBITS
UNNECESSARY AND WANTON INFILCTION OF PAIN.

UNDER THE TEST ADOPTED UNDER FARMER, A CLAIMANT NEED NOT SHOW THAT THE OFFICIAL ACTED
OR FAILED TO ACT BELIEVING THAT HARM WOULD BEFALL THE INMATE; IT IS ENOUGH THAT HE
ACTED OR FAILED TO ACT DESPITE HIS KNOWLEDGE OF A SUBSTANTIAL RISK, FARMER V. BRENNAN
511 U.S. 825,842. TOGUCHI V. CHUNG, 391 F.3D 1051,1059 SERIOUSLY UNDERMINES THE ABOVE
CIVIL CODE AND INVALIDATES THE ABOVE REGULATIONS THAT HAVE BEEN ESTABLISHED TO INSURE
THE PROTECTION OF A PRISONERS HEALTH AND SAFETY AND INVALIDATES

1 THE HOLDING IN FARMER. IN OPPOSITE OF THIS COURTS PREVIOUS VIEW, IT DID AND WILL PRE-
2 SENT AN OFFICIAL WITH THE OPPURTUNITY AND MOTIVATION TO "TAKE REFUGE IN THE ZONE BE-
3 TWEEN IGNORANCE OF OBVIOUS RISK AND ACTUAL KNOWLEGE OF RISK. THEREBY REDUCING HIS CUL-
4 PABILITY FROM DELIBERATE INDIFFERENCE TO MERE NEGLIGENCE." THE HOLDING STRIPPS THE
5 DEFENDANT OF HIS RESPONSIBILITIES AND UNDERMINDS THE HOLDING IN FARMER THAT AN OFF-
6 ICIAL IS LIABLE UNDER THE EIGHTH AMENDMENT FOR HIS ACTIONS OR INACTIONS (ID AT 842),
7 IT ALSO UNDERMINDS THE HOLDING THAT THE CLAIMANT NEED NOT SHOW THE OFFICIAL ACTED OR
8 FAILED TO ACT BELIEVING THAT HARM WOULD BEFALL HIM (ID AT 842) AS LONG AS THERE IS
9 AMPLE ROOM FOR THE "HAD NO REASON TO BELIEVE CLAUSE" ADOPTED BY THE NINTH CIRCUIT IN
10 TOGUCHI. A DEFENDANT HAS NO CONFINES TO KEEP HIM FROM PRESCRIBING MEDICATIONS THAT
11 HAVE AN ADVERSE EFFECT OR SUBJECTING A INMATE TO A RISK OF HARM OR EVEN DEATH, NOR
12 HE HAVE TO WORRY ABOUT TAKING REASONABLE MEASURES TO ABATE THE HARM. AND FOR THIS REA-
13 SON THIS COURT SHOULD REJECT THE TOGUCHI STANDARD.

14

15 III. THIS COURT SHOULD GRANT CERTIORARI AND CLARIFY WHETHER THE NINTH CIRCUIT ERRORED
16 IN ANALYZING THE LEGAL AND FACTUAL ASPECTS OF THE DELIBERATE INDIFFERENCE CLAIM.

17

18 A. THE LEGAL AND FACTUAL ISSUE THE COURT CONSIDERED FIRST WAS THE SUBJECTIVE PRONG OF
19 THE DELIBERARTE INDIFFERENCE STANDARD. DESPITE THE HOLDINGS FROM THE DISTRICT COURT
20 THAT DR. INTERIAN KNEW OF AND DREW THE INFERENCE THAT THERE WAS A SUBSTANTIAL RISK OF
21 SERIOUS HARM, THE NINTH CIRCUIT HELD THAT THE PLAINTIFF DID NOT ALLEGE SUFFICIENT FA-
22 CTS TO STATE A PLAUSIBLE CLAIM THAT THE DEFENDANT KNEW OF AND DREW THE INFERENCE OF A
23 SUBSTANTIAL RISK OF HARM.

24

25 1. SUBSTANTIAL DOCUMENTATION WAS SUBMITTED TO SHOW DR. INTERIAN WAS BOTH AWARE OF THE
26 FACTS AND DREW THE INFERENCE THAT A SUBSTANTIAL RISK OF HARM EXISTED.

27

28 TO SUSTAIN A CLAIM OF DELIBERATE INDIFFERENCE, THIS COURT HAS CONSISTANTLY HELD THAT A

1 PRISON OFFICIAL MUST BOTH BE AWARE OF THE FACTS FROM WHICH THE INFERENCE COULD BE
2 DRAWN THAT A SUBSTANTIAL RISK OF HARM EXIST, AND HE MUST ALSO DRAW THE INFERENCE,
3 FARMER V. BRENNAN, 511 U.S. 825,837. EVIDENCE SHOWING THAT A SUBSTANTIAL RISK OF HARM
4 WAS LONGSTANDING, PREVASE, WELL DOCUMENTED, OR EXPSESSLY NOTED BY A PRISON OFFICIAL
5 AND THE CIRCUMSTANCES SUGGEST THAT THE OFFICIAL HAS BEEN EXPSED TO INFORMATION CONC-
6 ERNING THE RISK AND THUS MUST HAVE KNOWN ABOUT IT IS SUFFICIENT TO FIND A DEFENDANT
7 HAD ACTUAL KNOWLEDGE OF THE RISK (ID AT 842).SEE ALSO REED V. MCBRIDE (7TH CIR.

8 178 F. 3D 849; PHELPS V. KAPNOLAS (2D CIR.), 308 F. 3D 180; SIMMONS V. COOK, (8TH
9 CIR.1998), 154 F. 3D 805,807. HERE CAINES SUBMITTED DOCUMENTATION OF 7362 HEALTH CARE
10 FORMS ON JULY 12,13,16, AND 29TH, AUGUST 1,2,8,15TH, COMPLAINING OF HIS COMPLICATIONS.
11 HE SUBMITTED DR. INTERIANS NOTES FROM THE CDCR-237-C-1 FORM IN WHICH HE NOTED DELAYED
12 HEALING, CONSTANT BLEEDING, INFECTION,SEVERE NASAL COGESTION, EDEMATOUS TISSUE, O.A.F.
13 USE OF WARFARIN! DRUG-DRUG INTERACTIONS FROM WARNING LABELS, DIARRHEA WARNINGS WHICH
14 SATISFIED THE SUBJECTIVE COMPONENT THAT A DEFENDANT BE BOTH AWARE OF THE FACTS FROM
15 WHICH AN INFERENCE CAN BE DRWAN THAT THERE EXSIST A SUBSTANTIAL RISK OF HARM AND DREW
16 THE INFERENCE. SEE SER 55,58 (DISTRICT COURT AGREEING THAT PLAINTIFF HAD MET THIS COM-
17 PONENT).

18 B
19 B. THE LEGAL AND FACTUAL ISSUE THE COURT CONSIDERED SECOND WAS THAT A DEFENDANT IS
20 NOT DELIBERTLEY INDIFERENT FOR PRESCRIBING MEDICATIONS IN WHICH HE HAS NO REASON TO
21 BELIEVE WULD RESULT IN ADVERSE REACTIONS, CITING TOGUCHI V. CHUNG, 391 F.3D 1051,
22 1059-60.

23
24 I. DEFENDANTS CONDUCT CONSTITUTED DELIBERATE INDIFERENCE UNDER THE FARMER STANDARD.

25
26 THIS COURT HAS HELD THAT UNDER THE EIGHT AMENDMENT TEST ADOPTED TODAY, AN EIGHTH
27 AMENDMENT CLAIMANT NEED NOT SHW THAT A PRISON OFFICIAL ACTED OR FAILED T~~E~~ ACT BELI-
28 EVING HARM WOULD ACTUALLY BEFALL AN INMATE; IT IS ENOUGH THAT AN OFFICIAL " ACTED OR

1 FAILED TO ACT " DESPITE HIS KNOWLEDGE OF A SUBSTANTIAL RISK OF HARM, FARMER V. BRENN-
2 AN, 511 U.S. 825. THIS MEANS DESPITE THE DEFENDANTS KNOWLEDGE THAT PLAINTIFF WAS ON A
3 BLOOD THINNER AND THAT THERE WAS A SUBSTANTIAL RISK THAT THERE MAY BE A NEGATIVE DRUG
4 -DRUG INTERACTION CAUSED BY THE MIXTURE OF THESE ANTIBIOTICS, AND DESPITE THE DEFEN-
5 DANTS KNOWLEDGE THAT THE PRESCRIBED MEDICATION CAUSED SEVERE DIARRHEA WHICH COULD LEAD
6 TO PAIN AND SUFFERING, PLAINTIFF DOES NOT HAVE TO SHOW THAT THE DEFENDANT PRESCRIBED
7 THESE MEDICATIONS BELIEVING THAT PLAINTIFF WOULD SUFFER HARM; IT IS ENOUGH THAT HE
8 ACTED BY PRESCRIBING THE MEDICATIONS DESPITE HIS KNOWLEDGE OF THE RISK, ITS ENOUGH
9 THAT HE EVEN FAILED TO CHECK FOR THEREBY BEING LIABLE FOR HIS ACTS OR OMISSIONS (ID).
10 UNDER FARMER.

11
12 2. DEFENDANTS CONDUCT CONSTITUTED DELIBERATE INDIFERENCE UNDER THE TOGUCHI STANDARD.

13
14 THE COURTS IN TOGUCHI HELD " IF DR. CHUNG HAD ASSESSED KEANE'S AND DETERMINED THAT HE
15 WAS SUFFERING FROM WITHDRAWL, AND IN THE FACE OF THAT KNOWLEDGE, ADMINISTERED DRUGS
16 THAT SHE KNEW TO BE LIFE THREATENING, HER CONDUCT WOULD MEET THE DELIBERATE INDIFE-
17 RENCE STANDARD, TOGUCHI V. CHUNG, 391 F.3D 1051,1059. HERE DR. INTERIAN ASSESSED CAIN
18 AND DETERMINED THAT NOT ONLY WAS HE ON WARFARIN, BUT THAT THE DELAYED HEALING WAS DUE
19 TO ANTICOAGULANT PROBLEMS AND KNEW THAT BOTH ANTIBIOTICS THAT HE PRESCRIBED WHEN GIV-
20 EN WITH WARFARIN INCREASED THE RISK OF EXCESS BLEEDING, WHICH WOULD INCREASE THE RISK
21 OF DELAYED HEALING AND INFECTION ALONG WITH PAIN AND SUFFERING, THIS CONDUCT MEETS
22 THE STANDARDS ANNOUNCED IN TOGUCHI FOR DELIBERATE INDIFERENCE.

23
24 C. THE THIRD LEGAL AND FACTUAL ISSUE THE NINTH CIRCUIT CONSIDERED WAS THE DELAY IN
25 SURGERY. THE COURT HELD CAINES ALLEGATIONS OF A DELAY IN SURGERY, WITHOUT EVIDENCE
26 THAT THE DELAY CAUSED SUBSTANTIAL HARM, CANNOT SUPPORT A DELIDERATE INDIFERENCE CLAIM
27 CITING WOOD V. HOUSEWRIGHT, 900 F.2D 1332,1335 (9TH CIR. 1990).

28 //

1 1. SUBSTANTIAL HARM IS NOT REQUIRED TO STATE AN EIGHT AMENDMENT CLAIM.

2
3 THE TEST FOR DELIBERATE INDIFERENCE IS "WHETHER THERE EXIST A 'SUBSTANTIAL RISK OF SE-
4 RIOS HARM." FARMER V. BRENNAN, 511 U.S. 825,837. THE VIOLATION IS NOT PREMISSED ON
5 THE DETRIMENTAL EFFECT OF THE DELAY, BUT RATHER THAT THE DELAY ALONE IN PROVIDING MED-
6 ICAL CARE CREATES A SUBSTANTIAL RISK OF SERIOUS HARM, BLACKMORE V. KALMAZOO COUNTY, 390
7 F.3D. 809,899 n.11 (6TH CIR. 2004). THE SECOND CIRCUIT HAS ALSO HELD ACTUAL PHYSICAL
8 INJURY IS NOT REQUIRED, SEE SMITH V. CARPENTER, 316 F.3D 178,188 (2D CIR. 2003), DEC-
9 LINING TO ADOPT THE SIGNIFICANT INJURY TEST. THE NINTH CIRCUIT IN MCGUCKIN V. SMITH,
10 974 F.2D 1050,1060 (9TH CIR. 1992); JEIT V. PENNER, 439 F.3D 1091 (9TH CIR. 2006) HAVE
11 ALSO REJECTED THE SUBSTANTIAL INJURY TEST ADOPTED BY THE NINTH CIRCUIT IN THIS CASE.
12 THE COURTS IN HUDSON V. MCMILLIA REJECTED THE SUBSTANTIAL HARM REQUIREMENT AND HELD
13 THE CONSTITUTION IS VIOLATED WHETHER OR NOT SIGNIFICANT INJURY IS EVIDENT, HUDSON V.
14 MCMILLIAN, 503 U.S. 1 n.5, THIS COURT HAS SYSTEMATICALLY HELD THAT A PRISONER DOES NOT
15 NEED TO SUFFER SERIOUS INJURY OR INJURY AT ALL, THE EIGHT AMENDMENT PROTECTS AGAINST
16 EMMINET INJURIES AND DE MINIMIS INJURIES, SEE WHITLE V. ALBERS, 475 U.S. 312; HELLING
17 V. MCKINNEY, 509 U. S. 25ALL HOLDING THE SAME. SINCE ONE DOES NOT HAVE TO AWAIT THE
18 CONSUMATION OF THREATENED INJURY TO OBTAIN PREVENTATIVE RELIEF, FARMER, AT 837, CAIN
19 DOES NOT HAVE TO AWAIT OR SUSTAIN ACTUAL OR SUBSTANTIAL INJURY TO SUSTAIN AN EIGHTH
20 AMENDMENT CLAIM, SEE WHITLEY V. ALBERS, 475 U.S. 312.

21 2
22 2. PER SE SUBSTANTIAL HARM FROM DELAY REQUIREMENT UNDER HOUSEWRIGHT MET.

23
24 IN WOOD V. HOUSEWRIGHT, 900 F. 3D 1332,1335 (9TH CIR. 1990) THE COURT HELD THAT A
25 DELIBERATE INDIFERENCE CLAIM BASED ON A THEORY OF IMPROPER DELAY IN TREATMENT REQUIRES
26 THAT THE DELAY CAUSE SUBSTANTIAL HARM. IN HOUSEWRIGHT, HUG, CIRCUIT JUDGE HELD THAT
27 THE LONG AND UNJUSTIFIED DELAY IN TREATMENT TO REMOVE THE BROKEN PIN AMOUNTED TO DELI-
28 BERATE INDIFERENCE. REINHARDT,CIRCUIT JUDGE HELD THE CONFISCATION OF THE SLING AND THE

1 INORDINATE DELAY IN PROVIDING ESSENTIAL MEDICAL CARE CLEARLY CONSTITUTES "DELIBERATE
2 INDIFERENCE" AND THE RESULTANT PAIN AND SUFFERING FROM A DEALY CLEARLY MEETS THE STA
3 NDARDS SET FORTH IN ESTELLE. ESTELLE V. GAMBLE, 429 U.S. 97,104-05,HELD THAT A DELAY
4 IN MEDICAL ATTENTION CAN VIOLATE THE EIGHT AMENDMENT WHEN IT IS TANTAMOUNT TO UNNEC-
5 ESSARY AND WANTON INFILCTION OF PAIN.

6
7 EVIDENCE SHOWS THAT PLAINTIFF SUFFERED FROM CONSTANT BLEEDING FOR 34 DAYS, SEVERE CON-
8 GESTION FOR 34 DAYS, AN INFECTION BONE SPICULE, AN ORAL ANTRAL FISTULA, DIARRHEA,HEM-
9 RROHIDS, TWO PAINFULL SURGERIES, DEPRESSION AND HUMILIATION. AN ORAL ANTRAL FISTULA
10 (O.A.F.) REFERS TO AN OPENING OR CHANNEL BETWEEN THE MAIN SINUS NEAR THE NOSE THAT
11 LIES DIRECTLY ABOVE THE ROOTS OF THE TEETH AT THE BACK OF THE MOUTH THAT CAN BECOME
12 INFECTED AND CAUSE CONGESTION. BONE SPICULE REFERS TO BONE PARTICLES LEFT IN THE EXT-
13 RACTION CITE WHICH PUNCTURE THE GUMS AND CAUSE BLEEDING, BECOMES ROTTEN AND CAUSEES
14 AN INFECTION. CAINES SUFFERED MORE THAN SUBSTANTIAL HARM. SOMETHING

15
16 3. DR. INTERIAN WAS DELIBERATELY INDIFERENT UNDER THIS COURTS STANDARDS.

17
18 UNDER THE STANDARDS ADOPTED TODAY, A DEFENDANT IS DELIBERATELY INDIFERENT IF HE KNOWS
19 OF A SUBSTANTIAL RISK OF HARM AND DISREGARDS THAT RISK BY FAILING TO TAKE REASONABLE
20 MEASURES TO ABATE THAT HARM, FARMER V. BRENNAN 511 U.S. 825,847. PRISON OFFICIALS MAY
21 BE LIABLE FOR FAILURE TO REMEDY A RISK OF HARM SO OBVIOUS AND SUBSTANTIAL THAT THE
22 PRISON OFFICIAL MUST HAVE KNOWN ABOUT IT. THE EIGHT AMENMENT GUARANTEES EACH PRIS-
23 ONER THAT REASONABLE MEASURES WILL BE TAKEN TO ENSURE HIS SAFETY. WHERE A PRISONER
24 CAN PROVE THAT NO SUCH REASONABLE STEPS WERE TAKEN AND, AS A RESULT, HE EXPERIENCED
25 SEVERE PAIN OR SUFFERING THE EIGHT AMENDMENT IS VIOLATED. DELIBERATE INDIFERENCE IS
26 FOUND WHERE OFFICIAL KNEW OF PRISONERS CONDITION AND TOTALLY FAILED TO TREAT IT COM-
27 PETENTLY, ORTIZ V. CITY OF IMPERIAL, 884 F.2D 1312 (9TH CIR. 1989). THE DISTRICT CO-
28 URT HAS ALREADY HELD THAT DR. INTERIAN KNEW OF A SUBSTANTIAL RISK OF HARM (SER 55,58)

THE RECORD SHOWS THAT FOR 34 DAYS PLAINTIFF SUFFERED CONSTANT BLEEDING AT THE EXTRACTION SITE, FOR 34 DAYS PLAINTIFF SUFFERED SEVERE NASAL CONGESTION FROM THE O.A.F. AND BONE SPICULE, HOWEVER, DR. INTERIANS NOTES SUBMITTED AS DOCUMENTATION TO THE LOWER COURTS DO NOT SHOW ANY MEASURE AT ALL THAT HE TOOK TO ABATE THE ABOVE HARMS, FAILURE TO TAKE ANY MEASURE OR ACTION AT ALL DESPITE BEING AWARE OF THE SERIOUS RISK CANNOT BE CONSTITUTED AS REASONABLE MEASURES. SEE GAMBLE V. SOUTH CAROLINA DEPT. OF CORR. 2019-CV-02242, FARMER AT 842. THE RECORD DOES NOT SHOW ANY DIAGNOSTIC TEST DR. INTERIAN PERFORMED TO DETERMINE THE CAUSE OF THE HARM EVENTHOUGH HE KNEW THERE WERE STILL SERIOUS COMPLICATIONS TWO WEEKS AFTER THE EXTRACTION AND THE CONDITION WAS WORSENING. THOUGH HE KNEW OF THE RISK OF FURTHER INFECTIONS AND COMPLICATIONS, AND NOTED THE PROBLEMS WERE WORSENING HE STILL DID NOT REQUEST THE REQUIRED SURGERY FOR NEARLY 4 WEEKS, A THREE MONTH DELAY IN REPLACING DENTURES, CAUSING GUM DISEASE AND WEIGHT LOSS CONSTITUTED AN EIGHTH AMENDMENT VIOLATION, SEE HUNT V. DENTAL DEPT. 865 F.2D 158 (9TH CIR. 1989), SEE ALSO HARTSFIELD V. COLBURN, 371 F.3D 454 (8TH CIR. 2004). UNDER THE STANDARDS ANNOUNCED BY THIS COURT, DR. INTERIAN KNEW OF AND DISREGARDED A SUBSTANTIAL RISK OF HARM BY FAILING TO TAKE REASONABLE MEASURES TO ABATE THE HARM, THE DELAY WAS FOR NO PENALOGICAL INTEREST, DR. INTERIAN HAS MET THE REQUIREMENTS FOR DELIBERATE INDIFERENCE.

IV. THIS CASE IS THE IDEAL VEHICLE TO RESOLVE THE QUESTIONS PRESENTED.

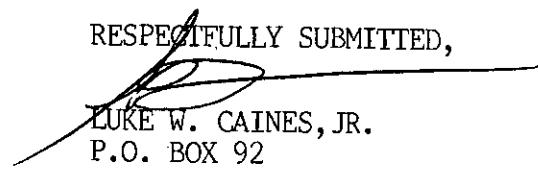
FINALLY, BETWEEN CAINES AFIDAVIT, HIS DOCUMENTS PRESENTED, THE CONSTITUTIONAL PROVISIONS AND THE CONFLICTING DECISION OF THE NINTH CIRCUIT, THERE IS ADEQUATE INFORMATION REGARDING THE HARM SUFFERED BY PLAINTIFF DUE TO THE DEFENDANTS DELIBERATE INDIFERENCE FOR THIS COURT TO REACH A DECISION ON THE ISSUES PRESENTED. GIVEN HOW CONSTANTLY THE DISTRICT AND CIRCUIT COURTS HAVE SHUT DOWN § 1983 CLAIMS INCLUDING GENUINE ISSUE OF LAW AND FACT CONCERNING SUBSTANTIAL HARM, DELIBERATE INDIFERENCE AND DOCUMENTATION SUBMITTED BASED ON APPLYING THE WRONG STANDARDS OR MISAPPLYING THE

THE STANDARDS IN GENERAL, NO GOOD WILL COME FROM WAITING FOR OTHER CASES WITH THE SAME LEGAL AND FACTUAL ISSUES BECAUSE THERE IS LIKELY TO BE PLENTY MORE WRONGLY DECIDED CASES WITHOUT FURTHER CLARIFICATION ON THE APPROPRIATE TEST AND STANDARDS FOR DETERMINING DELIBERATE INDIFERENCE AND HARM CAUSED BY IT FROM THIS COURT. AT A BARE MINIMUM, THE COURT COULD SIMPLY CLARIFY THAT THE SUBSTANTIAL HARM TEST, THE HOLDINGS IN TOGUCHI AND THE DECISION RENDERED BY THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURTS PRIOR HOLDINGS AND DOES NOT MESH WITH THE RULE OF UNIFORMITY, REMAND AND REVERSE WITH INSTRUCTIONS TO REVIEW PLAINTIFFS CASE IN LIGHT OF THIS COURTS DECISION REGARDING THE IMPORTANT ISSUES AND QUESTIONS RAISED IN THIS PETITION.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

RESPECTFULLY SUBMITTED,


LUKE W. CAINES, JR.
P.O. BOX 92
CHOWCHILLA, CA. 93610
PETITIONER IN PRO-PER

1-27-2022

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 1-17-2022