No. 23-5255

IN THE UNITED STATES SUPREME COURT

ROBERT LEE SWINTON JR.

Plaintiff/Petitioner.

V.

LIVINGSTON COUNTY, LIVINGSTON COUNTY JAIL, MONROE COUNTY,MONROE COUNTY JAIL, NURSE SCHINSKI,NURSE YUNKER, CHIEF DEPUTY YASSO,CORPORAL SLOCUM, DEPUTY FORRESTER,DR. MAXIMILLIAN CHUNG,DR. CHARLES THOMAS, CORRECTIONAL MEDICAL CARE INC.,

Defendant/Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SECOND CIRCUIT COURT OF APPEALS

PETITION OF THE PETITIONER

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QUESTIONS

Question History: The petitioner was housed by the United States Marshal Service pending trial, by the New York County Jail facilities of Monroe and Livingston Counties. In the care of these county jails, the petitioner suffered 13 different tooth abscesses on the same tooth, while requesting that these county jails contact the USMS for care of this issue from 2012 to 2014 and recorded in the medical records. The county jails conceded that it could not provide the care the petitioner needed at the facility, yet failed to arrange the care needed with the USMS. After the second court hearing in 2014, the court addressed the petitioner's tooth problem, the jail gave the USMS false information pertaining to care, then the court ordered that Livingston provide a dental care report for the petitioner's dental care. The jail facility would not provide care after this order, and the petitioner sought legal treatise from the Livingston County Jail to file a claim in the courts for injunctive relief and damages pertaining to the tooth. Livingston County Jail denied access to court to the petitioner for civil filing, in which the petitioner was seeking to challenge a prior conviction as well with legal material. The court immediately dismissed the official capacity claims with prejudice, even though the petitioner stated that this was the policy of both jail facilities for these actions.

QUESTIONS:

1. Is this the correct evaluation of the evidence for deliberate indifference and would the Monell policy standard be eroded by the evaluation of this case?

2. Do these actions satisfy the actual injury requirement in *Lewis v. Casey* and hold the strongest argument the complaint suggested by a pro se litigant?

LIST OF PARTIES

All parties are listed in the caption.

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NEW YORK CODES, RULE AND REGULATION

9 NYCRR § 7010.2

.....10,13,16,27,28

CITATIONS TO THIS CASE

ROBERT L. SWINTON, JR., Plaintiff, v. LIVINGSTON COUNTY, LIVINGSTON COUNTY JAIL, MONROE COUNTY, MONROE COUNTY JAIL, NURSE SCHINSKI, NURSE YUNKER, CHIEF DEPUTY YASSO, CORPORAL SLOCUM, DEPUTY FORRESTER, CORRECT CARE SOLUTION, INC., CORRECTIONAL MEDICAL CARE, INC., DR. MAXIMILLIAN CHUNG, and DR. CHARLES THOMAS, Defendants. (Now *Swinton v. Schinski, et al)*

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

2018 U.S. Dist. LEXIS 166718,15-CV-00053A(F); 2016 U.S. Dist. LEXIS 34600; 2016 U.S. Dist. LEXIS 148370

U.S. SECOND CIRCUIT COURT OF APPEALS, 21-1434

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JURISDICTION

The petitioner is humbly requesting that the Honorable Court exercises its jurisdiction over this petition, pursuant to U.S. Supreme Court Rule 10(a) and 28 U.S.C. § 1651(a). This is a request for a petition pertaining to a ruling from The U.S. Court of Appeals for The Second Circuit on March 2, 2023. This is a request for a review of the decision rendered on this date, in which the Mandate issued April 18, 2023 and rehearing en banc was denied on April 18, 2023 that fully resolved this appeal in The U.S. Second Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTORY LAW

United States First Amendment Right to Redress the Government of Grievances

United States Fifth and Fourteenth Amendment Due Process of Law

New York Code, Rules and Regulations, 9 NYCRR §§ 7010.2 and 7032.4

STATEMENT OF THE CASE

PROCEDURAL POSTURE OF CASE

The pro se Plaintiff commenced this action with the filing of a complaint on January 16, 2015, naming Livingston County, Livingston County Jail ("LCJ"), Monroe County, Monroe County Jail ("MCJ"), Chief Deputy Yasso, Deputy Forrester, Corporal Slocum, Nurse Schinski, Nurse Yunker as defendants [Complaint DCD ("district court docket") 1].

By Decision and Order ("D&O") on March of 2015, the court granted Plaintiff's motion for leave to proceed 'in forma pauperis' [Order at DCD 4], and dismissed with prejudice several of the Plaintiff's claims, including all claims against Livingston County, Monroe County, LCJ and MCJ, in all official capacities of the individually named defendants [D&O of Judge Arcara, DCD 4]. On October 26, 2016, by D&O, the district court granted in part and denied in part the Plaintiff's motion for leave to

amend his complaint [DCD 84], permitting the addition of defendants Dr. Thomas, Dr. Chung, Correctional Medical Care Inc. ("CMC") and Correct Care Solutions ("CCS") [DCD 115].

On January 19, 2017, Plaintiff filed the Amended Complaint [Decision and Order of Judge Arcara, DCD 129]. The Plaintiff later dismissed CCS from the case [DCD 245-246].

On September 27, 2018, the Magistrate Judge issued the first R&R granting the motion to dismiss/for summary judgment filed by the defendants Chief Deputy Yasso, Deputy Forrester, Corporal Slocum, Nurse Schinski and Nurse Yunker (the Livingston County Defendants) [R&R, DCD 237; see DCD 188].

By D&O on November 4, 2019, the District Court adopted the R&R, granting all of the Livingston County Defendants' summary judgment motion [D&O at DCD 256].

On June 14, 2019, Dr. Chung moved for summary judgment [DCD 252]. On November 22, 2019, CMC and Dr. Thomas moved for summary judgment [DCD 259].

On December 22, 2020, the Magistrate Judge issued a second R&R, recommending that the motions of CMC, Dr. Thomas and Dr. Chung

shall be granted, and the action dismissed [R&R at DCD 268]. The R&R concluded that Dr. Thomas did not intentionally or recklessly deny Plaintiff appropriate treatment for his abscessed tooth, and that the Plaintiff failed to offer admissible dental evidence to raise an issue of fact.

On January 6, 2021 (mailed earlier, prison mailbox rule and COVID protocols), the Plaintiff filed his objections to the R&R [DCD 269], and the Defendants responded [DCD 273 and 278].

On May 20, 2021, the District Court Judge issued a D&O adopting the R&R, and granting the CMC, Thomas and Chung motion for summary judgment [D&O DCD 287], with an order filed May 21, 2021 [DCD 288]. A Notice of Appeal was docketed on June 7, 2021, filed by the Plaintiff [DCD 290].

The appeal was fully briefed, and the judgment of the Western District of New York was affirmed on March 2, 2023. A petition for Rehearing In Banc was filed on March 14, 2023. The petition was denied on April 18, 2023.

STATEMENT OF FACTS

1. The plaintiff ("plaintiff or Swinton") was federally arrested on October 19, 2012 after state arrest on October 16, 2012. Swinton was in the sole custody of the ("United States") and housed in State facilities by the United States Marshal Service ("USMS") under contract with these State facilities. Defendant Dr. Chung's 21-1434 Supplemental Appeal Appendix ("SA") will be used in reference.

2. Swinton began abscessing in the Monroe County Jail, State of New York ("MCJ") on December 4, 2012 (SA 389, 586). Swinton requested outside care from Dr. Thomas, the treating physician employed by the MCJ and Correctional Medical Care ("CMC") (SA 459). Swinton suffered 6 abscesses in the Monroe County Jail and 7 abscesses in the Livingston County Jail, for a total of 13 abscesses on the same tooth before the problem was corrected on February 18, 2015 (SA 520-524).

3. No outside care for Swinton's abscessing could be arranged without prior approval through the United States Marshal Service ("USMS"). Dr. Thomas did not seek approval from the defendant, and made a diagnosis that a root canal was needed on December 26, 2012 (SA 587). The plaintiff alleged that the policy by the county jail facilities was an issue in the January 16, 2015 complaint for both jail facilities (SA 10-

11). Thomas stated that Swinton could get his help from the next facility, and put this in the medical records, while recording that Swinton was requesting that he contact the USMS for outside care that he could not provide to fulfill his own prescribed root canal treatment as needed.

4. Swinton began to write letters to the USMS at 100 State Street, Rochester, New York that went unanswered by the USMS. Two letters were written to the USMS directly requesting assistance with abscessing tooth and dental scheduling in 2013. These letters were written while in the MCJ. Swinton repeated these requests to James L. Riotto II, Esq., his attorney in his criminal case. Riotto alleged to Swinton that he contacted the USMS concerning his tooth abscessing.

5. Swinton suffered extreme pain and suffering during extended time frames that could have been prevented, and seven different abscessings occurred at the MCJ, requiring antibiotics. No dental staff made any plans to completely remedy Swinton's abscessing or provide adequate health care, required by NYCRR § 7010.2, while diagnosing the root canal treatment that was ultimately needed (SA 586-590). Less efficacious treatments were administered to temporarily relieve the

abscessing, while repairs failed numerous times and were consistently repeated by MCJ dental staff employed by CMC.

6. Dr. Thomas saw Swinton 2 more times after his initial visit and diagnosis that a root canal was needed for abscessing on the same tooth, while all tooth fillings and antibiotics failed. Dr. Thomas made no provisions to stop the abscessings, while applying the same remedy each visit stating that they would fail. Thomas knew that he must contact the USMS to obtain this treatment from the start (SA 613-616 'MCJ agreement).

7. Dr. Chung finally made a request for outside dental care on February 5, 2014, after a total of 9 visits to him; three of which were abscessing at the time of the visit, discharging blood and pus from an ulcer below the gumline (SA 564-569, 620). Later on in summary judgment motion, Chung averred that he knew that he could not extract the "I" tooth at the MCJ, which would evidence that Thomas knew this as well and both continued to apply temporary fillings that they knew would continuously fail, and in fact, did continuously fail to cause repeated abscess pain and suffering to Swinton (SA 449-452) . The USMS did not acknowledge the receipt of this request recorded in Swinton's

medical records (SA 606). Chung averred that he would not be able to extract the infected tooth at the MCJ, yet did not seek to have any outside dental care previous to this date while acknowledging that a root canal was needed. 9 NYCRR § 7010.2(h) (SA 451-52). The medical records of Swinton show that another medical request was made by "MRC Eva Lopez" on February 10, 2014 that was not reflected by the USMS records (SA 563). Swinton was transferred from the MCJ on February 12, 2014. Swinton alleged that this transfer was done to avoid dental care that was needed. This transfer tactic was attempted again at the Livingston County Jail ("LCJ") by the USMS, when Swinton was about to receive a root canal at the USMS expense, and aborted by LCJ Chief Deputy Yasso. See 15-CV-53, Dk. 188-3, p. 15 (SA 111).

8. Chung alleged to Swinton that he was on a 'National Waiting List' for routine care, and he would be seen soon. The same list is used in The Federal Bureau of Prisons ("FBOP"), and aggravated the claim herein. This gives the appearance that Thomas and Chung were in contact with the USMS the entire time and were in league to deny Swinton dental care. Swinton alleged that he was transferred when he requested a grievance from the MCJ staff, to begin the administrative

process, the same as the LCJ and averred to by Yasso. This process was denied by the MCJ and the transfer was done 2 days after the last alleged request by Chung and Lopez on February 10, 2014.

9. On February 12, 2014, Swinton reported the abscess to the LCJ upon intake to the facility from the MCJ. Swinton told Nurse Schinski that the decay started under the gold crown, abscessing began and the crown fell off (SA 578). Schinski only reported that the crown fell off, in which the gold crown was not there when Swinton arrived at the facility. Swinton asked Schinski to get him help because of the persistent pain, contact the USMS and also told her about the alleged 'waiting list' that he was on, according to MCJ staff. Schinski told Swinton that he had to submit a medical request and there was no dental services or staff at the LCJ. See 9 NYCRR §§ 7010.2(i) and (j). No staff was able to render an acceptable treatment for Swinton, and no staff was trained to diagnose or treat Swinton for an abscess tooth at the LCJ. Swinton submitted a medical request on February 15, 2014.

10. Swinton saw Nurse Yunker on February 20, 2014 for his dental abscess and told Yunker that he was alleged by MCJ staff to be on a 'waiting list' to get an extraction, and still wanted the extraction (SA

574). Yunker told Swinton that she would look into getting Swinton dental assistance, and would contact the USMS to arrange care or information on where Swinton was on the list that she was not familiar with. No record shows that Yunker made any USMS contact, despite Yunker writing 'list?' on the medical request form, and Swinton was directly asking for the extraction of the tooth on February 15, 2014. Yunker also averred that she never saw Swinton for a dental issue until August 7, 2014 (SA 120-121).

11. Swinton wrote Magistrate Judge Payson and the USMS at 100 State Street, Rochester, New York in April of 2014, after another full blown abscessing episode in the LCJ, in which Swinton was seen by Schinski on April 14, 2014, after a court hearing on April 10, 2014. Swinton was suffering from a full blown abscess in court, and in severe pain. Access to legal material and the abscessed tooth was addressed on the record, recorded in transcripts and submitted to the court in this case (SA 626-629). Swinton was seeking legal treatise from the LCJ to pursue this claim, and to gain legal knowledge on how to file a federal claim for the repeated denials of dental care and treatise to seek post conviction filings to prevent a career offender enhancement in federal court. LCJ

was refusing to provide this legal treatise on the subjects that Swinton was seeking redress for. Due to the indifference of the USMS, Swinton was left to suffer 4 more abscesses before a proper civil claim could be made to this court on January 16, 2015, and hindered by the actions of the LCJ. The letters were acknowledged as received in court. A document with 'Pascuzzi' was written on Schinski's records, without the substance of what was discussed with the USMS and Schinski pertaining to Swinton or what contact was made. After the antibiotics ran their prescribed course, Swinton was still inflamed and returned to medical on April 28, 2014, after submitting another request that he was asked by the court to submit to the LCJ (SA 626-629, 516, 596). Swinton was given peroxide, which was a less efficacious treatment, and Schinski made no plan to remedy the abscess as she was obligated to do by 9 NYCRR Sec. 7010 mandate to provide adequate health care.

12. On April 10, 2014, USMS Deputy Lamp stated that he received a letter from Swinton in court, which also stated that the magistrate had been written as well and it pertained to a tooth infection. Lamp stated to the magistrate that Swinton had put in a slip that did not pertain to the tooth, and that Swinton did not submit a medical request

that pertained to the tooth, and this was told to him by the facility (SA 626-627). Swinton told the magistrate that he did put in a slip pertaining to the tooth, and had submitted three slips already. Swinton's medical records evidence that Swinton had put in 3 slips as of this court date, two pertaining to the tooth, which made this a false statement in the court to prevent treatment that was needed by Swinton (SA 592-594). Swinton was told to put in another slip, the USMS knew that LCJ has never had a dental staff and the USMS Deputy addressing the problem in court did not move to have the LCJ send Swinton out to a dentist. The USMS had a duty of care to Swinton beyond dispute at this point, and knew by their own contract that the USMS had to authorize an outside dental visit for Swinton (SA 609-612). There were no records of USMS contact with the Livingston County Jail in the facility records. This evidence that there was an agreement between the USMS and the LCJ to prevent the dental care necessary to remedy the abscessings.

13. After Swinton returned from court, no dental appointment was made by the USMS or the LCJ, and no 'Prisoner Medical Request' was made by the LCJ to the USMS for Swinton to see a dentist. This was also a negligent discharge of duty by the USMS and the Livingston

County Jail actors under New York State statute of 9 NYCRR Sec. 7010 by failing to provide adequate health care.

14. Swinton was only given peroxide and continued to abscess until the next court date on May 14, 2014. The court, USMS and Swinton's attorney addressed Swinton's lack of care and the facility's failure to address and treat Swinton's tooth. The court ordered the USMS to get a report on the status of Swinton's dental care, and tell the LCJ Swinton needs to see a dentist. See 15-CV-53, Dk. 269, p. 96-97 (transcript of 15-CR-6055, Dk. 162)(SA 631-633). This makes the LCJ defendants in willful violation of 9 NYCRR Sec. 7010.2(j), failure to plan to remedy a known illness or provide adequate health care, and after this date, was a clear refusal to provide the needed care to Swinton.

15. Swinton continued to abscess and reported to Schinski in medical on May 28, 2014. Swinton was given peroxide and told to come back when it gets worse (SA 516). This is supported by Schinski's own medical records. During these abscessing episodes, Swinton told Schinski that he was forced to stick a staple in an enlarged puss bubble to relieve some of the pain and pressure in his face and gums.Schinski gave Swinton peroxide and would not take any further steps in the dental care

of Swinton, and stated that this peroxide remedy came from the doctor, which made this a policy for an abscess remedy for Swinton and other prisoners. Swinton also could not eat on some days because of this, and reported this to the LCJ. Swinton asked Schinski did the USMS contact the facility about getting dental care, and Schinski stated that the USMS had not contacted the LCJ pertaining to Swinton's dental care. This is now a willful disregard of a court order by the USMS that was issued by Magistrate Judge Payson, and protecting the policy that the USMS had in place with the MCJ and the LCJ for dental care.

16. Swinton made multiple complaints to security staff at LCJ, and both Swinton and security staff approached medical staff, including Chief Deputy Yasso about getting Swinton outside dental care. Swinton was seen on August 7, 2014. Yunker contacted the USMS on this date that Swinton was seen, and an outside dental appointment was approved. Yunker made the appointment 4 weeks away from the approval date. During these reports, LCJ medical staff began to deny Swinton all pain medications in retaliation for making these reports of dental denial to security administration, in which security still denied Swinton a grievance for this issue stating that it was remedied (SA 581-

584). This continued periodically until the root canal was performed, after the initiation of this civil action.

17. On September 11, 2014 Swinton was seen by Dr. Washburn in Geneseo, N.Y. Dr. Washburn expressed to Swinton that he could not pull the tooth over the infection, the infection was bad and he could only prescribe antibiotics for the abscess. Dr. Washburn asked that the jail seek a root canal from the USMS and he could do nothing else until the infection subsided after the course of antibiotics relieved the abscess. LCJ Nurse Yunker wrote in the medical records on September 11, 2014 that "ALSO SAID HE NEEDS A ROOT CANAL" (SA 516). On November 24, 2014, Yunker made a self-serving entry that Swinton refused an extraction, which was not supported by any record and Swinton argued that he never refused an extraction in the district court while records show that Swinton requested an extraction (SA 574).

18. The USMS was billed for the dental service of Dr. Washburn, which showed the care given to Swinton, in which Washburn provided a temporary filling that he stated that it would not hold but will prevent infection and stated that Swinton needed to be seen immediately after the antibiotics ran their course. Yunker did not do anything to get the

prescribed treatment for me, and Yunker was aware that she had to initiate a Prisoner Medical Request ("PMR") to the USMS for the requested care of me. Yunker also acknowledged her obligation to seek dental care for me by writing "IM AWAIRE" in my medical records to show that she needed to make further arrangements for my care but failed to do so (SA 516).

19. On November 24, 2014, I returned to Yunker with another abscess of the same tooth, and Yunker contacted the USMS for a root canal. This is also the date when Yunker placed in the medical records that I refused an extraction, which was alleged in this case by all defendants after Yunker's affidavit (SA 508-511, 517). Since Swinton's repeated complaints to the LCJ about the abscessings, around July of 2014, the LCJ medical staff began to prohibit me from all pain medications to punish me for these complaints, which was one of the repeated subject of grievances from me in 2014 (SA 581-584). The LCJ also began to restrict me from the administrative grievance process around August of 2014, pertaining to my dental abscesses. The USMS, LCJ and various dental offices went back and forth about rates for service for two more months, which caused me three more abscesses and a

prolonged episode of abscess from December of 2014 to January of 2015 (SA 606). In December of 2014, the LCJ would not give Swinton copies to file a State or federal civil complaint, and Swinton sent the filing documents to Diane Fransciosa (then Diane Robinson) to copy and mail on my behalf to initiate this complaint on January 16, 2015. Swinton's State civil complaint was returned twice outside of the mailing system, by the hands of the LCJ staff (SA 29, one of the returns). Swinton suffered almost continuous pain and suffering from November of 2014 to February of 2015. On February 12, 2015, the New York State Commission of Corrections held that this was not an acceptable standard of care given to Swinton in the LCJ (SA 570-571), from a LCJ grievance that was filed in December of 2014. Swinton's last abscess episode was in February of 2015, and root canal was performed roughly a week after the last round of antibiotics on February 18, 2015.

ACCESS TO COURT AND DUE PROCESS CLAIMS

22. Due to prior convictions, Swinton was subjected to a USSG 4B1.1 career offender enhancement, and while at the LCJ, he sought to challenge the prior convictions that warranted this enhancement. Swinton was unnecessarily suffering from the dental abscesses after

reporting these to the jails, the USMS and court. Swinton also sought to research filing a civil claim in the courts for a tort claim and injunctive relief. As stated, the USMS or the LCJ would not honor any requests to give Swinton dental attention, even when ordered to do so by the court. After recognizing that the search for civil claims cases had begun, LCJ began to deny Swinton access to court by denial of citations and law pertaining to civil procedures. Swinton also pointed to unanswered legal requests to Forrester, the LCJ law librarian, pertaining to filing a civil suit, in opposition to summary judgment motions from the defendants.

23. After arrival at the LCJ on February 12, 2014, there was a 'runner' system in place where the officers would look for legal materials and provide them, and could only look for civil laws or citations if Swinton already knew what was needed. None of the personnel was trained in law, and most did not know what they were looking for. No computer search engine was in the facility at that time, and was not installed until September of 2014, yet still experiencing errors in operations. Swinton was seeking to challenge the Florida prior conviction and the New York prior convictions. Counsel was appointed to the prior Florida conviction challenge on April 14, 2014, which resulted in a conflict of interests

between that counsel and Swinton, in which a total breakdown in communication occurred. No counsel was appointed to challenge the New York prior conviction, in which Swinton wanted to compel the prior 1999 conviction documents to research the prior and counsel was appointed for federal representation only. The government failed to provide these documents under federal rules of criminal procedures, which caused me to believe that something was wrong. Swinton began researching the available challenges in the MCJ before transfer.

24. The LCJ has never had actual federal books made available to the federal detainees and me, from what was told to me by staff, to research criminal litigation or post conviction remedies of any other State or federal priors, aside from a Second Circuit Handbook and Federal Code Book. The LCJ was withholding legal letter envelopes, and also successfully restricted me from receiving legal materials pertaining to my case. Other restrictions were made to keep me from researching and filing this instant civil complaint in the courts. I had Thompson, my federal criminal attorney, address this in court along with my dental abscess issue on April 10, 2014, with the USMS as parties to this discussion in court. After this discussion, I knew I would have to pursue

my own civil remedies. The USMS did not investigate the allegation or correct the denial of access to court that it was directly informed of in court, while engaged in an on the record discussion with the court and defense counsel. At no time did the USMS intervene in the constitutional violation of access to court. Swinton could not (1) file the civil complaint that could have gotten me dental assistance at a much earlier date, preventing 4 additional abscesses (2) compel the documents for the prior New York State documents that caused the career offender enhancement, that was alleged in error in the federal criminal case, or (3) file or move to withdraw Florida counsel's filing and file pro se.

25. Swinton attempted to file his own civil complaint with the Livingston County Court, which was returned to Swinton by LCJ staff officer Gilg from the County Attorney's Office. LCJ began to refuse copying for a corrected State claim, so I changed the civil complaint to a federal civil complaint because of the improper actions mentioned. I began going back and forth with LCJ staff about the copying denials, previously averred to and recorded on the record of this case. The USMS was a party in my initial civil action apart from 15-CV-53, and had an interest in allowing the access to court denial to continue against me to

prevent civil action from being initiated or be inadequately prepared, since it had breached its duty owed to me by its detainment and would be subject to civil action as well.

I also reported this to the court on September 19, 2014. See 15-CV-53, Dk. 1, p. 31-34. These issues and more were continuously reported to the USMS by letter, and were not addressed. This caused some of the grounds in 16-CV-116 (RJA) when the USMS refused to address or intervene in providing me with access to court and ministerial duties to ensure due process of law to me while in its custody and contracted housing to other facilities.

26. Other harms were that in 2020, while on criminal remand from the Second Circuit, Swinton experienced the same denial of the NYS prior conviction documents that were obtained by himself and standby counsel, which finally proved that Swinton was not convicted of attempted sales of a controlled substance, but actually convicted of accomplice to an attempted sale of a controlled substance. This prevented the initial challenge to the prior New York charge, in which Swinton was proceeding pro se at the time, under the correct statutes of conviction. See *United States v. Swinton,* 15-CR-6055-EAW (W.D.N.Y.), Dk. 345.

Instead of being able to accept an 87 month plea agreement, this subjected me to a 270 month sentence after trial.

ACCESS TO COURT INJURY

35. While in the LCJ, Swinton was prevented from filing this claim earlier to prevent further abscesses in the facility, causing further pain and suffering while denying judicial intervention redress from the court in a federal or State civil setting to gain jurisdiction over his dental abscessing issue. A total of 7 abscesses in the LCJ that could have been prevented by court intervention had Swinton been able to adequately research the procedure for gaining this intervention in a civil court forum. Swinton was also prevented from filing a proper post conviction motion in Florida from the denial of access to court, and unable to file any compelling motions in the State court to gain my prior conviction documents that my counsel was under no obligation to provide, which the United States directly denied these documents while under legal obligations to provide these documents by Federal Criminal Procedure Law. This effectively prevented me from exercising my right to proceed

pro se, in which I ultimately did after I could not receive help from my counsel or the court in a criminal setting.

ARGUMENT OF THE CASE

Was there enough evidence to call for a trial against the defendants? Was there damage to the plaintiff for denial of access to court? Were the statements of the defendants taken as evidence over the statement and physical medical evidence of the plaintiff? Was there actual legal and physical damage to the plaintiff when he was denied access to court? Was a policy alleged enough by Swinton's allegations and the medical records that it should have proceeded on the merits against the county defendants?

At initial dental assessment, Thomas of the MCJ, had no idea of where or when Swinton would be going to a "next facility" or whether he would be transferred anywhere. This is evidence that Thomas knew that the USMS would not provide the treatment that was needed and prescribed by Thomas as needed on December 26, 2012 to remedy the abscessings that would continue. New York State Codes, Rule and Regulation mandated that Thomas provide adequate health care to a

known dental problem that was not remedied and could not be cared for at either facility. See 9 NYCRR §§ 7010.2(h),(i) and (j). The defendants of this case directly violated their own State protocols in order to avoid treating Swinton. This has become policy between State jail facilities since claims have failed in the courts, and now affecting all pretrial and sentenced prisoners in the State of New York. See Leckie v. City of New York, WL 3168699 (S.D.N.Y). The same actions happened to Swinton in this case. See Leckie, WL 3168699 at *14.

All of the MCJ and LCJ medical staff was outright refusing to contact the USMS to get dental care for me, whether root canal or extraction, and when the USMS contacted by me or ordered by the court to address me care, nothing was done and Swinton was transferred after the complaint to the USMS. Chief Deputy Yasso also averred that the USMS attempted this transfer tactic to prevent the root canal performed on February 18, 2015, and he requested that the USMS not transfer me. Upon information and belief, the USMS is instructing their housing facilities being used for federal detainees not to contact them pertaining to certain care and they would be denied assistance or approval for anything that would shift the cost to the USMS or require transport to

an outer dental facility. See 9 NYCRR §§ 7010.2(h) and (i). The MCJ and LCJ were in league with this deliberate indifference.

It was alleged in court by the USMS that Swinton had not sought help for the tooth in the LCJ, and had not submitted any medical slips pertaining to the abscessed tooth. The medical records directly contradicts this statement made in court by the USMS that the LCJ had informed them that Swinton had not sought help for his dental issues, and made on the record of Swinton's criminal case. This is direct evidence that the LCJ was avoiding care of Swinton's abscessing tooth, and in league with the Western District of New York USMS. A guilty intent can be inferred by the record that the defendants were deliberately avoiding the correct care of Swinton, and when Swinton proceeded with remedies to obtain help, he was intended to be shipped to avoid liability and care of Swinton.

By the defendants' own affidavits submitted to the court, every defendant from both county jail facilities knew that they had to get care (1) outside of their facility for Swinton, and (2) had to contact the USMS for this care. 13 different abscesses showed that the facilities did not remedy the problem, and were directly aware that it was a reoccurring

infection. Each dental defendant at the MCJ and LCJ defendants saw Swinton for the same abscessing tooth 3 or more times. The New York Commission of Corrections itself held that this was not adequate care given to Swinton.

At no time did the district or appeals court argue that Swinton's injury was not an unnecessary infliction of pain prescribed by the Eighth Amendment or "serious", and prior precedent bound the court from stating otherwise. See Chance v. Armstrong, 143 F.3d 698,702-703 (2d Cir. 1998); Estelle v. Gamble, 429 U.S. 97,104 (1976). The records also show that officials knew that further damage would occur, and in fact did reoccur. See Farmer v. Brennan, 511 U.S. 825,835 (1994). Even when the basis of claim is the delay in treatment, by Second Circuit precedent, further harm should have been evaluated. See Smith v. Carpenter, 316 F.3d 178,185-86 (2d Cir. 2003). The facts of the case called for further depositions or a trial after court transcripts and medical documents supported Swinton's version of the actions of the defendants. The additional prongs added by the Second Circuit on the standard of deliberate indifference erodes the principles of Farmer and Estelle, Id.

This same claim would lie against a federal employee under Carlson v. Green, 446 U.S. 14 (1980).

The court held that Swinton did not state that policy was the problem clearly enough, even though acknowledging that it was alleged. The plaintiff began the initial complaint with the statement that "the defendant, Livingston County, has shown deliberate indifference and medical neglect in regards to the plaintiff..." and "the defendant is responsible for policy and the enforcement of such, and for the supervision of the Livingston County Jail". Swinton also alleged the same for Monroe County. A Monell v. New York City Dept. of Social Services, 436 U.S. 658,694 (1978) was stated from the initial document, and the court dismissed these defendants with prejudice. The policy is that the county jails routinely deny dental care to federal pretrial detainees, in league with the USMS, and this policy caused over two years of constant abscessing to the petitioner. A parallel suit was filed against the USMS along with this complaint. This suit survived summary judgment and is still pending. See Swinton v. United States, 15-CV-47 (W.D.N.Y.).

Actual Injury for Due process of Law Denial.

Swinton repeatedly abscessed while seeking legal remedies for himself, and even addressing the court in his criminal case for help. Swinton sought to go pro se in his own criminal proceedings and Livingston County jail staff was made aware of this. Swinton also made it clear that he was seeking judicial intervention when the jail staff ceased all legal access. Swinton suffered four more abscessing episodes while trying to get his own help after a court's intervention on April 10, 2014 and May 14, 2014, while the court's intervention did not work on the USMS and the housing jail facilities. The court repeatedly held that Swinton was not injured, yet the medical records and court filings show that he was in fact injured. At no time did the court take into consideration that Swinton also wanted to challenge the conditions of his confinement, in which the dental issues were alleged in the same complaint and the allegations that the Monroe County Jail sought to hinder the filing of a grievance in its facility, and the Livingston County Jail sought to hinder the suit Swinton was seeking to file. See 9 NYCRR § 7032.4(a), Lewis v. Casey, 518 U.S. 343,351 (1996) and Bounds v. Smith, 430 U.S. 817,355 (1977). These allegations were made to the court by initial and amended complaints to the Western District of New York.

Another Prong of Deliberate Indifference has been Added in The Second Circuit.

Swinton's issues were denied on a "Men's Rea" prong in Darnell v. Pineiro, 849 F.3d 17,29 (2d Cir. 2017). See DCD 237, p. 24-32 (Report and Recommendation). This would abrogate the role of the jury in civil cases, and allow the court to assess guilt or innocence from the filing of the complaint and the words of the defendant. This goes beyond assessing evidence and completely deciding the case from the initial complaint and defendant affidavits. Swinton directly informed the court on numerous occasions that he did not refuse any extractions of the tooth, and in fact, Dr. Chung averred that the tooth couldn't be extracted at the Monroe County Jail and made no request for Swinton to be seen at another dentistry. Immediately upon being transferred to the LCJ, Swinton submitted a medical request asking for an extraction, yet the defendants alleged that Swinton refused an extraction. The defendants provided no documentation that Swinton refused an extraction from the outside dentist on September 11, 2014, and the dental records from Dr. Washburn's office does not reflect this denial of extraction. This was done

to mask the guilty intent of all parties that were already shown to submit self-serving or incorrect testimony by their own affidavits and Swinton's medical records. The court relied heavily on the affidavits of the defendants to dismiss this case, even when it contradicted the medical documents.

Swinton was held to answer for the medical documentation omissions of the defendants, even after he wrote his own affidavits to fill in the omitted parts and disputed parts of the documents. See DCD 237, p. 30 - 32. The court also relied on care that was not given to Swinton, and in fact, disputed in the facility grievance of Swinton. See 2d. Cir. SA, p. 581 - 584. The court faulted the USMS for negligence, in which the defendants of this case had an obligation to plan and obtain adequate health care for Swinton from the USMS, which did not occur until August 7, 2014, and still did not follow up with the care request that was known to be needed. Abscessing episodes began in December of 2012.

Just reading the complaint and the medical records, this was a material issue of fact that could only be decided by a jury, yet it was decided by the court.

In Conclusion

The petitioner humbly requests that this court grants certiorari to resolve the issue of care that has become routine in the Western District of New York.

July 7, 2023

By:

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Robert Lee Swinton Jr., Pro Se