

Case No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

Frederick C. Cashner, Jr.
Petitioner,

v.

John J. Widup, *et al.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Frederick C. Cashner, Jr. #231127
Petitioner, *pro se*
Pendleton Correctional Facility
4490 W. Reformatory Rd.
Pendleton, IN 46064-9001

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit decided an important federal question in a way that conflicts with this Court's decision in *Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), when it failed to acknowledge Cashner's argument that, although the doctor did not *completely* ignore his pain, the doctor's choice of the "easier and less efficacious treatment" for his objectively serious medical condition can still amount to deliberate indifference for purposes of the Eighth Amendment?
2. Whether the Court decided an important federal question in a way that conflicts with this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009), when it:
 - a. condemned Cashner for failing to introduce at screening the contract between ACH and the Porter Co. Jail? And,
 - b. when it concluded that Cashner's statement:

"Advanced Correctional Healthcare acted with deliberate indifferent to my serious medical needs by creating and employing a policy to refuse and/or delay treatment to save money, thus violating my rights to Due Process of Law and my Eighth Amendment privilege against cruel and unusual punishment,"

was nothing more than a few words on paper and insufficient to state a plausible *Monell* claim?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page.

Accordingly, a list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. John J. Widup, Warden Porter Co. Jail 2755 S.R. 49, Valparaiso, IN 46383
2. Nadir Al-Shami, Doctor Porter Co. Jail 2755 S.R. 49, Valparaiso, IN 46383
3. Kimberly White, Nurse Porter Co. Jail 2755 S.R. 49, Valparaiso, IN 46383
4. Advanced Correctional Healthcare 3922 W. Baring Trace, Peoria, IL 61615

TABLE OF CONTENTS

Questions Presented	1
List of Parties	2
Table of Authorities Cited	3
Index to Appendices	3
Opinions Below	4
Jurisdiction	4
Constitutional and Statutory Provisions Involved	5
Statement of the Case	5
Reasons for Granting the Writ	15
Conclusion	15

TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>PAGE NUMBER</u>
Arnett v. Webster, 658 F.3d 742 (7th Cir. 2011)	14
Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)	15
Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) .	15
Berry v. Peterman, 604 F.3d 435 (7th Cir. 2010)	13
Cesal v. Moats, 851 F.3d 714 (7th Cir. 2016)	13
Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)	15
Estelle v. Gamble, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976)	12
Kelley v. McGinnis, 899 F.2d 612 (7th Cir. 1990)	12
Pyles v. Fahim, 771 F.3d 403 (7th Cir. 2014)	14
Smego v. Mitchell, 723 F.3d 752 (7th Cir. 2013)	14
Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974)	12

<u>RULES & STATUTES</u>	<u>PAGE NUMBER</u>
Fed. R. Civ. P. 8	15
28 U.S.C. § 1254(1)	4
42 U.S.C. § 1983	8

INDEX TO APPENDICES

Opinion of the United States Court of Appeals for the Seventh Circuit	Appendix A
Opinion of the United States District Court, N.D. Indiana	Appendix B
Cashner's § 1983 Complaint of June 23, 2014	Appendix C
Cashner's Brief in Opposition to Summary Judgment.....	Appendix D
Cashner's Appellate Brief to the Seventh Circuit Court of Appeals	Appendix E

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari 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 unpublished.

The opinion of the United States District Court appears at Appendix "B" to the petition and

☒ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date upon which the United States Court of Appeals decided my case was November 28, 2017.

A copy of that decision appears at Appendix "A".

☒ No petition for rehearing was filed.

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

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Eighth Amendment to the United States Constitution:

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

2. Due Process Clause of the Fourteenth Amendment to the United States Constitution, Section 1.:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

From March 25, 2011, through February 25, 2013, Cashner was confined in the Porter Co. Indiana Jail as a pretrial detainee. And, despite his repeated complaints, Cashner suffered severe chronic headache pain for the entire duration of the above-stated twenty-three (23) month time period.

In response to his complaints, Cashner was prescribed a variety ineffective blood pressure and pain relieving medications.

On September 16, 2011, Cashner informed his primary care physician, (Dr. Wes Harmston), that he had experienced similar headaches approximately ten (10) years earlier; that said headaches were caused by problems with his C5 and C6 vertebrae;

and that the same was treated/rectified by surgical fusion of said vertebrae.

On May 14, 2012, Dr. Harmston stated that there was nothing else he could do to control Cashner's headaches, and that it was therefore his recommendation that Cashner see a Neurologist. Cashner then advised that if money was going to be an issue in seeing a specialist, he had insurance that would cover the costs.¹

Dr. Harmston thereafter issued instructions that an appointment was to be made for Cashner to see a Neurologist, and a June 28, 2012, appointment was made for Cashner to see Merrillville, Indiana Neurologist Dr. Daksha Vyas. For reasons not particularly clear, however, Cashner was not transported to said appointment.

On August 30, 2012, however, Cashner was in fact transported to the office of Dr. Vyas, at which time she prescribed Ultram and Flexeril for pain; ordered blood work, an MRI, and C-spine X-rays; and issued instructions that said testing was to be scheduled and completed by the jail medical staff prior to the follow-up appointment that she scheduled for September 13, 2012.

On September 4, 2012, Nurse White drew blood for testing in accordance with the instructions of Dr. Vyas.

On that same September 4, 2012, however, Dr. Nadir Al-Shami, (who replaced Dr. Harmston in July 2012), entered the room; snatched Cashner's chart from Nurse White's desk, and began blustering that he had traveled the world treating patients; that he was a better doctor than any neurologist; and that he was not going to let another doctor tell him how to treat a patient of his.

¹ Cashner was employed with U.S. Steel in Gary, Indiana, where he enjoyed the benefit of full major medical insurance. And, upon his retirement in February of 2005, Cashner continued to pay for that same coverage with the same Insurance company until he could no longer afford to do so.

Dr. Al-Shami then stated that an MRI was a very expensive procedure, and that it was too expensive for Cashner to have at the jail's expense. To which, Cashner then reiterated that if money was going to be an issue, he had insurance that would cover the costs.

Dr. Al-Shami then stated that Cashner would not be returning to see Dr Vyas. He then canceled all of Cashner's prescriptions; canceled all of Dr. Vyas' ordered testing; and canceled Cashner's follow-up appointment with Dr. Vyas.

Dr. Al-Shami then stated that Cashner's headaches were all in his head, (implying that Cashner's headaches were imaginary), but that if he were still in pain, he should order Tylenol from commissary. Dr. Al-Shami then stated that he would no longer treat Cashner for his chronic headaches.

Thereafter, Porter Co. Jail Warden John J. Widup called Cashner into his office and questioned Cashner about his headaches, and suggested that maybe Cashner's problem was that he had not been taking his prescribed blood pressure medications.

Cashner then assured Warden Widup that he always takes his medications, and that it had never been documented or even suggested otherwise.

Warden Widup then reiterated Dr. Al-Shami's statement that an MRI was too expensive for the jail to pay for, and Cashner reminded Widup that he had medical insurance that would cover the costs of any ordered testing and/or treatment.

Warden Widup then questioned Cashner as to how he could still have medical insurance after being in jail for over a year, and advised that he would have to confirm this fact with his Head Nurse/defendant Kimberly White.

Thereafter, on October 11, 2012, because his ability to have defense-related communications with his client was being hindered by Cashner's unrelenting headaches, Cashner's criminal defense attorney filed a Motion with the court wherein Cashner's criminal case was pending, requesting an Order to compel Porter County Jail authorities to act in accordance with Dr. Vyas' instructions, and on October 29, 2012, the same was granted.

Cashner was then rescheduled to see Dr. Vyas on December 6, 2012, which in turn extended Cashner's pain and suffering by an additional one-hundred and sixty (160) days, and resulted only in the reordering of the same testing and prescriptions as those which had been canceled by Dr. Al-Shami on September 4, 2012.

On December 6, 2012, Dr. Vyas again ordered Ultram, Flexeril, blood work, X-rays, an MRI, and reissued her instructions that said testing be completed prior to the rescheduled follow-up appointment of February 22, 2013.

Said testing, however, was never performed, and the appointment of February 22, 2013, was again canceled by Dr. Al-Shami.

On January 3, 2013, Cashner was convicted as charged, and on February 25, 2013, the defendant(s) realized their goal of causing Cashner and his presumably expensive medical problems to be the responsibility of the IDOC.

In his § 1983 Complaint of June 23, 2014, [Appendix C], Cashner alleged that Dr. Al-Shami and certain Porter County Jail employees had violated his Federally protected rights because their decision(s) to deny him effective medical treatment were based upon concerns for the expense, as opposed to medical judgment.

Cashner also alleged that Advanced Correctional Health, Inc., (aka ACH), had acted with deliberate indifference to his serious medical needs by creating and employing a policy to refuse and/or delay treatment to save money, thus violating his Due Process and Eighth Amendment proscriptions against cruel and unusual punishment.

Cashner also alleged that because the conduct of the Medical defendant's was grossly negligent, and a significant a departure from accepted professional standards and practices, the same constitutes medical malpractice and was thus done in violation of Indiana's Medical Malpractice Act.

On July 30, 2014, the court conducted the requisite "screening" of Cashner's Complaint and thereupon granted Cashner leave to proceed on his claims that Warden John Widup, Nurse Kim White, and Dr. Nadir Al-Shami acted with deliberate indifference to his serious medical needs.

The court, however, dismissed defendants David Lain and Ron Gaydos, and all claims against them, for the stated reason that his Complaint does not plausibly allege that these defendants, (the Porter County Sheriff and the Assistant Warden), were personally involved in the complained of medical decisions.

The court then dismissed ACH, and all claims against them, for the stated reason that Cashner had not allege that Dr. Al-Shami acted pursuant to an official policy, and thus his Complaint does not provide a plausible basis to infer that Cashner's injury was caused by an official practice or policy.

The court then stated that "all other claims contained in the Complaint" were

being dismissed.

On March 28, 2016, Widup filed his motion for summary judgment wherein he argued that because there is no evidence that he acted with deliberate indifference to Cashner's serious medical needs, he is entitled to summary judgment.

On the same March 28, 2016, defendants White and Al-Shami filed their motion for summary judgment wherein they argued that the medical care rendered to Cashner was adequate and within the applicable standard of care.

In support of his argument, Warden Widup submitted his Affidavit wherein he denied any personal involvement in medical-related decisions at the Porter Co. Jail, and submitted a copy of the Contract between ACH and the Porter County Jail, which bolstered Cashner's argument that the defendant's actions were done in accordance with their contractually imposed "cost-containment" policy.

In support of their argument, in addition to their Affidavits wherein they confirm that Dr. Wes Harmston, (not Dr. Al-Shami), was in fact Cashner's initial "primary care physician," and that Warden Widup was in fact involved in "medical-related decisions," defendants White and Al-Shami submitted two-hundred and eighty-eight, (288) pages of Cashner's "medical records," which consists of little more than a daily log of their tinkering with, and monitoring of, Cashner's blood pressure.

In his April 22, 2016, Brief in Opposition to Summary Judgment, [Appendix D], Cashner brought to the district court's attention that the defendant's arguments *completely ignore* his allegations that their decisions were cost-containment driven, but instead focused almost exclusively on their position that Dr. Al-Shami's

ineffectual fiddling with Cashner's blood pressure equates to constitutionally adequate medical treatment.

Cashner brought to the court's attention that Dr. Al-Shami was not a neurologist, and thus not qualified to make neurological assessments or diagnoses, and that the record was clear that Dr. Al-Shami *cancelled* Cashner's neurological consultations *before* Dr. Vyas was able to complete her neurological examinations, such that there were no identifiable and/or reviewable conclusions upon which Dr. Al-Shami could rely for making competent "neurological" medical judgments.

It was also brought to the attention of the district court that subsequent to his placement in the IDOC, a radiologist at this Facility, *by a simple X-ray*, determined that Cashner's chronic headaches, (just as he repeatedly told the defendants), were the product of pinched nerves caused by endplate osteophyte, (spinal bone spurs).²

Cashner also brought to the court's attention that the defendant's had *admitted* that Warden Widup was in fact involved in "medical-related decisions," and that the same sufficiently rebutted the defendants "no direct involvement" arguments, such that the entry of summary judgment would be precluded.

On December 21, 2016, the district court issued a forty-nine (49) page opinion, thirty-nine (39) pages of which was nothing more than a wholesale adoption – a "verbatim past[ing]" – of the Statement of Facts from the defendant's summary

² Although it did not occur until after summary judgment was entered against him, in accordance with the recommendations of the neurologist that Cashner met with subsequent to his placement in the IDOC, Cashner, on March 9, 2017, underwent surgery at Ball Hospital in Muncie, Indiana, at which time his C4 vertebra was fused with his already fused C5 and C6 vertebrae, which resulted in the termination of his headaches of **six (6) years**.

judgment brief, and a detailed of review the record in the light most favorable to the defendants, (*i.e.* the moving party), wherein the court gave the defendants the benefit of all reasonable inferences that could be drawn there from, ultimately granting summary judgment in their favor. [See Appendix B]

In his June 8, 2017, Brief to the United States Court of Appeals for the Seventh Circuit, [Appendix E], Cashner argued, *inter alia*, that because Dr. Al-Shami had not identified an effective pain medication and could not explain Cashner's pain, and yet despite his knowledge of Cashner's history of endplate osteophyte, rejected, and in fact terminated, the obvious and cost-free³ alternative of allowing Cashner to see a neurologist, a jury could, on the summary judgment record, conclude that Dr. Al-Shami either knowingly adhered to an easier and less efficacious method to treat Cashner's pain, (a method proven to be ineffective), or that he simply decided that Cashner could endure his pain until his transfer to the IDOC, at which time he would no longer be his problem, or the problem of the Porter Co. Jail.

In support of his appellate arguments, Cashner directed the Court to *Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), wherein this Court, adopting the language of the Second Circuit in *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974), held that "doctor's choosing the 'easier and less efficacious treatment...', may be attributable to deliberate indifference ... rather than an exercise of professional judgment." *Estelle, Id.* 429 U.S. at 104 n.10

Cashner then directed the Court to *Kelley v. McGinnis*, 899 F.2d 612, 616 (7th Cir. 1990), which is the decision wherein the Seventh Circuit first applied this

³ Given Cashner's full-coverage Insurance.

Court's above-stated *Estelle* principle, and held, "complaint sufficient to state claim where plaintiff alleged that clinic personnel deliberately gave him certain kind of treatment knowing that it was ineffective." *Id.* at 616.

Cashner also directed the Seventh Circuit to one of its more recent application of this Court's *Estelle* principle, *Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010), wherein the Court held that "Although the doctor did not completely ignore plaintiff's pain, a doctor's choice of the "easier and less efficacious treatment" for an objectively serious medical condition can still amount to deliberate indifference for purposes of the Eighth Amendment. *Estelle*, 429 U.S. at 104 & n.10." *Id.* at 441

In its opinion of November 28, 2017, however, despite its reference to its most recent application of this Court's above-stated *Estelle* principle, (*i.e.* *Cesal v. Moats*, 851 F.3d 714, 714 (7th Cir. 2016), the Court concluded that Cashner was simply *disagreeing* with Dr. Al-Shami's treatment decisions, and that because Cashner, during six months of treatment, was personally examined by Dr. Al-Shami on six separate occasions and benefitted from seventeen telephone orders providing for additional treatment,⁴ this level of continuous treatment would not constitute even negligence, let alone deliberate indifference." [Appendix A, p.5]

The Court also concluded that because Cashner had not placed before the court at screening the contract between ACH and the Porter Co. Jail, his short plain statement of the claim was nothing but "a few words on paper" and "insufficient to state a plausible *Monell* claim." [Appendix A, p.7]

⁴ It should be noted that the Court's reference to "additional treatment" in reality, amounted to nothing more than "telephonic tweaks" to the dosages of the already prescribed, but utterly ineffective blood pressure and pain relieving medications.

Cashner, however, remains subscribed to his position that the “record evidence” is such that would support an inference that Dr. Al-Shami’s treatment of Cashner was blatantly inappropriate; caused him to suffer needless pain; and thus was sufficient to survive summary judgment.

To be sure, the disparity between Dr. Al-Shami’s testimony and that of Cashner about the appropriateness of the treatment that he was receiving amounts to more than mere *disagreement*.

The record is clear that Cashner suffered from, and had a documented history of, endplate osteophyte, and that Dr. Al-Shami, fully aware of this fact, chose the easier, less efficacious course of tinkering with Cashner blood pressure medications, fully aware of the fact that said course of treatment was wholly ineffective.

Accordingly, because Dr. Al-Shami’s choosing the easier and less efficacious course of treatment could permit an inference that his “medical decision” to tinker with Cashner’s blood pressure medications was so significant a departure from accepted professional standards or practices, that the same calls into question whether Dr. Al-Shami was actually was exercising his professional judgment.

And, because this is a case scenario in which the Seventh Circuit was all too familiar, (see as additional examples *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014); *Smego v. Mitchell*, 723 F.3d 752, 758 (7th Cir. 2013); and *Arnett v. Webster*, 658 F.3d 742, 754 (7th Cir. 2011) (all explaining that a “physician is deliberately indifferent when he persists in an ineffective treatment.”), it is Cashner’s position that the Court’s decision of November 28, 2017, is one that not only conflicts with

many of its own prior decisions, but is a decision that conflicts with this Court's decision in *Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976).

REASONS FOR GRANTING THE WRIT

Because Cashner's summary judgment record is a textbook example of a doctor not *completely* ignoring his patient's pain, but instead choosing the "easier and less efficacious course of treatment," the Seventh Circuit's failure to acknowledge that this of Dr. Al-Shami's ineffectual treatment of Cashner can still amount to deliberate indifference for purposes of the Eighth Amendment constitutes the deciding of an important federal question in a way that conflicts with this Court's decision in *Estelle v. Gamble*, *Id. supra*.

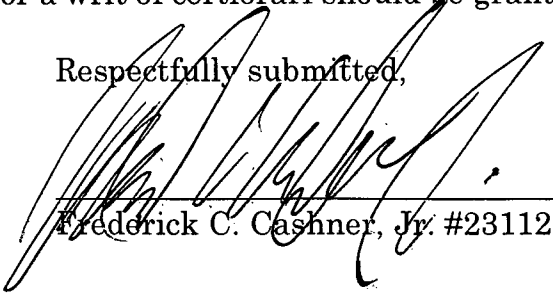
And, because Cashner's complaint was to be liberally construed and held to a less stringent standard than a formal pleading drafted by a lawyer, the Seventh Circuit's criticizing Cashner for failing to introduce the contract between ACH and the Porter Co. Jail at screening, and concluding that his short and plain statement of the claim showing that he was entitled to relief, as per FRCP Rule 8, was nothing more than a few words on paper and insufficient to state a plausible *Monell* claim, constitutes the deciding of another important federal question in a way that conflicts with this Court's decisions in *Bell*, *Erickson*, and *Ashcroft*, *Id. supra*.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Executed on: February 26, 2018

Respectfully submitted,



Frederick C. Cashner, Jr. #231127

Appendix A