No. 10-2012

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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| **ARBOLEDA ORTIZ,** | ) **Appeal from the United States** |
| **Plaintiff-Appellant,** | ) **District Court for the Southern** |
| | ) **District of Indiana,** |
| **v.** | ) **Indianapolis Division** |
| | ) **The Honorable Judge Larry J.** |
| **THOMAS WEBSTER, DOCTOR,** | ) **McKinney** |
| | ) |
| **Defendant-Appellee.** | ) **No. 2:05-cv-246-LJM-JMS** |

# BRIEF AND REQUIRED APPENDIX OF APPELLANT ARBOLEDA ORTIZ

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**ORAL ARGUMENT REQUESTED**

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## JURISDICTIONAL STATEMENT

Arboleda Ortiz alleges a violation of his rights under the Eighth Amendment through this *Bivens* action.

On November 15, 2006, Defendants filed a Motion for Summary Judgment (Dkt. 56). The district court granted it September 25, 2007. (Dkt. 62). Ortiz appealed to the Seventh Circuit. On June 13, 2008, the Seventh Circuit affirmed the judgment as to Defendants Mark A. Bezy and Sharon Seanez, but reversed and remanded as to Defendant Dr. Thomas Webster. *Ortiz v. Bezy,* 281 Fed. Appx. 594 (7th Cir. 2008). Remand was proper because the Court found Ortiz had shown a genuine issue of material fact concerning Dr. Webster. *Id.* Following remand, Dr. Webster filed a renewed Motion for Summary Judgment. (Dkt. 90). The district court granted it on March 30, 2010. (Dkt. 146). The district court had jurisdiction over Ortiz's claim pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

Ortiz filed a timely Notice of Appeal on April 27, 2010. The jurisdiction of the Seventh Circuit is proper via 28 U.S.C. § 1291 and Rule 4(b) of the Federal Rules of Appellate Procedure.

## ISSUES PRESENTED FOR REVIEW

I. Arboleda Ortiz had ptygeria. And while seven different medical personnel advised surgery, Ortiz would not receive it for six years. During that time, his daily life was consumed by eye irritations, sharp headaches, and deteriorating vision.

Was this deliberate indifference to Ortiz's serious medical needs?

II. When Ortiz's surgery was refused, a "NO TOWN TRIP" notation was stamped on the denial form. The NO TOWN TRIP notation reflected a policy whereby death row inmates were prohibited from being taken off-site for medical care.

Was the NO TOWN TRIP policy deliberate indifference to Ortiz's serious medical needs?

## STATEMENT OF THE CASE

Suffering from an eye condition known as ptygeria, inmate Arboleda Ortiz sued three correctional officials alleging deliberate indifference to his medical needs. Two officials were granted summary judgment, but the Court reversed as to the prison's Clinical Director, Dr. Webster. *Ortiz v. Bezy,* 281 Fed. Appx. 594 (7th Cir. 2008) (*see also* Appendix at A13). Upon remand, Dr. Webster again prevailed at summary judgment. And once again, Ortiz appeals.

## STATEMENT OF THE FACTS

Arboleda Ortiz is a federal prisoner housed in Terre Haute, Indiana. While the details of Ortiz's underlying conviction and death penalty sentence are not germane to this *Bivens* action, they are reported at *United States v. Ortiz*, 315 F.3d 873 (8th Cir. 2002).

### A. The Symptoms of Ptygeria

From the outset of Ortiz's incarceration at Terre Haute he suffered from ptygeria. (Dkt. 142 at 3, Ex. 3). In plain English, masses of thickened conjunctiva that cover the cornea. (Dkt. 142 at 3). The medical term also belies the gravity of the condition's consequences: near blindness. *Id.* Blocking light to the retina, ptygeria prevents images from being processed. *See* MD Guidelines at www.mdguidelines.com/pterygium. Ptygeria can also pull on the cornea and change the refractive properties of the eye, causing astigmatism. Digital Journal of Ophthalmology at www.djo.harvard.edu/sitephp?url=/patients/pi/426.

The specter of blindness aside, the physical pain caused by ptygeria is consuming. Ortiz's eyes were bloodshot, itchy, swollen, and often infected. (Dkt. 142 at 11, Ex. 50). Discharge seeped from them. *Id.* While Ortiz's suffering over the six years was constant, his pain level fluctuated from minor to intense to excruciating. *Id.* At his nadir, Ortiz felt like sandpaper was being rubbed across his eyes. *Id.* The thickened conjunctiva also left his vision blurred, akin to looking

through a dull, out-of-focus lens. *Id.* Not surprisingly, this distorted vision caused sharp headaches. *Id.*

Ortiz's plight was unavoidable. Inmates stated that Ortiz's eyes were swollen, oozing, and glazed over. (Dkt. 142 at 11, Exs. 51, 52, 53). Inmate David Hammer observed Ortiz's eyes when a liquid discharge was draining from them, and when they were swollen. *Id*. Hammer also described each eye being veiled with a coat of wax. *Id*.

**B. Surgery is Advised for Ortiz**

Ortiz underwent a medical examination upon entering the Terre Haute facility on January 19, 2001. (Dkt. 142 at 3, Ex. 1). He was documented as suffering from "eye trouble" and "cataracts." *Id.* Four months later, ophthalmologist Jonathan McGlothan examined Ortiz. (Dkt. 142 at 3, Ex. 3). Dr. McGlothan found Ortiz's visual acuity was 20/80 in each eye and that ptygeria existed. (Dkt. 142 at 4, Ex. 3). Dr. McGlothan prescribed glasses because Ortiz's vision improved to 20/50 with them. *Id.* But this remedy was cosmetic as his eyes had "visually significant" ptygeria and astigmatism. (Dkt. 142 at 5, Ex. 3). Accordingly, Dr. McGlothan recommended surgery. *Id.*

Dr. McGlothan's determination was aligned with accepted medical norms. Medline Plus, a service of the U.S. National Library of Medicine and the National Institutes of Health, states surgery is needed when ptygeria obstructs vision. *See* Medline Plus at www.nlm.nih.gov/medlineplus/ency/article/001011.htm.

Other sources similarly advise surgical removal if the ptygeria treads far enough onto the cornea of the eye. *See* Digital Journal of Ophthalmology at www.djo.harvard.edu/sitephp?url=/patients/pi/426. Finally, ptygeria should also be removed if there is a persistent foreign body sensation in the eye or if the eye is constantly irritated. *Id*.

For these reasons, Dr. McGlothan advised surgery. (Dkt. 142 at 5, Exs. 3, 4, 5). Dr. David George agreed with Dr. McGlothan's surgery plan on April 30, 2001. (Dkt. 142 at 5, Ex. 3). Clinical Director Dr. Gregory Lawson also approved Ortiz's surgery. (Dkt. 142 at 5, Ex. 8; see also Appendix at A19).

**C. Surgery for Ortiz is Denied**

The opinions of three doctors notwithstanding, the Utilization Review Committee ("URC") rejected the request. Signed by Debi Lamping, no explanation was given for the denial other than a cryptic "NO TOWN TRIP" written on the surgery recommendation. (Dkt. 142 at 5; *see also* Appendix at A19). Debi Lamping was a Health Systems Specialist at the prison from 1999 to 2005. (Dkt. 90 at 3). Her duties included coordinating outside health care visits for inmates. *Id.* Lamping testified that pursuant to the practice of prior Clinical Director Lawson, she would note whether a recommendation for outside treatment, *i.e.*, a town trip, had been approved by the URC. *Id.* at 3-4. If the URC rejected the request, Lamping would write "NO TOWN TRIP." *Id.*

After the surgery request was denied, Ortiz visited the Chronic Care Clinic on July 23, 2001, where it was again noted that Ortiz had ptygeria in both eyes. (Dkt. 142 at 5, Ex. 7). Dr. McGlothan's request for surgical excision was denied again, this time by the prison's Central Office on October 10, 2001. (Dkt. 142 at 5, Ex. 8; *see also* Appendix at A20). And again, no reason was given for the denial. *Id.* However, "NO TOWN TRIP" was scribbled on the document. *Id.*

Ortiz's condition remained, and on February 11, 2002, optometrist Dr. Cristian Radaneata examined Ortiz.[1] (Dkt. 142 at 6, Ex. 10). Diagnosing ptygeria in both eyes, he prescribed prednisone and eye drops. *Id.* In the meantime, Dr. Thomas Webster became the prison's Clinical Director on June 2, 2002. (Dkt. 142 at 7). Ortiz visited the clinic on December 13, 2002 and was again prescribed eye drops. (Dkt. 142 at 6, Ex. 14). Ortiz's ptygeria was noted as "red irritated conjunctiva dry." (Dkt. 142 at 7, Ex. 14).

On April 24, 2003, surgery was once again recommended. (Dkt. 142 at 7, Exs. 15, 16). Registered Nurse Pam Swain referred Ortiz to ophthalmologist Dr. Conner. *Id.* In her referral to Dr. Conner, Swain noted Ortiz's visual acuity was 20/100 and that Ortiz had "difficulty seeing up close and at a distance in both eyes." *Id*. In his May 14, 2003 medical report, Dr. Conner noted the ptygeria was "causing corneal distortion," and referred Ortiz to Dr. McGlothan for surgery.

[1] While an optometrist is a health care professional licensed to provide primary eye care services, an ophthalmologist is a medical doctor specialized in eye and vision care. *See* MedicareNet.com.

(Dkt. 142 at 7, Exs. 16, 17). Dr. McGlothan in turn submitted another request for surgical excision on May 21, 2003. (Dkt. 142 at 7, Ex. 19). The URC denied Dr. McGlothan's request for surgery the same day, no reason given. (Dkt. 142 at 7, Exs. 18, 19, 20). The URC noted a follow up with Dr. Webster. *Id*. On May 22, 2003, Dr. Webster determined Ortiz had 20/100 vision in each eye and might need surgery in the next two years. (Dkt. 142 at 7, Ex. 18). A six month follow-up with the eye clinic was also advised, but no record of it exists. *Id.*

A year later, Ortiz was examined on April 13, 2004 and prescribed more eye drops. (Dkt. 142 at 7, Ex. 21). On June 30, 2004, Ortiz's visit to Dr. Radaneata led to more eye drops with a notation to follow-up in six months. (Dkt. 142 at 8, Ex. 25). Clinic visits on July 29, 2004, August 2, 2004, and October 29, 2004 resulted in eye drops prescribed each time. (Dkt. 142 at 8, Exs. 26, 27, 28). The July 29, 2004 visit revealed the ptygeria was encroaching on 2 mm of the left cornea and 3 mm on the right cornea. *Id.*, Ex. 26. The August 2, 2004 notes stated "fibrosis tissue encroaching from the visual area to the iris area, associated with constant redness." *Id.*, Ex. 27. Ortiz had no treatment or examination for his ptygeria in 2005 and was never examined by an ophthalmologist in 2005. (Dkt. 119 at 66, Ex. 8).

Ortiz sued on October 5, 2005. On July 19, 2006, optometrist Dr. Rutan examined Ortiz and recommended surgery. (Dkt. 142 at 10, Ex. 31). He noted the ptygeria was encroaching 2 mm on the left cornea and 3 mm on the right, which

mirrored Ortiz's condition on July 29, 2004. (Dkt. 142 at 10, Exs. 30, 32). Ortiz was taken out of the prison for the first time on August 22, 2006, and examined by eye surgeon Dr. Padma P. Ponugoti. (Dkt. 142 at 10, Ex. 34). She bluntly concluded Ortiz "needs to have surgery." *Id.* She described Ortiz's eyes as "itchy, red, and painful." *Id.*

**D. Ortiz Has Surgery**

Dr. Ponugoti surgically removed the pterygium from Ortiz's left eye on November 1, 2006. (Dkt. 142 at 10-11, Exs. 38, 39, 43). Ortiz saw Dr. Ponugoti again on December 14, 2006. (Dkt. 119 at 30, Ex. 4 at 6-7). Dr. Ponugoti recommended that a follow-up appointment be scheduled within two months. *Id.* But Ortiz would not see Dr. Ponugoti for another six months. On June 19, 2007, Dr. Ponugoti determined that Ortiz had ptygeria with rapid growth in both eyes. (Dkt. 119 at 33, Ex. 4 at 9). She thus recommended a follow-up with a cornea specialist for surgery: "excision with mitmycin C or ammotic membrane transplant." *Id.*

Time would again lapse. Ortiz would not see the cornea specialist as recommended by Dr. Ponugoti. (Dkt. 119 at 34, Ex. 4 at 10). Instead, three months later, Ortiz was again examined by Dr. Ponugoti. *Id*. She reaffirmed her previous diagnosis and advised that Ortiz needed a cornea specialist "ASAP." *Id.* But months again passed, and it was not until March 11, 2008 that Ortiz saw Dr. Robert D. Deitch, Jr. (Dkt. 119 at 36, Ex. 5 at 1). Dr. Deitch recommended

resection with conjunctival autograph placement, and that both eyes be operated on simultaneously. *Id.* The URC deferred the request because surgery was "not medically necessary" on May 1, 2008. (Dkt. 119 at 36, Ex. 5 at 2-3). The Seventh Circuit issued its decision reversing as to Dr. Webster on June 13, 2008. Two weeks later, Ortiz was brought to the Beltway Surgery Center in Indianapolis where Dr. Deitch surgically removed the ptygeria from Ortiz's eyes. (Dkt. 119 at 40-41, Ex. 5).

**E. The NO TOWN TRIP Policy**

Death row inmates at Terre Haute were told they could not receive outside medical treatment unless the condition was life-threatening. (Dkt. 142, Exs. 53, 55, 57). Assistant Health Services Administrator Andrew Rupska told David Hammer that death row inmates were under a "no town trip" designation, meaning no outside medical care. *Id.*, Exs. 52, 53. In 2000, Hammer was not allowed to go to an outside hospital where he could be tested for Gallbladder disease. *Id*. Warden Harley G. Lappin told Hammer that the decision was due to his security classification, and came from the Federal Bureau of Prison's Central Office. *Id*. The "no town trip" policy was also applied to Jeffery Paul who was refused an off-site visit to a medical facility. (Dkt. 142, Ex. 57). Instead, a fellow inmate removed Paul's cyst with a razor blade. *Id*. These conditions garnered the attention of the ACLU, which began investigating, *inter alia*, the medical treatment provided to inmates on death row, including Ortiz.

*See* www.tribstar.com/local/x1155776530/ACLU-alleges-abuses-on-Terre-Haute-Death-Row.

**F. The Procedural Posture**

Ortiz brought a *pro se* Eighth Amendment claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). Defendants Mark Bezy, Sharon Seanez, and Dr. Webster filed a Motion for Summary Judgment (Dkt. 56). The district court granted it. (Dkt. 62). Still lawyerless, Ortiz appealed. The Seventh Circuit affirmed as to Bezy and Seanez, but reversed as to Dr. Webster. (Appendix at A14). The Court reversed because Dr. Webster denied Ortiz surgery after eye specialists had recommended it, and "although he belatedly provided an explanation for the denials-that the eye specialists found that the ptygeria did not affect Ortiz's vision-the explanation does not square with the record." (Appendix at A17). The Court also highlighted "the unexplained 'NO TOWN TRIP' notation, which read in Ortiz's favor suggests that he was denied surgery because it would have required a trip to town." *Id*. A question of fact existed because the Defendants "offered no explanation for the notation, and they gave no other contemporaneous reason for denying Ortiz's surgery." *Id*.

Following remand, Dr. Webster filed a renewed Motion for Summary Judgment. (Dkt. 90). Dr. Webster relied on affidavits from Debi Lamping and his expert, Dr. Maturi. Dr. Maturi stated that surgery is needed when visual acuity

significantly declines. (Dkt. 90, Ex. 1). Such a decline occurs when a person's vision falls below the 20/50 range, which is when cataract surgery is reimbursable under Medicare guidelines. *Id.*

The District Court found Ortiz's ptygeria "certainly reached the stage of a serious medical need." (Appendix at A9). Thus, the case hinged on whether Dr. Webster acted with a sufficiently culpable state of mind. *Id*. The court found he had not, determining Ortiz had only shown a "disagreement with medical professionals about his treatment needs." (Appendix at A11). The court found Dr. Webster's explanation of the NO TOWN TRIP designation "cryptic" but granted summary judgment anyway. (Appendix at A11). Ortiz appeals.

## SUMMARY OF ARGUMENT

Death row and human decency are not incompatible. Nor is the daily life of a death row inmate an abstraction. Yet for six years, Arboleda Ortiz was ravaged by ptygeria. He suffered excruciating eye pain and headaches while his eyesight inexorably eroded. The damage, both physical and mental, wrought by ptygeria confirms Ortiz needed surgery. Seven different medical personnel agreed. But Ortiz waited six years, turning a bad dream into a prolonged nightmare.

Under the Eighth Amendment, correctional officials are liable only if their conduct is deliberately indifferent. This standard is arduous. But four points eviscerate that government-friendly dynamic: the debilitating nature of ptygeria, seven medical personnel recommending surgery, six years of suffering, and a NO TOWN TRIP policy precluding death row inmates from outside medical care. These four facts render this case *sui generis*. Dr. Webster's actions constitute deliberate indifference because they enabled the corrosive effects of ptygeria to fester. Permitting eye pain, headaches, and vision loss for six years was an unnecessary infliction of pain.

The District Court's finding that Dr. Webster did not act with deliberate indifference warrants reversal. This Court's *de novo* review facilitates that end. Subjecting Ortiz to daily discomfort, painful eyes, and near blindness for six years was cruel and unusual. He deserves his day in court.

## ARGUMENT

### I. Standard of Review.

The Court reviews matters decided on summary judgment *de novo,* resolving all reasonable inferences in favor of the non-moving party. *Sherrod v. Lingle,* 223 F.3d 605, 610 (7th Cir. 2000). Summary judgment is proper only if the record shows no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). If the Court finds an issue of material fact exists, it will reverse. *Sherrod,* 223 F.3d at 610.

### II. Ortiz Was Deprived of a Constitutional Right.

Alleging violations of his civil rights guaranteed under the Constitution, Ortiz brings this action via *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Per *Bivens*, a claimant is entitled to damages for injuries caused by federal officials' constitutional violations. *Id.* at 396-97. A claimant must show: (1) a deprivation of a right secured by the Constitution and laws of the United States; and (2) that the deprivation was caused by an official acting under color of federal law. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978). As the prison's Clinical Director, Dr. Webster committed acts incompatible with the Eighth Amendment.

### III. Deliberate Indifference To Ortiz's Medical Needs Violates the Eighth Amendment.

The Eighth Amendment prohibits cruel and unusual punishment. U.S. CONST. AMEND. VIII. This prohibition encompasses correctional medical care

claims. *Estelle v. Gamble,* 429 U.S. 97, 106 (1976). Per *Estelle*, prison officials may not act with "deliberate indifference" to the serious medical needs of a prisoner. *Id.* at 104-05. The *Estelle* standard involves two criteria: (1) the potential harm to an inmate is sufficiently serious to require treatment; and (2) the official was deliberately indifferent to the inmate's health and safety. *Id.; Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

### A. Vision Loss Epitomizes Sufficiently Serious.

A condition is serious if the failure to treat it "could result in further significant injury or the unnecessary and wanton infliction of pain." *Gutierrez v. Peters,* 111 F.3d 1364, 1373 (7th Cir. 1997) (internal quotes omitted). In other words, the sufficiently serious standard is met when a condition is one that society considers "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling v. McKinney*, 509 U.S. 25, 36 (1993) (emphasis in original). Ortiz's ptygeria satisfies this standard because it necessitated surgery.

#### 1. The District Court correctly found Ortiz's condition is serious.

The District Court found Ortiz's ptygeria "certainly reached the stage of a serious medical need." (Appendix at A9). There is no reason to doubt that ruling. A condition that causes near blindness and leaves a person with perpetually itchy and discharge-filled eyes is the height of serious. Remarkably, Dr. Webster refused to concede this element at summary judgment. (Appendix at A9). If he

clings to this position on appeal, he should explain how a condition that causes excruciating pain is not serious and whether he would be content to forego surgery and live with ptygeria for six years.

Considering conditions which the Court has deemed serious confirms why the first element of *Estelle v. Gamble* is met here. For example, *Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007) (openly dislocated finger); *Johnson v. Doughty*, 433 F.3d 1001, 1003 (7th Cir. 2006) (hernia); and *Norfleet v. Webster*, 439 F.3d 392, 394-95 (7th Cir. 2006) (arthritis). These afflictions pale in comparison to the pain and suffering of ptygeria. Additionally, the Court hinted that Ortiz's condition was serious. (Appendix at A16). It observed, "most of the doctors—including specialists—who examined Ortiz recommended surgery and all prescribed some treatment …."*Id*. The Court ultimately discerned an issue of fact about the seriousness of Ortiz's condition given the "'visually significant' growths on his eyes." *Id*. at A17. If the findings of the district court and this Court are not enough to satisfy the first prong of *Estelle v. Gamble*, the following sections should.

**2. Ptygeria is a serious medical condition necessitating surgery.**

A serious medical condition is also defined as one "diagnosed by a physician as mandating treatment …." *Gutierrez*, 111 F.3d at 1373. A claimant may rely on his treating physicians to establish his standard of care, "even if those physicians are defendants or agents of defendants." *Gil v. Reed*, 381 F.3d

649, 660 (7th Cir. 2004). The recommendations of those treating Ortiz demonstrates ptygeria's seriousness. Between April 2001 and June 2008 no less than seven medical personnel recommended surgery. Medical records spanning six years noted Ortiz's eyes were inflamed, draining liquid, swelling, and irritated. (Dkt. 142 at 11). Ortiz also had significantly altered vision, as noted by Dr. McGlothan and Dr. Conner. (Dkt. 142 at 17). *Estelle v. Gamble* is thus satisfied.

Moreover, a serious medical condition can be "one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Gutierrez*, 111 F.3d at 1373. A medical degree was not needed to recognize Ortiz's plight. His bloodshot and discharge-filled eyes were unavoidable. Fellow inmates noted as much. (Dkt. 142 at 11, Exs. 51, 52, 53). David observed Ortiz's eyes when liquid discharge dripped from them. *Id.,* Exs. 52, 53. Hammer also described each eye as being covered with wax. *Id*. This evidence, viewed in Ortiz's favor, proves the obvious and serious nature of Ortiz's condition.

In sum, the District Court correctly found Ortiz's condition was serious. The failure to operate resulted in unnecessary headaches, infected eyes, and deteriorating eyesight. These are conditions "today's society chooses not to tolerate." *Helling*, 509 U.S. at 36. And because Ortiz experienced severe pain and significant anxiety while waiting six years for surgery, he was denied "the minimal civilized measure of life's necessities." *Gutierrez*, 111 F.3d at 1369.

### B. In Depriving Medical Care That Perpetuated Serious Pain, Dr. Webster Was Deliberately Indifferent.

Whether a prison employee acts with deliberate indifference is a condition-specific question of fact. *Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000). Adequate medical care is the touchstone of Eighth Amendment claims against medical professionals. *Johnson v. Doughty,* 433 F.3d 1001, 1010 (7th Cir. 2006). However, medical malpractice is insufficient. *Snipes v. DeTella,* 95 F.3d 586, 590-91 (7th Cir. 1996). The Constitution guarantees that a prisoner may not knowingly be given inadequate treatment, and deliberate indifference can be shown by a failure to change clearly ineffective treatment. *Chavez v. Cady*, 207 F.3d 901, 903-06 (7th Cir. 2000). Deliberate indifference can also be inferred when the medical professional's decision departs from accepted practice. *Estate of Cole v. Fromm*, 94 F.3d 254, 261-62 (7th Cir. 1996). Considered *de novo*, deliberate indifference exists here for five reasons.

#### 1. Knowing Ortiz's condition yet ignoring repeated requests for surgery is inadequate care.

An official must act with an adequately culpable state of mind, not an express purpose of causing harm or knowing harm would result. *Haley v. Gross,* 86 F.3d 630, 641 (7th Cir. 1996). It is enough that the official knew of a substantial risk of harm to the inmate and failed to act in disregard of that risk. *Id.* "[A] fact finder may conclude that a prison official knew of a substantial risk from the

very fact that the risk was obvious." *Farmer,* 511 U.S. at 842. Bloodshot, swollen, and conjunctive-laden eyes proves the risk was already realized.

Dr. Webster's care was inadequate because he ignored Ortiz's obvious condition. Dr. Webster refused surgery despite Ortiz's impaired sight and persistent physical pain. The duty to provide medical care includes not only instances involving "lingering death," but also where "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose." *Estelle,* 429 U.S. at 103. The anguish of itchy eyes and clouded vision furthered no aim. Dr. Webster was thus obligated to authorize the surgery sought by ophthalmologists McGlothan and Conner. *See Gil v. Reed,* 381 F.3d 649 (7th Cir. 2004) (failing to follow specialist's advice deliberate indifference). Moreover, deliberate indifference exists when ignoring a non-life-threatening condition is "repugnant to the conscience of mankind." *Id.* at 105. Such is the case here. For six years, Ortiz experienced deteriorated eyesight and inflamed eyes. He routinely sought treatment, and although surgery was advised, nothing was done. In the meantime, Ortiz suffered.

The record captures Dr. Webster's culpable state of mind. The lack of documentation, lack of follow-up, and years of delay demonstrate that Dr. Webster's care was inadequate. Dr. Webster knew first hand that Ortiz was hurting and had distorted vision yet endorsed the status quo. Dr. Webster indicated on May 22, 2003 that Ortiz's visual acuity was 20/100 in each eye and

that he "may need the surgery within the next two years." (Dkt. 142, Ex. 18). In that same notation, Dr. Webster wrote that a follow-up with the eye clinic was needed, but no indication exists that this was done. Dr. Webster knew Ortiz's condition, knew Ortiz needed surgery, and yet chose to delay. Dr. Webster thus acted with a culpable state of mind in failing to provide adequate care. Because Dr. Webster knew about Ortiz's ptygeria, disregarded it, and only begrudged surgery after Ortiz sued, deliberate indifference exists as a matter of law.

**2. Contentment with ineffective treatment is deliberate indifference.**

That an inmate has seen a doctor numerous times does not mean adequate treatment exists. *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008) (treatment decision cannot preclude deliberate indifference if it was far afield of accepted norms). Persisting in treatment "known to be ineffective" is deliberate indifference. *Greeno v. Dailey*, 414 F.3d 645, 655 (7th Cir. 2005). Here, the eye drops did nothing.

As noted above, seven medical personnel agreed Ortiz had vision-obstructing ptygeria and needed surgery. This treatment mirrored accepted medical standards. *See* Digital Journal of Ophthalmology and Medline Plus Encyclopedia. Thus, the only effective treatment was surgery. Yet for six years, Ortiz was given eye drops and sent on his way.

The positions of Dr. McGlothan, Dr. George, Dr. Lawson, Dr. Conner, Nurse Swain, Dr. Ponugoti, and Dr. Deitch are troubling enough for Dr. Webster.

But also problematic is Dr. Webster's own expert, Dr. Maturi. Dr. Maturi stated that surgery is needed when visual acuity significantly declines. (Dkt. 90, Ex. 1, Attachment B). Such a decline occurs when a person's vision falls below the 20/50 range, which is when cataract surgery is reimbursable under Medicare guidelines. *Id.* A parallel can be made between cataracts and ptygeria, per Dr. Maturi, using the nationwide guidelines for cataract surgery. Dr. McGlothan found Ortiz's visual acuity in 2001 was 20/80 in each eye. (Dkt. 142, Ex. 3). It then regressed to 20/100 without correction. (Dkt. 142, Exs. 16, 18). Ortiz thus met Dr. Maturi's guidelines for surgical removal in April 2001, vindicating Drs. McGlothan, George, and Lawson and refuting Dr. Webster. (Dkt. 90, Ex. 1, Attachment B). Dr. Maturi's testimony also establishes the futility of eye drops.

Ineffective treatment constituted deliberate indifference in *Greeno v. Dailey,* 414 F.3d 645. The prisoner's severe heartburn and vomiting indicated he had an ulcer. *Id*. at 649. Two years of visits to prison doctors resulted in treatments which the doctors knew were imperceptible. *Id*. at 655. The doctors refused to engage a specialist or permit an endoscopy. *Id*. at 649. The Court reversed, holding deliberate indifference stemmed from the doctors' two-year refusal to refer the prisoner to a specialist or to permit an endoscopy. *Id.* at 655. Thus, persisting with treatment "known to be ineffective" violated the Eighth Amendment. *Id.*

Like *Greeno*, Ortiz's treatment did nothing. Unlike *Greeno*, the eye pain,

headaches, and vision loss lasted six years, significantly longer than the two years of heartburn and vomiting. Dr. Webster denied the surgery recommendations of doctors who examined Ortiz. Because the refusal of surgery here resembles the refusal to permit an endoscopy in *Greeno*, the District Court's ruling falls. The ineffectiveness of eye drops was manifested each time Ortiz was examined. And in six years, Ortiz's ptygeria never diminished, his vision never improved, and his suffering never ceased.

### 3. Insisting on the easiest treatment is deliberate indifference.

Similar to the ineffective treatment basis is the easiest treatment basis. Choosing an "easier" treatment for a serious medical condition violates the Eighth Amendment. *Estelle,* 429 U.S. at 104 at n. 10. While the cost of treatment alternatives may be considered, "medical personnel cannot simply resort to an easier course of treatment that they know is ineffective." *Johnson v. Doughty,* 433 F.3d at 1013. Dr. Webster's insistence on continuing the facile treatment of eye drops, knowing they did nothing to the ptygeria, was deliberate indifference. Eye drops are easier than surgery, cheaper, and do not necessitate off-site medical care. Juxtaposing the futility of eye drops with the efficacy of surgery also establishes inadequate care.

*Berry v. Peterman* demonstrates why reversal is proper. 604 F.3d 435 (7th Cir. 2010). The prison doctor had not identified an effective pain medication, yet "rejected the obvious alternative of referring [plaintiff] to a dentist." *Id.* at 441. A

jury could thus conclude the prison doctor "knowingly adhered to an easier method to treat [plaintiff's] pain that she knew was not effective." *Id.* The Court's reasoning is of particular importance. "It is hard to imagine that a doctor seeing a civilian patient, or a doctor in a prison having on-site dental staff, would respond in this way to persistent complaints of severe dental pain over a period of weeks …." *Id.* A six-year delay in removing a civilian's vision-obstructing ptygeria is similarly inconceivable.

A doctor must know "that surgery was necessary and then consciously disregard that need in order to be held deliberately indifferent." *Johnson*, 433 F.3d at 1013. Dr. Webster knew the eye drops were superficial. The severity of Ortiz's condition was embodied by the surgery recommendations, Ortiz's unavoidable symptoms, and Dr. Webster's notation that Ortiz's visual acuity was 20/100. (Dkt. 142, Ex. 18). The standard articulated in *Johnson* is satisfied because Dr. Webster knew surgery was needed, yet he continued to dawdle. Eye drops only delayed the inevitable and Dr. Webster's four-year embrace of them was made in the face of documented pain, blurred vision, and eye growths. This is deliberate indifference. Because Ortiz demonstrated surgery was medically required, reversal is proper.

**4. Forcing Ortiz to languish for six years is deliberate indifference.**

"A significant delay in effective medical treatment also may support a claim of deliberate indifference." *Berry*, 604 F.3d at 441. Such a delay violates the

Constitution if it is (1) medically unjustified and (2) likely to make an inmate medical problem worse or result in permanent injury. *Estelle*, 429 U.S. at 105-06. Withholding treatment that eliminates significant suffering violates the Constitution. *Gutierriez,* 111 F.3d at 1371. Delaying surgery for six years was unjustified, forcing Ortiz to endure near blindness and incessant eye irritations.

On April 30, 2001, Dr. McGlothan advised surgery as Ortiz's ptygeria was "visually significant." (Dkt. 142, Exs. 3, 4, 5). "Visually significant" is a term of art that signifies both a significant change in vision and when surgical intervention is necessary. (Dkt. 90, Ex. 1, Attachment B). On May 14, 2003, Dr. Conner also recommended surgery due to conical distortion. (Dkt. 142, Ex. 16). The recommendations of these eye specialists adhere to Dr. Maturi's opinion that surgery is necessary when "severe conical distortion occurs or severe loss of vision occurs." (Dkt. 90, Ex. 1, Attachment B). Still, surgery was not approved until years later when Ortiz sued.

Ortiz's six-year wait is unprecedented. Delays infinitely shorter have constituted deliberate indifference. In *Board v. Farnham*, a wait of three months to provide medical attention for broken teeth was deliberate indifference. 394 F.3d 469, 480 (7th Cir. 2005). In *Berry v. Peterman*, the doctor's refusal to refer plaintiff to a dentist resulted in an unnecessary delay in treating his decaying tooth. 604 F.3d 435, 442 (7th Cir. 2010). The plaintiff's constant complaints about his pain indicated "the delay unreasonably prolonged [plaintiff's] suffering, making

summary judgment inappropriate." *Id.* at 442. The six-year delay here unreasonably prolonged Ortiz's suffering. Finally, in *Grieveson v. Anderson,* the Court reversed summary judgment for defendants when an inmate's broken nose went untreated for two days. 538 F.3d 763, 779 (7th Cir. 2008). This delay was actionable even without expert testimony that the delay aggravated the underlying condition. *Id*.

These delays pale in comparison to Ortiz's. Six years, coupled with Dr. Webster's knowledge of Ortiz's suffering, support an Eighth Amendment violation. *See Williams v. Liefer,* 491 F.3d 710, 716 (7th Cir. 2007) (judgment as a matter of law improper because jury could conclude treatment delay "unnecessarily prolonged and exacerbated" prisoner's pain). Disconcertingly, the fulcrum for surgery was this suit. And even then, as late as the summer of 2008, Dr. Webster's obstinacy ensured Ortiz's anguish would linger. (Dkt. 119 at 36, Ex. 5 at 2-3). It was not until the Court reversed that Ortiz was ultimately relieved of his burdens in the summer of 2008.

As noted at the brief's outset, this case is unique. Waiting six years to treat a condition that is obvious, painful, and impairs a major life function is rare. But it is no less repugnant.

**5. This was not a matter of medical disagreement.**

The District Court recognized that Dr. Webster was aware Ortiz had a serious medical condition, but found the matter amounted to a disagreement

about treatment. (Appendix at A10-11). This was incorrect because the District Court found Ortiz suffered pain and diminished vision, proving the futility of eye drops. (Appendix at A9). Surgery was not elective; nor a question of if, but when. And it took six years to confirm what three doctors advised in 2001. Meanwhile, itchy eyes, headaches, and vision loss plagued Ortiz daily.

This case is not a matter of medical disagreement, but rather an absence of professional judgment. A serious medical need is disregarded when the professional's response is so inadequate that it demonstrates an absence of professional judgment. *Collignon v. Milwaukee County,* 163 F.3d 982, 989 (7th Cir. 1998). The commonly accepted standards for ptygeria, embodied by the Digital Journal of Ophthalmology and Medline Plus Encyclopedia, prove surgery was needed. Additionally, a doctor can be deliberately indifferent when he fails to follow a specialist's advice. *Gil v. Reed,* 381 F.3d 649, 663-64 (7th Cir. 2004). Dr. Webster did just that, defying eye specialists McGlothan and Conner. These points, considered *de novo*, demonstrate an absence of judgment by Dr. Webster.

The realities of Ortiz's condition reflect the absence of judgment in delaying surgery. As the Court recognized in the first appeal, "the records show that [Ortiz's] vision worsened from 20/80 to 20/100 between 2001 and 2003, that he had 'difficulty seeing,' and that the ptygeria were 'causing visual distortion.'" (Appendix at A17). Surgery was warranted and this position brooked no alternatives. In his response brief, Dr. Webster will emphasize that Dr. Radaneata

did not recommend surgery. But seven medical personnel did. Such lopsided odds should have precluded summary judgment. More importantly, the Defendant himself recognized the likelihood of surgery and per *Johnson v. Doughty*, a doctor must know that surgery is necessary to prove deliberate indifference. 433 F.3d at 1013. Finally, the two-year window for surgery set by Dr. Webster was arbitrary. Ortiz's condition remained virtually unchanged from his first day in Terre Haute. That window is further untenable in light of Dr. Webster's May 1, 2008 deferral of surgery because it was "not medically necessary." (Dkt. 119 at 36, Ex. 5 at 2-3).

The District Court's finding of medical disagreement is wrong for one final reason. On May 14 and 21, 2003, requests for surgery were submitted, and both requests were denied without explanation. As URC chairman, Dr. Webster authorized all URC decisions. (Dkt. 142, Ex. 58 at 6, 7). Moreover, per the Federal Bureau of Prisons, if the clinical director does not follow a consultant's recommendation, the reason must be documented. *Id*. at 8. Dr. Webster did not do this. There is no indication he considered cost, effectiveness, surgery risks, or other medical opinions. With the facts viewed in Ortiz's favor, this void shows a lack of medical judgment. While Dr. Webster provided an after-the-fact explanation, a self-serving affidavit lacking factual support carries no weight on summary judgment. *See Butts v. Aurora Health Care, Inc.*, 387 F.3d 921, 925 (7th

Cir. 2004). Moreover, the District Court credited the declarations of the Defendant's witnesses to the neglect of Ortiz's witnesses.

Because Dr. Webster refused surgery without justification, his decision defied Bureau of Prison mandates and lacked professional judgment.

**6. Summation.**

The above sections set forth the five distinct bases for deliberate indifference. Yet, the District Court's entire analysis was a paragraph. (Appendix at A11). Worse, the court summed up the deliberate indifference issue in a sentence: "[w]hat Ortiz has shown is, at best, disagreement with medical professionals about his treatment." (Appendix at A11). Ortiz's position deserves more than this. Moreover, this conclusory assessment clashes with the court's finding of facts. Because the District Court found Ortiz suffered, surgery was recommended to Dr. Webster, and Dr. Webster knew surgery would alleviate Ortiz's plight (Appendix at A11), finding for Dr. Webster was reversible error.

## IV. Ortiz Was Denied Surgery Due to His Death Row Status.

Most troubling is why Ortiz had to endure ptygeria for six years. Ortiz demonstrated a motive for ignoring his plight—death row. The disputed issues of fact regarding the NO TOWN TRIP policy preclude summary judgment.

### A. The NO TOWN TRIP Policy Violates the Eighth Amendment.

Systemic deficiencies in staffing, facilities, or procedures may demonstrate a substantial risk of serious harm such that "the inmate population is effectively

denied access to adequate medical care." *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983). Faulty systems predictably cause needless suffering. *Id*. Accordingly, the Court has found Eighth Amendment liability for such deficiencies. *See Holmes v. Sheahan*, 930 F.2d 1196, 1200 (7th Cir. 1991) (failure to adequately train correctional staff); *Bass v. Wallenstein,* 769 F.2d 1173, 1186 (7th Cir. 1985) (deficiencies in sick call procedures).

Forbidding the transport of death row inmates to off-site care is a systemic deficiency incompatible with the Eighth Amendment. The NO TOWN TRIP notation establishes this policy is not some inmate-concocted conspiracy. The record reflects this policy began in 2001 and continued until December 2005. (Dkt. 142 at 9, Exs. 50, 53, 55, 56, 57). Thus, no death row inmate was taken out of the Terre Haute prison for medical care during that period. *Id*. The NO TOWN TRIP policy precluded Ortiz from receiving the oft-diagnosed surgery from 2001 through 2005, with Dr. Webster enforcing the NO TOWN TRIP policy from June 2002 to December 2005.

Two of Ortiz's medical records are branded with the NO TOWN TRIP notation. First, the April 30, 2001 consultation sheet of Dr. McGlothan's surgery recommendation. It contains a consultation report dated October 2001 stating the surgical request is "denied by Central Office at this time." (Appendix at A19). Second, an April 30, 2001 consultation sheet that contains a February 11, 2002

consultation report in which Dr. Radaneata recommends eye drops for Ortiz's ptygeria. (Appendix at A20).

**B. Dr. Webster Fails to Explain the NO TOWN TRIP Policy.**

This Court was troubled by the NO TOWN TRIP notation. "The unexplained 'NO TOWN TRIP' notation, which read in Ortiz's favor suggests that he was denied surgery because it would have required a trip to town." (Appendix at A17). The Court also highlighted that the Defendants "offered no explanation for the notation, and they gave no other contemporaneous reason for denying Ortiz's surgery." *Id.* These concerns have not been assuaged.

On remand, Dr. Webster introduced a declaration from Debi Lamping. But this belated effort to downplay the NO TOWN TRIP policy fails. First, Lamping states that "Dr. McGlothan's recommendation was considered by the [URC], but the request was deferred." (Dkt. 90, Ex. 3). However, Ortiz's medical records contain no entries, notations, or reports reflecting the URC considered Dr. McGlothan's recommendation. Even more troubling, the medical consultation sheet approving surgery was signed by then Clinical Director Dr. Gregory Lawson. (Appendix at A19). And it was URC Chairman Dr. Lawson who approved all URC decisions. Thus, it is disingenuous to claim the URC deferred consideration of the surgery when the medical records establish the URC's Chairman approved surgery. Moreover, Dr. George, also a URC member, approved surgery. (Dkt. 142 at 5, Ex. 3).

Second, Lamping claims one "NO TOWN TRIP" notation existed and that the other record reflecting that notation was a duplicate. (Dkt. 90, Ex. 3). The District Court concurred. (Appendix at A5). Lamping states she made the "NO TOWN TRIP" notation on one consultation sheet immediately after the URC deferred the request and therefore multiple notations did not exist. (Dkt. 90, Ex. 3). However, each consultation sheet contains separate and distinct information in the consultation report section. (*Compare* Appendix A19 *with* A20). More importantly, each consultation sheet is dated differently—October 2001 and February 12, 2002. (*Compare* Appendix A19 *with* A20). Different information and different dates refute the notion of duplication. Thus, Dr. Webster cannot evade the NO TOWN TRIP policy via Debi Lamping.

The District Court found the NO TOWN TRIP notation "is actually nothing other than an equally cryptic means by which Dr. Webster's predecessor would annotate the URC's decision on a recommendation for off-site care." (Appendix at A11). This was error. Dr. Webster's predecessor, Dr. Lawson, approved Ortiz' surgery on April 30, 2001. (Appendix at A19). The District Court ignored this critical fact. Moreover, the District Court improperly credited the facts involving the NO TOWN TRIP notation in favor of Dr. Webster.

Access to care is a key component of a constitutionally viable prison health care system. *Lewis v. Wallenstein*, 769 F.2d 1173, 1184-85 (7th Cir. 1985). Here, there is a systemic deficiency in denying certain inmates off-site care. *See*

www.tribstar.com/local/x1155776530/ACLU-alleges-abuses-on-Terre-Haute-Death-Row. The pervasive risks of needless pain and suffering caused by the NO TOWN TRIP policy is obvious as this policy precluded Ortiz's surgery for years. As URC chairman, Dr. Webster authorized all URC decisions and reviewed all requests for outside medical care. Dr. Webster thus knew the risks posed by the NO TOWN TRIP policy. Denying Ortiz the needed surgery based on the NO TOWN TRIP policy was deliberate indifference.

## CONCLUSION

When surgery is advised by numerous medical personnel and nothing is done for six years, something is wrong. The Eighth Amendment still applies on death row, and forcing Ortiz to endure years of torment when the remedy was obvious is cruel and unusual. Pursuant to Circuit Rule 36, this matter should be reassigned to a new District Court Judge on remand.

Respectfully submitted,

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