No. 11-16022

United States Court of Appeals

For the Ninth Circuit

MICHAEL SHAW FAUSETT,
Plaintiff-Appellant,

v.

LEBLANC *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of California
Case No. 2:08-cv-01724-RLH-VPC
Chief Judge Roger L. Hunt (visiting from the District of Nevada)

REPLACEMENT OPENING BRIEF FOR PLAINTIFF-APPELLANT

Louis K. Fisher
Tara Stuckey Morrissey*
Sarah S. Podmaniczky
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

*Appointed through the
Ninth Circuit Pro Bono Program

Attorneys for Appellant

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PRELIMINARY STATEMENT

In 2007, prisoner Michael Shaw Fausett underwent an invasive, extremely painful spinal surgery at U.C. Davis Medical Center. Upon his return to Mule Creek State Prison, the prison's medical staff (the "Staff") disregarded medical orders and failed to take medically necessary steps to manage Fausett's pain. For example, despite a clear physician's order stating that Fausett should receive a walker for use in-house and a wheelchair for longer distances, the Staff never provided Fausett with an ambulatory device. And despite the very painful nature of Fausett's surgery, the Staff also failed to prescribe pain medications recommended by U.C. Davis physicians. As a result of these wrongs, Fausett endured significant pain and suffering.

In this civil rights action for deliberate indifference, Fausett struggled to litigate his complex medical claims *pro se* while on heavy medications and while undergoing psychiatric treatment. Through a series of erroneous rulings, the magistrate judge severely hampered Fausett's ability to succeed on his claims. Fausett asked the magistrate judge, who was visiting from the District of Nevada, to appoint counsel for him. The magistrate judge denied his request—not on the merits, but based on the erroneous assumption that "California and the Eastern District have [no] pool of pro bono attorneys." Fausett then asked the magistrate judge—three times—to appoint a neutral expert who could opine on the medical

issues in the case. The magistrate judge denied his request—not on the merits, but based on the legal mistake that the Federal Rules prohibit appointment unless there is a "pool of money available for the appointment." Finally, Fausett asked the magistrate judge to serve his treating physicians with a subpoena to answer written deposition questions. The magistrate judge denied the request because Fausett could not afford to pay the service fee, when in fact that fee was statutorily waived.

Crippled by the impact of the magistrate judge's rulings, Fausett proceeded to summary judgment. The district court granted summary judgment to the Staff, relying in large part on Fausett's failure to "provid[e] an affidavit or other statement from a physician." The district court failed to acknowledge that the magistrate judge had rejected Fausett's repeated attempts to secure that very evidence. Concluding that there was no evidence that the Staff's treatment was medically unacceptable, the district court granted summary judgment to the Staff. In doing so, the district court overlooked key evidence supporting Fausett's claims, failed to view the facts in the light most favorable to Fausett, and drew unreasonable inferences in favor of the Staff. This Court should reverse the rulings below to allow Fausett to vindicate his constitutional rights.

STATEMENT OF JURISDICTION

Fausett's complaint asserts a claim arising under 42 U.S.C. § 1983. The United States District Court for the Eastern District of California had subject-

matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered final judgment on April 13, 2011, ER1, and Fausett filed a timely Notice of Appeal on April 21, 2011, ER44.

STATEMENT OF THE ISSUES

1. Whether the lower court erred by denying counsel to Fausett based on its erroneous assumption that there was no "pool of pro bono attorneys," and by failing to consider (a) the inability of Fausett, a highly medicated prisoner undergoing psychiatric treatment, to litigate complex claims alleging deliberate indifference to medical needs arising from spinal surgery and (b) the likelihood of success on his claims.

2. Whether the court erroneously denied Fausett's motion to appoint a neutral expert because Fausett could not afford to compensate the expert, without addressing its authority under Federal Rule of Evidence 706 to appoint a neutral expert at the defendants' expense.

3. Whether the court erred when it denied Fausett's motion to subpoena his treating physicians on the grounds that Fausett could not pay the service fee, even though 28 U.S.C. § 1915(d) waived the service fee.

4. Whether the out-of-district magistrate judge lacked jurisdiction over Fausett's case because she was not assigned pursuant to an emergency order under 28 U.S.C. § 636(f).

5. Whether the court erred in granting summary judgment to the Staff, where the court (a) emphasized the lack of physician testimony, despite Fausett's repeated attempts to obtain expert medical testimony and to issue subpoenas to his treating physicians, and (b) failed to consider evidence presented by Fausett that created a genuine dispute of material fact regarding the Staff's deliberate indifference to Fausett's medical needs.

ADDENDUM

Pertinent statutes, rules and unpublished opinions are set forth in an addendum to this brief.

STATEMENT OF THE CASE

In July 2007, Michael Shaw Fausett, an inmate in California, underwent posterior lumbar interbody fusion ("PLIF") surgery. ER90. Following his surgery, medical staff at Mule Creek State Prison ("Mule Creek") deliberately ignored his serious medical needs. Medical personnel refused to provide appropriate medications and failed to provide him with a wheelchair or walker, forcing him to walk long distances without assistance. ER265-73. These wrongs prevented the

proper and timely success of surgery and caused significant pain and suffering. *Id.*; ER60; ER76; ER84-89; ER135; ER147-48.

After filing numerous administrative complaints and appeals, Fausett filed the present § 1983 action on July 25, 2008, in the United States District Court for the Eastern District of California. ER265-66; ER274. Proceeding *pro se*, Fausett alleged that Mule Creek medical staff, including Nurse Cecilia LeBlanc, Nurse Cooper, Nurse Kelly Martinez, Dr. Boru Nale, Dr. Galloway and Dr. Naseer (collectively, "the Staff"), were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. ER265-72.

On December 12, 2008, United States District Judge Roger Hunt, visiting from the District of Nevada, referred the matter to United States Magistrate Judge Valerie Cooke, also from the District of Nevada. ER43. On January 27, 2010, the magistrate judge denied Fausett's oral motion for appointment of counsel. ER33; ER35. On January 27, March 29, and August 26, 2010, the magistrate judge denied Fausett's motions for appointment of a neutral medical expert. ER15; ER39-40; ER29-30; ER23-24.

On August 26, 2010, the magistrate judge also denied Fausett's motion for a subpoena to serve depositions by written questions on Fausett's treating physicians. ER14. Fausett filed objections to this ruling, ER253-54, which the

magistrate judge rejected, ER10. Fourteen days later, Fausett filed a motion for reconsideration, ER251, which also was denied, ER9.

The parties filed cross-motions for summary judgment. D.E.101, 109, 110, 111. On April 13, 2011, the court granted the Staff's summary judgment motion and denied Fausett's motion. ER2-7.

Fausett filed a timely notice of appeal on April 21, 2011. ER44. After briefing was completed, and "[u]pon review of the record and the briefing," this Court "determined that the appointment of pro bono counsel in this appeal would benefit the court's review." 9th Cir. Docket No. 18. Pro bono counsel was appointed on January 16, 2013 (9th Cir. Docket No. 21), and now files this replacement opening brief.

STATEMENT OF FACTS

A. Background

1. Fausett's Back Problems And Surgeries

Michael Shaw Fausett, age 53, was imprisoned at Mule Creek State Prison ("Mule Creek") during the period relevant to this action. ER130-31. Fausett has experienced severe back and neck pain since at least 2000. ER134. Six years later, in June 2006, Mule Creek medical staff referred Fausett to the University of California, Davis Medical Center ("U.C. Davis"), where he underwent anterior cervical diskectomy and fusion at the C5-6 vertebrae for his neck pain. ER72.

Fausett's lower back pain continued after surgery, and in January 2007, Mule Creek staff sent him back to U.C. Davis. Dr. Jan Paul Muizelaar, chair of the U.C. Davis department of neurosurgery, diagnosed Fausett with "severe degenerative disk disease at [the] L4-5 [vertebrae] consisting of loss of water, loss of height, and endplate edema at 4-5, plus a midline bulge at this level." ER71.

Dr. Muizelaar proposed treating the pain with an epidural steroid injection, "but if that would not help," he estimated that Fausett had "a 70 percent chance of being helped by a posterior lumbar interbody fusion at L4-5" ("PLIF"). *Id.* Fausett had received no epidural steroid injections by his next appointment, in June of 2007. ER72. Fausett and Dr. Muizelaar proceeded with surgery. *Id.*

On July 10, 2007, Fausett underwent PLIF surgery at U.C. Davis. ER90. Because Percocet did not alleviate the pain of the surgery, the hospital pharmacy provided stronger medications during his recovery at the hospital. ER90-91.

The U.C. Davis discharge note instructed that Fausett should see Dr. Muizelaar on July 25 for a follow-up and said that Fausett was "able to ambulate without a walker." ER90. "However," it noted, Fausett "uses a front-wheeled walker for comfort." *Id.* It also said that Fausett could participate in "[a]ctivity as tolerated." ER91. Another discharge order stated that Fausett should not engage in "heavy lifting/strenuous activity" for eight weeks. ER94. Dr. Muizelaar

directed that Fausett should continue to take pain medication after he was discharged. ER97-98.

2. Fausett Returns To Mule Creek

Fausett returned to Mule Creek at about 5:30 p.m. on July 20, 2010. Mule Creek Nurse LeBlanc noted that she received him in the Triage and Treatment Area ("Triage"), and Dr. Boru Nale was on call that day. ER92; ER119; ER144-45. Another nurse, possibly named Cooper, was also in Triage. ER118-19; ER138.

LeBlanc's notes from that day include "Physician's Orders and Medications" stating that Fausett was to receive a "walker for use in house for ambulation" and a wheelchair "for movement of longer distances." ER92. A staff member took Fausett from Triage to his cell by wheelchair, but did not leave the wheelchair with Fausett. ER140. Despite the physician's orders from LeBlanc's notes, Fausett never received a wheelchair. *Id.*

Fausett was forced to walk one-quarter to one-half mile from his cell in Building 9 to the infirmary, and the same distance back, four times per day, to receive his medications. ER58; ER140. Fausett asked repeatedly for a wheelchair, cane, or back brace to ease the pain of walking two to four miles per day for his medications. Fausett asked Mule Creek physician R. P. Galloway for a cane or a brace, but Galloway repeatedly refused to issue either to Fausett. ER146. Fausett

asked Mule Creek physician Dr. Naseer for a cane, but Naseer told him that Mule Creek "d[id]n't have canes." ER147.

Although Dr. Muizelaar had directed that Fausett return for a follow-up on July 25 (five days after discharge), Mule Creek did not send Fausett back to Dr. Muizelaar until August 15, nearly four weeks after discharge. ER54-55; ER90. After that visit, Dr. Muizelaar advised Mule Creek that Fausett needed more pain medication; he reminded Mule Creek that "this particular surgery is very painful for two to four months." ER54. Dr. Muizelaar recommended that Fausett take two tablets of Vicodin three times a day and 5 milligrams of Valium three times a day, "as this helped him well in the hospital." *Id.*

But Fausett received no Valium from Mule Creek. ER102; ER125. Staff physicians substituted Robaxin, a muscle relaxant, and Motrin for the pain. ER52; ER110; ER125. Even though Fausett told the Staff that the medication did not relieve his pain, no changes were made to his prescriptions. ER51. Making matters even worse, Fausett undertook the painful walk to the Mule Creek dispensary only to learn that his Mule Creek doctors, including Galloway and Naseer, had not re-filled his prescriptions and the dispensary was unable to provide him with needed painkillers. ER79-83; ER102. Staff members at the dispensary also treated him as "a nuisance" when he sought his medications; they told him to "go away." ER53; ER81.

The walk across prison grounds to the dispensary was so difficult for Fausett that on August 17, 2007, his leg collapsed and he fell to the pavement, suffering cuts and bruises. ER100. He fell again on February 27, 2008, necessitating an x-ray to check for fractured bones. The x-ray revealed that, despite the PLIF surgery, Fausett's L4-5 vertebrae had not fused. ER48; ER108.

Fausett experienced "severe depressive episodes" around the time of his surgery. He began meeting with Dr. Gia-Evita Lanzano, a staff psychiatrist, in May 2007. Dr. Lanzano had to speak with the medical staff several times during Fausett's recovery, asking the staff to stop allowing Fausett's prescriptions to expire and to give him adequate pain medication. ER62. In written deposition testimony, Dr. Lanzano stated that the medical staff's response "[v]aried between overt cooperation to sardonic dismissing of [Fausett's] complaints, opining that [Fausett] was simply gaming the system and drug-seeking." *Id.* In early 2008, Fausett added several meetings per month with a social worker, George Esposito. Esposito testified that "[t]here appeared to be a bias against [Fausett] centering around his alleged 'drug seeking'" and that Fausett's depression was related to his "dealing with unsuccessful neck and back surgeries." ER66-67.

B. Fausett's Complaint

On July 28, 2008, Fausett filed this § 1983 action against the Staff in the United States District Court for the Eastern District of California. ER265. Fausett

sought relief for the Staff's deliberate indifference to his serious medical needs in violation of the Eighth Amendment. ER265-73.

1. Preliminary Rulings

Fausett's case was assigned to Judge Roger L. Hunt, a United States District Judge for the District of Nevada sitting by designation in the Eastern District of California, pursuant to 28 U.S.C. § 292. ER174. Rather than refer the case to a magistrate judge sitting in the Eastern District of California, who would have been familiar with California prisoner claims and protocols, Judge Hunt referred it to Magistrate Judge Valerie P. Cooke, a United States Magistrate Judge for the District of Nevada. ER43. No emergency order authorized Judge Cooke's assignment to the Eastern District. *See* 28 U.S.C. § 636(f). Judge Cooke granted Fausett's motion to proceed *in forma pauperis* ("IFP") under 28 U.S.C. § 1915(a). ER169.

At a telephonic status conference on October 28, 2009, Judge Cooke acknowledged that she was unfamiliar with Eastern District protocol in prisoner cases. *See* ER248. Judge Cooke relied on defense counsel, Ms. Kathleen Williams, to explain Eastern District and prison practices, including how service worked and the local rule defaults for discovery scheduling. *See, e.g.*, ER231. She occasionally asked about or confirmed prison protocols with Fausett. ER248;

ER213. But she also relied on defense counsel to speak for Fausett. ER190 (THE COURT: What's he saying, Ms. Williams?).

2. The Court Denies Fausett Appointed Counsel

Fausett requested an attorney during the second status conference, on January 27, 2010. He asked if it would "be possible for [the court] to order some help for [him]." ER240. Fausett needed counsel "to help," he explained, because he was in "psychiatric treatment," had "been through a lot of medications," and "went to the observation corrections room in the mental health" facility. ER240-42. "I'm not really clear on a lot of this," he told the court, and "I'm not doing too good with it." ER240, 242.

But the court denied Fausett's motion for counsel, stating—incorrectly—that the Eastern District of California had no "pool of pro bono attorneys" to represent indigent civil plaintiffs. "I've appointed counsel to an inmate . . . just once in ten years on the bench," the court explained, "when that inmate was so mentally disabled that it was evident that that person couldn't possib[l]y represent himself." ER37-38. The court denied the motion without further analysis or explanation. ER38. In the court's "Minutes of Proceedings," it failed to provide any reasoning for its denial of appointment of counsel, *see* ER33, in violation of Local Rule 303, *see* L.R. 303(a) ("Rulings of the Magistrate Judge shall be in writing with a statement of the reasons therefor . . . ."). Local rules for the District of Nevada, to

which Judge Cooke would have been accustomed, do not contain a rule equivalent to Local Rule 303. *See* D. Nev. L.R. IB 1. The court did not inform Fausett of the need to object to this ruling, and Fausett did not file objections with the district court.

3. Fausett Tries To Add Claims Against Martinez And Galloway

The denial of appointed counsel had numerous prejudicial effects beginning shortly after the court's ruling. In the early stages of discovery, Fausett realized that his *pro se* complaint lacked allegations that he thought he had included. Without counsel, however, he was unable to move successfully to amend his complaint, despite the permissive standard for such motions. Fausett first tried to alert the court to his mistake on March 12, 2010, stating in a status report that "[d]epending upon the completion of discovery," he "intend[ed] to amend, via supplement, a cause of action against Defendant Kelly Martinez and Defendant Dr. Galloway, showing and revealing their patterns of conduct on denying Plaintiff his medical care before and after surgery." ER262. He did not know that he would need to file a motion to amend his complaint. ER197.

The court told Fausett that, to amend the complaint, he had to "confer with [defense counsel]." The court added that if defense counsel would not stipulate to amendment, Fausett would "have to file a motion to amend for leave to file an amended complaint" before April 30. ER226.

On April 20, 2010, Fausett asked for an extension, because he had not "gotten a lot of the stuff from request nor discovery items back." ER209. He asked for thirty days and told the judge that he "d[id]n't know how these things really proceed." ER210. "I'm a little confused on what I'm doing," he added. ER210. The court extended the deadline to May 20. ER211. Fausett tried to draft a motion to amend, but "didn't get it done in time." ER206. Instead, on May 20, he moved for another extension. D.E.50. He noted that his "medical condition and pain medications have caused [him] problems with concentration and understanding how to even proce[e]d to amend the complaint." ER159.

On May 31, Fausett moved to amend his complaint to add new claims against Martinez and Galloway. D.E.54. The court denied the motion, reasoning that an amendment "at this late date" would be "unduly prejudicial." ER198.

4. Discovery

Judge Cooke instituted an aggressive discovery schedule, setting a June 1, 2010 deadline on January 27, 2010. ER235. As that deadline drew closer without significant progress, she resisted extending discovery, because she "never want[ed] to do that unless [she] absolutely ha[d] to." ER228. On July 14, 2010, a month and a half after discovery was supposed to have ended, not all discovery matters had concluded. Judge Cooke told the parties, "I want to end this discovery. I want to get this case moving. This cannot—I'm not going—I'm just telling everybody,

we are going to finish discovery, and we're going to get—dispositive motions are going to be filed." ER202.

Initially, Fausett expected the discovery schedule would give him ample time to obtain the information he needed from the defendants—not knowing the discovery rules or objectives, he thought that his claims could "be proved almost immediately," and six months "seem[ed]," to him, "like an awful long time to go through something that's pretty clear." ER232-33.

Fausett quickly realized that Judge Cooke's schedule presented more of a challenge than he had expected. Trying to keep up with Judge Cooke's discovery schedule, Fausett sent letters to his treating doctors, including Dr. Muizelaar, asking them in April to "be [his] expert witnesses." ER162-63. On May 19, Fausett submitted a status report stating that he "plan[ned] to depose Dr. Muizelaar as an expert" if the doctor was willing to take on that role. ER156. He also "contend[ed] that a court[-]appointed impartial expert may be needed for Plaintiff if Dr. Muizelaar can not be a[n] expert witness for [him]." ER157; ER257. Dr. Muizelaar never responded to Fausett's requests.

Fausett had also hoped to depose several witnesses. When defense counsel told the court that she planned to depose Fausett, he "ask[ed] that [he] follow" and be permitted to depose his own witnesses. He believed that "in those rules that [defense counsel] was citing, that if that party requested depositions, then anyone

who asked afterwards, that they pay for the depositions that follow." ER237. The court told him that he would have to pay for his own depositions, but "a lot of inmates" who "don't have the money to notice and pay for depositions . . . use written discovery as a tool to better understand their case." ER238-39. Further, the magistrate judge instructed Fausett that he was limited to ten depositions by written questions, ER217-18, even though the Federal Rules permitted him to request leave for more, *see* Fed. R. Civ. P. 31(a)(2).

Fausett received the Staff's responses to his interrogatories and requests for production on May 28, 2010. ER151. At that time, he realized that he "need[ed] to ask a second set of interrogatories, production of documents, and a first set of admissions." *Id.* He also believed that the Staff had not produced one of the documents he had requested, and that a second request was the appropriate way to obtain that document. ER152. Accordingly, on June 23, 2010, he sought an extension of discovery, which had all but closed, "because of the Defendants[']incomplete responses." D.E.63; ER151-52. Judge Cooke denied the motion, informing Fausett that "[t]he thing is, . . . if the other side answers your discovery but you don't like the answers, . . . the remedy is to file a motion to compel. . . . And that's not before the court." Judge Cooke did not construe Fausett's motion as one to compel, or allow him to file a motion to compel, because she had closed discovery by the time she addressed the motion. ER201.

5. The Magistrate Judge Refuses To Appoint A Neutral Expert

Throughout the discovery process, it was clear that medical testimony was important to prove Fausett's claims. On three separate occasions, Fausett asked Judge Cooke to appoint an expert or doctor to clarify the medical issues in the case, including whether his back had healed properly. Fausett's first request was during a conference in January, before discovery began. Fausett admitted that he did not "know if [he was] supposed to do it in court or if I'm supposed to ask at a different time . . . to have a third-party doctor examine me, so that we can resolve . . . [w]hat the damage was." ER244. The judge responded:

> [T]here is no pool of money available for the appointment of a third-party physician to examine you. Such examinations can be held if people pay for them. And so, once again, it becomes, in these cases, an issue of money, which I know feels to the inmate like it's not a level playing field. . . . If the defendants wanted to request an independent medical examination under the rules [Fed. R. Civ. P. 35], they could do that. . . . But they'd have to pay for it.

ER40. The court did not consider whether an expert could be appointed under Fed. R. Evid. 706, which allows the court to apportion costs of the neutral expert among the parties. *See* Fed. R. Evid. 706(c)(2). In its "Minutes of Proceedings," the court failed to even mention its denial of Fausett's motion for an expert. *See* ER32-33. *But see* L.R. 303(a) ("Rulings of the Magistrate Judge shall be in writing with a statement of the reasons therefor . . . .").

In March, Fausett again requested a court-appointed expert witness. He noted in a status report that "a court appointed impartial expert may be needed" if Dr. Muizelaar refused to provide a report on behalf of Fausett. ER262. Judge Cooke again denied Fausett's motion. The "problem[]," she told Fausett, "is that if you wish to retain an expert or get an independent medical examination, you have to pay for it." ER29-30. Again, she did not consider Rule 706 or issue a written ruling.

On August 26, 2010, Fausett renewed his request for an independent expert. Fausett tried to call Judge Cooke's attention to *Gorton v. Todd*, a recent Eastern District of California order discussing the importance of court-appointed experts in *pro se* deliberate indifference cases like Fausett's:

> MR. FAUSETT: What I need to do is I would like to make an oral motion before we close.
>
> THE COURT: Go ahead, sir.
>
> MR. FAUSETT: For an expert witness.
>
> THE COURT: Who's going to pay for that, sir?
>
> MR. FAUSETT: It was just addressed by Kelso that—
>
> THE COURT: Who is Kelso?

> MR. FAUSETT: Excuse me. The Honorable Judge Clark Kelso[1] just had made a ruling about a portion [sic] of cost for an expert witness for prison—
>
> THE COURT: Well, sir, discovery—well, sir, discovery is closed. The time for designating expert witnesses has come and gone. I'm not—I don't know who this judge is or what the order is, but your motion is denied.

ER32-33. Judge Cooke did not consider the authority Fausett offered. *See id.* Judge Cooke did not inform Fausett of the need to object to these rulings, and Fausett did not file objections with the district court.

6. Denial Of Fausett's Motion For Service Of Subpoenas

Despite initially telling Fausett that he would not have to "pay for" his doctors to answer written deposition questions or interrogatories, on the last day of discovery, Judge Cooke told him that he must pay the U.S. Marshal Service to serve Dr. Muizelaar with a subpoena to answer written deposition questions. Judge Cooke asked him, "[D]o you have money to serve these subpoenas?" He did not. ER186. "I don't understand what they do in California," Judge Cooke responded. *Id.* Defense counsel told Judge Cooke that subpoenas could be mailed to the prison litigation coordinator for department of corrections employees without "him having to pay to have the U.S. Marshal serve [them]," but Fausett could not "send Dr. Muizelaar's [to the coordinator] because he's a UC Davis

[1] In fact, the Honorable Lawrence Karlton issued the ruling. *Gorton v. Todd*, No. 08-3069, slip op. (E.D. Cal. Aug. 10, 2010).

Medical Center physician . . . [s]o we would not be able to accept service on Dr. Muizelaar's behalf." ER187. Judge Cooke told Fausett: "You are not going to be able to do your written deposition questions to Dr. Muizelaar from UC Davis unless you can pay for it." ER21. It later became clear that Dr. Henry, another potential witness who treated Fausett for back and neck pain following his surgery, was not a prison employee. ER10; ER184-85. The court thus extended its ruling to include subpoenas to both Dr. Muizelaar and Dr. Henry. ER10.

On September 13, 2010, Fausett filed objections to the magistrate judge's refusal to serve subpoenas, arguing that the ruling deprived him of "due process of law" and of "the right to depose his own witnesses." ER253-54. Judge Cooke overruled his objection, confirming that Fausett "would have to pay the cost for service of subpoenas" and that "[t]he court will not order the issuance of these subpoenas because plaintiff offers no evidence that he can pay these costs." ER10. Fourteen days later, Fausett filed a motion for reconsideration, ER251, which Judge Cooke denied, ER9.

7. Nurse Cooper Is Dismissed

Judge Cooke's final action in the case was to recommend dismissing Cooper based on defense counsel's claim that she had a sworn statement from Cooper stating that Cooper did not work in the prison's Triage on July 20, 2007, when Fausett returned to the prison after his surgery. ER177. Fausett immediately asked

for time to find the proper defendant, ER179, but Judge Cooke gave him no time to do so, *see* ER183; ER193; ER194.

On September 27, 2010, Judge Cooke issued a report and recommendation proposing to dismiss Cooper. ER166. This report and recommendation, unlike Judge Cooke's earlier "Minutes of Proceedings," advised Fausett of the need to file objections with the district court. ER166-67. Fausett timely filed objections, D.E.86, but the district court adopted the report and recommendation, ER164.

8. Summary Judgment

(a) The Staff's Motion For Summary Judgment

On December 20, 2010, the Staff moved for summary judgment. D.E.101. In a single motion, they argued that Fausett had raised only a difference of opinion about the best course of treatment and that "there is no evidence that [they] intentionally failed to provide [that care], or that Fausett suffered any harm as a result." D.E.101-1 at 16-17. They argued that "there [wa]s no evidence" that a wheelchair or walker was necessary, D.E.101-1 at 13, pointing to discharge papers indicating that Fausett was "able to ambulate without a walker" while in the hospital and that he "use[d] a front-wheeled walker for comfort," ER90. The Staff also argued and that the substitute drugs prescribed by the prison were "comparable to those prescribed by Dr. Muizelaar at U.C. Davis." D.E.101-1 at 13. The Staff's statements in support of this assertion did not say that the drugs

prescribed were equally effective or that they were effective for Fausett. *See* ER125-26. In opposition to the Staff's motion for summary judgment, Fausett argued that the Staff knew he needed a wheelchair and failed to carry out Dr. Muizelaar's medical orders, and that the substitute medication did "not work." D.E.125 at 10, 13, 16.

(b) Fausett's Motions For Summary Judgment

Two days after the Staff filed a motion for summary judgment, Fausett filed his own motions for summary judgment against Nale, LeBlanc, and Martinez. D.E.109, 110, 111. In support of his motions for summary judgment, Fausett presented a host of evidence. For example, Fausett included the physician's order from LeBlanc's July 20, 2007 notes stating that Fausett should receive a walker and wheelchair. ER92. His declaration and testimony noted that he had been wheeled from Triage to his cell when he returned from U.C. Davis, and he was in excruciating pain when he had to walk across the prison yard. ER60; ER76; ER140. Fausett also included a prison incident report stating that his leg gave out two separate times while he was trying to walk across prison grounds after his PLIF surgery. ER87-89. Finally, he submitted Dr. Muizelaar's August 15, 2007 note, reminding the Staff that Fausett's "particular surgery is very painful for two to four months." ER54.

With respect to his medications, Fausett submitted an August 3, 2007 request for medical services in which Fausett complained that his medications were not working. ER76-78. In addition, Dr. Muizelaar's note warned that the surgery was "very painful" and recommended placing Fausett on Valium. ER54. Instead, the Staff prescribed Robaxin and Motrin. ER125; ER52; ER110.

(c) The District Court's Rulings On Summary Judgment

The district court granted summary judgment to the Staff, concluding that there was no evidence "that the Defendants[']' course of treatment went beyond negligence or even medical malpractice and was medically unacceptable." ER6. Emphasizing the importance of medical testimony, the district court faulted Fausett for "not provid[ing] an affidavit or other statement from a physician stating that his treatment was medically unacceptable." *Id.* The district court never acknowledged Fausett's repeated attempts to seek appointment of a medical expert and to issue written deposition questions to his treating physicians. ER2-6.

As relevant to this appeal, the court held that there was no genuine issue of material fact concerning two aspects of Fausett's medical treatment. *First*, the district court concluded that "Fausett has provided no evidence—aside from his own claims and personal opinion—that his condition required a wheelchair or crutches and, to the contrary, the evidence produced demonstrates that Fausett was able to ambulate without a walker while still at U.C. Davis." ER6. The district

court did not discuss the physician's order that Fausett should have a walker and a wheelchair for long distances, or any of Fausett's other evidence on this issue.

Second, the district court concluded that although "it [wa]s true that Defendants did not provide Fausett with the type of pain medication that Dr. Muizelaar prescribed[,] . . . [they] did provide Fausett with other pain medications." ER5. The district court did not consider Fausett's testimony that the drugs were ineffective, nor did it find that the alternative medication was similar or adequate to address Fausett's condition. *See id.*

SUMMARY OF ARGUMENT

I. In this complex case concerning the Staff's deliberate indifference to Fausett's serious medical needs following spinal surgery, the magistrate judge erroneously denied Fausett three critical tools for proving his claim.

First, the court denied Fausett appointed counsel based on the erroneous assumption that the Eastern District of California had no pool of pro bono attorneys, and thus never exercised its discretion to determine whether appointed counsel was warranted under 28 U.S.C. § 1915(e)(1). Exceptional circumstances warranted appointment of counsel in this case, because Fausett—a heavily medicated prisoner undergoing psychiatric treatment—was unable to litigate his claims, which involve complicated legal and medical issues and are likely to succeed on the merits with counsel's assistance. This Court should reverse the

decision below and order that counsel be appointed for Fausett. At a minimum, this Court should reverse and remand to allow the district court to exercise its discretion to determine whether exceptional circumstances warrant appointment of counsel in this case.

Second, the court denied Fausett a neutral expert based on the mistaken legal conclusion that Fausett was required to compensate any court-appointed expert, and thus never exercised its discretion to determine whether a neutral expert should be appointed under Federal Rule of Evidence 706. A court-appointed expert would have promoted accurate factfinding regarding medical issues, particularly given the serious factual disputes at stake and the absence of any party expert in the case. The court's failure to appoint a neutral expert severely prejudiced Fausett, because the absence of physician testimony played a key role in the district court's decision to grant summary judgment to the Staff. This Court should reverse the denial of a court-appointed expert or, in the alternative, reverse and remand to allow the district court to exercise its discretion under Rule 706.

Third, the court deprived Fausett of the ability to subpoena his treating physicians to answer written deposition questions because Fausett could not afford to pay the fee to serve the subpoenas. This ruling violated Fausett's right to a statutory waiver of the service fee as an *in forma pauperis* litigant. *See* 28 U.S.C. § 1915(d). This error should be reversed.

In the alternative, this Court should vacate the district court's order referring the case to Magistrate Judge Cooke. Judge Cooke, who was a judge appointed to the District of Nevada, lacked jurisdiction to hear Fausett's case in the Eastern District of California because no emergency order authorized her assignment there. *See* 28 U.S.C. § 636(f).

II. Following a series of erroneous rulings by the magistrate judge, the district court erroneously granted summary judgment to the Staff. The district court faulted Fausett for not presenting any medical testimony to prove his claims, without so much as acknowledging Fausett's repeated, unsuccessful attempts to obtain a court-appointed expert and to subpoena his treating physician. Moreover, the district court's grant of summary judgment overlooked key evidence favoring Fausett, failed to view the facts in the light most favorable to Fausett, and rested on unreasonable inferences drawn in favor of the Staff. This Court should reverse the order granting summary judgment. At a minimum, it should reverse and remand to allow the district court to properly consider all of the evidence.

STANDARD OF REVIEW

This Court reviews the appointment or refusal to appoint an expert under Rule 706, and the denial of a motion for counsel, for abuse of discretion. *Walker v. Am. Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1070-71 (9th Cir.

1999) (appointment of an expert); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (appointment of counsel).

The court's denial of a motion for subpoenas and its appointment of an out-of-district magistrate judge are reviewed *de novo* because, in this case, these issues involve questions of statutory interpretation. *See Holmes v. Merck & Co.*, 697 F.3d 1080, 1082 (9th Cir. 2012). The district court's grant of summary judgment is also reviewed *de novo*. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012).

ARGUMENT

I. THIS COURT SHOULD REVERSE THE MAGISTRATE JUDGE'S RULINGS, WHICH SEVERELY HAMPERED FAUSETT'S ABILITY TO VINDICATE HIS CONSTITUTIONAL RIGHTS

Through a series of erroneous rulings, the magistrate judge deprived Fausett of the ability to effectively litigate his claims of deliberate indifference to serious medical needs. Fausett, a *pro se* prisoner undergoing psychiatric treatment, was heavily medicated and confused throughout the litigation, and he was unable to skillfully navigate the discovery process without assistance. Despite the complexities of Fausett's claims, the magistrate judge denied Fausett appointed counsel, a neutral expert, and the ability to subpoena his treating physician to answer written deposition questions—all based on erroneous assumptions regarding local procedures and federal law. Without these critical tools, Fausett faced a steep uphill battle, which ultimately resulted in summary judgment for the

Staff. This Court should reverse these rulings or, at the very least, reverse and remand for the court to reconsider its rulings in light of the correct legal standards. In the alternative, this Court also may reverse on the basis that Judge Cooke lacked jurisdiction to hear Fausett's case in the Eastern District of California because no emergency order authorized her assignment. *See* 28 U.S.C. § 636(f).

A. The Court Erred By Failing To Appoint Counsel

In its discretion, a "court may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). This Court has stated that "[i]n an appropriate case, a federal court has a *duty* under [§ 1915(e)(1)] to assist a party in obtaining counsel." *United States v. 30.64 Acres of Land*, 795 F.2d 796, 804 (9th Cir. 1986) (emphasis added).[2] District courts should appoint counsel in "exceptional circumstances," which requires an evaluation of (1) "the plaintiff's ability to articulate his claims in light of the complexity of the legal issues involved" and (2) the likelihood of the plaintiff's success on the merits. *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004) (quotations omitted). Even if a district court denies a motion for appointment of counsel, it must recognize its discretion to appoint counsel, *see 30.64 Acres of Land*, 795 F.2d at 804, and "provide an adequate explanation of its reasons," *Solis v. Cnty. of L.A.*,

[2] Section 1915(e) was formerly numbered § 1915(d). *See* Pub. L. No. 104-134, § 804(a)(2), 110 Stat. 1321-73 (1996).

514 F.3d 946, 958 (9th Cir. 2008); *see also 30.64 Acres of Land*, 795 F.2d at 804 ("The court does not discharge this duty if it makes no attempt to request the assistance of volunteer counsel or, where the record is not otherwise clear, explain its failure to do so.").

The court's denial of Fausett's motion was an abuse of discretion because the court failed to appreciate its discretion to appoint counsel and failed to adequately explain its reasons. Furthermore, under the governing "exceptional circumstances" test that the court failed to apply, Fausett's case was sufficiently exceptional to warrant appointment of counsel.

1. The Court Failed To Appreciate Its Discretion To Appoint Counsel And Failed To Adequately Explain Its Reasons For Denying Counsel

This Court has reversed the denial of a motion to appoint counsel where, as here, the court failed to appreciate its discretion to appoint counsel and failed to adequately explain its reasons for denying counsel. For example, in *30.64 Acres of Land*, this Court held that the district court "did not adequately address [a] motion for counsel" where it denied the motion by merely stating, "'I know nothing in this case that allows this Court to appoint an . . . attorney for you, and that's the problem.'" 795 F.2d at 798, 803-04. "[T]he only conclusion we can draw," this Court explained, "is that the district court believed, as it said, that it had no *power* to secure counsel" and thus "never reached the merits of [the] motion or exercised

its discretion." *Id.* at 804. Accordingly, this Court reversed and remanded to allow the court to exercise its discretion in ruling on the motion. *Id.*

Similarly, in *Solis*, this Court reversed and remanded the district court's denial of counsel, reasoning that "because the district court failed to articulate its reasons for denying Solis's request, we cannot determine on appellate review whether its denial constituted an abuse of discretion." 514 F.3d at 958. On remand, the district court was instructed to reconsider the request and to "provide an adequate explanation of its reasons such that its decision may be reviewed by [the Court] on appeal." *Id.*

Here, as in *30.64 Acres of Land* and *Solis*, this Court should reverse and remand the court's denial of Fausett's motion for appointment of counsel so that the court may determine whether counsel is warranted. The court's primary reason for denying the motion was that "there is no pool of lawyers who take these cases and are paid to represent indigent litigants," and "California and the Eastern District have [no] pool of pro bono attorneys." ER37-38. The magistrate judge stated that she had only appointed counsel once in ten years in Nevada and explained that "part of the reason why" is that "we just don't have a pool of lawyers available to do this work." ER38.

The court's oral ruling reflects a clear misunderstanding of Ninth Circuit law, as well as the procedures in the Eastern District of California. It is irrelevant

that "there is no pool of lawyers who . . . are *paid* to represent indigent litigants," ER37 (emphasis added), because a court's inability to "make mandatory assignments" of counsel does not relieve it of the duty to determine whether voluntary counsel should be appointed. *30.64 Acres of Land*, 795 F.2d at 803. As this Court has explained, "[i]f a court determines that a case has sufficient merit and a litigant sufficient need to justify uncompensated representation by counsel, . . . individual members of the bar will respect that decision and provide the needed services." *Id.* Furthermore, the court was wrong that the Eastern District of California has no pool of pro bono lawyers. While that may be true in the District of Nevada, *see* ER38 ("we just don't have a pool of lawyers"), the Eastern District of California has a dedicated pool of pro bono attorneys for the specific purpose of representing prisoner-plaintiffs in § 1983 suits. Eastern District of California, "Pro Bono Panel," http://www.caed.uscourts.gov/caed/staticOther/page_1668.htm (last visited Feb. 15, 2013).

The court's misunderstanding was inextricably intertwined with its denial of Fausett's motion for counsel. Without further explanation, "the only conclusion we can draw" is that the court believed its discretion was severely circumscribed by the lack of pro bono attorneys, and thus it "never reached the merits of [the] motion or exercised its discretion." *30.64 Acres of Land*, 795 F.2d at 804. The court failed to apply—or even recognize—the factors for determining whether

"exceptional circumstances" exist, and it made no case-specific findings. At a minimum, this Court should reverse and remand so that the court may reconsider Fausett's motion and "provide an adequate explanation of its reasons." *Solis*, 514 F.3d at 958; *see also 30.64 Acres of Land*, 795 F.2d at 804.

2. "Exceptional Circumstances" Warrant Appointment Of Counsel

Because it is clear from the record that "exceptional circumstances" warrant appointment of counsel, this Court may reverse the decision below and order that counsel be appointed. *See, e.g.*, *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) (per curiam) (ordering district court to request the appointment of pro bono counsel on remand because "[t]he case will undoubtedly proceed more efficiently and effectively if Johnson has legal representation"). Fausett's ability to litigate his claims was weak "'in light of the complexity of the legal issues involved,'" *Agyeman*, 390 F.3d at 1103, and his claims have "sufficient merit," *30.64 Acres of Land*, 795 F.2d at 803.

Given the "complexity of the legal issues involved" and Fausett's difficulty in litigating his claims, *Agyeman*, 390 F.3d at 1103, the court should have appointed counsel. This case involved difficult medical issues regarding a patient's treatment needs following an invasive back surgery. The critical issue was whether "the course of treatment the [prison] chose was medically unacceptable under the circumstances," *Snow*, 681 F.3d at 988 (quotations

omitted), and Fausett was not capable of navigating the complex discovery and motions practice necessary to prove that the Staff's treatment was medically unacceptable in light of his particular surgery and circumstances.

Fausett had difficulty litigating his claims before the magistrate judge. As he explained to the court, he was "in psychiatric treatment" and had "been through a lot of medications." ER240-41. He lacked legal training and was confused by the litigation process, as demonstrated by his comments that discovery rules were "far beyond [him]," ER238, that he was "not really clear on a lot of this," ER240, that he was "trying to keep up," ER233, and that he was "a little confused on what [he was] doing," ER210; *see also* ER215-16 (stating three times, "I need help."). Throughout the discovery process, Fausett's misunderstanding of discovery rules caused him to make errors that impeded his ability to litigate his claims. For example:

- Fausett did not realize that he needed to file a formal motion to amend his complaint. ER197. As a result, his untimely motion led the court to deny his motion for leave to amend. ER198.
- When Fausett was dissatisfied with the Staff's discovery responses, he moved to extend discovery rather than file a motion to compel. The court denied Fausett's motion to extend discovery and refused to construe it as a motion to compel because it would be untimely. ER199-201.
- Fausett did not realize the complexity of the discovery process, initially remarking that "everything that I've said can be proved almost immediately." ER232-33.

- Fausett did not know the proper procedures for requesting that an expert be appointed. *See* ER244 ("I don't know if I'm supposed to [move for an expert] in court or if I'm supposed to ask at a different time. I don't know.").

- Fausett did not know the procedure for deposing witnesses. Based on "those rules that [defense counsel] was citing," Fausett believed that if the Staff requested depositions, then the Staff also would pay for any follow-up depositions that he requested. ER237.

Even the magistrate judge had difficulty following Fausett's arguments. Indeed, the magistrate judge went so far as to rely on defense counsel to speak for Fausett. ER190 (THE COURT: What's he saying, Ms. Williams?).

Fausett's lack of legal knowledge also caused the court's misunderstandings and misstatements of the law to go uncorrected. For instance, the court told Fausett that he was absolutely limited to 10 depositions by written questions, ER217-18, when in fact he could have requested leave for more, Fed. R. Civ. P. 31(a)(2). In addition, the court refused to order the Marshal's service to serve Fausett's written depositions, ER10, when the court was required to do so for litigants proceeding *in forma pauperis*, *see* 28 U.S.C. § 1915(e). *See infra* at 43-45. And the court failed to consider Rule 706 when Fausett asked repeatedly for an "independent expert." *See infra* at 36-39. Furthermore, the magistrate judge, who was from the District of Nevada, had little understanding of Eastern District of California procedures or local prison rules. *See* ER186; ER248. Indeed, the magistrate judge relied on defense counsel to explain Eastern District and prison

practices, including service of process and the local rule defaults for discovery scheduling. *See, e.g.*, ER231. Appointed counsel would have significantly aided both Fausett and the court in navigating the discovery process. *See Johnson*, 207 F.3d at 656.

Moreover, as discussed further in Part II, Fausett's claims have "sufficient merit." *30.64 Acres of Land*, 795 F.2d at 803. With the assistance of counsel, Fausett could have conducted more effective discovery to prove his claims, including by presenting expert testimony and taking depositions. *See Agyeman*, 390 F.3d at 1104. For example, appointed counsel could have retained an expert to testify for Fausett. *See Gorton v. Todd*, 793 F. Supp. 2d 1171, 1186 (E.D. Cal. 2011) (noting that "appointed counsel in section 1983 cases may move for reimbursement of expert witness costs"). On summary judgment, counsel also could have highlighted the evidence demonstrating the merits of Fausett's case. At a minimum, Fausett's evidence created genuine issues of material fact that should have been litigated at trial by pro bono counsel.

Given the complexity of the case and Fausett's difficulty in maneuvering the discovery process, as well as the merit of his claims, "exceptional circumstances"

warranted appointment of counsel. The court's denial of counsel under § 1915(e)(1) was an abuse of discretion and should be reversed.[3]

B. The Court Erred By Failing To Appoint An Expert Pursuant To Federal Rule Of Evidence 706

Under Federal Rule of Evidence 706, a court may, "[o]n a party's motion or on its own, . . . order the parties to show cause why expert witnesses should not be appointed." Fed. R. Evid. 706(a); *see also Walker*, 180 F.3d at 1070-71. When considering a motion for a court-appointed expert, a court must articulate a valid reason for its ruling and demonstrate that it exercised its discretion under Rule 706. *See, e.g.*, *McKinney v. Anderson*, 924 F.2d 1500, 1511 (9th Cir.), *vacated on other grounds sub nom. Helling v. McKinney*, 502 U.S. 903 (1991) (reversing and remanding where magistrate judge's "unduly restrictive reading of the rule" prevented it from exercising its discretion to determine whether a court-appointed expert was warranted). The court's discretionary determination should consider several "guideposts set forth by the appellate courts," including: (1) whether appointment of an expert will "promote accurate factfinding," (2) "whether testimony from the parties' experts is sufficient to reveal the facts," and

[3] If this Court reverses the denial of appointment of counsel, the district court should reopen discovery to allow appointed counsel to obtain support for Fausett's claim. In addition, the district court should provide an opportunity for appointed counsel to file a renewed motion to amend. *See supra* at 13-14.

(3) whether the claim raises constitutional concerns. *Gorton*, 793 F. Supp. 2d at 1178, 1182.

In this case, the court's denial of an expert was based on legally invalid reasoning, and there is no indication that the court exercised its discretion to consider whether Fausett's case merited a court-appointed expert. And the court's failure to properly exercise its discretion was prejudicial because the "guideposts" show that an expert should be appointed in this case.

1. The Court's Denial Was Based On An Error Of Law, Thus Preventing The Court From Exercising Its Discretion Under Rule 706

Despite Fausett's clear requests for a "court-appointed impartial expert," the court denied Fausett's motion without even acknowledging Rule 706. ER262; Fed. R. Evid. 706 (providing for "court-appointed expert witnesses"); *see also* ER39-40 (first request); ER29-30 (second request); ER23-24 (third request). Instead, the court denied Fausett's motion because Fausett could not afford to compensate an expert witness. ER40 ("[T]here is no pool of money available for the appointment."). Under the plain language of Rule 706, as well as this Court's precedents, that reasoning was legally invalid. This Court should reverse and remand because the court, based on its "unduly restrictive" view of the circumstances in which an expert might be appointed, never exercised its

discretion to determine whether an independent expert was warranted in this case. *McKinney*, 924 F.2d at 1511.

Under Rule 706, no "pool of money" is required as a condition of appointing an expert. ER40. While a court-appointed expert is entitled to reasonable compensation under Rule 706, such compensation shall be paid "by the parties in the proportion and at the time that the court directs." Fed. R. Evid. 706(c)(2). When "one of the parties in an action is indigent [and] the expert would significantly help the court," a court may apportion all of the costs of the expert to one party. *McKinney*, 924 F.2d at 1511. Therefore, it is error to deny a Rule 706 request because the court or one party lacks funds to pay for an impartial expert. *See id.*; *Ledford v. Sullivan*, 105 F.3d 354, 361 (7th Cir. 1997) ("[W]hen the district court stated that no funds existed to pay for the appointment of an expert, it failed to recognize that it had the discretion to apportion all the costs to one side.").

For example, in *McKinney,* this Court reversed the denial of a prisoner's motion for a neutral expert where, as here, the magistrate judge believed that "no expert" could be appointed because "no funds ha[d] been provided by law to pay the" expert, and McKinney could not pay for the expert. 924 F.2d at 1511. This Court concluded that "the magistrate's ruling was based upon an unduly restrictive reading of the rule," and "McKinney [wa]s entitled to the benefit of the court's

exercise of its discretion." *Id.* Accordingly, this Court remanded for the district court to exercise its discretion to "consider appointing an expert witness." *Id.*

This Court should reach the same conclusion and remedy here. Like the magistrate judge in *McKinney*, the court believed there was "no pool of money available" to appoint an expert and did not even consider exercising its discretionary power to assign the costs of the expert to the Staff. ER40. The court never addressed whether the issues in Fausett's case were complex or whether an expert would clarify those issues, nor did it provide any other reason for its denial. *See Steele v. Shah*, 87 F.3d 1266, 1270-71 (11th Cir. 1996) (reversing grant of summary judgment and remanding for reconsideration of plaintiff-prisoner's Rule 706 motion because the court had given "no explanation for the refusal to appoint" an expert); *Gorton*, 793 F. Supp. 2d at 1182 (requiring that the court "'expressly articulate a reasoned explanation for its determination'") (quoting *Gaviria v. Reynolds*, 476 F.3d 940, 945 (D.C. Cir. 2007)). As in *McKinney*, this Court should reverse and remand to allow the court to exercise its discretion to appoint a neutral expert. 924 F.2d at 1511.

2. The Appellate Guideposts Confirm That The Court Should Have Appointed A Neutral Expert

Under the "guideposts set forth by the appellate courts," which the district court here failed to address, a court-appointed expert is warranted because (1) the appointment of an expert would "promote accurate factfinding," (2) "testimony

from the parties' experts" is not "sufficient to reveal the facts," and (3) the claim seeks to vindicate important constitutional rights. *Gorton*, 793 F. Supp. 2d at 1178.

(a) Appointment of an expert would promote accurate factfinding

The "most important question a court must consider when deciding whether to appoint a neutral expert witness is whether doing so will promote accurate factfinding." *Id.* at 1179. In considering this factor, a court should determine whether there is "some evidence, admissible or otherwise, that demonstrates a serious dispute that could be resolved or understood through expert testimony." *Id.* at 1181. Especially where medical issues are not "particularly clear," it is "appropriate . . . to appoint an independent expert to assist the court in evaluating contradictory" claims. *Walker*, 180 F.3d at 1071.

This Court need look no further than the district court's summary judgment order to conclude that expert opinion would have promoted accurate fact-finding. The district court recognized that the medical issues in this case required an expert when it faulted Fausett for offering no evidence that the "course of treatment went beyond negligence or even medical malpractice and was medically unacceptable." ER6. "For example," the court concluded, "Fausett has not provided an affidavit or other statement from a physician stating that his treatment was medically unacceptable." *Id.* Although the absence of expert testimony was not a sufficient

basis for entering summary judgment, *see infra* Part II, the court's ruling highlights the importance of such evidence to the ultimate factfinding in this type of case. *See Gorton v. Todd*, No. 08-3069, slip op. at 2 (E.D. Cal. Aug. 10, 2010) (noting that when a case involves "complex medical issues where plaintiff contests the type of treatment he received, expert opinion will almost always be necessary to establish the necessary level of deliberate indifference") (quotation omitted). Rather than foreclose all possibility of recovery for Fausett because the issues were too complex, the court should have exercised its discretion to appoint a neutral expert.

As the district court's opinion suggests, Fausett's claim involved complex medical issues, which presented a "serious dispute that could be resolved or understood through expert testimony." *Gorton*, 793 F. Supp. 2d at 1181. The central issue was whether the chosen course of treatment "was medically unacceptable under the circumstances." *Snow*, 681 F.3d at 988 (quotations omitted). In this case, that question is particularly complex because Fausett's claims center on whether the Staff's post-surgical treatment was medically acceptable in light of the invasive, painful nature of PLIF surgery. *See* ER 265-73. The summary judgment record demonstrated a "serious dispute" on this point—it included evidence that Fausett needed a wheelchair, ER92, that his substitute medications were not effective and had not been refilled by the pharmacy, ER75,

77, 79-82, and that the PLIF surgery had failed because no fusion had occurred, ER84-86; ER279. Expert testimony was required to explain the relevant medical issues and to opine on the level of medical care required under the circumstances. *See Walker*, 180 F.3d at 1071 (concluding that "an independent expert [would] assist the court" in understanding medical issues where evidence was "confusing and conflicting"). The need for expert testimony was only heightened by the court's erroneous denial of Fausett's request for issuance of subpoenas to his treating physicians, leaving Fausett with no ability to introduce medical testimony in support of his claims.

(b) The parties' evidence did not adequately reveal the facts

The second guidepost also supports appointment of a neutral expert because "testimony from the parties' experts" was not "sufficient to reveal the facts." *Gorton*, 793 F. Supp. 2d at 1182. That is obviously the case here because no party provided expert testimony, despite the central role that it should have played in this case. Fausett could not afford to do so, and the Staff presented no expert testimony to assist the court in understanding the medical issues. The court's failure to appoint an expert left many questions unanswered, as the summary judgment order confirmed. ER6 (noting the lack of evidence "from a physician stating that [Fausett's] treatment was medically unacceptable").

(c) The nature of the claim counsels in favor of appointing an expert

When necessary to promote accurate factfinding, a court-appointed expert is even more essential where, as here, the plaintiff is seeking to vindicate important constitutional rights. Satisfaction of the other two guideposts, *see supra* at 40-42, means that a court-appointed expert is necessary for an indigent plaintiff to have an adequate opportunity to litigate his claims. And denying plaintiffs that opportunity would raise serious concerns when important rights are at issue. *See Gorton*, 793 F. Supp. 2d at 1184. Given the complex medical issues involved in Fausett's claim and the seriousness of the dispute, an independent expert was essential and should have been granted to allow Fausett to challenge the Staff's deliberate indifference to his serious medical needs.

C. The Court Erred In Denying Fausett's Motion For Subpoenas

Under 28 U.S.C. § 1915(d), "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." As this Court has explained, "the plain language of section 1915 expressly provides for service of process for an indigent's witnesses" at no cost. *Tedder v. Odel*, 890 F.2d 210, 211 (9th Cir. 1989) (per curiam). Section 1915 thus waives the fee for the United States Marshal to serve defendants. *See Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1996) ("[W]hen a plaintiff is proceeding *in forma pauperis* the court is obligated to issue plaintiff's

process to a United States Marshal who must in turn effectuate service upon the defendants, thereby relieving a plaintiff of the burden to serve process . . . .").

Overlooking the clear requirements of section 1915, the court improperly denied Fausett's motion for supboenas of his treating physician at U.C. Davis, Dr. Muizelaar, as well as of Dr. Henry, another physician who treated Fausett for back and neck pain following his surgery (ER184-85). After unsuccessfully attempting to communicate with Dr. Muizelaar on his own, ER162-63; ER257-58, Fausett moved for a subpoena to require Dr. Muizelaar to answer written deposition questions. ER185-86; D.E.69 at 4. In response, the court incorrectly informed Fausett that he needed to pay the U.S. Marshal Service to serve subpoenas on doctors who did not work at the prison. The dialogue began:

THE COURT:	So do you have money to serve these subpoenas?
MR. FAUSETT:	No, ma'am.
THE COURT:	Well, how are they going to paid for?
MR. FAUSETT:	How are they going to be paid for?
THE COURT:	Right. The service?

ER186. After the court admitted that it "d[id]n't understand what they do in California," the court asked defense counsel to explain service procedures, and defense counsel stated that Fausett "cannot" serve non-prison personnel without a fee. ER186-87. As a result, the court denied Fausett's motion, informing Fausett,

"You are not going to be able to do your written deposition questions to Dr. Muizelaar from UC Davis unless you can pay for it." ER188. When it later became clear that Dr. Henry was not a prison employee, the court extended its ruling to refuse a subpoena to Dr. Henry, as well. ER10. Fausett filed objections to this ruling, ER253-54, which the magistrate judge rejected, ER10. Fourteen days later, Fausett filed a motion for reconsideration, ER251, which also was denied, ER9.

The court's denial was based on its misunderstanding of the statute, because section 1915(d) waives the service fee for plaintiffs proceeding *in forma pauperis*. *See* 28 U.S.C. § 1915(d); *Byrd*, 94 F.3d at 219. The ruling directly contravened section 1915(d), and it resulted in significant prejudice to Fausett. Particularly after the court denied a third-party expert, physician testimony was essential to Fausett's case. If the court had served written deposition questions on these witnesses, Fausett could have survived summary judgment by presenting physician statements regarding Fausett's condition and the recommended course of post-surgical treatment. *See* ER6 (faulting Fausett for "not provid[ing] an affidavit or other statement from a physician stating that his treatment was medically unacceptable"). This Court should reverse the decision below to allow Fausett the opportunity to serve subpoenas on his physician witnesses, as clearly authorized by statute.

D. This Court Should Review The Magistrate Judge's Rulings

Although a litigant generally must file timely objections to a magistrate judge's errors with the district court to obtain review of those errors, *see* Fed. R. Civ. P. 72(a); *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996), the requirement to object is not jurisdictional, *Simpson,* 77 F.3d at 1174 n.1. As the Supreme Court has explained, "because the rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice." *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *see also Pollard v. The GEO Group, Inc.*, 629 F.3d 843, 853 (9th Cir. 2010), *rev'd on other grounds sub nom. by Minneci v. Pollard*, 132 S. Ct. 617 (2012) (excusing *pro se* litigant's failure to object).

Appellate courts have recognized that the requirement to object may be excused in "exceptional circumstances." *Cont'l Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 253 (3d Cir. 1998). Exceptional circumstances may exist in several situations, including when (1) failure to review the issue would result in "manifest injustice," (2) review of the issue is in the public interest, or (3) the alleged error was "fundamental" and resulted in a "highly prejudicial error." *Id.*

In this case, the "interests of justice," *Thomas*, 474 U.S. at 155, strongly favor appellate review. Although only one is needed, all three of *Continental Casualty*'s examples of "exceptional circumstances" apply here, confirming that

this Court should excuse Fausett's failure to object to the magistrate judge's discovery rulings.

First, "manifest injustice would result from the failure to consider" the magistrate judge's rulings. *Cont'l Cas.*, 150 F.3d at 253. In *Thomas*, the Supreme Court emphasized the importance of giving litigants "clear notice" of the need to object, 474 U.S. at 155, and observed that the magistrate judge's report and recommendation specifically provided "clear notice" in a "prominent legend," *id.* at 144. In this case, by contrast, no notice of the need to object was given, even though a simple oral statement would have sufficed. The magistrate judge never mentioned this requirement during the telephonic conferences, and the court's minute entries are silent regarding the need to object. The lack of notice from the magistrate judge is especially problematic because it occurred in conjunction with, and after, Fausett's motion for appointed counsel. The court—fully apprised that Fausett was in psychiatric treatment, under medication, and unclear on procedural rules—should have anticipated that Fausett would be unaware of the need to object unless he were provided with the specific notice that could have been, and routinely is, so easily given. As a result of the magistrate's failure to give that notice here, Fausett—a *pro se* prisoner with no legal training—was (understandably) unaware of the need to raise objections with the district court prior to bringing an appeal. *Cf. Pollard*, 629 F.3d at 853.

If Fausett had been provided with notice, he surely would have filed timely objections with the district court. This is clear from the record. On September 28, 2010, the magistrate judge issued a formal report and recommendation concerning the dismissal of a defendant. ER166-167. For the first time, the order notified Fausett of the requirement to file objections within 14 days. *Id.* On October 8—just 10 days after the order was issued—Fausett timely objected to the magistrate judge's order. D.E.86. Moreover, Fausett's diligence in seeking reversal of the magistrate judge's earlier rulings confirms that he made every effort to pursue all known avenues of revenue. As the litigation progressed, Fausett repeatedly renewed his requests, *see, e.g.*, ER39-40; ER29-30; ER23-24, filed objections with the magistrate judge, ER253-54, and moved for reconsideration of the magistrate judge's rulings, ER251.[4] Under these circumstances, where Fausett failed to receive proper notice through no fault of his own, review of the magistrate judge's

[4] Indeed, Fausett's repeated protests concerning the magistrate judge's subpoena ruling should be deemed "objections" within the meaning of Rule 72(a). On September 13, 2010, Fausett filed objections to the subpoena ruling, ER253-54, but on September 24, the magistrate judge confirmed her earlier ruling, ER10. Fourteen days later, Fausett filed a motion for reconsideration, ER251, which the magistrate judge denied, ER9. Therefore, Fausett "reasonably apprise[d] the district court that the magistrate judge's ruling [was] being contested." *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996); *see also McKeever v. Block*, 932 F.2d 795, 799 (9th Cir. 1991).

rulings is necessary to prevent "manifest injustice." *Cont'l Cas.*, 150 F.3d at 253. This alone warrants review.

Second, and independently, "the public interest requires review" of the magistrate judge's discovery rulings. *Id*. The Supreme Court has cautioned that "[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011). An indigent prisoner's ability to challenge his conditions of confinement is critical to ensure "the essence of human dignity inherent in all persons." *Id.* Without counsel, a court-appointed expert, or other medical testimony, a prisoner may lack the necessary tools to vindicate his rights in complex cases involving the adequacy of medical care. Particularly given the desperate state of California prisons' medical delivery systems, *see id.* at 1927, it is important for this Court to review erroneous rulings denying these tools in § 1983 cases alleging deliberate indifference to medical needs.

Third, "the alleged error[s] [were] fundamental and resulted in a highly prejudicial error." *Cont'l Cas.*, 150 F.3d at 253. As explained above, the magistrate judge fundamentally erred by failing to address the governing criteria for appointment of counsel, failing to entertain the possibility of a court-appointed expert, and failing to understand that no fee was required for service of a subpoena

in an *in forma pauperis* case. These errors severely prejudiced Fausett's ability to prove his claims in a variety of ways discussed above. As a result, Fausett—without counsel, expert testimony, or even subpoenaed testimony from his own treating physicians—received an (erroneous) summary judgment order faulting him for "not provid[ing] an affidavit or other statement from a physician stating that his treatment was medically unacceptable." ER6. The magistrate judge's errors were highly prejudicial and went to the heart of Fausett's ability to vindicate his rights at trial. This Court should review—and reverse—the magistrate judge's errors, especially given the importance of the rights at stake and, most significantly, the manifest injustice that would result from denying review to a party who had no notice of the rules.

E. The Magistrate Judge Lacked Jurisdiction Over Fausett's Case

Even if this Court does not reverse the magistrate judge's rulings on grounds of error, it still should vacate and remand because Judge Cooke—a magistrate judge from the District of Nevada—lacked jurisdiction to sit by designation in the Eastern District of California absent an order authorizing her assignment.

"[F]ederal magistrate[s] are creatures of statute, and so is their jurisdiction." *N.L.R.B. v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994). Therefore, "they have only the jurisdiction or authority granted to them by Congress, which is set out in 28 U.S.C. § 636." *Phillips v. Beierwaltes*, 466 F.3d 1217, 1222 (10th

Cir. 2006) (quotation omitted). A magistrate judge may be "temporarily assigned" to perform her usual duties "in a judicial district other than the judicial district for which [s]he has been appointed" *only* "[i]n an emergency and upon the concurrence of the chief judges of the districts involved." 28 U.S.C. § 636(f).

Judge Cooke was not assigned to the Eastern District of California under § 636(f). The record makes clear that Judge Hunt referred non-dispositive matters to her as a matter of course, *see* D.E.9, and no emergency order issued, *see* 28 U.S.C. § 636(f). Judge Hunt cited Eastern District Local Rules for the referral, but the Local Rules do not purport to—and in any event cannot—grant jurisdiction to magistrates from out of the district absent a § 636(f) assignment. *See* L.R. 300(b) (defining "Magistrate Judge" as "both the full-time Magistrate Judges and the part-time Magistrate Judges sitting in the Eastern District of California"). Because Judge Cooke lacked jurisdiction over proceedings in the Eastern District of California, this Court should vacate Judge Hunt's order referring Fausett's case to Judge Cooke, and remand so that a judge with jurisdiction over the case may determine the issues.

II. THE DISTRICT COURT ERRED IN GRANTING THE STAFF'S MOTION FOR SUMMARY JUDGMENT

"Summary judgment is appropriate only if, taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is

entitled to judgment as a matter of law." *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011); Fed. R. Civ. P. 56(a). To determine whether the nonmoving party has produced evidence demonstrating a dispute of material fact, the district court must review all of the evidence submitted with the summary judgment filings. *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). If the nonmoving party has produced evidence about a material fact that conflicts with the moving party's evidence, the court must assume the truth of the nonmoving party's evidence. *Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999). Any inference drawn from the facts must be reasonable, and drawn in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This Court reviews a grant of summary judgment *de novo*. *Snow*, 681 F.3d at 985.

This Court should reverse the district court's grant of summary judgment to the Staff. In granting summary judgment, the district court relied heavily on the absence of any physician testimony without even acknowledging that the magistrate judge repeatedly rejected Fausett's attempts to obtain such testimony. Furthermore, the district court apparently failed to consider key pieces of evidence that established genuine issues of material fact.

A. Deliberate Indifference Under 42 U.S.C. § 1983

"A prison official violates the Eighth Amendment when he acts with 'deliberate indifference' to the serious medical needs of an inmate." *Snow*, 681 F.3d at 988 (quoting *Farmer v. Brennan*, 511 U.S. 825, 828 (1994)). Deliberate indifference occurs when (1) a prisoner had serious medical needs, and (2) the defendants knew of and purposefully disregarded those needs. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). To prevail on a claim involving alternative courses of treatment, a prisoner "must show that the course of treatment the [prison] chose was medically unacceptable under the circumstances." *Snow*, 681 F.3d at 988 (quotations omitted).

B. The Magistrate Judge's Rulings Prevented Fausett From Obtaining An Adequate Summary Judgment Record

The district court's order granting summary judgment to the Staff confirms the devastating impact of the magistrate judge's flawed discovery rulings. Because the magistrate judge denied Fausett's motions for appointment of counsel and for appointment of a third-party expert, Fausett was unable to obtain an expert to testify regarding the adequacy of his medical care. *See supra* at 27-43. And because the magistrate judge also denied Fausett his right to serve written depositions on his treating physicians, the record was devoid of any physician testimony regarding Fausett's condition or recommended course of treatment. *See supra* at 43-45. This absence of physician testimony served as a key basis for the

district court's summary judgment order, *see* ER6, and yet the district court failed to even recognize the crippling impact of the magistrate judge's earlier rulings. The district court's summary judgment ruling should be reviewed in this context. Indeed, "it would be incongruous to deny [Fausett] the ability to present the necessary proof to withstand a motion for summary judgment" by depriving him of expert or other medical testimony while then "grant[ing] summary judgment against [Fausett] simply because [he] has failed to come forward with such proof." *Smith v. Jenkins*, 919 F.2d 90, 93 n.4 (8th Cir. 1990).

C. The District Court Improperly Ignored Fausett's Evidence, Which Revealed Disputes Of Material Fact

This Court reverses a district court's grant of summary judgment when the district court fails to consider all of the non-movant's evidence, *see Riverside Cnty.*, 249 F.3d at 1135, or fails to consider the evidence in the light most favorable to the nonmoving party, *see Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1188-89 (9th Cir. 2003). In this case, reversal is warranted on both grounds. There is no indication that the district court considered evidence related to two primary claims of deliberate indifference to medical needs: (1) the Staff's failure to provide Fausett with a wheelchair or other assistance, and (2) the Staff's failure to issue prescribed medication to Fausett.

1. The District Court Failed To Consider Evidence That Fausett Required A Wheelchair

At summary judgment, there was no dispute that the Staff failed to provide Fausett with a wheelchair, walker or cane when he was discharged to the prison ten days after spinal fusion surgery. *See* ER140. Nor was there any dispute that, upon his return to Mule Creek, Fausett had to journey one-quarter to one-half mile from his cell to the infirmary—and the same distance back—four times per day to receive his medications. *See id*. Thus, the issue on which the district court focused was whether Fausett had a serious medical need for the wheelchair, walker or other device that the Staff failed to provide. Fausett presented compelling evidence on this issue. *First*, on the date Fausett was discharged from U.C. Davis to Mule Creek, the prison's medical notes for "Physician's Order and Medications"—which contain detailed information regarding prescriptions to be ordered—include an order for a "walker for use in house for ambulation" and a "w/c [wheelchair] for movement of longer distances." ER92. This evidence alone establishes the medical necessity of the walker and the wheelchair, given the long distances that Fausett had to travel.

Second, a staff member took Fausett from Triage to his cell by wheelchair, confirming the need for a wheelchair to travel long distances. ER140. *Third*, a prison incident report stated that Fausett's leg gave out when he was trying to walk across the grounds, which demonstrates his inability to walk long distances.

ER87-89. *Fourth*, Fausett testified that he was in excruciating pain, including when he walked across campus. ER60; ER76; ER135, 147-148. *Fifth*, medical notes from Dr. Muizelaar stated that Fausett's "particular surgery is very painful for two to four months." ER54.

As a whole, Fausett's evidence establishes that the Staff's failure to issue Fausett a wheelchair or other ambulatory device after invasive, painful PLIF surgery "was medically unacceptable under the circumstances," particularly given the long distances that Fausett repeatedly had to walk to obtain his medications. *Snow*, 681 F.3d at 988 (quotations omitted). At a minimum, the evidence establishes a genuine issue of material fact.

In granting summary judgment to the Staff, however, the district court concluded that "Fausett has provided no evidence—aside from his own claims and personal opinion—that his condition required a wheelchair or crutches." ER6. The court never mentioned the most critical piece of evidence in support of Fausett's claim: the physician's order, from the prison's own medical records, that Fausett receive a wheelchair and a walker. Nor did the court mention any of the other evidence discussed above, other than Fausett's own testimony. But even that testimony—*i.e.*, that Fausett experienced severe pain without a wheelchair or walker—is sufficient to raise a genuine issue of material fact. The court erred by

failing to address most of Fausett's evidence and by failing to view Fausett's testimony in the light most favorable to him.

The court also erred in its assessment of Dr. Muizelaar's discharge papers (which were unaccompanied by explanatory testimony due to the magistrate judge's erroneous refusal to subpoena Dr. Muizelaar as a witness). Apparently relying on a note from Dr. Muizelaar, the court stated that "the evidence produced demonstrates that Fausett was able to ambulate without a walker while still at U.C. Davis." ER6. But Dr. Muizelaar merely noted that Fausett "is able to ambulate without a walker" and "uses a front-wheeled walker for comfort." ER90. Viewed in the light most favorable to Fausett, this suggests only that Fausett was physically capable of walking short distances in the hospital without a walker, but that even this was painful. And the note says nothing about longer distances. It is an enormous (and unreasonable) leap to infer that Fausett's ability to "ambulate" in hospital hallways during his recovery means that he was able to journey miles per day to obtain his medicine at Mule Creek. Indeed, any such inferential leap is contradicted by the prison's own medical records stating that Fausett should receive a wheelchair "for movement of longer distances." ER92. Under appropriate summary judgment standards, the discharge notes do not support the Staff's motion at all, much less overcome Fausett's strong evidence on this issue. The district court's inferences were unreasonable, and the court failed to view the

evidence in the light most favorable to Fausett. Summary judgment should be reversed. At the very least, this Court should reverse and remand to the district court with instructions to give proper consideration to Fausett's evidence.

2. The District Court Failed To Determine Whether The Pain Medication Prescribed By The Staff Was An Adequate Substitute For Valium

As the district court acknowledged, Fausett's evidence "certainly show[ed] . . . that Defendants did not follow Dr. Muizelaar's post-surgical orders with exactness" and "did not provide Fausett with the type of pain medication that Dr. Muizelaar prescribed." ER5-6. After Fausett's follow-up visit with Dr. Muizelaar more than one month after surgery, ER54; ER72, Dr. Muizelaar advised Mule Creek that Fausett needed more pain medication and reminded the Staff that "this particular surgery is very painful for two to four months," ER54. Dr. Muizelaar recommended that Fausett take two tablets of Vicodin three times a day and five milligrams of Valium three times a day, "as this helped him well in the hospital." *Id*. Despite Dr. Muizelaar's advice, Fausett received no Valium from Mule Creek. ER102; ER125-26. Instead, Staff physicians substituted Robaxin, a muscle relaxant, and Motrin for the pain. ER52; ER110; ER125-26.

Based solely on the fact that "the evidence also shows that Defendants did provide Fausett with other pain medications," the district court rejected Fausett's claim regarding his medication. ER5. The court made no express finding that

Robaxin and Motrin were adequate or effective substitutes for Valium in light of Fausett's condition, yet it concluded that "Defendants have met their burden of establishing that they were not deliberately indifferent to Fausett's medical needs." ER6. This ruling amounts to nothing more than a determination that deliberate indifference to serious medical needs does not exist so long as *some* treatment is provided. That is not the law. *See Snow*, 681 F.3d at 998.

Furthermore, in finding an absence of "evidence that the Defendants[']course of treatment . . . was medically unacceptable," the court relied solely on the observation that "Fausett has not provided an affidavit or other statement from a physician stating that his treatment was medically unacceptable." ER6. This was the very evidence that the magistrate's erroneous rulings had prevented Fausett from obtaining. And Fausett nevertheless did present evidence that the Valium prescribed by Dr. Muizelaar "helped him well in the hospital," ER54, whereas at the prison—when Fausett received no Valium—he was in extreme pain, ER52; ER76. In addition, the prison's own psychiatrist and social worker testified that the medical staff "sardonic[ally] dismiss[ed]" Fausett's complaints of inadequate pain medication and claimed—contrary to the impressions of the psychiatrist and social worker—that he was "simply gaming the system and drug-seeking." ER62; *see also* ER66. Especially when viewed in the light most favorable to Fausett, this evidence supports an inference that the Staff treated Fausett for a level of pain

much lower than what Fausett actually experienced and what Dr. Muizelaar sought to treat. The district court failed to address any of this evidence, which at least raises a genuine issue as to the medical acceptability of the Staff's departure from the U.C. Davis physician's prescribed treatment.

* * *

Because the evidence created genuine issues of material fact regarding the adequacy of the Staff's medical treatment of Fausett, summary judgment must be reversed. At a minimum, the case should be remanded so that the court may properly consider all of the evidence when determining whether summary judgment is appropriate. *Riverside Cnty.*, 249 F.3d at 1136-37 (reversing and remanding summary judgment ruling when this Court could not "tell with certainty what evidence the district court considered before ruling on the summary judgment motions"). Remand is, in all events, necessary for development of the record with appointed counsel, a neutral expert, and testimony from Fausett's treating physicians—or at least for proper consideration by the district court of these issues.

CONCLUSION

For all these reasons, this Court should reverse the district court's entry of summary judgment, denial of appointed counsel, denial of a court-appointed expert, and denial of subpoenas, and it should vacate the referral to an out-of-district magistrate judge. At the very least, this Court should reverse and remand to allow the district court to reconsider its rulings.

Dated: February 15, 2013

Respectfully submitted,

/s/ Tara Stuckey Morrissey
Louis K. Fisher
Tara Stuckey Morrissey
Sarah S. Podmaniczky
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

Attorneys for Plaintiff-Appellant
Michael Shaw Fausett

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully requests that this Court hear oral argument in this case.

STATEMENT OF RELATED CASES

Pursuant to Cir. Rule 28-2.6, Plaintiff-Appellant states that:

(a) there is no appeal that arises out of the same case (or any consolidated case) in the district court;

(b) no appeal that concerns the case being briefed was previously taken to this Court;

(c) he is unaware of any case that raises the same or closely related issues that are on appeal to this Court; and

(d) he is unaware of any case that is on appeal to this Court and which involves the same transaction or event at issue in this case.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that the attached replacement opening brief is proportionally spaced, using a typeface of 14 points and—exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii)—contains 13,971 words. As permitted by Fed. R. App. P. 32(a)(7)(C), in making this declaration, the undersigned has relied upon the word count of the word-processing system used to prepare the attached brief.

Dated: February 15, 2013

/s/ Tara Stuckey Morrissey
Tara Stuckey Morrissey

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Replacement Opening Brief for Plaintiff-Appellant, along with Plaintiff-Appellant's Excerpts of Record, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 15, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 15, 2013

/s/ Tara Stuckey Morrissey
Tara Stuckey Morrissey

ADDENDUM

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Title 28—Judiciary and Judicial Procedure

§ 636. Jurisdiction, Powers, and Temporary Assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
>
> (2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;
>
> (4) the power to enter a sentence for a petty offense; and
>
> (5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b) (1) Notwithstanding any provision of law to the contrary—

> (A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court

proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he

serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt authority.—

(1) In general.—A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority.—A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties.—The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall

not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court.—Upon the commission of any such act—

> (A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or
>
> (B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—
>
> > (i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,
> >
> > (ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or
> >
> > (iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders.—The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other

order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate judge shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate judge so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. A magistrate judge may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate judge assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate judge may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate judge. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate judge, shall not apply to the recall of a retired magistrate judge under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate judge under this subsection or section 375 of this title unless such retired magistrate judge met such requirement upon appointment or reappointment as a magistrate judge under section 361.

Title 28—Judiciary and Judicial Procedure

§ 1915. Proceedings in Forma Pauperis

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the

prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

Fed. R. Evid. 706. Court-Appointed Expert Witness

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES ROBERT GORTON,

Plaintiff, No. CIV S-08-3069 LKK GGH P

vs.

TODD, et al.,

Defendants. ORDER

_____/

Plaintiff, a prisoner proceeding pro se, claims that defendant doctors at the University of California Davis Medical Center were deliberately indifferent to his serious medical needs. On November 24, 2009, these defendants moved for summary judgment.[1] They argued, inter alia, that to succeed on a claim for deliberate indifference, plaintiff must provide expert testimony. MP&A Summary Judgment, ECF No. 49-1, at 13. On December 15, 2010 and December 18, 2010, plaintiff filed three motions for a court appointed expert witness. Motions, ECF Nos. 53, 56, 61. Plaintiff also argued in his opposition to the summary judgment motion that he needed the court to appoint an expert witness on his behalf so that he could meaningfully oppose the summary judgment motion. Opposition, ECF No. 63, at 1-2. On January 21, 2010, the magistrate

[1] The defendants from Mule Creek Prison have also moved for summary judgment, but briefing on this motion is not yet complete.

judge denied the motions, concluding that, "At this time appointment of a medical expert is not warranted." Order, ECF No. 69, at 2. On June 8, 2010, the magistrate judge issued findings and recommendations that the court grant the motion because, inter alia, "[I]n cases involving complex medical issues where plaintiff contests the type of treatment he received, expert opinion will almost always be necessary to establish the necessary level of deliberate indifference." Findings and Recommendations, ECF No. 75, at 11 (citing Hutchinson v. United States, 838 F.2d 390 (9th Cir. 1988)). On June 24, 2010, plaintiff filed objections to the findings and recommendations again raising the issue of the claimed necessity of appointment of an expert witness.

The Ninth Circuit has held that district courts may appoint expert witnesses for a pro se prisoner bringing a civil rights complaint against prison officials and to "apportion all cost [of the expert] to one side," namely the prison officials. McKinney v. Anderson, 924 F.2d 1500, 1511 (9th Cir. 1991) affirmed on other grounds Helling v. McKinney, 509 U.S. 25 (1993). In this case, the Court of Appeals then recommended that the district court appoint an expert "[c]onsidering the complexity of the scientific evidence in the present case." Id.

The apparent inability of an indigent prisoner to ever successfully litigate cases such as the instant case seems to implicate serious constitutional rights. For this reason, the court will request supplemental briefing from the parties on this question. The United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in Section 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, (1989). In certain exceptional circumstances, however, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015 (9th Cir. 1990); Wood v. Housewright, 900 F.2d 1332 (9th Cir. 1990). Given the legal complexity and the broad significance of this issue, the court has determined that this case may be appropriate for the limited appointment of counsel as to the question of whether the denial of plaintiff's request for

an expert witness offends his constitutional rights.[2] Therefore, this court will refer this case to the King Hall Civil Rights Clinic for review. Plaintiff is cautioned while the case is under review, he has responsibility to continue to prosecute his action. The court is not staying the litigation pending the review; rather the review and continued processing of this case will take place at the same time. No scheduled dates in this litigation have been vacated. Also, it may ultimately turn out that volunteer counsel may not be procurable for plaintiff's case.

Accordingly, IT IS HEREBY ORDERED that:

1. The Clerk of Court shall serve this order upon Carter Capps White, King Hall Civil Rights Clinic, UC Davis School of Law, One Shields Avenue, Bldg. TB 30, Davis, CA 95616;

2. The King Hall Civil Rights Clinic should inform the court within thirty (30) days of the issuance of this order as to whether it will accept limited representation of plaintiff; and

3. Upon notice from the King Hall Civil Rights Clinic, the court will set a briefing schedule for the issue described above.

IT IS SO ORDERED.

DATED: August 10, 2010.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

[2] The court will invite the parties to consider whether experts should be appointed as a matter of course when these cases are brought as well as under what conditions, if any, must a district court grant such a request for appointment in accordance with the Constitution. Further, the court will request briefing as to the anticipated scope of medical testimony necessary, if any, and the administrative and financial burdens appointment of expert witnesses in cases like these may pose.