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98-20571

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 98-20571 Hall v. Thomas  
USDC No. H-97-CV-874

ROBERT ARTHUR HALL

Plaintiff-Appellant,

v.

Tommy B. Thomas, Sheriff, ET AL

Defendants-Appellees.

U.S. COURT OF APPEALS  
**FILED**

SEP 04 1998

CHARLES R. FULBRUGE III  
CLERK

Appeal from the United States District Court for  
the Southern District of Texas, Houston Division

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BRIEF OF APPELLANT

ROBERT ARTHUR HALL  
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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 98-20571 Hall v. Thomas, et al  
USDC No. H-97-CV-874

ROBERT ARTHUR HALL,  
Plaintiff-Appellant

v.

TOMMY B. THOMAS, Sheriff, ET AL  
Defendants

TOMMY B. THOMAS, Sheriff; K.W. BERRY, Major; MIKE SEALE, Doctor;  
M.W. QUINN, Major; C. TRINH, Doctor; DONALD KLEIN, Doctor; MARK  
CHASSAY, Doctor; K. HOWARD, Nurse; M. GUICE, Doctor; A. PHI,  
Doctor; KHAM LUU, Doctor.

Defendants-Appellees.

**BRIEF OF APPELLANT**

**Statement of Subject Matter and Appellant Jurisdiction**

The district court had subject matter jurisdiction under 42 U.S.C. Section 1983 and 42 U.S.C. Section 12132 because the complaint raises a federal question, whether the defendants violated the plaintiff's rights under the U. S. Constitution and the

Americans with Disabilities Act (ADA). This Court has appellate jurisdiction under 28 U.S.C. Section 1291 because the grant of summary judgment is a final judgment. Said final judgment was entered on June 9, 1998, and the plaintiff's Notice of Appeal was filed on June 19, 1998.

### **Statement of Issues Presented for Review**

1. Whether the district court, in granting summary judgment and motions to dismiss, improperly decided that the ADA did not apply to the plaintiff while he was a prisoner in the Harris County Jail, Houston, Texas.

2. Whether the district court, in granting summary judgment and motions to dismiss, improperly decided factual issues in whether plaintiff had stated a claim under the ADA.

3. Whether the district court improperly granted qualified immunity to the defendants.

4. Whether the district court improperly dismissed plaintiff's 42 U.S.C. Section 1983 action because plaintiff's factual allegations of "deliberate indifference to his serious medical needs by the defendants" raised a material issue under the Eighth Amendment and subsequently under the First, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

### **STATEMENT OF THE CASE**

#### **A. Statement of Proceedings**

On March 18, 1997, the plaintiff filed civil suit under 42 U.S.C. Sections 1983 and 12132 and alleges that his serious

medical needs, as a disabled person, were not met due to the deliberate indifference of the defendants. On January 16, 1998, the district court in a Memorandum Opinion (See Doc 65, pgs. 1-18) and Order (see Doc 66, pgs. 1-2) granted summary judgment and motions to dismiss for the defendants on the following grounds:

1) The district court dismissed with prejudice plaintiff's claims under the ADA (42 U.S.C. Section 12132) by ruling that the provisions of the ADA did not apply to the plaintiff as a prisoner. (See Doc. 65, pgs. 5-10 and Doc. 66, p.1)

2) The district court dismissed with prejudice plaintiff's claims for relief under 42 U.S.C. Section 1983 against all the named defendants in their official capacities by stating that the defendants medical treatment was "potentially negligent" but not deliberately indifferent to plaintiff's serious medical needs. (See Doc. 65, pgs. 11-18)

#### B. Statement of Facts

On February 21, 1995, U.S. Marshals arrested the plaintiff on a parole warrant. At the time the disabled plaintiff had a history of mental and physical disabilities (See Doc. 65, p.2 at THE DISPUTE). The plaintiff was assigned to the Harris County Jail in Houston, Texas. While housed at that facility, the disabled plaintiff claims that his Constitutional rights were violated based on the deliberate indifference of the defendants to adequately treat his serious medical conditions. The plaintiff filed civil suit under 42 U.S.C. Sections 1983 and 12132 seeking damages against the named defendants.

On October 10, 1997, defendants Seale, Guice, Trinh, Phi, Luu, Chassay and Klein filed a motion for summary judgment in this action (See Doc. 45, pgs. 1-13). As an Exhibit Dr. Mike Seale submitted an affidavit. No other affidavits were submitted, at any other time, by any other defendant doctor in this action.

On November 25, 1997, the plaintiff submitted an Answer to Defendant Doctor's Motion for Summary Judgment. With the Answer was a supporting Brief, Affidavit of Robert Arthur Hall and a notarized letter of Dr. William J. Riley (See Doc. 50, pgs. 1-13; see also Exhibits A-C attached thereto).

#### **Summary of Argument**

The plaintiff's affidavit (Doc 50, Exhibit B) squarely contradicted the factual allegations of the defendants, and the facts it alleged would have supported a judgment for the plaintiff under the Eighth Amendment and subsequently the First, Fifth, Sixth and Fourteenth Amendments and the Americans with Disabilities Act. Summary judgment was therefore improper on the record before the district court.

#### **ARGUMENT**

##### **POINT 1**

#### **THE DISTRICT COURT SHOULD NOT HAVE DISMISSED PLAINTIFF'S ADA CLAIM**

Summary judgment is to be granted only if the record before the court shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of



law." Rule 56(c), Fed.R.Civ.P. Whether a party is entitled to a summary judgment is a question of law over which this Court exercises plenary review. (See Tobey v. Extel/JWP, Inc., 985 F.2d 330, 332 (7th Cir. 1993))

A. **The** district court improperly dismissed plaintiff's claims under the ADA.

(1) Plaintiff's affidavit and brief (See Doc. 50, Exhibits A and B) stated that the ADA applied to him while he was confined as a prisoner in the Harris County Jail at the time of the complaint and that there were a number of genuine issues as to material fact when the complaint was viewed in light of the provisions of the ADA.

(2) On January 16, 1998, the district court improperly dismissed plaintiff's claims as a prisoner under the ADA. (See Doc. 65, pgs. 5-10; and Doc. 66, p. 1)

(3) On June 15, 1998, the U.S. Supreme Court issued a unanimous ruling in Pennsylvania Dept. of Corrections v. Yeskey, 118 F.3d 168 (3rd Cir. 1997), aff'd 1998 LEXIS 3888. Affirming that "...the plain text of Title II of the ADA unambiguously extends to state prison inmates..." Id. at 11. Writing for the Court, Justice Scalia stated:

"...the statutes language unmistakably includes state prisons and prisoners within its coverage.

Id. at 5

"...the ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt. Title II of the ADA provides that:

"Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. Section 12132.

State prisons fall squarely within the statutory definition of public entity which includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." Section 12131 (B).

Id. at 6

The statute defines the term to include anyone with a disability...who...meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. Section 12132 (2).

(4) Plaintiff's complaint describes that, due to the deliberate indifference of the defendants, that as a "qualified individual with a disability" that he was "excluded from participation in" and "denied the benefits of the services, programs, or activities of" the Harris County Sheriff's Department-Jail Division that were available to jail inmates. Namely the medical services, religious services, law library services and all recreational activities benefiting inmates in the jail for a sixteen (16) month period. (See Doc. 1, pgs. 13-16)

(5) The record supports that the defendants were informed a number of times that the plaintiff had a physical disability in both legs. (See Doc.1, pgs. 13-17; See Exhibits 56, 66, 74, attached thereto) With deliberate indifference to the plaintiff's

serious medical needs, the defendants failed to accomodate his disabled person in medical services, religious services and recreational activities for a sixteen (16) month period in the Harris County Jail and in violation of the Americans with Disabilities Act, 42 U.S.C. Section 12132. The district court improperly dismissed plaintiff's claims under the ADA in light of the foregoing.

## POINT 2

### THE COMPLAINT STATES A CLAIM UNDER THE ADA

At 28 C.F.R. Section 35.149 Discrimination prohibited, it states in part:

"...no qualified individual with a disability shall...be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

A. The plaintiff's claim to being a "qualified individual" under the ADA.

(1) The plaintiff cites the Memorandum Opinion of the district court to establish his standing as a qualified individual with a disability. In the Opinion (See Doc. 65, p.2) at part II. THE DISPUTE the district court finds:

"At the time of his arrest, Hall had a history of mental and physical disabilities including; neurological and musculoskeletal difficulties, epilepsy, hypothyroidism, chronic kidney dysfunction, diabetes, and several mental and emotional disorders (i.e. bipolar disorder, clinical major depression, and split personality disorder)."

The district court states at Doc. 65, p. 17:

"...the plaintiff obviously suffers from severe mental and physical illnesses..."

(2) The district court's descriptions above define the plaintiff's mental and physical conditions as severe (serious) and qualify him as a "disabled person" under the ADA definitions found in 28 C.F.R. Part 35 as follows:

Section 35.101 Purpose.

The purpose of this part is to effectuate subtitle A of Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities.

Section 35.104 Definitions.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment.

(1)(i) The phrase physical or mental impairment means-

(A) Any physiological disorder or condition... affecting one or more of the following body systems: Neurological, musculoskeletal...genitourinary...

(B) Any mental or psychological disorder such as... emotional or mental illness...;

(3) The plaintiff is a "qualified individual with a disability who...meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." The plaintiff's complaint, Brief and affidavit

has claimed, and supported with Exhibits, that the defendants et al, who represented the Harris County Sheriff's Department as a public entity, excluded the plaintiff from participation in, and denied him the benefits of the services, programs, and activities that were afforded to other inmates in the Harris County Jail and this states a claim under the ADA.

B. A reasonable prison official would have known that his actions constituted a violation of the ADA.

The disabled plaintiff's Original Complaint describes in detail a sixteen (16) month period of incarceration in the Harris County Jail where:

(a) The disabled plaintiff was mis-classified upon his entry into the jail and placed in Administrative Detention where the defendants made no accommodations for his mental and physical disabilities. Such accommodations should have been the classification of the plaintiff to a hospital section and/or medical cellblock in the jail.

(b) The mis-classification of the plaintiff by the defendants resulted in:

- 1) the plaintiff not being seen by proper mental health personnel;
- 2) the plaintiff having extended and untreated depression;
- 3) the plaintiff not receiving treatment for his bipolar disorder;
- 4) the plaintiff having to suffer excessive seizure activity that for the most part went unnoticed and untreated.

(c) The disabled plaintiff's orthopedic and musculoskeletal disabilities were not accommodated by his having to wear medically

restricted leg irons (See Doc. 1, Exhibit 56). The use of the leg irons, and the pain and injury produced thereby, prevented the plaintiff from:

- 1) the free exercise of his religion in not being able to attend religious services;
- 2) and from the exercise of plaintiff's rights to having meaningful access to the courts by his not being able to attend all library periods for sixteen (16) months;
- 3) and from attending all recreational activities for sixteen (16) months.

(d) While in Administrative Detention, and during the sixteen month period of the complaint, the plaintiff:

- 1) suffered an untreated kidney dysfunction for months; and
- 2) had a misdiagnosis of herpes and which after months of suffering was diagnosed as out of control diabetes;
- 3) the months that the out of control diabetes went undiagnosed left the plaintiff covered in sores, with swollen glands and a partial loss of vision and at the same time he was deprived of 180 doses of seizure medications which caused the plaintiff to have excessive and dangerous seizure activity.

(e) A reasonable prison official would not have placed the mentally disabled plaintiff, who had a history of suicide attempts in that jail system, had clinical depression, bipolar disorder and split personality disorder in Administrative Detention.

A reasonable prison official would not have placed the physically disabled plaintiff, who had orthopedic and musculoskeletal

difficulties, epilepsy, hypothyroidism, chronic kidney dysfunction and had swollen glands and was covered in sores in Administrative Detention.

A reasonable prison official would have accommodated the mental and physical disabilities of the plaintiff by having him placed in the mental health ward of the Harris County Jail and or in one of the medical cellblocks designated for this purpose and also found within the Jail. A reasonable prison official would have seen that all medications prescribed for the disabled plaintiff were actually given to the plaintiff for the treatment of his disabilities.

Unreasonableness of Defendants Documented in Original Complaint

(f) In the plaintiff's Medical Records, attached to the Original Complaint (Doc. 1), the defendants have placed copies of letters that the plaintiff, and others acting on behalf of the plaintiff, sent to the Harris County Sheriff's Department-Medical Division and U.S. Marshals Office, and which prove the defendants knew the plaintiff was not receiving reasonable and adequate medical services from the defendants. These letters are excerpted as follows:

1) August 23, 1995, letter from plaintiff to Hospital Administrator states:

"Having sent multiple requests...I have become increasingly ill while your department has been indifferent to my needs." (Doc. 1, Exhibit 67)

2) September 20, 1995, letter from plaintiff to U.S. Marshal Ray Bright, and which was service copied to the defendants, stated the

plaintiff had attempted and failed to obtain medical attention on ten (10) different dates and that even a jail chaplain was also trying to get the plaintiff medical attention but without success. (See Doc. 1, Exhibit 69, pgs. 1-3)

3) On March 13, 1996, a U.S. Government Memorandum was sent from Acting Chief Deputy Lisa Griffis to defendant Major Quinn which stated that "Hall is a diabetic and is having problems with lack of monitoring of his medication doses..." (See Doc. 1, Exhibit 70)

The defendants were unreasonable for they knew the disabled plaintiff had been laying on a bunk for months, in a Administrative Detention cell, (a) covered with sores, (b) with swollen glands, (c) suffering untreated clinical depression, (d) suffering with an untreated bipolar disorder (e) and suffering an untreated split personality disorder. The defendants also knew the plaintiff was suffering pain from (f) his unaccommodated orthopedic and musculoskeletal difficulties, (g) suffering from kidney dysfunction and (h) suffering excessive seizure activity through his not receiving 180 doses of seizure medication for his disability of epilepsy. The defendants, therefore, acted unreasonably and knew their actions or inactions violated the Americans with Disabilities Act.

Plaintiff's complaint stated a claim under the ADA. The district court improperly dismissed plaintiff's claim under the ADA.



### POINT 3

#### THE DISTRICT COURT SHOULD NOT HAVE GRANTED QUALIFIED IMMUNITY TO THE DEFENDANTS

A. The district court stated in its Memorandum Opinion:

"Thus, the assessment of a qualified immunity defense requires an examination of two factors. First, the Court must consider whether the plaintiff has alleged the violation of a clearly established right...Second, the Court must consider whether the actions complained of with reference to the law that existed at the time, were objectively reasonable.

In order to address the first step of the qualified immunity defense, this Court must determine if the provisions of the ADA apply to prisoners." (See Doc. 65, p.5)

The district court then erroneously describes in the Opinion how the ADA does not apply to prisoners and ends granting the defendants qualified immunity in the following tentative manner:

"When examined in light of the entire statutory scheme, this Court is unable to clearly discern a congressional intention to include state correctional facilities within the ambit of Title II of the ADA. As such, the actions Hall attributes to the defendants could not have violated a "clearly established statutory right" and, thus, do not state a cause of action. In the alternate, due to the ambiguous language of the ADA, lack of guidance from the Fifth Circuit, and entrenched disagreement among the sister circuits, this Court finds that the defendants are entitled to qualified immunity for their actions with respect to Hall's ADA claim. (See Doc. 65, p. 9)

The district court granted qualified immunity to the defendants based solely on the wrong conclusion that the ADA did not apply to prisoners such as the plaintiff. As cited in POINT 1 supra the

unanimous Supreme Court ruling in Pennsylvania Dept of Corrections v. Yeskey, (citation omitted) affirmed that "...the plain text of Title II of the ADA unambiguously extends to state prison inmates..." Thus, in effect, removing the only claim the defendants had to qualified immunity from the plaintiff's complaint brought under the ADA.

B. As demonstrated in the complaint, and in this appeal above, over the months of the complaint the defendants had received a number of documented requests from the plaintiff, plaintiff's family, plaintiff's attorney, a jail chaplain and a U.S. Marshal concerning the complained of deliberate indifference to the plaintiff's serious medical needs and then the defendants failed to act as a reasonable person would in the instances complained of.

The above defeats the defendants claims to qualified immunity for state employees performing discretionary functions in their official capacity are granted qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Melear v. Spears, 862 F.2d 1177, 1184 n.8 (5th Cir. 1989)

#### POINT 4

#### THE COMPLAINT STATES A CLAIM UNDER THE EIGHTH AMENDMENT

The Supreme Court has ruled that "deliberate indifference to serious medical needs of prisoners" is cruel and unusual punishment." (See Estelle v. Gamble, 429 U.S. 97, 104 (1976). The plaintiff's complaint alleges facts that state a claim under this standard.

A. The plaintiff's claim to "serious medical needs" under the Eighth Amendment.

(1) Courts have acknowledged that conditions that cause significant pain are "serious medical needs." (See McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1992); Boretti v. Wiscomb, 930 F.2d 1150, 1154-55 (6th Cir. 1991)(needless pain is actionable even if there is no permanent injury); Dean v. Coughlin, 623 F. Supp. 392, 404 (S.D.N.Y. 1985)("conditions that cause pain, discomfort, or threat to good health" are serious.) This is true because a chief purpose of the Cruel and Unusual Punishment Clause is to prevent the "unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. at 104 (citation omitted). The plaintiff's complaint, brief, and affidavit alleges that he suffered significant and recurrent pain from his untreated physical and mental disabilities for a sixteen (16) month period due to the deliberate indifference of the defendants to his serious medical needs. This pain is more than sufficient to make the plaintiff's medical needs "serious" under an Eighth Amendment application.

(2) Courts generally agree that a medical need is "serious" if it "has been diagnosed by a physician as mandating treatment..." (See Johnson v. Busbee, 953 F.2d 349, 351 (8th Cir. 1991); see also Gaudreault v. Municipality of Salem, Mass., 923 F.2d 203, 208 (1st Cir. 1990). Plaintiff's claim, replete with attached medical records (See Doc. 1, Exhibits 1-21), shows he had been "diagnosed by a physician as mandating treatment" on several disabilities and medical conditions that were "serious."

(3) A medical condition is serious if it "significantly affects an individuals daily activities," McGuckin v. Smith, supra. The plaintiff's overall mental and physical conditions that were ignored and left untreated, had serious consequences for him. Besides pain and suffering, the complaint alleges that these conditions were so serious that for sixteen (16) months they prevented him from leaving his cell to participate in services and activities provided for inmates at the Harris County Jail. Thus, the serious medical conditions "significantly affected" the plaintiff's daily activities.

B. The defendants' conduct amounts to deliberate indifference to the plaintiff's serious medical needs.

(1) The complaint alleges that the jail doctors prescribed medications to control the plaintiff's epilepsy, and that in a 360 day period the plaintiff did not receive 180 doses of this seizure medication due to the defendant doctors deliberate indifference in not taking action once they were informed of the missed medications. (See Doc. 1, pgs. 17-23) "Intentionally interfering with treatment once prescribed" is one of the forms of deliberate indifference cited by the Supreme Court. Estelle v. Gamble, 429 U.S. at 105. Many decisions have held that failing or refusing to provide medication prescribed by physicians constitute deliberate indifference. (See Aswegan v. Bruhl, 965 F.2d 676, 677-78 (8th Cir. 1992); Hill v. Marshal, 962 F.2d 1209, 1213-14 (6th. Cir. 1992); Johnson v. Hay, 931 F.2d 456, 461 (8th Cir. 1991)

(2) During the complained of 360 day period and in reference to the 180 missed seizure medications, the plaintiff, and others acting on his behalf, spoke to or wrote the defendant doctors concerning the ever growing number of missed seizure medications. These efforts are graphically described by Exhibits in the Original Complaint (See Doc. 1, pgs. 28-33) which concludes at part 17) with:

"The foregoing sixteen (16) references portray Plaintiff, and others acting on the behalf of Plaintiff, making persistent and reasonable efforts to obtain his needed seizure medication for sixteen (16) months. It is remarkable that the Defendants themselves documented into Plaintiff's MR (medical record) eleven (11) entries pertaining to where Plaintiff either spoke with HCSD-MD doctors and nurses, wrote letters; had administrative replies in the MR; or U.S. Marshals sent fax messages. Outside the MR is Plaintiff's grievance #95-1083 and Plaintiff's attorney's two letters of 4/8/96 and 4/17/96 and the two personal attempts by Fr. Ron Cloutier. All these concerted efforts to break through the medical neglect and deliberate indifference to the serious medical needs of the Plaintiff by the HCSD-MD that resulted in the suffering and wanton infliction of pain and callous disregard for the health and well being of the Plaintiff."

Several courts have held that "repeated examples of negligent acts which disclose a pattern of conduct by the prison staff" may add up to deliberate indifference. (See Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); accord, Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991); DeGidio v. Pung, 920 F.2d 525, 533, (8th Cir. 1990)(consistent pattern of reckless or negligent conduct establishes deliberate indifference.)

The plaintiff has demonstrated above, that in his original complaint that he, and others acting on his behalf, repeatedly over the months of the complaint, talked to and/or wrote the defendant doctors describing to them a sixteen (16) month period wherein 180 doses of seizure medication had not been given to the plaintiff for his serious medical condition of epilepsy. These long running examples of negligent acts disclosed a pattern of conduct by the defendant doctors that adds up to deliberate indifference to the plaintiff's serious medical needs and states a claim for the plaintiff under the Eighth Amendment.

(3) Deliberate indifference can be demonstrated by acts or statements by prison personnel directly showing an indifferent or hostile attitude towards prisoners' medical needs. (See Hughes v. Joliet Correctional Center, 931 F.2d 425, 428 (7th Cir. 1991); White v. Napoleon, 897 F.2d 103, 109 (3rd Cir. 1990); Kersh v. Derozier, 851 F.2d 1509, 1510, 1513 (5th Cir. 1988). In the instant case, and over a sixteen (16) month period, the complaint reflects that plaintiff spoke directly to Medical Director Mike Seale, and other defendant doctors, concerning his serious medical needs, including the 180 missed seizure medications. However, Dr. Seale, and the other defendant doctors, were deliberately indifferent to those needs and took little or no action in each instance recorded. (See Doc. 1, pgs. 28-33)

(4) Courts focus on facts that show that professional judgment was either not exercised or was not followed after it was

exercised. In those fact situations, good intentions are not a defense. As one court stated:

"Deliberate indifference can be proved by showing a prison officials mental state. But deliberate indifference is also a standard for measuring the adequacy of prison officials' responses to the known medical needs of inmates and their system for allowing inmates to make their needs known."  
Dean v. Coughlin, 623 F. Supp. 392 at 402

Plaintiff's complaint more than demonstrates that "professional judgment was...not exercised or was not followed after it was exercised" for the defendants' response to the known serious medical needs of the plaintiff was deliberate indifference to those needs. (See Doc. 1, pgs. 28-33)

(5) There are several familiar fact patterns that courts have held constitute deliberate indifference:

(a) Delay or denial of access to medical attention. (See Estelle v. Gamble, 429 U.S. at 104; Fields v. City of South Houston, Texas, 922 F.2d 1183, 1192 n. 10 (5th Cir. 1991) The defendants granted a grievance that plaintiff filed on December 5, 1995, concerning him not being seen by medical doctors for a number of months. The district court recognized this claim but refused to see the serious implications of the ongoing pattern and practice of deliberate indifference manifested by the defendants failure to respond to the plaintiff's serious medical needs by the keeping of doctor appointments. (See Doc. 65, p. 12)

(b) Failure to inquire into essential facts that are necessary to

make a professional judgment. As one court put it, "We will defer to the informed judgment of prison officials as to an appropriate form of medical treatment. But if an informed judgment has not been made, the court may find that an Eighth Amendment claim has been stated." Tillery v. Owens, 719 F. Supp. 1256 at 1308. The complaint now on appeal, states that the defendant doctors failed to inquire into essential facts that were necessary to make a professional judgment. Plaintiff's complaint explained in detail to the district court how the Medication Administration Record (MAR) worked. (See Doc. 1, pgs. 18-19) Copies of the MAR from plaintiff's medical records were attached to the Original Complaint as Exhibits 33-47 for the district court to review and ascertain that indeed 180 doses of seizure medications were not dispensed to the plaintiff. The "essential facts" that the defendant doctors needed to "make a professional judgment" were contained in the MAR. However, the defendant doctors never reviewed the MAR in deliberate indifference to the plaintiff's serious medical needs in having the doses of seizure medication monitored by the doctors so as to keep him in safe ranges of this epilepsy medication.

(c) Failure to carry out medical orders. Such cases often involve the failure to provide prescribed medications. Aswegan v. Bruhl, 965 F.2d at 677-78; Hill V. Marshal, 962 F.2d 1209, 1213 (6th Cir. 1992), cert. denied 113 S.Ct. 2992 (1993); Johnson v. Hay, 931 F.2d 456, 461 (8th Cir. 1991) The defendants failed



for sixteen (16) months, through deliberate indifference, to review the MAR of plaintiff's medical records and ascertain that he had missed 180 doses of the seizure medications. The defendants refused to review these records even after the plaintiff, plaintiff's family, plaintiff's attorney, a jail chaplain and a U.S. Marshal reported the problem to them. (See Doc. 1, pgs. 28-33)

The Medication Administration Records present evidence, documented by the defendants, that the plaintiff was subjected to an Eighth Amendment violation through the "unnecessary and wanton infliction of pain" by the defendants deliberate indifference to the plaintiff's serious medical needs of having his seizure disorder treated correctly.

(d) Extreme cases of bad judgment by medical personnel constitute deliberate indifference. One federal appeals court has held that treatment "so grossly incompetent, inadequate, or excessive as to shock the conscience" or "so inappropriate as to evidence intentional maltreatment" violates the Eighth Amendment. (See Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986) (emphasis supplied); accord, Howell v. Evans, 922 F.2d 712, 719 (11th Cir. 1991); Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990) Plaintiff's complaint of 180 doses of missed seizure medications while suffering kidney dysfunction, orthopedic problems and out of control diabetes state an extreme case of bad judgment by the defendants and which constitutes deliberate indifference. on the part of the defendants.

For the foregoing demonstrated applications of "deliberate indifference" the district court should not have dismissed the plaintiff's 42 U.S.C. Section 1983 action against the defendant doctors.

### CONCLUSION

#### Relief Requested

For the foregoing reasons, the grant of summary judgment and/or motions to dismiss should be reversed and the case should be remanded to the district court for trial.

Date: August 28, 1998



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PLAINTIFF PRO SE

### VERIFICATION

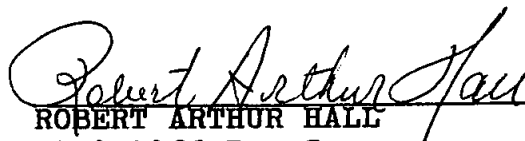
Pursuant to 28 U.S.C. Section 1746, I certify under penalty of perjury that the foregoing is true and correct.



ROBERT ARTHUR HALL  
Date: August 28, 1998

**CERTIFICATE OF SERVICE**

I certify that on August 28, 1998, a true and correct copy of the above and foregoing BRIEF OF APPELLANT was served by certified mail, return receipt requested, upon Mary E. Baker, Assistant County Attorney, 1019 Congress, 15th Floor, Houston, Texas, 77002 and Ralph C. Longmire, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711.

  
ROBERT ARTHUR HALL  
Plaintiff Pro Se