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## A Tooth and Nail Fight: *Peralta v. Dillard* and the Ninth Circuit's Indifference Toward Eighth Amendment Violations

Emily Koruda  
*Boston College Law School*

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# A TOOTH AND NAIL FIGHT: *PERALTA* v. *DILLARD* AND THE NINTH CIRCUIT'S INDIFFERENCE TOWARD EIGHTH AMENDMENT VIOLATIONS

EMILY KORUDA\*

**Abstract:** In *Peralta v. Dillard*, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, denied a prisoner suffering from severe tooth decay and dental disease legal recourse from a state prison that had not provided him adequate medical treatment. In its six-to-five ruling, the Ninth Circuit ignored more than thirty years of precedent when it allowed courts to consider budgetary constraints and resource allocation available to prison officials in actions brought by inmates pursuant to 42 U.S.C. § 1983. In doing so, the court eliminated the option for inmates to seek solely monetary damages for Eighth Amendment violations. As a result of this decision, prisoners who have suffered injuries due to a prison official's deliberate indifference are left with neither remedy nor recourse. Additionally, the court's ruling renders ineffective important incentives that had encouraged states to improve prison conditions. States can now hide behind their budgets and neglect to improve poor conditions by citing lack of resources as a defense. This Comment explores the majority's holding that lack of resources may in some circumstances justify cruel and unusual prison conditions contrary to the Eighth Amendment and Ninth Circuit precedent, and argues that the dissenting opinions more accurately reflect precedent in advocating for the constitutionally required medical treatment of U.S. prisoners.

## INTRODUCTION

Cion Adonis Peralta had been incarcerated in several California state prisons prior to January 24, 2004, when he was brought to California State Prison in Los Angeles County ("Lancaster").<sup>1</sup> Within three days of his arrival at Lancaster, Mr. Peralta requested dental care, both verbally and in writing, asserting that he needed treatment for his painful cavities and bleeding gums.<sup>2</sup> A few weeks after this initial request, Mr. Peralta had yet to receive care, and subsequently filed a written 602 Appeal with the Department of Corrections

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\* Staff Writer, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE, 2014–2015.

<sup>1</sup> *Peralta v. Dillard* (*Peralta I*), 704 F.3d 1124, 1125 (9th Cir. 2013), *aff'd en banc*, 744 F.3d 1076 (9th Cir. 2014).

<sup>2</sup> *Id.*

and Rehabilitation.<sup>3</sup> Mr. Peralta received a reply to his 602 Appeal notifying him that he was being placed on a waiting list for routine care.<sup>4</sup> The prison, however, was gravely understaffed and, as a result, prisoners on the routine care waitlist waited up to twelve months before receiving care.<sup>5</sup> Emergency dental cases were given higher priority, but Mr. Peralta was never moved to the emergency list.<sup>6</sup>

On August 23, 2004, Mr. Peralta filed a first formal-level appeal, arguing that his several months' wait for routine care was inadequate, particularly in light of his severe pain and continually bleeding gums.<sup>7</sup> Pursuant to 602 Appeal procedure, Dr. Sheldon Brooks, a staff dentist, interviewed Mr. Peralta on October 15, 2004.<sup>8</sup> Dr. Brooks examined the tooth in question and wrote Mr. Peralta a prescription for a few tablets of ibuprofen.<sup>9</sup> Dissatisfied with this treatment, Mr. Peralta submitted his 602 Appeal to the second formal level on October 21, 2004.<sup>10</sup> Dr. Brooks met with Mr. Peralta twice more between January 25, 2005 and December 23, 2005, yet Dr. Brooks never extracted the tooth, nor did he investigate for further cavities or infections.<sup>11</sup> Mr. Peralta's final formal appeal was later rejected by the Department of Corrections in Sacramento due to the fact that Dr. Brooks "did not identify [Mr. Peralta's] dental needs as urgent dental care."<sup>12</sup>

Before Mr. Peralta's third visit to Dr. Brooks, he filed a pro se complaint pursuant to 42 U.S.C. § 1983 ("section 1983") seeking monetary damages against Dr. Brooks, Dr. Thaddeus Dillard, the prison's Chief Dental Officer,

<sup>3</sup> *Id.*; Appellant's Replacement Opening Brief at 8, *Peralta I*, 704 F.3d 1124 (No. 09-55907) [hereinafter Appellant's Brief]; see State of California Inmate/Parolee Appeal CDCR 602 Form (2008–2009), available at [https://www.pdfFiller.com/en/project/29170820.htm?form\\_id=17359507](https://www.pdfFiller.com/en/project/29170820.htm?form_id=17359507). Administrative California Department of Corrections and Rehabilitation 602 Appeal procedure has four levels: the informal appeal and three levels of formal review. *How to File A CDCR Administrative Appeal*, PRISON LAW OFFICE 5, (Sept. 2008), <http://www.prisonlaw.com/pdfs/AdminAppeal10-10-08.pdf>. Typically, if a review is appealed at the informal level, the first formal-level appeal is sent to the Appeals Coordinator and reviewed by the supervisor of the appellant. *Id.* If the issue is not solved at the first formal level, it can be appealed again for a second formal-level review. *Id.* at 5–6. The warden completes the second formal-level review. *Id.* If the appellant is not satisfied with the second formal-level review, he or she can file a third formal-level appeal, which is sent to the Department of Corrections and Rehabilitation Chief of Inmate Appeals. *Id.* at 6.

<sup>4</sup> *Peralta I*, 704 F.3d at 1125; Appellant's Brief, *supra* note 3, at 8.

<sup>5</sup> *Peralta v. Dillard (Peralta III)*, 744 F.3d 1076, 1094 (9th Cir. 2014) (Christen, J., concurring in part and dissenting in part); *Peralta I*, 704 F.3d at 1125.

<sup>6</sup> See *Peralta III*, 744 F.3d at 1094 (Christen, J., concurring in part and dissenting in part).

<sup>7</sup> *Peralta I*, 704 F.3d at 1126; Appellant's Brief, *supra* note 3, at 8.

<sup>8</sup> *Peralta I*, 704 F.3d at 1126.

<sup>9</sup> *Id.*

<sup>10</sup> Appellant's Brief, *supra* note 3, at 10.

<sup>11</sup> *Id.* at 12. Two years after this initial request, Mr. Peralta was transferred to Mule Creek State Prison where he was ultimately treated for his periodontal disease and had seven cavities filled. See *Peralta III*, 744 F.3d at 1090 (Christen, J., concurring in part and dissenting in part).

<sup>12</sup> Appellant's Brief, *supra* note 3, at 13 (internal quotations omitted).

and Dr. Junaid Fitter, the prison's Chief Medical Officer.<sup>13</sup> Mr. Peralta asserted that the doctors violated his Eighth Amendment protection against cruel and unusual punishment by their deliberate indifference to his serious medical needs.<sup>14</sup> By prohibiting cruel and unusual punishment, the Eighth Amendment embodies the fundamental and inherent rights of human decency and dignity, which in this case is the right to adequate medical treatment.<sup>15</sup>

Mr. Peralta secured pro bono counsel on February 19, 2008.<sup>16</sup> The case went to trial on May 5, 2009 in the U.S. District Court for the Central District of California, which granted judgment as a matter of law to Dr. Dillard and Dr. Fitter.<sup>17</sup> The case against Dr. Brooks proceeded.<sup>18</sup> Prior to the jury's deliberation, the judge instructed the jurors that the question of whether the doctor or dentist met his duties to Mr. Peralta under the Eighth Amendment must be considered in light of the personnel and financial resources available to the dentist or doctor and whether these resources could be reasonably obtained.<sup>19</sup> At the close of trial, the jury returned a special verdict in favor of Dr. Brooks, finding that he did not act with deliberate indifference as to Mr. Peralta's dental needs, which therefore did not result in recognized harm.<sup>20</sup> Mr. Peralta appealed, challenging the jury instructions and the judgments in favor of Dr. Dillard and Dr. Fitter.<sup>21</sup>

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<sup>13</sup> See 42 U.S.C. § 1983 (2012) (permitting individuals to bring private causes of action against state officials for violations of their constitutionally protected rights); *Peralta III*, 744 F.3d at 1081; Appellant's Brief, *supra* note 3, at 4. To establish a prima facie case under section 1983, a plaintiff must show two elements: (1) the action occurred "under color of [law]" and (2) the action is a deprivation of a constitutional right or a federal statutory right. 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330–31 (1986).

<sup>14</sup> See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *Peralta III*, 744 F.3d at 1081.

<sup>15</sup> See U.S. CONST. amend. VIII; *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (prohibiting corporeal punishment in Arkansas prison system).

<sup>16</sup> Appellant's Brief, *supra* note 3, at 4.

<sup>17</sup> *Peralta I*, 704 F.3d at 1126.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1127. The jury instruction read, in pertinent part:

Evidence has been presented during the trial regarding dental staffing levels and the availability of resources at the Lancaster correctional facility where Plaintiff Peralta was incarcerated during the time of his alleged injuries in this case.

Whether a dentist or a doctor met his duties to Plaintiff Peralta under the Eighth Amendment must be considered in the context of the personnel, financial, and other resources available to him or her which he or she could not reasonably obtain. A doctor or dentist is not responsible for services which he or she could not render or cause to be rendered because the necessary personnel, financial, and other resources were not available to him or her which he or she could not reasonably obtain.

*Id.*

<sup>20</sup> *Id.* at 1126.

<sup>21</sup> *Peralta III*, 744 F.3d at 1081.

On rehearing en banc, addressing the issues of whether the jury instructions misstated the law and whether Dr. Fitter and Dr. Dillard were deliberately indifferent to Mr. Peralta's serious medical needs, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment.<sup>22</sup> Reasoning that monetary damages cannot be applied against officials who do not have control over the resources or budgetary decisions within their facilities, the court held that individuals may raise "insufficient resources" as a defense to a claim for damages asserting that a prisoner suffered an Eighth Amendment violation.<sup>23</sup> Prior to this ruling, however, circuit precedent did not recognize lack of resources as a defense for failure to provide constitutionally adequate care for prisoners.<sup>24</sup> The dissenters argued that this decision would have radical adverse consequences for inmates who challenge the cruel and unusual conditions they experience in prison.<sup>25</sup>

Part I of this Comment briefly summarizes the factual and procedural history of *Peralta v. Dillard*. Part II examines the history of Mr. Peralta's appeal and how the district court decided to instruct the jury on the role that the prison's budgetary constraints play in the decision-making process. Part III discusses the Ninth Circuit's holding that prison officials may raise a cost and budgetary constraints defense to justify cruel and unusual punishment under the Eighth Amendment. Finally, Part IV critiques the majority's decision and demonstrates how the majority neglected to effectuate the basic principles of the Eighth Amendment, leaving prisoners who are suffering from serious medical needs abandoned without legal recourse.

## I. THE ROOT OF MR. PERALTA'S DENTAL PROBLEMS

Within days of arriving at Lancaster, Mr. Peralta made verbal and written requests to receive dental treatment for his cavities, bleeding gums, and severe pain.<sup>26</sup> Having received no response to his complaints, Mr. Peralta filed a 602 Appeal to the Department of Corrections on July 15, 2004.<sup>27</sup> The Department

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<sup>22</sup> *Id.* at 1084, 1088–89.

<sup>23</sup> *Id.* at 1084. The court also issued an unpublished memorandum, agreeing with the district court's decision to grant judgment as a matter of law to Dr. Dillard and Dr. Fitter. *See Peralta v. Dillard (Peralta II)*, 520 F. App'x 494, 495 (9th Cir. 2013) (holding a reasonable juror would not have a legally sufficient evidentiary basis to find for Peralta on his claims against the defendants for deliberate indifference). Upon a rehearing en banc, a divided Ninth Circuit ultimately affirmed the prior judgments. *Peralta III*, 744 F.3d at 1084, 1089.

<sup>24</sup> *Peralta III*, 744 F.3d at 1089 (Christen, J., concurring in part and dissenting in part).

<sup>25</sup> *See id.* at 1097 (Hurwitz, J., concurring in part and dissenting in part) ("Today's decision thus not only forecloses relief to inmates who suffer cruel and unusual punishment, but also encourages future constitutional violations.")

<sup>26</sup> *Peralta v. Dillard (Peralta I)*, 704 F.3d 1124, 1125 (9th Cir. 2013), *aff'd en banc*, 744 F.3d 1076 (9th Cir. 2014); Appellant's Brief, *supra* note 3, at 8.

<sup>27</sup> Appellant's Brief, *supra* note 3, at 8.

of Corrections replied on August 20, 2004, and notified Mr. Peralta that he was being put on a waiting list for routine care, not on the list for emergency care.<sup>28</sup> The average wait on the routine care list typically lasted between nine and twelve months.<sup>29</sup> Generally at Lancaster, a prisoner on the emergency care list was entitled to receive care before those on the routine care list.<sup>30</sup> Yet, the record did not indicate the protocol for determining which prisoners received spots on the emergency care list.<sup>31</sup>

On August 23, 2004, Mr. Peralta filed a first formal-level appeal, arguing that his several-month wait for routine care was inadequate.<sup>32</sup> On October 15, 2004, three months after filing his 602 Appeal, Dr. Brooks interviewed Mr. Peralta.<sup>33</sup> Dr. Brooks took one X-ray of Mr. Peralta's teeth, reviewed Peralta's health history, and performed a clinical examination on one tooth.<sup>34</sup> Finding severe bone loss, he scheduled Mr. Peralta for an extraction of the tooth.<sup>35</sup> Dr. Brooks did not examine any other teeth or investigate for further cavities or infections.<sup>36</sup> Dr. Brooks then wrote Mr. Peralta a prescription for a few tablets of ibuprofen.<sup>37</sup>

Mr. Peralta continued to experience constant pain and bleeding gums.<sup>38</sup> As a result, he filed a second formal-level appeal on October 21, 2004, asserting that his dental needs had not been sufficiently addressed.<sup>39</sup> On January 25, 2005, while his second appeal was pending, Mr. Peralta visited Dr. Brooks for his scheduled tooth extraction.<sup>40</sup> Upon further examination, Dr. Brooks told Mr. Peralta that the tooth did not have a cavity and therefore its extraction was not necessary.<sup>41</sup> Mr. Peralta took Dr. Brooks's advice and decided against having his tooth pulled.<sup>42</sup>

On December 23, 2005, nearly eighteen months after Mr. Peralta made his initial request for dental care, Dr. Brooks finally cleaned Mr. Peralta's teeth.<sup>43</sup> The records from this cleaning indicated that Dr. Brooks found significant plaque and calculus buildup, bleeding gums, bone loss, and gingival re-

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Peralta v. Dillard (Peralta III)*, 744 F.3d 1076, 1090 (9th Cir. 2014) (en banc) (Christen, J., concurring in part and dissenting in part).

<sup>31</sup> *Id.* at 1094.

<sup>32</sup> *Peralta I*, 704 F.3d at 1126.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; Appellant's Brief, *supra* note 3, at 10.

<sup>40</sup> *Peralta I*, 704 F.3d at 1126.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

cession.<sup>44</sup> Dr. Brooks diagnosed Mr. Peralta with advanced periodontitis.<sup>45</sup> Dr. Brooks, however, did not schedule Mr. Peralta for another appointment to treat these discovered ailments.<sup>46</sup> Instead, in February 2006, Mr. Peralta was transferred to Mule Creek State Prison where he was ultimately treated for his periodontal disease and had seven cavities filled, two years after he made his initial request for treatment at Lancaster.<sup>47</sup>

## II. THE PATH FROM TOOTH PAIN TO THE NINTH CIRCUIT

On March 18, 2005, in the District Court for the Central District of California, Mr. Peralta filed his section 1983 complaint against Dr. Dillard, Dr. Fitter, and Dr. Brooks for violating his Eighth Amendment right to freedom from cruel and unusual punishment by failing to provide necessary dental treatment.<sup>48</sup> Prior to trial, Mr. Peralta filed his proposed jury instructions, which emphasized that the prison's lack of funding for resources cannot be used as a defense for liability under section 1983.<sup>49</sup> The defendants made no objection to these proposed instructions.<sup>50</sup> The district court, however, neglected to use Mr. Peralta's instructions.<sup>51</sup> The district court submitted its own version to the jury over Mr. Peralta's objection, stating the opposite of what Mr. Peralta proposed: that the jury should consider available financial and other resources when assessing liability under section 1983.<sup>52</sup>

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<sup>44</sup> Appellant's Brief, *supra* note 3, at 12.

<sup>45</sup> *Id.* Periodontitis is an oral bacterial infection that gradually causes inflammation of the gums surrounding teeth and can lead to bone loss. Mara S. Meyer et al., *A Review of the Relationship Between Tooth Loss, Periodontal Disease, and Cancer*, 19 *CANCER CAUSES & CONTROL* 895, 896 (2008).

<sup>46</sup> Appellant's Brief, *supra* note 3, at 12.

<sup>47</sup> *See Peralta III*, 744 F.3d at 1090 (Christen, J., concurring in part and dissenting in part). When Dr. Brooks examined Mr. Peralta at Lancaster, he did not examine Mr. Peralta's other teeth or address Mr. Peralta's suspicions that he had other cavities. *See* Appellant's Brief, *supra* note 3, at 12.

<sup>48</sup> Appellant's Brief, *supra* note 3, at 4.

<sup>49</sup> *Id.* at 5. Mr. Peralta's requested jury instruction stated:

Evidence has been presented during the trial regarding dental staffing levels and the availability of resources at the Lancaster correctional facility where Plaintiff Peralta was incarcerated during the time of his alleged injuries in this case. State budgetary constraints are not a defense to primary or supervisory liability under Section 1983. Specifically, (1) the lack of funding from the State of California for resources at the Lancaster facility is not a defense to liability under Section 1983, and (2) the lack of staffing or other resources in the dental department at the Lancaster facility is not a defense to liability under Section 1983.

*Id.*; *see also* Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986), *overruled by* Peralta v. Dillard (*Peralta III*), 744 F.3d 1076 (9th Cir. 2014) (en banc) (stating that "[b]udgetary constraints, however, do not justify cruel and unusual punishment").

<sup>50</sup> Appellant's Brief, *supra* note 3, at 5.

<sup>51</sup> *Id.* at 6.

<sup>52</sup> *Id.* at 5–6; *see also* 42 U.S.C. § 1983 (2012).

After Mr. Peralta presented his evidence, Dr. Dillard, Dr. Fitter, and Dr. Brooks moved for directed verdict.<sup>53</sup> The district court directed a verdict in favor of Dr. Dillard and Dr. Fitter, based on the finding that there was not sufficient evidence that either doctor had actual knowledge of a serious medical condition.<sup>54</sup> The court did not grant Dr. Brooks's motion, determining that there was sufficient evidence of Dr. Brooks's deliberate indifference to Mr. Peralta's medical condition for the issue to be presented to a jury.<sup>55</sup>

During trial, Dr. Brooks testified that due to understaffing, he spent the majority of his day treating patients from the emergency care list.<sup>56</sup> If he happened to have time at the end of a day, he would try to see patients on the routine care list.<sup>57</sup> As a result, patients on the routine care list would typically wait approximately twelve months before meeting with a doctor.<sup>58</sup> The prison was severely understaffed.<sup>59</sup> California at the time required one dentist for every 950 prisoners; the ratio at Lancaster was roughly one dentist for every 1500 inmates.<sup>60</sup>

At the conclusion of the trial, the jury returned a verdict in favor of Dr. Brooks on May 8, 2009, and on May 26, 2009 the district court entered judgment.<sup>61</sup> Mr. Peralta then appealed the jury's verdict to the U. S. Court of Appeals for the Ninth Circuit. In his appeal, Mr. Peralta argued that the judgment in favor of Dr. Brooks was unfounded because the district court erred in instructing the jury that lack of resources could be a defense to the § 1983 claim.<sup>62</sup>

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<sup>53</sup> Appellant's Brief, *supra* note 3, at 6.

<sup>54</sup> *Id.*

<sup>55</sup> *See id.* at 6–7.

<sup>56</sup> *Peralta III*, 744 F.3d at 1094 (Christen, J., concurring in part and dissenting in part).

<sup>57</sup> *See id.* According to his testimony, Dr. Brooks confirmed that Mr. Peralta's infection warranted him a spot on the emergency waiting list. *Id.* at 1090. However, Mr. Peralta was instead placed on the waiting list for routine dental care. *Id.*

<sup>58</sup> *See id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1081 (majority opinion).

<sup>61</sup> Appellant's Brief, *supra* note 3, at 7. The Ninth Circuit affirmed the dismissal of Mr. Peralta's claims against Dr. Dillard and Dr. Fitter on the grounds that the evidence presented did not establish either doctor's awareness of and indifference to Mr. Peralta's dental needs. *See Peralta III*, 744 F.3d at 1086–88.

<sup>62</sup> Appellant's Brief, *supra* note 3, at 7; *see* 42 U.S.C. § 1983 (2012). Mr. Peralta also appealed the district court's holding in favor of Dr. Dillard, the Chief Dental Officer, and Dr. Fitter, the Chief Medical Officer at Lancaster. *See Peralta v. Dillard (Peralta II)*, 520 F. App'x 494, 495 (9th Cir. 2013). Serving as the Chief Dental Officer, Dr. Dillard was required to sign Mr. Peralta's second-level appeal, but he failed to do so. *Peralta III*, 744 F.3d at 1087. Dr. Fitter did sign the appeal, but did not review Mr. Peralta's chart before signing. *See id.* at 1086.

### III. NO MONEY, NO PROBLEM: “LACK OF RESOURCES” AS A VIABLE DEFENSE TO EIGHTH AMENDMENT VIOLATIONS

Before approaching Mr. Peralta’s claim, the U.S. Court of Appeals for the Ninth Circuit first analyzed the U.S. Supreme Court case of *Farmer v. Brennan*, which established the conditions that constitute deliberate indifference.<sup>63</sup> Next, the majority examined Ninth Circuit precedent on the issue of budgetary constraints as a justification for cruel and unusual punishment.<sup>64</sup> Yet having laid this groundwork, the majority then deconstructed these foundational cases in an attempt to distinguish Mr. Peralta’s case and set new precedent.<sup>65</sup>

Mr. Peralta’s claim, alleging deliberate indifference to serious medical needs, was based on a fundamental Eighth Amendment protection, namely the prohibition of cruel and unusual punishment.<sup>66</sup> In *Farmer*, the Court addressed the issue of whether prison officials may be held liable for deliberate indifference under the Eighth Amendment, and held that liability may attach if prison officials are aware of or can draw an inference that inmates face a substantial risk of serious harm but disregard that risk by failing to take reasonable measures to alleviate it.<sup>67</sup> A claimant does not have to show that the prison official acted or failed to act for the intentional purpose of causing harm.<sup>68</sup> According to the *Farmer* Court, it is sufficient to show that the prison official acted or failed to act despite his or her knowledge of a substantial risk of serious harm.<sup>69</sup>

Once the *Farmer* framework had been established, the majority examined the controlling cases in the Ninth Circuit, *Jones v. Johnson* and *Spain v. Procnier*, which both iterated the basic principle that budgetary constraints are not a justification for cruel and unusual punishment under the Eighth Amendment.<sup>70</sup>

<sup>63</sup> See *Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Peralta v. Dillard (Peralta III)*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc).

<sup>64</sup> See *Peralta III*, 744 F.3d at 1083.

<sup>65</sup> See *id.*

<sup>66</sup> See U.S. CONST. amend. VIII; *Farmer*, 511 U.S. at 839–40 (stating the standard for deliberate indifference as “subjective recklessness as used in the criminal law”). The Eighth Amendment establishes, among other things, the elementary principle that the government is responsible for providing medical care for incarcerated individuals, a critical component of basic dignity. See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”); see also *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2010) (“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. If the government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.”).

<sup>67</sup> *Farmer*, 511 U.S. at 847.

<sup>68</sup> *Id.* at 842.

<sup>69</sup> *Id.*

<sup>70</sup> U.S. CONST. amend. VIII; *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986), *overruled by Peralta v. Dillard (Peralta III)*, 744 F.3d at 1076 (stating that “[b]udgetary constraints, however, do not justify cruel and unusual punishment”); *Spain v. Procnier*, 600 F.2d 189, 200 (9th Cir. 1979)

As Mr. Peralta argued, the principle established in *Jones* and *Spain* should have required the Ninth Circuit to hold that the district court's jury instruction to allow a lack-of-resources defense was improper and violated his Eighth Amendment rights.<sup>71</sup>

The majority, however, directed its analysis away from this principle and instead focused on the relief granted in these cases.<sup>72</sup> In *Jones*, the plaintiff sought both injunctive relief and monetary damages, and in *Spain*, the case centered on injunctive relief.<sup>73</sup> Since these cases did not address the issue of a plaintiff seeking *only* monetary damages, the majority determined that they were not controlling for Mr. Peralta's case.<sup>74</sup> The majority weakened Mr. Peralta's claim even further by establishing that states, which run prisons like the one where Mr. Peralta was held, cannot be held liable for solely monetary damages due to their Eleventh Amendment protections.<sup>75</sup> Mr. Peralta, therefore, could not have been granted the type of redress he was seeking.<sup>76</sup> He could only sue to order the state to provide additional services.<sup>77</sup> He could not request compensation for the pain and suffering he endured for nearly two years.<sup>78</sup>

The majority further investigated the issue of money damages generally for Eighth Amendment violations and declared that such damages are retrospective, meaning they provide a remedy for something a prison official could have done but did not do.<sup>79</sup> Thus, the resources available to a prison official at the time the prison official was considering an inmate's treatment are relevant to the jury's finding of deliberate indifference.<sup>80</sup> These resources, or lack thereof, "define the spectrum of choices that officials had at their disposal" at the time they made decisions regarding a prisoner's treatment plan.<sup>81</sup>

Deviating from the *Farmer* framework, the majority held that a prison official charged with deliberate indifference to serious medical needs can avoid

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(determining that "[t]he cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment").

<sup>71</sup> Appellant's Brief, *supra* note 3, at 2.

<sup>72</sup> See *Peralta III*, 744 F.3d at 1083.

<sup>73</sup> See *id.*; *Jones*, 781 F.2d at 770; *Spain*, 600 F.2d at 197.

<sup>74</sup> See *Peralta III*, 744 F.3d at 1083.

<sup>75</sup> U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); see also *Peralta III*, 744 F.3d at 1084 ("We may not circumvent this protection by imputing the state's wrongdoing to an employee who himself has committed no wrong."). The Eleventh Amendment prohibits lawsuits in federal courts for monetary damages against non-consenting states. See U.S. CONST. amend. XI.

<sup>76</sup> See *Peralta III*, 744 F.3d at 1084.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> *Id.* at 1083.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

liability by demonstrating budgetary constraints.<sup>82</sup> Thus, under this line of reasoning, the Ninth Circuit majority held that the district court's jury instruction was proper and affirmed the directed verdicts in favor of Dr. Fitter and Dr. Dillard.<sup>83</sup> The significance of the majority's ruling is that a prison official may now claim a lack of available resources as a viable defense to an Eighth Amendment violation.<sup>84</sup> Additionally, a court may instruct a jury to consider the resources available to prison officials when determining liability due to deliberate indifference.<sup>85</sup>

#### IV. THE NINTH CIRCUIT CREATED A GRIM OUTLOOK FOR PRISONERS ASSERTING EIGHTH AMENDMENT RIGHTS

Incarcerated prisoners are deprived of liberty, but they should not be denied rights tied to their inherent human dignity.<sup>86</sup> By allowing a "lack of resources" to stand as an adequate defense, however, the Ninth Circuit failed to uphold the fundamental essence of the Eighth Amendment, thus precluding inmates suffering cruel and unusual punishment from relief.<sup>87</sup>

Judge Morgan Christen and Judge Andrew D. Hurwitz's opinions, both dissenting in part and concurring in part, exposed critical flaws in the majority's reasoning.<sup>88</sup> Judge Christen first noted how far the majority opinion deviated from the precedent set in *Farmer*.<sup>89</sup> The *Farmer* Court held that a prison official may be held liable under the Eighth Amendment for refusing to provide constitutionally required medical care if he or she knows that a prisoner is in danger of substantial risk of serious harm and disregards that risk by failing to take reasonable steps to alleviate the harm.<sup>90</sup> Yet as Judge Christen rightfully asserted in her dissent, the majority ignored this precedent by indiscriminately creating a lack-of-resources defense for plaintiffs seeking money damages.<sup>91</sup>

<sup>82</sup> See *id.* at 1092–93 (Christen, J., concurring in part and dissenting in part).

<sup>83</sup> See *id.* at 1089.

<sup>84</sup> See *id.* at 1084 (majority opinion).

<sup>85</sup> *Id.*

<sup>86</sup> See *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2010); see also *Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

<sup>87</sup> See U.S. CONST. amend. VIII; *Peralta v. Dillard (Peralta III)*, 744 F.3d 1076, 1091 (9th Cir. 2014) (en banc) (Christen, J., concurring in part and dissenting in part).

<sup>88</sup> See *Peralta III*, 744 F.3d at 1092–93 (Christen, J. concurring in part and dissenting in part); *id.* at 1097 (Hurwitz, J., concurring in part and dissenting in part).

<sup>89</sup> See *id.* at 1091 (Christen, J. concurring in part and dissenting in part) (stating that by circumventing the deliberate indifference standard established in *Farmer v. Brennan*, "[the majority] overturns more than thirty years of circuit precedent by holding that lack of resources is a defense to a damages claim that a prisoner was denied the constitutionally-required minimum threshold for adequate care"); see also *Farmer v. Brennan*, 511 U.S. 825, 839–40 (1994).

<sup>90</sup> *Farmer*, 511 U.S. at 847.

<sup>91</sup> See *Peralta III*, 744 F.3d at 1091 (Christen, J., concurring in part and dissenting in part) ("The jettisoned circuit precedent dates back to 1979 when, writing for the Ninth Circuit, now-Justice Ken-

Furthermore, the majority focused on the type of relief Mr. Peralta was seeking, and as Judge Christen highlighted, this should not matter.<sup>92</sup> Mr. Peralta's original claim requested only monetary damages.<sup>93</sup> He relied on *Jones* as grounds for his entitlement to money damages under section 1983.<sup>94</sup> The majority, however, developed a novel analysis to undermine Mr. Peralta's argument and overrule *Jones*.<sup>95</sup> The majority claimed that prisoners could still bring section 1983 suits if they sought injunctive relief, tenuously distinguishing *Jones* on the grounds that Peralta sought only monetary damages.<sup>96</sup> Yet as Judge Christen pointed out, this reasoning is impractical.<sup>97</sup> For prisoners like Mr. Peralta, who did not have his periodontal disease treated for two years until he reached Mule Creek State Prison, injunctions do not remedy the past pain and suffering that these prisoners are forced to endure due to prolonged medical neglect.<sup>98</sup>

Like Judge Christen, Judge Hurwitz emphasized the majority's illogical abandonment of precedent.<sup>99</sup> His dissent also shed important light on the resounding detrimental impact this decision would have on future plaintiffs attempting to assert their Eighth Amendment rights to be free of cruel and unusual punishment.<sup>100</sup> The majority's holding effectively renders inmates, who are seeking damages for suffering serious medical conditions, helpless.<sup>101</sup> The Eighth Amendment "prohibits all cruel and unusual punishments, not simply those inflicted by officials of states with well-funded prison medical systems."<sup>102</sup> Yet following this decision, in lawsuits alleging a failure to provide constitutionally adequate medical care for prisoners, state actors can present a lack of resources as a defense.<sup>103</sup> And, as Judge Hurwitz noted, that defense

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nedy explained that "the cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment." (quoting *Spain v. Procnier*, 600 F.2d 189, 200 (9th Cir. 1979)).

<sup>92</sup> See *id.* at 1093.

<sup>93</sup> *Id.* at 1081 (majority opinion).

<sup>94</sup> *Jones v. Johnson*, 781 F.2d 769, 770–71 (9th Cir. 1986), *overruled by* *Peralta v. Dillard* (*Peralta III*), 744 F.3d at 1076; Appellant's Brief, *supra* note 3, at 37.

<sup>95</sup> *Peralta III*, 744 F.3d at 1082, 1083.

<sup>96</sup> See *id.* at 1083.

<sup>97</sup> See *id.* at 1093 (Christen, J., concurring in part and dissenting in part); *Jones*, 781 F.2d at 771 (stating that the plaintiff successfully filed a section 1983 action seeking damages and injunctive relief against prison officials, who were found deliberately indifferent to his medical needs); *Procnier*, 600 F.2d at 200.

<sup>98</sup> *Peralta III*, 744 F.3d at 1093 (Christen, J., concurring in part and dissenting in part). Judge Christen asks, "[W]hat good is prospective injunctive relief to a prisoner whose appendix has burst?" *Id.*

<sup>99</sup> See *id.* at 1097 (Hurwitz, J., concurring in part and dissenting in part).

<sup>100</sup> See *id.* at 1098.

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* at 1097–98; see also U.S. CONST. amend. VIII.

<sup>103</sup> *Peralta III*, 744 F.3d at 1098 (Hurwitz, J., concurring in part and dissenting in part).

will likely succeed.<sup>104</sup> Furthermore, Judge Hurwitz's dissent highlighted how the majority's holding will encourage constitutional violations moving forward.<sup>105</sup> States will now have a way to avoid paying damages for depriving prisoners of the constitutionally required level of care, and as a result, there will be little incentive to increase appropriations for such care.<sup>106</sup>

#### CONCLUSION

By holding that it is proper to consider the resources available to a prison official who may not have budgetary authority in a section 1983 action, the decision in *Peralta* jeopardizes an inmate's ability to seek redress for Eighth Amendment violations. The majority's decision erodes individual Eighth Amendment protections and strikes down years of sound precedent. This ultimately gives government actors license to provide constitutionally inadequate and sub-standard treatment for prisoners with virtually no legal repercussions. As a result, inmates like Mr. Peralta are left stranded by the legal system, unable to collect monetary damages for injuries and illnesses suffered at the expense of a prison official's deliberate indifference to their medical needs. Prisoners may be deprived of their rights to liberty, but they should not be denied their inherent human dignity.

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*