

19-5205

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ZACHARY A. SMITH,
Petitioner,

vs.

JOHN A. MATTHEWS., et al.,
Respondents.

FILED

JUN 27 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ZACHARY A. SMITH,
Reg. No. 521163
Western Missouri Corr. Center
609 E. Pence Road
Cameron, Missouri 64429

Petitioner

QUESTIONS PRESENTED

I

SHOULD A PRO SE PRISONER BE PERMITTED TO ADMIT MEDICAL INFORMATION FROM A REPUTABLE WEBSITE AS "VERIFYING MEDICAL EVIDENCE" TO OVERCOME A MOTION FOR SUMMARY JUDGMENT? [The Seventh Circuit said "yes" in **Rowe v. Gibson**, 798 F.3d 622 (7th Cir. 2015), but the Eighth Circuit said "no" in **Smith vs. Matthews, et al.**,]

II

DOES A DISTRICT COURT ABUSE ITS DISCRETION WHEN IT DENIES A PRO SE PRISONER'S FED.R.EVID. RULE 706 MOTION AND THEN GRANTS SUMMARY JUDGMENT AGAINST HIM, CLAIMING THE PRISONER FAILED TO PROVIDE VERIFYING MEDICAL EVIDENCE?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

John A. Matthews, Former CRCC Medical Director

Paul R. Jones, Former CRCC Medical Director

Stephen E. Dorsch, Former CRCC Medical Director

J. Cofield, Corizon Director of Operations

T. Bredeman, Corizon Assoc. Regional Medical Director

Corizon Health, LLC

Respondents

TABLE OF CONTENTS

OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION INVOLVED.....	2
STATEMENT OF THE CASE.....	3
A. STATEMENT OF THE PROCEEDINGS.....	3
B. STATEMENT OF THE FACTS.....	4
REASON FOR GRANTING THE WRIT.....	10
C. THE EIGHTH CIRCUIT IS IN CONFLICT WITH THE SEVENTH AND ELEVENTH CIRCUIT COURT OF APPEALS.....	10
D. IMPORTANCE OF THE QUESTIONS PRESENTED.....	11
CONCLUSION.....	11
PROOF OF SERVICE.....	12

INDEX TO APPENDICES

- A. Opinion of the Eighth Circuit Court of Appeals, issued on April 25, 2019.
- B. District Court's order granting Defendants' motion for summary judgment and dismissing case, issued on December 20, 2017.
- C. Order of the Eighth Circuit Court of Appeals denying petition for rehearing and/or rehearing en banc on May 25, 2019.

TABLE OF AUTHORITIES

Hayes v. Snyder, 546 F.3d 516 (7th Cir. 2008).....	5
Haid v. Cradduck, 2016 U.S. Dist. LEXIS 82528 (WD.ARK 2016).....	7
Moore v. Cheatham, 2015 U.S. Dist. LEXIS 104997 (WD.MICH 2015).....	7
Rowe v. Gibson, 798 F.3d 622 (7th Cir. 2015).....	10
Smith v. Jenkins, 919 F.2d 90 (8th Cir. 1990).....	10
Roberson V. Bradshaw, 198 F.3d 645 (8th Cir. 1999).....	10
Spann v. Roper, 453 F.3d 1007 (8th Cir. 2006).....	10
Steele v. Slah, 87 F.3d 1266 (11th Cir. 1996).....	10
Severance v. Chastain, 2017 U.S. Dist. LEXIS 140641 (ED.MO 2017).....	11
Willis v. Palmer, 2016 U.S. Dist. LEXIS 68384 (ND.IA 2016).....	11

CONSTITUTIONAL AMENDMENTS, STATUTES, AND RULES

42 U.S.C. § 1983.....	3
Fed.R.Evid. Rule 706.....	10, 11

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT**

The Petitioner, Zachary A. Smith, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit rendered on April 25, 2019.

OPINION BELOW

The Eighth Circuit Court of Appeals affirmed the District Court's order granting summary judgment to the defendants. The unpublished per curiam opinion appears at Appendix A to this petition. A motion for rehearing and/or rehearing en banc was denied; the order appears at Appendix C to this petition.

JURISDICTION

The Eighth Circuit Court of Appeals' judgment was entered on April 25, 2019. A motion to that court for rehearing and/or rehearing en banc was denied on May 28, 2019.

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

CONSTITUTIONAL PROVISION INVOLVED

The following Constitutional provision is involved in this case.

U.S. CONST., AMEND. VIII

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

STATEMENT OF THE CASE

A. Statement of the Proceedings

This is a civil rights actions under 42 U.S.C. §1983, filed by Zachary A. Smith, against the Respondents for claims of deliberate indifference to Zachary's serious medical need, in violation of the Eighth Amendment.

The district court granted Respondents' motion for summary judgment and dismissed the case, concluding that "[i]n order to defeat Defendants' motion for summary judgment, Plaintiff must present 'verifying medical evidence' [which shows that Defendants] ignored an acute or escalating situation or that [Defendants' action] adversely affected the prognosis...." (Appendix B, page 3).

The district court also concluded that the medical information submitted in support of his motion in opposition was not verifying medical evidence, and that his "case boils down to such a disagreement and that Defendants are entitled to judgment as a matter of law," (Appendix B, page 4), relying on the affidavit of Defendant Dorsch, stating, "I diagnosed [Smith as having] a probable spermatic chord cyst. My plan was to monitor the cyst [with] a possible future evaluation with a scrotal ultrasound. Mr. Smith declined an offer of additional pain medication" (Appendix B, page 2). The court also dismissed Smith's claim against Defendant Matthews because he was never served process despite Smith's repeated requests for the court to do so (Appendix B, page 5).

Zachary filed a timely appeal. On April 25, 2019, the Eighth Circuit Court of Appeals entered a one paragraph per curiam opinion,

concluding that it saw no error in the district court's decision to grant summary judgment, and affirmed the judgment. A motion for rehearing and/or rehearing en banc was denied on May 28, 2019.

B. Statement of Facts

Zachary, now a forty-three-year-old Caucasian male, has had a history of being denied adequate medical care for serious medical needs by Defendant Matthews, dating back to 2001. He had refused to treat a serious medical need of Zachary's until he exhausted grievances and filed a 1983 complaint. Once surgery was performed, Zachary dismissed the case.

In 2009, Zachary developed kidney stones but were not treated until April of 2014. Zachary had to file grievances and pass a kidney stone before Matthews would refer him to see a urologist. Zachary received Extracorporeal Shock Wave Lithotripsy (ESWL) to break up a kidney stone that was too large to pass.

Shortly before April 27, 2014, Zachary started experiencing a constant pain in his testicles and scrotum, swelling, fluid buildup, an uncomfortable feeling of heaviness, and a dragging sensation (DOC. 120, Pl. Ex. A, page 7).

Zachary submitted numerous health service requests (HSR's) and was seen several times by Corizon doctors [Respondents], nurses, etc., but was treated like a nuisance (DOC. 120, Pl. Ex. A, page 8). Matthews told Zachary during one visit, "I don't know what could be causing your pain; I've never heard of anything like what you are describing. It may be something you'll just have to live with," and then denied Zachary's request to be referred to a urologist (DOC. 1, page 3-B;

DOC. 120, Pl. Ex. A, page 8). (The court held in *Hayes v. Snyder*, 546 F.3d 516 (7th Cir. 2008) that a doctor's refusal to refer prisoner to a specialist where the doctor did not know cause of reported pain made no sense and supported deliberate indifference finding.)

On August 6, 2015, Defendant Dr. John A. Matthews was charged with a class B felony of possession of child pornography, in the Circuit Court of Clay County, State of Missouri v. John A. Matthews, Case No. 15CY-CR03747. According to court records, Matthews' relative made a report to a detective of the Clay County Sheriff's Office, stating that Matthews admitted to her that he had been watching images of nude boys and an actual pornography of two boys together "doing things to each other" on the family's laptop computer (DOC. 1, pages 3-C and 3D). (On November 19, 2015, Matthews pled guilty to one count of possession of child pornography, and was sentenced to twelve years in the Missouri Department of Corrections. Matthews was transferred to another state to serve his sentence (DOC. 1, page 3-D)).

On August 29, 2015, Zachary saw Respondent Jones. He told Jones that he was having pain in his testicles and scrotum area, along with swelling and fluid buildup, especially after an ejaculation or nocturnal emission (DOC. 120, Pl. Ex. A, page 9).

Jones spoke to Zachary in a condescending manner, stating there was nothing wrong with him. Zachary asked to be referred to a urologist. Jones said he couldn't refer an offender to a urologist unless he was a visually physical ailment (DOC. 120, Pl. Ex. A, page 9). Zachary then asked Jones for pain medication, antibiotics, and a bottom bunk restriction because of his pain and discomfort. Jones said, "I will not give you anything because there is nothing wrong

with you. Your treatment plan is to assure you that there is nothing wrong with you. The pain you say you feel is all in your mind. In fact, the last doctor gave you antibiotics when I wouldn't have done so. I think we are done here" (DOC. 120, Pl. Ex. A, page 9).

Zachary walked out frustrated, feeling mentally and emotionally upset, helpless, humiliated, dehumanized, and without anything to relieve his pain and suffering (DOC. 120, Pl. Ex. A, page 9; DOC. 119, Pl. Ex. A-1, pages 37-38).

On October 9, 2015, Zachary saw Respondent Dorsch. During the exam, Dorsch said he felt a varicocele on the left and a lump on the right, near the spermatic chord, possibly a cyst. Dorsch told Zachary to stop drinking coffee and take aspirin for ninety days. Zachary asked to see a urologist in which Dorsch replied, "I want to "wait and see' if the lump gets any larger." Dorsch ignored the size of Zachary's scrotum due to the two hydroceles (DOC. 120, Pl. Ex. A, page 10.) Despite Respondent's Exhibit C stating Zachary has two hydroceles, Dorsch ignored Zachary's physical condition and said Zachary didn't have a hydrocele (DOC. 119, Def. Ex. A-1, pages 40-41).

Zachary reported to CRCC medical unit that he had blood in his stool after taking NSAIDS (ibuprofen, aspirin, etc.), and that his testicles were hurting April 29, 2015; June 8, 2015; and July 10, 2015 (DOC. 119, Def. Ex. A-1, pages 27, 29, and 32; DOC. 120, Pl. Ex. A, page 12).

On January 12, 2016, Zachary told Respondent Dorsch that his testicles constantly hurt, day and night; that nothing has changed; and that the aspirin was not alleviating the pain but was making his

stomach hurt. Zachary also told Dorsch that every time he took NSAIDS his stomach would hurt and he would have blood in his stool. Despite what Zachary told him, Dorsch still tried to prescribe Zachary more NSAIDS. Zachary flat out refused any prescription for NSAIDS. Zachary told Dorsch that he believed the stomach pain and blood in his stool was from long-term use of NSAIDS to alleviate pain from kidney stones. Zachary again asked to be referred to a urologist in which Dorsch replied, "You do not meet the criteria for an ultrasound or an outside consult at this time." Zachary asked what was the criteria and Dorsch said that Zachary had to have something visually wrong with him (DOC. 120, Pl. Ex. A, page 11).

On May 24, 2016, Zachary filed a 1983 civil rights action against the Respondents (DOC. 1). Shortly after, they scheduled Zachary for an ultrasound. On July 15, 2016, Zachary underwent an ultrasound. The FINDINGS: There is likely a small 3.6-mm spermatocele seen on the right. The supratesticular area is negative. Right testicle itself is remarkable. There is a small right hydrocele. No intratesticular mass is seen and color flow is normal. The left testicle shows a slightly less prominent epididymis with moderate flow. Minimal hydrocele seen with septations. There is a small 5.4-mm left supratesticular mass, likely a small lymph node. IMPRESS: Normal testes with small bilateral hydroceles, septated and slightly more prominent on the left than on the right. 2. There are small benign nodular are in both scrotal areas. 3. Color flow is normal (DOC. 119, Def. Ex. C). (In **Haid v. Cradduck**, 2016 U.S. Dist. LEXIS 82528 (WD.ARK 2006 and **Moore v. Cheatham**, 2015 U.S. Dist. LEXIS 104997 (WD.MICH 2015, the courts held evidence prisoners were in pain and suffering from

hydroceles were sufficient enough to preclude summary judgment.)

Zachary continues to suffer from daily discomfort, and pain in his testicles, a pain that keeps him from enjoying everyday activities--reading and writing literature, jogging and exercising, a good night's sleep, mental and emotional distress, and anxiety for over four years (DOC. 120, Pl. Ex. A, page 13).

Zachary presented the following verifying medical evidence of his condition and its treatment via highly reputable medical websites (DOC. 120, pages 6-8). (The Respondents refused to answer admissions and interrogatories concerning the medical subjects, and the district court refused to compel them to answer and refused to appoint a urologist, forcing Zachary to use the only verifying medical evidence available to him (DOC. 90. 95, 103, 105, 114, 120)).

Long-term use of anti-inflammatory drugs such as aspirin, ibuprofen, and naproxen can cause ulcers--an open sore in the lining of the stomach or dupdenum, the upper end of the small intestine--which causes blood in the stool (DOC. 120, Pl. Ex. A, page 3).

Spermatoceles are also known as spermatic cysts. They are fluid-filled masses, often painless, and they grow near the testicles. They tend to be benign. These cysts are found near the top and behind the testicles, but are separate from the testicle. They can be smooth, filled with a whitish, cloudy fluid, and most often hold sperm. Their size can vary. If their size becomes a bother or causes pain, then there are ways to fix the problem (DOC. 120, Pl. Ex. A, pages 1-2. See also [www.urologyhealth.org.](http://www.urologyhealth.org/)).

Spermatocelectomy is the standard treatment for spermatoceles that causes symptoms. The goal of surgery is to remove the spermatocele

from the epididymal tissue and preserve the reproductive tract. This out-patient procedure is often done with local or general anesthesia. It usually takes less than one hour (DOC. 120, Pl. Ex. A, pages 1-2. See also www.urologyhealth.org).

A hydrocele is a collection of fluid in the membranes surrounding the testicles that is typically painless and does not cause harm to the testicles. However, a hydrocele can cause pain, pressure, and discomfort because of its size, especially while walking or exercising. If the hydrocele is large, it can be difficult for a doctor to feel the testicles. Hydroceles tend to get larger over time if not corrected (DOC. 120, Pl. Ex. C, pages 1-2. See also www.urologyhealth.org).

Surgery is the standard treatment for hydrocele that cause pain, pressure, and discomfort. The operation for a hydrocele involves making a very small cut in the scrotum or lower abdominal wall. The fluid is then drained from around the testicle. The passage between the abdomen and the scrotum will also be sealed off so the fluid cannot re-form in the future. This is a minor operation and is performed as a day case, so does not usually involve an overnight stay in the hospital (DOC. 120, Pl. Ex. C, pages 2 and 3. See also www.urologyhealth.org).

A varicocele forms when the valves inside the veins in the spermatic chord prevents blood from flowing properly. The resulting backup cause the veins to widen (dilate). This can cause the testicle to harden and atrophy, resulting in infertility and loss of testicle. They usually occur in the left side. They often produce no signs or symptoms. However, if pain or swelling in the scrotum is experienced, a mass near scrotum, testicles are different sizes, a doctor should

be consulted and an ultrasound done because a number of conditions that cause a scrotal mass or testicular pain require immediate treatment (www.mayoclinic.org.).

REASON FOR GRANTING THE WRIT

C. The Eighth Circuit Court of Appeals' Opinion is in Conflict With Decisions from the Seventh and Eleventh Circuit Courts of Appeals

In **Rowe v. Gibson**, 798 F.3d 622 (7th Cir. 2015), the Seventh Circuit Court of Appeals held: "When medical information can be gleaned from websites of highly reputable medical centers, it is not imperative that it instead be presented by a testifying witness. Such information tends to fall somewhere between facts that require adversary procedure to determine and facts of which a court can take judicial notice ... the appellate court need only determine whether there is a factual dispute sufficient to preclude summary judgment."

Several courts, including the Eighth Circuit (**Smith v. Jenkins**, 919 F.2d 90 (8th Cir. 1990); **Roberson v. Bradshaw**, 198 F.3d 645 (8th Cir. 1999); and **Spann v. Roper**, 453 F.3d 1007 (8th Cir. 2006)), have found it to be incongruous to deny a plaintiff the ability to present necessary proof to withstand a motion for summary judgment--as the district court did in Zachary's case by denying his Rule 706 motion and failing to consider verifying medical evidence from reputable websites--then grant summary judgment against him, claiming he failed to provide verifying medical evidence.

The Eighth Circuit's opinion is also in conflict with the Eleventh Circuit. In **Steele v. Shah**, 87 F.3d 1266 (11th Cir. 1996), the court

reversed summary judgment in favor of prison medical defendants and remanded to the district court to consider plaintiff's Rule 706 motion to appoint an expert witness.

The Eighth Circuit Court's opinion in Zachary's case is also in conflict with several district courts from its own circuit which district courts have consistently granted plaintiffs' Rule 706 motions based on the reasoning of the Seventh Circuit's holding in **Rowe: Severance v. Chastain**, 2017 U.S. Dist. LEXIS 140641 and **Willis v. Palmer**, 2016 U.S. Dist. LEXIS 68384.

D. Importance of The Question Presented

This case presents a question of great importance for pro se prisoners and lower courts because the issue whether a pro se prisoner can use medical information from a reputable website, as verifying medical evidence to overcome a motion for summary judgment, is fundamental to deliberate indifference cases. A decision by this Court would clarify and resolve the current conflicted lower court decisions.

This issue's importance is enhanced because the lower courts are in conflict and are dispensing justice for some pro se litigants but not for all, like the pro se prisoners handicapped by poverty and denied treatment for serious medical needs, in violation of the Eighth Amendment to the United States Constitution.

CONCLUSION

For the question presented and the reason stated, Zachary prays this Court grant a Writ of Certiorari in this case. He further prays for any other and further relief the Court may deem just and proper under the circumstances.