No. 19-701

In the
Supreme Court of the United States

LLOYD N. JOHNSON,
Petitioner,
v.
KAREN RIMMER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

PAUL D. CRANLEY
Counsel of Record
TIMOTHY POSNANSKI
JOSEPH S. DIEDRICH
HUSCH BLACKWELL LLP
33 East Main Street, Suite 300
P.O. Box 1379
Madison, WI 53701-1379
608.255.4440
Paul.Cranley@huschblackwell.com
Timothy.Posnanski@huschblackwell.com

Counsel for Respondents

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS RESTATED

1. Whether a medical professional's treatment decision met the professional judgment standard articulated in *Youngberg v. Romeo* where the professional's decision was based on his assessment of the patient's condition and upon recognized medical and psychological practices and was supported by the agreement of other medical professionals involved in the patient's care.

2. Whether a plaintiff pursuing a claim under 42 U.S.C. § 1983 must present evidence sufficient for a reasonable jury to conclude the defendant was personally involved in causing the constitutional deprivation alleged.

PARTIES TO THE PROCEEDINGS

Petitioner is Lloyd N. Johnson. Respondents are David Macherey and Ade George.

Petitioner incorrectly lists three additional trial court defendants, Thomas Harding, Remedios Azcueta, and Tony Thrasher as parties to this proceeding. However, Petitioner did not appeal the District Court's grant of summary judgment in favor of these three Defendants. As the court below noted: "Mr. Johnson now brings this appeal, *challenging only the district court's decision in favor of two individual defendants: Dr. David Macherey and Nurse Ade George*." P-App. 2a (emphasis added). Petitioner has waived the right to appeal the summary judgment entered in favor of any of the other defendants. *United States v. Barnes*, 660 F.3d 1000, 1006 (7th Cir. 2011).

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COUNTERSTATEMENT OF THE CASE

The fact-driven nature of this case and Petitioner's incomplete and inaccurate statement of the facts require this Counterstatement of the Case.

A. Statement of Facts

On March 8, 2012, Lloyd Johnson was involuntarily admitted to the Milwaukee County Mental Health Complex ("MHC") on an emergency detention, pursuant to Wis. Stat. § 51.15. Petitioner's Appendix ("P-App.") 3a-4a. Johnson was assigned to a private room in the Intensive Treatment Unit ("ITU"), a locked area of the MHC designed for high risk psychiatric patients. *Id.*

The morning after Johnson arrived at MHC, he was seen by Dr. Macherey, a psychologist and Treatment Director for the ITU, for an initial evaluation. P-App. 4a-5a. Based on his assessment, Dr. Macherey ordered Johnson placed on 1:1 observation, which required direct observation by an assigned staff member at all times. *Id.* Dr. Thomas Harding, a psychiatrist and Medical Director of MHC, also examined Johnson and concurred with Dr. Macherey's assessment. P-App. 5a.

On Thursday, March 15, 2012, Dr. Macherey and Dr. Harding held a recovery planning conference with Johnson and the entire treatment team, including a registered nurse, a social worker, and an occupational therapist involved in his care. P-App. 6a-7a. Based on the team assessment, Dr. Macherey concluded that Johnson's condition was improving, but he nonetheless ordered that Johnson remain on 1:1 observation. P-App. 7a.

On Friday, March 16, 2012, Dr. Macherey again assessed Johnson and observed that Johnson appeared to be stabilizing and his symptoms appeared to be decreasing over the course of his treatment at the MHC. P-App. 8a. At approximately 3:00 p.m. on the afternoon of March 16, 2012, Dr. Macherey discontinued 1:1 observation status. P-App. 9a. In Dr. Macherey's clinical judgment as a psychologist, Johnson's condition had improved to the point that 1:1 observation was no longer required. *Id*. Each member of the treatment team, including Dr. Harding, agreed with Dr. Macherey's decision. P-App. 9a.

MHC staff continued to closely monitor Johnson, checking on him every 15 minutes, as well as conducting "change of shift rounds" several times per day and "environmental rounds" twice per shift. P-App. 10a-11a. At approximately 4:00 p.m. on March 18, 2012, Johnson approached the nursing station to inform the staff he had just severed his penis with a pair of scissors. P-App. 12a. He was immediately treated and taken to Froedtert Hospital for surgery. *Id*.

Following Johnson's self-injury, the Critical Incident Committee of the Medical Staff at the MHC conducted a root cause analysis, culminating in a written report of the events surrounding the incident. P-App. 12a-16a. Administrators at the MHC also conducted a unit-level investigation known as a "program review" of Johnson's self-injury. *Id*. Neither investigation was able to determine how Johnson obtained the scissors he used to injure himself. *Id*.

In his complaint, Johnson alleged that Dr. Macherey violated his substantive due process rights

by removing him from 1:1 observation prematurely. P-App. 16a. Petitioner offered testimony from an expert witness, Dr. Dunn, who testified that Petitioner should have remained on 1:1. P-App. 9a n. 18. Dr. Dunn also testified that: 1) there are no established standards for when to remove a patient from 1:1 observation; 2) the use of 1:1 can be harmful to patients over time; and 3) the decision to remove a patient from 1:1 is a legitimate course of treatment. P-App. 9a-10a n. 18.

Petitioner further alleged that his substantive due process rights were violated because *a* nurse must have left the scissors in his room. P-App. 18a. Petitioner identified several nurses he believed may have been responsible, including Nurse Ade George. P-App. 18a. The evidence showed that Nurse George was the last person to change Johnson's dressings, although he was seen by other MHC staff thereafter. *Id*. Nurse George testified she did not change Johnson's bandages in his room and did not even use scissors because she applied self-adhesive bandages that did not need to be cut. P-App. 11a n. 22.

On this record, the defendants moved for summary judgment. The district court granted the motion, entering judgment in favor of all defendants on all of Petitioner's claims. P.-App. 17a-19a.

B. Seventh Circuit Decision Affirming Summary Judgment

Petitioner appealed as to only two defendants, Dr. Macherey and Nurse George. P-App. 2a. The Seventh Circuit affirmed summary judgment as to both defendants.

With regard to Dr. Macherey, the Seventh Circuit applied the standard set forth in *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452 (1982), holding that Dr. Macherey could only be held liable under § 1983 if his decision to remove Johnson from 1:1 observation was "such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that [Dr. Macherey] actually did not base the decision on such a judgment." P-App. 22a, *quoting Youngberg*, 457 U.S. at 323.

After an exhaustive consideration of the facts, the court concluded:

> Considering Mr. Johnson's documented improvement, the consensus of his treatment team that removing him from 1:1 observation was appropriate, and the recognition [by Petitioner's own expert] that, at some point, 1:1 care is too restrictive for the patient, a reasonable factfinder could not find that no minimally competent doctor would have made the same decision.

P-App. 29a. The court further noted that "evidence that *some* medical professionals would have chosen a different course of treatment is insufficient to make out

a constitutional claim." *Id.* at 29a-30a, quoting *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016).

With regard to Nurse George, the Seventh Circuit concluded that the evidence failed to support Petitioner's claim, holding that "*on the basis of the record made in the district court*, no reasonable factfinder could determine that Nurse George, as opposed to another treating nurse, left the scissors that Mr. Johnson eventually used." P-App. 30a. The court, therefore, affirmed the district court's decision, holding that the evidence submitted by Petitioner failed to establish Nurse George's "*personal involvement* in the alleged constitutional deprivation." P-App. 31a, quoting *Colbert v. City of Chicago*, 851 F.3d 649, 657 (7th Cir. 2017).

SUMMARY OF THE ARGUMENT

This is a fact-intensive case that was correctly decided on the application of uncontroversial and well-established precedent; this Court's intervention is not required. The Seventh Circuit's application of the professional judgment standard provides no basis for this Court to grant certiorari because it conforms to this Court's precedent and is not at odds with any other circuit court. Additionally, the Seventh Circuit's decision affirming the dismissal of Petitioner's claims against Nurse George was based upon the Petitioner's failure to establish a sufficient evidentiary basis to demonstrate Nurse George's personal involvement in the alleged constitutional deprivation. There is no basis to grant certiorari because the law applied by the Seventh Circuit is in harmony with all other circuits. The Petition for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit's Application of the Professional Judgment Standard was Entirely Consistent with *Youngberg v. Romeo* and Demonstrates no Split Among Circuits.

A. The Court Below Properly Applied the *Youngberg* Standard.

In *Youngberg v. Romeo*, the Supreme Court established the standard for determining whether a professional, acting on behalf of the government, has adequately protected the rights of involuntarily committed persons. 457 U.S. at 321-23. The Supreme Court reasoned that a decision, "if made by a professional, is presumptively valid." *Id.* at 323. Thus, the Court held that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id*. To ensure that this standard has been met, therefore, courts must "make certain that professional judgment in fact was exercised." *Id*. at 321.

The *Youngberg* Court distinguished the professional judgment standard applicable to involuntarily committed persons from the deliberate indifference standard applicable to convicted prisoners. *Id*. at 312, n.11, 321-322. The Court did not quantify the difference, but noted that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement

than criminals whose conditions of confinement are designed to punish." *Id*. at 321-322.

Here, the Seventh Circuit faithfully applied the professional judgment standard to evaluate the care provided to Petitioner. The court explained:

> [D]etermining that Dr. Macherey or Nurse George violated Mr. Johnson's substantive due process rights requires the more specific professional judgment standard, which applies to professionals like physicians, psychiatrists, and nurses within their area of professional expertise. *We have been clear that this standard asks whether the medical professional substantially departed from accepted professional standards.*

P-App.23a, n.43 (quoting *Collignon v. Milwaukee Cty.*, 163 F.3d 982, 988 (7th Cir. 1998)) (emphasis added).

Applying this standard, the Seventh Circuit properly found that Dr. Macherey's decision to remove Johnson from 1:1 observation was not a substantial departure from accepted professional standards. Dr. Macherey made a professional judgment based upon his review of the appropriate medical considerations, which is precisely what *Youngberg* requires. The record clearly supports this conclusion. Dr. Harding agreed with Dr. Macherey's assessment that Petitioner had demonstrated enough improvement to be removed from 1:1 observation, and the other members of the Petitioner's treatment team concurred. Further, Petitioner's own expert admitted that: (1) 1:1 observation is intrusive and can be harmful to the

patient; (2) there are no established standards in the field of psychiatry for the use of 1:1 observation, and (3) removing a person from 1:1 care is a legitimate course of treatment.

The court below thus adhered to Supreme Court and Seventh Circuit precedent, which require applying the *Youngberg* standard to cases involving involuntarily committed persons. The Seventh Circuit has also extended this standard to cases alleging inadequate medical care of convicted persons, entitling criminals to the same "more considerate treatment" required for the involuntarily committed. *See Collignon*, 163 F.3d at 988. In *Collignon*, the court held that "in the context of a claim for inadequate medical care," the professional judgment standard, as articulated in *Youngberg*, applies both to convicted persons under the Eighth Amendment and to pretrial detainees or involuntarily committed persons under the Fourteenth Amendment. *Id.* at 989.

Following *Collignon*, the Seventh Circuit has consistently applied the *Youngberg* professional judgment standard to both involuntary commitment cases (as it did in this case) and convicted prisoner cases where the defendant is a medical professional. *See, e.g., Sain v. Wood*, 512 F.3d 886, 894–95 (7th Cir. 2008) (applying *Youngberg* standard in an involuntary commitment case); *and see Rasho v. Elyea*, 856 F.3d 469, 476 (7th Cir. 2017), *reh'g denied* (May 5, 2017) (applying same standard in convicted prisoner case involving medical professional); *see also King v. Kramer*, 680 F.3d 1013, 1018–19 (7th Cir. 2012) (quoting *Estate of Cole by Pardue v. Fromm*, 94 F.3d

254, 261–62 (7th Cir. 1996)) (same). In doing so, the Seventh Circuit has not diminished the professional judgment standard when evaluating involuntary commitment cases.

The Seventh Circuit did not depart from *Youngberg* whatsoever. Accordingly, there is no reason for the Court to revisit this issue; this Court should reject the petition.

B. There is No "Split in the Circuits" With Respect to the Professional Judgment Standard.

There is no conflict among the circuits requiring this Court's intervention. The Seventh Circuit's statement that a plaintiff can demonstrate the absence of professional judgment by proving "no minimally competent professional" would have reached the same decision as the defendant is entirely consistent with *Youngberg*. It is also consistent with the other circuits Petitioner invokes to demonstrate the alleged circuit split, all of which use similar reasoning. *See Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1247-49 (2d Cir. 1984) (Expert testimony failed to establish the defendant's treatment decision did not meet "minimally accepted standards across the profession," and thus plaintiff failed to prove the chosen treatment was such a "substantial departure from prevailing standards of practice" that it could be said the defendant did not, in fact, exercise professional judgment.) *Patten v. Nichols*, 274 F.3d 829, 845 (4th Cir. 2001) (The professional judgment standard requires showing "that the choice in question was not a sham or otherwise illegitimate;" consequently, the

standard is met where "the defendants' conduct had some basis in accepted professional opinion.") *Mitchell v. Washington*, 818 F.3d 436, 443–44 (9th Cir. 2016) (Evidence that defendant physician did not follow "the preferred treatment course" for plaintiff's condition was insufficient "to rebut the *Youngberg* professional judgement standard," and summary judgment for the defendant was affirmed.)

Petitioner nevertheless claims there is a circuit split between the Seventh and Ninth Circuits, based on the latter's decision in *Ammons v. Washington Dep't of Social and Health Servs.*, 648 F.3d 1020 (9th Cir. 2011). In *Ammons*, the Ninth Circuit interpreted the professional judgment standard to require medical professionals "take adequate steps in accordance with professional standards to prevent harm from occurring." *Id.* at 1030. This statement mirrors the Seventh Circuit's observation below, which asks "whether the medical professional substantially departed from accepted professional standards." P-App.23a (n.43). Whether phrased in the affirmative ("adequate steps in accordance") or the negative ("substantially departed from"), the two expressions are consistent and articulate the same substantive standard. Further, like all of the cases Petitioner cites in support of his imagined circuit split, the *Ammons* court ultimately based its conclusion on the uncontroversial language of *Youngberg*, asking whether the defendant had failed to exercise professional judgment. *Ammons*, 648 F.3d at 1034; P-App.22a.

Similarly, there is no split between the Seventh Circuit and the Second or Third Circuits, which

generally compare the professional judgment standard to gross negligence or recklessness. *See Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1146 (3d Cir. 1990) (stating the professional judgment standard "closely approximates—[but] remains somewhat less deferential than—a recklessness or gross negligence standard"); *Kulak v. City of New York,* 88 F.3d 63, 75 (2d Cir. 1996) (professional judgment standard "requires more than simple negligence on the part of the doctor but less than deliberate indifference"); *see also* Pet.6, 8 (relying on *Shaw* and *Kulak* to claim a circuit split). The *Kulak* court cites and relies upon the Seventh Circuit for the very proposition Petitioner claims differentiates the two circuits. *Kulak*, 88 F.3d at 75, citing *Estate of Porter by Nelson v. State of Ill.*, 36 F.3d 684 (7th Cir. 1994), *abrogated on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613 (2002). Likewise, in *Estate of Porter*, the Seventh Circuit explicitly adopts the same reasoning Petitioner claims divides the Seventh and Third Circuits: "We agree with the Third Circuit . . . that [p]rofessional judgment, like recklessness and gross negligence, generally falls somewhere between simple negligence and intentional misconduct." *Estate of Porter by Nelson*, 36 F.3d at 688, *citing Shaw*, 920 F.2d at 1146.

There is no split in the circuits regarding application of the professional judgment standard that should be resolved by the Court. The petition should be denied.

II. The Seventh Circuit's Decision Affirming Summary Judgment in Favor of Nurse George is Entirely Consistent with this Court's Precedent and does not Evidence a Split Among Circuits.

A. Petitioner Failed to Establish a Record Sufficient to Support a Constitutional Claim Against Nurse George.

The requirement that a plaintiff establish individual liability to proceed with an action under § 1983 is neither controversial nor unique to the Seventh Circuit. *See* P-App. 31a, *citing Colbert*, 851 F.3d at 657; *see also Jutrowski v. Township of Riverdale*, 904 F.3d 280, 289 (3d Cir. 2018) ("[T]he tenet that a defendant's § 1983 liability must be predicated on his direct and personal involvement in the alleged violation has deep historical roots in tort law principles, is manifest in our excessive force jurisprudence, and is reinforced by persuasive authority from our Sister Circuits."); *Burley v. Gagacki*, 729 F.3d 610, 619 (6th Cir. 2013) ("To establish liability against an individual defendant acting under color of state law, a plaintiff must show that the defendant was 'personally involved' in the use of excessive force."); *Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002) ("[A] plaintiff could not hold an officer liable because of his membership in a group without a showing of individual participation in the unlawful conduct."); *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010) ("individual liability under § 193 must be based on personal involvement in the alleged constitutional violation").

Petitioner failed to establish Nurse George's personal involvement in the alleged constitutional deprivation. *Colbert*, 851 F.3d at 657. In the district court, Petitioner maintained that any one of three individuals may have left the scissors in his bathroom: Nurse George, Nurse Azcueta, or Nurse Plum.[1] P-App. 31a. He never took the position that there was sufficient evidence from which a jury could conclude that Nurse George was personally responsible. *Id*. Instead, he argued that the district court should infer that *a* nurse left the scissors in his bathroom and asserted, simultaneously, that Nurse George or Nurse Azcueta or Nurse Plum left the scissors. *Id*. The district court found, and the Seventh Circuit agreed, that evidence suggesting that one of several individuals may have left the scissors is insufficient to establish the individual liability of Nurse George under § 1983. *Id*.

On appeal, Petitioner abandoned his district court argument and voluntarily chose to pursue only Nurse George, despite having conceded before the district court that he could not determine which of the three nurses left the scissors in his bathroom. Accordingly, based on the record made by Petitioner, the Seventh Circuit held that no reasonable fact finder could determine that Nurse George was the individual responsible for his injury. *Id*.

In reaching this decision, the court below was not breaking any new ground. Petitioner failed to come

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[1] Nurse Plum was never a defendant in this case and Petitioner did not appeal the summary judgment entered in favor of Nurse Azcueta.

forth with evidence from which a jury could decide that Nurse George was the party responsible for his injury. Reviewing these facts against well-established legal principles, the court correctly held that the evidence was simply insufficient to support Petitioner's claim. There is no reason for this Court to reconsider that decision.

B. There is No Circuit Split over the Personal Involvement Requirement for § 1983 Claims.

The Seventh Circuit's approach to individual liability under § 1983 is entirely consistent with Ninth Circuit case law. Petitioner relies on *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986) to imply that a defendant's personal involvement need not be proven under Ninth Circuit precedent. But Petitioner omits any reference to that circuit's subsequent, and controlling, decision in *Jones v. Williams*, which substantially constrains *Rutherford*. *See Jones*, 297 F.3d at 935.

In *Jones*, the plaintiff relied on *Rutherford* to argue she was entitled to the following jury instruction:

> When a plaintiff cannot specifically state which defendant police officers engaged in an unreasonable search of a plaintiff's residence, but there is evidence to specify that certain defendants were among the police officers who were inside plaintiff's residence, and the officers agree they are among the officers who were present, the jury can reasonably infer that the

> named officers were participants in the alleged unlawful conduct.

Id. at 935. The court rejected the instruction as "swe[eping] too broadly" and "tak[ing] the holding of *Rutherford* to an extreme [it] did not intend." *Id.* at 935–36.

Clarifying *Rutherford*'s holding, the Ninth Circuit stressed that a jury cannot "find against the defendants without finding that they had some personal involvement" or find liability without "evidence that identified any *particular officer* . . . ." *Id.* at 935–36 (emphasis added). The court instead requires evidence of "individual participation, not simply being present or being a member of a team . . . ." *Id.* at 937. After *Jones*, then, the Ninth Circuit's standard is entirely consistent with the Seventh Circuit's. *See* P-App.31a (quoting *Colbert*, 851 F.3d at 657) (requiring "*personal involvement* in the alleged constitutional deprivation.").

Petitioner next cites an unpublished decision, *Segal v. Los Angeles Cty.*, 852 F.2d 1290, 1988 WL 79481 (9th Cir. 1988), which, like the *Rutherford* decision on which it relies, predates *Jones*. *Segal*, 1988 WL 79481 at *1. Accordingly, Petitioner's reliance on *Segal* fails for the same reason his reliance on *Rutherford* fails.

Beyond *Rutherford* and *Segal*, Petitioner's only other offerings are two cases from the District of Kansas, in the Tenth Circuit, *Davis v. Hill*, 173 F. Supp. 2d 1136, 1144 (D. Kan. 2001) and *Smith v. Delamaid*, 842 F. Supp. 453, 460 (D. Kan. 1994). The Tenth Circuit, however, is in accord with the Seventh and Ninth Circuits in requiring a plaintiff to prove a

defendant's personal involvement in the alleged constitutional violation to establish individual liability under § 1983. *See Dodds*, 614 F.3d at 1195; *Wilson v. Montano*, 715 F.3d 847, 854 (10th Cir. 2013).

Further, *Davis* and *Smith* actually support the personal involvement requirement for § 1983 claims. Both were excessive force cases in which the plaintiffs could not identify which police officers beat them. The courts acknowledged the officers' mere presence at the scene was insufficient to support a claim for use of excessive force. *Davis*,173 F. Supp. 2d at 1143 ("It is well established that for individual liability under § 1983 to attach, a defendant must personally participate in the alleged deprivation"); *Smith*, 842 F. Supp. at 459 (plaintiff had no claim for excessive force because he could not identify which officer hit him). However, because officers have a duty to intervene to prevent excessive use of force, evidence of their presence at the time of the beating was found sufficient to support a claim for failure to intervene. *Davis* at 1143; *Smith* at 459. Petitioner has no similar claim against Nurse George, and evidence of her personal involvement was required.

Accordingly, Petitioner has failed to demonstrate any split in the circuits that should be resolved by the Court. The petition should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PAUL D. CRANLEY
Counsel of Record
TIMOTHY POSNANSKI
JOSEPH S. DIEDRICH
HUSCH BLACKWELL LLP
33 East Main Street, Suite 300
P.O. Box 1379
Madison, WI 53701-1379
608.255.4440
Paul.Cranley@huschblackwell.com
Timothy.Posnanski@huschblackwell.com

Counsel for Respondents