No. 10- 10-180 AUG 2- 2010

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

MARLITA THOMAS, as mother, next friend and Special Administrator of the Estate of Norman L. Smith, deceased,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the per se rule effectively adopted by the court below, that the issuance of a "no duplication of damages" instruction to the jury in a Section 1983 claim cures any error that may result from incorrect adjoining instructions that invited the jury to assess damages "by defendant" and "by claim" and to decide the legal question of joint liability, is proper.

2. Whether the adjudication of constitutional tort claims against multiple defendants for a single, indivisible injury violated either the law of damages in Section 1983 actions or the defendant's Seventh Amendment right to a fair trial, where the district court invited the jury to assess damages "by defendant" and "by claim," the jury did so and the district court then aggregated the separate damage awards into a single judgment.

LIST OF PARTIES

The parties to the proceeding below were defendant/petitioner County of Cook, a body politic and corporate, defendants Cook County Sheriff's Department, Alex Sanchez, Jesus Facundo, Terrence Toomey are being served as respondents and plaintiff/respondent Marlita Thomas as mother, next friend and Special Administrator of the Estate of Norman L. Smith, deceased.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner County of Cook, Illinois (the "County") respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit filed on May 3, 2010.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit affirmed the jury verdict and judgment entered in the United States District Court for the Northern District of Illinois. The Seventh Circuit's amended opinion is reported at 604 F.3d 293 (7th Cir. 2010) and is reprinted in the Appendix hereto at App. 1a. The Seventh Circuit's initial opinion is reported at 588 F.3d 445 (7th Cir. 2009) and is reprinted in the Appendix hereto at App. 56a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which petitioner seeks review was issued on May 3, 2010. (App. 1a) This petition was timely filed within 90 days of the issuance of the May 3, 2010 opinion, which amended the Seventh Circuit's December 1, 2009 opinion in this matter and which denied the County's petition for rehearing en banc.

The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment

> Trial by jury in civil cases.
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. Section 1983

> §1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Norman Smith died from meningitis while incarcerated at the Cook County Sheriff's Department of Corrections. Smith's mother, Marlita Thomas ("Plaintiff"), filed multiple state law and constitutional tort claims against the Cook County Sheriff, various deputy sheriffs and the County (collectively "Defendants"). Plaintiff alleged that Defendants were deliberately indifferent in failing to provide medical assistance resulting in Smith's death, a single, indivisible injury. The case proceeded to trial before a jury.

A two week jury trial culminated with a verdict in favor of Thomas. The jury awarded Thomas $3,000,000.00 against the County and $1,000,000.00 against the Sheriff. The jury found three of the deputy sheriffs liable and awarded compensatory damages of $150,000.00 collectively against these individuals. The district court entered judgment against all defendants in the amount of $4,150,000. *See Thomas*, 604 F.3d at 310-311;[1] *see also Thomas*, 604 F.3d at 314 (Sykes, J., dissenting in part from the denial of rehearing

[1] Ironically, the panel decision affirmed the aggregated judgment that included the $1,000,000 that the jury assessed against the Sheriff even though the panel also held that it did not "find sufficient evidence, however, to hold the Sheriff liable." *See Thomas*, 604 F.3d at 298.

en banc) (observing that "[t]he district court added the jury's improper separate awards (the total: $4.45 million), ordered a modest remittitur, and entered judgment for $ 4.15 million"). Defendants appealed this judgment and the Seventh Circuit affirmed. *See Thomas v. Cook County Sheriff's Dep't*, 588 F.3d 445 (7th Cir. 2009).

The County then filed a petition for rehearing *en banc* on the grounds that the panel decision could not be reconciled with earlier decisions from the Seventh Circuit[2] that rejected the notion that damages could be apportioned among joint tortfeasors and suggested that, at most, "the highest assessment of compensatory damages against any of the jointly liable defendants placed a ceiling on the recovery of compensatory damages." *See Bosco*, 836 F.2d at 281.

On May 3, 2010, by a 7-3 vote, the Seventh Circuit denied the County's petition and issued an amended panel opinion. Judge Sykes, joined by Judges Posner and Tinder, dissented in part from the denial of the petitions for rehearing *en banc*.[3]

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[2] *See Watts v. Laurent*, 774 F.2d 168, 180 (7th Cir. 1985), *Bosco v. Serhant*, 836 F.2d 271, 281 (7th Cir. 1987), *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1146 (7th Cir. 1985) and *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1387 (7th Cir. 1984).

[3] The individual defendants also filed a petition for rehearing *en banc*. While Judge Sykes stated that the County's petition "ha[d] considerable merit" and should

SUMMARY OF THE ARGUMENT

It is essentially undisputed that "the verdict form and jury instructions were badly botched in this case, inviting juror confusion and duplication of damages." *Thomas*, 604 F.3d at 314 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). Both the majority below and Judge Sykes in dissent agree that the district court used a verdict form and gave jury instructions that invited the jury to assess damages by claim and to award damages by defendant. *Compare Thomas*, 604 F.3d at 312-313 (recognizing that the verdict form should not be structured in a way that would invite the jury to divide the damages for a single injury among defendants or theories of recovery) and *Thomas*, 604 F.3d at 319 (Sykes, J., dissenting in part from the denial of rehearing *en banc*) (stating her concern with the process by which a judgment was entered, "which the panel rightly acknowledges was flawed but wrongly declines to remedy").

The jury, to be sure, ultimately did what everyone agrees it should not have done: it assessed damages by claim and awarded damages by defendant. And the district court did what it

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have been granted, she also stated that the individual defendants' petition "raise[d] no issue worthy of the full court's review." *Thomas*, 604 F.3d at 314 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). Consequently, Judge Sykes dissented in part from the denial of the petitions for rehearing *en banc*.

should not have done: aggregate the various damage amounts into a single judgment.

Nonetheless, the majority below issued an amended opinion affirming the jury verdict relying on the presumption that the jury followed the district court's instruction not to award compensatory damages twice for the same injury. *Thomas*, 604 F.3d at 311. Judge Sykes, however, correctly observed in her dissent that the instructions that came after the "no duplication instruction" robbed that instruction of any salutary effect. *Id.* at 317-318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). Judge Sykes found that the district court accompanied the "no duplication instruction" with a "bewildering hodgepodge of instructions—some inapplicable, some simply wrong—[that] erased whatever effectiveness the no-duplication instruction might have had." *Id.* at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*).

The decision below, therefore, essentially provides a roadmap for litigants who seek to encourage juries to award duplicate awards in Section 1983 cases. As long as a district court at some point gives a "no duplication instruction," the remaining jury instructions on damages can be wrong or inapplicable without any consequence whatsoever.

In this regard, the decision below effectively creates a *per se* rule that a "no duplication instruction" renders error in other damage

instructions as irrelevant. This decision, which gives a "green light" to those litigants who would encourage juries to award duplicate damages, cannot be reconciled with or the decisions of the First Circuit in *Figueroa v. Alejandro*, 597 F.3d 423 (1st Cir. 2010), the Sixth Circuit in *Wilson v. Morgan*, 477 F.3d 326, 341 (6th Cir. 2007), the Eighth Circuit in *Fleming v. Harris*, 39 F.3d 905, 907 (8th Cir. 1994), the Ninth Circuit in *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) and the Tenth Circuit in *Street v. Parham*, 929 F.2d 537, 539 (10th Cir. 1991).

Those decisions hold that when reviewing jury instructions on the elements of a Section 1983 claim, courts determine "whether the charge in its entirety— and in the context of the evidence— presented the relevant issues to the jury fairly and adequately." *Figueroa*, 597 F.3d at 434, *citing Goodman v. Bowdoin College*, 380 F.3d 33, 47 (1st Cir. 2004).[4] Importantly, courts reviewed

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[4] *See also Wilson v. Williams*, 83 F.3d 870, 874 (7th Cir. 1996) (holding, in a Section 1983 action, that courts should "construe jury instructions in their entirety, seeking to determine if, as a whole, they were sufficient to inform the jury correctly of the applicable law"). In *Wilson*, the Seventh Circuit reversed and remanded the case for a new trial because an erroneous instruction confused the jury. The Court declared that it would "not guess as to what the jury actually believed in this case, we hold that the error in their instruction was not harmless, and therefore reverse and remand for a new trial." *Wilson*, 83 F.3d at 877. The Seventh Circuit

instructions "as a whole, not to determine whether they were flawless, 'but whether the jury was misled in any way and whether it had an understanding of the issues and its duty to decide those issues." *Street*, 929 F.2d at 539, *citing Shute v. Moon Lake Elec. Ass'n. Inc.*, 899 F.2d 999, 1004 (10th Cir. 1990). *See also Shannon v. United States*, 512 U.S. 573 (1994), *citing Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (recognizing the "almost invariable assumption of the law that jurors follow their instructions").

When jury instructions are, as Judge Sykes described them, a "bewildering hodgepodge of inapplicable and incorrect instructions," the assumption that a juror would follow them should not comfort anyone. This Court should grant this petition and resolve the conflict between the circuits that the decision below has created regarding its *per se* rule on "no duplication instructions" in Section 1983 actions, the law of damages in Section 1983 actions, and the Seventh Amendment right to a fair jury trial.

REASONS FOR GRANTING THE PETITION

The majority acknowledged that the jury was not properly instructed on damages, *Thomas*, 604 F.3d at 311-313, and yet issued an opinion affirming the jury verdict. To accomplish this, the

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should have reached the same conclusion regarding the erroneous and highly confusing damage instructions in the present case but did not do so.

majority determined that the jury did not duplicate damages because they received a "no duplication" instruction. The majority, however, ignored the proverbial "elephant in the room"—the other jury instructions that directed the jury to assess damages by claim and by defendant.[5] As Judge Sykes observed:

> all the other claims in the case sought compensation for a single indivisible injury—Smith's suffering and death from pneumococcal meningitis while detained in the jail—though from more than one defendant and under multiple theories of relief.
>
> Nothing could be more common in a tort case. Personal-injury plaintiffs almost always sue every defendant plausibly within the causal chain under all available legal theories. But the presence of multiple claims and multiple defendants does not mean that damages are assessed "by claim" or "by defendant," and that's how the

[5] The jury awarded $3,000,000.00 against the County, $1,000,000.00 against the Sheriff (who the Seventh Circuit later dismissed), and $150,000.00 collectively against the three individual defendants Sanchez, Facundo, and Toomey. This demonstrates that the jury awarded damages by Defendant for a single, indivisible injury.

> district court submitted this case to the jury.

Thomas, 604 F.3d at 314-315 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). In short, the district court "incorrectly submitted the question of damages to the jury, resulting in duplicative separate awards, which the court then improperly aggregated." *Id.* at 315.[6]

The majority preserved the jury's verdict but did so at a steep cost: the issuance of a decision that conflicts with law from other circuits regarding the proper review of jury instructions, the law of damages in Section 1983 cases, the improper aggregation of tort damages against several defendants for a single, indivisible injury and the Seventh Amendment right to a fair jury trial.

Consequently, and in accordance with the criteria set forth in Supreme Court Rule 10(a) and 10(c), this Court should grant this petition.

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[6] Although the verdict form did not provide for the insertion of the name of any Defendant, the jury inserted the names of the County and Sheriff in awarding $3,000,000.00 against the County and $1,000,000.00 against the Sheriff. This demonstrates both the power and the corrosive effect of the totality of the district court's erroneous damages instructions.

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS FROM THE FIRST, SIXTH, EIGHTH, NINTH AND TENTH CIRCUITS REGARDING THE *PER SE* RULE EFFECTIVELY ADOPTED BELOW THAT A "NO DUPLICATION OF DAMAGES" INSTRUCTION TO THE JURY IN A SECTION 1983 CLAIM CURES ANY ERROR THAT MAY RESULT FROM OTHER INCORRECT DAMAGE INSTRUCTIONS.

The decision below concedes that a verdict "form should not be structured in a way that would invite the jury to divide the damages for a single injury among defendants or theories of recovery." *Thomas*, 604 F.3d at 313. This admonition is, however, pure *dicta*.[7] In its actual holding, the majority affirmed a jury verdict where the verdict form and jury instructions invited the jury (which accepted the invitation) to commit error by awarding damages by defendant and by claim for a single indivisible injury.

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[7] The precedential value of a case lies in its holding and not in its *dicta*, suggestions or advice. *See, e.g., United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (recognizing this Court's "customary refusal to be bound by *dicta*"); *Beneficial Nat'l Bank v.* Anderson, 539 U.S. 1, 17 (2003) (Scalia, J., dissenting) (stating that "[*d*]*icta* of course have no precedential value").

The panel below did not overturn this verdict for one solitary reason—the district court gave the jury a no duplication of damages instruction. However, the notion that the jury was not instructed to duplicate damages is a myth. As Judge Sykes observed, the instructions that came after the "no duplication instruction" robbed that instruction of any salutary effect:

> But immediately after this no-duplication instruction, the [district] judge confusingly told the jury:
>
> > "Of course, if different injuries are attributed to the separate claims, then you must compensate the plaintiff fully for all his [sic] injuries. You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim.
> >
> > Although there are multiple defendants in this case, it does not necessarily follow that if one is liable, all or any of the others are also liable. Each defendant is entitled to fair, separate and individual consideration of his or her case without regard to your decision as to the other defendants.

> If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.
>
> You may find that more than one defendant is liable for a particular injury.
>
> If so, the plaintiff is not required to establish how much of the injury was caused by each particular defendant who[m] you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages.
>
> If you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable without determining individual percentages of liability.

Id. at 317-318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). Here, the "no duplication instruction" was not clear because the jury was flooded with a proverbial tidal wave of

contradictory instructions that led it to assess damages by claim and award damages by defendant. *Id.* at 318.

Judge Sykes further observed that "[t]he [jury] instructions also appear to have invited the jury to decide the issue of joint liability, which is a legal question for the court." *Id.* What's more, the jury's deliberation resulted in "duplicative separate awards, which the court then improperly aggregated." *Id.* at 314.

Even the majority below recognized that "[m]ost of the issues surrounding the damages award in this case could have been avoided with a better verdict form, and we take this opportunity to offer some general guidance on what the proper sequence of inquiries on a civil verdict form should be." *Id.* at 312-313. The majority also recognized that "[t]he [verdict] form should not be structured in a way that would invite the jury to divide the damages for a single injury among defendants or theories of recovery." *Id.* at 313. Ironically, that is exactly what happened here and that is what the Seventh Circuit affirmed.

A *per se* rule that a "no duplication" instruction cures any other error regarding damage instructions in a Section 1983 case cannot be reconciled with the decisions of the First, Sixth, Eighth, Ninth and Tenth Circuits in *Figueroa*, *Wilson*, *Fleming*, *Oviatt* and *Street*. In these cases, the courts viewed jury instructions as a whole when reviewing jury instructions on various elements of Section 1983. *See Figueroa*, 597 F.3d

at 434 (reviewed jury instructions as a whole when considering whether instructions on First Amendment retaliation claim was proper); *Wilson*, 477 F.3d at 341 (reviewed jury instructions as a whole when determining whether "the jury instructions on probable cause and comparative fault were incorrect, inadequate, and prejudicially misleading"); *Fleming*, 39 F.3d at 907 (reviewed jury instructions as a whole when considering the elements of plaintiff's excessive force claim were properly presented to the jury); *Oviatt*, 954 F.3d at 1481 (reviewed jury instructions as a whole to determine whether the jury was properly instructed on causation in Section 1983 claims); and *Street*, 929 F.2d at 539 (reviewed jury instructions as a whole to determine whether the jury was properly instructed on qualified immunity).

In the present case, the majority did not review the instructions on tort damages in a Section 1983 claim as a whole, but instead focused upon a solitary instruction—the "no duplication of damages" instruction. In the final analysis, however, the majority "relie[d] too heavily on the presumption that jurors follow their instructions—a presumption that is unwarranted given the circumstances, or at least cannot bear the weight the panel assigns to it." *Thomas*, 604 F.3d at 319 (Sykes, J., dissenting in part from the denial of rehearing *en banc*).

When read as a whole, the jury instructions in the present case directed the jury to award damages by claim and by defendant. In concluding

that an isolated "no duplication" instruction absolved the error resulting from the other erroneous damage instructions, the majority decision conflicts with the decisions of the First, Sixth, Eighth, Ninth and Tenth Circuits in *Figueroa*, *Wilson*, *Fleming*, *Oviatt* and *Street*. This Court should grant the petition to resolve the conflict.

II. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS FROM THIS COURT AS WELL AS THE THIRD, FIFTH, SIXTH, SEVENTH AND TENTH CIRCUITS REGARDING THE LAW OF DAMAGES IN SECTION 1983 ACTIONS AND THE SEVENTH AMENDMENT RIGHT TO A FAIR TRIAL.

A. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN CAREY AND STRACHURA REGARDING THE APPLICATION OF THE LAW OF DAMAGES IN SECTION 1983 CASES.

This Court has long recognized that Section 1983 "creates a species of tort liability" and that a Section 1983 "suit seeking legal relief is an action at law within the meaning of the Seventh Amendment." *See, e.g., City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *see also Meyer v. Holley*, 537 U.S. 280, 285 (2003) (recognizing that "when Congress creates a tort action, it legislates against a legal background of

ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.").

In the absence of proof of actual injury in a Section 1983 action, a plaintiff may only recover nominal damages. *Carey v. Piphus*, 435 U.S. 247 (1978). In *Carey*, this Court stated:

> But over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under Section 1983 as well.

Carey, 435 U.S. at 257-258. Subsequent to *Carey*, this Court reversed a judgment in a Section 1983 action where the district court erroneously instructed the jury that it could award compensatory damages based on the abstract value of a constitutional right. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

In the present case, the district court did not follow common law damage principles when instructing the jury and the both the jury verdict and the judgment entered on that verdict are not faithful to such principles. Given the invitation in

the jury instructions to assess damages by claim and by defendant, one can only hazard to guess what the jury determined when it assessed damages against the County, the Sheriff of Cook County and the individual defendants.

Previous cases from the Seventh Circuit recognized that damages could not be awarded by claim or by defendant for a single, indivisible injury in a constitutional tort case. *Watts v. Laurent*, 774 F.2d 168, 180 (7th Cir. 1985), for example, featured confusion with multiple verdict forms similar to the confusion with the jury verdict forms in the present case. In *Watts*, a prison assault case, the plaintiff filed Section 1983 claims against five correctional employees. The defendants were jointly and severally liable but the five verdict forms potentially allowed the jury to apportion damages among various defendants. As in the present case, the jury was instructed to consider each defendant's case individually but was not instructed to reach a total damage figure and then divide it up among the defendants. The jury entered $40,000 awards on each of the individual's verdict forms. In post trial proceedings, the plaintiff claimed the jury had awarded a total of $200,000 and the defense argued that the jury had awarded only $40,000 as a total figure. The Seventh Circuit declined to follow the plaintiff's contention that the total verdict was $200,000 for two reasons. First, such an interpretation would violate the principle of joint and several liability. Second, the jury was not instructed to reach a damage figure and divide it up among the defendants. The Seventh Circuit,

therefore, found that it could not accept plaintiff's position without assuming that the jury disregarded the jury instructions. *Watts,* 774 F.2d at 180-181. Because the jury's intention was unclear as to whether the total award was $40,000 or $200,000, the court remanded the case for a new trial on damages.

Unfortunately, as Judge Sykes observed, the majority decision "conflicts with *Watts*." *Thomas*, 604 F.3d at 319 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). The majority decision likewise conflicts with *Carey* and *Strachura*, as it authorizes the award of duplicate damages for a single injury. This petition should be granted to resolve this conflict.

B. THE DECISION BELOW CANNOT BE RECONCILED WITH DECISIONS OF THE SIXTH AND TENTH CIRCUITS REGARDING THE APPORTIONMENT OF DAMAGES FOR A SINGLE, INDIVISIBLE INJURY AMONG TORTFEASORS WHO ARE JOINTLY AND SEVERALLY LIABLE.

Judge Sykes observed that the decision below "approve[d] the aggregation of improper separate damages awards in a single-injury joint-liability case; this has consequences for the law of damages in our circuit." *Thomas*, 604 F.3d at 319 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). The majority decision has implications beyond the Seventh Circuit, as well, due to its resolution of this aggregation issue.

Other circuits have recognized that in Section 1983 claims, persons who concurrently violate others' civil rights are jointly and severally liable for injuries that cannot be apportioned among the joint tortfeasors. *See, e.g., Northington v. Marin*, 102 F.3d 1564, 1569 (10th Cir. 1996), *citing* Restatement (Second) of Torts § 433B; *see also Patrick v. City of Detroit*, 906 F.2d 1108, 1114-16 (6th Cir. 1990) ("apportionment is improper when only joint and several liability is to be considered"). The majority decision not only perpetuates a miscarriage of justice but also provides authority for aggregating individualized damage awards against multiple defendants for a single injury. This decision is, however, legally untenable, as it authorizes a wholly unprincipled manner of assessing and awarding damages.

In dissent, Judge Sykes stated that the majority decision, unlike the earlier Seventh Circuit decision in *Watts*, improperly endorsed aggregation in a situation where a jury makes separate damage awards against several defendants for a single, indivisible injury:

> [*Watts*] specifically *rejected* the remedy of aggregation for a verdict that improperly assesses damages "by defendant" in a single-injury joint-liability case.
>
> Although there are some differences between *Watts* and this case, the material similarity is this: The jury was improperly invited to award

> damages "by defendant" in a single-injury joint-liability case, and the question on appeal was whether the resulting separate damages awards may properly be aggregated. *Watts* answered this question "no" -- aggregation is *not* appropriate in this situation. Here, the error is even worse because the jury was invited to award damages "by defendant" *and* "by claim"--and was given unintelligible instructions to boot. Aggregation is no more appropriate here than it was in *Watts*.

Thomas, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). The aggregation of separate damage awards against several defendants for a single injury cannot be reconciled with *Watts*, *Northington* or *Patrick*. This petition should be granted to resolve this conflict.

C. THE DECISION BELOW CANNOT BE RECONCILED WITH DECISIONS FROM THE THIRD, FIFTH AND SEVENTH CIRCUITS REGARDING THE SEVENTH AMENDMENT RIGHT TO A FAIR JURY TRIAL.

The County has a Seventh Amendment right to a fair trial by jury in this case. *See Bailey v. System Innovation, Inc.*, 852 F.2d 93, 98 (3rd Cir. 1988) ("fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right");

Latiolais v. Whitley, 93 F.3d 205, 207 (5th Cir. 1996); and *Lemons v. Skidmore,* 985 F.2d 354, 357 (7th Cir. 1993). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 586 (1976) (Brennan, J., concurring in the judgment) (stating that "[s]o basic to our jurisprudence is the right to a fair trial that it has been called 'the most fundamental of all freedoms,'" *citing Estes v. Texas*, 381 U.S. 532, 540 (1965)). The manner in which the district court instructed the jury to assess damages and the district court's aggregation of the separate damage awards violated the County's right to a fair trial, a right guaranteed under the Seventh Amendment.

Plaintiff's constitutional tort claims alleged a single, indivisible injury—Smith's death. *Thomas*, 604 F.3d at 314-315 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). The County did not receive a fair trial on these claims because of the jury was invited to assess damages by defendant and by claim and because the district court aggregated the separate damage awards into a single judgment.

This Court has recognized that:

> there can be no doubt that claims brought pursuant to Section 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, Section 1983 provides relief for invasions of rights protected under federal law.

> Recognizing the essential character of the statute, "we have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability"

City of Monterey, 526 U.S. at 709. This Court then stated that its "settled understanding of Section 1983 and the Seventh Amendment thus compel the conclusion that a suit for legal relief brought under the statute is an action at law." *Id.* at 710. *City of Monterey* shows that Plaintiff's constitutional tort claims are actions at law and, under the Seventh Amendment, the County had a right to a fair jury trial on such claims. The trial below was not fair because of the manner in which the case was submitted to the jury.

The district court invited the jury to award the damages for a single injury by defendant and by claim, added the separate damage awards together and then entered judgment in the aggregate amount. That approach deprived the County of a fair trial (*i.e.*, its right to have the jury determine liability and then assess damages for the single injury in this case).

The decision below conflicts with the decisions of the Third, Fifth and Seventh Circuits in *Bailey*, *Latiolais* and *Lemons* and this Court's decision in *City of Monterey* with regard to the application of the right of a fair trial under the Seventh Amendment. The petition should be granted to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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