No. _____





# Supreme Court of the United States

JUDY JOHNSON and JAMES EDWARDS,

*Petitioners,*

v.

ESTATE OF TERRY GEE, JR., DECEASED,
BY SPECIAL ADMINISTRATOR, THOMAS BEEMAN,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

JAMES S. STEPHENSON
WAYNE E. UHL*
**Counsel of Record*
STEPHENSON MOROW & SEMLER
8710 N. Meridian Street, Suite 200
Indianapolis, Indiana 46260
317/844-3830
wuhl@stephlaw.com
jstephenson@stephlaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

## QUESTIONS PRESENTED

1) Can a jail official be deliberately indifferent to serious medical needs of an inmate and violate the Fourteenth Amendment where the official defers to treatment decisions of medical professionals working within the jail facility?

2) Did the Seventh Circuit properly deny qualified immunity where the court failed to address the "clearly established law" prong of qualified immunity analysis, and where the only decisions on point held that jail officials do not violate an inmate's constitutional rights by deferring to treatment decisions of medical professionals?

## PARTIES TO THE PROCEEDINGS

The petitioners are jail officers Judy Johnson and James Edwards. The respondent is the Estate of Terry Gee, deceased, by its special administrator, Thomas Beeman.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

## OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit is published at 2010 WL 528484 (7th Cir. 2010). It is reproduced in the Appendix. App. 1-12.

## JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on February 16, 2010. The Seventh Circuit denied petitioners' petition for rehearing on April 15, 2010. App. 46-47. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens to the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states, in relevant part:

> 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.

## STATEMENT OF THE CASE

This is a Fourteenth Amendment claim alleging deliberate indifference to serious medical needs of a pretrial detainee incarcerated in a county jail.

Terry Gee was booked into the Monroe County (Indiana) jail on March 18, 2005. On March 30, 2005, Judy Johnson, a jail officer, was called to an inmate block by nurse Trina Estes. Estes expressed concern that Gee be placed in a medical segregation cell for medical observation. Gee had been treated by medical staff for two days before Johnson was so notified, and had contact with a jail nurse two to four times a day during his detention.

It was after 9:30 p.m. when Johnson was called to the cell block. She was advised that Gee was being treated by the adult nurse practitioner, Wygonda Rogers. Rogers had prescribed an antibiotic for Gee for a bacterial infection earlier that evening, and a double dose of insulin due to his high blood sugar level. Rogers had been treating Gee and was familiar with his condition. Estes administered the antibiotic and the double dose of insulin.

At Estes' request, Johnson approved Gee's transfer to the medical segregation cell. Gee was too weak to walk so Johnson ordered a wheelchair to transport Gee to the medical segregation cell. Estes also advised that Gee needed to be taking fluids so Johnson ordered a pitcher of water be placed in the medical segregation cell. Estes continued to check on Gee while in medical segregation until the end of her shift at 11:34 p.m., and did not expect Gee's condition to worsen.

Jail officers thereafter periodically observed Gee and recorded their observations on a log. The observations were that Gee was lying down and appeared to be resting.

Medical staff resumed seeing Gee during their 4:00 a.m. shift. Gee was seen in the segregation cell by nurse Gwen Sunkel at 4:24 a.m. and at 6:00 a.m. on March 31, at which times Sunkel administered medications to Gee, including another dose of the antibiotic.

At 7:15 a.m. on March 31, adult nurse practitioner Wygonda Rogers examined Gee in the medical segregation cell. She advised jail officer James Edwards that Gee needed to be taken to Bloomington Hospital for pneumonia observation, but did not indicate to Edwards that there was an emergency, nor that Edwards should call an ambulance. Edwards called the book-in desk and arranged for another jail officer to be taken off a transport assignment in order to drive Gee to the hospital. Gee was transported to the hospital and arrived there at 8:08 a.m. on March 31. He died on April 5, 2005, while still in the hospital.

The district court denied Johnson and Edwards' motion for summary judgment, acknowledging established law that a jail official is entitled to defer to the judgment of medical staff with regard to the appropriate way to treat an inmate, but concluding that Johnson and/or Edwards could be guilty of deliberate indifference for having "improperly deferred to the medical staff." App. 36. The district court also denied Johnson and Edwards' motion for summary judgment on grounds of qualified immunity.

Johnson and Edwards filed an interlocutory appeal to the Seventh Circuit, predicated upon denial of their request for qualified immunity. The Seventh Circuit affirmed the ruling of the district court, acknowledging that generally prison and jail officials may defer to medical professionals' decisions, but that an exception exists if the inmate's condition is "so obvious" that "deference to the nurses was

unreasonable." App. 12. The order of the Seventh Circuit did not address nor determine whether it was clearly established in March of 2005 that the conduct of Johnson and Edwards could violate the Fourteenth Amendment where the record shows that both deferred to and fulfilled directives from medical staff in connection with the staff's treatment of Gee's condition.

The panel below addressed the qualified immunity arguments of Johnson and Edwards in a single paragraph:

> Unlike the Medical Defendants, the Jail Defendants are clearly state actors, and they can assert qualified immunity. While the case is closer against the Jail Defendants, a jury could determine that they, too, were deliberately indifferent to Gee's medical condition. Johnson and Edwards argue that they were entitled to rely on the nurses' judgments, and generally prison officials can defer to medical professionals' opinions. *Burks v. Raemisch,* 555 F.3d 592, 595 (7th Cir. 2009). However, there is an exception when a risk to a prisoner's health is so obvious that a jury may reasonably infer actual knowledge on the part of the defendants. *Vinning-El v. Long*, 482 F.3d 923, 925 (7th Cir. 2007) (citing *Hall v. Bennett*, 379 F.3d 462, 464 (7th Cir. 2004)). This may be one of the rare cases where a layperson would recognize that Gee received treatment so inadequate that Johnson's and Edwards' deference to the nurses was unreasonable.

> *Johnson [v. Doughty]*, 433 F.3d [1001], at 1011 [(7th Cir. 2006)]. Gee was clearly in terrible shape, and he was deteriorating right before everyone's eyes. We agree with the district court that it is conceivable Johnson and Edwards should have realized that Gee needed immediate medical care, probably in a hospital.

App. 11-12.

A petition for rehearing was filed on the ground that the panel decision failed to address the core issue of whether the right was clearly established in 2005 as required under *Pearson v. Callahan*, 555 U.S. ___ (2009), and there was no controlling case law in March 2005 which held that jail officers can be liable for deliberate indifference despite deferring to determinations and directions of jail medical staff. The Seventh Circuit denied the petition for rehearing, without opinion, on April 15, 2010. App. 46-47. Whether the law was clearly established in March 2005 that jail officers can be liable for deliberate indifference where they defer to determinations made by medical staff remains unanswered.

## REASONS FOR GRANTING THE PETITION

### I. The Court should grant the petition to determine under what circumstances, if any, non-medically trained correctional staff may be found deliberately indifferent to a prisoner's medical needs by failing to disregard or overrule treatment decisions of medical staff.

#### A. There is a conflict among the circuit courts concerning whether there are circumstances under which correctional officers are obligated to overrule medical staff and, if so, what conduct thereafter is constitutionally required.

In *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) the Court determined that "deliberate indifference to the serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' ... proscribed by the Eighth Amendment." *Id.*, *quoting Gregg v. Georgia*, 428 U.S. 153, 173 (1976).[1] "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering

---

[1] In this case, the decedent Gee was a pretrial detainee and therefore, any claim would arise under the Fourteenth rather than Eighth Amendment. However, the due process rights of Gee were at least as great as those available to convicted prisoners under the Eighth Amendment. *City of Revere v. Massachusetts General Hospital,* 463 U.S. 239, 244 (1983).

with the treatment once prescribed." *Id.* (footnote omitted). The Court noted that an allegation of negligence or malpractice in the treatment of a prisoner's condition did not state a claim under the Eighth Amendment. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.*, 429 U.S. at 106.

*Estelle* involved a prisoner with a back injury who was seen 17 times over a three month period by prison medical staff without resolution of the back pain. *Id.* at 99-101. The district court dismissed the *pro se* complaint for failure to state a claim but the Fifth Circuit Court of Appeals reversed, ordering the claim reinstated. 516 F.2d 937 (5th Cir. 1975). The Court of Appeals agreed with the prisoner (Gamble) that more should have been done by way of diagnosis and treatment, including perhaps an x-ray of the back or other tests or treatments. 516 F.2d at 941. This Court held that such failure to pursue other avenues did not constitute deliberate indifference: "But the question whether an x-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment." *Estelle*, 429 U.S. at 107.

Gamble had also brought suit against the Director of the Texas Department of Corrections and the warden of the prison. Since the Court of Appeals had not separately considered the claims against those two individuals, this Court remanded the case to the Court of Appeals to consider whether a claim had been stated against them. After remand, the

Fifth Circuit affirmed dismissal of the two non-medical defendants, finding that they did not exhibit deliberate indifference by interfering with the doctor's performance, or in any other manner. *Gamble v. Estelle*, 554 F.2d 653 (5th Cir. 1977).

In *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3rd Cir. 1993), the Third Circuit held that two prison officials could not be held to have been deliberately indifferent in failing to respond to a prisoner's medical complaints when they knew he was already being treated by the prison doctor. The Third Circuit expanded on this holding in *Spruill v. Gillis,* 372 F.3d 218 (3rd Cir. 2004).

> If a prisoner is under the care of medical experts (Dr. McGlaughlin and Brown in this case), a non-medical prison official will generally be justified in believing that the prisoner is in capable hands. This follows naturally from the division of labor within a prison. Inmate health and safety is promoted by dividing responsibility for various aspects of inmate life among guards, administrators, physicians, and so on. Holding a non-medical prison official liable in a case where a prisoner was under a physician's care would strain this division of labor. Moreover, under such a regime, non-medical officials could even have a perverse incentive *not* to delegate treatment responsibility to the very physicians most likely to be able to help prisoners, for fear of vicarious liability.

> Accordingly, we conclude that, absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official like Gooler will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference.

372 F.3d at 236.

The Third Circuit also appears to hold that if a non-medical correctional official has a reason to believe that a prisoner is being "mistreated," his obligation under the Constitution is to review the inmate's complaints and verify with the medical staff that he is being treated. *James v. Pennsylvania Department of Correction*, 230 Fed.Appx. 195, 198 (3rd Cir. 2007), *citing Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005). No obligation to overrule the medical staff or to send the prisoner elsewhere for treatment seems to be present.

The Fourth Circuit addressed the right of non-medical correctional personnel to rely on the opinions of medical staff in *Miltier v. Beorn*, 896 F.2d 848 (4th Cir. 1990). In *Miltier,* the prisoner's estate brought suit against two wardens, alleging that they were liable, as supervisors, for the alleged deliberate indifference of medical staff.

> [I]t would be an unprecedented extension of the theory of supervisory liability to charge these wardens, not only with ensuring that Gwendolyn received prompt and unfettered

> medical care, but also with ensuring that their subordinates employed proper medical procedures – procedures learned during several years of medical school, internships, and residencies. No record evidence suggests why the wardens should not have been entitled to rely upon their health care providers' expertise. Moreover, everything in the record suggests that the wardens closely monitored Gwendolyn's health and ensured that she received medical treatment. *See Boyce [v. Alizaduh]*, 595 F.2d [948], at 953 [(4th Cir. 1979)]. Although record evidence suggests that the wardens were aware of Gwendolyn's deterioration, it would be ironic indeed if their awareness, resulting from close monitoring of Gwendolyn's condition, became the vehicle by which they were rendered liable under § 1983 for their subordinates' misconduct.

896 F.2d at 854-55. *See also Shakka v. Smith,* 71 F.3d 162, 167 (4th Cir. 1995) (noting that prison officials who contravene decisions of medical professionals risk liability for interfering with a prisoner's treatment).

The Seventh Circuit has also recognized that non-medical correctional personnel are entitled to rely on the opinions of medical professionals. *Lee v. Young,* 533 F.3d 505, 511 (7th Cir. 2008). *See also Hayes v. Snyder,* 546 F.3d 516, 526-27 (7th Cir. 2008); *Johnson v. Doughty,* 433 F.3d 1001, 1010-11 (7th Cir. 2006); *Greeno v. Daley, supra*, 414 F.3d at 655-56; *Burks v. Raemisch,* 555 F.3d 592, 596 (7th Cir. 2009)

("A layperson's failure to tell the medical staff how to do its job cannot be called deliberate indifference. . . ."). After the panel decision in this case, the Court reaffirmed this principle in *Berry v. Peterman,* 604 F.3d 435 (7th Cir. 2010).

> As *Hayes, Johnson, Greeno, Spruill,* and a host of other cases make clear, the law encourages non-medical security and administrative personnel at jails and prisons to defer to the professional medical judgments of the physicians and nurses treating the prisoners in their care without fear of liability for doing so.

*Id.* at 440.

In *Johnson v. Doughty, supra,* after holding that an officer who deferred to medical professionals was not deliberately indifferent, the Seventh Circuit cited a district court opinion with the following quote in parenthesis: "Except in the unusual case where it would be evident to a layperson that a prisoner is receiving inadequate or inappropriate treatment, prison officials may reasonably rely on the judgment of medical professionals." *Id.*, 433 F.3d at 1011, *quoting Bond v. Aguinaldo*, 228 F.Supp.2d 918, 920 (N.D. Ill. 2002). The "unusual case" exception appears to have been subsequently applied only in the panel's decision in this case.

The Eighth Circuit has also recognized that non-medical correctional personnel are entitled to rely on the diagnoses and medical judgments of trained

medical professionals. *Meloy v. Bachmaier,* 302 F.3d 845, 849 (8th Cir. 2002); *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042-43 (8th Cir. 2006) (jailer not required to second-guess or disregard a psychiatrist's opinions or treatment recommendations).

After the panel issued its opinion in the instant case, the Eleventh Circuit decided *Townsend v. Jefferson County*, 601 F.3d 1152 (11th Cir. 2010). In *Townsend,* the Court held that two jailers were entitled to rely on the opinion of the jail nurse concerning whether a prisoner's condition constituted an emergency. *Id.*, at 1159. The Eleventh Circuit, however, indicated that the reliance may not have been justified if the jailers knew that the nurse had grossly misjudged the prisoner's condition, that they knew that the nurse was ignoring a serious medical need of the prisoner, or if they knew that the nurse had previously exhibited deliberate indifference in carrying out her responsibilities. *Id.*

The principle that non-medical correctional personnel are entitled to rely on the judgment of trained medical staff without incurring liability under 42 U.S.C. § 1983 has been recognized by the Third, Fourth, Seventh, Eighth and Eleventh Circuits. The Fourth and Eighth Circuits do not appear to recognize an exception to this rule. The Third Circuit recognizes an exception where the correctional official has reason to believe that the prisoner is being mistreated, but appears to hold that the only obligation of the official is to ensure that the prisoner is receiving treatment from the medical staff. The

Seventh Circuit may recognize an exception where it would be "evident" to a layperson that the prisoner is receiving inappropriate or inadequate treatment. The Eleventh Circuit would perhaps recognize an exception where either the official knows that medical staff has "grossly misjudged" the circumstances due to the obviousness of the prisoner's condition or if he knew or suspected that the medical staff was being deliberately indifferent.

The Court should grant certiorari to resolve the conflict between the Circuit Courts and to determine under what if any circumstances non-medically trained correctional staff may be found deliberately indifferent by failing to overrule trained medical staff who are in the process of providing treatment to prisoners, and to address the nature of their constitutional obligations once doing so. The case affords an excellent opportunity for the Court to address the issue because the evidence shows without dispute that Johnson and Edwards did not disregard but instead fulfilled the directives of medical staff.

## II. The Court should grant the petition because the Seventh Circuit violated Supreme Court precedent by failing to address whether the law was clearly established in March 2005 that a jail officer violates an inmate's constitutional rights by not overruling determinations by medical staff.

### A. The Seventh Circuit decision ignores Supreme Court precedent and fails to address the issue of whether the right was clearly established.

The essence of the defense of qualified immunity is that governmental actors are shielded from liability if their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the

> law forbade conduct not previously identified as unlawful.

*Id.* (footnotes omitted). *See also Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions" they undertook). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, *Harlow*, 457 U.S. at 819, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). A right is clearly established for qualified immunity purposes only where the contours of the right are sufficiently clear that a reasonable official would understand that what the official is doing violates the right and, in light of pre-existing law, the unlawfulness of the act is apparent. *Id.* at 640.

In *Saucier v. Katz,* 533 U.S. 194 (2001), the Court established a two-prong methodology for determining questions of qualified immunity. First, the court is to consider whether, based on the facts alleged, the official's conduct violated a constitutional right. *Id.* at 201. If no constitutional right was violated, there is no need for further inquiry. *Id.* However, if the violation of a constitutional right could be established on the evidence submitted, the next step is to ask whether the right was clearly established at the time of the incident. *Id.* Again, the Court stressed that the "relevant, dispositive inquiry in determining whether

a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.*

*Pearson v. Callahan*, 555 U.S. ___ (2009) held that the two prong approach of *Saucier*, while often advantageous, is not mandatory. The Court found that, under appropriate circumstances, a court may bypass the first prong of the *Saucier* test (whether the conduct alleged violated a constitutional right) and go directly to the second prong of the test (whether the right at issue was clearly established under the law as it existed at the time of the conduct). In addressing the conduct of the officers in question, the Court in *Pearson* again emphasized that the relevant inquiry involved the law established at the time of the conduct. "This inquiry turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Id.* (slip op. at 18-19), *quoting Wilson v. Layne*, 526 U.S. 603, 614 (1999). Finding that the officers were entitled to rely on case law from other circuits and were therefore entitled to qualified immunity, the Court went on to state:

> The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers

> are entitled to rely on existing lower court cases without facing personal liability for their actions. In *Wilson*, we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 526 U.S., at 618. Likewise, here, where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

*Pearson*, 555 U.S. ___, ___ (slip op. at 19-20).

Nothing in *Pearson* suggests that if a possible constitutional violation is present, the second "clearly established" prong can be skipped. From *Harlow*, through *Anderson*, to *Saucier* and *Pearson,* the Court has made it clear that the dispositive question for assertion of qualified immunity is the state of the law at the time of the conduct at issue.

The panel decision appears to have turned the option offered in *Pearson* on its head. Rather than bypassing the first prong of the *Saucier* analysis and proceeding to the second prong, the panel addressed the question of whether the allegations could possibly make out a constitutional deprivation. It then ignored the second prong of the analysis, whether the conduct in question violated clearly established law. As such,

the dispositive question for purposes of qualified immunity was not addressed.

The panel decision contains no analysis of the state of the law at the time of the conduct in question, March 30-31, 2005. With the exception of a reference to *Hall v. Bennett,* 379 F.3d 462 (7th Cir. 2004), every case upon which the panel relied was decided after the events in question, *Burks* in 2009, *Vinning-El* in 2007, and *Johnson* in 2006. *Hall* was not a case involving medical care. In *Hall*, the Court held that a plant engineer and foreman electrician at a prison could be found to have been deliberately indifferent in ordering a prisoner to work on live electric wires without protective equipment since, given their expertise, the risk of such conduct was obvious. *Hall*, 379 F.3d at 464-65. *Hall* did not involve a non-expert officer who was in a position to overrule more qualified staff. No argument can be made that *Hall* clearly established the constitutional obligation of non-medically trained correctional officers to overrule the decisions of trained and experienced medical staff who were in the process of providing treatment to a prisoner and to take the prisoner elsewhere for treatment.

At best, the Seventh Circuit panel's reference to *Hall* stands for the unremarkable, general proposition that some risks to a prisoner's health and safety may be "obvious." The panel conducted no analysis into the question of whether the clearly established law in 2005 indicated that deferring to treatment decisions of trained medical staff was such

an obvious risk to the health and safety of the prisoner. The mere citation to *Hall* cannot be taken as a substitute for such analysis.

Nor did the panel make any determination as to whether, under the law as it existed on March 30-31, 2005, Johnson and Edwards were on notice that their conduct in deferring to the judgment of the trained and experienced medical staff who were treating the prisoner was clearly unlawful. Johnson and Edwards invited the panel to correct this defect in their petition for rehearing, but the panel declined the invitation.

*Saucier* held that if the court determines that the alleged conduct did not violate the Constitution, the inquiry could end. This holding is rational in that if the conduct in question did not violate the Constitution at the time of the decision, the case is ended on a basis other than qualified immunity and there is no need to inquire into clearly established law. But if the court makes a determination that the allegations could constitute a constitutional violation, there is no case from this Court, including *Harlow, Anderson, Saucier,* or *Pearson,* which authorizes a lower Court to deny qualified immunity without addressing the core issue of whether the asserted constitutional right was so clearly established that a reasonable official would understand that his conduct would violate that right. In other words, if a court conducts the analysis under the first prong of *Saucier* and finds a violation, but declines to perform the analysis under the second

prong, the defense of qualified immunity as defined by this Court has no meaning.

The decision of the panel of the Seventh Circuit in this case ignores the qualified immunity analysis as established by this Court in *Pearson*. The panel made no determination as to whether, under the law as it existed on March 30-31, 2005, Johnson and Edwards were on notice that their conduct in deferring to the judgment of trained and experienced medical staff was clearly unlawful. The Court should grant certiorari to ensure compliance with its decisions pertaining to the defense of qualified immunity.

### B. There was no controlling case law in March of 2005 which put petitioners on notice that their conduct was clearly unlawful.

Neither the respondent nor the panel decision cited to any controlling authority which clearly established, as of March 2005, that the petitioners had a constitutional obligation (even in a rare case) to overrule the judgment of trained medical staff who were providing treatment. No case has been referenced wherein a correctional officer has been found to have been deliberately indifferent for not overruling the decisions of medical staff. No controlling authority which existed prior to the incident in question has been cited which would have indicated to Johnson or Edwards that this was even a possibility. "If the law did not put the officer on notice that his conduct

would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier*, 533 U.S. at 202.

Of course, the general principle that deliberate indifference to the serious medical needs of a prisoner on the part of correctional staff constitutes "unnecessary and wanton infliction of pain" violative of the Constitution was clearly established. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

> This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards *in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.*

*Id.* (emphasis supplied) (footnotes omitted).

Accordingly, it was also clearly established that denying or delaying access to medical care could amount to deliberate indifference, as would interfering with treatment that had been prescribed. However there is no allegation that either Johnson or Edwards did anything to deny or delay Gee's access to the jail's medical staff, and the district court's opinion is devoid of any indication that such was the case. Gee was seen on a regular basis by medical staff well before either Johnson or Edwards entered the picture, and medical staff continued to treat Gee afterward. Nor are there any allegations that either Johnson or Edwards intentionally interfered with the treatment prescribed by the medical staff. Instead,

both carried out requests and followed orders issued by the medical staff.

A corollary to the established law has arisen in several circuits in the form of a general rule that, once the prisoner is under the care of qualified medical professionals, correctional officers are entitled to rely on the opinions of those medical professionals and will not be found to have been deliberately indifferent in doing so. This general rule was established law in the Seventh Circuit at the time of the conduct in question. *Perkins v. Lawson*, 312 F.3d 872, 875-76 (7th Cir. 2002). Conversely, the Seventh Circuit had clearly established that a correctional officer who disregarded the directions of medical professionals did so at his own peril. *Zentmeyer v. Kendall County, Illinois,* 220 F.3d 805, 812 (7th Cir. 2000) ("This is not to say that prison officials may substitute their judgment for a medical professional's prescription. Of course they cannot.").

The first case from the Seventh Circuit which indicated that there may be situations in which correctional staff could be found to be deliberately indifferent even while relying on the judgment of trained medical staff was *Johnson v. Doughty*, *supra*, decided in 2006 well after the events in question. *Johnson* repeated the general rule that non-medical correctional personnel are entitled to rely on the opinions of medical professionals in the treatment of the medical conditions of prisoners, *id.*, 433 F.3d at 1010-11, but also quoted the district court ruling in *Bond v. Aguinaldo, supra,* to the effect that there may

be an "unusual case where it would be evident to a layperson that a prisoner is receiving inadequate or inappropriate treatment," in which case it is unreasonable for prison officials to "rely on the judgment of medical professionals." *Johnson*, 433 F.3d at 1010 (*quoting Bond,* 228 F.Supp.2d at 920).

District court opinions do not clearly establish law for purposes of qualified immunity. *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995). The district court in *Bond* cited to *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3rd Cir. 1993) and to two other district court opinions as authority for the general rule that correctional officers may rely on their medical staff. *Durmer* merely states that prison administrators cannot be found to be deliberately indifferent by not responding to medical complaints from an inmate under the care of the prison doctor. *Durmer,* 991 F.2d at 69. Both of the district court cases cited by the court in *Bond* reflect the general rule authorizing reliance on medical staff, but contain no reference to an exception in "unusual cases." *See Williams v. Cearlock*, 993 F.Supp. 1192, 1197 (C.D. Ill. 1998) ("Prison administrators, having no medical expertise, must rely on healthcare professionals to assess the needs of prisoners and initiate treatment."); *McEachern v. Civiletti,* 502 F.Supp. 532, 534 (N.D. Ill. 1980) ("Defendants' reliance upon the opinion of their medical staff as to the proper course of treatment for plaintiff is sufficient to insulate them from any liability under the eighth amendment."). Apparently, the district judge in *Bond* speculated that there may be

unusual cases where the rule would not apply. But *dicta* in one district court decision does not constitute clearly established law.

Again, this is not a case where medical staff was not treating Gee, nor did Johnson or Edwards possess facts which show that the course of treatment by medical staff constituted "mistreatment" of Gee's condition. *Spruill, supra,* 372 F.3d at 236. Nor did opinions from other circuits pre-March 2005 refer to an "unusual case" exception to the rule that prison officials are not deliberately indifferent if they rely on decisions by medical providers. *Miltier v. Beorn, supra; Shakka v. Smith, supra; Meloy v. Bachmeier, supra.*

This Court has not addressed the issue of the degree to which non-medically trained correctional staff are entitled to rely on the opinions and judgment of trained medical staff. That there may be "unusual cases" where a correctional officer had a constitutional obligation to monitor and second-guess the treatment decisions of professional medical staff was not clearly established in the Seventh Circuit by any means. While *Spruill* left open the possibility that there may be cases where a correctional officer is not entitled to rely on the decisions of medical staff where a prisoner is either not being treated or is being mistreated, that opening did not appear in the decisions of other circuit courts. Nor do the facts in this case indicate that either Johnson or Edwards knew that the medical staff were "mistreating" Gee so as to come within that exception. There was no

clearly established law which would have put Johnson or Edwards on notice that, based upon the facts in their possession, the Constitution required they overrule medical staff while staff was in the process of providing treatment to a prisoner. Neither the Seventh Circuit nor the respondent has cited any authority which indicates that such a constitutional obligation was clearly established at the time.

The Court should grant certiorari to either require the Seventh Circuit perform the analysis required under *Pearson* of whether the petitioners violated clearly established law or, in the alternative, to conduct such inquiry itself.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES S. STEPHENSON
WAYNE E. UHL*
*Counsel of Record
STEPHENSON MOROW & SEMLER
8710 N. Meridian Street,
Suite 200
Indianapolis, Indiana 46260
*Counsel for Petitioners*

Dated: July 13, 2010