No. 11-1004

IN THE

Supreme Court of the United States

MARY LAFOND,

Petitioner,

v.

CRYSTAL AMMONS,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 72 L. Ed. 2d 28 (1982), this Court addressed when liability could be imposed on a state hospital administrator for decisions that violate the substantive due process right of an involuntarily committed person to safe conditions of confinement. After concluding that "it must be unconstitutional to confine the involuntarily committed . . . in unsafe conditions", *id.* at 316, this Court held "liability may be imposed only when the decision 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.* at 323.

Here, Respondent Crystal Ammons ("Ammons"), who was involuntarily confined as a fourteen year-old in a state-operated psychiatric hospital for severely emotionally and behaviorally disturbed children, brought a 42 U.S.C. §1983 claim against the hospital administrator for failing to exercise professional judgment to take steps to provide safe confinement conditions. Specifically, the hospital administrator did nothing to protect Ammons from being raped sixty to one hundred times by a male counselor despite the fact that (1) the counselor had been the subject of a prior claim of sexual molestation; (2) it had been reported that the hospital had a "staggering, epidemic" problem with sexual activity among its patients; and (3) there were many warning signs that the counselor was engaging in an inappropriate sexual relationship with Ammons.

1. Did the Court of Appeals properly apply the *Youngberg* professional judgment standard in denying the hospital administrator's motion for summary judgment on her defense of qualified immunity where the evidence viewed in the light most favorable to Ammons clearly established that the administrator, Mary LaFond ("LaFond"), had "numerous warnings" of risks to Ammons and "did literally nothing" in response to those warnings?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ammons respectfully requests that the Court deny the Petition for Writ of Certiorari ("Petition") filed on behalf of LaFond.

STATEMENT OF THE CASE

While in the custody of a state-operated mental hospital, Ammons, a minor-child psychiatric patient, was repeatedly raped by her counselor, an adult male hospital employee. The counselor had previously been accused of sexually molesting a minor female psychiatric patient, but retained unfettered access to female patients. In fact, the counselor had been the subject of "several" earlier child abuse investigations and, in the weeks leading up to the rapes, there were many warning signs that the counselor was engaging in an inappropriate sexual relationship with Ammons, a child. Opp. App. 2a-6a, 9a-13a, 25a.

Ammons brought claims pursuant to 42 U.S.C. §1983 for violation of her substantive due process rights to safe conditions while in state custody. This petition involves Defendant (Petitioner) LaFond's motion for summary judgment on the issue of qualified immunity.

A. Respondent's Confinement At The Child Study And Treatment Center

Ammons was involuntarily committed to the Washington State Department of Social and Health Services's ("DSHS") Child Study and Treatment Center ("CSTC") in October 2001 when she was thirteen years

old. Pet. App. 4a. The CSTC is a residential psychiatric hospital for severely emotionally and behaviorally disturbed children, which, in 2001, served approximately forty-eight inpatients. Pet. App. 3a.

Ammons had become a dependent of the State of Washington at the age of four. Pet. App. 4a. After being sexually abused by a family member, she was moved into foster care in March 1995, at age seven. *Id.* Between the ages of seven and eighteen, Ammons was placed in various residential care facilities and psychiatric hospitals, including CSTC. *Id.* According to CSTC records, Ammons was "an extremely vulnerable child entrusted to the care of this state." Opp. App. 19a.

LaFond was CSTC's Chief Executive Officer (CEO) from 1995 to the end of March 2003. Pet. App. 3a. As CEO, LaFond was responsible for ensuring that the pediatric patients were provided care in a safe environment. SER 47-48.[1] In order to ensure patient safety, the CEO was required to verify that staff members were following policies and that patient care be given paramount importance. SER 45-46. LaFond acknowledged that this responsibility to provide a safe environment remained at all times. SER 48. LaFond likewise testified that the CSTC was a small facility and that it was not difficult for the CEO to enforce policies which would restrict a male staff member from spending extended one-on-one moments with female-child patients. SER 52-53.

1. SER refers to Supplemental Excerpts of Record and ER refers to Excerpts of Record, filed under Ninth Circuit Rule 30-1.

B. History And Warnings Of Sexual Abuse At Child Study And Treatment Center Prior To Respondent's Admission

During LaFond's tenure as CEO, she received a letter from CSTC Director of Nursing Services, Mary Claire Rutherford ("Rutherford"), which raised concerns about improper clinical staff handling of reported sexual incidents in the resident cottages. Pet. App. 3a. On July 2, 2001, Rutherford also wrote to the Secretary of DSHS to voice her concerns that CSTC was "not dealing adequately and effectively with these issues of repeated sexual activity among minor patients and staff abuse towards children." ER 489. Rutherford wrote that the sexual activity at CSTC was occurring in "staggering, epidemic proportions." ER 489. LaFond was copied on Rutherford's letter to the Secretary of DSHS.[2] ER 490.

In early 2001, also during LaFond's tenure, a patient at CSTC ("Resident A") alleged that a Psychiatric Child Care Counselor named Anthony Grant ("Grant") had sexually molested her. Pet. App. 3a; Opp. App. 2a-6a. Resident A reported her allegations to two separate staff members who prepared incident reports. ER 464-70.

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2. Footnote 3 of the Petition states that Rutherford's letter "did not relate to sexual abuse by staff or suggest that any staff posed a risk." This is not accurate. Rutherford's letter to LaFond stated "You have also allowed abusive staff to continue to work directly with our children even with clear substantiated documentation of abuse. In addition you and certain professional staff have been reluctant to follow our mandated guidelines regarding reporting alleged abuse." ER 479. Her warnings were contemporaneous with Resident A's allegations of sexual molestation.

LaFond was aware of the allegations but did not contact law enforcement, nor Resident A's social worker. ER 445-46. These allegations were reported to Child Protective Services ("CPS") and CPS conducted interviews with Resident A, Grant, other staff, and at least one patient. Pet. App. 4a. Resident A repeated to the CPS investigator that Grant had molested her. *Id.*

A resident psychologist at CSTC claimed that Resident A later recanted her accusations against Grant in a conversation with her. At no point, however, did Resident A recant her testimony to outside investigators.[3] Pet. App. 22a. Though not a party to this action, Resident A submitted a declaration in the district court swearing that she never recanted her allegations against Grant. Opp. App. 4a.

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3. Ammons disputes LaFond's characterization that the allegations were "recanted" and that Grant was "cleared" of the allegations by Resident A. Indeed, the issue was "hotly contested" in the district court. Pet. App. 69a. Eleven days following Resident A's allegations, LaFond sent correspondence acknowledging that the victim was "***not*** recanting her allegations." ER 474 (emphasis added). As the Court of Appeals observed: "T]he record reflects that Resident A repeatedly stated that Grant had touched her inappropriately, but later recanted her allegations when speaking to Dr. Bacon. At no point, however, did Resident A recant her testimony to outside investigators. That she recanted to Dr. Bacon in a moment when she was admittedly upset about losing contact with Grant, at the very least, raises doubts as to CPS's conclusion that the accusations were 'unfounded.'" Pet. App. 22a. Accordingly, for purposes of denial of the motion for summary judgment, whether or not Resident A recanted is a disputed issue of material fact that the Court was required to resolve in Plaintiff's favor.

After LaFond informed the CPS investigator that Resident A had allegedly recanted, CPS concluded that Resident A's allegations were "unfounded" and closed the investigation. Pet. App. 4a. CPS did not interview Resident A again after LaFond reported the alleged recantation. SER 190-193. After the investigation was closed, Grant was allowed to remain on staff and continued to work with female child patients. LaFond did not speak with Grant concerning the allegations.

LaFond did not report Resident A's allegations to law enforcement, but instead reported them only to CPS, a branch of DSHS. Accordingly, Ammons disputes LaFond's characterization of LaFond having "followed state laws requiring staff to report physical or sexual abuse to Child Protective Services...." Pet. 3-4, 6.

CPS, DSHS and the CSTC all operate under the same bureaucratic umbrella. Therefore, Washington state law requires the reporting of allegations of sexual abuse to a law enforcement agency. RCW 26.44.030(4).[4] CPS is not a "law enforcement agency" under the statute.[5] In this case, the proper law enforcement agency to investigate allegations of child molestation would have been the

4. "The department, upon receiving a report of an incident of alleged abuse or neglect pursuant to this chapter, involving a child who has died or has had physical injury or injuries inflicted upon him or her other than by accidental means **or who has been subjected to alleged sexual abuse, shall report such incident to the proper law enforcement agency.**" RCW 26.44.030(4) (emphasis added).

5. "'Law enforcement agency' means the police department, the prosecuting attorney, the state patrol, the director of public safety, or the office of the sheriff." RCW 26.44.020 (12).

Washington State Patrol, an entity wholly independent from the CSTC. LaFond's failure to report allegations of child sexual abuse to a law enforcement agency is a gross misdemeanor. *See* RCW 26.44.080.

C. Warnings Provided To Child Study And Treatment Center Regarding Counselor's Relationship With Respondent

While Ammons was at CSTC, she stayed in regular contact with her former foster mother, Connie Tienhaara ("Tienhaara"), who became concerned about Ammons's preoccupation and seemingly close relationship with Grant. Pet. App. 5a. Tienhaara's concerns grew upon learning that Grant had given Ammons gifts, including a stuffed animal, compact discs, letters and pictures of himself. *Id.* During 2002 and early 2003, Tienhaara communicated her concerns about Grant to Ilys Hernandez ("Hernandez"), the head of Ammons's cottage at CSTC. *Id.*

Tienhaara spoke to Hernandez in person and on the phone and specifically requested that Grant not be permitted to be alone with Ammons. *Id.* Hernandez assured her that Grant was never alone with Ammons and that "CSTC had a strict policy against male counselors being alone with female patients." *Id.* Despite these assurances, however, Tienhaara learned in late March 2003 that Ammons was scheduled to go on a one-on-one outing with Grant. *Id.* The outing was only cancelled after Tienharra called CSTC and strenuously objected. *Id.* Hernandez did not inform Tienharra that any allegations of sexual abuse had been made against Grant. *Id.*

During her time at CSTC, the staff documented 188 incidents of Ammons's flirtatious behavior with male staff. Pet. App. 6a. "The notes associated with her evaluations indicate that she had 'boundary problems' with the staff, and they direct staff members to closely monitor her interactions specifically with male employees." *Id.* Throughout the early part of 2003, "it was further noted that Ammons had a 'crush' on one of the male staff members, and that she was spending time with him alone and seeking out his attention." *Id.*

Jessikah Ramsey[6], a fellow patient at CSTC, testified that Grant was "extremely flirtatious" with her and Ammons, that their flirtatious interactions were apparent to Hernandez and Dr. Bacon, and that it was "obvious" how infatuated Ammons was with Grant. Opp. App. 9a. However, no restrictions were ever placed on Grant's interactions with Ammons or Ramsey. *Id.* Rather, according to Ramsey, the frequency of Grant's interactions with her and Ammons continued to escalate. *Id.* Ramsey stated that she and Ammons would pass notes through other staff members to Grant so often that "the night shift was getting mad" at her. Opp. App. 10a. She also testified that she and Ammons "had entire sections on the walls of their room (where any staff member could see them) dedicated to Grant, where they posted flirtatious signs such as 'Hottie Alert Tony,' and 'Tony's Finer than Silk.'" Opp. App. 12a.

Grant was grooming Ramsey and Ammons. He gave Ramsey and Ammons "pictures of himself, letters, stuffed animals for Valentine's Day, music CDs and, at least to Ramsey, his personal cell phone number." Pet. App. 6a; Opp. App. 10a. Another CSTC staff member allowed

6. Like Resident A, Ramsey is not a party to this lawsuit.

Ramsey to use her cell phone to send Grant text messages. Opp. App. 10a. On one occasion, Grant painted Ramsey's nails. *Id.* Ramsey testified that she was often alone with Grant in the cottage's TV room or in her "pod," a part of the cottage with female bedrooms, including hers. Pet. App. 7a. She further testified that Grant would often visit the female pod at night, just before bedtime, and that she knew that Grant was taking Ammons to the "canteen" area of the Administration Building alone. Opp. App. 12a.[7]

Hernandez later reported to the Lakewood Police Department that the whole atmosphere with Ammons and Grant was "not healthy." SER 204. She likewise told the police that staff "had spoken to Grant in the past about his behavior with other girls on the pod, as there were some other complaints." SER 204. Hernandez warned Grant about "boundary issues," but reported that he was not receptive, but seemed to merely tolerate the remarks. SER 204.

On April 18, 2003, Ammons was discharged from CSTC and went to live in North Dakota with Tienhaara and her family. Pet. App. 7a. After Ammons left CSTC, Tienhaara discovered that she and Grant were corresponding via e-mail. *Id.* "These e-mails were extremely flirtatious and revealed that Ammons and Grant were romantically involved." *Id.* For example, Grant once

7. The canteen is an area of the Administration Building with snack and soda machines, located in a different building than the female cottages. ER 142. Though LaFond claims that CSTC "had policies and practices that governed staff and patient interaction and used cameras, door alarms and staff to protect patients", Pet. at 9, n.4, these measures did nothing to prevent Grant from taking Ammons out of her cottage between 60 and 100 times, walking her across the campus after hours, unlocking the Administration Building and raping her down the hall from LaFond's office.

wrote, "Wanna go to the canteen tonight? ;) (I wish!)." *Id.* Shortly after Tienhaara discovered the e-mails, Ammons broke down crying and told Tienharra that "she was not a virgin anymore." ER 355-56. She then told Tienharra that Grant had been taking her to the canteen area and having sex with her from January 2003 until she left CSTC in April of that year.[8] Pet. App. 7a.

"The relationship Ammons described included sexual intercourse and other types of sexual activity that took place on multiple occasions in the 'canteen area.'" *Id.* At the time this sexual relationship began, Grant was twenty-nine years old, Ammons was fourteen. *Id.* Tienhaara immediately contacted CSTC about this molestation, and CSTC placed Grant on leave. *Id.*

Tienhaara also reported the rapes to law enforcement. ER 356. After investigating the matter for several months, CSTC concluded that Grant had, while on duty, engaged in sexual intercourse and other sexual activity with Ammons during her involuntary confinement at the facility.[9] CSTC eventually fired Grant. Pet. App. 7a-8a; Opp. App. 14a-22a.

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8. Tienhaara testified that "Crystal then provided many details, that Tony, while on duty as a state employee at the CSTC had been taking her to the canteen area where he penetrated her vagina with his penis, that he did not use protection, that he requested oral sex and she complied, and that he digitally penetrated her vagina on many occasions. There were other details too." ER 355.

9. The State of Washington determined that Grant "between January 1, 2003 and April 18, 2003, had sexual contact with [Ammons], including penile-vaginal sexual intercourse, digital sexual intercourse, and fellatio with [Ammons] while on duty as a Psychiatric Child Care Counselor for the Child Study and Treatment Center." Opp. App. 15a.

D. The District Court Denied Qualified Immunity To Defendants LaFond And Webster.

Ammons sued DSHS, LaFond, and the subsequent CSTC CEO Norman Webster in Pierce County Superior Court, alleging that (1) DSHS was negligent under state law for failing to protect her from the "known dangerous proclivities of Anthony Grant," and (2) LaFond and Webster were deliberately indifferent to Ammons's safety, in violation of 42 U.S.C. § 1983. Pet. App. 8a. The case was removed to federal district court. After the exchange of some discovery, Ammons moved for summary judgment. Appellants cross-moved, arguing that they were entitled to qualified immunity. *Id.*

The district court denied all parties' motions for summary judgment, finding that issues of material fact remained unresolved. *Id.* The court held that LaFond and Webster were not entitled as a matter of law to qualified immunity under *Neely v. Feinstein*, 50 F.3d 1502 (9th Cir. 1995).

The district court reasoned that "the evidence supports [Ammons's] claim that there were numerous warnings - from CSTC staff, plaintiff's foster mother, and based on past allegations of abuse by Grant - that together required the CSTC administrators to take steps to protect [Ammons] from the dangers she faced. Defendants admit they did literally nothing." Pet. App. 70a-71a. LaFond and Webster appealed.

E. The Ninth Circuit Affirmed The Denial Of Qualified Immunity As To Defendant LaFond.

Invoking this Court's decision in *Youngberg v. Romeo*, the Ninth Circuit Court of Appeals affirmed the denial of qualified immunity as to LaFond.[10]

The Court began its analysis with the well-established proposition that "Involuntarily committed patients in state mental health hospitals have a Fourteenth Amendment due process right to be provided safe conditions by the hospital administrators." Pet. App. 12a. Quoting *Youngberg*, the Court observed that "'the right to personal security constitutes an historic liberty interest protected substantively by the Due Process Clause... if it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed — who may not be punished at all — in unsafe conditions.'" *Id.* (quoting *Youngberg*, 457 U.S. at 315–16 (internal citations and quotations omitted)).

The Court held, "According to *Youngberg*, the Constitution requires that hospital officials, in order to protect a patient's right to safe conditions, exercise professional judgment.... [L]iability may be imposed for failure to provide safe conditions 'when the decision made 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.'" Pet. App. 12a-13a (quoting *Youngberg*, 457 U.S. at 323).

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10. The Court of Appeals reversed the denial of immunity as to Webster. Pet. App. 31a-32a. Ammons did not seek further review of this decision.

The Court distinguished this standard from the "deliberate indifference" standard used in Eighth Amendment cruel and unusual punishment cases. Pet. App. 13a. As the *Youngberg* Court noted, "persons 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.* (quoting *Youngberg*, 457 U.S. at 321–22) (emphasis in original). The Court noted that the *Youngberg* professional judgment standard was cited with approval in *County of Sacramento v. Lewis*, 523 U.S. 833, 852 n. 12, 118 S. Ct. 1708, 140 L.Ed.2d 1043 (1998), where this Court held that "[t]he combination of a patient's involuntary commitment and his total dependence on his custodians obliges the government to take thought and make reasonable provision for the patient's welfare." *Id.*

Relying upon *Youngberg* and subsequent Ninth Circuit precedent, the Court held "that at the time the events alleged in this case took place, it was clearly established that LaFond and Webster, as state officials, had a duty to exercise professional judgment to provide safe conditions for Ammons and the other patients at CSTC." Pet. App. 15a (citing *Neely v. Feinstein*, 50 F.3d 1502, 1507 (9th Cir. 1995) ("A mental patient's right to personal security in the institution to which he or she is committed was clearly established in 1988 [the year of the alleged violation].") (additional citations omitted)). Accordingly, the Court of Appeals set out to determine "whether the facts alleged, if proved, are sufficient to support a jury finding that the official's conduct was '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.'" Pet. App. 21a (quoting *Youngberg*, 457 U.S. at 323).

Applying this standard and interpreting the facts in favor of Ammons, the Court determined that Petitioner LaFond knew that Grant had been previously investigated for sexual abuse of a female child patient yet she allowed Grant to continue working in a cottage housing female patients without taking steps to ensure that he was not given repeated opportunities to be alone with one or more of these female child patients. Pet. App. 21a-22a.

LaFond took no steps to limit Grant's access to female child patients, even though LaFond declared that it was her general practice, when an accusation of staff abuse was determined unfounded, to instruct the supervisors to watch the staff member more closely and to counsel him or her about high risk behavior. Pet. App. 22a-23a. The Court observed, "In neither her declarations, nor her deposition testimony, did LaFond state that, after Resident A's accusation, LaFond instructed Grant's supervisors to watch him more closely or provided Grant with counseling about any high risk behavior."[11]

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11. As previously noted, LaFond also likely committed a gross misdemeanor by failing to report Resident A's allegations to law enforcement. LaFond admitted at her deposition that contacting law enforcement is critical when there are allegations of sexual abuse:

> **Q:** If a child alleges sexual abuse at the hands of an adult, you're aware that's a crime, correct?
> **A:** Correct.
> ...
> **Q:** Is it important to involve law enforcement when a child makes an allegation of sexual abuse?
> **A:** Of course.

SER 41. Despite this knowledge, LaFond never contacted law enforcement regarding Resident A's allegations, and instead, insisted on having final authority over when abuse allegations would be reported. SER 76-77.

Id. Accordingly, the Court determined that LaFond's actions pertaining to the prior accusations against Grant demonstrated "a substantial departure from reasonable professional judgment." Pet. App. 24a.

Additionally, LaFond took no action in spite of increasing and documented evidence of Grant's inappropriate relationship with Ammons. Pet. App. 23a. The Court observed that the CSTC, the "facility that LaFond was charged with overseeing, contained overwhelming information and signals that Grant was pursuing improper relationships with female patients and with Ammons specifically." *Id.* As detailed by the Court, LaFond and the rest of the CSTC staff were practically "inundated" with signs and indications that Grant was engaged in an inappropriate relationship with Ammons. Pet. App. 23a.

Ammons's lack of boundaries with male staff, and her preoccupation with Grant in particular, were well documented in her files. Pet. App. 25a. Her particular relationship with Grant was evidenced by her behavior and the displays on the wall of her room, so much so that her crush was apparent to other patients and staff members. *Id.* Ammons flirted with Grant so regularly and extensively that CSTC staff frequently commented on it, both in her files and to Ammons herself. Pet. App. 23a. In fact, Ammons's file contained 188 references to her improper interactions with male staff, as well as documentation about her feelings toward Grant in particular. *Id.*

Ammons's foster mother repeatedly voiced her concerns about the relationship between Grant and Ammons to CSTC, and specifically asked that Grant not be permitted to be alone with Ammons. *Id.* As the Court observed, CSTC is a small facility, and LaFond had every opportunity to become aware of the escalating impropriety between Grant and Ammons, and to take action accordingly. *Id.* LaFond failed to take affirmative steps to inform herself of the situation at CSTC, even after Rutherford had explicitly warned her about the staff's failure to respond appropriately to reports of sexual impropriety. Pet. App. 23a-24a. The Ninth Circuit concluded:

> Instead of taking steps to ensure that her subordinates adequately monitored the relationships between staff and patients, LaFond took literally no action whatsoever to prevent Grant from engaging in an abusive relationship with Ammons. Whether because of ignorance or a failure to fully appreciate the seriousness of the situation, LaFond allowed this relationship to go on for months, unchecked and unmonitored.

Pet. App. 26a-27a. On the basis of the above, the Court of Appeals held that "under the facts alleged and produced, LaFond's apparent inaction and poor supervision with respect to the safety of Ammons and the other female patients support a finding that she failed to exercise professional judgment, and thereby violated the Fourteenth Amendment." Pet. App. 27a.

The Court clarified that its holding was not imposing liability on LaFond: "We hold only that, supposing Ammons's allegations are true, a reasonable jury could conclude that LaFond, ... demonstrated 'a departure from accepted professional judgment' that amounts to a violation of Ammons's clearly established Fourteenth Amendment right to safety during her involuntary commitment to a state hospital." Pet. App. 30a. On this basis, the Court concluded that LaFond is not entitled to qualified immunity.

REASONS FOR DENYING THE PETITION

The Petition should be denied because it presents no "compelling reasons" for acceptance of review. *See* Sup. Ct. R. 10. The Court of Appeals properly stated and applied the *Youngberg* professional judgment standard as established by this Court. Though Petitioner claims the existence of a "substantial Circuit split" in the interpretation and application of the *Youngberg* professional judgment standard, no such split exists. Indeed, the Court of Appeals' opinion is consistent with the *Youngberg* professional judgment standard that has been applied with uniformity across the Circuits.

Though Petitioner objects to the Court of Appeals' application of the properly stated *Youngberg* standard, review is not warranted on this point. Sup. Ct. R. 10. The Court of Appeals rightly held that the qualified immunity inquiry at summary judgment requires construing the facts and inferences in Plaintiff's favor. As such, the Court correctly stated and applied the *Youngberg* standard and determined that material facts remained in dispute such that LaFond is not entitled to qualified immunity as a matter of law.

1. The Court Of Appeals Properly Applied The *Youngberg* Professional Judgment Standard.

The Ninth Circuit's opinion is consistent with this Court's analysis in *Youngberg*. There, a severely disabled man committed to a state mental institution claimed that the hospital administrators violated his substantive due process rights to safe conditions of confinement, freedom from restraint and right to minimally adequate training. *Youngberg v. Romeo*, 457 U.S. 307. This Court established the appropriate standard by which to evaluate the substantive due process claims of a civilly committed person; namely that "liability may be imposed only when the decision 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.* at 323. The *Youngberg* Court acknowledged that the professional judgment inquiry would necessarily involve a reasonableness determination, holding "In this case, therefore, the State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety..." *Id.* at 324. "In determining what is "reasonable"... we emphasize that courts must show deference to the judgment exercised by a qualified professional." *Id.* at 323.

Following this directive, the Ninth Circuit framed the inquiry below as whether LaFond's actions constituted "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that [she] actually did not base the decision on such a judgment." Pet. App. 21a. Contrary to Petitioner's characterizations, the Ninth Circuit did not hold that "any" departure from the standard of care would satisfy the *Youngberg*

professional judgment test. Nor did the Court hold either that LaFond exercised "erroneous" professional judgment or failed to choose the correct choice from among several professionally appropriate options. To the contrary, after recounting the "overwhelming evidence" available to LaFond of Grant's inappropriate sexual relationship with Ammons, the Court held that accepting Ammons's allegations as true, "LaFond's apparent inaction and poor supervision with respect to the safety of Ammons and the other female patients support a finding that *she failed to exercise professional judgment*, and thereby violated the Fourteenth Amendment." Pet. App. 27a (emphasis added).

Similarly, the Courts of Appeals have consistently acknowledged the "reasonableness" aspect of the *Youngberg* professional judgment inquiry. *See Batista v. Clarke*, 645 F.3d 449, 453 (1st Cir. 2011) (*Youngberg* inquiry asks "whether a defendant failed to exercise a reasonable professional judgment"); *Kulak v. City of New York*, 88 F.3d 63, 76 (2d Cir. 1996) (whether decision is a substantial departure from "accepted practices"); *West v. Schwebke*, 333 F.3d 745, 749 (7th Cir. 2003) (whether the decision "exceeds the scope of honest professional disagreement"); *Terrence v. Northville Regional Psychiatric Hosp.*, 286 F.3d 834, 850 (6th Cir. 2002) (whether a reasonable medical professional would have taken the actions alleged); Pet. App. 24a (whether LaFond's actions demonstrated a substantial departure from reasonable professional judgment). Accordingly, the standard necessarily requires evaluation of the reasonableness of the professional's decision, in order to balance the "liberty of the individual" and "the demands of an organized society." *Youngberg*, 457 U.S. at 320. "Throughout this analysis, courts must acknowledge that

a heightened degree of protection must be afforded to the involuntarily committed." *Terrence*, 286 F.3d at 849 (citing *Youngberg*, 457 U.S. at 321-22).

Petitioner, like the dissent below, rejects any assessment of the reasonableness of the professional's decision, arguing instead that any decision made by a professional is valid. But this reworking of *Youngberg* would turn qualified immunity into absolute immunity, and serve to insulate all decisions made by professionals, regardless of how egregious, into protected "professional judgments." An identical argument was rejected by the Seventh Circuit, where Judge Easterbrook wrote that "medical judgment" just because exercised by a professional does not mean "anything goes." *West*, 333 F.3d at 749. In *West*, a case involving civilly-committed sex offenders who had been subject to long periods of seclusion, the Court denied qualified immunity because the evidence was in conflict "on the question whether a *reasonable person* could have thought the use of seclusion appropriate from a security perspective." *Id.* at 748 (emphasis added).

Here, as in *Youngberg*, Ammons presented competent expert testimony relevant to whether LaFond failed to exercise professional judgment. *See Youngberg*, 457 U.S. at 323, n. 31. The Court of Appeals was required to view this (and all) evidence in the light most favorable to Ammons. In doing so, the Court of Appeals properly held that Petitioner could not sustain her burden on summary judgment and was therefore not entitled to qualified immunity.

2. The Ninth Circuit's Ruling Does Not Conflict With Rulings By Other Circuits Interpreting And Applying The *Youngberg* Professional Judgment Standard.

Petitioner urges this Court to accept review to resolve a "substantial split among the circuits with regard to the liability standard for a substantive due process violation by a state hospital official." Pet. at 23. To illustrate the supposed "struggle," Petitioner groups the Courts of Appeals into three categories, contending that each takes a different view of the *Youngberg* professional judgment standard. As illustrated below, this approach oversimplifies (and in some cases misstates) the holdings of the cited cases and significantly overstates any differences in application of *Youngberg*. There is no Circuit split warranting review.

a. In All Circuits, The *Youngberg* Professional Judgment Standard Requires Evidence Of A Substantial Departure From Accepted Judgment, Practice Or Standards.

Petitioner claims that the "Fourth, Third, Tenth and Second Circuits have issued decisions holding that *Youngberg* requires evidence that no professional judgment was exercised, the standard rejected by the Ninth Circuit majority." Pet. at 24. This argument both misstates the holdings of the cited cases and the Ninth Circuit's opinion. In each of the cases cited by Petitioner, the Court applied the professional judgment standard as the *Youngberg* Court established it: that is, "liability may only be imposed 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." *Youngberg*, 457 U.S. at 323. This is the same standard the Ninth Circuit applied.

The Courts of Appeals have uniformly applied this standard as well. In *Patten v. Nichols*, 274 F.3d 829 (4th Cir. 2001), the estate of a psychiatric patient sued after the patient died while involuntarily committed to a state-run mental hospital. The Fourth Circuit agreed with the Estate that the *Youngberg* professional judgment standard applied. Applying this standard, the *Patten* court went on to explain that where the defendant doctors had "taken immediate action" to talk to and evaluate the decedent when they learned she had called her relatives and said she was "dying", they "exhibited both professional concern and judgment" sufficient to satisfy the requirements of *Youngberg*. *Id.* at 844.

Likewise, in *Deavers v. Santiago*, 243 Fed. Appx. 719 (3d Cir. 2007), the Third Circuit applied *Youngberg* to a civilly committed patient's challenge to a treatment plan he considered "counterproductive." *Id.* at 722. In rejecting the patient's substantive due process claim, the Court held that the treatment plan did not constitute a "substantial departure from accepted professional judgment." *Id.* In *Kulak v. City of New York*, 88 F.3d 63 (2d Cir. 1996), the Second Circuit held that the defendant physicians were entitled to qualified immunity where a civilly-committed patient challenged their treatment decisions concerning which medications to prescribe. The Second Circuit noted that the *Youngberg* professional judgment standard "requires more than simple negligence on the part of the doctor but less than deliberate indifference." *Id.* at 75.

Where the plaintiff's expert "simply disagreed" with the diagnosis of five different hospital doctors who had determined the plaintiff was manic or psychotic, plaintiff failed to make out a claim that the doctors' actions had "substantially departed from accepted practices." *Id.* at 75-76.

Finally, in *Yvonne L. By and Through Lewis v. New Mexico Dept. of Human Servs.*, 959 F.2d 883 (10th Cir. 1992), the Tenth Circuit agreed with the Seventh Circuit that the *Youngberg* professional judgment standard applies to foster children seeking redress for injuries sustained in state custody. The Tenth Circuit summarized the *Youngberg* standard as follows: "Failure to exercise professional judgment does not mean mere negligence as we understand *Youngberg*; while it does not require actual knowledge the children will be harmed, it implies abdication of the duty to act professionally..." *Id.* at 894. The Court then remanded for fact finding in light of this standard.

In each of the above cases, the plaintiffs challenged treatment decisions or diagnoses made by professionals, which under *Youngberg* are entitled to a presumption of validity. *Youngberg*, 457 U.S. at 323. Yet in none of these decisions do the courts conclude that *any decision*, regardless of how egregious, insulates a hospital administrator from liability.

In the case of Ammons, LaFond "did nothing" in response to the "overwhelming evidence" both of rampant sexual activity taking place at CSTC and the "obvious" and "unhealthy" relationship between Ammons, a child, and Grant, an adult male staff member. LaFond's inaction was not a "treatment decision" or an erroneous, albeit

professional, judgment call. Rather, as the Court of Appeals properly held, it was an absolute abdication of LaFond's professional responsibilities altogether.

Construing the facts in favor of Ammons, the Court properly denied Defendants' motion for summary judgment. *See West*, 333 F.3d at 749 (denying qualified immunity because of fact issues regarding whether defendants' decisions "exceed the scope of honest professional judgment"); *Terrence*, 286 F.3d at 850 (denying qualified immunity because a rational fact finder could find that defendants failed to act as a "reasonable medical professional" would do in like circumstances).

b. The *Youngberg* Professional Judgment Standard Is Not The Same As the Eighth Amendment Deliberate Indifference Standard.

As this Court explained in *Youngberg*, persons 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. *Youngberg*, 457 U.S. at 322. Though Petitioner claims that three Circuits have rejected this Court's clear distinction and equated *Youngberg* with the Eighth Amendment deliberate indifference standard[12], none of the cases cited by Petitioner support this claim. Pet. at 26 ("Circuits Equating Youngberg To Deliberate Indifference.").

12. "Deliberate indifference" is the appropriate measure of a prison official's conduct in cases alleging "cruel and unusual" punishment under the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).

To the contrary, each case cited by Petitioner, in addition to many others not cited, recognize a uniformly accepted distinction between the professional judgment and deliberate indifference standards. For example, in *Batista v. Clarke*, the First Circuit explained that the *Youngberg* professional judgment standard is "a different, more plaintiff-friendly standard" that evaluates "whether the defendant failed to exercise a reasonable professional judgment." 645 F.3d at 453. Likewise, in *Yvonne L.*, the Tenth Circuit held "to the extent there is a difference in the standards, we agree with the Seventh Circuit that the *Youngberg* standard applies. The compelling appeal of the argument for the professional judgment standard is that foster children, like involuntarily committed patients are 'entitled to more considerate treatment and conditions than criminals.'" *Yvonne L.*, 959 F.2d at 894 (quoting *Youngberg*, 457 U.S. at 321-22). Finally, Petitioner cites to *dicta* in *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998) for the proposition that there is "minimal difference" between the *Youngberg* standard and the deliberate indifference standard. However, since *Collignon*, the Seventh Circuit has clearly applied the "heightened" *Youngberg* standard to civilly committed mental patients. *See e.g.*, *West*, 333 F.3d at 748 (noting *Youngberg*'s call for "more considerate treatment" of civilly committed patients).

Other Circuits have likewise relied on *Youngberg* for the proposition that the Fourteenth Amendment provides "heightened protection" to the involuntarily committed which requires greater scrutiny of state actors than the deliberate indifference standard under the Eighth Amendment. *See, e.g.*, *Terrence*, 286 F.3d at 848 (6th Cir.) (*Youngberg* provides "heightened constitutional

protection" over deliberate indifference standard); *Patten*, 274 F.3d at 843 (4th Cir.) ("Applying the deliberate indifference standard... would be giving involuntarily committed patients the *same* treatment as that afforded to convicted prisoners, a result the *Youngberg* Court specifically condemned."); *Kulak*, 88 F.3d at 75 (2d Cir.) (professional judgment standard requires less than deliberate indifference); *Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1150 (3d Cir. 1990) ("the plaintiff carries a greater burden when trying to show deliberate indifference than when trying to establish a failure to exercise professional judgment").

In sum, the Courts of Appeals are in agreement that the *Youngberg* professional judgment standard provides greater protection to involuntarily committed individuals than the deliberate indifference standard provides to convicted prisoners. This issue does not warrant this Court's review.

c. The Circuits Are In Agreement That More Than Mere Negligence Is Required To Violate The *Youngberg* Professional Judgment Standard.

Petitioner relies on *dicta* from two cases to argue that the Circuits are "further split" on the role of "gross negligence" in adjudicating due process claims. *See* Pet. at 28-29. This argument fails for two reasons. First, because the Ninth Circuit did not base its opinion on whether LaFond's actions were merely negligent, this argument is irrelevant. Second, all Circuits agree that merely negligent conduct does not support a constitutional violation. Quoting this Court's analysis in *County of Sacramento v. Lewis*, 523 U.S. at 849 some Circuits have

used the term "gross negligence" to assist in explaining the "middle ground" levels of culpability identified by this Court that can lead to liability for state actors violating the rights of the involuntarily committed. Petitioner, however, has not identified any case in which a Court of Appeals has upheld a substantive due process claim on the basis of negligence alone.

In sum, Petitioner has failed to identify any meaningful difference in the Courts of Appeals' application of the *Youngberg* professional judgment standard, let alone "compelling" conflicts on the same important matter. *See* Sup. Ct. R. 10. The Petition should be denied.

3. The Ninth Circuit Correctly Held That Defendants Had A Clearly Established Duty To Exercise Professional Judgment To Provide Safe Conditions For A Minor Child Involuntarily Committed To A State-Operated Mental Institution.

A minor child's substantive due process right to safe conditions while involuntarily committed to the custody of the state is a clearly established constitutional right. Petitioner's claim that this right was not "clearly established" at the time Ammons was repeatedly raped by Grant ignores two decades of Ninth Circuit and other federal court precedent, including this Court's decision in *Youngberg*. Pet. App. 14a-15a (citing *Neely*, 50 F.3d at 1507 ("A mental patient's right to personal security in the institution to which he or she is committed was clearly established in 1988 [the year of the alleged violation]."); *Flores by Galvez–Maldonado v. Meese*, 942 F.2d 1352, 1363 (9th Cir. 1991) (describing *Youngberg*'s holding as "when individual is in state custody, state may acquire

constitutional duty to ensure individual's safe care"); *Estate of Conners by Meredith v. O'Connor*, 846 F.2d 1205, 1207 (9th Cir. 1988) (holding that, under *Youngberg*, patients who have been involuntarily committed to a state mental hospital retain liberty interests in safety)). Based on the above, at the time the events alleged in this case took place, it was clearly established that LaFond had a duty to exercise professional judgment to provide safe conditions for Ammons and the other patients at CSTC. Pet. App. 15a.

Petitioner claims that despite this Ninth Circuit and other federal court authority, the law was not "clearly established." To do so, Petitioner misstates the Ninth Circuit opinion and again argues that the Court imposed a simple negligence standard, allowing liability for "erroneous" professional judgment. Pet. at 31. As stated above, the Ninth Circuit did not hold that LaFond was "mistaken" in the exercise of her professional judgment. Rather, applying the *Youngberg* standard, the Court determined that LaFond had failed to exercise any professional judgment at all. Pet. App. 27a. Moreover, in addition to *Youngberg* and its progeny, the Ninth Circuit's decision in *Neely* made clear that hospital officials were required to exercise professional judgment to ensure the safe care of mental patients in state custody.[13]

13. As the Court observed, in both *Neely* and the instant case, "the harm to the plaintiff resulted from the hospital administrator's failure to take meaningful steps to prevent the formerly accused staff member from interacting one-on-one with female patients. In *Neely*, [the Ninth Circuit] found these facts sufficient to support a reasonable jury's determination that Feinstein failed to exercise professional judgment." Pet. App. 29a. The Court went on to hold that this case presents "even more evidence" of a failure to

Petitioner's final argument that the Ninth Circuit's "holding on the merits contradicts its holding on qualified immunity" misunderstands the appropriate standard of review on summary judgment. *See* Pet. at 32-33. Every court addressing the qualified immunity question must first make a determination, viewing the facts in the light most favorable to the injured party, whether a constitutional right has been violated. As the Ninth Circuit made clear, its decision is not an imposition of liability. Rather, the Court held only that disputed issues of material fact prevented summary judgment in LaFond's favor such that she is not entitled to qualified immunity as a matter of law. Pet. App. 30a-31a. A jury will decide whether LaFond is ultimately liable for the alleged violations of Ammons's constitutional rights.[14]

---

exercise professional judgment than found in *Neely*. *Id.* Here, the record "additionally supports a claim that LaFond remained unreasonably ignorant of or ignored the overwhelming evidence that Grant continued to flagrantly abuse his position. Whereas [in *Neely*] Feinstein reprimanded [the abuser] for poor judgment and [another supervisor] placed restrictions on [the abuser's] duties, LaFond made no changes with respect to managing Grant." *Id.*

14. It is well-established that where genuine issues of material fact exist which could lead a rational jury to conclude that a plaintiff's clearly established constitutional rights were violated, the court cannot grant summary judgment to a defendant asserting a qualified immunity defense as a matter of law. *See Terrence*, 286 F.3d at 850 (remanding for trial on plaintiff's substantive due process claims); *West*, 333 F.3d at 748 ("there is nothing that invocation of immunity can do for [Defendants], however, as long as the evidence is in conflict on the question *whether* a reasonable person could have thought the use of seclusion appropriate from a security perspective.") (emphasis in original).

CONCLUSION

Petitioner has failed to set forth any "compelling reason" why this Court should grant review. Sup. Ct. R. 10. The Ninth Circuit's decision below is consistent with the Courts of Appeals' application of the *Youngberg* professional judgment standard to the substantive due process rights of involuntarily committed individuals.

The Ninth Circuit concluded, after construing the evidence most favorably to Ammons, that a jury could find LaFond failed to exercise any professional judgment in failing to take any action to provide a safe environment for an involuntarily committed minor despite several obvious warning signs.

The Ninth Circuit properly affirmed the District Court's denial of Defendant LaFond's motion for summary judgment. The Petition for Writ of Certiorari should be denied.

Respectfully submitted
this 13th day of April, 2012

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APPENDIX

APPENDIX A — DECLARATION OF ANJELICA CORDNEL-MAURICE IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON AT TACOMA, DATED AUGUST 6, 2009

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 08-05548 RBL

CRYSTAL AMMONS,

Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES; NORM WEBSTER, individually and in his official capacity acting under color of state law; and MARY LAFOND, individually and in her official capacity acting under color of state law,

Defendants.

DECLARATION OF ANJELICA CORDNEL-MAURICE

I, Anjelica Cordnel-Maurice, declare under the penalty of perjury, that the following is true and correct:

1. My name is Anjelica Cordnel-Maurice.

Appendix A

2. I was born on May 18, 1987.

3. I currently live at 2034 Howard Road, Auburn, Washington 98002-6327.

4. When I was a young girl, I was a psychiatric patient at the Child Study and Treatment Center ("CSTC").

5. The CSTC is a psychiatric hospital for children located in Pierce County, Washington. The hospital is run by the State of Washington, Department of Social and Health Services.

6. While I was a patient at the CSTC, I met one of the registered counselors at the hospital. His name is Anthony Grant ("Counselor Grant").

7. Counselor Grant was a grown-man at the time he worked as one of the staff members at the CSTC.

8. When I was a child-patient at the CSTC, Counselor Grant befriended me. He talked and flirted with me so much I developed a crush on him and I noticed that a lot of the young female patients did too.

9. Counselor Grant was not assigned to provide direct care for me but he would hang around my area. Counselor Grant worked with the boy patients only.

10. Counselor Grant was open about being in close contact with me and other young female patients. He was outwardly flirtatious and did not try to hide it.

11. Counselor Grant began coming to my bedroom at the CSTC and would request sexual favors.

12. Counselor Grant said that if I flashed my breasts, allowing him to gaze at them, he would be easier on me.

13. Counselor Grant asked me to flash my breasts for him every night that he worked at the CSTC. He kept telling me not to tell anyone. He told me that he would be easy on me if I kept undressing for him. He insisted that I promise not to tell anybody.

14. On many occasions, Counselor Grant told me to take off all of my clothing. When I did, Counselor Grant would grope and fondle my breasts. He told me how good they felt.

15. Counselor Grant also put his fingers in my vagina while I was a child-patient at the CSTC. This happened frequently. If I complied with what Counselor Grant wanted, he would buy and bring me cigarettes. He would sneak those to me a couple at a time. He would also give me his CSTC keys so that I could go into areas where people would not see me smoking.

16. I did not want to, nor did I ever, touch Counselor Grant's penis, although he would ask me to.

17. Over the span of several weeks, Counselor Grant was able to spend many moments molesting me.

18. Counselor Grant molested me and digitally raped me frequently. I cannot remember how long it kept happening, but it was going on for at least several weeks.

19. I was thirteen years old and scared. It was hard for me to get the courage to let people know what was happening to me and it was difficult to talk about it.

20. At the end of March 2001, I reported that Counselor Grant had been asking me to expose my breasts, that he made me promise not to tell anybody, that it had been happening frequently, and that Counselor Grant had been fondling my bare breasts and digitally penetrating my vagina.

21. I was taken to a back room and interviewed. I repeated my experiences about Counselor Grant molesting me. I never changed my story. I never recanted any of the things that I finally had the courage to report.

22. The CSTC staff that interviewed me told me that I must have been imagining things, that my stories did not add up to them, and that the CSTC would never hire a staff member who would molest a child-patient.

23. The staff at the CSTC would not believe me. It seemed like the CSTC staff members involved were determined to discredit what I was telling them.

24. I never, ever, recanted the things I told the CSTC staff about the things Counselor Grant had been doing to me — requesting that I take off my clothes, touching my breasts, and penetrating my vagina.

25. I am aware that there is a document that shows exactly what I said to an investigator and the things that the investigator asked me. I am not aware of any statement written by me or any recording that shows that I ever recanted.

26. I was simply not believed by anyone at the CSTC.

27. Instead, I was told that I must immediately move from an open unit to a closed, lock-down unit where my freedom was severely restricted.

28. I felt as if I was being punished for having the courage to speak out about being molested while I was a child-patient at the CSTC.

29. I never had the opportunity to speak to any law enforcement/police officer about being molested by Counselor Grant, an adult male staff member.

30. No one at the CSTC ever told me that I had a right to speak to a law enforcement/police officer.

31. A few weeks ago — I do not remember the date, but I think it might have been as long as six months ago — a woman who said she was from the Attorney General's Office called my cell phone number. She also came to see me.

32. The woman from the Attorney General's Office spoke with me.

33. The woman from the Attorney General's Office asked me about the sexual molestation by Counselor Grant. She asked me if I ever recanted. I told her that I had not.

34. I asked the woman from the Attorney General's Office if she would file a claim on my behalf because of what Counselor Grant had done to me while I was a child-patient at the CSTC. She assured me that she would.

35. The woman from the Attorney General's Office led me to believe that I was being represented by that office.

Signed and dated this 6 day of August, 2009 at Auburn, Washington.

/s/
Angelica Cordnel-Maurice

I don't think I ever signed any documents that would allow DSHS or the Attorney General's Office to give my personal medical information to anyone. I certainly did not mean to.

APPENDIX B — DECLARATION OF JESSIKAH RAE RAMSEY IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON AT TACOMA, DATED JULY 16, 2009

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON AT TACOMA

No. 08-05548 RBL

CRYSTAL AMMONS,

Plaintiff,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES; NORM WEBSTER, individually and in his official capacity acting under color of state law; and MARY LAFOND, individually and in her official capacity acting under color of state law,

Defendants.

DECLARATION OF JESSIKAH RAE RAMSEY

I, Jessikah R. Ramsey, declare under the penalty of perjury, that the following is true and correct:

1. My name is Jessikah R. Ramsey.

Appendix B

2. I was born on October 15, 1987.

3. I currently live at 615 Cedar Avenue, Marysville, Washington 98270.

4. When I was younger, I was admitted to the State of Washington's Child Study and Treatment Center ("CSTC"). It is a state-operated psychiatric hospital for children.

5. I was admitted to the CSTC on two separate occasions, once when I was about eight years old and once when I was about fourteen and/or fifteen years old.

6. During my second admission, I was at the CSTC for approximately fourteen months.

7. During my first and second admission to the CSTC, I met a patient named Crystal Ammons. Crystal was also a psychiatric patient. During my second admission, Crystal was about thirteen or fourteen years old.

8. Crystal and I received a lot of attention from one of the male staff members at CSTC, Anthony Grant.

9. Compared to Crystal and me, Mr. Grant was a much older, grown man.

10. As a staff member at CSTC, his position was Psychiatric Child Care Counselor.

11. Crystal and I were barely teenagers who were psychiatric hospital patients.

12. Mr. Grant was extremely flirtatious with Crystal, and me, on many occasions. These flirtations were not hidden from anyone at the CSTC.

13. The affectionate and flirtatious interactions between Crystal, myself and Mr. Grant were so well-known and obvious that two administrators at the CSTC, Ms. Hernandez and Dr. Bacon, told us that it was "inappropriate." But, that was all they said.

14. I do not recall anyone at the CSTC putting any restrictions on Mr. Grant from being close to us or flirting with us. In fact, the frequency of our interactions continued to escalate.

15. It was obvious how infatuated Crystal was with Mr. Grant. She did not hide it from anyone.

16. The flirtation by Mr. Grant never stopped, nor did it seem like he was trying to hide his behavior from any of the other staff members or administrators. It was out in the open.

17. On Valentine's Day, Mr. Grant brought gifts for Crystal and myself. Mr. Grant gave Crystal a stuffed puppy. She named it "Tony." Mr. Grant gave me a stuffed gorilla with a cape. Mr. Grant did not bring gifts to any boy patients, only four special girl patients.

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18. Mr. Grant created quite a few music CDs for Crystal and me.

19. Mr. Grant gave us letters.

20. Mr. Grant gave us photos of himself.

21. Mr. Grant gave me his personal cell phone number and asked me to use it. A staff member named Michelle G would allow me to use her cell on CSTC incentive trips to send Tony text messages on his personal cell phone.

22. Mr. Grant painted my nails. **See, *e.g.*, Attachment 1.** I am not sure if he painted Crystal's, but I would not be surprised.

23. Mr. Grant had one-on-one access to Crystal and me on a regular basis.

24. Crystal and I would pass notes to Mr. Grant directly or through other staff members. Notes were being passed to Mr. Grant so often that night shift was getting mad at me for asking them to give him notes. **See, *e.g.*, Attachment 1.**

25. On many occasions, when Mr. Grant was in his car leaving the CSTC after his shift, he would stop at the end of the parking lot and wave to Crystal and me. Sometimes he would even get out of his car to wave. We would blow kisses to him and he would pretend to catch them. **See, *e.g.*, Attachment 2.**

26. At one point, Mr. Grant got his tongue pierced. It seemed like he enjoyed showing it to me in a sexual manner. I would draw pictures for him, give him flirtatious cards and, after he came back from a vacation, let him know that Crystal and I missed him. Crystal wrote letters to him also. **See, *e.g.*, Attachment 3.** He received many letters, cards, notes and kept a lot of those at the CSTC.

27. Mr. Grant enjoyed it when we called him "Tobasco sauce," which was his preferred nickname because we thought he was hot. **See, *e.g.*, Attachment 4.**

28. My situation at the CSTC was much different that Crystal's. I was permitted to leave campus on my own to attend Lakes High School. Crystal did not have permission to leave the CSTC on her own.

29. I felt that Crystal was far more vulnerable than I. Crystal could not leave and did not have nearly as many age-appropriate contacts as I did.

30. Crystal always seemed like a nine or ten year old girl when it came to male/female relationships.

31. Crystal was easily influenced and seemed very eager to please Mr. Grant.

32. On the other hand, I made it pretty clear that I had boundaries. Mr. Grant was smart enough not to try anything overly sexual with me.

33. It is amazing how out in the open the entire relationship was between Mr. Grant, me, and Crystal.

As another example, we would make signs ("Hottie Alert Tony" "Tony's Finer than Silk") and show them to staff members. **See, *e.g.*, Attachment 2.** We had entire sections on the walls of our room (where any staff member could see them) that were dedicated to Mr. Grant. **See, *e.g.*, Attachment 4.**

34. I was alone many times with Mr. Grant (in the T.V. room, in the van on the way back from outings, in the pod). At times, he would visit the female pod, right before bedtime.

35. I never went alone to the Canteen area with Mr. Grant, but I knew that Mr. Grant was taking Crystal to the Canteen alone.

36. When Crystal was discharged from the CSTC, Mr. Grant was still employed as a Psychiatric Child Care Counselor.

37. I remember that, at some point after Crystal left, Mr. Grant was assigned to his home because DSHS decided to conduct an investigation.

38. I have seen the results of the DSHS investigation, including the determination made by DSHS (CEO Norm Webster) that ***"between January 1, 2003 and April 18, 2003" [Mr. Grant] had penile-vaginal sexual intercourse, digital sexual intercourse, and fellatio with Crystal A., while on duty as a Psychiatric Care Counselor for the Child Study and Treatment Center."*** **Attachment 5.** I do not doubt it.

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39. Ms. LaFond and Mr. Webster were never around. I never saw them paying any attention to what Mr. Grant was doing.

Signed and dated this 16 day of July, 2009 at Marysville, Washington.

/s/_____
Jessikah R. Ramsey

APPENDIX C — LETTER TO ANTHONY GRANT FROM THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CHILD STUDY & TREATMENT CENTER, DATED JANUARY 15, 2004

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL
AND HEALTH SERVICES
CHILD STUDY & TREATMENT CENTER
W27-25 • 8805 Steilacoom Blvd SW •
Lakewood, WA 98498-4771 (253) 756-2504

January 15, 2004

CONFIDENTIAL CERTIFIED MAIL

Anthony Grant
[REDACTED]
[REDACTED]

Dear Mr. Grant:

This is official notification of your immediate suspension without pay followed by your dismissal from your position as a Psychiatric Child Care Counselor 1 (PCCC 1) at the Child Study and Treatment Center (CSTC) with the Department of Social and Health Services (DSHS). Your immediate suspension without pay for fifteen (15) calendar days is effective today; January 16, 2004 through February 2, 2004 followed by your dismissal, which is effective February 3, 2004.

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This disciplinary action is taken pursuant to Washington Administrative Code (WAC) 356-34-010 - (1) (a) Neglect of duty, (g) Malfeasance, (h) Gross misconduct, and (i) Willful violation of the published employing agency or department of personnel rules or regulations, and WAC 356-34-050.

Immediate suspension under WAC 356-34-050 is necessary for the good of the service. This is because of the extremely severe nature of your actions and your proximity to our vulnerable clients.

Specifically, you are being disciplined for the following acts of misconduct:

> While in your position as a Psychiatric Child Care Counselor 1 and while on the grounds of the CSTC, you developed an inappropriate personal and sexual relationship with fourteen year old Crystal A., who at the time of the incidents was a resident of CSTC;
>
> Between January 1, 2003 and April 18, 2003, you had sexual contact with Crystal A., including penile-vaginal sexual intercourse, digital sexual intercourse, and fellatio with Crystal A., while on duty as a Psychiatric Child Care Counselor for the Child Study and Treatment Center;
>
> On November 19, 2003, based upon the above behaviors, you were arraigned in the Pierce County Superior Court and charged with three

counts of Rape of a Child in the Third Degree and one count of Child Molestation in the third degree.

DSHS Administrative Policy 8.02, "*Client Abuse*" states in relevant part:

> "*Abuse or Neglect or Patient Abuse or Neglect means the nonaccidental physical injury or condition, sexual abuse, or negligent treatment of a nursing home or state hospital patient under circumstance which indicate that the patient's health, welfare, and safety is harmed thereby (RCW 70.124,020).*
>
> ***
>
> *EXAMPLES:*
>
> *To assist staff in identifying suspected or actual abuse and neglect, the following examples are provided:*
>
> *D. Sexual abuse may include, but not limited to: intimate caressing or fondling, exposure, intercourse, and any overly sexual act, permitting, encouraging, or forcing the client to participate in sexually explicit conduct, showing, selling, or otherwise distributing pornographic material to the client."*

Appendix C

Child Study and Treatment Center Policy 204, *"STAFF/ PATIENT RELATIONS"* states in relevant part:

> *"POLICY*
> *Abuse as defined in DSHS Administrative Policy 8.02, "Client Abuse". And Mental Health Division Policy #22, Patient Abuse Policy, will not be tolerated.*
>
> * * *
>
> *Staff shall limit shows of physical affection towards patients to supportive hugs. Kissing is not allowed."*

DSHS Administrative Policy 6.04, "*Standards of Ethical Conduct for Employees*," states, in relevant part:

> *"A. The Department of Social and Health Services requires employees to perform duties and responsibilities in a manner than maintains standards of behavior that promote public trust, faith, and confidence. Specifically, employees shall:*
>
> 1. *Strengthen public confidence in the integrity of state government by demonstrating the highest standards of personal integrity, fairness, honesty, and compliance with laws, rules, regulations, and departmental policies.*

Appendix C

* * *

5. *Promote an environment of public trust free from fraud, abuse of authority.*

You acknowledged by your signature that you had read both Administrative Policies 6.04 and 8.02 on January 24, 2002. A copy of each of these policies, as well as your New Employee Checklist, is attached and incorporated by this reference as Attachment A.

You have a number of duties in your job as Psychiatric Child Care Counselor 1 that relate to your personal interactions with Crystal A. You have a duty to:

- follow Washington state law by not engaging in sexual activity with minors;
- protect the interests of our clients;
- be professional, ethical and humane in your dealings with our clients; and
- conduct yourself within the bounds of the DSHS Administrative Policy 6.04 and 8.02.

You neglected these duties and willfully violated DSHS Administrative Policy 6.04 and 8.02 and CSTC Policy 204 when you engaged in inappropriate sexual activities with Crystal as described in paragraph four (4) of this letter.

Appendix C

Your wrongful conduct in your capacity as a Psychiatric Child Care Counselor 1 clearly demonstrates malfeasance. You abused the trust placed on you and interfered with the performance of your assigned duties when you developed an inappropriate personal and sexual relationship with Crystal. Your conduct is conduct that ought not to be engaged in by any Child Study and Treatment Center employee but particularly by someone in your position.

Having sexual relations or contact of any kind with Crystal - who, along with her family, trusted you as a Psychiatric Child Care Counselor and representative of the state of Washington - is gross misconduct. Your actions were offensive, dishonest and totally contrary to the accepted standards of state employees in general and Psychiatric Child Care Counselors in particular. You were arraigned on November 19, 2003, and charged with three counts of *Rape of a Child 3rd degree*, and with one count of Child Molestation in the 3rd degree. Your actions have been reported in *The Tacoma News Tribune* and *Seattle Post-Intelligencer* newspapers (November 20, 2003) and websites. Your flagrant misbehavior toward a vulnerable client and the resulting media coverage give the public a picture of a state employee that does not take his job and the welfare of his clientele seriously, and who took advantage of an extremely vulnerable child entrusted to the care of this state. This kind of coverage erodes public trust, faith , and confidence in our agency in general, and gives our clients the impression that we are less than trustworthy and honorable in our services to them. It has negatively impacted our ability to serve the needs of the citizens and of our clients.

Appendix C

In order to determine the appropriate level of discipline, I have reviewed your personnel history in your official personnel file. This review indicates that you have worked at the Child Study and Treatment Center since 1999. Your file contains a letter of reprimand dated July 25, 2002, for an incident that occurred on July 1, 2002. On that date, at approximately 7:30 p.m., you requested to leave work early on sick leave. After granting your request due to your extreme illness, and leaving two cottages short of staff, at approximately 8:15 p.m. that same evening, Mr. Rick Ramseth observed you warming up in preparation to play a softball game.

At a pre-termination review meeting on the present charges against you, held on December 12, 2003, you offered no information to convince me that I should take action other than to dismiss you from your employment.

Your actions as described in this letter are so egregious and represent such a total disregard for the welfare of Crystal A. that I find you to be completely unsuitable for employment. Given my duty to the public, and to our staff to manage our program in a responsible fashion, and most importantly to the vulnerable clientele that we serve, I find that the good of the service requires your immediate suspension followed by your dismissal from your position.

Singly, any of the causes identified in the second paragraph of this letter warrants taking this disciplinary action. When all causes are considered, this action is clearly justified.

Appendix C

You may appeal this action to the Washington State Personnel Appeals Board pursuant to Washington Administrative Code (WAC) 356-34. Your appeal must be received in writing at the office of the Personnel Appeals Board, 2828 Capitol Boulevard, Olympia, Washington, 98504, within 30 days after the effective date stated in paragraph one of this letter.

You also have the right to file a grievance under the provisions of Article 25 of the Institutions Basic Agreement between the Department of Social and Health Services and the Washington Federation of State Employees. You are entitled to representation.

The incident for which this action was taken was investigated by the Washington State Patrol. A copy of the investigative report from the Washington State was provided to you as an attachment within the December 2, 2003 letter scheduling your pre-termination review, and is attached and incorporated by this reference.

The Department of Social and Health Services personnel policies, Washington Administrative Code, and the Basic Agreement are available for review at your request in the Child Study and Treatment Center Human Resource Office.

Sincerely,

/s/_____
Norm Webster
Chief Executive Officer
Child Study and Treatment Center

Appendix C

Attachments: WSP Administrative Investigation Report D03-052
Administrative Policy 6. 04
Administrative Policy 8.02
CSTC Policy 204
New Employee Checklist dated 1-24-02

Cc: Karl Brimner, Director, Mental Health Division
Sherer Murtiashaw, Director, Human Resource Division
Phil Wilson, Human Resource Administrator
Lynne Glad, Human Resource Manager
Personnel

APPENDIX D — LETTER TO LAURA L. WULF FROM STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, WESTERN STATE HOSPITAL, FILED SEPTEMBER 17, 2009

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES
WESTERN STATE HOSPITAL

W27-19 • 9601 Steilacoom Blvd SW • Tacoma WA
98498-7213 • (253) 582-8900

February 17, 2004

Laura L. Wulf
Assistant Attorney General
Labor & Personnel Division
P.O. Box 40145
Olympia, Washington 98504-0145

RE: Anthony Grant v. DSHS
PAB No. DISM-04-0006

Dear Ms. Wulf:

The following information is provided for the above-referenced case as requested:

1. Attachment is the disciplinary letter as provided to Anthony Grant.

Appendix D

2. Chronology of Events:

While Anthony Grant was a Psychiatric Child Care Counselor 1 and while on the grounds of the CSTC, he developed an inappropriate personal and sexual relationship with fourteen year old Crystal A., who at the time of the incidents was a resident of CSTC.

Between January 1, 2003 and April 18, 2003, Mr. Grant had sexual contact with Crystal A., including penile-vaginal sexual intercourse, digital sexual intercourse, and fellatio with Crystal A., while on duty as a Psychiatric Child Care Counselor for the Child Study and Treatment Center.

On November 19, 2003, based upon the above behaviors, he was arraigned in the Pierce County Superior Court and charged with three counts of Rape of a Child in the Third Degree and one count of Child Molestation in the third degree.

Mr. Grant is currently scheduled to go to trial on April 6, 2004.

3. Attached is the list of witnesses.

4. Crystal A. is currently living with foster parents in Minot, North Dakota.

Appendix D

I could not find any record, but Mr. Grant has had several CPS investigations while he was employed at CSTC.

If you need additional information, I can be contacted at (253) 761-3305.

Sincerely,

/s/_____
D. Lynne Glad
Human Resource Consultant
Western State Hospital

LIST OF WITNESSES

The following witnesses are at the following address:

Child Study and Treatment Center
8805 Steilacoom Blvd. S.W.
Tacoma, Washington 98498

Norm Webster, CEO 253-756-2735
Ilys Hernandez, PSW 3 253-745-2539
Jan Bacon, Program Director 253-756-2758
James Griffin, PCCC 3 253-756-2371

Chris Simpson, DCFS Caseworker (425) 649-4156
Teresa Berg, Sgt, Lakewood Police (253) 798-4212