RECORD NO. 15-1589

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GORDON GOINES,
Plaintiff-Appellant,

v.

VALLEY COMMUNITY SERVICES BOARD, DAVID SHAW, ROBERT DEAN, D.L. WILLIAMS, JENNA RHODES and JOHN DOES 1-10,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT HARRISONBURG

REPLY BRIEF OF APPELLANT

Jesse H. Baker, IV
14422 Hamill Run Drive
Gainesville, Virginia 20155
(949) 829-1551
Jb4kb@virginia.edu

Participating Attorney for
THE RUTHERFORD INSTITUTE
Counsel for Appellant

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-1589 Caption: Goines v. Valley Community Services Board, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gordon Goines
(name of party/amicus)

who is the appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Jesse H. Baker IV Date: 6/16/2015

Counsel for: Gordon Goines

CERTIFICATE OF SERVICE

****

I certify that on June 16, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Rosalie Pemberton Fessier
25 N. Central Avenue, P.O. Box 108
Staunton, Virginia 24402-0108

James M. Bowling, IV
416 Park Street
Charlottesville, Virginia 22902

Richard H. Milnor, Esq.
Zunka Milnor & Carter, Ltd.
414 Park Street
Charlottesville, VA 22902

s/ Jesse H. Baker IV (signature)

6/16/2015 (date)

Print Save Reset Form

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

In his opening brief, Goines provided a full description of the only facts relevant to this appeal — the facts alleged in his Complaint. *See Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir.) (en banc) (noting that for purposes of reviewing a dismissal under Rule 12(b)(6) of Federal Rules Civil Procedure, the Court must "accept as true the facts as alleged in the complaint, and view those facts in the light most favorable to the nonmoving party"), *cert. denied*, 522 U.S. 1090 (1997). In contrast, the response brief filed by Dean, Shaw, Rhodes, and VCSB misrepresents numerous pertinent factual allegations, dwells on allegations contained in a police report that contradict the Complaint, and fails to address other critical facts alleged in the Complaint.

STATEMENT OF THE FACTS ALLEGED

The following facts in particular must be taken as true and viewed in the light most favorable to Goines:

- When Goines tried to access cable channels on his television, the television froze and produced a loud line noise. This was because someone in Goines' apartment complex had spliced the television cable running to Goines' apartment. (JA 10 ¶¶ 18-19.)
- A Comcast field tech informed Goines of the cable theft and recommended Goines notify the police. (JA 10-11 ¶¶ 20-21.)

- On May 15, 2014, Goines reported the cable theft and attendant service problems to officers Dean and Shaw. (JA 11 ¶¶ 22-26.)[1]
- Goines told the officers he would not have felt comfortable questioning his neighbors about the theft himself, not knowing how the neighbors would react. (JA 11 ¶ 23.) Goines told the officers he "did not want to get in a fight" with a neighbor. (Id.)
- Goines suffers from cerebellar ataxia, a neurological condition similar to Lou Gehrig's Disease. As a result of this disorder, Goines has great difficulty with his balance, speech, and fine motor functions, including the movement of his mouth, hands, legs, and eyes. (JA 9 ¶¶ 14-15.)
- The impacts of cerebellar ataxia are purely physiological. They do not affect Goines' judgment or cognitive functioning. Goines has no "mental health issues." (JA 10 ¶ 16.)
- Upon observing Goines' physical disabilities, Shaw and Dean leapt to the conclusion that Goines had "mental health issues." As a result of this

[1] Despite defendants' characterization otherwise, the Complaint does allege that Goines reported the theft and service issues to Dean and Shaw. The Complaint alleges that 1) Goines went to the 11 ¶26.) The proper and reasonable inference from this chain of events is that Goines made his complaint to Dean and Shaw — that is, he informed Dean and Shaw of the cable theft and resulting service issues. police "to report the cable theft" (JA 11 ¶22), 2) that he reported the cable theft to an Officer Feazell, who contacted Dean and Shaw (JA 11 ¶¶23-24), and
that 3) Shaw and Dean "ignored or did not take the time to understand Goines' complaint." (JA

assumption, they did not believe Goines' truthful complaint about a neighbor stealing his cable. (JA 12 ¶ 26.)

- Goines told the officers that, as a result of the cable theft, his television had frozen and produced unwanted noises *when* the television was turned on and Goines tried to change the channel. During the brief period when Dean and Shaw were with Goines in his apartment, neither they *nor* Goines heard the noise because they did not turn on Goines' television. (JA 12 ¶¶ 27-29.)[2]
- Shaw and Dean therefore had no basis to conclude that Goines was "having irrational issues and hearing things." (JA 12 ¶ 29.)
- Instead of investigating the cable theft, Shaw and Dean interrogated Goines about his earlier comment that he "did not want to get in a fight" with a neighbor. (JA 11 ¶ 23.) Shaw asked Goines *what he would use to hurt* whatever neighbor was responsible for the theft, if they got in a hypothetical fight. Goines replied "my hands." This is the least threatening possible response Goines could have given to such a question.
- At no time did Goines make any threat to do harm to any person or to himself. (JA 12 ¶ 34.)

[2] Contrary to the suggestion in the officers' response brief, at no time did Goines claim to be hearing "clicking noises," or any noises, that the officers did not hear. Nowhere does the Complaint allege that Goines claimed to be hearing noises that the officers could not hear.

- At the request of Dean, Rhodes petitioned a magistrate judge to order Goines' involuntary admission to a mental health facility ("May 15 Petition"). [3] (JA 14 ¶ 47; JA 16 ¶ 54; *see also* JA 22-33.)
- The May 15 Petition was accompanied by a "Preadmission Screening Report" completed by Rhodes, which included the "diagnosis" that Goines had a "Psychotic Disorder.". (JA 15 ¶ 49; *see also* JA 27.)
- Goines does not have a "Psychotic Disorder", or any other mental illness. (JA 10 ¶ 16, JA 17 ¶ 59.)
- In her report, Rhodes stated that Goines "often displays inappropriate affect" and was "appearing to respond to internal stimuli by his eyes darting about the roof, as if responding to visual hallucination." (JA 15 ¶ 49; *see also* JA 23.) Rhodes' report failed to mention that Goines' eye and mouth movements were actually just symptoms of his cerebellar ataxia, even though Goines informed Rhodes of his condition. (JA 15 ¶ 49.)
- Goines provided Rhodes with the name of his physician who could have further explained his condition to Rhodes, but the physician was never contacted. (Id.)
- Rhodes did not have the minimum training required under Virginia law to

[3] Rhodes' report identified Dean as the petitioner, but the petitioner's name was omitted from the Order granting the petition. (*See* Exhibit A to Complaint, JA 22, and Exhibit B to Complaint, JA 34.)

diagnose mental disorders. (JA 15-16 ¶¶ 50-51.)

- Based upon the unfounded conclusions in Rhodes' May 15 report — including the diagnosis of "Psychotic Disorder" — the magistrate issued a Temporary Detention Order against Goines. (JA 16 ¶ 55; *see also* Exhibit B to the Complaint, JA 34.) The TDO and a subsequent Involuntary Detention Order, also based upon Rhodes' report, served as the basis to deprive Goines of his liberty for six days.

ARGUMENT

A. The facts alleged must be viewed in the light most favorable to Goines.

The only version of facts entitled to any presumption of truth are the facts alleged in the Complaint. *Jenkins*, 119 F.3d at 1159. Those facts must also be viewed in the light most favorable to Goines. *Id*. With respect to the exhibits attached to the Complaint — Rhodes' report and the TDO — and the incident report referenced in the Complaint, the defendants' statements in those documents should not be taken as true, because, as the district court correctly found, "it makes little sense to bind the plaintiff to exculpatory statements and the defendants' factual version of events contained within an exhibit to the complaint[.]" (JA 187.)

As the Sixth Circuit explained in *Jones v. City of Cincinnati*, 521 F.3d 555 (6th Cir. 2008),

> Rule 10(c) "does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading simply because the documents were

> attached to the complaint to support an alleged fact." . . . Rather, we treat the exhibit as an allegation that the officers made the statements in the transcript and we treat that allegation as true.

Id. (internal quotations and citations omitted). Every federal appellate court to address the issue has reached the same conclusion as *Jones*. The Eight Circuit, in *West-Anderson v. Mo. Gaming Co.*, 557 F. App'x 620, 622 (8th Cir. 2014) (unpublished) held that statements made by police officers in their reports, which were attached to but contradicted allegations in the plaintiff's complaint, "were not entitled to a presumption of truth in assessing the basis of [the officers'] knowledge at the time of arrest or whether probable cause existed." *Id*. at 622. The Seventh Circuit, in *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449 (7th Cir. 1998) held "Rule 10(c) does not require a plaintiff to adopt every word within the exhibits as true" because "[t]o take [the defendant's] 'untested self-serving assertions' as true and use them to dismiss [p]laintiff's claim . . . would make little sense." *Id*. at 454-56. And the Second Circuit, in *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669 (2d Cir. 1995), held the plaintiff's act in attaching an investigative report that cleared the defendants of wrongdoing did not require the court to treat the substance of the report as true. *Id*. at 674–75.

District courts in this circuit have adopted the reasoning of *Jones*. In *Pinder v. Knorowski*, 660 F. Supp. 2d 726 (E.D. Va. 2009) (Morgan, J.), the plaintiff had attached to his complaint an affidavit prepared by one of the defendant officers.

The court rejected the officers' argument that the version of facts presented in the affidavit should be taken as true, explaining that the plaintiff did not attach the "affidavit to prove the facts in the affidavit, but rather to support the allegations in his Complaint." *Id*. at 737. "To take [the defendant officer's] 'untested self-serving assertions' as true and use them to dismiss [p]laintiff's claim . . . would make little sense." *Id*. (quoting N. Ind. Gun,163 F.3d at 456.) Likewise, in *Moody v. City of Newport News, Va.*, __ F. Supp. 3d __, 2015 WL 1347475 (E.D. Va. March 25, 2015) (Davis, J.), the court concluded that it would not accept as true the factual account contained in a police report attached to the complaint. *Id*. at *8. The court treated the exhibit simply as an allegation that the police made a report concerning the incident. *Id*.

Here, the district court correctly found the reasoning of the above cases should apply to this case, because "it makes 'little sense' to bind the plaintiff to exculpatory statements and the defendants' factual version of events contained within an exhibit to the complaint." (JA 187.) However, when it came time to apply that reasoning to the defendants' motions to dismiss, the district court was far more deferential to the defendants' version of events. In so doing, the court not only misapplied *Jones*, *West-Anderson*, and *N. Ind. Gun*, it failed to view the facts alleged in the light most favorable to Goines.

First, the court determined that "Goines reported hearing noises that [Dean and Shaw] could not hear." (JA 199.) The suggestion is that when Dean and Shaw were with Goines in his apartment, Goines claimed to be hearing noises that neither officer could hear. This is not true. As alleged in the Complaint, Goines explained to the officers that, as a result of the cable theft, his television had produced a clicking noise *when* the television was turned on and Goines tried to change the channel. (JA 12 ¶¶ 27-29.) During the brief period when Dean and Shaw were with Goines in his apartment, neither they *nor* Goines heard the noise — because they did not turn on Goines' television. (Id.) No reasonable person could possibly interpret this fact as evidence that Goines "was having auditory hallucinations." (JA 199.)

Nowhere does the Complaint allege that Goines claimed to be hearing noises that the officers could not hear. That notion appears to come from language in Shaw's incident report, which was not even attached to the Complaint, and is certainly not entitled to a presumption of truth.

Second, the court found that Goines "repeatedly told [Dean and Shaw] that he believed 'someone outside was controlling his T.V.'" (JA 198, 199.) The Complaint does not allege this. The Complaint alleges Goines told the officers that a neighbor was stealing his cable service, and that the neighbor's actions had caused his television to produce loud line noise and signals when he tried to access

cable channels. (JA 11 ¶¶ 22-23.) While the notion that a neighbor was "controlling" Goines' television service is basically true, this was *not* how *Goines* explained the situation to the officers — it was how Shaw chose to recast Goines' complaint, in a report Shaw prepared after Goines had been unlawfully seized for a mental exam. Shaw failed to mention, in his report, that Goines had actually reported a cable theft, or that Goines explained that the cable theft had caused his television to freeze and produce the unwanted interference. By omitting these important details, and mischaracterizing Goines' perfectly sensible complaint as a claim that "someone outside was controlling his T.V.", Shaw's report presents an incomplete, distorted version of what the officers actually knew at the time they seized Goines.

Third, the district court noted that neither the police report nor Rhodes' report mentions that Goines told them a neighbor was stealing his cable, causing his television to freeze and produce the unwanted interference. (JA 199-200.) Instead of viewing this "fact" properly — as a self-serving omission by the defendants in their version of events — the court inferred that Goines never actually told anyone he thought a neighbor was stealing his cable, and instead told the defendants that someone was "controlling" his TV. (JA 199-200.) Not only is this notion inconsistent with the Complaint, it is factually untrue.

The version of facts presented in Shaw's and Rhodes' reports are not entitled to any deference. The Complaint alleges that Shaw and Rhodes each *prepared* a report, and alleges that Shaw and Rhodes made certain statements in their reports. It was improper for the court to accept as true any assertions in those reports that were not expressly admitted by the Complaint, as the accuracy of the statements made by Shaw and Rhodes "is a question of credibility and weight of the evidence that is not before a court considering a motion to dismiss." *Moody*, 2015 WL 1347475, at *8 (quoting *Jones*, 521 F.3d at 561). "To take the defendants' 'untested self-serving assertions' as true and use them to dismiss [p]laintiff's claim . . . would make little sense." *N. Ind. Gun*, 163 F.3d at 456. By taking the untested assertions (and omissions) in the defendants' version of facts as true, the district court failed to view the facts alleged in the Complaint in the light most favorable to Goines.

B. Under *Bailey*, *Cloaninger*, *Gooden*, and *Takoma Park*, Dean and Shaw seized Goines in violation of the clearly established right to be free from mental health seizure in the absence of probable cause.

Dean and Shaw are not entitled to qualified immunity because they seized Goines in violation of a "clearly established ... right [ ] of which a reasonable person would have known." *Bailey v. Kennedy*, 349 F.3d 731, 740 (4th Cir. 2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A right is "clearly established" if "'the contours of the right [are] sufficiently clear'" so that a

reasonable officer would have understood, under the circumstances at hand, that his behavior violated the right." *Id*. (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). On the facts alleged, and viewing those facts in the light most favorable to Goines, it was clearly established that there was no probable cause to seize Goines.

At the time of Goines's seizure (for the purpose of a motion to dismiss) Shaw and Dean knew: (1) Goines had a speech impediment, and difficulty controlling the movements of his mouth, eyes, hands, and legs; (2) Goines reported that when he tried to access cable channels on his television, the television froze and produced a loud line noise; (3) During the brief period when Dean and Shaw were with Goines, neither they nor Goines heard the noise because they did not turn on Goines' television; (4) Goines reported that someone in his apartment building was stealing his cable service; and (5) Goines told the officers that he would not have felt comfortable questioning his neighbors about the theft himself, not knowing how the neighbors would react.

In light of established Fourth Circuit authority, it would have been clear to a reasonable police officer that he did not have probable cause to arrest Goines. The "general right to be free from seizure unless probable cause exists [is] clearly established in the mental health seizure context." *Gooden v. Howard County*, 954 F.2d 960, 968 (4th Cir. 1992); *Bailey* 349 F.3d at 740. Defining the right at issue in this case with the requisite "high level of particularity," *Edwards v. City of*

Goldsboro, 178 F.3d 231, 250–51 (4th Cir. 1999), the question is whether, at the time of Dean and Shaw's actions, it was clearly established that a police officer may not detain someone for an emergency mental evaluation based only on an individual's physical disabilities and a comment that he did not want to get in a fight.

It was clearly established that probable cause was lacking on this set of facts. "The law in no way permits random or baseless detention of citizens for psychological evaluations." *Gooden*, 954 F.2d at 968. Accepting the facts as alleged, the officers observed nothing that would indicate to them that Goines might be a danger to anyone. No reasonable officer, upon hearing Goines say he "did not want to get in a fight" with an unknown person, would have thought Goines was in such imminent danger of harming someone that immediate seizure was required. Moreover, even *if* Goines had said, in response to the officers' questioning, that he might use his hands in the event of a hypothetical fight with an unknown person, there is nothing in the Complaint to suggest this comment would have made a reasonable officer believe emergency seizure was necessary.

As the district court correctly observed, "At the time of Goines' seizure, it was well established that the officers had to have 'probable cause to seize [him] for an emergency mental evaluation.'" (JA 190.) The court granted the officers' motions to dismiss, however, on the grounds that "a reasonable officer would not

have known that probable cause was 'clearly' lacking under the facts of this case." (JA 191.) The district court based that determination on this Court's decision in *Raub v. Campbell*, 785 F.3d 876 (4th Cir. 2015), that none of the Court's cases involving mental health seizures by police officers — *Bailey*, *Gooden*, *Cloaninger v. McDevitt*, 555 F.3d 324 (4th Cir. 2009), and *S.P. v. Takoma Park*, 134 F.3d 260 (4th Cir. 1998) — delineated "the appropriate standard where a mental health evaluator must decide whether to recommend a temporary detention on the belief that an individual might be a danger to others." *Id*. at *6. (JA 201-202.)

Raub should be distinguished from this case. *Raub* addressed the question of whether the mental health evaluator who recommended Raub's involuntary commitment was entitled to qualified immunity. By contrast, Dean and Shaw were not mental health evaluators faced with deciding whether to recommend an involuntary detention, but police officers, who seized Goines without a warrant based on the notion that he somehow presented a danger to himself or others. The probable cause standard for such a seizure was clearly established through this Court's decisions in *Bailey*, *Cloaninger*, *Gooden*, and *Takoma Park*, all of which addressed situations where police officers seized individuals for involuntary mental exams on the belief that the individuals presented a danger to themselves or others.

The controlling authority for this case is *Bailey*, in which this Court held that a neighbor's 911 call reporting that the plaintiff threatened to kill himself was insufficient, "without more," to establish probable cause for police to seize him for a psychological evaluation. Here, Goines never threatened anyone, and the police received *no* reports that Goines threatened anyone. Further, Goines did not know *which* of his neighbors was responsible for the cable theft, and Goines' purpose in reporting the theft was for the police to determine who was responsible. The fact that Goines was not even able to identify the neighbors responsible for the theft further undercuts the defendants' claims that Goines represented a danger to anyone. In light of *Bailey*, Goines' purported statement that he would use his hands in the event of a hypothetical fight with a hypothetical person is wholly insufficient to create probable cause for the officers' actions.

This case is not like *Gooden*, in which the officers seized the plaintiff based upon repeated reports and observations of "long, loud blood-chilling screams" coming from the plaintiff's apartment, which the plaintiff denied making, and evidence that she was throwing herself against walls and the floor. *Id*. at 964-5. Nowhere does the Complaint allege Goines acted erratically, or that he had harmed or posed a threat of harm to anyone. This case is also distinguishable from *Takoma Park*. The officers there, responding to a reported suicide threat, found the plaintiff "visibly agitated and crying" about a "painful argument" that had caused her

husband to leave. *Id.* at 264. The plaintiff told the officers "if it was not for her kids she would end her life." *Id.* Here, Dean and Shaw received no reports that Goines threatened to harm anyone. They observed nothing to suggest Goines was emotionally unstable, or that Goines posed a danger to any person. At no time did Goines harm or threaten harm to anyone.

Finally, this case is nothing like *Cloaninger*, in which the plaintiff's doctor told police that the plaintiff — Cloaninger — was threatening to kill himself. The police knew that Cloaninger had made prior suicide threats, and that he kept firearms in his home. 555 F.3d at 334. When the police arrived at Cloaninger's home, he refused to open the door and "ordered them off his property or else he would kill them all and then kill himself." *Id*. at 328. After several failed attempts to contact Cloaninger's doctor, the officers contacted a VA nurse who knew Cloaninger and who confirmed his prior suicide threats. The nurse agreed that an emergency commitment was appropriate. *Id*. at 328-29. "[A]fter collecting all this information and professional advice," this "additional information ... established probable cause." *Id*. at 333.

Cloaninger only supports Goines' position that Dean and Shaw lacked probable cause to seize Goines. Goines never threatened to harm anyone. No attempt was made to collect "information and professional advice," such as contacting Goines' family, or his doctor, or anyone who knew Goines. Instead, they

assumed he had "mental health issues" because of his unsteady walk and difficulty pronouncing words — physical disabilities that have nothing at all to do with Goines' mental health. Any reasonable officer would have known the difference, or at least taken the time to contact someone who did.

On the facts alleged in Goines' Complaint, the contours of probable cause were sufficiently clear that the unlawfulness of seizing Goines would have been apparent to reasonable officers. Thus, the officers' motions to dismiss Goines' §1983 claims should have been denied.

C. Rhodes did not have probable cause to conclude that Goines had a "Psychotic Disorder" or any other mental illness.

Contrary to Rhodes' assertion in her response (DN 18 at 48), the probable cause standard for a mental health evaluator was clearly established at the time Rhodes requested that Goines be detained against his will. In *Raub v. Campbell*, 3 F.Supp.3d 526 (E.D. VA Feb. 28, 2014), *aff'd*, 785 F.3d 876 (4th Cir. 2015), the Eastern District of Virginia defined the standard as "whether a reasonable person, exercising professional judgment and possessing the information at hand, would have concluded that [Goines], as a result of mental illness, posed an imminent threat to others." *Id*. at 535.

Under the standard articulated in *Raub*, 3 F.Supp.3d at 535, Rhodes lacked probable cause for the detention of Goines because (1) Goines has no mental illness, and no objectively reasonable evaluator would have concluded, based on

the information available to Rhodes, that Goines had a mental illness; (2) no objectively reasonable evaluator, exercising professional judgment, would have diagnosed Goines with a mental disorder; (3) Rhodes was objectively incapable of exercising the professional judgment required to diagnose a mental disorder; and (4) Goines never threatened to harm anyone, and no objectively reasonable evaluator would have concluded, based on the information available to Rhodes, that Goines, "as a result of mental illness, posed an imminent threat to others." *Raub*, 3 F.Supp.3d at 535.

1. Rhodes was objectively incapable of exercising the reasonable professional judgment required to diagnose Goines with a mental disorder.

The *Raub* court's formulation should not be misconstrued so the mental health evaluator would only be required to be "certified" by a community services board in order to diagnose a mental illness. The "exercise of professional judgment" also must be understood to include a reasonable evaluation by a mental health professional with the education and experience necessary to accurately diagnose mental illness (where a diagnosis is to be made).

This understanding of "professional judgment" aligns the standard for probable cause in the context of mental health detentions with the minimal standards set forth in the Virginia Code for the diagnosis of mental health disorders. The Code defines the "diagnosis and treatment of mental and emotional

disorders" as the practice of clinical psychology, and requires "the appropriate diagnosis of mental disorders according to standards of the profession." Va. Code § 54.1-3600. The appropriate diagnosis of mental disorders is a discretionary clinical function, requiring the exercise of professional judgment. As such, it may not be delegated to unlicensed personnel. Va. Code § 54.1-3614.

In diagnosing Goines with "Psychotic Disorder NOS (298.9)", Rhodes engaged in clinical psychology without being qualified to perform the diagnostic function of a clinical psychologist. Rhodes had a degree in education. She was not a medical professional, clinical psychologist, or clinical social worker in Virginia or any other state.[4] As such, Rhodes lacked the education or experience to make direct diagnoses of psychological or mental health disorders. *See*, *e.g.*, Education and Experience Requirements for Clinical Psychologists, 18 VAC 125-20-54 (doctorate in clinical or counseling psychology) and 18 VAC 125-20-65 (residency consisting of a minimum of 1,500 hours of supervised experience in the delivery of clinical psychology services). The possibility that Rhodes may have been "certified" by VCSB to conduct preliminary mental evaluations under Va. Code § 37.2-809(A) is not relevant to Goines' argument. Nothing in § 37.2-809(A) authorizes an individual who is not a licensed psychologist or medical doctor to

[4] Although Commonwealth employees who render psychological services are exempt from the state licensure requirements, they must be "supervised by a licensed psychologist or clinical psychologist." Va. Code § 54.1-3601.

make direct diagnoses of mental disorders to support a request for involuntary detention.

In reporting to the magistrate that Goines had a "Psychotic Disorder NOS (298.9)", Rhodes represented to the magistrate that she was capable of exercising the "professional judgment" required to accurately diagnose Psychotic Disorder NOS (298.9). In fact, she was not. If Rhodes had made the same representation to a patient in the context of a voluntary evaluation, she would have been subject to discipline by the Virginia Board of Psychology for, *inter alia*, violating its practice standards and performing functions outside her areas of competency. 18 VAC 125-20-160.

These standards must not be lowered in the context of an involuntary mental evaluation. If anything, the Commonwealth's interest in ensuring that mental health disorders are appropriately diagnosed "according to the standards of the profession" should be heightened in the context of involuntary evaluations, where the diagnosis of mental health disorders serves to deprive citizens of their liberty.

This is not to say that every involuntary detention necessarily requires the diagnosis of a specific mental health disorder. The contours of objective reasonableness will vary with the circumstances. But in a setting like this, where the basis for detention rests on the diagnosis of a mental health disorder, there is

simply no probable cause for detention where the evaluator making the diagnosis is not properly trained to do so.

2. No objectively reasonable clinician would have concluded, based on the information available to Rhodes, that Goines had a mental illness.

Moreover, no reasonable clinician, exercising professional judgment and possessing the information available to Rhodes, would have concluded that Goines had a mental illness of any kind. *Raub*, 3 F.Supp.3d at 535. In her report, Rhodes stated that Goines "often displays inappropriate affect" and was "appearing to respond to internal stimuli by his eyes darting about the roof." These symptoms are not evidence that Goines was "responding to visual hallucination", as Rhodes represented to the magistrate. These are symptoms of Goines' neurological condition, which impairs his control of the movement of his mouth and eyes. Rhodes' report failed to disclose this fact to the magistrate, even though Goines informed Rhodes of his condition. (JA 15 ¶ 49.) But Rhodes dismissed that information as a "hallucination" caused by Goines' non-existent mental illness.

Goines even provided Rhodes with contact information for his doctor, Dr. McLaughlin at the University of Virginia. Although Dr. McLaughlin could have explained Goines' cerebellar ataxia and attendant physical disabilities, and confirmed that Goines did not suffer from any mental illness, Rhodes made no effort to contact her. No objectively reasonable clinician, upon observing Goines' physical disabilities, hearing him explain the neurological condition causing his

physical disabilities, and having contact information for Goines' treating physician, would have failed to consult that physician before concluding Goines had a mental illness, and was "in need of hospitalization."

The district court concluded Rhodes had probable cause for the detention of Goines because "[Goines'] has not alleged that Rhodes lied or misrepresented what she knew in her report." (JA 206.) But Goines alleges Rhodes' report was false because he was not mentally ill and he was not dangerous. Furthermore, the standard set forth in *Raub* — a decision which this Court affirmed — is whether Rhodes reasonably exercised professional judgment. Thus, even if Rhodes was "truthful" in that she believed Goines was mentally ill and dangerous, if that belief was not based upon reasonable professional judgment, she violated Goines' rights. *See Malley v. Briggs*, 475 U.S. 335, 345-46 (1986).

The law of the Fourth Circuit is clear: a government official is liable for an unreasonable seizure, even if the official mistakenly believes he is acting reasonably. *Henry v. Purnell*, 652 F.3d 524, 532 (4th Cir. 2011) (en banc). An officer's subjective intentions are irrelevant. The relevant question is the "objective reasonableness of the officer's conduct in light of the relevant facts and circumstances." *Id*. at 534. Under the rule articulated in *Henry*, even a well-intentioned mental health evaluator who, due to his or her negligence (or, here,

negligence compounded by lack of professional judgment), deprives someone of liberty is liable for her unconstitutional conduct.

Other courts have agreed. As one court explained:

> If [the mental health evaluator] had misrepresented [the detainee's] mental condition in the form, or if he had no probable cause to believe that she qualified for involuntary detention under the statute, and yet he initiated the process for having her arrested, then that situation could be sufficiently analogous to *Jones* [a case involving a false statement by a police officer] such that [the mental health evaluator] should be deemed to have been on notice that his conduct violated [the detainee's] constitutional rights.

Harbaugh v. Stochel, No. 3:12cv110(CDL), 2013 U.S. Dist. LEXIS 60440 (M.D. Ga. Apr. 29, 2013); *see also Olivier v. Robert L. Yeager Mental Health Ctr.*, 398 F.3d 183 (2d Cir. 2005).

Moreover, "qualified immunity does *not* protect an officer who seeks a warrant on the basis of an affidavit that a reasonably well-trained officer would have known failed to demonstrate probable cause – even if the magistrate erroneously issues the warrant." *Miller v. Prince George's County*, 475 F.3d 621, 632 (4th Cir. 2007) (citation omitted, emphasis in original). Similarly, Rhodes is not protected by the fact that the magistrate issued a TDO, especially since the magistrate was relying on the report that was the product of Rhodes' negligence and omitted a critical fact: Rhodes was inherently incapable of exercising the professional judgment required to diagnose mental health disorders.

A public official, such as Rhodes, is entitled to qualified immunity only if her actions were objectively reasonable. In the context of a mental health evaluation, "the question is whether a reasonable person, exercising professional judgment and possessing the information at hand, would have concluded that [Goines], as a result of mental illness, posed an imminent threat to others." *Raub*, 3 F.Supp.3d at 535.

Yet, the district court failed to apply this standard to the facts alleged. Instead, the court treated Rhodes' actions with far greater leniency:

> Rhodes observed that Goines appeared to be reacting to visual stimuli not visible to her, that he displayed an inappropriate affect (including laughing at inappropriate times), and that he was disoriented to time. She noted that he was perseverating on the topic of his neighbors controlling his television. Especially when coupled with the officers' reports to her that he insisted there were clicking noises in his apartment that they did not hear, these facts support a finding of probable cause.

(JA 206.) Thus, the centerpiece of the *established* standard — reasonable professional judgment — was ignored. That was error. What matters is not whether Rhodes could explain why *she* concluded Goines had a mental illness; what matters is whether her explanation — including her diagnosis that Goines had a "Psychotic Disorder" — is within the bounds of reasonable professional judgment.

If her explanation does not hold up to professional scrutiny, then it is not objectively reasonable and Rhodes has no qualified immunity. As the court held in

Rodriguez v. City of New York, 72 F.3d 1051, 1063 (2d Cir. 1995), considering a statute similar to the one at issue here:

> Though committing physicians are not expected to be omniscient, the statute implicitly requires that their judgment – affecting whether an individual is to be summarily deprived of her liberty – be exercised on the basis of substantive and procedural criteria that are not substantially below the standards generally accepted in the medical community. Due process requires no less.

Given that Rhodes was neither a physician nor a psychologist, she was not capable of exercising the professional judgment required to diagnose mental disorders "according to the standards of the profession." VA Code § 54.1-3600. There is no basis to conclude, as Rhodes argues, that her evaluation of Goines was based on reasonable professional judgment simply because her name appears on VCSB's list of "certified prescreener[s]." (DN 18 at 58.)

The fact that VCSB may have designated Rhodes as a "certified prescreener" says nothing about her judgment and does not prove she was properly trained. And even if she met some standard set by statute or regulation to conduct evaluations, this does not mean she met the federal standard necessary to support deprivations of liberty in this context. But even more to the point, the question is not whether Rhodes was qualified, but whether in this case her evaluation and diagnosis of Goines was based on *reasonable professional judgment*. This cannot be determined based on the documents that are properly considered at this stage. In *Raub*, the decision had to await summary judgment.

Whether a mental health evaluator has exercised reasonable professional judgment can best be shown – and, perhaps, can only be shown – by professional testimony. "A doctor's decision to commit a person involuntarily . . . does not ordinarily involve matters within the layman's realm of knowledge." *Olivier*, 398 F.3d at 190 (quotation omitted); *see also*, *e.g.*, *Arnett v. Webster*, 658 F.3d 742 (7th Cir. 2011) (requiring expert testimony on whether there was an absence of professional judgment).

Goines has no mental illness. No objectively reasonable evaluator would have concluded, based on the information available to Rhodes, that Goines had a mental illness. No objectively reasonable evaluator, exercising professional judgment, would have diagnosed Goines with "Psychotic Disorder". Rhodes made that unsupported and inaccurate diagnosis despite being objectively incapable of exercising the professional judgment required to diagnose a mental disorder. Goines never threatened to harm anyone. And no objectively reasonable evaluator would have concluded, based on the information available to Rhodes, that Goines, "as a result of mental illness, posed an imminent threat to others." *Raub*, 3 F.Supp.3d at 535.

Taking these facts as true, Goines' interaction with Rhodes was insufficient to establish probable cause for an involuntary detention, or to support the baseless

conclusions Rhodes included in her report. Rhodes' motion to dismiss should have been denied.

D. VCSB's practice of delegating authority to diagnose mental disorders to unlicensed, unsupervised employees constitutes deliberate indifference to the constitutional rights of citizens faced with involuntary mental detention.

The district court dismissed Goines' *Monell* claim against VCSB on the ground that VCSB's employee, Rhodes, did not violate Goines' constitutional rights. (JA 209-10.) For the reasons above, the facts alleged show that Rhodes violated Goines' right to be free from seizure in the absence of probable cause. Therefore, VCSB's motion to dismiss should have been denied.

The district court did not otherwise address the sufficiency of Goines' *Monell* claim or the various issues raised by VCSB in its motion to dismiss. Should this Court decide to address those issues, it should conclude Goines has sufficiently stated a claim against VCSB.

Liability attaches to VCSB because its practices caused the deprivation of Goines' right to be free from unreasonable seizures. A government entity is liable under Section 1983 for deprivations that stem from a "custom, policy or practice" of the entity. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-92 (1978). Under *Monell*, an agency is liable for deprivations caused by its failure to adequately train or supervise its employees, or where the entity's practices

constitute "tolerance or acquiescence of federal rights violations." *Burgess v. Fisher*, 735 F.3d 462, 478 (6th Cir. 2013).

The Supreme Court has held that inadequate training could give rise to liability if:

> in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers can reasonably be said to have been deliberately indifferent to the need.

City of Canton v. Harris, 489 U.S. 378, 390 (1989).

Here, the need for adequate training or supervision is readily apparent. In the context of involuntary psychological exams, the diagnosis of mental disorders deprives citizens of their liberty. Thus, VCSB's employees who perform involuntary mental exams face a recurring constitutional duty to ensure that individuals are not detained in the absence of probable cause. The diagnosis of mental disorders is a discretionary clinical function, requiring the exercise of professional judgment. VCSB's policy-makers are well aware that delegating this function to employees who are inherently incapable of exercising reasonable professional judgment would result in a pattern of Fourth Amendment violations.

For these reasons, the need for VCSB to ensure that its evaluators are adequately trained or supervised is "so obvious, that the failure to do so could

properly be characterized as deliberate indifference to constitutional rights." *City of Canton*, 489 U.S. at 390 n10.

The Complaint alleges a continuing failure by VCSB to ensure that its evaluators are trained or supervised in the diagnosis of mental disorders. (JA 16 ¶ 52, JA 18 ¶ 66.) On the contrary, VCSB has a widespread practice of delegating the diagnostic function to unlicensed, unsupervised employees like Rhodes. (Id.) VCSB's policy-makers know that such employees are incapable of exercising the professional judgment required to accurately diagnose mental disorders. VCSB is also well aware that its employees, in presenting such diagnoses to a magistrate to procure an involuntary detention, falsely represent to the magistrate that their conclusions were supported by the reasonable "professional judgment" as required by *Raub* to establish probable cause. *Raub*, 3 F.Supp.3d at 535.

Yet, VCSB failed to ensure that its evaluators were adequately trained — i.e. licensed physicians or clinical psychologists — before allowing them to "diagnose" mental disorders for purpose of obtaining detention orders. (JA 16 ¶ 52, JA 18 ¶ 66.) At a minimum, VCSB could have trained its employees who, like Rhodes, are incapable of exercising the professional judgment that a diagnosis requires, by instructing them not to make diagnoses of mental diseases in their reports to the magistrates. But it chose not to. VCSB's policy-makers should have known such practices would likely result in constitutional violations. And as

alleged, VCSB's practice of delegating the authority to diagnose mental disorders to untrained, unsupervised employees was the proximate cause of the deprivation suffered by Goines. (JA 18 ¶ 66.)

In light of the tremendous discretion given to evaluators like Rhodes, the need for professional training or supervision is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that VCSB "can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. Taking these facts as true, VCSB is liable under § 1983 for the deprivation of Goines' right to be free from arrest in the absence of probable cause. *See, e.g.*, *Jordon v. Jackson*, 15 F.3d 333, 340 (4th Cir. 1994) (holding plaintiffs stated a claim of municipal liability with allegations that defendants "maintained a policy of providing inadequate training to their employees," that defendants "condoned and ratified the improper and overreaching conduct of their social workers," and that those policies proximately caused the deprivation of plantiffs' constitutional rights.).

CONCLUSION

Plaintiff-Appellant Gordon Goines, respectfully asks this Court to (i) vacate and reverse the decisions of the district court granting the motions to dismiss filed by Defendant-Appellees Robert Dean, David Shaw, Jenna Rhodes, and Valley

Community Services Board and dismissing Goines' claims under 42 U.S.C. §1983, and (ii) remand the case to the district court for the taking of discovery and trial.

Respectfully Submitted,

/s/Jesse H. Baker, IV
Jesse H. Baker, IV (VSB 81825)
14422 Hamill Run Drive
Gainesville, Virginia 20155
(949) 829-1551
Jb4kb@virginia.edu

Participating Attorney for
THE RUTHERFORD INSTITUTE

Counsel for Plaintiff-Appellant Gordon Goines

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains [*6,937*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2011*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: August 31, 2015 /s/Jesse H. Baker, IV
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that on August 31, 2015, I caused this Reply Brief of Appellant foregoing to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will provide electronic notice to the following:

Richard H. Milnor, Esquire
Zunka, Milnor & Carter, Ltd.
414 Park Street, P.O. Box 1567
Charlottesville VA 22902
rmilnor@zmc-law.com

Counsel for Appellees for Robert Dean, David Shaw, and D.L. Williams

Rosalie Pemberton Fessier, Esquire
Timberlake, Smith, Thomas & Moses, P.C.
The Virginia Building
25 N. Central Avenue, P.O. Box 108
Staunton, Virginia 24402-0108
rfessier@tstm.com

Counsel for Appellee Valley Community Services Board

James M. Bowling, IV
St. John, Bowling, Lawrence & Quagliana, LLP
416 Park Street
Charlottesville, Virginia 22902
jmb@stlawva.com

Counsel for Appellee for Jenna Rhodes

I further certify that on August 31, 2015, I caused the required copies of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

/s/Jesse H. Baker, IV
Counsel for Appellant