

No. 18A696

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC WENZEL, ANNIE ALLEY and THELMA WENZEL,

Applicants,

v.

CARL STORM,

Respondent.

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

**SECOND APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

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**SECOND APPLICATION FOR EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI**

To: Justice Neil M. Gorsuch, Circuit Justice for the United States Court of Appeals for the Eighth Circuit:

Under this Court's Rules 13.5 and 22, Applicants Eric Wenzel, Annie Alley and Thelma Wenzel request an additional extension of fourteen (14) days to file a petition for a writ of certiorari in this case. Their petition will challenge the decision of the Eighth Circuit in *Wenzel v. City of Bourbon*, 899 F.3d 598 (8th Cir. 2018), a copy of which was attached to Petitioner's original application for extension of time to file a petition for a writ of certiorari. In support of this application, Applicants state:

1. The Eighth Circuit issued its opinion on August 9, 2018, and it denied a timely petition for panel rehearing and rehearing en banc on October 9, 2018. Without an extension, the petition for a writ of certiorari would be due on January 7, 2019. With the requested extension, the petition would be due on March 8, 2019. This Court's jurisdiction will be based on 28 U.S.C. § 1254(1).

2. This case is a serious candidate for review. It involves the fatal shooting of Applicants' decedent, Gary Wenzel ("Wenzel"), when Officer Carl Storm ("Storm"), while finishing a traffic stop of Wenzel's nephew, Shawn, Wenzel left Shawn and began following Wenzel for improper tags on Wenzel's vehicle. Despite the minor violation of improper tags, Storm participated in a high-speed chase of Wenzel for Wenzel's alleged improper tags on his vehicle. The chase and following of Wenzel by Storm was captured on Storm's

vehicle dashboard camera.

3. Wenzel's vehicle finally came to a stop and Wenzel exited his vehicle. This was captured on Storm's vehicle dashboard camera. From the camera you can see Wenzel exit his vehicle and approach Storm's vehicle. As Wenzel was approaching Storm's vehicle, Wenzel was swinging his arms and his hands were visible and you could see that there was no weapon in Wenzel's hands and that Wenzel was unarmed. The video shows Wenzel go down as storm shot Wenzel at least 3 times, including one bullet to the side of Wenzel's head, and killed Wenzel. At the time Storm shot and killed an unarmed Wenzel, Storm had on his duty belt a baton, and pepper spray. Despite having nonlethal and less intrusive methods of capturing available Wenzel on his belt of a baton, and pepper spray and seeing that Wenzel was unarmed, Storm chose to shoot Wenzel several times and kill him.

The questions raised here involve qualified immunity and the legal analysis of this important Fourth Amendment issue regarding a police officer's shooting and killing an unarmed man after a high-speed chase over a minor infraction of alleged improper tags on the person's vehicle.

4. In reaching its decision on qualified immunity, the Eighth Circuit in its opinion on multiple occasions used its own interpretation of Wenzel's activity that is depicted in the video, finding that, "The video shows Wenzel quickly exiting his vehicle and walking aggressively toward Storm's patrol car. *Id.* Wenzel appears to be angry, with his arms swinging as he walked. *Op.* at

3-4. The video shows that Wenzel did not comply with or even react to Storm's commands. Op. at 4." The Eighth Circuit's own interpretation of the video not only violates the province of the jury, but is also contrary to this Court's holding in Anderson v. Liberty Lobby, Inc., 477 U.S. 24 (1986) and Scott v. Harris, 550 U.S. 372 (2007)

5. The Eighth Circuit's decision failed to recognize and contradicted this Court's holding in *United States v. Place* in that a seizure conducted without a warrant is presumptively unreasonable. United States v. Place, 462 U.S. 696, 701, 103 S. Ct. 2637, 2641, 77 L. Ed. 2d 110 (1983). The Eighth Circuit's decision also disregarded this Court's precedent that a seizure is unlawful when it is "more intrusive than necessary." Florida v. Royer, 460 U.S. 491, 504 (1983). The undisputed evidence is that Wenzel was not armed, yet Storm used lethal force in shooting and killing Wenzel

6. This Eighth Circuit opinion also conflicts with decisions of other sister circuits. This case presents an excellent opportunity to resolve this conflict.

7. Petitioner's original application sought 60-day and this Honorable Court granted Petitioner's 30 days to file their petition for a writ of certiorari no later than Wednesday, February 6, 2019.

8. Petitioner's undersigned counsel has been diligently working on the petition for a writ of certiorari, but due to counsel's the debilitating condition of ulnar neuropathy the undersigned is in need of the 2nd extension

to file Petitioner's petition for a writ of certiorari no later than March 8, 2019.

9. On January 15, 2019, the undersigned obtained a 2nd opinion on his physical ailment of ulnar neuropathy from Dr. Ida Fox with Barnes Hospital and Dr. Fox has ordered an ultrasound, ordered physical therapy and the undersigned and Dr. Fox are in the process of scheduling surgeries on the undersigned's arms to occur consecutively (one arm followed by the other arm as counsel is paralyzed and confined to a wheelchair) in approximately 2 to 3 months. (*See Exhibit 1 attached hereto*).

10. For these reasons, Petitioners respectfully request a second extension of time, so that the due date for their petition for a writ of certiorari be extended to March 8, 2019.

Respectfully submitted,

SCHOTTEL & ASSOCIATES, P.C.

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Counsel for Petitioners

Name: James W. Schottel Jr. | DOB: 5/24/1972 | MRN: 101606859 | PCP: Jonathan Nicholas Byrd, MD

Appointment Details



AFTER VISIT SUMMARY

James W. Schottel Jr.

1/15/2019 1:00 PM Washington University Surgery 314-362-7388

Instructions from Ida Keiko Fox, MD

Your medications have changed today
See your updated medication list for details.

Today's Visit



You saw Ida Keiko Fox, MD on Tuesday January 15, 2019. The following issues were addressed: Ulnar neuropathy of both upper extremities; Tetraplegia (CMS/HCC); and Cubital tunnel syndrome, bilateral.

BMI
21.76

Weight
164 lb 14.5 oz

Height
6' 1"

What's Next

Upcoming Appointments

JAN 30 2019 Testing
Wednesday January 30 3:00 PM

Washington University
Neurological Testing
4921 Parkview Place
6th Floor Suite H
SAINT LOUIS MO 63110-1032
314-362-3324

FEB 1 2019 New with Leigh Mc Govern Wilson, DPT
Friday February 1 11:30 AM
Please show up at least 15 minutes prior to your appointment to complete new patient forms.

Washington University
Occupational Therapy
14532 South Outer Forty Road
1st Floor Suite 120
Chesterfield MO 63017-5784
314-286-1669

FEB 18 2019 HOSPITAL OUTPATIENT VISIT
Monday February 18 10:15 AM

Surgical and Wound Care Clinic
4901 Forest Park Avenue
Suite 340
SAINT LOUIS MO 63108
314-362-1300