

No. _____

In the Supreme Court of the United States

Dawn Alexander,
Applicant,
v.

Michael Carter, Representative for Tony Byrd
Respondent.

Application for Extension of Time
to File Petition for Writ of Certiorari

To the Honorable Neil M. Gorsuch, Justice for the Eighth Circuit:

1. The Petitioner, Dawn Alexander, prays that an order be entered extending the time for filing a petition for certiorari for 60 days, through and including January 12, 2019.

2. This Court's jurisdiction will be invoked pursuant to 28 U.S.C. §1254.1

3. The relevant dates are:

On May 3, 2018 the U.S. Court of Appeals for the Sixth Circuit

issued its opinion granting summary judgment in favor of Respondent.

On August 15, 2018 the U.S. Court of Appeals for Sixth Circuit entered its order denying Applicant's petition for rehearing and suggestions for rehearing en banc.

Absent an extension of time, the petition for writ of certiorari would be due on November 13, 2018.

4. This application is submitted more than ten (10) days prior to the scheduled date for filing the petition for certiorari.

5. The pertinent nature of the case may be stated as follows:

Petitioner Dawn Alexander brought this action under 42 U.S.C §1983 and the Fourth Amendment against municipal police officers and a Gibson County, Tennessee Deputy Sheriff for false arrest, physical abuse, and excessive force.

Deputy Tony Byrd stood next to her, watched but took no action to prevent the arrest or multiple assaults inflicted on her at the hands of his fellow officers. She alleged that he tacitly approved and sanctioned the conduct of fellow officer by failing to make any effort to prevent or stop it or intervene to secure her release.

Evidence further showed that the three city police officers knew they were out in the county and outside their jurisdiction and that they radioed the sheriff's department to dispatch a deputy to assist them. Deputy Byrd arrived shortly thereafter and was present and observed the events leading to Alexander's arrest.

The assaults by the officers were captured on a police dashcam video recorder. The video shows that three city police initiated physical contact and the use of force, and that Alexander neither resisted arrest nor assaulted anyone.

Alexander was detained in handcuffs in a police car during which time Deputy Byrd and the city police agreed that he would file misdemeanor charges against her on behalf of the City. Byrd's own evidence shows that he not only failed to prevent the arrest or end it once it occurred, but actually approved of and assisted the officer in deciding what charges to file. Later that day he filed two Affidavits of Complaint with the state court charging her with assault and resisting arrest. Following a preliminary hearing, the General Sessions Court, dismissed the charges for lack of probable cause.

The claims against the city and its officers were settled leaving only the claim against Deputy Byrd. The district court granted summary judgment in his favor as a matter of law on her claims of false arrest, false imprisonment, and excessive use of force. It held that he was merely present at the scene, that he did not actually arrest her or use excessive force, and could not be held liable for the resulting harm and deprivation of Petitioner's constitutional rights.

It held that it would not consider the Fourth Amendment claim against Byrd since the complaint did not expressly raise a theory of failure to protect in her pleading and that she could not rely on it as a basis to oppose summary judgment. On appeal, the Sixth Circuit affirmed.

In *Johnson v. City of Shelby* 135 S.Ct. 346 (2014), this Court held that the doctrine of "theory of the pleadings" became obsolete with adoption of Rule 8(a) of the Federal Rule of Civil Procedure. Petitioner submitted that she had alleged and proven sufficient facts to support her claim under the Fourth Amendment. The panel distinguished the case as introducing a new claim, entirely from different from her Fourth Amendment claim.

To defeat a claim on summary judgment, a defendant is required to produce evidence establishing the absence of material facts necessary to support a claim. In addition, the defendant may show that under the facts stated the law affords no recourse. Petitioner therefore submits that the Court of Appeals, contrary to *Johnson v. City of Shelby*, has resurrected the old theory of the pleadings presenting doctrine as a means of defeating an otherwise valid claim.

Alternatively, the panel reasoned that Byrd could not reasonably have anticipated that Plaintiff's Fourth Amendment against him for false arrest and excessive force might be based on his duty to protect Plaintiff from unconstitutional violations. It concluded that allowing a new legal claim for the first time in response to a motion for summary judgment would deny the defendant notice of what claims to investigate and the benefit of discovery.

In this case, Alexander based her claim on the Fourth Amendment. The case law makes clear that an officer may be liable under the Fourth Amendment where he is involved in the violation himself, either directly or through his approval, encouragement, or support of the conduct of

others, has supervisory control of the offending officer, or owes the victim a duty of protection from violations by other officers which occur in his presence. They are not new legal theories but are plainly embraced within the scope of the Fourth Amendment itself. Since any defendant in Byrd's situation would be aware of the bases for his liability, including his duty to protect the victim, there is no prejudice in asserting a duty to protect. It is hardly likely that any further discovery would add to the facts or contribute anything to the defense.

The Second Circuit in *Anderson v. Branen*, the court held that an officer who fails to intercede is liable for the preventable harm caused by the actions of other officers where that officer observed (1) excessive force being used, (2) a citizen has been unjustifiably arrested, or (3) any constitutional violation has been committed by a law enforcement official. Also see *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972).

Among some of the issues which may be raised in the Petition for Certiorari are the following:

(a) Whether the principles enunciated by Rule 8(a) F.R.Civ.P. continue to be applicable in defining the scope of the issues for cases

involving summary judgment;

(b) Whether a deputy sheriff may be deemed to exercise supervisory authority for purpose of the Fourth Amendment over municipal police officers within his jurisdiction.

(c) Whether a deputy's presence together with his acquiescence approval, encouragement, and support in the false arrest of Petitioner and the excessive use of force constitutes sufficient personal involvement to warrant imposition of liability, and especially so when he had an official duty to protect her from constitutional violations by other officers.

(d) Whether Byrd's agreement to support the false arrest and use of excessive force by city officers, his framing of the charges in support of the arrest, and his filing of those charges with the court to initiate a criminal prosecution are sufficient to subject him to personal liability under 42 U.S.C. §1983.

(e) Whether an officer has sufficient time to intervene to prevent a series of assaults involving the use of excessive force is to be determined by the totality of the time involved or merely by the time required to inflict each assault separately.

6. This extension of time is necessary since counsel is a sole practitioner in a small rural community and is engaged in an active litigation practice. He currently is preparing two appeals in state court, and will be filing a third appeal before the Eighth Circuit within the next two weeks. He is also defense counsel in a first degree murder case which he is preparing for trial early this next year. He is also preparing a major federal action to be filed within the month.

The facts and issues in this case involve complex and unique questions of law relating to personal liability under 42 U.S.C. §1983 and the Fourth Amendment. Counsel's research is extensive and substantial time will be required to determine and define the issues to be presented, update the research, and draft the Petition.

Counsel for Plaintiff has been out of the office a substantial amount of time since March due to health problems involving extensive pulmonary embolisms in both lungs, and while he has returned to the office, he has been unable to put in a full week's work due to chronic fatigue. He will continue his treatment and current medication for at least six more months during which time he will be working at a reduced workload.

In addition, it is expected that a substantial amount of time will be required to employ a commercial printer with the knowledge and experience to prepare and print the petition for certiorari once counsel has completed his final draft.

For these reasons, Petitioner respectfully requests an order extending the time for filing a petition for certiorari through January 12, 2019.

Respectfully submitted,

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Counsel for Petitioner

Certificate of Service

I, Jim R. Bruce, attorney for Applicant hereby certify that on November 3, 2018 copies of this application were mailed *via* U.S. Postal Service, first-class, postage prepaid, and e-mailed to Counsel for Respondent, James I. Pentecost, Esq., at 106 Stonebridge Blvd., Jackson, Tennessee 38305, and jpentecost@pgandr.com.

This the 3rd day of November 2018.

/s/ Jim R. Bruce
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