No. 19-1099

In The Supreme Court of the United States

CITY OF BAKERSFIELD, AARON STRINGER,

Petitioners,

v.

LESLIE LARAY CRAWFORD,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

There are no amendments to Petitioner's corporate disclosure statement as set forth in the Petition for a Writ of Certiorari.

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The Ninth Circuit's decision in this case creates a serious conflict with the long established precedent of this Court and with the Federal Rules of Evidence. The Respondent's Brief in Opposition exemplifies exactly why the Ninth Circuit's decision needs to be reviewed and reversed by this Court. Nothing contained in the Respondent's Brief in Opposition refutes the importance of the issue that this case presents.

The Respondent erroneously characterizes the issue decided by the Ninth Circuit as a "simple evidentiary issue"; however, nothing could be further from the truth. In 1989, this Court clearly established the analysis that is to be conducted when considering a Fourth Amendment claim. Since *Graham v. Connor*, the question has always been "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them without regard to their underlying intent or motivation." From this decision, the scope of relevant evidence has been defined as that which the officer knew. There has never been approval to broaden the inquiry to include evidence which was not known to the defendant officer because that simply invites an analysis using 20/20 vision of hindsight, which is strictly forbidden. That is, until the Ninth Circuit's decision in this case.

While the Ninth Circuit has repeatedly flouted this Court's direction when it came to the issue of qualified immunity, it has never so brazenly attempted to expand the *Graham* analysis to include testimony from a family member about how the decedent conducted himself on other occasions to prove the conduct of the defendant officer was unreasonable on an entirely separate occasion.

The Ninth Circuit's decision was not a "simple evidentiary issue." It expands *Graham v. Connor*, in a way that was never envisioned. It violates Federal Rule of Evidence 404 by allowing the introduction of evidence of conduct on prior occasions to prove conduct on an entirely separate occasion. It has created conflict amongst the circuits in terms of the scope of evidence that should be admitted in a Fourth Amendment case and it has created an entirely separate analysis for cases involving individuals who are purportedly mentally ill. Under the Ninth Circuit's decision, the scope of evidence in such cases goes well beyond what an officer knew or even should have known and allows the presentation of evidence which is devoid of any relevance to the *Graham* analysis whatsoever.

The issue of police encounters with individuals who purport to suffer from mental illness is obviously not going away. It is a common occurrence and it is incumbent on this Court to provide direction so that both parties are guaranteed a fair trial under *Graham* and its progeny.

Summary reversal, or plenary review, is appropriate not only to correct the Ninth Circuit's mistaken view of the law, but to affirm *Graham v. Connor* such that the focus remains on the circumstances the officer confronted and not on events about which he knew nothing about.

I. RESPONDENT'S CLAIM THAT EVIDENCE OF THE DECEDENT'S CONDUCT ON OTHER OCCASIONS SHOULD BE ADMITTED TO HELP THE JURY "VISUALIZE" WHAT WAS ACTUALLY SEEN BY THE OFFICER IGNORES LONG ESTABLISHED PRECEDENT AND IGNORES BASIC RULES OF EVIDENCE

The "Question Presented" that was formulated by the Respondent is revealing. Specifically, the Respondent attempts to argue the validity of the Ninth Circuit's ruling by suggesting that testimony from a "person with knowledge of the characteristic behavior and appearance of the victim," who was not present on the scene, should be admitted to "help the jury visualize what was actually seen by the officer at the time of the incident". ["Question Presented" at Brief in Opposition ("Opp.") p. I; Introduction at Opp. p. 1.]

However, such testimony runs far afield of *Graham v. Connor,* 490 U.S. 386, 397 (1989) and its progeny which clearly and unequivocally define the question as being "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them without regard to their underlying intent or motivation." *Id.* at 397. "[T]he 'reasonableness' of a particular use of

force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Id.* In conducting the reasonableness inquiry, a finder of fact "cannot consider evidence of which the officers were unaware. . .." *Glenn v. Washington Cty.*, 673 F.3d 864, 873 n.8 (9th Cir. 2011); *See also United States v. City of Albuquerque*, 2020 U.S. Dist. LEXIS 103158 (D.NM June 12, 2020):

> the determination whether a reasonable officer would have known that the offender suffered from mental illness is not based on whether it surfaces after the situation that the offender suffered from mental illness. Instead, the determination is based on whether a reasonable officer at the crime scene would have known from the circumstances that a person suffered mental illness. Thus, the determination is not based on hindsight, which is using knowledge acquired after the incident, but the reasonable-officer-on-the-scene perspective, which is using knowledge available during the incident.

It is for this reason that information that is not known to a police officer is routinely excluded. *See e.g., Glenn v. Washington Cnty.*, 673 F.3d 864, 873 n.8 (9th Cir. 2011) [*Graham* teaches that "[w]e cannot consider evidence of which the officers were unaware"]; *Hayes v. Cty. of San Diego*, 736 F.3d 1223, 1233 (9th Cir. 2013).

Yet, the Ninth Circuit's decision in this case is in complete contravention to these well established and long held principles. The evidence that the Ninth Circuit has expressly authorized in this case was completely unknown to the defendant officer; yet under the Ninth Circuit's decision, a plaintiff can go well beyond what an officer at the scene knew or perceived or should have known or perceived. Under the Ninth Circuit's holding, a plaintiff may now introduce evidence of prior behavior on *other* occasions to prove that the use of force by the defendant officer on this occasion was unreasonable.

According to Respondent, such evidence would "help the jury visualize" what the officer was seeing. However, in truth, what the officer "was seeing" comes in through the testimony of the officer and from witnesses who also saw what occurred. The testimony of an individual who was not even at the scene at the time of the subject incident not only invites the 20/20 hindsight analysis that is strictly prohibited but also invites speculation and conjecture because, in reality, the Respondent cannot actually testify that her "prior observations" were identical to the decedent's behavior during the incident in question because the Respondent was not actually there. At best, the Respondent would testify in generalities; however, the Respondent is not a medical expert and certainly should not be permitted to ascribe particular behavior as being related to mental illness.

Further, the Respondent has also unintentionally exposed the conflict between the Ninth Circuit's decision and the Federal Rules of Evidence. Fed. R. Evid. 404 clearly prohibits the introduction of evidence of behavior on prior

occasions for the purpose of proving conduct on the date in question. *See e.g., Carson v. Polley*, 689 F.2d 562, 575 (5th Cir. 1982); *Outley v. City of New York*, 837 F.2d 587, 592-93 (2d Cir. 1988); *Carter v. District of Columbia*, 254 U.S. App. D.C. 71, 795 F.2d 116 (1986).

Yet that is exactly what the Ninth Circuit's decision has allowed; the introduction of evidence pertaining to the conduct of the decedent on prior occasions to prove that he was acting the same way on the date of the incident.

The Ninth Circuit has a long history of trying to narrow the doctrine of qualified immunity such that police officers are not given the benefit of a reasonable mistake. By and through this decision, the Ninth Circuit is now trying to expand the scope of evidence that a plaintiff can introduce to show that a particular use of force was unreasonable. The Ninth Circuit's decision is clearly in conflict with both *Graham v. Connor* and Fed. R. Evid. 404 and must be re-examined by this Court.

II. THE NINTH CIRCUIT DECISION CREATED A SPLIT IN CIRCUIT AUTHORITY ON THE PROPRIETY OF INTRODUCING EVIDENCE THAT WAS UNKNOWN TO A POLICE OFFICER AT THE TIME FORCE WAS USED

It is nonsensical for the Respondent to contend that there is not a split between the circuits relating to the introduction of this evidence.

The Ninth Circuit's decision in this case is the only case that the Petitioner has been able to locate which stands for the proposition that a family member could testify as to her observations of decedent on other occasions to prove that the conduct of a police officer on a *different* occasion was somehow unreasonable. District Courts and the Ninth Circuit had previously and repeatedly reached the opposite conclusion. *See e.g., Chien Van Buit v. City & Cty of San Francisco*, 2018 U.S. Dist. Lexis 33917, at *6 (Feb. 27, 2018)[Holding that what the decedent's family and friends knew about his mental illness is not relevant to what the officers knew or perceived and that such evidence violated Fed. R. Evid. 404]; *Daily v. City of Phx.*, 2019 U.S. Dist. LEXIS 192199, at *16 (D. AZ Nov. 5, 2019)[excluding evidence of mental illness since there was no evidence the officers knew that the decedent was emotionally disturbed or mentally ill and specifically rejecting the argument that the defendants should have perceived that the decedent was mentally ill]; *Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003); *Santos v. Gates*, 287 F.2d 846, 851 (9th Cir. 2002); *Ting v. United States*, 927 F.2d 1504, 1508 (9th Cir. 1991)[holding that whether a suspect was emotionally disturbed or mentally ill is only relevant to a *Graham* analysis if the officers on scene knew that to be the case. *See also Daily v. City of Phoenix*, 201 WL 6527298 (D. AZ Aug. 8, 2017).

Indeed, the Ninth Circuit reached its decision by relying on a case which had nothing to do with the frame work that this Court established in *Graham v. Connor* and its progeny which is exactly the framework that was used not only by the district courts within the Ninth Circuit, but

also in the Seventh Circuit and the Second Circuit. *See e.g.*, *Wallace v. Mulholland*, 957 F.2d 333, 336 (7th Cir. 1992)[excluding evidence of decedent's mental health condition finding that evidence about the general nature of a mental condition was irrelevant and prejudicial and that the subject of the case was the decedent's *actual* behavior and the way the officers responded to it]; *Rason v. Hardiman*, 803 F.2d 269, 278 (7th Cir. 1986)[affirming decision not to receive evidence of decedent's mental health history]; *Palmquist v. Selvik*, 111 F.3d 1332 (7th Cir. 1997); *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988)[excluding evidence that was unknown to police officer at the time of the use of deadly force];*Palmquist v. Selvik*, 111 F.3d 1332, 1339 (7th Cir. 1997)[applying *Sherrod* rule excluding evidence that was outside the "time frame of the shooting" as being irrelevant and prejudicial]; *Colter v. Reyes*, 2017 U.S. Dist. LEXIS 103617 (E.D. NY July 4, 2017) [Excluding evidence of mental health condition since the involved officer did not have any knowledge of such condition].

While the Respondent attempts to minimize the split between the Seventh Circuit and Second Circuit decisions and the Ninth Circuit decision in this case, an examination of the case authority from the Seventh and Second Circuits confirm that their holdings on this issue are consistent with *Graham v. Connor*, whereas the Ninth Circuit strained to reach its decision by relying on an entirely inapposite case and flawed analysis.

The split between circuits requires this Court to weigh in on the scope of admissible evidence that should be permitted in the context of a Fourth Amendment case.

Without this Court's guidance, the Ninth Circuit has improperly expanded the scope of evidence that will be considered when determining whether the split second conduct of a police officer was reasonable.

III. IN ITS RULING, THE NINTH CIRCUIT DID CREATE A SEPARATE ANALYSIS FOR MENTALLY ILL INDIVIDUALS

The Respondent tries to persuade this Court that the Ninth Circuit's holding does not create a separate analysis for mentally ill individuals. However, that is the only conclusion that can be reached given the clear exception the Ninth Circuit has created in its holding.

The rule regarding the admissibility of evidence that is unknown to a police officer has been reiterated time and time again in Courts across the country – if the police officer was unaware of the information at the time force was used, it is not coming in for the jury to consider. *See e.g.*, *Rubalcava v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995); *Palmquist v. Selvik*, 111 F.3d 1332, 1339 (7th Cir. 1997); *Witt v. West Virginia State Police, Troop 2,* 633 F.3d 272, 275 (4th Cir. 2011).

The Ninth Circuit's holding in regard to testimony as it pertains to mental illness creates a clear exception to the general rule. That is, while the Ninth Circuit strictly forbids the introduction of evidence of gang affiliation, drug use, and/or other arrests if they were unknown to the officer at the time force was used, the Ninth Circuit will now permit the introduction of evidence of prior conduct, which the officer was unaware of, for the purpose of informing the

jury that the decedent was mentally ill and/or had conducted himself in an irrational manner before.

The Ninth Circuit's holding clearly creates a separate analysis for mentally ill individuals as there is no other scenario where evidence pertaining to information that is otherwise unknown to a police officer would be admitted.

IV. THIS ISSUE IS OBVIOUSLY ONE OF SIGNIFICANT SOCIETAL IMPORTANCE AND REQUIRES GUIDANCE FROM THE UNITED STATES SUPREME COURT

The Petitioners' Petition for Writ of Certiorari highlighted the significance of the issues involved in this case. Since that time, the issues presented herein have only been magnified by the current movement advocating police reform. The use of force by police officers is being scrutinized now more than ever and the issues presented herewith are not going to go away. They will only become more prevalent.

It is incumbent on this Court to provide some clear guidance given the conflicting decisions throughout this Country and the Ninth Circuit's clear departure from the *Graham* analysis.

CONCLUSION

The Court should either summarily reverse the Judgment of the Ninth Circuit Court of Appeals, or grant the Petition for Writ of Certiorari, set the case for full merits briefing and argument, and reverse the Judgment below.

Respectfully submitted,

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