No. __-___

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES MCMANEMY,
Petitioner,

vs.

BRUCE TIERNEY, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. A split exists within the Eighth Circuit concerning how narrowly or broadly existing precedent is to be applied in finding clearly established law for qualified immunity purposes. This split is causing disparate results based on the makeup of randomly assigned panels. As justice cannot hinge on a randomly assigned panel, is the test for clearly established law being properly applied within the Eighth Circuit?

II. When the proper standard is applied, is it clearly established that an officer repeatedly striking a prone, non-resisting suspect – who is physically restrained by four other officers – in the face for 40 seconds constitutes excessive force under the Fourth Amendment?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

I. Petitioner, who was the plaintiff in proceedings below, is Charles McManemy.

II. Respondents, who were defendants in proceedings below, are:

- Bruce Tierney, a Law Enforcement officer for the Butler County Sheriff's Office, in his individual capacity;
- Curt Lubben, a Law Enforcement officer for the Butler County Sheriff's Office, in his individual capacity; and,
- Kirk Dolleslager, a Law Enforcement officer for the Grundy County Sheriff's Office, in his individual capacity.

III. Defendants in proceedings below who are not respondents in these proceedings are:

- Kiley Winterberg, a Law Enforcement officer for the Butler County Sheriff's Office, in his individual capacity;
- Jennifer Degroote, a dispatcher/jailer for the Butler County Sheriff's Office, in her individual capacity;
- Karson Roose, a dispatcher/jailer for the Butler County Sheriff's Office, in his individual capacity;
- DeWayne Viet, a dispatcher/jailer for the Butler County Sheriff's Office, in his individual capacity;
- Jennifer Becker, a nurse for the Butler County Sheriff's Office, in her individual capacity;
- John/Jane Doe(s), dispatchers/jailers for the Butler County Sheriff's Office, in his/her individual capacity;
- Jason Johnson, Sheriff for the Butler County Sheriff's Office, in his individual capacity;
- Rick Penning, Sheriff for the Grundy County Sheriff's Office, in his individual capacity;
- Butler County, Iowa, a county corporation existing under State of Iowa law; and,
- Grundy County, Iowa, a county corporation existing under State of Iowa law.

IV. No party is a nongovernmental corporation.

RELATED PROCEEDINGS

I. *Charles McManemy v. Bruce Tierney, et al.*, No. 17-cv-03020-LRR, U.S. District Court for the Northern District of Iowa; Judgment Entered: 10/23/2018.

II. *Charles McManemy v. Bruce Tierney, et al.*, Case No. 18-3519 / 18-3520 (cross-appeal) / 18-3554 (cross-appeal), U.S. Court of Appeals for the Eight Circuit; Judgment Entered: 08/17/2020; Rehearing Denied: 10/23/2020.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Additional Authorities

OPINIONS BELOW

The Eighth Circuit's opinion is published at 970 F.3d 1034. App. A at 1a-13a. The order denying *en banc* rehearing is unpublished. App. C at 17a-18a. The district court's opinion is unpublished. App. D at 19a-38a.

JURISDICTION

The Eighth Circuit entered judgment on August 17, 2020. A timely petition for rehearing was denied on October 23, 2020. The petition is timely filed per the Court's March 19, 2020 order extending a petition's filing deadline to 150 days after denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

A. Introduction

Butler County Deputy Bruce Tierney kneed Charles McManemy in the face multiple times while McManemy was on the ground restrained by four officers. McManemy was not resisting when Tierney kneed him for upwards of 40 seconds. Two Eight Circuit judges affirmed that Tierney's actions were not prohibited by clearly established law. The third panel judge dissented, finding clearly established precedent demands such actions be found unconstitutional. While *en banc* review was denied, three judges would have granted it.

McManemy's case is representative of the ongoing dispute in the Eight Circuit as to how clearly established law should be interpreted and applied, with justice being determined by a random chance of panel assignment rather than by the law. This intra-circuit split must be resolved by this Court. Given the uncertainty as to what constitutes clearly established law, McManemy's case provides the Court the opportunity to definitively clarify what it means for the law to be clearly established.

Further at issue is the force utilized by Grundy County Deputy Kirk Dolleslager when he tased McManemy after handcuffs had been applied and McManemy restrained, as well as the failure of Dolleslager and Butler County Deputy Curt Lubben to intervene in Tierney's use of force, despite clearly established law requiring such intervention.

B. Procedural Background

On March 16, 2017, Charles McManemy filed a Complaint alleging violations

of his constitutional rights, pursuant to 42 U.S.C. § 1983, and related state law claims. (DCD[1] 1.) All named defendants sought Summary Judgment, which McManemy resisted. (DCD 59-60, 67, 74, 79.) On October 23, 2018, the district court granted Summary Judgment on all federal claims with judgment contemporaneously entered. (DCD 88-89.) McManemy appealed the grant of Summary Judgment for Tierney, Lubben, and Dolleslager based on qualified immunity for excessive force and failure to intervene. (DCD 90.) In a 2-1 decision, the Eighth Circuit affirmed. App. A at 1a-13a. McManemy was denied *en banc* rehearing. App. C at 18a.

C. Factual Background

On March 18, 2015, the Butler County Sheriff's Office was conducting a narcotics investigation of McManemy, claiming prior knowledge indicating McManemy would be delivering narcotics. (Record[2] 195.) Butler County deputies intended to stop McManemy before the purported delivery. (Record 195.)

That morning, McManemy borrowed a friend's truck and drove to visit his girlfriend, with whom he stayed until about 3:30 p.m. (Record 6[17-18][3], 7[19].) He left her residence and picked up an open-air trailer at another friend's house. (Record 7[19].) McManemy was notified by family that his father was near death and he should come to Iowa City to see his father. (Record 7[22].) He went first towards a friend's house who was going to go with him to Iowa City. (Record 7[22]-8[23].)

McManemy ran a stop sign in front of Dolleslager. (Record 7[20-21].)

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[1] "DCD" references the district court docket.
[2] "Record" references the Joint Appendix filed with the Eighth Circuit, with citation to pages as identified in the Table of Contents.
[3] Bracketed numbers reference the page number of deposition excerpts included in the Record.

Dolleslager initiated a stop on McManemy for speeding. (Record 108[27].) McManemy did not stop because he believed Dolleslager was Lubben, of whom he was scared. (Record 7[21-22], 8[24], 9[30].) As McManemy drove, a Sheriff's car attempted to ram him. (Record 8[25].) One deputy threw a rolled-up spike-strip through McManemy's windshield, which entered the truck's cab and grazed McManemy's shoulder. (Record 8[27-28], 90[11].) The truck's tires were then shot out by officers. (Record 10[33].)

McManemy stopped the truck, lit a cigarette, placed a pocketknife from his pocket on the passenger seat, and exited the truck. (Record 10[34], 39[149].) After exiting the vehicle, he laid face down on the gravel road with his arms and legs spread. (Record 11[35].)

Lubben and Dolleslager were among the first deputies on scene. (Record 11[37], 73[14].) Dolleslager approached McManemy who stayed on the ground. (Record 225[4] at 19:38:40.) Lubben searched the truck before physically engaging - going "hands on" - with McManemy. (Record 73[15].) McManemy was tased by Dolleslager before being handcuffed as six deputies were still "hands on." (Record 13[45], 76[26].) Being tased caused McManemy's body to move involuntarily. (Record 13[46], 14[50], 77[29].) Winterberg arrived with a K-9 dog. (Record 225 at 19:39:05.)

Deputies were unable to handcuff McManemy using one set of handcuffs because of McManemy's prior shoulder injury. (Record 13[43].) Lubben knew of McManemy's shoulder issues and informed the other deputies that two sets of handcuffs were needed to secure him. (Record 13[43], 73[16].) Deputies repeatedly

[4] "Record 225" refers to the dash camera video from Officer Dolleslager's vehicle, as referenced in the Joint Appendix, with citation to the video's time stamp.

yanked McManemy's arm back, but the prior shoulder injury prevented it from moving back far enough for handcuffing. (Record 13[43-44].) The only voluntary movement made by McManemy during this handcuffing occurred when deputies took his arm and started "cranking it back because it would not go" any farther. (Record 13[46].) McManemy pleaded with the deputies to no avail, begging them to use two sets of handcuffs. (Record 13[44], 73[16].)

Tierney arrived at the scene, ran toward McManemy, and with four of the six deputies presently "hands on," Tierney stomped and kicked McManemy's legs. (Record 225 at 19:39:07-19:39:09.) Another deputy was using his knee to pin McManemy's head down and thrash McManemy's face into the gravel road. (Record 11[37].) Tierney kneeled on the road next to McManemy's pinned face. (Record 12[40], 225 at 19:39:14.) Deputies eventually used two sets of handcuffs to secure McManemy. (Record 28[105].) Tierney kneed McManemy in the left eye multiple times while McManemy's head remained pinned. (Record 29[109], 40[151], 77[32].) Dolleslager tased McManemy a second time. (Record 13[45].)

After his arrest, McManemy quickly identified the deputy who kneed him in the eye as wearing brown pants. (Record 29[109], 77[32].) Tierney was the only deputy present in brown pants. (Record 31[117], 39[150], 40[151].) Lubben and Dolleslager made no effort to stop Tierney from assaulting McManemy. (Record 225 at 19:39:14.)

During booking at the Butler County Jail following his arrest, McManemy complained of injuries to his face, including the swelling/closing of his eye. (Record

16[55], 17[59-60], 25[94], 29[109-110].) At McManemy's first court appearance days later, the court ordered the Sheriff to take pictures of McManemy's injuries. (Record 41[155].) McManemy was eventually diagnosed with injuries to his left eye as follows: contusion, nodular episcleritis, floaters, light sensitivity, and other vitreous opacities. (Record 204-211.) He was advised on signs of retinal detachment. (Record 207-208.) McManemy continues to deal with eye and vision issues. (Record 32[121-122].)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The Eighth Circuit's Internal Split as to How Clearly Established Law is Determined Must Be Resolved

1. The Intra-Circuit Split is Deep, Recurring, and Must Be Resolved by This Court

The panel majority found it has not been clearly established that Tierney delivering multiple knee strikes to McManemy's face while McManemy was pinned underneath four officers in the process of handcuffing constituted excessive force. The dissent identified three Eighth Circuit decisions establishing Tierney's force as a Fourth Amendment violation. (Opinion 13.) *See Gill v. Maciejewski*, 546 F.3d 557 (8th Cir. 2008); *Krout v. Goemmer*, 583 F.3d 557 (8th Cir. 2009); *Blazek v. City of Iowa City*, 761 F.3d 920, 925 (8th Cir. 2014). This split decision is emblematic of the ongoing intra-circuit split as to the proper analysis for determining clearly established law. The division leading to the decision at issue is best seen through two decisions issued within four months of each other.

The first, *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019), was an 8-4 *en banc* decision reversing the denial of qualified immunity to an officer. *Kelsay*, 933 F.3d at

977. In *Kelsay,* the plaintiff allegedly interfered non-violently in an arrest and two late-arriving officers were ordered to arrest plaintiff. *Id.* When these officers arrived, the plaintiff stood with her younger daughter fifteen feet away from police and upwards of thirty feet from her other children. *Id.* The plaintiff saw her older daughter arguing with another patron and started to walk toward them. *Id.* An officer ran behind plaintiff, grabbed her arm, and demanded she "'get back here.'" *Id.* She complied and the officer physically released her. *Id.* She told the officer what she was doing and began walking toward her daughter's altercation. *Id.* The officer grabbed the plaintiff in a bear-hug from behind and threw her to the ground, knocking her unconsciousness and breaking her collarbone. *Id.* The district court determined such force, if proven, violated plaintiff's clearly established rights. *Id.* at 979.

Two-thirds of the Eighth Circuit judges disagreed, declaring: "[i]t was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer." *Id.* at 980. According to this analysis, because "[n]one of the decisions cited…involved a suspect who ignored an officer's command and walked away, …they could not clearly establish the unreasonableness of using force under the particular circumstances here." *Id.*

Four dissenting judges, led by Chief Judge Smith, discussed four cases clearly establishing use of comparable force in similar circumstances against likewise "nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public" was a constitutional violation

Id. at 982-83 (Smith, C.J.; dissenting.) Judge Grasz separately identified another problem underlying the majority's decision: "[t]he law is never made clear enough to hold individual officials liable for constitutional violations involving excessive force as Congress authorized in 42 U.S.C. § 1983." *Id.* at 987 (Grasz, J.; dissenting). A petition for writ of certiorari was denied. *Kelsay v. Ernst*, 140 S. Ct. 2760 (2020).

Four months later, two of the dissenting judges in *Kelsay* issued the majority decision in *Jackson v. Stair*, 944 F.3d 704 (8th Cir. 2019). In its initial decision, the majority largely affirmed the district court's dismissal, reversing on just a single use of force. *Jackson*, 944 F.3d at 707. That opinion was subsequently vacated, with the matter reheard in light of *Kelsay*. *Id.* The revised opinion left the initial opinion untouched with "a new, clarifying analysis on the excessive force and qualified immunity claims involving" one officer. *Id.*

At issue were three successive tasings, each individually assessed for excessiveness. *Id.* at 714. The first and third were objectively reasonable and not Fourth Amendment violations; however, genuine issues of material fact existed on whether the second tasing was excessive. *Id.* This unwarned tasing occurred while plaintiff was on the ground writhing from the first tasing with no "time to react with compliance or continued resistance." *Id.* at 711-12. Video footage refuted claims the officer perceived plaintiff moving as if to confront officers. *Id.* at 712.

The majority viewed three authorities, distinguished in *Kelsay*, as "sufficient case law to establish that a misdemeanor suspect in Jackson's position at the time of the second tasing – non-threatening, non-fleeing, non-resisting – had a clearly

established right to be free from excessive force." *Id.* at 713. It also noted the Eighth Circuit has "held that 'general constitutional principles against excessive force' are enough to create a clearly established right and to put a reasonable officer on notice…." *Id.* (*quoting Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012)).

In his partial dissent, Judge Wollman rejected a fact question existed, as the plaintiff's prior "threatened use of force" and earlier "hysterical" demeanor "justified the continued application of the taser." *Id.* at 714 (Wollman, J; dissenting). This dissent challenged only whether the force was objectively reasonable in the factual circumstances, not the majority's analysis of clearly established law. *Id.*

A second petition for rehearing of *Jackson* was denied, with Judges Colloton and Loken dissenting from the denial. *Jackson v. Stair*, 953 F.3d 1052 (8th Cir. 2020) (Colloton, J; dissenting). Though noting Judge Wollman's dissent, the rehearing dissent took a different approach and challenged the law utilized in the majority opinion. It asserted the majority's ruling "necessarily" held the district court and dissent "were clearly so wrong that the issue was 'beyond debate'" with the officer being "'plainly incompetent or…knowingly violat[ing] the law.'" *Id.* at 1052 (Colloton, J; dissenting). The authority underlying the majority decision:

> …cited no comparable decision involving application of a taser against a non-compliant subject who threatened use of force against a police officer, and no decision holding that a subject's "momentary post-tasered position on the ground" requires an officer to consider it "a clearly punctuated interim of compliance" that makes another use of the taser unreasonable under the Fourth Amendment.

Id. at 1053-54 (Colloton, J; dissenting). The dissent argued these authorities were

inapposite as not addressing "whether the Fourth Amendment forbids two five-second deployments of a taser to subdue a rage-filled subject who threatens force against an officer." *Id.* at 1054 (Colloton, J; dissenting). Rather, they "involv[ed] different legal inquiries or materially different circumstances that do not squarely govern the specific facts of this case." *Id.* at 1054 (Colloton, J; dissenting). A petition for writ of certiorari was denied. *Stair v. Jackson*, No. 20-183, 2021 WL 231556 (2021).

This is the legal backdrop against which McManemy's claims were addressed; an Eighth Circuit divided as to the proper analytical scope of clearly established law. The split decision at issue arose directly from this division, with a majority opinion by two in the *Kelsay* majority and a dissent by a *Kelsay* dissenter. Rehearing was denied, with three of four *Kelsay* dissenters voting to grant it. The Eighth Circuit either cannot or will not resolve this division. At least twice, this Court was petitioned to resolve the split and declined. This case, a clear a product of the recurring intra-circuit split, is the vehicle by which this Court can finally work the resolution.

2. The Eighth Circuit Minority's Analysis Arises from This Court's Original and Controlling Clearly Established Standard

In upholding the grant of qualified immunity to Tierney, the majority rejected McManemy and the dissent's proffered authorities as not "squarely govern[ing]" the circumstances of McManemy's arrest. App. A at 9. This phrase, "squarely governed," is central to the majority's legal analysis in this case, and to the dissent concerning the rehearing of *Jackson*. *See Jackson*, 953 F.3d at 1054 (Colloton, J; dissenting).

This analysis is problematic, as while the phrase originates in this Court's decisions, the majority uses it out of its original context. This language first appeared

in *Brosseau v. Haugen*, 543 U.S. 194 (2004), with the *Brousseau* Court stating none of the cases relied on "squarely governs the case here[.]" *Id.* at 201. "Squarely governs," however, was *never* the standard, but rather a two-word shorthand *for* the standard: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. …The relevant, dispositive inquiry…is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 199 (*quoting Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The Ninth Circuit was reversed for deviating from this standard as the cases on which it relied "taken together undoubtedly show that this area [shooting fleeing driver of vehicle operating near officers] is one in which the result depends very much on the facts of each case." *Brosseau*, 543 U.S. at 201.

The language *Brosseau* quotes originates from *Anderson v. Creighton*, 483 U.S. 635 (1987), which held finding a right's contours to be sufficiently clear for a reasonable officer does not require that "the very action in question has previously been held unlawful…but it is to say that in the light of pre-existing law that unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

Anderson's "apparent" standard goes further back: "The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages…." *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

Davis' "anticipate" is itself a restatement: "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate

subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Harlow's "anticipate" arises from the language of *Wood v. Strickland*, 420 U.S. 308 (1975), which stated the law was clearly established for purposes of qualified immunity "from liability for damages under [§]1983 if he knew or reasonably should have known the action he took within his sphere of official responsibility would violate the constitutional rights…affected." *Wood*, 420 U.S. at 322.

While *Wood* originally limited itself "to 'the specific context of school discipline[,]" this was soon extended. *Id. See Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (immunity defense for prison officials unavailing if the right infringed "was clearly established…if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm.") This is not "an unfair burden upon a person assuming a responsible public office…nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of [§]1983." *Wood*, 420 U.S. at 322. *See* also Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1795 (2016) (specification requirement inherently protects officers at expense of citizens' interests).

The clearly established standard is met when an objectively reasonable officer should know or anticipate his actions are unconstitutional under the circumstances. *O'Conner v. Donaldson*, 422 U.S. 563, 577 (1975). Substituting a "squarely governing"

analysis misapplies the standard as "…the focus is on whether the officer had fair notice that her conduct was unlawful[.]" *Brosseau*, 543 U.S. at 198.

The majority's approach undermines the qualified immunity doctrine's intent to "reflect[] a balance that has been struck 'across the board[.]'" *Anderson*, 483 U.S. at 642 (*quoting Harlow*, 457 U.S. at 821 (Brennan, J., concurring)). As Justice Sotomayor has warned, this analysis "…tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Kisela v. Hughes*, 138 S. Ct. 1148, 1161 (2018). While Tierney used a degree of force less than the force used in *Kisela*, it still exemplifies the force for which law enforcement regularly evades liability under the majority's analysis. *See Kelsay*, 933 F.3d at 980; *Taylor v. Riojas*, 141 S. Ct. 52, 54 n.2 (2020) (reversing Fifth Circuit grant of qualified immunity to officers housing inmate in "deplorable unsanitary conditions" and faulting appellate court for finding "'ambiguity in the case law'"); *Baxter v. Bracy*, 751 F. App'x. 869, 872 (6th Cir. 2018) (releasing police dog on suspect raising hands in surrender not a clearly established violation); *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) (officers engaging in a cover-up and suppression of evidence not a clearly established violation).

Relief under 42 U.S.C. §1983 is "an important means of vindicating constitutional guarantees." *Harlow*, 457 U.S. at 809 (*quoting Butz v. Economou*, 438 U.S. 478, 506 (1978)). Exempting government actors from liability would "provide no redress to the injured citizen, nor would it in any degree deter…officials from committing constitutional wrongs." *Butz*, 438 U.S. at 505. *Cf. Bivens v. Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing.").

For decades, however, and "continuing uninterrupted to this day, the Court has sedulously eviscerated the substance, procedures, and remedies essential to meaningful enforcement of the mid-nineteenth century statutory cause of action to vindicate federal constitutional rights…." Harold S. Lewis, Jr., *Affirmative Distraction: Race Preference and Bias in the New South*, 9 J.S. LEGAL HIST. 1, 26 (2001). Qualified immunity is the primary limitation on relief under 42 U.S.C. §1983. *See* Cover, 68 FLA. L. REV. at 1785.

When this judicially created doctrine was first applied, it was in accordance with "the defense of good faith and probable cause" purportedly existing in the common-law of tort liability and deemed "available" in §1983 actions. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). *But see Little v. Barreme*, 6 U.S. 170, 170 (1804) (government officer obeying instructions, "acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages…."); *Bates v. Clark*, 95 U.S. 204, 209 (1877) (good reason and good faith for constitutional violation "is no defence to the action."); *Myers v. Anderson*, 238 U.S. 368, 382 (1915) (reliance on legal provision does not "interpose a shield to prevent the operation upon them of the provisions of the Constitution of the United States and the statutes passed in pursuance thereof."). Its application was premised on the belief protecting officer's reasonable conduct in legal gray areas was necessary. *Pierson*, 386 U.S. at 555.

Subsequently, qualified immunity's concern became balancing "the evils

inevitable" in civil rights litigation. *Harlow*, 457 U.S. at 813. The "evils" balanced were damages being the "only realistic avenue for vindication of constitutional guarantees" against the "cost" to officials and "society as a whole" from claims against "innocent" officers. *Id.* at 814. Balance was to be achieved by "[r]eliance on the objective reasonableness of an official's conduct as measured by reference to clearly established law[.]" *Id.* at 818.

The scales are no longer balanced: "Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officers, no matter how egregious their conduct, if the law they broke was not 'clearly established.'" *Jamison v. McClendon*, 476 F. Supp. 3d 386, 404 (S.D. Miss. 2020). Through an ever-tightening strictness of specificity, a "qualified" immunity has become an increasingly pure "immunity from suit." *See* Alan K. Chen, *The Facts about Qualified Immunity*, 55 EMORY L.J. 229, 236 (2006).

The language of clearly established law has retreated from "fair notice and apparent" to requiring near duplication of prior cases:

> This "clearly established" requirement is not in the Constitution or a federal statute. The Supreme Court came up with it in 1982. In 1986, the Court then "evolved" the qualified immunity defense to spread its blessings "to all but the plainly incompetent or those who knowingly violate the law." It further ratcheted up the standard in 2011, when it added the words "beyond debate." In other words, "for the law to be clearly established, it must have been 'beyond debate' that [the officer] broke the law." An officer cannot be held liable unless every reasonable officer would understand that what he is doing violates the law.

Jamison, 476 F. Supp. 3d at 404 (citations omitted). *See also* Cover, 68 FLA. L. REV. at 1793 ("Under the call of 'fair notice,' the Court has thus foreclosed a plaintiff's

reliance on any rule of law that might require an iota of extrapolation or on any nonconstitutional source.").

This pro-official tilt undermines the premises from which the doctrine was conceived, now justified only by an interest in protecting officials. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 18 (2017). At nearly every stage of the doctrine's development the Court has:

> ….heralded a retreat from its earlier pronouncements. Although the Court held in 2002 that qualified immunity could be denied "in novel factual circumstances," the Court's track record in the intervening two decades renders naïve any judges who believe that pronouncement.
>
> Federal judges now spend an inordinate amount of time trying to discern whether the law was clearly established "beyond debate" at the time an officer broke it. But it is a fool's errand to ask people who love to debate whether something is debatable.

Jamison, 476 F. Supp. 3d at 405-06 (citations omitted).

Nor does this account for a decade of lost development of the law. Once, qualified immunity had a threshold question to be answered: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. Proper sequencing was essential as "[t]he law might be deprived...were a court simply to skip ahead to the question whether the law [was] clearly established[.]" *Id.*

This has resulted from the Court's removing *Saucier*'s mandated sequence. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). While saying it "is often beneficial", to resolve whether a violation occurred, this benefit was seen as not worth the "price." *Id.* at 236-37. This has led to a paradox:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

Zadeh v. Robinson, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring).

This decades-long approach is not just of academic concern. Its impact on the ability of citizens to seek redress for constitutional violations is quantifiable:

> …Section 1983 plaintiffs also fare poorly compared to non-civil-rights plaintiffs. Pretrial judgment rates for plaintiffs are lower than in other classes of cases, pretrial dismissal rates are higher than for other class of cases and have plaintiff trial win rates of 30 percent or less, which is lower than the rates for most classes of civil litigation. Constitutional tort cases have settlement rates well below the 70-80 percent rate in non-civil-rights cases. On appeal, plaintiffs in constitutional tort litigation who succeeded at trial suffer much higher reversal rates, over 50 percent, than defendants in constitutional tort cases who prevailed at trial, who suffer reversal in less than 20 percent of appeals by plaintiffs.

Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 7 (2015). Summary reversal of plaintiffs already limited victories has faced fierce critique. *See Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (identifying "an unflinching willingness" to find in favor of immunity); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 87 (2018) ("The Court is not just maintaining the doctrine of qualified immunity as a matter of precedent, but doubling down on it, enforcing it aggressively against lower courts."). This "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect" the Constitution provides.

Kisela, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

Scholars observing the increased deference to law enforcement have noted "the gap between having a legal right and having an effective remedy for that right rarely has been wider than in litigation under section 1983." Cover, 68 FLA. L. REV. at 1777 (*quoting* Theodore Eisenberg, *Civil Rights Legislation* 23, 11 (5th ed. 2004)). As the late Justice Scalia said, "Wise observers have long understood that the appearance of justice is as important as its reality." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting).

The appearance of justice is fading. Society is increasingly losing belief in the courts as an avenue for such redress. Reaffirming the original clearly established law standard, as exemplified in the analysis by Judge Grasz's in his dissent here, the dissents in *Kelsay*, and majority in *Jackson*, is necessary to restore balance to the doctrine and provide McManemy the opportunity to obtain relief.

B. The Law Clearly Establishes Tierney Used Excessive Force

The dissent identified three Eighth Circuit cases notifying Tierney the force he used on McManemy was unconstitutional. Of these cases, *Gill v. Maciejewski*, 546 F.3d 557 (8th Cir. 2008) most explicitly mirrors these circumstances.

Before Gill's arrest, he fought with bar patrons and employees. *Gill*, 546 F.3d at 561. Before McManemy's arrest, he led police on a car chase. (Record 10[31], 195.)

When police arrived, Gill did not resist as officers forced him to the ground. *Id.* Similarly, McManemy remained face down on the gravel road with arms and legs spread as police arrived. (Record 10[35-37], 73[14]; 225 at 19:38:40.)

Like Gill, McManemy was pinned on the ground by multiple police officers. *Id.* at 562. (Record 76[27].) And just as Gill was pinned when the offending officer arrived on scene, McManemy was pinned when Tierney arrived on scene. *Id.* (Record 76[27], 225 at 19:39:07.)

Gill identified the offending officer as the only one carrying a pepperball gun. *Id.* McManemy identified Tierney as the only officer present wearing brown pants. (Record 40[151], 83[17].)

"While Gill was pinned to the ground by multiple officers, Maciejewski approached and smashed his knee into the hapless suspect's head[,]" which was excessive force. *Id.* at 562. While McManemy was restrained by four officers with his head pressed into gravel as two other officers watched, Tierney intentionally positioned himself next to McManemy's face and kneed him in the eye for upwards of forty seconds. (Record 12[41], 29[109], 76[27], 225 at 19:39:07-14.)

The majority does not believe *Gill* is similar enough, claiming it involved non-resistance and greater force. The majority refers to the blow delivered as "jumping on Gill from a standing position," a description not appearing in *Gill*, which only described the officer "dropping a knee" or "smashing his knee" onto Gill's head. *Id.* at 561-62. The only difference between the strikes is angle and repetition.

The majority's claim of resistance relies first on the concluded car chase. This is improper as objective reasonableness is assessed by "whether the suspect poses an immediate threat to the safety of officers or others[.]" *Graham v. Connor*, 490 U.S. 386, 396 (1989) (emphasis added). The concluded chase has no bearing on Tierney's

use of force. *See Id.* at 396 ("With respect to a claim of excessive force, the same standard of reasonableness at the moment applies[.]"); *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014) (considering reasonableness of force "[u]nder the circumstances at the moment when the shots were fired[.]"); *Howard v. Kan. City Police Dept.*, 570 F.3d 984, 989 (8th Cir. 2009) (officers initial actions justified, but objectively unreasonable after forcing to ground).

Nor does the chase distinguish these circumstances from *Gill* or *Krout*. Police were called because Gill was fighting bar staff after being ejected for fighting. *Gill*, 546 F.3d at 561. When police arrived, Gill was already physically restrained before being forced to the ground by police. *Id.* By comparison, McManemy was already down with arms and legs spread in voluntarily surrender when officers arrived. (Record 225 at 19:38:40.)

Krout involved an attempt to back a truck into a police vehicle by someone reported as having a knife, who had to be physically removed from his vehicle, and who fought with officers until being tossed to the ground. *Krout*, 583 F.3d at 561. "Once [suspect] was on the ground and no longer resisting[,]" however, officers delivered knee strikes to his back and punched his head, even after he was handcuffed. *Id.* Such force "is objectively unreasonable[.]" *Id.* at 566.

Blazek makes a similar point: "It was clearly established in 2009 that when a person is subdued and restrained with handcuffs, a 'gratuitous and completely unnecessary act of violence' is unreasonable and violates the Fourth Amendment." *Blazek*, 761 F.3d at 925. Nor is type of force determinative, as *Blazek* relied on cases

involving pepper spray and handcuff application as clearly establishing officers cannot violently jerk handcuffed suspects up by the arms. *Id.* at 925-26.

As the Eighth Circuit has recognized for at least 40 years: "No matter how difficult it is to apprehend a prisoner, the law does not permit officers to beat him once he is securely in custody. …[T]hey may not avenge themselves for his pre-surrender conduct by punishing him bodily after he has submitted." *Feemster v. Dehntjer*, 661 F.2d 87, 89 (8th Cir. 1981).

Returning to *Gill*, the majority compared the resulting injuries. App. A at 10. Degree of injury is relevant only "as it tends to show the amount and type of force used." *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011). The majority's analysis relied on *Mann v. Yarnell*, 497 F.3d 822 (8th Cir. 2007), a pre-*Chambers* case. This analysis misapplied *Mann*, which considered degree of injury only because "Mann himself has no recollection of the events that occurred[.]" *Mann*, 497 F.3d at 824. With video evidence "dark and often unintelligible" and Mann not presenting the "memory of any observer or participant[,]" only his injuries were left to determine the reasonableness of force and these "could have just as easily resulted from the application of the stun technique on a struggling target." *Id.* at 827 n.6. *Mann* is inapposite as McManemy testified to the amount and type of force used, contradicted only by opposing testimony. A jury must determine who to believe.

Only "actual injury" necessary to sustain an excessive force claim. *Dawkins v. Graham*, 50 F.3d 532, 535 (8th Cir. 1995) (bruises, laceration, elevated blood pressure, and posttraumatic stress disorder each actual injuries). "A greater than de

minimis injury requirement under the Fourth Amendment would mean that the same quantum of force, in the same circumstances, could be unconstitutional when applied to a citizen with a latent weakness and constitutional when applied to a hardier person." *Chambers*, 641 F.3d at 906. *Chambers* is particularly applicable here as involving "gratuitous" force toward a restrained person's head. *See Id.* at 908 (intentionally driving to jerk restrained person "roughly…in his car seat while his head was positioned adjacent to the dashboard.").

Tierney injured McManemy. This was documented. (Record 204-211.) It was observed. (Record 41[155].) His injuries are continuing. (Record 32[121], 49[189].) McManemy suffered actual injury. This is enough and *Gill* remains apposite. *See Blazek*, 761 F.3d at 925 (qualified immunity not determined by whether force "caused an unacceptable degree of injury."). *Gill*, *Krout*, and *Blazek* put Tierney on fair notice his actions were unconstitutional.

The ultimate question is whether force was excessive from lack of provocation or need. *United States v. Harrison*, 671 F.2d 1159, 1162 (8th Cir. 1982). Tierney multiple knee strikes to McManemy's face where neither provoked nor necessary. This was not a "rapidly evolving" situation requiring a "split second decision." *Graham*, 490 U.S. at 397. Tierney had time to circle around a pinned McManemy, including entering and exiting a ditch, after two officers had already disengaged. (Record 13[46], 76[25-27], 82[13-14]; 225 at 19:39:07, 19:39:09, 19:39:14.) At the moment Tierney utilized force, it was unreasonable and excessive. *Id.* at 396. *See also Plumhoff*, 572 U.S. at 777 (reasonableness considered "at the moment" force used).

That two other officers, present before Tierney, were not physically engaging McManemy must be considered. "[T]he 'perspective' of a reasonable officer may include consideration of alternative courses of action available at the time force was used." *Retz v. Seaton*, 741 F.3d 913, 918 (8th Cir. 2014). McManemy was not an immediate threat. Repeated knee strikes to his head served no legitimate purpose.

Tierney's force is further unreasonable given the only reason McManemy was not handcuffed was due to a preexisting shoulder injury known to the officers at the scene. This had been announced and ignored. (Record 13[43], 73[16], 74[20].) A known incapacity preventing the movement of arms behind a person back is considered in assessing reasonableness of force. *Shekelton*, 677 F.3d at 366. When a known disability prevents compliance, lack of compliance is not a threat. *See Id.* (suspect with known shoulder disability "did not threaten officer, did not attempt to run…, and did not behave aggressively[.]")

The majority erroneously relies on *Schoettle v. Jefferson County*, 788 F.3d 855 (8th Cir. 2015) to avoid considering McManemy's known shoulder impairment. *Schoettle* expressly states "knowledge of an arrestee's medical condition can be relevant to a determination of whether the officer employed excessive force." *Id.* at 860 (*citing Graham*, 490 U.S. at 397). The hypoglycemic episode in *Schoettle* did not make the force used unreasonable as officers still faced "a belligerent and impaired man" physically resisting removal from a vehicle. *Id.* at 861. "If the officers realized…Schoettle's impairment was not attributable to any fault of his own, that knowledge would not have made Schoettle any less dangerous[.]" *Id.* at 861.

Schoettle is factually distinguishable. McManemy was not "refusing to give up one of his arms[;]" he physically could not bend it as demanded and pain caused by the officers cranking it forced his movement. Unlike *Schoettle*, McManemy's impairment did not create a threat. Rather, the circumstance made Tierney's force unreasonable.

Since the law governing unreasonable use of force is clearly established, we must next look at whether the facts, viewed in the light most favorable to McManemy demonstrate deprivation of a constitutional right

C. Disputed Material Facts Exist Regarding Use of Excessive Force

A genuine issue of material fact exists if: (1) a fact is disputed; (2) material to the outcome; and (3) a reasonable jury could return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute exists as to the circumstances of the force used by Tierney, in kneeing McManemy, and by Dolleslager, in the second tasing of McManemy. As this dispute would permit a verdict in McManemy's favor, genuine issues of material fact exist requiring reversal of the grants of qualified immunity.

1. Tierney's Use of Force

The majority claims McManemy "admits that he suffered his injuries during a struggle to handcuff him, not when he was 'fully subdued.'" App. A at 10. This concession was considered most important by the majority in distinguishing it from prior precedent. App. A at 10. Its analysis is premised on the idea Tierney's force ended when McManemy was subdued. No such admission was ever made.

McManemy's brief expressly argued he "was kicked and kneed in the face while subdued and handcuffed." No admission was made at oral argument, with counsel only having acknowledged some resistance "up until a point", not that Tierney's force occurred before McManemy was subdued. (Oral Arg. 1:44-1:50.) This is not an admission the force occurred "during a struggle to handcuff him." App. A. at 10.

Tellingly, the dissent rejected such an admission:

> …in light of the above-mentioned evidence and our duty to draw inferences in McManemy's favor, a jury could conclude that some of the strikes from Tierney's knee occurred after McManemy was handcuffed and after any reasonable belief in resistance would cease. That is, a jury could find that Tierney struck McManemy's face when he was subdued and offered no resistence.

App. A at 13.

The majority assumed, without evidence, the force stopped after McManemy's handcuffing. The record does not establish precisely when handcuffing occurred, nor when Tierney's force ended, other than Tierney standing up forty seconds after kneeling. It is an open question when the force ended in relation to when McManemy was subdued, with the jury the proper factfinder to resolve this.

Finding this force objectively reasonable ignores Tierney's calculated acts leading up to its use. On arrival, Tierney ran to engage McManemy. (Record 76 [25], 225 at 19:39:07). Despite four officers already "hands" on with a prone McManemy, and two others observing, Tierney aggressively steps on and kicks McManemy's right leg. (Record 225 at 19:39:09). He does so while circling the scrum to determine where to best impose himself. (Record 76 [25-27].) McManemy was screaming for help and for deputies to use two sets of handcuffs while a deputy's knee was pressing and

thrashing his face into the gravel. (Record 11 [37-38], 13 [43-45], 73 [16], 225 at 19:39:09.) Tierney positioned himself near McManemy's face as it was pinned on the ground. (Record 12 [40], 76 [27], 225 at 19:39:14.) Tierney then proceeded to knee McManemy in the left eye multiple times. (Record 29-31 [109, 111,117], 39 -40 [150, 151], 77 [32], 83 [17].)

Kneeing McManemy under these circumstances was unreasonable and served no legitimate purpose. Having already surrendered by laying down with arms and legs spread, McManemy posed no threat to fight or flee. (Record 11 [35], 39 [148-149].) McManemy was not resisting, but instead was known to be physically incapable of moving his arm as demanded. (Record 13 [43, 44, 46].) He was tased while deputies were "hands on" with him. (Record 76 [26].) The movements of his legs and body were an involuntary response typical of a person being tased. (Record 13 [46], 18 [63], 77 [29].) This is not active resistance. These circumstances belie any reasonable belief McManemy posed an ongoing threat.

2. Dolleslager's Use of Force

Use of a taser may constitute excessive force. *LaCross v. City of Duluth*, 713 F.3d 1155, 1159 (8th Cir. 2013). Tasers have been known for over twenty years to "inflict[] a painful and frightening blow…the sort of torment without marks with which the Supreme Court was concerned[.]" *Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993) (*citing Hudson v. McMillian*, 503 U.S. 1, 9 (1992)).

The majority opinion concluded Dolleslager's taser logs, which show McManemy being tased two times, 15 seconds apart, definitively establish the force

was reasonable. App. A at 7a. This conclusion violates the obligation to view evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The taser logs do not contradict McManemy, as he has never wavered on the fact he was tased when handcuffed shortly after being tased for the first time. (Record 13[45].)

In comparing the logs and video from Dolleslager's car, the discharge report/taser log timestamps do not match the time on the video. In comparing the Dolleslager video run times from 19:38:25 through 19:40:05 to the Grundy County Taser log outlining two taser bursts, one at 20:22:58 and the other at 22:23:13, there is a clear discrepancy. This fact should be looked at in the light most favorable to McManemy. Whether McManemy was tased when handcuffed is a genuine issue of material fact. (Record 13[45], 114 [54].)

D. Lubben and Dolleslager Failed to Intervene in Use of Excessive Force

1. Clearly Established Law

"[A] police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge." *Putnam v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981) (*quoting Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972)). "[A]n officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment." *Nance v. Sammis*, 586 F.3d 604, 612 (8th Cir. 2009). The use of more than *de minimis* force by an officer is sufficient to support a claim of excessive force. *Chambers*, 641 F.3d at 906.

Like McManemy's case, officers in *Krout* failed to intervene in the police beating of an agitated arrestee in a gas station/restaurant parking lot. *Krout*, 583 F.3d at 561. Unlike McManemy, the officers believed the arrestee was armed, had to physically remove him from the truck he had attempt to back into a police vehicle, and who then fought with officers. *Id.* at 560-61. After forcing him to the ground, officers repeatedly kneed and punched the arrestee while other officers stood around observing. *Id.* A jury could reasonably find the observing officers had knowledge of the force and the opportunity to stop it. *Id.* at 566. *Krout* establishes the failure of Lubben and Dolleslager to intervene violated McManemy's constitutional rights.

2. Failure to Intervene

a. Lubben's Failure

Lubben failed to intervene when Tierney's used of excessive force against McManemy. When Tierney arrived at the scene, Lubben was present and one of four deputies "hands on" with McManemy when Tierney aggressively stepped on and kicked McManemy's right leg. (Record 76[25], 225 at 19:39:07, 19:39:09.) McManemy's head was being held down by the knee of a deputy and being thrashed into the gravel. (Record 11[37-38], 13[43-45], 73[16], 225 at 19:39:09.) Lubben knew of and announced McManemy had a shoulder impairment and how use of two sets of handcuffs was necessary to handcuff McManemy. (Record 73[16], 74[20].) Lubben knew McManemy could be restrained without significant force but with two sets of handcuffs. (Record 12[39-40], 13[43], 73[15-16], 74[17, 20], 79[38].)

McManemy's only voluntary movements came when his impairment was

disregarded by deputies' repeatedly "cranking back" his arm. (Record 13[43, 46].) All other movements were caused by being tased while he pled for two sets of handcuffs to be used. (Record 13 [44-45], 73 [16], 77 [29].) Deputies finally did so to secure and subdue him. (Record 13[45], 14[48-49], 16[57-58], 28 [105].) At least seven deputies were on the scene. (Record 76 [25], 225 at 19:39:09.)

Tierney purposefully positioned himself next to McManemy's face, pinned by a deputy's knee to the gravel road. (Record 11 [37-38], 12 [40], 76 [27], 225 at 19:39:14.) Tierney then kneed McManemy in the left eye multiple times. (Record 29 [109], 30 [111], 39-40 [150-151], 83 [17].)

Lubben had ample opportunity to intervene in Tierney's excessive use of force, which lasted upwards of forty seconds. Lubben was present and on the same side of McManemy as Tierney during Tierney's knee strikes. (Record 225 at 19:39:10-19:40:00). Nothing prevented him from intervening in Tierney's use of excessive force.

b. Dolleslager's Failure

Dolleslager failed intervene in Tierney's use of excessive force. Like Lubben, Dolleslager was one of the deputies "hands on" with McManemy when Tierney stepped on and kicked McManemy's leg. (Record 76[25], 225 at 19:39:07, 19:39:09.) In positioning himself next to McManemy, Tierney was right next to Dolleslager. (Record 76[27], 113[49-50], 225 at 19:39:14.)

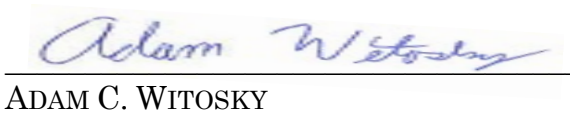
The circumstances established by the record allow a jury to find Dolleslager saw Tierney use excessive force due to the fact he was right next to Tierney, who used force in plain sight. (Record 16[57].) Nothing prevented Dolleslager from seeing

Tierney do so. Based on the record, it is possible for a jury to find Tierney kneed McManemy during Dolleslager's second use of a taser. Dolleslager's own contemporaneous use of excessive force cannot be used to excuse the failure to intervene. Dolleslager is not entitled to qualified immunity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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