No. 20-21

IN THE
SUPREME COURT of the UNITED STATES

BILLY DUANE CARD FLESHNER,

Petitioner,
v.

MATTHEW TIEDT, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Billy D. Fleshner
P.O. Box 84137
Sioux Falls, SD 57118
Telephone: 605-376-5230
Pro se Petitioner

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

1. Can Peace Officers use excessive force when the force is objectively unreasonable and it violates well established case law and department policies?

2. Can the District Court contradict evidence recorded on video in its statement of facts?

3. Can the district court err by not being impartial and unbiased?

4. Are federal judges helping to make police unaccountable for their actions?

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Billy D. Fleshner, an individual. Petitioner was the Plaintiff-Appellant in the court below.

Respondents Kenneth W. Wiley, an individual, Matthew P. Tiedt and Kyle J. Shores, in their Individual and Official Capacity as Deputies of Bremer County, Connie Sents, a dispatcher of Bremer County, Dan Pickett, in his Official Capacity as Sheriff of Bremer County, Daniel P. Schaeffer and James E. Dickinson, in their Individual and Official Capacity as State Troopers of Iowa, Bremer County, Iowa, Judge Linda R. Reade and Judge Charles J. Williams were the defendants and appellees below.

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PETITION FOR WRIT OF CERTIORARI

Billy D. Fleshner, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, filed on April 10th, 2020. There was no good-faith determination of the law in petitioner's cases in either the district court or the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The District Court's final judgment of April 10, 2020, is reproduced as Pet. App. 79a and its March 19, 2018, judgment is reproduced as Pet. App. 75a.

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment was entered on April 10, 2020. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First, Fourth, Fifth, Seventh and Fourteenth Amendments to the United States Constitution.

The First Amendment, U.S. Constitution, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourth Amendment, U.S. Constitution, provides:

That "[t]he 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.

The Fifth Amendment, U.S. Constitution, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment, U.S. Constitution, provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

The Fourteenth Amendment, U.S. Constitution, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

This case involves Title 42 U.S.C. § 1983.

Title 42 U.S.C. § 1983 provides:

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 subject, 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 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 was unavailable. For the purpose of this section, and Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Factual Background. The facts germane to this action, as known by Petitioner Billy Duane Card Fleshner ("Fleshner") and corroborated by the Orders filed by the Northern District Court of Iowa, statements given by the Respondents Deputy Matthew Tiedt ("Deputy Tiedt"), Deputy Kyle Shores ("Deputy Shores"), Iowa State Patrol Officer Dan Schaefer ("Trooper Schaefer"), Iowa State Patrol Officer James E. Dickinson ("Trooper Dickenson"), and recording devices of Deputy Tiedt and Trooper Schaefer, are as follows.

The video evidence shows that the grounds to initiate the stop against Fleshner on Christmas Eve, December 24, 2014, were fabricated to make it sound as if Fleshner was intoxicated, not for any traffic statute violations he supposedly committed. This is clear to anyone with common

sense as Fleshner was never tested for being drunk and it was admitted by the officers involved in the traffic stop that Fleshner was completely sober during the time of his arrest.

In the Order of 03/28/2019 (D.E. #96), App., p. 19a, the district court stated in the "a. Window Tint" that "Tiedt did not violate plaintiff's right to be free from unreasonable seizures because Tiedt had, at a minimum, reasonable suspicion to initiate the traffic stop based on plaintiff's tinted windows.".

Fleshner was stopped based on hearsay. Tiedt admitted under oath during a deposition held on September 14, 2015 that he stopped Fleshner because: "We received a complaint on your driving, from an independent third party." (Deposition of Matthew Tiedt, 9/14/2015, p. 13, lines 12-15)

Deputy Tiedt never declared that a possible window tint violation was the bases of initiating the stop of Fleshner. The district court was attempting to rewrite the facts of the case in an attempt to justify the dismissal of the improper stop of Fleshner on December 24, 2014.

In the Order of 03/28/2019 (D.E. #96), App., p. 5a, the district court stated: Defendants further contend that none of the law enforcement personnel who ultimately responded to the scene were able to see into plaintiff's Jeep due to the Jeep's windows being tinted. (Docs. 74-1, at ¶ 7; 76-1, at ¶ 6).

Deputy Tiedt mentioned three different times he COULD see into Fleshner's Jeep in his incident report dated December 24, 2014. Deputy Shore's and Trooper Schaefer's incident reports dated December 24, 2014, also makes admissions of seeing into the vehicle.

The district court and the Eighth Circuit Court failed

to address this blatant discrepancy of the facts. Even worse, the district court used these false claims to justify their rulings.

The United States Court of Appeals for the Eighth Circuit ruled that Fleshner adequately stated a claim that he was subjected to an objectively unreasonable traffic stop which was not supported by probable cause or reasonable suspicion. See Order (D.E. #56), App., p. 76a-78a.

In regard to the excessive use of force the district court initially admitted that "Fleshner's assertions are sufficient to state a claim for excessive force" and the first Motion for Summary Judgment was denied. Order of 03/04/16 (D.E. #26).

Fleshner's Excessive Use of Force claim was dismissed in the Order of 03/28/2019 (D.E. #96) App., p. 1a, in which the district court clearly determined the facts of the case to favor the law enforcement officers involved despite the issue of facts in dispute and the previous per curiam order. See Order of 03/28/2019 (D.E. #96), App., p. 43a-48a.

The First Amended Complaint (D.E. 15) explains the facts in detail of the attack by Trooper Schaefer and the video evidence from Trooper Schaefer's dash cam (18:29:30-18:34:22) proves the accuracy of the facts.

From the time Trooper Schaefer demanded Fleshner get on the ground to the time Trooper Schaefer grabbed Fleshner by the head and neck and struck him in the groin was a total of five (5) seconds (Trooper Schaefer's dash cam, 18:33:37-18:33:42)

Trooper Schaefer grabbed Fleshner by the head and neck, and started winding up for the knee strike. As soon as Deputy Tiedt used his right leg to sweep Fleshner's left leg, which spread Fleshner's legs open, Trooper Schaefer drove his knee into Fleshner's groin.

It's clear this strike to the groin was intentionally executed by Trooper Schaefer. (Trooper Schaefer's dash cam, 18:33:37-18:33:42)

The video evidence shows Trooper Schaefer's knee is waist high and his leg is on the inside of Fleshner's right leg. Trooper Schaefer was looking in the direction of the strike he employed against Fleshner.

The district court was again attempting to twist the facts in favor of the defendants by claiming: (1) Plaintiff turned back toward the interior of the Jeep, putting his back to the officers (2) Plaintiff started to pull away from Schaefer and (3) Plaintiff continued to straighten his legs and pull away from Schaefer while being told repeatedly to get on the ground. (D.E. #96), App., p. 44a-45a.

The video does not show Fleshner resisting once he exited as requested and Fleshner was never charged with resisting arrest.

During the Iowa state trial[1] of the gun charges, all the law enforcement officers admitted that Fleshner never made threats, never attempted To escape, never attempted to harm any of the officers and was never physically armed with a weapon.

Shown in the video evidence on Trooper Schaefer's dash cam is Trooper Dickinson with a large flashlight in his right hand. Fleshner believes the flashlight is what struck him three times causing injuries to his right thigh.

Plaintiff also claims that Schaefer struck plaintiff in the right thigh with a flashlight or other object during his arrest. (Docs. 15, at ¶ 100, 83-2, at 8).

Order of 03/28/2019 (D.E. #96), App., p. 23A.

Fleshner's First Amended Complaint admits Dickinson struck him while on the ground, not Schaefer. (D.E. #15 ¶ 100).

The district court further protects the officers by claiming Trooper Schaefer "pressed" his knee into Fleshner's back while Fleshner was on the ground. Trooper Schaefer twice used his body weight to drop his knee into Fleshner's back. See Order of 03/28/2019 (D.E. #96), App., p. 47a.

The second knee drop by Trooper Schaefer drove into Fleshner's back made Fleshner's head bounce off the concrete, which Fleshner vividly remembers.

Details of this incident are also stated in the First Amended Complaint, (D.E. #15 ¶¶ 96-104).

The district court failed to address the claims in

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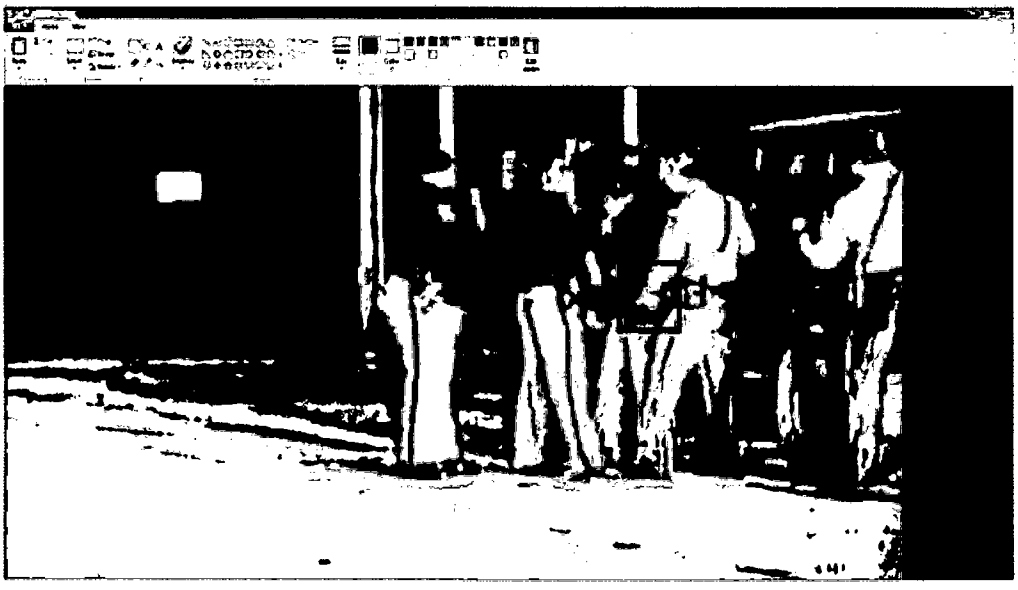
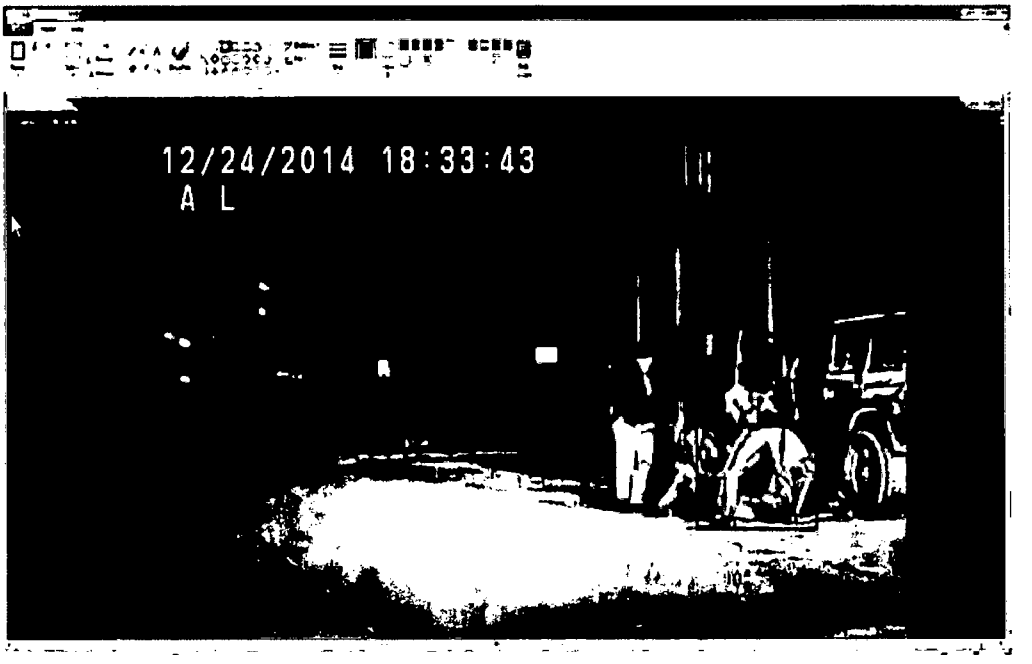
1 Fleshner was wrongfully charged and was subsequently acquitted

Trooper Schaefer's, Deputy Shores and Deputy Tiedt's incident reports claiming Fleshner had BOTH hands pinned under his body/belly and was resisting arrest, but did admit Tiedt maintained his hold on Fleshner's Left wrist. See Order of 03/28/2019 (D.E. #96), App., p. 45a-46a.

From the time the assault by the law enforcement officers began to the time Fleshner was handcuffed, Deputy Tiedt had Fleshner by the left wrist the entire time as shown in the video evidence.





Trooper Schaefer and Deputy Tiedt both claim in their incident reports that they had to force Fleshner's hands/arms from under Fleshner's body. This is not supported by their video evidence.

The district court ignored obvious conflicting statements made by the officers directly supported by the video evidence.

The Bremer County Sheriff's Office law enforcement policies number 4.08 is very clear on how to initiate and affect an arrest. Under the "Arrest Procedures for Non-Compliant individuals" section two (2).

This policy is also very clear on the responsibility of the arresting officer under "Officer Care & Responsibility:"

Not only has the district court failed to address false claims made by the officers in their incident reports and pleadings, the court has also made false claims in its summary judgment to further justify its rulings. See (D.E. #96), App., p. 29a-30a.

Petitioner did not plead guilty to all charges as

claimed by the district court. Fleshner should have never been stopped in the first place and in turn should have never been charged with any violations.

Once plaintiff was on his feet, he pulled away from Tiedt and Schaefer and used his shoulder to close the locked door of his Jeep. (Schaefer Video, at 18:34: 48; Docs. 15, at ¶ 107; 83-2, at 12). See (D.E. #96), App., p. 48a.

The district courts claim is inaccurate and rewrote the facts of what actually transpired. None of the officers had ahold of Fleshner during this time.

Regarding the search and seizure claim the process and procedure for impounding vehicles in the State of Iowa is clear under the applicable sections of Iowa Administrative Code ("IAC") for Public Safety [661] Ch. 6.

Clearly none of these elements were fulfilled as Fleshner's vehicle was in the parking lot of a gas station and therefore could not constitute a traffic hazard.

While in the patrol car, Fleshner had informed Deputy Tiedt that he could have someone come and get his vehicle. Deputy Tiedt denied Fleshner that option.

Before the search Fleshner was under arrest for interference of official acts. There was no evidence, which could have been used in an administrative or judicial proceeding, to prove this charge against Fleshner.

Fleshner was available and capable to give or not give consent to such impoundment. Fleshner clearly refused an inventory and impoundment as documented on the video evidence on Trooper Schaefer's dash cam (18:38:33-18:38:40). See the First Amended Complaint (D.E. #15 ¶¶ 115-116).

The "inventory search" was conducted in bad faith for the sole purpose of investigation and general rummaging in

order to illegally attempt to discover incriminating evidence (of which there was none).

One of many clear examples of a Fourth Amendment violation is when papers inside Fleshner's vehicle were confiscated to be copied by the sheriff 's department before being returned to Fleshner as shown on Trooper Schaefer's dash cam (18:48:20-18:48:35). See (D.E. #15 ¶ 121).

No law, process or procedure allows legal property to be seized by officers during an inventory search *without* a warrant.

One example of the law enforcement officers failing to inventory Fleshner's property according to "standardized police procedures" was in the First Amended Complaint, (D.E. #15 ¶ 146), and on Trooper Schaefer's dash cam (19:30:30-19:31:05) where Trooper Schaefer admitted he was NOT going to open or "take it all apart" and claimed the item to be a raft when, in fact, it contained rain gear.

During trial held on May 6th and 7th, 2019, all officers testified that this item was not properly inventoried by any of the officers during the inventory search.

The district court denied Fleshner a fair trial after ruling on the Respondents motions for summary judgment.

On November 20th, 2018, Fleshner mailed his opposition and response to motions for summary judgment (D.E. #85 & 86) through the USPS and paid for early morning next day delivery. Fleshner was granted an extension with his response due by November 21st, 2018. The district court did not file this response until November 26th, 2018, making it look as-if Fleshner had filed late even though they had received the response on November 21st, 2018. The certificate of service was dated November 20th, 2018.

The Bremer County Appellee-Defendants filed a

motion to strike (D.E. 87) claiming Petitioner failed to respond in a timely manner and on January 18th, 2019. The district court granted in part to strike Petitioners opposition to motions for summary judgment and his response to motion for summary judgment (D.E. #85 & 86).

The district court clearly did not want the law of the case doctrine on the record that informed the district court that it has a duty to follow the issues in this case decided on appeal.

The FPTC was held on April 4th, 2019. Fleshner was informed that many of his exhibits and issues raised in his Amended Complaint would NOT be allowed at the jury trial after the district court's ruling on the Respondent's motions for summary judgment further preventing Fleshner from presenting all the facts to a jury.

During trial on May 6th, 2019, the district court decided to allow Respondents to present exhibits filed late in their third amended exhibit list but refused Petitioner permission to present his additional exhibits filed in his second amended exhibit list. This further shows the continual bias of the district court and presiding judge during trial.

Also, during trial the district court decided to remove punitive damages leaving only nominal damages of one dollar if the jury were to rule in favor of the Petitioner.

Fleshner's observations of what transpired leading up to trial and once trial was concluded, it was clear that he was bamboozled, and in a very clever way. Trooper Schaefer took the blame for the remaining issue against Bremer County Respondents after the jury was informed that Trooper Schaefer was granted immunity and any testimony he gives could not be used against him in the trial.

Because of the decisions and rulings of the presiding

judge, the jury trial was a complete waste of tax payers' money and a waste of the juries, court staff and everyone else's time by holding a mishandled jury trial.

REASON FOR GRANTING THE WRIT

I. Peace Officers cannot use excessive force when the force is objectively unreasonable and it violates department policies.

The Respondent's misconstrue their own citation of authority.

> Held: Because the car chase respondent initiated posed a substantial and immediate risk of serious physical injury to others, Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. Pp. 3–13.

Scott v. Harris, 550 U.S. 372, Syllabus, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

> Fleshner posed no risk of injury to anyone.

> (a) Qualified immunity requires resolution of a "threshold question: 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 v. Katz, 533 U. S. 194, 201. Pp. 3–4.

> (b) The record in this case includes a videotape capturing the events in question. Where, as here, the record blatantly contradicts the plaintiff 's version of events so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a summary judgment motion. Pp. 5–8.

Id.

In this case, the video plainly contradicted both the Respondent's *and* the lower court's version of the facts.

> I. Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." The Court there simply applied the Fourth Amendment's "reasonableness" test to the use of a particular type of force in a particular situation. That case has scant applicability to this one, which has vastly different facts. Whether or not Scott's actions constituted "deadly force," what matters is whether those actions were reasonable. Pp. 8–10.

Id.

"Different facts" in the context of applying precedent is not a new principle.

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. 264, 290 (6 Wheat. 264, 399-400) (1821).

Seven years after *Scott, supra*, was decided, the Eighth Circuit addressed the issue more comprehensively.

We recognized for the first time in *Chambers v. Pennycook,* 641 F.3d 898 (8th Cir.2011), that police conduct that causes only *de minimis* injury could constitute excessive force. We noted, however, that it had previously "remain[ed] an open question in this circuit whether an excessive force claim requires some minimum level of injury." *Id.* (quoting *Andrews v. Fuoss,* 417 F.3d 813, 818 (8th Cir.2005)).

Chambers was handed down on June 6, 2011, more than a month after Meehan was arrested. Meehan thus cannot avail herself of the legal principle articulated in *Chambers.* Meehan argues, however, that the law was clearly established even before *Chambers* that *de minimis* injury could give rise to an excessive force claim. Meehan notes that *Chambers* was the result of an en banc rehearing granted in part because of the petitioner's assertion that the original panel's holding—that *de minimis* injury could not support an excessive force claim—conflicted with a 2010 Supreme Court case, *Wilkins v. Gaddy,* 559 U.S. 34, 130 S.Ct. 1175, 175 L.Ed.2d 995 (2010). *Wilkins,* however, dealt with a prisoner's right to be free from excessive force under the Eighth Amendment and did not clearly establish that *de minimis* injury could support an excessive force claim under the Fourth Amendment. *Chamber*'s holding was not based on *Wilkins* but on an exhaustive study of case law, a study that no reasonable police officer should have been expected to conduct. *See Davis v. Scherer,* 468 U.S. 183, 196, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984) ("[Police officers] are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.'" (quoting Peter H. Schuck, *Suing Government* 66 (1983))). Meehan does not point to any other specific case enunciating the principle that *de minimis* injury can give rise to an excessive

> force claim, nor can we find one. *See LaCross v. City of Duluth,* 713 F.3d 1155, 1159 (8th Cir.2013) (recognizing that the law on this point became clear only after *Chambers* was handed down). Because the law was not clear before *Chambers* that police conduct could constitute excessive force even if it caused only *de minimis* injury, Meehan's excessive force claim must fail.

Meehan v. Thompson, 763 F. 3d 936, 946-947 (8th Cir. 2014).

II. The district court erred in overruling the Eighth Circuit Court of Appeals.

The district court has a duty to follow the issues in this case decided on appeal by the higher court of appeals. Clearly, this district court believes that it is not bound by the Eighth Circuit Court of Appeals earlier ruling.

The law of the case doctrine applied by the Eighth Circuit, is:

> When a case has been decided by this court on appeal and remanded to the District Court, every question which was before the court and disposed of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution according to the mandate. It cannot alter it, examine it except for purposes of execution, or give any further or other relief or review of it for apparent error with respect to any question decided on appeal.

Houghton v. McDonnell Douglas Corporation, 627 F.2d 858, 864 (8th Cir.1980), citing Thornton v. Carter, 109 F.2d 316, 319-20 (8th Cir. 1940).

In re Apex Oil Co., 265 BR 144, 153-154 (8th Cir. BAP 2001).

> As an initial concern, we address Myers's argument that we should not review this matter because of the law of the case doctrine. We disagree. "Law of the case" is a policy of deference under which "a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); see also *Little Earth of the United Tribes, Inc. v. United States Dep't of Hous. & Urban Dev.*, 807 F.2d 1433, 1438 (8th Cir.1986) ("The law of the case doctrine applies to issues implicitly decided in earlier stages of the same case."). The law of the case "prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy." *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir.1995). We have held that "[w]hen an appellate court remands a case ... all issues decided by the appellate court become the law of the case ..." Id.

In re Raynor, 617 F. 3d 1065, 1068 (8th Cir. 2010).

The Eighth Circuit agreed the issues remaining in the Petitioner's case should be determined by a Jury.

> According to Gage County, we are not bound by our holding in Dean under the law-of-the-case doctrine because that decision applied controlling law incorrectly. As a reminder, Dean held that Nebraska county sheriffs "made final policy with regard to law enforcement investigations and arrests." 807 F.3d at 941. For that reason, we held that it was for the jury to decide in this case "whether Sheriff DeWitt's decisions caused the deprivation of rights at issue by policies which affirmatively command that it occur." Id. at 942 (internal quotation marks omitted).

Dean v. Searcey, 893 F. 3d 504, 510-511 (8th Cir. 6/11/2018) (footnote omitted).

> To conclude, we note that there are certain types of law enforcement conduct that "do more than offend some fastidious squeamishness or private sentimentalism about combatting crime" and which the Constitution forbids. *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Over the course of now four opinions, and our multiple meticulous reviews of the evidence presented, we have recognized this case is an example of such conduct—and a jury has agreed. For this, § 1983 offers a measure of recourse. Indeed, the only measure of recourse: "[f]or people in [Appellees'] shoes, it is damages or nothing."

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (Harlan, J., concurring).

Id. at 522.

III. The district court erred by contradicting obvious evidence recorded on video in its statement of facts.

The growing trend on the part of unelected officials (federal judges) to deny litigants meaningful access to the courts through judicial rewriting of the facts at some point is going to have to be addressed by the judges themselves or by Congress.

The problem has not gone unnoticed.

> Do judges routinely display a casual attitude toward the facts of the case? I suggest that practicing attorneys be asked whether they have had cases where the judge's statement of the facts were false. Every practicing attorney to whom I have asked this question has responded in the affirmative; some have

told me that the practice is, unfortunately, quite common, and that judicial misrepresentation of the facts of cases has produced a crisis in their professional lives. They feel that their work is subject to the whim of judges who play God with the facts of a case, changing them to make the case come out the way the judge desires. Some say that if they had known that the practice of law would be like this, they would have gone into a different profession. Professor Monroe Freedman recently stated in a speech to the Federal Circuit Judicial Conference:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no publication and no-citation rules.

Professor Freedman wrote a letter to me in which he stated that at the luncheon immediately following his speech, a judge sitting next to him said (apropos of the passage above quoted), "You don't know the half of it!"

Apart from these professional concerns, we should also ask ourselves what kind of a judiciary system this society has produced where judges can misstate the facts of a case and then proceed to apply the law to those fictitious facts. Can any person be safe in court if this practice is allowed to continue? If judges can listen to the evidence and then tell a contrary story, what remains of justice? The vaunted security we have in a free country and a just legal system turns to quicksand. Our case may be

> factually proven, legally required, and morally compelled, but we can still lose if the judge changes the facts. And if we complain no matter how loudly higher courts will not be interested in reviewing a "factual" controversy, and the legal community, as well as the general public, will assume that the facts were those stated by the judge.

Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, Cardozo Law Review, vol. 11, 1313, 1345-1346 (1990) (footnotes omitted).

Nor has it gone entirely unnoticed in the published opinions.

> The majority would rewrite the facts to make this an innocent oversight. The judge and jury found the facts otherwise. Indeed, as the trial judge, after reviewing the facts in evidence in this case, stated in his opinion, "there was a sense of fraud in the air, which sense the jury later confirmed."

Nobelpharma Ab Usa v. Innovations Inc., 129 F.3d 1463, 1477 (Fed. Cir. 1997).

> We are enjoined to view civil right pleadings liberally. *Hainesv. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Anderson v. Sixth Judicial District Court*, 521 F.2d 420 (8th Cir. 1975). Such pleadings must nonetheless not be conclusory and must set forth the claim in a manner which, taking the pleaded facts as true, states a claim as a matter of law. See *Anderson v. Sixth Judicial District Court*, supra; *Ellingburg v. King*, 490 F.2d 1270, 1271 (8th Cir. 1974).

Nickens v. White, 536 F.2d 802, 803 (8th Cir. 1976).

Apparently, this is no longer true, as the

district court introduced fictions in the place of facts. Fleshner suspects the district court rewrote the facts in order to benefit the Respondents and the Eighth Circuit Court seems to not mind that they had done so.

"Qualified immunity is a question of law not a question of fact. The threshold issue in a qualified immunity analysis is whether the facts viewed in the light most favorable to plaintiff show that the state actor's conduct violated a federal constitutional or statutory right." *McClendon v. Story County Sheriff's Office*, 403 F.3d 510, 515 (8th Cir. 2005) (footnote omitted). "[T]he second step is to ask whether the (violated) right was 'clearly established.'" Id. (citation omitted).

Geitz v. Overall, 137 Fed. Appx. 927 (8th Cir. 2005).

That courts misstate the facts is well known by those in the legal profession today.

It is hardly a secret that courts misstate facts. Every lawyer involved in litigation probably can cite several instances of courts misstating or distorting the facts in a particular case. To be sure, the extent to which courts misrepresent facts is hard to measure. Most of the time the only persons who know about it are the attorneys who argued the case. And they are unlikely to criticize the court publicly. To give the court an opportunity to rectify a material misstatement, the lawyer may file a motion to reargue the case based on the court's mistaken description of the facts. But it is rare that a court will even acknowledge a mistake, let alone correct it.

Why do courts misstate facts? The volume of litigation sometimes may account for a court's lackadaisical attitude toward the facts of a case.

> There are also instances however, in which there is little doubt that a court has closely examined and understood the factual record, and then produced a recitation and interpretation of the facts that not only is at variance with the record, but appears to have been deliberately reconstructed to achieve a particular result.
>
> Bennett L. Gershman,[2] *Now You See It, Now You Don't:* Depublication and nonpublication of opinions raise motive questions, New York State Bar Association Journal, October 2001, Vol. 73, No. 8.

IV. The district court erred in removing the determination of the facts from a jury.

As Fleshner's First Amended Complaint (D.E. #15), App., p. 132A-153A, ¶¶ 12-213 (¶¶ 13-155 from video evidence) makes abundantly clear, the district court determined "facts" that were—and are—clearly contradicted by the video evidence. By so doing, the district court invaded the province of the jury. In former times, the courts did not conduct themselves in such a fashion.

> By undertaking to reconcile irretrievably conflicting findings of the jury, the court, we think, has made the same error that it correctly attributes to the Ohio Court of Appeals—it has invaded the province of the jury under this federal statute. We would avoid such an intrusion by ordering that the cause be put to another jury.

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Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 127, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963) (Stewart, J. and Goldberg, J. dissenting).

> The jury first determines the facts, then it applies the law to those facts. United States v. Gleason, 726 F.2d 385, 388 (8th Cir. 1984). See generally 2 C. Wright, Federal Practice & Procedure § 485, at 711 (1982) ("The purpose of a charge is to inform the jury of its function, which is the independent determination of the facts, and the application of the law, as given by the court, to the facts found by the jury."). Thus, when the judge is no longer deciding the law that applies to the evidence, but rather is applying the law to the facts—facts that are determined after assessing the probative value of evidence introduced at trial—the judge has invaded the jury's province.

United States v. White Horse, 807 F.2d 1426, 1430 (8th Cir. 1986) (emphasis in original).

V. The district court erred in holding that there were no Fourth Amendment violations.

The Fourth Amendment, for all practical purposes regarding vehicles, no longer exists. An Ohio opinion from 2002 summarizes the state of the law on this issue rather succinctly:

> {¶1} Terry C. Bowie, Jr. appeals the judgment of conviction entered by the Marietta Municipal Court finding him guilty of OMVI and failure to drive within marked lanes. In his sole assignment of error, appellant argues that the trial court erred in refusing to suppress the evidence obtained by Trooper Roe because the officer lacked a reasonable

and articulable suspicion to stop the vehicle. We reject this contention because even a de minimis traffic violation provides a legitimate basis for a traffic stop.

State v. Bowie, 2002-Ohio-3553 (Ohio App. Dist. 7/02/2002).

{¶17} Harsha, J., concurring in judgment only:

{¶18} Because I took an oath of office that requires me to enforce the law as interpreted by the United States and Ohio Supreme Courts, I'm forced to concur in this court's judgment. Nonetheless, here's the opinion I'd like to, but ethically can't, adopt:

{¶19} "When Charles Dickens wrote in Oliver Twist that "The law is an ass, an idiot(.)", he was describing the law in general as it stood in Victorian England. Alas, his words still resonate today. One need only peruse the short list of illegal activity that follows it to confirm that fact:

{¶20} "in Arizona adults may not have more than one missing tooth visible when smiling

{¶21} "one cannot shower naked in Florida

{¶22} "a man with a moustache cannot kiss a woman in public in Iowa

{¶23} "a woman may not buy a hat without her husband's permission in Kentucky

{¶24} "in Massachusetts mourners at a wake cannot eat more than three sandwiches

{¶25} "one-armed piano players must play for free in Iowa

{¶26} "in Nebraska barbers cannot eat onions between 7 a.m. and 7 p.m.

{¶27} "in California no vehicle without a driver may exceed 60 mph."

{¶28} "Add Ohio to the list - the practical effect of today's decision is that by driving a vehicle in Ohio you waive the Fourth Amendment. Now, virtually every driver is subject to being stopped if, over the course of a ten mile trip to grandma's, she weaves once within her own lane or, God forbid, her vehicle touches the edge marking. The next time you see a state trooper on the highway, follow that vehicle for ten miles. Keep track of how often it moves within its lane of travel or exhibits some other form of "erratic driving." Since citizen's arrest powers are limited to felony situations, your best bet is to stop, call the highway patrol dispatcher and report a suspected traffic offender. Good luck.

{¶29} "Beam me up Scotty" before Fagin and the Artful Dodger kidnap Oliver and the rest of us."

Id.

In formulating a reasonableness test, one authority states:

> It is submitted that for an impoundment of an arrestee's vehicle to be reasonable under the fourth amendment, the arresting officer should be required (i) to advise the arrested operator "that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner," and (ii) *432 to comply with any reasonable alternative disposition requested. Surely, the police should not be expected to undertake delivery of the auto to some distant point or to make any other disposition which

> would be more onerous than having the vehicle brought to the station. But if the driver asks that his car be left at the scene and the circumstances are such that it can be lawfully parked in the vicinity, then his wishes should be respected.

Wayne R. LaFave, Search and Seizure § 7.3, at 555, 559 (1978)

However, facts still matter.

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake. Id., at 8, quoting *United States v. Place*, 462 U.S. 696, 703 (1983). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. See *Terry v. Ohio*, 392 U. S., at 22- 27. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner*, 471 U. S., at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104

L.Ed.2d 443 (1989).

In this case the district court did not have to speculate on the facts and circumstances as it is all apparent of the video evidence. However, the district court did not use the proper application or careful attention to the facts as recorded on video evidence.

VI. The district court erred in denying Petitioner trial by jury on all remaining issues.

The text of the Seventh Amendment, U.S. Constitution, is quite plain.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Unfortunately for those who hope to petition their government for the redress of grievances, the meaning of the Seventh Amendment has apparently degenerated into something almost completely meaningless.

For an example of how far the courts have strayed from the original meaning of the Seventh Amendment, consider a case from Louisiana in 1959.

> The jury found for the defendant. The plaintiff, Clegg, appealing here, asserts that this resulted from the unexpected use by the Judge of a jury verdict in the form of three questions. In proof of it, plaintiff points out that the Insurer's defense contented itself with testimony of a single witness, the truck driver, who virtually swore the defendant into liability, and the cross examination of plaintiff's witnesses, several of whom were psychiatrists. The Insurer refutes both the claim of error and the asserted cause of the

adverse verdict. On the latter, it says that the jury rejected the plaintiff's thesis because it was patently unacceptable to thinking jurors.

The Insurer describes the claim as bizarre. If it is not that, it is an understatement to call it anything less than unique.

The Insurer's truck, southbound on Airline Highway near Norco, Louisiana, suddenly swerved onto its right shoulder to avoid hitting school children alighting from a northbound school bus. The truck hit and smashed several cars and ran into gasoline pumps of a roadside filling station causing fire and widespread destruction. Clegg, of Baton Rouge, was standing nearby. He was not physically injured. He was not touched in any way by anything. What happened to him, he says was that on seeing this holocaust and the need for someone to rush in to help rescue victims, he suddenly became overwhelmed by fear and realized for the first time in his life that he was not the omnipotent, fearless man his psyche had envisioned him to be. His post-accident awareness that this event had destroyed his self-deceptive image of himself precipitated great emotional and psychic tensions manifesting themselves as psychosomatic headaches, pain in legs and neck, a loss of general interest, a disposition to withdraw from social and family contacts, and the like.

As it might have appeared to the jury of lay persons, the medical theory was that the accident had made Clegg see himself as he really was, not as Clegg had thought himself to be. In short, the accident had destroyed the myth. No longer was he the brave invincible man. Now, as any other, he was a mere human, with defects and limitations and a faint heart. It was, so the Insurer argued with plausibility

> to the jury, the strange case of a defendant being asked to pay for having helped Clegg by bringing him back to reality—helping him, as it were, to leave Mount Olympus to rejoin the other mortals in Baton Rouge.
>
> To this elusive excursion into the id of Clegg, there were added many irrefutable earth-bound events that made it sound all the more strange. At the time of the accident, Clegg was a TV advertising salesman. Within a short space of time, he had changed employment. He became president of a company, in which he was apparently personally interested, at a salary over twice as high as he had previously earned. He bought and sold several pieces of real estate, had made $25,000 in one trade, and had purchased and moved into a new $40,000 home. Within nine months of the accident he had successfully undertaken a campaign to become elected a city Councilman of Baton Rouge. The psychiatrists, acknowledging these external facts, then reasoned that this was a part of his struggle by which to recapture his lost self-esteem, and that while these things were most assuredly being accomplished, it was being done at further damage to Clegg.

Clegg v. Hardware Mutual Casualty Co., 264 F.2d 152, 154 (5th Cir. 1959).

Note that—from 1791 until at least 1959—even nonsense such as this was decided by a jury.

> [U]ltimately, the guarantee of [our] rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.

Bracy v. Gramley, 81 F.3d 684, 703 (7th Cir. 1996) (dissent), *reversed*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2nd 97

(1997).

VII. The district court erred by not being impartial and unbiased.

This issue is addressed under 28 U.S.C. 455.

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The test under §455(a) is:

> "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality."

Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988).

The issue has been addressed when neither an affidavit nor a motion to recuse has been filed in earlier proceedings. In this case Fleshner had no time to file either because the issue was not clearly obvious until after the jury trail.

> "It is less clear under our case law whether we may review a refusal to recuse under section 455(b) when the argument is raised for the first time on appeal."

United States v. Smith, 210 F.3d 760, 764 (7th Cir.2000)

After review of the many issues addressed in this appeal any reasonable person would be convinced the judge was not impartial. Once the rehash of the first summary judgment was filed a second time and then granted it was clear the presiding judge was overstepping his authority to favor the opposing parting.

> "In determining whether a judge must disqualify himself under 28 U.S.C. sec. 455(b)(1), the question is whether a reasonable person would be convinced the judge was biased."

Hook v. McDade, 89 F.3d 350, 355 (7th Cir.1996) (internal quotation omitted)

The bias and impartiality of a presiding judge can greatly affect the outcome of the trail as described.

> "The entire conduct of the trial from beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial." Fulminante, 499 U.S. at 309–10; accord *United States v. Mills*, 138 F.3d 928, 938 (11th Cir. 1998)

CONCLUSION

If officers violate departmental policies, procedures and/or Constitutional rights should they have the right to qualified immunity?

If judges rewrite the facts of a case and grant qualified immunity, should that ruling be upheld by the higher court in an appeal?

Who determines what constitutes a de minimis injury? A judge? A jury? A healthcare professional?

Are we to return to the days when police could use rubber hoses to beat on people in order that no marks would be visible and the police could then claim, "No injury"?

As we are now witnessing, on the news and across this country, people are furious with the recent violent attacks committed by those who are mandated to protect and serve us.

Eric Garner was suspected of selling single cigarettes from packs without tax stamps and during his arrest he was put in a choke hold by a New York City police officer and choked to death.

George Floyd was detained by four officers for using a counterfeit bill to make a purchase at a store, and for all we know, Floyd was not even aware it was counterfeit. Moments later Floyd was murdered by one of the officers' who drove his knee into Floyd's neck for several minutes while handcuffed on the ground. This was despite Floyd's assertion that he was not resisting and could not breathe. Unfortunately, Police Officers know they are protected by Qualified Immunity, which has legitimized the free use of excessive force, and willful contravention of laws. Police Officers should be held to higher standards and should not be given a free pass when they abuse the law and constitutional rights of individuals.

Fleshner knows all too well what it's like to be attacked by four officers and getting knees driving into his body. Lucky for him he survived the attack and has spent the last five years trying to get justice only to find out that the courts lie just as bad as the out of control officers. It seems "NO JUSTICE, NO PEACE" rings true!

If the courts are scratching their heads and wondering why this abuse against its citizens is getting worse maybe they should look at the legal doctrine called "Qualified Immunity", and the several cases it's been used on to shield bad officers from the crimes they have committing. It is obvious from recent events that "Qualified Immunity" does not serve the public good.

The judicial system has encouraged this kind of behavior for far too long by using this legal doctrine to protect those who should be punished. The Supreme Court MUST put an end to these abusive violations by peace officers, and the lower courts, or this problem will continue

to spiral further out of control.

For the reason set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX