No. 20-477

In the Supreme Court of the United States

SHANIKA DAY AND HARVEY MORGAN,

PETITIONERS,

V.

FRANKLIN WOOTEN AND RANDALL DENNY,

RESPONDENTS.

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

REPLY BREIF FOR PETITIONERS

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SUMMARY OF REPLY

Justice should not require an asphyxiating individual to specifically state the cause of his asphyxiation before dying in order for his Section 1983 claim to survive summary judgment. When trained law enforcement officers are detaining an arrestee who cries out "I can't breathe!" and collapses because his handcuffs are so tight that he cannot expand his chest, knowledge should be inferred. When another law enforcement officer arrives and recognizes the arrestee's medical distress due to the handcuff positioning, knowledge should be inferred. For approximately forty-eight minutes, Terrell can be seen on video, lying in the sun on the pavement with metal handcuffs positioned in the middle of his back. Law enforcement officers should be held accountable for keeping him restrained over his pleas for oxygen until he died.

This case is another example of how the "clearly established" prong of qualified immunity is an unpredictable judicial doctrine with tendencies to absolve officers from deadly civil rights violations. As the qualified immunity doctrine has expanded, the purpose of 42 U.S.C. § 1983 has eroded. Officers who maintain ignorance of the circumstances they face and the constitution they uphold, too often escape liability.

Requiring the parents of a teen who died at the hands of officers to prove that those officers had subjective knowledge they were violating the constitution is a heavy burden. Heightening the dispositive evidentiary burden on appeal is a burden too heavy to lift. If the statements of a deceased victim who was rendered unable to speak from asphyxiation are dispositive of an officer's knowledge, law enforcement will have no fear of facing accountability for positional asphyxiation.

The Brief in Opposition underscores these points, illustrating how the qualified immunity doctrine was utilized as *post hoc* justification to asphyxiate an arrestee in medical distress with excessively tight handcuffs. Officers with positional asphyxiation training placed an overweight and winded eighteen-year-old suspect who was complaining of difficulty breathing in an adverse position on top of tight metal handcuffs. Officers recognized his worsening respiratory condition. However, his inability to articulate more than "I can't breathe!" before asphyxiating to death rendered the officers immune from suit in the Seventh Circuit.

Sargent Wooten and Officer Denny ask the Court to maintain this deadly evidentiary burden to overcome qualified immunity, which did not exist

when the District Court held officers were not immune.

To clarify the three main factual red herrings in the opposition brief, (1) there is a pending medical malpractice suit against the first set of EMTs for their failure to evaluate and treat Terrell, in part due to allowing Sargent Wooten to sign a refusal for Terrell's medical treatment, (2) when the Sheriff Deputy arrived with the jail wagon, he demonstrated that a reasonable officer would observe the obvious signs Terrell was in medical distress, dead, or dying, by refusing to transport Terrell to jail and having officers call a second set of EMTs, and (3) the two security guards who witnessed Terrell leave the mall have vastly different accounts of how Terrell acted and while one insists he had a weapon, the other insists he did not.

The full encounter was captured on security video and submitted to the courts below. No weapons are seen in Terrell's possession in any video.[1] What is seen in the video is that officers acknowledge, then largely ignore Terrell's medical

[1] While a weapon was recovered in the grass near the place of Terrell's arrest, it was never proved to be his weapon or in his possession. App. P. 4-5a.

distress until he becomes unresponsive, at which point officers prod him with their hands and feet.

Designated evidence demonstrates the officers regarded Terrell's respiratory distress with disdain or as inconvenient. They did not take his cries "I can't breathe!" seriously and were uncaring until it became apparent that he was dead or dying. They claim he was uncooperative because they told him to breathe and he did not. They told him to sit up and he did not. They told him to change positions and he did not. In reality, Terrell was not uncooperative—he was in the dying process, unresponsive and not fully conscious.

There is no justification for Sargent Wooten and Officer Denny's actions. When the Circuit Court decision reversed the District Court decision, it encouraged officers to willfully ignore an arrestee's inability to breathe. It immunizes an officer who passively allows an arrestee to openly and obviously asphyxiate, so long as that officer claims he lacked knowledge because the decedent failed to identify what was killing him. This significantly narrows an arrestee's clearly established Fourth Amendment right to be free from excessively tight handcuffs.

I. The Seventh Circuit's opinion that an asphyxiating suspect's statements about the cause of his asphyxiation is dispositive on the issue of an officer's knowledge is a deadly precedent that conflicts with the purpose of Section 1983 and other Seventh Circuit case law on qualified immunity.

Crying "I can't breathe!" and collapsing in medical distress should be enough to protect an arrestee from slowly asphyxiating in the care, custody, and control of trained law enforcement officers who recognize the signs. The decision below made it factually dispositive whether a dying arrestee also identified why, "because of handcuffs," before dying. The decision below rendered irrelevant all other evidence demonstrating that officers knew or should have known Terrell's handcuffs were the cause of his asphyxiation. Absent the asphyxiating arrestee's complaints about causation, other evidence was insufficient to show a potential violation of the "clearly established" right to be free from an officer's knowing use of handcuffs in a way that would inflict unnecessary pain or injury.

The panel found that despite the following evidence, there was no evidence demonstrating the officers' "knowledge" that the handcuff positioning was causing or exacerbating his asphyxiation.

1. The officers had positional asphyxiation training, which Officer Denny relied on to re-position Terrell's body at the start of the arrest. App. P. 5a.

2. A reasonable law enforcement officer, the Sheriff Deputy, arrived and immediately knew Terrell was in medical distress and helped officers add a second pair of handcuffs to Terrell, App. P. 7a, then refused to transport Terrell to jail and requested the second ambulance, which found Terrell pulseless and later pronounced him dead. App. P. 8a.

3. The autopsy report confirmed Terrell's cause of death was "Sudden Cardiac Death due to Acute Ischemic Change," with the contributory cause of "Sustained respiratory compromise due to hands cuffed behind the back, obesity, underlying cardiomyopathy." App. P. 8a.

4. Video evidence demonstrated the officers were always near Terrell and observed his medical distress worsen. Once they were unable to stand or sit him up, they laid him on his back and occasionally prodded his body. One officer even poured water on his face, but he did not respond.

The panel granted qualified immunity at the summary judgment stage by finding this evidence failed to demonstrate the officers had "knowledge"

that placing Terrell in excessively tight handcuffs in an adverse position was causing him to asphyxiate.

> Day never complained that the tightness of the handcuffs was restricting his breathing. The record contains no evidence that there was any indication the handcuffs were the cause of Day's breathing difficulty until the autopsy report was released. Thus, Day's right "to be free from an officer's knowing use of handcuffs in a way that would inflict unnecessary pain or injury" was not violated.

App. P. 17a.

Overlooking the approximate forty-eight minutes that Terrell spent asphyxiating in a single pair of handcuffs, the panel opinion addressed the disputed fact that Officer Denny added a second pair of handcuffs before the second ambulance arrived,

> officers added the second pair of handcuffs at that point "because they believed Day was having a medical problem," not because they specifically understood the handcuffs were causing his breathing difficulty. Furthermore, even if the addition of the second pair of handcuffs is

> evidence that the officers be-came aware that the first pair was restricting his breathing, it would then also be evidence that the officers did consider Day's medical condition and modified the handcuffs when it became apparent, they were causing a problem.

App. P. 19-20a.

The brief in opposition claims this view of the panel's decision is "a faulty premise" for this petition. Opposition at 14. It is not. The premise of this petition is that the panel specifically raised "knowledge" as the dispositive evidentiary issue. App. P. 17a.

The premise of the petition is that dispositive evidence demonstrating "knowledge" determines the result of the court's qualified immunity analysis. Here, the evidence Day and Morgan relied on to demonstrate "knowledge" was not enough to qualify Terrell's asphyxiation as the violation of a clearly established right. The lack of evidence came down to one thing: "[Terrell] never complained that the tightness of the handcuffs was restricting his breathing." App. P. 17a.

Absent the officer's "knowledge," it was not clearly established that Terrell had a right to have

his difficulty breathing considered by officers in their handcuff and adverse body position. The panel concluded "knowledge" was not shown with evidence the officers had positional asphyxiation training, App. P. 5a, another reasonable law enforcement officer on the scene had knowledge of Terrell's medical distress, App. P. 7a, video showed officers nearby and observant, or the autopsy's confirmation that handcuff positioning contributed to his death, App. P. 8a.

The brief in opposition primarily offers the first EMT's partial evaluation as a red herring. Medics did not properly evaluate Terrell. Video evidence clearly demonstrates that Terrell's condition was adverse at that time because he could not stand unassisted to be evaluated. Instead, the medics carelessly allowed Sargent Wooten to sign away Terrell's right to receive medical treatment and transportation to the hospital for his medical condition.

Relying on the partial medical evaluation of the first set of EMTs is inappropriate, particularly at the summary judgment stage. The video evidence as well as the deposition testimony of those EMTs demonstrates that Terrell was not fully evaluated. Because of the egregious actions of these EMTs, there is a pending medical malpractice lawsuit

against them in a companion case before the Indiana Department of Insurance. The EMT was complicit in Terrell's death.

There is sufficient evidence demonstrating knowledge here. Terrell said "I can't breathe!" and became unresponsive, slowly dying in the care, custody, and control of the officers over the course of forty-eight minutes. The officers' training involving positional asphyxiation was sufficient to give them knowledge that Terrell was at risk of death based on his winded condition in tight handcuffs and restrictive position on the pavement. More evidence demonstrating knowledge is that another officer arrived on scene and immediately recognized Terrell was in medical distress, dead, or dying. The autopsy is evidence confirming that the handcuffs played a serious role in causing Terrell's death. The dispositive issue of whether Terrell had a "known injury or condition" is shown with this evidence, and it should not be dispositive whether Terrell also stated the handcuffs as the cause of his death.

Section 1983 is a vital part of the law in this country because it authorizes individuals to enforce their federal constitutional rights against state officials acting under color of law. This decision below disrupts the balance between the interests of the officer, society, and the constitutionally injured

individual. The decision below unfairly heightens the non-movant plaintiff's evidentiary burden to overcome the qualified immunity defense at the summary judgment stage.

Prior to the decision below, Seventh Circuit precedent clearly established an arrestee's right to have a known injury or condition considered, together with other circumstances, by officers when handcuffing. *Rooni v. Biser*, 742 F.3d 737, 742 (7th Cir. 2014); *Stainback v. Dixon*, 569 F.3d 767, 773 (7th Cir. 2009); *Tibbs v. City of Chicago*, 469 F.3d 661, 666 (7th Cir. 2006). The decision below significantly narrows the provability of the "knowledge" element of this right.

Prior to the decision below, the District Court found that "assuming the Plaintiffs' version of events occurred, reasonable officers would know they were violating an established right by leaving [Terrell]'s hands cuffed behind his back after he complained of difficulty breathing." App. P. 46a. The District Court viewed the facts in a light most favorable to Terrell and found that the evidence supported a finding that the officers had knowledge that the arrestee's inability to breathe was dangerous and that the handcuffs were causing his medical distress. App. P. 46a.

Previously, an officer's knowledge was of an injury or medical condition could be shown with evidence that it was "apparent or []otherwise []made known to him." *Stainback*, 569 F.3d at 666. The panel decision altered this dispositive evidentiary burden identified in *Tibbs v. City of Chicago*, 469 F.3d 661 (7th Cir. 2006), *Rooni v. Biser*, 742 F.3d 737 (7th Cir. 2014), and *Stainback v. Dixon*, 569 F.3d 767 (7th Cir. 2009),

The Seventh Circuit's erosion of Terrell's Fourth Amendment right in favor of qualified immunity sets a dangerous precedent. In this case, allowing a suspect to lie on top of metal handcuffs, on pavement for an extended period of time, is tantamount to torture. A shockingly long forty-eight minutes of police torture by positional asphyxiation on the city streets of Indianapolis killed Terrell Day. The coroner specifically identified that the handcuff positioning, coupled with obesity, compromised Terrell's respiratory system and stopped his heart. Not only did the Sargent Wooten and Officer Denny escape criminal charges, the Seventh Circuit panel's reversal set them free from civil liability as well.

Asphyxiating an arrestee in police restraints despite his cries for air is torture. "They are crimes not only against law but against humanity." *United States v. Curry*, 965 F.3d 313, 346 (4th Cir. 2020).

Immunizing officers from such conduct sets a dangerous precedent. It restrains our constitutional protections from a slow and torturous in-custody death, and fails to deter torture by law enforcement officers.

The Seventh Circuit discredited relevant evidence that Officer Denny and Sgt. Wooten knew or should have known the handcuffs were causing Terrell to asphyxiate. The qualified immunity analysis should have analyzed all "the facts that were knowable to the defendant officers" at the time they engaged in the conduct in question. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (quoting *White v. Pauly*, 196 L. Ed. 2d 463, 466 (2017) (per curiam).

Despite designating time-stamped video evidence of the entire encounter, several of the panel's factual findings are disproved by video evidence. Furthermore, several of the panel's factual findings cut against the district court's factual findings. Overall, this case should have been decided by the trier of fact. The Seventh Circuit reached the issue of qualified immunity by resolving disputed facts in a light most favorable to Sargent Wooten and Officer Denny.

II. Other circuits evaluate evidence showing an officer's "knowledge" without it being dispositive whether the asphyxiating arrestee specifically identifies the cause of his asphyxiation.

The Sixth Circuit found that an officer's positional asphyxiation training "alerted them to the potential danger of this particular type of excessive force." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) (citing *Hope v. Pelzer*, 536 U.S. 730, 744-45 (2002)). The *Champion* court explained it was immaterial whether officers intended no harm and even "may have believed they were helping him," because the qualified immunity analysis is objective and the officers' motive is "irrelevant." *Id.*

The Ninth Circuit's found that an officer's knowledge that his force is causing an arrestee to asphyxiate can be based on positioning and restraint. *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003). The Ninth Circuit relied on *Drummond* in *Slater v. Deasey*, 776 Fed. Appx. 942 (9th Cir. 2019) to hold that a reasonable person should know that the *position* officers placed the arrestee in, coupled with the pressure of the restraint, might cause him to asphyxiate and involves a degree of force that is greater than reasonable.

The Tenth and Eleventh Circuit similarly take the position that an officer's training and certain circumstances may demonstrate his knowledge that his force is causing an arrestee to asphyxiate. *See Wilson v. Meeks*, 52 F.3d 1547, 1556 (10th Cir. 1995) (finding the officers took deliberate actions that delayed medical treatment which they knew would exacerbate the arrestee's medical problem); *see also Williams v. Matthew Sirmons*, 307 F. App'x 354, 359-60 (11th Cir. 2009) (finding that a reasonable officer would know that the arrestee was under medical duress under the circumstances); *see also Cottrell v. Caldwell*, 85 F.3d 1480, 1491-92 (11th Cir. 1996) (finding that only officers not trained to recognize signs of asphyxiation would be entitled to qualified immunity because they lack knowledge about the risk of an arrestee's asphyxiation).

III. This case is a good vehicle for removing the judicial requirement of the "Clearly Established" prong of the Qualified Immunity analysis.

The "clearly established" prong stands for the proposition that a trained law enforcement officer will not know he/she is violating someone's constitutional right unless case law previously made it clear that established actions will violate the

constitution in an established factual scenario.[2] Claiming that an individual's constitutional right was not "clearly established" became easier after the grant of qualified immunity in *Pearson v. Callahan*, 555 U.S. 223, 230 (2009), because it gave courts more flexibility in granting qualified immunity. Since then, factual circumstances are analyzed on an increasingly granular level.

The "clearly established" prong of the qualified immunity analysis essentially gives consideration to a law enforcement officer's subjective notion of fault.[3] For example, the officers' argument below was that they were unaware their actions violated the Fourth Amendment because there was that no case law clearly establishing either (1) "a right which prohibited a non-resisting obese detainee from laying

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[2] The Supreme Court determined that a "reasonable official" would not understand the illegality of his/her conduct unless it was "clearly established" and "defined with specificity" by the Supreme Court and among the circuits. *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019); *Williams v. Strickland*, 917 F.3d 763, 769 (4th Cir. 2019).

[3] Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 589, 667-70 (1998); Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1504 (1999).

on his back and on top of his handcuffs on pavement after medical personnel informed the officers that he had no medical issues and could be transported to jail," or (2) a "right for a suspect to be taken to a hospital despite being examined by medical professionals, being cleared for transport to jail, and never having requested to go to the hospital." App. P. 44a.

The brief in opposition claims removing the "clearly established" prong would upend forty years of settled law. Opposition at 26. It would not. Case law continually shifts what factual scenarios are "clearly established" constitutional violations. The premise of this petition is that it is practically impossible and highly unworkable to create a factual mold for a "clearly established" constitutional right. This petition asks that the judicially required and interpreted "clearly established" prong of the qualified immunity analysis be eliminated.

The judicially created "clearly established" prong of the qualified immunity analysis operates to erode constitutional protections based on factual nuances, as they are perceived by the officer alleged to have violated the constitution. In application, "clearly established" rights do not follow a clear or established fact pattern. No two cases present the

same set of facts. Yet, the grant or denial of qualified immunity hinges on factual variations in case law.

The brief in opposition points to a single sentence in the District Court's analysis, claiming the Fourth Amendment was not violated because the initial seizure was reasonable. Opposition at 26. This overlooks the crux of the Fourth Amendment excessive force claim below—that the officers killed Terrell by using objectively unreasonable force under the totality of the circumstances. Terrell would be alive today if the officers acted reasonably and allowed him to be transported to the hospital. Instead, Sargent Wooten cut short the medical exam by signing away Terrell's right to medical treatment and dropped his body in the sun, on asphalt, with tight metal handcuffs digging into his back; a position restricting his breathing so that he slowly asphyxiated. App. P. 6a. Officers treated Terrell like a disposable overweight teenager.

The brief in opposition claims Justice Barrett's participation in the panel decision is so inconvenient for this Court that it should detract from the merits of the petition. Opposition at 28-29. Justice Barrett's elevation is not something any of the parties had control over. Her documented intention to recuse herself from cases such as this is

appropriate. Sargent Wooten and Officer Denny point to nothing other than convenience.

This is an appropriate time for change. There is an ongoing national conversation sparked by outrage, protests, and riots about how qualified immunity unfairly shields law enforcement officers from liability for use of force. Congress introduced a variety of bills to end or modify the judicially created doctrine of qualified immunity. The call to end qualified immunity resonated with lower courts who frequently grapple with applying the doctrine.[4]

The country has numerous cases wherein police officers asphyxiate citizens they are sworn to

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[4] *See e.g.*, *Briscoe v. City of Seattle*, No. C18-262 TSZ (W.D. Wash. Sept. 1, 2020) ("qualified immunity jurisprudence is due for a major overhaul."); *Peterson v. Martinez*, No. 3:19-cv-01447-WHO (N.D. Cal. Aug. 12, 2020) (referring to the *Jamison* opinion as an "excellent opinion . . . describing the unhappy development of qualified immunity jurisprudence"); *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA (S.D. Miss. Aug. 4, 2020) ("Judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called 'qualified immunity.' In real life it operates like absolute immunity.").

protect with excessive restraints and rarely face criminal charges. Section 1983 is a vital tool for civil accountability, but its effectiveness is increasingly limited by the proverbial "snowball" effect of Qualified Immunity. The instant case is a prime example. Judicial interpretation of the factual nuances here absolved the officers from liability.

Terrell spent forty-eight minutes dying a slow, torturous death. The devastating footage, like the footage of too many others, shows a group of white law enforcement officers excessively restraining a non-combative African American young man accused of committing a minor infraction. Additionally, there were two security guards present when the initial encounter transpired; the two officers testimony differed. The Security guard who reported the incident testimony was disputed by the video surveillance evidence and the second security Officer on the scene.

Trained law enforcement officers watched him die with knowledge that their actions were killing him. Terrell said "I can't breathe," but his inability to say the words, "because of handcuffs," should not determine whether his Fourth Amendment right was "clearly established." Without accountability, this case opens the door to legally permissible police torture on our city streets.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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