No. 20-5846

In the Supreme Court of the United States

Anthony C. Green,

Petitioner,

v.

Kelly Lake, *et al.*,

Respondents.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Anthony C. Green petitions for rehearing on writ of certiorari to the United States Court of Appeal for the Eighth Circuit in *Green v. Lake, et al.* **19-2001**. **U.S. Sup. Ct. No. 20-5846.** Pursuant to U. S. Supreme Court Rule 44, Petitioner hereby petitions this Court for rehearing in the above-entitled matter. The grounds are so limited to the intervening circumstances of substantial or controlling effect that was not previously presented. The Petition for Rehearing is prepared, filed and served in good faith and not for delay. The following grounds were not presented in the original petition to this Court:

1. Defendants were not entitled to Qualified Immunity

2. Excessive Force and Failure to Protect/Intervene

INTRODUCTION

This case involves the scope and strength of the bedrock constitutional principle that mandates that the deliberate misconduct for those assigned to care for the civilly committed be assessed under an objective reasonableness standard. The lower Courts have so departed from the bedrock decision set by this Court in *Kingsley* that rehearing is necessary and appropriate. *Kingsley* was also a case that dealt with a person who was civilly committed. For the reason argued below, Petitioner respectfully requests that this Court grant a rehearing in this matter.

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REASONS FOR GRANTING THE PETITION FOR REHEARING

I. The Lower Court's Ruling Conflicts With The *Kingsley* test.

Individuals who have been civilly committed involuntarily, have a "substantive due process right to reasonably safe custodial conditions." *Elizabeth M. v. Montenez,* 458 F. 3d 779 (CA8 (Neb.) Feb. 15, 2006). Excessive force claims are governed by an objectively unreasonable standard set forth in *Kingsley*. If this Court were to analyze the *Kingsley* test, it would find a reasonable fact finder would conclude Defendants actions unreasonable and in violation of the Constitution. A civil detainee is "entitled to protections at least as great as those afforded to a civilly committed individual and at least as

great as those afforded to an individual accused but not convicted of a crime." *Jones v. Blanas,* 393 F. 3d 918, 932 (9th Cir. 2004).

There is also a line of authority holding involuntarily civilly committed individuals retain the right to safe conditions and the right to freedom from bodily restraint, both of which are liberty interests protected by the due process clause of the Fourteenth Amendment. *See Youngberg v. Romeo*, 457 U.S. 307, 315-16, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (addressing substantive due process challenge brought on behalf of adult with significant disabilities who had been committed to state facility where he was repeatedly injured and physically restrained); *Hydrick* v. *Hunter*, 500 F.3d 978, 997 (9th Cir. 2007), *cert. granted, judgment vacated on other grounds,* 556 U.S. 1256, 129 S. Ct. 2431, 174 L. Ed. 2d 226 (2009) (holding the Fourteenth Amendment governs excessive force claims brought by the "civilly confined" and "requires civilly committed persons not be subjected to conditions that amount to punishment, within the bounds of professional discretion") (internal citations omitted). Here, too, the fit is imperfect, as Green was committed under § 253B and was in a facility when the alleged use of force was committed by facility employees, and law enforcement officers. ***Cf.*** *Gray v. Cummings*, 917 F.3d 1, 4 (1st Cir. 2019) (analyzing under the Fourth Amendment, without considering whether the Fourteenth Amendment applies, excessive force claim brought against officer who tased patient while attempting to return her to hospital to which she had been involuntarily committed under state mental health provision and from which she had absconded); *Lanman v. Hinson*, 529 F.3d 673, 681-82 (6th Cir. 2008) (decedent voluntarily admitted to facility was entitled "to freedom from undue bodily restraint in the course of his treatment" under the Fourteenth Amendment, and "[b]asing this right in substantive due process, rather than the Fourth Amendment . . . . gives proper deference to the decisions of institutional professionals concerning medical treatment.").

Nonetheless, and ultimately, the Fourteenth Amendment appears to be the proper vehicle for plaintiffs' excessive force claim in the absence

of clear authority to the contrary. Notably, following the Supreme Court's decision in *Kingsley*, the same objective reasonableness standard should apply here regardless of whether Petitioner's claim arises under the Fourth or Fourteenth Amendment, as "a pretrial detainee [pursuing an excessive force claim under the Fourteenth Amendment] need only show the force purposely or knowingly used against him was objectively unreasonable." 135 S. Ct. at 2473. Evaluating an excessive force claim brought by an involuntarily committed mental health patient, the Sixth Circuit explained, *Kingsley* rendered any distinction between the Fourth and Fourteenth Amendments' excessive force standards "purely academic" because, "[i]n light of *Kingsley*, under either amendment, the court would employ the same objective test for excessive force." *Clay v. Emmi*, 797 F.3d 364, 369 (6th Cir. 2015); *Kingsley,* 135 S. Ct. at 2479 (Alito, J., dissenting) ("It is settled that the test for an unreasonable seizure under the Fourth Amendment is objective, so if a pretrial detainee can bring such a claim, it apparently would be indistinguishable from the substantive due process claim that the Court discusses.") (citing *Graham*, 490 U.S. at 397). ***Cf.*** *Castro*, 833 F.3d at 1069 ("Under *Kingsley*, it does not matter whether the defendant understood that the force used was excessive, or intended it to be excessive, because the standard is purely objective.") (assessing *Kingsley's* impact on pretrial detainee's failure to protect claim under the Fourteenth Amendment).[1]

For the reason set forth, this Court should grant the Petition for Rehearing.

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[1] *Robinson v. Cty. of Shasta,* 384 F. Supp. 3d 1137 (U.S. Dist. Ct. for the E. Dist. of Cal. May 1, 2019) motion granted in part and denied in part. *See also Smith v. Oreol,* 2018 U.S. Dist. LEXIS 226670 (U.S. Dist. Ct. for the Cent. Dist. of Cal. Marc. 20, 2018) motion to dismiss denied, and action allowed to proceed.

II. DEFENDANTS WERE NOT ENTITLED TO QUALIFIED IMMUNITY.

Skrtich[2] holds that qualified immunity is unavailable to the defendant alleged to have used force in violation of the Eighth Amendment. 280 F.3d at 1301. Two steps, in other words, are collapsed into one: to allege a defendant violated a constitutional right is to allege that the right was clearly established, "because the use of force 'maliciously and sadistically caused harm' is clearly established and in violation of the Constitution." *Id.* "To receive qualified immunity, the government official must first prove he was acting within his discretionary authority." *Gonzalez,* 325 F.3d at 1234. It is clear, however " defendants were acting outside their discretionary authority[]" as correctional officers at the time of the challenged actions so "the burden shifts to [MSOP and Carlton County Defendants] to show qualified immunity is not appropriate." *Id.; see also Townsend v. Jefferson Cnty.,* 601 F.3d 1152, 1158 (11th Cir. 2010). To meet this burden, Fuqua must prove both that "(1) the defendants violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland,* 370 F.3d 1252, 1264 (11th Cir.2004); *Crosby v. Monroe Cnty.,* 394 F.3d 1328, 1332 (11th Cir. 2004) (same); *Youmans,* 626 F.3d at 562 (citation omitted) ("[O]nce a defendant raises the defense [of qualified immunity and demonstrates he was acting within his discretionary authority], the plaintiff bears the burden of establishing both that the defendant committed a constitutional violation and that the law governing the circumstances was clearly established at the time of the violation."). This court is "free to consider these elements in either sequence and to decide the case on the basis of either element that is not demonstrated." *Id.; Rehberg v. Paulk,* 611 F.3d 828, 839 (11th Cir. 2010) (citing *Pearson,* 555 U.S. at 241-42) (holding that the court

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[2] *Skrtich v. Thornton*, 280 F.3d 1295 (11th Cir. 2002); *see also Reed v. White,* 2020 U.S. Dist. LEXIS 159639 (U.S. Dist. Ct. for the N. Dist. of Ala., Northeastern Div. Sept. 2, 2020)

may analyze the elements attendant to qualified immunity "in whatever order is deemed most appropriate for the case.").

Defendants were not entitled to qualified immunity, and this Court must hold that they are not entitled to qualified immunity. This Court should grant the petition for rehearing. *Perry v. Bone,* 2020 U.S. Dist. LEXIS 42481 (U.S. Dist. Ct. for the Mid. Dist. of Ala., S. Div. Marc. 11, 2020) *defendants motion on qualified immunity denied without prejudice. See also Sherman v. Quest,* 2020 U.S. Dist. LEXIS 100686 (U.S. Dist. Ct. for the S. Dist. of Fla. June 8, 2020) qualified immunity in summary judgment motion on excessive force claim denied.

III. Excessive Force and Failure to Protect/Intervene.

"Pretrial detainees (unlike convicted prisoners) cannot be punished at all . . . ." "After *Kingsley*, then, if force used against a pretrial detainee is more severe than is necessary to subdue him or otherwise achieve a permissible governmental objective, it constitutes 'punishment' ant is therefore unconstitutional."[3] *See also Ferreira v. United States,* 2020 U.S. Dist. LEXIS 120868 (U.S. Dist. Ct. for the S. Dist. of Fla. July 6, 2020) defendants motion for summary judgment denied, and case proceed to trial. The facts alleged by Petitioner regarding excessive force carried out by Carlton County Defendants and MSOP Defendants, as Petitioner was handcuffed, constitutes excessive force,

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[3] *Piazza v. Jefferson County, Alabama,* 923 F.3d 947, 952 (11th Cir. 2019); *see also Hadley v. Gutierrez,* 526 F.3d 1324, 1334 (11th Cir. 2008) ("punching a non-resisting criminal suspect for no apparent reason other than malice . . . is not protected by our constitution"). Likewise, verbal defiance coupled with the failure to follow an order does not support the use of gratuitous force, *see Sawyer v. Asbury,* 537 Fed. Appx. 283, 294-95 (4th Cir. Aug. 13, 2013), *abrogated on other grounds as recognized in Brooks v. Johnson,* 924 F.3d 104 (4th Cir.2019), and a detainee's single strike at an officer may "not necessarily justify the deputy responding with two to three punches or necessitate that the other officers apply additional force" to the detainee. *Cortes v. Broward County, Florida,* 758 Fed.Appx. 759, 765 (11th Cir. Dec. 18, 2018).

and therefore in violation of the Constitution. If an officer, whether supervisory or not, fails to intervene or refuses to take reasonable steps to protect the victim of another officer's use of excessive force, the officer may be held liable for the other officer's malfeasance under § 1983. *See Hadley v. Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008) (citing *Velazquez v. City of Hialeah*, 484 F.3d 1340, 1341 (11th Cir. 2007)). The non-intervening officer must, however, have been in a position to intervene yet failed to do so. *See id.* at 1331 (citation omitted).

As to the first inquiry, "the defendant must possess a purposeful, knowing or possibly reckless state of mind[,]"accidental or negligent conduct will not suffice. As for the second question, "a pretrial detainee need only show that the force purposefully or knowingly used against him was objectively unreasonable." *Id.* at 2473. This standard cannot be applied mechanically, and "[a] court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *See also Richmond v. Huq,* 885 F. 3d 928 (CA6 (Mich.) Marc. 22, 2018) *summary judgment rev. in part, aff'd in part and rem.*; *see also Ayarzagoitia v. Christensen,* 2020 U.S. Dist. LEXIS 8741 (U.S. Dist. Ct. for the Dist. of Idaho, Jan. 16, 2020) claim allowed to proceed on failure-to-protect. In *Castro*, the Ninth Circuit held a failure to protect claim, also analyzed under the Eighth Amendment for convicted prisoners, involves an objective inquiry when brought by a pretrial detainee. In *Gordon v. County of Orange*, the Ninth Circuit concluded "claims for violations of the right to adequate medical care" are governed by the Eighth Amendment deliberate indifference standard when brought by a convicted prisoner, "and must be evaluated under an objective deliberate indifference standard" under the Fourteenth Amendment when brought by a pretrial detainee. 888 F.3d 1118, 1125 (9th Cir. 2018.)

Therefore, based on the arguments set forth above, this Court should grant the Petition for Rehearing. This Court should not allow Defendants to get away with violating Petitioner's clearly established

Constitutional rights. Furthermore, this Court should not allow Defendants to violate the Constitutional rights of any civilly committed individual within their custody/jurisdiction.

CONCLUSION

Qualified immunity is not automatic and a bald assertion of discretionary authority is not enough. *Estate of Cummings*, 906 F.3d at 940 (CA11 (Al.) Oct. 2, 2018); *see also Davis v. Dieudonne,* 2020 U.S. Dist. LEXIS 10676 (U.S. Dist. Ct. for the S. Dist. of Fla. Jan. 21, 2020) *motion granted in part and denied in part.* It has been held in the Eleventh Circuit that summary judgment on statutory immunity was improper where genuine issues of material fact regarding whether officers acted within wanton and willful disregard for the rights and safety of the arrestee. *Alexandre v. Ortiz,* No. 18-12368, 789 Fed. Appx. 169, 2019 U.S. App. LEXIS 30329, 2019 WL 5076354, *3 (11th Cir. 2019)(per curiam)(citing *Furtado v. Yun Chung Law,* 51 So. 3d 1269, 1277 (Fla. 4th DCA2011)(quotations omitted); and *Thompson v. Douds*, 852 So.2d 299, 310 (Fla. 2d DCA2003). Since 2002, the Eleventh Circuit has made clear qualified immunity defense is not available in cases involving the unlawful and excessive use of force, in violation of the Eighth Amendment, since the law has been clearly established "correctional officers could not use force maliciously or sadistically for the very purpose of causing harm." *Skrtich, supra,* (citing *Whitley*, 475 U.S. at 320-21). This case should be no different from the Eleventh Circuit with the fact that Petitioner is a "pretrial detainee" "civilly committed" and may not be punished, thus making this case all the more reason to grant the Petition for Rehearing.

Based on the relevant facts, a "reasonable jury could conclude that [the officers, Defendants] acted with malice and intended to harm [Green] when they used force against him." This Court must determine whether the requirements of a §1983 excessive force claim brought by a civilly committed person (Petitioner Anthony C. Green) in Defendants custody satisfies the subjective standard or the

objective standard. This Court must conclude with respect to the question that the relevant standard is objective not subjective. This Court must now consider the question before it here- the Defendant's state of mind with respect to the proper interpretation of the force (a series of events in the world) that the defendant deliberately (not accidentally or negligently) used. In deciding whether the force deliberately used is, constitutionally speaking, ``excessive,'' should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to this question that this Court must hold courts must use an objective standard. In short, this Court must agree the test set forth in *Kingsley*, that a pretrial detainee need only show that the force purposely or knowingly used against him was objectively unreasonable.

The question before this Court is whether Petitioner's (a pretrial detainee/civilly committed individual) due process rights are violated when "the force purposely or knowingly used against him [is] objectively unreasonable." This Court's cases hold that the intentional infliction of punishment upon a pretrial detainee may violate the Fourteenth Amendment. In light of these cases, this Court must agree that ``the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.'' *Graham v. Connor*, 490 U.S. 386, 395, n. 10, 109 <*pg. 432> S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (citing *Bell, supra,* at 535-539, 99 S. Ct. 1861, 60 L. Ed. 2d 447). *Bell* forbids States to take any harmful action against pretrial detainees that is not ``reasonably related to a legitimate goal.'' *Id.,* at 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447.

Re-Executed on August 15th, 2022

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CERTIFICATE FOR PETITION FOR REHEARING UNDER RULE 44 OF THE U.S. SUPREME COURT

Petitioner hereby files and serves this Certificate pursuant to Rule 44 of the United States Supreme Court. The grounds are so limited to the intervening circumstances of substantial or controlling effect that was not previously presented. The attached Petition for Rehearing is prepared, filed and served in good faith and not for delay. The following grounds were not presented in the original petition to this Court:

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