No. 22-589

In the Supreme Court of the United States

DARYL HOLLOWAY,

Petitioner,

v.

THE CITY OF MILWAUKEE, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS CITY OF MILWAUKEE, DANIEL RUZINSKI, WILLIAM HEROLD, MICHAEL CARLSON, GREGORY NOWAKOWSKI, AND JOSEPH LAGERMAN

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QUESTIONS PRESENTED

1. Whether the Court should intervene and address a supposed ambiguity among the circuits on whether an identification procedure violated the Due Process Clause?

2. Whether the Court should intervene and reverse the doctrine of qualified immunity?

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The opinion of the Seventh Circuit is available at *Holloway v. City of Milwaukee*, 43 F.4th 760 (7th Cir. 2022) and is attached to Plaintiff's Petition as Appendix A. The opinion of the district court's order granting summary judgment in favor of defendants is not reported, but can be located at *Holloway v. City of Milwaukee*, 2021 WL 4459876 and is attached to Plaintiff's Petition as Appendix B. The Judgment from the United States District Court for the Eastern District of Wisconsin is attached to Plaintiff's Petition as Appendix C.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was filed on August 8, 2022. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1 (Due Process clause), in relevant part

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of 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.

42 U.S.C. § 1983, in relevant part

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

SUMMARY STATEMENT OF POSITION

Darryl Holloway (hereinafter "Holloway") was charged and convicted of two criminal counts of sexual assault that occurred in Milwaukee in the summer of 1992. The two victims, G.D. and M.G., provided Milwaukee police with descriptions of their attacker independent of each other. Pet'r. App. 21.

Holloway was brought to a police station, where Detective Joseph Lagerman took Holloway's statement, read him the charges for which he was under arrest, and advised him of his *Miranda* rights. Pet'r. App. 29. Holloway continually denied involvement in the crimes and willingly volunteered to stand in a lineup, provide samples of blood, hair, and saliva, and gave alibi information for the relevant dates. Pet'r. App. 29.

Holloway was placed in a lineup on September 30, 1992, at approximately 7:50 P.M. at the Milwaukee Police Administration Building with four other men pulled from the Milwaukee City Jail. Pet'r. App. 29. The four other men – called "fillers" – were chosen by the late Detective William Stawicki and Detective William Herold. Pet'r. App. 29. The fillers were supposed to be of similar height, build, facial features, and skin tone as Holloway. Pet'r. App. 29. Holloway was placed in position #2 at the direction of his public defender who made no objection to the lineup that day. Pet'r. App. 30. Besides a visual lineup, the detectives conducted a voice lineup. Pl. App. 30.

At the lineup, G.D. identified Holloway as the man who assaulted her. Pet'r. App. 30. G.D. told Herold she was "absolutely sure" that Holloway was the correct

individual based on his voice and general physical characteristics, although G.D. admitted she never saw her attacker's face and did not choose Holloway from a photo array the day prior. Pet'r. App. 30. Despite M.G.'s statement that her attacker covered his face below his eyes, M.G. also identified Holloway as the person who assaulted her during the in-person lineup. Pet'r. App. 31. M.G. told Detective Gregory Nowakowski "she was 'positive' that Holloway was the person who assaulted her, and that he looked 'exactly like' her rapist." Pet'r. App. 31.

Holloway moved to suppress the lineup as suggestive and overall tainted, but Milwaukee County Circuit Court Judge Jeffrey Wagner, who presided over Holloway's pretrial proceedings and subsequent trial, denied the motion stating the lineup was conducted in a "fair and impartial manner, using the necessary means to avoid any type of suggestiveness whatsoever." Pet'r. App. 32.

After requests for additional DNA testing by Holloway's post-conviction counsel, the Milwaukee County District Attorney's office agreed to have additional DNA testing performed on the rape kit samples from the assaults on M.G. and G.D. Pet'r. App. 38-39. That new testing demonstrated that Holloway may not have been the source of the seminal fluid. *Id.* After another round of testing conducted by a private lab, Holloway and the State agreed that this evidence was "exculpatory in nature." Pet'r. App. 38. The parties agreed that had this evidence been available at trial, "a reasonable probability exists that a jury would have reached a different result" and that, in light of the new evidence, "it would be difficult for the State to

provide guilty beyond a reasonable doubt in a retrial." Pet'r. App. 39.

On October 4, 2016, Judge Wagner, the same judge who had sentenced Holloway 23 years earlier, vacated Holloway's convictions and rendered him innocent as a matter of law. Pet'r. App. 39.

Holloway filed a lawsuit against the City of Milwaukee, and police officer defendants (hereinafter "the City") under 42 U.S.C. § 1983. Pet'r. App. 40. Notably, Holloway argued that the September 30, 1992, lineup was unduly suggestive because G.D. was shown a four-person photo array containing Holloway's photo on September 29, but he was the only person from the photo array in the lineup on September 30, thus violating his due process right to a fair trial. Pet'r. App. 43.

The district court granted summary judgment in favor of the City on all claims. Pet'r. App. 66. The district court found that the September 30 lineup met the criteria to withstand a challenge to due process as it was not unduly suggestive, and that it did not violate Holloway's constitutional rights. Pet'r. App. 8, 44, 46. Further, the district court found that G.D.'s identification was not impermissible despite her viewing Holloway's photo in a photo array one day prior to the lineup. Pet'r. App. 50.

The Seventh Circuit affirmed the district court's decision granting summary judgment in favor of the City of Milwaukee on August 8, 2022. Pet'r. App. 2. Notably, however, the court's decision emphasized that, notwithstanding the possibility that identification procedures were unduly suggestive and violated Holloway's constitutional rights, the officers were protected by qualified immunity. Pet'r. App. 8-9.

ARGUMENT

I. IDENTIFICATION PROCEDURES USED IN THIS CASE DO NOT WARRANT THE INTERVENTION OF THIS COURT THROUGH THE GRANTING OF CERTIORARI

Holloway argues that he is entitled to a grant of certiorari in this matter because the manner in which he was identified prior to trial violated his constitutional and due process rights. In describing the due process requirements for out-of-court identifications, such as lineups, the Seventh Circuit holds:

> With respect to testimony regarding suggestive out-of-court identifications, the Due Process Clause is concerned primarily with the substantial likelihood of misidentification. *Biggers,* 409 U.S. at 198, 93 S.Ct. 375. Thus, the Supreme Court has observed that "[t]he admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." *Manson v. Brathwaite,* 432 U.S. 98, 106, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Therefore, to determine whether the admission of testimony regarding an out of court identification offends the defendant's due process rights, we conduct a two-step analysis. *United States v. Rogers,* 387 F.3d 925, 936 (7th Cir.2004). First, the defendant must establish that the identification procedure was unduly suggestive. *Id.* If the defendant establishes this factor, we then must deter-

> mine whether, under the totality of the circumstances, the identification was nonetheless reliable. *Id.*

United States v. Hawkins, 499 F.3d 703, 707 (7th Cir. 2007). This is effectively the same standard as applied by other courts of appeal, meaning that there is not a notable split between the circuits on this issue such that would warrant this Court's intervention. Specifically, the Sixth Circuit notes:

> In analyzing whether a defendant was denied due process of law, we conduct a two-step inquiry. *Howard v. Bouchard,* 405 F.3d 459, 469 (6th Cir.2005), *cert. denied,* 546 U.S. 1100, 126 S.Ct. 1032, 163 L.Ed.2d 871 (2006). First, we assess whether the identification was unnecessarily suggestive. *Id.* If so, we then consider whether the evidence was nevertheless reliable despite the impermissible suggestiveness of the identification procedure. *Id.*

Haliym v. Mitchell, 492 F.3d 680, 704 (6th Cir. 2007).

In analyzing the lineup at issue here to determine if Holloway's due process rights were violated in light of the holding of multiple courts of appeal, it must be shown that the lineup was both unduly suggestive and that that fact made the identification unreliable at trial. As the Seventh Circuit holds: "Simply saying that a witness was shown a suggestive photo array or lineup and later testified is not enough. That [a defendant] was later exonerated does not, without more, make his case that a due process violation has occurred." *Alexander v. City of S. Bend*, 433 F.3d 550, 556 (7th Cir. 2006). This means that the fact that

Holloway's conviction was later vacated does not on its own establish that the lineup at issue here violated his right to due process. Rather, he must also show that the testimony resulting from this lineup was fundamentally unreliable.

Here, the Seventh Circuit found that the identification procedure used in this matter may have been potentially unduly suggestive in the eyes of a jury, but did not reach any conclusion as to whether this rendered the identification and testimony thereof as unreliable in the context of a jury's determination of Holloway's guilt or innocence. *Holloway v. City of Milwaukee*, 43 F.4th 760, 767 (7th Cir. 2022). The District Court did find the testimony resulting from the lineup reliable based on "an independent review of the trial transcript[.]" *Holloway v. City of Milwaukee*, No. 19-CV-1460, 2021 WL 4459876, at *11 (E.D. Wis. Sept. 29, 2021), *aff'd,* 43 F.4th 760 (7th Cir. 2022). This determination was reached on the basis of the factors for reliability laid out by the Court in *Neil v. Biggers*, with the Court at the time writing:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

409 U.S. 188, 199–200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972). In this case, using the factors outlined in *Biggers*, the testimony and identification of Holloway

was reliable. This is further evident when considering the fact that Holloway's conviction was eventually vacated on the basis of DNA evidence, and not in any way because of the lineup and identification at issue.

Given that no finding has been reached that the lineup identification and testimony thereof at issue here was unreliable, it cannot and has not been established that the lineup here violated Holloway's due process rights. As such, summary judgment was appropriate in this matter and this Court should reject Holloways request for certiorari.

Furthermore, Holloway overstates the split. *Perry v. New Hampshire,* 565 U.S. 228, 132 S.Ct. 716 (2012) clarified *Biggers*. To suggest the existence of a deep and mature jurisdictional split, Holloway cites over a dozen cases that were decided before this Court's 2012 opinion in *Perry*. Those older cases are relatively uninstructive: because they were decided prior to *Perry*, they give little indication about whether the jurisdictions that followed Holloway's favored approach would still do so today. The true nature of the current split can only be divined by focusing on the cases decided after *Perry*. This case is a poor vehicle for considering the question presented as the United States Court of Appeals for the Seventh Circuit's resolution of the case is correct under *Perry* and *Biggers*.

II. CERTIORARI SHOULD ALSO BE DENIED WITH RESPECT TO ISSUES OF QUALIFIED IMMUNITY

A. Qualified Immunity Should Not Be Reconsidered

The doctrine of qualified immunity as understood today, traces its roots in this Court back to *Pierson v. Ray*, 386 U.S. 547 (1967). The Court in *Pierson* found that law enforcement officers could assert a defense of good faith in a 42 U.S.C. § 1983 action, just as officers could use common law defenses. *Id.* at 554. The Court in *Pierson* noted that Congress chose not to specifically abolish common law immunities, although it had the power to do so. *Id.* at 555.

The Court further clarified that the standard for evaluating government officials' actions is an objective, rather than subjective standard. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In doing so, the Court explained that a subjective inquiry into government officials leads to substantial litigation costs and can be particularly disruptive to effective government. *Id.* at 817. As such, the Court set forth the framework for the modern qualified immunity doctrine: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

In setting forth this rationale, the Court noted important public policy considerations. The Court in *Harlow* noted that claims brought against government officials run a direct financial cost as well as a broad social cost. *Id.* at 814. Costs explicitly listed included litigation costs, the diversion of official energy from

important public issues, the deterrence of people seeking public office, and the fear of lawsuits diminishing the fervor of government officials in completing their duties. *Id.*

The doctrine of qualified immunity shields officers from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *District of Columbia v. Wesby,* 138 S.Ct. 577, 589 (2018).

This Court has repeatedly emphasized the importance of the protections afforded to government officials through qualified immunity. Additionally, this Court has regularly corrected lower courts when they wrongly subject government officials, and specifically individual officers, to liability. *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 611 n.4 (2015). This Court, as recently as 2021, has emphasized the existence of and clarified the standards for the doctrine of qualified immunity. *See City of Tahlequah, Oklahoma v. Bond,* 142 S.Ct. 9 (2021); *Rivas-Villegas v. Cortesluna*, 142 S.Ct. 4 (2021).

Holloway cites *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 228 (2022) in support of his request to reconsider qualified immunity. *See* Pet'r. Br. 28, 31, 32. However, Holloway's reliance on the language set forth in *Dobbs* is mistaken.

The doctrine of *stare decisis* serves an important function by protecting the interests of those relying on a previous decision. *Dobbs* at 237. *Stare decisis* saves parties and courts the expense of relitigating issues, contributes to the integrity of the judicial process, and restrains judges by respecting rulings of important issues previously decided. *See Dobbs*. These valuable policy goals reflect the policy goals laid out in *Harlow*.

Still, Holloway's reliance on language in *Dobbs* fails to recognize a key distinction between *Dobbs* and the present petition. The Court in *Dobbs* took time to emphasize that stare decisis is at its weakest when the Court interprets the Constitution. *Id.* at 2262; citing *Agostini v. Felton*, 521 U.S. 203, 235 (1997). *Stare decisis* is at its weakest when the Court interprets the Constitution, because the Court's interpretation can only be altered by a constitutional amendment or by overruling the Court's prior decision. *Agostini* at 235.

In contrast, as this Court has noted, where "the precedent interprets a statute, stare decisis carries enhanced force, since critics are free to take their objections to Congress." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). The Court in *Kimble* correctly noted that the court's decision interpreting a statute, becomes part of the statutory scheme and is subject to change by an act of Congress. *Id.* at 456.

Just as noted in *Kimble*, Congress has had ample opportunity to modify the doctrine of qualified immunity in the context of § 1983 actions. The general framework outlined in *Harlow* has been in place for over 40 years. Congress's inaction regarding this often-discussed doctrine, further supports leaving the

doctrine in place. This Court has explicitly recognized qualified immunity in § 1983 actions for over 50 years. The doctrine of qualified immunity finds support in the common law and is supported by sound public policy. In short, the doctrine of qualified immunity should not be reconsidered by this Court.

B. This Case Presents a Poor Vehicle for Reconsidering Qualified Immunity

In his petition, Holloway asserts that The Seventh Circuit's decision "highlights that Holloway, more likely than not, suffered constitutional deprivation with an unfair, unduly suggestive identification procedure." Pet'r. Br. 36.

However, The Seventh Circuit, never went as far to say that it is more likely than not that the identification procedure was unfair or unduly suggestive. *Holloway v. City of Milwaukee*, 43 F.4th 760 (7th Cir. 2022). At most, The Seventh Circuit noted that, in the context of evaluating the case at the summary judgment stage, a jury could have concluded that the identification was subconsciously influenced by seeing the photo earlier. *Id.* at 767. Noting that even if Holloway's constitutional rights were violated, The Seventh Circuit concluded that Holloway cannot show that the unlawfulness of the officers' conduct violated a clearly established constitutional right. *Id.*

The Seventh Circuit properly analyzed the district court's decision by laying out the two requirements for the officers to be entitled to qualified immunity. Officers are entitled to qualified immunity under § 1983 unless 1) they violated a federal statutory or constitutional right; and 2) the unlawfulness of their

conduct was clearly established at the time. *D.C. v. Wesby*, 138 S.Ct. 577, 589 (2018).

The Seventh Circuit analyzed but ultimately did not decide whether the officers violated a constitutional right. The Seventh Circuit felt it was unnecessary to decide the first element of a § 1983 defense, because the case could be decided on the second element. Specifically, The Seventh Circuit held that Holloway pointed to no controlling or persuasive authority that it was illegal for the officers to use a photo array approximately a day before a physical lineup. *Id.*

Officers are not and cannot be expected to predict constitutional law. This Court has noted that if judges disagree on a constitutional issue, it would be unfair to subject officers to money damages for incorrectly applying the law in controversy. *Pearson v. Callahan*, 555 U.S. 223, 244–45 (2009); citing *Wilson v. Layne*, 526 U.S. 603 (1999). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

This case presents a poor vehicle for reconsidering qualified immunity, because officers were making the very sort of discretionary decision that is contemplated by the qualified immunity doctrine. The doctrine of qualified immunity shields officers from civil liability if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555

U.S. 223, 231 (2009). In the present case, it is not a close call as to whether or not officers violated a clearly established constitutional right of Holloway. The officers did not. This is illustrated by The Seventh Circuit's finding that Holloway pointed to no controlling or persuasive authority establishing that it was impermissible for police to use a photo array approximately a day before an in-person lineup. *Holloway* at 767.

The facts of this case presented to the Court, outline the important decisions law enforcement must make with urgency, free from the restraint that would be inherently present if qualified immunity were not afforded to them. From July to September of 1992, there were five different sexual assaults that officers were investigating. Pet'r. App. 2. These assaults were violent, occurred over a relatively short amount of time, and were in a concentrated area in the Riverwest neighborhood and the east side of Milwaukee. Pet'r. App. 21. As such, public safety was at risk and there were no indications that the assaults would stop until the perpetrator was arrested.

Milwaukee officers developed Holloway as a suspect through a Shorewood officer's recent arrest for prowling. Pet'r. App. 23. Shorewood borders Milwaukee to the east and is near the area where the assaults occurred. Through further investigation, officers discovered that Holloway fit the physical description of the attacker, and was on parole for a sexual assault conviction that had broadly similar *modus operandi* to the current, ongoing assaults. Pet'r. App. 27. A Milwaukee officer then placed a photo of Holloway in a photo array and showed the photo array to one of the victims. Pet'r. App. 28. Upon the victims' request

and Holloway's agreement, Holloway was placed in a physical lineup the following day and identified as the attacker by two of the three victims. Pet'r. App. 29-32.

The Seventh Circuit properly set forth the doctrine, analyzed the issue, and correctly determined that the doctrine of qualified immunity applied to the officers' conduct. This situation, where officers conduct a photo array and then follow up with an in-person lineup to attempt to identify and arrest the attacker in a string of violent sexual assaults, is the kind of action where the public interest is better served by action taken with independence and without fear of consequences. *Harlow* at 819. Therefore, this case presents a poor vehicle for this Court to reconsider qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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