

No. 17-890

In the Supreme Court of the United States

RICHARD LOPEZ, *et al.*,
Petitioners,

v.

ESTATE OF JAMES FRANKLIN PERRY AND
JAMES FRANKLIN PERRY, JR.,
Respondents.

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

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE	2
I. Material Facts	2
REASONS THE PETITIONERS WRIT SHOULD BE DENIED	12
I. The Petition Merely Seeks To Have This Court Reevaluate The Factual Findings Of The Seventh Circuit At Summary Judgment To Construe Inferences In Favor Of The Moving Party And Prevent The Jury From Acting As Fact-Finder	13
II. No More Specific Description Of The Clearly Established Constitutional Right Was Required Given The Disputed Facts Before The Court And Petitioners Are Not Entitled To Qualified Immunity	17
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

<i>Allin v. City of Springfield</i> , 845 F.3d 858 (7th Cir. 2017)	18
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	14, 16
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731	18
<i>Bunn v. Khoury Enters., Inc.</i> , 753 F.3d 676 (7th Cir. 2014)	14
<i>City and County of San Francisco v. Sheehan</i> , 135 S. Ct. 1765 (2015)	19, 20
<i>Deets v. Massman Const. Co.</i> , 811 F.3d 978 (7th Cir. 2016)	16
<i>Findlay v. Lendermon</i> , 722 F.3d 895 (7th Cir. 2013)	18
<i>Gill v. City of Milwaukee</i> , 850 F.3d 335 (7th Cir. 2017)	18
<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	19, 20
<i>Mullenix v. Luna</i> , 136 S. Ct. 305 (2015)	18
<i>Ortiz v. City of Chicago</i> , 656 F.3d 523 (7th Cir. 2011)	21
<i>Reichle v. Howards</i> , 132 S. Ct. 2088 (2012)	18

<i>Washington v. Hauptert</i> , 481 F.3d 543 (7th Cir. 2007)	18
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<i>Williams v. Rodriguez</i> , 509 F.3d 392 (7th Cir. 2007)	20, 21, 22
--	------------

STATUTES

Fed. R. Civ. P. 56(a)	14
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INTRODUCTION

On the 13th of September 2010, James Franklin Perry (“Perry”) died, shackled and gagged, covered in his own urine feces and blood on the floor of the pre-bookings area of Milwaukee County Jail Facility (“CJF”). As the parties prepare to start trial in mere weeks, a trial set to determine the culpability of government agencies in the gruesome death of an inmate in their care, the Petitioners ask this Court to cloak them in the protection of the Constitution of the United States. A protection, it should be noted, that the Seventh Circuit Court of Appeals did not see fit to afford them after a withering examination during oral argument. A protection, it should be noted, that the Petitioners did not see fit to provide an inmate in their charge who was obviously in severe physical distress in the moments leading up to his death, as recorded on surveillance footage. The Respondents, conversely, simply want these questions to be adjudicated in front of the trier of fact, another right as yet erroneously denied the Respondents in whole.

Petitioners argue that there was no objective indicia that suggested Perry was suffering from a medical emergency when he suffered seizures, defecated on himself, urinated on himself, could not walk, could not breathe, and directly told the officers that he could not breathe and that they were killing him. He was dropped, bloodied, and could not speak, but Petitioners claim that he should have told officers that he was having a medical emergency. Almost every symptom the hospital discharge papers warned could indicate that he was suffering a medical emergency had manifested, but the Petitioners paid no mind, telling Perry that he was

acting like an animal and placing a spit mask over his face exacerbating his symptoms. Petitioners argue that the Seventh Circuit erred because it did not cite any cases wherein this specific line of abuse had occurred, and therefore none of the Petitioners could have possibly known that they were violating Perry's constitutional rights. Petitioners further claim that so long as officers adamantly deny that they were aware of a medical emergency, the courts should overlook the heaps of evidence that suggest the contrary and dispense of a case before a jury is ever given the chance to hear it.

This Court should deny the Petition not only because it merely seeks this Court to reevaluate the findings of fact of the lower court, but because the public policy that would result from a reversal in this case is nothing short of mortifying.

STATEMENT OF THE CASE

I. Material Facts

Perry's Booking

On September 13, 2010, officers arrested Perry at approximately 2:30 a.m. It would take three hours before the Milwaukee Police Department ("MPD") did an initial medical risk-screening interview of Perry. Perry was then sent to the MPD's Prisoner Processing Section (PPS) of the Police Administration Building (PAB). (R. 123-1:14, 19).¹

¹ Respondents cite, where appropriate, to the docket ("R.") in the district court, specifying the docket number, attachment number, and page.

At approximately 5:45 a.m., MPD Officer Chaquila Peavy, a non-medical employee, completed the first Medical Receiving Screening Form for Perry and documented that Perry expressly advised he required seizure medication twice a day and had not taken his evening dosage prior to being arrested. (R. 123-2). The response of the Petitioners? Nothing. No medicine. No effort to get medicine. No referral to a nurse. No trip to the medical care facility or hospital. No special observation level or rules. No isolated location to observe and limit any harmful effect of a seizure. Nothing. The Petitioners treated Perry as if he never told them of his seizure problem, his untreated condition for several hours, and the potential medical consequences. Instead, MPD put Perry in the “bullpen” —a large holding cell for multiple people with concrete floors and limited space.

Perry’s First Medical Emergency

Twelve hours after his arrest, untreated for his seizure illness, Petitioners discovered Perry injured from a full body seizure witnessed by others that caused Perry to strike his head on the concrete floor of the “bullpen”. (R.123-1:19); (R.123-3); (R.124-1:3). After Perry’s seizure, fall, and injury, it took Petitioners one-half hour until they transported him from PPS to Aurora Sinai Medical Center Emergency Room (“Hospital”), via ambulance. At approximately 3:02 p.m., MPD Officer Petitioner Corey Kroes (“Kroes”) rode with Perry and MPD Officer Petitioner Crystal Jacks (“Jacks”) followed in a squad car. (R.123-3:2); (R.124-3:4). Perry was not resistant, combative and had not urinated or defecated on himself. (R.124-3:5).

The Hospital treated Perry for more than three hours while he continued to have multiple seizures, and only discharged him with special instructions concerning Perry's at risk-condition, the need for continuous observation, the warning signs to look for, report, and seek emergency treatment. (R.123-6:27-33). Perry was discharged at 6:45 p.m. to the same officers who brought Perry to the Hospital and instructions were provided to ensure Perry's continued observation and medical safety with attention to the risk factors identified therein.

Crucially, the instructions specified warning signs that required immediate follow up medical care, detailed the importance of seeking prompt medical attention for ongoing seizure symptoms and side effects from the medication, which included traits Perry would evidence within minutes of leaving the Hospital, but which would continue and remain untreated until his death. (R. 123-6:31-32). Upon discharge, Perry was not resistive or combative, received a Glasgow score of 15 and it was noted he was "alert and oriented." (R. 123-6:23); (R. 124-4:12-13); (R. 124-3:9); (R. 124-3:12); (R. 124-3:12); (R.124-3:13).

Perry's Decompensation After Discharge

At approximately 6:50 p.m., just minutes after leaving the hospital and away from its care, Perry showed one of the key warning signs: disorientation — a symptom the Hospital's instructions specified as reason to seek prompt medical attention. How did the Petitioners respond? Shackling Perry's arms and legs to drag him into the PPS. In the elevator, Perry showed the second warning sign: lack of coordination—another symptom the Hospital's instructions specified

as requiring prompt medical attention. (R.123-4); (R.123-1:13); (R.124-7:11); (R.124-7:11); (R.124-7:12). Ignoring the instructions, Petitioners took no action to obtain prompt medical attention, failed to report the issues, and failed to take action to insure all other officers on staff would be aware of the instructions.

Petitioners Kroes, Jacks, Bungert and Santiago then carried Perry out of the elevator and deposited him on the floor of the hallway outside the booking area because he was unable to control his body or sit on the bench—yet another warning symptom listed in the Hospital’s instructions. (R.123-1:11); (R.124-4:13); (R.124-7:11). The Petitioners’ reaction? Mockery. A Petitioner told Perry “you’re faking it.” (R. 123-4).

After being placed on the floor of the hallway, Perry urinated and defecated on himself, the odor so offending it caused one Petitioner, Jacks, to become ill and vomit. At this point, the warning signs were glaring: difficulty ambulating and loss of bodily control exhibited by self-defecating and self-urinating. How did Petitioners respond? Still nothing. Kroes, Jacks, Santiago, and Bungert offered no assistance. (R.123-1:19); (R.124-4:23); (R.124-3:15-16); (R.124-3:17); (R.124-7:14); (R.123-4); (R.123-7:4-5). Although cognizant that urination and defecation could indicate a change in Perry’s condition, Kroes did not try to determine the cause. (R.124-4:11); (R.124-4:19). When Robbins, the PPS supervisor responsible for the well-being of all prisoners, first came upon Perry in the hallway, he laughed, turned, and walked away. (R.124-2:33-34. The Petitioners left an identified seizure victim, recently hospitalized, with particular instructions to seek prompt medical attention, shackled

by leg and arm, self-defecating, and self-urinating on the concrete.

“I Can’t Breathe”; Petitioners’ Response – Ratchet Up The Suffering Level

The warning sirens now blaring, Perry cried out to officers that he couldn’t breathe. The Petitioners’ response – “if you’re talking your breathing.” No effort to seek medical attention, ignoring the Hospital instructions, and worse. Petitioners placed a compression hold on Perry, pushing his chest toward his own knees, while shackled, and a known seizure patient still at substantial risk. (R. 124-9:7); (R. 124-9:8); (R.124-6:9); (R.124-4:25). Perry screamed for help and said “you’re killing me,” imploring God to intervene.

The MPD officers near Perry at that time, including Petitioners Santiago, Bungert, Jacks, Kroes, and Ayala, were required by MPD policy to immediately call for an ambulance and alert their supervisor when Perry stated, “I can’t breathe,” “You’re killing me” and “Help me.” Their response? Nothing, except to accelerate their barbaric treatment. (R. 124-2:31); (R. 124-2:32); (R. 124-2:34-35); (R. 124-11:16-17); (R. 124-11:27); (R. 124-8:8); (R. 124-3:17).

Put A Spit-Mask On A Seizure Victim

Despite Perry’s complaints that he could not breathe, despite the fact that he had been previously hospitalized earlier that night and suffered from multiple seizures while in custody, Petitioners Ayala and Ivy masked Perry’s face and covered his mouth with a “spit mask.” (R.124-9:6); (R.124-13:6); (R.123-8). Prior to and after securing the spit mask on Perry’s

face, Ayala observed blood in Perry's saliva and a bloodstain in his chin area, but did nothing. (R. 124-9:4); (R. 124-9:5); (R.124-10:4); (R.124-10:5).

Perry continued to beg for help and screamed that he couldn't breathe, to which Petitioner Kroes, clearly lacking training in seizure issues and breathing complaints of individuals, responded, "If you're talking, you're breathing." Despite Perry's cries, and in direct contradiction to the Hospital's instructions, Kroes did not check Perry's vital signs, render first aid, or do anything to determine whether Perry was in pain, discomfort, or suffering from a more severe medical event. (R.124-4:20); (R.124-4:21); (R.124-4:24).

A Person With Seizures Is An "Animal," So Treat Him Like A Prisoner

Instead of offering assistance or instructing his officers to provide assistance, Petitioner Robbins told Perry, "if he was going to act like an animal, he would be treated like he was in prison." Robbins then ordered Perry be put in cell A3 with only the regular 15 minute checks. (R. 123-1:19); (R. 124-2:12); (R. 124-2:13); (R. 124-16:6). Two years after Perry died, MPD Internal Affairs determined that Robbins spoke to Perry inhumanely, and Robbins subsequently retired to avoid a demotion. (R.124-6:46); (R.124-2:32); (R.124-15:8); (R. 123-13).

The gross indifference of the custodial officers is clear when considered in conjunction with MPD Standard Operating Procedure 090 (MPD SOP 900.10), in full force and effect on September 13, 2010, which set forth how to monitor and care for someone in custody that was physically restrained. (R. 123-8).

Under MPD SOP 090.10, physical restraints, including expectorant shields (spit masks), require special precautions when being utilized. Spit masks are defined as a physical restraint “used for persons spitting at officers.” (R. 123-8); (R.124-3:20). Due to the potential for medical emergencies occurring while a person is physically restrained, MPD SOP 90.10(F)(2) requires that:

Members shall remain cognizant of any changes in the condition of an arrestee that would require medical treatment. If medical treatment becomes necessary, members shall immediately request assistance by telephone or radio. It cannot be overemphasized that members shall continually monitor and remain cognizant of the condition of the person in custody, especially when he/she is in restraints. The arrestee may encounter immediate or delayed physical reactions that may be triggered by the change in physical or environmental factors. Therefore, caution and awareness on the part of the officer is constantly required. (R.123-8:3).

This Policy was completely ignored by the Petitioners as Perry suffered in front of them, instead they argued on summary judgment it was inapplicable.

Despite Perry’s deteriorated condition, cries for help, and statements that he could not breathe, Perry was carried by Petitioners Ayala, Kroes, Jacks, Lee, Santiago, and Bungert by his shackled arms and legs, still bleeding, with a spit mask over his head, covered in his own feces and urine, into cell A3—a cell which is difficult to see from the Lieutenant’s office. (R.124-2:12); (R.124-14:4); (R.123-1:58). Robbins was aware

that Perry had urinated and defecated on himself but he did not inquire as to the cause, nor did Ayala, Kroes, Jacks, Lee, Santiago, or Bungert. None of these officers made any attempt to determine if Perry needed further medical attention, offer him assistance, or inquire as to whether Perry should be returned to the Hospital. (R.124-2:12); (R.124-2:13); (R.124-14:5); (R.124-14:6); (R.124-9:14); (R.124-8:10); (R.124-17:8).

On the way to cell A3, Ayala, Kroes, Jacks, Lee, Santiago, and Bungert dropped Perry twice from about two feet above the floor, causing him to strike his head on the concrete—confirmed by other arrestees. (R.123-1:12, 58); (R.123-8:3); (R.124-15:11); (R.124-15:14); (R.124-18:13). After Perry was dropped on the floor, arrestee Evans observed blood on the floor in front of the cell where Perry had been dropped and could hear Perry moaning. (R. 123-1:58).

Petitioner Diaz-Berg walked by Perry's cell every fifteen minutes, heard grunting and saw him rolling around on the cell floor, but took no action whatsoever to distinguish whether Perry suffered a medical emergency, nor offered him any assistance whatsoever. (R. 124-16:15). Perry was not continually monitored after he was placed in cell A3 in violation of MPD's SOP 090.10. (R.124-12:23); (R.124-12:36)

Perry Transferred: Shackled & Masked

Petitioner Robbins attempted to expedite Perry's paperwork to have him conveyed to CJF for "medical reasons" because the CJF had nurses available to help Perry for his medical crisis. (R.124-2:22) At approximately 8:20 p.m., Lopez, Salinsky, Lee, Ayala, Diaz-Berg, Ivy, and Robbins removed Perry from cell

A3 after reapplication of shackles and the spit mask that was saturated with blood and spit. (R.124-14:6-7); (R.124-19:11, 14); (R.124-9:13); (R.124-17:15); (R.123-10:5); (R.123-1:36). Diaz-Berg and Robbins observed blood on the cell floor, but did nothing to determine why Perry was bleeding nor did they relay this information to anyone, including the County, even though they recognized that blood on the cell floor after an inmate is removed could indicate a medical emergency and they had an obligation to inquire as to the source of the blood. (R.123-1:11, 19); (R.124-16:17-18); (R.124-2:17, 22, 24, 25, 28, 29); (R.124-6:16, 23); (R.124-17:5). Lopez smelled a strong odor of fecal matter emitting from Perry, but made no effort to determine whether Perry voluntarily defecated on himself, or inquire as to his condition, despite acknowledging that a prisoner who involuntarily urinates or defecates on himself could indicate a medical emergency. (R.124-17:6, 8, 16, 18); (R.123-1:27). Puechner, an MPD custodian, cleaned Cell A3 after Perry had been removed and found “gobs of spit, blood and fecal matter on the cell floor” upon his arrival. (R.123-1:11).

Arrival at CJF

At 8:41 p.m., Perry arrived at the CJF and was removed from the transport wagon with blood coming from his head and blood in the rear of the conveyance wagon. (R. 124-12:14); (R. 124-17:21); (R. 123-1:6). Petitioners Lopez and Salinsky failed to advise the Milwaukee County Sheriff’s Office (MCSO) officers at the CJF of Perry’s acute medical condition. (R. 124-21:3); (R. 124-23:4).

At approximately 8:44 p.m., while Perry was still shackled and wearing a bloody spit mask, with soiled undergarments and pants around his ankles, Lopez, Salinsky, and MCSO officers Kieckbusch and Arndt picked him up and dragged him to a bench across from the nurse's station because Perry was unable to walk on his own—another warning symptom specified in the Hospital's instructions. (R.123-4); (R.124-17:19). Perry slid off the bench onto the pre-booking room floor—another warning symptom. Salinsky, Lopez, and Bell ignored Perry—in direct contradiction to MDP SOP 090.

Perry's Death

At 8:52 p.m., three minutes after the CJF's Master Control called for ambulance, and several minutes after Perry lay motionless on the floor in front of county employee nurse Wenzel, Wenzel removed Perry's spit mask to first assess the source of his seeping blood. (R.120-2:2). She observed Perry's head fall back and his eyes roll back, that Perry wasn't breathing, there was vomit and blood on his face, blood in his left ear, he was not responsive to stimuli, had no pulse, and his pupils were dilated. (R. 86-13:20); (R. 86-12:18).

Perry was dead, and now for the first time, his pulse was checked. (R. 120-1:18). At the scene, the Milwaukee Fire Department documented that the chief complaint was, "[Perry not breathing] onset of event occurred five minutes [8:45] prior to calling EMS." (R. 120-7:5). The MFD also documented that Perry's cardiac arrest occurred prior to MFD's arrival and was "Witnessed by Healthcare Provider." (*Id.*) According to Plaintiff's expert, Dr. Waldron, a combination of extreme stress and barriers to adequate breathing

including a spit mask filled with saliva, vomit and blood, exacerbated Perry's underlying heart condition and caused him to die. (R. 123-10:4)

REASONS THE PETITIONERS WRIT SHOULD BE DENIED

The above listed facts are not in dispute, were recounted before the Seventh Circuit in the parties' briefs, and were recounted again at oral argument before a three judge panel, causing the now retired Honorable Judge Richard Posner to exclaim that this was the worst case of police behavior he had ever seen over the course of his 35-year career. Astonishingly, Petitioners now bring this case before this Court with the argument that no words uttered by Perry, and no observation of Perry, could have put a reasonable officer in the Petitioners' shoes on notice of Perry's serious medical need. Petitioners cite Perry's exclamations that he was dying and could not breath, they note his inability to walk or speak, and one is even led to vomit due to the horrible stench caused by Perry involuntarily urinating and defecating himself, but they unabashedly argue that "courts have never required law enforcement officers to obtain medical degrees." (P. Pet. 16). Despite being handed papers by the hospital that listed symptoms that if shown by Perry meant that he immediately must be returned to the hospital, and Perry indisputably suffering numerous of those symptoms before the Petitioners' very eyes, and despite the barbaric insulting of Perry committed by Petitioner Robinson, they argue that "No evidence has been presented in this case which puts the subjective perceptions of the Petitioners in this regard into question." (P. Pet. 18).

Further, Petitioners' argue the equally untenable position that despite the well established precedent that detainees have a Constitutional right to basic medical care, Petitioners should have been granted qualified immunity because no clear case law existed "...where an arrestee experienced a seizure while in custody, was transported to a medical facility where he experienced more seizures and was treated with multiple doses of anti-seizure medication, and then after he was medically-cleared and released back into police custody...that arrestee collapsed due to a blood clot in his heart and hardening of his arteries..." This interpretation of the Constitution is not the law, has never been the law, and would grant unlimited immunity to all law enforcement officers so long as they discovered novel and untried methods of treating those in their care "like an animal."

This Court should deny certiorari because Petitioners merely seek this Court reevaluate the findings of fact of the Seventh Circuit, because the Seventh Circuit correctly decided that this case was not appropriate for summary judgment and that Petitioners were not entitled to qualified immunity, and because of disturbing public policy that would be created as a result of a reversal in this case.

I. The Petition Merely Seeks To Have This Court Reevaluate The Factual Findings Of The Seventh Circuit At Summary Judgment To Construe Inferences In Favor Of The Moving Party And Prevent The Jury From Acting As Fact-Finder.

Petitioners request that this Court act as trier of fact to reverse the judgment of the Seventh Circuit and

prevent this case from proceeding to a jury as is proper. As the district court correctly noted, “Summary judgment should be granted if ‘the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” Fed. R. Civ. P. 56(a). A “material fact” is one identified by the substantive law as affecting the outcome of the suit. *Bunn v. Khoury Enters., Inc.*, 753 F.3d 676, 681 (7th Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A “genuine issue” exists with respect to any such material fact when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 681-82.

On appeal, the Seventh Circuit went a step further, explaining in great detail as to why the district court’s findings were faulty. Importantly the Court noted that:

“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being.’ *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). When considering whether the medical care provided comported with the objectively reasonable requirement of the Fourth Amendment, we are guided by four factors: ‘(1) whether the officer has notice of the detainee’s medical needs; (2) the seriousness of the medical need; (3) the scope of the requested treatment; and (4) police interests, including administrative, penological, or investigatory concerns.’ *Ortiz*, 656 F.3d at 530 (citing *Williams*, 509 F.3d at 403). Here, the defendants

do not (and cannot) argue that the scope of the requested treatment—returning Perry to a hospital or simply checking his vital signs to see if further treatment was necessary—was too onerous or unreasonable. Nor do the defendants contend that the fourth prong, the interest of police, weighed against doing so. Rather, on appeal, the defendants argue that Perry cannot establish the first two prongs—notice and a serious medical need. The ultimate inquiry, however, is ‘whether the conduct of each defendant was objectively reasonable under the circumstances.’ *Id.* at 531.” (P. App. 19-20).

Whether law enforcement officers, jailers, or nurses, the question is one of facts applied to the jury’s determination of the objective reasonableness of the behavior of the Petitioners. On multiple occasions, after a review of the pleadings and the oral argument, the Seventh Circuit panel concluded that summary judgment was not an appropriate action for the court. Generally, the findings of the appellate panel illustrate the key holding that “[a] jury could infer from these facts that [petitioner] was on notice that Perry had a serious medical need and...failure to take action....was objectively unreasonable.” (P. App. 25). The Seventh Circuit simply applied the appropriate standard when ruling upon a motion for summary judgment, that any disputed facts be taken in a light most favorable to the non-moving party. The district court failed to do so, and the Seventh Circuit corrected that error.

The petition for writ of certiorari completely ignores the deference to the non-moving party required when ruling upon a motion for summary judgment and faults

the Seventh Circuit for not considering the facts in a light favorable to the Petitioners—the moving party. Further, the petition incorrectly states “even though no evidence created a question of fact as to the truthfulness of the officers’ descriptions of their observations of Mr. Perry’s behaviors, and/or the conclusions they derived therefrom, [the Seventh Circuit erred in holding] a jury was required to resolve ‘credibility determinations.’”

In this regard, the Seventh Circuit correctly concluded that the district court erred by giving such weight to the Petitioners’ own statements:

“But, in coming to these conclusions, the district court improperly credited the officers’ testimony that they never perceived that Perry was in distress while he was in their custody and prior to collapsing on the floor of the CJF. This was an error, as it ignores the district court’s obligation at summary judgment to consider the evidence in the light most favorable to Perry and to refrain from making credibility determinations. *See Deets v. Massman Const. Co.*, 811 F.3d 978, 982 (7th Cir. 2016) (noting that ‘credibility determination[s] may not be resolved at summary judgment.’); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (‘Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . .’). (Pet. App. 23).

Petitioners’ unsupported assertion that “. . . no evidence created a question of fact as to the truthfulness of the officers’ descriptions of their

observations of Mr. Perry's behaviors..." could not be further from the truth. As recited both above, and in the circuit court's opinion, multiple facts, including Perry's hospitalization, the ignored discharge instructions from the hospital, Perry's inability to walk, Perry's involuntary urination and defecation, Perry's pleas of "help me," and "you are killing me," and Perry's spitting and drooling into his lap, all could be viewed by a jury as evidence that creates a question of fact as to the truthfulness of the Petitioners statements. Even more so, the inhumane statements made by Petitioners, such as calling Perry an animal, could easily be viewed as evidence that undermines the truthfulness of Petitioners' testimony. Under Petitioners' theory, police officers could always escape liability so long as they deny any wrongdoing, despite any amount blood, bodies, or surveillance footage that suggests otherwise. This is not law and has never been the law.

This judgment should not be disturbed on the eve of trial, before the jury has even weighed the evidence to determine the objective reasonableness of the behavior of the government employees, when any concerns petitioners have can be ameliorated by proper arguments about jury instructions and appeals from those rulings.

II. No More Specific Description Of The Clearly Established Constitutional Right Was Required Given The Disputed Facts Before The Court And Petitioners Are Not Entitled To Qualified Immunity

As the Seventh Circuit correctly noted, qualified immunity "protects public servants from liability for

reasonable mistakes made while performing their public duties.” *Findlay v. Lendermon*, 722 F.3d 895, 899 (7th Cir. 2013). The Court engages in a two-part inquiry when determining whether qualified immunity bars suit: “(1) whether the facts, taken in the light most favorable to the plaintiff, make out a violation of a constitutional right, and (2) whether that constitutional right was clearly established at the time of the alleged violation.” *Gill v. City of Milwaukee*, 850 F.3d 335, 340 (7th Cir. 2017) (quoting *Allin v. City of Springfield*, 845 F.3d 858, 862 (7th Cir. 2017) (internal quotation marks omitted)). A right is “clearly established” if it is “sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (internal quotation marks omitted)). If the right was clearly established, then qualified immunity cannot bar a suit from going to trial. *Washington v. Haupert*, 481 F.3d 543, 547 (7th Cir. 2007). While this Court has warned that the constitutional right must not be defined at high level of generality, it has also instructed that there need not be a case directly on point. *Mullenix*, 136 S. Ct. at 308 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotation marks omitted)). Nonetheless, “existing precedent must have placed the ... constitutional question beyond debate.” *Al Kidd*, 563 U.S. at 741.

In support of their argument that the Seventh Circuit defined the right in question at too high a level of generality, the Petitioners cite a laundry list of cases wherein this Court reversed and admonished lower courts for doing just that. But in doing so, the

Petitioners miss the mark in two ways: 1) they fail to acknowledge that the cases they cite were reversed because this Court found the precedent relied on by the lower courts in those cases too far removed from the facts of those cases; and 2) they fail to acknowledge that the precedent relied on by the Seventh Circuit here is directly applicable to the facts of the present case –enough so that the Seventh Circuit correctly found that Petitioners should have been aware of Perry’s clearly established Constitutional right.

For example, Petitioners rely on *Sheehan*, a case wherein this Court reversed the Ninth Circuit’s decision to deny qualified immunity to police officers who had forcibly entered the home of an armed mentally disturbed group-home resident allegedly violating her Fourth Amendment right to be free from excessive force. *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772 (2015). Petitioners correctly note that in *Sheehan*, this Court found the Ninth Circuit erred by relying on *Graham v. Connor*, 490 U.S. 386 (1989), which held only that the objective reasonableness test applies to excessive-force claims under the Fourth Amendment, to support its holding that the officers should have been on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally. *Sheehan*, 135 S. Ct. at 1775. However, Petitioners fail to acknowledge one of the key reasons why this Court felt *Graham Connor* inappropriate:

Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making

threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction, see *Graham, supra*, at 388–389, 109 S.Ct. 1865, and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter.

Sheehan, 135 S. Ct. at 1776.

In the present case, there is no such divergence of the facts and the precedent relied on by the Seventh Circuit is directly applicable to this case. Petitioners note that the Seventh Circuit relied on *Williams v. Rodriguez*, 509 F.3d 392, 403 (7th Cir. 2007), and its holding that the objective reasonableness standard of the Fourth Amendment governed claims by detainees who had yet to receive a probable cause determination, but their petition misleadingly ignores the Seventh Circuit’s analysis of those factors as applied to the actions of Petitioners. By ignoring half of the Seventh Circuit’s opinion, the Petitioners misleadingly attempt to accuse the Seventh Circuit of relying on precedent that did not provide the Petitioners any guidance as to how they should have reacted to Perry’s medical needs under the Constitution. This could not be further from the truth.

The four-factor test established by *Williams* was designed to answer the exact question presented by this case: when is a government employee’s response to the medical needs of a detainee objectively reasonable? As noted above, when considering whether the medical care provided comported with the objectively reasonable requirement of the Fourth Amendment, the

court looks to four factors: “(1) whether the officer has notice of the detainee’s medical needs; (2) the seriousness of the medical need; (3) the scope of the requested treatment; and (4) police interests, including administrative, penological, or investigatory concerns.” *Ortiz v. City of Chicago*, 656 F.3d 523, 530 (7th Cir. 2011) (citing *Williams*, 509 F.3d at 403); (P. App. 19).

Thus, contrary to the misleading assertion of the Petition, the Seventh Circuit’s analysis of the law did not end after establishing that the objective reasonableness standard of the Fourth Amendment applied, rather the Seventh Circuit held that *Williams*, and the four-factor test it established, provided clear guidance to Petitioners concerning what was expected of them under the Constitution. *Id.*

Further, as related above, the Seventh Circuit did directly apply that four-factor test to the actions of the Petitioners. *Id.* The Seventh Circuit noted that Petitioners do not (and cannot) argue that the scope of the requested treatment was too onerous or unreasonable, or that the fourth prong weighed against providing care. *Id.* In regards to Petitioners Kroes and Jacks, the circuit court found they were on notice of Perry’s serious medical condition because they were present with him when he suffered his initial seizures and had to be taken to the hospital, they saw him receive treatment and medication, and they were given discharge instructions that read “GET PROMPT MEDICAL ATTENTION” if Perry experienced, among other things “unusual irritability, drowsiness or confusion.” (P. App. 24). They further found that Kroes, Jacks, Santiago, Bungert, Ayala, Lee, and Ivy were all present while Perry began to writhe and moan on the

floor, urinating and defecating on himself. (P. App. 25). In regards to Petitioner Robbins, the circuit court found he too was given the hospital discharge instructions and thus should have been on notice of Perry's condition and need for treatment. *Id.* Yet, when Robbins found Perry on the floor moaning and covered in his own urine and feces, he walked away laughing. (P. App. 27). As for Petitioner Diaz-Berg, the circuit court found that she was responsible for conducting wellness checks on Perry, heard him moaning and writhing in pain, and saw blood on the floor of the jail cell after Perry was removed, yet still argued that she did not perceive that Perry had a medical condition. (P. App. 28). As to the remaining Petitioners, Lopez and Santiago the circuit court found that they had been provided with the discharge papers, had to drag Perry out of the elevator to their police car, and still did not take Perry to the hospital or even inform the county about the symptoms Perry had exhibited while at PPS. (P. App. 26). Thus, contrary to the Petitioners' assertions otherwise, the Seventh Circuit did analyze each of the Petitioners actions, individually, and under the proper established legal standard, when it found they were not entitled to qualified immunity. This Court should abstain from reevaluating the Seventh Circuit's analysis of the facts, and deny Petitioners' petition for writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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