

**In The
Supreme Court of the United States**

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MARGARITA DIAZ-BERG, ALEXANDER C. AYALA,
FROILAN SANTIAGO, CRYSTAL JACKS,
COREY KROES, RICK BUNGERT, LUKE LEE,
JACOB IVY, and KARL ROBBINS,

Petitioners,

v.

ESTATE OF JAMES FRANKLIN PERRY
and JAMES FRANKLIN PERRY, JR.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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**REPLY BRIEF OF THE PETITIONERS
ARGUMENT**

I. RESPONDENTS MERELY ECHO THE ERRONEOUS CONCLUSION REACHED BY THE SEVENTH CIRCUIT THAT A HIGHLY GENERALIZED LEGAL ANALYSIS WILL SUFFICE WHEN REVIEWING WHETHER AN OFFICER’S RESPONSE TO AN ARRESTEE’S MEDICAL NEEDS IS PROTECTED BY QUALIFIED IMMUNITY

Respondents failed to meet their burden and provide this Court with caselaw which clearly establishes that the undisputed behaviors exhibited by Mr. Perry presented each of the Petitioners with objective evidence of an emergency medical condition, thus making them objectively unreasonable for not engaging any emergency response mechanism. Petitioners therefore are entitled to qualified immunity. As noted in the Petition, in reviewing this issue pursuant to the Fourth Amendment, the test is whether reasonable law enforcement officers, seeing what they saw and hearing what they heard, and given the totality of the circumstances – which included their training and experience – would conclude that Mr. Perry was experiencing an emergency medical situation. Rather than provide a controlling case with closely analogous facts, Respondents merely echo the erroneous conclusion made by the Seventh Circuit that a highly generalized legal analysis will suffice. Even though Respondents clearly were aware of this Court’s directives in the *Mullenix v. Luna*, *Ashcroft v. al-Kidd*, and *City and County of*

San Francisco v. Sheehan cases (Response to Petition, pp. 18-19), they still stubbornly maintain that the four-factor test established by the Seventh Circuit in *Williams v. Rodriguez*, 519 F.3d 392 (7th Cir. 2007) provides adequate guidance as to whether or not each of the Petitioners violated Mr. Perry's clearly established constitutional rights, and thus was entitled to qualified immunity. (Responsive Brief, pp. 20-21) Respondents note "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." (Responsive Brief, p. 21) However, that case involved Mario Williams, who stopped his vehicle in a driving lane. Mr. Williams was arrested by Officer Rodriguez for driving under the influence. When later asked to take a breathalyzer test, Mr. Williams said he had asthma, could not breathe, and needed medication. Mr. Williams filed a civil suit, alleging deliberate indifference to his medical needs, pursuant to the Eighth Amendment. The Seventh Circuit held that it had "previously stated that the [deliberate indifference] standard applies to pretrial detainees under the Fourteenth Amendment's due process clause." *Williams v. Rodriguez*, 509 F.3d 392, 401 (7th Cir. 2007). The Seventh Circuit cited to its decision in *Cavaliere v. Shepard*, 321 F.3d 616, 620 (7th Cir. 2003), wherein it held that the "Eighth Amendment does not apply to pretrial detainees, but as a pretrial detainee,

[Plaintiff] was entitled to at least the same protection against deliberate indifference to his basic needs as is available to convicted prisoners under the Eighth Amendment.” *Id.* The focus of the *Williams* case was whether Mr. Williams’ condition was “objectively serious” – a condition “diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” *Id.* The Seventh Circuit noted that

“Williams’s first mention of his asthmatic condition occurred when Officer Rodriguez asked him to take a breathalyzer test. It was at this point that Williams told Officer Rodriguez that he had asthma, ‘needed [his] medication,’ and ‘can’t breathe.’ These statements, when arising in the context of a request for Williams to take a breathalyzer test, are insufficient by themselves to show that Williams was suffering from a serious asthma attack. At no other point during processing did Williams affirmatively request his inhaler or any medical attention from Officer Rodriguez or any of the other officers present. Williams responds to this, stating that his silence during processing was due to his focus on trying to control his breathing. While Williams’s explanation for his silence is evidence that he was suffering from asthmatic symptoms, this also indicates that during processing, Williams’s asthma was not so severe that he was unable to control his breathing without immediate medical assistance. In addition, aside from Williams’s attempt to control his breathing, there is no evidence in the record showing that Williams

was exhibiting physical symptoms reflective of an asthma attack while in processing. Furthermore, although Williams's wife and brother put Officer Rodriguez on additional notice of Williams's asthma when they gave Officer Rodriguez Williams's inhaler, there is no evidence that they told Officer Rodriguez that Williams was in immediate need of his inhaler due to a current asthma attack. Thus, the facts, when viewed in the light most favorable to Williams, fail to show that his asthma was sufficiently severe during processing to be considered objectively serious for purposes of his deliberate indifference claim against Officer Rodriguez." Id. at 402.

The Seventh Circuit also noted that while the *Williams* case was pending, it decided the case of *Lopez v. City of Chicago*, 464 F.3d 711 (7th Cir. 2006)), which determined that claims regarding the provision of medical care to pretrial detainees are "governed by the Fourth Amendment and its objectively unreasonable standard." Id. at 403. The Court went on to note that in the context of a Fourth Amendment analysis as to an officer's objective unreasonableness, 1) notice of the arrestee's medical need; 2) the seriousness of the medical need; 3) the scope of the requested treatment; and 4) administrative, penological, or investigatory concerns should be considered. Id. at 403. The Court added that the "Fourth Amendment's reasonableness analysis operates on a sliding scale, balancing the seriousness of the medical need with . . . the scope of the requested treatment." Id. at 403. However, the Circuit Court held that Mr. Williams had failed to meet the

higher burden of showing that Officer Rodriguez was deliberately indifferent to an objectively serious medical condition, and therefore upheld the dismissal of the constitutional claims against him. *Id.* at 403-404. The *Williams* case provides no direction as to whether Officer Rodriguez would have been held liable if any claims were analyzed under the Fourth Amendment objective reasonableness standard. The *Williams* case thus brings into focus the need for clarification from this Court regarding the constitutional standard to be applied when courts analyze a claim raised under 42 U.S.C. § 1983 for failure to provide medical care. As noted in the amicus brief filed by the International Municipal Attorneys Association, there is a split amongst the Circuit Courts as to which constitutional standard applies.

However, given that Mr. Williams told the officers that he had asthma, and needed his inhaler and medication, and that this information was confirmed by his wife and brother, but yet the constitutional claims against Officer Rodriguez for failing to provide medical care were dismissed, the *Williams* case actually supports the Petitioners here in their assertion that they are entitled to the defense of qualified immunity. No case, including *Williams*, clearly put them on notice that they had a constitutional duty to call for emergency medical technicians to respond to Mr. Perry, from the time he was medically-cleared and released from the hospital, to the point in time that he collapsed in the presence of trained nurses at the CJF. During that timeframe, Mr. Perry did not tell any officer that he

1) was suffering from any type of emergency medical condition, or 2) needed medication or medical treatment. In fact, there is no evidence which establishes that Mr. Perry even knew that he had hardening of the arteries or any heart-related condition, which was the cause of his death.

II. RESPONDENTS FOCUS ON IRRELEVANT AND UNSUPPORTED FACTUAL PROPOSITIONS TO DETRACT FROM THE SIGNIFICANT LEGAL ISSUES PRESENTED IN THE PETITION

Respondents discussed a multitude of factual propositions that are either irrelevant or not supported by affirmative evidence. First, they maintain that Mr. Perry died “shackled and gagged, covered in his own urine, feces and blood on the floor of the pre-booking area of the Milwaukee County Jail Facility.” (Response p. 1) However, Mr. Perry was never gagged, and Petitioners clearly identified the observations they made of any urine, feces, or blood, throughout the course of Mr. Perry’s processing, and cited to the appropriate affirmative evidence in the record which supports same. At no time was Mr. Perry “covered” in his own urine, feces or blood. While officers could smell the odor of feces and/or urine emanating from Mr. Perry while he was at the PPS, no Petitioner observed any urine or feces “on” Mr. Perry, much less “covering” him. Petitioner Ayala did observe a slight red tint to Mr. Perry’s saliva, which he attributed to Mr. Perry biting the inside of his cheek during processing, and not a medical

emergency. Officer Diaz-Berg and Lieutenant Robbins observed a small drop of blood on the floor of Mr. Perry's jail cell, but only after he had been removed from the cell and was on his way to the CJF.

Respondents assert that Mr. Perry was "obviously in severe physical distress in the moments leading up to his death, as recorded on surveillance footage." (Response, p. 1) However, even the two medically-trained nurses at the CJF did not conclude that Mr. Perry was experiencing an emergency medical condition when he was first brought into the CJF.

Respondents assert that Mr. Perry "suffered seizures, defecated on himself, urinated on himself, could not walk, could not breath[e], and directly told the officers that he could not breath[e] and that they were killing him . . . [and that] [h]e was dropped, bloodied, and could not speak," while he was in the custody of the Petitioners, after he was released from the hospital. (Response, p. 1) However, as supported by the affirmative evidence cited in the Petition, Mr. Perry last suffered a seizure while he was a hospital patient. After Mr. Perry was medically-cleared, discharged, and brought to the PPS, officers could smell the odor of feces and/or urine emanating from his person, but as noted above, this was not an unusual occurrence at the PPS. Mr. Perry could walk, as is evidenced by the images captured on the security camera while he was escorted from his PPS jail cell to the elevator. Mr. Perry was breathing and talking throughout the course of time that he was in the presence of the Petitioners. Before he was placed in cell A3, Mr. Perry did state that

he could not breathe, he could not see, and that “they” were “killing” him, but Mr. Perry was talking, so therefore, he was breathing. Also, a spit mask was placed over his head. It was not unusual for officers to hear similar statements made by prisoners, simply because of the unusual feeling created by wearing the paper and mesh spit mask. Such statements did not indicate to any Petitioner that Mr. Perry truly could not breathe or that he was dying. (Which was much like the *Williams* case discussed above, where Mr. Williams told officers that he had asthma, could not breathe, and needed medication, but only after he was taken into custody and asked by officers to submit to a breathalyzer test.) Unlike Mr. Williams, who continued to request his inhaler while he was jailed, Mr. Perry stopped making statements like “I can’t breathe,” and “they are killing me” by the time he was placed into cell A3, where his handcuffs, shackles, and spit mask were removed. As noted by the Seventh Circuit, there is no admissible evidence which establishes that Mr. Perry was dropped by any Petitioner. (R. 74, p. 2, fn. 2.)

Respondents assert that “Perry expressly advised he required seizure medication twice a day and he had not taken his evening dosage prior to being arrested.” (Response, p. 3) However, Mr. Perry never requested either medication or medical treatment from any MPD officer. Also, there is no evidence that he was suffering from seizure activity when he collapsed at the CJF, so his response to MPD medical screening questions more than 12 hours earlier is not relevant here.

Respondents assert that “[c]rucially, the [hospital] 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” (Response p. 4), and clarified that Mr. Perry showed signs of disorientation, lack of coordination, and lack of body control after he left the hospital. (Response, pp. 4-5) However, as noted by the Circuit Court, in the Petition, and above, these symptoms were all present prior to Mr. Perry’s discharge from the hospital. Respondents refuse to acknowledge that the affirmative, undisputed evidence establishes that by the time Mr. Perry left the hospital, he had experienced at least two more seizures and he was under the influence of multiple doses of anti-seizure medication. Mr. Perry could not walk on his own, he could not dress himself, he was unable to communicate appropriately with Officers Kroes and Jacks, he had to be brought to the squad car in a wheelchair, he was mumbling, drooling, and occasionally screaming out. Respondents also ignore that Officers Kroes and Jacks were assured by hospital personnel that Mr. Perry’s behavior was due to the effects of his medication.

Respondents assert that Mr. Perry was not continually monitored after he was placed in cell A3. (Response, p. 9) However, the undisputed record makes clear that, like any prisoner at the PPS, Mr. Perry was

monitored at least every 15 minutes by jail personnel. Furthermore, like the Circuit Court, Respondents ignore the fact that janitor Puechner engaged in a conversation with Mr. Perry, while Mr. Perry was standing in his cell with his spit mask removed, after Mr. Perry asked him about the time. Also, there is no evidence which indicates that Mr. Perry experienced any type of medical emergency while he was in his jail cell, and in fact, when he was removed from the cell, he was walking on his own. As observed by Officer Ayala, the effects of the anti-seizure medication appeared to be wearing off.

Respondents continue by asserting that at the time Mr. Perry was being removed from the jail cell at the PPS, his spit mask “was saturated with blood and spit,” and that when he was removed from the conveyance vehicle at the CJF, he had “blood coming from his head and blood in the rear of the conveyance wagon.” (Response, p. 10) However, the affirmative evidence gleaned through discovery in this case establishes that no Petitioner observed that the spit-mask was saturated with any bodily fluid, or that Mr. Perry was bleeding “from his head.” The first observation of fluids saturating the spit mask was made when one of the nurses observed that there was blood and vomit in it, after the mask was removed at the CJF. Thus, many of Respondents’ factual assertions are just not borne out by facts supported by affirmative, admissible evidence.

Respondents refer this Court to Judge Richard Posner, and his statement at oral argument that “this was the worst case of police behavior he had ever seen

over the course of his 35-year career.” (Response, p. 12) While Judge Posner was present at oral argument, and chastised defense counsel and their clients with overly-emotional, almost shocking commentary, he suddenly retired, and did not participate in the decision that was issued by the Seventh Circuit. Additionally, Judge Williams, who did author the decision, recently retired as well. They leave behind a legacy of disregard for the direction provided by this Court regarding the proper legal standards to apply when reviewing questions involving the provision of emergency medical care to arrestees in the context of the defense of qualified immunity, which will likely continue if this Court does not grant the Petition and correct their misapplication of the law.

III. THIS CASE PRESENTS THIS COURT WITH AN IDEAL OPPORTUNITY TO PROVIDE NECESSARY GUIDANCE TO LAW ENFORCEMENT OFFICERS AND LEGAL PRACTITIONERS ALIKE IN THE APPLICATION OF QUALIFIED IMMUNITY IN THE CONTEXT OF THE PROVISION OF EMERGENCY MEDICAL CARE TO ARRESTEES

As discussed in the Petition and above, this case presents facts which are undisputed, upon which the Petitioners are entitled to the defense of qualified immunity. It is undisputed that Mr. Perry was brought to the hospital for medical treatment for his seizure activity. While at the hospital, he experienced more seizures, and was administered multiple doses of anti-seizure

medication. Mr. Perry was medically-cleared, and released from hospital care, even though at the time of release he was unable to walk on his own, he was unable to dress on his own, he was not able to appropriately communicate with officers, he was drooling, mumbling, and screaming out. There was no significant change in his behavior, or in his appearance, from the time that Mr. Perry was released from the hospital, until after he was brought into the CJF and before trained nurses, who themselves did not conclude that Mr. Perry was experiencing a medical emergency. Review by this Court will provide much needed guidance to legal practitioners and law enforcement officers alike regarding the application of qualified immunity to events involving the provision of emergency medical care to arrestees by law enforcement officers.

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CONCLUSION

This Court has summarily reversed multiple decisions denying qualified immunity on the basis that no clearly established law existed which put government officials on notice that their actions might have violated a constitutional right. This case warrants this Court's review as well, because the Seventh Circuit decision applied constitutional law at a too-highly-generalized level, and essentially requires law enforcement officers to act as doctors, and be able to recognize undiagnosed medical conditions.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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