

No. 19-682

IN THE
Supreme Court of the United States

MELANIE KELSAY,

Petitioner,

v.

MATT ERNST,

Respondent.

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

PETITION FOR REHEARING

JOY SHIFFERMILLER
SHIFFERMILLER LAW
OFFICE PC LLO
1002 G Street
Lincoln, NE 68508

AMY R. UPSHAW
KING & SPALDING
1700 Pennsylvania
Avenue, NW
2nd Floor
Washington, D.C. 20006

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE
CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@
law.northwestern.edu

Counsel for Petitioner

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PETITION FOR REHEARING

Pursuant to Rule 44.2, and based on intervening circumstances of a substantial or controlling effect, Petitioner Melanie Kelsay respectfully petitions for rehearing of the Court's order denying *certiorari* in this case.

GROUND FOR REHEARING

Since denying *certiorari*, the Court has rescheduled ten petitions involving qualified immunity.¹ In the event the Court grants one or more of those petitions, it should consolidate the cases or hold this case for a possible GVR.

A decision by the Court on any of these cases could alter the outcome in Petitioner's case. Some of the rescheduled petitions ask for reconsideration or abolition of the doctrine of qualified immunity.² Some address the level of specificity required for existing precedent to clearly establish the law and defeat qualified immunity.³ A decision in either type of case could change the outcome here.

¹ See *Baxter v. Bracey*, No. 18-1287; *Brennan v. Dawson*, No. 18-913; *Zadeh v. Robinson*, No. 19-676; *Corbitt v. Vickers*, No. 19-679; *West v. Winfield*, No. 19-899; *Mason v. Faul*, No. 19-7790; *Anderson v. City of Minneapolis*, No. 19-656; *Cooper v. Flaig*, No. 19-1001; *Davis v. Ermold*, No. 19-926; *Hunter v. Cole*, No. 19-753.

² *Zadeh Pet. i*; *Corbitt Pet. i*; see *Cooper Pet. i*; *Baxter Pet. i*.

³ *West Pet. i*; see *Baxter Pet. i*; *Anderson Pet. i*, 15-19; *Mason Pet. i*; *Davis Pet. i*; *Hunter Pet. i*; *Brennan Pet. i*, 20-29

Modification or abolition of qualified immunity would change the game in this case. Every judge to address whether Officer Ernst violated the Fourth Amendment—the district court judge and the four en banc dissenters—said yes. Pet. App. 12a, 46a-50a.

A new decision by this Court clarifying the specificity necessary to clearly establish the law could also alter the result of this litigation. This is a close case that resulted in an en banc court of appeals decision split eight-to-four. *Id.* at 1a-24a. Of the thirteen federal judges to review the excessive force claim against Ernst, five would have denied qualified immunity based on analogous prior decisions of the Eighth Circuit. *Id.* at 12a-22a, 45a-53a. As the principal dissent stated: “[A] reasonable officer would have known based on our body of precedent that a full-body takedown of a small, nonviolent misdemeanor who was not attempting to flee, resisting arrest, or ignoring other commands was excessive under the circumstances.” *Id.* at 22a.

At a time when the national call for law enforcement accountability reverberates like never before, it would be a profound injustice for this indisputably close case about police brutality—“a blind body slam of a comparatively slightly built and nonviolent misdemeanor”—to slip through the cracks. *See id.* at 37a.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

JOY SHIFFERMILLER
SHIFFERMILLER LAW
OFFICE PC LLO
1002 G Street
Lincoln, NE 68508

AMY R. UPSHAW
KING & SPALDING
1700 Pennsylvania
Avenue, NW
2nd Floor
Washington, D.C. 20006

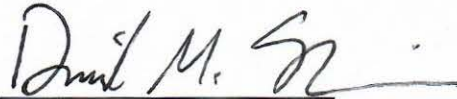
DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE
CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@
law.northwestern.edu

Counsel for Petitioner

JUNE 2020

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

A handwritten signature in cursive script, appearing to read "David M. Shapiro", written in black ink.

David M. Shapiro