No. 20-391

In The
Supreme Court of the United States

JODY LOMBARDO, ET AL.,

Petitioners,

v.

CITY OF ST. LOUIS, MISSOURI, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL A. GARVIN
City Counselor
*ROBERT H. DIERKER
Deputy City Counselor
J. BRENT DULLE
Associate City Counselor
314 City Hall
1200 Market St.
St. Louis, MO 63103
314-622-3361
dierkerr@stlouis-mo.gov
Attorneys for Respondents

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

The petitioners herein seek to establish a broad, new codicil to the Fourth Amendment regarding use of force in subduing arrestees who have exhibited violent or suicidal behavior, seeking to authorize juries to decide if putting such an arrestee face-down is excessive. But if anything is clearly established under the Fourth Amendment, it is that courts (and perforce juries) do not sit to second-guess the conduct of officers who are confronted with tense, rapidly evolving, exigent circumstances, but are to evaluate that conduct from the viewpoint of a reasonable officer on the scene. In the case at bar, the Court of Appeals correctly refused to convict officers of violating the Fourth Amendment when they strove mightily to protect petitioners' decedent from his methamphetamine-fueled, violent, suicidal behavior, pending arrival of urgently summoned emergency medical assistance. That the arrestee's seriously diseased heart did not withstand the strain was an unfortunate and unintended outcome, but not the result of a constitutional violation warranting review by this Court. The questions presented by this case in reality are:

Whether police officers, acting to protect themselves and the arrestee from the arrestee's suicidal, thrashing and violent behavior while under the influence of methamphetamine, violate the Fourth Amendment by using non-lethal physical force to restrain the arrestee, including placing him temporarily in a prone position, while awaiting the arrival of medical

QUESTIONS PRESENTED FOR REVIEW
– Continued

assistance, such that the officers are not entitled to qualified immunity against a claim of constitutional deprivation under 42 U.S.C. §1983?

Whether police officers who participate in restraining a suicidal and violent arrestee, but who are not present or assisting in placing the arrestee in a prone position, can be held liable for violating the arrestee's Fourth Amendment rights under 42 U.S.C. §1983, because the prone restraint was excessive force?

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INTRODUCTION

The petition for certiorari in this case is remarkable for its blend of agitprop, distortion of the record, and mischaracterization of the issues.

First, the agitprop. The petitioners use published reports regarding the death of George Floyd as a cudgel to try to browbeat this Court into reviewing a case that is a straightforward application of basic Fourth Amendment principles. The only things in common between this case and the reports regarding George Floyd are drug use and heart disease. *The Wall Street Journal*, June 1, 2020, www.wsj.com/livecoverage/george-floyd-protests. Petitioners also allude to reports concerning police use of deadly force in the City of St. Louis. Deadly force was not used in this case, and the reports cited by petitioners in an effort to denigrate the City of St. Louis have nothing to do with officers trying to save a suicidal arrestee from himself.

Second, the distortions of the record. As will be delineated below, at no time did officers pile onto the late Mr. Gilbert to the point that he bore 1300 pounds on his back. The undisputed facts show that little or no force was exerted on Gilbert's back, nor was any force exerted while he was inert and unresisting. More importantly, the record is pellucid that during most of the time various officers tried to restrain Gilbert, he continued to thrash about violently, injuring at least one officer in the process.

Third, the mischaracterization of issues. Petitioners boldly state that qualified immunity is not an issue

in this case. Petition, 28. That is a perplexing statement indeed. The district court granted summary judgment on the basis of qualified immunity, canvassing the same precedents cited by petitioners, and concluding that there simply was no consensus that, *under the circumstances presented in this case*, "prone restraint" was clearly unconstitutional. On appeal, as permitted in any qualified immunity case, the Court of Appeals chose to address the threshold issue of whether there was a constitutional violation, but the only reason that issue was before the Court of Appeals was because of respondent officers' assertion of qualified immunity. If this Court reviews the judgment below, it will necessarily arrive at the same point as it did in *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1868-69 (2017), having to conclude that respondent officers could not, in 2015, have understood their actions as violative of a clearly established constitutional right.

Police officers are not liable under 42 U.S.C. §1983 when they apply simple physical force to a combative, uncooperative, potentially suicidal prisoner to protect themselves and the prisoner, even if that force includes restraining the prisoner in a prone position for a period of time until resistance ceases. Such a use of force was and is objectively reasonable under the Fourth and Fourteenth Amendments.

Considered in light of the actual record in this case, the Court of Appeals broke no new ground, injected no division into the law of excessive force under the Fourth Amendment, and plainly conformed to the binding precedents of this Court. Ten police officers

tried, but failed, to protect petitioners' decedent Nicholas Gilbert from suicidal, violent behavior. They failed because Mr. Gilbert's heart could not withstand the combination of methamphetamine ingestion and the struggle to subdue him that his actions provoked. Like any other tool available to police officers confronted with violent behavior of arrestees – such as tasers, for example – shackling and holding down a struggling arrestee can have unexpected and unintended consequences, but the result does not necessarily mean that the force used was unreasonable. Objective reasonableness is the touchstone of Fourth Amendment analysis, and that reasonableness must be evaluated in light of all of the circumstances. Petitioners posit a loaded question, whether a jury could find that placing a shackled arrestee face down and pressing into his back "until he suffocated" can be found to be excessive force. But, contrary to this Court's repeated emphasis, that question states the issue at a high level of generality, utterly without regard to the actual circumstances – violent, flailing, struggling behavior – leading to the application of force, and without regard to the record showing that force applied directly to the arrestee's back was minimal.

Under the totality of the circumstances of this case, the Court of Appeals correctly decided the first prong of the qualified immunity analysis: that no constitutional violation occurred. There is no need for this Court to review that decision.

STATEMENT OF THE CASE

The Court of Appeals acted on an appeal from the grant of summary judgment. Because respondents agree that the real questions presented do not turn on any disputed facts, respondents proceed on the facts as stated by the lower courts, reserving the right to contest facts in the event of further proceedings in this Court or below.

On December 8, 2015, Nicholas Gilbert suffered from severe heart disease and had ingested a substantial quantity of methamphetamine. Joint Appendix (JA) 1995-96 (¶¶108-09). Although only 5 feet 3 inches in height, he weighed 160 pounds. JA 2194 (¶3). He was arrested on that day for trespass and occupying a condemned building; he was also subject to outstanding traffic arrest warrants. JA 2193 (¶1). The arresting officers delivered him to a booking area at a police district station and he was booked at 4:45 p.m. JA 1976 (¶14), 1977 (¶23). He denied any health problems at booking and gave no indication of drug use. JA 1978 (¶25), 1979 (¶30). He displayed no erratic behavior until after he had been placed in a cell, alone, for some time. JA 1979 (¶¶31-32). See generally Appendix to Petition ("App.Pet.Cert.") 15a-16a (District Court opinion).

The booking area of the police station is known as the "holdover," and features a number of holding cells arranged in a semi-circle around the booking clerk's work area. JA 1976-77. The holdover is a temporary holding area and has no medical staff on site; in case

of medical emergencies, officers must summon emergency medical services. JA 1977 (¶¶19-21). At the holdover, there is one larger cell for prisoners awaiting booking, and there are additional individual cells for prisoners who have been booked and are awaiting transfer to the main jail, known as the City Justice Center. The holding cells were visible through a window behind the clerk's desk. JA 1978. Officers routinely came and went in and out of the holdover area and did paperwork there. App.Pet.Cert. 15a.

At some point in the early evening, Gilbert began to exhibit noisy and unusual behavior, dropping coins, and flailing or waving in the air. JA 531, 1979 (¶31), 2194. Shortly thereafter, Officer King noticed that Gilbert was tying clothing around his neck and attaching it to the cell bars. King called out to other officers that it looked like Gilbert was about to attempt suicide. JA 1979 (¶¶32-34). Other officers (Stuckey, DeGregorio, and Wactor) then noticed the same behavior. JA 1979-80. Two other prisoners could not observe Gilbert from their cells, but they did detect noisy behavior by Gilbert and one heard a statement suggesting that Gilbert was attempting suicide. They later heard noise consistent with fighting. JA 1724-25, 1729, 2260. See generally App.Pet.Cert. 35a-36a.

Sergeant Bergmann, summoned by some of the officers, came to the holdover. With Officer Stuckey in the lead, Sergeant Bergmann and Officer DeGregorio proceeded to Gilbert's cell. JA 1981. There is uncertainty as to whether Gilbert emerged from his cell when it was opened, or remained in the cell; in any case,

Gilbert no longer had anything around his neck but he had his hands up in what Officer Stuckey interpreted as a fighting stance, and so Stuckey entered the cell and grabbed Gilbert's left wrist to try to handcuff him. JA 1982, 2196-97. A struggle then commenced with Bergmann, Stuckey and DeGregorio. In the process, Gilbert was brought to a kneeling position over the concrete bench in the cell and handcuffed. JA 1982 (¶¶53-54). Despite this, Gilbert continued to thrash about, striking his head on the bench and suffering a gash which bled. JA 1983-84, 2201.

At the point when Gilbert was kneeling over the bench, he continued to thrash and resist. Whether this was due to difficulty in breathing or was due to his methamphetamine-fueled state is a matter of dispute, but there is no dispute that he did not become quiet and compliant. JA 1983-84. On the contrary, he kicked Officer Stuckey in the groin, at which point Sergeant Bergmann called for additional help and leg shackles. JA 1984-85 (¶¶61-63). Officers King and Wactor responded, with Wactor bringing the leg shackles. King and Wactor succeeded in shackling Gilbert's legs, and King left the cell. JA 1985 (¶63). Officer Stuckey also left the cell and called out for more help. He did not return to the cell. JA 1986 (¶69).

After Gilbert's legs were shackled, Bergmann requested that emergency medical service (EMS) be summoned. King notified the police dispatcher to summon EMS, referencing Gilbert's possible "psychotic issues." JA 1985-86 (¶66). The call for EMS went out from dispatch at 6:15 p.m. *Id.* At this point, Gilbert was

not in a prone position, but remained crouched over the bench. JA 1986 (¶72).

In response to Stuckey's further alarms, Officers Mack, Opel, Cognasso, Lemons and vonNida came to Gilbert's cell. JA 1987. Officer Mack relieved Officer DeGregorio, who left the cell and had no further contact with Gilbert. JA 1987 (¶74), 2214. Officer Mack assisted Sergeant Bergmann in moving Gilbert to the floor. JA 1987 (¶75). At that point, Officer Opel relieved Sergeant Bergmann, who left the cell after instructing Officer Opel to control Gilbert's right side to prevent him from banging his head on the concrete floor. *Id.* (¶¶75-76). Officer Wactor remained, but did not kneel on Gilbert or apply other force. JA 488.

At this point, there is no dispute that Gilbert was on the floor, thrashing about and kicking in spite of the leg shackles. JA 197, 199; cf. JA 1998, 2206. Plaintiffs proffered evidence that Gilbert's combative or struggling behavior was due to "air hunger," i.e., difficulty in breathing due to his position. JA 1988-90 (referencing "air hunger" but not denying physical movement by Gilbert). However, there is no evidence that any of the officers in the cell after Gilbert was maneuvered onto the floor placed even minimal weight directly on Gilbert's neck or back or otherwise compressed his neck or chest. JA 808-15. Officer Lemons knelt on Gilbert's leg to stop the kicking. JA 1988 (¶32). Officer vonNida held an arm or leg. *Id.* (¶82). Officer Cognasso knelt on Gilbert's calves. *Id.* (¶80).

Gilbert stopped kicking or flailing after a few minutes, at which point the officers rolled him onto his side, and Officer Cognasso stood up. JA 1989-90. At this point, Sergeant Bergmann radioed for the status of EMS response and asked that they "step it up." JA 1990 (¶86). This broadcast occurred at 6:26 p.m. *Id.* At this time, officers first noticed that Gilbert was having difficulty breathing. JA 488-89, 1991-93. Another call was made to expedite EMS at 6:27 p.m. JA 1993-94. Officer Mack checked and found a pulse, but then Gilbert stopped breathing and Officer Mack could not find a pulse. JA 1994. Officers went to obtain a defibrillator, started CPR and rescue breathing, and attempted to shock Gilbert's heart. *Id.* Sergeant Bergmann again radioed for the status of EMS at 6:36 p.m. JA 1994-95 (¶102). Officers Mack and Wactor continued CPR until fire department medics arrived. *Id.* (¶103). Gilbert was eventually transported to a hospital where he was pronounced dead at 7:32 p.m. *Id.* (¶105).

The City medical examiner performed an autopsy on Gilbert, finding the heart disease and amphetamine concentration. JA 1995-96. The medical examiner concluded that Gilbert's death was accidental, caused by heart disease, exacerbated by methamphetamine and forcible restraint. JA 1996, 2088. Neither the medical examiner nor plaintiffs' expert opined that there was any indication of serious injury to the chest attributable to the forcible restraint that both agreed had occurred. JA 2013-14, 2088.

The City police division duly investigated Gilbert's death to determine if the officers involved had violated policy in regard to the use of force. JA 1996. The City has a detailed policy regarding the use of force, mandating that officers use the least amount of force necessary to accomplish lawful objectives and to protect the public, officers and arrested persons. JA 1997. The City also has a policy regarding prisoners in a holdover who exhibit violent behavior to the point of being self-destructive or who attempt suicide. JA 1998. This policy authorizes the use of restraints pending transporting such a prisoner to a medical facility. *Id.* (¶118). The policy requires that suicidal prisoners not be left alone. *Id.* (¶119). There is no specific policy regarding emotionally disturbed prisoners or prisoners exhibiting what St. Louis police refer to generically as "organic brain syndrome" – shorthand for persons exhibiting disturbed behavior – but treatment of such persons is governed by the general use of force policy. JA 1998 (¶121). There is no specific policy forbidding prone restraint. Published materials on the issue cite a risk of asphyxiation from prolonged prone restraint, but the literature indicates that opinion is divided and the risks are highest in dealing with persons who are obese or suffering from heart disease. JA 2139 ff., 2168, 2269 ff. Nevertheless, the City trains officers to minimize the time a person is restrained in a prone position. JA 1764-66. Officers are also trained to work in teams to control combative persons by restraining the person's limbs. JA 2000 (¶130). App.Pet.Cert. 24a-25a.

The district court's opinion

The district court (Collins, Magistrate Judge) entered a thorough opinion, painstakingly analyzing the record. The court had previously excluded part of the proffered testimony of plaintiff's expert, Dr. Diaz (a ruling not contested on appeal). The court did not attempt to resolve any factual disputes, but viewed the record in the light most favorable to plaintiffs. App.Pet.Cert. 12a. However, the district court treated plaintiffs' argumentative denials regarding Gilbert's "air hunger" as admissions of the facts that he was flailing or thrashing about. App.Pet.Cert. 19a, n. 8, also 34a, n. 12.

After a thorough review of the record, the district court elected to resolve the case on the question of whether the defendant officers had violated a right that was clearly established as of December 8, 2015. App.Pet.Cert. 28a. The court canvassed the authorities, including a comprehensive review of cases cited here by respondents. *Id.*, 54a ff. The district court therefore granted summary judgment to all individual defendants on the basis of qualified immunity. The individual claims having fallen, the district court granted summary judgment to the City without considering whether the record supported any claim of unconstitutional custom or failure to train. *Id.*, 73a.

REASONS FOR DENYING THE PETITION

I. The petition should be denied because the decision of the Court of Appeals does not present questions that raise a serious Fourth Amendment issue of national importance or that involve a division of authority among the Circuits requiring attention from this Court, but rather the decision of the Court of Appeals is a straightforward review of summary judgment under Fed. R. Civ. P. 56.

The petitioners paint a wholly false picture of the state of the law in regard to the use of force in circumstances like those confronting respondent officers, characterizing the opinion of the Court of Appeals as creating a "circuit split as to the constitutionality of suffocating a prone and handcuffed person by putting force on their [sic] back." Pet. 17. In reality, the opinion of the Court of Appeals is entirely consistent with established Fourth Amendment jurisprudence.

The complete answer to petitioners' attempt to manufacture a division of the Circuits is found in the able opinion of the district court in this case. The magistrate judge's analysis is a model of careful and thorough analysis of nearly all of the cases cited by petitioners in support of their assertion of a circuit split. App.Pet.Cert. 54a-67a. The district court demonstrated that each and every case cited for the proposition that exerting back pressure on a struggling prisoner is a constitutional violation turned on facts differing in important respects from the case at bar.

Respondents see no utility in parroting the district court's analysis. However, some observations about the cases cited by respondents as creating a Circuit division are warranted here.

First, several of the cases cited by respondents – particularly the Ninth Circuit cases such as *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) – are of doubtful authority, having been decided before *Kisela v. Hughes*, 138 S.Ct. 1148 (2018), *Mullenix v. Luna*, 136 S.Ct. 305 (2015) and *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014).

Second, none of the cases cited involve circumstances sufficiently similar to those of this case as to create a conflict on the merits of the claimed Fourth Amendment violation. As this Court has repeatedly emphasized, specificity is especially important in the Fourth Amendment context. *Kisela v. Hughes*, 138 S.Ct. at 1152. Even *Drummond*, supra, involved the application of significant, prolonged force to the arrestee's neck. Similarly, *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004), involved multiple officers simultaneously on the arrestee's back and repeated pepper spraying after the individual had stopped struggling. *Champion* also cites to Ninth Circuit precedent that has been criticized by this Court. 380 F.3d at 904, citing *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) (per Reinhard, J.), discussed in *City & County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1776 (2015) and *Kisela v. Hughes*, 138 S.Ct. at 1154.

Finally, many cases within the Circuits adverted to by petitioners have themselves rejected Fourth Amendment violations in face-down or "prone restraint" cases. Thus, in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), the Seventh Circuit held that restraining a shackled, obese, mentally challenged individual in a prone position was not excessive force when the restrained person was resisting, citing, *inter alia*, Eighth Circuit precedent. An even closer case to the one at bar is *Giannetti v. City of Stillwater*, 216 Fed.Appx. 756 (10th Cir. 2007), in which a mentally challenged, obese, and suspected methamphetamine intoxicated person was placed in a prone position, with several officers' weight on her back. Her death was found due to "restraint/positional asphyxiation." Nevertheless, the Tenth Circuit (also citing Eighth Circuit precedent) held that the use of force under the circumstances did not contravene the Fourth Amendment.

While respondents do not concede that some of the cases relied on by petitioners on the issue of prone restraint were correctly decided, particularly *Hopper v. Plummer*, 887 F.3d 744 (6th Cir.), cert. denied, 139 S.Ct. 567 (2018), it is clear that most if not all cases turn on a crucial, undisputed fact, viz., that the arrestee was not only shackled but was not resisting for a substantial period of time. By contrast, in this case, the record is clear that Gilbert continued to struggle during most of the time that he was prone. App.Pet.Cert. 33a-34a. That he was not "violent" is not

the same as being compliant. As soon as he became quiet, he was turned on his side.

Not only is petitioners' notion of a Circuit split unsupported, but their claims of importance of the question are inflated. Again, the grandstanding assertion that the Eighth Circuit's judgment has any bearing on situations like that reported in the case of George Floyd is wholly fatuous. Equally fatuous is the contention that the Eighth Circuit's holding will impair criminal civil rights prosecutions. Petitioners cite no reported case in which a criminal civil rights prosecution has been premised on prone restraint, nor do they explain just how the Eighth Circuit's judgment in this case would preclude a prosecution under any circumstances other than (perhaps) those exactly duplicating Mr. Gilbert's situation.

In sum, petitioners' complaint is either that the Eighth Circuit erred in conducting its review of an appeal from grant of summary judgment under Fed. R. Civ. P. 56, or the Eighth Circuit misapplied accepted Fourth Amendment principles. Although the Eighth Circuit did neither, those sorts of error are not what warrants review on certiorari. Sup. Ct. R. 10.

II. The petition should be denied, because the decision of the Court of Appeals is correct as a matter of Fourth Amendment jurisprudence on the record presented, which demonstrated the paradigm tense, rapidly evolving emergency situation requiring split-second reaction by officers at the scene, and which fell far short of showing any unreasonable use of force by officers under the circumstances.

The late Justice SCALIA, in another context, lamented, "The §1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier. . . . *Monroe [v. Pape]* changed a statute that had generated 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law." *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (dissenting opinion). This case exemplifies the gulf that has opened between the original intent of the 42nd Congress in enacting what is now §1983 and the application of the statute since 1961. Notwithstanding the protestations of petitioners, principles of qualified immunity are at the heart of this case,[1] and until

[1] Petitioners' effort to secure review by this Court in this case is particularly quixotic in light of the inevitability that respondent officers must be accorded qualified immunity even if this Court agrees with petitioners on the Fourth Amendment issue. There can be no doubt that in 2015 it was not "clearly established" that "prone restraint" of a violent arrestee for any period of time

Monroe v. Pape is reconsidered, this Court will continue to be confronted with situations like the one here, in which plaintiffs seek to turn an accidental death into a constitutional deprivation.

Unbeknownst to any respondent, the late Nicholas Gilbert was a high risk prisoner due to heart disease and recent ingestion of a large quantity of methamphetamine. When he began to show signs of attempting suicide in his cell at a police station holdover, the St. Louis police officers then on duty did what their duty called for: they attempted to control his behavior until he could be transferred to a hospital for proper care. In their attempt to protect Gilbert, the officers were confronted with a combative, flailing, thrashing individual who was a threat to the officers as well as himself. Faced with this emergency, the officers did not deploy nightsticks, tasers or pepper spray. They used manual, physical force to try to subdue Gilbert pending arrival of emergency medical help. Because Gilbert struggled vigorously, it required multiple officers to restrain and shackle him, and even then he remained a danger to himself and others by flailing and kicking. Leaving Gilbert shackled and alone in the cell was not an option. Having seen Gilbert cut his head open on a concrete bench in the cell, the officers did the common sense thing: they took him to the floor and tried to keep

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was constitutionally forbidden. Cf. *Wilson v. Layne*, 526 U.S. 603 (1999). The record is also bereft of any evidence that any prior similar incident had ever occurred in the City's police stations, much less been brought to the attention of City policymakers. Cf. *City of Canton v. Harris*, 489 U.S. 378 (1989).

control of his limbs until he quit the struggle and medical help arrived. Unfortunately, the officers' efforts at restraint had the unexpected and unwanted effect of bringing on death due to the heart disease and drug ingestion.

All force that happens to kill an arrestee is not deadly force. *Mullenix v. Luna*, 136 S.Ct. 305, 312 (2015) (Scalia, J., concurring). In the case at bar, it is undisputed that the efforts to restrain Gilbert began when he was observed in the process of tying clothing around his neck and cell bars. It is undisputed that he was noisy and disruptive at or about that time. It is undisputed that, when Sergeant Bergmann and Officers Stuckey and DeGregorio entered his cell, Gilbert resisted any effort to subdue him, flailing his arms and, as he was borne down over the bench, kicking at the officers. It is undisputed that individual respondents Bergmann, DeGregorio, Stuckey, King and Wactor acted to handcuff and shackle the decedent Gilbert while he struggled against them, ending in a kneeling position over a concrete bench. None of these respondents placed any force on Gilbert after he was moved to a prone position on the floor. App.Pet.Cert. 37a, 39a. At that point, Officer Stuckey, nursing a groin injury, and Officers King and DeGregorio withdrew altogether from the decedent's cell and did not return. Sergeant Bergmann, although remaining nearby and continuing to ensure that emergency medical help was en route, exerted no additional force on Gilbert. Officer Wactor, after securing Gilbert's legs with shackles, never personally applied force to Gilbert.

The use of force on disruptive prisoners who are in the process of being booked seems to partake of both Fourth and Fourteenth Amendment principles, but whatever the source, the basic principle is that the Constitution forbids only the use of unreasonable force when officers lawfully restrain such a person. *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015); *Hollingsworth v. City of St. Louis*, 800 F.3d 985 (8th Cir. 2015). Further, the use of reasonable force, even if deadly force, can continue until the threat is ended. *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2022 (2014).

In the case at bar, petitioners paint with a broad brush, asserting that some ten officers, weighing in total some 1300 pounds, piled onto the unresisting Gilbert until he stopped breathing. Of course, nothing in the record supports that gross distortion of the facts. Moreover, petitioners also insist on ignoring the basic principle of liability under 42 U.S.C. §1983: liability is personal and each defendant's conduct must be independently assessed. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); see also *Wood v. Moss*, 572 U.S. 744, 764 (2014).

The district court carefully reviewed each individual officer's conduct in this case. App.Pet.Cert. 15a-23a. Although the district court decided to focus on the "clearly established" facet of qualified immunity, the court certainly did not conclude that any officer acted unreasonably. *Id.*, 70a-71a. In any event, the Court of Appeals chose to address the threshold question of whether any constitutional violation occurred. E.g., *Pearson v. Callahan*, 555 U.S. 223 (2009). The record shows ineluctably that no violation occurred at the

hands of any officer, but particularly at the hands of respondents Sergeant Bergmann and Officers Stuckey, DeGregorio, King and Wactor. The only force used by those officers was physical force that did not include prone restraint: catching and holding arms or legs, handcuffing, and forcing Gilbert to a kneeling position, followed by leg shackling due to repeated kicking. Given that the behavior of Gilbert was a threat to himself and others, this use of physical force was eminently reasonable.

Petitioners argued below that the officers should have simply removed some of Gilbert's clothing and left him alone in his cell, or should have left him alone after he was handcuffed and shackled. It is not the province of petitioners or the courts to assess the use of force in hindsight. That assessment must be from the standpoint of a reasonable officer on the scene, in the circumstances confronting him. The effort to restrain Gilbert pending the arrival of emergency medical personnel was not a constitutional violation. Compare *Graham v. Connor*, 490 U.S. 386 (1989) with *White v. Pauly*, 137 S.Ct. 548 (2017). Accordingly, the judgment in favor of respondents Bergmann, DeGregorio, Stuckey, King and Wactor was correct insofar as it found no constitutional violation.

As noted, the petitioners' view that all respondents put excessive weight on the decedent Gilbert's back while he was in a prone position for 15 minutes is not supported by the record. On the contrary, it is undisputed that five of the officers had no role in placing Gilbert on the floor. With regard to Officers Mack, Opel,

Cognasso, Lemons and vonNida, individually assessed, see *Wood v. Moss*, 572 U.S. 744, 764 (2014), the record shows that they moved Gilbert to the floor to help prevent him from thrashing and kicking and injuring himself, which he had done while in a kneeling position. Even accepting petitioners' evidence that Gilbert was in the throes of "air hunger" – an opinion excluded by the district court, a ruling not raised on appeal, App.Pet.Cert. 34a – this *post-hoc* diagnosis is nothing more than second-guessing the officers who were attempting to protect themselves and Gilbert while awaiting medical assistance.[2] The radio dispatch records confirm that he was not in a prone position, with significant weight on his back, for 15 minutes. But even if he were in that position, the officers acted reasonably in continuing to restrain him until he became quiet. This restraint did not consist of significant force on his back: Officer Lemons knelt on Gilbert's leg to stop the kicking; Officer vonNida held an arm or leg; Officer Cognasso knelt on Gilbert's calves. App.Pet.Cert. 22a. That they may not have moved him to his side until he became quiet does not establish that the officers acted unreasonably. On the contrary, as soon as he became quiet, the officers did what petitioners insist should

[2] Notably, methamphetamine intoxication can entail episodes in which the individual exhibits superhuman strength. See, e.g., Vilke, et al., "Excited delirium syndrome (ExDS): Treatment options and considerations," 19 J. Forensic & Legal Medicine 117 (2012). Thus, the fact that the officers suspected drug use at the time does not diminish the challenge that Mr. Gilbert's struggles presented or diminish the need to restrain him to protect himself and the officers.

have been done: they moved him to his side, checked for respiratory distress, and acted immediately when that distress became apparent.

As noted above, the issue in a claim of use of excessive force by an officer is whether the force applied was objectively unreasonable under the circumstances. No court has held that placing a resisting prisoner in a prone position while restrained is *per se* unreasonable.[3] Indeed, this Court denied certiorari on a similar question presented in *Hanson v. Best*, 915 F.3d 544 (8th Cir.), cert. denied, 140 S.Ct. 50 (2019). Even if Gilbert had ceased resisting altogether for a perceptible period of time, it was not objectively unreasonable to apply continued restraint to be sure that he was no longer a threat to himself or others. There was and is no constitutional requirement that officers carry stop-watches to measure the duration of prone restraint; the Constitution permits using force until the threat is over. See *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2022 (2014) (" . . . if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat is ended").

The record shows without doubt that, as soon as Gilbert was no longer a threat to himself or others, the

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[3] There is no consensus in the literature on the issue, either. That *some* arrestees may be at risk from prone restraint does not establish that the technique is any more dangerous than any other use of force that must be exerted on resisting arrestees. Compare JA 1930 (Justice Dept. circular) with JA 2269 ("A Prospective Analysis of the Outcomes of Violent Prone Restraint Incidents in Policing").

officers promptly moved him to his side. When it became apparent that he was in distress, they removed handcuffs and took further steps to render first aid. Unfortunately, the combination of methamphetamine and the struggle that he provoked would prove too much for Gilbert's severely diseased heart. But the result is not the issue: the reasonableness of the application of force is the issue, and the record shows that Officers Mack, Opel, Cognasso, Lemons and vonNida used reasonable force to control and subdue Gilbert under the circumstances. Thus, there was no constitutional violation.

When all is said and done, the quintessence of this case is aptly summarized by Dickens: "it is always the person not in the predicament who knows what ought to have been done in it, and would unquestionably have done it too." *A Christmas Carol*, "Stave Three." The Court of Appeals rightly rejected the temptation to second-guess the respondent officers, who valiantly attempted to save Nicholas Gilbert from himself in a situation that developed unexpectedly and demanded an immediate response. When the initial emergency ended, they removed restraints and were then confronted with yet another unexpected emergency: the effects of Mr. Gilbert's diseased heart. Again, they did their best to save Mr. Gilbert. It would be the antithesis of sound Fourth Amendment jurisprudence to condemn respondents' efforts as a constitutional violation, and the Court of Appeals correctly so held.

CONCLUSION

While counsel for respondents would welcome the opportunity of vindicating respondents' efforts to save decedent's life before this Court, there is no need. The petition for certiorari should be denied.

Respectfully submitted,

MICHAEL A. GARVIN
City Counselor
*ROBERT H. DIERKER
Deputy City Counselor
J. BRENT DULLE
Associate City Counselor
314 City Hall
1200 Market St.
St. Louis, MO 63103
314-622-3361
dierkerr@stlouis-mo.gov
*Counsel of Record
Attorneys for Respondents