No. 17-871

In the Supreme Court of the United States

CHERYL WENZEL, *et al.*,
Petitioners,
v.
ESTATE OF JAMES FRANKLIN PERRY, *et al.*,
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

CASES

CONSTITUTION

RULES

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-booking 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.

The Petitioners believe the Seventh Circuit defined the constitutional right at issue—a detainee's right to basic medical care—too generally and thus conflicting with relevant decisions of this Court. This is inaccurate. In fact, the Seventh Circuit defined the clearly established constitutional right at the appropriate level in light of the contested facts at issue in the underlying summary judgment hearing and did not need to define the extent of the medical care an arrestee is entitled to. The Fourth Amendment required the Respondents to demonstrate only that the Petitioners' actions were "objectively unreasonable

under the circumstances". The case law bears this out and the Seventh Circuit agrees. Applying the law to the disputed facts and employing the appropriate deference to the non-moving party when considering a motion for summary judgment, the Seventh Circuit found that a reasonable jury could believe that the Petitioners, Virgo and Wenzel, did not provide *any* reasonable care as they stood by – without taking any vitals – and watched as Perry died. Accordingly, the Seventh Circuit ruled that, as to the Petitioners, summary judgment on Perry's 1983 claims was improperly granted and qualified immunity was inappropriately applied. This Writ is simply an attempt to deny the Respondents their right to have a reasonable jury determine the contested facts at issue, for which the public is best served if allowed to be adjudicated.

STATEMENT OF THE CASE

I. Material Facts

A. Petitioners' Screening at CJF

At 8:45 p.m., on September 13, 2010, four minutes after Perry was dragged into the CJF in obvious distress, Petitioner Nurse Virgo approached him.[1] Her pre-screening consisted of a few questions to which Perry could only nod in response. Virgo documented that Perry could not verbalize his name, there was profuse blood of unknown origin emanating from his

[1] For the same reasons as the Petition, this Response will recount the events of the day from the point of the Petitioners first contact with Perry. In doing so, Respondents will cite, where appropriate, to the docket ("R.") in the district court, specifying the docket number, attachment number, and page.

spit mask, he had soiled underpants (had bowel movement), and recent history of seizure. (R.86-10:23, 34); (R.86-21:10); (R.120-1:8, 9, 10); (R.120-3). As a result, Virgo refused Perry's admission to the facility. (R.86-10:19). Even though Virgo was unsure of the source of the profuse bleeding when Perry first arrived at 8:45 p.m., she never removed Perry's spit mask. (R.86-10:16). Virgo never asked if he was having trouble breathing. (R.86-10:12, 31). Virgo failed to bring any of the assessment, monitoring, or emergency equipment with her when she pre-screened Perry and failed to do the most basic of all nurses' training— take vitals and determine his baseline. (R. 86-10:28); (R. 86-13:12). Even Virgo's limited initial screening revealed that Perry suffered from a medical emergency. (R. 86-10:16). Yet, she offered Perry no assistance and failed to call for a medical emergency response. (R. 86-10:24). Instead, Virgo inexplicably walked away from a clearly distressed man in the final minutes of his life to confer with an on-call doctor about rejecting Perry, and then started doing paperwork. (R. 86-10:16).

Shortly thereafter, Petitioner Nurse Wenzel observed blood and possibly vomit on the inside of Perry's spit mask, blood on Perry's shirt, "soiled' underpants, and that his pants had fallen down. (R. 86-13:15). Wenzel never asked about Perry's vitals, nor did Wenzel take Perry's vitals. (R. 86-13:16, 23). This is in despite of the fact that Wenzel knew that vital signs should be taken when someone is in physical distress and she observed Perry in physical distress. (R. 86-13:16, 18, 26, 28, 30). Wenzel knew Perry was in medical trouble when Virgo refused him at 8:45 p.m., and she had a duty to render aid to Perry at that point. (R. 86-13:4-5). Instead, Wenzel stood behind the nurse's

station and "decided to watch him for a bit." (R. 86-13:9, 15, 16, 29). She did not render any medical care or attempt to communicate with Perry. Wenzel testified, "… [Virgo] had assessed him, so truthfully, I didn't have to." (R. 86-13:15).

Despite policy, procedures and training to take vital signs, Pope-Wright, the nursing director for the County jail, admitted that Virgo and Wenzel did not take any vital signs from Perry even though it was clear "… he had a serious medical condition [and] that he was ill or injured…" (R. 120-1:9). For nearly two minutes after Virgo refused Perry's admission to the CJF, he remained on a concrete bench, rocking back and forth in pain, held in place by two Milwaukee Police Department officers. (R. 120:5).

B. Ambulance Called

From 8:48 to 8:51 p.m., neither Virgo, Wenzel, nor anyone else stayed next to Perry to assess, monitor or provide any medical assistance. (R. 86-7:25, 26); (R. 86-10:44); (R. 86-13:18). At 8:48 pm, seven critical minutes after Perry had arrived at CJF and was left on the concrete floor, county officers initiated a call for an ambulance. (R. 120:5); (R. 120-2:2); (R. 120-7:1); (R. 86-12:13). At that point, three minutes had already passed since Virgo rejected Perry. When Virgo pre-screened Perry at 8:45 p.m., and determined that he was in trouble, there was no reason to wait an additional three minutes to call an ambulance. (R.120-1:13, 14). Virgo could not explain why it took three minutes to call an ambulance after she rejected Perry. (R. 86-10:2). Virgo did not need the approval of the on call doctor to call for an ambulance. (R. 86-10:18). Virgo admitted she must

immediately seek assistance if she observed a medical emergency. (*Id.*)

While Wenzel watched Perry die, she recognized his distress. (R. 86-13:26). Wenzel never inquired why Perry arrived in the condition he did, how long Perry had vomit and blood on his spit mask, how long Perry had urine and feces on his body, how long Perry had blood on his T-shirt, or how long Perry had been verbally unresponsive. (R. 86-13:33).

At 8:50:31 p.m., the Milwaukee County Sheriff's Office ("MCSO") recorded that Perry suffered from an "uncontrolled bleed from the head." (R. 86-13:33); (R. 120:16); (R.120:19). Even though the CJF's Master Control informed the Milwaukee Fire Department ("MFD") that Perry suffered from an uncontrolled bleed from his head and had suffered from cardiac arrest, Petitioners still has not called a medical emergency at this point. (R. 86-12:13); (R. 86-13:21).

C. 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 Wenzel, she 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). Between the time Virgo pre-screened Perry at 8:45 p.m. and the time Wenzel

removed the spit mask at 8:52 p.m., Perry received no medical care. (R. 120-1:17). Milwaukee County officers could not explain why it took four minutes after the ambulance was summoned to remove Perry's spit mask to assess the source of the seeping blood. (R. 86-12:12). Nor could they explain why eleven minutes passed from the time Perry arrived in pre-booking to when his spit masked was removed, despite his documented distressed state. (R. 120-1:15); (R. 86-21:19). MCSO minimum instructional standards require personnel to remain near an ill or injured inmate, so they can monitor and watch closely enough to be aware of any changes in condition. (R. 120-9:1); (R. 86-12:18); (R. 86-11:8); (R.86-9:7). In the minute prior to Perry being discovered as a pulseless non-breather, no one monitored him or offered aid. (R. 86-12:29).

At the scene, the MFD 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 Respondents' 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

At its very base, Petitioners' Writ implores this Court to reverse the decision of the Seventh Circuit because they believe the court should have given their subjective testimony more weight than the undisputed evidence in this case and granted qualified immunity based on the nothing more than the Petitioners' claims that they did their best. Contrary to the Petitioners' assertions otherwise, the Seventh Circuit denied Petitioners the protection of qualified immunity because it found that the Petitioners failed to provide Perry the standard of care required by the Constitution, failed to provide *any* care, and did so despite established legal precedent that Petitioners should have been aware of. Further, Petitioners are asking this Court to require the Seventh Circuit to define the extent of medical care that must be provided to an arrestee in police custody when, based on the disputed facts in this case taken in a light most favorable to the non-moving party, a reasonable jury could conclude Petitioners Virgo and Wenzel did not engage in *any* reasonable medical care of Perry and thus violated Perry's clearly established Constitutional right to at least very basic medical care regardless of what care could have been provided or would have been sufficient. As to those material disputes of fact, the jury is the appropriate source of judge and remedy, and not a motion for summary judgment, as the Seventh Circuit has agreed.

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.

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 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. *Inter alia*, the Petition mistakenly asserts that:

> "the court of appeals failed to credit that Virgo and Wenzel were medical professionals applying their best professional judgment and, in fact, taking actions consistent with that reasonable judgment in the eleven minutes before the ambulance crews took over the efforts to revive Perry. . . . Neither nurse—the only two medical professionals on the scene—believed that Perry presented a medical emergency until he became unresponsive as the MPD officers were removing his spit mask."

(P. Pet. 20-21) (emphasis removed).

Yet, this assertion overlooks the Seventh Circuit's explicit consideration of this argument:

> "Yet, the jury could view the video from that night and disagree with the district court's characterization of the nurses' actions. Nurse Virgo, the first medical professional to come into contact with Perry after he was released from

the hospital, interacted with Perry for just over 30 seconds after he first arrived. There is evidence that his spit mask was "seeping blood," yet, Nurse Virgo did not remove the mask to determine why Perry was bleeding or the blood's origin. She did not take his vitals or even touch him. It was only after Nurse Wenzel removed Perry's mask almost seven minutes later that Nurse Virgo first touched Perry when rendering emergency aid. And, while Nurse Virgo contends that she knew that Perry was medically unfit to be booked from her first interaction with him, she did not immediately call for help. Rather, three minutes passed before an ambulance was called. Further, it is not clear, based upon this record, whether the ambulance was told it was urgent to come at that time or if that message was only relayed to emergency dispatchers at 8:52 p.m., when a medical emergency was finally declared. The district court improperly concluded that there was no factual dispute as to whether Nurse Virgo's actions were objectively reasonable.

The same is true of the district court's conclusion regarding Nurse Wenzel's actions. ... Rather a jury could determine that it was this delay in removing the mask, which the County seems to assert concealed the emergent nature of Perry's condition, that was objectively unreasonable. On this record, summary judgment was inappropriate with regard to the two nurses." (P. App. 28-29).

As the Seventh Circuit realized, the timeline of the medical care and the reasonableness of the nurses' actions were heavily in dispute. A reasonable jury could conclude that it is impossible to see signs of heart trouble or trouble breathing and that the nurses could not have reached those conclusions, as the petition asserts, simply by looking at Perry and asking him a few yes-or-no questions as he sat slumped and shackled on the floor, with a bloody and vomit-covered spit mask over his mouth, pants around his ankles, covered in his own feces and urine, and largely unresponsive. A reasonable jury could similarly conclude that it was unreasonable to simply assume there was no medical emergency when an arrestee was visibly bleeding even though no inquiry as to the injury or extent of the injury was performed. A reasonable jury could similarly conclude that Perry's lack of verbal responses was in fact a symptom of troubled breathing. A reasonable jury could similarly conclude that a nurse that does not inquire as to medication or seizure history is unreasonable when the nurse knows the arrestee has had a history of seizures and is in a physically distressed state. A reasonable jury could similarly conclude that, at a bare minimum, a nurse must take an arrestee's vitals and establish a baseline to conduct any sort of medical inquiry whatsoever. A reasonable jury could similarly conclude that the nurses did not check to see if there was a medical emergency whatsoever. Indeed, when all disputed facts are taken in the light most favorable to the non-moving party, the reviewing court must assume that the fictional jury did reach each one of these conclusions.

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 v. 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 fails to elaborate on the four-factor test established in that case, and 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 regard to Petitioner Virgo, the Seventh Circuit found that she failed to remove the spit mask from Perry's face after noticing that it was "seeping blood," did not check his vitals, and knew that he was medically unfit to be admitted into the jail, yet did not immediately call for any kind of help. (P. App. 28-29). In regard to Petitioner Wenzel, they found that instead of rendering any assistance to Perry, she merely stood and watched him from the nurses' station, ultimately removing the spit mask when it was already too late to save him. (P. App. 29). This is the analysis the Seventh Circuit is referring to later in its opinion, when it notes that the Petitioners' actions were objectively unreasonable because they failed to provide "*any*" care. (P. App. 33). Accordingly, Petitioners were correctly denied qualified immunity, and this case should be allowed to proceed before a jury for it to determine the full extent of Petitioners' liability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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