No. 13-862

In The
Supreme Court of the United States

LATRINA D. THOMAS, TUTRIX, ON BEHALF OF KA'DARY DA'SHUN THOMAS,
Petitioner,

v.

SCOTT NUGENT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER FOR THE CITY OF WINNFIELD,
Respondent.

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

REPLY BRIEF FOR PETITIONER

CAROL D. POWELL LEXING
FAITH JOHNSON
LAW OFFICE OF CAROL D. POWELL LEXING & ASSOCIATES, PLC
1900 Lamy Lane, Suite J
Monroe, LA 71201
legaldove2@yahoo.com
Phone: 318.324.0700
Attorneys for Petitioner Latrina D. Thomas

MICHAEL A. VATIS
Counsel of Record
LEAH M. QUADRINO
JILL C. MAGUIRE
BENJAMIN B. WATSON*
KAITLIN A. CASSEL**
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, NY 10036
mvatis@steptoe.com
Phone: 212.506.3927
Attorneys for Petitioner Latrina D. Thomas

Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITY

In The
Supreme Court of the United States

No. 13-862

LATRINA D. THOMAS, TUTRIX, ON BEHALF OF KA'DARY DA'SHUN THOMAS,
Petitioner,
v.
SCOTT NUGENT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER FOR THE CITY OF WINNFIELD,
Respondent.

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

REPLY BRIEF FOR PETITIONER

ARGUMENT

1. The Petition cited numerous cases holding that it was clearly established by 2008 that it was unconstitutional to electroshock a person who was fully restrained and posed no safety or flight risk, even if that person did not obey an order to get up. Respondent does not cite a single case to the contrary. Instead, he points to irrelevant—or non-existent—factual differences between this case and the cases cited in the Petition. *Every* case has

different facts. That has never prevented this Court, or lower courts, from finding that prior precedents clearly established a constitutional right.

a. Respondent argues that four of the cases cited in the Petition are irrelevant because the subjects there had not been "fully restrained" when they were shocked. Opp. at 10-12. This argument is completely illogical. If, as Respondent's argument concedes, no reasonable officer would think that it was constitutional to tase a subject who had *not* been fully restrained, then certainly no reasonable officer would think that it was constitutional to shock a subject in similar circumstances who *had* been fully restrained.

Moreover, in two of the cases, the subjects in fact *had* been physically restrained before they were electroshocked. *Thomas* v. *Holly*, 533 F. App'x 208, 219 (4th Cir. 2013) (unpublished) ("Plaintiff was effectively secured," as he "lay unarmed, face down on the ground, had three fellow officers sitting on top of him . . . holding him down, [and] one of those officers held Plaintiff's right handcuffed arm behind his back"); *Meyers* v. *Balt. Cnty., Md.,* 713 F.3d 723, 734 (4th Cir. 2013) (subject "ha[d] been brought to the ground, [and] ha[d] been restrained physically by several other officers").

b. Respondent attempts to explain away two other decisions on the ground that they may have involved Tasers used in probe mode rather than drive-stun mode. Opp. at 8-10. Respondent forgets that one of the eight shocks of Pikes was in probe mode. Pet. at 9.

More fundamentally, Respondent's argument is based on his continual mischaracterization of the physical effects caused by drive-stun mode. Respondent—with no support whatsoever—describes drive-stun mode as causing only "temporary and localized pain," Opp. at 3, as though it were no worse than stubbing a toe. But drive-stun mode inflicts extreme pain on the subject and temporarily incapacitates him. Indeed, that is the whole point—to incapacitate the subject when he is actively resisting arrest or behaving violently, so that police can secure him and put handcuffs on him. United States' Compl. in Intervention Pursuant to 42 U.S.C. § 14141 at 2, 7 (¶¶ 2, 28), *Shreve* v. *Franklin Cnty., Ohio*, No. 2:10-cv-644 (S.D. Ohio Nov. 3, 2010), *available at* www.justice.gov/crt/about/spl/documents/franklin_complaint_11-8-10.pdf ("Drive stun mode produces a continuous extremely painful electrical shock" that is "designed to subdue a violently resisting subject to handcuffing"); *Crowell* v. *Kirkpatrick*, 400 F. App'x 592, 595 (2d Cir. 2010) ("significant" pain); *McKenney* v. *Harrison*, 635 F.3d 354, 364 (8th Cir. 2011) (Murphy, J., concurring) ("incapacitating pain"). It also can leave permanent scars. Pet. at 5. And it creates a risk of serious injury or death. Pet. at 6-7. This is probably why *Wells* and *Hickey* do not even mention what mode the Taser was in.

Respondent also ignores a key aspect of this case: he did not electroshock Mr. Pikes one time. He shocked him at least *eight* times. Pet. at 10-13. The subjects in *Wells* and *Hickey* were tased only once.

c. Respondent argues that *Austin* v. *Redford Township Police Department*, 690 F.3d 490 (6th Cir. 2012), is not pertinent because the arrestee had already been placed in the patrol car when he was tased and had not been given sufficient time (only 30 seconds) to comply with the officer's command before he was tased. Opp. at 16. Again, Respondent ignores a key fact: he electroshocked Mr. Pikes at least twice *after* putting him in the patrol car. Pet. at 12-13.

Moreover, Nugent delivered most of the shocks in such rapid succession that Pikes was given almost *no* time to recover and comply with Nugent's commands before he was shocked again. Nugent delivered five of the shocks in *less than 85 seconds*. Pet. at 10. That averages to approximately 21 seconds between shocks—*less* time than in *Austin*. And the time between the *commands* and the shocks would necessarily have been even shorter, given the time necessary to give the command (and the warning that Pikes would be tased) and the time that (presumably) elapsed between the previous shock and the command.

d. Respondent admits that there are "factual similarities" between this case and *Orem* v. *Rephann*, 523 F.3d 442 (4th Cir. 2008). But he asserts that *Orem* is irrelevant because it was decided on Fourteenth Amendment grounds (since the plaintiff was considered a pre-trial detainee). Opp. at 16-17. Similarly, he dismisses *Hickey* on the ground that it was decided under the Eighth Amendment (since it involved tasing of an inmate).

What Respondent does not recognize, however, is that the Eighth and Fourteenth Amendment standard for proving excessive force is *higher* than the Fourth Amendment standard. *Graham* v. *Connor*, 490 U.S. 386, 398 (1989) (Eighth Amendment standard is "less protective" of plaintiffs' rights than the Fourth Amendment standard because a higher showing is required); *Burgess* v. *Fischer*, 735 F.3d 462, 472 (6th Cir. 2013) (plaintiffs have "a substantially higher hurdle to overcome" under the Fourteenth Amendment); *Fennell* v. *Gilstrap*, 559 F.3d 1212, 1217 (11th Cir. 2009) (same); *Clement* v. *Gomez*, 298 F.3d 898, 903-04 (9th Cir. 2002) (same). Whereas the Fourth Amendment requires a plaintiff to show only that the use of force was objectively "unreasonable," the Eighth and Fourteenth Amendments require a plaintiff to show that he was subjected to the "unnecessary and wanton infliction of pain" and that officers acted "maliciously and sadistically for the very purpose of causing harm." *Graham*, 490 U.S. at 398 & n.11 (1989) (Eighth Amendment (quotation marks and citation omitted)). See also *Orem*, 523 F.3d at 446 (Fourteenth Amendment).

Thus, a tasing that violates the Eighth or Fourteenth Amendment would necessarily violate the Fourth Amendment if the subject were an arrestee instead of an inmate or a pretrial detainee. *Boister* v. *Service*, 96 F.3d 1448 (6th Cir. 1996) (unpublished table decision), *available at* 1996 WL 499096, at *4 ("Because the district court ruled . . . that Boister's alleged facts, if true, established that Service violated his 'clearly established' Eighth Amendment rights, *a fortiori*, the same conclusion

must hold true under the less rigorous Fourth Amendment excessive force standard."). Accord *Nance* v. *King*, 888 F.2d 1386 (4th Cir. 1989) (unpublished table decision), *available at* 1989 WL 126533, at *1.

Moreover, courts regularly rely on decisions involving other constitutional provisions in determining whether a constitutional right was "clearly established." See, *e.g., Brown* v. *City of Golden Valley*, 574 F.3d 491, 499-500 (8th Cir. 2009) (citing Eighth Amendment cases in holding that plaintiff had a clearly established Fourth Amendment right to be free from Taser shock); *Flores* v. *City of Palacios*, 381 F.3d 391, 401 (5th Cir. 2004); see also *Meyers*, 713 F.3d at 734.

e. Respondent concedes that cases involving other forms of force are relevant to the "clearly established" analysis. Opp. at 12. But he seeks to distinguish some of these cases based on their facts. (Respondent does not attempt to distinguish *Richman* v. *Sheahan*, 512 F.3d 876 (7th Cir. 2008), at all.) Once again, Respondent ignores the central holding of these cases—that it was clearly established that using significant force against someone who posed no flight or safety risk but simply was being "passively resistant" violated the Fourth Amendment. See, *e.g., Meirthew* v. *Amore*, 417 F. App'x 494, 497, 499 (6th Cir. 2011). And, again, Respondent's argument depends entirely on his deeply flawed premise that using a Taser in drive-stun mode is a minor matter.

Respondent tries to distinguish *Bultema* v. *Benzie County*, 146 F. App'x 28 (6th Cir. 2005), on the

ground that the pepper spray there was used "in order to subdue the arrestee to get him handcuffed," Opp. at 13. He makes the same argument with respect to the choke-hold used in *Griffith* v. *Coburn*, 473 F.3d 650 (6th Cir. 2007). Opp. at 13-14. As discussed above, though, if it was clearly established that it was unconstitutional to use significant force on an arrestee *before* he was restrained, it was at least as clearly established that it was unconstitutional to use the same force on a person in similar circumstances *after* he was restrained.

In any event, Respondent's description of *Bultema* is wrong. The pepper spray was used "on Bultema after he was handcuffed." 146 F. App'x at 35.

Respondent also tries to distinguish *Griffith* on the ground that the use of a choke-hold is "nowhere near the short, discontinuous and localized pain accompanied by a Taser in drive-stun mode." Opp. at 14. However, the court in *Griffith* specifically held that the choke-hold was at the same level in the "force continuum" as the use of a Taser. 473 F.3d at 657.

Respondent attempts to distinguish *Headwaters Forest Defense* v. *County of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002), on the ground that the protesters were "self-restrained, as opposed to restrained by police in the act of arrest." Opp. at 14. But nothing in *Headwaters* or any other case suggests that this matters. The only relevant issue is whether the person subjected to force was restrained, and therefore posed no safety or flight risk.

He also claims that pepper spray is a more significant use of force than a Taser, but cannot cite a single case in support. See Opp. at 13. In fact, numerous cases have held that Tasers fall on the same level or *higher* on the use-of-force continuum than pepper spray. *E.g., Abbott* v. *Sangamon Cnty., Ill.*, 705 F.3d 706, 726 (7th Cir. 2013); *Brown*, 574 F.3d at 500 n.6; *Griffith*, 473 F.3d at 657-80; *McGlown* v. *City of Birmingham*, 880 F. Supp. 2d 1229, 1234 (N.D. Ala. 2012).

In any event, the central holding of *Headwaters* is clearly pertinent: any reasonable officer would have known that it was unconstitutional to use pepper spray to force passively resistant protesters to move when the officers could have accomplished their objective by simply cutting the steel devices that the protestors had used to bind themselves together. 276 F.3d at 1130. The same principle applies here—Nugent and the other officers could move Pikes to the car simply by lifting him up and assisting him in walking, as they eventually did.[1]

---

[1] Respondent's assertions (Opp. at 15) that Pikes "could not have been moved via alternate means" are contradicted by the record. The officers eventually got Pikes into the car by helping him to get up and walk, and got him out of the car and into the police station by carrying him. This did not require super-human effort. See, *e.g.,* 6/8/09 Pls. Reply to Resp. to Mot. Ex.'s A-F at 4 & 7, ECF No. 59 (Dist. Ct.); 9/1/11 SUMF to Mot. for Summ. J. on Behalf of Detective Mardsen and Officer Carpenter Ex.'s A-B at 9-10, ECF No. 157-3 (Dist. Ct.); & 10/14/11 Pls. Mem. in Opp'n to Mot. for Summ. J. Scott Nugent Ex. 25 at 7, ECF No. 203-5 (Dist. Ct.).

f. Respondent does not dispute that some applications of force are so obviously unconstitutional that an officer would not be protected by qualified immunity even if there were not cases on point. Pet. at 18-19 & n.11. The electroshocking of Pikes clearly falls into this category. There is simply no valid reason to inflict tremendous pain on an arrestee, and subject him to the risk of serious injury or death, where he is handcuffed and not posing a safety or flight risk but simply does not get up when ordered.

Respondent also does not dispute that sources other than case law can warrant a finding that a constitutional right to be free from certain forms of force was clearly established. Pet. at 18. The Petition cited numerous such sources. Pet. at 5-8. Respondent simply ignores these sources, just as he ignored his own department's policy when he repeatedly tased Pikes.

g. Respondent argues that "the very fact that . . . a Circuit split exists . . . necessarily means that qualified immunity was properly granted." Opp. at 18. This argument is plainly incorrect because the Fifth Circuit's decision to grant qualified immunity is what *created* the conflict. There was no split prior to the Fifth Circuit's decision that might have led Nugent to reasonably believe that his conduct was constitutional; and the Fifth Circuit remains alone in its view that such conduct did not violate a clearly established right. *Wilson* v. *Layne*, 526 U.S. 603 (1999), and *Reichle* v. *Howards*, 132 S. Ct. 2088 (2012), are thus completely inapposite.

Moreover, this Court's decision in *Pearson* v. *Callahan*, 555 U.S. 223 (2009), dealt with precisely the *opposite* situation. There, the court of appeals' decision was the first and only one to find that the type of search performed by the police in that case was *unconstitutional*, so the officer was entitled to rely on the prior cases approving that type of search. *Id.* at 244-45. Here, *all* of the prior cases demonstrated that actions like Nugent's violated a clearly established right; the Fifth Circuit was the first to hold to the contrary. In this situation, there is no basis for finding that the constitutional right was not clearly established.

Respondent's argument actually shows precisely why certiorari should be granted. If the Court were to allow this decision to stand, officers in the future could repeatedly electroshock fully restrained arrestees who pose no flight or safety risk, just to force them to get up, *and* they would be protected by qualified immunity because of the circuit split that the Fifth Circuit has created.

2. Respondent expressly concedes that the circuit split on the burden of proof issue is "real." Opp. at 19. This alone warrants certiorari.

Yet, Respondent suggests that the split is "irrelevant to the outcome of this case" since he would have satisfied the burden even if it were his to bear. *Ibid.* This suggestion flies in the face of precedent and logic. Which party bears the burden is critical. Pet. at 31.

Moreover, Respondent clearly could not carry the burden here. To do so, he would have to show either that his conduct was not unconstitutional or that the

right he violated was not clearly established in 2008. Respondent has not even tried to prove the former. And the cases he relies on certainly do not show the latter.

Those cases were decided *after* 2008, so they could not possibly have influenced a reasonable officer's belief about the constitutionality of his actions in January 2008. They are also totally off-base.

In *Buckley* v. *Haddock*, 292 F. App'x 791 (11th Cir. 2008), the court emphasized that the subject was in fact causing a threat to the safety of the officer, himself, and passing motorists by lying beside a busy highway. *Id*. at 794 & n.6. It was undisputed below that Pikes was not a safety threat to anyone.[2]

In *Mattos* v. *Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc), the Ninth Circuit found that the officer's tasing of the subject *was unconstitutional*. It is thus unfathomable how this decision could have caused a reasonable officer in Nugent's shoes to believe that his conduct was constitutional. Moreover, the officers in *Mattos* were faced with a potentially dangerous situation in which they

---

[2] Respondent *now* says that Pikes posed a safety threat because he was "a very large man . . . and obviously very motivated to not go to jail." Opp. at 3 n.1. But the record is replete with evidence, including the officers' own statements, making clear that Pikes was never a safety threat. Pet. at 9-13. This is presumably why Respondent never asserted below that Pikes was a safety threat. Nor was Pikes a flight risk. Indeed, Respondent's whole justification for repeatedly tasing Pikes was that Pikes *did not move*.

"reasonably felt" that they might be physically harmed. 661 F.3d at 451.

Moreover, Nugent's repeated electroshocking of Pikes was so clearly unconstitutional that any reasonable officer in Nugent's shoes would have known it, even if there had not been ample precedent directly on point. Pet. at 18-19 & n.11.

Finally, a jury reasonably could have found, based on the evidence in the record, that Pikes was physically *unable* to get up when commanded to do so. Pet. at 9-13. Even Respondent does not contend that a reasonable officer might not have known that tasing a person who was unable to get up was unconstitutional.

3. Respondent's argument about whether the court of appeals even had subject-matter jurisdiction misses the point. Respondent concedes that the district court denied qualified immunity solely because there were *factual* issues that were important to the qualified immunity issue. Opp. at 21. It is irrelevant whether or not the court of appeals, after asserting jurisdiction, applied the correct legal standard in determining whether Respondent was entitled to qualified immunity.[3] The court of appeals lacked jurisdiction to decide that question in the first place, because the district court had never decided the legal issue.

---

[3] The Fifth Circuit clearly did not apply the correct legal standard, as it read the evidence in the light most favorable to Respondent rather than to Petitioner, the non-moving party. Pet. at 35 n.22.

Moreover, Petitioner never conceded appellate jurisdiction; she vigorously disputed it. Pet. at 35 n.22. Her point was simply that Respondent was not entitled to qualified immunity even if Pikes had been able to get up. In any event, this Court has made it crystal clear that a party cannot concede subject-matter jurisdiction. Pet. at 34. A court either has it, or does not. The Fifth Circuit did not.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant certiorari.

Respectfully submitted,

CAROL D. POWELL LEXING
FAITH JOHNSON
LAW OFFICE OF CAROL D. POWELL LEXING & ASSOCIATES, PLC
1900 Lamy Lane, Ste. J
Monroe, LA 71201
legaldove2@yahoo.com
Phone: 318.324.0700
Attorneys for Petitioner Latrina D. Thomas

MICHAEL A. VATIS
Counsel of Record
LEAH M. QUADRINO
JILL C. MAGUIRE
BENJAMIN B. WATSON*
KAITLIN A. CASSEL**
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, NY 10036
mvatis@steptoe.com
Phone: 212.506.3927
Attorneys for Petitioner Latrina D. Thomas

MARCH 11, 2014

* Admitted in Virginia and practicing law in the District of Columbia under the supervision of the listed attorneys pursuant to D.C. Bar Rule 49(c)(8).

** Admitted in Maryland and practicing law in the District of Columbia under the supervision of the listed attorneys pursuant to D.C. Bar Rule 49(c)(8).