



## Supreme Court considers plea from parents of man killed in St. Louis jail who was shackled facedown

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When the Supreme Court meets behind closed doors on Thursday, the justices will discuss a case brought by parents who say their son, Nicholas Gilbert, died in police custody in St. Louis after law enforcement officers placed their weight on his back as he was shackled facedown.

In court papers, the parents compare elements of the death of their son -- who was White -- with the murder of George Floyd. The allegation produced an angry response from the city that accused the parents of using the death of Floyd "as a cudgel to try to browbeat this Court into reviewing a case that is a straightforward application of basic Fourth Amendment procedures."

The case is being watched for any signal of the justices' willingness to step in and offer more definitive guidance on the legal doctrine of qualified immunity that shields law enforcement from liability for constitutional violations including allegations of excessive force.

Petitions are likely to continue to flow into the court at a time when tensions across the country are particularly high.

Under the doctrine of qualified immunity, an officer is not liable, even if he or she violates the Constitution, unless it was "clearly established" that the conduct was unconstitutional.

Critics say the bar is too high and want the Supreme Court to revisit the issue in a substantive way. Paul Hughes, a McDermott Will & Emery LLP lawyer who has unsuccessfully petitioned the court on the issue, noted that Justices Clarence Thomas and Sonia Sotomayor have "both expressed deep reservation with the judge-made doctrine, and it is being applied with wild inconsistency across the country."

Last term, the justices declined to take up several cases concerning qualified immunity, and now the Gilbert case focuses sharply on excessive force.

For Hughes, the Gilbert case "presents a fact pattern now well-known after George Floyd -- 'positional asphyxiation,' where an individual is suffocated to death by one or more police officers pinning the individual, chest down, to the ground."

"Because this is a common police tactic, and it all too often results in death, it is crucial that the Supreme Court provide definitive guidance regarding the Constitution's prohibition on the use of excessive force in this context," Hughes said.

St. Louis City Counselor Michael Garvin told the Supreme Court that 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."

"The only things in common between this case and the reports regarding George Floyd are drug use and heart disease," the city argued, and added that a "grandstanding assertion" that a lower court opinion in favor of the city "has any bearing on situations like that reported in the case of George Floyd is wholly fatuous."

The case first appeared on the docket in November, but the court rescheduled it for consideration some 13 times before discussing it for the first time last month and scheduling it again for Thursday's closed-door conference. The repeated rescheduling suggests that at least one justice may have taken some kind of interest in the case along the way.

#### Incident in holding cell

The case currently under consideration concerns the issue of "prone restraint" and is brought by Jody Lombardo and Bryan Gilbert, the parents of Nicholas Gilbert, who was arrested for trespass and occupying a condemned building in 2015. Lawyers for his parents say he was the subject of excessive force when he was handcuffed and shackled facedown in his holding cell as officers pressed on his back. Gilbert ultimately stopped breathing and was transported to the hospital where he was pronounced dead.

Gilbert's family sued the officers in their individual capacities and the city for an unconstitutional policy that they said violated Gilbert's rights.

A federal appeals court recited the facts of the case: On December 8, 2015, officers arrested Gilbert who was cooperative at first and checked "no" to a question asking whether he had a medical condition. While he was in the cell, however, the officers observed as he began to wave his hands in the air and rattle the bars of his cell. One officer saw him tying an article of clothing around the bars of his cell and his neck. As officers responded, the struggle continued and at one point Gilbert was brought to a kneeling position and he thrashed his head on a concrete bench causing a gash on his forehead. His legs were shackled and other officers responded as Gilbert was placed in a prone position on the floor. According to the deposition of one officer, while Gilbert was in a prone position the officers put weight on various parts of his body, including the "upper right side, and there was, I believe, a lower or middle part of his torso."

The St. Louis City Medical Examiner's autopsy report stated that the manner of death was accidental and that the cause of death was arteriosclerotic heart disease exacerbated by methamphetamine and forcible restraint. The appeals court noted that lawyers for Lombardo presented a conflicting expert report alleging that the cause of death was forcible restraint inducing asphyxia. There is no video of the incident.

Garvin told the Supreme Court that it should allow the lower court opinion to stand.

"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," Garvin wrote.

Courts, he added, "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."

"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," Garvin said.

A district court found in favor of the police officers based on qualified immunity holding that there was no clearly established Fourth Amendment right against the prone restraint used against Gilbert at the time of the incident. The 8th US Circuit Court of Appeals agreed, saying that no reasonable jury could find that the officers used excessive force and that the officers' actions "did not amount to constitutionally excessive force."

Jonathan Taylor of Gupta Wessler PLLC, a lawyer for the parents, notes that the appeals court decision that went against his client has already been invoked by other police officers in other cases -- including by one of the officers in the George Floyd killing.

"What the Supreme Court does with this petition is of course tremendously important to our clients," Taylor said in an interview, "but it is even more important for what it means going forward."

If the decision is allowed to stand, he said, "it will be much harder to hold officers accountable when they kill someone by forcible prone restraint."

Jay Schweikert, an expert on qualified immunity at the Cato Institute, cautions about comparing the Gilbert case to the Floyd case, both incidents with very different sets of facts. He notes that as things stand, the Supreme Court's excessive force doctrine is highly dependent on the specific factual context of each individual case and that it would be a mistake to lump together as "equally problematic all uses of force against suspects in prone positions." But still, he thinks the court should offer more guidance.

"The application of this doctrine to people in a prone position is an area where we could use more clarity from the court, but it's hard to get clear, bright-line rules in this area of the law," Schweikert said in an interview.