IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

CSA-REG-3461-2018

COREY CUNNINGHAM, *et al.*

Appellants,

v.

BALTIMORE, COUNTY, MARYLAND, *et al*.

Appellees.

Circuit Court for Baltimore County
(The Honorable Mickey J. Norman, presiding)

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF MARYLAND

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INTEREST OF AMICI

The American Civil Liberties Union of Maryland is the state affiliate of the American Civil Liberties Union (ñACLUò), a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nationôs civil rights laws. Since its founding in 1931, the ACLU of Maryland, which comprises approximately 45,000 members throughout the state, has appeared before various courts and administrative bodies in numerous civil rights cases against the government or government officials, both as direct counsel and as *amicus curiae*. The issue before the Court is of vital interest to the ACLU of Maryland, as it receives numerous complaints from and frequently represents individuals whose rights have been violated through police misconduct. The ACLU of Maryland has also previously appeared before Maryland courts as direct counsel and *amicus curiae* seeking to protect citizens against unlawful police actions. *See, e.g., King v. State*, 434 Md. 472 (2013); *Maryland Dep't of State Police v. Maryland State Conference of NAACP Branches*, 430 Md. 179 (2013); *State v. Andrews*, 227 Md. App. 350 (2016); *Espina v. Jackson*, 442 Md. 311 (2015); *Prince George's Cnty. v. Longtin*, 419 Md. 450 (2011); *Houghton v. Forrest*, 412 Md. 578 (2010*); Lee v. Cline*, 384 Md. 245 (2004); *Ashton v. Brown*, 339 Md. 70 (1995). Accordingly, the issues before the Court are of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

In this case, the Honorable Mickey J. Norman, three times denied defense motions seeking to take from the jury the question of ñqualified immunity.ò The motions maintained it was ñreasonableò as a matter of law for Officer Royce Ruby to open fire, killing Korryn Gaines and seriously injuring her five-year-old son, Kodi Gaines, and, each time, Judge Norman held it was a question for the jury. In denying the defense motions, Judge Norman correctly ruled a determination of the ñreasonablenessò of Officer Rubyôs conduct required an assessment of disputed facts, a task classically within the sole province of the jury. Indeed, after all evidence had been presented, the judge rejected the defenseôs request to rule the evidence could not support a jury verdict and allowed the question of whether Officer Ruby had acted reasonably to be submitted through a special verdict sheet to the jury.

The jury found Officer Rubyôs actions were not ñreasonable,ò and entered a substantial verdict against Officer Ruby and Baltimore County. Only then did Judge Norman decide ï a full year after the trial had concluded ï his prior rulings had been wrong, as had the juryôs determination that Officer Ruby had not acted ñreasonably.ò Judge Normanôs post-trial ruling is a textbook example of a jurist improperly usurping the role of the jury because he did not like or agree with its findings. Judge Norman abused the elasticity of the ñreasonablenessò determination as part of the qualified immunity analysis to give into temptation to weigh in as the 7th juror.

This is the most dangerous kind of judicial abuse, for it undermines the legitimacy of the legal system. Particularly against the backdrop of the extraordinary and numerous hurdles victims of police misconduct must overcome to get before a jury, invalidating the juryôs verdict on the flimsiest of rationales is intolerable and invites already widespread distrust of police to bleed into distrust of the courts. What victims see is this: A White police officer killed a Black woman and severely injured her five-year-old son. After a lengthy trial with extensive evidence, a Baltimore County jury found for the family. A judge, who is a former law enforcement officer, overturned every aspect of the juryôs verdict a year later in an opinion plainly sympathizing with officer, depriving the family of any remedy.

Amici respectfully urge the court to right this wrong and reinstate the hard-won verdict to the Gaines family.

QUESTIONS PRESENTED

The ACLU adopts the Questions Presented set forth in Appellantôs Brief of Corey Cunningham, as next Friend, Father and Guardian of Minor Child Kodi Gaines.

STATEMENT OF FACTS

The ACLU also adopts the Statement of Facts set forth in Appellantôs Brief of Corey Cunningham, as next Friend, Father and Guardian of Minor Child Kodi Gaines.

ARGUMENT

I. JUDGE NORMAN USURPED THE ROLE OF THE JURY AND ABUSED THE DOCTRINE OF QUALIFIED IMMUNITY TO DO SO.

The trial judge is expected to be an impartial arbitrator. *Tierco Maryland, Inc. v. Williams*, 381 Md. 378, 426 (2004). In a jury trial, the judgeôs role is to apply the rules of procedure and evidence to ensure facts are developed in an orderly, trustworthy fashion, and to instruct the jury in the legal principles it must apply in reaching a verdict. Proper judicial management of the trial requires the judge scrupulously to keep within that role: While the judge may participate in the application of the law to the facts, factual assessments governed by commonsense and good judgment must be reserved strictly for the jury. The most noxious transgression of this delimitation of roles occurs when the judge substitutes his judgment for that of the jury, not because the jury got it wrong, but because the judge would have reached a different verdict, had the judge been on the jury.

In the case *sub judice*, Judge Norman grossly exceeded his bounds and utilized the doctrine of ñqualified immunityò to substitute his judgment for that of the jury. After repeatedly denying defenseôs motions seeking to take the case from the jury based on the question of ñqualified immunity,ò Judge Norman found ï over one year after the jury returned a substantial verdict for Appellants ï Officer Ruby was entitled to qualified immunity. He did so by improperly creating his own findings of fact and drawing his own inferences to fit within the amorphous contours of qualified immunity.

Under the qualified immunity doctrine, ñgovernment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.ò *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). ñQualified immunity balances two important interestsð the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.ò *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The qualified immunity test depends ñon an objective appraisal of the ***reasonableness*** of the force employed.ò *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (emphasis added). ñThe inquiry on qualified immunity is whether a ***reasonable*** officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances.ò *Id.* (emphasis added).

Legal doctrines that depend on determinations of ñreasonablenessò are particularly susceptible to abuse by judges tempted to conform verdicts to their own personal views. The defense of ñqualified immunityò provides a case in point as it hinges on a determination of what a ñreasonableò officer would know, think or perceive: It is an inflatable doctrine that easily can be made to assume the dimensions required of it by a judge who prefers a particular outcome. Here, the trial judge attributed his ñabout-faceò to having the opportunity to hear the evidence presented at trial, but manifestly that was untrue: When the trial concluded, and the presentation of evidence was fresh in his mind,

the judge ***denied*** the defenseôs renewed motion for judgment. Only after the jury had reached a verdict the trial judge disagreed with did he reverse his own rulings to justify reversing that of the jury. But, of course, the trial judgeôs apologia is itself an indictment, as surely it is the place of the jury, and not the judge, to evaluate the evidence presented at trial and to apply to it discretionary rubrics such as ñreasonableness.ò

The question of whether it was objectively reasonable for Officer Ruby to fire the first shot depended on an evidentiary dispute about whether Ms. Gaines had raised and pointed her weapon, a dispute only the jury could resolve. It is undisputed Officer Ruby shot Ms. Gains in the back which, in itself, strongly belies Officer Rubyôs claim he shot Ms. Gaines in response to an imminent threat, particularly when testimony put Ms. Gaines in the kitchen thirty to forty minutes before Officer Ruby shot her and her son. Judge Norman ignored evidence arising from Officer Rubyôs own testimony clearly demonstrating it was impossible for Ms. Gaines to have pointed her weapon at the doorway of her apartment. In his lengthy decision, Judge Norman fails to explain how the jury could have erred insupportably in sifting the evidence upon which the qualified immunity defense rested. Manifestly, Judge Norman did not like the outcome that issued from the juryôs assessment of the evidence, so he simply changed the outcome utilizing the defense of qualified immunity. Amici respectfully urge this Court to reverse this abuse of power and reinstate the hard-won verdict to the Gaines family.

II. COURTS MUST BE FAR MORE VIGILANT IN PROTECTING VICTIMS OF CIVIL RIGHTS ABUSES TO ENSURE THAT QUALIFIED IMMUNITY IS NOT USED AS AN ABSOLUTE SHIELD EFFECTIVELY PROHIBITING VICTIMS OF CIVIL RIGHTS ABUSES FROM RECOVERING FROM STATE ACTORS UNDER 42 U.S.C. § 1983.

From the perspective of victims of civil rights abuses by police, the government either completely fails to respond, or responds inadequately. Victims of police misconduct rarely see the officer responsible for wrongdoing disciplined or charged criminally, even when the harms experienced are irreparable losses of life or significant physical and mental injury. As a result, it falls to the victims of unconstitutional police abuses to seek justice through the civil court system. Indeed, such cases are often the primary means by which police are held accountable for violating rights protected by the Constitution.[1] And while going to court can be trying for anyone, victims of police abuse shoulder unique risks and burdens when they stand up to police, who have unparalleled power even among government employees. Victims challenging police misconduct in court often fear retaliation by officers who have the authority to deprive them of their liberty, the ability to

[1] Based on the experience of amici, neither disciplinary proceedings nor criminal prosecution are, in practice, functioning mechanisms for police accountability. *See, e.g.,* Peter Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 Md. L. Rev. 271 (1994) (chronicling systemic scope of failure of accountability mechanisms responding to police brutality nationally); Scott Turow, *Presumed Guilty: You Think You Know Why the Diallo Cops Were Acquitted. Think Again.* Wash. Post, Mar. 5, 2000, at B1 (describing racial inequality in patterns of police abuse); Mark Puente, *Baltimore Police Should Revamp Misconduct Probes, Audit Says*, Balt. Sun, Sept. 20, 2014 (describing findings of audit showing systemic failures of internal affairs).

access highly sensitive information contained in law enforcement databases, and the capacity to invoke the machinery of criminal investigative tools against them.

Once in court, victims find that the entire weight of government has been thrown behind the police officer and his defense. *See* Md. Code Ann., Cts. & Jud. Proc. Art. § 5-302 (providing for representation by government). In effect, victims are forced to take on not just the officer but also the entire system. They must overcome the well-documented ñblue wallò that compels officers to protect fellow officers.[2] They must overcome the overwhelming odds that police officersô version of events will be credited over that of victims.[3] And, of course, they must overcome the immunities available to law enforcement.

Here, despite the odds, Appellants were able to overcome all these obstacles to get to the jury. That jury entered a substantial verdict in their favor, after weighing the evidence and determining they were wronged. Three times ***before*** the case went to the jury

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[2] As explained by one of the nation's first police monitors, ñpolice officers [tend] to become uncooperative when faced with an investigation, creating what has been called the 'blue wall' to enforce a code of silence by intimidating any officer who shows any willingness to cooperate with investigators or point the finger at a fellow officer.ò Merrick Bobb, Internal and External Police Oversight in the United States at 6 (2002), available at http://www.prearesourcecenter.org/sites/default/files/library/internalandexternalpoliceoversightintheunitedstates.pdf. Officers themselves acknowledge this culture; in a survey of officers from 121 different police departments, only 39 percent believe that officers would report serious criminal violations committed by other officers. See Judith A.M. Scully, Rotten Apple or Rotten Barrel?: *The Role of Civil Rights Lawyers in Ending the Culture of Police Violence*, 21 Nat'l Black L.J. 137, 143 (2009).

[3] Police misconduct cases are often extraordinarily difficult to prove, as juries typically credit police. *See, e.g*., Turow, *supra* n. 1 (noting, in authorôs experience as a U.S. Assistant Attorney, jurorsô reluctance to convict police officers of wrongdoing).

and even after all the evidence had been presented, Judge Norman found qualified immunity did not bar Appellants from relief.

Yet, after the jury found for them, Appellantsô years of effort to pursue justice were undone in one fell swoop by Judge Norman. This case demonstrates the deep flaws in the ***judicially created*** doctrine of qualified immunity, which gives judges unfettered power to transform the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment and undermining trust in police and courts alike. In *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018), Justice Sotomayor recently drew much-needed attention to the Supreme Courtôs qualified immunity jurisprudence, explaining it ñsends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.ò 138 S. Ct. at 1162.

Where police killings are disproportionately borne by the most marginalized groups; where the government declines to criminally prosecute police even when they act with malice; where the government itself supplies the defense and indemnifies police for wrongdoing; and judges can overturn jury verdicts for plaintiffs challenging police misconduct without anything but the flimsiest of unauthorized reasoning, the promise of justice in the courts appears increasingly illusory for communities that bear the brunt of police abuse. Police departments in Maryland and across the country are in crisis because

of the erosion of trust; continued expansion of qualified immunity guarantees the same loss of trust for the courts.

CONCLUSION

ACLU respectfully requests the Circuit Courtôs Order of February 14, 2019 be reversed, and the verdict of the jury entered on February 22, 2018 be upheld. Anything less would betray the nationôs solemn claim that it remains a government of laws, not of men. *Marbury v. Madison*, 5 U.S. 137 (1803).

Respectfully submitted,

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STATEMENT OF FONT USED AND TYPE SIZE

This brief is prepared with the type known as Times New Roman; the body has a type size of thirteen (13) point in the conformance with Maryland Rule 8-112(c). This font appears on the July 1, 1997 ñCOMMERCIAL AND COMPUTER FONTS APPROVED BY THE COURT OF APPEALS OF MARYLAND UNDER RULE 8-112.ò

___/s/_____
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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 2,757 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 10th day of March, 2020, I filed the foregoing Amicus Curiae Brief electronically and served two copies by postage prepaid First-Class U.S. Mail to:

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