

## Written Testimony of S. Lee Merritt, Esquire to the Senate Judiciary Committee

June 16, 2020

We live in the deadliest and most incarceration prone police culture in the modern world. Our criminal justice and legal system is as ravenous as it is racist. Our law enforcement community racks up thousands of civilian deaths every year— and tens of thousands more are brutalized, injured and maimed. Millions more are arrested and jailed - making the United States the single most incarcerated nation in the entire history of the world.

This is an American Crisis— a genocide. This is not hyperbole but rather a reality that demands a national response and I want to thank this committee for taking immediate, swift and responsive action.

I come before you today as a civil rights attorney. A practitioner. I am the Legal Director of the Grassroots Law Project and I represent the families of citizens killed by police - some these names you may have heard, but far too many you have not. I represent the family of Ahmaud Arbery who was murdered by a former police officer Gregory McMichael; his son Travis McMichael and their neighbor William Bryan. While I am here to provide testimony on the Justice in Policing Act and Ahmaud Arbery was not killed in an officer involved shooting, it was failures in policing that directly contributed to his death and the delay of justice to his family. Neighbors initially sought police help for the black jogger that frequented their neighborhood that they considered suspicious and Officer Ronald Rash encouraged them to pursue a course of vigilantism. He was aware for months that these men were actively hunting a black suspect to whom they intended to do harm. Once the deed was done, it was law enforcement that lied to Wanda Cooper Jones, Ahmaud's mother, telling her that her son had been killed during a burglary by a homeowner. Local DAs Jackie Johnson and George Barnhill participated in the cover up of his shooting. The Glynn County police chief where this crime occurred was subsequently arrested on separate criminal corruption allegations along with a handful of his top officials. Ahmaud's story is not just tragic and unjust, it lays bare the need for a reimagining of police in America and their mission in our society.

I run a practice dedicated almost exclusively to responding to police murders. I am one of many attorneys that has this crisis at the root of their firm as this nation churns out enough bodies and human rights violations to keep us all occupied for a very long time. I continue to stand for the family of George Floyd. Derick Chauvin and other officers of the Minneapolis police department held him down for 8 minutes and 46 seconds under the unbearable weight of oppression. He could not breathe and as the nation looked on in horror we could not breath. Minnesota Attorney General Keith Ellis and Minnesota's top law enforcement officials, preemptively declared that it would be difficult to convict the offending officers for the murder of George Floyd. As hard as that is to accept given the evidence we have now all seen with our own eyes - it is consistent with the American experience. Because of existing laws that basically give carte blanche to law enforcement to kill at-will with the utterance of these words "I feared for my life," hard fought, rare prosecutions and difficult convictions have characterized the experience of the families of:

Botham Jean - Killed in his apartment complex by a police officer that said her training instructed her to shoot the unarmed man eating a bowl of ice cream in his living room because “she could not see his hands.”

Atatiana Jefferson - Also gunned down in her home after leaving the front door open to catch a cool breeze of relief from the heat of the night in Fort Worth Texas. FWPD Officer Aaron Dean crept around the back of her home and shot her through her bedroom window where she had been playing video games with her seven-year-old nephew.

The beautiful families that have traveled with me represent a cross section of America. Disproportionately black. Undeniably strong. Relentlessly committed to the cause of justice in policing. They include the father of Maggie Brooks- A fire chief in Arlington Texas. His daughter was accidentally shot by a police officer who recklessly shot at her 6 month old puppy, but struck Ms. Brooks instead— killing her. Qualified Immunity has banned her family access to the court. Under the current federal laws there will be no criminal or civil accountability for this officer or his department.

They include the family of Michael Dean who went out to get his daughter a birthday cake on her 6th birthday but never made it home. I wish I could tell you what happened back in December of 2019 but all we know is he was shot in the head at point blank range after being pulled over for a traffic stop. The offending officer Carmen DeCruz was arrested and charged with manslaughter but then released on bond several months after the murder. This family still has not been allowed to see body and dash cam evidence of what happened to their loved one. They have been denied access to these videos by City of Temple Texas and the Bell County district attorney Henry Garza.

Cameron Lamb was unarmed and shot in his place of business in Kansas City MO. The chief KCPD has broken with the local DA and refused to submit even a probable cause affidavit in the case making prosecution very difficult.

Jemel Roberson was a hero. He stopped a mass shooting at a nightclub where he worked security. A Midlothian, Illinois police officer responded to the scene in militarized fashion wielding a high power rifle that he indiscriminately pointed at patrons, victims and witnesses alike before taking aim on the back of Jemel who was holding down a suspect and awaiting his arrival. I imagine he was relieved to hear police had arrived— until he was shot in his back three times by Covey who remains with the department.

Antwon Rose was 17 and unarmed when he ran from a traffic stop. He was shot in his back three times by Officer Michael Rosfeld on the same day that he was sworn in as a peace officer for E. Pittsburgh after transferring in from another department where he faced accusations of misconduct. Uncontradicted testimony at his trial established that shooting an unarmed teen he

wrongfully perceived as a threat was consistent with his training. Officer Rosfeld was acquitted on all counts. And Antwon's family was left devastated.

I grew up in a neighborhood like Antwon Rose. I got into my own fair share of trouble. In my community we were confronted with death every day both from the notoriously violent LAPD, as well as gangs, drugs, and poverty. Sadly it was not unusual to pass a street memorial bearing the face of friends lost to gun violence. However, our pain was rarely treated with any real level of seriousness or concern. In the name of the "war on drugs" the LAPD regularly flooded our communities with police, but we never got safer as a result. In fact, it got worse.

What we have come to understand is that this system was not built for the justice or freedom of Black people. It was built to oppress us. It is not broken - as we often say. In fact, it's functioning exactly the way it was designed and built to function. It is firing on all cylinders. From slavery until this very day, this system has been on our neck. And every now and then, we force this system, against its will, to do right by us.

What these past few months have taught us, from the murders of Ahmaud Arbery, Breonna Taylor, and George Floyd - is that we're not satisfied with the crumbs of justice. We need serious, tangible, measurable, systemic change. We say Black Lives Matter, because this system, day in and day out, treats Black lives as if they don't.

The question that we must be the generation to answer - is "what are we really going to do about it?" Will future generations look back on this moment with pride that we confronted our greatest evils with real courage, or will they see us, and be disappointed, because we had a moment to make change possible, and failed? Right now, that answer still hangs in the balance.

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The public outcry that we have seen throughout the nation since the death of George Floyd presents a unique opportunity to reimagine the justice system. We must unburden law enforcement from the myriad duties we have thrust upon them and let them focus on genuine threats to public safety. The response of police officers, and the perceived threat of violence that entails, has too often escalated tensions and precipitated violence in matters that could be resolved by social workers, drug counselors, mental health professionals, educators, and other members of our communities.

Achieving this goal will require collaboration between law enforcement, public health officials, mayors, and legislators. We must identify the needs within our communities and provide the appropriate resources and personnel to respond to those needs.

Police officers will undoubtedly be one of the beneficiaries of this reimagined justice system. If they are provided with the assistance of community partners, they will be less likely to find

themselves in the types of unpredictable circumstances that too often lead to the use of force. For too long we have asked police officer to fulfill roles that far outstretch their core mission and the result is distrust and fear. Now is the time to clarify the role of the police officers in our communities and provide the resources to fulfill that role.

In addition to redefining roles, we must reexamine existing structures. Accountability, redressability, and transparency must be the pillars of any path forward. Empathy and compassion must permeate our law enforcement ethos. Congress must consider administrative and criminal processes for the review of police misconduct. Plans that ensure that violent officers are not allowed to continue to wield the power of the state need to be discussed. Mechanisms for review and oversight have to be developed. And barriers to accountability, like qualified immunity, must be removed.

It may at times be difficult to see how a legal concept like qualified immunity can impact the effort to stop unreasonable violence by police officers. Attorney Amir Ali and The MacArthur Justice Center have put together compelling evidence demonstrating why qualified immunity empowers officers like Derek Chauvin to feel comfortable kneeling on the neck of George Floyd for eight minutes and forty-six seconds or Louisville police felt entitled to enter Breonna Taylor’s apartment unannounced and fatally shoot her. Permit me to allow Mr. Ali and his colleagues at MacArthur to explain in their own words:

“This is not the first time a man has been killed by an unjustified knee to his neck, or fatally shot for no good in their own home. George and Breonna are the most recent names, but we have seen this happen before and we have seen the families of those other people try to seek justice from the courts. When they have, courts have kicked them out, saying that the officers—no matter whether they violated the U.S. Constitution—are entitled to “qualified immunity.” We cannot, on the one hand, consistently say these officers are immune when they engage in the unjustified killing of black people and, on the other, say we are surprised when they are so casual in doing it.”

This statement is far from the intellectual musings of ivory tower academics, it is the inescapable conclusion drawn from the grant of qualified immunity in fourteen cases since 2002 alone. Allow us to show you:

#### History of Immunity – George Floyd

1. *Estate of Burns v. Williamson*, 2015 WL 4465088 (C.D. Ill. July 21, 2015)

In 2015, an officer pushed his knee into Patrick Burns’s back in the course of an arrest. Meanwhile, other officers tased and “hogtied” him. Burns died shortly after he was arrested, while in police custody. Although the court acknowledged that there was clear, undisputed evidence that the knee on Burns’s back caused

“hemorrhaging of the muscles around [his] spine,” it granted the officer qualified immunity. The court reasoned that Mr. Burns could not have lost his ability to breathe when the officer placed his knee on Mr. Burns’s back, because Mr. Burns was able to “scream and spit and writhe.” *Id.* According to the court, there was no evidence of an officer’s use of his knee to apply “crushing weight” to Mr. Burns’s back and the officer was “not on notice” that killing Mr. Burns by “simply placing a knee in a person’s back” would constitute excessive force.

Mr. Burns was tased 21 times in total and his hands and legs were handcuffed together. If an officer gets complete immunity for sticking his deadly knee to Mr. Burns’s back despite all of that, how can we now act surprised when Derek Chauvin thinks he can get away with the same?

2. *Wilson v. Gee*, 2012 WL 13106092 (M.D. Fla. Nov. 27, 2012)

In 2008, Florida police killed Roney Wilson after his brothers called 911 to report that Mr. Wilson was having a mental health crisis. The officers were made aware that Mr. Wilson was mentally ill, but upon arriving at the scene, the police tased Mr. Wilson eight times. Similar to the case of George Floyd, an officer pinned Wilson to the ground by holding his boot on Mr. Wilson’s shoulder and pressing his knee across Mr. Wilson’s back. While in this position, another officer “hog-tied” Mr. Wilson, connecting his handcuffed hands to his handcuffed legs using a third pair of handcuffs. Within a minute or two of being placed in this position, Mr. Wilson lost consciousness and died. The court granted the officers immunity for their actions. In reaching this decision, the court relied in part on prior cases in which it had *also* granted immunity to officers that wrestled a mentally ill man to the ground, handcuffed him, possibly placed him in a chokehold, and then placed leather restraints on his hands and legs, resulting in the man’s death. So, *precisely because* the court had given immunity to officers in a similar situation in the past, the doctrine of qualified immunity made it easier for them to do it again in Wilson’s case.

Again, if courts are saying that officers can get away with this—and pointing out that many other officers have—why would you expect anything different to happen?

3. *Giannetti v. City of Stillwater*, 216 F. App’x 756 (10th Cir. 2007)

In 2003, police officers stopped Mary Giannetti for a traffic violation in Stillwater, Oklahoma. *Giannetti v. City of Stillwater*, 216 F. App'x 756, 758 (10th Cir. 2007). When Mary refused to exit her vehicle, police arrested her for eluding police—a misdemeanor. *Id.* Mary experienced a mental health crisis in jail when the officers stripped away her clothing and attempted to force her into a jumpsuit. *Id.* at 759. As the officers tore off Mary's socks and pantyhose, they held Mary facedown with their legs on her shoulders and neck. *Id.* at 760. The officers themselves testified that Mary screamed that “her lungs were collapsing” and that “she couldn't breathe.” *Id.* Mary “begged” the officers to stop. *Id.* The officers ignored her and continued to pull the jumpsuit up her legs. *Id.* They did not notice that Mary had stopped breathing. *Id.* Mary died. *Id.* The Medical Examiner called the cause of death “positional asphyxia.” *Id.* at 761. When her husband sued the officers, a federal court of appeals found that the violence was “objectively reasonable.” *Id.* at 762.

4. *Callwood v. Phenix City, Alabama*, 2016 WL 6661158 (M.D. Ala. Nov. 10, 2016)

In 2013, Khari Illidge was with his friend when he began “acting strangely.” Khari took off his clothes and began wandering naked along a road in Phenix City, Alabama. An officer encountered Khari in the roadway and tased. Khari walked toward Mills, saying, “excuse me, out of the way.” *Id.* at \*2. As Khari approached, Mills used his taser on Khari five times. After a brief struggle, Khari attempted to escape. More officers arrived. They tased Khari fourteen additional times, handcuffed him, and jumped on top of him. One officer “placed a knee between [Khari's] shoulder blades and another in the middle of his back.” That officer weighed 385 pounds. *Id.* Khari became unresponsive and when the officers eventually turned Khari onto his side, a white, frothy substance and blood poured out of his nose and mouth. Khari had died.

Khari's mother sued the officers, but the court gave the officers qualified immunity because no “clearly-established” law prevented the officers from applying their “body weight” on a person in that way. The court justified this in part by noting that another court had given officers qualified immunity after they hog-tied and kneeled on a man until he suffocated. Because the officers in *that case* received qualified immunity, the court reasoned, the officers who killed Khari also received immunity. Thus, the court granted immunity to “all the officers for participating in, and failing to intervene in . . . the use of physical restraints and the application of body weight during the arrest.”

5. *Lewis v. City of W. Palm Beach*, 2008 WL 763250 (S.D. Fla. Mar. 19, 2008)

In 2005, Officer Raymond Shaw saw Donald George Lewis wandering through traffic in West Palm Beach, Florida. Lewis was shirtless and distraught. Officer Shaw asked Lewis to lie on the ground. Lewis initially complied, but eventually moved back into the roadway. Officer Shaw caught up to Lewis, forced him to the ground in the center of the road, and placed his knee on Lewis's lower back. Officer Leroy Root arrived at the scene as Shaw was handcuffing Lewis. Like in George Floyd's case, Officer Root pushed his knee onto Lewis's upper back and neck as Lewis, like Floyd, continued to groan audibly. The officers then bound Lewis's legs using a leg restraint and, like in the case of Floyd, continued to press down with their knees on Lewis's back. Eventually, the officers tied Lewis's handcuffs to his leg restraint in a "hogtied" position. At this point, another officer realized that Lewis had become unconscious. He never regained consciousness and died at the scene.

When his mother sued the officers and the city for excessive force, the court held that the officers were entitled to qualified immunity. It gave them immunity *even though* it found that "there was simply no need for the officers to kneel on Lewis' upper back and neck" and that "a reasonable juror could find that the officers used constitutionally excessive force." It explained that the right to be free from such force was not "clearly established." In other words, there were no cases on file in the Eleventh Circuit that said kneeling on a handcuffed person's neck was a constitutional violation. So, even though the court recognized that the force was "constitutionally excessive," the officers got a free pass. On appeal, the Eleventh Circuit agreed. *Lewis v. City of W. Palm Beach, Fla.*, 561 F.3d 1288 (11th Cir. 2009). It said that because no previous court had addressed a case similar to the officers' use of force or their use of the "hogtie" position, they got qualified immunity.

6. *Williams v. City of Douglas*, 2009 WL 10702448 (S.D. Ga. Aug. 25, 2009)

In 2005, sixty-four-year-old Harrison Williams returned to his old apartment in Douglas, Georgia to dig up a Japanese fig tree that he had planted. Harrison, who had received permission from his landlord to return, left his car in the driveway with the radio on. Officer Roger Goddard responded to a call in the area and saw Harrison's car parked there. Goddard wanted the radio volume down. Harrison told Goddard that the radio had a "short circuit" and sometimes raised the volume when

the user meant to turn the volume down. Harrison entered the car to work the radio, but as he had predicted, his effort to decrease the volume had the opposite effect. Enraged, Goddard pulled Harrison from the vehicle, forced his arms behind his back, and put a knee into Harrison's back. Goddard handcuffed Harrison and, like in the case of George Floyd, placed his knee into Harrison's neck. Goddard eventually released Harrison and cited him for a noise complaint that was eventually dismissed. Harrison sued the police department for excessive force. Citing to *Lewis*, the court found that no clearly established law precluded the use of force that Goddard applied in Harrison's case.

7. *Pliakos v. City of Manchester*, 2003 WL 21687543 (D.N.H. July 15, 2003)

A court granted qualified immunity to officers that left Kostantinos Pliakos face down on the ground, with his hands handcuffed behind him, for three minutes. While face down, Pliakos suffocated, passing away shortly after he was handcuffed. The officers failed to notice for at least one minute that Pliakos had died. The court justified its decision to grant the officers immunity by stating that no case had clearly established "a constitutional right not to be handcuffed in a prone position if one presents some of the risk factors for positional asphyxia."

8. *Fernandez v. City of Cooper City*, 207 F. Supp. 2d 1371 (S.D. Fla. 2002)

In *Fernandez v. City of Cooper City*, 207 F. Supp. 2d 1371, 1374 (S.D. Fla. 2002), a Florida court held that an officer who placed his knee on Fidel Fernandez's back, while Mr. Fernandez was face down on the ground, restrained with two handcuffs, and restrained at his legs, did not violate Mr. Fernandez's right to not be subject to excessive force during arrest. *Id.* at 1379. Mr. Fernandez died from suffocation while restrained by police officers. *Id.* at 1375. At trial, the officers involved admitted to being aware of the harm and risks of blocking an individual's airway, including the risk of suffocation and death. The court reasoned, however, that the officers had no alternatives and that Mr. Fernandez's restraint face-down on the ground, the pressure applied to his back, and the multiple handcuffs were all the result of his own conduct--not the officers'. As a result, the court concluded, the officers had not violated Mr. Fernandez's constitutional rights.

9. *Lombardo v. Saint Louis City*, 361 F. Supp. 3d 882 (E.D. Mo. 2019), *aff'd sub nom. Lombardo v. City of St. Louis*, 956 F.3d 1009 (8th Cir. 2020)



In 2016, Saint Louis Police officers arrested Nicholas Gilbert for suspected trespass and failure to appear on a traffic citation—a misdemeanor. While in jail, Gilbert tried to kill himself. Officers entered his cell to stop him, bringing him to a kneeling position and handcuffing both of his hands and shackling his legs. After a continued struggle, the officers held his shoulders and back, preventing him from lifting his chest. The officers held Gilbert down until they realized that his breathing appeared abnormal. He stopped breathing and was pronounced dead on arrival at a nearby hospital.

When Gilbert’s parents sued the city for their son’s death, the court denied their claim and granted the officers immunity, explaining that the officers did not violate a clearly established right. His parents argued that there was clearly established law holding that the prone restraint of a non-resisting arrestee violates the Fourth Amendment, but the court rejected this argument because Gilbert “thrashed” against the officers. His mental health crisis was no excuse. Citing to *Lewis*, the court stated that “even accepting Plaintiffs’ argument that Mr. Gilbert was having a mental health crisis and posed no threat, the Officers would still be entitled to qualified immunity.” On appeal, the Eighth Circuit affirmed.

History of Immunity – Failure to Intervene Where Officer Kills with Knee to Neck

10. *Deshotels v. Marshall*, 454 F. App’x 262 (5th Cir. 2011)

On November 1, 2007, police officers killed Seldon Deshotels. Five officers restrained Deshotels while he was on the ground, face down. While he was face down, an officer placed his knee on Deshotels’s back and another officer tased him. Deshotels died. The reviewing court held that the officers had not used excessive force at all *even though* one of the officers testified that he had not been concerned for his own safety or that of the other officers during the arrest. The court then granted qualified immunity to the officers who failed to intervene. It explained that they could not be held liable because no previous case had clearly established “that officers actively engaged in restraining a large, potentially dangerous suspect are required to intervene and prevent another officer’s use of excessive force.”

11. *Dyksma v. Pierson*, 2018 WL 3430684 (M.D. Ga. July 16, 2018), *aff’d*, 763 F. App’x 909 (11th Cir. 2019)

Nicholas Dyksma was eighteen years old when Sheriff's Deputy Tommy Pierson pinned Dyksma to the pavement and compressed his knee into Dyksma's neck twice—once for twenty seconds, then a second time for seventeen seconds. Nicholas was handcuffed, physically incapacitated, and no longer resisting during the second seventeen-second period. Like the officers who stood by and watched George Floyd die, two other officers in this case did nothing to stop Deputy Pierson and Dyksma died. When his family sued Deputy Pierson and the other officers, the court allowed the suit against Deputy Pierson to go forward but granted qualified immunity to the officers that failed to intervene, explaining that they had not violated any clearly established law.

#### History of Immunity -- Breonna Taylor

12. *Cass v. City of Abilene*, 814 F.3d 721 (5th Cir. 2016)

In 2016, an officer in Abilene, Texas, fatally shot business owner Marcus Cass in an attempt to seize business records. Like in the case of Breonna Taylor, police did not knock and announce themselves before entering the business. About seven seconds after police stepped foot in the building, Cass was dead. In its ruling on the case, the Fifth Circuit held that the officers may have violated Cass's constitutional rights and "unnecessarily created a dangerous situation that made Cass's death likely." Nevertheless, the court said, those suing on behalf of Cass needed to show not only that the officers broke the law, but that they violated a "*clearly established right*["]. Because plaintiffs failed to do so, the officers received qualified immunity.

13. *Santana v. Miami-Dade County*, 688 Fed. Appx. 763 (11th Cir. 2017)

In 2012, officers of the Miami-Dade, Florida Police Department went to search the home of Michael Santana, who they suspected of selling marijuana. Santana's girlfriend, who was in the home at the time, as well as neighbors, testified that they did not hear the police knock or announce themselves before entering the home. Within ten seconds of entry, an officer shot Santana, killing him. The court explained that even if it assumed that the officer committed a constitutional violation by shooting and killing Santana, it would still give the officer qualified immunity because there was no caselaw that put the officer "on notice that his conduct was unlawful." In the court's view, the officer had not violated "clearly established" law by shooting Santana.

14. *Whittier v. Goldstein*, 343 Fed. Appx. 517 (11th Cir. 2009)

In 2005, officers with the City of Sunrise Police Department in Florida raided the home of Marlene Whittier and her son, Anthony Diotaiuto, who was allegedly selling marijuana and cocaine. Whittier and several neighbors testified that they did not hear the police knock or announce themselves before prying the door open. After entering, police fatally shot Diotaiuto. The court gave the officers qualified immunity, explaining that it was not “clearly established” that their “conduct was unlawful” under the circumstances.<sup>1</sup>

These cases demonstrate that qualified immunity does not serve to protect officers from complicated and novel issues of law. It is judicial activism with unimaginable consequence – free reign to violate the civil rights of citizens with impunity. If a right cannot be vindicated, it can hardly be said to be a right, and a justice system that cannot protect the foundational entitlements of this country, can hardly be said to be just at all.

I do not profess to have all the answers to the complex problems confronting our country. The issues I have mentioned provide a starting point on a long journey. This is a systemic problem. It will require grassroots change. It will require federal intervention. It will require hard decisions, accountability, and unwavering effort. It will take commitment from this Senate both now, and in the future. Change needs to be made, it must be made, and we must remain vigilant in guaranteeing the rights of the people. The voices rising up in the streets across this country are demanding it.

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<sup>1</sup> Research courtesy of Amir Ali, Esq. and the fellows at the MacArthur Justice Center.