Ronald J. CRUZ, individually and as personal representative of Thomas C. Cruz, Plaintiff–Appellee,

v.

CITY OF LARAMIE, WYOMING; Bonnie Noel, individually and in her official capacity as Officer, Laramie Police Department; Richard D. Michel, individually and in his official capacity as Officer, Laramie Police Department; Troy Jensen, individually and in his official capacity as Officer, Laramie Police Department; Ben Fritzen, individually and in his official capacity as Officer, Laramie Police Department, Defendants–Appellants,

and

Bill Ware, individually and in his official capacity as Chief of Police, Laramie Police Department, Defendant.

Nos. 99–8045, 99–8049, 99–8050.

United States Court of Appeals, Tenth Circuit.

Feb. 15, 2001.

Administrator of estate of arrestee who had died after being placed in "hog-tie" restraint, in which his ankles and wrists were bound together behind his back, brought suit asserting § 1983 and state law claims against city and arresting officers. The United States District Court for the District of Wyoming, William F. Downes, J., denied defendants' motions for summary judgment. Defendants appealed. The Court of Appeals, Politz, Circuit Judge, sitting by designation, held that: (1) use of "hog-tie" restraint on an arrestee whose diminished capacity is apparent constitutes excessive force in violation of Fourth Amendment; (2) right was not clearly established in June 1996, when such a restraint was used on arrestee while he appeared to be on drugs, so that officers were protected by qualified immunity with respect to § 1983 claims; but (3) officers were not immune with respect to state law claims, since their conduct was unreasonable; and (4) fact issues precluded summary judgment on failure to train claim asserted against city.

Affirmed in part and reversed in part.

1. Federal Courts ⚷554.1

Typically, orders denying qualified immunity before trial are appealable only to the extent they resolve issues of law.

2. Civil Rights ⚷214(2), 240(5)

To overcome claim of qualified immunity, plaintiff bears the burden of showing that (1) the defendants' actions violated a constitutional or statutory right, and (2) the right was clearly established and reasonable persons in the defendants' position would have known their conduct violated that right.

3. Federal Courts ⚷755

In applying qualified immunity standard, appellate courts may not review a district court's resolution of disputed facts, and may review only purely legal determinations.

4. Federal Courts ⚷770

Scope of an interlocutory appeal from a denial of motion for summary judgment based on qualified immunity is limited to "purely legal" challenges to the district court's ruling on whether a plaintiff's legal rights were clearly established, and cannot include attacks on the court's "evidence sufficiency" determinations about whether there are genuine disputes of fact; in other words, Court of Appeal can only review whether the district court mistakenly identified clearly established law, given the facts that the district court assumed when it denied summary judgment for that purely legal reason. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

5. Federal Courts ⚷770

On appeal from denial of motion for summary judgment based on qualified immunity, Court of Appeals may review district court's ruling as to whether the law was clearly established, but lacks authority

to the extent that appeal seeks interlocutory review of the district court's ruling that genuine disputes of fact precluded summary judgment based on qualified immunity. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

6. Federal Courts ⚷579, 770

Court of Appeals lacked jurisdiction to review portion of district court order denying summary judgment on basis of qualified immunity to police officers, against whom § 1983 action had been brought, which was based on disputed facts relating to a Fourth Amendment violation. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

7. Federal Courts ⚷579, 770

On appeal from order denying summary judgment on basis of qualified immunity to police officers, against whom § 1983 action had been brought, Court of Appeals had interlocutory appellate jurisdiction to review determination that Fourth Amendment right allegedly violated by officers was clearly established, and that officers had acted unreasonably, even though it lacked jurisdiction to review portion of order denying summary judgment which was based on disputed facts relating to a Fourth Amendment violation. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

8. Federal Courts ⚷776

Court of Appeals reviews de novo decision that constitutional rights allegedly violated were clearly established, as will potentially defeat claim of qualified immunity.

9. Civil Rights ⚷214(2)

For the law to be clearly established, for purposes of qualified immunity determination, there ordinarily must be a Supreme Court or Court of Appeals decision from the applicable circuit on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains; however, plaintiff is not required to show that the very act in question previously was held unlawful in order to establish an absence of qualified immunity.

10. Arrest ⚷68(2)

Claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other seizure of a free citizen are most properly characterized as involving the protection of the Fourth Amendment. U.S.C.A. Const. Amend. 4.

11. Arrest ⚷68(2)

Use of "hog-tie" restraint to subdue arrestee, in which arrestee's ankles are bound to his wrists behind his back, with 12 inches or less of separation, constitutes the use of excessive force, in violation of Fourth Amendment, when the arrestee's diminished capacity, due to severe intoxication, controlled substances, a discernible mental condition, or any other condition, is apparent. U.S.C.A. Const.Amend. 4.

12. Arrest ⚷68(2)

"Hog-tie" restraint of arrestee who had been running around naked and jumping up and down and yelling, in which arrestee's tied ankles were bound to his handcuffed wrists behind his back, constituted use of excessive force, in violation of Fourth Amendment, where diminished capacity of arrestee was obvious to arresting officers, as arrestee was yelling continuously about swarming insects and was swatting at invisible objects, and after his eyelid was opened, arrestee's pupil was constricted but did not constrict further in response to sunlight, which led officers to surmise that he was on some type of drug. U.S.C.A. Const.Amend. 4.

13. Civil Rights ⚷214(6)

It was not clearly established in June 1996 that use of "hog-tie" restraint, in which subject's ankles are bound to his wrists behind his back, to subdue arrestee, who had been running around naked outside, and whose diminished capacity, which was apparently due to drug use, was obvious, constituted the use of excessive force

in violation of arrestee's Fourth Amendment rights, and thus, arresting officers were protected by qualified immunity in § 1983 action by administrator of estate of arrestee, who had died while so restrained. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

14. Officers and Public Employees ⚷114

For officers to be protected by immunity for their conduct under Wyoming law, the conduct in question must be reasonable.

15. Municipal Corporations ⚷747(3)

Actions of police officers in using "hog-tie" restraint on arrestee who had been running around naked, in which his ankles were bound to his wrists behind his back, were unreasonable, so that officers were not protected by immunity under Wyoming law with respect to state law claims asserted by administrator of estate of arrestee, even though officers were protected by qualified immunity with respect to § 1983 claims because it was not clearly established at time in question that their actions violated Fourth Amendment. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

16. Officers and Public Employees ⚷114

Immunity under Wyoming law for an officer's official actions does not require that a right not be clearly established.

17. Federal Courts ⚷579, 770

Court of Appeals would exercise pendent appellate jurisdiction over denial of city's motion for summary judgment with respect to claim that city had failed to adequately train its police officers, which was not independently appealable, in connection with appeal from denial of individual officers' motion for summary judgment, on basis of qualified immunity, in § 1983 action in which excessive force claims were asserted, where inadequate training claim related directly to reasonableness of officers' conduct, and thus was inextricably linked with qualified immunity issue raised by appealable order. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

18. Civil Rights ⚷206(4)

Inadequacy of police training may serve as the basis for liability under § 1983 only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. 42 U.S.C.A. § 1983.

19. Federal Civil Procedure ⚷2491.5

Genuine issue of material fact as to whether city was deliberately indifferent to rights of persons with whom its police officers came into contact by failing to adequately train officers on use of hobble restraints precluded summary judgment on § 1983 claim asserted against city by administrator of estate of arrestee, who had died after being placed in "hog-tie" restraint by officers. U.S.C.A. Const. Amend. 4; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Vonde M. Smith (Kent W. Spence with her on the brief) of Lawyers & Advocates for Wyoming, Jackson, WY, for Plaintiff–Appellee.

Karen A. Byrne, Byrne Law Offices, Cheyenne, WY, for Defendant–Appellant City of Laramie; Elizabeth Zerga of Herschler, Freudenthal, Salzburg, Bonds & Zerga, Cheyenne, WY, for Defendant–Appellants Bonnie Noel, Richard D. Michel, Troy Jensen and Ben Fritzen.

Before BALDOCK, LUCERO, and POLITZ,[1] Circuit Judges.

POLITZ, Circuit Judge.

The City of Laramie, Wyoming, and four of its police officers appeal the denial of

1. The Honorable Henry A. Politz, United States Court of Appeals for the Fifth Circuit, sitting by designation.

their motions for summary judgment. For the reasons assigned we affirm in part and reverse in part.

BACKGROUND

On June 10, 1996, in late afternoon, the Laramie Police Department received a complaint that a man, later identified as Thomas C. Cruz, was running around naked. Officer Troy Jensen, the first to arrive on the scene, found the naked Cruz on an exterior landing of an apartment building, jumping up and down, yelling, and kicking his legs in the air. Officer Bonnie Noel then arrived and, immediately upon seeing Cruz, called for an ambulance. A few seconds later Officer Richard Michel reached the scene. The officers sought to calm Cruz and tried to persuade him to come down the steps. Their efforts initially were not successful. After several minutes, however, Cruz descended and approached the officers who met him at the bottom of the steps with their batons drawn. Cruz attempted to go past the officers. During the ensuing struggle the officers wrestled Cruz to the ground and handcuffed him face down. Cruz continued to yell and flail about. The officers asked Cruz what kind of drugs he had taken but received no response.

Officer Ben Fritzen then arrived and, after assessing the situation, applied a nylon restraint around Cruz's ankles to abate the kicking. The officers fastened the ankle restraint to the handcuffs with a metal clip. The parties dispute the resulting distance between Cruz's ankles and wrists. The district court found sufficient evidence in the record to support an inference that Cruz was "hog-tied" because the separation was one foot or less. If that distance were two feet or more, it appears that it would have been deemed a "hobble restraint." Appellee contends that the terms are interchangeable, both referring to the technique whereby officers' fasten an individuals hands and feet together behind the individual's back.

Shortly after Officer Fritzen applied the restraint, Officer Michel turned Cruz's head to check the reaction of his pupils to sunlight. Cruz had calmed markedly after officers completed the arm-leg restraint. Just before the ambulance arrived, Officer Noel noticed that Cruz's face had blanched. The restraint was removed. Immediately upon reaching the scene the ambulance emergency team began CPR. Cruz was pronounced dead on arrival at the hospital. Autopsy results showed a large amount of cocaine in his system.

Ronald Cruz, the decedent's brother, brought the instant action against the officers, individually and in their official capacities, the City of Laramie, and Chief of Police Bill Ware, both individually and in his official capacity. The action invokes 42 U.S.C. § 1983, and advances a state law negligence claim under the Wyoming Governmental Claims Act. The affidavits of experts provide two different causes of death, one concluded that Cruz's position while on the ground contributed to his death, the other concluded that his death resulted solely from cocaine abuse. Defendant police officers' and the City of Laramie's motions for summary judgment were denied and these appeals followed.

ANALYSIS

A. Qualified Immunity For Fourth Amendment Claim

1. Jurisdiction

Before reaching the merits, we must first briefly address our appellate jurisdiction. After the denial of their motion, the officers appealed. Thereafter, the City of Laramie sought a reconsideration of the initial order of denial. The trial court then issued a corrective order, modifying the factual basis for its original order, but again denying qualified immunity to the officers. The officers appealed the corrective order. The City of Laramie timely appealed both orders. We consolidated the appeals.

[1, 2] Typically, orders denying qualified immunity before trial are appealable only to the extent they resolve issues of

law.[2] The issue of jurisdiction over such appeals, in the summary judgment setting, has been the subject of significant controversy, one addressed recently both by the Supreme Court and this circuit. The predicates for determining whether review is appropriate are intertwined with the qualified immunity analysis, requiring application of a two-part test. A plaintiff bears the burden of showing that: (1) the defendants' actions violated a constitutional or statutory right; and (2) the right was clearly established and reasonable persons in the defendants' position would have known their conduct violated that right.[3]

2. Constitutional Violation

[3, 4] In applying the qualified immunity standard, the Supreme Court has directed that appellate courts may not review a district court's resolution of disputed facts, but may review only purely legal determinations.[4] Consistent therewith, we have noted that the scope of an interlocutory appeal from a denial of qualified immunity is limited to:

> "purely legal" challenges to the district court's ruling on whether a plaintiff's legal rights were clearly established, and cannot include attacks on the court's "evidence sufficiency" determinations about whether there are genuine disputes of fact. That is, we can only review whether the district court "mistakenly identified clearly established law ... given [ ] the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." [5]

[5] Accordingly, we may review the trial court's ruling as to whether the law was clearly established, but we lack authority "to the extent that Defendants [ ] seek interlocutory review of the district court's ruling that genuine disputes of fact precluded summary judgment based on qualified immunity." [6]

[6] Applying that rubric herein, the first part of the trial court's decision found sufficient facts to support a claimed violation of appellee's fourth amendment rights. We therefore lack jurisdiction over the portion of the appealed decision precluding summary judgment based on disputed facts relating to a constitutional violation.

3. Clearly Established Law

[7] The district court also found, in applying the second part of the test, that the constitutional right allegedly violated was clearly established and that defendants acted unreasonably. This portion of the ruling decides an issue of law over which we have interlocutory appellate jurisdiction.

[8, 9] We review *de novo* the decision that the decedent's rights were clearly established.[7] "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." [8] The plaintiff is not required to show, however, that the very act in question previously was held unlawful in order to establish an absence of qualified immunity.[9]

2. *See Behrens v. Pelletier,* 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996); *Johnson v. Jones,* 515 U.S. 304, 312–14, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); *Foote v. Spiegel,* 118 F.3d 1416, 1422 (10th Cir.1997).

3. *Albright v. Rodriguez,* 51 F.3d 1531, 1534 (10th Cir.1995).

4. *Johnson,* 515 U.S. at 313, 115 S.Ct. 2151.

5. *Sevier v. City of Lawrence, Kansas,* 60 F.3d 695, 700 (10th Cir.1995) (quoting *Johnson v. Jones,* 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238,—(1995)).

6. *Mick v. Brewer,* 76 F.3d 1127, 1133 (10th Cir.1996).

7. *Romero v. Fay,* 45 F.3d 1472, 1475 (10th Cir.1995).

8. *Medina v. City and County of Denver,* 960 F.2d 1493, 1498 (10th Cir.1992).

9. *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citing *Mitchell v. Forsyth,* 472 U.S. 511, 535 n. 12, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)).

[10] The district court correctly noted that the issue at bar involves excessive force under the fourth amendment. "[C]laims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop or other 'seizure' of a free citizen are most properly characterized as involving the protection of the Fourth Amendment." [10] In *Mick v. Brewer,* we upheld the denial of summary judgment, concluding that "the district court did not err by ruling that the law governing excessive force cases was clearly established on June 18, 1992." [11] We therein held that the fourth amendment "reasonableness" inquiry turned on whether the officers' actions were "objectively reasonable" in light of the facts and circumstances confronting them, without regard for their underlying intent or motivation.[12] While *Mick* unqualifiedly denotes that objectively unreasonable actions by officers constitute a violation of an individual's constitutional rights, it remains for us to determine whether the contours of this fourth amendment right were sufficiently clear that reasonable persons in the officers' position would have known their conduct violated that right.[13]

[11] The conduct at issue involves the tying of the decedent's arms behind his back, binding his ankles together, securing his ankles to his wrists, and then placing him face down on the ground. We note that while sister circuits may characterize the hog-tie restraint somewhat differently, we understand such to involve the binding of the ankles to the wrists, behind the back, with 12 inches or less of separation.[14] We have not heretofore ruled on the validity of this type of restraint. We do not reach the question whether all hog-tie restraints constitute a constitutional violation *per se,* but hold that officers may not apply this technique when an individual's diminished capacity is apparent. This diminished capacity might result from severe intoxication, the influence of controlled substances, a discernible mental condition, or any other condition, apparent to the officers at the time, which would make the application of a hog-tie restraint likely to result in any significant risk to the individual's health or well-being. In such situations, an individual's condition mandates the use of less restrictive means for physical restraint.

A review of the known dangers of the hog-tie restraint supports this position. Initially, case law informs of tragic examples of positional asphyxia stemming from the hog-tie restraint, especially in instances involving individuals of diminished capacity. In *Gutierrez v. San Antonio,* discussed below, the Fifth Circuit found that a 1992 San Diego Police Study presented sufficient evidence that hog-tying may create a substantial risk of death or serious bodily injury.[15] In *Johnson v. City of Cincinnati,* the Southern District of Ohio found sufficient information existed in the law enforcement community to put the authorities on notice that positional asphyxia was a problem nationwide.[16] In the civil arena, a Michigan jury awarded a significant verdict to the family of a mentally ill patient who died after officers applied a "kick—stop restraint" analogous to a hog-tie.[17] We recognize that in *Price v. San*

10. *Graham v. Connor,* 490 U.S. 386, 394–95, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

11. *Mick,* 76 F.3d at 1136.

12. *Id.* at 1135–36 (citing *Graham,* 490 U.S. at 397, 109 S.Ct. 1865).

13. *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

14. Appellants describe Cruz's position as "hobbled" rather than "hog-tied"; the officers say that the distance between Cruz's hands and feet was approximately two feet. The district court found sufficient evidence to support appellee's contention that the distance was 12 inches or less.

15. 139 F.3d 441 (5th Cir.1998) (discussing hog-tying in context of whether officers used "deadly force").

16. 39 F.Supp.2d 1013 (S.D.Ohio 1999).

17. *Swans v. City of Lansing,* 65 F.Supp.2d 625 (W.D.Mich.1998).

Diego,[18] the district court rejected the validity of a popular study connecting positional asphyxia with placement in a prone restraint. Instead, the court relied on another study, one by appellants' expert herein, concluding that hog-tying does not result in positional asphyxia. That study, however, is not persuasive herein for it focused on healthy adult males. Our holding today relates to individuals with an apparent and discernible diminished capacity.[19]

In addition to the case law highlighting problems associated with the hog-tie restraint, appellee provided the district court with numerous articles and other materials discussing "sudden custody death syndrome" and noting the relationship between improper restraints and positional asphyxia. The articles detail the breathing problems created by pressure on the back and placement in a prone position, especially when an individual is in a state of "excited delirium." These breathing problems lead to asphyxiation. The materials provided to the district court include police handbooks, Justice Department symposia, various journals and periodicals, and newspaper articles detailing deaths of individuals while in custody. Given the extent of the case law, and the "legally-related" literature available to law enforcement personnel detailing the serious dangers involved in application of the hog-tie restraint, it is apparent that officers should use much caution in applying the hog-tie restraint. In those instances in which it may be appropriate, such restraint should be used with great care and continual observation of the well being of the subject.

[12] Turning to the case at bar, the decedent's diminished capacity was apparent to the officers from the moment they arrived on the scene. Officer Jensen arrived first, and upon seeing Cruz naked and yelling on the stairs, called for back up. Officer Noel arrived about 30 seconds later, saw Cruz on the stairway and Jenson below, "and immediately radioed dispatch requesting an ambulance and additional back-up." Cruz was yelling continuously about swarming insects, and he was swatting at invisible objects. After Officer Fritzen applied the hand-ankle restraint, Officer Michel opened Cruz's eyelid and observed that the pupil was constricted but did not constrict further in response to sunlight. The officers surmised that Cruz was on some type of drug. It seems beyond peradventure that Cruz's diminished capacity was apparent to them both before and after they applied the restraint. We conclude and hold that the fourth amendment protection against excessive force includes the protection of an individual's right to be free from a hog-tie restraint in situations such as the one confronting the officers herein.

[13] While the use of a hog-tie restraint in this case falls within the rule we announce today, we cannot say, however, that a rule prohibiting such a restraint in this situation was "clearly established" at the time of this unfortunate incident. The decisions from other circuit and district courts fall shy of the mandated "clearly established weight of authority from other courts."[20] We find informative the Fifth Circuit's reasoning in *Gutierrez v. City of San Antonio*,[21] involving a man placed in a hog-tie restraint who died in the back seat of a patrol car while officers transported him to the hospital.[22] The court denied qualified immunity because plaintiff dem-

18. 990 F.Supp. 1230 (S.D.Cal.1998).

19. *See Johnson*, 39 F.Supp.2d at 1017 (noting that the subject study was "restricted to healthy subjects" and therefore did not affect the admissibility of testimony regarding "the theory of positional asphyxia").

20. *Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir.1992).

21. 139 F.3d 441 (5th Cir.1998).

22. The court described the restraint and the officers' conduct as follows: "Walters placed the loop around Gutierrez's feet, and Solis linked the clasp around the hand-cuffs, drawing Gutierrez's legs backward at a 90 degree angle in an 'L' shape, thereby 'hog-tying' him." *Id.* at 443.

onstrated material disputes of fact relating to the officers' knowledge of decedent's drug use, whether officers' placed decedent face-down in their squad car, and whether the San Antonio Police Department warned its officers of the possible dangers of hog-tying prior to November 1994.[23] While the facts in *Gutierrez* are similar to those at bar, this ruling does not suffice to satisfy the strict requirements governing qualified immunity. It must be viewed in the total jurisprudential setting which includes the Eighth Circuit decision upholding the use of what it called a "hobble" restraint,[24] and the Southern District of California opining that "the hog-tie restraint in and of itself does not constitute excessive force...." [25] We perforce therefore cannot say that at the time of this tragic incident the decedent had a clearly established right to be free from a hog-tie restraint under the circumstances. Accordingly, we must reverse the district court's denial of summary judgment on plaintiff's fourth amendment claims.

B. Officers Immunity for State Law Claims

[14–16] The district court found genuine issues of material fact respecting the claim of immunity under state law for plaintiff's tort claims. The court found that while the officers were acting within the scope of their duties, in good faith, and that those duties were discretionary rather than ministerial, their conduct was unreasonable under the circumstances. The court observed that all four factors outlined by the Wyoming Supreme Court in *Kanzler v. Renner*[26] must be met and, because defendants acted unreasonably, their claim for immunity under state law must fail. While the federal qualified immunity standard focuses on whether a right was clearly established such that the officers would know their conduct violated that right, state law immunity in Wyoming requires that the officers' conduct be reasonable. In finding that the fourth amendment protects against application of a hog-tie restraint in this situation, we necessarily conclude that the officers acted unreasonably.[27] State law immunity in Wyoming does not require that a right be clearly established. The district court found the officers' conduct to be unreasonable and we find no error in this assessment. We therefore affirm its denial of summary judgment on the claim of state law immunity on the negligence claims.

C. Denial of Summary Judgment For City of Laramie

The district court found sufficient evidence to deny the City of Laramie's Motion for Summary Judgment as to the plaintiff's claim of its failure to train adequately the individual officers.

[17] Initially, we note that while the ruling denying summary judgment to the City is not independently appealable, we may exercise pendent appellate jurisdiction under *Swint v. Chambers County Commission.*[28] The *Swint* court held that pendent appellate jurisdiction allows re-

23. *Id.*

24. *See Mayard v. Hopwood,* 105 F.3d 1226 (8th Cir.1997) (finding use of a "hobble" restraint fastening individuals hands and feet objectively reasonable where she resisted being placed in a police car).

25. *Price v. San Diego,* 990 F.Supp. 1230 (S.D.Cal.1998) (rejecting a previous study showing dangers of hog-tying and noting that a new study "has shown the dangers to be fictitious, which obviates the need for precautions").

26. 937 P.2d 1337, 1344 (Wyo.1997) (holding that immunity for police officers requires that officers be (1) acting within the scope of assigned duties; (2) in good faith; (3) reasonably under the circumstances; and (4) that the officers' acts were discretionary and not merely operational or ministerial duties).

27. *Mick v. Brewer,* 76 F.3d 1127, 1134 (10th Cir.1996) (holding that fourth amendment inquiry involves determination as to whether an officer's conduct was "objectively reasonable").

28. 514 U.S. 35, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995).

view of an otherwise nonappealable decision that is "inextricably intertwined" with an appealable decision.[29] That situation exists here because plaintiff's claim of inadequate training relates directly to the objective reasonableness of the officers' conduct, the issue involved in the appealable order. We therefore may consider whether the district court erred in denying the City's motion.

We may grant summary judgment "if the pleadings on file, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [30] There is no genuine issue of material fact if, based on the evidence in the record, no reasonable jury could return a verdict for the non-moving party.[31]

[18, 19] Generally, "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." [32] With respect to a showing of "deliberate indifference," the district court determined that material issues of fact precluded summary judgment. The court cited evidence that the City failed to train its officers on the use of hobble restraints and that the City put such restraints in its police cars. The court also noted that high ranking officials were aware of positional asphyxia attributable to hobble restraints and of a doctor's report stating that "deaths in police custody with hog-tie restraint[s] have been reported in medical literature a number of times." The district court found that genuine issues of material fact were in dispute. The denial of summary judgment to the City therefore was appropriate.

29. *Id.* at 50–51, 115 S.Ct. 1203.

30. Fed.R.Civ.P. 56(c).

31. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–52, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The appealed rulings therefore are REVERSED in part and AFFIRMED in part consistent herewith.

UNITED STATES of America, Plaintiff–Appellee,

v.

Alexander Antoine CHRISTOPHER, Defendant–Appellant.

No. 00–10899.

United States Court of Appeals, Eleventh Circuit.

Jan. 22, 2001.

Rehearing and Suggestion for Rehearing En Banc Denied March 21, 2001.

Alien was convicted in the United States District Court for the Northern District of Georgia, 99-00539-CR-JOF-1-1, J. Owen Forrester, J., of illegal reentry into United States, and he appealed his sentence. The Court of Appeals, Dubina, Circuit Judge, held that alien's state conviction for shoplifting was "aggravated felony" for purpose of enhanced penalty provisions.

Affirmed.

1. Sentencing and Punishment ⚷793

Alien's state conviction for shoplifting was "aggravated felony" for purpose of enhanced penalty provisions for offense of illegal reentry into United States, where alien had been sentenced to twelve months imprisonment for shoplifting, even though state court had suspended sentence.

32. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).