No. 07-____

In The

Supreme Court of the United States

KENNETH JONES,

Petitioner,

v.

ADAM JENNINGS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment is violated when, for several seconds, a law enforcement officer uses a compliance technique on a suspect who may be concealing a weapon, who seconds before injury was kicking wildly at the officers, who actively resisted and refused to stop resisting and give his hand for cuffing, when that suspect claims to be in pain, but is not yet under control.

2. Whether the First Circuit departed from bedrock qualified immunity principles in two respects: First, in holding that the law was "clearly established" by the Eleventh Circuit in a case involving injury to a resisting suspect who "docilely submitted to arrest" that did not involve a compliance technique; and second, through its determination that the officer's conduct was such an "obvious violation" of the Fourth Amendment that no testimony, evidence, or case law was needed, and that the jury could rely on its common sense and reject the only expert testimony affirming the use of the technique as reasonable under the circumstances.

3. In deciding a Motion for Judgment as a Matter of Law, when a judge is assessing the defense of qualified immunity following a general jury verdict in favor of the plaintiff, whether the judge must deem the jury to have found those facts that are *most* unfavorable to the qualified immunity defense, especially when those facts are contradicted by a videotape of the incident.

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The opinion of the First Circuit Court of Appeals reported at *Jennings v. Jones*, 499 F.3d 2 (1st Cir. 2007) and reproduced in Appendix at pages 1-68, vacated the unreported memorandum and order of the District Court granting Petitioner's post-trial Motion for Judgment as a Matter of Law, available at 2005 WL 2043945 (D.R.I. Aug. 24, 2005) (Appendix 69).[1]

JURISDICTION

On August 24, 2005 the District Court granted Petitioner's post-trial Motion for Judgment as a Matter of Law (JMOL). On March 7, 2007, the First Circuit vacated the District Court judgment, reinstating the jury verdict. In response to a request by Petitioner for en banc consideration, on August 17, 2007, the First Circuit entered a revised panel decision and judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

[1] References to the Appendix are hereinafter designated "App." References to the Record Appendix filed with the First Circuit are designated "R".

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent, Adam Jennings, seeks damages pursuant to 42 U.S.C. §1983 for an alleged violation of his rights under the Fourth Amendment to the United States Constitution, which provides: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

This case arises from injuries received when a Rhode Island State Police officer, Trooper Kenneth Jones (Jones), used a pain compliance technique on a resistant suspect for several seconds while the suspect exclaimed the officer was causing him pain. Contrary to holdings in the Eleventh and Ninth Circuits, the First Circuit held that officers are constitutionally obligated to credit a suspect's claims of pain during an otherwise lawful arrest.

The First Circuit's opinion departed from precedent in several key respects, each deserving of this Court's review. First, a two-judge majority rejected established Fourth Amendment caselaw by viewing the evidence *not* in the light of a reasonable officer on the scene, instead holding that the jury could have applied its common sense and rejected the uncontradicted testimony of the only expert to testify. The First Circuit also now stands alone in refusing to

review the totality of the circumstances facing Jones, instead focusing on a snippet of "several seconds."

Next, the First Circuit departed from sister circuits in granting constitutional significance to complaints of pain from an arrestee. The Circuit ruled it was "obvious" that Jones should have known that such complaints should be heeded, and that failure to do so violated the Constitution. If unreviewed, the First Circuit's decision will have a chilling effect on attempts by police officers to arrest resisting suspects who – before they are under control – claim a lawful arrest is hurting them, presenting officers with the Hobson's choice of risking civil liability or becoming a victim themselves. The First Circuit opinion creates a new rule unsettling the law of qualified immunity, placing suspects, officers, and bystanders in significant danger.

Another departure from other circuits and from decisions of this Court was the finding that a single decision from another jurisdiction "clearly established" the law for qualified immunity purposes, in light of cases more similar to the situation facing Jones.

Finally, the opinion raises a procedural issue so significant that the dissent requested guidance from this Court: how does a judge in evaluating qualified immunity defer to a jury's discernible resolution of disputed factual issues on a motion pursuant to Fed. R. Civ. P. 50 following a general jury verdict?

Facts Developed at Trial

On July 14, 2003, the Rhode Island State Police executed a warrant to seize cigarettes being sold illegally in Charlestown, Rhode Island. Undercover detectives were the first to enter the shop. Moments later, uniformed troopers Jones, Hill and Buonaiuto, along with a number of others, approached from outside. From the outset, Jennings was hostile and combative, shouting, cursing and gesturing. He was inciting others and interfering with officers' ability to execute the search warrant.[2] (R514, R552, R593, R603, R604, R605, R606, R624, R625). At one point, Detective Shepherd was checking under the counter to insure that there was nothing he could use as a weapon, such as scissors. (R625). Jennings' disruptive behavior escalated and Detective Bell ordered him arrested for disorderly conduct. (R552).

At this point, Jones was on the deck landing adjacent to the door of the shop, and heard Bell say "cuff him" and then heard Jennings yell "I'm not gettin' arrested." Jennings then assumed a defensive stance, backing up to the wall and lowering his center of gravity, resisting the attempts of the troopers to control him. (R79-84). Jones entered the trailer, and Jennings kicked wildly at him. Jones grabbed Jennings' leg to control it. (R122). Jennings was then taken down to the ground, where he lay on his stomach, clasping his hands at his waistband, to

[2] He was seated behind the counter next to the cash register. (R608).

keep them from the officers. (R76-77, R123, R149). At this point, no one knew if Jennings was armed (R121-124), and officers repeatedly instructed Jennings to "stop resisting" and "give us your hands." (R105, R160, R163-164, R556, R598). Jennings continued to twist and turn while on the floor, clasping his hands underneath him, refusing to give them to any of the troopers. (R102, R106, R151, R160, R162, R597, R655). Hill managed to extricate only Jennings' left arm,[3] handed it to Detective Demers, and stood up. Hill testified that when he stood up Jennings was still resisting arrest, and it was his intention to get out of the way so that the other troopers could continue their attempts to get Jennings under control. (R151-152). Troopers testified that although the kicking had stopped at the time of injury, Jennings was still offering significant resistance by twisting and turning his body, and by refusing to give up his remaining hand for cuffing. (R102, R106, R151, R160-164, R597, R655). Although in a videotape of the struggle, Jennings can be heard yelling about his ankle, he never stopped fighting with the troopers and in fact continued to use his legs as weapons. He admits that he pulled his arms into himself, although the troopers repeatedly told him to show his hands. (R336). Most important is Jennings' own testimony *that his ankle was broken while he was on*

[3] The two-member majority only notes that one of Jennings' hands was obtained by the officers during the struggle. They fail to acknowledge that his other hand was under his body in his waistband at the time of the injury. (App.5).

his stomach, still on his right hand, before he was handcuffed and under control. (R338-339).

During the struggle (the entire incident lasted less than a minute, Jones' involvement was less than that – after Hill stood up was a period of twelve to fifteen seconds), Jones employed a technique he was taught in the State Police Academy to control Jennings' leg and to ensure that he would comply and allow himself to be arrested. (R76-78). Jennings, however, continued to twist and turn. (R102, R106, R124, R160, R162, R597, R655).

Buonaiuto was directly across from Jones during the struggle. His testimony is important also because he is an instructor of defensive tactics at the State Police Academy. (R646). He testified that Jennings was "very aggressive" and was resisting arrest – as soon as Buonaiuto touched him, Jennings stiffened "like a telephone pole." (R651). Jennings then pulled in his hands and backed against the wall, gaining leverage. (R651). Although he had the best view of Jones' application of the hold, Buonaiuto did not tell Jones to stop, because he saw nothing unreasonable about Jones' actions. (R656).[4]

During this brief struggle, the overall situation was far from under control. The scene outside was

[4] Jennings' section 1983 claim against Buonaiuto for failure to stop Jones from using excessive force was dismissed via a Rule 50 motion at the close of plaintiffs' case, and was not appealed. This is inconsistent with the First Circuit's ultimate finding of unreasonableness.

violent and tumultuous. The video of the chaos inside shows Jennings' mother striking Jones on his head while Jones was kneeling and holding Jennings' ankle. (App.72-3; R127). Jennings' arrest occurred on the border of these two chaotic scenes – in the open doorway to the shop itself.

Lt. Darren Delaney, the use of force/defensive tactics instructor at the State Police Academy, offered the only expert testimony. He testified for the defendants, but was offered as an expert witness by Jennings' attorney. (App.21; R463). Lt. Delaney teaches fifteen compliance techniques at the Academy. Their purpose is to make an individual comply and stop resisting so that an arrest can be accomplished. (R436).

Lt. Delaney offered a documentary representation of the "Use of Force Continuum" (R18) defining, categorizing and depicting the levels of resistance offered by individuals, side-by-side with the reasonable responses allowable on the part of troopers. (R18).[5] the levels of resistance depicted are: Level I – Compliant; Level II – Resistant (Passive); Level III – Resistant (Active); Level IV – Assaultive (Bodily Harm); and Level V – Assaultive (Serious Bodily Harm, Death). The reasonable response available to

[5] The Use of Force Continuum is a widely recognized concept used by law enforcement officers throughout the country. *Brister v. Walthall County Sheriff Deputies*, No. 2:05 cv 2045KS-MTP, 2007 WL 2254446, at *10 (S.D. Miss. Aug. 1, 2007).

troopers at each level are as follows: Level I – Cooperative Controls; Level II – Contact Controls; Level III – Compliance Techniques; Level IV – Defensive Tactics; and Level V – Deadly Force. Lt. Delaney testified that the technique used by Jones is available to troopers for application on individuals exhibiting resistance at Levels II – IV. (R458). Lt. Delaney teaches recruits that when making an arrest, they should stay within the level of force being offered by the person arrested. (R451).

After viewing the videotape of the incident, Lt. Delaney's expert opinion was that Jones used force that was reasonable under the circumstances. (R472). Lt. Delaney explained that Jennings' statement "I'm not gettin' arrested" initially fell into Level II – Passively Resistant. (R442). A trooper would be allowed to use compliance techniques at this point, including the ankle hold. (R468). When Jennings pulled his hands into his body and assumed a defensive stance he became actively resistant – Level III. (R443). Jennings reached Level IV – Assaultive Behavior, by kicking at Jones. (R447). According to Lt. Delaney, the levels of resistance offered by Jennings escalated "very quickly" from non-compliant to actively resistant and then assaultive. (R445). Lt. Delaney makes it clear that the use of force is gauged using these five levels. The movement upward and downward is as to those specific levels on the continuum and the particular methods of restraint, and not as to the particular degree of force used during application of the restraint or device. (R451, R457-458).

The uncontradicted testimony is that Jennings was assaultive before he was taken to the ground, and *continued his active resistance until he was flex cuffed,* after the injury. Detective Demers testified that Jennings was not under control until the flex cuffs were on both of his hands. (R599). Lt. Delaney testified that it would be proper to reduce force only if the suspect is in control and in custody (R468), and that it would have been a mistake for Jones to release Jennings' leg prior to cuffing because of the possibility that Jennings might kick again, and to assist the other officers in attempting to place flex cuffs on him. (R466, R472-473).

The Decision of the District Court

Three plaintiffs filed a complaint containing more than two dozen separate counts against eight defendants. The case was sent to the jury only on the claims by three plaintiffs against three troopers for excessive force, as well as state law battery claims. Jennings obtained a general verdict for $301,100.[6] (App.104-105). A post-trial motion for JMOL was granted by the District Court. (App.69-99).

The District Court admitted that it erred in declining to grant JMOL at the close of Jennings' case, since the jury did not have any evidence that Jones acted unreasonably. (App.79-80). The trial

[6] Jennings' medical costs totaled $1,100. The other plaintiffs did not prevail.

Court's application of Rule 50 rested on three independent grounds: First, that "Jennings failed to present *any* evidence that Jones' actions deviated from the standard of conduct that should have been expected from an objectively reasonable police officer under the circumstances"; second, "even if Jones' use of the 'ankle turn control technique' is viewed as amounting to excessive force it did not violate any 'clearly established' constitutional prohibition"; and third, that the "undisputed evidence demonstrates that it was 'objectively reasonable' for Jones to believe that he was acting lawfully." (App.80, 85-86).

The District Court noted "the relevant inquiry in excessive force cases is whether no reasonable officer could have made the same choice under the circumstances." (App.81). The trial judge cited Lt. Delaney's testimony as supporting the use of the technique in situations where a suspect is offering either active or passive resistance (App.85-86), holding that "[e]ven if Jennings had stopped actively resisting when his ankle was broken, the reasonableness of Jones' continued application of the ankle turn control technique must be judged in light of Jennings' earlier conduct and the facts available to Jones at the time that he acted." (App.84).

The District Court accepted Lt. Delaney's testimony that under the circumstances, Jones acted reasonably in using the ankle hold, because the resistance offered authorized its use, and that Jones acted reasonably in maintaining the hold because releasing it would have left all troopers vulnerable to

injury. The District Court noted that Jones had no way of knowing whether Jennings' statement that surgery had recently been performed on his ankle was true or merely a ruse to get Jones to release his hold. (App.84).[7]

> In short, there was an absence of any evidence that "no objectively reasonable officer" would have used the level of force used by Jones and, therefore, the jury unfairly was put in the untenable position of trying to decide that question without sufficient evidence of the applicable standard for measuring the lawfulness of Jones' conduct.

(App.86).

This alone supported JMOL. The trial court further noted that Jennings was "unable to cite any case . . . that holds the use of the ankle turn control technique, or any similar technique, in arresting an uncooperative subject to be unconstitutional." The trial court noted that the cases on point approved of and upheld the use of such techniques during an arrest. (App.89-91). The court determined the alleged constitutional violation would not be apparent to an objectively reasonable officer since Jones did not know why Jennings was being arrested or whether he was armed, Jones did not know why Jennings failed to heed orders to show his hands, and Jones had no

[7] In fact, Jennings admitted that the statement to the officers – clearly audible on the video – that he had pins in his ankle *was completely false*. (R323).

way of knowing whether Jennings would resume kicking or resisting if he released the hold. (App.92-93).

> The ambiguity of the factual situation confronting Jones; the 'split second' nature of the decision that he was required to make; the existence of an established departmental policy permitting the use of the ankle control technique under such circumstances; and the absence of any case law prohibiting its use, virtually compel the conclusion that it was objectively reasonable for Jones to believe that he acted lawfully.

(App.93).

The Decision of the First Circuit

The First Circuit vacated the JMOL, reinstated the jury verdict and ordered that any further proceedings be consistent with its determination that excessive force was used and that qualified immunity did not apply. (App.43, 101). Despite a general verdict with no specific finding as to what the jury believed was excessive, a divided Court of Appeals found that the jury using its "common sense" could have found that the force used by Jones was excessive and that the law was "clearly established" on this point by a single Eleventh Circuit case denying summary judgment, or alternatively, that the violation was so obvious that no case law was needed.

The majority found that the force used was excessive despite acknowledging "Jennings initially

resisted the arrest, requiring the use of force by state police officials to subdue him" (App.1); that "Jennings resisted handcuffing . . . " (App.4); and that "officers repeatedly instructed Jennings to stop resisting and to show them both of his hands because they were concerned that he might have a weapon." (App.5). The two-member majority "recognize[d] the difficult situation confronting the police. It is undisputed that Jennings was challenging authority and resisting arrest. For much of the struggle, the police could not see Jennings' hands, and they reasonably could have believed that he might have a weapon." (App.20).

The majority recognized "[n]o expert testified that, under the circumstances faced by [Jones], no reasonable officer would have" acted as Jones did. (App.27). Under applicable precedent, this should have resulted in the affirmance of the District Court and the end of the case, yet the majority crafted a rule that no expert testimony was needed to come to the conclusion that excessive force was used, since this case involved force "applied with bare hands." (App.30).

The basis for the panel's decision finding excessive force and denying qualified immunity "was not merely Jones' use of force, but rather Jones' *increased* use of physical force after Jennings had ceased resisting for several seconds and stated that the force Jones was using was hurting his previously injured ankle." (App.21). The ultimate holding of the panel that Jennings was non-resistant is contradicted by a videotape of the incident, which demonstrates that

until the time of the injury officers continually instructed Jennings to stop resisting.

Reversing the trial judge's grant of qualified immunity, the majority held that *Smith v. Mattox,* 127 F.3d 1416 (11th Cir. 1997) gave Jones "fair warning" that his conduct was unconstitutional. (App.32). *Smith* was a case affirming denial of summary judgment, involving an arrestee who had "docilely submitted to arrest." *Smith* simply did not provide Jones with fair warning. Indeed, half of the judges who have considered this case do not believe that it does. The majority further determined that no decisional law was needed, since "the unlawfulness of [Jones'] conduct was readily apparent even without clarifying caselaw." (App.33-34).

In a spirited dissent Judge Lynch pointed out that the jury could not have found that Jones was either "plainly incompetent" or that he "knowingly violated the law" because the trial court determined that punitive damages were not warranted. (App.49). The dissent recognized that no First Circuit case gave Jones fair warning, nor was there a clear consensus of persuasive authority giving such notice. (App.56). She read *Smith v. Mattox* as supporting Jones, not Jennings. (App.58). She cited cases finding no excessive force where injuries resulted after officers were informed of pain or preexisting injuries during arrest. (App.58-59). She also pointed out that the majority confused who has the burden of proving clear notice for qualified immunity purposes, noting that the majority cited no cases supporting its distinction

between use of force and increased use of force. (App.58).

The dissent requested instruction from this Court as to the role of the trial judge in ascertaining facts when ruling on a Rule 50 motion after a general jury verdict, especially when the incident that is the focus of the jury's verdict is captured on videotape:

> This is an important issue. It is true that where the question is whether there is sufficient evidence to support a jury verdict (the usual question on a motion for JMOL), the appellate court will take all facts in favor of the verdict. But there is no attack on the sufficiency of the jury verdict, as to at least the second and third prongs of the immunity analysis. The attack is on the trial judge's separate conclusion, a determination assigned to the judge and not the jury, that Jones is entitled to immunity. This raises the question of how the judge, in evaluating immunity, is required to treat a general jury verdict, and that is precisely the type of black hole in the law we discussed [previously].
>
> * * *
>
> *These are important issues on which it would be helpful to have guidance from the Supreme Court.*

(App.53-54) (emphasis added).

In summary, Jennings presented no evidence that Jones' actions were unreasonable. To the contrary, two officers (one qualified as an expert by

Jennings' attorney) testified that Jones' actions were reasonable. Not only did Jennings fail to offer a single decision that would have given Jones "fair warning" that his conduct fell below constitutional requirements, several similar decisions have upheld the use of compliance techniques as reasonable. The First Circuit has crafted an unworkable constitutional requirement – contrary to other circuits – that when a suspect merely complains of pain, an officer must believe him and presumably stop the arrest instead of reacting to the totality of the circumstances. The First Circuit found this proposition so obvious that the jury was entitled to use its common sense and find against Jones. Finally, the First Circuit disagreed with other courts that have established a bright line in force cases – that point in the arrest when the suspect is under control, usually evidenced by handcuffing.

While the First Circuit has remanded the case for a ruling on Jones' pending motions it also stated that its determinations that Jones' use of the technique was excessive, unreasonable and violated clearly established law, "will control the future course of the proceedings." (App.42-43). The decision leaves Jones and all other law enforcement officers without clear guidance as to when or how they may use compliance techniques on resisting suspects.

REASONS FOR GRANTING THE WRIT

A writ of certiorari is necessary because the First Circuit creates a split among circuits (and departs from decisions of this Court) in holding that a single decision from another circuit can "clearly establish" the law for qualified immunity purposes. The decision also conflicts with other circuits that have considered the constitutional significance of an arrestee's complaints of pain *before* he is handcuffed and under control. This case has far-reaching public policy implications, in that it allows juries, untrained in the methods of arrest, to employ their common sense in determining whether excessive force has been used. This will result in considerable uncertainty for police officers, the public they serve, and culminate in wildly conflicting verdicts. Finally, certiorari is warranted to clarify what facts a court should consider when ruling on a Rule 50 post-trial motion based on qualified immunity.

I. THE FIRST CIRCUIT HAS SYSTEMATICALLY ABANDONED ESTABLISHED TESTS AND PRINCIPLES USED TO EVALUATE POLICE CONDUCT IN EXCESSIVE FORCE CASES.

In order to determine whether force used was reasonable under the Fourth Amendment, courts must pay "careful attention to the facts and circumstances of each particular case," including: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers

or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Saucier v. Katz*, 533 U.S. 194, 205 (2001). In *Saucier*, the Court reiterated the importance of the officer's "on scene perspective" and also emphasized that the officer's split-second judgment must be evaluated from the officer's "temporal perspective" of "reasonableness at the moment." *Saucier*, 533 U.S. at 206.

If the *Graham* factors are applied here, Jones wins; he did not know why Jennings was being arrested, but he knew that Jennings' behavior could result in serious injury to himself or his fellow officers, and that until the moment both of Jennings' hands were in the flex cuffs, he was actively resisting arrest and not under control.

A. Contrary To This Court's Instruction, The First Circuit Has Discarded The Totality Of The Circumstances Test.

There is universal agreement that courts must look at the totality of the circumstances to determine whether the amount of force used was reasonable. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076 (8th Cir. 1990); *Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir. 2004). The First Circuit's decision conflicts with this Court's command to evaluate reasonableness from the "on scene perspective" of the

officer who must make a split-second decision based on the limited facts and circumstances of the tense, uncertain, dangerous, and rapidly evolving scenario with which he is confronted. *Graham*, 490 U.S. at 396-97; *Saucier*, 533 U.S. at 205. All of the attendant circumstances must be taken into account. *Kesinger v. Herrington,* 381 F.3d 1243, 1248 (11th Cir. 2004) (citing *Graham*); *Vinyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002); *Curley v. Klem*, 499 F.3d 199 (3rd Cir. 2007).

The First Circuit departed from this venerable principle by abandoning the requirement that any incident involving use of force be viewed as a whole. Instead, the majority split Jennings' arrest into (1) the period before Hill stood up, and (2) the seconds that followed. The majority recognized that the critical period here was only "several seconds," which they defined as "more than two but fewer than many in number or kind." (App.6). The decision has its foundation in that brief period, rather than the entire chaotic incident.

In *Scott v. Harris*, 550 U.S. ___, 127 S.Ct. 1769 (2007), this Court recognized that split-second decisions regarding a response to a situation, especially one created by a suspect, must be given deference. *Id.* Other circuits recognize that courts should never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. In *Carswell v. Borough of Homestead*, 381 F.3d 235 (3rd Cir. 2004) the Third

Circuit granted qualified immunity in a case involving deadly force:

> Our recitation of these events is a discussion in slow motion of an incident that took place in a matter of seconds. Officer Snyder had no time for the calm, thoughtful deliberation typical of an academic setting.

Id. at 243. That court continued, stating "[w]hat constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Id.* at 244.

Indeed, a prior decision of the First Circuit in a case involving the Rhode Island State Police held that thirty seconds is too short a period of time to expect an officer to process the barrage of information incident to an arrest:

> It simply expects too much of an officer faced with an arrestee who has been evasive, one who already apparently has attempted to conceal a deadly weapon from him, one who displays on his shirtless torso tattoos indicative of his apparent propensity for violence, and one who appears to be resisting arrest, to think not only about all of this but about the weather, too. Certainly a reasonable officer might fail to contemplate all of this in the mere 30 seconds (or less) it took to cuff the appellant.

Milette v. Manni, No. 99-1498 (1st Cir. Dec. 14, 1999) (App.107).

B. The First Circuit Departed From Other Circuits That Have Established The Moment Of Handcuffing As A Bright Line For Determining When Force (Whether Used Or Increased) Is Excessive.

A police officer making an arrest is entitled to secure the suspect by means that include handcuffing. *McDermott v. Town of Windham*, 204 F.Supp.2d 54, 65 (D.Me. 2002). The holding in the case sub judice creates confusion in the law enforcement community because it does away with the general rule that only when the suspect is under control, evidenced by handcuffing, should the reasonable officer's response change. See, *Brister v. Walthall County Sheriff Deputies*, 2007 WL at * 10 ("An officer is required not to relax care until the suspect is fully secured."); *Tatum v. City and County of San Francisco*, 441 F.3d 1090 (9th Cir. 2006) (distinguishing between force applied before handcuffing with that applied post-handcuffing); *Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007) (finding use of pepper spray after traffic stop objectively reasonable because motorist refused orders to exit her vehicle, creating a flight risk if not subdued); *Garrett v. Athens-Clarke County,* 378 F.3d at 1281 (where the Eleventh Circuit held a few moments of compliance did not mandate a de-escalation of force); *Mann v. Yarnell*, 497 F.3d 822 (8th Cir. 2007) (no excessive force where injured suspect was not handcuffed, was still resisting "at least to some degree," had not been complying with the instructions repeatedly shouted at him, and was not "under complete police control").

This Court has recognized that clear guidelines are necessary in excessive force cases:

> Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.

Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001).

Other circuits have agreed that handcuffing is the signal that a suspect is no longer a threat. The First Circuit departs from that pragmatic recognition, and confuses the law enforcement community by referring to Jennings' conduct as "non-resistant" when that term was not used by witnesses, contradicts the only testimony offered (including a videotape), is not depicted on the Use of Force Continuum, and means nothing to police professionals. This decision now also requires, among officers' myriad other duties, a second-by-second evaluation of the level of force required, regardless of whether the suspect has been brought under control.

C. A Jury's "Common Sense" Cannot Be Used To Determine The Reasonableness Of An Officer's Conduct.

The First Circuit discards the undisputed evidence, applicable caselaw, and procedure. This is not

a case where expert testimony was offered over the suspect's objection. Jennings offered Lt. Delaney as an expert, effectively stipulating that the subject matter was outside the ken of ordinary jurors and that Lt. Delaney had the requisite specialized knowledge. This acknowledgment *by Jennings* is at odds with the majority's finding that no expert testimony was necessary and the jury was free to use their "common sense." The parties and the trial court agreed that expert opinion was required, and the First Circuit was not free to reject that determination.

Jones acted as he had been taught, as a reasonable officer in a similar situation would have acted. Lt. Delaney and Buonaiuto, both use of force instructors, testified that Jones' use of the technique was appropriate given the level of resistance offered, and both testified that he employed it correctly. In *Conn v. Gabbert*, 526 U.S. 286 (1999), this Court reviewed and reversed a Ninth Circuit decision in part because the circuit's decision was founded on notions of "common sense" and arguments that had "scant metaphysical support" rather than empirical evidence and established caselaw. Encouraging the use of the jury's common sense discards years of excessive force decisions and creates a rule of law different than in any other circuit.

D. There Is A Distinct Circuit Split As To The Constitutionally Mandated Response To A Subject Who Complains Of Pain, But Who Is Not Yet Under Control.

Contrary to sister circuits, and trial courts within the First Circuit, the two-member majority instructs officers that they must alter their arrest techniques when an arrestee who is not yet under control says "ow." The decision rests on "the common sense proposition that it is not reasonable for police officers to increase their use of physical force after an arrestee who has been resisting arrest stops resisting for several seconds and warns the officers that they are hurting his previously injured ankle." (App.29). Contrast *Rodriguez v. Farrell,* 294 F.3d 1276, 1278 (11th Cir. 2002), where the Eleventh Circuit stated that "a police officer need not credit everything a suspect tells him . . . especially . . . when the officer is in the process of handcuffing a suspect." *Rodriguez* relied on a New Hampshire case recognizing that "statements by suspects claiming (at the time of their arrest) to have pre-existing injuries are, 'no doubt, uttered by many suspects who, if given the choice, would prefer not to be handcuffed at all. . . . '" *Id.,* citing *Caron v. Hester*, No. Civ. 00-394M, 2001 WL 1568761, at *8 (D.N.H. Nov. 13, 2001). *See also McDermott v. Town of Windham,* 204 F.Supp.2d at 65 (The fact that the officer continued handcuffing despite the suspect's complaints of pain did not rise "anywhere near" the level of actionable force.) *Rodriguez* noted *Jackson v. City of Bremerton,* 268 F.3d 646

(9th Cir. 2001) and *Morreale v. City of Cripple Creek,* No. 96-1220, 1997 WL 290976 (10th Cir. May 27, 1997), both cases where arrestees were injured after informing officers of pre-existing injuries during an arrest. In these latter cases, no excessive force was found. If anything, they "clearly established" that an officer does not have to believe everything a suspect tells him. *See also Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), cert. denied, 513 U.S. 1152 (1995) (upheld as reasonable "physical pressure administered on . . . limbs in increasing degrees, resulting in pain"); *Nolin v. Isbell*, 207 F.3d 1253, 1257-58 (11th Cir. 2000) ("painful handcuffing in the course of an arrest, without more, does not amount to excessive force if the resulting injuries are minimal"). In *Schultz v. Hall*, 365 F.Supp.2d 1218 (N.D. Fla. 2005), the arrestee had a disability and repeatedly told officers that she needed to be handcuffed in front. When they did not, she complained of pain. Summary Judgment was granted for the officers, even in light of significant injury. "[P]laintiff appears to have had a pre-existing condition which 'made what otherwise would be a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury . . . .'" 365 F.Supp. at 1229 (citing *Rodriguez*). The facts of *Schultz* are strikingly similar to this case, but the outcome is completely different. This tension must be resolved so that law enforcement officers have consistent and fair notice as to what force is lawful.

II. THE FIRST CIRCUIT'S DECISION REJECTS LONGSTANDING QUALIFIED IMMUNITY PRECEDENT.

A. Smith v. Mattox Did Not Clearly Establish The Law In Rhode Island. Instead, Applicable Precedent Supports The Objective Reasonableness Of The Force Used In This Case.

The First Circuit determined that a single Eleventh Circuit decision on an interlocutory appeal gave Jones "fair and clear warning" that "it was unconstitutional for police officers to increase their use of physical force after an arrestee who has been resisting arrest stops resisting for several seconds and warns them that they are hurting his previously injured ankle." (App.31).[8] This Court has stated that one opinion recognizing a right will not fulfill the burden of "clearly establishing" the law. *Wilson v. Layne,* 526 U.S. 603 (1999).

An asserted right is not clearly established unless a plaintiff can cite "cases of controlling authority *in their jurisdiction* at the time of the incident which clearly established the rule on which they

[8] Contrary to this holding, trial courts within the First Circuit had previously determined that a suspect did not have a clearly established right not to be handcuffed behind his back after he informed an officer of prior injury. *Caron v. Hester*, No. 00-394M, 2001 WL 1568761 (D.N.H. Nov. 13, 2001). This was confirmed in 2006 by *Calvi v. City of Rockland*, No. 05-11-P-S, 2006 WL 890687 (D. Me. 2006); aff'd sub nom. *Calvi v. Knox County*, 470 F.3d 422 (1st Cir. 2006).

[sought] to rely," *Wilson v. Layne,* 526 U.S. at 618 (emphasis added); *Luna v. Pico*, 356 F.3d 481, 490 (2nd Cir. 2004); *Warlick v. Cross,* 969 F.2d 303 (7th Cir. 1992).

To qualify as a clearly established right, "the law must have defined the right in a quite specific manner, and . . . the announcement of the rule establishing the right must have been *unambiguous and widespread*, such that the unlawfulness of particular conduct will be apparent *ex ante* to reasonable public officials." *Brady v. Dill*, 187 F.3d 104, 116 (1st Cir. 1999) (emphasis added). The question is not what a lawyer would learn or intuit from researching case law. *McCullough v. Wyandanch Union Free School Dist.,* 187 F.3d 272, 278 (2nd Cir. 1999). The burden of proving that the rights allegedly violated were clearly established falls upon the plaintiff, not the defendant. *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987).

Before August 17, 2007 the First Circuit was consistent with other circuits when determining what law is "clearly established" for qualified immunity purposes:

> To attain the necessary perspective, an inquiring court must look back in time and conduct the judicial equivalent of an archaeological dig. The court must canvass controlling authority in its own jurisdiction and, if none exists, attempt to fathom whether there is a *consensus of persuasive* authority elsewhere.

Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir. 2003), cert. denied, 540 U.S. 1109 (emphasis added). Two federal court judges do not believe *Smith* provided "fair warning." "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. at 618.

Smith v. Mattox did not give Jones fair warning that his conduct violated the Fourth Amendment. The decision was not issued by the First Circuit and the facts were not analogous. The suspect in *Smith* "docilely submitted to arrest . . . " and later his arm was broken. 127 F.3d at 1418-20. No evidence suggests that Jennings was docile, before or after the command to arrest him was given. It is doubtful that even the Eleventh Circuit would apply *Smith v. Mattox* to this case, given its admonition that "if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." 127 F.3d at 1419.

The Eleventh Circuit found that the handcuffing of the suspect in *Smith* presented a "close case" on summary judgment. It is unknown how that case was resolved, but *Smith* was a handcuffing case, not a compliance technique case. Because it was an interlocutory appeal that court had to assume the suspect was offering no resistance *at all* and had obeyed all orders of the officers to lie down and produce his hands for cuffing, unlike Jennings. 127 F.3d at 1420.

The First Circuit has previously recognized that thirty seconds was simply too short of a period to expect an arresting officer to process information and react. *Milette v. Manni, supra.* (App.106-7). If anything, *Milette* "clearly establishes" that a thirty-second time period is insufficient for an officer to be expected to alter his or her behavior when arresting a combative suspect, and highlights not only a circuit split, but internal inconsistency.

Despite having no burden, Jones referred the trial court to more analogous cases involving compliance techniques. *See Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) (granting qualified immunity where the Tenth Circuit had not ruled on the validity of a particular restraint); *Leporace v. City of Philadelphia*, No. 96-6363, 1998 WL 309865 (E.D. Pa. June 9, 1998) (upholding twisting of plaintiff's arm and wrestling with him after he walked away from officers); *Crosby v. Munroe County*, 394 F.3d 1328 (11th Cir. 2004) (upholding blow to head where it was unclear whether suspect was armed); *Smith v. Ball State Univ.*, 295 F.3d 763 (7th Cir. 2002) (no excessive force found in use of holds on suspect mistakenly thought to be intoxicated). These decisions, coupled with *Milette,* "clearly establish" that Jones' actions were reasonable.

This Court should grant certiorari to clarify what constitutes fair warning in a qualified immunity analysis. If that doctrine is to retain any vitality, this decision cannot stand.

B. A Reasonable Officer Would Not Have Known That His Actions Were Unconstitutional.

Qualified immunity is a presumption that must be rebutted. *Mossey v. City of Galveston*, 94 F.Supp.2d 793 (S.D. Tex. 2000). A claimant has the burden to prove that no reasonable, similarly situated official could have considered the conduct of the official in question to be lawful, under the circumstances known to him at the time. Courts must be careful not to substitute their judgment for that of the reasonable officer on the scene. *Graham,* 490 U.S. at 396.

Even if Jones was mistaken about the need for the use of the technique, or any of the underlying facts, he reasonably could have believed that his utilization of the technique was lawful. The trial judge was *not* bound by Jennings' arguments. The undisputed facts show that Jones did not know "why Jennings was being arrested or whether he was armed. Nor could Jones have known, with any certainty, why Jennings failed to heed orders to show his hands. Moreover, even if Jennings had stopped actively resisting, Jones had no way of knowing whether Jennings would resume kicking or resisting if Jones released his ankle hold." (App.93).

As the trial court put it:

> The ambiguity of the factual situation confronting Jones; the 'split second' nature of the decision that he was required to make; the existence of an established departmental

> policy permitting use of the ankle control technique under such circumstances; and the absence of any case law prohibiting its use, virtually compel the conclusion that it was objectively reasonable for Jones to believe that he acted lawfully.

(App.93).

At worst, this is a case falling into the hazy border between excessive and acceptable force, an area where qualified immunity must apply. *Brousseau v. Haugen*, 543 U.S. 194 (2004).

C. The Use Of Force Was Not Obviously Excessive.

The majority found that Jones should have known that his conduct obviously violated Jennings' constitutional rights. (App.33). A flaw in this finding is that the trial court granted JMOL in two key aspects: punitive damages, and as to the civil rights actions against the troopers who failed to stop Jones from utilizing the compliance technique. These decisions, not appealed by Jennings, are inconsistent with the majority's determination that the unlawfulness of Jones' conduct was apparent.

The majority acknowledged that the situation – created *by Jennings* – made it difficult for Jones to gauge the appropriate level of force. (App.38). *Saucier's* protection for reasonable or mistaken beliefs

should therefore shield Jones from liability. 533 U.S. at 705.

The majority wrote that *Smith v. Mattox* "emphasizes the obvious unconstitutionality of increasing the force used on an arrestee to such a degree that a broken ankle results." (App.33). This, although it has been noted that the fact of injury is not determinative of whether a constitutional right has been violated. *Flanigan v. Town of Colchester*, 171 F.Supp.2d 361 (D.Vt. 2001); *Pena-Borrero v. Estremeda*, 365 F.3d 7 (1st Cir. 2004). In fact, the circuit that penned *Smith* found that even a case with horrific injuries did not rise to the level of a constitutional violation. In *Rodriguez v. Farrell*, *supra,* a pre-existing injury was exacerbated by cuffing a suspect behind his back, resulting in twenty-five surgeries and eventual amputation of an arm.

In sum, the undisputed evidence demonstrates that 1) Jennings was not totally secured at the time his ankle was broken; 2) Jennings had posed a threat to the safety of the officers and others just seconds before cuffing; 3) officers were having a difficult time getting the flex cuffs on Jennings; and 4) Jones' overall use of force was, in the opinion of the expert, reasonable under the circumstances. (App.65-66). Two judges and the only testimony offered at trial concluded that based on these facts Jones' conduct was not objectively unreasonable.

III. BECAUSE OF THE UNDEFINED NATURE OF THE STANDARD A COURT IS TO USE IN DECIDING A POST-JUDGMENT MOTION PURSUANT TO FED. R. CIV. P. 50 BASED ON QUALIFIED IMMUNITY, THIS COURT SHOULD GRANT CERTIORARI.

The issue of qualified immunity is one for the trial court's determination, not a question for the jury. *Hunter v. Bryant,* 502 U.S. 224 (1991). (App.46). As the dissent notes, this Court has never addressed the question of "what role jury findings play in the judicial immunity determination . . . " (App.46) saying "[t]hese are important issues on which it would be helpful to have guidance from the Supreme Court." (App.54). In fact, the First Circuit has twice before indicated a need for instruction in this area. *See Kelley v. LaForce*, 288 F.3d 1, 7 n.2 (1st Cir. 2002) ("[T]he Supreme Court has not clearly indicated whether the judge may act as fact-finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury."); *Ringuette v. City of Fall River*, 146 F.3d 1, 6 (1st Cir. 1998) ("Something of a 'black hole' exists in the law as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved . . . prior to trial.").

The jury certainly did not find two facts: "First, Jones did not break Jennings' ankle with reckless or callous indifference to Jennings' federal rights. Second, he did not knowingly violate the law." (App.49). This is because punitive damages were deemed

unwarranted by the trial court. It is accurate to say that "[o]n this record, there is considerable ambiguity and no certainty about what underlying factual conclusions motivated the *general* verdict." (App.52-53). There were no "foundational, historical facts" that would explain the jury's rationale. *See, e.g., Acosta v. City and County of San Francisco,* 83 F.3d 1143, 1147 (9th Cir.), cert. denied, 519 U.S. 1009 (1996). We simply do not know precisely why the jury found against Jones, but neither did the two-person majority.[9]

In keeping with this Court's "totality of the circumstances" view in excessive force/qualified immunity cases, the District Court stated: "The jury determined that Jones' use of the ankle turn control technique amounted to excessive force." (App.82). That is all that the District Court could say without speculating, and the First Circuit went too far in hypothesizing that the jury must have based its decision on an increased force theory.

The two-judge majority concluded, absent any evidence, that the increased force employed by Jones caused the broken ankle. (App.17). Even the treating physician did not go that far: he stated only that "the cause of the fracture was the altercation and

[9] Of course, jurors could have awarded Jennings damages simply because he was injured. (App.2). This, of course, would be directly contrary to instructions that the fact of injury is not determinative in an excessive force case. *Flanigan v. Town of Colchester, supra*; *Pena-Borrero v. Estremedia, supra.*

whatever stress was placed on his ankle." (R363). Thus, not only did the First Circuit reject expert testimony as to use of force, it also intruded into the arena of medical expertise.

In considering a Rule 50 motion a trial court is to draw all rational inferences from the facts in favor of the plaintiff – however, he is not entitled to inferences based on speculation and conjecture. *Borges Colon v. Roman-Abreu*, 438 F.3d 1 (1st Cir. 2006). In qualified immunity cases, a trial court is to defer to the jury's "discernible resolution of disputed factual issues." *Id.* at 18 (citations omitted); *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir. 1999).

The only reasonably discernible facts in this case were that Jennings was assaultive and resistant, refusing to give up his hands and was not handcuffed at the time of injury. The videotape of the incident is crucial as it shows that several officers continued to order Jennings to stop resisting, even after Hill stood up. The "bright line" in this case is not when Hill stood up, because everyone testified that Jennings was not yet under control at that point. Jennings was not under control until the flex cuffs were put on both hands after the injury.

Despite recognizing that deference should be accorded only to the jury's *discernible* resolution of disputed factual issues, the majority relies on the supposition that the jury must have thought Jones increased torque on Jennings, and that that increase crossed a constitutional line. (App.10). This is pure

speculation. Since the verdict was a general one, "it is far from obvious on what subsidiary facts the verdict rested." (App.52). This issue is so important that the dissent writes " . . . it would be helpful to have guidance from the Supreme Court." (App.54). This issue alone merits review by this Court.

In *Scott v. Harris*, *supra,* a videotape contradicted plaintiff's version of the facts submitted for summary judgment. This Court held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 550 U.S. at ___, 127 S.Ct. at 1776.

The videotape of this arrest shows the extent of Jennings' combative nature mere seconds before injury. It also clearly shows officers telling him to stop resisting and he wouldn't get hurt – up to the instant of injury. These facts contradict the findings of the First Circuit, especially its insistence that Jennings was not resisting at the time of injury. Further, the videotape contradicts any assertion that Jennings docilely submitted to arrest as in *Smith v. Mattox,* cited by the majority as providing "fair warning" to Jones that his actions were unconstitutional. (App.83).

The record in this case presents a clear set of facts for this Court to grant certiorari and decide these pressing issues of national importance.

CONCLUSION

Among the risks police officers face daily, none is more dangerous than those times when they are forced to engage a combative suspect. That danger remains until the suspect is under control and handcuffed. Those critical moments between first contact and ultimate control – here, mere seconds – are perilously unstable, unpredictable and potentially deadly. This Court should grant certiorari to return discretion to law enforcement officers as they make the split second decisions that occur so often in their environment, and return the law of qualified immunity to its more workable state, as it existed prior to this decision.

Respectfully submitted,

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