SECTION 1983: QUALIFIED IMMUNITY

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QUALIFIED IMMUNITY

I. INTRODUCTION

A. Note on Absolute Immunity

A government official may invoke one of two types of immunity from personal liability for damages: absolute or qualified immunity. The Supreme Court has adopted a "functional" approach to absolute immunity, so that whether an official is entitled to absolute immunity will depend on the function performed by that official in a particular context. ***Forrester v. White***, 484 U.S. 219, 224 (1988). Most government officials are entitled only to qualified immunity. Officials performing **judicial**, **prosecutorial**, or **legislative** functions, however, have been afforded absolute immunity. **Witnesses** in judicial proceedings have likewise been afforded absolute immunity with respect to their testimony. The **President** enjoys absolute immunity when performing his official functions. ***Nixon v. Fitzgerald***, 457 U.S. 731 (1982). *But see* ***Clinton v. Jones***, 117 S. Ct. 1636, 1644 (1997) ("[W]e have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity.").

The leading cases on judicial, prosecutorial, witness, and legislative immunity are set out below.

1. Judicial Immunity

a. Judges

See, e.g., ***Mireles v. Waco***, 502 U.S. 9 (1992) (absolute judicial immunity where conduct is in excess of jurisdiction rather than in absence of jurisdiction);); ***Forrester v. White***, 484 U.S. 219, 228-29 (1988) (judge has absolute immunity only when acting in judicial, as opposed to administrative, capacity); ***Stump v. Sparkman***, 435 U.S. 349 (1978) (absolute immunity for judge acting within jurisdiction).

b. Officials Acting in Judicial or Quasi-Judicial Capacity

Friedland v. Fauver, 6 F. Supp.2d 292, 304 (D.N.J. 1998) ("Following the lead of the Ninth Circuit Court of Appeals, the First, Fourth, Seventh, and Eighth Circuits have generally awarded parole officials absolute immunity for actions taken in the processing of alleged parole violations. However, the Court of Appeals for the Third Circuit has ruled that 'probation and parole officers are entitled to absolute immunity when they are engaged in adjudicatory duties,' but '[i]n their executive or administrative capacity, probation and parole officers are entitled only to a qualified, good faith immunity,' *Wilson v. Rackmill*, 878 F.2d 772, 775 (3d Cir.1989) . . . In this Circuit, parole board members and officers are entitled to absolute immunity only when serving as a hearing examiner or making a decision to revoke or deny parole.")

2. Prosecutorial Immunity

a. Prosecutors

Burns v. Reed, 500 U.S. 478 (1991) (prosecutor absolutely immune for functions performed in probable cause hearing, but only qualified immunity attached to function of giving legal advice to police; ***Imbler v. Pachtman***, 424 U.S. 409, 424-26 (1976) (absolute immunity for prosecutors performing prosecutorial acts).

In ***Buckley v. Fitzsimmons***, 509 U.S. 259 (1993), the Supreme Court held that prosecutors did not have absolute immunity with respect to claims that they had fabricated evidence during the preliminary investigation of a crime and had made false statements at a press conference announcing the arrest and indictment of petitioner.

In ***Kalina v. Fletcher***, 522 U.S. 118 (1997), the Supreme Court held, in a unanimous opinion, that a prosecutor who makes false statements of fact in an affidavit supporting an application for an arrest warrant, is entitled to qualified, rather than absolute, immunity. The Court explained:

> [P]etitioner's activities in connection with the preparation and filing of two of the three charging documents-the information and the motion for an arrest warrant-are protected by absolute immunity. Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the third document in the package was part of the advocate's function as well. . . . [W]e merely hold that § 1983 may provide a remedy for respondent insofar as petitioner performed the function of a complaining witness. We do not depart from our prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate.

Id. at 129, 131.

Michaels v. New Jersey, 222 F.3d 118, 121, 122 (3d Cir. 2000) (coercion of child witnesses did not violate any right held by petitioner and, although petitioner's due process rights were violated when the testimony was used at trial, prosecutors had absolute immunity), *cert. denied sub nom* ***Michaels v. McGrath,*** 121 S. Ct. 873 (2001). *See also* ***Michaels v. McGrath***, 121 S. Ct. at 873, 874 (Thomas, J., dissenting from denial of writ of certiorari) ("I believe that the Second Circuit's approach [in *Zahrey*] is very likely correct, and that the decision below leaves victims of egregious prosecutorial misconduct without a remedy. In any event, even if I did not have serious doubt as to the correctness

of the decision below, I would grant certiorari to resolve the conflict among the Courts of Appeals on this important issue. I respectfully dissent.").

b. Officials Acting in Advocacy Capacity

Ernst v. Child and Youth Services of Chester County, 108 F.3d 486, 488-89 (3d Cir. 1997) ("Like the other courts of appeals that have addressed the issue, we hold that child welfare workers and attorneys who prosecute dependency proceedings on behalf of the state are entitled to absolute immunity from suit for all of their actions in preparing for and prosecuting such dependency proceedings.").

3. Witnesses

Briscoe v. LaHue, 460 U.S. 325, 342 (1983) (police officers entitled to absolute immunity for claims brought pursuant to § 1983 arising out of allegedly perjured testimony at criminal trials).

Palma v. Atlantic County, 53 F. Supp.2d 743, 765 (D.N.J. 1999) (no absolute immunity for police officers acting as complaining witnesses before a grand jury).

See also ***Gravely v. Speranza***, No. 02-1444 (JEI), 2006 WL 91308, at *6 n.9 (D.N.J. Jan. 17, 2006) ("In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Supreme Court held that police officers are entitled to absolute immunity from claims brought pursuant to Section 1983 arising out of allegedly perjured testimony given at criminal trials. Neither the Supreme Court nor the Third Circuit have squarely held that this immunity extends to testimony given before the grand jury, although the Third Circuit has extended *Briscoe* to adversarial pre-trial proceedings. In light of the Supreme Court's subsequent decision in *Malley v. Briggs*, 475 U.S. 335 (1986), holding that police officers are not entitled to absolute immunity for knowing false statements made in procuring a warrant, several courts have questioned whether police officers testifying as the complaining witness before the grand jury are entitled to absolute immunity. . . Given this Court's conclusion that Plaintiff's claim against Scull has no merit, we need not address the issue of immunity.")

The Court of Appeals for the Third Circuit has distinguished cases involving misrepresentation of facts from cases involving misrepresentation of law. *See* ***Egervary v. Young,*** 366 F.3d 238, 250, 251(3d Cir.2004) ("To sum up, we adhere to the well-settled principle that, in situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures but reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions. . . However, we draw a distinction between that situation and the facts as presented both here and in *Townes*, where the actions of the defendants, while clearly a cause of the plaintiff's harm, do not create liability because of the intervention of independent judicial review, a superseding cause. We conclude that where, as here, the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and procedures, such error must be held to be a superseding cause, breaking the

chain of causation for purposes of §1983 and *Bivens* liability. . . . Thus, because the judge's execution of the ex parte Order superseded any prior tortious conduct by defendants and shrouded any subsequent actions with a cloak of legitimacy, we find no basis for imposing *Bivens* liability on any of the defendants. This is not to say that we condone behavior in which an attorney urges the court to make an erroneous decision or fails to properly investigate the facts or governing law before presenting them to the court. However, such actions or omissions would neither excuse judges from their responsibility to correctly ascertain the relevant law and procedures nor would they create civil liability on the part of others for errors of law committed by judges. Finally, we note that neither the District Judge's error in granting the Order nor the defendants' actions in seeking and executing it left Egervary without a remedy in the underlying case. Egervary initially filed a motion for reconsideration of the ex parte Order. He could have pursued this motion, and, if it were denied, appealed the ruling. A reversal by this Court then would have permitted Egervary to enlist the aid of the State Department in obtaining Oscar's return. He instead chose to withdraw his motion for reconsideration and pursue the *Bivens* claim. While it was clearly his right to do so, he is now left with the consequences of that decision.").

4. Legislative Immunity

Tenney v. Brandhove, 341 U.S. 367 (1951) (absolute immunity for members of state legislature). In ***Bogan v. Scott-Harris***, 118 S. Ct. 966 (1998), a unanimous Court made "explicit what was implicit in our precedents: Local legislators are entitled to absolute immunity from § 1983 liability for their legislative activities." *Id*. at 972. The Court went on to address question of whether Court of Appeals erred in classifying conduct here as administrative rather than legislative.

> Although the Court of Appeals did not suggest that intent or motive can overcome an immunity defense for activities that are, in fact, legislative, the court erroneously relied on petitioners' subjective intent in resolving the logically prior question of whether their acts were legislative. Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. . . . This leaves us with the question whether, stripped of all considerations of intent and motive, petitioners' actions were legislative. We have little trouble concluding that they were. Most evidently, petitioner Roderick's acts of voting for an ordinance were, in form, quintessentially legislative. Petitioner Bogan's introduction of a budget and signing into law an ordinance also were formally legislative, even though he was an executive official. . . .We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its

> constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office.

Id. at 972, 973.

See also ***Powell v. Ridge,*** 247 F.3d 520, 525 (3d Cir. 2001) ("Despite their understanding of legislative immunity's broad parameters, however, the Legislative Leaders are not seeking immunity from this suit which, it must be remembered, they voluntarily joined. Nor are the Legislative Leaders seeking any kind of wholesale protection from the burden of defending themselves. Instead, the Legislative Leaders build from scratch a privilege which would allow them to continue to actively participate in this litigation by submitting briefs, motions, and discovery requests of their own, yet allow them to refuse to comply with and, most likely, appeal from every adverse order. As we noted at the outset, and as the Legislative Leaders conceded at oral argument, the privilege they propose would enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined. In short, they assert a privilege that does not exist.").

II. QUALIFIED IMMUNITY : PRELIMINARY PRINCIPLES

A. Basic Doctrine

A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). The immunity is "immunity from suit rather than a mere defense to liability." ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985).

B. Affirmative Defense

Although qualified immunity is an affirmative defense, *see* ***Gomez v. Toledo***, 446 U.S. 635, 640 (1980), once the defendant pleads qualified immunity, the majority of circuits hold that the burden then shifts to the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct. *See, e.g.*, ***Gardenhire v. Schubert***, 205 F.3d 303, 311(6th Cir. 2000) ("The defendant bears the initial burden of coming forward with facts to suggest that he acted within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendant's conduct violated a right so clearly established that any official in his position would have clearly understood that he was under an affirmative duty to refrain from such conduct."); ***Pierce v. Smith***, 117 F.3d 866, 871 (5th Cir. 1997) (where § 1983 defendant pleads qualified immunity and shows he is a government official whose position involves the exercise of discretion, plaintiff has the burden to rebut qualified immunity defense by establishing the violation of clearly established law); ***Magdziak v. Byrd***, 96 F.3d 1045, 1047 (7th Cir. 1996); ***Dixon v. Richer***, 922 F.2d 1456, 1460 (10th Cir. 1991).

C. Timing and Questions of Waiver

See ***Eddy v. Virgin Islands Water and Power Authority,*** 256 F.3d 204, 210 (3rd Cir. 2001) ("We agree with the conclusions of the First and Sixth Circuits that the defense of qualified immunity is not necessarily waived by a defendant who fails to raise it until the summary judgment stage. Instead, the District Court must exercise its discretion and determine whether there was a reasonable modicum of diligence in raising the defense. The District Court must also consider whether the plaintiff has been prejudiced by the delay.").

D. "Extraordinary Circumstances"

In ***Harlow***, the Court indicated that there may be some cases where, although the law was clearly established, "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." 457 U.S. at 819. This "extraordinary circumstances" exception is applied rarely and generally in the situation where the defendant official has relied on advice of counsel. *See e.g.*, ***Armstrong v. City of Melvindale***, No. 04-2192, 2006 WL 27216, at **4-6 (6th Cir. Jan. 6, 2006) ("Defendants present two arguments that they did not violate a clearly established right. First, they again proffer the forfeited argument regarding the Michigan drug forfeiture laws. Second, they argue that the assurances of constitutional propriety gained from consultation with Prosecutor Plants, her review of the warrant and supporting affidavit, and the judge's issuance of the warrant rendered reasonable their belief that probable cause supported the issuance of the warrant. . . . The district court never reached the question of whether the officers' reliance on the issuance of the warrant was unreasonable. It instead focused only on the fact of a constitutional violation. This suggests a misconception; even with a constitutional breach, the law accords qualified immunity protection under appropriate circumstances. This case presents such circumstances. Defendants consulted with Prosecutor Plants because they were uncertain as to whether a warrant to search the Melvindale premises was constitutional. Plants not only advised them that a warrant would be constitutionally permissible, she also sanctioned a draft of the warrant and supporting affidavit. . . Only then did Defendants apply to a judge for the warrant. With the judge's approval, Defendants executed the search, and Plaintiffs do not allege that the search exceeded the scope of the warrant. . . . Defendants wrongly believed that probable cause supported the warrant, but their mistake was not so unreasonable as to deny them qualified immunity. . . . Because the officers exercised reasonable professional judgment in applying for the warrant and because reasonable officers in Defendants' position might have believed that the warrant should have issued, we cannot say that Defendants violated a clearly established right by conducting the search of Plaintiffs' business."); ***Cox v. Hainey***, 391 F.3d 25, 34-36 (1st Cir. 2004) ("[T]he appellant submits that a police officer should not be able to insulate himself from liability for an erroneous determination simply because he obtained a prosecutor's blessing to arrest upon evidence that did not establish probable cause. We agree with the appellant's premise that a wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one. That is not to say, however, that a reviewing court must throw out the baby with the bath water. There is a middle ground: the fact of the consultation and the purport of the advice obtained should be factored into the totality of the

circumstances and considered in determining the officer's entitlement to qualified immunity. Whether advice obtained from a prosecutor prior to making an arrest fits into the totality of circumstances that appropriately inform the qualified immunity determination is a question of first impression in this circuit. In *Suboh v. Dist. Atty's Office of Suffolk Dist.*, 298 F.3d 81 (1st Cir.2002), we noted the question but had no occasion to answer it. *See id.* at 97. In dictum, we implied that if an officer seeks counsel from a prosecutor anent the legality of an intended action and furnishes the latter the known information material to that decision, the officer's reliance on emergent advice might be relevant, for qualified immunity purposes, to the reasonableness of his later conduct. . . Other courts, however, have spoken authoritatively to the issue. [collecting circuit cases] . . . .We agree with our sister circuits and with the implication of the *Suboh* dictum that there is some room in the qualified immunity calculus for considering both the fact of a pre-arrest consultation and the purport of the advice received. As a matter of practice, the incorporation of these factors into the totality of the circumstances is consistent with an inquiry into the objective legal reasonableness of an officer's belief that probable cause supported an arrest. It stands to reason that if an officer makes a full presentation of the known facts to a competent prosecutor and receives a green light, the officer would have stronger reason to believe that probable cause existed. And as a matter of policy, it makes eminently good sense, when time and circumstances permit, to encourage officers to obtain an informed opinion before charging ahead and making an arrest in uncertain circumstances. . . . Although we acknowledge the possibility of collusion between police and prosecutors, we do not believe that possibility warrants a general rule foreclosing reliance on a prosecutor's advice. . . . We caution, however, that the mere fact that an officer secures a favorable pre-arrest opinion from a friendly prosecutor does not automatically guarantee that qualified immunity will follow. Rather, that consultation comprises only one factor, among many, that enters into the totality of the circumstances relevant to the qualified immunity analysis. . . The primary focus continues to be the evidence about the suspect and the suspected crime that is within the officer's ken. In considering the relevance of an officer's pre-arrest consultation with a prosecutor, a reviewing court must determine whether the officer's reliance on the prosecutor's advice was objectively reasonable. . . Reliance would not satisfy this standard if an objectively reasonable officer would have cause to believe that the prosecutor's advice was flawed, off point, or otherwise untrustworthy. . . Law enforcement officers have an independent duty to exercise their professional judgment and can be brought to book for objectively unreasonable mistakes regardless of whether another government official (say, a prosecutor or a magistrate) happens to compound the error. . . The officer's own role is also pertinent. If he knowingly withholds material facts from the prosecutor, his reliance on the latter's opinion would not be reasonable. . . In this case, the advice that Hainey received from the assistant district attorney was of the kind that an objectively reasonable officer would be free to consider reliable. The undisputed facts indicate that the two reviewed the available evidence fully and had a frank discussion about it. This discussion culminated in the prosecutor's statement that he believed Hainey had probable cause to arrest the appellant. And, finally, there is nothing to suggest that the prosecutor was operating in bad faith. We conclude, therefore, that an objectively reasonable officer would have taken the prosecutor's opinion into account in deciding whether to make the arrest. Thus, the district court appropriately considered that opinion in assessing the objective reasonableness of Hainey's actions and, ultimately, in granting him qualified immunity.").

But see ***Woodwind Estates, Ltd. v. Gretkowski***, 205 F.3d 118, 125 (3d Cir. 2000) ("[T]he supervisor defendants contend that their Rule 50(a) motion should be upheld on the alternative ground that they are entitled to qualified immunity for their decision to deny Woodwind's application for subdivision approval. According to the supervisors, they are entitled to qualified immunity simply because they were relying upon the recommendation of the planning commission and the township solicitor. We disagree. . . . Under the local ordinance, the Woodwind plan as submitted must have been approved as a subdivision because it satisfied all of the objective criteria. Yet the supervisor defendants denied approval for the subdivision plan. The supervisor defendants have not shown that their interpretation or understanding of the ordinance was reasonable or that Pennsylvania law on the subject was unclear. Accordingly, the defense of qualified immunity is not available to the supervisor defendants in the instant matter.").

Compare ***Lawrence v. Reed***, 406 F.3d 1224, 1230-36 (10th Cir. 2005) ("The only question on appeal, then, is whether 'extraordinary circumstances' excused [Sheriff] Reed from knowing the clearly established law. Mr. Reed points to two reasons why he neither knew nor should have known that the seizure of Mrs. Lawrence's vehicles violated clearly established law: his consultation with the city attorney, and his reliance on the derelict vehicle ordinance. . . . In this case, we find particularly significant the fact that Mr. Reed and City Attorney Lewis never once discussed the applicable constitutional law governing Mr. Reed's conduct. Mr. Reed concedes that a warrant or notice-and-hearing are required before depriving a citizen of their property; he also concedes that these constitutional requirements were clearly established and that he violated them. Yet he now argues that his consultation with the city attorney--who never once mentioned the requirement of a warrant or notice-and-hearing-- somehow prevented him from knowing that these procedures were constitutionally required. This cannot be the case. What Mr. Reed really wants us to conclude is that it is generally reasonable to rely on the city attorney's advice--that it is the attorney's job, not the police officer's, to point out when a statutorily authorized course of conduct violates the Constitution. But this is an argument that officers should not be held responsible for knowing the law in the first place, not that consultation with the city attorney somehow interfered with that knowledge. Given Mr. Reed's concession that his conduct violated Mrs. Lawrence's clearly established rights, and given the Supreme Court's admonishment that 'a reasonably competent public official should know the law governing his conduct,' . . . Mr. Reed must point to something in his consultation with the city attorney that prevented him from knowing the law. This he has not done. The district court therefore erred by granting Mr. Reed immunity on the basis of his consultation with the city attorney. . . . Alternatively, Mr. Reed argues that he should not be held responsible for knowing the unlawfulness of his conduct because his conduct was authorized by the Rawlins derelict vehicle ordinance. . . . Thus, officers can rely on statutes that authorize their conduct--but not if the statute is obviously unconstitutional. Again, the overarching inquiry is whether, in spite of the existence of the statute, a reasonable officer should have known that his conduct was unlawful. . . . Just as we do not require officials to predict novel constitutional rulings, we do not require them to predict novel statutory rulings. Instead, the focus of the qualified immunity inquiry is on what a reasonable officer should have known. Here, Mrs. Lawrence concedes that the derelict vehicle ordinance applies on its face to her property; but she argues that the 1982 Settlement Agreement carved out an exception for her industrially zoned property. What she has failed to produce, however, is any

evidence that Mr. Reed knew or should have known about the 1982 Settlement Agreement. Absent such evidence, we cannot conclude that the agreement rendered unreasonable Mr. Reed's conclusion that the derelict vehicle ordinance authorized his conduct. . . But this does not end our inquiry. Another important consideration is whether Mr. Reed could reasonably have concluded that the statute was constitutional. . . . Mr. Reed should have known that the ordinance was unconstitutional. Had the derelict vehicle ordinance provided some form of pre-or post-deprivation hearing--even a constitutionally inadequate one--we would not necessarily expect a reasonable officer to know that it was unconstitutional. For once the ordinance provides a hearing, its constitutionality turns on a court's resolution of the Mathews balancing test, which, in the absence of case law directly on point, is not something we would require officers to predict. Here, however, the ordinance provides no hearing whatsoever; an officer need not understand the niceties of Mathews to know that it is unconstitutional. Our decisions, and those of other circuits, have made abundantly clear that when the state deprives an individual of property--for example, by impounding an individual's vehicle--it must provide the individual with notice and a hearing. . . This is especially true where, as here, the state not only impounds the vehicles but permanently disposes of them. . . In sum, a hearing is '[t]he fundamental requirement of due process,' . . . and the Rawlins derelict vehicle ordinance does not even pretend to provide one. This is a sufficiently obvious constitutional violation that Mr. Reed should have known about. Mr. Reed, therefore, was not entitled to rely on the ordinance, and qualified immunity is inappropriate. . . . In spite of the layers of complexity built up around the doctrine of qualified immunity, the fundamental inquiry is fairly simple: should the officer have known that his conduct was unlawful? For the reasons set forth above, we find that Mr. Reed should have known that his conduct was unlawful, and we therefore REVERSE the district court's grant of immunity and its dismissal of Mrs. Lawrence's claims, and REMAND for further proceedings.") *with* ***Lawrence v. Reed***, 406 F.3d 1224, 1236-39 (10th Cir. 2005) (Hartz, J., dissenting) ("I respectfully dissent. The Supreme Court opinion providing for qualified immunity in 'extraordinary circumstances' despite the violation of clearly established law, *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), gives little guidance on what circumstances are 'extraordinary.' The majority may well have construed the term correctly. But the very concerns expressed in *Harlow* suggest to me that Sheriff Reed is entitled to qualified immunity. . . . Given the complexities of the law today, it should not be surprising to find intelligent, conscientious, well-trained public servants who do not know all the clearly established law governing their conduct. The statement in *Harlow* that reasonably competent public officials know clearly established law, . . . is a legal fiction. Nevertheless, the objective test, and the legal fiction it embraces, can advance the policies behind qualified immunity if the extraordinary-circumstances exception is properly understood. The extraordinary-circumstances exception should encompass those situations in which the legal fiction does not make sense and applying that fiction would create problems that qualified immunity is intended to avert. In my view, this goal can be advanced by including as an extraordinary circumstance the official's reliance on specific advice by a nonsubordinate attorney of sufficient stature regarding the specific challenged action. Although, as I previously stated, it is doubtful that reasonably competent public officials actually know all the clearly established law governing their conduct, it is largely true that reasonably competent public officials are sufficiently versed in the law that they know not to take certain actions without seeking proper legal advice. If they violate clearly established law without having sought legal advice, holding them liable makes good sense. But there

is little sense in holding officials liable for unlawful action that received the imprimatur of properly sought legal advice. The *Harlow* legal fiction should not be extended to say that reasonably competent public officials know when the legal advice they receive is contrary to clearly established law. . . . Thus, in my view, incorrect legal advice is an extraordinary circumstance cloaking an official with qualified immunity when, as here, it comes from the highest level nonsubordinate attorney with whom the official is to consult and the attorney is fully informed of the planned action and the surrounding circumstances. . . . In the present case Sheriff Reed fully informed the City Attorney of the relevant surrounding circumstances and how he intended to proceed. The City Attorney gave his imprimatur. It would be contrary to Harlow's underlying concern about 'dampen[ing] the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties,' . . . to tell officials like the sheriff that they cannot rely on their chief nonsubordinate government attorneys but must postpone action (to conduct their own research or call a professor at the nearest law school?) or risk being sued.").

E. Constitutional-Question-First Analysis Required by *Wilson/ Saucier*

In ***Siegert v. Gilley***, 500 U.S. 226 (1991), plaintiff, a clinical psychologist, brought a ***Bivens*** action against his supervisor, claiming impairment of future employment prospects due to the sending of a defamatory letter of reference. The Court of Appeals for the District of Columbia had dismissed on grounds that plaintiff had not overcome respondent's claim of qualified immunity under the "heightened pleading standard."

The Supreme Court held that the claim failed at an analytically earlier stage. The plaintiff did not state a constitutional claim. Under ***Paul v. Davis***, 424 U.S. 693 (1976), there was no constitutional protection for one's interest in his reputation, even if facts sufficient to establish malice were pleaded.

Chief Justice Rehnquist set out the "...analytical structure under which a claim of qualified immunity should be addressed." The first inquiry is whether the plaintiff has alleged the violation of a clearly established constitutional right. This question is a purely legal question. "Once a defendant pleads a defense of qualified immunity, '[o]n summary judgment, the judge . . . may determine not only currently applicable law, but whether the law was clearly established at the time," and until this threshold immunity question is resolved, there should be no discovery.

In ***County of Sacramento v. Lewis***, 523 U.S. 833 (1998), a majority of the Court reinforced the view that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *Id.* at 841 n.5. Justice Souter, writing for the majority, explained:

> [T]he generally sound rule of avoiding determination of constitutional issues does not readily fit the situation presented here; when liability is claimed on the basis of a constitutional violation, even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted. What

> is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or non-constitutional. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law. . . But these avenues would not necessarily be open, and therefore the better approach is to determine the right before determining whether it was previously established with clarity.

Id. Justice Stevens would limit *Siegert's* analytical approach to cases where the constitutional issue is clear. Where the question is difficult and unresolved, he would prefer its resolution in a context where municipal liability is raised and the case cannot be disposed of on qualified immunity grounds. *Id.* at 859 (Stevens, J., concurring in the judgment). Justice Breyer wrote separately in *County of Sacramento* to express his agreement with Justice Stevens' view that *Siegert* "should not be read to deny lower courts the flexibility, in appropriate cases, to decide § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented." *Id*. at 858, 859 (Breyer, J., concurring).

See also ***Conn v. Gabbert***, 526 U.S. 286, 290 (1999) ("[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.").

In ***Wilson v. Layne***, 526 U.S. 603 (1999), the Supreme Court resolved a split among the Circuits as to the availability of qualified immunity for law enforcement officers who invite the media to "ride along" to observe and record the activities of the officers while executing a warrant in a private home. The Court of Appeals for the Fourth Circuit, in a divided en banc opinion, had granted the officers qualified immunity on the ground that, at the time of the challenged conduct, no court had held that the bringing of media into a private residence in conjunction with the execution of a warrant was a violation of the Fourth Amendment. Finding that the law was not clearly established at the time, the Fourth Circuit did not address the "merits" question of whether such media ride-alongs, involving entry into a private residence, constituted a violation of the Fourth Amendment**.** 526 U.S. at 608.

The Supreme Court affirmed the grant of qualified immunity, but did so by adopting the analytical approach it had established in *Siegert*, *County of Sacramento*, and *Conn.* Before addressing whether the law was clearly established at the time of the alleged violation, the court must first determine whether the plaintiff has alleged the violation of a constitutional right at all. 526 U.S. at 609. A unanimous Court concluded that such media ride-alongs violated the Fourth Amendment. "We hold that it is a violation of the Fourth Amendment for police to bring members of the media

or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Id.* at 614. *Wilson* not only strongly reinforces (requires?) the merits-first approach to the qualified immunity analysis, but also clarifies that this approach is not reserved for those cases in which the court determines that the constitutional right does *not* exist.

With only Justice Stevens dissenting, the Court went on to conclude that, despite the finding of a constitutional violation by a unanimous Court, the law was not clearly established at the time of the officers' conduct such that a reasonable officer would have known that the conduct violated the Fourth Amendment. The Court framed the issue as the objective question of "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed.**"** *Id.* at 615. The Court concluded general Fourth Amendment principles did not apply with obvious clarity to the officers' conduct in this case. *Id.* Furthermore, "[p]etitioners [had] not brought to [the Court's] attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely, nor [had] they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* at 616. Finally, the Court gave considerable weight to the fact that the federal and local law enforcement departments involved in the incident had ride-along policies which "explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests," or "did not expressly prohibit media entry into private homes." *Id.* at 617.

Justice Stevens took the position that "[t]he absence of judicial opinions expressly holding that police violate the Fourth Amendment if they bring media representatives into private homes provides scant support for the conclusion that in 1992 a competent officer could reasonably believe that it would be lawful to do so. Prior to our decision in *United States v. Lanier*, . . . no judicial opinion specifically held that it was unconstitutional for a state judge to use his official power to extort sexual favors from a potential litigant. Yet, we unanimously concluded that the defendant had fair warning that he was violating his victim's constitutional rights." *Id.* at 621. (Stevens, J., concurring in part and dissenting in part).

See also ***Hanlon v. Berger***, 526 U.S. 808, 810 (1999) (per curiam) ("Petitioners maintain that even though they may have violated the Fourth Amendment rights of respondents, they are entitled to the defense of qualified immunity. We agree. Our holding in *Wilson* makes clear that this right was not clearly established in 1992. The parties have not called our attention to any decisions which would have made the state of the law any clearer a year later--at the time of the search in this case. We therefore vacate the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.").

In ***Saucier v.Katz,*** 121 S. Ct. 2151, 2156 (U.S. 2001), the Court reinforced this analytical approach as follows:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. [citing *Siegert*] In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

NOTE: In a denial of certiorari and dissent from the denial, some members of the Court have commented on problems caused by the "constitutional-question-first rule."

Bunting v. Mellen, 124 S. Ct. 1750, 1751 (2004) (Stevens, J., joined by Ginsburg J., and Breyer, J., respecting the denial of certiorari) ("The 'perceived procedural tangle' described by Justice SCALIA's dissent. . . is a byproduct of an unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity. Justice BREYER and I both questioned the wisdom of an inflexible rule requiring the premature adjudication of constitutional issues when the Court adopted it. See *County of Sacramento v. Lewis*, 523 U.S. 833, 858, 859 (1998). Relaxing that rule could solve the problem that Justice SCALIA addresses in his dissent. Justice SCALIA is quite wrong, however, when he states that the 'procedural tangle' created by our constitutional-question- first procedure explains our denial of certiorari in this case. Indeed, it is only one of three reasons for not granting review.")

Bunting v. Mellen, 124 S. Ct. 1750, 1754, 1755 (2004) (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) ("The Fourth Circuit's determination that a state military college's grace before meals violates the Establishment Clause, creating a conflict with Circuits upholding state-university prayers, would normally make this case a strong candidate for certiorari. But it is questionable whether Bunting's request for review can be entertained, since he *won judgment* in the court below. For although the statute governing our certiorari jurisdiction permits application by 'any party' to a case in a federal court of appeals, 28 U.S.C. § 1254(1), our practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed. . . . . I think it plain that this general rule should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination. That constitutional determination is *not* mere dictum in the

ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases. . . . Not only is the denial of review unfair to the litigant (and to the institution that the litigant represents) but it undermines the purpose served by initial consideration of the constitutional question, which is to clarify constitutional rights without undue delay. . . This problem has attracted the attention of lower courts. Two Circuits have noticed that if the constitutional determination remains locked inside a § 1983 suit in which the defendant received a favorable judgment on qualified immunity grounds, then "government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts." *Horne v. Coughlin,* 191 F.3d 244, 247 (C.A.2 1999) (quoted in *Kalka v. Hawk,* 215 F.3d 90, 96 (C.A.D.C.2000)); see *Horne, supra,* at 247, n. 1 (concluding that this Court could not have reviewed the judgment in *County of Sacramento v. Lewis, supra,* if the Ninth Circuit had not believed the right clearly established). As both Circuits recognized, the mess up here is replicated below. See *Horne, supra,* at 247 (noting the parallel between unreviewability of district court and court of appeals decisions); *Kalka,* 215 F.3d, at 96, and n. 9 (similar). This understandable concern has led some courts to conclude (mistakenly) that the constitutional-question-first rule is customary, not mandatory. See *id.,* at 96, 98; *Horne, supra,* at 247, 250; see also *Pearson v. Ramos,* 237 F.3d 881, 884 (C.A.7 2001) (doubting that the *Saucier* rule is "absolute," for the reasons given in *Kalka* and *Horne*). The perception of unreviewability undermines adherence to the sequencing rule we have created. . . . This situation should not be prolonged. We should either make clear that constitutional determinations are *not* insulated from our review (for which purpose this case would be an appropriate vehicle), or else drop any pretense at requiring the ordering in every case.").

See also ***Brosseau v. Haugen,*** 125 S. Ct. 596, 598 n.3 (2004) (per curiam) (" We have no occasion in this case to reconsider our instruction in *Saucier*. . . that lower courts decide the constitutional question prior to deciding the qualified immunity question.")

Brosseau v. Haugen, 125 S. Ct. 596, 598, 600-01(2004) (per curiam) (Breyer, J., joined by Scalia, J., and Ginsburg, J., concurring) ("I join the Court's opinion but write separately to express my concern about the matter to which the Court refers in footnote 3, namely, the way in which lower courts are required to evaluate claims of qualified immunity under the Court's decision in *Saucier v. Katz*. . . . As the Court notes, . . . *Saucier* requires lower courts to decide (1) the constitutional question prior to deciding (2) the qualified immunity question. I am concerned that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court. Indeed when courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review, see *Bunting v. Mellen,* 541 U.S. 1019, 1025 (2004) (SCALIA, J., dissenting from denial of certiorari). For these reasons, I think we should reconsider this issue.").

Smith v. Cupp, 430 F.3d 766, 773 n.3 (6th Cir. 2005) ("Two judges of this circuit have recently articulated a number of reasons to eliminate the Supreme Court's requirement that courts always begin with the question of whether a right has been violated, and never begin with the question of

whether any such right at stake has been clearly established. *See Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir.2005) (Sutton and Gibbons, JJ., concurring). Although the points raised are excellent, like those judges, we continue to follow the order of inquiry the Supreme Court set forth in *Saucier*. It is true that the Supreme Court in *Brosseau* exercised its discretion to resolve the qualified immunity inquiry without first resolving whether there was a constitutional violation, notwithstanding the Court's earlier contrary 'instruction' to the lower courts. . . As lower courts we are bound to follow the Supreme Court's reasoning and holdings, as much as, if not more so than, its 'instructions.' The reasoning of *Brosseau* certainly *permits* us to follow the instructions, however, and we continue to do so.")(emphasis original).

Lyons v. City of Xenia, 417 F.3d 565, 581-84 (6th Cir. 2005) (Sutton, J., with whom Gibbons, J., joins, concurring) ("As the Court has acknowledged,. . . requiring courts preemptively to resolve constitutional questions where non-constitutional grounds for disposition remain readily available cuts against the normal grain of constitutional adjudication. The customary rule is that a court 'will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.'. . . Just as the Court has been right to identify the risk that the constitutional question might infrequently, if ever, be decided, . . . so there is a risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented. Heightening these concerns is the fact that some constitutional rulings effectively will be insulated from review by the en banc court of appeals or the Supreme Court where the appellate panel identifies a constitutional violation but grants qualified immunity under the second inquiry. . . . By multiplying constitutional holdings that are not subject to review in the normal course, a rigid application of the two-step inquiry may do as much to unsettle the law as to settle it. An unbending requirement in this area produces another oddity: The same lower-court judges that are supposed to adhere to this rule are given complete discretion over whether to publish a given decision. Appellate panels that choose not to publish a decision no more create binding precedent than those that decide only the clearly established question. . . . Lower federal courts given the authority to exercise judgment about when to publish their decisions, it seems to me, ought to be given authority occasionally to decide the last qualified immunity question before the threshold one. The same administrative concerns that permit the former ought to permit the latter. . . . Much as the *Saucier* two-step inquiry is a reasoned departure from the general rule that a court 'will not pass upon a constitutional question' unless essential to the disposition of a case,. . . so also the Court should permit lower courts to make reasoned departures from *Saucier*'s inquiry where principles of sound and efficient judicial administration recommend a variance. Here, as elsewhere, avoiding difficult and divisive constitutional questions will at times promote, not hinder, the enforcement and development of the law. . . . The alternative, as the four separate opinions from this three-judge panel illustrate, is to require courts to issue narrow, panel-riven, fact-bound constitutional rulings of limited precedential value, only to have them then announce that the government officials are entitled to qualified immunity because the precedents 'taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case.'. . And of course in *Brosseau* itself, the very case that prompted the Court to ask us to take a second look at this case, the Court did not address the constitutional question but only the clearly established question. Lower federal courts ought to have the same authority.").

Kwai Fun Wong v. United States, 373 F.3d 952, 956, 957 (9th Cir. 2004) ("The confluence of two well-intentioned doctrines, notice pleading and qualified immunity, give rise to this exercise in legal decisionmaking based on facts both hypothetical and vague. On one hand, the federal courts may not dismiss a complaint unless 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' . . All that is required is a 'short and plain statement' of the plaintiff's claims. . . On the other hand, government officials are entitled to raise the qualified immunity defense immediately, on a motion to dismiss the complaint, to protect against the burdens of discovery and other pre-trial procedures. . . The qualified immunity issue, in turn, cannot be resolved without first deciding the scope of the constitutional rights at stake.[citing *Saucier*] The unintended consequence of this confluence of procedural doctrines is that the courts may be called upon to decide far-reaching constitutional questions on a nonexistent factual record, even where, as the government defendants contend and as may be the case here, discovery would readily reveal the plaintiff's claims to be factually baseless. We are therefore moved at the outset to suggest that while government officials have the right, for well-developed policy reasons, *see Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985), to raise and immediately appeal the qualified immunity defense on a motion to dismiss, the exercise of that authority is not a wise choice in every case. The ill-considered filing of a qualified immunity appeal on the pleadings alone can lead not only to a waste of scarce public and judicial resources, but to the development of legal doctrine that has lost its moorings in the empirical world, and that might never need to be determined were the case permitted to proceed, at least to the summary judgment stage.").

1. Cases Doing *Wilson/Saucier* Analysis

Miller v. State of New Jersey, No. 04-3502, 2005 WL 1811820, at *2 (3d Cir. Aug. 2, 2005) (not published) ("Miller's cause of action is premised on his belief that Prosecutors and Sheriff's Deputies from Union and Essex Counties conspired to restrict and, in doing so, to violate, what Appellant believes is his absolute right 'under the Second Amendment to possess a firearm [while] off-duty since it is reasonably related to his service in the state-sanctioned militia,' i.e., the Essex County Sheriff's Office. . . . While local law enforcement officers undoubtedly play a critical role in combating future acts of terrorism, the Essex County Sheriff's Office is clearly not a militia for purposes of satisfying the first prong of a qualified immunity analysis, i.e., a clearly established Constitutional right protected by the Second Amendment.")**.**

Gibson v. Superintendent of New Jersey Dep't of Law and Public Safety-Division of State Police, 411 F.3d 427, (3d Cir. 2005)("Several circuits have recognized that police officers and other state actors may be liable under §1983 for failing to disclose exculpatory information to the prosecutor. [citing cases] We agree. Although *Brady* places the ultimate duty of disclosure on the prosecutor, it would be anomalous to say that police officers are not liable when they affirmatively conceal material evidence from the prosecutor. In this case, Gibson alleges that the Troopers suppressed the extent of their impermissible law enforcement tactics, and had that information been available, he would have been able to impeach several witnesses and possibly could have halted the entire prosecution. We think that Gibson states an actionable §1983 claim against the Troopers for interference with his Fourteenth Amendment due process rights. However, we also realize that this

duty on the part of the Troopers was not clearly established at the time of Gibson's prosecution in 1994. . . . Even in 2000, this Court was only able to assume that police officers 'have an affirmative duty to disclose exculpatory evidence to an accused if only by informing the prosecutor that the evidence exists .'[citing *Smith v. Holtz*, 210 F.3d 186, 197 n.14 (3d Cir.2000)]Because such a right was not clearly established in this Circuit at the time of Gibson's conviction, Troopers Pennypacker and Reilly are entitled to qualified immunity with regard to their failure to inform the prosecutor of *Brady* material.").

Wright v. City of Philadelphia, 409 F.3d 595, 600, 601 (3d Cir. 2005) ("There is some disagreement as to how *Saucier* should be interpreted. Specifically, the dispute is whether a court must determine the issue of whether there has been a constitutional violation before reaching the qualified immunity question, or whether that inquiry is the first part of a two-pronged test for qualified immunity. In some cases, we have interpreted *Saucier* to imply that the issue of qualified immunity is only relevant after a court has concluded that a constitutional violation has occurred. In that view, if there is no constitutional violation, there is no reason to reach the qualified immunity issue. . . In other cases, we have interpreted *Saucier* to mean that a defendant is entitled to qualified immunity unless a plaintiff can prove both that a constitutional right has been violated, and then that the constitutional right violated was clearly established. . .Under either interpretation, if no constitutional violation is found, a court need not address whether a reasonable officer would have known he or she was violating a clearly established right. As a practical matter, the outcome will be the same whether we conclude that the officers are immune from suit or instead, that the plaintiff has no cause of action. Our concurring colleague believes that *Brosseau v. Haugen* . . . conclusively resolves this dispute in favor of the first interpretation. We note that at least six of our sister Courts of Appeals would seem to disagree. [citing cases] Those Courts of Appeals considered *Brosseau* and yet still treated the constitutional violation as part of the qualified immunity test, as opposed to a separate inquiry like our concurring colleague recommends. . . Accordingly, at least two of those Courts of Appeals have specifically concluded that defendants would be entitled to qualified immunity upon a determination that no constitutional violation was committed. . . We believe that those Courts of Appeals acted reasonably in reading *Brosseau* as consistent with a two-step qualified immunity inquiry, with the first step being the 'constitutional issue' and the second being 'whether the right was clearly established.' This case, however, does not require us to decide between the two readings of *Saucier* because the constitutional violation was presented to us in the context of qualified immunity. Specifically, in the course of asserting their claim for qualified immunity, Heeney and O'Malley argue there was no constitutional violation. We recognize that a conclusion that no constitutional violation took place would also negate an essential element of the § 1983 claim, . . . but the constitutional violation is best addressed as an aspect of the qualified immunity analysis because that was the jurisdictional basis for this interlocutory appeal. . . .While we could construe the officers' arguments as challenging Wright's cause of action, we believe the proper way for us to review the constitutional violation here is through the qualified immunity denial. Accordingly, this opinion analyzes the threshold inquiry, whether the officers' conduct violated Wright's constitutional rights, as the first part of the qualified immunity analysis.")

Wright v. City of Philadelphia, 409 F.3d 595, 605, 606 (3d Cir. 2005) (Smith, J., concurring) ("The majority appears to attempt to avoid confusion by relabeling the second prong of the *Saucier* test. Whereas *Brosseau* refers to the second prong of the *Saucier* test as addressing the 'qualified immunity' issue, the majority refers to that prong as addressing 'whether the right was clearly established.' While I share the concern motivating this seemingly commonsensical change, I think it conceals the basic problem with the majority's approach. That is, the Supreme Court seems clearly to view the second prong of the *Saucier* test as the essential 'qualified immunity' inquiry--not as part of a larger qualified immunity inquiry. . . We should do the same. Unfortunately, in my view the majority compounds its error in describing the nature of our inquiry by holding that the officers in this case were entitled to qualified immunity because there was no constitutional violation. . . To my knowledge, only one of our sister circuits has gone this far. [citing *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 65 (1st Cir.2004)] . . . By contrast, the Eleventh Circuit speaks neither of the qualified immunity inquiry as consisting of two steps, *see Evans v. Stephens*, ___ F.3d ___, No. 02-16424, 2005 WL 1076603, at *4 (11th Cir. May 9, 2005) (en banc), . . . nor holds that failure to establish a constitutional violation triggers qualified immunity.[citing *Purcell v. Toombs County*, 400 F.3d 1313, 1324 (11th Cir.2005)]. . . As the majority's terminology and holding seem to me inconsonant with *Brosseau*, I believe the Eleventh Circuit employs the better approach. Ultimately, the majority apparently feels compelled to hold that the officers have qualified immunity because 'that was the basis for this interlocutory appeal.' In other words, the majority seems to believe that what arrived in a 'qualified immunity' envelope cannot be returned in a 'failure to state a claim' envelope. I disagree with the majority for two reasons. First, the purpose of the qualified immunity doctrine is to 'permit insubstantial lawsuits to be quickly terminated,'. . . i.e., to allow the 'dismissal of insubstantial lawsuits without trial.' . . In other words, the essential reason we are permitted to exercise interlocutory jurisdiction when qualified immunity is denied by a district court is broadly to determine whether dismissal is appropriate. 'Unless the plaintiff's allegations state a claim of violation of clearly established law,' the Court has explained, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.' . . Thus, '[a] court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged a deprivation of a constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the violation.'. . In my view, where no such claim is stated, dismissal on that ground--rather than on the ground that the officials are immune--is appropriate. Second, the majority's reasoning contravenes the purpose of the two-step *Saucier* inquiry. As discussed above, *Saucier* 's 'order of battle' is designed to force courts to establish precedent on the contours of constitutional rights to provide guidance for law enforcement officers. . . Applying this approach, a court may find that an official's alleged conduct was constitutionally permissible or that the conduct, while constitutionally impermissible, did not cross a 'clearly established' line. Referring to both of these scenarios as establishing 'qualified immunity' sends a confusing signal to law enforcement officials concerning what actions they may or may not take. The majority's reasoning thus ironically has the potential to frustrate the development of 'clearly established' law, the very raison d'etre for *Saucier* 's two-step test. In view of the foregoing, I believe the proper analytical course in this case would be first to consider whether the defendants violated the Constitution. Because we answer that question in the negative, Ms. Wright lacks a cause of action. That

determination should end our inquiry, and we should decline to reach the 'second, qualified immunity question.'").

Neuburger v. Thompson, 124 Fed. Appx. 703, 2005 WL 19275, at *2, *3 (3d Cir. Jan. 5, 2005) ("We recognize the Supreme Court indicated in *Hope* . . . that in some cases 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.' ' . . Our case law establishes the general rule that a trooper violates an individual's Fourth Amendment rights by employing deadly force when that individual does not pose an immediate threat to the safety of the trooper or others. . . But here there is no persuasive argument that it was objectively unreasonable to respond with deadly force when Ms. Neuburger, who had refused to follow directions to put down her weapon, pointed a handgun at an officer. . . . Mr. Neuburger correctly points out that an overwhelming show of force that shocks the conscience may also amount to a constitutional deprivation under the state-created danger doctrine. . . Mr. Neuburger argues that *Smith* and other cases decided under the state-created danger doctrine, when read in connection with the Fourth Amendment's requirement that an officer's use of force be objectively reasonable, reveal that a situation in which deadly force becomes necessary because of the troopers' own actions can make out a constitutional violation. In making this argument, Mr. Neuburger is in effect attempting to blend the state-created danger doctrine with the analysis governing Fourth Amendment excessive force claims. Our Court has considered but not adopted this approach. Specifically, in *Abraham v. Raso*, 183 F.3d 279 (1999), we discussed decisions from other circuit courts offering that, in limited circumstances, an officer's acts creating the need for force may be important in evaluating the reasonableness of that officer's eventual use of force. . . But we left 'for another day' whether such an approach should be followed. . . Thus, Mr. Neuburger's assertions advocate a rationale that has not been accepted in our Circuit. As this is not the case to adopt that rationale, Mr. Neuburger's complaint does not allege the violation of a clearly established constitutional right, and therefore the troopers are entitled to qualified immunity.").

Sutton v. Rasheed, 323 F.3d 236, 250 n.27 (3d Cir. 2003) ("We believe that the Supreme Court directive in *Wilson v. Layne* is mandatory. Accordingly, the District Court can decide the issue of qualified immunity only after it has concluded that a cause of action has been stated. Therefore, we initiate our inquiry by examining whether plaintiffs have alleged a constitutional violation.").

Donahue v. Gavin, 280 F.3d 371, 378 (3d Cir. 2002) ("[T]he district court should only have considered the defendants' claim of immunity if Donahue first established that their conduct violated a clearly established statutory or constitutional right. . . . [P]ost-conviction incarceration is not a seizure within the meaning of the Fourth Amendment and, therefore, post-conviction incarceration cannot constitute a Fourth Amendment violation.").

Doe v. Delie, 257 F.3d 309, 315 n.4 (3d Cir. 2001) ("Notwithstanding the fact that the Supreme Court has twice stated in mandatory, unqualified language that '[a] court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all ...'. . . , Judge Garth's dissent would prefer that we skip the first prong of

qualified immunity analysis. . . This practice ignores the Supreme Court's express language and creates an exception based on the procedural posture of the case. While there may be pragmatic considerations favoring Judge Garth's qualification of the Supreme Court's unqualified language, the Court has not yet suggested any basis for departing from the rule articulated in *Wilson*.").

Allah v. Brown, 351 F.Supp.2d 278, 282, 283 (D.N.J. 2004)("In the Third Circuit it is clear that as a general matter, prisoners have a constitutional right to be present when their legal mail is opened. Defendants now ask the Court to determine whether the *Turner* standard requires their presence in the context of today's heightened terrorism concerns, and more specifically, the threat of anthrax contamination through the mail. . . . This Court finds that there is no reasonable connection between the Legal Mail Policy and the Defendants' asserted interest. Defendants have offered no evidence that there is an elevated risk of anthrax contamination in prisons resulting from the events of September 11, 2001, which prompted DiFrancesco's executive order. . . . In addition, a policy requiring the inmates' presence while their legal mail is opened does not significantly increase the risk that third-parties would be susceptible to anthrax contamination. The only additional person protected from exposure by the Legal Mail Policy is the inmate himself, who is at liberty to waive his first amendment right to be present. A policy requiring that legal mail be opened in an enclosed area would be reasonable, and a policy providing that any suspicious letters marked as legal mail be opened outside of the inmates' presence might also be appropriate. However, a policy expressly directing that all of the inmates' legal mail be opened and inspected outside of their presence impermissibly "overreaches" Defendants' legitimate interest in maintaining prison safety and security. . . . Given the importance of the rights at issue in this case, the inconvenience associated with opening legal mail in the presence of the inmate addressees do not outweigh Plaintiffs' First Amendment rights to freely communicate with their attorneys and the courts. Accordingly it is ordered that Defendants immediately cease and desist the practice of opening inmates' legal mail outside of their presence. . . . The Legal Mail Policy was enacted at a very uncertain time in our history, and was enacted with the legitimate goal of protecting prison inmates and staff. Although this Court finds that the Legal Mail Policy is an overreaching response to the threat of anthrax contamination, it does not find that the law was so clearly established that it would be obvious to a reasonable official that the policy violated Plaintiffs' First Amendment rights. Because a reasonable official could believe that the Legal Mail Policy was constitutionally permissible under *Turner*, Defendants are entitled to qualified immunity from monetary damages in this case.").

2. Case Not Doing *Wilson*/*Saucier* Analysis

Carswell v. Borough of Homestead, 381 F.3d 235, 240, 421 (3d Cir. 2004) ("Our appellate review of a Rule 50 ruling is plenary and is similar to that in a summary judgment appeal. We review the record as would a District Court. This scope of appellate review places us in the same position as the District Court with respect to the admonition in *Siegert v. Gilley*, 500 U.S. 226 (1991) and *Saucier* to decide the constitutional issue before considering qualified immunity. . . It is quite understandable that the trial judge was hesitant to rule that a constitutional violation had occurred on the facts in the record at that point when the qualified immunity issue offered a more sure-footed disposition of the Rule 50 motion. Here, unlike *Saucier* and *Siegert*, the case had already been in trial for a week.

Consequently, Snyder had already lost much of the benefit of qualified immunity - freedom from trial. . . It is preferable to resolve the qualified immunity issue at the summary judgment, or earlier, stage, but if this is not possible, it remains appropriate to consider the matter in a Rule 50(a) motion. . . . We believe that the circumstances here, however, are sufficiently unlike those in *Saucier* and *Siegert* that we may proceed directly to the qualified immunity issue without ruling preliminarily on the constitutional violation claim. . . We are hesitant to hold that the jury could find excessive force based on the record here. It appears to us that without the testimony of Dr. McCauley, the plaintiff failed to establish a constitutional violation. . . We have serious doubts about the admissibility of his opinion that Snyder should not have drawn his gun based on the expert's assumption that the officer knew the husband was unarmed. . . . Accordingly, we assume, but do not decide, that plaintiff established a Fourth Amendment constitutional violation and proceed to the immunity issue.").

III. HEIGHTENED PLEADING REQUIREMENT

A. The *Leatherman* Decision

Although the majority in ***Siegert*** disposed of the case on grounds that the plaintiff stated no claim for relief, four Justices who did confront the question, approved of the "heightened pleading standard" where the state of mind of the defendant is an essential component of the underlying constitutional claim, but rejected the District of Columbia Circuit's "direct evidence" requirement, instead requiring nonconclusory allegations of subjective motivation supported by *either* direct *or* circumstantial evidence. If this threshold is satisfied, then limited discovery may be allowed.

Plaintiffs attempting to impose **Monell** liability upon a governmental unit had been required, in some circuits, to plead with particularity the existence of an official policy or custom which could be causally linked to the claimed underlying violation. *See, e.g.,* ***Strauss v. City of Chicago***, 760 F.2d 765 (7th Cir. 1985).

In ***Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit***, 113 S. Ct. 1160 (1993), the Supreme Court unanimously rejected the "heightened pleading standard" in cases alleging municipal liability. The Fifth Circuit had upheld the dismissal of a complaint against a governmental entity for failure to plead with the requisite specificity. "While plaintiffs' complaint sets forth the facts concerning the police misconduct in great detail, it fails to state any facts with respect to the adequacy (or inadequacy) of the police training." 954 F.2d 1054, 1058 (5th Cir. 1992).

While leaving open the question of "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials," the Supreme Court refused to equate a municipality's freedom from *respondeat superior* liability with immunity from suit. 113 S. Ct. at 1162.

Finding it "impossible to square the 'heightened pleading requirement' . . . with the liberal system of 'notice pleading' set up by the Federal Rules[,]" the Court suggested that Federal Rules 8 and 9(b) would have to be rewritten to incorporate such a "heightened pleading standard." The Court

concluded that "[i]n the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id*. at 1163.

B. *Crawford-El v. Britton*

In ***Crawford-El v. Britton***, 118 S. Ct. 1584 (1998), the Court addressed the "broad question [of] whether the courts of appeals may craft special procedural rules" for cases in which a plaintiff's substantive constitutional claim requires proof of improper motive and "the more specific question [of] whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment." *Id.* at 1587. In striking down the D.C. Circuit's "clear and convincing" burden of proof requirement in such cases, a five-member majority of the Court, in an opinion written by Justice Stevens, clarified that the Court's holding in *Harlow v. Fitzgerald*, 457 U.S. 731 (1982), that "bare allegations of malice" cannot overcome the qualified immunity defense, "did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation." 118 S. Ct. at 1592. The Court noted that "although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in *Harlow*, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation." *Id*. The Court explained that the subjective component of the qualified immunity defense that was jettisoned in *Harlow* "permitted an open-ended inquiry into subjective motivation [with the] primary focus . . . on any possible animus directed at the plaintiff." *Id.* at 1594. Such an open-ended inquiry precluded summary judgment in many cases where officials had not violated clearly established constitutional rights. "When intent is an element of a constitutional violation, however, the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff . . . or to deter public comment on a specific issue of public importance." *Id.*

Sensitive to the concerns about subjecting public officials to discovery and trial in cases involving insubstantial claims, the Court noted that existing substantive law "already prevents this more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial[,]" and "various procedural mechanisms already enable trial judges to weed out baseless claims that feature a subjective element . . . ." *Id*.

First, under the substantive law on which plaintiff relies, there may be some doubt as to the whether the defendant's conduct was unlawful. The Court gave as an example the question of whether the plaintiff's speech was on a matter of public concern. Second, where plaintiff must establish both motive and causation, a defendant may still prevail at summary judgment by, for example, showing that defendant would have made the same decision in the absence of the protected conduct. *Id.*

The Court noted two procedural devices available to trial judges that could be used prior to any discovery. First, the district court may order a reply under Fed. R. Civ. P. 7(a), or grant a defendant's motion for a more definite statement under Rule 12(e). As the Court noted, this option

of ordering the plaintiff to come forward with "specific, nonconclusory factual allegations" of improper motive exists whether or not the defendant raises the qualified immunity defense. 118 S. Ct. at 1596-97. Second, where the defendant does raise qualified immunity, the district court should resolve the threshold question before discovery.

> To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law. [footnote omitted] Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question, which sometimes requires complicated analysis of legal issues. If the plaintiff's action survives these initial hurdles and is otherwise viable, the plaintiff ordinarily will be entitled to some discovery. Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.

Id. at 1597.

The majority opinion concluded that "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself." *Id.* at 1595. Instead of the categorical rule established by the Court of Appeals, the Court endorsed broad discretion on the part of trial judges in the management of the factfinding process. *Id*. at 1598.

Chief Justice Rehnquist dissented, and formulated the following test for motive-based constitutional claims:

> [W]hen a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext.

Id. at 1600 (Rehnquist, C.J., joined by O'Connor, J., dissenting).

Justice Scalia, joined by Justice Thomas, dissented and proposed the adoption of a test that would impose "a more severe restriction upon ‘intent-based' constitutional torts." *Id.* at 1604. (Scalia, J., joined by Thomas, J., dissenting). Under Justice Scalia's proposed test,

> [O]nce the trial court finds that the asserted grounds for the official action were objectively valid (e.g., the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (e.g., the incompetent person fired was a Republican).

Id.

C. *Swierkiewicz v. Sorema*

Swierkiewicz v. Sorema, 122 S. Ct. 992, 998 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. [footnote omitted] This Court, however, has declined to extend such exceptions to other contexts. . . . Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. §1979, 42 U.S.C. §1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).").

D. Third Circuit Cases

Alston v. Parker, 363 F.3d 229, 233 (3d Cir. 2004) ("Alston's § 1983 complaint should have been considered not under a heightened pleading requirement, but under the more liberal standards of notice pleading. Although once enforced in several circuits, including ours, a fact- pleading requirement for civil rights complaints has been rejected by the Supreme Court in no uncertain terms. . . . While our ruling in *Darr*, 767 F.2d at 80, is one of several decisions in which this Court imposed a higher bar for § 1983 pleadings, *see, e.g., Frazier*, 785 F.2d at 67; *Ross v. Meagan*, 638 F.2d 646, 650 (3d Cir.1981); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir.1976), none of which have been expressly overruled, these pronouncements preceded and cannot be reconciled with the Supreme Court's holdings in *Leatherman* and *Swierkiewicz.* Insofar as our decisions, such as *Darr*, run counter to the principle of notice pleading in § 1983 actions, they are not controlling. Fundamentally, a heightened pleading requirement for civil rights complaints no longer retains vitality under the Federal Rules.").

Backof v. New Jersey State Police, No. 02-4131, 2004 WL 260779, at *3 n.3 (3d Cir. Feb. 13, 2004) (unpublished) ("As a general matter, pleading requirements for §1983 claims are quite permissive. In *Leatherman* . . . the Supreme Court held that a court may not apply a 'heightened pleading standard' in §1983 actions. While the holding explicitly encompassed only §1983 actions against municipalities and left open the question whether the Supreme Court's qualified immunity jurisprudence would require heightened pleading in cases involving individual government officials, . . . its logic appears to extend to all § 1983 actions.").

Ray v. Kertes, 285 F.3d 287, 297 (3rd Cir. 2002) (no provision of the PLRA requires pleading exhaustion with particularity).

In re Bayside Prison Litigation, 190 F.Supp.2d 755, 764, 765 (D.N.J. 2002) ("Therefore, after *Swierkiewicz*, . . . I conclude that Plaintiffs are not obligated to plead with specificity their claim against individual government officials under § 1983 in order to withstand a Motion to Dismiss. . . . The liberal pleading requirement of Rule 8(a) applies equally to Plaintiffs' claims of a conspiracy under § 1983.").

IV. State of Mind and Qualified Immunity

Beers-Capitol v. Whetzel, 256 F.3d 120, 142 (3d Cir. 2001) ("We have determined, however, that the plaintiffs have raised a genuine issue of material fact as to whether Burley was deliberately indifferent. Because deliberate indifference under *Farmer* requires actual knowledge or awareness on the part of the defendant, a defendant cannot have qualified immunity if she was deliberately indifferent; a reasonable YDC worker could not believe that her actions comported with clearly established law while also believing that there is an excessive risk to the plaintiffs and failing to adequately respond to that risk. Conduct that is deliberately indifferent to an excessive risk to YDC residents cannot be objectively reasonable conduct.").

Larsen v. Senate of the Commonwealth of Pennsylvania, 154 F.3d 82, 94, 95 (3d Cir. 1998) ("The qualified immunity analysis requires a determination as to whether reasonable officials could believe that their conduct was not unlawful even if it was in fact unlawful. . . In the context of a First Amendment retaliation claim, that determination turns on an inquiry into whether officials reasonably could believe that their motivations were proper even when their motivations were in fact retaliatory. Even assuming that this could be demonstrated under a certain set of facts, it is an inquiry that cannot be conducted without factual determinations as to the officials' subjective beliefs and motivations, and thus cannot properly be resolved on the face of the pleadings, but rather can be resolved only after the plaintiff has had an opportunity to adduce evidence in support of the allegations that the true motive for the conduct was retaliation rather than the legitimate reason proffered by the defendants. . . . In reaching this result we are not suggesting that a bare allegation of retaliatory motive necessarily is sufficient to defeat an assertion of qualified immunity as to a retaliation claim. In some circumstances, the legitimate basis for the actions might be so apparent that the plaintiff's allegations of retaliatory motive could not alter the conclusion that under the circumstances alleged in the pleadings, the defendants would have been compelled to reach the same decision even without regard for the protected First Amendment activity.").

Grant v. City of Pittsburgh, 98 F.3d 116, 124 (3d Cir. 1996) ("The City Defendants claim that under *Harlow* their subjective 'political or personal motives' are irrelevant to the qualified immunity analysis. The plaintiffs counter that the City Defendants' formulation of the qualified immunity standard would effectively prevent any plaintiff whose constitutional claim has as an essential element the state of mind of the public officials from ever getting past qualified immunity. Although we have not directly addressed this issue, . . . several of our sister circuits have. Those courts have held, with virtual unanimity, that, despite the broad language of *Harlow*, courts are not barred from examining evidence of a defendant's state of mind in considering whether a plaintiff has adduced sufficient evidence to withstand summary judgment on the issue of qualified immunity, where such state of mind is an essential element of the constitutional violation itself. . . . We therefore join our sister circuits in adopting the narrower view of *Harlow*. Accordingly, in evaluating a defense of qualified immunity, an inquiry into the defendant's state of mind is proper where such state of mind is an essential element of the underlying civil rights claim.").

V. Discovery

In some cases, limited discovery may be needed on the qualified immunity issue to properly establish the contours of the right in question. A court may defer its decision on the immunity question, allow limited discovery to achieve the requisite factual development and decide the issue on summary judgment.

In ***Crawford-El v. Britton***, 118 S. Ct. 1584 (1998), the Court noted:

> Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from all discovery. *Harlow* sought to protect officials from the costs of 'broad-reaching' discovery. . . and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity.

118 S. Ct. at 1594 n.14

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P.F. v. Mendres, 21 F. Supp.2d 476, 483, 484 (D.N.J. 1998) ("We do not perceive our conclusion to be inconsistent with the Supreme Court's mandate that the immunity issue be resolved at the earliest possible stage of the litigation. The Court's opinion in *Crawford-El* indicates approval of the possibility that limited discovery may be necessary where the underlying substantive legal theory requires the Court to engage in some factual analysis to determine whether the defendant's conduct rises to the level of a constitutional violation. . . . In light of our conclusion that we cannot resolve the immunity issue at this juncture, we must next address how this particular litigation should proceed. The Supreme Court's opinion in *Crawford-El* teaches that we may tailor discovery narrowly and dictate the sequence of discovery so as to protect the defendant's immunity defense. . . . We must make it clear that this initial discovery phase is limited only to gathering information which bears upon our qualified immunity inquiry. In the context of this case, the initial discovery will be limited to gathering information pertaining to the inquiry that we must undertake in determining if defendant's conduct rises to the level of a constitutional violation of the plaintiffs' right to privacy. . . [O]nce this information is gathered, defendant may file a motion for summary judgment which raises the immunity defense again in light of the factual development gained through this initial discovery phase. Accordingly, we will deny the motion to dismiss without prejudice to the defendant's right to assert a qualified immunity defense in a properly supported motion for summary judgment.").

VI. When Is Right "Clearly Established?"

A. What Law Controls?

Wilson v. Layne, 526 U.S. 603, 615, 616 (1999) (The Court concluded general Fourth Amendment principles did not apply with obvious clarity to the officers' conduct in this case. Furthermore, "[p]etitioners [had] not brought to [the Court's] attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely, nor [had] they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.").

United States v. Lanier, 520 U.S. 259, 269 (1997) [**Note: case involved criminal prosecution under 18 U.S.C. § 242**] ("[I]n applying the rule of qualified immunity under 42 U.S.C. § 1983 and *Bivens* . . . we have referred to decisions of the Courts of Appeals when enquiring whether a right was 'clearly established.'. . . Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.").

Elder v. Holloway, 114 S. Ct. 1019, 1023 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.' [cites omitted] That question of law, like the generality of such questions, must be resolved *de novo* on appeal. [cite omitted] A court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'").

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Doe v. Delie, 257 F.3d 309, 321 (3d Cir. 2001) ("District court opinions may be relevant to the determination of when a right was clearly established for qualified immunity analysis. [footnote surveying circuits in terms of weight afforded district court opinions in clearly-established-law analysis] However, in this case, the absence of binding precedent in this circuit,. . . the doubts expressed by the most analogous appellate holding, together with the conflict among a handful of district court opinions, undermines any claim that the right was clearly established in 1995.").

Pro v. Donatucci, 81 F.3d 1283, 1291-92 (3d Cir. 1996) ("We agree with the district court that Pro's right to respond to the subpoena without fear of retaliation was clearly established at the time Donatucci acted. . . . *Bieregu* [*v. Reno,* 59 F.3d 1445, 1459 (3d Cir. 1995)]found law to be clearly established despite a circuit split, as long as 'no gaping divide has emerged in the jurisprudence such that defendants could reasonably expect this circuit to rule' to the contrary. . . Thus, the split between the Courts of Appeals for the Fifth and the Fourth [footnote omitted] Circuits at the time of

Donatucci's actions does not preclude our deciding that Pro's right to respond to the subpoena was clearly established.").

Brown v. Grabowski, 922 F.2d 1097, 1118 (3d Cir. 1990) ("We believe that *Thurman,*. . . a lone district court case from another jurisdiction, cannot sufficiently have established and limned the equal protection rights of a domestic violence victim . . . to enable reasonable officials to ‘"anticipate [that] their conduct [might] give rise to liability for damages.'" [cites omitted]).

B. Defining the Contours of the Right

Brosseau v. Haugen, 125 S. Ct. 596, 598, 599 (2004) (per curiam) (“We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity. . . *Graham* and *Garner,* following the lead of the Fourth Amendment's text, are cast at a high level of generality. . . . Of course, in an obvious case, these standards can ‘clearly establish’ the answer, even without a body of relevant case law. [citing *Hope v. Pelzer*]. . . . The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision. . . . We therefore turn to ask whether, at the time of Brosseau's actions, it was ‘ “clearly established”’ in this more ‘ “particularized”’ sense that she was violating Haugen's Fourth Amendment right. . . The parties point us to only a handful of cases relevant to the ‘situation [Brosseau] confronted’: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. . . .These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the ‘ “hazy border between excessive and acceptable force.”’ . . The cases by no means ‘clearly establish’ that Brosseau's conduct violated the Fourth Amendment.”).

Groh v. Ramirez, 124 S. Ct. 1284, 1293, 1294 (2004) (“Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. . . . [E]ven a cursory reading of the warrant in this case--perhaps just a simple glance--would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal.”)

Hope v. Pelzer, 122 S. Ct. 2508, 2514-18 (2002) (“We agree with the Court of Appeals that the attachment of Hope to the hitching post under the circumstances alleged in this case violated the Eighth Amendment. . . . In assessing whether the Eighth Amendment violation here met the *Harlow* test, the Court of Appeals required that the facts of previous cases be ' 'materially similar' to Hope's situation.' . . This rigid gloss on the qualified immunity standard, though supported by Circuit precedent, [footnote omitted] is not consistent with our cases. . . . Our opinion in *Lanier* . . . makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier,* we expressly rejected a requirement that previous cases be 'fundamentally similar.' Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary

to such a finding. The same is true of cases with 'materially similar' facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional. . . . The use of the hitching post as alleged by Hope 'unnecessar[ily] and wanton [ly] inflicted pain,' . . . and thus was a clear violation of the Eighth Amendment. . . Arguably, the violation was so obvious that our own Eighth Amendment cases gave the respondents fair warning that their conduct violated the Constitution. Regardless, in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . . [F]or the purpose of providing fair notice to reasonable officers administering punishment for past misconduct, [there is no] reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for prolonged periods and handcuffing him to a hitching post for seven hours. The Court of Appeals' conclusion to the contrary exposes the danger of a rigid, overreliance on factual similarity. . . . The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity--he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous. This wanton treatment was not done of necessity, but as punishment for prior conduct. Even if there might once have been a question regarding the constitutionality of this practice, the Eleventh Circuit precedent of *Gates* and *Ort*, as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful. The 'fair and clear warning,' . . . that these cases provided was sufficient to preclude the defense of qualified immunity at the summary judgment stage. . . .We did not take, and do not pass upon, the questions whether or to what extent the three named officers may be held responsible for the acts charged, if proved. Nothing in our decision forecloses any defense other than qualified immunity on the ground relied upon by the Court of Appeals.").

Saucier v. Katz, 121 S. Ct. 2151, 2156 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.").[*See* discussion of *Saucier, infra*]

United States v. Lanier, 520 U.S. 259, 269-72 (1997) [**Note: case involved criminal prosecution under 18 U.S.C. § 242**] ("Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is 'fundamentally similar' at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights. [citing cases] But even putting these examples aside, we think that the Sixth Circuit's 'fundamentally similar' standard would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling. This danger flows from the Court of Appeals' stated view . . . that due process under § 242 demands more than the 'clearly established' law

required for a public officer to be held civilly liable for a constitutional violation under § 1983 or *Bivens*. [cites omitted] This, we think, is error. In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability,'. . . by attaching liability only if '[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' [citing *Anderson*] So conceived, the object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying § 242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.' This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. . . But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,'. . . . In sum, as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, 'in the light of pre-existing law the unlawfulness [under the Constitution is] apparent,' [citing *Anderson*] Where it is, the constitutional requirement of fair warning is satisfied.").

Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The 'contours' of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.....in light of pre-existing law the unlawfulness must be apparent.")

NOTE: Although qualified immunity is an affirmative defense, *see* ***Gomez v. Toledo***, 446 U.S. 635, 640 (1980), once the defendant pleads qualified immunity, the majority of circuits hold that the burden then shifts to the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct. *See, e.g.,* ***Gardenhire v. Schubert***, 205 F.3d 303, 311(6th Cir. 2000) ("The defendant bears the initial burden of coming forward with facts to suggest that he acted within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendant's conduct violated a right so clearly established that any official in his position would have clearly understood that he was under an affirmative duty to refrain from such conduct."); ***Pierce v. Smith***, 117 F.3d 866, 871 (5th Cir. 1997) (where § 1983 defendant pleads qualified immunity and shows he is a government official whose position involves the exercise of discretion, plaintiff has the burden to rebut qualified immunity defense by establishing the violation of clearly established law); ***Magdziak v. Byrd***, 96 F.3d 1045, 1047 (7th Cir. 1996); ***Dixon v. Richer***, 922 F.2d 1456, 1460 (10th Cir. 1991).

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McKee v. Hart, No. 04-1442, 2006 WL 27474, at *6, *7 (3d Cir. Jan. 6, 2006) ("Before Sattele allegedly engaged in the conduct at issue in this case, we held . . . that a public employee states a First Amendment claim by alleging that his or her employer engaged in a 'campaign of retaliatory harassment' in response to the employee's speech on a matter of public concern, even if the employee could not prove a causal connection between the retaliation and an adverse employment action. . . Jones contends that *Suppan* and *Baldassare*, taken together, were sufficient precedent to put Sattele on notice that his conduct--making harassing comments to Jones arising out of Jones's voicing of concerns about corruption in the pharmaceutical industry--was constitutionally prohibited. In *Suppan*, however, we gave little guidance as to what the threshold of actionability is in retaliatory harassment cases. Instead, we merely held that such a claim existed. . . . Moreover, the alleged conduct in *Suppan* spanned more than a year and involved the supposed lowering of ratings on employees' promotion evaluations and the admonishment of employees because of their union activities and support for a particular mayoral candidate. . . Based only on our acknowledgment of a retaliatory harassment cause of action in *Suppan* and the facts of that case, a reasonable official in Sattele's position would not have been aware that making a few comments over the course of a few months (the gist of which was asking an employee to focus on his job) might have run afoul of the First Amendment. *Baldassare* also does not further Jones's argument that his First Amendment right to be free from retaliatory harassment was clearly established at the time of Sattele's alleged conduct. That case involved a straightforward retaliation claim brought under the First Amendment in which the plaintiff alleged a direct causal connection between his speech on a matter of public concern and his demotion, . . . not that he was subject to a campaign of retaliatory harassment such as the one involved in *Suppan* and alleged by Jones in this case. Thus, *Baldassare* would not have helped Sattele understand that his conduct might be constitutionally prohibited. . . . *Brennan* provided some additional guidance about what types of conduct would support such a claim, holding that some of the plaintiff's allegations (that he had been taken off the payroll for some time and given various suspensions as a result of his speech) would support a retaliation claim, whereas other of his allegations (including his claim that his supervisor stopped using his title to address him) would not because of their triviality. . . However, *Brennan* was not decided until 2003, after Sattele's alleged conduct, which occurred in the fall of 2002, had already taken place. Thus, to the extent that *Brenna*n added some specificity to the contours of the retaliatory harassment cause of action, an employee's First Amendment right to be free from such harassment was still not clearly established at the time of Sattele's conduct. . . . Accordingly, because of the dearth of precedent of sufficient specificity (and factual similarity to this case) regarding a public employee's First Amendment right to be free from retaliatory harassment by his or her employer at the time of Sattele's conduct, we cannot say that the constitutional right Jones alleged Sattele violated was clearly established. Sattele is therefore entitled to qualified immunity under the second, as well as the first, prong of our *Saucier* analysis.").

Estate of Smith v. Marasco, 430 F.3d 140, 154, 155 (3d Cir. 2005) (***Smith II***)("The question we must address, of course, is not simply whether the behavior of the troopers 'shocks the conscience' under the applicable standard, but whether a reasonable officer would have realized as much. In this regard, 'the salient question' we must ask is whether the law, as it existed in 1999, gave the troopers 'fair warning' that their actions were unconstitutional. . . It is not necessary for the plaintiffs to identify a

case presenting analogous factual circumstances, but they must show that the contours of the right at issue were ' "sufficiently clear that a reasonable official would understand that what he is doing violates that right." ' . . . While the jurisprudence does not yield a clear definition of 'conscience-shocking' (applicable to situations such as this), we agree with the District Court that the Smiths have not shown that a reasonable officer in the position of these troopers would have understood his conduct to be 'conscience-shocking.' . . We therefore conclude that the troopers are entitled to qualified immunity with respect to the state-created danger claim. . . . [W]e think a reasonable officer could recognize a difference between abandoning a private citizen with whom he had come in contact and failing to prolong a two-hour search for a private citizen whom he has been unable to locate . . . . At this stage, such a difference is sufficient for the officers to be entitled to qualified immunity.").

Rivas v. City of Passaic, 365 F.3d 181, 200, 201 (3d Cir. 2004) ("We discern from these cases that, as of November 1998, our case law had established the general proposition that state actors may not abandon a private citizen in a dangerous situation, provided that the state actors are aware of the risk of serious harm and are partly responsible for creating the opportunity for that harm to happen. As the Supreme Court explained in *Hope v. Pelzer* . . . in some cases 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."' In sum, we find that the preexisting law of 'state-created danger' jurisprudence was clearly established. As such, it was sufficient to put Garcia and Rodriguez on notice that their conduct, if deemed unlawful, would not shield them with immunity.").

Doe v. Groody, 361 F.3d 232, 243 (3d Cir. 2004) ("We agree that in determining whether a right is 'clearly established,' we should analyze the right with specificity. . .Where a challenged police action presents a legal question that is 'unusual and largely heretofore undiscussed' . . . or where there is 'at least some significant authority' that lends support of the police action, . . . we have upheld qualified immunity even while deciding that the action in question violates the Constitution. On the other hand, the plaintiff need not show that there is a prior decision that is factually identical to the case at hand in order to establish that a right was clearly established. . . . The principal narrow question in this case is whether in 1999, when these searches occurred, it was clearly established that police could not broaden the scope of a warrant with an unincorporated affidavit. We think that a review of the cases indicates that it was.").

Kopec v. Tate, 361 F.3d 772, 778 (3d Cir. 2004) ("Therefore, we hold that the right of an arrestee to be free from the use of excessive force in the course of his handcuffing clearly was established when Officer Tate acted in this case, and that a reasonable officer would have known that employing excessive force in the course of handcuffing would violate the Fourth Amendment. Accordingly, the district court committed error in granting summary judgment in favor of Officer Tate on the basis of his qualified immunity defense. In reaching our result we point out that other courts of appeals have made determinations consistent with ours. [citing cases] ").

Kopec v. Tate, 361 F.3d 772, 779, 785, 786 (3d Cir. 2004) (Smith, J., dissenting) ("The Supreme Court has repeatedly instructed that the determination of qualified immunity requires particularizing the constitutional right 'in light of the specific context of the case.' . . This is where I believe the majority's analysis falls short, because it only relies on the broad proposition that the Fourth Amendment secures the right to be free from the use of excessive force during an arrest, and concludes that Officer Tate violated this clearly established right. This analysis is flawed, in my view, because it fails to determine what the contours of the right were, and neglects to recognize that the law did not provide Officer Tate with fair warning that he was required to respond more promptly than he did to Kopec's complaint that the handcuffs were too tight. . . . In February 2000, only a handful of cases of § 1983 claims involving tight handcuffing were extant. [citing cases] . . . . Prior to the incident at issue in this case, the caselaw did not provide any guidance with respect to how quickly an officer must respond to a complaint that handcuffs have been applied too tightly. Nor was there any guidance in the cases as to how an officer should prioritize his response when there are other tasks in which he is legitimately engaged or may be required to undertake at the time. In light of this caselaw, I conclude that Tate could have reasonably believed that his response to Kopec's complaints was lawful. To put it another way, I believe the law did not put Officer Tate on notice that he had to respond immediately to Kopec's complaint that the handcuffs were too tight. Nor was there any caselaw providing Officer Tate with fair notice that he must stop engaging in the legitimate police task at hand, i.e., interviewing Smith, in order to assess whether the handcuffs were too tight. Because the caselaw did not provide Tate with notice that his response was unlawful, he should be entitled to qualified immunity.").

S.G., as Guardian ad Litem of A.G. v.Sayreville Bd. of Ed., 333 F.3d 417, 423 (3d Cir. 2003) ("[W]e hold that the school's prohibition of speech threatening violence and the use of firearms was a legitimate decision related to reasonable pedagogical concerns and therefore did not violate A.G.'s First Amendment rights. In any event, defendants are entitled to qualified immunity because there was no clearly established law to the contrary.")

Atkinson v. Taylor, 316 F.3d 257, 264 (3d Cir. 2003) ("In the present case, without weighing the underlying evidence with respect to Atkinson's claim, we conclude that appellants are not entitled to qualified immunity on the ETS claim of future harm. As the *Warren* Court recognized, the *Helling* decision established the constitutional right required by the first prong of the *Saucier* test. . . Atkinson invokes the constitutional right claimed by the *Helling* prisoner: alleging that he was unwillingly exposed to levels of ETS that pose an unreasonable risk of future harm. Similarly, Atkinson has satisfied the second prong of the *Saucier* test. The right recognized by the *Helling* decision is 'clearly established' so that a reasonable prison official would know when he is violating that right.").

McLaughlin v. Watson, 271 F.3d 566, 572 (3d Cir. 2001) ("[W]e agree with Defendant that the District Court erred in summarily dispensing with the qualified immunity issue in favor of Plaintiffs. As discussed above, the analytical framework that a court must use in addressing a 'qualified immunity' argument is well-settled in this Circuit. The court cannot--as the District Court essentially did here--stop with a conclusory statement that Stiles' alleged use of 'influence with plaintiffs' employer' violated the first amendment. Rather, the District Court must go one step further and

determine whether the facts alleged by plaintiffs violated a 'clearly established right.' This necessarily entails an analysis of case law existing at the time of the defendant's alleged improper conduct. Without such an analysis there is no way to determine if the defendant should have known that what he or she was doing was constitutionally prohibited . . . . In other words, there must be sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put defendant on notice that his or her conduct is constitutionally prohibited.").

Brown v. Muhlenberg Township, 269 F.3d 205, 211 & n.4 (3d Cir. 2001) ("If the facts asserted by the Browns are found to be true, we conclude that a reasonable officer in Officer Eberly's position could not have applied these well established principles to the situation before him and have concluded that he could lawfully destroy a pet who posed no imminent danger and whose owners were known, available, and desirous of assuming custody. . . In other words, it would have been apparent to a reasonable officer that shooting Immi would be unlawful. . . . If the unlawfulness of the defendant's conduct would have been apparent to a reasonable official based on the current state of the law, it is not necessary that there be binding precedent from this circuit so advising.").

Brown v. Muhlenberg Township, 269 F.3d 205, 219-22 (3d Cir. 2001) (Garth, J., dissenting and concurring) ("The issue that has divided this panel and which should concern every judge, every police officer and every official who claims qualified immunity by virtue of his or her office is: how do we determine the second prong of the qualified immunity doctrine--i.e., when is the constitutional right which is claimed to have been violated clearly established so as to visit liability on the official? Distressingly, the majority opinion fails to announce a standard by which the bench and the bar can test whether a particular legal principle--that is the particular constitutional right--is 'clearly established' for purposes of qualified immunity. I strongly urge that in deciding this second prong, at the least a balancing process should be undertaken whereby the factors to be balanced are: (1) Was the particular right which was alleged to have been violated specifically defined, or did it have to be constructed or gleaned from analogous general precepts? [citing *Wilson v.Layne*] (2) Has that particular right ever been discussed or announced by either the Supreme Court or by this Circuit? (3) If neither the Supreme Court nor this Circuit has pronounced such a right, have there been persuasive appellate decisions of other circuit courts-- and by that I mean more than just one or two--so that the particular right could be said to be known generally? (4) Were the circumstances under which such a right was announced of the nature that an official who claimed qualified immunity would have, acting objectively under pre-existing law, reasonably understood that his act or conduct was unlawful? . . . . Can it really be held that the Fourth Amendment 'seizure of property' right was readily and generally known to apply to the shooting of a Rottweiler which was loose on the street? Can we really say that this particular Fourth Amendment principle was defined with particular specificity and was therefore clearly established for purposes of qualified immunity? I am aware of no authority which defines the principle with sufficient particularity so as to make it applicable to the situation here. . . . The relevant focus has to be on the final part of the qualified immunity inquiry--whether the right allegedly violated was clearly established so that a reasonable official in Eberly's position would understand that what he was doing violated that right. . . . If there has never been a constitutional right articulated that would prevent a police officer from shooting a barking, unleashed, uncontrolled dog such as the Rottweiler which was killed--as there has not been in this

jurisdiction or any others--how can the absence of such a right as postulated by the majority constitute a clearly established right so as to hold Eberly liable?").

Doe v. Delie, 257 F.3d 309, 322 (3d Cir.2001) ("We conclude that the contours of defendants' legal obligations under the Constitution were not sufficiently clear in 1995 that a reasonable prison official would understand that the non-consensual disclosure of a prisoner's HIV status violates the Constitution.").

VII. Role of the Judge/Jury

In ***Hunter v. Bryant***, 502 U.S. 224, 228 (1991) (Per Curiam), the Supreme Court reversed a judgment of the Ninth Circuit denying qualified immunity to federal agents who had arrested, without probable cause, someone they suspected of threatening the President's life. In criticizing the approach taken by the Ninth Circuit, the Court noted:

> The Court of Appeals' confusion is evident from its statement that '[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment...based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' . . . This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial.... Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Brosseau v. Haugen,125 S. Ct. 596, 598, 601-04 (2004) (per curiam) (Stevens, J., dissenting) (" In my judgment, the answer to the constitutional question presented by this case is clear: Under the Fourth Amendment, it was objectively unreasonable for Officer Brosseau to use deadly force against Kenneth Haugen in an attempt to prevent his escape. What is not clear is whether Brosseau is nonetheless entitled to qualified immunity because it might not have been apparent to a reasonably well trained officer in Brosseau's shoes that killing Haugen to prevent his escape was unconstitutional. In my opinion that question should be answered by a jury. . . .[T]he Court's search for relevant case law applying the *Garner* standard to materially similar facts is both unnecessary and ill-advised. [citing *Hope* and *Lanier*] Indeed, the cases the majority relies on are inapposite and, in fact, only serve to illuminate the patent unreasonableness of Brosseau's actions. Rather than uncertainty about the law, it is uncertainty about the likely consequences of Haugen's flight--or, more precisely, uncertainty about how a reasonable officer making the split-second decision to use deadly force would have assessed the foreseeability of a serious accident--that prevents me from answering the question of qualified immunity that this case presents. This is a quintessentially 'fact-specific' question, not a question that judges should try to answer 'as a matter of law.' . . .Although it is preferable to resolve the qualified immunity question at the earliest possible stage of litigation, this preference does not give judges license to take inherently factual questions away from the jury. . . The bizarre scenario described in the record of this case convinces me that reasonable jurors could well disagree about the

answer to the qualified immunity issue. My conclusion is strongly reinforced by the differing opinions expressed by the Circuit Judges who have reviewed the record. . . .The Court's attempt to justify its decision to reverse the Court of Appeals without giving the parties an opportunity to provide full briefing and oral argument is woefully unpersuasive. If Brosseau had deliberately shot Haugen in the head and killed him, the legal issues would have been the same as those resulting from the nonfatal wound. I seriously doubt that my colleagues would be so confident about the result as to decide the case without the benefit of briefs or argument on such facts. . . At a minimum, the Ninth Circuit's decision was not clearly erroneous, and the extraordinary remedy of summary reversal is not warranted on these facts. . . . In sum, the constitutional limits on an officer's use of deadly force have been well settled in this Court's jurisprudence for nearly two decades, and, in this case, Officer Brosseau acted outside of those clearly delineated bounds. Nonetheless, in my judgment, there is a genuine factual question as to whether a reasonably well-trained officer standing in Brosseau's shoes could have concluded otherwise, and that question plainly falls with the purview of the jury.").

THIRD CIRCUIT

Harvey v. Plains Township Police Department, 421 F.3d 185, 194 n.12 (3d Cir. 2005) ("The parties appear to be in disagreement over the proper role of the jury in qualified immunity determinations. Although the courts of appeals are not unanimous on this issue, this Court has held that 'qualified immunity is an objective question to be decided by the court as a matter of law.' [citing *Carswell*] 'The jury, however, determines disputed historical facts material to the qualified immunity question.'. . . 'A judge may use special jury interrogatories, for instance, to permit the jury to resolve the disputed facts upon which the court can then determine, as a matter of law, the ultimate question of qualified immunity.'. . At this stage, however, the summary judgment standard requires the Court to resolve all factual disputes in Harvey's favor and grant her all reasonable inferences, obviating any need to look to a jury.").

Carswell v. Borough of Homestead, 381 F.3d 235, 242, 243 (3d Cir. 2004) ("The importance of the factual background raises the question of whether the decision as to the applicability of qualified immunity is a matter for the court or jury. The Courts of Appeals are not in agreement on this point. We held in *Doe v. Groody*, 361 F.3d 232, 238 (3d Cir.2004), that qualified immunity is an objective question to be decided by the court as a matter of law. . . The jury, however, determines disputed historical facts material to the qualified immunity question. *See Sharrar v. Felsing*, 128 F.3d 810, 828 (3d Cir.1997). District Courts may use special interrogatories to allow juries to perform this function. *See, e.g., Curley*, 298 F.3d at 279. The court must make the ultimate determination on the availability of qualified immunity as a matter of law. . . Several other Courts of Appeals have adopted a standard similar to ours. [footnote citing cases] In contrast, other Courts of Appeals have held that District Courts may submit the issue of qualified immunity to the jury.[footnote citing cases]").

Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002) ("We note that the federal courts of appeals are divided on the question of whether the judge or jury should decide the ultimate question of objective reasonableness once all the relevant factual issues have been resolved. . . . . We addressed the issue in *Sharrar*, in which we observed that the "reasonableness of the officers' beliefs or actions is not a

jury question," 128 F.3d at 828, but qualified that observation by later noting that a jury can evaluate objective reasonableness when relevant factual issues are in dispute, *id.* at 830-31. This is not to say, however, that it would be inappropriate for a judge to decide the objective reasonableness issue once all the historical facts are no longer in dispute. A judge may use special jury interrogatories, for instance, to permit the jury to resolve the disputed facts upon which the court can then determine, as a matter of law, the ultimate question of qualified immunity.").

Gruenke v. Seip, 225 F.3d 290, 299, 300 (3d Cir. 2000) ("The evaluation of a qualified immunity defense is appropriate for summary judgment because the court's inquiry is primarily legal: whether the legal norms the defendant's conduct allegedly violated were clearly established. . . Nevertheless, some factual allegations, such as how the defendant acted, are necessary to resolve the immunity question. . . . [T]his admittedly fact-intensive analysis must be conducted by viewing the facts alleged in the light most favorable to the plaintiff. . . . Finally, when qualified immunity is denied, any genuine disputes over the material facts are remanded, to be settled at trial.").

Sharrar v. Felsing, 128 F.3d 810, 826-28 (3d Cir. 1997) ("We have recently noted the 'tension ... as to the proper role of the judge and jury where qualified immunity is asserted.'. . . To some extent that tension may be attributable to our effort to comply with the Supreme Court's instruction that qualified immunity defenses be resolved at the earliest possible point in the litigation while recognizing the difficulty in applying that instruction in situations where there are disputes of relevant fact. . . . A review of our opinions in the last three or four years discloses that we have not always followed what appears to be the Supreme Court's instruction that the reasonableness of an official's belief that his or her conduct is lawful is a question of law for the court, although other courts have interpreted the opinion in that way. . . . We do not suggest that there may never be instances where resort to a jury is appropriate in deciding the qualified immunity issue. . . . We thus hold, following the Supreme Court's decision in *Hunter*, that in deciding whether defendant officers are entitled to qualified immunity it is not only the evidence of 'clearly established law' that is for the court but also whether the actions of the officers were objectively reasonable. Only if the historical facts material to the latter issue are in dispute, as in *Karnes*, will there be an issue for the jury. The reasonableness of the officers' beliefs or actions is not a jury question, as the Supreme Court explained in *Hunter*.") The court indicated, however, that where there was a factual dispute to be resolved by the jury, the jury should decide the issue of objective reasonableness as well. 128 F.3d at 830, 831.

Hill v. Algor, 85 F. Supp.2d 391, 401 (D.N.J. 2000) ("Generally, the applicability of qualified immunity is a question of law. . . However, where factual issues relevant to the determination of qualified immunity are in dispute, the Court cannot resolve the matter as a question of law.").

VIII. QUALIFIED IMMUNITY AND FOURTH AMENDMENT CLAIMS

In ***Anderson v. Creighton,*** 483 U.S. 635 (1987), the Supreme Court held that the language of the Fourth Amendment proscribing "unreasonable" searches and seizures did not preclude the possibility that an officer can act in an objectively reasonable fashion even though in violation of the Fourth

Amendment. The Court noted that determinations of probable cause are often quite difficult and officials should be held liable in damages only where their conduct was clearly proscribed. In the wake of *Anderson,* a number of circuits employ the concept of "arguable probable cause" in Fourth Amendment qualified immunity analysis. *See, e.g.,* ***Escalera v. Lunn,*** 361 F.3d 737 (2d Cir. 2004) (*infra*); ***Storck v. City of Coral Springs,*** 354 F.3d 1307, 1317 & n.5 (11th Cir. 2003) (*infra*).

Does *Anderson* control in Fourth Amendment Excessive Force Cases?

A. *Saucier v. Katz*

In ***Saucier v. Katz,*** 121 S. Ct. 2151 (2001), a majority of the Supreme Court held that in a Fourth Amendment excessive force case, the qualified immunity issue and the constitutional violation issue are not so intertwined that they "should be treated as one question, to be decided by the trier of fact." *Id.* at 2154. The Court determined that the analysis set out in *Anderson v. Creighton*, 483 U.S. 635 (1987) is not affected by the Court's decision in *Graham v. Connor,* 490 U.S. 386 (1989), and that "[t]he inquiries for qualified immunity and excessive force remain distinct, even after *Graham*." 121 S. Ct. at 2158 . *Graham* protects an officer who reasonably, but mistakenly, believed the circumstances justified using more force than in fact was needed. "The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.*

The respondent in *Saucier,* a sixty-year-old animals' rights advocate, filed a *Bivens* action in federal court, claiming that a military policeman used excessive force in arresting him when he attempted to unfurl a protest banner during a speech given by Vice President Gore at the Presidio Army Base in San Francisco. *Id.* at 2154. Because the district court had concluded there was a material issue of fact as to the reasonableness of the force used, and because the merits inquiry on the excessive force claim was considered to be identical to the immunity inquiry, summary judgment was denied. On interlocutory appeal, the Ninth Circuit affirmed the denial of qualified immunity to the officer, holding that the law on excessive force was clearly established by *Graham,* and that the question of objective reasonableness essential to the merits of the Fourth Amendment claim was identical to the question of objective reasonableness presented by the claim of qualified immunity. A determination of the reasonableness issue by the jury would resolve both the merits and the immunity questions. *Id.* at 2155.

In reversing the Ninth Circuit, Justice Kennedy, writing for the majority, reinforced, but did not apply, the Court's "instruction to the district courts and courts of appeal to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found . . . ." 121 S. Ct. at 2159. Constrained by the limited question on which the Court had granted review and expressing doubt that a constitutional violation did occur, the Court "assume[d] a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force. . . ." *Id.*

Assuming a constitutional violation, the next question that must be asked is whether the right was clearly established. On this question, the Court explained that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 2156. The Court admonished that consideration of the question of whether the right was clearly established must be on a "more specific level" than that recognized by the Ninth Circuit. *Id.* at 2155. On the other hand, the Court observed:

> This is not to say that the formulation of a general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the standard. Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.

Id. at 2157.

The Court concluded that given the circumstances confronting Officer Saucier and, given the lack of "any case demonstrating a clearly established rule prohibiting the officer from acting as he did," the officer was entitled to qualified immunity. *Id.* at 2160.

Justice Ginsburg, joined by Justice Stevens and Justice Breyer, concurred in the judgment but disagreed with the "complex route the Court lays out for lower courts." *Id.* at 2160 (Ginsburg, J., joined by Stevens and Breyer, JJ., concurring in the judgment). For the concurring Justices, application of the *Graham* objective reasonableness standard was both necessary and sufficient to resolve the case. The only inquiry necessary was "whether officer Saucier, in light of the facts and circumstances confronting him, could have reasonably believed he acted lawfully." *Id.* at 2161. Applying the *Graham* standard, Justice Ginsburg concluded that respondent Katz "tendered no triable excessive force claim against Saucier." *Id.* at 2162.

The concurring Justices did not share the majority's fears that eliminating the qualified immunity inquiry in excessive force claims would lead to jury trials in all Fourth Amendment excessive force cases. *Id.* at 2163. Justice Ginsburg noted the not uncommon granting of summary judgment in excessive force cases where courts have found the challenged conduct to be objectively reasonable based on relevant undisputed facts. Where the determination of reasonableness depends on which of two conflicting stories is believed, however, there must be a trial. Once a jury finds, under the *Graham* standard, that an officer's use of force was objectively unreasonable, the concurrence concludes that "there is simply no work for a qualified immunity inquiry to do." *Id.* at 2164.

Justice Kennedy wrote for the majority and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas. Justice Souter joined in Parts I and II of the majority opinion but

would have remanded the case for application of the qualified immunity standard. Justice Ginsburg wrote the opinion concurring in the judgment. She was joined by Justices Stevens and Breyer.

B. *Brosseau v. Haugen*

Brosseau v. Haugen, 125 S. Ct. 596, 598, 599 (2004) (per curiam) ("We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity. . . *Graham* and *Garner,* following the lead of the Fourth Amendment's text, are cast at a high level of generality. . . . Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law. [citing *Hope v. Pelzer*]. . . . The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision. . . . We therefore turn to ask whether, at the time of Brosseau's actions, it was ' "clearly established"' in this more ' "particularized"' sense that she was violating Haugen's Fourth Amendment right. . . The parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. . . .These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the ' "hazy border between excessive and acceptable force."' . . The cases by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment.").

C. Post-*Brosseau* Case Law in Third Circuit

Gilles v. Davis, 427 F.3d 197, 206, 207 (3d Cir. 2005) ("Taking account of the entire episode and the information Davis possessed at the time, we hold Davis is entitled to qualified immunity because it would not have been clear to a reasonable officer that Gilles did not engage in disorderly conduct. . .While the Court of Common Pleas held Gilles' speech was insufficient to constitute disorderly conduct, it does not necessarily follow that the arresting officers are civilly liable for the arrest. Qualified immunity encompasses mistaken judgments that are not plainly incompetent. . . Under qualified immunity, police officers are entitled to a certain amount of deference for decisions they make in the field. They must make 'split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving.'").

Harvey v. Plains Township Police Department, 421 F.3d 185, 193, 194 (3d Cir. 2005) ("Our dissenting colleague argues that our conclusion runs afoul of *Anderson v. Creighton* . . . because Dombroski 'could have believed that his conduct was lawful in light of the information in his possession.' We certainly agree, as we must, that *Creighton* requires a particularized inquiry, involving consideration of both the law as clearly established at the time of the conduct in question and the information within the officer's possession at that time. However, we part ways when considering whether the information in Dombroski's possession could reasonably have supported the

belief that his actions were constitutional. As an initial note, there is no need to 'particularize' the Fourth Amendment right implicated here beyond 'the basic rule, well established by [Supreme Court] cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.' . . . As in *Groh*, there was no exigency here, and the *Groh* Court rejected, over a dissent, the notion that 'ample room' must be made for mistaken judgments of law or fact in cases in which no exigency exists. . . Thus, the simple question we are faced with is whether it was reasonable for Dombroski to infer consent from the knowledge in his possession. Our dissenting colleague notes that 'there is a presumption that a properly mailed item is received by the addressee.' However, we do not see how Dombroski could reasonably infer from the presumption of mailing that Harvey consented to anybody entering her apartment.'. . Our colleague seems to question what Dombroski should have done 'at what he understood to be a long prearranged appointment.' He should have done exactly what he was dispatched to do-keep the peace-and not affirmatively aid in the removal of property from Harvey's apartment. We stress that, at this stage, we must take for a fact that the officer ordered the landlord to open the door. This, and only this, is the action we find to be unreasonable, and clearly so.").

Bennett v. Murphy, 120 Fed. Appx. 914, 2005 WL 78581, at **3- 6 (3d Cir. Jan. 14, 2005) ("At the outset we recognize that there is a degree of 'duplication inherent in [*Saucier's*] two-part scheme' as applied to excessive force cases. . . That is, the question whether the amount of force an officer used was unreasonable and violated the Fourth Amendment may be viewed as blending somewhat into the question whether the officer reasonably believed that the amount of force he used was lawful. But *Saucier* makes clear that the two inquiries are distinct: Even where an officer's actions are unreasonable under *Graham*'s constitutional standard (as *Bennett II* held was true of Murphy's conduct), that officer is still entitled to immunity if he or she has a reasonable 'mistaken understanding as to whether a particular amount of force is legal' in a given factual situation . . . Murphy thus asserts that even assuming his actions were constitutionally unreasonable, he made a reasonable mistake as to the legality of those actions. To support that assertion he puts forth two related arguments. First, he contends that *Garner*'s 'immediate threat' standard, while clearly established, offered no guidance in the particular situation he faced. In that respect we are of course mindful of the principle, which the Supreme Court recently reaffirmed in *Brosseau v. Haugen* . . . that the inquiry whether an injured party's constitutional right was clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' Applying that principle, *Brosseau* . . . stated that *Graham* and *Garner* 'are cast at a high level of generality' and provided little guidance as applied to the situation confronting the officer in that case: 'whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.' We agree of course that *Graham* and *Garner* set out a standard that is general in nature in the context addressed in *Brosseau*. And we also agree with the District Court that there are circumstances, such as those in *Brosseau*, in which the 'immediate threat' standard may be 'subject to differing interpretations in practice' . . . . But we cannot say that the *Graham* and *Garner* 'immediate threat' standard is lacking in adequate substantive content as applied to the very different situation that Murphy addressed in Bennett's factual scenario: whether to shoot

an armed distraught man who, although refusing to drop his weapon over the course of an hour-long standoff, had never pointed his single-shot shotgun at anyone but himself and who was not in flight at the time he was shot . . . As *United States v. Lanier*, 520 U.S. 259, 271 (1997) teaches, 'general statements of the law are not inherently incapable of giving fair and clear warning' to public servants that their conduct is unlawful. And because (as we held in *Bennett II*) the facts alleged by Bennett disclose no basis from which to conclude that David posed an immediate threat to anyone but himself, we conclude that this case is one in which the 'general constitutional rule already identified in decisional law ... appl[ies] with obvious clarity to the specific conduct in question' . . . Murphy's second and related argument is that in light of what he terms 'similar' cases involving deadly force, his mistaken application of the 'immediate threat' standard was reasonable. Murphy cites two of those cases, *Montoute* and *Leong*, in support of the proposition that he reasonably believed David could lawfully be shot because he had a weapon and refused to put it down. But in reality neither of those cases calls into question the rule, recognized as clearly established prior to this incident by the Ninth Circuit *in Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir.1997), that under *Graham* and *Garner* '[l]aw enforcement officers may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed.' . . . Murphy cites a number of other cases in his brief in attempted support of his contention that he could not reasonably understand what the law required in the circumstances he faced. To the contrary, the contrast between the situations confronting the officers in those cases . . . and the scenario in this case actually point in the opposite direction. On the facts as we must credit them, Murphy acted precipitately at a time and under circumstances totally lacking in the urgency posed by all of those cases: More than an hour had passed during the standoff with David, a period throughout which he had threatened to harm no one but himself; and when Murphy chose that instant to shoot to kill, David was at a standstill 20 to 25 yards from the nearest officer and fully 80 yards from Murphy himself. Surely Murphy cannot rely on such cases, all of them involving suspects who unquestionably posed an immediate threat of physical harm to police, in support of the contention that he reasonably believed it was lawful to shoot David, who posed no such threat. To be sure, those other cases may illustrate that the concept of excessive force 'is one in which the result depends very much on the facts of each case' [citing *Brosseau*] But as we have already explained, the facts alleged by Bennett, which we take as true for purposes of the qualified immunity inquiry, are such that any reasonable officer would understand, without reference to any other case law, that *Graham* and *Garner* prohibited shooting David. For that reason we conclude that Murphy is not entitled to qualified immunity.").

IX. Availability of Interlocutory Appeal

Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (denial of qualified immunity, **to the extent that it turns on an issue of law,** is an appealable "final decision"). The Court noted, *id.* at 528:

> An appellate court reviewing the denial of ... immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law:

> whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment ... on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Behrens v. Pelletier, 516 U.S. 299, 312, 313 (1996) ("Denial of summary judgment often includes a determination that there are controverted issues of material fact, . . . and *Johnson* surely does not mean that every denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision' under *Cohen* and *Mitchell*. [cite omitted] *Johnson* reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity . . , typically, the issue whether the federal right allegedly infringed was 'clearly established[.] [cites omitted] Here the District Court's denial of petitioner's summary-judgment motion necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law. *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.' This argument was presented by petitioner in the trial court, and there is no apparent impediment to its being raised on appeal. And while the District Court, in denying petitioner's summary-judgment motion, did not identify the particular charged conduct that it deemed adequately supported, *Johnson* recognizes that under such circumstances 'a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'").

Johnson v. Jones, 515 U.S. 304, 319, 320 (1995) ("[W]e hold that a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.").

Swint v. Chambers County Commission, 514 U.S. 35, 51 (1995) ("The Eleventh Circuit's authority immediately to review the District Court's denial of the individual police officer defendants' summary judgment motions did not include authority to review at once the unrelated question of the County Commission's liability. The District Court's preliminary ruling regarding the County did not qualify as a 'collateral order,' and there is no 'pendent party' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise.").

NOTE: In ***Johnson v. Fankell***, 520 U.S. 911 (1997), the Court held, in a unanimous opinion, that defendants have no federal right to an interlocutory appeal from a denial of qualified immunity in

state court. In response to petitioners' argument that the Idaho rules were interfering with their federal rights, the Court noted:

> While it is true that the defense has its source in a federal statute (§ 1983), the ultimate purpose of qualified immunity is to protect the state and its officials from overenforcement of federal rights. The Idaho Supreme Court's application of the State's procedural rules in this context is thus less an interference with federal interests than a judgment about how best to balance the competing state interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.

Id. at 919, 920. In response to petitioners' further argument that the Idaho rule did not sufficiently protect their right to prevail before trial, the Court explained:

> In evaluating this contention, it is important to focus on the precise source and scope of the federal right at issue. The right to have the trial court rule on the merits of the qualified immunity defense presumably has its source in § 1983, but the right to immediate appellate review of that ruling in a federal case has its source in § 1291. The former right is fully protected by Idaho. The latter right, however, is a federal procedural right that simply does not apply in a nonfederal forum.

Id. at 921.

THIRD CIRCUIT

Hamilton v. Leavy, 322 F.3d 776, 786 (3d Cir. 2003) ("We recently announced in *Forbes v. Township of Lower Merion*, 313 F.3d 144, 146 (3d Cir.2002), a supervisory rule requiring district courts to set out what facts they relied on and the legal reasoning they used to determine whether to grant a summary judgment motion for qualified immunity. We now extend this rule to require district courts to provide the same information when deciding motions for summary judgment based on absolute immunity defenses. Accordingly, we remand to the District Court in order for it to reconsider whether the defendants are entitled to quasi-judicial absolute immunity.")

Forbes v. Township of Lower Merion, 313 F.3d 144, 148, 149 (3d Cir. 2002) ("In this case, the District Court denied Salkowski's and McGowan's summary-judgment motions without identifying the set of material facts that the Court viewed as subject to genuine dispute. As a consequence, we are greatly hampered in ascertaining the scope of our jurisdiction. If the District Court had specified the material facts that, in its view, are or are not subject to genuine dispute, we could 'review whether the set of facts identified by the district court [as not subject to genuine dispute] is sufficient to establish a violation of a clearly established constitutional right,' *Ziccardi*, 288 F.3d at 61, but based on the District Court's spare comments in denying the defendants' summary-judgment motion, we are

hard pressed to carry out our assigned function. We do not fault the District Court for not specifically identifying the genuinely disputable material facts because our prior qualified-immunity cases have not imposed the requirement. However, we find that the lack of such a specification impairs our ability to carry out our responsibilities in cases such as this. . . . We cannot hold that the District Court's denial of summary judgment constituted error here because in the absence of a clear supervisory rule, the Federal Rules of Civil Procedure do not impose on trial courts the responsibility to accompany such an order with conclusions of law. . . We instead exercise our supervisory power to require that future dispositions of a motion in which a party pleads qualified immunity include, at minimum, an identification of relevant factual issues and an analysis of the law that justifies the ruling with respect to those issues.").

Ziccardi v. City of Philadelphia, 288 F.3d 57, 62 (3d Cir. 2002) ("In our view, *Johnson* clearly applies to factual disputes about intent, as well as conduct. First, we see nothing in the *Johnson* Court's reasoning that supports a distinction between issues of conduct and issues of intent. . . . Second, at least one passage in *Johnson* refers directly to questions of intent and suggests that the Court specifically contemplated that its decision would not allow interlocutory appeals regarding the sufficiency of the evidence of intent.").

Bines v. Kulaylat, 215 F.3d 381, 384 (3d Cir. 2000) ("The Supreme Court has not decided whether denial of summary judgment based on a good-faith defense can ever fall within the collateral-order doctrine. We have not, nor has any other circuit court of appeals, decided the issue. Nevertheless, we find our course amply guided by previous decisions in which we have addressed the collateral-order doctrine. Those decisions clearly indicate that denial of summary judgment based on a good-faith defense does not permit an interlocutory appeal.").

In re Montgomery County, 215 F.3d 367, 374 (3d Cir. 2000) ("Because the District Court never explicitly addressed the Appellants' immunity claims, we must decide whether we have interlocutory jurisdiction to review an implied denial of those claims. We join the other Circuit Courts of Appeals that have addressed this issue and hold that we do. [citing cases]").

Acierno v. Cloutier, 40 F.3d 597, 609 (3d Cir. 1994) (en banc) (overruling *Prisco*, which had held that orders denying qualified immunity in cases seeking both damages and injunctive relief were not immediately appealable).

Kulwicki v. Dawson, 969 F.2d 1454, 1460 (3d Cir. 1992) (while recognizing that "...Courts of Appeals do not take a uniform view of appellate jurisdiction over denials of immunity[,]" court concluded that "[o]ur jurisdiction to hear immunity appeals is limited only where the district court does not address the immunity question below, or where the court does not base its decision on immunity *per se*....Insofar as there may be issues of material fact present in a case on appeal, we would have to look at those facts in the light most favorable to the non-moving party.").

Kulwicki, *supra*, 969 F.2d at 1461 n. 7 ("We note that an appeal from a denial of immunity where factual issues remain is distinct from that where the defendant official denies taking the actions at issue. Unlike a claim of official immunity, the 'I didn't do it' defense relates strictly to the merits of the plaintiff's claim, and is therefore not immediately appealable.").