

SECTION 1983: QUALIFIED IMMUNITY

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SECTION 1983: QUALIFIED IMMUNITY

I. UPDATE ON ABSOLUTE IMMUNITY

A. Prosecutorial Immunity

In *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), the Court unanimously held that a district attorney and chief deputy district attorney had absolute immunity as to claims “that the prosecution failed to disclose impeachment material . . . due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants.” *Id.* at 858, 859. Although these obligations were “administrative” in nature, the Court said they were “unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like.” *Id.* at 862. The obligations at issue here required “legal knowledge and the exercise of related discretion.” *Id.* The Court concluded that the “management tasks at issue. . . concern how and when to make impeachment information available at a trial. They are thereby directly connected with the prosecutor’s basic trial advocacy duties. And, in terms of *Imbler*’s functional concerns, a suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised inadequately, on the other, would seem very much alike.” *Id.* at 863. Note that *Van de Kamp* dealt only with the individual liability of the defendants and did not address any entity liability based on a policy or custom of the office.

See also *Schneyder v. Smith*, 653 F.3d 313, 334 (3d Cir. 2011) (“One thing that *Van de Kamp* does not change is our characterization of the conduct in question as the nonperformance of a constitutional duty to advise the court of a significant change in the circumstances surrounding the detention of a material witness. We also continue to think that this duty is, broadly speaking, administrative rather than advocative. After *Van de Kamp*, we must ask the further question whether this is the sort of administrative duty the performance or nonperformance of which is protected by prosecutorial immunity. We hold that it is not. . . . After the continuance, the *Overby* case was a long way off, and it simply is not the prosecutor’s prerogative to decide how long to keep a material witness detained. Declining to reveal the change in *Overby*’s status was an abdication of Smith’s responsibility to provide the court with information sufficient for it to decide an issue within its sole competence. As the sole government official in possession of the relevant information, Smith had a duty of disclosure that was neither discretionary nor advocative, but was instead a purely

administrative act not entitled to the shield of immunity, even after *Van de Kamp*.”).

Yarris v. County of Delaware, 465 F.3d 129, 136-39 (3d Cir. 2006) (“We believe that destroying exculpatory evidence is not related to a prosecutor’s prosecutorial function. Unlike decisions on whether to withhold evidence from the defense, decisions to destroy evidence are not related to a prosecutor’s prosecutorial function. . . . Accordingly, the ADAs are not entitled to absolute immunity from suit for constitutional violations caused by their alleged deliberate destruction of exculpatory evidence. . . . Less clear is whether the ADAs are absolutely immune from claims based on allegations that they withheld exculpatory evidence, in the form of DNA samples, after Yarris was convicted and sentenced to death. . . . We agree with other courts that ‘[a]bsolute immunity applies to the adversarial acts of prosecutors during post-conviction proceedings ... where the prosecutor is personally involved ... and continues his role as an advocate,’ but that ‘where the role as advocate has not yet begun ... or where it has concluded, absolute immunity does not apply.’[citing cases] After a conviction is obtained, the challenged action must be shown by the prosecutor to be part of the prosecutor’s continuing personal involvement as the state’s advocate in adversarial post-conviction proceedings to be encompassed within that prosecutor’s absolute immunity from suit. Based on the facts on the record as it now stands, the prosecutors have not satisfied their burden of showing that they are entitled to the immunity they seek. Yarris’s direct appeal to the Supreme Court of Pennsylvania was argued in April and decided in October of 1988. *See Commonwealth v. Yarris*, 519 Pa. 571, 549 A.2d 513 (Pa.1988). Yarris’s numerous requests for DNA testing of physical evidence began in March 1988—presumably in an attempt to uncover new evidence that might entitle him to extraordinary relief in case the legal avenues he was pursuing did not succeed. The prosecutors have not shown that their response to Yarris’s DNA test requests was part of their advocacy for the state in post-conviction proceedings in which they were personally involved. Without such a showing, a prosecutor acting merely as a custodian of evidence after conviction serves the same non-adversarial function as police officers, medical examiners, and other clerical state employees and—just as with certain police investigative work—‘it is neither appropriate nor justifiable that, for the same act, [absolute] immunity should protect the one and not the other [s] .’ . . . The handling of requests to conduct scientific tests on evidence made after conviction—not related to grounds claimed in an ongoing adversarial proceeding—can be best described as part of the ‘prosecutor’s administrative duties ... that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings’ and ‘are not entitled to absolute immunity.’ . . . Because the ADAs have not yet shown how the handling of DNA evidence related to ongoing

adversarial proceedings in which they were personally involved, we conclude that the prosecutors may have been ‘function[ing] as ... administrator[s] rather than as ... officer[s] of the court’ and, thus, may be ‘entitled only to qualified immunity.’ . . . As a general matter, we note that a prosecutor is absolutely immune from liability for using ‘false testimony in connection with [a] prosecution.’ . . . With respect to the solicitation of false statements alleged here, the ADAs are entitled to absolute immunity to the extent that their conduct occurred while they were acting as advocates rather than investigators.”)

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.”)

Peterson v. Bernardi, No. 07-2723 (RMB/JS), 2010 WL 2521392, at *12, *13 (D.N.J. June 15, 2010) (“Where it is shown that a post-conviction inquiry will be genuinely probative (because, for example, new evidence has come to light), a prosecutor’s interest, at least initially, in preserving a conviction’s integrity may be in tension with the interest of the public in convicting and punishing the guilty. . . . Because a prosecutor’s advocacy in these cases is on his own behalf, his purpose is more administrative than genuinely prosecutorial. . . . Despite this marked attenuation, Defendant Bernardi insists that his conduct’s procedural context—that is, responding to a motion for post-conviction relief in court—places the conduct squarely within the traditional judicial/quasi-judicial prosecutorial function. In *Yarris*, the Third Circuit held that the decision of prosecutors to deny requests for the testing of DNA evidence was not a prosecutorial function entitled to absolute immunity. . . . The only material difference here is that Defendant Bernardi’s prosecutorial decision may have been made in the context of a motion for post-conviction relief. The fortuitous fact that Plaintiff filed a motion, rather than requesting DNA testing from Defendant Bernardi directly, does not alter the conclusion that such determinations are not traditionally advocative in nature. Entitlement to prosecutorial immunity cannot turn upon the accident-of-fate that Plaintiff happened to request relief from a court, rather than from Defendant Bernardi directly. The applicability of prosecutorial immunity here is a close and

difficult call on which reasonable minds may differ. It is certainly counterintuitive that a prosecutor's conduct in defending a conviction on appeal is immunized, but his conduct in responding to a motion for post-conviction relief may not be. The manifest conclusion of the controlling cases is that the relevant inquiry is one not of type, but of degree. The precedents, in other words, turn not upon easily recognized categories or labels, but rather a measurement of conceptual proximity. Given the attenuated connection of Defendant Bernardi's conduct—particularly in light of its context, execution, and purpose—with a prosecutor's traditional advocative role, Defendant Bernardi's instruction to oppose Plaintiff's July 2002 motion is not protected by absolute immunity.”)

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.”).

B.S. v. Somerset County, No. 11–1833, 2013 WL 69211, *7, *10, *11, *14, *15 (3d Cir. Jan. 8, 2013) (“As Appellees correctly point out, we have recognized that the justifications for according absolute immunity to prosecutors sometimes apply to child welfare employees. Specifically, in *Ernst v. Child & Youth Services of Chester County*, 108 F.3d 486 (3d Cir.1997), we joined several of our sister circuits in deeming ‘child welfare workers and attorneys who prosecute dependency proceedings on behalf of the state ... absolute[ly] immun[e] from suit for all of their actions in preparing for and prosecuting such dependency proceedings.’ . . . As a careful comparison of this case to *Ernst* reveals, the same sorts of protection we identified there actually do apply here with respect to the caseworkers’ function of seeking judicial orders related to custody of Daughter. . . . [A]lthough *Ernst* is certainly distinguishable in that absolute immunity was available to child welfare workers ‘for their actions on behalf of the state in preparing for, initiating, and prosecuting *dependency proceedings*,” *id.* at 495 (emphasis added), that distinction is not dispositive as far as the availability of ‘important safeguards that protect citizens from unconstitutional actions’ goes. *Id.* . . . Having determined that the absence of dependency proceedings is not, in itself, a basis for resolving the absolute immunity question, we must now consider whether Eller and Barth were, in fact, formulating and presenting recommendations to a court when they undertook the conduct of which Mother complains. In other words, we need to ascertain whether Eller and Barth

‘function[ed] as the state’s advocate when performing the action(s)’ that gave rise to the due process violations Mother seeks to redress, or whether those claims instead arose from unprotected ‘administrative or investigatory actions.’ . . . Inasmuch as their acts were fundamentally prosecutorial, in the manner described in *Ernst*, we conclude that Eller and Barth are absolutely immune from liability with respect to the procedural due process claims. . . . We emphasize, however, as we did in *Ernst*, that this holding does not insulate from liability all actions taken by child welfare caseworkers. . . . Investigations conducted outside of the context of judicial proceedings may still be susceptible to due process claims. Nor can caseworkers shield their investigatory work from review merely by seeking a court order at some point. . . . The key to the absolute immunity determination is not the timing of the investigation relative to a judicial proceeding, but rather the underlying function that the investigation serves and the role the caseworker occupies in carrying it out. . . . Here, Eller advocated on behalf of the County in the May 5 meeting and continued in that role through the June 23 custody determination. Because the underlying function of her actions throughout that judicial proceeding—including during the investigation and composition of the report—was fundamentally prosecutorial in nature, she is entitled to absolute immunity for this claim.”)

C. Witnesses

Rehberg v. Paulk, 132 S. Ct. 1497, 1505-08 (2012) (“The factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses. In both contexts, a witness’ fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability needed to prevent perjurious testimony. In *Briscoe*, the Court concluded that the possibility of civil liability was not needed to deter false testimony at trial because other sanctions—chiefly prosecution for perjury—provided a sufficient deterrent. . . . Since perjury before a grand jury, like perjury at trial, is a serious criminal offense, see, e.g., 18 U.S.C. § 1623(a), there is no reason to think that this deterrent is any less effective in preventing false grand jury testimony. . . . [W]e conclude that grand jury witnesses should enjoy the same immunity as witnesses at trial. This means that a grand jury witness has absolute immunity from any § 1983 claim based on the witness’ testimony. In addition, as the Court of Appeals held, this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness’ testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution. . . . In sum, testifying, whether before a grand jury or at trial, was not the distinctive function performed by a complaining witness. It is clear—and petitioner does not contend otherwise—that a

complaining witness cannot be held liable for perjurious *trial* testimony. *Briscoe*, 460 U.S., at 326. And there is no more reason why a complaining witness should be subject to liability for testimony before a grand jury. Once the distinctive function performed by a ‘complaining witness’ is understood, it is apparent that a law enforcement officer who testifies before a grand jury is not at all comparable to a ‘complaining witness.’ By testifying before a grand jury, a law enforcement officer does not perform the function of applying for an arrest warrant; nor does such an officer make the critical decision to initiate a prosecution. . . . Instead, it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury, and in many jurisdictions, even if an indictment is handed up, a prosecution cannot proceed unless the prosecutor signs the indictment. [footnote omitted] It would thus be anomalous to permit a police officer who testifies before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to prosecute.”)

See also Allen v. Johnson, No. 12–3966 (RBK), 2013 WL 103631, *3 (D.N.J. Jan. 8, 2013) (“Plaintiff also seeks damages against Sgt. Johnson for his false testimony before the grand jury and municipal court regarding the criminal charge of robbery against Plaintiff. This claim fails because a witness is absolutely immune from suit for testifying falsely. *See Rehberg v. Paulk*, 132 S.Ct. 1947 (2012) (witness before grand jury, like trial witness, enjoys absolute immunity); *Briscoe v. LaHue*, 460 U.S. 325, 330–346, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) (police officer who testifies in criminal trial enjoys absolute witness immunity for false testimony); *Kulwicki v. Dawson*, 969 F.2d 1454, 1467 and n. 16 (3d Cir.1992) (witness who testifies in judicial proceeding is absolutely immune for false testimony); *Williams v. Hepting*, 844 F.2d 138, 143 (3d Cir.1988) (witness is entitled to absolute immunity from civil liability under § 1983 for perjured testimony at preliminary hearing and suppression hearings.”); *Jones v. Dalton*, 867 F.Supp.2d 572, 584 (D.N.J. 2012) (“Porter, as an investigator, is not entitled to prosecutorial immunity, but seeks absolute immunity with respect to his grand jury testimony. After briefing closed on these Motions, the Supreme Court resolved a Circuit split in *Rehberg v. Paulk* The work in preparation for such testimony is also absolutely immune. . . . Accordingly, Porter may not be held liable for § 1983 claims on the basis of his grand jury testimony or preparatory work therefor. . . . Both malicious prosecution and First Amendment retaliation claims require Plaintiff to prove that the proceeding was not initiated with probable cause. . . . A grand jury indictment is prima facie evidence of probable cause. Absolute immunity prohibits Jones from rebutting this presumption with evidence that Porter made misrepresentations to the grand jury. Accordingly, the Motion will be granted on these two claims.”)

But see Frederick v. New York City, No. 11 Civ. 469(JPO), 2012 WL 4947806, at *3, *4 (S.D.N.Y. Oct. 11, 2012) (“Appearing in this case to oppose Plaintiff’s request, the DA invokes the Supreme Court’s recent opinion in *Rehberg v. Paulk*, 132 S.Ct. 1497 (2012), as the beginning and the end of the analysis, categorically foreclosing the relief sought by Plaintiff here. If the DA’s position were correct—and *Rehberg* barred the use of grand jury witness testimony in a malicious prosecution suit brought under § 1983—then Plaintiff could not establish a particularized need to unseal A.C.’s grand jury records. Accordingly, the DA’s argument is addressed at the outset. In *Rehberg*, a unanimous Court held that grand jury witnesses enjoy absolute immunity from § 1983 liability based on their testimony. . . It also declined to recognize exceptions for complaining witnesses or law enforcement witnesses. . . To preempt exceptions that could swallow its rule, the Court noted that this grant of immunity ‘may not be circumvented by claiming that a grand jury witness conspired to present false testimony, or by using evidence of the witness’ testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution.’ . . Without such a corollary to its main holding, *Rehberg* would soon become a nullity, since ‘a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.’ . . This context is critical to an understanding of the specific language with which the Court expounded and protected its new rule. . . That very language rests at the heart of the DA’s argument, which fixates on the final clause of the *Rehberg* corollary: a ban on ‘using evidence of the [grand jury] witness’ testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution.’ At first glance, this language appears to support the DA’s position that *Rehberg*—whether intentionally or inadvertently—precludes the introduction of any grand jury testimony as evidence in a § 1983 malicious prosecution claim. Yet the apparent incongruity between such a sweeping prohibition and the traditionally narrow compass of absolute immunity doctrine suggests the need for a closer look. . . So does the oddity of locating this doctrinal innovation in a corollary whose stated purpose is to protect grand jury witness immunity. The question is thus whether *Rehberg*’s reference to ‘any other § 1983 claim’ refers to *any claim at all*—or, as Plaintiff urges, to *any claim against the witness who testified*. This is almost, but not quite, a question of first impression. The DA offers four citations to support his claim. Three of these cases, however, are inapposite, since they do not address circumstances where a witness *other* than the § 1983 defendant, and with whom the defendant had *not* conspired, offered the disputed grand jury testimony. . . Upon careful review of the opinion, this Court holds that *Rehberg* does not create a categorical bar to the use of grand jury testimony as evidence against defendants in malicious prosecution suits

brought pursuant to § 1983. Rather, where *Rehberg* bans ‘using evidence of the witness’ testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution,’ that decision prohibits only the use of a witness’s own grand jury testimony against that witness if he or she subsequently becomes a § 1983 defendant.”); *Sankar v. City of New York*, No. 07 CV 4726(RJD)(SMG), 2012 WL 2923236, *2, *3 (E.D.N.Y. July 18, 2012) (“Defendants cite *Rehberg v. Paulk* to argue that Officer Ostrowski is absolutely immune from ‘any § 1983 claim based on the witness’ testimony.’ . . . Defendants argue that *Rehberg* ‘clearly counsels against the Court’s finding’ that Ostrowski’s signing of the sworn criminal complaint alone is sufficient to satisfy the initiation prong of a malicious prosecution claim. . . . In *Rehberg*, the Supreme Court held that an investigator employed by the DA’s office was entitled to the same absolute immunity under Section 1983 as a trial witness. In *dicta*, the Court observed: ‘By testifying before a grand jury, a law enforcement officer does not perform the function of applying for an arrest warrant; nor does such an officer make the critical decision to initiate a prosecution.... [S]uch a witness, unlike a complaining witness at common law, does not make the decision to press criminal charges.’ . . . *Rehberg*, however, is inapplicable. *Rehberg* did not alter controlling Second Circuit (and New York) law that an officer’s filing of a sworn complaint is sufficient to satisfy the initiation prong of a malicious prosecution claim. Ostrowski’s testifying at the grand jury was but one additional step this officer took in his effort to push the case against plaintiff forward. If anything, *Rehberg* reinforces the distinction between one who simply testifies at a grand jury and ‘does not make the decision to press criminal charges,’ *Rehberg*, 132 S.Ct. at 1508, and one, like Ostrowski, who ‘set[s] the wheels of government in motion by instigating a legal action.’ . . . Defendants’ attempt to convert grand jury testimony into an all-purpose shield from malicious prosecution liability is unpersuasive. The adoption of such a broad interpretation of *Rehberg* would allow any police officer—regardless of the extent of their involvement in laying the groundwork for an indictment—to escape liability merely by securing an appearance before a grand jury.”)

II. NOTE ON QUALIFIED IMMUNITY AND PRIVATE ACTORS

The Supreme Court has held that private defendants in § 1983 suits challenging their use of state replevin, garnishment or attachment statutes later held unconstitutional, cannot invoke the qualified immunity available to government officials in such suits. *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992).

In *Richardson v. McKnight*, 117 S. Ct. 2100, 2102 (1997), the Court held that “prison guards who are employees of a private prison management firm are

[not] entitled to a qualified immunity from suit by prisoners charging a violation of . . . § 1983.” The opinion was five-four, with Justice Breyer writing for the majority (joined by Justices Stevens, O’Connor, Souter and Ginsburg).

The Court found four aspects of *Wyatt* relevant to its decision: 1) *Wyatt* reaffirmed that § 1983 can sometimes impose liability upon a private individual; 2) *Wyatt* reinforced a distinction that exists between an “immunity from suit” and other kinds of legal defenses; 3) *Wyatt* identified the legal source of § 1983 immunities as both historical origins and public policy concerns underlying suits against government officials; and 4) *Wyatt* was a limited decision, not applicable to all private individuals regardless of their relationship to the government. *Id.* at 2103-04.

The majority concluded that “[h]istory does not reveal a ‘firmly rooted’ tradition of immunity applicable to privately employed prison guards.” *Id.* at 2104. Furthermore, the Court found the public policy concerns underlying immunity for government officials — discouragement of “unwarranted timidity,” reduction of threat of damages suits as a deterrent to talented candidates pursuing careers in public service and elimination of “distraction” from duty — were not implicated in the context of prison employees of the large, multistate private prison management firm. *Id.* at 2105-08.

The Court rejected petitioners’ argument that a functional approach should be applied in deciding the immunity question. As the Court notes:

The Court has sometimes applied a functional approach in immunity cases, but only to decide which type of immunity—absolute or qualified—a public officer should receive. [cites omitted] And it never has held that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity, . . . especially for a private person who performs a job without government supervision or direction. Indeed a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery.

Id. at 2106.

NOTE: In *Correctional Services Corp. v. Malesko*, 122 S. Ct. 515, 519 (2001),

the Court refused to extend an implied cause of action for damages under *Bivens* against private entities acting under color of federal law. The Court did not address the question of whether private individuals employed by such entities were subject to a *Bivens* action. That question has been answered in *Minnecci v. Pollard*, 132 S. Ct. 617 (2012). The plaintiff in *Minnecci* was a prisoner in a federal facility run by a private prison management company, Wackenhut Corrections Corporation. Plaintiff claimed that he had been deprived of adequate medical care in violation of the Eighth Amendment, and sought damages from several prison employees. The Ninth Circuit held that the Eighth Amendment provided Pollard with a *Bivens* action. *Pollard v. The GEO Group, Inc.*, 607 F.3d 583, 603, as amended 629 F.3d 843, 868 (9th Cir. 2010). With only Justice Ginsburg dissenting, the Court (per Justice Breyer) held that Pollard could not assert a claim under *Bivens*. 132 S. Ct. at 623. The Court explained that “Pollard’s Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an ‘alternative, existing process’ capable of protecting the constitutional interests at stake.” *Id.* The Court noted that research disclosed that “state law imposes general tort duties of reasonable care (including medical care) on prison employees in every one of the eight States where privately managed secure federal facilities are currently located.” *Id.* at 624. Finally, the Court acknowledged that state tort remedies may often prove “less generous” than *Bivens* actions, but this did not make such remedies inadequate. *Id.* at 625. The Court left “different cases and different state laws to another day[.]” concluding that “where, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner must seek a remedy under state tort law.” *Id.* at 626.

See also Flores v. U.S., 689 F.3d 894, 902, 903 (8th Cir. 2012) (“In recommending that summary judgment be granted to the APS defendants on plaintiffs’ *Bivens* claim, the magistrate judge addressed ‘whether decedent’s representatives may pursue a *Bivens* action against a private physician employed by a private corporation that has contracted with the government to provide medical services to prison inmates.’ . . . The magistrate judge considered the circuit split on the issue, noting that this circuit had not yet addressed the question, and concluded that ‘a *Bivens* action should not extend to private employees of federal prisons where state tort law already provides a remedy.’ . . . The magistrate judge concluded that alternative remedies were available to plaintiffs in the form of state tort law and that a *Bivens* action should not be allowed. After final judgment was

entered, the Supreme Court resolved the circuit split in *Minnecci v. Pollard*, 132 S.Ct. 617 (2012). The Court held that it could not ‘imply the existence of an Eighth Amendment-based damages action (a *Bivens* action) against employees of a privately operated federal prison’ because ‘state tort law authorizes adequate alternative damages actions [.]’. . In light of the holding in *Minnecci*, plaintiffs cannot maintain a *Bivens* action against Dr. Salmi and APS—a private citizen and a private corporation—because Minnesota law provides adequate alternative tort actions, including a wrongful death claim based on medical malpractice.”); ***Bonilla v. Corrections Corp. of America***, No. 4:11CV1349, 2012 WL 263378, at *3 (N.D. Ohio Jan. 27, 2012) (“Similar to the plaintiff in *Minnecci*, Plaintiff herein is a federal prisoner seeking damages from privately employed personnel working at a privately operated federal prison for alleged Eighth Amendment violations that would typically fall within the scope of traditional Ohio state tort law. Accordingly, Plaintiff’s Eighth Amendment *Bivens* claim against Defendant Rupeka in his individual capacity fails to state a claim upon which relief may be granted and is, therefore, dismissed pursuant to 28 U.S.C. § 1915(e).”)

But see Winchester v. Marketti, No. 11 CV 9224, 2012 WL 2076375, at *2, *3 (N.D. Ill. June 8, 2012) (“Defendants argue that I should ‘extend’ *Minnecci* to block § 1983 actions against private employees working in state prisons because, as with their federal counterparts, they are subject to state tort law which provides an adequate remedial framework for injuries they may cause. This argument fails. *Minnecci* deals solely with the question of when the judicial branch should recognize an implied cause of action under *Bivens*. It has absolutely no bearing on § 1983 cases, where Congress has already created a cause of action. The Supreme Court has long recognized that private physicians and nurses who contract with the state to provide medical care to prisoners act ‘under color of law’ for purposes of § 1983. . . Defendants’ attempt to distinguish this case from *West* based on different contractual terms regarding liability and indemnification is unavailing: ‘[i]t is the physician’s *function* within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State.’. . And if the Supreme Court somehow intended a case about whether to recognize a new *Bivens* action to overturn a long line of established law on who may be a § 1983 defendant, as Defendants argue, it would need to say so explicitly (and provide considerable explanation).”)

The Ninth Circuit had also held that the private prison employees acted under color of federal law. That holding was not reviewed by the Supreme Court. *Id.* at 627 n.* (Ginsburg, J., dissenting). Compare ***Pollard v. Geo Group, Inc.***, 629 F.3d 843, 854-58 (9th Cir. 2010), rev’d on other grounds sub nom, ***Minnecci v. Pollard***, 132 S. Ct. 617 (2012) (“[T]he threshold question presented here is

whether the GEO employees can be considered federal agents acting under color of federal law in their professional capacities. We conclude that they can. . . . We note at the outset that the one federal court of appeal to have directly addressed the question—the Fourth Circuit—has held that employees of private corporations operating federal prisons are not federal actors for purposes of *Bivens*. Neither the Supreme Court nor our court has squarely addressed whether employees of a private corporation operating a prison under contract with the federal government act under color of federal law. That said, we have held that private defendants can be sued under *Bivens* if they engage in federal action. . . . In our view, there is no principled basis to distinguish the activities of the GEO employees in this case from the governmental action identified in *West*. Pollard could seek medical care only from the GEO employees and any other private physicians GEO employed. If those employees demonstrated deliberate indifference to Pollard’s serious medical needs, the resulting deprivation was caused, in the sense relevant for the federal-action inquiry, by the federal government’s exercise of its power to punish Pollard by incarceration and to deny him a venue independent of the federal government to obtain needed medical care. On this point, *West* is clear. . . . The relevant function here is not prison management, but rather incarceration of prisoners, which of course has traditionally been the State’s ‘exclusive prerogative.’ . . . Likewise, in the § 1983 context, our sister circuits have routinely recognized that imprisonment is a fundamentally public function, regardless of the entity managing the prison. . . . In accord with *West* and other federal courts of appeal, we hold that there is but one function at issue here: the government’s power to incarcerate those who have been convicted of criminal offenses. We decline to artificially parse that power into its constituent parts—confinement, provision of food and medical care, protection of inmate safety, etc.—as that would ignore that those functions all derive from a single public function that is the sole province of the government: ‘enforcement of state-imposed deprivation of liberty.’ . . . Because that function is ‘traditionally the *exclusive* prerogative of the [government],’ it satisfies the ‘public function’ test under *Rendell-Baker*.”) and ***Holly v. Scott***, 434 F.3d 287, 297, 300, 301(4th Cir. 2006) (Motz, J., concurring in the judgment) (“The majority’s holding that private correctional employees are not governmental actors ignores or misreads controlling Supreme Court case law. Those cases, as well as numerous cases from other federal courts, establish that individual private correctional providers are government actors subject to liability as such. Accordingly, I cannot join the majority opinion. However, because Ricky Holly possesses an alternative remedy for his alleged injuries, no action under *Bivens* . . . lies in this case. For that reason alone, I concur in the judgment. . . . In this case, the government has delegated its authority to the privately employed defendants, empowering them to incarcerate, to confine, to discipline, to feed, and to provide medical and other care to inmates who are imprisoned by order of the

federal government. The defendants are acting as agents of the government; their actions are thus clearly attributable to the federal government, and a prisoner must be able to seek redress from the defendants if they cause him constitutional injury. Therefore, if Holly had no alternative remedy for the alleged deprivation of his constitutional rights, it seems to me that he could certainly bring a *Bivens* action against these defendants. . . . The fact is that, at least in this country, incarceration of those charged with committing crimes is, and always has been, the province and prerogative of the government. That historically immunity has not been afforded those performing some correctional duties demonstrates only that the government has delegated some of its correctional functions to private actors. . . . These correctional functions have not been ‘exclusively public,’ . . . only in the sense that private individuals have long been empowered by the government to fulfill the tasks involved in the fundamentally governmental function of incarceration of criminals. But this government delegation of some duties to private persons or entities does not change the public character of the underlying function performed by ‘private correctional providers,’ as the Court recognized in *Malesko* Indeed, in *Richardson* itself, the Court recognized that its historical discussion did not apply to questions of governmental action. After concluding that the defendants lacked qualified immunity, the *Richardson* Court remanded for a determination of whether the defendants were, in fact, liable as governmental actors for their operation, confinement, and care of inmates. . . . If the Court’s historical analysis of ‘public function’ for immunity purposes were meant to control the ‘public function’ determination for liability purposes—as the majority holds today—the Court would not have needed to remand the case at all. . . . In holding to the contrary, the majority disregards all of this authority and creates a circuit split. Indeed, like the *en banc* majority in *West*, the majority’s view stands alone among the federal circuits addressing this point. [citing cases] Even more disturbingly, the majority, again like the *en banc* majority in *West*, misreads and misunderstands Supreme Court precedent. Pursuant to that precedent, the defendants here were clearly exercising authority fairly attributable to the government and so are government actors for liability purposes.”) *with Holly v. Scott*, 434 F.3d 287, 288 (4th Cir. 2006) (actions of private prison employees not fairly attributable to federal government).

See also Schneider v. Donald, 2006 WL 1344587, at *7, *8 (S.D. Ga. May 12, 2006) (“While the *Richardson* Court did not address whether privately employed prison guards should be subject to lawsuit under Section 1983, other courts have held that employees of privately run prison facilities are subject to Section 1983 liability. [citing cases] The rationale used by these courts for finding private individuals subject to Section 1983 liability is that the privately run prisons perform ‘a function which is traditionally the exclusive prerogative of the

state.’ . . . A curious result follows. Employees of privately run prison facilities may be sued under Section 1983 because those prisons perform a function that courts deem the ‘exclusive prerogative of the state.’ Those same employees, however, may not claim qualified immunity because, according to the Supreme Court in *Richardson*, prison administration has never been an exclusively state function. The liability of employees of private prison facilities under Section 1983 becomes even more muddled when one considers the parallel universe of liability created by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which provides an avenue of recovery for constitutional violations caused by federal employees. Two courts have recently held that employees of privately run federal prison facilities are not subject to liability under *Bivens*. *Holly v. Scott*, 434 F.3d 287, 294 (4th Cir.2006); *Peoples v. CCA Detention Centers*, 422 F.3d 1090, 1108 (10th Cir.2005). In reaching its decision in *Holly*, the Fourth Circuit followed the Supreme Court’s analysis in *Richardson* and found that prison administrators did not perform a traditionally ‘public function.’ . . . For prisoners, whereas their counterparts in federal private prison facilities may have no remedy at all in federal court for constitutional violations, and whereas their counterparts in state-run prison facilities must overcome the qualified immunity defense, prisoners in state private prison facilities may file under Section 1983 and not be concerned about the qualified immunity hurdle. The Court finds no reason for a prisoner in a state private facility to be in a more favorable position than his counterparts in state-run facilities or in federal facilities. The Court suggests that, to remedy this anomaly, the time has come for courts to revisit the liability of employees at state private prison facilities in light of the Supreme Court’s analysis in *Richardson*. Defendants employed by CCA in this case, however, have not raised the issue of qualified immunity, and the Court accordingly will leave resolution of the issue for another day.”).

The Supreme Court distinguished *Richardson* in *Filarsky v. Delia*, 132 S.Ct. 1657, 1665-68 (2012) (“[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis. . . . *Wyatt* is plainly not implicated by the circumstances of this case. Unlike the defendants in *Wyatt*, who were using the mechanisms of government to achieve their own ends, individuals working for the government in pursuit of government objectives are ‘principally concerned with enhancing the public good.’ . . . Whether such individuals have assurance that they will be able to seek protection if sued under § 1983 directly affects the government’s ability to achieve its objectives through their public service. Put simply, *Wyatt* involved no government agents, no government interests, and no government need for immunity. . . . *Richardson* was a self-consciously ‘narrow[]’

decision. . . The Court made clear that its holding was not meant to foreclose all claims of immunity by private individuals. . . Instead, the Court emphasized that the particular circumstances of that case—‘a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms’—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983. . . Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work. A straightforward application of the rule set out above is sufficient to resolve this case. Though not a public employee, Filarsky was retained by the City to assist in conducting an official investigation into potential wrongdoing. There is no dispute that government employees performing such work are entitled to seek the protection of qualified immunity. The Court of Appeals rejected Filarsky’s claim to the protection accorded Wells, Bekker, and Peel solely because he was not a permanent, full-time employee of the City. The common law, however, did not draw such distinctions, and we see no justification for doing so under § 1983. New York City has a Department of Investigation staffed by full-time public employees who investigate city personnel, and the resources to pay for it. The City of Rialto has neither, and so must rely on the occasional services of private individuals such as Mr. Filarsky. There is no reason Rialto’s internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York.”)

III. 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. “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 or on a statute, ordinance or regulation that is presumptively constitutional.

See Messerschmidt v. Millender, 132 S. Ct. 1235, 1249, 1250 (2012) (“[B]y holding in *Malley* that a magistrate’s approval does not automatically render an officer’s conduct reasonable, we did not suggest that approval by a magistrate or review by others is irrelevant to the objective reasonableness of the officers’ determination that the warrant was valid. . . . The fact that the officers secured these approvals is certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause.”)

Fiore v. City of Bethlehem, No. 11–3043, 2013 WL 203410, *4, *6 (3d Cir. Jan. 18, 2013) (not reported) (“Mr. Fiore starts at a severe disadvantage. Because the officers relied on ADA Taschner’s legal advice in securing the arrest warrant, we must presume that they are entitled to qualified immunity. . . . Indeed, Mr. Fiore’s uphill climb is even steeper: the arresting officers not only relied on ADA Taschner’s advice that probable cause existed, but they also obtained an arrest warrant from a neutral magistrate. [citing *Messerschmidt*] Of course, the officers’ reliance on an arrest warrant does not automatically mean that Mr. Fiore’s arrest was objectively reasonable. Mr. Fiore may still succeed by showing that no reasonable officer could have believed there was probable cause despite the existence of the warrant. This he cannot do. . . . In short, Mr. Fiore has not scaled the ‘high’ threshold for showing that no officer could have reasonably relied on the arrest warrant’s determination of probable cause. . . He has not shown that ‘every reasonable official’ would have understood that, despite the issuance of an arrest warrant, there was no probable cause for Mr. Fiore’s arrest. . . The officers are therefore entitled to qualified immunity.”)

Kelly v. Borough Of Carlisle, 622 F.3d 248, 251, 254-56, 258, 259 (3d Cir. 2010) (“The gravamen of Kelly’s appeal—that the District Court erred when it held that Officer Rogers’s reliance upon legal advice before he arrested Kelly shielded him from liability—raises a question of first impression in the Third Circuit. . . . Recognizing its discretion to do so under *Pearson*, the District Court bypassed the question of whether Kelly’s constitutional rights were violated and first considered whether the law was clearly established. Although the District Court explicitly held that the First Amendment law was not clearly established, its analysis of the Fourth Amendment did not engage the relevant state court precedents interpreting the Wiretap Act. Instead, the District Court simply concluded that Officer Rogers acted reasonably under the circumstances. . . . Kelly claims Officer Rogers violated his clearly established Fourth Amendment

rights by arresting him without probable cause. In challenging the District Court's conclusion that Officer Rogers acted reasonably, Kelly contends the District Court failed to analyze the Wiretap Act and inappropriately relied on the presence of legal advice. Conversely, Officer Rogers argues that reliance on a prosecutor's advice is a permissible consideration in determining the reasonableness of his actions, and that the District Court correctly held his reliance was reasonable. . . . Neither the Supreme Court nor this Court has squarely addressed the question of whether a police officer's reliance upon legal advice cloaks him with qualified immunity. Although there is no holding directly on point, we do not write on a blank slate. . . . Like the Supreme Court in *Malley*, we reject the notion that a police officer's decision to contact a prosecutor for legal advice is *per se* objectively reasonable. Nevertheless, we recognize the virtue in encouraging police, when in doubt, to seek the advice of counsel. Considering the proliferation of laws and their relative complexity in the context of a rapidly changing world, we cannot fairly require police officers in the field to be as conversant in the law as lawyers and judges who have the benefit not only of formal legal training, but also the advantage of deliberate study. Consistent with these principles, the First Circuit has stated that advice obtained from a prosecutor prior to making an arrest 'should be factored into the totality of the circumstances and considered in determining the officer's entitlement to qualified immunity.' *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir.2004) (collecting cases from other circuits) Although we agree with much of the First Circuit's opinion in *Cox*, we do not adopt its 'totality of the circumstances' approach. In our view, encouraging police to seek legal advice serves such a salutary purpose as to constitute a 'thumb on the scale' in favor of qualified immunity. Accordingly, we hold that a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause. That reliance must itself be objectively reasonable, however, because 'a wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one.' *Id.* at 34. Accordingly, a plaintiff may rebut this presumption by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice. . . . In addition to its failure to make essential factual findings, the District Court did not analyze sufficiently the state of the law at the time of Kelly's arrest. . . . Instead, the District Court relied upon the mere existence of legal advice without considering the relative clarity or obscurity of the Pennsylvania Wiretap Act and the cases interpreting it. This was error. . . . In light of the foregoing precedents, at the time of Kelly's arrest, it was clearly established that a reasonable expectation of privacy was a prerequisite for a Wiretap Act violation. Even more to the point, two Pennsylvania Supreme Court cases—one almost 20 years old at the time of

Kelly's arrest had held that covertly recording police officers was not a violation of the Act. Finally, it was also clearly established that police officers do not have a reasonable expectation of privacy when recording conversations with suspects. . . . In sum, because the District Court did not consider the facts in the light most favorable to Kelly, did not evaluate the objective reasonableness of Officer Rogers's decision to rely on ADA Birbeck's advice in light of those facts, and did not evaluate sufficiently the state of Pennsylvania law at the relevant time, we will vacate the summary judgment insofar as it granted qualified immunity to Officer Rogers on Kelly's Fourth Amendment claims and remand for additional factfinding and application of the proper legal standard.")

[See also *Kelly v. Borough of Carlisle*, 815 F.Supp.2d 810, 814-20 (M.D. Pa. 2011) ("In its opinion remanding this matter, the Court of Appeals outlined three questions for this Court's consideration. The first two questions are questions of fact, namely: (1) whether Plaintiff hid the camera and was in fact 'secretly' recording Defendant during the stop; and (2) whether Defendant called ADA Birbeck to seek legal advice. . . . The third question is a question of law. The Court of Appeals held that it was clearly established that probable cause did not exist to arrest Plaintiff for a violation of the Pennsylvania Wiretap Act. In light of this holding, the court of appeals asked this Court to determine 'how the Pennsylvania Wiretap Act fits into the landscape painted' by cases holding that police officers generally have a duty to know the basic elements of the laws they enforce. . . . The Court interprets this directive as requiring it to determine whether Defendant's erroneous probable cause determination was unreasonable as a matter of law and therefore not entitled to qualified immunity. Because an affirmative response to the legal inquiry would obviate the need for any further findings of fact, the Court will consider this issue first. Then, if necessary, the Court will make the findings of fact ordered by the court of appeals. . . . In the present case, a finding that the Defendant is not, as a matter of law, entitled to qualified immunity solely because he made an erroneous probable cause determination regarding a statute that was clearly established would unfairly burden police officers and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' . . . Although the law in this matter was clearly established and showed that Defendant did not have probable cause to make an arrest, the Court cannot conclude that Defendant must be denied qualified immunity on this basis. . . . In the case at bar, the Court is bound to assume certain facts. First, it must assume that during the stop Plaintiff made an audio and visual recording of Defendant. Plaintiff did not request Defendant's permission to make the recording, nor did Plaintiff tell Defendant he was making the recording. Plaintiff, sitting in the passenger seat as Defendant was standing on the driver's side of the car, kept the camera in his lap the entire time Defendant was at the car. The Court must further

assume, however, that although Plaintiff's hands were in his lap, his hands were not covering the camera. In addition, Defendant saw Plaintiff holding the camera measuring approximately two inches wide by four inches long by two inches tall at the outset of the stop and did not object to the recording until after issuing Shopp a traffic citation. Before arresting Plaintiff, Defendant confiscated the camera and called ADA Birbeck. Defendant informed ADA Birbeck that he had pulled over a truck for a traffic violation and that the passenger in the truck had been secretly recording him without his permission. Defendant did not inform ADA Birbeck that pursuant to standard Carlisle Police Department procedure he was also recording the stop. After relaying these facts, Defendant asked if the conduct gave rise to a Wiretap Act violation. After reviewing the statute, ADA Birbeck informed Defendant that there was probable cause for an arrest and gave Defendant an approval number to charge Plaintiff. As the Court previously explained, when viewed in a light most favorable to Plaintiff, these facts could give rise to the conclusion that Defendant deliberately misled ADA Birbeck when he called for permission to charge Plaintiff. If a jury concluded that Defendant misled ADA Birbeck to secure an approval to arrest, then the Court could not conclude that Defendant relied in good faith on ADA Birbeck's advice. . . . Accordingly, although qualified immunity should be decided at the earliest possible stage in the litigation, . . . the outstanding dispute of material fact prevents the Court from making the qualified immunity determination at summary judgment. . . . This is not to say that Defendant is not entitled to qualified immunity. Rather, the Court concludes that it requires a jury to resolve the outstanding questions of fact identified in this memorandum prior to making the qualified immunity determination.".]

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.”)

C. Demise of the “Rigid Order of Battle”

1. *Pearson v. Callahan*

In *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Court reviewed a decision of the Court of Appeals of the Tenth Circuit that had held the “consent-once-removed” doctrine – which permits a warrantless entry into the home by police when consent has been given to an undercover officer who has observed contraband in the home—did not apply when the person to whom consent was given was a police informant rather than a police officer. The Court of Appeals also denied qualified immunity to the officers involved, noting that “the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances.” *Callahan v. Millard County*, 494 F.3d 891, 898 (10th Cir. 2007), *rev’d by Pearson v. Callahan*, 129 S. Ct. 808 (2009). In granting certiorari, the Supreme Court directed the parties to brief and argue whether *Saucier* should be overruled.

In an unanimous opinion authored by Justice Alito, the Court reexamined the mandatory constitutional-question-first procedure required by *Saucier* and concluded “that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained.” 129 S. Ct. at 817. The Court acknowledged much of the criticism that had been leveled at the “rigid order of battle” by lower court judges and by members of the Court. *Id.* The Court justified its overruling of precedent by highlighting the various criticisms that have been directed at *Saucier’s* two-step protocol: (1) Deciding the constitutional question first often results in substantial expenditures of resources by both the parties and the courts on “questions that have no effect on the outcome of the case.” *Id.* at 818. (2) The development of constitutional doctrine is not furthered by decisions that are often “so fact-bound that the decision provides little guidance for future cases.” *Id.* at 819. (3) It makes little sense to have lower courts forced to decide a constitutional question that is pending in a higher court or before an en banc panel. *Id.* (4) It likewise does little to further the development of constitutional precedent to force a decision that depends on “an uncertain interpretation of state law.” *Id.* (5) Requiring a constitutional decision at the pleading stage based on bare or sketchy allegations of fact or one at the summary judgment stage resting on “woefully inadequate” briefs creates a risk of “bad decisionmaking.” *Id.* at 820. (6) The mandated two-step analysis often shields constitutional decisions from appellate review when the defendant loses on the “merits” question but prevails on the clearly-established-law prong of the analysis. Such unreviewed decisions may then have “a serious prospective effect” on conduct. *Id.* (7)

Finally, the approach requires unnecessary determinations of constitutional law and “departs from the general rule of constitutional avoidance.” *Id.* at 821.

While abandoning the mandatory nature of two-step analysis, the Court continued to recognize that the approach can be beneficial in promoting “the development of constitutional precedent[.]” *Id.* at 818, and “is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.” *Id.* In the end, the Court has left it to the lower court judges to decide, as a matter of discretion, what “order of decisionmaking will best facilitate the fair and efficient disposition of each case.” *Id.* at 821. The Court addressed expressed “misgivings” about its decision. First, the *Saucier* approach is not prohibited; it is simply no longer mandated. Second, constitutional law will continue to develop in other contexts, such as criminal cases, cases involving claims against government entities and cases involving claims for injunctive relief. Third, the Court does not predict a flood of suits against local governments by plaintiffs pursuing novel claims. *Id.* at 821, 822. Nor does the Court anticipate a new “cottage industry of litigation” over the proper standards to use in deciding whether to reach the merits in a given case. *Id.* at 822.

Without addressing or overruling the constitutional holding of the Court of Appeals, the Court reversed the Tenth Circuit on the grounds that the law on the “consent-once-removed” doctrine was not clearly established at the time of the challenged conduct such that a reasonable officer would have understood the conduct here to be unlawful. As the Court explained:

When the entry at issue here occurred in 2002, the ‘consent-once-removed’ doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980’s. [citing cases] It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine’s application to cases involving consensual entries by private citizens acting as confidential informants. See *United States v. Paul*, 808 F.2d, 645, 648 (1986). The Sixth Circuit reached the same conclusion after the events that gave rise to respondent’s suit, see *United States v. Yoon*, 398 F.3d 802, 806-808, cert. denied, 546 U.S. 977, 126 S. Ct. 548, 163 L.Ed.2d 460 (2005), and prior to the Tenth Circuit’s decision in the present case, no court of appeals had issued a contrary decision. The officers here were entitled to rely on these cases, even though their own Federal Circuit had not

yet ruled on “consent-once-removed” entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions. . . . [H]ere, where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

129 S. Ct. at 822, 823.

2. *Post-Pearson* Cases

U.S. SUPREME COURT

Reichle v. Howards, 132 S. Ct. 2088, 2093-97 (2012) (“We granted certiorari on two questions: whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Howards’ arrest so held. . . . If the answer to either question is ‘no,’ then the agents are entitled to qualified immunity. We elect to address only the second question. We conclude that, at the time of Howards’ arrest, it was not clearly established that an arrest supported by probable cause could violate the First Amendment. We, therefore, reverse the judgment of the Court of Appeals denying petitioners qualified immunity. . . . The ‘clearly established’ standard is not satisfied here. This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards’ arrest. . . . Here, the right in question is not the general right to be free from retaliation for one’s speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause. This Court has never held that there is such a right. . . . We next consider Tenth Circuit precedent. Assuming *arguendo* that controlling Court of Appeals’ authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit’s cases do not satisfy the ‘clearly established’ standard here. . . . At the time of Howards’ arrest, *Hartman*’s impact on the Tenth Circuit’s precedent governing retaliatory arrests was far from clear. Although the facts of *Hartman* involved only a retaliatory prosecution, reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests. . . . A reasonable official also could have interpreted *Hartman*’s rationale to apply to retaliatory arrests. . . . Like retaliatory prosecution cases, evidence of the presence or absence

of probable cause for the arrest will be available in virtually every retaliatory arrest case. Such evidence could be thought similarly fatal to a plaintiff's claim that animus caused his arrest, given that retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury. . . . To be sure, we do not suggest that *Hartman's* rule in fact extends to arrests. Nor do we suggest that every aspect of *Hartman's* rationale could apply to retaliatory arrests. *Hartman* concluded that the causal connection in retaliatory prosecution cases is attenuated because those cases necessarily involve the animus of one person and the injurious action of another, 547 U.S., at 262, but in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest. Moreover, *Hartman* noted that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision is further weakened by the 'presumption of regularity accorded to prosecutorial decisionmaking.' . . . That presumption does not apply here. Nonetheless, the fact remains that, for qualified immunity purposes, at the time of Howards' arrest it was at least arguable that *Hartman's* rule extended to retaliatory arrests. . . . *Hartman* injected uncertainty into the law governing retaliatory arrests, particularly in light of *Hartman's* rationale and the close relationship between retaliatory arrest and prosecution claims. This uncertainty was only confirmed by subsequent appellate decisions that disagreed over whether the reasoning in *Hartman* applied similarly to retaliatory arrests. Accordingly, when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. Petitioners Reichle and Doyle are thus entitled to qualified immunity.")

Reichle v. Howards, 132 S. Ct. 2088, 2097, 2098 (2012) (Ginsburg, J., with whom Breyer, J., joins, concurring in the judgment) ("Were defendants ordinary law enforcement officers, I would hold that *Hartman v. Moore* . . . does not support their entitlement to qualified immunity. . . . A similar causation problem will not arise in the typical retaliatory-arrest case. Unlike prosecutors, arresting officers are not wholly immune from suit. As a result, a plaintiff can sue the arresting officer directly and need only show that the officer (not some other official) acted with a retaliatory motive. Because, in the usual retaliatory arrest case, there is no gap to bridge between one government official's animus and a second government official's action, *Hartman's* no-probable-cause requirement is inapplicable. Nevertheless, I concur in the Court's judgment. Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy. In performing that protective function, they rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge. Whatever the views of Secret Service Agents Reichle and Doyle on the administration's policies in Iraq,

they were duty bound to take the content of Howards' statements into account in determining whether he posed an immediate threat to the Vice President's physical security. Retaliatory animus cannot be inferred from the assessment they made in that regard. If rational, that assessment should not expose them to claims for civil damages.")

Messerschmidt v. Millender, 132 S. Ct. 1235, 1244-51 (2012) ("The validity of the warrant is not before us. The question instead is whether Messerschmidt and Lawrence are entitled to immunity from damages, even assuming that the warrant should not have been issued. . . . Under these circumstances—set forth in the warrant—it would not have been unreasonable for an officer to conclude that there was a 'fair probability' that the sawed-off shotgun was not the only firearm Bowen owned. . . . And it certainly would have been reasonable for an officer to assume that Bowen's sawed-off shotgun was illegal. . . . Evidence of one crime is not always evidence of several, but given Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned. [footnote omitted] Given the foregoing, it would not have been 'entirely unreasonable' for an officer to believe, in the particular circumstances of this case, that there was probable cause to search for all firearms and firearm-related materials. . . . It would . . . not have been unreasonable—based on the facts set out in the affidavit—for an officer to believe that evidence regarding Bowen's gang affiliation would prove helpful in prosecuting him for the attack on Kelly. . . . Not only would such evidence help to establish motive, either apart from or in addition to any domestic dispute, it would also support the bringing of additional, related charges against Bowen for the assault. . . . Moreover, even if this were merely a domestic dispute, a reasonable officer could still conclude that gang paraphernalia found at the Millenders' residence would aid in the prosecution of Bowen by, for example, demonstrating Bowen's connection to other evidence found there. . . . Whatever the use to which evidence of Bowen's gang involvement might ultimately have been put, it would not have been 'entirely unreasonable' for an officer to believe that the facts set out in the affidavit established a fair probability that such evidence would aid the prosecution of Bowen for the criminal acts at issue. . . . Whether any of these facts, standing alone or taken together, actually establish probable cause is a question we need not decide. Qualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments.' *al-Kidd*, 563 U.S., at — (slip op., at 12). The officers' judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not 'plainly incompetent.' . . . On top of all this, the fact that the officers sought and obtained approval of the warrant application from a

superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause. . . . In light of the foregoing, it cannot be said that ‘no officer of reasonable competence would have requested the warrant.’ . . . Indeed, a contrary conclusion would mean not only that Messerschmidt and Lawrence were ‘plainly incompetent,’ . . . but that their supervisor, the deputy district attorney, and the magistrate were as well. . . . [B]y holding in *Malley* that a magistrate’s approval does not automatically render an officer’s conduct reasonable, we did not suggest that approval by a magistrate or review by others is irrelevant to the objective reasonableness of the officers’ determination that the warrant was valid. . . . The fact that the officers secured these approvals is certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause. . . . In contrast to *Groh*, any defect here would not have been obvious from the face of the warrant. Rather, any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all the items listed in the warrant. This is not an error that ‘just a simple glance’ would have revealed. . . . Indeed, unlike in *Groh*, the officers here did not merely submit their application to a magistrate. They also presented it for review by a superior officer, and a deputy district attorney, before submitting it to the magistrate. The fact that none of the officials who reviewed the application expressed concern about its validity demonstrates that any error was not obvious. *Groh* plainly does not control the result here. . . . The question in this case is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued. It is instead whether the magistrate so obviously erred that any reasonable officer would have recognized the error. The occasions on which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions. Even if the warrant in this case were invalid, it was not so obviously lacking in probable cause that the officers can be considered ‘plainly incompetent’ for concluding otherwise. . . . The judgment of the Court of Appeals denying the officers qualified immunity must therefore be reversed.”)

Messerschmidt v. Millender, 132 S. Ct. 1235, 1252 (2012) (Kagan, J., concurring in part and dissenting in part) (“*Malley* made clear that qualified immunity turned on the officer’s own ‘professional judgment,’ considered separately from the mistake of the magistrate. . . . And what we said in *Malley* about a magistrate’s authorization applies still more strongly to the approval of other police officers or state attorneys. All those individuals, as the Court puts it, are ‘part of the

prosecution team.’. . . To make their views relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity on each other for unreasonable conduct—like applying for a warrant without anything resembling probable cause.”)

Messerschmidt v. Millender, 132 S. Ct. 1235, 1253-61 (2012) (Sotomayor, J., with whom Ginsburg, J., joins, dissenting) (“In this case, police officers investigating a specific, non-gang-related assault committed with a specific firearm (a sawed-off shotgun) obtained a warrant to search for all evidence related to ‘any Street Gang,’ ‘[a]ny photographs ... which may depict evidence of criminal activity,’ and ‘any firearms.’. . . They did so for the asserted reason that the search might lead to evidence related to other gang members and other criminal activity, and that other ‘[v]alid warrants commonly allow police to search for “firearms and ammunition.”’. . . That kind of general warrant is antithetical to the Fourth Amendment. . . .The Court’s analysis bears little relationship to the record in this case, our precedents, or the purposes underlying qualified immunity analysis. For all these reasons, I respectfully dissent. . . . The operative question in this case, therefore, is whether—given that, as petitioners comprehended, the crime itself was not gang related—a reasonable officer nonetheless could have believed he had probable cause to seek a warrant to search the suspect’s residence for all evidence of affiliation not only with the suspect’s street gang, but ‘any Street Gang.’ He could not. . . . The majority has little difficulty concluding that because Bowen fired one firearm, it was reasonable for the police to conclude not only that Bowen must have possessed others, but that he must be storing these other weapons at his 73-year-old former foster mother’s home.[footnote omitted] Again, however, this is not what the police actually concluded, as Detective Messerschmidt’s deposition makes clear. . . .Even assuming that the police reasonably could have concluded that Bowen possessed other guns and was storing them at the Millenders’ home, I cannot agree that the warrant provided probable cause to believe any weapon possessed in a home in which 10 persons regularly lived—none of them the suspect in this case—was either ‘contraband or evidence of a crime.’. . . The majority asserts, without citation, that the magistrate’s approval is relevant to objective reasonableness. . . .In cases in which it would be not only wrong but unreasonable for any well-trained officer to seek a warrant, allowing a magistrate’s approval to immunize the police officer’s unreasonable action retrospectively makes little sense. . . .To the extent it proposes to cut back upon *Malley*, the majority will promote the opposite result—encouraging sloppy police work and ex-acerbating the risk that searches will not comport with the requirements of the Fourth Amendment. The Court also makes much of the fact that Detective Messerschmidt sent his proposed warrant application to two superior police officers and a district attorney

for review. Giving weight to that fact would turn the Fourth Amendment on its head. This Court made clear in *Malley* that a police officer acting unreasonably cannot obtain qualified immunity on the basis of a neutral magistrate's approval. It would be passing strange, therefore, to immunize an officer's conduct instead based upon the approval of other police officers and prosecutors. [footnote omitted] The effect of the Court's rule. . . is to hold blameless the 'plainly incompetent' action of the police officer seeking a warrant because of the 'plainly incompetent' approval of his superiors and the district attorney. . . . Qualified immunity properly affords police officers protection so long as their conduct is objectively reasonable. But it is not objectively reasonable for police investigating a specific, non-gang-related assault committed with a particular firearm to search for all evidence related to 'any Street Gang,' 'photographs ... which may depict evidence of criminal activity,' and all firearms. The Court reaches a contrary result not because it thinks that these police officers' stated reasons for searching were objectively reasonable, but because it thinks different conclusions might be drawn from the crime scene that reasonably might have led different officers to search for different reasons. That analysis, however, is far removed from qualified immunity's proper focus on whether *petitioners* acted in an objectively reasonable manner. Because petitioners did not, I would affirm the judgment of the Court of Appeals.")

Ryburn v. Huff, 132 S. Ct. 987, 990-92 (2012) (per curiam) ("No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposition direction. . . . A reasonable police officer could read these decisions to mean that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence. . . . The panel majority—far removed from the scene and with the opportunity to dissect the elements of the situation—confidently concluded that the officers really had no reason to fear for their safety or that of anyone else. As the panel majority saw things, it was irrelevant that the Huffs did not respond when the officers knocked on the door and announced their presence and when they called the home phone because the Huffs had no legal obligation to respond to a knock on the door or to answer the phone. The majority attributed no significance to the fact that, when the officers finally reached Mrs. Huff on her cell phone, she abruptly hung up in the middle of their conversation. And, according to the majority, the officers should not have been concerned by Mrs. Huff's reaction when they asked her if there were any guns in the house because Mrs. Huff 'merely asserted her right to end her conversation with the officers and returned to her home.' . . . Confronted with the facts found by the District Court, reasonable officers in the position of petitioners could have come to the

conclusion that there was an imminent threat to their safety and to the safety of others. The Ninth Circuit’s contrary conclusion was flawed for numerous reasons. . . . [T]he panel majority did not heed the District Court’s wise admonition that judges should be cautious about second-guessing a police officer’s assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent. . . . Judged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, petitioners’ belief that entry was necessary to avoid injury to themselves or others was imminently reasonable. In sum, reasonable police officers in petitioners’ position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent. And a reasonable officer could have come to such a conclusion based on the facts as found by the District Court. The petition for certiorari is granted, the judgment of the Ninth Circuit is reversed, and the case is remanded for the entry of judgment in favor of petitioners.”)

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080, 2083, 2085 (2011) (“Courts should think carefully before expending ‘scarce judicial resources’ to resolve difficult and novel questions of constitutional or statutory interpretation that will ‘have no effect on the outcome of the case.’ . . . When, however, a Court of Appeals does address both prongs of qualified-immunity analysis, we have discretion to correct its errors at each step. Although not necessary to reverse an erroneous judgment, doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote. The former occurs when the constitutional-law question is wrongly decided; the latter when what is not clearly established is held to be so. In this case, the Court of Appeals’ analysis at both steps of the qualified-immunity inquiry needs correction. . . . Because *al-Kidd* concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation. . . . A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’ . . . We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. . . . The constitutional question in this case falls far short of that

threshold. At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional. . . . [Ashcroft] deserves qualified immunity even assuming. . . that his alleged detention policy violated the Fourth Amendment.”)

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011) (Kennedy, J., joined by Ginsburg, J., Breyer, J., and Sotomayor, J., concurring) (“The Court’s holding is limited to the arguments presented by the parties and leaves unresolved whether the Government’s use of the Material Witness Statute in this case was lawful. . . . The scope of the statute’s lawful authorization is uncertain.”)

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2086, 2087 (2011) (Kennedy, J., concurring) (“The fact that the Attorney General holds a high office in the Government must inform what law is clearly established for the purposes of this case. . . . [T]he Attorney General occupies a national office and so sets policies implemented in many jurisdictions throughout the country. The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law. While it may be clear that one Court of Appeals has approved a certain course of conduct, other Courts of Appeals may have disapproved it, or at least reserved the issue. When faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction where the action is taken. . . . The Court of Appeals for the Ninth Circuit appears to have reasoned that a Federal District Court sitting in New York had authority to establish a legal rule binding on the Attorney General and, therefore, on federal law-enforcement operations conducted nationwide. . . . Of course, district court decisions are not precedential to this extent. . . . But nationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.”)

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2087 (2011) (Ginsburg, J., joined by Breyer, J., and Sotomayor, J., concurring in the judgment) (“Is a former U.S. Attorney General subject to a suit for damages on a claim that he instructed subordinates to use the Material Witness Statute, 18 U.S.C. § 3144, as a pretext to detain terrorist suspects preventively? Given *Whren* . . . I agree with the Court that no ‘clearly established law’ renders Ashcroft answerable in damages for the abuse of authority al-Kidd charged. . . . But I join Justice SOTOMAYOR in objecting to the Court’s disposition of al-Kidd’s Fourth Amendment claim on the merits; as she

observes, . . . that claim involves novel and trying questions that will ‘have no effect on the outcome of th[is] case.’”)

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2089, 2090 (2011) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., concurring in the judgment) (“I concur in the Court’s judgment reversing the Court of Appeals because I agree with the majority’s conclusion that Ashcroft did not violate clearly established law. I cannot join the majority’s opinion, however, because it unnecessarily ‘resolve[s][a] difficult and novel questio[n] of constitutional ... interpretation that will “have no effect on the outcome of the case.”’. Whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is, in my view, a closer question than the majority’s opinion suggests. Although the majority is correct that a government official’s subjective intent is generally ‘irrelevant in determining whether that officer’s actions violate the Fourth Amendment,’ . . . none of our prior cases recognizing that principle involved prolonged detention of an individual without probable cause to believe he had committed any criminal offense. We have never considered whether an official’s subjective intent matters for purposes of the Fourth Amendment in that novel context, and we need not and should not resolve that question in this case. All Members of the Court agree that, whatever the merits of the underlying Fourth Amendment question, Ashcroft did not violate clearly established law. The majority’s constitutional ruling is a narrow one premised on the existence of a ‘valid material-witness warran[t],’ *ante*, at 1—a premise that, at the very least, is questionable in light of the allegations set forth in al-Kidd’s complaint. Based on those allegations, it is not at all clear that it would have been ‘impracticable to secure [al-Kidd’s] presence ... by subpoena’ or that his testimony could not ‘adequately be secured by deposition.’. . . Nor is it clear that the affidavit supporting the warrant was sufficient; its failure to disclose that the Government had no intention of using al-Kidd as a witness at trial may very well have rendered the affidavit deliberately false and misleading. . . The majority assumes away these factual difficulties, but in my view, they point to the artificiality of the way the Fourth Amendment question has been presented to this Court and provide further reason to avoid rendering an unnecessary holding on the constitutional question. I also join Part I of Justice KENNEDY’s concurring opinion. As that opinion makes clear, this case does not present an occasion to address the proper scope of the material witness statute or its constitutionality as applied in this case. Indeed, nothing in the majority’s opinion today should be read as placing this Court’s imprimatur on the actions taken by the Government against al-Kidd.”)

Camreta v. Greene, 131 S. Ct. 2020, 2026-36 & n.11 (2011) (“We conclude that this Court generally may review a lower court’s constitutional ruling at the behest of a government official granted immunity. But we may not do so in this case for reasons peculiar to it. The case has become moot because the child has grown up and moved across the country, and so will never again be subject to the Oregon in-school interviewing practices whose constitutionality is at issue. We therefore do not reach the Fourth Amendment question in this case. In line with our normal practice when mootness frustrates a party’s right to appeal, see *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950), we vacate the part of the Ninth Circuit’s opinion that decided the Fourth Amendment issue. . . . S.G. . . . alleges two impediments to our exercise of statutory authority here, one constitutional and the other prudential. First, she claims that Article III bars review because petitions submitted by immunized officials present no case or controversy. . . . Second, she argues that our settled practice of declining to hear appeals by prevailing parties should apply with full force when officials have obtained immunity. . . . We disagree on both counts. . . . [T]he critical question under Article III is whether the litigant retains the necessary personal stake in the appeal This Article III standard often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution. That is not because a court has made a retrospective judgment about the lawfulness of the officials’ behavior, for that judgment is unaccompanied by any personal liability. Rather, it is because the judgment may have prospective effect on the parties. . . . If the official regularly engages in that conduct as part of his job (as *Camreta* does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action. . . . Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. He thus can demonstrate, as we demand, injury, causation, and redressability. . . . Article III aside, an important question of judicial policy remains. As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so. . . . On the few occasions when we have departed from that principle, we have pointed to a ‘policy reaso[n] ... of sufficient importance to allow an appeal’ by the winner below. . . . We think just such a reason places qualified immunity cases in a special category when it comes to this Court’s review of appeals brought by winners. The constitutional determinations that prevailing parties ask us to consider in these cases are not mere dicta or ‘statements in opinions.’ . . . They are rulings that have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong. . . . And more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of

immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity—and observance—of constitutional rules. . . . [W]e have permitted lower courts to avoid avoidance—that is, to determine whether a right exists before examining whether it was clearly established. . . . In general, courts should think hard, and then think hard again, before turning small cases into large ones. But it remains true that following the two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial to clarify the legal standards governing public officials. . . . Here, the Court of Appeals followed exactly this two-step process, for exactly the reasons we have said may in select circumstances make it 'advantageous.' . . . To that end, the court adopted constitutional standards to govern all in-school interviews of suspected child abuse victims. . . . Given its purpose and effect, such a decision is reviewable in this Court at the behest of an immunized official. No mere dictum, a constitutional ruling preparatory to a grant of immunity creates law that governs the official's behavior. . . . This Court, needless to say, also plays a role in clarifying rights. Just as that purpose may justify an appellate court in reaching beyond an immunity defense to decide a constitutional issue, so too that purpose may support this Court in reviewing the correctness of the lower court's decision. . . . We emphasize, however, two limits of today's holding. First, it addresses only our own authority to review cases in this procedural posture. The Ninth Circuit had no occasion to consider whether it could hear an appeal from an immunized official: In that court, after all, S.G. appealed the judgment in the officials' favor. We therefore need not and do not decide if an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds. . . . Second, our holding concerns only what this Court *may* review; what we actually will choose to review is a different matter. That choice will be governed by the ordinary principles informing our decision whether to grant certiorari—a 'power [we] ... sparingly exercis[e].' . . . Although we reject S.G.'s arguments for dismissing this case at the threshold, we find that a separate jurisdictional problem requires that result: This case, we conclude, is moot. . . . When 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' we have no live controversy to review. . . . Time and distance combined have stymied our ability to consider this petition. . . . In this case, the happenstance of S.G.'s moving across country and becoming an adult has deprived Camreta of his appeal rights. Mootness has frustrated his ability to challenge the Court of Appeals' ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school. We therefore vacate the part of the Ninth Circuit's opinion that addressed that issue, and remand for further proceedings consistent with this opinion. . . . We leave untouched the Court of Appeals' ruling on qualified immunity and its corresponding dismissal of S.G.'s claim because S.G. chose not to challenge that

ruling. We vacate the Ninth Circuit’s ruling addressing the merits of the Fourth Amendment issue because, as we have explained, . . . that is the part of the decision that mootness prevents us from reviewing but that has prospective effects on *Camreta*.”)

Camreta v. Greene, 131 S. Ct. 2020, 2036 (2011) (Scalia, J., concurring) (“I join the Court’s opinion, which reasonably applies our precedents, strange though they may be. The alternative solution, as Justice KENNEDY suggests, . . . is to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity. . . The parties have not asked us to adopt that approach, but I would be willing to consider it in an appropriate case.”)

Camreta v. Greene, 131 S. Ct. 2020, 2036 (2011) (2011) (Sotomayor, J., joined by Breyer, J., concurring in the judgment) (“I agree with the Court’s conclusion that this case is moot and that vacatur is the appropriate disposition; unlike the majority, however, I would go no further. As the exchange between the majority and Justice KENNEDY demonstrates, the question whether *Camreta*, as a prevailing party, can obtain our review of the Ninth Circuit’s constitutional ruling is a difficult one. There is no warrant for reaching this question when there is clearly no longer a genuine case or controversy between the parties before us.”)

Camreta v. Greene, 131 S. Ct. 2020, 2038, 2040-45 (2011) (Kennedy, J., joined by Thomas, J., dissenting) (“[T]he Court today, in an altogether unprecedented disposition, says that it vacates not a judgment but rather ‘part of the Ninth Circuit’s opinion.’ . . The Court’s conclusion is unsettling in its implications. Even on the Court’s reading of our cases, the almost invariable rule is that prevailing parties are not permitted to obtain a writ of certiorari. . . After today, however, it will be common for prevailing parties to seek certiorari based on the Court’s newfound exception. . . . As today’s decision illustrates, our recent qualified immunity cases tend to produce decisions that are in tension with conventional principles of case-or-controversy adjudication. . . . The goal was to make dictum precedent, in order to hasten the gradual process of constitutional interpretation and alter the behavior of government defendants. . .The present case brings the difficulties of that objective into perspective. In express reliance on the permission granted in *Pearson*, the Court of Appeals went out of its way to announce what may be an erroneous interpretation of the Constitution; and, under our case law, the Ninth Circuit must give that dictum legal effect as precedent in future cases. . . . [T]he Court’s standing analysis will be inapplicable in most qualified immunity cases. . . When an officer is sued for taking an extraordinary action, such as using excessive force during a high-speed car chase, there is little possibility that a constitutional decision on the merits will again influence that

officer's conduct. The officer, like petitioner Alford or the petitioner in *Bunting*, would have no interest in litigating the merits in the Court of Appeals and, under the Court's rule, would seem unable to obtain review of a merits ruling by petitioning for certiorari. . . . This problem will arise with great frequency in qualified immunity cases. Once again, the decision today allows plaintiffs to obtain binding constitutional determinations on the merits that lie beyond this Court's jurisdiction to review. The Court thus fails to solve the problem it identifies. . . . It is most doubtful that Article III permits appeals by any officer to whom the reasoning of a judicial decision might be applied in a later suit. Yet that appears to be the implication of the Court's holding. The favorable judgment of the Court of Appeals did not in itself cause petitioner Camreta to suffer an Article III injury entitling him to appeal. . . . On the contrary, Camreta has been injured by the decision below to no greater extent than have hundreds of other government officers who might argue that they too have been affected by the unnecessary statements made by the Court of Appeals. . . . It is revealing that the Court creates an exception to the prevailing party rule while making clear that the Courts of Appeals are not to follow suit, in any context. . . . If today's decision proves to be more than an isolated anomaly, the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect. . . . If qualified immunity cases were treated like other cases raising constitutional questions, settled principles of constitutional avoidance would apply. So would conventional rules regarding dictum and holding. Judicial observations made in the course of explaining a case might give important instruction and be relevant when assessing a later claim of qualified immunity. . . . But as dicta those remarks would not establish law and would not qualify as binding precedent. . . . The distance our qualified immunity jurisprudence has taken us from foundational principles is made all the more apparent by today's decision. The Court must construe two of its precedents in so broad a manner that they are taken out of their proper and logical confines. To vacate the reasoning of the decision below, the Court accepts that *obiter dictum* is not just binding precedent but a judgment susceptible to plenary review. I would dismiss this case and note that our jurisdictional rule against hearing appeals by prevailing parties precludes petitioners' attempt to obtain review of judicial reasoning disconnected from a judgment.")

THIRD CIRCUIT

Marcavage v. National Park Service, 666 F.3d 856, 859, 860 (3d Cir. 2012) ("As the Supreme Court has noted, '[i]f judges ... disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the

controversy.’ . . . Both a United States Magistrate Judge and a United States District Judge previously determined that the Sixth Street sidewalk was a nonpublic forum—an area that is not used by tradition or designation for public expression and that consequently carries a less stringent standard of review when assessing government justifications for limiting speech. . . . This led both judges to find Marcavage’s arrest constitutionally permissible. While we ultimately held otherwise, the fact that two judges found no First Amendment violation indicates that Marcavage’s constitutional right to demonstrate on the Sixth Street sidewalk was not clearly established. . . . [T]o strip Saperstein and Crane of qualified immunity requires the violation of a clearly established constitutional right. Marcavage’s right to demonstrate on the Sixth Street sidewalk was far from clear at the time of his arrest. . . . Until we reversed the Magistrate Judge and District Judge in *Marcavage III*, Saperstein and Crane had made no mistake. They had better than probable cause—they had evidence sufficient for a conviction. As in the First Amendment context, qualified immunity bars Marcavage’s Fourth Amendment damages claim.”)

Schneyder v. Smith, 653 F.3d 313, 328-31 & n.21 (3d Cir. 2011) (“To summarize what we have said so far: The liberty interests of a detained material witness are protected by the Fourth Amendment, because this court adheres to Justice Ginsburg’s ‘continuing seizure’ theory. Schneyder’s detention was a seizure, but because she was not arrested as a criminal suspect ‘probable cause’ is the wrong lens through which to examine the case. Instead, to determine whether her rights were violated we must assess whether the seizure was ‘reasonable’ within the Fourth Amendment’s meaning. This requires balancing Schneyder’s interests against the government’s, and a jury could conclude that Schneyder’s interest in going free outweighed the government’s interest in keeping her locked up until the new trial date. If Schneyder’s rights were violated, Smith was the only official in a position to prevent it—by keeping Judge Means informed of significant changes in the facts underlying the detention order. Smith’s duty not to cause a violation of Schneyder’s constitutional rights required her to promptly report the continuance in the *Overby* case to Judge Means—though she would have been free to argue that continued detention was warranted even in light of the new facts. Because Smith did not fulfill this obligation, Schneyder has made out a prima facie case for recovery of damages under § 1983. . . . Because the foregoing discussion takes place in the context of qualified immunity, our inquiry is not complete. We still must decide whether the duty we have just identified was clearly established at the time the violation occurred. . . . Although we are aware of no decision predating Smith’s actions that involved the sort of claim that Schneyder has raised here, we are nevertheless convinced that this is one of those exceedingly rare cases in which the existence of the plaintiff’s constitutional right

is so manifest that it is clearly established by broad rules and general principles. That is, this ought to have been a member of that class of ‘easiest cases’ that, according to Judge Posner, ‘don’t even arise.’ . . . No reasonable prosecutor would think that she could indefinitely detain an innocent witness pending trial without obtaining reauthorization. And there can be no doubt that is what Smith intended. The trial at which Schneyder was to testify did not take place until more than a year and a half after her arrest, and there is no indication that Smith would ever have taken steps of her own volition to free her key witness or even to have her status reviewed. If the initial continuance was not something Smith felt a need to report, there is no reason to think that she would have advised Judge Means of any of the subsequent developments. Were it not for the persistence of Schneyder’s family and the generous efforts of a public defender with cases of his own and no prior connection to the plaintiff, there can be no telling how long she would have remained locked up. . . . The judges comprising this panel—all three former prosecutors—feel secure in declaring that any reasonable attorney in Smith’s position would have known that her course of action was so outrageous as to be unconstitutional, even in the absence of a case telling her so. ‘When properly applied, [qualified immunity] protects “all but the plainly incompetent or those who knowingly violate the law.”’ The self-evident wrongfulness of Smith’s conduct is sufficient to place her in either category. She is not entitled to qualified immunity.”)

Schmidt v. Creedon, 639 F.3d 587, 589, 590, 598, 599 (3d Cir. 2011) (“We now hold that, except for extraordinary situations, under Pennsylvania law, even when union grievance procedures permit a policeman to challenge his suspension after the fact, a brief and informal pre-termination or pre-suspension hearing is necessary. However, because this rule was not clearly established at the time of Schmidt’s suspension, we conclude that appellees are entitled to qualified immunity. . . . At the time of Schmidt’s suspension, other circuits had concluded that ‘due process requires pre-termination notice and an opportunity to respond even where a [collective bargaining agreement] provides for post-termination procedures that fully compensate wrongfully terminated employees.’ [collecting cases] These cases did not clearly establish that Schmidt was entitled to a hearing before being suspended—as opposed to being terminated. In light of the closeness of the question, the absence of clear precedent in this or other circuits, and the District Court’s thoughtful conclusion, we cannot say that ‘it would be clear to a reasonable [official] that his conduct was unlawful in the situation’ presented to appellees in this case.”)

Ray v. Township of Warren, 626 F.3d 170, 177 (3d Cir. 2010) (“We agree with the conclusion of the Seventh, Ninth, and Tenth Circuits on this issue, and

interpret the Supreme Court's decision in *Cady* as being expressly based on the distinction between automobiles and homes for Fourth Amendment purposes. The community caretaking doctrine cannot be used to justify warrantless searches of a home. Whether that exception can ever apply outside the context of an automobile search, we need not now decide. It is enough to say that, in the context of a search of a home, it does not override the warrant requirement of the Fourth Amendment or the carefully crafted and well-recognized exceptions to that requirement. . . . Regardless of whether there were exigent circumstances in this case, however, the responding officers are entitled to qualified immunity. . . . There is no dispute that at the time of the officers' actions in this case, two Circuits had arguably extended the community caretaking doctrine to warrantless entries into homes. . . . Moreover, this Circuit had addressed the issue only in a nonprecedential opinion, *Burr v. Hasbrouck Heights*, 131 Fed. Appx. 799 (3d Cir.2005), one month prior to the officers' actions, and had left unresolved whether a community caretaking exception might justify a warrantless search of a home. Until our decision in this case, the question of whether the community caretaking doctrine could justify a warrantless entry into a home was unanswered in our Circuit. Given the conflicting precedents on this issue from other Circuits, we cannot say it would have been apparent to an objectively reasonable officer that entry into Ray's home on June 17, 2005 was a violation of the law.")

Kelly v. Borough Of Carlisle, 622 F.3d 248, 259 & n.6, 260, 262 (3d Cir. 2010) ("Kelly also claims the District Court erred when it held his First Amendment right to videotape matters of public concern was not clearly established. . . . Before turning to Kelly's First Amendment claims, we will address the amicus brief submitted by the American Civil Liberties Union. The ACLU takes issue with the District Court's decision to skip the 'violation prong' of the qualified immunity inquiry and proceed directly to the 'clearly established' prong. The ACLU urges us to establish a rule that the *Saucier* sequence should be the default approach to qualified immunity analysis, especially in cases alleging violations of the First Amendment. The ACLU suggests that deviation from the *Saucier* sequence is proper only in cases involving unusual facts or uncertain state law. We decline to adopt the rule proffered by the ACLU because it is inconsistent with *Pearson*. Although the Supreme Court acknowledged that *Saucier's* two-step procedure is often advantageous, *Pearson*, 129 S.Ct. at 821, it also recognized that the costs of *Saucier* outweigh its benefits in some cases. . . . In our view, it would be unfaithful to *Pearson* if we were to require district courts to engage in 'an essentially academic exercise' by first analyzing the purported constitutional violation in a certain category of cases. . . . Should the Supreme Court decide that *Saucier* sequencing is necessary in First Amendment cases or any other type of case, it may establish such a rule. It is not our place to do so in light of *Pearson*,

and, consequently, the District Court did not abuse its discretion when it bypassed the constitutional question and proceeded to the clearly established prong. . . . Kelly contends his First Amendment rights were violated when Rogers seized his video camera (prior to calling ADA Birbeck) and when Rogers arrested him. In defense, Rogers argues that a ‘right to surreptitiously videotape a police officer without an expressive or communicative purpose’ was not clearly established at the time of the arrest. . . . We have not addressed directly the right to videotape police officers. . . . Though we have not had occasion to decide this issue, several other courts have addressed the right to record police while they perform their duties. We turn now to these cases, as well as cases regarding the more general right to record matters of public concern. . . . In light of the foregoing, we conclude there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on ‘fair notice’ that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment. Although *Smith* and *Robinson* announce a broad right to videotape police, other cases suggest a narrower right. *Gilles* and *Pomykacz* imply that videotaping without an expressive purpose may not be protected, and in *Whiteland Woods* we denied a right to videotape a public meeting. Thus, the cases addressing the right of access to information and the right of free expression do not provide a clear rule regarding First Amendment rights to obtain information by videotaping under the circumstances presented here. Our decision on the First Amendment question is further supported by the fact that none of the precedents upon which Kelly relies involved traffic stops, which the Supreme Court has recognized as inherently dangerous situations.”)

Bayer v. Monroe County Children and Youth Services, 577 F.3d 186, 192 (3d Cir. 2009) (“On appeal, defendants do not challenge the court’s conclusion that plaintiffs were entitled, as a matter of procedural due process, to a post-deprivation hearing within 72 hours. And in light of *Pearson*, we need not reach this issue, as we find that, under the ‘clearly established’ prong of the *Saucier* test, defendants should be afforded qualified immunity with respect to this claim. . . . Even if we assume that plaintiffs had a constitutional right to a post-deprivation hearing within 72 hours and that this right was clearly established at the relevant time, we consider it objectively reasonable for defendants to have believed, under the law existing at the time, that their particular conduct in this case was lawful and in keeping with this right. “).

Matheny v. County of Allegheny Pa., No. 09-1070, 2010 WL 1007859, at *4-*6 (W.D. Pa. Mar. 16, 2010) (“Plaintiff asserts that Defendants Mollo and Avetta violated his “clearly established” First Amendment right to record the actions of police officers in public by arresting him in retaliation for making a cell

phone audio-and video-recording. The Court disagrees that the First Amendment right—assuming such a right exists at all [FN3. Under the U.S. Supreme Court’s decision in *Pearson*, the Court is not required to proceed in the two-step sequence set forth in *Saucier*. See *Pearson*, 129 S.Ct. at 818. Here, it is more appropriate first to address what traditionally has been the second inquiry, *e.g.*, whether the right alleged to have been violated was clearly established. Because the Court finds that the alleged First Amendment right at issue here is not clearly established, the Court does not (and need not) reach the issue of whether Defendants Mollo and Avetta violated Plaintiff’s Constitutional rights under the First Amendment.]—was ‘clearly established’ as of the date of Plaintiff’s arrest on April 29, 2009. As an initial matter, neither the United States Supreme Court nor the Third Circuit has held that individuals have an unfettered First Amendment right to record police officers in the performance of their official duties. Although this is not dispositive of the issue, a review of the sparse existing decisional law reveals that the right—assuming one exists at all—is far from ‘clearly established.’ [collecting and discussing cases] Although these cases may recognize a limited right to videotape police conduct, subject to reasonable time, place, and manner restrictions, such a right notably has not been recognized in the context of an audio recording. . . . Far from demonstrating that the right is clearly established, the existing decisions demonstrate that the law on the subject is plainly underdeveloped. . . . In sum, in light of the existing law as of April 29, 2009, the Court concludes that the purported First Amendment right to record the police was not ‘clearly established.’ The limited case law on the subject simply does not provide sufficient guidelines or define the contours of the right in such a manner that reasonable officials in Defendants’ position would understand that their actions, which were motivated in the first instance by the Pennsylvania Wiretap Act, would impinge upon or violate Plaintiff’s purported First Amendment right to record the incident. Because the First Amendment right to record police conduct is not ‘clearly established,’ the Court concludes that Defendants Avetta and Mollo are entitled to qualified immunity on Plaintiff’s First Amendment retaliation claim under Count I.”)

IV. 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 / Hill v. McDonough*

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).").

See also Hill v. McDonough, 126 S. Ct. 2096, 2103 (2006) ("Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.").

D. *Jones v. Bock*

Jones v. Bock, 127 S. Ct. 910, 918, 919, 921, 926 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court. . . . What is less clear is whether it falls to the prisoner to plead and demonstrate exhaustion in the complaint, or to the defendant to raise lack of exhaustion as an affirmative defense. The minority rule, adopted by the Sixth Circuit, places the burden of pleading exhaustion in a case covered by the PLRA on the prisoner; most courts view failure to exhaust as an affirmative defense. . . . We think petitioners, and the majority of courts to consider the question, have the better of the argument. Federal Rule of Civil Procedure 8(a) requires simply a 'short and plain statement of the claim' in a complaint, while Rule 8(c) identifies a nonexhaustive list of affirmative defenses that must be pleaded in response. The PLRA itself is not a source of a prisoner's claim; claims covered by the PLRA are

typically brought under 42 U. S. C. § 1983, which does not require exhaustion at all, see *Patsy v. Board of Regents of Fla.*, 457 U. S. 496, 516 (1982). Petitioners assert that courts typically regard exhaustion as an affirmative defense in other contexts. . . and respondents do not seriously dispute the general proposition. . . The PLRA dealt extensively with the subject of exhaustion, see 42 U. S. C. “1997e(a), (c)(2), but is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense. In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. [citing *Leatherman*, *Swierkiewicz* and *Hill*] We think that the PLRA’s screening requirement does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints. We understand the reasons behind the decisions of some lower courts to impose a pleading requirement on plaintiffs in this context, but that effort cannot fairly be viewed as an interpretation of the PLRA. ‘Whatever temptations the statesmanship of policy-making might wisely suggest,’ the judge’s job is to construe the statute—not to make it better.’. . . We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks. We once again reiterate, however—as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*—that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.”)

Jones v. Bock, 127 S. Ct. 910, 922, 923 (2007) (“The PLRA requires exhaustion of ‘such administrative remedies as are available,’ 42 U. S. C. ‘1997e(a), but nothing in the statute imposes a ‘name all defendants’ requirement along the lines of the Sixth Circuit’s judicially created rule. . . . Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to ‘properly exhaust.’ The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion. As the MDOC’s procedures make no mention of naming particular officials, the Sixth Circuit’s rule imposing such a prerequisite to proper exhaustion is unwarranted.”)

Jones v. Bock, 127 S. Ct. 910, 924 (2007) (“As a general matter, if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad. ‘[O]nly the bad claims are dismissed; the complaint as a whole is not. If Congress meant to depart from this norm, we would expect some indication of that, and we find none.’”)

E. *Bell Atlantic Corp. v. Twombly*

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1968, 1969, 1974 (2007) (“Justice Black’s opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of ‘the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’. . . This ‘no set of facts’ language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard On such a focused and literal reading of *Conley*’s ‘no set of facts,’ a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. . . . [A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. [citing cases and commentators] We could go on, but there is no need to pile up further citations to show that *Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. . . . *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival. . . . [W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1555, 1578, 1588, 1589 (2007) (Stevens, J., joined by Ginsburg, J., except as to Part IV, dissenting) (“If *Conley* ‘s ‘no set of facts’ language is to be interred, let it not be without a eulogy. . . . Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of petitioners. I would not rewrite the Nation’s civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process—a rulemaking process—for revisions of that order. . . . Whether the Court’s actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.”)

F. *Erickson v. Pardus*

Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (“It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered ‘a cognizable independent harm’ as a result of his removal from the hepatitis C treatment program. . . . The complaint stated that Dr. Bloor’s decision to remove petitioner from his prescribed hepatitis C medication was ‘endangering [his] life.’ . . . It alleged this medication was withheld ‘shortly after’ petitioner had commenced a treatment program that would take one year, that he was ‘still in need of treatment for this disease,’ and that the prison officials were in the meantime refusing to provide treatment. . . . This alone was enough to satisfy Rule 8(a)(2). Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings. The Court of Appeals’ departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation’s outset, without counsel.”)

G. *Ashcroft v. Iqbal*

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942, 1943, 1949-54 (2009) (“This case . . . turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent’s pleadings are insufficient. . . . Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations

contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not ‘show[n]’-that the pleader is entitled to relief.’ . . . In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. . . . We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners ‘knew of, condoned, and willfully and maliciously agreed to subject [him]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’ . . . The complaint alleges that Ashcroft was the ‘principal architect’ of this invidious policy. . . . and that Mueller was ‘instrumental’ in adopting and executing it. . . . These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim. . . . namely, that petitioners adopted a policy ‘because of,’ not merely “in spite of,” its adverse effects upon an identifiable group.’ . . . As such, the allegations are conclusory and not entitled to be assumed true. . . . It is important to recall that respondent’s complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent’s constitutional claims against petitioners rest solely on their ostensible “policy of holding post-September-11th detainees” in the ADMAX SHU once they were categorized as “of high interest.” . . . To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as ‘of high interest’ because of their race, religion, or national origin. This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of ‘of high interest’ for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving ‘restrictive conditions of confinement’ for post-September-11 detainees

until they were ‘ “cleared” by the FBI.’ . . . Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners’ constitutional obligations. He would need to allege more by way of factual content to ‘nudg[e]’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’ . . . [R]espondent’s complaint does not contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8. It is important to note, however, that we express no opinion concerning the sufficiency of respondent’s complaint against the defendants who are not before us. Respondent’s account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent’s complaint does not entitle him to relief from petitioners. . . . Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’. . . and it applies to antitrust and discrimination suits alike. . . . Because respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise. . . . It is true that Rule 9(b) requires particularity when pleading ‘fraud or mistake,’ while allowing ‘[m]alice, intent, knowledge, and other conditions of a person’s mind [to] be alleged generally.’ But ‘generally’ is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint to survive a motion to dismiss.”)

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1959-61 (Souter, J., joined by Stevens, J., Ginsburg, J., Breyer, J., dissenting) (“The complaint . . . alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it. Ashcroft and Mueller argue that these allegations fail to satisfy the ‘plausibility standard’ of *Twombly*. They contend that Iqbal’s claims are implausible because such high-ranking officials ‘tend not to be personally

involved in the specific actions of lower-level officers down the bureaucratic chain of command.’. . . But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel. That is not what we have here. . . . Iqbal’s claim is not that Ashcroft and Mueller ‘knew of, condoned, and willfully and maliciously agreed to subject’ him to a discriminatory practice that is left undefined; his allegation is that ‘they knew of, condoned, and willfully and maliciously agreed to subject’ him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller “fair notice of what the ... claim is and the grounds upon which it rests.”““)

H. Post-*Twombly*/*Iqbal* Cases: Third Circuit

James v. City of Wilkes-Barre, 700 F.3d 675, 680-682 (3d Cir. 2012) (“Mrs. James’s assertion that she ‘justifiably and reasonably believ[ed] herself compelled by law’ to comply with Officer Marshall’s request does not alter our conclusion. . . . By crediting these allegations, the District Court assumed that Mrs. James was ‘compelled’ to accompany her daughter to the hospital. This was error because whether she was in fact ‘compelled’ to do so is a legal conclusion. At the motion to dismiss stage, we accept as true all factual assertions, but we disregard threadbare recitals of the elements of a cause of action, legal conclusions, and conclusory statements. . . . Although Mrs. James asks us to accept as fact her assertion that she ‘justifiably and reasonably believ[ed] herself compelled by law,’ in reality it is a legal conclusion artfully pleaded as a factual assertion, which is not entitled to a presumption of truth. . . . As far as relevant factual averments go, the Complaint pleads only that the officers ‘insisted’ that one parent accompany Nicole. As we have explained, insistence alone is insufficient to constitute a seizure under the Fourth Amendment. . . . The only fact that might point toward a seizure is Officer Marshall’s threat that Mr. and Mrs. James would be charged with assisted manslaughter if they prevented Nicole from going to the hospital and she actually committed suicide. But that threat was not made in connection with Mrs. James’s decision to accompany Nicole to the hospital;

rather, it was made in the context of the parents agreeing to send Nicole to the hospital in the first place, which does not implicate a restriction on Mrs. James's freedom of movement. . . . For the reasons stated, we hold that Mrs. James was not seized in violation of the Fourth Amendment. Having found no constitutional violation, we hold that Officer Marshall is entitled to qualified immunity.")

Bistran v. Levi, 696 F.3d 352, 368-71(3d Cir. 2012) ("After stripping away conclusory allegations not entitled to the presumption of truth, we conclude that Bistran states a plausible failure-to-protect claim against the ten Prison Management Defendants, Lts. Rodgers and Robinson, and Sr. Officer Bowns based on Bistran's placement in the recreation yard with Northington and his gang. First, Bistran alleges that putting him in a locked recreation area with Northington *et al.* posed a substantial risk of serious harm because (a) Northington and others knew of Bistran's cooperation with prison officials plus (b) Northington had a violent criminal past and had previously threatened to attack Bistran in the recreation yard because of that cooperation. Second, Bistran alleges that officials were deliberately indifferent to the obvious risk posed because they made no attempt to prevent his placement in the yard with Northington despite the fact that he (Bistran) repeatedly advised the officials responsible for the photocopying operation of the threats Northington and others made. Third, Bistran pleads causation: Northington and two other inmates violently attacked him on June 30, 2006 in the recreation yard because he cooperated with prison officials, not for some other reason. We consider the supporting factual allegations in further detail. . . . [T]he alleged number of tortfeasors in this case does not undermine the plausibility of the underlying torts. In *Young v. Quinlan*, we allowed an inmate's failure-to-protect claim to proceed past summary judgment when, among other things, he claimed to have 'told [ten named prison officials] several times that he was concerned for his safety and needed to be placed in protective custody,' and each of these ten officials had failed to respond reasonably to stop the assaults by other inmates. . . . Here too the fact that Bistran claims to have specifically warned eight officials of the risks he faced does not transform his allegations into impermissible 'group pleading.' . . . In sum, Bistran has stated a plausible claim that thirteen officials violated their constitutional duty to protect him from inmate violence by being deliberately indifferent to the risk posed by his placement in the recreation yard with Northington and others who knew of his prior complicity with prison authorities. If this claim fails to survive a motion to dismiss, little does.")

Green v. New Jersey, No. 12-1517, 2012 WL 3641995, *1, *2 (3d Cir. Aug. 27, 2012) (not published) ("We agree with the District Court that, as drafted, the complaint fails to state a claim on which relief may be granted. To avoid

dismissal, a complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level.' . . . The complaint 'must not be "so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by [Fed.R.Civ.P. 8]"'. . . Green's complaint fails to satisfy these standards. . . Nevertheless, prior to dismissing a pro se complaint under § 1915(e), a District Court must give the plaintiff an opportunity to amend his pleading to cure the defect unless such an amendment would be inequitable or futile. . . The District Court neither informed Green that he could amend his complaint, nor did it determine that any amendment would be inequitable or futile. On the current record, we cannot exclude the possibility that Green, who is litigating his case pro se, might plead additional facts in an amended complaint that will state a claim for relief. Thus, while we express no view as to whether Green will ultimately plead any meritorious claims, we conclude that the District Court erred in dismissing the complaint without providing Green leave to amend. Accordingly, we will summarily vacate the District Court's order dismissing the case with prejudice and remand for further proceedings consistent with this opinion.")

Burtch v. Milberg Factors, Inc., No. 10-2818, 2011 WL 5027511, at *5 (3d Cir. Oct. 24, 2011)("To determine the sufficiency of a complaint under *Twombly* and *Iqbal*, we must take the following three steps: First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.'")

Argueta v. U.S. Immigration and Customs Enforcement, 643 F.3d 60, 72, 74-77 (3d Cir. 2011) ("[W]e assume for purposes of this appeal that a federal supervisory official may be liable in certain circumstances even though he or she did not directly participate in the underlying unconstitutional conduct. The District Court specifically concluded that a Fourth Amendment claim does not require a showing of a discriminatory purpose and that Plaintiffs could therefore proceed under a 'knowledge and acquiescence' theory. Plaintiffs acknowledge that the 'terminology' used to describe 'supervisory liability' is 'often mixed.' . . . They contend that a supervisor may be held liable in certain circumstances for a failure to train, supervise, and discipline subordinates. . . . We accordingly stated in a § 1983 action that '[p]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence.' *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988). . . We further indicated that a supervisor may be liable under § 1983 if he or she implements a policy or practice that creates an unreasonable risk of a constitutional violation on the part of the

subordinate and the supervisor's failure to change the policy or employ corrective practices is a cause of this unconstitutional conduct. . . . Having addressed the legal elements that a plaintiff must plead to state a legally cognizable claim, we turn to the remaining steps identified by *Iqbal*: (1) identifying those allegations that, because they are no more than conclusions, are not entitled to any assumption of truth; and (2) then determining whether the well-pleaded factual allegations plausibly give rise to an entitlement to relief. . . . We acknowledge that Plaintiffs filed an extensive and carefully drafted pleading, which certainly contained a number of troubling allegations especially with respect to alleged unconstitutional behavior on the part of lower-ranking ICE agents. Plaintiffs are also correct that, even after *Iqbal*, we must continue to accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and then determine whether a reasonable inference may be drawn that the defendant is liable for the alleged misconduct. . . . [W]e ultimately conclude that, like *Iqbal*, Plaintiffs failed to allege a plausible *Bivens* claim against the four Appellants. Initially, certain allegations in the Second Amended Complaint were conclusory in nature and merely provided, at best, a 'framework' for the otherwise appropriate factual allegations. . . . For instance, the broad allegations regarding the existence of a 'culture of lawlessness' are accorded little if any weight in our analysis. . . . We further note that the relevant counts in the pleading contained boilerplate allegations mimicking the purported legal standards for liability, which we do not assume to be true. We also must reject certain broad characterizations made by the District Court, which were not supported by either the actual factual allegations in the Second Amended Complaint or reasonable inferences from such allegations. Most significantly, the District Court went too far by stating that Myers and Torres 'worked on these issues everyday.' . . . Turning to the non-conclusory factual allegations in the Second Amended Complaint, we begin with the critical issue of notice. Plaintiffs did reference an impressive amount of documentation that allegedly provided notice to Appellants of their subordinates' unconstitutional conduct. However, these alleged sources of notice were fatally flawed in one way or another. Broadly speaking, we must point out the typical 'notice' case seems to involve a prior incident or incidents of misconduct by a specific employee or group of employees, specific notice of such misconduct to their superiors, and then continued instances of misconduct by the same employee or employees. The typical case accordingly does not involve a 'knowledge and acquiescence' claim premised, for instance, on reports of subordinate misconduct in one state followed by misconduct by totally different subordinates in a completely different state. . . . Second, we observe that allegations specifically directed against Appellants themselves (unlike the allegations directed at the agents who actually carried out the raids) described conduct consistent with otherwise lawful behavior. . . . In other words, a federal

official specifically charged with enforcing federal immigration law appears to be acting lawfully when he or she increases arrest goals, praises a particular enforcement operation as a success, or characterizes a home entry and search as an attempt to locate someone (i.e., a fugitive alien). In fact, the qualified immunity doctrine exists to encourage vigorous and unflinching enforcement of the law. . . . We also agree with Appellants' assertion that Plaintiffs themselves did not really identify in their pleading what exactly Appellants should have done differently, whether with respect to specific training programs or other matters, that would have prevented the unconstitutional conduct. . . . We also cannot overlook the fact that Appellants themselves occupied relatively high-ranking positions in the federal hierarchy. . . . [T]he context here involved, at the very least, two very high-ranking federal officials based in Washington D.C. who were charged with supervising the enforcement of federal immigration law throughout the country (as well as two other officials responsible for supervising such enforcement throughout an entire state). . . . [W]e wish to emphasize that our ruling here does not leave Plaintiffs without any legal remedy for the alleged violation of the United States Constitution. Chavez, Galindo, and W.C. are still free to pursue their official capacity claims for injunctive relief against any further intimidation or unlawful entry into their home. Also, we do not address Plaintiffs' individual capacity claims for damages against the lower-ranking ICE agents named in the Second Amended Complaint.”)

Santiago v. Warminster Tp., 629 F.3d 121, 128-34 & n.8, n.10 (3d Cir. 2010) (“While we conclude that the Third Amended Complaint can be read as alleging liability based on the Supervising Officers' own acts, we will nevertheless affirm the District Court's ruling because those allegations fail to meet the pleading requirements set forth by the Supreme Court in *Twombly* and *Iqbal*. . . . [A]ny claim that supervisors directed others to violate constitutional rights necessarily includes as an element an actual violation at the hands of subordinates. In addition, a plaintiff must allege a causal connection between the supervisor's direction and that violation, or, in other words, proximate causation. . . . Therefore, to state her claim against Chief Murphy and Lt. Donnelly, Santiago needs to have pled facts plausibly demonstrating that they directed Alpha Team to conduct the operation in a manner that they ‘knew or should reasonably have known would cause [Alpha Team] to deprive [Santiago] of her constitutional rights.’. . . As to her claim against Lt. Springfield, Santiago must allege facts making it plausible that ‘he had knowledge of [Alpha Team's use of excessive force during the raid]’ and ‘acquiesced in [Alpha Team's] violations.’. . . Numerous courts, including this one, have expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal*. . . . Because we hold that Santiago's pleadings fail even under our existing supervisory liability test, we

need not decide whether *Iqbal* requires us to narrow the scope of that test. . . . Santiago alleges that the plan developed and authorized by Chief Murphy and Lt. Donnelly ‘specifically sought to have all occupants exit the Plaintiff’s home, one at a time, with hands raised under threat of fire, patted down for weapons, and then handcuffed until the home had been cleared and searched.’ Because this is nothing more than a recitation of what Santiago says the Alpha Team members did to her, it amounts to a conclusory assertion that what happened at the scene was ordered by the supervisors. While the allegations regarding Alpha Team’s conduct are factual and more than merely the recitation of the elements of a cause of action, the allegation of supervisory liability is, in essence, that ‘Murphy and Donnelly told Alpha team to do what they did’ and is thus a ‘formulaic recitation of the elements of a [supervisory liability] claim,’ *Iqbal*, 129 S.Ct. at 1951 (internal quotation marks omitted)—namely that Chief Murphy and Lt. Donnelly directed others in the violation of Santiago’s rights. Saying that Chief Murphy and Lt. Donnelly ‘specifically sought’ to have happen what allegedly happened does not alter the fundamentally conclusory character of the allegation. . . . Our conclusion in this regard is dictated by the Supreme Court’s decision in *Iqbal*. . . . In short, Santiago’s allegations are ‘naked assertion[s]’ that Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in the allegedly excessive manner that they did and that Lt. Springfield acquiesced in Alpha Team’s acts. As mere restatements of the elements of her supervisory liability claims, they are not entitled to the assumption of truth. However, it is crucial to recognize that our determination that these particular allegations do not deserve an assumption of truth does not end the analysis. It may still be that Santiago’s supervisory liability claims are plausible in light of the non-conclusory factual allegations in the complaint. We therefore turn to those allegations to determine whether the claims are plausible. . . . In summary, the allegations against Alpha Team are that the officers ordered everyone to exit the house one at a time; that Santiago exited first under threat of fire; that Santiago was patted down in a demeaning fashion, found to be unarmed, and subsequently handcuffed; that the remaining occupants of the home then exited, some of whom were handcuffed while others were not; that Santiago’s daughter was coerced into consenting to a search of the home; and that Santiago was left restrained for thirty minutes while her home was searched, during which time she had a heart attack. The question then becomes whether those allegations make it plausible that Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in a manner that they ‘knew or should reasonably have known would cause [Alpha Team] to deprive [Santiago] of her constitutional rights,’ . . . or that Lt. Springfield ‘had knowledge [that Alpha Team was using excessive force during the raid]’ and ‘acquiesced in [Alpha Team’s] violations.’ . . . [T]here is no basis in the complaint to conclude that excessive force was used on anyone except Santiago. Even if someone else had been

subjected to excessive force, it is clear that the occupants were not being treated uniformly. Thus, Santiago's allegations undercut the notion of a plan for all occupants to be threatened with fire and handcuffed. While it is possible that there was such a plan, and that Alpha Team simply chose not to follow it, 'possibility' is no longer the touchstone for pleading sufficiency after *Twombly* and *Iqbal*. Plausibility is what matters. Allegations that are 'merely consistent with a defendant's liability' or show the 'mere possibility of misconduct' are not enough. . . Here, given the disparate treatment of the occupants of the home, one plausible explanation is that the officers simply used their own discretion in determining how to treat each occupant. In contrast with that 'obvious alternative explanation' for the allegedly excessive use of force, the inference that the force was planned is not plausible. Where, as here, an operation results in the use of allegedly excessive force against only one of several people, that use of force does not, by itself, give rise to a plausible claim for supervisory liability against those who planned the operation. To hold otherwise would allow a plaintiff to pursue a supervisory liability claim anytime a planned operation resulted in excessive force, merely by describing the force used and appending the phrase 'and the Chief told them to do it.' *Iqbal* requires more. . . . We next ask whether the allegation that Lt. Springfield was placed in charge of the operation, coupled with what happened during the operation, makes it plausible that Lt. Springfield knew of and acquiesced in the use of excessive force against Santiago. Again, we conclude that it does not. The complaint implies but does not allege that Lt. Springfield was present during the operation. Assuming he was present, however, the complaint still does not aver that he knew of the allegedly excessive force, nor does it give rise to the reasonable inference that he was aware of the level of force used against one individual. . . . In sum, while Santiago's complaint contains sufficient allegations to show that the Supervising Officers planned and supervised the operation and that, during the operation, Alpha Team used arguably excessive force, her allegations do nothing more than assert the element of liability that the Supervising Officers specifically called for or acquiesced in that use of force. . . . The Third Amended Complaint was filed after the close of discovery. Consequently, there is no reason to believe that Santiago's conclusory allegations were simply the result of the relevant evidence being in the hands of the defendants. Under *Iqbal*, however, the result would be the same even had no discovery been completed. We recognize that plaintiffs may face challenges in drafting claims despite an information asymmetry between plaintiffs and defendants. Given that reality, reasonable minds may take issue with *Iqbal* and urge a different balance between ensuring, on the one hand, access to the courts so that victims are able to obtain recompense and, on the other, ensuring that municipalities and police officers are not unnecessarily subjected to the burdens

of litigation. . . The Supreme Court has struck the balance, however, and we abide by it.”)

West Penn Allegheny Health System, Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010) (“The District Court opined that judges presiding over antitrust and other complex cases must act as ‘gatekeepers,’ and must subject pleadings in such cases to heightened scrutiny. The District Court’s gloss on Rule 8, however, is squarely at odds with Supreme Court precedent. Although *Twombly* acknowledged that discovery in antitrust cases ‘can be expensive,’ . . . it expressly rejected the notion that a ‘“heightened” pleading standard’ applies in antitrust cases. . . and *Iqbal* made clear that Rule 8’s pleading standard applies with the same level of rigor in ‘“all civil actions[.]”’ . . . It is, of course, true that judging the sufficiency of a pleading is a context-dependent exercise. . . Some claims require more factual explication than others to state a plausible claim for relief. . . For example, it generally takes fewer factual allegations to state a claim for simple battery than to state a claim for antitrust conspiracy. . . But, contrary to the able District Court’s suggestion, this does not mean that *Twombly*’s plausibility standard functions more like a probability requirement in complex cases. We conclude that it is inappropriate to apply *Twombly*’s plausibility standard with extra bite in antitrust and other complex cases.”)

In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, 319 n.17 (3d Cir. 2010) (“Although *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir.2009), stated that *Twombly* and *Iqbal* had ‘repudiated’ the Supreme Court’s earlier decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), see *Fowler*, 578 F.3d at 211, we are not so sure. Clearly, *Twombly* and *Iqbal* inform our understanding of *Swierkiewicz*, but the Supreme Court cited *Swierkiewicz* approvingly in *Twombly*, see 550 U.S. at 555-56, 127 S.Ct. 1955, and expressly denied the plaintiffs’ charge that *Swierkiewicz* ‘runs counter’ to *Twombly*’s plausibility standard, *id.* at 569-70, 127 S.Ct. 1955. As the Second Circuit has observed, *Twombly* ‘emphasized that its holding was consistent with [the Court’s] ruling in *Swierkiewicz* that “a heightened pleading requirement,” requiring the pleading of “specific facts beyond those necessary to state [a] claim and the grounds showing entitlement to relief,” was “impermissibl[e].”’ *Arista Records*, 604 F.3d at 120 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955 (alterations in *Arista Records*)). In any event, *Fowler*’s reference to *Swierkiewicz* appears to be dicta, as *Fowler* found the complaint before it to be adequate. 578 F.3d at 212; see also *id.* at 211 (‘The demise of *Swierkiewicz*, however, is not of significance here.’”).

Fowler v. UPMC Shadyside, 578 F.3d 203, 209, 210 (3d Cir. 2009) (“Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court’s opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), continuing with our opinion in *Phillips, supra.*, and culminating recently with the Supreme Court’s decision in *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 155 L.Ed.2d 868 (2009), pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss. . . . The Supreme Court’s opinion in *Iqbal* extends the reach of *Twombly*, instructing that all civil complaints must contain ‘more than an unadorned, the-defendant-unlawfully-harmed-me accusation.’. . . Therefore, after *Iqbal*, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint’s well-pleaded facts as true, but may disregard any legal conclusions. . . . Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a ‘plausible claim for relief.’. . . Inasmuch as this is an employment discrimination case, we asked the parties to comment on the continued viability of the Supreme Court’s decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). In *Swierkiewicz*, the Supreme Court held that a complaint alleging unlawful employment discrimination did not have to satisfy a heightened pleading requirement. The complaint in that case was said to be sufficient because it ‘detailed the events leading to [the plaintiff’s] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination.’. . . The Supreme Court in *Swierkiewicz* expressly adhered to *Conley*’s then-prevailing ‘no set of facts’ standard and held that the complaint did not have to satisfy a heightened standard of pleading. . . . *Swierkiewicz* and *Iqbal* both dealt with the question of what sort of factual allegations of discrimination suffice for a civil lawsuit to survive a motion to dismiss, but *Swierkiewicz* is based, in part, on *Conley*, which the Supreme Court cited for the proposition that Rule 8 ‘relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.’. . . We have to conclude, therefore, that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*. . . . The demise of *Swierkiewicz*, however, is not of significance here. We had already extended our holding in *Phillips*, to the employment discrimination context. In *Wilkerson v. New Media Technology Charter School, Inc.*, 522 F.3d 315 (3d Cir.2008), a terminated charter-school teacher brought an action claiming that she was fired for retaliation and her

religious beliefs. The teacher pleaded that she was fired because of her ‘ “Christian religious beliefs,” her refusal to engage in the “libations ceremony,” and her “complaints related to the ceremony.”’ . . . We held that the ‘plausibility paradigm announced in *Twombly* applies with equal force to analyzing the adequacy of claims of employment discrimination.’”).

Wilkerson v. New Media Technology Charter School Inc., 522 F.3d 315, 322 (3rd Cir. 2008) (“Today, we extend our holding in *Phillips* to the employment discrimination context. The plausibility paradigm announced in *Twombly* applies with equal force to analyzing the adequacy of claims of employment discrimination.”).

Phillips v. County of Allegheny, 515 F.3d 224, 230-34 (3rd Cir. 2008) (“What makes *Twombly*’s impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new ‘plausibility’ paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting *Conley*’s ‘no set of facts’ language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework. . . . In determining how *Twombly* has changed this standard, we start with what *Twombly* expressly leaves intact. The Supreme Court reaffirmed that Fed.R.Civ.P. 8 ‘ “requires only a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests,”’ and that this standard does not require ‘detailed factual allegations.’ . . . [T]he *Twombly* decision focuses our attention on the ‘context’ of the required short, plain statement. Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case—some complaints will require at least some factual allegations to make out a ‘showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ *Twombly*, 127 S.Ct. at 1964. Indeed, taking *Twombly* and the Court’s contemporaneous opinion in *Erickson v. Pardus*, 127 S.Ct. 2197 (2007), together, we understand the Court to instruct that a situation may arise where, at some point, the factual detail in a complaint is so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by Rule 8. . . . The second important concept we take from the *Twombly* opinion is the rejection of *Conley*’s ‘no set of facts’ language. In rejecting the *Conley* language, the Supreme Court was careful to base its analysis in pre-existing principles. . . The Court emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement. . . Indeed, the Court cited *Twombly* just days later as authority for traditional Rule 8 and 12(b)(6)

principles. *See Erickson*, 127 S.Ct. at 2200. Thus, under our reading, the notice pleading standard of Rule 8(a)(2) remains intact, and courts may generally state and apply the Rule 12(b)(6) standard, attentive to context and an showing that ‘the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ *Twombly*, 127 S.Ct. at 1964. . . . The more difficult question raised by *Twombly* is whether the Supreme Court imposed a new ‘plausibility’ requirement at the pleading stage that materially alters the notice pleading regime. . . . The answer to this question is difficult to divine. Numerous references to ‘plausibility’ in *Twombly* seem to counsel reliance on the concept as a standard for notice pleading. . . . Yet, the *Twombly* decision repeatedly indicated that the Court was not adopting or applying a ‘heightened pleading standard.’ . . . The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come. Therefore, we decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context. Reading *Twombly* to impose a ‘plausibility’ requirement outside the ‘ 1 context, however, leaves us with the question of what it might mean. ‘Plausibility’ is related to the requirement of a Rule 8 ‘showing.’ In its general discussion, the Supreme Court explained that the concept of a ‘showing’ requires only notice of a claim and its grounds, and distinguished such a showing from ‘a pleader’s “bare averment that he wants relief and is entitled to it.”’ *Twombly*, 127 S.Ct. at 1965 n. 3. . . . The Supreme Court’s *Twombly* formulation of the pleading standard can be summed up thus: ‘stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest’ the required element. *Id.* This ‘does not impose a probability requirement at the pleading stage,’ but instead ‘simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of’ the necessary element. . . . That is to say, there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation. The complaint at issue in this case clearly satisfies this pleading standard, making a sufficient showing of enough factual matter (taken as true) to suggest the required elements of Phillips’ claims.”).

Mitchell v. Township of Willingboro Municipality Government, No. 11–1664 (JBS/JS), 2012 WL 5989358, *4, *5, *8 (D.N.J. Nov. 28, 2012) (“The Third Circuit has cautioned against dismissing a case based on qualified immunity on a Rule 12(b)(6) motion because ‘it is generally unwise to venture into a qualified immunity analysis at the pleading stage as it is necessary to develop the factual record in the vast majority of cases.’ *Newland v. Reehorst*, 328 Fed. Appx. 788, 791 n. 3 (3d Cir.2009). While the issue of whether a right is clearly established and whether a reasonable officer could have believed his actions were lawful are questions of law for the court to decide, the Court does not consider facts outside the pleadings in assessing these issues. The Third Circuit has clearly held that

‘qualified immunity will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint.’ *Thomas v. Independence Township*, 463 F.3d 285, 291 (3d Cir.2006). In this case, the court confirms its previous holding that the Plaintiff has sufficiently pled a violation of his Fourth Amendment rights by Defendant Perez. . . Plaintiff’s complaint alleges that Officer Perez received a 9–1–1 dispatch call to pull over a blue Honda Accord with no license plates that had been speeding down a nearby road. Plaintiff alleges his car was a green Honda Accord with a Pennsylvania license plate and that he was not committing any traffic violations at the time he was pulled over by Officer Perez. Plaintiff further argues his Honda Accord had a rear Pennsylvania license plate and that Pennsylvania does not require a license plate on the front of the car. Plaintiff maintains Defendant Perez used the 9–1–1 dispatch call as a pretext to make the stop and Plaintiff avers the only reason he was pulled over was because he is an African American male. This sufficiently alleges a deprivation of a constitutional right and plausibly states a claim under the Fourth Amendment. With regard to the second prong of the qualified immunity analysis, it is well established that an officer must have an articulable and reasonable suspicion that the driver has committed a motor vehicle offense in order to conduct an investigatory stop. . . Defendant Perez does not argue that Plaintiff’s Fourth Amendment rights in this case were not clearly established. Consequently, the Plaintiff’s complaint satisfies the second prong of the qualified immunity analysis. Therefore, the court concludes it is inappropriate to dismiss this case on qualified immunity grounds at the pleading stage. Here, the immunity is not established on the face of the complaint. The Plaintiff adequately alleges a violation of his Fourth Amendment rights and these rights were clearly established at the time of the incident. . . . Therefore, since the law was clear at the time of the incident that reasonable suspicion was required to conduct an investigatory stop, Defendant Perez can be granted qualified immunity only if his conduct in stopping Plaintiff’s car was a violation a reasonable officer could have committed. Viewing the facts in the light most favorable to Plaintiff as the non-moving party, the court concludes a reasonable officer would not have conducted an investigatory stop of the Plaintiff in this situation and a jury could conclude reasonable suspicion did not exist.”)

Major Tours, Inc. v. Colorel, Civil No. 05-3091 (JBS/JS), 2010 WL 2557250, *13, *14 (D.N.J. June 22, 2010) (“The Complaint contains abundant allegations of racially-motivated discrimination, which are summarized at the beginning at the first paragraph: ‘Because of Plaintiffs’ race, Defendants and their associates have targeted their buses for improper, illegal, and unreasonably burdensome stops, inspections, and seizures.’ (Compl.¶ 1) Plaintiffs allege, among other things, that Defendants and their agents gathered near certain casinos known to

have primarily African American clientele in order to stop buses in a racially discriminatory manner (*Id.* ¶ 26); that Defendants exercised their discretion with racially discriminatory intentions, targeting Plaintiffs’ buses for towing because of Plaintiffs’ race (*Id.* ¶ 30); and that Defendants often require Plaintiffs—on account of their race—to have their buses towed away (*Id.* ¶ 34). Each of these is a specific allegation of a discriminatory act taken for racially discriminatory reasons, and supported by further allegations of white owned buses being subjected to differential treatment. Defendants maintain that these statements are too conclusory, but they are not. . . . Unlike the defendants in *Iqbal*, Defendants in this case have offered no nondiscriminatory reason for any of the racially discriminatory behavior specifically alleged in the Complaint, nor is there any obvious nondiscriminatory explanation for the disparate treatment alleged by Plaintiffs. There is no obvious and lawful purpose that explains, for example, why inspectors would target casinos frequented by African Americans for bus safety inspections, or why they would permit white operated buses to repair violations on-site while requiring Plaintiffs to be towed. Rule 8 does not require plaintiffs who are pleading a pattern of racially discriminatory conduct to include all of the evidence that suggests that the conduct was a result of racially discriminatory intentions rather than the byproduct of some legitimate purpose. . . . Instead, they must simply allege enough facts to nudge the claim into the realm of the plausible. Therefore, the factual allegations in the current complaint regarding racially discriminatory purpose are sufficiently concrete with respect to the investigator defendants.”)

V. 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.’”).

THIRD CIRCUIT

Hubbard v. Taylor, 538 F.3d 229, 236, 238 (3d Cir. 2008) (Neither the Supreme Court nor the Third Circuit has “established a right of pretrial detainees to be free from triple-celling or from sleeping on a mattress placed on the floor. . . . In the absence of direct authority from the Supreme Court or this Court, the Defendants in this case were not obliged to familiarize themselves with, and adhere to, the decisions of district courts outside their jurisdiction when the very court to whose jurisdiction they were subject repeatedly approved of their practices at Gander Hill.”).

Williams v. Bitner, 455 F.3d 186, 194 (3d Cir. 2006) (“In sum, we hold that the Prison Officials are not entitled to qualified immunity from Williams’s First Amendment claim. Although we had not yet addressed the issue raised here at the time of the incident, the Fifth, Seventh, and Eighth Circuits had addressed First Amendment claims similar to Williams’s and held that prison officials must respect and accommodate, when practicable, a Muslim inmate’s religious beliefs regarding prohibitions on the handling of pork. Moreover, decisions from the Supreme Court and this Court support the principles underlying the right asserted by Williams. We therefore conclude that the state of the law at the time the violation occurred gave the Prison Officials ‘fair warning’ that their alleged treatment of Williams was unconstitutional.”).

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

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084, 2085 (2011) (“A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’ . . . We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. . . . The constitutional question in this case falls far short of that threshold. At the time of al-Kidd’s arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional. . . . [Ashcroft] deserves qualified immunity even assuming. . . that his alleged detention policy violated the Fourth Amendment.”)

Weise v. Casper, 131 S. Ct. 7, 7, 8 (2010) (Ginsburg, J., joined by Sotomayor, J., dissenting from denial of certiorari) (“I cannot see how reasonable public officials, or any staff or volunteers under their direction, could have viewed the bumper sticker as a permissible reason for depriving Weise and Young of access to the event. Nevertheless, the Court of Appeals held respondents entitled to qualified immunity because ‘no specific authority instructs this court ... how to

treat the ejection of a silent attendee from an official speech based on the attendee's protected expression outside the speech area.' 593 F.3d 1163, 1170 (C.A.10 2010). No 'specific authority' should have been needed. . . . I see only one arguable reason for deferring the question this case presents. Respondents were volunteers following instructions from White House officials. The Volunteer Protection Act of 1997, 111 Stat. 218, 42 U.S.C. § 14501 *et seq.*, had respondents invoked it in the courts below, might have shielded them from liability. Federal officials themselves, however, gain no shelter from that Act. Suits against the officials responsible for Weise's and Young's ouster remain pending and may offer this Court an opportunity to take up the issue avoided today.")

Safford Unified School Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2643, 2644 (2009) (“[T]he *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions. . . . *T.L.O.* directed school officials to limit the intrusiveness of a search, ‘in light of the age and sex of the student and the nature of the infraction,’ . . . and as we have just said at some length, the intrusiveness of the strip search here cannot be seen as justifiably related to the circumstances. But we realize that the lower courts have reached divergent conclusions regarding how the *T.L.O.* standard applies to such searches. [collecting cases] We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.”).

Safford Unified School Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2644 (2009) (Stevens, J., joined by Ginsburg, J., concurring in part and dissenting in part) (“This is, in essence, a case in which clearly established law meets clearly outrageous conduct. . . .The strip search of Savana Redding in this case was both more intrusive and less justified than the search of the student’s purse in *T.L.O.* Therefore, while I join Parts I-III of the Court’s opinion, I disagree with its

decision to extend qualified immunity to the school official who authorized this unconstitutional search.”).

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 (“DOC) 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*]

Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law”).

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.”)

THIRD CIRCUIT

Sharp v. Johnson, 669 F.3d 144, 159, 160 (3d Cir. 2012) (“At issue here is whether Sharp had a clearly established right under the First Amendment to separate religious services in accordance with the Habashi sect of Sunni Islam when Sunni Islamic services were already available. The Supreme Court has stated that ‘[a] special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand.’ . . We echoed this when we said, ‘The requirement that a state interpose no unreasonable barriers to the free exercise of an inmate’s religion cannot be equated with the suggestion that the state has an affirmative duty to provide, furnish, or supply every inmate with a clergyman or religious services of his choice.’ *Gittlemacker v. Prasse*, 428 F.2d 1, 4 (3d Cir.1970). . . . Given this precedent, a reasonable official would not have understood the denial of Sharp’s request, whether made by Sharp on behalf of either himself or a small number of inmates, to violate a constitutional right.”)

Beckinger v. Township of Elizabeth, No. 10-2002, 2011 WL 2559446, at *4, *5 (3d Cir. June 29, 2011) (not published) (“As the District Court reasoned, after *Garcetti* and prior to our decision in *Reilly* on July 1, 2008, the status of First Amendment protection for government employee attendance at hearings as part of employment duties was uncertain. To the extent that *Reilly* clarified the issue, it did so in the context of testimony presented under compulsion of a subpoena in a criminal trial. *Reilly*, therefore, does not stand for the proposition that a law enforcement officer has a First Amendment right to attend voluntarily a parking ticket adjudication hearing in derogation of direct orders to the contrary. Thus, it cannot be said that the right asserted in this case was clearly established when Memorandum No. 07-17 was issued. Moreover, *Reilly* is also distinguishable on

the ground that it involved discipline for the content of the employee's testimony. In this case, by way of contrast, the employer made a decision not to pursue parking violation charges against any alleged violators as part of an effort to correct what it felt was an overzealous enforcement of a township parking ordinance. . . . The instant case, rather than focusing on an employer's retaliation based on the substance of testimony, is far more akin to an employer's attempt to restrain the actions of employees which were considered to 'detract from the agency's effective operation.' In this case, a decision was made to not devote public resources to pursuing parking citations issued under unique circumstances. Our holding in *Reilly* certainly did not address this particular context. Nor have the Appellants cited any authority that would preclude a municipality from instructing its law enforcement officers from appearing at hearings to enforce parking violations. Under this set of facts, it simply cannot be said that the Appellants' 'right' to appear at hearings was 'clearly established.' In summary, we find that a government employee's right to attend a court proceeding to enforce parking violations was not clearly established at the time Memorandum No. 07-17 was issued. . . . Thus, we will affirm the District Court's finding of qualified immunity for Appellants McNeilly and Black and its concomitant grant of summary judgment on this basis.")

Burns v. PA Dept. of Corrections, 642 F.3d 163, 179 (3d Cir. 2011) (“[W]e do not think it is unreasonable for prison officials at the time of Burns’ hearing to have known that: (1) Burns had a property interest in his prison account, (2) he was entitled to due process before his account could be debited, (3) a later *Holloway* hearing would determine the amount of money to be deducted, but the actual disciplinary hearing was the only forum for determining if any money should be deducted at all, and (4) due process is violated when a determination to deprive an inmate of a protected interest is based solely on the uncorroborated statements of confidential informants. However, two matters give us pause in concluding that Burns is entitled to relief here. First, although it was not unreasonable for a government official to have realized that due process must be provided in adjudicating whether a prison account can be debited, *Burns* is the first case that clearly established that the *assessment* itself implicates a prisoner’s protected property interests, even if the account is not actually debited. The devaluation in the property interest in the inmate’s funds that results from such an assessment was not clearly established before *Burns I*, and we do not believe that a reasonable official could have foreseen the analogy to a judgment creditor that formed the basis of our holding in *Burns I*. Second, we think it understandable that the existence of a later *Holloway* hearing could have caused a reasonable prison official to believe that, because the Pennsylvania state courts have found that a *Holloway* hearing was *necessary* to satisfy due process, that hearing was

also *sufficient* to satisfy due process. Although some officials may have been able to deduce that a *Holloway* hearing was insufficient to satisfy due process, we do not believe that a reasonable official in Canino's position would have had a 'fair warning' that an assessment of the account prior to the *Holloway* hearing was subject to due process protections. Prior to *Burns I*, inmates were only entitled to procedural due process before their accounts were debited. Neither this court, nor any Pennsylvania appellate courts had held that an inmate was also entitled to procedural due process before the account was assessed, even if the fund was not debited before we decided *Burns I*. Thus we cannot conclude that the circumstances here were sufficient to give prison officials 'fair warning' that their conduct was unconstitutional. . . Accordingly, we hold that they are entitled to qualified immunity.")

McSpadden v. Wolfe, No. 08-2209, 2009 WL 1059552, at *5 (3rd Cir. Apr. 21, 2009) ("In the case at hand, Appellees were forced to apply confused caselaw to a confusing factual situation—when presented with a sentence that, in their opinion, violated *Bowser*, they twice wrote for clarification to the sentencing judge, who, in emphasizing that the April 10, 1997, sentence was 'with all appropriate credit for time served,' led them to believe that the credit specified in the amended order had already been applied. In light of the complexity of Pennsylvania sentencing case law, and the fact that Appellees were confronted with Judge New's ambiguous letter, computation of Appellant's sentence constituted a discretionary function for which qualified immunity may be available.").

Yarris v. County of Delaware, 465 F.3d 129, 142, 143 (3d Cir. 2006)("At the outset, we note that *Youngblood* addresses law enforcement officials' constitutional duty to preserve evidence *prior* to conviction, whereas Yarris's claim is based on the CID Detectives' post-conviction conduct. . . . The CID Detectives contend that their alleged mishandling of DNA samples does not amount to a constitutional violation because they could not have acted in bad faith insofar as DNA testing was still in its infancy at the time of the alleged violation. We disagree. . . . [A]ccepting Yarris's allegations as true and drawing all reasonable inferences in his favor, we conclude that even though DNA testing may have been less common at the time of the alleged mishandling of evidence, the CID Detectives were given fair warning that their conduct was unconstitutional. . . Accordingly, the CID Detectives are not entitled to qualified immunity from this claim at this stage of the proceedings.").

Jones v. Brown, 461 F.3d 353, 364, 365 (3d Cir. 2006) ("*Bieregu* established as a general matter that prisoners have a First Amendment protected interest in being present when their legal mail is opened. . . But as the Supreme Court emphasized

in *Saucier*, ‘that is not enough.’ . . . For two reasons, we believe it cannot be said with confidence that reasonable prison administrators in the defendants’ position would have realized that they were violating the teachings of *Bieregu*. First, as we have explained, prison administrators in defendants’ position would not have been violating inmates’ rights if they reasonably believed they were acting in the interest of inmate and staff health and safety. As we have further explained, the *Turner* test is highly fact sensitive and, at the time the challenged regulation was adopted, there was no guidance in our case law regarding the application of *Bieregu* and *Turner* in the context of the special circumstances encountered in the Fall of 2001. Without being able to determine whether the October 2001 series of anthrax letters had ended or was on-going, a reasonable administrator might well have understood the legal mail policy to be consistent with those cases. Second, even at a later point in time when it became apparent that there was no significant, on-going risk from anthrax attack, we believe a reasonable prison administrator evaluating whether the legal mail policy should be continued might well have concluded that *Bieregu* was no longer sound law. As previously noted, at that point we had declared without reservation in *Oliver v. Fauver*, 118 F.3d 175, 178 (3d Cir.1997), that the Supreme Court had ‘effectively overruled *Bieregu*.’ While we here hold that this was not true with respect to the First Amendment aspects of *Bieregu*, in the absence of authority suggesting otherwise, we cannot find a prison administrator to have been unreasonable in taking our statement in *Oliver* at face value. Accordingly, we will affirm the ruling of both the *Allah* Court and the *Jones* Court that the defendants are entitled to qualified immunity with respect to plaintiffs’ damage claims.”).

McKee v. Hart, 436 F.3d 165, 171-73 (3d Cir. 2006) (“Before Sattelle 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 Sattelle 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 Sattelle'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 Sattelle'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 Sattelle 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 Sattelle's alleged conduct, which occurred in the fall of 2002, had already taken place. Thus, to the extent that *Brennan* 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 Sattelle'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 Sattelle's conduct, we cannot say that the constitutional right Jones alleged Sattelle violated was clearly established. Sattelle 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.”).

Doe v. County of Centre, 242 F.3d 437, 454 (3d Cir. 2001) (“The Supreme Court has directed that the right in question should be defined in a particularized and relevant manner, rather than abstractly. . . .Therefore, we define the right in question as the right of HIV-positive individuals and related persons to be free from generalized discrimination when public agencies place HIV-negative

individuals into their HIV-positive private homes. To defeat qualified immunity, this right must have been sufficiently clear such that a reasonable official would have known that enacting and applying the County's policy would have violated the right. . . . To the contrary, however, the placement of HIV-negative children into HIV-positive private homes presents a novel legal issue.”).

Sterling v. Borough of Minersville, 232 F.3d 190, 197, 198 (3d Cir. 2000) (“ . . . Wilinsky testified that he did not include suspicion of homosexual activity in his police report because of the confidential nature of the information. Obviously, then, Wilinsky was aware that one's sexual orientation is intrinsically personal and no compelling reason to disclose such information was warranted. Because the confidential and private nature of the information was obvious, and because the right to privacy is well-settled, the concomitant constitutional violation was apparent notwithstanding the fact that the very action in question had not previously been held to be unlawful.”).

Gruenke v. Seip, 225 F.3d 290, 300 (3d Cir. 2000) (“Merely because the Supreme Court has not yet ruled on whether a school official's administration of a pregnancy test to a student violates her Fourth Amendment rights does not mean the right is not clearly established. Moreover, a review of current Fourth Amendment law in the public school context reveals not only that the right is clearly established, but also that Seip's conduct as alleged was objectively unreasonable.”).

Bartholomew v. Commonwealth of Pennsylvania, 221 F.3d 425, 429, 430 (3d Cir. 2000) (“[W]hile it was ‘clearly established’ that warrants must be particular, the narrower and more appropriate question, i.e. whether it was clearly established that one has a constitutional right to be free from a search pursuant to a warrant based upon a sealed list of items to be seized, has not heretofore been answered, at least in those terms. . . . It simply cannot be said, therefore, that ‘the contours of the right’—the precise right at issue here—were ‘sufficiently clear’ such that ‘a reasonable official would understand that what he[or she] is doing violates that right.’ We now make clear what was heretofore not ‘sufficiently clear’ and hold that, generally speaking, where the list of items to be seized does not appear on the face of the warrant, sealing that list, even though it is ‘incorporated’ in the warrant, would violate the Fourth Amendment.”).

VI. 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.

Scott v. Harris, 127 S. Ct. 1769, 1776 & n.8 (2007) (“The question we need to answer is whether Scott’s actions were objectively reasonable. . . . JUSTICE STEVENS incorrectly declares this to be ‘a question of fact best reserved for a jury,’ and complains we are ‘usurp[ing] the jury’s factfinding function.’ . . . At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, . . . the reasonableness of Scott’s actions—or, in JUSTICE STEVENS’ parlance, ‘[w]hether [respondent’s] actions have risen to a level warranting deadly force,’ . . . is a pure question of law.”) (emphasis original).

Scott v. Harris, 127 S. Ct. 1769, 1784, 1785 (2007) (Stevens, J., dissenting) (“Whether a person’s actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. . . . Here, the Court has usurped the jury’s factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. . . . In my judgment, jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent’s speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.”).

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 within the purview of the jury.”).

THIRD CIRCUIT

Curley v. Klem, 499 F.3d 199, 208-11 & n.12 (3rd Cir. 2007) (*Curley II*) (“The point of immunity is to protect someone from the burden imposed by litigation itself. It is supposed to be ‘an *immunity from suit* rather than a mere defense to

liability....’ . . . Hence, the Supreme Court has instructed that ‘[i]mmunity ordinarily should be decided by the court long before trial.’ . . . That is well and good when there are no factual issues in a case, but often the facts are intensely disputed, and our precedent makes clear that such disputes must be resolved by a jury after a trial. . . . The fundamental challenge lies in the nature of the questions that compose the test. Since they are mixed questions of law and fact, one is left to ask who should answer them. As we noted in *Curley I*, ‘[a] disparity of opinion exists among our sister circuits as to whether a judge or jury should make the ultimate immunity determination.’ . . . The First, Fourth, Seventh, and Eleventh Circuits have all indicated that qualified immunity is a question of law reserved for the court. The Fifth, Sixth, Ninth, and Tenth Circuits have permitted the question to go to juries. Precedent from the Second and Eighth Circuits can be viewed as being on both sides of the issue, with the evolution being toward reserving the question for the court. . . . Our precedents too have evolved. Our recent precedents say that the court, not a jury, should decide whether there is immunity in any given case. . . . [T]he *Carswell* approach, despite its limitations, . . . appears to have taken root and to represent the pattern and practice both in our Circuit and much of the rest of the country. We therefore take the opportunity to reiterate and clarify a central message from that case: whether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury. . . . When a district court submits that question of law to a jury, it commits reversible error. . . . When the ultimate question of the objective reasonableness of an officer’s behavior involves tightly intertwined issues of fact and law, it may be permissible to utilize a jury in an advisory capacity, . . . but responsibility for answering that ultimate question remains with the court.” [footnotes omitted])

Curley v. Klem, 499 F.3d 199, 212 n.14 (3rd Cir. 2007) (*Curley II*) (“We note that in the Supreme Court’s recent decision in *Scott*, 127 S.Ct. 1769 (2007), the Court stated that, because the case ‘was decided on summary judgment, there [had] not yet been factual findings by a *judge* or jury....’ *Id.* at 1774 (emphasis added). Without wanting to read too much into that statement, since it may refer to nothing more than a case in which the parties waive any right to a jury, it appears the Court at least contemplated a circumstance where a judge may resolve factual issues. Certainly the dissent in *Scott* was concerned about judicial fact finding.”).

Curley v. Klem, 499 F.3d 199, 214 (3rd Cir. 2007)(*Curley II*) (“Confusion between the threshold constitutional inquiry and the immunity inquiry is also understandable given the difficulty courts have had in elucidating the difference between those two analytical steps. . . . At the risk of understating the challenges

inherent in a qualified immunity analysis, we think the most helpful approach is to consider the constitutional question as being whether the officer made a reasonable mistake of fact, while the qualified immunity question is whether the officer was reasonably mistaken about the state of the law.”)

Curley v. Klem, 499 F.3d 199, 224-26 (3rd Cir. 2007) (*Curley II*) (Roth, J., dissenting) (“‘Objective reasonableness’ can be a jury issue to the extent it applies to the question of whether, as a factual matter, a violation was committed. However, ‘objective reasonableness’ is most definitely not a jury issue to the extent it applies to the question of whether, as a legal matter, a right was clearly established. Whether a right was clearly established is the ‘key immunity question’; we have never permitted a jury to answer that question. Indeed, we never would have said so because determining whether a right is clearly established—which requires a review of the applicable case law—is clearly outside the expertise of the jury. There is simply nothing in *Sharrar* or *Karnes* that permits submission of the ultimate question of qualified immunity, i.e., *Saucier* step two, to the jury. . . . Courts, including this one, create confusion by talking about ‘objective reasonableness’ in the Fourth Amendment context without specific reference to either *Saucier* step one or two. The use of the term ‘objective reasonableness’ without reference to factual or legal reasonableness is what has made this area of the law so confusing and it is why our precedents appear at times to say contradictory things with regard to the respective roles of judge and jury in determining objective reasonableness. I will try to clarify matters. If there are no disputed material facts, the court must determine the objective reasonableness of a mistake of fact (here, whether it was objectively reasonable for Klem to mistake Curley for the perpetrator). However, if there are triable issues of material fact, the jury must determine the objective reasonableness of that mistake of fact. With regard to the objective reasonableness of a mistake of law (here, whether it was objectively reasonable for Klem to believe that the law permitted him to use of deadly force against Curley in the situation at hand), the court should always determine this issue, because doing so requires a review of case law, which is not a task appropriate for the jury. . . . If there are no disputed material facts, the court should make this determination as soon as possible. However, if factual disputes relevant to this legal analysis do exist, the court will have to postpone making this determination until the jury resolves all the relevant factual disputes, because determining what actually happened is a prerequisite to determining whether the law clearly established that a particular action was permitted or prohibited by the Fourth Amendment under those circumstances. . . . After the jury resolves these relevant fact disputes, presumably through the use of special interrogatories, . . . the court is then capable of deciding whether or not the

law clearly permitted or prohibited the conduct constituting the constitutional violation.”).

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) (***Curley I***) (“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.

Sherwood v. Mulvihill, 113 F.3d 396, 401 n.4 (3d Cir. 1997) (“As we recently noted, tension exists as to the proper role of the judge and jury where qualified immunity is asserted. . . . The Supreme Court has held that the application of qualified immunity is a question of law. *Siegert*, 500 U.S. at 232. In contrast, the

existence of probable cause to support a warrant, when raised in a section 1983 action, is a question of fact. . . This may prove problematic in attempting to resolve immunity issues in the early stages of litigation where a genuine and material factual dispute exists concerning probable cause.”).

Karnes v. Skrutski, 62 F.3d 485, 491 (3d Cir. 1995) (“While the qualified immunity defense is frequently determined by courts as a matter of law, a jury should decide disputed factual issues relevant to that determination.”).

Brandt v. Monte, No. 06-0923, 2009 WL 235417, at *8, *9, *12 (D.N.J. Jan. 29, 2009) (“To determine whether a reasonable official would know that his conduct was unlawful, the Court must decide whether the official could have made a reasonable mistake of law, and if not, whether he could have made a reasonable mistake of fact. [citing *Pearson v. Callahan* and *Curley v. Klem*] Here, Plaintiff alleges that he was forcibly medicated pursuant to an emergency declaration in the absence of an emergency to induce his consent. The Court must therefore decide, given the circumstances confronting the Ancora Defendants, (1) whether they could reasonably have believed that issuing the Emergency Certificate as a pretext was lawful, and if not, (2) whether they could reasonably have believed that Plaintiff presented a genuine emergency. . . . As to the first inquiry, the Court holds that no reasonable person in the Ancora Defendants’ position could have believed that issuing the Emergency Certificate pretextually, in the absence of a genuine emergency, was lawful. . . . The second inquiry—whether the Ancora Defendants made a reasonable mistake of fact—presents a more difficult question. Regardless of whether Plaintiff actually presented an emergency, the Court must decide whether an objective person in the Ancora Defendants’ position reasonably could have believed, given the circumstances before them, that Plaintiff presented an emergency. . . . Although fact-specific, the Third Circuit has held that this is a legal determination to be made by the Court, based on an analysis of the ‘totality of the circumstances.’ . . . Confronted with conflicting evidence, the Court is at a loss in determining what actually occurred in the treatment team meeting. . . . As the decision of whether the Ancora Defendants reasonably perceived an emergency is contingent upon the credibility-centered factual determination of what circumstances they confronted, the Court cannot decide the legal issue without first resolving the factual dispute. In these cases, the Third Circuit has instructed that District Courts may ‘utilize a jury in an advisory capacity, but responsibility for answering th[e] ultimate question remains with the court.’ . . . This suggests that the Court may resolve the mistake-of-fact question in one of three ways: (1) present special interrogatories to the jury (in an advisory capacity) at the conclusion of trial, (2) hold a pretrial hearing before an advisory jury, which would answer special interrogatories, or (3) hold a pretrial hearing at which the

parties would present more evidence to the Court, with the Court as factfinder (for the sole purpose of resolving qualified immunity. The Court notes that the latter two options have the advantage of resolving this matter before trial, so the Ancora Defendants, if held to be qualifiedly immune, would not undergo the burdens of defending against these claims at trial. *See Curley*, 298 F.3d at 278 (noting the “imperative [of] decid[ing] qualified immunity issues early in the litigation”). However, the Court is mindful that holding a ‘mini-trial’ before a specially empaneled advisory jury would impose a new set of burdens on the litigants. Thus, the Court will allow the parties to confer and decide jointly which of these procedures shall be used.”).

VII. 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: Third Circuit

Lamont ex rel. Estate of Quick v. New Jersey, 637 F.3d 177, 184, 185 (3d Cir. 2011) (“The plaintiff argues that there is a triable issue on whether the troopers’ continued use of force, even if initially justified, became excessive as the events unfolded. We agree. Even where an officer is initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force has vanished. [citing cases] Here, the troopers opened fire as Quick yanked his right hand out of his waistband. At that point, the troopers reasonably believed that Quick was pulling a gun on them. But after Quick made this sudden movement, his right hand was visible to the troopers, who were standing between five and eight feet away and had their flashlights trained on him. . . . In our view, a jury could find that the troopers should have realized that Quick did not have a weapon some time thereafter and ceased fire. . . . Having determined that a jury could find that the troopers’ use of force reached excessive proportions, we now move to the second qualified immunity question: whether

the right at issue was clearly established. . . We conclude that it was. . . . It has long been the law that an officer may not use deadly force against a suspect unless the officer reasonably believes that the suspect poses a threat of serious bodily injury to the officer or others. . . In short, the dispute in this case is about the facts, not the law. The doctrine of qualified immunity is therefore inapposite.”)

Giles v. Kearney, 571 F.3d 318, 327 (3d Cir. 2009) (“No reasonable officer could agree that striking and kicking a subdued, nonresisting inmate in the side, with force enough to cause a broken rib and collapsed lung, was reasonable or necessary under established law.”)

Hill v. Nigro, No. 07-3871, 2008 WL 510474, at *2 (3d Cir. Feb. 27, 2008) (“Even assuming arguendo that a genuine issue of material fact exists with respect to whether Hill attempted to run over Officer Nigro, the record is clear that a reasonable officer could have reasonably believed that Hill posed a significant threat of death or serious physical injury to others. During his guilty plea, Hill conceded that the police asked him to pull over, but that he refused and drove away at a speed high enough to cause the death or serious injury of anyone he hit. Indeed, while attempting to elude arrest, Hill crashed into another car and its driver had to be taken to the hospital for injuries he sustained. Under these circumstances, we conclude that summary judgment was properly entered in favor of Officer Nigro.”).

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.”).

VIII. 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.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1946, 1947 (2009) (“[R]espondent contends the Court of Appeals had jurisdiction to determine whether his complaint avers a clearly established constitutional violation but that it lacked jurisdiction to pass on the sufficiency of his pleadings. Our opinions, however, make clear that appellate jurisdiction is not so strictly confined. . . . Though determining whether there is a genuine issue of material fact at summary judgment is a question of law, it is a legal question that sits near the law-fact divide. Or as we said in *Johnson*, it is a ‘fact-related’ legal inquiry. . . . To conduct it, a court of appeals may be required to consult a ‘vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials.’ . . . That process generally involves matters more within a district court’s ken and may replicate inefficiently questions that will arise on appeal following final judgment. . . . Finding those concerns predominant,

Johnson held that the collateral orders that are ‘final’ under *Mitchell* turn on ‘abstract,’ rather than ‘fact-based,’ issues of law. . . The concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings. True, the categories of ‘fact-based’ and ‘abstract’ legal questions used to guide the Court’s decision in *Johnson* are not well defined. Here, however, the order denying petitioners’ motion to dismiss falls well within the latter class. Reviewing that order, the Court of Appeals considered only the allegations contained within the four corners of respondent’s complaint; resort to a ‘vast pretrial record’ on petitioners’ motion to dismiss was unnecessary. . . And determining whether respondent’s complaint has the ‘heft’ to state a claim is a task well within an appellate court’s core competency. . . Evaluating the sufficiency of a complaint is not a ‘fact-based’ question of law, so the problem the Court sought to avoid in *Johnson* is not implicated here. The District Court’s order denying petitioners’ motion to dismiss is a final decision under the collateral-order doctrine over which the Court of Appeals had, and this Court has, jurisdiction.”)

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

Argueta v. U.S. Immigration and Customs Enforcement, 643 F.3d 60, 69 (3d Cir. 2011) (“Pursuant to *Iqbal*, our appellate jurisdiction extends beyond merely determining whether the complaint avers a clearly established constitutional violation, and we also have the power to consider the sufficiency of the complaint itself. . . . ‘[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded.’. . . Accordingly, ‘the sufficiency of [a plaintiff’s] pleadings is both “inextricably intertwined with” and “directly implicated by” the qualified immunity defense.’”)

Griffin-El v. Beard, No. 10-2335, 2011 WL 332481, at *3 & n.2 (3d Cir. Feb. 3, 2011) (“We will . . . vacate the District Court’s denial of summary judgment on the basis of qualified immunity and remand for the District Court to specify, in compliance with *Forbes*, which material facts, if any, preclude qualified immunity as to each Appellant. On remand, the District Court should ensure it analyzes separately the specific conduct of each Appellant in determining whether Griffin-El has ‘adduced evidence sufficient for a factfinder to conclude that a reasonable public official would have known that his or her conduct had violated clearly established constitutional rights.’. . . We are sensitive to the burden we impose on the able District Court where, as here, a plaintiff sues a host of individuals. But each state actor is entitled to have the defense of qualified immunity considered in the context of his or her specific conduct in determining whether there is indeed a genuine dispute of fact material to the question of whether ‘it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.’”)

Blaylock v. City of Philadelphia, 504 F.3d 405, 414 (3d Cir. 2007) (“In *Scott*, although the District Court held that Harris’s conduct during the chase (other than his speeding) was a fact subject to reasonable dispute, the Supreme Court disagreed. *Scott* would thus appear to support the proposition that, in this interlocutory appeal, we may exercise some degree of review over the District Court’s determination that the degree of resemblance between Andre and Dana’s accomplice is subject to reasonable dispute. In *Scott*, however, the District Court was charged with determining whether the defendants’ conduct was reasonable

under the circumstances, and the Court had before it a videotape of undisputed authenticity depicting all of the defendant's conduct and all of the necessary context that would allow the Court to assess the reasonableness of that conduct. Moreover, as the Supreme Court held, the videotape clearly supported Scott's version of events, and 'blatantly contradicted' Harris's. Such a scenario may represent the outer limit of the principle of *Johnson v. Jones*—where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review. Here, by contrast, we have only two police photographs, and an argument by the defendants not that the two men depicted are similar in appearance, but that one of the men depicted in the photographs must be similar in appearance to a third person whose picture we do not have. As the District Court noted, the photographs show little more than that 'both Omar and Andre Blaylock are young black men who had short hair at the time their police photographs were taken,' . . . and, other than the officers' affidavits stating that they thought they were observing Omar selling drugs with Dana, there is 'no evidence relating to the physical characteristics of [Dana's accomplice].' Moreover, as Andre's counsel noted at argument, the photographs do not depict Andre's or Omar's height, weight, or build. Thus, unlike *Scott v. Harris*, we do not have a situation in which 'opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it.' Even if we assume that the photographs are so similar to each other that a police officer could reasonably mistake one photograph for the other, that does not establish that no reasonable jury could find that Andre did not resemble Dana's accomplice (who is undisputedly not Omar). Because the officers make no arguments regarding the false arrest claim that do not ask us to contradict the District Court's determination of which facts are subject to genuine dispute, we will dismiss that portion of their appeal for lack of jurisdiction under *Johnson v. Jones*.")

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.”).