Case No. 18-7648

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM R. STEVENSON
PETITIONER

VS.

RANDY CORDOVA, ET AL
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS
CASE NO. 17-1053

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I Whether the Court of Appeals erred in concluding the law was not clearly established as to the conduct of Defendants Espinoza and Williams and in concluding that Petitioner's case was not a case in which the constitutional violation was obvious?

II Whether the usual deliberate indifference standard of Farmer v. Brennaon, 501 U.S. 825 (1994) applies to Eighth Amendment claims against prison officials who knew of but ignored a substantial risk of harm to a prisoner's health and safety, and whether the Tenth Circuit, like the Sixth Circuit in Wilson v. Seiter, 501 U.S. 294 (1991) applied the wrong legal standard to Petitioner's claims that Defendants Williams, Clinkinbeard and Espinoza acted with deliberate indifference to his health and safety?

III Whether the Court of Appeals misapprehended summary judgment and qualified immunity standards and failed to view evidence in the light most favorable to Petitioner as the non-moving party?

IV Whether the Court of Appeals erred in not conducting its own independant de novo review of the directed verdict issue, and does the transcript of Petitioner's cross-examination testimony demonstrate he presented sufficient evidence and sufficient disagreement requiring submission to the jury?

V Whether the Defendants obtained a jury verdict in their favor by the knowing use of contradictory and perjured testimony, and whether the District Court was biased towards Petitioner and improperly influenced the testimony, depriving Petitioner of neutrality and due process?

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Objections and Misstatements

It appears that Respondents have not objected to the jurisdiction of the Court to grant the petition; not objected to the questions presented; and have made no attempt to point out any perceived misstatements of fact or law. Rule 15.2.

Reasons to Grant Petition

Although the reasons Petitioner believes warrant the grant of the petition are adequately stated in the petition, he believes a brief reply is in order to address new points and to correct several assertions contained in the opposition brief (Opp Br.).

Reply

Respondents Reason 1

Respondents have made no attempt to refute the extensive case law and arguments contained in the petition relating to clearly established law regarding Petitioner's fourth, fifth, sixth and seventh arguments (Pet, 19-24), including the argumenst 1) that a reasonable officer in Espinoza's position would have known that his taser was not having effect because Petitioner's hands and arms were trapped by the officers weight, and known (at least by the second tasing) not to continue to electrocute him 3 additional times; 2) that a reasonable officer in his position would have known not to squeeze the handcuffs even tighter, using "extra effort," after they had already been "slammed on" extremely tight; 3) that a reasonable officer in both Espinoza and Williams' position (after hearing repeated complaints) would have known that they had to balance the need to maintain or restore discipline against the risk of harm. Hudson v. McMillian, 503 U.S. 1, 6 (1992), and would have known that if they did not intervene to check the cuffs by means of the "pinky rule," or loosen or replace the cuffs they would be subjecting Petitioner to an unnecessary and substantial risk of harm; and 4) that in the absence of a materially similar prior case, the general excessive force standard of Hudson applied to clearly establish his rights. (Pet, 13, 21, 24)

Respondents argue that there are no decided cases from this Court or any Circuit that addressed Espinoza's use of a taser under the circumstances he faced; and that he was not provided "fair warning" that his conduct might be unconstitutional. (Opp Br. 12-13). As to Williams, they argue that he too was not provided "fair and clear warning" that his conduct in not intervening could be unconstitutional. (p.22). Both arguments fail. Hope v. Pelzer, 536 U.S. 730 (2002) may well have provided "fair warn- that (1) handcuffing an inmate and forcing him to remain in awkward positions for prolonged periods offended contemporary concepts of decency and human dignity and thus violated the Eighth Amendment; and (2) that leaving an inmate in handcuffs when no penological purpose existed violated the Eighth Amendment. And Farmer v. Brennan, 511 U.S. 828 (1994) provided "fair warning" that officials have an affirmative duty to protect inmates from harm; and that subjecting them to an unnecessary and substantial risk of harm violated the Eighth Amendment.

In this case, the constitutional violations were obvious, so that Petitioner's rights were clearly established without a materially similar case, and the general excessive force standard of Hudson applied to establish his rights. As argued, the contours of Petitioner's rights were sufficiently clear that a reasonable officer would have understood that what he was doing violated that right. In light of the inability of Respondents to face the issues presented in the petition regarding clearly establsished law, the need for review of the action below is indisputable, requiring summary reversal.

Next, Respondents argue that they are entitled to wide-ranging deference in the adoption of policies and practices that are needed to preserve internal order and discipline. (Opp Br. 11). True, but certain actions not taken in good faith and for no "legitimate penological purpose" (LPP) are not insulated from judicial review. Whitley v. Albers, 475 U.S. 312, 322 (1986). In this case, there was no LPP for Espinoza to tase Petitioner 5 times while he was dog-piled and arms trapped; no LPP to apply the cuffs using "extra effort" after he had already applied them extremely

tight; no LPP for Holloway to apply pressure points to his head after he had been cuffed and shackled; no LPP for Sullivan to intentionally press his face hard into the concrete floor after he was cuffed and shackled; no LPP for Benavidez to intentionally bend and pull his wrist hard against the steel cuffs after he had been cuffed and shackled; an no LPP for not loosening or replacing the cuffs after he had been cuffed and shackled (incapable of resisting or presenting a danger), and especially after he was strapped to board and then gurney.

Once Petitioner was cuffed and shackled, officer safety was no longer at stake and there was no LPP for not checking or replacing the cuffs to prevent injury. Petitioner remained cuffed for 30 minutes, long after the need to make split-second, decisions "in haste, under pressure or without the luxury of a second chance." Hudson, 503 U.S. at 3. Since there was no emergency situation, Respondents were required to balance the need to "maintain or restore discipline" through force against the risk of injury. Hudson, 503 U.S. at 6. The use of force must stop when the need for it to maintain or restore discipline no longer exists. Skrtich v. Thornton, 280 F.3d 1295, 1304 (11th Cir. 2002). When prison safety is no longer at stake, the officials license to use force is limited and to establish an Eighth Amendment violation an injured inmate need not prove malicious and sadistic intent. Unwin v. Campbell, 124 F.2d 125, 126 (1st Cir. 1988). As stated in Skrtich, "[T]he argument that beating a prisoner for noncompliance with a guard's order after the prisoner has ceased to disobey or resist turns the "clearly established law" of excessive force on its head and changes the purpose of qualified immunity in excessive force cases from one of protection for the legitimate use of force into a shield for clearly illegal conduct." Skrtich, 280 F.3d at 1305. Here, the Respondents actions were taken in bad faith and not for legitimate penological purposes.

A. Espinoza (Taser and Handcuffs)

Respondents claim that Petitioner failed to present any evidence to suggest that Espinoza acted with a sufficiently culpable state of mind in using taser and in

applying handcuffs. (Opp Br. 16) They claim Petitioner offers no evidence to dispute that Espinoza warned him prior to tasings; and that video clearly shows he did not immediately begin tasing upon arival. (p.14-15) The video howver "does not" clearly show that he did not immediately began tasing. It shows that he had his taser pulled on the run and "immediately" stuck it to Petitioner's back. (Resp. App. A, 118-4 at 2:30- 3:30 [hereinafter Vestibule Video]). Combined with Petitioner's sworn testimony that he was immedaite dog-piled; and tased "instantly." (Pet App. F-2, ¶51; Pet App. F-3, 75:18-20), which was to be credited, it was to be inferred there was no warning.

Resondents claim that Petitioner did not "visually respond" to being tased, so Espinoza tased him a second time. (Opp Br. 15) Espinoza tased Petitioner in the back, while dog-piled, so he could not see if Petitioner "visually responded" or not. They also claim there is no dispute the tasings were ineffective in securing compliance; and whether tased 3 or 5 times was immaterial to summary judgment analysis. (p.15).

Although Espinoza claims he discharged his taser 3 times, Petitioner's contrary evidence shows he did so 5 times. (Pet App. F-2; F-11 (photos & second anatomical); Vestibule Video, 23:54-24:06, 25:9-17, 25:23-25:28 and 36:40-42). The number of times tased is material, as it shows "state of mind" and "intent", because Espinoza "knew" that Petitioner was dog-piled and that his hands and arms were trapped (thus the taser appearing ineffective), but yet he maliciously continued to tase him 3 additional times, and then tried to cover if up and say he tased Petitioner only 3 times while he was looking directly at Petitoner's back during anatomical, (See Pet App. F-11 "Video Footage," p. 2, (beginning of conspiracy) and 30:00-30:19), showing state of mind.

Respondents do not address Petitoners claim (Pet, 21) that a reasonable person in Espinoza's position would have realized the taser was having no effect because his hands were trapped, and known, at least by the second tasing, not to continue to tase him three additional times.

Regarding the handcuffs, Respondents do not address the claim (Pet, 21) that a

reasonable person in his position would have known not to squeeze the cuffs even tighter, using "extra effort," after they had already been applied extremely tight. Petitioner asserts that it was this intentional effort that made the cuffing wanton and unnecessary. Therefore, the evidence shows that he acted with a sufficiently culpable state of mind when he used the "extra effort" (as alleged in complaint) to squeeze the cuffs even tighter, and when he refused immediate and 7 subsequent requests to loosen the cuffs in the Upper Vestibule.

Finally, Respondents do not address claim (Pet, 21) that both Espinoza and Williams would have known, after hearing repeated complaints that the cuffs were too tight, that if they did not intervene to check or loosen them, they would be subjecting Petitioner to an unnecessary and substantial risk of harm. Likewise, Respondents fail to address claim (Pet, 23-24) that their refusal to loosen under the circumstances violated basic concepts of decency.

B. Williams (Handcuffs)

Respondents claim Petitioner failed to introduce sufficient evidence to establish that Williams knew of a constitutional violation and did not intervene as a supervisor. (Opp Br. 21). The evidence shows however that Williams arrived in the Upper Vestibule at 3:40 minutes (Vestibule Video, 3:40); that Petitioner identified him as being present (Pet App. F-2, ¶58; and that Petitioner made a total of 8 complaints about the cuffs in the Vestibule (¶52-61). The District Court (DC) found that he complained several times, but without response (Pet App. B, 41).

As to Williams' involvement, Petitioner alleged in complaint that his involvement was based on claims that he "stoody by and did nothing," that he "acted with indifference," that he "made no attempt to intervene," and that he "had a duty to exercise control of his subordinates." (¶80-81, 87-88, 97-98).

Respondents claim that Petitioner "admitted" that Williams could be seen arriving in the Vestibule at 3:40 minutes and then leaving at 3:40 minutes (Opp Br. 21, 26-27),

which they claim was too short a time to intervene. Not so, as they are aware that the Court of Appeals (COA) agreed with Petitioner - (in response to his argument that the DC erred in dismissing Williams because he was present to witness excessive force and hear complaints in Upper Vestibule) - 'that the DC's reasoning in granting Williams summary judgment failed to address the claim based on his inaction,' or failure to intervene. (Pet App. A, 13). As argued on appeal (as shown on Vestibule Video at 3:40) Willaims arrived at 3:40 minutes; and argued (as shown on Body Cam Video - Resp App. A, 118-5 at 3:40 [hereinafter Body Cam Video]), he can be seen leaving out the door of cellhouse 1 at 3:40 minutes.[1] Respondents are aware that there are "two" different video.

The above fact show that Williams (like supervisor Cordova and Holloway) was present in the Vestibule to hear Petitioner's complaints; to witness how tight the cuffs were; to watch Holloway apply pressure points when he was cuffed and shackled; (Pet App. B, 52); to watch Sullivan press his face to floor for over a minute (Pet App. F-2, ¶55; Vestibule Video, 4:54-5:41); and to hear him yell in pain twice when Benavidez bent and pulled wrist (Pet App. F-2 ¶62; Vestibule Video, 11:42-58).

This was sufficient evidence to show that Williams was aware of facts from which he could infer others were using excessive force. There was 12 minutes in which he could have intervened to check or loosen the cuffs (or direct others to); 60 seconds in which to stop Sullivan; and time to direct Benavidez not to use force again, but failed to do so.

Petitioner's claim against Williams was not that he himself used "exceessive physical force," but that he acted with "deliberate indifference" to his health and safety when he failed to intervene to loosen cuffs and stop subordinates. Regarding the refusal-to-loosen, Petitioner presented sufficient evidence that his failure contributed to and exacerbated pre-existing carpal tunnel and nerve damage (Pet App.

1. The actual time is 2.47 minutes, where he can be seen leaving Cellhouse 1.

F-2, ¶78, 81, 86, 96), constituting the "unnecessary and wanton infliction of pain" prohibited by the Eighth Amendment. He did likewise regarding his other failures, which caused Petitioner's other injuries.

Respondents Reason 2

Respondents claim that Petitioner argues that the "deliberate indifference" standard should be applied to his "excessive use of force" claims against Clinkinbeard and Espinoza. (Opp Br. 23). Not so, he argues only that the standard applies to his claim that William, Clinkinbeard and Espinoza were "deliberately indifferent" when they knew of but ignored a substantial risk of harm to his health and safety that was obvious when they failed their affirmative duty to intervene to check or loosen the cuffs to prevent injury. (Pet, 25).

They point out, citing Farmer, 511 U.S. at 835, that the "[a]pplication of the deliberate indifference standard is inappropriate" when "officials stand accused of using excessive physical force." They argue that the reason for not using the standard is because "[t]he decisions of prison officials are typically made "in haste, under pressure, and frequently without the luxury of a second chance." (p. 23). However, there is no claim that Williams used excessive force against Petitioner, and although Clinkinbeard and Espinoza did, they were also "deliberately indifferent" when they failed to intervene, thus the claim of "deliberate indifference."

Here, after Petitioner was cuffed and shackled - incapable of resisting or posing a danger - (and especially after he was strapped to board and gurney), the situation was not one in which Respondents needed to make additional split-second decisions, "in haste, under pressure or without the luxury of a second chance." On the contrary, the evidence shows that Petitioner was "fully restrained" and "completely immobilized" and not capable of "harming anyone," and that there was plenty of time to loosen or replace the cuffs. (Pet App. F-12, Espinoza Depo, 52:23-53:3, Cordova Depo, 79:4-12, 76:24-77:14, 82:17-23; Pet App. F-2, ¶64-68).

The evidence shows Petitioner remained in cuffs for 30 minutes, which provided

ample opportunity to loosen or replace the cuffs. Aside from complaining 8 times in the Vestibule, the Body Cam Video shows he complained 20 additional times. (See Pet. App. F-11 "Video Footage" at p. 2, for Time Codes). At Time Codes 1:39-44, 11:22-31, 11:46, 11:49, 12:04-13:26, and 14:42-48, the Court can see just how tight the cuffs were; certainly tight enough to cause pain, nerve damage and exacerbate carpal tunnel. Contrary to what Nurse Bufmak claimed (Opp Br. 30), these cuffs were "tight!"

Who would not be justifiably upset if officials blatantly refused to respect your right to be free from "excessively tight" cuffs, when they made it clear by ignoring your repeated complaints that they had no intent to loosen? And who would not be further justifiably upset, if when the time come to remove the cuffs in medical (and you agreed, stating: "Yes, she can do the anatomical" and "Let's do this. I want this documented" - Body Cam Video, 11:30, 14:40; Pet App. F-4, 15-16), but they still refuse and delay further, showing no regard for your pain, health and safety? Prison official liable for exposing prisoner to excessive force at hands of other prison employees under same deliberate indifference standard that Farmer employs for prison officials who fail to protect inmates from violence by others. Curry v. Scott, 249 F.3d 493, 506 n 5 (6th Cir. 2001). Prison official may be liable for failure to to protect inmate from use of force if he is deliberately indifferent to a substantial risk of serious harm; Supervisor present during use of force could be found to be deliberately indifferent for failure to intervene. Burgress V. Moore, 39 F.3d 216, 218 (8th Cir. 1994). Given the lack of respondent superior liability under §1983, a supervisor's liability is not for the use of excessive force, but for distinct acts and omissions that are the proximate cause of the use of force. **Blyden v. Mancusi**, 186 F.3d 252, 264 (2nd Cir. 1999). See also Buckner v. Hollins, 983 F.2d 119, 122 (8th Cir. 1993)(applying deliberate indifference standard to excessive force cliam based on prison official's failure to act).

And Wilson v. Seiter (Opp Br. 24) was not cited as an excessive force case, but to show that when the Sixth Circuit erred and applied the wrong legal standard the case was remanded by the Supreme Court for consideration of the appropriate standard.

Respondents claim that the COA found no error in the DC dismissing Clinkinbeard and Espinoza because Petitioner did not allege a refusal-to-loosen claim against them in his Complaint. (Opp Br. 24). Here, instead of addressing Petitioner's claim based on the facts presented in the record, the COA improperly deferred to the ruling of the DC, noting that "the [DC] construed [the] refusal-to-loosen claim as brought against Cordova and Holloway." (Pet. App. A, 12). This issue remains **unresolved.**

Although the Complaint does not detail how Clinkinbeard and Espinoza violated the Petitoner's rights, it did specifically idneitfy them as being present in the Vestibule to hear his complaints, and alleged numerous times that "there was no reply," and "no response." (Pet. App. F-2, ¶58, 52-61). Therefore, they were aware of facts from which the inference could be drawn that a substantial risk of harm existed.

In his summary judgment response (since it was established both were present to hear complaints), Petitioner argued that they were liable for failing to intervene to protect him from injury; that they had an affirmative duty to loosen the cuffs to prevent a substantial risk of harm; that they acted with deliberate indifference to his health and safety; that not only did Cordova, Holloway and Williams fail to intervene, but **"the others"** did as well; that their refusal-to-loosen was not done in good faith; and that such supported an inference of wantonness. (Pet App. F-4, 27, 30, 34-37).

On appeal, he cited case law for the proposition that: Identifying those present was sufficient to allege direct participation; the duty to uphold the law does not turn upon an officer's rank; a correctional officer cannot escape liability by relying on his inferior or non-supervisory rank; rank does not shield officer from liability for failure to intervene to stop excessive force by others; and prison official may be liable for failure to protect inmate from excessive force if he is deliberately indifferent to a substantial risk of harm.

On rehearing, Petitioner requested rehearing, inter alia, on the basis that the Panel ignored that he alleged sufficient claims against them to establish an Eighth

Amendment violation based on their failure to intervene and deliberate indiffrence, and that bystander liability applied. The COA passed and did not grant rehearing to resolve the issue. (Pet App. C). As such, the issue remains open and has merit, and if the Court does not address it, the issue should be remanded for the lower courts to resolve, which this Court has the power to do.

Respondents Reason 3

Although Respondents claim that Petitioner failed to present any evidence to demonstrate a dispute of material fact (Opp Br. 27), Petitioner asserts that he did (Pet App. F-4, Pp 8-20) and that the question here presented is whether the COA viewed and credited his evidence in the light most favorable to him or credited the Respondent's evidence and version of events and relied on its mistaken view of matters.

Respondents claim that the COA conducted its de novo review and found that "no disputes existed" as to seven facts listed by Respondents. (Opp Br. 27-28). However, what Respondents are claiming as 'findings' by the court that "no dispute exists" the majority consist of merely a chronology of events or background facts as listed by the COA. (Pet App. A, 2 n 1).

Respondents claim that Petitioner offered only the surveillance video, which has no audio, to support his claim that Espinoza tased him immediately and without warning. (Opp Br. 28). Petitioner presented sufficient evidence during summary judgment to be entitled to a "reasonable inference" that he tased him without warning. And although the video does not exactly show "when" Espinoza began tasing Petitioner (Pet App. B, 7-8), it does show that he pulled his taser on the run, and stuck it to his back "immediately" upon contact (Vestibule Video, 2:30-2:59). It also shows that when Petitioner's right arm was not trapped beneath his body, it was trapped by an officer kneeling on it while he was being tased. Id 3:30. Moreover, Petitioner's verified Complaint shows that when back-up staff arrived, "no on asked a single question," but he was "immediately dog-pilled" and "tased five times." Pet App. F-2, ¶51).

Additionally, his sworn Declaration (not available, but cited in summary judgment response) indicates the same. (Pet App. F-4, 8-9). Finally, his Deposition shows that he "was just tased," and that he was tased "instantly." (Pet App. F-3, 74:2-10, 75: 18-20). Petitioner's Deposition testimony was given under oath, and his Declaration and Compliant were signed under penalty of perjury and thus sufficiently verified for purposes of refuting affidavits filed by Respondents.

The COA was required to examine the factual record and believe Petitioner's evidence and draw all reasonable inferences in his favor.. Scott v. Harris, 550 U.S. 372, 378 (2007). It did not do so. If Petitioner's verified and sworn testimony showed that Espinoza tased him "immediately" and "instantly," and if the video showed that he had his taser pulled on the run and stuck it to Petitioner's back "immediately" (which it does), then he was entitled to the "reasonable inference" that he was tased without warning. But whether tased without warning or not, clearly the excessive tasing violated DOC policy (Pet, 20) as well as clearly established law.

Respondents claim that Petitioner did not address the fact that the tasings were ineffective. (Opp Br. 28). On the contrary, he did address such. The facts show his hands and arms were trapped by the weight of the officers and he could not move - making it impossible for him to comply while being dig-piled and tased. Petitioner relies upon the arguments raised in the petition in support of this claim (Pet, 30).

Respondents claim that the COA found that it was uncontested that the "pinky rule" applies when an inmate is being compliant and not when he is physically resisting the application of handcuffs. (Opp Br. 28). Again, Petitioner relies upon the arguments raised in the petition in support of this claim (Pet, 31). The pinky rule could have been used at anytime, not just upon application. There was no justification.

Respondents claim that Holloway testified that the cuffs could not be ratchted down or loosened, but had to be unlocked and loosened. (Opp Br. 29). This howvere is contrary to his direct testimony where he and Cordova both admitted that they could have placed losser fitting cuffs over the tight ones and safely removed the tight

ones at any time, while Petitioner remained cuffed [incapable of resisting or presenting a danger], but did not do so. Respondents do not refute this testimony occurred, nor do they provide the Court with this testimony, which shows that there was no real "legitimate penological purpose" for not replacing the cuffs upon hearing initial and subsequent complaints in Vestibule or immediately in medical or shortly thereafter. As argued, the decision not to check, loosen or replace the cuffs was not based on any legitimate penological purpose, but on their deliberate indifference, no doubt for insisting they carry him after they ignored his repeated complaints and refused to respect his right to be free from the excessively tight cuffs, as suggested by the DC in summary judgment memorandum. (Pet App. B, 49).

Again, the Respondents were required to balance the need to maintain or restore discipline [through force] against the risk of injury. Hudson, 503 U.S. at 6. The Supreme Court made clear in Hope v. Pelzer, 536 U.S. 730 (2002) that leaving a prisoner in handcuffs when no penological purpose existed, would violate the Eighth Amendment.

Respondents claim that Petitioner attempts to create issues of fact that are not material. (Opp Br. 29). Here, Petitioner merely refers to what the evidence shows and to what issues of dispute his counsel found/stated in summary judgment response that have not been resolved. (Pet App, F-4, 4-20; Pet, 28). The bottom line is that the COA misapprehended summary judgment and qualified immunity standards when it did not credit Petitioner's evidence and version of events or draw all reasonable inference in his favor, but instead relied on Respondent's evidence and its own mistaken view of events. As such, this Court should vacate the COA's opinion and remand to properly credit Petitioner's evidence and draw all reasonable inferences in his favor.

Respondents Reason 4

Respondents claim that the COA found that the evidence regarding Benavidezs' conduct fell short of showing the force he used was excessive; and that overturning the directed verdict would require this Court to make findings different from those made by the lower courts. (Opp Br. 30-31).

A review of Petitioner's direct testimony (which, conspicuously, Respondents do not provide - see Pet, 8), would have shown that he did present sufficient evidence to show that Benavidez used excessive force, not only in the Vestibule, but 3 more times in medical and on way to segregation. Given that his direct and cross-examination testimony were sufficient, it is apparent that the COA did not conduct its own de novo review, but simply accepted the incorrect and incomplete findings of the DC. It appears that it did not review the competing testimony of Petitioner and Benavidez at all, considering the transcripts were not ordered until the last minute - 3 days before the date of opinion - insufficient time to thoroughly consider them. (Pet App. F-6; Pet, 10). If it did review the transcripts, it did not do so thoroughly or properly weigh the competing testimony. Nor did it thoroughly consider the DC's incorrect and incomplete view of what Petitioner's evidence actually showed, or how the DC confused the testimony and timing of events regarding Benavidezs' testimony about the "handholds." (Pet, 10).

Respondents claim that Benavidezs' use of force was proper and not repugnant to the conscience of mankind, "even while restrained in handcuffs." (Opp Br. 31) What possible justification could Benavidez have for using excessive force on a "fully restrained" inmate? Respondents incorrectly claim that 1) Petitioner admitted that Benavidez was "just standing on the sideline as an observer (Opp Br. 31). He made no such admission and the reference provided (Resp App. E, 431-53) does not support such; and 2) Petitioner admitted that when he told Benavidez that he was hurting his wrist, he moved his hand and moved it to his "shoulder area." Id. Petitioner made no such admission and the reference (Resp App. E, 431-32) does not support such. And contrary to their claim, Petitioner did not argue that "the standard is whether Benavidez should have touched him at all." (Opp Br. 32). He argued (and rightfully so) that he had no business intentionally bending and pulling when he was fully restrained.

It was for the jury to decide if his conduct was malicious and sadistic, not the DC. If reasonable minds could differ as to the import of the evidence, a verdict

should not be directed. Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949). And this Court said long ago: "[I]n every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon which the onus of proof is imposed." Improvement Co. V Munson, 14 Wall, 442, 448, 20 L. Ed 867 (1872).

On rehearing, Petitioner laid out the facts and the DC's incorrect and incomplete findings and requested rehearing on the basis the Panel did not conduct an independant de novo review but instead relied on the DC's findings in its new trial denial order. The COA passed and did not grant rehearing. (Pet App. C). As such, this issue too remains open and has merit, and if this Court does not address it, the issue should be remanded for the lower courts to resolve, which this Court has the power to do.

Respondents Reason 5

Respondents claim that issue 5 is waived. (Opp Br. 33). The issue should not be considered waived, as it was raised in new trial motion and had the COA properly appointed counsel to assist in preparing Petitioner's meritorious claims, it would have surely been included.

Respondents calim that Petitioner did not point to any conflict in the testimony of Cordova and Holloway that would justify disturbing the verdict, because they testified they would have loosened the cuffs upon Petitioner's compliance with orders. (p. 34). However, Petitioner was bound hand and foot, what was he to comply with? And he did point out conflicts about replacing the cuffs (unrefuted) and would have pointed out more by specific reference had their testimony been included in record or he allowed transcripts. Petitioner is at an unfair disadvantage.

Respondents "vigorously deny" inconsistancies in their testimony and interrogatory responses. Since they provided no transcripts, it's more difficult to see, but a comparison of Holloway's testimony with his interrogatory responses 9, 13 and 14 will show his perjury that he did not check. (Pet App. F-5, 593:17-21).

Respondents claim that the DC was simply applying the "directed verdict standard" when it denied their motion for directed verdict (p. 35). On the contrary, a review of the transcript shows the DC did much more than simply apply the directed verdict standard. It went beyond that when it indicated that it could not discount the possibility the jury could find in Petitioner's favor; when it indicated that the jury may or may not find persuasive their testimony; when it required them to continue to put on evidence; when it told them that it had problems and reservations with their theory of the case; when it told them their motion was premature and that there was a better time and place [but] "not now." (Pet App. F-5, 557:1-558:5; Pet, 36-38). These and other comments by the DC were improper.

Respondents Reason 6

Respondents ask the Court to deny review because the COA did not publish its opinion and it lacks precedential value. (p. 36). This is not a valid reason under the circumstances of this case. Simply because the opinion was not published, does not mean that it cannot be cited and relied on for its "persuasive value." (See Pet App. A, 1 *). Fed.R.App.P. 32.1, provides that "A court may not prohibit or restrict the citation of federal judicial opinions...that have been designated as "non-precedential." As such, citing it is of "limited value," but as stated in petition (p. 40), it [with its faulty reasoning] may still be relied upon by correctional officers in making use of force decisions relating to tasings, handcuffing and intervention, and used by courts and correctional officers alike as "persuasive authority." Therefore, Respondent's reason is unavailing and must fail. Futher, this Court, in Manuel v. City of Joliet, 136 S. Ct. 890 (2016), accepted review of an unpublished Seventh Circuit case dealing with malicious prosecution and the Fourth Amendment, resulting in remand. Petitioner asserts his matters are no less important to the greater public, deserving review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, it is respectfully submitted that the Petition for Writ of Certiorari should be granted

Respectfully submitted this 2 day of April, 2019

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