NO. _____

In the Supreme Court of the United States

ARLANE JAMES; IN RE: WILLIE GIBBONS; JRG, A MINOR, BY HIS MOTHER AND LEGAL GUARDIAN, IKEYA CRAWFORD; AND DKL AND LMG, MINORS, BY THEIR MOTHER AND LEGAL GUARDIAN, ANGEL STEPHENS,

Petitioners,

v.

NOAH BARTELT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit's decision to exercise jurisdiction over an appeal of the District Court's denial of qualified immunity on a motion for summary judgment is in conflict with *Johnson v. Jones* and its own precedent?

2. Whether the Third Circuit's ruling that inexplicably deviates from the Third Circuit's precedent in *Bennett v. Murphy* is an error of law?

3. Whether an officer who testifies that he was not in fear of his life or the lives of others nor did he feel threatened by Gibbons before fatally shooting a suspect be entitled to qualified immunity?

4. Whether the Third Circuit erred as a matter of law when it interpreted this Court's holdings in *White v. Pauly* and *Kisela v. Hughes* as creating a new standard of review to the established law when it granted Bartelt absolute immunity for his use of deadly force against a suicidal suspect?

PARTIES TO THE PROCEEDINGS

The Parties to the proceeding in the court whose judgment is sought to be reviewed are:

Petitioners and Plaintiffs-Appellants

- Arlane James, Executrix of the Estate of Willie Gibbons
- J.R.G., a minor, by his mother and legal guardian, Ikeya Crawford;
- D.K.L., a minor, by his mother and legal guardian, Angel Stephens
- L.M.G., a minor, by her mother and legal guardian, Angel Stephens

Respondents and Defendants-Appellees

- Noah Bartelt

Prior Defendants who are not parties to this petition: Phillip Conza; Daniel Hidder; Michael Koriejko; New Jersey State Police; and State of New Jersey.

LIST OF PROCEEDINGS

United States Court of Appeals for the Third Circuit

No. 18-1432

Arlane James, In Re: Willie Gibbons; J.R.G., a Minor, by His Mother and Legal Guardian, Ikeya Crawford; D.K.L., a Minor, by His Mother and Legal Guardian, Angel Stephens; L.M.G., A Minor, by Her Mother and Legal Guardian, Angel Stephens v. New Jersey State Police; State of New Jersey; John Does 1-10; Noah Bartelt, State Trooper; Phillip Conza, State Trooper; Daniel Hidder, State Trooper; Michael Koriejko, State Trooper; James Mcgowan, Sergeant, in Their Individual and Official Capacities.

Noah Bartelt, *Appellant*.

Opinion: April 21, 2020

Rehearing Denial: August 6, 2020

Order: February 12, 2019

United States District Court, District of New Jersey

No. 13-3530

In Re: Willie Gibbons, Et al., *Plaintiffs*, v. New Jersey State Police, Sergeant James Mcgowan, State Trooper Noah Bartelt, State Trooper Phillip Conza, State Trooper Michael Korejko, State Trooper Daniel Hider, *Defendants*.

Opinion: December 19, 2017

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

DEPOSITION TRANSCRIPTS

TABLE OF CONTENTS – Continued

Page

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Arlane James et al. respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS AND ORDER BELOW

Defendant/Respondent Noah Bartelt timely submitted his Notice of Appeal of the District Court's denial of qualified immunity on March 5, 2018, Case No. 18-1432. On February 12, 2019, the Third Circuit filed a Notice referring the matter to the Merits Panel, and is reproduced in the Appendix at App.18a. The Opinion of the Court of Appeals granting Defendant/Respondent Noah Bartelt's Petition is reported below as a precedential opinion sur nom *James v. New Jersey State Police*, 957 F.3d 165 (3d Cir. Apr. 21, 2020) and is reproduced at App.1a-17a. The Order and Opinion denying Plaintiffs/Petitioners en banc Petition for Rehearing and the Opinion Sur Denial of Rehearing en Banc is reported sur nom *Gibbons v. New Jersey State Police*, 969 F.3d 419 (3d Cir. Aug. 6, 2020) and is reproduced at App.42a-43a and App.44a-84a, respectively. The Order of the Court of Appeals referring Appeal No. 18-1432 to a Panel and dismissing Appeal No. 18-1603 for lack of jurisdiction on appeal as not a final order within 28 U.S.C. § 1291.

The order of the District Court granting Defendants motion for summary judgment is not officially

reported. It is Document 213 of the District Court sur nom *Gibbons v. New Jersey State Police*, (Case No. 1:13-cv-03530, DNJ 2017). It is reproduced as part of this Petition at App.18a-37a.

JURISDICTION

The Third Circuit entered its judgment on April 20, 2020. A timely petition for rehearing en banc was denied on August 6, 2020. App.42a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE[1]

The instant case originated from the shooting and killing of Willie Gibbons, an African American man whose history of schizophrenia[2] was known to the State Troopers who served as the local in Bridgetown, NJ where Gibbons lived. The shooting emanated from a domestic dispute between Gibbons and his girlfriend, Angel Stephens. Stephens became concerned that Gibbons had stopped taking his medication for schizophrenia. On May 24, 2011, Stephens called the police following an argument with Gibbons. However, when police arrived at their house, they could not initially identify who was the victim as the statements of Gibbons and Stephens conflicted. Police told Stephens that she could not get a restraining order because "there was no fighting or nothing done," unless Gibbons had threatened her "with a knife or a gun." At that point, Stephens for the first time accused Gibbons of threatening her with a gun. Police then questioned Gibbons, but he denied threatening her. Police searched Gibbons' truck for weapons, but he did not find any

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[1] These facts are drawn from the Appendices submitted to the District Court in support of the Motion for Summary Judgment and the Opposition to the Motion; the District Court's Summary Judgment opinion; the Third Circuit opinion; and, the Dissent filed by eight judges in response to the Third Circuit's decision to deny Plaintiffs' request for an en banc hearing.

[2] According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), schizophrenia is characterized by a range of cognitive, behavioral, and emotional dysfunctions. https://pro.psycom.net/assessment-diagnosis-adherence/schizophrenia-dsm5-definition (last visited 12/27/2020).

weapons before leaving the scene. Stephens then obtained a temporary restraining order from Fairfield/ Downe Joint Municipal Court against Gibbons. The order prohibited Gibbons from possessing firearms and from returning to Stephens's house without a police escort. The police accompanied Gibbons back to the house to retrieve essential items and informed him that he would need to "request a police escort" to return.

On May 25, 2011, Gibbons returned to the police station to file a Citizen's Complaint based upon the events of the previous night. He alleged that police had harassed him. Later that day, while working with his father, Gibbons discovered he had left his drill that he needed for the job in the shared house. As previously instructed, Gibbons called to ask for a police escort in order to retrieve the tool. Trooper Michael Korejko answered the phone. Korejko knew that Gibbons had filed a complaint against the police. When Gibbons explained that he needed to get his drill and other items from the house, Korejko declined to help, saying "we are pretty busy." He now told Gibbons that he was not "allowed over there unless [he had] a court order from a judge to get those items."

Gibbons then tried to call Stephens. When he could not get her on the phone, he went to the house to ask her for the drill. Stephens was on the telephone with Clarence Dunns; when Gibbons arrived, Dunns took it upon himself to call the police. Dunns only told police that "he's out there in front of her house" and never mentioned a gun. However, the dispatcher inexplicably told the officer who eventually responded that Gibbons had "showed up [at the house], with a handgun . . . "

When Trooper Phillip Conza arrived at Stephens' house, he told Stephens he had heard that Gibbons had a gun. Stephens did not express any concern for her safety. Nevertheless, Conza suggested she come down to the police station. As she drove to the station, Stephens passed Gibbons walking on the side of the road; she called the Trooper Barracks to report that she had seen Gibbons walking down Burlington Road heading toward the station. The dispatcher asked if she saw a gun and Stephens responded that Gibbons had a backpack, but she did not see a gun. After speaking to Stephens, Trooper Conza told her to go to the State Police barracks to lodge a complaint. Conza then headed to Gibbons' mother's house, where he met Bartelt and Korejko. Hider passed Gibbons walking on North Burlington Road, but did not report seeing a gun. He radioed the other officers and turned around down the road to return to the scene. Korejko, Bartelt, Conza, and Hider responded to the Burlington Road location. Bartelt was the most junior of the troopers. Although three other troopers were already dispatched, Bartelt asked to go to the chase and was the first to make contact with Gibbons.

The video camera in Bartelt's car was operative, but as he proceeded towards Gibbons' location, Bartelt inexplicably manually disabled his camera. Bartelt first contacted Gibbons from inside his vehicle and told Gibbons to "come here." Gibbons kept walking at "a normal" pace in his original direction, turning his head around to say, "stay away from me." Bartelt parked, angling his troop car in the southbound lane of travel. Bartelt testified that Gibbons turned around and pointed a gun in his left hand to his own head,

again saying "stay away from me." Bartelt stated that there was no threat by Gibbons, and he had no fear of Gibbons, that there was no other person around in the vicinity of Gibbons and there were three other Troopers seconds behind. However, he alighted from his car after speaking and driving beside Gibbons then stated he might have said words such as 'drop the gun,' but within seconds of the command and while Gibbons' gun remained pointed at the left side of his head, he was shot twice in his center mass by Trooper Bartelt. Bartelt noted that he was attempting to discharge a third shot but his weapon jammed. Gibbons was later transported to the hospital by helicopter and was pronounced dead in the early morning of March 26, 2011, after undergoing emergency surgery at Cooper Hospital in Camden, New Jersey.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION TO EXERCISE ITS JURISDICTION AND REVIEW THE DISTRICT COURT'S DECISION THAT BARTELT WAS NOT ENTITLED TO QUALIFIED IMMUNITY CONTRADICTS *JOHNSON V. JONES* AND ITS OWN PRECEDENT.

The District Court had original jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343. The Third Circuit Panel ("Panel") asserted subject matter jurisdiction to hear the appeal that is now before this Court pursuant to 28 U.S.C. § 1291 and the collateral-order doctrine. App.3a at n.1. Pursuant to 28 U.S.C. § 1291, appellate courts have jurisdiction only from final decisions of the district court. The denial of a motion for summary judgment, which allows an issue to proceed to trial, is generally not considered a final order. Hence, "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." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). Under the Circuit's own supervisory rule, disposition of a party's motion on qualified immunity requires the district court to identify relevant factual issues and analyze the law that justifies the ruling with respect to those issues. *Forbes v. Township of Lower Merion*, 313 F.3d 144, 149 (3d Cir. 2002). By exercising its jurisdiction to properly review Bartelt's appeal, the Panel exceeded the limits of its jurisdiction under 28 U.S.C. § 1291.

Resultingly, the Panel in this case assumed jurisdiction under the collateral-order doctrine. Pursuant to the doctrine, district courts in this Circuit must comply with the supervisory rule and write decisions that provide "at minimum, an identification of relevant factual issues and an analysis of the law that justifies the ruling with respect to those issues." *Forbes*, 313 F.3d at 149. Failure to comply with these requirements will result in the Circuit remanding the case to the district court to "specify those material facts that are and are not subject to genuine dispute and explain their materiality." *Id.* at 146. *See also Blaylock v. City of Phila.*, 504 F.3d 405, 409 (3d Cir. 2007) ("defendant's argument cannot be entertained under the collateral-order doctrine but must instead await an appeal at the conclusion of the case") (emphasis added). Once the district court fails to "specify those material facts that are and are not subject to genuine dispute and explain their materiality," Third Circuit precedent is to remand the case to the district court rather than exceed the limits of the Circuit's jurisdiction. *Id.* at 410 (citing *Forbes*, 313 F.3d at 146). *See also Blaylock*, 504 F.3d at 410 (reciting Third Circuit cases following this precedent.).

The Panel acknowledged that the District Court based its holding on the existence of disputed material facts but failed to identify the set of material facts that it had reviewed to make that determination. App.38a. The District Court's decision does include an analysis of Plaintiffs' Fourth Amendment claim against Bartelt, the Trooper who shot and killed Gibbons. App.36a-38a. This analysis concluded that genuine issues of disputed fact prevented it from holding that Bartelt was reasonable in his belief that

Gibbons "posed a danger to him or someone else" to prevail on a motion for summary judgment." App.38a. The District Court found legal authority for this position in Third Circuit precedent: "[l]aw enforcement officers may not kill suspects who do not pose an immediate threat to their safety or the safety of others simply because they are armed." *Bennett v. Murphy*, 120 F. App'x 914, 918 (3d Cir. 2005). The law upon which the District Court relied in its analysis all predate the 2011 shooting and killing of Gibbons. This analysis did not satisfy the Panel's needs to evaluate the disputed material facts that the District Court had reviewed.

Once the Circuit Court decided to exercise jurisdiction, it essentially agreed that the Panel would undertake a cumbersome review of the record. One can assume only that in the Panel's analysis "the record provides sufficient guidance" for it "to retrace the analytical steps taken by the District Court." *Forbes*, 313 F.3d at 149. The Panel determined that there were three facts that the District Court "likely assumed. App. 5a at n.3. It wrongly states that the Parties do not dispute these facts. Clearly, there is a dispute about whether Gibbons was in possession of and was brandishing a weapon. That unproven fact was disputed by the record. *See infra* at Argument III. Other than these three 'facts," the Panel recited almost to the letter Defendant Bartlet's Concise Statement and the factual findings that the District Court had used rather than "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." *Williams v. City of York, PA*, 967 F.3d 252, 257 (3d Cir. Jul. 24, 2020) (Hardiman, J.) (quoting

Johnson, 515 U.S. at 319). The Panel's decision not to review the record from below and to accept the District Court's facts just pushes the can down the road. The cumbersome review of the record that this Court reasoned was necessary was undertaken only by the five Circuit Court judges in the Opinion Sur Denial of Rehearing En Banc ("Dissent"). (App.46a-54a). That effort empowered those judges to write a 35-pages dissent that acknowledged the Plaintiffs' voices and that reached the same conclusion as did the District Court—Trooper Bartelt is not entitled to qualified immunity for shooting Willie Gibbons.

II. THERE ARE GENUINE ISSUES OF MATERIAL FACTS THAT SUPPORT THE DISTRICT COURT'S HOLDING THAT BARTELT IS NOT ENTITLED TO QUALIFIED IMMUNITY.

If this Court determines that the matter was properly before the Third Circuit, it must consider whether the record that was considered by the District Court and the Panel contained material facts that should have been considered before this matter reached this Tribunal. The clear language of Rule 56 and this Court's precedent, the Third Circuit Panel erred as a matter of law when it subsumed the jury's role as Fact Finder.

A. Defendants Did Not Satisfy the Summary Judgment Standard to Prevail on Its Motion to Obtain Qualified Immunity for Bartelt Before the District Court.

In deciding the merits of a party's motion for summary judgment, the court's role is not to evaluate the evidence and decide the truth of the matter, but

to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). As the Third Circuit has held, credibility determinations are the province of the factfinder. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). An "issue is 'genuine' if supported by evidence such that a reasonable jury could return a verdict in the nonmoving party's favor (*Anderson*, 477 U.S. at 248). "A fact is 'material' if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit." *Id.* (emphasis added). The decision of whether the fact will sway the jury one way or the other cannot be determined by the courts when a party seeks a jury trial.

As we argue herein, there are so many facts in the record that the District Court did not review that it was incumbent upon the Dissent to review the record in the light most favorable to Plaintiffs (App.46a-53a) —not merely those facts extrapolated by the lower court. The District Court's decision includes 67 facts (59 plus eight in the footnotes) all taken from the Affidavits of the Parties' Counsel. (App.22a-29a). In these facts, Gibbons asserts he did not have a gun; the dispatcher asserts he was brandishing a gun; inference can be drawn that Stephens' allegations about the gun were specious. These equate to disputes.[3] The Dissent notes that the Third Circuit "possess jurisdiction to review whether the set of facts identified

[3] Just as the Circuit Court made assumptions about what intent the District Court had in not setting forth facts (App.65a), Plaintiffs could assume that it was the District Court's intent to set forth only facts which neither Party could reasonably dispute. Undisputed facts equate to a purely legal argument.

by the district court is sufficient to establish a violation of a clearly established constitutional right[.]" (App.58a-59a). *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 986 (3d Cir. 2014) (quoting *Ziccardi v. City of Phila.*, 288 F.3d 57, 61 (3d Cir. 2002)). However, if a District Court fails to do its job, the circuit court must "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*, 515 U.S. at 319. Although the Panel stated that it would follow its own precedent and review the record to determine what additional facts the District Court likely assumed (App.3a, citing *Johnson*, 515 U.S. at 319), the Panels' decision evidences little evidence that occurred.

B. Consciously or Unconsciously, There Was a Decided Lack of Objective Legal Reasonableness in the Facts as Relied Upon by the Third Circuit.

The District Court's facts unquestionably rely heavily on the version of events postulated by Defendants. Approximately 65% of the facts were taken from Defendants' Counsel's affidavit; with the remaining 28% coming from Plaintiffs' Counsel's Certification. Given that the Panel felt that it must accept the District Court's facts, this imbalance creates an inference of justice denied. This decided imbalance is more pronounced when one considers the facts that were gleaned when the Dissent reviewed the record. Of the 165 footnotes in the Dissents opinion, 65 references were to the submissions from the Parties to the Court on behalf of the motion and opposition to summary judgment–approximately 68% from Plaintiffs' Appendix ("PA") and 32% from Defendants' Appendix

("A").[4] An argument for this discrepancy can be attributed to the limited references made by the District Court to Plaintiffs' Rule 51.5 Statement of Facts.

Additionally, in their opposition to Defendants' motion for summary judgment, Plaintiffs assert that Gibbons had schizophrenia on six different occasion. Dkt.184-1-¶¶ 2, 5, 7-9 and 122. Nonetheless, the district court makes a single mention that Gibbons was diagnosed with schizophrenia. (App.22a); similarly, the Third Circuit mentions this material fact only once adding that Gibbons was on medication. (App.47a). Moreover, *Bartelt* testified that he had never received any training in handling people who were suicidal or who had schizophrenia. (PA-274-277). There is no explanation for why these material facts were ignored by both the District Court and the Panel. The importance of these claims is for a jury to decide. It is noteworthy that they meant so little to the District Court and the Panel.

III. THE THIRD CIRCUIT'S RULING INEXPLICABLY DEVIATES FROM ITS PRECEDENT IN *BENNETT V. MURPHY.*

Petitioners contend that the Circuit failed to follow Bennett's most fundamental tenant and its attempt to distinguish the two cases was unavailing. The case at bar raises the issue whether the Third Circuit ignored its identified "closest factually analogous precedential opinion, *Bennett v. Murphy*, 274 F.3d 133

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[4] "PA-" refers to Plaintiff's Appendix to the District Court; "A-" refers to Defendant's Appendix in the District Court. "App." refers to the Petitioner's Appendix herein.

(3d Cir. 2002), by finding Bartelt entitled to qualified immunity." (App.11a-12a). At its core, Bennett held as a matter of law that an individual "who is manifesting only self-harm cannot be a sufficient threat to warrant deadly force." (App.57a). (citing *Bennett*, 274 F.3d at 136) (emphasis in original). In reviewing Bennett's findings by the proper standard of review:

> Viewing the evidence in the light most favorable to the plaintiff, we opined that the suspect 'did not pose a threat to anyone but himself. '*Bennett,* 120 F.3d at 136. Thus, we held that the defendant police officer's deadly force was 'objectively excessive' in violation of the Fourth Amendment. *Id.* (App.13a)

If this pronouncement is so, then post *Bennett,* " . . . any officer who used deadly force against an individual who 'did not pose a threat to anyone but himself," knowingly violated the law of this circuit and could appropriately be held accountable for that violation." (App.57a). Hence, Bartelt had "fair warning" that his action under the operative facts was contrary to existing law. The Panel ignored its recent precedent by finding qualified immunity available to Bartelt, contrary to *Bennett*. *See*, *Bryan v. United States,* 919 F.3d 356, 363 (3d Cir. 2019)

IV. *BENNETT V. MURPHY* WAS PRECEDENTIAL CASE LAW FOR THE THIRD CIRCUIT WHEN BARTELT SHOT AND KILLED GIBBONS.

By its own acknowledgement, the Panel held that Bennett was of precedential value to the Circuit and therefore should have been followed in the common practice of prior decisional law. *Bland v. City of Newark*, 900 F.3d 77, 84 (3d 2018). The Panel how-

ever found artificial exceptions to deviate from that practice when reviewing the instant case. Specifically, the Panel identified three factors which it charged distinguished the encounter between Gibbons and Bartelt, with that of the confronting parties in Bennett. First, it was noted that Bartelt had prior notice of facts about Gibbons which led him to perceive Gibbon as presenting "an increased risk of harm as compared with the suspect in Bennett." (App.13a). Those factors included: 1) Gibbons' violation of the restraining order not to visit Stephens unescorted by law enforcement; 2) Gibbons' possession of a firearm and brandishing it earlier that day and 3) Gibbons' mental illness and possible failure to take his medication prior to the encounter. Petitioners contend that these distinctions upon close scrutiny had no perceptible impact upon Bartelt or his decisions of that fateful evening.

First, Gibbons' visit to Stephen's home unescorted by police did not make him any more dangerous when Bartelt encountered him with a gun pointed to his temple. That he had unsuccessfully sought a police escort to her home in compliance with the order earlier that day is equally irrelevant. Additionally, Gibbons' alleged possession of a weapon earlier that day added nothing to Bartelt preparation for the encounter with Gibbons. There are no facts or insights the Panel points to that support the notion that Bartelt's knowledge of Gibbons' violation the restraining order assisted him in any way during his encounter. Similarly, knowledge that Bennett had been unable to visit with his girl-friend and became agitated in *Bennett*, 274 F.3d at 136 may have, but did not play any part in the police encounter when they were greeted with the suspect

having a shotgun pointed under his chin. 274 F.3d 133 at 135, n.2

Second, the Panel places undue emphasis on the proximity between Bartelt and Gibbons at the time or their encounter; suggesting that the closer distance gave Bartelt "the best opportunity to evaluate whether Gibbons posed a threat to others." (App.13a). It notes further that by comparison, Bennett was compliant to officers and was 80 yards from them. We contend this reasoning is flawed for several reasons. Bartelt's closeness to Gibbons was dictated by Bartelt not Gibbons. Gibbons was observed by Bartelt walking down the street. Bartelt could have elected to drive up to meet Gibbons at a distance of 30 yard or 10 feet; Bartelt not Gibbons controlled that decision and all the attendant options of that decision. The Panel also alleged that Bennett was compliant to commands given by officers. The Panel does not identify what specific commands it is referencing, or what the impact was of that compliance. What is evident in both cases is that neither suspect complied with the command to drop their weapon. *See*, *Bennett*, 120 F. App'x at 918. One significant exception is that the officers in *Bennett* waited an hour for the Plaintiff to compose himself before one newly arrived officer elected to shoot *Bennett*, 274 F.3d at 135. Gibbons however was never given that option, despite his obvious suicidal state of mind.

Even the plaintiff in, *Kisela v. Hughes,* 138 S.Ct. 1148 (2018), at the point when shots were fired by the officer at the suspect, she was approaching her roommate with the knife and within six feet of her. There, her earlier erratic behavior of hacking a tree with a large knife raised legitimate concerns that she might cause harm to her roommate with whom it was

claimed she had a dispute. *Id.* at 1153. Here, Gibbons was given seconds to comply with Bartelt's command before he was fatally shot. And as mentioned, his continuing threat up to the moment of being shot was always and only to himself.

Finally, the Court made mentioned of Gibbons' mental illness as a factor which informed Bartelt of Gibbons' threatening propensity, but fails to explain how it informed his actions or its significance to the case. (App.4a n.2). It was also observed that he might not have taken his medication. However, no explanation was given how Gibbons was affected by the lack of medication, how having taken his medication would have made any difference or how Bartelt's knowledge had any impact upon how events unfolded. Thus, the three claimed distinctions between Bartelt's prior knowledge of Gibbons and officers confronted with Bennett urged by the court ring hollow. Obviously, whether Gibbons suffered from mental illness, had or had not taken medication is of no moment when circumstances led him to the brink of a potential violent suicide attempt5. The officers in Bennett were faced with an individual who had experienced a mental break-down of some sort prior to their arrival. The Troopers' approach in Bennett, with no prior knowledge of any history of mental illness allowed the distraught suspect time to calm down. Unfortunately,

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5 Five to 6% of people with schizophrenia die by suicide, about 20% make suicide attempts on more than one occasion, and many more have significant suicidal thoughts. Suicidal behavior can be in response to hallucinations and suicide risk remains high over the lifespan of individuals with schizophrenia. https://pro.psycom.net/assessment-diagnosis-adherence/schizophrenia-dsm5-definition (last visited, 12/27/2020)

one trooper among them became impatient and fired at the non-threatening suspect. The same could be said of Bartelt's encounter with Gibbons, who also greeted him with a possible suicide scenario. By comparison, however, Bartelt made no effort to deescalate the situation with Gibbons or wait out whatever mental illness episode he was experiencing or even wait for more experienced troopers to arrive to assist him. To the extend Bartelt had knowledge that Gibbons suffered from some mental illness, that that knowledge did not inform any of Barelt's decisions. It is submitted that the alleged distinguishing facts offered by the Panel between Bennett and Gibbons were meaningless, or at best, differences of no significance. In both instances, the trooper and not the suspect created the exigency and thereafter over reacted to it causing death. *See*, *Kisela* 138 S.Ct. at 1160 (Sotomayor J., dissenting)

V. *BENNETT* IS THE LAW OF THE CIRCUIT AND MUST BE FOLLOWED.

Petitioners agree that police officers need not enter a "suicide pact" as a condition of employment, but one of reasonable behavior even under stressful circumstances. The principle that an officer is required to refrain from using deadly force unless he reasonably believed the suspect poses a threat of serious bodily harm to the officer or others was not novel to this circuit or troopers when the Gibbons' shooting occurred. *See*, *Lamont v. New Jersey*, 637 F.3d 177, 185 (3d Cir. 2011). Bennett is the case in this Circuit that illustrates that "clearly established principle." *See*, *L.R. v. School Dist. of Phila.*, 836 F.3d 235, 247-248 (3d 2016).

The instant case must be viewed as progeny of *Bennett* and its legal principle. Quoting the dissent of Judge Mckee, he observed:

> According to Bartelt's own description of the incident, this was not an immediate reflexive action to defend himself from Gibbons or to prevent Gibbons from harming fellow officers or anyone else. Rather, according to Bartelt, he opened fire after processing all of the above and seeing that Gibbons held a gun 'pointed toward his temple on his left side.' 132 (PA-72). Only then, despite conceding that Gibbons had not threatened him, 133 (A-160) did Bartelt act on his initial impulse, which was to fatally open fire. (App.73a).

Plaintiffs submit that this was not a case that warrants the invocation of qualified immunity. It is a matter of constitutional dimension and its application here serves only to undermine and muddle its proper use in the future. Accordingly, the fatal shooting of Gibbons, an armed but suicidal suspect during a police stop violated his Fourth Amendment Rights and the precedent set forth for the Circuit in Bennett must be followed.

VI. SHOULD AN OFFICER RECEIVE QUALIFIED IMMUNITY WHEN BY HIS OWN TESTIMONY HE WAS NOT IN FEAR OF HIS LIFE, THE LIVES OF OTHERS NOR DID HE FEEL THREATENED BY GIBBONS BEFORE FATALLY SHOOTING HIM.

It is established law that qualified immunity advances a policy of "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably." (App.2a). (*citing, Pearson v.*

Callahan, 555 U.S. 233, 231 (2009)). In order to invoke the immunity, the Court must find that the underlying facts establish a violation of a constitutional right and second, that the right at issue was clearly established at the time the defendant's misconduct occurred. *Spady v. Bethlehem Area Sch. Dist.,* 800 F.3d 633, 637 (3d Cir. 2015).

In its review of the facts below, the Panel accepted as factual (and undisputed) material disputed facts in the record concerning the possession and brandishing of a weapon by Gibbons. Specifically, the Court imputed knowledge to Bartelt that Gibbons: (1) violated the restraining order entered; 2) was in possess of a firearm that he had brandished within the last hour the last hour (prior to his encounter with Bartelt) and (3) was reportedly mentally ill and may not have taken his medication. (Discussed *Infra* in Point II.) The notion that Gibbons brandish a weapon while at Stephen's home was not confirmed by Stephens or her neighbor Dunn.6

A. Gibbons Never Threatened Bartelt Before He Was Fatally Shot.

The fact sensitive nature of the events which trigger the invocation of qualified immunity is critical to the review of its application. Hence, the context of the events is the turning point in this case as in most. The Panel identified key facts in granting Bartelt's motion for qualified immunity. The Petitioner contends

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6 In his dissenting opinion, Judge McKee, referred to the reference to the dispatcher's broadcast of Gibbons showing up to Stephen's house with a handgun was inexplicable based on the facts in the record. (App.49a).

that the Court's assessment was fatally flawed and reached the wrong conclusions. Significantly, the suicidal nature of this entire episode was completely downplayed, if not ignored by the Panel. Although there is mention that Gibbons suffered from a diagnosed condition of schizophrenia cited in a footnote (App.4a n.2), the suicidal aspect of Gibbons' conduct and cases recognizing this unique feature in the context of police shootings were largely overlooked. *See*, *Bennett v. Murphy*, 274 F.3d 133 (3d Cir. 2002), *supra*; *Weinman v. McClone*, 787 F.3d 444, 450 (7th Cir. 2015) and *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 785 (4th Cir 1998). Additionally, it is undisputed that Gibbons at no time aimed or even pointed the gun at Bartelt or anyone other than himself. Further, by Bartelt's own admission, the time between his command to Gibbons to "drop the gun" and actually shooting him was seconds at best. PA-74-75. Those commands were not even clearly heard by Trooper Conza, who claimed to be on the scene at the time of the shooting. (A-181). Hence, unlike Troopers in Bennett, who waited for almost an hour attempting to deescalate the situation, Gibbons was given no such consideration. *Bennett*, 274 F.3d at 136.

An additional concern raised was over the proximity of Gibbons to Bartelt which fueled the urgency of his need to act immediately. We contend that Bartelt's actions resulted in a "self-created exigency." By all accounts, Gibbons was walking down the street with a gun pointed or trained on his head and directed Bartelt only to "stay away from me." It was not claimed that Gibbons threatened by Gibbons anyone by words or gestures. Moreover, according to Bartelt, he did not feel threatened by Gibbons and acknow-

ledged that he was likely walking to the police precinct, but ended it shooting him anyway.

A key, but often overlooked witness in this case was Joanne Leyman, a neighbor who lived right next to the site of the shooting. She testified during her deposition that immediately after the hearing the two shots she looked out of her window and saw one officer standing over Gibbons saying "Willie can you hear me?" (App.86a). Most significantly she observed only one police vehicle on the street at the exact moment and both Conza and Bartelt claimed to be present at the scene. Both Trooper also claimed to have driven to the scene in separate vehicles. PA-295, A-85. Her testimony remains a stubborn fact that will not go away.

There is ample caselaw prior to Bennett that established that qualified immunity was applicable to law enforcement officers in fatal and near fatal shootings where the plaintiff had threatened self-harm. In *Rhodes v. McDannel*, 945 F.2d 117 (6th Cir. 1991), qualified immunity applied to an officer who fatally wounded a suspect that was advancing toward the victim and the officer wielding a machete. Gibbons however posed no active threat to Bartelt and at no point approached Bartelt. Most significantly, Gibbons at all times had his weapon pointed at himself and did nothing to threaten or menace Bartelt before he was shot.

In *Montoute v. Car*, 114 F.3d 181 (11th Cir, 1997), the Court found qualified immunity to apply an officer who shot a suspect that discharged a sawed off (a felony under Florida law) shot gun in the air, but near a large crowd. *Id* at 183-184. The *Montoute* Court observed that use of deadly force to prevent the escape

of a fleeing felon was constitutionally protected citing a authority *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1964, 1701 (1985). In the present case, there was never a claim that Gibbons discharged any weapon prior to his meeting with Bartelt. Furthermore, as Gibbons walked down the street before he encountered Bartelt, there were no other pedestrian on the street at risk of harm. Finally, although Gibbons may have violated a restraining order, he was clearly not a fleeing felon. *Id.* at 185.

In *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 785 (4th Cir. 1998), qualified immunity was found where a suicidal suspect involved in a domestic dispute was shot by police after charging a crowd of officers brandishing a kitchen knife shouting, "I want to die." Once police arrived, Sigman yelled, "You better go down the road or I'm going to cut off your head," and I'm going to kill her." *Id.* at 784-785. At some point in time, Sigman came out of the house with the knife in his hand approaching the officers within 10 to 15 feet shouting, "Go ahead and shoot me" and "I want to die." *Id.* at 785. Thereafter, Sigman was mortally wounded. *Id.* at 186. Upon close review of *Sigman*, it bears little resemblance to the instant case other than the consideration of qualified immunity. Bartelt's own "Undisputed Response" regarding whether Gibbons made any gesture or threats to him prior to the shooting to which Bartelt responded: Willie did not verbally threaten Bartelt. (A-251, A-268). There is no such factual similarity to the instant case and *Sigman* at the point when the shooting occurred.

Lastly, reference has been made to *Kisela*, 138 S.Ct. at 1154 (2018), and its application of qualified immunity. This case also involved a disturbed person

(Hughes) engaged in erratic behavior including "hacking a tree" with a large knife. *Id.* at p.2 There several police responded to the scene where a woman with the large knife came within 6 feet of her roommate at the scene. Hughes ignored the orders to "drop the knife" twice before being shot. In making the analogous case to *Kislea*, the Panel posits: "(1) Gibbons was armed with a gun; (2) Gibbons ignored Bartelt's orders to drop his gun; (3) Gibbons was easily within range to shoot Bartelt or Conza; and (4) the situation unfolded in seconds" (App.11a).

The Gibbons case is similar to *Kisela* only in terms of the brief time given both suspects to respond to the order to drop their weapon. The significant departure which makes Bartelt's conduct unreasonable, is that there was no urgency in the instant case, similar to *Kisela*. Gibbons by contrast was simply walking down the street. His conduct threatened no one and Bartelt could have continued to follow Gibbons, attempt to deescalate the situation or simply wait for back up officers. It is submitted that a reasonable officer similarly situated would not have been compelled to use deadly force under these same facts.

The relevant case law consistently observes that it is the threatening conduct of the suspect toward law enforcement or others, together with the officer's reasonable belief that the threat to himself or others is genuine that must be present to justify the lethal response. In *Bennett*, as in the present case, the threatening conduct was self-directed. Moreover, in neither case did the officer(s) on site feel threatened. Here, Bartelt was aware that other officers were in route to the scene. When he arrived and confronted Gibbons, Bartelt was not compelled to take any action, any

more than the officers in Bennett. In the absence of actual threatening conduct toward Bartelt or anyone present, Gibbons' suicidal posture cannot serve as a catalyst to justify the officer "self-created exigency" and trigger qualified immunity protection. Bartelt stated that he was aware that he had other options than the lethal option he chose. (App.110a). Moreover, Gibbons' failure to "drop the gun," placed Bartelt in no greater danger than his continued posture of holding the weapon to his own head; it was a stalemate at best which urged no immediate action.

Finally, in consideration of the qualified immunity application based on Gibbons' claim of Fourth Amendment violation by Bartelt's use of excessive force, the Court must consider whether the officer's conduct was "objectively reasonable" under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). That analysis "requires careful attention to the facts and circumstances of each particular case." *See also*, *Tennessee v. Garner*, 471 U.S. 1 at 11. Here, the violation of a restraining order and possession of a weapon did not warrant the mini "manhunt" launched by the State Police. Moreover, when confronted, Gibbon posed no serious threat to the safety to Bartelt or anyone but himself and he could hardly be considered a flight risk by walking down the street. Gibbons was obviously not a fleeing felon as he was not charged with a felony. *See*, *Montoute v. Carr*, *supra*. The entire reaction to Gibbons' conduct by the State Police and Bartelt in particular was excessive and accordingly his conduct should strip him of qualified immunity protection.

VII. THE PANEL ERR AS A MATTER OF LAW WHEN IT INTERPRETED THIS COURT'S HOLDINGS IN *WHITE V. PAULY* AND *KISELA V. HUGHES* AS CREATING A NEW STANDARD OF REVIEW WHICH IF MISAPPLIED CAN GRANT AN OFFICER ABSOLUTE IMMUNITY WHEN USING DEADLY FORCE AGAINST A SUSPECT WITH A MENTAL DISABILITY.

A. Qualified Immunity Is a Non-Constitutional Defense for Unconstitutional Acts by Government Officials.

Section 1983 makes no reference to defenses or immunities which, if misapplied, can defeat Fourteenth Amendment constitutional safeguards it was envisioned to protect. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1866 (2017). (J. Thomas Concurring). Qualified immunity attaches before the officer is subjected to civil suit for damages, unless they are put on notice that their conduct is unlawful. *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Therefore, it abridges the right of trial by jury to a victim of Fourth Amendment violations. *Saucier* provides that the officer must have "fair warning" that their conduct violates the constitution, unless an obvious case where a body of relevant case law is unnecessary. *See*, *Hope v. Prizer*, and *Brosseau v. Hagen*, 543 U.S. 194, 199 (2004).

Procedurally, judges are asked to determine whether a constitutional violation has occurred and then determine if the officer is entitled to qualified immunity. In *James*, the Panel reversed Judge Rodriguez's ruling despite the existence of the 18-years precedent in *Bennett v. Murphy* and *Lamont v. New Jersey*, 637 F.3d 177 (3d Cir. 2011), which provided fair warning. *See* Argument II *supra*. The Panel's deci-

sion, approved by the Panel, moved the needle closer to providing Trooper Bartelt absolute immunity.

B. The Criteria for Determining Whether Qualified Immunity Applies.

There are three important criteria used in the qualified immunity analysis; does the state actor have notice which a reasonable officer would have known. *Kisela v. Hughes* quoting *Brosseau* at 198. The Court clarified it does not require a case on point, but existing precedent must have placed the statutory or constitutional violation question beyond debate *Pauly v. White*, 580 U.S.

Justice Thomas in his dissent in *Baxter v. Bracey* stated that the 'clearly established law' test the Court adopted because of a balancing of competing values about litigation costs and efficiency is incorrect. *See*, *Harlow v. Fitzgerald*, 438 U.S. 478, 516 (1978). *See Baxter v. Bracey*, C. Thomas, *dissenting from the denial of Certiorari*, 140 S.Ct. 1862 (2020).

The rational of pre-trial determination granting qualified immunity issue at the summary judgment phase is largely to prevent litigation cost against the officer denies substantial justice. *Harlow* was a civil action against a Nixon Official during Watergate. Rather than a case involving deadly force. Accordingly, Constitutional protection weighs heavily for its revision or establishment of a clear line test. This case is prime example of the importance of that reform to prevent injustice, especially as in this case when the victim is unable to give their version of the events.

C. The Panel Misapplication of *Pauly* Shows the Need for Court's Procedural and Clear Test Guidance So It Can Be Applied Uniformly Throughout All the Circuits.

The Dissent notes that Bartelt was faced with an immediate threat of death or physical injury. The Third Circuit had clearly established that, "[l]aw enforcement officers may not kill suspects who do not pose an immediate threat to their safety or the safety of others simply because they are armed." (App.64a, 72a-73a). Additionally, the District Court held that genuine issues of disputed fact prevent the Court from holding that Bartelt was reasonable in his belief that Gibbons posed a danger to him or someone else to warrant qualified immunity on Plaintiffs' claim for excessive force. (App.40a-42a).

The Panel's reversal highlights the need for this Court to provide a clear delineated procedure for determining qualified immunity when disputed facts exist at the summary judgment phase. Accepting only one version of the disputed fact then granting immunity based upon those fact leads to injustice and changes qualified immunity to absolute immunity. The facts in *James* are disputed including the time Gibbons was shot. The Panel ignored the stated facts Bartelt knew when he used deadly force on Gibbons, to determine if the law was clearly established. Judge Rodriguez was faced with conflicting testimony, contradicted by non-biased witnesses and *Bennett* as precedent. Accordingly, this Court should remand the matter for the matter to be tried. *See*, Fed. R. App. P. 35 (a)(1).

The Dissent notes that there were three different versions of the event that occurred the night Gibbons

was shot. (App.53a-58a). Moreover, more than once, this Court has advised that "a court ruling on summary judgment in a deadly force case" must be careful "to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead is unable to testify.'" This Court has likewise emphasized "the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard." *See Lamont.*

D. Qualified Immunity Must Be Decided Only After the Facts of the Case Have Been Established.

Failure to determine the facts of the case before determining if there is establish precedent is causes a hodgepodge of decisions, resulting in appeals to this Court seeking clarification. *See* Argument II *supra*. Therefore, a Fourth Amendment excessive force claim which calls for an evaluation of whether police officers' actions are objectively reasonable in light of the facts and circumstances confronting him. *Graham v. Conner*, 490 U.S. 386, 397 (1989). While the question of reasonableness is objective, the court may consider the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. In a claim of excessive force upon a suspect the court must determine whether the officer's conduct was to restore discipline, or maliciously and sadistically to cause harm. *Brooks v. Kyler*, 204 F.3d 102, 106 (3d Cir. 2000) (quoting *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)). This Court needs clear procedural lines regarding when such evidence

can be used and how it should be evaluated. Otherwise as in this case, a reviewing court using *Pauly* may elect not to follow established precedent and distinguish the case.

Qualified immunity does not abrogate the summary judgment standard. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). Tolan involved an excessive force claim filed by a black professional baseball player who was shot in his mother's driveway by police officer Cotton. Tolan was recently followed by the Fifth Circuit denying an officer qualified immunity. *Hunter v. Cole*, 935 F.3d 444, 455 (5th Cir. 2019) (en banc), Hunter again applied for certiorari which was denied. *Hunter v. Cole*, 19-753, 2020 WL 3146695 (U.S. June 15, 2020). In *Hunter*, the suspect had a gun to his own head and made no threatening gestures toward the police officer when he was shot.

The court explained: "[w]e conclude that it will be for a jury, and not judges, to resolve the competing factual narratives. The dissenting justices in *James*, noted that Gibbons' death leaves us reliant on the officers' recounting of events, and that there are many similarities between Cole and James. (App.81a-82a). Viewed at summary judgment in a light favorable to the non-movant, Gibbons posed a threat to no one but himself. It thus "follow[s] immediately" that Bartelt's use of deadly force violated clearly established law. (App.56a). Accordingly, a bright line test is needed to prevent the bevy of cases now going before the Court for clarification.

E. Procedural Safeguards That Avoid Misinterpretations and Constitutional Violations Are Urgently Needed.

In *James*, the Panel accepted the officers after the act rational and reason for using excessive force. However, in *Glenn v. Washington Cnty.*, 673 F.3d 864 (9th Cir. 2011), where an emotionally disturbed individual is acting out and inviting officers to use deadly force, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. *Id* at 876, *see also Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010) ("[I]f Officer MacPherson believed [the plaintiff] was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means."). Here, Gibbons' shooting is more disturbing because he was pleading for distance and threatening his own life with the gun. His mental illness should have prevented Bartelt from using deadly force against him not caused him to be shot. (App.73a-74a). The Panel gave credence to non-relevant facts to determine that the law was not clearly establish and therefore Bartelt use of deadly force is justified. They equate the presence of a gun as being consistent with a threat, regardless of the officer's statement to the contrary. (App.102a-108a)

Would a reasonable officer in that situation know that their act was against establish precedent the law? Due to *Bennett v. Murphy* the answer must be yes otherwise there is no qualified immunity just absolute immunity. *Bartelt's* statement shows his intent to shoot Gibbons regardless of the situation, therefore, not

deserving of the defense of qualified immunity. (App. 110a-111a).

Accordingly, qualified immunity for Bartelt's act should not be granted even the wide berth defense of qualified immunity under *Pauly*. As Justice Thomas noted "We apply this clearly establish" standard "across the board" and without regard to the precise nature of the various official's duties or the precise character of the particular rights alleged to have been violated. Contrary to the common law tort remedy under which it was premised. The common law Doctrine of 1871 looked quite different from our current doctrine" He suggest the balancing Act is best left to Congress of policy preferences for Congress. *Ziglar v. Abbasi*.

Pauly and all the cases used by the panel involved some act or tension where the officer can mistakenly, or reasonable believe that the suspect was a threat to the officer. The suspect was threatening another, fleeing after a long stand-off, pointing the gun at the officer, or stating to the officer that they had a gun and will use it. None of that scenario exists here. Since the Court must consider only the facts known to the officer at the time of the shooting none exist for granting qualified immunity to *Bartelt* by the Panel. *See*, *Pauly* quoting *Kingsley v. Hendrickson* 576 U.S. 2015 (2015). (App.65a-66a).

F. The Panel's Ruling in Gibbons Means There Will Never Be a Case on Point to Provide Fair Warning.

For qualified-immunity purposes, "clearly established rights are derived either from binding Supreme Court and Circuit's precedent or from a 'robust consensus of cases of persuasive authority in the

Courts of Appeals.'" *Bland v. City of Newark*, 900 F.3d 77, 84 (3d Cir. 2018), *see District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018). In *James,* the Panel distinguished *Bennett,* a Third circuit opinion on point and ignore other precedent in reaching its decision. The Panel opined that even if these cases bear some factual similarity to the scenario Trooper Bartelt faced, "we do not agree that they create a clearly established right." and in any event, they were all decided after the events here (*i.e.*, after May 25, 2011). Thus, they "'could not have given fair notice to [Trooper Bartelt]' because a reasonable officer is not required to foresee judicial decisions that do not yet exist." *See Kisela*, 138 S.Ct. at 1154 (quoting *Brosseau*, 543 U.S. at 200 n.4). The Panel's ruling in Gibbons contradicts its holding in Bennett thus creating contradiction and confusion in the district courts. There is a split in the several circuits regarding the application of the test and whether an officer granted qualified immunity for using deadly force in one jurisdiction another officer for the same act in another jurisdiction would be denied, based upon violative of the Fourth Amendment. Without clear procedural guidelines this "clearly established" prong becomes harder to reach a consistent legal theory.

CONCLUSION

The Petition for the Writ of Certiorari should be granted. We respectfully request this Honorable Court to reverse the Third Circuit's finding of "qualified immunity" as to Trooper Noah Bartelt and forward the matter to the Circuit with direction to remand the case to the District Court for trial.

Respectfully submitted,

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