No. 98-507

In the Supreme Court of the United States

OCTOBER TERM, 1998

JAMES SNYDER, PETITIONER

v.

SIDNEY TREPAGNIER
AND CITY OF NEW ORLEANS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a jury finding that an officer violated the Fourth Amendment to the Constitution by using excessive force necessarily precludes a finding of qualified immunity, so as to make such dual findings irreconcilable.

2. Whether a reviewing court may reconcile apparent inconsistencies in special jury verdicts despite possible defects in special interrogatories submitted, by determining whether, upon review of the entire record, the verdict as a whole was reasonable and supported by the evidence.

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INTEREST OF THE UNITED STATES

This Court granted certiorari to decide whether the determination that a law enforcement officer violated the Fourth Amendment by using excessive force "necessarily precludes" the officer from being entitled to qualified immunity. The United States has a strong interest in that question because qualified immunity issues arise when federal employees are sued for allegedly using excessive force in violation of the Fourth Amendment under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and because the United States has enforcement obligations with respect to and an interest in the faithful application of the nation's civil rights laws.

STATEMENT

This case arises out of a jury verdict determining that, although respondent New Orleans Police Officer Sidney Trepagnier violated petitioner James Snyder's constitutional rights by using deadly force that left Snyder paralyzed from the waist down, Officer Trepagnier was entitled to qualified immunity nonetheless.

1. Some of the relevant facts are not in dispute. Shortly after being released from prison, petitioner and his former cellmate, Todd Taylor, began a trip down the coast from Pennsylvania in a stolen Pontiac. Tr. 665-666, 668, 899. Petitioner testified that, because he and Taylor lacked funds for the trip, it was necessary to commit crimes along the way. Tr. 907. Together, petitioner (who has only one arm) and Taylor attempted to rob a truck stop, burglarized a home, stole a woman's pocketbook and credit cards, and committed a number of minor larcenies (such as stealing gasoline for the car). Tr. 665-669, 670, 906-913.[1]

As Taylor and petitioner drove through Louisiana, they passed New Orleans Police Officer Joseph Valenti. Tr. 826-827. Because Valenti clocked the Pontiac at over 80 miles an hour, he activated the lights on his patrol car and pulled up behind the Pontiac. Tr. 827-828. Petitioner and Taylor, however, attempted to outrun the patrol car, and a high-speed (110 mph) chase ensued. Tr. 828-829. Petitioner testified that, although he initially told Taylor to stop the car (apparently in the hope that he could escape more safely on

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[1] Petitioner disputed the extent of his involvement in the burglary of the home, but admitted that he had acted as Taylor's "lookout." Tr. 908-909. Similarly, petitioner initially disputed that he knew the Pontiac was stolen. He testified that he and Taylor were "at a mall [when Taylor] said 'Wait here. I'm going to go try to get some money and a vehicle,' and he left and he came back with the car that had the keys in it and stuff." Tr. 666. Petitioner, however, later admitted that he had assumed the Pontiac was stolen. Tr. 904-905, 959.

foot, Tr. 671, 926-929), he admitted that he told Taylor, "Get the hell out of here," and that Taylor had "speeded up trying to lose the police officer" in response, Tr. 671.

Officer Valenti radioed for assistance, and Officer Trepagnier joined the pursuit. Tr. 672, 829-830. The car chase ended when Taylor, at petitioner's direction, drove down an off-ramp that led nowhere, and Trepagnier passed them to prevent them from re-entering the highway. Tr. 831-833. Trapped, petitioner and Taylor jumped out of the car and ran toward a swampy, wooded area. Tr. 672, 833. The events that followed were the subject of conflicting testimony and sharp dispute.

a. Although petitioner denied having a gun, Officer Valenti, whose car was just behind the Pontiac when petitioner jumped out, and Officer Trepagnier, whose car was just ahead of the Pontiac, both testified that they saw petitioner holding a handgun as he got out of the car. Tr. 749, 751, 790-792, 834. Petitioner's accomplice, Taylor, also said (in a videotaped deposition played for the jury, Tr. 209, 214) that he saw a gun in petitioner's hand as petitioner ran out of the car; at an earlier deposition, however, he had denied that either of them had guns. Compare Aug. 17, 1995, Dep. 20, with Aug. 30, 1994, Dep. 100.

According to Trepagnier and Valenti, they then chased petitioner and Taylor through trees, thick brush, and deep mud. Tr. 751, 838. At various places, the mud was either knee, thigh, or hip deep; and a person who stood still would sink deeper.[2] One officer described the area as the muddy equivalent of "quicksand," Tr. 277; a paramedic testified that

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[2] See Tr. 284 ("You may take one step and sink up to, say, mid-calf * * *. There are other times when you step in it and you just went all the way down * * * to your crotch area."); Tr. 276 ("If you stood there for 30 seconds, it might be up to your buttocks area; in other words, that wasn't just a solid foundation * * *. You continued to sink down.").

he "would sink into this mud up to [his] waist, sometimes almost to [his] chest," Tr. 315; and a crime scene investigator testified that other officers carried her in and out because she was unable to walk in the deep mud, Tr. 254.

Officer Trepagnier testified that, as he stumbled through the swamp, he heard a shot from the direction where petitioner and Taylor were running. Tr. 752, 792, 797. Officer Valenti, who testified that he had become separated from everyone else, also testified that he heard gunfire. Tr. 834, 851. Shortly after hearing the gunfire and regaining his footing, Officer Trepagnier looked up and saw petitioner ahead of him in a clearing. Petitioner, bogged down in deep mud, was making little progress. Tr. 752; see also Tr. 753 (petitioner was "still trying his best to get out of that muck and mire" but had "slowed down to almost a halt"). Petitioner agreed that, as Trepagnier came upon him, he was "stuck in the mud up to [his] nose," Tr. 931, or his "knees," Tr. 672.

Trepagnier ran toward petitioner from behind. According to Trepagnier: "[I]t was my intention to just take my left hand and push [petitioner] down" into the mud "and disarm him with my right hand." Tr. 752; see Tr. 801. However, Trepagnier testified that, as he got within arm's reach, petitioner began "coming around with the gun" to shoot him. Tr. 803. In Trepagnier's words:

> As I got close enough to do this, to push him down, he peeked over his right shoulder and saw me coming. When he did that, he started around with his weapon in my direction. When he did that, I pulled my revolver and fired one shot, striking [petitioner] in the back.

Tr. 752-753; see also Tr. 795, 801. As petitioner fell forward, Officer Trepagnier fell forward on top of him, "pushing [petitioner's] arm down in the mud and water." Tr. 756, 803. Although Trepagnier had been a police officer for about a

decade, he had never before discharged his gun in the line of duty. Tr. 720, 780, 820.

Officer Valenti, who at that point was also running through knee-deep mud, then entered the clearing where he spotted petitioner, Trepagnier, and Taylor. Tr. 838-839. Trepagnier was on top of petitioner, and Taylor was 25 to 30 yards beyond them, struggling in deep mud. *Ibid.* Weapon drawn, Valenti ordered Taylor to freeze and—wading into deeper mud—approached Taylor and handcuffed him. Tr. 839-840. Valenti testified that, because he noticed water and mud splashing over petitioner's wound as petitioner lay on his stomach, he and Trepagnier moved petitioner about six feet onto more solid ground; they also radioed for medical assistance. Tr. 759-762, 808, 841.

Assistance arrived quickly but, because of the deep mud, it took eight to ten people about half-an-hour to carry petitioner from where he was lying to the ambulance. Tr. 315, 329. The New Orleans Police Department "Dive Team" also arrived, and began searching for petitioner's gun. The head of the dive team testified that, because the area was mostly covered by deep mud, it was not possible to use scuba gear for the search. Tr. 262, 271, 283. Nonetheless, he and his team attempted to conduct a pattern search, by hand, through the knee and waist-deep mud; ultimately, however, they concluded that the mud made searching futile. Tr. 278-279. It was impossible to see where anyone had been or stepped because the moment a person took a step, the area where his foot had been would fill up with mud and water. Tr. 283-284. The searchers, moreover, were sinking down into the mud, impeding their efforts. *Ibid.* As a result, the search was eventually called off, and the gun was never found. Tr. 278-279.[3] Before the dive team arrived, however,

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[3] Because of the deep mud, Amici Curiae American Civil Liberties Union, et al., are simply incorrect to assert (at 3) that "[i]f Trepagnier tes-

other officers recovered petitioner's cigarettes and a pair of sunglasses in the general area where petitioner had been shot. Tr. 237, 241-242. A few empty bullet casings also were found some distance away, but those were summarily dismissed as unrelated to the shooting. Tr. 248-250, 868.

b. Petitioner's version of the events was entirely different. Petitioner agreed that, as Officer Trepagnier came upon him, he was bogged down in the mud and unable to proceed. Tr. 672, 931. Petitioner testified, however, that he did not have a gun, that he was no longer attempting to escape when Officer Trepagnier came upon him, and that he made no hostile movements. According to petitioner, once he became stuck in the mud, he saw Officer Valenti approaching from the left, pointing a gun at him, and he saw Officer Trepagnier approaching from the left and behind. Tr. 672, 934. At that point, petitioner testified, he "put [his one] hand up, sat down, and laid over on [his] side." Tr. 934; see Tr. 672 ("So I just sat down and laid down.").

Petitioner testified that Trepagnier then used him as a hostage to force Taylor to surrender:

> [Trepagnier] ran up, straddled me, put his left hand on my side and a gun on my head and yelled at [Taylor] "If you don't come back, I'm going to shoot him." I said, "Keep running. He can't shoot me. I don't have a gun."

Tr. 934-935; see Tr. 672-673. Petitioner further testified that, although Taylor started to come back, Trepagnier kept "screaming and hollering." Tr. 673, 942, 944. Petitioner claimed that Trepagnier carried on in that manner, with a

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tified truthfully, a gun should have been recovered within inches of where [petitioner] was shot." Even a cursory review of the trial transcript reveals that the deep mud made the police's ability to recover the gun a hotly disputed fact. See, *e.g.*, Tr. 1001 (closing argument of defense counsel) (petitioner "lost that gun in the muck"); Tr. 100-101 (opening statement of plaintiff's counsel) (disputing extent of mud).

gun to petitioner's head, for about five minutes. Tr. 940, 942, 946.

According to petitioner, Trepagnier then moved his gun down petitioner's back, and asked petitioner why he had run. Tr. 673, 946-947. Petitioner replied "I'm wanted in Pennsylvania." Tr. 673. "The next thing I knew," petitioner testified, "he shot me in the back." Tr. 673; see also Tr. 946-947 ("I told him that I was wanted in * * * Pennyslvania, and that's when he shot me in my back."). In sum, it was petitioner's theory that Officer Trepagnier, "enraged" by the high speed chase, had "snapp[ed]," shooting petitioner in the back for no good reason. Tr. 945; see also Tr. 981-982 (argument of plaintiff's counsel). Petitioner testified that, as he lay in the mud, he remembered Trepagnier radioing for medical assistance. Tr. 674.[4]

Because of the shooting, petitioner is paralyzed from the waist down, and will be confined to a wheelchair for life.

2. After the close of evidence and the arguments of counsel, the district court instructed the jury on, among other things, excessive use of force, qualified immunity, and assault and battery under Louisiana law. (Relevant portions are reproduced in the Appendix to this brief.)

With respect to excessive force, the court did not make it clear that, where an officer reasonably believes that the suspect is armed and poses a threat, the use of deadly force may be constitutionally permissible, even if it later turns out that the suspect was unarmed. To the contrary, the court admonished the jury: "[Y]ou are instructed, even if an officer has probable cause to chase, apprehend and/or arrest the subject, *the use of deadly force to apprehend a fleeing subject who is not armed with a weapon and presents no*

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[4] Petitioner claimed that Trepagnier went on to say "'The swamp's a hell of a place to die, ain't it' and things like that." Tr. 674, 890. Trepagnier denied saying anything of that sort. Tr. 768-769.

threat of immediate bodily harm violates that subject's constitutional rights." Tr. 1032 (emphasis added). In contrast, the jury was instructed that, in determining qualified immunity, it should view the facts as they appeared to the officer at the time: "[I]f, * * * after considering all of the circumstances of the case *as they would have reasonably appeared at the time*, you find from a preponderance of the evidence that [Trepagnier] had *a reasonable and good faith belief* that his actions would not violate the plaintiff's constitutional rights, then you cannot find him liable even if the plaintiff's rights were, in fact, violated." *Ibid.* (emphasis added).

To the question "Do you find that Officer Sidney Trepagnier deprived [petitioner] of his constitutional rights by using excessive force in arresting him?" the jury answered "yes." Pet. App. A27. To the question "Do you find that Officer Sidney Trepagnier had a reasonable belief that his actions would not violate [petitioner's] constitutional rights?" the jury also answered "yes." *Ibid.* To the question whether Officer Trepagnier had committed an assault and battery under Louisiana law, the jury answered "no." *Id.* at A28. Judgment was entered on the verdicts, and petitioner and the City of New Orleans both appealed.

3. The court of appeals affirmed in relevant part,[5] rejecting petitioner's contention that the jury's excessive force and immunity determinations were irreconcilable. Consistent with Fifth Circuit precedent, the majority held that "[t]here is no inherent conflict between a finding of excessive force and a finding of qualified immunity." Pet. App. A18.

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[5] Relying upon *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), the court of appeals held that the evidence was not sufficient to support the judgment against the City of New Orleans. Pet. App. A5-A17. This Court's grant of certiorari was limited to two reformulated questions presented, and excluded petitioner's challenge to that aspect of the court of appeals' judgment. See 119 S. Ct. 863-864 (1999).

"[I]t is possible for the jury to find that, although the actual circumstances * * * did not justify the officer's behavior, the circumstances *that appeared to the officer* would have justified" the conduct, the majority wrote. *Id.* at A19 (quoting *Melear* v. *Spears*, 862 F.2d 1177, 1188 (5th Cir. 1989) (Higginbotham, J., concurring)). The majority then reconciled any apparent inconsistency in the jury's answers by concluding that the jury must have found that "Trepagnier *reasonably believed* that [petitioner] had a gun," so that "given the 'uncertain facts' Trepagnier possessed," it could not be said that he knew he was violating petitioner's rights. Pet. App. A20.

Judge DeMoss dissented. In this case, he argued, the critical issue was whether petitioner had a gun, and the interrogatory failed to provide an answer to that question. Pet. App. A22. Immunity was not possible under these circumstances, he continued, because "absent some lawful justification, no reasonable police officer could reasonably believe that shooting a suspect in the back from a distance of six to ten inches would not violate that individual's constitutional rights." *Id.* at A23. Petitioner's petition for rehearing was denied. *Id.* at A41-A42.

SUMMARY OF ARGUMENT

When there is no uncertainty about the legal standard governing a law enforcement officer's use of force, or its application to particular facts, a determination that the officer used excessive force is tantamount to a finding that the officer could not have reasonably believed such force was justified. In such a case, a finding of liability precludes a finding of immunity. When there is such uncertainty, however, so that an officer could reasonably believe he was entitled to use the force at issue, even though a court might subsequently determine he was not, a finding of liability would not preclude a finding of immunity. In other words,

findings of immunity and excessive force are ordinarily reconcilable if the factfinder could have determined that the force used was not permissible, but that it was sufficiently close to an unclear constitutional boundary that reasonable officers could have disagreed.

This case does not present a suitable record for considering general principles governing the relationship between liability and immunity in the excessive force context because an erroneous liability instruction made the determinations of excessive force and immunity easy to reconcile. The jury in this case was instructed to find a constitutional violation if petitioner in fact was not armed when he was shot, whether or not the officer had a reasonable belief that petitioner was armed. The instructions also indicated, however, that if the officer had a reasonable but mistaken belief that petitioner was armed and threatening, it should enter a verdict of immunity. As a result, the verdicts in this case are easily reconciled the way the Fifth Circuit reconciled them—as reflecting the jury's judgment that Officer Trepagnier reasonably but mistakenly believed that petitioner still had a gun at the time of the shooting. Indeed, that conclusion is consistent with the factual record, the strategy of counsel, and the jury's finding of no assault and battery under Louisiana law. Accordingly, the judgment of the court of appeals should be affirmed, or the Court may wish to consider dismissing the writ of certiorari as improvidently granted.

ARGUMENT

THE DETERMINATION THAT AN OFFICER USED EXCESSIVE FORCE DOES NOT NECESSARILY PRECLUDE QUALIFIED IMMUNITY

The determination that an officer used excessive force may preclude a finding that the officer was entitled to qualified immunity, but it does not always or necessarily do so. Because an officer may be entitled to immunity even for

unlawful conduct if the unlawfulness of his conduct was not "clearly established" and thus obvious at the time he acted, there is no necessary inconsistency between a finding of excessive force and a decision that the officer is entitled to qualified immunity. But the two findings are inconsistent where both the legal standard and the result of its application to any state of facts the jury reasonably could find is clear, which may often be true in cases involving the use of deadly force.

In this case, however, the way in which the jury was instructed makes the findings of excessive force and immunity easy to reconcile—without regard to the answer to the question presented, and without reference to relevant immunity and Fourth Amendment principles. In particular, the instructions would have led ordinary jurors to believe, erroneously, that it violates the Fourth Amendment to use deadly force on an unarmed individual, even if the officer mistakenly but reasonably believes the individual to be armed and threatening. Because the immunity instruction appropriately permitted the jury to take any such mistaken but reasonable belief into account in determining immunity, however, the error harmed neither petitioner nor Trepagnier, and the special verdict can be reconciled regardless of the answer to the question presented.

A. The Qualified Immunity Inquiry Is Distinct From The Excessive Force Inquiry Where There Is Uncertainty About The Governing Legal Standard Or Its Application To Particular Facts

1. In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that qualified immunity precludes a government official from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Building on *Harlow* and its predecessors, in *Malley* v. *Briggs*, 475 U.S. 335, 343 (1986), the Court ob-

served that qualified immunity leaves "ample room for mistaken" but nonetheless reasonable "judgments" regarding the requirements of law. Even where an officer errs and violates the Constitution, immunity shields the officer from liability unless "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions were constitutional. *Id.* at 341. "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized." *Ibid.*

In *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987), this Court clarified that the immunity inquiry must be made on a particularized level, and that immunity may not be denied simply because "the relevant 'legal rule'" was "clearly established" at a higher "level of generality," *e.g.*, because the right to due process under law was "clearly established." 483 U.S. at 640. Instead:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful * * * but it is to say that *in the light of pre-existing law the unlawfulness [of the officer's action] must be apparent.*

483 U.S. at 640 (emphasis added).

Under *Anderson* and *Malley*, the excessive force inquiry is not necessarily identical to the immunity inquiry. The excessive force inquiry requires the decisionmaker to apply its best understanding of current law to determine whether the officer's conduct was "reasonable." The immunity inquiry, however, asks whether, even if the officer's use of force was

objectively excessive and therefore unconstitutional, the officer might nonetheless be immune from liability because the law or its application to the specific facts confronted by the officer did not at that time clearly establish that "what he [was] doing" violated the plaintiff's rights. *Anderson*, 483 U.S. at 640. In other words, even if the jury concludes that the conduct was unreasonable, the officer is entitled to immunity if "officers of reasonable competence could [have] disagree[d]" with that conclusion at the time the officer acted. *Malley*, 475 U.S. at 343.

2. Proposing the opposite view, petitioner and his amicus point out that the excessive force and qualified immunity inquiries have much in common. Pet. Br. 19-20; Amicus Curiae American Civil Liberties Union, et al. Br. (ACLU Br.) 10-18. In particular, they note that both the Fourth Amendment and the qualified immunity inquiry must be made from the perspective of a reasonable officer on the scene, *Graham* v. *Connor*, 490 U.S. 386, 397 (1989); that both make allowance "for the fact that police officers are often forced to make split-second judgments" under "circumstances that are tense, uncertain, and rapidly evolving," *ibid.*; and that because both inquiries are objective, the officer's actual or subjective motivation or state of mind is irrelevant, see *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996); *Harlow*, 457 U.S. at 817-818.

The similarity between the inquiries is further reinforced by the fact that both allow room for reasonable factual errors, and are based on the circumstances as a reasonable officer could have perceived them, even if that perception turns out to have been mistaken. Compare *Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987) (Because "probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment," *Hill* v. *California*, 401 U.S. 797, 804 (1971), the Fourth Amendment allows "for honest mistakes."); *Illinois* v. *Rodriguez*, 497 U.S. 177, 185-186 (1990)

(similar), with *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974) ("The concept of immunity" itself "assumes" that errors occur but "goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."). Thus, "[e]ven where post-incident review demonstrates that the force used was unnecessary"—such as where the officer reasonably but mistakenly concluded that the suspect had a gun—"there is no Fourth Amendment violation" and *a fortiori* no violation of clearly established rights if the officer "reasonably believed the force used was necessary." ACLU Br. 11.

The ACLU is mistaken, however, to rely on these similarities to conclude that excessive force and qualified immunity inquiries are necessarily identical. Qualified immunity takes into account one factor that the excessive force inquiry does not—what a reasonable officer could have understood the requirements *of law* to have been at the time he acted. As the Court explained in *Malley*, where a defendant violates the Constitution, he "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct is lawful; "but if officers of reasonable competence could disagree on this issue, immunity should be recognized." 475 U.S. at 341. Put differently, immunity cannot be denied unless the "contours of the right" were "sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Anderson*, 483 U.S. at 640 (emphasis added). The "qualified immunity standard" thus "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley*, 475 U.S. at 341, 343).

Consequently, there are obvious cases in which the results of the excessive force and qualified immunity inquiries can diverge. For example, immunity is unquestionably appropri-

ate where the law changes after the officer acted, making unlawful a use of force that previously could have been thought lawful. See, *e.g.*, *Petta* v. *Rivera*, 143 F.3d 895 (5th Cir. 1998) (per curiam) (immunity appropriate where cases, since overruled, suggested at the time the officer acted that the force was permissible). Likewise, immunity is appropriate where the finding of excessive force rests on what is, in effect, a "new rule" of constitutional law that a reasonable officer would not necessarily have anticipated.[6] Courts therefore may properly conclude that immunity is appropriate where the finding of excessive force rests on a "new rule" of Fourth Amendment law. See, *e.g.*, *Hammer* v. *Gross*, 932 F.2d 842 (9th Cir.) (en banc) (officer's use of force to help nurse extract blood for blood-alcohol test objectively unreasonable where plaintiff consented to use of breath test, but immunity appropriate since officer was not required to anticipate that rule), cert. denied, 502 U.S. 980 (1991).

Finally, even where the applicable legal standard is well-established, immunity may be appropriate where the result of applying that standard to the particular circumstances confronting the officer was not sufficiently "obvious" in advance. In other words, even if the applicable legal formula or test is clear, immunity should be denied only where "it is obvious that no reasonably competent officer would have concluded" that application of that standard to his conduct would show it to be unlawful. *Malley*, 475 U.S. at 341. In-

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[6] See *Mitchell* v. *Forsyth*, 472 U.S. 511, 417, 535 (1985) (even if rule against warrantless wiretaps was "merely a logical extension of general Fourth Amendment principles," immunity was appropriate because the question was "open" when the officer acted); *Harlow*, 457 U.S. at 818 (official "could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful"); cf. *Teague* v. *Lane*, 489 U.S. 288 (1989) (new rules of criminal procedure not applicable on habeas corpus).

deed, this Court's decision in *Anderson* v. *Creighton*, *supra*, so holds, rejecting the contention that the clarity of the general standard can by itself preclude immunity. Instead, the Court held, even where the legal standard is well-articulated, "[t]he contours of" its application "must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." 483 U.S. at 640 (emphasis added). Consequently, in this context, "qualified immunity applies unless application of the [excessive force] standard" or established case law "would *inevitably lead every reasonable officer* * * * to conclude the force was unlawful." *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993) (emphasis added).

3. As an alternative argument, petitioner's amicus emphasizes (ACLU Br. 12-13) that a finding of excessive force rests on the conclusion that a hypothetical reasonable officer under the circumstances would not have used the same type or degree of force that the defendant did. From that, amicus goes on to argue that a finding of immunity is inconsistent with a finding of excessive force, since immunity rests on the conclusion "that the very same objectively reasonable officer could have believed that the force was reasonable." ACLU Br. 12; see, *e.g.*, *Street* v. *Parham*, 929 F.2d 537, 540-541 & n.2 (10th Cir. 1991) (similar); *Smith* v. *Mattox*, 127 F.3d 1416 (11th Cir. 1997) (per curiam) (similar).

This Court rejected that argument in *Anderson* v. *Creighton*. There, the plaintiffs (like amicus here) argued that officers who violate the Fourth Amendment by engaging in unreasonable conduct could not possibly be entitled to qualified immunity, which protects objectively reasonable official action, because it was "not possible * * * to say that one 'reasonably' acted unreasonably." 483 U.S. at 643. This Court rejected that argument as "unpersuasive," *ibid.*, because it relies on the coincidence of language (the common use of the word "reasonable") in the Fourth Amendment and the quali-

fied immunity inquiries. If the Fourth Amendment had been written to speak of "undue" searches and seizures, the Court explained, the fallacy of the argument would be apparent, even though the meaning of the Amendment would be unchanged. *Id.* at 643-644. The Court continued:

> [The argument's] surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term, such as "undue" searches and seizures been employed, what might be termed the "reasonably unreasonable" argument against application of *Harlow* to the Fourth Amendment would not be available—just as it would be available against application of *Harlow* to the Fifth Amendment if the term "reasonable process of law" had been employed there. The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable * * *. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable [although ultimately mistaken] should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Ibid.

Although amicus (ACLU Br. 13-14) attempts to distinguish *Anderson* by pointing out that *Anderson* itself involved a probable cause determination, the Court's decision in *Anderson* did not turn on, and did not even discuss, any supposed differences between "probable cause" and "reasonableness" generally. To the contrary, it flatly rejected the very argument (that it is "not possible * * * to

say that one 'reasonably' acted unreasonably") amicus attempts to resuscitate today. In any event, the excessive force inquiry, because it "is not capable of precise definition or mechanical application" and "requires careful attention to the facts and circumstances of each particular case," *Graham*, 490 U.S. at 396, may be no less plagued by factual and legal complexity in particular cases than questions of probable cause. Indeed, *Graham* v. *Connor* seems to have envisioned that qualified immunity would be available to officers charged with using excessive force. 490 U.S. at 399 n.12 (noting that the officer's objective good faith—*i.e.*, "whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983.").[7]

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[7] The reasoning of those courts that have concluded that the inquiries inevitably merge, moreover, precisely parallels the reasoning this Court rejected in *Anderson*. Before *Anderson*, some courts had taken the position that, where an officer conducted a search or arrest without probable cause, he could not defend against damages by arguing that he reasonably engaged in unreasonable conduct. See *Deary* v. *Three Un-Named Police Officers*, 746 F.2d 185, 192-193 (3d Cir. 1984); *Clark* v. *Beville*, 730 F.2d 739, 740-741 (11th Cir. 1984); *Mahoney* v. *Kesery*, 976 F.2d 1054, 1057-1058 (7th Cir. 1992). See also J. Newman, *Suing the Lawbreakers*, 87 Yale L.J. 447, 460 (1978) ("[I]f the plaintiff's own case requires him to show an arrest that was not reasonably based on probable cause, what does the [immunity] defense mean? Surely the officer could not *reasonably* believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe that there was probable cause."). *Anderson* ended that line of cases, holding unequivocally that a law enforcement officer could act in an objectively reasonable fashion even though he or she had violated the Fourth Amendment's bar on unreasonable searches or seizures. See *Oliveira* v. *Mayer*, 23 F.3d 642, 648 (2d Cir. 1994) (Newman, J.) (conceding that *Anderson* "authoritatively instructed that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the inquiry as to qualified immu-

When a jury or court determines whether excessive force has been used, it articulates a standard to govern the conduct of an officer confronting a certain set of facts. When the decisionmaker decides the question of immunity, it asks a different question—whether that standard of conduct was sufficiently obvious in the first instance that an officer could not reasonably have thought his conduct lawful when he acted. Although both inquiries use the term "reasonable," *Anderson* makes it clear that the term serves a different function in each context. In the inquiry into the substantive requirements of the Fourth Amendment, reasonableness defines the boundaries of the conduct that is warranted under the circumstances. In the immunity context, it defines the boundaries of what an officer might, because of a lack of clarity in the law or in its application to the specific facts of the case, understandably have believed the legal limit to be. As a result, the fact that an officer's conduct turns out to have been "unreasonable" in the decisionmaker's view—perhaps because the officer did not spend more time seeking to avoid the need for force, or because the officer went one push or blow over what turned out to be the constitutional line—does not preclude the decisionmaker from also acknowledging that the question was sufficiently close that reasonable officers, or reasonable judges or jurors, could have disagreed before the decisionmaker rendered judgment.

Amicus's argument proceeds from the unstated premise that reasonable minds could not disagree over what constitutes "reasonable force." But reasonable judges and jurors

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nity"), cert. denied, 513 U.S. 1076 (1995); see also *Karnes* v. *Skrutski*, 62 F.3d 485, 491-492 & n.3 (3d Cir. 1995) (argument that qualified immunity cannot apply where officer acted unreasonably "misconstrues the nature of qualified immunity, and in any case has been rejected by the Supreme Court").

can and often do disagree. Where such disagreement is possible, immunity must be granted. *Malley*, 475 U.S. at 341 (where "officers of reasonable competence could disagree * * * immunity should be recognized"); *Anderson*, 483 U.S. at 640 (reasonable officer must understand that "what he is doing" is unconstitutional). As the Second Circuit has explained, "to say that the use of constitutionally excessive force violates a clearly established right * * * begs the open question whether the particular degree of force under the particular circumstances was" so clearly "excessive" in light of then-existing law that only the plainly incompetent would be unaware of its illegality. See *Finnegan* v. *Fountain*, 915 F.2d 817, 823 (1990). We therefore agree with Justice Powell's observation that "[t]here is no principled reason" for adopting an across-the-board prohibition on the "defense of qualified immunity in an excessive use of force claim." *Slattery* v. *Rizzo*, 939 F.2d 213, 215 (4th Cir. 1991).[8]

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[8] If, as a matter of Fourth Amendment law, the use of force could not be constitutionally excessive unless *no reasonable officer* could have believed that force to be reasonable, then the excessive force and immunity inquiries would more closely approximate each other; both would be based on whether "any reasonable officer" could have thought the conduct to be lawful. But courts do not typically approach the Fourth Amendment in that fashion. Nothing in the jury instructions in this case, for example, advised the jury that it could not find excessive force unless no reasonable officer could have believed the use of force to be reasonable. To the contrary, the instructions in this case seemed to compel the jury to find excessive force no matter what a reasonable officer might have thought, so long as petitioner turned out to be unarmed. See pp. 23-26, *infra*. Contrary to amicus's argument (ACLU Br. 15-16), the fact that juries and courts may sometimes recognize that there are a range of "reasonable" options available to an officer, and that officers are not required to select the most reasonable or least forceful option, does not alter the analysis. The fact that an officer's choice turns out to be outside the range of reasonable alternatives does not necessarily mean that *no reasonable officer* could have thought that choice reasonable in the first instance.

4. Although findings of excessive force and qualified immunity are not necessarily inconsistent, they are not necessarily consistent either. If there is no reasonably possible set of facts under which the officer's conduct would be close to an unclear constitutional boundary—where any set of facts supported by the evidence would either make the officer's conduct reasonable and constitutional, or so clearly unreasonable that no one could have thought it constitutional —the results of the Fourth Amendment and the qualified immunity inquiries ordinarily would be expected to converge.

That circumstance frequently arises in cases involving the use of deadly force. Under *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985), "deadly force" may be used on a fleeing felon only "[w]here the officer has probable cause to believe"—whether or not that belief turns out to be have been correct — "that the suspect poses a threat of serious physical harm, either to the officer or to others." Because both the standard and its application to many (if not most) factual contexts is abundantly clear, the results of the excessive force and the immunity inquiries should be the same. The only question the jury will need to answer may be historical, *i.e.*, whether or not the officer could reasonably have believed that there was a threatening weapon. If the answer is "yes," there ordinarily is no constitutional violation (and *a fortiori* no violation of a "clearly established" right); if the answer is "no," then the use of deadly force is ordinarily so clearly excessive and unconstitutional that no reasonable officer could have thought otherwise.

There are, nonetheless, deadly force cases in which immunity is an issue, because open questions under *Tennessee* v. *Garner* remain. Thus, cases may raise reasonably debatable questions such as whether the force used (*e.g.*, chokeholds,

use of incendiary devices) constitutes "deadly force;"[9] whether particular facts provide "probable cause" to believe that the suspect was armed and posed a threat, see *Anderson*, 478 U.S. at 641 (officer entitled to immunity for reasonable but mistaken probable cause determination); what constitutes a "fleeing" suspect; and whether a risk to bystanders renders an otherwise reasonable use of deadly force unreasonable. But in cases where neither the arguments of counsel, nor the evidence, suggest a reasonable set of facts that might place the officer sufficiently close to a constitutional line to warrant immunity despite a constitutional violation—*i.e.*, where, under any sustainable view of the facts, the officer's conduct was either clearly lawful or clearly lawless—the results of the excessive force and immunity inquiries must be the same.

B. Under The Actual Instructions Given To The Jury—Which Were Erroneous But Favored Petitioner—The Findings Of Excessive Force And Qualified Immunity In This Case Are Easily Reconciled

1. Under ordinary circumstances and proper instructions, this might well have been a case in which the excessive force and immunity determinations would not be expected to diverge. The case involved the propriety of deadly force, and thus benefitted from a clear standard of often indisputable application. The jury was presented with two diametrically opposed versions of the facts. And counsel never argued to the jury that the officer's conduct might be suffi-

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[9] Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 100 (1983) (raising claim that chokeholds are excessive and deadly force that cannot be used "under circumstances that do not threaten death or serious bodily injury"); see, *e.g.*, *In re City of Phila. Litig.*, 49 F.3d 945, 971-972 (3d Cir. 1995) (qualified immunity appropriate because police not required to anticipate law governing use of explosives to destroy unoccupied bunker during police stand-off with armed suspects).

ciently close to an unclear constitutional boundary to entitle him to immunity despite his having violated the law. Instead, the jury was left to decide whether it believed Officer Trepagnier, who testified that he saw petitioner "coming around with the gun" when he fired, see p. 4, *supra*, in which case deadly force clearly would be reasonable; or whether it believed petitioner, who testified that Trepagnier shot him in the back, with full knowledge that he was unarmed, because Trepagnier was "enraged" by the high speed chase, pp. 6-7, *supra*, in which case deadly force would be so clearly unconstitutional that no reasonable officer could disagree.

2. This case, however, does not present that situation. Even if a properly instructed jury could not have reached differing determinations on excessive force and immunity, but see note 13, *infra*, the jury in this case was instructed in a peculiar manner—a manner that unduly favored petitioner by leading to a possibly erroneous finding of a constitutional violation—that makes the determinations readily reconcilable.

In particular, the district court's instructions (reproduced in relevant part at App. 1a-5a, *infra*) left the unmistakable impression that, even if Officer Trepagnier had reasonable grounds to conclude that petitioner was armed and posed a threat, the jury was *required* to find a constitutional violation if in fact petitioner did not have a gun when Trepagnier shot him. After reminding the jury that the excessive force determination is "objectively" determined, the court admonished the jury "[Y]ou are instructed, even if an officer has probable cause to chase, apprehend and/or arrest the subject, *the use of deadly force to apprehend a fleeing subject who is not armed with a weapon and presents no threat of immediate bodily harm violates that subject's constitutional rights*." Tr. 1032 (emphasis added). (The jury was given a copy of the instructions to review during deliberations. Tr. 1043.) The excessive force instructions reinforced that mes-

sage. The elements of excessive force, the jury was told, were (1) "some harm" that (2) "resulted directly and only from the use of force that was clearly excessive to the need" and (3) "the excessiveness of which was objectively unreasonable, in light of the facts and circumstances at the time." Tr. 1030. The jury was further admonished that "the reasonableness inquiry is an objective one. The question is whether the officer's actions are objectively reasonable, in light of the facts and circumstances confronting him, without regard to their underlying intent or motivation." Tr. 1031. Nowhere was the jury told that reasonable but erroneous conclusions regarding the danger posed by the suspect may properly preclude the finding of a constitutional violation.[10]

That error did not harm petitioner, since it eliminated a factor that could favor only Trepagnier in the Fourth Amendment inquiry.[11] Nor did it prejudice Trepagnier,

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[10] The court did state that, in deciding reasonableness, the jury "may" consider (among five non-exhaustive factors) "the threat reasonably [per]ceived by the responsible officials," Tr. 1030; and it directed the jury that "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene" and must "embody allowance for the fact that police officers are often forced to make split-second judgments." Tr. 1031. Read in the context of the directions as a whole, however, those suggestions would not tend to dispel the incorrect impression given by the court's instruction that "the use of deadly force to apprehend a fleeing subject who is not armed with a weapon and presents no threat of immediate bodily harm" always "violates that subject's constitutional rights." Tr. 1032.

[11] Petitioner (at 37-38) and his amicus (ACLU Br. 18-22) also fault the jury instructions for introducing a subjective component into the immunity inquiry. But any error in that regard prejudiced respondent and not petitioner. The court told the jury that respondent would be immune from liability if he had a "reasonable and good faith belief" that his behavior was lawful, *i.e.*, the court required *both* an actual subjective belief, *and* that the belief be objectively reasonable. See also Tr. 1031-1032 (directing jury that subjectively good intentions could not make unreasonable conduct reasonable). The requirement of subjective good

since the jury was properly instructed that a reasonable error in assessing the threat posed by petitioner was relevant to the immunity issue. "[I]f, after considering the scope of the discretion and responsibility generally given to police officers in the performance of their duties," the jury was told, "and after considering all of the circumstances of the case *as they would have reasonably appeared at the time*, you find from a preponderance of the evidence that [Trepagnier] had *a reasonable and good faith belief* that his actions would not violate the plaintiff's constitutional rights, then you cannot find him liable even if the plaintiff's rights were, in fact, violated." Tr. 1032 (emphasis added).

Closing arguments reinforced the erroneous impression that a reasonable mistake by the officer was relevant to immunity but not to liability. Stressing that no gun was found, petitioner's counsel quoted only one portion of the jury instructions in closing—the instruction that "the use of deadly force to apprehend a fleeing suspect who is not armed with a weapon and presents no threat of immediate bodily harm violates [petitioner's] constitutional rights," adding "and that's what happened here." Tr. 982. Respondents' counsel countered that petitioner's counsel had omitted the immunity instruction from his summation, reminding the jury that if, based on "all of the circumstances of the case *as they would have reasonably appeared at the time*, [Trepagnier] had a *reasonable and good faith belief* that his actions would not violate [petitioner's] constitutional rights, then you cannot find him liable even if [petitioner's] rights were, in fact, violated." Tr. 1006 (emphasis added).

Although those erroneous instructions ultimately prejudiced no one, they *do* explain why the verdicts can be reconciled in this case. Because the instructions (and arguments

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faith as well as objective reasonableness was improper under *Harlow*, 457 U.S. at 817-818, but harmless to petitioner.

of counsel) indicated that any reasonable error in assessing the danger petitioner presented should be taken into account only when determining immunity, but not in determining whether there was a constitutional violation, the verdict the jury returned could easily reflect the conclusion that Trepagnier reasonably believed petitioner had a gun and represented a threat, but that petitioner in fact had disposed of the gun before Trepagnier shot him—which is precisely how the Fifth Circuit reconciled the verdicts.

That construction, moreover, is consistent with the evidence and the trial strategy of counsel. Evidence tending to show that petitioner at one point had a gun includes the testimony of three witnesses who testified that they saw him holding a gun as he jumped out of the car, see p. 3, *supra*; the testimony of two officers that they heard gunfire as they pursued him, see p. 4, *supra*; and petitioner's repeated and unprovoked statements that he did not have a gun, before anyone had suggested that he had had one. Tr. 934-936, 947-952; see Tr. 672-673; see also Tr. 1000-1001 (closing argument). Evidence tending to show that petitioner had no gun at the time of the confrontation with Officer Trepagnier includes, in addition to petitioner's own testimony, Tr. 934-936, the fact that a search of the muddy swamp immediately surrounding where petitioner was shot did not produce a gun, see p. 5, *supra*.

Having been instructed that "the use of deadly force to apprehend a fleeing subject who is not armed with a weapon and presents no threat of immediate bodily harm violates that subject's constitutional rights," Tr. 1032, a jury that believed petitioner had disposed of the gun before being shot would have felt compelled to find a constitutional violation. If the jury also believed that Trepagnier saw petitioner leave the car armed, heard gunfire, and perhaps—during the heat of the chase and in the split second he had to decide whether to shoot—mistook something in petitioner's hand

for the gun, such a jury likewise would have concluded that immunity was proper because Trepagnier reasonably thought petitioner was armed and therefore "had a *reasonable and good faith belief* that his actions would not violate [petitioner's] constitutional rights." *Ibid.* (emphasis added).

That conclusion, moreover, is consistent with the jury's resolution of the assault and battery claim. Contrast Pet. Br. 49. The jury was specifically instructed that, under Louisiana law, an officer's use of deadly force constitutes a battery unless the officer "reasonably believes th[at] he is in imminent danger of losing his life or receiving great bodily harm and that the use of deadly force is necessary to save himself from danger." Tr. 1034-1035. Because Trepagnier admits having shot petitioner, the jury's conclusion that Trepagnier did not commit an assault and battery necessarily carries with it the conclusion that Trepagnier reasonably believed petitioner to be armed and threatening. That same conclusion mandated acceptance of Trepagnier's immunity defense as well.

3. Petitioner's claim that the verdict cannot be reconciled on that basis because it would be inconsistent with the testimony of his expert and a stipulation (Br. 38-39), does not withstand scrutiny. A jury finding that Officer Trepagnier reasonably believed petitioner to be "coming around" with his arm extended in a threatening way would not necessarily contradict either.[12] The jury would have to disbelieve Offi-

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[12] The stipulation that the shooting was "not the result of negligence, inadvertence, mistake, or accident," Br. 38 (emphasis omitted), disavows only the claim that the gun was fired by mistake, and not the claim that the officer had a mistaken belief about the circumstances confronting him. Nor is such a finding necessarily inconsistent with the expert testimony that the bullet entered petitioner's back at nearly a 90-degree angle, Pet. Br. 38-39; Tr. 1018-1019. Because Trepagnier was allegedly just behind petitioner and to his left, and petitioner allegedly was turning to the right, Tr. 752-753, 798, the turning motion would have put his back square to

cer Trepagnier's claim that he actually *saw* the gun in petitioner's hand when he shot petitioner. But the jury could have dismissed only that part of Trepagnier's story, concluding that he was reluctant to admit a mistake of such grave consequence (no matter how reasonable the error), or that he in fact believed (or had convinced himself) that he saw a gun rather than some other item in petitioner's hand. Or the jury may have relied on probabilities and burdens of proof, concluding that it had not been proven that petitioner in fact was armed, but that it was proven that Trepagnier had probable cause to believe he was. In fact, if the jury believed only part of Trepagnier's story, it is possible to hypothesize findings that, even under proper instructions and a proper view of the law, would make the findings of excessive force and qualified immunity reconcilable.[13]

Because the jury's answers to the excessive force and qualified immunity interrogatories can be reconciled in light of the actual instructions the jury heard, the Court can affirm the court of appeals' judgment without regard to the answer to the question presented and without reference to the underlying Fourth Amendment and qualified immunity principles. For the same reason, however, the Court may

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Trepagnier at some point during the turn. Trepagnier also might have moved to stay behind petitioner as he turned.

[13] For example, the jury could have found that Trepagnier knew petitioner had a gun when he left the car, and inferred that he still had it when Trepagnier confronted him in the swamp; the jury could have concluded that the inference was sufficiently reasonable to confer immunity, but not strong enough to support probable cause as required by *Garner*, 471 U.S. at 11. A reasonable but mistaken probable cause determination is precisely the sort of error for which immunity is appropriate. See *Anderson*, 483 U.S. at 638. Or the jury could have found a constitutional violation on the ground that petitioner did not qualify as a fleeing suspect under *Garner*, because he was stuck in the mud, but further concluded that Trepagnier reasonably believed he did qualify, and hence should be shielded by immunity.

wish to consider dismissing the writ of certiorari as improvidently granted. Simply put, full briefing and complete review of the record reveal that this case does not present the questions on which review was granted, as the jury's findings are readily reconcilable in light of the actual instructions given, whether or not they would be reconcilable in an ordinary case with a properly instructed jury. Because that defect could render any resolution of the questions presented arguably advisory, *i.e.*, of no application to the current case, the Court may wish to dismiss the writ as improvidently granted, as it has under similar circumstances in the past. See *Belcher* v. *Stengel*, 429 U.S. 118, 119 (1976) (per curiam) (dismissing writ where, in light of full briefing and oral argument, "it appears that the question framed in the petition for certiorari is not in fact presented by the record now before us."); see also *Williams* v. *Zuckert*, 371 U.S. 531 (1963) (per curiam); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959); see generally, R. Stern, et al., *Supreme Court Practice* 258-262 (7th ed. 1993).[14]

[14] Because the special verdicts are not inconsistent given the actual instructions before the jury, we do not address (and also believe that the case does not call on the Court to decide) the second question presented, which involves the manner in which courts should reconcile inconsistent special verdicts.

CONCLUSION

The judgment below should be affirmed. In the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted.

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MARCH 1999

APPENDIX

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

Docket No. 92-CV-3465-L

JAMES SNYDER

v.

SIDNEY TREPAGNIER, ET AL.

EXCERPTS FROM THE JURY INSTRUCTIONS FROM THE TRANSCRIPT OF THE TRIAL BEFORE THE HONORABLE ELDON E. FALLON UNITED STATES DISTRICT JUDGE

[1030] * * * * *

The plaintiff alleges that the defendant used excessive force in arresting him. United States citizens are protected against the use of excessive force by the Fourth Amendment to the United States Constitution. In order to prove that the defendant used excessive force in violation of the Fourth Amendment, the plaintiff must prove by a preponderance of the evidence some harm that resulted directly and only from the use of force that was clearly excessive to the need and the excessiveness of which was objectively unreasonable in light of the facts and circumstances at the time. If the plaintiff fails to prove any one of these elements, you must find for the defendant.

Some of the things you may want to consider in determining whether the defendant used excessive force are:

(1) The relationship between the need and the amount of force used;
(2) The need for the application of force;
(3) The extent of the injury suffered;
(4) The threat reasonably received by the responsible officials; and
(5) Any efforts made to temper the severity of a forceful response.

[1031] Injuries which result from, for example, an officer's reasonable use of force to overcome resistance to arrest do not involve constitutionally-protected interests. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight. The nature of the reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.

This reasonableness inquiry is an objective one. The question is whether the officer's actions are objectively reasonable, in light of the facts and circumstances confronting him, without regard to their underlying intent or motivation.

If you find that the plaintiff has proven his claim, you must then consider the defendant's defense; namely, that the defendant, Sidney Trepagnier, acted in good faith and thus is not liable.

Police officers are presumed to know about the basic unquestioned constitutional rights of citizens. Thus, the plaintiff need not prove that the defendant, Officer Sidney

Trepagnier, acted with a specific knowledge of the plaintiff's particular constitutional right that he violated.

You are instructed that even if the officer has [1032] good intentions this cannot make an objectively unreasonable use of force constitutional. In this respect you are instructed, even if an officer has probable cause to chase, apprehend and/or arrest the subject, the use of deadly force to apprehend a fleeing subject who is not armed with a weapon and presents no threat of immediate bodily harm violates that subject's constitutional rights.

On the other hand, if, after considering the scope of the discretion and responsibility generally given to police officers in the performance of their duties and after considering all of the circumstances of the case as they would have reasonably appeared at the time, you find from a preponderance of the evidence that the defendant, Sidney Trepagnier, had a reasonable and good faith belief that his actions would not violate the plaintiff's constitutional rights, then you cannot find him liable even if the plaintiff's rights were, in fact, violated as a result of the defendant's good faith action.

The plaintiff must also prove by a preponderance of the evidence that the act by the defendant was a cause-in-fact of the damage the plaintiff suffered. An act is a cause-in-fact of an injury or damage if it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury or damage.

The plaintiff must also prove by a preponderance [1033] of the evidence that the act by the defendant was a proximate cause of the damage plaintiff suffered. An act is a proximate cause of plaintiff's injuries or damages if it appears from the evidence that the injury or damage was a reasonably foreseeable consequence of the act.

In summary, if you find from a preponderance of the evidence in this case and after applying these instructions on the law that the plaintiff has proven his claim of a constitutional violation through the use of excessive force, your verdict must be for the plaintiff and against the defendant police officer who used such force, provided you further find that the plaintiff suffered some injury as a result of the incident in question.

On the other hand, if you find that the plaintiff has not proven his claim of a constitutional deprivation or suffered an injury or that the police officer was acting in good faith at the time of the incident, then your verdict must be for the defendant police officer and against the plaintiff as to this claim.

You must next consider the plaintiff's claim under Louisiana law for the intentional act of assault and battery. Under Louisiana law, any intentional attempt to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and an intentional display of force such as would give the victim reason to fear or expect [1034] immediate bodily harm, constitutes an assault. An assault may be committed without actually touching or striking or doing bodily harm to the person of another.

"Battery" is defined as an intentional use of force upon the person of another. Battery is an intentional act that requires proof that the defendants knowingly and willfully acted in a way which caused harm to the plaintiff. Under Louisiana law, a physical violence against a person by a law enforcement official constitutes a battery for which the official may be held liable unless the official has a defense to the battery such as justification or self-defense. Under Louisiana law, "justification" is defined as the use of force or violence upon the person of another when committed for the purpose of preventing a forcible offense against the person, provided

that the force or violence used must be reasonable and apparently necessary to prevent such offense. Thus, an individual cannot recover damages for a battery if that individual is the aggressor in provoking the incident in which he was injured and the person retaliating uses only the force that is reasonableness under the circumstances. Therefore, in this case, you should examine all the circumstances surrounding the incident in question to determine if the amount of force used by defendant was reasonable.

Under Louisiana law, the use of deadly force is only justified when committed in self-defense by one who [1035] reasonably believes this he is in imminent danger of losing his life or receiving great bodily harm and that the use of deadly force is necessary to save himself from danger.

The plaintiff must also prove by a preponderance of the evidence this the intentional use of force upon him was a cause-in-fact of the damages he suffered. Under Louisiana law, a plaintiff's disability is presumed to have resulted from an incident if before the incident the injured person was in good health, but commencing with the incident the symptoms of the disabling condition appear and continuously manifest themselves afterwards, provided that the medical evidence establishes a reasonable probability of a casual connection between the incident and a disabling condition.

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[1043] * * * * *

When you retire to the jury room, Ladies and Gentlemen of the Jury, to deliberate on your verdict, you may take this charge with you. I will give you copies of what I have just read, as well as the exhibits which the Court has admitted into evidence.

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