No. 09- 09-903

IN THE

Supreme Court of the United States

MICHAEL SHREFFLER,

Petitioner,

v.

DARRYL L. LEWIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. BERSANI
Counsel of Record
CHARLES E. HERVAS
MICHAEL W. CONDON
YORDANA SAWYER
HERVAS, CONDON & BERSANI, P.C.
333 Pierce Road, Suite 195
Itasca, Illinois 60143
(630) 773-4774

Attorneys for Petitioner

227662

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

I.

Whether the Eighth Amendment's Cruel and Unusual Punishment Clause applies to use of force claims brought pursuant to 42 U.S.C. § 1983 by convicted inmates who have not yet been sentenced.

II.

Whether the legal standard used to evaluate § 1983 use of force claims under the Eighth Amendment should also be used to evaluate use of force claims under the substantive due process component of the Fourteenth Amendment.

III.

Whether the Seventh Circuit, in rejecting Petitioner's qualified immunity defense, failed to heed this Court's pronouncements in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), and *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078 (1986), to give the correctional officer the proper deference in the use of a Taser on a known violent and unruly jail inmate.

PARTIES TO THE PROCEEDINGS

Respondent Darryl Lewis brought this action for money damages pursuant to 42 U.S.C. § 1983 for violation of the Eighth Amendment against the County of Kankakee, Chief of Corrections Michael Downey, Correctional Officers Michael Shreffler, Todd Schloendorf, Miguel Ayala, and jail nurse Jean Flageole. The Seventh Circuit affirmed summary judgment in favor of all defendants except Petitioner Michael Shreffler. There are no other parties to these proceedings.

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OPINIONS BELOW

The decision of the Seventh Circuit Court of Appeals is reported at *Lewis v. Downey*, 581 F.3d 467 (7th Cir. 2009), and is reproduced in Appendix A. The decision of the District Court for the Central District of Illinois is not reported but is reproduced in Appendix B.

JURISDICTIONAL STATEMENT

The Seventh Circuit Court of Appeals rendered its decision on September 4, 2009. Petitioner's timely petition for rehearing and rehearing *en banc* was denied on October 27, 2009 (App. C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment VIII; United States Constitution, Amendment XIV, § 1; and, 42 U.S.C. § 1983 are implicated in this case.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

A. Lower court proceedings

Respondent Darryl Lewis, a convicted federal inmate,[1] filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 against the Petitioner Michael Shreffler and the County of Kankakee, Chief of Corrections Michael Downey, Correctional Officers Todd Schloendorf, Miguel Ayala, and jail nurse Jean Flageole. In his complaint, Lewis sought money damages for constitutional injuries that he allegedly suffered while he was awaiting sentencing at the Jerome Combs Detention Center in Kankakee, Illinois.

On July 2, 2008, the district court entered an order granting summary judgment in favor of all defendants and subsequently denied Lewis's post-judgment motions. Lewis appealed the decision to the Seventh Circuit only as it related to his Eighth Amendment use of force claim against Shreffler and Ayala and his Fourteenth Amendment procedural due process claim that he was placed in segregation without a hearing by Schloendorf. The Seventh Circuit affirmed the district

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1. The Kankakee County Sheriff operates the Jerome Combs Detention Center ("JCDC") in Kankakee, Illinois. In addition to state detainees, the JCDC also houses federal inmates pursuant to a contract with the United States Marshall's Office.

court's judgment as to the claims against Ayala and Schloendorf, but reversed the grant of summary judgment as to the use of force claim against Shreffler. Shreffler's petition for rehearing and rehearing *en banc* was subsequently denied by the Seventh Circuit on October 27, 2009.

B. Statement of Facts

On January 26, 2006, Lewis started a fistfight with another inmate, Darwin Brown. Correctional Officer Adam Brinkman observed Lewis approach Brown from behind and swing at him. Brinkman called for assistance and ordered all inmates to lock up. Despite Brinkman's order, Lewis threw another punch at Brown, this time striking him. Lewis repeatedly punched Brown even after other inmates attempted to separate them. Several correctional officers entered the cellblock and ordered the inmates to stop. Corporal Todd Schloendorf attempted to restrain Lewis by putting his arm around him, placing him in a headlock, and taking him to the ground. Lewis was placed in segregation in the maximum security area of the jail as a result of the incident.[2]

On February 6, 2006, while still housed in a maximum security cell, Lewis pushed the intercom button from his cell and screamed and yelled that he

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2. This was not Lewis's only altercation at the Jerome Combs Detention Center. Lewis had been previously sanctioned "quite a few times" for fighting.

had pills in his cell, and that he was going to ingest them unless he saw the nurse. Corporal Marlin Woods spoke with the nurse about Lewis's statements and then told Lewis that he could not see the nurse because he had earlier refused medical treatment. Lewis held up a bottle of pills to the security camera located in his cell and told Woods to "forget about it" and that he would "take care of [the] pain" himself, implying a suicide threat. Lewis then became angry and threw the pills on the cell floor.

Corporal Woods requested that Shreffler and Ayala accompany him to Lewis's cell so that he could check on Lewis and shake down his cell to remove the pills and any contraband.[3] The officers then entered Lewis's cell. Shreffler, carrying a Taser [4] in his hand, ordered Lewis

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3. Both Woods and Ayala knew Lewis to be an inmate who frequently refused orders, was combative and had a propensity to fight.

4. Taser is a registered trademark of TASER International, Inc. A Taser is an electronic control device that operates by firing two probes attached by electrical-conducting wires into the target individual, sending pulses of low amperage, high voltage electricity through the wires, which results in temporary immobilization and an immediate loss of the target's neuromuscular control for the duration of the electrical pulse. *See Sanders v. City of Fresno*, 551 F. Supp. 2d 1149, 1158 n.15 (E.D. Cal. 2008); *also* TASER International, Inc.'s website, http://www.taser.com/research/Pages/FAQGeneral.aspx. The District Court in *Beaver v. City of Federal Way*, 507 F. Suppl. 2d 1137, 1142-43 (W.D. Wash. 2007), explained the Taser's effects:

> The Taser is not designed to use pain as a principal motivator. Instead, the pulses cause a break in the

(Cont'd)

to stand up, but Lewis refused to comply. At his deposition, Lewis described his behavior as follows: "I was slug. The only thing I did was like . . . turn my head over and just looked at him". Corporal Woods then ordered Shreffler to deploy his Taser, which Shreffler did by shooting Lewis once in his right leg.[5] Lewis slid out of his bed and onto the floor. He was then handcuffed and removed from his cell. Lewis conceded at his deposition that he did not suffer any injuries, only a temporary shocking from the use of the Taser.

(Cont'd)

> body's central nervous system signaling, resulting in involuntary muscle contractions. This will generally result in the target falling, if standing, or in preventing a target on the ground from standing. The effect is generally temporary. Although infliction of pain as a motivator is not the primary function of a properly deployed Taser, pain is a necessary byproduct of its use. However, it is also a very useful tool for law enforcement, as it is considered to inflict considerably less pain on a suspect than other forms of force available to an officer.

507 F. Supp. 2d at 1142-43.

5. In Woods's professional experience as a supervisor, he believed that using a Taser on Lewis was the safest method of restraint given in part to Lewis's propensity to fight and his refusal of Shreffler's order.

REASONS FOR GRANTING THE PETITION

This case raises important federal questions concerning the applicable constitutional amendment and correct legal standard to be followed by correctional officers in their use of force to maintain order and security in county jails. The Seventh Circuit joined the Third Circuit in applying the Fourteenth Amendment Due Process Clause to Section 1983 claims brought by convicted inmates awaiting sentencing. In contrast, the majority of the circuits which have addressed this issue – the Second, Fifth, Eighth, Ninth, Tenth, and Eleventh – have applied an entirely different amendment: the Eighth Amendment's Cruel and Unusual Punishment Clause. The Seventh Circuit's opinion also conflicts with the holdings of the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits concerning the proper standard to be applied to use of force claims arising under the Fourteenth Amendment's Due Process Clause. Finally, this case also presents issues regarding the proper deference to be given a correctional officer in the use of a Taser on a known violent and unruly inmate, and whether the Seventh Circuit's application of the undisputed facts and divergent case law resulted in the erroneous denial of Petitioner's qualified immunity defense. This Court should exercise its discretion and grant the petition for *writ of certiorari* in order to provide guidance to correctional officers and administrators, as well as the lower courts, on these important issues.

Although this Court has held that the Due Process Clause of the Fourteenth Amendment applies generally to pretrial detainees, *see Bell v. Wolfish*, 441 U.S. 520,

535, 99 S. Ct. 1861 (1979), and that the Cruel and Unusual Punishment Clause of the Eighth Amendment applies to convicted inmates, *see Whitley v. Albers*, 475 U.S. 312, 318-326, 109 S. Ct. 1078 (1986), it has not yet defined precisely where the line is drawn between these two categories for the purposes of evaluating use of force claims. Given the different allowances under the Fourteenth and Eighth Amendments – the latter permitting punishment so long as it is not cruel and unusual, and the former disavowing punishment altogether – this is more than a mere academic inquiry.[6] The federal circuit courts are sharply divided over this issue in the absence of direct precedent from this Court. *See, e.g., Lewis v. Downey*, 581 F.3d 467, 473 (7th Cir. 2009) (applying the Fourteenth Amendment to claims brought by pre-sentence inmates); *Tilmon v. Prator*, 268 F.3d 521, 523-24 (5th Cir. 2004) (holding that conviction is the trigger for Eighth Amendment protection); *Fuentes v. Wagner*, 206 F.3d 335, 341 (3rd Cir. 2000) (drawing the Eighth Amendment line at sentencing).

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6. Resolution of these issues will greatly impact the operation of county jails across the nation. According to the Bureau of Justice Statistics, in 2008, 785,556 individuals were confined nationally in county jails. This represents thirty-four (34) percent of the total population of confined persons within the United States. *Correctional Populations*, U.S. Bur. Justice Stat., available at *http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm*. County jails routinely house the full spectrum of inmates: arrestees released on bail; pretrial detainees pending trials; convicted prisoners awaiting sentencing or transport to prisons; and, convicted prisoners serving a sentence under one year. Guidance from this Court is needed so that correctional officers understand whether the status of an inmate makes a difference in the use of force context.

Equally unsettled is the correct legal standard to be followed by correctional officers in their use of force under substantive due process. While this Court has addressed use of force claims brought under both the Fourth and Eighth Amendments, it has yet to address how these claims should be evaluated under the Fourteenth Amendment. The circuit courts have used a variety of standards, including the Fourth Amendment's reasonableness inquiry, *see, e.g., Andrews v. Neer*, 253 F.3d 1052, 1060-61 (8th Cir. 2001), the Eighth Amendment's malice standard, *see, e.g., Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993), the "shocks the conscience" standard from *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998), *see e.g., Harris v. City of Circleville*, 583 F.3d 356, 365 (6th Cir. 2009), and hybrids of all these schemes, *see, e.g., Danley v. Allen*, 540 F.3d 1298, 1306 (11th Cir. 2008); *Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001). In noting this Court's silence on the issue, the Seventh Circuit in the instant case fell back on the Eighth Amendment standard in evaluating Lewis's claim. This default position, while a common solution reached by several federal appellate courts, does not resolve the recurring issue of whether another standard, beyond the Eighth Amendment, applies to use of force claims brought in the jail setting.

Finally, in rejecting Petitioner's qualified immunity defense, the Seventh Circuit failed to give Petitioner the proper deference in choosing to use a Taser as a means of managing a known violent and unruly inmate. *See Whitley*, 475 U.S. at 321-22; *Bell*, 441 U.S. at 547 n.29. As law enforcement increases its use of Tasers and

other electronic control devices,[7] litigation concerning the use of these devices has been gaining momentum. *See Brown v. City of Golden Valley*, 574 F.3d 491,498 (8th Cir. 2009) (noting that case law involving the use of Tasers is new and developing). Some courts have viewed Tasers as safe and valuable law enforcement tools, while others have equated them to more intense and dangerous weapons in an officer's arsenal. *Compare Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2008), *with Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993). Guidance from this Court is needed so that correctional officers know that, in their professional judgment based on the rapidly evolving and often dangerous circumstances of the moment, they can effectively control disruptive inmates using a Taser or other electronic control device so that injury to both the inmates and officers can be avoided and institutional order and security can be restored.

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7. According to the National Institute of Justice, 11,500 law enforcement agencies have acquired approximately 260,000 electronic control devices in operational settings. *Study of Deaths Following Electro Muscular Disruption: Interim Report*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, June 2008, at 1 (available at *http://www.ncjrs.gov/pdffiles1/nij/222981.pdf*).

I. THIS COURT SHOULD RESOLVE THE CIRCUIT COURT CONFLICT AND CLARIFY WHETHER THE EIGHTH OR THE FOURTEENTH AMENDMENT APPLIES TO USE OF FORCE CLAIMS BROUGHT PURSUANT TO 42 U.S.C. § 1983 BY CONVICTED INMATES NOT YET SENTENCED

In *Graham v. Connor*, this Court "reject[ed] the notion that all excessive force claims brought under § 1983 are governed by a single generic standard." 490 U.S. 386, 393, 109 S. Ct. 1865 (1989). Rather, the analysis of a use of force claim begins with identifying the constitutional right at issue. *Id.* at 394. This inquiry hinges on the status of the individual alleging excessive force within the criminal proceedings. *Id.* When a use of force claim arises in the context of an arrest, the Fourth Amendment's protections against unreasonable seizures apply. *Id.* Prisoners awaiting trial, on the other hand, are protected by the Due Process Clause of the Fourteenth Amendment, *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861 (1979), while the Eighth Amendment's proscription against cruel and unusual punishment provides protection for convicted prisoners. *Whitley v. Albers*, 475 U.S. 312, 318-326, 106 S. Ct. 1078 (1986). Not all persons alleging excessive force, however, fit neatly into these fixed categories.

This Court's jurisprudence has yet to clarify the issue. In *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401 (1970), this Court held that the Eighth Amendment is inapplicable when public school teachers impose corporal punishment on students. The Court explained

that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a *formal adjudication of guilt* in accordance with due process of law." *Id.* at 671 n.40 (emphasis added). *Ingraham* never explained whether "a formal adjudication of guilt" included sentencing or just the traditional proceedings associated with obtaining a criminal conviction.

In the instant case, the Seventh Circuit turned to a footnote in *Graham* for guidance in defining "a formal adjudication of guilt." *Lewis*, 581 F.3d at 474 (*citing Graham*, 490 U.S. at 392 n.6). This footnote, however, was *dicta* and hardly definitive. The footnote described Judge Friendly's excessive force analysis from *Johnson v. Glick*, 481 F.2d 1028 (1973).[8] Interestingly, this Court later noted – in another footnote – that the Eighth Amendment attaches after conviction. *Graham*, 490 U.S. at 395 n.10 (*quoting Whitley*, 475 U.S. at 327 ("After conviction, the Eighth Amendment 'serves as the

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8. The footnote reads:

> "Judge Friendly did not apply the Eighth Amendment's Cruel and Unusual Punishments Clause to the detainee's claim for two reasons. First, he thought that the Eighth Amendment's protections did not attach until after conviction and sentence. 481 F.2d at 1032. This view was confirmed by *Ingraham v. Wright*, 430 U.S. 651, 671 n. 40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions") . . ."

Graham, 490 U.S. at 392 n.6.

primary source of substantive protection . . .'")). Contrary to the Seventh Circuit's interpretation, therefore, neither the footnotes in *Graham* nor Judge Friendly's analysis in *Johnson* elucidate at what point Eighth Amendment rights vest.

Other Supreme Court jurisprudence provides no better direction. In *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), this Court first announced that the origin for constitutional rights of pretrial detainees is the Due Process Clause of the Fourteenth Amendment. This Court explained that a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. *Bell*, 441 U.S. at 535-36 (*citing Ingraham*, 430 U.S. at 671-72 n.40). Other than noting that the State acquires the power to punish "only after it complies with constitutional guarantees traditionally associated with criminal prosecutions," this Court did not address the specific nuance of determining precisely what is meant by "pretrial detainee" or when the proscriptions of the Eighth Amendment begin. *Bell*, 441 U.S. at 535 n.16.

In the absence of direct precedent from this Court, the federal appellate courts have reached conflicting results. For example, in *Hamm v. DeKalb County*, 74 F.2d 1567 (11th Cir. 1985), an inmate claimed that he endured unconstitutional jail conditions both before and after his conviction. Using the inmate's conviction as the division between the two, the Eleventh Circuit evaluated the claims under the Cruel and Unusual Punishment Clause and the Due Process Clause. *Id.* at 1572 (*citing Ingraham*, 430 U.S. at 671-72, and *Bell*, 441 U.S. at 520).

Similarly, the Tenth Circuit in *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), reached the same conclusion when it considered the claims of a widow of an inmate who was killed by fellow inmates in the jail. The inmate was awaiting sentencing at the time of his death. The Tenth Circuit rejected the widow's argument that her failure to protect claim should be evaluated under the Due Process Clause. *Id.* at 1492-93 (*citing Bell*, 441 U.S. at 534-35). The court reasoned that a convicted inmate awaiting sentencing is being detained primarily for punitive purposes, not merely to ensure his presence at trial. *Id.* at 1493. The Tenth Circuit explained:

> We see no reason to treat incarcerated persons whose guilt has been adjudicated formally but who await sentencing like pretrial detainees, who are detained primarily to ensure their presence at trial and who cannot be punished [citation]; and we perceive every reason to treat those awaiting sentencing the same as inmates already sentenced. The critical juncture is conviction, either after trial or, as here, by plea, at which point the state acquires the power to punish and the Eighth Amendment is implicated.

Id. (*citing Bell*, 441 U.S. at 534-35, *Ingraham*, 430 U.S. at 664, 671 n. 40). Judge McKay concurred in part and dissented in part, disagreeing with the court's conclusion that the Eighth Amendment was applicable to pre-sentence inmates' claims. *Id.* at 1507-08 (McKay, dissenting). Acknowledging that this Court has yet to decide the issue, Justice McKay noted that a criminal

defendant retains a number of rights until sentencing and that the Fourteenth Amendment's right to be free from punishment should be among them. *Id.* at 1508.

The Third Circuit in *Fuentes v. Wagner*, 206 F.3d 335 (2000), considered other circumstances where sentencing is the turning point in criminal proceedings. The Third Circuit relied on *Cobb v. Aytch*, 643 F.2d 946, 962 (3d Cir. 1981), a right to bail case in which the court stated that "[t]he right to remain at liberty continues until a court pronounces a judgment of sentence." The *Cobb* court based its decision on the fact that state statutory law allowed un-sentenced defendants a right to bail, and that un-sentenced prisoners retained their Sixth Amendment rights to counsel and a speedy trial. *Cobb*, 643 F.2d at 926. After considering the decisions in *Cobb* and *Bell*, the *Fuentes* court stated it was "simply wrong" as a matter of law that a convicted inmate awaiting sentencing should have the same status as a sentenced inmate. *Fuentes*, 206 F.3d at 341 (*citing Bell*, 441 U.S. at 538).

Expressly rejecting the Third Circuit's holding in *Fuentes*, the Fifth Circuit more recently in *Tilmon v. Prator*, 368 F.3d 521 (5th Cir. 2004), affirmed a district court's decision to draw the line at conviction. In doing so, the court discussed the holdings of *Cobb, Fuentes,* and *Berry*, and concluded that "the adjudication of guilt, i.e., the conviction, and not the pronouncement of sentence, is the dispositive fact with regard to punishment in accordance with due process." *Tilmon*, 368 F.3d at 523. The *Tilmon* court made a careful examination of this Court's pronouncements in *Bell* and concluded that punishment, such as the punishment

announced at sentencing, can only follow a determination of guilt after trial or plea. *Id.* at 523-24.

Other courts have struggled with this issue since *Bell* and would benefit from this Court's guidance. *See Whitnack v. Doughlas County*, 16 F.3d 954 (8th Cir. 1994) (analyzing a pre-sentence inmate's condition of confinement claim under the Eighth Amendment); *Resnick v. Hayes*, 213 F.3d 443 (9th Cir. 2000) (using the Eighth Amendment standards to analyze the constitutionality of a pre-sentence inmate's placement in disciplinary segregation); *Estate of Gaither v. District of Columbia*, No. 03-1458, __ F. Supp. 2d __, 2009 WL 2916976, at *13 (D.D.C. Sept. 8, 2009) (declining to decide the issue as the inmate's conditions of confinement claim would be judged under the same standard regardless of the constitutional provision involved); *Athill v. Speziale*, No. 06-4941, 2009 WL 1874194, at *7-8 (D.N.J. June 30, 2009) (unpublished order) (holding that a pre-sentence inmate was protected from excessive force under the Due Process Clause); *Jeanty v. County of Orange*, 379 F. Supp. 2d 533 (S.D.N.Y. 2005) (finding that Eighth Amendment rights vest upon conviction, not sentencing).

The question of whether convicted inmates awaiting sentencing are protected under the Eighth or Fourteenth Amendment is a recurring issue which has clearly caused confusion among the federal appellate circuit courts. This case presents a prime opportunity for this Court to consider this issue and resolve the circuit courts' conflict. This Court, therefore, should exercise its resources in favor of granting *certiorari* in order to provide guidance to jail administrators and lower courts.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT COURT CONFLICT AND CLARIFY THE LEGAL STANDARD TO BE FOLLOWED BY CORRECTIONAL OFFICERS IN THEIR USE OF FORCE ON INMATES DETAINED IN COUNTY JAILS

While this Court has noted that a pretrial detainee's Due Process rights "are at least as great as the Eighth Amendment protections available to a convicted prisoner," *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979 (1983) (*citing Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861 (1979)), it has left open the question of what standard should apply to use of force claims brought under the substantive due process component of the Fourteenth Amendment. *See, e.g., Fuentes v. Wagner*, 206 F.3d 335, 344 (2000) ("no determination has as yet been made regarding how much more protection unconvicted prisoners should receive [than convicted prisoners]"); *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996) ("Whether the standard for excessive force claims is the 'reasonableness' standard of the Fourth Amendment, or some other intermediate standard, the Supreme Court has declined to say.").

In *Bell*, this Court held that the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from conditions of confinement that "amount to punishment." 441 U.S. at 535. To state a constitutional violation, a pretrial detainee must establish that he was subjected to a disability or restrictive condition that harmed him beyond merely interfering with his "desire to be free from discomfort" during confinement.

Id. at 537. Whether a condition amounts to "punishment," depends on whether it is imposed for the purpose of punishment or whether it is incidental to some other legitimate penological purpose. *Id.* at 538. Absent proof of an intent to punish, "that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.* (*quoting Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554 (1963)).

Although *Bell* is instructive on which constitutional amendment applies generally in the pretrial detention context, it is not a use of force case and, therefore, contributes little to the use of force analysis. *Bell* involved institutional conditions and practices, including double bunking, strip searches, inadequate recreational, educational and employment opportunities, insufficient staff, and restrictions on the purchase and receipt of personal items and books. The regulatory nature of these practices prompted this Court to apply the factors identified in *Kennedy* in determining whether a governmental act is punitive.[9] The *Kennedy* factors,

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9. "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the (Cont'd)

however, cannot be readily applied to the use of force context. *See Telfair v. Gilberg*, 868 F. Supp. 1396, 1411 (S.D. Ga. 1994). *Bell*, therefore, does not provide a standard for use of force claims.

This Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998), although instructive, adds only confusion to the mix. In *County of Sacramento*, this Court clarified the standard of culpability on the part of a police officer for violating substantive due process in a pursuit case. *Id.* Employing a "shocks the conscience" standard, this Court rejected the "deliberate indifference" test associated with prison medical care claims and, instead, analogized police pursuit claims with Eighth Amendment use of force claims under *Whitley v. Albers*, 475 U.S. 312, 318-326, 106 S. Ct. 1078 (1986), where a higher standard of fault (malicious and sadistic intent to harm) was required to state a constitutional claim. *Id.* at 849-55. This Court reasoned that:

> [L]iability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care,

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inquiry, and may often point in differing directions." *Bell*, 441 U.S. at 537-38 (*quoting Kennedy*, 372 U.S. at 168-69) (footnotes omitted)).

> indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." [citation] Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case.

Id. at 853 (citations omitted). After analyzing the facts, this Court affirmed summary judgment for the defendant officer, concluding that the officer did not harbor "an improper or malicious motive" in pursuing the suspected law violator. *Id.* at 855.

The lack of direction by this Court has caused the federal appellate courts to employ a myriad of conflicting standards in evaluating substantive due process violations in the use of force context. Several circuit courts have merged the Fourteenth Amendment standard with the Eighth Amendment standard outlined in *Whitley*, and expounded on in *Hudson v McMillian*, 503 U.S. 1, 112 S. Ct. 995 (1992), and *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002). For example, the Fifth Circuit in *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993), *cert. denied*, 509 U.S. 905 (1993), concluded that it was impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security. Therefore, the court stated that the standard announced in *Whitley* and *Hudson* should guide courts in evaluating pretrial detainee use

of force claims. *Valencia*, 981 F.2d at 1446. *See also Danley v. Allen*, 540 F.3d 1298, 1306 (11th Cir. 2008) (*citing Bozeman v. Orum III*, 422 F.3d 1266, 1271 (11th Cir. 2005) ("it makes no difference whether [the inmate] was a pretrial detainee or a convicted prisoner because 'the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving . . . pretrial detainees'")); *Fuentes*, 206 F.3d at 341 (3rd Cir. 2000) (Eighth Amendment standards apply to a pretrial detainee's use of force claim arising in the context of a prison disturbance); *U.S. v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999) ("we conclude that the *Hudson* analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well"); *Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998) (applying *Whitley* analysis); *Orem v. Rephann*, 523 F.3d 442 (4th Cir. 2008) (applying *Whitley*); *Athill v. Speziale*, No. 06-4941, 2009 WL 1874194, at *8 (D.N.J. June 30, 2009) (collecting cases).

A few circuits use the Fourth Amendment's objective reasonableness standard. *See Andrews v. Neer*, 253 F.3d 1052, 1060-61 (8th Cir. 2001); *Moore v. Novak*, 146 F.3d 531 (8th Cir. 1998); *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002). Other circuits have used an intermediate standard between the Fourth Amendment's objective inquiry and the Eighth Amendment subjective standard. The Seventh Circuit in *Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996), for example, concluded that collapsing the Eighth and Fourteenth Amendment analyses eviscerates this Court's holding in *Bell*. Therefore, the Seventh Circuit requires a pretrial inmate alleging excessive force to prove that the defendants "acted deliberately or with

callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights." *Wilson*, 83 F.3d at 875 (*quoting Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988)); *see also Telfair*, 868 F. Supp. 1396 (using an intermediate standard devised by district court).

Still other courts have followed *County of Sacramento*'s analysis. Noting that "[a] substantially higher hurdle must be surpassed to make a showing of excessive force under the Fourteenth Amendment than under the 'objective reasonableness' test of *Graham*," the Sixth Circuit in *Harris v. City of Circleville*, 583 F.3d 356, 365 (6th Cir. 2009), concluded that the Due Process Clause only protects against conduct that "shocks the conscience" *Harris*, 583 F.3d at 365; *see also Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001) ("shocks the conscience" standard applicable to pretrial detainee's excessive force claim); *but see Telfair*, 868 F. Supp. at 1409-10 (rejecting a "shocks the conscience" standard for pretrial detainee's excessive force claims because "it would rarely be met").

A review of the above case law, therefore, demonstrates the need for this Court to establish the proper constitutional framework for evaluating use of force claims under substantive due process protections. Is it *Bell*'s "punishment" standard? Is it a merger with *Whitley* and *Hudson*'s "malice" standard, as implied by *County of Sacramento v. Lewis*? Or, is it some intermediate standard of culpability, such as the "deliberate indifference" standard used to evaluate medical care claims in both the pretrial and post-conviction case law? Correctional officers, as well as the

lower courts, need guidance from this Court on what legal standard to apply in Fourteenth Amendment use of force cases. Accordingly, this Court should exercise its discretion and grant a *writ of certiorari.*

III. IN REJECTING THE PETITIONER'S QUALIFIED IMMUNITY DEFENSE, THE SEVENTH CIRCUIT FAILED TO GIVE PETITIONER THE PROPER DEFERENCE IN HIS USE OF A TASER ON A KNOWN VIOLENT AND UNRULY INMATE

In rejecting Petitioner's qualified immunity defense, the Seventh Circuit failed to give Petitioner the proper deference, as required under *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078 (1986) and *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), in his decicion to use a Taser to control a known violent and unruly inmate. This Court in *Whitley* held that correctional officials should be accorded wide-ranging deference in adopting and executing policies and practices that, in their professional judgment, are needed to preserve internal order and discipline and maintain security. *Whitley*, 475 U.S. at 321-22; *accord Bell*, 441 U.S. at 547 n.29 (holding that deference applies regardless of whether the circumstances involve pretrial inmates or convicted prisoners). Such deference applies not only to actual confrontations with inmates but also "to prophylactic or preventative measures intended to reduce the incidence of these or any other breaches of prison discipline." *Whitley*, 475 U.S. at 322. A judge or jury should not "freely substitute their judgment for that of officials who have made a considered choice." *Id.*

In *Whitley*, this Court held that the Eighth Amendment proscribes only the unnecessary and wanton infliction of pain. This Court explained:

> The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.

Id. This Court explained that a correctional officer's decision to use force in response to a disturbance must necessarily take into account the potential risk that the disturbance presents to inmates and officers. *Id.* at 320.

Against that backdrop, this Court needs to address whether the Seventh Circuit properly accorded Petitioner the deference required under *Whitley* and *Bell*. Tasers are an effective, non-lethal, hands-off means for correctional officers to incapacitate an inmate at a safe distance. As such, they have become invaluable additions to correction officers' arsenals, giving them an alternative weapon when firearms, batons, pepper spray, or hand-to-hand combat are impractical or unsafe. *See Beaver v. City of Federal Way*, 507 F. Supp. 2d 1137, 1142-43 (W.D. Wash. 2007) (noting that a Taser inflicts considerably less pain than other forms of force and that it is a valuable tool for protecting law enforcement officers by providing an enlarged safety zone around the officer). Use of a Taser is appropriate to diffuse a situation so as to prevent the need for escalating force. *Sanders v. City of Fresno*, 551 F. Supp. 2d 1149, 1172

(E.D. Cal. 2008). Like mace and water hoses, a Taser or stun gun permits an officer "to perform his duty without physical confrontation between staff and inmate" and often is the safest means available to enforce prison security. *Soto v. Dickey*, 744 F.2d 1260, 1263 (1984); *see also See Danley v. Allen*, 540 F.3d 1298, 1307-08 (11th Cir. 2008) (collecting cases where pepper spray use was found not disproportionate to the need to control an inmate who fails to comply with jailers' orders).

The effective and safe use of the Taser in the instant case aptly demonstrates why correctional officers should be allowed more latitude than the Seventh Circuit permitted. Lewis undisputedly had a past history of violence against other inmates and correctional officers. He was known to be combative and frequently disobedient. On the day in question, he acted aggressively and defiantly by screaming and yelling over the intercom, angrily throwing a bottle of pills on the floor, and refusing to immediately get up to be handcuffed. Based on these facts, there was certainly a reasonable basis for the officers to perceive that Lewis presented a threat of violence. In the exercise of their professional judgment and discretion, the officers should not have to wait for that threat to immediately materialize before taking action to prevent further disturbance. *See Danley*, 540 F.3d at 1307-08 . Indeed, by using a Taser to momentarily incapacitate Lewis, as opposed to going "hands on" and, thereby, risking a potential fight and injury to officers and even Lewis himself, the officers chose, in their professional discretion, a minimally dangerous and intrusive means to preserve order and security.

It is also relevant that Lewis, admittedly, did not incur any injury as a result of being shot with the Taser. *See Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995 (1992). Indeed, courts have held that a single shot from a Taser does not inflict a serious injury. *See, e.g., Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004); *Buckley v. Haddock*, 292 Fed. Appx. 791, 795, 2008 WL 4140297 (11th Cir. 2008) (unpublished) (holding that Tasers do not "pose a substantial risk of causing serious bodily injury").[10] Thus, in light of the deference that should have been afforded Officer Shreffler, combined with the plausible need for application of force, the single deployment of the Taser to Lewis's right thigh, and the lack of any injury resulting from the event, the Seventh Circuit erred in finding an inference of malicious intent sufficient to support a constitutional violation and to deny summary judgment.

Alternatively, the Seventh Circuit erred in finding that, based on the existing case law, "a reasonable officer would understand that employing a Taser gun under the version of the facts that Lewis has described would violate the prisoner's constitutional rights." *Lewis v. Downey*, 581 F.3d 467,479 (2009). At the onset, the Seventh Circuit's denial of qualified immunity ignores the issues presented in Parts I and II, *supra*. A county jail officer examining the case law would be confused at

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10. According to National Institute of Justice, there is no conclusive medical evidence that indicates a high risk of serious injury or death from the direct effects of a Taser. *Study of Deaths Following Electro Muscular Disruption: Interim Report*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, June 2008, at 3 (available at *http://www.ncjrs.gov/pdffiles1/nij/222981.pdf*)

best in his attempt to understand and apply the correct constitutional provision and standard depending on the status of a particular inmate at any given time in the county jail.

Moreover, the lower courts have treated electronic control devices with varying degrees of favor and skepticism. In *Caldwell v. Moore*, 968 F.2d 595 (6th Cir. 1992), for example, the Sixth Circuit held that the use of stun gun against a disobedient, mentally ill prisoner did not violate the Eighth Amendment, noting correctional officers have limited choices when an inmate refuses an order. *Caldwell*, 968 F.2d at 602. Other circuits have ruled likewise. *See, e.g., Jasper v. Thalacker*, 999 F.2d 353, 354 (8th Cir. 1993) (using stun gun to subdue an unruly inmate); *Michenfelder v. Sumner*, 860 F.2d 328, 335-36 (9th Cir. 1988) (allowing use of stun gun on inmate who refused to submit to a strip search); *Hunter v. Young*, 238 Fed. Appx. 336, 2007 WL 1678060 (10th Cir. June 12, 2007) (unpublished) (affirming use of Taser on a physically impaired detainee who failed to comply with orders); *Henderson v. Gordineer*, No. 3:06-1425, 2007 WL 840273, at *7 (D.S.C. March 14, 2007) (unpublished) (single Taser shot not excessive given prisoner's admission to snatching pills and failure to obey the officer's orders); *Dye v. Lomen*, 40 Fed. Appx. 993, 2002 WL 1585903 (7th Cir. 2002) (unpublished) (use of a Taser on disobedient inmate did not violate the Eighth Amendment).

Yet, other courts have been more stringent concerning the use of Tasers. In *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993), the Eighth Circuit found unconstitutional the use of a stun gun on an inmate who

refused to clean his cell despite the fact that the inmate was neither a danger to himself or others. *Hickey*, 12 F.3d at 756; *accord Orem v. Rephann*, 523 F.3d 442, 446-47 (4th Cir. 2008); *Vasquez v. Raemisch*, 480 F. Supp. 1120, 1133 (W.D. Wis. 2007) (use of Taser unreasonable where inmate was obnoxious and talking during a search); *Preston v. Pavlushkin*, No. 03-CV-00617-RPM, 2006 WL 686481 (D. Colo. 2006) (unpublished) (use of Taser to force inmate to clean up food tray violated Eighth Amendment). Given the aforementioned conflicts and lack of clearly established case law, the Seventh Circuit's denial of qualified immunity for Petitioner should be corrected by this Court.

CONCLUSION

For the foregoing reasons, Petitioner Michael Shreffler respectfully submits that the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

MICHAEL D. BERSANI
Counsel of Record
CHARLES E. HERVAS
MICHAEL W. CONDON
YORDANA SAWYER
HERVAS, CONDON & BERSANI, P.C.
333 Pierce Road, Suite 195
Itasca, Illinois 60143
(630) 773-4774

Attorneys for Petitioner