No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOSEPH CHRISTOPHER ROBERTS,

Petitioner

V.

JEFFERSON COUNTY, TEXAS

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a showing of a pervasive practice of abuse by subordinates impute constructive knowledge on a policy maker in a Section 1983 case? And, if so, what proof is required to raise a fact issue regarding the existence of a pervasive practice of abuse?

Joseph Roberts was assaulted twice by two different corrections officers while a dozen other officers watched and celebrated the assaults. Joseph Roberts presented the testimony of two former Jefferson County jailors, and a renowned expert who all testified that assaults like the ones on Mr. Roberts were commonplace at the jail. He also presented a video of the assaults that show a dozen officers watching the assaults and two officers (including the supervisor on duty at the jail) high-fiving each other after the assaults.

The trial court held at the summary judgment stage that this evidence was not sufficient to allow the case to proceed to a jury against the county. The Court of Appeals confirmed this ruling, stating that Plaintiff did not come forward with historical evidence of a custom and practice of excessive force so as to impute knowledge on the policy maker. Petitioner believes these rulings are contrary to this Court's holdings in *Monell v. New York City Dep't of Soc. Servs.*, *Praprotnik*, *Scott v. Harris,* and represents a departure by the Fifth Circuit from the holdings in the other Circuits.

LIST OF PARTIES

1) Joseph Christopher Roberts, Petitioner; and

2) Jefferson County, Texas, Respondent.

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The opinion of the U.S. District Court for the Southern District of Texas, the Honorable Marcia Crone presiding, granting Jefferson County's Motion for Summary Judgment is included at App. C 1-43. The opinion of the U.S. District Court for the Southern District of Texas, the Honorable Marcia Crone presiding, denying Plaintiff's Motion for Reconsideration of Jefferson County's Motion for Summary Judgment is included at App. B 1-16. The Opinion of the U.S. Court of Appeals for the Fifth Circuit is unpublished and contained here at App. A 1-2.

Jurisdiction

Federal jurisdiction arises from Mr. Roberts' claim that he was deprived of the rights secured by the U.S. Constitution 14th Amendment. Mr. Roberts brought suit pursuant to 42 U.S.C. § 1983 in the U.S. District Court for the Southern District of Texas. The Trial Court dismissed Mr. Roberts' case at summary judgment. The case proceeded to trial against the officers who committed the assaults and resulted in a verdict for the Plaintiff. The Fifth Circuit denied Petitioner Joseph Roberts' appeal of the Trial Court's ruling on Jefferson County's Motion for Summary Judgment on May 11, 2012. This petition is timely filed within ninety days of the Fifth Circuit's denial of Mr. Roberts' appeal. The

jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

United States Constitution, 14th Amendment
(full text at App. D)

42 U.S.C. § 1983
(full text at App. E)

Statement of the Case

This is a 42 U.S.C. §1983 action brought by Joseph Christopher Roberts for assaults to which he was subjected pursuant to the pervasive practices of Jefferson County on April 5 and 6, 2007. Mr. Roberts was a pretrial detainee taken to the Jefferson County Jail ("the Jail") on outstanding traffic warrants. He was assaulted twice by two different officers, once while being booked in and once while being booked out. Both assaults were witnessed by close to a dozen officers and were captured on the Jail's closed-circuit video. None of the Jefferson County employees intervened or looked surprised by the assaults and the supervisor on duty celebrated the assaults by "high fiving" another officer immediately after witnessing the second assault. Two long-time officers familiar with the unwritten customs and practices at the Jail testified that assaults of the type committed on Joseph were commonplace and accepted practices. Their testimony is corroborated by the video of the assaults and the testimony of Mr.

Roberts' expert, Captain Maurice Cook, a peerless law enforcement expert.

1. Course of Proceedings and Disposition Below

Mr. Roberts sued Jefferson County and the two jailers who assaulted him pursuant to 42 U.S.C. §1983 for his damages caused by the assaults. After conducting discovery, Jefferson County moved for summary judgment. Plaintiff responded to the Motion and attached exhibits supporting his arguments. The Hon. Marcia Crone determined that Plaintiff's claims against Jefferson County failed as a matter of law. App. C 1 - 43. After trial on the merits against the remaining Defendants, Plaintiff moved for reconsideration of the Court's Order granting summary judgment in favor of Jefferson County. The Hon. Marcia Crone denied Plaintiff's Motion to Reconsider, which was based on manifest injustice and newly discovered evidence. App. B 1-16. Roberts timely appealed. After oral argument, the Fifth Circuit denied Mr. Roberts' appeal on May 11, 2012. App. A 1-2.

2. Factual Background

On April 5th, 2007, Joseph Christopher Roberts ("Mr. Roberts" or "Plaintiff") was taken to the Jefferson County Correctional Facility ("Jail") because he had outstanding traffic warrants. A short time after arriving at the Jail, Mr. Roberts was "booked-in" by Cole, a corrections officer at the Jail. Cole searched Mr. Roberts. Then Cole pushed Mr. Roberts. Cole then punched Mr. Roberts repeatedly

in the face, splitting his lip, and slammed his head off the booking counter. This assault was witnessed by no-less-than six corrections officers. None of the officers looked at all surprised by the assault; in fact, the assault was so routine that hardly a head turned, no one came to Mr. Roberts' aid, and the assault was unremarkable enough that officers did not even stop the phone conversations they were having.

Mr. Roberts, then bleeding profusely from the lip, was placed in a holding cell and seen by a nurse. The County decided to release Mr. Roberts on a personal recognizance bond and treat him at the local hospital. As Mr. Roberts was being booked out, he spit blood that had filled his mouth onto the discharge papers. Mr. Roberts was handcuffed at the time. Vickery, another officer, grabbed Mr. Roberts and threw him into a wall. Vickery then took the bloody discharge papers and smeared them on Mr. Roberts' head. Sgt. Doyle then "high-fived" another officer, apparently pleased with the way things had transpired. No less than seven officers were within a couple of feet of this altercation, and none took action or looked surprised; in fact, they were all laughing at Mr. Roberts as he slumped dazed against the wall. Both Cole and Vickery finished their shifts without reprimand. Cole worked four full shifts following the incident without reprimand. Jefferson County did nothing until Mr. Roberts' father complained about his son's beating, and it became clear that the assaults had been captured on the Jail's closed circuit camera.

Argument

The video of the two assaults, and more importantly the witnessing officers' reactions to the assaults, makes this case exceptional. In *Scott v. Harris*, this Court held that incontrovertible evidence, such as a relevant videotape whose accuracy is unchallenged, should be highly credited by the Court even when contradicted by testimonial evidence to the contrary. *Scott v. Harris*, 550 U.S. 372 (2007). Although videos have traditionally been used by law enforcement to contradict a Plaintiff's version of events in §1983 cases, video evidence that supports a Plaintiff's claims should be even more powerful because of the high burden a municipality should be required to overcome to prevail on summary judgment.

In order to prove a custom and practice of excessive force in the Fifth Circuit, the Plaintiff must show that many incidents of excessive force went unpunished prior to the Plaintiff's incident – basically requiring Plaintiff to prove events that were not reported. This standard effectively renders municipal liability a fiction in the Fifth Circuit. Moreover, this standard is contrary to the rulings of this Court in *Monell v. New York City Dep't of Soc. Servs.*, and illustrates a growing chasm between the Circuits regarding how to apply *Monell* when a Plaintiff attempts to prove constructive knowledge by a policy maker of a pattern of unconstitutional behavior by his or her subordinates. *Monell*, 436 U.S. 469. If the dictates of *Scott* and *Monell* are followed, then a jury should have the opportunity to view the video of the assaults on Mr. Roberts and draw the

reasonable inferences afforded by the honest reactions of the witnessing corrections officer to determine if excessive force is "so widespread and pervasive as to have the force of law." This case provides the perfect platform for this Court to guide the Circuits on how to apply *Monell* and *Scott* so there is uniform application of Federal law.

Mr. Roberts presented evidence from four sources that clearly indicate the existence of widespread, unconstitutional customs and practices. The video of the assaults on Mr. Roberts is by far the most compelling and probative. In addition, two Defendants with extensive personal knowledge of the day-to-day customs at the Jail testified to the widespread, unconstitutional practices. Finally, Mr. Roberts' expert reviewed the case and evidence thoroughly and determined that the assaults were a result of unconstitutional customs in Jefferson County that the Sheriff knew of, or in the proper exercise of his duties, should have known of.

1. The Fifth Circuit's insistence that a Plaintiff show Actual Knowledge of a Custom and Practice by a Policy Maker is Contrary to This Court's Holdings and Represents a Split in the Circuits

The requirements that a Plaintiff must meet to maintain a § 1983 action against a municipality on grounds of municipal "custom" or "practice" are stringent and rightly so. Those requirements can be summarized as follows: 1) there is, in fact, a "custom" or "practice" that amounts to a "policy," where, though not officially adopted, practices are so

persistent and widespread that, although not authorized, they have the effect of "policy"; 2) the custom or practice must be attributable to the municipality, meaning that its use is so common that a policymaker can be said to have actual or constructive knowledge of it; 3) despite that knowledge (actual or imputed), the policymaker failed to correct the unconstitutional custom or practice to an extent that the requisite degree of culpability -- "deliberate indifference" to an individual's constitutional rights -- can be established; and 4) the custom or practice was the "moving force" behind the unconstitutional violation, establishing the element of causation. *See Monell v. New York City Dep't of Soc. Servs.,* 436 U.S. 658, 694 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130-31 (1988).

The issue causing a split among the Circuits is what type of proof is necessary to show a widespread custom and practice and whether a Plaintiff must show actual knowledge by a policy maker despite the pervasive nature of the actual custom being practiced. The Fifth Circuit has taken the stance that the only allowable evidence is historical. If a Plaintiff cannot show a long, unbroken history of unpunished unconstitutional acts, the Fifth Circuit refuses to impute constructive knowledge on a municipality. *See Pineda v. City of Houston*, 291 F.3d 325, 327-28 (5th Cir. 2002) (holding that Plaintiff failed to show actual knowledge by a policy maker of a widespread custom and practice of performing warrantless searches).

This Court held that if an unconstitutional custom and practice is widespread and pervasive

then constructive knowledge should be imputed on a policy maker and that actual approval of the practice by a policy maker is not required. *Praprotnik*, 485 U.S. at 130-31. The holding of this Court prohibits a policy maker from remaining willfully ignorant of his subordinates unconstitutional acts when it is shown that the policy maker should have been aware of the custom through the proper exercise of his duties. *Id.*; *Pembaur v. Cincinnati*, 475 U.S. 469 (1986).

In Mr. Roberts' case, the trial court clearly sought to impose a requirement that the Plaintiff show actual knowledge by the policy maker at the summary judgment stage. In its Memorandum Opinion, the trial court acknowledged that the reactions of the witnessing officers on the video arguably creates a reasonable inference sufficient to create a fact issue regarding the pervasiveness of the practice to use excessive force against pretrial detainees, but nevertheless concluded that Plaintiff's claim failed because he "adduced no evidence that Sheriff Woods had actual or constructive knowledge of the purported custom." App. C at 26. This position demonstrates the growing dissention between the Circuits regarding the application of this Court's holdings in *Praprotnik* and *Monell.*

The Court of Appeals for the Second Circuit dealt with the same issue but came to an opposite conclusion from the Fifth Circuit. That Court held that a plaintiff could prove constructive knowledge with far less evidence than was presented in Mr. Roberts' case. The Court held:

> First, while the district court's statement is not completely clear on this point, its language

> suggests that the court required Sorlucco to demonstrate that the Commissioner, himself, was actively engaged in a pattern and practice of discrimination. To the extent that the district court employed such a standard, we reject it. While discrimination by the Commissioner might be sufficient, it was not necessary. As stated previously, a § 1983 plaintiff may establish a municipality's liability by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior policymakers. *Praprotnik,* 485 U.S. at 130, 108 S.Ct. at 927; *Krulik,* 781 F.2d at 23. Thus, Sorlucco did not have to prove that the Commissioner actively participated in the general discriminatory practice of his department.

Sorlucco v. New York City Police Dept., 971 F2d 864, 871-72 (2nd Cir. 1992).

The Fifth Circuit's requirement that a Plaintiff prove that a policy maker actual knows of a widespread, unconstitutional custom and practice is contrary to the holdings of this Court and effectively precludes municipal liability based on custom and practice in the Fifth Circuit.

2. The Reasonable Inferences from the Video and the Witnessing Officers' Honest Reactions Would Convince a Reasonable Jury that Jefferson County had a Custom and Practice of Excessive Force at the Jail

The other departure by the Fifth Circuit from the holdings of this Court and of the other Circuits is what type of evidence is permitted to show a widespread custom and practice. The Fifth Circuit applies its own standard of proof and requires a showing of a long practice of unpunished unconstitutional behavior – basically requiring a Plaintiff to prove not only his own constitutional deprivation but also that of a significant number of identically situated people. *See* App. A at 25-26; *Pineda*, 291 F.3d 325, 327-28 (5th Cir. 2002). Requiring a Plaintiff to prove a multitude of unreported and unpunished violations effectively precludes municipal liability. A Plaintiff cannot prove the existence of unreported events. Mr. Roberts believes that this Court did not intend to limit the type of proof necessary to show a custom and practice to this impossible standard.

This Court did not limit the type of evidence a Plaintiff can bring forward to show that there is at least a fact issue regarding how pervasive a custom is. In this case, the Plaintiff presented (in addition to lay and expert testimony) a video of the assaults that demonstrates an endemic acquiescence to excessive force at the Jefferson County Jail.

The video of the incident is the most probative and trustworthy evidence regarding the existence of

a custom and practice of using excessive force at the Jail. Courts increasingly rely on video evidence because it is objective and trustworthy. Although videos have traditionally been used by law enforcement to contradict a Plaintiff's version of events in §1983 cases, video evidence that supports a Plaintiff's claims is even more powerful because of the high burden the County must overcome to prevail on summary judgment. In *Scott v. Harris*, this Court held that incontrovertible evidence, such as a relevant video tape whose accuracy is unchallenged, should be highly credited by the Court even when contradicted by testimonial evidence to the contrary. *Scott v. Harris*, 550 U.S. 372.

Since *Scott v. Harris*, Courts increasingly rely on video evidence and the inferences that may be deduced from a video. Even though credibility is not to be judged on a motion for summary judgment, Courts look to the video of events and, "when opposing parties tell two different stories, one of which is blatantly contradicted by the record…a court should adopt that version for the purpose of ruling on a motion for summary judgment." *Marvin v. City of Taylor*, 509 F.3d 234, 239 (6th Cir. 2007). In *Marvin v. Taylor*, the Court granted summary judgment for the officers despite Marvin's testimony. Here the situation and standard are reversed – the Sheriff's testimony that a custom and practice of excessive force does not exist is contradicted by the video.

Viewed as a whole, the video gives the impression that the assaults on Mr. Roberts were commonplace, accepted and even encouraged. Some specific evidence of this includes:

- The two assaults on the Plaintiff were not isolated incidences. First Officer Cole punched Mr. Roberts three times in the face and slammed his head on the booking counter. Over an hour later, Mr. Roberts was assaulted and humiliated again by a different officer. When two different officers commit two completely separate assaults on video in the span of an hour or two, there is something wrong with the Jail and the way its officers were trained and supervised.

- Not a single officer looked the least bit surprised during either assault. In fact, several officers do not even terminate the cell phone calls they were on during the assaults. A reasonable jury could infer, based merely on the reaction of the witnessing officers, that excessive force was a widespread and pervasive practice at the Jefferson County Jail.

- Not one of more than a dozen officers who watched the assaults intervened during either of the two assaults on Plaintiff, although required by law to do so. This fact is clear from the video of the assaults against the Plaintiff.

- The Jail supervisor celebrated the second assault with another Jefferson County officer. Again, clearly visible on the video

> of the assaults, Officer Doyle and Officer Burke high-five each other after Vickery rubbed Plaintiff's blood into his hair. They were standing amongst a group of officers that are laughing about the incident. None of these officers were reprimanded.
>
> - None of the more than a dozen witnessing officers authored a use of force report. Use of force reports were required by the written rules of Jefferson County anytime force is used against a detainee. This is further evidence from which a jury could infer that assaults of the type depicted on the video are so commonplace as to impute knowledge on the County.

When a reasonable jury could draw inferences from the video that contradict the Sheriff's testimony, the issue should go to the jury. The accuracy of the video is unquestioned and the citizens of Jefferson County were denied the opportunity to draw reasonable inferences regarding the way the Jail is actually run and, more importantly, denied the opportunity to correct an endemic problem with law enforcement in their community.

Honest reactions to an event are the truest indications of how commonplace the event is. For example, if cattle were walking the streets of Washington D.C., the reactions of the populace would be the most trustworthy evidence that cattle in the streets are not commonplace in our Nation's Capital. If, however, the same scene unfolded in

New Dehli, the reactions of the populace would be the clearest indicator that cattle in the streets are commonplace and accepted in New Dehli. Mr. Roberts presented the most trustworthy evidence possible – a video of the assaults. A reasonable jury could reasonably conclude that the reactions of the officers that witnessed and even celebrated the assaults on Mr. Roberts demonstrate the pervasiveness that this Court in *Monell* allows us to impute knowledge on a policy maker.

This Court never sought to limit the types of evidence that can be used to show a widespread custom and practice of unconstitutional violations. If it did, the various Circuits have misinterpreted the Court's holdings such that the same set of facts will garner disparate results depending on where they occur. It is important that Federal law be uniformly applied across the circuits, and it is especially important that the citizens of one state have the same constitutional rights as those in other states.

Reasons the Writ Should be Granted

There are two reasons this Court should grant Mr. Roberts' writ. First, this case presents an opportunity for the Court to mend a growing split between the Circuits regarding the application of *Monell, Praprotnik*, and *Scott.* Federal law should be uniformly applied across the Circuits, and this is especially true when dealing with the Constitutional Rights of our citizens. Taking the dictates of *Praprotnik* and *Scott* at face value, a Plaintiff should be able to survive summary judgment if a video shows a dozen officers reacting as if two separate

assaults are commonplace and accepted. If Mr. Roberts' case had occurred in Los Angeles, California instead of Beaumont, Texas, Mr. Roberts would have been able to present his case to a jury. In the only other reported case of this type, the City of Los Angeles admitted liability to Rodney King, but in Texas the same case does not reach a Jury. The first reason Mr. Roberts' writ should be granted is so that all citizens of the United States, regardless of what state they live in, possess the same constitutional protections.

The second reason this writ should be granted is to correct the injustice visited on Mr. Roberts by the Trial Court and the Fifth Circuit. Even if this Court does not agree that there exists a departure by the Fifth Circuit from its holdings generally, Mr. Roberts still deserves the opportunity to present his case to a Jury. Mr. Roberts elicited testimony from two long-time employees of the Jefferson County Jail that people were routinely beaten without just cause. The unpunished prior incidents included a supervisor strapping a detainee to a backboard, gagging him and tasing him repeatedly as a form of torture. One officer witnessed a Lieutenant gag a mentally ill detainee and hit her repeatedly. Mr. Roberts' expert reviewed the Internal Affairs Division files from Jefferson County and determined that the Sherriff was willfully ignorant of the rampant constitutional violations routinely occurring on his watch. And there was also the video that showed a group of officers watching the second assault and then "high-fiving" each other as they mocked Mr. Roberts. Not only is their reaction probative, but the fact they were not reprimanded is

almost conclusive of acquiescence to unconstitutional practices.

Conclusion

Mr. Roberts, through his counsel, has argued and briefed these issues extensively and has attempted to keep this writ as concise as possible. Mr. Roberts responded to Jefferson County's Motion for Summary Judgment, sought a Motion for Reconsideration following the trial against the remaining Defendants, appealed the Ruling to the Fifth Circuit, and argued the case orally at the Fifth Circuit. There is ample briefing on Mr. Roberts' case specifically in the Record, so this Petition for Writ has focused primarily on why this case deserves consideration by this Honorable Court from a national perspective. This case presents an ideal opportunity to bridge a chasm that has resulted in disparate rulings on civil rights cases dealing with the imputation of constructive knowledge pursuant to *Monell* and its progeny. So while Mr. Roberts maintains that he specifically deserves a trial on the merits of his case, the purpose of this Writ is an attempt to effectuate uniform application of constitutional law in the United States.

The direction the Fifth Circuit has taken regarding the proof required to show constructive knowledge in a §1983 has potentially disastrous implications and results. The holdings of the Fifth Circuit on excessive force cases have effectively instructed municipal policy makers that turning a blind eye to constitutional deprivations will insulate a municipality from liability. Jefferson County

provides a perfect opportunity to bring the Fifth Circuit in line with the other Circuits and to explain how *Monell* and *Praprotnik* should be applied. With the video, the testimony regarding prior horrendous assaults, the testimony of former officers and expert witness testimony regarding the widespread existence of a custom and practice of tacit approval of excessive force in Jefferson County, this case presents this Court an opportunity to clarify what evidence is permissible and what proof is required to infer constructive knowledge on a policy maker.

On a national level, regardless of where the Court determines the line to be, the Circuits are in desperate need of further guidance for the sake of judicial economy, uniformity in the application of constitutional law, and the very rights the Constitution of the United States seeks to protect. On a more local level, jails and police departments need to know that there are some limits on what they can do to a citizen. Currently they are torturing people with impunity in Jefferson County. With regard to Mr. Roberts specifically, he deserves his day in Court. He presented powerful evidence from multiple sources upon which a reasonable jury could find a rampant practice of excessive force in Jefferson County.

Petitioner therefore respectfully requests that this Petition for Writ be granted and welcomes the opportunity to present these issues to the Court in Oral Argument.

Dated: August 9, 2012

Respectfully submitted,

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