

# United States Court of Appeals For the First Circuit

---

No. 05-2522

ADAM JENNINGS,  
Plaintiff, Appellant,

v.

KENNETH JONES,  
Defendant, Appellee.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND  
[Hon. Ernest C. Torres, U.S. District Judge]

---

Before  
Boudin, Chief Judge,  
Torruella, Lynch, Lipez, and Howard, Circuit Judges.

---

**ORDER OF COURT**  
**Entered: August 17, 2007**

Appellee Kenneth Jones' petition for rehearing en banc is denied.

**Concurring statements follow.**

**BOUDIN, Chief Judge and LYNCH, Circuit Judge, concurring  
in the denial of rehearing en banc.** Properly, the revised panel opinion withdraws its ruling that the appellant waived or forfeited his right to a ruling on his conditional new trial motion by failing to renew or argue it after the district judge granted qualified immunity. The panel opinion adheres to its decision overturning the district judge's belated grant of qualified immunity; at a minimum, we are both doubtful as to the panel majority's reasoning and result on this issue.

Nevertheless, at this time a new trial, in which all issues can be assessed afresh, appears to us the best solution--taking account of the unfortunate uncertainty about just what the jury decided and the other demands on the en banc court. If the district court grants the motion for a new trial and sets aside the jury verdict, appellant will have an adequate opportunity to defend himself on a fresh record and with proper instructions.

**Torruella, Circuit Judge, and LIPEZ, Circuit Judge,  
concurring in the denial of rehearing en banc.** The majority and  
dissenting opinions speak for themselves. Whether or not there  
should be a new trial on remand, and what issues should or should  
not be addressed in any new trial, are entirely matters for the  
district court to decide in the first instance.

\_\_\_\_\_ By the Court:  
Richard Cushing Donovan, Clerk.

\_\_\_\_\_/s/\_\_\_\_\_  
By: Margaret Carter, Chief Deputy Clerk

[Certified copies to Hon. Ernest C. Torres and Mr. David DiMarzio,  
Clerk, United States District Court for the District of Rhode  
Island. Copies to Mr. Bradley and Ms. Partington.]