1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COOPER INDUSTRIES, INC., :

4 Petitioner :

5 v. : No. 99-2035

6 LEATHERMAN TOOL GROUP, INC. :

7 - - - - - - - - - - - - - - - - - -X

8 Washington, D.C.

9 Monday, February 26, 2001

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:03 a.m.

13 APPEARANCES:

14 WILLIAM BRADFORD REYNOLDS, ESQ., Washington, D.C.; on

15 behalf of the Petitioner.

16 JONATHAN S. MASSEY, ESQ., Washington, D.C.; on behalf of

17 the Respondent.

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1 C O N T E N T S

2	ORAL ARGUMENT OF	PAGE
3	WILLIAM BRADFORD REYNOLDS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JONATHAN S. MASSEY, ESQ.	
7	On behalf of the Respondent	24
8	REBUTTAL ARGUMENT OF	
9	WILLIAM BRADFORD REYNOLDS, ESQ.	
10	On behalf of the Petitioner	46

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 first this morning in Number 99-2035, Cooper Industries,

5 Inc. v. Leatherman Tool Group.

6 Mr. Reynolds.

7 ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS

8 ON BEHALF OF THE PETITIONER

9 MR. REYNOLDS: Thank you, Mr. Chief Justice, may

10 it please the Court:

11 The Court today considers what is the proper

12 standard of review for appellate courts when faced with a

13 constitutional challenge to a punitive damage award as

14 grossly excessive.

15 In the instant case, the Ninth Circuit upheld a

16 punitive damage award against Cooper Industries of 4.5

17 million, which 90 times the $50,000 compensatory award.

18 It did so using an abuse of discretion review standard.

19 We submit that that was error, that the court of appeals

20 should have examined the constitutional excessiveness

21 issue independently under a de novo review standard.

22 This Court framed the gross excessiveness

23 constitutional inquiry as it applies to punitive damages

24 in BMW v. Gore. It identified there three guideposts for

25 making what is essentially a comparative analysis, looking

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1 at the reprehensibility of the offense, the ratio, or
2 relationship of the punitive damages to the compensatory
3 award, in order to discern whether the punishment or any
4 discernible relationship to the offense or was wildly
5 disproportional, and as a third guidepost to look at other
6 available sanctions, whether criminal or civil, that would
7 bear on the question of how society generally punishes
8 this sort of offense.
9 QUESTION: Mr. Reynolds, when you have a
10 standard, what should I say, so wildly extreme, as wildly
11 disproportionate, does it make any difference -- does it
12 really -- do you really think it makes any difference
13 whether you're reviewing the lower court for a -- de novo,
14 or for abuse of discretion?
15 I mean, the question is whether the court abused
16 its discretion in not considering this wildly
17 disproportionate. Does that really boil down to any
18 difference for -- between whether it is wildly
19 disproportionate -- I just find it hard to imagine a
20 situation in which I would be reviewing a district judge
21 for abuse of discretion, and would find that it is -- that
22 it is an abuse of discretion, where I wouldn't also find
23 that it was wildly disproportionate.
24 MR. REYNOLDS: Well, Your Honor, I think that
25 you certainly could come to the same conclusion under both

1 standards, but the --

2 QUESTION: Well, the point is, wouldn't you

3 almost -- wouldn't you virtually always come to the same

4 conclusion under both standards?

5 MR. REYNOLDS: I don't know that you would, and

6 I think that the reason de novo review is important is

7 that you have a legal issue here. You have one that

8 implicates a constitutional right. It is, I think

9 admittedly, bottomed on guideposts that are fluid

10 concepts, and there's a need to have some kind of a

11 coherent doctrine that develops so as to have a uniform

12 application of the substantive standards.

13 QUESTION: Well, do you have much doubt, Mr.

14 Reynolds, that if the standard is de novo review, there

15 will be more determinations of lower -- of the district

16 court, trial court upset than if there's abuse of

17 discretion review?

18 MR. REYNOLDS: I believe there probably would be

19 more awards that would be upset, or there would be more

20 remittitur decisions.

21 QUESTION: More law would develop in the courts

22 of appeals, presumably.

23 MR. REYNOLDS: That's exactly the point I was

24 trying to make, that I do think that you would get a more

25 coherent body of law. You would be able to better

1 determine how to apply the standard, and it would be
2 applied in a way that would be more uniform, and I think
3 one of the objectives of the due process protection is
4 that people who are similarly situated be treated the same
5 way for --
6 QUESTION: Mr. Reynolds, is this a mixed
7 question of fact and law that we're talking about?
8 MR. REYNOLDS: Justice O'Connor, I think that it
9 could be characterized as a mixed question of fact and law
10 in that, as I understand what that means, it means that if
11 you have established facts, and you're applying a legal
12 principle to those facts, that would be a mixed question
13 of fact and law.
14 QUESTION: For instance, in the first prong, the
15 reprehensible conduct, presumably a review of the facts is
16 included in the appellate review, so you do seem to have a
17 mixed standard --
18 MR. REYNOLDS: Well, to some --
19 QUESTION: -- mixed question.
20 MR. REYNOLDS: Excuse me, Your Honor.
21 To some extent I think I would agree with you.
22 It does seem to me that what we're talking about here in
23 de novo review is the same thing that the Court does
24 traditionally. As to historical facts, the Court accords
25 deferential review, and we don't suggest there would be

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1 any difference as to that.

2 But when you get to the legal issue of where you

3 cross the constitutional line, and you start looking at it

4 in a comparative analysis, which really is looking at

5 extrinsic facts that are outside the record, that's where

6 the legal inquiry comes in and de novo review would be

7 required.

8 QUESTION: On the reprehensibility of the

9 conduct, do you envisage that if you prevail the circuit

10 court will have some sort of standards for

11 reprehensibility, or how will it go about writing this?

12 MR. REYNOLDS: Well --

13 QUESTION: I could see if it was abuse of

14 discretion, I can hear the circuit court saying, well,

15 trial judges see the witness, and they heard the whole

16 trial, and they're in the position to make this judgment,

17 and we're not going to second-guess them. That's what

18 would happen under the abuse of discretion standard in all

19 likelihood.

20 What would the circuit court do with this first

21 prong that Justice O'Connor mentioned, reprehensibility?

22 MR. REYNOLDS: I --

23 QUESTION: Under your view?

24 MR. REYNOLDS: As I understand it, Your Honor,

25 the court of appeals would basically take the conduct and,

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1 on the established record, that would be the baseline, if
2 you will, for its comparative analysis under the Gore
3 factors. You would have to look at where that conduct
4 fits on a continuum of blameworthiness, if you will, and
5 that would be essentially a legal question.
6 What you're doing is very much, it seems to me,
7 Your Honor, what you do under the de novo review standard
8 that this Court announced in Bajakajian, I believe is how
9 you pronounce it.
10 QUESTION: Mr. Reynolds, may I interrupt you at
11 that point, because what you described sounded very much
12 to me like what a jury does when it's choosing among
13 negligence degrees of culpability, negligence, gross
14 negligence, recklessness. Those are quintessentially jury
15 decisions, and they're not reviewed de novo by any judge,
16 not the trial judge, not the court of appeals, so why
17 isn't the degree of reprehensibility exactly the same?
18 MR. REYNOLDS: Well, Your Honor, here the -- we
19 are over a threshold of malice that is necessary in order
20 to award a punitive award.
21 QUESTION: Just like you would be over a
22 threshold if you decide there's negligence. Then, if
23 there's negligence, then there would be recovery, but
24 there might be greater recovery if you had a higher
25 standard.

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1 MR. REYNOLDS: Right, but I think what the
2 Court has said in BMW v. Gore is that you are going to
3 determine whether or not the punishment that is imposed
4 here is reasonably related to the crime, and whether it
5 rationally serves the interest of punishment and
6 deterrence, and that is an analysis, a legal analysis that
7 looks to this conduct as compared to similar conduct and
8 the way in which that has been treated in the punishment
9 arena, and in other situations.
10 QUESTION: Could you describe the precise test
11 that the court of appeals would be applying under your
12 standard as compared with the precise test that would
13 apply under an arbitrary and capricious standard?
14 It seems to me the substantive question, which
15 they would apply on de novo, is whether any reasonable
16 person could possibly consider this proportionate. Isn't
17 that the test? It has to be wildly disproportionate. I
18 assume that means no reasonable person could consider it
19 proportionate, right?
20 MR. REYNOLDS: I think that that would --
21 QUESTION: Okay.
22 MR. REYNOLDS: I don't quarrel with that, Your
23 Honor.
24 QUESTION: Now, if you're using an abuse of
25 discretion standard, you would be asking whether any

1 reasonable judge, whether no reasonable judge could think
2 that any reasonable person would consider this
3 proportionate. You're sure that the two questions don't
4 boil down to the same thing?
5 MR. REYNOLDS: Well, Your Honor, I --
6 QUESTION: I -- it's just too subtle for me to
7 understand the difference between the two.
8 MR. REYNOLDS: I think that there is a
9 substantive standard that has been announced as being
10 applicable in BMW v. Gore, and we're not going back and
11 suggesting we revisit that. What we're saying is that it
12 ought to get meaningful application, it ought to be
13 applied so as to allow the courts to give some content to
14 it and through cases to come to a more clear understanding
15 of exactly how it applies in different cases.
16 It is, I believe, clear, and I agree with the
17 Chief Justice, that the de novo standard would allow
18 courts of appeals, who believe that this was
19 disproportionate punishment, it would allow them to apply
20 a remittitur when, under the abuse of discretion standard,
21 they would feel that they were not compelled to.
22 QUESTION: I understand that, but it seems to me
23 that whenever a court of appeals finds that no reasonable
24 person could possibly consider this proportionate, so it
25 is wildly disproportionate, it would automatically find

1 that no reasonable judge could have thought that a
2 reasonable person would find this proportionate. I don't
3 know whether you can find one finding --
4 MR. REYNOLDS: Yes, Your Honor. I don't
5 disagree --
6 QUESTION: -- without automatically making the
7 other one, so what are we arguing about?
8 MR. REYNOLDS: I don't disagree that where you
9 have a punitive award that is so over the line that
10 everybody agrees that it would be unconstitutional, that
11 whichever standard you apply would probably give you the
12 same result. You're going to have a lot of cases where
13 you're not talking about something that is so over the
14 line.
15 I happen to believe this case is one that is so
16 over the line, and the point is that you've got a legal
17 question, it's got a constitutional dimension, you've got
18 a standard that is not one that is dependent upon looking
19 at the historical facts and second-guessing them, and
20 that, I believe, dictates that you look for de novo review
21 and independent review by the courts of appeals.
22 QUESTION: Whatever word you use to describe it,
23 I take it that what you're essentially asking is to have
24 the judge, as a panel of three judges, sit as though they
25 were jurors, as though they were jurors making a

1 determination of reprehensibility.

2 MR. REYNOLDS: As though they were jurors in

3 making the policy judgment as to what the appropriate

4 punishment is in order to fulfill the goals of deterrence

5 and retribution.

6 QUESTION: And then if we go back in history,

7 punitive damages, I believe, was considered in the

8 bailiwick of the jury, and not the judge. In fact, there

9 was a question whether any judge, even the trial judge,

10 could overturn the jury's verdict, is that not so?

11 MR. REYNOLDS: Well, I believe it's clear that

12 you could have a court overturn a verdict if, indeed, it

13 was a verdict that was outrageously excessive, or, as they

14 said in the early cases, driven by juror bias or passion,

15 and was not proportional to the offense, and I believe the

16 common law, as well as the early American law, has said

17 that punitive damages would certainly be reviewable in

18 that regard, as would compensatory, so I think --

19 QUESTION: Mr. Reynolds --

20 MR. REYNOLDS: -- appellate review is available.

21 QUESTION: I'm not certain of that, and I think

22 that, at least as to compensatory damages, there was some

23 disagreement on this Court whether there was any allowance

24 of --

25 MR. REYNOLDS: Right.

1 QUESTION: -- appellate review at all. Justice
2 Scalia and I differed on that --
3 MR. REYNOLDS: I understand --
4 QUESTION: -- on that question.
5 MR. REYNOLDS: -- but I believe in Gasperini
6 you said that there was appellate review.
7 QUESTION: Would you argue, Mr. Reynolds,
8 different principles to -- and different propositions to
9 the circuit court than you would to the jury, or do you
10 just argue the same thing?
11 MR. REYNOLDS: I think that the -- well, the
12 arguments to the jury in this regard would depend in large
13 part on the instructions that were given to the jury, and
14 I think there are some instructions that would be very
15 problematic to give the jury in terms of the BMW v. Gore
16 guideposts, so --
17 QUESTION: Mr. --
18 QUESTION: So that the court of appeals --
19 MR. REYNOLDS: -- I don't think the jury would
20 have the same --
21 QUESTION: -- does consider different
22 propositions, i.e., comparative awards and similar cases
23 in other parts of the country, or something like that?
24 MR. REYNOLDS: I think that's right. I think
25 that the -- what happens is, this is a check on the

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1 excesses of the jury determination with regard to
2 punishment, and it is a test, as I understand BMW v. Gore,
3 that says that we're going to look at what the jury did in
4 this case in order to serve society's interest in
5 punishment and deterrence, and to see whether that is out
6 of line, constitutionally out of line, with the punishment
7 that is visited for similarly-situated people who commit
8 similar offenses.
9 QUESTION: Mr. Reynolds --
10 MR. REYNOLDS: It is a check, if you will, at
11 the appellate level on the jury judgment call.
12 QUESTION: So if that's true, then Justice
13 Scalia's proposition that no reasonable juror could find
14 the award doesn't quite work, because you're putting forth
15 different contentions to the two different bodies.
16 You're putting one case to the court of appeals, and
17 another to the jury, i.e. --
18 MR. REYNOLDS: I --
19 QUESTION: -- that this is inconsistent with
20 what other juries and judges have done around the country
21 and therefore just doesn't meet the standard of
22 proportionality under some Nation-wide proportionality
23 standard that the jury didn't hear about, or is the answer
24 that the jury can hear about this stuff?
25 MR. REYNOLDS: I think that certainly there are

1 special instructions that could help to inform the jury's
2 decision that we would not be at all adverse to giving.
3 I understood Justice Scalia's question to be
4 where the court of appeals was looking to see whether the
5 punitive award was reasonable amount and rational in terms
6 of the purposes that it was intended to serve, and I
7 think --
8 QUESTION: Mr. Reynolds, you're looking over one
9 important player. It's not jury versus court of appeals
10 making this decision. The court of appeals doesn't get
11 into the picture until a district judge, the trial judge,
12 so it would be de novo review not of the jury's
13 assessment, but of the trial judge's refusal to tamper
14 with the jury's verdict, so isn't it -- the court of
15 appeals is reviewing not the jury's action but the trial
16 court's action, isn't that so?
17 MR. REYNOLDS: That's correct, and I think that
18 as we were saying, Justice Ginsburg, the court of appeals
19 would, in that instance, do the traditional deferential
20 review of the historical facts, or the fact questions, but
21 as to this legal question it would be a de novo review.
22 QUESTION: Mr. Reynolds, let me ask you if I am
23 understanding your argument correctly in this respect. I
24 think you're making two different kinds of arguments for
25 the value of the de novo review.

1 The first argument is simply that de novo review
2 on its own merits is the better review here. The second
3 argument is sort of a practical one, that if all you have
4 is abuse of discretion review of what the trial judge does
5 when the trial judge reviews the jury verdict, you're not
6 going to have very many appellate cases, and you're
7 certainly not going to have many appellate cases with
8 exhaustive discussions of the way jury verdicts ought to
9 be examined.
10 And I think you're saying that if you have de
11 novo review, you're simply going to have more
12 articulations by appellate courts of the way trial courts
13 ought to look at jury verdicts, and if you are making the
14 second argument, I suppose you're making -- you're saying
15 what ought to happen in the development of the review of
16 punitive damages is the same thing that I think happened
17 back in the old days on the review of jury verdicts of
18 negligence.
19 If you go back in the law reports to the
20 twenties and the thirties when negligence law was
21 developing, you find exhaustive appellate discussions of
22 whether, you know, the train was close enough to the
23 intersection for the driver to have been negligent in
24 going out on the track, and so on, and I think you're
25 arguing for a sort of parallel between punitive damages

1 development and maybe the old negligence law development,
2 in that you're saying each one would profit greatly by
3 having plenary treatment in appellate courts. Is that a
4 fair --
5 MR. REYNOLDS: That is fair, Justice Breyer. I
6 do think that. I think that the two arguments go hand-
7 in-hand. In other words, I --
8 QUESTION: I agree. I agree.
9 MR. REYNOLDS: My argument that the de novo
10 review is in and of itself --
11 QUESTION: But the value is not only in the
12 substantive standard, the value is in the application of
13 that standard in sort of developed appellate discussions.
14 MR. REYNOLDS: I think that's right, especially
15 in light of the recent decision in BMW v. Gore.
16 QUESTION: May I ask you a question, Mr.
17 Reynolds? You indicated that you thought the court of
18 appeals would decide what the appropriate award was. I'm
19 not sure that's right. It seems to me that the court of
20 appeals decides what is the limit on appropriate awards,
21 and anything over whatever the ceiling is would be
22 inappropriate.
23 Is it your view that if there is a reversal or
24 remand in the case, that the instruction should always be
25 to enter judgment for the amount that would be the maximum

1 constitutionally-permissible award, or would it be to send
2 it back and say to the lower court, you got the range
3 wrong, instead of being 1 million to 10 million, it's
4 500,000 to 2 million, and you can start over again and put
5 the new award within the permissible constitutional range?
6 Which way -- what are you suggesting?
7 MR. REYNOLDS: I know you're not going to like
8 this answer, because I think that what I would say is, the
9 court of appeals probably could take either approach.
10 If the court of appeals viewed the award as
11 constitutionally excessive, there is authority that
12 suggests that the court of appeals could set what would be
13 the maximum allowable award constitutionally, on its own.
14 I think there is also the ability of the court
15 of appeals to do a remand, and to have the district court
16 perform that, so I'm not sure that --
17 QUESTION: Mr. Reynolds, is it settled --
18 MR. REYNOLDS: -- I have a specific response one
19 way or the other on that.
20 QUESTION: Is it settled that a court of appeals
21 could order a remittitur? I didn't know that that was a
22 settled question.
23 MR. REYNOLDS: I --
24 QUESTION: I thought that was an open question.
25 MR. REYNOLDS: Well, I -- as I said to Justice

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1 Stevens, I'm not sure I can say it's settled, so I think
2 that my sense is that they could do either one.
3 The Eleventh Circuit has in the Johannes case
4 ordered the remittitur at the maximum allowable rate
5 constitutionally, or amount constitutionally. the Tenth
6 Circuit in Oxy Products on the other hand did not do that,
7 and said it had to be something that was sent back, so --
8 QUESTION: But we -- this Court has never ruled
9 on that question --
10 MR. REYNOLDS: No.
11 QUESTION: -- and it's in the background. That
12 question comes up in the background of the Seventh
13 Amendment in the Reexamination Clause, doesn't it, whether
14 the court of appeals can --
15 MR. REYNOLDS: Well --
16 QUESTION: Can instruct the entry of a final
17 judgment that's different from the number that the jury
18 came in?
19 MR. REYNOLDS: Your Honor, I think that the
20 Seventh Amendment Reexamination Clause would not inhibit a
21 court of appeals from directing the maximum amount, and I
22 say that because we're in an area where we aren't
23 concerned with facts tried to the jury. We're in an area
24 where we have a legal question, where the jury has made a
25 public policy judgment call on the punishment, and what

1 the court of appeals would be saying is that the -- that a
2 jury could not have imposed a punishment in excess of
3 whatever that amount is, not constitutionally.
4 QUESTION: Mr. Reynolds, this problem exists no
5 matter how we come out in this case, doesn't it?
6 MR. REYNOLDS: I --
7 QUESTION: What relevance does this have to this
8 case? I mean, this is going to be a problem whether the
9 review is de novo, or whether the review is for abuse of
10 discretion, and we -- it seems to me we shouldn't find for
11 or against you on the basis of how we feel on this point,
12 isn't that right?
13 MR. REYNOLDS: I think that you would have the
14 same --
15 QUESTION: I mean, whatever standard you're
16 going to use, if you decide that the district court got it
17 wrong, you're going to be confronted with this issue --
18 MR. REYNOLDS: I --
19 QUESTION: -- so it seems to me it has nothing
20 to do with what we're wrestling with, but what I would
21 like to know is why you think that a court of appeals
22 would not be developing law if it's only applying the
23 abuse of discretion standard. Doesn't it have to come out
24 with a written opinion --
25 MR. REYNOLDS: I would --

1 QUESTION: -- and the written opinion would
2 say, you know, no reasonable judge could consider that
3 this was not wildly disproportionate? It would make a lot
4 of law, it seems to me.
5 MR. REYNOLDS: I believe the kind of opinion
6 you're likely to get is what we got in this case, where
7 the Ninth Circuit simply says they do not believe that the
8 district court abused discretion, and it would not provide
9 any enlightenment, or any kind of coherent -- doctrinal
10 coherence to the BMW v. Gore factors in an application of
11 that.
12 QUESTION: So what you want is not -- I mean, I
13 can't -- I'm having trouble seeing what the difference is
14 between the standards. Like a lot of other things, the
15 answer seems to be, it depends on what's at issue in the
16 particular case. This is a Federal case.
17 MR. REYNOLDS: This is a Federal case.
18 QUESTION: So they're already reviewing for
19 abuse of discretion under Rule 59 the decision not to give
20 a new trial on the issue.
21 MR. REYNOLDS: That's correct.
22 QUESTION: All right. So inevitably you're
23 saying, you have to review this for abuse of discretion at
24 least there, and now we get into the constitutional area,
25 so it must be, you know, sort of beyond that, and there

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1 are certain things, reprehensibility or harm, you'd say,
2 look, judge, remember, the district court judge saw this
3 and you didn't, and take that into account.
4 Now, when you get into the comparison of other
5 penalties, as to that, I don't see why the district judge
6 would be in a superior position at all. The judge would
7 be in a superior position to decide how reprehensible this
8 person's behavior was, and how harmful it was to this
9 plaintiff, but then once we get the outer limits of that,
10 the appellate judge on his own applies the constitutional
11 standard as an element of deference, and there's a big
12 element of no deference. I mean, what can you say beyond
13 that, and then beyond that, the words de novo and abuse of
14 discretion become slogans.
15 MR. REYNOLDS: I --
16 QUESTION: The people who want a tough review
17 say, de novo, the people who want a weak review say, abuse
18 of discretion, but those are slogans. In terms of how the
19 judge should act, is it as I described?
20 MR. REYNOLDS: I think as the judge would act it
21 is as you describe, but I do think it certainly does make
22 a difference what standard you are imposing.
23 QUESTION: Well, all right. Leaving the slogan
24 out of it, how do you -- if what we want to have happen --
25 and I'm not sure there's a disagreement between the two

1 sides on it. I'll find out -- what form of words do we
2 use to get that to happen? I mean, it's like be a judge.
3 MR. REYNOLDS: Well --
4 (Laughter.)
5 MR. REYNOLDS: -- that would certainly be a good
6 beginning.
7 (Laughter.)
8 MR. REYNOLDS: I think that what you would be
9 looking at is the kind of standard that you imposed, that
10 was imposed in the, I go back to the Bajakajian -- I
11 cannot pronounce that -- Bajakajian case, where the Court
12 had the excessiveness issue in the context of a fine and
13 the Eighth Amendment and said de novo review was the
14 appropriate review to determine disproportionality, and
15 went through a not dissimilar kind of an inquiry that BMW
16 v. Gore laid out.
17 And I believe that the de novo standard would
18 require the kind of demanding or exacting review of those
19 guideposts in a way that would be much more rigid and
20 decipherable, if you will, and understandable, than if you
21 had just an abuse of discretion review and, because it's a
22 due process right, and it's bottomed on the interest of
23 people being treated who are similarly situated in
24 uniform -- uniformly in a similarly situated way, there is
25 much to recommend that you go to the de novo standard that

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1 will, over time, I think, help to develop a much more
2 articulate and coherent line of inquiry for applying the
3 Gore standards.
4 QUESTION: Isn't it always an abuse of
5 discretion when the trial court makes an error of law?
6 MR. REYNOLDS: I think when the trial court
7 makes an error of law, that it would certainly be an abuse
8 of discretion, but I also would say that I think the
9 standard we use here is one that is compelled by the
10 nature of the inquiry and the fact that it's
11 constitutional, and by the Gore guideposts, and the
12 comparative analysis which are extrinsic to the
13 historical fact record, and that's what requires that
14 there be a de novo review.
15 I'll save the rest of my time for rebuttal, Mr.
16 Chief Justice.
17 QUESTION: Very well, Mr. Reynolds.
18 Mr. Massey, we'll hear from you.
19 ORAL ARGUMENT OF JONATHAN S. MASSEY
20 ON BEHALF OF THE RESPONDENT
21 MR. MASSEY: Mr. Chief Justice, and may it
22 please the Court:
23 We urge an abuse of discretion standard for two
24 principal reasons. First, there's the historical
25 tradition under which punitive damages were largely

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1 committed to the jury with quite limited appellate review,
2 the second reason is the pragmatic argument for abuse of
3 discretion standard. As Justice O'Connor and Justice
4 Kennedy have recognized, the Gore guideposts are intensely
5 fact-specific, reprehensibility perhaps most of all and,
6 as this Court noted in Gore, reprehensibility is perhaps
7 the most important indicator of the reasonableness of an
8 award.
9 Also --
10 QUESTION: What do we do generally, if you look
11 at our precedents, on mixed questions of fact and law on
12 appellate review?
13 You see some statements that it's de novo
14 review. What's the closest analogy, do you suppose?
15 MR. MASSEY: Well, we believe that
16 reasonableness is maybe a close analogy, because the
17 touchstone of excessiveness is, of course, reasonableness,
18 and it is the sort of grossly excessive standard that
19 Justice Scalia has referred to, and in many contexts
20 reasonableness --
21 QUESTION: Well, but there is more than one
22 question under the Gore standard, in addition to
23 reprehensibility, the ratio between compensatory and
24 punitive damages awarded, and how the award compares to
25 other sanctions available for comparable misconduct.

1 Those latter two seem closer to pure questions of law, in
2 a sense. What has this Court historically done, do you
3 think, on appellate review standard for mixed questions of
4 fact and law?
5 MR. MASSEY: Well, it's done both, Your Honor.
6 I mean, Pullman standard against Swint is a case noting
7 the difficulty of precise categorizations, but in the
8 context of reasonableness, Cooter and Gell, for example,
9 the reasonableness of Rule 11, the Pierce v. Underwood,
10 the reasonableness of a -- of the legal position taken by
11 the Government in equal-access-to-justice cases.
12 Cooter and Gell is notable because it discussed
13 how negligence has been traditionally reviewed very
14 deferentially under an -- essentially an abuse of
15 discretion standard, so I think Justice Souter's concern
16 about the development of the law can be fully addressed
17 through an abuse of discretion standard, and that --
18 QUESTION: I couldn't find any except the
19 ones -- I just had to look this up for another reason, and
20 Justice Ginsburg has a couple in an opinion she wrote, but
21 the case -- I mean, this seems not a question of mixed
22 fact and law, but up to a certain point you decide what
23 the facts are. Now, once the facts are there, it's purely
24 a question of applying the legal label, and so the real
25 question is, under what circumstances does a court of

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1 appeals defer, where all that's happened is the trial
2 judge is applying the legal label to a set of undisputed
3 facts.
4 Now, until we get to the point of dispute, I'll
5 give you all the discretion you want, but once we're in
6 the nondisputed area, at that point, the only two I could
7 find were the ones you mentioned. There was a Rule 11
8 case, and she had both, and there was question involving
9 competence of witnesses or something, competence -- there
10 was a competence thing. I can see it on the page. You
11 know what I'm talking about?
12 MR. MASSEY: Yes, Your Honor.
13 QUESTION: All right.
14 (Laughter.)
15 QUESTION: I couldn't find any other than that.
16 MR. MASSEY: Well, it's -- yes. We agree that
17 the very last step of the analysis has a strongly legal
18 flavor to it, but --
19 QUESTION: Strongly legal -- it isn't a question
20 of degree. It is a question of black and white. The
21 question of applying a legal label to a set of undisputed
22 facts is a question of law.
23 Now, you can give as much weight as you want to
24 the judge before you decide what the nondisputed area is,
25 so I'll give you all that. Now, I say, defer, defer,

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1 defer, as long as there's any factual matter in dispute.
2 At that point, we reach the area where there's none. Now,
3 all we're doing is applying the legal label. Now, on that
4 one, is there anything other than what Justice Ginsburg
5 had in her opinion?
6 MR. MASSEY: There's Gasperini, Your Honor,
7 which involved a New York statute which did not simply
8 direct district courts to review the historical facts
9 underlying a compensatory award, but instructed them to
10 engage in a comparative analysis, an essentially legal
11 analysis of this compensatory award versus other
12 compensatory awards in New York to see if they were
13 comparable.
14 QUESTION: In fact, they gave that instruction
15 to the appellate courts, and this Court said, because of
16 the Seventh Amendment, that job -- the only judge
17 positioned to do it in the Federal courts would be the
18 district courts.
19 MR. MASSEY: Exactly, Your Honor, and that was
20 essentially a legal inquiry, but this Court said the court
21 of appeals was constrained --
22 QUESTION: Oh, but then that's exactly the
23 question, because I'd say, I don't see any reason why,
24 once we're in the area of undisputed fact, why there's any
25 reason that a court of appeals here should defer one

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1 little bit, any more than it does with any other standard
2 of law, except with a very few exceptions.
3 MR. MASSEY: Well, as Justice Scalia noted, the
4 question of whether a mistake of law has been made is an
5 automatic abuse of discretion, if there hasn't been a
6 mistake, so traditionally this label of abuse of
7 discretion has been used, even though before Gore, even
8 under State law excessiveness standards, there was always
9 the last step of applying the law to the facts in the
10 court of appeals.
11 In other words, consider a State which has
12 codified standards for excessiveness of damages, as some
13 States have, like Texas, for example. That -- the
14 district judge has no discretion whether to apply those
15 statutory criteria. He has no limited right to be wrong,
16 in Judge Friendly's terms. That's a pure issue of law in
17 the last step, yet the standard of review has always been
18 abuse of discretion.
19 QUESTION: I think the Ornelas case from our
20 Court is against your position to a certain extent. You
21 say that the BMW standards are very fact-specific.
22 Ornelas involved a Fourth Amendment question, which is
23 classically fact-specific --
24 MR. MASSEY: Yes.
25 QUESTION: -- and yet we held there that the

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1 review was de novo and not abuse of discretion.

2 MR. MASSEY: Yes, Your Honor, you did. We

3 believe that case is not controlling, because first there

4 were separate interests there, a need for a national

5 standards of law enforcement, and other reasons that the

6 Court noted. In particular --

7 QUESTION: Well, but if BMW v. Gore announces a

8 constitutional rule, presumably there's a need for

9 national standards there, just as surely as with the

10 Fourth Amendment.

11 MR. MASSEY: Well, Your Honor, we think, though,

12 that a district court review would be the best way to

13 promote uniformity in the context of punitive damages,

14 because --

15 QUESTION: Well, though, you could have said the

16 same thing about Ornelas.

17 MR. MASSEY: Well, this Court did note in

18 Ornelas the importance of deferring to local courts and

19 law enforcement officials on the questions underlying the

20 judgments of reasonable suspicion --

21 QUESTION: As a part of de novo review.

22 MR. MASSEY: Yes, Your Honor. You're correct

23 about Ornelas. That doesn't involve the jury context and

24 the tradition of appellate review in punitive damages

25 cases, but you're right that -- of course, you did also

1 write, though, Ohio v. Robinette, which was a Fourth
2 Amendment voluntariness of consent to search.
3 QUESTION: I don't cite Ornelas just because I
4 wrote it.
5 MR. MASSEY: No, I understand.
6 (Laughter.)
7 MR. MASSEY: I understand, Mr. Chief Justice. I
8 understand, but the Robinette case is a case where you
9 noted that the fact-specific nature of reasonableness made
10 bright line rules inappropriate, and you recognized the
11 need to defer to the sort of close people who were closer
12 on the facts and on the scene.
13 But let me just circle back for a moment,
14 because the Rule 59 context, and motions for remittiturs,
15 those have always been judged by an abuse of discretion
16 standard, and that, of course, is where constitutional
17 excessiveness challenges are ordinarily raised. There's
18 quite a logic to the Cooter and Gell position that we
19 ought to have a unitary standard of review in this area
20 because the Rule 59 context, as Justice Breyer mentioned,
21 will require the district judge to apply sometimes the
22 very same standards as are in Gore to the judgment under
23 State law requirements.
24 The third -- the second and third Gore
25 guideposts have been tossed out as being primarily legal,

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1 but that's not always true. The second guidepost involves
2 actual harm as well as potential harm. Gore noted that
3 whether a high ratio is permissible because of a
4 particularly egregious act might have resulted only in a
5 small number of damages. In other words, there are a
6 number of difficult factual questions associated with each
7 of these guideposts.
8 QUESTION: Well, the difference with 59, I
9 thought, look, BMW is -- governs quite extreme cases, you
10 know, and if you say, look, judge, you have a lot of
11 discretion under 59, and you have a lot of discretion to
12 decide how egregious something is, and you have
13 reprehensibility, and how much harm, and all those things.
14 Now you give him discretion on discretion, then
15 you say at this last step, where you're also applying this
16 legal label that only applies to extreme cases, you're
17 saying, and now there's some more discretion even in that,
18 you don't have much of a rule left.
19 MR. MASSEY: Well, Your Honor, if we think that
20 you will -- I mean, Justice Souter's concern that the law
21 be developed in this area we think can be fully
22 accommodated by abuse of discretion.
23 The General Dynamics amicus brief, and the brief
24 submitted by General Dellinger in this case, both discuss
25 a lot of studies that have been done and cases that have

1 been decided since BMW v. Gore. One striking thing is the
2 role of courts under an abuse of discretion standard in
3 striking down punitive damages. There are about six
4 studies discussed, the GAO study, Rand, Michael --
5 QUESTION: Are these studies of what trial
6 judges have done in reviewing, or are they studies about
7 what appellate courts have done in reviewing trial judges?
8 MR. MASSEY: Both, Your Honor. Both. In -- the
9 total of both trial and appellate together is -- the range
10 of reversal goes from 54 to 70 percent. If you want to
11 look just at appellate courts applying abuse of
12 discretion, I believe there are numerous cases in the
13 General Dynamics brief.
14 Particularly, there's a case called Kim, one
15 called Kimzey, there's an Aetna Life case from the Ninth
16 Circuit, so I don't believe -- the abuse of discretion
17 standard is not a toothless standard. As this Court noted
18 in U.S. v. Taylor, which was a 1980 Speedy Trial Act case
19 which reversed the dismissal of a case under the Speedy
20 Trial Act, this Court described abuse of discretion as
21 permitting thorough appellate review, so we don't share
22 the view --
23 QUESTION: Well, but it's thorough appellate
24 review -- you say it's not a toothless standard, but I
25 mean, his argument is that his teeth are very far apart,

1 and a lot is going to get through, and sure, there are
2 some teeth, but -- I mean, I -- it seems to me that your
3 brother's argument is -- does not depend, perhaps, on
4 exact parsing of the difference between applying de novo
5 and abuse so much as it does in emphasizing that if you're
6 going to have de novo review it's going to be a more
7 aggressive review, and it's going to be a more articulate
8 review, and doesn't he make sensible points in that
9 respect?
10 MR. MASSEY: Well, perhaps superficially, but I
11 really -- but we believe that, for example, the practical
12 result of telling courts of appeals that they have to
13 review de novo long, burdensome records might be actually
14 to reduce the amount of time they have --
15 QUESTION: Yes, but I mean, you've just been
16 telling us that they're going to review carefully on abuse
17 of discretion, and I suppose they're going to have to look
18 at long, burdensome records there, aren't they?
19 MR. MASSEY: Well, we believe that in a case
20 involving -- the headline cases we see in the papers about
21 big, punitive awards can be addressed fully by an abuse of
22 discretion standard.
23 What's going to happen in the run-of-the-mill
24 cases, where the result is actually reasonable and falls
25 within what this Court described in Gore as the zone of

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1 reasonableness, those cases are going to occupy a
2 tremendous amount of appellate resources without many
3 differences in result, and the result of the whole process
4 may be more unpublished opinions in punitive damages cases
5 because the courts of appeals are busy reading records in
6 cases where the abuse of discretion standard would have
7 the same outcome.
8 So we -- as a practical matter, Rule 59 is a
9 familiar standard. The abuse of discretion review has
10 grown up, not just under Gore, but under the State law
11 excessiveness standards which courts have always applied
12 historically, even though the last step of applying any of
13 these standards could be described as a purely legal
14 issue.
15 QUESTION: Well, that's -- Mr. Massey, the point
16 that I'm having difficulty with, and I think Justice
17 O'Connor raised it first, there's one of these standards,
18 reprehensibility, degree of reprehensibility that sounds
19 like even at the last step. It's a judgment call that the
20 jury makes, just as I described gross negligence and
21 recklessness. I don't really see the difference.
22 But the other two standards, the seriousness of
23 the injury and the comparable awards in other cases, that
24 the jury isn't so well-equipped to deal with, and you can
25 say this is law applied to historic facts.

1 MR. MASSEY: Well, sometimes it is, Your Honor.
2 Sometimes those -- I mean, the second guidepost is almost
3 always part of the jury charge. The third guidepost is a
4 part of the jury charge in some places. It wasn't in this
5 case -- well, there is an Oregon statute that instructs
6 juries on the criminal and legislative sanctions which
7 could be applied, but even those guideposts will be very
8 factual.
9 For example, the Cooper brief in this very case,
10 the reply brief, leads off with three pages of factual
11 argument about potential harm and reprehensibility and the
12 legislative sanctions, so even at this level there's still
13 factual disagreement about how to apply this.
14 QUESTION: Well then, you have to take the facts
15 as the plaintiff states them. I mean, normally, these
16 trials, you take the facts as the plaintiff states them,
17 then the defense comes along on appeal and says, well, you
18 can't take that, because there's no support for that, but
19 you're going to have to do that anyway in any appeal, and
20 so -- but you read it with an eye favorably towards the
21 side that won, you know, and there's always an argument
22 you can't read it that favorably, but that's going to be
23 true no matter what standard you have.
24 But having done that, I don't see what's left
25 that's so tough for the appellate judge to do.

1 MR. MASSEY: Well, Your Honor, in resolving the
2 parties' disputes about what reasonable inferences are
3 possible --
4 QUESTION: No, I'm saying that that kind of
5 thing --
6 MR. MASSEY: I --
7 QUESTION: -- is true in every trial, every
8 appeal. They're always arguing about that sort of stuff,
9 and that's true whether punitive damages are at stake or
10 not, and that's true -- you know, I mean, you get an
11 appeal, there are dozens of arguments like that from a
12 complicated trial, so we always go through that. I know
13 how to do it. I mean, I might not do it brilliantly, but
14 I try, and what you do is, you read it with an eye
15 favorably towards the side that won.
16 Now, that's true regardless. Now I'm looking at
17 the stage beyond that, and once you're beyond that, I
18 don't see that it's so tough for a -- you know, it isn't
19 too complicated. You now know what your facts are. So
20 it's at that point that I -- and I don't know how to write
21 it to get this -- I don't -- I see where -- you see, I
22 need -- I don't think you disagree that much with it, but
23 I'm not sure.
24 MR. MASSEY: Well, I don't -- I agree -- I don't
25 think we disagree that much. We think an abuse of

1 discretion label for the analysis, though, is more
2 appropriate, because that's -- in all the cases that
3 you've reviewed you've mostly been applying discretion
4 under Rule 59. It's not -- perhaps in many cases you
5 could say that courts of appeals are --
6 QUESTION: Does the court of appeals apply an
7 abuse of discretion standard when it's reviewing the
8 decision of a trial court under Rule 59?
9 MR. MASSEY: Yes, Your Honor.
10 QUESTION: And does one of our cases stand for
11 that proposition?
12 MR. MASSEY: I -- this Court's cases -- yes.
13 It's sort of accepted, that's the accepted standard under
14 the -- as in the Tri-Counties case that you heard earlier,
15 that was the thing that Justice Breyer --
16 QUESTION: Which we dismissed as improvidently
17 granted --
18 MR. MASSEY: Yes, Your Honor. No, I'm not
19 citing that case as precedent.
20 QUESTION: -- because we thought it was an open
21 question.
22 MR. MASSEY: Right. Well, that's a --
23 QUESTION: How about Gasperini? Gasperini said
24 that the standard for the appellate court vis-a-vis the
25 trial court --

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1 MR. MASSEY: Yes.

2 QUESTION: -- on compensatory damages is abuse

3 of discretion, and that was a majority opinion --

4 MR. MASSEY: Yes.

5 QUESTION: -- of this Court.

6 MR. MASSEY: Yes, Your Honor.

7 QUESTION: Isn't the difference between the Rule

8 59 situation a sort of precedent for what we should do

9 here, in the situation we've got here, something like

10 this:

11 Rule 59 motions are reviewing, sort of, or are

12 intended to review what are claimed to be specific

13 mistakes and problems in individual cases, but what we're

14 dealing with here is regarded somehow as a more serious

15 and a more intractable problem than what Rule 59

16 addresses, and therefore the argument is, because you have

17 a more intractable problem in trying to get some kind of

18 coherent standard for punitive damages, you've simply got

19 to have a more restrictive remedy or a more intensive

20 review, so Rule 59 really is not a good precedent to

21 appeal to.

22 MR. MASSEY: Well, Your Honor, procedurally the

23 excessiveness challenges are made under the Rule 59

24 rubric, so that applying the sort of --

25 QUESTION: In the sort of normal -- I say

1 normal remittitur motions, but I don't think we perceive
2 the problem of remittitur issues as being a problem
3 comparable to the difficulty of trying to get some kind of
4 a coherent standard for punitive damages, and because the
5 problems are different maybe the remedies and terms of
6 judicial review ought to be different.
7 MR. MASSEY: Well, Your Honor, I think the
8 seriousness with which the lower courts address this
9 problem is not really going to be affected by the standard
10 of review. I think the message has been sent in Gore and
11 has been received, and the courts have shown themselves
12 quite willing to step in and reverse verdicts that the
13 perceive to be excessive, and I -- we believe that the de
14 novo standard is frankly just confusing. It's beyond what
15 the historical tradition would permit. It --
16 QUESTION: Well --
17 MR. MASSEY: -- sort of -- yes.
18 QUESTION: When you're finished, I want to go
19 back to the question of historical tradition, but go ahead
20 and finish what --
21 MR. MASSEY: Well, and it fails to recognize the
22 first-hand vantage point of the district judge. This
23 Court has recognized in the habeas context, for example,
24 Professor Baktor's warning that it's sort of debilitating
25 to State courts to be told that they're going to be

1 second-guessed by Federal courts.
2 In this instance, when you have highly
3 fact-intensive questions I think the message sent by a de
4 novo review is -- might have the unintended consequence of
5 sort of undermining the district court's willingness to
6 grapple with the record, knowing that whatever he does is
7 going to be reviewed again by the -- by his brethren on
8 the court of appeals.
9 QUESTION: But that's quite different than the
10 habeas rule. I mean, there's no writ of habeas pecuniae
11 that says, you know, if you lose a punitive damages award
12 in the State court you can go into Federal court and
13 relitigate it. That's just the ordinary pressure that any
14 trial judge is subject to knowing he will be reviewed by
15 an appellate judge, appellate court.
16 MR. MASSEY: Yes, Your Honor. We -- I simply
17 meant that the judges now are doing a very conscientious
18 job of restraining --
19 QUESTION: Well then, they have nothing to fear.
20 (Laughter.)
21 QUESTION: Mr. Massey, going back to the
22 historical point that you alluded to, I'm not sure that I
23 follow your argument, and I'd like you to maybe expand on
24 it.
25 I realize -- I mean, we have faced the argument

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1 that historically the review of a jury verdict is very,
2 for this kind of punitive excessiveness is very grudging,
3 but we passed that point and we said, yes, there can be
4 some review, and that review to begin with can take place
5 by a trial judge, and a trial judge who is performing
6 what, I think, functionally is an abuse of discretion
7 review of what the jury did, informed by particular Gore
8 factors and so on, can set it aside.
9 Once we have passed the point of saying there
10 can be that kind of review by the trial judge, what is it
11 historically that would have a bearing on the question,
12 whether the appellate court's review of the trial judge is
13 either de novo or abuse of discretion? I would have
14 thought that the force of historical precedent is behind
15 us once we take the position that the verdicts can be
16 reviewed at all?
17 MR. MASSEY: Well, Your Honor, the common law,
18 though, drew the line between the trial judge and the
19 appeals court, that that -- the Seventh Amendment was
20 adopted largely to prevent appellate courts from
21 interfering, not trial judges.
22 QUESTION: Well, that might ground an argument
23 saying the trial judge's review is itself unreviewable,
24 but that's not your argument, and if we accept the
25 proposition that the trial judge can be reviewed under

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1 some standard, what historically -- what does history tell
2 us as to whether that standard ought to be de novo, in
3 which case the appellate court is looking at the jury
4 verdict for abuse, or on an abuse of discretion, in which
5 case the appellate court is looking for an abuse by the
6 trial judge, who reviews for abuse? What does history
7 tell us when we are at the stage where we are at now?
8 MR. MASSEY: Well, I mean, history would counsel
9 that having gone to abuse of discretion in Gasperini we
10 ought not go further to de novo, because the Gasperini
11 step --
12 QUESTION: But the review of the jury -- the
13 substantive standard for reviewing the jury verdict is
14 going to be exactly the same in either case.
15 MR. MASSEY: Well, but that was always true
16 historically. In other words, even in the 19th Century,
17 judges, the trial judges were reviewed for excessiveness
18 but not courts of appeals and, even before Gore, we had
19 common law standards for reviewing damages awards, or --
20 QUESTION: Okay, but if that --
21 MR. MASSEY: -- borrowed those --
22 QUESTION: But if that is not a reason for
23 saying there is no appellate review, I don't know why it
24 is a reason for making this choice between two varieties
25 of appellate review.

1 MR. MASSEY: Well, sort of in for a penny, in
2 for a pound, but we think we ought to --
3 QUESTION: Yes.
4 MR. MASSEY: -- stop where we are, rather
5 than -- I mean, the Court in Gasperini made the quite
6 deliberate decision not to go to de novo review, or to
7 tell the courts of appeals --
8 QUESTION: And did think there was historical
9 precedent for --
10 MR. MASSEY: Yes.
11 QUESTION: -- an abuse of discretion standard,
12 and there was disagreement on the Court whether that was
13 so, but the majority held that there was, but -- so unless
14 Gasperini is overruled, then I think this case has got to
15 turn on, is there a significant difference between
16 compensatory damages, where we said abuse of discretion is
17 it, no de novo review --
18 QUESTION: Except that --
19 QUESTION: -- and punitive damages. It's got to
20 turn on that, unless the Court is going to redo Gasperini
21 and say no, the court of appeals can have de novo review
22 there, too.
23 MR. MASSEY: Yes, Your Honor, we agree, and we
24 think the line between --
25 QUESTION: May I just ask you this question?

1 MR. MASSEY: Yes.

2 QUESTION: Is there not at least conceptually --

3 maybe practically it doesn't matter -- a difference

4 between constitutional excessiveness of a damage award and

5 nonconstitutional excessiveness? In other words, could

6 not -- like the damages in Gasperini or the damages here

7 might be excessive in a sense that they violated State

8 law, or they just offended the conscience some way, but

9 did not violate the Constitution.

10 Does it -- is there -- is it conceivable that an

11 award could be excessive as a matter of just general

12 common law rulings of one kind or another, but yet not

13 violate the Constitution?

14 MR. MASSEY: Yes, Your Honor.

15 QUESTION: So that this case is conceptually

16 quite different from Gasperini?

17 MR. MASSEY: Well, it is in that way, although

18 of course the Gore factors themselves are distilled from

19 the common law. I mean, Your Honor did not mint them from

20 new sources. You traced back to the common law roots, and

21 footnote 24 of Gore in fact refers to their deep-rooted

22 nature within the common law. So we think the common law

23 precedents are still highly instructive.

24 But going back to the line between compensatories and

25 punitives. I mean, at common law there was not that line.

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1 The courts did not treat the two differently and, in fact,
2 in footnote 7 of Cooper's reply brief they discuss the
3 common law tradition of treating them similarly,
4 indistinguishably, in fact, in the same verdicts, so we
5 agree that Gasperini here is controlling, and we don't
6 think it should be overruled or modified, and we don't
7 think a meaningful distinction can be drawn between
8 punitive damages and compensatories.
9 I would just like to add, and this uniformity
10 notion that we've heard about, first we believe the
11 district courts are in a good position, but also, second,
12 this Court in TXO essentially rejected a proposal for
13 intrajurisdictional comparisons. The BMW factors are
14 guideposts, but only guideposts. They are nonexclusive,
15 and the question of gross excessiveness lends itself to an
16 abuse of discretion standard rather than the de novo one.
17 If there are no further questions, thank you
18 very much.
19 QUESTION: Thank you, Mr. Massey.
20 Mr. Reynolds, you have 3 minutes remaining.
21 REBUTTAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS
22 ON BEHALF OF THE PETITIONER
23 MR. REYNOLDS: Thank you, Mr. Chief Justice.
24 On Gasperini, I'd just like to say there's no
25 need to overrule Gasperini. In that case, the Court was

1 looking at an excessiveness issue as it relates to
2 compensatory damages, not to punitive, where it was very
3 much tied up with a review of the historical facts, and
4 that's why the Court said that deferential review was what
5 was required in Gasperini.
6 Here we have punitive damages that, as I've
7 explained, are of a much different sort, and they're not
8 tied up with the historical facts, so Gasperini does not,
9 certainly, need to be overruled.
10 The other point I make under Rule 59 --
11 QUESTION: Excuse me, doesn't pain and suffering
12 come into a Gasperini calculation sometimes, or often?
13 MR. REYNOLDS: But again it goes to the
14 compensation in the compensatory award. We're looking
15 now at the punishment on the defendant --
16 QUESTION: Yes, but it's -- I understand. I'm
17 not sure the calculation of pain and suffering is much
18 different from calculation, the calculation at issue here.
19 MR. REYNOLDS: The calculation, I would submit,
20 Mr. Justice Scalia, is on the side of the fact-finding,
21 the historical facts, and what the harm is to the injured
22 party. Here, we are talking about not facts tried to the
23 jury, the historical facts, but the judgment made on the
24 punishment side.
25 I do think that there is a difference between

1 nonconstitutional excessiveness and constitutional
2 excessiveness. This Court in Brown and Ferris did say
3 that where you're dealing with an issue of
4 nonconstitutional excessiveness on the punitive damage
5 side, that the deferential review would be the appropriate
6 review, but unless what the Court has said in BMW v. Gore
7 is superfluous, unless we're going to say that there's no
8 difference between the constitutional excessiveness and
9 nonconstitutional, then there is something here that
10 requires a de novo review standard that is not just the
11 deferential review that you have in the nonconstitutional
12 context, and we would submit that the -- all the indicia
13 that point to de novo review are in place here.
14 And I would point the Court to the Salve Regina
15 decision of this Court which does, indeed, explain why,
16 when a de novo review is, is indeed required and necessary
17 on a legal issue, especially of constitutional importance,
18 that abuse of discretion is no answer to that review
19 standard.
20 Thank you.
21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
22 Reynolds. The case is submitted.
23 (Whereupon, at 10:59 a.m., the case in the
24 above-entitled matter was submitted.)
25