IN THE SUPREME COURT OF THE UNITED STATES

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LARRY HOPE, :

Petitioner :

v. : No. 01-309

MARK PELZER, ET AL., :

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Washington, D.C.

Wednesday, April 17, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

CRAIG T. JONES, ESQ., Atlanta, Georgia; on behalf of the Petitioner.

AUSTIN C. SCHLICK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

NATHAN A. FORRESTER, ESQ., Solicitor General of Alabama, Montgomery, Alabama; on behalf of the Respondents.

GENE C. SCHAERR, ESQ., Washington, D.C.; on behalf of Missouri, et al., as amici curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 01-309, Larry Hope v. Mark Pelzer.

Mr. Jones.

ORAL ARGUMENT OF CRAIG T. JONES

ON BEHALF OF THE PETITIONER

MR. JONES: Thank you, Mr. Chief Justice, and may it please the Court:

Under United States v. Lanier, the law was clearly established for purposes of qualified immunity when it gives officials fair warning that their conduct is unlawful. The fair warning standard is met when a rule laid out by prior law applies with obvious clarity to the conduct in question, even if the rule arises from a case involving different facts.

The materially similar facts requirement of the Eleventh Circuit is an unwarranted gloss upon the fair warning standard, just like the fundamentally similar facts requirement which this Court unanimously rejected in Lanier. It is an impermissible gloss because it emphasizes similarity of fact over clarity of ruling.

QUESTION: And what should be the rule that you say was violated here? If we write out the opinion, we'd say the rule that the officer should have known is, and we

have to fill in the blank. What is that rule?

MR. JONES: The rule established by the Eleventh Circuit's own precedent is that it is unconstitutional to punish an inmate through the use of restraint, and restraint is punitive if it goes beyond the point in time which is necessary to quell a disturbance or immediate threat.

QUESTION: Does the include solitary confinement?

MR. JONES: No, Your Honor. Restraint involves total physical immobility coupled with the pain and discomfort attendant to that.

QUESTION: And what case establishes that proposition?

MR. JONES: Well, there is a --

QUESTION: Any physical restraint is unlawful. What case establishes that?

MR. JONES: Physical restraint, the precedents speak of physical restraint to a fixed object.

QUESTION: Yes, and what precedent in particular?

MR. JONES: Gates v. Collier is the first case of a body of law which has developed in our circuit, Justice Scalia. Gates v. Collier was a 1974 Fifth Circuit decision which was binding upon the present Eleventh

Circuit and it held that a variety of forms of corporal punishment --

QUESTION: That's my problem. It was a whole variety. They didn't say that any single one. I mean, as I recall that case, there are a number of instances of brutality against prisoners, and the holding of that case was that that was cruel and unusual punishment, but I don't recall that case saying that any single one of the many instances that the case recited, one of which was physical restraint, would qualify.

MR. JONES: Your Honor, the Fifth Circuit decision in Gates affirmed a district court decision which specifically enjoined each and every one of those punishments, and the fact that --

QUESTION: And you think that amounts to a holding that any single one of them would have violated the Eighth Amendment?

MR. JONES: Yes, Your Honor, if used punitively, that is correct, and --

QUESTION: But the court ordered stopping each and every one of those measures. Wasn't that the nature of the injunctive degree, not just a combination of them, but each one?

MR. JONES: Yes, Justice Ginsburg. This was not a case where the court viewed the totality of the

circumstances and said that the conditions constituted cruel and usual punishment and ordered the State of Mississippi to build a new prison. This was a case where the State was specifically enjoined --

QUESTION: Did the reasoning follow that line?

MR. JONES: Well --

QUESTION: Was the reasoning of the opinion, did it examine each one individually and say each one individually was cruel and unusual?

MR. JONES: It examined a variety of practices, and those practices were discussed in a subsection called corporal punishment. The fact that Gates involved multiple holdings does not make it any less important in clearly establishing the law, otherwise a case could only clearly establish the law if it had a single holding. The fact that Gates v. Collier drew multiple bright lines as opposed to a single bright line did not make --

QUESTION: Do we need --

MR. JONES: Yes.

QUESTION: In this case, do we need to get into the issue, Mr. Jones of what this Court's holdings amount to on this subject, or are we just limiting ourselves to the Eleventh Circuit, perhaps the old Fifth Circuit?

MR. JONES: With respect to the underlying constitutional violation, or with respect to qualified

immunity analysis?

QUESTION: With respect to each.

MR. JONES: Well, Your Honor, this Court has never squarely addressed the constitutionality of continued restraint as a form of corporal punishment. It has acknowledged in decisions that restraints can be harmful.

QUESTION: I suppose one would have to do that, yes.

MR. JONES: Yes, that's correct.

QUESTION: Are you relying on anything beyond the restraint itself? I mean, in the facts that have been recited, the facts include leaving the individual in the sun without a shirt on, and not giving him bathroom breaks, and pouring water out in front of him to taunt him. Are you relying upon those features?

MR. JONES: Not as -- not for the proposition that the law was clearly established, with regard to those facts. Those facts are certainly relevant on the issue of the damages suffered by the --

QUESTION: Well, do we have to assume that the facts as alleged are true for purposes of deciding whether summary judgment is appropriate?

MR. JONES: Based -- Justice O'Connor, based upon the grant of certiorari by the Court, the issues

raised in the petition, and the grant, I think that is correct.

QUESTION: I would assume we -- I gather we just assume those are correct for purposes of evaluating the summary judgment question.

MR. JONES: I think that is correct.

QUESTION: And the Eleventh Circuit decided there was a constitutional violation?

MR. JONES: Yes, Your Honor.

QUESTION: And there was no cross-appeal on that.

MR. JONES: That is correct, Your Honor.

QUESTION: So do we take that as a given, too?

MR. JONES: I think that this case is like Saucier, where the Court acknowledged that the first step be the inquiry of whether there was a constitutional violation made out by the facts. That was resolved by the circuit court.

QUESTION: Well, that gets back to the Chief Justice's question, and I'm wondering again if the Court writes the opinion giving you the judgment that you seek, isn't it necessary for us to say, a) this law was clearly established, and b) it is a correct interpretation, a correct exposition of the Cruel and Unusual Punishment Clause, so we are -- it would be a rather odd holding for

us to say, well, this was established in the Eleventh Circuit, but we're not telling you whether or not that was right.

MR. JONES: Well, I think, Justice Kennedy, because the certiorari was only granted on the second part of the Saucier test, that is, on the clearly established inquiry, the Court could limit its ruling to the issue of whether the law was clearly established and whether, specifically whether the Eleventh Circuit applied the proper standards in determining whether --

QUESTION: Well, maybe Justice Kennedy is suggesting that it's fairly included within the question granted, that it's quite impossible for a judge to say that it does or does not violate a clearly established constitutional principle if he doesn't think that it violates a constitutional principle at all, clearly established or otherwise. I mean, isn't -- doesn't -- the one sort of wrapped up in the other?

MR. JONES: Yes, Your Honor, and I think that it is fairly included. My point is that --

QUESTION: I take it your position, though, is that all we have to decide is whether the substantially similar standard is the proper standard, and if we say no, it's not, that's like Lanier, which was -- what was it? -- substantially identical, I guess, wasn't it, something

like that?

MR. JONES: The verdict was fundamentally similar --

QUESTION: Fundamentally, yes.

MR. JONES: --in Lanier.

QUESTION: And if we say that that gloss, the substantially similar gloss was wrong, what you want us to do is simply vacate and send the thing back, or do you want us to go further and say, no, in fact, there -- we determined that there can be no sovereign -- that there can be no qualified immunity here, because if we have to go the second step, then we have to get into the issue, it seems to me, that Justice Kennedy has raised.

MR. JONES: Your Honor, I believe that the first -- the issue of whether there's a constitutional violation is fairly included within the questions which were granted by the Court.

QUESTION: All right. Now, if that's what we're going to get into, so we will determine what the violation was and then get to immunity with respect to that particular violation, we won't confine ourselves simply to the substantially similar verbiage, then I go back to my earlier question, and I take it -- and I think you've answered it, but I want to make sure I understand you -- for purposes of determining whether there's a

constitutional violation, you are not arguing, I take it, that we should take into consideration the particular circumstances of the day, the heat, the shirt, the bathroom breaks, the water, is that correct? All we look at is the restraint itself?

MR. JONES: Yes, Your Honor, because the conduct of these defendants was to restrain this man as a form of punishment.

QUESTION: And some of the allegations of the facts have been questioned, and one point was about the lack of bathroom breaks. There's nothing in the pleadings -- the pleadings didn't allege lack of bathroom breaks, and how does that get into the cases if the other circuits didn't mention that either?

MR. JONES: Well, I think it got into the case because the respondents wanted to argue the case rather than the law.

QUESTION: But that had not been found below, and it hadn't been even asserted in the complaint, is that correct?

MR. JONES: Yes, that is correct, except to the extent that the affidavit of the plaintiff was referenced, I think incorporated by reference into the pleadings.

QUESTION: And the plaintiffs affidavit said that specifically, that he wasn't allowed bathroom breaks?

MR. JONES: The plaintiff's affidavit is that he was left on the hitching post for 7 hours, and the fair inference that can be drawn from that is that he was restrained for 7 hours without breaks, and there's certainly no evidence rebutting that with respect to the second incident, which he was on the hitching post.

The first incident he was on the hitching post, there is evidence that he was given one bathroom break, and he was taken down that incident only after 2 hours, which in itself is --

QUESTION: That, we got into that. That is, I think, disputed even as to the first instance because I think that the State said he had been offered other breaks but he had declined them. Well, that's one thing, and another argument that was made about the background, if we're going to get anything beyond the hitching, that the particular officers' names were not involved in some of the worst aspects of that.

That is, the officers that are named defendants here didn't tell Hope to take off his shirt, and didn't pour water in front of him and have the dogs drink it. Those were other people who are not named defendants, and you don't contest that, do you?

MR. JONES: I do not contest that reading of the record, Justice Ginsburg.

QUESTION: They didn't keep him on there for 7 hours, as far as we know. Do we know that they were in charge of how long he would stay there?

MR. JONES: We do not know that, Your Honor, although we do know that it was their expectation that he be restrained indefinitely. Findings in other cases indicate that -- including the published case of Austin v. Hopper, indicate that inmates were routinely left on the hitching post for the remainder of the day.

QUESTION: You say indefinitely. According to the prison policy, they were kept on until they agreed to go back to the work crew without disrupting it, so that he could have been released at any time that he said I'm ready to go back on the work crew and dò the work, right?

MR. JONES: Justice --

QUESTION: That's what the prison policy says, anyway.

MR. JONES: Well --

QUESTION: Now, is the contention in this case that he was prepared to -- you see, I don't understand what they could have done. Here is a prison that has a policy of having work crews. You don't contend that that's cruel and unusual punishment, right?

MR. JONES: That is correct.

QUESTION: And the allegation is that this

prisoner refused to work in one case, and disrupted a work crew in another case, and according to the prison policy -- I mean, you have to do something when he does that. To take him back and say, oh, you know, you've got to go back to prison, he says yes, that's exactly what I want. What was the prison supposed to do?

MR. JONES: Well, Justice Scalia, in both instances he was being punished for fighting. He was being punished for --

QUESTION: Disrupting the work crew.

MR. JONES: For an altercation.

QUESTION: Okay.

MR. JONES: An altercation which subsided at the work site, which was miles away from the prison property, and after he -- in each instant after he was restrained and subdued, and whatever disruption he was a part of had abated, he was put into a van for 20 minutes without incident, another 20 minutes were spent transporting him to the facility without incident, he was then walked without incident, without the necessity for the use of force, to the post.

QUESTION: And the work rules were not brought up by the State. The Eleventh Circuit said specifically, we are not going to consider these work rules because they were never put in the district court record as a reason

for the officer's behavior in question.

MR. JONES: That is correct, Justice Ginsburg, and if they were in the record, the evidence would also be they were not followed, which was also consistent with the finding of the Middle District of Alabama in the case of Austin v. Hopper.

QUESTION: Quickly, what are we supposed to take as the fact? Do we take the fact in the second affidavit of Larry Hope?

MR. JONES: Yes.

QUESTION: Okay. There's nothing about bathroom breaks in that.

MR. JONES: That is correct, but the critical time element here is the time it took them between the time that the disruption had abated and the time that they decided to punish him for past conduct which had occurred an hour earlier and 10 miles away. That is the critical time element, not the amount of time --

QUESTION: You say it's critical. Why is that critical? I mean, must they decide to punish him instantaneously or never?

MR. JONES: It's critical, Your Honor, because restraint is not a proper form of punishment under those circumstances. They can suspend privileges, they can take away TV --

QUESTION: You say no kind of restraint is permissible?

MR. JONES: Not as a form of punishment. If they need to restrain him to maintain order and discipline at the scene of exigent circumstances, that's perfectly proper.

QUESTION: Or to make him go back to work. You say that that issue is not in this case. You say that there's not in this case the fact, contended by the State, that the only reason he was restrained was to get him to agree to go back to the work crew, and that as soon as he said okay, I'll go back and I won't disrupt it any more, he would have been released. You say that's not in the case.

MR. JONES: Yes, Your Honor, because if you fight with five prison guards, you're not going to be able to escape punishment simply by --

QUESTION: So we should leave open -- even if we decide in your favor, you want us to leave open the question of whether this prison could follow the policy that it has in effect, namely, only restraining people this way as a means of inducing them to go back to the work crew. That would be left open.

MR. JONES: Yes, Your Honor. We're not attacking the policy. We're attacking the conduct which

was used in this case in violation of clearly established law.

Thank you.

QUESTION: Thank you, Mr. Jones.

Mr. Schlick, we'll hear from you.

ORAL ARGUMENT OF AUSTIN C. SCHLICK

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. SCHLICK: Mr. Chief Justice, and may it please the Court:

An official is immune from personal liability for violating Federal rights unless the violation would have been clear to a reasonable officer. Where, as here, the governing legal standard does not itself establish a violation, the practical inquiry would be whether the violation was established by case law is not distinguishable in a fair way.

QUESTION: What, in your view, is the governing legal standard that you just referred to?

MR. SCHLICK: The overarching standard would be the Harlow v. Fitzgerald, where the law was clearly established. The --

QUESTION: Well, I thought -- you're not talking, then, about a substantive standard?

MR. SCHLICK: In that, in the particular context

where one looks to case law, this Court's decision in Saucier v. Katz uses the formulation whether the facts were distinguishable in a fair way, and that would be an appropriate gloss as well. Now --

QUESTION: I mean, we start with a prohibition for substantive law, the prohibition against cruel and unusual punishment. Then how do we work ourselves down from there, or up from there, whatever you want to call it?

MR. SCHLICK: Yes, Your Honor. We would urge the Court in this case to take the case on the terms on which it was briefed and decided in the Eleventh Circuit, that is whether the law they applied in the Eleventh Circuit in 1995 clearly established the violation. In that context --

QUESTION: Then we don't get into the question of our own view whether -- what the law might, or the result might be in this case?

MR. SCHLICK: Even under that approach, the first step would be to ask whether this Court's decisions themselves gave clear notice, and the answer to that in our view would be no. It's only because of the Gates v. Collier decision that these officers had fair warning, had clear notice.

QUESTION: So then the result could be one thing

in the Eleventh Circuit and another thing in the Fourth Circuit?

MR. SCHLICK: Yes, the -- it could be. This Court hasn't definitively decided whether, when it takes a qualified immunity case, it should analyze the case in light of its own law solely, or whether it should give greater weight to the relevant circuits. In this case, we think it would give most guidance to the lower courts to analyze the case as the Eleventh Circuit did.

QUESTION: But what is the standard that the officers should have been aware of, first in the Eleventh Circuit, and then, assuming that we think we -- that this case presents either the necessity or the proper opportunity for us to say what the national standard ought to be, what is the standard at a more specific level of abstraction than Cruel and Unusual Punishment Clause that we should be dealing with?

MR. SCHLICK: Justice Kennedy, let me address the Eleventh Circuit first. In the Eleventh Circuit, the reasonable officer would have looked to the Gates v. Collier decision, noted that it held that it violates the Eighth Amendment to punish an inmate by handcuffing the inmate to a fence for a prolonged period of time, or cell bars for a prolonged period of time, or forcing him to maintain an awkward position for a prolonged period of

time. The reasonable officer --

QUESTION: Even if -- do you maintain that the issue of whether it was done only to get him to return to the work crew is not in the case?

MR. SCHLICK: Yes.

QUESTION: We have to assume that he was just put on there to punish him, and he couldn't have been released if he had said I'm ready to go back to the work crew?

MR. SCHLICK: Yes, Justice Scalia. The Eleventh Circuit we think correctly explained that's not a fair inference from the record as we must take it.

In the Eleventh Circuit, the reasonable officer would -- could not have concluded that there is a constitutional difference between handcuffing an inmate to a fence or a cell bar and handcuffing an inmate to a metal pole. Accordingly --

QUESTION: For purposes of punishment?

MR. SCHLICK: For purposes of punishment.

QUESTION: You have to add that.

MR. SCHLICK: Yes, Your Honor.

QUESTION: And you're content to have us hold these officers liable when a few years down the line we may find that the Eleventh Circuit's opinion was wrong?

MR. SCHLICK: Your Honor, we don't suggest a

view one way or the other on liability. We're simply suggesting that to grant qualified immunity at this stage of the case was improper. That brings me, though, to the second question --

QUESTION: Well, I understand, but I mean, they would be stripped of their qualified immunity even though the Eleventh Circuit's opinion was wrong, and we find it to have been wrong when we finally confront that issue.

MR. SCHLICK: I think that suggests Justice Kennedy's second question, which was, absent Gates, how would the case be viewed, and in that situation --

QUESTION: And don't you think we have to reach that?

MR. SCHLICK: No. No, we don't think so, Your Honor, because it wasn't included in the petition or in the questions on which this Court granted certiorari, and really it hasn't been squarely faced by the parties, because the State is defending the Regulation 429 rather than the facts that must be taken as true in this case.

QUESTION: Well, it's not defending Regulation 429, according to you. Regulation 429 as it reads says, he is released as soon as he agrees to go back to the work crew without disruption.

MR. SCHLICK: That's right. My point, Justice Scalia --

QUESTION: So regulation 429 is not in the case, according to you.

MR. SCHLICK: -- is that the respondents have briefed the case as if they were acting in compliance with Regulation 429, which is not in our view how the case must be taken. Now --

QUESTION: At least the case in the Eleventh Circuit, because it wasn't in the case. It wasn't in the case before the district court. It was -- in the district court it was just restraint as punishment. The idea of this being a temporal measure to get him to go back to work doesn't show up till the Eleventh Circuit, and the Eleventh Circuit rejects it because it wasn't raised in the district court.

MR. SCHLICK: That's correct, Justice Ginsburg.

QUESTION: So the regulation is not before us, you're saying.

MR. SCHLICK: That's correct.

QUESTION: Okay.

MR. SCHLICK: To answer Justice Kennedy's second question, how would this Court address the issue if Gates v. Collier did not exist, in that case, a reasonable officer -- the question would be, what would a reasonable officer -- what would have been clear to a reasonable officer. The reasonable officer could have made a

colorable argument that the appropriate analysis is the deliberate indifference standard established by this Court's decision in Farmer v. Brennan, that standard being whether the officer was deliberately indifferent to a substantial risk of serious harm.

The reasonable officer could further have concluded that neither the May incident in this case nor the June incident in this case presented a substantial risk of serious harm.

QUESTION: So you think deliberately indifferent is a sufficient standard for the imposition of liability without more specificity. All officers must be aware that their specific acts can be challenged under the general standard of deliberately indifferent.

MR. SCHLICK: Yes, we think it would be sufficient to establish a substantive violation of the Eighth Amendment, although as the facts must be taken here, qualified immunity would attach, because there's a colorable argument that the threshold was not crossed, but I'd want to say that this Court has not resolved whether it's this deliberate indifference standard or rather the Hudson v. McMillian test, the excessive force test of whether force was used maliciously and sadistically to inflict harm, and that is an unresolved question, is, it's -- that is that very absence of certainty that would

be most relevant absent the Gates v. Collier decision. In this --

QUESTION: Suppose I think that I have to reach the question of whether it would violate the Constitution, not just whether the Eleventh Circuit said it would. Do you think it would violate the Constitution to make the inmate stand in a corner, to immobilize him to that extent?

MR. SCHLICK: You would need to know more, not --

QUESTION: To go stand in the corner.

MR. SCHLICK: Not in all instances, no, Your Honor.

QUESTION: So what makes the difference is, you say stand in the corner, and I'm going to handcuff you, and that's the difference between cruel and unusual, and not cruel and unusual?

MR. SCHLICK: The relevant considerations, Justice Scalia, would be the degree of pain and the threat to the safety of the inmates.

QUESTION: It's not necessarily the degree of pain. Being handcuffed to some immobile object, any -- not much more than standing in a corner.

MR. SCHLICK: The overarching question of whether the pain was wanton and unnecessary would focus on

the degree of pain, the penalogical justification, and the threat to the inmate's safety, so you would need to know the facts that bear on those inquiries.

In this case, as I've said, the Eleventh Circuit decision of Gates v. Collier was directly on point. It provided sufficient certainty for the officers here, and it was correct in that as applied to these facts, under this Court's decisions, there was an Eighth Amendment violation.

QUESTION: I didn't understand your last statement. You say, it would depend on the facts, the degree of pain, the circumstances. I thought your argument for the proposition that any physical restraint as a form of punishment is bad.

MR. SCHLICK: No, Your Honor. That --

QUESTION: You're not.

MR. SCHLICK: It's the petitioner's position, but not a position of the United States.

QUESTION: Ah. All right. All right. All right.

MR. SCHLICK: If the Court has no further questions --

QUESTION: Thank you, Mr. Schlick.

Mr. Forrester, we'll hear from you.

ORAL ARGUMENT OF NATHAN A. FORRESTER

ON BEHALF OF THE RESPONDENTS

MR. FORRESTER: Mr. Chief Justice, and may it please the Court:

In the last 15 years, at least eight Federal master judges and eight Federal district judges in Alabama have read the law to hold that handcuffing a prisoner to a restraining bar or to a similar stationary object does not violate the Eighth Amendment.

QUESTION: Have they discussed Gates? I didn't go to look at the district court opinions, though you cited them, but did those opinions discuss Gates?

MR. FORRESTER: No, Justice Souter, they didn't pointedly cite Gates.

QUESTION: Did they just ignore the pre-Eleventh Circuit precedent? I mean, how did they get by without --

MR. FORRESTER: Primarily they refer to the subsequent authority in Williams v. Burton and Ort v. White, and I don't think that we can presume that they stargazed and ignored it, or that they just thought that case really had been largely superseded by this subsequent clarifying authority.

QUESTION: What was the subsequent clarifying authority? Gates was a specific injunction. It said, we won't use physical restraints or punishments. What came

after from the Eleventh Circuit that modified that injunction?

MR. FORRESTER: Well, the proposition for which petitioner's amici wish this Court to read Gates and say that our respondents should have read Gates is this very broad proposition that any form of restraint as a form of punishment is unconstitutional, although that proposition has clearly been narrowed not just by the Eleventh Circuit's rulings and rulings in Williams v. Burton and Ort, which indicated that certainly in an excessive force context you could restrain a prisoner for a period of time, but also by this Court's rulings in Wilson v. Seiter and Whitley v. Albers, and the clarifying ruling in Farmer v. Brennan, where this Court indicated that the fact that a restraint was possibly objectively problematic is not enough to create an Eighth Amendment right. There had to be --

QUESTION: If we are assuming the fact as alleged, as it was used here, not to quell a riot, not to keep things calm in an interim, but as a means of punishment -- because that's what I understood the injunction in Gates was, not, you couldn't use restraints in a temporary situation, but that you could not use it strictly for punishment purposes --

MR. FORRESTER: Well --

QUESTION: And that, as far as I know, hasn't been modified.

MR. FORRESTER: A couple of responses to that. The first is that the restraint was not used in this case as a form of punishment. Petitioner never alleged or presented evidence that it was used as a form of punishment. That phrase does not appear anywhere in his first affidavit or his second affidavit. He simply says that he was put on the bar, and our respondents put him on the bar not to punish him, per se, but because he was refusing to work under the regulation.

QUESTION: But you didn't bring up the regulations in the district court. At least the Eleventh Circuit said it was nowhere in the record.

MR. FORRESTER: Well, first of all we think that the Court's entitled to take judicial notice of it, because it is the law, that you don't have to actually introduce the law into the record, but on top of that, it was always in the mix. The district court -- the activity log for the petitioner's first day on the bar is a copy of the log that comes from the appendix to the regulations.

QUESTION: What has that got to do with it, that reg? I mean, so what? That is, his allegation is that he was left for 7 hours on a very hot day with his arms about over his head, standing up, and given no water, except

once, so there are 3 hours at least without any water. All right, that's his allegation.

Now, introduce any regulation you want, why doesn't that create an issue for trial?

MR. FORRESTER: Well, because, the Your Honor, the most important fact there is that he could have gotten off the bar --

QUESTION: I don't see anything, all right, that he said that was so, and I don't see anything where anybody in the record said that was so.

MR. FORRESTER: The regulation --

QUESTION: So what is the regulation? Did you move, did you say -- did you say -- I don't see in these papers in front of me, say that the reason we're entitled to summary judgment is, it was ordinary practice to let the person go off, and then you'd cite that, and here they're following ordinary practice.

Now, maybe then they'd have to have replied, but I couldn't find anything like that. Where does it say that in the trial court?

MR. FORRESTER: No, Your Honor, we didn't say that, but it was petitioner's --

QUESTION: Then why isn't it --

MR. FORRESTER: Because it was petitioner's burden, as the plaintiff, to set forth the facts that made

that his claim.

QUESTION: They set forth facts.

MR. FORRESTER: And once we --

QUESTION: They set forth facts, and the question is, why doesn't that -- I gave you the facts, and why doesn't that present -- I would have thought as a trial judge you'd say, of course that's an issue for trial, unless, of course, there's something unusual here, something unusual that may be -- and you're saying -- where is this counter thing in the trial court? I don't see it. I have nothing -- I take it I should take this case as there having been nothing along the lines you're talking about in the trial court.

MR. FORRESTER: The activity log that is in the record is --

QUESTION: What page should I look at? I'll look at whatever you tell me to look at in the trial court.

MR. FORRESTER: It's pages 38 in --

QUESTION: I read through once, and I could find nothing --

MR. FORRESTER: I'm sorry, Your Honor. Pages 38 and 39, the activity log.

QUESTION: Where do you find that, the joint appendix?

MR. FORRESTER: Of the joint appendix.

QUESTION: 38 and 39?

MR. FORRESTER: Yes, Your Honor.

QUESTION: Is that of the second incident? I thought there was no activity log of the --

MR. FORRESTER: Yes, that's the first incident.

QUESTION: All right. The activity log, as far as I see it, says nothing about what you're saying. It just says he was placed on a restraining bar for a fight.

MR. FORRESTER: Yes, Your Honor. It refers to the two --

QUESTION: I've looked at it now. What does it say?

MR. FORRESTER: It refers to the two conditions that are the conditions for using the restraining bar under reg 429.

QUESTION: Why don't you read that?

MR. FORRESTER: Refusing to work and being disruptive to the work squad.

QUESTION: And what it says is, refusing to work, fight.

MR. FORRESTER: Yes, Your Honor.

QUESTION: That's the reason that they put him on the bar. Okay. Now what?

MR. FORRESTER: Yes, Your Honor. Now, the

bottom of the next page -- unfortunately there's a typographical error in this appendix, but it says, Annex A to AR 119. That should be 429, and we have gone back and checked. The actual copy of this log in the record says, AR 429.

QUESTION: Yes, and it says that right after it says, restraining bar to be used only during daylight hours, Annex A to AR-119, so -- now, what has that to do with it?

MR. FORRESTER: That refers -- that's actually 429, and that is the regulation.

QUESTION: Okay. Let's suppose that you're a genius as a trial judge, and you happen to know that when it says here AR-119 it means AR-429, okàay. Now, what it said is, restraining bar to be used only during daylight hours, cite, 429. Now, how does that help?

MR. FORRESTER: Well, reg 429 is what these respondents were following when they put him on the bar, and this petitioner has not alleged that when he was put on the bar he could not have gotten off.

QUESTION: Okay. I'll take that into account.

My other question is whether or not it is the case that any human being would know that it is cruel and unusual to keep a person, if that's what happened -- it's what he's alleged -- keep a person chained with his arms

over his head, handcuffed to a bar, for 7 hours, in the hot sun, not giving him water but for once, so he goes at least 3 hours without water.

Now, is there a case that would confuse what I think would be ordinary common sense on that -- at least, or tell me why that isn't ordinary common sense to think that that is very cruel, and certainly an unusual thing to do.

MR. FORRESTER: Yes, Your Honor. Let me preface my response with one quick -- he wasn't cuffed with his hands over his head. They were chest high. His own pictures show that in the joint appendix, but I would draw Your Honor's attention to a district court opinion which is transcribed in the joint appendix. It starts at --

QUESTION: One of my pictures happens to show it's slightly up here, his hands, and the others show it's about eye level.

MR. FORRESTER: And he's slumping.

The -- I would like to draw Your Honor's attention to this district court opinion that is transcribed in the joint appendix at page 81. It's entitled, Whitson v. Gillikin, and this was a 1994 case. This was 1 year before the events in this case. Jim Gates, who is one of the respondents here, was a defendant in this case, and in this case the prisoner alleged that

he was put on the bar for 8 hours in 95-degree heat, which is hotter than this case, was not given any water, was not given any bathroom breaks, which has not been alleged in this case.

The district court, or rather the magistrate judge appointed counsel for this pro se litigant, instructed counsel to go out and provide supplemental briefing on the question of whether that circumstance violated a clearly established right, and the court said, I have done my own diligent search -- this is on page 89 -- the court has made a diligent search of the case law, I requested additional brief from the parties, and neither the court nor the parties have identified any cases binding or otherwise in this circuit in which it was found that the Eighth Amendment as violated in these circumstances.

Now, we submit that if you have a learned authority such as this reading the law that carefully and not finding it in this manner, it would be exceedingly unfair to hold our respondents --

QUESTION: This is --

MR. FORRESTER: -- responsible for doing the same.

QUESTION: -- a post -- post Gates?

MR. FORRESTER: Yes. This is a 1994 case. This

is 20 years after Gates.

QUESTION: And it seems to me exceedingly careless for the counsel who was appointed not to bring that to the magistrate judge's attention.

MR. FORRESTER: Your Honor, in 28 years since Gates v. Collier, no Federal court of which we are aware has ever read it for the broad principle that petitioner now seeks to read it in this case. It's clear in the context of Gates v. Collier that the officers there were employing -- were handcuffing prisoners to cells and to fences for malicious and entirely arbitrary reasons. They had no valid penalogical purpose whatsoever.

QUESTION: The more drastic episode in this case was the second episode, and there you can't even point to an activity log, didn't even write it up. The State treated it as though it didn't happen.

MR. FORRESTER: Well, Your Honor, it's not clear that they didn't write it up, and furthermore it wasn't respondent's responsibility.

QUESTION: Whose burden was it -- whose burden would it be to show an entry in the activity log? After all, the prisoner doesn't -- is not the custodian of that log. Isn't it the State's obligation to bring it forward, just as it was brought forward with respect to the first instance?

MR. FORRESTER: Yes. We attempted to find it, and just couldn't find it, and these three respondents, moreover, were not personally responsible for the activity log. They weren't responsible for keeping it because they weren't the one supervising him, and they weren't responsible for his custody after it was kept.

QUESTION: They weren't responsible for how long he was left on the bar, either.

MR. FORRESTER: Correct, Your Honor.

QUESTION: Which makes me wonder whether it was your burden to bring in the regulation or, rather, whether it was the burden of the plaintiff to show that these defendants, when they put him on the bar, knew that he would be left on the bar for 7 hours, and if that was their burden, it seems to me it's not up to you to volunteer the defense which is in the public record, that in fact, if the prison policy was followed, he wouldn't have been left there for 7 hours as soon as he agreed to go back to the work crew.

QUESTION: But it's your position, I take it, that so long as the regulation was in place so that he could go back to work, that the State could legitimately keep him --

MR. FORRESTER: Yes.

QUESTION: -- hanging to this rail for as long

as it takes, no matter how hot it is, and without water, for as long as the State chooses to use it, just so long as the regulation is there that says, you can go back to work?

MR. FORRESTER: No, Your Honor.

QUESTION: Is that your position?

MR. FORRESTER: No, Your Honor, not hanging from the rail.

QUESTION: Well, like this.

MR. FORRESTER: Chest high -- chest high, like this --

QUESTION: All right.

MR. FORRESTER: -- where he can stand fully erect --

QUESTION: In this case, handcuffed to the rail --

MR. FORRESTER: Yes, Your Honor.

QUESTION: -- for as long as the State wishes without administration of water or bathroom breaks, just because there's a regulation that says he can go back to work. That's your position?

MR. FORRESTER: No, Your Honor. The regulation clearly entitles him to regular water and bathroom breaks.

QUESTION: But the allegations are that he was not given water and not given bathroom breaks. We take

those allegations as true for purposes of a summary judgment motion.

MR. FORRESTER: No, Your Honor, he did not allege, ever, nor present evidence that he was denied a bathroom break, and he did not allege that he was denied water. He simply said that during one 3-hour stretch these two other defendant, nondefendant officers, who are clearly not these three respondents, deprived him of water and -- you know, in acts --

QUESTION: -- certainly in the hot sun for 3 hours without water is fine. That's fine?

MR. FORRESTER: If it is being done because he has refused to work -- and I would hasten to add, Your Honor, this is --

QUESTION: But we have nothing in the record, as I understand it, to indicate that. Your position on that, as I understand it, is that's what the regulation makes clear, that that's why they were doing it, but the regulation is not on the record, and I don't see any basis upon which a United States district court is required to take judicial notice of every State's prison regulations if the State doesn't want to put it into the record.

MR. FORRESTER: Yes, Your Honor. I mean, I would note that even in the absence of the regulation the district court didn't find his allegations in evidence

sufficient to make out a claim that would withstand qualified immunity, so introducing that only makes the case all that stronger, but I would hasten to add that the Court did make a finding that he was put on the bar because he was disruptive to the work crew -- work squad. That is the condition in the regulations. He was not put on the bar for a strictly punitive purpose in the sense that petitioners are arguing --

QUESTION: Can you help me with this, Mr. Forrester? The assumption seems to be in the State's argument that if you restrain a person in order to -- then choose the word, convince, coerce him to do something, that is not punishment. I thought one of the purposes of punishment was rehabilitation, or corrections, as well as deterrence and prevention.

MR. FORRESTER: Yes, Your Honor.

QUESTION: Why isn't this punishment if you're doing this in order to have him comply with your command?

MR. FORRESTER: Yes, Your Honor, it is certainly punishment in the broad sense. For instance, it is a part of prison life. We're not saying that it shouldn't be analyzed as to whether it's cruel and unusual, but in the narrow sense in which they are using it, and in the narrow sense in which Ort v. White sought to distinguish punishment from what it termed an immediately necessary

coercive measure, this requires --

QUESTION: Yes, but Mr. Schlick, can I just ask you about the case you called our attention to on page 89-90 of the -- and there, according to the magistrate judge's opinion, Judge Putman, in that case the plaintiff was refusing to check out in his work detail, but then he gave him the choice of either working or being handcuffed to the security bar. There's no such allegation in this case, is there?

MR. FORRESTER: Petitioner never alleged that he couldn't have gotten off the bar --

QUESTION: But you didn't allege that you gave him the choice, did you?

MR. FORRESTER: The petitioner bears the burden, as the plaintiff, to say I could not have gotten off the bar if I had asked for it.

QUESTION: I must say, I can't understand why that wasn't put in by the State. I can't -- I cannot imagine why the State did not raise that point, that he could have gotten off the bar at any time by just saying, I'll go back to work. Why -- what's your explanation for that?

MR. FORRESTER: Well, it is a regrettable --

QUESTION: Regrettable, it's incomprehensible.

MR. FORRESTER: -- litigation error.

QUESTION: Why doesn't the -- Ort, which you say he's the magistrate on page 89 and 90, supports your position. Interestingly enough, that case is cited by the Government in support of its position, and I suppose the reason is because they make very clear in that case that it was unusual to deprive a person of water, and in that circumstance, absolutely necessary, and so how, in this circumstance, was it necessary to do what he says they did?

I was deprived of water, was teased by two officers when I asked for water, on one occasion they started to bring me water but ended up giving it to some dogs, I was given some once or twice during 7 hours, but that was not enough, and at one point dùring the hottest part of the day I was left without water for at least 3 hours.

All right, so for a person reading the case of Ort, and then reading that, you would think that Ort actually supports the Government, not you, because -- unless, of course, there's some reason that behavior like that, if it occurred, would have been necessary, so what is the necessity, or what can you say about it?

MR. FORRESTER: Well, I would hasten to add, Your Honor, those allegations that you keep reading again are not alleged against our three respondents.

QUESTION: That's, of course, what you say, but what the allegation says is that it was your three respondents. In -- on -- in the affidavit what he says specifically on that is, he says, I believe that the officer who actually put me on the hitching post was defendant Sergeant Mark Pelzer. However, a report says I was put there by defendant Gates, and an officer named Mark Dempsey, and then McClaran wrote the report, and in McClaran's reply he suggests he was there, and so I don't see any denial here by your particular clients that they were not responsible for this, and he alleges they were.

QUESTION: Would that be your burden? Is that their burden to say, I was not responsible, or is it the plaintiff's burden to say, you were responsible for not giving me water?

QUESTION: That's not there. The language I read was the plaintiff's affidavit saying they were responsible in his opinion.

QUESTION: Responsible for putting him onto the post.

MR. FORRESTER: We do believe it was the plaintiff's burden, Justice Breyer. The excerpt you just read actually refers to the first day he was on the bar, May 11. The second day was not when Pelzer put him on the bar, but it is no way clear from that that either Pelzer

or Gates, who it would appear put him on the bar, stuck around after that.

QUESTION: It's an important point for me. I still don't understand why coercion to comply with an order by a restraint is not a punishment.

MR. FORRESTER: We do think it's punishment in a broad sense. That's trying to make too fine a point. The point I'm trying to respond to is their contention basically that there was no valid penalogical purpose for putting him on the restraining bar, that this was somehow arbitrary or retaliative, or retributive and not remedial, which was the purpose. The purpose here was to get him to go back to work. It wasn't --

QUESTION: But he says, and we must take this as true I think at this stage, I have no reason to say I'm willing to go back to work because I never for a moment said I wouldn't work. They took me away from the work site. In one case I was having a fight with somebody, but in neither case did I say, I won't work. This was not a man who said, I want to be back in my cell watching the television and not working.

MR. FORRESTER: Yes, Your Honor, but getting into the altercation, actually getting to the point where he had his blade raised and was ready to strike another inmate, is certainly disruptive to the work squad, and

that's a serious security issue for these --

QUESTION: Thank you, Mr. Forrester.

Mr. Schaerr, We'll hear from you.

ORAL ARGUMENT OF GENE C. SCHAERR

ON BEHALF OF MISSOURI, ET AL., AS AMICI CURIAE,

SUPPORTING THE RESPONDENTS

MR. SCHAERR: Mr. Chief Justice, and may it please the Court:

We believe this case is controlled by any of three common sense principles of law, each of which is essential if this Court's qualified immunity doctrine is to prevent the problems that it was designed to prevent.

The first is that where personal liability is at stake, public officials shouldn't be expected to be more adept at construing case law than the State court judges whose decisions are reviewed in Federal habeas proceedings.

Now, the United States appears to adopt a standard that would be equivalent functionally to the standard that this Court has already adopted in the habeas context, and we think the United States' argument in this point is correct, and in fact we believe the Court has already come close to adopting that standard in the Saucier decision, which said the proper inquiry is whether the case on which a plaintiff relies occurred, and I

quote, under facts not distinguishable in a fair way from the facts presented in the case at hand. It seems to me that is just another way of saying that the facts of the two cases can't be materially indistinguishable.

QUESTION: Well, let me ask you a different question, though. What's the conceptual difference between materially similar, which was used here, and fundamentally similar, which was disapproved in Lanier?

MR. SCHAERR: Well, as I understand, the fundamentally similar requirement required a much tighter fit between the facts of the two cases than the materially similar standard does, and I think --

QUESTION: I mean, maybe you're right, but I don't know that from looking at the two words. I mean, it sounds to me as though materially and fundamentally are substantially similar.

(Laughter.)

QUESTION: I mean, I --

MR. SCHAERR: And not materially -- you got it.

QUESTION: But it's splitting it pretty fine, it seems to me, and wouldn't it be better, wouldn't it serve clarity better if we in effect said in this case, look, stop paraphrasing the standard, and just stick to the basic standard, and that is, would it be clear to a reasonable officer?

MR. SCHAERR: Well, it seems to me, Justice Souter, the way you answer that question is, you look at the case law, and that's what at issue here. There's no allegation that the text of the Eighth Amendment or that any statute bars the conduct at issue here.

QUESTION: So you're saying regardless of how they paraphrased it, when you get down to the district court cases, on any standard, they ought to win. That's it. You're not resting anything on materially similar as the right way to describe it.

MR. SCHAERR: Well, I think it is important and useful for this Court to make the link to the habeas context, because I think that would provide greater clarity in the law, and the ultimate standard under this Court's decisions is whether official action violated clearly established law.

Well, that's the exact -- that's exactly the same phrase that's used in the habeas statute, and that this Court has interpreted in Williams and Penry II as meaning materially indistinguishable, and it would be useful, and I think quite productive to apply that in this context as well, and would bring greater clarity to the law.

QUESTION: But isn't that -- isn't it a concern for the State court, because here we're talking about an

officer, and did he follow what was an Eleventh Circuit decision.

MR. SCHAERR: Right.

QUESTION: There, we're talking about a Federal court overriding a determination by a State court, so I don't think the settings are similar. There's a particular concern that the habeas statute reflects, and that is not overriding a State court's determination.

MR. SCHAERR: Sure, but -- and I agree the two situations are not entirely identical, but if anything it seems to me the section 1983 context raises even greater federalism concerns, because as this Court recognized a couple of terms ago in Geyer v. Honda, litigation can often be the functional equivalent of a statutory -- of a statute or a regulation, and so what happens in the 1983 context, as illustrated in this case, is that courts articulate broad rules that purport to govern the conduct, the day-to-day conduct of elected and nonelected State officials, and so it seems to me if anything the federalism concerns are greater.

In another important way, public officials, nonlawyer, nonjudge public officials are at a disadvantage and that, as this Court noted in Saucier, and I quote, public officials are often forced to make split-second judgments in circumstances that are tense, uncertain, and

rapidly evolving, unlike judges, who can take all the time they want sometimes to --

QUESTION: Yes, but wait a minute, this is not split-second. We're talking 7 hours here.

MR. SCHAERR: I agree with that, Justice O'Connor, but the standard, it seems to me, needs to apply to the full range of official action that would be covered by 1983.

QUESTION: Yes, but you have to ask whether a reasonable officer in these circumstances would have known that what was done was unconstitutional.

MR. SCHAERR: I think that ultimately is the answer, and it seems to me the way you answer that is asking the question posed in Saucier, of whether the two cases are materially -- well, are -- whether there's a fair distinction between the two cases, which seems to me amounts to material distinction.

QUESTION: If you're requested to advise the correctional officers in your State as to the standard, the constitutional standard they must observe with reference to restraining inmates, and circumstances like these, what is the standard that you tell them they must follow?

MR. SCHAERR: Well, I don't think that's clear from this Court's decisions at this point, as the United

States --

QUESTION: Well, they come to you, and you're their attorney, and you have to figure out what we mean up here.

MR. SCHAERR: Well, at --

(Laughter.)

MR. SCHAERR: At worst -- at worst I would tell them they have to follow the standard in Farmer. That is, their actions can't be objectively cruel, but they also -- they also cannot act with a subjective awareness of a serious harm to the inmates, and it seems to me that's the key distinction in this case between Gates, or the key reason why Gates is not controlling here.

Gates was decided long before Whitley and Farmer and all of those decisions that made clear the subjective requirement in the Eighth Amendment, and indeed if you look at the Eleventh Circuit's opinion, there's not even a finding of any awareness of serious harm that would come to these inmates. They just completely overlooked the serious harm requirement, and so it seems to me Gates, based on this court's current cases, Gates is easily distinguishable, and can't be taken as controlling here.

Now, the second principle that I'd like to address is the principle --

QUESTION: Well, I don't see in Gates -- and I'm

reading from page 1306, where they talk about being put in awkward positions, though.

MR. SCHAERR: Right.

QUESTION: I don't see any requirement of serious harm to the inmates.

MR. SCHAERR: Well, that's right, and that's why it seems to me Gates had been overtaken by this Court's subsequent decisions and therefore was not -- was no longer binding, even if you take it on the terms that the petitioner was --

QUESTION: What decision --

QUESTION: Yes, what --

QUESTION: -- of this Court do you rely on as changing what Gates said?

MR. SCHAERR: Well, Farmer added a new requirement. Well, not just Farmer, but Farmer and the other decisions that preceded it added a requirement of subjective awareness of a risk of serious harm. Gates didn't impose that kind of requirement at all, and therefore once this Court's decisions made clear that that subjective requirement was present, Gates, it seems to me, could no longer be regarded as controlling in this situation, even if you interpret Gates on its own terms. as the petitioner would have you.

QUESTION: Well, even if that were a

requirement, you think the allegations here don't suffice?

MR. SCHAERR: No, I don't. At worst, the --

QUESTION: That one would not -- a reasonable person would not be aware that you couldn't restrain someone on a post or rail for 7 hours in the heat, without water more than every 3 hours?

MR. SCHAERR: Well, I think the question is whether the harm that you could foresee from that -- and the record does not suggest that he was without water. He says that he received water only once or twice during that 7-hour period. Lots of people go without water and food for 24 hours.

QUESTION: Yes, but also no bathroom breaks.

MR. SCHAERR: I'm sorry.

QUESTION: Also no bathroom breaks for 7 hours.

MR. SCHAERR: There's no allegation of that in his affidavit.

QUESTION: Well, the court of appeals said there was.

MR. SCHAERR: The court of appeals made a mistake, and this Court has the ability to review the summary judgment record de novo, and it's not a long record.

But that leads me to the -- to my second principle, and that is that a public official shouldn't be

held liable under section 1983, or shouldn't be stripped of his or her qualified immunity except on the basis of his or her own actions based on reasonable inferences from the summary judgment record, and it seems to me that principle is well-illustrated in the Saucier decision that this Court decided last term.

Indeed, as Justice Ginsburg recognized in her concurrence in that case, the evidentiary predicate for denying qualified immunity must consist of what Rule 56(e) calls specific facts set forth in affidavits or other similar evidence. General allegations are not enough, in the summary judgment context, even though they might be on a motion to dismiss.

QUESTION: Can I just ask you a specific point --

MR. SCHAERR: Yes.

QUESTION: -- because he's right about -- my thing about the defendants was not June 7, it was, he alleges it. Is there any place in the record where it's denied that these are the right defendants?

MR. SCHAERR: With respect to some of the activity, yes. I couldn't give you the pages as I sit here, but the burden is on the plaintiff to make that record.

QUESTION: Thank you, Mr. Schaerr.

Mr. Jones, you have 3 minutes left.

MR. JONES: Thank you, Mr. Chief Justice, and may it please the Court:

If the Court has no questions, we submit that the judgment of the court of appeals should be reversed.

CHIEF JUSTICE REHNQUIST: Very well. Thank you, Mr. Jones. The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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