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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
LARRY HOPE, :
Petitioner :
v. : No. 01-309
MARK PELZER, ET AL., :
- - - - -X

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.

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

2 (10:04 a.m.)

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

5 Mr. Jones.

6 ORAL ARGUMENT OF CRAIG T. JONES

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

8 QUESTION: Does the include solitary
9 confinement?

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

13 QUESTION: And what case establishes that
14 proposition?

15 MR. JONES: Well, there is a --

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

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

20 QUESTION: Yes, and what precedent in
21 particular?

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

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

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

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

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

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

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

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

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

5 QUESTION: Did the reasoning follow that line?

6 MR. JONES: Well --

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

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

18 QUESTION: Do we need --

19 MR. JONES: Yes.

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

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

1 immunity analysis?

2 QUESTION: With respect to each.

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

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

10 MR. JONES: Yes, that's correct.

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

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

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

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

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

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

6 MR. JONES: I think that is correct.

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

9 MR. JONES: Yes, Your Honor.

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

12 MR. JONES: That is correct, Your Honor.

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

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

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

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

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

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

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

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

1 like that?

2 MR. JONES: The verdict was fundamentally
3 similar --

4 QUESTION: Fundamentally, yes.

5 MR. JONES: --in Lanier.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 QUESTION: They didn't keep him on there for
2 7 hours, as far as we know. Do we know that they were in
3 charge of how long he would stay there?

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

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

15 MR. JONES: Justice --

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

18 MR. JONES: Well --

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

24 MR. JONES: That is correct.

25 QUESTION: And the allegation is that this

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

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

10 QUESTION: Disrupting the work crew.

11 MR. JONES: For an altercation.

12 QUESTION: Okay.

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

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

1 for the officer's behavior in question.

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

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

10 MR. JONES: Yes.

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

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

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

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

1 QUESTION: You say no kind of restraint is
2 permissible?

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

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

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

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

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

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

3 Thank you.

4 QUESTION: Thank you, Mr. Jones.

5 Mr. Schlick, we'll hear from you.

6 ORAL ARGUMENT OF AUSTIN C. SCHLICK
7 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE PETITIONER

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

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

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

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

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

25 MR. SCHLICK: In that, in the particular context

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

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

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

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

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

25 QUESTION: So then the result could be one thing

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

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

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

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

1 time. The reasonable officer --

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

5 MR. SCHLICK: Yes.

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

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

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

18 QUESTION: For purposes of punishment?

19 MR. SCHLICK: For purposes of punishment.

20 QUESTION: You have to add that.

21 MR. SCHLICK: Yes, Your Honor.

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

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

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

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

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

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

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

20 QUESTION: Well, it's not defending Regulation
21 429, according to you. Regulation 429 as it reads says,
22 he is released as soon as he agrees to go back to the work
23 crew without disruption.

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

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

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

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

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

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

18 MR. SCHLICK: That's correct.

19 QUESTION: Okay.

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

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

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

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

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

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

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

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

11 QUESTION: To go stand in the corner.

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

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

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

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

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

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

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

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

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

16 QUESTION: You're not.

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

19 QUESTION: Ah. All right. All right. All
20 right.

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

23 QUESTION: Thank you, Mr. Schlick.

24 Mr. Forrester, we'll hear from you.

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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

1 after from the Eleventh Circuit that modified that
2 injunction?

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

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

25 MR. FORRESTER: Well --

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

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

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

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

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

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

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

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

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

11 MR. FORRESTER: The regulation --

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

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

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

23 QUESTION: Then why isn't it --

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

1 that his claim.

2 QUESTION: They set forth facts.

3 MR. FORRESTER: And once we --

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

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

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

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

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

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

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

1 MR. FORRESTER: Of the joint appendix.

2 QUESTION: 38 and 39?

3 MR. FORRESTER: Yes, Your Honor.

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

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

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

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

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

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

17 QUESTION: Why don't you read that?

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

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

22 MR. FORRESTER: Yes, Your Honor.

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

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

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

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

10 MR. FORRESTER: That refers -- that's actually
11 429, and that is the regulation.

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

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

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

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

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

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

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

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

18 MR. FORRESTER: And he's slumping.

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

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

5 The district court, or rather the magistrate
6 judge appointed counsel for this pro se litigant,
7 instructed counsel to go out and provide supplemental
8 briefing on the question of whether that circumstance
9 violated a clearly established right, and the court said,
10 I have done my own diligent search -- this is on page
11 89 -- the court has made a diligent search of the case
12 law, I requested additional brief from the parties, and
13 neither the court nor the parties have identified any
14 cases binding or otherwise in this circuit in which it was
15 found that the Eighth Amendment as violated in these
16 circumstances.

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

21 QUESTION: This is --

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

24 QUESTION: -- a post -- post Gates?

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

1 is 20 years after Gates.

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

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

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

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

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

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

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

9 MR. FORRESTER: Correct, Your Honor.

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

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

24 MR. FORRESTER: Yes.

25 QUESTION: -- hanging to this rail for as long

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

5 MR. FORRESTER: No, Your Honor.

6 QUESTION: Is that your position?

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

9 QUESTION: Well, like this.

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

12 QUESTION: All right.

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

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

17 MR. FORRESTER: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

16 MR. FORRESTER: Yes, Your Honor.

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

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

1 coercive measure, this requires --

2 QUESTION: Yes, but Mr. Schlick, can I just ask
3 you about the case you called our attention to on page 89-
4 90 of the -- and there, according to the magistrate
5 judge's opinion, Judge Putman, in that case the plaintiff
6 was refusing to check out in his work detail, but then he
7 gave him the choice of either working or being handcuffed
8 to the security bar. There's no such allegation in this
9 case, is there?

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

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

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

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

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

24 QUESTION: Regrettable, it's incomprehensible.

25 MR. FORRESTER: -- litigation error.

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

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

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

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

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

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

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

19 QUESTION: Responsible for putting him onto the
20 post.

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

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

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

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

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

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

1 that's a serious security issue for these --

2 QUESTION: Thank you, Mr. Forrester.

3 Mr. Schaerr, We'll hear from you.

4 ORAL ARGUMENT OF GENE C. SCHAERR

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

6 SUPPORTING THE RESPONDENTS

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

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

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

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

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

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

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

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

17 (Laughter.)

18 QUESTION: I mean, I --

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

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

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

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

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

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

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

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

3 MR. SCHAERR: Right.

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

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

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

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

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

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

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

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

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

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

1 States --

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

5 MR. SCHAERR: Well, at --

6 (Laughter.)

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

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

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

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

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

3 MR. SCHAERR: Right.

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

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

11 QUESTION: What decision --

12 QUESTION: Yes, what --

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

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

25 QUESTION: Well, even if that were a

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

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

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

7 MR. SCHAERR: Well, I think the question is
8 whether the harm that you could foresee from that -- and
9 the record does not suggest that he was without water. He
10 says that he received water only once or twice during that
11 7-hour period. Lots of people go without water and food
12 for 24 hours.

13 QUESTION: Yes, but also no bathroom breaks.

14 MR. SCHAERR: I'm sorry.

15 QUESTION: Also no bathroom breaks for 7 hours.

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

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

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

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

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

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

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

16 MR. SCHAERR: Yes.

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

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

25 QUESTION: Thank you, Mr. Schaerr.

1 Mr. Jones, you have 3 minutes left.

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

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

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

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

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