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5 v. :

6 STAN HENDRICKSON, ET AL. :

7 - - - - - x

9 Monday, April 27, 2015

10

14 APPEARANCES:

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

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 14-6368, Kingsley v.
5 Hendrickson.

6 Ms. Ward.

7 ORAL ARGUMENT OF WENDY M. WARD

8 ON BEHALF OF THE PETITIONER

9 MS. WARD: Mr. Chief Justice, and may it
10 please the Court:

11 The core of the liberty interest protected
12 by due process is the right to be free from unjustified
13 bodily restraint and harm. It's hard to imagine
14 anything more inconsistent with these core rights than
15 the use of a weapon on a restrained detainee, and that
16 is why Respondents urge this Court to import a
17 subjective intent element that doesn't relate to due
18 process, but is instead drawn from the test for
19 violation of a convicted prisoner's Eighth Amendment
20 rights.

21 Respondents candidly admit that they favor
22 this test because it better insulates guards from
23 liability, but that is no reason to ignore meaningful
24 constitutional distinctions between those who have been
25 convicted and those who have not.

1 JUSTICE GINSBURG: Well, why isn't the
2 safety of the detainee, why isn't that just a facet of
3 the use of excessive force? I think that's how the
4 district court treated it.

5 MS. WARD: The -- the safety of the detainee
6 was the stated objective for the use of the force in --
7 in this case. And that is a legitimate interest, but
8 the determination of whether the -- the force itself was
9 excessive is based on the Bell test for legitimate
10 purpose, legitimate penological objectives. So then the
11 test is objectively, then, whether or not the use of
12 force was excessive to the state -- stated need and the
13 Fourth Amendment test provides a -- a -- a good familiar
14 workable standard that can be used to determine that
15 question.

16 JUSTICE GINSBURG: You -- you mentioned the
17 Fourth Amendment now, but as I understand it, the
18 complaint just alleged a due process violation. It
19 didn't -- it didn't refer to the Fourth Amendment.

20 MS. WARD: That's correct, Your Honor. And
21 -- and the Fourteenth Amendment substantive due process
22 test as articulated in Bell does provide the clearest
23 application by the Court of the rights of detainees in
24 the prison context.

25 And the Court has stated that Bell does

1 apply to the excessive force claims of pretrial
2 detainees and it makes perfect sense because, like a
3 prison policy that goes too far, it's easy to see how
4 a use of force can be administered as punishment.

5 JUSTICE KENNEDY: So suppose you have a
6 detainee being held in a prison population. And --
7 is -- is your point that the prisoners can be punished,
8 but the detainee cannot be?

9 MS. WARD: That's correct, under the --

10 JUSTICE KENNEDY: All right. Now -- now --
11 now suppose the prisoners are misbehaving. They're
12 unruly. They're yelling and throwing things at the
13 guards and the guards say, alright, lockdown for 24
14 hours; you can't go to the mess hall. Now, the detainee
15 raises his hand and says, Oh, excuse me. I'm a
16 detainee. I -- I have a different standing.

17 Is that your -- is that what has to happen
18 here.

19 MS. WARD: Yes, but -- but the problem with
20 the hypothetical is that the -- that's a legitimate
21 penological objective. So under either test, neither
22 the prisoner --

23 JUSTICE KENNEDY: That was my next question.
24 So there can be punishment for simply not -- in order to
25 maintain discipline within the prison population. You

1 can be deprived of your exercise or your right to go to
2 the mess halls. So you can, quote, "punish" for that
3 purpose, even if it's a pretrial detainee.

4 MS. WARD: If it's a pretrial detainee,
5 you -- you can discipline for -- to enforce legitimate
6 objectives. If it's a convicted prisoner, even harsh
7 conditions are --

8 JUSTICE KENNEDY: You use the word
9 "discipline;" I use the word "punish." Are they the
10 same?

11 MS. WARD: They're not the same. Punishment
12 is the end result of application of the Bell test.
13 Discipline is what happens to you if you fail to follow
14 the rules.

15 JUSTICE SCALIA: And it doesn't matter if
16 the -- if the punisher, so to speak, is simply an
17 individual guard at the prison versus the -- the State,
18 which will run a prison that it knows has these cruel
19 guards. It doesn't matter. The -- the tortification of
20 the Due Process Clause, right?

21 MS. WARD: Right. It -- it doesn't matter.
22 And, in fact, guards are probably entitled to even less
23 deference than prison administrators who are making
24 policy for the Court. In footnote 38 of Bell, the Court
25 acknowledged that -- or suggested that individual

1 instances of abusive practices might be -- the guards
2 might be given --

3 JUSTICE SCALIA: It's a substantive due
4 process you're arguing, right? Not procedural due
5 process.

6 MS. WARD: Yes.

7 JUSTICE SCALIA: And it's not the Eighth
8 Amendment. You're not relying on the Eighth Amendment?

9 MS. WARD: That's right, other than to
10 distinguish --

11 JUSTICE SCALIA: Right.

12 MS. WARD: -- what you can do with a
13 convicted prisoner versus a detainee.

14 JUSTICE KENNEDY: I just have to tell you, I
15 find it very difficult to understand how it would be a
16 different standard if these same facts occurred, but it
17 was an inmate who was serving a sentence. What -- what
18 is the rationale for why they should be different?

19 MS. WARD: The rationale for why they should
20 be different is it's a -- it's an after-the-fact
21 analysis. And the Constitution requires that detainees
22 not be punished. And it allows --

23 JUSTICE SOTOMAYOR: I'm sorry. Why is
24 anybody --

25 JUSTICE KENNEDY: But -- but you said that

1 they could be disciplined and now -- and that's --

2 MS. WARD: I think the -- I think the
3 difference --

4 JUSTICE KENNEDY: You use the -- I -- where
5 am I going to read to find a difference between
6 discipline and punishment?

7 MS. WARD: I think the difference is
8 punishment is the result of applying the Bell
9 rationally-related test. If use of force is not
10 rationally related to a legitimate objective, we can
11 define that as punishment. If the act complained of
12 fails the Bell test, objectively, we can call that
13 punishment.

14 JUSTICE KENNEDY: But even --

15 JUSTICE SOTOMAYOR: I'm having a problem
16 with trying to understand why we're talking about a
17 difference between any of the Amendments, the Fourth,
18 the Fourteenth, or the Eighth. The cruel and unusual
19 punishment, I thought, was generally -- generally
20 applicable to the sentence a prisoner receives.

21 That's very different than to the
22 application of -- of force separate from the -- from the
23 sentence. We're talking about whether and under what
24 circumstances a prison guard or a prison is liable for
25 using unnecessary force on another person.

1 I don't think that taking any prisoner and
2 for no reason -- arbitrary reason banging his head on
3 the wall because you think that'll send the message to
4 other prisoners would be acceptable, do you, under any
5 of the Amendments?

6 MS. WARD: That's correct.

7 JUSTICE SOTOMAYOR: All right. So I -- I
8 just don't quite understand the difference. I think the
9 issue is one, how -- how you instruct the jury. And the
10 government is saying you instruct the jury by saying you
11 have a subjective intent to punish the prisoner -- you
12 just want to beat him up; or you're inflicting harm
13 that's not necessary or reasonable for a legitimate
14 penological reason, correct?

15 MS. WARD: That's correct. That's correct.

16 JUSTICE SOTOMAYOR: Do you have a different
17 standard than the government?

18 MS. WARD: We do, Your Honor.

19 JUSTICE SOTOMAYOR: All right. Then yours
20 is broader.

21 MS. WARD: Well --

22 JUSTICE SOTOMAYOR: And explain why. Why is
23 the government standard not good enough?

24 MS. WARD: I misspoke. I'm sorry. I
25 misspoke. We agree with the government as to what the

1 appropriate standard is, but we disagree with the
2 government as to how the standard was improperly applied
3 in the jury instructions in this case.

4 JUSTICE SOTOMAYOR: That I -- I understand.
5 I'm just talking about the standard now.

6 MS. WARD: We -- we are in agreement with
7 the Solicitor General on the standard.

8 JUSTICE SCALIA: What if -- what if I don't
9 agree with the Solicitor? Is there anybody here to
10 argue for a different standard? No? We -- we just have
11 to pick between two people who argue for the same
12 standard, right?

13 MS. WARD: I -- I -- I believe the
14 Respondents have a different standard in mind, Your
15 Honor.

16 JUSTICE SCALIA: Yes. Okay.

17 CHIEF JUSTICE ROBERTS: Is it possible -- I
18 hadn't thought about it too much -- that you would have
19 different priorities in training, depending on whether
20 you're dealing with people who've already been convicted
21 of crimes and people who are being detained, like,
22 perhaps people who have been convicted tend to engage in
23 particular activity more than people just awaiting
24 trial?

25 MS. WARD: I think the detainees can be as

1 dangerous as prisoners. But as to your point about
2 training standards, currently, as the amici former
3 corrections officers point out, they are trained to an
4 objective standard. And it's -- it's difficult to even
5 comprehend how you would train officers in view of
6 particular subjective maliciousness element. Do you --
7 do you explain to them how they can use force as long as
8 they're not malicious, as long as they never admit to --

9 CHIEF JUSTICE ROBERTS: Well, I know -- of
10 course you're not going to say you can't act with --
11 with malice, but it would seem to me if the standards
12 are broader with respect to people who have been
13 convicted, you might tell the officers, look, you have
14 more flexibility with respect to people who are already
15 subject to a conviction. You have to be -- you phrase
16 it the other way -- you have to be more careful with
17 respect to people who are simply being detained.

18 But it's very complicated in a case like
19 this because the Respondents make a very persuasive case
20 that the convicts are actually less of a threat than
21 the -- often than the pretrial detainees. You go to --
22 you're going to go to jail if you've got 10 days on a
23 DUI or something like that, but the people who are
24 detained preconviction may be multiple murderers.

25 MS. WARD: That's certainly true. They

1 certainly may be dangerous folks who are deserving of --
 2 you know, in the prison context, if they're dangerous
 3 and -- and discipline needs to be imposed, that's --
 4 that's a possibility. The -- the question is: How do
 5 we evaluate their excessive force claims after the fact?

6 JUSTICE SOTOMAYOR: I still go back to my
 7 question: Why is there a difference at all? What you
 8 seem to be suggesting is that gratuitous violence,
 9 unnecessary violence, can be directed to pretrial and
 10 post-trial detainees. Isn't your objection that
 11 unreasonable, unnecessary force is not permissible? Why
 12 are we giving a license to prison guards to use
 13 unreasonable or unnecessary force --

14 MS. WARD: We are --

15 JUSTICE SOTOMAYOR: -- against anybody?

16 MS. WARD: I think I understand your
 17 question, Justice Sotomayor. Convicted prisoners
 18 actually can be punished. That is one of the legitimate
 19 objectives with respect to convicted prisoners.

20 JUSTICE SOTOMAYOR: But they can't be
 21 punished corporally. They can be denied good credit --
 22 good time credit. Do you think we could put them -- you
 23 can knock them against the wall as punishment?

24 MS. WARD: No.

25 JUSTICE SOTOMAYOR: Not -- not in terms of

1 discipline. It may be that some matter, immediate need
2 justifies that action, but are you suggesting that as
3 punishment they could do it for unnecessary force?
4 Unnecessary, not punishment -- or even punishment.
5 They -- they looked -- they -- they said the -- a bad
6 word to the prison officer.

7 MS. WARD: The egregious use force will fail
8 both tests.

9 JUSTICE ALITO: Well, that's what I wanted
10 to ask about. As a practical matter, in evaluating
11 excessive use of force claims, how much difference does
12 it make whether there's a purely objective standard or a
13 subjective standard. It will be the rare case, I would
14 imagine, where there's direct evidence of the officers'
15 subjective intent. So the subjective intent is going to
16 be inferred from objective factors.

17 So what -- give me an example of an excessive
18 use of force claim that would involve the unreasonably --
19 a use of force that's objectively unreasonable, but there
20 is not the subjective intent to harm.

21 MS. WARD: Mr. Kingsley's case might be just
22 such an example. It was unreasonable for him to be
23 Tased, and under our jury instructions, the jury well
24 could have found that that use of force was
25 unreasonable. But yet the subjective element that was

1 injected to our jury instructions could have made it --
 2 it could have resulted in the -- the finding for the --
 3 the verdict for the Respondents.

4 JUSTICE ALITO: Well, in a case where
 5 there's -- where the jury thinks that there was force
 6 that was objectively unreasonable, and in particular, if
 7 it's a -- if it's a 1983 claim or a Bivens claim, where
 8 the officer has qualified immunity, it doesn't seem to
 9 me that there are going to be very many cases where the
 10 difference between these two standards will result in a
 11 different outcome. Am I wrong?

12 MS. WARD: I think you are wrong. I think
 13 that juries give a lot of deference to officers. And if
 14 they can -- if they're allowed to inject their
 15 subjective good faith as part of a response to the
 16 elements for proving the -- the case by the -- by the
 17 prisoner, that would result in a lot more findings and
 18 verdicts in favor of guards, even in instances where
 19 objectively unreasonable, unjustified force is used.

20 In the - in the

21 JUSTICE GINSBURG: I don't see how you could
 22 use excessive force -- unreasonably excessive force and
 23 be acting in good faith.

24 MS. WARD: Well, there's the issue -- the
 25 issue of qualified immunity with respect to mistake of

1 law. They could believe that the law actually allows
2 for them to engage in whatever use of force that
3 they're -- that they're using, but --

4 JUSTICE KENNEDY: But no -- but we're asking
5 what the standard ought to be. We don't talk about
6 qualified immunity until we know and until the officer
7 knows the standard.

8 MS. WARD: Yes.

9 JUSTICE KENNEDY: And as of this point, I -
10 I do not know why the standard should be different for
11 convicts as opposed to pretrial detainees, other than
12 for purposes of rehabilitation. And even that has to be
13 reasonable. You want to us say that under these facts,
14 the result might be different, depending on if it's a
15 pretrial detainee or an inmate, and that's just very
16 difficult for me to understand why that should be.

17 MS. WARD: It's -- it's -- using the
18 objective test for a pretrial detainee is faithful to
19 the Constitution. It's faithful to due process. Due
20 process talks about deprivations of life, liberty, or
21 property. Deprivations are X. The Eighth Amendment,
22 which governs the use of force with respect to convicted
23 prisoners, talks about cruel and unusual punishment.
24 There's a -- there's a -- an inherently subjective
25 element to cruel and unusual punishment.

1 JUSTICE KAGAN: But -- but Ms. Ward, you've
2 said a few times that we're supposed to be looking to
3 see whether something counts as punishment. And in the
4 Eighth Amendment context, we've suggested that that term
5 "punishment" does indeed have a subjective component;
6 that it requires some kind of intent to chastise or to
7 deter. So I'm a little bit with Justice Kennedy, that
8 I'm not quite sure what the word "punishment" is doing
9 in this context, but if we're looking for punishment, we
10 have indicated that punishment is a subjective concept.

11 MS. WARD: Yes. In the Eighth Amendment
12 context, because the word "punishment" appears in the
13 Eighth Amendment, but as it's used in Bell, it's
14 referring to X. It's referring to evaluation of prison
15 policies or uses of force that go too far.

16 JUSTICE SCALIA: Yes, but you -- you -- you
17 brought punishment into this discussion. We didn't.
18 Justice Kagan didn't. Your brief is full of references
19 to punishment. You say it's punishment that's bad.
20 You -- you want to abandon all of that? That's --
21 that's not the criteria?

22 MS. WARD: No, that is the -- that is the
23 criteria.

24 JUSTICE BREYER: I don't understand it,
25 either. It seems to me that there is some circumstances

1 where a guard is trying to punish someone, but there are
2 many circumstances where a guard has something totally
3 else in mind. He's trying to keep order in the prison.
4 A policeman might try to stop a fleeing felon. That has
5 nothing to do with punishment.

6 And so what a guard -- normally, the
7 provision that governs the policeman is the Fourth
8 Amendment. I would guess that if you're talking about
9 trying to keep order in a prison, the Due Process Clause
10 may have something to do with it. This person who may
11 be awaiting a lawyer is there, his liberty confined, and
12 you cannot use excessive force.

13 I - I don't see what punishment had to do
14 with it. But I -- but I did think, and I don't know the
15 answer, but I looked it up in the Model Penal Code, that
16 either the policeman who's trying to stop someone, or
17 perhaps the prison guard who's trying to keep order,
18 cannot use excessive force.

19 Now, what is excessive force? It is force
20 that is objectively unreasonable. Now, suppose he does.
21 The next question is: Is a state of mind required? We
22 can imagine -- it would be a weird case -- but we can
23 imagine a very weird case where the force is objectively
24 unreasonable, but the policeman is totally innocent.
25 Somebody told him, that is a Taser, but it's really a

1 gun. He uses it. Objectively unreasonable. State of
2 mind, innocent. Is he liable?

3 As far as I can tell, the government thinks
4 he should be. As far as I can tell, you think he should
5 be. End of case. We just say everybody agrees. Is
6 that where we are? Because I'm rather worried about
7 holding the policeman in this weird case, where his
8 state of mind is a hundred percent innocent. What here
9 happened is that they read in a little bit of
10 culpability, the least onerous subjective intent. It's
11 called recklessness. You have to be aware of the risk.
12 So I'm rather tempted to say, yes, there should be
13 something guilty about this policeman. Now, there's
14 where I am at the moment, and I'd like you to explain
15 where I should go.

16 MS. WARD: The Fourth Amendment doesn't
17 require any inquiry into the subjective state of mind.
18 And the Fourth Amendment test, in the case of a police
19 officer on the street, does the job adequately. It
20 provides the adequate amount of deference, and it -- it
21 protects people from excessive uses of force. That same
22 analysis can do the job in the prison situation when a
23 pretrial detainee's interests are at stake as well. A
24 subjective intent element shouldn't be required of the
25 test at all, because that only comes in when there is a

1 question of cruel punishment.

2 JUSTICE BREYER: At least in a prison, I
3 would think a prison guard would have a pretty tough
4 time thinking that if this person is in prison because
5 he's been convicted of a crime, I can try to control his
6 riotous behavior as long as I reasonably believe that
7 what I'm doing is correct, even if it turns -- but now I
8 have a totally different standard, where this person's
9 in the same cell, doing the same thing, but he hasn't
10 yet had his trial. He's just there waiting for his
11 lawyer or he's been there because bail has been denied.
12 I -- I don't see how you administer such a rule.

13 JUSTICE SOTOMAYOR: Can I --

14 JUSTICE BREYER: What's the answer to that?

15 MS. WARD: It's okay for the standards to be
16 different, because it's more faithful to the
17 Constitution. It's okay for the analysis of the
18 excessive force claim in both situations to be
19 different, and -- and I will --

20 JUSTICE SOTOMAYOR: Can I -- I'm still
21 struggling because we're trying to create boxes in a way
22 that makes no sense to me. There are all sorts of
23 reasons for doing things, and the Eighth Amendment cases
24 that we have, have to do with punishment qua not
25 bringing control, not responding to a prison outbreak,

1 or a fight, or anything else, but the types of
2 conditions that are imposed on prisoners as punishment,
3 i.e., you've broken an administrative rule, and now
4 we're going to put you in shackles in the dark dungeon.

5 We've already said in one case you can't do
6 that. You may subjectively and legitimately think that
7 that will keep you constrained, but that's too far.
8 It's not -- it's unwanted and unnecessarily cruel and
9 unusual. All right?

10 MS. WARD: Yes.

11 JUSTICE SOTOMAYOR: But that's very
12 different than this situation. Whether it's a pretrial
13 detainee or post-trial detainee, I don't think the
14 Constitution gives you a free pass to punish a prisoner
15 by inflicting unwanted corporal punishment. I'm not
16 talking about the conditions of -- of punishment; i.e.,
17 good time credit, solitary confinement, segregation of
18 some sort, deprivation of a prison job you have. That,
19 clearly, you need an Eighth Amendment, sort of
20 subjective intent element.

21 I'm talking about the use of force for
22 purposes of restoring discipline. That's what this was
23 about, wasn't it?

24 MS. WARD: Yes.

25 JUSTICE SOTOMAYOR: So I keep saying why are

1 we thinking about the necessity to impose subjective
2 standards or any other standards or that they have to be
3 different?

4 MS. WARD: I see that I have used my time.

5 CHIEF JUSTICE ROBERTS: Yes.

6 MS. WARD: And can I respond --

7 CHIEF JUSTICE ROBERTS: Sure.

8 MS. WARD: -- briefly?

9 CHIEF JUSTICE ROBERTS: We'll -- we'll give
10 you an extra minute since --

11 MS. WARD: Thank you.

12 CHIEF JUSTICE ROBERTS: -- the Court
13 intruded on your time.

14 MS. WARD: Thank you.

15 The Court could decide that the standard for
16 all excessive force cases should be an objective
17 standard. I think that the -- the jurisprudence related
18 to convicted prisoners has already shut that door that
19 require -- in requiring a subjective intent element for
20 a convicted prisoner, but it's more faithful to the
21 Constitution to actually give effects to the rights of
22 detainees which are much closer to the rights of free
23 citizens because they haven't received all of their due
24 process pursuant to a legal conviction.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Bash.

2 ORAL ARGUMENT OF JOHN F. BASH

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE, SUPPORTING AFFIRMANCE

5 MR. BASH: Mr. Chief Justice, and may it
6 please the Court:

7 If there's one point I would like to convey
8 to the Court this morning which I think is responsive to
9 a number of questions that were asked in the opening
10 presentation, it's that there are two relevant
11 differences between the standard we're advancing and the
12 standard Mr. Clement is about to get up and talk about.

13 One goes to what sort of purpose is
14 required, and the other goes to how you establish that
15 purpose.

16 On the first, Mr. Clement says it is
17 malicious and sadistic intent. We say it is a punitive
18 purpose. It is clear as day in the Court's Eighth
19 Amendment cases, Farmer, Wilson, Whitley, that malicious
20 and sadistic comes from the wantonness requirement of
21 Eight Amendment, cruel and unusual.

22 He is just wrong about that. The only
23 argument he has on that -- that it should be malicious
24 and sadistic is Judge Friendly's opinion that this Court
25 cited in a couple Eighth Amendment cases. But if you

1 look at Judge Friendly's analysis -- this is on page 28
 2 of the red brief -- he very clearly says that there's a
 3 whole list of factors relevant. Malicious and sadistic
 4 is one factor. It's not dispositive, and all of the
 5 other factors are objective.

6 So I don't think you can extrapolate from a
 7 few citations to Judge Friendly that malicious and
 8 sadistic is appropriate for a due process claim for
 9 someone who has not convicted of an offense.

10 And by the way, I think --

11 JUSTICE SCALIA: This is a due process case,
 12 right?

13 MR. BASH: It --

14 JUSTICE SCALIA: It's not a Fourth Amendment
 15 case, and it's not an Eighth Amendment case; is that
 16 right?

17 MR. BASH: That's correct. Now, Justice
 18 Scalia --

19 JUSTICE SCALIA: It's just that you want to
 20 bring into the due process analysis --

21 MR. BASH: Justice Scalia, you characterize
 22 it as substantive due process, and --

23 JUSTICE SCALIA: Yes.

24 MR. BASH: -- I think a couple cases have
 25 talked about it like that, but it's not exactly

1 substantive due process. I mean, the rule this Court has
2 established is that before you go through the procedures
3 of the Bill of Rights conviction or a guilty plea and so
4 forth, you may not be punished. So it really sounds a
5 little more in procedural due process than I think your
6 question gave it credit for.

7 Now, the other point is how you establish
8 that purpose. Under the Eighth Amendment standards this
9 Court has set forth, it has interpreted cruel and unusual
10 punishment to require a degree of subjective intent.
11 Although it has used the term "punishment" to describe
12 the general legal standard under the Due Process Clause,
13 of course, that clause does not say the word
14 "punishment." What's required --

15 JUSTICE KENNEDY: And -- and your -- your
16 standard in this case as to the pretrial detainee is
17 that he is entitled to what protection?

18 MR. BASH: He is --

19 JUSTICE KENNEDY: What -- what is your
20 standard?

21 MR. BASH: It -- it's exactly what Justice
22 Rehnquist said for this Court in Bell, which is that
23 either an intent to punish, which I take to be shorthand
24 for an intent to achieve objectives that are -- are not
25 reasonable -- reasonable at that point for that person's

1 status in the system, or, objectively, there's no
2 reasonable relation between the use of force and those
3 objectives.

4 JUSTICE BREYER: Wait, wait, wait, wait.
5 The first one, that's the -- I mean, now you've run --
6 just run -- I could say the objective part has to be
7 objectively unreasonable force. Now, the question is:
8 Is there also some kind of subjective part? And at this
9 moment, it seems to me, on the one hand, you say, yes,
10 and on the other hand, no.

11 MR. BASH: No. I'm saying no on both hands.
12 It's --

13 JUSTICE BREYER: No. No. In other words --

14 MR. BASH: It -- it is --

15 JUSTICE BREYER: -- even though this man,
16 the defendant, is completely innocent, it wasn't his
17 fault in the slightest, he wasn't even negligent, the
18 guard is nonetheless liable. I can't find anywhere --
19 not even in Fourth Amendment cases could I find a case
20 where that actually occurred.

21 MR. BASH: Because, Justice Breyer, that's
22 not what we're saying.

23 JUSTICE BREYER: All right.

24 MR. BASH: I think the premise of the
25 question conflates two different types of intent. And

1 this is exactly what the court of appeals did below.

2 There's the intent to actually do the act. So if I --

3 if he had accidentally Tasered him --

4 JUSTICE BREYER: Obviously --

5 MR. BASH: -- or if --

6 JUSTICE BREYER: -- you have the intent to

7 do the act, that obviously --

8 MR. BASH: But -- but --

9 JUSTICE BREYER: -- isn't the problem.

10 MR. BASH: -- that was the premise of your

11 question about --

12 JUSTICE BREYER: No.

13 MR. BASH: -- if you think it is --

14 JUSTICE BREYER: -- it isn't. It isn't.

15 MR. BASH: Well, the Taser gun question -- I

16 mean --

17 JUSTICE BREYER: Can I ask my question?

18 MR. BASH: Yes.

19 JUSTICE BREYER: It is objectively

20 unreasonable. But it is an odd case where the policeman

21 is -- or warden or whoever, is totally reasonable in

22 thinking the contrary, and that focuses you on the

23 question of whether there is some kind of either

24 purposeful, knowledgeable, or reckless, that being the

25 weakest, requirement in respect to the use of

1 objectively unreasonable force, not the act, but knowing
2 that it is objectively or reckless in respect to. You
3 see?

4 MR. BASH: Well, let -- let me describe
5 how --

6 JUSTICE BREYER: I want to know what your
7 view is on that.

8 MR. BASH: My view is this: One, it has to
9 be an intentional act. That -- that's the less --

10 JUSTICE BREYER: Well, that's --

11 MR. BASH: And -- well, and intent --

12 CHIEF JUSTICE ROBERTS: Do you mean -- do
13 you mean -- just to -- you mean voluntary?

14 MR. BASH: Well -- well, not --

15 CHIEF JUSTICE ROBERTS: Not -- not a -- a
16 mistake with a Taser or gun?

17 MR. BASH: And it -- no. A mistake with a
18 Taser or gun would not be an intentional application of
19 force. It would be a negligent application of force.
20 And I think under Daniels v. Williams -- that's the slip
21 on the pillow case case -- that would not count.

22 The question we're asking is: What does the
23 connection have to be between that intentional use of
24 force and any legitimate penological objective?

25 And bear in mind, the officer has to know

1 all the relevant facts. So if you have an eggshell
2 prisoner who has some special medical condition that
3 nobody knows about, that's not going to bear on the
4 constitutional analysis. It's the facts that the
5 officer is aware of.

6 And I think what this Court's decisions in
7 Bell, Block, say is that an objectively unreasonable
8 deprivation of liberty violates the Due Process Clause.
9 And just as confirmation that that is an objective
10 standard in both Bell -- this at page 561 -- and
11 Block -- this is a page 585 -- the Court said there's
12 not even an allegation here that there was a punitive
13 intent or some ill intent. Therefore, we're going to
14 analyze it under an objective test.

15 And the opinion --

16 JUSTICE SCALIA: Why is this different for
17 inmates as -- as opposed to detainees?

18 MR. BASH: Because what the Due Process
19 Clause --

20 JUSTICE SCALIA: What's the test for
21 inmates? You -- you don't apply the same test.

22 MR. BASH: The -- the malicious and sadistic
23 intent test that Mr. Clement is asking you to apply to
24 pretrial detainees.

25 But remember, this would probably not only

1 apply to pretrial detainees, certainly not only
2 pretrial detainees in mixed populations. It would also
3 probably apply to immigration detainees, juveniles who
4 have not been subject to a criminal punishment, and a
5 host of other people who have not gone through the
6 rigors of the Bill of Rights, who have not been
7 convicted of a crime, and never --

8 JUSTICE KENNEDY: Do you agree that the
9 pretrial detainee can be deprived of -- of privileges
10 because of bad behavior that's disruptive to the
11 confinement?

12 MR. BASH: Yes. And that's what I was
13 getting at when I said the way that I think Justice
14 Rehnquist used the term "punishment" in the due process
15 cases is as shorthand for a deprivation of liberty in
16 the prison context that has no reasonable relation to
17 any legitimates objectives. So if it was --

18 JUSTICE ALITO: Why wouldn't -- why wouldn't
19 persons who were being arrested and persons who have
20 been convicted and are incarcerated have the same due
21 process rights as detainees?

22 MR. BASH: Because the Due Process Clause
23 permits the punishment of people who are convicted. And
24 as this Court interpreted that in the context of
25 convicted prisoners, it's that convicted prisoners may

1 be subject to harsher conditions than pretrial detainees.

2 JUSTICE GINSBURG: So it's -- so it's okay
3 to use excessive force in the case of a prisoner,
4 somebody who has been convicted? I mean, the question
5 here is did -- what did the police -- was it
6 objectively unreasonable to use the extent of force that
7 was used in this case. So are you saying that in the --
8 in the case of a convicted prisoner, that it would be
9 okay to use excessive force?

10 MR. BASH: Well, it probably almost always
11 violate the Eighth Amendment if there was an actual
12 intent to punish, and the punishment was carried out by
13 the use of force.

14 But I think often what we're talking about
15 is these cases on the margin, where the officer maybe
16 had mixed motives or whatever. And the idea behind the
17 Eighth Amendment jurisprudence is that we're going to
18 amp the standard up when you're talking about someone
19 who is subject to the penological force of the State.

20 JUSTICE KENNEDY: Can you give us an example
21 of what a guard could do to an inmate and a guard could
22 not do to a pretrial detainee, other than for
23 rehabilitation purposes?

24 MR. BASH: I don't think the use of force as
25 discipline is ever appropriate. But, you know, in a --

1 in a max prison where you only have felony convicts, I
2 think, at the margins, officers are willing to be able to
3 use slightly more force than they can with pretrial
4 detainees where people who are held, as this Court said
5 in Salerno, in regulatory detention. Admittedly --

6 CHIEF JUSTICE ROBERTS: Well, I think it's
7 pretty unusual, isn't it, to have a pretrial detainee in
8 a maximum security prison?

9 MR. BASH: No. I -- I was just trying to
10 identify for Justice Kennedy how the standard at the
11 margins might be different, so when you're talking
12 about --

13 CHIEF JUSTICE ROBERTS: And you come up with
14 a hypothetical, I think, is quite unrealistic, so I'm
15 not sure it's responsive.

16 MR. BASH: I - I didn't mean to come up with a
17 hypothetical.

18 JUSTICE SOTOMAYOR: I'm even not sure why
19 that's right. Why -- you get a free -- the Constitution
20 permits you to get a free kick in?

21 MR. BASH: That -- that's -- that is
22 certainly --

23 JUSTICE SOTOMAYOR: So if you walk by a
24 prisoner and, you know, I want to establish discipline
25 so I can freely kick them any time I want?

1 MR. BASH: That's certainly not what we're
2 saying. What we are saying is that the prohibition on
3 what officers can do to convicted prisoners is they
4 cannot punish them cruelly and unusually. And it makes
5 sense that this Court has upped the subjective intent
6 standard with respect to convicted prisoners because it
7 reflects that the constitutional prohibition is only
8 cruel and unusual punishment. Here is a --

9 JUSTICE GINSBURG: Mr. Bash, would you
10 explain? I mean, you agree that it's only the objective
11 standard, use of excessive force, but then your bottom
12 line is the same as the Respondent, that is, you think
13 that this -- this verdict should hold and it should not
14 be any new trial. Can you explain how your bottom line
15 is the same as Respondent, but your standard is the same
16 as Petitioner?

17 MR. BASH: I would take the Court to page
18 277 and 278 of the Joint Appendix, which lists the
19 pertinent jury instructions. And the -- the jury was
20 instructed to find four elements, three of them no one
21 is contesting at this stage. The third one is the key
22 element. This is on page 278. And it said, "Defendants
23 knew that using force presented a risk of harm to
24 Plaintiff, but they recklessly disregarded Plaintiff's
25 safety. If it" -- full stop there, I would agree you

1 naturally infer that, at least on this review, as
2 importing a subjective element. But then it tells you
3 exactly what recklessly disregarded Plaintiff's safety
4 means. By failing to take reasonable measures to
5 minimize the -- the risk of harm to Plaintiff. And I
6 see that as no different than the proportionality
7 standard that Bell itself requires.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Clement.

10 ORAL ARGUMENT OF MR. PAUL D. CLEMENT

11 ON BEHALF OF THE RESPONDENTS

12 MR. CLEMENT: Mr. Chief Justice, and may it
13 please the Court:

14 This Court should adopt -- adopt the
15 subjective test fashioned by Judge Friendly in Johnson
16 against Glick in addressing a due process claim for
17 excessive force by a pretrial detainee.

18 This Court has already adopted that standard
19 in the Eighth Amendment context for convicted prisoners,
20 and both doctrinal and practical reasons strongly
21 suggest that it should apply the same test in the due
22 process context in which that test originated, and the
23 contrary propositions are simply not compatible with
24 this Court's precedents.

25 JUSTICE GINSBURG: In Johnson and Glick, the

1 bottom line was that there was reliability; isn't that
2 so?

3 MR. CLEMENT: No, Justice Ginsburg. The
4 bottom line was a remand so that there could be a -- a
5 factual determination based on the Four Factor Test that
6 Judge Friendly articulated.

7 So in the lower courts, they dismissed the
8 claim. Judge Friendly recognized that the Due Process
9 Clause does provide protection, and then he articulated
10 that Four Factor Test, one important part of which is a
11 subjective factor that, I think, sensibly tries to
12 distinguish those situations where an officer is trying
13 to use force in a good faith effort to maintain order
14 and discipline and contrast that with a situation where
15 the force is being used sadistically or maliciously for
16 the very purpose of inflicting pain.

17 JUSTICE GINSBURG: But if we look at
18 this -- this case, the conduct was deliberate, using the
19 Taser was deliberate. The effect known to the officer
20 was that it would cause pain. So what subjective
21 element other than when using -- I'm deliberately using
22 force, I know it will cause pain. What beyond that?

23 MR. CLEMENT: So the question is: Is this a
24 good faith effort to try to get these handcuffs off, or
25 is this somebody who's acting simply to punish the --

1 the detainee? And I think that's what the good faith
2 test really gets to. It gets to what, I think, in some
3 respects is the nub of the issue here.

4 JUSTICE SOTOMAYOR: Well, let's put the nub
5 of the issue here. Let me give you the fact -- let's
6 use this actual situation.

7 The -- the defendant says, I wasn't
8 resisting, I wasn't spreading my arms apart, I was just
9 laying there, and they came and Tased me. All right.
10 The officers say instead he was pulling his arms and
11 resisting it so we couldn't get the handcuffs open. So
12 assuming a jury credits the Petitioner, what would that
13 do under -- how would that be evaluated under your test?

14 MR. CLEMENT: Well, I suppose that if the
15 jury actually credited Petitioner's versions of events,
16 they might be able to find liability under the John --
17 Johnson v. Glick standard. I think it's worth recognizing
18 that there was a jury trial here, and under a recklessness
19 standard, they ruled in favor of our clients, and it
20 seems to me that it would be very odd to have to have a
21 new jury trial.

22 JUSTICE SOTOMAYOR: Let's go back
23 to -- that's why I keep trying to go back to what is
24 the -- what are the -- under what circumstances and how
25 does your test get to the gratuitous use of violence or

1 the excessive use of violence where it's unnecessary?

2 MR. CLEMENT: Well, I think it gets to it in
3 a way that provides a degree of deference to the
4 difficult decisions that the guard has to make, which is
5 it recognizes that unlike the arrest context in other
6 situations, prison environment's different. There are
7 going to be lots of situations where guards are going to
8 use force and legitimately.

9 JUSTICE SOTOMAYOR: But that instruction is
10 going to be given anyway.

11 MR. CLEMENT: What's that?

12 JUSTICE SOTOMAYOR: Under -- under the Bell
13 v. Wolfish case, that presumption was given anyhow.

14 MR. CLEMENT: Well, but I -- I don't -- I
15 mean, I think there are real differences between the
16 instruction, and if you look at -- the way -- the clearest
17 way to illustrate this is if you look at Joint Appendix
18 page 78 and you look at the instruction that was offered
19 by the Petitioners below, it flat out says you can't take
20 into account the good faith intent of the officer. It's
21 irrelevant.

22 Now, I think that's perfectly appropriate in
23 a Fourth Amendment instruction where there's objective
24 reasonableness, and this Court said a bunch of times
25 that the subjective intent of the officer doesn't

1 matter.

2 But in the difficult context of a prison, I
3 think Judge Friendly got it right, I think this Court
4 got it right with respect to convicted prisoners, which
5 is you give the guard a little bit of flexibility
6 because it's a difficult situation. And if you say
7 after the fact, maybe they shouldn't have used the
8 Taser, or if, in a case where they used the Taser twice,
9 maybe they should've used it once, but not twice, those
10 questions of degree ought to be some degree of
11 deference.

12 This test allows for that. It gives a jury
13 a landing place. If they look at this in hindsight and
14 say, you know, I wish they hadn't used the Taser, but I
15 think they were doing it to get the handcuffs off. This
16 isn't a case like Hudson against McMillan where they
17 were just taking the guy out and beating him up
18 punitively. So I don't think there should be a
19 Constitutional violation here.

20 JUSTICE BREYER: Well, that's true -- you
21 know, what you say is equally true where you're running
22 a jail, isn't it? And it's equally true where the
23 person in the jail is -- has been convicted or hasn't
24 been convicted. The need for order is the same.

25 So how would it apply in a circumstance

1 where there's a claim of excessive force to someone who
2 has been convicted, but it has nothing to do with
3 punishment. No one thinks it has to do with punishment.
4 The situation was one where they were trying to maintain
5 order, or the situation was one where they were trying
6 to give medical treatment, or the situation was any one
7 of a thousand.

8 What I can't see is why the punishment
9 standard should apply whether he's been convicted or
10 not. And I also can't see why they should be different
11 whether he's been convicted or not.

12 MR. CLEMENT: Well, I think the punishment
13 standard applies in both cases, Justice Breyer, because
14 the relevant constitutional text has been interpreted to
15 require punishment. In the Eighth Amendment context --

16 JUSTICE BREYER: But suppose you brought a
17 lawsuit under the Due Process Clause? I mean -- and
18 there are instances where people are seized in jail, so
19 it was under the Fourth Amendment.

20 I mean, why is punishment in these other
21 situations? I can't figure that one out. I can't
22 figure out -- and then I looked at the Model Penal Code.
23 The Model Penal Code seems to require both excessive
24 force and some kind of state of mind, which could be
25 recklessness, which is what the judge said here or maybe

1 even negligence.

2 MR. CLEMENT: Well, obviously, if you adopt,
3 as this Court has in the Eighth Amendment context, the
4 understanding that punishment inherently requires some
5 subjective mental state, the lowest available mental
6 state is recklessness and under that standard, which the
7 jury clearly was instructed under, we would prevail. So
8 that would lead to an affirmance.

9 Now, I would still think, since it is
10 well-established that the relevant standard for
11 excessive force in cases involving convicted prisoners
12 is the Johnson v. Glick standard, I think since that's
13 established and nobody here is asking for Whitley or
14 Hudson to be overruled, and there are so many practical
15 imperatives for treating pretrial detainees and
16 convicted prisoners the same, I think this Court should
17 apply the Johnson v. Glick standard in the due process
18 claims of pretrial detainees.

19 In a subsequent case, if the Court wants to
20 reconsider what the test should be even under the Eighth
21 Amendment and apply it uniformly across pretrial
22 detainees and convicted inmates, that may make some
23 sense.

24 I also think there's some very interesting
25 questions lurking out there about what kind of objective

1 evidence of unreasonableness is enough in an Eighth
2 Amendment case, or if we prevail, a Fifth Amendment
3 case, what kind of objective evidence is enough to get
4 to the jury on the subjective intent question. I think
5 those are all questions that this Court may eventually
6 have to confront, but I think the first step in a case
7 where nobody wants to overrule Hudson and Whitley is to
8 suggest that since the imperatives that the officers
9 face with respect to pretrial detainees and convicted
10 inmates are essentially identical.

11 JUSTICE SCALIA: Why is that? Why don't you
12 tell us why that's so?

13 MR. CLEMENT: Well, I'll -- I'll tell you
14 why that's so. And it's so in these -- particularly in
15 a -- in a local jail like Monroe County, Wisconsin,
16 where you have these individuals, they're housed side by
17 side. As the Chief Justice has alluded to, in this kind
18 of jail, the only way you can serve their sentence as a
19 convicted individual is if you've been convicted for a
20 relatively minor offense. But if you're there pretrial,
21 awaiting your trial, any -- any -- any book -- any --
22 any offense in the criminal book could be your charge of
23 -- that -- where you're being held for, so it could be a
24 murderer. And I think this Court has recognized, and
25 this -- I mean, this is empirically true -- this Court

1 has recognized this empirical fact, first in Bell
2 against Wolfish, then in Block against Rutherford,
3 and -- and more recently, in the Florence County case.
4 When you --

5 JUSTICE KAGAN: Mr. Clement, sorry. There's
6 a lot to what you say that sometimes the practical
7 concerns are the same for pretrial detainees and for
8 convicted criminals. There's also something to the
9 other point of view, which is that in our cases, we've
10 consistently said that if you're a pretrial detainee, if
11 you haven't been found to have committed wrongful
12 conduct, you shouldn't be treated the same way as people
13 who have been found to have committed wrongful conduct;
14 that for the convicted criminals, it's kind of, you
15 know, we're allowed to punish them, because they've done
16 something wrong. And we haven't found that yet for the
17 pretrial detainees.

18 And so what place in your system is there
19 for that, you know, very commonsensical, and also, you
20 know, normatively attractive proposition that people who
21 haven't been found to have done anything ought not to be
22 treated with the same level of disregard for their
23 interests as people who have been?

24 MR. CLEMENT: Justice Kagan, there is a
25 place for that in the doctrine. I would submit it's not

1 in the excessive force cases. So let me tell you where
2 I think it is. I mean, Sandin against Conner is a good
3 example. There the Court said that with convicted
4 individuals, it was perfectly permissible to move them
5 from minimum security to maximum security as a punitive
6 matter, and you didn't even have to give them any
7 process to do that. I don't think that same analysis
8 would apply to pretrial detainees.

9 Another example is footnote 17 of the Bell
10 against Wolfish case, where I think it's understood that
11 at least if the statutory law provides for it, that if
12 you're convicted, you can be sent out to the work gang
13 and have to pick up trash along the highway. I don't
14 think you can do that to a pretrial detainee. But
15 whatever differences there are, I don't think they arise
16 in an excessive force context. I think if you think
17 about this Court's cases, and start with Whitley. If
18 you're trying to quell a prison riot, and you have an
19 inmate who's going up the stairs, trying to go where
20 there's an unarmed guard, it doesn't make a whit of
21 difference whether that inmate is a pretrial detainee or
22 a -- a -- a convicted individual.

23 JUSTICE KAGAN: So that might be, but let's
24 take another comparison. And the comparison is two
25 people who have been indicted for the same offense, and

1 one makes bail and he's out on the street, and the other
2 doesn't make bail, and so he is in an institutional
3 facility. And the one who's out on the street has some
4 kind of encounter with a police officer, and he reaches
5 into his pocket to take out something, and the police
6 officer shoots him. And let's just imagine that
7 circumstances are such that this is utterly
8 unreasonable.

9 And then the same -- the same person
10 indicted for the same offense, not convicted of that
11 offense, same circumstances, the police shoot him, now
12 he's not going to be treated in any respect the same
13 way. Why should that be so?

14 MR. CLEMENT: I think because the fact of
15 incarceration really is a game-changer. When that
16 person's out on bail, nobody is going to know that, so
17 he has exactly -- or she, the exact same expectations as
18 any reasonable individual. The same expectations as the
19 individual in *Graham v. Connor*, who's doing nothing more
20 than trying to buy orange juice in a convenience store.

21 There are rules that apply to that, and they
22 should be sufficient and they should be objective, and
23 that's the Fourth Amendment standard.

24 When you're in the incarceration context,
25 things are different. The margin for error for the

1 guards is quite different. The need to protect the
2 other inmates from a potentially violent person doesn't
3 have the same kind of direct analogue when something's
4 unfolding on the streets. Sometimes it can, but the
5 quarters, I think, are -- are going to be different, in
6 the main, in the incarceration context. And so I think
7 it makes sense to apply a standard that's slightly more
8 forgiving of the prison guards than of the police
9 officers.

10 JUSTICE GINSBURG: And I -- I still find it
11 very hard to understand how use of force can be excessive
12 without being at least reckless. It's -- it's confusing.
13 For excessive use of force, but yet what -- what does the
14 reckless add to it? If -- if it's an excessive use of
15 force, isn't that at least reckless by definition?

16 MR. CLEMENT: I think often it will be.
17 We're not here to defend the recklessness instruction as
18 the platonic sort of form. We actually think that
19 applying Judge Friendly's instruction from Johnson
20 against Glick is the right way to go, which we think
21 provides a little more separation between the two.

22 I don't think, though -- I mean, we can --
23 we can obviously come up with hypothetical situations
24 where there are going to be different applications. I
25 think the principal difference here is this instruction,

1 both in the Eighth Amendment context, and in the due
2 process context in Johnson v. Glick, I think it gives
3 the jury a practical landing place when they think, you
4 know, with the benefit of hindsight, I wish the police
5 -- I wish the corrections officer hadn't done that, but
6 I don't think it was completely outside of the bounds of
7 what was reasonable. I certainly don't think it's so
8 purposeless and so arbitrary that it gives rise to an
9 inference that it had a punitive motive.

10 That gives the jury kind of a reasonable
11 landing place, and I think this case is actually a
12 pretty good illustration of this. I think if you look
13 at this and you ask yourself, was it reasonable to use
14 the Taser? That's a debatable question. Was it really
15 punitive? Was it unrelated to an interest in trying to
16 get the handcuffs off? Of course not.

17 And so I do think in cases like this, it
18 gives the jury an appropriate landing place to come up
19 and make a judgment that doesn't second guess the
20 officers. And this Court has said so many times that
21 deference to prison officials is an important value.
22 And I think this test that we've proposed that, again,
23 originates with Judge Friendly in a due process case
24 gives --

25 JUSTICE SOTOMAYOR: But you're giving --

1 you're -- you're loading the deck completely, because
2 you're instructing the jury first to give the police
3 officers deference, and then you're now giving them an
4 instruction that assumes that whatever they do is okay.

5 MR. CLEMENT: I don't think so. I think --

6 JUSTICE SOTOMAYOR: I mean, there's no --
7 there's -- by adding that kind of subjective intent that
8 you want, maliciousness and wantonness, which are not --
9 are only one part, as your -- as the Assistant Solicitor
10 General said, only one part of the Johnson test.

11 MR. CLEMENT: But -- but if I -- if I
12 could --

13 JUSTICE SOTOMAYOR: You're -- you're -- the
14 way you've articulated in your brief has really loaded
15 the deck completely.

16 MR. CLEMENT: Well, in -- in fairness, and
17 to correct the Assistant Solicitor General, the
18 instruction we asked for, which is at Joint Appendix 65,
19 it has all of the Johnson factors. Now, it focuses, as
20 we think -- and that's the pattern jury instruction in
21 an excessive force case for a prisoner in the Seventh
22 Circuit, we think it gets it right, which is it focuses
23 the ultimate inquiry on this, is it a punitive intent or
24 is it a good faith effort to restore order.

25 But then if you look for the factors that

1 the jury can consider, all four -- all the rest of the
 2 Johnson factors are there. And we think that's actually
 3 the best reading of Bell v. Wolfish, too, which is to
 4 say it provides objective factors, but then it's
 5 basically asking, you can look at those objective
 6 factors and it allows -

7 JUSTICE SOTOMAYOR: Except that -

8 MR. CLEMENT: -- you to infer a punitive intent.

9 JUSTICE SOTOMAYOR: Bell v. -- Bell v.
 10 Wolfish, the first part of the application section of
 11 that opinion goes to whether there's an intent to
 12 punish. It assumes there's not, and then it goes to the
 13 objective test and says, in that particular case, that
 14 the conditions met that -- those conditions as well, but
 15 it treated it as alternative. That's --

16 MR. CLEMENT: Well, I think alternative ways
 17 to prove a punitive intent. And if you look at Bell v.
 18 Wolfish, when it talks about those objective factors, it
 19 then says, so if you have purposeless or arbitrary
 20 government action, the court may infer an intent to
 21 punish. So it's objective factors in service of what is
 22 ultimately a subjective inquiry.

23 The other thing I think that needs to be
 24 added, though, is that Bell v. Wolfish, you know, we
 25 think we win under it. But it is a test that was really

1 designed to judge some conditions questions. And we
2 think Johnson against Glick, and we think, in the -- in
3 the Eighth Amendment context, Whitley and -- and Hudson,
4 are directed at the unique dynamic that you have in
5 excessive force cases.

6 JUSTICE GINSBURG: Am I right that the
7 pattern instruction in -- in this case, the pattern
8 instruction asked only the excessive force question,
9 asked the jury to decide whether the force was excessive
10 in light of the particular facts and circumstances?

11 MR. CLEMENT: Well, okay. So there were two
12 pattern instructions, neither of which were used. There
13 was the pattern instruction which my friends wanted to
14 have, which was the Fourth Amendment pattern
15 instruction. There was the pattern instruction that was
16 the Eighth Amendment standard that we wanted to have.
17 And Judge Crabb essentially split the difference and
18 came up with this nonpattern jury instruction that asked
19 the excessive force question, and baked in this notion
20 of recklessness.

21 Now, we think obviously that the lowest
22 standard of intent that could be compatible with the Due
23 Process Clause is recklessness, and so we think you
24 should affirm if you think recklessness is the standard.
25 But in fairness, we think the most coherent way to

1 approach this issue is to apply a single unitary
2 standard to pretrial detainees and post-convicted
3 inmates when you're talking about these kind of
4 excessive force claims.

5 JUSTICE KAGAN: Mr. Clement, why not look at
6 it this way? I mean, you said -- and it's really the
7 basis of your argument -- that being in an institutional
8 setting is the game-changer. There's no doubt it's
9 important.

10 But there's another potential game-changer
11 as well, and that is this question of have you actually
12 been convicted? Has the legal system found that you're
13 a person who is a wrongdoer?

14 So if we say that both of these things are
15 important, why shouldn't we adopt a set of principles
16 that say it is -- we're -- we're looking for objectively
17 reasonable conduct, but in looking for that, of course
18 we take into account the prison circumstances. Of
19 course we take into account the context in making that
20 evaluation, so that the person on the street does not
21 necessarily come up with the same result as the person
22 in prison because the contexts are different.

23 But still, the test, the basic test is the
24 same because they are both people who have not been
25 found to have done anything wrong.

1 MR. CLEMENT: Well, a couple of responses,
2 Justice Kagan. I mean, obviously, you could try to take
3 the Fourth Amendment test and you could adjust it -- try
4 to adjust it for the prison conditions.

5 We don't think that that's going to work in
6 a way that gives sufficient deference to the prison
7 officials. We do think -- this Court has said so many
8 times they are in a unique environment. It's not
9 something that the normal jury is going to have any sort
10 of insight into. So I think if you just ask them was it
11 reasonable in hindsight, I don't think you're going to
12 get sufficient deference. So that's one reason.

13 JUSTICE KAGAN: I would think that the jury
14 would give a lot of deference to prison officials, in
15 part because they are unfamiliar with the circumstances.
16 And folks will come in and will say, you know, here's --
17 I think that there's -- that -- that that will be the
18 natural tendency.

19 MR. CLEMENT: I mean, I hope you're right
20 for the sake of my clients, but I think that tendency is
21 going to be embodied much more if you let them take into
22 account good faith. And I think that's a really
23 important way of thinking about the question here,
24 because if you look at their proposed jury instruction,
25 at JA 78, it's the one thing the jury is told they can't

1 take into account, is whether there was good faith. And
2 that does not seem particularly productive.

3 Another point you made was that, you know,
4 there is this difference that these individuals are --
5 have not been convicted. And I do think that's
6 important, and I've talked about a couple of instances
7 where I think that that makes an outcome-determinative
8 difference.

9 But you also have to take into account that
10 the Bell decision itself said the presumption of
11 innocence has nothing, really, to do with this. And I
12 think that was a reflection of the reality that when
13 the -- an institution is trying to deal with pretrial
14 detainees and inmates, it's not dealing with different
15 entities.

16 Another thing I'd like to say about Bell v.
17 Wolfish is I do think it's an analysis that applies most
18 readily to conditions cases. And there are a number of
19 cases we cite in footnote 9 of our red brief involving
20 the lower courts' applications of various tests
21 requiring subjective intent. There's a D.C. Circuit
22 case called Norris against the District of Columbia. I
23 paid more attention on rereading it because I noticed
24 that Justice Ginsburg had written the opinion.

25 It's decided in 1984, and I think it's

1 actually quite instructive because in 1984, the D.C.
2 Circuit had the benefit of Bell v. Wolfish. It also
3 had the benefit of Johnson against Glick. And when it
4 confronted an excessive force claim, as opposed to a
5 conditions claim, the D.C. Circuit looked to Johnson
6 against Glick and not to Bell v. Wolfish, which it
7 doesn't even cite, to provide the relevant standard.

8 And I think that just shows that
9 Judge Friendly got this one right. He has an analysis
10 that of course looks to objective factors in terms of
11 the amount of force used, the need for the force, the
12 relationship of the two, but also says, was this a good
13 faith effort to maintain or -- or restore order, or was
14 this something that was just sadistic and malicious with
15 the intent to cause harm?

16 My friends from the Solicitor General
17 Office, I guess, don't like the words "salist -- sadistic
18 and malicious." I looked them up. I mean, they sound
19 kind of rough, but they actually -- you know, Judge
20 Friendly got that right, too. I mean, they're words
21 that basically mean exactly what he said in the rest
22 of the sentence --

23 JUSTICE KAGAN: But if you really --

24 MR. CLEMENT: -- which is there's no
25 intent --

1 JUSTICE KAGAN: -- if you really --

2 MR. CLEMENT: -- other than to cause harm.

3 JUSTICE KAGAN: -- want to take the
4 Judge Friendly test -- and I guess you've talked about
5 this before, but it is a multifactor test where the
6 question of sadisticness is counting as a plus factor,
7 a thumb on the scales. But it's clear under that test
8 that even if that sadistic quality isn't there, it's
9 still allowable to hold the prison official to have
10 violated the law.

11 MR. CLEMENT: I -- I don't think that's the
12 right reading of it, which is I think the ultimate
13 question under that test, and that's certainly the way
14 it's been applied by this Court in the Eighth Amendment
15 context, and you see that in this pattern jury
16 instruction that we propose.

17 The ultimate test is, is this a good faith
18 effort to maintain order, or is this an effort to
19 inflict punishment just for the sake of punishment? And
20 then the rest of the factors inform that as, of course,
21 they always would.

22 And I think one way of thinking about the
23 question before the Court in this case is that this
24 Court has already borrowed the -- the Johnson v. Glick
25 factors that were due process factors -- they've already

1 borrowed them and used them in the Eighth Amendment
2 context.

3 And the question in this case is should they
4 take that due process test and apply it in a due process
5 case? And that doesn't sound like a difficult question,
6 and I really don't think it is. I think this Court got
7 it right in Hudson and Whitley. You think about those
8 cases. Whitley, it wouldn't matter whether or not that
9 individual going towards an unarmed guard was pretrial
10 or post-conviction. But in Hudson it's the opposite. I
11 mean, Hudson is this case where you have somebody who is
12 singled out for a punitive beating in response to an
13 altercation with the guard.

14 Again, it makes no difference. That's not
15 acceptable behavior, whether or not they are an inmate
16 who's been convicted or pretrial detainee. Applying one
17 test to both of these very similar individuals seems to
18 be the appropriate response.

19 If there are no further questions.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Ms. Ward, 4 minutes.

22 REBUTTAL ARGUMENT OF WENDY M. WARD

23 ON BEHALF OF PETITIONER

24 MS. WARD: Thank you.

25 Justice -- Justice Kagan got it exactly

1 right. The institutional setting is not the
2 game-changer. The game-changer is the fact of lawful
3 conviction pursuant to due process. That's -- that's
4 the -- the dividing line between the right test and the
5 wrong test.

6 Justice Ginsburg also was looking at
7 recklessness in our jury instructions, and you -- you got
8 it right also. Disregard -- reckless disregard of
9 someone's rights has no place in a jury instruction that
10 should be objective.

11 And I want to step through the jury
12 instructions because we part ways with Mr. Bash on the
13 jury instructions in particular. If you look at -- part
14 of the confusion comes in in the three different uses of
15 recklessness in the jury instructions, as the dissent
16 below noted. There's three different ways that
17 recklessness is used.

18 If you look at 277 of the Joint Appendix,
19 the first use of recklessness is that force is applied
20 recklessly. Well, here we're asking whether force is --
21 force is less than deliberate if you look at how force
22 applied recklessly is -- is used in Farmer, for example,
23 deliberate indifference. You're looking at -- you're --
24 you're conflating deliberate indifference with a
25 deliberate act. That's confusing.

1 And Question No. 1 of the special verdict
2 questions, excessive force means force applied
3 recklessly that is unreasonable. So the -- again, this
4 is what I was talking about, force applied recklessly;
5 that's also not deliberate.

6 And then the -- the plaintiff is required to
7 prove each of the following factors by a preponderance
8 of the evidence. Factor 2 is the reasonableness test.
9 Factor 3, which is in addition to the reasonableness
10 test, is reckless disregard of plaintiff's safety, which
11 is, again, a different use from acting recklessly.
12 And -- and it's that reckless disregard for plaintiff's
13 safety language that the Court said in Farmer was
14 unquestionably related to a culpable state of mind.

15 And then if there's any question about
16 whether reckless in our jury instructions were related
17 to a bad intent, the third use of recklessness, which is
18 on 278 about halfway down the page, acted with
19 recklessness disregard of plaintiff's rights. The jury
20 instructions defined that specifically not in the -- the
21 special verdict itself, but in the -- the instruction on
22 punitive damages, which is found on page 281, where the
23 court said to the jury that an action is in reckless
24 disregard of plaintiff's rights if, under the
25 circumstances, it reflects complete indifference to the

1 plaintiff's safety or rights. If you find that
 2 defendant's conduct was motivated by evil motive or
 3 intent, unquestionable bad intent related to that
 4 element of reckless -- or that version of recklessness
 5 that was used in the jury instructions.

6 If the Court has no further questions.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
 8 The case is submitted.

9 (Whereupon, at 11:01 a.m., the case in the
 10 above-entitled matter was submitted.)

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