No. _____

In The
Supreme Court of the United States

MATTHEW ANDERSON,

Petitioner,

v.

LIEUTENANT JOHN BONNEWELL,
SERGEANT BRUCE TAYLOR, AND
CORRECTIONAL OFFICER EDGAR VERDE,

Respondents.

On Petition For A Writ Of Certiorari
To The Delaware Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a trial court can disregard the five factors set forth in *Whitley v. Albers*, 475 U.S. 312 (1986), in an Eighth Amendment excessive force case in favor of deferring solely to the correctional officers' perception of the incident and insist upon direct evidence that the officers had the specific intent of malice and sadism.

2. Whether a trial court can consider a video of a beating of an inmate in a prison, which the trial court expressly acknowledges has limitations, in order to reject the inmate's account of what happened to him for purposes of summary judgment in an Eighth Amendment excessive force case when, at the time the footage was taken, he was covered in a "scrum" of correctional officers and another correctional officer's body blocked parts of the camera's view of the incident.

PARTIES

Petitioner Matthew Anderson ("Petitioner" or "Anderson") is a natural person and a citizen of the United States and the State of Florida. On February 9, 2015, he was incarcerated at the Sussex County Violation of Probation Center ("SVOP") in Georgetown, Delaware.

Respondents Lieutenant John Bonnewell ("Bonnewell"), Sergeant Bruce Taylor ("Taylor"), and Correctional Officer Edgar Verde ("Verde") are natural persons and citizens of the United States and the State of Delaware. On February 9, 2015, all three were working as correctional officers at the SVOP facility in Georgetown, Delaware.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a natural person and citizen of the United States.

RELATED PROCEEDINGS

Superior Court of the State of Delaware:

Anderson v. Bonnewell, et al., C.A. No. N17-02-080 FWW (Aug. 19, 2019) (order granting summary judgment).

Delaware Supreme Court:

Anderson v. Bonnewell, et al., Case No. 394, 2019 (Apr. 16, 2020) (order affirming Superior Court's grant of summary judgment).

RELATED PROCEEDINGS – Continued

Anderson v. Bonnewell, et al., Case No. 394, 2019 (May 5, 2020) (order denying Motions for Reargument and Rehearing *en Banc*).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew Anderson respectfully petitions for a writ of certiorari to review the judgment of the Delaware Supreme Court in this case.

OPINIONS AND ORDERS BELOW

The Order of the Delaware Supreme Court, affirming the decision of the Superior Court of the State of Delaware to grant summary judgment to all of the Respondents, was entered on April 16, 2020. Its citation is *Anderson v. Bonnewell*, 228 A.3d 139, 2020 WL 1910488 (Del. Apr. 16, 2020) (TABLE), *rehr'g en Banc denied* May 5, 2020. It is reproduced at 1a. Petitioner's Motions for Reargument and Rehearing *en Banc* to the Delaware Supreme Court were denied on May 5, 2020. There is no separately reported decision, but the Order is reproduced at 25a. The Superior Court for the State of Delaware granted summary judgment to all three Respondents via a verbal ruling, which was handed down in a telephonic hearing and transcribed by a court reporter, on August 19, 2019. That ruling is unreported, but it is reproduced at 8a.

JURISDICTION

The Delaware Supreme Court's order, of which Petitioner seeks review, was entered on April 16, 2020. The Delaware Supreme Court denied reargument and rehearing *en Banc* on May 5, 2020. Pursuant to this

Court's Rule 13.3 and the Court's Miscellaneous Order of March 19, 2020, regarding the COVID-19 pandemic, this Petition is timely. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case presents important questions of federal law regarding excessive force claims against law enforcement at a time when our national attention is focused on these issues. Law enforcement-involved violence has been prevalent in the national conscience over the last few years. In addition to media attention and criminal charges, victims of law enforcement-involved violence have filed civil lawsuits asserting violations of civil rights. Most of the attention is on police-related violence and excessive force. But correctional officer-related violence and excessive force deprives inmates of their Constitutional rights. Understandably, inmates' claims of excessive force are subject to a higher standard as the nature of their claim turns upon the Eighth Amendment rather than the Fourth Amendment. Thirty-four years ago, this Court set forth the test for these claims in *Whitley v. Albers*, 475 U.S. 312 (1986). The Delaware Supreme Court, however, misapplied this test to the point of creating an entirely new test for Eighth Amendment excessive force claims. Compounding that miscarriage of justice, the Delaware Supreme Court erroneously expanded this Court's decision in *Scott v. Harris*, 550 U.S. 372, 378 (2007), and contradicted Circuit Courts of Appeals by relying on a video the Delaware Supreme Court acknowledged had limitations to ignore Petitioner's

account of events and grant summary judgment to Respondent-correctional officers. The Delaware Supreme Court's ruling ignored the "humanity underlying the Eighth Amendment" and denied Petitioner his right to a trial by jury. *Woodson v. N.C.*, 428 U.S. 280, 304 (1976).

A. Factual Background

Petitioner Anderson was serving a term of incarceration at the SVOP facility on February 9, 2015, for a violation of probation. On the day prior, February 8, 2015, Petitioner had been written up by Respondent Bonnewell for having contraband. Petitioner had also been written up recently for being in the shower during count. Because of these two infractions, Petitioner was concerned he was going to lose his job at SVOP.

On the afternoon of February 9, Petitioner was in a line of inmates walking down the main hallway of SVOP to the chow hall. Petitioner saw Bonnewell approaching him, walking in the opposite direction. Petitioner raised his hand and said, "Hey yo, Lieutenant Bonnewell, can I speak to you for a second?" He wanted to apologize for the previous write-ups and ask about his job. Bonnewell stopped and looked at Petitioner across the hall. Bonnewell said, "Hey yo? Who the fuck do you think you are talking to, boy?" Petitioner turned around and faced the chow hall without saying anything.

Bonnewell then proceeded down the hallway. Petitioner then turned around and said, "You don't have to talk to me that way, you know." Bonnewell spun around, aggressively rushed up the hallway, and got in Petitioner's face and began yelling at him. Bonnewell told Petitioner, "I own you, boy," and "I'll fuck you up," while standing right in Petitioner's face. Petitioner acknowledges he responded in kind by saying, "you're not going to fuck up anything" or "you don't own anything." At one point during the exchange, Bonnewell called Petitioner a "cock sucking faggot."

While Bonnewell was in Petitioner's face, Respondent Taylor arrived. Taylor was similarly yelling in Petitioner's face that Taylor would "fuck up" Petitioner and that he "owns" Petitioner while spitting in Petitioner's face. Petitioner responded they were not going to "fuck up" anything and that they did not "own" anything.

Bonnewell and Taylor created a triangle formation around Petitioner. Bonnewell and Taylor started encroaching on Petitioner, which caused him to back up. Bonnewell and Taylor also pointed down the hall, away from the chow hall, telling Petitioner to go stand on the "footprints." The "footprints" are an area of SVOP where inmates go to stand. Bonnewell stated he did not think another level of force – such as pepper spray – was necessary because he felt Petitioner was going to comply. After being backed up at least two steps, Petitioner turned to his right to comply with Bonnewell and Taylor's orders.

Before Petitioner could complete his turn to go down the hallway and comply, Respondent Verde ran out of the chow hall, grabbed Petitioner around the neck and shoulder area, and dragged Petitioner to the ground. Verde claims that Petitioner was "blading," or taking a fighting stance, when Verde came upon the scene. Verde's attack surprised Petitioner, and everything was a blur after that. As he went to the ground, Bonnewell shot pepper spray directly into Petitioner's face at close range. The video of the event shows Petitioner grabbing for his eyes after he is sprayed with the pepper spray, which is not an uncommon reaction. Petitioner had three correctional officers on him dragging him to the floor.

Respondent Bonnewell was near Petitioner's head through most of the beating while Petitioner was on the ground. Respondent Taylor was on Petitioner's right side with his weight on Petitioner. Respondent Verde started on the right side of Petitioner near his shoulder with his knee in Petitioner's back and ended up near Petitioner's head. The video shows the three Respondents surrounding Petitioner's upper torso as he laid on the ground. The Respondents had his right arm, and Petitioner was trying to use his left arm to protect his face from the beating. Petitioner was on the ground and not resisting or fighting, but Respondents were still hitting him. He was scared he was going to die. At some point, a fourth correctional officer arrived on the scene from another part of the facility and held down Petitioner's legs and feet. Respondents assert Petitioner was resisting while on the ground.

While Petitioner still had one hand protecting his face, the officers yelled at Petitioner to give up his arm. Petitioner responded he would give up his arm and asked them to stop beating him. They only ordered him to give up his arm once, and he complied; there was not a significant struggle for Petitioner's arm. The officers agreed to stop beating him. Petitioner removed the hand protecting his face. The officers twisted his wrist, and his head came off the ground, so they slammed it back onto the ground multiple times. Respondents deny slamming his head on the ground, but Petitioner had injuries to his head following the beating. Respondents continued to punch and knee Petitioner in the face after he was cuffed, pepper sprayed, and held down by multiple officers. Verde admitted striking Petitioner with his knee at least once, though he denies it was a strike to Petitioner's head. Much of what occurred on the floor is not on the video due to the camera angle and the officers around Petitioner when he was on the ground. Also, a fifth officer stands between the camera and the pile of men on the floor on two separate occasions. But the video shows the men on the ground moving up and down, which a fact finder could believe was the officers punching, kicking, and kneeing Petitioner. Ultimately, Petitioner was escorted in handcuffs to medical. A puddle of blood was left on the floor where Petitioner was laying. Bonnewell testified it was "reasonable to say" the blood came from Petitioner.

Following the attack, Petitioner was taken to medical at SVOP. He had injuries to his face, head, and

wrist. He had a black eye. These injuries were photographed on the day of the beating, and these photographs were part of the lower courts' records. While in a cell following the beating, Petitioner saw the correctional officers high-fiving each other. Petitioner's medical needs continued, and he was ultimately sent to the infirmary at the neighboring Sussex Correctional Institute.

B. Proceedings Below

On February 8, 2017, Petitioner Anderson filed his Complaint in the Superior Court of the State of Delaware alleging state law claims of assault (Count I), battery (Count II), and intentional infliction of emotional distress (Count III), as well as a claim for excessive force under 42 U.S.C. Section 1983 for violations of the Eighth Amendment to the United States Constitution and Article I of the Delaware Constitution (Count IV), and conspiracy (Count V).

Following discovery, all three Respondents moved for summary judgment individually. By agreement, Petitioner filed one "omnibus" Answering Brief. On brief in response to the Respondents' motions for summary judgment, Petitioner presented evidence on each of the five factors set forth in *Whitley*. Petitioner highlighted the disputes of fact that existed on each of those factors and argued it was not the Court's role to weigh those factors at summary judgment. Petitioner argued on brief that no express intent was necessary for an excessive force claim under the Eighth Amendment.

Petitioner also argued on brief that the video of the incident did not blatantly contradict his account of events.

Oral argument was heard on Friday, August 16, 2019, before the Superior Court. Petitioner argued at oral argument that while the standard is "malicious and sadistic," there are five factors to examine and those factors had been reaffirmed by this Court and the Third Circuit. Petitioner reiterated from his brief that no express intent was necessary. Nonetheless, Respondent Taylor's counsel argued that Petitioner's use-of-force expert, Martin Horn ("Horn"), could not speak to Respondents' intent and Respondent Verde's attorney argued Horn could not testify as to Verde's perception. Petitioner countered that Horn testified that Verde's actions were unreasonable. Even Respondents' use-of-force expert reluctantly agreed Verde's perception could have been unreasonable. Petitioner argued there is no way to dispute what was going through an officer's mind at the time. The Superior Court and Petitioner engaged at length about the role of Respondents' perception in the analysis, and Petitioner argued the officers' perception comes into play in the fourth factor under *Whitley*. Petitioner argued it is not the determinative/dispositive factor. Finally, Petitioner reaffirmed that the video did not blatantly contradict his position, especially about Petitioner being struck while all the men were on the floor.

The Superior Court issued its decision orally on Monday, August 19, 2019, and granted all of the Respondents' individual Motions for Summary Judgment.

The Superior Court held that the Section 1983 claim was barred by qualified immunity because there was no Constitutional violation. (18a.) The Court acknowledged the video, including its limitations, but used it to determine that "no reasonable jury could believe" Petitioner's account:

> Court [sic] has the benefit of a video recording of the incident which the Court finds very helpful in resolving the motions. The video does have its limitations, however. Chief among them are that there is no audio and the video only shows the altercation from a single angle. Nonetheless, the video clearly shows certain things occurred.
>
> To the extent that anything the Court describes as facts shown by the video conflicts with the allegations of the plaintiff, the Court has determined that the video blatantly contradicts the plaintiff's version such that no reasonable jury could believe it.
>
> The relevant portion of the video last [sic] approximately a minute and a half and shows the following:
>
> * * *
>
> Lieutenant Bonnewell appears walking to the right side of the hallway in the opposite direction of the line of inmates and on the opposite side of the hall.
>
> The plaintiff makes a gesture with his left hand and arm in what appears to be an attempt to get Bonnewell's attention. The

defendant's [sic] left arm is slightly raised and his thumb and forefinger are extended, but the motion does not appear to be done in an aggressive manner.

The plaintiff appears to say something to Bonnewell. Bonnewell stops and says something to the plaintiff who then turns his head to face forward towards the front of the line. Bonnewell is at this time several feet away from the plaintiff and on the opposite side of the hallway.

Bonnewell then continues on his way for about another six or seven paces or about 15 to 20 feet. The plaintiff turns and, again, appears to speak to Bonnewell as Bonnewell is walking away. Bonnewell turns and walks back to the plaintiff quickly.

This time, unlike the first time when Bonnewell was on the opposite side of the hallway as the plaintiff, Bonnewell appears – approaches the defendant [sic] and stands directly in front of him with his face inches from the plaintiff's face.

At this point Sergeant Taylor comes into view from the same direction as Bonnewell had been walking behind Bonnewell's left side and stands shoulder to shoulder with him as both men point past the plaintiff – point past the plaintiff with their hands.

Bonnewell with his right hand and Taylor with his left. Does [sic] not appear to be disputed that they're pointing to something

called the footprints which is an area out of view of the camera where inmates are sometimes directed to stand.

Plaintiff takes a step or two back and starts to turn his body. His left hand is closed as it had been ever since Bonnewell stopped to say something to the plaintiff the first time. Correctional Officer Verde then enters the video coming from the same direction and on the same side of the hall as the other two officers.

Verde enters approximately ten seconds after Bonnewell turns to reengage the plaintiff. Verde enters quickly, but not at a run and starts to tackle the plaintiff with Verde's left hand and arm reaching over plaintiff's left shoulder in the neck area. All three officers and the defendant [sic] go to the ground after about five seconds of struggle with the defendant [sic] initially going to his knees in what might be described as a fetal position.

A fourth correctional officer joins with the defendants and an active struggle ensues for about 20 to 25 seconds. Ultimately the plaintiff is handcuffed on his feet and walked away after 30 to 35 seconds or so.

The entire incident where any physical force was used is just over a minute in duration. During the struggle, Bonnewell appears to spray something, cap stun, in the plaintiff's face, but at no time did the Court see any correctional officer kick or punch the plaintiff.

Physical force in the video shows the plaintiff being tackled with defendant Verde initiating that action and then a bit of a scrum until the plaintiff was handcuffed, the four officers and the plaintiff on the ground.

* * *

Claims 1983 and related 1985 claims are based on an allegation that his eighth amendment [sic] right to be free from cruel and unusual punishment was violated by the defendants' use of excessive force. That issue turns on whether the force was applied in good faith – in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Much argument has been devoted to what has been referred to as the Whitley factors set out in Whitley V [sic] Albers, 475 U.S. 312 and the Court has considered those factors in making its decision.

Court [sic] also focuses on different language in Whitley found that [sic] 321 and 322 which reads prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices in that their judgment needed [sic] to preserve internal order and discipline and to maintain institutional security. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates just as it does to prophylactic or preventative measures intended to reduce the

incidents of these and any other breaches of prison discipline.

It does not insolate [sic] from review actions taken in bad bath [sic] for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment of [sic] that of officials who have made a considered choice. Accordingly, in ruling on a motion for a directed verdict in such a case as this . . . and as in motions for summary judgment motions for directed verdict, view the evidence and the inferences in a light most favorable to the non-moving party. [sic]

Courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives.

Unless it appears that the evidence viewed in a light most favorable to the plaintiff will support a reliable inference of wantonness and the infliction of pain under the standard we have described, the case should not go to the jury.

Only if ordinary errors of judgment could make out an eighth amendment [sic] claim would this evidence in Albers create a jury question.

* * *

The Court views [Petitioner's expert] Mr. Horn's opinions and the inferences to be drawn from it in the light most favorable to

the plaintiff. If this were a standard of care case in a different context, it would clearly be enough to defeat summary judgment, but this is an eighth amendment [sic] cruel and unusual punishment case involving a malicious or sadistic standard. Not only does Mr. Horn offer no opinion on that score, the video refutes it. It shows zero kicking, punching and other malicious and sadistic acts of violence, if that was the purpose to inflict injury. In reality, apart from Officer Verde's take down, which I'll address later, it shows nothing more than the force necessary to cuff an uncooperative inmate.

As to the particular defendants, Bonnewell gets into the plaintiff's face and joins in the take down once it is occurring and participates in the scrum including cap stunning the plaintiff. None of this amounts to malicious and sadistic behavior for the purpose of inflicting pain.

Taylor does even less and Horn recognizes that. Verde initiates the take down, but while the use of that force might be questioned, that clearly falls within what Whitley says is a dispute of the reasonableness of the use of force or the existence of arguably superior alternatives.

The Court finds, one, that the use of force did not violate the eighth amendment [sic]. And, two, that the defendants are entitled to qualified immunity because there is no violation to a constitutional [sic] right.

> Therefore, the motions for summary judgment as it relates to the 1983, 1985 claims which are four and five in the complaint [sic] are granted.

(11a – 18a.)

Petitioner timely appealed the Superior Court's decision to the Delaware Supreme Court on September 17, 2019. On brief, Petitioner argued: (a) the Superior Court erred by resolving disputes of fact, weighing evidence, and granting too much deference to the correctional officers' perceptions; (b) nothing in the Eighth Amendment standard required direct or specific evidence that Respondents acted with malicious or sadistic intent as that was the function of the *Whitley* factors; and (c) the video did not blatantly contradict Petitioner's account of events. There was no oral argument. The Delaware Supreme Court, in its ruling on April 16, 2020, stated it "determined that the judgment of the Superior Court should be affirmed on the basis of and for the reasons assigned by the Superior Court in its August 19, 2019 telephonic hearing." (1a.) That was the extent of the Delaware Supreme Court's reasoning.[1] In ruling upon Petitioner's subsequent motion for rehearing *en Banc*, the Delaware Supreme Court stated "it appears that the motion for rehearing *en*

[1] Because the Delaware Supreme Court did not write separately and only adopted the reasoning of the Delaware Superior Court, Petitioner will refer to the Delaware Superior Court's decision as the decision on review. Petitioner ascribes that decision to the Delaware Supreme Court throughout this Petition as it was essentially adopted by reference.

Banc is without merit and should be denied" on May 5, 2020. (25a.)

The Delaware Supreme Court rejected Petitioner's arguments that disputes of fact, particularly with whether force was necessary at all, given that Respondent Bonnewell testified Petitioner was complying, and whether Respondent Verde behaved reasonably when he came upon the scene and saw the other two Respondents backing Petitioner up toward a wall, precluded summary judgment. The Delaware Supreme Court likewise ignored Petitioner's arguments that the focus on the officers' perceptions was wrong in light of the *Whitley* factors. Finally, the Delaware Supreme Court considered video evidence – that by its own admission had its limitations and was blocked during parts of the most relevant portion of the incident – to construe facts against Petitioner and grant summary judgment to Respondent-correctional officers in an Eighth Amendment excessive force claim.

Certiorari is warranted and necessary to correct these significant errors for important federal questions.

REASONS FOR GRANTING THE PETITION

A. The Decision Under Review Cannot Be Reconciled With This Court's Decision in *Whitley v. Albers* or the Recent Decision of the Seventh and Ninth Circuit Courts of Appeals.

This Court, through its decisions and precedent, has attempted to strike the correct balance between the ability of law enforcement – particularly correctional officers – to do their jobs, which admittedly can be dangerous, and the ability of inmates to hold those same correctional officers accountable when their actions go too far. The Delaware Supreme Court's decision, however, upset that balance and tipped the scale too far in favor of correctional officers, thereby depriving Petitioner of his civil rights. In so doing, the decision under review contradicts holdings by the Seventh and Ninth Circuits and exposes a Circuit split with the Eighth Circuit.

The Delaware Supreme Court jettisoned the five factors set forth in *Whitley v. Albers* used to determine the subjective prong of an Eighth Amendment excessive force claim in favor of focusing on what the correctional officers on the scene perceived. This misapplied *Whitley* and essentially created a new test for excessive force claims under federal law. As this Court ruled in *Whitley*, when a convicted inmate claims he was subjected to excessive force in prison under the Eighth Amendment, the question "ultimately turns on 'whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and

sadistically for the very purpose of causing harm.'" *Whitley*, 475 U.S. at 318, 320. This Court announced five factors to consider when engaging in this inquiry: (1) "'the need for the application of force[;]'" (2) "'the relationship between the need and the amount of force that was used[;]'" (3) "'the extent of injury inflicted[;]'" (4) "the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them[;]" and (5) "any efforts made to temper the severity of a forceful response." *Id.* at 321 (internal citations omitted).

In addition to giving more weight to the perceptions of Respondents, the Delaware Supreme Court's ruling emphasized that Petitioner's use-of-force expert, Horn, could not opine on the "score" of Respondents acting "maliciously and sadistically." This is not the standard.

1. The Decision Conflicts With the Seventh Circuit's Holding that the *Whitley* Factors Are the Test for the Subjective Component of an Excessive Force Claim Under the Eighth Amendment.

The Delaware Supreme Court's focus was not consistent with the express language of *Whitley*, the purpose of *Whitley*, or applications/interpretations of *Whitley* over the intervening 34 years. The five factors of *Whitley* are used to determine whether a particular defendant acted "'maliciously and sadistically for the very purpose of causing harm.'" *Whitley*, 475

U.S. at 320-21. The Delaware Supreme Court specifically acknowledged it gave the *Whitley* factors short shift in favor of deference to Respondents:

> Much argument has been devoted to what has been referred to as the Whitley factors set out in Whitley V [sic] Albers, 475 U.S. 312 and the Court has considered those factors in making its decision.
>
> Court [sic] also focuses on different language in Whitley found that [sic] 321 and 322 which reads prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices in that their judgment needed [sic] to preserve internal order and discipline and to maintain institutional security.

(App. at 12-13.)

Petitioner presented sufficient evidence on every single element of the five-part *Whitley* test. Petitioner produced expert testimony from a former Commissioner of Prisons for the Commonwealth of Pennsylvania and of New York City, Horn, that the initial use of force by Respondent Bonnewell was unjustified because he escalated rather than deescalated the situation. His conclusion was that everything that flowed from the initial encounter was therefore excessive. Horn opined that Respondent Verde's take down of Petitioner was excessive and the other Respondents engaged in excessive force by joining the take down when they knew how the incident began. Respondent Bonnewell even testified he thought no force was

needed prior to Respondent Verde's take down because Petitioner was going to comply with his verbal commands. Verde failed to evaluate the situation and instead went hands-on. Anderson suffered serious injuries to his face and head, back, shoulder, and neck. As to the fourth factor, Horn testified that, from the perspective of a reasonable correctional officer, Petitioner posed no threat to safety. He further testified Respondents' actions increased the risk of harm. On the fifth factor, Horn opined all officers had alternatives that would have tempered rather than heightened the situation. Finally, in addition to all of the evidence regarding the five *Whitley* factors, Petitioner presented evidence that the Respondents were high-fiving one another after the incident, that Respondent Taylor testified about using force against inmates who were "showing off," and that Petitioner had been recently written up by Respondent Bonnewell. Notwithstanding these abounding factual disputes, the Delaware Supreme Court affirmed the grant of summary judgment by giving undue deference to Respondents.

The decision on review directly conflicts with the recent Seventh Circuit decision in *McCottrell v. White*, 933 F.3d 651 (7th Cir. 2019). The district court granted summary judgment to the defendants because the plaintiffs "lacked evidence that the officers' use of force was wanton or unnecessary" and because the defendants believed indoor gun "shots were necessary and reasonable given that prison fights escalate quickly and inmates sometime use makeshift weapons." *Id.* at

660-61. The Court of Appeals reversed the district court's grant of summary judgment and expressly stated the five-factor *Whitley* test is "***the controlling test for determining intent when more than de minimis force is applied in a prison disturbance***." *Id.* (emphasis added). The decision on review did not follow *Whitley*'s controlling test and is therefore in conflict.

As recounted above, there were material disputes of fact on each of the five factors of the controlling *Whitley* test. To that end, the decision on review further conflicts with the Seventh Circuit's *McCottrell* decision. The Seventh Circuit, on *de novo* review, walked through each of the five *Whitley* factors, ultimately concluding "virtually every factor in the Supreme Court's five-part test" contained genuine issues of material fact precluding summary judgment. *Id.* at 670. Acknowledging *Whitley* requires granting deference to prison officials during disturbances, the Seventh Circuit concluded that a jury had to determine whether the shots were fired while the fight in the chow hall was ongoing and why the officers used the force they chose to use. *Id.* at 671. The Seventh Circuit correctly realized that giving deference to prison officials does not mean throwing out the *Whitley* test. But that is precisely what the Delaware Supreme Court did by ignoring, most acutely, the reasonableness of Respondent Verde's actions when he came upon the scene and took Petitioner to the floor. Central to this case – just as it was in *McCottrell* – is whether the use of force was warranted and why the officers used the force they did.

The Delaware Supreme Court even recognized that whether Petitioner was taking a fighting stance – perhaps the key factual determination as to whether Respondent Verde acted reasonably – was "debatable." (23a.) The decision on review and *McCottrell* are in direct and irreconcilable conflict. Certiorari is necessary to correct this error of federal law and resolve the conflict.

2. The Decision Conflicts With the Ninth Circuit's Holding that "Sadism" or "Masochism" Are Not Separate Elements an Excessive Force Claim that Plaintiff Must Prove Under the Eighth Amendment and Illustrates a Circuit Split of Authority.

Relatedly, the Delaware Supreme Court's misapplication of *Whitley* did not end with its five factors. Petitioner argued, following *Whitley*, that "***[a]n express intent to inflict unnecessary pain is not required***" for an Eighth Amendment excessive force claim. *Whitley*, 475 U.S. at 319 (emphasis added). Respondents argued that Petitioner's use-of-force expert, Horn, did not opine on the "score" of Respondents acting sadistically or maliciously. Proving, through direct testimony or otherwise, that a correctional officer specifically acted sadistically or maliciously is – and has never been – the test under *Whitley*. The "maliciously and sadistically" language has always been the ultimate question, which is ascertained through the application of *Whitley's* five factors.

The Delaware Supreme Court's elevation of the phrase "maliciously and sadistically" over the five *Whitley* factors conflicts with the Ninth Circuit's recent decision and illustrates a Circuit split of authority. The Ninth Circuit recently reversed – under a plain error standard of review – a district court that gave jury instructions requiring the plaintiff show the correctional officer's use of force was sadistic. *Hoard v. Hartman*, 904 F.3d 780, 782 (9th Cir. 2018). In *Hoard*, after jury deliberations began, jurors asked for definitions of maliciously and sadistically. *Id.* at 786. Without objection from plaintiff's appointed counsel, the district court read dictionary definitions of the terms "explaining that '[t]he term 'maliciously' in the instructions has its ordinary meaning, which is 'having or showing a desire to cause harm to another.' Likewise, the term 'sadistically' has its ordinary meaning, which in this context means 'having or deriving pleasure from extreme cruelty.'" *Id.* (internal citations omitted). In finding plain error and reversing and remanding the case, the Ninth Circuit rejected arguments based upon Eighth Circuit precedent that "'[t]he word 'sadistically' is not surplusage; '[sic] 'maliciously' and 'sadistically' have different meanings, and the two together establish a higher level of intent than would either alone.'" *Id.* (internal citations omitted).

The Eighth Circuit's approach to jury instructions on Eighth Amendment excessive force claims exposes a Circuit split. In three cases, the Eighth Circuit has made clear that a "fact-finder may not conclude that the Eighth Amendment was violated unless it finds

that the force was applied 'maliciously and sadistically for the very purpose of causing harm.'" *Howard v. Barnett*, 21 F.3d 868, 872 (8th Cir. 1994) (reversing district court for not giving jury instruction that included the word sadistic); *see also Jackson v. Gutzmer*, 866 F.3d 969 (8th Cir. 2017) (reversing denial of summary judgment on qualified immunity issue); *Parkus v. Delo*, 135 F.3d 1232 (8th Cir. 1998) (following *Howard* and upholding jury instruction using the words sadistic and malicious over objection that those words overstated the burden plaintiff must meet).

The approach of the Eighth Circuit and the Delaware Supreme Court is wrong. Excessive force claims under the Eighth Amendment contain a subjective element, which is "'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" But the five *Whitley* factors are the test for this subjective component. *See Randolph v. Griffin*, 816 Fed. Appx. 520, 523 (2d Cir. 2020); *McCottrell*, 933 F.3d at 666-67. As the dissent in the Eighth Circuit's *Howard* decision noted, "[w]hen a person uses force in a manner that satisfies all of the elements listed above, particularly when the force is 'excessive' under the circumstances and 'constitute[s] the unnecessary and wanton and malicious infliction of pain,' . . . [then], by definition it is applied 'sadistically.'" *Howard*, 21 F.3d at 873 (McMillian, J., dissenting).

Allowed to stand, the decision on review and the decisions of the Eighth Circuit neuter this Court's attempts to balance the legitimate needs of correctional

officers with the Constitutional rights of inmates. These approaches that ignore the *Whitley* factors as the test for the subjective component of an Eighth Amendment excessive force claim deprive inmates of any way to redress violations of their Constitutional rights by placing an insurmountable burden on them in litigation. Certiorari is warranted and necessary to resolve this conflict and split of authority.

B. The Decision Under Review Cannot Be Reconciled With This Court's Decision in *Scott v. Harris* or the Decisions of Multiple Courts of Appeals.

Arguably, part of the reason recent law enforcement-involved shootings are at the forefront of our national conscience is because of the prevalence of video recordings of the incidents. Civil rights cases now commonly have as evidence some sort of video, whether from an officer's bodycam or dash cam or from an observer with a smart phone. The civil rights of these alleged victims are incredibly important to them, the nation, and the rule of law. The role these videos play in an individual case is critical to these federally-protected rights, as they provide another type of evidence. Notwithstanding the significant importance of video to Petitioner's federally-protected civil rights, the Delaware Supreme Court adopted – without any comment or indication that it reviewed the video itself – one state trial judge's interpretation of the video showing the beating of Petitioner and determined it "blatantly contradicted" Petitioner's account. It so held

despite the fact the Superior Court judge acknowledged the video had its limitations, most notably camera angle and a lack of audio. (11a.) The Superior Court judge also called the men on the floor a scrum and neglected to note that another officer stands between the camera and this "scrum" at least twice. (14a, 18a, 21a.) From that erroneous conclusion, summary judgment was improvidently granted, despite multiple factual issues under the *Whitley* factors, thereby preventing a jury of Petitioner's peers from hearing the case. A court should not be able to simply rely on the mere existence of a video to determine that a civil rights plaintiff's account is uncredible. Moreover, even if part of a plaintiff's account is "blatantly contradicted" by the video, a court should not discredit all of the plaintiff's account. *Coble v. City of White House, Tenn.*, 634 F.3d 865 (6th Cir. 2011).

In *Scott v. Harris*, this Court considered a video in the context of a Fourth Amendment excessive force claim. 550 U.S. 372, 378 (2007). The majority determined the "videotape quite clearly contradict[ed] the version of the story told by [plaintiff below]." *Id.* This Court stated the plaintiff-below's "version of events" was "so utterly discredited by the record that no reasonable jury could have believed him." *Id.* at 380. This Court reversed the Court of Appeals' denial of summary judgment by the officer involved on the basis of qualified immunity and instructed lower courts to not rely on a statement of facts by a party at summary judgment when his or her version of the facts was "blatantly contradicted by the record." *Id.* at 380-81.

Multiple Courts of Appeals have reversed grants of summary judgment to defendant officers in civil rights cases where trial courts have wrongly concluded that a video "blatantly contradicted" a civil rights plaintiff's version of the facts. *Michael v. Trevena*, 899 F.3d 528, 533-34 (8th Cir. 2018); *Godawa v. Byrd*, 798 F.3d 457 (6th Cir. 2015); *McDowell v. Sheerer*, 374 Fed. Appx. 288, 291-93 (3d Cir. 2010). Factors that have played into the Courts of Appeals decisions have been: the video not clearly depicting the incident; how the video is framed, including obstacles to the viewer; where audio is missing; where the video does not capture the entire event; and where the footage is blurry. *Ash v. Landrum*, 819 Fed. Appx. 770 (11th Cir. 2020) (stating video of poor quality did not contradict plaintiff's account) (*citing Shaw v. City of Selma*, 884 F.3d 1093, 1097 & n.1 (11th Cir. 2018)); *McCottrell*, 933 F.3d 651 (refusing to construe the facts depicted in a blurry video with no audio track where it was difficult to tell at one point an officer sprayed an inmate with pepper spray); *Michael*, 899 F.3d at 533-34 (reversing summary judgment because video, which contained a tree and limited the frame of view, did not blatantly contradict plaintiff's account); *Coker v. Ark. State Police*, 734 F.3d 838, 841 (8th Cir. 2013) (accepting plaintiff's version of facts where audio was not understandable and, when understandable, did not present a clear picture of what was happening); *Witt v. W. Va. State Police, Troop 2*, 633 F.3d 272, 277 (4th Cir. 2011) (finding the footage to be of little assistance in resolving factual disputes because it lacked audio, was of unreliable quality, and was missing seven seconds of incident). When

the video does not blatantly contradict the plaintiff's account, as is the case here, the court must accept the plaintiff's version of the facts. *See*, *e.g.*, *Michael*, 899 F.3d at 532-34. The Delaware Supreme Court's error must be reversed to resolve this conflict with the federal Circuits.

The Eighth Circuit's decision in *Michael* is particularly on point to the case at bar. The Eighth Circuit reversed a grant of summary judgment for defendant officers where the District Court reviewed video footage and determined it blatantly contradicted the plaintiff's account. 899 F.3d at 533-34. At issue was whether the plaintiff's sister intentionally ran over his foot, which led to an alleged civil rights violation. *Id.* at 531. Dash cam video, which was partially obscured by a tree and "the way the dash cam frame[d] the front yard", showed the plaintiff's foot being run over, but a jury could reasonably believe he did it intentionally or it was done to him intentionally. *Id.* at 532-35. Because the incident on the video was subject to differing interpretations – even amongst the panel of Eighth Circuit judges – the district court erred by not taking the plaintiff's account as true for purposes of summary judgment. *Id.* at 533-34 & n.2.

Such is the case here. As shown more fully in the Statement of Facts, the video actually supports Petitioner's explanation of how the incident began with Respondent Bonnewell, how Respondent Taylor joined Respondent Bonnewell and backed Petitioner against a wall, and how they then pointed to Petitioner to go to the "footprints." As Petitioner is backing against the

wall, Respondent Verde comes onto the screen moving swiftly. Respondent Verde claims Petitioner's fist was balled up, but the video is too grainy to make out that detail and thus does not "blatantly contradict" Petitioner's account. Respondent Verde grabs Petitioner's "left shoulder in the neck area," according to the Delaware Supreme Court. (13a.) As explained above, Horn describes this as a choke hold, but the Delaware Supreme Court says Verde did not apply a choke hold. (22a.). In the video, all that can be made out is Respondent Verde's arm going over Petitioner's left shoulder. The video does not blatantly contradict Petitioner's expert's account. Finally, as the Delaware Supreme Court acknowledges, there is a "scrum" on the floor. (*See* 14a, 18a, 21a.) During this time, Petitioner claims he gave up his hands yet Respondents continued to beat him. The video is at times blocked by officers and body parts, but the Delaware Supreme Court determined that no correctional officer kicked or punched Petitioner. (14a, 18a, 21a.) The video does not blatantly contradict Anderson's account because a viewer of the video cannot see exactly what is happening. The viewer can see officers moving up and down while they are on the ground that could be the punches and knees Petitioner claims were thrown. To that point, Respondent Verde admitted to striking Petitioner with his knee at least once, although he denies it was a strike to Petitioner's head. Thus, a reasonable jury could very well believe that the video, even with its limitations, supports rather than contradicts Petitioner's account. This is bolstered by the photographs included in the record

revealing injuries to the front and at least one side of Petitioner's head.

The Delaware Supreme Court disregarded the line of cases following *Scott* recounted herein and expanded *Scott*'s holding to allow a Court to consider any video regardless of any limitations the video may have in depicting the incident. The Delaware Supreme Court erred by adopting – without any comment or indication that it reviewed the video itself – the Superior Court judge's opinion and interpretation of the video. The Delaware Supreme Court determined, weighed, and resolved genuinely disputed issues of material fact. Allowing such a decision to stand is in direct conflict with the Circuit Courts of Appeals of the Third, Fourth, Sixth, Eighth, and Eleventh Circuits. Moreover, as video recordings are more prevalent in excessive force cases, this Court should correct this miscarriage of justice for Petitioner and future civil rights plaintiffs. Certiorari is warranted and necessary.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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October 2020