1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL B. KINGSLEY, :

4 Petitioner : No. 14-6368

5 v. :

6 STAN HENDRICKSON, ET AL. :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Monday, April 27, 2015

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:01 a.m.

14 APPEARANCES:

15 WENDY M. WARD, ESQ., Madison, Wis.; on behalf of

16 Petitioner.

17 JOHN F. BASH, ESQ., Assistant to the Solicitor General,

18 Department of Justice, Washington, D.C.; for United

19 States, as amicus curiae, supporting affirmance.

20 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

21 Respondents.

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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 goes too far, it's easy to see how a use
4 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, All right, 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 the problem with the
20 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 acknowledge that -- or suggested that individual

1 instances of abusive practices might be -- the guards
2 might be given --
3 JUSTICE SCALIA: This is 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 give me an example of an excessive use of
18 force claim that would involve the unreasonably -- a use
19 of force that's objectively unreasonable, but there is
20 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 JUSTICE GINSBURG: I don't see how you could
21 use excessive force -- unreasonably excessive force and
22 be acting in good faith.
23 MS. WARD: Well, there's the issue -- the
24 issue of qualified immunity with respect to mistake of
25 law. They could believe that the law actually allows

1 for them to engage in whatever use of force that
2 they're -- that they're using, but --
3 JUSTICE KENNEDY: But no -- but we're asking
4 what the standard ought to be. We don't talk about
5 qualified immunity until we know and until the officer
6 knows the standard.
7 MS. WARD: Yes.
8 JUSTICE KENNEDY: And as of this point, I do
9 not know why the standard should be different for
10 convicts as opposed to pretrial detainees, other than
11 for purposes of rehabilitation. And even that has to be
12 reasonable. You want to us say that under these facts,
13 the result might be different, depending on if it's a
14 pretrial detainee or an inmate, and that's just very
15 difficult for me to understand why that should be.
16 MS. WARD: It's -- it's -- using the
17 objective test for a pretrial detainee is faithful to
18 the Constitution. It's faithful to due process. Due
19 process talks about deprivations of life, liberty, or
20 property. Deprivations are X. The Eighth Amendment,
21 which governs the use of force with respect to convicted
22 prisoners, talks about cruel and unusual punishment.
23 There's a -- there's an inherently subjective element to
24 cruel and unusual punishment.
25 JUSTICE KAGAN: But -- but Ms. Ward, you've

1 said a few times that we're supposed to be looking to
2 see whether something counts as punishment. And in the
3 Eighth Amendment context, we've suggested that that term
4 "punishment" does indeed have a subjective component;
5 that it requires some kind of intent to chastise or to
6 deter. So I'm a little bit with Justice Kennedy, that
7 I'm not quite sure what the word "punishment" is doing
8 in this context, but if we're looking for punishment, we
9 have indicated that punishment is a subjective concept.
10 MS. WARD: Yes. In the Eighth Amendment
11 context, because the word "punishment" appears in the
12 Eighth Amendment, but as it's used in Bell, it's
13 referring to X. It's referring to evaluation of prison
14 policies or uses of force that go too far.
15 JUSTICE SCALIA: Yes, but you -- you -- you
16 brought punishment into this discussion. We didn't.
17 Justice Kagan didn't. Your brief is full of references
18 to punishment. You say it's punishment that's bad.
19 You -- you want to abandon all of that? That's --
20 that's not the criteria?
21 MS. WARD: No, that is the -- that is the
22 criteria.
23 JUSTICE BREYER: I don't understand it,
24 either. It seems to me that there is some circumstances
25 where a guard is trying to punish someone, but there are

1 many circumstances where a guard has something totally
2 else in mind. He's trying to keep order in the prison.
3 A policeman might try to stop a fleeing felon. That has
4 nothing to do with punishment.
5 And so what a guard -- normally, the
6 provision that governs the policeman is the Fourth
7 Amendment. I would guess that if you're talking about
8 trying to keep order in a prison, the Due Process Clause
9 may have something to do with it. This person who may
10 be awaiting a lawyer is there, his liberty confined, and
11 you cannot use excessive force.
12 I don't see what punishment had to do with
13 it. But I -- but I did think, and I don't know the
14 answer, but I looked it up in the Model Penal Code, that
15 either the policeman who's trying to stop someone, or
16 perhaps the prison guard who's trying to keep order,
17 cannot use excessive force.
18 Now, what is excessive force? It is force
19 that is objectively unreasonable. Now, suppose he does.
20 The next question is: Is a state of mind required? We
21 can imagine -- it would be a weird case -- but we can
22 imagine a very weird case where the force is objectively
23 unreasonable, but the policeman is totally innocent.
24 Somebody told him, that is a Taser, but it's really a
25 gun. He uses it. Objectively unreasonable. State of

1 mind, innocent. Is he liable?

2 As far as I can tell, the government thinks

3 he should be. As far as I can tell, you think he should

4 be. End of case. We just say everybody agrees. Is

5 that where we are? Because I'm rather worried about

6 holding the policeman in this weird case, where his

7 state of mind is a hundred percent innocent. What here

8 happened is that they read in a little bit of

9 culpability, the least onerous subjective intent. It's

10 called recklessness. You have to be aware of the risk.

11 So I'm rather tempted to say, yes, there should be

12 something guilty about this policeman. Now, there's

13 where I am at the moment, and I'd like you to explain

14 where I should go.

15 MS. WARD: The Fourth Amendment doesn't

16 require any inquiry into the subjective state of mind.

17 And the Fourth Amendment test, in the case of a police

18 officer on the street, does the job adequately. It

19 provides the adequate amount of deference, and it -- it

20 protects people from excessive uses of force. That same

21 analysis can do the job in the prison situation when a

22 pretrial detainee's interests are at stake as well. A

23 subjective intent element shouldn't be required of the

24 test at all, because that only comes in when there is a

25 question of cruel punishment.

1 JUSTICE BREYER: At least in a prison, I
2 would think a prison guard would have a pretty tough
3 time thinking that if this person is in prison because
4 he's been convicted of a crime, I can try to control his
5 riotous behavior as long as I reasonably believe that
6 what I'm doing is correct, even if it turns -- but now I
7 have a totally different standard, where this person's
8 in the same cell, doing the same thing, but he hasn't
9 yet had his trial. He's just there waiting for his
10 lawyer or he's been there because bail has been denied.
11 I -- I don't see how you administer such a rule.
12 JUSTICE SOTOMAYOR: Can I --
13 JUSTICE BREYER: What's the answer to that?
14 MS. WARD: It's okay for the standards to be
15 different, because it's more faithful to the
16 Constitution. It's okay for the analysis of the
17 excessive force claim in both situations to be
18 different, and -- and I will --
19 JUSTICE SOTOMAYOR: Can I -- I'm still
20 struggling because we're trying to create boxes in a way
21 that makes no sense to me. There are all sorts of
22 reasons for doing things, and the Eighth Amendment cases
23 that we have, have to do with punishment qua not
24 bringing control, not responding to a prison outbreak,
25 or a fight, or anything else, but the types of

1 conditions that are imposed on prisoners as punishment,
2 i.e., you've broken an administrative rule, and now
3 we're going to put you in shackles in the dark dungeon.
4 We've already said in one case you can't do
5 that. You may subjectively and legitimately think that
6 that will keep you constrained, but that's too far.
7 It's not -- it's unwanted and unnecessarily cruel and
8 unusual. All right?
9 MS. WARD: Yes.
10 JUSTICE SOTOMAYOR: But that's very
11 different than this situation. Whether it's a pretrial
12 detainee or post-trial detainee, I don't think the
13 Constitution gives you a free pass to punish a prisoner
14 by inflicting unwanted corporal punishment. I'm not
15 talking about the conditions of -- of punishment; i.e.,
16 good time credit, solitary confinement, segregation of
17 some sort, deprivation of a prison job you have. That,
18 clearly, you need an Eighth Amendment, sort of
19 subjective intent element.
20 I'm talking about the use of force for
21 purposes of restoring discipline. That's what this was
22 about, wasn't it?
23 MS. WARD: Yes.
24 JUSTICE SOTOMAYOR: So I keep saying why are
25 we thinking about the necessity to impose subjective

1 standards or any other standards or that they have to be
2 different?
3 MS. WARD: I see that I have used my time.
4 CHIEF JUSTICE ROBERTS: Yes.
5 MS. WARD: And can I respond --
6 CHIEF JUSTICE ROBERTS: Sure.
7 MS. WARD: -- briefly?
8 CHIEF JUSTICE ROBERTS: We'll -- we'll give
9 you an extra minute since --
10 MS. WARD: Thank you.
11 CHIEF JUSTICE ROBERTS: -- the Court
12 intruded on your time.
13 MS. WARD: Thank you.
14 The Court could decide that the standard for
15 all excessive force cases should be an objective
16 standard. I think that the -- the jurisprudence related
17 to convicted prisoners has already shut that door that
18 require -- in requiring a subjective intent element for
19 a convicted prisoner, but it's more faithful to the
20 Constitution to actually give effects to the rights of
21 detainees which are much closer to the rights of free
22 citizens because they haven't received all of their due
23 process pursuant to a legal conviction.
24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Bash.

1 ORAL ARGUMENT OF JOHN F. BASH
2 ON BEHALF OF THE UNITED STATES,
3 AS AMICUS CURIAE, SUPPORTING AFFIRMANCE
4 MR. BASH: Mr. Chief Justice, and may it
5 please the Court:
6 If there's one point I would like to convey
7 to the Court this morning which I think is responsive to
8 a number of questions that were asked in the opening
9 presentation, it's that there are two relevant
10 differences between the standard we're advancing and the
11 standard Mr. Clement is about to get up and talk about.
12 One goes to what sort of purpose is
13 required, and the other goes to how you establish that
14 purpose.
15 On the first, Mr. Clement says it is
16 malicious and sadistic intent. We say it is a punitive
17 purpose. It is clear as day in the Court's Eighth
18 Amendment cases, Farmer, Wilson, Whitley, that malicious
19 and sadistic comes from the wantonness requirement of
20 Eight Amendment, cruel and unusual.
21 He is just wrong about that. The only
22 argument he has on that -- that it should be malicious
23 and sadistic is Judge Friendly's opinion that this Court
24 cited in a couple Eighth Amendment cases. But if you
25 look at Judge Friendly's analysis -- this is on page 28

1 of the red brief -- he very clearly says that there's a
2 whole list of factors relevant. Malicious and sadistic
3 is one factor. It's not dispositive, and all of the
4 other factors are objective.
5 So I don't think you can extrapolate from a
6 few citations to Judge Friendly that malicious and
7 sadistic is appropriate for a due process claim for
8 someone who has not convicted of an offense.
9 And by the way, I think --
10 JUSTICE SCALIA: This is a due process case,
11 right?
12 MR. BASH: It --
13 JUSTICE SCALIA: It's not a Fourth Amendment
14 case, and it's not an Eighth Amendment case; is that
15 right?
16 MR. BASH: That's correct. Now, Justice
17 Scalia --
18 JUSTICE SCALIA: It's just that you want to
19 bring into the due process analysis --
20 MR. BASH: Justice Scalia, you characterize
21 it as substantive due process, and --
22 JUSTICE SCALIA: Yes.
23 MR. BASH: -- I think a couple cases have
24 talked about it like that, but it's not exactly
25 substantive process. I mean, the rule this Court has

1 established is that before you go through the procedures
2 of the Bill of Rights conviction or a guilty plea and so
3 forth, you may not be punished. So it really sounds a
4 little more in procedural due process than I think your
5 question gave it credit for.
6 Now, the other point is how you establish
7 that purpose. Under the Eighth Amendment standards this
8 Court set forth, it has interpreted cruel and unusual
9 punishment to require a degree of subjective intent.
10 Although it has used the term "punishment" to describe
11 the general legal standard under the Due Process Clause,
12 of course, that clause does not say the word
13 "punishment." What's required --
14 JUSTICE KENNEDY: And -- and your -- your
15 standard in this case as to the pretrial detainee is
16 that he is entitled to what protection?
17 MR. BASH: He is --
18 JUSTICE KENNEDY: What is your standard?
19 MR. BASH: It -- it's exactly what Justice
20 Rehnquist said for this Court in Bell, which is that
21 either an intent to punish, which I take to be shorthand
22 for an intent to achieve objectives that are -- are not
23 reasonable -- reasonable at that point for that person's
24 status in the system, or, objectively, there's no
25 reasonable relation between the use of force and those

1 objectives.

2 JUSTICE BREYER: Wait, wait, wait, wait.

3 The first one, that's the -- I mean, now you've run --

4 just run -- I could say the objective part has to be

5 objectively unreasonable force. Now, the question is:

6 Is there also some kind of subjective part? And at this

7 moment, it seems to me, on the one hand, you say, yes,

8 and on the other hand, no.

9 MR. BASH: No. I'm saying no on both hands.

10 It's --

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

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

13 JUSTICE BREYER: -- even though this man,

14 the defendant, is completely innocent, it wasn't his

15 fault in the slightest, he wasn't even negligent, the

16 guard is nonetheless liable. I can't find anywhere --

17 not even in Fourth Amendment cases could I find a case

18 where that actually occurred.

19 MR. BASH: Because, Justice Breyer, that's

20 not what we're saying.

21 JUSTICE BREYER: All right.

22 MR. BASH: I think the premise of the

23 question conflates two different types of intent. And

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

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

1 if he had accidentally Tasered him --

2 JUSTICE BREYER: Obviously --

3 MR. BASH: -- or if --

4 JUSTICE BREYER: -- you have the intent to

5 do the act, that obviously --

6 MR. BASH: But -- but --

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

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

9 question about --

10 JUSTICE BREYER: No.

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

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

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

14 mean --

15 JUSTICE BREYER: Can I ask my question?

16 MR. BASH: Yes.

17 JUSTICE BREYER: It is objectively

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

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

20 thinking the contrary, and that focuses you on the

21 question of whether there is some kind of either

22 purposeful, knowledgeable, or reckless, that being the

23 weakest, requirement in respect to the use of

24 objectively unreasonable force, not the act, but knowing

25 that it is objectively or reckless in respect to. You

1 see?

2 MR. BASH: Well, let -- let me describe

3 how --

4 JUSTICE BREYER: I want to know what your

5 view is on that.

6 MR. BASH: My view is this: One, it has to

7 be an intentional act. That -- that's the less --

8 JUSTICE BREYER: Well, that's --

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

10 CHIEF JUSTICE ROBERTS: Do you mean -- do

11 you mean -- just to -- you mean voluntary?

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

13 CHIEF JUSTICE ROBERTS: Not -- not a -- a

14 mistake with a Taser or gun?

15 MR. BASH: And it -- no. A mistake with a

16 Taser or gun would not be an intentional application of

17 force. It would be a negligent application of force.

18 And I think under Daniels v. Williams -- that's the slip

19 on the pillow case case -- that would not count.

20 The question we're asking is: What does the

21 connection have to be between that intentional use of

22 force and any legitimate penological objective?

23 And bear in mind, the officer has to know

24 all the relevant facts. So if you have an eggshell

25 prisoner who has some special medical condition that

1 nobody knows about, that's not going to bear on the
2 constitutional analysis. It's the facts that the
3 officer is aware of.
4 And I think what this Court's decisions in
5 Bell, Block, say is that an objectively unreasonable
6 deprivation of liberty violates the Due Process Clause.
7 And just as confirmation that that is an objective
8 standard in both Bell -- this at page 561 -- and
9 Block -- this is a page 585 -- the Court said there's
10 not even an allegation here that there was a punitive
11 intent or some ill intent. Therefore, we're going to
12 analyze it under an objective test.
13 And the opinion --
14 JUSTICE SCALIA: Why is this different for
15 inmates as -- as opposed to detainees?
16 MR. BASH: Because what the Due Process
17 Clause --
18 JUSTICE SCALIA: What's the test for
19 inmates? You -- you don't apply the same test.
20 MR. BASH: The malicious and sadistic intent
21 test that Mr. Clement is asking you to apply to pretrial
22 detainees.
23 But remember, this would probably not only
24 attain to pretrial detainees, certainly not only
25 pretrial detainees in mixed populations. It would also

1 probably apply to immigration detainees, juveniles who
2 have not been subject to a criminal punishment, and a
3 host of other people who have not gone through the
4 rigors of the Bill of Rights, who have not been
5 convicted of a crime, and never --
6 JUSTICE KENNEDY: Do you agree that the
7 pretrial detainee can be deprived of -- of privileges
8 because of bad behavior that's disruptive to the
9 confinement?
10 MR. BASH: Yes. And that's what I was
11 getting at when I said the way that I think Justice
12 Rehnquist used the term "punishment" in the due process
13 cases is as shorthand for a deprivation of liberty in
14 the prison context that has no reasonable relation to
15 any legitimates objectives. So if it was --
16 JUSTICE ALITO: Why wouldn't -- why wouldn't
17 persons who were being arrested and persons who have
18 been convicted and are incarcerated have the same due
19 process rights as detainees?
20 MR. BASH: Because the Due Process Clause
21 permits the punishment of people who are convicted. And
22 as this Court interpreted that in the context of
23 convicted prisoners, it's that convicted prisoners may
24 be subject to hasher conditions than pretrial detainees.
25 JUSTICE GINSBURG: So it's -- so it's okay

1 to use excessive force in the case of a prisoner,
2 somebody who has been convicted? I mean, the question
3 here is did -- what did the polices -- was it
4 objectively unreasonable to use the extent of force that
5 was used in this case. So are you saying that in the --
6 in the case of a convicted prisoner, that it would be
7 okay to use excessive force?
8 MR. BASH: Well, it probably almost always
9 violate the Eighth Amendment if there was an actual
10 intent to punish, and the punishment was carried out by
11 the use of force.
12 But I think often what we're talking about
13 is these cases on the margin, where the officer maybe
14 had mixed motives or whatever. And the idea behind the
15 Eighth Amendment jurisprudence is that we're going to
16 amp the standard up when you're talking about someone
17 who is subject to the penological force of the State.
18 JUSTICE KENNEDY: Can you give us an example
19 of what a guard could do to an inmate and a guard could
20 not do to a pretrial detainee, other than for
21 rehabilitation purposes?
22 MR. BASH: I don't think the use of force as
23 discipline is ever appropriate. But, you know, in a --
24 in a max prison where you only have felony convicts, I
25 think, at the margins, officers are going to be able to

1 use slightly more force than they can with pretrial
2 detainees where people who are held, as this Court said
3 in Salerno, in regulatory detention. Admittedly --
4 CHIEF JUSTICE ROBERTS: Well, I think it's
5 pretty unusual, isn't it, to have a pretrial detainee in
6 a maximum security prison?
7 MR. BASH: No. I -- I was just trying to
8 identify for Justice Kennedy how the standard at the
9 margins might be different, so when you're talking
10 about --
11 CHIEF JUSTICE ROBERTS: And you come up with
12 a hypothetical, I think, is quite unrealistic, so I'm
13 not sure it's responsive.
14 MR. BASH: I didn't mean to come up with a
15 hypothetical.
16 JUSTICE SOTOMAYOR: I'm even not sure why
17 that's right. Why -- you get a free -- the Constitution
18 permits you to get a free kick in?
19 MR. BASH: That -- that's -- that is
20 certainly --
21 JUSTICE SOTOMAYOR: So if you walk by a
22 prisoner and, you know, I want to establish discipline
23 so I can freely kick them any time I want?
24 MR. BASH: That's certainly not what we're
25 saying. What we are saying is that the prohibition on

1 what officers can do to convicted prisoners is they
2 cannot punish them cruelly and unusually. And it makes
3 sense that this Court has upped the subjective intent
4 standard with respect to convicted prisoners because it
5 reflects that the constitutional prohibition is only
6 cruel and unusual punishment. Here is a --
7 JUSTICE GINSBURG: Mr. Bash, would you
8 explain? I mean, you agree that it's only the objective
9 standard, use of excessive force, but then your bottom
10 line is the same as the Respondent, that is, you think
11 that this -- this verdict should hold and it should not
12 be any new trial. Can you explain how your bottom line
13 is the same as Respondent, but your standard is the same
14 as Petitioner?
15 MR. BASH: I would take the Court to page
16 277 and 278 of the Joint Appendix, which lists the
17 pertinent jury instructions. And the -- the jury was
18 instructed to find four elements, three of them no one
19 is contesting at this stage. The third one is the key
20 element. This is on page 278. And it said, "Defendants
21 knew that using force presented a risk of harm to
22 Plaintiff, but they recklessly disregarded Plaintiff's
23 safety. If it" -- full stop there, I would agree you
24 naturally infer that, at least on this review, as
25 importing a subjective element. But then it tells you

1 exactly what recklessly disregarded Plaintiff's safety
2 means. By failing to take reasonable measures to
3 minimize the -- the risk of harm to Plaintiff. And I
4 see that as no different than the proportionality
5 standard that Bell itself requires.
6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Mr. Clement.
8 ORAL ARGUMENT OF MR. PAUL D. CLEMENT
9 ON BEHALF OF THE RESPONDENTS
10 MR. CLEMENT: Mr. Chief Justice, and may it
11 please the Court:
12 This Court should adopt the subjective test
13 fashioned by Judge Friendly in Johnson against Glick in
14 addressing a due process claim for excessive force by a
15 pretrial detainee.
16 This Court has already adopted that standard
17 in the Eighth Amendment context for convicted prisoners,
18 and both doctrinal and practical reasons strongly
19 suggest that it should apply the same test in the due
20 process context in which that test originated, and the
21 contrary propositions are simply not compatible with
22 this Court's precedents.
23 JUSTICE GINSBURG: In Johnson and Glick, the
24 bottom line was that there was reliability; isn't that
25 so?

1 MR. CLEMENT: No, Justice Ginsburg. The
2 bottom line was a remand so that there could be a -- a
3 factual determination based on the Four Factor Test that
4 Judge Friendly articulated.
5 So in the lower courts, they dismissed the
6 claim. Judge Friendly recognized that the Due Process
7 Clause does provide protection, and then he articulated
8 that Four Factor Test, one important part of which is a
9 subjective factor that, I think, sensibly tries to
10 distinguish those situations where an officer is trying
11 to use force in a good faith effort to maintain order
12 and discipline and contrast that with a situation where
13 the force is being used sadistically or maliciously for
14 the very purpose of inflicting pain.
15 JUSTICE GINSBURG: But if we look at
16 this -- this case, the conduct was deliberate, using the
17 Taser was deliberate. The effect known to the officer
18 was that it would cause pain. So what subjective
19 element other than when using -- I'm deliberately using
20 force, I know it will cause pain. What beyond that?
21 MR. CLEMENT: So the question is: Is this a
22 good faith effort to try to get these handcuffs off, or
23 is this somebody who's acting simply to punish the --
24 the detainee? And I think that's what the good faith
25 test really gets to. It gets to what, I think, in some

1 respects is the nub of the issue here.

2 JUSTICE SOTOMAYOR: Well, let's put the nub

3 of the issue here. Let me give you the fact -- let's

4 use this actual situation.

5 The -- the defendant says, I wasn't

6 resisting, I wasn't spreading my arms apart, I was just

7 laying there, and they came and Tased me. All right.

8 The officers say instead he was pulling his arms and

9 resisting it so we couldn't get the handcuffs open. So

10 assuming a jury credits the Petitioner, what would that

11 do under -- how would that be evaluated under your test?

12 MR. CLEMENT: Well, I suppose that if the

13 jury actually credited Petitioner's versions of events,

14 they might be able to find liability under the Johnson

15 v. Glick standard. I think it's worth recognizing that

16 there was a jury trial here, and under a recklessness

17 standard, they ruled in favor of our clients, and it

18 seems to me that it would be very odd to have to have a

19 new jury trial.

20 JUSTICE SOTOMAYOR: Let's go back

21 to -- that's why I keep trying to go back to what is

22 the -- what are the -- under what circumstances and how

23 does your test get to the gratuitous use of violence or

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

25 MR. CLEMENT: Well, I think it gets to it in

1 a way that provides a degree of deference to the
2 difficult decisions that the guard has to make, which is
3 it recognizes that unlike the arrest context in other
4 situations, prison environment's different. There are
5 going to be lots of situations where guards are going to
6 use force and legitimately.
7 JUSTICE SOTOMAYOR: But that instruction is
8 going to be given anyway.
9 MR. CLEMENT: What's that?
10 JUSTICE SOTOMAYOR: Under -- under the Bell
11 v. Wolfish case, that presumption was given anyhow.
12 MR. CLEMENT: Well, but I -- I don't -- I
13 mean, I think there are real differences between the
14 instruction, and if you look at -- the clearest way to
15 illustrate this is if you look at Joint Appendix page 78
16 and you look at the instruction that was offered by the
17 Petitioners below, it flat out says you can't take into
18 account the good faith intent of the officer. It's
19 irrelevant.
20 Now, I think that's perfectly appropriate in
21 a Fourth Amendment instruction where there's objective
22 reasonableness, and this Court said a bunch of times
23 that the subjective intent of the officer doesn't
24 matter.
25 But in the difficult context of a prison, I

1 think Judge Friendly got it right, I think this Court
2 got it right with respect to convicted prisoners, which
3 is you give the guard a little bit of flexibility
4 because it's a difficult situation. And if you say
5 after the fact, maybe they shouldn't have used the
6 Taser, or if, in a case where they used the Taser twice,
7 maybe they should've used it once, but not twice, those
8 questions of degree ought to be some degree of
9 deference.
10 This test allows for that. It gives a jury
11 a landing place. If they look at this in hindsight and
12 say, you know, I wish they hadn't used the Taser, but I
13 think they were doing it to get the handcuffs off. This
14 isn't a case like Hudson against McMillan where they
15 were just taking the guy out and beating him up
16 punitively. So I don't think there should be a
17 Constitutional violation here.
18 JUSTICE BREYER: Well, that's true -- you
19 know, what you say is equally true where you're running
20 a jail, isn't it? And it's equally true where the
21 person in the jail is -- has been convicted or hasn't
22 been convicted. The need for order is the same.
23 So how would it apply in a circumstance
24 where there's a claim of excessive force to someone who
25 has been convicted, but it has nothing to do with

1 punishment. No one thinks it has to do with punishment.
2 The situation was one where they were trying to maintain
3 order, or the situation was one where they were trying
4 to give medical treatment, or the situation was any one
5 of a thousand.
6 What I can't see is why the punishment
7 standard should apply whether he's been convicted or
8 not. And I also can't see why they should be different
9 whether he's been convicted or not.
10 MR. CLEMENT: Well, I think the punishment
11 standard applies in both cases, Justice Breyer, because
12 the relevant constitutional text has been interpreted to
13 require punishment. In the Eighth Amendment context --
14 JUSTICE BREYER: But suppose you brought a
15 lawsuit under the Due Process Clause? I mean -- and
16 there are instances where people are seized in jail, so
17 it was under the Fourth Amendment.
18 I mean, why is punishment in these other
19 situations? I can't figure that one out. I can't
20 figure out -- and then I looked at the Model Penal Code.
21 The Model Penal Code seems to require both excessive
22 force and some kind of state of mind, which could be
23 recklessness, which is what the judge said here or maybe
24 even negligence.
25 MR. CLEMENT: Well, obviously, if you adopt,

1 as this Court has in the Eighth Amendment context, the
2 understanding that punishment inherently requires some
3 subjective mental state, the lowest available mental
4 state is recklessness and under that standard, which the
5 jury clearly was instructed under, we would prevail. So
6 that would lead to an affirmance.
7 Now, I would still think, since it is
8 well-established that the relevant standard for
9 excessive force in cases involving convicted prisoners
10 is the Johnson v. Glick standard, I think since that's
11 established and nobody here is asking for Whitley or
12 Hudson to be overruled, and there are so many practical
13 imperatives for treating pretrial detainees and
14 convicted prisoners the same, I think this Court should
15 apply the Johnson v. Glick standard in the due process
16 claims of pretrial detainees.
17 In a subsequent case, if the Court wants to
18 reconsider what the test should be even under the Eighth
19 Amendment and apply it uniformly across pretrial
20 detainees and convicted inmates, that may make some
21 sense.
22 I also think there's some very interesting
23 questions lurking out there about what kind of objective
24 evidence of unreasonableness is enough in an Eighth
25 Amendment case, or if we prevail, a Fifth Amendment

1 case, what kind of objective evidence is enough to get
2 to the jury on the subjective intent question. I think
3 those are all questions that this Court may eventually
4 have to confront, but I think the first step in a case
5 where nobody wants to overrule Hudson and Whitley is to
6 suggest that since the imperatives that the officers
7 face with respect to pretrial detainees and convicted
8 inmates are essentially identical.
9 JUSTICE SCALIA: Why is that? Why don't you
10 tell us why that's so?
11 MR. CLEMENT: Well, I'll -- I'll tell you
12 why that's so. And it's so in these -- particularly in
13 a -- in a local jail like Monroe County, Wisconsin,
14 where you have these individuals, they're housed side by
15 side. As the Chief Justice has alluded to, in this kind
16 of jail, the only way you can serve their sentence as a
17 convicted individual is if you've been convicted for a
18 relatively minor offense. But if you're there pretrial,
19 awaiting your trial, any -- any -- any book -- any --
20 any offense in the criminal book could be your charge of
21 -- that -- where you're being held for, so it could be a
22 murderer. And I think this Court has recognized, and
23 this -- I mean, this is empirically true -- this Court
24 has recognized this empirical fact, first in Bell
25 against Wolfish, then in Block against Rutherford,

1 and -- and more recently, in the Florence County case.
2 When you --
3 JUSTICE KAGAN: Mr. Clement, sorry. There's
4 a lot to what you say that sometimes the practical
5 concerns are the same for pretrial detainees and for
6 convicted criminals. There's also something to the
7 other point of view, which is that in our cases, we've
8 consistently said that if you're a pretrial detainee, if
9 you haven't been found to have committed wrongful
10 conduct, you shouldn't be treated the same way as people
11 who have been found to have committed wrongful conduct;
12 that for the convicted criminals, it's kind of, you
13 know, we're allowed to punish them, because they've done
14 something wrong. And we haven't found that yet for the
15 pretrial detainees.
16 And so what place in your system is there
17 for that, you know, very commonsensical, and also, you
18 know, normatively attractive proposition that people who
19 haven't been found to have done anything ought not to be
20 treated with the same level of disregard for their
21 interests as people who have been?
22 MR. CLEMENT: Justice Kagan, there is a
23 place for that in the doctrine. I would submit it's not
24 in the excessive force cases. So let me tell you where
25 I think it is. I mean, Sandin against Conner is a good

1 example. There the Court said that with convicted
2 individuals, it was perfectly permissible to move them
3 from minimum security to maximum security as a punitive
4 matter, and you didn't even have to give them any
5 process to do that. I don't think that same analysis
6 would apply to pretrial detainees.
7 Another example is footnote 17 of the Bell
8 against Wolfish case, where I think it's understood that
9 at least if the statutory law provides for it, that if
10 you're convicted, you can be sent out to the work gang
11 and have to pick up trash along the highway. I don't
12 think you can do that to a pretrial detainee. But
13 whatever differences there are, I don't think they arise
14 in an excessive force context. I think if you think
15 about this Court's cases, and start with Whitley. If
16 you're trying to quell a prison riot, and you have an
17 inmate who's going up the stairs, trying to go where
18 there's an unarmed guard, it doesn't make a whit of
19 difference whether that inmate is a pretrial detainee or
20 a -- a -- a convicted individual.
21 JUSTICE KAGAN: So that might be, but let's
22 take another comparison. And the comparison is two
23 people who have been indicted for the same offense, and
24 one makes bail and he's out on the street, and the other
25 doesn't make bail, and so he is in an institutional

1 facility. And the one who's out on the street has some
2 kind of encounter with a police officer, and he reaches
3 into his pocket to take out something, and the police
4 officer shoots him. And let's just imagine that
5 circumstances are such that this is utterly
6 unreasonable.
7 And then the same -- the same person
8 indicted for the same offense, not convicted of that
9 offense, same circumstances, the police shoot him, now
10 he's not going to be treated in any respect the same
11 way. Why should that be so?
12 MR. CLEMENT: I think because the fact of
13 incarceration really is a game-changer. When that
14 person's out on bail, nobody is going to know that, so
15 he has exactly -- or she, the exact same expectations as
16 any reasonable individual. The same expectations as the
17 individual in Graham v. Connor, who's doing nothing more
18 than trying to buy orange juice in a convenience store.
19 There are rules that apply to that, and they
20 should be sufficient and they should be objective, and
21 that's the Fourth Amendment standard.
22 When you're in the incarceration context,
23 things are different. The margin for error for the
24 guards is quite different. The need to protect the
25 other inmates from a potentially violent person doesn't

1 have the same kind of direct analogue when something's
2 unfolding on the streets. Sometimes it can, but the
3 quarters, I think, are -- are going to be different, in
4 the main, in the incarceration context. And so I think
5 it makes sense to apply a standard that's slightly more
6 forgiving of the prison guards than of the police
7 officers.
8 JUSTICE GINSBURG: I still find it very hard
9 to understand how use of force can be excessive without
10 being at least reckless. It's -- it's confusing. For
11 excessive use of force, but yet what -- what does the
12 reckless add to it? If it's an excessive use of force,
13 isn't that at least reckless by definition?
14 MR. CLEMENT: I think often it will be.
15 We're not here to defend the recklessness instruction as
16 the platonic sort of form. We actually think that
17 applying Judge Friendly's instruction from Johnson
18 against Glick is the right way to go, which we think
19 provides a little more separation between the two.
20 I don't think, though -- I mean, we can --
21 we can obviously come up with hypothetical situations
22 where there are going to be different applications. I
23 think the principal difference here is this instruction,
24 both in the Eighth Amendment context, and in the due
25 process context in Johnson v. Glick, I think it gives

1 the jury a practical landing place when they think, you
2 know, with the benefit of hindsight, I wish the police
3 -- I wish the corrections officer hadn't done that, but
4 I don't think it was completely outside of the bounds of
5 what was reasonable. I certainly don't think it's so
6 purposeless and so arbitrary that it gives rise to an
7 inference that it had a punitive motive.
8 That gives the jury kind of a reasonable
9 landing place, and I think this case is actually a
10 pretty good illustration of this. I think if you look
11 at this and you ask yourself, was it reasonable to use
12 the Taser? That's a debatable question. Was it really
13 punitive? Was it unrelated to an interest in trying to
14 get the handcuffs off? Of course not.
15 And so I do think in cases like this, it
16 gives the jury an appropriate landing place to come up
17 and make a judgment that doesn't second guess the
18 officers. And this Court has said so many times that
19 deference to prison officials is an important value.
20 And I think this test that we've proposed that, again,
21 originates with Judge Friendly in a due process case
22 gives --
23 JUSTICE SOTOMAYOR: But you're giving --
24 you're -- you're loading the deck completely, because
25 you're instructing the jury first to give the police

1 officers deference, and then you're now giving them an
2 instruction that assumes that whatever they do is okay.
3 MR. CLEMENT: I don't think so. I think --
4 JUSTICE SOTOMAYOR: I mean, there's no --
5 there's -- by adding that kind of subjective intent that
6 you want, maliciousness and wantonness, which are not --
7 are only one part, as your -- as the Assistant Solicitor
8 General said, only one part of the Johnson test.
9 MR. CLEMENT: But -- but if I -- if I
10 could --
11 JUSTICE SOTOMAYOR: You're -- you're -- the
12 way you've articulated in your brief has really loaded
13 the deck completely.
14 MR. CLEMENT: Well, in -- in fairness, and
15 to correct the Assistant Solicitor General, the
16 instruction we asked for, which is at Joint Appendix 65,
17 it has all of the Johnson factors. Now, it focuses, as
18 we think -- and that's the pattern jury instruction in
19 an excessive force case for a prisoner in the Seventh
20 Circuit, we think it gets it right, which is it focuses
21 the ultimate inquiry on this, is it a punitive intent or
22 is it a good faith effort to restore order.
23 But then if you look for the factors that
24 the jury can consider, all four -- all the rest of the
25 Johnson factors are there. And we think that's actually

1 the best reading of Bell v. Wolfish, too, which is to
2 say it provides objective factors, but then it's
3 basically asking, you can look at those objective
4 factors and it allows you to infer a punitive intent.
5 JUSTICE SOTOMAYOR: Bell v. -- Bell v.
6 Wolfish, the first part of the application section of
7 that opinion goes to whether there's an intent to
8 punish. It assumes there's not, and then it goes to the
9 objective test and says, in that particular case, that
10 the conditions met that -- those conditions as well, but
11 it treated it as alternative. That's --
12 MR. CLEMENT: Well, I think alternative ways
13 to prove a punitive intent. And if you look at Bell v.
14 Wolfish, when it talks about those objective factors, it
15 then says, so if you have purposeless or arbitrary
16 government action, the court may infer an intent to
17 punish. So it's objective factors in service of what is
18 ultimately a subjective inquiry.
19 The other thing I think that needs to be
20 added, though, is that Bell v. Wolfish, you know, we
21 think we win under it. But it is a test that was really
22 designed to judge some conditions questions. And we
23 think Johnson against Glick, and we think, in the -- in
24 the Eighth Amendment context, Whitley and -- and Hudson,
25 are directed at the unique dynamic that you have in

1 excessive force cases.

2 JUSTICE GINSBURG: Am I right that the

3 pattern instruction in -- in this case, the pattern

4 instruction asked only the excessive force question,

5 asked the jury to decide whether the force was excessive

6 in light of the particular facts and circumstances?

7 MR. CLEMENT: Well, okay. So there were two

8 pattern instructions, neither of which were used. There

9 was the pattern instruction which my friends wanted to

10 have, which was the Fourth Amendment pattern

11 instruction. There was the pattern instruction that was

12 the Eighth Amendment standard that we wanted to have.

13 And Judge Crabb essentially split the difference and

14 came up with this nonpattern jury instruction that asked

15 the excessive force question, and baked in this notion

16 of recklessness.

17 Now, we think obviously that the lowest

18 standard of intent that could be compatible with the Due

19 Process Clause is recklessness, and so we think you

20 should affirm if you think recklessness is the standard.

21 But in fairness, we think the most coherent way to

22 approach this issue is to apply a single unitary

23 standard to pretrial detainees and post-convicted

24 inmates when you're talking about these kind of

25 excessive force claims.

1 JUSTICE KAGAN: Mr. Clement, why not look at
2 it this way? I mean, you said -- and it's really the
3 basis of your argument -- that being in an institutional
4 setting is the game-changer. There's no doubt it's
5 important.
6 But there's another potential game-changer
7 as well, and that is this question of have you actually
8 been convicted? Has the legal system found that you're
9 a person who is a wrongdoer?
10 So if we say that both of these things are
11 important, why shouldn't we adopt a set of principles
12 that say it is -- we're -- we're looking for objectively
13 reasonable conduct, but in looking for that, of course
14 we take into account the prison circumstances. Of
15 course we take into account the context in making that
16 evaluation, so that the person on the street does not
17 necessarily come up with the same result as the person
18 in prison because the contexts are different.
19 But still, the test, the basic test is the
20 same because they are both people who have not been
21 found to have done anything wrong.
22 MR. CLEMENT: Well, a couple of responses,
23 Justice Kagan. I mean, obviously, you could try to take
24 the Fourth Amendment test and you could adjust it -- try
25 to adjust it for the prison conditions.

1 We don't think that that's going to work in
2 a way that gives sufficient deference to the prison
3 officials. We do think -- this Court has said so many
4 times they are in a unique environment. It's not
5 something that the normal jury is going to have any sort
6 of insight into. So I think if you just ask them was it
7 reasonable in hindsight, I don't think you're going to
8 get sufficient deference. So that's one reason.
9 JUSTICE KAGAN: I would think that the jury
10 would give a lot of deference to prison officials, in
11 part because they are unfamiliar with the circumstances.
12 And folks will come in and will say, you know, here's --
13 I think that there's -- that -- that that will be the
14 natural tendency.
15 MR. CLEMENT: I mean, I hope you're right
16 for the sake of my clients, but I think that tendency is
17 going to be embodied much more if you let them take into
18 account good faith. And I think that's a really
19 important way of thinking about the question here,
20 because if you look at their proposed jury instruction,
21 at JA 78, it's the one thing the jury is told they can't
22 take into account, is whether there was good faith. And
23 that does not seem particularly productive.
24 Another point you made was that, you know,
25 there is this difference that these individuals are --

1 have not been convicted. And I do think that's
2 important, and I've talked about a couple of instances
3 where I think that that makes an outcome-determinative
4 difference.
5 But you also have to take into account that
6 the Bell decision itself said the presumption of
7 innocence has nothing, really, to do with this. And I
8 think that was a reflection of the reality that when
9 the -- an institution is trying to deal with pretrial
10 detainees and inmates, it's not dealing with different
11 entities.
12 Another thing I'd like to say about Bell v.
13 Wolfish is I do think it's an analysis that applies most
14 readily to conditions cases. And there are a number of
15 cases we cite in footnote 9 of our red brief involving
16 the lower courts' applications of various tests
17 requiring subjective intent. There's a D.C. Circuit
18 case called Norris against the District of Columbia. I
19 paid more attention on rereading it because I noticed
20 that Justice Ginsburg had written the opinion.
21 It's decided in 1984, and I think it's
22 actually quite instructive because in 1984, the D.C.
23 Circuit had the benefit of Bell v. Wolfish. It also the
24 benefit of Johnson against Glick. And when it
25 confronted an excessive force claim, as opposed to a

1 conditions claim, the D.C. Circuit looked to Johnson
2 against Glick and not to Bell v. Wolfish, which it
3 doesn't even cite, to provide the relevant standard.
4 And I think that just shows that
5 Judge Friendly got this one right. He has an analysis
6 that of course looks to objective factors in terms of
7 the amount of force used, the need for the force, the
8 relationship of the two, but also says, was this a good
9 faith effort to maintain or restore order, or was this
10 something that was just sadistic and malicious with the
11 intent to cause harm?
12 My friends from the Solicitor General
13 Office, I guess, don't like the words "sadistic and
14 malicious." I looked them up. I mean, they sound kind
15 of rough, but they actually -- you know, Judge Friendly
16 got that right, too. I mean, they're words that
17 basically mean exactly what he said in the rest of the
18 sentence --
19 JUSTICE KAGAN: But if you really --
20 MR. CLEMENT: -- which is there's no
21 intent --
22 JUSTICE KAGAN: -- if you really --
23 MR. CLEMENT: -- other than to cause harm.
24 JUSTICE KAGAN: -- want to take the
25 Judge Friendly test -- and I guess you've talked about

1 this before, but it is a multifactor test where the
2 question of sadisticness is counting as a plus factor, a
3 thumb on the scales. But it's clear under that test
4 that even if that sadistic quality isn't there, it's
5 still allowable to hold the prison official to have
6 violated the law.
7 MR. CLEMENT: I don't think that's the right
8 reading of it, which is I think the ultimate question
9 under that test, and that's certainly the way it's been
10 applied by this Court in the Eighth Amendment context,
11 and you see that in this pattern jury instruction that
12 we propose.
13 The ultimate test is, is this a good faith
14 effort to maintain order, or is this an effort to
15 inflict punishment just for the sake of punishment? And
16 then the rest of the factors inform that as, of course,
17 they always would.
18 And I think one way of thinking about the
19 question before the Court in this case is that this
20 Court has already borrowed the -- the Johnson v. Glick
21 factors that were due process factors -- they've already
22 borrowed them and used them in the Eighth Amendment
23 context.
24 And the question in this case is should they
25 take that due process test and apply it in a due process

1 case? And that doesn't sound like a difficult question,
2 and I really don't think it is. I think this Court got
3 it right in Hudson and Whitley. You think about those
4 cases. Whitley, it wouldn't matter whether or not that
5 individual going towards an unarmed guard was pretrial
6 or post-conviction. But in Hudson it's the opposite. I
7 mean, Hudson is this case where you have somebody who is
8 singled out for a punitive beating in response to an
9 altercation with the guard.
10 Again, it makes no difference. That's not
11 acceptable behavior, whether or not they are an inmate
12 who's been convicted or pretrial detainee. Applying one
13 test to both of these very similar individuals seems to
14 be the appropriate response.
15 If there are no further questions.
16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Ms. Ward, 4 minutes.
18 REBUTTAL ARGUMENT OF WENDY M. WARD
19 ON BEHALF OF PETITIONER
20 MS. WARD: Thank you.
21 Justice -- Justice Kagan got it exactly
22 right. The institutional setting is not the
23 game-changer. The game-changer is the fact of lawful
24 conviction pursuant to due process. That's -- that's
25 the -- the dividing line between the right test and the

1 wrong test.

2 Justice Ginsburg also was looking at

3 recklessness in our jury instructions, and you got it

4 right also. Disregard -- reckless disregard of

5 someone's rights has no place in a jury instruction that

6 should be objective.

7 And I want to step through the jury

8 instructions because we part ways with Mr. Bash on the

9 jury instructions in particular. If you look at -- part

10 of the confusion comes in in the three different uses of

11 recklessness in the jury instructions, as the dissent

12 below noted. There's three different ways that

13 recklessness is used.

14 If you look at 277 of the Joint Appendix,

15 the first use of recklessness is that force is applied

16 recklessly. Well, here we're asking whether force is --

17 force is less than deliberate if you look at how force

18 applied recklessly is -- is used in Farmer, for example,

19 deliberate indifference. You're looking at -- you're --

20 you're conflating deliberate indifference with a

21 deliberate act. That's confusing.

22 And Question No. 1 of the special verdict

23 questions, excessive force means force applied

24 recklessly that is unreasonable. So the -- again, this

25 is what I was talking about, force applied recklessly;

1 that's also not deliberate.

2 And then the -- the plaintiff is required to

3 prove each of the following factors by a preponderance

4 of the evidence. Factor 2 is the reasonableness test.

5 Factor 3, which is in addition to the reasonableness

6 test, is reckless disregard of plaintiff's safety, which

7 is, again, a different use from acting recklessly.

8 And -- and it's that reckless disregard for plaintiff's

9 language that the Court said in Farmer was

10 unquestionably related to a culpable state of mind.

11 And then if there's any question about

12 whether reckless in our jury instructions were related

13 to a bad intent, the third use of recklessness, which is

14 on 278 about halfway down the page, acted with

15 recklessness disregard of plaintiff's rights. The jury

16 instructions defined that specifically not in the -- the

17 special verdict itself, but in the -- the instruction on

18 punitive damages, which is found on page 281, where the

19 court said to the jury that an action is in reckless

20 disregard of plaintiff's rights if, under the

21 circumstances, it reflects complete indifference to the

22 plaintiff's safety or rights. If you find that

23 defendant's conduct was motivated by evil motive or

24 intent, unquestionable bad intent related to that

25 element of reckless -- or that version of recklessness

1 that was used in the jury instructions.

2 If the Court has no further questions.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:01 a.m., the case in the

6 above-entitled matter was submitted.)

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