OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1077

TITLE HAROLD WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL., Petitioners V. GERALD ALBERS

PLACE Washington, D. C.

DATE December 10, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

HAROL WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL., Petitioners v. GERALD ALBERS : No. 84-1077

Washington, D.C.

Tuesday, December 10, 1985

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

APPEARANCES:

DAVE FROHNMAYER, ESQ., Attorney General of Oregon, Salem, Oregon; on behalf of the Petitioners.

GENE B. MECHANIC, ESQ., Portland, Oregon, appointed by this Court; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

(11:10 a.m.)

THE CHIEF JUSTICE: We hear argument first this morning in Whitley v. Albers.

Mr. Attorney General, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVE FROHNMAYER, ESQ.

ON BEHALF OF THE PETITIONERS

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

This case is before this Court on a writ of certiorari to the Ninth Circuit Court of Appeals. During a 1980 prison riot in Oregon, officials formed a plan to restore order and to rescue a hostage whose life had been threatened by a knife-wielding inmate. An unarmed prison official vaulted over an inmate-constructed barricade and raced up a flight of stairs to the cell in which the hostage was being held. An inmate, Respondent Albers here, ran up after him. Pursuant to prior orders, and armed official shot, but shot low, in order to present Respondent and a fellow inmate from getting up the stairs and thereby potentially impeding the rescue attempt.

In this incident, which the record shows took place from start to finish in less time than I have now

taken to describe it, the hostage was successfully rescued, but Respondent Albers suffered a serious and permanent injury to his knee.

The district court below concluded that the evidence presented no basis from which a jury could conclude that the cruel and unusual punishments clause of the Eighth Amendment had been violated. Respondent and the Ninth Circuit have disagreed, so that this case places squarely the issue as to in the aftermath of this difficult decision, how far the hindsight of a jury can intrude into prison security decisions.

Is it the role of the jury to sort through the waste pile of discarded or unconsidered hostage rescue plans, decide that one of them might have been better, and on that basis assess personal monetary liability against prison officials for a constitutional violation? We submit that the Ninth Circuit has permitted a jury to do what this Court repeatedly has told judges themselves to refrain from doing.

And this case is of extraordinary practical importance because when they are faced with an outbreak of violence, prison officials must act. They do not have the luxury of after-the-fact reflection. The maintenance of security, as this Court has repeatedly indicated, is the most essential aspect of the

maintaining of prison itself. And if officials do not retain control or regain it, the lives of staff and inmates alike are continually at risk, and the officials have abdicated their essential official responsibility.

I will argue this morning for the validity of four proposition which should control the outcome of this case: first, that the record shows no proof of wantonness or cruelty in this hostage rescue action, which is essential to establish an Eighth Amendment violation; secondly, that there was no proof that Albers' injury was inflicted unnecessarily, that is to say, totally without penological justification; third, that the Ninth Circuit's reasonableness standard ignores the deference and discretion, the latitude for official judgment which this Court in numerous constitutional cases has repeatedly said is essential for the administration of prisons; and finally, that the Court of Appeals for the Ninth Circuit incorrectly interpreted this Court's standards of qualified immunity and it also ignored the total absence of meaningful case law as guidance for prison officials when it denied the existence of immunity for the prison officials in this case.

Let me now recapitulate the facts in more detail because they demonstrate the justice of our

cause.

On June 27th in 1980 the inmates in Cellblock A of the Oregon State Prison became upset. They suspected that other inmates had been mistreated. They disobeyed a cell-in order given by prison officials. One of the two guards on the block was taken hostage; the other was assaulted. There was fighting among the inmates, destruction of the furniture in the cellblock was virtually complete, and despite a demonstration to a selected group of the inmates that others in fact had not been abused, the inmates still retained control.

Richard Klenk was a main instigator of the riot. He was armed with a knife. He reported that he had already killed one inmate and would kill others, and he made it clear that if there were any attempt to retain control -- regain control of the cellblock, that he would cut the throat of the hostage guard.

The plan that was adopted called for Captain Whitley to enter unarmed at a time when Klenk was away from the hostage cell. Surprise about the timing and nature of the assault obviously was a key element. Whitley's objective was to secure the safety and return of the hostage officer. Approximately 20 guards were lined up to follow Whitley into the cellblock. The first three of them were armed with shotguns in order to

protect Whitley, and the armed guards had been ordered to shoot, but shoot low, any inmate who went up the stairs after Whitley.

When Klenk again refused to free the hostage, Whitley began the assault. Whitley vaulted the barricade as a warning shot was fired. He pursued Klenk, who ran up the stairs toward the hostage. Officer Kennicott followed over the barricade, firing a second shot in the direction of two inmates who ran up the stairs ahead of Whitley. Whitley, in pursuit of Klenk, ran past Albers and started up the stairs. Albers, who had not run up the stairs after the warning shot or the second shot, then turned, and along with another inmate followed Whitley up the stairs. Kennicott, pursuant to his orders, shot. Albers was injured in the knee, and the other inmate was also injured.

The district court found that on these facts no jury could reasonably find liability under the Eight Amendment to the United States Constitution, and he also found that -- directed the verdict on the basis that the defendants in this action were immune. The Ninth Circuit reversed and held that there was a jury question on the existence of an Eighth Amendment violation, and it also held that if an Eighth Amendment violation were

found, almost as a per se rule, then a qualified immunity could not apply.

Before we begin our argument, I think it is appropriate to recapitulate the constitutional tests which we believe that this Court has articulated governing an Eighth Amendment violation in a prison context.

We are mindful of this Court's admonition that the Eighth Amendment analysis is not simply constituted of parsing dictionary meanings of selected pieces of constitutional --

QUESTION: Mr. Attorney General, I hate to interrupt you, but the Eighth Amendment is the only one involved in this case?

MR. FROHNMAYER: We contend that it is, Justice Marshall. It was the one that was argued below. We have understood and the District Court understood the due process argument to have been advanced only because the due process clause was the vehicle of incorporating the Eighth Amendment guarantee as against the states.

QUESTION: Mr. Frohnmayer, do you think the due process clause imposes some separate obligation applicable to the use of excessive force in this situation? Would that be another way to analyze the

problem?

MR. FROHNMAYER: Justice O'Connor, we do not believe that the -- that that adds anything to the analysis that would flow otherwise under the Eighth Amendment.

QUESTION: Well, do you think the standard should be the same if looked at under the due process clause for use of excessive force as for Eighth Amendment purposes?

MR. FROHNMAYER: Well, if it is a prison context, then I would suggest that no, that the Eighth Amendment should be the exclusive vehicle by which that is analyzed, or at least if the due process clause is considered the analysis --

QUESTION: Why is that for a single incident that seems to have very little to do with conditions of imprisonment or with any aspect of punishment?

MR. FROHNMAYER: Well --

QUESTION: This is more or less a single incident in the process of putting down a prison riot, isn't it?

MR. FROHNMAYER: It is a single incident, but the incident implicates the core of what it is that a prison is all about, which is the maintenance of security of people who are very dangerous people. And

so in that sense, I believe that this Court's analysis in Rhodes v. Chapman would consider it as an Eighth Amendment issue. Under the due process clause, however, if that were the mode of analysis of this Court, we would conclude that there should be no difference in the analysis, that the tests ultimately would resolve themselves to the same result, and that that would be done by virtue of analyzing whether it was wanton, whether or not it was unnecessary in the sense that it lacked a penological purpose, and whether or not what was done was within the range of professional discretion.

And each of those things has been examined by this Court in the due process context, we believe, in Bell v. Wolfish, Block and Rutherford, but the Eighth Amendment, focusing as it does on punishment and conditions of confinement, is the mode of analysis in which this case was argued at the beginning and which we believe is most appropriate for its disposition.

QUESTION: General, I think the Ninth Circuit viewed this as an Eighth Amendment case --

MR. FROHNMAYER: Yes, it did, Justice Brennan.

QUESTION: Not a due process case.

And what standard do you think the Court of

Appeals for the Ninth Circuit applied?

MR. FROHNMAYER: I think that the standard that was applied took pieces of what purports to be an Eighth Amendment test, but in the application of that test to what actually happened, as revealed by the record, in fact diluted it and watered it down. What I think the Ninth Circuit did essentially was adopt a reasonableness test, a hindsight reasonableness test.

QUESTION: It used the term "reasonableness" and "reasonable" several times, but it also referred to our decision in Estelle where a deliberate indifference was a standard. So it seemed to me that the Court of Appeals for the Ninth Circuit used both of those standards more or less interchangeably.

MR. FROHNMAYER: We think that it did, and we think that that is, that is the flaw of the Ninth Circuit's decision because it's one thing to articulate at least the verbal formulas of the tests evolved by this Court. It is quite another to apply them incorrectly. And the latter is the flaw of the Ninth Circuit.

And as we understand what it did, it essentially evolves into a reasonableness test because the test of excessiveness as we look at the Ninth Circuit is simply was there some less forceful

alternative that might have worked. If that were the case, then a jury question on the reasonableness of the course of action that was chosen is presented.

We believe that is not what this Court meant by the deliberate indifference test nor by the other tests suggesting that the wanton infliction of pain or unnecessary in the sense that there is no penological is the appropriate test.

I hope I have been responsive to your question because I think it is the application of the test that constitutes the error made by the Ninth Circuit.

QUESTION: The Court does purport to apply both standards and more or less homogenizes the two standards, doesn't it?

MR. FROHNMAYER: That is correct, that is correct indeed.

We are mindful, of course, that there is a core set of values of the Eighth Amendment that have been variously described as prohibitions against cruelty, barbarism or sadistic torture. We are mindful also that there is an evolutionary aspect, whether one talks about Weems, Trop v. Dulles or others of the Eighth Amendment test, such that the -- there must be some kind of social consensus about the excess of the punishment that is imposed.

But taking all of this Court's recent decisions, we believe that there is a three part test that should govern cases of the kind presented here, whether they are isolated outbreaks of prison violence or whether they go to the question of prison conditions: first of all, that the action that is taken must be wanton in the sense that it is the senseless, irrational infliction of pain. Secondly, it must be unnecessary in the sense that it serves no valid penological purpose. And third, it must fall outside the range of acceptable professional discretion which this Court has granted to prison administrators, but which has its limits also.

Our first proposition obviously is that there is no proof in this record that a jury would have considered that there was wanton infliction of pain. This Court has used adjectives such as gross or extreme or harsh or gratuitous, all of which stem from the historic roots in application of the Eighth Amendment guarantee, even going back to the petition of Wright.

The Ninth Circuit, we believe, as my colloquy with Justice Powell I hope has demonstrated, that the Ninth Circuit has distorted this to say that if a lesser level of force might have sufficed, then the case must go to the jury. For Albers, on the other hand,

apparently any evidence of unreasonableness will do. This is really importing a tort-like cast into the Eighth Amendment's jurisprudence, and whatever else it may do, we believe that the Eighth Amendment does not import the restatement of torts into constitutional litigation, because under either test which has been advanced or mixtures of the test which have been advanced, any evidence of a possibly less forceful alternative would present a jury question, and therefore, virtually any time an inmate is injured by the use of force in the quelling of a prison riot, there would be a jury question under the Eighth Amendment. This we believe cannot be correct.

Our second proposition is that Albers' injury was not inflicted unnecessarily, that is to say wholly without penological justification. If there is one central purpose for prisons, it is the maintenance of security, and it takes only the learning of Hudson v. Palmer from which that is virtually a direct quote in order to establish that proposition.

It was objectively clear from the circumstances, however favorably the record is read in favor of Respondent Albers, that any inmate who went up the stairs after an unarmed guard who was attempting to rescue a hostage presented an objective threat to the

success of the rescue operation, and if that is the case, then the plan had to account for that. The subjetive expectations of Respondent Albers are in that sense constitutionally irrelevant to the fact of the plan that had been formulated.

And let us bear in mind that if too little force had been used, again with our virtues of hindsight, and if Albers had been of another mindset or if in fact he had ascended the top of the stairs, there might well have been two hostages or two dead hostages or weapons in the control of those who --

QUESTION: General Frohnmayer, is there an element of kind of command decision in your reasoning that this is a little bit like war, at least, and that perhaps the prison officials may be entitled to sacrifice or injure one prisoner if it means that several hostages will thereby be released?

MR. FROHNMAYER: They should consider those alternatives, Justice Rehnquist, but there is an element of choice of evils about it. In every war, even one side's own enemies are injured by friendly fire. In a situation where there is a crisis, there is an emergency, and where every alternative is full of risk and danger, where there are no risk-free alternatives, it is possible that that result could occur.

Emergencies come closer to war decisions.

Now, that doesn't mean that one engages in illegal warfare because we do believe that in this Court's admonishment that professional judgment be used, and in the very reason that you give deference and tell lower courts to give deference to prison administrators, we expect them to act as professionals, and that's what happened here.

We are not asking for a promiscuous delegation of authority to engage in mindless violence against persons who are helpless because they are incarcerated. The facts of this record bespeak the rationality and justice of what was done.

QUESTION: Mr. Attorney General, could I interrupt because one point I want to be sure I have clearly in mind.

This is a summary judgment case in which, as I understand it, we must assume all the facts favorable to your adversary in this case.

MR. FROHNMAYER: A directed verdict case in the same standard, yes.

QUESTION: And in the Ninth Circuit opinion, as I recall it, they made a point that if one views the evidence most favorably to the other side, one might conclude that the height -- that the crisis had pretty

much passed, that the conditions had subsided to a certain extent, and so that the emergency justification, which seems quite persuasive, as you present it, wasn't as strong as it was an hour or two before

To what -- I think you perhaps may want to comment on that. Is the record subject to a different view as to the degree of emergency that existed at the time that the action was -- took place?

MR. FROHNMAYER: It is susceptible to that as a conclusion but not as a fact. Justice Stevens, even taking the record in the most favorable light to Respondent, he's entitled to a favorable gloss on the fact but not to ignore the facts, and the facts that remain, there was still a hostage, there was still a threat to that hostage's life. The person holding the hostage had threatened to kill others, and he was armed and had been observed to have been armed.

QUESTION: Is it clear that -- was this fellow Klenk the one who was holding -- I had the impression there were two other inmates who in effect said we will protect this man. I don't know if that was known to the men who broke in or not, but there is a little uncertainty in my own mind about exactly what the jury might conclude on that fact.

MR. FROHNMAYER: Yes, Justice Stevens, the

hostage officer, officer Fitts, was being held in Cell 201. There is obviously no lock on the door of Cell 201. The testimony did show that those two inmates who said that they would help protect Officer Fitts also said that they were not sure they could guarantee his safety.

QUESTION: I see.

MR. FROHNMAYER: Klenk was armed with a knife. That is undisputed. The inmates were still in control of Cellblock A. That's undisputed. They had all violated the cell-in order. That's undisputed. And there is still pregnant in this situation the potential for violence any time order and controls are not restored.

QUESTION: Isn't it also true that during this period some other guard or some other was allowed to go in and talk to the hostage and go out and report that he was, seemed to be okay or something like that?

MR. FROHNMAYER: Yes. In fact, it was Captain Whitley, the very person who led the assault over the barricade, a minimum of three times went in to assess the facts, to determine what the realities and the dangers were. He led that assault. It was his plan that was carried out.

But at this point obviously he was not doing

what he did on the basis of rumor and innuendo and hearsay; he had personally assessed the situation as an expert who had to deal with that situation.

So even given the most favorable gloss, even assuming that there had been a subsiding of th violence, Cellblock A was in the control of the inmates; a person was threatened to be killed; a hostage was there, and the ever-present danger of an uncontrolled outbreak of violence which could have resulted in injury to inmates or guards alike was always present, and I think even given the most favorable assumptions to Respondent, almost on its face has to be seen in a situation of extreme danger.

The plan in fact was carried out as was intended. These officials were experts. They did assess the risks and facts. This was not mindless violence perpetrated against prisoners irrespective of their involvement as aspects who created danger, and even every expert who testified, even those experts who testified on behalf of Respondent, all of them acknowledged that life threatening alternatives might equally have been used. One of the alternatives suggested by one of Plaintiff's experts was to assassinate Klenk with a sniper rifle. Another expert suggested that riot batons be used, acknowledging in his

examination that those riot batons could cause deadly injury.

We submit that Albers and the Ninth Circuit have invited juries to substitute their judgment in hindsight on the basis of what might have been most reasonable or more reasonable. We submit that that is not the Eighth Amendment test. The test is whether the plan that was chosen violates the Eighth Amendment to the United States Constitution. And on all evidence, even most favorably considered for requirement, it does not.

This Court -- and this is our third proposition -- has repeatedly declared that broad latitude is necessary for the effective administration of prisons for reasons, policies and the separation of powers, considerations which are too lengthy to mention. We note that we are not asking for the promiscuous delegation of discretion to wreak violence on people, but the latitude, the deference that has been acknowledgeed, whether in Procunier v. Martinez, Bell v. Wolfish, Rhodes v. Chapman, Block v. Rutherford, is all directed toward an acknowledgement that the central core responsibility of prisons is to maintain security. When that security breaks down there will always be suggestions of some other alternative that might have

been used, and there will never, never be a riskfree alternative on the technology that we have.

QUESTION: May I ask you one other question, General Frohnmayer?

MR. FROHNMAYER: Yes.

QUESTION: They relied on an expert that the Ninth Circuit referred to, and I guess his testimony doesn't go far enough in your view to, even if you believe it all and disbelieve your experts, to satisfy your test, but supposing -- we are concerned with the problem can you always get a jury trial in a case of this kind. Supposing in a case like this the jury can always get some -- I mean the Plaintiff can always find some expert who would be willing to get up on the witnes stand and say in my professional opinion this was, A, wanton; it was unnecessary, whatever the three parts of the test are. If you just had nothing but an expert testimony and then some kind of ambiguous fact, would that always get you to the jury, if you again have an expert witness that --

MR. FROHNMAYER: No. I am aware of the consideration that you mention, and we think not. The trial judge is still the gatekeeper, and we suggest that it is not the function of the jury to arbitrate simple professional disagreements, and I believe the Court has

confronted this issue in another context, in Youngberg v. Romeo, which is -- and in Estelle v. Gamble, and in both of those cases there is a distinction between a permissible level of professional judgment, even if it is malpractice or negligence within that level of judgment, and a decision that is made that is so far outside the realm of the professionally acceptable that it can't be, and that's the kind of thing we are looking for.

And let me suggest the considerations that my follow that a trial judge would utilize in determining whether or not to let a case go to the jury. They would want to determine whether those officials were in lawful charge. They would want to determine whether they had an official duty to act, to respond. They would want to know whether they were qualified experts. Indeed, in this case, Hoyt Cupp was a qualified expert. They would want to know what kind of information they possessed: did they really go out and try to find out what was happening, as Captain Whitley did, actually visit the cell area in order to see, or were they going on rumor and hearsay and other unreliable information. You'd want to know whether they assessed the risks, did they actually take a look at the alternatives? Did they form a plan? They formed a plan in this case. They weighed

it against the possibility of tear gas and determined that the threat to the elderly inmates, the fact that they couldn't clear the cellblock in time, the fact that the other cell doors were barricade, made that not a realistic option.

So you would want in the ideal world a weighing of options by these professionals.

And finally they formed a plan, and then they followed according to the plan. The shots that injured Respondent Albers were fired according to a plan that made it absolutely necessary that the entry and escape place, the stairs, was kept safe.

Now, once those factors have been considered, that's the realm as we understand it for the operation of the professional judgment that is at issue and that we say is one of the criteria by which you measure whether the Eighth Amendment has been violated.

My fourth and final proposition is that the Ninth Circuit has misconstrued this Court's learning in the application of qualified immunity. It has reintroduced a subjective test contrary to the learning of this Court in Harlow v. Fitzgerald, and it has totally ignored the fact that there does not exist one guiding decision on the level of permitted conduct by prison officials in a riot situation that pre-exists

this case that would have given meaningful guidance to the conduct of prison officials in quelling the prison riot.

For those reasons, we believe the Ninth Circuit has not given sufficient guidance and was improper in not according qualified immunity to Petitioners -- or to the Petitioners in this case.

Mr. Chief Justice, I wish to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

MR. FROHNMAYER: Unless I interrupted your question.

CHIEF JUSTICE BURGER: Mr. Mechanic?

ORAL ARGUMENT OF GENE B. MECHANIC, ESQ.

ON BEHALF OF RESPONDENTS

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

This case is about the standard under the cruel and unusual punishments clause, and I believe, the due process clause, to be applied to the shooting of an unarmed prisoner by prison officers, and whether under the circumstances here a jury could have found that defendants failed to meet that standard.

We believe that applying the correct legal standard, a jury would have concluded or could have

concluded that Albers' constitutional rights were violated when he was shot. But we further assert that even under the standard with the -- which the state is suggesting, a jury could have round in Albers' favor.

Thus, we urge the Court to affirm the decision of the Ninth Circuit Court of Appeals.

The state has presented a distorted picture of the events at the Oregon State Penitentiary on June 27, 1980, and has also misstated the legal standard announced by the Ninth Circuit and the position that Albers is taking in this case.

With this in mind, I wish to discuss the legal standard which is not a minimal tort standard which Albers proposes, and then we can look at the facts and see whether the record shows, drawing all inferences in Albers' favor, as we must in a directed verdict case, that a court erred in issuing a directed verdict.

No one disagrees that under the Eighth Amendment's cruel and unusual punishments clause a state cannot inflict the unnecessary and wanton infliction of pain, and in dealing with the due process clause, no one disagrees that force used by the state must be reasonably related to legitimate governmental objective. In fact, the interests involved here in this case concerning the use of deadly force is no more than

the -- is exactly the same interest that this Court dealt with in the Garner case last year when it talked about the use of deadly force against a fleeing felony suspect.

QUESTION: But that was a Fourth Amendment case, wasn't it, Mr. Mechanic?

MR. MECHANIC: Yes, Justice Rehnquist. However, even though this is not a Fourth Amendment case, and even though the constitutional analysis may be different, and in fact, the ultimate constitutional standard may be different, we are still talking about the same interest. When Albers is shot and he is likely to either die or to suffer serious injury, it is the same interest at stake from a constitutional perspective as the interest that Gerald Albers had, even though we are dealing with separate constitutional principles.

QUESTION: What line of cases from this Court do you rely on for your due process as opposed to your Fourth Amendment contention?

MR. MECHANIC: Well, this Court mentioned in the Ingraham case that the right to personal security is similar under the Fourth Amendment as it is under the due process. So this Court has already drawn a comparison.

QUESTION: And that was the paddling at

school?

MR. MECHANIC: Correct, but it was in the context of a discussion, of course, of the Eighth Amendment's application to the paddling of students in school.

So I am not suggesting that we need to come to the same conclusion on the standard. I am only suggesting that the interest to life that Gerald Albers had was certainly as significant as the interest to life that Edwin Garner had when he was shot while he was trying to climb over the wall by a police officer who knew that he committed a nighttime burglary, which is a very serious offense.

Now, the fight we have in this case is what these words, "unnecessary and wanton infliction of pain" and "reasonable relation to a legitimate governmental interest" really mean. The Attorney General kept on using these words, but I still don't know what standard the state is really proposing that a judge or jury should determine applies to a case of this nature.

I believe that the position I am going to state is more clear and more inconformity with the jurisprudence of this Court than the State's position. I would like to set forth the factors specifically that we are proposing apply in a case of this nature to the

shooting of a prisoner under the Fourteenth and Eighth Amendments.

First, I believe that it is crucial to look at the degree of force. We absolutely agree that not every showing of force states a constitutional claim. As Judge Friendly said in the Johnson v. Glick case which this Court cited with some approval again in the Ingraham case for the proposition that prison brutality is subject to Eighth Amendment analysis, not every push or shove states a constitutional claim. We agree with that.

But we need not decide in this case what the exact line is that needs to be gone over because here we are dealing with deadly force. The state agrees that we are talking about deadly force. The state's analysis takes into account in no way how much force is used. So as far as the state's analysis is concerned, you just don't need to consider whether deadly force is used or some other force, and we think that this Court's analysis of Eighth and Fourteenth Amendment principles says that the state's position is wrong on that.

QUESTION: May I ask this question?

The guards were instructed to shoot low and also to give warning shots. I would quite agree that they could have been inaccurate and could have shot high

instead of low, but on the facts of this case, could you say there was a deliberate use of deadly force?

MR. MECHANIC: Yes. I believe that we can't make a distinction constitutionally when a police officer takes a firearm and shoots, even though they are attempting to shoot low, and we think that a jury should consider that, we are still talking about the most severe force that the government can inflict on a member of society, and we know of various examples where, of course, policemen say they have shot low and they still miss.

The fact is Albers was hit, he bled severely, he climbed up the stairs, he lost six out of the eleven or thirteen pints of blood in the body, he had to take a piece of clothing off of his body to tie a tourniquet to stop the bleeding, which may have very well saved his life.

So I think that we have to consider this to be the same kind of force that was applied in the Garner case.

QUESTION: If the officers had only used, what do you call them, billies or the sort of sticks or clubs that police officers normally carry, and had hit and killed a prisoner, would that have been the use of deadly force intentionally? It would depend on the

facts and circumstances, of course.

MR. MECHANIC: It would depend on the facts and circumstances, Justice Powell, and I think that --

QUESTION: But I --

MR. MECHANIC: Assuming that the club was used in a way that it might more commonly be used, which is to incapacitate but, and not kill, then I would say thgat would not be deadly force.

QUESTION: I am really trying to get at whether or not the fact that a firearm was used rather than some other weapon is the point you are making.

MR. MECHANIC: Yes, that's the point I'm making, and that's the point that Mr. Frohnmayer referred to professional standards.

QUESTION: Could it have rubber bullets and --

MR. MECHANIC: If it had rubber bullets, I would say it is not deadly force. Professional standard clearly distinguish firearms with real bullets from any kind of use of force, and that is part of this case as far as the Correction Division's own rules --

QUESTION: Well, Mr. --

QUESTION: What kind of shot was used here?

MR. MECHANIC: It was --

QUESTION: Bird shot?

MR. MECHANIC: No. 6 birdshot.

QUESTION: The kind you use for grouse and pheasants?

MR. MECHANIC: Correct. It was not the most severe shot, but it was still real bullets --

QUESTION: No. 6 is used for squirrels. No. 8 and No. 9 and No. 10 are used for birds.

MR. MECHANIC: Well, I'm sorry, I'm not as educated as you are, Justice Powell, on that, but I must say that the real issue -- we can perhaps draw some fine lines with respect to what number of birdshot they used and what kind of specific force was applied, but the fact is we are talking about very serious force.

QUESTION: Well, Mr. Mechanic, are you concerned only with the decision and order that a prisoner who followed Mr. Whitley up the stairs would be shot? Is that the focus you want us to have on that decision?

MR. MECHANIC: I would like -- I would like you to have that focus. The problem with --

QUESTION: You are not concerned, then, with the fact that an assault team was going to be sent into the cellblock.

MR. MECHANIC: The main focus of this case is not that an assault team was sent into the cellblock --

QUESTION: But the decision to shoot anyone who followed Whitley up the stairs.

MR. MECHANIC: And particu -- yes, and particularly Gerald Albers, because as the circumstances I will state show, Gerald Albers was set aside from what was going on in that cellblock.

QUESTION: And do you take the position that a decision in these circumstances to shoot anyone who followed him up the stairs was unprofessional? Is that your point, or what?

MR. MECHANIC: I believe that it in fact is, if we are dealing with professional judgment, a substantial departure from professional judgment to shoot someone, even a prisoner, without some basis to believe that that person is dangerous, and in fact, the only basis the State of Oregon has established in this case is that they were prisoners. Prisoners are potentially dangerous. Therefore they can be shot. That's the logic that I see from the state's analysis.

QUESTION: One was -- but at least one was armed.

MR. MECHANIC: I'm sorry, Justice Marshall.

QUESTION: At least one prisoner had a knife.

MR. MECHANIC: Correct.

QUESTION: So they weren't that innocent.

MR. MECHANIC: One prisoner had a knife and one prisoner was clearly not innocent, and one prisoner --

QUESTION: It only, it only takes one knife to kill one person.

MR. MECHANIC: I understand that, and I am not here to argue that any force could not have been plied against that one prisoner, and I am not here to argue that if Gerald Albers was caught in the middle whereby they tried to shoot the prisoner who was armed and they missed and the bullet went into Gerald Albers' body, or if they hit a wall and the bullet ricocheted into Gerald Albers' body, that that would state a constitutional claim because in that instance we don't have an element of wantonness, and that's what I'd like to come to next.

We need to look at the degree of force. Then we need to look at what wantonness really means. The state is saying wantonness means that the only way that Albers can show that he has a constitutional claim is if the prisoner of officers shot him solely for the sake of inflicting pain, with a punitive intent. That's wrong. The Estelle v. Gamble case makes that clear when it distinguishes deliberate indifference of a medical officer, stating a constitutional claim from the

intentional denial of medical care. Going back to the Weems case, the Court said that cruelty under the Eighth Amendment is a zeal for purpose, whether honest or sinister.

There's just no support for the state's position from cases I've read --

QUESTION: Well, do you take the position then that to impose liability here, the decision had to be wanton or reckless?

MR. MECHANIC: I take the position that wantonness, yes, Justice O'Connor, is synonymous with recklessness, with a callous disregard --

QUESTION: Well, do you really think that the Ninth Circuit spoke in terms of wanton or reckless behavior as opposed to what was reasonable in the circumstances?

MR. MECHANIC: I believe that the thrust of the Ninth Circuit's decision is a deliberate indifference and recklessness standard. They don't use the terms "callous disregard" or "reckless disregard." They use the term -- they do use the term "deliberate indifference," and they do recognize that the pain has to be wanton.

I think they use the term "reasonableness" in a context that is synonymous --

QUESTION: Well, it just -- there's language in the opinion that the Court of Appeals applied a standard of whether the officer knew or should have known that force was unnecessary.

MR. MECHANIC: Correct, but that comes after the sentence deriving the fact, after that, it ways "If an emergency plan was adopted with deliberate indifference to the right of Albers."

QUESTION: Well, that was an alternative, I thought.

MR. MECHANIC: Well, I would say that the only way you can interpret the Ninth Circuit's reasoning correctly would be to attach the conclusion that the thrust of their argument was that there had to be a deliberate indifference, not just an unnecessariness.

QUESTION: In any event, you do not stand here to support a standard of simply asking whether the officer knew or should have known that the force was unnecessary.

MR. MECHANIC: No, unless you interpret unnecessary with gross disproportionality to the force that's use, and force that's used that's clearly excessive, to the degree that you show such reckless conduct or callous conduct of the nature that perhaps this Court considered in looking at the analysis, even

in the Smith v. Wade case, dealing with punitive damages. We're talking about a very high standard on the spectrum, and we're not willing to go to the state standard, which we don't think is supportable, of actually having to show full punitive intent. We think the evidence here can meet that standard, but that's not our position.

So wantonness is the second component. Unnecessariness is the third component.

Now, I'm not sure what the state said other than that if the least penological purpose is served by the most excessive use of force, then that is necessary for purposes of the Eighth Amendment. That's wrong I believe. Eighth Amendment means, or the thrust of the Eighth Amendment is against that which is excessive, as Justice Marshall said in the Furman case. But we're talking about clear excessiveness. We're talking about gross disproportionality. We're not just dealing with a fine balancing test where if we can show that there was a less harsh means for taking care of Albers, we win.

But we are dealing with the most serious force here, or certainly a very serious force. So we think that the gross disproportionality standard certainly is a very serious consideration in this case.

Finally, we would like to look at the degree

of injury. We think that there may be some situations where even though force is applied unnecessarily and wantonly, the pain that it causes is so insignificant that it might not raise the constitutional dimensions.

There is no question in this case that Albers suffered very serious pain, perhaps the most serious you can suffer without actually dying.

Now I would like to apply the facts of this case to these standards. We're not relying on an expert battle here. We think that a judge could in fact issue a directed verdict even though one expert says that prison officers inflicted unnecessary and wanton pain on a prisoner. But we want to look at the actual facts, and I stress that what the courts -- what the Attorney General said was a good closing argument to a jury, but if you look at this record, he did not draw all inferences in Albers' favor, and of course, if there is any substantial evidence in the record to support Albers' position, a directed verdict was improper.

The jury should have an opportunity to decide the question if there is any evidence of any sufficiency to meet our standards.

First, there was not mass hysteria going on at the time of the shooting. The focus was on Richard Klenk. The security manager had been inside that

cellblock three times over the hour and a half period that the disturbance went on. About a half an hour before the shooting began, the furniture breaking -- and there wasn't a lot of furniture in the cellblock -- had stopped. Inmates were milling around, waiting, according to the testimony, for something to be done about Klenk.

Klenk did have a knife. Klenk had said that he had killed an inmate, which was wrong, but we're assuming that Whitley understood that he killed an inmate legitimately. Whitley said that his main concern was Klenk. The other defendants said that their main concern was Klenk. And it had to be because no one was supporting Klenk. Whitley never saw any other inmates around Klenk saying go ahead, you know, let's keep this thing going. Whitley only was concerned about trying to neutralize Klenk.

A few moments before the shooting began, Gerald Albers was asked by some inmates to come downstairs and to try to help resolve the disturbance. Albers is a pretty well respected inmate. He's also a well behaved inmate. That's a stipulated fact. He's also in an honor block. We understand they were all maximum security prisoners, but in the context of the prison, these prisoners had a history at least for a

period of time of good behavior.

Albers comes downstairs, and he sees Whitley, and he asks him, after talking to some elderly inmates who are locked in to the first tier, whether or not Whitley can help get the elderly inmates out of the cellblock because Albers and the elderly inmates were afraid that there would be tear gas that was being used --

QUESTION: Mr. Mechanic, in a milling crowd of prisoners in a prison riot, are the guards and the other people supposed to know the behavior record, the prior behavioral record of each one of the people in that milling crowd?

MR. MECHANIC: No, Your Honor.

QUESTION: Well, then, what's the relevance of their good behavior?

MR. MECHANIC: If in fact the facts showed here that we are dealing with a milling crowd and that the defendants really hadn't yet focused on Albers and talked to Albers and had given Albers an indication that he should stay downstairs to help the elderly inmates get out, which is what Whitley told Albers, according to the record, as the evidence stands, Whitley says to Albers, okay, I'll come back with the key.

Why didn't he tell Albers to go back to his

cell? He didn't do that. I submit that a jury could infer that at that moment, whatever cell-in orders had been issued before as far as Albers were concerned was no longer in effect.

So we're focusing in on what the defendants knew in this case. If we're dealing with a mass disturbance where split second decisions need to be made, of course we can't expect prison officers to make judgments as to who is responsible and who is not, but that's not the facts we have here.

QUESTION: Well, Judge Panner, when he, in his opinion, in granting the motion for a directed verdict, said here the uncontradicted evidence is that defendants were faced with a riot situation.

You disagree with him on that, I suppose, as well as with the Attorney General?

MR. MECHANIC: At the time the shooting began, yes, but only to this extent. Riot is a very nebulous term, Justice Rehnquist. Under common definitions, a riot is any time three or more people get together and act tumultuously and violently. What the state seems to be suggesting here is that because we attach the term "riot" to this case, it creates all new sorts of constitutional issues.

I don't think that's the case. I think what

we need to do is establish the correct legal standard to apply as far as a use of force against prisoners as a general matter. To the extent that a riot is in effect, we need to see whether or not the circumstances, how those particular circumstances apply to that legal standard.

QUESTION: You would judge each riot on its own facts then?

MR. MECHANIC: I think that if we establish the basic legal standard we are proposing, someone brings a complaint, those circumstances would have to be judged, and in many cases a judge would properly issue a directed verdict. But that's not the case here because Judge Panner resolved very important facts which another person may have resolved differently.

For example, if one inmate is holding a bomb or a grenade, that's not a riot under proper definition, but it's equally as serious or more serious than the situation we have here.

QUESTION: Do you think --

QUESTION: It's according to where you're holding that bomb.

MR. MECHANIC: Correct.

QUESTION: If you're holding that bomb on my head, it's a riot. Now --

MR. MECHANIC: I understand your point, Justice Marshall.

QUESTION: In this case, they knew at least one of them was armed with a knife.

MR. MECHANIC: Correct.

QUESTION: They didn't know whether the others had knives or not.

MR. MECHANIC: They knew that Mr. Albers was unarmed, and they knew that the other inmates down there --

QUESTION: How did they know he was unarmed?

MR. MECHANIC: Well, the presumption has to be that they had no basis to believe that he was armed.

QUESTION: Well, how can you add a presumption when you find one that was armed? Isn't that the end of the presumption?

MR. MECHANIC: When Mr. --

QUESTION: If you have the presumption that they're not armed and you find one is armed, isn't that the end of that presumption?

MR. MECHANIC: Well, under the circumstances of this case, Justice Marshall, I don't believe it would be because the security people had ample opportunity to go in there and view the situation, and as far as the inmates immediately down in the open area, they talked

to Richard Klenk and talked to Gerald Albers, and the only indication they had was Albers was there to help in some way, and they gave Albers approval to help.

We weren't dealing with a lot of inmates in that open area --

QUESTION: Counsel --

MR. MECHANIC: There were only a handful.

QUESTION: It's not disputed, is it, that the prison guards had reason to believe that one inmate had been killed.

MR. MECHANIC: Yes, Your Honor.

QUESTION: That's a fact, and it also is a fact that the inmates were milling around, whatever that means, and you would not use the term "riot" in light of those circumstances? I realize --

MR. MECHANIC: No, I --

QUESTION: -- you say it's ambiguous, but couldn't you?

MR. MECHANIC: I'm -- we agreed that there was a riot under your common definition that evening. I believe there may be a question as to what was going on right at the end that a jury would have to resolve. But we're no questioning that you cannot term this as a riot. I'm only stressing that the word "riot" brings in so many different sets of circumstances --

QUESTION: Mr. Mechanic --

MR. MECHANIC: -- that we can't attach absolute --

QUESTION: May I interrupt with -- is it not correct that a couple of hours or maybe an hour and a half before the shooting that there had been a cell-in order, and that at the time of the violence, there were still a lot of inmates who had not returned to their cells?

MR. MECHANIC: Correct.

QUESTION: How many? Does the record tell us?

MR. MECHANIC: No, it doesn't, but I -- there were a number of -- there were 200 inmates in that cellblock, and --

QUESTION: But to the extent that there were inmates that had not returned to their cells, now, whether the word "riot" fits or not, they at least were in disobedience of an outstanding cell-in order.

MR. MECHANIC: Correct, except for Gerald Albers, I believe, who was told to remain there while Mr. Whitley got the key. So we're not questioning there wasn't some disobedience of a cell-in order. The inmates basically were standing around, standing outside their cells on different tiers, looking, seeing what was going on down in the open area. That certainly is a

violation of the cell-in order, but the violation was only to that extent.

Now, what happened next is when Mr. Whitley went out, he talked to Cupp and he talked to Kennicott, and a decision was made to shoot anyone going up those stairs. The only way Albers had a chance to get back to his cell was going up those stairs. So he's waiting for Whitley to come back, expecting Whitley to help get the elderly inmates out.

By the way, under this case, the experts said that it's appropriate professional procedure to allow inmates who don't want to get involved in a disturbance to leave.

Instead of, however, coming back with a key, Whitley comes back, he says let's go, shoot the bastards, and starts running up the cell. Albers hears those words, he sees firearms, he starts hightailing back to his cell. He turns around, glances over his shoulder, and he sees a rifle, he freezes -- this is the testimony -- he looks Kennicott right in the eye, Kennicott admitted he knew Albers, he knew he was well-behaved, and then Albers is shot.

There's no basis to believe Albers was dangerous. And even applying any semblance of the Garner reasoning without expecting even a probable cause

standard, can we shoot someone without any basis to believe that they're dangerous, under the circumstances of this case, given the particular exigencies that I have discussed.

I think that's an appropriate question for a jury, and that's really all we need to decide here.

Mr. Cupp said that anyone outside their cell was fair game. That's an indication, I believe, along with Whitley's statement of shoot the bastards, but even the punitive intent to get Albers, for some reason, was there.

So we could meet that standard. But even under our correct analysis, or under our correct analysis of the constitutional standard, the deadly force was inflicted unnecessarily, which means grossly disproportionate to any need, and wantonly reckless disregard. They never gave Albers a warning. They never gave him a way out. Even Garner was told to halt before he was shot. Even the Tennessee statute that you dealt with in that case required a warning of "Halt" before using deadly force. There were no words spoken to Gerald Albers before he was shot.

Potential dangerousness is not sufficient to use deadly force, and that's all the state has said in tis case they have.

Maybe a jury would conclude that what they did was constitutionally proper, but under the circumstances and the proper standard to be applied, a jury could also reasonably have concluded that what they did was improper constitutionally.

The principle that juries are links to the public attitude of contemporary standards of decency under the Eighth Amendment are still good law, and juries perform this historical function day in and day out, and they apply the same standards we're suggesting day in and day out.

It's our position that they should be allowed to apply those standards in this cas, assuming the judge finds that there is sufficient evidence in the record to raise to the standards that we're discussing.

QUESTION: Are you going to say anything about immunity, Mr. Mechanic?

MR. MECHANIC: One quick thing on immunity, Justice Brennan. We believe the law was clear at the time that prison officers could not use grossly disproportionate and excessive force. That's the standard we are relying on. Whether a riot in fact provided them with the circumstances so that they should not be held liable on the merits is one thing, but we cannot have a riot exception carved out of the legal

standard.

So the law was clear. The Ninth Circuit reasoning I am not supporting. We did not argue that reasoning. We argued simply that under the Harlow standard, the law was clear at the time that you have a principle of what unnecessary and wanton infliction of pain means, by repeated circuit court decisions and the general doctrines of this Court.

One point about the riot in answering Justice Brennan's inquiry about my discussing immunity. The state admits that if they dropped napalm on the cellblock, that might be a constitutional violation because it would show imputed intent. But under their immunity argument they would be immune because there was never a court decision that dealt with a riot and told them what they could do or could not do in the use of force. That stresses and highlights the weakness of the state's position on the kind of identity you need to meet this court's requirement that there be a clear constitutional principle.

Thank you very much.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Attorney General?

ORAL ARGUMENT OF DAVE FROHNMAYER, ESQ.

ON BEHALF OF PETITIONERS -- Rebuttal

Thank you, Mr. Chief Justice. I believe I will not require all of the time, but I wish to clarify some issues of fact, some of law, and some of concluding policy.

The first one of fact is that obviously the crisis was not subsiding. At best the facts show that it was a stalemate, no one had given an inch, there was still a hostage and still a knife-wielding inmate.

Second, the evidence was that all or almost all of the inmates were out of their cells.

The third point, which is much -- is one as much of prediction as one of fact. It is a point raised by Justice Marshall's colloquy with counsel -- is that no one could know what Albers would have done. This was a split second decision. Two inmates, one of them Albers, one another, were going up the stairs. The presumption ought to have been one of dangerousness.

The third factual issue is that there was no testimony so far as I am aware that the -- all of the other inmates, all 199 of the others were simply waiting for something to be done about Klenk.

Now some points about law. Tennessee v. Gardner is inapt and inappropriate in the resolution of this case. Not only does it deal with a different amendment, but there's a very stark fact about the

difference between the subject of the shooting in that case and in this case. Here Albers objectively was pursuing an unarmed guard who was attempting to rescue a person in a position of danger. He wasn't fleeing a crime, he was running to the maximum point of danger in this prison at this time, which was hostage cell No. 201. And the notion that he should have been presumed, constitutionally presumed meant that the state officials dealing with this issue should presume constitutionally that he would behave as a law abiding citizen instead of a person incarcerated in a maximum security institution is a presumption that flies against our common sense and our sense of justice.

The second point on the law that I'd wish to leave with this Court is that there was no deliberate indifference in this case. The constellation of concerns that prison officials had to be aware of included the possibility that if the disturbance were to continue, the inmates would wreak violence on themselves, on the most vulnerable and weak of those who were there, that the hostage guard might be -- might be further harmed, that indeed, if the riot or disturbance went on, that very serious damage could occur to people.

Now, to characterize the plan as deliberately

indifference to that whole range of concerns is to misuse the test that this Court has articulated. And our point, I believe, is equally well made by the United States government in its amicus curiae brief on pages 21 and 22 on that very point.

The last point with respect to the law is on the issue of disproportionality as counsel argues. We do not understand the disproportionality analysis in the cruel and unusual punishment cases to have application to what we're talking about here. It has been evolved in the case of sentences that has been its sole restriction, with the exception of one minor mention in Rhodes v. Chapman.

Finally, let me suggest the reality confronted by prison officials in this case. Every day we are bombarded by headlines about hostage taking, about risks, and about alternatives which sometimes end in tragedy. There are in many of these cases no risk-free alternatives, certainly in the context of a prison riot where there is already a hostage and an imminent threat, not merely to the hostage but to other lives. There ought to be some consideration about the fact that there is no perfect answer, and that despite the best of professional intentions, the result may be tragic.

Fortunately that was not the result in this

case, where Captain Whitley deserves a badge of heroism and not a civil rights action asking for monetary damages against him.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

We'll hear arguments next in Texas v. McCullough.

(Whereupon, at 11:09 a.m., the case in the above-entitled matter was submitted.)

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lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

#84-1077 - HAROL WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL., Petitioners V. GERALD ALBERS

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BY Paul A. Richardson

(REPORTER)