ORIGINAL

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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DETHORNE GRAHAM, Petitioner V. M. S. CONNOR, ET AL.

CASE NO: 87-6571

PLACE: WASHINGTON, D.C.

DATE: February 21, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

DETHORNE GRAHAM, :

Petitioner :

v. : No. 87-6571

M. S. CONNOR, ET AL. :

Washington, D.C.

Tuesday, February 21, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:46 p.m.

APPEARANCES:

H. GERALD BEAVER, ESQ., Fayetteville, North Carolina on behalf of the Petitioner.

MARK I. LEVY, ESQ., Chicago, Illinois, on behalf of Respondents.

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C O N T E N T S

P R O C E E D I N G S

(1:46 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-6571, Dethorne Graham v. M. S. Connor.

Mr. Beaver, you may proceed whenever you're ready.

ORAL ARGUMENT OF H. GERALD BEAVER

ON BEHALF OF PETITIONER

MR. BEAVER: Mr. Chief Justice. May it please the Court:

On November 12, 1984, Dethorne Graham was not a convict or a criminal. He was not a pretrial detainee. Indeed, he was not even a formal arrestee. He was a free citizen of the United States of America who on that day had an insulin reaction, and he called upon a friend to take him to a convenience store where he could purchase some orange juice to help counteract the effect of the insulin reaction.

Upon arriving there, he noted that because of a line it would take him a long time to get his orange juice, and he became concerned and ran to his friend's car and motioned for him to take him to his girlfriend's house.

A Charlotte, North Carolina police officer saw him hurriedly exit the convenience store and determined

the conditions to be suspicious enough to allow for a brief investigative stop to determine the facts. Upon making this stop, Mr. Berry immediately informed Officer Connor that Mr. Graham was indeed suffering from what he described as a sugar reaction.

At this time Officer Connor asked Mr. Berry, or told Mr. Berry, that he must remain with Mr. Graham at that time while he determined what happened at the convenience store, and he began to depart.

At this time the Petitioner became concerned, and according to his testimony he has little memory of what occurred, most likely because of the continuation of his insulin reaction. He exited the car and ran around it twice, and then sat down on the curb.

From this point forward, taking the evidence in the light most favorable to the Petitioner, as must be done on a directed verdict, he was seated at that time, again peacefully talking with the police officers when back-up officers arrived.

We know that those officers must have been told of the alleged sugar reaction before the first comment.

QUESTION: What was he doing when the officers arrived? He was sitting on the curb.

MR. BEAVER: He was sitting on the curb.

QUESTION: Was he conscious?

MR. BEAVER: Yes, he was at that time.

QUESTION: Had he been?

MR. BEAVER: Yes, he had been conscious, but he has not memory of those events.

QUESTION: To whom was he talking?

MR. BEAVER: He was talking to Mr. Berry and to Officer Connor at that time, when the back-up officers arrived, and we can tell by the comment of the first arriving officer that they were explained about the sugar reaction because the first comment was, "I've"seen a lot of people with sugar diabetes before but none that ever acted like this. There must be -- he must be drunk. Let's lock him up."

And they grabbed him, and they turned him over and they handcuffed him very tightly, so tightly that at the conclusion of this episode he had cut wrists; and they lifted him up by his arms and they carried him to the hood of Mr. Berry's car and laid him over it.

At this time, he regained his senses and began to talk with the officers and complain about the treatment he was receiving, and he asked them to please check his back pocket for his diabetic decal to show that he was indeed a diabetic.

The response was, an officer told him to shut

up and slammed his head into the hood of the police car -- or, I'm sorry, Mr. Berry's car. A few moments later, no less than four police officers grabbed Mr. Graham, one on each arm, one on each leg, picked him physically off the ground, carried him to a police car, opened the back door and threw him in, to use the Petitioner's words, like he was a sack of potatoes, and they drove him home -- never arrested him.

When he arrived home they unhandcuffed him and he fell flat on the ground, and he was carried within a few moments for medical attention and the examining physician discovered he had a broken foot.

He in fact had an insulin reaction. His blood sugar count was very low; and they discovered that he had cut wrists and he had a large abrasion over his right eye. He had an injured right shoulder that prohibited him to the extent that for two weeks he could not administer his own insulin shots.

He missed five and a half weeks of work at the North Carolina Department of Transportation. He incurred mecical expenses. All as a result of this.

On these facts, the lower courts on a directed verdict held that these acts by the police officers had violated no constitutional right of Mr. Graham to be free from bodily harm and physical abuse at the hands of

law enforcement officers.

May it please the Court, this decision is wrong, and it is wrong for four reasons. Initially it is wrong because it fails to understand that whenever force --

QUESTION: Now what court decision are you talking about?

MR. BEAVER: I'm talking about the District Court decision and the 4th Circuit Court of Appeals.

QUESTION: We're reviewing the Court of Appeals decision.

MR. BEAVER: We are, sir.

QUESTION: What did it hold?

MR. BEAVER: The 4th Circuit United States Court of Appeals, we contend, created a generic hybrid type of constitutional right with no specific provision as to what the constitutional anchor for the analysis is.

They permitted the consideration of the subjective intent of the officers when it is our contention that two decades of 4th Amendment jurisprudence of this Court forbids such an analysis.

QUESTION: So you're saying they applied the wrong rule of law.

MR. BEAVER: Yes, sir. They are wrong because they failed to understand that whenever force is used by

officers to seize a citizen, the 4th Amendment, by its very own terms preventing, or prohibiting unreasonable search and seizure, controls analysis.

The decision is wrong because it fails to apply the principles that were laid down by this Court in Tennessee v. Garner, an objective standard of reasonableness test to analyze this situation.

It was wrong because it suggests contrary to two decades of 4th Amendment jurisprudence, beginning in 1967 with this Court's decision in the Schmerber case, that at a minimum the 4th Circuit held that it was relevant to consider, at a minimum that it was relevant to consider, not only was the officer's conduct unreasonable, but whether the officer inflicted pain on the citizen maliciously, sadistically, for the very purpose of causing harm. The 4th Amendment forbids that, Tennessee v. Garner and Terry v. Ohio tell us.

And finally, the decision was wrong because the court below erred as a matter of law in resolving credibility issues, weighing testimony, determining credibility in the light not most favorable to the Petitioner and drawing unfavorable inferences in deciding and affirming its directed verdict.

Initially, all parties in briefs concede that the Petitioner was seized in this case, when Officer

Connor informed the Petitioner and Berry that they were not free to leave. However, the inquiry was not stopped there, for we are told in Terry v. Ohio that a seizure which is reasonable at its inception may violate the 4th Amendment by virtue of its intolerable intensity and scope.

To quote this court in Tennessee v. Garner, reasonableness depends not only when a seizure is made, but also how it is carried out. Tennessee v. Garner relied upon two decades of 4th Amendment jurisprudence of this court and analyzed an officer's use of force in seizing a suspect from an objective standard of reasonableness.

May it please the Court, Tennessee v. Garner logically controls the disposition of this claim just as Terry and its progeny controls the framework of Tennessee v. Garner.

Inexplicably, the 4th Circuit Court of Appeal fails to even cite or mention Tennessee v. Garner or the objective standard of reasonableness and instead embarks upon a determination of the Petitioner's claim based upon a substantive due process concept which was first formulated by the 2nd Circuit in its 1973 decision in Johnson v. Glick.

In Glick, relying upon this Court's 1952

decision in Rochin v. California, the 2nd Circuit Court of Appeals held that the due process clause protects criminal suspects from police conduct that shocks the conscience. But of course, Rochin, the analytical predecessor of Glick, predated Mapp v. Ohio, and at that time, at the time Rochin was decided the 4th Amendment was not a part of the Constitution made applicable to the states.

Nonetheless, Judge Friendly announced four tests to be used in analyzing this 'shock the conscience' test, the fourth of which was a wholly subjective factor of whether the force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.

These factors have since been used by a number of Circuits including the one below to analyze excessive force claims. However, we submit that the continued use of this substantive Glick test, and particularly its fourth factor, in seizure and arrest cases, is patently at odds with the express words of the 4th Amendment and the holdings of this Court. And that is for four reasons.

QUESTION: Mr. Beaver, don't you understand that your opponents here concede that the 4th Amendment

is the correct mode of analysis for these facts?

MR. BEAVER: I understand that they do so in their brief, sir. Yes, sir, I do that. But what they do not concede is that -- they would have this Court believe, and the 4th Circuit would hold, that its decision which relied upon the four Glick factors and discussed the four Glick factors, it would have us believe that that is simply another way of stating objective standard of reasonableness, and it is not.

Objective standard of reasonableness forbids, strictly forbids a look at subjective intent, and the reason for this is it is irrelevant. It is irrelevant to an objective 4th Amendment consideration.

Two examples: Tennessee v. Garner is a prime example of why it is irrelevant. In that case, clearly a majority of this Court held that the conduct engaged upon by the officers was objectively unreasonable. However, this Court -- the Courts below when it was never raised, the officer there clearly acted with a benign intent. He was not in any way malicious or sadistic or acting for the purposes of --

QUESTION: But does the subjective factor have any bearing on any immunity that the officers might have?

MR. BEAVER: It does not under this Court's decision in Harlow v. Fitzgerald where a subjective --

this Court has driven subjective considerations from every aspect of 4th Amendment analysis.

QUESTION: So under your view, I take it, the immunity analysis collapses into the objective analysis under the 4th Amendment and the issue is simply the same?

MR. BEAVER: Oh, no. They are simply not the same. Tennessee v. Garner is a prime example of why it's not the same. Tennessee v. Garner, the conduct was held clearly to be objectively unreasonable at the same time it was held to be within qualified good faith --

QUESTION: There there was reliance, because of reliance on a statute?

MR. BEAVER: Because of reliance upon the Bright Lyon test --

QUESTION: In this case -- in this case, are the two inquiries precisely the same?

MR. BEAVER: I would think not, but with all due respect there was no raising of the qualified good faith immunity defense in this case. It was never presented either by pleadings or in argument before the District Court or before the Appellate Court. It was never raised. It's simply not an issue in the matter.

Hypothetically, I can see no reason why this case would be any different with Tennessee v. Garner. I think it clearly violates -- can be argued clearly that

it violates Bright Lyon standards to take a handcuffed man who merely asked you to look into his diabetic decal, grab him on the back of the head and slam his head into the hood of a car.

QUESTION: Counsel, under the objective approach, or test, that you propose, I assume that statements made by the officers during the course of the arrest that might indicate personal animus would be irrelevant.

MR. BEAVER: Yes. And my I explain -- or may I take one little caveat to that. I recall your Footnote 13, I believe it was in United States v. Scott, in which you were talking about -- this is the case involving the wire taps -- in which you indicated that perhaps such bad faith statements could be usable by the Court in the criminal context, for example, to determine whether the exclusionary rule should apply.

It can also be used in the civil context to look into credibility issues for jury determination if the officer is acting objectively malicious by his statements. Clearly a jury can consider that in determining the credibility of him taking the stand and saying that things occurred in a different way. And finally, in a civil context it's also useful for punitive damages questions.

QUESTION: (then)... it would appear that the officer's statements would have no relevance.

MR. BEAVER: Other than perhaps in a decision by the jury whether to award punitive damages.

QUESTION: Some of the circuits have applied a pretextual seizure doctrine. For instance, a traffic arrest is made, and it may be unreasonable even though the officer had probable cause, if in fact the officer was trying to make a drug arrest, for example. There are cases involving pretextual seizures..

MR. BEAVER: I see.

QUESTION: Do you think your objective standard would preclude that kind of an analysis?

MR. BEAVER: I believe that a pretextual stop is not objectively reasonable, if that makes sense. To arrest someone and seize them on a pretext I think from an objective point of view can be argued is --

QUESTION: But you wouldn't look at the officer's true intent under your theory.

MR. BEAVER: Let me back up and say, strictly speaking with the objective test I would agree with you, with the justice...

QUESTION: You can't hypothesize any case in which a seizure is objectively unreasonable and there is good faith?

MR. BEAVER: Oh, I'm certain that there are many cases where there is an objectively unreasonable seizure --

QUESTION: Only with the statute.

MR. BEAVER: Tennessee v. Garner is a prime example. It was good faith and the seizure was unreasonable.

QUESTION: There was a statute there.

MR. BEAVER: Put on the spot it is very difficult for me to think of hypotheticals. I would certainly think that there are a number of situations cited in our briefs, both ours and the Solicitor General, as amicus, and I do not recall them specifically in my mind at this time and I apologize.

QUESTION: Are you two whispering over there, or what's going on? I can't hear what you're saying.

MR. BEAVER: Pardon me. I cannot think of one at this time. There are numerous hypotheticals set forth in both our brief and the brief of the Solicitor General as amicus. If I may I would defer to those briefs and I apologize for not being able to come up with one at this moment.

QUESTION: Mr. Beaver, you have to run that one by me again, where you said that you cannot conceive of how, you say, a pretextual stop is always objectively

unreasonable. I think we're playing with words there.

MR. BEAVER: Well, I believe that I stated that --

QUESTION: You don't know it's objectively unreasonable unless you know what the subjective intent of the officers is. Right?

MR. BEAVER: That's correct, and I have since rescinded that in speaking with the justice as stated, but I do not believe that that would be a situation. I think a pretextual stop would not necessarily be objectionably unreasonable.

QUESTION: It would not at all be.

MR. BEAVER: It would not be objectively unreasonable.

QUESTION: So you'd be willing to apply your rule consistently, so you can make as many pretextual stops as you want.

MR. BEAVER: Right.

QUESTION: Without violating the 4th Amendment.

MR. BEAVER: May I state, sir, that this is not my rule. This is the rule from Tennessee v. Garner and 20 years of objective jurisprudence.

QUESTION: Whatever. You would still apply it consistently, though, and you'd think that pretextual stops are okay.

MR. BEAVER: For the purposes of this argument I believe that I would, yes sir.

QUESTION: But the next argument, you wouldn't.

MR. BEAVER: Well, I might not. It depends on who my client is, Your Honor. Assuming, then, that the 4th Amendment applies, the Court below erred in considering either as an element of the Petitioner's claim or as a conceptual factor, however that is defined by the 4th Circuit Court of Appeals, the subjective intent of the officers.

First of all, Section 1983 this Court has on numerous occasions has held contains no state of mind requirement, and one must focus on the specific constitutional amendment itself. As this Court has held in Tennessee v. Garner and in Terry v. Ohio and other earlier cases, the 4th Amendment calls for this objective standard.

The 4th Amendment does not prohibit malicious and sadistic seizures or seizures that are accompanied by severe injury. It prohibits unreasonable searches and seizures, and as I stated I believe firmly that the subjective intent of the officers in making a seizure is a wholly irrelevant factor.

QUESTION: Wouldn't the officer at least have to intend to seize the person.

MR. BEAVER: Yes. Under -- this sounds as if Your Honor is asking whether there must be an intentional act to predicate this test, and we certainly are willing to concede that this case does not imply anything about unintended acts creating unintended injuries. This case is no more involved with that type of situation than Tennessee v. Garner was.

I believe that what the 4th Circuit opinion does, we mentioned a moment ago, or I mentioned the hybrid test which is not specifically set to any particular constitutional amendment.

Yet if you tell a jury, in instructing the jury, that they should consider the subjective intent of an officer, you're going to end up with many jury verdicts in which the jury says well, the person was not being malicious or sadistic therefore we should not find against him.

As mentioned earlier, this Court has driven subjective considerations even from the good faith defense. It goes even further in the last term in Michigan v. Chesternut, this Court drove the any subjective intent requirements out of the decision as to whether or not a person felt that he was seized.

The Court held in Michigan v. Chesternut that a person is seized when he, when an objective person,

when a reasonable person under the circumstances would not feel that he was wrong.

QUESTION: What if we agree with you that the Court of Appeals used the wrong standard? What should we do? I know you want us to reverse, but --

MR. BEAVER: We would argue the case should be reversed and sent back for a new trial.

QUESTION: For a new trial?

MR. BEAVER: Yes. Or at a minimum, new findings under the correct standard.

QUESTION: You mean in the Court of Appeals, they ought to review the, what the District Court did under the right standard?

MR. BEAVER: May it please the Court, the decision on directed verdict is a question of law.

QUESTION: Right.

MR. BEAVER: The District Court, the Court of Appeals, for that matter this Court, has no discretion in how to determine the facts here. The facts are to be determined in the light most favorable, and this Court as well as, is in as good a position as any Court, to read the bare record and determine what is the light most reasonable -- most favorable to the Petitioner.

QUESTION: But if they reviewed the directed verdict judgment under the wrong standard why shouldn't

we just send it back to the Court of Appeals and say, you should fly the right standard?

MR. BEAVER: That is one option for this Court. We, however, believe that this Court is in as good a position to make that decision and that clearly, clearly there is evidence in the light most favorable to the Petitioner.

QUESTION: Then we have to study the record and know all the facts -- that's a lot of work.

MR. BEAVER: I presume the justice has studied the record and is familiar with the facts.

QUESTION: Should the jury be instructed that if the facts are as you state them to be they must bring in a verdict for the Plaintiff? Does the jury decide reasonableness in every case?

MR. BEAVER: No, not in every case. Personally I've tried two cases in which a Court has told the jury if they find it in the way that the Plaintiff has contended things occurred they would find for the Plaintiff. If they found it in the way the defense said -- there are some cases which are clear. There are other cases which it is a jury question, when they have to resolve conflicts.

QUESTION: In this case, if the evidence is as you have explained it, and I recognize only one side has

testified, then as a matter of law is it an unreasonable seizure?

MR. BEAVER: In my opinion, in this case, were there no other side to be heard, yes, under an objective reasonableness test. You don't even treat arrestees like this. This is a Terry stop that got out of control, as a matter of law, without hearing from the other side.

But there is another side to be heard. We are not asking this Court to direct the verdict in our favor. Clearly, clearly they have the opportunity to present their evidence and to make their arguments.

The problem with this case is that the 4th Circuit opinion, and I repeat, allows -- at least allows, if not requires -- the consideration of subjective intent. The 4th Amendment forbids it.

Thank you.

QUESTION: Thank you, Mr. Beaver. Mr. Levy, we'll hear now from you.

ORAL ARGUMENT OF MARK I. LEVY

ON BEHALF OF THE RESPONDENTS

MR. LEVY: Thank you, Mr. Chief Justice, and may it please the Court.

We think Petitioner has misunderstood the Court of Appeals decision in this case. That decision

does not implicate the question the Petitioner has asked this Court to decide.

The question presented and briefed and argued today by Petitioner is whether excessive force claims under the 4th Amendment and Section 1983 are governed by a subjective test.

Now, let me note that the Petitioner himself concedes in his brief that he never focused his claim on the 4th Amendment either in the District Court or in the Court of Appeals. Indeed, his complaint nowhere refers to the 4th Amendment, even though it was filed some approximately four months after Garner was decided.

And today, Petitioner faults the Court of Appeals for not referring to either Terry or Garner in its opinion, but I note that his brief in the Court of Appeals cited neither of those cases.

QUESTION: Yes. But the dissenting opinion did. Judge Butzner cited them.

MR. LEVY: That's correct, it did. But this case was never focused --

QUESTION: They weren't exactly a mystery, those cases at that time.

MR. LEVY: Excuse me?

QUESTION: Those are new cases. I would think the Court of Appeals normally would address itself when

the dissenting judge cites them.

MR. LEVY: It certainly could have. But we don't think this case presents the question the Petitioner seeks to raise in this Court, for the decisions and the judgments below do not depend upon the application of a subjective test, and I say that for two reasons.

First, the phrase "maliciously and sadistically" does not, as Petitioner believes, refer to the actual subjective intent of the officers. Indeed, at the trial here, no one ever suggested that subjective intent was an element.

QUESTION: Let me interrupt you for just a moment. Do you agree that this case should be decided under 4th Amendment principles?

MR. LEVY: We agree that it can be analyzed under the 4th Amendment.

QUESTION: And should be?

MR. LEVY: Yes, we would agree with that. I think there are some cases I should add, and this one may be debatable, that could be decided under the 5th Amendment standard.

The test proposed by Petitioner is that the 4th Amendment seizure continue so long as the arrestee is in the company of the arresting officers, which could

continue after bail has been set and the person bound over in the local jail.

So we think that test goes very far, but on these facts as we've got them today we don't object to the application of a 4th Amendment analysis. But as I was saying, the trial in this case, no one ever suggested that subjective malice was an element of Petitioner's cause of action, and Petitioner never even attempted to prove the subjective intent of the officers.

Now the 4th Circuit itself explained in this case that "concepts such as malicious and sadistic should be understood as descriptions of the degrees of force that exceed the state's privilege and thereby implicate intrusions into constitutionally protected personal security."

The en banc 4th Circuit offered the same explanation in its subsequent opinion in Justice against Dennis, which was rendered prior to the filing of the petition in this case.

QUESTION: Is this on the theory that words mean precisely what we intend them to mean and nothing else? That's a very strange way to use those words, isn't it?

MR. LEVY: No. It was an attempt by the Court of Appeals to define that level of force that

constitutes a constitutional violation. It is not the subjective intent of the officers. A malice standard in law is often an objective standard, and under the 4th --

QUESTION: For example?

MR. LEVY: I think in common law immunity defenses, for example.

QUESTION: A malice standard is objective?

MR. LEVY: I believe that's right. Malice can be inferred from the objective circumstances, and the Court said as much in this case and in its --

QUESTION: The inference is of intent. I mean, the normal meaning of those terms is addressed to the intent of the actor, and there may be objective circumstances that give rise to an inference, but I think the normal use would indicate subjective intent.

MR. LEVY: They could be used in that way, but the Court of Appeals --

QUESTION: They would normally be used that way, and I don't know that I can read the Court of Appeals language as imposing some objective standard out there by the use of those words. It looked very much like they were kind of acopting a sort of Whitley v. Albers standard for review of what occurred here.

MR. LEVY: We read the Court of Appeals decision in this case and in Justice subsequent en banc

decision to explain that it was an objective test: that it's a legal description of that level of force that is more than simply a battery under state law and reaches the level of a constitutional violation. So it is not an objective -- I mean, it is not a subjective standard that looks to the intent of the jury.

Now, it may well be that other words could be better chosen to accomplish that, but we think the Court of Appeals has sufficiently explained itself. But let me say, equally important, even if the Court of Appeals did think that in general a subjective test was appropriate here, the decisions of the District Court and the Court of Appeals in this case did not turn in any way on any subjective standard.

Rather, both Courts held the Respondent's conduct was objectively reasonable considering the need for force, the amount of force used and the extent of the injuries that Petitioner has alleged.

QUESTION: What reason was there for handcuffing a diabetic in a coma?

MR. LEVY: At the time the officers didn't know that he was a diabetic in a coma.

QUESTION: What was he doing that was so violent that he had to be handcuffed?

MR. LEVY: You have to go back one step even

before that. Officer Connor saw Petitioner act in a very suspicious and unusual manner. He saw Connor hurrying from the convenience store.

QUESTION: Violent?

MR. LEVY: It wasn't clear. He saw him hurry into a convenience store. He was hurrying out.

QUESTION: Well, what did he do that was violent?

MR. LEVY: Testimony. Petitioner's own witness said that Petitioner was throwing his hands around; that he was resisting putting the handcuffs on; that Berry had asked for Officer Connor's help in catching --

QUESTION: But what was he doing, I'm talking about before they put the handcuffs on him. What was he doing before they tried to put the handcuffs on?

MR. LEVY: He was acting in a very bizarre manner. He ran out of the car, circled around it twice and then sat down. At that point, Berry asked for Connor's help in catching the Petitioner, and Berry testified without contradiction at trial that even at that point, before any handcuffs were being considered, Petitioner was throwing his hands around. The District Court --

QUESTION: Was that threatening anybody? Did

he strike anybody?

MR. LEVY: Well, the officers didn't have to wait until he was --

QUESTION: Did he strike anybody?

MR. LEVY: I don't believe the record indicates that he struck anybody.

QUESTION: Did he threaten to strike anybody?

MR. LEVY: He was acting in an unpredictable and potentially dangerous manner.

QUESTION: Can you answer, did he threaten to strike anybody?

MR. LEVY: He did not overtly threaten to strike anyone.

QUESTION: Did he have a weapon of any kind?

MR. LEVY: The record doesn't indicate, I don't believe.

QUESTION: The record didn't show he had a weapon of any kind?

MR. LEVY: That's correct.

QUESTION: Well, why was he handcuffed?

MR. LEVY: The record shows that he was properly stopped as a suspect for a criminal investigation; that he was acting suspiciously; that he was acting in a bizarre manner; that Mr. Berry asked for Officer Connor's help.

QUESTION: Is bizarre an explainable word, or does it cover anything?

MR. LEVY: No, it doesn't cover anything.

QUESTION: What does it cover?

MR. LEVY: It covers, certainly, Petitioner's conduct in this case.

QUESTION: Which was what?

MR. LEVY: And Mr. Berry so said. He said he didn't know what was wrong with Petitioner. It might be an insulin reaction, a sugar reaction. He'd never seen one. He was scared. He didn't know what to do. He asked for Officer Connor's help. He testified that Petitioner was throwing his hands around.

The District Court stated without contradiction that when the back-up officers were arriving a scuffle started, and at that point the officers sought to put the handcuffs on Petitioner. He resisted the handcuffs. He threw his hands around more. Even after he was handcuffed and the officers wanted to put him in the car, the undisputed record shows that he was vigorously fighting and kicking, resisting getting into the car, and the District Court and the Court of Appeals both commented on that.

QUESTION: Shouldn't a diabetic object to being arrested rather than given treatment?

MR. LEVY: He wasn't arrested. He was never arrested.

QUESTION: Well, why was he handcuffed?

MR. LEVY: He was handcuffed because the officers were concerned that he was a criminal suspect. He was acting in a very unusual and erratic way. He was throwing his hands around. Indeed, the District Court stated from the record that he was handcuffed in part to protect himself, as well as the officers.

QUESTION: In order to protect himself?

MR. LEVY: The District Court summarized the record as indicating that. That's correct.

QUESTION: May I differ from that conclusion?

MR. LEVY: The record either supports it or it doesn't, but the District Court did say that, and I think it is supported by the record. But the officers also were entitled to protect themselves; to maintain control of the situation; to secure their custody of the Petitioner.

They didn't have to wait until he threatened them. They didn't have to wait until events got out of control. The circumstances here, that he was a criminal suspect, he was properly stopped for investigation. Indeed, Petitioner's own expert witness at trial conceded that the use of handcuffs was reasonable and

appropriate here.

QUESTION: Was there a seizure here?

MR. LEVY: Yes, I agree there was a seizure. No one disputes that. The Petitioner concedes below and in this Court that the seizure itself was proper and lawful. That's not what he is complaining about.

QUESTION: Well, Mr. Levy, I guess at the time the officers finally put the Petitioner in the wagon they were aware that no crime had occurred in the convenience market.

MR. LEVY: I think that's not correct. The record shows that it wasn't until he was in the car that for the first time, Officer Connor was able to check to see what had happened at the convenience store and determined that no crime had been committed.

QUESTION: Were they aware he was a diabetic at the time he was lifted into the wagon.

MR. LEVY: There were statements to them that he was a diabetic. I don't think they knew one way or the other, although I don't think that particularly matters either. Even if he was a diabetic, and his complaint is that he wasn't given medical treatment, he doesn't allege any injuries from that.

QUESTION: Well, let's see. He alleges his foot was broken.

MR. LEVY: That didn't result from the diabetes.

QUESTION: From being lifted into the wagon.

MR. LEVY: The record doesn't show how his foot was broken. He simply failed to carry his burden of proof to show that. It could have been something that he did to himself, as the District Court suggested, or it could have resulted from the officer's reasonable use of force. There's no indication.

QUESTION: Isn't that really a jury question?

MR. LEVY: But the Plaintiff in this case, the Petitioner, has the burden of putting in evidence that shows its more probable than not.

QUESTION: Well, if you're sure that your foot was okay before this sort of a fracas and it's broken afterwards, isn't the jury entitled to infer that it was a result of this confrontation?

MR. LEVY: Oh, it's entitled to infer that it occurred during the confrontation. It's not entitled to infer, we don't think, that it was caused by the officers through any wrongful conduct. As I say, it could have been something that the Petitioner did to himself in his course of thrashing around and resisting. It could have been something that occurred from the reasonable use of force by the officer.

QUESTION: And you don't think those are jury questions?

MR. LEVY: I don't think they are in this case, but even if they are, there still is no jury question about whether the officers acted unreasonably.

Even if they could find that an injury resulted, there is still a precedence step and a constitutional step about whether the officers did anything that violated the 4th Amendment.

QUESTION: How many officers were there? Four?

MR. LEVY: I believe there were five in total.

QUESTION: Five.

MR. LEVY: That's correct.

QUESTION: Diabetic coma is not particularly uncommon, is it?

MR. LEVY: It is not uncommon, although it is very similar in its symptoms to drunkenness. The police did not act unreasonably here in thinking the Petitioner might be drunk.

QUESTION: Well, that's always asserted, but there are diabetic comas and there is drunkenness.

MR. LEVY: There is.

QUESTION: And police officers know the difference.

MR. LEVY: Well, these officers here had

training on diabetics and one officer stated that based on her experience Petitioner was not acting like a diabetic. He was acting like a drunk. Now, she may have made a mistake in that, but it was her conclusion at the time, based on the training she had received. I would cite the Court to the 1st Circuit's decision in Compton against --

QUESTION: Before you do that, Mr. Levy, what about the reasonableness of not following up on his request that they look at the card in his pocket that would indicate he was a diabetic.

MR. LEVY: Even if he was a diabetic, that would not have changed the officer's actions here.

QUESTION: If they were on reasonable notice of the fact that he was a diabetic and desperately in need of orange juice that wouldn't affect the reasonableness?

MR. LEVY: Well at first they wouldn't have known that he was desperately in need of orange juice.

QUESTION: Well, he said he was.

MR. LEVY: That's not clear from the record, and even if they knew he was having a diabetic problem they wouldn't have known whether it was caused by too much or too little blood sugar. The treatments for those conditions are exactly the opposite, and by

guessing wrong they could have done more harm than good.

Petitioner was also asked twice whether he wanted to go to the hospital or needed medical assistance and he said no.

QUESTION: They didn't have to guess. Couldn't they ask his companion what they were trying to do?

MR. LEVY: His companion said, Mr. Berry said, that he didn't know what was wrong with Petitioner. It might be a blood or a sugar reaction; that he had never seen that before; that he was scared; that he didn't know what to do, and that he asked for Officer Connor's help in catching Petitioner when he was running around the car.

QUESTION: What do you think the reasonable police officer should do in that circumstance? Dump the man in the car and take him home and dump him on the lawn?

MR. LEVY: Well, that's not what happened here even at the end. They took him home. He was given the orange juice at that point.

QUESTION: Not by the police officers.

MR. LEVY: Excuse me?

QUESTION: By the police officers?

MR. LEVY: I believe it was by his friend who

had brought the orange juice. But the police didn't interfere with his getting the orange juice at that point. He was freed.

They removed him from the scene not because they were arresting him but because a crowd had gathered and was getting out of hand, and so they decided to remove him. But the conclusion that his medical problem wasn't urgent and could be deferred until he was secured and removed from this hostile scene seems to us to be reasonable, in light of his own statements refusing medical assistance and saying he didn't need to go to the hospital.

In view of his physical resistance; in view of the crowd that was gathering. I think the police, while perhaps not acting perfectly -- I don't know the answer to that question -- but I can't say that they acted unreasonably here.

QUESTION: Can I ask one other question that was prompted by something Justice O'Connor asked. If we adopt a purely objective standard as everyone suggests, is the language that the officers used relevant or not?

MR. LEVY: I think it is not relevant.

QUESTION: It would not itself be an unreasonable aspect of a way in which one seizes a citizen, to use that kind of language?

MR. LEVY: I believe that's correct.

QUESTION: You don't think it would ever be harmful at all?

MR. LEVY: If the seizure itself was lawful --

QUESTION: Well, they have sufficient factual basis for a Terry stop. Is it appropriate or is it reasonable for the officer to use epithets and things.

MR. LEVY: It may not be appropriate, and I certainly don't defend what the Court of Appeals characterized --

QUESTION: Is it not relevant, even?

MR. LEVY: I think it is not relevant under an objective standard, the 4th Amendment.

QUESTION: Even though it might incite further confrontation and the like and help bring the crowd around and all that sort of thing. Well anyway, you say it's totally irrelevant.

MR. LEVY: I think it is. Now, sometimes the police officers are legitimately entitled, I believe, to use rough language. That is a method of controlling a suspect or of controlling a crowd.

There's much difference between asserting their authority and meekly requesting in polite language that the suspect do anything. I don't attempt to defend some of the language that's alleged to have used here,

but we've only heard one side of the case.

QUESTION: This is five officers with loaded guns and a handcuffed prisoner, and they need to do something else?

MR. LEVY: What they did at that point --

QUESTION: Did they need to do anything else to maintain peace and order?

MR. LEVY: They put him in the car and they removed him from the scene, that's what they did. And at that point they --

QUESTION: Why did they need five? Why did they have to use that kind of language?

MR. LEVY: They didn't have to use that kind of language, and we don't defend that but it's not --

QUESTION: Well that's a part of it in my book.

MR. LEVY: But even if it's a part of it -- and I don't agree with that -- but even if it is, it is not a constitutional violation.

QUESTION: How big was this man?

MR. LEVY: The record doesn't indicate. It only indicates that Berry was 280 pounds. But remember, when the police stopped the car --

QUESTION: Five policemen, fully armed, can take care of one prisoner without maltreating him.

MR. LEVY: I don't think the officers here

maltreated him.

QUESTION: Yes, or no?

MR. LEVY: Yes, I think five officers can, but part of what they had to do --

QUESTION: Well, why didn't they?

MR. LEVY: I think they did.

QUESTION: They maltreated him.

MR. LEVY: No. I don't think the record showed that.

QUESTION: They picked him up and shoved him in the back of a car.

MR. LEVY: He was resisting. Even after he was handcuffed, Justice Marshall, the undisputed evidence is that he was kicking and fighting, resisting getting into the car. The officers were entitled to use force to overcome his resistance, even if it meant, as he characterizes it, throwing him into the car.

The evidence is that two or three officers stood on one side and pushed him in the door. One officer took his arm from the other side and pulled him through. That was what he characterizes as throwing him in the car.

Given his resistance, even after he was handcuffed, and given the crowd that was gathering and getting out of hand the police were reasonable in

deciding that they needed force to overcome his resistance and that they needed to get him into the car quickly and out of the hostile environment.

QUESTION: Mr. Levy, suppose we think the Court of Appeals applied the wrong standard; that they did not apply an objective standard and that the objective standard is the proper one. Shouldn't we remand to the Court of Appeals without getting to the facts, or not?

MR. LEVY: We think the Court can get to the facts. The record here is not very long.

QUESTION: Well, of course we can. What do think we ought to do?

MR. LEVY: I think the Court should decide it. I think it would provide helpful guidance to lower Courts if the Court not only enunciated the standard but applied it here. The record in this case is about 100 pages long. It's really quite short.

Unfortunately, some important material is not contained in the joint appendix, but I would urge the Court to read the record if it decides to undertake the question of whether the directed verdict in this case was appropriately entered.

But to follow up on your question, Justice White, even if you think the 4th Circuit's general

standard is one of subjective intent, the basis for the holding in this case was not subjective.

Both of the decisions below turn on the determination that the officers acted with objective reasonableness in the circumstances of this case. The Court of Appeals itself said that a directed verdict was proper because "the evidence clearly establishes that at each stage of the incident the actions of the officers were essentially reasonable."

The Court of Appeals did not rule for Respondents here on the theory that they had not acted maliciously and sadistically in using unreasonable force. Instead, it held that looking to the need for an amount of force here, the use of force simply could not have been found to be unreasonable in the circumstances of this case. That's the objective standard the Petitioner advocates.

QUESTION: Mr. Levy, I hate to keep interrupting you, but I think there is a lot in the opinion that supports your argument that the Court was basically applying an objective standard.

But the one comment that I wish you'd comment on is the second paragraph of Footnote 3, when the Court points out that they don't think there should be a conceptual difference between 8th Amendment standard and

the 4th Amendment standard. I read that as the Court of Appeals applying the equivalent of an 8th Amendment standard in a 4th Amendment context.

MR. LEVY: Let me give two answers. First, at most that would go to the question of what the Court of Appeals thinks the general standard is, not necessarily what it was applying in this case. But beyond that, it's not so clear to me that the 8th Amendment standard under Whitley isn't a subjective standard.

QUESTION: Oh, I agree one can read that as also an objective standard, but it's a much more severe, it's a different standard than the 4th Amendment standard, or is it? Do you think it is?

MR. LEVY: It's different in its words, and maybe at the margin it's different. It's hard to know exactly, and we don't necessarily propose that the Court adopt the same words as the 4th Amendment standard here.

QUESTION: But the Court of Appeals seems to have applied a standard that would be the same standard in an 8th Amendment context. That's what I'm saying. And if you don't urge that, then it seems to me that you are not defending the Court of Appeals rationale.

MR. LEVY: No, I think the Court of Appeals decision is defensible, although as we discussed before its language may be a little bit ill-chosen to convey

the sense of an objective test. We think that's what they were doing, and maybe more precise language would be useful.

QUESTION: Well, I'm not making the objective subject dichotomy, but just saying that theirs is a more severe objective test than the proper objective test would be.

MR. LEVY: I think the problem in this case, or in Whitley against Albers, or in Garner, is to formulate a constitutional standard that allows -- that accommodates the legitimate need of law enforcement officers to use force on the one hand, but doesn't allow them to use force that is simply gratuitous or unrelated to any legitimate law enforcement need.

The problem is basically the same in those two areas. Now it may be that taking the context into account, the law enforcement officials can do different things in those two areas in balancing the two competing considerations, but the underlying problem is very much the same.

An example may help to illustrate that. If the prison riot that occurred in Whitley had occurred at a pretrial detention center like the MCC in New York, the 8th Amendment wouldn't have applied because those people hadn't yet been convicted of a crime.

And yet a riot in a jail, it seems to me, could be handled in precisely the same way that the riot in Whitley was handled. The fact that the jail situation would be analyzed under Bell against Wolfish and 5th Amendment substantive due process terms, whereas the Whitley situation was analyzed in 8th Amendment terms, doesn't really change very much, if at all, the real issue that's before the Courts in dealing with these kinds of problems.

And similarly, in the 4th Amendment area, the question again is what is a reasonable range of choice for police officers in carrying out their duties.

Now, the test we would propose -- and it differs in language but I don't think in philosophy from the Court of Appeals -- is this: force is unreasonable under the 4th Amendment if it is clearly excessive, such that no reasonably competent police officer could have thought it appropriate because it was arbitrary in relation to any legitimate law enforcement need.

In other words, so long as the use of force was debatable and within the range of judgment of reasonable police officers, it is not a federal constitutional tort. And we think that is in sum and substance very much what the Court of Appeals was getting at in this case.

It was trying to determine, through the malicious and sadistic standard, when the use of force was appropriate for a law enforcement need on the one hand, or when it wasn't. When it was simply being used, to quote the language, maliciously and sadistically for the very purpose of inflicting harm. We think that was the issue the Court was grappling with, and its standard drew the line in that place.

Now, let me talk a little bit more about the general 4th Amendment standard. We don't disagree that this case can be analyzed in 4th Amendment terms. We don't disagree that the 4th Amendment establishes an objective reasonableness test judged in the light of the totality of the circumstances as they appeared to the officers at the time.

And indeed, the 4th Circuit itself recently applied an objective reasonableness standard under the 4th Amendment in a recent decision called Martin v. Gentile, which is reported in 849 F.2d.

We do, though, strongly disagree with the way in which Petitioner proposes that the 4th Amendment test be understood and implemented. Now, it is axiomatic, we think, that the use of force is a necessary and unavoidable part of police work, including arrests and stops.

As the North Carolina amicus brief explains, police daily confront dangerous, often violent situations that require split-second judgments on the scene, in difficult, uncertain and fast-changing circumstances that pose serious risks and injury or even death to the police officers and others.

It should be recognized that there is a range of actions that would be reasonable for the police to take in light of their appraisal on the scene, on the spot of the ambiguous and changing circumstances as they see them.

It's important that not every state battery claim against the police official be converted into a federal lawsuit under Section 1983. Not every battery becomes a federal constitutional case simply because the defendant is a police officer.

In judging the actions of the police officers it is also important that they not be -- not be looked at in hindsight in the calm of the courtroom to determine whether the officers acted in the best possible way, or whether they used no more force than we can now see was absolutely necessary in the circumstances.

And that's basically what Petitioner's test proposes. His standard is the hypothetical reasonable

police officer. The force is excessive if the hypothetical police officer would not have thought that it was reasonably required and necessary in the circumstances, and that language -- reasonably required and necessary -- is contained in Petitioner's brief on pages 25 and 36.

Now, Petitioner of course pays lip service to the concerns that I raise, but it's clear from the way he would apply his test in this case that he doesn't really mean them. His test would enshrine the Restatement of Torts in the Constitution, and would convert every battery case against the police officer under state law into a federal cause of action.

I read his brief, I've listened to his argument, and he proposes no principle -- no basis -- for saying that some battery actions fall only under state law and distinguishing those that he says would be a federal constitutional case.

Every such arrest that involves the use of force is a potential federal civil rights case under his proposed test. Every claim that the police officers used more force than was necessary -- that is, they were appropriately using some force, but simply used more than they reasonably should have, would state a federal cause of action.

Every contention that a suspect was thrown a little bit too hard against a wall, or that an officer's grip on a suspect was a little too hard --

QUESTION: Before you go too far on these "everys" we're cealing with one diabetic. We're not talking about murderers and criminals.

MR. LEVY: Well, he was a diabetic as we now know, but he was also a criminal suspect who was acting very suspiciously and erratically.

QUESTION: Well, criminal suspects are not guilty.

MR. LEVY: And he was never arrested here. There's no question about his guilt. But he was a suspect. He was acting erratically, he was physically resisting the officers. We think his treatment here was not a constitutional violation in any respect.

Now, there's one part of Petitioner's test that I'd like to comment on specifically. As the Solicitor General's brief makes clear, Petitioner's test calls for a comparison between the police officer's conduct and any less forcible alternatives that they might have used in the circumstances.

That's a least drastic means test, and we think it's wholly out of place in this context and inconsistent with this Court's decisions in Whitley

against Albers, in Bell against Wolfish and most particularly in Martinez Fuerte, which was itself a 4th Amendment case.

A reasonable governmental action does not become unreasonable simply because the police did not take the best possible option. At least so long as the choices were within the ranges of debatable alternatives, the fact that the best one is not selected does not render the choice made unconstitutional.

Another problem with the Petitioner's least drastic means approach is that it practically invites the jury to second-guess the actions of the police officers and to substitute its judgment for theirs as to what should have happened.

QUESTION: Mr. Levy, your test is kind of a rational basis test to boil it down, isn't it?

MR. LEVY: It could be characterized that way. It does draw on that, as well as the 4th Amendment notion of reasonableness, but we think that really is the core inquiry here. When is it reasonable, when is it rational for police to use the force that they did in the way that they did, or when was it unrelated to some legitimate law enforcement need?

And I don't know that juries are going to be very good at making that determination. They're going

to be presented with alternatives by Plaintiff's expert witness at trial.

They're going to be deliberating this in the calm hindsight of the courtroom, and it's going to be all too easy for them to conclude that it would have been better for the police to have acted differently, and that should not be the constitutional standard and it should not be left to the juries to decide.

QUESTION: Well, but you're conflating the 4th Amendment test with a test for official immunity. I mean, we could adopt a tighter test for the 4th Amendment. That is the test that your opponent explicitly espouses. Was it more force than was necessary, period. If it was, it's a 4th Amendment violation.

Whether the policeman is liable for it, on the other hand, would depend upon whether a reasonable policeman could have believed that he was using no more than was necessary. The issue of immunity is quite different from the issue of whether there has been a 4th Amendment violation.

MR. LEVY: It is quite different, and there is no immunity issue in this case because by oversight it was failed to be raised below.

QUESTION: But don't make us distort the law

to cover that oversight.

MR. LEVY: Well, the application of immunity doctrine here is not at all clear. In some respects, it's like Anderson against Creighton, and we think whatever the standard is, there would be room for an immunity defense.

But in Whitley against Albers and in Daniels against Williams, the Court didn't refrain to decide the liability issue because there might be an immunity defense. Liability is the logically antecedent question and there are reasons why the Court shouldn't want all its bases.

QUESTION: Thank you, Mr. Levy. Mr. Beaver, do you have any rebuttal?

REBUTTAL ARGUMENT OF H. GERALD BEAVER,

ON BEHALF OF THE PETITIONER

MR. BEAVER: Very briefly, if I might, Your Honor. Mr. Chief Justice, again may it please the Court.

Speaking of this hostile environment. It was not a hostile environment to my client. He was amongst friends. It was hostile, perhaps, to the police officers who were abusing him.

The point I'm getting at is, I don't believe the police can create their own exigency and then complain that they had to use force against someone to

get themselves out of the exigency that they have created by their own objectively unreasonable behavior.

QUESTION: Well, the Court of Appeals said that it was undisputed that really the evidence showed that your client was being very active sitting on the curb, and that he was having to be restrained by his friend and an officer.

MR. BEAVER: If I may, sir, get fact-specific, Justice: under the case in the direct examination of Mr. Berry, he was directly asked whether at any time he saw the Petitioner kicking or waving his arms around or resisting in any way. He stated he was there throughout the entire transaction and at no time did this occur. He did state on cross-examination that on a time or two the Petitioner protested against his treatment and pulled his arms away.

QUESTION: There was testimony that he tried to kick an officer.

MR. BEAVER: There was testimony from another police officer that he did that, but we are not bound by the credibility of a police officer that we call for adverse examination under the Federal Rules of Evidence, Your Honor.

We've heard these cries of wolf, that if such a standard were to be adopted the floodgates would be

let down, before. But to be quite candid, there are a mountain of problems in bringing cases such as this.

The Monell doctrine prohibits bringing other than the most egregious, clearest policy, practice and procedure cases against municipalities. Qualified good faith immunity protects officers much as Justice Scalia has just correctly discussed.

It is easy to confuse the objective standard of reasonableness and qualified good faith immunity. It is a substantial protection for police officers who act with objective good faith in their activities.

The Detura decision issued by this Court two years ago, which prohibited the awarding of substantial damages on the basis of violation of constitutional rights alone without any regard whatsoever for physical injury, would certainly deter the bringing of most de minimus lawsuits.

And having practiced in the United States District Courts in these type of cases, may I say we are acutely aware of the requirements of Rule 11, and we are going to be absolutely certain of our cases before they are pled and they are brought.

Turning to the facts of this case, again I believe that my opponent continues to misjudge the standard of evidence in the light most favorable to the

Petitioner.

He states that our own expert testified that the seizure was appropriate, but if you will look closely at the record you will find that this testimony occurred during a voir dire hearing, if I'm correct, as to his expertise in which he was posed a hypothetical question which he did not posit with any and all of the facts subsequently brought into the case.

And at another time, when presented another hypothetical case, with all the -- hypothetical question -- with all the pertinent factors in, stated that in his opinion the seizure of the Petitioner was improper.

My opponent in this matter would have this Court imply or approve an objective standard of reasonableness but something else test. That something else, we don't know exactly what it is. It's somewhere between the 8th Amendment requirement and the objective standard of reasonableness.

This Court clearly has never applied subjective factors such as here, except in the Albers situation. That case has been recently, and that decision -- that malicious and sadistic, an intent to harm -- has been recently reaffirmed by this Court no later today, and the decision to deny certiorari in the case of Dudley v. Stubbs.

There Justice O'Connor, even for speaking in dissent, for the three Justices in dissent, clearly recognizes there that there is a distinction between the willful indifference test in the nonriot situation and the substantive condition in the prison riot situation.

The only purposes of the dissent is to say in that factual circumstance the dissenters feel that sufficient evidence was presented of a prison riot-type situation.

There is absolutely no reason, as Judge Butzner says in his dissent, and this Court has never at any time even hinted, that the substantial wall against liability created in cases involving convicted prisoners should be applied to free and innocent citizens. We ask you not to apply such a standard.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Beaver. The case is submitted.

(Whereupon, at 2:45 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-6571 - DETHORNE GRAHAM, Petitioner V. M.S. CONNOR, ET AL.

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BY alan friedman

(REPORTER)