

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: COUNTY OF SACRAMENTO, ET AL., Petitioners v.
TERI LEWIS AND THOMAS LEWIS, PERSONAL
REPRESENTATIVES OF THE ESTATE OF PHILIP
LEWIS, DECEASED

CASE NO: 96-1337 *C1*

PLACE: Washington, D.C.

DATE: Tuesday, December 9, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COUNTY OF SACRAMENTO, ET AL., :

4 Petitioners :

5 v. : No. 96-1337

6 TERI LEWIS AND THOMAS LEWIS, :

7 PERSONAL REPRESENTATIVES OF :

8 THE ESTATE OF PHILIP LEWIS, :

9 DECEASED :

10 - - - - -X

11 Washington, D.C.

12 Tuesday, December 9, 1997

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:10 a.m.

16 APPEARANCES:

17 TERENCE J. CASSIDY, ESQ., Sacramento, California; on
18 behalf of the Petitioners.

19 PAUL J. HEDLUND, ESQ., Los Angeles, California; on
20 behalf of the Respondents.

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

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-1337, the County of Sacramento v. Teri
5 Lewis and Thomas Lewis.

6 Mr. Cassidy.

7 ORAL ARGUMENT OF TERENCE J. CASSIDY

8 ON BEHALF OF THE PETITIONERS

9 MR. CASSIDY: Mr. Chief Justice, and may it
10 please the Court:

11 Deputy Smith is entitled to qualified immunity
12 in this case on the grounds that the law regarding
13 substantive due process claims under the Fourteenth
14 Amendment was not clearly established at the time of the
15 police pursuit in this case in May of 1990.

16 In that regard, the legal standard was not
17 sufficiently well-developed, nor were the factual contours
18 of such a claim developed so as to put a reasonable
19 officer in the position of Deputy Smith on notice of what
20 type of conduct would constitute a violation of
21 substantive due process in the context of a police
22 pursuit.

23 QUESTION: May I ask you a question right at the
24 start, please, Mr. Cassidy? The County of Sacramento
25 apparently takes the position that a substantive due

1 process violation does arise from a negligently conducted
2 police chase of someone.

3 I mean, you don't raise the question whether
4 there is a substantive due process violation at all. You
5 apparently assume there is, and then just want us to
6 decide what standard to apply. Do I understand correctly
7 that's your position on behalf of the county?

8 MR. CASSIDY: Justice O'Connor, no, we do not
9 concede that a negligent claim would support a violation
10 of substantive due process. In fact, we have --

11 QUESTION: Well, do you concede that on the
12 facts in this case, the police pursuit case before us,
13 that the only inquiry is what standard to apply, because
14 there would be a substantive due process violation?

15 MR. CASSIDY: The petitioners in this case have
16 asserted that the proper question presented is whether or
17 not -- what -- the proper legal standard to be applied in
18 a claim for substantive due process. There are amici
19 briefs which have asserted that no claim lies in this case
20 because of the accidental nature of the conduct involved.

21 QUESTION: But that's not the position taken by
22 the county.

23 MR. CASSIDY: Upon reflection, I would agree
24 with that position as asserted by amici. However, it had
25 not been asserted in the lower court or by us in our

1 briefing.

2 QUESTION: So what am I supposed to do? I mean,
3 you give me two options, that it's a substantive due
4 process violation if it's -- if it shocks the conscience,
5 or if it's grossly negligent conduct. What if I think
6 none of the above?

7 MR. CASSIDY: Justice Scalia --

8 QUESTION: Do I pick grossly negligent conduct
9 because that's the closest to not having a substantive due
10 process violation at all?

11 MR. CASSIDY: Well, no, Your Honor. We would
12 respectfully submit that in the event this Court
13 determines to adopt the type of approach it did in
14 *Albright v. Oliver* and determine that all claims perhaps
15 involving a seizure fall within the Fourth Amendment
16 standards, then there would be no claim available under
17 the Fourteenth Amendment.

18 QUESTION: Well, I certainly thought that's what
19 this case was about when I first read about its facts. I
20 mean, we've had a number of cases involving police chases
21 and they always come up as unreasonable seizure cases.

22 MR. CASSIDY: And I would --

23 QUESTION: Lo and behold, I read this thing and
24 it's somehow a substantive due process violation put in a
25 whole different category of constitutional analysis, and

1 the city just goes along with that. Is there any case on
2 record in which somebody has asserted that something like
3 this -- a court has held that something of this sort is a
4 substantive due process violation?

5 MR. CASSIDY: I believe that the courts of
6 appeal have analyzed the case law involving police
7 pursuits under substantive due process violations, or
8 alleged violations, but if this Court then looks --

9 QUESTION: Certainly nothing in this Court has.

10 MR. CASSIDY: Correct, and if this Court were to
11 look at the recent Mays opinion out of the Seventh
12 Circuit, perhaps, and upon reflection by petitioners we
13 would submit that that may be the correct analysis.

14 If only the Fourth Amendment were to apply in
15 this case, then there would be no violation because, in
16 fact, the means that were used to -- or were involved in
17 this accident were not intentionally applied, so there was
18 no seizure.

19 So if this Court is left to analyze it under the
20 Albright analysis, then there would be no violation.
21 Petitioner would prevail.

22 QUESTION: I certainly -- you know, you cannot
23 expand the First Amendment, for example, by saying, well,
24 this doesn't violate any of our First Amendment law,
25 however, we think this was a deprivation of liberty under

1 the Due Process Clause, apart from the First Amendment.
2 We wouldn't hear something like that.

3 MR. CASSIDY: That's correct, Your Honor.

4 QUESTION: Why should we do it for the Fourth?

5 MR. CASSIDY: Upon reflection, petitioners would
6 submit that it should not be so expanded, and that perhaps
7 the analysis by this Court in DeShaney v. Winnebago is the
8 correct analysis, that in fact, if this Court were to
9 allow the claim for substantive due process to go forward,
10 it would substantially disrupt the political process.

11 As this Court's noted in DeShaney as well as in
12 the recent Collins decision and the Washington v.
13 Glucksberg, the political process is extremely important
14 to allow the States to develop the appropriate law.

15 QUESTION: But could you not have a high speed
16 chase that wouldn't involve the Fourth Amendment? For
17 example, think back to the days of the Freedom Riders.
18 Suppose there had been State police involved in just
19 following these people on the road to terrorize them for
20 mile after mile, not for the purpose of seizing them for
21 arrest, but to frighten them. Couldn't that be an
22 appropriate situation for a due process rather than a
23 Fourth Amendment approach?

24 MR. CASSIDY: Justice Ginsburg, although that
25 specific type of circumstance has not been decided by this

1 Court, the Fifth Circuit in the Checki v. Webb case did
2 take that approach, and therein lies the basis for the
3 analysis that potentially there could be such a claim.

4 However, I think that what that demonstrates is
5 the fact that in the context of qualified immunity Deputy
6 Smith could not have known, as a reasonable officer in the
7 field, what type of standards should be applied not only
8 at the present time but back in May of 1990, when this
9 pursuit occurred.

10 QUESTION: Well, do you -- if we assume for the
11 sake of argument that this is properly a substantive due
12 process case and not a Fourth Amendment case, are we
13 supposed to take the case on the assumption that on at
14 least one of the two alternative standards that has been
15 proposed here there is a substantive due process
16 violation? That seems to be the assumption of the State's
17 position, but I may be wrong.

18 MR. CASSIDY: No. I believe there was no
19 violation of substantive due process, regardless of which
20 standard may be adopted by this Court.

21 QUESTION: So it's not merely a question of, he
22 didn't know which. We may assume that in fact it would be
23 findable today that there is no substantive due process
24 violation, even assuming that this is a substantive due
25 process case.

1 MR. CASSIDY: Well, 1), if you assume --

2 QUESTION: Because usually we don't get wrapped
3 around problems of qualified immunity unless we are at
4 least assuming that now there's a violation, so that's why
5 I want to know whether you are conceding that now, on at
6 least one of these standards, there would be a substantive
7 due process violation.

8 MR. CASSIDY: No, we are not. If the Court
9 determines to reach the issue and make a determination as
10 to what the proper legal standard is, petitioners do not
11 concede, under either standard that has been posited, that
12 in fact there may have been a violation.

13 QUESTION: I suppose you take the position that
14 there was -- a) there was no violation, but b) if you
15 should find a violation, there was nonetheless qualified
16 immunity.

17 MR. CASSIDY: That's correct.

18 QUESTION: Why wasn't this case disposed of on
19 the basis of qualified immunity? I think our cases have
20 said that the courts should make that inquiry first before
21 they move on to decide the constitutional questions, and
22 even if this is a substantive due process violation, it's
23 surely a brand new one, isn't it?

24 MR. CASSIDY: Well, in fact, Justice Scalia,
25 petitioners would heartily agree, and in fact the district

1 court did dispose of this matter on behalf of Deputy Smith
2 with respect to the qualified immunity issue, and we
3 believe correctly did so.

4 We believe that the Ninth Circuit's analysis
5 rejects this Court's prior teachings in Harlow and Malley
6 v. Briggs and determines that, under this very gray area
7 of conduct that is sufficiently egregious, that somehow an
8 officer, in the context of the rubric of the Fourteenth
9 Amendment, should have known that his conduct may violate
10 a constitutional right, and we believe that this case
11 should have been disposed of on qualified immunity
12 grounds.

13 In fact, in the recent Linear case, which
14 analogizes to the qualified immunity context, this Court
15 specifically pointed out that when the case law leaves
16 open the general rule to be applied, then it's necessary
17 that there be a very high degree of factual particularity
18 in order to overcome that immunity.

19 In the context of a police pursuit that occurred
20 in May of 1990, no such factual particularity was present.
21 There were several cases that had analyzed this issue.
22 However, in those cases, excepting the Checki v. Webb
23 case, there were no violations found, and only in Checki
24 was there some suggestion there may have been a violation.

25 But circumstances in that case law had involved

1 excessive speeds, traveling too closely, failing to
2 activate lights and sirens, failing to call in by radio,
3 alleged violations of departmental policies, alleged
4 violations of State law, all of which had resulted in a
5 finding of no liability, so certainly the factual contours
6 were not sufficiently developed in May of 1990 to provide
7 and put a reasonable officer on notice that he could be
8 held liable.

9 But in the Malley case, this Court points out
10 that, specifically, if reasonable officers could disagree
11 as to whether there may have been a violation, then the
12 immunity applies, and petitioners respectfully submit that
13 in fact that's exactly what occurred in this case.

14 Reasonable officers could certainly disagree as
15 to whether there was some potential for liability in May
16 of 1990 arising out of the facts and circumstances of this
17 case and the context of alleged violation of substantive
18 due process, and on that basis petitioners respectfully
19 request that this Court find that there was qualified
20 immunity that Deputy Smith is entitled to, and therefore
21 petitioners prevail.

22 If this Court proceeds to analyze what the
23 proper legal standard is with respect to an alleged
24 violation of substantive due process, then petitioners
25 respectfully submit that the standard should be one that

1 is either arbitrary or shocks the conscience.

2 In that regard, I think it's important to look
3 at the policy considerations which may be affected.
4 Specifically, there should be deference given to the
5 political process and the nature of the interests involved
6 in the type of case in the circumstance or in the context
7 of a police pursuit.

8 There's also the impact --

9 QUESTION: May I ask, on the political process,
10 is it correct that in California the officers are immune
11 for this kind of conduct, even if it's -- no matter how
12 gross?

13 MR. CASSIDY: You are correct, Justice Stevens,
14 in that the individual officer is immune. However, the
15 entity may be held liable under appropriate circumstances.

16 QUESTION: In other words, the city might be
17 held liable.

18 MR. CASSIDY: Correct.

19 QUESTION: On a respondeat superior type of
20 approach, or --

21 MR. CASSIDY: That's correct. However, they
22 leave the individual officer out of the context of that
23 civil liability, and there is a specific statutory scheme
24 which has been adopted by California that not only allows
25 for the potential for a municipality to be liable in the

1 context of a Code 3 emergent vehicle operation, but also
2 specifically the legislature has adopted a statute that
3 encourages departments in California to adopt an
4 appropriate police or law enforcement agency policy
5 regarding pursuits so as to potentially avoid liability if
6 the accident results from the vehicle operated by the
7 suspect.

8 QUESTION: Now, in this case did the plaintiff
9 sue the county, too?

10 MR. CASSIDY: Yes.

11 QUESTION: On State law grounds?

12 MR. CASSIDY: Correct.

13 QUESTION: Yes.

14 MR. CASSIDY: And a portion of that was
15 dismissed at the district court level and a portion of
16 that was reserved, specifically whether or not the county
17 of Sacramento would be immune from liability under the
18 vehicle code section that provides for the adoption of an
19 appropriate pursuit policy as well as the issue of whether
20 or not it was an accident that resulted from the operation
21 of the suspect's vehicle in this case.

22 I think that if the less stringent standard is
23 adopted by the Court in this case, then it will
24 effectively remove this type of claim from the political
25 process. This type of claim is appropriate to be resolved

1 by the States in adopting their State tort laws.

2 Specifically, the persons directly affected,
3 whether it be the -- in the category of suspects or in the
4 category of innocent bystanders, it is clear that the
5 States and those bystanders, being the very electorate
6 that affect the laws of the State, should have a say in
7 whether or not there should be recovery.

8 QUESTION: Well, of course, we don't ordinarily
9 say that if there's -- when we're trying to interpret a
10 provision of the Constitution that the public ought to
11 have some input on it. I mean, certainly we hear argument
12 and we try to figure out what those who adopted that
13 provision may mean, but we don't generally say that, let's
14 hear what the people have to say about it.

15 MR. CASSIDY: But indirectly, Mr. Chief Justice,
16 we do that through our State legislatures, and that is
17 precisely what this Court has looked to to see whether or
18 not States would adopt and should adopt appropriate laws
19 to govern these types of situations, and that's what the
20 Court referred to in Collins, directing to leave this to
21 the area of the local representatives, rather than an
22 interpretation of the charter of the Government for this
23 entire country. Then it becomes a judicial interpretation
24 as opposed to a political interpretation.

25 QUESTION: But I think Collins first evaluated

1 whether or not there was a substantive due process
2 violation and said no, and said, therefore this is left to
3 the political process.

4 I mean, I think you first have to do your
5 reasoning on the constitutional point, then the result may
6 be that it's left to the political process.

7 MR. CASSIDY: I understood that was the analysis
8 in the Collins case. However, we would respect that there
9 should be some deference given to the State political
10 process as explored in the DeShaney decision, because that
11 is important to determine whether this Court will expand
12 its interpretation of claims for substantive violations of
13 due process.

14 QUESTION: Well, we do it if we first conclude
15 that it is not arbitrary, that whatever the State action
16 was that caused the injury was not arbitrary in the sense
17 of just being beyond the realm of reason as something the
18 State might choose to do, or a governmental actor might
19 choose to do.

20 Is it your argument here -- I take it ultimately
21 it is -- that you simply cannot say that a high speed
22 chase, assuming there is cause to apprehend in the first
23 place, is so totally beyond the realm of reasonable
24 conduct addressing a legitimate governmental object as
25 ever to fall within that arbitrary character. Is that

1 your position?

2 MR. CASSIDY: Well, I believe that the
3 initiation and continuing of high speed pursuits are not
4 arbitrary, at least in most circumstances.

5 QUESTION: They may be unwise, but they are not,
6 as it were, so totally beyond the realm of reason as to
7 rise to the level of a substantive due process violation.

8 MR. CASSIDY: I believe that's correct. There
9 is a rational purpose, more often than not, I think, in
10 the substantial number of police pursuits that allow for
11 those pursuits to take place.

12 QUESTION: Now, how do you distinguish those --
13 and I -- I know I'm mixing apples and oranges here, but
14 how do you distinguish those, your position there from the
15 analysis that occurs in an unreasonable force situation
16 under the Fourth Amendment?

17 Why is -- why can we not say, let's say in
18 unreasonable force cases that, sure, the force is always
19 directed to the consummation of a legitimate governmental
20 object, which is the apprehension of the suspect, or the
21 person for whom there is a warrant. Why don't we in
22 effect dismiss all of those cases on the same analysis?

23 MR. CASSIDY: Well, because I believe that, in
24 terms of the Bill of Rights and specifically the Fourth
25 Amendment, that those are directed toward guaranteeing

1 certain minimal levels of safety, whereas the Fourteenth
2 Amendment is essentially the residual provision. It's a
3 limitation on State powers as opposed to the guarantees
4 that would fall within the Fourth Amendment, and --

5 QUESTION: But would it be fair to say that the
6 force cases are all cases in which there can be, or could
7 have been, or was an apprehension in the first place, and
8 it's clear that by no stretch of the imagination was the
9 force necessary to accomplish the object? Would that be a
10 fair characterization?

11 MR. CASSIDY: Well, that would be true, Your
12 Honor --

13 QUESTION: And in this case it isn't correct to
14 say that by no stretch of the imagination the speed was
15 unnecessary to catch the person. Is that the distinction?

16 MR. CASSIDY: Well, that is true, and that we
17 are still in the realm potentially of the show of
18 authority, as opposed to the actual means put in motion to
19 cause the apprehension.

20 QUESTION: Well, Mr. Cassidy, doesn't the Fourth
21 Amendment itself speak in terms of unreasonableness?

22 MR. CASSIDY: Correct, Your Honor.

23 QUESTION: So that that would supply the
24 standard for the Fourth Amendment but perhaps would not
25 supply the standard for some other analysis.

1 MR. CASSIDY: That is correct, Your Honor.

2 QUESTION: Do you know of any case under
3 substantive due process in which the deprivation in
4 question was negligent, or even grossly negligent?

5 MR. CASSIDY: No.

6 QUESTION: Or even shocking the conscience but
7 not intentional?

8 MR. CASSIDY: Under the Fourth Amendment, or
9 Fourteenth?

10 QUESTION: Under the substantive Due Process
11 Clause. Under the Due Process Clause, which we have
12 interpreted to be a substantive clause.

13 MR. CASSIDY: I'm sorry, I -- is there any case
14 law --

15 QUESTION: Your argument concedes that if it
16 shocks the conscience it doesn't matter if the officer did
17 not intend to deprive this individual of his life.

18 MR. CASSIDY: Correct.

19 QUESTION: Do you know of any other substantive
20 due process cases where there has been a negligent, even
21 grossly negligent deprivation of life that was held to
22 violate substantive due process?

23 MR. CASSIDY: I don't know that we concede that
24 it should be something less than intentional, so --

25 QUESTION: You don't make the argument anywhere,

1 and I -- you know, I was --

2 MR. CASSIDY: I believe --

3 QUESTION: -- surprised not to see it made.

4 MR. CASSIDY: I believe we did state that it
5 would be necessary in the context of adopting the shocks-
6 the-conscience standard that that be aligned with the need
7 for intentional and deliberate conduct in order to support
8 a violation for substantive due process under the
9 Fourteenth Amendment.

10 QUESTION: Well, is what you're saying that
11 conduct which is not intentional very likely would not
12 shock the conscience? Shock the conscience suggests
13 something moral, and simply gross negligence perhaps does
14 not raise any moral question.

15 MR. CASSIDY: That's correct. We believe that
16 the logical extension of shocks the conscience, in terms
17 of the framework of defining such a claim, would be that
18 of the language previously adopted by Judge Friendly in
19 Johnson v. Glick, whether in fact there was conduct on the
20 part of an officer that was malicious or sadistic for the
21 very purpose of causing harm, and only in those
22 circumstances could there potentially be a claim asserted
23 for a violation of substantive due process in the context
24 of a police pursuit.

25 QUESTION: Why couldn't there -- so I'm thinking

1 about it possibly a little differently, some things that
2 you say. There is a category of cases where Government
3 officials deprive a person of life. They're police
4 officers, and most, but not all of those fall under the
5 Fourth Amendment. That's one category.

6 MR. CASSIDY: Correct.

7 QUESTION: And there's a second category where
8 they behave in ways that shock the conscience. That's a
9 second category, not the first.

10 Then there's possibly a third category that
11 Justice Ginsburg mentioned where you could have conduct,
12 perhaps it's rare, but someone who's not a policeman,
13 someone who doesn't behave in a way that shocks the
14 conscience, but nonetheless either negligently,
15 recklessly, or intentionally deprives a person of his
16 life. Now, that might be covered by the Fourteenth
17 Amendment, mightn't it? I mean, at least where someone
18 intentionally deprives a person of his life.

19 MR. CASSIDY: Well --

20 QUESTION: What should the standard be there?
21 Maybe it wasn't a policeman. Maybe it was a health
22 officer. I don't know who it was.

23 But what should the standard be in that third
24 category of cases? Would you say it never violates the
25 Constitution to intentionally deprive a person of his life

1 without justification? Would you say, reckless? Would
2 you say, negligent? Does it depend on whether the State
3 provides an adequate tort remedy, so that the process is
4 okay, or not okay?

5 What's the standard in that third area? That's
6 what I'm not certain about, which is why I asked.

7 MR. CASSIDY: I believe that third area should
8 be handled by the States under the States --

9 QUESTION: So even if a person --

10 MR. CASSIDY: -- process and should not be --

11 QUESTION: Even if a health officer, for
12 example, intentionally murdered somebody under color of
13 law, it didn't shock the conscience but it was awful, it
14 doesn't violate the Constitution even if the State
15 provides no remedy?

16 MR. CASSIDY: I have difficulty finding that
17 that perhaps would not shock the conscience. However,
18 that may fall --

19 QUESTION: You're going to expand the shock-
20 the-conscience category. I mean, that's a way of dealing
21 with it.

22 MR. CASSIDY: That may also be a claim under the
23 Fourth Amendment, because that person effected a seizure
24 of that party. If it's a nonpolice officer it may not be,
25 but that -- it's our position that that gray area -- the

1 Fourth Amendment would handle the claims for alleged
2 unreasonable seizures of the person.

3 The Fourteenth Amendment, as petitioners have
4 proposed, should be limited to only those claims that
5 involve conduct that shocks the conscience. Any other
6 areas should be covered by the State tort law and the
7 political process in the States to adopt the appropriate
8 tort remedies as the legislatures in the States see fit.

9 A good example of that is all of the statistical
10 data that was submitted to this Court in the context of
11 police pursuits. This Court should not, certainly, be
12 forced to wade through all of those statistical statistics
13 in order to make its decision in this case. However, the
14 States are in the position to assess what statistical data
15 is appropriate and to determine what remedies should be
16 invoked, and with that, Mr. Chief Justice, I would --

17 QUESTION: How about an individual instance,
18 like Checki itself? Would you agree that that is an
19 illustration of where you might have -- where you have
20 conduct that is shocking?

21 MR. CASSIDY: I believe Checki is an
22 illustration.

23 For instance, another illustration would
24 potentially be when an officer knows the identity of a
25 suspect and could apprehend them at a later time, but

1 however proceeds to intentionally harass and threaten that
2 person by tail-gating them at 2 to 3 feet at speeds in
3 excess of 100 miles an hour.

4 Mr. Chief Justice, I would like to reserve the
5 remainder of my time.

6 QUESTION: May I ask just one quick question,
7 please, before you sit down?

8 I wanted to get back to this case, and you said
9 at the beginning that you thought if it were a Fourth
10 Amendment case there's clearly no liability. Why is that?
11 Why isn't an attempted seizure subject to the Fourth
12 Amendment?

13 MR. CASSIDY: Because I believe that this Court
14 has previously addressed that question regarding the show
15 of authority in the Hodari case, and there is no seizure,
16 and that was confirmed by this Court's opinion in Brower.

17 With that, Mr. Chief Justice, I would like to
18 defer my time.

19 QUESTION: Very well, Mr. Cassidy.

20 Mr. Hedlund, we'll hear from you.

21 ORAL ARGUMENT OF PAUL J. HEDLUND

22 ON BEHALF OF THE RESPONDENTS

23 MR. HEDLUND: Thank you, Mr. Chief Justice, and
24 may it please the Court:

25 This Court and the Constitution protect fleeing

1 felons from lethal force except in certain circumstances.
2 It would seem that this Court and the Constitution would
3 do the same for people who only commit minor traffic
4 infractions, and especially for innocent trapped
5 passengers like Philip Lewis.

6 Furthermore, it is submitted that it should not
7 be --

8 QUESTION: Well, it sort of begs the question to
9 call this lethal force. When you say lethal force, you --
10 that indicates, you know, intentionally trying to kill the
11 person. That's not in this case at all, is it?

12 MR. HEDLUND: The -- well, I think in this
13 case --

14 QUESTION: It was at most an irresponsibly
15 speedy chase.

16 MR. HEDLUND: Well --

17 QUESTION: Was there any indication that there
18 was an intent to kill anybody, to apply lethal force?

19 MR. HEDLUND: Well, actually, when you look at
20 the end of the accident itself, the police officer during
21 his deposition will not even concede that he hit the
22 individual, that -- you'll see on page, I think it's 106
23 of the appendix, that here is an individual who is
24 ejected, or stands up in the center of a two-lane highway.
25 How in the world can the officer, who has 200 feet prior

1 to impact, hit the individual, who's in the center of a
2 two-lane highway?

3 QUESTION: If that's the case you shouldn't
4 worry about the shocks-the-conscience standard, then. If
5 you have a case where a policeman, you know, just revved
6 up and drove right into somebody, why should you worry
7 about shocks the conscience?

8 MR. HEDLUND: Well, I think --

9 QUESTION: That certainly shocks my conscience.

10 MR. HEDLUND: It certainly shocks mine. I think
11 I can prevail in any jury on any test this Court wishes to
12 present.

13 However, I think that the test, and that is
14 really the crucial issue that was presented here
15 originally, the test -- and I think this case is properly
16 analyzed under the Fourteenth Amendment. I think all the
17 lower courts have actually analyzed most cases under the
18 Fourteenth Amendment.

19 QUESTION: Was that true after our opinion in
20 Conner v. Graham, as well as before? I know that there
21 had been some considerable use of the substantive due
22 process in dealing with police use of force in arrests
23 before our opinion in Conner, but in Conner, of course, we
24 said those kinds of things come under the Fourth
25 Amendment. Are the cases you're talking about, do they

1 come after Conner?

2 MR. HEDLUND: Oh, yes, and -- I mean, there are
3 legions of cases, and some of them use shocks the
4 conscience, and some of them use reckless disregard. The
5 Ninth Circuit --

6 QUESTION: Those are two quite different
7 concepts, aren't they? Shocks the conscience certainly
8 connotes something intentional, whereas reckless disregard
9 connotes something -- indifference, but not intent.

10 MR. HEDLUND: Well, I think it connotes reckless
11 intent, which is, you know --

12 QUESTION: Well, reckless intent is a -- kind of
13 is an oxymoron. Reckless means you don't care, and intent
14 means you do.

15 MR. HEDLUND: Well, I think there is -- that's
16 exactly the point that's presented here, and I would like
17 to make one more point when I say, about the Fourteenth
18 Amendment.

19 The individual who is killed in this case
20 represents almost an innocent bystander, because he's on
21 the back of a motor cycle, but at the time that he was
22 actually killed he was standing in the middle of the
23 street, because he had stepped off the motor cycle. It
24 had stopped, and it was stopped in response to --

25 QUESTION: Well, if you -- if, as you say, you

1 can persuade a jury that the police officer just did this
2 intentionally, as Justice Scalia says, you will win under
3 any standard. But the Ninth Circuit didn't analyze it as
4 if that were the case. It analyzed it as if it were gross
5 negligence.

6 MR. HEDLUND: No, I disagree. In fact, the
7 Ninth Circuit asked me specifically what I thought the
8 standard would be, and suggested whether I thought the
9 standard should be gross negligence, and I said, I think
10 if you do that the Supreme Court will reverse you right
11 away.

12 I don't think that gross negligence today --

13 QUESTION: So what did the Ninth Circuit decide
14 was the standard?

15 MR. HEDLUND: Reckless disregard. Conscience
16 indifference.

17 QUESTION: Yes, but that still is not your case,
18 where the police officer simply guns the motor --

19 MR. HEDLUND: Well --

20 QUESTION: -- sees this guy standing there,
21 says, I'm going to kill him.

22 MR. HEDLUND: No, the person didn't gun the
23 motor. He laid down 166 feet --

24 QUESTION: Just coasted in and intentionally --

25 MR. HEDLUND: No, no, you don't coast with 166

1 feet of four-wheel-lock skid. We concede that. He wished
2 he got out of the way, yes. I concede that.

3 QUESTION: Well, he wished that, and he wasn't
4 exactly an innocent bystander. I mean, he was riding on a
5 motor cycle in violation of his parole, the motor cycle
6 being driven by someone whom he had been told, as a
7 condition of his parole, to stay away from.

8 MR. HEDLUND: Right.

9 QUESTION: So there was some reason to believe
10 that the reason they were both fleeing was that they
11 were -- if found together were in violation of their
12 parole for grand theft auto on some other occasion.

13 MR. HEDLUND: It was joy-riding --

14 QUESTION: Joy-riding.

15 MR. HEDLUND: -- for Philip Lewis.

16 QUESTION: Well, whatever.

17 MR. HEDLUND: But from the position of the
18 officer, that -- there was -- they didn't know these kids
19 at all, and when they were perceived originally they were
20 walking the motor cycle between the two police cars. The
21 officer that instituted the chase didn't even know if the
22 lights that were put on on Mr. Stapp's automobile were
23 intended for Mr. Lewis, or for Mr. Brian Willard, more
24 specifically, because --

25 QUESTION: They didn't realize that the police,

1 when they turned the lights on, were trying to stop them.

2 MR. HEDLUND: There is no indication that
3 Officer Smith, who did this incredibly reckless act, even
4 knew that Philip Lewis or Brian Willard saw the lights.
5 The only evidence is that Officer Stapp saw lights go on,
6 and he was below the car, and at an angle.

7 He was faced in this direction. He looked over
8 his shoulder. The boy -- the boys at one time, he says,
9 or another, looked at him and then proceeded off. He
10 immediately turned his car in a three point turn and
11 proceeded out at a high rate of speed.

12 QUESTION: And how -- which was necessary to
13 catch up to the motor cycle. How fast was the motor cycle
14 going?

15 MR. HEDLUND: At that point -- I asked him
16 specifically, because, he said, they accelerated away
17 quickly, and I said, what does that mean, you -- oh, at a
18 high rate of speed, he said. At a high rate of speed,
19 they went. This is a 1976 Honda motor cycle that had just
20 been worked on and finally fixed so it could even run, and
21 he says, well, that means they accelerated quickly to the
22 speed limit and then beyond.

23 The truth -- when you see, as I have, the
24 testimony of Officer Smith, everything in his testimony
25 smacks of this incredible callous indifference, and this

1 incredible hostility for an incident that was really
2 created beforehand which, he came out of -- he and the
3 other officer came out of a house dispute which was --
4 turned nasty, and he got back in his car -- Stapp himself,
5 all he heard was the revving of a motor cycle. He assumed
6 that the revving of the motor cycle meant something,
7 perhaps that the motor cycle was going fast.

8 QUESTION: Well, we're here to talk about what
9 standard should be applied in determining these cases --

10 MR. HEDLUND: Well, that's --

11 QUESTION: -- and whether or not the Ninth
12 Circuit was correct.

13 If Collins v. Harker Heights controls the case,
14 what should be the outcome?

15 MR. HEDLUND: Well, I actually like the opinion
16 in Collins, because it seems to me to indicate that
17 Collins is a situation in which the Court is willing, if
18 the conduct, no matter what it is -- no matter what it
19 is -- is so egregious that it shocks the conscience, that
20 means to say that I --

21 QUESTION: Well, that's not what the court of
22 appeals held, was it? The court of appeals held reckless
23 indifference, which is really mistaking the analysis given
24 in Collins.

25 MR. HEDLUND: Well, Collins --

1 QUESTION: In Collins we used, of course,
2 reckless indifference, but that was just to get over the
3 Monell liability problem, not the substantive problem. So
4 you are, then, not defending the Ninth Circuit analysis, I
5 take it.

6 MR. HEDLUND: I am defending the Ninth Circuit
7 analysis. I thought it was a good analysis, and an
8 appropriate analysis. I --

9 QUESTION: Did you think it was correct under
10 Collins, despite the fact that they used the second prong
11 test, municipal liability, to determine the first
12 question, whether or not there was a substantive
13 violation?

14 MR. HEDLUND: Well, I think they just determined
15 that the same test should apply for municipal liability as
16 applies for the underlying violation.

17 QUESTION: But that's quite -- exactly contrary
18 to what the Court held in Collins.

19 MR. HEDLUND: But Collins is a particular case
20 that doesn't present the issues that this case presents at
21 all. Collins is a way of getting around Worker's Comp
22 statutes.

23 QUESTION: But Collins is an interpretation of
24 the substantive Due Process Clause, and it uses the
25 shocks-the-conscience test. It tried to give it an

1 objective component, not a subjective component, and the
2 Ninth Circuit is the only one that seems to have
3 misunderstood it, and it has done so in your case, and so
4 it doesn't seem to me that you can, on the one hand say
5 that you like being with Collins and on the other hand
6 defend the judgment of the Ninth Circuit.

7 MR. HEDLUND: Well, I -- what I was saying is
8 that Collins to me, reading Collins indicated that when
9 you're dealing with noncore fundamental issues such as
10 life, and here it's a failure to train, and you're dealing
11 with nonspecifically governmental entities, like a
12 sanitation department, which could be anything, there is a
13 desire not to expand at all the Fourteenth Amendment into
14 areas --

15 QUESTION: But there was no question in Collins
16 whether or not a governmental official was involved, and
17 I'm not sure --

18 MR. HEDLUND: No, but --

19 QUESTION: -- I know of any authority for the
20 proposition that depending on whether or not you're a
21 police officer or some other municipal employee the
22 standard of -- under the Due Process Clause differs. Do
23 you --

24 MR. HEDLUND: Oh, I think it does, and it
25 should.

1 QUESTION: What is the -- what case do you have
2 for that?

3 MR. HEDLUND: I don't -- to me the Collins case
4 specifically is -- says that this is not the kind of
5 governmental function that the Fourteenth Amendment was
6 normally designed by the Framers to protect against, but
7 in our --

8 QUESTION: Because the standard of shock-the-
9 conscience was not met. We're talking about standards.

10 MR. HEDLUND: I --

11 QUESTION: We don't have different standards of
12 liability under the Fourteenth Amendment depending on a
13 whole range of different governmental officers. If the
14 injury is the same we base it on what the injury is.

15 MR. HEDLUND: So is it the -- I --

16 QUESTION: It seems to me that you're going to
17 either defend the Ninth Circuit analysis or you're not,
18 and if you're going to defend the Ninth Circuit analysis,
19 then you have to ask us to alter the analysis that we used
20 in Collins.

21 MR. HEDLUND: I don't believe that the analysis
22 in Collins applies. I think shocks-the-conscience test
23 that was enunciated in Collins is a good test for
24 situations which are outside the normal purview of the
25 Fourteenth Amendment, and which this Court does not want

1 to be overridden by every administrative decision that
2 occurs, and in those cases I think it's perfectly
3 appropriate, and I applaud the Court --

4 QUESTION: Well, do you think that high speed
5 auto chases are the sort of thing that the Fourteenth
6 Amendment was designed to address?

7 MR. HEDLUND: Absolutely. That is the --

8 QUESTION: In 1868?

9 MR. HEDLUND: Well, high speed automobile
10 chases --

11 QUESTION: Carriage chases, perhaps.

12 MR. HEDLUND: Well --

13 (Laughter.)

14 MR. HEDLUND: And carriage chases didn't wreak
15 the havoc that a 4,000-pound automobile doing 100 miles an
16 hour behind some kids, when the police officer himself
17 says -- talk about shocks the conscience -- that he was
18 concerned for the safety of the passenger because the
19 passenger's on the back of that errant motor cycle and not
20 wearing a helmet.

21 QUESTION: Can I ask you, follow -- you may not
22 agree with what -- my analysis, but assume it for a
23 second. Assume that you could recover under the Fourth
24 Amendment were it not for the problem of seizure --

25 MR. HEDLUND: Right.

1 QUESTION: -- so we're not talking about the
2 Fourth Amendment. I'll assume for the sake of argument
3 that you could prove a shock-the-conscience. Maybe you
4 can, maybe you can't.

5 MR. HEDLUND: Yes.

6 QUESTION: I'd say there is a category of shock-
7 the-conscience behavior. If you win on that one, fine,
8 but I don't think that's what's in front of us. I think
9 what's in front of us is the concern with a middle
10 category of case --

11 MR. HEDLUND: Right.

12 QUESTION: -- where a Government official
13 deprives a person of his life and the Constitution says
14 you can't.

15 Now, with property, I think this Court said in
16 Parratt that you're going to look to State law because
17 they provide the procedure that's due. All right. With
18 life, maybe it makes a difference whether it's
19 intentional, reckless, or negligent, and whether the State
20 provides procedure that's due. That's what I want to
21 know.

22 What's the procedure that you get here under
23 State law?

24 MR. HEDLUND: Well, I --

25 QUESTION: That is to say, can you recover from

1 the municipality here under State law so that your client,
2 if there was negligent or reckless or wrongful behavior,
3 would be compensated? Does State law permits that or not?

4 MR. HEDLUND: I don't think it's as easy as yes
5 or no. I think yes. The defendants say no. They still
6 say no.

7 They say, and I've been down this line enough
8 times, that every single possible immunity -- there's one
9 that says fleeing people trying to evade don't have -- you
10 know, that an officer and the municipality are both immune
11 from that liability, and then they try to say that the
12 person on the back of the motor cycle was a coconspirator
13 or something like that, had some agreement that he was
14 going to continue.

15 Actually, in fact, the agreement here was that
16 Mr. Lewis asked Brian Willard to stop and pull over on
17 Orangevale, which is where the accident happened.

18 Now, of course, what will happen eventually is
19 either they will show that he's either participating or,
20 when we get to the negligence claim, if we ever get to
21 there, they will say, well, then he was partially
22 negligent for asking him to stop right in the middle of
23 the road.

24 QUESTION: Well, Mr. Hedlund, you still have, I
25 guess, unresolved at this stage State law claims --

1 MR. HEDLUND: Yes.

2 QUESTION: -- against the police officer --

3 MR. HEDLUND: Yes.

4 QUESTION: -- and the county?

5 MR. HEDLUND: I have unresolved all claims. I

6 have never had a trial. I have never --

7 QUESTION: Well, there was a summary judgment at

8 issue here.

9 MR. HEDLUND: Right.

10 QUESTION: That's what we're dealing with.

11 MR. HEDLUND: Right.

12 QUESTION: But with regard to the section 1983

13 claims only, isn't that right?

14 MR. HEDLUND: No. The summary judgment went to

15 the State claims, too, and the Federal judge there

16 proceeded to knock me out on the State claims to the

17 extent that he could and then reserved the one --

18 QUESTION: Well --

19 MR. HEDLUND: One left.

20 QUESTION: -- in any event, as I understand the

21 situation, you have remaining for disposition in the lower

22 courts claims of negligence or gross negligence against

23 the officer and the --

24 MR. HEDLUND: Not the officer any more.

25 Immunity applied to him completely. But to the county --

1 QUESTION: To the county.

2 MR. HEDLUND: Yes. Otherwise the county is out
3 on this.

4 QUESTION: Is it something like the Federal Tort
5 Claims Act where the governmental body is substituted for
6 the individual who may have been negligent?

7 MR. HEDLUND: Well, is it respondeat superior
8 that exempts the officer, yes. In practicality the
9 officer is exempted anyway, because the --

10 QUESTION: Judgment-proof, or --

11 MR. HEDLUND: Well, the -- no, not because of
12 judgment-proof, but because of agreements that are reached
13 between the entities and their employees. They originally
14 request insurance, but they have a back-up plan and they
15 indemnify the employee.

16 QUESTION: May I ask you, if this case were
17 analyzed under the Fourth Amendment rather than
18 substantive due process, what do you think a proper
19 disposition would be?

20 MR. HEDLUND: Well, I think I would -- in terms
21 of disposition, you mean, what would be found? I think I
22 would win hands-down, objective test of reasonable force.

23 QUESTION: How would you get over the possible
24 hurdle that there was actually no seizure here?

25 MR. HEDLUND: Well, that's the problem. That's

1 why it's analyzed under the Fourteenth Amendment. It's
2 unfortunate, but the truth is that one-third of all these
3 deaths -- which, by the way, are occurring one a day in
4 high speed chases. This is a phenomenal problem. It
5 kills exactly, almost to the individual -- in 1995, 383
6 people each, as much as handguns used by police, so it is
7 the --

8 QUESTION: Do you have any idea how many
9 dangerous felons have been captured in high speed chases
10 who would have killed more than 383 people?

11 MR. HEDLUND: Well, there's no statistics.
12 It's -- you know --

13 QUESTION: I mean, it's all a cost-benefits
14 analysis, isn't it, and I guess if the -- you know -- you
15 can't really --

16 MR. HEDLUND: I -- you know, I think, though --
17 I think that the notion of the Fourteenth Amendment is
18 that there are certain arbitrary procedures. When you
19 pursue someone for no cause -- there is -- without
20 sufficient justification, and you endanger so many
21 people's lives, going over a blind hill at night --

22 QUESTION: Well, you have this big wind-up, but
23 what's the answer to Justice Stevens' question? What is
24 the standard under the Fourth Amendment. We're talking
25 about standards here. We can apply those standards to the

1 facts in the judicial system, but we want to know what the
2 standard is --

3 MR. HEDLUND: I think --

4 QUESTION: -- so we can instruct the Ninth
5 Circuit --

6 MR. HEDLUND: I think --

7 QUESTION: -- whether it was correct or not.

8 MR. HEDLUND: I think that Farmer v. Brennan is
9 a good standard, that -- disregarding a known risk. I
10 think that that is enough to give intent. If it weren't
11 for Brower I think that we would agree with the notion of
12 an analysis under the Fourth Amendment. I think that --

13 QUESTION: So there can never be a lawful -- or,
14 there can never be a high speed chase consistent either
15 with --

16 MR. HEDLUND: No. I think that one has to
17 balance --

18 QUESTION: Well, there's always a known risk.

19 MR. HEDLUND: That's true.

20 QUESTION: If you're going to drive that fast
21 there's a known risk, and presumably you disregard it when
22 you make the chase, so how do you distinguish between the
23 cases in which there would be recovery and those in which
24 there would not be?

25 MR. HEDLUND: Is it justified? Is there some

1 compelling reason? You know, there are so many policy
2 questions that should be answered here. What is this
3 officer going to do when he catches up? What can you do?

4 QUESTION: What should the line be, felony
5 misdemeanor? Lack of probable cause? Probable cause?

6 MR. HEDLUND: Serious felonies you can engage in
7 a -- the same as firing your weapon. I don't think
8 there's really any difference. I think this -- these high
9 speed chases represent exactly, to the man, the same
10 problem that the discharge of the officer's weapon, except
11 to use the military phraseology they have an incredible
12 kill radius.

13 QUESTION: You know, I'd be sympathetic if your
14 client were a bystander, but it takes two to make a chase,
15 and your --

16 MR. HEDLUND: Not when one's driving a motor --

17 QUESTION: Well, he was not driving. He was
18 sitting right behind the fellow that was driving. There's
19 no reason to believe that he wasn't happy to get away as
20 much as the person who was driving.

21 QUESTION: And he owned the motor cycle, didn't
22 he?

23 QUESTION: And he owned the motor cycle.

24 MR. HEDLUND: He owned the motor cycle, yes.
25 That was his crime. He owned the motor cycle. He'd owned

1 it for 5 days. He fixed it up, took it down to a gas
2 station. At the gas station was Mr. Brian Willard. He
3 argued with Mr. Brian Willard not to go on the bike, but
4 he said, my father bought it for me. If you're going to
5 take it, I have to go along with you. My father will kill
6 me otherwise. Yes, that --

7 QUESTION: Did you put Mr. Brian Willard on the
8 stand, who said -- who said, the decedent kept yelling in
9 my ear, please, slow down. Stop. Stop. Did that happen?

10 MR. HEDLUND: Yes.

11 QUESTION: You put him on the stand and that's
12 what he said?

13 MR. HEDLUND: That's what he has said. He did
14 not say that in his deposition. He said he didn't
15 remember that. He didn't remember being asked to pull
16 over. He told the police when he turned himself in.

17 You know, Mr. Brian Willard left the scene. He
18 was okay. He was a little further from the center of the
19 road on the -- in the oncoming lane the other side.

20 QUESTION: All this is -- as you've said, it's
21 all violating your standard, and so forth. Is there any
22 reason -- assuming your facts are right, is there any
23 reason to think you could not recover against the State --
24 against the municipality under State law, assuming your
25 facts are what they say, are what you just said?

1 All the facts are just as you said them. Is
2 there any reason to think that State law would not give
3 you a tort remedy against the municipality, or against --

4 MR. HEDLUND: I believe it will.

5 QUESTION: You believe it will. All right. And
6 is the -- fine.

7 MR. HEDLUND: I've always believed it would.

8 You know, one of the things, 40 percent -- 40
9 percent of these high speed police chases --

10 QUESTION: The chases, if you're going into the
11 statistics, they're very much contested in these briefs,
12 and I'm not certain --

13 MR. HEDLUND: Okay.

14 QUESTION: I mean --

15 MR. HEDLUND: Okay.

16 QUESTION: One of the briefs of the
17 municipalities says 300 a year out of the 2.2 million
18 people --

19 MR. HEDLUND: It's now 400.

20 QUESTION: All right. But there are 2.2 or 2.3
21 million people who die. It's very bad that there are 3 or
22 400. That's terrible, but that's not enormous in terms of
23 the number of people who die in accidents. That's what
24 one side says, and I guess the other side focuses on this,
25 and I'm not sure that it's directly related, is it, or

1 not, in your opinion?

2 MR. HEDLUND: Well, I believe that it's related
3 from the standpoint, is this a problem that rises to
4 constitutional dimensions, and I think the Court should
5 consider not only -- if this were an isolated event, it
6 wouldn't come to the Court's attention. It wouldn't be
7 fought for all these years by the police departments. The
8 reason they're fighting like this is because they want to
9 continue this. They want to continue to take the lives of
10 innocent --

11 QUESTION: Maybe they're fighting it because
12 they think the Ninth Circuit was wrong and didn't follow
13 our cases.

14 MR. HEDLUND: To be sure, but --

15 QUESTION: It's happened before.

16 (Laughter.)

17 MR. HEDLUND: I hope that doesn't color the
18 Court's -- or give a jaundiced eye towards the Ninth
19 Circuit. I think the Ninth Circuit correctly determined
20 this. I think it's the only methodology that we have, and
21 this Court has available to it in a single sweep to
22 announce policy that will make -- that will be
23 incorporated into policy immediately, that will make
24 these --

25 QUESTION: But we don't announce policy Mr. --

1 MR. HEDLUND: No.

2 QUESTION: You know --

3 MR. HEDLUND: All you have to do is say, we're
4 not talking about an expansion of the Fourteenth
5 Amendment. We're talking an application of it.

6 This is exactly what the Fourteenth Amendment --
7 although the Framers didn't know about cars then they
8 certainly knew about arbitrary, abusive, oppressive
9 Government power, and there can be no more core Government
10 function that affects the individuals in this society
11 every single day than the interface that occurs exactly
12 out on the streets with the police car fully lit and right
13 behind you showing every bit of color of law that's
14 available, and that color of law is depriving innocent
15 people of their lives every day with no justification
16 whatsoever, and --

17 QUESTION: And yet one of the leading cases that
18 you rely on didn't show color of law. In fact, wasn't
19 that one of the problems in Checki, that it was an
20 unmarked vehicle, that this police vehicle was chasing for
21 something like 20 miles without any indication that it was
22 a police car?

23 MR. HEDLUND: Well now, again, that brought it
24 out of, you know, normal perhaps Fourth Amendment type
25 situations, but --

1 QUESTION: You think a car with lights on is
2 worse? You think a marked police car is worse?

3 MR. HEDLUND: Well, I think it removes any
4 question of whether it's under color of law.

5 QUESTION: It also removes any question of
6 whether the person fleeing didn't know he was fleeing from
7 an officer trying to make an arrest.

8 MR. HEDLUND: Yes. The person fleeing was Brian
9 Willard, the driver of the motor cycle, and the --

10 QUESTION: It still bears upon the guilt of the
11 police officer whether the police officer reasonably
12 continued the chase.

13 MR. HEDLUND: When he -- when he saw --

14 QUESTION: It may not make your client any more
15 guilty, but it certainly makes the police officer more
16 reasonable in continuing the pursuit, knowing that the
17 person sees the police lights, hears the siren, and is
18 fleeing.

19 MR. HEDLUND: Well, the problem that we have in
20 all of these, and one of the things that we see constantly
21 in the petitioner's briefs and the amicus briefs on his
22 behalf is that there is a justification because you might
23 catch other people.

24 Or one of the amicus briefs, he even goes so far
25 as to say that a person who has such contempt or disregard

1 for law and order and law enforcement officials, that the
2 removal of that person from society serves a valuable
3 function.

4 I -- you know, I can't imagine the kind of
5 transgression on fundamental constitutional rights that is
6 envisioned by that statement, and nor can I envision what
7 practical result is going to occur when the things
8 discovered after the chase actually give reason for the
9 chase to begin with.

10 That's like saying if we went into everyone's
11 homes we find a lot of people have done crimes. That's
12 not what this country is about. That's not what the
13 Constitution is about.

14 QUESTION: Oh, but presumably most citizens know
15 that if they violate the traffic laws and a police car
16 attempts to stop them they should stop and yield to the
17 authority. I mean, most of us understand that.

18 MR. HEDLUND: That's exactly true. Most of us
19 understand that you shouldn't murder someone, but the
20 problem is that there are certain situations, most of the
21 time murders, and most of the time fleeing occurs because
22 for some reason or another -- it's a kid, it's somebody
23 who just makes a decision that's irrational. Most people
24 stop.

25 QUESTION: Well, there was at least testimony

1 here by the young man who survived that the decedent kept
2 urging him to flee.

3 MR. HEDLUND: There was a statement, not kept,
4 but that the decedent said at one point, let's get out of
5 here, in the beginning, contested.

6 QUESTION: Thank you, Mr. Hedlund.

7 MR. HEDLUND: Thank you.

8 QUESTION: Mr. Cassidy, you have 4 minutes
9 remaining.

10 REBUTTAL ARGUMENT OF TERENCE J. CASSIDY

11 ON BEHALF OF THE PETITIONERS

12 MR. CASSIDY: Thank you, Your Honor.

13 I think there is a simple remedy in that case --
14 in this case, and that is, to pull over and stop and yield
15 to lawful authority. It's the criminal that initiates the
16 reckless conduct and endangers the public. The law
17 enforcement officer is simply trying to apprehend the
18 suspect and uphold his duties of office. In this case --

19 QUESTION: Mr. Cassidy, I did want to call to
20 your attention one thing. You, on page -- is it 20 of
21 your brief? -- you refer to the decisions of Evans and
22 Temkin, and you say that this Court -- well, you tell me
23 what -- you said the Court had implicitly approved of the
24 court of appeals' decisions in those cases.

25 MR. CASSIDY: Only to the extent the issues

1 presented on the petitions for the writ before this Court
2 were exactly the same question presented in the reverse,
3 and this Court declined hearing --

4 QUESTION: Is a denial of certiorari an implicit
5 approval of anything?

6 MR. CASSIDY: No, certainly not authority, Your
7 Honor, but some indication that this Court has approved of
8 that analysis as opposed to this Court's -- the Ninth
9 Circuit's analysis in this case.

10 QUESTION: Gee, I hope not. I have voted to
11 deny certiorari in a lot of cases whose analysis I don't
12 approve of.

13 MR. CASSIDY: Accepted, Your Honor.

14 Quickly, petitioners would prevail because there
15 was no Fourth Amendment claim in this case, so even if
16 this Court were to determine that the Fourth Amendment
17 applied, not only was there no seizure in this case, but
18 no Fourth Amendment claim was asserted.

19 In terms of the factual circumstances,
20 petitioners respectfully submit Deputy Smith was acting
21 appropriately, and that in fact Mr. Lewis did initiate and
22 cause Mr. Willard to proceed and flee from Deputy Smith.

23 Mr. Willard admitted in deposition that he knew
24 Deputy Smith was trying to stop him initially and during
25 the course of the pursuit and if, in fact, this pursuit

1 was coming to a conclusion because these two individuals
2 decided to stop, you don't yield to lawful authority in
3 the middle of the road.

4 The simple fact of the matter is, they crashed
5 the motor cycle in the middle of the road, because had
6 they made good their left-hand turn about a 150 feet down
7 the road or so there's a barrier that would not let police
8 vehicles through but the motor cycle would make good its
9 escape.

10 I think there is a valid justification in the
11 fact that pursuits are conducted and oftentimes result in
12 finding suspects who have committed more serious crimes,
13 and I think that's an important policy consideration that
14 this Court should look to.

15 In addition, with all the discussion we've had
16 here today, petitioners would respectfully submit that it
17 seems clear that Deputy Smith is entitled to qualified
18 immunity on the grounds that the law was clearly not
19 established sufficiently in May of 1990 to hold Deputy
20 Smith liable.

21 Moreover, if this Court determines that there is
22 potentially a claim under the Fourteenth Amendment, then
23 we would submit the appropriate legal standard is conduct
24 that shocks the conscience, and Collins is controlling.

25 The cases which fall in between the cracks, so

1 to speak, are those to be left for the States to decide.
2 That's specifically the type of policy choices that should
3 be made by the people of the various States through their
4 local representatives, but should not be thrust upon them
5 by the judicial expansion of the Due Process Clause of the
6 Fourteenth Amendment.

7 Thank you. With that, submitted.

8 CHIEF JUSTICE REHNQUIST: Thank you,
9 Mr. Cassidy.

10 The case is submitted.

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

COUNTY OF SACRAMENTO, ET AL., Petitioners v. TERI LEWIS AND THOMAS LEWIS, PERSONAL REPRESENTATIVES OF THE ESTATE OF PHILIP LEWIS, DECEASED
CASE NO: 96-1337

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna M. Federico
(REPORTER)