SUPREME COURT OF THE UNITED STATES

No. 01–309

LARRY HOPE, PETITIONER *v.* MARK PELZER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 27, 2002]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The Court today subjects three prison guards to suit based on facts not alleged, law not clearly established, and its own subjective views on appropriate methods of prison discipline. Qualified immunity jurisprudence has been turned on its head.

I

Petitioner Larry Hope did not file this action against the State of Alabama. Nor did he sue all of the Alabama prison guards responsible for looking after him in the two instances that he was handcuffed to the restraining bar.[1] He chose instead to maintain this lawsuit against only three prison guards: Officer Gene McClaran, Sergeant Mark Pelzer, and Lieutenant Jim Gates. See 240 F. 3d 975, 977, n. 2 (CA11 2001).[2] It is therefore strange that in

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[1] Despite the Court's consistent use of the term "hitching post," the apparatus to which petitioner was handcuffed is a "restraining bar." See Ala. Dept. of Corrections Admin. Reg. No. 429, p. 1 (Oct. 26, 1993), reprinted in App. 102.

[2] While petitioner also sued five other guards in connection with the fight that occurred before he was affixed to the restraining bar on June 11, 1995, he later withdrew his claims against them and asked that they be dismissed from the case. See 240 F. 3d, at 977, n. 2; Plaintiff's Special Report and Brief in Response to Defendants' Motion for Sum-

the course of deciding that none of the three respondents is entitled to qualified immunity the Court does not even bother to mention the nature of petitioner's specific allegations against McClaran, Pelzer, and Gates. The omission is both glaring and telling. When one examines the alleged conduct of the prison guards who are parties to this action, as opposed to the alleged conduct of *other* guards, who are *not* parties to this action, petitioner's case becomes far less compelling.

The Court's imprecise account of the facts requires that the specific nature of petitioner's allegations against the three respondents be recounted. Petitioner claims that: (1) on May 11, 1995, Officer McClaran ordered that petitioner be affixed to the restraining bar;[3] (2) Sergeant Pelzer, on that same date, affixed him to the restraining bar;[4] and (3) Lieutenant Gates, on May 11 and June 7, 1995, affixed petitioner to the bar.[5] That is the sum and substance of petitioner's allegations against the respondents.[6]

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mary Judgment (ND Ala.), pp. 1–2, 5–6, Record, Doc. No. 33.

[3] See Second Affidavit of Larry Hope (ND Ala.), at 2–3, Record, Doc. No. 32.

[4] *Id.*, at 3.

[5] *Id.*, at 3–4.

[6] There is some confusion as to who actually affixed petitioner to the restraining bar on May 11. While petitioner "believe[s]" that Sergeant Pelzer did so, *id.*, at 3, the "Institutional Incident Report" produced by respondents and written by Officer McClaran indicates that Officers Keith Gates and Mark Dempsey placed petitioner on the bar, see *id.,* Exh. 2. Petitioner acknowledged that fact and attached the report to his second affidavit. See *id.,* at 3. Consequently, interpreting petitioner's pleadings in the light most favorable to him, I will assume that petitioner has alleged that Pelzer, Gates, and Dempsey cuffed him to the bar on May 11. Additionally, I will assume that the "Officer Keith Gates" mentioned in Officer McClaran's report is the same person as the Lieutenant Jim Gates who is a respondent in this case. It is worth noting, however, that respondents vigorously dispute petitioner's

With respect to McClaran and Pelzer, petitioner has *never* alleged that they participated in the June 7 incident that so appalls the Court.[7] And with respect to Lieutenant Gates, petitioner has never alleged that Gates either participated in or was responsible for any of the June 7 events recounted by the Court other than attaching petitioner to the bar. Petitioner has never contended that Gates looked after or otherwise supervised him while he was on the bar. See Second Affidavit of Larry Hope (ND Ala.), Record, Doc. No. 32. Nor has petitioner ever claimed that Gates was responsible for keeping him on the bar for seven hours, removing his shirt,[8] denying him water, taunting him about his thirst, or giving water to dogs in petitioner's plain view. See *ibid*. The relevance of these facts, repeatedly referenced by the Court during the course of its legal analysis, see, *e.g.*, *ante*, at 7, 14, therefore escapes me.

Then there are the events referenced in the Court's opinion that cannot even arguably be gleaned from the record. For instance, while the Court claims that on June

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assertion that Lieutenant Jim Gates and Officer Keith Gates are one and the same, see Brief for Respondents i, and petitioner has yet to produce any evidence to support this somewhat incredible claim.

[7] See, *e.g.*, Plaintiff's Special Report and Brief in Response to Defendant's Motion for Summary Judgment 1–2, Record, Doc. No. 33 ("[T]he only remaining claims are those against Defendants McClaran, Pelzer, and Gates in connection with the May 11, 1997 hitching post incident, and Defendant Gates in connection with the June 7 hitching post incident"); Second Affidavit of Larry Hope, Record, Doc. No. 32.

[8] It is important to note that petitioner has never maintained that Gates placed him on the bar without a shirt. Rather, petitioner's first affidavit, see Affidavit of Larry Hope 2, Record, Doc. No. 1, as well as photographs appended as exhibits to petitioner's second affidavit, see Second Affidavit of Larry Hope, Exhs. 3–5, Record, Doc. No. 32, which were verified by petitioner as "taken while [he] was on the hitching post on June 7," *id.,* at 5, indicate that petitioner's shirt was removed, if at all, after he was attached to the bar.

7 petitioner "was given no bathroom breaks," *ante*, at 3, during his time on the bar, petitioner has never alleged that Gates or any other prison guard refused him bathroom breaks on that date. See Second Affidavit of Larry Hope, Record, Doc. No. 32. As a matter of fact, the District Court expressly found below that petitioner "was not denied restroom breaks." Supplemental App. to Pet. for Cert. 2. In addition, photographs taken of petitioner attached to the restraining bar on June 7 show him wearing a t-shirt, revealing at a minimum that petitioner was not shirtless "all day." See Second Affidavit of Larry Hope, Exhs. 3–5, Record, Doc. No. 32; *id.,* at 5, (verifying that the photographs were "taken while [he] was on the hitching post on June 7").

Once one understands petitioner's specific allegations against respondents, the Eighth Amendment violation in this case is far from "obvious." *Ante*, at 6. What is "obvious," however, is that the Court's explanation of how respondents violated the Eighth Amendment is woefully incomplete. The Court merely recounts petitioner's allegations regarding the events of June 7 and concludes that "[t]he use of the hitching post under these circumstances violated the 'basic concept underlying the Eighth Amendment[,] [which] is nothing less than the dignity of man.'" *Ante*, at 7 (quoting *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958)). The Court, however, fails to explain how respondents McClaran and Pelzer violated the Eighth Amendment, given that they had no involvement whatsoever in affixing petitioner to the restraining bar on June 7. The Court's reasoning as applied to respondent Gates is similarly inadequate since petitioner has never alleged that Gates bore any responsibility for most of the conduct on June 7 that supposedly renders the Eighth Amendment

violation "obvious."[9]

II

Once petitioner's allegations regarding respondents' conduct are separated from his other grievances and the mistreatment invented by the Court, this case presents one simple question: Was it clearly established in 1995 that the mere act of cuffing petitioner to the restraining bar (or, in the case of Officer McClaran, ordering petitioner's attachment to the restraining bar) violated the Eighth Amendment? The answer to this question is also simple: Obviously not.

A

The Court correctly states that respondents are entitled to qualified immunity unless their conduct violated "'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Ante*, at 7 (quoting *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982)). But the Court then fails either to discuss or to apply the following important principles. Qualified immunity pro-

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[9] In an effort to rehabilitate the Court's opinion, JUSTICE STEVENS argues that the specific nature of respondents' connection to the events of May 11 and June 7 falls outside the scope of the questions presented. See *ante*, at 15. In conducting qualified immunity analysis, however, courts do not merely ask whether, taking the plaintiff's allegations as true, the plaintiff's clearly established rights were violated. Rather, courts must consider as well whether each defendant's alleged conduct violated the plaintiff's clearly established rights. For instance, an allegation that Defendant A violated a plaintiff's clearly established rights does nothing to overcome Defendant B's assertion of qualified immunity, absent some allegation that Defendant B was responsible for Defendant A's conduct. Similarly here, in the absence of any allegation by petitioner that respondents were in any way responsible for the behavior of other prison guards on May 11 and June 7, the conduct of those other guards should not be considered in analyzing whether respondents are entitled to qualified immunity.

tects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986). If "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," then qualified immunity does not apply. *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001). But if, on the other hand, "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley, supra,* at 341.

In evaluating whether it was clearly established in 1995 that respondents' conduct violated the Eighth Amendment, the Court of Appeals properly noted that "[i]t is important to analyze the facts in [the prior cases relied upon by petitioner where courts found Eighth Amendment violations], and determine if they are materially similar to the facts in the case in front of us." 240 F. 3d, at 981 (internal quotation marks omitted). The right not to suffer from "cruel and unusual punishments," U. S. Const., Amdt. 8, is an extremely abstract and general right. In the vast majority of cases, the text of the Eighth Amendment does not, in and of itself, give a government official sufficient notice of the clearly established Eighth Amendment law applicable to a particular situation.[10] Rather, one must look to case law to see whether "the right the official is alleged to have violated [has] been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987).

In conducting this inquiry, it is crucial to look at precedent applying the relevant legal rule in similar factual

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[10] Cf. *Saucier* v. *Katz,* 533 U. S. 194, 201–202 (2001) (discounting as too general the principle that a police officer's use of force violates the Fourth Amendment if it is excessive under objective standards of reasonableness).

circumstances. Such cases give government officials the best indication of what conduct is unlawful in a given situation. If, for instance, "various courts have agreed that certain conduct [constitutes an Eighth Amendment violation] under facts not distinguishable in a fair way from the facts presented in the case at hand," *Saucier, supra*, at 202, then a plaintiff would have a compelling argument that a defendant is not entitled to qualified immunity.

That is not to say, of course, that conduct can be "clearly established" as unlawful only if a court has already passed on the legality of that behavior under materially similar circumstances. Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address "materially similar" conduct. Or, as the Court puts it, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Ante*, at 10.

Although the Court argues that the Court of Appeals has improperly imposed a "rigid gloss on the qualified immunity standard," *ante*, at 7 and n. 9, requiring that the facts of a previous case be materially similar to a plaintiff's circumstances for qualified immunity to be overcome, this suggestion is plainly wrong. Rather, this Court of Appeals has repeatedly made clear that it imposes no such requirement on plaintiffs seeking to defeat an assertion of qualified immunity. See, *e.g.*, *Priester* v. *Riviera Beach*, 208 F. 3d 919, 926 (CA11 2000) (stating that qualified immunity does not apply if an official's conduct "was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point" (internal quotation marks omitted)); *Smith* v. *Mattox*, 127 F. 3d 1416, 1419 (CA11 1997) (noting that a plaintiff can overcome an assertion of qualified immunity by demonstrating

"that the official's conduct lies so obviously at the very core of what the [Constitution] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw"); *Lassiter* v. *Alabama A&M Univ.*, 28 F. 3d 1146, 1150, n. 4 (CA11 1994) ("[O]ccasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of caselaw").

Similarly, it is unfair to read the Court of Appeals' decision as adopting such a "rigid gloss" here. Nowhere did the Court of Appeals state that petitioner, in order to overcome respondents' assertion of qualified immunity, was required to produce precedent addressing "materially similar" facts. Rather, the Court of Appeals merely (and sensibly) evaluated the cases relied upon by petitioner to determine whether they involved facts "materially similar" to those present in this case. See 240 F. 3d, at 981 ("It is important to analyze the facts in these cases, and determine if they are 'materially similar' to the facts in the case in front of us").

To be sure, the Court of Appeals did not also ask whether respondents' conduct so obviously violated the Eighth Amendment that respondents' assertion of qualified immunity could be overcome in the absence of case law involving "materially similar" facts. The majority must believe that the Court of Appeals, therefore, has implicitly abandoned its prior qualified immunity jurisprudence. I, on the other hand, believe it is far more likely that the Court of Appeals omitted such a discussion from its opinion for a much simpler reason: Given petitioners' allegations, it thought that the argument was so weak, and the alleged actions of respondents so far removed from "'the hazy border between excessive and acceptable force,'" *Priester, supra*, at 926 (quoting *Smith, supra*, at

1419), that it was not worth mentioning.

B

Turning to the merits of respondents' assertion that they are entitled to qualified immunity, the relevant question is whether it should have been clear to McClaran, Pelzer, and Gates in 1995 that attaching petitioner to a restraining bar violated the Eighth Amendment. As the Court notes, at that time Alabama was the only State that used this particular disciplinary method when prisoners refused to work or disrupted work squads. See *ante*, at 1. Previous litigation over Alabama's use of the restraining bar, however, did nothing to warn reasonable Alabama prison guards that attaching a prisoner to a restraining bar was unlawful, let alone that the illegality of such conduct was clearly established. In fact, the outcome of those cases effectively forecloses petitioner's claim that it should have been clear to respondents in 1995 that handcuffing petitioner to a restraining bar violated the Eighth Amendment.

For example, a year before the conduct at issue in this case took place, the United States District Court for the Northern District of Alabama rejected the Eighth Amendment claim of an Alabama prisoner who was attached to a restraining bar for five hours after he refused to work and scuffled with guards. See *Lane* v. *Findley*, No. CV–93–C–1741–S (Aug. 4, 1994). The District Court reasoned that attaching the prisoner to a restraining bar "was a measured response to a potentially volatile situation and a clear warning to other inmates that refusal to work would result in immediate discipline subjecting the offending inmate to similar conditions experienced by work detail inmates rather than a return to inside the institution." *Id.*, at 9. The District Court therefore concluded that there was a "substantial penological justification" for attaching the plaintiff to the restraining bar.

Ibid.

Both the Court and petitioner attempt to distinguish this case from *Lane* on the grounds that the prisoner in *Lane* was "offered regular water and bathroom breaks" while on the restraining bar. See *ante*, at 16, n. 12; Reply Brief for Petitioner 16, n. 5. But this argument fails for two reasons: (1) Respondents McClaran and Pelzer were involved only in the May 11 incident, and it is undisputed that petitioner was offered water and a bathroom break every 15 minutes during his 2 hours on the bar that day; and (2) petitioner, as previously mentioned, has never alleged that respondent Gates was responsible for denying him water or bathroom breaks on June 7.

The same year that it decided *Lane*, the United States District Court for the Northern District of Alabama dismissed another complaint filed by an Alabama prisoner who was handcuffed to a restraining bar. In that case, the prisoner, after refusing to leave prison grounds with his work squad, was handcuffed to a restraining bar for eight hours. Temperatures allegedly reached 95 degrees while the prisoner was attached to the bar, and he was allegedly denied food, water, and any opportunities to use bathroom facilities. See *Whitson* v. *Gillikin*, No. CV–93–H–1517–NE (Jan. 24, 1994), p. 7, App. 81. As a result of being handcuffed to the bar, the prisoner "suffered lacerations, pain, and swelling in his arms." *Id.*, at 85. The District Court, without deciding whether the defendants' conduct violated the Eighth Amendment, held that "there was no clearly established law identifying [their behavior] as unconstitutional." *Id.*, at 88.

Federal District Courts in five other Alabama cases decided before 1995 similarly rejected claims that handcuffing a prisoner to a restraining bar or other stationary object violated the Eighth Amendment. See, *e.g.*, *Ashby* v. *Dees*, No. CV–94–U–0605–NE (ND Ala., Dec. 27, 1994) (fence); *Vinson* v. *Thompson*, No. CV–94–A–268–N (MD

Ala., Dec. 9, 1994) (restraining bar); *Hollis* v. *Folsom*, No. CV–94–T–0052–N (MD Ala., Nov. 4, 1994) (fence); *Williamson* v. *Anderson*, No. CV–92–H–675–N (MD Ala., Aug. 18, 1993) (fence); *Dale* v. *Murphy*, No. CV–85–1091–H (SD Ala., Feb. 4, 1986) (light pole).[11] By contrast, petitioner is unable to point to any Alabama decision issued before respondents affixed him to the restraining bar holding that a prison guard engaging in such conduct violated the Eighth Amendment.

In the face of these decisions, and the absence of contrary authority, I find it impossible to conclude that respondents either were "plainly incompetent" or "knowingly violat[ing] the law" when they affixed petitioner to the restraining bar. *Malley*, 475 U. S., at 341. A reasonably competent prison guard attempting to obey the law is not only entitled to look at how courts have recently evaluated his colleagues' prior conduct, such judicial decisions are often the only place that a guard can look for guidance,

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[11] The Court's attempt to distinguish away all of these decisions only serves to undermine further its qualified immunity analysis. The Court appears to suggest that affixing a prisoner to a restraining bar is not clearly unlawful so long as (1) guards provide the prisoner with water and regular bathroom breaks, or (2) the prisoner is placed on the restraining bar as a result of his refusal to work. See *ante*, at 16, n. 12. But as previously explained, see *supra,* at 10, petitioner was offered water and bathroom breaks every 15 minutes during his May 11 stay on the bar, and there has never been any allegation either that respondents McClaran and Pelzer were involved at all in the June 7 incident or that respondent Gates was responsible for denying petitioner water or bathroom breaks on that date. As a result, even under the Court's own view of the law, respondents are entitled to qualified immunity. Moreover, the Court nowhere explains how respondents were supposed to figure out in 1995 that it was permissible to affix prisoners to a restraining bar if they refused to work but it was unlawful to do so if they were disruptive while on work duty. The claim that such a distinction was clearly established in Eighth Amendment jurisprudence at that time is nothing short of incredible.

especially in a situation where a State stands alone in adopting a particular policy.

C

In concluding that respondents are not entitled to qualified immunity, the Court is understandably unwilling to hold that our Eighth Amendment jurisprudence clearly established in 1995 that attaching petitioner to a restraining bar violated the Eighth Amendment.[12] *Ante*, at 10. It is far from "obvious," *ante*, at 6, 10, that respondents, by attaching petitioner to a restraining bar, acted with "deliberate indifference" to his health and safety. *Hudson* v. *McMillian*, 503 U. S. 1, 8 (1992). Petitioner's allegations do not come close to suggesting that respondents knew that the mere act of attaching petitioner to the restraining bar imposed "a substantial risk of serious harm" upon him. See *Farmer* v. *Brennan*, 511 U. S. 825, 847 (1994). If, for instance, attaching petitioner to a restraining bar amounted to the "gratuitous infliction of 'wanton and unnecessary' pain," *ante*, at 7, it is curious that petitioner, while handcuffed to the bar on May 11, chose to decline most of the bathroom breaks offered to him. Respondents also affixed petitioner to the restrain-

[12] I continue to believe that "[c]onditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence." *Farmer* v. *Brennan*, 511 U. S. 825, 859 (1994) (THOMAS, J., concurring in judgment). As a result, I do not think, as an original matter, that attaching petitioner to the restraining bar constituted "punishment" under the Eighth Amendment. See *ibid*. Nevertheless, I recognize that this Court has embraced the opposite view—that the Eighth Amendment does regulate prison conditions not imposed as part of a sentence, see, *e.g.*, *Estelle* v. *Gamble*, 429 U. S. 97 (1976)—so I will apply that jurisprudence in evaluating whether respondents' conduct violated clearly established law. I note, however, that I remain open to overruling our dubious expansion of the Eighth Amendment in an appropriate case. See *Farmer, supra*, at 861–862 (THOMAS, J., concurring in judgment).

ing bar for a legitimate penological purpose: encouraging his compliance with prison rules while out on work duty.

Moreover, if the application of this Court's general Eighth Amendment jurisprudence to the use of a restraining bar was as "obvious" as the Court claims, *ante*, at 6, 10, one wonders how Federal District Courts in Alabama could have repeatedly arrived at the opposite conclusion, and how respondents, in turn, were to realize that these courts had failed to grasp the "obvious."

D

Unable to base its holding that respondents' conduct violated "'clearly established . . . rights of which a reasonable person would have known,'" *ante*, at 10 (quoting *Harlow*, 457 U. S., at 818), on this Court's precedents, the Court instead relies upon "binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a [Department of Justice] report informing the ADOC of the constitutional infirmity in its use of the hitching post," *ante*, at 10. I will address these sources in reverse order.

The Department of Justice report referenced by the Court does nothing to demonstrate that it should have been clear to respondents that attaching petitioner to a restraining bar violated his Eighth Amendment rights. To begin with, the Court concedes that there is no indication the Justice Department's recommendation that the ADOC stop using the restraining bar was ever communicated to respondents, prison guards in the small town of Capshaw, Alabama. See *ante*, at 14. In any event, an extraordinarily well-informed prison guard in 1995, who had read both the Justice Department's report and Federal District Court decisions addressing the use of the restraining bar, could have concluded only that there was a dispute as to whether handcuffing a prisoner to a restraining bar constituted an Eighth Amendment violation, not that such a

practice was clearly unconstitutional.

The Alabama Department of Corrections regulation relied upon by the Court not only fails to provide support for its holding today, the regulation weighs in respondents' favor because it expressly authorized prison guards to affix prisoners to a restraining bar when they were "disruptive to the work squad." App. 102. Alabama prison guards were entitled to rely on the validity of a duly promulgated state regulation instructing them to attach prisoners to a restraining bar under specified circumstances. See *Wilson* v. *Layne*, 526 U. S. 603, 617 (1999) (crediting officer's reliance on Marshals Service policy as "important" to the conclusion that qualified immunity was warranted in an area where the state of the law "was at best undeveloped"). And, as the Court recounts, petitioner was placed on the restraining bar after entering into an argument with another inmate while on work duty (May 11) and a wrestling match with a guard when arriving at his work site (June 7). *Ante*, at 2–3.

The Court argues that respondents must have been "aware of the wrongful character of their conduct" because they did not precisely abide by the policy set forth in the ADOC regulation. *Ante*, at 13. Even taking petitioner's allegations as true, however, I am at a loss to understand how respondents failed to comply with the regulation. With respect to respondents McClaran and Pelzer, who were involved only in the May 11 incident, the Court concedes that the required activity log was filled out on that date, and petitioner was offered water and bathroom breaks every 15 minutes. *Ante*, at 2, 13. With respect to respondent Gates, the Court complains that no such log exists for petitioner's June 7 stay on the bar and the record suggests that the periodic water and bathroom-break offers contemplated by the regulation were not made. Petitioner, however, has never alleged that Gates was responsible for supervising or looking after him once he

was handcuffed to the post. He has only alleged that Gates placed him there.

While the Court also observes that the regulation provides that an inmate "'will be allowed to join his assigned squad'" whenever he tells an officer "'that he is ready to go to work,'" *ante*, at 13 (quoting App. 103), the Court again does not explain how any of the respondents in this case failed to observe this requirement. Petitioner has never alleged that he informed respondents or any other prison guard while he was on the bar that he was ready to go to work.

Finally, the "binding Eleventh Circuit precedent" relied upon by the Court, *ante*, at 10–12, was plainly insufficient to give respondents fair warning that their alleged conduct ran afoul of petitioner's Eighth Amendment rights. The Court of Appeals held in *Ort* v. *White*, 813 F. 2d 318 (CA11 1987), that a prison guard did not violate an inmate's Eighth Amendment rights by denying him water when he refused to work, and the Court admits that this holding provides no support for petitioner. Instead, it claims that the "reasoning" in *Ort* "gave fair warning to the respondents that their conduct crossed the line of what is constitutionally permissible." *Ante*, at 11–12. But *Ort* provides at least as much support to respondents as it does to petitioner. For instance, *Ort* makes it abundantly clear that prison guards "have the authority to use that amount of force or those coercive measures reasonably necessary to enforce an inmate's compliance with valid prison rules" so long as such measures are not undertaken "maliciously or sadistically." 813 F. 2d, at 325.

To be sure, the Court correctly notes that the Court of Appeals in *Ort* suggested that it "might have reached a different decision" had the prison officer denied the inmate water after he had returned to the prison instead of while he was out with the work squad. *Id.*, at 326. But the suggestion in dicta that a guard might have violated a

prisoner's Eighth Amendment rights by denying him water once he returned from work duty does not come close to clearly establishing the unconstitutionality of attaching a disruptive inmate to a restraining bar after he is removed from his work squad and back within prison walls.

Admittedly, the other case upon which the Court relies, *Gates* v. *Collier*, 501 F. 2d 1291 (CA5 1974), is more on point. Nevertheless, *Gates* is also inadequate to establish clearly the unlawfulness of respondents' alleged conduct. In *Gates*, the Court of Appeals listed "handcuffing inmates to [a] fence and to cells for long periods of time" as one of many unacceptable forms of "physical brutality and abuse" present at a Mississippi prison. *Id.,* at 1306. Others included administering milk of magnesia as a form of punishment, depriving inmates of mattresses, hygienic materials, and adequate food, and shooting at and around inmates to keep them standing or moving. See *ibid*. The Court of Appeals had "no difficulty in reaching the conclusion that these forms of corporal punishment run afoul the Eighth Amendment." *Ibid*.

It is not reasonable, however, to read *Gates* as establishing a bright-line rule forbidding the attachment of prisoners to a restraining bar. For example, in referring to the fact that prisoners were handcuffed to a fence and cells "for long periods of time," the Court of Appeals did not indicate whether it considered a "long period of time" to be 1 hour, 5 hours, or 25 hours. The Court of Appeals also provided no explanation of the circumstances surrounding these incidents. The opinion does not indicate whether the handcuffed prisoners were given water and suitable restroom breaks or whether they were handcuffed in a bid to induce them to comply with prison rules. In the intervening 21 years between *Gates* and the time respondents affixed petitioner to the restraining bar, there were no further decisions clarifying the contours of the law in

this area. Therefore, as another court interpreting *Gates* has noted: "There is no blanket prohibition against the use of punishment such as the hitching post in *Gates* which would signal to the Commissioner of Corrections [let alone ordinary corrections officers] that the mere use of the hitching post would be a constitutional violation." *Fountain* v. *Talley*, 104 F. Supp. 2d 1345, 1354 (MD Ala. 2000).

Moreover, Eighth Amendment law has not stood still since *Gates* was decided. In *Farmer* v. *Brennan*, 511 U. S. 825 (1994), this Court elucidated the proper test for measuring whether a prison official's state of mind is one of "deliberate indifference," holding that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*, at 837. Because the Court of Appeals in *Gates* did not consider this subjective element, *Gates* alone could not have clearly established that affixing prisoners to a restraining bar was clearly unconstitutional in 1995. Also, in the face of recent Federal District Court decisions specifically rejecting prisoners' claims that Alabama prison guards violated their Eighth Amendment rights by attaching them to a restraining bar as well as a state regulation authorizing such conduct, it seems contrary to the purpose of qualified immunity to hold that one vague sentence plucked out of a 21-year-old Court of Appeals opinion provided clear notice to respondents in 1995 that their conduct was unlawful.

* * *

It is most unfortunate that the Court holds that Officer McClaran, Sergeant Pelzer, and Lieutenant Gates are not entitled to qualified immunity. It was not at all clear in

1995 that respondents' conduct violated the Eighth Amendment, and they certainly could not have anticipated that this Court or any other would rule against them on the basis of nonexistent allegations or allegations involving the behavior of other prison guards. For the foregoing reasons, I would affirm the judgment of the Court of Appeals. I respectfully dissent.