

Brandon J. Leavitt

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EDUCATION

JURIS DOCTOR CANDIDATE May 2011
Pepperdine Law School Malibu, California

- **Journal:** *Journal of Business, Entrepreneurship, and the Law*, Staff Member
- **Certificate Program:** Geoffrey H. Palmer Center for Entrepreneurship and the Law
- **Activities:** J. Reuben Clark Law Society, Regional Representative

B.S. BIOCHEMISTRY 2002-2003, 2005-2008
Brigham Young University Provo, Utah

- **Activities:** BYU Men's Chorus (tenor); BYU ballroom dance competition finalist in rumba, samba, paso doble, and polka
- **Chemistry Coursework:** biochemistry, organic chemistry, inorganic chemistry, physical chemistry, analytical chemistry, and chemical safety
- **Additional Coursework:** physics, calculus, statistics, genetics, biology, microbiology, and technical writing

WORK EXPERIENCE

SUMMER CLERK / INTERN Summer 2009
Judge Ron Clark, United States District Court for the Eastern District of Texas Beaumont, Texas

- Prepared Court orders in response to various motions, including qui-tam actions, motions for summary judgment, motions in limine, Markman hearings, and others
- Researched relevant technologies and points of law in preparation for court orders and court hearings
- Prepared various court memoranda such as a summary of Mexican copyright law and an analysis of potential ethical issues arising from pro se capital cases
- Provided technical analysis for patent cases

LABORATORY AND FIELD TECHNICIAN Summer 2008
Mark Hansen, P.E. Palmer, Alaska

- Obtained and analyzed soil samples from construction sites to determine suitability of use
- Obtained and tested concrete mixes to determine maximum load
- Performed in-field radiometric tests on soil and asphalt compaction levels at construction sites
- TROXLER Nuclear Safety Course certified

RESEARCH ASSISTANT August 2006 – April 2008
Dr. Young Wan Ham, Brigham Young University, Department of Chemistry Provo, Utah

- Studied the total synthesis of novel, sequence specific, RNA-binding molecules (publication pending)
- First undergraduate hired to assist the lab setup process
- Helped train new assistants in basic laboratory techniques
- Received a \$1,800 undergraduate Office of Research and Creative Activities (ORCA) grant

RESEARCH AND DEVELOPMENT ASSISTANT / CHEMICAL MANAGEMENT
Hi-Z Technology Inc.

Summer 2006
San Diego, California

- Performed technical work for projects sponsored by NASA, ARMY-TACOM, DOD, and DOE
- Assisted in the development of a low heat, low smoke, human-portable, 55-watt thermoelectric generator
- Cleaned an HF acid spill and improved the storage system of hazardous chemicals

SERVICE

SOUTHERN CALIFORNIA REGIONAL REPRESENTATIVE
J. Reuben Clark Law Society

April 2009 – Present
Malibu, California

- Represent 11 JRCLS student chapters at regional and attorney chapter meetings
- Serve as president to the Southern California JRCLS chapters at large
- Assist in the transition of leadership among chapter presidents

PROSELYTIZING MISSIONARY
The Church of Jesus Christ of Latter-day Saints

Summer 2003 – Summer 2005
Sinaloa, Mexico

- Completed a 2-year mission teaching principles taught by the LDS church and serving the Mexican people (90 hours/week; approximately 9,000 hours total)
- Held various positions of leadership and training
- Proficient in Spanish (oral and written)

ADDITIONAL SKILLS

- Eagle Scout (Order of the Arrow)
- 12 years' experience violin, 6 years' experience vocal, 2 years' experience piano, learning mandolin
- Familiar with scientific research techniques such as gas chromatography, IR spectroscopy, HPLC, mass spectrometry, NMR, western-blot, immunoprecipitation

The following excerpt is from an Appellate Brief I submitted for my Legal Research and Writing class. This excerpt is my own work, and has not been edited by anyone other than myself

II. SUMMARY JUDGMENT GRANTING QUALIFIED IMMUNITY TO OFFICER RAGOSA WAS PROPER BECAUSE HE DID NOT USE EXCESSIVE FORCE AGAINST APPELLANT IN VIOLATION OF THE EIGHTH AMENDMENT.

The Eighth Amendment of the United States Constitution establishes the right to be free from cruel and unusual punishment. Under 42 U.S.C. § 1983 (2000), excessive force violates this clause of the Eighth Amendment. See Felix v. McCarthy, 939 F.2d 699, 701-02 (9th Cir. 1991). Because Officer Ragosa stipulates for the purposes of his Summary Judgment Motion that Appellant has an Eighth Amendment right to be free from excessive force, the only point at issue is whether Officer Ragosa's actions violated the Eighth Amendment. Saucier v. Katz, 533 U.S. 194, 201 (2001).

Excessive force in violation of the Eighth Amendment is established after incarceration if there is an unnecessary and wanton infliction of pain. E.g., Ingraham v. Wight, 430 U.S. 651, 670 (1976). The United States Supreme Court has provided the following four elements to determine the presence of unnecessary and wanton infliction of pain:

Where [1] a prison security measure is used to [2] resolve a disturbance that [3] poses a significant risk to the safety of inmates and prison staff, and [4] whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (citation omitted).

In Whitley, a prison guard was ordered to "shoot low" at anyone attempting to enter the scene of a hostage rescue attempt. Id. at 316. When an innocent inmate tried to help alleviate the situation by checking on elderly prisoners, the prison guard shot him in the knee. Id. Even though, in retrospect, the inmate was only trying to help and the

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situation had already begun to resolve itself, the United States Supreme Court held that the guard was entitled to qualified immunity because the four elements of the Whitley test were satisfied. Id. at 322-24.

A. Officer Ragosa's Use of Force Was A Prison Security Measure.

The United States Supreme Court held in Whitley that the officer implemented a prison security measure by shooting an inmate in the leg. Id. at 320; accord Spain v. Proconier, 600 F.2d 189, 194 (9th Cir. 1979) (finding that the use of tear gas can be a security measure in dangerous situations). Ragosa's use of pepper spray (C.R. at 17) was inherently less dangerous than the gun used in Whitley or the tear gas in Spain. Also, as shown by the other officers' ability to don protective masks and goggles immediately after Officer Ragosa's warning (Id.), the use of pepper spray in Folsom was likely an established prison security measure. Because the deadlier approaches used in Whitley and Spain were valid prison security measures, the less dangerous measure applied by Officer Ragosa should also be considered valid. By the same reasoning, Officer Ragosa's use of arm restraints and handcuffs on Appellant were security measures. (See C.R. at 17.)

B. Officer Ragosa Attempted To Resolve A Disturbance.

The Supreme Court held in Whitley that the officer who shot an innocent inmate in the leg during a hostage situation did so in an attempt to resolve a disturbance. Whitley, 475 U.S. at 320. Likewise, Officer Ragosa also attempted to resolve a disturbance. Upon entering the kitchen, Officer Ragosa saw Appellant brandishing his hook as a weapon and inciting those involved in the riot to kill each other. (C.R. at 16.)

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After ordering Appellant to get down (Id.), Officer Ragosa immediately separated Appellant from the conflict, commenting, “this is where you belong for you antics – locked up in the back” and “you are just not very important right now.” (Id. at 17.) Officer Ragosa then helped subdue the remaining rioters with pepper spray. (Id.)

Similar to Whitley, the undisputed facts indicate that Officer Ragosa’s quick removal of Appellant from the conflict, his comments as to the purpose of Appellant’s confinement, and his speed in aiding his fellow prison guards all indicate his motive and preoccupation with ending the disturbance.

C. The Disturbance Presented A Significant Risk To The Safety Of Inmates And Prison Staff.

The Supreme Court found in Whitley that actual unrest such as riotous situations present a significant threat to prison security. Whitley, 475 U.S. at 321-22. By the time Officer Ragosa arrived on scene, approximately twenty-five inmates had been fighting for a minute and a half. (C.R. at 16.) This actual unrest involved the leaders and some members of two violent rival gangs (Id. at 15), and, like the kidnapping situation in Whitley, represented a significant risk to the safety of the inmates and prison staff. See also Marquez v. Gutierrez, 322 F.3d 689, 691 (9th Cir. 2003) (finding that a yard fight between three unarmed inmates posed a significant risk to prison safety). Because an unarmed fight between three inmates posed a significant risk to prison safety, then the twenty-five rioting gang members, an inherently more dangerous situation, also should represent a significant risk to the safety of inmates and prison staff.

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D. Officer Ragosa’s Use Of Force Was A Good Faith Effort To Maintain Or Restore Discipline.

When the first three elements of the Whitley test are satisfied, the question of an Eighth Amendment violation ultimately turns on the fourth element: “whether the use of force represented a good faith effort to maintain or restore discipline or an unnecessary or wanton infliction of pain.” Whitley, 475 U.S. 320-21. The United States Supreme Court adopted five factors to assess if force is used in a good faith effort to maintain or restore discipline or if it represents an unnecessary or wanton infliction of pain:

[1] The need for the application of force, [2] the relationship between the need and the amount of force that was used, . . . [3] the extent of injury inflicted, . . . [4] the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and [5] any efforts made to temper the severity of a forceful response.

Id. at 321.

Because of the need for force to establish order, the reasonably perceived threat to the safety of staff and inmates, and the tempered severity of the officer’s response, The Supreme Court held in Whitley that the guard’s actions represented a good faith effort to restore discipline. Id. at 324.

1. Officer Ragosa’s application of force was necessary.

In Spain, tear gas was used to forcefully remove recalcitrant inmates from their cells. Spain, 600 F.2d at 193. Although the Ninth Circuit Court did not find that using tear gas for cell extraction is always necessary, it did hold that “[t]he infliction of pain and the danger of serious harm may be necessary if there is a threat of an equal or greater harm to others” Id. at 195.

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Attempts to compare the facts of the present case to Spain would be misguided because the present case required both a greater need for force and implemented a less dangerous security measure than in Spain. Officer Ragosa entered the scene of a prison riot and saw Appellant inciting the participants to violence. (C.R. at 16.) Furthermore, Appellant was brandishing his hook as a weapon, making threatening gestures, and apparently ignoring Officer Ragosa's orders to get down. (Id.)

Although comparison of the present case to the *facts* in Spain would be misguided, the undisputed facts, when coupled with the *reasoning* in Spain, strongly suggest that the inherent risks in Officer Ragosa's application of force were necessary because of the threat of equal or greater harm resulted from not quelling a violent prison riot.

2. Officer Ragosa's use of force was proportional to the need.

The Supreme Court held in Whitley that whether or not the force used is appropriately related to the need for force is determined by inference from the evidence. Whitley, 475 U.S. at 320-22. The Court in Whitley also stated that, although in hindsight prison officials were "hasty in using . . . firepower," this still fails to show that the degree of force was not plausibly necessary. Id. at 323; cf. Spain 600 F.2d at 547 (finding that the use of potentially dangerous quantities of tear gas does not constitute excessive force when used to calm an "actual or incipient riot involving a large number of inmates").

Officer Ragosa's use of force falls under the approach taken by the Courts in Whitley and Spain. By twisting Appellant's arm behind his back, Officer Ragosa facilitated his relocation away from an actual riot. (C.R. at 16.) By hand-cuffing Appellant to the sink (Id. at 17), Officer Ragosa ensured that Appellant was properly

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subdued in a location where he could do no more harm to the situation. Pushing Appellant hard against the sink (Id. at 16) may have been unnecessary, but Appellant neither complained nor alleged any damage from that act. (Id. at 18.) Finally, Officer Ragosa quelled the riot by releasing the pepper spray. (Id. at 17.) Therefore, by inference from the facts, Officer Ragosa's actions demonstrate that the force used to calm the riot was proportional to the need.

3. Appellant's injuries were necessary and not excessive.

The degree of injury is not what violates the Eighth Amendment, but the intentional use of force that is "unjustified, brutal and offensive to human dignity." Felix, 939 F.2d at 702 (quoting Meredith v. Arizona, 523 F.2d 481, 484 (9th Cir. 1975)). The Supreme Court held in Whitley that although the guard failed to make a special provision for the innocent inmate before firing, it was far from behavior evidencing a willingness to inflict unjustified pain and suffering. Whitley, 475 U.S. at 325. Appellant may inappropriately attempt to argue that Officer Ragosa was "deliberately inattentive" to Appellant's medical needs because he was not given medical care for ninety minutes (C.R. at 18) after being exposed to pepper spray. See Estelle v. Gamble, 429 U.S. 97, 105-06 (1976). But see Whitley, 475 U.S. 320 (establishing that the Estelle deliberate indifference standard does not apply in situations where prison officials are necessarily preoccupied with the safety of prison staff and inmates).

The necessary and appropriate measure of force used by Officer Ragosa in subduing Appellant and quelling the riot has already been discussed above. Resulting from the events, Appellant suffered short term pepper spray poisoning, significant blood

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loss through self-inflicted cuts and abrasions, and mild burns. (C.R. at 18.) Appellant's burns and blood loss, however, resulted from Appellant's own aggressive attempts to maneuver while handcuffed to the sink. (Id.) As a result of Officer Ragosa's actions, the only injuries Appellant needed to suffer were brief pain in the arm from being forcibly removed from the riot and short-term exposure to pepper spray, both of which were done in a good faith effort to end the riot. (Id. at 17-18.) Therefore, as in Whitley, Appellant's injuries were not excessive because the undisputed facts present no evidence that Officer Ragosa's actions were unjustified, brutal or offensive to human dignity.

4. Officer Ragosa reasonably perceived a great threat to prison safety considering the facts known to him.

An innocent inmate, if he is interfering in a dangerous prison situation, may be reasonably perceived as a great threat to the safety of prison staff and inmates. See Whitley, 475 U.S. at 323; see also Marquez, 322 F.3d at 691 (granting qualified immunity to a prison guard who equivocally shot an innocent inmate in the leg after presuming that because he was near an unarmed prison fight that he was part of it). Even more so than in Whitley and Marquez, the facts known to Officer Ragosa strongly indicate that he could reasonably perceive a great threat to the safety of both prison staff and inmates. Appellant is a convicted felon, the leader of a small prison gang, and has a history of instigating confrontations and subverting authority. (C.R. at 13-14.) Appellant had been known to threaten the prison staff and aspired to control the prison population. (Id. at 14.) Entering the havoc of a riot and knowing the above facts, Officer Ragosa saw Appellant armed with his hook, which he brandished as a weapon in a threatening

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manner, while encouraging the twenty-five rioters to continue fighting and to kill each other. (Id. at 16.) Considering these circumstances, a prison guard could have reasonably perceived a great threat to prison staff and inmates.

5. Officer Ragosa repeatedly attempted to temper the severity of his response.

Finally, the Supreme Court held in Whitley that any attempt to temper the severity of a forceful response needs to be considered. Whitley, 475 U.S. at 321. Like in Whitley, Officer Ragosa told the kitchen staff to get down before he exercised any force. Additionally, Officer Ragosa led Appellant through the kitchen and into the dishwashing room, warned the kitchen staff to be prepared for him to use pepper spray, and then closed both sets of doors. (C.R. at 16-17.) Furthermore, Officer Ragosa warned the rioting inmates that he was going to use pepper spray. These uncontroverted facts suggest that Officer Ragosa repeatedly attempted to temper the severity of his response.

Officer Ragosa's conduct satisfied the four elements of the Whitley test by implementing measures designed to resolve a riot that threatened prison security. Balancing the need for force with the force used, the extent of Appellant's injuries with the potential risk of injury to others, the reasonable perception of the risk of harm, and attempts to temper the severity of the response, demonstrates that Officer Ragosa acted in good faith to restore order. Therefore, Officer Ragosa did not violate the Eighth Amendment as a matter of law and is entitled to qualified immunity against Appellant's claim. Accordingly, this Court should affirm the District Court's Order granting Summary Judgment to Officer Ragosa.