In the

Supreme Court of the United States

W. J. Estelle, Jr., Director,
Texas Department Of Corrections, et al.,

Petitioners,

v. No. 75-929

J. W. Gamble,

Respondent.

Washington, D. C.
October 5, 1976

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v.	:	
J. W. GAMBLE, Respondent.	:	

Washington, D. C.

Tuesday, October 5, 1976

The above-entitled matter came on for argument at 10:02 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

BERT W. PLUYMEN, ESQ., Assistant Attorney General, P. O. Box 12548, Austin, Texas 78711, for the Petitioners.

DANIEL K. HEDGES, ESQ., 800 Bank of the Southwest Building, Houston, Texas 77002, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 75-929, Estelle against Gamble.

Mr. Pluymen, you may proceed whenever you are ready.

ORAL ARGUMENT OF BERT W. PLUYMEN ON

BEHALF OF THE PETITIONERS

MR. PLUYMEN: Mr. Chief Justice, and may it please the Court: This case arose when the respondent, J. W. Gamble, filed an action under 42 U.S.C. sec. 1983 in the United States District Court for the Southern District of Texas alleging inadequate medical treatment for a back injury which he has sustained and filing suit against the Director of the Texas Department of Corrections, the warden of his unit, the medical director, who was also the chief medical officer of the prison hospital.

The district court, without requiring the State to file a response, without asking for any response, summarily dismissed the complaint for failure to state a claim on which relief could be granted.

The United States Court of Appeals for the Fifth Circuit subsequently reversed and remanded the case with instructions to reinstate the complaint, appoint counsel, and permit amendment.

Your Honors, the crux of this case is whether the Federal district courts will in the future in the Fifth

circuit sit as a medical review board to review the diagnosis and treatment by doctors in correctional institutions or whether the Federal courts in the Fifth Circuit will operate within the confines of the limitations imposed by the Constitution and by the jurisdictional part of section 1983, which is 28 U.S.C. 1343.

In looking at a complaint, it is established law by this Court that a complaint should not be dismissed summarily unless it is beyond doubt that plaintiff can prove no facts in support of his claim which will entitle him to relief. In the area of prisoner medical care there are only two places in the Constitution where a claim could possibly be stated. One is underneath the Eighth Amendment cruel and unusual punishment clause; the other is under the Fourteenth Amendment due process clause, a section relating to life.

QUESTION: Your brief, I believe, indicates that because of changes in the creation of administrative procedures, this kind of problem will tend to go away in the future. Is that --

MR. PLUYMEN: No, your Honor, that is in respondent's brief. I fail to see how the creation of administration of procedures will be helpful in terms of an issue whether a complaint states a claim upon which relief can be granted.

QUESTION: You don't question -- or do you question his outline of the administrative procedures that have now

been established to deal with these problems?

MR. PLUYMEN: No, your Honor, I do not, except for one instance, and that is that at the time when this complaint was filed in 1973, the grievance procedure which was subsequently written into the rules and regulations, in other words, the appeal to the warden, then to the director, and the director sending someone down from his staff to investigate the complaint, those were in effect in 1973 and have been for quite a while. They were merely made written rules and regulations. They went through the formal procedure of passing it through the board.

I do not see how, when the question comes up as to whether a claim has been stated, how the existence or non-existence of a grievance procedure would help in any matter. As a matter of fact, under both the grievance procedure and that inmate legal assistance project which was cited in respondent's brief, the inmate does not have to utilize either one. He can go directly into Federal court and file a complaint. And the established law in that area right now is that no exhaustion is required under section 1983, the latest ruling, as the Court knows, being McCray v. Burrell by the Fourth Circuit.

QUESTION: If this Court should decide that his administrative remedies had to be exhausted and utilized first, to what extent do you think that would solve this problem?

MR. PLUYMEN: As far as a flood of litigation in

Federal courts is concerned, which the district courts have experienced over the last five or six years, I think it would help tremendously. Minnesota has had experience with it. Maryland has had experience with it. An independent grievance type of procedure has helped tremendously in reducing the burden on the Federal courts, and also the States.

But as an alternative, your Honor, the State of Texas has a Tort Claims Act which inmates are presently utilizing to sue the State. It's Article 6252-19. In addition to being able to sue the State itself and obtain money out of the coffers of the State, the inmate has the regular common law tort remedy to sue the doctor individually.

So it is petitioners' position that the respondent in fact has State remedies and that the Constitution itself, and Federal courts should not under the Eighth Amendment or 14th Amendment hear ordinary negligence or medical malpractice or tort claims.

QUESTION: Would the physician's claim of privilege in this sort of action or defense be any different by virtue of the fact that he was employed by the State of Texas?

MR. PLUYMEN: The only thing the Tort Claims Act does, Mr. Justice Rehnquist, is it establishes liability on the part of the State itself. There is an alternative. You can either try to take the money out of the doctor's pocket, or under the Tort Claims Act take it out of the State coffers.

QUESTION: But if the physician would be liable on the facts, then that liability is assumed by the State the same way it is under the Federal Tort Claims Act?

MR. PLUYMEN: Yes, your Honor, that is correct.

QUESTION: Mr. Attorney General, while you are interrupted, would you help me on the procedure here. The complaint was filed, as I read the record, I think February, and the magistrate made a recommendation in June, and then the district judge dismissed the complaint. What happened between February and June as to why the State didn't file a motion of any kind, or didn't answer?

MR. PLUYMEN: Mr. Justice Stevens, apparently the complaint was never sent by the district court to our office. The first time that we ever saw anything about the case or heard anything about the case was when an appeal was filed.

QUESTION: What is the practice in this district in Texas? Does the complaint just get filed, or is it somehow or other screened by a magistrate for leave to file in some way? It was a little puzzling to me to try to figure out what happened.

MR. PLUYMEN: Your Honor --

QUESTION: Is there an automatic provision in the rules down there for you to be served when something is filed against --

MR. PLUYMEN: Your Honor, the practice in the Texas

courts is to refer the case to a magistrate, both the habeas corpus cases and the 1983 cases.

QUESTION: For what purpose?

MR. PLUYMEN: For screening.

QUESTION: And supposing they find no merit, then do they deny leave to file, or --

MR. PLUYMEN: The magistrate will recommend either to deny relief to file or to grant relief to file. What usually occurs is that the magistrate will recommend to the court -- give a list of recommendations and conclusions, and he will recommend generally -- I have never seen one otherwise -- that the petition be filed, and there is an in forma pauperis question in almost all of these things that has to be decided one way or the other. There is some determination made as to whether an inmate in fact happens to be a pauper. We have had some problems with that. So that has to be decided. Also, the question as to whether counsel should be appointed in the case even though, you know, there is no Federal statute which provides for reimbursement.

QUESTION: But that is all done in advance of any service or notice to the defendants?

MR. PLUYMEN: I cannot honestly answer that question across the board. I know it happened in this case. We did not receive anything.

QUESTION: This is not a sport; I mean, this is the

way it is done frequently in this district, is it?

MR. PLUYMEN: I am not sure, your Honor. I could really not answer that. I just don't --

QUESTION: The reason I raise it, this practice had been followed in the Seventh Circuit and was challenged at one time. I was just wondering if it had ever been challenged in that district.

MR. PLUYMEN: No, it has not. I wish I could answer the question, but I cannot. We received the complaint, and generally in both habeas corpus cases and section 1983 cases -- I know in habeas corpus cases you get the recommendation, you are served before the magistrate ever gets into the act. In the northern districts -- all the cases I have ever handled, you go ahead and receive the complaint without ever hearing anything from the court, and you go ahead and answer it. In this case I don't know what happened, whether it got sent elsewhere or what.

QUESTION: The magistrate seems to have corresponded with the prisoner without corresponding with the defendants. In other words, he asked him if he had any other information, but he didn't ask the defendants if they wanted to file the medical records or anything like that.

MR. PLUYMEN: Your Honor, my --

QUESTION: Which seems a little bit unusual.

MR. PLUYMEN: My co-counsel just passed me a note -- I

am a little nervous this morning --

QUESTION: I am not being critical. I am just trying to figure out what happened.

MR. PLUYMEN: My mind is not working too clearly. Hopefully it will be better as I go along. But in 1983 cases the defendant has to be served, the defendants themselves. And the way we operate is that in habeas corpus cases --

QUESTION: This was a 1983 case.

MR. PLUYMEN: This was a 1983 case, right. I was trying to make a distinction. But in 1983 cases the defendant has to be served, and we don't automatically represent the defendants who are sued. In other words, they have to request our office for representation. So the defendant --

QUESTION: Even the Director of the Department of Corrections?

MR. PLUYMEN: Right, even the Director has to request representation, because there are numerous cases where they will retain private counsel, in 1983 cases, the number of defendants that we represent, like the Highway Patrol.

QUESTION: I see.

QUESTION: So you don't have any complaint. You were served.

MR. PLUYMEN: I don't even know whether we were served with the complaint or not.

QUESTION: Who do you represent here?

MR. PLUYMEN: Mr. Justice Marshall, I represent the petitioners, the Director --

QUESTION: Well, you don't have a complaint that the petitioner wasn't served. The petitioner was served.

MR. PLUYMEN: That is correct. I had no complaint about that. Mr. Justice Stevens was inquiring as to the procedure that occurred in this case, and I just frankly don't know.

QUESTION: Now I am confused. Is there some procedure requiring the grant by a magistrate of leave to file a 1983 complaint?

MR. PLUYMEN: No, your Honor.

QUESTION: In other words, the plaintiff -- this was a handwritten one, wasn't it?

MR. PLUYMEN: Yes, your Honor, it was.

QUESTION: And it was -- doubtless it had to be served on these petitioners.

MR. PLUYMEN: That is correct.

QUESTION: But what you are telling us is whether or not your office gets it to defend the petitioners depends on your being requested to represent the defendants, is that it?

MR. PLUYMEN: That is correct, your Honor.

QUESTION: And you never head of this case until there was an appeal?

MR. PLUYMEN: That's correct.

QUESTION: Who represented the petitioners in the district court?

MR. PLUYMEN: Apparently there was no need to represent the petitioners in the district court because the district court summarily dismissed without requiring a response.

QUESTION: And it was when the appeal was taken to the Court of Appeals that you first heard of it, is that it?

MR. PLUYMEN: That is correct, your Honor.

QUESTION: And does your office always represent defendants in cases like this in the Court of Appeals at least?

MR. PLUYMEN: Not necessarily. As a practical matter, most of the defendants will request our representation in the vast majority of cases. There are some who retain private counsel.

Even if the State had been required to --

QUESTION: Can you give us any case here where the Attorney General didn't represent Mr. Estelle? Any one I have seen the Attorney General represented him.

MR. PLUYMEN: Mr. Estelle is sued thousands of times. He is the named defendant in every habeas corpus and every civil rights case filed in the institution.

QUESTION: Who else represents him if the Attorney General does not?

MR. PLUYMEN: Private counsel would. I know of no case, Mr. Justice Marshall, where Mr. Estelle has requested

anyone other than our office to represent him.

QUESTION: I thought so.

QUESTION: What you are suggesting is perhaps that other defendants than Estelle, like the Board of Regents or other people who might be party to 1983 actions --

MR. PLUYMEN: That's correct.

QUESTION: -- under Texas law might have other counsel.

MR. PLUYMEN: For example, the highway patrolmen frequently have private counsel.

QUESTION: Mr. Attorney General, I don't mean to belabor the point, but you assume that Mr. Estelle was served. I wonder if that's a valid assumption. This is an in forma pauperis complaint. I assume the parshal wouldn't go out with a summons unless he got his fees. And the recommendation that he be given permission to proceed in forma pauperis by the magistrate is in the same order in which he recommended that the proceeding be dismissed, which may explain why your clients never heard of the case until it was on appeal.

MR. PLUYMEN: It may explain it. I was really curious about it. I know our office never heard of the case until it was on appeal.

QUESTION: But I am just wondering if they are following rule 4 there about automatically issuing summons or what they do. And it seems to me, as I read this case, it

is a pleading case, and here we are arguing the substance and a lot of facts and all, and I was wondering why there was nothing at all filed by the State . It seems to me that may be significant.

But the answer is you didn't know about the case.

MR. PLUYMEN: We didn't know about the case. That's the reason. It wouldn't make any difference as far as substance is concerned whether the State were required to file a response or not. If the State came back and filed a motion to dismiss for failure to state a claim, we would end up with the same result.

QUESTION: You would, but perhaps you would have filed the medical records. You might have had a different record before us, instead of just having prisoner allegations. We don't know what you would have filed.

MR. PLUYMEN: That's true.

QUESTION: You might have investigated and find, well, there is something here. We don't have any way of knowing what you would have done had you been served in the normal course.

QUESTION: I take it the court of appeals just took it as if there had been a motion to dismiss filed; all the allegations in the complaint were taken as true, and they nonetheless held that that stated a claim for relief.

MR. PLUYMEN: That's correct.

Petitioner's position is that when a district court gets a complaint which on its face clearly fails to state a claim upon which relief could be granted, it has the power to dismiss it without waiting for a motion to dismiss.

QUESTION: You disagree with the result reached by the court of appeals on the law?

MR. PLUYMEN: That's correct. And the court of appeals' opinion, and also the respondent's brief, it's very difficult for anyone arguing that there is a claim stated here to get away from a difference of opinion and a disagreement as far as diagnosis and treatment is concerned. The petitioners' brief outlines the general rule stated by eight circuit courts of appeals when a motion to dismiss is filed or when a claim is filed and the court looks at it and decides to go ahead and dismiss it for failure to state a claim, a summary dismissal, in other words. That particular test to get underneath either the Eighth Amendment cruel and unusual punishment or the 14th Amendment is, number one, if there is a total failure or refusal to provide medical care, that presumably would be an Eighth Amendment violation. It might also be a 14th Amendment violation.

QUESTION: Do you agree with that or not? What is the State's --

MR. PLUYMEN: I do agree with that.

QUESTION: If there is a total failure to provide any

treatment in the prison --

MR. PLUYMEN: That's correct, your Honor.

QUESTION: -- you think that would be a 1983 cause of action.

MR. PLUYMEN: I think that would state a claim.

QUESTION: But what do you understand the court of appeals to have said here -- just negligent treatment is sufficient?

MR. PLUYMEN: The court of appeals here came to the conclusion that there was a total failure to treat. I have read that opinion several times, and I just could not understand why they reversed the district court. And the conclusion they come to is total failure to treat.

QUESTION: If that is their conclusion, you agree with it.

MR. PLUYMEN: I would agree with the law, that that is the law, but if the application of the law to the facts were correct, it is very difficult for me to understand --

QUESTION: The State then would draw the line between total failure and just an ordinary malpractice.

MR. PLUYMEN: An ordinary malpractice case.

QUESTION: Or negligence.

MR. PLUYMEN: Inadequate medical treatment without any exceptional circumstances like deliberate indifference, or intentional neglect. The Federal courts -- I understand

the Fifth Circuit's position to be essentially that, well, somebody has got to help this poor guy. In the first place, he wasn't a poor guy. He was treated by at least two doctors on at least eight different occasions; they responded very quickly. The day he was injured, he worked four more hours, he requested a hospital pass, they gave him one immediately, they didn't make him work any longer. He went to the hospital, he was checked for a hernia, he was sent to his cell. An hour later he felt pain again, he didn't feel good. He came back, they let him go back. He saw a doctor that very day.

QUESTION: Mr. Attorney General, what if the Fifth Circuit's opinion said the rule in this circuit is that you state a 1983 cause of action when there has been a total failure to treat, you don't state one when you allege only negligent failure, and we construe this complaint to allege a total failure. Now, would you petition for cert on that ground?

MR. PLUYMEN: Yes, your Honor.

QUESTION: Incidentally, I note at A-31 that the court of appeals apparently read this as reading "general medical services afforded by the State in its prisons are publicly known to be 'woefully inadequate.'"

MR. PLUYMEN: That is correct, Mr. Justice Brennan.

QUESTION: And that falls short of what you think would be the basis for a constitutional claim?

MR. PLUYMEN: Your Honor, in this sort of class action lawsuit by a number of prisoners which we have pending, we have two or three of them, in which the Justice Department is involved in extensive discovery, that would be relevant, and it would be tried at the district court level. In this case, we fail to see how a general shortage of doctors in the Texas Department of Corrections is relevant in any way when he sees two doctors on a number of occasions. They see him time after time. They give a prescription, Dr.Astone gives a prescription the first day after he is injured --

QUESTION: May I ask, what you are just telling us, is that in the complaint?

MR. PLUYMEN: No, your Honor, that is in the appendix submitted by respondent, the appendix to the brief submitted by respondent to the Fifth Circuit. It was a citizen's advisory report to a committee in the prison reform --

QUESTION: That is referred to, I gather, in footnote 1?

MR. PLUYMEN: That is correct, your Honor.

QUESTION: What's this on appendix pages 10 and 11? Isn't that petitioners' -- I mean, the respondent's writing?

MR. PLUYMEN: That is correct, your Honor.

QUESTION: He says he went to Dr. Ralph Gray, Medical Director of the Texas Department of Corrections.

MR. PLUYMEN: That is correct, your Honor.

QUESTION: He says himself that he had medical

treatment.

MR. PLUYMEN: He does. He not only went to see Dr. Gray, he saw Dr. Astone five different times.

QUESTION: It's in his complaint.

MR. PLUYMEN: It's in his complaint. He states he saw Dr. Astone -- the interesting thing about this whole complaint is that there was never any time when there was any substantial wait when he requested medical care. He saw the doctor the very day he was injured, he saw Dr. Astone the next day, he was "examined" by Dr. Astone. He stated that Dr. Astone's medical record reflected he had a back strain. Dr. Astone prescribed bed rest and pain pills for two days. Three days later he sees Dr. Astone again. Dr. Astone prescribed bed rest and pain pills for seven days. Seven days later he sees Dr. Astone again. That sequence of the time between visitations and the time for prescriptions continues throughout the complaint.

QUESTION: Is this a medical doctor? We don't know. Because you know in prison the word "doctor" does not mean a medical doctor. A corpsman handing out pills, they call him "Doc."

MR. PLUYMEN: Dr. Gray, I know the people who work on the Prison Reform Committee, and they have all the respect in the world for Dr. Gray. He is the Medical Director of TDC. He is the Chief Medical Officer --

QUESTION: How about that first man he went to?

MR. PLUYMEN: Dr. Astone?

QUESTION: No, Captain somebody.

MR. PLUYMEN: Capitain Blunt.

QUESTION: You mean a doctor is a captain?

MR. PLUYMEN: No, sir. Captain Blunt would not be a doctor.

QUESTION: That's what I thought.

MR. PLUYMEN: Dr. Astone --

QUESTION: He is a captain of the guard.

MR. PLUYMEN: In general -- if we are going to talk about hearsay and reports and everything, in general the medical captains are people who come out of the army and were medics and have training and they are utilized by TDC on --

QUESTION: But this record just won't help us.

MR. PLUYMEN: The issue in this case is whether a claim under the Constitution of the United States was stated, and with the kind of medical care that this person alleges, petitioners just fail to see how it is any way possible to conclude that a claim was stated.

QUESTION: You say that is impossible with the allegations of the complaint.

MR. PLUYMEN: That is correct, your Honor.

QUESTION: Without reference to what was submitted to the court of appeals by way of an appendix.

MR. PLUYMEN: Your Honor, that is correct. Our position is that if there were 300 doctors in TDC and he saw none, how is it relevant that there are 300 doctors there? They alleged that there were two or three full-time doctors. Well, he saw two, and he didn't just see them once, he saw them on numerous occasions, and he saw them practically immediately after he complained.

QUESTION: The complaint says that he saw them on numerous occasions.

Frankly, I have tried to decipher this. It is a very difficult job for me at my age with my eyes. Has anybody ever tried to translate this into print or something for us?

MR. PLUYMEN: Well, in petitioners' statement of facts we set out some of it. In respondent's statement of facts, some other parts of it are set out. Neither is complete.

QUESTION: Material submitted to the court of appeals by appendix that wasn't in the pleadings is that Citizens Advisory Committee report, isn't it, not the sequence of treatment, which is -- the sequence of treatment is in the complaint.

MR. PLUYMEN: It's in the complaint.

QUESTION: What you are saying, aren't you, is that even if the medical care in Texas prisons generally is inadequate, that on the complaint filed here there is no showing, no allegation that the court can act upon.

MR. PLUYMEN: That's correct, your Honor. It is completely irrelevant.

QUESTION: I thought also your claim was it is a legal matter that an allegation of inadequate care was insufficient to state a claim under the Federal Civil Rights Act. An allegation of either inadequate care or negligent care was insufficient to state a Federal claim, wasn't that your point?

MR. PLUYMEN: That's the point. Eight courts of civil appeals --

QUESTION: Is that your position?

MR. PLUYMEN: That's the position.

QUESTION: That's what I thought.

QUESTION: Mr. Attorney General, is there any way that you and the respondent can get us a translation of this that you will agree on?

MR. PLUYMEN: I think we could probably have it typed up, your Honor.

QUESTION: That you both agree is what was said.

MR. PLUYMEN: We could do that.

QUESTION: What you have at page 3 to 6 or 7 of your petition really summarizes each allegation, does it?

MR. PLUYMEN: It's a summary and an interpretation.

QUESTION: It's an interpretation and not a --

MR. PLUYMEN: It's not a verbatim transcript. The

original record contains the complaint, and it's legal size paper. His writing is fairly big, although it is not typewritten and some of it is hard to read.

QUESTION: So it reduces to this the way we get it, doesn't it?

MR. PLUYMEN: That's correct, your Honor.

QUESTION: Mr. Attorney General, may I ask one other question? We, of course, are dealing with the facts, but under Conley v. Gibson I guess the test that is sufficient is whether under any state of facts which can be conceived there might be a valid claim proved, or words to that effect. And then the court of appeals seems to adopt an even more liberal standard. At page 31 they say that a situation calls for even greater liberality on the part of the district court where the State has not been required to file any pleading whatsoever -- that's the point we were talking about earlier. Do you think the standard for reviewing the sufficiency of the complaint should be the same or different when there has been no response, no motion, no nothing by the State?

MR. PLUYMEN: Our position is it should be exactly the same.

QUESTION: So you would disagree with the analysis by the court of appeals on that point as well as on their test of what section 1983 requires.

MR. PLUYMEN: That's correct, although I couldn't

predict, like your Honor said, exactly what the State would have done. If I had handled the case, I would have filed a motion to dismiss for failure to state a claim, period.

QUESTION: Certainly there is no hint in the Federal Rules of Civil Procedure that the standard is any different when the State has responded by way of a one-line motion to dismiss or by some other pleading when the question of sufficiency of the complaint to state a claim is raised, is there?

MR. PLUYMEN: No, there is not, your Honor. I doubt that by answering the State could somehow salvage the complaint.

QUESTION: Well, conceivably, if the State answers and then there is a motion for judgment on the pleadings, the plaintiff is entitled to rely on the State's admissions in the answer as well as on the plaintiff's complaint.

MR. PLUYMEN: That's true, your Honor.

If the Court would consider all the cases decided by the circuit court, we would submit that on the facts there is no case that we have any substantial disagreement with as far as granting or dismissing a complaint.

QUESTION: Is that where we usually take our law from, take a consensus of the courts of appeals?

MR. PLUYMEN: I understand that, Mr. Justice Rehnquist, no, you do not.

QUESTION: We have never even held that total absence

of medical care raises a constitutional question, have we?

MR. PLUYMEN: No, you have not, your Honor. I was just the citing the eight courts of appeals because there are a number of judges, quite a number of judges, and their collective wisdom. The facts in those cases, when you compare them with the facts of this case, in every case where they have granted relief or permitted a complaint to be filed over a motion to dismiss, the facts of those cases were completely different, of a totally different nature than the facts of this particular case.

QUESTION: Isn't your position that the court of appeals applied the wrong standard of law in deciding whether there was a cause of action stated, because the court says that the treatment was inadequate.

MR. PLUYMEN: The court says that at one point. At another point the courts said there was a total refusal to treat, which I cannot --

QUESTION: It says it totally failed to provide adequate treatment. That is an adequacy standard, isn't it?

MR. PLUYMEN: It sounds like it.

QUESTION: And that standard, I take it, you assert is wrong.

MR. PLUYMEN: We have asserted that all the way through this case. We assert it in the brief and cite numerous cases in support of it.

MR. CHIEF JUSTICE BURGER: Mr. Hedges.

ORAL ARGUMENT OF DANIEL K. HEDGES ON

BEHALF OF THE RESPONDENT

MR. HEDGES: Mr. Chief Justice, and may it please the Court: My name is Daniel Hedges, counsel for the respondent, J. W. Gamble. The respondent would like to make just three basic points before the Court today.

The first of those is that a pro se petition by an illiterate prisoner alleging a violation of his constitutional right to medical care should never be dismissed without requiring a responsive pleading, or at least examining the relevant medical records.

Second, that a petition which sets forth a pattern of conduct which establishes deliberate indifference by prison officials to the rights of prisoners to accurate medical care or to medical care at all states a cause of action.

And, third, turning from the procedural point to the substantive point to the complaint itself, under whatever standard the Court chooses to apply, Mr. Gamble's complaint does state a cause of action. In reference to the question by Mr. Justice White just a few moments ago, in the opening pages of the Fifth Circuit opinion, they state, "We find the complaint sufficient in alleging that the action of the authorities was tantamount to a refusal of medical treatment." Later on in the opinion they do state that it was inadequate. I would

probably find myself in agreement with my colleague from the Attorney General's office it is not entirely certain just which of the standards the Fifth Circuit did apply in this case.

QUESTION: Well, if you accept the allegations of the complaint as true, obviously you can't conclude that there was a total failure to provide treatment.

MR. HEDGES: We would not --

QUESTION: He saw a doctor and the doctor did some things for him. Now, you could say he did the wrong things or it wasn't adequate. But he had medical care of some kind.

MR. HEDGES: He saw doctors, your Honor, but we would certainly say that we can argue that there was a refusal of medical care. I cite the Court an example from a Fifth Circuit case, Robinson v. Jordan, where the individual was complaining of severe rectal pain, saw doctors on several occasions, the doctors prescribed suppositories of some sort to treat this person's pain, the pain persisted, he continued to complain. They wouldn't do X rays, they wouldn't do further tests, and they wouldn't change the prescription. Months later the person finally got another examination. He had advanced rectal cancer, had to have a colostomy. That person stated a claim.

I would say that if a diagnosis is conducted, treatment is prescribed in accordance with that diagnosis, but

the symptoms persist, there is certainly a medical possibility that the doctor's diagnosis was wrong. And refusal to conduct a subsequent diagnosis, and if necessary change the treatment, you are not really talking about just diagreement with the diagnosis, you are talking about a refusal to conduct a subsequent diagnosis in the face of persisting symptoms.

QUESTION: You think that is an assertion that the doctors refused to provide care that they knew should be provided?

MR. HEDGES: I think if it is clear to them that the care which they were providing was having no effect whatsoever, then the logical conclusion would be that their diagnosis was wrong.

QUESTION: That is basically a malpractice claim, isn't it? And in the other case you told us about, that was a malpractice claim.

MR. HEDGES: That was a 1983 case.

QUESTION: Yes, but what it boils down to is a malpractice claim, isn't it?

MR. HEDGES: It is very similar, and we don't need to rely on that in this case, and I would hate to spend my time before the Court dealing with that because [illegible] we have all the --

QUESTION : It is quite different from a claim of total failure or refusal to give any medical care whatsoever

to somebody in an illness or accident.

MR. HEDGES: It is definitely different from a total absence of medical care.

QUESTION: And the two claims are different, not in degree, but in kind, are they not?

MR. HEDGES: Yes, they are. And we feel that we can come under the total refusal test as well in the circumstances of this case.

QUESTION: On the basis of the man's own complaint he saw not one, but two, doctors and saw them more than once.

MR. HEDGES: I would like to call the Court's attention to certain other allegations in the complaint in which on certain occasions, not overall, but on certain occasions this individual suffered from the deliberate indifference of prison authorities to his medical needs. This is the standard we would urge before the Court today, and not the total refusal standard. This standard is set forth in our brief and explained in some detail. This is the standard we would set forth before the Court and urge is that an allegation of deliberate indifference by prison authorities to the medical needs of a prisoner states a claim. This test has several advantages, one of them being you aren't looking at medical care, you aren't disagreeing with doctors; you are looking at the actions of the prison authorities. And I have cited nine examples in the brief of where the prison authorities denied adequate

medical care to this individual on an administrative basis. I would like to just bring back to the Court three of those which give a very good example of what I am talking about here.

Mr. Pluymen pointed out that this individual was never refused the opportunity to go to see a doctor or to see some sort of medical personnel when he was in pain. This is incorrect. On February 7 and 8 of 1974, when he was in solitary confinement, he asked to go on sick call. He was refused permission to go on sick call by prison guards, not by medical authorities, but by administrative individuals, by prison guards. The Law Enforcement Assistance Association, a branch of the Justice Department, has stated in one of its recent reports that denial to access to sick call is an open invitation to inmates to sue the institution for it is prima facie evidence of denial of medical care.

He also had a prescription from one of the doctors he did see that he receive a lower bunk. The man had a lower back injury, they prescribed a lower bunk. He never got one. Once again, an administrative decision by the prison authorities, not disagreement as to diagnosis, not disagreement as to treatment. I think Mr. Justice Stewart is absolutely correct, we were discussing diagnosis and we were discussing treatment a minute ago. We are not now.

QUESTION: Mr. Hedges, do I understand you that every time a prison guard denies a man a right to sick call

it's a 1983 action?

MR. HEDGES: Not every time he does it, your Honor, but I would urge upon the Court the standard stated in --

QUESTION: How many times?

MR. HEDGES: You can't put a number on it, your Honor.

QUESTION: I didn't think you could.

MR. HEDGES: You can't, your Honor, but I would urge upon the Court the standard --

QUESTION: Because I mean if a guy every morning says, "I would rather have sick call than go to work," he never would go to work or he would have 365 1983's a year.

MR. HEDGES: Some of the prisoners apparently come pretty close to filing that many, your Honor, I realize. And that is a problem. But the Second Circuit in a 1974 decision, Bishop v. Stoneman, examined the full cumulation of incidents. What the district court had done was look into each individual incident alleged. It said, No, this incident by itself isn't enough. And they dismissed. The Second Circuit reversed and remanded saying, Look at the cumulation of the incidents, and if from that cumulation of incidents you determine a series of incidents which constitute a pattern of conduct amounting to deliberate indifference to the medical needs of prisoners, then you have a claim.

QUESTION: Do you think this complaint shows that?

MR. HEDGES: I do, indeed, your Honor. There are nine

separate instances where this individual --

QUESTION: I start off with the very great difficulty of a man that has a 600-pound bale fall on him and he can move.

MR. HEDGES: That's very difficult to understand, your Honor.

QUESTION: Isn't it rather impossible? A man to have a 600-pound weight fall on him and then work four more hours before he gets a pain?

MR. HEDGES: I think what happened was the pound -- the bale -- there is such a difficulty here, your Honor, it is hard to tell just what happened. It's hard to tell if a 600-pound bale fell on him or if he was trying to pick up one bale and strained his back. Your Honor, it is impossible to tell --

QUESTION: I just saw the Olympics and a guy had a great difficulty raising 400, and this man was tossing around 600 pounds.

MR. HEDGES: It is very hard to understand. It's also impossible to --

QUESTION: Why don't you use the word "believe"? It's pretty hard to believe.

MR. HEDGES: If that's what he was trying to say; it's hard to understand what he was trying to say, your Honor.

QUESTION: It's hard to believe. You won't go with

me on that.

MR. HEDGES: That a 600-pound bale fell on him?

QUESTION: That he worked four hours afterwards without a pain.

MR. HEDGES: If indeed a 600-pound bale fell on him, that would be hard to believe.

QUESTION: That's what he said.

MR HEDGES: He said that the bale fell flat.

Your Honor, I think we get in a problem when we start trying to delve into just what --

QUESTION: I also think if I can't believe one thing a man says, I have difficulty believing other things he said.

MR. HEDGES: I think it is a question of what is he trying to say rather than, you know, do we believe him or do we not believe. It's unclear from this petition, getting back to the man's complaint. You can't tell whether or not there was in fact a diagnosis here. The Court is asking wasn't there a diagnosis of lower back strain. All it says in the complaint is, in one place it says Dr. Astone record show plaintiff have lower back strain. In another place it says Dr. Gray record show plaintiff have lower back strain. In the same hospital, two different doctors don't have their own records. The patient has the records, and it's impossible to tell from the complaint who made that entry in the record. Was it even a doctor at all? Or was it one of these inmate nurses?

We get back to the questions that the Court asked at the very outset, and those go to this procedural point: Without the medical records themselves, without ever having seen the medical records, it's really impossible to tell just what did happen to this individual, just what care was received. We have a great danger when we allow the district courts to dismiss these cases, which are so very difficult to interpret and in sections difficult to believe admittedly, and there are so very many of them, when we allow them to be summarily dismissed without a responsive pleading and without any discovery, we run a tremendous risk that the very few valid cases, or the valid cases that do come along will simply be thrown out with the invalid ones because there are just too many cases to consider and consider carefully.

What should be done here is that the State or the defendants in this case, Mr. Estelle, Mr. Gray, and Mr. Husbands, should be required to assist the courts. This isn't a question of whether Federal courts will sit as medical review boards. The question in this case before the Court is should the defendants be required to play their role in the litigation of helping the courts to decide whether or not there is a valid claim. And the tools are there in the Federal Rules of Civil Procedure: summary judgment with affidavits, a 12(b)(6) motion with the medical records simply attached. None of this was done in this case.

Another solution which is there,which was discussed earlier, is the administrative grievance procedures. Those are there in the Texas courts now. In the Federal courts, in the experimental project --

QUESTION: In the Texas courts or --

MR. HEDGES: I am sorry, in the Texas Department of Corrections. Those administrative procedures are now available. In the Federal Bureau of Prisons 35 percent of the complaints receive favorable action. Those are complaints which never had to go to court because they received favorable action in the prison within the grievance procedures. And furthermore, those which go through these grievance procedures and then get into the courts are going to have documentation attached, they are going to have a record attached. It's not going to be like the case here.

So there is no excuse for the district courts dismissing these cases without requiring some sort of responsive pleading or some sort of discovery. It's very dangerous, and the few good cases, the few valid cases, will be thrown out because of the great flood of litigation, and furthermore there are other procedures available.

QUESTION: How do you deal with this -- as I read this appendix, the magistrate ruled that it couldn't be filed. But he said, "I permit it to be filed."

MR. HEDGES: I believe it was filed and an immediate

dismissal recommended, your Honor.

QUESTION: No, he said, "I permit it to be filed." Isn't that what he said?

MR. HEDGES: Permission to file in forma pauperis he granted, the clerk be required to file the petition.

QUESTION: So he allowed it to be filed.

QUESTION: In forma pauperis.

MR. HEDGES: In forma pauperis, that's correct.

QUESTION: That's not what I asked. Is this that he allowed it to be filed?

MR. HEDGES: I do not know any provision under which he could deny the permission to file it, your Honor.

QUESTION: Well, to get back to what we were asking the Attorney General, was Mr. Estelle served?

MR. HEDGES: There is no summons or indication whatsoever of service in the record, your Honor. Therefore, on the record we have to assume he was not.

QUESTION: How can you complain about the State not filing something if they didn't know about it?

MR. HEDGES: The blame does not lie with the State there, your Honor; the blame lies with the district court and the magistrate for not requiring that the State be served and file something. Wherever the blame lies, the end result is that the district court did dismiss a petition without any responsive pleading. The effect on my client is the same

whichever place it started out.

QUESTION: What you are arguing then is an exception to the normal provisions of the Rules of Civil Procedure where a defendant can simply come in and file a one-sentence motion to dismiss and argue the insufficiency of the complaint. You say that a defendant in a 1983 action is not able to do that.

MR. HEDGES: He could do it. I think it should not be granted, your Honor, unless he -- all he would have to do is attach a xerox copy of the medical records and an affidavit from the doctor.

QUESTION: Supposing he doesn't attach anything. The Rules of Civil Procedure don't require you attach anything in the way of evidence to a motion to dismiss. Are you saying there is a special exception to the Rules of Civil Procedure for a defendant in a 1983 action?

MR. HEDGES: I think for a pro se petition in a 1983 action such as the one here, the courts should not dismiss these cases without at least looking at the medical records and requiring some responsive pleading. It is not in the Rules of Civil Procedure, your Honor is absolutely correct. This is the position that several of the circuits have taken, and I would urge before this Court that it is a very sound position for the reasons that I have already stated.

I would like to move on very briefly from the questions of procedure to the questions of what is a proper standard once

a district court has one of these petitions for reviewing it and would urge upon the Court the standard which I have already touched upon, that deliberate indifference by prison officials to the medical needs of prisoners, allegations of this state a claim under 1983. Before looking at that test, it is really essential that the Court keep in mind that whatever test the Attorney General's office advocates, and they advocate this exceptional circumstances test, whatever test I advocate, the improper test was used in the present case, and that was the so-called prison deference rule or hands-off doctrine. This was at the district court level. A magistrate used this test. And this is one which is simply saying, "We aren't going to interfere with the decisions of prison officials," which is probably an adequate test in matters of administration of prisons, in matters of discipline, but the circuits have uniformly held that this is a totally inappropriate test when you are talking about the medical needs of prisoners, the constitutional rights of prisoners.

The proper test is that of deliberate indifference, and I have already dealt with the case which best exemplifies it, Bishop v. Stoneman, in which the court looked at all of the circumstances involved, the Second Circuit did, and said based on this cumulation of incidents we see a pattern of conduct here which indicates a deliberate indifference to the needs of prisoners.

QUESTION: In all these cases it would be essential, in a case such as this, for the court to come to some judgment as to how gross or how deviant the performance of the medical personnel was.

MR. HEDGES: Or you might not have to in one case, your Honor, you might have an obvious --

QUESTION: In this one you would have to look at the course of treatment and come to some conclusion as to whether the doctors were indifferent or whether they were merely negligent or whether their treatment was adequate.

MR. HEDGES: Well, in this case, your Honor, I would urge that the Court look at the actions of the nonmedical prison personnel, the nine separate instances which I have set out in the brief, and three of which I have discussed with the Court just a minute ago, and I think you will find those, completely aside from diagnosis and completely aside from treatment --

QUESTION: Well, what I am not quite clear about is I understand the suggestion that at least a standard ought to be deliberate indifference of the prison officials. But when, if ever, do we get into the question of the adequacy of the medical treatment under your summation?

MR. HEDGES: Your Honor, I think I discussed that somewhat in my colloquy with Mr. Justice Stewart a little while ago that you have a situation here like you did in the

Robinson v. Jordan case, if you are going to look at it. Of course, one of the questions is are you going to look at it at all.

QUESTION: Under your suggestion, would looking at the adequacy of the medical treatment be required?

MR. HEDGES: It would be one of the factors you would look at. It would not be the sole factor. Probably --

QUESTION: But the basic standard would be deliberate indifference of prison officials to the medical needs of the inmates.

MR. HEDGES: That is correct, your Honor. The medical treatment -- or denial of medical treatment -- would be one aspect of this. And when you look at a deliberate indifference standard, if you can establish deliberate indifference to the needs of all of the prisoners in the prison system, this, of course, is relevant to an allegation of deliberate indifference to the needs of one of the prisoners in the prison system. And the fact that at many times there is one doctor available and 17,000 patients -- 70,000 prisoners, excuse me -- is relevant to the care afforded, or the interest in the needs and the situation --

QUESTION: No matter how adequate his particular treatment of a particular inmate may be.

MR. HEDGES: I think that would be going too far. I think you need to look at the adequacy of his treatment certainly.

QUESTION: Would that be relevant only in a class action?

MR. HEDGES: It would certainly be more relevant in a class action, your Honor, but it wouldn't be totally irrelevant in a case such as this. I would like to call to the Court's attention on this point that in their brief the Attorney General's office does not allege there was any real prejudice or that the outcome of the decision by the Fifth Circuit was in any way influenced substantially by their reference to this appendix. Therefore, this is not a matter that the Court should even really consider, and furthermore, it was clearly a proper matter for judicial notice since it was the report of a working paper which ended up being a report from a legislative committee. It was perfectly proper for them to consider it, and it was relevant to the medical care.

QUESTION: Talking about the standard that you would have us apply, in your brief you state that allegations of mere negligence by prison medical personnel or disagreement as to the diagnosis do not constitute actionable claims under the Civil Rights Act. Have you changed your position on that?

MR. HEDGES: No, I have not, your Honor. I concur with the Attorney General on that.

QUESTION: If this complaint alleged merely negligence on the part of the doctors you wouldn't be here.

MR. HEDGES: Well, I don't think I would be arguing

this case in this fashion, no, your Honor. That does not state a claim. As the Attorney General has pointed out there are other remedies available that are short of relying on your constitutional remedies. You have simply got the Texas Tort Claims Act available and several other remedies.

QUESTION: There is a Texas Tort Claims Act?

MR. HEDGES: Yes, there is, your Honor.

QUESTION: And it's available to inmates of penitentiaries?

MR. HEDGES: Yes, it is, your Honor. And that would be the solution for mere negligence.

QUESTION: You are relying on averments of negligence against nonmedical personnel.

MR. HEDGES: More than mere negligence, but gross indifference to the needs of this individual and insistence on completely ignoring him on several occasions.

QUESTION: You argue that that rises to the level of an Eighth Amendment violation?

MR. HEDGES: If there is a pattern of such conduct against such an individual, yes, your Honor, that's exactly what we would argue.

QUESTION: Under the facts averred in this complaint.

MR. HEDGES: Yes, your Honor, we argued that the deliberate indifference against this individual does amount to cruel and unusual punishment.

QUESTION: That's the only possible Federal constitutional claim in this case, isn't it? There is no procedural due process claim.

MR. HEDGES: No, there is not.

QUESTION: And there is no other possible constitutional claim --

MR. HEDGES: There is none, your Honor.

QUESTION: -- that occurs to you, is there?

MR. HEDGES: There is none. The cruel and unusual punishment standard is what we are dealing with.

I talked about the procedural problems. I think the Court delved into them very closely at the very outset with their questions of the Attorney General. We have never seen the medical records. We don't really know what happened, and this petition is exceedingly difficult to read and it is simply improper to rely on these individuals to try to make these pleadings. We have looked at the standard of care.

I would like to point out one more thing that is in the complaint, one more instance of this deliberate indifference. I cited one. I would just like to cite one more to the Court, and I think it will convey to the Court somewhat better than the denial of sick call what deliberate indifference really is.

On January 31 Gamble went before the Unit Disciplinary Committee because he had refused to go to work. One of the

people who testified at that Disciplinary Committee meeting was the Captain Blunt whom he had seen on so many occasions at the infirmary. Now, about three weeks previous to this, Captain Blunt had prescribed for Gamble hypertension medication and pain medication. At the time of the hearing Gamble was still receiving this medication. He was in a physical condition which required hypertension medicine and back medicine. Blunt testified at this Unit Disciplinary Committee hearing that this man is in first-class medical condition. First-class medical condition means this man can go out in fields and go back to work on the 600-pound bales of cotton or whatever heavy labor there is.

Immediately following this he was put into solitary confinement, there was no medical examination of him before he was put into solitary confinement. This is a textbook example of deliberate indifference by prison officials to the medical needs of this individual.

To briefly summarize, this is a case where the wrong procedure was used. There was no responsive pleading required. The medical records have never been seen. And all that might be required here is to take a look at these medical records. Furthermore, very simple streamlined procedures are available, both through the Federal Rules of Civil Procedure and through these administrative grievance procedures which Mr. Chief Justice Burger has called for in his 1973 speech on the state of

the judiciary, which Mr. Justice Powell has touched upon in his Procunier decision. Texas now has them. It's too late for Mr. Gamble to utilize them, but they are available now, and this Court should not be seeing any more cases coming out of Texas like this. Mr. Gamble simply asks to be accorded the same rights that other prisoners in Texas now have.

Second, the standard of care. Whatever the Court decides is the proper standard, the wrong standard was applied here, and that was this hands-off doctrine, we just won't interfere with the prison officials' decisions.

And third, completely aside from questions of diagnosis and treatment, Mr. Gamble's complaint does state a cause of action, a case of deliberate indifference to his medical needs by the prison administrative officials.

QUESTION: Mr. Hedges, is it really fair to Judge Bue to say that he applied a hands-off in prison matters approach? I was under the impression that he was presiding in some major piece of litigation involving a review of all the medical practices within the Texas system.

MR. HEDGES: Judge Bue?

QUESTION: Isn't that correct, or am I misinformed?

MR. HEDGES: Your Honor, we can't tell from this case whether Judge Bue really even reviewed the magistrate's decision or not. The Lawrence v. Wainwright case which is the hands-off doctrine case was in the magistrate's decision.

QUESTION: I see.

MR. HEDGES: There is no indication whatsoever in the record that there was any independent review of the magistrate by Judge Bue. All Judge Bue's opinion says is we adopt the recommendations of the magistrate.

QUESTION: I see.

MR. HEDGES: But that was the standard which was applied.

QUESTION: Am I correct in believing he does have some major case pending that he decided something involving the --

MR. HEDGES: That is correct. It deals with the care afforded the prisoners in the Harris County jails, your Honor.

QUESTION: I see.

QUESTION: May I ask a question? The magistrate's report states that he requested the plaintiff, the then plaintiff, to clarify and particularize the allegations of deprivation. The magistrate then goes on to say that his response was negative; it did not do that. Is the response in the appendix?

MR. HEDGES: It is not -- there must not have been a response, your Honor. There was no response. And with mail being the way it is and some of my efforts to communicate with my prisoner, I don't know whether he received that request or

not. But I don't believe there was a response.

QUESTION: I think we must assume that he did. The magistrate says his response did not do so. They have been lost somewhere.

MR. HEDGES: It is not in the record which I received when I was appointed by the Fifth Circuit, your Honor.

QUESTION: I was also puzzled by the last comment you made that Judge Bue signed a final judgment and he says for the reasons set forth in the magistrate's memorandum. Are you suggesting he did not look at the memorandum?

MR. HEDGES: No. It's impossible to tell from the records, your Honor, what degree of review there was. But there is a great danger -- it's helpful to utilize the magistrates, but as the Court is very well aware, the enormous volume of these cases, we run the great danger of the courts abdicating their responsibilities to the magistrates and letting the magistrates make these recommendations. I have no indication whatsoever that that occurred in this case.

QUESTION: We certainly can't assume that the district judge didn't do his duty.

MR. HEDGES: Certainly not, your Honor.

QUESTION: Mr. Hedges, one other question. The docket entries make reference to a motion to vacate the district judge's order. I couldn't find that. Do you know if that was in the nature of a motion for leave to amend

the complaint or --

MR. HEDGES: It simply requested that it be vacated. It was also pro se.

QUESTION: No additional fact allegations.

MR. HEDGES: No, there were not.

MR. CHIEF JUSTICE BURGER: Mr. Pluymen, you have about three minutes left.

REBUTTAL ARGUMENT OF BERT W. PLUYMEN

ON BEHALF OF PETITIONERS

MR. PLUYMEN: Your Honors, it would be apparent from our arguments today and more apparent from the two briefs that counsel and I had no disagreement as to the law to be applied. I have no disagreement with the deliberate indifference test, of course, if you decide to use that test under constitutional standards.

The only disagreement that we have comes to the application of the law to the facts. The deliberate indifference particular occurrences cited by counsel in his brief are taken completely out of context. The failure of the building department to issue him a lower bunk for one week during a course of medical treatment by Dr. Astone for four weeks; I fail to see how that stands out. His medical prescription for 30 days given by Dr. Gray which was lost for four and then given to him; I fail to see how that alleges any constitutional claim. His being threatened by the lieutenant and a sergeant

60 days after he was injured, and he was asked, "Do you want to go to work," he said, "No," and they threatened to send him to the farm, quote, unquote. That was some 34 days after Dr. Astone had ordered him to do light work and he had refused to do it.

He was taken before a Disciplinary Committee twice. The first time after having been cared for by Dr. Astone for three weeks, he said, "I still hurt. Dr. Astone has had me for 26 days under his care; he didn't even notice my high blood pressure." The Disciplinary Committee did not say, "Go to work or we are sending you to solitary." They said, "We are going to send you to see another doctor." The very next day he saw Dr. Gray. He remained under Dr. Gray's care for two weeks after that. It wasn't until 86 days, or 40 days after that first Disciplinary Committee hearing, 86 days after the injury, that he was taken before the Disciplinary Committee the second time, and that's when he was sent to solitary for refusing to work. It had been a long time, he had been under doctor's care twice. The doctor already had ordered him to do light work months before. He had refused to do it then. They finally cracked down on him and sent him to solitary.

So there is really no deliberate indifference in this case as far as a constitutional standard or claim is concerned.

Bishop v. Stoneman, which is cited by counsel as the

best evidence or the best example of deliberate indifference, the allegations contained in that case are horrendous. Back injury, request to see a doctor, it took six months, people vomiting blood not seeing doctors for 7 or 8 days after that. The facts are just -- it's not only a difference in degree in that case but in kind.

If your Honors were serious about us typing up a verbatim transcript of this complaint, since we have agreed on the law, your Honors can determine for yourselves the application of the law to the facts. There is no sense in us arguing --

QUESTION: It might be useful. Will you do that and have counsel here agree with you that it is a correct reading.

MR. PLUYMEN: As far as the medical records are concerned, should the court call up the medical record in every case? Our office will submit the medical record generally to the court along with a motion to dismiss or whatever pleading for the benefit of the court. In this particular case, what difference does it make in terms of whether he stated a complaint or not? Upon reading the complaint, he names the analgesics, Robaxin,Febridyne, Sodium Solicylate. The EKG, I spent two days in a county medical library trying to figure out the terminology that he cites in his complaint. He obviously copied it. We don't even have to assume he copied it out of his own medical record. But taking

a look at the -- if the court called up the medical record, what difference would it make?

MR. CHIEF JUSTICE BURGER: I think your time is up now, counsel.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:02 a.m., the arguments in the above-entitled matter were concluded.]