

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1630 & 82-6695

TITLE TED S. HUDSON, Petitioner v. RUSSELL THOMAS PALMER, JR.; and
RUSSELL THOMAS PALMER, JR., Petitioner v. TED S. HUDSON

PLACE Washington, D. C.

DATE December 7, 1983

PAGES 1 thru 47



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Washington, D.C.

Wednesday, December 7, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:37 a.m.

APPEARANCES:

WILLIAM G. BROADDUS, ESQ., Chief Deputy Attorney General of Virginia, Richmond, Va; on behalf of Petitioner and Cross Respondent, Hudson.

MS. DEBORAH C. WYATT, ESQ., Charlottesville, Virginia; on behalf of Respondent and Cross Petitioner, Palmer.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

WILLIAM G. BROADDUS, ESQ.

on behalf of the Petitioner and

Cross Respondent, Hudson

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DEBORAH C. WYATT, ESQ.

on behalf of the Respondent and

Cross Petitioner, Palmer

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Broaddus, you may proceed when you are ready.

ORAL ARGUMENT OF WILLIAM G. BROADDUS, ESQ.,
ON BEHALF OF PETITIONER AND CROSS RESPONDENT

MR. BROADDUS: Mr. Chief Justice, and may it please the Court:

The two petitions in this case bring before this Court two important constitutional issues pertaining to prison administration. The first issue, that presented by the Petitioner, is whether a prison inmate has some reasonable and legitimate expectation of privacy while in prison so that he is entitled to the protection of the Fourth Amendment and Fourteenth Amendments against allegedly unreasonable searches.

The second issue, that presented by the Cross Petitioner, is whether a prison inmate whose property has been destroyed by the random unauthorized but unanticipated act of a guard has in law been deprived of property without due process when the state provides adequate post-deprivation remedies which are adequate to make the inmate whole.

These issues arose out of an incident which occurred at Bland Correctional Institution in September, 1981. Bland is a state run penal facility which houses

1 450 felons.

2 According to the inmate's complaint the prison
3 guard conducted a shakedown, that is, a search of his
4 locker but the shakedown was not routine and was
5 conducted for purposes of harrassment. He further
6 alleged that the guard destroyed some of his property.

7 Although the guard denied these allegations
8 the District Court accepted them as true for purposes of
9 ruling upon the guard's motion for summary judgment.
10 The trial court concluded that the allegations of
11 deprivation of property did not constitute a taking
12 without due process because of this Court's reasoning in
13 the case of Parratt v. Taylor.

14 The trial court also concluded that the
15 allegations of harrassment did not rise to the level of
16 a constitutional violation. The Court of Appeals
17 affirmed both of those rulings.

18 The Court of Appeals found that the inmate had
19 some minimal right of privacy entitled to protection
20 under the Fourteenth Amendment, and the Court of Appeals
21 ruled that a guard could not search unless there was an
22 established program or policy for random searches or in
23 the alternative that the guard had some reasonable basis
24 for believing that the prisoner possessed contraband.

25 The Petitioner submits the Court of Appeals

1 erred with respect to this conclusion, and I would like
2 first to address this issue. It is clear from this
3 Court's prior opinions that an iron curtain does not
4 exist between the Constitution and our nation's prison.
5 It is equally clear, however, that prisoners suffer a
6 substantial reduction and even loss in many rights and
7 privileges.

8 In each case before the Court determines that
9 an inmate possesses a right it carefully weighs that
10 claim in light of the accute need of prison
11 administration for prison security because that is the
12 paramount need which prison administration is charged
13 with. Secondly, it will weigh the claim in light of
14 the effect upon the prison inmate.

15 With respect to the claim that a prison inmate
16 possesses a right of privacy this Court is well aware
17 from its many cases that prisons are dangerous places.
18 They are used to house dangerous men.

19 Inmates may seek to assault, to brutalize
20 other inmates. They may seek to assault guards. They
21 may seek to escape.

22 The introduction of drugs and weapons into
23 this situation can only exacerbate an already dangerous
24 place and situation.

25 QUESTION: General Broaddus, can I ask you a

1 question about the scope of your submission?

2 MR. BROADDUS: Yes, sir.

3 QUESTION: As I understood your opening
4 statement you were suggesting that the Fourth Amendment
5 has no application to searches in the prison. You also
6 say that there is no protection for the prisoner against
7 seizures in searches.

8 I notice the complaint alleges that the
9 officer shook down my locker and destroyed a lot of my
10 property, that is, legal materials, letters and other
11 personal property. It is not so much the search as the
12 destruction of property.

13 Is there a protection against unreasonable
14 seizures -- That is what I am asking -- as opposed to
15 searches.

16 MR. BROADDUS: Justice Stevens, with respect
17 to the destruction of property aspect, that, of course,
18 will be controlled by *Parrat v. Taylor*. With respect to
19 the seizure of property we would submit that because
20 there is no legitimate expectation or right of privacy
21 that the Fourth Amendment does not apply and that,
22 therefore, a seizure would not be controlled by the
23 Fourth Amendment but by some other aspect, if at all,
24 such as the taking of property without due process.

25 QUESTION: Mr. Broaddus, I suppose that if I

1 am a policeman and you are a suspect I may have a
2 probable cause that would justify my searching for and
3 seizing a gold ring in your possession that is maybe
4 worth \$20,000, but the fact I may seize it in the Fourth
5 Amendment sense does not justify me in keeping it.

6 MR. BROADDUS: That is correct.

7 QUESTION: That is what you meant by the
8 Parrat rather than Fourth Amendment being applicable to
9 the property destruction?

10 MR. BROADDUS: Yes, sir. Of course, in
11 Virginia there would be many other ways in which the
12 inmate might recover that particular property, through
13 the inmate grievance procedure or through state
14 actions. So he is certainly not without remedies to
15 recover in that situation.

16 In order to minimize the problems which are
17 brought about by the introduction of drugs and weapons
18 into prisons official surveillance is and as this Court
19 has noted traditionally always has been the order of the
20 day in prisons. If one follows the analysis which this
21 Court has established for Fourth Amendment cases which
22 emanated out of Katz and applied more recently in United
23 States versus Knox and before that in Smith v. Maryland,
24 one can only conclude that a prisoner does not have a
25 legitimate expectation of privacy in prison.

1 First, does the prisoner himself actually
2 expect privacy? In this particular situation we know
3 from the prisoner's affidavit that he and I quote,
4 "realizes routine shakedowns are necessary to properly
5 run a prison". So he himself had no actual expectation
6 of privacy, but even if he did certainly society is not
7 prepared to legitimize such an expectation because
8 society has recognized the paramount needs of prison
9 administrators to search, to seek out weapons, to seek
10 out drugs and contraband.

11 Both society and inmates want prisons to be a
12 safe place, but they can only be safe if weapons and
13 drugs and contraband are kept out. So we would contend
14 that because the prisoner does not expect privacy and
15 because society is not prepared and has not in any way
16 legitimized an expectation that he has no basis for
17 claiming privacy entitled to Fourth Amendment
18 protection.

19 QUESTION: What if in a shakedown which you
20 say is perfectly permissible, a random shakedown,
21 suppose it is and the officer enters his cell and is
22 searching around and he just picks up a radio and
23 carries it out. He doesn't destroy it, he just -- You
24 say the Fourth Amendment protection of effects just does
25 not apply in a prison?

1 MR. BROADDUS: We would take the position,
2 Justice White, that it does not apply. Of course, that
3 is not the case here. That was simply an allegation of
4 destruction of property without due process --

5 QUESTION: I know, but there was a seizure of
6 it. There is no question that there was a seizure, and
7 I guess as the case comes to us we assume that it was
8 destroyed.

9 MR. BROADDUS: That is the allegation, yes,
10 sir, which was --

11 QUESTION: At least it was seized. You say
12 that the prison authorities are completely free from any
13 Fourth Amendment restraints from seizing a prisoner's
14 effects even if they are not contraband or even if their
15 possession is wholly consistent with prison rules.

16 MR. BROADDUS: Under the Fourth Amendment --

17 QUESTION: Is that right?

18 MR. BROADDUS: Under the Fourth Amendment,
19 yes, sir, we would. I think that the Fourth Amendment
20 right of freedom from seizures must be something
21 different and separate and apart from the taking of
22 property without due process.

23 QUESTION: But it certainly is a separate
24 question from the search.

25 MR. BROADDUS: Yes, sir. In, for example,

1 Delaware v. Prouse which could be analyzed as a seizure
2 case the Court was concerned with the intrusion upon the
3 driver of a motor vehicle, his freedom from anxiety, the
4 limitation upon his movement and what not. Those
5 concerns*simply are not present in prisons.

6 QUESTION: That may be. That is the argument
7 going to the search, the shakedown.

8 MR. BROADDUS: Yes, sir.

9 QUESTION: But even on the search supposing
10 you had a prison system whereby they censored all the
11 incoming mail so it was all read before the prisoner was
12 permitted to have it and he gets his mail. Could a
13 guard go in and say, "I think I'll read your mail"?

14 MR. BROADDUS: There would be no Fourth
15 Amendment prohibition in that situation.

16 QUESTION: There would be no prohibition at
17 all then would there?

18 MR. BROADDUS: Well, if that were to
19 constitute abuse then under the Virginia regulations
20 which prohibit guards from abusing inmates the inmate
21 would have redress under the inmate grievance procedure
22 which has been approved by the Attorney General of the
23 United States. So he would have redress there, but he
24 would not have it under the Fourth Amendment of the
25 Constitution.

1 QUESTION: Just what remedies are available
2 under state law in Virginia for redressing the property
3 deprivations, just the grievance procedure?

4 MR. BROADDUS: Justice O'Connor, it would be
5 far more than that. The grievance procedure would be
6 but the first which would be available. Also in state
7 courts an inmate may sue in detinue or he may sue in
8 conversion and recover damages for destruction of
9 property or recover the property itself in the state
10 court.

11 QUESTION: If the Court were to agree with
12 your view is there any danger that a state might alter
13 its grievance procedure --

14 MR. BROADDUS: I would certainly --

15 QUESTION: So that some of the same
16 protections would not be available?

17 MR. BROADDUS: I would certainly think not,
18 Justice O'Connor. If anything we would insure that that
19 grievance procedure operates the way it is intended to
20 operate because it benefits not only Virginia but also
21 federal courts and --

22 QUESTION: What is the remedy if he prevails
23 in a grievance procedure?

24 MR. BROADDUS: Under the grievance procedure
25 he would be entitled either to recover the property and

1 have it returned to him assuming it is still in
2 existence or to be made whole through payment of the
3 value of the property. If the radio could be valued he
4 would be made whole by payment of the value of the
5 radio.

6 QUESTION: Payments out of state funds?

7 MR. BROADDUS: Yes, sir. Funds are made
8 available to the various institutions, and that is the
9 source of the payment.

10 QUESTION: Who is it that makes the final
11 judgment in the grievance procedure?

12 MR. BROADDUS: That ultimately goes up -- It
13 is a hierarchy level, if you will, sir, and depending
14 upon the nature of the claim it may be the
15 superintendent of the particular facility or it may be
16 the regional superintendent who has control of many
17 various facilities or it might be the deputy director of
18 the overall Department of Corrections.

19 If there is no right of privacy under the
20 Fourth Amendment then surely there must be no right of
21 privacy in a prison inmate --

22 QUESTION: Forgive my interrupting you again.
23 I gather there is no judicial review?

24 MR. BROADDUS: Under the grievance procedure?

25 QUESTION: Yes.

1 MR. BROADDUS: That is correct, sir. There is
2 none.

3 We submit that there is no right of privacy
4 which a prison inmate possesses under the Fourteenth
5 Amendment. To suggest that an inmate has an intimate
6 right of privacy in his locker comparable to a woman's
7 fundamental privacy to an abortion or a couple's right
8 of privacy to practice birth control simply is novel at
9 best and to find such in a prison setting is simply
10 untenable.

11 The Court of Appeals' approach seemed to be
12 calculated to give a little bit to the prison
13 administrator and something to the prison inmate as
14 well. We suggest that that approach not only splits the
15 baby but is simply unworkable.

16 Under the Court of Appeals' approach the
17 prison inmate would not have any greater enhanced
18 freedom from searches. He would still be subject to
19 random searches, but the Court of Appeals' approach
20 would certainly limit the capability of the guard to
21 make a search in a meaningful manner such that it would
22 deter the introduction to prisons of weapons and drugs
23 and other contraband.

24 Now the unreasonableness of the Court of
25 Appeals' approach is demonstrated we believe by a 1976

1 University of Virginia Law Review article by Gianelli
2 and Galligan which was cited with approval by the court
3 below. That article suggested that a plan should be
4 promulgated on constitutional grounds before prison
5 guards may search.

6 It would require limitations upon the
7 frequency and the intensity of the search. It would
8 suggest that if a guard was searching for a knife that
9 he would be able to search only in those places where a
10 knife might be found, and once the knife was found the
11 search would have to cease.

12 We submit that such an approach is
13 unreasonable and unworkable. It simply transforms the
14 Fourth Amendment into a font of tort law without any
15 privacy interest being present to be implicated.

16 Such an approach would simply increase federal
17 litigation without substantially advancing the rights of
18 prison inmates. As I have indicated we do not suggest
19 that the prisoner is without any protection whatsoever.
20 We do contend, however, that he may not wrap himself in
21 the Fourth Amendment and use the Fourth Amendment to
22 erect a wall between his activities and necessary
23 security activities undertaken to a properly run
24 prison.

25 We urge this Court to hold that the Fourth

1 Amendment is not applicable in a prison. If the Court
2 rejects this position then we would further urge that it
3 should reject the requirement of the Court of Appeals
4 that random searches can be conducted only pursuant to
5 an established program or policy for such.

6 We would urge this Court to adopt an approach
7 which would say that all prison searches for security
8 purposes undertaken in a reasonable manner are per se
9 constitutional under the reasonableness clause of th
10 Fourth Amendment. That approach would be comparable to
11 what this Court has utilized in the 1972 case of United
12 States v. Biswolf which is not cited in our brief but
13 one in which the Court upheld warrantless administrative
14 searches in the gun industry even though probable cause
15 and reasonable suspicion were not present and there was
16 no plan for such searches.

17 Finally on this point we would also urge the
18 Court to clarify that the normal rules of proof and
19 going forward in civil cases should control a 1983 claim
20 such as this and not the burden shifting approach which
21 the Court of Appeals seemed to adopt in what be more
22 appropriate in criminal suppression motions in criminal
23 cases.

24 I would like to turn now to a second issue,
25 that of the Parrat v. Taylor. The Petitioner submits

1 that the line of cases beginning with Paul v. Davis and
2 going through Zimmerman Brush do not depend upon the
3 state of mind of the state actor or the state public
4 official charged with the wrongful conduct.

5 Indeed Paul v. Davis, Ingraham v. Wright, and
6 McCollan v. Baker, the action was at least arguably
7 intentionally undertaken. The analysis we submit must
8 depend instead upon whether the state was logically able
9 to anticipate the wrongful act.

10 If the state was not able to anticipate the
11 wrongful act then it was not in a position to provide in
12 a meaningful manner a predeprivation hearing. In that
13 situation if it does go forward and provide in a
14 meaningful manner a post-deprivation remedy which is
15 capable of making the victim of the tort whole under
16 Parrat v. Taylor, the person has not been deprived of
17 procedural due process and has not lost property without
18 due process of law.

19 In this situation we have only an allegation
20 of random conduct which was not sanctioned or condoned
21 by the state. It was not pursuant to an official scheme
22 or plan.

23 Accordingly the state action is not complete,
24 and because the state action was not complete and the
25 state has provided meaningful remedies there has not

1 been a taking of property without due process of law.
2 In the reply brief the Cross Petitioner suggests that
3 the Petitioner seeks to constitutionalize the
4 deprivation of property without our argument.

5 If the state condoned the action here then
6 perhaps it would fall under Zimmerman Brush, but that is
7 not the case. As I have indicated we have only the
8 random isolated single allegation of wrongful conduct
9 depriving someone of property, and due process has been
10 provided. So the deprivation was not without due
11 process of law.

12 In conclusion, we would ask this Court to
13 reverse the judgment of the Court of Appeals so that the
14 matter may be sent back to the District Court and have
15 that decision upheld dismissing the complaint.

16 QUESTION: What is the grievance procedure
17 that was referred to, the procedure on which a prisoner
18 can call for some kind of remedy?

19 MR. BROADDUS: Mr. Chief Justice, at the time
20 of this particular incident we had a grievance procedure
21 in place which was similar to what is presently in
22 place. It is not identical to the one that is presently
23 in place.

24 The one that is presently in place now has
25 been approved by the Attorney General of the United

1 States under the Kripp Act, 42 U.S.C. 1997 I believe,
2 and provides to the inmate the opportunity to file
3 complaints with respect to the manner in which the
4 prison is run and to seek redress of any grievance that
5 he might have through that procedure and provided an
6 opportunity for a meaningful hearing and depending upon
7 the nature of the claim he may indeed have an
8 opportunity to be made whole.

9 CHIEF JUSTICE BURGER: Very well. We will
10 resume here at 1 o'clock.

11 (Whereupon, at 11:59 .m., the hearing in the
12 above-entitled matter recessed to reconvene at 1:00 p.m.
13 this same day.)
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1 AFTERNOON SESSION

2 (12:58 p.m.)

3 CHIEF JUSTICE BURGER: Ms. Wyatt, I think you
4 may proceed whenever you are ready.

5 ORAL ARGUMENT OF DEBORAH C. WYATT, ESQ.,
6 ON BEHALF OF RESPONDENT AND CROSS PETITIONER

7 MS. WYATT: Mr. Chief Justice, and may it
8 please the Court:

9 This case is here on summary judgment from a
10 suit against a guard himself who conducted what has been
11 described as a ransacking search of my client's locker
12 and destruction of his property for harrassment
13 purposes. It presents two questions. First, whether
14 there is now to be drawn around prison walls an iron
15 curtain for purposes of the Fourth Amendment.

16 QUESTION: What would you say if in searching
17 the locker or the cell of the prisoner they found a
18 pistol or narcotics in an examination and seizure of
19 these things without a warrant? What would you say
20 about that?

21 MS. WYATT: I do not believe that under the
22 analysis of search and seizures and prisons that a
23 warrant is required, but I think we still might focus on
24 the justification. If somebody went in to search to
25 harrass I think it would still be a harrassing search

1 and seizure --

2 QUESTION: Would it be admissible against him
3 in evidence?

4 MS. WYATT: The pistol? I think if it
5 violated the Fourth Amendment as the law stands now it
6 would not be admissible against him.

7 QUESTION: Would not be admissible? Is that
8 your answer?

9 MS. WYATT: Yes, Your Honor. It could be
10 confiscated. Obviously it could be, but --

11 QUESTION: How about heroin, 14 packages of
12 heroin in small packages for delivery?

13 MS. WYATT: I think all of that would be
14 analyzed the same. If the search is a legitimate
15 search, and that is quite broad in a prison context.
16 You can search randomly if that is your pattern in the
17 prison. You can search an individual if you have a
18 particular suspicion, and under either of those
19 circumstances if you find the heroin, if you find the
20 gun they are, of course, admissible because that is a
21 reasonable search and seizure under prison
22 circumstances.

23 But if you search to harrass for no other
24 purpose but to harrass then you have violated the Fourth
25 Amendment, and therefore the suppression issues would

1 apply.

2 QUESTION: What do you take the search to
3 harrass to mean?

4 MS. WYATT: A search for no legitimate purpose
5 at all.

6 QUESTION: Not looking for anything in
7 effect?

8 MS. WYATT: That is correct. Not expecting to
9 find, not looking for contraband, not even doing this as
10 a deterrent. I think prisons would have the right to
11 have a search policy as a deterrent, random searches,
12 and I believe the Fourth Circuit recognized that and
13 said that you could have a system of random cell
14 searches but there must be a system pursuant to which
15 the individual is being searched.

16 If you did it --

17 QUESTION: Now there certainly is a middle
18 ground between a system for searching, a prescribed set
19 of rules, and the harrassing search that you say is a
20 search simply to no purpose whatever. I take then in
21 that case a guard would simply figure he had nothing
22 else to do and would just want to wander through
23 people's cells.

24 MS. WYATT: I believe if there is no
25 legitimate purpose it would be analyzed as unreasonable,

1 and I think in a prison situation we have obviously a
2 very broad standard of reasonableness.

3 QUESTION: Are harrassing and no legitimate
4 purpose equivalent in the way you are using the terms?

5 MS. WYATT: Yes, Your Honor. It would be the
6 same. Harrassing as I use it means not for a legitimate
7 purpose.

8 If you have a suspicion that someone has
9 contraband even if you are lethally searching him for
10 that contraband that is not for a harrassment purpose.
11 The way I am using it is an abusive purpose.

12 You are picking on someone in your custody.
13 You are not doing it for any legitimate prison security
14 or administrative purpose. That is what we have on
15 summary judgment in this case.

16 QUESTION: So that is apart from any
17 requirement that there be rules or anything else? I
18 take it your view is the Fourth Circuit could be
19 affirmed without laying down any requirement that there
20 be rules for Fourth Amendment searches in prisons.

21 MS. WYATT: Absolutely. In fact the question
22 presented is simply whether the Fourth Amendment applies
23 within prison, and that is what the Fourth Circuit
24 held. The Fourth Circuit did proceed to address such
25 issues as burden of proof and, of course, Petitioner has

1 argued that that has been shifted and shifted
2 incorrectly.

3 I read the Fourth Circuit's opinion
4 differently, and I read it to be that a prisoner must
5 allege an unreasonable search and seizure which is going
6 to be a very small range of searches or seizures in a
7 prison setting that will be unreasonable. Once he has
8 alleged that then the state can justify it if they do
9 honestly justify it by saying that we have a pattern of
10 random searches or I had a particular suspicion about
11 this individual.

12 But to pick on the person, to do it abusively
13 for only the purpose of harrassment would be I think a
14 classic case of an unreasonable search and seizure and
15 perhaps one of the only cases of an unreasonable search
16 and seizure within a prison setting. I believe that is
17 why Petitioner is retreated to a bright line request for
18 this Court.

19 I certainly suspect that Petitioner is not in
20 a position to request a bright line because Petitioner
21 knew that what Petitioner was doing was wrong, but even
22 if this Court felt that a bright line was needed I can
23 suggest another line that I think is equally bright in a
24 prison setting which is that it is unconstitutional to
25 search and seize for the purpose of harrassment. I

1 think that Petitioner's position on the Fourth Amendment
2 is unwarranted. It is unsound, and I think that for
3 that reason the Court should decline the invitation to
4 sweep away this constitutional right any more broadly
5 than necessary.

6 Again, the only question that has been framed
7 for this Court is whether the Fourth Amendment applies
8 in prisons, and indeed it should even though that may
9 only provide limited protection to a prisoner.

10 With regard to the second question in this
11 case, that is, the due process issue and the question of
12 whether a due process violation, whether an intentional
13 abusive deprivation can ever violate the due process
14 clause when it violates a state's own laws which is to
15 say when a state --

16 QUESTION: I am not sure, Ms. Wyatt, I observe
17 that in your cross petition you stated the question only
18 in terms of the due process violation, not a Fourth
19 Amendment.

20 MS. WYATT: That is correct, Your Honor, in my
21 cross petition. The Fourth Amendment issue was raised
22 in the original petition by the Attorney General's
23 Office, and I am addressing now the issue I raised which
24 is the due process, whether an intentional, abusive
25 deprivation is totally unprotected by the due process

1 clause.

2 I think Petitioner who alleged that it does
3 not has totally missed a major distinction in this case,
4 which is a distinction between suits against higher
5 supervisory officials or otherwise against general
6 policies or procedures and challenges directly to
7 individuals who themselves have abused. In the former
8 case understandably the analysis is going to turn on
9 whether a wrongful deprivation was pursuant to that
10 policy or was instead a random act not authorized by the
11 procedure, a fluke, or even an abuse under a procedure
12 where the risk of abuse is low as in Ingraham.

13 But that is not this case, and that analysis
14 does not apply to this case. This case is a challenge
15 directly to the individual who abused, and in that sense
16 this case is governed by *Screws v. United States* and
17 *Monroe v. Pape*.

18 Both of those cases involved challenges
19 directly to the officials who abused, not to supervisory
20 officials. In both of those cases the Court said that
21 it is no defense that the act is unauthorized. It is no
22 defense that it is unauthorized even if that means that
23 a state then provides remedies and that, therefore, one
24 might be able to receive compensation in state courts.

25 This was rejected in *Screws v. United States*

1 where the Court cleanly held under a challenge to the
2 individual official that that intentional wrongful
3 deprivation violated the due process clause immediately
4 and state court remedies are completely and totally
5 irrelevant.

6 QUESTION: Is there not a difference between
7 the facts in Screws and the facts here, though?

8 MS. WYATT: There is a difference. That was a
9 criminal prosecution among --

10 QUESTION: A different kind of deprivation,
11 too, was it not?

12 MS. WYATT: That was a life deprivation.

13 QUESTION: It was all completed before there
14 was any possibility of a hearing.

15 MS. WYATT: I think there could always be a
16 wrongful death action, for example, in state court.

17 QUESTION: Well, would that make the person
18 who suffered the deprivation of life whole? You cannot
19 restore his life can you?

20 MS. WYATT: I think our principles of tort law
21 except the fiction that, for example, a suit for
22 wrongful death does make that deprivation whole, but I
23 certainly acknowledge that that is life and that when we
24 are looking at a procedure whether we are talking about
25 life, liberty or property may enter a Matthews v.

1 Eldridge analysis because that is the weight of the
2 particular interest at stake.

3 But this Court has never severed property off
4 from the other rights, and the due process clause, of
5 course, mentions them in the same breath. What Screws
6 held was that it did not matter whether there were
7 remedies after the fact, that the deprivation
8 immediately at once violated the due process clause.

9 In Monroe v. Pape, of course, we are talking
10 about the Fourth Amendment although the Court does not
11 focus very often and in fact I think gives only a
12 paragraph to which particular constitutional violation
13 was at issue. Another factor that both those cases made
14 very clear is the fact that abuse of power is really at
15 the heart of the Fourteenth Amendment.

16 QUESTION: I am a little confused, Ms. Wyatt.
17 You probably can clarify it very quickly. I can
18 understand the Attorney General's Office in Virginia
19 appearing in the case because it is one of their guards,
20 one of their attendants that is involved, but is the
21 state as such a party to the litigation?

22 MS. WYATT: Absolutely not, Your Honor.

23 QUESTION: What is the source of authority for
24 the court, any court, to lay down any regulations about
25 random searches or any other kind of searches in a

1 private law suit between a prisoner and a guard?

2 MS. WYATT: Your Honor, I think that that
3 points out a very important distinction in this case.
4 This case is not against a prison warden as in Parrat.
5 It is against the guard himself.

6 As in Monroe v. Pape there was an action
7 against the officials themselves, but the Court did not
8 find it difficult in that case to say the Fourth
9 Amendment had been violated.

10 QUESTION: Can the Fourth Amendment be
11 violated by private parties?

12 MS. WYATT: This is not a private party, Your
13 Honor, and that is one thing that Screws and Monroe both
14 made clear. He acted without authority, but he was --

15 QUESTION: I was taking you up on your
16 statement that this was private.

17 MS. WYATT: I did not mean to --

18 QUESTION: A private suit.

19 MS. WYATT: I never meant to indicate it is a
20 private party, Your Honor. He sued the guard. He sued
21 the official who abused, but not the people who should
22 have controlled the guard, not higher supervisory
23 officials. He sued the guard, however, who quite
24 clearly under Screws and Monroe was acting under
25 pretense of law and would be a proper defendant under

1 1983 from that standpoint.

2 To the extent that he violated either the
3 Fourth Amendment or the due process clause I think both
4 are proper for adjudication.

5 QUESTION: Your claim has to be that the state
6 acting through this guard deprived your client of his
7 property without due process of law. It is not a -- The
8 Constitution does not say no prison guard shall deprive
9 a person of property. It says no state.

10 MS. WYATT: Correct, Your Honor. That is
11 exactly why I say that this case is mostly governed by
12 Screws and Monroe because that argument was presented in
13 both of those cases, and in both of those cases as in
14 United States v. Classic before the court stated that
15 the misuse of state power, the intentional misuse of
16 state power can be attributable to the state itself in
17 the sense of the --

18 QUESTION: I think the law on that is quite
19 clear, but I think the Parrat case says the final
20 judgment on the state's deprivation of due process is
21 not to be pronounced solely on the basis of the action
22 of a guard or a warden. It is what opportunity the
23 state offers to alleviate the claimed deprivation.

24 MS. WYATT: Your Honor, if this were a Parrat
25 case I think the result would be the same. If this were

1 a case suing the prison warden for having allowed this
2 prison guard to do this then we would look at how
3 frequently did the guard do this, did they know that the
4 guard was going to do this, or was this a random,
5 unauthorized, unpredictable act by the guard under
6 otherwise normal procedures. But that is not this
7 case.

8 This case is a suit against the fellow who did
9 it. This is a suit against the abusive guard himself.
10 The only cases that are that are very notable which
11 present such a challenge are Screws and Monroe, and the
12 analysis is not, therefore, the risk of error. It is
13 not, therefore, whether this was random, an unauthorized
14 and uncontrollable by the state.

15 Once you are suing the guard himself who
16 abused then you turn to Screws and Monroe when you say
17 does it matter that it is unauthorized, if it is
18 intentional --

19 QUESTION: Do you think Parrat would have come
20 out different if the two assistant wardens or guards in
21 the mail room had been sued rather than the warden?

22 MS. WYATT: Parrat was a negligent case, and I
23 believe if you sued an individual who had negligently
24 lost property, and he said "Yes, I negligently lost the
25 property" that you would have no due process violation

1 but you would have no due process violation because that
2 is negligent. It is not an abuse of power.

3 I think that when you are looking at the local
4 level, when you are looking at the specific officer it
5 makes all the difference in the world whether he is
6 abusing his power and acting under pretense of law or is
7 really involved in an automobile accident or computer
8 error. Those are not under pretense of law.

9 QUESTION: Then to your mind the distinction
10 really turns on negligence versus intent, not the
11 superior versus the actual actor.

12 MS. WYATT: Your Honor, I believe it is both.
13 As I understood your question if I were suing -- If we
14 were suing the guard himself and said, "You lost this
15 property. You hit me with your police car" and it is a
16 negligence, not that he was trying to run him over, that
17 would simply not be a due process violation.

18 What we have, of course, at this level is an
19 intentional abusive taking, but both of those situations
20 are different from a situation where we are holding
21 higher people to account for policies, where we are
22 saying the procedures you have enacted do or do not have
23 a high risk of error. In Logan there was a too high
24 risk of error. In Ingraham there was not. There were
25 many safeguards in Ingraham which prevented this, but in

1 all of those cases and in fact in most of the cases that
2 have been before this Court in due process situations we
3 have been looking at supervisory officials for their
4 policies and whether they allowed too many things to
5 happen.

6 In that context I think negligence can state a
7 cause of action. But if we are looking to the
8 individual himself for his own particular action I do
9 not think due process is implicated unless we are
10 talking about an abuse of power, and I think Screws and
11 Monroe made it very clear that an abuse of power was the
12 very target of the Fourteenth Amendment.

13 If you follow Petitioner's argument an officer
14 -- We must remember that this is not just in prison
15 settings. The due process issue is not confined to the
16 prison setting. It applies to officers out on the
17 street as well.

18 If an officer can walk up to someone and grab
19 his glasses off his face because he does not like him
20 and grind them into the ground, Petitioner's argument
21 would say as long as there is a state tort of conversion
22 the victim of that abuse is confined to state court
23 exactly as if his neighbor had done that.

24 QUESTION: Ms. Wyatt, on that very point is
25 this locker in his cell?

1 MS. WYATT: Pardon me?

2 QUESTION: The locker involved in this case.

3 MS. WYATT: Is that his cell?

4 QUESTION: Was that in his cell?

5 MS. WYATT: Your Honor, to be candid I was a
6 little confused from the record. I became involved in
7 this case in the Fourth Circuit, and the references in
8 the record refer to locker and indicate that there was a
9 dormitory. So I am assuming from the record that the
10 locker was within a dormitory.

11 QUESTION: I have great problem with the
12 search and seizure. If these things had been laying out
13 there would that have been a search and seizure, if they
14 had been laying on his table, on his bed?

15 MS. WYATT: Your Honor --

16 QUESTION: Would it have been a search and
17 seizure?

18 MS. WYATT: If it were searched or seized for
19 no legitimate purpose -- Well, it would have been a
20 search and seizure, yes. The question of whether --

21 QUESTION: If he just picked it up off the
22 bed?

23 MS. WYATT: Yes.

24 QUESTION: That would be a search and a
25 seizure, search and a seizure?

1 MS. WYATT: I am not sure if it would be a
2 search. I think if he read it it might be a search,
3 yes.

4 QUESTION: How could it be a search? It is
5 laying right there.

6 MS. WYATT: Is Your Honor talking about a
7 plain view kind of exception then to a search a
8 seizure? Perhaps then it would not be --

9 QUESTION: I understand your complaint that
10 the guard mistreated this man, but I do not understand
11 where the search and seizure comes in.

12 MS. WYATT: The allegations are --

13 QUESTION: Your allegations do not help me.
14 What does the evidence show?

15 MS. WYATT: My understanding from the record
16 is that there is a locker and that the guard went into
17 that locker and as the descriptions from the affidavits
18 indicate ransacked the locker, went through the locker.
19 My client on summary judgment says it was for no
20 purpose. It was not searching for contraband. It was
21 only to harass. That to me would indicate --

22 QUESTION: The guard agrees to that?

23 MS. WYATT: The guard, of course, denied that,
24 but we are here on summary judgment so for purposes of
25 this case at this point that would be taken as true.

1 There were some affidavits filed in support of that
2 saying, yes, he conducted a ransacking search of this
3 man's locker.

4 From the facts I do not believe it was in
5 plain view. He deliberately went in there. Now if he
6 went in for a legitimate purpose we would have a
7 different analysis, but he went in to abuse --

8 QUESTION: The door could have been wide
9 open.

10 MS. WYATT: It could have been wide open, and
11 if the regulations allow the guard to go in there --

12 QUESTION: How can we decide what we do not
13 know?

14 MS. WYATT: Your Honor, my --

15 QUESTION: Suppose I need to know to decide
16 whether it is a search and seizure whether it was
17 sitting out in plain view.

18 MS. WYATT: The facts --

19 QUESTION: There is nothing in this evidence
20 of this case to show whether it was or was not in plain
21 view.

22 MS. WYATT: There has been no indication that
23 it was in plain view from either side.

24 QUESTION: Is that not open? Was this not
25 remanded for a hearing?

1 MS. WYATT: This was remanded on the issue of
2 whether there could be --

3 QUESTION: On the Fourth Amendment issue?

4 MS. WYATT: On the Fourth Amendment issue.

5 QUESTION: The things that my brother was
6 inquiring about, would they be open to proof at the
7 hearing?

8 MS. WYATT: They certainly could be. There
9 are many issues left open to proof at the District Court
10 level.

11 QUESTION: Is it or is it not, not could be.

12 MS. WYATT: Your Honor, the Fourth Circuit
13 remanded primarily on the issue of whether there was a
14 Fourth Amendment violation under the guidelines it set
15 forth, but there are many factual matters in dispute. I
16 do not believe it is in dispute that it was a search.
17 Plain view was never raised by the guard.

18 Instead he said it was a legitimate search for
19 contraband, and my client said it was an illegitimate
20 search for harassment purposes. I think that they both
21 conceded then that it was a search for purposes of the
22 Fourth Amendment, but again this will be remanded and
23 there will be more factual evidence taken at that
24 level. I do not know whether my client would prevail
25 once we get back there, but here for purposes of summary

1 judgment it was a search and it was a harrassment
2 search.

3 QUESTION: Did you rely on Pape and Screws in
4 the Court of Appeals on the issue you raised in your
5 cross appeal?

6 MS. WYATT: I did not rely so strongly. I did
7 urge that abuse of power was an important factor.

8 QUESTION: I notice neither are cited nor
9 addressed as I see it.

10 MS. WYATT: I believe Monroe v. Pape as I
11 recall was cited. I did urge the distinguishing
12 feature. There was the abuse of power.

13 QUESTION: You relied on Screws?

14 MS. WYATT: I do not recall. Perhaps I did
15 not. Obviously if it is not cited in the Fourth Circuit
16 level I did not.

17 QUESTION: I understand Screws to say that in
18 order to deny a federal right you have to make it
19 explicit that you are doing it for that purpose.

20 MS. WYATT: There is a willfulness requirement
21 in Screws because of the criminal nature of that
22 particular civil rights --

23 QUESTION: No, Screws says you have to say
24 so.

25 MS. WYATT: That the Civil Rights Act --

1 QUESTION: Screws says if you are an officer
2 and you are denying a prisoner or an individual his
3 rights you have to make it clear that you are beating
4 him up for the sole purpose of denying him his rights.

5 MS. WYATT: Your Honor, I believe --

6 QUESTION: Is that not what Screws said?

7 MS. WYATT: I believe we have Screws although
8 it is not life. It is property. We have at this point
9 in this Court the facts that this was deprived --
10 Property was destroyed for an abusive purpose only, and
11 by abusive I mean under pretense of law but for an
12 unauthorized or illegitimate purpose.

13 The hypothetical I was giving I think would
14 show that there is something inherently fundamentally
15 unfair about an officer on the street being able -- to
16 go back to the glasses analogy -- to do that and to
17 confine somebody solely to state court.

18 QUESTION: Why is that fundamentally unfair if
19 he will get paid at state court the same thing he will
20 get paid at federal court?

21 MS. WYATT: Because there is something
22 different that has happened. To say that is to say that
23 the action by the official is not different than the
24 action by the neighbor. I think Justice Harland very
25 well put it in his concurrence in Monroe as well as his

1 later concurrence in Bivens that an action such as that
2 is different in kind from an action, the same action, by
3 a civilian.

4 QUESTION: But the injured party gets
5 compensated in full under the hypothesis. So I am
6 asking why is it so obviously unfair?

7 MS. WYATT: I am not sure what compensated in
8 full means. I think there is another problem, however.
9 If it is a constitutional violation you can also sue for
10 injunctive relief.

11 If we are saying that this is no
12 constitutional violation because you can get full
13 compensation in the state court then we are also saying
14 you cannot get injunctive relief. The state's duty is
15 complete upon the compensation, and the guard can keep
16 on doing that day after day.

17 This Court recognized earlier this year that
18 the due process clause protects against the arbitrary
19 use of power in *Collander v. Lawson*. If it protects
20 against the arbitrary use of power certainly it protects
21 no less against the abusive use of power.

22 QUESTION: May I ask you another question
23 about the *Screws* case? Which of the opinions in the
24 *Screws* case do you primarily rely on?

25 MS. WYATT: I think that which makes my point

1 most clear is obviously that of Justice Rutledge in
2 concurrence.

3 QUESTION: Does he refer at all to
4 deprivations of property in that opinion do you know?

5 MS. WYATT: No. He does not that I know of,
6 but I again do not know of any opinion of this Court and
7 I would also caution the Court if we are to make a new
8 distinction here the area of due process I do not think
9 anyone would doubt has many complexities already. I
10 think if we start also a new sort of layer of
11 distinctions here between property and life and liberty
12 it is going to be all the more confusing although it may
13 enter the analysis when we are looking at a procedure
14 about how much process is due and when and how under
15 *Matthews v. Eldridge*.

16 What we have here is no process. When there
17 is no process, when there is an abusive taking it should
18 not matter whether it is life or liberty or this pen
19 here. If this is my pen and an officer takes it I
20 should not be relegated to state court to sue for its
21 value back, and once I have done that the due process
22 clause is silent and an officer can keep on taking that
23 forever.

24 I recognize that --

25 QUESTION: Well, he cannot do that if you are

1 right in your Fourth Amendment position.

2 MS. WYATT: I think they are two entirely
3 different guarantees.

4 QUESTION: Is that not right? If you are
5 correct on your Fourth Amendment submission he would not
6 keep doing it over and over.

7 MS. WYATT: If this is a seizure, no, he could
8 not because we would have a constitutional violation.
9 But I think they are two separate ones. I think again
10 that the due process clause itself recognizes a
11 prohibition against arbitrary use of power, and I simply
12 cannot believe that it any less protects against power
13 not arbitrary but abusive.

14 It says that an officer cannot pick on someone
15 for no reason. Certainly it cannot say any less that
16 someone -- that an officer should be able to pick on
17 someone for a bad reason, for an abusive reason.

18 I think this Court has recognized in many
19 cases that this very conduct, an abusive deprivation, is
20 at the heart of the due process clause. It is conduct
21 which was the target of the Fourteenth Amendment, and as
22 Screws did hold though, yes, that was a life deprivation
23 --

24 QUESTION: Ms. Wyatt.

25 MS. WYATT: Yes.

1 QUESTION: I guess the Court held in Ingraham
2 v. Wright that state court remedies were an adequate
3 process for students subjected to corporal punishment in
4 school, and that of course is even a liberty interest,
5 not even a property interest. How is the interest you
6 are talking about more significant than that?

7 MS. WYATT: Justice O'Connor, I think that is
8 a very important question because I read Ingraham a
9 little bit differently. I do not read Ingraham as
10 saying that state court remedies are going to be always
11 sufficient and, of course, Ingraham clearly does not
12 address substantive due process.

13 Ingraham was one of these challenges to higher
14 supervisory officials, the school principal, an
15 assistant principal and at one point I believe even the
16 school board though they got dismissed before they
17 reached this Court. They were the defendants, not the
18 teacher who spanked.

19 That is a case, therefore, where the Court
20 looked at the risk of abuse and said, "We've got state
21 remedies that are a deterrent. We've got openness.
22 We've got a number of other reasons that the risk of
23 abuse is very small and, therefore, the procedure
24 satisfies due process --

25 QUESTION: Well, might that not be true here,

1 too, for a deprivation of property with state remedies
2 that could be considered adequate?

3 MS. WYATT: I think it would be if we were
4 challenging the prison that allowed it. I think the
5 prison could say, "We had no idea that this guard was
6 abusive. This was random, and the procedures we've
7 instilled are basically secure against such abuse." But
8 that is not this --

9 QUESTION: You think Ingraham would have been
10 a different result had one of the teachers who had
11 administered the punishment were a defendant?

12 MS. WYATT: I think it absolutely would have
13 and should have been. I think at that case we might
14 have been talking about something more substantive.
15 That teacher who had done the spanking to a hematoma
16 might be held accountable in a way that somebody who had
17 adopted the policy would not be.

18 That is exactly the distinction that I think
19 is very important in this case and that has been missed
20 by Petitioner. This is not a challenge to supervisory
21 officials.

22 This is a challenge to the officer himself.
23 There is no excuse for his failure to deny due process.
24 If he wanted to take he knew how to do it. He did not
25 do it legally, and he violated at once the due process

1 clause.

2 Accordingly, I would ask this Court to affirm
3 the decision of the Fourth Circuit holding that the
4 Fourth Amendment applies to prisoners and reversing the
5 faulty due process ruling of the Fourth Circuit below.

6 Thank you.

7 QUESTION: Counsel, may I ask a question about
8 the facts?

9 MS. WYATT: Yes, sir.

10 QUESTION: There was another guard or officer
11 with Hudson at the time was there not?

12 MS. WYATT: I am not aware of that, Your
13 Honor.

14 QUESTION: The affidavit from Mr. Hudson on
15 page 14 of the appendix -- Perhaps I am misreading it.

16 MS. WYATT: I do see where it says Officer
17 Lephew.

18 QUESTION: The third paragraph.

19 MS. WYATT: Yes, Your Honor.

20 QUESTION: Why was he not sued?

21 MS. WYATT: Your Honor, again I was appointed
22 at the Fourth Circuit level. I believe from all of the
23 pleadings I certainly get the clear indication that it
24 was Guard Hudson's abuse, Guard Hudson's repeated
25 harrassment that my client was most concerned with and

1 in fact he primarily sought injunctive relief against
2 Guard Hudson. It may be that another officer assisted
3 or participated, but he was not suing everybody for
4 everything. He was suing --

5 QUESTION: Did you request an affidavit from
6 this other officer also?

7 MS. WYATT: Your Honor, I was not involved at
8 the District Court level.

9 QUESTION: You were not involved?

10 MS. WYATT: No, I was not. I was appointed at
11 the Fourth Circuit level.

12 QUESTION: Does it suggest at all that there
13 may be not have harrassment if there were two of them
14 there and one of them was not even sued?

15 MS. WYATT: Your Honor, I believe his
16 complaint goes on to give a number of instances of how
17 this officer abused. Of course, they most clearly
18 involved the search and seizure. They also involved the
19 destruction of his property, and although another
20 officer I see is included in one of the incidents I
21 think it really adds credibility to my client's claim
22 that he wanted Guard Hudson removed. That was --

23 QUESTION: You only sued on the one instance.

24 MS. WYATT: He included a number of different
25 harrassment incidents.

1 QUESTION: In his suit?

2 MS. WYATT: In his suit, in his original
3 suit. He talks about something that happend on
4 September 16 and 17. He talks about the fact that a
5 false charge was brought against him by Guard Hudson,
6 that Guard Hudson had harrassed him before, that he said
7 "Next time I'll really mess your cell up". He did a
8 number of things on the 16th and I believe also the 17th
9 --

10 QUESTION: He referred to the 16th and the
11 17th only I think.

12 MS. WYATT: Perhaps so, Your Honor. But he
13 makes comments there that it was more than that. Again,
14 I think it is important and telling that he sued
15 primarily for injunctive relief.

16 QUESTION: May I ask -- You were appointed at
17 the Fourth Circuit.

18 MS. WYATT: That is correct.

19 QUESTION: Was he represented by counsel in
20 the District Court?

21 MS. WYATT: No. He was proceeding pro se.

22 If there are no further questions, thank you.

23 CHIEF JUSTICE BURGER: Do you have anything
24 further, counsel?

25 MR. BROADDUS: Not unless the Court has

1 questions.

2 CHIEF JUSTICE BURGER: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 1:28 p.m., the case in the
5 above-entitled matter was submitted.)

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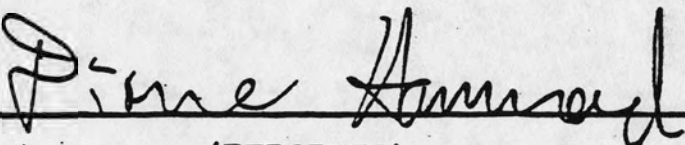
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82-1630-TED S. HUDSON, Petitioner v. RUSSEL THOMAS PALMER, JR.; and
82-6695-RUSSELL THOMAS PALMER, JR., Petitioner v. TED S. HUDSON

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