ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DEAN NEITZKE, ETC., ET AL., Petitioners V. HARRY LAWRENCE WILLIAMS, SR.

CASE NO: 87-1882

PLACE: WASHINGTON, D.C.

DATE: February 22, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

DEAN NEITZKE, ETC., ET AL.,
Petitioners
v. : No. 87-1882
HARRY LAWRENCE WILLIAMS, SR.,

Washington, D.C.

Wednesday, February 22, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 p.m.

APPEARANCES:

ROBERT S. SPEAR, Chief Counsel, Indiana Attorney General Office, Indianapolis, Indiana; on behalf of Petitioners.

GEORGE A. RUTHERGLEN, Charlottesville, Virginia (appointed by this Court); on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

(2:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1882, Dean Neitzke or Neitzke v. Harry Lawrence Williams. You may proceed whenever you're ready, Mr. Spear.

ORAL ARGUMENT OF ROBERT S. SPEAR

ON BEHALF OF PETITIONERS

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

This case was initiated by Mr. Williams, a prisoner at the Indiana State Reformatory, a maximum security institution, tendering the complaint for filing to the United States District Court for the Southern District of Indiana. This complaint was tendered pro se and pursuant to 28 U.S. Code, Section 1915 as a pauper's petition. It was a 42 U.S. Code, Section 1983 action. There were five defendants. The complaint alleged violations of the Eighth Amendment and also due process violations.

The district court dismissed the entire case as frivolous, pursuant to Section 1915(d). Thereafter, the district court allowed on amendment and again dismissed the case.

The Seventh Circuit affirmed this dismissal as

to three of the defendants under both theories, and also as to the remaining two defendants under the due process theory, but revived the action as to the Eighth Amendment against Mr. Neltzke, the hospital administrator, and Dr. Choi, the medical director.

In establishing this case, the Seventh Circuit set forth the following standard: "A frivolous complaint is one in which the petitioner can make no rational argument in law or facts to support his or her claim for relief." And in making this holding, the court relied on the D.C. Circuit case of Brandon v. District of Columbia Board of Parole.

The Seventh Circuit, therefore, clearly held that 28 U.S. Code, Section 1915(d) is not synonymous with the test under 12(b)(6). The court specifically agreed with the district court that the Eighth Amendment allegations in this case failed to demonstrate the level of indifference necessary to survive the 12(b) motion under Estelle v. Gamble but nevertheless held that the case should be filed.

It is the Petitioners' contention in this case that a complaint which fails to state a claim upon which relief can be granted is frivolous within the meaning of 28 U.S. Code, Section 1915(d).

Section 1915 allows access to the federal

courts for the poor, as set forth in decision of this Court in Adkins v. DuPont. There is an already established standard for 12(b)(6) for pro se complaints which is, when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. This Court set forth this standard in Conley, reaffirmed it in Haines, and indeed in Estelle v. Gamble.

It's Petitioners' contention that this standard is low enough. The issues in this case deal with how the district courts should handle the congressional mandate of Section 1915(d) not to permit frivolous or malicious complaints under pauper's petitions. We are not addressing here the variety of methodology by which various circuit courts have tried to handle this problem. We are talking about the lowest permissible standard as opposed to another standard that may be established in a different circuit.

It is Petitioners' contention that a complaint which does not meet the pro se test for a 12(b)(6) motion is a minimum beneath which no complaint should be allowed to be filed.

QUESTION: When you say it doesn't meet the pro se test, Mr. Spear, you're talking about the rule that pro se complaints are liberally construed in favor of

the plaintiff?

MR. SPEAR: Yes, Your Honor. The Petitioners in this case would submit that instead a test should be establishing using 12(b)(6) as the standard beneath which the legal sufficiency of the complaint should not be allowed to go for purposes of Section 1915(b).

QUESTION: Mr. Spear, at least on, on the face of the language there appear to be differences between the two provisions, and it isn't really clear to me that they would necessarily be the same. Do you think that Rule 11, which is designed, according to the notes, to help eliminate frivolous claims, is implicated every time a complaint is dismissed under Rule 12(b)(6)?

MR. SPEAR: No, Your Honor, it is not. But it is a showing under Rule 11 that you must show, in order to avoid this sanction as a plaintiff, that you have a basis in fact and in law. If you do not have a basis in law, Rule 11 sanctions would apply in a situation where the standard was not closed, but not -- would only apply -- would not apply in those rare cases where it is not clear-cut whether or not the complaint fails to state a claim.

In short, although many cases, perhaps most that reach this Court, there is a serious question of the sufficiency of the legality. At the district court

level, the vast majority of complaints are fairly readily apparent whether they meet the 12(b)(6) standard.

QUESTION: Well, do you think that the frivolous and malicious standard under the statute applies to factual as well as legal aspects of the complaint?

MR. SPEAR: Yes, Your Honor.

QUESTION: You do?

MR. SPEAR: We'd submit, however --

QUESTION: Does the district court have the power on its own sua sponte to inquire behind the fact of the complaint under 1915?

MR. SPEAR: Apparently it does, Your Honor. We note in our brief that several circuits, specifically in at least one instance in the Second, and the Eleventh and the Fifth and the Fourth, rather frequently do this. Now, we are not suggesting --

QUESTION: Could they refer it to a magistrate to find out some facts on whether to dismiss under 1915?

MR. SPEAR: Yes, Your Honor, we believe they have that power -- in fact, do so right now. That is not, however, the case that is in front of the Court today and we'd also point out, Your Honor, that probably when it talks about frivolous --

QUESTION: Well, do you think under Rule 12(b)

that one does that, or does one look just to the face of the complaint?

MR. SPEAR: The face of the complaint, Your Honor. And we are only dealing with with the legal sufficiency here under a frivolous test. Normally one would suspect that since the language of the statute isn't disjunctive of frivolous or malicious -- malicious may very well tend to be factual.

For instance, if a party were to bring a hundred lawsuits within a period of a few weeks or multiple lawsuits against the same person for the same facts, that would tend to fall under the malicious side of the test. That's not what we have here. This is on the frivolous side of the test, and in front of us we have a pure legal test.

We would submit further that the Rule 11 standard, which has been proposed by the Respondent in this case, is particularly inappropriate for use in this context. Rule 11 is used by the district courts as a sanction and a deterrent to paying plaintiffs and to their lawyers for filing complaints which are either not based correctly in the law or not based correctly factually. They have to meet both tests.

It is not appropriate to use such a standard for plaintiffs who on their face cannot be deterred or,

or punished in any fashion for bringing a frivolous complaint when they have, on their face, tendered a proper pauper's petition and literally have no assets upon which to levy.

The test that we are attempting to have this Court establish, although it has not reached this Court yet, has already been established in our opinion in eight of the circuits, and only the Seventh Circuit and the D.C. Circuit have found that a complaint can go lower than a 12(b)(6) motion standard and still survive in some viable fashion.

The test, in fact, is broader in both the Eleventh Circuit and, at least in one case, in the Second. We are not contending that here today because it has not simply reached this basis in this case.

The standard method in the Southern District of Indiana and the Northern District is that a complaint is referred to a magistrate. The magistrate makes findings that, in fact, it states a claim. He has the power to order a file and then process is served.

QUESTION: Well, Mr. Spear, you say that in the Southern District of Indiana the complaint is referred to a magistrate and the magistrate makes findings as to whether it states a claim?

MR. SPEAR: Your Honor, the magistrate examines

the complaint and if it, in his opinion, states a claim, he has the power to order a file and process it, sir. If in fact in his opinion it does not state a claim, or is frivolous under the 1915(d) standard, he makes a recommendation and sends it to a district judge. And the district judge makes the determination of whether or not the complaint is filed or not filed.

QUESTION: So, the magistrate in either of those situations doesn't make what are -- what would normally be called factual findings?

MR. SPEAR: No, Your Honor. They're not factual findings. These are legal findings. And, in fact, in the Seventh Circuit the only test -- there is no factual test prior to filing -- the only test is the legal test.

QUESTION: I thought you responded to me that it was perfectly proper under 1915 to make a factual inquiry?

MR. SPEAR: Yes, it is, Your Honor. But that is not the test the Seventh Circuit uses. The test that is used in other circuits makes those factual inquiries. In -- in an adversarial proceeding in front of a magistrate sometimes -- with lawyers on both sides. We're not suggesting that procedure here today. We -- We have not reached that question. We have a

single issue on the legal sufficiency of the single complaint under the current standards used by the Seventh Circuit. And we would submit that they have dropped below the permissible standard for 1915(d) in -- contrary to what eight other circuits have held.

So, there are multiple ways to deal with 1915(d). We're not suggesting there are not.

QUESTION: Mr. --

MR. SPEAR: We're suggesting this is below --

QUESTION: Mr. Spear, can I just a -- get a little bit more about the procedure you actually follow in the, in the Southern District of Indiana.

You say the pro se complaint is filed. It's automatically referred by the clerk to a magistrate. Or does it go through the judge's office first?

MR. SPEAR: It is tendered in the clerk's office, and from the clerk's office it goes to the magistrate.

QUESTION: All right. And then the magistrate screens it and he decided whether it states a cause of action or not. And does he -- does he --

MR. SPEAR: And also pauper's petition about whether those --

QUESTION: Whether the financial requirements.

MR. SPEAR: Yes, sir. Yes, sir.

QUESTION: And that no service is made on the defendant while this is being done?

MR. SPEAR: That's correct, Your Honor.

QUESTION: And what is -- is there a rule that prescribes how promptly he must do this?

MR. SPEAR: No, Your Honor, although it is my understanding that it is done very promptly because from the time of tendering by, by a prisoner case, for instance --

QUESTION: Is it stamped --

MR. SPEAR: -- 'til it's filed is within days.

QUESTION: Is it stamped when it's delivered to the clerk's office and then -- is there a docket entry made and a case file opened on the case?

MR. SPEAR: Your Honor, it is not -- it is not filed at that time and I --

QUESTION: It's not filed. So I take it there's no time stamp on when it comes in or --

MR. SPEAR: No, Your Honor, there's not.

QUESTION: And then if the -- then when the -- when the magistrate gets through with it and he says, "I don't think this is worth filing," what do they do? Mail it back to him or do they keep a copy in the file?

MR. SPEAR: Your Honor, he -- he lacks the authority to be able to make that decision himself. He

--

QUESTION: But he sends it to the judge.

MR. SPEAR: Sends it to the judge.

QUESTION: The judge says, "I agree with you." And I imagine routinely the judge would probably agree with the magistrate because there's no point in saying the magistrate -- if the judge is going to do all the same work all over again.

MR. SPEAR: Yes, sir.

QUESTION: I mean, just knowing how judges work. So, the judge gets with the magistrate's recommendation. And what does the judge do?

MR. SPEAR: The judge looks -- looks at it, and assuming the judge agrees with the magistrate --

QUESTION: Right.

MR. SPEAR: -- issues effectively legal findings -- not factual findings, but legal findings -- with effect of a two or three page written opinion if it is not going to be filed, and sends -- that is filed with cause number with the complaint. And --

QUESTION: It's then given a cause number? It's given a number after the judge says it should not be filed?

MR. SPEAR: Yes, Your Honor.

QUESTION: And then --

MR. SPEAR: It's given a number and sent back to the pro se petitioner, a copy of the judge's opinion.

QUESTION: And when does -- when does the time for the pro se petitioner to appeal from that action start to run out?

MR. SPEAR: Thirty days, as it would be in any other appeal.

QUESTION: From the time it's mailed back to him or -- 'cause I gather there's no -- is there an order entered by the district judge then?

MR. SPEAR: Yes, Your Honor. There is an order entered showing that it is dismissed under 1915(d).

QUESTION: I see.

MR. SPEAR: So that at that point the case is actually docketed. From there it goes to the Seventh Circuit. Courtesy copies in the case of state defendants in 1983 actions are ordinarily sent to the Indiana Attorney General's Office, and the Seventh Circuit routinely in such a case, when it is docketed there, sends us notice -- or, actually, the Attorney General's Office, notice that such a case is now pending on appeal.

So, strangely enough, it is briefed on appeal as if the parties had already filed the complaint; 1915(d) allows the dismissal of the complaint either

before or after filing. But if --

QUESTION: But if it automatically goes to the state Attorney General's Office, what is saved by not sending it to your office in the first instance?

MR. SPEAR: Your Honor, the -- that is a courtesy copy. Only about two-thirds of these cases deal with, with the State of Indiana. A 1983 action may very well deal with a small county official --

QUESTION: Oh, I see.

MR. SPEAR: -- and it also may deal with a state employee who does not wish to be represented by the Attorney General. That's totally optional. Now, they normally do because it's free, frankly, Your Honor. But they can have their own counsel. And they are unaware -- they are unaware that the complaint has ever been tendered.

The rule in this case that we are contending for is simply a de minimus rule, not a rule that would change what we believe the standard to be before the Seventh Circuit entered the, the instant opinion. And we are again arguing that Spears v. McCotter, Harris v. Menendez, and Martin-Trigona v. Stewart rules of the circuits should be adopted by this Court. And, again, we've listed many other cases in our brief, as the standard beneath which a pro se tendered complaint

cannot proceed under Section 1915.

That's the only issue in front of the Court. It's the issue that we believe the Seventh Circuit has violated.

In conclusion, Your Honors, it is the position of the Petitioners in this case to establish a familiar and identifiable standard under Section 1915(d) to determine when a pauper's petition should be dismissed as frivolous, and we would submit that that standard should be equivalent to the 12(b)(6) standard.

QUESTION: May I just ask one other question. It's kind of a -- maybe it's kind of silly in a way. But the procedure that you follow deprives the defendant of knowledge that he or she has been sued.

MR. SPEAR: Yes, Your Honor.

QUESTION: Or has been attempted to be sued.

MR. SPEAR: Yes, Your Honor.

QUESTION: Maybe that's good and maybe it's bad.

MR. SPEAR: Yes, it does, Your Honor. But it also gives them the advantage of Section 1915(d), that they are not -- they're not harassed or, or subject to the --

QUESTION: They don't have to hire a lawyer or come into court or anything.

MR. SPEAR: Yes, Your Honor. That's exactly

right. And for most defendants it's probably a privilege to be deprived of the right to be sued.

QUESTION: Yeah.

MR. SPEAR: They probably don't want to have that right.

QUESTION: Yeah.

MR. SPEAR: Thank you, Your Honor.

QUESTION: Thank you, Mr. Spear.

Mr. Rutherglen.

ORAL ARGUMENT OF GEORGE A. RUTHERGLEN

ON BEHALF OF RESPONDENT

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

This case concerns the question of whether the standard for dismissal of frivolous actions under Section 1915(d) is the same as the standard for dismissal for failure to state a claim under Rule 12(b)(6).

Respondent submits that it is not, for two reasons. First, Federal Rules of Civil Procedure, and other principles of our adversary system, sharply distinguish between frivolous actions to warrant the imposition of sanctions in a complaint that simply fails to state a claim. In particular, a motion to dismiss for a failure to state a claim raises a pure question of

law. This question of law may not be frivolous.

Petitioners propose that the district courts should always routinely resolve these questions of law, even when they present major questions of constitutional law, without the benefit of an adversary presentation by either party.

Second, the literal terms of Section 1915(d), its legislative history, and the prior decisions of this Court, require the same standards of frivolousness to apply in actions by litigants as -- in actions by indigents as in actions by ordinary litigants. When Congress used the phrase "frivolous or malicious" in Section 1915(d), it did not mean failure to state a claim.

QUESTION: Mr. -- Mr. Rutherglen, when was -- 1915 was -- it's a pretty old statute. It's older than the Civil Rules by a good deal, isn't it?

MR. RUTHERGLEN: Yes, Your Honor. It was enacted in 19 -- in 1892.

QUESTION: So, you know, what -- what Congress had in mind concerning frivolousness for purposes of dealing with the federal rules doesn't really -- there's no reason to think it had anything to do with what Congress had in mind in the 19th century when it decided who would have the privilege of proceeding in litigation

without paying ordinary court costs.

MR. RUTHERGLEN: Yes, Justice Scalia. The legislative history does not speak to the content of the phrase frivolous. The single most common use of the word frivolous in the opinions of this Court before 1892 concerns the procedure for dismissing an appeal for failure to present a substantial federal question.

And, indeed, the rules of this Court in their 1878 version, Supreme Court Rule 6, specifically allowed a motion to affirm on the ground that the question on which jurisdiction depends is so frivolous as not to need further argument.

If Congress was aware of any standard usage of the word frivolous, it was aware of its equivalence with failure to state a substantial federal question. Moreover, that's exactly what this Court held much later in Coppedge against United States. This Court held that a pauper's appeal could be dismissed only when a paying litigant's appeal could be dismissed, only when it failed to state a substantial federal question.

Respondent submits that failure to state a substantial federal question is virtually identical to the standard adopted by the court of appeals in this case. Is there a rational basis in fact and in law for the complaint that the plaintiff has submitted?

QUESTION: Just as a matter of English usage, Mr. Rutherglen, failure to state a substantial federal question does not sound a great different to me than failure to state a claim on which relief can be granted.

MR. RUTHERGLEN: Your Honor, there are numerous decisions of this Court, for instance, the famous decision in Bell against Hood which established precisely this distinction. This Court held in Bell against Hood that the question whether there was a claim directly under Fourth Amendment presented a substantial federal question, even though the district court might on an adversary presentation dismiss because the complaint failed to state a claim after the district court held that there was no such cause of action.

QUESTION: Do you think that kind of hair-splitting that we have in Bell against Hood is a good model to pattern a system that's going to process an awful lot of indigent complaints?

MR. RUTHERGLEN: I do, Your Honor, so long as the procedures and the burdens that are put upon the federal district courts and that are put upon the defendants in these cases are clearly set forth. All we are seeking today is the basic minimal procedures which any paying litigant gets in federal court. Just notice of the suppcsed defects in the complaint and an

opportunity to respond to those defects before the complaint is dismissed.

Moreover, Your Honor, we only defend the judgment of the court of appeals in this case. The court of appeals said that it was perfectly appropriate for a dismissal under Section 1915(d) to be done sua sponte if there was no rational basis in law or fact for the plaintiffs' claims. And, indeed, in this very case the court of appeals affirmed the dismissal of almost all of the plaintiffs' claims. Only two claims were sent back down to the district court.

QUESTION: Do you think courts can sua sponte dismiss under Rule 12(b)(6)?

MR. RUTHERGLEN: Your Honor, courts can sua sponte dismiss under Rule 12(b)(6). My understanding of standard federal practice, as reflected in the federal rules, is that ordinarily they don't.

QUESTION: But some circuits do, do they not? Courts in some circuits do?

QUESTION: I believe it is the exceptional practice, Your Honor. Bear in mind that Petitioners' claim is not to do this in exceptional cases. Petitioners' claim is that as an ordinary practice in indigent litigation a complaint will be dismissed without giving any notice to anybody.

Now, of course, Respondent in this case cannot complain about the absence of notice to the Defendants. But Respondent himself got no notice until judgment was entered against him.

We submit that this practice is both contrary to the ordinary procedures under the Federal Rules, deprives the plaintiff of notice and opportunity to be heard on the sufficiency of his complaint and works to the detriment of the efficient administration of justice in the federal system.

We believe that the federal courts will do a better job in handling these cases, and we admit they pose problems for the federal district courts if it asks the defendants simply to submit a motion to dismiss for failure to state a claim under the Federal Rules.

QUESTION: Well, then you have to grant the motion to proceed in favor of paupers, the case has to be docketed, and you go through that whole procedure.

MR. RUTHERGLEN: Yes, Your Honor. Those are fairly minor administrative expenses. But, bear in mind, under the court of appeals' decision, it is only when there is a close case, only when there is some rational basis in law and fact, that we even go through that minimal procedure?

QUESTION: Well, I -- yeah, but your submission

is that any time that it isn't frivolous you go through that procedure.

MR. RUTHERGLEN: Well, Your Honor, I think that the statute virtually requires --

QUESTION: No.

MR. RUTHERGLEN: -- that conclusion.

QUESTION: That's -- your position is that unless it's frivolous you go through that procedure.

MR. RUTHERGLEN: Yes. I think the statute requires the federal district courts to --

QUESTION: Well, Mr. -- Mr. -- the statute says, "may authorize the filing." It doesn't say "shall."

MR. RUTHERGLEN: That's right, Your Honor. The --

QUESTION: That would appear to give discretion to the district court.

MR. RUTHERGLEN: Yes, Your Honor. It would appear to give discretion to the district courts. However, I know of no decision in the lower federal courts that leaves this issue entirely to the unfettered discretion of the district judges.

QUESTION: Well, you answered -- you agreed with Justice O'Connor. I thought that that some districts do. Some -- in some circuits they do have sua

sponte dismissals for a failure to state a cause of action.

MR. RUTHERGLEN: In cases involving paying litigants. I thought that was the gist of her question. But if I misinterpreted it, I apologize.

QUESTION: Well, what's the difference? A paying litigant, he's in court and the judge just says, "I don't think you stated a cause of action," and he dismisses it sua sponte.

MR. RUTHERGLEN: Yes. Our position on those circuits, Your Honor, is that their standard is the incorrect standard and should not be adopted by this Court. Instead, we advocate that the -- our courts of appeals --

QUESTION: The paying client ought to have notice that he's about to be dismissed.

MR. RUTHERGLEN: Except in clear cases. Except in clear cases, we think that --

QUESTION: What are those?

MR. RUTHERGLEN: Well, Your Honor --

QUESTION: Frivolous ones?

MR. RUTHERGLEN: Yes, those are frivolous ones. We submit that the definition of a frivolous case, both for indigent litigants and for paying litigants, is that the complaint is clearly insufficient.

QUESTION: What's the difference between a complaint that is clearly insufficient and one that fails to state a claim? Why set up a brand new standard?

MR. RUTHERGLEN: Well, Your Honor, the standard under Rule 12(b)(6) serves a quite different purpose than the standard that is appropriate under Section 1915(d) or under the standards for imposing sanctions against paying litigants.

The purpose of a motion to dismiss for a failure to state a claim under Rule 12(b)(6) is to isolate a dispositive issue of law at the beginning of the lawsuit before there has been factual investigation and factual findings by the district court and terminate the proceedings if those factual investigations are no longer necessary. If -- even though all the allegations that the plaintiff puts in his complaint are true, the law denies the plaintiff relief.

Now, that's one purpose served by Rule 12(b)(6).

QUESTION: And that applies even if the law is pretty hard to figure out?

MR. RUTHERGLEN: That's right, Your Honor.

QUESTION: You can still figure it out without getting into any further factual inquiry?

MR. RUTHERGLEN: That's right, Your Honor. And there are any number of cases -- we cite them in our

brief -- in which this Court has decided major questions of federal law in cases that came up on a motion to dismiss for a failure to state a claim.

We believe that that standard, which perfectly well suits that purpose, cannot be transplanted to do double duty under Section 1915(d). In particular, if there is some doubt, and only when there is some doubt about the sufficiency of the complaint, we believe that the minimal procedures required by the court of appeals, service of process upon the defendants and an adversary presentation on the sufficiency of the complaint, will, first, protect the rights of indigent litigants, and, secondly, lead to the efficient administration of justice.

This case, we believe, illustrates exactly how these hasty procedures in the district court translate into wasteful procedures overall in the federal judicial system. There were no adversary procedures whatsoever in this case in the district court. We believe that it is better to have the adversary procedures in the district court before the case gets to the court of appeals.

In this case, because the district court did not serve process upon the Defendant, there was no adversary presentation on the sufficiency of the

complaint. It was only in court of appeals that three federal judges had to take the time to figure out whether this complaint stated a claim.

QUESTION: Mr. Rutherglen, do you have any guess as to what percentage -- I'm trying to think of, of how many cases in the circuits that adopt the, the rule you're arguing against would be affected by the, by the rule that you would have us adopt. How many of these pro se complaints that are dismissed without further proceedings would have to go through further proceedings?

MR. RUTHERGLEN: Your Honor, I don't have those statistics at my --

QUESTION: Well, I understand.

MR. RUTHERGLEN: -- my fingertips. But my --

QUESTION: Are you --

MR. RUTHERGLEN: -- I suspect --

QUESTION: How many would be clear in, in your estimation? Eighty percent or closer to 20 percent?

MR. RUTHERGLEN: My experience with prison litigation leads me to believe that this case is typical. Most or all of the claims are clearly insufficient in most complaints drafted by prisoners by themselves. But I cannot give you any numerical indication.

I think the best evidence of the burden that the procedure in the court of appeals -- the procedure adopted by the court of appeals would put on the district court is revealed in this case, a simple need to serve process upon the defendant and then a filing of a motion to dismiss for failure to state a claim.

QUESTION: Well, then, there's an argument on the motion to dismiss?

MR. RUTHERGLEN: There would be no need for argument. The rules, Federal Rule 12(d), provides that a hearing must be held on any motion filed under Rule 12. But my understanding is that hearings are rarely held in the district courts and that these motions are often decided on the paper record.

QUESTION: So then what you want is the, the -- in addition to the plaintiff's complaint, the defendant would presumably file a motion to dismiss, and the district court, which apparently would have felt beforehand that the complaint failed to state a claim for relief, is now given additional ammunition to reach that conclusion, and really nothing from the plaintiff.

MR. RUTHERGLEN: Well, the plaintiff is then given an opportunity to file a brief in support of the sufficiency of the complaint.

QUESTION: But the plaintiff is pro se,

presumably. I gather that brief may not be a whole lot of help to the court.

MR. RUTHERGLEN: It is true, Your Honor, that the brief may not be a whole lot of help to the court, but with pro se litigants the courts, the federal courts, just must take them as they find them. There is no question in this case about appointing counsel to represent these indigent litigants.

Our position is that given the disabilities, the practical disabilities that pro se litigants typically labor under, the procedures should be enforced against them so that they at least have an opportunity to respond to the alleged defects in the complaint before the judge has already made up his or her mind and entered judgment against the plaintiff.

That's what happened in --

QUESTION: Well, why isn't --

MR. RUTHERGLEN: -- this case.

QUESTION: -- Haines against Kerner enough for you?

MR. RUTHERGLEN: Haines against Kerner is not enough, Your Honor, because it is a standard that is designed to implement motions to dismiss for failure to state a claim. Haines against Turner asks the court in very traditional fashion simply to assume that all the

allegations stated in the complaint are true.

QUESTION: Well, also to liberally construe the complaint, doesn't it?

MR. RUTHERGLEN: But it's -- Your Honor, it nevertheless just says -- I believe the exact words are that a court can grant a motion to dismiss for failure to state a claim only if it appears beyond doubt that the plaintiff can prove no set of facts at trial that would entitle him to relief.

Haines against Kerner, like any standard for dismissal for failure to state a claim, doesn't give the plaintiff the benefit of the doubt on the law. That is precisely what the court of appeals said was appropriate in these cases in which there was some question about the sufficiency of the complaint.

Moreover, I believe that as a matter of judicial administration it would only confuse the lower federal courts if the standard, which is perfectly suitable for one purpose under 12(b)(6), is suddenly transplanted to be used to determine what constitutes frivolous actions under Section 1915(d).

This Court would never take that step with a paying litigant, risking the confusion that might arise from confusing Rule 12 with Rule 11. Nor would this Court take this step with respect to assessing

attorney's fees against civil rights plaintiffs. This Court has clearly said in Christianburg Garment, case decided under Title 7 but now applied under the Civil Rights Attorney's Fees Statute, generally, that attorney's fees can be assessed against a civil rights plaintiff only if the plaintiff's action was frivolous, unreasonable, or without foundation.

Moreover, in a prior decision, this Court has squarely held in Hughes against Rowe that a prisoner's complaint could fail to state a claim, yet would not justify the imposition of sanctions under Section 1988.

Your Honor, the Petitioners rely quite heavily upon the statement in the court of appeals opinion that the complaint failed to demonstrate the level of deliberate indifference necessary to survive a motion ot dismiss under Rule 12(b)(6). We contend that this statement is simply a dictum, that what the court meant was that there was some doubt about the sufficiency of the complaint, as it went on to state explicitly in the very next sentence in its opinion.

Moreover, the overall order of the court of appeals is consistent with this interpretation of its statement. The court of appeals sent the case back down to the district court for further adversary proceedings on this issue.

To the extent that Petitioners rely upon this statement, we contend, for reasons elaborated in Part IV in our brief, that the complaint specifically alleges, often with supporting evidence in exhibits attached to the complaint, that Respondent suffered a deliberate indifference to serious medical needs.

In any event, this dictum is just another example of the procedural complications that ensue from sua sponte dismissal of a complaint for failure to state a claim.

In its opinion, the court of appeals plainly meant to establish an orderly procedure for disposition of actions brought by indigent litigants, to have the district court first consider sua sponte whether a complaint has any rational basis in law or fact. If it does, then to have process served upon the defendant and entertain a motion to dismiss.

If the court then granted the motion to dismiss, the case would come to the court of appeals, as it does in ordinary appellant practice, with the benefit of the district court's considered judgment after a presentation of the issues on the sufficiency of the complaint by both sides.

It is that procedure, not the effect of an unconsidered dictum of the court of appeals, that

constitutes the only question of general significance before this Court today. We believe that the court of appeals decided it correctly.

If the Court has no further questions, Respondent respectfully requests that the judgment of the court of appeals be affirmed.

QUESTION: Thank you, Mr. Rutherglen. Mr. Spear, do you have anything more?

MR. SPEAR: Yes, Your Honor. Very briefly.

REBUTTAL ARGUMENT OF ROBERT S. SPEAR

MR. SPEAR: The Petitioners in this case still contend that the pro se 12(b)(6) rules set out in Estelle v. Gamble and in Haines v. Kerner is in fact the appropriate standard and is a low enough standard to protect the rights of --

QUESTION: Mr. Spear, can I ask you this question on the -- referring especial -- specifically to Estelle against Gamble and the complaint against the medical people in that case --

MR. SPEAR: Yes, Your Honor.

QUESTION: -- which the district court had dismissed the complaint and under your view it should have found it frivolous because ultimately the dismissal was upheld, even though the court of appeals thought there was merit to the, to the laim.

So that, in your view, the standard of being frivolous means that no matter serious and close the argument may be, if the ultimate determination is that it doesn't state a claim, it's still frivolous?

MR. SPEAR: Yes, Your Honor, although I would submit that in close cases, as we learned from Conley, Haines and Estelle, in pro se litigation in close cases they are decided in favor of the plaintiffs. So, realistically that issue simply was --

QUESTION: Well, it wasn't in Estelle. It wasn't in the district court or in this Court.

MR. SPEAR: Your Honor, I would --

QUESTION: And that was a close case. I think everyone would agree to that.

MR. SPEAR: I think it was, Your Honor, but I would submit that that is an unusual situation.

QUESTION: Well, if you think that's the case, then what -- what harm is there to adopt -- t adopt the rule that Mr. Rutherforn -- Rutherglen suggests?

MR. SPEAR: Because, Your Honor --

QUESTION: If you think it's only in a rare case anyway that anything other than a clear complaint is going to be dismissed this way, you're really not losing anything.

MR. SPEAR: Your Honor, we would submit that

there the Seventh Circuit has adopted a much lower standard and an unenforceable standard when it differed from the other circuits.

You had earlier asked the question about when the statute was originally adopted. It was, in fact, originally adopted in 1892 and recodified in 1948 after the rules, of course, had been adopted. But in 1892 Congress was looking at a system where the courts refused to demure a system, and even learned lawyers had difficulty stating a cause of action. Cases would go back, would be repled two or three times.

The different situation we have today with the modern rules and with the standard established under Haines and under Conley, that, that we would submit that in fact the current standard of 12(b)(6) is in fact, as interpreted by this Court for pro se plaintiffs, the equivalent of a frivolous standard as it would have existed in 1892.

There is a practical aspect to this case. As the record shows, the court had already gone through this procedure, and had to go through this procedure under the Seventh Circuit no matter what the outcome was below. That is to say, the district court had already examined the complaint and weeded out three of the defendants and half the claims against the remaining two

defendants.

And it would have to do that under 1915(d) even if it had filed the complaint as the Seventh Circuit ordered it to do. It's still going to go through the same test. The magistrate is going to examine it. The district court is going to examine it at that level.

What the test that's argued for by the respondent in this case, however, would do was cause the same process to happen twice because, assuming the complaint is then filed, the defendants are brought into court and they are penalized in effect -- they are sued -- they must defend themselves. At that point, the pro se petitioner files his response and the district court goes through the same analysis to determine whether or not the case states a claim. The identical analysis that it underwent before it allowed the case to be filed.

We would submit that that does not cause a judicial economy and it makes no rational sense to have that kind of a test when you have to do exactly the -- the courts do exactly the same thing twice. Plus, it burdens the defendants, plus it burdens the other potential plaintiffs in the whole system, which is now clogged, to say the least.

That kind of a standard does not assist the district court in following what Congress has told it it

must do, and that is winnow out these cases, and, in fact, the Seventh Circuit has said they must do.

We would continue to submit, Your Honors, that a system that causes the same complaint to be examined for the same standard twice by the district court is not the system that should be adopted by this Court. Rather, this Court should adopt the familiar and identifiable standard of 12(b)(6) as instructions for the district courts and the circuit courts, to allow them to implement the congressional policy of Section 1915(d) in a way that they can define and get a handle on.

The questions of this Court to learned counsel here show that in a specific case it was very difficult for him to define a rule that shows well, yes, it's below 12(b)(6), but how far below is it before it still must be dismissed because there's no -- any question of any of the parties in this case or the courts that at some point 1915(d) does kick in and there is a dismissal.

The question is not whether there is any standard prior to filing. The question is what is that standard. And we would submit that the way to handle that in a method that's enforceable by the courts is to use 12(b)(6) because it is a standard that the lawyers, the courts, the judges are familiar with.

Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Spear.

The case is submitted.

(Whereupon, at 2:40 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1882 - DEAN NEITZKE, ETC., ET AL., Petitioners V.

HARRY LAWRENCE WILLIAMS, SR.

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

BY alan friedman

(REPORTER)