

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MYRA JO COLLINS, Petitioner V. CITY OF
HARKER HEIGHTS, TEXAS

CASE NO: 90-1279

PLACE: Washington, D.C.

DATE: Tuesday, November 5, 1991

PAGES: 1 - 50

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20540

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 MYRA JO COLLINS, :
4 Petitioner :
5 v. : No. 90-1279
6 CITY OF HARKER HEIGHTS, TEXAS :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, November 5, 1991

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 1:00 p.m.

13 APPEARANCES:

14 SANFORD JAY ROSEN, ESQ., San Francisco, California;
15 on behalf of the Petitioner.

16 LUCAS A. POWE, JR., Austin, Texas; on behalf of the
17 Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	SANFORD JAY ROSEN, ESQ.,	
4	On behalf of the Petitioner	3
5	LUCAS A. POWE, JR.,	
6	On behalf of the Respondent	25
7	REBUTTAL ARGUMENT OF	
8	SANFORD JAY ROSEN, ESQ.	
9	On behalf of the Petitioner	49
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-1279, Myra Jo Collins v. the City of Harker
5 Heights, Texas.

6 Mr. Rosen.

7 ORAL ARGUMENT OF SANFORD JAY ROSEN

8 ON BEHALF OF THE PETITIONER

9 MR. ROSEN: Mr. Chief Justice, and may it please
10 the Court:

11 This case is here on a pleading stance, as it
12 involves the affirmance by the Fifth Circuit of a Rule
13 12(b)(6) motion to dismiss. That ruling of the Fifth
14 Circuit is in direct conflict with one of the Eight
15 Circuit in the Ruge case.

16 In the complaint, which must be taken -- the
17 allegations of which are taken as true, plaintiff alleges
18 that the defendant city employed her decedent, that it
19 caused his death in violation of due process by sending
20 him into the sewer where he succumbed, knowing that there
21 was a high risk of death as a result of a prior incident
22 that occurred several months before he went into the sewer
23 and indeed before he was employed and pursuant to a policy
24 or custom of deliberate indifference to his safety needs
25 and the risks to his life, as evidenced by its failure to

1 comply even with the mandates of the Texas Hazard
2 Communication Act and thereby, failed to train, warn,
3 properly equip or supervise him in relation to the risks.

4 The allegations are read as claiming a violation
5 directly of the due process clause of the Fourteenth
6 Amendment and also a violation of due process as a result
7 of violations of the substantive mandates of the Texas
8 Hazard Communication Act.

9 QUESTION: And what is the violation of the
10 Constitution claim, Mr. Rosen?

11 MR. ROSEN: The taking of his life in essence,
12 Your Honor, in disregard of his bodily security.

13 QUESTION: That is protected by what provision
14 of the Constitution?

15 MR. ROSEN: The due process clause of the
16 Fourteenth Amendment, which specifically states that life
17 shall not be taken without due process of law.

18 QUESTION: If they had given him some sort of a
19 hearing before they sent him into this place, would that
20 have solved the due process problem?

21 MR. ROSEN: The only hearing that would have
22 solved the due process problem would have been training,
23 warning, and supervision, not a hearing, shall you go down
24 in and succumb.

25 If one wanted to analyze the case on procedural

1 grounds, arguably, that could stand as a hearing, but I
2 think not. This is basically a substantive due process
3 case.

4 QUESTION: (Inaudible) case in this Court, in
5 your support?

6 MR. ROSEN: In terms of his life having been
7 lost?

8 QUESTION: The closest --

9 MR. ROSEN: The closest, excuse me, would be
10 Harris and City of Canton, even though it involved not a
11 public employee, of course, but it did involve the
12 deliberate indifference of a municipality.

13 QUESTION: And a failure to train?

14 MR. ROSEN: And a failure to train. Or, as I
15 believe Justice O'Connor described it as an inaction in
16 the fact of a known and patent --

17 QUESTION: That was where the woman was in the
18 custody of the policy and slumped down?

19 MR. ROSEN: Yes, Your Honor.

20 QUESTION: But there she was in custody. Here
21 it's a little hard to say that the employee is in the
22 custody of the city. To be sure, he has a supervisor who
23 tells him where to go and what to do, but he's not in a
24 kind of involuntary custody that the petitioner was in
25 Harris.

1 MR. ROSEN: That is why, Your Honor, in all of
2 the briefing we have taken the position that not only do
3 you have to prove your section 1983 claim against the
4 municipality by meeting the standard of deliberate
5 indifference, but in order to establish the violation of
6 the due process right itself, you have to meet a standard
7 of deliberate indifference.

8 For example, Your Honor, in the Daniels,
9 Davidson, and Whitley cases, the Court specifically
10 reserved the question of the appropriate standard for
11 harms to individuals who were either pre-trial detainees
12 or people whose liberty was unconstrained with respect to
13 due process violations of the type that might have been
14 involved in those cases.

15 QUESTION: Is there a case in this Court dealing
16 with police using undue force in making an arrest?

17 MR. ROSEN: There have been a number of such
18 cases.

19 QUESTION: Yes. But is there one that involves
20 liability because of lack of training?

21 MR. ROSEN: Not to my recollection.

22 QUESTION: I suppose you would say that the
23 deliberate indifference standard involving failure to
24 train would apply in a situation like that? What about in
25 the -- what about in the Fourth Amendment case where they

1 -- where they've -- and the claim is that the municipality
2 failed to train officers about what the rules were about
3 entering a house?

4 MR. ROSEN: That raises an interesting point
5 that goes in a way to the heart of the duality that's
6 here. As to the officer, the case would be analyzed as a
7 Fourth Amendment proposition under Graham and Brower
8 because any excessive force case is so analyzed. It is
9 not analyzed as a --

10 QUESTION: Training case --

11 MR. ROSEN: -- a due process proposition.

12 As to the municipality, since -- or to the
13 entity that employs the officer, you would still under
14 Canton and City of Harris -- excuse me, City of Canton and
15 Harris have to demonstrate that the municipality's pattern
16 -- customer policy was deliberately indifferent and caused
17 the officer to engage in the unreasonable act under the
18 Fourth Amendment.

19 QUESTION: The deliberate indifference you are
20 talking about here basically comes from Monell's
21 requirement that it be a policy of the municipality rather
22 than an act of the individual, doesn't it?

23 MR. ROSEN: That is correct, and that gets to --
24 past the section 1983 initial pleading obligation, which
25 as this Court has repeatedly said, involves only two

1 elements: that a Federal right has been invaded under the
2 color of State law. So far as the municipality under
3 Monell, in order to get that person as a defendant, you
4 have to also demonstrate deliberate indifference.

5 The Ninth -- the Fifth Circuit's error in this
6 case was that it didn't recognize that so far as section
7 1983 was concerned we had pled all the elements, do you
8 have to get down right away to a determination of whether
9 there has been a Federal right that's been invaded.

10 And we submit that under the teachings of this
11 Court's decisions, where there is a claim of substantive
12 due process invasion of one's life interest or bodily
13 security interest, that deliberate indifference is the
14 standard that defines the constitutional right.

15 QUESTION: Then you are really borrowing from
16 the Monell line of cases a concept that had nothing to do
17 with the Constitution and importing it into constitutional
18 law, aren't you?

19 MR. ROSEN: I think not, Your Honor, because I
20 can borrow that from the Estelle line of cases under the
21 Eighth Amendment.

22 QUESTION: But you are not claiming an Eighth
23 Amendment violation.

24 MR. ROSEN: No, we are not. Arguably we could
25 stand here and say that demonstrating that the

1 municipality had caused this violation through deliberate
2 indifference is sufficient and all we need to do then is
3 demonstrate some level of recklessness or gross
4 negligence, as was left free, at least for argument, in
5 Daniels, Davidson, and Whitley.

6 QUESTION: How does your case differ from
7 DeShaney v. Winnebago County?

8 MR. ROSEN: The way that differs is we analyzed
9 DeShaney as essentially a State action causation case. In
10 DeShaney, Mr. Chief Justice, your analysis was that there
11 essentially was an intervening private cause for which the
12 State was not responsible, and there was no State action.

13 In other words, the chain of causation had been
14 broken. No such thing exists in this case.

15 QUESTION: Well, the Fifth Circuit seemed to say
16 that there be -- there could have been liability if there
17 had been an abuse of governmental power.

18 MR. ROSEN: And I know not where they get that
19 as an element of a section 1983 claim.

20 QUESTION: Has it ever -- has that -- has that
21 concept been given some content in the Fifth Circuit?

22 MR. ROSEN: Yes, the content is --

23 QUESTION: What would have been -- what would
24 have been an abuse of governmental power in a case like
25 this? What could it have been?

1 MR. ROSEN: As I read the Fifth Circuit law,
2 which involves four -- five cases in which they have used
3 that phrase, I don't think it is possible to make that
4 assertion within the context of an employment relationship
5 for an injury that occurs on the job.

6 QUESTION: Well, having employees is an exercise
7 of governmental power I suppose, isn't it?

8 MR. ROSEN: We believe so, Your Honor.

9 QUESTION: And -- did you argue to them that it
10 is an abuse of governmental power if you don't train your
11 employees properly?

12 MR. ROSEN: We argued, by the time we got to the
13 Fifth Circuit, as its opinion reflects, that the analysis
14 presented by the Eighth Circuit in the Ruge decision is
15 the correct analysis, which tracks just what Your Honor
16 said, that it's not the employment and the injury in
17 employment, but by putting somebody untrained in a
18 position of high risk known to the municipality and so far
19 as these pleadings are concerned, we may infer, not known
20 to decedent, that is the violation of constitutional
21 right. We stand on the Eighth Circuit analysis.

22 QUESTION: Counsel, do you know -- section 1983
23 aside, do you know of any case involving the due process
24 clause and involving substantive due process, deprivation
25 of life, liberty, or property, where the deprivation was

1 not intentional, where the State through negligence or
2 gross negligence or whatever you like has caused
3 somebody's death and it's been held to be a violation of
4 the due process clause?

5 MR. ROSEN: I would think, if you are speaking
6 of the State as opposed to an individual flesh-and-blood
7 State actor, I know of no such case, so far as --

8 QUESTION: You think the test for a
9 constitutional violation under 1983 is different from the
10 test under the due process clause, simpliciter, as we say?

11 MR. ROSEN: No, Your Honor. I think it is the
12 same, and that is why we have gone for the standard in
13 this context of deliberate indifference, which under
14 Wilson is an intense standard.

15 QUESTION: Yes, but as the Chief Justice pointed
16 out, that's the standard for attributing -- for
17 attributing the violation to the municipality, but in all
18 of the cases I am aware of anyway, the violation, at least
19 when you are talking about a due process, substantive due
20 process violation, is an intentional violation on the part
21 of somebody, not that the person died or was deprived of
22 something accidentally or even with gross negligence. At
23 least somebody did it intentionally.

24 Then if you want to attribute it to the city,
25 you have to have gross indifference, but you need some

1 intentional action, don't you, for a due process
2 violation?

3 MR. ROSEN: What we -- our position is that the
4 city's failure to train is the intentional action, just as
5 in LaFleur the --

6 QUESTION: I don't mean any intentional action,
7 I mean, the deprivation has to be intentional. You have
8 to intentionally have deprived the person of life,
9 liberty, or property, not by mere accident.

10 MR. ROSEN: But intent has two components.
11 There's the standard that's articulated in Wilson, albeit
12 in an Eighth Amendment context, in which Your Honor
13 described it, and as I analyze it, as what is known as
14 objective intent. And then there is a standard, I think
15 in Whitley and Albers which one would analyze as
16 subjective intent.

17 We suggest that you do not need to prove the
18 objective intent to make out the due process violation,
19 and we have adequately pled the objective intent standard.

20 QUESTION: Well --

21 MR. ROSEN: We think that perhaps in LaFleur,
22 for example, the pregnancy leave case, surely someone
23 performed an intentional act of saying you must go on
24 leave, but there was no intent to violate a right as such.

25 QUESTION: That is not a substantive due process

1 case.

2 MR. ROSEN: Well, it was analyzed, as I recall,
3 an arbitrary and capriciousness standard basis as opposed
4 to equal protection bases. And we would submit, Your
5 Honor, that at those levels, the equal protection analysis
6 is really a subset of a fundamental substantive due
7 process --

8 QUESTION: I suppose then when the Army is
9 grossly negligent or something or a general is grossly
10 negligent in the conduct of a battle and some troops are
11 killed -- or deliberately indifferent, that's a violation
12 of the due process clause.

13 MR. ROSEN: No, I think not. It is contextual,
14 Your Honor.

15 QUESTION: Why wouldn't it be a violation of the
16 due process clause, these people would have been deprived
17 of their lives, and there would have been, you know,
18 deliberate indifference.

19 MR. ROSEN: First -- well, that's not gross
20 negligence.

21 QUESTION: All right. Let's say deliberate
22 indifference. That is a violation of --

23 MR. ROSEN: That's an intent -- that's an
24 intent, as I read the cases, albeit in the Eighth
25 Amendment context. That equates to intent. Now, fallback

1 --

2 QUESTION: Do you have any due process case that
3 says that?

4 MR. ROSEN: That uses deliberate indifference?

5 QUESTION: Right, for purposes of deciding
6 whether there has been a violation of the due process
7 clause, not for purpose of attributing it to the city.

8 MR. ROSEN: It has been reserved, Your Honor.
9 The closest is the Whitley and Albers case in which the
10 subjective intent standard was applied, and the issue was
11 reserved as to people who were either pre-trial detainees
12 or people whose liberty was not constrained.

13 We submit that it is contextual in the sense of
14 the government need, the interest of the individual, and
15 where the acts are taking place.

16 QUESTION: Under your analysis, you really don't
17 need the Federal Tort Claims Act to sue a Veterans
18 Hospital or to sue anybody else that works for the
19 government. You have a Bivens action, I presume, if you
20 can show the deliberate indifference on the part of a
21 government employee, a surgeon or a postman that ran over
22 you?

23 MR. ROSEN: I think not, Your Honor, under the
24 -- as I understand the Federal Tort Claims Act, which is
25 not before us, it basically precludes Bivens actions for

1 actions that are taken properly within the scope of
2 employment.

3 So the issue never gets to the courts, except on
4 the basis of a proper certification of whether the action
5 was taken within the scope of employment.

6 QUESTION: Well, wouldn't you have a Bivens
7 claim against someone who, under your theory, denied --
8 took your life away by deliberate indifference to your
9 safety on the part of the government?

10 MR. ROSEN: If you are talking about the Federal
11 Government, I understand that the Federal Tort Claims Act
12 and this Court's decisions take care of that. If you are
13 talking about the State --

14 QUESTION: Well, take the Federal Government.

15 MR. ROSEN: I understand that if there is a
16 certification that the action occurred within the course
17 of -- within the course of employment --

18 QUESTION: Supposing there had never been a
19 Federal Tort Claims Act passed, and the government just
20 says we have sovereign immunity from all of this.

21 MR. ROSEN: Well, then the government is out,
22 but the individual actor under a Bivens action sued in his
23 or her personal capacity presumably would have to stand in
24 answer if a claim of deliberate indifference is made.
25 Yes, Your Honor.

1 QUESTION: And that would be a constitutional
2 violation?

3 MR. ROSEN: If proven, and proving it, of
4 course, is extremely difficult.

5 QUESTION: So that if I can show that a postman
6 deliberately runs over me, or is consciously indifferent
7 to my welfare, I can sue him under the United States
8 Constitution?

9 MR. ROSEN: Runs over you while he is driving
10 the postal truck?

11 QUESTION: Yes.

12 MR. ROSEN: That -- that's a one tough one, Your
13 Honor. I know those hypotheticals are used in the
14 negligence cases, which is one of the reasons why you've
15 have identified that negligence can never be the standard
16 for making out a due process violation involving injury to
17 person, property or life.

18 And we do believe, Your Honor, that it is a
19 question of identifying the appropriate standard that is
20 the task of this Court.

21 QUESTION: Well, even if we were to acknowledge
22 that, you know our problem, obviously, a reluctance to
23 have an undifferentiated, broad-based substantive due
24 process right under 1983. Why shouldn't we just apply the
25 Parratt line of cases to such claims, and to say that they

1 apply in the substantive violation area as well, when the
2 claim is undifferentiated, not based on the First or
3 Fourth Amendments or a specific constitutional violation?

4 Because it seems to me that would strike very
5 close to the root of the real harm. If there's no ability
6 to recover from the State, it seems to me that that is an
7 aggravated factor that might be taken into account in
8 determining whether there's 1983 -- liability at all?

9 MR. ROSEN: Your Honor, that would involve a
10 modification of what appears to be the rule in *Zinermon v.*
11 *Burch*.

12 QUESTION: Yes, it would.

13 MR. ROSEN: But obviously the Court is free to
14 make that modification. I don't know however why there
15 should be a differentiation between substantive due
16 process rights against arbitrary or capricious government
17 action and First Amendment rights or equal protection
18 rights or other --

19 QUESTION: Because of the obvious problem of
20 your turning 1983 into a general tort statute.

21 MR. ROSEN: I think not --

22 QUESTION: Which was probably not the intent of
23 the Congress.

24 MR. ROSEN: I agree. That wasn't the intent of
25 Congress, but it was the intent of Congress to reenact the

1 Constitution in terms of its liberty components through
2 the enactment of section 1983, and it was the intent of
3 Congress that section 1983 should be a broad remedial
4 statute.

5 It is appropriate to differentiate with respect
6 to the standards within one bundle of rights, substantive
7 as opposed to procedural, as to what standard will be
8 applied --

9 QUESTION: But if there is an adequate remedy,
10 then that necessity is gone.

11 MR. ROSEN: Well, as I say, it would require a
12 revision of the statement in Zinermon v. Roth to say that,
13 but we don't agree that this is an attempt to turn section
14 1983 into a general tort statute. As --

15 QUESTION: But is it not true that your theory
16 -- in this case you have an employee who is suing.

17 MR. ROSEN: Right.

18 QUESTION: But your theory would equally apply
19 to a civilian pedestrian walking down the street who fell
20 into a manhole -- said they'd left a cover off a manhole
21 and somebody fell into the sewer and they were
22 deliberately indifferent in the way they taught people to
23 put manholes back onto the sidewalk?

24 MR. ROSEN: It is -- it is conceivable that such
25 a case could be --

1 QUESTION: You are not limiting -- your category
2 of potential plaintiffs is not limited to employees, by
3 any means?

4 MR. ROSEN: No, it does not, and it doesn't
5 necessarily limit it to death as opposed to physical or
6 emotional injury --

7 QUESTION: Physical injury (inaudible) liberty.
8 And your test, I want to be sure I understand you, because
9 you are not relying on a procedural due process claim.
10 You are claiming this is a violation of substantive due
11 process?

12 MR. ROSEN: As pled and presented below, that is
13 essentially correct except with respect, at some levels,
14 to the claim under the Texas Hazard Communication Act, but
15 it has not been briefed very fully to you.

16 QUESTION: There you are claiming that statute
17 gave you some kind of a liberty interest of which you
18 could not be deprived without a prior hearing, is that it?

19 MR. ROSEN: That would be one thing. If one had
20 to fall back under that statute, we believe that the
21 respondent has demonstrated the inadequacy of the remedy
22 available with respect to these claims, by demonstrating,
23 for example, that under the Texas Tort Claims Act, if a
24 private employee were killed, an action could be brought
25 for gross negligence and exemplary damages, but because of

1 the immunity statutes --

2 QUESTION: There is some kind of constitutional
3 obligation to give employees of the city precisely the
4 same remedy that non-employees would have?

5 MR. ROSEN: Well, it certainly renders suspect
6 the adequacy of the remedy under the Texas Hazard
7 Communication Act. But this case has been analyzed and
8 presented, principally as a substantive due process case.
9 No question about it.

10 And there is no decision of this Court that has
11 reached the proportions of this case. There are several
12 circuit court decisions that we believe are instructive.

13 QUESTION: No decision of this Court that holds
14 there is a substantive due process violation by committing
15 a tort, whether it's negligence, deliberate or deliberate
16 indifference, is there, other than substantive due
17 process, in the sense of picking up one of the enumerated
18 rights in the Bill of Rights -- if it's the Eighth
19 Amendment or the Fourth Amendment.

20 MR. ROSEN: Yes, there is --

21 QUESTION: Which one?

22 MR. ROSEN: -- and we submit that that is
23 Whitley and Albers, does suggest that --

24 QUESTION: That's an Eight Amendment, wasn't it?

25 MR. ROSEN: I beg your pardon?

1 QUESTION: Wasn't that an Eight Amendment case?

2 MR. ROSEN: No, Your Honor. In the decision, I
3 believe, the Court also addressed the due -- substantive
4 due process claim and held it to the same standard as the
5 Eighth Amendment standard. So that would be the only case
6 that appears to be more or less directly on point, albeit
7 in the context of --

8 QUESTION: At least you can't find a case that
9 wasn't at least an alterative provision of the Bill of
10 Rights, an alternative ground --

11 MR. ROSEN: The implications of both Daniels and
12 Davidson --

13 QUESTION: They were procedural due process
14 cases.

15 MR. ROSEN: That is true.

16 QUESTION: At least in part.

17 MR. ROSEN: They were addressed as procedural
18 due process claims. I frankly don't know why.

19 QUESTION: Because the majority didn't follow my
20 separate opinion.

21 (Laughter.)

22 MR. ROSEN: I do recall that, but I meant there
23 were concessions along the way by counsel. It was
24 analyzed specifically as procedural.

25 QUESTION: Mr. Rosen.

1 MR. ROSEN: Yes, sir.

2 QUESTION: Never mind deliberate indifference,
3 even intentional action on the part of the government,
4 that is, intentional action by a government officer, which
5 is the only way the government can act, the tort claims
6 act carefully excludes intentional torts. And I guess
7 under your theory of what substantive due process
8 embraces, it doesn't matter if the Tort Claims Act
9 excludes intentional torts, does it, because you could
10 have a Bivens action, I suppose for the intentional torts.

11 MR. ROSEN: You might, but not against the
12 government.

13 QUESTION: Because they aren't constitutional,
14 but not against the government.

15 MR. ROSEN: And it would have to be against the
16 officer in his individual capacity.

17 QUESTION: And that would be a constitutional
18 action against the officer?

19 MR. ROSEN: I would think so --

20 QUESTION: For depriving you of --

21 MR. ROSEN: Your life.

22 QUESTION: Limb, life, liberty, or property
23 without due process of law.

24 MR. ROSEN: Yes, and if the standard --

25 QUESTION: Substantive due process is wonderful.

1 It really -- it -- everything turns into a constitutional
2 thing.

3 MR. ROSEN: I don't think so, Your Honor. It
4 would be everything turns into a constitutional thing if
5 you were talking about negligence or a failure to apply a
6 proper duty of care or standard -- ordinary standard of
7 care.

8 We're talking about intent. At the very least,
9 we're talking about deliberate indifference, which is
10 objective intent. And why shouldn't the populace be
11 protected from the government if it really goes about on
12 that level of willfulness, taking people's lives or
13 injuring them egregiously or taking their property?

14 We believe that that was the purpose in the
15 enactment of the Constitution and certainly in section
16 1983.

17 QUESTION: Do you think they knew about
18 substantive due process when 1983 was enacted?

19 MR. ROSEN: I believe they did --

20 QUESTION: They had this line of cases clearly
21 in mind?

22 MR. ROSEN: Yes, there was some discussion of
23 the Coyne case, if I recall, in the debates. There was
24 some discussion of substantive due process, natural law
25 kinds of cases, in some of those debates, to the best of

1 my recollection -- not clearly in mind.

2 I have admitted already and I think the record
3 is clear, the historic record, that there wasn't a lot of
4 debate on section 1 of that Civil Rights Act, that the
5 focus was on the criminal provisions and the conspiracy
6 provision.

7 QUESTION: Were there any substantive due
8 process cases on the books at the time 1983 was decided?

9 MR. ROSEN: I think not.

10 QUESTION: I thought this was before the Lochner
11 era when --

12 MR. ROSEN: I think it may have been -- were
13 there things in Barron and Baltimore and there were
14 circuit decisions by Justice Washington and such that
15 dealt with very much related concepts under the fourth --
16 Article IV, equal protection or privileges and immunities
17 clause.

18 But I see --

19 QUESTION: Is there is any State litigation
20 pending or attempted?

21 MR. ROSEN: The only State litigation -- there
22 is no private claim that could be brought in State court.
23 The attorney general of Texas did bring an enforcement
24 action, a civil action under the Texas Hazard
25 Communication Act which the court has agreed to take

1 judicial notice just on the subject of the applicability
2 to these circumstances --

3 QUESTION: There were workman's comp benefits
4 available, right?

5 MR. ROSEN: I beg your pardon. There were.

6 QUESTION: As a matter of State law.

7 MR. ROSEN: As a matter of State, but --

8 QUESTION: But not punitive damages?

9 MR. ROSEN: Not punitive damages, not general
10 damages. And as a matter of State law, a private -- an
11 employee of a private entity would have those claims.

12 QUESTION: Under workman's compensation in State
13 law, is there an exception for serious and willful
14 misconduct or something like that, so that if there's
15 aggravated conduct there can be a suit under the general
16 tort laws?

17 MR. ROSEN: For gross negligence, but not
18 against the municipality, which is immune where there is a
19 death.

20 Thank you, Your Honors. May I reserve my
21 remaining time?

22 QUESTION: Yes, Mr. Rosen.

23 Mr. Powe, we will hear now from you.

24 ORAL ARGUMENT OF LUCAS A. POWE, JR.

25 ON BEHALF OF THE RESPONDENT

1 MR. POWE: Mr. Chief Justice, may it please the
2 Court:

3 What this case lacks is a constitutional
4 violation. Petitioner attempts to create one by stringing
5 epithets at the city's conduct in a worker's compensation
6 case. Petitioner's argument is that if there is injury on
7 one hand and a bad enough governmental entity on the
8 other, and causation between the two, there is a
9 constitutional violation.

10 This has never been the law; this ought not be
11 the law, because if it is, it is going to turn a
12 tremendous amount of litigation into Federal
13 constitutional law.

14 Let me offer a hypothetical which I believe will
15 help flesh out the facts of this case and the contours of
16 what's available. The police department of Harker Heights
17 is deliberately indifferent to the maintenance of its
18 cars, just doesn't care about them. Police go out; they
19 arrest a suspect. Driving the suspect back, the steering
20 wheel jams, the police officer and the suspect are both
21 killed.

22 In our mind the suspect has a 1983 action. The
23 police officer does not have 1983 action. The reason for
24 the distinction between these two people is custody. When
25 this Court has dealt with section 1983 claims in a

1 substantive due process fashion, the key element is
2 custody.

3 QUESTION: What difference does that make?

4 MR. POWE: Justice White, a person as Jeraldine
5 Harris in City of Canton v. Harris wasn't free to make her
6 own choices under those facts. If she wanted to leave the
7 police station, presumably the officers would have
8 prevented it.

9 Custody is a basic fact where an individual in
10 our society loses the liberty of choice, and the due
11 process clause is about the --

12 QUESTION: But what if the police sergeant is
13 told by the lieutenant, you drive that car, you have no
14 choice in this matter.

15 MR. POWE: That is not true, Justice Stevens.
16 The -- I am not saying that the consequences of failure to
17 drive the car are de minimis but the sergeant has the
18 opportunity under our society to say, I won't drive the
19 car.

20 QUESTION: You think the passenger in custody
21 would have a substantive due process claim. Is that what
22 you are saying?

23 MR. POWE: I would like to concede that arguendo
24 for purposes of this case only. It is clear to me that --

25 QUESTION: But the only custody cases we've had

1 where there is a violation of recovery is our Eighth
2 Amendment cases, aren't they?

3 MR. POWE: Well, it seems to me that your
4 decision in City of Canton v. Harris at least suggested
5 that there would be that, and I don't mean to argue the
6 suspect's constitutional rights before this Court. I wish
7 to argue the city's constitutional rights, and it is my
8 contention that --

9 QUESTION: Let's assume that this arrest is made
10 and the trouble is that the officer driving the car just
11 doesn't know how to drive. And the reason he -- one of
12 the reasons he doesn't know how to drive is that they
13 didn't even inquire whether he knew how to drive and they
14 sent him out. You could say they are deliberately
15 indifferent.

16 Would you say that is a -- there would be a 1983
17 action there?

18 MR. POWE: By the suspect?

19 QUESTION: Yes.

20 MR. POWE: I'd like to concede it for the
21 purposes of this argument --

22 QUESTION: No. I don't want you to just concede
23 it. What's your opinion?

24 MR. POWE: My opinion is that the government
25 does in fact owe some duties that are sufficient to get

1 past a 12(b)(6) motion under this, that facts would be
2 necessary --

3 QUESTION: All right, so you get that and you go
4 to trial and you prove that they just didn't seem to care
5 whether the people who drove police cars knew how to drive
6 or not.

7 MR. POWE: My instinct is that when the police
8 takes --

9 QUESTION: Your legal opinion is?

10 MR. POWE: My legal opinion is that when the
11 police take someone off the street, that they owe a duty
12 of reasonable care to that.

13 QUESTION: So that would also go just to any
14 pedestrian that was run over by somebody who didn't know
15 how to drive?

16 MR. POWE: No, no.

17 QUESTION: Why not?

18 MR. POWE: I don't believe that that's true.

19 QUESTION: Why not? Don't they owe some duty to
20 --

21 MR. POWE: I think that's the third line. I was
22 ready in my hypothetical to kill a pedestrian if
23 necessary.

24 (Laughter.)

25 MR. POWE: Although I would like to minimize the

1 number of deaths in one argument.

2 (Laughter.)

3 QUESTION: But you still have got to deal with
4 that.

5 MR. POWE: The point that I have in my argument
6 is that the police officer who was driving the car may
7 only prevail in a 1983 action if this Court holds that
8 there is a duty of workplace safety that the city must
9 provide.

10 And this Court's cases don't -- there is no
11 indication anywhere in this Court's constitutional cases
12 that a municipality has a duty of workplace safety.

13 QUESTION: Mr. Powe, I suppose in one sense a
14 government employee has to do what the employee is told to
15 do by the supervisors or risk being fired, and in that
16 sense, may be as much in the control of the government as
17 Ms. Harris was in the City of Canton, in a different
18 sense.

19 MR. POWE: I simply don't believe in our society
20 that that can be an accurate description. Ms. Harris has
21 no choices whatsoever once the police bring force to bear
22 upon her.

23 But my police officer, unless this Court is
24 going to repeal the Thirteenth Amendment, may always quit
25 his job.

1 QUESTION: Mr. Powe, we don't say that for
2 purposes of a violation of the First Amendment, for
3 example. We don't say that you can do whatever you like
4 to government employees with regard to restricting their
5 speech, because after all, if they don't like it, they can
6 quit.

7 MR. POWE: That's quite true.

8 QUESTION: So why should it be any different for
9 substantive due process?

10 MR. POWE: That's quite true because this Court
11 has found that the Constitution applies in the workplace -
12 -

13 QUESTION: Right.

14 MR. POWE: With the First Amendment, the Fourth
15 Amendment, the equal protection clause, the specific --

16 QUESTION: But not the substantive due process
17 clause for some reason?

18 MR. POWE: That's quite correct.

19 QUESTION: Why? Could you -- because you'd lose
20 this case otherwise?

21 (Laughter.)

22 QUESTION: Would equal protection apply.

23 MR. POWE: I hoped I got that out; I meant to.
24 There is a reason why this Court has held. First, the
25 very fact that a provision has been placed specifically in

1 the Constitution is a demonstration by those involved that
2 they believed the government was more likely to violate
3 that provision and its violation was more harmful.

4 QUESTION: They didn't really believe in
5 substantive due process.

6 MR. POWE: Well, the case that you were asking
7 Mr. Rosen for is Dred Scott v. Sanford. That's the only
8 substantive due process case that I am aware of.

9 QUESTION: Well, they really believed in due
10 process. They just didn't ever believe that there was
11 anything substantive about it.

12 MR. POWE: That is quite correct, Justice White,
13 of course.

14 QUESTION: Mr. Powe, what if here the city knew,
15 clearly knew that sending this employee into the sewer
16 would result in his death, but concluded that it was going
17 to send him anyway, intentionally sent him there to his
18 death?

19 MR. POWE: I don't see that it makes any
20 difference whatsoever.

21 QUESTION: No liability?

22 MR. POWE: No liability -- it is wrong. Let me
23 make it clear. It's wrong. The facts that you give might
24 be enough for an indictment, and I'm not a criminal law
25 expert but some form --

1 QUESTION: No, we are talking about whether it
2 is a substantive due process violation?

3 MR. POWE: No, no. It is not. I think it is
4 tortious, there is a State system that is fully
5 functioning that is able to deal with tortious conduct.
6 There is an assumption that seems to pervade --

7 QUESTION: Well, do you defend the court below
8 where it has a turn on whether there is an abuse of
9 government power? That's how I read the court, as finding
10 within 1983 some element of having to prove abuse of
11 government power. Do you defend that?

12 MR. POWE: No, not really. I think the Fifth
13 Circuit was caught in its standard between this Court's
14 decisions in Parratt v. Taylor and Daniels v. Williams,
15 and it was doing the best it could.

16 I think if it had thought further about what it
17 was dealing with, it would have understood the discussions
18 of abuse of power occur in the context of custody with the
19 police --

20 QUESTION: I want to make sure why you concede
21 that there is liability in your hypothetical. Is it
22 because there is a Fourth and an Eighth Amendment concern?
23 This custody requirement that you impose, where does that
24 come from?

25 MR. POWE: I believe reading Justice White's

1 opinion in City of Canton v. Harris --

2 QUESTION: That's a Court opinion.

3 MR. POWE: Excuse me, Justice White. That the
4 decision to restrain liberty, to prevent a person --

5 QUESTION: That's standard Fourth Amendment law.

6 MR. POWE: I will agree with that. I think of
7 -- I have been thinking of --

8 QUESTION: So your hypothetical, it doesn't seem
9 to me to advance the analysis very much. And I am frankly
10 surprised you concede it, because if you say that if there
11 is custody as a free-floating substantive due process
12 right to be treated properly within custody, it's just a
13 slight extension to say that this employee was in the
14 constructive -- I mean, you know how that works.

15 MR. POWE: I know how it works, but I just don't
16 believe that it's accurate. I don't believe that we can
17 discuss in our country the idea that work is a custodial
18 environment. That seems to me to be contrary to all our
19 notions. It is true that for some people the economic
20 system imposes more constraints than on others, but I
21 think that that's much like the problem in DeShaney v.
22 Winnebago County, that some children have the misfortune
23 of being born to bad fathers.

24 QUESTION: Mr. Powe, why is custody important?
25 I am trying to grasp -- I understand that you are drawing

1 the line on custody, but is it because if there is custody
2 there is a specific provision of the Constitution
3 violated, as opposed to the substantive due process
4 provision?

5 MR. POWE: No, Justice Scalia.

6 QUESTION: Suppose provision --

7 MR. POWE: If I understood, the reason I am
8 drawing the line at custody is that if there is not
9 custody a State does not violate due process of law with
10 respect to the people it deals with.

11 QUESTION: That's the conclusion.

12 MR. POWE: I think that that's what flows from
13 this Court's cases.

14 QUESTION: But isn't the reason that there is
15 liability if there is custody essentially a Fourth
16 Amendment or an Eighth Amendment analysis, which you are
17 saying you don't have here.

18 MR. POWE: No, it -- we don't have --

19 QUESTION: Isn't that what you mean?

20 MR. POWE: Yes.

21 QUESTION: So you're drawing a line for purposes
22 of 1983 between substantive due process and the violation
23 of other constitutional provisions.

24 MR. POWE: Substantive due process --

25 QUESTION: Real constitutional provisions, the

1 ones that really say that.

2 MR. POWE: Well, there are -- I think within
3 that there's still some ambiguity because at various times
4 this Court has held that substantive due process can give
5 meaning to an idea as if it were functionally equivalent
6 to a specific guarantee of the Constitution.

7 At one time, liberty of contract under Lochner
8 was such a right. The right of privacy under Griswold
9 appears to be such a right; the right of travel.

10 QUESTION: Can I ask --

11 QUESTION: (Inaudible) custody (inaudible)
12 example. Supposing a woman has been raped and wants an
13 abortion, and that everyone would agree in the hypothesis
14 that she had a substantive due process right to an
15 abortion. She is not in custody. Could the State
16 arbitrarily interfere with her access to the abortion
17 clinic?

18 MR. POWE: The State can't interfere with a
19 guaranteed constitutional right under any circumstance.

20 QUESTION: It is guaranteed only in a
21 substantive due process --

22 MR. POWE: Yes, that is true, Justice Stevens,
23 but it is one of those very few examples where this Court
24 has interpreted substantive due process as if there were
25 specific words beyond due process: right of privacy.

1 There is no case that does it with workplace safety.

2 This case -- Court has avoided finding a
3 fundamental right to food, to clothing, to shelter, to
4 education, to employment --

5 QUESTION: But how about travel then? Supposing
6 somebody wanted to get access to someplace -- you would
7 say that that is also one that's been crystallized as a --
8 as though it were --

9 MR. POWE: As though it were. Substantive due
10 process, as you --

11 QUESTION: So there three kinds of substantive
12 due process rights: those that are enumerated, those are
13 just -- might as well have been enumerated, and then this
14 kind of noncustodial category?

15 MR. POWE: I think -- functionally, this Court
16 has developed these categories where there are the
17 specific guarantees in the Constitution. There are some
18 aspects of substantive due process which are the
19 functional equivalent of specific guarantees in the
20 Constitution.

21 That seems to me to be a fair reading --

22 QUESTION: And then there are some others that
23 are in the penumbra.

24 MR. POWE: Yes. If I could state that work
25 place safety, to use Palko, is simply -- doesn't seem to

1 me to be implicit in the concept of ordered liberty. It's
2 important, but it's not the same rank order. There is no
3 reason to believe I think that government is more likely
4 to infringe on the safety of its employees than private
5 employers.

6 There's no more reason to believe that a
7 government infringement here would be more harmful to the
8 people involved than if it happened with private
9 employers.

10 Indeed, one facet of government in the workplace
11 is that governmental policies may be changed. Governments
12 are not as driven as private corporations by the bottom
13 line. We can change governmental policies through
14 democratic processes, and that seems to me to be perfectly
15 applicable to these cases.

16 QUESTION: Would it change your analysis, Mr.
17 Powe, if Mr. Collins were a city prisoner, required to
18 clean the sewers?

19 MR. POWE: Yes, I believe that -- I believe the
20 city --

21 QUESTION: Your workplace analysis?

22 MR. POWE: I believe the city owes a higher duty
23 to those who are forced by the force of law, forced into
24 what they are doing than those who do so voluntarily in
25 employment.

1 QUESTION: But where's the underlying
2 constitutional right?

3 MR. POWE: I think the underlying constitutional
4 right is the facet of due process of law that ties into
5 coercion.

6 QUESTION: (Inaudible) voluntary --

7 QUESTION: I suppose a member of the State
8 national guard whose commanding officer tells him to go
9 down -- where does he come? I mean, he is an employee but
10 he goes to jail for desertion or insubordination.

11 MR. POWE: I grant that it -- or I grant the
12 problem that you are giving me with the hypothetical. I
13 do not pretend that coercion is a perfect bright-line rule
14 that one can see both sides of it at all times.

15 There will be some blurry situations involving
16 custody coercion. I don't dispute that. For purposes of
17 this case, if the workplace is custodial or coercive, then
18 I think everything is. And I think that it's important to
19 realize that workplace safety is very, very far to one
20 side of the line that I'm drawing.

21 Petitioner's argument is that only a Federal
22 judicial forum can provide the needed remedy for her and
23 that this Court should eschew bright-line rules in
24 formulating what should happen.

25 As petitioner words it, all she is asking for is

1 an opportunity to go to Federal court under certain very
2 limited circumstances. The participation of the amici
3 seem to -- in this case seem to me to belie that. I think
4 there is an understanding of the various amici that have
5 filed briefs in this case that something big is at stake
6 in the amount of litigation that can occur.

7 If I -- if the city of Harker Heights has sent
8 three individuals down that manhole that day -- one, Mr.
9 Collins had died, another had been seriously injured, and
10 the third, while getting out had broken his wristwatch,
11 this Court would be faced with three 1983 cases today, one
12 involving life; one involving liberty, bodily security;
13 and one involving property.

14 The point of this is that it's not sewers. It's
15 schools, it's hospitals, it's everywhere that government
16 is, because petitioner's argument is that if the
17 government is bad enough and there is injury, then there
18 is going to be a 1983 claim.

19 Petitioner states that when I articulate this,
20 that I am making a floodgates argument. I think that my
21 argument is both constitutional law and it is a floodgates
22 argument, because I find nothing in petitioner's argument
23 that would close the floodgates. I don't even find a
24 finger in the dike under these circumstances.

25 What petitioner I think overlooks consistently

1 is the point of States and the creativity within our
2 Federal system. The States for the last 20 years have
3 been amazingly active in tort reform. Under some
4 circumstances the States have expanded liability. In a
5 couple of areas they have contracted liability.

6 Torts is an area that the State courts deal
7 with, and the legislatures deal with. Texas, in fact, has
8 dealt with the problem that we are discussing today in two
9 separate fashions. In one fashion there is the Texas
10 Worker's Compensation Act. Petitioner is receiving a
11 worker's compensation award under the Texas statute.

12 In the other hand, there is the Texas Hazard
13 Communication Act. I -- in petitioner's brief, as I
14 understood the brief, and I did not hear this in the oral
15 argument, petitioner was trying to state that the Texas
16 Hazard Communication Act created some form of
17 constitutional expectation that would then be protected by
18 due process.

19 It was as if Texas had created this right on one
20 hand and then inadvertently failed to provide a good
21 enough remedy for the constitutional right that Texas had
22 created.

23 I believe that petitioner's argument in her
24 brief about the Texas Hazard Communication Act borders on
25 unconstitutional. It seems to me that the Texas

1 legislature is free to pass whatever statutes it pleases.
2 It is perfectly free to remedy those statutes in any way
3 that it pleases, and if Texas did not adequately provide a
4 good enough remedy under the Texas Hazard Communication
5 Act, that the forum for discussion of that is either in
6 Austin, Texas, or across the street at the Congress.

7 QUESTION: If a police officer goes out to a
8 scene of some confusion or commotion and wants to get
9 through a crowd and the crowd tries to block him and he
10 just uses his gun or his stick unnecessarily -- doesn't
11 intend to arrest anybody, he just wants to get out, and he
12 hurts somebody unnecessarily -- would you seek -- you
13 could plead a 1983 action there?

14 MR. POWE: I am not sure --

15 QUESTION: It isn't a Fourth Amendment issue.

16 MR. POWE: No, it's not. You are quite correct.
17 It does seem to me that police and their ability to use
18 force, and use force without fear, I think, of violence
19 coming back at them, at least in your crowd example --

20 QUESTION: This is a form of coercion?

21 MR. POWE: Justice White, when a police officer
22 tells me to move along, I view that as a very good idea.
23 I think that that is a statement that is backed up by the
24 power of the State and --

25 QUESTION: So you would say, if you could prove

1 that there -- that this officer wasn't really trained and
2 there was deliberate indifference about his training, that
3 it would be a 1983 case?

4 MR. POWE: I'm sure that --

5 QUESTION: Is this an arguendo thing?

6 MR. POWE: Yes. That is arguendo. I was about
7 to say, I am sure petitioner would agree with that.

8 In Daniels v. --

9 QUESTION: What about this situation, if it were
10 intentional -- that is, not deliberate indifference, but
11 the State said, yeah, we know there's gas down there and
12 you are going to get hurt, but we want you to go down.
13 That wouldn't make any difference?

14 MR. POWE: No, it doesn't make any difference to
15 me. I think that whatever standard of fault that can be
16 required, it can be pled. And my point is that without a
17 custodial setting, there simply is not a constitutional
18 violation under due process of law.

19 QUESTION: I don't know what could be a more
20 clear violation of substantive due process than
21 intentionally taking somebody's life -- intentionally
22 taking somebody's life. I mean, you know, you talk about
23 relatively more obscure things such as the other rights,
24 privacy rights you were talking about. I am talking about
25 killing somebody and you say that is not a violation of

1 substantive due process?

2 MR. POWE: That is correct, under some
3 circumstances. Substantive due process takes its position
4 from context.

5 QUESTION: I guess I don't understand
6 substantive due process at all.

7 MR. POWE: I think, Justice Scalia, that
8 substantive due process is the most difficult concept in
9 constitutional law, and I think you understand it as well
10 as or better --

11 QUESTION: You shouldn't just compound the
12 error.

13 (Laughter.)

14 MR. POWE: Yes, I think that's an excellent
15 statement.

16 In Daniels v. Williams, this Court noted that
17 the only thing governmental about the action was the fact
18 that the respondent was a deputy sheriff and the
19 petitioner was an inmate in his custody. At least there
20 was custody there.

21 In the instant case, the only thing that
22 separates this case from an ordinary tort is the fact that
23 the respondent happens to be a governmental entity.
24 Otherwise, this case presents a tort case.

25 QUESTION: Well, your opponent disagrees with

1 that. I'm not sure that it's right. He says there's this
2 higher standard of proof, the deliberate indifference and
3 so forth, which is also his thumb in the dike. That's why
4 he doesn't think you are opening the floodgate. So there
5 is that. The ordinary negligence wouldn't be enough,
6 where it would be in most cases.

7 MR. POWE: This case would be found in torts
8 class, tort as a personal injury problem. I don't
9 believe that deliberate indifference covers a
10 constitutional case. I don't believe that Joshua DeShaney
11 could succeed on the facts of that case if the case went
12 back and were repleaded as a deliberate indifference case.

13 I don't think deliberate indifference is a facet
14 of the Constitution under these circumstances. It came
15 about as a way in this context of ascribing liability to a
16 city for a constitutional violation that existed. It did
17 not create the constitutional violation itself.

18 QUESTION: Yes, but the other side of the coin,
19 and I didn't agree with it myself, but the Court has said
20 in effect that negligence isn't enough to establish a
21 constitutional violation, which seems to me to imply that
22 something more than negligence might.

23 MR. POWE: Something more than negligence might
24 in the types of settings where this Court has been
25 deciding its 1983 cases. This case marks a tremendous

1 change in the type of 1983 case that has been brought. I
2 think that this case is the equivalent of Paul v. Davis
3 when -- once you had Monroe v. Pape, I think a case like
4 Paul v. Davis was an inevitable outgrowth, and I think
5 that once you have Monell, a case like Collins v. City of
6 Harker Heights is the outgrowth.

7 But I do think that the fundamental insight of
8 Paul v. Davis was that neither 1983 nor the Fourteenth
9 Amendment turned this Court into a uniform commission on
10 State tort law.

11 QUESTION: So if a -- if the mayor of a city has
12 an enemy that opposes -- has opposed him and he knows
13 exactly where he lives and there is a snow storm and he
14 tells the driver of the snow plow, why don't you just tear
15 up that fellow's lawn in the process of cleaning the
16 street and he does it, and I take it that this is no
17 difference than causing a death or anything. It's just no
18 1983 action.

19 MR. POWE: That's right. It is a tort for which
20 there are State courts and State remedies available to
21 deal with. Not every injury committed by government has
22 to be a constitutional violation.

23 QUESTION: I know, but you wouldn't go so far to
24 say that they sent the man into the sewer or ran over the
25 front lawn, because the man was a member of another

1 political party or because he was a member of the wrong
2 race or something like that? You aren't going that far?

3 MR. POWE: No, no, certainly, I didn't mean to.

4 At page 19 --

5 QUESTION: You are not?

6 (Laughter.)

7 QUESTION: Why does that make a difference?

8 MR. POWE: I think that both the Thirteenth
9 Amendment and the invidious discrimination requirement of
10 the equal protection clause impose limits on government in
11 all contexts.

12 QUESTION: You are treating them both the same,
13 you just don't have any duty to either one of them.

14 MR. POWE: If the statement is that a person was
15 -- the State used its selective power on the basis of race
16 or on the basis of political belief adversely to the
17 individual, I think those are --

18 QUESTION: You're out of the substantive due
19 process area?

20 MR. POWE: Yes, I certainly am. At page 19 of
21 petitioner's reply brief she states that Federal judges
22 will know a dismissible 1983 case when they see one. Well
23 all four Federal judges below voted to dismiss this
24 complaint and that is because for all her artful pleading,
25 all petitioner alleges is a tort.

1 QUESTION: Are you defending -- are you
2 defending the rationale below?

3 MR. POWE: As I stated, Justice White, I believe
4 that the Fifth Circuit, if they had thought about the case
5 a little more in --

6 QUESTION: You would say that abuse of
7 governmental power wouldn't have made any difference?

8 MR. POWE: I think abuse of governmental power
9 is inherent in the concept of due process of law, and that
10 that -- the Fifth Circuit was tagging --

11 QUESTION: Give me an example. There isn't any
12 -- could there be an abuse of governmental power so-called
13 in a case like this that would make a 1983 action?

14 MR. POWE: No, under no circumstances.

15 QUESTION: Yes. Give me another case where
16 there would be a abuse of power that would make the
17 difference.

18 MR. POWE: I think that if the police got an
19 order to throw the prisoner in my initial hypothetical, an
20 order came from the city, throw the prisoner into the
21 river and kill him.

22 QUESTION: Well, that's a custody case.

23 MR. POWE: That is the line that I believe the
24 Constitution --

25 QUESTION: But you don't need to talk about

1 abuse of power to get there.

2 MR. POWE: I believe that abuse of power is
3 inherent -- you know, it's part of the custody and it
4 describes when a custodial setting is going to raise to a
5 constitutional violation and when it's not.

6 QUESTION: Thank you, Mr. Powe.

7 Mr. Rosen, you have 2 minutes remaining.

8 REBUTTAL ARGUMENT OF SANFORD JAY ROSEN

9 ON BEHALF OF THE PETITIONER

10 MR. ROSEN: Thank you, Your Honor.

11 Respondent has now thrown itself in conflict
12 with every circuit court in the United States with respect
13 to the range of hypotheticals. For example, in McClary,
14 that court in footnote 6 allowed for an intentional injury
15 to the life or security interest.

16 The Ninth Circuit had a case, if I recall, not
17 too long ago in which the police systematically hassled a
18 bar owner. For no particular reason, they didn't like
19 him. That gave rise to a substantive violation of the
20 Constitution.

21 Similarly, the Cornelius case of the Eleventh
22 Circuit in which the town clerk got kidnapped. That gave
23 rise to a substantive security violation.

24 Mr. Justice Thomas, there is one -- I beg your
25 pardon.

1 QUESTION: Are those cases in conflict with the
2 Fifth Circuit?

3 MR. ROSEN: I believe so. I believe so.

4 Mr. Justice Thomas --

5 QUESTION: So the Fifth Circuit's put itself in
6 conflict with almost -- with every other court of appeals?

7 MR. ROSEN: I believe so on this abuse of power
8 concept.

9 Mr. Justice Thomas, there is a case that tracks
10 your hypothetical, Fruit v. Norris cited in the ACLU
11 amicus brief. A prisoner was ordered into a sewer,
12 refused to go. Of course, he was in custody. He wasn't
13 killed. He wasn't whipped. He was disciplined, just as
14 an employee who might have refused to go into the sewer
15 might have been disciplined.

16 We really have seen no analytical difference
17 based upon custody. The real key, Mr. Justice Stevens, is
18 the standard -- that is, the finger in the dike.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rosen.

20 The case is submitted.

21 (Whereupon, at 2:00 p.m, the case in the above-
22 entitled matter was submitted.)
23
24
25

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. 90-1279 MYRA JO COLLINS, Petitioner, V. CITY OF HARKER HEIGHTS, TEXAS

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

BY *Lona M. May*
(REPORTER)

RECEIVED,
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'91 NOV 12 P 4:37