

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GEORGE F. DENTON, DIRECTOR OF
CORRECTIONS OF CALIFORNIA, ET AL.,
Petitioner, v. MIKE HERNANDEZ

CASE NO: 90-1846

PLACE: Washington, D.C.

DATE: Monday, February 24, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GEORGE F. DENTON, DIRECTOR OF :

4 CORRECTIONS OF CALIFORNIA, :

5 ET AL., :

6 Petitioners :

7 v. : No. 90-1846

8 MIKE HERNANDEZ :

9 - - - - - X

10 Washington, D.C.

11 Monday, February 24, 1991

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 12:59 p.m.

15 APPEARANCES:

16 JAMES CHING, ESQ., Supervising Deputy Attorney General of
17 California, Sacramento, California; on behalf of the
18 Petitioners.

19 RICHARD W. NICHOLS, ESQ., Sacramento, California; on
20 behalf of the Respondent.

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

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now on No. 90-1846, George F. Denton, Director of
5 Corrections of California v. Mike Hernandez.

6 Mr. Ching.

7 ORAL ARGUMENT OF JAMES CHING

8 ON BEHALF OF THE PETITIONERS

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

11 This matter is before the Court for a second
12 time. The initial decision, Hernandez I, announced an
13 exclusive judicial notice rule for determination of
14 frivolity under section 1915(d). This Court summarily
15 remanded, granted the petition, remanded the case to the
16 Ninth Circuit for determination according to the
17 then-recent case of Neitzke.

18 QUESTION: We didn't hear oral argument --

19 MR. CHING: No, Your Honor.

20 QUESTION: We just held the case for Neitzke.

21 MR. CHING: Yes. You remanded it for review in
22 light of Neitzke.

23 Hernandez II, the product of that remand, once
24 again announces an exclusive judicial notice rule. This
25 rule is contrary to the holdings of Neitzke and is

1 contrary to the logic of, the interpretation of 1915 in
2 the line of cases this Court has announced beginning with
3 McDonald and Sindram, passing through the announcement of
4 Rule 38.9 and the recent case of Zatko.

5 The -- it is my contention initially there is no
6 justification for an exclusive judicial notice rule. The
7 Ninth Circuit has fashioned this requirement out of thin
8 air. It has no basis in law and is contrary to policy.

9 QUESTION: Are you going to explain in a little
10 more detail what is the exclusive judicial notice rule
11 that you're referring to, Mr. Ching?

12 MR. CHING: Yes, Your Honor. The Ninth Circuit
13 required that before a case could be determined as
14 frivolous and in forma pauperis status rejected, reference
15 had to be made through judicial notice to some objective
16 negating fact which positively contramanded the
17 allegations of the pleading. This approach is contrary to
18 that in Neitzke, in which this Court required that,
19 contrary to a 12(b) motion for judgment on the pleadings,
20 a district court had to pierce the veil and eliminate,
21 pierce the veil of the pleadings in the complaint and
22 eliminate the fantastic and the delusional.

23 Clearly the Ninth Circuit rule fails as to the
24 fantastic. There is no judicial notice to be made that a
25 plaintiff is not Satan or Mohammed or a martian. These

1 fantastic cases prove that the exclusive judicial notice
2 rule cannot be left in place.

3 The present case presents the other half of
4 Neitzke, the delusional cases. Within the corners of
5 these five complaints is ample proof of a diagnosed
6 delusional condition and of perceptions which not only
7 defy the principles of formal logic but also defy common
8 sense, and in fact are perfectly predictable from the
9 initial medical diagnosis in the record. This is an
10 individual who is incapable of reasoning in an appropriate
11 manner. We do not say that because he is ill his
12 complaints must be ignored. But because he is ill his
13 perceptual apparatus is seriously wanting.

14 QUESTION: Well, Mr. Ching, do you take the view
15 that the trial judge is to determine the credibility of
16 the allegations made in a complaint, the factual
17 allegations made, or do you take the position that the
18 trial court should just determine what rational inferences
19 can be drawn from the facts that are alleged?

20 MR. CHING: The use of the term credibility I
21 believe is an unfortunate one, my point being that there
22 is no evaluation of a witness' testimony made within the
23 four corners of the five complaints.

24 QUESTION: I mean, it would seem to me that
25 in -- looking at the complaints here that perhaps it could

1 be said that no rational inference of rapes could be made
2 from the facts that were alleged with the exception, of
3 course, of the affidavits submitted by Armando Esquer.
4 What do you do about that, where he says he witnessed
5 sexual assaults on the complaining party?

6 MR. CHING: I agree with you as to the
7 evaluation that must be made of the unsupported
8 allegations. The issue of the supporting affidavits does
9 tend to lend credibility to the allegations that are
10 referred to --

11 QUESTION: Well, as to that do you think in the
12 face of the affidavit of Armando Esquer, that as to that
13 complaint which is one of the five, that it can be
14 dismissed --

15 MR. CHING: Your Honor, I would say --

16 QUESTION: -- as frivolous?

17 MR. CHING: -- on its face, read without the
18 context of the five complaints, it would survive a
19 frivolity determination, and indeed it might very well
20 survive a 12(b)(5), 12(b)(6) rather. There is a range of
21 rationality within the complaints. As to whether or not
22 all would survive is a matter that I think is at first
23 instance entrusted to the discretion of the trial court.
24 However, the larger context and the context to which the
25 magistrate referred in dismissing these complaints is that

1 the seemingly rational is in fact tainted by the less
2 rational contained in the grouping.

3 QUESTION: But, but when you look at the
4 affidavit of this third party, then it seems to me you're
5 saying that the trial judge should just make a credibility
6 determination as to that affidavit.

7 MR. CHING: Well, insofar as what the trial
8 judge should be doing in evaluating a complaint, he should
9 be attempting to pierce the veil, whatever that means, in
10 Neitzke terms. Neitzke states that a 12(b)(5), 12(b)(6)
11 cannot be based on a credibility determination. I believe
12 there is an inference in Neitzke that the court is
13 entitled to go beyond the mere surface reading of it and
14 is entitled to take both judicial notice and to make
15 rational connections amongst the parts of the complaints
16 that appear before it.

17 The --

18 QUESTION: Could I ask, was this dismissal here
19 with prejudice or without prejudice?

20 MR. CHING: It was not, it was not formally
21 stated to be either. I believe that the Ninth Circuit
22 intended it --

23 QUESTION: I'm sorry.

24 MR. CHING: -- the denial of in forma pauperis
25 was all the court intended.

1 QUESTION: So you think that all we're, so you
2 think that he could have rebrought any one of these
3 complaints if he could pony up the money for the filing
4 fee and --

5 MR. CHING: Yes, Your Honor, I, it is --

6 QUESTION: I mean, that makes a big difference
7 as to what our standard is going to be. If all we're
8 doing is excluding somebody from the IFP, it seems to me
9 it's one thing, but if you think the dismissal means he
10 can't rebring it, then maybe we ought to have a higher
11 standard.

12 MR. CHING: The dismissal is one which simply
13 denies IFP. I see no greater significance to it. The
14 Ninth Circuit has in fact taken the position by requiring
15 not only the objective judicial notice rule, but also the
16 de novo review on appeal, and also the reporting
17 requirements to the inmate, that is reporting to the
18 inmate how the complaint is deficient, that no
19 subjectivity should enter into this process. I think that
20 is fundamentally contrary to the position set forth in the
21 cases that relate to 39.8, excuse me, 38.9 -- 39.8 -- in
22 any case, this Court's rule regarding frivolity.

23 The term frivolous is inherently subjective. It
24 is inherently judgmental. It is, it can only be based --

25 QUESTION: Well, do you read any of our cases as saying

1 that a complaint is frivolous if it has a legally
2 sustainable basis?

3 MR. CHING: Certainly not. This Court has
4 always adhered to the rule that the frivolous case is one
5 that is inarguable in law or fact. This, in a case that
6 presented an arguable legal claim --

7 QUESTION: Because it would seem to me that most
8 of the cases under 39.8 are cases that are just not
9 sustainable as a matter of law.

10 MR. CHING: Well, Your Honor --

11 QUESTION: I don't know what precedential value
12 you can get from those cases. We haven't stated any
13 standard to the contrary of what the respondent argues
14 here.

15 MR. CHING: The standard set forth in 39.8 is
16 the same that is set forth in 1915(d), and is perfectly
17 consistent with any theory that this Court has inherent
18 power to order its own business.

19 QUESTION: Yes, but the standard for frivolity
20 in a petition for certiorari to this Court may be quite
21 different when applied on facts from the standard of
22 frivolity applied to a complaint filed in the district
23 court.

24 MR. CHING: Within the terms of the rules, and
25 of course the different subject matter and jurisdiction of

1 the courts, that may be true. However, frivolous seems to
2 have a unitary meaning within the three contexts. The
3 1915 use of frivolous seems to be the same as in 39.8.

4 QUESTION: I don't understand the realm of
5 discretion and subjectivity you're arguing. I take it you
6 mean that what might pass one district judge wouldn't pass
7 another so far as this rule is concerned?

8 MR. CHING: I believe that would be one
9 consequence of a discretionary interpretation of
10 frivolity, and yet I believe we have to entertain a
11 discretionary interpretation of frivolity because there is
12 no substantial means to assure a perfectly uniform result
13 in each application to the various district courts.

14 The suggestion has been made by the United
15 States that the terms used in Rule 11, not well grounded
16 in law, are interpretable or applicable to the frivolity
17 determination in 1915(d). This is a rule that has its
18 basis in the arguments that were pointed out in the
19 dissents, that the fundamental basis for requiring a
20 frivolity determination is to ensure that an economically
21 feasible litigation comes before the court. Rule 11
22 attempts to apply some kind of economic calculus to the
23 actions of counsel in bringing litigation and it relies
24 on, it has a well-formed case law which in fact could be
25 applicable to the determination of frivolity in this

1 instance.

2 QUESTION: Rule 11 is really premised on the
3 idea of sanctions, frequently monetary sanctions --

4 MR. CHING: Yes.

5 QUESTION: -- imposed against counsel, perhaps,
6 and in some cases perhaps clients, and the fact that one
7 is seeking to proceed IFP pretty well negates the idea
8 that sanctions of that sort are going to be used.

9 MR. CHING: It's my understanding that the
10 United States' position applies only to the importation of
11 the test itself and rather than the utilization of
12 sanctions. Certainly it would be futile against indigent
13 plaintiffs. However, the attempt to require plaintiffs to
14 make that decision or be held to that standard is a
15 unitary one.

16 If the Court has no further questions I would
17 like to reserve my time for rebuttal.

18 QUESTION: Very well, Mr. Ching.

19 Mr. Nichols, we'll hear from you.

20 ORAL ARGUMENT OF RICHARD W. NICHOLS

21 ON BEHALF OF THE RESPONDENT

22 MR. NICHOLS: Mr. Chief Justice, and may it
23 please the Court:

24 Section 1915 is a statute of general
25 applicability to poor persons. It is a statute enacted in

1 support of a congressional goal that access to the courts
2 should be equally available to the poor as well as to the
3 rich. It is not a statute which applies only to prisoner
4 or civil rights cases such as this case is, and, as the
5 Chief Justice has indicated, it is not a sanction
6 statement, statute.

7 In balancing the right of access under Section
8 1915 against caseload concerns that district courts
9 obviously have that moved Congress to authorize dismissals
10 for frivolousness under the statute, it is desirable that
11 district courts be afforded an objective standard -- this
12 is one of the substantial differences between the
13 petitioner and the respondent in this case -- an objective
14 standard pursuant to which they can determine whether
15 particular factual allegations have an arguable basis and
16 therefore are not frivolous.

17 This Court has already partially determined an
18 objective standard in Neitzke, namely the standard that
19 the claim must have a, quote, arguable basis, unquote, in
20 law and fact. Arguable does not mean reasonable chance of
21 succeeding according to the viewer. Arguable in the view
22 of the respondent means whether any rational fact-finder
23 could conclude that the allegations are true.

24 QUESTION: Doesn't arguable almost, you think of
25 it as an adjective used to modify something dealing with

1 law rather than facts.

2 MR. NICHOLS: Certainly that is the sense in
3 which it is most frequently used, but the Court's
4 definition of the standard in Neitzke applied the same
5 definition, arguable basis, to both law and fact. And it
6 seems to the respondent that in trying to figure out what
7 an arguable basis is, Mr. Chief Justice, that a rational
8 fact-finder would be the one to determine whether a
9 particular factual argument is or is not arguable.

10 QUESTION: Are you inserting a whole layer of
11 some sort of determination different from a motion to
12 dismiss or a motion for summary judgment?

13 MR. NICHOLS: It's essentially, essentially akin
14 to a motion for summary judgment procedure, although not
15 necessarily having to be brought by motion. The Neitzke
16 case clearly establishes that motions to dismiss and
17 frivolousness dismissals are different in kind.

18 And if I may respond to Justice Scalia's earlier
19 question, it is the respondent's view, it is my view that
20 a frivolousness dismissal constitutes a factual
21 determination of frivolousness which would preclude the
22 bringing of a second action on the same claims if the
23 plaintiff could get together the money to pay the filing
24 fee.

25 QUESTION: And yet Neitzke certainly allows the

1 district court or the magistrate, whoever is the initial
2 determiner, to probe beyond the surface allegations. You
3 don't have to treat it the way you do a dismiss, where a
4 motion to dismiss or all properly pleaded facts are
5 treated as true.

6 MR. NICHOLS: Absolutely, and --

7 QUESTION: So what more can the district court
8 do, in your view, than it can do on a motion to dismiss,
9 which is virtually nothing so far as well pleaded facts?

10 MR. NICHOLS: Well, the district court can
11 require a number of, impose a number of procedural
12 requirements to require the plaintiff to get away from
13 pleading conclusions and plead evidentiary material,
14 heightened facts, so that the district court can
15 determine, prior to the plaintiff coming in for an
16 evidentiary credibility determination, whether the
17 pleadings with those items of evidence would be sufficient
18 to enable a rational fact-finder to conclude that there
19 was something worth proceeding on to the credibility
20 point.

21 QUESTION: The rule, the section as written
22 contemplates some dismissals without further leave to
23 amend or anything else, don't you think?

24 MR. NICHOLS: It certainly contemplates
25 dismissals without leave to amend. I suppose that there

1 are some types of allegations that are so outlandish on
2 their face that no rational fact-finder could ever
3 conclude, no matter how much opportunity to amend was
4 granted, that they would, that they could survive.

5 QUESTION: Well, Mr. Nichols, some of the
6 allegations here may fall in that category, I would
7 suggest.

8 MR. NICHOLS: Well, some of them -- I will
9 certainly admit, Justice O'Connor, that quite a number of
10 them fail to survive a 12(b)(6) test at this point, and it
11 may be on amendment --

12 QUESTION: Well, they may fail to allow a
13 rational inference to be drawn as to some of them.

14 MR. NICHOLS: Well, Mr. Hernandez has never been
15 given an opportunity to amend in respond, in response to
16 the Ninth Circuit's view of what he ought to be able to
17 do. We don't know what he might try to do by way of
18 amendment. If I may give you an example, let's assume a
19 prisoner says I was raped by Robin Hood and his merry men.
20 Clearly an irrational allegation on its face. However, if
21 you superimpose on that the possibility of a prisoner
22 alleging that there had been a prison show about Robin
23 Hood and some of the other inmates had kept some of the
24 clothing and the other inmates in that clothing had come
25 in, maybe it's not quite so irrational.

1 QUESTION: What if you were --

2 MR. NICHOLS: And the notice point, it seems to
3 me, is a kind of a due process thing that if you're going
4 to throw a plaintiff out with prejudice he ought to have
5 an opportunity to plead his best case. And when we're
6 talking about pro se plaintiffs we can almost presume that
7 they haven't pled their best case in the first instance.

8 QUESTION: Mr. Nichols, in your response to
9 Justice O'Connor you said that some of the allegations
10 here would not survive a 12(b)(6) motion, as if you were,
11 that were a more extreme test than 1915. I had thought
12 that just the opposite was true, that some allegations of
13 fact that would survive a 12(b)(6) test could be thrown
14 out on the grounds of fantasy or delusion in a way that we
15 have never said a 12(b)(6) motion would reach them.

16 MR. NICHOLS: Your Honor, what I had in mind in
17 response to Justice O'Connor was Mr. Hernandez has brought
18 in the director of the prison system, he has brought in
19 the warden, and he has not pled anything remotely close to
20 personal responsibility on the part of those people.

21 QUESTION: But -- you were not then addressing
22 the 28 rape claims, assuming responsible --

23 MR. NICHOLS: I will go a little farther than
24 that, Mr. Chief Justice. Some of the rape claims say I
25 suspect. I don't know who did it, but guard Perdoni was

1 on the shift at the time it happened. I would be
2 perfectly prepared to concede that that does not
3 constitute a sufficient allegation against the unknown
4 guard or the speculative guard to survive a 12(b)(6)
5 motion in terms of an allegation of personal
6 responsibility for a specific act.

7 But what the Ninth Circuit has done has been to
8 say a lot of these allegations probably don't survive a
9 12(b)(6), but it is the rule of our circuit that, as Mr.
10 Ching has referred to it, the notice rule, that before the
11 Ninth Circuit will dismiss a case under 12(b)(6) with
12 prejudice it requires that a pro se plaintiff be given
13 notice of the deficiency and an opportunity to amend.

14 QUESTION: Well, it --

15 QUESTION: Was this a dismissal under 12(b)(6)?

16 MR. NICHOLS: No, it was not. This was a
17 dismissal under 1915.

18 QUESTION: Well, did you just misspeak yourself?

19 MR. NICHOLS: No. What I said, what I intended
20 to say, Justice White, was that the Ninth Circuit in
21 reversing the 1915 dismissal pointed out that many of
22 these allegations as they stood would not survive a
23 12(b)(6), but that the district court ought to give the
24 plaintiff, Mr. Hernandez, an opportunity to replead in
25 light of its discussion of those legal deficiencies so

1 that he could attempt to avoid those 12(b)(6)
2 deficiencies.

3 QUESTION: Well, what about 1915? What did they
4 say about 1915?

5 MR. NICHOLS: They said that 1915 required them
6 to be able to take judicial notice that no rapes occurred,
7 and they could not do that.

8 QUESTION: Well, the state is challenging that
9 standard for dismissing under 1915.

10 MR. NICHOLS: The state, as I understand it, is
11 contending that the district court has absolute and
12 standardless discretion to dismiss under 1915.

13 QUESTION: Well, anyway, they disagree with the
14 Ninth Circuit on 1915.

15 MR. NICHOLS: Certainly.

16 QUESTION: They do. Well, are you going to
17 argue about that? Are you going to get to that sometime?

18 MR. NICHOLS: Yes, Justice White. It is my view
19 that a 1915 dismissal cannot be justified unless the court
20 can make a determination that no rational fact-finder
21 could ultimately conclude that the allegations of the
22 complaint are worthy of belief.

23 QUESTION: But even Robin Hood and his merry men
24 does not qualify for that in your view?

25 MR. NICHOLS: In my view Robin Hood and his

1 merry men without any other facts does not, would be
2 dismissible under 1915.

3 QUESTION: Would not?

4 MR. NICHOLS: Would.

5 QUESTION: It would?

6 MR. NICHOLS: Yes. But what I am saying is
7 that --

8 QUESTION: Why is that?

9 MR. NICHOLS: -- if you superimpose additional
10 facts on top of that, then maybe you can start dealing
11 with a mentally ill prisoner who perceives matters perhaps
12 a little differently than you and I might perceive them,
13 articulates them a little differently --

14 QUESTION: I understand, but what -- your bottom
15 line is I can dismiss it as a district judge? A guy comes
16 in and says I have been raped by Robin Hood and his merry
17 men --

18 MR. NICHOLS: If that is all he says --

19 QUESTION: That's all he says.

20 MR. NICHOLS: That's all he says --

21 QUESTION: I don't have to let him amend?

22 MR. NICHOLS: That's my bottom line.

23 QUESTION: Why don't I have to let him amend?

24 MR. NICHOLS: I am sorry. If I can back up for
25 a moment, Justice Scalia. If that's all he says and he

1 doesn't attempt to amend. If he attempts to -- he ought
2 to be given notice, in my view, that it is the court's
3 intent to dismiss under 1915 unless he amends to set forth
4 some additional facts that carry with them an indicia of
5 rationality.

6 QUESTION: But the Ninth Circuit disposed of the
7 1915 issue on the requirement of judicial notice.

8 MR. NICHOLS: That's correct.

9 QUESTION: And then the remand wasn't in
10 connection with 1915, it was the 12(b)(6).

11 MR. NICHOLS: I believe the remand was on both
12 issues.

13 QUESTION: Well, what were they going to remand?
14 Oh, I mean the remand for giving him a chance to amend was
15 on 12(b)(6).

16 MR. NICHOLS: They were going to give him a
17 chance to amend to cure the 12(b)(6) deficiencies and
18 to --

19 QUESTION: And?

20 MR. NICHOLS: -- and to amend to cure what
21 appeared to be irrational allegations as they stood.

22 QUESTION: Under --

23 MR. NICHOLS: Under 1915.

24 QUESTION: If one reads 1915(d) in connection
25 with Rule 56 for summary judgment in a civil case, Rule

1 12(b)(6), motion to dismiss, it is supposed to open the
2 possibility, one would think, and I think Neitzke supports
3 this, of a judge, before the complaint is served or
4 answered, at a very, very early stage, to dismiss a
5 certain small class of cases even though they might state,
6 if the facts were believed, they might state a legal
7 claim. Now, if one tacks on the notice requirement that
8 the Ninth Circuit is talking about, the leave to amend, it
9 loses all its usefulness.

10 A judge is far, a trial judge is far better off
11 saying I'll never use 1915, we'll just get the state to
12 respond, file a motion for summary judgment, and decide it
13 that way. It seems to me, with all the baggage that you
14 say 1915 carries with it, it is virtually useless.

15 MR. NICHOLS: Mr. Chief Justice, the posture
16 that we take is that a district judge can do all of those
17 things prior to service and prior to requiring that an
18 answer or responsive pleading be filed by a defendant.

19 QUESTION: But the district court will have
20 taken up a considerable amount of its time in doing those
21 things. It would have perhaps taken less time to simply
22 say let the state answer, file a motion for summary
23 judgment, we'll have that argued, I'll decide it then.

24 MR. NICHOLS: Well, it seems to us, Mr. Chief
25 Justice, that the district court is required to take a

1 look at each of the allegations. For example in this case
2 there are some allegations that respectfully are not
3 irrational in my view under anybody's test.

4 QUESTION: No one doubts the district court must
5 take a look at each of the allegations, but the question
6 is may the district court dismiss some allegations as
7 frivolous without any ifs, ands, or buts about it?

8 MR. NICHOLS: I believe that the district court
9 may not do so unless and until a plaintiff has been given
10 a knowing opportunity to present his best evidentiary case
11 to the court. And if he can't pass muster at that time
12 then the district court can dismiss without having to have
13 process served.

14 QUESTION: What if he, what if the court does
15 all of that and after doing that 99 of the allegations are
16 clearly frivolous, they are of the Robin Hood category,
17 and there is one that, yeah, it could have happened, most
18 unlikely in the company of these 99 other absolutely mad
19 allegations. The court has to let that one go forward,
20 you think, and couldn't say this is a ridiculous,
21 frivolous suit, out of here?

22 MR. NICHOLS: That is our view, Justice Scalia.
23 The court does have to let that one go forward.

24 QUESTION: Well, why is that? It seems to
25 me -- do you know any other provision that is phrased this

1 way? It doesn't say it may dismiss if the action is
2 frivolous or malicious. It says it may dismiss if
3 satisfied that the action is frivolous or malicious. I
4 think that --

5 MR. NICHOLS: I know of no other statute that
6 has that --

7 QUESTION: Don't you think that has a flavor of,
8 look, use your common sense, district judge. This is
9 something that doesn't have to be accorded, the ability to
10 bring suit without paying the filing fees. If you're
11 satisfied that it's a frivolous suit, dismiss it without
12 prejudice, and if he wants to pay money to make these
13 frivolous claims he can do it.

14 MR. NICHOLS: Well, there is two questions there
15 as I see it, Justice Scalia. Number one is that this is
16 not a refusal in the first instance by the district court
17 to permit this complaint to be filed under section 19(a).
18 The district court did permit these complaints to be filed
19 and specifically found that it could not find on the face
20 of each separate complaint that it was frivolous. And the
21 1915(d) dismissal order was entered only after the
22 district court looked at all of these case, related them
23 all together and dismissed them on the basis of one is not
24 incredible but 28 is, in effect.

25 QUESTION: Dealing with a mentally disturbed

1 person, and that there was not much reason to believe that
2 any of these complaints was valid. And it would seem to
3 me a very reasonable determination by the district court.

4 MR. NICHOLS: It is our view, Justice Scalia,
5 that that type of a rationale puts you on the slippery
6 slope of essentially denying to mentally ill persons as a
7 class the right of access to the court because any
8 mentally ill person is going to be to some degree unable
9 to state a claim that would not be subject to that type of
10 criticism.

11 QUESTION: It's not a denial of access to the
12 courts. It's a denial of the special privilege of being
13 able to come to court without paying the money. Right?
14 You can always still file it if you can pay the filing
15 fee.

16 MR. NICHOLS: But that privilege was granted
17 here. This is a second step after that privilege was
18 granted by the district court.

19 QUESTION: Does the district court have any
20 discretion under 1915(a) if the affidavit is filed? I
21 don't read that section as requiring any determination of
22 merit or likely merit by the district court.

23 MR. NICHOLS: Well, there is an argument to be
24 made, and I don't believe it is a proper argument, but
25 there is an argument to be made that in section 1915(a)

1 the use of the word may, the district court may authorize
2 the filing without prepayment of fees, constitutes an
3 empowerment to the district court to refuse to authorize
4 such a filing even if the affidavit of poverty
5 conclusively establishes poverty eligibility. That is not
6 the case that we are dealing with here, however, because
7 the district court in this case did grant leave.

8 QUESTION: May I ask you a question, Mr.
9 Nichols? I'm not sure that I understand your argument to
10 be the same as the theory of the Ninth Circuit, and that's
11 what I want to be sure I --

12 MR. NICHOLS: It is not 100 percent the same,
13 Justice Stevens.

14 QUESTION: Well, specifically in the case of an
15 allegation that one would call fantastic or delusional
16 scenarios, men from Mars, little green men doing things to
17 someone. They wouldn't require notice to dismiss that
18 kind of a complaint, as I understand it.

19 MR. NICHOLS: Well, where I perceive my
20 difference from the Ninth Circuit, Justice Stevens, is
21 that the Ninth Circuit relied on a judicial notice concept
22 that the facts alleged were not subject to reasonable
23 dispute. Now that to me is an evidentiary test, and the
24 test that I am arguing to this Court is a test that is
25 measured at the stage of the fact-finder or the ultimate

1 determiner of the action, not an evidentiary test. And in
2 that sense it is a test that is closer, I believe, to the
3 summary judgment test that the Court has articulated in
4 Matsushita and Celotex.

5 QUESTION: I'm still a little -- I'm not sure
6 we're on the same wave length here, that's what's
7 bothering me. In order to affirm the Ninth Circuit one
8 would not have to hold that in the category of fantastic
9 or delusional scenarios, they treat those separately, that
10 notice is required. You may argue that notice is
11 desirable in those cases, but the Ninth Circuit didn't
12 hold that.

13 MR. NICHOLS: That's correct, Your Honor.

14 QUESTION: And what they said, that this is a
15 case which seems highly improbable but there is enough
16 corroboration -- Justice O'Connor mentioned the affidavit
17 and some of these things -- that they alleged 28 rapes,
18 well, maybe one occurred, who knows, that you can't, you
19 don't put it in the fantastic or delusional category, but
20 in the factual category. Then they say there is notice
21 required.

22 MR. NICHOLS: They -- I don't think the Ninth
23 Circuit imposes a notice requirement in 1915 at all.

24 QUESTION: Okay --

25 MR. NICHOLS: What the Ninth Circuit does do is

1 to require that all of the alleged facts be considered to
2 be true unless judicial notice to the contrary can be
3 taken.

4 QUESTION: And judicial notice, for example,
5 would be if they were men from Mars, we would take
6 judicial notice that that's fantastic and we can dismiss
7 without looking any farther.

8 MR. NICHOLS: Right.

9 QUESTION: But if you've got something that on
10 its face is not totally improbable you don't dismiss on
11 its face --

12 MR. NICHOLS: That's absolutely correct.

13 QUESTION: -- without requiring a response.

14 MR. NICHOLS: That's absolutely correct, Justice
15 Stevens.

16 QUESTION: Mr. Nichols, your test is what? It's
17 an absolute -- isn't it all relative? The men from Mars?
18 I mean, Robin Hood is dead, I suppose, but men from Mars?
19 There may be men from Mars, you know. Do we really know
20 that there aren't?

21 MR. NICHOLS: Well, I think that's --

22 QUESTION: If somebody came in with a paid
23 complaint alleging some cause of action that depended upon
24 that, you know --

25 MR. NICHOLS: I think that's what judges sort

1 out, Justice Scalia.

2 QUESTION: So it's not an absolute impossibility
3 test. It's just what seems to you to be likely or not,
4 right?

5 MR. NICHOLS: No. Not what seems to the
6 individual district judge. What any rational fact-finder
7 could determine. I go back here and I rest very strongly
8 on the test in the summary judgment cases, that the
9 rational fact-finder is the test, and that's not --

10 QUESTION: You are irrational if you allow the
11 possibility that there exist creatures on Mars?

12 MR. NICHOLS: I'm sorry?

13 QUESTION: You're irrational if you entertain
14 that possibility? Is that --

15 MR. NICHOLS: In the present state of knowledge
16 in this society I think that is true.

17 QUESTION: If you entertain the possibility?

18 MR. NICHOLS: There is nothing that I am aware
19 of --

20 QUESTION: My goodness. I'm glad you weren't on
21 board with Columbus.

22 MR. NICHOLS: I'm sorry?

23 QUESTION: I'm glad you were not on board with
24 Columbus. I mean, you know, they would have said the same
25 thing about the round earth, I suppose.

1 MR. NICHOLS: Well --

2 QUESTION: Don't feel badly about this, Mr.
3 Nichols. You can stick with it if you like.

4 MR. NICHOLS: I suppose that Columbus was
5 putting up some of his own money in connection with the
6 ships that he sailed west on and not asking entirely for
7 the crown's fisc on it.

8 QUESTION: Spain didn't have a section 1915(d).

9 QUESTION: Mr. Nichols, it seems to me what you
10 have come back to, though, is that you say this is the
11 same as a summary judgment standard. I'm not sure that I
12 discern any difference.

13 MR. NICHOLS: That -- I think that is
14 essentially right. Where there is a difference is --

15 QUESTION: But if you say that then don't you
16 run contrary to what we said in Neitzke?

17 MR. NICHOLS: I am sorry, Justice Kennedy.

18 QUESTION: If you say that isn't that contrary
19 to our case in Neitzke where we said there is a
20 difference?

21 MR. NICHOLS: Neitzke dealt with the
22 distinctions between 1915(d) and 12(b)(6), not
23 distinctions between 1915(d) and summary judgement.
24 12(b)(6) you have to accept as true the facts that are
25 alleged. Summary judgment you can probe those facts to

1 the degree that if you conclude that no rational
2 fact-finder could support a conclusion you can grant
3 summary judgment, even though there is a scintilla of
4 evidence to the contrary. And that is the, that is the
5 test that I am proposing.

6 QUESTION: What is the standard of review? Do
7 you have a position on that? What --

8 MR. NICHOLS: Yes, Justice Scalia. The
9 standard --

10 QUESTION: Is it de novo entirely or abuse of
11 discretion? What?

12 MR. NICHOLS: I would propose a de novo standard
13 or review because what we are talking about here is
14 judging the viability or nonviability of written
15 documents. It's not like a Rule 11 situation where you
16 are inquiring into the reasonableness of an investigation
17 under the circumstances.

18 QUESTION: Even though it says if satisfied, the
19 court may do it if satisfied that the action is frivolous?

20 MR. NICHOLS: It seems to me that the if
21 satisfied test of absolute standardless discretion would
22 do precisely what Mr. Ching conceded to Justice O'Connor
23 would happen, namely allow a district judge in Michigan to
24 handle exactly the same allegations as a district judge in
25 Texas in completely opposite ways. And --

1 QUESTION: That may be the case, but that's
2 always the case when you apply an abuse of discretion
3 standard. If there is discretion it means things can be
4 done differently in different districts.

5 MR. NICHOLS: Well --

6 QUESTION: But you have no explanation for the
7 words if satisfied that then. It may as well have read,
8 as far as your case is concerned, if the action is
9 frivolous or malicious, which is not what it says.

10 MR. NICHOLS: That's correct, Your Honor. I do
11 not have an explanation.

12 QUESTION: You don't defend the Ninth Circuit's
13 standard, and I suppose we could, if we don't agree with
14 it either I suppose we could just remand and say make up
15 another one, or we could say here's what the right
16 standard is. And we could say and by the way, the
17 respondent proposed a standard that we think isn't too
18 bad, so we're going to remand and have you decide the case
19 under that standard.

20 MR. NICHOLS: It --

21 QUESTION: Is that what we should do?

22 MR. NICHOLS: I'd take it a step further,
23 Justice White.

24 QUESTION: You wouldn't have us apply your
25 standard up here?

1 MR. NICHOLS: I would not have you apply my
2 standard up here. I would have you remand the case to the
3 Ninth Circuit with directions to remand it to the district
4 court to apply that standard.

5 QUESTION: Or, if we don't agree with your
6 standard, whatever standard we come up with should go back
7 to the district court?

8 MR. NICHOLS: Whatever standard you come up with
9 ought to go back to the district court, and it ought to be
10 a standard that is applied to each specific factual claim
11 and not just simply to the complaints as a whole.

12 QUESTION: The United States seems to think that
13 the lower courts are at sea after Neitzke. They don't,
14 they're all over the lot. Is that right?

15 MR. NICHOLS: I don't know that I would argue
16 with that.

17 QUESTION: All right. Thank you.

18 QUESTION: Thank you, Mr. Nichols.

19 Mr. Ching, do you have rebuttal? You have 16
20 minutes remaining.

21 REBUTTAL ARGUMENT OF JAMES CHING

22 ON BEHALF OF THE PETITIONERS

23 MR. CHING: Your Honor, I would suggest that the
24 Court was correct in stating that there has been an
25 accretion of miscellaneous procedures, all of them

1 unauthorized by law, such as the Spears and Martinez
2 reports, such as holding these complaints in some file,
3 such as requiring or in fact encouraging fact pleading
4 rather than notice pleading in these instances. These
5 measures are inappropriate for this lowest tier of
6 decisions to be made by the district court.

7 Neitzke pointed out there is a difference
8 between summary judgment and 1915(d). Similarly there is
9 a difference between 1915(d) and summary -- and a motion
10 to dismiss. 1915(d) has a purpose. It is presumptively
11 supposed to do something. It is supposed to screen
12 frivolous cases out. This is not a decision that requires
13 a panoply of procedures, nor does it require adversaries
14 be summoned to report on the true facts of the situation.

15 QUESTION: May I ask you, Mr. Ching, what your
16 understanding of the Ninth Circuit rule is? Is it not
17 true that they think there's a category of cases called
18 fantastic or delusional that the district judge can just
19 dismiss out of hand?

20 MR. CHING: Yes. But my interpretation of the
21 words, in reading both opinions, is that fantastic and
22 delusional must be established by judicial notice.

23 QUESTION: Right. If they, in other words if
24 they take judicial notice of the fact that even though
25 it's possible, as Justice Scalia points out, the

1 probability that there are men from Mars in this
2 particular prison is sufficiently remote that the judge
3 can take judicial notice of the improbability and
4 therefore go ahead and dismiss?

5 MR. CHING: I believe I must disagree with that.
6 It is a rational attempt to make sense of what the Ninth
7 Circuit says. However, judicial notice is quite clear.
8 We have a rule that states what judicial notice can be
9 taken of.

10 QUESTION: What is it?

11 MR. CHING: Well, it states that there is
12 permissive and mandatory judicial notice available of such
13 facts in a general group that are beyond question,
14 statutes of the United States --

15 QUESTION: Which negate the allegations of the
16 complaint? Is that it?

17 MR. CHING: Yes. And so by extension I find it
18 very difficult to think that a court could in good faith
19 take judicial notice that there are no martians.
20 Therefore we're left --

21 QUESTION: What do you suppose we meant when we
22 referred -- that comes out of Neitzke, I think, the
23 fantastic or delusional scenarios. Do you think, what do
24 you think we meant by that?

25 MR. CHING: I think the Court did in fact mean

1 Mars. It meant --

2 QUESTION: We didn't mean judicial notice
3 though?

4 MR. CHING: You certainly did not, Your Honor.
5 You meant exactly the opposite. You meant a subjective
6 common sense determination, ab initio, without an
7 accretion of procedures.

8 QUESTION: But what is it, maybe I miss it in
9 the Ninth Circuit, what is it in the Ninth Circuit opinion
10 that tells us that even in the kind, the martian type
11 delusional case they are not going to dismiss? I don't
12 understand the judicial notice argument in that particular
13 context.

14 MR. CHING: Well, I must say I find it very
15 difficult to understand it as well.

16 QUESTION: I thought what they said was that
17 there are allegations here that have some factual support,
18 and there is enough factual support that we'll send them
19 back and have the district judge take a look at them.

20 MR. CHING: Exactly. Well, judicial notice is
21 the wrong term. This is --

22 QUESTION: They don't use that term, do they?

23 MR. CHING: Yes, they do.

24 QUESTION: Do they?

25 MR. CHING: In both opinions. They are quite

1 firm and they refer to the rule itself. This is the
2 problem.

3 QUESTION: You're right.

4 MR. CHING: The problem is the term of art
5 cannot be utilized in this context with any rational,
6 legitimate administrative justification. There is no
7 judicial notice possible that there are no martians.
8 Hence Mr. Hernandez will prosecute a martian complaint.
9 Certainly if it's well pleaded it will go through
10 12(b)(5), 12(b)(6) rather. If it's, if the people cannot
11 produce evidence, the defendants, that there are no
12 martians, it passes summary judgment. We have to go to
13 trial and ask the jury what essentially the judge should
14 have done in the first place. We will have to ask the
15 jury whether it's rational to believe there are martians
16 who are prosecuting, who are, with the aid of the
17 Department of Corrections, persecuting --

18 QUESTION: And if they put a martian on the
19 stand the jury might believe them.

20 MR. CHING: Very well. And imagine discovery,
21 you know. The problems are rife, and the problems arise
22 because the trial court under the Ninth Circuit doctrine
23 is not given sufficient leeway to make these rational
24 decisions.

25 QUESTION: And your point is if a martian is,

1 can be determined delusional, it's not too much of a jump
2 to say that these allegations of repeated rapes while he
3 was asleep without his awaking are pretty close to the
4 same category?

5 MR. CHING: I would say within the context of
6 these five, yes. He supplied us his entire medical data.
7 We know he is a diagnosed psychotic. We know he is taking
8 drugs for this condition.

9 QUESTION: Yeah, but what do you do about the
10 affidavit of the eye witness?

11 MR. CHING: I am prepared to admit there is a
12 range of possibilities that he can create and he has
13 created. Any lawyer worth his salt can figure out which
14 ones are going to have the best chance of succeeding.

15 QUESTION: So do you say the complaint
16 nevertheless should have been dismissed in its entirety?

17 MR. CHING: Yes. I believe that --

18 QUESTION: I haven't, I don't understand that.

19 MR. CHING: There is a smaller context, and with
20 great solicitude you can isolate any one of these
21 pleadings and make sense of them. But you're not required
22 to interpret this in an isolated context. When a
23 complaint comes to the court it is to consider the whole
24 complaint.

25 QUESTION: But just because the fellow is

1 psychotic doesn't mean he's not going to be raped.

2 MR. CHING: Oh, certainly not. My point here,
3 though, is this particular psychosis is one that affects
4 perception and the ability to deal and frame complaints
5 which have some basis in reality.

6 Well, I am perfectly pleased to submit the
7 matter at this point.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ching.

9 The case is submitted.

10 (Whereupon, at 1:50 p.m., the case in the
11 above-entitled matter was submitted.)
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CERTIFICATION

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No. 90-1846 GEORGE F. DENTON, DIRECTOR OF
CORRECTIONS OF CALIFORNIA, ET AL., Petitioners v.
MIKE HERNANDEZ*

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BY Michelle Sanders

(REPORTER)