OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: KEITH J. HUDSON, Petitioner, v.

JACK McMILLIAN, ET AL

CASE NO: 90-6531

PLACE: Washington, D.C.

DATE: Wednesday, November 13, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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KEITH J. HUDSON, :

Petitioner :

v. : No. 90-6531

JACK McMILLIAN, ET AL. :

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Washington, D.C.

Wednesday, November 13, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

ALVIN J. BRONSTEIN, ESQ., Washington, D.C.; appointed by this Court on behalf of the Petitioner.

JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Petitioner.

HARRY McCALL, JR., ESQ., Special Assistant Attorney General of Louisiana, New Orleans, Louisiana; on behalf of the Respondents.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We will now hear oral argument in No. 90-6531, Keith J. Hudson v. Jack McMillian, et al.

Spectators are admonished not to talk until you get out of the courtroom. The Court remains in session.

Mr. Bronstein.

ORAL ARGUMENT OF ALVIN J. BRONSTEIN

ON BEHALF OF THE PETITIONER

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

I represent, by appointment of this Court, the petitioner, Keith Hudson, a prisoner at the Louisiana State Penitentiary at Angola, Louisiana.

On the night of October 30, 1983, Mr. Hudson had an exchange of words with one of the respondents, Sergeant McMillian. The officer decided to give Hudson a disciplinary charge, two charges I believe, and to comport with the policy, McMillian then called another officer, the respondent Sergeant Woods and again, by virtue of policy, called their ranking superior, Lieutenant Mezo.

The officers placed Hudson in full restraints before moving in to a disciplinary cell which is referred to in the record as the dungeon. Full restraints

consisted of handcuffs, attached to waist chains and shackles or leg irons. In other words, Hudson was essentially immobilized. The two sergeants then led Hudson out of his cell, down a corridor and out of sight of any other prisoners in their cells.

They stopped, and at that point the two sergeants, both of whom were over 6 feet tall and each weighing 200 or more pounds, began to beat the petitioner. Sergeant Woods held him from behind and hit him in the back. McMillian repeatedly punched Hudson about the face, mouth, and chest. Lieutenant Mezo stood by and observing the beating and saying only, quote: "Don't be having too much fun, boys."

Hudson sustained some injuries, bruises and swelling to his face, mouth and lip; a split lower lip; and a cracked dental plate, a few bruises on his body. After the beating ended he was taken and thrown into the disciplinary cell. He brought a pro se action under the civil rights act, and the case proceeded to a full trial.

The trial court, after reviewing the testimony of various witnesses and certain exhibits, they heard from a number of prisoners, a number of officers, found essentially the facts that I have just recited. The trial court went on to find that there was no need to use any force because the petitioner was already in restraints,

that the force used was excessive, and that the respondents' conduct was, quote: "can only be seen as motivated by malice."

The court found that Hudson's Eight Amendment rights were violated and awarded him $800 in compensatory damages. The court of appeals did not disturb any of the findings -- the trial court's factual findings. Indeed, it repeated them and deplored the use of unnecessary force in the treatment of prisoners, calling it a blight on the criminal justice system.

The Fifth Circuit stated that because no force was required in this case, the force used was objectively unreasonable. The conduct of the respondents, the court said, and again I quote: "qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain." End quote.

However, the court of appeals went on to reverse the judgment of the trial court because it found that Hudson did not suffer a significant injury, one prong of a four-element standard for Eighth Amendment violations, constructed by the Fifth Circuit, without any reference to any decision of this Court.

The court of appeals refers only to a prior Eighth Amendment decision in its court in the Fifth Circuit which in turn relies solely on a Fourth Amendment

case in the circuit that misreads this Court's decision in Graham v. Connor.

QUESTION: Do you object just to the first part of the Fifth Circuit's four-part test, the significant injury part? Do you think the other factors are appropriate under Whitley?

MR. BRONSTEIN: I think the other factors are rather confusing. They seem to be interrelated. One must be related to the other --

QUESTION: What case do you think provides the proper standard? Is it Whitley or some other case?

MR. BRONSTEIN: I don't think we need to reach that, Justice O'Connor, in this case because whatever the standard is --

QUESTION: Well, would you answer me, please, what case do you think provides the proper standard for a case of this kind?

MR. BRONSTEIN: I think in this case where there was no penalogical justification for the behavior of the officers, where there was no emergency, where there was no tense situation, there was no need to make split-second decisions, the test ought to be deliberate indifference: that is, the unnecessary and wanton infliction of pain.

QUESTION: I would have thought that probably Whitley provided the standard in asking whether the force

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was applied in a good-faith effort to maintain or restore discipline, or whether it was done maliciously or sadistically for the purpose of causing harm.

MR. BRONSTEIN: Whitley --

QUESTION: I would think that would fit, would it not?

MR. BRONSTEIN: It does fit, but I don't think it is a necessary standard in this case under these facts. Whitley is a situation where you had a major disturbance. You still had a hostage. You had officers and prisoners milling around. The officer had to make a decision when he saw the prisoner running up the stairs --

QUESTION: It sounds to me like you would think that we have to apply the standard for perhaps failure to provide medical care?

MR. BRONSTEIN: It's similar. Medical --

QUESTION: But in that context we have said that significant harm has to ensue. I'm a little surprised that that's the standard you propose.

MR. BRONSTEIN: Well, I don't recall seeing significant harm in Estelle, Justice O'Connor.

QUESTION: I thought we had said that in the Estelle prison conditions format that there has to be a showing of prolonged and significant discomfort.

MR. BRONSTEIN: That was one of the things that

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had to be shown. There had to be the unnecessary -- the objective element was some unnecessary and wanton infliction of pain. Pain -- you can have pain without actual injury, without harm. You can have it momentary. In this case, if instead of administering the beating, they had hooked up the prisoner to the tucker telephone that's described in a number of this Court's opinions, there would have a been a great deal of pain, or some pain, but no injury.

So I think the test is closer to Estelle under these facts that it is to Whitley. As I respectfully said in the beginning, we don't need to reach that in this case because whatever the test is, it's met. The trial court found malice. The court of appeals talked about the unnecessary and wanton infliction of pain. What the court of appeals did that's wrong is to construct an extra constitutional requirement without any support in the history of the Eighth Amendment or in decisions of this Court.

The Court has never focused on significant injury in Eight Amendment cases, but rather on the unnecessary and wanton infliction of pain.

QUESTION: I guess you at least have to have injury in fact to have any standing?

MR. BRONSTEIN: Injury in fact?

QUESTION: Yes.

MR. BRONSTEIN: Well, I think injury goes -- it's probative of damages. It is probative of the state of mind --

QUESTION: And may be for constitutional standing?

MR. BRONSTEIN: Well, I would respectfully disagree that you need -- if you're talking about physical injury -- that may be where we are talking about two different things. There has to be some hurt, yes, I agree with that. There has to be some hurt, which can be psychic pain. It can be physical injury. It can be physical pain without injury. But, yes, under that definition, there has to be some injury.

I think it's important to dwell for a moment on what is not involved in this case because that helps us get to the standard issue. There are no substantial deference concerns because there was no disturbance. It was not a tense situation. There were no security problems and, therefore, there was no penalogical justification for the conduct of the respondents, found by both lower courts.

This was not a spontaneous incident involving split-second decisions, but rather a carefully planned and brutal attempt to cause fear, pain, suffering,

humiliation, and injury. They set out -- the respondents set out to teach Hudson a lesson, and that was to punish him.

QUESTION: Mr. Bronstein, suppose -- well, punish him or -- suppose the same thing had happened after he was arrested but before he had been convicted, he got beat up by some prison guards, would he have had an Eighth Amendment claim?

MR. BRONSTEIN: No. The Eighth Amendment only applies after conviction. He would have had --

QUESTION: That's very strange.

MR. BRONSTEIN: -- a substance due process claim or a Fourth Amendment claim. That would be Graham v. Connor.

QUESTION: Why should it change that way, that --

MR. BRONSTEIN: This Court has said it changes that way upon conviction.

QUESTION: Is there any indication in this case that it was the policy of the prison to punish people this way?

MR. BRONSTEIN: No, on the contrary. The policy of the prison is not to administer --

QUESTION: Were any of these officials at the policy level of the prison?

MR. BRONSTEIN: Well --

QUESTION: The reason I am asking is, I mean, assuming we agree with you on the, you know, extent of the injury point, I just wonder whether we should remand for some further findings by the district court. I mean, I am particularly referring to what we said in Wilson v. Seiter, that deprivation does not constitute punishment if prison officials -- neither knew or had reason to know about it. I think we might by officials something more than a prison guard.

MR. BRONSTEIN: Respectfully, I disagree. I think if you look at all other cases we talk about guards as being officials. In the context of a facility like this, a prison guard, and these were sergeants and one lieutenant, they administer on behalf of the State an enormous amount of authority and power. They have power and authority over the prisoner, the prisoner's life and every moment of that day.

They called their superior officer; he is referred to in the record as "rank." That's the expression they used. So clearly a lieutenant is a very senior officer there. But we have no derivative liability claim here. We don't have an issue of whether the State is liable. We have no issue of whether superior officers are liable because of the actions of the lower officials.

That's not involved in this case.

He sued only the respondents individually. They were given a certain amount of authority and power by the State. There is no color of State law issue in this case, so I don't see any problem about policy being involved in this case.

Indeed, the official policy would be that you don't beat up prisoners. But as it apparently happened, these guards did beat up a prisoner. They are liable because they beat him up, because the State gave him -- gave them the authority or the power to do it.

They were wearing the uniforms. They had the power to put this person -- they were engaged in, in the language that you yourself used, Justice Scalia, in West, where you were concerned about -- West v. Atkins -- you were concerned about the doctor, the private physician, who didn't have any supervisory role, nor did he have any penalogical role, although the majority of the Court disagreed with you -- your characterization of that.

But here these officers did have penalogical roles; that's what they do. They discipline prisoners, and they remove prisoners. They put them in restraints. That is accepted practice, to put people in restraints at a maximum security unit before you move them. And then they beat him on their way to discharging their other

authorities. The beating is what we are complaining about.

QUESTION: Is it essential for you to win to win under -- to win on the Eighth Amendment? Would a pre-trial detainee win in this case under due process?

MR. BRONSTEIN: Yes, I think a pre-trial detainee would win under a substantive due process claim.

QUESTION: Well, I suppose your client could too.

MR. BRONSTEIN: Theoretically he could, but this Court on a number of occasions has said that the substantive due process right of a sentenced prisoner is redundant, that the Eighth Amendment is the one we must look to.

QUESTION: So you really are saying -- you say, it is just as obvious as can be that this is punishment --

MR. BRONSTEIN: That's right. That would meet Webster. I didn't mean to interrupt, Justice White.

QUESTION: Go ahead.

MR. BRONSTEIN: Webster says to punish is to cause to undergo pain, loss, or suffering. Well, they caused him pain and suffering in this case, and they did it in the Eighth Amendment context because they were wearing uniforms and they were engaged in, at least in part, what they are supposed to do.

QUESTION: And he was in prison?

MR. BRONSTEIN: And he was in prison.

QUESTION: What would be the leading case from our Court for supporting this substantive due process violation for, say, a pre-trial detainee here?

MR. BRONSTEIN: Well, I think Graham v. Connor --

QUESTION: Well, Graham said --

MR. BRONSTEIN: The Fourth --

QUESTION: Fourth Amendment, didn't it? Do you have to go back to Rochin against California?

MR. BRONSTEIN: There is a lot of dicta in more recent cases about that.

QUESTION: No holdings though, right?

MR. BRONSTEIN: In Bell v. Wolfish, there is some discussion of that, the pre-trial equivalent of Chapman -- Rhodes v. Chapman.

QUESTION: What about the school spanking case, where the Court drew the line between convictions and punishment, pre-conviction punishment. They said they might well be covered by substantive due process.

MR. BRONSTEIN: Yes, Ingraham -- in Ingraham, the Court said that.

QUESTION: Ingraham, I couldn't think of the name.

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QUESTION: That's the closest case on substantive due process?

MR. BRONSTEIN: I think so, but again, this Court keeps making it clear that Eighth Amendment is the appropriate standard when you are talking about a sentenced prisoner --

QUESTION: Mr. Bronstein, with apologies to Mr. Webster, that definition you read, it says to cause -- what was it again? To cause --

MR. BRONSTEIN: Undergo pain, loss, or suffering.

QUESTION: Well, I mean, when I accidentally hit somebody with my car, I cause that effect, and I -- you know, I would not say that I punished that person. I would say I hurt the person. Doesn't punishment have some further --

MR. BRONSTEIN: Yes. Then we get to the Eighth Amendment, the cloaking with authority and that becomes punishment in Eighth Amendment terms.

And I would like to reserve the rest of my time, if I may.

QUESTION: Very well, Mr. Bronstein.

Mr. Roberts.

ORAL ARGUMENT OF JOHN G. ROBERTS

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

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MR. ROBERTS: Thank you, Mr. Chief Justice, and may be it please the Court:

The Federal Government runs the second largest prison system in this country, second only to California's. That responsibility has made us keenly aware of the problem of frivolous brutality suits filed by inmates -- inmates who have nothing but time on their hands and for whom a trip to the courthouse for a hearing would be a pleasant diversion.

Accordingly, we would welcome any development that holds promise of weeding out such frivolous suits. Like every other circuit to have considered the question, however, we cannot embrace the Fifth Circuit's significant injury test.

That test is an extra-constitutional construct with no basis in the text or history of the Eighth Amendment or in this Court's decisions interpreting it. What this Court has focused on is not significant injury, but the, quote: "unnecessary and wanton infliction of pain." End quote. That was the touchstone last term in Wilson, a few terms ago a Whitley --

QUESTION: And what case do you think provides the standard for analysis?

MR. ROBERTS: We do think Whitley does, Your

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Honor.

QUESTION: Yes.

MR. ROBERTS: This action was taken in response to a prison disturbance and therefore the principles of Whitley would apply. It seems to me that the conclusion that there was no justification for the force that was applied is the answer to the question that Whitley asks and can't be used to prove the inapplicability of the Whitley standard.

The court below acknowledged that this Court's standard was satisfied in this case. In the words of the Fifth Circuit, "The conduct of McMillian and Woods was clearly excessive and occasioned the unnecessary and wanton infliction of pain." End quote. It threw it out because in the court's view, Hudson had not sustained significant injury.

But the respondents have not and cannot today cite a single decision from this Court indicating that significant injury is a threshold -- requirement on top of the unnecessary and wanton infliction of pain.

We think that most beatings that give rise to a valid Eighth Amendment claim would also give rise to significant injury, but it is not a threshold requirement that the framers forgot to mention and this Court has never had occasion to mention. It is simply one factor to

consider in deciding if there has been unnecessary and wanton infliction of pain.

The Fifth Circuit's test will, we think, weed out frivolous claims, but at too high a price. It will, for example, weed out meritorious claims like the one before the Court today. My brother quite properly focused on the facts of this case, which come to this Court undisputed.

The petitioner, while cuffed and shackled, was punched in the eyes, the mouth, the chest, the stomach, kicked from behind. He sustained bruises, swelling, a split lip --

QUESTION: Mr. Roberts, what about a case in which a prisoner claims to have simply suffered mental suffering, as the result of some action taken by the prison authorities, and there is no sign, no physical sign of any actual injury?

MR. ROBERTS: My answer is in two parts, Your Honor. First of all, I don't think we can categorically exclude such claims. It is easy to imagine cases of mental torture that would qualify under the Eighth Amendment: a prison guard pretending to partially load a revolver and then playing Russian Roulette with the inmate. I think that would be the infliction of pain, unnecessarily and wantonly.

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I do think though when there is a claim of pain which isn't substantiated, if you will, by more concrete evidence, that a court can be properly skeptical of the claim. But --

QUESTION: Mr. Roberts, we have held that everything that happens to you when you are in prison is not punishment, so you could be made -- you could be caused to suffer pain by your confinement unintentionally, without that being punishment. Why isn't there an additional requirement that even if somebody intends to cause it, it has to be the somebody who has some responsibility for establishing penal policy for the State?

MR. ROBERTS: I think that that is relevant when the question --

QUESTION: And that any other causes of action you have don't depend on the Eighth Amendment. I mean, I assume you have an assault cause of action against somebody who does this thing? Why is it a violation of the Eighth Amendment?

MR. ROBERTS: Well, I think there's a -- it's a different question, whether the State can be held liable under St. Louis v. Praprotnik. There you do need to establish that the harm was pursuant to a State policy. But here, this fits the ordinary dictionary definition of

punishment or Judge Posner's definition that was cited by Your Honor --

QUESTION: But the Eighth Amendment only applies to punishment by the State. It doesn't apply to punishment by my mother or punishment by someone else. Don't you have to tie this to the State?

MR. ROBERTS: You have to show a State action, and I don't think there is any dispute that that is present in this case. You don't have to show that the State of Louisiana passed a statute saying you may beat the -- prisoner before the prisoner --

QUESTION: You have to show more than State action. You have to show State punishment. When the heat goes off by accident in the prison and the prisoners are very cold, painfully cold, for several days, that's State action. The State keeps them there and doesn't heat the prison, but it is not cruel and unusual punishment because there is no intent on the part of the State as a State to punish.

MR. ROBERTS: This is punishment under the ordinary definition of the term. It was a consequence of the prisoner's failure to follow the guard's orders.

QUESTION: Was it punishment by the State? That is what I am saying. Just because an individual -- whenever an individual employee of the State goes beyond

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his authority and acts in this way, is it reasonable to say that is punishment by the State?

MR. ROBERTS: In this case it is because it is punishment under the definition and a response by a State actor to a perceived violation of prison rules, a consequence. They said knock it off or else, and the or else was the punishment. Now, we don't think that every time a guard beats a prisoner it is necessarily punishment. We can imagine cases where it is not.

For example, a guard has difficulties at home and comes in in a rage and says, I am going to beat the first three people I see, and beats two guards and an inmate. That's not punishment of the inmate because it doesn't fit the dictionary definition. The inmate is not being -- in Judge Posner's words that you quoted in Wilson, it is not a deliberate act intended to chastise or deter.

The inmate in that case would have an assault remedy against the guard. But in this case --

QUESTION: Mr. Roberts, before you time is up, I would like to know what your answer would have been to this case -- do you think this prisoner would have had a cause of action if he had been pre-trial detainee?

MR. ROBERTS: Yes. Under Bell v. Wolfish, he would have sustained punishment without any other

legitimate State purpose and that would have violated substantive due process in the case of a pre-trial detainee.

Another example that may not be punishment, Justice Scalia, is a purely personal dispute, sort of two people who have been feuding since childhood, a Hatfield and a McCoy and the one becomes a guard and all of a sudden one is an inmate and the guard immediately assaults him, as he would if he ran into him on the street. We think in that case it may not properly be characterized as punishment.

But the key fact here is that the guard was exercising State authority to enforce prison rules established by the State, and in that situation it clearly qualifies as punishment.

In addition, of course, they did call upon Lieutenant Mezo --

QUESTION: It doesn't have to punishment for a crime? Then why in Bell v. Wolfish couldn't you have used the Eighth Amendment? Does it have to be punishment inflicted because of the conviction and because of your crime?

MR. ROBERTS: No, it does not. In Bell v. Wolfish, the Eighth Amendment was not applicable because the Court has held it applies only after conviction and

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sentence.

QUESTION: Exactly. That's my point. Why is that, because the punishment has to be a punishment inflicted for a crime that you have been convicted of and sentenced for.

MR. ROBERTS: Well, the Eighth Amendment doesn't impose such a limitation. It says that cruel and unusual punishments will not be --

QUESTION: If it doesn't then there is no explanation for Bell v. Wolfish.

MR. ROBERTS: Well, the Court has decided in Bell -- Ingraham and other cases that the Eighth Amendment protections are triggered only with conviction and punishment. That was the intent of the framers in establishing it. Having gotten over that hurdle, the question simply then is, and a threshold, is this punishment?

And it seems to me that when the guard is discharging his duties in enforcing the prison rules -- it's punishment in the normal sense. If you don't stop making a disturbance, I will punish you. He is --

QUESTION: The hurdle you referred to, it seems to me the very nature of the hurdle is, look at the kind of punishment the Eighth Amendment refers to is only punishment for the conviction of a crime. That's the

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nature of those decisions, it seems to me.

MR. ROBERTS: Well, the Court hasn't limited it such in the past. For example, in Estelle v. Gamble or something, the prisoners were not denied medical care because they had been sentenced for particular crimes. It was a condition of confinement.

The point is that in deciding -- once it is determined that it is punishment, the relative question is not whether there has been an actual physical injury, but whether the inmate has sustained pain, and in this case, we think he has.

Thank you, Your Honor.

QUESTION: Thank you, Mr. Roberts.

Mr. McCall, we will hear from you now.

ORAL ARGUMENT OF HARRY McCALL, JR.

ON BEHALF OF THE RESPONDENTS

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

We respectfully, obviously, differ with our friends, and we would suggest to Your Honors that the Fifth Circuit test is consistent with the decisions of this Court, and in particular with Wilson against Seiter.

Let me, if I may, remind you gentlemen that is the question that the Court asked in its grant of certiorari. That question was --

QUESTION: Would you like to remind me, too?

MR. McCALL: I beg your pardon.

QUESTION: I should, with my apologies for not mentioning specifically, Justice O'Connor.

The question was, did the Fifth Circuit apply the correct legal test when determining the petitioner's claim that his Eighth Amendment rights under the cruel and unusual punishment clause were not violated as a result of a single incident of force by the respondents, which did not cause a significant injury.

As counsel has pointed out to you, Justice O'Connor and gentlemen -- the Justices. I thank you, Your Honor.

The Fifth Circuit has a four-element test, and I think the only one with which we are concerned with today is the first element, namely that is, that there must be a significant injury.

Now, what my friends appear to have done is that they seem to be overlooking that or merging it, insofar as the decisions of this honorable Court are concerned, with the fourth element -- that is, the nature of the unnecessary and wanton suffering.

Let me say this, it will be recalled that in Estelle v. Gamble, the decision was that the indifference which was at issue must be to serious medical claims, not

just any medical claims -- serious medical claims. In Rhodes it was held that double-celling was not sufficiently serious to satisfy the objective component of the Eighth Amendment prison claim. And perhaps it's appropriate at this point for me to recall that in Wilson against Seiter, it was made clear by this Court that an Eight Amendment violation claim requires both an objective and a subjective element.

And in Rhodes, the question which was decided was that the objective element was not sufficiently serious. Here we're concerned with the objective element again. Now, Wilson, I think is the one which makes it clearest of all.

In Wilson, Your Honors cited your decision in Whitley with a proposition, and I quote: "Assuming the conduct is harmful enough to satisfy the objective component." Clearly what was said there was harmful enough. It excluded conduct which was less than harmful enough, whether you use the term "harmful," whether you use the term "significant," whether you use the term "insignificant," clearly what was stated there was that there was a level, if you will, below which you didn't have a constitutional violation.

QUESTION: Mr. McCall, what is that level? I mean, I think I can understand the level that you might

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call de minimis. You know, it's really negligible. I guess a slap over the knuckles with a ruler or something like that, but what criterion is there that would exclude this beating, this physical beating -- punching in the face, in the chest, and yet would include other things? What is your standard?

MR. McCALL: The answer to that is --

QUESTION: This is certainly above de minimis, isn't it?

MR. McCALL: No, we don't. We say that it is constitutionally de minimis.

Now, I'm sorry. I don't mean to be chopping logic with you, Your Honor, but the reason I say that is that, first, let's consider this conduct. In the finding of the trial court, it was that there were minor bruises and swelling to the face, mouth, and lip and damage to the dental plate. This is from page 26 of the joint appendix.

There were minor injuries to the back and mouth and a strange feeling while eating for several months. This at pages 28 and 29 of the joint appendix.

I think my answer to your question, Your Honor, is that there must be some physical -- in the case of a beating, and let me confine it to that, some physical evidence of the alleged physical violence.

QUESTION: Then you would think that the use of

an electric prod pole or some kind of device like that that didn't leave any physical remnants on the prisoner would be perfectly okay. It might hurt a lot but that's okay.

MR. McCALL: No, that doesn't follow. Forgive me, Your Honor --

QUESTION: I would think it would --

MR. McCALL: It doesn't follow. I was coming to that. You have two types of traces, if you will, from injuries. You have a beating such as this or such as this is alleged to have been, which I think everyone would expect to leave some traces. You heard Mr. Bronstein talk with eloquence about the two 6-foot guards who were pummeling this man and hit him, according to the record, maybe 9 or 10 times in the face.

He was examined by the medical technician 2 days later, and he found only minor bruises. Now, we would submit that as to that type of episode that you would expect a physical trace. Now, let us --

QUESTION: But you think that the Eighth Amendment does not prohibit having prison guards who will simply take one of the prisoners because he is not obeying their orders, hold him down and beat him up, just as long as all you have is a few bruises. That is okay, as a matter of prison policy?

MR. McCALL: I think that what you are suggesting is a conflict, if you will --

QUESTION: I'm asking what you're suggesting.

MR. McCALL: I am sorry, Your Honor, with due deference. What I have not said is beating him incontinently, because while we appreciate the fact that we must accept the findings of the trial court here, we do not agree with it. You will recall that the record shows that both these guards denied any sort of beating.

Now, we are stuck with the fact that there was a finding.

QUESTION: Yes, and the magistrate even found that this was not a single isolated incident, but a part of a continuing series of events, and that the supervisor said, just go right ahead, boys, as long as you don't have too much fun. That was the finding; is that right?

MR. McCALL: Almost exactly, Your Honor. The findings -- the finding was that it was not an isolated incident. The basis for that was the remark made by the magistrate in his opinion that they had also beaten another prisoner. There was no suggestion, there's nothing in the evidence, there's nothing in the magistrate's finding that this was a practice or a pattern. I think that the entire basis for that statement was, as I say, the off-hand remark that the other prisoner

was also beaten, as to which we have no evidence and nothing but the passing remark by the magistrate.

But let me come back, if I may, to your original question. Is there any objection to the administration of some sort of treatment or some -- something that gives a great deal of pain but doesn't leave a trace? No. Because what we say is that you have a different standard, if you will, where the violation consists of a physical beating, which would normally leave traces, or one which was calculated not to leave traces, because we all know, to the shame of ou system, that there are methods of torturing or punishing people that leave no traces.

As to those, if the testimony is that there was intense suffering, say, but that the nature of the procedure was such that it left no marks, then we do not urge this test of a -- an observable significant injury. What we're saying is, and we would respectfully enjoin the Court to bear this in mind. We are saying that where there is a physical invasion, if you will, a physical maltreatment of a prisoner which would normally be expected to leave some sort of traces, that then there must have been a significant injury.

Now, that doesn't exclude a significant injury that doesn't leave traces. For example, in your Estelle case, there was no physical trace, but what they said was

that studied indifference to serious medical needs could lead to a condition which would be sufficiently detrimental, if you will, sufficiently harmful to the prisoner to warrant invoking the Eighth Amendment.

By the same token, in the conditions of confinement, there was no evidence of any physical deterioration on the part of the prisoners, but the test there is not the marks, if you will --

QUESTION: Well, I would have thought this case came a lot closer to Whitley, it being a case where the prison guards were trying to maintain discipline and so is this. Why doesn't that case provide the standard?

MR. McCALL: My answer to it is that the difference is that in Whitley there is no question but what there was a serious deprivation of constitutional rights. The man was shot. You can't get much more serious than that. So that Whitley is where we --

QUESTION: Whitley just applies if the injury is more serious?

MR. McCALL: Well, I'm saying that Whitley itself had to do with a more serious injury, and I think that the difference --

QUESTION: It did, but I don't find in the opinion an expression that it could only be applied when someone was shot. I thought it dealt with the maintenance

of prison discipline.

MR. McCALL: If I recall Whitley, Your Honor, the Court -- Your Honors held that there was the -- clearly the -- more than significant injury and they held that that injury however did not constitute a constitutional deprivation because of the absence of the subjective element.

So that I don't think you can go off entirely on the physical -- on the objective, or entirely on the subjective. And this, as I recall, was the lesson of Wilson against Seiter, that you have both objective and subjective.

Now, clearly, in Whitley you had -- you satisfied the objective test, but the subjective test was not satisfied. Now, what we say here is that perhaps there may have been satisfaction of the subjective test, but the objective test was not satisfied. And the reason for that was that the injuries were so slight.

Now as I say, coming back again to your question, there can be injuries which are more than slight which don't leave any trace, such for example as the application of electric shocks or things like that. That, then, is a matter of testimony. But this is why it is so important to I think this Court and to courts generally to have a test which is one which can be applied and can be

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practically be applied.

How do you sort out those claims which are purely frivolous? Your Honors will recall that Judge Friendly, in that classic case, that not every push or shove --

Now, what this test purports to do is to eliminate the push or shove which is not -- one which is not of sufficient seriousness. Regrettably, as we know in a prison situation, it's not like it is in this room. There is, at the very least, animosity. There is at the very least a lack of cooperation, and I think as Judge Friendly said, the prison population is not one which is normally a peaceful or easy population to get along with. There is animosity on the part of the guards. If a prisoner is moved from one place to another, it's reasonable to assume that he's going to drag his feet, so to speak.

Now at what point does it become an invasion of his constitutional rights if he is urged along? And what we are saying is that -- and first, let me say that there are two questions presented by the question which Your Honors said, what is the proper test to apply? Conceivably, Your Honors could decide, yes, that is the proper test, but that in this case, this particular case, that the test -- the criterion was met. We don't think

so.

But what we do say to you is that this test is consistent with those decisions that I have mentioned, and in particular those decisions, Estelle, Rhodes, Whitley, and Wilson.

QUESTION: You don't -- you don't deny, I suppose, that the officers intended to discipline this man?

MR. McCALL: I suppose that is a question of definition, Justice White.

QUESTION: Well, do you think they expected to get him to obey or get him to do something, to -- didn't they want to alter his conduct in some way?

MR. McCALL: I really don't know. I don't know whether it was just that they were annoyed with him because they felt that they had -- he had given them lip, so to speak, and they were just going to show him or whether they hoped that this would have a salutary effect on future conduct. That -- I can't answer that --

QUESTION: Well, of course, I suppose if they intended to discipline him or affect his conduct some way or deter a repetition of his conduct, they would want to make sure that they did something to him besides inflict a frivolous injury -- I mean, just a de minimis thing. That wouldn't affect anybody.

MR. McCALL: I suppose you could say so, but let us take for example --

QUESTION: So you think these people just enjoyed being cruel?

MR. McCALL: No, I am not saying that, Your Honor. But I am saying I can't answer your question exclude the fact that maybe they were simply venting their impatience, their anger on him and were not --

QUESTION: Well, they certainly then intended to let him know how they felt --

MR. McCALL: No question about that, I think, Your Honor.

QUESTION: And you don't do that by just de minimis conduct.

MR. McCALL: Conceivably you could. It depends on the message. Take, for example, the traditional thing, where you --

QUESTION: You are not saying this was de minimis. You are saying it was constitutionally de minimis?

MR. McCALL: Correct, Your Honor.

Let us assume the old thing, that you go in and you see somebody and you say -- like this. You are conveying a message and you are not certainly inflicting an injury. The seriousness of it, I think, is simply a

measure of how do you get your message across?

Now, I'm -- this is why I have difficulty with your question, Mr. Justice White. I don't know whether they were saying -- or their mental process was, we are going to show this so-and-so that he can't do this to us or whether they were just saying, I've had it.

QUESTION: What if they beat him so that they broke his shoulder? They broke his shoulder. Would that violate the Eighth Amendment?

MR. McCALL: In my opinion, clearly it would.

QUESTION: Why?

MR. McCALL: Because he had a significant injury.

QUESTION: Yes, but supposing they'd beaten him and he had just stumbled after they hit him in the face or something and he broke his shoulder in the fall rather -- they didn't try to break his shoulder. What do you do with that case?

MR. McCALL: I think you then get into a question of causation --

QUESTION: Well, the causation is perfectly clear. He got hit in the face and he fell down and he broke his shoulder when he fell, but the officer didn't try to break his shoulder.

MR. McCALL: In that case, I would say yes.

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QUESTION: Yes what?

MR. McCALL: Yes, that there is an Eighth Amendment violation because you have -- once you establish a causation factor, whether it was intended that he should fall or whether the fall was the result of what they intended to do, that comes back to the basic --

QUESTION: See, my hypothetical is -- to use Justice Scalia's approach is clearly not a part of the intended punishment. The intended punishment was the same bruises you have got here, and then accidentally he broke his shoulder.

MR. McCALL: I think the legal principle is that you intend those consequences which would logically follow from your action. And if you administer a blow, the severity of which is such that it will cause a fracture, then you intend that.

But I am trying to answer your question, Mr. Justice, what was the intent of the guards here. I don't know whether the guards were simply angry or --

QUESTION: They did intend to beat him.

MR. McCALL: Did they beat him?

QUESTION: I said they -- well, you are stuck with the findings, I guess --

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

QUESTION: All right, let's be stuck with them.

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Don't you suppose they intended to beat him?

MR. McCALL: I'm sure they did. But what I am saying is that a beating by itself does not rise to the level of a constitutional deprivation unless --

QUESTION: Even if they intend to punish him for his conduct?

MR. McCALL: Yes, I think even so because I think that the objective test is not in any way affected by the intention of the person who is administering the beating. So that let us assume that they were, as you say, saying, we are going to beat him, we are going to punish him in our own. I doubt that they did. I suspect that what they did was that -- I don't know whether, as somebody had suggested earlier today, they got up on the wrong side of the bed or what --

QUESTION: All three of them got up on the wrong side of the bed.

MR. McCALL: All right, Mr. Justice Stevens.

But the point is, clearly this would not have happened unless there had been strong feelings, and whether those were motivated by a desire to shall I say discipline the prisoner or whether they were simply venting their anger, I think doesn't really change the question here.

The question is, did this beating which was

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subsequently determined to have left nothing but minor bruises and swelling to the face, mouth, and lip, did that constitute a significant injury? That's the specific question.

QUESTION: I take it then, if a significant injury as you would define it, were to be inflicted by an individual prison guard, contrary to prison policy and it is something that he himself could be disciplined for, you say that would be an violation of the Eighth Amendment -- if there was a significant injury?

MR. McCALL: No, I don't say that, although it has led to that. And let me tell you why.

QUESTION: I thought you already had said that?

MR. McCALL: Because --

QUESTION: You're getting to a significant injury -- certainly the Court of Appeals for the Fifth Circuit would accept it, I suppose. If it were a significant injury it would state a 1983 violation.

MR. McCALL: You're getting to the other qualification of the court's question and that question was, a single incident of force. Now, what we would say as to your question is, no. And the reason we would say no is that that would not constitute an action by the State, because it was -- first, you said, let us assume it was contrary to regulations. Clearly, it was. The State

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of Louisiana doesn't condone this type of thing. We have constitutional provisions. We have statutes. There are prison regulations, all of which proscribe this type of thing.

So that, yes, you would first have -- it would be an opposition to all of those. Now, if you had a single incident, as stated in the Court's question, and this was by a guard, then we would say, no, there is no Fifth Amendment -- I mean, Eighth Amendment violation and the reason for that is that that would not constitute punishment.

QUESTION: Even if it was the warden of the prison that did it?

MR. McCALL: I would have to say if the warden did it, that it would give you a different answer because there you have someone who sets policy.

But here you have two of your -- I would say -- we call them corrections securities officer. They are the lowest level of the people who handle prisoners.

QUESTION: We know that one was a lieutenant, wasn't he?

MR. McCALL: Yes, the lieutenant, he was on the cell block with the two corrections officers, and the officer in charge of the camp was a major. So it is our suggestion to the Court, and I believe it's the proper

one, that there was not the authorization or that there was not anything done with the sanction or as an implementation of prison policy.

QUESTION: I don't see what difference the warden would make. I mean, if you have a State statute, he has -- he has authority to establish policy, but he doesn't have authority to repeal a State statute, does he, if you say there is a State statute against this.

MR. McCALL: Let me say that I --

QUESTION: So it wouldn't really matter if the Governor did it even, he can't repeal the State statute --

MR. McCALL: I am completely comfortable with that suggestion, but the difficulty I have with it is that it then introduces the question of whether the statutory provisions are honored in the breach, and that the true policy of the State is that which is implemented by someone having authority.

But in principle --

QUESTION: Like a lieutenant?

MR. McCALL: No, not a lieutenant, because lieutenant's are, if you will forgive my saying so, a dime a dozen in the prison hierarchy, just as they are in the Army.

QUESTION: We won't quote you.

(Laughter.)

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MR. McCALL: Having been one myself, I know --

QUESTION: Not to this lieutenant, anyway --

(Laughter.)

MR. McCALL: Let's say, not all lieutenants are equal. Some lieutenants are more equal than other lieutenants.

QUESTION: You were a lieutenant?

MR. McCALL: I was a lieutenant, so I know whereof I speak.

QUESTION: In the prison or just in the Army?

MR. McCALL: Not in the prison; in the Army. There are some who say there isn't that much difference, but --

(Laughter.)

MR. McCALL: -- the answer to your question is no, I was --

But seriously, let me come back if I may to the point I hope that I have made it clear. I may not have convinced you, but I hope I have made the point clear, that this is a separate argument on our part that a single incident of force does not constitute punishment, and that therefore, it would not meet the Eighth Amendment --

QUESTION: Do we have any kind of a finding below that the court of appeals didn't even address, that this isn't a single incident case? I thought the court of

appeals just didn't get that -- to that question, but the indication was at the trial by the magistrate --

MR. McCALL: They went off on the significant injury. You are quite right, Justice O'Connor.

QUESTION: And didn't the magistrate find they also beat up the witness Allen?

MR. McCALL: That was his finding, yes, sir.

QUESTION: So it is not exactly a single incident.

MR. McCALL: We are stuck with that.

QUESTION: Yes.

MR. McCALL: But certainly, shall we say, insofar as this prisoner was concerned, it was a single incident.

But I think that the answer to the question is, I say there are two separate questions. One is, did this episode rise to the level of a constitutional deprivation by reason of the significance of the injury?

Now, while to you or to me or to anyone in our situation in life, even a slight beating would constitute a significant injury, the fact is that in context, this was not a significant injury and the standard which this Court has enunciated in those cases, and in particular in Wilson against Seiter, that you must suffer objectively significantly harm.

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This, I take from page 279 and 280 of the Wilson v. Seiter lawyer's edition opinion. Again, at page 282, Whitley was cited for the proposition that, assuming that the conduct is harmful enough to satisfy the objective component of an Eight Amendment claim. And at page 279, Rhodes is cited for the proposition that the objective component of the Eighth Amendment prison claim was, and I quote: "Was the deprivation sufficiently serious?"

So that what we would respectfully suggest to Your Honors is that the test applied by the Fifth Circuit, that is to say, the first element, is the objective element, was there a significant injury, is a proper one. It is one which is in keeping with the holdings of this Court. It is a practical one which commends itself as a means of eliminating frivolous claims, and that, therefore, we would strongly recommend to Your Honors that the Fifth Circuit should be affirmed and the judgment accordingly.

Unless the Court has any other questions --

QUESTION: Thank you, Mr. McCall.

MR. McCALL: I thank you, Your Honor.

QUESTION: Mr. Bronstein, you have 4 minutes remaining.

MR. BRONSTEIN: I have no rebuttal, Your Honor. May it please the Court, I thank the Court for hearing me.

CHIEF JUSTICE REHNQUIST: Very well.

The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)

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