OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HOWARD WYATT, Petitioner v.

BILL COLE AND JOHN ROBBINS, II

CASE NO: 91-126

PLACE: Washington, D.C.

DATE: January 14, 1992

PAGES: 1 - 46

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

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

'92 JAN 23 A10:01

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

HOWARD WYATT , :

Petitioner :

v. : No. 91-126

BILL COLE AND JOHN ROBBINS, II :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, January 14, 1992

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

APPEARANCES:

JIM WAIDE, ESQ., Tupelo, Mississippi; on behalf of the Petitioner.

JOSEPH L. McNAMARA, ESQ., Jackson, Mississippi; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ORAL ARGUMENT OF	PAGE
JIM WAIDE, ESQ.	
On behalf of the Petitioner	3
JOSEPH L. McNAMARA, ESQ.	
On behalf of the Respondent	29

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in 91-126, Howard Wyatt v. Bill Cole and John Robbins. Mr. Waide.

ORAL ARGUMENT OF JIM WAIDE

ON BEHALF OF THE PETITIONER

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

My client, Howard Wyatt, the petitioner, is a cattle farmer in Simpson County, Mississippi. He had a cattle partnership with the respondent, Bill Cole. In July of 1986 the partners weren't getting along very well --

QUESTION: To say the least.

MR. WAIDE: Thank you, Your Honor.

They were discussing breaking up the partnership. Now, they had never been able to agree on what the terms were or how they were going to break it up, and they had further discussions scheduled.

The day before they were to meet for further discussions on breaking up the partnership, my client, Mr. Wyatt, who is not a very sophisticated man and who has less than a high school education, comes home and he finds out at the farm in Simpson County -- he finds on his

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

property Mr. Cole, the respondent, his attorney, the other respondent Mr. Robbins, and a bunch of deputy sheriffs and other people going about the process of taking possession of partnership property. That's what he finds when he gets there.

He's never -- through 2 days of taking over the property they never serve him with any papers, but they do after they've taken what Cole contends is his share of the partnership property. As it turns out they have an order from the judge that says take 23 head of cattle and other personal property, and they take possession of it.

Now, Your Honor, these cattle are Brahma cattle, which probably means not much to most members of this Court, but it's a peculiar type of cow, and that is that a Brahma, if Your Honors have ever watched a rodeo, once these cattle have ever been driven with horses or ever been chased with dogs they become mean and unmanageable. You can't keep them behind a fence, and after that their value is diminished. They're worth nothing more than what they're worth by the pound.

If you're gentle with the cattle, if you treat them right, some of these cattle -- one of the cows the testimony was it was worth $6,000, a registered, gentle animal, but after this, after the running of the cattle and the manner in which they were taken over, I might say

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

analogous, Justice White, to some football players that you've seen. On one occasion they're gentle, and you go out on the field and they become tough and ornery and that's what happened to these cattle by raising --

QUESTION: Yes, but when you run them enough they become very gentle.

(Laughter.)

MR. WAIDE: Anyway, Your Honor, Brahma cattle are probably not that important to most of us, even though Mississippians probably have more appreciation than some of us that live in Washington, D.C., but to my client, Mr. Wyatt, these animals were very important to him. They were important to his family -- it's what he done. He had a job in the factory --

QUESTION: Well, does that really bear on the constitutional issue?

MR. WAIDE: No, sir, it probably doesn't, except that the defendants are claiming good faith and innocence and I think it might have some bearing on that, that they would have known what they were going to do to him.

QUESTION: But the good faith and innocence claim goes to their knowledge about the unconstitutionality of the statute, not to the disposition of the cattle.

MR. WAIDE: Yes, sir, that's correct, Your

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Honor.

The end result of it, in any event, was that a hearing was finally held. The Mississippi statute provided for a preseizure -- strike that -- a prehearing seizure. You go out and seize somebody's property on making an affidavit and then you have a hearing later. That was basically the scheme of the statute, and of course Mr. --

QUESTION: So it's not a preseizure hearing, it's a postseizure hearing.

MR. WAIDE: That's correct, Your Honor. The Mississippi statute provided or allowed -- it could be interpreted to provide -- the Mississippi supreme court later ruled this is an incorrect interpretation, but it could be read to say that you can go seize somebody's property and then have the hearing later.

You just file your affidavit with the judge that you're entitled to the property, he automatically issues the order to go pick up the property, and then you have the hearing later after posting a bond, so you can be sued, of course, if you were wrong in making the seizure.

So that's basically the statutory scheme, and that's the way that they were able to come take the cattle, and after having them a few days Mr. Cole transported them to Texas, even though a State judge ruled

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that the order of replevin was wrong in the first place.

QUESTION: Well, you had a postseizure hearing.

MR. WAIDE: That's correct.

QUESTION: What happened at the hearing?

MR. WAIDE: Thank you, Your Honor. At the postseizure hearing the circuit judge ruled that the replevin was erroneously issued under State law, that this dividing up a partnership is not within the replevin statute. You're not wrongfully detaining property when you detain it as a partnership.

QUESTION: So what did he order?

MR. WAIDE: He ordered him -- I might point this out, Your Honor. He ordered him to bring the cattle back or pay damages, but at this point, of course, if he brought the cattle back that wouldn't remedy the wrong, because the damages was caused in large part by chasing them.

QUESTION: And then what happened?

MR. WAIDE: Let me finish my answer, if I might -- and also, Your Honor, my client, who's never had any history of psychiatric problems, suffered a mental breakdown and was hospitalized, and the remedy of bringing the cattle back which a State judge ordered wouldn't have cured that.

But in any event, he didn't follow the judge's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

order. He'd taken advantage of the replevin statute as far as he wanted to use it, and Mr. Cole just did not follow the order of the State judge.

Cole claimed his lawyer, Robbins, never told him about it. Robbins said he told him about it and he doesn't know why he didn't follow it. But anyway, he didn't follow the order of the State judge.

QUESTION: And then what happened?

MR. WAIDE: Your Honor, the next thing that happened was we decided for strategic reasons and because we believed, erroneously as it turned out, we'd be better off in the United States District Court, we took a nonsuit of our pending proceeding. The State judge had said he owed us damages, but we didn't know how much damages or how the State law was going to be interpreted, and we took a voluntary nonsuit of the State replevin action and filed suit in the United States District Court, so that's how this case got started.

Now, Your Honor, even though 42 -- and I feel like I'm right in saying this -- even though 42 U.S.C. section 1983 says in the broadest of terms that everybody, every person who violates another's constitutional rights under color of law is subject to damages, even though the statute says that, under well-settled principles that this Court has announced in many decisions, the district judge

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

held that just about everybody involved was clearly immune from suit -- everybody.

QUESTION: Absolutely.

MR. WAIDE: Yes, sir, and very little question about it, most of it we abandoned in the district court. We sued everybody, but most of it we abandoned because we thought this Court's decisions didn't leave us any room.

QUESTION: Was this absolute immunity, or qualified?

MR. WAIDE: In this case they're claiming qualified immunity for a private defendant.

QUESTION: That's what the district judge ruled.

MR. WAIDE: Yes, sir. The State was immune, of course, because of the Eleventh Amendment. Of course, everybody knows the judge was immune, and of course we didn't sue the judge. Everybody knows that he was immune from making a judicial decision. There are compelling reasons why the law officers were immune. The judge told them to go out there and seize the cattle, and they couldn't be put in the position very well of violating the court's order of being held in contempt, but in addition to that we had the qualified immunity, which we think is very tough to overcome, but those immunities.

So we just -- even though the statute says, here you are, you're got a remedy, under the immunity doctrines

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

as they developed we didn't have any remedy because -- and the reason we're here today, and the only person that was involved that was not subject to decisions of this Court, and we don't believe the decisions of this Court have been followed in this case, was Cole and his attorney, Robbins. That is the private party immunity, immunity of private parties who violate constitutional rights, and that's the question that's before the Court today.

Justice O'Connor in Forrester v. White sounded a familiar theme for this Court, a theme that is said over and over again in these immunity cases, when Your Honor said we don't extend immunity beyond what its policy considerations are. In applying immunity, we look to the policies that the immunity was created for. That was said directly in Forrester v. White and is a theme, I think, in this Court's qualified immunity cases.

Now, Your Honor, the policies that this Court has announced in qualified immunity cases are very clear and are just about the opposite of any policies that might be involved in this case. For example, this Court has said and said over and again probably beginning with Harlow v. Fitzgerald, but over and over again, we want to attract citizens to public office. We don't want to make it undesirable for a citizen -- unnecessarily desirable for a citizen to hold public office.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

We're not involved in that. Mr. Robbins and Mr. Cole are not candidates for public office. They're just the opposite. They're private people.

And then, Your Honors, probably the strongest case for immunity is the law enforcement officer, the fellow that's out there and he's trying to decide whether to make an arrest.

If he makes the arrest, this Court has said we don't want to hold him liable for exercising his judgment and trying to save society from some criminal act in making the arrest. We don't want to put a burden on that discretionary decision. We want him to be able to make that decision on whether somebody committed a crime and whether they ought to be arrested based on exercising his discretion in carrying out a public function. Of course, that's not involved in this case. That has nothing to do with this case.

And then, Your Honor, probably the strongest thing, or the thing that's so applicable to public officials and so inapplicable to a private party, when you look at Mitchell v. Forsyth this Court made it very clear that it's not just an immunity from damages, it's an immunity from suit. The official is not supposed to take his mind off of his important public duties, take his time away from them, by having to defend the suit, and so not

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

only it is a freedom from damages, but it's a freedom from suit so he can take an immediate appeal.

Now, to put these people in that position and say we don't want to take their minds off of public duties and they can take an immediate appeal is just totally inconsistent with the policies of Mitchell v. Forsyth.

QUESTION: Mr. Waide, that may be true with respect to official immunity, but we adopted official immunity for 1983 actions because it was in existence in 1870. There was also a private immunity in 1870, though, for people bringing legal actions.

I mean, you couldn't sue and recover for false arrest, for malicious prosecution, for abuse of process, without showing that the person brought that legal process without probable cause, which meant that the person had to have entertained a subjective belief that he was not justified in going ahead. Now, why shouldn't that same immunity -- not official immunity, but the immunity of a person invoking the legal process which existed in 1870, why shouldn't that be applied to 1983?

MR. WAIDE: Your Honor, first, it's -- I think it's probably not quite accurate to characterize that as an immunity. I consider -- it's more accurate to characterize that as an affirmative defense to suit. That is to say that if you have probable cause or malice, there

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

might be some defenses to the suit that could be raised.

QUESTION: No, it was not a defense. The plaintiff had to show it, so I don't care whether you call it an immunity or not --

MR. WAIDE: All right, sir.

QUESTION: But it would have been your burden to show it.

MR. WAIDE: All right, sir. Anyway, it was a matter that would be taken up at trial. It's a matter that would be taken up at trial, it's not a defense from suit. An immunity, as this Court has construed it, is a defense from even having to undergo a trial.

QUESTION: Well, no, you would have to plead it. You would have to plead that subjectively malicious frame of mind, or you wouldn't even get past the summary judgment stage.

MR. WAIDE: Well, Your Honor, I certainly don't mean to argue with the Court. I thought -- my interpretation of it was, it was an affirmative defense, but in any event of course there was no summary judgment procedure. When I looked at the precedents the conclusion that I drew from it was, it was a matter that would be submitted to the jury at trial, the issue of malice, an affirmative -- well, where there's an affirmative defense and not a matter for the factfinder.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And Your Honor, I wouldn't quarrel -- let me say this, Your Honor. I wouldn't quarrel -- the Mississippi supreme court I think took the correct view of this matter in a case that the respondent cited, and they said there might be some defenses you could raise at trial. You might be able to show -- it might be Mr. Cole would come up at trial and say well, I thought the statute was legal on its -- if the Court wanted to adopt a subjective good faith standard, I don't find that nearly so objectable as saying you can't even get to first base, this is an immunity from suit.

QUESTION: That's what you should have taken to the State court.

MR. WAIDE: Justice White, ironically we should have, because -- and I think this is an another important facet about this case -- if this Court is going to adopt a policy, and that's what it has to do, Your Honor; Justice White in the Burns case very recently said this Court has no authority to just judicially create policies, and Justice Scalia, that's why, of course, the Court looks to the common law background.

But in this case, if this Court adopts a policy, if this Court says we're going to have a policy that private defendants can't be sued, I think it's important to think about what policy interest is it that we're

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

implementing, and to me that is the policy of the State of Mississippi, the policy of the State of Mississippi to protect -- to allow its citizens to rely on statutes. That would be the policy that the Court would be looking at, that particular policy, and I think that 42 U.S.C. 1988 counsels this Court to look at what State policies are.

Now, the State of Mississippi, Your Honor, on the comment that we should have stayed in State court, in retrospect we certainly should have because the case that counsel cited consistent with his ethical duty to cite cases contrary to his position, the Mississippi supreme court has said in the Foremost case that he cited that they don't see -- in effect they don't see any Mississippi policy prohibiting a suit against a person that wrongfully implements -- wrongfully brings a replevin action. That's the policy that Mississippi announced. Now, the thing that I don't understand on it --

QUESTION: Do you think then, Mr. Waide, that the outcome here should depend on what the policy is in each of the 50 States?

MR. WAIDE: No, Your Honor, I don't. The only point that -- I might say it wouldn't differ in this case, because all the States have similar policies, but I'll get to that in a second. But the only thing that I'm saying,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Your Honor, if we're talking about a policy decision -- we're talking about a policy. That's what we're talking about. Is this Court, as a matter of policy, going to create an immunity?

I'm saying that if the Court does that, the policy that it would have to be implementing or trying to carry out is an interest the State of Mississippi has. That would be the policy.

Now, Your Honor, I understand the danger that Your Honor Mr. Chief Justice is talking about, that you'd have a different rule of immunity from State to State. I might say, Your Honor, that in Robertson v. Wagaman this Court addressed that and said 42 U.S.C. 1988 counsels, or means there's bound to be some differences.

Of course, we have different statutes of limitations because we look to State law.

QUESTION: So is the answer to the question that I asked you yes or no?

MR. WAIDE: Your Honor, my answer to this question is it would be uniform across the States. The reason I say that is because in Dora v. Connecticut -- this is the most recent replevin case that's decided -- there's an appendix to that opinion that outlaws the replevin laws across the State, and it's practically uniform, if not a uniform requirement, that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

when somebody brings a replevin action he posts a bond.

In other words, all the States contemplate that the private person wrongfully bringing a replevin action can be sued. That's what I'm saying, Your Honor. It wouldn't make for any difference in this case.

QUESTION: Because you say the policy of all 50 States is to allow an action against someone who wrongfully brings a replevin action without any requirement of malice?

MR. WAIDE: Yes, Your -- well, Your Honor, the statutes, I think the language of the statutes just simply says if you wrongly sue out a writ of replevin you can be sued.

QUESTION: Well, of course, that leaves the whole question up in the air. What does the word wrongfully mean?

MR. WAIDE: Yes, sir, I understand. The only point that I'm making, Your Honor -- that is correct, but the only point that I'm making is the States, as a matter of policy, do not have a policy that people who bring replevin actions are immune from suit.

QUESTION: No, but you don't answer the question of whether there might be States in which there would be some showing of malice required, if you're talking about just State causes of action.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. WAIDE: All right. Well, Your Honor, in the first place I would assume, at least for the sake of argument, that in any type of suit as a factual matter, any type of suit that's based on some type of abuse of process or malicious prosecution theory, which is what this essentially is, that type of suit there are certain factual matters that the jury could take into account, and I think one of those might be whether this person acted intentionally or something, but that doesn't -- the qualified immunity is an objective standard. It's an immunity from suit, and that's what -- all I'm asking this Court --

QUESTION: Excuse me, Mr. Waide, I'm not sure that -- I think it's one and the same thing. I think you try to characterize the one as an immunity and the other as a matter of evidence. All the immunity is for officers is that you have no cause of action -- if it's qualified immunity, you have no cause of action unless you prove bad faith, and it's the same thing here. Against a private individual you have no cause of action unless you prove bad faith. Now, both of them you can either characterize them as immunity, or you can characterize them as what must be proven at trial, but they are one and the same thing.

MR. WAIDE: Excuse me, Your Honor, but I would

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

differ with the Court just in this respect. The qualified immunity, as this Court has announced it, is a legal standard of objective rulings. Although the term bad faith is used, it really has nothing to do with bad faith. It's a question of whether they acted contrary to law, and what I'm saying is there are certain matters the Court -- I'm asking this Court to rule there is no qualified immunity -- in the sense that this Court has applied it to public officials, there is no qualified immunity.

It's not necessary, Your Honor, for this Court to even reach the question of what kind of matters might be admissible into evidence at trial, and I'm simply suggesting to the Court that when we go to trial we will probably call some lawyers and they would say, well it was at least known everywhere that there's some question about whether this is constitutional or not. You'd at least know there was a question about it. I mean, maybe you don't meet -- maybe it's still qualified immunity, but everybody ought to know there's some question about this type of procedure.

And Mr. Cole will get on the stand and he'll say well, I thought the statute was valid, and we'll ask Mr. Robbins well, didn't you tell him there was at least a question about it? Didn't you tell him there was at least

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

a question that this Court has said again and again that these things are of questionable legality, and the Mississippi supreme court, Your Honor, in its opinion appeared shocked that anybody would do anything like this and said that its understanding of the statute was that there had to be some emergency reason to go out and seize property before a hearing. That's -- you can't get that from the statute.

But the Mississippi supreme court, if anybody is going to have a policy against not suing or allowing reliance on the State statute, it is surely the Mississippi supreme court.

I might say the Attorney General, Your Honor, was an amicus curiae in this case and he took no position on this issue. He said, I concede the statute's unconstitutional, but he didn't take any position that I want our private citizens not to be sued.

QUESTION: What about Cole? What should be the standard for his liability? Suppose he -- he doesn't know anything about the law, let's assume that. Does he have a good faith defense under your view of what the --

MR. WAIDE: Your Honor, my opinion of how the Court should decide the case as to Cole is that first, disagreeing perhaps with Justice Scalia, that there is no common law background sufficiently close to this to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

justify this Court giving any immunity at all, so immunity, which is a legal defense, is just out.

Qualified immunity is out, and I don't know that it's appropriate for this Court to announce exactly what defenses maybe Cole could raise down in the courts, but if the Court is going to do that, I would just suggest that those analogous defenses that exist in the common law, Mr. Cole ought to be able to get up there and say, I think, well I thought the statute was legal.

And we ask him on cross-examination well, Mr. Cole, are you telling me that you think you can go out and seize somebody's property before any trial, not knowing whether you're going to win the trial?

QUESTION: Well, I want to know what the standard is, because he would say well, my attorney told me there was a statute on the books. I thought that it was all right.

Suppose he, number one demonstrates his subjective good faith -- he acted in good faith. He thought that he had a right to do what he did, what result?

MR. WAIDE: All right, I think the jury in that case would probably decide in Mr. Cole's favor if it thinks the lawyer never told him.

QUESTION: Well, is the jury entitled to an

instruction under 1983 that subjective good faith is a defense?

MR. WAIDE: No, sir, that's -- no, they're not, Your Honor, and what I'm saying is it's --

QUESTION: Well, it seemed to me that earlier you conceded, and I think perhaps that there may be some good reasons for that, that there should be a subjective good faith defense. Whether you call it a defense or an immunity I really don't care, and it seems to me there may be sound reasons for that. Do you concede that that's a prudent course for the law to take?

MR. WAIDE: Your Honor, the appropriate course in this case, in my opinion, is to decide the case before the Court, which is that the qualified immunity doctrine as this Court has announced it is not to be applied to private defense. Now, that's the end of that discussion.

Now, the second question is, what about defenses that Cole could raise, such as --

QUESTION: Let's assume that we think that's before us.

MR. WAIDE: All right, sir -- such as, I didn't think I was doing anything wrong. I think then that the Court could give the jury an instruction that the plaintiff must prove that Cole acted with malice. I think that very well might be an appropriate instruction, but

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

you have to remember, Your Honor, that the Mississippi --

QUESTION: And we get that as a matter of Federal law under 1983.

MR. WAIDE: Your Honor, the State law standards are incorporated into 1983, as I understand it, by 1988 and generally in a malicious prosecution or abuse of process type suit that is an element of the case.

QUESTION: So we do this tort by tort.

MR. WAIDE: Well, Your Honor, the fact that we have 1988 indicates to some extent there's going to be variance among the States, but I don't think there's any great disparity. I think any -- as far as I know, any State that talks about a malicious prosecution or an abuse of process type of situation requires malice.

QUESTION: Well, but your cause of action is under 1983.

MR. WAIDE: That's correct, Your Honor, but when 1983 doesn't provide the appropriate rules of decision and there's nothing in the statute, it's just general that you look to the common law or the to State law, and we think that -- Your Honor, we think that even if the jury's instructed on malice, that we had to prove that as an element of the case, assuming that such an instruction is given, we think that we had evidence that we could have proved that with, but the trouble was the district judge

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

ruled that this was a matter of law, and that's consistent with Your Honor's decisions, and that we were not going to be able to submit the case to the jury.

QUESTION: Why would we apply these defenses as a matter of State law? We don't apply immunity -- official immunity as a matter of State law. We simply determined that when this Federal statute was passed in 1870 there was such a thing. We changed it a little bit, but basically there existed an official immunity, so we apply it as a matter of Federal law. Why shouldn't we do the same thing with respect to private immunity or defenses against liability?

MR. WAIDE: Well, Your Honors do apply State law and have frequently applied State law on various defenses that might come up such as the statute of limitations, or such as survivorship rules. That's in Wilson v. Garcia, and 1988 contemplates that you'll look to common law or State law for the rules of decision in a lot of cases, and I see nothing wrong with doing that in this case, and I also see no inconsistency, assuming that's a bad thing.

QUESTION: Do you know any other case where we look to State law for defenses to a Federal cause of action?

MR. WAIDE: Yes, Your Honor, Wilson v. Garcia on the statute of limitations, which is an affirmative --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: No, I'm not talking about statutes of limitations, I'm talking about substantive defenses to the cause of action.

MR. WAIDE: Well --

QUESTION: It seems very strange to create a Federal cause of action and say however, what defenses exist to this Federal cause of action ought to be a matter of State law. It's very strange.

MR. WAIDE: Well, Your Honor, all that I can say is it's always my assumption in trying 1983 cases, and it appears to be universally done, if there's no rule, there's no Federal rule -- you know, if we're talking about a cause of action and there's nothing in any statute that says what the elements are for this cause of action, you've got to look somewhere for the rule of law, so to me the logical place to look and dictate it by 1988 is State law or the common law.

That's what the statute directs the court to do, and of course as in Erie v. Tompkins there's no general Federal common law, so that's the only place logically that you could look.

QUESTION: Mr. Waide, why wasn't the bond valid in this case? Why couldn't you collect on the bond?

MR. WAIDE: Justice White, the bondsman was attorney Robbins' son and Mr. Cole's wife. The wife was

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

in Texas and the son had no assets that we could find.

QUESTION: What was the condition of the bond?

MR. WAIDE: Just pay any damages that might accrue because of the wrongful suing out of the writ of replevin was the condition of the bond.

QUESTION: So if the bondsman had been good the bondsman could recover against his principal, I suppose.

MR. WAIDE: Your Honor, had the bond been good, Mississippi replevin law -- we're just talking about State law now for wrongful replevin -- had very limited damages rules, which was part of the reason why we came to Federal court. The damages were the loss of use of the property and the value of the property, and there hasn't been any State precedents effected.

QUESTION: Well, anyway, whatever you could have collected on the bond, the bondsman could have collected from his principal.

MR. WAIDE: Yes, sir, that would be correct, Your Honor.

QUESTION: And it wouldn't -- and the principal wouldn't have been able to plead any kind of immunity or any defense against that kind of action.

MR. WAIDE: That's an interesting point, Your Honor, and the way the statute is written it's an absolute liability. It's like playing with dynamite. If you

wrongfully replevin property, you're liable, and I hope, as I said to Justice Scalia --

QUESTION: So the risk of an illegal replevin is on the person who replevies.

MR. WAIDE: Yes. Now, those are the -- Justice -- I said to Justice --

QUESTION: And that goes for, you think -- and I suppose it goes for --

MR. WAIDE: Constitutional tort.

QUESTION: Yes.

MR. WAIDE: Your Honor, what I would like --

QUESTION: Mr. Waide, just a minute. You've said -- the Mississippi supreme court has said if a replevin action is wrongfully brought the plaintiff is liable for damages. Has the Mississippi supreme court defined what it means by wrongfully?

MR. WAIDE: Just failing to comply with the statute, Your Honor, is essentially what it would amount to, that it was not justified.

QUESTION: Is that what the Mississippi supreme court has said?

MR. WAIDE: I don't know that that language is there, but that's the situation. There are two situations --

QUESTION: Well, just a minute --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. WAIDE: I'm sorry.

QUESTION: I didn't ask you what the situation was, I asked you what the supreme court of Mississippi has held with respect to the meaning of wrongful replevin.

MR. WAIDE: All right, sir. It's held two things, Your Honor. First, a replevin that the court ultimately rules was not justified is a wrongful replevin.

QUESTION: Under the State law.

MR. WAIDE: Under the State law. It's ruled in that situation. It's ruled in a second situation. It's ruled in this 1983 type situation. Those are the two situations it's addressed on the constitutional issues.

QUESTION: Where the replevin statute has been held unconstitutional.

MR. WAIDE: The Mississippi supreme court, Your Honor -- this is the case that I was referring to. The Mississippi supreme court has addressed this precise issue before us and held there was no immunity as a matter of law.

QUESTION: Well, I -- well, was it a case in which the replevin statute was held unconstitutional?

MR. WAIDE: Yes, sir, it was. It's a case that's cited. I might give the Court the cite.

QUESTION: But you don't know whether you could have collected under the bond in that case.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. WAIDE: In that case, could you have collected on the bond? I would assume so. That wasn't discussed in the case.

QUESTION: Well, you don't -- let's not assume it --

MR. WAIDE: All right, sir.

QUESTION: -- because the bond may just be conditioned on a rightful replevin under State law, and not on the possible unconstitutionality of the statute.

MR. WAIDE: Your Honor, the case I consider to be all fours with this case. It's the precise -- the only difference in that case and this one is that we did have a ruling by a State judge in this case that the ruling was wrong -- that the replevin was wrongful as a matter of State law.

QUESTION: What's that cite for the supreme court of Mississippi?

MR. WAIDE: 563 Southern 2nd 1387. My time is up, Your Honor.

QUESTION: Thank you.

Mr. McNamara, we'll hear from you.

ORAL ARGUMENT OF JOSEPH L. McNAMARA

ON BEHALF OF THE RESPONDENT

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

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

In analyzing whether to extend immunity to parties who come before it as section 1983 defendants, this Court has engaged in a dual history and policy analysis, and I would first address the issue of what is the compelling public policy which would cause this Court to formally extend immunity to those persons who act such as my clients, Mr. Cole and Mr. Robbins did, and I would say, Your Honor, that the public policy that is foremost is that the courts want to encourage that citizens have a right to rely upon a statute which has not been declared unconstitutional and which they do not suspect to be unconstitutional.

QUESTION: What if they should?

MR. McNAMARA: If they should?

QUESTION: What if, objectively, they should suspect it?

MR. McNAMARA: If they fail to meet the objective standard -- in other words, I think --

QUESTION: Oh, so it's an objective test you're talking about?

MR. McNAMARA: Your Honor, I would want this Court to approve the objective standard which was applied in this case --

QUESTION: All right.

MR. McNAMARA: -- by the district court and

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

approved by the Fifth Circuit Court of Appeals, but I would also state --

QUESTION: But not just a subjective good faith test.

MR. McNAMARA: No, Your Honor.

QUESTION: Okay. Go ahead.

MR. McNAMARA: There are reasons why the objective case, and that contrary to what the general argument of counsel for the petitioner seems to be that the extension of any immunity -- and this is said in his brief -- the extension of any immunity under these circumstances is going to make it practically impossible for there ever to be a recovery against private party defendants, and Your Honor, for instance, in the case which is before the Court, Mr. Cole and Mr. Robbins were granted the extension of immunity by the district court, approved by the Fifth Circuit Court of Appeals, as to the actions which were taken up to the district court judge's April opinion which said that the statute in question is unconstitutional.

Then, when Mr. Cole kept those cattle out in Texas he was subject to damages in this situation, or at least to have the question brought before the jury, so at least in this case is an example of a private party defendant who was at least exposed to liability before a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

jury and who ultimately by the Fifth Circuit's mandate is going to have to pay some attorney's fees for the conduct which he engaged in after the declaration of unconstitutionality by the district court, since he did not comply with the order.

A second point that seems to be made by Mr. Wyatt's counsel is --

QUESTION: That's a new cause of action?

MR. McNAMARA: No, Your Honor. In the Fifth Circuit Court of Appeals --

QUESTION: I mean, when he fails to obey a ruling of the district court that was made in this 1983 suit, I assume you say that's a new and independent violation for which there must be some other 1983 action --

MR. McNAMARA: No, Your Honor.

QUESTION: -- or was this just a contempt of court?

MR. McNAMARA: No, Your Honor. The Fifth Circuit Court of Appeals affirmed everything which came to it from the district court except that it remanded for a finding of attorney's fees against Mr. Cole for the reason that he had engaged in conduct which violated the statute after the district court judge had declared it unconstitutional.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

The jury had found no damages at the trial below because for the main reason that counsel for Mr. Wyatt conceded that there were no damages occurring even for the mental anguish which he alleges his client to have suffered, that no damages occurred after the declaration of unconstitutionality, that all of the damages which Mr. Wyatt was claiming he said occurred before the declaration of unconstitutionality, and Mr. Waide has alluded to the great emotion and upset that he experienced because of the taking of his cattle.

Now, a second public policy reason to consider is that if the Court does not grant immunity to private persons who acted as Mr. Cole and Mr. Robbins did, then the Court would be putting the burden of paying for the unconstitutionality of the Mississippi statute on the persons who absolutely have the minimal involvement in this case, and in this Court's decision last term in Burns v. Reed, in discussing the extension of -- well, actually the issue was, of course, whether the prosecutor would be entitled to absolute immunity in his role of giving the advice to the police.

In his majority opinion at -- I've got 114 Lawyer's Edition 2nd 564 -- there is a discussion by the majority there as to why should we extend this grant of absolute immunity to the prosecutor in his role of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

advising the police and then grant only the limited or qualified immunity to the police.

So this Court has previously looked at who has the most involvement, who has the most ability to determine the unconstitutionality of the statute, and one of the comments that the Court makes there is that those police officers are certainly not going to have the law training that prosecutors have.

QUESTION: But one of the people here for whom you're seeking immunity is a lawyer, I gather, and that person would certainly have law training, one assumes.

MR. McNAMARA: That's right, Your Honor, and in Harlow v. Fitzgerald in the majority opinion when it's discussing the objective standard which would be applied, that this Court says that we're going to look at it as whether or not a reasonable person would know that the action taken would be a clear violation of the constitutional rights of the defendant, and further on in that opinion it clarifies -- the opinion is clarified where the Court says we're going to look at the reasonable Government official.

And so in this instance in the application of the objective standard, one can look at the reasonable attorney, one could look at the reasonable person who's just somewhat casually engaged in the cattle business, or

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

one could look at whether the 1983 defendant was Citibank who may be bringing replevin actions at numbers per hour throughout the United States.

QUESTION: Mr. McNamara, as I recollect, one reason we have adopted the objective standard for official immunity, which I as recollect was not the common law approach, was that officials are subject to suit all the time. They'll spend their whole lifetime in court if every time they obey their orders they have to go through a trial to show subjective good faith.

Now, that isn't the case with respect to private individuals. They're not going to be drawn into this thing repeatedly. Why do they need that same kind of protection?

MR. McNAMARA: Obviously, even the Citibank example that I gave is not going to have the potential exposure that the public officer would, but it seems to me that there's an important public policy in encouraging people such as Mr. Cole and Mr. Robbins to utilize procedures that are presumptively valid at the time they use them.

QUESTION: Well, but sure there is, but we could take account of that by giving a good faith immunity -- subjective good faith immunity, not just the objective standard.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. McNAMARA: Your Honor, and in this case, that the issue which petitioner raised in the brief was the question of whether or not there should be an extension of immunity, and the petitioner did not argue some alternative to the objective standard of immunity which was applied by the Fifth Circuit and by the district court, and we would say under these circumstances, since there happened to have been in the case before the Court extensive discovery, this is not a situation coming before the Court where there were simply pleadings and where my clients moved for summary judgment on the basis of Harlow Fitzgerald immunity.

If there was some malicious conduct, or if there was some evidence of some special knowledge that either of my clients possessed below, then that was not put forward by the plaintiff at that time, and it would -- our position would be that in this case if the Court should decide that there should be an extension of immunity but it should be something other than the objective or reasonable objectiveness standard from Harlow v. Fitzgerald, that remand would not be necessary, because there's no indication of any lack of good faith on the part of --

QUESTION: Do you think this defendant who is a lawyer should have been aware of any decisions in this

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Court that might raise a question about the validity of the replevin statute in Mississippi?

MR. McNAMARA: Your Honor, I would rely upon what the district judge stated, and that is that at the time of the execution or use of the statute by John Robbins, that there was not complete agreement about the law.

For instance, in the Mitchell v. W.T. Grant case involving, I believe it's Louisiana sequestration statute, there was some similar infirmities there. For instance, I think that in that case, or in the case of that statute, that the writ of sequestration could be issued by a clerk and there was a provision there that the person against whom the writ was issued could come into court and seek a dissolution, but there were similar safeguards available to the Mississippi statute, and I would say this.

In 1975, the Mississippi legislature revised an earlier edition of the replevin statute because the first edition which I'm familiar with did not have the requirement of bond, did not have the availability for advancing the course on the docket, and so I would say that a reasonable attorney even with more expertise in the area than Mr. Robbins had would not come to the conclusion that this statute was unconstitutional.

QUESTION: May I ask you one question? Your

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

opponent cited a case -- I'm not sure I caught the name of it -- by the Mississippi supreme court in 563 Southern 2nd 1387 I don't think he cited in his brief. Are you familiar with the case?

MR. McNAMARA: I'm not, Your Honor, and Mr. Waide erroneously stated that I cited it.

QUESTION: I didn't see it cited in anybody's brief.

MR. McNAMARA: I don't believe that I did, and I checked my table of contents to see if I'd just forgotten it.

Your Honor, if there had been malicious conduct on the part of my clients in this case there was a remedy available under State law, and in fact the remedy available under State law for the wrongful attachment was a remedy of which the petitioner in this case chose not to avail himself.

I would concede under Mississippi law that the damages which are available for the suing out of wrongful attachment would not include the mental anguish which Mr. Wyatt alleges to have suffered, but there are Mississippi cases which --

QUESTION: How about the damage to the cattle, if there was some?

MR. McNAMARA: Yes, Your Honor.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Yes, what?

MR. McNAMARA: The damages for the --

QUESTION: Mental suffering of the cattle.

MR. McNAMARA: Yes, Your Honor. Thank you for helping me out -- or their change of attitude, or whatever therapy might be necessary for those cattle.

QUESTION: Even Brahmas.

MR. McNAMARA: Your Honor, Mr. Waide knows a lot more about Brahmas than I do, but those damages would be available if there had been a decrease in the market value of those cattle as a result of the change in their behavior, then that could be recovered under Mississippi law.

QUESTION: Do you concede that under Lugar against Edmondson Oil there can be a cause of action under section 1983 against a private defendant for use of a statute, State statute that is later determined to be unconstitutional?

MR. McNAMARA: Certainly, Your Honor, no question about that, and what we say is -- we do not challenge that point. What we say is, there is an immunity which ought to be available for the public policy reasons which I've stated.

I think the emphasis that I would want to place on public policy reasons has to do with the fact that in

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

this case, and I believe that this circuit alluded to this in the Folsom Investment Company case, it said that the first line of defense in these cases should be the legislature who passed it, or the Attorney General of the State who in some instances would enforce statutes, and that the burden of paying for the unconstitutionality of this statute should not fall upon persons such as Wyatt and Cole.

QUESTION: Mr. McNamara, when you said that there would be a remedy under Mississippi law for the suing out of a wrongful attachment, what do you mean by the suing out of a wrongful attachment? Would you have to prove knowing that it's wrongful?

MR. McNAMARA: No, Your Honor, in the joint appendix which was submitted where Judge Barbour, the district judge in this case, was citing to circuit court Judge Jerry Yeager's opinion, after dismissing the attachment that Judge Yeager said that Mr. Wyatt would be able to recover damages for wrongful attachment, that in the initial suit in circuit court is that Judge Yeager said the replevin statute was not what should have been utilized because these gentlemen were partners and they should not have resorted to the replevin statute, so my understanding of the record is that Judge Yeager was prepared to award some damages but it wasn't all the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

damages Mr. Wyatt felt that he was entitled.

QUESTION: Not on the basis that the replevin statute was unconstitutional, but that it didn't cover that particular situation.

MR. McNAMARA: Right, Your Honor. There was not a declaration in the circuit court of unconstitutionality. It was simply, you've picked out the wrong attempted remedy, Mr. Cole, by coming here, because you are partners, and you should seek dissolution of your partnership and proceed under that particular set of statutes in Mississippi which provides for the splitting up of partnerships.

QUESTION: Let me ask another case about Mississippi authorities. I understood your opponent to tell us that the Mississippi -- I don't know which Mississippi court -- had held its own statute unconstitutional, is that correct?

MR. McNAMARA: Your Honor, I believe that is the earlier edition.

QUESTION: You're not --

MR. McNAMARA: I don't know, Your Honor. I was not aware of -- it is cited in -- I'm sorry, Your Honor. It's cited in our petition, the Underwood v. Foremost Financial Services case.

QUESTION: Where is that cited again?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. McNAMARA: It was in the brief of respondents in opposition to the petition for certiorari at page 3.

QUESTION: What did it hold?

MR. McNAMARA: Your Honor, the supreme court of Mississippi was examining the application of good faith immunity to private defendants under color of State law.

QUESTION: That's the case we talked about earlier.

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

QUESTION: I see. You were not counsel when the brief in opposition was filed, I understand.

MR. McNAMARA: No, Your Honor, I was not.

What the petitioner wants to do in this case is to deny the extension of immunity, and when this Court has denied the extension of immunity it has relied in part on policy grounds and part on the historical inquiry which I'll get to in a second, but for instance, in Owen v. City of Independence, the court there at the end of the opinion makes the comment basically that it is as a matter of policy equating the role -- has done equity in that it would provide a plaintiff with a remedy, it would allow the official who acts in good faith to go about his duties without fear of being dragged into court, and it makes the public pay only for those unconstitutional policies which

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the State enforces, and so therefore it spreads the liability for the unconstitutionality of a statute among the citizens of the State, and that would not be done in this case. It would be quite the opposite. It would be placed upon the private party.

As far as the historical analysis is concerned, this Court has looked at historical analyses most strongly when it was denying -- or when it was granting full immunity as in the case of legislatures, prosecutors, and judges. In the later inquiries there is not -- such as in Anderson v. Creighton, there has not been the great reliance upon historical precedent.

When a police officer at common law did not have reasonable grounds to act in effectuating an arrest or carrying out a search, then he had a defense which was based upon a subjective standard, and this Court in Anderson v. Creighton adopted the Harlow v. Fitzgerald standard and said we will make it an objective reasonableness standard.

There's no reason, logically, then, why that same standard cannot translate to be utilized by the private defendant, and one of the things that I think that Wyatt overlooks is that the good faith -- or excuse me, the objective reasonableness standard which is applied as an immunity in these cases is, after all, an affirmative

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

defense, and so the party asserting that affirmative defense has to come forward and on a motion for summary judgment bears the burden of showing that he would come under terms of the immunity.

Your Honor, in this particular case Mr. Wyatt -- or excuse me, Mr. Cole and Mr. Robbins utilized a statute which neither of them had reason to believe was unconstitutional, and they were attempting to go about utilizing an orderly process, although it turned out to be the wrong process, and the court's reasoning below in the Fifth Circuit for the granting of extension of immunity should be adopted here.

QUESTION: Had the Mitchell case and Georgia Finishing and Quintus and Snyerback been decided at the time that this replevin was instituted?

MR. McNAMARA: Oh, yes, Your Honor, they had, all of those had been.

QUESTION: And you think that they don't make it pretty clear that a prejudgment hearing is necessary?

MR. McNAMARA: No, Your Honor, because the Mississippi replevin statute says -- or provides for a person to be able to come in and challenge the taking of the property, and I believe it gives it a hearing within 3 days to seek to set aside the writ of replevin, and it would seem at least under what this Court said in the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Mitchell case that there were sufficient constitutional safeguards, but the important issue perhaps for the purposes of this case is in judging the conduct of the defendants under the objective reasonable standard, that the trial court said that objectively it could be determined that the statute was not one which was clearly unconstitutional at the time.

Your Honor, the extension of qualified immunity in this situation would be uniform, it would be in keeping with the prior decisions of this Court, it would be a just resolution for private party defendants who until Lugar v. Edmondson were -- those were among a class of persons who by most lawyers were not even dreamed to be potential section 1983 defendants, and the holdings in the Adickes v. S.H. Kress Company, and in other cases where a private party acts in conspiracy with a judge or public official, those holdings would be held intact, and furthermore, to use the example of Adickes v. Kress case, even if the court decided to grant qualified immunity in a situation such as that, those parties would not meet the objective reasonableness standard because there was a clear violation of constitutional rights.

As is said in -- I believe in the dissent in Lugar v. Edmondson makes a comment about Adickes v. Kress having occurred some 10 years after Brown v. Board of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Education, and for the public policy reasons and because there's adequate historical basis for an analogy to give a good faith defense, and because this Court has adopted across the board Harlow v. Fitzgerald and other qualified immunity cases, we ask that this Court affirm the holding of the Fifth Circuit.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McNamara. The case is submitted.

(Whereupon, at 1:53 p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

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

NO. 91-126 - HOWARD WYATT, Petitioner v. BILL COLE AND JOHN ROBBINS, II

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

BY Michelle Sanders

(REPORTER)