

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: DONALD L. HELLING, ET AL., Petitioners v.

WILLIAM McKINNEY

CASE NO: 91-1958

PLACE: Washington, D.C.

DATE: Wednesday, January 13, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 DONALD L. HELLING, et al., :
4 Petitioners :
5 v. : No. 91-1958
6 WILLIAM MCKINNEY :
7 - - - - -X
8 Washington, D.C.
9 Wednesday, January 13, 1993
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:13 a.m.
13 APPEARANCES:
14 FRANKIE SUE DEL PAPA, ESQ., Attorney General of Nevada,
15 Carson City, Nevada; on behalf of the Petitioners.
16 JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General,
17 Department of Justice, Washington, D.C.; as amicus
18 curiae, supporting the Petitioners.
19 CORNISH F. HITCHCOCK, ESQ., Washington, D.C.; on behalf of
20 the Respondent.
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1 PROCEEDINGS

2 (10:13 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in number 91-1958, Donald L. Helling v. William
5 McKinney. General Del Papa.

6 ORAL ARGUMENT OF FRANKIE SUE DEL PAPA

7 ON BEHALF OF THE PETITIONERS

8 MS. DEL PAPA: Mr. Chief Justice, and may it
9 please the Court:

10 Our Nation's prisons are dangerous places. We
11 take our most troubled and troublesome citizens, we put
12 them behind walls for our protection and their
13 rehabilitation. We do so in structures and under rules
14 designed for security, ours and theirs, then we ask those
15 who manage them to somehow make it work.

16 It is a difficult, complex job; one in which the
17 most routine daily decisions can have serious, even lethal
18 consequences. It is in recognition of those consequences
19 that 35 States, the United States District of Columbia,
20 Puerto Rico, and three territories, ask you to reverse a
21 Ninth Circuit opinion that is not only in direct conflict
22 with opinions of other circuit courts, but severely
23 impacts the serious decisions confronting the men and
24 women who run our Nation's over 1,300 prisons.

25 The respondent in this case was convicted of

1 murder and is serving his sentence in the Nevada prison
2 system. In 1987 he filed a civil rights complaint
3 alleging he had shared a cell with a series of inmates who
4 were heavy smokers and that prison officials had done
5 nothing to separate smoking and nonsmoking inmates. He
6 also alleged certain medical symptoms as a result of
7 exposure to secondary cigarette smoke, and that the
8 exposure constituted cruel and unusual punishment.

9 He sought an injunction prohibiting prison
10 administrators from housing him with inmates who smoke and
11 asked for compensatory and punitive damages. That
12 complaint launched the case that is before the Court
13 today.

14 The question is whether, as the Ninth Circuit
15 has held, the respondent has stated a valid Eighth
16 Amendment claim. Even --

17 QUESTION: General Del Papa, has Nevada changed
18 its regulations since the institution of the lawsuit,
19 concerning -- insofar as they would affect placement of
20 prisoners for smoking or nonsmoking purposes?

21 MS. DEL PAPA: No, Justice O'Connor. The --
22 the -- what was in existence at the time of this initial
23 complaint was an informal policy of accommodation in terms
24 of whenever practical.

25 QUESTION: And now that's embodied in written

1 policies --

2 MS. DEL PAPA: That's correct.

3 QUESTION: -- That are consistent with the
4 former informal policies.

5 MS. DEL PAPA: That's correct.

6 QUESTION: And this particular petitioner, I
7 mean plaintiff in the suit below, has been moved since the
8 institution of the lawsuit.

9 MS. DEL PAPA: That's correct.

10 QUESTION: And is he presently being housed in a
11 single cell?

12 MS. DEL PAPA: Yes.

13 QUESTION: Do you think there's some reason to
14 think that he may be moved again during his incarceration
15 and again subjected to secondary smoke?

16 MS. DEL PAPA: The underlying facts are capable
17 of repetition, yes. Because at any time -- of course,
18 classifications are reviewed through administrative
19 regulations at least every 6 months. But, again, there is
20 always the possibility of transfers. Because he is in a
21 single cell now does not mean that he will always have a
22 single cell.

23 QUESTION: Let me ask you another question while
24 I have you interrupted. To impose liability on the State
25 here or the prison authorities, I suppose the plaintiff

1 has to show that the prison authority is deliberately
2 indifferent to any condition arising from secondary smoke.

3 MS. DEL PAPA: Yes.

4 QUESTION: And was that issue ever addressed in
5 the courts below, deliberate indifference --

6 MS. DEL PAPA: The --

7 QUESTION: -- In light of the policy of the
8 prisons?

9 MS. DEL PAPA: Well, the informal policy, of
10 course, was in place at the time. And the magistrate
11 specifically found no serious medical need nor deliberate
12 indifference.

13 QUESTION: The magistrate found no deliberate
14 indifference.

15 MS. DEL PAPA: Yes.

16 QUESTION: And was that, then, reviewed?

17 MS. DEL PAPA: Yes.

18 QUESTION: That finding?

19 MS. DEL PAPA: Yes.

20 QUESTION: And what was the finding on review?

21 MS. DEL PAPA: The finding on review -- the
22 court of appeals attempted to distinguish between a
23 serious medical need of a present condition and a future
24 condition.

25 QUESTION: The deliberate indifference finding,

1 was that ever addressed on review?

2 MS. DEL PAPA: Well --

3 QUESTION: That there was no deliberate
4 indifference.

5 MS. DEL PAPA: The court of appeals on -- wanted
6 to remand this case because of the -- the way that --
7 well, they first, of course, found that they disagreed
8 with -- I'm sorry.

9 QUESTION: I guess I'm trying to find out
10 whether the court ever addressed the -- the finding that
11 there was no deliberate indifference. Because it seems to
12 me that if there is no deliberate indifference, there is
13 no need to look at the objective question at all.

14 MS. DEL PAPA: Well -- and we would argue that,
15 yes, they did review the deliberate indifference because
16 they did find no abuse of discretion on -- on the part of
17 the magistrate. However, it's complicated by the fact
18 that she had found no constitutional right to a smoke-free
19 environment, where they had found a different claim here.
20 And -- and it is our contention --

21 QUESTION: Is there any need to address the
22 objective question if -- if it's clear that there was no
23 deliberate indifference?

24 MS. DEL PAPA: No.

25 QUESTION: Well, didn't the deliberate

1 indifference go to two different issues? One, whether he
2 had a medical condition that had not been adequately taken
3 care of. And secondly, whether they were deliberately
4 indifferent to the whole smoking policy. Weren't they
5 separate in that magistrate -- before the magistrate, or
6 am I wrong on that?

7 MS. DEL PAPA: I don't -- I don't believe so.

8 QUESTION: I see.

9 QUESTION: Well, didn't the magistrate find that
10 there was really no problem unless the prisoner had some
11 symptoms, some active symptoms of -- that would require
12 medical treatment? That just a latent threat, as yet
13 unrealized, just wouldn't state a cause of action. And on
14 that basis they found no deliberate -- no -- no
15 indifference because there weren't any symptoms.

16 MS. DEL PAPA: There were symptoms, Justice
17 White, that --

18 QUESTION: All right. But, anyway, whatever the
19 symptoms were, they weren't -- he found that they were not
20 deliberately indifferent.

21 MS. DEL PAPA: Yes.

22 QUESTION: Well, the point is that the
23 deliberate indifference finding of the magistrate was
24 connected with the -- with the substantive finding that
25 there's no -- that there's no problem so long as you don't

1 have current symptoms.

2 MS. DEL PAPA: Yes.

3 QUESTION: That you don't have a right to -- so
4 you can't really say that the rest of the case goes away
5 by reason of the deliberate indifference finding.

6 MS. DEL PAPA: Well, we would argue that the --
7 the exposure to the environmental tobacco smoke in the
8 first instance does not meet with the objective component.
9 And, of course, I realize you can take these and there's
10 no set way in taking these.

11 QUESTION: No, but -- but the problem is if --
12 if this case comes to us with the finding that, in fact,
13 the State was not indifference -- was not indifferent to
14 this -- to this prisoner's desire to have a nonsmoking
15 roommate and was not indifference to his -- was not
16 indifferent deliberately to his desire to -- to have clean
17 air, entirely clean, free of cigarette smoke, then, as
18 Justice O'Connor says, we don't have to reach the other
19 issue.

20 But I did not understand the magistrate to have
21 said oh, the State was very -- very concerned about this
22 prisoner's right to clean air. I thought the magistrate
23 said he has no right to clean air. Now, he has a right,
24 if he has symptoms, to be given some consideration, but
25 they did that. They were not deliberately indifferent to

1 that. Now, is that a fair description of what --

2 MS. DEL PAPA: Yes.

3 QUESTION: Okay.

4 MS. DEL PAPA: That's a very fair description.

5 First let us say that we share concern that
6 exposure to environmental tobacco smoke is a potential
7 health hazard. We fully recognize and appreciate the
8 EPA's recent report giving ETS class-A status as an
9 environmental hazard. But we do not agree that exposure
10 to it rises to the level of an Eighth Amendment violation.
11 Giving it that status has considerable consequences.

12 QUESTION: Even though it's five packs a day.

13 MS. DEL PAPA: Yes.

14 QUESTION: Do you smoke, Madam Attorney General?

15 MS. DEL PAPA: No.

16 At worst it lays the groundwork for a
17 constitutional burden impossible for prison authorities to
18 carry out, recognizing the realities of our Nation's
19 prison system. At best it is an unwarranted and unwise
20 constraint on the discretion of our prison administrators,
21 who must daily balance health and security concerns in the
22 management of these complex and inherently dangerous
23 institutions.

24 Society continues to debate the relative rights
25 of smokers and nonsmokers, and the health concerns

1 relating to the use of tobacco. Even as that process
2 continues to unfold, the Ninth Circuit has mistakenly
3 determined that the debate is over, and it has provided a
4 constitutional right for prisoners establishing a health
5 standard which our Nation's legislatures have so far
6 expressly rejected, a goal that those of us on this side
7 of those prison walls do not --

8 QUESTION: But is that really a fair
9 interpretation of the court of appeals? As I understood
10 it, they remanded and now there're two issues to be
11 decided in the district court proceedings. One, whether
12 objectively the harm is sufficient and secondly, the
13 deliberate indifference problem. Have they really decided
14 that -- that the plaintiff will win on remand?

15 MS. DEL PAPA: Well, what the Ninth Circuit has
16 done, I would contend, is that they have recognized a
17 different standard than what this Court's standard is for
18 Eighth Amendment violations by -- they framed the question
19 below in terms of whether such -- such exposure posed an
20 unreasonable risk of harm, but that's not the -- the
21 standard that this Court applies to Eight Amendment
22 violations.

23 QUESTION: Well, do you take the position that
24 the warden, if he wanted to, could deliberately impose an
25 unreasonable risk of harm to a nonsmoker by putting him in

1 a cell where he knew there would be a serious risk of --
2 of harm?

3 MS. DEL PAPA: I'm sorry, I don't understand the
4 question.

5 QUESTION: Do you take the position that the
6 warden could deliberately house a person with a smoker
7 knowing that that person would -- would have a very
8 serious risk of harm from the smoking?

9 MS. DEL PAPA: We take the position that, again,
10 because there is an accommodation policy and because
11 smoking is of a secondary concern -- smoking is considered
12 to be a personal preference. There are other concerns
13 that the warden would have to take into consideration
14 first before reaching and trying to accommodate the -- the
15 smoking preference. Such things as --

16 QUESTION: Does he have any duty at all, under
17 the Constitution, to accommodate a smoking concern that
18 the plaintiff -- the prisoner alleges is going to cause
19 serious harm --

20 MS. DEL PAPA: Not --

21 QUESTION: That hasn't yet materialized. It's
22 latent and future.

23 MS. DEL PAPA: Not under the Constitution.

24 QUESTION: No duty whatsoever. And the second
25 question, could he deliberately house an inmate with a

1 smoker as a punitive measure; say you've been misbehaving,
2 I think I know a way - that I'll straighten you out for
3 the future.

4 MS. DEL PAPA: That, of course, would be in
5 violation of Nevada law. It would be considered
6 retaliation.

7 QUESTION: Well, would it violate the Federal
8 Constitution, though, do you think?

9 MS. DEL PAPA: No.

10 QUESTION: Well, do you agree that deliberate
11 indifference to an unreasonable risk of serious harm would
12 violate the Eighth Amendment?

13 MS. DEL PAPA: The problem with what you have
14 stated, Justice Kennedy, is the unreasonable risk of harm
15 portion of that. Because it's -- it's very difficult to
16 determine, and certainly I would agree that if you had a
17 constitutional right and -- and then you had -- and
18 thereby completing the objective component of the Wilson
19 v. Seiter test, and then you showed deliberate
20 indifference, then, yes, you would have -- that's where
21 you would have the problem.

22 QUESTION: Well, I -- I just want to make sure
23 we are agreed on the standard. You do agree, then, that
24 deliberate indifference to an unreasonable risk of serious
25 harm would violate the Eighth Amendment?

1 MS. DEL PAPA: Well 1--

2 QUESTION: That's the correct legal standard for
3 us to apply.

4 MS. DEL PAPA: No, Your Honor, that is not the
5 correct legal standard, because this Court's standard, in
6 terms of conditions of confinement cases such as Rhodes v.
7 Chapman, is instead inhumane conditions. I think that you
8 would first have to consider whether or not this is a -- a
9 serious deprivation of life's minimal necessities, and
10 then you would reach the question of what is cruel and
11 unusual punishment.

12 And, of course, all of that ties back to the
13 question of what are society's standards. In -- today in
14 the society that we live in, smoking is accepted. All of
15 us are exposed to environmental tobacco smoke.

16 QUESTION: Well, we can -- we can argue about
17 what is or is not a serious risk of -- of harm. But
18 I'm -- I'm simply wondering about your standard that
19 you're applying.

20 MS. DEL PAPA: Well, the standard that I believe
21 should apply is this Court's standard with reference to
22 Eighth Amendment cases, and not an unreasonable risk of
23 harm standard that the Ninth Circuit attempted to apply in
24 the original case.

25 QUESTION: Well, suppose an inmate has a -- has

1 a long history of violent assaultive behavior on his
2 cellmates. And suppose we assume that it's an
3 unreasonable risk of harm to put another cell -- another
4 prisoner in with him. Now, would deliberate indifference
5 to that risk constitute an Eighth Amendment violation?

6 MS. DEL PAPA: No.

7 QUESTION: You can distinguish that from the
8 case that we have before us, I suppose, in that one could
9 certainly argue that Justice Kennedy's hypothesis poses a
10 punishment that is perhaps not only cruel but unusual,
11 whereas I gather one of your points is that this is not --
12 if it's a punishment, it's nonetheless not an unusual
13 punishment, because people in civil society outside of the
14 prison are exposed to pretty much the same thing all the
15 time.

16 MS. DEL PAPA: Yes, Your Honor.

17 QUESTION: Well, what does the -- does the
18 record show the number or percentage of prisoners in this
19 particular prisoner who smoked?

20 MS. DEL PAPA: Yes. It has been agreed that
21 anywhere between two-thirds and 90 percent of inmates
22 smoke. Which, of course -- the majority of inmates in our
23 prison systems in our country smoke.

24 QUESTION: General, in -- with respect to the
25 articulation of the standard, you have said that

1 unreasonable risk is not the appropriate way to -- to
2 state it. But however it may be stated, whether it be
3 stated in terms of unreasonable risk or an unreasonable
4 deprivation of life's necessities, what is or is not
5 reasonable is ultimately, is it not, a function to be
6 determined under the concept of evolving decency? Is that
7 fair to say, under our cases?

8 MS. DEL PAPA: Yes.

9 QUESTION: Who should make that determination in
10 the first instance? Should we make it? Should a district
11 court make it, a court of appeal make it?

12 MS. DEL PAPA: I would think that, again -- and
13 what this Court has said is that the clearest and most
14 reliable objective factor with risk is, of course, our
15 legislative enactments. I think you would look first to
16 those as the factors as to what society's standards are.

17 QUESTION: Well, they're -- they're something to
18 look at, but my question is who should look at it?
19 Because, for example, we -- we may indeed look at
20 legislative enactments and I suppose -- I haven't done it,
21 but I -- I assume we will find legislation about smoke-
22 free zones in public buildings and so on.

23 But in each of those instances the legislature
24 is dealing with people who, by and large, have some
25 voluntary control as to whether or not they will or will

1 not be in the smoke-free zone. So that the legislation is
2 not, in effect, going to answer our question; it's just
3 going to be part of the record on which the question
4 should be answered.

5 And -- and I go back to the question, who
6 should, in effect, compile that record and where should it
7 be compiled? Are we in a position to make that judgment
8 right here and now?

9 MS. DEL PAPA: I would say no, because I think
10 that the standard of decency relative to exposure of
11 environmental tobacco smoke in our country has not
12 evolved. The debate is continuing.

13 QUESTION: Don't you agree that deliberate
14 indifference to the obvious medical needs of the prisoner
15 is a -- is a violation of the Eighth Amendment?

16 MS. DEL PAPA: If -- if you have serious
17 existing medical needs --

18 QUESTION: Yes.

19 MS. DEL PAPA: -- Which we did not have in this
20 instance.

21 QUESTION: You didn't answer my question.

22 MS. DEL PAPA: If -- yes, if you -- if you have
23 deliberate indifference to serious medical needs.

24 QUESTION: Yes. And, now, there's an allegation
25 in this case -- this is a pleading case, as I understand

1 it.

2 MS. DEL PAPA: That's correct.

3 QUESTION: There's an allegation that -- that --
4 that housing someone, a nonsmoker with a smoker, poses a
5 serious medical risk, and that the authorities are
6 deliberately indifferent to it. Why doesn't that state a
7 cause of action?

8 It doesn't. That's just an allegation and I
9 don't know whether it could be supported or not. But why
10 doesn't that state of cause of action under the Eighth
11 Amendment, just like a complaint alleges the water is
12 dirty in this prison, it's giving every -- making
13 everybody sick, and they're completely indifferent to
14 this. That would -- wouldn't that state an Eighth
15 Amendment cause of action?

16 MS. DEL PAPA: No, Your Honor.

17 Mr. Chief Justice, I'd like to reserve the
18 balance of my time.

19 QUESTION: Very well, General Del Papa. Mr.
20 Roberts, we'll hear from you.

21 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

22 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

23 SUPPORTING THE PETITIONERS

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

1 The position of the United States is that the
2 decision below should be reversed. The reason is that
3 exposure to secondary tobacco smoke does not satisfy the
4 objective component of an Eighth Amendment violation. The
5 Ninth Circuit below framed the issue as whether such
6 exposure posed an reasonable risk of harm; that is not the
7 Eighth Amendment standard.

8 What this Court has asked in its condition of
9 confinement cases is, instead, whether there has been a,
10 quote, serious deprivation of basic human needs or a
11 denial of the, quote, minimal civilized measure of life's
12 necessities, end quote.

13 QUESTION: Well, isn't -- isn't nontoxic air a
14 basic human need?

15 MR. ROBERTS: A smoke-free cell is not a basic
16 human need.

17 QUESTION: Well, how about my phraseology,
18 nontoxic air?

19 MR. ROBERTS: The question under the Eighth
20 Amendment looks to society's standards. And in society --

21 QUESTION: Well, let's -- before we get to
22 society's standards -- well, maybe you are. You're saying
23 society does or does not have an understanding that
24 nontoxic air is one of basic -- life's basic needs?

25 MR. ROBERTS: Society does not have an

1 understanding that a smoke-free environment, the toxin of
2 second-hand smoke, to use -- in your phraseology, is a
3 basic human need. At the very least what is condemned as
4 cruel and unusual in prisons --

5 QUESTION: Who -- who should make the
6 determination -- that kind of mixed determination of fact
7 and value that you just stated? Should we make it in the
8 first instance or should a district court at least take a
9 stab at it based on a record?

10 MR. ROBERTS: Well, I think it's a legal
11 question that each court presented with it along the way
12 has an obligation to decide.

13 QUESTION: But it's one that -- is it one that
14 can be decided without a factual record?

15 MR. ROBERTS: Yes. This Court addressed a
16 similar question in Gregg v. Georgia, or in Coker v.
17 Georgia, where it looked to societal standards reflected
18 in legislative enactments to determine what society's
19 standards would be --

20 QUESTION: Of course, we weren't dealing there
21 with an issue which was sort of on the cutting edge of
22 what society does or does not tolerate, whereas we are
23 doing that here, aren't we?

24 MR. ROBERTS: If we -- if we are at the cutting
25 edge, it seems to me then the answer is clear. The Eighth

1 Amendment does not require that prisons be in the vanguard
2 of a movement toward a public health ideal. They follow
3 contemporary standards of decency, to use the formulation
4 quoted most recently in Hudson v. McMillian.

5 QUESTION: Well, Mr. Roberts, why would we even
6 have to address the question if there's no deliberate
7 indifference to an assumed right to a smoke-free
8 environment?

9 MR. ROBERTS: You would not have to address it.
10 There is both an objective component and a subjective
11 component; failure on either one means there's no Eighth
12 Amendment violation.

13 QUESTION: And which one should be addressed
14 first, do you suppose?

15 MR. ROBERTS: I don't think there's any natural
16 priority in addressing them here. What the Ninth Circuit
17 based its decision on was the objective component. It
18 said the objective component may be satisfied if there's
19 an unreasonable risk of harm. That's the issue before the
20 Court today, and that's where we think the Ninth Circuit
21 erred. It erred because society does not unambiguously
22 condemn exposure to secondhand tobacco smoke in the way it
23 must before --

24 QUESTION: Even if -- even if -- even assuming
25 an unreasonable risk of harm.

1 MR. ROBERTS: Even assuming an unreasonable risk
2 of harm.

3 QUESTION: That's what you have to really face
4 up to.

5 MR. ROBERTS: That's right. The question is --

6 QUESTION: There's -- the case comes to us,
7 exposure to this kind of smoke poses an unreasonable risk
8 of harm to a person's health.

9 MR. ROBERTS: That's the question.

10 QUESTION: And -- but that just doesn't state a
11 cause of action under the Eighth Amendment.

12 MR. ROBERTS: It does not. It is not the
13 standard this Court has articulated. And the reason is --

14 QUESTION: What -- what about Justice White's
15 hypothetical about the water?

16 MR. ROBERTS: As I understood the hypothetical,
17 he said everyone was getting sick. That is an existing
18 medical need; under Estelle v. Gamble it must be addressed
19 by the prison authorities.

20 QUESTION: But if the -- if the allegation were
21 there's an unreasonable risk that everybody will get sick
22 in the next 30 days, that would not be. Is that the
23 distinction?

24 MR. ROBERTS: It would depend -- it would depend
25 on what society's standards were with respect to that

1 risk.

2 QUESTION: Well, they like to drink nontoxic
3 water and they like to breathe nontoxic air, I guess.

4 MR. ROBERTS: Then it would state an Eighth
5 Amendment claim. But the fact of the matter is --

6 QUESTION: Wait, it would state an Eighth
7 Amendment claim.

8 MR. ROBERTS: If -- yes. If it's -- if you're
9 telling me that there's toxic water that is going to make
10 everyone sick within the next 30 days, yes. As a
11 society --

12 QUESTION: But not toxic smoke.

13 MR. ROBERTS: Not smoke, because there's a --

14 QUESTION: Why not? What's the difference?

15 MR. ROBERTS: The difference is that as a
16 society we don't accept or tolerate the notion that
17 everyone will drink water that's going to make people sick
18 within 30 days. We do accept and tolerate the condition
19 that people are exposed to secondary tobacco smoke.

20 QUESTION: What about asbestos --

21 MR. ROBERTS: Asbestos --

22 QUESTION: -- In a prison? The allegation says
23 that this prison is loaded with asbestos. It's a serious
24 medical risk.

25 MR. ROBERTS: And that may well state a Eighth

1 Amendment violate, because we, as a society, don't treat
2 exposure to asbestos as a matter of personal preference.
3 When we go to a restaurant they don't ask do you want the
4 asbestos section or the nonasbestos section.

5 (Laughter.)

6 MR. ROBERTS: They do ask do you want smoking or
7 nonsmoking. Smoking is a matter of personal preference,
8 and exposure to secondary tobacco smoke also a matter of
9 personal preference. And the first thing that --

10 QUESTION: Well, it isn't in the -- it isn't in
11 the prison a matter of personal preference. They --
12 you -- the prisoner goes where he's put.

13 MR. ROBERTS: Exactly. And it's not entirely up
14 to our preferences --

15 QUESTION: It doesn't say you want smoking or
16 nonsmoking in the prison.

17 MR. ROBERTS: In our society it's not entirely
18 up to personal preferences to move away either. OSHA
19 estimates that 77 percent of nonsmoking Americans are
20 exposed to secondary tobacco smoke at work. Many
21 Americans are exposed involuntarily to secondary tobacco
22 smoke at home.

23 If a parent smokes and exposes children to
24 secondary tobacco smoke, we don't brand that as child
25 abuse. It's difficult to imagine how what we allow

1 parents to do to children in the home is somehow cruel and
2 unusual when done to a convicted felon in prison.

3 QUESTION: Mr. Roberts, as I understand it this
4 case was -- resulted in a directed verdict by the
5 magistrate at a -- at the close of the plaintiff's
6 evidence.

7 MR. ROBERTS: Yes, Your Honor.

8 QUESTION: Following up on Justice Souter's --
9 anyway, what evidence was introduced, if any, before the
10 magistrate as to the -- the kind of things we're talking
11 about right here?

12 MR. ROBERTS: Because the inmate's complaint was
13 not framed the way the Ninth Circuit framed it, the
14 evidence at the trial concerned his existing medical needs
15 and the -- and the evidence the State would have submitted
16 concerned the steps they had taken to accommodate that.
17 There was not evidence about the general public health
18 issue.

19 QUESTION: And the plaintiff offered no such
20 evidence.

21 MR. ROBERTS: The plaintiff had pamphlets from
22 various organizations that he wanted to admit into
23 evidence, and that was not admitted by the magistrate.

24 QUESTION: And those pamphlets, as I understand
25 it, had to do with smoking by -- the dangers -- dangers to

1 the health of the smoker --

2 MR. ROBERTS: Exactly.

3 QUESTION: -- And not to second -- were not
4 addressed to secondary smoking.

5 MR. ROBERTS: Exactly. But I want to emphasize
6 that the issue under the Eighth Amendment is not the state
7 of medical knowledge or a public health ideal. The fact
8 that the surgeon general tells us that exposure to
9 secondary tobacco smoke is harmful does not dispose of the
10 Eighth Amendment issue. The issue is societal standards
11 and, for better or for worse, we as a society do not
12 always follow the surgeon general's guidance about what is
13 most healthful.

14 The surgeon general tells us we eat too much red
15 meat and too many eggs and that that increases our risk of
16 heart disease, but we still do it. And the same is true
17 with respect to exposure to secondary tobacco smoke.

18 QUESTION: Well, should we decide this case
19 simply on the basis that the prisoner attempted to make
20 out a serious risk to his own health and that he did not?

21 MR. ROBERTS: I think it can be disposed of
22 in -- on that basis.

23 If you compare the prisoner's complaint, the
24 pretrial stipulation, with the Ninth Circuit opinion,
25 you'll think you've seen two different cases. Because the

1 prisoner's complaint was urging either a completely
2 smoke-free environment and failure to address his serious
3 medical needs, and he lost on both counts. The Ninth
4 Circuit reshaped the complaint to state a very different
5 claim and then proceeded to decide that different claim.

6 QUESTION: But that's what's -- that's the one
7 that's before us, though, isn't it?

8 MR. ROBERTS: Well, in the Ninth Circuit's --

9 QUESTION: It is kind of a pleading case, and
10 whether the Ninth Circuit, in effect, has reshaped the
11 complaint into a cause -- an actionable cause of action.

12 MR. ROBERTS: That's correct.

13 QUESTION: Yeah.

14 MR. ROBERTS: The Ninth Circuit judgment, which
15 we think should be reversed --

16 QUESTION: Do you think we have a live case
17 here?

18 MR. ROBERTS: Yes, Your Honor. The -- the
19 prisoner is completely subject to being moved to a smoking
20 cell, having a smoker moved into his -- into his cell.
21 The standard --

22 QUESTION: But you didn't -- I was just going to
23 say you didn't urge review on the grounds that this was
24 really a procedural case, that the Ninth Circuit shouldn't
25 have reached the issue of the standard, given the fact

1 that the prisoner had not either raised an allegation or
2 offered evidence that would make it appropriate to develop
3 the standard.

4 MR. ROBERTS: No. Our position is that the
5 Ninth Circuit erred in its articulation of the standard
6 under the Eighth Amendment --

7 QUESTION: Yeah.

8 MR. ROBERTS: -- And that should be reversed.
9 The standard is, as reiterated last year in Hudson v.
10 McMillian, contemporary standards of decency.
11 Contemporary means two things. One, it means we're not
12 bound by what was barbarous in the eighteenth century when
13 the Eighth Amendment was drafted, but it also means we're
14 not bound by the public health ideal of the future to
15 which we may or may not be moving.

16 Under the surgeon general's guidance and the
17 guidance of EPA, they say we should change how we treat
18 secondary tobacco smoke. That means we're not there yet,
19 and if we're not there yet --

20 QUESTION: Well, they go further than that and
21 say it imposes -- secondary smoke imposes a serious health
22 risk.

23 MR. ROBERTS: Yes. And it does, and they say
24 society should change how it treats that. That means that
25 it cannot be cruel and unusual because society's standards

1 tolerate it. That's the problem the surgeon general and
2 EPA have identified.

3 QUESTION: But, by your asking us to address
4 that issue, insisting, almost, that we do, it seems to me
5 you are endorsing the way the Ninth Circuit treated the
6 pleadings in this case and the proof in this case, and I
7 had thought there was a serious question as to whether or
8 not this was even raised?

9 MR. ROBERTS: I think it was not raised, and I
10 think the case can be disposed of on that basis, saying
11 that the Ninth Circuit went too far in liberally
12 construing the complaint.

13 QUESTION: Although that was never suggested to
14 us at the certiorari stage.

15 MR. ROBERTS: I think in the -- the State's
16 papers did suggest that the Ninth Circuit went too far in
17 construing what the issue was in the complaint.

18 Thank you, Your Honor.

19 QUESTION: Thank you, Mr. Roberts. Mr.
20 Hitchcock, we'll hear from you.

21 ORAL ARGUMENT OF CORNISH F. HITCHCOCK

22 ON BEHALF OF THE RESPONDENT

23 MR. HITCHCOCK: Thank you, Mr. Chief Justice,
24 and may it please the Court:

25 Before addressing the question presented on the

1 merits, I would like to take a few moments to respond to
2 the questions from the Court about the present nature of
3 the controversy, particularly some of the opening
4 questions from Justice O'Connor.

5 2 years ago the court of appeals ruled that Mr.
6 McKinney is entitled to seek an injunction regarding the
7 conditions of his confinement at the Nevada State Prison
8 in Carson City. Shortly after that, as the questioning
9 indicated, he was moved to a new facility where he has
10 been located for the last 2 years, or assigned for the
11 last 2 years.

12 Second, he no longer shares a 6 foot by 8 foot
13 cell with somebody who smokes five packs of cigarettes a
14 day, which amounts to one cigarette every 10 minutes
15 during every waking hour. And third, there is a new
16 written policy that is far more explicit than the informal
17 practice cited before.

18 And I'd like to respond more specifically to
19 Justice O'Connor's question, because I think it is not
20 entirely accurate to say that the new written policy --
21 which, by the way, took effect prior to trial in this
22 case, although we were not told that until the reply brief
23 stage in this case -- is a little more explicit.

24 The informal policy previously in question is
25 cited in the Joint Appendix at page 22, paragraph 4, the

1 affidavit of Donald Helling, who was the classification
2 officer at the time. Now, this affidavit was not part of
3 the record at trial. It was submitted in connection with
4 the preliminary injunction papers. Mr. Helling was
5 planning to testify, as I understand it, but he did not,
6 in fact, testify. And this was not before the magistrate
7 who heard the case with consent of the parties when she
8 directed the verdict.

9 And if one looks at the paragraph in question,
10 it does not mention smoking as such. What it talks about
11 is considering various factors, including the personal
12 desires of the inmate, quote unquote, which are taken into
13 account, insofar as practical, in deciding who rooms with
14 whom.

15 Now, the policy in question that took effect --
16 well, let -- to go chronologically, the pretrial
17 stipulation under which this case was presented to the
18 trial court and to the court of appeals states -- and I'm
19 quoting now from page 51 of the Joint Appendix. Paragraph
20 8 at the top of the page states as a stipulation signed by
21 the Deputy Attorney General of Nevada, who was handling
22 the case, and I quote: There are no restrictions on
23 smoking in the prison's housing units, classroom or
24 library.

25 No restrictions in the housing units. The

1 official policy which was adopted subsequently, and which
2 we first learned about when the solicitor general filed
3 his brief, indicates three factors that I think are
4 relevant here to the question of whether -- of the state
5 of the present controversy.

6 First of all, smoking by inmates is now
7 prohibited throughout the Nevada State Prison System
8 during meetings, counselling sessions, or visits with a
9 doctor. Secondly, no-smoking areas are explicitly created
10 in common areas such as classrooms, libraries, the gym,
11 chapels, dining areas, and the infirmary.

12 And third, with respect to housing questions
13 Nevada prison officials are now required expressly to
14 make, and I quote, reasonable efforts, unquote, to
15 accommodate nonsmokers and smokers alike. And if a
16 nonsmoker such as Mr. McKinney has to be double celled and
17 if he asks for a nonsmoking cellmates, the rules require,
18 and I quote, accommodations will be made as necessary
19 consistent with security considerations and space
20 availability, unquote.

21 So this -- this is the rule that's now in
22 effect, and has been since 1989. As I mentioned a moment
23 ago, we and the solicitor general assumed that this was a
24 1992 policy, but as the State points out in its reply
25 brief, in fact it took place on October 1st, 1989. The

1 relevant copies, which change only minor -- in minor
2 details from year to year, have been lodged with the clerk
3 and --

4 QUESTION: You say it took place in October,
5 1989. The regulation was issued then.

6 MR. HITCHCOCK: The regulation was issued on
7 September 28th, 1989. And it states effective October 1,
8 1989, smoking will be regulated as follows. That --
9 that's in the additional materials that were lodged.

10 QUESTION: In your view, do those regulations
11 meet constitutional requirements?

12 MR. HITCHCOCK: In our view, if those standards
13 are followed in the prison system, and I -- we submit that
14 it would be very difficult for a prisoner to challenge the
15 conditions of confinement to satisfy the subjective prong
16 if the prison official is saying we're doing all that we
17 can consistent with the considerations, with balancing of
18 the interests. Then I think under *Wilson v. Seiter* it
19 would be very difficult for a prisoner to say you are
20 being deliberately indifferent, you are not demonstrating
21 the requisite subjective intent that it needed for an
22 Eighth Amendment violation.

23 QUESTION: So there would be no basis for
24 injunction currently.

25 MR. HITCHCOCK: There would be no basis for an

1 injunction under that situation.

2 QUESTION: And there's no question about damages
3 in this case.

4 MR. HITCHCOCK: Well -- well, there's no
5 question -- but let me -- let me answer the question a
6 little more specifically, if I may, Justice White. You
7 are correct that there is no question as to damages here.
8 The Ninth Circuit held -- affirmed a denial of damages.

9 QUESTION: Yes.

10 MR. HITCHCOCK: I think -- and let me emphasize
11 this point because it goes to Justice Kennedy's question
12 as well as your own. If the policy is in effect and if it
13 is being implemented, if it's being followed, then I think
14 the prisoner would have a difficult situation.

15 If the complaint is, yes, there's this policy,
16 but they're ignoring it, they're not celling me -- there's
17 three cells down there where they could give me a cellmate
18 and they're not doing it, or they're not having no-smoking
19 areas, then I think the question of subjective culpability
20 would still be an open issue.

21 QUESTION: And you don't think that that's
22 likely. You don't think that the prison's objections to
23 this whole notion is -- is based upon the fact that, of
24 course, you're going to have claims of that sort. If the
25 whole thing rests upon whether you're doing your best,

1 they're going to say well, gee, there are a lot of people
2 that you could have celled me with instead. That'll
3 always be an available claim, won't it?

4 MR. HITCHCOCK: It depends. If -- if the
5 crowding situation is as bad as the State is suggesting,
6 then perhaps a prisoner will not be able to make the
7 claim. I think --

8 QUESTION: Well, it's a lawsuit all the time,
9 and at least in our cases you have to have a prisoner
10 who -- who, you know, is -- has been beat up or who -- who
11 is -- is physically very ill. But under -- under this
12 rule any prisoner can -- can say, gee, I -- you know, I
13 want a new roommate.

14 MR. HITCHCOCK: Well.

15 QUESTION: And they very often want new
16 roommates for quite other reasons, don't they?

17 MR. HITCHCOCK: Yes. And in this case Mr.
18 McKinney's concern has, in fact, been accommodated. It
19 might affect a number of prisoners, as, for example, the
20 drinking water case Justice White posited.

21 I'd like also to respond to the question
22 about --

23 QUESTION: Could I -- could I --

24 MR. HITCHCOCK: Yes.

25 QUESTION: Could I -- why wouldn't it that --

1 why, if this new regulation is a -- is to be taken
2 seriously, I would suppose we might vacate the judgment
3 below and remand for reconsideration in light of this new
4 regulation in terms of whether there's anything left of
5 the lawsuit as far as an injunction is concerned.

6 MR. HITCHCOCK: I think that would be a sensible
7 resolution. I mean, for example, the Chief Justice asked
8 the question what about the conditions at this prison.
9 The lawsuit in question challenges conditions at a prison
10 to which he is no longer assigned, and where there's no
11 evidence in the record.

12 So I -- I think, as some of the questions by
13 Justice Souter were asking, the question really in this
14 case is who should decide, in the first instance, what is
15 involved in this case, what the facts are --

16 QUESTION: Well may I -- may I ask a question
17 there?

18 MR. HITCHCOCK: Yes, sir.

19 QUESTION: Shouldn't counsel for the -- you, I
20 guess you, decide whether you've got a lawsuit that's
21 worth pursuing at this point in time?

22 MR. HITCHCOCK: Counsel should. Let me explain
23 the situation there. Mr. McKinney has obtained the
24 services of an attorney out in Nevada who will represent
25 him in proceedings on remand in this case. As appellate

1 counsel in this case, I have been unable to try to
2 determine exactly what the conditions are he's presently
3 complaining of.

4 His concern at the present time is with
5 conditions at the Ealey State Prison where he is presently
6 housed more so than the conditions back at the former
7 prison where he's only returned for several weeks. I
8 think, as cases like Lewis v. Continental Bank and the
9 Differdorfer case suggest, when there's been a material
10 change of the sort that's involved here, the appropriate
11 resolution is to let the trial court sort things out in
12 light of the developments.

13 I mean, for example, if we had known --

14 QUESTION: Yes, but we're not in the habit of
15 announcing constitutional rules in cases that may be
16 totally hypothetical and speculative and nobody really
17 intends to go to trial in the case.

18 MR. HITCHCOCK: Well, that is correct. But the
19 problem is -- is as appellate counsel 2,000 miles away, I
20 am unable to do the sort of factual and legal research
21 that would be necessary in order to frame either a new
22 complaint or an amended complaint that would take account
23 of the fact that there is this policy that has taken
24 effect, as well as the fact he's no longer at the prison
25 that he filed suit from.

1 QUESTION: No, but if the case were simply
2 dismissed at this point, I don't think there'd be anything
3 that would prevent him from bringing a new lawsuit saying
4 where he now is he doesn't like the situation either.

5 MR. HITCHCOCK: That -- that is correct. The
6 court could simply dismiss it.

7 QUESTION: Litigating about what happened 2
8 years ago --

9 QUESTION: And this sort of -- this sort
10 determination that you're referring to is not made by us
11 on the basis of the preference of -- of an individual
12 party. It's based on, you know, theories of mootness and
13 controversy and that sort of thing.

14 MR. HITCHCOCK: Well, that -- that's absolutely
15 correct, Mr. Chief Justice. What we're dealing here,
16 really though, is a situation where there was a
17 development, a factual development, which, had we known
18 about it before the -- before the petition had been
19 granted, we might have been able to address and the Court
20 might have decided to see how the issue plays out in light
21 of Wilson v. Seiter. This is the first opportunity,
22 frankly, we've had to raise that question, which is why
23 I'm doing it at the time.

24 QUESTION: Are -- are you saying the case is
25 moot? Are you acknowledging the case is moot?

1 MR. HITCHCOCK: My client is unwilling to
2 concede mootness or to give up the injunction. What I'm
3 saying is that I cannot, from Washington, D.C., do the
4 type of investigation. I think that -- that it would be
5 needed to say precisely --

6 QUESTION: You're saying you don't know that the
7 case is not moot.

8 MR. HITCHCOCK: It may be moot, it may not be
9 moot. I cannot stand before the Court and say that if I
10 had to draft a new complaint about the conditions at
11 Ealey, this is what I would say. I think -- the case has
12 gone on for 6 years now. The State knew about the change
13 in this case between the time of the stipulation and
14 between the time of trial. It chose not to tell anybody
15 that there was now a written policy that deals with this.
16 until we got to the reply brief stage.

17 And under the circumstances, as Justice Stevens
18 pointed out, you could simply say we're going to dismiss
19 and let Mr. McKinney bring a new case, if he chooses to do
20 so. I think under the circumstances of the case, though,
21 the magistrate being familiar with it and whatnot, it
22 might be the preferable disposition, as in Lewis v.
23 Continental Bank, to simply send it back and say, okay, is
24 there still -- let the trial court, who can take facts,
25 figure out what's left of the case in the light of --

1 QUESTION: You don't -- you perhaps don't
2 consent to -- you -- you may be -- not be in any position
3 to consent to -- to -- or to urge us to do that, but I
4 suppose we could -- but you did say it might be -- from
5 our point of view it might be a sensible thing to do to
6 remand to the court of appeals.

7 MR. HITCHCOCK: Or -- or to have the court of
8 appeals remand to the trial court.

9 QUESTION: Why not let the court of appeals
10 decide what to do with it?

11 MR. HITCHCOCK: Well, the court of appeals in
12 this case, I think, did in its second opinion. What the
13 court of appeals -- when the Court -- this Court remanded
14 for consideration in light of Wilson, the court of appeals
15 said, all right, Wilson adds an -- well, adds or clarifies
16 an element that has to be proven, and we're going to send
17 it back to the district court since the case is at the
18 pleading stage --

19 QUESTION: Well, but, yeah -- but we're going to
20 ask them to reconsider it in the light of the -- of the
21 changed regulations.

22 MR. HITCHCOCK: Yes.

23 QUESTION: They did not know either about the
24 changed regulation or about his transfer.

25 MR. HITCHCOCK: We advised the court of appeals

1 the second time around that he had been transferred and
2 had a no-smoking cellmate. The - the State did not advise
3 the court of appeals. Ironically, the latest version was
4 adopted the same day as the supplemental briefs in this
5 case. They did not tell them, by the way we have a new
6 written policy in this case that you might want to tell
7 the trial court to consider in addition.

8 I'd like to -- to pick up another question
9 Justice O'Connor asked before about the finding of a
10 deliberate indifference. It is certainly correct that, as
11 the trial court viewed the issue, there are two questions.
12 One, deliberate indifference to existing conditions and
13 two, the question of whether there was a constitutional
14 violation of the broader sort that the court of appeals
15 recognized.

16 The court of appeals decided quite explicitly,
17 and this is at pages -- see 38 and 39 of the Joint
18 Appendix, that there was no deliberate indifference as to
19 the present conditions in which Mr. McKinney was being
20 confined. But because there was no evidence in the record
21 at trial as to the future conditions, the finding of
22 deliberate indifference does not extend to the second
23 claim.

24 And I would point out, as we noted at pages 16
25 and 17 of our brief, the United States and all the State

1 amici agree with us, that the subjective element which
2 underlies deliberate indifference did not come into play
3 here.

4 What the magistrate -- the way the magistrate
5 viewed the case -- and this, again, is at pages 41 and 42
6 of the Joint Appendix. At the summary -- was at the
7 summary judgment stage, it was not appropriate to grant
8 summary judgment to the State because, in her view, the
9 question was whether -- was to what extent is Mr. McKinney
10 currently suffering from some illness. In her view prior
11 to Wilson, Eighth Amendment violations turned on the
12 seriousness of the particular complaint.

13 And when at trial, she concluded, based on the
14 evidence, that there was nothing presently wrong with him
15 that was not being treated, she made the finding of
16 deliberate indifference and ruled as a matter of law that
17 he did not have a broader claim. In our view, that the
18 correct analogy --

19 QUESTION: That -- that was a directed verdict.

20 MR. HITCHCOCK: It was a directed verdict at the
21 close of --

22 QUESTION: Of the plaintiff's case.

23 MR. HITCHCOCK: Yes. And if I can respond to
24 the earlier question, Mr. Chief Justice, I think that --
25 that Mr. Roberts raised, the question was well what did

1 Mr. McKinney put on. Most of the exhibits dealt with
2 complaints that he had filed.

3 I would point out also that Mr. McKinney, prior
4 to trial, made a motion to have the appointment of an
5 expert toxicologist to talk about precisely these issues.
6 That motion, which was denied by the magistrate prior to
7 trial but which the court of appeals said should not have
8 been denied, asked for a -- an expert to testify on such
9 issues as, and I'm quoting -- well, what he said was
10 without the testimony of an environmental toxicologist,
11 plaintiff cannot prove the effect of smoker's side-stream
12 smoke upon a nonsmoker.

13 He said that he had been in touch with a
14 toxicologist at the local university but could not pay
15 him, and asked would you appoint someone. The court of
16 appeals said the magistrate erred under Rule 706 of the
17 Federal Rules of Evidence in denying that request, and
18 said that when the case is remanded for trial the
19 court -- the trial court should seriously consider
20 appointing such an environmental -- environmental
21 toxicologist.

22 QUESTION: Well, counsel, if the trial court
23 were to look at the current adopted and articulated policy
24 regarding secondary smoke and conclude that under that
25 policy there could be no deliberate indifference, then

1 there wouldn't be a need for taking testimony from an
2 expert, would there?

3 I mean that would be the end of the case,
4 because you have to meet two prongs.

5 MR. HITCHCOCK: Yes. The case may well be
6 decided on summary judgment based on the subjective prong.
7 The question that is presented in this case however, the
8 only issue that the State brought up, is the question of
9 whether the objective prong of an Eighth Amendment
10 violation can be stated based upon the exposure to tobacco
11 smoke that may cause a serious injury down the road.

12 QUESTION: Well I thought normally we tried to
13 avoid deciding tough constitutional issues if there was
14 some other factual nonconstitutional basis for deciding
15 it.

16 MR. HITCHCOCK: That is correct, and that's why
17 we suggested in our brief that the policy in question
18 here, if it had been brought up at the petition stage, we
19 could have talked about it and suggested that the best
20 resolution would have been either to deny certiorari and
21 let the case go back, either in the judgment or affirm --
22 with the judgment of the court of appeals remaining
23 unaffected, or with instructions to consider this element
24 as well. But we didn't know until the merit stage that
25 there had been an explicit policy in question. And I

1 think --

2 QUESTION: Mr. Hitchcock.

3 MR. HITCHCOCK: Yes, sir.

4 QUESTION: Just to talk for a minute about the
5 issue on which we granted certiorari in this case, would
6 you -- what is your response to Mr. Roberts assertion that
7 it -- it would seem extraordinary to say that it's cruel
8 and unusual punishment simply to expose someone to
9 secondary cigarette smoke when we don't even consider it
10 child abuse --

11 MR. HITCHCOCK: My answer --

12 QUESTION: -- For parents to do that?

13 MR. HITCHCOCK: Well, my answer to that, I
14 think, will depend in turn upon the evolving standards.
15 As we -- we pointed out in our brief the fact that, as of
16 the time we wrote it, EPA and -- EPA was in the process of
17 adopting a report which was finally released last week,
18 which, in fact, classifies environmental tobacco smoke not
19 as some annoyance to which everybody is subjected at some
20 time in his or her life, or part of what's called in the
21 scientific parlance, background smoke --

22 QUESTION: Well, EPA is sort of on the cutting
23 edge in these things, isn't it?

24 MR. HITCHCOCK: No, I don't think so, Your
25 Honor.

1 QUESTION: You don't think so.

2 MR. HITCHCOCK: No. If -- if you examine the
3 methodology the EPA has -- and we cited the sources --
4 what they do is they look to the weight of the evidence.
5 There is a -- a series of scientific papers, scientific
6 studies, which conclusively show that EPA should, in
7 fact -- that environmental tobacco smoke is, in fact, a
8 Group A carcinogen of the same order as arsenic, asbestos,
9 benzene, coke oven emissions --

10 QUESTION: Well, that's fine ---

11 MR. HITCHCOCK: And simpler considerations --

12 QUESTION: That -- that establishes the risk and
13 the danger, just as you can establish the risk and the
14 danger from eating too many fatty foods. But people
15 haven't stopped eating fattening foods, and I -- and I
16 presume we don't have to feed people in prisons bean
17 sprouts simply because that would be healthier.

18 MR. HITCHCOCK: No.

19 QUESTION: It's a risk that we all know about
20 and that this society has accepted. I mean maybe it's
21 intelligent, maybe it's unintelligent, but this society
22 has accepted it. Now, why isn't the case -- why isn't it
23 the case that whatever the EPA says -- EPA says about the
24 medical fact, this society has accepted this risk, as is
25 demonstrated by the fact that it is not -- you have no

1 cause of action for child abuse simply because you raise
2 your child in a -- in a nonsmoke-free environment.

3 MR. HITCHCOCK: Well, if I could give a factual
4 answer, one of the striking things about the EPA's study,
5 although it's not gone into detail, is that the part of
6 the population most susceptible to serious injuries are,
7 in fact, children. Conditions such as asthma and other
8 conditions, which may not have been suspected not terribly
9 long ago, are, in fact, conditions that -- which children
10 can, in fact, obtain serious illnesses far beyond the
11 magnitude of the 3,000 excess lung cancer deaths a year.

12 So the way I would answer it is let's look at
13 asbestos. A number of years ago one would not have
14 thought it was child abuse to put children in schoolrooms
15 with asbestos. One might not have thought -- one would
16 have thought building one's home with asbestos was
17 perfectly benign.

18 I think the question here -- the only question
19 presented on the merits is whether or not a cause of
20 action is stated based on an objective condition and
21 whether, under Conley v. Gibson, one can say as a matter
22 of law that there's no set of facts that could be proven
23 which would entitle Mr. McKinney to relief.

24 QUESTION: How does Conley v. Gibson bear on a
25 case that went to trial?

1 MR. HITCHCOCK: Because it went to trial on the
2 separate question of whether Mr. McKinney is suffering a
3 present injury. And let me --

4 QUESTION: Well, wasn't that up to Mr. McKinney,
5 to what -- what issues he went to trial on?

6 MR. HITCHCOCK: It was up to trial, but -- but
7 the -- the second claim recognized by the court of appeals
8 turned upon his ability to produce some kind of evidence
9 as to the long-term exposure, and I believe he protected
10 his right by filing not one but two motions to have expert
11 testimony, which was denied, in which the magistrate --
12 which the court of appeals said he's entitled to.

13 I think the distinction, in response to your
14 question and other questions from the Court, Mr. Chief
15 Justice, is that -- a distinction between a case such as
16 *Hutto v. Finney*. If a prisoner -- which involved the
17 punitive isolation from other prisoners.

18 If a prisoner complained on the first day of
19 that kind of punitive isolation and a doctor said I've
20 looked at this person, there's absolutely nothing wrong
21 with him, one would be hard pressed to say that there was
22 deliberate indifference to a current condition. Similarly
23 -- but on the other hand if the condition involved his
24 exposure after a month or several weeks or a year, that
25 might be a situation where there was an injury.

1 And as the Court pointed out in Hutto,
2 situations that are tolerable for a few days or a few
3 weeks may be, in the Court's phraseology, intolerably
4 cruel for a longer period of time.

5 QUESTION: Well, then a decision on the
6 objective component of the cruel and unusual punishment
7 aspect of this case would probably have more staying power
8 and significance than a decision on the -- on the
9 subjective.

10 MR. HITCHCOCK: Well, as a matter of law to
11 guide the lower courts.

12 But let me talk also more specifically about
13 that, because I think analytically the question of whether
14 exposure to environmental tobacco smoke can, at some
15 level, rise to an objective Eighth Amendment violation
16 really has two subclass -- subparts to it.

17 The first is whether, at a general level or as a
18 general proposition, exposure to a hazard which does not
19 manifest itself immediately but is -- poses an
20 unreasonable risk of a serious harm at some future point
21 is covered by the Eighth Amendment.

22 That's the position that the State takes in this
23 case, although the solicitor general, at least, does not
24 go that far. And let me give an example of what accepting
25 that argument would mean, and then I will suggest that

1 this Court has not gone that far in its opinions.

2 Under the State's formulation in this case, let
3 us suppose that prisoners in a prison system were given
4 shots using the same needle. They had to share a needle,
5 a flu shot or whatever. And let's suppose that some of
6 the inmates sharing that needle were HIV positive and
7 let's suppose that that would have the effect of exposing
8 some unexposed prisoners to be getting the AIDS virus and
9 dying a rather slow and painful death somewhere down the
10 road.

11 Under that scenario the State posits that that
12 is not cruel and unusual punishment to expose people to
13 that risk, that the Eighth Amendment only applies if death
14 or serious injury is -- is instantaneous or imminent, and
15 it does not cover those types of situations down the road.

16 I think that argument is foreclosed, at least
17 implicitly, by decisions of this Court such as *Hutto v.*
18 *Finney* and *Rhodes v. Chapman*, particularly *Rhodes* where
19 the Court cited with approval a number of lower court
20 decisions which also involved threats of -- of imminent
21 danger where it was not clear that somebody would be --
22 would be injured.

23 QUESTION: But again, I -- you know, I expect
24 any doctor who -- who used needles that way would be
25 subject to -- to a lawsuit under -- under current

1 standards. And I assume any parent who -- who used the
2 same needle for a series of injections to various children
3 would be subject to some -- some legal sanction for that
4 kind of action.

5 But, once again, I think if the doctor has a --
6 does not have a nonsmoking waiting room or if the parents
7 smoke despite the fact that they have children, we do not
8 consider that contrary to current standards. It may
9 indeed be dangerous, but there are some dangers our
10 society has not said is too much.

11 MR. HITCHCOCK: Well, there's --

12 QUESTION: Maybe it should, but it hasn't.

13 MR. HITCHCOCK: Well, there's -- there's a
14 factual distinction too, Justice Scalia. I think that the
15 exposure of children in the home to smoke during the hours
16 the parents and children are together during the day is --
17 is qualitatively different than the situation complained
18 of here, which is confinement in a 6 foot by 8 foot cell
19 with somebody who is lighting a cigarette in close
20 proximity once every 10 minutes of every hour during every
21 waking hour during the day.

22 And even if one would not consider that to be --
23 well, I don't know what one might say if that was the way
24 the children were being raised and that was the situation
25 they were exposed to 7 days a week in a small room with a

1 parent without the adequate ventilation.

2 QUESTION: There are a lot of parents with
3 children in -- small children in small rooms. I don't
4 know of a single lawsuit on it.

5 MR. HITCHCOCK: Well, again, I think the
6 question is -- I think one can find an answer to that by
7 looking to the severity of the risk here, where you have
8 the risk at this level for a period of time, and I just
9 don't -- I don't think if, also, one looks at the way
10 society treats smoking, at least with respect to adults in
11 a number of situations, that that is the level of
12 exposure.

13 I'd like to --

14 QUESTION: The -- the question -- the question
15 then becomes whether or not we can say that if -- if
16 there's a particular risk of serious danger, we can
17 nonetheless tolerate it because it's -- because society as
18 a whole does.

19 MR. HITCHCOCK: Well, the question is at what
20 level, and I'd like to deal with that question.

21 In this context the -- there are evolving
22 standards in this direction. If I -- if one looks at
23 cases like *Enman v. Florida*, *Coker*, *Thompson*, other cases
24 where the Court has instructed to look to legislation,
25 there is an impressive amount of legislation that, in

1 fact, restricts smoking beyond the levels at which this
2 case was tried.

3 QUESTION: How many States have enacted
4 antismoking legislation to protect in the workplace and so
5 forth?

6 MR. HITCHCOCK: There are -- 45 States and the
7 District of Columbia have enacted restrictions in some
8 fashion at some level.

9 QUESTION: So that might be some indicator of
10 public standards of decency.

11 MR. HITCHCOCK: And -- and I would go one step
12 further, Justice O'Connor. According to the -- an article
13 in the 1991 Journal of the American Medical Association, a
14 number of other municipalities with populations of over
15 25,000 have adopted their own ordinances, primarily in
16 those States where there's no law or the law is very weak.
17 And --

18 QUESTION: Of course, we don't know whether
19 those statutes are based on the fact that they think the
20 risk of death is so overwhelming, or just people don't
21 like the smell of the doggone stuff.

22 MR. HITCHCOCK: Well, regardless --

23 QUESTION: I mean those laws may well be based
24 on that. We can't say it's that society's made the
25 judgment that -- that the risk of death is intolerable.

1 MR. HITCHCOCK: Well, I'm -- I'm not aware of
2 the legislative history behind the ordinances, but I can
3 say they do have the prohibitions and restrictions --

4 QUESTION: Oh, I'm sure they will all make
5 health noises, but one doesn't know that that's the --
6 people do not like the smell of cigarette smoke.

7 MR. HITCHCOCK: Well, they do --

8 QUESTION: And they don't like it when they're
9 eating and they don't like it any place they are. I don't
10 know why that has anything to do with the -- a consensus
11 in society that this is an unreasonable health risk.

12 MR. HITCHCOCK: Well, there is a consensus, I
13 think, if one looks at the statute. And to finish up on
14 Justice O'Connor's inquiry, the -- the JAMA article that
15 we cited indicates that by mid-1989, and I'm quoting now,
16 nearly all urban Americans were covered by a State or
17 local smoking restriction.

18 I'd like to come back to your question, Justice
19 Scalia, because I think there may be another distinction
20 to separate this case from the child abuse case. The
21 problems that we are talking about here, I think, are more
22 serious than those that have identified with children.

23 The EPA pointed to lung cancer, an extremely
24 serious, often fatal situation. The other situation which
25 is frequently found is death by heart disease. We're

1 talking about risks of death here that are far higher than
2 have been recognized in many other situations.

3 Administrator Reilly stated on Wednesday that the risk of
4 death from lung cancer is at about 1 in 1,000 for people
5 who have never smoked.

6 QUESTION: But if we found the same risk -- the
7 same risk, the same degree that you find from secondary
8 tobacco smoke, with respect to fatty foods, do you think
9 that it would be cruel and unusual punishment to serve
10 hamburgers and sausages in State prisons?

11 MR. HITCHCOCK: It -- it would depend at what
12 level it was being served. If you had the kind of --

13 QUESTION: At the level that produces the same
14 risk that you're concerned about from tobacco.

15 MR. HITCHCOCK: If -- yes. If you had a level,
16 a risk of 1 in 1,000, which is the risk of death by lung
17 cancer or heart disease, my answer would be yes. And to
18 put that in context, 1 in 1,000 doesn't sound like much,
19 but it is a level which this Court, in the benzene case,
20 said entitles OSHA to regulate risks on the grounds that
21 they are significant, and OSHA has, in fact, regulated
22 product -- exposure in the workplace to products such as
23 formaldehyde or ethylene oxide. And it is well above the
24 tolerance level that EPA and the FDA use in their own
25 regulation of other cancerous materials.

1 QUESTION: But you really don't contend that
2 OSHA standards apply in prison, do you?

3 MR. HITCHCOCK: Well, OSHA standards do not
4 apply in prison, but in terms of -- of the risk that they
5 would --

6 QUESTION: Or even they -- it wouldn't have to
7 have even the same degree, or do you think that there
8 should be the same degree of risk in --

9 MR. HITCHCOCK: Well, there -- there's at least
10 one case I'm aware of, Justice Stevens, a court of appeals
11 decision which involved exposure to pesticides. And it
12 was held that there was cruel -- there was an Eight
13 Amendment violation stated if prison inmates were out
14 working in the fields under -- with exposure to pesticides
15 that was not comparable to those of private employees with
16 the same standard. So it -- it may be, but in this case
17 if we're comparing risks and comparing -- I'm putting it
18 in context -- EPA and FDA will regulate risks if the
19 chance of death from lung cancer is as low as 1 in 100,000
20 or 1 in a million.

21 Also, the other serious injury, you know, which
22 again has not been identified with child abuse, is death
23 by lung cancer. The Journal of the American Medical
24 Association has indicated that the chance of death is as
25 high as 1 in 100, based on exposure to cigarette smoke

1 among people who never smoke.

2 If the Court has no further questions, we ask
3 the charge be affirmed.

4 QUESTION: Thank you, Mr. Hitchcock.

5 General Del Papa, you have a minute remaining.

6 REBUTTAL ARGUMENT OF FRANKIE SUE DEL PAPA

7 ON BEHALF OF THE PETITIONERS

8 MS. DEL PAPA: Justice White, in response to
9 your question to Mr. Roberts, we did note in our petition
10 that the Ninth Circuit erred in the way that it framed the
11 issue at pages 25-29 of our --

12 QUESTION: Thank you very much.

13 MS. DEL PAPA: I have just a couple of brief
14 points. We alerted the Court to our policy and the fact
15 that it had changed, not that it was written, in our reply
16 brief at the petition stage. We would contend --

17 QUESTION: Well, why didn't you tell the Ninth
18 Circuit about this?

19 MS. DEL PAPA: I don't believe there was an
20 opportunity. And, again, we would contend --

21 QUESTION: But the policy change was in 1989,
22 wasn't it?

23 MS. DEL PAPA: But it was -- I think, due to the
24 timing and the way the -- the policy actually, Your Honor,
25 came out before the magistrate actually -- the policy came

1 out before trial.

2 QUESTION: But it was inconsistent with the
3 stipulation.

4 MS. DEL PAPA: We're contending that the -- that
5 the policy has not materially changed, particularly
6 with -- with reference to the accommodations.

7 QUESTION: But, you must agree, I think, that
8 the written policy is inconsistent with certain parts of
9 the stipulation.

10 MS. DEL PAPA: I don't agree with that.

11 QUESTION: You don't agree.

12 CHIEF JUSTICE REHNQUIST: Thank you, General Del
13 Papa. The case is submitted.

14 (Whereupon, at 11:14 a.m., the case in the
15 above-entitled matter was submitted.)

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CERTIFICATION

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Donald L. Helling, et al., Petitioners v. William McKinney

Case No: 91-1958

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BY *Ann Marie Federico*

(REPORTER)