OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LEONARD ROLLON CRAWFORD-EL, Petitioner v.

PATRICIA BRITTON

CASE NO: No. 96-827

PLACE: Washington, D.C.

DATE: Monday, December 1, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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LEONARD ROLLON CRAWFORD-EL, :

Petitioner :

v. : No. 96-827

PATRICIA BRITTON :

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Washington, D.C.

Monday, December 1, 1997

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

APPEARANCES:

DANIEL M. SCHEMBER, ESQ., Washington, D.C.; on behalf of the Petitioner.

WALTER A. SMITH, JR., ESQ., Special Deputy Corporation Counsel, Washington, D.C.; on behalf of the Respondent.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 96-827, Leonard Rollon Crawford-El v. Patricia Britton.

Mr. Schember.

ORAL ARGUMENT OF DANIEL M. SCHEMBER

ON BEHALF OF THE PETITIONER

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

In Harlow v. Fitzgerald, a First Amendment retaliation case, the Court held that district courts should protect defendants' qualified immunity through firm application of the civil rules protecting defendants against the burden of broad-ranging discovery and enabling them promptly to seek and in substantial cases promptly to obtain summary judgment.

The Federal rules are fully sufficient to accomplish these purposes. At the outset of litigation district courts can hold the plaintiff's discovery in abeyance and allow defendants to inquire of the plaintiffs, obtaining from the plaintiffs all evidence that they have to support their contentions that they exercised First Amendment rights, that the defendants knew about it, that the defendants injured the plaintiffs, and

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that the motive for the injury was retaliation for exercise --

QUESTION: Well, I suppose you're right that the rules and the procedures are fully sufficient if we wish to devote a huge amount of resources to complaints of this type and to subject officials who have a claim of immunity to prolonged discovery.

MR. SCHEMBER: That's what I'm saying, Your Honor.

QUESTION: If those two factors are eliminated, then I suppose you're quite right, the rules are quite adequate.

MR. SCHEMBER: Yes.

QUESTION: But the question is whether or not the cost of these proceedings to the Government official who wishes to assert the immunity are so high that the purpose of the immunity is substantially lost.

MR. SCHEMBER: Yes.

QUESTION: Or am I wrong that that's the question?

MR. SCHEMBER: No, that's the question, but the two burdens identified in Harlow are, first, the burdens of trial and the burdens of broad-ranging discovery, and what I'm suggesting is that at the outset of the case the district court through firm application of the rules, as

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the Court said should be done in Harlow, can protect defendants against broad-ranging discovery and, indeed, impose the burden on the plaintiff to come forward immediately with all evidence to support the claim, all elements of the claim, and if the plaintiff is unable to do so immediately, the defendant is entitled to summary judgment unless, of course, the plaintiff can show specific facts giving rise to a reasonable likelihood that discovery will uncover necessary evidence.

QUESTION: Mr. Schember, speaking more generally there's talk of discovery abuses not just in this case but throughout the country, and the answer often is, well, the district judges have it within their power to prevent that, and I think a lot of people agree that's true, but you have 700 district judges in the country and they just react differently to this sort of problem.

MR. SCHEMBER: Yes, and I think guidance from this Court could tell them how to firmly apply the civil rules, and the purpose of my argument is to suggest precisely what should be said in that regard, and that by holding the plaintiff's discovery in abeyance at the outset of the case until the defendant has been entitled to discover all the plaintiff's evidence, thereby placing the defendant in the position of promptly seeking summary judgment unless the plaintiff has sufficient evidence or

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has a basis for seeking discovery, that is firm control that prohibits excessive burden on the defendant at the outset.

And even if the plaintiffs make a showing that there's a reasonable likelihood that discovery will uncover evidence supporting their claims the district court still could hold their discovery in abeyance if the defendant wished to assert a defense under Mount Healthy Board of Education v. Doyle, saying even if I -- we were substantially motivated by hostility to the plaintiff's exercise of constitutional rights, nonetheless we would have taken the same action in any event, and if defendants come forward with sufficient evidence to establish that defense, they are entitled immediately to summary judgment on that ground unless, of course, plaintiff immediately can present admissible evidence rebutting that, or, again, make a showing that there are facts giving rise to a reasonable likelihood that discovery --

QUESTION: When you're talking about intent, though, that's a very difficult issue to get summary judgment on, because it's the subjective state of someone's mind, and it's just something that ordinarily it goes to a trier of fact, I think.

MR. SCHEMBER: Well, certainly the Harlow court commented on that with respect to the subject of general

bad faith and malice. However, inquiry as to the specific intent of unconstitutional animus I would suggest is narrower. For example, the plaintiff certainly has to show I exercised First Amendment rights and the defendant knew about it, and discovery as to that inquiry certainly is narrower than whether the defendant's a bad person, a malicious person, someone who customarily is mean to people, that type of thing.

QUESTION: It still gets you into subjective investigations, which is really what we tried to put behind us in Harlow.

MR. SCHEMBER: Well --

QUESTION: I mean, we really tried to make this an objective inquiry.

MR. SCHEMBER: Well, the Court certainly said that qualified immunity is to be based upon a showing -- on the fact that a -- no violation of clearly established law exists, but, of course, retaliation for exercise of First Amendment rights, or discrimination on the basis of race or sex was clearly -- is clearly established constitutional law.

QUESTION: That clearly established law principle was simply the device which would enable an objective determination to be made in Harlow.

What this case requires, if we're to follow the

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philosophy of Harlow, is some other device that would likewise produce an objective test rather than a subjective one.

Now, I'm not sure that what the D.C. Circuit majority did here does that. It's still a subjective test by clear and convincing evidence, but Judge Silberman's test would certainly do that.

MR. SCHEMBER: Well, but Justice --

QUESTION: Given these facts, could a reasonable person have taken this action. If so, end of the matter.

MR. SCHEMBER: Yes, that certainly would do that, but that would be effectively the end of claims that are based upon the subjective intent and, if we are to eliminate entirely claims that are based upon proving the unconstitutional animus --

QUESTION: Just as in Harlow we eliminated claims that were based upon subjective intent.

MR. SCHEMBER: General malice, but Harlow cannot be read for the proposition that First Amendment retaliation cases cannot go forward, period. Harlow was a First Amendment retaliation case, and what the Court said in that case is, firmly apply the civil rules in order to make sure that there's no broad-ranging discovery and to make sure that there's early determination by summary judgment, rather than a long-delayed trial in an

insubstantial case.

It cannot -- I do not believe Harlow can be read to foreclose First Amendment retaliation cases, and it has not been understood, I don't believe, since then, to stand for that proposition.

QUESTION: It can surely be read as an attempt by this Court to make the section 1983 inquiry an objective inquiry rather than a subjective one. Surely that was the whole driving force behind Harlow.

MR. SCHEMBER: Well, that was a Bivens inquiry. That was a Bivens case rather than a section 1983 case, but yes, the -- it is true that what the Court did was strip away the particular subjective aspect of the Woodby-Strickland test. That part of the test didn't make any sense.

QUESTION: Why -- you can always make this claim that what was done was done with a -- with an intent to deprive me of a constitutional right.

MR. SCHEMBER: Well, it can't always be --

QUESTION: It can't always be proven.

MR. SCHEMBER: Well, I suppose it can always be asserted, but the firm application of the rules will ferret out baseless assertions if the assertion is baseless.

QUESTION: May I ask, in this case, what would

happen if the trial judge let the plaintiff take the deposition of the defendant and she testified that she merely gave the materials to the brother-in-law, or whatever he was, as a matter of convenience, she knew all about his First Amendment activities, but she didn't hold a grudge against him, and that's all she said.

What should the district judge do with the case, and then there's a motion for summary judgment. There's nothing substantiating it except his belief that she acted improperly.

MR. SCHEMBER: Well, but there would be -- the motion should be denied for the following reason. Implicit in -- certainly we wouldn't ignore what she said already on the subject, and that is that she doesn't think prisoners have any rights, and that prisoners bound for a Federal penitentiary don't have any right to any property at all, and that is not a reasonable assertion, the idea that there are no circumstances in which any Federal prisoner has any right to possess any legal papers, no matter what their need might be for pending litigation --

QUESTION: Yes, but --

MR. SCHEMBER: -- is not a reasonable --

QUESTION: That may be her belief, but she may say with respect to the transactions at issue in this case, I did it as -- purely as a matter of convenience,

and even though that's my belief, I wasn't trying to discipline him. I just was going about my work.

MR. SCHEMBER: If that were a reasonable belief, then in theory it would be a defense. However, it is not a reasonable basis for her to have so acted.

In Waters v. Churchill the Court talked about the problem of inadvertent or mistaken violation of First Amendment rights and said that there should be inquiry as to whether the so-called mistake in the case -- or the genuine mistake -- was a reasonable mistake.

QUESTION: This was no mistake. What she did with his papers or whatever they were, nobody fights about that. That's clear, isn't it, the facts? Actually what she did is not in dispute, is it?

MR. SCHEMBER: No, it's not.

QUESTION: The only dispute is what her reason for doing it was.

MR. SCHEMBER: Yes, and implicit in her reason, certainly the facts indicate that she intended to deprive him totally of these papers and all of his property. There's no doubt about that. Her belief was that, supposedly that he wasn't entitled to have them at all, but that was not a reasonable belief. That is not a proper basis for a Mount Healthy defense.

QUESTION: You say the facts are that she

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intended totally to deprive him of his papers?

MR. SCHEMBER: Yes.

QUESTION: I thought she merely adopted a more convenient way of getting them delivered to their destination.

MR. SCHEMBER: No, not at all.

QUESTION: Namely, sending them through the brother-in-law.

MR. SCHEMBER: It was her belief -- no. It was her belief that the prisoners were not -- in the Federal penitentiary were not entitled to any property at all.

QUESTION: Well --

MR. SCHEMBER: That was unreasonable belief. She diverted it outside the system so that he wouldn't get it. She said to Mr. Carter, I don't know why Crawford-El's so upset about his property. I should just -- I should have just have thrown it in the trash. That's what she said.

QUESTION: Then credibility determinations basically are going to swallow up the immunity rule, I suppose, if the summary judgment stays.

MR. SCHEMBER: Well, the plaintiff has to have admissible evidence that proves the elements of the case and yes, if it does come down to a question of whether or not the plaintiff is credible in assertings, for example,

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a defendant's admission that's involved here --

QUESTION: But I mean, if you --

MR. SCHEMBER: -- then yes, it does come down to that, yes.

QUESTION: Do you think this case is unusual or remarkable in that respect?

MR. SCHEMBER: Quite unusual, yes, because what we have here is a fairly high-ranking prison official dealing directly one-on-one with a prisoner. She wasn't a prison guard, for example, and yes, it is rather unusual in this --

QUESTION: Well, how --

QUESTION: Well, wouldn't you -- I'm sorry.

MR. SCHEMBER: -- regard.

QUESTION: How would you compare it to other cases? You said, don't worry because this discovery is going to be limited and there's going to be summary judgment, but you say in this case, if I understand you right, this one's got to go to trial.

MR. SCHEMBER: Yes, because here there is admissible evidence proving the elements of the claim, including defendant's admissions from this official to the plaintiff.

QUESTION: And I suppose you would say the same thing about that Martin case and about Martin v. Malhoyt,

another D.C. Circuit case, so I'm trying to see where there is a match. I think there is none.

For the Harlow, when you're talking about the legal standard, then we have clearly established law. Here, on the surface everything looks lawful. What makes it unlawful is a clearly unconstitutional design, either race discrimination, First Amendment violation, but on the surface everything looks okay.

MR. SCHEMBER: Well, it's undisputed that the facts of the case state a violation of District of Columbia common law, not that I'm suggesting that that necessarily bears directly on the question of the availability of the constitutional cause of action, but it certainly bears upon the reasonableness of the -- of her action.

This is an instance where there was injury inflicted. Out-of-pocket loss was imposed, and it happens to have been in violation of the District of Columbia common law and also there is sufficient evidence from which the jury could find that unconstitutional animus motivated it, and it is in the public interest, even if there could be a recovery under a common law conversion claim that the First Amendment claim go forward and that the plaintiff be allowed to prove that if hostility to exercise First Amendment rights was --

QUESTION: Well then, I gather what you're saying is --

MR. SCHEMBER: -- he can prove it.

QUESTION: -- that there shouldn't be any match on the subjective intent side to what this Court has installed on the -- purely on the what-the-law-is side in Harlow.

MR. SCHEMBER: Well, the question of match, I don't think I'm following --

QUESTION: In other words, Harlow inserted a test, and it is that it's not only that there was a violation of law, and it's not only that the law was established, but it must be clearly established.

MR. SCHEMBER: Right.

QUESTION: Now you're saying, but where the law would not be in doubt if the motive is unconstitutional, then there is no -- nothing special for these official -- officials.

MR. SCHEMBER: There should not be, I am arguing to the Court, for the reasons that a clear and convincing evidence rule would not properly balance defendant's needs for immunity against the countervailing interests, which are the need to deter officials from violating constitutional rights, and the need to redress the victims.

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If we had a situation where Government employees could have their careers ruined by supervisors who retaliate against them for their exercise of speech off-duty on matters of public concern, the -- and if those employees were not able to obtain any redress unless they could prove their claims by clear and convincing evidence, the chilling effect on Government employees' speech would be contrary to the public interest.

QUESTION: Why is this any different from Harlow in this respect: why couldn't we have said the same thing in Harlow that you're saying to us now, namely, this can be handled by pretrial discovery if -- so long as you assert that, number 1, the Constitution was violated, and number 2, the officer knew he was violating the Constitution?

Never mind that it wasn't clearly established, he knew he was violating the Constitution, and that was his intent. What's the problem? Just have pretrial discovery, and if you can't show that was his intent, we just simply dismiss the case.

But we didn't take that course in Harlow.

MR. SCHEMBER: No. Well --

QUESTION: I don't see why this is any different.

MR. SCHEMBER: What's very different from

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whether you should hold in a Bivens action the more knowledgeable official liable for the same action where, because that official is -- can foresee the developments in constitutional law, whereas an official who takes the same action is not held liable because he or she cannot foresee developments in constitutional law. That --

QUESTION: Mr. Schember, suppose --

MR. SCHEMBER: That makes sense.

QUESTION: Mr. Schember, supposing you take this in a context, just, say, within the prison, and the prisoner comes up to the respondent here and says, look, I've told you before, I think your system is wrong, you're wrong in denying me those privileges I asked for, and she says to him, look, I just don't want to hear any more from you, I've decided that, and he says, okay, I'm filing a complaint in the district court saying that for a bad motive you disciplined -- you're doing something to me because I petitioned you. Now, is that a cognizable claim?

MR. SCHEMBER: Well, he has been disciplined is the hypothetical there?

QUESTION: Yes.

MR. SCHEMBER: That seems to be the Government's hypothetical at page 19 of their brief, and it seems to be -- the United States amicus brief.

That example, that hypothetical is a classic example of circumstances in the -- in which the defendant would promptly obtain summary judgment under Mount Healthy Board of Education v. Doyle, could certainly prove it. Even if I had that motive that you attribute to me you committed a disciplinary violation, and we punish prisoners who commit disciplinary violations. I would have taken the same action in any event under the existing rules.

QUESTION: But that would have to go to trial, wouldn't it?

MR. SCHEMBER: Oh, no, not at all, Your Honor.

QUESTION: He's saying, look, you say you would have done the same thing, but I say you wouldn't have done the same thing, and that's a question of fact.

MR. SCHEMBER: Well, the -- well, but the plaintiff has to come -- if the defendant asserts a Mount Healthy defense in a summary judgment motion. The plaintiff can't just simply say, well, I think you had a different intent. The plaintiff would have to come forward with admissible evidence showing that the official would not have done the same thing absent the intent.

QUESTION: Well, but is the trier of fact permitted to infer from the fact that the official did in your view impair this person's First Amendment rights

here --

MR. SCHEMBER: Yes.

QUESTION: -- with a bad motive?

MR. SCHEMBER: Well, yes, but the plaintiff cannot get past summary judgment merely by arguing to the judge, judge, the jury may disbelieve the defendant. Oh, no. Under the summary judgment rules the plaintiff has to come forward with tangible, admissible evidence creating a genuine issue for trial on that, and mere assertion by the plaintiff of, I don't think the defendant would have taken the action but for hostility to me. That's not enough.

QUESTION: Well, what about the case in which the prisoner has in fact taken some action, as in this case in going to the press, which has resulted in embarrassment to the prison. Take Justice Stevens' hypothetical otherwise.

The warden says, I know all of that. Yes, he spoke to the press, it was embarrassing, but that's not the reason I did this. I did this because this seemed to be the most expeditious way of getting the property back to the person.

Would the fact that in -- on your theory, would the fact that the prison had been embarrassed be a sufficient basis for raising a claim of improper motivation that would survive the summary judgment --

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MR. SCHEMBER: I think not. No, I think the official would win summary judgment under that hypothetical, because it's very -- if the motive was to get the property back to the prisoner by the most expeditious means, and that was a means to do that, and that's what the official was trying to do, then I would think she would be entitled to summary judgment on it.

QUESTION: So that your -- your argument --

MR. SCHEMBER: And those aren't the facts here.

QUESTION: I'm sorry. Your argument here is not merely based on the number of extraneous remarks that the prison official made, but on the assumption that this was not the expeditious way to get the property back.

MR. SCHEMBER: Indeed it was not, and that was not her intent.

QUESTION: In other words, you find something facially incredible about the explanation.

MR. SCHEMBER: And -- well, the undisputed facts are that she did not divert the property outside the prison system for the purpose of getting it back to Mr. Crawford-El. It was to divert it outside the prison system because she thought he didn't have any entitlement at all to it, and that she could have thrown it in the trash, and as an alternative to throwing it in the trash, she allowed a relative to pick it up.

QUESTION: In my example --

MR. SCHEMBER: That's what the record shows.

QUESTION: In my example, how would you state the rule? Would you say that for -- should we come down with a rule saying that for summary judgment purposes reasonable -- evidence suggesting an improper motivation, even on the part of a reasonable person, is insufficient to survive the summary judgment motion?

MR. SCHEMBER: If the defendant raises the Mount Healthy defense and assumes the burden of presenting evidence from which the jury can conclude by a preponderance of the evidence that the official would have taken the same action in any event, even if she or he were motivated in part by unconstitutional --

QUESTION: But that's --

MR. SCHEMBER: -- that's the test.

QUESTION: That's quite contrary to ordinary -- the ordinary rule we apply.

QUESTION: Yes.

QUESTION: That, you know, you say the jury could have found, but if you say the jury could have found, ordinarily that's a question of fact. If you -- you have to say the jury must have found for want of any other evidence before you get summary judgment, I thought.

MR. SCHEMBER: Oh, no. If the defendant

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provides, in a Mount Healthy motion, evidence from which the jury can conclude that she would have acted in the same way in any event, if the plaintiff doesn't come forward with evidence rebutting that -- and it's got to be evidence, not surmise and guess.

QUESTION: No, but it's more than surmise and guess in this hypothetical. Most people, in fact, get mad when they are embarrassed in the public print, and they get mad at the people who are causing them embarrassment. That's more than mere speculation. Why, therefore, isn't it enough to survive?

MR. SCHEMBER: Well, what -- here you're suggesting that there was a dual motive.

QUESTION: In my hypothetical the opposing evidence is this. The prison official says, I did this only because I thought this was the most expeditious way to get things back. I know I was embarrassed, but that had nothing to do with it.

On the other side, the evidence is that the prisoner went to the press, made statements that were published, and which were embarrassing to the prison administration. Now, that's more than mere speculation. They -- one may reasonably infer that people who get embarrassed that way get mad at the people who cause the embarrassment.

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You say, nonetheless -- I thought you said nonetheless that, in fact, the prisoner's claim would not survive summary judgment.

MR. SCHEMBER: What I said was, if the defendant files a Mount Healthy motion and assumes the burden of saying, I would have acted in the same way, even though I was, or maybe assumed to be -- to have acted with unconstitutional animus, if, in that context, the defendant raises the defense and presents evidence that would -- that from -- on which a jury could reach a conclusion that the defense is established, then the plaintiff must come forward.

QUESTION: Well, the evidence is just what I said.

MR. SCHEMBER: In your hypothetical, Your Honor, the claim would go forward, because all that's been shown is that there were two substantial motivations for the action, and the defendant has not gone the extra step of saying, even though there was this motive, or irrespective of the motive, I definitely would have, in any event, taken the same action.

QUESTION: So the distinction seems to be a mere pleading distinction. In my hypothetical, the prison official said, I wasn't influenced by this embarrassment, and it comes out one way. If, on the other hand, the

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prison official says, well, of course I felt some motivation, but my principal concern, and the predominant purpose, was simply to get the property to the prisoner in the most expeditious way, then the result would be different?

MR. SCHEMBER: Well, the Mount Healthy standard is, would the official have taken the same action anyway? That's the -- under Mount Healthy, that's what the official has to show.

If we have two substantial motivations, it's -- and one is unconstitutional animus, and there's no proof by the defendant that the same action would, in fact, have been taken absent the unconstitutional animus, then the plaintiff is entitled to prevail.

QUESTION: Mr. Schember, you're talking about what I guess is an affirmative defense.

MR. SCHEMBER: Yes.

QUESTION: Now, the ordinary rule of summary judgment is that the -- all factual issues are resolved against the moving party on a motion for summary judgment.

MR. SCHEMBER: Yes.

QUESTION: And on a question of intent like this, that Justice Souter is posing, or -- it seems to be very difficult under ordinary rules of summary judgment to get summary judgment for the defendant, where the

defendant says, I acted on a proper motive. I did not act on an improper motive.

But there are some things which would permit an inference. A finder of fact could infer that there was an improper motive.

MR. SCHEMBER: Yes, but the Mount Healthy defense, the defendant would say, is, I would have taken the same action in any event, as in the discipline hypothetical.

QUESTION: Yes, but the -- neither the jury nor the judge on summary judgment are bound by that statement.

MR. SCHEMBER: Oh, unless the plaintiff comes forward and says, now, wait a minute, other people committed that disciplinary offense, and you didn't punish them. Unless the plaintiff comes forward with something tangible that says, judge, here is a basis in fact for not allowing summary judgment to a defendant who says, I would have taken the same action for the following reason --

QUESTION: I don't think that's right --

MR. SCHEMBER: -- the defendant wins.

QUESTION: -- because I think on a question of intent like that a jury is entitled to disbelieve any witness, or any party. You know, the -- a jury can disbelieve the defendant.

MR. SCHEMBER: Well, yes, but that -- at trial,

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that's true, but it is also clear --

QUESTION: But it's also true on summary judgment.

MR. SCHEMBER: Well, but on summary judgment, no, a plaintiff -- a party cannot resist summary judgment simply by saying in the face of an affidavit from the other side, judge, maybe the jury won't believe this affidavit. Oh, no, the --

QUESTION: Of course, your whole argument here has been built around Mount Healthy and around the premise that there is really no substantial problem with suits brought by prisoners and other persons against governmental officials that are not common to the entire litigation system so there should be no special rules. Isn't that the gravamen of your submission?

MR. SCHEMBER: The gravamen, yes, with this qualification. Yes, I recognize that there is, in intent cases, some degree of concern similar to what was involved in Harlow, although the question of unconstitutional intent is a far more narrow inquiry than general subjective ill-will.

My argument is that the differences, the potential burdens that are presented in unconstitutional intent cases are not so great that the balance of interests overall tips in favor of changing --

QUESTION: Well, but --

MR. SCHEMBER: -- the rule, because the Federal rules can be applied in a firm way to substantially reduce the burdens that might otherwise be there.

QUESTION: May I ask in this case, one of the concerns is the burden on the defendants of going through discovery. How extensive is the discovery that you think you need in this case?

MR. SCHEMBER: I would not think very extensive. There are certainly -- in the verified complaint there are --

QUESTION: Do you need anything beyond the deposition of the defendant?

MR. SCHEMBER: Yes. There's a captain in Seattle I think we need to depose. There is -- if he will not simply cooperate with an investigation.

There are some prisoners who we would like to depose, if they're not available simply through investigation, but in terms of the other side, in terms of this specific claim, no. I think the deposition of the defendant should be sufficient.

However, one of the issues we'd want to get into with her is the extent of her role in deciding which prisoners get transferred to Federal penitentiaries, because it -- that relates to her belief that, well, if I

send them to a Federal penitentiary they won't be entitled to any property, and I think that's an underlying factor that we may want to look into.

And if that deposition develops specific lines of inquiry as to Government policy on that subject, then I think maybe a couple of other depositions would be warranted, but no, I do not believe extensive discovery would be required in this case for this claim.

Now, we do have a claim against D.C. which requires a custom, policy, and practice proof as well, and that's not before the Court now.

QUESTION: All right, then how exactly, in your view, do you deal with the problem? You may say there is no problem, but I take it, the problem, to be that many prisoners will file pieces of paper in Federal court that they call a complaint. They won't be sent to the judge, actually. They'll be sent to a magistrate, and the magistrate's normal inclination under notice pleading is, discovery is fine.

But here, they say that in these cases where motives are alleged, it's a great burden upon the prison official to have to sit at a deposition, and there's no real reason for it, so the first thing you'd want to do is require the prisoner to say what he's talking about in detail, but I guess we can't do that under the Federal

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rules.

MR. SCHEMBER: Well --

QUESTION: Or maybe there are some other things we could do. I want your view on what we should do about that problem, including, if you like, denying that it's a problem.

MR. SCHEMBER: Hold the plaintiff's discovery in abeyance and allow the defendant to do discovery.

Now, certainly under the rules you can also require a reply from the defendant. If the answer to the complaint raises qualified immunity, there could be a reply required.

QUESTION: You say in the reply.

MR. SCHEMBER: But it would be far more efficient, rather than just getting more assertions from the plaintiff, to put the plaintiff to the burden of producing evidence, and that's what discovery is for.

QUESTION: Yes, but --

MR. SCHEMBER: Let the defendant ask the questions of the plaintiff, or send interrogatories. Make the defendant -- make the plaintiff produce the actual evidence, as opposed to assertions, so that way we can --

QUESTION: What are the -- well.

MR. SCHEMBER: I'm sorry, Your Honor.

QUESTION: I want to know what particular rules

you will work with to produce this result.

MR. SCHEMBER: 26. Rule 26 enables the court to limit discovery to the needs of the case and to prevent undue burden, and that includes controlling the timing, the methods, and the means of discovery, and allowing the defendant to go first and holding the plaintiff's discovery in abeyance goes a long way to solving this problem.

QUESTION: Thank you, Mr. Schember.

Mr. Smith, we'll hear from you.

ORAL ARGUMENT OF WALTER A. SMITH, JR.

ON BEHALF OF THE RESPONDENT

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

Petitioner's counsel has just said that in his view the gravamen of his position is that there needn't be any special rules at all. I think the Court has already decided in Harlow that there have to be, so I'd like to argue two points to you.

First, that in wrongful intent cases such as this there needs to be some kind of heightened standard applied to protect public officials with regard to determining whether they had a wrongful intent or not, because if you don't have some kind of special heightened standard the result is going to be, in nearly all of these

cases, we're going to put public officials through discovery, past summary judgment, and into trial, and that will cause all of the harm to effective government and all of the harm to the public interest that this Court in Harlow designed a rule to prohibit, and I think he's quite wrong to say that we can simply rely on the normal rules to take care of the case.

QUESTION: But isn't it true that Harlow dealt with the special problem of qualified immunity, and your position in this case, even if there's no qualified immunity defense interposed, you'd still make the same arguments.

MR. SMITH: Well, on the merits we would, but since we did interpose qualified immunity, Your Honor, there are two parts to the qualified immunity.

QUESTION: But it seems to me the case really is about the merits, because if the defendant here did what was alleged, there really isn't a basis for qualified immunity. On the other hand, if the defendant is correct, there's no cause of action.

MR. SMITH: I guess I disagree with that, Your Honor. I would say this case is about whether or not Ms. Britton's assertion of good faith in the actions that she took is going to be upheld under the qualified immunity doctrine. The Court said there are two --

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QUESTION: But if she's in good faith there's no cause of action.

MR. SMITH: Well, but the Court said there are two parts to the good faith immunity. One is what the Court called objective. The other is what the Court called subjective, and in Harlow --

QUESTION: I understand that, but do you not agree that if she acted in good faith and did not have the motive that the plaintiff describes, there's no cause of action at all. She doesn't need an affirmative defense.

MR. SMITH: That is true. That is true, but good faith immunity is called, I think, Your Honor, good faith immunity precisely because it's designed to assure public officials that if they act in good faith, as Harlow said, cases against them will be promptly dismissed, according to --

QUESTION: No, I don't think that's right. In Harlow it's even if they acted in bad faith and for malice and all these other bad motives, if the right wasn't clearly established at the time, the plaintiff still loses. It's not a question of subjective good faith. It's a question of the state of the law at the time of the conduct.

MR. SMITH: I think that's right, Your Honor, but there was a second part to the good faith immunity,

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and that is the intent. The first part is the one you just mentioned, knowledge of the law, and the Court said that we weren't going to allow inquiries into the knowledge. Now we're trying to figure out what to do when the claim is with regard to improper intent.

QUESTION: Mr. --

MR. SMITH: Once again --

QUESTION: Mr. Smith, the court of appeals certainly regarded this as a qualified immunity case, didn't it?

MR. SMITH: Absolutely, Your Honor.

QUESTION: Justice -- Judge Williams' opening sentence says, we're here to decide this issue about qualified immunity.

MR. SMITH: That's correct, and there's no doubt that, in fact, the qualified immunity defense was raised in the trial court. That's why the court of appeals ended up addressing it.

I'd like to respond to something Justice Scalia said, though. He said that in Harlow we had found a mechanism for making sure we didn't have to have an inquiry into the knowledge part. What we now need to find is a mechanism to make sure that we don't have subjective inquiries into the intent part, because that can do just as much damage to the purposes of the Harlow decision as

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inquiries into the knowledge of the law.

QUESTION: But it isn't an intent part and a knowledge part. There are two discrete kinds of wrongful acts. In the Harlow thing it was a question of whether the law had been violated and the Court's answer was, there's qualified immunity unless that law was clearly established.

Now, here, there isn't any question that if the motive that's alleged exists, what was done was terribly unlawful, so the two -- you can't just mix them together and say they're all part of the same kind of tortious conduct. One is, did I act in violation of the law, and the other is, what was in my head, because if one thing was in my head, then I acted in violation of the law, if another thing was, I didn't, so they're two different kinds of torts.

MR. SMITH: They are two different things, Your Honor, but I would try to argue to you they're both part of the good faith immunity, and before Harlow the Court said there were two parts to the inquiry, one that the Court called subjective, and one that the Court called objective, but they both had to do with the state of the mind of the official. One is the knowledge of the law in the mind of the official, the other is whether or not there's improper intent.

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QUESTION: Well, let's just say -- let's just say, when it's a question of what the law is, that we want to make intent irrelevant. We just want to know, was this clearly established law?

MR. SMITH: Right.

QUESTION: But in the kind of tort we're talking about here, the intent is everything. You can't make it irrelevant.

MR. SMITH: Oh, I wasn't trying to make it irrelevant, Your Honor. I'm trying to make it part of the qualified immunity inquiry and find a way to assure that the qualified immunity will be given to the official without having to go through discovery and trial, and my point is that if you don't have some kind of what Justice Scalia was calling a special mechanism, nearly every one of these cases where improper intent is alleged is going to have to go through discovery and trial, bringing about all of the harm that Harlow was designed to prohibit.

That's the point that I'm trying to make, and we need to find, again to use Justice Scalia's words, I think a mechanism for assuring that what the Court said in Harlow should not occur -- a subjective inquiry -- will not occur here either.

We must find a way to assure public officials that when they act in good faith in their positions,

insubstantial claims against them will be promptly dismissed.

QUESTION: Why? Why do we have to do that? Is that our job? I mean, I hate to contradict myself, but --

(Laughter.)

MR. SMITH: Me, too.

(Laughter.)

QUESTION: It seems to me that we're interpreting a statute here. It's either there or it's not there. You're talking as though, you know, we're writing the law. We're not writing this law.

MR. SMITH: No, I'm not suggesting you're writing it. I am suggesting, as the Court has often said -- you're interpreting section 1983, and the Court has often said that there are two parts to that. What was the state of common law immunity at the time when the statute was adopted, and are there other special policy considerations?

QUESTION: Could we -- I mean, I just don't know where we plucked this notion of clear and convincing evidence from. Are we free to pick and choose the propositions that we're going to allow to be established by a preponderance and other propositions only by clear and convincing evidence?

MR. SMITH: Well, I think you are authorized to

make that determination, Your Honor, for the same reason you're authorized to determine the burden of proof in a statute where Congress hasn't provided what the burden of proof will be, and for the same reason you're authorized to define and refine the contours of the qualified immunity.

QUESTION: Is Harlow your best authority for that proposition?

MR. SMITH: About defining and refining?

QUESTION: Yes, about our general authority to formulate rules that will give meaning and substance and force to the sovereign immunity defense from a procedural standpoint.

MR. SMITH: Well, Harlow, Wyatt, I would cite Woodby v. INS, where the Court adopted a clear and convincing standard, and said it was doing so in part because Congress had not established the standard, and it was a particularly, peculiarly judiciary function to determine what the burden of proof --

QUESTION: We make it up based on our assessment of the needs of the judicial system quite apart from common law analogues, et cetera?

MR. SMITH: No, not quite apart, Your Honor. I think when you do it you are interpreting the statute, and you interpret the statute on the basis of, the Court has

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said, two things, both policy considerations and what the state of common law immunity was at the time the statute was adopted. I mean --

QUESTION: Mr. Smith, you have said a couple of times, I think, that in the case of these intent causes of action like this one, if we don't have some such mechanism as clear and convincing, as a threshold standard, that for practical purposes summary judgment will not be granted and qualified immunity will be a dead letter. Do you have any factual evidence in the record to that effect? Do we have an empirical basis to say that what you're saying is true?

MR. SMITH: I think the best support we have in the record, the statistics that are before the Court, the best ones are cited in Judge Silberman's opinion at page 38a and 56a, and in the amicus brief for the States at page 12, and in the amicus brief for the United States at pages 1 and 2, and I think if you read all of those data together, they do say one important thing.

We have an explosion of cases in this area. Almost half of them are prisoner cases, and nearly all of them are ultimately determined to be nonmeritorious, but you can always allege improper intent in such cases and, under the rules that we now have, you can almost always get through in discovery and trial in such cases.

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QUESTION: But how many -- do we have any basis for saying how many of those cases are cases in which improper intent is alleged with a substantial basis in the evidence, even though ultimately it turns out that the jury finds otherwise? Those are the ones that we're trying to winnow out.

MR. SMITH: That's correct.

QUESTION: Do we have any basis for apportioning those cases as against the --

MR. SMITH: I don't think the data will tell you which are improper intent cases and which are not, but this much we know. Improper intent is very easy to allege, particularly in the prisoner context, particularly --

QUESTION: May I ask, is the rule you're advocating limited to prison cases, or would it apply to employee discharge cases?.

MR. SMITH: It would apply, I think, Your Honor, across the board, as the Court said in Harlow.

Now, you may find at some later date you need to refine it for some reason, but I think the core reason we're asking for some kind of special standard be applied here, would apply across the board, and --

QUESTION: If it -- so, please, finish.

MR. SMITH: Go ahead.

QUESTION: If you're --

MR. SMITH: No, I'd rather hear your question.

QUESTION: If it would apply across the board --

MR. SMITH: Across the board to all cases.

QUESTION: Then you have to be careful, because, you know, a lot of these claims might be very, very good. There might be prisoner ones that are good, so how do you winnow them out, and my question is, what is wrong with just following the present rules?

Suppose you said that, first, when the prisoner files a claim which you can't really understand, which very often happens, that the official who's being sued can ask for a reply, and that reply at the judge's or magistrate's discretion can describe in detail what he knows and what he's talking about.

Then the second thing is, having obtained that, the official can move for summary judgment under 56, at which point discovery will not take place unless the judge decides under 56(f) that justice so requires, et cetera, using the standard of 56(f), and we could say, you have to be very careful where motive is alleged. Anyone can allege it. There are, you know, all these considerations that you're concerned about.

So the magistrate would have full power to deal with the case, understanding that it's likely to be

special, and understanding all the things you argue.

What's wrong with that as a special standard?

MR. SMITH: Because you're still --

QUESTION: -- the rules.

MR. SMITH: I think, Your Honor, in the mind run of the cases, you're still going to go to trial.

QUESTION: Why?

MR. SMITH: Because we're going to have credibility determinations, or we're going to have, as the Chief Justice said, a situation where all of the evidence has to be --

QUESTION: Is that in fact what's happening now? I mean, somebody asked if there was any empirical information. How many cases like this actually go to trial without any heightened pleading rules or heightened proof burden rules? How many?

MR. SMITH: I don't think we have the data that have actually counted --

QUESTION: Well -- because you said there were a lot. I thought I heard you say that --

MR. SMITH: What I said there were a lot of, Your Honor, are claims of this kind, and what I --

QUESTION: Yes, but do they get -- the question is, do they get weeded out efficiently without any heightened pleading rules, any additional proof burden

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rules?

MR. SMITH: And my answer is -- the answer has to be no, because under the governing standards you have to let credibility determinations or any case in which any permissible inference can be drawn in favor of the plaintiff, you have to let them go forward.

QUESTION: But the numbers I saw --

MR. SMITH: That's the nub of the problem the Court discussed in Harlow.

QUESTION: The number I saw on this very point in the record was something like 500-some-odd cases. Does that ring a bell, that number?

MR. SMITH: Well, the 500 number is in the U.S.'s brief, but that's only for Bivens.

QUESTION: That's true, but that's 500-and-some-odd cases out of, let's say, 80,000 prisoners, and if -- that doesn't seem like an enormous -- I mean, on its face, that didn't seem overwhelming as a problem. I don't know how many prisoners there are, 80 or 90,000, probably.

MR. SMITH: Well, the --

QUESTION: The Federal system probably has 80,000, does it, something --

MR. SMITH: Yes. The numbers of the prisoner cases, though, are in the States' brief, and in the data that Judge Silberman relied on. They are in the

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thousands.

QUESTION: But there are close to a million prisoners in the State systems, and so -- perhaps more than a million, and so is the -- it seemed like a -- I mean, I don't know what to make of this. That's --

MR. SMITH: My view -- my view, Your Honor, would be two things. First of all, thousands of cases puts quite a burden on the district courts, but the more important point, I think, is that the policy consideration that drove Harlow was that if you permit cases like this to proceed, you will dampen the ardor of public officials. Unless public officials are certain that these insubstantial suits are going to be promptly dismissed before discovery and trial, the risk is great, the Harlow court said, that these public officials are not going to be unflinching in their duties, and at a given prison, it would only take one such claim to do that kind of harm.

Just let one of these cases linger and occupy the time of a public official, challenging what I still want to call their good faith, just one of them can dampen their ardor with regard to other situations. They will be afraid to take action that might engender another lawsuit, and we would submit that is the core of Harlow, and it is why some kind of special rule needs to be applied.

I haven't talked yet about clear and convincing.

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Obviously, you have to first be persuaded that some kind of heightened standard is needed in order to address the problem.

I would like just to take the last few moments, with the Court's permission, to tick off what I think are four reasons why clear and convincing is the right kind of heightened standard to use in these cases.

First of all, and this will be abbreviated, as Judge Williams said in his opinion, this is a situation where we had asymmetry in the risk of error. That is to say, the Court has already determined in Harlow itself that some meritorious cases must be turned away in order to serve the greater good of ensuring that insubstantial cases will be promptly dismissed, and it's in an asymmetry of error situation the Court has often adopted clear and convincing.

His second reason was that this is a case where, just to use his words, motive is easy to allege and hard to disprove. That, too, suggests that we need a benefit of the doubt for public officials, and that's a point the Court made in Harlow itself, where it said at page 814, note 23, dishonest or vindictive motives are readily attributed and as readily believed, actually raising the specter that we may have public officials who are completely innocent of the charge but would be found

guilty because of the tenuousness of the kind of evidence we're dealing with.

QUESTION: Are you proposing this rule just for criminal -- for prisoner cases?

MR. SMITH: No, Your Honor. I would --

QUESTION: Then this asymmetry that you're talking about may not necessarily apply. I don't know.

MR. SMITH: Oh, I -- I would --

QUESTION: A fairly high percentage of frivolous in the prison context, but I'm not sure outside of the prison context.

MR. SMITH: Well, again, we don't have the exact numbers, but I would suggest that in other contexts you still have the problem --

QUESTION: Can we adopt the clear and convincing rule for the prison context and not elsewhere? I mean, since we can adopt these burden of --

MR. SMITH: Well --

QUESTION: -- proof rules willy nilly, can we just do it for the prison context?

MR. SMITH: I would suggest an across-the-board approach is the best approach but, Your Honor, as I'm sure you would put it, I'll take what I can get here --

(Laughter.)

MR. SMITH: -- if, in fact, you want to hold

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this only for prisoners.

Could I mention the other two reasons, though? One is that I think you've done this in analogous situations, not only in the civil fraud context, but I think New York Times may be the best analogy. There, in order to protect the public's great interest in uninhibited public debate, you adopt a clear and convincing standard.

So, too, I would suggest, to serve the public interest in having uninhibited public official decisionmaking, it's important to adopt the clear and convincing --

QUESTION: In the civil fraud context we did it in the context of the Federal rules, is that not correct, or is that incorrect?

MR. SMITH: Well, I think --

QUESTION: You said we've done this in the civil fraud context. I thought this was a heightened pleading requirement in Rule 9.

MR. SMITH: No, the Court in Woodby, Your Honor, referred to various different situations where courts have, in a civil fraud context, adopted a clear and convincing test.

And the fourth one I'd like to mention is the presumption of regularity, which the Court noted as long

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ago as the United States v. Chemical case and reaffirmed in Armstrong, which is, there should be a presumption of regularity to validate decisions of public officials in the absence -- and this was the key phrase, I think -- in the absence of clear evidence to the contrary.

It seems to me that, too, supports the view that clear and convincing is the right kind of heightened standard to use here, although I'll say in response to something Justice Breyer said our primary point is that something has to be done to assure public officials that these insubstantial claims will not put them through discovery and trial.

We think clear and convincing is the best choice.

QUESTION: Better than the heightened pleading rule which this Court hasn't held is out the window with respect to individuals, as distinguished from municipalities?

MR. SMITH: I do think it's better than the heightened pleading rule, for the reasons I've been saying, but it's not as rigid, say, as the direct evidence rule, which I think frankly made it too tough on some plaintiffs, because most of these cases are circumstantial evidence cases.

I mean, I think it's important to say that what

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the court of appeals has done here with a difficult problem is find a middle-of-the-road course.

QUESTION: So you're not supporting Judge Silberman's approach, then. You're just supporting the combination of Williams and --

MR. SMITH: Ginsburg.

QUESTION: Yes.

MR. SMITH: That's correct, Your Honor. Thank you.

QUESTION: Thank you, Mr. Smith.

Mr. Minear.

ORAL ARGUMENT OF JEFFREY P. MINEAR

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

The issue before you is how to apply Harlow's qualified immunity standard when a Government officer takes action that is lawful on its face, but would be unlawful if taken with an improper motive.

The issue here resurrects the very same problems that this Court confronted in Harlow. Here, as in Harlow, if qualified immunity -- qualified immunity would become an empty gesture if an officer who takes reasonable action is nevertheless subject to suit whenever his motivations

might be questioned.

We submit that when an officer --

QUESTION: Well, we know he's subject to suit, but I mean, how do we -- do you have an empirical basis for telling us how much deserves to be weeded out but is not being weeded out under the law as it now stands?

MR. MINEAR: I think the statistics provide a partial answer here, and the statistics I'll cite from are the Bureau of Justice statistics that are prepared in a monograph that they have made publicly available called Prisoner Petitions in the Federal Courts. That --

QUESTION: Are those in your brief or an appendix --

MR. MINEAR: No, it's not. Unfortunately it is not, but generally the statistics are also available from the administrative office of the courts, and they indicate that for prisoner petitions approximately 40,000 prisoner petitions are filed each year.

QUESTION: State and Federal?

MR. MINEAR: Federal and State cases --

QUESTION: Yes.

MR. MINEAR: -- involving civil rights claims.

Of those cases, about 60 percent are weeded out at the pleadings stage, but that still leaves 16,000 cases which require some additional treatment of one kind or

another.

QUESTION: But do you know how many of those are based on unconstitutional motive?

MR. MINEAR: No. That is one bit of evidence that we do not know.

What we do know from the evidence that's provided by the Bureau of Justice statistics is that about 40 percent of these cases arise from either disciplinary actions or claims of inadequate medical treatment, or claims of protection of personal security, all types of cases that could, in fact, involve a claim of impermissible motive.

QUESTION: But even among them I take it your statistics don't give us a way to estimate the number of cases that should not be weeded out at the summary judgment stage even though they are not unsuccessful.

MR. MINEAR: That is --

QUESTION: As distinct from those that should be and are also ultimately unsuccessful.

MR. MINEAR: We simply do not have information on that, but we do have, as an example, this case here, and this is a case that I think that many people would say is -- presents an insubstantial claim.

QUESTION: This rule might --

QUESTION: -- this case -- I have no idea about

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this case, but why shouldn't we say, look, the Department of Justice has whole groups of people whose job it is to collect statistics. You're asking us to create a special rule that would undoubtedly inevitably cut off some good claims, and therefore if you want us to create a special rule to deal with a special situation of harassment to public officials for claims that are not good, why doesn't the Department have the burden of coming in with the statistics that show it's a real problem?

MR. MINEAR: Well, I think the statistics that we have presented do suggest that there's a --

QUESTION: Well, all I know --

MR. MINEAR: -- problem here.

QUESTION: -- from the statistics is that there are a lot of cases and 60 percent get weeded out, and it doesn't seem like that much compared to the number of prisoners, then somebody else might say the same, and we don't know how many deal with the motive, and we don't know whether the best way is to have a higher proof on the substance, or whether it's better to get simply more elaborate pleadings, or whether it's better to have special ways of enforcing discovery requirements -- I mean, there are many, many ways of dealing with it, if it's a problem.

QUESTION: Mr. Minear, did the Court require

some special research and statistics before it decided Harlow?

MR. MINEAR: No, the Court did not, and in fact --

QUESTION: Or in Miranda?

(Laughter.)

MR. MINEAR: No, it did not, and again, I think the statistics we have here are helpful, but ultimately the decision rests with you, and I think the decision has to be drawn from the principles that you developed in Harlow.

QUESTION: But Mr. Minear, like respondent's counsel you are not proposing a rule that is limited to prison petitions, are you?

MR. MINEAR: No, we are not.

QUESTION: So even if we had all those statistics, they wouldn't show us the bottom line that we have to know, would they?

MR. MINEAR: No, they don't, and I think ultimately this requires the exercise of judgment.

QUESTION: You're also not proposing a rule that's limited to the qualified immunity defense. You're proposing a rule that covers all unconstitutional motive affirmative claims.

MR. MINEAR: No, I do disagree with you there,

Justice Stevens. What we're proposing here is a limitation on, or an application of qualified immunity to the motivation --

QUESTION: What if the trial judge in this case said, the law was perfectly clear at the time of action, so no matter what happens there's no qualified immunity, but nevertheless I'm concerned about the very problem you're all discussing here? Would they have just said, well, since the qualified immunity defense isn't available, well, just too bad?

MR. MINEAR: Well, we do think that this rule ought to be applied as part of the qualified immunity defense, and let me explain how that would work, and I think the easiest way to focus on this is to imagine a case that's -- in which the jury is being instructed -- let's suppose we've gotten past summary judgment.

The jury will be instructed that the plaintiff has to come forward and prove his constitutional claim and then the jury will be instructed, if you find that that claim is proved by a preponderance of the evidence, then you must consider the defendant's qualified immunity defense and, accepting your hypothetical, Justice Stevens, that the -- there's a clearly established rule, what we're asking, that there be an additional instruction that the jury be told that you must find that there was a firm

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basis for believing that the officer had an improper intent.

Now, we're suggesting, of course, that this same standard should apply at the summary judgment stage as well, and we think the reason why it's justified --

QUESTION: Wouldn't there have had to have been a firm basis for believing they had the intent if the -- in order for the plaintiff to make out the affirmative case?

MR. MINEAR: No. That is the difference with the clear and convincing standard. Clear and convincing evidence is evidence sufficient to give the jury a firm belief of an improper motive.

QUESTION: That's very good as well as a charge to the jury, Mr. Minear, but how does a judge on a summary judgment stage -- is there some way he can distinguish between a claim that is supported by a preponderance of the evidence but not by clear and convincing evidence?

MR. MINEAR: Yes, we think that he can, and he has to ask the same question. He applies that standard of proof that -- the clear and convincing standard in determining the summary judgment motion, much as took place in Anderson v. Liberty Lobby, where he looks at the factual question through the prism of the appropriate standard, and that is what we're suggesting is appropriate

here.

And that standard is necessary, we submit, because otherwise there will always be these types of claims in which improper motive can be alleged based merely on inference and, because the judge must credit the inferences in favor of a nonmoving party, these cases will go on and be subjected to a jury trial even though it's very unlikely that they will proceed, or that they will produce a verdict, and that is something that we do have statistics on.

We do know that only 1 percent of the criminal -- of the prisoner petition cases ultimately result in court-ordered relief for the prisoner out of the 40,000 cases that the district courts are charged with handling, and that seems to me that is significant. It does indicate to us that there is a need for additional winnowing --

QUESTION: But do those statistics tell us how many of those cases actually went to trial?

MR. MINEAR: Yes, they do tell us how many of those cases went to trial.

QUESTION: And how many?

MR. MINEAR: Roughly about 3 percent of the cases --

QUESTION: About 3 percent, so that's really the

universe we're most concerned about, the 3 percent.

MR. MINEAR: Yes, and what we're concerned about also -- not just the 3 percent. I take that back. We're also concerned about those cases in which there's extensive discovery where a motion for summary judgment is ultimately granted after the plaintiff has conducted deposition after deposition and the court concludes that in fact there is not sufficient factual evidence to support the claim.

QUESTION: Why just -- just don't allow those depositions, as opposing counsel suggests? Only allow the Government to -- Government defendant to depose. Don't allow the plaintiff.

MR. MINEAR: Well, we think that in fact Justice Ginsburg in the court of appeals has suggested an appropriate approach with regard to discovery, and as a separate matter he has suggested that discovery should not go forward unless it's likely to produce sufficient evidence to achieve the desired result at trial.

In other words, the plaintiff has to produce some evidence of an improper motive and, in addition, must show that there's a reasonable likelihood that he can produce evidence through discovery that will --

QUESTION: How does he know what he can produce through discovery until he has it?

MR. MINEAR: Well, this is the same type of balancing determination that a court always has to make under Rule 26(b)(2)(3). There's always a question of the burdens and benefits of discovery, and the benefits of discovery is the likelihood of the evidence being produced.

The plaintiff is obligated when he submits his Rule 56(f) affidavit to indicate what his basis for believing is that this discovery will be fruitful, so in fact the district judge will have a basis to make that determination. He will be able to look at what the plaintiff is suggesting he will obtain on discovery, and he can make a reasoned judgment of whether or not he's likely to obtain the evidence he thinks he will receive.

In a case such as this, I think it's quite clear that the intended deposition of Ms. Britton is unlikely to produce anything more than what her deposition states, namely that she did this for a proper purpose.

QUESTION: You mean her affidavit?

MR. MINEAR: Her affidavit that she had prepared in an earlier stage of this proceeding.

And with regard to that, I'd also like to note that in this case the -- it's very easy to make factual allegations along the way. If you look to what the fourth amended complaint actually states in this case on page 185

of the petition, it indicates that the plaintiff himself indicates that Ms. Britton was acting in order to protect the prisoner's property. He made that allegation in his complaint. What we find is that the facts, the factual allegations change as the case moves forward.

Ultimately, that takes me back to my point with regard to restrictions on discovery. We do think that it's appropriate not only to have a clear and convincing standard here, but also to require that there be limitations on discovery to ensure that that discovery is limited and narrowed to that -- to those areas that are in fact of vital importance in proving the plaintiff's case.

Now, there's also been some suggestion in the questions from the Court about your authority -- I see my time has expired.

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

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

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Leonard Rollon Crawford-El, Petitioner v. Patricia Britton
Washington, D.C. #96-827
Dec. 4, 1997

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BY Dana Marie Federico

(REPORTER)