IN THE SUPREME COURT OF THE UNITED STATES

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CORRECTION OFFICER PORTER, :

ET AL., :

Petitioners :

v. : No. 00-853

RONALD NUSSLE :

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Washington, D.C.

Monday, January 14, 2002

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

APPEARANCES:

RICHARD BLUMENTHAL, ESQ., Attorney General, Hartford, Connecticut; on behalf of the Petitioners.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

JOHN R. WILLIAMS, ESQ., New Haven, Connecticut; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-853, Porter v. Nussle.

General Blumenthal.

ORAL ARGUMENT OF RICHARD BLUMENTHAL

ON BEHALF OF THE PETITIONERS

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

This case is about the meaning of the term, prison conditions, and the reason it is here is because the Second Circuit misinterpreted that term contrary to the purposes of Congress and the meaning given that term by this Court.

In fact, Congress adopted this Court's language when it passed the Prison Litigation Reform Act of 1996 and adopted the meaning of that term given to it by this Court in a line of cases, Preiser v. Rodriguez, the Bronson case, McCarthy v. Bronson, and Wilson v. Seiter, that very clearly include single episode and excessive force cases, which the Second Circuit Court of Appeals excluded in its decision. It interpreted the term, prison conditions, to exclude those kinds of single episode and excessive forces instances of misconduct by prison officials.

QUESTION: What's the universe of conditions and nonconditions that you would suggest? There was considerable discussion in the brief about the distinction between 1983 suits and habeas corpus suits. You would not draw the line there, would you, or would you?

GENERAL BLUMENTHAL: Preiser v. Rodriguez draws the line between habeas corpus petitions on the one hand challenging the fact or duration of confinement and the on the other hand conditions of prison life, or conditions of his prison life, as it refers to the petitions that we think are the universe that would be included in 1983 actions. Virtually any conditions of prison life ought to be regarded as conditions of confinement cases.

QUESTION: Well, can you give me an example, under your theory, of a case that is not covered by habeas corpus, but that also are not a condition of prison life which is a 1983 suit? When could a 1983 suit lie under your theory?

GENERAL BLUMENTHAL: Our position would be that all of those 183 lawsuits ought to be subject, are subject to the exhaustion requirement. There are no exclusions, whether it's --

QUESTION: You can't think of any suit brought by a prisoner that is not controlled by the term, conditions, unless it's a habeas corpus suit?

GENERAL BLUMENTHAL: Well, if it were completely unrelated to prison life -- an example might be, for example, a lawsuit against a State tax commissioner, for example, just to take one that seems relevant in light of the earlier argument today, where the prisoner is claiming that he's been denied a refund to which he's properly entitled, and --

QUESTION: You're saying that all Eighth Amendment claims under 1983, which is what most of the prison cases are.

GENERAL BLUMENTHAL: All --

QUESTION: They claim that they've been deprived of a constitutional right because they have been sentenced to prison and the conditions of that prison, whether it's an isolated beating by a guard or anything else, are unduly -- are cruel and unusual?

GENERAL BLUMENTHAL: Yes, Justice Scalia. All Eighth Amendment constitutional claims, indeed all constitutional claims under 1983, this Court has never established a hierarchy among such claims regarding excessive force claims as deserving greater priority, so that they ought to be spared the exhaustion requirement.

In fact, it is specifically said in Wilson v. Garcia that, for example, on statute of limitations questions there ought to be uniformity, and certainty, so

as to avoid the kind of litigation that also was the purpose of Congress in passing the PLRA, and that is really one of the key points here.

QUESTION: That's an easier line. What you're saying is that the minute you begin defining a universe of conditions which is smaller than the 1983 suits -- generally we have a whole jurisprudence that has to be tested and create satellite litigation, et cetera, and I understand that. I'm just wondering if your definition is prevailing, Congress would have used those words, conditions. It would have just said all 1983 suits involving prisoners, period.

GENERAL BLUMENTHAL: Justice Kennedy, Congress used that term because it was used by this Court to describe a category of the universe as set forth in Preiser and again in McCarthy v. Bronson, where the court faced a similar issue under the Magistrates Act, the nonconsensual referral of petitions to magistrates, and said that all of these cases, 1983 cases are, indeed, conditions of confinement cases, and Congress wanted to use that language and that meaning given by this term so as to avoid corollary or, as you put it quite well, satellite litigation that, in fact -- in fact has been spawned in the Second Circuit by the Nussle case, and we see it, for example, in Royster v. United States, which is

before this Court on cert, where excessive force is no longer even involved.

It's a particularized instance, as the court of appeals referred to it, of denial of the documents, legal documents that the prisoner claims he is entitled to receive, and courts then and now would have to decide what kinds of cases are excessive force, if they are mixed with other cases that may not be excessive force, if they seem to involve in some respect ongoing conditions --

QUESTION: You can certainly find some Eighth Amendment claims that have nothing to do with excessive force, I think. A case comes to mind that we decided earlier this term, a case called Molesco, which came from the Second Circuit. It didn't come here under the Prison Litigation Act, but what happened there was that the prisoner had a heart condition, he ordinarily was allowed to use the elevator to go up to the sixth floor cell, this day the prison attendant said no, you can't use the elevator, so he walked up the stairs and had a heart attack.

Now, that case was brought under the Eighth Amendment. I take it under your view that if it were a prison litigation action he should have to exhaust administrative remedies.

GENERAL BLUMENTHAL: Exactly, Mr. Chief Justice.

He ought to be required to exhaust because in that case, for example, the prison administrator could and might well make adjustments to the facilities, might do retraining, different decisions on hiring, in fact, disciplining --

QUESTION: General Blumenthal, on the other side of that is the argument that Nussle makes that he said that the guards told me if I report what they did they would kill me, so are there assurances -- you said the value of -- no risk to the prisoners, this is going on, so that they can cure it. He says, if I told they said they were going to kill me. Are there assurances in the system that there isn't going to be retaliation of someone who makes an internal complaint?

GENERAL BLUMENTHAL: Certainly in Connecticut's system, Justice Ginsburg, there are such assurances, and in the joint appendix at 11 and at other places there are requirements for confidentiality, for example. There is a requirement for an informal contact or request.

In the Connecticut system, the commissioner entertains, personally reads, is on the floor and, indeed, there is the requirement that the lieutenant make two rounds every day, that a captain make one round, that he be or she be accessible in those circumstances, and that protection be provided, and that is, as a matter of fact, one of the advantages of exhausting, because it assures

timely, prompt attention.

QUESTION: General Blumenthal, I don't really understand this. Was the threat that the guards made, if you tell somebody through an administrative internal procedure we're going to kill you, but it's perfectly okay to go to a court directly. We just really want you to exhaust administrative remedies. We'll kill you if you exhaust administrative remedies.

(Laughter.)

QUESTION: But if you go right to the court, that's okay. Is that realistically what the threat was?

GENERAL BLUMENTHAL: Justice Scalia, the --

QUESTION: So this problem, you have it no matter what, don't you?

(Laughter.)

QUESTION: You can't --

GENERAL BLUMENTHAL: The threat of retaliation was more general.

QUESTION: I would think so.

GENERAL BLUMENTHAL: And it was never verified, of course.

QUESTION: Prison guards don't --

GENERAL BLUMENTHAL: It was a claim.

QUESTION: -- administrative law generally, in my experience.

GENERAL BLUMENTHAL: Well, they're learning, Justice Scalia, and part of the claim here was one of retaliation, but it --

QUESTION: Was he still in prison when he brought this case?

GENERAL BLUMENTHAL: He was in prison when he brought this lawsuit. He waited for 3 years. He waited until literally 3 to 5 days, depending on whether you look at the complaint or whatever, until the statute of limitations was about to expire, and then he went to court.

It was not a timely, emergent, exigent plea for help, and if there had been a real threat physically to him, the prison administration would have afforded a far more effective means of protection than going to Federal court and seeking some remedy -- and by the way, he sought money damages. He didn't seek any protection or injunctive relief -- than going to Federal court and seeking some remedy far in the future.

The excessive force claim -- and I want to be very frank about it -- is intertwined with the single episode contention on which the court of appeals also relied, and in our view the excessive force claim, the threat of physical harm, is a more difficult one because it's raised in this Court's cases, in Hudson v. McMillian,

and Farmer v. Brennan, which deal with the element of proof, the elements of proof that have to be provided to make out a claim, with the standard of intent that has to be shown.

QUESTION: You acknowledge they do draw this distinction between prison conditions and excessive force cases?

GENERAL BLUMENTHAL: They do, Justice Kennedy, but only for the purpose of the standard of proof or intent, and this Court has made that distinction very clear in Crawford-El v. Britton, which is cited in the briefs at 523 U.S. 574, and particularly at 585 the Court draws the distinction, because in Crawford-El it is saying that a heightened standard of intent need not be shown, should not be required in order to protect prison officials from frivolous lawsuits or from discovery.

And the Court says we have a law that will do that, we have the PLRA, and it says about the PLRA, most significantly, and I'm quoting from 585, most significantly the statute draws no distinction between constitutional claims that require proof of an improper motive and those that do not, so the Court there -- and it goes on to say, if there is a compelling need to frame new rules of law based on such a distinction, presumably Congress either would have dealt with the problem in the

reform act, or will respond to it in future legislation.

What the Court is doing there is saying, and it does so after a footnote that cites Farmer, and refers to the Eighth Amendment, that is to say, footnote 7, we don't mean that prison conditions should exclude the excessive force claims simply because we have said in Farmer and Hudson v. McMillian that under the questions presented there they would do so, so the Court I think as answer -- this Court has answered that question, and --

QUESTION: Is this the citation to Crawford-El?

GENERAL BLUMENTHAL: Crawford-El is 523 United States 574, and I have been quoting from 585.

QUESTION: Thank you.

GENERAL BLUMENTHAL: And 597. The quote was from 597, but I want to make clear, in fairness, that quotation is not central to the holding of the case, which I mentioned earlier. It is a distinction that the Court draws so as to in effect provide reassurance that the Prisoner Litigation Reform Act will do the job of eliminating frivolous litigation as, indeed, it did in 1997a(c), where it provided for dismissal of actions that are frivolous, malicious, or seek monetary damage from an official who is immune, and it uses the term, prison conditions.

In fact, prison conditions is also a term used

in 1997e(f), where there's a reference to the pretrial proceedings that can occur by means of video, or telephone, or other telephone communications technology. There is no reason that the term, prison conditions, in those sections of the statute, ought to exclude excessive force cases or single episode instances of misconduct and, indeed, it would do violence, it would be directly contradictory to the purposes of Congress, which were to reduce the volume of litigation, particularly frivolous litigation, to give prison administrators a chance to correct errors or mistakes and to reduce the interference of Federal courts in prison administration, and to provide a better record if there is going to be resort to the Federal courts.

With the Court's permission, if there are no further questions I'd like to reserve the remainder of my time.

QUESTION: Very well, General Blumenthal.

Mr. Gornstein, we'll hear from you.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

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

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

For four reasons, actions that challenge

particular instances of unlawful conduct such as excessive force are actions with respect to prison conditions that must be exhausted under the PLRA.

First, in three cases, this Court has used the terms, prison conditions, or conditions of confinement, to refer to particular instances of unlawful conduct and, in one of those cases, McCrary v. Bronson, it applied the term to a single episode of excessive force. There's no reason to think that Congress intended any narrower meaning here.

Second, the purposes of the exhaustion provision are to give prison officials an opportunity to resolve problems within the prison by themselves, and to reduce the enormous volume of prison litigation in Federal courts. In terms of those two purposes, there's absolutely no reason to distinguish between actions that challenge particular instances of unlawful conduct such as excessive force and any other sort of prisoner complaint. Prison authorities in fact have a particularly strong interest in resolving complaints about staff misconduct on their own, and grievance procedures are fully effective to do that without any need for significant Federal court litigation.

Third, as this Court has recognized, it is extremely difficult to administer a line between isolated

episodes or particular instances and more systematic practices, or actions undertaken pursuant to a policy. Any effort to do that would generate substantial additional litigation on a threshold collateral issue when Congress' goal was to reduce the amount of judicial resources devoted to prisoner complaints.

And finally, creating an exception for particular instances of unlawful conduct has the potential to create an enormous loophole in the exhaustion requirement. Already, that exception has been applied by the Second Circuit to retaliation claims, to confiscation of property claims, and it has the potential and capability to be applied to a wide variety of prisoner complaints that are directed at the actions of individual officers.

It is very unlikely that the Congress amended this exhaustion provision for the express purpose of making sure that a dramatically increased number of cases would have to go through the exhaustion process, would have simultaneously cut out that large category of claims that could benefit from the exhaustion process.

QUESTION: Could you tell me on your point 1, you cited the case where excessive force applied to -- prison conditions applied to a single incident. What was that case?

MR. GORNSTEIN: McCrary v. Bronson.

QUESTION: And was that pre or post enactment of the litigation reform act?

MR. GORNSTEIN: That's preenactment.

QUESTION: Preenactment.

MR. GORNSTEIN: And in that case was a construction of the Magistrates Act that had nonconsensual referral in cases involving conditions of confinement, and the Court interpreted the phrase, Conditions of confinement, to embrace single incidents, including excessive force, and rejected an alternative construction that is similar to the one adopted by the Second Circuit here that prison conditions refers to systematic practices, and it did so for the same reasons, really, that you should reach the same conclusion here.

The Court said that the purpose of that act was to reduce the workload of Federal courts, and that would further that purpose, and it said that trying to draw that distinction between individual actions and systematic practices would provoke -- generate a whole new round of litigation, when what we're trying to deal with here is something that's trying to save time.

QUESTION: What about Hudson and Farmer?

MR. GORNSTEIN: Hudson and Farmer show that the term, prison conditions, can be used in a narrower sense,

and that context matters, but here the context was in defining the substantive elements for proving a particular kind of Eighth Amendment violation, and the substantive standards for proving a claim really have nothing to do with whether a claim should be exhausted.

The context we have here is an exhaustion provision, and the purposes of exhaustion, as I have said, are to give prison officials a chance to act first to solve a problem and to reduce the volume of litigation and, in light of those purposes, it simply makes no sense to adopt a narrower meaning. Instead, the Court should adopt a broader meaning that comes from Preiser v. Rodriguez, and McCrary v. Bronson, and Wilson v. Seiter.

QUESTION: Of course, still in all, even in Hudson, I guess, drawing a distinction between continuing prison conditions and single incident prison conditions, or single incidents that aren't prison conditions, still involves you in the same problem of satellite litigation that you say would be one of the horrible effects of adopting the same interpretation in the present case. I mean, that didn't stop us from coming out that way in Hudson. Maybe it should have, but it didn't.

MR. GORNSTEIN: Justice Scalia, two responses to that. One is that the line that was actually drawn in Hudson as I read it is not between single instances and

systematic practices, it's between excessive force claims and everything else, which is -- does still have its difficulties in administration, but maybe not quite as challenging as single instances versus systematic practices.

The other difference is, we're talking about applying something at the liability stage to make a determination on whether there has been liability enough, as opposed to, what do we do right at the outset of litigation when somebody comes in with a complaint, it's a threshold question, and generating additional litigation about that on a threshold question on a collateral issue it seems to me is something that you would want to generate less litigation about, generally speaking.

If the Court has no further questions --

QUESTION: Thank you, Mr. Gornstein.

Mr. Williams.

ORAL ARGUMENT OF JOHN R. WILLIAMS

ON BEHALF OF THE RESPONDENT

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

When Congress enacted the Prison Litigation Reform Act, it did so on the heels of at least three decisions by this Court which clearly defined the term, prison conditions, to exclude excessive force cases and

those cases start, of course, with Wilson v. Seiter, which expressly held, and I will quote, the very high state of mind prescribed by Whitley does not apply to prison conditions cases.

QUESTION: What was at issue in Wilson v. Seiter?

MR. WILLIAMS: Well, of course, that was a medical indifference case, deliberate indifference case involving the distinction between a single incident and multiple incidents, and to the extent that the Second Circuit, post Nussle, has gone on to attempt to draw a distinction of that kind, we do not defend it. The distinction which I think is applicable here in defining the term, prison conditions, is excessive force cases versus all other types of cases, other than --

QUESTION: So on the other side of the line so far as you're concerned would be a number of single incident types of thing that did not involve excessive force?

MR. WILLIAMS: Yes, indeed. I think the distinction is one that this Court has made it absolutely clear the distinction is between -- has to do with the mens rea that's required. If the mens rea is a malicious, sadistic, intending to cause pain, that's not a prison condition. If it is, however, deliberate indifference,

that is a prison condition.

QUESTION: But why would Congress have made that distinction and said that one -- the kind of cases you're refer -- shouldn't exhaust administrative remedies whereas the other one should. It doesn't -- I can see -- you can certainly draw a definitional line, but why would Congress have said case A exhaust, case B don't?

MR. WILLIAMS: Well, excessive force cases are different. They've always been different under this Court's jurisprudence. There are many protections that are already built in to avoid frivolous litigation in the excessive force context.

For example, the standard itself, cruel, malicious, sadistic, is a very tough one to meet. Second, Leatherman, of course, did not remove or excuse getting away with just notice pleading. It required fact pleading, so that when you combine the requirement of fact pleading with the high standard that has to be met there's a very -- it's a very rare case that will pass a 12(b)(6) motion if it's an excessive force case in the first place.

QUESTION: Isn't the answer to your argument, though, the answer that Mr. Gornstein gave a moment ago when he referred to the significance of context? If the issue before the Court involves a distinction among different kinds of prison cases, then we can certainly

understand the distinction when we say conditions are different from particular incidents, and if you refer only conditions, you're meaning to exclude particular incidents.

But if we're trying to draw a distinction between prison cases and all kinds of -- all other kinds of 1983 cases, which was the case when Congress passed this statute, then I suppose it does make good sense to use prison conditions in a much broader sense to cover everything that might come out of prison litigation to distinguish it from other kinds of 1983 cases, and isn't that the answer to your argument based on our use of the term in certain cases?

MR. WILLIAMS: I think that's more a policy issue than a statutory construction issue, and I think that this is just a simple case of statutory construction.

QUESTION: But the -- I mean, Mr. Gornstein's argument is kind of a compared-to-what argument. He's saying, when you use the phrase, conditions, what are you comparing the conditions against? Are you comparing them against other kinds of things that happen in a prison, or are you comparing them against other kinds of cases that might be brought under 1983, and the answer is possibly going to be quite different, depending on which context you're in.

MR. WILLIAMS: Well, I think the context in which this Court has used it, and therefore in which Congress is presumed to have used it, is the latter.

QUESTION: The cases that, including the one you cite, the Government cites for the opposite proposition.

MR. WILLIAMS: I think --

QUESTION: The cases say, and they have loads of language there which seem to say it, that Wilson v. Seiter and three other cases did focus on the issue of single incident versus affecting several people. They all decided that single incident is within the meaning of prison conditions or the like.

Senator Biden on the floor says, if you pass this law, you are going to sweep within it excessive force cases, and nobody denies it, all of which from the most -- and the language, the language admits of Justice Souter's suggestion, and he provides a purpose.

So taking all those things together, why isn't the law in this case precisely along the lines he suggested?

MR. WILLIAMS: There's no doubt that the cases involved do not see a principal distinction between single incident and multiple incident cases. That, I think, is where the Second Circuit in the post Nussle cases has gone wrong. I don't defend that. I think that the distinction

is the one that this Court has always drawn, which is between the excessive force mens rea, which is cruel, malicious, sadistic, intending to cause pain and nothing else, on the one hand --

QUESTION: That's only excessive force?

QUESTION: That's only excessive force?

QUESTION: I see somebody in dire need of medical attention and I sit there smiling cruelly -- please, get me a doctor.

MR. WILLIAMS: That is exactly --

QUESTION: You call that excessive force?

MR. WILLIAMS: That's -- no. That's deliberate indifference. This Court has often said that. That's exactly what we're talking about.

QUESTION: Well --

MR. WILLIAMS: There -- it's -- indeed --

QUESTION: It has nothing to do with the things you were saying, then, cruelty, and savagery, whatever.

MR. WILLIAMS: Well, the term is --

QUESTION: You can be just as cruel and savage without applying excessive force, if you do it right.

MR. WILLIAMS: The -- we can have words mean whatever we want them to mean, but this Court has made it clear what it means when it refers to excessive force, and that is the mens rea that we were just talking about

which, after all, comes from Judge Friendly's seminal opinion in Johnson v. Glick.

That, however, is not what we mean when we talk about prison conditions, and this Court has made that clear, and made it clear at the time Congress enacted the PLRA, and I think that the important distinction between the PLRA and the Magistrates Act is that when the Magistrates Act was passed, all they had -- and that's what this Court held in McCarthy v. Bronson, all they had to guide them on the meaning of the term was Preiser, and so following Preiser, of course, that's what it meant, and that's why they used it that way in the Magistrates Act.

But after this Court decided McCarthy and Brennan, this Court then went on to address the issue, focus on the language, and explain this very distinction that I'm arguing for here, and it was after this Court had done so in three cases, one after the other, that Congress then passed the PLRA.

QUESTION: That's what I don't understand. Now, I didn't realize this. You're conceding, I take it, that an individual incident is a prison condition, as long as it isn't an excessive force incident, and at that point, although maybe there are three cases that say this -- I'll read them -- why would anybody want to say that a single incident refusing to feed a prisoner, a single incident

refusing to give him medical assistance, a single incident refusing to let him take exercise in fact is a prison condition, but a single incident of hitting him is not?

MR. WILLIAMS: I can't speak for Congress' intention, but I can speak for the meaning of the words as they've been defined by the Court, and there is an obvious distinction under this Court's cases. That's what we're talking about when we talk about statutory construction, and that's why I say that this is not a grand policy case. This is a traditional --

QUESTION: Well, but we're also talking about reaching a sensible result.

MR. WILLIAMS: Well, the sensible result is the result that this Court has often reached in the past, which is to say to Congress, if this is what you want to do, do it in the way that you're supposed to do it.

QUESTION: But it really isn't quite that clear what Congress wanted to do as between these two views.

MR. WILLIAMS: Well, of course, if Congress is ambiguous, then we go back to the default position, and the default position is, we go back to dictionary meaning, and this Court held in McCarthy v. Bronson that if you just look to the dictionary definition of the term, prison conditions, you're not talking about excessive force cases, and in McCarthy this Court said, however, we don't

use the dictionary definition because when the Magistrates Act was passed Congress is presumed to have been looking to Preiser, but once Congress gets mushy, as they really are in the PLRA, because some sections use the term prison conditions, some sections don't, and that's even true in the title 42 amendment, so --

QUESTION: Mr. Williams, there's a case that has come up in various forms where violence, random violence is what characterizes the prison system. There was the litigation in Alabama, where the State Attorney General said, this, the atmosphere in this prison is jungle-like, and this Court said it in Dosset v. Rawlinson. Where do you put those cases? Those are excessive force cases, but it's pervasive in the prison, not just one beating by a guard. Would those cases come outside the prison Litigation Reform Act, even though you're talking about the kind of conduct that pervades the entire institution?

MR. WILLIAMS: I'm not sure that this Court has ever told us exactly what the mens rea is that must be met in such a case, and I think that will be the answer to the question when that case arises. If this Court says that in any given pervasive violence situation, then the necessary mens rea remains the Johnson v. Glick one, then that's an excessive force case and it's not a prison conditions case.

On the other hand, if this Court says that the necessary mens rea is simply deliberate indifference, then it is a prison conditions case.

QUESTION: Well, it's hard to say it's deliberate indifference when you're beating up on someone.

MR. WILLIAMS: If you're suing the individual guard, of course, you're dealing with an instance of brutality. What I was thinking of is the more interesting question of where the warden issues a decree.

QUESTION: The warden knows that this is going on. It's not deliberate indifference, because it's a jungle-like atmosphere.

MR. WILLIAMS: If the warden is aware of it and is tolerating it, then it becomes policy, and then this Court is going to have to say, well, what's the standard of liability for the warden? Is it deliberate indifference or is it the Johnson v. Glick? I don't know. I don't believe this Court has told us.

QUESTION: I would think that just the usage, ordinary English, what the words mean, when a condition pervades a prison, then it's a prison condition.

MR. WILLIAMS: Well, I think that that gets off into the single incident versus multiple incident issue, and I prefer to think of it in terms of the mens rea, and I can conceive that an argument might well be made, and in

fact I would be happy to make it, that where it is so pervasive that the warden is charged with actual knowledge of -- there's the municipal liability cases under 1983 -- that he's charged with knowledge of it, then I would say that the Johnson v. Glick standard applies, and it's not a prison condition, but you could make the other argument just as well.

In any event, it's an easy line to draw so that we will know, the district courts will know in any given case where it falls on the line of --

QUESTION: Why in the world would Congress -- you can give us no inkling of why Congress would sit down and say, whether there has to be exhaustion of administrative remedies ought to depend upon what state of mind the actor is going to be held to? Why is there any conceivable connection between those two issues, and that's what you're saying they did, that they left it up to the future law of this Court as to what mens rea will be required, and if on the one hand the mens rea is going to be, you know, just deliberate indifference, then you have to exhaust, and if it's intentional cruelty you don't have to exhaust.

MR. WILLIAMS: I would think that the reason for that, if Congress had a reason, is that Congress knew that because of the very high bar this Court has a record in

excessive force cases, combined with the fact pleading requirement, that the concerns Congress had about frivolous litigation and undue meddling of the district courts in their business are already met by existing law, and therefore the PLRA need not be concerned with it and indeed, I think just about everybody agrees that the concerns of Congress in enacting the PLRA was precisely those two things, neither of which readily fits the excessive force model.

QUESTION: But if you have a guard who is sadistically beating people, certainly that seems to be the sort of thing that might easily be corrected, at least for the future, by exhaustion.

MR. WILLIAMS: But that, again, is a policy question, Chief Justice.

QUESTION: Well, it is, but when we're trying to figure out what Congress really intended here, I think one shies away from a distinction which is perfectly technically sound but doesn't seem to have anything to do with what people thinking about the desirability of exhaustion would have thought about.

MR. WILLIAMS: Well, when you look at the entire PLRA, and I was a little dismayed in preparing for oral argument to realize that the entire PLRA isn't in the joint appendix to our briefs, but when you look at it in

its entirety, the presence or absence of that phrase, prison conditions, is quite interesting.

For instance, in title 42, prison conditions do not apply to the attorney fee cap. Rather, that relates to prisoner suits, and similarly the distinction that there can be no monetary award for emotional distress unless it's accompanied by physical injury, those are prisoner suits, not prison conditions cases.

When you look further, section 807, the lien provisions under the act, again, there's no prison conditions limitation, so clearly Congress had in mind that there are some kinds of suits by prisoners where it wants to impose more stringent limitations and others where it wants to impose some limitations but not the whole panoply of limitations.

QUESTION: But here the prisoner suits, it happens to be the caption for the provision. They use in the text prison conditions but the caption is prison suits, isn't it?

MR. WILLIAMS: Yes, it is, and then in the context of the section they go on and draw the distinction. Sometimes it's all prisoner suits, sometimes it's just prisoner suits about prison conditions, so I think we really get no place in particular from the fact of the caption.

QUESTION: What would we do with a case where the prisoner said, these guards are beating up on me, and the reason they are is that this prison doesn't give guards any training, doesn't supervise them, so my 1983 suit is against the guards that beat me up, but they're also against the officials in the prison who are responsible for training and for monitoring? Those have to go to --

MR. WILLIAMS: They go two different directions and, of course, as we know, that is common place in prisoner's suits, that they have multiple counts, multiple claims, and some of them are dismissed early on, some of them go a little bit farther, and so forth. That is the nature of prison litigation in this particular case, the suit against the guard for beating him up would not require exhaustion and would go forward. Prison conditions claims obviously would have to be exhausted, had they not already been exhausted.

QUESTION: Suppose I believe that policy was relevant, would I then be right to think that the isolated beating case is perhaps the strongest case where you should require exhaustion, for the reason that the prison doesn't want such a person on its payroll, and if the prisoner is right, they'll find out about it fast and get rid of him

MR. WILLIAMS: No, actually, the difficulties of removing a civil servant who has --

QUESTION: Oh, but I'll take action.

MR. WILLIAMS: When you combine all of his Laudermill rights with all of his rights under the collective bargaining agreement, moving that guard or taking meaningful disciplinary action against him is not going to be necessarily that fast.

Of course, what you can do quickly is move the prisoner to another unit, but then you deal with what we know to be the reality of the prison guard grapevine, so that there's not an easy solution.

QUESTION: You say that a prison guard who maliciously beats up on people is just there to stay, so to speak?

MR. WILLIAMS: Well, one would hope not.

QUESTION: One would.

MR. WILLIAMS: But the fact of the matter is that, like all public employees, they enjoy a number of due process protections and, like most public employees, they also enjoy union protection.

QUESTION: Many of them are not public employees any more.

MR. WILLIAMS: I'm sorry.

QUESTION: Many of them are not public employees

any more. That's one reason some States have moved to having private companies manage prisons.

MR. WILLIAMS: I agree. I agree. That is true.

QUESTION: In those cases there wouldn't be a problem in getting rid of a guard.

MR. WILLIAMS: Well, there's probably still a pretty effective union contract. The guards' union is a pretty powerful force and, indeed, in this case that was present. There were the references to the fact that the guards' union was involved in a big dispute with the Governor of Connecticut, who happened to be a friend of Mr. Nussle, so that that was present.

The attempt by the State to take the title 18 definition and move it over to title 42 I think is equally unsuccessful. The fact that it's in a different part of the code is one reason why Congress certainly wouldn't have attempted to adopt it. Indeed, it's in a part of the code, title 18, that deals with different issues from those which Congress was dealing with in its title 42 amendments.

Most importantly, of course, it is explicitly limited by its terms to section 802, that is, title 18, and is not applicable elsewhere and, as this Court held in the Vermont Agency of National Resources case, that at least suggests that it is inapplicable to title 42.

Also of great interest, and I think not addressed in the briefs, is that section 803 has its own definition section, just as section 802 does, but in the section 803 definition the term, prison conditions, or conditions of confinement, is not defined, but interestingly, in section 802 and in section 803 there is a definition of the word, prisoner. The words aren't precisely the same, but the words appear to have the same meaning.

Now, why would Congress find it necessary to define prisoner in section 803 when they'd already done so in 802, unless it was because they took seriously the limitation in 802, that the definitions there were limited to section 802?

So I think that the attempt by the petitioners to borrow the section 802 language and incorporate that into section 803 simply won't work, and what we are left to fall back on is the statutory construction arguments which I have previously made.

I hate to say it, but I think I'm out of time. Thank you.

QUESTION: You're not out of time, but you're welcome to sit down.

MR. WILLIAMS: Out of ideas.

QUESTION: Yes, okay.

(Laughter.)

QUESTION: Thank you, Mr. Williams.

Mr. Blumenthal, you have 4 minutes.

REBUTTAL ARGUMENT OF RICHARD BLUMENTHAL

ON BEHALF OF THE PETITIONERS

GENERAL BLUMENTHAL: Thank you, Mr. Chief Justice, and may it please the Court:

I am not completely out of ideas. A few brief ones: First, to expand, perhaps, on the point raised by Justice Breyer, I can't speak for all the State prison systems throughout the United States, but a prison guard who did what Mr. Nussle claimed he or they did would be transferred, disciplined, perhaps fired by this commissioner. I am certain of that fact, because we have assisted in that process.

Indeed, some of those guards have been criminally investigated, not guards involving this incident, but some who have committed the kinds of acts that Mr. Nussle might complain of. There are speedy, effective administrative remedies that can be applied to protect prisoners, and it is in the interests, may I respectfully suggest, of the State to do so to eliminate or at least reduce prison unrest, to make sure that it isn't held liable in more serious incidents, if they are bad guards.

The administrators of modern prison systems have a very powerful and compelling self-interest in using the grievance system as a management tool. Now, that may not have been on Congress' mind. Congress undoubtedly was concerned, as the legislative history clearly shows, with the fact that there were 40,000 of these lawsuits pending, prisoner petitions, constituting one-quarter of the entire Federal case load. Congress wanted to streamline the system and force all of these prison petitions to go through the exhaustion process, and there is no evidence, absolutely no evidence in the legislative history or elsewhere it intended to carve out or make an exception for single incident excessive force cases and, indeed, the evidence is all to the contrary.

McCarthy v. Bronson was a single incident, single episode of excessive force, but this Court said that it was included in the term, conditions of confinement, for purposes of the Magistrate Referral Act. That is the term that Congress understood it to be. Crawford-El confirms at 597, where I quoted it. It's in our view conclusive on this point, but we would submit that the interests of the statute are best served, Congress' purposes are best served. The distinction that is suggested by the respondents is unsupported in principle and unworkable in practice for many of the same

reasons that this Court said in Wilson v. Seiter that the single incident versus continuing practice distinction was simply illogical and impractical.

If the Court has no further questions, I have nothing further.

CHIEF JUSTICE REHNQUIST: Thank you, General Blumenthal. The case is submitted.

(Whereupon, at 11:48 a.m., the case in the above-entitled matter was submitted.)