

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

NATHANIEL JONES-BEY,	)	
	)	
Plaintiff,	)	
	)	Cause No. 3:97cv793AS
v.	)	Lafayette, Indiana
	)	September 16, 1999
STEPHEN ABRAHAM and	)	9:35 a.m.
RHONDA GUNTHER,	)	
	)	
Defendants.	)	
	)	

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VOLUME III  
EXCERPT OF JURY TRIAL TRANSCRIPT  
BEFORE THE HONORABLE ALLEN SHARP

APPEARANCES

Plaintiff Pro se:	MR. NATHANIEL JONES-BEY and MR. MICHAEL L. PARKINSON Parkinson Law Office 318 Brown Street Lafayette, Indiana 47902
For the Defendant:	MR. THOMAS D. QUIGLEY and MS. THERESA A. STEVENS Indiana Attorney General Indiana Government Center South 402 W. Washington Street Indianapolis, Indiana 46204
Court Reporter:	Loretta M. Spromberg United States Court Reporter 115 Robert A. Grant Courthouse 204 South Main Street South Bend, Indiana 46601

Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided transcription.

1           MR. PARKINSON: May it please the Court, ladies  
2 and gentlemen of the jury: As you all know, Mr.  
3 Jones-Bey has filed suit against Stephen Abraham and  
4 Rhonda Gunther, the two remaining defendants in this  
5 case, and one issue before you is the issue of  
6 excessive force.

7           Now, the judge, at the end of our closing  
8 arguments, is going to go over with you in detail and  
9 comprehensively the law, the federal law, on this case.

10          However, let me point out to you just two or  
11 three things that I think will be most helpful in  
12 helping you to decide.

13          As the judge will explain in an excessive use  
14 of force claim the critical test is this -- and I will  
15 ask you to listen to this carefully, and this will be  
16 in your Jury Instruction Number 12 -- the question to  
17 decide is whether each of these defendants applied  
18 force in a good faith effort to maintain or restore  
19 discipline or maliciously and sadistically to cause  
20 harm?

21          I will repeat that: Whether each defendant  
22 applied force in a good faith effort to maintain or  
23 restore discipline or maliciously or sadistically to  
24 cause harm?

25          Now, that's the issue that you are here to

1 decide today as to each of the defendants separately.

2 Let's review a little bit of the facts that you  
3 heard here in this case, and I will present to you some  
4 questions, some issues that I think you should be  
5 considering on behalf of Mr. Jones-Bey's claim.

6 As you know, there were two really separate  
7 incidents that took place, the first regarding Officer  
8 Gunther.

9 You know from the testimony, from the evidence  
10 presented here today that this all took place beginning  
11 with a rather what we would characterize as innocent  
12 and perhaps, in light of subsequent events, silly  
13 incident.

14 Mr. Jones-Bey is Muslim. That's his religion.  
15 That's something that is very, very dear and precious  
16 to him, as it would be for anyone.

17 Our family, our religious connections, those  
18 things that are held most dear to us are in a sense  
19 for everybody sacred and precious.

20 For some reason after several years of being  
21 in this institution Mr. Jones-Bey was not given a  
22 food tray which respected his religious beliefs.

23 One of the questions I think here is why.

24 Now, I am going to propose to you a suggestion:  
25 Perhaps initially it was a mistake, but did any of you

1 here today hear any evidence as to why in this large  
2 institution Officer Gunther or the officer accompanying  
3 her or who she accompanied -- however you want to look  
4 at it -- couldn't have tried the simple remedy of  
5 making sure that this man simply got a vegetarian dish  
6 as had been the custom, as had been the policy and  
7 routine of this prison for years?

8 Why? That's a question.

9 Could it be that she deliberately simply didn't  
10 care? Could it be that when Mr. Jones-Bey began to  
11 protest she deliberately allowed him to be upset and  
12 then rather than trying to take a constructive and I  
13 suggest very simple solution to the problem, she, along  
14 with this Officer Richards -- we'll hear more about him  
15 later from the Court -- stood by and watched Mr.  
16 Jones-Bey be sprayed with a chemical agent.

17 Now, what evidence do we have to kind of support  
18 that?

19 Well, we have Officer Gunther's own testimony;  
20 and you will have a chance to deliberate among  
21 yourselves as to the credibility of Officer Gunther  
22 and the things she said.

23 I would suggest to you that much of her  
24 testimony is simply not credible.

25 She suggested first -- her stated first reason

1 for standing by and allowing Mr. Jones-Bey to be  
2 sprayed with a chemical agent while he was confined,  
3 while he was behind a locked door where there was no  
4 danger whatsoever of his getting out of that cell,  
5 no danger whatsoever of his being able to attack  
6 anybody -- what was her reason?

7 She stated that she stood by and allowed it and  
8 consented to it because she was afraid he would hurt  
9 his foot. Is that a reason to spray someone with a  
10 chemical weapon?

11 Let me give you a contrast. Say there was a  
12 prison riot. Say Mr. Jones was out of his cell. Say  
13 he was attacking someone. Would there then be a need  
14 to restore discipline? Absolutely. No question.

15 Chemical agents and even lethal weapons under  
16 the law can be used.

17 The question here that I will ask you to  
18 deliberate on is what was the real danger? Was her  
19 first and primary concern really this man's foot?

20 She then added that the second concern she had  
21 was that a big chunk of metal, known as the cuff port,  
22 might be dislodged by this man with his foot.

23 Whether or not that's possible in a state  
24 prison, whether or not these doors can actually have  
25 such an apparatus dislodged by a prisoner is one

1 question; but the second question is: Is it reasonable  
2 to believe that she actually believed that this man  
3 who she stated as far as she knew was not actually  
4 kicking this cuff port could seriously -- or was at  
5 any risk of actually dislodging this hunk of metal  
6 even if it were possible to do that?

7 So why did she stand by and in essence consent  
8 to have this man sprayed with Mace?

9 Important question I think, and I would suggest  
10 the question with regard to that defendant that you  
11 have to deliberate on.

12 What is believable? What is credible?

13 Was she standing by and in essence consenting  
14 to it, encouraging it, if you will, because it was  
15 necessary to restore discipline or was she angry at  
16 Mr. Jones-Bey?

17 Did she maybe not like the fact that he got to  
18 be served special food trays?

19 Did she maybe resent the fact that he was  
20 Muslim?

21 Was she maybe angry because of Mr. Jones-Bey's  
22 improper language?

23 So what do you do with someone who starts to use  
24 bad language at you, starts getting mad at you? Spray  
25 them with Mace? Was that what was going through her

1 mind?

2 If that was the intent and that was the purpose  
3 of all this, then I would suggest to you that under  
4 this test of the law she was not there to restore  
5 discipline. There was no danger. Mr. Jones was behind  
6 a locked door in a maximum security facility causing no  
7 harm to anybody, risking no harm to anybody, and not  
8 even risking any harm to himself.

9 Her first reason for consenting to this action,  
10 that he would hurt his foot, is in essence  
11 condescending. Who in the world sprays a chemical  
12 agent on somebody because they are afraid that person  
13 would hurt themselves?

14 I suggest to you that even in a zoo locked  
15 animals are not treated that way. That's not a  
16 justifiable reason.

17 On cross-examination she came up with some other  
18 reasons which she said she simply neglected to mention  
19 at first. Is she making up new reasons here? Are any  
20 of those reasons credible? I suggest not.

21 Now, there is one other distinction in the law  
22 which I have to bring to your attention at this point;  
23 and I've touched upon it briefly, and this will be  
24 contained in your Instruction Number 10 which the judge  
25 will go over with you.

1           No one is suggesting and there was no evidence  
2 here today that Officer Gunther actually sprayed the  
3 chemical agent; however, the standard in the law is  
4 that if someone knew of and consented to a  
5 constitutional deprivation then that person is also  
6 culpable.

7           I remind you here -- in case it wasn't made  
8 clear in opening arguments -- that the test is by  
9 preponderance of the evidence; in other words, take  
10 some scales and balance them (indicating).

11           Does it tip more reasonably in Mr. Jones-Bey's  
12 favor or does it tip in the defendants' favor?

13           That's the standard by which you have to judge  
14 under the law; and this is the better law; this is the  
15 law of the United States of America.

16           The second incident. We turn to the defendant  
17 Sergeant Abraham.

18           The reason Sergeant Abraham gave for subjecting  
19 Mr. Jones-Bey to an even more harsh chemical agent was  
20 again, number one, for his own personal welfare.

21           The milder agent that he had been contaminated  
22 with that had gotten on him and his clothing, that  
23 milder agent had to be washed off.

24           So how did he remedy that situation? By  
25 spraying him with a stronger and more harmful agent

1 in his own words. Is that reasonable?

2 I ask you to seriously consider: Is that  
3 reasonable, particularly in light of the fact that what  
4 happened in the end in this case is that after several  
5 hours of being left alone Mr. Jones-Bey willingly, of  
6 his own free will, decided he wanted to wash this  
7 chemical agent off of him, and he willingly, as you saw  
8 in the videotape, allowed himself to be escorted to the  
9 showers so he could do that.

10 Why wasn't that tried in the first place? Isn't  
11 that more reasonable? I submit to you it is far more  
12 reasonable.

13 The question is: Why wasn't it done at the  
14 outset?

15 Was this an instance where the defendant was  
16 trying to maintain or restore discipline? I suggest  
17 not. Why then?

18 Now, the evidence is that he was ordered to go  
19 through this action. However, the simple fact that he  
20 was ordered to do something never relieves anybody  
21 under the constitutional obligations in this country  
22 of respecting individual rights.

23 Each human being of their own accord in this  
24 country is held individually accountable for their own  
25 actions. Being ordered to do something is not an

1       excuse, not in this country.

2               I submit to you those are the two issues before  
3       us.

4               Another jury instruction will advise you as to  
5       the issue of damages. That means if you find in favor  
6       of Mr. Jones-Bey and against either of these defendants  
7       or both of these defendants, what do you do then?

8               Well, then it is your duty in each case to  
9       decide how should this man be compensated. This is  
10       not a criminal proceeding. Nobody here is on criminal  
11       trial. This is a lawsuit for a monetary damage based  
12       on a personal injury under the Civil Rights Act of the  
13       United States Constitution.

14               There was a lot of testimony and you will  
15       find in the exhibits that the Court will give you  
16       documentation showing that yes, these chemical agents  
17       did get on Mr. Jones-Bey.

18               I don't think there is any question about that,  
19       but, yes, these chemical agents caused watering of the  
20       eyes, irritation of the skin, and it is not good to  
21       breathe these things in.

22               How do you know that? Because the officers who  
23       were spraying this agent, at least the final agent,  
24       were all wearing gas masks. They didn't want to inhale  
25       the residue of this. Obviously it is harmful;

1 obviously it is painful. Obviously it causes injury  
2 to the person. It is not pleasant.

3 Nevertheless it is not just physical pain that  
4 should be accounted for, but mental or emotional  
5 suffering; and the Court will instruct you specifically  
6 on that standard.

7 Why was Mr. Jones-Bey put through all this? Why  
8 weren't his religious beliefs simply respected from the  
9 outset and somebody in this large institution just  
10 bring the poor man a tray of vegetables?

11 There was no evidence here in the court today  
12 that that wasn't possible. I submit to you to even  
13 suggest that it wasn't possible is totally  
14 unreasonable. The State of Indiana provides prisons  
15 very well with food supplies of all kinds.

16 Mr. Jones-Bey has introduced into evidence one  
17 exhibit which I believe will go to the jury. It is a  
18 policy statement on the use of chemical agents.

19 The second paragraph simply states: "The safety  
20 and security of the facility and the community shall be  
21 given the utmost consideration when use of firearms or  
22 chemical agents are considered."

23 I wanted to submit that to you so you could have  
24 it, not so much for what it says, but for what it  
25 doesn't say.

1           Yes, these officers are instructed to use  
2 chemical agents when safety and security are a concern.

3           Were they ever instructed specifically to use a  
4 chemical agent when somebody is kicking on their cell  
5 door?

6           Were they ever instructed specifically to use a  
7 chemical agent under the official policies (indicating)  
8 of this institution in the state of Indiana? To shoot  
9 a chemical agent on somebody for the purpose of  
10 removing them from their cell for their own health?

11           This policy is not the law governing this case.  
12 The law is what I stated to you earlier at the  
13 beginning of my argument, and you will be given  
14 these instructions in writing so you can review them.

15           But, as I said, it is what this policy doesn't  
16 say and I suggest what could have been in the minds of  
17 these two defendants when they did this. I suggest  
18 they were not relying on any policy, even if that were  
19 an excuse for doing what they did.

20           My one final thought: You might be tempted  
21 to think that because Mr. Jones-Bey is obviously  
22 incarcerated and being punished for a crime that well,  
23 he deserved this. Right or wrong he deserved it. So  
24 what.

25           Well, if you are tempted to think that way, let

1 me suggest to you that's not the law that this country  
2 lives under.

3 As I suggested to you before, each individual  
4 is accountable for their own actions, whether they be  
5 a government official or someone who is convicted of a  
6 crime.

7 Mr. Jones-Bey is serving out a sentence for his  
8 crime and when that sentence is finished he will be  
9 released.

10 When he or someone like him is released, what  
11 will they have learned from their time of imprisonment?

12 Will they leave thinking that they have been  
13 treated like an animal and that's how human beings  
14 should be treated or will they leave believing that  
15 they served their time; they fulfilled their sentence  
16 and they were punished according to the law for the  
17 crime that in a court of law they were sentenced to or  
18 will they leave thinking that brutality, unreasonable  
19 use of force is acceptable in this society and is  
20 acceptable out there in the world?

21 It is an important question.

22 These cases come into court not frequently,  
23 but I say not infrequently; and the reason they are  
24 submitted to juries like you is because you, the  
25 public, are the final guardians.

1           You, the public, are the final say as to what is  
2 acceptable in the prisons of the state of Indiana under  
3 the law as reflected in the law as it has been  
4 presented to you today.

5           You are the judges; and you are, therefore, in a  
6 sense a guarantor of the kind of prison systems we have  
7 and the way prisoners are treated.

8           Yes, he is serving for a crime -- no doubt about  
9 that -- but is it inconceivable to you that someday  
10 maybe you or a loved one or a friend might someday be  
11 arrested and jailed or imprisoned, whether for a day  
12 or a year or more.

13           Like everybody here in this courtroom today,  
14 this man is a human being. What is the standard to  
15 be applied to him as well as any other human being?

16           If you look at it that way, I would suggest to  
17 you that will avoid the kind of prejudice that the law  
18 and the United States Constitution forbids.

19           Thank you very much.

20  
21                           \* \* \*

22  
23           (Defense closing argument has not been transcribed.)

24  
25                           \* \* \*

1 THE COURT: You may close for the plaintiff.

2 MR. PARKINSON: Thank you, Your Honor.

3 Ladies and gentlemen of the jury, the counsel  
4 for the two defendants went through a lot of things,  
5 and I will briefly comment on a few items, and then I  
6 am going to go back to the issue that I started with  
7 and that is what is the law of this case and what is  
8 the standard by which you, the jurors, use to decide.

9 Again, you are the ones who decide this issue  
10 and you decide it according to the law as this Court  
11 will provide for you.

12 The counsel made a long recitation of his  
13 version of the evidence. He has a right to do that,  
14 of course, but just so there is no confusion here, the  
15 issue here is not his recollection of the evidence --  
16 and not mine for that matter -- but yours.

17 You all have been present throughout this trial;  
18 you all have -- or many of you have, perhaps, been  
19 taking notes.

20 The issue is how do you remember it; what did  
21 you pick up and describe. Not what the counsel  
22 remembers the evidence to be, but what did you  
23 remember. What was the evidence actually presented.

24 And he had another couple of comments that I  
25 want to comment on because, again, I don't want

1 confusion to result here.

2 He stated that Mr. Jones-Bey did not testify.

3 That's true.

4 I am not sure what his point in that is, but the  
5 point cannot be that Mr. Jones-Bey is perhaps hiding  
6 something.

7 Mr. Jones-Bey had every right to testify.

8 Oftentimes plaintiffs or other witnesses do not  
9 testify because they have nothing to add.

10 I have argued here today primarily, I dare  
11 say exclusively, the evidence as provided by the two  
12 defendants themselves, by counsel here today.

13 I suggest to you there is not a whole lot of  
14 dispute as to what actually transpired, what actually  
15 took place.

16 We know that the gas or the chemical agent -- or  
17 however it is described -- was sprayed. We know  
18 basically what each defendant was doing at each time.

19 That's the evidence we are arguing here today.

20 One other thing: As plaintiff, Mr. Jones-Bey  
21 has the right to call any witness. So does defense  
22 counsel.

23 Under the rules of procedure if defense counsel  
24 had wished to call Mr. Jones-Bey as a witness and ask  
25 him questions, they had every right to do that. They

1 did not.

2 I suggest to you for the same reason: The  
3 evidence was out and there was no reason to go over  
4 it again and again.

5 Now then, the legal standard which counsel for  
6 the defendants stated in part -- and I'm reciting those  
7 parts that I think he wanted you to emphasize from the  
8 defense perspective. I am going to go back and I am  
9 going to read the whole thing again, like I did at the  
10 outset. That is: Did the defendants act or use force,  
11 quote, in a good faith effort to maintain or restore  
12 discipline or maliciously or sadistically to cause  
13 harm?

14 Counsel stated that you should apply the  
15 maliciously or sadistically standard; and if you didn't  
16 find it was malicious or sadistic, then you should find  
17 for the defendants.

18 Well, that's true, but the problem is how you  
19 understand "maliciously or sadistically." By reading  
20 the whole statement of the law.

21 There is a contrast here. Good faith effort  
22 to restore discipline or maliciously or sadistically;  
23 that is, if it was not a good faith effort to restore  
24 discipline, then it was maliciously or sadistically.

25 And that is, in fact, what we are arguing here

1 today.

2           There is an operative word here that I think may  
3 be very helpful. Counsel referred to the effort to  
4 maintain or restore discipline, but there are two words  
5 that come right before that that are very important --  
6 and laws and courts when they draft statements of the  
7 law, they draft them very carefully because each word  
8 counts. The words are "good faith." Was there a good  
9 faith effort to maintain and restore discipline?

10           I suggest there was not. There was no good  
11 faith reason for these actions. There was no good  
12 faith need to restore any discipline.

13           Mr. Jones-Bey, as I said before, was behind his  
14 cell offering no risk to anyone.

15           And, again, the testimony of the defendants  
16 themselves simply does not bear out any harm or risk  
17 of harm to anyone.

18           Counsel made a remark toward the end of his  
19 closing argument, however, that I suggest is not only  
20 misleading, but dangerous.

21           He stated in effect that what we have here was a  
22 need for control because this was a prison. A need for  
23 control.

24           Ladies and gentlemen, in the law that you will  
25 be presented under the Constitution of the United

1 States of America, action is not justifiable because  
2 someone thinks there is a need for control.

3 I suggest to you that that is, in fact, what was  
4 going on here: A simple need or desire to control. To  
5 maintain discipline? No, just to control.

6 I suggest to you that every abuse of power in  
7 the history of the world uses that as an excuse for  
8 excessive force, for infringement of human rights.

9 There is a need to control.

10 I think it was further emphasized by a  
11 comparison that counsel himself made, and I think in  
12 the minds of these two defendants -- or at least I  
13 suggest that to you -- perhaps this was, in fact, what  
14 they were thinking.

15 He stated dogs need to be controlled. Dogs?

16 Is there anyone among you who would spray their  
17 own pet dog or someone else's dog with a chemical agent  
18 in order to control them.

19 If they were attacking someone, maybe, but  
20 Mr. Jones-Bey was not attacking anyone.

21 Is that really what is going on here? Is that  
22 the psyche that is taking place in these prisons where  
23 human beings are reduced to animals and treated  
24 accordingly?

25 Is that the standard that should be used?

1 I suggest that the law says no.

2 Good faith effort to maintain or restore  
3 discipline. That's the standard.

4 And the issue for you to decide and the central  
5 issue, setting everything else aside, is: Was that  
6 standard applied in good faith?

7 Thank you for your time.

8 (Subsequent proceedings have not been transcribed.)

9

10

CERTIFICATE

11

12 I, Loretta M. Spromberg, CSR, certify that the  
13 foregoing is a correct transcript from the record of  
14 proceedings in the above-entitled matter.

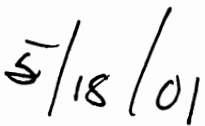
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