In the

Supreme Court of the United States

FRANCIS HAINES,

Petitioner,

vs.

OTTO J. KERNER, Former Governor, State of Illinois, et al.,

Respondents.

70-5025

Washington, D. C.
December 6, 1971

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Washington, D. C.,

Monday, December 6, 1971.

The above-entitled matter came on for argument at 10:09 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

STANLEY A. BASS, ESQ., 10 Columbus Circle, Room 2030, New York, N. Y. 10019, for the Petitioner.

WARREN K. SMOOT, ESQ., Assistant Attorney General of Illinois, 188 West Randolph Street, Suite 2200, Chicago, Illinois 60601, for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 5025, Haines against Kerner.

Mr. Bass, you may proceed whenever you're ready.

ORAL ARGUMENT OF STANLEY A. BASS, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on certiorari to the United States Court of Appeals for the Seventh Circuit, which affirmed the dismissal of a pro se action brought by an Illinois prisoner against prison officials and others under 42 U.S.C. Section 1983, seeking damages and other relief for injuries resulting from allegedly unconstitutional disciplinary treatment.

The District Court granted the respondent official's motion to dismiss, without allowing leave to amend or to amplify, without directing an answer from the defendant, without allowing discovery, without appointing counsel or some other person to assist the petitioner, and without conducting any hearing.

The facts are basically as follows:

In 1968, Haines, who was then 66 years old, was an inmate of the Illinois State Penitentiary, serving a life sentence imposed for burglary, as an habitual offender, which was imposed in 1939.

Q Where was he, at Statesville or --

MR. BASS: He was in Menard.

Q Menard.

MR. BASS: At the time he had a foot disability, for which he had been awarded compensation by the Illinois Industrial Commission.

On March 10 of 1968, Haines, while on work detail, was threatened by two younger inmates about 30 years old. Statements were made by the other inmates to the effect that the "young blood" was taking over and that the "old blood", like Haines, was "done".

Haines did not immediately react to these taunts, but obtained an inmate pass to go outside and inspect a pile of cinders. When Haines re-entered the shack, the two younger inmates resumed their argument and their threats, stating that Haines had better watch out or he would be hurt. Again Haines did not react.

After Haines entered the bathroom, these other inmates approached him in a threatening manner and resumed the argument. One of the two men asked him if he wanted to start something, he thinks it was Doherty, and Haines then hit Doherty with a shovel. Subsequently there was a scuffle with Mr. Moore, and after that Mr. Haines was taken by one of the officials of the prison to the solitary confinement.

Some time after that, which is not clear from the

complaint, Mr. Haines was taken by the defendant Rogers to the disciplinary officer. Mr. Haines refused to explain his actions, other than to acknowledge he had hit Doherty with the shovel.

He was locked again in an isolation cell until a report could be had from the defendant Duncan. Some time after that, it's also not clear how long a period this was, the report was submitted to the disciplinary committee. At that time Haines was brought before them, and objected to certain statements regarding his hitting the shovel on the floor. Haines had indicated that he had dislodged some dirt from the shovel.

And the defendant Lence wanted to know why plaintiff would hit Doherty and stated it had been 28 years since Haines had been in the "hole".

When plaintiff refused to talk to these officers, he was given 15 days' punishment in solitary, from March 10 to March 25, 1968.

Mr. Haines described somewhat the conditions of the solitary. He says that it was a dark cell, that he had no bed or mattress, that he had to sleep on the floor on blankets, that he had received just one regular meal during the afternoon and some bread in the morning and evening, that there were no personal articles of hygiene, specifically no soap or towel, and that his false teeth became so rancid he had to take them out.

Following his stay in solitary confinement, Mr. Haines was demoted to "C" grade, which meant that he lost certain commissary privileges and other privileges which Haines said are not known to him, although in discovery Haines filed numerous requests for admissions and interrogatories, where he sought to ascertain more information along that line.

The issues in the case are, first, whether or not the District Court prematurely dismissed the complaint. Secondly, whether the totality of the circumstances of this particular solitary confinement, as applies to this particular inmate, unjustified on this record, violated Haines' right to be free from cruel and unusual punishment. Third, whether Haines was effectively precluded from making a defense, a self-defense, at the disciplinary proceeding. And, finally, there's a question of whether or not Haines was penalized for exercising his right to remain silent until the existence of any immunity was fairly demonstrated to him.

The issues that are not involved in this case are a general attack upon solitary confinement, per se, under humane conditions; and, secondly, whether or not the application of Goldberg vs. Kelly type of procedures apply to all disciplinary proceedings. We deal in this situation with a specific problem where a man is charged with a prosecutable offense where the self-incrimination question must be dealt with.

Q Mr. Bass, I'm just a little curious. Does the

record show what happened to Doherty and Moore?

MR. BASS: The record does not show what happened to Doherty and Moore in terms of whether or not they were punished or prosecuted, nor does the record show if Haines was ever prosecuted. I believe he was not.

The principles applicable to this --

Q Do you know?

MR. BASS: I don't know. Well, I do know that he was not prosecuted, from talking to Mr. Haines. But I don't know about the other two individuals.

The principles applicable to the Eighth Amendment claim are well stated in Jackson vs. Bishop, in opinion by Mr. Justice Blackmun, then Circuit Judge.

Q You said there had been no hearing in this case?

MR. BASS: We said that there was a disciplinary hearing --

Q No, no, in the District Court --

Q It was dismissed.

MR. BASS: The District Court summarily dismissed, --

Q I see.

MR. BASS: -- on the motion of the defendant to dismiss.

Q So there's no evidence on which we can assess the cruel and unusual punishment claim?

MR. BASS: The only thing we have, the allegations

of the complaint, which are taken as true for the present purposes. Which must be liberally construed in accordance with, pro se pleading rules.

Quoting from the Supreme Court pronouncements in Jackson vs. Bishop, Mr. Justice Blackmun pointed out that the meaning of the Eighth Amendment is nothing less than the dignity of man that is the flexible guarantee drawing meaning from the evolving standards of decency that mark the progress of a maturing society. Wanton infliction of pain and unnecessary cruelty are barred.

Significantly, a statement is made there that broad and idealistic concepts of dignity, civilised standards, humanity and decency are youthful and usable.

And, as we point out, the practices of other jurisdictions, standards of the American Correctional Association, the United Nations minimum standards, and the views of experts show that these concepts are also practical and workable.

This Court has not hesitated to strike down State penal practicas which contravene federal constitutional guarantees, Younger vs. Gilmore, Crews vs. Howe, Johnson vs. Avery, Cooper vs. Pate, and Lee vs. Washington. All involve cases where State penal practices were held to be inconsistent with the federal constitution.

It appears that the respondents do fall back to the position that the action taken here was actually necessary to

the maintenance of prison discipline and security. But, interestingly, there is no evidence in this record to support that conclusion. And that is another reason why the case needs to be remanded.

They suggest possible abuse of facilities by a person in solitary confinement, as an abstract possibility. But nowhere is it suggested, as the Second Circuit pointed out in Wright vs. McMann, that a determination had been made administratively, that Haines was a person that would have abused those facilities. Accordingly, the case must be remanded to ascertain whether or not such a determination had ever been made.

And it should be noted in this connection that there are alternatives to the type of punishment that was imposed upon Haines. This would be entitled to some weight in determining whether or not the inflictions in this case were actually necessary for prison discipline.

As the President's Crime Commission pointed out in 1967, one of the things that could be done in a situation involving misbehavior is that the inmate should be contacted by members of the staff concerned with his classification and counseling, which could include chaplains, caseworkers, and persons of that sort. They should discuss with him the causes and consequences of his misbehavior, trying to reach agreement on what the causes are, and how they may be corrected. So that

instead of blindly imposing a subtle or not so subtle form of corporal punishment, they ought to try to get through to the man's mind and find out why his attitudes are the way they are. In this case, it is quite possible they would have finally ascertained that Haines was reacting in self-defense and was not the aggressor.

And, as we find from some of the returns to our questionnaire from some of the Departments of Corrections, many persons are saying "we use solitary confinement only as a last resort, when other alternatives are not availing."

Perhaps one approach that --

Q Well, will you clarify for me, Mr. Bass, I'm a little confused by something you've just said. What happened when they undertook to make an inquiry into the incident of hitting the other prisoner over the head with the shovel?

MR. BASS: Well, he refused to explain his actions. I'll get to that in a moment as to why. He was effectively precluded from talking about self-defense at that point. That's the second point, involving due process.

With respect to the first point, perhaps the best approach would be for this Court to adopt the procedure utilized in the Eastern District of Arkansas with respect to the whipping cases. The first case, Talley vs. Stephens held that there must be procedural safeguards surrounding the

infliction of corporal punishment in order to minimize abuse.

Interestingly, none are shown here. That is, we do not know whether or not the Illinois regulations requiring a doctor to certify that a person is fit to take certain types of confinement. There is no showing that there's administrative review over lower echelon personnel, nor is there any showing that Haines' physical condition was given any weight whatsoever in the determination that he should be subjected to this type of punishment.

Of course, this is a determination for the prison officials, not the courts, to make. However, there is no showing that the prison officials made such an informed showing on this record, and therefore the case must be remanded.

As the Fourth Circuit pointed out in Brown vs. Peyton, while the judgment of prison officials are entitled to considerable weight, prison officials are not judges and not charged with the responsibility of enforcing the Constitution, and they are not always disinterested persons. We do not denigrate their views, but cannot be absolutely bound by them.

The second approach that might be taken would be to hold, as in Jackson vs. Bishop, that there are such practices that so contravene civilized standards as to constitute cruel and unusual punishment per se.

For example, there is no showing at all that any legitimate interest is served by keeping people in dark cells;

nor is there any showing that persons couldn't be loaned personal articles of hygiene, which would then be returned back to the officials, so that a person would not be able to make weapons of razor blades, or things of that sort. Nor is there any showing that it's impossible to construct a bed that cannot be taken apart by a prisoner. Nor is there a showing that it's impossible to have medical visitation, or to have exercise.

So we think that a remand should be held in this case in order to fully develop the record as to exactly what alternatives are available to the State, and whether or not the inflictions in this case were absolutely necessary.

We're not seeking final judgment here, but only a chance to prove that Haines was in effect treated as rubbish.

The second claim, which is the procedural due process claim is as follows:

Mr. Haines points out that no statement of reasons was ever given for the punishment, and there's the chance that he may have been penalized for exercising his right to remain silent.

He was in the dilemma of talking and possibly incriminating himself or not talking and thereby suffering punishment.

As we've pointed out, this --

Q Of course, he was -- the fact that no reasons were given for the punishment really doesn't make this case

very unusual. That's the general rule in an ordinary criminal prosecution after a conviction. The sentencing judge, quite often, doesn't give reasons why he imposes one sentence rather than another. Isn't that true?

MR. BASS: Well, I was leading to another point, Mr. Justice Stewart. And that is --

Q And I thought your procedural due process claim was different.

MR. BASS: -- the extent to which the federal court might defer to administrative determination, which are based upon sound procedural basis, then it may be that if it can be shown that there were a statement of reasons, that there were adequate procedures. The federal courts might then not undertake to review every single situation.

But what we have here is a situation where no reasons were given, without any explanation as to whether or not that would have been impossible.

Actually, many prison officials now do give reasons for punishment.

Q You mean give reasons why they impose ten days in solitary confinement rather than twelve, or rather than eight?

MR. BASS: I believe some of them --

Q If so, this makes this much different from the ordinary criminal process, where, in those States where juries

set the punishment, no reason is ever given, or ascertainable, and in those jurisdictions where the federal judge, or where the judge in the federal system, or in the State systems, where the judge imposes the punishment, he quite typically doesn't give reasons why he imposes the sentence of two years rather than two and a half or three, rather than one and a half.

MR. BASS: Well, the alternative --

Q Isn't that true?

MR. BASS: -- to no reasons is that the federal courts will then have to fish into the cases to determine what the reasons were.

Q Why?

MR. BASS: In order to ascertain whether or not there was an impermissible basis of punishment. If he was penalized for taking the Fifth Amendment, that would be an illegitimate basis --

Q In reviewing State criminal convictions, and federal criminal convictions, this Court and most reviewing courts are entirely without power to look into the punishment, so long as it's within permissible limits. And generally no reason is given by the one who imposes sentence.

MR. BASS: Well, in the event that the Court does not require a statement of reasons be given, it will be necessary then in individual cases to ascertain exactly what the basis was.. If an inmate claims that the reason that he

was punished was because he engaged in protected activities, such as filing writs against the warden --

Q You mean as to why he was punished at all?

MR. BASS: Why he was punished at all, or why he was punished to the extent to which he was punished.

Q Well, that's the second part, that I don't understand.

MR. BASS: We would simply submit that it may be required by due process and, perhaps more important, it will enable the federal courts to ascertain whether or not the case does present the constitutional infirmity raised by the prisoner.

But, in any event, we would suggest that the way that the dilemma that the inmate has can be resolved is suggested by the District of Columbia Circuit decision in Melson vs. Sard. There there was a man on federal parole who was arrested for a new offense. He sought a continuance of the federal parole revocation proceeding on the ground he might incriminate himself. The Circuit Court said there was no need for a continuance, because they would adopt an implicit use immunity rule,saying anything that he said in the revocation proceeding would be, ipso facto, inadmissible in the criminal case.

Under those circumstances, that removes the legitimate fear of self-incrimination. It has been fairly demonstrated

to the prisoner that he has no Fifth Amendment problem. He could then talk. In this situation there is no showing that Haines knew of any implicit use immunity, nor that he was advised by this.

Now, the appointment of counsel might suffice, or simple admonition by the administrative officials might suffice. On this record, we certainly cannot presume a waiver that he intentionally relinquished that right, knowing that he had such a right; and under the circumstances the case must be remanded for a determination.

In addition, while Haines raised a question as to whether or not his good time was properly taken away, we think, candidly, that that issue really is not relevant to this case, for the following reason:

In Illinois, life prisoners are entitled to be considered for parole at the end of 20 years, minus good time. But Haines didn't need that good time, because his twenty years were up in 1959. Therefore, the only question related to his release is whether or not the parole board might have taken this disciplinary proceeding into consideration, in denying him parole in 1968.

For the Court's information, Mr. Haines, in June of 1971, was paroled effective July 6th, contingent upon acceptance by a veterans hospital if detainer was not exercised against him. But, unfortunately, the veterans hospital has not chosen

to accept him, and that is the problem that remains to be worked out. But he still has a damage claim in this case that must be resolved.

He does say that he suffered physical injuries, and pain and suffering as a result of being in that solitary cell. And, under the circumstances, he has a clear right, under Section 1983, under Monroe vs. Pape, to come into this Court and seek relief.

If there are no further questions, I will save my remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Bass.

Mr. Smoot.

ORAL ARGUMENT OF WARREN K. SMOOT, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SMOOT: Mr. Chief Justice, and members of the Court; and may it please the Court:

In June of 1968, petitioner filed a pro se civil rights complaint in the District Court for the Northern District of Illinois, Eastern District. In addition to the facts that Mr. Bass has already laid out, I would like to add the additional facts that were presented by the complaint.

Haines was 65 and he was working in the yard gang. There was a verbal disagreement between himself and other inmates. And in response to this verbal disagreement, Haines struck another inmate over the head with a shovel.

This incident was observed by another inmate by the name of Orlando. A prison official who was close at hand came to the incident. He administered first hand to the inmate -- first aid to the inmate that was struck over the head with the shovel, then called for the Disciplinary Lieutenant of the Day. It's the procedure at Menard Penitentiary to walk serious rule infractors to the disciplinary captain.

When Mr. Haines was walked to the disciplinary captain, he admitted the violation of the serious rule of the penitentiary. He admitted to the lieutenant that he struck another inmate over the head.

In response to this admission, Mr. Haines was placed in what Menard calls a holding cell. Mr. Haines calls it isolation; we'll accept that as true.

On the same day an investigation took place. On the same day, March 10th, 1968, Mr. Haines was given a hearing in front of two captains -- one was a lieutenant, one was a captain, who were not involved in the original incident. The investigation report of the guard who made the investigation was presented to Mr. Haines. He was confronted with the investigation. He had the opportunity to rebut the investigation, or, in the alternative, to explain his actions.

He took advantage of that by making what he felt were minor changes in the investigation report. In fact, he said, "Well, I didn't bang the shovel on the yard room floor,

as the investigation presents; but I will answer no further questions."

Q Were the prison regulations published and disseminated among the prison population?

MR. SMOOT: Yes, Your Honor. It's the policy of the penitentiary to place the inmate guidebook in each cell. And I think it's Rule 19 which prohibits fighting in the penitentiary, and it also gives the inmates notice that if fighting does occur, there will be quick and summary punishment, including potentially isolation and revocation of good time.

Q Is that Rule 19, or is the guidebook --

MR. SMOOT: It's in the respondents' brief, Your Honor. I don't have the page at hand.

Q Yes. Thank you.

MR. SMOOT: After the hearing, giving Mr. Haines a chance --

Q Excuse me -- does the regulation provide for the hearing?

MR. SMOOT: I don't -- I don't think it does, Your Honor. But it is the policy for the penitentiary to have a hearing for all serious rule infractions. Minor rule infractions, such as not standing in line for the count, taking food that's not authorized, oftentimes the guard will dispose of this violation on the spot. But any violations which the prison considers serious -- fighting, stealing, contraband -- they

will have a hearing in front of an impartial disciplinary captain. In this situation there were two.

Q By impartial, that is someone who is not connected with the particular incident?

MR. SMOOT: That's true, Your Honor. They are penitentiary staff, though, in that context.

Only after Haines was given a hearing in front of these two members who were not a part of the original confrontation was there a disposition. The disposition resulted in placing Mr. Haines in 15 days in isolation. He did have a toilet; he slept on the floor with three blankets; he admitted having one meal a day, plus bread and water in the morning and in the evening.

He alleged the absence of any personal hygiene articles, but he specifically noted no towel, no soap. He also alleged his false teeth became rancid.

The first issue I'd like to address myself to is whether the hearing or the procedure in which the penitentiary disciplined Mr. Haines complied with due process.

The majority of federal circuits who have examined this problem have concluded that as long as the punishment is not posed arbitrarily or capriciously, it comports with due process.

This Court has stated in several cases that the fundamental requisite of due process is a meaningful opportunity

to be heard. The meaningful opportunity to be heard is a relative concept, depending on the capacity of those to be heard and the circumstances of the situation.

This Court has also noted that where a specific proceeding is required, the nature of that proceeding will depend on the nature of the alleged right involved, the nature of the proceeding, and the possible burdens inflicted on the proceeding.

I think when you look at the facts as pleaded by Haines, -- and by the way, I've viewed approximately 800 civil rights complaints, where I've been working for the Attorney General; and Mr. Haines was not only articulate pro se litigant, but he plead his facts well. He was very specific. There is no evidence that Mr. Haines is inarticulate,non-intelligent, or incapable of presenting his own complaints.

Haines admitted the rule violation. He admitted to a guard - there is no evidence of coercion - that he hit, struck another inmate over the head. He refused to answer any further.

After an investigation by the guard, being presented with this investigation, Mr. Haines had the opportunity to rebut the findings of fact in the investigation or explain his actions.

He failed to correct any -- the report, or to respond other than to make minor corrections in the report. The disposition occurred only after investigation and a hearing.

Q Mr. Smoot, what was he punished for? Not answering the question, or for hitting the man over the head?

MR. SMOOT: There's no question that the record supports that he was punished for the rule infraction.

Q Well, where is that in the record?

MR. SMOOT: Well, I think it's a reasonable assumption to make, that if an inmate strikes another inmate over the head with a shovel, he admits it to the guard, and there is investigation, and after they give him the opportunity to respond to that, they say, "All right, 15 days in" --

Q Well, is it possible that he was punished to not saying he did it?

MR. SMOOT: Not in this situation, no, sir.

But, even --

Q Why is it impossible?

MR. SMOOT: All right. It could be possible; but it's not logical in this situation, that he was punished for not making -- he already admitted the rule violation, so he was not cited in this situation. He admitted the rule violation. Even if he was cited, I think it should be permissible to punish an inmate for remaining silent.

Q Oh, you do?

MR. SMOOT: Yes, sir.

The Fifth Amendment follows the individual into the penitentiary. No question about that. But the Fifth Amendment

should not permit an inmate to remain silent when he is asked solely and narrowly questions concerning discipline in the penitentiary. Because the inmates are probably one of the sole, or oftentimes the only sole information concerning what's going on in the penitentiary. And I don't think the Fifth Amendment or the right against self-incrimination should prohibit the penitentiary from disciplining inmates for remaining silent.

It's not in issue here, and we are not quite sure what the punishment would be for remaining silent. But obviously it's not logical assumption from the facts in this case that Mr. Haines was punished for remaining silent.

There's no issue here of confrontation and cross-examination. The facts were not in dispute. The question for the penitentiary officials was: What would be the resolve of the situation?

There are no complicated-fact situations. The credibility of witnesses are not in issue here. There is no biased evidence, from the statement of the pleading. So, since the facts were not in dispute, and there is no evidence of faulty memory or bias, obviously cross-examination is not required.

Haines did not ask for any witnesses. He states in the complaint that Orlando was a witness; at the time of the hearing he did not ask for inmate Orlando to come in.

It is the policy of the penitentiary to permit inmates to call other witnesses, if they have any, or, in the alternative, if the disciplinary captain feels it's the better practice, he will go out and have an investigation or write up a report on the other witnesses and come back and present it to the inmate who's objected to the hearing.

The second issue concerns cruel and unusual punishment. I think equally as important, or maybe even more important, are the facts that Haines does not allege. The following facts are not in issue here:

Haines did not allege that there was any absence of running water; in fact, he had running water. He said he had a toilet. And the unit in the isolation cell at Menard only comes with a basin and toilet, they are not separable. So he had a wash basin with running water and a toilet. He never alleged the absence of running water.

Q It was the same -- same utensil?

MR. SMOOT: Same unit, Your Honor, yes, sir.

Q Was the toilet and the wash basin?

MR. SMOOT: Yes, they're one unit; they're installed. They were installed in 1968, prior to his incarceration.

Mr. Haines does not allege the absence of any shower or shave. In fact, it's the policy of Menard Penitentiary to give inmates a shower once a week and a shave while in isolation. He never alleged he didn't have a shower.

Q Well, now, you say that's the policy. You're just telling us that.

MR. SMOOT: That's right, Your Honor. For your information.

Q If there were a hearing, I take it that's the sort of thing that would develop at a hearing.

MR. SMOOT: In response to that, Your Honor, may I say: I think the logical implication for requiring a hearing is that you are assuming the penitentiary has done something wrong and you're making them prove up that they didn't do anything wrong. I think the proper posture --

Q I don't understand where that fails.

MR. SMOOT: Okay. If I may complete --

Q Okay.

MR. SMOOT: I think the proper posture here is when you have a complaint. Even if it's pro se. The rule says that -- a liberal construction; must give the inmate a liberal construction. But this does not mean that you plead facts for the individual that may or may not state a cause of action. You rule, you give the appropriate remedy; that's all liberal construction says. That the federal courts should provide the inmate a remedy, notwithstanding if he says habeas corpus and it's really civil rights, or vice versa; the federal court should apply liberality there. But not plead facts for the individual.

And Mr. Haines was very specific throughout his complaint. Concerning the allegation he mentioned the individuals' names and the dates. I think it's logical to assume that if he didn't have running water or he didn't have showers, or he didn't have adequate heat or ventilation, he'd have brought these out in his complaint. And I think it's improper for the federal court to assume the absence of these, hold a hearing, and then require the State to prove that he had.

I think it's fair to both parties, and you're not doing an injustice to the liberal construction, to require the federal courts to merely rule on the facts as pleaded. And I think what's logical here is to show the facts that were not pleaded, to balance off against the facts that were, in concluding whether, under the total circumstances, the incarceration of Haines was cruel and unusual punishment.

There is no inadequate heat or ventilation in this case. There was no inadequate medical attention. He alleges no permanent physical discomfort. He says he had circulation problems at that time.

Absent his specific allegation that he had no towel or soap, he alleges no unsanitary conditions. So he has a situation in which you have 15 days, that's the maximum time an individual can spend in isolation at Menard Penitentiary; in every penitentiary in Illinois.

He had toilet; he had running water.

Q That's the maximum consecutive --

MR. SMOOT: That's right.

Q -- number of days?

MR. SMOOT: That's right.

Q And then after 24 hours or so, can he be put in there for another 15 days?

MR. SMOOT: Yes, I suppose, technically; but it is not the procedure. If he goes out and would strike another inmate over the head with a shovel or attack him, yes, I think technically he could be placed back in there.

Q Back he could go.

MR. SMOOT: Yes.

Q So he could spend 30 out of 31 days, or 60 out of 62 days, or 240 out of 244 days in isolation; is that right?

MR. SMOOT: Technically, yes, Your Honor. But it's not the policy to do that.

Q Well, it doesn't happen very often, I suppose, but why is it the policy?

MR. SMOOT: That's right.

Q Hunh?

MR. SMOOT: The policy is not to do that, but technically they could, yes. I guess. As the rules are interprated right now.

Q May I ask, Mr. Smoot, this volume of photographs, is that the State's Appendix?

MR. SMOOT: Yes, it is, Your Honor. The respondent's.

Q And it was in evidence, was it, below?

MR. SMOOT: No, it wasn't. It was not in evidence below. But I think it's a legitimate response for the respondent to show the courts what other jurisdictions are doing.

Q Well, I gather, you have included, have you not, a photograph of the isolation cell at Menard?

MR. SMOOT: Yes, sir. That's the last section.

Q This is it?

MR. SMOOT: Yes, sir.

Q I notice this one. This, I gather, is the toilet and wash basin that you referred to?

MR. SMOOT: That's right.

Q There's a mattress in front here.

MR. SMOOT: Yes. That came approximately six months after Haines was in there. They have mattresses now, but --

Q So it doesn't show what the cell was like when Haines was occupying it.

MR. SMOOT: If you remove the mattress, that's what the cell was like.

All right. On the basis of the facts as presented, there are clearly two issues under the Eighth Amendment:

Was the penalty disproportionate and/or was the implementation unnecessarily painful?

This Court has listed four factors in determining whether punishment is cruel and unusual. They've looked at the history of the similar or same punishments. They've compared what other jurisdictions are doing in similar situations. They've looked at the case law and finally they have used contemporary standards of decency.

Under all four tests, the present punishment was not cruel and unusual.

There's no question that in the 1780's, when the Eighth Amendment -- the 1780's, when the Eighth Amendment was enacted, the use of isolation, silence, and hard labor was the Quaker's humane alternative to the former sanguinary punishment.

The Walnut Street Prison initially started using isolation 1/20th to 1/2 of the confinement of individuals who were sentenced to death.

Now, subsequently, the different penitentiaries throughout the country in the early 1780's found that prolonged use of isolation was detrimental to the health of the individual. So they discontinued the continual use of isolation. But up to 1840, in both the Auburn Penitentiary System and the Pennsylvania Penitentiary System, which were the two main penitentiary systems in the 1830's and '40's, isolation was continually used for part of the sentence for serious violators of the criminal law, and also for the punishment.

In fact, John Howard, who is the father of all penological reform, in the early 1770's, suggested the use of isolation for serious rule infractions.

There's no question that historically the framers of the Eighth Amendment did not intend that this type of punishment should be circumscribed by the cruel and unusual clause.

The Court may take judicial notice of many of the federal courts' opinions. Isolation is the common measure for discipline in penitentiaries throughout the country.

Now, the Court should be careful, because not all jurisdictions use the term "solitary" or "isolation". They may have a different term, but the effect is the same. Whether you call it administrative segregation or you called it corrective measures, or a holding cell, the removal --

Q Or the "hole".

MR. SMOOT: Or the "hole", yes. But I think the use of the term, "the hole" is such a derogatory one that it kind of begs the question in this type of situation.

But every jurisdiction, to my knowledge, uses some form of isolation in punishing individuals.

The case law -- there's a multitude of cases, and respondent has noted these in the notes, and they are sufficiently laid out in the brief, and I'm not going to mention them here. But there are common denominators that the federal courts have come up with in determining whether confinement is

cruel and unusual punishment.

The common denominator involves prolonged nudity. There is no evidence here that there's prolonged nudity. Overcrowding. Haines was in the cell by himself. Unjustified beatings. No allegation that he was physically confronted in any manner.

Inadequate food or water. There's no evidence here.

I'll address myself to how he was given adequate food and water under the contemporary standards.

There's no allegation of inadequate heat or ventilation. There's no allegation of inadequate medical treatment. He makes no claim.

Q You mean of inadequate.

MR. SMOOT: Inadequate, yes, Your Honor.

Q I suppose you mean that.

MR. SMOOT: That's right. There is no allegation of inadequate medical treatment.

Q Or of inadequate heat or ventilation?

MR. SMOOT: That's right, Your Honor. I apologize if I said the opposite.

He makes no allegation that it was unclean. In fact, they keep these cells very clean.

And the fourth -- and the eighth common denominator was excessive confinement, in light of the conditions that were involved.

None of these are evident.

The final factor, and I think this is particularly relevant here, if we apply contemporary standards of decency -- a rather vague term, but I think we can place it into more specific context. If we look at the American Association -- the American Correctional Association issue of 1966. Many of the penitentiaries follow this as their penological guide. They have noted that custody, discipline, and security are the primary functions of the penitentiary. And only if you have proper control of the inmates can you have an effective rehabilitative system.

The American Correctional Association notes that isolation is an acceptable form of discipline. And they circumscribe it by the following limitations: No more than 15 days at a time. You should have a toilet and wash basin, but they observe that not all isolation cells need a toilet and wash basin, because it's been their experience that certain inmates, for causes unknown or causes known, will go in and break things up. They will tear up toilets, they will stuff towels down the toilet seat, there will be an overflow; they will burn the mattresses.

They may be on a restricted diet. You have an individual here who has access to limited space. It has to be clean, not completely dark. They observe, well, they acknowledge it shall not be wholly dark. Well-heated and ventilated.

If we take a look at the situation, we will observe that the prison really had no viable alternative than to use isolation.

And I think the Court should keep in mind that when you are comparing whether this isolation, or the "hole", whatever terminology you use, is cruel and unusual, it's not logical to compare the confinement to your bedroom or living room at home. It should be a relative comparison. These individuals are in a penitentiary. By definition, punishment must be somewhat derogatory.

So if you place an individual in isolation, it has to be a little more severe than the normal coming and going that he has in the prison cells, or it's not effective.

Q Do you have any comment about the false teeth allegation?

MR. SMOOT: Yes, I have, Your Honor. It's true. We must accept as true that his false teeth became rancid. But it's due to his own shortcomings. He had running water, and he had false teeth and he could remove them from his mouth; and I don't find that particularly inhumane to require a man to remove his false teeth from his mouth and wash it underneath the running water.

Concerning the towel and soap, he had showers, or he didn't -- at least it's not in issue here whether he did have a shower. And a shower once a week and a shave, that means he

had had two showers and two shaves, doesn't make the absence of a towel or soap cruel and unusual punishment in my estimation. Especially -- I think the test here is reasonable.

The penitentiary has 1200 inmates in there, and I think it's reasonable for the penitentiary to set up a situation which will meet the average individual. Haines hit another inmate over the head with a shovel. There's some evidence of violence. He was healthy. He was working in the yard gang with pick and shovel.

At the hearing the disciplinary captains had the opportunity to observe his physical demeanor. So when they placed the inmate in there without towel and soap, I think it's reasonable to conclude that in the -- that could be used as a garrot. They could place the soap in the towel, and that's a very effective blackjack.

So when you compare the interest of the penitentiary to prevent their guards from serious attack, at the same time determining whether or not he was submitted to inhumane punishment, I think the opportunity that he has a shower doesn't convert the mere absence of towel and soap to cruel and unusual punishment. Especially when he is provided with adequate food. The American Correctional Association says 2500 calories a day. All right. he had a regular noon mean, and bread and water in the morning. That composition could easily total 2500 calories a day.

Q Did it?

MR. SMOOT: We don't know. It could easily have done so.

He didn't allege that it was inadequate. He had a regular noon meal.

Q Well, why give the other prisoners three meals?

MR. SMOOT: You mean the people that are released?

Q No, the other prisoners, who are not --

MR. SMOOT: All people in isolation at that time received one regular noon meal and bread and water.

Q Well, how about the other 1200? They got three meals. What are you doing, wasting taxpayers' money?

MR. SMOOT: (Laughing) No, but to make isolation effective, you've got to have it severe.

Q So it's a minimum.

MR. SMOOT: Pardon me?

Q You've got a minimum of food. Do you admit that?

MR. SMOOT: Well, I'm not sure it's a minimum. He could have 2500 calories in the noon meal. There's a lot of starch at the penitentiary. But he had the minimum meal. I can admit that and still, with clear conscience, say that it wasn't cruel and unusual punishment. You've got to have it fairly severe to have it punishment. If you don't have it severe, you might as well not punish the individual.

And we are going back to the position: what viable

alternatives did the prison have? They have 1200 inmates who are looking at this situation. Punishment has got to be severe in summary. It's got to be certain. There has got to be a consistency there.

Can you imagine the trouble with the penitentiary individual if they start saying, "All right, you hit him over the head with a shovel; but we'll give you a pass." Now, the next guy comes along and he's got just a little different situation. Now he wants a pass, after he's struck another inmate over the head. There's no evidence that -- here counsel charges to presume that Mr. Haines was not able. He wielded a shovel pretty well.

Q What do you mean "pass"; what does that mean?

MR. SMOOT: All right. By "pass" I mean not commit him to isolation. Haines was on a life sentence --

Q "Pass" means you will overlook this?

MR. SMOOT: Yes.

Q Is that what you mean?

MR. SMOOT: Yes.

He had a life sentence. He could not have good time revoked. It was impossible. He could not earn good time. You can't take good time away from a death or a life sentence.

So the only thing they could have done is three things: One, don't punish him at all, give him a pass. Two, put him in isolation. Three, do something minor, like take

away his earphones or not let him attend the theater for that Saturday or for three weeks coming.

I think in the context of the penitentiary, the other two are reasonable.

Q Isn't it true that he was eligible for parole in 20 years?

MR. SMOOT: That's right, but he already had been up for that, Your Honor. So he couldn't --

Q Well, wouldn't it -- when he's up for parole, isn't his prison record considered by the parole board in Illinois?

MR. SMOOT: Yes, it is. Yes, it is. But I think that goes to due process, as a point to the cruel and unusual punishment point.

Q But the point you raise, that's why I was wondering why you were raising it.

MR. SMOOT: No, I'm saying --

Q This just doesn't strike me as being any upheaval.

MR. SMOOT: Well, it was not a viable -- the point I am trying to make, it was they had no viable alternative. Even though it may affected his parole.

Q Yes.

MR. SMOOT: At that time they had only three alternatives: No punishment, minor withdrawal of rights, or

isolation.

So I think it's logical to say isolation. Now, the question for this Court to answer:was the implementation of isolation reasonable?

I think when you compare the requirements of discipline, the requirements of the penitentiary for custody and security, when you balance that against fairness to the individual, I believe the answer is that this was not cruel and unusual punishment. Even though you personally may disagree with what happened, I don't believe, and the courts have not so found, that that's the test.

Most recent penological advancements are not the test in this situation. The fact that there was other alternatives doesn't make this cruel and unusual, because within an area the prison should have discretion to apply what they feel is appropriate in a situation.

I think, in summary and in conclusion, I submit that this petitioner was disciplined in a fair manner. No question about that. And he received punishment that was only a workable humane alternative available to the prison authorities under the circumstances. This Court should affirm the dismissal of the petitioner's complaint.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Smoot.

Mr. Bass, do you have anything further?

REBUTTAL ARGUMENT OF STANLEY A. BASS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BASS: Yes, Mr. Chief Justice.

The respondents are asking this Court to act as a trial court by bringing in exhibits and by making certain statements about policies. Our position is that the case shoudl be remanded so that a full record can be made in the trial court.

Secondly, it's our position that the State does not have a right to jeopardize inmate health without showing necessity and without showing some reliable procedural safeguards.

It's not irrelevant to note the effect upon any potential rehabilitation, as the Court, in Jackson vs. Bishop, pointed out, when an inmate receives cruel and unusual punishment it makes it much more difficult to socialize him.

The final remark is that with respect to such questions as shave and shower, Haines did allege "There was no articles of hygiene furnished him", and it would seem to me, under a liberal construction, that one might then put the burden on the State to come forward and say exactly what you did supply him.

And under the circumstances, we feel that the record must be developed more fully, and the case should be remanded to the District Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bass.

Mr. Bass, you acted at the request of the Court, and by appointment of the Court, and we wish to thank you for your assistance to us and to the client you represented before us.

MR. BASS: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:58 a.m., the case was submitted.)