In the

Supreme Court of the United States

CHARLES L. WOLFF, JR., et al,

Petitioners

v.

ROBERT O. McDONNELL, et al.,

Respondents.

No. 73-679

Washington, D. C.
April 22, 1974

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v.	:	No. 73-679
ROBERT O. McDONNELL, et al., Respondents.	:	

Washington, D. C.

Monday, April 22, 1974

The above-entitled matter came on for argument at 10:04 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MELVIN KENT KAMMERLOHR, ESQ., Assistant Attorney General of Nebraska, 2119 State Capitol, Lincoln, Nebraska 68509, for the Petitioners.

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for the U.S., as amicus curiae, supporting petitioners.

DOUGLAS F. DUCHEK, ESQ., Lincoln, Nebraska, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first this morning in No. 73-679, Wolff against McDonnell.

Mr. Kammerlohr, you may proceed whenever you are ready.

ORAL ARGUMENT OF MELVIN KENT KAMMERLOHR

IN BEHALF OF THE PETITIONERS

MR. KAMMERLOHR: Mr. Chief Justice, and may it please the Court: I had the honor of appearing here several years ago on the issue of first impression whether or not the States should be required to have a post conviction remedy, in the case of Case v. Nebraska, you will recall. Just before the time for argument, our State legislature passed a post conviction remedy. So I came back armed with the certified copies -- unfortunately I don't have anything like that with me today, but this Court praised the action of Nebraska, at any rate, in the interest of State-Federal relations and in the interest of comity for passing a post conviction remedy.

Unfortunately, our problems haven't been as strong in this area as they have been in the area of civil rights actions, as this Court knows, and as the increase in Federal courts is going throughout the Nation in civil rights actions. But in the same spirit, I would like to urge this Court, and I do urge this Court, that as the Honorable Chief Justice Burger in his dissent to Goldberg v. Kelly and a companion case urged

at that time that as these administrative regulations are evolving, that we should not make them of constitutional quality and take away the flexibility but to give them a chance to evolve. And that's what we are urging here as the briefs on both sides. We are I think in pretty much agreement what we want. People aren't really saying that prisoners shouldn't have this or shouldn't have that, but it's more a question of whether it should be a constitutional quality or not.

The groups of various prison administrators are constantly working and making model regulations and so on, as the briefs also show. So on that part we would strongly urge that this not be raised to the question of constitutional standards.

Mr. Justice Stewart also emphasized this in the recent case of Preiser v. Rodriguez when he was pointing out the need for exhausting State remedies in cases of habeas corpus type and he specifically stated in regard to the prisons, "Since these internal problems of State prisons involve issues so peculiarly within State authority and expertise the States have an important interest in not being bypassed in the correction of these problems."

I think the same with equal authority could be stated in this kind of a situation. Of course, the question also gets down to whether the inmate has actually lost liberty

in instances where, say, he is taken from the general population and placed in an adjustment center or solitary confinement, has he lost liberty within the meaning of the Constitution, or was this contemplated at the time of his due process trial, his due process sentence, and possibly his due process revocation proceeding of probation? Was this liberty then taken from him?

What does the judge mean when he says, "I sentence you to the penitentiary," after all this due process has been given? What does it actually mean? I think a lot of judges probably themselves don't know the situation of the tiers of the cells and how much time the inmates in one institution work and how much in another they work or how much they are involved in this or that. But what does the judge mean when he says, "I sentence you to the penitentiary"?

I would next move to another very important issue in this case, your Honors, and this involves the interpretation of Johnson v. Avery in which this Court said that if one inmate would not be permitted to assist another in preparation of legal petitions in habeas corpus proceedings, then the prison must provide some alternative. And the Court of Appeals for the Eighth Circuit in the present case went on to say that we must also consider whether this alternative is satisfactory; we must also consider civil rights actions. And we say this is an extension, a great extension of Johnson v.

Avery, because Johnson v. Avery in several places specifically limited the case to habeas corpus proceedings in providing this alternative. And if it's extended to civil rights proceedings, it's going to mean a terrific increase in the number of cases. And as this Court knows from reading the multitudes of cases throughout the United States in the Federal district courts and the U.S. Court of Appeals, these inmates will sue on every conceivable possible thing in nearly every step the administration takes or doesn't take.

QUESTION: What do you understand the Eighth Circuit to have said, Mr. Kammerlohr, with respect to what the warden would have to do in connection with --

MR. KAMMERLOHR: I understand what you mean, Mr. Justice Rehnquist, that when it was remanded to Federal district court where the District Judge determines whether or not Nebraska was providing a reasonable alternative to permitting one inmate to help another, that they must take into consideration civil rights actions as well as habeas corpus proceedings. I think they meant are we furnishing inmate assistance for civil rights actions and are we doing it sufficiently. And I think this is giving a completely new constitutional right that wasn't meant or even contemplated by Johnson v. Avery.

QUESTION: Mr. Kammerlohr, I am troubled about one little thing. Do we have a final judgment here?

MR. KAMMERLOHR: I believe we do, Mr. Justice Blackmun, in the sense that I see what you are getting at. The Court did say that the district court should on remand determine some of these issues, such as whether -- in what situations right to counsel, for example, is required in a disciplinary proceeding.

However, we are also arguing another point that certainly was granted in this case, that who should make the initial determination? Should it be the district court or should it be the prison administration, and then review those particular things. In other words, shouldn't the court set the guidelines as it did in -- if it's going to set guidelines -- as it did in Morrissey v. Brewer as to future cases and then the prison administration within those guidelines would have to set the rules. So I suppose you can argue all around whether it's false judgment or isn't because of the nature of the way these things arise.

QUESTION: Do you view the Court of Appeals has made a constitutional decision in general outline?

MR. KAMMERLOHR: Yes, your Honor, I do.

QUESTION: Did they leave the details to be worked out --

MR. KAMMERLOHR: On the question of right to counsel they did say that there must be some case where there is right to counsel, which is a new extension, and also presume then

that there are constitutional rights to some due process in a disciplinary proceeding. The court said that we had admitted as far as revocation of good time, because Morrissey v. Brewer came back in the meantime, reversing the Eighth Circuit, and we did then concede that as far as good time is concerned that there was due process due in Nebraska because good time is directly related to eligibility for parole. But we didn't concede that there was any due process due in any other disciplinary proceeding as our brief in the Eighth Circuit clearly points out. Also, we couldn't concede constitutional rights one way or the other anyway. That's for this Court and not for us to be conceding what the constitutional rights are or what they aren't.

I would briefly like to hit one more issue and then I will be through, your Honors. That is the question of opening attorney-inmate mail for contraband. We feel that the Eighth Circuit rules [illegible] that they set down in this case would be difficult to administer where they say a simple telephone call to the attorney whose name appears on the letter would determine whether the attorney had actually sent the letter or not.

First, it's not a matter of a telephone call, especially in the Federal prison system where they might have to call all over the United States. A lot of attorneys are hard to get hold of on the first call. We think it would be

much simpler if there is some -- they also stated that in appropriate circumstances, the mail could be opened in the presence of the inmate. But we don't know what appropriate circumstances are.

QUESTION: Nebraska doesn't follow the Federal pattern of having the mail opened in the presence of the inmate if he wants it done that way?

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: You do or don't?

MR. KAMMERLOHR: We do. We think it would be very reasonable to open the mail for contraband in the presence of the inmate, not to read it, but merely to open it in the presence of the inmate, in any case where they question it without saying they have to make a telephone call to somebody first or something like that.

QUESTION: Is that the procedure now?

MR. KAMMERLOHR: No, this is a procedure that the Eighth Circuit indicated in their opinion in this case.

QUESTION: Has that been adopted by Nebraska?

MR. KAMMERLOHR: I don't believe so, your Honor.

QUESTION: So they are still following the same rule. I thought your answer to the Chief Justice was that you had changed. I was wrong. You haven't changed it.

MR. KAMMERLOHR: My answer was that they want to have a rule where they can open the mail in the presence of the

inmate for contraband.

QUESTION: They could do that today, couldn't they?

MR. KAMMERLOHR: They don't feel they can under the opinion in this case from the Eighth Circuit which merely says "in appropriate circumstances."

QUESTION: If they did it in all circumstances, then you would have no problem, would you?

MR. KAMMERLOHR: That's right, your Honor.

QUESTION: That's what the Federal system does.

QUESTION: Well,the Court of Appeals for the Eighth Circuit would be required to do more than that.

MR. KAMMERLOHR: They say if there is any question, if it is from an attorney, a simple telephone call would answer the question. Then they went on to say in appropriate circumstances if fluoroscoping and bending would not reveal, then they could open it in the presence of the inmate. The only trouble there is when --

QUESTION; The Eighth Circuit would not permit you simply to open every piece of mail in the presence of the inmate without more -- you have to have a better reason than that to open mail.

MR. KAMMERLOHR: Yes, your Honor, that is the way I interpret that opinion.

QUESTION: Yes. Yes.

MR. KAMMERLOHR: Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING PETITIONERS

MR. BORK: Mr. Chief Justice, and may it please the Court: The United States is quite concerned about the decision of the Eighth Circuit and the possibility that the constitutional rules formulated in this case might impair the freedom of the Bureau of Prisons to continue its evolution of prison disciplinary procedures. We have described that evolution to date in the appendix to our brief and I won't pause to discuss it here.

But the Government does believe that its current procedures in disciplinary actions in Federal prisons accord that process which is due in the unique setting of prison life. It is a process whose objective must be an inmate's correction and rehabilitation and not punishment.

The constitutional rules devised by the Court of Appeals for the Eighth Circuit we think in this case are dangerously simplistic because they ignore both the objectives of prison discipline and the realities of prison life. These rules, I think, would really damage the mission of the Federal Bureau of Prisons and the inmates of those prisons.

We have discussed in our brief the reasons why the rules laid down by the Eighth Circuit should not be applied

in any event retroactively. But I will leave that to the brief and discuss here the rules and due process itself because we are primarily concerned with the future impact of these rules.

The basic error, we think, in the opinion below is the mechanical application of prison disciplinary procedures of the procedure requirements laid down for parole and probation revocation hearings by Morrissey v. Brewer and by Gagnon v. Scarpelli. The Morrissey opinion of this Court itself warned against this very error of thoughtlessly transposing rules devised for one factual context to a totally different factual context. In Morrissey this Court stated that what process is due under varying circumstances is to be determined in the light of the private interest affected and the precise nature of the governmental function involved. The Court of Appeals' opinion here, I think, discloses very little evidence of consideration of either of those factors.

We have outlined at pages 13 and 15 of our brief, 13 through 15 of our brief, the similarities and the differences between Morrissey-Scarpelli standards and the present Federal Bureau of Prisons standards. I won't pause to discuss them in detail, but I would call your attention to the fact that in many respects the Bureau's procedures today meet the requirements laid down by Morrissey and Scarpelli.

QUESTION: Mr. Solicitor General, you said two factors [illegible] you thought had been largely disregarded by the

Court of Appeals, and I missed those. What were they?

MR. BORK: Those were the factors specified, Mr. Justice Stewart, in Morrissey for determining what process is due under varying circumstances. The first is the private interest that is affected, the deprivation. The second is the precise nature of the governmental function involved, the governmental interest.

QUESTION: From cafeteria workers, that sort of test.

MR. BORK: That the Bureau is sensitive to degrees of deprivation, I think is shown by the fact apparent from the chart on pages 13 through 15, that more procedural safeguards are provided for forfeitures of good time, which is a greater deprivation than for lesser disciplinary actions within the prison, and that these procedures are effective, I would suggest, is shown by the fact that as the Bureau informs us the Washington office reverses and remands from 20 to 25 percent of the good time forfeitures ordered within the prison system. I think that shows effectiveness and not the contrary because we all know the Federal courts also have a reversal rate and we usually regard that as corrective and proper rather than evidence of something being wrong at the lower level.

I would also point out --

QUESTION: I suppose it has a tendency to harmonize or homogenize in effect the treatment of prisoners in all the 60-odd Federal prisons by having a review in Washington.

MR. BORK: It does, Mr. Chief Justice. There are certainly obviously bound to be differences in attitude among various wardens and chief executive officers in Federal installations, and this procedure does, just as you say, tend to make uniform the treatment with respect to forfeiture of good time.

I would also emphasize that the lack of an automatic review in the lesser disciplinary actions is more a formal matter than a real matter because any prisoner who is subject to disciplinary action of any sort has available the prisoners' mailbox through which he can send uncensored, unread mail to any member of the Executive Branch, including the Attorney General, the Director of the Bureau of Prisons, and any Congressman. And as a matter of fact, any judge. And the result is that those claims are referred to the legal office of the Bureau of Prisons and they are reviewed there and often the legal office, I am told, investigates on the scene to determine the proprietary of disciplinary action.

The principal differences between the standards of Morrissey and Scarpelli and present Federal procedures lies in four areas. The first is the right to confront and cross-examine adverse witnesses. The second is the right to full disclosure in every case of all the evidence that may be relied upon. The third is the unqualified right to present witnesses of your own. And the fourth, of course, is the right to counsel.

Those are rights that are, of course, associated with

criminal prosecution. Parole and probation revocations I think much more closely resemble criminal prosecution in their effect upon the individual's liberty than does a prison disciplinary hearing. The individual in the former may be, as this Court has put it, condemned to suffer grievous loss. The prison inmate is in a different position. He has already been convicted of a crime and is living in a prison and has already been deprived of liberty in the most pervasive manner. He lives, in fact, in a thoroughly regulated and controlled society.

When he is brought up for disciplinary action, he faces a range of sanctions, ranging from reprimand, temporary loss of television viewing time, perhaps a period in segregation, at the utmost a forfeiture of good time. The deprivations he faces in that sense are minimal and not on the same scale of magnitude as those faced by a man who is liable to be removed from free society and put behind prison walls for a period of years. Thus I think the private interest affected in prison disciplinary actions doesn't suggest, much less require, that Morrissey-Scarpelli standards be applied to those actions.

When we look at the other factor in the due process equation, the governmental function involved, I think it becomes apparent that in the prison setting, the Morrissey-Scarpelli standards are not only not appropriate, they are

impossible. We can start by considering the asserted right to confront and cross-examine adverse witnesses. Suppose that an inmate observes other prisoners beat a man senseless or perhaps he observes group homosexual rape. If that witness must be produced at a disciplinary hearing, identified, confronted, and cross-examined and then returned to a prison population, it may be doubted that he will have a life worth living and in fact it may be doubted that he will be allowed to continue to live his life, and the Federal prisons, as other prisons, have had just such episodes of the murder of inmate informers. Transfer to other Federal prisons does not solve the problem because enough prisoners move between the prisons that the man is again identified in his new prison, and we have had murders of men who had been transferred because they have informed in a prior prison.

I think we should consider also what effects that kind of a procedure would mean for prison life for the rest of the prisoners and for the ability of the Bureau of Prisons to carry out its mission. Witnesses to prison violence or to the acquisition of drugs, weapons, or other contraband simply cease to come forward. They would be completely unwilling to subject themselves to identification and to reprisal. And without information on such matters, it would be impossible for the Federal prisons to maintain discipline, and without that, it would be impossible to try to effect rehabilitation.

Prisons would become in effect jungles ruled by bands of violent inmates.

Under such circumstances, I think the possibility of an existence for inmates that could be termed human would be impossible, and certainly there would be no question of rehabilitation. And I might point out that the latest figures indicate that despite the fact that the Federal prisons are steadily receiving a tougher and more sophisticated band of criminal, still their recidivism rate is declining gradually.

I don't think the Constitution can be interpreted to require that kind of inhumanity to the very persons it is invoked to protect. It would be an irony, I think, if due process were interpreted to require savagery within the prisons.

The right to counsel poses similar problems, one of them a sheer burden. In fiscal 1973 there were 19,000 disciplinary proceedings within the Federal prisons. So that a right to counsel would impose a staggering burden. But more importantly, I think, the presence of lawyers on both sides would change the procedure completely from one that is aimed to rehabilitation to one that is aimed towards confrontation and delay. As the Scarpelli opinion itself recognized, when you bring counsel into an informal proceeding and make it formal, you change the nature of the proceeding altogether.

Changing these from rehabilitative and corrective procedures and rather informal discussions between an adjustment

board and the prisoner and turning it into a confrontation between the accused and the prosecution is bound to polarize the prison community with a consequent increase in tensions and violence. I think we can see that on a minor scale. Anyone who has lived for example through the recent period of turmoil in the universities knows what happens when ordinary and informal disciplinary processes are suddenly made formal. The demand for rights and procedures is in itself a sign of anger, and when they are granted to a close community, the result is to insure polarization. Every disciplinary trial in a law school becomes a contest between the student body and the faculty. When convictions occur, disruptions break out. If that occurs in the best law schools in this country, and it did, I think we can imagine what is going to happen in the Federal prisons if we go through the same kind of a process. We have within the Federal prisons a large body of men, many of whom have already demonstrated their propensity for violence. I don't think, therefore, these rights belong in the Federal disciplinary proceedings.

I will say more than a word about the prisoner-attorney mail matter. In the Federal prisons, mail goes out unopened and unread to attorneys. Mail that comes in is examined only for contraband -- money, drugs, weapons, and so forth. If the prisoner wishes and the attorney wishes, that mail will be opened only in the presence of the inmate so it

cannot be censored and cannot be read. Only contraband can be discovered. I think that is a minimal safeguard and one that's entirely proper and necessary.

In sum, the United States thinks the decision of the Court of Appeals for the Eighth Circuit, insofar as it applies Scarpelli and Morrissey rules should be reversed. As law, we think it insupportable; as penology, we think it disastrous.

MR. CHIEF JUSTICE BURGER: Mr. Duchek. In view of the lateness of the amicus brief filed by Solicitor General, you may respond to that if you wish in the usual way. A week or ten days, what would you like?

MR. DUCHEK: Ten days.

MR. CHIEF JUSTICE BURGER: Ten days? All right.

ORAL ARGUMENT OF DOUGLAS F. DUCHEK

ON BEHALF OF THE RESPONDENTS

MR. DUCHEK: Mr. Chief Justice, and may it please the Court: I think that perhaps a brief history of this case would be in order at this time.

This case was originally filed by Mr. McDonnell, pro se, in the United States District Court for the District of Nebraska, and it was really a broad scope and broad brush challenge to most of the rules, practices and procedures of the Nebraska penal and correction complex. In fact, the entire rule book is attached as an exhibit to Filing 42, which is

the stipulation of facts in this case. Several of the challenges were settled by stipulation in appropriate order prior to trial. Mail was no longer stopped that was meant for judges; mail was no longer censored and deleted that was meant for judges. Certain library rules were loosened, and other relief was given by consent or by stipulation in appropriate order at trial.

However, the case was appealed to the United States Court of Appeals for the Eighth Circuit and then the plaintiff, Mr. McDonnell, filed a cross-appeal after the State appealed from the trial court's decision.

The State decided to file a petition for writ of certiorari to this Court, following the Court of Appeals' decision, and raised five questions. But it appears as though three, really, are the thrust of the State's discussion before this Court.

The first is, should Morrissey and Scarpelli rules govern that prison disciplinary hearings which may impose serious penalties or a grievous loss on an inmate be conducted in a fundamentally fair manner? Do the Morrissey and Scarpelli generally attach to prison disciplinary hearings? The State concedes that when good time sentence credits are involved the Morrissey-Scarpelli procedures in a general fashion attach. The Eighth Circuit has outlined four of those generally that would attach.

Good time, although after Preiser v. Rodriguez could not be restored in this action, still in this action to the extent that it is a grievous loss or a substantial penalty which is present in every disciplinary hearing at the Nebraska penal and correctional complex, because good time in Nebraska is conferred for good behavior and faithful performance of duties, and when you are called up before the disciplinary committee because of an alleged misconduct, the finding of the investigation and the report of that committee when placed in the inmate's file will affect the eligibility of that inmate to accumulate future good time and to be eligible for consideration for release on parole or mandatory release under supervision at a certain time in his sentence.

QUESTION: ... the State proceedings to review of the deprivation of good time?

MR. DUCHEK: The Eighth Circuit asked the parties to address themselves to that point after the case was under submission by the Eighth Circuit. And Mr. Kammerlohr and I did do that in letters to the Eighth Circuit, and that is noted in a footnote in the Court of Appeals' opinion. It was my argument in the letters that we addressed to the Eighth Circuit that there really is no adequate State remedy and the Court of Appeals reserved that decision for the district court on remand. Nebraska does not have a great writ like the Federal great writ Its writ is only available to challenge the legality of the

sentence in that was the sentence imposed within the confines of the statutory mandate.

QUESTION: Is that true even under the new Post Conviction Relief Act? Is that followed in the case of Nebraska?

MR. DUCHEK: It is my understanding that the Post Conviction Relief Act that it would not be available as a method to challenge a matter in the prison affecting your good time credit, because that has to do with the proceeding whereby you were incarcerated in prison.

QUESTION: Mr. Duchek, the appendix, as I read it, does not set out the complaint in full. I take it Mr. McDonnell was the only named plaintiff in this action. Am I right?

MR. DUCHEK: Mr. Justice Rehnquist, the complaint reads Robert O. McDonnell, individually, and on behalf of all prisoners in the same class as plaintiff incarcerated in Nebraska penal and correctional complex, Lincoln, Nebraska, and on behalf of all other persons who in the future may be confined.

QUESTION: Did he allege in the complaint that each of these procedures which are complained about had actually occurred to him?

MR. DUCHEK: I don't know that he alleged that each of the procedures complained about had occurred to him. Some of the evidence that was produced at the trial and in preliminary hearings demonstrated that each of the complained procedures had taken place against members of the inmate class, and --

QUESTION: Of course, we have held that a person can't represent a class of which he is not a member. And I would think you might have some standing problem unless he had alleged that each of the things about which the complaint sought adjudication had occurred to him.

MR. DUCHEK: He alleged that they had either occurred to him, as I remember the complaint and as his complaint was drafted, or their presence chilled his rights to exercise certain other of his rights which the regulations appeared to prohibit. The court made findings under rule XXIII-C that the plaintiff class representative, R. O. McDonnell, was a proper representative, that there were questions of law and fact common to the class, that Robert O. McDonnell was a proper person to present such questions of law and fact to the court and that there were common grievances and that common relief would be appropriate.

QUESTION: Where is that found?

MR. DUCHEK: That is found in 342 Fed. Sup. in a paragraph that says the courts found this is a proper class action, and it is found at, I believe, paragraph 13 or 14 of the amended complaint where we set forth the allegations as to the class.

QUESTION: Do you have a record citation, or is it in the appendix?

MR. DUCHEK: What is that, Mr. Justice Rehnquist?

QUESTION: The finding you are referring to.

MR. DUCHEK: If you will look in the brief of the Nebraska's petition for certiorari at Appendix 2, on page -- well --

QUESTION: Somewhere in the district court --

MR. DUCHEK: That's right, your Honor. I am sorry I don't have that marked.

QUESTIOK: Don't waste your time looking for it.

MR. DUCHEK: Thank you. But if you will check Appendix 2 in the petition for certiorari, you will see that the court made an express finding that it was a proper class action.

I would point out that in the amended complaint, only the inmate class representative sought restoration of the good time he lost, and the balance of the amended complaint seeks preparatory and injunctive relief as to the legal rights and relations of the plaintiff inmate class and the persons who are named as parties defendant.

The real thrust of the Morrissey and Scarpelli issues before the Court today can be found in the languge in Morrissey that says that whatever the State and society has at stake in these cases, whatever possibility there is to return the inmate to a useful and normal life within the law. Morrissey goes on to say the State and society have no interest in having erroneous factual determinations which can impose --

which find that a person has violated conditions of parole or prison conduct rules, and the State or society has absolutely no interest in taking action in response to a finding of misconduct which factual record doesn't clearly indicate the response that is required. Therefore, it is really society's interest that is perhaps paramount in this case because, as the Joint Anti-Facist League case points out, Justice Frankfurter concurring opinion, this society, a democratic one and a popular one, will only continue to be effective when not only is justice done toward an individual but the community sees that justice is done.

Now, when an inmate is called before the disciplinary hearing, be it for a substantial allegation of misconduct in which he can be placed in the hole or segregation, and in which he can have a notation made in his record that will continually affect his eligibility for release under parole or some early release, or when he, placed in a dry cell, has anything taken against him in the prison that results in his being removed from the prison population and put in a solitary state where he is isolated from other prisoners, from the programs of the prison, from the privileges which would normally attach to his movement within the prison society -- and I think these privileges parallel to some extent what the Chief Justice described as the other enduring attachments of everyday life available to a person when he is outside the prison -- when the

inmate comes before the disciplinary committee hearing and has these kinds of interests at stake, then he faces a grievous loss and a substantial penalty which our society has always held that due process is meant to protect.

Why would the Bureau of Federal prisons and the States provide the real wealth of protection that are currently provided if it was not recognizing that it was,one,imposing a penalty on this individual for alleged misconduct or, two, taking some action that substantially affected the individual.

I would direct the Court's attention to Appendix A of the brief of the respondent which contains the chart of disciplinary proceedings which are currently given by the various penal systems in the country. It was prepared by a division of the American Bar Association, and it sets out nicely and by percentages what elements of disciplinary process are currently provided.

QUESTION: Well, the only ones you are complaining of here apparently are the solitary confinement and being placed in a dry cell.

MR. DUCHEK: Well, I think there has to be some definition made of what is a grievous loss.

QUESTION: Pardon?

MR. DUCHEK: I think there does have to be a definition or a determination made of what amounts to a grievous loss when an inmate is to be punished inside a prison. The

respondent believes --

QUESTION: I don't find that in anything that has been decided so far.

MR. DUCHEK: Well, I think the Court of Appeals said that any time there was a substantial penalty which could be imposed, such as solitary confinement or placement in a dry cell --

QUESTION: Those are the only two you mentioned in your brief.

MR. DUCHEK: That's correct, your Honor. And then additionally the effect on good time. I think that any time that good time is to be taken from an inmate --

QUESTION: They elimiminated that.

MR. DUCHEK: I don't understand what they meant by that. They did remand the case for hearings to determine -- and this gets to the final judgment question that was asked in my opinion also -- they did remand the case for hearings to determine what procedures were necessary to give procedurally fair process, and if those procedures were being met except that the court in the district court could not restore good time.

QUESTION: Are there some disciplinary procedures the end result of which would not be and can never be loss of good time?

MR. DUCHEK: Well, I wouldn't think there was.

QUESTION: You don't think there were.

MR. DUCHEK: Not under the definition of how good --

QUESTION: I suppose where one has not accumulated good time, obviously --

MR. DUCHEK: That's right. Well, you can only accumulate good time by good behavior and faithful performance of duties, and you are called before the disciplinary committee hearing -- and again, there are very few prisoners that are called before the disciplinary hearing. The appendix points out most are resolved at what Nebraska calls the investigation stage where confrontation and cross-examination takes place, by the way. If you are called before the disciplinary committee hearing and the report goes in your file, that surely must be an indication that you have not been faithfully performing your duties or on good behavior. Therefore, while accumulated good time is not forfeited necessarily, and that may be what you were getting at, certainly while you are placed in solitary confinement, it doesn't appear that the prison will be crediting you with any good time there because you had failed --

QUESTION: Well, I gather your answer is that there is a risk in every disciplinary proceeding, whether it is a hearing before the committee, that one may either lose accumulated good time or risk accumulation in the future of good time.

MR. DUCHEK: I cannot see how it can be interpreted

and understood any other way, your Honor.

QUESTION: Then your submission is we ought to treat all the problems raised by this case against that background?

MR. DUCHEK: I think that to consider placement in solitary confinement and to consider placement in a dry cell without realizing that you are also considering good time accrual is not to give the case its full attention. And I think the case warrants that the Court understand that that is what's involved.

I understand that there may be some Preiser v. Rodriguez issues in this case, but I think that the Court of Appeals resolved those by saying that the preparatory and injunctive relief could be entered, but good time could not be restored. If relief is given for those situations in which an inmate can be placed in solitary or confined to a dry cell a fortiori, good time will also be affected because they won't give any less protection for those kinds of matters than they will for the other kind of matters.

There has been much attention made and raised towards this idea of counsel. And I think it's important for the Court to know that this respondent and this plaintiff has never asked that counsel be provided in a good time hearing. We have urged that a counsel substitute is necessary and counsel substitute is provided in Nebraska, and this plaintiff has offered that counsel substitute, I am informed, and that's not

in the record anywhere, but the prisoners recognize him as someone who can be an effective person to help explain their side of the story.

Now, counsel substitute can be any number of people. It can be a staff member; it can be another inmate; it can be a law student. There is a law student program at Nebraska. However, the Eighth Circuit Court of Appeals did go the one step farther when Gagnon came down and said in those instances where fundamental fairness requires it and where I take it there is a timely and tolerable claim -- a request for counsel based on a timely and tolerable claim, et cetera, that then counsel should be afforded.

Now, the examples raised by the Solicitor General are interesting in that regard, and they also get to this idea of the impossibility of giving fundamental fairness in a prison situation. If there was an assault, an assault and battery on another prisoner, if there was a forcible rape, I would understand those to be matters of conduct for which prosecution is possible. In fact, they are probably best handled by prosecution. And if that's the case, there is going to have to be a witness called forward and there is going to have to be evidence put on, and that witness is going to swear and be on the stand.

QUESTION: Don't you want to leave with the prison administration some range of discretion as to whether or not

they should treat an infraction of rules as a criminal act or merely a disciplinary?

MR. DUCHEK: I certainly do, Mr. Chief Justice, as does the respondent. And this will be the gray area where rehabilitory prison expertise can best exercise. But Morrissey also provides room for those instances that the Solicitor General has raised where it is simply for security reasons impossible to disclose the identity of the informant.

Now, I would put it to the Court that if a man is written up for the kind of situations described by the Solicitor General, he is going to have a pretty good idea, if a guard didn't see it, that one of the members of the party told the administration about it or that one of the members in the party told someone else about it so it is going to get back to the participants one way or the other. This record, the record now before the Court in the great majority of instances will disclose employees instigating the write-up. In fact, testimony in the appendix never once mentions an inmate instigating the write-up. It talks about a supervisor or an employee seeing conduct he believes is not proper conduct in initiating the write-up.

In that regard, Mr. Kammerlohr couldn't bring a certified copy of the statute to the Court, but there are new rules at the Nebraska prison which have been in effect since October of 1973. I believe they are reflected in the chart

which is in the appendix in the respondent's brief, and they are also briefly discussed in appendix B to the respondent's brief which is a recapitulation of certain rights prepared by the New Jersey Attorney General's Office in a lawsuit there. Counsel substitute is now part of the Nebraska proceeding, and if the Court will read Warden Wolff's testimony at one of the evidentiary hearings in this matter, the Court will note that in the investigative stage of the Nebraska prison disciplinary proceeding, a corrections officer calls before him the accused inmate and the person -- and it's usually a job supervisor -- who did the accusing, and he sits them down before him so that they may talk about the alleged misconduct. Now, that is confrontation in a very real sense of the term. They are there together.

The record does not really bear out in very much detail what kind of cross-examination goes on, but I don't think that adversarial cross-examination is what anybody is talking about. I think they are talking about a kind of testing of the evidence that this system, this Anglo-American system, always found necessary and always found the only way to make actual determinations when persons are to suffer a grievous loss or a substantial penalty to their living conditions.

As the Court pointed out in, I believe it's a footnote in Scarpelli, and I think it's a sound belief, the State has

it within its power to very creatively respond to the burdens, the constitutional burdens, that this Court hands down because of what it feels is constitutionally required. And I have every confidence that not only the Bureau of Prisons but the State of Nebraska and all the States can respond in a creative fashion to any constitutional mandate this Court would hand down. And all that we're talking about is basic fundamental fairness that, to my thinking, is the foundation upon which our system is constructed.

The idea that some of the things which we are requesting in this case are in the antithesis of good penology is subject to much debate. In organizing this case, an indigent prisoner in Nebraska penal complex does not have at his command the resources that certainly the Solicitor General and the United States Government has at hand or for that matter that the State of Nebraska has at hand. And therefore, the respondent had to assign some responsibilities and ask for some help in this area.

On March 7 we came to Washington and we had a meeting with certain groups that might be called public interest groups to assign and dole out areas of responsibility on the briefs with the only thought in mind if we could prevent overlapping the amicus brief would save this Court's time in reading things that it had read before. Therefore, I would specifically direct the Court's attention, especially, to the amicus brief

of the National Council on Crime and Delinquency which the respondent believes does answer some of the questions about sound penology which the Solicitor General has raised. That amicus brief in summary does point out that by reducing the sense of injustice felt by most prisoners, the provision for due process protections in disciplinary hearings alleviates prison tensions and enhances the possibility for a corroborative institution.

In 1870 the American Prison Administrators Society, the American Prison Association in its declaration of principles acknowledged that an inmate should play an integral part in his own rehabilitation and should take responsibility for that. I believe that opening up prison disciplinary hearings and allowing for an input and a testing and a more formalization of the determinations of facts which will have a substantial impact on the prisoner is what the American Prison Association was talking about in 1870.

There is an interesting notation in the case of Carothers v. Follette which involved John D. Carothers who was at the time in segregation. He wrote a letter on September 30 of 1969 to his parents -- and he was later disciplined for that letter by the way -- in which he was reacting basically to the fact that he was in solitary confinement, and the bitterness and the frustration and the complete rejection of the processes that had put him in solitary

confinement, I think really buttresses the National Council on Crime and Delinquency's argument that to not implement procedures which, one, are designed to bring about fair results, but, two, are seen by the community at large to bring about fair results is to really do a disservice in the American correctional system that perhaps the Constitution mandates nothing more than perhaps due process, mandates nothing more than that the nature, the time and the duration and the nature of a man's confinement bear some relation to the purposes of his commitment.

QUESTION: Could I ask you, what is the very first step in Nebraska in a disciplinary proceeding?

MR. DUCHEK: Well, there would be an observation of alleged misconduct. Right? Then, as I understand it, there would be a formal --

QUESTIO: Not "would be." Is. There is, this is the existing procedure.

MR. DUCHEK: Well, let me then just make one preparatory remark. I think the existing procedures, as I have them, there has been a thought that everything is stayed, the mandate of the Court of Appeals that was stayed holds everything in limbo, and it's very difficult to know what is actually being done there. But I believe what is being done is after the write-up -- after the observance of misconduct, there is a formal write-up of that incident, a notation made of it on a form that the

prison has designed. That form then goes to the Chief Corrections Officer, and he looks at that form and he sees, one, who did the writing up or who is doing the accusing, the accusation, who made the charge, and, two, who is the accused. That is the Chief Corrections Officer's responsibility to conduct an investigation into the allegation of misconduct. And he proceeds to conduct that investigation, and he does that by bringing the person that is doing the accusing and the accused into his presence and sitting them down, I would take it, and discussing with them this charge. And he has at his command the ability to make such further investigation as is required.

QUESTION: That is the procedure which you think doesn't go far enough, is inadequate to satisfy constitutional rights, just that kind of an informal hearing.

MR. DUCHEK: If that was done in front of the disciplinary committee which had to make the decision about what kind of disposition --

QUESTION: But it never gets to the disciplinary committee until or unless the correctional officer sends it.

MR. DUCHEK: That's right. The correctional officer if he can't resolve it at that point, the testimony in the record is that most are resolved at that point.

QUESTION: That's one of the things I wanted to ask you about. I take it that the vast majority of disciplinary

matters are resolved at that point.

MR. DUCHEK: That is the testimony of Warden Wolff.

QUESTION: Do you object to that phase of the --

MR. DUCHEK: No. At that point there would not be a substantial penalty or a grievous loss.

QUESTION: How about your counsel or help right? Are you going to say there is a need for representation at what amounts to a plea of guilty?

MR. DUCHEK: No, sir. Again, because at this time, as I understand it, it does not go to the disciplinary committee.

QUESTION: But if the prisoner says, yes, I did do that, then you say the officer disposes of it at that time.

MR. DUCHEK: That's right.

QUESTION: How does he dispose of it?

MR. DUCHEK: He disposes by reprimand or he says, O.K., you better stay out of the cafeteria for a week, or you better not watch TV --

QUESTION: What if he says -- does he have the power to put him in solitary confinement?

MR. DUCHEK: No. That moves on to the disciplinary committee then. That was exactly what I was going to come to. If he thinks it is of such substantial nature that the disciplinary committee has to impose punishment, then he would send it on.

QUESTION: With the report that the prisoner has admitted the matter?

MR. DUCHEK: To some extent, yes. I take it that is what would be in his report. And this then would be where perhaps the Gagnon ideas might come into this.

Let's say that there was a reason that the conduct occurred, a reason which the inmate would like to explain. Well, at that hearing, perhaps the inmate would need counsel substitute to present his case. I think the better approach would be, frankly, if the matter cannot be resolved at that level, that there be a factual hearing in front of the disciplinary committee.

QUESTION: Yes, but let's suppose there aren't any factual matters involved. Let's assume there is an admission, yes, these events occurred.

MR. DUCHEK: All right, so you are just sending it on to the disciplinary committee for --

QUESTION: Because I take it the chief correctional officer hasn't got the power to impose certain kinds of punishment.

MR. DUCHEK: I think that's the case, yes.

QUESTION: All right, you still would say counsel or some substitute.

MR. DUCHEK: Well, to the extent that the disciplinary committee feels it needs to have an adequate factual record

before it to judge this conduct so that it may impose the kind of sanctions against this prisoner that are directed toward rehabilitation. It is respondent's position that an orderly hearing has to be held --

QUESTION: They don't even do that in criminal trials when you are getting a presentence report. Well, the presentence report the accused doesn't participate in making.

MR. DUCHEK: They do in Nebraska, your Honor, to the extent --

QUESTION: Many times they don't even see it.

MR. DUCHEK: The accused participates to the extent that he has an interview with the probation officer.

QUESTION: He has had that here. He has been brought before the Chief Corrections Officer and allowed to say anything he wants to say.

MR. DUCHEK: That's right. I would assume that he could -- well, if he admits it, your Honor, quite frankly, the problem is not as great as if he denies it. I will not contest that for a moment. If he denies it, though --

QUESTION: In other words, you will concede that if he had admitted it, all that gets to the disciplinary committee is the correction officer's report which includes the admission. Perhaps without violating constitutional guarantees the disciplinary committee may impose discipline without affording him any kind of a hearing?

MR. DUCHEK: Well, it would seem that if the prisoner wants to present a version of the story to justify --

QUESTION: Does he have notice?

MR. DUCHEK: Yes, he would have notice.

QUESTION: So he does get all the facts.

MR. DUCHEK: Notice of the disciplinary committee hearing, even after the confrontation before the Chief Investigating Officer, he will have notice.

QUESTION: So at the time he gets there and he would say, well, what the corrections officer report states is true, I did all those things, that would be the end of it, you think?

MR. DUCHEK: I think that if he wanted to have assistance in explaining what happened and why it happened, counsel substitute would be appropriate. And as I understand it in Nebraska he would get it.

QUESTION: In other words, if he said, "Well, look, I know, that's so, but this is why," then he has to be allowed some help.

MR. DUCHEK: That's right. These are not articulate people.

QUESTION: You say in Nebraska he ought to have a counsel substitute and he gets it. Well, what is this case about in that aspect?

MR. DUCHEK: Well, we are here as respondent and in that aspect I'm not quite certain, your Honor.

QUESTION: You mean he gets it under the Eighth Circuit's decision?

MR. DUCHEK: Well --

QUESTION: You don't know what he gets, do you, right now.

MR. DUCHEK: I have the rules, your Honor.

QUESTION: But you don't know what actually happens as of now.

MR. DUCHEK: I have the rules and I know what R. O. McDonnell tells me usually happens. I also know that the decision of the Court of Appeals, the mandate has been stayed. And you heard Mr. Kemmerlohr attempt to explain that they are in a little limbo out there about what they are supposed to do. But I believe that the chart that's in the appendix which was prepared by Warden Wolff, the responses of Warden Wolff, will indicate what they are doing as of the date of the chart.

QUESTION: Then the answer is you don't know what they are doing today.

MR. DUCHEK: That's correct, except I know --

QUESTION: That's the only question I have.

QUESTION: Is this disciplinary committee hearing something where the Eighth Circuit opinion went further than you really think the Constitution required it to go?

MR. DUCHEK: No.

QUESTION: The colloquy between you and Justice White?

MR. DUCHEK: No, I don't believe so. I believe that the colloquy between Mr. Justice White and myself would be perfectly within the decision of the Eighth Circuit.

QUESTION: But is it the existing practice in Nebraska so far as you know?

MR. DUCHEK: To the extent that I can read that chart which spoke as of the date that's indicated in there, I think it's October 1973, and to the extent that the evidence of Warden Wolff in the record of this case said that most admit their guilt and it would only go on to the disciplinary committee for imposition of a substantial penalty, that's an accurate description of what Nebraska now does, and I think that's within the mandate of the decision of the Eighth Circuit Court of Appeals.

QUESTION: Did I understand you to say in response to one of the questions, that under the present Nebraska rules, at that point they have a counsel substitute?

MR. DUCHEK: I know that they can have a counsel substitute before the disciplinary committee.

QUESTION: Under the Nebraska rules as distinguished from the Court of Appeals opinion.

MR. DUCHEK: The Court of Appeals only held -- the Court of Appeals held that Gagnon v. Scarpelli might dictate certain instances where a lawyer is required, when fundamental fairness requires a lawyer.

QUESTION: And that's the fundamental difference between the Court of Appeals and Nebraska. Nebraska says that Gagnon v. Scarpelli do not apply at all.

MR. DUCHEK: Not to anything other than good time.

QUESTION: Yes. Exactly.

MR. DUCHEK: That's exactly right.

And to answer your question, Mr. Justice Rehnquist, I think to the extent that they feel Gagnon would never require a lawyer, ever, within a prison, that's part of their concern.

QUESTION: Now, is it part of your submission that in those instances where a qualified lawyer is not required but a counsel substitute is, that Nebraska does not provide an adequate substitute?

MR. DUCHEK: No. If I understand the question, it seems to me that in most disciplinary proceedings a counsel substitute, be it staff member, another lawyer, or law student, because they would be there and they are a little better able to organize, is fine.

QUESTION: And satisfies the due process.

MR. DUCHEK: That's right. Procedures adequate to meet the interests that are at stake, however informal.

QUESTION: So if you credit the testimony and the statement in your brief, in the vast majority of the situations there wouldn't be a fact-finding issue anyway.

MR. DUCHEK: That's what I understand the situation

to be from the testimony.

QUESTION: This chart to which you referred appears where in these --

MR. DUCHEK: Well, it's in Appendix A --

QUESTION: Of what?

MR. DUCHEK: On the brief of the respondent. It's page 11 of the study itself, but I believe it's 13-A of the Appendix.

QUESTION: Of the brief of the respondent.

MR. DUCHEK: Yes. It's in this one.

QUESTION: Mine only goes to 11-A then it goes to page 45. 13-A? It says a lot of States, I don't know if it's all 50 States, but a great many States. Is that the chart you are talking a bout?

MR. DUCHEK: That's the chart.

QUESTION: Thank you.

MR. DUCHEK: You will notice that a hundred percent of the States --

QUESTION: Does it come in the size you have it rather than --

MR. DUCHEK: I can get it in this size. I would be happy to furnish it in this size.

QUESTION: That would be helpful. It is difficult to read this one.

QUESTION: Take the average age of the Court, I think

you are wise in doing it.

MR. DUCHEK: Yes. Why don't I --

QUESTION: If you would submit it to the clerk, he will make a number of xerox copies.

MR. DUCHEK: Why don't I just get you xerox copies of the ADA study in total and submit those to the clerk?

The chart would point out a hundred percent of the answering jurisdictions claimed, and the chart defines "claimed" simply to mean they said they did, and we didn't do any hearings to determine whether or not it is true -- a hundred percent of the answering jurisdictions give written rules specifying offenses and partial tribunal, inmate personally appears, inmate hears the evidence, and inmate may make his own statement.

Ninety-eight percent inmate receives copy of the rules, inmate receives written notice of the charges, and inmate receives prior notice of the hearing.

Eighty-four percent or higher, 89 percent the inmate may be represented by counsel substitute, 85 percent based the decision solely on evidence of the hearing; the decisions rendered in writing in 88 percent of the time, inmate has appeal in 4 percent of the time; and over 90 percent of the time inmates may appeal the decision and records are made of the hearing.

Seventy-nine percent of the jurisdictions allow a

brief continuance, and 54 percent an inmate may call witnesses, and 64 percent inmate may confront witnesses, and in 57 percent the inmate may cross-examine adverse witnesses.

Now, that cross-examination is not a trial type of cross-examination by any scope of the imagination, and it is described in greater detail in Appendix B of the brief of the respondent which is that recapitulation from the Attorney General of New Jersey.

Moving on to some of the other issues which have been raised before this Court today, the respondent believes that with regard to the mail issue, that really the remedy fashioned by the Eighth Circuit Court of Appeals is perhaps a simpler method than that advocated by the State or perhaps allowed by the Bureau of Prisons. The amicus brief of the American Bar Association on this issue points out that we do have a substantial interest at stake, that being access to the courts and attorney-client privilege, and that unless there is really a probable cause or a reason to think that there might be contraband in correspondence addressed to an inmate, is there any justifiable reason to interfere with this preferred First Amendment right? It seems to the respondent that having to take the mail out and open it in the presence of the inmate, have him come to a room where you open the mail in his presence there, begins to get into and to make decisions that become burdensome and that the most you would ever have to check on

the sender of the piece of mail would be once, and if you determined it was a proper piece of mail to be delivered, it could be delivered and that would be the end of the matter.

But it seems that the relief fashioned, not only -- this was fashioned by Judge Denny who in Nebraska is a trial judge and felt this was a proper relief for the interest involved on the Government side and on the inmate side -- it seems to the respondent that this is not burdensome and that the argument of the respondent in this regard in his brief as well as the argument of the amicus, the American Bar Association, clearly underpins this position.

QUESTION: What is the constitutional objection to the system used in the Federal institutions where there is no reading, there is no interception, but merely an examination for contraband? Do you see a constitutional objection to that?

MR. DUCHEK: Well, the constitutional objection would perhaps be that First Amendment rights are preferred and that --

QUESTION: How is the First Amendment violated if the content is not read at all?

MR. DUCHEK: Only by the delay, your Honor.

QUESTION: The actual opening.

MR. DUCHEK: That's right.

QUESTION: Does this record contain any information

about the frequency of narcotics being introduced into prisons by mail?

MR. DUCHEK: I don't believe it is reproduced in the Appendix, but you will find it in the record, I believe in volume III, which is a transcript of the preliminary hearing.

QUESTION: This has been a significant problem. Are you aware of that?

MR. DUCHEK: Yes, I am aware of that. And Nebraska said in the preliminary hearing testimony that it had devices that could detect some drugs, and that's part of the reason that I think the trial court was influenced in the decision it made.

QUESTION: Well, if the prison authorities in a given instance are willing to take on what is a very substantial burden in terms of the use of personnel of opening but not reading, do you really see in this context a significant constitutional problem?

MR. DUCHEK: The constitutional issue is the exchange of ideas, your Honor, and that must be sacrosanct, however that can be done.

QUESTION: And the Federal practice doesn't interfere with the exchange of ideas, does it?

MR. DUCHEK: Not if it's properly run, no.

I think to the extent that mail is ever opened there is the possibility that something would be read. If it's not

read, then the First Amendment is protected -- protection is afforded.

One thing which the respondent would like to talk about briefly is this idea of expungement from the record of determinations of misconduct arrived at in hearing which did not provide the inmate procedural due process protection. Expungement is not retroactive application of procedural rights at all. It is simply giving the full application of the law to the decision that has been reached and that has traditionally been the practice of this Court, and Linkletter v. Walker was a deviation from that practice.

QUESTION: It wasn't in the Morrissey case, was it?

MR. DUCHEK: Well, it was held that future parole revocations would be conducted --

QUESTION: According to the Morrissey standards.

MR. DUCHEK: But really the situations are entirely different because the inmate is in the prison and he is going to stay in the prison, and expunging from his record determinations of misconduct held in hearings where the facts are unreliable is not going to allow the prisoner for any earlier release. It may allow him for earlier consideration for parole. But in those situations where the prison feels society's interest is that there be a notation in this man's record of serious misconduct, they can hold the hearing. It does not allow anybody to walk out of the

prison because of a backward application --

QUESTION: What if the events occurred five years ago. You say there are no problems about conducting now a given proceeding?

MR. DUCHEK: I recognize those problems. But I think they can try to hold the hearings, and again it doesn't allow a man to get out, it only allows him to be considered.

QUESTION: The Morrissey holding did not provide for retroactive effect. It was recognized that some people might have had a parole revoked pre-Morrissey in circumstances where conceivably it might not have been finally revoked after Morrissey. And that was a deprivation of almost total freedom, wasn't it?

MR. DUCHEK: You're right. That's correct.

QUESTION: Whereas here it isn't a deprivation of total freedom, but discipline.

MR. DUCHEK: I just think that the burden on the State is so much more less, expunging the record is so much less that there need not be the kinds of considerations about giving this decision for application of the law that would attach to a decision like Morrissey where you are turning somebody loose perhaps.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Kammerlohr.

REBUTTAL ORAL ARGUMENT OF MELVIN KENT KAMMERLOHR

ON BEHALF OF THE PETITIONERS

MR. KAMMERLOHR: Mr. Chief Justice, I would like to comment for a moment on rebuttal.

First, on the question of raising good time problems, the question of good time in this civil rights action, which this case is, rather than in a habeas corpus proceeding as required by Preiser v. Rodriguez, I would like to merely point out that in Preiser, as the Court specifically points out, there is not only direct good time involved, but these men, although the petitioner, I believe, as you asked, Mr. Justice Rehnquist, in that case also did not accumulate good time while they were in segregation as a result of the disciplinary proceeding for which they lost good time. So they were both, the good time and the good time which did not accumulate. And this Court there said nevertheless you must bring a habeas corpus unless you are asking for damages. And, of course, the damage issue is not in this case either.

Secondly, we answered the Eighth Circuit when Preiser came out, they asked us for a supplement, and the State of Nebraska answered the Eighth Circuit that we did have declaratory judgment remedy, mandamus remedy, and possibly mandatory injunction remedy to the question in State courts whether or not good time is being deprived illegally since the good time is provided for by statute.

Next I would like to point out briefly, or emphasize one more time, that I think it is a very serious question whether an inmate has a grievous loss in any of these situations. I think his grievous loss is back when the court sentenced him to that penitentiary or when the court decided to revoke that probation. As this Court knows much better than I do, we have come a long way on the question of what's cruel and unusual punishment since the Constitution, from disembowelment, pillories and all that kind of punishment we used to have. But I think the basic question really involved is a prison, or are some prisons cruel and unusual punishment? If not, what is contemplated when a judge sentences a man to this place, is that not his grievous loss?

Pointing out the statute that is cited in our brief at the beginning of our brief, in Nebraska the statute says the court shall determine when it sentences a man how much time he shall spend in solitary confinement, what period of his sentence. So suppose a judge says, "I sentence you to one year in solitary confinement." Is that cruel and unusual punishment? That seems to me has to be answered first.

QUESTION: Is that practice followed generally in your State? Does the sentencing judge when he imposes sentence specify how long a period is to be spent in solitary confinement?

MR. KAMMERLOHR: I don't believe it is, your Honor, very often. I believe they usually have a pat phrase that

they say. "No part of this sentence shall be in solitary confinement except for violation of prison rules," is pretty much the standard wording of it.

QUESTION: So the --

MR. KAMMERLOHR: I am just saying it could be possible.

QUESTION: But it's pretty much of a dead letter so far as the facts are --

MR. KAMMERLOHR: But it happens all over the United States, your Honor, in county jail cases where a person may be sentenced to -- especially in smaller counties, where a person is sentenced to a county jail and there may not be another prisoner in there for months and he might spend a year in county jail, up to a year for misdemeanors, and so on.

QUESTION: Well, that's not the ordinary concept of solitary confinement of being alone in a great big jail.

MR. KAMMERLOHR: There aren't any programs. Some of these county jails have as many cells as for maybe 12 people, but there may be only one person in there for a long time, or maybe one here and one over there somewhat.

QUESTION: What in the world has that got to do with this case?

MR. KAMMERLOHR: It's the question of what is cruel and unusual punishment.

QUESTION: Is that allegation in here?

MR. KAMMERLOHR: No, your Honor. But the question

of a grievous loss is in here. And I'm merely saying that the Eighth Circuit by incorporating all of the --

QUESTION: I understand you to be saying the State of Nebraska could go on and quarter it, but since they didn't go that far, they could go anywhere else they want to go. Is that your argument?

MR. KAMMERLOHR: That's part of it, your Honor, yes.

QUESTION: I thought it was.

MR. KAMMERLOHR: Yes.

I believe that this is a question which needs to be answered, your Honor, Mr. Justice Marshall, that if we send them to prison, what is contemplated.

QUESTION: Take it for the State of Nebraska, as its law officer, you make a statement like that.

MR. KAMMERLOHR: I'm just saying what is contemplated when we send them to prison, your Honor. I'm not advocating it by any means.

As I opened, and I would like to say in closing, your Honors, I think we are all after the same thing. We are after rehabilitation. We do have programs for work release which are being expanded all the time. We have extensive parole programs, and all of these things are developing. The programs from what used to be done have come a long way, and as this Court has stated many times, I believe that these evolving programs should be allowed to continue to develop

without the strict constitutional guidelines at this time.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

Mr. Duchek, you appeared here by appointment of the Court and at our request, and on behalf of the Court, I thank you for your assistance not only to your client but to the Court.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:20 a.m., the oral argument in the above-entitled matter was concluded.]