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SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

PETER PREISER, ETC., et al.,

Petitioners

v.

JAMES NEWKIRK

No. 74-107

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January 20, 1975

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IN THE SUPREME COURT OF THE UNITED STATES

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PETER PREISER, ETC., ET AL., :
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 Petitioners :
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v. :
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JAMES NEWKIRK :
:
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No. 74-107

Washington, D. C.

Monday, January 20, 1974

The above-entitled matter came on for argument at
10:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

HILLEL J. HOFFMAN, ESQ., Assistant Attorney General of
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For Petitioners

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For Respondent

C O N T E N T SORAL ARGUMENT OF:PAGE:

HILLEL J. HOFFMAN, ESQ.
For Petitioners

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DANIEL POCHODA, ESQ.
For Respondent

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REBUTTAL ARGUMENT OF:

HILLEL J. HOFFMAN, ESQ.

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MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 74-107, Preiser against Newkirk.

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

ORAL ARGUMENT OF HILLEL J. HOFFMAN, ESQ.,

ON BEHALF OF PETITIONERS

MR. HOFFMAN: Mr. Chief Justice and may it Please the Court:

This is an appeal by the Commissioner of Corrections of the State of New York from a decision of the Second Circuit which held that when an inmate is transferred between a medium-security institution and a maximum-security institution, he is entitled to a due process hearing regardless of the type of transfer, that is, whether it is administrative or disciplinary or for any other reasons.

The decision of the Court of Appeals was handed down on June 3rd, 1974, approximately three weeks before this Court's decision in Wolff versus McDonnell and it affirmed the decision of the Southern District of New York which had been handed down in October of 1973.

The facts and circumstances in this case, your Honor, are not very much in dispute at this point and, essentially, what took place is that on June 2nd, 1972,

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at the Wallkill Correctional Facility, which is a medium-security institution in New York State, a group of inmates circulated a petition calling for the formation of an inmate labor union.

The circulation of this petition caused a certain degree of tension and unrest at the institution because there was already in existence an inmate liason committee which had been elected by the inmates and while the petitions were being circulated, there was a rumor that was going through the population that the liason committee had supported the labor union whereas, in fact, that was not true.

One of the members of the liason committee spoke to the superintendent on the telephone. The superintendent was at his residence while the circulation was taking place and the superintendent gave the committee member permission to address the inmates on the public address system and he advised -- this inmate advised his fellow prisoners that the liason committee did not support the union and that any inmates who wished to discuss the matter could meet at a common meeting place.

Such a meeting did take place. There were no fights. There was no violence. But there was loud talk and inmates were trying to outshout each other and, essentially, the inmates were concerned, number one, with why the inmate liason committee was not supporting the union and, number two,

many of them were fearful that because the union did not have official sanction that perhaps there would be reprisals directed toward those who had signed the union petition.

For the next two days after this meeting had taken place, the institution seemed to be calm, at least according to the superintendent's testimony.

However, he directed his deputies, his deputy superintendents, to go into the population and ascertain what the situation was and it was reported back to him by his deputies that there was still a degree of tension and unrest in the population because of this potential power struggle between the liason committee on one side and the union organizers on the other side.

Now, the Wallkill Correctional Facility is basically an open facility. There are no large cellblocks as we have in a conventional prison. There are merely corridors and individual rooms and there is no way that portions of this institution can be isolated in the event that there is a disturbance.

The superintendent testified that he was concerned that at a movie that was coming up on the following weekend where all of the population would be in one room, that there might be a disturbance, that the friction might result in a fight between the two factions and on the 6th of June, he called the correction department in Albany and he

requested permission to transfer a small group of inmates without any disciplinary consequences, merely to protect them and to cool the situation and he was given that permission and on June 8th, 1972, five out of eight inmates who had been recommended by his deputies for transfer were sent to other correctional facilities.

The superintendent himself did not choose where they were sent to. That was done by the classification board in Albany.

About a month after these transfers took place, the Respondent Newkirk and his co-plaintiffs at that time began the lawsuit in the Southern District of New York and they asked the district judge for a temporary restraining order returning them to Wallkill pending the outcome of the case.

The district judge denied that relief but set the case down for an early trial.

The trial did take place in November of 1972 in the Southern District of New York and by that time, two of the group that had been transferred had already been paroled and their cases were immediately dismissed as moot.

The district judge heard testimony from the two remaining inmates and from the superintendent and from a deputy commissioner of corrections and at the close of the trial, the district judge reserved decision and as an effort towards settling the case, the superintendent agreed to take

the two remaining plaintiffs back to Wallkill without their having to go to any other facilities.

They were taken back and settlement negotiations began. We discussed the possibility of a consent decree and in the interim, another of the plaintiffs was given an open parole date and he was paroled in February of 1973.

At that point, there was only one plaintiff left. That was Mr. Newkirk and he had been at Wallkill for three or four months at this time. He had been returned to his job. The superintendent believed that there were no longer any difficulties and he affirmed that he would treat this man fairly, that there would be no retribution for having brought the lawsuit and at that point we decided to cease our settlement efforts and to move to dismiss the case as moot.

We made our motion in March of 1973 and the district judge granted that motion as to the third inmate who had been paroled but the district judge reserved decision as to Mr. Newkirk because he was still in custody and I might add that at that time, Mr. Newkirk was not yet eligible for parole. His earliest parole eligibility is in July of 1975.

The district court handed down its decision in October of 1973 and it held that although there was not a sufficiently delineated controversy to warrant the granting

of an injunction, it nevertheless issued a declaratory judgment and it held that Mr. Newkirk's rights had been violated because he had not been informed in advance of the rules of the institution that would lead to a transfer.

When the district court entered its judgment, it added an additional requirement that if Mr. Newkirk was to be transferred in the future that he would be entitled to notice of charges and an opportunity to be heard.

QUESTION: Mr. Hoffman --

MR. HOFFMAN: Yes.

QUESTION: Am I right in thinking that this was not a class action?

MR. HOFFMAN: That is correct, your Honor. It was not.

We appealed the decision of the district court to the Second Circuit and what we were seeking was merely a clarification that where a transfer is done for purely administrative reasons, and it does not have adverse parole consequences, where there is no punishment at the receiving institution, where it is merely to separate rival groups of inmates, where there is no detriment to the inmates' records, that these transfers should not be within the parameters of the Due Process Clause.

And the Second Circuit, in our view, went even further than the district judge. There was a suggestion in

the district judge's opinion that, in fact, this was a disciplinary transfer because there were no segregation units at Walkill and, in effect, the superintendent was punishing this group.

But the Court of Appeals went further and said that regardless of the type of transfer, regardless of the label placed on the transfer, that every inmate who experienced a change in custody level and who experienced the deprivation of privileges that were alleged in this case, would be entitled to a due process hearing.

QUESTION: What was the date of the district judge's decision?

MR. HOFFMAN: A decision and judgment were handed down in October of 1973.

QUESTION: Well, he had -- he didn't have the benefit, of course, of Wolff against McDonnell, at that time.

MR. HOFFMAN: That is correct.

Your Honors, we believe that the decision of the Court of Appeals should be reversed on two grounds.

Number one, as a matter of law.

And, number two, on the grounds of mootness.

And with respect to our first ground, we think that this Court should declare and make it clear to the lower federal courts that where an inmate is moved between

institutions and he is not placed in solitary confinement, does not lose his good behavior allowances, does not suffer adverse parole consequences, that in that situation, the man is not entitled to a due process hearing of the sort that he would receive under Wolff versus McDonnell.

In a footnote in Wolff, this Court stated that the procedures in that case were intended to apply to solitary confinement, of loss of good behavior allowances, but not necessarily to other losses or privileges.

Now, we think there are some very compelling reasons why the Due Process Clause should not apply in this situation.

First, many transfers are made for security reasons and we have -- we are required to act on confidential information which it may very well be dangerous to reveal to the inmate.

Both Superintendent Butler and the deputy commissioner of corrections testified that as a matter of correctional procedure, an inmate is never told in advance that he is going to be transferred because by telling him in advance, it may provoke the active misconduct which the transfer is designed to prevent.

Very often we receive information from confidential sources, sometimes from other inmates, and if we were to reveal why someone was being transferred, it might very well

reveal the source. It might provoke an act of violence and as we have cited in our -- both in our petition for certiorari and in our brief, there have been many cases in the last two or three years where prison administrators have been sued for damages and sometimes personal damages for failing to protect inmates from assaults by other inmates and the power to move inmates between institutions is one of the primary ways that these types of assaults can be prevented.

These are situations where we don't want to bring the man up on disciplinary charges. We may not have enough concrete information to bring him up on disciplinary charges.

We don't wish to adversely affect his record.

We merely want to remove him from that situation.

The second reason why we think that Due Process is inappropriate here is that these procedures may well inhibit some of our rehabilitation programs.

In New York State, we have a movement now toward the use of medium and minimum security facilities and these programs are based on the assumption that if the program is not working, or if the inmate is not working out in that program, that we can move him out of there and if we are in a situation where, when we move a group of men to a new facility, we have to give every one of them a Due Process hearing when we decide, for programmatic reasons, to move

them to another facility or to change them -- to move them into a new program, we feel that that would be a very undue burden on the administration and, moreover, there may not be much that the inmate himself can contribute at a hearing.

It may be for reasons that are totally unrelated to his conduct.

Thirdly, we think that --

QUESTION: It may be, then, they don't want the hearing.

MR. HOFFMAN: That may be true, your Honor.

QUESTION: You'd only have the hearing if he asked for it.

MR. HOFFMAN: Yes. But I think many inmates faced with a transfer to a facility that they might not wish to go to would probably request a hearing if they could get one.

We also think that this Court should reject the concept which is inherent in the Court of Appeals decision and in the District Court decision that, because an inmate is sent to an institution which has programs that he feels will benefit him or which is geographically convenient for him, that if he is removed from that institution, he must be given a hearing and the Solicitor General has argued quite extensively in their brief and we agree with them that, merely because a man has been sent to a particular facility does not mean that he should have a legal right protected by

the Due Process Clause to remain there.

We run a unitary correct corrections system. We have 24 institutions in the State of New York and our entire program is based on the assumption that we can move men freely between our facilities without having to give them hearings every time we change their custody level.

We also think that this is one area where the need for summary adjudication outweighs the individual inmate's interest in Due Process.

First, as I mentioned before, we don't believe that notice of charges and advance warning is appropriate in many of these cases. As I said, it would provoke the very act that we are trying to prevent.

Secondly, with the transfers being made for diagnostic reasons, it may not be helpful to the inmate to tell him that he is being transferred because he has a personality disorder or because he is intellectually incapable of functioning in a particular program and we don't think that giving him a hearing in this type of situation will benefit him or that he will be able to add anything that will add the decision-makers in making their decision.

Thirdly, we think that Due Process procedures are certainly not helpful where inmates are being moved because of budgetary reasons or because a particular facility is

being phased out or converted into a different type of facility and if I may give an example here, in the fall of 1973 we converted the Sing Sing Correctional Facility from, essentially, a long-term institution to a short-term institution and in the process we had to move 750 inmates to maximum security facilities because that was the only place we could send them.

Now, under the rationale of the decisions below, I suppose that we would be required to give all of them Due Process hearings because we changed their custody level and because they may not enjoy some of the privileges at the new institutions that they enjoyed at Sing Sing and because many of them may be further from their homes.

But I think if we had had to give 750 hearings in that situation, it would have been a truly intolerable burden.

QUESTION: Is there such a thing as a disciplinary transfer?

MR. HOFFMAN: In New York we try to avoid them.
The departments --

QUESTION: Is there such a thing?

MR. HOFFMAN: Technically speaking, there could be such a thing because our disciplinary rules do provide for a program change as one of the consequences of an act of misconduct.

QUESTION: Let's assume you had one of those.

MR. HOFFMAN: If we had one of those, I believe that the inmate's remedy would be to complain to the superintendent and complain to the corrections commissioner that he should have been given a hearing under our rules.

But the department's policy is against disciplinary transfers.

QUESTION: Is there any way to find out whether you do have them or not?

Do you keep any records?

MR. HOFFMAN: Well, we keep records on the movement of inmates and, usually, the --

QUESTION: Records on why they are moved?

MR. HOFFMAN: Normally the transfer order itself will merely state administrative reasons, separation from enemies. It is usually a one-line statement and these are very common and, as in this case, they don't have disciplinary consequences.

QUESTION: Are they available?

MR. HOFFMAN: They are not available to the inmate but they could be available in a court proceeding if the court directed that they be produced as a matter of discovery.

QUESTION: Well, if the inmate commits some punishable act which, if he stayed in the same prison, he might suffer some loss of privileges or he might be put in

solitary confinement or he might lose good time or something like that.

If he commits one of those acts and he decides, well, we have got to reassess this man, he really needs to be some place else.

Now, if you just did that and just transferred him to another type of institution because you didn't think he belonged in this one, you wouldn't call that a disciplinary transfer, I take it.

MR. HOFFMAN: No, because we don't believe that the -- there is no punishment intended and we don't believe that the loss is sufficiently grievous.

QUESTION: Why would you say there is ever a disciplinary transfer, even if the commission of some punishable act is the thing that triggers the transfer?

When would there ever be a disciplinary transfer?

MR. HOFFMAN: Well, I think there would be -- in New York there would be a disciplinary transfer if a man was brought up on charges for having violated the rules and the disposition at the hearing was that his program be changed and that he be moved to another facility -- as a result of that specific rule violation. And it would be entered in his record.

QUESTION: Yes, but why is that a disciplinary transfer? That is just an administrative decision that he

belongs somewhere else.

MR. HOFFMAN: Well, it is disciplinary in the sense that it is a response to a violation of the rules and it would be entered in his record and it would be a packet of papers in his record which would indicate that he was brought up on charges so that it would indicate both to the receiving institution and the parole board that, in fact, he had been brought up on charges for this offense.

Now, in the ordinary situation --

QUESTION: Well, then, I take it that in any -- that there will never be a due process problem arise in a disciplinary transfer because he will have had a hearing.

MR. HOFFMAN: Yes, if he is brought up on charges, if he has committed a rule violation, our policy is that he should get a hearing under our disciplinary rules.

The department does not favor disciplinary transfers. They want the inmates to be brought up on charges.

QUESTION: Well, that is what the backward reasoning is, then. You -- you say that if it is disciplinary, he does get a hearing. But what if he claims it is disciplinary and you say, well, it is just administrative.

That is the problem.

MR. HOFFMAN: Yes, it is a problem but we feel --

QUESTION: That is the problem here, I think,

isn't it?

MR. HOFFMAN: It is a problem but we feel that this is an area where the balance should be struck in favor of the state rather than the inmate.

An inmate, when he brings a lawsuit, will always claim that he is being punished for some reason. He may not be punished at all, but that is one of the ways that he can get into federal court under Section 1983. He has to claim a deprivation of due process or a denial of equal protection.

So I think that the mere fact that a man claims that he is being punished is not necessarily dispositive.

QUESTION: No. Nor on the other hand does the mere fact that you deny that he is being punished mean that he is not being punished.

MR. HOFFMAN: That is correct. But we feel that in this area, where there is no loss of good behavior allowance, where he is not sent to segregation, where there is no effect on his parole eligibility, that the balance should be struck in our favor, rather than in favor of the inmate. We also --

QUESTION: In this case, all it took was a telephone call.

MR. HOFFMAN: It was a telephone call followed by formal paperwork that went --

QUESTION: But I mean, the decision was made just as the result of a telephone call.

MR. HOFFMAN: Yes, sir.

QUESTION: "I want to get these guys out of here."

MR. HOFFMAN: Yes, it was deemed an emergency.

QUESTION: That's all there was to it.

MR. HOFFMAN: It was deemed an emergency situation but the department in Albany determined--

QUESTION: Well, who determined it was an emergency? The warden did.

MR. HOFFMAN: The warden did, yes. But the department in Albany determined where the men went, so they -- the warden did not have the power to select some faraway institution. They might have been moved to another institution that was very close.

QUESTION: How many institutions are there, penal institutions are there in your state?

MR. HOFFMAN: We have a total of 24 and we have five maximum security prisons.

QUESTION: Auburn, Clinton and --

MR. HOFFMAN: Auburn, Clinton, Attica, Green Haven and Great Meadow are the maximum security --

QUESTION: Maximum.

MR. HOFFMAN: Yes.

QUESTION: And there are 24 and they are all over the state, I suppose.

MR. HOFFMAN: All over the state.

QUESTION: In every area of the state.

MR. HOFFMAN: Yes, that's correct.

QUESTION: Every section of the state.

MR. HOFFMAN: That's true.

QUESTION: I take it there are additional municipal and county institutions?

MR. HOFFMAN: Well, those, we have no jurisdiction over those.

QUESTION: No, no, I say there are in New York State, in addition to the state institutions you mentioned.

MR. HOFFMAN: Oh, yes, and New York City has its own correctional system and the counties have their own county penitentiaries for misdemeanants.

We take only the felony prisoners.

QUESTION: Those are short-term, short-timers, are they not?

MR. HOFFMAN: We take felony prisoners and we also take detainees from New York City under a special contract with the city.

We have approximately 800 detainees from New York City who are awaiting trial and we took them because the New York City institutions were overcrowded.

QUESTION: Mr. Hoffman, could he have been sent to Clinton in the first place?

MR. HOFFMAN: Certainly. He could have been sent

there by the classification or the reception committee.

QUESTION: Had he been sent there, we wouldn't have a lawsuit, I suppose.

MR. HOFFMAN: That is correct and that is one of the things that we are afraid of, that once you establish the principle that if a man's custody level is changed or if he is at an institution that is farther from the place of conviction, then we feel that inmates who are coming in the classification process will also request the same due process hearing.

QUESTION: Well, we have been talking about an issue that may not be here at all, if there is no jurisdiction here.

MR. HOFFMAN: Yes, as an alternative grounds, we raised in the District Court and the Court of Appeals the issue of mootness.

QUESTION: Well, isn't this --

QUESTION: Why isn't this primary? If we don't have jurisdiction, you'll never get --

MR. HOFFMAN: Well, having -- having lost on this issue twice in the lower courts, I felt that we had to brief the merits as well as the mootness question but I think this is clearly an example of a moot case.

This man was returned to the institution. It was entirely speculative whether he would be transferred again. And it was not a class action and we think that the district

judge could have dismissed the case and now the man has been moved to a minimum-security facility in New York City which indicates tangentially that it is quite positive that he probably will be released on parole when he reaches his eligibility date in July.

QUESTION: But it is, in the words of the many, capable of repetition as to this particular Respondent.

MR. HOFFMAN: Yes, it is capable of repetition, yes. If --

QUESTION: Characteristically, the cessation of enjoined acts doesn't moot a case for an injunction, does it?

MR. HOFFMAN: No, not necessarily, but I think one has to weigh the likelihood that the conduct will occur again. In our view, we felt there was -- it was not very likely that Mr. Newkirk was going to be transferred in the near future.

QUESTION: Was there any injunction entered here?

MR. HOFFMAN: No, no.

QUESTION: Just a declaratory judgment.

MR. HOFFMAN: Yes. Yes, and the district judge felt that there was not a sufficient basis to grant an injunction. He only granted a declaratory judgment.

If I may save my remaining time?

MR. CHIEF JUSTICE BURGER: Mr. Pochoda.

ORAL ARGUMENT OF DANIEL POCHODA, ESQ.,

ON BEHALF OF RESPONDENT

MR. POCHODA: Mr. Chief Justice and may it Please the Court:

The transfer of Respondent James Newkirk in June of 1972 is characterized by two things.

In the first place, it was a move from a medium-security institution, Wallkill, to Clinton, a maximum-security institution and therefore, Respondent contends it constituted grievous loss under constitutional standards to Mr. Newkirk.

Secondly, the transfer itself was based on conclusions made by prison officials about Mr. Newkirk's behavior, about his conduct at Wallkill.

Respondent's position is, that in light of these two factors, he was entitled to at least minimal procedural due process prior to his removal from Wallkill.

QUESTION: What was the first factor here? I want to be sure.

MR. POCHODA: The first factor is the change from a medium to a maximum security --

QUESTION: Right.

MR. POCHODA: -- institution, thereby resulting in a major change and a loss of interests protected by the 14th Amendment.

And the second factor was that the transfer was based on evaluations of conduct.

QUESTION: How do you define "minimal?"

MR. POCHODA: The amount and procedure, your Honor?

QUESTION: Yes.

MR. POCHODA: Well, the -- we have not appealed from the Second Circuit's granting of minimal due process which was, in this case, was only a notice of the pending allegations against Mr. Newkirk and an opportunity to respond. The Second Circuit did not feel that it should, in the context of this particular case, set for all time the type -- the amount of procedures that were necessary in transit situations.

It was the Second Circuit -- I,m sorry.

QUESTION: Notice and an opportunity to respond without a personal hearing.

MR. POCHODA: No, with a personal hearing.

QUESTION: With a personal hearing.

MR. POCHODA: Yes.

QUESTION: Confrontation?

MR. POCHODA: Yes. Well, no, the Second Circuit did not answer that question. It was -- the Second Circuit's opinion was a few weeks before the Court's decision in Wolff.

QUESTION: In Wolff.

QUESTION: When you said a moment ago, "Loss of interests protected by the 14th Amendment" in connection with the transfer from Wallkill to Clinton, what are those interests?

MR. POCHODA: The most dramatic deprivation suffered by Mr. Newkirk was a loss of his liberty interests. We feel that, as the courts below found, that an analysis of the differences of the two institutions revealed quite clearly that a move from the medium-security institution to the maximum-security institution resulted in restrictions in every area of Mr. Newkirk's liberties and freedoms.

QUESTION: He was more closely confined at Clinton.

MR. POCHODA: Yes. Yes. In fact, the object -- I mean, the object of Wallkill itself, as defined by New York State, is to provide relief from the regimentation and restrictions found in maximum-security institutions.

New York State has set up, as Mr. Hoffman stated, a system of intentional gradation between institutions and this is codified by regulation and New York State by that -- and by the way, it runs Wallkill -- has recognized that there is a need to provide a different atmosphere to prepare people for release.

There is a need to instill individual responsibility into the inmate, to have actions governed by that internalized control and not just by the physical bodily

restraints and every witness at trial, including prison officials, attested to the substantial differences in terms of an individual's freedoms and liberties.

QUESTION: Any other interests? I am thinking of the subsequent Second Circuit case which apparently held that even in a transfer from institutions of comparable security there was a hearing required.

MR. POCHODA: Yes, that case of Haymes versus Montanye with the -- which is presently pending before this Court for cert, I just would like to state, we don't feel is at all equivalent to this case and only gets mentioned because both the briefs of the Petitioners and the United States characterize it, we think, in an erroneous manner.

In fact, the court there was not concerned with, and did not state that the important issue was the fact that there may have been grievous loss.

Well, in fact, the court directed the Second Circuit, which was just remanded on a dismissal of a complaint, directed the Trial Court to decide whether the transfer was, in fact, a punitive transfer -- was, in fact, a disciplinary transfer.

That case concerns the situation mentioned by Mr. Justice Stewart where the inmate involved claimed that the transfer was, in fact, for a violation of a rule and the Second Circuit mentioned that it seemed to them that a

prima facie case had been made and that the transfer might well have been made just to get around the rules of the institution, the disciplinary regulations that require a hearing.

QUESTION: You don't claim, then, if someone is transferred from Wallkill to a comparable place near Buffalo he has suffered a grievous loss because he is closer to Buffalo than he is to New York?

MR. POCHODA: No, we feel that the major loss here is due to the differences in the institution.

QUESTION: Well, I know that is the major loss, but do you claim that there is any protected interest by virtue of the fact that you are transferred 400 miles away?

MR. POCHODA: Well, it is hard to make that judgment without having the record before us. It might be, in fact, that a result of that transfer, there are certain interests that would be affected. There may be freedoms that are denied by that transfer in a specific case.

QUESTION: Like what?

MR. POCHODA: Well, it may be that the transfer -- well, you say, only because of the distance involved and no difference in the institutions?

QUESTION: Yes.

MR. POCHODA: I would say probably no, probably it would not be in and of itself a violation or an

infringement on 14th Amendment interests and that the operative fact in this case, in this situation, was the distinct differences, as attested to by all of the witnesses, including the prison officials, the distinct differences between the two institutions that every aspect of the inmate's life was more restrictive and more repressive in terms of physical restraints, bodily restraints, freedom of choice, freedom of movement.

I should also add that once -- upon arrival at Clinton, Respondent was placed in segregation for a lengthy period. For four and a half weeks he was denied every opportunity, every freedom of movement and was kept locked in his cell for 23 hours a day and the District Court stated specifically that he was placed in segregation upon arrival at Clinton.

QUESTION: Do you agree with Mr. Hoffman that he could have been assigned at Clinton in the first place?

MR. POCHODA: Oh, yes, your Honor. In fact, Mr. Newkirk originally was assigned to a maximum-security institution.

QUESTION: But would you be here had that happened?

MR. POCHODA: We would not be here if he had remained at a maximum-security institution throughout his incarceration.

QUESTION: So you are not complaining about the

classification initially?

MR. POCHODA: No, no. No, in fact, we admit that there is no absolute right to be placed at Wallkill.

We agree with the State of New York and with the United States in its amicus brief that there is no right to be placed at Wallkill, that the state, in fact, did not have to set up Wallkill, just as the state did not have to set up a parole system.

QUESTION: But you feel that once he has been placed there, a right flows from it, even though it might have been an erroneous assignment, administratively?

MR. POCHODA: Yes, yes, we feel it is analagous, for example, to placement on parole, that even if a person is erroneously granted parole and even though the state does not have to set up a parole system, once placed in that institution, assuming this Court finds that there is an interest, that there is a loss of 14th Amendment interests, in terms of a change from that type of institution to the maximum-security institution, there is a right to be granted procedural due process before removal.

We are also not contesting --

QUESTION: So you think that inmates are entitled to participate in all reclassification decisions as long as the decision may increase the severity of confinement?

Whether disciplinary or not, if they just -- if they

just decide, well, this man isn't getting along quite as well here, he should --

MR. POCHODA: He -- excuse me.

QUESTION: -- and we think that he would rest better in another type of institution.

MR. POCHODA: Yes, the problem is with the use of the words "disciplinary" and "administrative." I mean, most of the trial courts, when confronting this question and when confronted with a similar situation, have stated that a transfer is, in fact, disciplinary when it involves the closer custody, when it involves this type of change, when it involves punishment in fact, because it is clear that the difference in life at Clinton as opposed to Wallkill involves a severe deprivation and punishment to the inmate.

And the courts have recognized almost the definition of disciplinary is when you impose punishment in response to an inmate's behavior or in response to conclusions about an inmate and we are saying, when those two instances are present, since there is no way -- there is no way for this Court to draw a line between what is disciplinary, unless you look to the objective conditions that when, in fact, the change resulted in loss of an interest protected by the 14th Amendment and when that change comes about because of conclusions about conduct, again, we say that the inmate should not be involved and this characterization by the

Petitioners and the United States is not accurate.

And I should say, and I'd like to get to it in awhile, that many of the characterizations of the scope and effect of the holdings below are not accurate and it does not cover the ground that is characterized or put forth here today.

QUESTION: When at Wallkill, it becomes overcrowded and Clinton is underused so that as an administrative matter some people have got to be chosen to go from Wallkill to Clinton, now, do you say that everybody who is involved in that kind of a transfer is entitled to a hearing?

MR. POCHODA: No, your Honor. The court below specifically -- this is one of the examples I was referring to -- specifically did not say -- say that in that case this particular holding is not enforced.

It is only when the transfer is due to conclusions about the inmate, about the inmate itself, so that the inmate can have some valuable input to the decision.

QUESTION: Even though, in my hypothesis, certainly the man is subjected to the sort of constraints that you say amount to a restriction on his liberty.

MR. POCHODA: That is right, your Honor. We say that even when that loss is present, in terms of a procedural due process right, it would not exist because it would be meaningless, that the court specifically stated -- both of

the lower courts stated, that unless the transfer is based on some evaluation about the individual himself, so that the individual could contribute something of value to a due process hearing, the case is not applicable.

QUESTION: Let me alter Mr. Justice Rehnquist's hypothetical case just a trifle -- perhaps not a trifle.

A decision is made administratively by the director of the institutions for the state that 500 prisoners from one category, let us say medium security, must be transferred to other facilities and the only other ones available are maximum security and the warden in each institution is then directed to determine which of the prisoners in his institution are marginally more dangerous, more in need of maximum security than others.

Now he has got to make a value judgment to effect that transfer in order to relieve the overcrowding. A due process hearing?

MR. POCHODA: Well, to the extent that the decision involves conclusions about individuals, we think that there would be minimal due process required.

Of course, the inmate -- there are many other considerations that may enter into a decision and the warden is free to use his discretion, to use his expertise, as this Court recognized in the case of Morrissey versus Brewer, to use whatever other facts that are around that are important

to that decision, certainly, but to the extent that there also are individual facts where the inmate can have input, we contend, and the courts below held that there should be at least minimal procedures.

Let me just state that --

QUESTION: May I ask a question before you move on?

What is the offense for which Mr. Newkirk was convicted?

MR. POCHODA: It is a manslaughter offense.

QUESTION: And what was his sentence?

MR. POCHODA: It was 20 to life.

QUESTION: 20 until life. He was first of all imprisoned in Sing Sing, did you say?

MR. POCHODA: In 1962, yes.

QUESTION: Suppose he had been transferred from Sing Sing to Clinton and he felt that Sing Sing was more congenial and really didn't want to go to Clinton? Would that entitle him to a due process hearing?

MR. POCHODA: No, it wouldn't, your Honor, not under the facts of this case. I think we should make it very clear because I think that both the Petitioners and the United States have completely misrepresented the scope and effect of the holding below, that the holding below specifically limited its constitutional ruling, as it properly did, to the facts of this case.

And the facts of this case involve a transfer from one type of institution to another of greater security and it specifically declined -- the Court of Appeals -- it is on page 27 of the petition for cert -- specifically declined to extend this rule to other factual situations.

It stated we don't have to decide and we feel that we cannot decide in the context of this case that question. The court did not decide, for example, what would be required in a situation from one maximum -- for a transfer from one maximum-security institution to another maximum-security institution and it should have not -- it should not and that should await further adjudication, further records and should not be done on the basis of a hypothetical plaintiff.

QUESTION: Is it your position basically that whenever there is a transfer to a more favorable level of institution, that some sort of vested right accrues and that cannot be denied without a hearing?

MR. POCHODA: Yes, it -- well, it would depend. We would say -- we wouldn't use the word "more favorable," we would use that, if, in fact, the differences involved in terms of the initial --

QUESTION: There are three levels of security institutions basically and --

MR. POCHODA: Yes.

QUESTION: -- I am thinking in terms of a transfer to one that would be regarded as more favorable, less security.

MR. POCHODA: I see. In terms of the gradation set up by the State of New York itself.

QUESTION: Yes. Yes.

MR. POCHODA: Yes, we feel that upon a factual analysis of the difference between those institutions the court properly found that there were 14th Amendment interests that would be infringed upon, upon a move from a lesser security to a higher security and only in that case is an inmate entitled to a minimal due process hearing.

Now, again, we must reiterate, we are not contending that a person cannot be removed. We are also not even contending that -- that persons cannot be removed immediately and the court below specifically held that in emergency situations, people can be immediately removed, even prior to a hearing and the hearing can be granted at a subsequent time.

We are not in any way taking -- attempting to take away the power of the prison officials to remove anybody or any group of inmates from any one institution.

All we are saying is that there is an interest on all sides, the state as well as the individual, that that discretion be informed discretion, that everybody has an

interest in avoiding errors.

In fact, in this particular case, the record demonstrates conclusively that a person who was erroneously transferred and the state itself, who as stated by Mr. Hoffman and his peers throughout their brief, they are concerned about assaults. They are concerned about one inmate attacks another inmate.

They have no interest in removing the wrong inmate and that is what happened in this case.

In fact, Mr. Newkirk himself, the Court of Appeals found, his transfer was based on misinformation. It was based on third-hand reports, the lack of procedures, the lack of accurate fact-finding led to mistakes.

There could be no interest on any side in such procedres. There also is no interest, as this Court recognized in Morrissey, to have inmates respond in this way to arbitrary action.

It can only hurt chances for rehabilitation. So --

QUESTION: Mr. Pochoda, in answer to the question a little while ago from my brother Powell, I -- your answer surprised me because I didn't think it had been your theory.

You have talked about 14th Amendment interests being protected. Well, what the 14th Amendment protects, there are three rather basic things.

It protects life, liberty and property -- or property from being taken away without due process of law.

Now, life is not necessarily a 14th Amendment interest; neither is liberty; neither is property. What the 14th Amendment says is that a person cannot be deprived of any one of those three things without due process of law.

I had understood your claim to be that what was involved here was a deprivation of liberty, when a person, an inmate, is transferred for reasons having to do with an evaluation of him, from a minimum-security institution to a maximum-security institution.

But in answer to my brother Powell, you indicated that your theory was he acquired a property interest when he was transferred to a minimum or medium security institution and that to take -- to transfer him from there to a maximum security institution would be depriving him of property.

Has that been your theory?

MR. POCHODA: No, your Honor, we --

QUESTION: Well, then, I think you made a mistaken answer to my brother Powell.

MR. POCHODA: I didn't realize I had indicated that.

We believe that the -- that is a direct infringement on the liberty interests, that --

QUESTION: And only that, isn't it? It certainly doesn't take his life. We can agree on that.

MR. POCHODA: Well, we feel that it might well be argued that Mr. Newkirk had, in fact --

QUESTION: Well, it might be argued, but what is your argument?

MR. POCHODA: We did also argue that there was a property interest involved.

QUESTION: What property interest?

MR. POCHODA: That he had, by meeting the criteria for placement at Wallkill and successfully being placed at Wallkill because of maintaining a good record at maximum security institutions, he had become -- availed himself of the benefits provided by Wallkill.

Those benefits included training in a marketable vocation. He was only able to train in his intended profession at Wallkill.

QUESTION: So he did acquire a vested interest.

MR. POCHODA: Yes.

QUESTION: Then you answered correctly that, under your theory -- Mr. Justice Powell and I was mistaken about your theory.

MR. POCHODA: I see. We believe that both interests were -- an inmate would be deprived of both interests by a move from Wallkill back to a security institution.

The liberty interest is more direct in terms of looking at the differences between Wallkill and Clinton but

that he had also acquired a state-created benefit that he had a reasonable expectation of maintaining that benefit until his release from prison because that is the usual procedure at Wallkill, that persons stay there until released and very few people have transferred back.

QUESTION: And that was his property.

QUESTION: The transfer from Wallkill to Clinton, because of overcrowding that I asked you about earlier, would, I would think, deprive him of that property interest, if he had it.

MR. POCHODA: Your Honor, we believe that, in fact, the transfer because of overcrowding would deprive him of a liberty and a property interest, but that the due process -- procedural due process -- procedural due process would not be applicable to any situation where the deprivation was based on conclusions that had nothing to do about the inmate, that it would be meaningless -- it would be meaningless to offer a hearing in such situations.

Clearly, one could be offered but we feel that it would be a meaningless gesture to have an inmate come in and to try to offer some evidence that the budget really isn't --

but

QUESTION: Well, why couldn't the inmate say, "Look, if you have got to transfer 300 people out of the 1,000 that are at Wallkill, it shouldn't be me, because I have done so well here."

MR. POCHODA: Well, I believe that the inmate might well, but that would be a substantive or equal protection argument and in this case we are concerned only with procedural due process in this case and the court below was only concerned and, of course, the record and the briefs only concern procedural due process.

QUESTION: But the selection for transfer involves a value judgment that prisoners A, B and C are going to be moved but D, E and F are not going to be moved.

Now, is that a different kind of a value judgment by the warden than the one that was made here?

MR. POCHODA: Your Honor, we are not trying to take that judgment away from the warden. We --

QUESTION: No, I didn't say that.

MR. POCHODA: -- are saying the warden can make those judgments. But if the judgment -- if, as a part of the process, a part of the input to that judgment involves facts about the inmate, the inmate should participate. The inmate cannot participate and say, I am better than B or C, but if the warden -- who may be misinformed about the inmate, as he was in this case, to that extent, to the extent that facts about the individual go into that decision, he should be provided due process hearing, just as, to the extent that facts about an individual go into the decision to deprive a person of parole.

QUESTION: Well, when I sort out your answer and read it in light of the way I read the District Court's opinion and the Court of Appeals, this means that potentially, every one of these 500 transferees would be entitled to a hearing.

Now, you suggest that the Solicitor General and your friend misread these opinions. I read them the same way they do and coupled with your answer, it would call for a hearing in every one of these cases.

MR. POCHODA: If there was a need to transfer 500 persons?

QUESTION: Yes.

If they wanted a hearing.

MR. POCHODA: Well, we -- we feel that it wouldn't necessarily, that if it was only on budgetary, that there might be, as I cited to Mr. Justice Rehnquist, a separate question about a rational plan, a separate question of a substantive due process question or an equal protection concern, that unless there was some finding about the individual that was involved, there would not be procedural due process requirements.

QUESTION: In other words, if they sorted them out by saying, the 300 people here who have been here the shortest time would be the ones. Or the 300 people here who have been here the longest time. Or if we say we are going to take

every 10th, just at random. On none of those selections would you claim any right to it -- to a hearing. Is that right?

MR. POCHODA: That is right.

QUESTION: But if, on the other hand, they say, the following 300 people are going to be the ones to be transferred for budgetary reasons, or capacity reasons, because we think those are the 300, after evaluating all of our population, those are the 300 who seemed to have less -- the least potential for benefit at the program here, then you would say there would have to be a due process hearing, right?

MR. POCHODA: Yes. The inmate, I don't believe, would have a -- would be able to judge himself or compare himself to the other 299 people. But to the extent that it is based on some evaluation --

QUESTION: It was found that he had a -- pejoratively found against him --

MR. POCHODA: Yes.

QUESTION: -- he had a -- that he was in the group that had the least potential for benefit at that institution and therefore he was going to be in that group that was transferred to the greater security institution.

Would he then have a right to a due process hearing?

MR. POCHODA: Yes.

QUESTION: I gather you'd say he would.

MR. POCHODA: Yes, your Honor and I think the record in this case demonstrates why it is necessary. By the standards put forth by the State of New York and the United States, Mr. Newkirk would not have been, is not entitled, as they say, to a due process hearing.

He is not entitled even though he suffers the same loss as a person who gets a disciplinary hearing and even though it is also based on evaluation about his conduct.

It seems to me, for instance, that the rule they propose, on its face, is a violation of equal protection.

There is no rational reason why a person who is -- who acts wrongfully, who acts in violation of institutional rules before being removed and suffer a loss is allowed and permitted due process and a person who acts totally properly and legally, who suffers the same loss on the basis of his conduct, does not get a due process hearing.

QUESTION: So would a random selectee suffer the same loss and yet you are not even claiming that he is entitled to procedural due process.

MR. POCHODA: That is because --

QUESTION: Why?

MR. POCHODA: Because procedural due process would not be relevant. It would be a meaningless gesture.

QUESTION: What if they transferred just left-handed

persons?

QUESTION: Yes.

MR. POCHODA: Again, we think that might well be a violation of substantive due process or an invidious discrimination based on the equal protection clause.

QUESTION: Mr. Pochoda, have you ever been at the -- well, I don't know whether you have ever been at the federal institution at Springfield, Missouri?

MR. POCHODA: I haven't.

QUESTION: But there -- and I suppose this is characteristic of some state institutions, they have varying types of confinement. They have maximum security. They have minimal security, really minimal and they have some intermediate stock.

Now, if this Respondent were transferred next week from one level to another, would you be here? Within the same institution but into a different type --

MR. POCHODA: Yes, I believe so.

QUESTION: I am not speaking of the whole or something like this.

MR. POCHODA: I can't say with certainty, your Honor, but I believe that might well be the type of change that would affect the liberty interest. I think this Court and every court that I know that has considered the question has stated that a transfer even within any one particular

institution which, in fact, deprives a person of liberty interest, such as segregation or solitary confinement, courts have consistently stated that that transfer must be accompanied by procedural due process, regardless of the way they are put on that transfer by prison administrators.

Courts have recognized on every level, all of the trial courts have considered this question, including the appellate courts -- and the appellate courts have stated time and again that we must have an objective test, that it defeats the purpose and it would make the due process clause a nullity if prison officials are allowed to say, well, we are going to have -- this inmate is going to be forced to suffer the same loss as a person who is disciplined but we are going to call it administrative, therefore, he is not entitled to procedural due process.

QUESTION: Let's suppose a prisoner violates a -- the prison rules several times and on each occasion he is disciplined, he is given a hearing and he is -- some kind of discipline is imposed, he has lost some good time or he has spent some days in solitary or something and the policy is that periodically they review a man's situation and here, they look back on a man's record and they say that he is -- after hearing, he has been found to have had these six infractions. We think he belongs somewhere else.

Now, it isn't they are transferring him because of

his conduct, but it is for conduct that has already been adjudicated.

MR. POCHODA: Yes, we would think that. In fact, he would be entitled to procedural due process but the requirements --

QUESTION: Now, what would he contribute? What would be the purpose of such a hearing?

MR. POCHODA: Well, I was going to say that the requirements have been met in that case, that the only -- the only -- that transfer only concerns conduct that already has been, after due process hearing, been found to have, in fact, occurred and that you wouldn't have to -- if, in fact, the institution has a rule, for example, that six violations will lead to transfer and after a hearing, the inmate is found, on six different occasions to have violated the institutional rule, he wouldn't have a separate -- separate seventh hearing because it would, again, be meaningless; that, in fact, there, our test is met but on every occasion where conduct is involved and that conduct in any way led to the decision to transfer, the person was provided with procedural due process.

QUESTION: Well, then, you don't really -- you aren't really urging that -- urging your entitlement to a hearing in order to participate in the judgment of the administrator as to where he belongs.

MR. POCHODA: No. We are not attempting to --

QUESTION: You just want to make sure he is operating on accurate facts.

MR. POCHODA: Exactly. We feel that it is exactly analagous to the situation in Morrissey versus Brewer, that, as this Court recognized, there is a factual part of a decision and then there is also a predictive part.

I mean, even if a person is found, for example, to have violated a technical -- one of the technical rules of parole, it doesn't automatically mean he is going to be recommitted. The hearing is to decide what the facts are and what the attitude of the inmate is, what mitigation circumstances are.

But, of course, the final decision is still left to prison administrators, as it properly should [be] and the same exact situation exists in this case.

QUESTION: It seems to me when you answered Mr. Justice White, you added another factor that might be critical. You said, "If the institution has a rule that six violations lead to transfer, then they could do it without an additional hearing."

Mr. Justice White didn't begin with a premise that there was an institutional rule, but that the warden, in the process of evaluating all prisoners who had had problems, said, here is a man with six violations. We think he has got

to go somewhere else.

Now, there is no rule. This is just a value judgment that six is enough for this man and it might take into account the nature of the crime which he committed in the first place, the length of the sentence which he had, long or short.

What do you say about that? Must there be a hearing for that?

MR. POCHODA: No, no, I just use that as a hypothetical in terms of the rule, but, again, if all of the factors that concern the conduct of the inmate are already, have already been the subject of a procedural due process hearing, another one is not necessary and, of course, although there may be, again, a substantive due process problem if, for example, other people with six violations are not transferred, that is not the subject of this suit.

We think --

QUESTION: Will you state -- I know you have to do it briefly -- your position on mootness?

MR. POCHODA: Yes, we feel that, in fact, what has occurred in this case is, at best, a temporary voluntary cessation that, in fact, it is a weaker case than others where the Court has ruled that a voluntary cessation is not enough because Petitioners have maintained their policy of this type of transfer and, in fact, Mr. Newkirk is

immediately and presently subject to that policy.

There have been no intervening events such as the end of a strike or events in Viet Nam or other events that this Court has recognized in other cases that make recurrence unlikely.

It is totally within the control of Petitioners to, right this second, transfer Mr. Newkirk immediately and for the same reasons it did in the first place.

QUESTION: Is Mr. Newkirk in any other -- is he in any different position in this respect from other prisoners?

MR. POCHODA: Well, we believe he is in a sense, because --

QUESTION: Has he been threatened in any way?

MR. POCHODA: Well, we believe he is to the extent that he has already experienced this conduct and therefore he is presently suffering continuing harm. He is not acting -- he is refraining from certain actions that he would participate in had he not been transferred, in light of his initial transfer and the continuing policy.

And, secondly, the initial transfer is on Mr. Newkirk's record.

Of course, also, the fact that the initial transfer has meant that we have a completed record in this case and that all of the facts have been fully laid out for the Court.

QUESTION: When you say he is refraining from certain conduct which he might otherwise do because of this risk, of this experience, what kind of conduct do you have in mind?

MR. POCHODA: Well, it is the same type of conduct that led to his initial transfer, which is perfectly legal and proper conduct in terms of being involved in petitions, which the Petitioners themselves state are legal and it is only because of reactions of others that they decided to transfer five people in this case.

That is, refraining from legal conduct but, of course, the Petitioners' transfer policy allows them to move out persons who are involved in legal conduct, to impose this punishment on the basis of legal conduct without giving the reasons.

So he is in the exact same position as he was minutes before his transfer in June 8th, 1972. Nothing has changed.

QUESTION: Of course, when you say that, you are speculating on what he was doing in terms of his behavior.

MR. POCHODA: Well, except that the policy does not depend on Mr. Newkirk. Given their transfer policy of, that people can be transferred for any reason, without any justifications or effort, it doesn't depend on the behavior. He can be transferred tomorrow, no matter what he does.

There is nothing that is preventing the operation of this policy on Mr. Newkirk. It does not depend on what Mr. Newkirk does, no.

In fact, in this case, the court below found that in spite of Mr. Newkirk's actions, that he had done nothing, that he had perfectly, that he had adjusted well to Wallkill and was participating fully and had never been any problem and in spite of the fact that they had made a mistake about what they claimed required the transfer, he was still transferred.

And, of course, this could happen today and tomorrow as well.

QUESTION: I was a little puzzled by one of your responses. You suggested, I think in answer to Mr. Justice Stewart, that if they decided that the last 300 prisoners in would be the ones transferred, or the first 300 in -- just an arbitrary classification, that that would be all right.

Now, is there any rational basis for that?

Or, what is the rational basis for that kind of decision?

MR. POCHODA: Well, in the first place, I meant to say that it would be all right in terms of, it would not be a necessity for procedural due process.

I should also add by the way that, in light of the overextension as characterized by the Petitioners, this

particular holding does not concern great numbers of inmates and does not concern hundreds of people, that only 18 people, one person per month was transferred from Wallkill involuntarily to a maximum-security institution.

We are not talking about great numbers and we should await -- we agree that this Court should await and not make a decision without other types of hypotheticals, about transfers between institutions or initial placement until those facts are before the Court.

But we feel that there would be leeway in deciding in a situation like that, that that is a rational, that is a reasonable plans in terms of penological and administrative considerations, that the first 300 or even the last 300 should be removed if necessary -- that has never been necessary in New York State, but that would not bring into play procedural due process in each.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hoffman, do you have anything further?

REBUTTAL ARGUMENT OF HILLEL J. HOFFMAN, ESQ.

MR. HOFFMAN: Yes, I'd like to respond to a few points that were made.

First, at the trial I asked Mr. Newkirk on cross-examination if he was ever placed in special housing and this appears at page 37a of the Appendix.

Mr. Newkirk testified that he was not placed in

special housing and that he did not receive any loss of good behavior allowances.

Secondly, the concern that we have --

QUESTION: That meant, when he went to Clinton?

MR. HOFFMAN: At the receiving -- yes, at the receiving institution.

QUESTION: Special housing would be --

MR. HOFFMAN: Would be the segregation units.

QUESTION: Segregation unit.

MR. HOFFMAN: He was placed in an idle company until they found a job for him which meant that he kept in his own cell and that he was released for one hour a day for recreation but he was not into the segregation unit at Clinton.

QUESTION: He was just segregated in the cell all by himself.

MR. HOFFMAN: Well, there may be other inmates who are --

QUESTION: That's not segregation?

MR. HOFFMAN: No, because he is in with the rest of the prison population and there may be other incoming inmates on that gallery.

QUESTION: All the others are in separate cells?

MR. HOFFMAN: Each inmate is in his own cell. And when he is on a reception --

QUESTION: How long is he there for that, 23 hours a day?

MR. HOFFMAN: It depends -- I think in this case the testimony was that he was there for approximately a month. It depends on how long the institution takes to classify him.

QUESTION: What is the difference between that and solitary confinement?

MR. HOFFMAN: Well, solitary confinement, he is completely removed from the population and there may be no one else in the solitary confinement unit.

QUESTION: Well, wasn't he completely removed for 23 hours a day?

MR. HOFFMAN: No, because there is a great deal of activity on these galleries and there are people that pass by the cells.

QUESTION: I thought you said he was in the cell by himself?

MR. HOFFMAN: Yes, but he is not --

QUESTION: Well, if he is by himself, he is in isolation.

MR. HOFFMAN: Well, a New York State inmate is always in a cell by himself. We --

QUESTION: What, for 23 hours a day?

MR. HOFFMAN: No, not 23 hours a day, but inmates

are always confined in single cells in New York.

When he is in reception status, there are other inmates on the gallery and there are officers and guards --

QUESTION: Well, were they in separate cells at Wallkill? Of a certainty they were not.

MR. HOFFMAN: No, at Wallkill they didn't have cells. They had rooms.

QUESTION: That's right. I know.

MR. HOFFMAN: Yes. Yes.

QUESTION: So it was different.

MR. HOFFMAN: Yes, it was different.

QUESTION: For one month, at least, it was different.

MR. HOFFMAN: Yes. But he was treated in the same way that any incoming inmate would have been treated at Clinton.

QUESTION: Did they have solitary at Wallkill?

MR. HOFFMAN: No. No, they don't.

QUESTION: Do they have isolation there?

MR. HOFFMAN: They have a hospital unit where in an emergency they can put someone for a day or two but they don't have a solitary confinement unit.

QUESTION: So if you do something at Wallkill that deserves isolation, the only way to do it is transfer them to Clinton. Is that right?

MR. HOFFMAN: In many situations. On occasion they will use the hospital rooms if an inmate is violent or in order to calm someone down. But if the inmate is a troublemaker or if there is a real threat of violence, they must move him to another institution.

The language in the Second Circuit that we are concerned about appears at pages 26 and 27 of our petition for certiorari and there the court speaks about the substantial loss that was suffered as a result of the transfer and the Second Circuit makes it clear that even though this transfer may have been outside of the disciplinary process, that it is the substantial loss suffered by the inmate that requires the due process procedures and we think that this rule could apply to any type of classification case where a man is sent from medium to maximum or minimum to medium for whatever reason.

Now, in a system of 24 institutions and 15,000 inmates, we cannot possibly avoid errors in every case but we think that the likelihood that an error may be committed in an individual case is -- is not so great that these procedures should be invoked in, perhaps, thousands of transfers per year.

We also think that the Haymes case is an example of the next logical step in this process where the Second Circuit ruled that if there was a punitive motive, even if

a man went between maximum security institutions, that he would be entitled to a hearing and, there again, they stress the distances involved and the possible loss of privileges that the man may have suffered as the result of going between these two institutions.

Now, in point of fact, there are no two institutions in New York that are exactly alike and a man may be moved from Green Haven to Clinton or from Auburn to Attica for programmatic reasons having nothing to do with his conduct and he may lose the job that he enjoyed. He may lose an educational program that he enjoyed. He may be farther from his family, but we don't think that all of these transfers require due process hearings and under the rationale of the Second Circuit where due process is measured only by the loss experienced by the inmate, then I think, legally, we would be required to give hearings in this situation.

QUESTION: Under the prison rules -- or, do the prison rules expressly say that for certain kinds of conduct, transfer is an appropriate sanction?

MR. HOFFMAN: No, they don't. As a matter of fact, the Court of Appeals struck out that requirement in the District Court's order because the Court of Appeals believed that it would be impossible to specify all of the situations that might lead to a transfer.

QUESTION: Well --

QUESTION: Justice White's question was about the prison rules, not about the District Court judgment.

MR. HOFFMAN: No, there is nothing in the prison rules.

QUESTION: Was there ever?

MR. HOFFMAN: No, there was not.

QUESTION: But you did have prison rules defining what kind of sanctions would be imposed for certain kinds of conduct?

MR. HOFFMAN: We have departmental regulations which list -- we have adjustment committee hearings and we have formal disciplinary hearings and they list the dispositions that an inmate can receive as a result of those hearings.

QUESTION: Well, does that suggest that -- that transfer is not a type of punishment under the rules?

MR. HOFFMAN: Well, the rules do provide for a program change that could be interpreted as a transfer, but the department's policy is not to use transfers as --

QUESTION: Well, you told me that before. But --

MR. HOFFMAN: Yes.

QUESTION: Again, I -- the rules purport to say if you engage in certain kinds of conduct, here is what might happen to you and your rules don't say that -- that a transfer is imposed for engaging in those kinds of conduct.

MR. HOFFMAN: That is correct. That is correct.

Yes. They do not.

QUESTION: I am still surprised you don't just say that there isn't any such thing as a disciplinary transfer in the prisons of New York.

MR. HOFFMAN: Well, we did say --

QUESTION: There are a lot of transfers, but it just is not for discipline.

MR. HOFFMAN: We did say that, but the Court of Appeals very flatly rejected that assertion.

QUESTION: I know, but you say -- I thought, awhile ago, you said, yes, there are disciplinary transfers.

MR. HOFFMAN: No.

QUESTION: You are trying to get away from them, but you said there are some.

MR. HOFFMAN: No. I said it was conceivable that, if you interpret a program change as a transfer to another institution, there could be one but in that case the man would have to be given formal notice of charges.

But in practice, no, we don't have disciplinary transfers. In that respect we differ, I believe, from the federal system.

QUESTION: Mr. Hoffman.

MR. HOFFMAN: Yes.

QUESTION: In New York, when a judge sentences a

convicted person, does he designate the prison to which he shall be sent?

MR. HOFFMAN: No, he -- unless it is a special case, for example, a juvenile offender where he might go to a reformatory, but other than that, he is merely remanded to the Department of Corrections.

QUESTIONS: And the Department of Corrections makes a judgment as to where he should be confined.

MR. HOFFMAN: That is correct. The judgment is made at a classification and intake center. And even in that process, a man may go back and forth between institutions.

For example, a man may be received at Green Haven and be sent to Sing Sing for a month for classification and then go back to Green Haven or go to Clinton or go to Attica and all of these institutions do have some differences and that is what we are concerned about here, that if the measure of due process is the loss of privileges or the distance from the place of conviction, then the possibilities of hearings are endless in these cases.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:05 o'clock a.m., the case was submitted.]