In the

Supreme Court of the United States

JOSEPH BAXTER, ET AL.,

Petitioner,

--vs--

NICHOLAS A. PALMIGIANO

No. 74-1187

Washington, D. C.
December 15, 1975

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Washington, D. C.

Monday, December 15, 1975

The above-entitled matter came on for argument at 11:06 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:

RONALD A. DWIGHT, ESQ., Special Assistant Attorney General, 250 Benefit Street, Providence, Rhode Island 02903
For Petitioners

STEPHEN J. FORTUNATO, JR., ESQ., 1168 Newport Avenue, Pawtucket, Rhode Island 02861
For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-1187, Baxter against Palmigiano.

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

ORAL ARGUMENT OF RONALD A. DWIGHT, ESQ.

ON BEHALF OF PETITIONERS

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

I am here on behalf of the Attorney General of the State of Rhode Island and Providence Plantations in the case of Baxter v. Palmigiano.

This case centers on two issues on two issues, whether counsel are required to be present at in-prison disciplinary hearings where the infraction complained of may also be the subject of criminal prosecution and, second, whether use-immunity must be granted for any statements made at the hearing where the silence of the inmate is considered as a factor by the disciplinary board.

Before I address those two issues, your Honors, I'd like to make mention of a footnote in the Solicitor General's brief questioning whether a three-judge court should have been convened in this case and I must state that the Solicitor General is in error when he says that this case is an attack on the Morris rules because there is nothing in any rule or statute or regulation of the State of

Rhode Island which prevents counsel from being present at these disciplinary hearings.

The rules are clear that an inmate has a right to assistance by a classification officer or any other individual authorized by the warden and since the decision of the First Circuit, attorneys have been authorized by the warden to be present in these cases so therefore no holding in this case would hold that statute of Rhode Island or regulation to be invalid and --

QUESTION: But you are challenging something about the First Circuit's holding in that respect, aren't you, in this petition?

MR. DWIGHT: We are, your Honor, but I felt since the question of this Court's jurisdiction had been raised, that it was my obligation to bring this --

QUESTION: Well, but Rhode Island can go right back there, can it not?

MR. DWIGHT: It can, your Honor.

QUESTION: I mean, it is only under the compunction of the First Circuit decision, isn't it?

MR. DWIGHT: Right. Well, I am not sure I am answering your Honor's question.

QUESTION: As I understood you, you said that they now make provision for counsel in these cases.

MR. DWIGHT: Well, under the compulsion of the

First Circuit.

QUESTION: But only under that compulsion.

MR. DWIGHT: Yes, your Honor. We advised the warden that there was at the present time -- prior to the First Circuit's decision -- the First Circuit's decision no requirement that counsel be present at these hearings.

QUESTION: So your point is, in response to footnote one on page 3 of the Government's amicus curiae brief in this case that this was not an attack on the statewide Morris rules as such. Is that it?

MR. DWIGHT: That is correct, your Honor.

QUESTION: And that therefore, contrary to the Government suggestion, a three-judge court was not required and that it was properly heard and determined by a single district judge. Therefore, the appeal was proper to the Court of Appeals and certiorari jurisdiction exists in this Court. Is that your point?

MR. DWIGHT: That is exactly correct, your Honor.

QUESTION: And if I understand your reasoning behind that, you are saying that the reason it is not an attack on the Morris rules is that out of force of compulsion you have complied with the First Circuit's judgment and that doesn't seem to me to be a very satisfactory reason.

There may be other good reasons why a three-judge district court wasn't required but to say that Rhode Island

is now doing something that the First Circuit told it it had to do, that it wouldn't otherwise do, I don't know that it is an entirely adequate answer to the Government's point.

MR. DWIGHT: Well, your Honor, we are just -- we made a legal determination before the First Circuit decision that legal counsel were not required but in no way has there been any change in any statute or regulation in the State of Rhode Island. That is my point.

QUESTION: Well, then, the action in the district court was a challenge to a regulation of statewide applicability, wasn't it?

MR. DWIGHT: It was not a regulation, your Honor.

QUESTION: Or the consent decree or --

MR. DWIGHT: Well, my point is that Morris rules do not forbid counsel at disciplinary hearings. They state that it is any person authorized by the warden or the Department of Corrections and actually, when the Morris rules were drafted, I have been told that this specific point was not covered because of the doubt on it and therefore, they decided to leave it blank and to put this language in it that would authorize either lawyers or nonlawyers depending on what the law ultimately should be determined to be.

To go on to the facts of the case. Inmate Palmigiano, who was incarcerated in the Rhode Island Adult

Correctional Institution for murder, on November 11th, 1972, decided that another inmate needed medical attention and because it was not being granted quickly enough, he went around advising the other inmates not to return to their cells at the time of the 9:00 p.m. lock-up.

He was subsequently charged with -- by a corrections officer with inciting to riot and disruption and he was told that evening that he might be prosecuted for state crime.

Two days later a disciplinary hearing was held pursuant to the Morris rule and at that time, after consulting with his attorney prior to the hearing, he asked that he be admitted to the hearing.

The Captain Baxter, who was the chairman of the disciplinary board, stated that disciplinary boards are disciplinary boards, they are not courts of law. It would be treated as a disciplinary case. "You have been offered a postponement. You refused it. We do not have as an institutional policy attorneys sitting on disciplinary hearings. Your request is denied."

The case was brought in the district court and the District Court of Rhode Island concluded that procedural due process had been awarded the inmate.

Mr. Palmigiano appealed to the First Circuit, where the First Circuit held in Baxter I that he was

permitted to have a retained counsel but not appointed counsel and that use immunity should be granted for any statements that he made.

The State of Rhode Island petitioned for writ of certiorari which was granted. The case was vacated and remanded in light of this Court's opinion in Wolff v. McDonnell.

The First Circuit handed down a second opinion in which they stated that no counsel was required except in those cases where an infraction might be the subject of criminal prosecution and in that instance they said that Miranda perhaps required that counsel be present and then they also stated use-immunity would be required where the silence of the inmate at the hearing would be considered as a factor against him.

It is the state's position here that this Court's opinion in Wolff v. McDonnell has already covered this situation.

If underlying facts in Wolff V. McDonnell include inmates who had committed infractions that were also the possible subject of a criminal prosecution the Wolff v. McDonnell case was a class action, unlike this case and there were inmates in that case who had committed infractions of insurrection, threatening to kill an officer, assault and drunkenness.

It is the state's position that because of these underlying facts, Wolff v. McDonnell covers the situations of disciplinary hearings where infractions may also be the subject of possible future criminal prosecution.

More specifically, there is a footnote in the Court's opinion in Wolff v. McDonnell which specifically cites Baxter I and in the body of the opinion, the Court said that "It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the need of the institution."

Footnote 20. And that footnote reads that the "Court of Appeals which has ruled on procedures required in prisoner disciplinary proceedings have been split. As to counsel, two circuits have held there is no right --" and then several cases are cited.

And then it states, "The First Circuit Baxter v. Palmigiano holds there is a right to retain counsel even where a staff assistant is available which the Ninth Circuit, Cluchette v. Procunier, envisions some sanctions in disciplinary proceedings calling for provision of counsel and has determined that counsel must be provided where a prison rule violation may be punishable by state law."

It is our position that this footnote clearly indicates that this Court did not agree with that

conclusion and that its determination in Wolff was supposed to be a reasonable accommodation of this type of case as well as the case where the infraction is not the subject of future criminal prosecution.

If one looks at Miranda, which is really the issue here, how far does Miranda apply, one sees that the underlying situation there that caused the Court to issue its opinion was the incommunicado interrogation of possible suspects.

QUESTION: Well, this disciplinary proceeding isn't a criminal proceeding within the meaning of the Sixth Amendment, is it?

MR. DWIGHT: Not at all, your HOnor, no. We have pointed that out and I think that the Court stated many times in Wolff v. McDonnell that disciplinary hearings are not criminal trials but our point is that the Sixth Amendment does not apply here at all. There isn't any requirement of counsel.

It is because the Fifth Amendment does apply certainly and that the 14th Amendment may require counsel if the Court should determine that it is necessary to protect Fifth Amendment rights of the inmates.

QUESTION: The reasoning of the Court of Appeals, as I understand it, was not to analogize the disciplinary proceeding to a criminal trial, but rather to analogize

the disciplinary proceeding to the in-custody interrogation of Miranda. Isn't that right?

MR. DWIGHT: That is right, your Honor and they pointed to Mathis --

QUESTION: Yes.

MR. DWIGHT: -- in stating that Miranda applies to an in-prison setting but it is our point of view, your Honor, that Miranda applies to incommunicado interrogations.

Here, the disciplinary hearing is held under the auspices of the Morris rules which is far different than the type of abuse that was the subject of Miranda.

QUESTION: Who else was in there to make it not incommunicado?

MR. DWIGHT: Well, your Honor, the inmate is entitled to a counsel substitute who is a classification officer at the prison.

QUESTION: Employed by whom?

MR. DWIGHT: Employed by the State of Rhode Island.

QUESTION: Who in there is not employed by the state?

MR. DWIGHT: The inmate, your Honor and even the inmate --

QUESTION: So it is not incommunicado because the inmate is there.

MR. DWIGHT: Well, your Honor, there are other safeguards.

QUESTION: I am waiting for who else you have in there.

MR. DWIGHT: There is no one else, your Honor.

QUESTION: Of course, in the Miranda situation, if the person being interrogated is a pauper, then his counsel is being employed by the state, isn't he?

MR. DWIGHT: That is true, your Honor.

QUESTION: But who else -- you still say it is not incommunicado.

MR. DWIGHT: It is not, your Honor, because, first of all, the inmate has oral and written notice in advance so he is not surprised. He has timely notice of the right to remain silent.

He appears at the disciplinary board with the right to assistance of an authorized counsel substitute. An impartial tribunal, none of whom reported upon, witnessed or investigated the alleged infraction, sit on the board.

He has the right to call witnesses and to cross-examine them, further dispelling any atmosphere of incommunicado interrogation.

QUESTION: Those are witnesses in the jail, I assume.

MR. DWIGHT: Or guards, your Honor.

QUESTION: Or guards, yes.

MR. DWIGHT: And also, I think this is significant, your Honor --

QUESTION: Is there any outside person allowed in there?

MR. DWIGHT: Well, your Honor, the entire proceedings is --

QUESTION: Is there any outside person allowed in there?

MR. DWIGHT: No, your Honor, I have stated that there is not.

QUESTION: And I submit that that might be incommunicado. Might be.

MR. DWIGHT: Well, your Honor, there is also another safeguard. The entire disciplinary hearing is taped and if the inmate should have some objection to the hearing, then the tape recording is there and fact, in the record in this case --

QUESTION: Can the tape recording be used in a criminal prosecution?

MR. DWIGHT: Well, it could be used to show your Honor that there was, something happened in the hearing where he was not granted the rights of the Morris rules.

QUESTION: Can it be used by the prosecutor?

MR. DWIGHT: I intend to address that question,

your Honor and --

QUESTION: Okay, in your own time.

MR. DWIGHT: I shall.

QUESTION: Does the inmate have the option not to take part in the hearing?

MR. DWIGHT: Yes, your Honor, sometimes the inmates walk out and refuse to take part in any way. The board goes on to hear the evidence presented and then they make their decision known to the inmates and --

QUESTION: Well, they are not compelled to be there at all, I take it.

MR. DWIGHT: They are not, your Honor. In fact, I attended a hearing where an inmate left and then the case was dismissed because he --

QUESTION: And if they are, they are not compelled to say anything, I take it.

MR. DWIGHT: No, your Honor, they are advised that they may remain silent.

QUESTION: You were there at one of these hearings?

MR. DWIGHT: I was not at this hearing, your Honor, but I did --

QUESTION: Does the state usually have a lawyer there?

MR. DWIGHT: Well, at the present time, your Honor, under the First Circuit opinion --

QUESTION: I am talking about when this case came up.

MR. DWIGHT: No, lawyers were not permitted.

QUESTION: Well, why were you there? You said you were at one of the hearings.

MR. DWIGHT: I just attended one recently, your Honor, in order to have a --

QUESTION: Oh, I see.

MR. DWIGHT: -- real-life experience of having attended a hearing in case your Honors wanted ask any questions about how it is conducted.

QUESTION: If the inmate elects not to remain at the hearing, does that result in any sanction or punishment?

MR. DWIGHT: Well, your Honor, at the time this case was heard, Mr. Palmigiano was advised, "You may advise your client to remain mute but it would be detrimental to his defense."

And the First Circuit concluded that this was a silence being held against the inmate.

At the present time, the inmates are advised that, "You have a right to remain silent and your silence will not be a determinative factor in the decision of the disciplinary board." That is one of the --

QUESTION: The rule was changed in that respect, following the First Circuit decision.

MR. DWIGHT: It was, your HOnor. But is is my position, your Honor, that even in this case that the inmate's silence was not really held against him. It is a factor and I feel that it is a fact that the disciplinary board should and realistically will consider but the Morris rules require that the determination of the disciplinary board should be based on substantial evidence and the state concedes that the silence of the inmate alone is not substantial evidence and unless there is other independent substantial evidence, the inmate should not be found guilty of the infraction.

QUESTION: But the board is permitted to consider the inmate's silence as a failure to refute or explain matters within his knowledge.

MR. DWIGHT: Well, at the time of Palmigiano's hearing, your Honor, that was true.

QUESTION: Do you see anything wrong with that?

MR. DWIGHT: Well, your Honor, there are many decisions of this Court which refuse to allow prosecutors to comment on an inmate's --

QUESTION: In a criminal proceedings.

MR. DWIGHT: Right. But in none of those cases has it actually been held that -- in the states -- that a jury in a criminal proceeding cannot consider silence.

QUESTION: Well, then, this Court has never held

that in a civil proceeding a state is required to draw no inference whatever from a person's claim of self-incrimination, has it?

MR. DWIGHT: No, your HOnor, and all the cases cited by the Respondent here concern criminal trials and it is our position that this is not a criminal trial.

These people have been constitutionally convicted and afforded all the rights of a free man before they enter prison and --

QUESTION: In a civil case, if a witness, whether a party or not, refuses to answer a question on the grounds of possible incrimination, Fifth Amendment grounds, and if the opposing counsel points to that in his closing argument, does that violate any provision of the Constitution? In a civil case.

MR. DWIGHT: I don't, in truth, know,your Honor, but I wouldn't do it without researching it.

QUESTION: Well, I was talking about the Constitution. Is there any reason why the lawyer in arguing the case can't point to that witness -- let's say he is the plaintiff in the case -- and say, "You heard me ask him this question and he declined to answer and I suggest to you he declined to answer --" and then undertakes to give an explanation.

MR. DWIGHT: I know of no impediment, your Honor.

QUESTION: There's no constitutional impediment to that at all, is there?

MR. DWIGHT: I don't think so, your Honor. I know in a criminal prosecution it would be improper.

Finally, your Honor, there is the question of use-immunity, whether the -- any statements that the inmate may make at the hearing could be used against him at a future time.

As I stated in my brief, there are some reasons for the state actually to agree with use-immunity because it might force the inmatesto enter the hearings to tell their side of the story.

QUESTION: You said"at a future time."

MR. DWIGHT: I mean in a future --

QUESTION: I understood it was only if he were prosecuted --

MR. DWIGHT: Right.

QUESTION: -- criminally for the conduct which led to the discipline. Is that right?

MR. DWIGHT: That is exactly correct, your Honor.

QUESTION: Yes.

MR. DWIGHT: But as a legal proposition, I don't think that there is any constitutional impediment to that testimony being used and this issue really centers on whether Simmons -- this Court's opinion in Simmons applies here or whether this Court's opinion in McGautha

applies here.

This Court has limited Simmons in many ways in recent years and it is the state's position that this situation is much more akin to that in McGautha.

In Simmons there were two constitutional rights involved, the Fourth and the Fifth. Here there is only one constitutional right involved, whether the inmate is going to speak, the Fifth.

That is much more akin to the situation in McGautha.

The inmate faces a problem that every person who has committed a crime faces, whether he will claim the Fifth or not and there is a compulsion in the sense that it may be in his favor to talk to the disciplinary board but that is no different than the compulsion in every criminal case and this is not even a criminal case.

So it is the state's position that use-immunity is not constitutionally required in this situation and in fact, there are impediments under Rhode Island law to use-immunity being granted because generally it can only be done when the Attorney General applies to the presiding justice of the Superior Court.

QUESTION: If the law were settled that at any subsequent criminal prosecution any statement that he had made at the disciplinary proceedings would, in fact, be

inadmissible, you'd have the same result without your problem of granting use-immunity by those unauthorized to grant it, wouldn't you?

MR. DWIGHT: Yes, your Honor, as a rule of evidence we'd have to follow that but it would add another thing; as generally we'd probably have to have stenographic transcription of all the disciplinary hearings to be sure exactly what was said so that we would be careful not to be using what was said.

QUESTION: Well, use-immunity would just be forbidding the question, "Didn't you testify at the disciplinary hearing, A, B, C and D?"

MR. DWIGHT: Well, but there is also derivative use-immunity according to Castigar, your Honor, so we would have to be careful that we used none of --

QUESTION: Well, there is use-immunity and then there is transactional immunity. We are talking here about use immunity.

MR. DWIGHT: Oh, absolutely, your Honor, not transactional immunity. We are only talking about the narrow immunity considered by this Court in Castigar.

QUESTION: At the most.

MR. DWIGHT: Right.

QUESTION: And wouldn't the -- if the law were established that as a matter of evidence, the law of

evidence, perhaps required by the Constitution, that any incriminating thing that he might have said at the disciplinary hearings would not and could not as a matter of evidentiary law, at the subsequent criminal prosecution be admitted, that would be -- and if that were the law and if he were advised of that, that would be the equivalent of use-immunity, I suppose, without getting into all the complication that you suggest about these prison officials not being authorized under state law to grant use-immunity.

They certainly would be authorized to advise him what the state of the law was, wouldn't they?

MR. DWIGHT: Oh, absolutely, your Honor, we'd have to follow what the --

QUESTION: Would this be substantially the equivalent of a Miranda rule applied to this setting?

MR. DWIGHT: It would, your Honor, except for the counsel question.

I mean, if this Court should feel that it either has to be counsel or use-immunity, the state would certainly prefer use-immunity. It is much less of a burden on the state. Also, I think in fairness to your Honors I should state that the disciplinary hearings now have become two types of hearings.

There is one in which the prisoner comes in and discusses with the beard what happened and is his offense and

there is the second in which he comes in and just stonewalls the disciplinary board because he is advised by the counsel not to say anything.

QUESTION: What do you think is the distinction between the use-immunity that you have been discussing and the application of, in effect, the Miranda doctrine to this situation?

MR. DWIGHT: Well, Miranda requires an appointed counsel.

QUESTION: Well, that isn't all it requires.

MR. DWIGHT: Well, it also has an evidentiary rule that the statements may not be used --

Well, if

QUESTION: /there is no counsel you can't use the statements.

MR. DWIGHT: Right, your Honor.

QUESTION: Now, do you equate that to a use-immunity? Is that your point?

MR. DWIGHT: Well, I think what your Honor is getting at, why don't we just not have lawyers and then we have the use-immunity automatically but I think the state would feel that if this Court ruled that Miranda applied, we'd have to supply lawyers because --

QUESTION: Well, Miranda didn't lay down any substantive requirement of constitutional law. Miranda just said that incriminating statements would be

inadmissible at a defendant's trial unless certain safeguards would have been provided at the time the incriminating statements were made. It didn't require any such safeguards. It just was a rule of exclusion of evidence, wasn't it?

MR. DWIGHT: I realize that it was an evidentiary ruling. That's correct, your Honor.

But on the counsel question, we maintain that this Court's decision in Wolff has already determined that counsel are not required at these hearings and I guess the application of Miranda then, if Wolff were considered to cover the situation, would be that use-immunity would have to be provided.

QUESTION: Well, you contend that isn't required either, don't you?

MR. DWIGHT: Our contention is that as a constitutional matter that is not required by the Constitution.

QUESTION: You don't say use-immunity would be required unless he is compelled to testify, would you?

MR. DWIGHT: That is right, your Honor.

QUESTION: And that his problem is just of having to testify in order to explain to the disciplinary is just one of the numerous problems that confronts any criminal defendant as witness McGautha.

MR. DWIGHT: Absolutely, your Honor. Whenever anyone does something illegal they have to decide whether

they are going to 'fess up or not and there is only the Fifth Amendment involved here. There is no weighing of one constitutional right against another.

The First Circuit handed a decision called Flint v. Mullen in which it made a similar determination on the question of a suspension hearing of somebody who had been given a suspended sentence and then was brought in and of course, that is more akin to a criminal prosecution but the court there decided that there was no constitutional problem and that it was just a weighing problem for the accused as to whether he was going to testify there or remain silent in order to protect his rights at the later criminal trial for the offense which he had committed.

Also, I'd like to point out that the case of Gagnon v. Scarpelli, your Honors considered the case of somebody who had been given a suspended sentence, I believe it was and in that case, the accused had committed a robbery and nowhere did the Court, when it discussed the counsel requirement there, suggest that because the accused there might be subject to criminal prosecution, therefore Miranda required a lawyer automatically at that hearing.

I think that if that is true, afortiorari, no lawyer should be required at a prison disciplinary hearing.

And also, in ultimately making this decision, the Court has to make a weighing of the rights of the Government

versus those of the individual and it is naturally the state's position that there are factors in prison that are very different from those in other situations, those of protecting not only the guards but the inmates from each other and that rapid discipline is very important.

If lawyers are introduced into these disciplinary hearings, we have all the problems of scheduling, postponements and it could be weeks and months before an inmate receives the discipline for the infraction which he committed.

I think that many commentators have said that one of the problems with the criminal justice system now is that people that do these things wait so long before anything happens that the purpose to make it known that you can't commit these things is dispelled because of the delay.

I think it is very important in a prison that disciplinary hearing follow very quickly infraction and that is what happened in the Palmigiano situation and the state feels that it could do this more rapidly if counsel were not required at the hearings.

If I have any time, I'd like to reserve it.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Fortunato.

ORAL ARGUMENT OF STEPHEN J. FORTUNATO, JR., ESQ.

ON BEHALF OF RESPONDENTS

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

I'd like to begin by first responding to a question raised by Mr. Justice Powell regarding the question of whether or not the prisoner can absent himself from the hearing. My answer to that is no, not when he is charged with a serious in-prison infraction.

I address myself to this problem at page 11 of my brief, footnote three. I contend that a reading of the Morris rules in the appendix will indicate there is a distinction between minor infractions and major infractions and that for the major infraction as we have here, he could not have absented himself.

QUESTION: Where do you -- is that by virtue of a rule or --?

MR. FORTUNATO: That is the provisions of the Morris rules. I would also suggest that I was counsel present here and the record before the Court so indicates and the only thing that the disciplinary board advised us when we raised the counsel question immediately seeking entrance into the disciplinary hearing was that they would consider a postponement to consider our position.

There was no indication of any sort that, well, why

doesn't Palmigiano just go sit this one out and we will proceed accordingly.

I would like to submit to the Court that we seek no extension of Wolff v. McDonnell in disciplinary hearings. We are not contending that sufficient time has elapsed from Wolff v. McDonnell so that this Court may now reconsider whether circumstances have changed so that additional safeguards should be afforded at the in-prison process.

In seeking the ingress of counsel into these proceedings we are not asking that counsel be permitted to cross-examine, to challenge the composition of the board, to assist the inmates in the presentation of this case as such, but solely to be there if there is to be interrogation and if, in fact, a criminal prosecution is threatened.

QUESTION: Is this something like the assistance a lawyer may give a grand jury witness?

MR. FORTUNATO: Clearly, your Honor --

QUESTION: You'd have the lawyer present at the hearing itself.

MR. FORTUNATO: We would analogize this to the Miranda, Mathis situation, the in-custody interrogation and submit that where --

QUESTION: What precise -- what would be the role of the lawyer?

MR. FORTUNATO: The lawyer would sit there so long

as there was to be interrogation relative to a possible criminal prosecution.

QUESTION: But I mean, simply advise his client?

MR. FORTUNATO: That is it.

QUESTION: As a lawyer does before Congressional inquiries, for example?

MR. FORTUNATO: As a lawyer would do at a police precinct upon being summoned by the police or by a phone call --

QUESTION: Say, "Don't answer this."

MR. FORTUNATO: "Don't answer this." "Perhaps you would be wise to answer this question and spare yourself further aggravation," just as I think was indicated in Miranda that that would be one of the functions of the attorney , not always to say "Be silent," but from time to speak and this --

QUESTION: And this rule, I gather, I think no non-lawyer assistant could really perform.

MR. FORTUNATO: I do not believe that a non-lawyer assistant is sufficiently trained to make the careful distinctions regarding the Fifth Amendment privilege.

QUESTION: Now, if he can't retain a lawyer, one must be appointed for him.

MR. FORTUNATO: I do not think that that issue is now before the Court but I would be constrained to say that

if he cannot re -- obtain one, this Court will ultimately find itself, I think, called upon to say that the indigent must have counsel.

QUESTION: Do you have very many inmates in Rhode Island who are not indigents?

MR. FORTUNATO: Not too many. Not too many. So I think that that would be a problem but I think --

QUESTION: When you say present during the interrogation, do you mean just during the interrogation of the inmate or during the interrogation of any of the other witnesses?

MR. FORTUNATO: Just during the interrogation of the inmates. We do not seek any extension of counsel's role.

QUESTION: Well, why would this function that you are talking about now not also be called for in situations where there is no other crime involved?

I mean, at least Wolff did say that counsel would not be required.

MR. FORTUNATO: Yes, and --

QUESTION: And you are saying that it should be in some situations such as when the conduct is independently a crime?

MR. FORTUNATO: Yes, I think that we have a qualitatively different situation because --

QUESTION: But only there, Mr. Fortunato.

MR. FORTUNATO: But only there, your Honor.

QUESTION: Where the infraction charged may also be a criminal offense.

MR. FORTUNATO: That is correct and --

QUESTION: But the function of being there when your client is interrogated would seem to be -- until you -- until the case is over, you really don't know what the conduct is, sometimes. So you would like to be there at any time that your client is interrogated.

MR. FORTUNATO: No, because he is aware of the charge. The Morris rules are salubrious insofar as they insist that the man be told in notice that what he did may result in a criminal prosecution.

We had notice that he was charged with a crime. He was also told to consult with his attorney which he, of course, did and it was only when we got to the hearing, as the record indicates, that we were excluded. Now --

QUESTION: We have got a little bit of a problem, though, in that the Morris rules may not be applicable anywhere else and by virtue of the state stipulation perhaps something / that the Morris rules provide may not be required by the Constitution.

MR. FORTUNATO: That is correct and I think that the First Circuit said that the Morris rules cannot be construed as filling all the constitutional gaps and therefore

we are here now contending that due process --

QUESTION: But concommitantly, the Morris rule -- it is not just a question whether the Morris rules go far enough to satisfy the Constitution, as you intimate the First Circuit said, but it is quite possible to stipulate that the Morris rules may in some instances go further than the Constitution requires.

MR. FORTUNATO: In some cases they may well do that.

QUESTION: But it seems to me it isn't always a wise predicate to argue from something that is in the Morris rules as if that were a constitutional given.

MR. FORTUNATO: No, I would not do that. I would suggest that the Constitution requires and that the proper effectuation of the Fifth Amendment privilege requires that counsel be present.

Now, one possible way of solving the problem would be the grant of use-immunity. However, as counsel for the state pointed out, the prison disciplinary board is not empowered to make such a grant.

QUESTION: What if they did the next-best thing and said, "I'll tell you what we will not do. We will not ask your client a question. If he wants to say something, he can say something, but we are just not going to ask him anything."

MR. FORTUNATO: If --

QUESTION: "We are going to put on our evidence. If he has got anything to answer, why, let him answer."

MR. FORTUNATO: If they said that "We will not interrogate," and if they also said, "We will not consider his silence against him," then I would be forced to concede that counsel perhaps should not be included in the --

QUESTION: So you don't -- at least Wolff, it seems to me, said that you don't need counsel present to decide whether or not to testify.

MR. FORTUNATO: Yes, if you are only dealing in a situation where -- and I don't believe Wolff addressed this question -- where there is no criminal prosecution threatened.

QUESTION: Well, there were some in there who were threatened.

MR. FORTUNATO: Yes, I am aware of that, your Honor, but --

QUESTION: Wolff certainly did not qualify the language at all.

MR. FORTUNATO: I am just --

QUESTION: It said, no counsel, period.

MR. FORTUNATO: That is certainly the holding of Wolff. I would merely submit that by listing in footnote 20 numerous cases around the country that the Court was not

commenting one way or the other on the merits of those cases.

QUESTION: What provision of the Constitution do you suggest requires them, the prison authorities, to tell the inmate that his silence will not be taken into account?

MR. FORTUNATO: I would suggest that the Fifth Amendment and the due process notions of effectuating --

QUESTION: Is there any case that has ever held, that you can cite to us, that tells us that he must be affirmatively told that his silence will not used against him?

MR. FORTUNATO: Not that says that his silence will not be used against him. But I don't think that he can be compelled -- and this is where we get the issue of the compulsion of this custodial interrogation and that is, Palmigiano was told, yes, sure, you can be silent.

He was also, I think, somewhat misled be being told that if you speak, it won't be used in a court of law.

But in any event, he was told that your silence will be held against you if you don't choose to speak.

QUESTION: What's the matter with that in a civil proceeding?

MR. FORTUNATO: Well, I think, as your Honor was, in your Honor's colloquy with the Attorney General, I think that in a civil proceedings there is no prejudice of a constitutional dimension for failure to call a witness

forward and certainly, you can comment to the jury, let's note here the absence of suchandsuch a witness or somebody's even failure to/be present in the courtroom.

QUESTION: Or the Plaintiff's claim of the Fifth Amendment when he is asked a question by defense counsel.

MR. FORTUNATO: Yes, but I think you have a qualitatively different situation here when we keep our eye on the future criminal prosecution and we argue along the line of Gardner versus Broderick and Lefkowitz that even though the disciplinary proceeding itself is a civil non-criminal, if you will, proceedings, nonetheless at that point the tribunal's decision to use his silence as substantive evidence against him acted as a compulsion.

QUESTION: But, Mr. Fortunato, isn't there a difference between using his silence, the disciplinary board using his silence as an inference that the alleged infraction was, in fact, committed by him and if he is then prosecuted, using his silence in the criminal prosecution?

Isn't there a difference?

MR. FORTUNATO: Perhaps I can answer this question by --

QUESTION: But there is a difference, isn't there?

MR. FORTUNATO: There is somewhat of a difference but I don't think that it would change my position.

What I mean is --

QUESTION: You would say that they can't use this silence either as bearing on whether he committed the infraction.

MR. FORTUNATO: That is correct.

QUESTION: Nor use the silence if later he is prosecuted for the very same conduct.

MR. FORTUNATO: That is correct. Now --

QUESTION: I should think there is a difference between the two.

MR. FORTUNATO: Well, what I would suggest is that the -- I certainly agree with the position of the state and various opinions of this Court which point out that an election between two constitutional rights cannot always leave a person eating his cake and having it, too. I mean, there are penalties that one suffers.

However, I think here if he elects to remain silent he foregoes, of course, his due process right to speak in his own defense.

He may live to regret that decision as a strategem. He may go to trial, take the stand there, let's say, in a selfdefense case and get an acquittal. Maybe he will then regret that he spent 30 days in the hole because he didn't come forth there. He might even have increased regret if, despite the threat of criminal prosecution, no criminal prosecution is ever brought to bear on him but I do not think

that these personal problems he faces are the same as a constitutional punishment, if you will, by having his -- by being compelled to speak and being in a compulsory situation in that regard and I think that the cases of this Court that --

QUESTION: Of course, our cases have said, neither judge nor prosecutor at a criminal trial can comment on the fact that one has not taken the stand.

But what is the fact of life as far as the jury is concerned?

MR. FORTUNATO: Well, I would say that the fact of life is that, despite repeated admonitions from the Court, if you don't put your client on the stand, you are in a lot of trouble.

QUESTION: Well, are the human beings who compose the disciplinary tribunal any different?

MR. FORTUNATO: Yes, but I don't think we should -- they are no different, of course. However, the --

QUESTION: I mean, even if they say to them, look, we won't use your silence against you.

MR. FORTUNATO: I think what we have to deal with, of course, is building our record for standing in front of an appellate court some day but the point is that I think what is ultimately of concern is the inmate's will and his volition and the fact, in the decision of

Wolff that now the disciplinary board will have to set forth reasons for the decision so despite the frailties of human nature they will at least have to consider what the guard said or what other inmates said or what --

QUESTION: But you really have -- you don't say that he needs to be advised that his silence won't be used against him. What you object to is the board telling him that if you remain quiet, that will be used against you.

MR. FORTUNATO: I object to that, yes.

QUESTION: And you say that that is really compelled.

MR. FORTUNATO: That is, your Honor.

QUESTION: And then you get into the Lefkowitz area of either you talk or we will fire you.

MR. FORTUNATO: That is correct.

QUESTION: Here it is, either you will talk or we will convict you, anyway.

MR. FORTUNATO: That is correct. That's --

QUESTION: But you do have a civil proceeding here. Wouldn't the role of the inmate be analagous to that of a civil defendant? That is, he ought to be summonable to the stand by whoever is presiding over the hearing and claim his privilege question by question rather than simply be able to invoke a general Fifth

Amendment privilege, not even to be called, the way a criminal defendant can?

MR. FORTUNATO: Of course, the civil defendant can always be summoned to the stand by the adverse party. Is your Honor suggesting -- is your Honor asking what should a judge do upon the --

QUESTION: No, I am asking as a matter of constitutional law is there any requirement that the Rhode Island disciplinary board not at least call the inmate, even against his will, to the chair or the stand, whatever they have in the room, and make him claim his privilege question by question rather than simply assert a blanket privilege?

MR. FORTUNATO: The Rhode Isbnd disciplinary laws do not -- the Morris -- so-called Morris rules do not address themselves to that question.

They do say that the inmate shall be summoned before the board and then the inmate shall be interrogated and they use that specific word "interrogated."

At the hearing itself they said to Nicholas Palmigiano, "Well, Nick, what do you want to say here?" That's the direct quote and they also then said, "Well, you're remaining silent. Are you going to answer any questions we put to you?"

QUESTION: Mr. Fortunato, we are talking about

a civil proceeding but in this "civil proceeding," you can end up in the hole, can't you?

MR. FORTUNATO: That is correct, your Honor.

QUESTION: May I come back to some of the prior questions? Your answers have left me in some doubt as to your position.

Let's assume for the moment that the rules require that the inmate be advised explicitly that he had the right to remain silent and not say anything or to elect not to answer any particular questions and moreover, if he were advised that his silence would not be used against him, would you still think that the presence of counsel is required by the Constitution?

MR. FORTUNATO: With one addition, then I would agree that counsel may not be required, and that would be if there were to be no interrogation of the inmate because dealing in the closed prison society you can tell him he can be silent, that his silence won't be held against him and you can still get into interesting colloquies with prison officials either immediately outside the room or at the board itself in an effort to, you know, we don't understand your behavior this time, Nick, you are usually so cooperative, and we have been good to you people, giving you the prison newspaper and all this sort of thing. So --

QUESTION: May I add one other condition? Suppose also that it were made clear that the inmate may leave the hearing without adverse consequences. This gets back to the first statement you made responding to your opponent. I think you said there was no option not to attend but as I understood what the Attorney General said, if the inmate made an appearance, he thereafter could leave.

Now, if the inmate could leave, if he had been advised he might remain silent -- could leave and silence and departure would not be used against him, would that answer your problem?

MR. FORTUNATO: I think it would because then we would have no custodial interrogation although the threat of future criminal prosecution may still hang over his head.

QUESTION: You seem to be proceeding all along on the assumption that the inmate doesn't want to answer any questions. Perhaps he wants to answer some questions and explain. Now, do you suggest that if he voluntarily wishes to explain some parts of the episode that he must have a lawyer there to guide him?

MR. FORTUNATO: Yes, and I would correct any notion I might have conveyed. I am not saying that in all situations the inmate may not wish to speak. I am simply

saying that to make that careful distinction as to whether or not he should forego his privilege, looking toward the trial and exercise his due process right to speak in order to perhaps protect himself from going to the hole or some other in-prison punishment, yes, the lawyer's counsel would be necessary.

QUESTION: Going back to the realities as Justice Brennan, I think, described them, is there any area of contest, inquiry, whether civil or criminal, where a defaulting party does not have his default in reality work against him? Do you know of any such area in --

MR. FORTUNATO: Well, I can only say that there have been numerous instances of acquittal when someone has not taken the stand. So --

QUESTION: That may be because of the weakness of the evidence against him.

MR. FORTUNATO: But at least it shows that the jury, upon a proper admonition, can keep that in its mind so while I certainly concede human frailty, I think that in an effort to support the value of non-compulsion historically and up to the present day, we should at least have rules that try to circumscribe situations enough so that compulsion and adverse inferences will be minimized, and I think that counsel's presence is required in this

instance to do that.

The distinction that I would like to call to the attention of the Court is that we proceed here solely, or seek the intrusion of counsel with our attention solely rivetted on the trial that looms and is threatened somewhere down the line and we do not have the same concern here for a conditional liberty that was present, say, in Gagnon or Morrissey v. Brewer and because we are in the Miranda - Mathis situation we contend, we are entitled to the counsel because of the custodial interrogation and so our focus is on the future criminal trial and no so much on getting intruding counsel in here to address themselves to the issue so that the defendant or the accused prisoner will not end up in the hole.

QUESTION: Well, what if the notice to the inmate who has been guilty of this infraction informs him that an informal hearing will be held at a particular day and hour in relation to the episode that is in question and that he may come if he wishes and if he comes, he may state his position, if he wishes. But he will not be compelled to answer any questions.

And then he comes -- take either choice.

He stays away or he comes and sits silent. Do you suggest that on the basis of the evidence of guards and other inmates he cannot be subjected to discipline

unless he has a lawyer there?

MR. FORTUNATO: I would add to those admonitions that you are now the subject of a criminal prosecution. You have the right to remain silent.

QUESTION: How do the prison authorities necessarily know that he is going to be subject? Perhaps he will and perhaps he will not.

MR. FORTUNATO: Well, I think that one can only speculate and hope that, based upon their training, they will recognize a crime when they see it.

The fact, I think, that we can --

QUESTION: Well, the crime of -- if it is a crime in the state -- of inciting a riot or creating a disturbance may be a rather subtle thing in some cases and perhaps they don't know at that time whether any such criminal procedure is going to take place or not.

MR. FORTUNATO: I think the burden there, your Honor, is clearly on the state that when it brings someone into a custodial situation, as we contend this is, that they have a burden of advising him that there is a threatened criminal prosecution.

The Morris rules so provide, recognizing that they are -- they do not cover every eventuality.

QUESTION: Well, go back to the hypothetical I gave you and the man does not come at all. He elects not

to come and they hear the guards and the other inmates who describe his conduct and then they say, "You are going to be put in solitary confinement for 21 days."

You say they can't do that?

MR. FORTUNATO: No, on that set of facts they could do that.

QUESTION: They could do that.

MR. FORTUNATO: Yes, they could.

QUESTION: Now, he comes to this informal hearing and remains in the chair silent. He is offered an opportunity to make a statement and he responds that he does not want to make a statement or answer any questions and then they proceed to do the same thing.

Any problem?

MR. FORTUNATO: Yes. I cannot concede that we should allow prison officials in this position to bring someone in on your set of admonitions or statements, elicit possibly self-incriminatory statements --

QUESTION: No, he has not made any statement in my second hypothetical.

MR. FORTUNATO: Oh, he has not --

QUESTION: He has made no statement.

MR. FORTUNATO: Oh, I am sorry.

QUESTION: He is invited to make any statement he wishes and he answers that he has no statement to make

and that he does not want to answer any questions.

MR. FORTUNATO: There is --

QUESTION: He is mute except for that statement declining to make any utterance.

MR. FORTUNATO: There is no problem and if that had happened in Palmigiano, we probably would not be here today.

What we are saying is that the evil of the Palmigiano situation is the circumstances of the interrogation and the fact that he was advised silence would be held against him; that interrogation was, in fact, attempted without counsel present.

So we have been in the appellate courts and are here today, in effect, seeking a precompliance review with that type of procedure.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Counsel?

MR. DWIGHT: Yes, your Honor, I would like to make just two brief points.

REBUTTAL ARGUMENT OF RONALD A. DWIGHT, ESQ.

MR. DWIGHT: Although it has been said that Mr. Palmigiano was told that his silence would be used against him, I think it is important for the Court to note that he was told that it would be detrimental to

his defense and that the Morris rules provide that any finding must be based on substantial evidence and the state concedes that silence alone is not substantial evidence because it obviously can be as much consonant with innocence as it is with guilt and Mr. --

MR. CHIEF JUSTICE BURGER: You have about three minutes remaining after lunch if you have anything further. We'll adjourn now until 1:00 o'clock.

MR. DWIGHT: Okay, your Honor.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: You may continue, Counsel.

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

I have one last point to make.

The Respondent implied that one would be entitled to an instruction that a jury must disregard the silence of a defendant but I don't think that this states the law correctly because in Griffin this Court stated in a footnote that they had reserved decision on whether an accused could require, as in Bruno, that the jury be instructed that his silence must be disregarded.

And the Bruno decision rested, not on

constitutional grounds but on a federal statute.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:02 o'clock p.m., the case was submitted.]