In the

Supreme Court of the United States

Jerry J. Enomoto, Et Al.,

Petitioners

V.

John Wesley Cluthchette, Et Al

No. 74-1194

Washington, D. C.
December 15, 1975

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v. No. 74-1194

JOHN WESLEY CLUTCHETTE, ET AL

Washington, D. C.

Monday, December 15, 1975

The above-entitled matter came on for argument at 1:03 o'clock p.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:

WILLIAM DOUGLAS STEIN, ESQ., Deputy Attorney General of California, 6000 State Building, San Francisco, California 94102
For Petitioners

WILLIAM BENNETT TURNER, ESQ., 12 Geary Street, San Francisco, California 94108
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. 74-1194, Enomoto against Clutchette.

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

ORAL ARGUMENT OF WILLIAM DOUGLAS STEIN, ESQ.

ON BEHALF OF PETITIONERS

MR. STEIN: Mr. Chief Justice and members of the Court: May it please the Court:

I am William Douglas Stein, Deputy Attorney General of the State of California, appearing here today on behalf of Jerry J. Enomoto, the director of our California Department of Corrections.

This case commenced effectively on November the 14th, 1970 with a major incident in the visiting room of the San Quentin State Prison involving an inmate named John Wesley Cluchette, who was then confined in our maximum security section.

As a result of that disturbance, a disciplinary hearing was scheduled six days later for November the 20th. On that same date counsel who was representing Mr. Cluchette in a state criminal prosecution that was going on at that time filed a civil rights action in the United States District Court for the Northern District of California.

That action sought a temporary restraining order to

prevent the disciplinary hearing that was scheduled for that date, a declaratory judgment that the procedures used by our department at that time lacked due process safeguards, and injunction barring such hearings and $30,000 in money damages.

Of course, the temporary restraining order was denied, but an order to show cause did issue returnable on December 4th, why a preliminary injunction should not issue in the matter.

The day before I appeared at that order to show cause hearing the complaint was amended. The complaint was amended to add one more name plaintiff and class actions allegations.

Since that time the matter has been considered by the court as a class action.

QUESTION: Has it been, in fact, certified as a class action?

MR. STEIN: To my knowledge, and I have not found a certification. However, the district court's opinion discusses relief. It mentions both the name plaintiffs, Mr. Cluchette and Mr. Jackson and ordered -- actually ordered expungement of their disciplinary records, ordered specific relief to them and then mentioned plaintiffs generally so I have taken it that since that opinion and order of the district court, the matter has

been considered as a class action.

QUESTION: Formally certified?

MR. STEIN: No, I can find nothing in the record formally certifying it. The --

QUESTION: Is that significant, whether we treat it as a class action?

MR. STEIN: It comes up now and again in the case and I am not sure that it is because any injunction that ran -- it has always been my position that any injunction that ran is against the procedures that were in use since those procedures were applied to all inmates.

The issue is going to be decided whether it is a class action or not.

QUESTION: Of course, the name plaintiff is still here. I mean, Cluchette is still in it.

MR. STEIN: The name plaintiff -- John Wesley Cluchette is the name plaintiff. He was subsequently paroled and the other name plaintiff, George Jackson, was killed in an escape attempt so a third person was, by stipulation, admitted as a name plaintiff to prevent the exhaustion of the class of plaintiff.

QUESTION: Do you think there is no question about this status of the class plaintiffs in the district court originally?

MR. STEIN: We never had -- there was never any

litigation about the class. The only evidence that was taken was taken at a hearing on an order to show cause why a preliminary injunction should not issue. I appeared there in response to an order to show cause about a particular inmate's disciplinary hearing on a particular day involving a particular incident.

At the close of that -- as I say, it was the day before the complaint was amended and at the close of that hearing, the judge stated that any injunction he issued would, in fact, be a permanent injunction.

The --

QUESTION: Well, you mean you thought the hearing was on a preliminary injunction?

MR. STEIN: The order to show cause concerned a complaint filed named one plaintiff, John Wesley Cluchette and attacked the conditions or the procedures to be used at his disciplinary hearing on one particular date, November the 20th. At the hearing there was evidence taken that the procedures would not materially be different but as far as the factual issue that we litigated on December the 4th, 1970, the only evidentiary hearing ever held in this case concerned a particular incident and the sole witness that was presented was the chairman of the disciplinary committee that heard Mr. Cluchette's complaint.

QUESTION: Well, but that would go to the breadth of the injunction and not to whether it should have been a preliminary as opposed to a permanent, wouldn't it?

MR. STEIN: That is correct.

Now, as I say, at this evidentiary hearing we presented -- or he was called by the petitioners or by the plaintiffs -- the man who was the chairman of the disciplinary committee that heard the infraction against Inmate Cluchette.

I think material to the issue, the main issue about whether counsel was required at that hearing is his testimony that the standard Miranda warning was given. That warning had been given in California prisons whenever a disciplinary infraction could be punished as a felony since Dorado was -- since the Dorado case in California which occurred between Escobedo and Miranda.

He was specifically informed that his case appeared to be a felony and that it would be --or could be turned over to the local district attorney who would have a prosecutorial decision to make, whether or not to prosecute that case.

Cluchette signed a waiver form. He signed a form waiving his Miranda rights and he agreed to speak to the committee.

Now, the chairman of the committee remembered that Inmate Cluchette did ask for certain witnesses to be called and that was denied. At that time the procedures did not provide for any testimony taken other than by written document.

He was unclear as to whether Inmate Cluchette requested his attorney's presence but it has never been litigated between the parties. The attorney had sent a telegram to the prison requesting his presence and of course, as I say, he filed the action the day of the hearing, attempting to stop the hearing so that he could be present.

So there is no evidence in the record that Inmate Cluchette did, in fact, ask for the attorney but we have never challenged that. We have always conceded that he did, in fact, ask at the hearing but just that the chairman did not hear it.

The chairman testified that had Inmate Cluchette refused to waive his Miranda rights, he would not have been questioned, that they would have then in that situation made their determination of the disposition -- first of all, a finding of guilt or innocence and disposition on the basis of the written reports they had before them and at that time all of our disciplinary hearings were conducted on the basis of written reports.

There was no live testimony.

The gist of the written reports, he testified, were written -- were read to Inmate Cluchette.

Now, the reports were voluminous. I think there were 13 to 15 supplemental reports. The rules and regulations of the director of corrections require any person having knowledge or seeing an incident involving -- any incident of disciplinary hearing to file a written report.

They were not given to the inmate. He was not allowed to see them or read them. The material portions were read to him by the committee.

As I say, the committee -- the hearing lasted about an hour and the following punishments were imposed:

Inmate Cluchette was ordered confined in isolation for 29 days. Concurrent with being retained in cell status for 29 days, his privileges were removed for 60 days and the matter was referred to the district attorney for prosecution.

The matter was, in fact, never prosecuted.

Now, Inmate -- as I pointed out earlier, at the start, Inmate Cluchette was already housed in our maximum security section so he was retained in the same cell, the same type of cell as he had been in before the incident.

I believe he was moved to a different cell

because isolation requires the removal of personal property from the inmate's cell except for legal materials, religious materials and toilet articles and I think it was easier to move Inmate Cluchette to another blank cell than to remove his goods from his -- what then would be property he should not have from his other cell.

So I believe he was moved to another cell but it was the exact same size, shape cell that he had been housed in before the incident.

QUESTION: How was the isolation carried out, then?

MR. STEIN: Well, that isolation -- that term as used in California at that time meant -- and testimony to this is in the record -- that all personal property, items of personal property except, as I said, for religious materials, legal materials and toilet articles, were removed from the cell.

He was -- and then he would be -- if isolation were the only punishment, he would also be restricted to the cell for 23 hours a day. He would be allowed one hour a day exercise outside the cell.

But this next punishment imposed was cell status which alters that and required him to remain in his cell 24 hours a day. There was no outside exercise permitted.

However, he was not isolated in the sense that he could not speak to other inmates.

He could not see other inmates celled next to him as the walls are solid between the cells and there are no cells in that section facing but he could speak through the bars to the people on either side and they exercised up and down the tier and he could talk to any inmate who was exercising in the tier.

Now, cell status has an additional penalty. As I said, the one-hour exercise normally allowed inmates in isoation was removed so for 29 days he had no outside cell exercise.

He did leave the cell twice a week to shower, for family visits, attorney visits and for parole board appearances. That is allowed on cell status.

In addition, the removal of his privileges for 60 days denied him the privilege of purchasing items at the canteen and other limited privileges that are available to maximum security inmates. Those are very much curtailed because of his housing in maximum security.

As I said, following the hearing, a permanent injunction issued, expungement of the records of the disciplinary proceedings held were -- of the two named plaintiffs were ordered.

The injunction was stayed pending the appeal by

the district court except for the part of the opinion that required us to present a plan for conducting disciplinary hearings in the future that complied with the procedures set forth in the district court's opinion.

Now, we submitted a plan to the district court in January of '72. That plan was later put into practice voluntarily by the director throughout California's prisons. As the plan was put into practical effect, certain changes became obvious that had to be made, intervening State Supreme Court judgments and, in fact, opinions of this Court required further changes which were made and subsequently supplemental plans have been submitted to the district court.

QUESTION: When you say voluntarily, Mr. Stein, do you mean, not under the compulsion of the district court's order?

MR. STEIN: That is correct, your Honor. Unlike the situation in Morris we have never been ordered to change the plan. That part of the order telling us to -- permanently enjoining us was stayed pending the appeal and it is still stayed as this case is here today.

QUESTION: Well, then, are you in a position to complain about anything that is included in your voluntary plan?

MR. STEIN: Certainly, your Honor. I think we

are because anything -- we are complaining that that plan -- we were -- we have been asked to draft a plan to comply with the district court's opinion. That plan has been objected to strenuously by the plaintiffs here, by the way, as not complying.

But to the extent that we go further than is required by the Constitution, your Honor, I don't believe our acquiescence should be read as concession that it constitutionally complies.

QUESTION: Well, but it seems to me, in order to be able to maintain that position you would have to say that because the plan was originally directed to be submitted by the district court, it is under the force of the court's order.

Otherwise, if you are doing something voluntarily that is beyond the Constitution I don't think you have any claim here.

MR. STEIN: Well, the issues, the specific issues we have raised here in this case are not in the plan. We do not provide counsel where the matter is pending as a criminal trial.

QUESTION: So here --

MR. STEIN: We do not offer the unlimited right to call witnesses. That's --

QUESTION: Here you are not challenging anything

that is included in your plan, in this court.

MR. STEIN: That is correct.

The other problem we have, too, your Honor, is that we now have a Ninth Circuit Court of Appeal opinion which imposes -- this is the opinion we have appealed from here. We are on cert to review. Which imposes procedures way beyond the constitutional limits as we read them and it is the Ninth Circuit opinion -- the jurisdiction of the Ninth Circuit takes in considerably more than California.

If that opinion is affirmed, then Oregon, Washington, Arizona, New Mexico and all federal prisons in the Western United States will have to comply.

QUESTION: Yes, but if California were doing it voluntarily it wouldn't have standing to raise the claims of Oregon and Washington just because the Ninth Circuit covers those territories, I wouldn't think.

MR. STEIN: It would require another lawsuit from Oregon or Washington.

QUESTION: Well, are you doing voluntarily everything the Ninth Circuit says you have to do?

MR. STEIN: No, we are not.

QUESTION: No.

MR. STEIN: No, I didn't want to leave that impression. As I stated, just shortly before Wolff was

decided in this Court, the Ninth Circuit issued its opinion which extended the due process procedures ordered by the district court to the including of the removal of any privilege.

We petitioned for rehearing following the decision in Wolff. A rehearing was granted. The opinion was purportedly modified to conform to Wolff. We suggested that the entire circuit hear the case. That was denied. We petitioned for cert and we are here today.

I am here, basically, to argue two points. One, the one that troubles us the most and was argued in the last case, is the requirement that we supply counsel in all cases where the alleged infraction is punishable as a crime and we would like to discuss what we view as the proper role of lower federal courts in imposing constitutional restrictions on the state prison administrators. Briefly --

QUESTION: I got your first point you are going to argue. I am not sure I got the second.

MR. STEIN: The --

QUESTION: The first is the same as we heard in the previous case, I know.

MR. STEIN: The first point is, whether counsel is required. Now, to the extent that we believe that the Ninth Circuit has exceeded the direct mandate of this

Court in Wolff, we believe that they have exceeded the proper role in applying the United States Constitution in state prison situations and, briefly --

QUESTION: With respect to confrontation and so on?

MR. STEIN: Yes.

QUESTION: I see.

MR. STEIN: There has been one nagging distinction, purported distinction in this case between the Nebraska case that I think has been put to rest by a recent California Supreme Court decision decided after our briefs were filed.

Throughout this case it has always been argued by the Respondents and the inmates that because of California's indeterminate sentence law, their situation is distinguished from Nebraska's good time credit sentencing the distinction being, of course, in California that the judge only sentenced the defendant to the term prescribed by law and our parole board sets both the maximum sentence and the parole release date.

They have argued that because a single disciplinary infraction of a major nature could be basis for the parole board's authority to extend their sentence to the maximum which, in many cases, is life, that it distinguishes them from the good time credit cases such

as Nebraska where the man has a fixed sentence and he works it off on good time credit.

Since the briefs were filed, the California Supreme Court has considerably modified the indeterminate sentence law and its current application, I submit, renders the purported distinction one without a difference.

In a case entitled In Re Rodriguez reported at Volume 122 of the California Reporter 552, the California Supreme Court required our adult authority or parole board to set a maximum sentence for every inmate based on the culpability of the individual offender as reflected in the circumstances at the time of the offense.

That sentence can no longer be raised. That term can no longer be changed. It can be reduced but it can never be increased back to the statutory maximum.

Now, the plaintiffs, when they filed the initial complaint argued that the imposition of discipline in a case would automatically or could possibly result in the extension of their sentences.

The Court of Appeals held the effect to be too nebulous to require them to proceed in habeas corpus and exhaust their state remedies but did, in fact, hold that the notation of a single disciplinary could be so detrimental to their interest in liberty through their release

on parole that the entire range of due process was required.

I submit that, following the Rodriguez modification that you can no longer distinguish the effect of the California indeterminate sentence law from the good time credit situation and that there is no basis on that ground to distinguish this case from Wolff.

In fact, as I remember in Wolff, there was one particular inmate whose good time -- had up to 17 months good time credit removed during the -- as a result of a disciplinary hearing. That was an automatic extension of his sentence, 17 months.

In California, the most that could occur would be a denial of release on parole. His maximum sentence could no longer be increased and traditionally, the denial of parole has always been reviewed on a 12-month series.

So we submit that since our California indeterminate sentence law has been modified, in effect, our procedure is better than Nebraska's on that situation, in that case. It cannot be distinguished and we stand on a better footing.

The main issue, of course, is whether counsel is required at these hearings.

The Ninth Circuit held that in their modification their modification, their opinion following Wolff, that

Wolff didn't require it but that your decision in Miranda required it.

I know it has been argued before and I would have to repeat it, that prison disciplinary proceedings as conducted in California, under the procedures outlined in Wolff are not analagous to the police station interrogation that brought forth the Miranda rules. There is simply no custody in the California disciplinary hearing.

The rules provide that the inmate will be present. However, he -- no physical force will be used to bring him to the hearing if he does not wish to attend and he may leave when he desires.

The hearings conducted under the proceedings in Wolff --

QUESTION: Let's be a little realistic. In a prison, if somebody tells you to be someplace, you go there.

MR. STEIN: Excuse me?

QUESTION: In a prison, if somebody tells you to go someplace, you go.

MR. STEIN: Well, Mr. Cluchette was told to move himself from the visiting table to another room and he broke a chair and assaulted the officers with the leg of it.

QUESTION: And he got in a whole lot of trouble.

MR. STEIN: He got 29 days in isolation and cell status.

QUESTION: Right. So I am saying that normally a request in a prison is an order.

MR. STEIN: Well, that is correct but no one -- the rules specifically provide -- and all the inmates are furnished copies of these rules. They are not kept by the prison administrators for themselves and I can almost quote them, that no physical force will be used to bring the inmate to the hearing so they do request his appearance and -- but he knows that if he doesn't want to go, they are not going to drag him in there.

In any event, he arrives. He is informed that it is an informal panel. There are findings made and I submit there is no interrogation. We specifically advise the man of his Fifth Amendment rights, in the event he is unaware of them. We give him the opportunity.

QUESTION: You may advise them, but do you interrogate them if -- do you start to interrogate them?

MR. STEIN: The testimony here was that they asked the man how he will plead to the charge.

QUESTION: Yes.

MR. STEIN: Guilty or not guilty. That if he requests to remain silent, he will not be questioned.

QUESTION: Yes, but what if he doesn't request to remain silent?

MR. STEIN: Then they will question him.

QUESTION: So there is interrogation unless he claims the privilege.

MR. STEIN: Unless he claims the privilege and the rules specifically provide that no adverse interest will be drawn if he remains silent. They will not consider that adverse to the inmate.

The purpose of the hearings, of course, is not the same as the police station interrogation. This Court has set forth the purposes of the disciplinary hearing better than I can. It has also described the conditions of the state prisons and what are the reasons behind the opinions in Preiser and the tensions and all that are involved in a prison system.

I won't take time today to go back over that. But as I say, the purpose is not to elicit statements for use of a subsequent criminal prosecution.

If Miranda has any effect at all, it is not -- there is no -- I don't perceive that there is a right to receive the Miranda admonitions. I think the prison authorities have the discretion to either give them or not give them, running the risk that if the inmate says anything, Miranda will be applied ultimately in a criminal

trial to prevent the admission of the statement. We have voluntarily agreed to give the Miranda admonition.

It is unfortunate that the admonition that was given probably went too far in that it advised him of his right to an attorney and when he asked about that, he was told that right arose if the district attorney talked to him or if he went to a criminal trial.

QUESTION: When you say you voluntarily give the Miranda warning out, does that mean you also provide counsel?

MR. STEIN: No. No. We do not provide counsel. We give the man --

QUESTION: So what, in effect, you are saying is, you give Fifth Amendment --

MR. STEIN: We give the Fifth Amendment and I think that is as far as we should have to go, is to advise the man of his right to remain silent under the Fifth Amendment and that anything he says could be used against him in a subsequent prosecution.

At the time they were reading from the standard Miranda warning card and they went beyond that and told him of his right to an attorney but the testimony before the district court was that if he asked for an attorney he would be advised that the attorney would be provided if and when he was ever prosecuted criminally but not at

the hearing.

QUESTION: And you do allow attorneys outside of the hearing room for the purpose of advising the inmate prior to the hearing?

MR. STEIN: Well, the inmate can always communicate with an attorney, yes, that is true. We don't allow the attorney to, as in a grand jury situation, remain outside and the inmate goes --

QUESTION: Back and forth.

MR. STEIN: -- back and forth. No, we don't allow that.

We submit that Miranda doesn't require that we furnish attorneys. It gives -- effectively, what it does is, it gives the state the choice of either continuing to question the man or give him an attorney.

QUESTION: Well, it doesn't do that as a matter of substantive law. Miranda simply says what may not be admitted in a criminal trial.

MR. STEIN: It is a rule of evidence, I think.

QUESTION: That is right.

MR. STEIN: And its fulcrum for its application is in an ultimate criminal trial.

QUESTION: That is right and it doesn't say what the state has to do or doesn't have to do in an interrogation of anybody.

MR. STEIN: That is correct.

QUESTION: It just has to do with what can be admitted in a criminal trial. Is that it?

MR. STEIN: Yes, that is the point I am --

QUESTION: So, actually, if that is right, this issue should really have never come up until the subsequent criminal trial if we are just going to decide cases that are before us.

MR. STEIN: That is correct, your Honor. As a matter of fact, there are statistics in this record to show that some 200 -- in a certain period of time, some 267 inmates were ultimately referred for prosecution. Eleven of those inmates were prosecuted. Fourteen of those inmates made statements characterized by the Respondents as arguably incriminating.

I submit that it is a waste of everyone's time and effort to provide 267 attorneys at disciplinary hearings when there is only going to be ultimately 11 trials and even if every one of those 11 gave a statement, and that is not clear, that due process can be satisfied by the traditional rules of voluntariness of an admission of a statement and then he will have an attorney as a representative at the trial.

QUESTION: At any rate, there is no occasion for any court to pass on that question until it is confronted

with it.

MR. STEIN: We tried the Ninth Circuit. We tried to convince the Ninth Circuit of that and yet they have, in their opinion, said we must provide an attorney whenever the charge is criminal. That is what brings us here. I am as sorry as anyone that we are here, really, I --

QUESTION: Didn't you say in this one that he was not prosecuted?

MR. STEIN: No, he was not prosecuted. He was referred for prosecution but the prison authorities don't decide what is and is not prosecuted. That is the district attorney's role.

QUESTION: We know that.

MR. STEIN: And he was -- yes, and he receives those complaints.

QUESTION: I think I perhaps did not get the distinction you drew before. You suggested that the prisoner may always communicate with an attorney but during the course of one of these proceedings, a disciplinary proceeding, the attorney may not be nearby for him to consult.

MR. STEIN: That is correct.

QUESTION: When is it that he is permitted to communicate? That is what I don't understand.

MR. STEIN: Okay. Well, they generally can

write letters to attorneys at any time, communicate back and forth, and they are given notice of the charges well before the -- but we are not --

QUESTION: I see.

MR. STEIN: I am not --

QUESTION: But it would be in advance. He would have the opportunity to, somehow to communicate with the attorney in advance of the actual disciplinary proceedings, the hearing.

MR. STEIN: Yes, that is right. The time of notice and hearing, as I say, it was six days in this case and obviously he got in touch with his attorney because he filed the civil rights action.

QUESTION: And may the attorney come to the institution and --

MR. STEIN: And interview? There is visiting provided for between the attorneys and the inmates, certainly.

QUESTION: Even one as -- as Clutchette was?

MR. STEIN: Oh, yes, even one on cell status or isolation --

QUESTION: Yes.

MR. STEIN: -- is allowed out of his cell to have interviews with his attorneys.

QUESTION: Is there some form that the authorities

use at the hearing to advise him of his rights?

MR. STEIN: There's the -- we were using at that time the standard Miranda warning card which lists all of the admonitions and asks the two questions, do you understand and if you understand --

QUESTION: But would you suppose someone would understand from that that they are advising him that whatever he says could be used against him, not only for purposes of a disciplinary hearing but for purposes of some later criminal proceeding?

MR. STEIN: Oh, it specifically says that anything you say can be used against you in the trial in the criminal prosecution. That is in the record. The admonitions are set forth and they were in the ultimate.

He was first advised that he might be prosecuted criminally and that any statements he used would be used in that -- could be used in that prosecution.

The -- one of the problems we have is that the -- after the Wolff decision when we preitioned for rehearing in the Ninth Circuit, the Ninth Circuit specifically says in their opinion that the issue of counsel in this situation was not reached by Wolff and they went on to reach it and we submit that where the lower federal courts are reviewing a state prison procedure, if they want to -- if they think that is unconstitutional, they should point

to a direct holding of this Court. They should not reach these matters on decisions they might reach were they the ultimate arbiter.

They can reach that, I submit to you, in federal prisons, in federal litigation, but when they do that in state litigation they limit down to one the total -- the parameters that we can experiment in.

At the moment, we have, every state in the Western United States is bound by this decision in Clutchette and must supply counsel and as I submit, there was no direct holding in Wolff and when the Ninth Circuit realized that there was no direct holding in Wolff, they should have -- at the most they could have issued, I submit, would be an advisory opinion that if this came up in a federal case they would require counsel but they should have remanded this case to the state courts where they belonged.

Even JUdge Zirpoli, at the close of the hearing we held in the district court, notes in his record that "It is unfortunate that this case came at the first to a federal court."

I'd reserve any remaining time I might have for rebuttal. Thank you.

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

Mr. Turner.

ORAL ARGUMENT OF WILLIAM BENNETT TURNER, ESQ.

ON BEHALF OF RESPONDENTS

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

There is no issue in this case as to the type of misconduct that is punishable within a prison or as to the type of punishment that can be imposed by prison officials.

The issue here involves the reliability of the fact-finding process used within the prison and only in very serious cases in which there is a dispute about the facts.

We are not dealing in this case with any emergency situation. The court below specifically said that prison officials always have the discretion to isolate any disruptive prisoner without any hearing.

These disciplinary proceedings involved in this case are those that can substantially alter a man's conditions of confinement and prolong his term of incarceration.

Now, it is also not the issue in this case whether the procedures that were used at the time this case was brought meet constitutional standards because they clearly do not. None of the safeguards that this Court required in the Wolff case were followed in 1970

when this case was brought.

Of course, California doesn't contend that they were in compliance then.

QUESTION: Mr. Turner, if these conditions can prolong a man's confinement, as you say, why is it maintainable at all in 1983 under Preiser?

MR. TURNER: Because the relief that is sought in this case is not release. It is not earlier release. There is no challenge in this case to the fact or duration of confinement.

QUESTION: But there was an expungement of some judgment, wasn't there?

MR. TURNER: Well, there was a part of the judgment which has never been carried out because it has been stayed -- was to expunge the disciplinary records in this case. There is no reason to believe that that would lead to release of either of these men.

QUESTION: But wouldn't it lead to at least earlier release?

MR. TURNER: No, not necessarily.

QUESTION: Well, possibly?

MR. TURNER: Remotely.

QUESTION: Well, then, why isn't it barred under Preiser?

QUESTION: Because Preiser says that a 1983

action is barred only when the fact or duration of confinement is being challenged and immediate or earlier release is being sought.

Now, in Wolff; this case is actually covered by Wolff because the only relief that is sought in this case is an injunction against the prospective enforcement of prison rules. It is exactly like Wolff in that respect. Footnote one in the Wolff decision covers it.

There is also not properly before this Court the constitutionality of the current procedures that are being used at San Quentin because the plan that is currently in use was not before the Ninth Circuit.

There has been a good deal of new evidence, discovery taken in the district court and the matter is under submission in the district court. Judge Zirpoli has not yet ruled on any aspect of the new plan and there is indeed considerable dispute about how the new plan actually operates in practice.

QUESTION: When you say "new plan," just what do you encompass in that?

MR. TURNER: I mean by that, your Honor, the plan which --

QUESTION: Everything the Ninth Circuit ordered?

MR. TURNER: No. The plan that the officials formally submitted to comply with Judge Zirpoli's order.

Their current plan is in the record at page 296 -- beginning at page 296. That is the plan that they are operating under now and there has been no ruling by the district court or by the Ninth Circuit about the adequacy of the provisions of that plan.

I take it, then, that the issue that the Court granted certiorari for is to consider whether the Ninth Circuit required that when the plan is ruled upon by the district court, that that plan would be required to have too much due process in it. I take it that is the state's complaint.

Of course, the state relies largely on the Wolff decision. We don't believe that Wolff can be read as controlling every aspect of this case.

In the first place, the Court said that its conclusions there were not graven in stone and the record in this case shows quite a different set of circumstances are -- well, there are different circumstances here than there were in the Nebraska prisons.

QUESTION: Well, do you rely separately on that language, "not graven in stone?" for a case remanded to a court of appeals for reconsideration in the light of Wolff?

MR. TURNER: Well --

QUESTION: Do you suggest that a court of appeals

is free to take some tack that is in any way inconsistent with Wolff?

MR. TURNER: No, I think they clearly have to follow Wolff but they have to follow Wolff only insofar as Wolff actually holds one thing or another and in this case --

QUESTION: Well, that would be true regardless of whether there were language about being graven in stone, wouldn't it?

MR. TURNER: That is, of course, true. The primary distinguishing factor here between the situation in Wolff is California's unique indeterminate sentence law where the ranges of sentence -- this, for example, in Clutchette's case, his sentence for second degree burglary was six months to 15 years and most of the common felonies carry sentences of from five years to life.

The Adult Authority, which does the actual sentencing and sets parole dates as well as maximum sentences, usually meets a prisoner on an annual basis and either sets a date or doesn't set a date but every disciplinary infraction must be referred to the Adult Authority for consideration at that time.

QUESTION: And where is Clutchette now?

MR. TURNER: Clutchette is on parole. He was paroled in 1972.

QUESTION: That is what I thought. So this case

is moot as to him himself?

MR. TURNER: Yes. No doubt about that.

QUESTION: No question of that.

MR. TURNER: Unless he is reincarcerated.

QUESTION: Well -- Is it or is it not moot as to him?

MR. TURNER: Yes, it is. He wouldn't be entitled to any relief here, individually.

QUESTION: Right. But there is now a named intervening plaintiff --

MR. TURNER: Yes, Alejandro Ferrell, who was --

QUESTION: Who is still --

MR. TURNER: -- who was joined as a party plaintiff in 1972 and who is still incarcerated at San Quentin.

QUESTION: But it makes no difference now with respect to Clutchette that the actual hearing he had did not comply with -- even with what this Court held was what was required in Wolff.

MR. TURNER: That is right. I suppose he might --

QUESTION: That is over the dam now.

MR. TURNER: -- theoretically be interested in expungtion. There is a damage claim which he made which has never been formally abandoned but I doubt seriously that it will be pursued.

QUESTION: Well, you said it was moot as to

Clutchette. Now, either it is or it is not in your submission.

MR. TURNER: I think for present purposes the Court may consider that claim abandoned as to him.

QUESTION: Well, this is not a class action. It is just a new name --

MR. TURNER: Well, that is unclear, Mr. Justice Brennan. In the --

QUESTION: Well, there has been no certification.

MR. TURNER: In the district court's opinion, it is said -- Judge Zirpoli said that the case is brought as a class action under Rule 23 B(1) and B(2) and clearly, all the requirements were met. There was no separate motion to certify --

QUESTION: Is that tantamount to a certification of this as a class action?

MR. TURNER: I should think so. There is no question about the fact that the class --

QUESTION: Of course, this new plaintiff is an intervenor, isn't he?

MR. TURNER: He is ex parte plaintiff, yes.

QUESTION: That is what I mean. Whether or not it is class action, it --

MR. TURNER: He has standing to raise all of the issues here. No doubt about that.

QUESTION: I think in Jacobs last year we held that where a district court has made exactly the same observations at you suggest Judge Zirpoli made here, that that was not a sufficient certification. But I take it it doesn't make any difference.

MR. TURNER: I don't think it makes any difference in view of the other plaintiff who does have standing.

QUESTION: Who are the members of the class?

MR. TURNER: I beg your pardon?

QUESTION: Who are the members of the class?

MR. TURNER: All prisoners at San Quentin. That is how the class was defined in the initial complaint.

QUESTION: That is a pretty broad class.

MR. TURNER: Well --

QUESTION: Well, they aren't all brought up on disciplinary actions, are they?

MR. TURNER: No, but they may be; at any time and any moment of any day they are subject to being called before the disciplinary board on very serious charges.

QUESTION: So are all the people that are arrested and all the people about to commit crime. That is a pretty big group.

MR. TURNER: The Adult Authority does not hold its own fact-finding hearings. It relies on the hearing that was conducted in the prison and this is what means

that the consequences of what happens at a disciplinary hearing are very serious because the California Supreme Court has held a single disciplinary infraction is sufficient cause to deny parole or to rescind the parole date which has previously been granted.

That is why the Supreme Court case in Rodriguez mentioned by counsel doesn't make any difference because when they set a tentative parole date, they can then rescind it on the basis of a disciplinary offense and make a man serve a whole lot longer in prison as a result.

It is the difference between being paroled next month and possibly five years from now when the macimum sentence expires.

The indeterminate sentence has particular relevance where the charge against the man is criminal in nature, where the -- as in Clutchette's case, he was charged with assault on an officer. That is a fairly heavy felony in California law.

In that kind of case, the state has an effective option of how to deal with the man.

It can achieve further incarceration, additional incarceration either by following through on the criminal process or can do the very same thing through the Adult Authority with far less procedural ceremony.

Summarily, they can make the man serve far

longer.

The issue to be tried, of course, in these disciplinary proceedings, is the same issue that would be tried in a criminal trial: Did the man or not commit the criminal act?

The courts below properly held that the San Quentin procedure that was used when this case was brought failed to protect the Fifth Amendment privilege.

This is because the man is faced with incurring a very serious and immediate punishment if he doesn't speak in his own defense.

He has no adequate alternative means of defense besides speaking for himself. At this time in San Quentin he had no right to call for any witnesses. He couldn't cross-examine anybody. He had no counsel. He had no counsel-substitute. He was left wholly on his own. The sole means of defending himself was to explain his situation but how could he do that and also exercise his Fifth Amendment privilege?

It is that dilemma that the Ninth Circuit addressed itself to and of course, the dilemma is doubly difficult fot the prisoner because he does not have the advice of counsel. There is nobody there to advise him on the intricacies of the Fifth Amendment.

Whether there is any realistic risk of

prosecution as a result of this event, whether what he wants to say might tend to incriminate him, and it is just not accurate to say that prisoners at San Quentin can routinely consult with counsel.

I have heard ofvery few San Quentin prisoners who have access to counsel. As this Court must recognize of virtually all of them, they are indigent. The only reason Clutchette had counsel is because he was at this time already under indictment for a felony, an in-prison felony in California and that is the only reason he had counsel and could consult with him.

So the situation facing the prisoner in these disciplinary hearings is, either he has to forfeit his only means of defense, the right to speak in his own behalf, or he has to waive the Fifth Amendment privilege.

This conflicts, we submit, with the line of cases in this Court, most recently Lefkowitz, and the earlier cases that say, a state cannot penalize the exercise of the Fifth Amendment and cannot coerce people to give incriminating testimony against themselves.

It doesn't make any difference that formally in this case the prisoner is not being punished for taking the Fifth Amendment and it doesn't make any difference whether or not there is an inference drawn from his silence because he doesn't have any other means of

defending himself.

QUESTION: In Lefkowitz, if he didn't talk, he would lose his job.

MR. TURNER: That is right and here if he doesn't talk he for sure gets the disciplinary punishment. There is really no doubt about it.

QUESTION: Well, that isn't for being silent.

MR. TURNER: No, it is not for being silent. It is because of being silent because he has no other defense but --

QUESTION: Well, it is because of the evidence against him, isn't it? It is not for being silent. It is because of what the evidence is against him.

MR. TURNER: Well, the question is whether he is required to forfeit all defense, his only defense, and whether due process can countenance that.

QUESTION: Is it true that he had 14 affidavits in this case, 14 written statements against him?

MR. TURNER: There were written statements filed.

QUESTION: Fifteen?

MR. TURNER: I don't know how many there were.

QUESTION: Quite a few.

MR. TURNER: He was not shown any of those statements, of course.

QUESTION: Yes, but there were quite a few so

it could be that they thought he was guilty, from those statements.

MR. TURNER: No doubt about that, as they do in most cases but --

QUESTION: Without even considering the fact of whether he testified or not.

MR. TURNER: That is right.

QUESTION: Well, you talk about forfeiture. Under your line of reasoning, isn't McGautha pretty much against you?

MR. TURNER: Well, it is not for this reason, your Honor. In McGautha the accused had the most elaborate procedural protections known under our law. He had a lawyer, the presumption of innocence, the state required to prove guilt beyond a reasonable doubt, trial before a jury drawn from a cross-section of the community. His counsel, as the Court went out of the way to say, could do everything that the accused himself wanted to do in the way of explaining mitigating circumstances to the jury.

QUESTION: But he still had to decide whether to take the stand or not.

MR. TURNER: Oh, he had to make that choice but the point is that if he made the choice to remain silent, he was still not without means of defense whereas the prisoner in the situation has nothing going for him other

than the right to speak in his own behalf.

Everybody agrees that due process says that you have the opportunity to be heard in your own defense, but you can't have it here if you want to take the Fifth Amendment.

QUESTION: He can't have it here because why?

MR. TURNER: Because he may be concerned about protecting himself in a later criminal prosecution.

QUESTION: Well, what if --

MR. TURNER: If he wants to exercise his Fifth Amendment privilege, that means he can't defend himself in the hearing.

QUESTION: What if he just wants to say, I just want to point out to you some of the shortcomings in the testimony of these other witnesses.

Is he prevented from doing that? Does he then open himself up for complete interrogation?

MR. TURNER: I don't know.

QUESTION: Well, if the answer to that is no, I would think there is not much to your argument.

MR. TURNER: Well, the point is that if he doesn't do something at the disciplinary hearing, he is going to be punished by the tribunal there and that punishment may include an immediate dose of solitary confinement, the other punishments that are available in

California as well as an increased term of imprisonment when the Adult Authority takes a look at it so he has got to make up his mind right then and there whether he is going to --

QUESTION: Well, I know, but that argument would mean that it wouldn't make any difference whether this conduct is otherwise criminal or not.

MR. TURNER: Well, the difference is because of the Fifth Amendment. He may not want to take the risk of saying something that would --

QUESTION: That would prejudice him in this disciplinary proceeding.

That is your argument now, apparently. It isn't just his fear of some later criminal trial.

MR. TURNER: Well --

QUESTION: Surely you can't say that that isn't covered by Wolff.

MR. TURNER: No, but this case is different from Wolff because of the possibility of criminal prosecution and he has to do one of two things, either take the Fifth or defend himself.

QUESTION: How do you know there was no possibility of future prosecution in Wolff?

MR. TURNER: Well, I have been told that in the district court the prisoners offered evidence that they

had been accused of things which could have been considered crimes but as I understand it, it was neither briefed nor argued by any party here that there was a criminal prosecution problem in the case and it is not adverted to in the Court's decision in any way.

I suppose if I am wrong in my reading in Wolff we'll find out about it in the decision of this case but I would suggest to the Court that the factors involved here are so much different from Wolff, when you have the spectre of a criminal prosecution and fully protecting the man's Fifth Amendment privilege.

QUESTION: Well, I understood the state to say that the -- at least, in the California situation that the man may at any time decide that he doesn't want to talk or to talk any more or he could leave.

MR. TURNER: Well, I don't think the record shows one way or another on that but even assuming that he could walk away from it --

QUESTION: Or assume that he can say, look, I don't want to talk any more. I have now said all that I want to say.

MR. TURNER: He is giving up any defense of a disciplinary practice and he has to take the consequences of that.

QUESTION: But he may stop at any time. Do you

think he can or not?

MR. TURNER: Yes. I have no reason to doubt that he can stop at any time but then suffer the consequence of the disciplinary punishment.

QUESTION: Is that fundamentally very much different from the decision made by a defendant in a full criminal case that he will not take the stand after there has been overwhelming evidence against him?

MR. TURNER: Well, I think the distinguishing factors are two: the -- analytically. It seems to make a difference in the Court's decision whether the --

QUESTION: Which Court's decision?

MR. TURNER: This Court.

QUESTION: You mean, Wolff?

MR. TURNER: Wolff and Lefkowitz and McGautha and all of the decisions that deal with the various issues. If the person is going to suffer serious consequences, that may not make the difference but if he has no alternative means of defending himself, that will.

That is, if the person is going to suffer grievous harm if he doesn't defend himself and if there is no other means of defending himself --

QUESTION: Now, when you say --

MR. TURNER: -- then there is a serious problem.

QUESTION: When you say, if he does not defend

himself, do you mean if he does not speak? Or do you mean if he doesn't come in with a full scale effort to meet the evidence of the other witnesses?

MR. TURNER: I only meant to say speak because that is all that the prisoner has going for him, at least at the time this case was tried; his only means of defense. He couldn't call any witnesses. His only means of defense was what he could say to explain away the charge.

QUESTION: Well, tell me in detail how he gives it up? Suppose the question is, suppose that he is advised that he can be silent and that anything can be used against him and he shrugs his shoulders and doesn't say anything, so they ask him, they say, well, the simple question is, did you beat up the guard or not?

Now, he says, well, I decline to answer.

And they say, fine, do you want to answer any other questions?

And he says, no.

Now, how does he give up any defense?

MR. TURNER: Well --

QUESTION: By declining to answer that question.

MR. TURNER: Well, because if he could -- for example, if his defense was, I was there but it was the man next to me who hit the guard.

QUESTION: Now, he doesn't give up any defense

by saying that, does he?

MR. TURNER: No, but saying that he was there may incriminate him in a criminal trial and it may be an important piece of evidence.

QUESTION: But he doesn't give up his defense, though.

MR. TURNER: In the criminal trial.

QUESTION: Yes.

MR. TURNER: That is right, he doesn't give up any defense in the criminal trial.

QUESTION: Nor in the disciplinary trial.

MR. TURNER: Well if he refuses to answer the question.

QUESTION: But if he answers that he doesn't give up.

QUESTION: And by the way, do you know whether there is any claim -- there is no law that says if you lie in one of these proceedings you are subject to perjury?

MR. TURNER: No, I don't believe so. It is not usually conducted under oath.

The issue before the Court has been somewhat mischaracterized. It is not whether counsel has to be provided in these proceedings, it is whether some kind of special precautions have to be taken because of the collision of two constitutional rights.

QUESTION: "Some kind," meaning what?

MR. TURNER: Some kind of special precaution. Well, the Ninth Circuit specified three. First, it said that the state can hold its own disciplinary proceedings.

Now, that is fine and do-able if the state is not wanting to impose segregation or some kind of disciplinary-like punishment while the case is pending in criminal court and that is many but definitely not all of the cases.

In many of the cases the state is going to say no, we don't want to wait until the criminal proceeding is over.

Well, then the Ninth Circuit said yes, that the state can hold a hearing and then it has the choice between providing counsel to protect the Fifth Amendment or providing use immunity.

Use immunity is a very simple and workable solution in these circumstances. It would eliminate the problem, essentially, because the man could testify freely and what he says couldn't be used against him and it would eliminate the need for counsel there.

But the Ninth Circuit, as I read the decision, left it up to the state to make that choice.

QUESTION: Would it be possible for them, if they give him use-immunity, to couple with that a

requirement that all his statements be under oath and subject to the penalties of perjury?

MR. TAYLOR: The state do it? The state could do that because it would then be openly compelling testimony and can do so, so long as it immunizes the --

QUESTION: Well, is there any difference -- is it any more or less compelling whether he is under oath or not under oath?

MR. TAYLOR: No, I don't think that makes --

QUESTION: The only difference is that in one case he may be subject to criminal prosecution for perjury, is it not? And that might keep the whole proceeding on a track a little bit more.

MR. TAYLOR: That is right. That is right. I think it would be an excellent idea.

QUESTION: When you spoke in response to Justice White about his giving up something, if 14 witnesses have placed him at the scene, what do you suggest he is giving up when he responds?

MR. TAYLOR: Well, in this case, the defense was clearly going to be self-defense and he is giving up --

QUESTION: Well, then, it wouldn't incriminate him just to say he was there.

MR. TAYLOR: No, not in that case but to go any step beyond that might get him in very deep trouble and

assaulting an officer in a California prison under the California penal code is a very serious felony and he shouldn't have put to that choice between either saying nothing or giving up the Fifth Amendment.

This choice that the prisoner is confronted with can't be postponed until the criminal trial to see whether what he says might be admitted or might not be admitted in evidence. The constitutional violation occurs at the hearing where he is required to forfeit one right or the other.

QUESTION: Well, would you say the constitutional violation in a typical Miranda interrogation followed by criminal trial occurs at the time of the interrogation or only if the Court fails to exclude the evidence?

MR. TURNER: Only at the trial, the criminal trial.

QUESTION: In other words, the defendant couldn't get an injunction out of, perhaps, Judge Zirpoli, to say that you may not interrogate this man without giving him Miranda warnings?

MR. TURNER: No. Not in an individual case. That would clearly be a matter for the state courts to deal with on criminal prosecution.

There are several other issues in this case. I intend to touch only on the other major issue, which

involves the right of confrontation or cross-examination.

And, of course, there was no such right at the time this case was tried in California prisons. What the Ninth Circuit did in light of the decision in Wolff, holding that there is no general right of cross-examination but that this would be committed to the discretion of prison officials, the Ninth Circuit simply prescribed a method by which arbitrariness could be controlled and said every time you deny cross-examination, put your reason on the record.

The Petitioners in this case have no quarrel with the requirement that they record reasons for denying cross-examination. Their present plan does exactly that and they have been living under that plan now for about three and a half years.

What they do complain about is that the reasons given authorized by the Ninth Circuit are not broad enough.

QUESTION: Well, that really stands Wolff on its head, though, what the Ninth Circuit did, didn't it? We said that the general presumption is against cross-examination in Wolff and the Ninth Circuit comes along now and says the presumption is in favor of cross-examination.

MR. TURNER: Well, we don't think that Wolff can be read as a declaration by this Court that never in

any circumstances can there be a right of cross-examination.

QUESTION: No, that wasn't my question because I said I would read Wolff as saying there is a presumption against cross-examination and now along comes the Ninth Circuit and says there is a presumption in favor of it.

Now, don't you think that is inconsistent with Wolff?

MR. TURNER: Well, I think it is inconsistent with the spirit of Wolff.

QUESTION: And then what business does the Ninth Circuit have doing that on a remand for reconsideration in the light of Wolff?

MR. TURNER: Your Honor, it wasn't a remand. The Court agreed itself to rehear it in light of Wolff.

QUESTION: Well, all right --

MR. TURNER: It is giving its own reading to Wolff and every other court to address this issue since Wolff has done the same thing.

QUESTION: Well, what business do any of them have then, if you say it is inconsistent with the spirit of Wolff?

MR. TURNER: I think the reason the courts are doing that is because they read Wolff carefully and can see that in Wolff -- Nebraska, in fact, permitted a limited right of cross-examination. The prisoner was allowed to

meet with the charging party and then at the hearing itself to ask the charging party questions so there was a limited right of cross-examination in Wolff itself.

Then what the Court said that went beyond that wasn't really necessary to the decision there but probably more important than that --

QUESTION: You mean, what the Court said in Wolff wasn't necessary to a decision?

MR. TURNER: If Wolff can be read as saying there is never a right of cross-examination, that certainly would not have been necessary to a decision.

QUESTION: Well, and do you think the Court of Appeals are then free to say there is a right of cross-examination?

MR. TURNER: No, and that is not what the Court said here, either. All they said is, do what the state is doing now and that is, provide reasons so that you can see whether the people are -- whether the officials are dealing fairly with prisoners in these situations.

In Wolff, the district court in that case, feeling itself bound by the then-existing Eighth Circuit precedent, didn't take any evidence whatever on whether a limited right of cross-examination is workable or that problems might result if it were used.

We think that this is a matter that is susceptible

of proof and in the district court in this case before the district court gives final approval to any rules, there ought to be an opportunity to take testimony on these problems because after all, a large number of states, 28 states according to the ABA survey, implement some kind of cross-examination rights, some kind of confrontation.

QUESTION: But that should be permissible only if Wolff left it open.

MR. TURNER: That is right.

QUESTION: And you really, when you say it is contrary to the spirit of Wolff, I gather, you said at least you thought it didn't think it left it open.

MR. TURNER: Well, no, I certainly think that what the Ninth Circuit did was proper in this case. That decision ought to be affirmed so that the case can go back down to the district court finally to dispose of what due process requires in this case.

QUESTION: Mr. Turner, I want to come back to the first point you argued. I am looking at the question number one in your brief and you end up by saying that there must be a hearing that protects the Fifth Amendment privilege of the inmate.

The question as phrased in the brief of the Attorney General of California states that specifically in terms of the requirement of counsel to be present. Do

you go beyond that?

MR. TURNER: No, we don't go that far, Mr. Justice Powell, we --

QUESTION: What exactly do you say is required by the Constitution?

MR. TURNER: That the Ninth Circuit gave the state options -- three options of dealing with the situation, providing special precautions at the hearing.

One, is the postponement hearing until you see whether the district attorney is going to prosecute or until the trial is concluded. That obviously eliminates the problem except when the state wants to take immediate action. And it may well be able to live with the postponement in many cases but where it wants to take immediate action and hold a hearing, then there are two options -- either counsel or use-immunity and the Ninth Circuit would permit either one.

That is why the issue is before this Court. It is not simply whether counsel has to be provided.

QUESTION: And these three options apply only where the misconduct also constitutes a crime.

MR. TURNER: That is correct, your Honor.

QUESTION: Well, not where it does, but where it may. Isn't that the qualification? Or it may be subject to criminal prosecution.

MR. TURNER: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Stein, you have just a few minutes -- two minutes left.

REBUTTAL ARGUMENT OF WILLIAM DOUGLAS STEIN, ESQ.

MR. STEIN: Mr. Turner correctly pointed out, the Ninth Circuit did provide us with three options but in reality they boiled down to just the one of counsel, I submit. Both parties are -- postponement is unacceptable to both parties.

We have been accused in the circuit court and in the district court of doing, under the term "classification" what the district court and the Ninth Circuit said we couldn't do, discipline.

We don't want to postpone these things.

In our plans for all cases other than these that involve criminal, we try and get this over in 72 hours. That is the way to maintain discipline in state prisons, not with postponement.

We postpone these major conditions, these major cases and we have to confine the man under some imposed conditions, restrict his freedom to move about and we are accused of doing by subversion what we can't do directly.

Use-immunity -- there is not -- really, I don't see anything as use-immunity, your Honors. It seems to me what we are talking about is the traditional theories and

notions of voluntariness of confessions, which is black letter law all down the books.

If the man is compelled to make a statement, then some sort of use-immunity is required but that is not, use-immunity is nothing new. That use-immunity is the trial court's hearing under Johnson v. Avery on the voluntariness of the statement that was made.

We agree, as anyone must that looks at this thing, that the prisoner faces a difficult choice. There is no question about that.

But what is counsel going to do for him? What role has counsel -- we have been talking about counsel. What role do you see him to play here? He is a mere advisor, apparently.

QUESTION: Now, why do you agree -- what is the difficult choice that counsel faces?

MR. STEIN: Okay, he faces a difficult choice. If he can make some sort of pitch to the disciplinary board that might get him out of the discipline.

QUESTION: Right.

MR. STEIN: But he might incriminate himself in a trial court.

QUESTION: Well, why would it? If it is going to get him out of a disciplinary infraction, why would it get him into a criminal offense?

MR. STEIN: Well, he -- I assume that --

QUESTION: Based upon the same charge, you mean, the same transaction.

MR. STEIN: He might make a statement the prosecutor could use later as a prior inconsistent statement or something like that. He is certainly not going to confess to a criminal charge as a way of getting out of it.

QUESTION: No, he isn't, is he?

MR. STEIN: No.

QUESTION: And that is not going to help him.

MR. STEIN: No, that's not.

QUESTION: And the only thing he is going to say, presumably in the disciplinary proceeding is something that he thinks is going to help him.

MR. STEIN: He thinks will help him.

QUESTION: That is probably not going to be incriminating, is it?

MR. STEIN: Probably not directly.

QUESTION: So why is it so inevitably such a difficult choice?

MR. STEIN: Perhaps we have missed --

QUESTION: Perhaps you have conceded too much on this.

MR. STEIN; Perhaps we have misconstrued all along.

I thank your Honors for your time.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:06 o'clock p.m., the case was submitted.]