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

In the

Supreme Court of the United States

ERNEST L. MONTANYE, Former Superintendent
of Attica Correctional Facility, et al.,)

Petitioners,)

v.)

RODNEY R. HAYMES,)

Respondent.)

No. 74-520

Washington, D.C.
April 21, 1976

Pages 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

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ERNEST L. MONTANYE, Former Superintendent :
of Attica Correctional Facility, et al., :
: Petitioners, :
: v. : No. 74-520
: RODNEY R. HAYMES, :
: Respondent. :
----- :

Washington, D. C.,
Wednesday, April 21, 1976.

The above-entitled matter came on for argument at
10:56 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOEL LEWITTES, ESQ., Assistant Attorney General of
New York, Two World Trade Center, New York, New
York 10047; on behalf of the Petitioners.

ALVIN J. BRONSTEIN, ESQ., The National Prison Project
of the American Civil Liberties Union Foundation,
1346 Connecticut Avenue, N.W., Washington, D. C.
20036; on behalf of the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 74-520, Montanye and others against Haymes.

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

ORAL ARGUMENT OF JOEL LEWITTES, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The issue presented today is whether the Due Process Clause requires that an inmate who is transferred within a State from one maximum security facility to another maximum security facility, with no imposition of disciplinary penalties, be afforded notice of the reasons for the transfer and an opportunity to be heard.

The underlying facts are as follows:

The respondent Haymes was incarcerated at Attica Correctional Facility in August of 1971. Attica being a maximum security facility. His conviction was for manslaughter in the first degree.

Attica is one of six maximum security facilities in the State of New York.

On June 9th, 1972, the respondent Haymes was transferred from Attica to Clinton, which is another maximum security facility. Two days earlier, the prison officials at Attica had confiscated and seized from Haymes a petition he

was circulating on behalf of other inmates.

This document, denominated by the Respondent to be a petition, was addressed to the District Court of the Western District of New York, and in it claimed that the discharge of Haymes on that very day as a law assistant in the Law Library at the Attica facility had already deprived 82 signatories of that petition of legal assistance.

In addition to that, the petition also complained of the various attitudes of the correction officers in charge of the Law Library.

A few weeks later, at the Clinton facility, Haymes filed a pro se complaint, returnable in the Western District of New York, against various Attica officials. And he raised two claims in that complaint.

No. 1, he claimed that the confiscation of the petition, he was entitled to damages for that in the amount of \$1500 compensatory damages.

And his second claim was that various acts of retaliation, including the transfer, had been taken against him and he sought \$1500 punitive damages.

With regard to the general claim of retaliation, only one aspect was pursued by counsel in the district court and that was the issue of transfer.

In the district court, the court held that, with regard to the transfer issue, it was dismissable, and it did

dismiss it, holding that even though it was alleged that the transfer was punishment, there was no allegation of harsher or substantially different treatment, since he was transferred from one maximum security facility to another maximum security facility.

However, in the Second Circuit Court of Appeals, Chief Judge Kaufman pointed out that it simply -- all an inmate had to do was to claim or allege that the transfer was for punishment, and that would entitle him to his day in court, where he could prove the transfer was punitively motivated and that the consequences were onerous to him.

The Court did not in any way analyze the facts to determine whether or not there was indeed an underlying liberty or property interest involved.

The Court simply defined punishment as harsh treatment meted out to reform, deter or reprimand, and suggested various consequences that flow from the transfer itself: No. 1, there was a claim -- hypothetical claim, I should say -- that was set forth in the opinion of the Second Circuit that he would be removed from his family. The Clinton facility is several hundred miles away from the Attica facility from which he was transferred.

QUESTION: I suppose it could be just the reverse, couldn't it?

MR. LEWITTES: Yes, it certainly could have been.

He could have been, obviously, been placed in the Clinton facility initially, at which point he would have been 350 miles or so away from his family.

The Court, that is, the Second Circuit Court of Appeals, also suggested that he suffered grievous loss in the sense that he be removed from his friends in the prison.

The other suggestion was that there could possibly be a loss of property during the time of the transfer.

QUESTION: Do you think the Second Circuit would have said he suffered a grievous loss if he had been moved from one cell block to another in the same prison? Presumably he would have been moved away from some of his buddies there.

MR. LEWITTES: It would seem that under the rationale of the Second Circuit, the answer to that would be yes.

QUESTION: Is that because of the issue raised by the confiscation of the petition? Is that why you say they would treat it the same way?

MR. LEWITTES: I say treated the same way because the Court, without analyzing whether or not there was a property interest or a liberty interest, said that so long as the inmate subjectively feels that there was punishment involved, he is entitled to his day in court.

It is clear, in the hypothetical suggested by Mr. Justice Rehnquist, that a movement from one cell to another

cell may be subjectively, in the mind of an inmate, punishment, and therefore would be entitled to his day in court. And he may even claim grievous loss, in that his cell is not close to the cell of a friend of his by reason of the movement to another cell.

So that was the reason for my affirmative answer.

QUESTION: Do you think they could tell an inmate that if he filed a petition in court he'd be moved to another cell? Would that be appropriate treatment, in response to his exercising a right to write to his lawyer, or something like that?

MR. LEWITTES: I think that he could be moved from any cell within the --

QUESTION: In other words, a rule which said to prisoners: If you write to your lawyer, you'll go to cell block A instead of cell block C. That would be perfectly permissible?

MR. LEWITTES: If we indeed are talking about a rule.

QUESTION: Or a practice.

MR. LEWITTES: Or a practice; then it is possible -- it can be claimed, at least, that by virtue of this particular rule or regulation, he had an expectation that he would remain in that cell. And it might be possible that -- it could be argued that there was, perhaps, created some sort of a liberty interest.

QUESTION: Well, is there a liberty interest in not being treated differently because of the fact that you file petitions or write letters to lawyers, or something like that?

MR. LEWITTES: I don't think it's a liberty interest that may be involved. It's the treating differently that may implicate an equal protection claim.

QUESTION: Let me just put the question a little differently, and then I'll abandon it.

Do you think, in the disposition by the Court of Appeals of this case, any particular significance was attached to the manner in which the whole incident arose? In other words, to the effect that it grew out of the alleged confiscation of the --

MR. LEWITTES: I'm sorry, I didn't hear the last part of that.

QUESTION: Well, as I understand it, two days before the transfer there was allegedly a confiscation of a paper that he'd been circulating.

MR. LEWITTES: That's correct.

QUESTION: How important do you think that background is in the Court of Appeals' disposition of the case?

MR. LEWITTES: I think in their view it was important, --

QUESTION: Well, should it have been important or not?

MR. LEWITTES: I think not.

No. 1, it is not very clear at all whether that was the fact that actually triggered the transfer in the first place.

QUESTION: Well, how would one find out without a trial, whether --

MR. LEWITTES: We don't have a record here, of course.

QUESTION: So, then, you're saying that there should be a trial of that issue, or is it --

MR. LEWITTES: I don't say there should be a trial, because the answer to that is that even if he were transferred for that reason, there is -- was no property or liberty interest involved, and so --

QUESTION: Your position is -- just so I have it right -- that even if he were transferred because he wrote a letter to his lawyer, say, that that would be a permissible transfer?

MR. LEWITTES: Yes, that would.

QUESTION: What if the transfer were designed to not discipline him in any general sense, but simply remove him to a place where he would have no access to his lawyer?

MR. LEWITTES: I think that he could then proceed in a plenary action under 1983, claiming that he was --

QUESTION: Not a procedural due processing, --

MR. LEWITTES: That's correct.

QUESTION: -- but denial of legal --

MR. LEWITTES: That's correct.

QUESTION: In other words, I take it, the combination of your responses means that if, in fact and in reality, the move or the transfer inflicts no harm or injury, that then there is no legal consequence?

MR. LEWITTES: No, what I'm saying -- I'm saying more than that, Mr. Chief Justice; I'm saying that before you determine whether or not there is the grievous loss, whether there is indeed injury, because injury goes to the weight and not to the nature, you must first determine whether or not there is a liberty or property interest to be protected in the first place.

Once it is determined that there is indeed such an interest, then we go to see the weight of that interest, and whether there is indeed grievous loss. I think that using grievous loss first puts the cart before the horse.

QUESTION: Well, do you need to go so far as to say that, for the purposes of this case, that a punitive -- to pursue what we have been talking about -- a punitive shift from the twelve o'clock lunch assignment to the one o'clock assignment, and explicitly stated as such to the prisoner, is -- violates no interest at all?

MR. LEWITTES: I say it violates no interest, and

if there were any loss it would be de minimis.

QUESTION: Yes, we can concede for the moment that if the loss or the injury would be de minimis in traditional terms; but what about the idea that something will be done to the prisoner if he writes a letter to his lawyer? Some sort of a psychological impact is bound to occur on him, isn't it?

MR. LEWITTES: Yes, I think that's true. However, --

QUESTION: Of course that would be the purpose of it, wouldn't it?

MR. LEWITTES: However, the fact is that transfer is never used and is not permitted in the State of New York to be used as a disciplinary matter.

QUESTION: Well, sometimes people do things they're not permitted to do, and then we have a case. That's what we're confronted with sometimes.

But surely you don't need to say, do you, that the State of New York --

MR. LEWITTES: No. I don't -- yes; I --

QUESTION: Change the man's lunch hour and tell him that this is a disciplinary action?

MR. LEWITTES: I think the real answer in this particular case, if I may say so, is that this petition, by the way, was not a petition by the Respondent Haymes, by any means claiming that he was not -- that he was denied

access to the courts. It was a letter written by Haymes on behalf of 82 signatories and not before the district court. And therefore Mr. Haymes would have no standing, in any event, to raise that issue.

QUESTION: Well, Mr. Lewittes, perhaps I -- I think maybe your response to the Chief Justice's question may be somewhat inconsistent with what I understood your earlier response to Justice Stevens' and my questions; but perhaps I'm wrong.

I thought you were saying that as long as he's challenging the matter here under procedural due process and not denial of access to the courts or to lawyers, that he had to establish some sort of liberty or property interest before you ever got to the question of whether there was something punitive done.

And unless he has a liberty or property interest in a lunch-hour right, the State is perfectly free to transfer him from one lunch hour to another and say: We're doing it because we don't like the way you're acting.

MR. LEWITTES: I did say that.

QUESTION: And do you stick to it?

MR. LEWITTES: I do.

QUESTION: You don't see any interference with his right to go to court?

MR. LEWITTES: There was no interference here at all.

with his right to go to court, Mr. Justice Marshall.

QUESTION: Well, I thought that the petition he drew himself and had the other 82 to sign --

MR. LEWITTES: No --

QUESTION: -- charged that the librarian prevented them from getting access to the courts.

MR. LEWITTES: He was -- yes, I said that that was --

QUESTION: Isn't that true?

MR. LEWITTES: That is, the petition was drawn by him on behalf of the 82 signatories.

QUESTION: To object to denial of materials to access to the courts.

MR. LEWITTES: No, that's not at all what the petition was about.

QUESTION: Well, then, see if Judge Kaufman is wrong.

MR. LEWITTES: The petition --

QUESTION: "The document charged" -- well, you just wait and let me read this.

"The document charged that the library officer Edward Brady went 'out of his way to circumvent inmates legal assistance'."

Is Judge Kaufman correct?

MR. LEWITTES: I think that -- to make the statement

more accurate, the petition read that since Mr. Haymes --

QUESTION: Well, why don't you read what you're giving out of your head, because I read what's written down here. Now, read me what the petition said.

If you want to contradict that.

QUESTION: Where do we find that, in the Appendix?

MR. LEWITTES: Yes, it's page 13a in the Appendix.

Now, 13a reads, Mr. Justice Marshall:

"I am writing to complain that I am now being deprived of legal assistance as a result of inmate Rodney R. Haymes and John Washington being removed from the prison law library."

It did not say that they were being denied access to the courts, that they just wanted these two specific people to be in the law library.

QUESTION: "The major problem and reason for my not being able to obtain legal assistance is a direct result of" that.

MR. LEWITTES: They're claiming that these two gentlemen -- that the removal of these two gentlemen from the law library somehow deprives them of legal assistance; that, the assumption being, that only Rodney Haymes and John Washington could assist them.

QUESTION: Well, I agree that it could be better done and better worded, but at least they are saying that

they have been denied the right to get that assistance, legal assistance. They are charging that.

MR. LEWITTES: Assuming --

QUESTION: Aren't they?

MR. LEWITTES: I don't think they are. I think that they are claiming that they're unhappy about the discharge of Rodney Haymes.

But, in any event, Mr. Justice Marshall, I think the fact is that that may be a complaint -- may be a complaint -- that could be presented in a 1983 action by any of the 82 signatories. But Mr. Rodney Haymes was not a signatory of that, and Mr. Rodney Haymes is not claiming in any manner that he was denied access to the courts.

QUESTION: But you agree that the other 82 were?

MR. LEWITTES: Pardon?

QUESTION: You agree that the other 82 would have a cause of action?

MR. LEWITTES: I think they could claim it. I'm not suggesting that -- I happen to feel that simply because Mr. Rodney Haymes and his fellow were removed from the law library does not present a cause of action, claiming denial of access. Whether they want to put it on a complaint, these inmates could do that; they could raise any kind of contention. I don't think it's a viable contention.

Despite the patent failure, it seems to Petitioners,

of the Second Circuit to first analyze the facts, first to determine whether or not a liberty or property interest is involved, both parties here do apparently agree that the Due Process Clause is not implicated unless Haymes can establish a liberty or property interest at a particular maximum security prison.

Now, he does not, in any manner, allege a property interest, since, by the statute which appears on page 2 of our brief, the power to transfer is discretionary.

Rather, Haymes attempts to construct an independent liberty interest in his retention at Attica, and he points to those various hypothetical situations raised in the Second Circuit opinion.

It is noteworthy, however, that Respondent Haymes does not allege in any manner that he suffered any of those hypothetical consequences.

The motive, which Chief Judge Kaufman referred to in the Second Circuit, claiming the motive was punishment here, we think is not relevant at this point; because what Mr. Haymes perceives as punishment, as perhaps what Mr. Roth in the Roth case perceived as grievous loss, does not independently establish a property or liberty interest. And without this property or liberty interest, the motive nor the result can be denominated as disciplinary and does not implicate the Due Process Clause.

QUESTION: Mr. Lewittes, let me ask you one more question, if I may.

Supposing that the Respondent here had been appointed by the Warden as kind of a special assistant to help in the Warden's office, and the Warden was dissatisfied with his behavior and said: "I'm going to fire you from the special assistant position, you're going to go back with the mass of the prisoners, just to punish you for the way you've been acting."

Now, do you think that would be a liberty or property interest?

MR. LEWITTES: I do not. I do not.

QUESTION: Of the assistant to the Warden, or of the prisoners who had been depending upon him for legal assistance?

How did you understand Mr. Justice Rehnquist's question?

MR. LEWITTES: I understood it as assistant to the Warden.

QUESTION: How do you view the statement in Wolff that the procedure of due process is implicated if a person is sent to solitary confinement for breaching a rule? Is it because he's promised in advance that "you won't be sent there unless you violate a rule"?

MR. LEWITTES: That is correct, because by virtue of

certain rules and regulations, it is determined that that is a punishment, and denominated as a punishment, and there is no expectation when one goes to -- when one is --

QUESTION: Well, I know, but if that's the only answer you're in somewhat unusual trouble here, aren't you? Don't you have to -- what is the property or liberty interest?

MR. LEWITTES: The expectation --

QUESTION: Which is what you claim is the predicate.

MR. LEWITTES: The expectation would be that one would normally stay in the general population.

QUESTION: That the State has made some rules --

MR. LEWITTES: And that a change --

QUESTION: -- or published rules which at least imply that you won't be in solitary unless you break a rule?

MR. LEWITTES: That is correct. Unless there is a material change in the terms of your confinement, you have the expectation that you will remain in the general population.

QUESTION: And the same would be true with respect to the loss of goodtime credits involved in Wolff?

MR. LEWITTES: That is absolutely correct.

If there are no more questions, I'd like to reserve whatever remaining time I may have.

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

Mr. Bronstein.

ORAL ARGUMENT OF ALVIN J. BRONSTEIN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think the questioning of the Court to my colleague from New York clarified the issue, particularly the questions by Mr. Justice Stevens, as to what the Court of Appeals was concerned about, and that was the conduct of Haymes, as alleged in the complaint, which led to the transfer; rather than the transfer itself.

What has not been discussed yet is the procedural posture of the case before the Court of Appeals and before this Court.

The State, in their reply brief filed last Friday, now concedes that the district court granted a motion to dismiss, that therefore the allegations of the complaint must be construed liberally, must be assumed to be true, and that they have no evidence in the record at this point to contradict the allegations of the complaint.

The Court of Appeals limited its inquiry, it did not reach the merits in this case. They limited their inquiry to whether the complaint stated a colorable claim, and they appropriately remanded it for an evidentiary hearing, basically on three questions:

Haymes should have the opportunity to prove what his

conduct was; if it was protected conduct, then he should have the opportunity to prove that there was causal connection between his conduct and the summary punishment, that is the transfer; and, finally, if both of those could be proved, whether he suffered injury.

And in the present status, this Court need not decide the merits of any of those claims. Those are appropriately for the district court in the first instance.

In the light of the State's new view of the present posture of the case, it is immaterial, I believe, at this point, whether we consider this was a pro se complaint, as we argue in Point II of our brief, and apply the Haines v. Kerner test; or whether it's the traditional rule on a motion to dismiss under Rule 12, as this Court recently said in Scheuer v. Rhodes.

In any event, the allegations of the complaint are assumed to be true and must be read in the light most favorable to the plaintiff.

QUESTION: Under your submission, would it make any difference whether he was moved from a maximum security prison 400 miles from his home base to one ten miles from his home base, or the reverse of that proposition?

MR. BRONSTEIN: It might only make a difference in terms of the injury, not in terms of the liberty interest which we claim.

QUESTION: The right would be the same in your submission?

MR. BRONSTEIN: That's right.

What I'm saying, Mr. Chief Justice, is -- in answer to, I think, what Mr. Justice Stevens was implying before -- that the State could not punish a prisoner, for example, for writing a letter to the Department of Justice to complain about segregated, racially segregated cell blocks. They couldn't punish him by transferring him 400 miles or punish him by transferring him 20 yards, if he suffered injury.

QUESTION: But that's not a denial of life, liberty, or property without procedural due process, is it? That's burdening a substantive constitutional right that he had.

MR. BRONSTEIN: That's right. That's -- the liberty interest in this case, Mr. Justice Rehnquist, arises -- at least it is alleged at this point, the procedural posture flows directly from other constitutional rights: from First, the Sixth and Fourteenth Amendment rights.

He was either, depending on how the complaint is read, engaging in his First Amendment right to petition the government for redress of grievances, the act of circulating this petition, which he was obviously going to mail to a governmental official; or he was engaging in Sixth and Fourteenth Amendment rights, which were identified by Mr. Justice Marshall a while ago.

QUESTION: Do you think that's what the Second Circuit relied on?

MR. BRONSTEIN: I think the Second Circuit was concerned about punishment for conduct which, at least on the basis of a pro se complaint, or a complaint liberally construed, suggested he was engaged in constitutionally protected activity.

QUESTION: The argument you're making is not expressed in the Court of Appeals -- was it?

MR. BRONSTEIN: Not expressly, because they were dealing with a case --

QUESTION: So you think they reached the right result, but for a reason which you would like to explain?

MR. BRONSTEIN: Well, I think they reached the right result, and I think there is the suggestion -- although it may not have been clearly articulated -- in the Court of Appeals decision.

QUESTION: Well, let me -- then I'll ask you another question: Would you like to defend the Court of Appeals opinion the way it is?

MR. BRONSTEIN: Well, that depends on the definition of what it is. I read it to be concerned with the punitive nature of the transfer, --

QUESTION: Yes. Is that enough?

MR. BRONSTEIN: Enough for what, Mr. Justice White?

QUESTION: To get relief, to prove that you suffered a grievous loss.

MR. BRONSTEIN: Well, I think in -- that's not in this case; that's not what this case is about in its posture, but I do believe --

QUESTION: Well, how about the Court of Appeals? Do you think the Court of Appeals thought that was enough?

MR. BRONSTEIN: No. I think the Court of Appeals talked about the --

QUESTION: And you agree that it wouldn't be enough?

MR. BRONSTEIN: No, not in another case; I don't agree that it wouldn't be enough in another case.

QUESTION: Well, you go ahead then, what do you think the Court of Appeals held?

MR. BRONSTEIN: I think the Court of Appeals held that, based on the posture of the case, that Haymes had an opportunity to prove that he was engaged in lawful conduct, or protected conduct, that he was not violating any regulation of the prison; and, in fact, was engaged in a constitutionally protected activity.

QUESTION: But, now, those two are quite different, aren't they? To say simply he was engaged in lawful conduct, and to say he was engaged in constitutionally protected conduct. Those are quite different.

MR. BRONSTEIN: They are, indeed, Mr. Justice

Rehnquist.

QUESTION: And which did the Court of Appeals hold?

MR. BRONSTEIN: I think they discussed both, or implied both. It is not the clearest decision, I would admit.

QUESTION: Sure isn't.

MR. BRONSTEIN: But certainly the complaint which they had before them, and what I wish to stress is that what this Court is considering now is a case before it in the exact same posture as Cooper v. Pate or Cruz v. Beto. A dismissal of a complaint by the district court without a hearing, without any responsive pleadings.

And all we need look at is the complaint.

QUESTION: Don't you think that the fulcrum on which the Court of Appeals opinion was based was a denial of procedural due process?

MR. BRONSTEIN: Only -- yes, but only after he was being punished for some conduct --

QUESTION: Without being given sufficient notice and hearing, and whatever else might be required by the due process clause of the Fourteenth Amendment in its procedural aspects. Isn't that what the Court of Appeals was talking about?

MR. BRONSTEIN: I don't think that was --

QUESTION: You don't?

MR. BRONSTEIN: -- alone what they were saying, Mr.

Justice Stewart, because they took -- on page 31a of the Appendix, in their opinion, they specifically expressed concern about the district court deciding that the "alleged punitive nature of the transfer was not material". "The alleged punitive nature".

The alleged punitive nature in the complaint, eight separate times in the complaint, Haymes alleges that he was petitioning the court for redress of grievances; five separate times he alleges that he was punished or retaliated against for exercising his constitutional right to petition the court for redress of grievances.

The conduct, therefore, that we -- that stands out to me in the complaint, is based just on those allegations, conceivably a liberty interest flowing directly from a First Amendment right --

QUESTION: What would the hearings be about?

MR. BRONSTEIN: What would the hearings be about? Before the district court or on the --

QUESTION: No. He claims he was entitled to a hearing before he was transferred.

MR. BRONSTEIN: That's right. The hearing --

QUESTION: So what would the hearing be about?

MR. BRONSTEIN: The hearing would be to determine whether or not he was engaged in protected activity, --

QUESTION: But that isn't a factual question.

MR. BRONSTEIN: I think it -- it first is a factual question.

QUESTION: Well, there's no question about what he was doing, is there? He was circulating this piece of paper. There isn't any question about what his physical acts were, and --

MR. BRONSTEIN: No, but the State --

QUESTION: -- what was on the paper, anything like that.

MR. BRONSTEIN: No, but the State might have the opportunity under the balancing test that this Court --

QUESTION: You think there just ought to be an argument on them all.

MR. BRONSTEIN: No. No. Because the State would have to come in then and respond to what their interest would be in --

QUESTION: In short, you want to argue about the law, that's right; and you want to get to the merits of whether they would be entitled to transfer him for allegedly violating the rule.

MR. BRONSTEIN: No. First, we'd have to decide if a rule was violated; secondly, whether -- if it wasn't, whether he was engaging in constitutionally protected activity; thirdly, was the State's interest involved because some disturbance seemed imminent, the kind of balancing that this

Court talked about in Procunier v. Martinez.

QUESTION: Do you think there really is any factual, historical factual question like, who did what to whom? Or what actually happened on a certain day?

MR. BRONSTEIN: In this case?

QUESTION: Yes.

MR. BRONSTEIN: Well, --

QUESTION: There's no accuracy problem here, is there, about what his conduct was?

MR. BRONSTEIN: Well, there seems -- there is some, if one considers the affidavits that were submitted by the district court, then there is some conflict. I don't think that the affidavits can be considered --

QUESTION: There might be some conflict of how to characterize them, but not about actually what he did.

MR. BRONSTEIN: Well, there are a number of factual controversies. Apparently his records indicate that he was transferred because of something he did in the law library, not what he did in circulating the petition. It doesn't say what that something is. It merely says "illicit activity in the law library". It could have been passing contraband, or it could have been furnishing legal assistance; I don't know what that is.

So there are a number of factual controversies, if you look beyond the claim.

QUESTION: Well, what liberty interest was involved in that allegation?

MR. BRONSTEIN: Pardon?

QUESTION: What liberty interest was involved in that, in his job in the library?

MR. BRONSTEIN: I don't think that -- I don't think his job in the library is in this case. I'm merely showing that the -- his central file says that he was transferred because of his activity in the law library, thereby indicating that there is a factual controversy, if there were a hearing. He claims he was transferred because he was circulating a petition in the yard.

His central file seems to suggest otherwise.

QUESTION: Well, why, under your submission, you say he should have a -- entitled to a right to argue about whether or not, under the balancing constitutional conduct, it could be dealt with this way by the prison authorities? You also say he should have a right to a hearing as to whether he violated a rule. I don't see why that's -- why the latter follows.

MR. BRONSTEIN: Oh. Only if the evidence were to indicate that the State's claim that he did violate a rule was material. The State would --

QUESTION: Well, why does the State need to show any violation of a rule before it transfers a man from one prison

to another?

MR. BRONSTEIN: I don't think they -- I don't think that's in this case, Mr. Justice Rehnquist.

QUESTION: Then why should there be a hearing about that?

MR. BRONSTEIN: Well, if the rule were to infringe on a separate protected liberty interest, if the rule were to say, as Mr. Justice Stevens, I think, asked before: "You may not write to your lawyer, otherwise we will transfer you; or you may not complain to the Department of Justice about racial segregation, otherwise we will transfer you", then the rule would certainly be at issue.

QUESTION: Well, let's go back to the beginning. If a man is sentenced, he is sentenced to the custody of the correctional authority in New York, is he not?

MR. BRONSTEIN: That is true, Your Honor.

QUESTION: And administratively he is then assigned to an institution; is that correct?

MR. BRONSTEIN: That's correct.

QUESTION: Well, suppose they advise him, or he learns that he's going to be sent to Attica, and he says, "No, Attica has had a terrible history, and it's a dangerous place, and I want to go somewhere else, and I want a hearing." Is he entitled to a hearing?

MR. BRONSTEIN: Well, first, Mr. Chief Justice, that,

I believe, respectfully, is not what's involved in this case.

QUESTION: No, I know that's not what's here, but --

MR. BRONSTEIN: But I think --

QUESTION: -- we're trying to sort out what is here, and I find great difficulty so far.

MR. BRONSTEIN: All right. Well, I think in the question, in the hypothetical that you postulate, some minimal inquiry should be made in the facts that you make. In fact, that's what the prison officials do.

QUESTION: You mean a hearing --

MR. BRONSTEIN: Before a prisoner is assigned to Attica or Clinton, or, in the federal system, to Leavenworth or Danbury, a case worker or classification officer meets with the prisoner, finds out what his potentials are, what his problems are, what his interests are, and then makes a decision --

QUESTION: But he doesn't ask the prisoner, the convicted person's opinion as to where he ought to be assigned, does he?

MR. BRONSTEIN: Well, I think in some cases they do. They ask, "Where is your family? Do you have a preference for being near the family? Are you close to your family?"

QUESTION: That's getting factual information, not an expression of desires.

MR. BRONSTEIN: Well, that's -- in the hypothetical

you postulate, which is not our case, where we claim separate protected interests, it is factual information that is essential before the prison officials exercise the discretion that I would concede, in your situation, that they have. Merely get accurate facts before you exercise your discretion.

QUESTION: Well, do they have to get any facts?

Suppose the prison authorities, simply as a rotation, and right in straight rotation, all people assigned to maximum security prisons are -- if they have three of them, every third man goes to one of them. No consultation, no inquiry, no hearing.

Are you suggesting that there's some property or liberty interest in the first instance?

MR. BRONSTEIN: I think in every instance, where a prisoner will suffer injury or will be faced with more adverse consequences, as a result of his condition of confinement, as the Court discussed in Footnote 19 in Wolff, that in each of those instances the admittedly discretionary authority of the corrections official requires some examination into the facts. The kind of examination might be very, very minimal in the hypothetical you postulate. It should be much more serious in a situation such as the ones in Wolff, where person could lose his good-time credits.

QUESTION: Well, let me make it concrete, then.

Let's assume you've got -- how many maximum security prisons

do you have in New York, do you know?

MR. BRONSTEIN: I'm not sure; I think there are four or five.

QUESTION: Let's assume, then -- well, all right, there are four. He's assigned to one that is 400 miles away from his home, and he demands a hearing and says that he wants to be at the one nearest to his home.

Does he have a property or liberty interest, or any kind of an interest in where he's to be assigned in the first instance?

MR. BRONSTEIN: I think there is some very, very limited interest, the kind of interest that Mr. Justice Douglas talked about in his concurring and dissenting opinion in Wolff, --

QUESTION: A constitutionally protected interest?

MR. BRONSTEIN: An interest flowing from the core value of the liberty concerns of the Due Process Clause, that this Court has talked on on occasion; where there is injury as the result of arbitrary or -- arbitrary actions of the administrator.

I'm not suggesting that a Wolff hearing would be required in a whole range of decision areas or decision points. Certainly, at the initial designation, the classification people may have all the facts before them that they need from his pre-sentence record, from his probation report before he

is sentenced. If they have those facts, then perhaps merely finding out where his family is, or if he has any particular educational or vocational aspirations, that might be all that would be necessary.

QUESTION: What is the constitutional right that he be near his family?

MR. BRONSTEIN: Well, it's not the constitutional right to be near your family; it's a constitutional --

QUESTION: Well, can't the State stop his family from visiting him?

MR. BRONSTEIN: Pardon?

QUESTION: They might put him in a place where they won't let him have any visitors. What's wrong with that?

MR. BRONSTEIN: Can a State stop the family from visiting? I don't think so.

QUESTION: Can the State set up a prison with no visitors?

MR. BRONSTEIN: I think not.

QUESTION: The case being?

MR. BRONSTEIN: Well, I think that would be a --

QUESTION: There's no such case.

MR. BRONSTEIN: -- violation of the First Amendment.

QUESTION: Originally they used to -- the judge used to pick the jail you went to.

MR. BRONSTEIN: That's correct.

QUESTION: Without any ceremony or any consultation or any anything. That was never questioned, was it?

MR. BRONSTEIN: Well, I think it is now. I think, you know, times have changed, and the prisons and jails and our perceptions about them are different now than they were many years ago.

QUESTION: Well, isn't it true that, leaving New York, you can go to Texas and you can take a man from Galveston, Texas, and put him in a jail in El Paso, and there's not a thing in the world he can do about it, legally.

MR. BRONSTEIN: Not about the decision, that's correct.

QUESTION: I'm talking about the original assignment.

MR. BRONSTEIN: That's correct.

All I'm saying is --

QUESTION: So why argue that there is anything on the original assignment?

Why take on that extra weight?

MR. BRONSTEIN: Well, I -- it's not in this case, and all I'm suggesting is that in the appropriate case there might be some appropriate factual inquiry necessary.

QUESTION: Well, why don't you say, rather, that they can do it originally, but they can't do it afterward?

QUESTION: I started back at the beginning to see when this right, this property or liberty interest that you are

arguing, comes into being. So I wanted to see whether you thought he gets it by virtue of the sentence, the judgment of the court?

MR. BRONSTEIN: In the situation where it has nothing to do with conduct, it arises in different places at different times.

In our case, in this case, the case being before this Court as it was before the Court of Appeals, on the decision -- on a motion to dismiss, with uncontroverted allegations. There is a separate liberty interest involved, at least on the face of the complaint. That liberty interest flowing directly -- not from the Due Process Clause originally, but from the First or Sixth Amendments, which trigger the implications of the Due Process Clause. It is precisely what this Court talked about in Perry v. Sinderman, where they said the liberty interest in due process would be irrelevant if a person were being punished for exercising a separate constitutionally protected right, a right flowing from the Bill of Rights.

And this --

QUESTION: Does that indicate, Mr. Bronstein, that really the theory you're advancing now is not a procedural due process theory at all.

MR. BRONSTEIN: That's right, it's a substantive process.

QUESTION: So we don't really have to find the grievous loss or any of that, if -- and even if he were given a hearing, you'd still have a claim under the theory you're now describing.

QUESTION: That's right, yes.

MR. BRONSTEIN: That's right. The grievous loss only goes to the question of damages. The transfer in this case only becomes relevant to the question of: Was the transfer punishment for the protected activity? And did it result in injury?

It is not the case in this posture, whether a liberty interest flows from the right not to be transferred.

QUESTION: Well, there you're talking about the causal connection, the fact of damage and amount of damage; you're not talking about the source of the right at all.

MR. BRONSTEIN: That's correct.

QUESTION: And you're also making a major amendment to the Court of Appeals opinion.

But you're not foreclosed from presenting that ground for affirmance, I take it.

QUESTION: Your ultimate point, I take it, is that there's enough in the complaint to require a hearing?

MR. BRONSTEIN: Precisely. And that that which is enough in the complaint, in terms of the substantive right, has been recognized by this Court already, if he can prove it.

The Court, in Cooper v. Pate and in Cruz v. Beto, has held that a district court erroneously dismissed a complaint where it alleged a violation of a First Amendment religious freedom act.

The Court, in Pell, said that a prisoner retains -- Pell v. Procunier -- his First Amendment rights. And, in Procunier v. Martinez, the Court struck down a California regulation because it offended the Constitution. A censorship mail regulation.

QUESTION: And this was a pro se application, and he didn't get a lawyer until just before judgment; right?

MR. BRONSTEIN: That's correct.

QUESTION: Could I ask you: Suppose a separate liberty interest were not involved, the Sixth Amendment or the First Amendment, that two -- suppose two prisoners were found to have violated a rule of the prison against trash in the library, or something like that, and one of them -- and one of them was sent to solitary and -- or say one of them was deprived of goodtime; and the other one was just transferred to another prison. And, concedely, both -- both consequences followed from the violation of the rule.

Neither was given a hearing. Would both of them be entitled to a hearing, under your view?

MR. BRONSTEIN: I believe under the -- what this Court said in Wolff v. McDonnell, yes, both of them would be

entitled to a hearing.

QUESTION: Why -- why would that be?

MR. BRONSTEIN: Because the Court indicated that if there was a major change in conditions, with adverse consequences, --

QUESTION: Well, yes, but there, as far as goodtime was concerned, I thought we -- I thought the Court said that the State created the expectation of goodtime and promised that it wouldn't be taken away unless some rule were violated.

MR. BRONSTEIN: Well, I think --

QUESTION: Isn't that -- isn't that the case?

MR. BRONSTEIN: As to the goodtime, yes.

QUESTION: Yes.

Now, do you know of any rule, any in the New York prisons that -- or any indication in any of the regulations that there's some promise that you won't be transferred unless you violate a rule?

MR. BRONSTEIN: Well, as I understand the New York regulations, the contrary is true. They have this rather "Catch 22" situation.

QUESTION: So where there -- what is the expectation of not being transferred?

MR. BRONSTEIN: Not -- in your hypothesis, not being transferred for misconduct and suffering grievous loss.

QUESTION: Well, I know, but they might have promised

him not to put him in solitary or deprive him of goodtime unless he violated a rule; but is there some promise that you won't be transferred?

MR. BRONSTEIN: Well, not -- I don't think it requires a promise. I think this Court held in Wolff that the interest of prisoners in [?]dismerit procedures is not -- is included -- they rejected the State of Nebraska's assertion that it was not included in the liberty interest protected by the Fourteenth Amendment.

QUESTION: But in Nebraska the statute provided for goodtime credits. You're suggesting that just some sort of informal decision-making creates the same sort of expectation as a statutory promise?

MR. BRONSTEIN: Well, but the Court also dealt with solitary and indicated that solitary represented a major change in the conditions of confinement. And therefore, triggered the implications of the due process.

QUESTION: Yes, but under the prison regulations, the imposition of that kind of serious punishment was conditioned upon the breach of a rule.

MR. BRONSTEIN: Well, I thought that was your hypothesis, that a rule was breached, and that then --

QUESTION: Well, I know, but I don't see any rule -- any rule in New York prisons that says that you won't transfer unless you breach them.

MR. BRONSTEIN: No. I misunderstood you.

I know -- my position is that you don't need a State rule saying we will not do something in order to trigger the liberty interest --

QUESTION: Well, that is outside McDonnell, isn't it?

MR. BRONSTEIN: Well, with all due respect, that's the way I read McDonnell --

QUESTION: Yes, all right.

MR. BRONSTEIN: -- and particularly the --

QUESTION: It's also the way the Court of Appeals reads it, I take it?

MR. BRONSTEIN: No, because ours is a different case, dealing with the specific conduct of the prisoner, as I indicated, which I think flows directly from his -- from the reading of his complaint.

I think our case is precisely what the Court said in Procunier v. Martinez, that the interest of prisoners in uncensored communication, in this case the right to petition for a redress of grievances, grounded in the First Amendment is plainly a liberty interest within the meaning of the Fourteenth. As such, it's protected from arbitrary governmental intrusion.

Similarly, the Sixth and Fourteenth Amendment rights are protected by Johnson and Avery, Procunier v.

Martinez; and I think that all the district court did here was to deny the motion to dismiss. All the Court of Appeals did was to say that there is a colorable claim in this complaint.

They remanded to the district court. They did not reach the merits. I think the decision of the district court -- of the Court of Appeals should be affirmed, and the case remanded to the district court for the taking of proof on those three issues: the nature of his conduct; was he punished by transfer; and did he suffer loss as a result of that?

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lewittes.

REBUTTAL ARGUMENT OF JOEL LEWITTES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LEWITTES: It is clear that the Respondent has completely turned the course here. The issues he now raises were raised in only Footnote 20 to his brief, on page 20; but it's interesting to note that Mr. Rodney Haymes, although he alleged several claims of retaliation in his petition, only one aspect has been pursued both in the district court and in the Court of Appeals; and that had to do with the procedural due process issue, whether he was entitled to notice of hearing. And not a claim that is claimed today, that he was transferred for prohibitive reasons; that is,

the First -- the Sixth Amendment right.

In any event, it's clear from the petition itself that he has no claims here; there is no standing on his part to raise these issues. He did not -- all he did was put that petition on behalf of 82 signatories. He does not claim in any manner that he was denied access to the courts --

QUESTION: But, Mr. Attorney General, in the very last paragraph of his complaint petition, on page 6a of the -- that is before the "Conclusion" -- of the Appendix, he does allege that he was removed from his job assignment, that the petition was confiscated, all as a "direct result of administrative reprisals against your petitioner for assisting those inmates contained in Civil Action No." so-and-so; and "for assisting Attica inmate Louis Martinize" in another petition; and also for circulating this petition.

Isn't -- doesn't that give him standing?

MR. LEWITTES: I think that --

QUESTION: It isn't just the 82 signatories that he's suing on behalf of; he's suing on behalf of himself, as I understand it.

MR. LEWITTES: I think the answer to that is found later in his affidavit, which, in essence, was his amended complaint --

QUESTION: Oh, I see.

MR. LEWITTES: -- on page 19a of the Appendix. Where

he says he was "finally shipped from Attica to Clinton in an obvious conspiracy attempt to separate this plaintiff from the other inmates who were also petitioning the court for redress concerning the inmates legal assistance, all of which were direct acts of reprisal by the within respondents against your plaintiff herein for attempting to exercise his own constitutional rights and in attempting to assist other inmates in securing their constitutional rights."

QUESTION: But doesn't that confirm what I read?

MR. LEWITTES: It does seem to say that, yes, sir. But it's clear to me that the petition itself, looking at the petition itself, the petition was -- the body of the petition indicates clearly that it was on behalf of the signatories who were complaining that Mr. Rodney Haymes had been indeed removed from the position of law clerk; and not that Rodney Haymes, by the way, had in any manner been denied access to the courts, because this complaint would not have been in the district court in the first place, had he been denied access.

QUESTION: No, he doesn't say he's been denied access to the courts. As I read it, he says that he was transferred because he assisted -- rendered legal assistance to other inmates. That's what he says.

MR. LEWITTES: There was -- we must not forget that there was a rule involved here.

QUESTION: Well, but that's a matter of defense,

isn't it?

MR. LEWITTES: Yes.

QUESTION: That's exactly the point your opponent makes. I agree with you he's changed his theory from his brief; but don't you have to meet that theory?

MR. LEWITTES: I think that --

QUESTION: Can't you just meet it by saying that he doesn't have any constitutional right to assist other inmates?

MR. LEWITTES: Yes.

QUESTION: Right.

QUESTION: You're satisfied to say that if a man can be disciplined for assisting other inmates with legal papers and --

MR. LEWITTES: I am not -- I'm not admitting that there was any discipline here.

QUESTION: He can be transferred for that reason?

MR. LEWITTES: He can be transferred for any reason.

QUESTION: That in order -- I see.

QUESTION: What do you do about 20a, the last full paragraph? "Keeping your plaintiff" -- your plaintiff -- "along with the others ... from submitting this petition to this very court for the redress of grievances thereto".

MR. LEWITTES: I don't seem to have that --

QUESTION: On page 20a.

QUESTION: Last paragraph.

MR. LEWITTES: I see.

QUESTION: This is a pro se job.

MR. LEWITTES: Well, it is not really a pro se job, because seven months before the decision in the district court, this petitioner had counsel, retained counsel, who never raised these issues, by the way, in the district court.

So it's --

QUESTION: This wasn't a pro se petition?

MR. LEWITTES: It was a pro se petition, Mr. Justice Marshall, but the fact is that he did retain counsel, who did submit, seven months prior to the decision in the Western District, a memorandum on behalf of him, --

QUESTION: Well, all right. Assuming that --

MR. LEWITTES: -- so you cannot really say it's pro se.

QUESTION: Assuming that this was the best lawyer in the State and dean of all of the law schools, is this enough to show that he alleges he was denied the right to petition the court for redress of grievances?

MR. LEWITTES: It is an allegation, but I don't think it is a --

QUESTION: Well, do we have anything before us, other than allegations?

MR. LEWITTES: No, we do not. We only have --

QUESTION: And do we have to give those allegations a full force?

MR. LEWITTES: We have to give the allegations the fact of full force, but not the conclusions of law, necessarily, that flow therefrom.

QUESTION: Well, what -- there's no conclusion of law here.

Why don't you want a hearing on this? In the district court.

MR. LEWITTES: I don't --

QUESTION: What's wrong with having a hearing?

MR. LEWITTES: I don't think that he has stated a claim, and I -- and he has just stated a dismissable claim, and there is no reason to go back to the district court again. He has not stated a cause of action.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.

[Whereupon, at 11:48 o'clock, a.m., the case in the above-entitled matter was submitted.]

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