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In the

Supreme Court of the United States

JOSEPH VITEK, ETC., ET AL.,

APPELLANTS.

V.

CHARLES MILLER, WILLIAM GEORGE FOOTE,  
AND LARRY D. JONES.

APPELLEES.

No. 77,888

1978 APR 28 PM 12 15

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## IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH VITEK, Etc., et al.,	:	
	:	
Appellants.	:	
v.	:	
	:	No. 77-888
CHARLES MILLER, WILLIAM GEORGE FOOTE,	:	
and LARRY D. JONES,	:	
	:	
Appellees.	:	
	:	

-----X

Washington, D. C.

Monday, April 24, 1978

The above-entitled matter came on for argument at

1:22 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  
 JOHN P. STEVENS, Associate Justice

## APPEARANCES:

MELVIN KENT KAMMERLOHR, Esq., Assistant Attorney  
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 Nebraska 68509, for the Appellants.

THOMAS A. WURTZ, Esq., University of Nebraska,  
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 Nebraska 68583, for the Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-888, Vitek against Miller.

Mr. Kammerlohr, I think you can proceed when you are ready.

## ORAL ARGUMENT OF MELVIN KENT KAMMERLOHR

## ON BEHALF OF APPELLANTS

MR. KAMMERLOHR: Thank you, your Honor.

Mr. Chief Justice, may it please the Court: As the Court knows, this case involves the broad question of the transfer of a penal complex inmate to a mental hospital, a State mental hospital. More narrowly encompassed probably within that question is the constitutionality of a Nebraska statute which provides generally that upon a finding by a physician or psychologist appointed by the Director of Corrections that an inmate has a mental defect or suffers from a mental defect and it is also the opinion of this physician or psychologist that he cannot be properly treated in the penal institution which he is in, the Director may transfer him to a State mental hospital.

It also provides, and I think one of the things the lower court overlooked, was that the transfer is for examination, study, and treatment and that the State mental hospital has the duty to send the inmate back when treatment is no longer necessary.

QUESTION: May he be detained in the mental hospital beyond what would be the expiration of his term of imprisonment.

MR. KAMMERLOHR: No, your Honor. One, he may not be detained beyond what is necessary for treatment; number two, if two psychiatrists -- when his prison term expires, if two psychiatrists find that he should be retained, then they must file and see that he gets the same mental health commitment that persons on the outside receive.

QUESTION: Civil commitment.

MR. KAMMERLOHR: Civil commitment, yes, your Honor, the same one.

QUESTION: I suppose you can transfer a prisoner and keep him in the mental facility during his term, during his prison term, for reasons and under circumstances that you couldn't get him committed after his prison term is over.

MR. KAMMERLOHR: No, your Honor.

QUESTION: No? You mean if you couldn't commit a person out on the street, you couldn't transfer one of these prisoners to the mental facility?

MR. KAMMERLOHR: I see what you mean. I thought you meant after the term had expired, your Honor.

QUESTION: No. During the prison term you can transfer him to the mental facility for reasons that would never justify putting him there after his term is over.

MR. KAMMERLOHR: Possibly. It's strictly, according to the statute, on the opinion of the physician or the psychologist.

QUESTION: Putting it the same way, if he is in prison, you may transfer him for reasons which perhaps if he never had gone to prison, you could not initially commit him.

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: Is that right?

MR. KAMMERLOHR: For examination, study, and treatment. On the other hand, the receivers at the State mental hospital must then -- and they are bound by statute to transfer him back if he should not have treatment.

QUESTION: Yes, but that's just a question of treatment, isn't it? But he can't go back if he wants to. He can be detained there against his will if they think he needs treatment.

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

QUESTION: But he is going to be detained somewhere against his will.

MR. KAMMERLOHR: He is going to be detained somewhere.

QUESTION: Suppose he developed symptoms of acute appendicitis, what do they do with him?

MR. KAMMERLOHR: Any kind of physical, your Honor, they do the same thing. They either tr.

QUESTION: For any illness, they transfer him to a hospital.

MR. KAMMERLOHR: They treat him if they can at the penal institution. If they cannot, they take him into the city of Lincoln to a private hospital usually.

In this particular case, for example, the appellee Jones burned himself, lit a mattress while he was in solitary confinement, burned himself very badly, and was taken in emergency to a private hospital, St. Elizabeth's Hospital in Lincoln, and remained in their burn unit -- they have a special burn unit -- for five months with this condition, very bad burns.

QUESTION: Suppose a prisoner says, "I am now in this mental facility and you propose to give me some shock treatments," or something like that, "Well, I don't want those treatments. I want to go back. I know you have got to keep me somewhere, but I don't want to be over here and submit to the treatments."

Now, I take it you would say that although if he weren't in prison the State couldn't keep him, you think you are entitled to keep him because he has been sentenced to a prison term.

MR. KAMMERLOHR: Well, my argument runs this way, your Honor, that those things should be properly attacked on a question of the conditions of confinement, the constitutionality

of the conditions and that having a commitment procedure such as the lower court tried to design here is not even going to come close to reaching the problem, because of the variety and availability and quality of the facilities all over the United States. And to try to make one blanket rule of commitment doesn't reach the problem, that those things ought to be looked into, which they are all the time in 42 U.S.C. 1983 cases, civil rights cases, as to the --

QUESTION: Take a specific example that Mr. Justice White suggested to you, he doesn't want an insulin shock treatment which is prescribed by the psychiatrist. What relief do you think he could have? Habeas corpus?

MR. KAMMERLOHR: Yes, your Honor. I think he could bring habeas corpus or civil rights action on the conditions and test out whether that decision is proper.

These are medical decisions. I think one place maybe we get off a little bit is presuming that the health care officials aren't going to act properly or that the penal officials aren't going to act properly. I don't think we can presume that in this type of case.

QUESTION: You don't mean he could have habeas corpus. The purpose of that is to get released, and he can't be released.

MR. KAMMERLOHR: He can be released from the -- I believe he could be released from the type of confinement

that he was in.

QUESTION: Under your State habeas he can be released from the mental hospital and sent back to the prison, can he?

MR. KAMMERLOHR: I think it would be an action. Maybe it would be mandamus or --

QUESTION: Suppose he brought habeas and the court said, "Well, I am not going to release you, but on this showing I will restrain the particular condition of your treatment, namely, the administration of insulin shock treatment, until there is more evidence presented." Could he do that under your State procedure?

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

QUESTION: How about Federal habeas?

MR. KAMMERLOHR: I think in a Federal habeas or Federal civil rights action that anything could be done.

As this Court well knows, we have been involved in civil rights actions on the constitutionality of the care and treatment in mental health facilities, in mentally retarded facilities, in prisons. Unfortunately, none of these cases have reached this Court yet. But the Federal district courts are setting up all kinds of guidelines and rules that these facilities must follow. And it seems to me that if the court said that you can or you may or may not give him a shock treatment unless you do thus and so, I think that can all be

done under a proper ruling of a civil rights action.

Maybe it would help if I backed up to the posture of this case. I filed a motion for summary judgment. This action was brought that the Nebraska statute for transfer was unconstitutional on its face, and I filed a motion for summary judgment, which was overruled. There was no allegation that the State had not followed that statute. And it seems to me under Meachum v. Fano and Montanye v. Haynes that the question is does transfer to a mental hospital come within those two cases? Does he have some right, some liberty interest, which had not been extinguished at the trial?

The lower court didn't directly face that issue. The lower court said that the Nebraska statute gave him an expectation within the exception to Meachum and Montanye, but they didn't then refer to the method of the transfer. They merely said, "This is an exception to Montanye and Meachum and therefore he is entitled to due process hearing."

The State statute is what was conferred. If you rely on State law, what was conferred was that he may be transferred, or may not if you want to take the negative, unless a physician finds that he should be. And this all happened. There is no allegation that this did not happen. Therefore, it's no longer an exception to Meachum, and we have to go back to Meachum and do we want to extend Meachum that far then.

QUESTION: Do you think the State law means that his transfer is conditional on the fact of a finding by a doctor rather than on the truth of the fact?

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: And that finding is not after an adversary proceeding of any kind.

MR. KAMMERLOHR: It's not what, sir?

QUESTION: That doesn't follow an adversary proceeding of any kind, it's just a doctor examines him and concludes.

MR. KAMMERLOHR: That's correct. And I think that everything that was conferred by statute has been followed. So then the next question is should Meachum include transfer to a mental hospital the same as it includes transfer to other types of penal facilities when this is within the contemplation of the sentence? It was certainly within the contemplation of the sentence that a person may go to some kind of a hospital. All of our statutes include this, and they are very broad to the Director of Corrections what he may do with various prison inmates.

QUESTION: If a patient gets violent, as some of the incorrigible ones do, do they administer tranquilizers sometimes, if you know?

MR. KAMMERLOHR: I am sure they must. They have a prison physician.

This is another thing that's wrong, it seems to me,

with attacking this problem on the transfer due process proceeding is that it doesn't apply to treatment within the penal institution. It only applies to transfers to a State hospital.

QUESTION: It doesn't apply if you are taking him downtown to have his appendix removed, either, you said.

MR. KAMMERLOHR: No, your Honor. Nor maybe for some treatment for venereal disease.

QUESTION: The only difference is that he is very glad to go to get the treatment. Isn't that why it doesn't come up? If a man has got appendicitis, I can't conceive of him complaining about being cured of appendicitis.

MR. KAMMERLOHR: That's true, your Honor, but if you had --

QUESTION: But if you say some people are crazy, they get very -- what is it? -- they don't agree with you.

MR. KAMMERLOHR: That's true.

QUESTION: I think that's the difference. I don't think the other one for just ordinary medical treatment, I don't think the problem comes up much.

MR. KAMMERLOHR: But I think that the interest we all have is -- suppose it were a heart operation or a tumor operation for a brain tumor. We are all interested in getting the best diagnosis. I think even the inmate wants to know, "Do I --

QUESTION: That's the point. He is going to cooperate with that. But what would happen if he didn't? Suppose he said, "I want to lay here and die with this appendicitis."

MR. KAMMERLOHR: He's not going to cooperate with just having the operation. He's going to cooperate with having the diagnosis. And I say that's what we are trying to do here. We want to send him over for diagnosis.

QUESTION: I see.

MR. KAMMERLOHR: If their diagnosis does not agree, they will send him back.

QUESTION: I see.

MR. KAMMERLOHR: It seems to me it's a medical problem, and that this due process hearing isn't going to gain anything. When you have a prison guard or someone sitting as a hearing officer and we get involved in an adversary proceeding similar to trying to determine whether a criminal defendant knows right from wrong or not and the State goes out and gets their psychiatrist and the defendant goes out and gets his psychiatrist and you have a knock-down, drag-out on the question of mental illness or not, we are not going to gain anything. Plus the court here said that he is entitled to counsel. So if we have to get involved in that sort of thing and all the places in the United States have to get involved in that thing, rather than relying upon our doctors,

I don't think it is going to reach the problem. And it doesn't reach it on in-house treatment at all. Some of these facilities have hospitals even, and it doesn't apply to them. Some have clinics and different things to handle mental patients.

QUESTION: Mr. Attorney General, is Jones still in Indiana?

MR. KAMMERLOHR: Pardon me, your Honor?

QUESTION: Is Mr. Jones still in Indiana?

MR. KAMMERLOHR: Yes. Mr. Jones is presently in Danville, Illinois, your Honor.

QUESTION: Danville, Illinois?

MR. KAMMERLOHR: In a veterans' hospital.

QUESTION: Is he getting involuntary medication there, do you know?

MR. KAMMERLOHR: Well, he agreed to go there on his limited parole, so I assume that anything he gets there is voluntary. However, on that particular point, he has four or five years to run, and I assume that he may violate -- or be sent back to Nebraska at any time, and we will be back in the same problem again.

Thank you, your Honors.

QUESTION: Mr. Kammerlohr, you didn't mention the question of mootness. Are you going to rely on your brief for that?

MR. KAMMERLOHR: Except what I was just referring to Mr. Justice Blackmun on that question --

QUESTION: As to where he is now, yes, Danville, Illinois.

MR. KAMMERLOHR: Danville, Illinois, and he may come back. He has four or five years left on his sentence, and this issue as to this particular appellee could arise at any time. I think it's different than the cases this Court has had on the question of pre-parole hearing and that sort of thing, because once a parole is given, that settles it for that issue. And this parole here was actually very limited for the purpose of mental treatment, which probably was instigated by what happened in this case.

QUESTION: You would base the rule on the need for treatment rather than on the need to segregate, that the rule didn't come about because of any decision by the prison administrators that once it's determined that a person is mentally ill, that he may be disruptive or that he should be separated from the prison population? It isn't that. You wanted to transfer him for treatment, is that it?

MR. KAMMERLOHR: For diagnosis.

QUESTION: And treatment.

MR. KAMMERLOHR: And treatment if necessary.

QUESTION: But it isn't on the notion that you want to segregate him.

MR. KAMMERLOHR: No, your Honor.

QUESTION: So you are not relying on the fact that a mentally ill patient kept in the penal complex might be a burden on the other inmates at all?

MR. KAMMERLOHR: Yes, I am relying on that also, your Honor.

QUESTION: I thought you just disavowed it in your answer to Mr. Justice White.

MR. KAMMERLOHR: Not to segregate him. This is the thing. If he is segregated in the penal institution, this rule of this lower court did not apply, the requirement of a hearing. And that's one thing I am saying is wrong with --

QUESTION: It wouldn't satisfy the prison authorities just to have him insulated or have him segregated from the other prisoners. You want to transfer him for treatment.

MR. KAMMERLOHR: Yes, your Honor, primarily. In our particular situation, because although at the time of this hearing there was a psychiatrist, now there is no longer a psychiatrist even working in the prison.

QUESTION: Mr. Attorney General, the prison has no jurisdiction over the hospital. Once he goes there the prison hasn't anything to do with him, does it? Yes or no?

QUESTION: Is it a State institution?

MR. KAMMERLOHR: It's a State institution. The directors are appointed by the Governor. The statute

authorizes it, and the statute also requires them to send him back.

QUESTION: If they are entitled to come back.

But I mean the prison does not describe what treatment he gets.

MR. KAMMERLOHR: No, your Honor.

QUESTION: They don't have anything to do with that.

MR. KAMMERLOHR: No, your Honor.

QUESTION: And once they send him over there, unless the hospital thinks he is ready to come back, the prison authorities can't demand that he come back.

MR. KAMMERLOHR: No, I don't believe they could, your Honor. Although the statute specifically leaves him in the custody of the prison authorities while he is there, so possibly they could. The statute does say that they remain legally in the custody of the prison authorities, not the mental hospital.

QUESTION: But the warden in the prison hasn't any power, under the statute as I understand it, to say to the mental hospital, "Please send this man back even though you think he needs treatment." I take it that's the decision of the mental hospital.

MR. KAMMERLOHR: I would think so. It should be. I don't interpret the statute that if the prison authorities said, "We want to send him to a different mental hospital,"

that they could not get him back.

QUESTION: What do you do with the last sentence of the statute, on appendix page 5 of your jurisdictional statute, that says, "A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the Department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary."

You say that the treatment-is-no-longer-necessary decision is one that is made by the people in the transferee facility, and the warden in the transferring facility must respect it?

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: Isn't the purpose so that the mental institution can't turn him loose on the public? Isn't that it?

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

QUESTION: And if they are going to turn him loose, they turn him back to the prison.

MR. KAMMERLOHR: That's right, your Honor. That's the way I understand it.

And also we have another statute, Section 83-109 which requires -- I should have included it in here; it's already in here, but it's also required under that statute that personnel of the Department of Public Institutions in any

case, relating to civilians or anybody else, when the superintendent of any facility believes someone is improperly in that facility, he has a duty immediately to notify the Director of the Department and have him transferred to a proper facility or discharged.

So the recipients here do have statutory requirements as far as not holding someone, as in these cases that used to come out and someone languishes for years in some place he shouldn't be. This isn't the problem any more, it shouldn't be. And if it is, it should come under a civil rights case where that can all be looked into. These facts were not even brought out particularly in this case. At least I claimed they shouldn't have been brought out under the motion for summary judgment.

QUESTION: Mr. Kammerlohr, you and your colleague, Mr. Wurtz, both apparently agree that the case is not moot, as I read your nonprinted briefs. How did the question of mootness get into this case? Did the Court ask --

MR. KAMMERLOHR: The court asked us to prepare our typewritten brief, your Honor.

QUESTION: On mootness.

MR. KAMMERLOHR: On mootness.

MR. CHIEF JUSTICE BURGER: Mr. Wurtz.

ORAL ARGUMENT OF THOMAS A. WURTZ ON  
BEHALF OF APPELLEES

MR. WURTZ: Mr. Chief Justice, your Honors, may it please the Court: I will address my argument first of all to the issue of mootness.

I last spoke with Larry Jones approximately three and a half to four weeks ago. He indicated to me at that time that he was still incarcerated in the Danville, Illinois, veterans' hospital. He was on a locked security ward. I posed to him the question as to whether or not he is receiving medication, whether or not this is voluntary or involuntary. He indicated that he was taking the medication that was prescribed for him voluntarily.

QUESTION: Do you suggest that the State of Nebraska has any responsibility for either his custody or his treatment at the present time?

MR. WURTZ: Yes, your Honor. I think because of the very limited nature of the parole that was given to Mr. Jones -- he wasn't given a parole on which he could go out and live in society. He couldn't seek a job. He was told to go strictly to the mental hospital and to abide by that.

QUESTION: That was a condition of his parole.

MR. WURTZ: Condition of his parole. But if he should choose to violate that, he would be back in the State of Nebraska.

QUESTION: If he escaped from the veterans' hospital in Illinois, he would be in violation of the conditions of parole and would be a fugitive, wouldn't he?

MR. WURTZ: That is correct, your Honor.

But also, if he were to probably not take his medication, I would suggest that he would probably come back to the State of Nebraska also.

QUESTION: Is there any reason to believe that the State of -- not the State of Illinois, but the Veterans' Administration has some bias against him or is treating him improperly in any way?

MR. WURTZ: Well, I have no knowledge of that. It doesn't appear in the record. Of course, he was transferred there after the hearing was concluded, but I have no knowledge of that. That is not one of our contentions.

QUESTION: You suggested a moment ago that if he didn't take his medication, he would soon be back in Nebraska. Is that on the thought that the veterans' hospital would refuse to have anything more to do with him?

MR. WURTZ: Somewhat, your Honor. I think inherent in being treated by a psychiatrist, the psychiatrist would feel that you have to agree with their diagnosis and go along with their prescription or they can't do anything with you. I think if he would not want to take his medication, the psychiatrist there on that wing of the veterans' hospital would probably

send him back.

QUESTION: But that is true of lots of other complaints besides psychiatric ones. As I understand it, if you have a back problem, a liver problem, any number of things that happen to people twice your age, you can find out that the doctor says, "Either do this, follow my advice, have an operation, don't have an operation, or I just can't go on treating you." It's not limited to psychiatric care.

MR. WURTZ: I would suggest, your Honor, that one has an inherent right to refuse medical treatment whether he be a civilian walking around on the street or whether he be in prison. It's different when you are talking about refusing medication, though, because once you give the State the power to transfer someone from a penal complex to a mental institution, as we see in the record here, you give the psychiatrist the power to place that person on medication, which they cannot refuse to take.

QUESTION: What if it was LSD in the experimental phases that one reads about in the newspaper with experimental drugs. Are you suggesting that that is permissible, but something other than medication isn't?

MR. WURTZ: Who would be administering this experimental drug?

QUESTION: The doctor.

MR. WURTZ: I would say that the patient would have

the right not to take it.

QUESTION: Putting it another way , if you have got appendicitis, they take you to the city hospital. You could object to that?

MR. WURTZ: Most people would not, but I think they would have the right to.

QUESTION: Would you say they have the right to commit suicide?

QUESTION: Are you going to have a hearing to see whether he should have his appendix removed?

MR. WURTZ: No, we don't need a hearing for that, but I think there is a right --

QUESTION: What if he says he is a Christian Scientist and he doesn't want to submit to any surgery.

MR. WURTZ: I think he should have that right not to submit to surgery, and his incarceration should not make any difference.

QUESTION: Is an issue the right to transfer at all in this case? Are we to judge this case on the assumption that the State had the power to transfer him if they went through the right procedures?

MR. WURTZ: That's what the State is contending.

QUESTION: How about your position?

MR. WURTZ: My position is that the lower court was correct in finding that statute, 83-180, unconstitutional.

QUESTION: That isn't what I asked you. Let us suppose the State gives him all the procedures that --

MR. WURTZ: That the lower court afforded him?

QUESTION: Is that the only issue? Is the procedural due process issue the only one that's here?

MR. WURTZ: Yes, your Honor.

QUESTION: So we judge it on the assumption that as long as due process was satisfied, the State had the right to transfer him? So we haven't got the issue in the case that you were just talking about, the right to refuse treatment.

MR. WURTZ: That is correct, your Honor.

I would feel that if Larry Jones would have been given a hearing and would have been able to come forward with psychiatric testimony of his own at the hearing to show the State of Nebraska that he did not feel that he was in need of psychiatric care and there was a hearing and he could present evidence as to that, he could have an attorney, and if there was a finding by an independent decision-maker that he was mentally ill, I think then the State should be able to transfer him to the Lincoln Regional Center for the limited duration, for the confinement during the period for which he was incarcerated, in this case three to nine years.

QUESTION: Just for the purposes of treatment?

MR. WURTZ: Just for the purposes of treatment.

QUESTION: What would happen --

MR. WURTZ: He could be confined when he was treated.

QUESTION: Suppose he becomes violent. Suppose he starts beating upon everybody. Do you have to have a hearing?

MR. WURTZ: Beating up on everyone where, your Honor?

QUESTION: Inside the prison, the man is a raving maniac and he says, "All you blankety, blank, blanks need to die," and he starts banging on them. Does he have to have a hearing?

MR. WURTZ: Yes, your Honor. That is kind of what happened --

QUESTION: Who is going to come in there to hear it? If he is banging on everybody, who will volunteer to hear it?

MR. WURTZ: I think it's important --

QUESTION: Would you?

MR. WURTZ: Well --

QUESTION: Would you?

MR. WURTZ: Would I represent him?

QUESTION: Would you volunteer to hear him? He is beating up everybody he lays eyes on. Would you give him a hearing?

MR. WURTZ: Yes, your Honor, I would. In the facts of the matter, it would probably be a short hearing and --

(Laughter.)

QUESTION: That's right.

MR. WURTZ: It may speak for itself when he is right there. But I still think that the transfer to the psychiatric hospital is so important --

QUESTION: Let's back up on what brought that on. Here is a man who in fact sets fire to himself with burns so severe that he was five months in the hospital being treated for the burns. Is it unreasonable to draw an inference that there is possibly some mental and emotional instability in that man that needs treatment?

MR. WURTZ: It is not unreasonable, your Honor, to draw that inference.

QUESTION: Isn't it a prima facie case that he needs mental treatment?

MR. WURTZ: There is no prima facie case because there was no one to make the case to, is my point.

QUESTION: How about the fire?

MR. WURTZ: Well, the testimony of Jones is he set his mattress on fire so that he may be moved up to the prison hospital, the hospital within the prison itself. I don't think there was really -- although the State contended that he committed suicide, he still to this day contends that he did not try and commit suicide. And I think perhaps there is a reasonable inference you can draw from what happened. Perhaps he did try to commit himself. But I as an attorney am bound to still believe the words of my client. He tells me

he did not commit suicide, and his story on the record why he burned up the mattress stands.

QUESTION: Your case really depends on our assumption that exactly the same treatment could have been given to him in the facility where he was as would be given to him in the facility to which he was transferred, doesn't it?

MR. WURTZ: No, it's not based on that assumption. I think the court below took note of that. I think the statute, 83-180, states that we really won't transfer someone to the Lincoln Regional Center unless conditioned upon a finding that we can't treat them here at the penal complex.

QUESTION: Do you think that statute is -- well, go ahead.

MR. WURTZ: And one of the big differences, I think, between the penal complex hospital itself and the Lincoln Regional Center, the state mental hospital, is that in the penal complex hospital itself, a prisoner can walk down there voluntarily, but he doesn't have to take the medication. The doctor can prescribe it, but he can refuse to take it. So when they have serious cases like, for example, Mr. Justice Marshall mentioned a man that is banging on everyone, a person like that, he would have to be transferred to the regional center, because they wouldn't forcibly give him medication in the penal complex.

QUESTION: Do you think the statute was intended to

confer a right on the prisoner that certain findings be made or that certain fact situations exist before he was transferred?

MR. WURTZ: Yes, your Honor. I think the lower court noted that. I think it's rooted in State law that he is not going to be transferred absent that finding that he can't be treated at the penal complex medically.

QUESTION: Do you think that was intended to confer a right on him?

MR. WURTZ: There didn't seem to be that I found, there was no legislative history that I could infer one way or the other from that. But I would argue that.

QUESTION: What if they had a wing in the hospital, or let's say the top three floors of the hospital of the penal institution was a hospital for emotionally and mentally disturbed prisoners. Now, they move him from the second floor to the top floor. You say they've got to have a hearing to do that? On the top floor I am assuming the psychiatrists are in charge and the function and activity there is the same as in the State mental institution. Do you have to have a hearing to move him from the second floor to the sixth floor?

MR. WURTZ: It would depend upon what they are doing to those people on the sixth floor.

QUESTION: The same thing they are doing here.

MR. WURTZ: I would argue that if they are forcing someone to take medication against his will, placing him on a

behavior modification program, giving him chemotherapy in which he has no say in it whatsoever, I think that he ought to be afforded a hearing.

It really doesn't make any difference whether you put a hospital eight floors up or you put it two miles away, as it is in the State of Nebraska. It's the nature of what they do to people, the prisoner when he is transferred.

QUESTION: When he went to the burn hospital, didn't he get some treatment?

MR. WURTZ: He didn't receive any psychiatric treatment. He received ---

QUESTION: Didn't he get treatment?

MR. WURTZ: He received treatment just for his burns.

QUESTION: He sort of enjoyed it, didn't he?

MR. WURTZ: Pardon me?

QUESTION: He sort of enjoyed it, didn't he? He didn't complain, did he?

MR. WURTZ: Of his burns?

QUESTION: About the treatment.

MR. WURTZ: No, sir.

QUESTION: And he didn't have a hearing either, did he?

MR. WURTZ: He didn't have a hearing. He requested the medical treatment. He had no problem with the medical

treatment. He wanted the medical treatment.

QUESTION: So it's up to him as to whether he wants the hearing.

MR. WURTZ: A hearing on the issue --

QUESTION: It's up to him as to whether he wants a hearing for medical treatment.

MR. WURTZ: He didn't request one, so you might say that.

QUESTION: So that's where we end up.

I understand from the Attorney General that they just wanted him to go to this other hospital to be examined, and if he was found not in need of treatment, he would be returned to where he wanted to be. Isn't that correct?

MR. WURTZ: That isn't the policy, as I understand it, and I don't think there is much evidence on --

QUESTION: Is that what the statute provides?

MR. WURTZ: The statute provides that. They say, "We send you for evaluation or treatment," but in essence all psychiatric care is evaluation and treatment. If someone is sent to the Regional Center -- and the record is clear on this point what happened to Larry Jones. He was sent over there, and the minute he was there he was placed on thorazine, and he refused thorazine, so what they did, they strapped him down and they injected the thorazine into his body. He was in a different place of confinement for sure. He didn't really have any choice what was going to happen to him.

QUESTION: But that has nothing to do with his having been transferred, does it? As you said, they could have done it eight floors up in the same building.

MR. WURTZ: It has everything to do with why he was transferred. I mean, that's why I think we need a hearing when you transfer someone.

QUESTION: There is a little confusion here, I think, as to what the issue is. Perhaps it could be clarified if you could say what would be the issues at the hearing.

MR. WURTZ: The issues at the hearing would be whether or not the patient or the inmate was mentally ill and a danger to himself or others.

QUESTION: Are you going to hold that hearing before you have a diagnosis?

MR. WURTZ: It is contemplated, your Honor, that there will be other diagnoses given at the hearing.

QUESTION: That is what he is being sent for to the hospital. They can't give a diagnosis in one day or two days.

MR. WURTZ: What I am saying is that the record shows that the State says, "We sent Larry Jones over there for evaluation." But what happened, the first day he got there, they strapped him down and injected him with thorazine. That's not evaluation.

QUESTION: The issues, then, you say would be whether or not he is mentally ill and, if so, if he is a

danger to himself and others. Then, if the finding after a full due process hearing with counsel is that, yes, he is mentally ill and, yes, he is a danger to himself and others, upon that finding, do you then concede that he could be transferred against his will to a mental hospital for involuntary treatment?

MR. WURTZ: Yes, your Honor, just the same as if he were to be civilly committed.

QUESTION: You do.

MR. WURTZ: Yes, sir.

QUESTION: I think that clarifies it, which is what I thought it was.

QUESTION: But the statute doesn't require any finding that he is a danger to himself and others.

MR. WURTZ: It certainly doesn't.

QUESTION: I know, but why do you put that in? I thought you had said a moment ago that we really weren't dealing with that issue, that we just assume that if the procedure is right, he could be transferred, regardless of what the substantive findings might be.

MR. WURTZ: Your Honor, if we had a hearing, I think we would have to establish some type of burden of proof. The lower court found the statute unconstitutional and it mandated a hearing and said it would leave it up to the legislature.

QUESTION: The court of appeals didn't say they had to find that he was a danger to himself or others.

MR. WURTZ: That's correct. I am inferring -- that would be the burden of proof to civilly commit one in the State of Nebraska is establish mandamus be found and the scheme of the mental health commitment statutes.

QUESTION: But the district court, I thought, went on quite a different theory than your answer to my brother Stewart. It didn't talk about the right to refuse involuntary treatment. It went on a Meachum v. Fano, Montanye analysis of a right of someone already committed to have some sort of hearing before he was transferred to another kind of institution.

MR. WURTZ: I think the lower court made it clear, though, as stated in its findings, that this was in essence a transfer from a prison to a mental hospital and did say that it was therefore different. But it went ahead to find the exception to Meachum.

QUESTION: But it rested its judgment I thought on the fact that State law conferred this right on him. My brother Stewart's questions were: surely, even though State law didn't confer a right upon you to be free from involuntary brain surgery, you might well have a due process right. But it wouldn't be a Meachum v. Fano type analysis.

QUESTION: It makes it a different issue, a different

case if that's what the issue is. But as I understand it now, that's not your contention. As I understand it now, it would have been an irrelevant claim in this due process hearing where he is represented by counsel for him to say, "I am a Christian Scientist and I don't believe in any kind of administration of drugs in my body." Correct? Do I understand that correctly?

MR. WURTZ: I am not sure of the answer to that question.

QUESTION: Well, is that what the issue is here?

QUESTION: You answered the question a while ago and said the issue wasn't here, that issue wasn't here at all.

QUESTION: He answered it a couple different ways.

MR. WURTZ: I will stick with that.

QUESTION: Mr. Wurtz, what would you do with an institution in a State not too far from here, New York, that has one prison that's in two parts. One part is criminally insane, and the other part is just criminal. And they move him across to the insane part. Do they have to have a hearing to do that?

MR. WURTZ: Here again, your Honor, it would depend upon the difference in the scope of the treatment that would be given to the individual.

QUESTION: It would be different treatment. One is medical and one is not.

MR. WURTZ: I would argue that we would have to have a hearing.

QUESTION: Suppose they had a full hospital, and many institutions have very good hospitals, many criminal institutions. And the man was there and they said, "With this type of disease you have, I am going to have to give you this drug," and you say, "I won't take it." Then do you have a hearing?

MR. WURTZ: Is this a psychiatric drug?

QUESTION: No, sir. It's a drug, and I don't need anything to be added to it. It's a drug that I don't want, the prisoner doesn't want -- aspirin, anything. Does he have to have the hearing?

MR. WURTZ: Aspirin, I would say no; thorazine, I would say yes.

QUESTION: Why? What's the difference between the two if it's the man's individual right you are talking about?

MR. WURTZ: Because a man that is on aspirin for two years will not have anything wrong with him after two years, and we don't know, the state of psychiatry is at an infant stage --

QUESTION: Then the man doesn't have an absolute right to decide whether he will take a certain treatment or not. Are you shifting again?

MR. WURTZ: Well, I am perhaps shifting for aspirin,

but I am not shifting for an operation.

QUESTION: I thought you said a drug, a certain kind of drugs.

I just want to know what this right that this man has to have a hearing for is.

MR. WURTZ: It's the right not to have --

QUESTION: We all know I'm not a physician, but I could take any drug in the world and you can find two doctors, one says it's right and the other says it's wrong. Now, who decides that?

MR. WURTZ: I think we should have a hearing, first of all, for psychiatric people, if there is a psychiatric problem, to determine whether or not this person is mentally qualified to make that decision.

QUESTION: Don't you agree that before the hearing he should be examined?

MR. WURTZ: Yes, and I think that is done --

QUESTION: That's what we have done here.

MR. WURTZ: That's done pursuant to 80-179.

QUESTION: Wasn't he to go for examination? And he said they gave him a drug.

MR. WURTZ: No, he was given a 30-day initial examination pursuant to 80-179 when he initially went into the Nebraska Penal Correctional Complex. Then he was transferred, with no due process guarantees, to the Regional

Center and then administered the drug.

QUESTION: Well, how could he be examined except to be transferred?

MR. WURTZ: Well, the statute 86-179 --

QUESTION: Are there any facilities in the prison involved to give him a psychiatric examination?

MR. WURTZ: Yes, your Honor, there is a psychiatrist, or there was one.

QUESTION: My question was to make a thorough psychiatric examination.

MR. WURTZ: The statutes contend that --

QUESTION: If you find a prison with one of those, you let me know, will you? None of them have that. That's why they sent him to these institutions.

MR. WURTZ: I don't know why they sent him to these institutions.

QUESTION: Isn't that right?

MR. WURTZ: I don't know --

QUESTION: Why are you objecting if you don't know why?

MR. WURTZ: Why what?

QUESTION: Why are you objecting if you don't know what you are objecting to.

MR. WURTZ: I am objecting to the fact that he was not given a hearing before he was sent over there.

QUESTION: And that's all the objection.

That's all.

QUESTION: I don't think under here at this hearing, if no psychiatrist has been able to give him a 30- or a 60-day examination, do you think any psychiatrist is going to make an evaluation on just walking into a hearing room and giving a judgment? Or is he going to say he wants at least a 30-day and perhaps more?

MR. WURTZ: I would hope he would have a 30-day and perhaps more.

QUESTION: Isn't that what the State of Nebraska did to him here, send him to a place where he could get an adequate examination?

MR. WURTZ: No, they didn't, your Honor. They sent him over there and they didn't give him any examination at all. They strapped him down and gave him medication.

I think when the lower court indicated that they wanted a hearing, I think that the hearing, they are indicating that in that hearing there will be separate testimony from different psychiatrists. And it would be hoped that the patient involved would be able to have independent psychiatric testimony of his own that he could offer at that hearing.

I think the important thing to realize and why this case is different from Meachum v. Fano is the fact that it is a transfer from a prison to a mental hospital, and I think the

lower courts and other courts have taken note of the fact that there is a stigma that does attach to people when they are transferred and placed in psychiatric care, which is not the same type of stigma one would receive if he were to be given just medical care.

QUESTION: What if he were transferred for treatment for alcoholism?

MR. WURTZ: That is a very difficult question, your Honor, because it is kind of right in between on that line. I am sure psychiatrists, many psychiatrists, would feel that that is a psychiatric problem in and of itself why that person is an alcoholic. But on the other hand, because of the dangerous things and bad things that it does to your liver, it's a physical problem.

I would think that alcoholism -- it would probably depend upon the type of medication that the psychiatrist or doctor would want to prescribe for the person that is an alcoholic.

QUESTION: Do you think that is a worse stigma than being in prison and having gone through the process of setting himself on fire? Do you think there is some stigma that is going to be worse than that?

MR. WURTZ: I think the stigma at the present time, it probably isn't there. I think the scars that he may have, physical scars, are probably worse than any stigma he will see

later on in his life.

QUESTION: You don't feel that we are getting away and maturing in our concepts of psychiatric treatment as contrasted with 20 years ago?

MR. WURTZ: Do I think we are getting away, your Honor?

QUESTION: Getting away from the old stigmatizing approach. You still think there is a stigma to be subjected to psychiatric treatment?

MR. WURTZ: I believe so, your Honor. One of the first cases I ever took as an attorney involved -- it was a question of custody in a divorce as to whether or not -- who will have the custody of the children, the husband or the wife. And the husband was one time an ex-felon, and he had a little girl, and it was brought up at the time of the hearing that the other attorney introduced evidence to the effect that this was a very sick person and that this sort of thing might reoccur again, because, well, he was sick once, and that seemed to give the judge at the time an irrebuttable presumption that he might be sick again.

QUESTION: You think if someone undergoes psychoanalysis, that he is stigmatized?

MR. WURTZ: Probably less so if he had that done voluntarily.

QUESTION: Careful how you answer that.

MR. WURTZ: I think if one goes voluntarily, I think you waive any stigma that might attach to yourself. But if you are sent over there and told, "You be confined over there with sick people, psychiatric people," I think the stigma, that might stay with you, particularly if you didn't want to go. Certainly Larry Jones is going to remember being strapped down and injected with thorazine. In Re Ballay, a case I cited in my brief, detailed a number of restrictions or stigmatizing things which still follow --

QUESTION: Of course, in an ordinary hospital you can be strapped down and injected with things you don't like to remember very well.

MR. WURTZ: That's true, but, your Honor, in this case the State of Nebraska did not involuntarily treat people for psychiatric problems in the penal complex itself. This was something that was to be done at the Lincoln Regional Center.

In Re Ballay does talk about a number of State constitutional statutory restrictions on voting rights, restrictions on one's right to serve on a Federal jury, restrictions in some States to get a driver's license. Right now if you want to purchase a gun, there is a question on the questionnaire as to whether or not you have ever been incarcerated in a mental hospital.

Again, I think the mere fact that one is in a psychiatric institution sometimes gives a rebuttable

presumption that he may again suffer from that occurrence. It can be used perhaps in some instances to impeach his credibility at trial if his credibility at trial is put at issue. And, again 83-180, the third part of the statute, says that at the end of the term if the State wishes to commit this person civilly, they can do that. They can keep the person there in the hospital and then proceed with civil commitment procedures very hastily.

I think, if I were sitting on a local mental health board and I saw the State come forward with an inmate who had actually been there in a mental hospital for a year, year and a half, two years, I think there would be a rebuttable presumption. I think it's in my mind. I see someone walking in, I don't know if he may be overmedicated, I don't know what his condition is, I think I might want to put a lot of weight into the credibility of the State at that time.

QUESTION: Well, you are going to pass this case, because this man is in the insane asylum right now, isn't he?

MR. WURTZ: He is in the psychiatric ward of the veterans' hospital. It's a nice name for an insane asylum.

QUESTION: So all this, you argue, is way off of this case, isn't it?

MR. WURTZ: Well, I believe, your Honor, and this gets into the mootness issue, it's not on the record, Larry Jones took the parole voluntarily because it was the only

parole they offered him. He was so afraid of what they were going to do to him in the State of Nebraska that he said, "I am going, and I do not want to come back." That is why he is taking his medication voluntarily in Illinois, because he is afraid that he is going to be sent back to the State of Nebraska. At least that is what he tells me.

I think the case is not moot, though, because there are a number of cases the Court has looked at and has found that there are collateral consequences to criminal convictions. And I think we can analogize here in the case also because of the stigmatizing consequences that happen to someone when he is sent to a psychiatric hospital very similar to the -- although they go a bit farther than the stigma which follows one who is put in prison.

QUESTION: Why don't you say there is a lot of difference between being in a hospital that is run by the Government and an average insane asylum run by a State. People don't have the same feeling about them, do they?

MR. WURTZ: I don't think it's as bad.

QUESTION: Where is my father? "He's in a Veterans' Administration hospital."

Where is my father? "He is in the State insane asylum for felony insane people."

There's a difference.

MR. WURTZ: And the record also does indicate,

although I do forget the page, it was in the testimony of Dr. Coates, that I said, "What is the Lincoln Regional Center?" And he said, "The State mental hospital." At one time it was called the State hospital for the insane, but I think what they did was just change the name in keeping with current psychiatric thought so it would not sound as bad.

QUESTION: Does the record show that his treatment at Danville is any different from what he would have had at the Lincoln Regional Center?

MR. WURTZ: No, your Honor, it does not. The transfer was effectuated after the hearing in this case.

QUESTION: You are taking the position that the medication he received in Danville is somehow different from the medication he would receive in Lincoln?

MR. WURTZ: That is correct, your Honor, because he is taking it voluntarily.

QUESTION: Does that not make the case moot?

MR. WURTZ: No, I don't think the case is moot. I think --

QUESTION: Maybe the Court would want it moot, but we have to struggle with this, and I don't think we can stipulate the case out on the ground it is moot.

MR. WURTZ: I think that the Court would find that there is no continuing injury. I think that you could find that there are collateral consequences to this conviction --

not a conviction, but to this transfer that the State effectuated upon him by sending him to the Lincoln Regional Center.

QUESTION: Do you want to hold Nebraska responsible for the collateral consequences of his being in Illinois in a mental institution?

MR. WURTZ: He in some sense is responsible because he went there voluntarily himself, your Honor.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Wurtz.

QUESTION: Just one more question. If you prevail in this litigation, your client will stay right there in the Veterans' Hospital in Illinois, won't he?

MR. WURTZ: I understand there is some proceeding to violate his parole. They are doing an investigation right now. But that is correct.

QUESTION: If he doesn't violate his parole.

MR. WURTZ: He will stay in the Danville psychiatric wing in the hospital.

QUESTION: So it won't have any effect on him.

MR. WURTZ: Pardon, your Honor?

QUESTION: I am still interested in this mootness business, but it is too bad because there is no adversarial relationship.

MR. WURTZ: I think there is still a spirited

controversy here because --

QUESTION: So does your opponent. You both want to get it decided even if it's moot.

MR. WURTZ: Your Honor, I do not think the case is moot.

QUESTION: I know you don't.

MR. CHIEF JUSTICE BURGER: You have said that before, now, and your time has expired.

MR. WURTZ: Thank you, your Honor.

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

REBUTTAL ARGUMENT OF MELVIN KENT KAMMERLOHR

ON BEHALF OF APPELLANTS

MR. KAMMERLOHR: I would just like to get back on the track and summarize, your Honor.

I think the issue here is the interest involved, whether or not after a person has been convicted and sentenced, such as in Meachum and others --

QUESTION: General Kammerlohr, could I ask you a question on that?

MR. KAMMERLOHR: Of course, your Honor.

QUESTION: Supposing during a criminal trial the trial judge had a law clerk who knew quite a bit about psychiatry and maybe he is even a medical psychiatrist, and at the end of the trial the trial judge said, "Well, I have heard

all the evidence and instead of sentencing you to the prison, I have talked to my law clerk and we decided it would be better for you to go to a mental hospital." Could he do that?

MR. KAMMERLOHR: No, your Honor.

QUESTION: Why not? Constitutionally could he do it assuming the statutes authorized that the trial judge can have discretion without any hearing on mental competence to send either to prison or to a mental hospital. Would the Constitution tolerate that?

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: They might want more than the law clerk's opinion, however, might they not, Mr. Kammerlohr?

MR. KAMMERLOHR: They might. But assuming -- I know what Mr. Justice Stevens is getting at is his dissent as to whether or not there is a residual, after the conviction, any residual right such as right to religious study and right to reasonable medical treatment, and those things.

As to that, your Honor, I am saying even if there is a residual, that the method in this statute satisfies the hearing that the lower court tried to outline.

QUESTION: We don't have to be concerned about the method in this statute unless we first decide whether the convicted person has any protected constitutional interest in not being sent to a mental institution.

MR. KAMMERLOHR: That's right.

QUESTION: We don't reach the statute until we first decide that. And as I understand your position, the State can have the trial judge, without any hearing whatsoever, decide, "I think I will send you to a mental hospital instead of the prison, because I think it would be better for you. I have watched you during the trial, and you would probably be better off over there where they give you these very special treatments." That's your position, I take it.

MR. KAMMERLOHR: It's my position that -- it's not my position that --

QUESTION: We don't have to worry about the adequacy of the hearing at all because there is no constitutionally protected interest in not being sent to a mental institution as opposed to another prison.

MR. KAMMERLOHR: It's my position that the way to attack that then comes later.

QUESTION: Any protection against that is a matter of grace by the State. It gives whatever protection it wants to. But the Constitution doesn't afford any protection. That's your position?

MR. KAMMERLOHR: I don't believe he could -- I will have to back up. I don't believe he could be sent for a definite term or term in the mental hospital if he were then found after he arrived there that he was not mentally ill. I think he could be sent there for examination, study, and

treatment if necessary.

QUESTION: But does the Constitution guarantee him a hearing after he gets to the mental institution? Or is that just a matter of grace given by the State?

MR. KAMMERLOHR: The Constitution -- the only thing that we have gotten so far as far as this Court is concerned that I can recall is reasonable medical treatment.

QUESTION: Maybe the Constitution guarantees that a State can't lock anybody up involuntarily in a hospital who is neither ill nor in need of treatment or diagnosis.

MR. KAMMERLOHR: When we do this --

QUESTION: To determine whether -- do you need a hearing before that determination is made, or could I have my law clerk make that determination if I were the trial judge?

MR. KAMMERLOHR: We do not need a hearing to send a person in before he is convicted to the mental hospital to see if he is able to stand trial, for example. And while he is there, he is usually involuntarily confined for a period of time until the doctors can examine him and determine and make a recommendation back to the court.

QUESTION: The question is what does the Constitution require. As I understand your position, if he has been convicted of a crime, the Constitution doesn't require anything. He can go wherever the trial judge sends him.

MR. KAMMERLOHR: That's not my position, your Honor, not 100 percent. I am saying if this Court finds there is a residual, that the Nebraska method of doing it is constitutional and that the Court should not have looked into whether any process was due in the first place, but if they did, that they should have found that our method was a more reasonable method than having this hearing.

QUESTION: I understand that.

MR. KAMMERLOHR: That's my total position.

QUESTION: Your real position is that even if there is a liberty interest, you do give adequate procedures.

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: That's your second argument. And your first position you don't really have a lot of confidence in, if I understand you.

MR. KAMMERLOHR: My first position I don't take as a strong case Meachum v. Fano and Montanye, but I do believe that this Court could put it within the framework of those cases.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:21 p.m., the oral arguments in the above-entitled matter were concluded.)