

ORIGINAL

In the
Supreme Court of the United States

JOSEPH VITEK, INDIVIDUALLY AND AS DIRECTOR
OF THE DEPARTMENT OF CORRECTIONAL SERVICES;
ROBERT PARRATT, INDIVIDUALLY AND AS WARDEN OF
THE NEBRASKA PENAL COMPLEX; JACK CLEAVENGER,
INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT
OF PUBLIC INSTITUTIONS; KLAUS HARTMANN, M. D.,
INDIVIDUALLY AND AS SUPERINTENDENT OF THE
LINCOLN REGIONAL CENTER: BENJAMIN COATES,
INDIVIDUALLY AND AS HEAD OF THE SECURITY
BUILDING, LINCOLN REGIONAL CENTER,

APPELLANTS,

v.

LARRY D. JONES,

APPELLEE.

No. 78-1155

Washington, D. C.
December 5, 1979

Pages 1 thru 40

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH VITEK, Individually and as Director :
of the Department of Correctional Services; :
ROBERT PARRATT, Individually and as Warden of :
the Nebraska Penal Complex; JACK CLEAVENGER, :
Individually and as Director of the Department :
of Public Institutions; KLAUS HARTMANN, M.D., :
Individually and as Superintendent of the :
Lincoln Regional Center; BENJAMIN COATES, :
Individually and as head of the Security :
Building, Lincoln Regional Center, :
:

Appellants, :
:

v. :
:

LARRY D. JONES, :
:

Appellee. :
:

No. 78-1155
:

-----X
Wednesday, December 5, 1979

Washington, D. C.

The above-entitled matter came on for argument at
10:04 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:

MELVIN KENT KAMMERLOHR, ESQ., Assistant Attorney General, State of Nebraska, 2115 State Capitol, Lincoln, NE 68509; on behalf of the appellants.

THOMAS A. WURTZ, ESQ., 101 E. Broadway, Suite 303, Eugene, Oregon 97401; on behalf of the appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Vitek against Jones.

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

ORAL ARGUMENT OF MELVIN KENT KAMMERLOHR, ESQ.,

ON BEHALF OF THE APPELLANTS

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

As the Court is well aware, this case was here and extensively argued about a year and a half ago, at which time it was returned back to a three-judge district court on the question of mootness, because the--Mr. Jones at that time had been paroled to a mental--VA mental hospital in Illinois.

The three-judge court found that the case was not moot because his parole could be violated--revoked at any time, and he might be returned back to the penitentiary at Nebraska, where he would be subjected to the same possibility of being transferred to a state mental hospital.

QUESTION: Then it's clear that at the time the three-judge court acted, he was still in the VA hospital in Illinois?

MR. KAMMERLOHR: Yes, Your Honor.

QUESTION: How soon after--

MR. KAMMERLOHR: Shortly after that, about three months, I believe, he was found to have left--he violated it some way. But at any rate, the parole board violated his parole and put out a warrant for his arrest.

And he was subsequently arrested in the State of Arizona, and returned to the penitentiary in Nebraska, where he now is incarcerated in the regular part of the penitentiary, as of this--as of Monday.

So they--we still have the same basic questions, I believe, that we argued here before, and that's really whether the statute in Nebraska authorizing transfer is constitutional or not.

QUESTION: Why is there a case in controversy about that at this point?

MR. KAMMERLOHR: Well, because the three-judge court, Your Honor, enjoined the State of Nebraska.

QUESTION: Oh, I understand that. But why was there jurisdiction--why is there any longer a live controversy?

I know he's in prison, but just any prisoner in a Nebraska prison wouldn't have a case or controversy with the state of Nebraska with respect to the provisions to transfer to a mental institution.

Why would this man? Because he's been transferred before, and is he about to be again, or what?

MR. KAMMERLOHR: No, because the state has been enjoined from transferring him to--

QUESTION: Well, I know, but if there's no case or controversy left, if the case is mooted, what you would do is, you would vacate the district court's judgment, and dismiss it, dismiss the case.

I just want to know, is there still a--and it's a jurisdictional matter.

QUESTION: You wouldn't object to that, would you?

MR. KAMMERLOHR: No, I wouldn't object to that, Your Honor. If the case were mooted, and we were no longer--

QUESTION: Why is it a live case at this point? Is Nebraska threatening to transfer him again or not?

MR. KAMMERLOHR: I can't say that, Your Honor, one way or another. I--if he should--as you know, he was very violent before; he burned himself up. And if he should do something like that, the State of Nebraska would transfer him immediately, I'm sure.

QUESTION: But you say you can't say--

MR. KAMMERLOHR: But we don't know from one day to the next.

QUESTION: When you say you can't say, you don't mean it's a state secret that you can't reveal, but just that you simply never know--

MR. KAMMERLOHR: Yes, Your Honor.

QUESTION: --until something happens whether it'll be done or not.

MR. KAMMERLOHR: Never know, and I am sure that they are ready to transfer him, according to the statute, is what they would like to do, at any time if he should suddenly become violent.

QUESTION: Just like any other inmate.

QUESTION: Well, that's true of any prisoner.

QUESTION: Just like any other inmate.

MR. KAMMERLOHR: Except that we aren't subject to an injunction on any other prisoner except--

QUESTION: I understand that; forget the injunction for a moment.

You think that--I'll ask you this way. Except for the injunction, would Nebraska now transfer him to the mental institution, or not?

MR. KAMMERLOHR: It might.

QUESTION: Well, how do you know?

MR. KAMMERLOHR: Well, it would depend on, I suppose, on his conduct.

QUESTION: On his conduct. On his conduct.

MR. KAMMERLOHR: On his conduct.

QUESTION: Well, I suppose if he developed tuberculosis, they might transfer him to an institution

where they could treat his tuberculosis.

MR. KAMMERLOHR: Yes, Your Honor.

QUESTION: But that's pure speculation, isn't it?

MR. RKAMMERLOHR: And this gentleman did spend five months in a civilian hospital in Lincoln because of his burns before. So, they do this everyday, they transfer people to different hospitals for medical treatment.

QUESTION: Well, all you want is to have the injunction lifted?

MR. KAMMERLOHR: We would like to have--of course we would like to have a rule. But as far as my basic legal interests, I would like to have the injunction ended, yes.

QUESTION: And if you can get a rule beyond that, so much the better?

MR. KAMMERLOHR: Yes, Your Honor.

QUESTION: Well, I suppose both parties, if there weren't the case or controversy requirement of Article III would like a ruling, since any district judge sitting in Nebraska is going to see that the Eighth Circuit, when it does have an actual case or controversy, will probably rule the way the three-judge court did.

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

QUESTION: But that doesn't remove the Article III requirement so far as we're concerned, nor so far as it is

concerned.

MR. KAMMERLOHR: We are--we only have three district judges in Nebraska; two of them are on this court.

QUESTION: Well, why did the three-judge court think this case wasn't moot? We remanded to see if it was moot.

MR. KAMMERLOHR: They took the--

QUESTION: They just assumed that because he was on parole and he had violated his parole, that the case wasn't moot; is that all they did?

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

QUESTION: Well, at the time he--

MR. KAMMERLOHR: Because the injunction ran for as long as he was subject to our custody.

QUESTION: Well, let me clarify the question I put to you at the outset. At the time the three-judge court decision came down, was he still in the VA hospital in Illinois, or had he violated his parole and left?

MR. KAMMERLOHR: He was still in the three-judge--or excuse me, he was still in the Illinois hospital; yes, Your Honor.

QUESTION: But the situation has changed significantly since then by reason of his escape and then his apprehension?

MR. KAMMERLOHR: Yes, Your Honor.

QUESTION: So he's back where he was before this controversy ever arose.

MR. KAMMERLOHR: Except that he's not now in the-- yes, he's back where he was before it ever arose. If he were in a--back transferred to the state mental hospital we'd be exactly where we were when he brought the action.

I think the officials are naturally afraid to do anything because of the injunction, and because of the fact that two of the three judges are the same judges they're going to have any time a case comes up.

So very briefly, then, I don't want to go over all of the ground we've gone over before. I appreciate the Court's time.

And I only want to emphasize a couple of points. And that is, that the transfer, according to statute, is not just for treatment, but is for examination and study. And then treatment, if necessary.

The statute provides that when treatment--when treatment is no longer necessary, an inmate shall be transferred back to the penitentiary.

So the first thing I want to emphasize is that it's merely a question of sending someone over to a private--or to a mental hospital, the same as civilians go to for examination and study.

The second thing I would like to emphasize is there there's no issue in this case on the constitutional quality of the conditions at this hospital. This has never been raised in the pleadings. The state has not presented any evidence on whether or not the kind of treatment is adequate or not.

And we think it would be a much better procedure to attack this place, if they think it's bad, on the constitutional quality, rather than on the method of getting over there.

And these are points which we went into quite extensively before, and I don't think there's any need to go into them again, Your Honor.

So with that, I'll end. Thank you.

QUESTION: May I ask you a question before you sit down?

MR. KAMMERLOHR: Excuse me, Mr. Justice Stevens.

QUESTION: I--when was the decision made on mootness? Was this the opinion in October of 1978? And as I read the opinion--

MR. KAMMERLOHR: Yes, Your Honor.

QUESTION: And as I read the opinion, he was not in Danville, but he was then on parole, wasn't he? And wasn't the theory of the three-judge court, one of the

conditions of the parole was, he had to submit himself for psychiatric examination upon request; is that correct?

MR. KAMMERLOHR: He was on parole, but his parole was a limited parole to Danville. And at the time the three-judge court--if you jibe the two times when the parole violation was entered, I think that it was probably about the time--the three-judge court didn't know about it. It was not before the three-judge court that he had violated it.

And we didn't know about it--I didn't know about it until after the three-judge decision came out.

QUESTION: That he'd violated his parole?

MR. KAMMERLOHR: Yes, Your Honor.

QUESTION: But he was on parole?

MR. KAMMERLOHR: He was on parole, yes.

QUESTION: He was on parole. And they--

MR. KAMMERLOHR: As far as the three-judge court was concerned. I'm sure that's true.

QUESTION: But they--

MR. KAMMERLOHR: But they just thought that because they'd entered this injunction, for as long as he was under Nebraska's custody.

QUESTION: No, they said Larry Jones is now on parole, but he is subject to and under the threat of transfer to the state mental hospital for examination,

study and treatment.

Apparently--and that's apparently their basis for being--saying it isn't moot.

QUESTION: Plus the fact that the state asserted the right to transfer him to a hospital on short notice, didn't it? It seeks to have that right?

MR. KAMMERLOHR: Yes, Your Honor.

QUESTION: Well, it seeks--of course it's always sought to have that right, long before the injunctive proceedings.

MR. KAMMERLOHR: Yes, Your Honor.

QUESTION: If we vacate--just--if we vacate this as moot, then I take it if you did try to transfer him, he could--his lawyer could no doubt go into court and get a temporary restraining order right away on the authority of this opinion.

MR. KAMMERLOHR: I'm sure he could; yes, Your Honor.

He shouldn't have any trouble at all.

QUESTION: Which is true of any other prisoner?

MR. KAMMERLOHR: It would be now.

QUESTION: Unless you have a new--

MR. KAMMERLOHR: Unless we have some new rule.

QUESTION: Or a new district court judge.

MR. KAMMERLOHR: We'll be fighting this thing

forever.

QUESTION: Or unless you have a new district court judge in Nebraska who interprets the constitution differently than this three-judge court did.

MR. KAMMERLOHR: That's right. And we think that basically this gets down to, has the legislature of Nebraska, the legislative body, done its job by passing a proper statute; not whether the administration is doing anything or not doing anything.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wurtz.

ORAL ARGUMENT OF THOMAS A. WURTZ, ESQ.,
ON BEHALF OF THE APPELLEES.

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

The question here presented for review is whether or not Larry Jones may be transferred from the Nebraska penal and correctional complex, which is the state penitentiary in Lincoln, Nebraska, to the Lincoln Regional Center, which is the state mental hospital, which is also located in the State of Nebraska.

QUESTION: Well, does that question arise until they try to do it?

MR. WURTZ: Well, it arose--they did do it,
Your Honor.

QUESTION: He's now in a penal institution, isn't he, a prison?

MR. WURTZ: He has been sent back to the penal institution.

QUESTION: Well, then, what's the question?

MR. WURTZ: Our contention is, Your Honor, this is still a very viable and live controversy, for the reason that he is still under the threat, as the district court found below, of being transferred back.

QUESTION: Would you say that he's still under a threat that if he develops tuberculosis he might be transferred to a hospital for treatment of tuberculosis?

MR. WURTZ: That might be true, Your Honor, but that is not precisely the issue we face here today in Court.

QUESTION: How is this case different from Weinstein against Bradford?

MR. WURTZ: I'm not familiar with that case?

QUESTION: Well, that was the case where there had been an injunction entered by, I think, the Court of Appeals for the Fourth Circuit against certain prison practices in connection with parole, and meanwhile, the man's parole expired. And we granted certiorari and then dismissed on the ground that it was moot, because the man was no longer under the same threat that he had been at the

time the case was decided.

MR. WURTZ: Well, for one, Larry Jones is not on parole. So therefore his parole had not expired. He has been sent back from the limited parole that he did have at the mental hospital in Danville, Illinois, back to the State of Nebraska.

QUESTION: But he hasn't been transferred to the mental hospital.

MR. WURTZ: He would be transferred, it is our contention, but for the fact that a three-judge federal panel has entered an injunction.

QUESTION: Well, but that's not what your opponent says. Your opponent says, it just depends on what happens.

MR. WURTZ: Well, if this injunction, that we have from the three-judge federal panel, were to be dissolved by this Court, or by the three-judge federal panel, we have no doubt that he would be transferred back, he could be transferred back to the mental hospital.

QUESTION: He could be, but would he?

MR. WURTZ: Well, I can't see into the future, Your Honor; I don't have a crystal ball.

QUESTION: No, none of us can.

MR. WURTZ: But it seems to be one of those cases which seems to be capable of repetition, yet it would

be evading review if this Court would not decide that issue here today.

QUESTION: Well, what if as far as you could tell or any doctor could tell, your client was completely cured? He wouldn't be any different than any other inmate. And just any inmate couldn't raise an issue about these procedures.

MR. WURTZ: Well, he isn't just any other inmate.

QUESTION: All right. Now, tell me why--tell me what substance there is--the fact that it happened to him before.

MR. WURTZ: It's happened to him before.

QUESTION: And his condition hasn't changed?

MR. WURTZ: He sat over there--that's right, he sat over there for nine months. He has had all of the collateral consequences that will ensue from having to be in the mental institution in the first place.

And he still has a threat of that hanging over his head. Now, I can't get into his mind and tell you exactly how he feels or anything. But it's just that type of collateral consequence that is still existing. And for that reason, we feel that there's still a spirit of controversy here.

QUESTION: Well, you can't--you won't cure the

collateral consequence that's already happened in this case?

MR. WURTZ: That's true. But the mere fact that those consequences have already happened, and the fact that they might happen again, and I think coupled with the fact that that is still hanging over his head, makes it still a very good and live controversy.

QUESTION: But to have a live controversy, you must say that the risk of his being transferred again is real enough to call it a case or controversy.

MR. WURTZ: Yes, I would agree with that statement, Your Honor. And I think those risks are real enough by the mere fact that had this three-judge court not entered the injunction, he would still be incarcerated in the state mental hospital.

QUESTION: Mr. Kammerlohr told us I think earlier that he had escaped, was it from Illinois to Arkansas, and has now been returned to prison in Nebraska. Was either the escape or return connected with any aberrant behavior?

MR. WURTZ: Well, as I understand the factual situation--and I must say that it is somewhat murky, because Mr. Jones was having some mental problems at the time, and frankly, he cannot really remember some of the things that happened. One day he was in Denver, and I received a call from him. And I said, well, you know, why aren't you in

Danville, Illinois. The next time I heard from him, he was in Arizona. And he had gotten to see someone in Denver at a hospital, talked to a parole officer. But then he ended up--next time I heard from him, he was in Arizona.

Then the next time I heard from him, he had been extradited from Arizona, and he had been sent back to the State of Nebraska.

QUESTION: Maybe he's a sun worshipper.

(Laughter.)

MR. WURTZ: Well, I don't know; he might be. But maybe he left because he didn't like the mental hospital. I don't know.

But one important point I think should be noted here, the Court here, it was my understanding, determined it was moot last time, because he was accepting psychiatric services.

QUESTION: We didn't say it was moot.

MR. WURTZ: Well, I--excuse me, it was remanded to consider mootness. But it was my understanding from the argument last time that one of the reasons that the Court did that was because he was accepting voluntary psychiatric treatment at the state hospital in Danville, but at the time the three-judge panel entered the order reinstating the injunction October 27, 1978, Mr. Jones was no longer accepting voluntary psychiatric treatment in Danville,

Illinois. He was on a work--it's actually a work-release program from that limited parole.

So he was not receiving psychiatric treatment voluntarily at the time the three-judge panel reinstated that injunction.

So we--I thought that was one of the reasons that the three-judge panel should have reinstated the injunction because the circumstances had actually changed from the time that we were up here in Court arguing the case.

QUESTION: Now, come back to my question, which I'm not sure you addressed yet.

Suppose the prison doctors concluded that he had developed tuberculosis. Is it your position that they must have adversary hearings before they can transfer him to a hospital to treat the tuberculosis?

MR. WURTZ: That would depend on two things, Your Honor. First of all, if he wanted to be treated. If he did not wish to be treated, it would be--probably if I was representing him, it would be our contention that he could refuse the medical treatment.

I think--in the cases involving Christian Scientists and other religious groups, I think we have held that one has that right to refuse medical treatment.

QUESTION: Yes, but being a Christian Scientist is not part of my hypothetical. Just this man, unless

you tell us he's a Christian Scientist.

MR. WURTZ: I would argue that he would have the right to refuse that medical treatment.

QUESTION: Well, my question is: Must there be a hearing before he is moved from the prison to the hospital for the treatment of his tuberculosis?

MR. KWURTZ: Well, the statute in Nebraska does not specifically provide for that now at this time.

QUESTION: Do you think the constitution does, the Federal constitution?

MR. WURTZ: I don't know that that issue has really been addressed. I personally think, if he does not really want to be operated on, or have his tuberculosis treated, I think he ought to have that right. And perhaps, yes, a hearing ought to be mandated, or given to him at that time.

QUESTION: But your claim here is that the Nebraska statutes themselves put some preconditions on a transfer to a mental institution.

MR. WURTZ: Well, there are conditions. They allow a physician to make that finding.

QUESTION: Well, I know, but they require it.

MR. WURTZ: Yes, they require it.

QUESTION: And then there must be a finding that he has a mental disease or defect before he may be

transferred to the hospital; isn't that right?

MR. WURTZ: That's correct. But it's also our contention that there ought to be some type of independent fact-finding.

QUESTION: Well, I understand that; I understand that. But you may not be the--the prison authorities just may not transfer him to the mental hospital without making this kind of a determination.

MR. WURTZ: We would hope that they would make some type of a determination.

QUESTION: Well, the statute requires it. The statute requires it. And you're suggesting--I thought your argument was--

MR. WURTZ: Well, we need a further safeguard, that's what we're saying.

QUESTION: --that because the statute requires it, there should be a hearing about it.

MR. WURTZ: Well, what I meant was that the statute requires it, that therefore we have a hearing. But what I'm saying is, you don't have a hearing but they can be transferred.

What we are saying, we're challenging the sufficiency of that statute. We're saying, yes, there is a safeguard there, but that safeguard isn't good enough.

QUESTION: You're saying---

MR. WURTZ: There ought to be a better hearing.

QUESTION: You're saying, in effect, that the state provision gives you a state right to have some sort of a hearing before you're transferred, and that because the state gives you that much of a right, the constitution requires you--the state to go further and to have more amplified hearing proceedings?

MR. WURTZ: No. I'm of the opinion, Your Honor, and we contend, that you have that right in and of itself. Under the constitution.

But I also think it's also a good argument that if you would want to categorize this type of case in the framework of the Meachum and Montanye decisions, that there be, there is an expectation that he won't be transferred.

QUESTION: Well, that was the district court's basis, wasn't it?

QUESTION: That's certainly--

MR. WURTZ: Yes, Your Honor.

QUESTION: --the narrowest way for you to win. And--

MR. WURTZ: I agree.

QUESTION: --I don't know why you want to climb a higher hill than you have to.

MR. WURTZ: I guess I'm on that hill, Your Honor, because it may appear from reading that opinion that that is why the district court found in our favor, that they said that

there was an expectation that he did have this. He could find from looking at the statute that there is an expectation there, and he should be transferred.

I think--

QUESTION: Or something created by state law?

MR. WURTZ: Yes, Your Honor.

I don't--I think he has the right, though, independent of the expectation given to him by state law. The Court also made a finding, though, and it was interesting though, it said in the opinion that this was clearly a transfer from a state penal complex to a state mental hospital. And therefore it is distinguished and different from the Meachum-type, Montanye-type cases.

I would agree--I don't think we need to go on that narrow a basis. But should this Court feel that this case would somehow fit within that framework of the Meachum and Montanye decisions, I think there is an expectation there, rooted in Nebraska state law.

QUESTION: You say that even though the state of Nebraska required no finding by a physician, and simply left it in the discretion of prison officials to transfer an inmate to a mental hospital, that he would have a constitutional right to a hearing before that could be done?

MR. WURTZ: Yes, Your Honor. In fact, there is a statute, I believe it's 33-176, which empowers the Department

of Corrections to place any inmate wherever he wants to put him. And--

QUESTION: But it does--the statutory scheme also requires the physician's review in the case of a transfer to a mental hospital, does it not?

MR. WURTZ: Yes, Your Honor. In 83-180, subsection 1, which the lower court found unconstitutional.

But we contend that even if 83-180 didn't exist, and all there was was 83-176, which gave the Department of Corrections officer the ability to just transfer him anywhere he wanted to, as long as it was within the Department of Corrections, that he has that--that fundamental right; it's protected--it's a protected liberty interest that the constitution should afford him.

QUESTION: Even though he's already been sentenced for a criminal conviction?

MR. WURTZ: Well, that doesn't have anything to do with it. Why should his rights be any different just because he happens to be in a prison?

QUESTION: Well, we've held, certain in Meachum v. Fano, that the transfer from one prison to another doesn't give rise to any constitutional right.

MR. WURTZ: Yes, that's correct. And I think that is the precise difference between Meachum and this case. This is not a transfer from one prison to another. It's a

transfer from one prison to a mental hospital. Before it was called the Lincoln Regional Center it was called the Nebraska State Home and the Nebraska Hospital for the Insane. This isn't a Meachum-type case, in that sense.

QUESTION: Mr. Wurtz, will you identify the injunction that is still in effect? Is it the one that's on page 19 of the Appendix?

I guess it's the jurisdictional statement; I beg your pardon. It may be in the Appendix, but I'm looking at the jurisdictional statement. Ended October 27, 1978.

MR. WURTZ: Yes, Your Honor, it's my understanding that the injunction is still left.

QUESTION: If that's still in effect, your client can't be transferred without the hearing that's described in that injunction, can he?

MR. WURTZ: That is correct, Your Honor.

QUESTION: Well, why are you complaining? Aren't you satisfied with that?

MR. SWURTZ: Yes.

QUESTION: You're defending that injunction?

QUESTION: You're not complaining. You're the respondent, or the appellee.

MR. WURTZ: Right. I didn't appeal, Your Honor.

QUESTION: But I thought you were arguing that the case is not moot. I should think you'd be happy to have us

say it is moot.

MR. WURTZ: Well, no, because--

QUESTION: You'd have the injunction, wouldn't you?

MR. WURTZ: --because it's my understanding of the mootness rule here in the Supreme Court, that if a Supreme Court found a case moot, it would be--vacated the lower injunction.

QUESTION: I guess you're right. I guess you are right on that.

MR. WURTZ: I guess that's what I was afraid of last time.

QUESTION: Right.

MR. WURTZ: We're happy that the injunction was reinstated.

QUESTION: And you don't want to have to go back in court if they move him over to Lincoln, Nebraska again. If they move him from where he is to Lincoln, Nebraska, you don't want the burden of going in to get another injunction?

QUESTION: Or if they start to move him?

MR. WURTZ: Well, that is correct. We would gladly do it again if we would have to. But it would seem to me that it's one of those cases that would just keep evading review.

QUESTION: Do you think there's no state remedy in this area?

MR. WURTZ: That is correct, Your Honor. That is why

we brought it in Federal court. I don't see--

QUESTION: Well, why do you think there's no state court remedy?

MR. WURTZ: Well, because habeas corpus, which we thought would be one of our only remedies, which we talked about last time, did not appear to lie in this type of case. Because he was--habeas corpus would only help us if he was put somewhere illegally. And if we would see him sitting in the Regional Center, and we bring the habeas corpus and we have the writ, it would be dissolved.

QUESTION: Well, don't Nebraska, the Nebraska state courts, entertain a challenge on the Federal constitutional grounds?

MR. WURTZ: Yes, Your Honor. Oh--if the question is, could we have raised this in state court as opposed to bringing it in a three-judge federal court, correct.

QUESTION: This is a state statute which, I take it from these papers, that it's never been construed by the state courts.

MR. WURTZ: Yes, that's correct, Your Honor.

QUESTION: They might construe it just the way you want it construed; isn't that so?

MR. WURTZ: That is a possibility, Your Honor. I don't know why--I think we brought it in the three-judge federal panel. I think we saw that this was a case that

probably was going to probably be appealed. And it would have taken--probably five years already going through the federal court system, and it probably would have taken seven through the state court system.

QUESTION: Maybe you could have got it rthrough the state courts in 18 months.

MR. WURTZ: Well, it would--I don't know if we could have or we couldn't have, your Honor. But it would have been my opinion that we couldn't have.

QUESTION: You mean that the state courts would not enforce the federal constitution, or consider your constitution-al attack?

MR. WURTZ: No, I didn't say that, Your Honor. I just said we made a calculated decision, and it was five years ago; I really can't remember why; to bring it before the three-judge federal panel, who--and I--the three-judge federal panel had jurisdiction to hear this type of case. I don't think there's any contention there.

QUESTION: Mr. Wurtz, I realize--Jones was convicted of robbery, I believe, wasn't it? A felony?

MR. WURTZ: Yes, Your Honor.

QUESTION: The statute applies to people in custody of the Department of Corrections. Who does that encompass? Does that encompass people convicted of misdemeanors, by any chance?

MR. WURTZ: That would depend on where they're placed.

QUESTION: But would a conviction of a misdemeanor entitle the judge to sentence the misdemeanant to the custody of the Department of Corrections?

MR. WURTZ: Yes, Yes, Your Honor, I believe it would.

QUESTION: So this statutory scheme would authorize transfer of such a person as well as a felon to a mental institution?

MR. WURTZ: That's correct, Your Honor. And in the state of Nebraska, as you get further out west, there are a lot of counties who, for whatever reason, may not have adequate facilities to take care of certain types of prisoners. Many times, they'll contract, they'll enter into contract with the state to house actual prisoners that might be in a county jail at the Nebraska penal correctional complex. So then they are clearly, in a situation like that, under the direction of the Department of Corrections, and could be so transferred under the statute.

QUESTION: Would you refresh my recollection? As I understand, the case was originally certified as a class action, then decertified, and now it's simply an individual action by Jones, is that it? Why was it decertified? What happened on the class action?

MR. WURTZ: I wish I knew. And I really don't.

And there is nothing in any opinion or order of the Court which really gives us any clue.

Initially, we brought this case just up on--before the three-judge federal panel without a record. We were trying to argue the merits, and we wanted a temporary injunction.

We had an oral hearing. The court inquired of me as to how many actual people were involved in this type of transfer, and I said that to the best of my recollection there were probably five or six people that probably were under a threat of being transferred from the penal complex to the Regional Center.

Now, the court had previously entered the order making it a class action. I--from what I can surmise, I think based on what I told them, they determined--

QUESTION: Not enough people.

MR. WURTZ: --there wasn't enough people.

QUESTION: Five or six people is not enough for a class action in anybody's book.

MR. WURTZ: It would all depend, though, Your Honor--

QUESTION: Ten is not enough. The number is a number that you can't put your hand on. If you can name all of them, you don't have a class action.

MR. WURTZ: Of course, it depends on how you define

the class. Now, when I originally got the three-judge panel to call it a class action, I tried to define the class as all those people that were confined in the penal complex in the Nebraska State Reformatory, which was about 1,300 people, under the theory that these people are all under a threat of being transferred. And maybe when the three judges got together, they just didn't like my definition of the class. And they--

QUESTION: Well, not only that, but that--you must concede that all 1,300 of them didn't have a case or controversy with the state over the validity of that statute. Not just anybody could have walked in and challenged that.

MR. WURTZ: Well, I understand the reasons--

QUESTION: You must concede that.

MR. WURTZ: Well, no, I'm not--

QUESTION: You don't concede anything.

MR. WURTZ: --going to concede anything, because I always get into trouble when I concede things, I found out, particularly in this Court.

(Laughter.)

But it could be argued that 1,300 people are under the threat as Jones is of now being transferred just by the mere existence of the statute.

QUESTION: It could be because you're arguing it.

QUESTION: And you could also argue that the two million people who live in Nebraska are under a somewhat more

attenuated threat of committing a crime, being convicted for it, being confined to the prison system, and then suffering this fate.

QUESTION: Well, and the other 228 million people in the United States who might go to Nebraska.

QUESTION: Who might move to Nebraska.

(Laughter.)

MR. WURTZ: Well, maybe. Well, that would certainly be a tenuous type of class.

QUESTION: You won't even concede that, will you?

(Laughter.)

MR. WURTZ: I'll never concede anything here again.

(Laughter.)

QUESTION: Mr. Wurtz, my recollection is that your client has a sentence that runs into the eighties, what is it, '82, or--?

MR. WURTZ: Yes, his parole is set for 1982. And it does not appear at this time that he is going to be paroled in the very near future.

I just wanted to mention a few things about the stigma that really attaches to those who are transferred from a penal complex or a prison to a state hospital as happened in our case.

Even if a prisoner would be released, and let's say he was sent over for evaluation and treatment under the

statute, the collateral consequences of what happens to him really stay with him for a long time. And that's really one of--

QUESTION: Are they worse than his efforts to set himself on fire?

MR. WURTZ: Your Honor, I really don't concede either--and I'm not trying to be smart about that--but I don't concede it, because I don't think it's on the record, and I don't think the state really made a prima facie case that he did set himself on fire and tried to commit suicide.

QUESTION: But in Nebraska, in Weinstein against Bradford, the man had already suffered what the Court of Appeals for the Fourth Circuit felt was unconstitutional harm. And we nonetheless vacated as moot, with the thought I believe expressed by my colleague Justice White that you can't undo collateral consequences in the past.

MR. WURTZ: Well, I think there's a grave difference, though--there may be a fine difference--between the types of collateral consequences. And it really gets into this stigma--or call it whatever you want--and I think it's been recognized by the courts that it's there--that there's a difference between a stigma when you go to a mental institution. It's different.

QUESTION: Well, isn't--

QUESTION: Mr. Wurtz, I'd like to follow through

on that a little bit. It's your position that going to a hospital, be it a state hospital--we used to call them institutions for the criminally insane, but they don't anymore--is worse than being incarcerated in some state prisons that we know of today?

Isn't this an old notion that is out of line with current medical attitudes?

MR. WURTZ: It would seem to me, Your Honor, that the gist of psychiatric medicine right now is trying to come along to those lines. But I'm not so sure that that--that we've really come that far today.

QUESTION: Well, obviously, from your argument, I'm afraid you haven't.

MR. WURTZ: Well, I don't--I haven't come that far. I suppose in some cities in the United States it may be even chic to have a psychiatrist, or to be having--to having psychiatric problems. It's kind of a thing to do in some cities.

I guess in Nebraska, which is basically a rural--

QUESTION: I'm just disturbed about your constant reference to stigma, because I think stigma in 1979 is far less than it was in 1900.

QUESTION: I also think it might help to try to win your case for your client on the narrowest possible grounds, which we usually turn to if they're the narrowest grounds.

The narrowest constitutional grounds there is.

And you're arguing that the constitution itself requires a hearing, even aside from the state statute is a very broad ground that this Court hasn't gotten close to.

MR. WURTZ: Well, I think if this Court would feel that it hasn't gotten close to that ground, it perhaps ought to. I think the case--

QUESTION: I'm just suggesting to you that a narrower--a much narrower ground that you argue in your brief. The three-judge court decided on that basis?

MR. WURTZ: The expectation--

QUESTION: Are you defending the three-judge court opinion or aren't you?

MR. WURTZ: Yes, I'm defending that opinion.

QUESTION: Well, why don't you stick to it?

MR. WURTZ: Well, because, had I written the opinion, I felt the court didn't have to go on that narrow of a ground. I think that right, that liberty interest, is so fundamental--

QUESTION: What do you mean, they didn't have to? The--I suppose the notion in judging constitutional cases is that you do decide as narrow a constitutional question as you can. That's the characteristic way. Or don't you teach that way?

MR. WURTZ: Well, I don't teach constitutional law.

QUESTION: Well, apparently you don't.

QUESTION: You're argument is that it's not chic to have a psychiatrist in Scott's Bluff?

MR. WURTZ: No, that's not my argument, Your Honor. My argument is that I don't think--I think if we have to go on as narrow a ground, you have to concede that this is a Meachum-type case. And I don't think it's a Meachum-type case. I think clearly it does not fit within that analytical framework at all; the reason being that they talk about transfers from prison to prison, this was clearly a transfer from a prison to a mental hospital.

QUESTION: But the fact is you've got a state statute that puts conditions--that imposes preconditions that depends on the ascertainment--that depends on facts. And the state statute says there must be some events occur before this transfer can happen. That is not Meachum.

MR. WURTZ: No, that's the statute.

QUESTION: And that is the basis on which the three-judge court proceeded, is it not?

MR. WURTZ: Yes, it is, Your Honor. And if I were to argue in support of that base, I would say that that statute gives the prisoner an expectation rooted in state law.

QUESTION: But you don't want to make that argument?

MR. WURTZ: No, I was going to get to it.

But I think the fundamental--the argument is so

it's so fundamental. I think he ought to have the right one way or the other.

I think also you get an expectation rooted in state law by looking to Nebraska civil commitment statute itself, even those these are in the civil context. I think it's clear that Nebraska does have commitment procedure, and one normally would not have the expectation that he would end up in a mental institution without a hearing, whether or not he'd be walking down the street or in a prison.

Getting back to the question, Mr. Justice Rehnquist, what was the question about chic in Scott's Bluff? I--it's two questions.

QUESTION: Well, all I meant to say was that you were arguing that must because it may be thought chic in some perhaps metropolitan areas for a person to have a psychiatrist, it was not viewed that way in most of Nebraska.

MR. WURTZ: Right. In answer to Justice Blackmun's question, I really feel that because Nebraska is such a rural state--my wife is from a small town in southeastern Nebraska. And I know that if someone went into this town of 6,000, everyone knows exactly what they're doing.

And it's really the type of stigma that stays with you in a small town.

QUESTION: Does the constitution vary--federal constitutional right--vary from state to state? If in New

York City it's thought chic to have a psychiatrist, so there's no stigma, but in southeastern Nebraska, it's not thought chic, so there is a constitutional right?

MR. WURTZ: Clearly not, Your Honor. That fundamental right, or the right that is given to you because there's an expectation given to you by state law, would exist one way or the other.

I think what I'm saying is that the stigma, when you go into a small town, might be more felt in a small town than it would be in New York City. Because in a town of 5,000 people, everyone knows you came from the Nebraska State Hospital. And it would affect your job possibilities.

QUESTION: If lawyers keep coming up to this Court saying it's a stigma, they probably will help to keep it a stigma, too.

QUESTION: It's more of a stigma than being in a state penitentiary?

MR. WURTZ: Yes, Your Honor.

QUESTION: In a small town?

MR. WURTZ: No, I can't answer that. I think in Mr. Jones case, the plaintiff here, he felt that it had--he didn't want to be there. It was probably much more of a stigma to him. And it could be to some prisoners. I'm not saying that that might not be a stigma to everyone. In fact, some prisoners may in fact want to be at a state mental hospital

as opposed to the penal complex for certain reasons, for security or for whatever.

I would also just like to say--talk a moment about the right to counsel which this--the three-judge court found should exist, if in fact the prisoner is given some type of hearing.

It would appear to me that if we do find, and I think we should find, that the prisoner does have a fundamental right to a hearing before he's transferred to the mental hospital, if he can't afford a lawyer, he really ought to have a lawyer appointed for him.

It's analogous to the *parens patriae* theory that, as in the juvenile proceedings, that if the state is going to take this person under their wing and take care of him now because they have taken away some of his liberties, they really ought to take care of him and insure that throughout all of the proceedings that he is afforded counsel.

Because as the lower court found, unless the prisoner really has--or knows his rights, what good are the rights? They're illusory.

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

MR. WURTZ: Thank you, Your Honor.

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

MR. KAMMERLOHR: I have nothing further, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:44 o'clock a.m., the case in the above-entitled matter was submitted.)

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