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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1329

TITLE JOSEPH PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL
INSTITUTION, WALPOLE, Petitioner v. JOHN REAL

PLACE Washington, D. C.

DATE January 9, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH PONTE, SUPERINTENDENT, :
MASSACHUSETTS CORRECTIONAL :
INSTITUTION, WALPOLE, : No. 83-1329
Petitioner, :
V. :
JOHN REAL :
-----x

Washington, D.C.

Wednesday, January 9, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:43 o'clock a.m.

APPEARANCES:

MARTIN E. LEVIN, Assistant Attorney General of
Massachusetts (pro hac vice); on behalf of the
Petitioner.

JONATHAN SHAPIRO, ESQ., Boston, Massachusetts; on behalf
of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Levin, I think you
3 may proceed whenever you're ready.

4 ORAL ARGUMENT OF MARTIN E. LEVIN, ESQ.

5 ON BEHALF OF THE PETITIONER

6 MR. LEVIN: Mr. Chief Justice and may it
7 please the Court, this case presents a relatively narrow
8 issue, and that is whether Chapter 103 of the Code of
9 Massachusetts Regulations, Section 430.14 fails to
10 satisfy the due process clause because it does not
11 require a Prison Disciplinary Board to state its reasons
12 in the record for denying an inmate's request for
13 witnesses at his disciplinary hearing.

14 I will argue that the regulation wholly
15 comports with due process, and that imposing the
16 additional procedural requirement of a statement of
17 reasons imposes unjustified burdens on the prison
18 administration.

19 I will also address the issue of mootness that
20 has been raised by the Respondent.

21 QUESTION: Counsel, when you say requirement
22 of a statement of reason, you're talking about a
23 requirement that the administrative record before the
24 Prison Disciplinary Board contain a statement of reasons
25 as to why the Superintendent refused to allow a witness

1 requested by the prisoner to be called?

2 MR. LEVIN: As to why the Disciplinary Board
3 refused to allow that request. Yes, Your Honor.

4 QUESTION: That would be as opposed to what
5 might later be offered in a 1983 suit where the prisoner
6 challenges his disciplinary hearing, reasons advanced at
7 that time by the State.

8 MR. LEVIN: Correct, Your Honor.

9 The Massachusetts Department of Correction has
10 adopted regulations governing the procedures used at
11 prison disciplinary hearings which track, virtually word
12 for word, this Court's holding in Wolff v. McDonnell.

13 The particular regulation at issue here,
14 Section 430.14, provides that an inmate does have a
15 right to call witnesses at his disciplinary hearing
16 except where that right conflicts with the prison
17 official's interest in seeing that the hearing does not
18 create undue hazards within the institution or otherwise
19 undermine correctional goals.

20 The regulation further provides that in
21 determining whether or not to allow an inmate's request
22 for witnesses, the board is to consider such factors as
23 relevance, necessity, the cumulative nature of the
24 testimony to be given, and the hazards present in a
25 particular case.

1 The regulation does not require the board to
2 state its reasons or provide support in the record for
3 its decision to deny an inmate's request for witnesses.

4 Of course, in Wolff v. McDonnell and again in
5 Baxter v. Palmigiano, this Court rejected the notion
6 that due process requires such a statement of reasons.

7 In this case, John real who was a prisoner at
8 the maximum security institution in Massachusetts, was
9 charged with three violations of the Massachusetts Code
10 of Disciplinary Offenses. Those charges stem from an
11 incident in which Mr. Real, contrary to an order of a
12 correctional officer named John Baleyko, entered an
13 office within the prison in which Mr. Baleyko was
14 attempting to stop another inmate's attack on another
15 officer.

16 At his disciplinary hearing, Mr. Real
17 requested that John Balayko, the reporting officer, the
18 officer who authored the disciplinary report, be called
19 as a witness. Mr. Baleyko was called and he testified t
20 the particulars of the offenses charged.

21 John Real also requested that two inmates be
22 called as witnesses. That request was denied and no
23 reason for the denial appears in the administrative
24 record.

25 The Disciplinary Board found that John --

1 QUESTION: What was the theory of -- his
2 theory of the incident? Why did he want the witnesses?

3 MR. LEVIN: Well, Your Honor, that's not clear
4 from the record as to why -- why those witnesses were
5 requested. In the record it reflects that, although Mr.
6 Real did not contest that he entered the office contrary
7 to the order of the correctional officer, that on
8 subsequent orders he was trying to leave, and that
9 incoming officers stopped him from leaving to shake him
10 down, as he --

11 QUESTION: Well, that's a pretty good
12 defense.

13 MR. LEVIN: Well, Your Honor, that may be a
14 good statement in mitigation, but in fact what occurred
15 here was the officer did issue an order which was not
16 obeyed under circumstances in which immediate obedience
17 was necessary.

18 QUESTION: But if he couldn't obey, in other
19 words, hasn't he asserted the defense that sounds rather
20 reasonable and he ought to have a chance to prove it?

21 MR. LEVIN: Well, he -- I don't want to get
22 into the particulars of the record, but our position
23 basically is that under the circumstances, in fact, when
24 the officer had indeed ordered him not to come in in the
25 first place, and he did not comply with that order,

1 although a number of other inmates whom he was with did,
2 was sufficient disobedience of an order, especially
3 under circumstances such as these in which an assault
4 was taking place, to constitute the offenses charged.

5 QUESTION: Mr. Levin, there were no reasons
6 given by the Disciplinary Board for its refusal to allow
7 any of the witnesses to be called?

8 MR. LEVIN: That's correct, Your Honor.

9 QUESTION: And at the subsequent habeas
10 hearing in the State trial court, is it correct that the
11 State at that time offered no reason, no subsequent
12 reason or explanation?

13 MR. LEVIN: Well, there was no evidence
14 presented by the State at that hearing. Basically, it's
15 our position that at that point, under the Constitution,
16 the judge had --

17 QUESTION: Well, in addition to no evidence,
18 as I understand that, and I want you to correct me if
19 I'm wrong, the attorney for the State offered no
20 explanation at all.

21 MR. LEVIN: That's correct, Your Honor. There
22 was no explanation offered.

23 QUESTION: So, on the surface then, the
24 Defendant may have had some plausible excuse for his
25 failure to immediately leave the scene, and yet the

1 reviewing court has no opportunity at all to understand
2 the reason why he wasn't allowed to call witnesses.

3 Is that right? Is that the posture in which
4 we review the case?

5 MR. LEVIN: Well, Your Honor, the reviewing
6 court did, I believe, have the administrative record
7 which reflected what was before the Prison Disciplinary
8 Board during the prison disciplinary proceedings.

9 It's our position that, given the guidance of
10 wholly proper procedures under these circumstances and
11 the discretion of the board to properly deny witnesses,
12 based on the factors that are laid out in those
13 regulations, and the failure of Mr. Real to state any or
14 make any showing that the board failed to follow those
15 procedures, that it was wholly within the discretion of
16 the board to make that determination, and that in fact
17 at the hearing before the judge, there was no reason why
18 correctional authorities had to come forward at that
19 point with their reason.

20 There basically was no prima facie showing by
21 the Plaintiff at that time which would necessitate
22 answer -- excuse me -- with respect to that issue.

23 QUESTION: One thing that worries me: We
24 assume that the original order by the guard was a lawful
25 order, don't we? Do we have to assume that?

1 MR. LEVIN: That it was a lawful order?

2 QUESTION: Yeah.

3 MR. LEVIN: Well, there has never been any
4 issue raised in the case that the guard didn't have the
5 authority to order Real to stay out of the office at
6 that time.

7 QUESTION: For no reason? He just -- he
8 doesn't like the way he twists his moustache, so he said
9 "You can't come in"? He can do that?

10 MR. LEVIN: Well, whether or not the officer
11 has --

12 QUESTION: And is that a lawful order?

13 MR. LEVIN: Whether or not the officer has to
14 give a reason to a prisoner, in general --

15 QUESTION: You say that in this case, the
16 prisoner has to give all these reasons. Well, doesn't
17 the guard have to give some?

18 MR. LEVIN: Well, under these circumstances,
19 Your Honor, I don't think the guard did have to give any
20 reasons. And, in fact, this case is a prime example
21 of --

22 QUESTION: I don't mean he had to give reason
23 to the man. Doesn't he have to give reasons to the
24 court?

25 MR. LEVIN: To the court?

1 QUESTION: Yeah.

2 MR. LEVIN: Well, the reasons for the order,
3 the reasons for the charge of the offense in the first
4 place, were before the court in the administrative
5 record and the disciplinary report.

6 QUESTION: It said -- well, what was the
7 reason for the guard doing that?

8 MR. LEVIN: The guard was in a prison office,
9 an office within the prison, trying to stop another
10 inmate's attack on another guard. That's what the record
11 shows.

12 A group of inmates from a shop, a prison shop
13 next door, began to enter the office. The guard,
14 naturally, said don't come into this office.

15 QUESTION: That's in the record.

16 MR. LEVIN: That's in the administrative
17 record. That's in the disciplinary report.

18 QUESTION: Well, that's all I was asking for.

19 QUESTION: Counsel, what, in your view, would
20 the prisoner have to show to trigger some duty to
21 respond at the habeas hearing in State court?

22 MR. LEVIN: Well, Your Honor, in some of the
23 lower federal courts in successful actions under these
24 circumstances, what prisoners did show, for example, was
25 that there was a persistent practice on the part of

1 prison officials to never allow an inmate to call a
2 witness.

3 Certainly, if an inmate could make a prima
4 facie showing, for example, that the prison officials
5 were acting on a discriminatory basis with respect to
6 their decisions, that would be a showing that prison
7 officials were not properly exercising their
8 discretion.

9 QUESTION: Could a showing ever be made, in
10 your view, on an individual case that it was needed just
11 for evidence and there was no valid excuse no
12 discrimination alleged, no overall policy alleged?

13 MR. LEVIN: Well, Your Honor, in the first
14 place, it's our position that the necessity with respect
15 to the evidence is not the end of the inquiry. The
16 inquiry also has to go to, as this Court considered in
17 Wolff, to what kinds of risks would be involved in
18 bringing that witness into the disciplinary hearing
19 room.

20 Second, with respect to your answer about the
21 individual case, certainly one can hypothesize
22 situations in which a prison inmate could make
23 allegations and prove through evidence that there was
24 some systematic discrimination against him or some plot
25 on the part of prison officials to set him up, and that

1 this was part of an ongoing plot.

2 QUESTION: Well, do you think that the case of
3 Hughes v. Roe has any relevance for our purposes here in
4 indicating that in the absence of some indication on the
5 record that concern for safety of witnesses, for
6 example, or other prisoners was a concern that the State
7 has to offer at least an explanation of some kind?

8 MR. LEVIN: No, Your Honor. I don't believe
9 Hughes v. Roe is applicable in this case or provides
10 much guidance. In Hughes, of course, an inmate had
11 alleged that he was placed into segregation without any
12 prior hearing whatsoever, and this Court held that that
13 was sufficient to survive a Rule 12(b)(6) motion to
14 dismiss.

15 Under subsequent case law, Helms v. Hewitt,
16 decided by this case, it was made plain that under those
17 circumstances, a liberty interest might be implicated
18 and an inmate might be entitled to a hearing. That kind
19 of a scenario is much -- the scenario where an inmate
20 may not have a hearing where liberty interest is
21 implicated, may not have a hearing at all, we submit is
22 quite distinct from the situation such as this where
23 there is no question that Mr. Real received his
24 hearing.

25 There is no indication that the Prison .

1 Disciplinary Board failed to follow what, on their face,
2 were fully adequate procedures, and where this Court has
3 indeed held that the prisoner doesn't have the right to
4 have a statement of reasons, which is exactly the right
5 that the Supreme Judicial Court held that he did have.

6 QUESTION: Well, of course, the Supreme
7 Judicial Court seems to have held that, and I think
8 that's contrary to the -- for myself, that's contrary to
9 the language in Wolff and in Baxter. But it seems to me
10 the State is going further here, and they are saying not
11 only do we not have to supply written reasons in the
12 administrative record at the time the hearing is
13 conducted before the Superintendent, but if the
14 disciplinary hearing is later challenged for revocation
15 of good time on a violation of the constitutional rights
16 of the prisoner, even in court we don't have to advance
17 any reason why the Superintendent didn't allow these
18 witnesses to be called.

19 And I think you run into a little trouble with
20 some of the language in Wolff there. I mean to say you
21 don't have to give reasons means you don't have to give
22 reasons, as I read Wolff, at the time of the
23 disciplinary hearings, not that you cannot be judicially
24 called upon later to give reasons in a particular case.

25 MR. LEVIN: No, Your Honor. We don't contest

1 that in the individual case, in a later judicial
2 proceeding to review the action of prison officials,
3 that where the prisoner makes out a prima facie case
4 that he's been denied his procedural rights, that prison
5 officials are going to have to answer that case as they
6 would in any other habeas corpus case or a 1983 case.

7 Our position is merely that where a prisoner
8 simply goes into court and says I didn't get a witness,
9 under this court's ruling in Wolff that's not enough
10 because, especially under these circumstances in
11 Massachusetts where the procedures which prison
12 officials follow are exactly those procedures prescribed
13 in Wolff, the Prison Disciplinary Board has that very
14 discretion to say you can request the witness but we can
15 deny it, and we don't have to tell you why.

16 So that it seems anomalous, just as a matter
17 of pleading, to have a prisoner go into court and say,
18 well, it did exactly what they're entitled to do under
19 the Constitution and under their regulations, but I want
20 to know more, I want them to answer me more; I want them
21 to justify themselves.

22 That, it seems to me, would be fairly
23 unprecedented just by virtue of general rules of
24 pleading, and --

25 QUESTION: Mr. Levin, may I just say that I'm

1 still a little unclear whether you draw a distinction
2 between the duty to explain at the hearing itself and in
3 subsequent litigation. Is it a different duty or the
4 same duty?

5 MR. LEVIN: Well, Your Honor, the --

6 QUESTION: You're saying that if aggravated
7 facts are alleged, you would have to explain; if he
8 alleged that there was a conspiracy directed against
9 him. But if he merely alleged that this was an eye
10 witness who could corroborate his defense, that's not
11 enough?

12 MR. LEVIN: Yes, Your Honor.

13 QUESTION: That's your position? And that's
14 the same position whether it's at the hearing or whether
15 he makes the allegation, an attack on the hearing in a
16 judicial proceeding?

17 MR. LEVIN: Yes, Your Honor.

18 QUESTION: You draw no distinction between the
19 two?

20 MR. LEVIN: We draw no distinction. We would
21 argue that he would have to go further than that,
22 because in fact all he's arguing -- and this Court did
23 consider the fact that presentation of witnesses is
24 generally a requirement of a procedurally fair hearing
25 in Wolff.

1 And under Wolff, even with respect to those
2 considerations, it was deemed that the concerns for
3 prison security and correctional goals were so great as
4 to override that right, and basically if the officials
5 are guided by proper considerations, as here they were
6 under the procedures, allow them the discretion to be
7 sure that hazards --

8 QUESTION: The decision below was that the
9 agency, the prison had to put in the administrative
10 record a reason.

11 MR. LEVIN: Yes, Your Honor.

12 QUESTION: And that it wouldn't be enough if,
13 in litigation, the State offered a reason?

14 MR. LEVIN: That was, most certainly, the
15 decision below, Your Honor.

16 QUESTION: So that's the issue we have,
17 whether at the time they must give an explanation.

18 MR. LEVIN: Yes, Your Honor.

19 CHIEF JUSTICE BURGER: We'll resume there at
20 1:00 o'clock.

21 MR. LEVIN: Thank you.

22 (Whereupon, at 12:00 o'clock noon the Court
23 recessed, to reconvene at 1:00 o'clock p.m., this same
24 day.
25

1 AFTERNOON SESSION

2 (1:00 P.M.)

3 CHIEF JUSTICE BURGER: You may continue, Mr.
4 Levin.

5 MR. LEVIN: Thank you, Mr. Chief Justice, and
6 may it please the Court, to resume with my response to
7 Justice White's question, in fact what the Supreme
8 Judicial Court did hold in this case is that the
9 statement of reasons to be given is to be given in the
10 administrative record at the disciplinary hearing.

11 Now, this Court has recently stated in *Olim v.*
12 *Wakinekona* that procedures do not exist in a vacuum.
13 They are not to be valued in and of themselves, but they
14 exist for a purpose, and that is to protect some
15 substantive right; in this case, it's the inmate's
16 substantive right or substantive liberty interest in
17 statutory good time.

18 Furthermore, this Court has noted that in
19 fashioning its procedural prescriptions, prescriptions
20 required by the Constitution, it is concerned that
21 government officials be guided by adequate procedures in
22 the generality of cases, and not with whether, when
23 guided by such procedures, officials make a decision
24 with which a court might later disagree.

25 In this case, the procedure prescribed by the

1 Supreme Judicial Court does not really bear any relation
2 to these principles. The procedural requirement of a
3 statement of reasons is primarily focused on
4 safeguarding, if you will, another procedural
5 requirement; that is, the requirement of the right to
6 call witnesses, that qualified right that this Court
7 enunciated in Wolff v. McDonnell.

8 Furthermore, and equally as important, the
9 impetus of the Supreme Judicial Court's decision was
10 that it wanted a record that it could review basically
11 on a case-by-case basis to decide whether or not it
12 agreed with what prison officials were doing.

13 Such a holding is not warranted by the
14 principles set forth by this Court in its due process,
15 procedural due process cases.

16 QUESTION: Mr. Levin, may I ask you a
17 question? You say that they said it had to be done at
18 the hearing.

19 MR. LEVIN: Yes, Your Honor.

20 QUESTION: But, in their opinion, they said
21 the question was based on the fact there was no -- I am
22 reading from page 16 of the jurisdictional statement, I
23 guess it is, petition for certiorari -- failure to
24 explain in any fashion at the hearing or later.

25 And then again on page 21, there is no

1 explanation for the denial of the inmate witnesses
2 requested, and so forth.

3 I didn't find the distinction you rely on.
4 They said that there was a failure at both parts of the
5 proceedings, is what they were addressing.

6 MR. LEVIN: Well, Your Honor, I'd have to page
7 through the opinion to find the exact spot, but I am
8 confident that even though they noted that there was no
9 statement of reasons given, either at the hearing or
10 later, the ruling was that the statement of reason
11 should come at the point of the disciplinary hearing and
12 not be what they considered to be a post hoc
13 reationalization.

14 They relied on Hayes II. I forget just now
15 whether that was Hayes v. Thompson or Hayes v. Walker,
16 but the case that's referred to in both our brief and
17 the Respondent's as Hayes II. And in that case, in that
18 very case, exactly what happened was that in accordance
19 with this Court's ruling in Wolff, a Prison Disciplinary
20 Board denied a request for witnesses. There was little
21 or no statement of reasons in the record.

22 The case before the trial court included
23 evidence put in by prison officials upon which the trial
24 court determined that there was no arbitrary deprivation
25 of the right to call witnesses. But in that case, the

1 Seventh Circuit reversed, stating that we want this
2 statement in the record.

3 And, although I don't have at my fingertips
4 the page number now --

5 QUESTION: That may all be absolutely correct,
6 but the constitutional violation, as I understand their
7 holding, was that there was no explanation at any time.
8 And I thought you, earlier in the proceeding, said it
9 would be the same issue whether you looked at it later
10 or at the time of the hearing.

11 That's why I'm a little unsure of your
12 position.

13 MR. LEVIN: Well, Your Honor, we're not saying
14 that it is the same issue. I believe Justice O'Connor
15 and some of the other justices were questioning us about
16 some of the pleading implications, basically, of our
17 position; what position were we taking with respect to
18 the burden to go forward really in pleading.

19 And we don't contest that certainly an inmate
20 has a right to bring a 1983 case or a petition --

21 QUESTION: Well, I am still not quite clear
22 whether your position is that there was no
23 constitutional violation in this record or that the
24 Massachusetts court ordered the wrong remedy.

25 Which do you say, or both?

1 MR. LEVIN: Well, Your Honor, both. On this
2 record, there was no constitutional violation.

3 QUESTION: Even though there was no
4 explanation at any time.

5 MR. LEVIN: Certainly not.

6 QUESTION: Well, Mr. Levin, let me ask you a
7 question about the holding. The Supreme Judicial Court
8 said that the regulations were unconstitutional, didn't
9 they?

10 MR. LEVIN: Yes, Your Honor.

11 QUESTION: And on page 22, they said -- and
12 this is of the jurisdictional statement: "We conclude
13 that the failure of the regulations to require some
14 support in the record for the denial of the Plaintiff's
15 witness has abridged his federal due process right.

16 Now, if you're talking about regulations
17 issued by the State in the record, I presume the Supreme
18 Judicial Court in that sense was referring to the
19 administrative record.

20 MR. LEVIN: Yes, Your Honor, and that's
21 exactly the portion of the opinion to which I was just
22 referring. Our reading of that holding is that the
23 Supreme Judicial Court held these regulations
24 unconstitutional because they did not require a
25 statement of reasons in the administrative record.

1 Now, we have noted in our brief several
2 reasons why we're most concerned about this new
3 requirement imposed by the Supreme Judicial Court, and I
4 would just like to highlight this afternoon one or two
5 of them.

6 The most serious cases, of course, are those
7 cases in which the calling of a witness may create
8 hazards within the institution because the witness may
9 be subject to reprisal, generally by the charged inmate.

10 In such cases where we have a requirement, an
11 across-the-board requirement of a statement of reasons,
12 the Prison Disciplinary Board is basically put into the
13 position of trying to guess how much it can put in the
14 record, how much must it put in the record without
15 running the very risk that it hopes to avoid by not
16 calling the witness in the first place.

17 QUESTION: What does that follow? Because
18 couldn't they put it in the record, but not show it to
19 the inmate? If it goes in the record, does it
20 necessarily have to -- for later review -- does it
21 necessarily have to be disclosed to the inmate?

22 MR. LEVIN: Well, Your Honor, I believe that
23 under the ruling in Wolff, the record is to be shown to
24 the inmate and is to include those factors that is
25 required by the court under the constitution.

1 I'm not quite certain what purpose it would
2 serve as far as the rationale of the Supreme Judicial
3 Court is concerned to have it otherwise. Principally,
4 when the Court was concerned that the Board state at the
5 outset to the knowledge of the inmate why it is that the
6 requested witness was denied --

7 QUESTION: I don't understand your reference
8 to Wolff. I thought you said Wolff doesn't require a
9 statement of reasons --

10 MR. LEVIN: No, no. But to the extent that a
11 record was required and that record went to the evidence
12 on which the Board relied and the reasons for sanctions
13 to be given, it's my reading that that was the record
14 that would be available to the inmate.

15 Furthermore, we run into a problem where we have
16 an across-the-board rule, and the only time the inmate
17 can't know is when, in fact, there's a risk of
18 reprisal. Then the only time the inmate doesn't know is
19 exactly -- will lead to exactly the same result. That
20 is, the arousal of the suspicions in the inmate's mind
21 which can lead to the physical retaliation that is
22 trying to be avoided.

23 And we submit that in fact this requirement
24 leads to exactly that position that the Respondent
25 himself has suggested at page 32 of his brief. That is,

1 it puts prison officials in the position of making a
2 decision between forgoing an otherwise proper and
3 necessary disciplinary action within the institution or
4 revealing sensitive information which can lead to harm
5 within the institution.

6 Now, the Commonwealth of Massachusetts is not
7 here to play the heavy, and we're not here to say the
8 Constitution doesn't accompany these individuals once
9 they step into the jailhouse door. But we don't believe
10 that this Court's ruling in Wolff or in Baxter or in the
11 recent cases of Hudson v. Palmer or Block v. Rutherford
12 or Hewitt v. Helm contemplate that the Constitution is
13 going to require that prison officials be put in that
14 kind of a position.

15 QUESTION: Well, I suppose that a procedure
16 whereby some kind of explanation is -- contemporaneous
17 explanation would be made by the Disciplinary Board, but
18 in every case perhaps kept confidential so that it could
19 be reviewed by any subsequent court in camera. Is that
20 procedure unworkable?

21 MR. LEVIN: Well, Your Honor, I'm not going to
22 say it's unworkable. But --

23 QUESTION: So that it isn't reviewed at all by
24 the prisoner.

25 MR. LEVIN: There are certain drawbacks to

1 that procedure which are inherent in the procedure in
2 general.

3 One, in dealing with these cases, we wish to
4 stress, as Judge Friendly said in his article, some kind
5 of hearing that we're dealing with a system of mass
6 justice, and that prison officials in Massachusetts, for
7 example, in 1980 had almost 7,000 disciplinary
8 proceedings at which prisoners were entitled to the full
9 procedural safeguards, presumably as you suggested,
10 which would include an extended record, although that
11 record would be confidential.

12 Now, this may not seem like much in the
13 context of any one disciplinary proceeding, but when you
14 add this up you're talking about man hours and you're
15 talking about resources that come out of other areas
16 within the prison.

17 I see that my time is growing short, and I do
18 want to address the issue of mootness because I promised
19 that I would, and I don't want to break my promise.

20 During the disciplinary action involved in
21 this case, Mr. Real was in the state prison on a three t
22 five-year sentence for possession of a sawed-off
23 shotgun. In November of 1982, the Commissioner of
24 Correction issued a certificate of discharge from that
25 sentence and he made the discharge effective to July 19,

1 1982 because of certain recalculations in good time
2 credit.

3 From that date, from the July 19th date, Mr.
4 Real was deemed to have begun serving a five-year from
5 and after sentence imposed for a manslaughter offense he
6 committed while in prison, killing another inmate.

7 Now, the Respondent has suggested that this
8 case is now moot because Mr. Real has received the
9 certificate of discharge from the three to five-year
10 sentence, that is, the sentence to which the good time
11 at issue would apply.

12 But that's clearly not the case, because if
13 this Court were to affirm the judgment of the Supreme
14 Judicial Court, returning the 150 days good time to Mr.
15 Real, his effective date of discharge then becomes some
16 time in February 1982. The running of his five-year
17 from and after sentence is from that date, and Mr. Real
18 ceases to be in Massachusetts custody in February of
19 1987, rather than in July of 1987.

20 Mr. Real clearly has a concrete interest in
21 this case which presents the Court with a justiciable
22 controversy.

23 If I might, if there are no further questions,
24 I'd like to reserve my remaining time. Thank you.

25 CHIEF JUSTICE BURGER: Mr. Shapirc.

1 ORAL ARGUMENT OF JONATHAN SHAPIRO, ESQ.

2 ON BEHALF OF THE RESPONDENT

3 MR. SHAPIRO: Mr. Chief Justice and may it
4 please the Court, I'd like to first address some of the
5 factual issues that were raised in Petitioner's
6 argument.

7 First of all, this is a classic case where the
8 calling of witnesses would be, as Justice Blackum
9 suggested, very important to the inmate's defense. What
10 had happened in the prison on the particular day in
11 question was that a scuffle had broken out between an
12 inmate and a guard. A number of other inmates who were
13 in the vicinity came into the room to see what was
14 happening, after which they were ordered to leave.

15 It was at this point that Mr. Real, while
16 leaving, was stopped, according to his testimony at the
17 hearing, was stopped by another officer who shook him
18 down and delayed him from complying with the order that
19 had been given to him.

20 The inmates which John Real requested be
21 called in his defense were eye witnesses who would have
22 corroborated his version of what happened, and
23 therefore, in our view, would have given him a defense
24 to the charge that he had disobeyed an officer and also
25 the charges, in addition, that he had incited to riot

1 and that he had engaged in conduct which was disruptive
2 of the orderly running of the institution.

3 All three of these charges were made against
4 Mr. Real, and all three of them were at issue in the
5 disciplinary hearing. And the witnesses that Mr. Real
6 requested to be called and which the record below
7 indicates were requested because they had been present
8 and because they would corroborate his version of what
9 happened, were the witnesses who were denied without any
10 explanation at any point in either the administrative or
11 the judicial proceedings of this case.

12 We think there are two issues involved in the
13 case.

14 QUESTION: Did he have any witnesses at all?

15 MR. SHAPIRO: The only witness who was
16 presented was the correction officer who testified
17 against him.

18 QUESTION: I said did he have any.

19 MR. SHAPIRO: He had requested that that
20 correction officer be present, because otherwise the
21 correction officer would not have been present. He did
22 not have any witnesses to testify on his behalf.

23 QUESTION: Well, he asked for two others.

24 MR. SHAPIRO: He asked also for the officer --

25 QUESTION: He asked for two inmates.

1 MR. SHAPIRO: Those were the witnesses who
2 were denied.

3 QUESTION: Yes. So he apparently had more --
4 other witnesses he wanted to call.

5 MR. SHAPIRO: The witness request in this case
6 requested two inmates who were eye witnesses, but also
7 -- and an officer. And that was all.

8 QUESTION: Right.

9 MR. SHAPIRO: And they were denied.

10 QUESTION: Right. Okay.

11 MR. SHAPIRO: It is clear, we think in the
12 record below, that the request was timely made to the
13 Disciplinary Board, and that both in the form which the
14 inmate was required to fill out, he sufficiently
15 indicated the reasons for those witnesses to be present
16 by indicating they were eye witnesses.

17 And he also, in the court proceeding which
18 followed the filing of his petition for habeas corpus,
19 he indicated why these witnesses were to be called in
20 his defense.

21 In both of these proceedings, the witnesses
22 were denied without any explanation.

23 QUESTION: What was the issue in the habeas
24 corpus proceeding? Was it the prison officials had
25 wrongfully denied him witnesses?

1 MR. SHAPIRO: Yes. He alleged that he had
2 been arbitrarily and capriciously denied due process
3 because witnesses he had requested were not called.

4 QUESTION: Did you -- was part of your
5 argument in the -- were you at the habeas corpus?

6 MR. SHAPIRO: Mr. Real was not represented at
7 any of the judicial proceedings below. He proceeded pro
8 se --

9 QUESTION: In the habeas corpus?

10 MR. SHAPIRO: -- in the Superior Court, and he
11 also proceeded pro se --

12 QUESTION: Who presented the argument, or who
13 made the argument that the reason for denial should
14 appear in the administrative record?

15 MR. SHAPIRO: That argument was not made at
16 all in the trial court, nor indeed was it made by Mr.
17 Real in the Supreme Judicial Court.

18 QUESTION: But that's what the Supreme
19 Judicial Court held.

20 MR. SHAPIRO: We think that a fair reading of
21 the Supreme Judicial Court's opinion is that both issues
22 were considered and ruled on.

23 QUESTION: Right. Well, would you -- if you
24 had been representing him in the habeas corpus hearing,
25 would you have been satisfied if the State had said

1 well, it's true that the administrative record doesn't
2 -- that no reasons were given orally or in writing at
3 the administrative hearing or in connection with the
4 decision, but here's the reason that we now present to
5 you to defend this charge that we had wrongfully denied
6 witnesses.

7 Would you have been satisfied with --

8 MR. SHAPIRO: I think that was the issue
9 presented. I think that would have been depositive of
10 the petition.

11 QUESTION: Well, I mean -- but the habeas
12 corpus court could then have decided whether that was
13 enough of a reason to deny witnesses.

14 MR. SHAPIRO: Yes. And I think that's exactly
15 the ground which the trial court decided.

16 QUESTION: Didn't the State ever give a
17 reason?

18 MR. SHAPIRO: The State has never given a
19 reason. Even to this day, they have never indicated --

20 QUESTION: But the District Court said that
21 -- also held there should be reasons given at the
22 administrative hearing.

23 MR. SHAPIRO: The trial judge, and this was a
24 Superior Court, State judge, held only that because in
25 his view the inmate had made a prima facie case, that he

1 was entitled to witnesses, and in court the Petitioner,
2 the State had not given any explanation as to why those
3 witnesses were refused, he concluded that that meant
4 that the witnesses had been arbitrarily denied and
5 ordered relief on that basis.

6 QUESTION: Right. Right.

7 MR. SHAPIRO: There was no requirement
8 considered or imposed by the trial judge that reasons be
9 given at the administrative rather than the judicial
10 hearing.

11 QUESTION: Right. But that's -- as it came
12 out in the Supreme Judicial Court: "We find persuasive
13 the requirement of the United States Court of Appeals
14 for the Seventh Circuit, there must be some support in
15 the administrative record to justify a decision not to
16 call --

17 MR. SHAPIRO: I think the Supreme Judicial
18 Court did certainly find that persuasive. However, as
19 Justice Stevens has suggested, I don't think that the
20 decision of the Supreme Judicial Court rests solely on
21 that ground. We think that the court considered both of
22 the issues; that is, whether in fact there was an
23 arbitrary deprivation and secondly, whether due process
24 requires that there be some support in the
25 administrative record.

1 And on page 22 of the petition for certiorari,
2 the Supreme Judicial Court says, in concluding its
3 discussion of this issue: "The trial judge properly
4 concluded that the sanctions resulting from a
5 constitutionally flawed disciplinary hearing were
6 invalid and correctly ordered the return of Real's good
7 time credits.

8 Well, the trial judge concluded only that the
9 witnesses had been denied arbitrarily, without any
10 consideration or discussion of the statement of reason.

11 QUESTION: Would it have satisfied your
12 position if the reason given was that it would expose
13 these witnesses to reprisals either by the individual or
14 by his friends?

15 MR. SHAPIRO: I think, unquestionably, that
16 would provide, depending on the facts of the case, a
17 legitimate justification for a limitation of the right
18 to call witnesses. And had the Commonwealth made such a
19 submission, I think that it would have, and I think it's
20 clear from the trial court's ruling that he would have
21 accepted that.

22 The trial judge, as the record of the hearing
23 before the trial judge indicates, was upset that the
24 State and the prison officials had made no attempt
25 whatsoever to justify the denial of witnesses.

1 He said all they have to do is come in here
2 and tell us why the witnesses were denied, but they
3 didn't do so. And I think it's that conclusion by the
4 trial judge that, in the face of a showing by the inmate
5 that witnesses had been requested, were relevant, that a
6 timely request had been made, and that nothing else
7 appeared on the face of the record to justify a denial
8 of those witnesses, at least in those circumstances the
9 burden shifts to the prison officials to come forward
10 and make some showing.

11 This is not to say that the prison officials
12 would bear the burden of proof on that issue; only that
13 they should come forward with some explanation of why
14 the witnesses were denied, at which time the burden
15 would then remain with the inmate to establish either
16 that those reasons were arbitrary or not legitimate.

17 QUESTION: Would it be appropriate for the
18 regulations to provide that in order to have that right,
19 the inmate must tender or proffer a statement of what
20 the witnesses, each of the witnesses would say if they
21 were called?

22 MR. SHAPIRO: I think the regulations could
23 properly require such a statement. We think in this
24 case, the inmate did make such a showing.

25 QUESTION: I'm not challenging that.

1 MR. SHAPIRO: The Petitioner has never
2 challenged the relevance of the witnesses. And we think
3 in this case, the Petitioner made a sufficient showing --

4 QUESTION: The State would hardly question the
5 idea that the inmate must identify and state the
6 testimony that would be given if the witness appeared.

7 MR. SHAPIRO: I think that would be a
8 reasonable requirement. We think in this case it was
9 satisfied by what was in fact tendered by the inmate in
10 his request and in the subsequent judicial proceedings.
11 But that hasn't ever been made an issue by Petitioner.

12 QUESTION: In your view of the Superior
13 Court's decision, the Superior Court would have had no
14 occasion to set aside the regulations because the
15 regulations weren't inconsistent with the reasoning of
16 the Superior Court.

17 MR. SHAPIRO: That's correct. And the inmate
18 himself did not challenge the constitutionality of the
19 regulations.

20 So we see there are two issues in the case;
21 one, whether or not due process is violated by the
22 arbitrary denial by the prison officials of the
23 witnesses on the facts of this case; and the second
24 broader issue, which is the issue as to whether due
25 process requires that the administrative record of a

1 disciplinary hearing contain a basis for the denial of
2 witnesses.

3 And we think they are both separate, yet both
4 presented. The second, broader one, we think is
5 unnecessary to be decided by this Court, because I think
6 the case can properly decided on --

7 QUESTION: Well, but that's the basis that the
8 Supreme Judicial Court decided it.

9 MR. SHAPIRO: That is one of the bases. We
10 think both grounds are --

11 QUESTION: In the Supreme Judicial Court's
12 opinion?

13 MR. SHAPIRO: Yes. And the statement on page
14 22, the end of that paragraph, I think indicates that the
15 Supreme Judicial Court was affirming the trial judge's
16 rationale.

17 QUESTION: Well, it affirmed the judgment for
18 the reasons given by the Supreme Judicial Court.

19 MR. SHAPIRO: And also earlier in the opinion,
20 the portion of the opinion referred to by Justice
21 Stevens on page 16, where the court in defining the
22 issue presented, indicates that the question is whether
23 federal due process requirements impose a duty on the
24 Board to explain in any fashion at the hearing or later,
25 why witnesses were not allowed to testify.

1 So we think both issues were properly
2 presented, and at least implicitly properly considered.
3 However, we think that the Respondent may defend the
4 judgment below on any ground that's properly presented
5 by the law and the record, regardless of whether either
6 of the courts below considered both of those issues
7 specifically.

8 So that even if the Supreme Judicial Court's
9 reasoning was based on the broader issue, if that
10 rationale is not necessary for a decision of the case by
11 this Court, which we don't think it is, it would be
12 unnecessary for this Court to decide that issue.

13 We think that the principle of judicial
14 restraint counsels in favor of deciding the narrower,
15 rather than the broader issue. And since the narrower
16 issue, that is, the arbitrariness of the denial of the
17 witnesses on the facts of this case, was properly
18 presented, provided the basis for the decision by the
19 trial court, that that can properly be the basis for a
20 decision by this Court.

21 On that issue, furthermore, we think that the
22 Commonwealth, in effect, concedes that judicial review
23 is appropriate where the inmate has made a prima facie
24 case.

25 Judicial review, in a subsequent habeas corpus

1 proceeding, at which point when the inmate has made that
2 prima facie case, the prison officials would have some
3 burden to justify the denial of witnesses.

4 In this case, we think that a prima facie
5 case was made, and it is difficult to see what more an
6 inmate could be required to do than to make a timely
7 request for relevant witnesses who could testify and in
8 this case provide a basis for a self defense claim.

9 The Petitioner's argument that there is a
10 greater burden defies common sense, and it also would
11 make that burden impossible to be met by the inmate.
12 It's difficult to see how the inmate could disprove the
13 reasons that the prison officials may have for not
14 calling a witness if the inmate can't even find out what
15 those reasons are.

16 The Petitioner argues that somehow the inmate
17 has a greater burden to go beyond making a showing of
18 relevance to his or her case, and to in fact disprove
19 any possible reasons the Commonwealth might have for not
20 calling the witnesses.

21 QUESTION: Mr. Shapiro, what about Justice
22 O'Connor's suggestion made to your opponent, that
23 perhaps there should be reasons at least adduced in the
24 habeas corpus hearing, but that perhaps those reasons
25 should be submitted in camera to the judge just because

1 of the very volatility of the prison situation?

2 MR.-SHAPIRO: We think that where the
3 Commonwealth makes a showing that that is a
4 consideration in the case, that would be appropriate.
5 Indeed, it would be appropriate, turning for a moment to
6 the question of requiring some statement of reason or
7 other basis to appear in the administrative record for a
8 similar requirement, and we have referred in our brief
9 to the regulations of the Federal Bureau of Prisons
10 which provides just for such a possibility.

11 And in a case where the Disciplinary Board
12 concludes that documenting the reliability of an
13 informant upon which it has relied in a decision would
14 pose a threat to identifying that informant or otherwise
15 endangering that informant, the Disciplinary Board of
16 the chairperson of the Disciplinary Board may document
17 those reasons, but not provide them to the inmate; that
18 is, to keep them apart from the inmate for the very
19 purpose of a subsequent justification in court, at which
20 time the reasons could be examined or the statement
21 could be examined in camera.

22 So that the only serious claim that the
23 Commonwealth has made here that a statement of reasons
24 would interfere with security or endanger the identify
25 of an informant, there is a perfectly reasonable

1 alternative which could be utilized so that those
2 reasons would not prejudice the particular informant
3 involved.

4 The other argument that Petitioner makes to
5 justify the prison officials in not having to make any
6 showing, either at the administrative hearing or
7 otherwise, is that an inmate's right to present
8 witnesses is not violated unless there is a pattern or
9 practice or a discrimination by the Disciplinary Board
10 or the prison officials which go beyond the individual
11 case.

12 We think in Wolff v. McDonnell, this Court
13 clearly stated that a witness has -- an inmate has a
14 right to call witnesses unless the witnesses would be
15 irrelevant, cumulative, unnecessary, or pose a threat to
16 institutional security in some other way.

17 The argument that somehow the inmate could be
18 denied witnesses arbitrarily, so long as there was no
19 overt discrimination or pattern in practice, is simply
20 inconsistent with Wolff, and is unrelated to the reasons
21 for according an inmate that right to call witnesses,
22 which is to give that individual an opportunity to have
23 a fair hearing on the charges against that particular
24 inmate.

25 And why, in order to establish that that right

1 has been violated, that inmate would have to show that
2 there is some pattern in practice, escapes me, and I
3 think finds no support whatsoever in any of the cases
4 this Court has decided.

5 The Commonwealth's argument would also carry
6 the principle of deference to the expert judgment of
7 prison officials too far. What the Commonwealth, in
8 effect, is arguing is that the officials should be
9 presumed to have made a decision to deny witnesses in
10 accordance with applicable regulations, and that any
11 inquiry into the basis for that refusal is unwarranted.

12 It's one thing to defer where prison officials
13 have exercised a judgment; it's another thing to defer
14 to the presumption that they have exercised a judgment
15 in accordance with applicable regulations. And the
16 effect of the decisions of the court below is primarily
17 to require that that discretion by prison officials, to
18 which this Court has often deferred, is in fact actually
19 exercised.

20 Without some obligation, either in the
21 administrative hearing or in court, to justify their
22 action, there is in fact no right to call witnesses on
23 behalf of the inmate. And there is no properly
24 exercised discretion to which a court could defer.

25 So in many ways, the requirements of the

1 courts below would serve the interests of both the
2 Commonwealth and the inmate by insuring that the
3 officials to whom discretion is accorded have, in fact,
4 exercised it.

5 Once there is that exercise, a court could
6 properly, as this Court has often counseled, defer to
7 the discretion because of the expertise which may have
8 been possessed by the officials who exercised it.

9 We do think that Hughes v. Roe is or should be
10 despositive of the case, because in Hughes the inmate
11 was held to have made a prima facie showing that he was
12 entitled to a hearing. And the prison officials, as in
13 the present case, made no response, made no showing as
14 to any legitimate basis in administration for
15 correctional goals for denying that hearing, and this
16 Court said in the absence of such a showing, the inmate
17 was entitled to relief; or at least in that case,
18 because it involved a complaint, that the complaint
19 should not be dismissed.

20 The same principle we think is applicable here
21 where, as we argue, the prima facie case is made where
22 the prison officials in court make no showing of a
23 legitimate basis for not according that right of the
24 inmate to call witnesses. Then, that inmate should be
25 entitled to relief.

1 With respect to the decision of the court
2 below on the issue of whether or not due process
3 requires that the administrative record of a
4 disciplinary hearing have some support for the decision
5 to deny witnesses, I'd like to emphasize first that that
6 decision is not inconsistent with Wolff.

7 In Wolff, this Court stated that an inmate has
8 a right to call witnesses, which may be denied if there
9 are certain legitimate considerations involved. The
10 Court went on to say that although it would be useful
11 for the Board to give an explanation of its reasons and
12 make a written statement of those reasons in the record,
13 at that time the Court deemed it unnecessary to require
14 that.

15 The Supreme Judicial Court's decision, first
16 of all, does not require a written statement of reason.
17 What it does require is that there be some support in
18 the administrative record. That requirement is a far
19 more flexible requirement than a written statement of
20 reasons.

21 That requirement can be satisfied by reviewing
22 the record to determine whether the record itself
23 supports a decision to deny witnesses; for example, if
24 the request of the inmate himself or herself indicates
25 that the witnesses would not be relevant to the

1 proceeding.

2 For example, the charge may be such that it's
3 clear that no witnesses could appropriately testify in
4 the case.

5 The Board, at a later review in court, could
6 rely upon that information which is obvious from a
7 review of the record itself to deny.

8 QUESTION: That would be pretty coincidental,
9 though, wouldn't it, when the record happened to support
10 because of the testimony of other witnesses or something
11 else, the refusal of the -- or due to the record,
12 supplied the reasons for the prison officials' refusal
13 to call the witness.

14 MR. SHAPIRO: I don't think it would be
15 coincidental. I think that in, if not the majority of
16 the cases, many cases, reviewing the record of an
17 administrative hearing will indicate what the issues were
18 in the case, why the witnesses were called, and why they
19 were denied.

20 So that although there may be cases where a
21 statement of reasons or some explanation by the Board is
22 required, we think that there are many other cases where
23 the record itself will, upon review, provide an adequate
24 basis for a decision by the Board.

25 QUESTION: Was the written record of the

1 administrative proceeding produced in the Superior Court
2 in this case?

3 MR. SHAPIRO: The written record of the
4 hearing consists of the disciplinary charge, and these
5 are set forth in the Appendix to this case, the
6 disciplinary report which is on page 13-A of the
7 Appendix, the report of the testimony and who testified
8 on 14-A, the decision of the Board on 15-A, the appeal
9 and the decision of the Superintendent affirming the
10 conviction of the inmate.

11 QUESTION: So at least the administrative
12 report, as it's now done in Massachusetts, doesn't have
13 a transcript of testimony.

14 MR. SHAPIRO: There is no transcript.

15 QUESTION: Well, how could a report of the
16 dimensions of, say, that on page 14-A ever, except by
17 sheerest coincidence, support a conclusion that
18 witnesses shouldn't be allowed?

19 MR. SHAPIRO: Very often the description of
20 the offense in the disciplinary report is more than
21 necessary to indicate what the case is about and what
22 the evidence is likely to be.

23 The decision of the Board in which the Board
24 sets forth, as this Court required in Wolff, a statement
25 of the evidence that's relied on, often gives enough

1 information. It's true that in many cases it may be
2 coincidental. In other cases it may be necessary for
3 the Board to give a reason in order to justify the
4 denial of witnesses, particularly in those cases where
5 the basis upon which the Board is denying a witness,
6 such as institutional security, is the kind of reason
7 which is peculiarly within the knowledge of the Board.

8 QUESTION: Didn't Wolff -- do I recall Wolff
9 right? It said that the prison administration could
10 deny the witnesses if it would jeopardize institutional
11 safety or correctional goals. Is that what it said?

12 MR. SHAPIRO: Yes. That is one of the
13 justifications.

14 QUESTION: Well, would it be enough to satisfy
15 the Constitution, in your view, if the Superintendent
16 said, or the decision-maker in the prison said we deny
17 these witnesses because in our view, calling these
18 witnesses would jeopardize institutional safety,
19 period?

20 MR. SHAPIRO: No. I think that they would be
21 required to set forth some basis for that conclusion.

22 QUESTION: They then have to explain their
23 judgment that institutional safety would be --

24 MR. SHAPIRO: I think so. Otherwise, I think
25 it would make meaningless the requirement that there be

1 a legitimate justification if they --

2 QUESTION: No, it wouldn't be meaningless. At
3 least it would show that the prison official knows what
4 the standard is and has thought that his position
5 complied with the standard. It wouldn't be a mindless
6 act anyway.

7 MR. SHAPIRO: I think that standard is so
8 broad, that effectively it would not only insulate --

9 QUESTION: So a court would have to decide
10 whether that institutional decision was rational or
11 not.

12 MR. SHAPIRO: And I think that is because of
13 this Court's decision in Wolff, that a court would be
14 obligated to do that.

15 QUESTION: Yeah, but Wolff didn't say that --
16 Wolff gave the standard, but it didn't say that the
17 official had to explain it in detail.

18 MR. SHAPIRO: I think to the extent that Wolff
19 recognizes a right to call witnesses, that right, in
20 order to be meaningful, it's implicit that there has to
21 be at least a limited judicial review.

22 We suggest that a limited judicial review
23 which is appropriate is a review for arbitrariness.

24 QUESTION: Well, it isn't entirely a fruitless
25 matter to inquire whether you knew what the law was and

1 whether you applied the right standard in denying.
2 That's frequently the only question there is.

3 MR. SHAPIRO: I think it would mean --

4 QUESTION: And at least the official could
5 evidence that he knew what the law was and give his
6 opinion that we looked at the evidence, we looked at the
7 situation and thought that the witnesses could be denied
8 under the standard.

9 MR. SHAPIRO: I don't think that simply
10 responding that institutional security would be
11 endangered does sufficiently indicate that the official
12 knows what the law is and is applying it. That's the
13 type of phrase that is mouthed by prison officials,
14 regardless of what's at stake, in order to justify
15 virtually anything.

16 CHIEF JUSTICE BURGER: Do you have anything
17 further, Mr. Levin?

18 ORAL ARGUMENT OF MARTIN E. LEVIN, ESQ.

19 ON BEHALF OF THE PLAINTIFF - REBUTTAL

20 MR. LEVIN: Your Honor, just to address
21 Justice White's question. Again, I'd like to stress
22 that there was nothing in this record that indicated
23 that prison officials were unaware of what the law was,
24 that the issue here had to do with the procedure that
25 Massachusetts had adopted, and there was never any

1 showing that officials did not know what that procedure
2 was or failed to follow that procedure.

3 Unless there are any other questions --

4 QUESTION: Is there any -- can you point to
5 anyplace in the record where the State explained why it
6 did not permit him to call these witnesses?

7 MR. LEVIN: There is no explanation of that
8 expressly in the record.

9 Thank you.

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

12 We'll hear arguments next in Schreiber v.
13 Burlington Northern.

14 (Whereupon, at 1:43 o'clock p.m., the case in
15 the above-entitled matter was submitted.)
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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: #83-1329 JOSEPH PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE, Petitioner v. JOHN REAL

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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