

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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

ORIGINAL

DKT/CASE NO. 84-438

TITLE SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION,
WALPOLE, Petitioner V. GERALD HILL AND JOSEPH CRAWFORD.

PLACE Washington, D. C.

DATE March 25, 1985

PAGES 1 - 52



ALDERSON REPORTING

(202) 628-9300
20 F STREET, N.W.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x
SUPERINTENDENT, MASSACHUSETTS :
CORRECTIONAL INSTITUTION, :
WALPOLE, : No. 84-438
Petitioner, :
V. :
GERALD HILL AND JOSEPH CRAWFORD :
- - - - -x

Washington, D.C.

Monday, March 25, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:04 o'clock a.m.

APPEARANCES:

MS. BARBARA A. H. SMITH, Assistant Attorney General
of Massachusetts, Boston, MA; on behalf of the
Petitioner.

MS. JAMIE ANN SABINO, ESQ., Wellesley, MA;
(Appointed by this Court) on behalf of the Respondents.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
BARBARA A. H. SMITH, ESQ.	
on behalf of the Petitioner	3
JAMIE ANN SABINO, ESQ.	
on behalf of the Respondent	27
BARBARA A. H. SMITH, ESQ.	
on behalf of the Petitioner - Rebuttal	50

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Ms. Smith, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF BARBARA A. H. SMITH, ESQ.
ON BEHALF OF THE PETITIONER

MS. SMITH: Mr. Chief Justice and may it please the Court, the particular issues that we bring to this Court for review are whether the due process clause of the United States Constitution as held by the Supreme Judicial Court of Massachusetts requires judicial review of the sufficiency of the factual findings of the Prison Disciplinary Board when those findings form the basis for a loss of good time credits to inmates.

Second, assuming that judicial review is required, whether the Constitution requires any greater scrutiny than inquiry into whether the decision is supported by some or any facts.

The particular issues, however, I think implicate a much more fundamental and far-reaching issue, and that is the extent to which the Court will involve itself in the eternal decisionmaking ability of prison administrators.

This case concerns what I believe is a very central concern of the prison system and that is the ability of the administrators to maintain discipline

1 within the system. This decision goes far beyond merely
2 requiring certain procedural requirements of the
3 disciplinary hearing, but indeed establishes the court
4 as the ultimate fact finder in this area.

5 To subject the internal determinations
6 regarding discipline to judicial second-guessing will
7 result in substantial disruption to the prison system,
8 to unnecessary but increasing demands on the judiciary,
9 and will result in minimal salutary benefit to the
10 inmates.

11 Now, the specific incidents which give rise to
12 the instant case are as follows. I will be very brief.
13 A guard on duty at a wing door into the yard at Walpole
14 State Prison heard an inmate call out, "What's going on
15 here?" The guard moved to a window in the door leading
16 out to the yard, where he again heard the inmate call
17 out, "What's going on here?"

18 He peered out the window, observed a
19 commotion, opened the door, and found the inmate
20 bleeding from his mouth, with a puffed eye. He
21 immediately observed three inmates jogging away down a
22 closed-in walkway into the regular yard.

23 Disciplinary reports issued and a hearing was
24 held for each inmate. The reporting officer testified
25 substantially as I have just described. However, in the

1 hearing for inmate Crawford -- Hill -- I'm sorry -- the
2 officer testified that a medic had told him that the
3 injuries were consistent with the inmate having been
4 beaten.

5 Crawford testified that he knew nothing of the
6 event and offered an affidavit from the injured inmate
7 that Crawford had not been involved. Hill also
8 testified that he knew nothing about the event.

9 The Board found the inmates guilty and ordered
10 loss of 100 days' good time credits. Hill and Crawford
11 appealed to the Superintendent who affirmed the decision
12 of the Disciplinary Board.

13 By regulation, the Commissioner of Correction
14 also reviews any loss of good time cases.

15 The inmates then filed a pro se complaint in
16 the Superior Court of Massachusetts, alleging that the
17 evidence was insufficient to support the finding of the
18 Disciplinary Board. The Superior Court, having reviewed
19 the Disciplinary Board's findings, concluded that as a
20 matter of law the Board's findings of guilty rested on
21 no evidence constitutionally adequate to support the
22 findings of the Board.

23 QUESTION: May I ask, Ms. Smith, I gather that
24 Massachusetts practice provides for this review in
25 Superior Court, does it?

1 MS. SMITH: I believe it provides only as a
2 result of the Supreme Judicial Court held in this case.
3 Now, the Superintendent appealed the Superior Court
4 Decision, alleging that there was no constitutional
5 right to judicial review of this nature, of the
6 sufficiency of the findings.

7 The Supreme Judicial Court held that there is
8 no statutory right of review in Massachusetts for issues
9 of this nature, but that its reading of Wolff v.
10 McDonnell, it felt, logically entitled an inmate to
11 judicial review as a matter of constitutional law.
12 Therefore, having reached this result, the Court
13 construed Massachusetts law, particularly the certiorari
14 aspect of Massachusetts law, as providing the
15 appropriate vehicle for raising this constitutional
16 claim; not that it was an independent statutory right,
17 independent of the constitutional finding.

18 QUESTION: How much of this is state law?

19 MS. SMITH: The decision, I don't believe, is
20 state law at all. Throughout the opinion, the Supreme
21 Judicial Court refers to this Court's decision in Wolff
22 v. McDonnell, and they rule specifically and that was
23 the issue presented to them, that it is the
24 Constitution, the due process clause in the United
25 States Constitution which mandates judicial review.

1 QUESTION: So whether or not -- I think you
2 suggested the inmates have a constitutional or
3 nonconstitutional claim in respect to a disciplinary
4 hearing, they are not entitled to any judicial review --

5 MS. SMITH: Of the sufficiency of the
6 evidence. Yes, Your Honor, that is our position.

7 QUESTION: When you say sufficiency, would
8 that be -- are you questioning the standard? Suppose
9 there was absolutely no evidence in the record instead
10 of what you had here.

11 MS. SMITH: Then I think, Your Honor, we'd get
12 into a question of whether there is an arbitrary
13 capricious denial of the inmates' liberty interest,
14 which I believe is quite different from the court
15 reviewing the weight, the credibility, the quantum of
16 evidence upon which a Board makes its decision.

17 And it is the latter that our court has said --

18 QUESTION: In other words, you would concede
19 that the law, whether it was -- say, federal law --
20 requires that there be some evidence in the record to
21 support the finding of guilt.

22 MS. SMITH: I believe that that is the scope
23 of review where there is a claim of an arbitrary denial
24 of a constitutionally protected right.

25 QUESTION: And you would agree that the

1 Constitution requires review to that extent?

2 MS. SMITH: Yes, I would, Your Honor.

3 QUESTION: So your argument really is on the
4 standard of whether it's sufficiency or just some
5 evidence. That's your real bone of contention.

6 MS. SMITH: That is one bone of contention.
7 The other bone of contention is whether the Constitution
8 requires the reviewability in general. And I think it's
9 very difficult to separate the question of reviewability
10 in general from the question of scope of review, because
11 many of the same factors inform the decision in both
12 areas.

13 QUESTION: Well, I thought you agreed with me
14 that you did need reviewability in general in order to
15 determine whether the decision was entirely arbitrary.
16 How else could you ever know it was entirely arbitrary
17 without some kind of judicial review?

18 MS. SMITH: Then I might rephrase it;
19 reviewable only for arbitrary or capriciousness, but not
20 reviewable for determination of sufficiency.

21 QUESTION: But you do agree it's reviewable to
22 that extent.

23 MS. SMITH: To that extent, yes.

24 QUESTION: So you're not complaining there's
25 no review at all.

1 MS. SMITH: No, Your Honor. But to a very
2 limited extent is there any review.

3 QUESTION: Which I think then boils down to
4 the fact that you are disagreeing on the standard of
5 review. That's the whole case.

6 MS. SMITH: That is certainly a large part of
7 the case, Your Honor.

8 QUESTION: Well, what else is there?

9 MS. SMITH: Your Honor, I don't think that we
10 can pass over or just ignore the question of what is the
11 constitutionally required general scope of
12 reviewability. And I will move ahead in my argument,
13 and I think the case of Ortwein v. Schwab points out
14 what I mean here.

15 In that case, a petitioner claimed that an
16 order reducing his welfare benefits was not supported by
17 reliable, probative, or substantive evidence. Now,
18 judicial review was provided by the state there;
19 however, a \$25 filing fee precluded these indigent
20 appellants from having access to the state-provided
21 judicial review.

22 This Court held that there was no due process
23 violation. It held that due process did not require
24 appellate review, that due process only requires a
25 predetermination evidentiary hearing. And where

1 procedural requirements are met, due process requires
2 nothing more.

3 Now, that case dealt with reviewability. It
4 didn't limit itself to the standard that would be
5 applied if someone alleged arbitrary and
6 capriciousness. I think it is on all fours with the
7 question that we are presenting here, and that the same
8 reasoning that applies in Ortwein should be applied in
9 the case at hand.

10 Going back to, if I may, the reliance of the
11 Supreme Judicial Court on the Woff decision, I think
12 it's entirely misplaced and reads much too much into
13 that decision.

14 In Wolff, this Court merely set out certain
15 procedural requirements to be applied to disciplinary
16 hearing, included advanced written notice of the
17 charges, an opportunity to be heard, and to present
18 evidence under certain circumstances, and a requirement
19 that a written statement of the evidence and the reasons
20 for the sanction be applied.

21 The Court indicated that these protections
22 were necessary to guarantee fundamental fairness. The
23 Court never indicated that judicial review of the legal
24 sufficiency of the evidence was an additional
25 constitutionally necessary safeguard, or that there was

1 a constitutionally required evidentiary standard.

2 QUESTION: Is the standard to be applied a
3 matter of procedural due process or substantive due
4 process in your view?

5 MS. SMITH: Your Honor, I think it's a matter
6 of procedural due process. I think the question is if a
7 hearing has been held, there has been an opportunity to
8 be heard, the hearing is conducted in a regular fashion
9 as the Court indicated in Wolff, that is the end of the
10 matter -- unless there is an assertion with the burden
11 of proof on the person making that assertion, that the
12 decision was arbitrary and capricious.

13 But there is no generalized, in a sense,
14 appellate review of disciplinary findings.

15 QUESTION: Well, whatever standard might be
16 found applicable to this type of claim, whether it is,
17 as you suggest, arbitrary and capricious or unsupported
18 by substantial evidence, which I guess is the
19 respondent, isn't the burden of proof on the prisoner in
20 any case?

21 MS. SMITH: I don't believe it was,
22 Your Honor, in this case. The court -- the prisoner
23 made the allegation there is insufficient evidence. The
24 court reviewed the Disciplinary Board's finding and made
25 its judgment that there was no constitutionally adequate

1 evidence to support.

2 I would think in the arbitrary and capricious
3 considerations, the petitioner would have the burden of
4 isolating some incident that would indicate some kind of
5 arbitrary and capricious conduct, either that there is
6 no evidence or that the Board acted in some type of
7 non-impartial manner or in some type of bad faith.

8 In this case, our court acknowledged that all
9 the procedural requirements of Wolff had been met, that
10 the decision was made in good faith.

11 QUESTION: So part of your argument as to the
12 nature of the right in question perhaps goes to where
13 the burden of proof lies.

14 MS. SMITH: That is one of the considerations.
15 Yes, Your Honor.

16 QUESTION: Then do you or don't you think that
17 the Constitution requires review of prison disciplinary
18 decisions that are arbitrary?

19 Does the Constitution require any judicial
20 review in any case? I thought your point here was
21 that --

22 MS. SMITH: I think that the Constitution
23 would --

24 QUESTION: I thought one of your points was
25 that the Constitution doesn't require any judicial

1 review, no matter what the facts are.

2 MS. SMITH: I don't think it does at this
3 point. I don't believe this Court has ever held that it
4 does. But --

5 QUESTION: Well, I know, but is your
6 submission that we should say that as long as prison
7 officials go through the procedures, they're just not
8 subject to judicial review?

9 MS. SMITH: Yes.

10 QUESTION: No matter what the evidence is?

11 MS. SMITH: But then it -- that is my
12 position. If the Court finds that there is some limited
13 scope of judicial review, I suggest that that scope --

14 QUESTION: You mean if we find that the
15 Constitution requires some review.

16 MS. SMITH: It would be limited to arbitrary
17 and capricious conduct.

18 QUESTION: What you describe as your position,
19 which I take it is your front line position, to Justice
20 White would not include our review, even for
21 arbitrariness and capriciousness.

22 MS. SMITH: Not the front line position I'm
23 taking. Backup position --

24 I'd suggest that the SJC's reliance on the one
25 sentence in Wolff which relates to the requirement of a

1 written record does not give support to their finding.
2 In that statement, the Court only indicated the
3 possibility of saying perhaps even review by the court
4 where fundamental constitutional rights had been
5 abridged.

6 This sentence simply doesn't support the
7 proposition that the Constitution requires that every
8 disciplinary hearing involving loss of good time credits
9 be reviewed for the sufficiency of the evidence. Loss
10 of good time credits does not involve the loss of a
11 fundamental constitutional right, and in any event the
12 court indicated the primary reason for the requirement
13 of this statement was for its use in collateral
14 administrative proceedings such as transfer decisions
15 based on the incident or parole determinations.

16 As I have already indicated in the Ortwein v.
17 Schwab case, this Court has held that due process simply
18 doesn't require a state to provide appellate review.
19 Now, in other cases, the Court has specifically rejected
20 the notion that mere entitlement to procedural
21 protection in certain administrative hearings carries
22 with it a concomitant right to judicial review of the
23 sufficiency of the evidence in those hearings.

24 And these determinations affect a broad range
25 of interests, including the welfare benefit situation in

1 Ortwein, the situation in court martials proceedings,
2 and in particular the decisions within the deportation
3 system, because the Court recognizes that the crux of
4 due process is you get a fair hearing.

5 And the Court has held that a fair hearing is
6 not established by proving that the decision of the fact
7 finders was wrong. In Tisi v. Todd, the Court
8 specifically held that a wrong inference drawn from the
9 evidence or if it is wrongly decided that evidence that
10 has been introduced constituted legal evidence of a fact
11 to be decided, the fact that these mistakes were made
12 doesn't render that hearing unfair.

13 And therefore, the Court in these areas has
14 refused to grant review to the factual findings of the
15 tribunals.

16 QUESTION: Ms. Smith, may I interrupt again on
17 the basic right to judicial review? You're quite
18 correct that in Ortwein, the Court held there was no
19 right to judicial review, but the basis for that was the
20 premise, even in criminal cases, there is no right to
21 judicial review.

22 But that does not mean, as I understand the
23 holding, that there's no right to review of the question
24 whether the judgment was constitutionally permissive.
25 It's not review of the basic merits of the case, but

1 whether the judgment is void because it was not in
2 conformity to the Constitution.

3 MS. SMITH: Doesn't that premise that there is
4 a constitutional standard that disciplinary boards have
5 to follow or have to meet in making their evidentiary
6 decisions?

7 QUESTION: It certainly does. But for years
8 it was thought that the review on an evidentiary basis,
9 a constitutional question would be whether there was
10 some or any evidence, the Jackson v. Virginia standard
11 -- or the Thompson v. Louisville standard. Whether
12 that's been modified by Jackson v. Virginia, I don't
13 know.

14 But surely, you're not contending that there
15 is no proceeding in which the constitutional validity of
16 the prison action can be looked at is required, are
17 you?

18 MS. SMITH: I was looking only at review for
19 evidentiary sufficiency, and I am saying there is no
20 constitutional right to review of that narrow area.

21 QUESTION: I see.

22 MS. SMITH: I'd just like to mention the
23 Hewitt v. Helms decision in which this Court, involving
24 the transfer of an inmate to administrative segregation
25 resulting in a curtailment of liberty within the prison

1 system, held that due process was satisfied if the
2 inmate gets notices of the reasons for the hearing, an
3 opportunity to be heard, and the decisionmaker reviews
4 the evidence.

5 There was no suggestion that there is an
6 additional due process procedural requirement that
7 judicial review of the legal sufficiency of the evidence
8 upon which a transfer to decisions is based is an
9 additional requirement of due process.

10 Finally, in resolving the question of
11 reviewability, I'd ask this Court to apply its
12 traditional analysis and weigh the relative interest to
13 the individual, to the state, and to balance the utility
14 of judicial review against the burden that it would
15 place upon the prison systems and indeed upon the
16 courts.

17 The due process clause is flexible and its
18 scope depends on the context in which it is applied.
19 This Court has already acknowledged in Wolff the
20 critical need to impose with discipline in the prison
21 system to ensure the safety of the other inmates as well
22 as the guards.

23 The Court has already recognized that prison
24 administrators have a better grasp of their domain than
25 a reviewing judge. And the members of a disciplinary

1 board have as a matter of every-day experience knowledge
2 of the particular physical structure of the prison.

3 To require judicial review of the sufficiency
4 of the evidence is then going to require introduction of
5 evidence of facts within the common knowledge of the
6 disciplinary board.

7 For example, the record in this case
8 establishes only that the assault took place at the west
9 wing guard gate, yard gate No. 1; that the inmates were
10 observed right away, jogging away down the walkway; and
11 that they were the only inmates in the chain link area.

12 Now, as a hypothetical matter, it may well be
13 that the physical structure of that area would render it
14 impossible for any other inmates to have committed the
15 offense. That physical structure is well known to the
16 guards. They did not put that evidence into the record.
17 But if we are going to have judicial review, we're going
18 to have to expand the hearing so that we can introduce
19 evidence --

20 QUESTION: That situation, Ms. Smith, would be
21 saved by the arbitrary and capricious standard, would it
22 not, because I would think there you are not limited to
23 just what -- you know, what a reporter's transcript
24 might show. You could come into the court proceeding
25 and say this was done in the context of such and such.

1 MS. SMITH: You could under those -- but not
2 under review for just sufficiency of the evidence. That
3 would require building a record just for the purpose of
4 educating the reviewing court to what is known to
5 everyone else.

6 We suggest that this would place unnecessary
7 burden on the prison system, and any form of judicial
8 review in general of the sufficiency of the evidence is
9 going to place an enormous burden on the courts. Our
10 statistics in 1980 show that disciplinary reports for
11 major infractions were issued in 6,900-and-some cases.

12 Now, full disciplinary --

13 QUESTION: In Massachusetts?

14 MS. SMITH: In Massachusetts alone. Full
15 disciplinary hearings must be held on all these, and
16 under the current decision every one of these hearings
17 in which good time sanctions were applied would be
18 automatically reviewable by the courts for the
19 sufficiency of the evidence.

20 I don't think I need belabor the burden that
21 would place upon the court system.

22 QUESTION: Let me ask one other question on
23 the threshold question, whether there is any judicial
24 review at all. The Solicitor General in his brief, page
25 8, says that the question whether the Constitution

1 requires judicial review of the claim arises only when
2 the applicable statutes would otherwise bar an aggrieved
3 party from raising a claim in court.

4 If, as in this case, a statute authorizes
5 judicial review, there is no need to determine whether
6 such review is constitutionally required. Then on page
7 9, he interprets the Supreme Judicial Court's holding as
8 an interpretation of state statutes authorizing judicial
9 review.

10 Do you agree or disagree?

11 MS. SMITH: I disagree.

12 QUESTION: You just think he's read the case
13 incorrectly?

14 MS. SMITH: I think, unfortunately, he was not
15 a party in the case below, does not know how the case
16 went up to the Supreme Judicial Court, and seems to fail
17 to recognize the fact that the Supreme Judicial Court in
18 a footnote specifically said in this case there is no
19 statutory right to review in Massachusetts.

20 What the court did, I think what the Solicitor
21 General's office misses, is that after finding a
22 constitutional right to review, they construed existing
23 Massachusetts law to accommodate that constitutional
24 finding.

25 QUESTION: The Solicitor General thought it

1 was a civil action in the nature of certiorari.

2 MS. SMITH: It was originally brought as a
3 civil action in the nature of a writ of habeas corpus ad
4 testificandum. Well, that clearly wasn't making it.
5 Even if it was brought as a writ of habeas corpus under
6 Massachusetts law, that too would have been
7 inappropriate because the remedy available was not
8 immediate release, as is required by the state habeas
9 corpus.

10 Therefore, the court having decided that
11 constitutional right to bring this action posited
12 certiorari as the appropriate vehicle to accommodate the
13 Constitution.

14 They were not going to leave it, saying
15 there's a constitutional right, but we in Massachusetts
16 will not observe it.

17 QUESTION: Certiorari is available in
18 Massachusetts?

19 MS. SMITH: In Massachusetts, since the
20 finding that there is a constitutional right to review.
21 That is the procedural mechanism for asserting the
22 right.

23 QUESTION: In this case it could have been
24 done?

25 MS. SMITH: In this case the court indicated

1 that would be the proper way, and that they would treat
2 this pro se complaint.

3 QUESTION: You don't agree with that?

4 MS. SMITH: I don't -- I do agree that if
5 there is a constitutional right, the appropriate vehicle
6 may well be certiorari.

7 QUESTION: And certiorari only exists if there
8 is a constitutional right.

9 MS. SMITH: That was the court's holding here,
10 that certiorari -- no one brought the action in the
11 nature of certiorari, but that since there is a
12 constitutional right, Massachusetts must provide some
13 vehicle for asserting the right, and they indicated --

14 QUESTION: What's the right, Ms. Smith?

15 MS. SMITH: Constitutional right to judicial
16 review.

17 QUESTION: Footnote 3, as you have already told
18 us, says there is no statutory right of review.
19 Decisions of the Department of Correction are not
20 reviewable on sites, your Massachusetts statute.

21 But you are now telling us that there is,
22 however, certiorari review at least in some limited
23 way?

24 MS. SMITH: What I'm trying to do is explain
25 the court's two footnotes. In the one, I think they

1 correctly say there's no statutory right to review. In
2 the other --

3 QUESTION: Which one is the other?

4 MS. SMITH: Footnote 2. They note that the
5 actions were brought as writs of habeas corpus ad
6 testificandum. They say that the actions should have
7 been brought as civil actions in the nature of
8 certiorari.

9 Now, at page --

10 QUESTION: Well, is there anything
11 inconsistent between the two footnotes?

12 MS. SMITH: No. Because there's no statutory
13 right to review. It --

14 QUESTION: But there is a common law of
15 certiorari.

16 MS. SMITH: Right. And if there's a
17 constitutional right --

18 QUESTION: Of a limited --

19 MS. SMITH: -- nature.

20 QUESTION: And that nature is?

21 MS. SMITH: Limited to the finding that here
22 we have the constitutional right to review.

23 QUESTION: I see.

24 MS. SMITH: And I think that if you look at
25 page 15 of their opinion in the Appendix to the

1 certiorari, I think they make it quite clear that they
2 are construing the existence of this vehicle to fit with
3 their view -- as they say, in view of our conclusion
4 that inmates have a constitutional right to such
5 review.

6 QUESTION: Ms. Smith, the colloquy has left me
7 a little bit confused. What do you say about the amicus
8 briefs of the Government citing about Massachusetts law
9 authorizes review of the decision of the Prison
10 Disciplinary Board.

11 MS. SMITH: They misunderstand what the court
12 decided in Hill. Massachusetts law does not
13 independently, of the court's decision in Hill that
14 there exists a constitutional right to review.

15 QUESTION: May I ask this question? Supposing
16 an inmate filed a piece of paper in a Massachusetts
17 state court and labeled it common law writ of
18 certiorari, in which he alleged that sanctions were
19 imposed on him in a disciplinary proceeding at which no
20 evidence was put before the trier of fact?

21 Would he get review of that or not?

22 MS. SMITH: Since the Hill decision? Yes,
23 Your Honor.

24 QUESTION: No, no. Apart from -- before the
25 Hill decision. Would state law authorize the judge to

1 consider those allegations?

2 MS. SMITH: Massachusetts law provides for
3 extremely liberal construction of pro se prisoner/inmate
4 complaints. I would say if the court construed that
5 complaint as an allegation that he was arbitrarily and
6 capriciously denied his liberty interest, that the court
7 might well review it.

8 However, that matter has never been litigated
9 and our Supreme Judicial Court hasn't ruled on whether
10 you can --

11 QUESTION: But according to Footnote 2, it
12 would review it pursuant to general law, chapter 249,
13 Section 4, which is your common law writ of certiorari.

14 MS. SMITH: But that defines a type of
15 complaint. That does not provide a statutory right to
16 review.

17 QUESTION: But that is a statutory right.

18 MS. SMITH: Well, our Supreme Court said that
19 there is no statutory right to review in the footnote
20 that Justice Brennan --

21 QUESTION: Tell me, Ms. Smith, is the common
22 law writ under the statute a discretionary writ?

23 MS. SMITH: I believe it is. I'm not
24 absolutely certain. I believe it is. And it has since
25 been abolished.

1 But one can still bring actions in the nature
2 of certiorari, nature of mandamus and so forth.

3 QUESTION: How do you decide evidentiary
4 questions? What if the man alleged that I got no
5 hearing at all; they didn't follow the procedure
6 specified by Wolff v. McDonnell in any respect. I was
7 unconstitutionally deprived of my good time, earned good
8 time.

9 Could he bring that proceeding in your common
10 law writ of certiorari, even apart from Hill?

11 MS. SMITH: I'm not sure that that would --

12 QUESTION: I mean there is just no state
13 remedy for a prisoner's claim that he was deprived of
14 liberty without any --

15 MS. SMITH: Well, we have a states of rights
16 statute, where if you make certain allegations about
17 invidious action on the part of the police, that you
18 might have that reviewed.

19 But he certainly has access to the federal
20 courts under the situation that you posit, either under
21 1983 or in some instances under federal habeas corpus.
22 So the inmate is certainly not deprived of --

23 QUESTION: But you think it's a fair reading
24 of the Massachusetts Supreme Court opinion that there's
25 no federal remedy, I mean no state remedy? I sure don't

1 read it that way.

2 MS. SMITH: No, I don't say there is no state
3 remedy. There is a state vehicle for raising the
4 constitutional claim, that being I have a constitutional
5 right to judicial review of the sufficiency of the
6 evidence. And that is all that our court said.

7 I see that my time is just about gone, and I
8 would only on this question of the scope of review ask
9 this Court to limit any scope to the general concerns of
10 arbitrary and capricious.

11 Thank you.

12 CHIEF JUSTICE BURGER: Ms. Sabino.

13 ORAL ARGUMENT OF JAMIE ANN SABINO

14 ON BEHALF OF THE RESPONDENTS

15 MS. SABINO: Mr. Chief Justice and may it
16 please the Court, I think it should be pointed out, what
17 all parties agree with in this case; that in
18 Massachusetts persons incarcerated do have a
19 constitutionally protected liberty interest in their
20 good time credits.

21 And all parties seem to agree that an
22 arbitrary and capricious denial of the liberty interest
23 violates the due process clause of the United States
24 Constitution.

25 It is our contention and we believe the

1 contention of the Massachusetts Supreme Judicial Court,
2 that a decision which is not based on some evidence is
3 that violation of due process, it is an arbitrary and
4 capricious violation.

5 QUESTION: We've never decided that before, I
6 guess.

7 MS. SABINO: Excuse me?

8 QUESTION: We have never decided that until
9 today, I guess, or we wouldn't be here.

10 MS. SABINO: Oh, I would disagree, *
11 Your Honor. I would say there are decisions of this
12 Court --

13 QUESTION: Where have we decided?

14 MS. SABINO: -- that indicate -- I refer the
15 Court specifically to some of the immigration decisions
16 such as --

17 QUESTION: Yes, but we've never -- we've never
18 had a holding to this effect in the context of prison
19 disciplinary hearings.

20 MS. SABINO: No, Your Honor. There has not
21 been a holding in the context of prison disciplinary
22 hearings. However, this Court has held in many cases
23 that a denial of the liberty interest on charges that are
24 unsupported by evidence is a denial of due process.

25 QUESTION: In what context? Prison or

1 immigration

2 MS. SABINO: That was in a deportation case,
3 Your Honor, United States --

4 QUESTION: Well, that's quite a different
5 matter, isn't it?

6 MS. SABINO: -- ex rel Vajtauer.

7 To some extent, it's a different type of
8 denial of liberty interest, but in fact it is a liberty
9 interest. And what we are discussing here is the
10 incarceration of people, somebody being kept in prison
11 for a period of time; in this case, 100 days; in other
12 cases, up to 700 days, or perhaps a three-year
13 incarceration.

14 I believe that liberty interest is of an equal
15 standing with liberty interests in the deportation
16 cases.

17 I would also note that in the past, that the
18 review for arbitrary and capricious includes reviewing
19 factual support for the questioned decision. The
20 specific issue of whether there has to be some or
21 sufficient evidence in prison disciplinary hearings has
22 been met by many circuit courts, and the vast majority
23 of them --

24 QUESTION: Well, do you agree then that if
25 there is some evidence in the record, that's enough?

1 MS. SABINO: That there is some evidence which
2 can rationally permit a board's finding. I would argue
3 that --

4 QUESTION: You don't argue for the standard,
5 then, adopted apparently by the court below? It was a
6 substantial evidence standard apparently.

7 MS. SABINO: No, Your Honor. The court below
8 only adopted the "some evidence" standard. They
9 indicated that there were differences among the circuits
10 between whether there had to be some evidence or
11 substantial evidence. However, in this case, as they
12 found, there was no evidence to support the decision;
13 they would use only the most lenient, "some" or "any"
14 evidence standard. And I would --

15 QUESTION: Would you say that there was indeed
16 no evidence here by virtue of the appearance that only
17 the four prisoners were in the area; that the one who
18 was injured was complaining, and the other three were
19 jogging away?

20 MS. SABINO: I would believe that there was no
21 evidence before one could rationally prove that any one
22 of those three people was a person involved in an
23 assault. If there had been ten people in that yard,
24 there had been 15 people in that yard, could the same
25 evidence say that all 15 were involved in the assault?

1 Some evidence may be relevant. The fact the
2 prisoner --

3 QUESTION: Isn't the very fact that there are
4 only three or four here, rather than the 15 in your
5 hypothesis, isn't that one of the factors that perhaps
6 makes what otherwise might be unreasonable reasonable?

7 MS. SABINO: No, Your Honor, I believe if
8 there's more than one. If, under this set of
9 circumstances, there was more than one person, there was
10 no evidence from what you could reasonably infer that
11 any one of those particular persons was involved in the
12 assault.

13 QUESTION: Well, you certainly can plausibly
14 infer that there was a 50 percent chance that either one
15 of them was involved. You say that doesn't meet the
16 arbitrary and capricious test?

17 MS. SABINO: I would agree. There were three
18 people.

19 QUESTION: You say you would agree that --

20 MS. SABINO: I meant I would disagree that it
21 does not meet the standard. There were three people.
22 There is no evidence to infer that each of those three
23 people was involved in the assault.

24 QUESTION: How about if there were two
25 people?

1 MS. SABINO: I believe it would be the same,
2 Your Honor, if there were two people.

3 QUESTION: That's still arbitrary and
4 capricious.

5 MS. SABINO: If there's no evidence to
6 indicate that both of those people were involved in the
7 assault, which could have easily been done by one
8 person --

9 QUESTION: You're talking about evidence
10 beyond a reasonable doubt.

11 MS. SABINO: No, not beyond a reasonable
12 doubt. We're saying something that you can rationally
13 make an inference from. Because there were two people,
14 how can you rationally make an inference that both of
15 them did an act?

16 QUESTION: Well, if they were all three
17 leaving the scene, as it were, maybe that indicates they
18 were all three involved. Maybe they all took a punch at
19 him.

20 MS. SABINO: Except that, as the Supreme
21 Judicial Court indicates, that even if you consider the
22 flight as more than demonstrating the reluctance to be
23 found at the scene of assault, you cannot fairly infer
24 that more than one person struck the inmate.

25 QUESTION: Well, that's the question, I

1 guess.

2 QUESTION: The question's really now --
3 suppose there was a gunshot, and there was one gun and
4 there were three people there. Would that be enough?

5 MS. SABINO: To convict all three of shooting
6 the gun?

7 QUESTION: No. To charge all three of them.

8 MS. SABINO: I --

9 QUESTION: And couldn't you find that one of
10 those three did it?

11 MS. SABINO: You could charge all three, and
12 then depending on what evidence was produced, perhaps
13 you could find all three. But if the same situation
14 occurred, that the guard did not see the assault, did
15 not see the people --

16 QUESTION: Well, do you know any other way of
17 doing it than for everybody to confess but one?

18 MS. SABINO: Well, Your Honor, in some cases
19 the disciplinary --

20 QUESTION: You're not talking about some
21 cases; you're talking about what's sensible.

22 MS. SABINO: I'm saying that in some cases
23 you're not going to be able to find somebody guilty,
24 because you don't know who is guilty.

25 QUESTION: Do you ever find prisoners

1 whistling on other prisoners?

2 MS. SABINO: Certainly that does happen. It
3 did not happen in this case. It happens in many cases
4 there is some other evidence; for example, blood on one
5 of the prisoner's shirts would have shown he was in
6 closer contact. Or the fact the guard may have been
7 able, in some case, to see what's going on.

8 QUESTION: Is the review here something in the
9 nature of review of administrative action generally?

10 MS. SABINO: I believe that it is less than
11 the review; that generally in many administrative
12 actions, the review is for sufficient evidence. I
13 believe this is what the Supreme Court, Judicial Court,
14 has done is somewhat less -- some or any evidence.

15 QUESTION: Then what deference is due to the
16 people who are living with and working with inmates of
17 prisons 365 days a year, less a little vacation?

18 MS. SABINO: Because this isn't a review of
19 the factual findings. It does not review the
20 credibility or the weight that the Board gives, and that
21 is something that comes from their expertise within the
22 prison.

23 QUESTION: You mean a court in reviewing it
24 cannot take into account that people who run prisons
25 have some special knowledge of the conduct of human

1 beings who are inmates of prisons?

2 MS. SABINO: I believe it takes it into
3 account in the fact that it does not hold an evidentiary
4 review and it does not question whether what the Board
5 found is credible or not credible evidence.

6 All the court does is looks at the evidence
7 the Board found and says can that support. And that is
8 certainly what the Board does in every administrative
9 proceeding. No one would contend that the Department of
10 Health and Human Services, the energy regulators of our
11 nation, the federal -- the FCC -- don't have expertise.

12 And, in fact, the deference to that is that we
13 do not go through the total evidentiary hearing. The
14 court isn't going to say well, was this guard telling
15 the truth, wasn't he telling the truth. It's going to
16 look at what the Board found as credible evidence, and
17 then say, as judges say in every case, is that legally
18 enough evidence, is that some evidence on which somebody
19 can be found guilty?

20 QUESTION: When you say as judges say in every
21 case, Ms. Sabino, are you saying it's just like review,
22 say, of a civil case in a bench trial, kind of clearly
23 erroneous?

24 MS. SABINO: I believe it's similar to the de
25 novo reviews for arbitrary and capricious action in

1 administrative cases, which would be in some cases
2 whether the Board acted arbitrarily or capriciously.

3 And I think it is very important to note that
4 the Supreme Judicial Court does not postulate a standard
5 that is stronger than the "some or any evidence."

6 When you're talking about evidence, at some
7 point you have to be discussing evidence that the fair
8 fact-finding can rely on. The fact that the inmate was
9 in the institution on the day an assault occurred is
10 relevant evidence, however tenuous, but is relevant.

11 Certainly that would not be evidence that's
12 some evidence of guilt. One must look at whether the
13 evidence would rationally permit a Board's finding of
14 guilt, and that's all that the Massachusetts Supreme
15 Judicial Court did.

16 I'd like to bring up the statute, the writ of
17 certiorari, because as I indicated, I think there's
18 agreement among the parties on many issues. There seems
19 to be a disagreement as to the mechanism for proceeding
20 to court, that the Petitioner seems to be arguing that
21 the Massachusetts Supreme Judicial Court has postulated
22 an independent constitutional mechanism for proceeding
23 to court.

24 The Massachusetts petition writ of certiorari
25 is a very broad writ. It states that a petition for

1 writ of certiorari --

2 QUESTION: Where are you reading from, Ms.
3 Sabino?

4 MS. SABINO: I'm reading from the Appendix of
5 my brief, page 4a.

6 QUESTION: Thank you.

7 MS. SABINO: "A petition for writ of
8 certiorari to protect errors in proceedings which are
9 not according to the course of common law may be
10 presented to a justice of the Supreme Judicial Court."

11 It then goes on to state that: "It shall be
12 open to the Petitioners to contend at the hearing upon
13 the petition that the evidence which formed the basis of
14 the action complained of or the basis of any specified
15 finding or conclusion was as a matter of law
16 insufficient to warrant such action, finding or
17 conclusion.

18 On the question that Justice Stevens raised
19 concerning procedural regulations, in previous cases
20 which are cited in my brief, particularly Commonwealth
21 v. Cepulonis, the inmate seemed to be arguing that the
22 Department of Corrections was not living up to its
23 regulations that a decision must be based on reliable
24 evidence, but it was looking specifically at the
25 regulations of the Department. And that was heard under

1 a writ of certiorari.

2 I believe that, were there a procedural
3 defect, that if there was no notice or no hearing or
4 something of that nature, an inmate would certainly be
5 able to proceed under the writ of certiorari.

6 In some ways, we are confusing what -- what
7 the Supreme Court has determined is the constitutional
8 right is not the constitutional right to have an
9 independent mechanism of proceeding to court, but the
10 constitutional right not to be deprived of a due process
11 of a liberty interest, not to have due process violated,
12 and the right of a court to overturn an administrative
13 decision that's arbitrary and capricious and that
14 violates due process.

15 QUESTION: Ms. Sabino, it's your assertion
16 basically that in the context of prison disciplinary
17 proceedings, that you want this Court to say it's
18 unconstitutional to discipline all three members of a
19 group that may well have been acting together in
20 assaulting another prisoner.

21 MS. SABINO: I want this Court to say that
22 there was no sufficient facts, there was no some
23 evidence on which one could reasonably infer --

24 QUESTION: Isn't this just a typical example
25 of what happens day in and day out in prisons?

1 MS. SABINO: It certainly --

2 QUESTION: Some prisoner is subjected to
3 assaults by some small group of fellow prisoners, and
4 you want us to in effect say we'll have to close our
5 eyes to that.

6 MS. SABINO: Certainly not. In cases where
7 there's evidence as to who committed the assault, one
8 would not close their eyes.

9 QUESTION: But the prisoners will never
10 testify against each other. What more can you have than
11 the guard reporting here were three fellow prisoners
12 involved in a scuffle, and they appeared to act as a
13 group and ran away as a group? And why shouldn't that
14 be enough?

15 MS. SABINO: There's no testimony that they
16 appeared to act as a group. The only testimony was the
17 three of the were moving away. In many cases you have
18 guards observing, and I would contend, Your Honor, from
19 the basis of my experience in disciplinary hearings,
20 that you do have prisoners testifying against each
21 other. You often have other evidence. You often have a
22 bloody hand, somebody holding the instrument. There may
23 often be only one person.

24 But I'm saying in the cases where a guard says
25 I did not see the assault, where there is no evidence

1 that more than one person participated in the assault --
2 because what you would have on the other hand, you leave
3 a prisoner who's standing in a yard, an assault occurs,
4 he stands there at the scene of the assault and he's
5 found guilty because he's standing there, or he leaves
6 and he's found guilty because he leaves.

7 That certainly cannot be a fair or rational
8 basis for depriving somebody of their liberty interests,
9 for incarcerating them for, in this case, a three-month
10 sentence based on no evidence at all that this
11 individual participated in an assault.

12 QUESTION: Ms. Sabino, the certiorari statute
13 you referred us to speaks of insufficient to warrant the
14 action. Is that a different standard under that statute
15 than what you concede, I think, is the proper standard
16 -- some evidence?

17 MS. SABINO: Under the writ of certiorari
18 statute, what the court will do is, will look at the
19 standard to be used based on the particular issue
20 brought before them, and that is in the case of
21 Commonwealth v. Cepulonis.

22 QUESTION: Well, now what I want to get at is,
23 you regard this as different from what I gather you
24 concede is the proper standard -- some evidence?

25 MS. SABINO: I do not regard it as different

1 in this light. The Massachusetts court has interpreted
2 this standard as a flexible standard based on the
3 particular issue in front of them.

4 If the issue in front of them is the
5 constitutional right not to be deprived of liberty
6 arbitrarily and capriciously, then I believe that would
7 be the appropriate standard.

8 Certainly, I argued below to the Massachusetts
9 Supreme Judicial Court that a sufficient evidence
10 standard was the appropriate standard. I do not
11 believe, however, that this is a case in which this
12 court should make a decision on the distinction between
13 the "some" and the "sufficient" evidence because the
14 court below did not decide that.

15 I believe that the certiorari statute that the
16 own department's rules of regulation and other types of
17 indicia would lead the proper determination to be a
18 sufficient evidence standard. However --

19 QUESTION: Didn't you say earlier that the
20 Supreme Judicial Court actually adopted the "some"
21 evidence standard? But that was not in connection with
22 the certiorari statute, was it?

23 MS. SABINO: What the Supreme Judicial Court
24 adopted, it did not actually adopt the standard. What
25 it said is, we are not going to adopt -- we are not

1 going to look at the dispute of standards between
2 whether it's some evidence or substantial evidence,
3 because in this case it only -- the evidence here does
4 not meet the "some" evidence standard.

5 I would argue that based on other
6 Massachusetts laws and regulations and those in other
7 states, that a substantial evidence test might be the
8 more appropriate test; specifically, when the department
9 itself is bound by its own regulations that a prisoner
10 must be found guilty by a preponderance of the evidence.

11 Again, substantial evidence does not raise
12 that, but it would be an indication of their having to
13 follow their own regulation.

14 However, in this particular Court, based on
15 what the Supreme Judicial Court has found, I think it
16 would be inappropriate to go above or argue beyond the
17 some or any evidence standard.

18 QUESTION: But the Supreme Judicial Court did
19 proceed on the basis that there was a constitutional
20 right to judicial review?

21 MS. SABINO: A constitutional right -- I
22 believe what they are saying is that there's a
23 constitutional right not to be deprived of a liberty
24 interest, and a constitutional right for a court to
25 overturn that.

1 QUESTION: That's a rather long answer to a
2 simple question. Didn't they proceed on the basis that
3 there was a constitutional right to judicial review in
4 this case?

5 MS. SABINO: I believe that they -- yes. But
6 not as an independent mechanism.

7 QUESTION: Yes. And then they thought that
8 they would not decide what the standard of review was in
9 this case, because they didn't need to.

10 MS. SABINO: Yes.

11 QUESTION: Because they thought there was no
12 evidence at all.

13 MS. SABINO: Yes. That's correct.

14 I think my reason for that is again trying to
15 distinguish the question as to whether there's an
16 independent constitutional mechanism. The court did not
17 make that decision below because that issue was never
18 raised. The question of whether there's an
19 independent --

20 QUESTION: You would appeal the factual point
21 all the way to this Court?

22 MS. SABINO: I did not appeal the factual --

23 QUESTION: I'm saying, is that what the court
24 said, the Supreme Court of Massachusetts?

25 MS. SABINO: The Supreme Court of

1 Massachusetts said that there was a constitutional
2 violation; therefore, it could be appealed through this
3 Court, were this Court to accept certiorari.

4 QUESTION: Why didn't they go further?

5 MS. SABINO: I'm not sure I understand the
6 question.

7 QUESTION: I hope not.

8 MS. SABINO: The court did not postulate an
9 independent constitutional mechanism saying that were
10 there no certiorari statute, were there no federal
11 habes, were there no 1983 actions, could you, based on
12 constitutional right, have a right to go to court?

13 That issue was not argued, nor was it raised,
14 from what I can see in the reading of the cases in the
15 other courts that examined prison disciplinary hearings.

16 In each of those cases, a writ of federal
17 habeas corpus or 1983 or in some cases similar state
18 certiorari or habe stautes were used.

19 QUESTION: May I ask you -- I notice that in
20 your brief, you don't quote any -- what you think the
21 questions presented are.

22 What do you think the issue before us is?

23 MS. SABINO: I think the issue before you is
24 whether there can be an arbitrary and capricious denial
25 of a due process right -- excuse me -- liberty interest,

1 and therefore violation of the due process clause if an
2 inmate is found guilty of a disciplinary offense, loses
3 a liberty interest, based on no or some evidence.

4 QUESTION: That's almost -- see, your opponent
5 in the second question is whether there needs to be a
6 standard more stringent than review for action which is
7 arbitrary, capricious, or an abuse of discretion.

8 What you're saying is the same standard as the
9 court used, because the no evidence standard is the same
10 as the arbitrary and capricious standard.

11 So I don't think the two of you really are
12 arguing about the standard, unless your opponent might
13 say some evidence is a higher standard than an arbitrary
14 and capricious standard, but I'm not sure it is.

15 MS. SABINO: I would agree, Your Honor. I do
16 not believe that any or some evidence standard is
17 higher.

18 QUESTION: And I don't find a question
19 presented as to whether the particular facts here, three
20 people running away from the scene, there's no question
21 presented as to whether that satisfies the arbitrary
22 standard or the some evidence standard.

23 That's not before us.

24 MS. SABINO: I would agree that the lower
25 court --

1 QUESTION: So we have a case before us in
2 which two courts have said there was no evidence. And
3 then the question is whether that was the right
4 standard.

5 QUESTION: Well, now is that correct that all
6 the court below said, judicial review is to be limited
7 to the legal sufficiency of the evidence? And then it
8 reviewed this evidence and said one can't say that this
9 is sufficient to support the findings.

10 The court never said there is -- we're
11 reviewing it for no evidence. They just said it wasn't
12 sufficient. When I read the opinion, I assumed they
13 recognized that there was some evidence here, but they
14 thought it wasn't sufficient, so of course that question
15 is here.

16 The court below clearly applied something
17 other than the no evidence standard.

18 MS. SABINO: I would disagree with that,
19 Your Honor, for two reasons. If you look at the opinion
20 at pages 16 or 17, the judge -- the court states: "The
21 trial judge reviewed the evidence to determine whether
22 there was some evidence which it believed would
23 rationally permit a Board's finding. In other cases,
24 the court relies upon cases in other courts which
25 clearly indicate the some or any evidence statute."

1 I think the reference to the sufficiency of
2 the evidence is again a -- perhaps looking at it in a
3 different light, that the question is whether or not --
4 the question is whether or not there's some evidence.
5 And is the evidence presented legally sufficient to meet
6 that standard of some evidence? That --

7 QUESTION: Well, that isn't what the court
8 said the standard was. It said the standard is the
9 sufficiency of the evidence.

10 MS. SABINO: I believe the court said the
11 standard is whether there is some evidence. I believe
12 the reference to sufficiency is, you're looking for the
13 sufficiency, and then the standard is, in this case,
14 whether there is some.

15 By specifically stating that this is an
16 alternative review to the substantial evidence, I do not
17 believe that they came in with a middle level.

18 QUESTION: I suppose the opinion will just
19 speak for itself, won't it?

20 MS. SABINO: Again --

21 QUESTION: Well, Ms. Sabino, don't you get any
22 support for your position from Footnote 5, page 17?

23 MS. SABINO: I believe that is great support
24 for my position. The fact that the court --

25 QUESTION: Excellent.

1 MS. SABINO: Yes.

2 QUESTION: The court is recognizing that there
3 is an alternative standard to review, and if one reads
4 all the cases one will see two standards of review, the
5 some or any evidence, or the sufficient evidence.

6 They in fact say that they are taking the
7 lower standard in this case, which is the some or any
8 evidence case.

9 QUESTION: Could I ask you, isn't one of the
10 -- do you think there is an issue in this case as to
11 whether or not a state court must give under the federal
12 Constitution, judicial review to a prison disciplinary
13 decision?

14 I'll put it another way. Suppose the
15 Massachusetts courts had said well, under our law, there
16 is just no review in the courts of prison disciplinary
17 decisions. We just -- that's just the law in this state.

18 Do you think the Federal Constitution would
19 require the Massachusetts courts to give some review?

20 MS. SABINO: I believe that there is an
21 inherent right to an independent constitutional --

22 QUESTION: Well, that may be; that may be; but
23 must the state court furnish direct review of the prison
24 disciplinary decision?

25 MS. SABINO: I believe if there were no state

1 mechanism for getting to court, that a federal habe in
2 the federal court would be the more appropriate.

3 QUESTION: All right. There would be federal
4 habeas available.

5 MS. SABINO: Yes.

6 QUESTION: Now, do you think that the court
7 below decided that the federal Constitution required
8 them, the state courts, to give judicial review?

9 MS. SABINO: I do not believe they decided
10 that. I believe they decided --

11 QUESTION: Do you think they just said that
12 this appellant is in the courts under state law?

13 MS. SABINO: Yes, and that the federal
14 Constitution requires that he not be deprived of a
15 liberty interest without some or any evidence; that the
16 right, the federal constitutional right that's being
17 vindicated is the right to due process.

18 QUESTION: So you think the state law is what
19 got this person into the Massachusetts courts?

20 MS. SABINO: I believe so. I believe that was
21 the mechanism, as opposed to the right being vindicated,
22 the mechanism for going to court.

23 QUESTION: And if the state hadn't provided a
24 mechanism, then the proper course would have been
25 federal habeas?

1 MS. SABINO: I believe that would have been
2 open to the Petitioner. I believe that there might be
3 some argument under our state constitution as well.

4 QUESTION: Would 1983 be --

5 MS. SABINO: This Court has ruled that 1983 is
6 not the appropriate avenue for restoring good time
7 credits. Pressler, I believe, stated that a habe staute
8 was the appropriate for the restoration of good times,
9 and 1983 was for damages.

10 QUESTION: May I ask if you agree with -- you
11 agree with the Solicitor General's analysis of the
12 entire case, as I understand, except for his final
13 paragraph in which he says there really isn't enough
14 evidence to meet the -- there really was enough evidence
15 to meet the standard.

16 MS. SABINO: Yes, I would agree with his
17 analysis.

18 If there are no further questions --

19 CHIEF JUSTICE BURGER: Very well.

20 Do you have anything further? You have one
21 minute remaining.

22 ORAL ARGUMENT OF BARBARA A.H. SMITH, ESQ.

23 ON BEHALF OF THE PETITIONER - REBUTTAL

24 MS. SMITH: Just for purposes of clarifying
25 for the Court the appropriate certiorari statute, my

1 respondent has cited the 1953 amended version in her
2 brief. That was further amended in 1963, omitting the
3 sentence that was read to the Court.

4 QUESTION: Where is it in yours?

5 MS. SMITH: The appropriate statute is at page
6 4 and 5 in my reply brief.

7 Thank you.

8 QUESTION: Four and five of what?

9 MS. SMITH: The reply brief.

10 QUESTION: Now, what did it omit, Ms. Smith?

11 MS. SMITH: It omitted the sentence read to
12 you by the Respondent: "It shall be open to the
13 Petitioner to contend upon hearing upon the petition
14 that the evidence which formed the basis of the action
15 complained of or the basis of any specified findings was
16 a matter of law insufficient."

17 QUESTION: Do you agree that the court below,
18 that the Supreme Judicial Court did not hold that the
19 state courts were required to give review of a prison
20 disciplinary decision?

21 MS. SMITH: What the court held is that the
22 federal Constitution requires of the state court to give
23 review of the sufficiency of the evidence of the
24 disciplinary hearings.

25 QUESTION: I see. All right, thank you.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

(Whereupon, at 11:59 o'clock a.m., the case in
the above-entitled matter was submitted.)

CERTIFICATION.

lderson Reporting Company, Inc., hereby certifies that the
ttached pages represents an accurate transcription of
lectronic sound recording of the oral argument before the
upreme Court of The United States in the Matter of:

#84-438 - SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE
Petitioner V. GERALD HILL AND JOSEPH CRAWFORD

nd that these attached pages constitutes the original
ranscript of the proceedings for the records of the court.

BY

Paul A. Richardson

(REPORTER)

'85 APR -1 PM2:32

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE