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10-1975

Montanye v. Haymes

Lewis F. Powell, Jr.

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DISCUSS

Responses:
Add nothing to this memo
Point out that opinion was simply a ~~dism~~ reversal and reinstatement of the Pro se complaint.

DENY motion to expedite

CFR 11/15

November 15, 1974 Conference
List 3, Sheet 3

Deny DB

No. 74-520	Motion to Expedite	
*SMITH, Superintendent	Cert to CA 2 (Kaufman, Smith, Timbers)	
v.		
HAYMES	Federal/civil	Timely

SUMMARY: Resp brought this §1983 action in USDC W. D. N. Y. (Curtin), challenging his summary transfer by N. Y. authorities from one maximum-security prison to another. The USDC granted summary judgment to petrs. CA 2 reversed, holding that the maximum security classification of the two institutions was not dispositive and that the hardship involved in the mere fact of dislocation may be sufficient

*/Petr's petition is styled Montanye, Superintendent and Smith, Deputy Superintendent v. Haymes. Smith has succeeded Montanye as Superintendent. See Rule 48(3).

to render resp's summary transfer - if a trial establishes that it was punitive - a denial of due process. Petrs note that the Court recently granted cert in Preiser v. Newkirk, No. 74-107, which raises a due process issue with respect to summary transfer from a minimum-security to a maximum-security prison, and moves that consideration of the present petition be expedited so that if cert is granted, this case may be heard together with Preiser.

FACTS: For unknown reasons, resp was discharged as an inmate law clerk in Attica's law library. Later the same day, prison authorities seized from resp a petition which he was circulating among the inmates. The petition, signed by 82 inmates, was addressed to USDC Judge Curtin and stated, inter alia, that the signatories were being deprived of legal assistance because of the removal of resp and another inmate law clerk. Two days later, resp was transferred without a hearing from Attica to the Clinton Correctional Facility, another maximum-security prison.

Petr then filed what the USDC treated as a §1983 action, alleging that his transfer without hearing to Clinton, in retaliation for circulating the petition, deprived him of due process. The USDC granted summary judgment for petrs, finding that the seizure of the petition was proper under prison rules because it represented unauthorized legal assistance. The USDC also found no violation of due process in resp's transfer, reasoning that the alleged punitive nature of the transfer was not material because no claim was made that the facilities at Clinton are harsher or substantially different from those at Attica.

CA 2 did not think it dispositive that both Attica and Clinton are maximum-security facilities with similar programs. Noting several hardships and deprivations involved in being transferred from one institution to another, e.g. separation from family, administrative segregation upon arrival at a new facility and record of transfer, the CA held that resp's summary transfer - if found to be punitive by the trial court -

may be a denial of due process.

CONTENTIONS: As in Preiser, petrs argue that the lower federal courts have taken divergent views of the necessity for providing hearings in connection with inter-institution transfers of inmates. They note that Preiser involves the transfer of an inmate from a medium-security to a maximum security institution and that heard together Preiser and the present case will present to the Court the two common types of intrastate transfers which have been the basis for conflicting decisions.

DISCUSSION: While the lower federal court cases do distinguish between transfers involving no change in custody level and those in which the character of the institution has changed, it is not clear that this case presents the added dimension petrs seek. The holding of CA 2 appears to be a rather narrow one. And, unlike Preiser there is n finding here that resp was transferred for disciplinary purposes.

The petition is before the Court on a motion to expedite.

There is no response.

11/14/74 Ginty CA Op in petn

PJN

Conference 11-15-74

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 74-520

SMITH

vs.

HAYMES

MOTION

Rehnquist & Stewart think there is reason to summ expedite

CFR

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Rehnquist, J.						CFR								
Powell, J.			✓											
Blackmun, J.			✓											
Marshall, J.						CFR								
White, J.			✓											
Stewart, J.						CFR								
Brennan, J.			✓											
Douglas, J.			✓											
Burger, Ch. J.			✓											

Deny Cert.

DISCUSS

GRANT motion to expedite
DENY cert
ldj

This case differs significantly from Preiser, both in substance and proc. posture. I would deny cert.
RC.

SUPPLEMENTAL MEMO

December 6, 1974 Conference
List 5, Sheet 1

No. 74-520

~~MONTANYE~~ (Smith), Superintendent

v.

HAYMES

Response to motion to expedite

Cert to CA 2
(Kaufman, Smith, Timbers)

Federal/civil (1983)

SUMMARY: This case was before the November 15 Conference on a motion to expedite, sub nomine Smith v. Haymes. A response was requested

Resp challenged his summary transfer from one maximum-security prison to another. The USDC granted summary judgment to petrs, N. Y. prison authorities. CA 2 reversed, holding that the maximum security classification of the two institutions was not dispositive and that the

hardships involved in the mere fact of dislocation may be sufficient to render resp's transfer a denial of due process if a trial establishes that the transfer was punitive. Petrs ~~made~~ note the Court's recent grant in Preiser v. Newkirk, No. 74-107, which raises a due process issue with respect to a summary transfer from a minimum-security to a maximum-security institution. Petrs move that consideration of the present petition be expedited so that if cert is granted, this case may be heard together with Preiser.

CONTENTIONS OF RESP: Resp characterizes CA 2's opinion as deciding very little, noting that the CA merely reinstated his complaint, requiring the USDC to make findings as to (1) whether the transfer had in fact been imposed for punitive reasons, and (2) whether the prisoner suffered significantly adverse consequences. They claim there is thus no final judgment and that review is inappropriate. Hamilton-Brown Shoe Co. v. Wolf Bro. & Co., 240 U.S. 251, 257-58 (1916); Bro. of Locomotive Firemen & Engineers v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967); Cobbledick v. United States, 309 U.S. 323 (1940). Resp further argues that findings are necessary to a proper resolution of the due process issue and contrast the situation here with the fully developed record in Preiser.

DISCUSSION: This case would not appear to present the added dimension to prison transfer issues that petrs contend. In its present posture, the case would seem to present for review only the narrow issue of whether summary transfers to like institutions is not per se a violation of due process. It does not appear that the issue can be approached in such a sterile context.

The petition is before the Court on a motion to expedite.

There is a response.

Ginty CA Op in petn.

12/5/74 DK

Conference 12-6-74

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 74-520

Montanye
vs.
Haymes

Mo for to expedite - Deny
~~Deny Motion~~
~~To Expedite~~

Cert { Hold for Preiser
74-107

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Hold for Brewer v Newkirk

74-520 Montagye v Haymes

Grant?

CA2 held that when a transfer is used as "punishment" – D/P is required "adverse effects" were required – but almost any thing is "adverse" – e.g. farther away from family [redacted].

I do not think the D/P issue turns on whether transfer is "punitive" or "adm"; CA2 held that if "punitive" D/P required.

Not moot – damages claimed

Gail - Book

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1975

Re: No. 74-520 - Montanye (Superintendent) v. Haymes (I will DENY)
Held for No. 74-107 - Preiser v. Newkirk

MEMORANDUM TO THE CONFERENCE:

For reasons undisclosed, respondent was removed from assignment as an inmate "law clerk" in Attica's law library. The institution seized from respondent a petition which he was circulating among the inmates. The petition, signed by 82 inmates, was addressed to USDC Judge Curtin and stated, inter alia, that the signatories were being deprived of legal assistance because of the removal of respondent and another inmate law clerk. Two days later, respondent was transferred, without a hearing, from Attica to the Clinton Correctional Facility. Both institutions are maximum-security facilities.

Petitioner then filed what the District Court treated as a § 1983 action, alleging that his transfer, without hearing, to Clinton was in retaliation for his circulating the petition and deprived him of due process. The District Court granted summary judgment for petitioner, finding that the seizure of the petition was proper under prison rules because it represented unauthorized legal assistance. The District Court also found no violation of due process in respondent's transfer, reasoning that whether the transfer was punitive was not material because no claim was made that the facilities at Clinton are harsher or substantially different from those at Attica. Noting the absence of a trial record, the Court of Appeals reversed. In a rather opaque opinion, it seems to have held that, if the District Court found that the transfer was intended as punishment, it is not "dispositive that both Attica and Clinton are maximum security facilities with similar programs." The mere fact of relocation may be sufficient to render the transfer a denial of due process if, in fact, it has consequences "sufficiently adverse to be properly characterized as punitive." It is anything but a clear analysis or an understandable opinion by the Court of Appeals.

The subject matter is in the same "ball park" as Newkirk, but since there is a remand to the District Court, my view is to wait on developments.

I will vote to DENY.

Regards,

Conference 6-19-75
6-20-75

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 74-520

MONTANYE

vs.

Haymes

Heretofore held for
Preiser v. Newkirk

clerk will circulate a memo - he will
Deny
Incliner to Grant
subject to discussion - 6/21

Relist for C.J.

Granted 6/22

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	✓	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	✓	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	✓	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

[c. JULY 1975?]

Montanye v. Haymes, No. 74-520 Held for Preiser v. Newkirk

I disagree with the Chief's recommendation. First, I do not find the Court of Appeals' opinion "opaque" or difficult to understand. It held that when transfer is used as punishment, "elementary fairness" requires that the inmate be given notice and a hearing to review the evidence of the alleged misbehavior and to assess the effect transfer will have on the inmate's future incarceration. It added that a showing that prison authorities intended the transfer as punishment would not be enough to require a hearing unless the transfer in fact had adverse consequences to the prisoner, but the opinion suggests that almost anything would qualify as sufficient adverse consequences: e.g., being farther away from family, being separated from friends in the original prison, having greater difficulty communicating with counsel, being put in administrative segregation upon arrival at the new facility, losing personal belongings in the move, having medical or psychiatric treatment or educational programs interrupted, or even having a notation of the transfer on his prison record.

In addition, the Court of Appeals said that punitive transfer without hearing might present an equal protection issue if hearings are provided for all other disciplinary action. (That is, if any in-prison discipline for a particular act requires a hearing, equal protection would require a hearing for a transfer used as discipline for the same act.) Although this may stand as an alternative ground for the Court of Appeals' order, I do not think it would block review of the due process holding.

Second, I disagree with the Chief that the remand for trial on the facts (to see if this transfer was intended to be punitive and had punitive effects) makes the issue unripe for review. If, as we discussed in analyzing Preiser v. Newkirk, due process would not require hearings even for disciplinary transfers, this ruling should be reviewed now, to save the State an unnecessary trial. The case was decided on summary judgment below. Respondent's complaint alleged that he was transferred for disciplinary reasons. CA2 held that this allegation, if proved, would establish a due process right to a hearing. That legal ruling is ripe for review. Of course, if a majority of the Court agrees with the Chief's distinction between disciplinary and nondisciplinary transfers, a decision in this case would not necessarily establish that no hearing is required for "administrative" transfers, but I feel confident that an opinion could be written that would dispose of both questions for all practical purposes. It seems to me that the disciplinary transfer issue is the more difficult, since hearings could serve no purpose at all in administrative transfers, and it is worth resolving. Without review, this case will stand as precedent in CA2 for the proposition that all disciplinary transfers require notice and a hearing.

Finally, a word about the dangers of mootness. This transfer occurred in 1972, and there is no hint in the papers about respondent's current status. But respondent's complaint

asks for damages for the deprivation he suffered after his transfer. I expect the claim for damages will turn out to be legally insufficient, as prison officials can probably establish that they acted in good faith under existing law. But the damages claim nonetheless will insulate the case from mootness, even if respondent is released from prison before the case can be decided. (Even if respondent could not recover damages after proving that a violation of his rights had occurred, it would be improper to anticipate that factual issue in ruling on this summary judgment issue. At this stage the only issue is whether respondent has alleged a cause of action and whether the facts of record establish a genuine issue of material fact that would affect respondent's right to recover. Prison officials' good faith would almost always be a factual issue requiring trial.)

For these reasons, if you want to decide the issue that was mooted out in Preiser, I think this case is appropriate for review, and I would recommend that it be granted.

penny

7-22-75

MEMORANDUM

TO: Justice Powell

FROM: Penny Clark DATE: July 22, 1975

No. 74-107 PREISER v. NEWKIRK

When I finished studying the Chief Justice's opinion, I concluded that the difficulties I have with it are too numerous for oral presentation and thought it best to start out with a written memorandum.

First, it is not clear from the opinion that the "legitimate entitlement" method of analyzing the "liberty" component of due process applies only in prison cases. The discussion is preceded by a statement that the case involves a prisoner, p. 8, but it does not say thereafter that this analysis is limited to that situation. The citations to Roth may be taken to suggest otherwise. Needless to say, this analysis cannot apply outside the prison context. To suggest that the constitutional protection of liberty depends on an express state-created expectation that one will be free of restraint is simply untenable.

Second, the opinion suggests that this new liberty analysis is not new at all, but is supported by prior opinions. It is not. In fact, Morrissey v. Brewer is inconsistent with the new analysis. The Morrissey opinion does not rely on any state statute or regulation creating an entitlement to remain

free on parole absent misconduct, and the opinion suggests there was none. Instead there was "at least an implied promise" that parole would not be revoked absent misconduct. On this basis the Court found a liberty entitlement strong enough to require a hearing. 408 U.S., at 482. The Newkirk opinion contains a strong suggestion that an implied promise would not be enough. P. 10. Gagnon v. Scarpelli simply followed Morrissey. Again there was no search for a statute or regulation creating an expectation that probation would not be revoked unless the prisoner misbehaved. Nor did Wolff v. McDonnell imply that in the absence of a statute no liberty interest would arise when a prisoner is transferred from the general prison population into solitary confinement. That case was easy, since there was a statute that created an expectation of both good time and freedom from solitary confinement absent misconduct. But the opinion does not rely on the statute in concluding that a prisoner had a due process right to a hearing before being placed in solitary for misconduct. At 571-572, n. 19, the opinion notes the existence of the statute, but relies on the practice (apparently talking in general terms that apply to other states as well) of not putting a prisoner in solitary absent misconduct. An earlier section of the opinion even more clearly eschews exclusive reliance on the statutory entitlement: at p. 558, the Court said that "a person's liberty is equally protected [with property interests], even when the

liberty itself is a statutory creation of the State." (emphasis added).

My conclusion is that the Newkirk opinion is the first to insist on a state statute or rule creating an entitlement to liberty, even in the prison context. And it appears inconsistent with Morrissey. For that reason, I think if the Court now wants to adopt an "entitlement" requirement in Newkirk it at least should explain this new approach.

In deciding whether to adopt this analysis instead of another route that would lead to the same result, I think it is important to consider how far the Court would go in rejecting liberty interests when there is no state-created entitlement. For instance, what if a state expressly provided that a parolee had no legitimate expectation to remain out on parole and that he could be sent back to prison for any reason or no reason at all? Or if a state had no statute or regulation providing that prisoners shall not be placed in solitary confinement absent misconduct, and the prison had a practice of putting inmates in solitary for long periods without holding any disciplinary proceedings? I could not say that no liberty interest would be affected under such circumstances, and I doubt that the Court would follow Newkirk to its logical conclusion.

I also find a basic problem in the Newkirk opinion on the attempted distinction between disciplinary proceedings and

nondisciplinary proceedings. First, Justice Marshall's dissent is right in saying that the District Court made a finding of fact to the effect that the transfer in this case was a disciplinary transfer. Petition at 42. The Court of Appeals did not disturb that finding, but simply ignored it in order to decide the case on a broader ground. This Court must accept that factual finding unless it is "clearly erroneous." Fed. R. Civ. P. 52(a). On the facts as revealed in the briefs and at argument, I do not think the finding can be considered clearly erroneous. And the Chief Justice's opinion does not say that it is, but simply relies on "suggestions" that the transfer had no disciplinary purpose. P. 11.

Second, the Newkirk opinion attempts to distinguish Wolff (as well as Morrissey and Gagnon) on the ground that they involved disciplinary action, and it purports to confine the ruling that there is no "liberty" interest to cases of nondisciplinary transfers. Pp. 7, 11, 12, 14. Neither the distinction nor the limitation make sense under customary due process analysis. The purpose of governmental action--whether punitive, disciplinary, or otherwise--has always been thought relevant only to the second stage of the due process analysis: in deciding, once you have found a "liberty" or "property" interest that deserves protection, what procedural protections (if any) are required. It is almost exclusively relevant to the question whether a hearing could serve any purpose, whether

it is necessary to protect the person affected, and whether the need for a hearing is outweighed by state interests. (It may also be relevant when the asserted "liberty" interest rests on harm to reputation, but even then a disciplinary proceeding would affect "liberty" only if it resulted in a record of misconduct, and a proceeding not labeled "disciplinary" conceivably could affect reputation just as much.)

I therefore conclude that the only way to draw a tenable distinction between disciplinary proceedings and non-disciplinary proceedings, assuming you want to do so, is to recognize that a prisoner has a slight liberty interest in his status quo in a medium-security institution, but to conclude that his slight interest is substantially outweighed by the state's interest in efficient prisoner placement, absent a disciplinary label. Disciplinary transfers could be distinguished because they depend entirely on facts individual to one inmate rather than mass transfers that would depend instead on comparisons among inmates, when a hearing would serve no purpose. But, if the Newkirk opinion is to remain grounded in a holding that there is no "liberty" interest, the purported distinction between disciplinary and nondisciplinary transfers cannot stand.

I think that the Newkirk analysis is outside the mainstream of this Court's due process precedent, and I do not think it would stand the test of hard cases. I strongly recommend that we write a brief separate opinion that recognizes a slight

liberty interest but concludes that in no circumstances can it outweigh the state's need to transfer prisoners for various reasons, including simple efficiency. I do not think we would have to distinguish between disciplinary and non-disciplinary transfers. We could reject the distinction, on the ground that litigation to determine which transfers were disciplinary would be as burdensome (perhaps more) to prison officials as holding a hearing in every transfer case. I think we would have to leave open the question whether a transfer that results in a record of serious misconduct might not affect the "liberty" interest in reputation (and possible future parole) substantially enough to require some hearing-type procedure, but that question is not presented in this case because no notation of misconduct is in respondent's prison file. Appx. 256a.

Penny

GP/gg 4-21-76

BOBTAIL MEMORANDUM

TO: Justice Powell

FROM: Greg Palm DATE: April 21, 1976

No. 74-520 Montanye v. Haymes

No. 75-252 Meachum v. Fane

Since Penny has already given you a memo on the Chief's opinion in this case (which you joined last Spring) and since I agree with much of what she said, this is a brief summary of my views in the area.

I think that prisoners do have a liberty interest that is implicated in the decision to transfer them from one penal institution to another. This liberty interest consists generally of such facts as: (1) distance from family and counsel; (2) educational/rehabilitative opportunities; (3) new/old environment problem; (4) type of institution re freedom of movement: minimum to maximum gradient. It is also my conclusion, however, that when the prisoner's general liberty interest is balanced against the interest of the state in this situation, Due Process does not demand that a hearing

be provided in any case except those where the transfer is being used as a disciplinary measure because the prisoner engaged in particular conduct.* [redacted] I therefore would disagree with any opinion that rested on the notion that absent a statutory entitlement, prisoners have no cognizable liberty interest. Of the two exceptions that I have outlined, I am less certain about the need for (1). On balance, I believe that the exception is necessary to ensure that the State does not utilize the transfer mechanism as a substitute for sanctions such as solitary confinement or alike for behavior that it wishes to discourage. A hearing would be useful in such situations because the issues would be "adjudicative" facts relating to the actions of the particular prisoner. There are two difficulties: (1) need

---

* (I would require that the State indicate the reason for the transfer and would also rely on its good faith not to lie about the reason - that is, if the State claims it is transferring the prisoner because of administrative reasons, and the prisoner claims it is because I am accused of doing X [illegible], I would not require a hearing).

to ensure that the exception does not become a mechanism by which prisoners can claim punishment for act * in order to get a hearing - my "good faith" assumption and reasons should satisfy this problem - and (2) even if used as punishment, the liberty loss involved in some transfers is likely to be so small as to make a hearing unnecessary. [redacted] I suspect, however, that through my disciplinary/good faith requirement the burden on prison authorities will not be unreasonable in light of the prisoners' potential liberty interests. *

Greg

---

* Even if hearings are required only in the two cases I have specified, any opinion should, of course, emphasize the special circumstances of the prison which justify less process then in almost any other situation.

74-520 MONTANYE v. HAYMES (Supt. of Attica / inmate) Argued 4/21/76

Resp., inmate at Attica prison, was transferred to Clinton - both maximum security prisons.

Resp. sued (not to be returned to attica) but for damages, claiming transfer was a "reprisal" for a petition he had circulated. Resp. also was relieved of his position as law clerk in prison library. The petition, circulated contrary to Rules, was confiscated (should have been dismissed under 12(b)(6))

DC granted "summary judg." for State, but CA2 reversed. Resp. was treated as 1983 suit

Transfer was made w/o notice or hearing.

Resp. was not placed in a different type of custody at Clinton. No adverse notation was made on Resp.'s record.

CA2 held that Complaint alleged "punative" action for exercising Const. Rt. to petition a Court. CA2 also found that mere fact of transfer imposed a hardship on Resp. sufficient to create "grievous loss".

x x x

Counsel for Resp. shifted his position to denial of 1st Amend Rt to petition for Grievances. (See Appendix 6(a) & 19a)

Lewitter (Cont A.G. v 4.) –
Argument not helpful.

Bronstein (for Resp.)
Argues CA 2 wrongly found that complaint asserts cause of action & remanded case for trial.

Bronstein goes beyond CA 2 O/P. (which was decided on procedural D/P grounds) and now argues that Resp's substantive Const. Rts under First Amend. were violated.

Relies on Preminger v Mantley — deprived of right to petition for grievance.

Lewitter (Rebuttal)
Resp. now asserts entirely different case. In her Brief, Bronstein argues procedural D/P — not substantive denial of 1st Amend. & preventing Resp. from petitioning Court for "redress of grievances".

Stevens & Marshall – quoting from Complaint (Appendix 6a) & Resp's affidavit (A. 20a) – suggest Resp has alleged denial of substantive rts. and is entitled to a hearing.

No. 74-520, MONTANYE v. HAYMES CA2 Conf. 4/23/76

The Chief Justice Passed

CA2's opinion would require a ~~the~~ D/P hearing on any move - even from a cell on south side of prison to north side.

CA2 misread Wolff.

No liberty or prop. interest here.

x x x

After discussion, will go along with the V. & R.

xxxxxxxxx Stevens, J. Affirm.

Clear on face of hearing that inmate ~~was~~ was entitled to a hearing on what we call "new issue".

The transfer issue does ~~it~~ require a hearing in itself. But several issue were raised by this Complaint. There was enough to justify a hearing on entire complaint. CA2 op. was wrong - altho its result (e.g. remand for hearing was OK)

Brennan, J. Affirm

Counsel for Resp. abandoned CA2's opinion, & argues a new issue: that Complaint states a denial of right to petition for grievance.

Stewart, J. Vacate judgment + Remand on new 3 issue

New issue complicates this case. This issue can be detected only with some imagination, but it is here & raises a substantive Const. issue not considered below. Remand.

White, J.

Vacate + Remand (new issue)*

Footnote in Wolff re to solitary confinement not controlling

May be some cases of transfers so outrageous as to.

Marshall, J.

Affirm on all grounds

Denial of access to Cts was alleged.

CA 2 was right on procedural D/P issue also.

Blackmun, J.

(I did not record Harry's vote - I think it was V + R)

Powell, J. Vacate + Remand on new issue.

I disagree with CA 2 op. re procedural D/P

(But see John's position)

Rehnquist, J. Vacate + Remand on new issue.

Disagree with CA 2 op.

* This issue was reserved below — at end.

Joins Stewart

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 6-2-76

Recirculated: _____

Stevens is writing a dissent

1st DRAFT

Received 2 7P 6/2/76

SUPREME COURT OF THE UNITED STATES

No. 74-520

Ernest L. Montanye, Former Superintendent, Attica Correctional Facility, et al., Petitioners, *v.* Rodney R. Haymes.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Joins

[June —, 1976]

MR. JUSTICE WHITE delivered the opinion of the Court.

On June 7, 1972, respondent Haymes was removed from his assignment as inmate clerk in the law library at the Attica Correctional Facility in the State of New York. That afternoon Haymes was observed circulating among other inmates a document prepared by him and at the time signed by 82 other prisoners. Among other things, each signatory complained that he had been deprived of legal assistance as the result of the removal of Haymes and another inmate from the prison law library.[1]

[1] The document read as follows:

"Hon. Judge John T. Curtin:

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

"Since the removal of the above two from the law library, I cannot any longer obtain any legal assistance either in the nature of obtaining the proper applicable case law corresponding with the particular issue contained in my case, as well as assistance in preparing my post-conviction application to the courts.

"The major problem and reason for my not being able to obtain legal assistance is a direct result of the attitude displayed by the

The document, which was addressed to a federal judge but sought no relief, was seized and held by prison authorities. On June 8, Haymes was advised that he would be transferred to Clinton Correctional Facility, which, like Attica, was a maximum-security institution. The transfer was effected the next day. No loss of good time, segregated confinement, loss of privileges or any other disciplinary measures accompanied the transfer. On August 3, Haymes filed a petition with the United States District Court which was construed by the judge to be an application under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 seeking relief against petitioner Montanye, the then superintendent at Attica. The petition complained that the seizure and retention of the document, despite requests for its return, not only violated Administrative Bulletin No. 20, which allegedly made any communication to a court privileged and confidential, but also infringed Haymes' federally guaranteed right to petition the court for redress of grievances. It further asserted that Haymes' removal to Clinton was to prevent him from pursuing his remedies and also was in reprisal for his having rendered legal assistance to various prisoners as well as having, along with others, sought to petition the court for redress.

In response to a show-cause order issued by the court,

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law library officer whom goes out of his way to circumvent inmates legal assistance.

"I feel that this was obviously the same reason why this officer has had Rodney Haymes and John Washington removed from the law library whereby they no longer have proper access to either the law books or myself and the other inmates whom they are legally assisting.

"Wherefore, I feel that my constitutional rights to adequate access to the courts for judicial review and redress is being violated as a direct result of the circumstances and conditions herein set forth.

(Signed by 82 inmates.)"

petitioner Brady, the correctional officer at Attica in charge of the law library, stated in an affidavit that Haymes had been relieved from his assignment as an inmate clerk in the law library "because of his continual disregard for the rules governing inmates and the use of the law library" and that only one of the inmates who had signed the petition being circulated by Haymes had ever made an official request for legal assistance. The affidavit of Harold Smith, Deputy Superintendent of Attica, furnished the court with Paragraph 21 of the Inmate's Rule Book,[2] which prohibited an inmate from furnishing legal assistance to another inmate without official permission and with a copy of a bulletin board notice directing inmates with legal problems to present them to Officer Brady—inmates were in no circumstances to set themselves up as legal counsellors and receive pay for their services.[3] The affidavit asserted that the petition taken from Haymes was being circulated "in direct disregard of the above rule forbidding legal assistance without the approval of the Superintendent" and that Haymes had been cautioned on several occasions about assisting other inmates without the required approval.

Haymes responded by a motion to join Brady as a

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[2] Inmates are prohibited except upon approval of the Warden, to assist other inmates in the preparation of legal papers

[3] The notice read as follows:

Office of Superintendent
April 25, 1972

"TO ALL CONCERNED:

"In all instances where inmates desire assistance in the use of the Law Library, they are to present their problems to Correction Officer Brady, who will assist them to the extent necessary or will assign inmates on the Law Library staff to particular cases.

"Under no circumstances are inmates to set themselves up as 'legal counselors' and receive pay for their services.

ERNEST L. MONTANYE
Superintendent"

defendant, which was granted, and with a counteraffidavit denying that there was a rule book at Attica, reasserting that the document seized was merely a letter to the court not within the scope of the claimed rule and alleging that his removal from the law library, the seizure of his petition and his transfer to Clinton were acts of reprisal for his having attempted to furnish legal assistance to the other prisoners rather than merely hand out library books to them.

After retained counsel had submitted a memorandum on behalf of Haymes, the District Court dismissed the action. It held that the rule against giving legal assistance without consent was reasonable and that the seizure of Haymes' document was not in violation of the Constitution. The court also ruled that the transfer to Clinton did not violate Haymes' rights: "Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at Green Haven are harsher or substantially different from those afforded petitioner at Attica . . . petitioner's transfer was consistent with the discretion given to prison officials in exercising proper custody of inmates." App. 26a.

The Court of Appeals for the Second Circuit reversed. 505 F. 2d 977 (1974). Because the District Court had considered affidavits outside the pleadings, the dismissal was deemed to have been a summary judgment under Rule 56, Federal Rules of Civil Procedure. The judgment was ruled erroneous because there were two unresolved issues of material fact: whether Haymes' removal to Clinton was punishment for a disobedience of prison rules and if so whether the effects of the transfer were sufficiently burdensome to require a hearing under the Due Process Clause of the Fourteenth Amendment.

The court's legal theory was that Haymes should no

more be punished by a transfer having harsh consequences than he should suffer other deprivations which under prison rules could not be imposed without following specified procedures. Disciplinary transfers, the Court of Appeals thought, were in a different category from "administrative" transfers. "When harsh treatment is meted out to reprimand, deter or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling . . . the specific facts upon which decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior, and to assess the effect which the transfer will have on the inmate's future incarceration." 505 F. 2d, at 980. The Court of Appeals found it difficult "to look upon the circumstances of transfer as a mere coincidence," *id.* 979; it was also convinced that Haymes might be able to demonstrate sufficiently burdensome consequences attending the transfer to trigger the protections of the Due Process Clause, even though Attica and Clinton were both maximum-security prisons. The case was therefore remanded for further proceedings to the District Court. We granted certiorari, — U. S. —, and heard the case with Meachum. We reverse the judgment of the Court of Appeals.

The Court of Appeals did not hold, as did the Court of Appeals in *Meachum* v. *Fano*, *ante*, that every disadvantageous transfer must be accompanied by appropriate hearings. Administrative transfers, although perhaps having very similar consequences for the prisoner, were exempt from the Court of Appeals ruling. Only disciplinary transfers having substantial adverse impact on the prisoner were to call for procedural formalities. Even so, our decision in *Meachum* requires a reversal

in this case. We held in *Meachum* v. *Fano,* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events. We therefore disagree with the Court of Appeals' general proposition that the Due Process Clause by its own force requires hearings whenever prison authorities transfer a prisoner to another institution because of his breach of prison rules, at least where the transfer may be said to involve substantially burdensome consequences. As long as the conditions or degree of confinement to which the prisoner is subjected do not exceed those normally incident to a criminal conviction and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. The Clause does not require hearings in connection with transfers whether or not they are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive.

We also agree with the State of New York that under the law of that State Haymes had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct. Under New York law, adult persons sentenced to imprisonment are not sentenced to particular institutions but are committed to the custody of the Commissioner of Corrections. He receives adult, male felons at a maximum-security reception center for initial evaluation and then transfers them to specified institutions. N. Y. Corr. Law § 71 (1); 7 N. Y. C. R. R. § 103.10. Thereafter, the Commissioner is empowered

by statute to "transfer inmates from one correctional facility to another." N. Y. Corr. Law § 23 (1). The Court of Appeals reasoned that because under the applicable state statutes and regulations, various specified punishments were reserved as sanctions for breach of prison rules and could not therefore be imposed without appropriate hearings, neither could the harsh consequences of a transfer be imposed as punishment for misconduct absent appropriate due process procedures. But under the New York law, the transfer of inmates is not conditional upon or limited to the occurrence of misconduct. The statute imposes no conditions on the discretionary power to transfer and we are advised by the State that no such requirements have been promulgated. Transfers are not among the punishments which may be imposed only after a prison disciplinary hearing. N. Y. C. R. R. § 253.5. Whatever part an inmate's behavior may play in decision to transfer, there is no more basis in New York law for invoking the protections of the Due Process Clause than we found to be the case under the Massachusetts law in the *Meachum* case.

The judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 2, 1976

Re: No. 74-520, Montanye v. Haymes

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1976

Re: 74-520 - Montanye v. Haymes

Dear Byron:

In due course I shall circulate a dissent.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1976

Re: No. 74-520, Montanye v. Haymes

Dear Byron:

Please join me in your opinion for the Court.

Sincerely,

Mr. Justice White

cc: The Conference

5-6

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6/4/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-520

Ernest L. Montanye, Former Superintendent, Attica Correctional Facility, et al., Petitioners, *v.* Rodney R. Haymes.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1976]

MR. JUSTICE WHITE delivered the opinion of the Court.

On June 7, 1972, respondent Haymes was removed from his assignment as inmate clerk in the law library at the Attica Correctional Facility in the State of New York. That afternoon Haymes was observed circulating among other inmates a document prepared by him and at the time signed by 82 other prisoners. Among other things, each signatory complained that he had been deprived of legal assistance as the result of the removal of Haymes and another inmate from the prison law library,[1]

[1] The document read as follows:

"Hon. Judge John T. Curtin:

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

"Since the removal of the above two from the law library, I cannot any longer obtain any legal assistance either in the nature of obtaining the proper applicable case law corresponding with the particular issue contained in my case, as well as assistance in preparing my post-conviction application to the courts.

"The major problem and reason for my not being able to obtain legal assistance is a direct result of the attitude displayed by the

The document, which was addressed to a federal judge but sought no relief, was seized and held by prison authorities. On June 8, Haymes was advised that he would be transferred to Clinton Correctional Facility, which, like Attica, was a maximum-security institution. The transfer was effected the next day. No loss of good time, segregated confinement, loss of privileges or any other disciplinary measures accompanied the transfer. On August 3, Haymes filed a petition with the United States District Court which was construed by the judge to be an application under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 seeking relief against petitioner Montanye, the then superintendent at Attica. The petition complained that the seizure and retention of the document, despite requests for its return, not only violated Administrative Bulletin No. 20, which allegedly made any communication to a court privileged and confidential, but also infringed Haymes' federally guaranteed right to petition the court for redress of grievances. It further asserted that Haymes' removal to Clinton was to prevent him from pursuing his remedies and also was in reprisal for his having rendered legal assistance to various prisoners as well as having, along with others, sought to petition the court for redress.

In response to a show-cause order issued by the court,

law library officer whom goes out of his way to circumvent inmates legal assistance.

I feel that this was obviously the same reason why this officer has had Rodney Haymes and John Washington removed from the law library whereby they no longer have proper access to either the law books or myself and the other inmates whom they are legally assisting.

Wherefore, I feel that my constitutional rights to adequate access to the courts for judicial review and redress is being violated as a direct result of the circumstances and conditions herein set forth.

(Signed by 82 inmates.)

petitioner Brady, the correctional officer at Attica in charge of the law library, stated in an affidavit that Haymes had been relieved from his assignment as an inmate clerk in the law library "because of his continual disregard for the rules governing inmates and the use of the law library" and that only one of the inmates who had signed the petition being circulated by Haymes had ever made an official request for legal assistance. The affidavit of Harold Smith, Deputy Superintendent of Attica, furnished the court with Paragraph 21 of the Inmate's Rule Book,[2] which prohibited an inmate from furnishing legal assistance to another inmate without official permission and with a copy of a bulletin board notice directing inmates with legal problems to present them to Officer Brady—inmates were in no circumstances to set themselves up as legal counsellors and receive pay for their services.' The affidavit asserted that the petition taken from Haymes was being circulated "in direct disregard of the above rule forbidding legal assistance without the approval of the Superintendent" and that Haymes had been cautioned on several occasions about assisting other inmates without the required approval.

Haymes responded by a motion to join Brady as a

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April 25, 1972

TO ALL CONCERNED

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ERNEST L. MONTANYE
Superintendent"

defendant, which was granted, and with a counteraffidavit denying that there was a rule book at Attica, reasserting that the document seized was merely a letter to the court not within the scope of the claimed rule and alleging that his removal from the law library, the seizure of his petition and his transfer to Clinton were acts of reprisal for his having attempted to furnish legal assistance to the other prisoners rather than merely hand out library books to them.

After retained counsel had submitted a memorandum on behalf of Haymes, the District Court dismissed the action. It held that the rule against giving legal assistance without consent was reasonable and that the seizure of Haymes' document was not in violation of the Constitution. The court also ruled that the transfer to Clinton did not violate Haymes' rights. "Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at Green Haven are harsher or substantially different from those afforded petitioner at Attica . . . petitioner's transfer was consistent with the discretion given to prison officials in exercising proper custody of inmates." App. 26a.

The Court of Appeals for the Second Circuit reversed, 505 F. 2d 977 (1974). Because the District Court had considered affidavits outside the pleadings, the dismissal was deemed to have been a summary judgment under Rule 56, Federal Rules of Civil Procedure. The judgment was ruled erroneous because there were two unresolved issues of material fact, whether Haymes' removal to Clinton was punishment for a disobedience of prison rules and if so whether the effects of the transfer were sufficiently burdensome to require a hearing under the Due Process Clause of the Fourteenth Amendment.

The court's legal theory was that Haymes should no-

more be punished by a transfer having harsh consequences than he should suffer other deprivations which under prison rules could not be imposed without following specified procedures. Disciplinary transfers, the Court of Appeals thought, were in a different category from "administrative" transfers. "When harsh treatment is meted out to reprimand, deter or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling . . . the specific facts upon which decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior, and to assess the effect which the transfer will have on the inmate's future incarceration." 505 F. 2d, at 980. The Court of Appeals found it difficult "to look upon the circumstances of transfer as a mere coincidence," *id.* 979; it was also convinced that Haymes might be able to demonstrate sufficiently burdensome consequences attending the transfer to trigger the protections of the Due Process Clause, even though Attica and Clinton were both maximum-security prisons.[1] The case was

[1] The Court of Appeals found "that the hardship involved in the mere fact of dislocation may be sufficient to render Haymes' summary transfer—if a trial establishes that it was punitive—a denial of due process." 505 F. 2d, at 981. The court said

"The facts of this case may provide a good illustration of the real hardship in being shuttled from one institution to another. After being sent to Clinton, Haymes found himself several hundred miles away from his home and family in Buffalo, New York. Not only was he effectively separated by the transfer from his only contact with the world outside the prison, but he also was removed from the friends he had made among the inmates at Attica and forced to adjust to a new environment where he may well have been regarded as a troublemaker. Contacts with counsel would necessarily have been more difficult. A transferee suffers other consequences as well. the inmate is frequently put in administra-

therefore remanded for further proceedings to the District Court. We granted certiorari, — U. S. —, and heard the case with *Meachum* v. *Fano, ante*. We reverse the judgment of the Court of Appeals.

The Court of Appeals did not hold, as did the Court of Appeals in *Meachum* v. *Fano*, that every disadvantageous transfer must be accompanied by appropriate hearings. Administrative transfers, although perhaps having very similar consequences for the prisoner, were exempt from the Court of Appeals ruling. Only disciplinary transfers having substantial adverse impact on the prisoner were to call for procedural formalities. Even so, our decision in *Meachum* requires a reversal in this case. We held in *Meachum* v. *Fano*, that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events. We therefore disagree with the Court of Appeals' general proposition that the Due Process Clause by its own force requires hearings whenever prison authorities transfer a prisoner to another institution because of his breach of prison rules, at least where the transfer may be said to involve substantially burdensome consequences. As long as the conditions or degree

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tive segregation upon arrival at the new facility, 7 N. Y. C. R. R. Part 260, personal belongings are often lost, he may be deprived of facilities and medications for psychiatric and medical treatment, *see Hoitt* v. *Vitek*, 361 F. Supp. 1238, 1249 (D. N. H. 1973), and educational and rehabilitative programs can be interrupted. Moreover, the fact of transfer, and perhaps the reasons alleged therefore, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom." *Id.*, at 981-982.

of confinement to which the prisoner is subjected do not exceed those normally incident to a criminal conviction and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. The Clause does not require hearings in connection with transfers whether or not they are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive.

We also agree with the State of New York that under the law of that State Haymes had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct. Under New York law, adult persons sentenced to imprisonment are not sentenced to particular institutions but are committed to the custody of the Commissioner of Corrections. He receives adult, male felons at a maximum-security reception center for initial evaluation and then transfers them to specified institutions. N. Y. Corr. Law § 71 (1); 7 N. Y. C. R. R. § 103.10. Thereafter, the Commissioner is empowered by statute to "transfer inmates from one correctional facility to another." N. Y. Corr. Law § 23 (1). The Court of Appeals reasoned that because under the applicable state statutes and regulations, various specified punishments were reserved as sanctions for breach of prison rules and could not therefore be imposed without appropriate hearings, neither could the harsh consequences of a transfer be imposed as punishment for misconduct absent appropriate due process procedures. But under the New York law, the transfer of inmates is not conditional upon or limited to the occurrence of misconduct. The statute imposes no conditions on the discretionary power to transfer and we are advised by the State that no such requirements have been promulgated. Trans-

fers are not among the punishments which may be imposed only after a prison disciplinary hearing. N. Y. C. R. R. § 253.5. Whatever part an inmate's behavior may play in decision to transfer, there is no more basis in New York law for invoking the protections of the Due Process Clause than we found to be the case under the Massachusetts law in the *Meachum* case.

The judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

June 4, 1976

No. 74-520 Montayne v. Haymes

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1976

Re: No. 74-520 - Montanye v. Haymes

Dear Byron:

Please join me.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1976

Re: 74-520 - Montanye v. Haymes

Dear Byron:

Please join me in your circulation of June 4.

Regards,

WEB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 22, 1976

RE: No. 74-520 Montanye v. Haymes

Dear John:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 22, 1976

Re: No. 74-520 -- Montanye v. Haymes

Dear John:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
			5/5/76					
Join BRW 6/7/76	Join JPS 6/22/76	Join BRW 6/2/76	1st draft 6/2/76 2nd draft 6/4/76 3rd draft 6/17/76	Join JPS 6/22/76	Join BRW 6/7/76	Join BRW 6/4/76	Join BRW 6/3/76	well dissent 6/2/76 typed draft 6/21/76 1st draft 6/25/76
					74-520 Montayne v. Haymes			