

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

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF TEXEIRA,

Appellant,

-against-

FISCHER,

Respondent.

No. 142
(papers sealed)

20 Eagle Street
Albany, New York 12207
September 16, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

MICHAEL E. CASSIDY, ESQ.
PRISONERS' LEGAL SERVICES OF NEW YORK
Attorneys for Appellant
121 Bridge Street
Suite 202
Plattsburgh, NY 12901

MARTIN A. HOTVET, ASG
NEW YORK STATE ATTORNEY GENERAL'S OFFICE
Attorneys for Respondent
The Capitol
Albany, NY 12224

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 142, Texeira
2 v. Fischer.

3 Counselor, would you like any rebuttal
4 time?

5 MR. CASSIDY: Yes, please, Your Honor, two
6 minutes.

7 CHIEF JUDGE LIPPMAN: Sure, go ahead.

8 MR. CASSIDY: May it please the court, my
9 name is Michael Cassidy from Prisoners' Legal
10 Services of New York in Plattsburgh. I represent the
11 petitioner-appellant.

12 This case arises out of a Article 78
13 challenge to a prison disciplinary hearing. And
14 there's no issue here as to whether or not his right
15 was - - - rights were violated at the hearing. This
16 - - - the - - - both the Supreme Court and the
17 Appellate Division both agreed that his rights to
18 call a witness had - - -

19 CHIEF JUDGE LIPPMAN: So what's the issue
20 here?

21 MR. CASSIDY: - - - clearly been violated.

22 CHIEF JUDGE LIPPMAN: The issue is - - -

23 MR. CASSIDY: The issue is the appropriate
24 remedy.

25 CHIEF JUDGE LIPPMAN: Right.

1 MR. CASSIDY: The - - - the courts below
2 remitted for a new hearing; and they did so under the
3 Third Department's choice of remedy framework, which
4 it's developed over the years. And - - - and that
5 framework involves the court's characterization of
6 the source of the - - - of the right as either
7 Constitutional or regulatory. If it's - - -

8 CHIEF JUDGE LIPPMAN: What is - - - what is
9 the source of it here?

10 MR. CASSIDY: The source here as a right to
11 call witnesses is Constitutional. In 1974, the
12 United States Supreme Court in Wolff v. McDonnell set
13 forth the basic procedural rights that prisoners have
14 in a prison disciplinary - - -

15 JUDGE PIGOTT: To be a little hyperbolic,
16 let's assume instead of what was charged here that -
17 - - that he was charged with murdering another inmate
18 - - - and don't send me over to county court yet - -
19 - but if - - - if there's a - - - if there's a
20 hearing with respect to whether or not he did that or
21 some other equally nasty thing, and his right to call
22 a witness is - - - is abridged, is he not guilty? Do
23 we just expunge any charge that he may have against
24 him?

25 MR. CASSIDY: Well, if - - - if the prison

1 officials didn't conduct the hearing properly, yes.

2 JUDGE PIGOTT: Did exactly what happened
3 here. No matter what the - - - the charge is, no
4 matter what the crime is, no matter how serious it is
5 with respect to the institution, gang warfare, I
6 could think of a zi - - - a few things, we just wipe
7 it out, and we say you didn't - - -

8 MR. CASSIDY: Yes.

9 JUDGE PIGOTT: - - - you didn't allow him
10 to call the witness; it's as if it never happened.

11 MR. CASSIDY: Yes.

12 JUDGE PIGOTT: Okay.

13 MR. CASSIDY: This court in Hartje in 1987
14 made a very blanket rule along those lines for
15 substantial evidence. The court said that - - - that
16 prison officials, if they didn't pull together enough
17 evidence to - - - to establish substantial evidence
18 that the person was guilty, they wouldn't get another
19 shot.

20 JUDGE PIGOTT: Wasn't there a presumption
21 there that - - - that they didn't have substantial
22 evidence because there wasn't substantial ev - - -
23 it's not like they had some, you know, hidden under
24 the desk and they didn't put it on. They - - - they
25 just did not have it, and therefore you're done.

1 MR. CASSIDY: It could be the case either
2 way, yes.

3 JUDGE PIGOTT: But if - - - but if in a
4 situation li - - - as - - - as this one or some other
5 one, where there's a clear procedural violation, I -
6 - - I'm having trouble understanding why regardless
7 of the severity of the crime the - - - the prison
8 system pays.

9 MR. CASSIDY: Well, one of the reasons is
10 that - - - that the - - - the - - - these rights
11 without some incentive to prison officials to do it
12 right - - - I mean, here we are thirty years after
13 Barnes, and I - - - I'm - - - I've been doing this
14 work since '91. I'm continuously amazed how often
15 prison officials get it wrong. And it's clear - - -

16 JUDGE ABDUS-SALAAM: What about - - - what
17 about judges, counsel? We get wrong too, sometimes,
18 and when we do, for example, when we exclude a - - -
19 a defendant from a sidebar, then that doesn't mean
20 the trial is - - - or he doesn't get a trial. It
21 just means that he gets another trial, not - - -

22 MR. CASSIDY: In the criminal context.

23 JUDGE ABDUS-SALAAM: Yeah, in the criminal
24 context.

25 MR. CASSIDY: Yes.

1 JUDGE ABDUS-SALAAM: So, why - - - why is -
2 - - why is a witness in a disciplinary proceeding
3 different than that?

4 MR. CASSIDY: Well, one of the reasons I -
5 - - I went into this in my reply brief in response to
6 respondent's arguments on that very point. The pro -
7 - - the criminal law is a very different situation.
8 It's the highest standard of proof that we have.
9 Prison - - - the prison situation, the hearing, is
10 the exact opposite. It's the lowest standard you can
11 get. There's hardly any protections - - - any
12 procedural protections - - - that prisoners have.
13 They're extremely limited.

14 And if those - - - if those rights are
15 going to mean anything at all to the prisoners and -
16 - - and to how our system is working here, they've
17 got to have some mechanism of enforcement.

18 CHIEF JUDGE LIPPMAN: So how do we know
19 whether it's Constitutional or regulatory?

20 MR. CASSIDY: Well, I would argue that - -
21 - that a - - - part of what the Third Department's
22 argument here about the characterization of the - - -
23 of the source of the right, it - - - it takes away
24 the focus on the - - - on the - - - the nature of the
25 right itself. If it's a violation of the right to

1 call witnesses, that is a - - - a basic right. And
2 they can - - - they can violate it in numerable
3 different ways, like whether or not they're - - -
4 it's a refusal, the - - - how they followed up, in
5 certain situations - - -

6 CHIEF JUDGE LIPPMAN: Does it matter the
7 reason why they didn't - - - they didn't follow up
8 and allow the witness, like in this case where thea -
9 - - theoretically, the - - - the witness thought it
10 wasn't in this institution, it was in another
11 institution, and you know, it wasn't where the - - -
12 the hearing officer said, gee, I'm not getting you
13 that witness no matter what. There was a rationale
14 as to why the witness wasn't - - - why there wasn't
15 follow-up.

16 MR. CASSIDY: Well, there was no rationale
17 here either.

18 CHIEF JUDGE LIPPMAN: No rationale
19 whatsoever?

20 MR. CASSIDY: No, the - - - the - - - as
21 the court - - - the courts in - - - already found
22 that there was a violation and I would argue that
23 once that violation is found - - -

24 CHIEF JUDGE LIPPMAN: Automatically
25 expunge.

1 MR. CASSIDY: Yes.

2 JUDGE PIGOTT: Would it - - - well, in - -
3 - in this case, when they - - - when they did try to
4 get a hold of this guy and he said I was never at
5 that facility, he clearly misunderstood.

6 MR. CASSIDY: Right.

7 JUDGE PIGOTT: I think he thought they were
8 talking about where he was and - - - and not when the
9 witness - - - so it was - - - it was accidental; it
10 was an oversight. But your - - - your suggestion is
11 if they had gone ahead with a hearing at that point,
12 then it gets expunged.

13 MR. CASSIDY: Well, this wasn't really an
14 oversight, though, because the hearing officer
15 accused - - -

16 JUDGE PIGOTT: No, I'm using that as an
17 example. I'm not using yours. I'm saying suppose it
18 is an oversight. Under your strict liability, so to
19 speak, rule, then - - - then that would be expunged?

20 MR. CASSIDY: Well, if - - - if he - - -
21 yes. Yes - - -

22 JUDGE PIGOTT: So - - -

23 MR. CASSIDY: - - - because - - -

24 JUDGE PIGOTT: Okay.

25 MR. CASSIDY: - - - we need some way to - -

1 - to compel prison officials to follow these rules.
2 Otherwise, I mean, there is a vast difference between
3 expungement and remittal.

4 JUDGE PIGOTT: If - - - if - - -

5 MR. CASSIDY: Remittal - - -

6 JUDGE PIGOTT: I know. If - - - if - - -
7 if he wanted twelve witnesses and they gave him
8 eight, and - - - and he comes up and says, hey, I
9 needed four more, and they - - - they didn't - - -
10 they didn't give them to me, expunge it.

11 MR. CASSIDY: Well, the - - - the first
12 question, though, they - - - I - - - I don't want to
13 assume - - - assume in your question whether or not
14 he was entitled to those other four. He may not have
15 been.

16 JUDGE PIGOTT: Right.

17 MR. CASSIDY: But my - - - my point is that
18 if - - - if the court determines that under this
19 particular factual scenario his right to witnesses
20 was violated because they didn't do what they should
21 have done - - - what the court had already explained
22 needed to be done in that situation, then it's a
23 violation of the right to call witnesses.

24 JUDGE ABDUS-SALAAM: But does it matter,
25 though, for example, counsel, whether the witness has

1 anything relevant to say? I mean, I can imagine a
2 scenario where a prisoner might just ask for two or
3 three witnesses and they may have nothing really to
4 provide in terms of relevance to the proceeding - - -

5 MR. CASSIDY: Well, then it wouldn't be a
6 violation.

7 JUDGE ABDUS-SALAAM: It would not?

8 MR. CASSIDY: Right, it wouldn't be a
9 violation in the first instance.

10 JUDGE ABDUS-SALAAM: Okay.

11 MR. CASSIDY: What I'm saying is once the
12 court - - - you've determined there is a violation -
13 - -

14 CHIEF JUDGE LIPPMAN: Then - - - then it
15 doesn't matter - - -

16 MR. CASSIDY: Then - - - then - - -

17 CHIEF JUDGE LIPPMAN: The level of the
18 violation, what it is. It's a violation is a
19 violation is a violation.

20 MR. CASSIDY: Yes. There - - - there
21 should be - - -

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. CASSIDY: - - - there should be a
24 bright line rule that expungement should be the
25 penalty - - -

1 CHIEF JUDGE LIPPMAN: Okay, counselor,
2 thank you.

3 Counsel?

4 You'll have your rebuttal, counsel.

5 MR. HOTVET: May it please the court.

6 Remittal was the appropriate remedy here because the
7 alternative, expungement, would not have been
8 consistent with the balance of equities, the most
9 important of which was the seriousness of the
10 misconduct and DOCCS's corresponding need to maintain
11 a record of it.

12 This court - - - the Appellate Division may
13 be affirmed, therefore, on either of two grounds.
14 One, that the error here was regulatory as the Third
15 Department said, and the balance of equities supports
16 the remedy. Or alternatively, disregarding whether
17 the error was regulatory or Constitutional, the
18 remedy of remittal was proper, given the equities.

19 JUDGE PIGOTT: I worry about equity. Whose
20 equities are we talking about?

21 MR. HOTVET: There are four equities here,
22 Your Honor, and they all weigh in favor of remittal.
23 These are the equities that the Appellate Divisions
24 have pointed out in - - - in deciding these cases.

25 The first one is the seriousness of the

1 offense and DOCCS's corresponding ability to maintain
2 an accurate record. The second one is the
3 intentionality of the hearing officer's error,
4 whether it was inadvertent or outright. The third is
5 whether or not a fair hearing - - - rehearing - - -
6 can be had. And the fourth is the extent to which
7 the penalty is served.

8 CHIEF JUDGE LIPPMAN: So even if you
9 violate someone's Constitutional rights or the - - -
10 it comes from the Constitutional side, you just say,
11 well, it's fair and therefore, you - - - you remit?
12 Do you know what I'm saying? Is it that easy - - -

13 MR. HOTVET: Yes, Your Honor.

14 CHIEF JUDGE LIPPMAN: - - - to say it's
15 Constitutional in nature but so what? We're just
16 going to - - - I look at the equities. Judge Pigott
17 said, you know, who's determining the equities? But
18 let's say, you know, the hearing officer is or
19 whoever is determining the equities. It doesn't
20 matter if it's Constitutional, remit?

21 MR. HOTVET: That's right, Your Honor.
22 Let's assume there was - - -

23 CHIEF JUDGE LIPPMAN: But why - - - but why
24 is that? That's what I'm asking.

25 MR. HOTVET: Well, I don't want to demean

1 the importance of an inmate's Constitutional rights.

2 CHIEF JUDGE LIPPMAN: Well, that's what I'm
3 asking you. How come?

4 MR. HOTVET: But while that's important in
5 other contexts like a 1983 action, it's not
6 productive in this context, the remedy context, and
7 for this reason. If the inmate gets a new hearing
8 that gives him all his rights, then he's not
9 prejudiced. The process has given - - -

10 JUDGE PIGOTT: Well, no one's prejudiced.

11 MR. HOTVET: But that's the point.

12 JUDGE PIGOTT: So?

13 MR. HOTVET: And since no one's prejudiced,
14 DOCCS should be able to keep a record - - -

15 JUDGE RIVERA: What if he's prejudiced by
16 the time and delay? The witness no longer remembers.
17 The witness is no longer within the control of DOCCS.

18 MR. HOTVET: Yes, and that - - - that was -
19 - -

20 JUDGE RIVERA: That's the key witness.

21 MR. HOTVET: And that's was your Barnes
22 case, Your Honor, and that's one of the equities.
23 That's the - - - the third one, whether there's
24 reason to think a - - - a fair rehearing can be had.
25 And if a witness - - -

1 Honor, and that's the point. That error was cured in
2 the rehearing. He had a rehearing here in July of
3 2013. He didn't challenge the rehearing. So as a
4 practical matter, that rehearing gave him all the
5 protections due process requires.

6 CHIEF JUDGE LIPPMAN: So what's the rule -
7 - - I mean, what's your rule as to how you know
8 whether you get a remittal or whether you get an
9 expungement?

10 MR. HOTVET: Well, we - - - we - - - you
11 can go with it - - - we defend on either of two
12 grounds. You can conclude that this is not - - -
13 this is only a regulatory error and the balance of
14 equities favor remittal, and I will explain why it
15 was only regulatory error in a minute. Or
16 alternatively, if you assume it's a Constitutional
17 error, we think that it doesn't make any sense - - -

18 CHIEF JUDGE LIPPMAN: So it doesn't matter
19 whether it's regulatory or Constitutional, it's still
20 a balance of the equities in your mind?

21 MR. HOTVET: As a practical matter, yes.

22 JUDGE PIGOTT: Rehearing - - - maybe I
23 missed it. I - - - was he found guilty, and then, he
24 said wait a minute, you didn't bring this prisoner,
25 and they had another hearing, and then he was found

1 guilty again?

2 MR. HOTVET: Yes.

3 JUDGE PIGOTT: Okay.

4 MR. HOTVET: He was found guilty the first
5 time. Supreme Court annulled the disciplinary
6 disposition but ordered a new hearing. A new hearing
7 was held in - - - and ended in July of 2013 at the
8 midpoint of his SHU sentence. And he was found
9 guilty again, and he does not claim that there was
10 any error of any kind.

11 JUDGE ABDUS-SALAAM: Did the witness that
12 he wanted, this Townsend (ph.) or Town (ph.),
13 whatever the man's name was - - - was he then - - -
14 did he get a - - - a sufficient explanation or some
15 explanation about why that witness wasn't provided?

16 MR. HOTVET: Well, he - - - the witness
17 testified in the second hearing.

18 JUDGE PIGOTT: I missed some - - -

19 JUDGE ABDUS-SALAAM: The witness did
20 testify?

21 MR. HOTVET: Yeah.

22 JUDGE ABDUS-SALAAM: Okay.

23 MR. HOTVET: The witness testified in the
24 second hearing. He - - -

25 JUDGE RIVERA: Why is it a regulatory

1 error?

2 MR. HOTVET: It's a regulatory - - -

3 JUDGE RIVERA: Why does it not rise to a
4 Constitutional error?

5 MR. HOTVET: It - - - it does not rise - -
6 - it's a regulatory violation because the hearing
7 officer did not provide a written reason for denying
8 a witness. The regulation has two sentences. This
9 is 254.5(a) and it has two sentences. And the first
10 sentence implements the Constitutional right
11 established in Wolff. You have a right to witnesses
12 unless it's irrelevant or - - - the second sentence,
13 however, goes beyond Wolff.

14 And the second sentence says you have a
15 right to a written reason. Wolff didn't prescribe
16 that. New York did it in its discretion. And you
17 recognized this in your Laureano decision. We say
18 the violation here - - - and the reason we didn't
19 appeal the Supreme Court's decision to annul was
20 because there's no question the hearing officer here
21 didn't give a reason. He didn't give a written
22 reason so it's a clear violation of the second
23 sentence of 254.5(a).

24 You don't have to get to whether there was
25 a violation of the first sentence, and you don't have

1 to get whether there was a violation of Wolff. There
2 was a clear violation here of the - - -

3 JUDGE RIVERA: What - - - what would have
4 been a violation of Wolff in this case?

5 MR. HOTVET: To deny a relevant witness.

6 JUDGE RIVERA: So in other words, if the
7 witness said, yes, I'm ready to testify and the
8 officer doesn't - - -

9 MR. HOTVET: Right.

10 JUDGE RIVERA: - - - doesn't facilitate
11 that testimony.

12 MR. HOTVET: Right. And we think - - -
13 it's a very close question, but we think that there's
14 an argument to be made that there wasn't a
15 Constitutional violation here.

16 Now I repeat, even if you decide there was,
17 we say it doesn't matter for the reasons I gave,
18 because whatever - - - whether - - - even if there
19 was in the first hearing, it was absolutely cured by
20 the second hearing where he had all his witnesses.
21 There's no claim of Constitutional violation there.
22 So the process as a whole gave him all the
23 protections that due process required.

24 A couple of reasons why we think the
25 Appellate Division could have found there was not a

1 Constitutional violation, he's heard on - - - the
2 petitioner is heard on tape planning to assault Ivan.
3 His only defense at the hearing, however, is that the
4 Ivan he was talking to on the telephone conversations
5 was not Ivan Tondro (ph.). It was another Ivan,
6 Jamaican Ivan. He said, yeah, I was planning to
7 assault Jamaican Ivan, but not Ivan Tondro.

8 Now in light - - - and then secondly, in
9 light of the very limited testimony that petitioner
10 wanted from Tondro, he - - - he wanted Tondro to say
11 he, Tondro, didn't know him, the petitioner - - -
12 there was no reason to think that Tondro had anything
13 to say that would help the petitioner's defense.

14 So in that line of reasoning, it's
15 reasonable to conclude that there wasn't a
16 Constitutional violation. But it's a very, very
17 close hard question whether there was a
18 Constitutional violation here. And for you to reach
19 it, violates the rule that you don't reach
20 Constitutional questions when there's another out.

21 CHIEF JUDGE LIPPMAN: Okay, counsel.
22 Anything else?

23 MR. HOTVET: I need to say why Barnes isn't
24 controlling because - - -

25 CHIEF JUDGE LIPPMAN: Sure, go ahead.

1 MR. HOTVET: - - - their - - - their
2 primary case is Barnes. Barnes ordered expungement
3 in that case, but under the circumstances there,
4 Barnes did not hold that expungement was the proper
5 remedy for every violation of the right to witnesses,
6 whether Constitutional or regulatory.

7 And three, given the facts in Barnes, the
8 remedy ordered there was consistent with the rule
9 that permits courts to decide the remedy by balancing
10 the equities. And there were two important equities
11 in Barnes that explained why expungement was
12 appropriate. And one was that the witness - - - it
13 was two years after the fact, and the key witness had
14 left prison, so you couldn't hold a meaningful
15 rehearing.

16 And secondly, this court could
17 understandably have serious questions about whether
18 there was any misconduct. On the one hand, the
19 inmate had suffered terrible injuries. He'd been
20 hospitalized - - -

21 JUDGE PIGOTT: I don't know. I just don't
22 understand how you balance Constitutional against
23 something else. I mean, either is - - - there is a
24 Constitutional violation or there isn't. You don't
25 say, well, you know, he was denied his right of free

1 speech, but it was - - - it was kind of important to
2 the public so we think it's okay that he was denied
3 his - - - his Constitutional right to free speech.

4 MR. HOTVET: Well, but the answer to that,
5 Your - - - are - - - you know - - - you know, from -
6 - - from the criminal practice that because there's a
7 Sixth Amendment violation in a hearing doesn't mean
8 the indictment in a trial - - - doesn't mean that the
9 tri - - - the indictment is quashed, all it means is
10 that there's a new trial.

11 JUDGE RIVERA: Well, I think the point is
12 that there's a Constitutional floor, right? And that
13 floor is that he gets to have these witnesses unless
14 they're not relevant or otherwise or excluded under -
15 - - under the Supreme Court jurisprudence. Okay,
16 fine. The fact that the hearing officer may or may
17 not give him a reason is irrelevant to that. But the
18 point is whether or not you denied him his witness.
19 And that's the Constitutional violation. The rest of
20 it is nice window dressing, but it doesn't matter. I
21 take that to be his point.

22 MR. HOTVET: Well, unless you accept our
23 argument that it wasn't a Constitutional violation.
24 But if you conclude there was a Constitutional vi - -
25 -

1 JUDGE RIVERA: But the Constitutional
2 violation you're referring to is the failure to
3 inform him of why he's being denied the person, when
4 the point is, is he being denied the witness.

5 MR. HOTVET: No, the second sentence of the
6 regulation isn't prescribed by Wolff. It's not a
7 Constitutional violation. It's only a regulatory
8 violation. So that you could affirm the Third
9 Department on this case on the basis that the record
10 establishes that the hearing officer didn't give him
11 the reason that's required by the second sentence of
12 the regulation, and therefore, it was a regulatory
13 violation only.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.
15 Thanks. We'll hear from your adversary with
16 rebuttal.

17 MR. CASSIDY: Your Honors, the - - - the
18 written statement requirement that's in the
19 regulation that's not the Wolff, that this court
20 recognized in Laureano, that wasn't at issue here,
21 and that's not the issue. The issue is, as you said
22 Your Honor, it's the denial of the witness. It's - -
23 - we weren't complaining about no written statement
24 in the record. And even - - -

25 CHIEF JUDGE LIPPMAN: You didn't object on

1 the second part?

2 MR. CASSIDY: Right. It's - - - it's - - -
3 it wasn't - - - this hasn't ever been about the
4 written statement. The written statement is
5 something that the regulations have required above
6 and beyond, just like they require tape-recording
7 these hearings.

8 JUDGE ABDUS-SALAAM: What was the prejudice
9 here, counsel, as - - - as was stated? Your client
10 got a hearing, where the witness did come in and
11 apparently wasn't favorable toward him. He still got
12 - - - you know, he - - - he was still considered to
13 have violated this regulation - - -

14 MR. CASSIDY: Right.

15 JUDGE ABDUS-SALAAM: - - - or gotten
16 involved in misconduct. So I'm - - - I'm - - - I'm
17 kind of not understanding the prejudice.

18 MR. CASSIDY: Well, that - - - that came up
19 later after - - - I mean we were in the midst of
20 challenging whether or not remittal in the first
21 place was appropriate or not. So I - - - I would
22 argue that it's - - -

23 JUDGE ABDUS-SALAAM: But wouldn't it seem
24 that - - -

25 MR. CASSIDY: - - - it's not.

1 JUDGE ABDUS-SALAAM: - - - because of this
2 witness that was - - - your client said was so
3 important comes in and apparently doesn't testify
4 favorably toward him, isn't - - - isn't the - - -
5 shouldn't we take that into account, because that
6 goes to the fairness of the proceeding?

7 MR. CASSIDY: I would argue no. The vast
8 majority of these prisoners - - - I don't know what
9 the percentage is, ninety-nine percent - - - they're
10 all found guilty. It's - - -

11 JUDGE PIGOTT: But isn't it - - - isn't it
12 - - -

13 MR. CASSIDY: They've got these procedural
14 rules that they need to follow.

15 JUDGE PIGOTT: Isn't his point well taken
16 if - - - if - - - if this was a criminal case and
17 let's say a confession was not suppressed, and then
18 the - - - an appellate court suppressed it, you - - -
19 it doesn't dismiss it; it sends it back for a new
20 trial.

21 MR. CASSIDY: Yes, but a criminal matter is
22 an entirely different - - - entirely different
23 matter.

24 JUDGE PIGOTT: Well, I understand, but
25 we're still talking about the same Constitution. And

1 - - - and for Constitutional violations in a criminal
2 case, we say you don't get it expunged, so why would
3 we say a Constitutional violation in a civil case
4 gets expunged?

5 MR. CASSIDY: Because in this - - - the
6 situation is unique. And - - - and these are the
7 only procedural protections they've got in this
8 hearing. I - - - I would say that be - - - before we
9 can put someone in solitary confinement, prison
10 officials, it - - - they should be - - - it should be
11 incumbent upon them to follow the rule of law, and
12 observe these basic rights; and they're so basic and
13 so easy to comply with. They should be required to
14 do that, before - - - before someone is found guilty.

15 JUDGE PIGOTT: But I - - - I can't get out
16 of my head that somebody's caught with a shiv,
17 because he's about to kill somebody, ends up, you
18 know, having that expunged from his record as if it
19 never happened because the constable stumbled. I - -
20 - I - - - I don't get that. I mean, for the safe - -
21 - safety of other prisoners and everyone else, you
22 would want to have that - - - that case heard. Maybe
23 he's innocent, but you just don't want to say, you
24 know, it's expunged so he can go back to his cell and
25 say, guess what? I get to keep my shiv.

1 MR. CASSIDY: Well, if - - - if there's
2 evidence of - - - of that, they're likely to be
3 charged criminally as well. Criminal charges are not
4 - - -

5 JUDGE PIGOTT: Well, you expect that there
6 - - -

7 MR. CASSIDY: - - - uncommon within the
8 prison as well. But it's - - -

9 JUDGE PIGOTT: Can you - - - can you - - -
10 can you use that in evidence? Can you ask the
11 prosecutor, you know, he was acquitted in prison of
12 this, now you're going to try to charge him
13 criminally?

14 MR. CASSIDY: I'm not - - - I don't do
15 criminal law, so I'm not sure how that would go.

16 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
17 you both.

18 MR. CASSIDY: May I just make one further
19 comment?

20 CHIEF JUDGE LIPPMAN: One quick point, go
21 ahead.

22 MR. CASSIDY: The equities that - - - that
23 counsel of - - - talked about, they - - - they were
24 never at issue in Barnes. You can read Barnes inside
25 out, upside down; equities were not part of the

1 consideration - - -

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MR. CASSIDY: - - - in the - - - in the
4 decision.

5 CHIEF JUDGE LIPPMAN: Thanks.

6 (Court is adjourned)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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 E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Texeira v. Fischer, No. 142, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: September 23, 2015