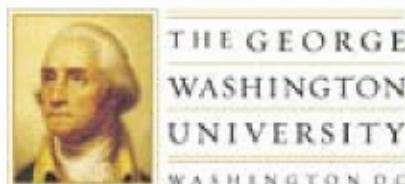


# The Burger Court Opinion Writing Database

*Preiser v. Newkirk*

422 U.S. 395 (1975)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



15

To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: The Other Justice

Circulated:

Recirculated: JUN 17 1975

No. 74-107, Preiser v. Newkirk

Respondent Newkirk has been an inmate of the New York prison system since his conviction for murder in the second degree in 1962. He had initially been confined at the Ossining Correctional Facility and, subsequently, at the Attica Correctional Facility, the Green Haven Correctional Facility, and the Auburn Correctional Facility. These three facilities were maximum security institutions at the time respondent was confined in them and are located in different parts of New York. In April 1971, nine years after his initial confinement, he was transferred to the Wallkill Correctional Facility, a medium security institution. <sup>1/</sup>

1/  
New York State has six correctional facilities that are designated as maximum security institutions: Attica, Auburn, Clinton, Green Haven, Ossining, and Great Meadow. Eight facilities, or portions thereof, are designated as medium security institutions: Albion, Bayview, Edgecombe, Parkside, Rochester, and Taconic. There are also four minimum security correctional camps. See 7 NYCRR, Part 100.1-100.94.

Wm Engle  
7/14

To: Mr. Justice ~~White~~  
Mr. Justice ~~Blackmun~~  
Mr. Justice ~~Brennan~~  
Mr. Justice ~~White~~  
Mr. Justice ~~Marshall~~ ✓  
Mr. Justice ~~Blackmun~~  
Mr. Justice ~~Powell~~  
Mr. Justice ~~Rehnquist~~

From: The Chief Justice

Circulated: MAY 23 1975

Recirculated: \_\_\_\_\_

P14

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-107

Peter Preiser, Etc.,  
et al., Petitioners, } On Writ of Certiorari to the United  
v. James Newkirk. } States Court of Appeals for the  
Second Circuit.

[May —, 1975]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 419 U. S. 894 (1974), in this case to determine whether a prison inmate transferred within a state correctional system from an institution classified as medium security to one classified as maximum security, for reasons not related to the imposition of disciplinary punishment, is entitled, under the Due Process Clause of the Fourteenth Amendment, to [redacted] notice of the reasons for the transfer and to an opportunity to be heard.

A

Respondent Newkirk has been an inmate of the New York prison system since his conviction for murder in the second degree in 1962. He had initially been confined at the Ossining Correctional Facility and, subsequently, at the Attica Correctional Facility, the Green Haven Correctional Facility, and the Auburn Correctional Facility. These three facilities were maximum security institutions<sup>1</sup> at the time respondent was confined in them and

<sup>1</sup> New York State has six correctional facilities that are designated as maximum security institutions: Attica, Auburn, Clinton, Green Haven, Ossining, and Great Meadow. Eight facilities, or

15, 13, 14

To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: The other Justice

Circulated: \_\_\_\_\_

Recirculated: MAY 27 1975

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

---

No. 74-107

---

Peter Preiser, Etc.,  
et al., Petitioners,  
v.  
James Newkirk.

On Writ of Certiorari to the United  
States Court of Appeals for the  
Second Circuit.

[May —, 1975]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 419 U. S. 894 (1974), in this case to determine whether a prison inmate transferred within a state correctional system from an institution classified as medium security to one classified as maximum security, for reasons not related to the imposition of disciplinary punishment, is entitled, under the Due Process Clause of the Fourteenth Amendment, to notice of the reasons for the transfer and to an opportunity to be heard.

### A

Respondent Newkirk has been an inmate of the New York prison system since his conviction for murder in the second degree in 1962. He had initially been confined at the Ossining Correctional Facility and, subsequently, at the Attica Correctional Facility, the Green Haven Correctional Facility, and the Auburn Correctional Facility. These three facilities were maximum security institutions<sup>1</sup> at the time respondent was confined in them and

<sup>1</sup> New York State has six correctional facilities that are designated as maximum security institutions: Attica, Auburn, Clinton, Green Haven, Ossining, and Great Meadow. Eight facilities, or

✓  
Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
THE CHIEF JUSTICE

June 2, 1975

Re: No. 74-107 - Preiser v. Newkirk

## MEMORANDUM TO THE CONFERENCE:

Enclosed is a revised draft of the above opinion with areas of change marked. These changes focus on what I consider the erroneous view of the dissent that lower courts' characterizing the transfer as "disciplinary" was a "finding of fact" unreviewable here. It is not, in my view, a fact-finding but a legal conclusion arrived at by starting with the premise that inmates acquire a "liberty interest" in a particular place of confinement even though the sentence is to the custody of the Department of Corrections.

Regards,



8, 11, 10

To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: The Chief Justice

Circulated:

Recirculated: JUN 2 1975

## 3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-107

Peter Preiser, Etc.,  
et al., Petitioners, } On Writ of Certiorari to the United  
v. States Court of Appeals for the  
James Newkirk. } Second Circuit.

[May —, 1975]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 419 U. S. 894 (1974), in this case to determine whether a prison inmate transferred within a state correctional system from an institution classified as medium security to one classified as maximum security, for reasons not related to the imposition of disciplinary punishment, is entitled, under the Due Process Clause of the Fourteenth Amendment, to notice of the reasons for the transfer and to an opportunity to be heard.

## A

Respondent Newkirk has been an inmate of the New York prison system since his conviction for murder in the second degree in 1962. He had initially been confined at the Ossining Correctional Facility and, subsequently, at the Attica Correctional Facility, the Green Haven Correctional Facility, and the Auburn Correctional Facility. These three facilities were maximum security institutions<sup>1</sup> at the time respondent was confined in them and

<sup>1</sup> New York State has six correctional facilities that are designated as maximum security institutions: Attica, Auburn, Clinton, Green Haven, Ossining, and Great Meadow. Eight facilities, or

Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
THE CHIEF JUSTICE

June 4, 1975

Re: No. 74-107 - Preiser v. Newkirk

## MEMORANDUM TO THE CONFERENCE:

From the outset we have known this was a "sticky" case partly due to the District Court's blurring fact findings with the legal conclusion of "disciplinary" transfer. Thurgood views as "fact" findings material that seems to me to be legal conclusion.

Wolff was a transfer to the "hole" for solitary confinement and characterized that as a "major change in conditions of confinement" reserved for severe discipline.

Here we have, at most, what under Wolff might be viewed as a "lesser penalty" if indeed it is a penalty at all. Newkirk was promptly assigned to work in the Warden's residence and assuming, arguendo, that the transfer had some penal overtones, it is not the "grievous harm" that calls for adding a due process hearing.

Alternatively, this case perhaps ought to be dismissed as moot. It is hardly worth more major efforts.

Regards,



Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
THE CHIEF JUSTICE

June 17, 1975

Re: No. 74-107 - Preiser v. Newkirk

## MEMORANDUM TO THE CONFERENCE:

Enclosed is my treatment of mootness in this case. Had there been unanimity, I could have followed Bill Brennan's desire for a "brief" disposition. Perhaps even with a unanimous opinion it needed complete explication.

) Regards,

*Gard - Brook*

Supreme Court of the  
District of Columbia

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.

- 2 -

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,

*W. S. R.*

1, 5, 6, 7, 8

To: Mr. Justice Black  
Mr. Justice Blackmun  
Mr. Justice Brennan  
Mr. Justice Chisolm  
Mr. Justice Douglas  
Mr. Justice Fortas  
Mr. Justice Harlan  
Mr. Justice Marshall

## 2nd DRAFT

From: [Redacted]

Circulated: \_\_\_\_\_

JUN 20 1975

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 74-107

Peter Preiser, Etc.,  
et al., Petitioners, } On Writ of Certiorari to the United  
v. James Newkirk. } States Court of Appeals for the  
Second Circuit.

[June —, 1975]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Respondent Newkirk has been an inmate of the New York prison system since his conviction for murder in the second degree in 1962. He had initially been confined at the Ossining Correctional Facility and, subsequently, at the Attica Correctional Facility, the Green Haven Correctional Facility, and the Auburn Correctional Facility. These facilities were maximum security institutions<sup>1</sup> at the time respondent was confined in them and are located in different parts of New York. In April 1971, nine years after his initial confinement, he was transferred to the Wallkill Correctional Facility, a medium security institution. The District Court and the Court of Appeals found, and it is not seriously disputed here, that the Wallkill facility is "unique," and

<sup>1</sup> New York State has six correctional facilities that are designated as maximum security institutions: Attica, Auburn, Clinton, Green Haven, Ossining, and Great Meadow. Eight facilities, or portions thereof, are designated as medium security institutions: Adirondak, Bedford Hills, Coxsackie, Elmira, Eastern, Fishkill, Tappan, Wallkill. Six others are designated minimum security institutions: Albion, Bayview, Edgecombe, Parkside, Rochester, and Taconic. There are also four minimum security correctional camps. See 7 NYCRR, Part 100 §§ 100.1-100.94.

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 2, 1975

No. 74-107

Dear Thurgood:

Please join me in your dissent  
in Preiser v. NEWKIRK.

WOD/Sandra

William O. Douglas

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 11, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

If the Court holds that the case is moot, I shall dissent. I would affirm the judgment below.

Sincerely,

W.O.D.

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 20, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

Please add to the bottom of your opinion the following statement: "Mr. Justice DOUGLAS dissents from the holding of mootness and would affirm the judgment below."

Sincerely,

William O. Douglas

Mr. Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 30, 1975

RE: No. 74-107 Preiser v. Newkirk

Dear Thurgood:

Please join me in your dissenting opinion  
in the above.

Sincerely,



Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

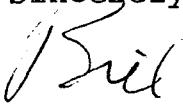
June 9, 1975

RE: No. 74-107 Preiser v. Newkirk

Dear Chief:

I too would be willing to join a brief  
Per Curiam dismissing this case as moot. I  
feel however that the least said, the better.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 18, 1975

151-3

RE: No. 74-107 - Preiser v. Newkirk

Dear Chief:

I would still prefer a very brief disposition of this case. However, I could join your circulated opinion if you could find it possible to make a few changes. Specifically, I think that on page 7, the full paragraph should make explicit that the transfer to Edgecombe was after the Court of Appeals decision, and that the rest of the opinion therefore only has reference to the current situation, not to the situation at the time of the Court of Appeals decision. (I happen to believe that the Court of Appeals was correct that the case was not moot at the time it decided it; see United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968). However, there is no need here to discuss the Court of Appeals decision on mootness, as long as we make clear that the present opinion is only with reference to the current situation.)

Secondly, I suggest the addition of a sentence on page 9, after the W.T. Grant and Aluminum Co. citations, applying the principles there stated to this case. That is, I believe that we should say that the transfer to a minimum security prison shows that the prison authorities no longer harbored any animosity toward Preiser, thus making it clear that this is no longer, even if it was at the time the Court of Appeals decided the case, a case concerning "mere voluntary cessation of allegedly illegal conduct," Concentrated Phosphate, supra.

Sincerely,



The Chief Justice

cc: The Conference

## SUPREME COURT OF THE UNITED STATES

No. 74-107 O.T. 1974

To: The Chief Justice  
Mr. Justice Dou  
Mr. Justice St  
Mr. Justice Wh  
Mr. Justice Har  
Mr. Justice Bl  
Mr. Justice Po  
Mr. Justice Re

From: Brennan, J.

Circulated: 6/19/75

Recirculated: \_\_\_\_\_

Peter Preiser, etc., et al.,  
Petitioners

v.

James Newkirk

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Second Circuit

June 1975

MR. JUSTICE BRENNAN, concurring. I join the opinion of the Court on the understanding that it merely holds the case moot because of the current status of respondent's confinement, and does not imply that the Court of Appeals was wrong in holding the case moot at the time it decided it. The transfer to Edgecombe was after the Court of Appeals decision. This transfer to a minimum security prison reduces to pure speculation any fears of another transfer which respondent may harbor, for it shows that the administrators of the prison system are now treating respondent like any other prisoner. Thus, even if the case was, when the Court of Appeals decided it, still live because the transfer back to Wallkill was "merely voluntary cessation of allegedly illegal conduct" and it was not "absolutely clear that the allegedly illegal behavior

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 19, 1975

*W. J. Brennan, Jr.*  
RE: No. 74-107. Preiser v. Newkirk

Dear Chief:

Our circulations crossed. In light of your changes  
of course I withdraw my concurrence and join your opinion.

Sincerely,

*Brennan*

The Chief Justice

cc: The Conference

P.S. I gather you mean "no animosity toward Newkirk",  
rather than toward Preiser, p. 7.

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 9, 1975

No. 74-107 - Priser v. Newkirk

Dear Lewis,

I agree with your letter of today and would be willing to join a Per Curiam explaining why this case is moot and vacating the judgment of the Court of Appeals for dismissal under Munsingwear.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 18, 1975

Re: No. 74-107, Preiser v. Newkirk

Dear Chief,

I am glad to join your opinion as recirculated on June 17 and agree with Lewis Powell that it should be a signed opinion.

Perhaps it is a personal idiosyncrasy, but I would much prefer that the first part of the sentence beginning on the 5th line of page 8 be revised to read:

"As the Court noted last Term, in an opinion by Mr. Justice Brennan . . . ."

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 10, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

It appears to me that this case is moot; but if a majority of the Court holds that there is still a case or controversy here, I join your opinion.

Sincerely,



The Chief Justice

Copies to Conference

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION  
LIBRARY OF THE UNITED STATES

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 18, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to Conference

MAY 30 1975

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 74-107

Peter Preiser, Etc.,  
et al., Petitioners,  
v.  
James Newkirk. } On Writ of Certiorari to the United  
States Court of Appeals for the  
Second Circuit.

[June —, 1975]

MR. JUSTICE MARSHALL, dissenting.

The District Court found that the transfer in this case was disciplinary, not "administrative," and that transfer from Wallkill to maximum security institutions was regularly used by prison officials for disciplinary purposes. The Court of Appeals affirmed, basing its opinion on the findings of the District Court. Yet today this Court ignores those findings and expressly treats the case as one involving transfers made "for reasons not related to the imposition of disciplinary punishment." *Ante*, at 1. Unless the Court means to reject the District Court's findings out of hand, I can only conclude that the Court has, for reasons of its own, strained to address an issue that is not raised by this case, and that it has failed to resolve the question directly presented here: whether a prisoner has a right to a hearing either before or after a disciplinary transfer that results in a substantial worsening of the conditions of his confinement. Because I think the Court of Appeals properly identified the minimum standards of due process applicable to such a disciplinary transfer, I would affirm the judgment below. Accordingly, I dissent.

I

To make clear the extent to which the Court has mischaracterized the issue in this case, it is necessary simply to quote a few passages from the District Court's opinion.

1,3,7

To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

From: Marshall, J.

Circulated: \_\_\_\_\_

Recirculated: JUN 5 197

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-107

Peter Preiser, Etc.,  
 et al., Petitioners, } On Writ of Certiorari to the United  
 v. } States Court of Appeals for the  
 James Newkirk. } Second Circuit.

[June 1, 1975]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The District Court found that the transfer in this case was disciplinary, not "administrative," and that transfer from Wallkill to maximum security institutions was regularly used by prison officials for disciplinary purposes. The Court of Appeals affirmed, basing its opinion on the findings of the District Court. Yet today this Court ignores those findings and expressly treats the case as one involving transfers made "for reasons not related to the imposition of disciplinary punishment." *Ante*, at 1. Unless the Court means to reject the District Court's findings out of hand, it seems that the Court has strained to address an issue that is not raised by this case, and that it has failed to resolve the question directly presented here: whether a prisoner has a right to a hearing either before or after a disciplinary transfer that results in a substantial worsening of the conditions of his confinement. Because I think the Court of Appeals properly identified the minimum standards of due process applicable to such a disciplinary transfer, I would affirm the judgment below. Accordingly, I dissent.

## I

To make clear the extent to which the Court has mischaracterized the issue in this case, it is necessary simply to quote a few passages from the District Court's opinion.

On the subject of transfers, the District Court said:

6/18/75

No. 74-107, Preiser v. Newkirk

Mr. Justice Marshall, concurring.

I join this opinion only because for some reason petitioner did not file this case as a class action. As a result, the State of New York by releasing the other three named plaintiffs, transferring petitioner back to Wallkill after the District Court action, and finally to a lesser correctional facility after the Court of Appeals acted, thereby made the case moot.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

LC

From: Marshall, J.

Circulated: JUN 20 1975

1st DRAFT

Recirculated: \_\_\_\_\_

# SUPREME COURT OF THE UNITED STATES

No. 74-107

Peter Preiser, Etc.,  
et al., Petitioners, } On Writ of Certiorari to the United  
v. States Court of Appeals for the  
James Newkirk. } Second Circuit.

[June —, 1975]

MR. JUSTICE MARSHALL, concurring.

I join this opinion only because for some reason petitioner did not file this case as a class action. As a result, the State of New York by releasing the other three named plaintiffs, transferring petitioner back to Wallkill after the District Court action, and finally to a lesser correctional facility after the Court of Appeals acted, thereby made the case moot.

©

6/21/75  
W. Marshall

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 10, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

I have considered at some length the opinions, and revisions thereof, that have been circulating for this case. I, too, now am inclined to agree with the suggestion contained in the last paragraph of your letter of June 4 and with Lewis' letter of June 9 that the case may be dismissed as moot. I therefore would be willing to join a per curiam disposing of the case on a Munsingwear basis.

Sincerely,

*H. A. B.*

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION OF THE LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 18, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

Please join me in your circulation of June 17.

Sincerely,

*HAB*.

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 9, 1975

No. 74-107 PREISER v. NEWKIRK

Dear Chief:

I would be willing to join a dismissal for mootness in this case.

When the Court of Appeals rendered its decision, Newkirk already had been transferred back to Wallkill. Although the case may not have been moot at that time, since Newkirk alleged that a deputy superintendent at Wallkill had threatened to transfer him again, Newkirk now has been transferred to a minimum security facility in New York City. Brief for Respondent, at 10.

The only record of the disputed transfer is a notation in Newkirk's file that he had been transferred from Wallkill to Clinton. That notation, reproduced in the Appendix at 256a, expressly states that the transfer "should have no bearing in any future determinations" made by the Parole Board or the time allowance committee. It thus appears to me that the transfer has no continuing consequences for Newkirk, and his allegation that he subjectively feels threatened by the possibility of another transfer without a hearing does not distinguish him from the rest of the prison population. There is no realistic danger that the issue would evade review if Newkirk were to suffer another transfer. This is not a class action, and Newkirk sought no damages.

2.

I therefore conclude that there is no continuing harm to Newkirk that warrants review. Under the rule of United States v. Munsingwear, Inc., 340 U.S. 36 (1950), I would vacate the judgment of the Court of Appeals and remand for dismissal.

Sincerely,



The Chief Justice

CC: The Conference

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

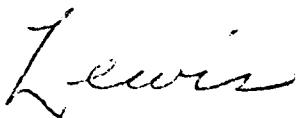
June 18, 1975

No. 74-107 Preiser v. Newkirk

Dear Chief:

I concur in your mootness memorandum, and think it should be a signed opinion.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

May 23, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

As I told you on the telephone, I think your opinion is an excellent one and plan to join it. I am a little worried about the possible interpretation that might be put on a sentence which appears at the bottom of page 13:

"Correctional administrators, as any public officials, are bound to follow procedures established by valid institutional regulations. See Accardi v. Shaughnessy, 347 U.S. 260 (1954)."

As I understand Accardi, it is based on federal law, and not on constitutional law. Since in the following sentences you refer to New York State law and cases decided by the New York state cases, I am sure you do not intend to establish the principle of federal constitutional law that a state institution must follow its own regulations, but I think if that sentence remains unchanged some zealous advocate will undoubtedly put that interpretation on it. Would you be willing to change it so as to read:

"Correctional administrators, as any public officials, may well be bound as a matter of state law to follow procedures established by valid institutional regulations. See Accardi v. Shaughnessy, 347 U.S. 260 (1954)."

Sincerely,

WHR

The Chief Justice

## Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 27, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
**JUSTICE WILLIAM H. REHNQUIST**

June 11, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

I have previously joined your circulation on the merits in this case, and continue to agree with your proposed disposition of the merits if they are reached.

I think the case is rather close on mootness, but on the basis of the facts described in Lewis' letter of June 9th I believe I could join in the disposition saying that the case was moot. I do think that such a disposition, while it need not be lengthy, ought to spell out rather precisely why the case is held to be moot. "Mootness" should not become the "functional equivalent" of dismissing a writ of certiorari as improvidently granted.

Sincerely,

## The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 18, 1975

Re: No. 74-107 - Preiser v. Newkirk

Dear Chief:

Please join me.

Sincerely,

*WRW*

The Chief Justice

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