The Burger Court Opinion Writing Database

Vitek v. Jones
445 U.S. 480 (1980)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

February 21, 1980

RE: No. 78-1155 - Vitek v. Jones

Dear Potter:

Please join me in your dissent.

Regards,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 24, 1980

Re: No. 780-1155 Joseph Vitek v. Larry D. Jones

Dear Byron:

I agree.

Sincerely

Bill

Mr. Justice White
cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 25, 1980

Re: 78-1155 - Vitek v. Jones

Dear Byron:

I have sent a short dissent to the printer.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE STEWART, dissenting.

It seems clear to me that this case is now moot. Accordingly, I would vacate the judgment and remand the case to the District Court with directions to dismiss the complaint. *United States* v. *Munsingwear*, 340 U. S. 36.

As the Court points out, this is not a class action, and the appellee is now incarcerated in the Nebraska Penal and Correctional Complex with an anticipated release date in March 1982. See pp. 3 and 4, nn. 3 and 5, *ante*. In that status, the appellee is simply one of thousands of Nebraska prisoners, with no more standing than any other to attack the constitutionality of Neb. Rev. Stat. 83–180 (1) on the sole basis of the mere possibility that someday that statute might be invoked to transfer him to another institution.

Although the appellee was once transferred in accord with § 83–180 (1), there is no demonstrated probability that that will ever happen again. *Weinstein* v. *Bradford*, 423 U. S. 147. And this case is not one that by its nature falls within the ambit of the "capable of repetition, yet evading review" exception to established principles of mootness. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498; *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 125. If the respondent should again be threatened with transfer under the allegedly infirm statute, there will be ample time to reach the merits of his claim.

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 21 FEB 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1155

Joseph Vitek, etc., et al., Applicants, v. Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

It seems clear to me that this case is now moot. Accordingly, I would vacate the judgment and remand the case to the District Court with directions to dismiss the complaint. *United States* v. *Munsingwear*, 340 U. S. 36.

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 28 FEB 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

It seems clear to me that this case is now moot. Accordingly, I would vacate the judgment and remand the case to the District Court with directions to dismiss the complaint. *United States* v. *Munsingwear,* 340 U. S. 36.

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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: 23 JAN 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE WHITE delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment entitles a prisoner convicted and incarcerated in the State of Nebraska to certain procedural protections, including notice, an adversary hearing, and provision of counsel, before he is transferred involuntarily to a state mental hospital for treatment of a mental disease or defect. We hold that it does.

I

Neb. Rev. Stat. § 83–176 (2) authorizes the Director of Correctional Services to designate any available, suitable and appropriate residence facility or institution as a place of confinement for any state prisoner and to transfer a prisoner from one place of confinement to another. Section 83–180 (1), however, provides that when a designated physician or psychologist finds that a prisoner "suffers from a mental disease or defect" and "cannot be given proper treatment in that facility," the director may transfer him for examination, study and treatment to another institution within or without the Department of Corrections.[1] Any prisoner so transferred to

[1] Section 83–180 (1) of the Revised Statutes of Nebraska provides: "When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical

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

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2-6

From: Mr. Justice White

Circulated: _____

Recirculated: 22 FEB 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE WHITE delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment entitles a prisoner convicted and incarcerated in the State of Nebraska to certain procedural protections, including notice, an adversary hearing, and provision of counsel, before he is transferred involuntarily to a state mental hospital for treatment of a mental disease or defect. We hold that it does.

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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 MAR 1980

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 15

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE WHITE delivered the opinion of the Court, except as to Part IV–B.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment entitles a prisoner convicted and incarcerated in the State of Nebraska to certain procedural protections, including notice, an adversary hearing, and provision of counsel, before he is transferred involuntarily to a state mental hospital for treatment of a mental disease or defect. We hold that it does.

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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: 20 MAR 1980

p. 15

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[March —, 1980]

MR. JUSTICE WHITE delivered the opinion of the Court, except as to Part IV-B.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment entitles a prisoner convicted and incarcerated in the State of Nebraska to certain procedural protections, including notice, an adversary hearing, and provision of counsel, before he is transferred involuntarily to a state mental hospital for treatment of a mental disease or defect. We hold that it does.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

Dear Lewis, Re Vitek - 78-1155

Thanks for your note about the above. I'm just leaving for a few days and will be in touch when I return.

Cheers

Byron

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 14, 1980

Re: No. 78-1155 - Vitek v. Jones

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 25, 1980

Re: No. 78-1155 - Vitek v. Jones

Dear Byron:

I shall await Potter's dissent in this case. I assume his dissent is directed at the issue of mootness. On the merits, I could not go so far as you do (page 13 of your opinion) in holding that counsel must be provided inmates facing transfer hearings if they are financially unable to furnish their own counsel. As you point out, the Court has not gone this far before. I am not willing to go that far now.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: FEB 13 1980

Recirculated: _____

No. 78-1155 - Vitek v. Jones

MR. JUSTICE BLACKMUN, dissenting.

I agree with MR. JUSTICE STEWART that this case is not properly before us. I write separately to express my own reasons for reaching that conclusion.

It is clear to me that the alleged harm (the transfer) that gave birth to this lawsuit disappeared when appellee was granted parole. Cf. Preiser v. Newkirk, 422 U.S. 395 (1975). Appellee has been returned to custody, however, and the parties agree that his reincarceration, coupled with his history of mental problems, has brought the controversy back to life.

p. 3

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: FEB 14 1980

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE BLACKMUN, dissenting.

I agree with MR. JUSTICE STEWART that this case is not properly before us. I write separately to express my own reasons for reaching that conclusion.

It is clear to me that the alleged harm (the transfer) that gave birth to this lawsuit disappeared when appellee was granted parole. Cf. *Preiser* v. *Newkirk*, 422 U. S. 395 (1975). Appellee has been returned to custody, however, and the parties agree that his reincarceration, coupled with his history of mental problems, has brought the controversy back to life.

Given these facts, the issue is not so much one of mootness as one of ripeness. At most, although I think otherwise, it is a case presenting a "mixed question" of ripeness and mootness, hinging on the possibility that the challenged procedures will be applied again to appellee. This Court has confronted mixed questions of this kind in cases presenting issues "capable of repetition, yet evading review," see, *e. g.*, *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), and *Sosna* v. *Iowa*, 419 U. S. 393 (1975), and in cases concerning the cessation of challenged conduct during the pendency of litigation, see, *e. g.*, *Walling* v. *Helmerich and Payne*, 323 U. S. 37, 43 (1944). In those contexts, the Court has lowered the ripeness threshold so as to preclude manipulation by the parties or mere passage of time from frustrating judicial review. MR. JUSTICE STEWART correctly observes, and the Court apparently con-

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 25, 1980

Re: No. 78-1155 - Vitek v. Jones

Dear Byron:

The rather substantial changes contained in your recirculation of 22 February necessitate some revision of my dissent. My revision goes to the printer tomorrow and should be around very shortly.

Sincerely,

HAB.

Mr. Justice White

cc: The Conference

pp. 1-3, Stylistic changes, and Footnotes Renumbered

Circulated:

Recirculated: FEB 29 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones.

On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE BLACKMUN, dissenting.

I agree with MR. JUSTICE STEWART that this case is not properly before us. I write separately to express my own reasons for reaching that conclusion.

The claimed harm that gave birth to this lawsuit was the alleged deprivation of liberty attending appellee's transfer to the Lincoln Regional Center. It is clear to me that that asserted injury disappeared, at the latest, when appellee was granted parole. Cf. *Preiser* v. *Newkirk*, 422 U. S. 395 (1975).[1]

[1] The Court does not appear to share this view. It states that, even while at the Veterans' Hospital, appellee Jones "insisted that he was receiving treatment for mental illness against his will." *Ante*, at 4. It adds that appellee was "paroled, but only on condition that he accept psychiatric treatment." *Ibid.* The Court does not identify the precise import of these facts, but a fair inference is that they are meant to suggest that this case—even during the time of appellee's parole—might properly have been pursued on the theory that the appellee was continuing to feel the effects of the alleged deprivation of constitutional rights in receiving in-patient care at the Veterans' Hospital.

I cannot accept this suggestion. First, its premise appears to be faulty. The District Court did not find, and it does not appear clearly in the record, that the parole board's offer or appellee's acceptance of parole were in any way related to his prior transfer to the Lincoln Regional Center. Appellee chose to accept conditional parole. Moreover, at the time appellee elected to go on parole, he was being housed at the penal complex, not at the Lincoln Regional Center. Thus, it is not surprising that the District Court based its finding of nonmootness solely on its conclusion that appellee—notwithstanding his conditioned release—was "under

February 7, 1980

78-1155 Vitek v. Jones

Dear Byron:

I am prepared to join your opinion subject to one clarification.

I agree that independent assistance should be provided a prisoner confronted with an involuntary transfer to a state mental hospital. But I do not think it necessary to insist that a licensed lawyer provide the assistance. I can envision circumstances, in which, for example, a prisoner would be better aided by a social worker with some mental health experience than by a lawyer. As I read your opinion, it can be construed as requiring the provision of a licensed attorney.

If we can get together on this point, I will join your entire opinion. Otherwise, I will dissent as to the need for a licensed lawyer.

In any event, since I have been reluctant to require the formality of a lawyer in all of these procedural due process cases, I will circulate a brief concurring opinion indicating why I view this case as different with respect to the need for independent assistance from Gagnon v. Scarpelli, 411 U.S. 717, that I wrote.

Sincerely,

Mr. Justice White

lfp/ss

February 14, 1980

78-1155 Vitek v. Jones

Dear Byron:

In addition to my concern as to a flat requirement of counsel (if you had licensed lawyers in mind), I think some response to Harry on "mootness" may be appropriate.

Although he characterizes his concern as one of "ripeness", much of his language and some of the cases cited address "mootness". I have thought the case was not moot, because on the basis of the record with respect to appellee, it fairly can be said that he lives under the constant threat of being returned to a mental institution - without a proper hearing. Thus, he could be deprived again of his constitutional rights long before a court could help him. Appellee therefore was under a constant threat that itself - especially for one with some history of mental problems - could cause injury. The District Court found such a threat.

Your note 5 substantially anticipates the mootness argument. I believe, however, it can be made more pointed in light of the dissents. In particular, comments could be directed to Harry's contention that a "realistic threat" is not sufficient to create a case or controversy in this case.

I could write something but it would be better if you did.

Sincerely,

Mr. Justice White

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 23, 1980

78-1155 Vitek v. Jones

Dear Byron:

Please join me in your opinion for the Court, except Part IV-B that requires the appointment of counsel for indigent prisoners.

I agree that independent assistance must be provided to a prisoner who faces involuntary transfer to a state hospital. I do not agree that a licensed lawyer must necessarily be provided. Accordingly, I will circulate a brief dissent on this point.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

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

From: Mr. Justice Powell

Circulated: MAR 5 1980

Recirculated: _____

3-5-80

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I join the opinion of the Court except for Part IV–B. I agree with Part IV–B insofar as the Court holds that qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a state mental hospital. I do not agree, however, that the requirement of independent assistance demands that a licensed attorney be provided.[1]

I

In *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), my opinion

[1] I also agree with the Court's holding that this case is not moot. The question is whether appellee faces a substantial threat that he will again be transferred to a state mental hospital. See *Doran* v. *Salem Inn Inc.*, 422 U. S. 922, 930–932 (1975); *Steffel* v. *Thompson*, 415 U. S. 452, 458–460 (1974); *Doe* v. *Bolton*, 179, 188 (1973). He was involuntarily transferred from the prison complex to a mental institution, and thereafter paroled upon condition that he continue to receive psychiatric treatment. When he violated parole, he was returned to prison. The State advises us that appellee's "history of mental illness indicates a serious threat to his own safety, as well as to that of others," and "there is a very real expectation" of transfer if the district court injunction were removed. App. to Juris. Statement A–24. The District Court concluded that appellee is under threat of transfer. In these circumstances it is clear that a live controversy remains in which appellee has a personal stake. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, No. 78–1651, slip op., at 9–10 (Feb. 20, 1980).

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

From: Mr. Justice Powell

3-14-80

Circulated: _____

2nd DRAFT

Recirculated: MAR 14 1980

SUPREME COURT OF THE UNITED STATES

No. 78-1155

Joseph Vitek, etc., et al., Applicants, *v.* Larry D. Jones. | On Appeal from the United States District Court for the District of Nebraska.

[February —, 1980]

MR. JUSTICE POWELL, concurring in part.

I join the opinion of the Court except for Part IV-B. I agree with Part IV-B insofar as the Court holds that qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a state mental hospital. I do not agree, however, that the requirement of independent assistance demands that a licensed attorney be provided.[1]

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[1] I also agree with the Court's holding that this case is not moot. The question is whether appellee faces a substantial threat that he will again be transferred to a state mental hospital. See *Doran* v. *Salem Inn Inc.*, 442 U. S. 922, 930-932 (1975); *Steffel* v. *Thompson*, 415 U. S. 452, 458-460 (1974); *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973). He was involuntarily transferred from the prison complex to a mental institution, and thereafter paroled upon condition that he continue to receive psychiatric treatment. When he violated parole, he was returned to prison. The State advises us that appellee's "history of mental illness indicates a serious threat to his own safety, as well as to that of others," and "there is a very real expectation" of transfer if the district court injunction were removed. App. to Juris. Statement A-24. The District Court concluded that appellee is under threat of transfer. In these circumstances it is clear that a live controversy remains in which appellee has a personal stake. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, No. 78-1651, slip op., at 9-10 (Feb. 20, 1980).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 28, 1980

Re: No. 78-1155 Vitek v. Jones

Dear Potter:

Please join me in your dissenting opinion.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 24, 1980

Re: 78-1155 - Vitek v. Jones

Dear Byron:

Please join me.

Respectfully,

John

Mr. Justice White

Copies to the Conference