

C O N T E N T S

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	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
	Michael Ahern, Assistant Attorney General of Connecticut as Amicus Curiae in support of Appellee	26
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IN THE SUPREME COURT OF THE UNITED STATES

October

TERM 1969

RECTOR SIMMONS, JR., ET UX.,)	
)	
Appellants)	
)	
vs)	No. 81
)	
WEST HAVEN HOUSING AUTHORITY,)	
)	
Appellee)	
)	

The above-entitled matter came on for hearing at 10:40 o'clock a.m.

BEFORE:

WARREN E. BURGER, CHIEF JUSTICE
 HUGO L. BLACK, Associate Justice
 WILLIAM O. DOUGLAS, Associate Justice
 JOHN M. HARLAN, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice

FRANCIS X. DIMEEN, ESO.
 New Haven Legal Assistance Association, Inc.
 169 Church Street
 New Haven, Connecticut 06510
 Counsel for Petitioner

F. MICHAEL AHERN,
 Assistant Attorney General of Connecticut
 Counsel for State of Connecticut, as
 amicus curiae, in support of judgment

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1 - P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: Number 81. Simmons
3 against West Haven Housing Authority.

4 MR. DINEEN: Mr. Chief Justice and may it please the
5 Court: My name is Francis X. Dineen. I represent the
6 Appellants in this matter. The jurisdiction of this Court is
7 invoked under 28 United States Code, Section 1257, Subsection
8 2. It goes to the fact that the constitutionality of a state
9 statute is an issue and for the decision of the Appellant Division
10 for the State of Connecticut, the constitutionality of that
11 state statute has been upheld.

12 The Supreme Court of Connecticut denied our petition
13 for certification and so the appeal to this Court is from the
14 Appellate Division of the Circuit Court.

15 The facts of this case involve relatively ordinary
16 eviction action which was commenced in July, 1967. After
17 pleadings were filed and defenses were raised and in fact,
18 seven special defenses were raised as to the eviction actions
19 that was brought.

20 In January of 1968 the trial took place; on January
21 16 judgment was handed for the landlord, the Housing Authority
22 of West Haven. Thereafter, on January 18 our appeal from that
23 judgment was filed with the Appellate Division. At that time,
24 pursuant to Section 52542 of the Connecticut General Statutes,
25 it was required that we file with the Court a bond with a

1 surety to cover the rents that might accrue during the pendency
2 of the appeal. And in order to file that bond on behalf of
3 our clients, we went to several surety companies, asking them
4 what they would require to go on the bond as a surety. The
5 bond in this case, because the rent was \$72 a month, would
6 have been approximately something in the nature of \$400, \$5.
7 or even more dollars. for this bond.

8 In fact, the case that we cited in our brief in
9 which the rent was approximately the same as our rent, the
10 Trial Court had ordered that a bond in the amount of \$700 be
11 filed in that particular case. So that, in any event, all
12 bonds would have been something in the nature of \$500 to \$700.
13 And this again, is to cover the rents that would accrue during
14 the pendency of the appeal.

15 The surety companies that we approached, asking them
16 that they go on this bond, demanded full cash collateral before
17 they would sign a bond, as well as demanding their fee. This
18 was impossible for our clients to pay; they were poor and they
19 didn't have that kind of money.

20 So, we went to the Trial Court and by motion on our
21 clients' behalf, to waive the surety bond. We stated these
22 facts to the Trial Court and asked that as an alternative in
23 order to protect the landlord during the pendency of the appeal
24 that we be allowed to pay the rent into the Court every month
25 to be held by the Court in escrow and we also agreed in the

1 event we should lose the appeal and ultimately if the Supreme
2 Court of Connecticut heard it, and lose there, that this money
3 then would be turned over to the landlord. We also agreed that
4 if in any one month we failed to pay that rent into the court
5 that the appeal could automatically be dismissed.

6 Now, we thought this was a fair alternative because
7 the interest that the state has in protecting the landlord
8 would be met entirely by this provision; by this alternative
9 that we offered. If we paid the rent every month as it came
10 due, and if we failed any one month and our appeal would then
11 be dismissed, the landlord would then have all the protection
12 that he would be entitled to.

13 MR. CHIEF JUSTICE BURGER: Is it clear, Mr. Dineen,
14 that the Court had the power, by way of equity discretion or
15 some other source to waive the bond requirement and accept
16 your alternative proposal?

17 MR. DINEEN: Your Honor, it appears to us that it is
18 clear that they did not have that discretion. The reason I
19 say that, we cited in our appendix the Appellate Court decision
20 and on Page 57 of the appendix where we cited the decision,
21 the Court says, "The right here to an appeal is not a constitu-
22 tional one, though one based upon privileges of natural justice.
23 It is but a statutory privilege in which the aggrieved party
24 has the right to avail himself of only when he has strictly
25 complied with the provisions of the statutes."

1 And later, on Page 60 of the appendix the Appellate
2 Division says, "want of bond with surety, where bond with
3 surety is by statute a prerequisite of review, furnishes a
4 sufficient ground for dismissal of the appeal.

5 We made the motion in the Trial Court because there
6 had not been a decision such as this with regard to waiving a
7 surety bond prior to this time. Now, we made it because we
8 felt we were offering a fair alternative. It turned out, from
9 our understanding now of the Appellate Division's decision,
10 that the Appellate Division decides that it does not have the
11 power to waive.

12 MR. JUSTICE BLACK: What did you say the suit was
13 filed for?

14 MR. DINEEN: This is an eviction action, Your Honor.

15 MR. JUSTICE BLACK: For nonpayment of rent?

16 MR. DINEEN: Well, there were two actions. The
17 action that we're concerned with was based on nonpayment of
18 rent. Prior to that --

19 MR. JUSTICE BLACK: And you offered to pay the money
20 into Court?

21 MR. DINEEN: We offered to pay the money to the Court
22 at the time of the appeal. During the pendency of the action
23 from July, 1967 until the time of judgment, to January of '68,
24 rent was not being paid. Now --

25 MR. JUSTICE BLACK: Was there any defense?

1 MR. DINEEN: Yes, there was, Your Honor. There were
2 defenses on the merits that no rent was due. Our defense all
3 along was for two reasons no rent was due. One was that we
4 claim that the landlord, the Housing Authority had not complied
5 with Connecticut statutes and this is set forth as well on
6 Page 29 of the --

7 MR. JUSTICE BLACK: What Connecticut statutes?

8 MR. DINEEN: There are Connecticut statutes that re-
9 quire that any building that is considered a tenement house or
10 a garden-type apartment and these are defined in Connecticut
11 statutes, must have what is called a "tenement house certifi-
12 cate," stating that that building complies precisely with the
13 tenement house laws. And if it does not have a tenement house
14 certificate, then no rent is due and under a case cited, I
15 believe in our jurisdictional statement, Dreamy Hollow Apart-
16 ments against Lewis, no special proceeding or summary process
17 action can be brought when such a house does not have this
18 tenement house certificate. That was one of our defenses as to
19 the claim for rent.

20 It was the second defense, and that relates to the
21 first action that was brought. There was an action brought some
22 two or three months before this second action, which is an
23 issue here -- that was brought in early May. It was an effort
24 by the landlord to put these people out for another reason. It
25 is our contention that under Connecticut law that once a first

1 action is brought there is no more obligation on the part of
2 the tenant to pay rent to the landlord.

3 MR. JUSTICE BLACK: But you offered to pay the rent
4 plus the costs?

5 MR. DINEEN: I beg your pardon, Your Honor.

6 MR. JUSTICE BLACK: Did I understand you to say awhile
7 ago you had offered to pay rent plus the costs?

8 MR. DINEEN: We had offered to pay rent every month
9 from the time of the appeal. The point I am trying to make is
10 this:

11 MR. JUSTICE BLACK: That would pay it off?

12 MR. DINEEN: I beg your pardon, Your Honor?

13 MR. JUSTICE BLACK: That would pay all the man was
14 claiming?

15 MR. DINEEN: No, Your Honor; that would pay from the
16 time the appeal started, during the entire pendency of the
17 appeal.

18 MR. JUSTICE BLACK: But would it pay the back rent?

19 MR. DINEEN: It would not pay the back rent, Your
20 Honor.

21 Now, as to that question that is no requirement in
22 Connecticut law that in order to defend or to litigate in a
23 summary process action that you have to pay any rent. In fact,
24 generally when a summary process action is commenced, the
25 landlord will refuse to take any rent, because this would be a

1 waiver, probably of his action.

2 Litigating and defending an eviction action is not
3 conditioned in Connecticut, upon paying current rent.
4 Connecticut law does not require that; and this particular
5 factor, we don't feel is relevant to the case. In other words,
6 the fact that for several months, from July until January rent
7 was not paid, is not relevant to the issues we present to this
8 Court.

9 If we paid the rent in full every month as we went
10 along during the litigation, we still would have come to the
11 same problem that we come to here. We would have come to the
12 time of appeal where we would have had to put up the bond with
13 the surety. In other words, to get the surety we would have to
14 put up a lump of money covering perhaps some six or seven or
15 eight months rent. And so, the precise same issue that's
16 raised by this case, would have been raised even if every month
17 we had been paying the rent to the landlord or into the Court
18 during the litigation.

19 But we had defenses, up until the time --

20 MR. JUSTICE BLACK: What did you say your second
21 defense was?

22 MR. DINEEN: The first was that there wasn't any
23 tenement house certificate. The second was that there had been
24 a prior action brought which terminates any obligation on the
25 part of the tenant to pay rent to the landlord. Once the

1 landlord commences an eviction action, he waives his right to
2 collect rent and his effort to terminate the lease --

3 MR. JUSTICE BLACK: Waives his right to collect
4 rent?

5 MR. DINEEN: To collect rent as such, Your Honor. He
6 still is entitled to collect whatever the reasonable value of
7 the premises are; but this would be a separate matter. The

8 These were our two defenses during the course of the
9 trial, that rent was not due to the landlord.

10 MR. JUSTICE STEWART: What was the basis of the prior
11 action; was that also an eviction action?

12 MR. DINEEN: That was an eviction action, Your Honor.
13 The basis of that was that they claimed a nuisance in this
14 regard to our tenants. We defended that; that never came to
15 trial; that action, in fact, is still pending, theoretically.
16 It has never been withdrawn; it still exists. Our defenses
17 relating to that action are set forth in the special defenses
18 that we had which are part of the record in the second action.

19 MR. JUSTICE STEWART: So, that was the first action;
20 an eviction action because your clients allegedly were com-
21 mitting a nuisance.

22 MR. DINEEN: That was the allegation.

23 MR. JUSTICE STEWART: And then that's never been re-
24 solved. And then there was a second action based upon the non-
25 payment of rent and you had two defenses: first that since

1 they didn't have a certificate they couldn't ask you for rent.

2 MR. DINEEN: That's correct, Your Honor.

3 MR. JUSTICE STEWART: And secondly, since they
4 brought this earlier action they didn't have any right to ask
5 you for rent as such, but only damages.

6 MR. DINEEN: They waived it or they were --

7 MR. JUSTICE STEWART: But I don't understand how you
8 can say that if you had kept paying rent this question would
9 still have arisen; because if you had, I suppose, in this
10 action, which is only based on the nonpayment of rent, it
11 couldn't have arisen; there wouldn't have been an appeal and
12 there wouldn't have been a --

13 MR. DINEEN: Yes, Your Honor. If we had been paying
14 -- let us assume we had been paying during the course of the
15 litigation. Now, if we paid as rent there is technical use of
16 words in Connecticut as to rent or use in occupancy. If we
17 paid it as rent and it was accepted as rent, this would operate
18 as a waiver of the action. In other words, once the landlord
19 had renewed the tenancy then they couldn't continue on with the
20 action.

21 But let us assume we didn't pay it as rent; we paid
22 it as use and occupancy; the reasonable value of the premises
23 as we went along.

24 Now, that wouldn't have affected the Court's judgment,
25 because the judgment was based upon facts that took place prior

1 to this time; prior to the continuation of litigation.

2 MR. JUSTICE STEWART: Nonpayment of rent; that's
3 what this action was for.

4 MR. DIMBEN: It was for a specific month, which was
5 back in the month of May, which was what they were claiming.
6 What I am saying is if we were paying during the course of
7 litigation that would not have affected the Court's judgment.
8 At the time of judgment, even though we were paid up and were
9 current, we still would have faced this appeal bond, which says
10 if you want to appeal you have to put up a bond with surety to
11 cover the rents that will accrue. Even if we had no arrearage
12 at that time we would have to get a surety and pay him, say,
13 five months in advance, or whatever it would be that we would
14 put down in the bond; say, five hundred dollars in advance and
15 even if you were current and had no arrears, we would still, in
16 order to meet this appeal bond, have to have our tenants put
17 up \$500 then and there, which they couldn't afford.

18 MR. JUSTICE MARSHALL: Well, how would you lose if
19 you paid the rent? I understand you said this was for failure
20 to pay rent. And if you did pay rent you would win.

21 MR. DIMBEN: Well, not necessarily, because this is a
22 very technical action. The action that was brought related to
23 a failure to pay in May. The first action was brought on May
24 6. We claim that we have a leeway to pay. In other words,
25 they had been there for months before; sometimes they paid on

1 the tenth; sometimes on the 15th. This was a working family
2 and when they didn't have it they got a few days extra to pay.

3 The landlord had wanted them out. He brought the
4 action on the technicality that they had to pay on the first.
5 Now, what I understood Mr. Justice Stewart's counter today,
6 was if we were paying in good faith along as we went, rather,
7 not necessarily on the first, which is the technical basis of
8 the action, but say on the 15th or whenever they had it each
9 month, wouldn't that affect the outcome? I'm saying no, that
10 would not affect the outcome at all because we would still get
11 to the point of judgment where the Trial Judge would say:

12 "Well, you didn't pay on the first, therefore a judgment for
13 the landlord. I don't care whether you have been paying your
14 arrears -- "

15 MR. JUSTICE MARSHALL: You mean that the Connecticut
16 Court would say that for the past six months you paid \$72
17 every day -- every month on the second, therefore you are out?

18 MR. DINEEN: Yes, Your Honor. If you didn't --

19 MR. JUSTICE MARSHALL: That's what the Court would
20 say?

21 MR. DINEEN: IF you didn't read the terms of the
22 lease and that the eviction action was drawn on the basis of
23 termination of lease for failure to comply with it, even
24 though during the course of litigation we were paying use and
25 occupancy, that Court would still say that there was a judgment

1 for the landlord. So that there could have been a time -- and
2 what I'm saying is that makes this nonpayment or this failure
3 to pay during the litigation -- there could have been a time
4 when we came to judgment for the landlord and we had no
5 arrears; we had been paying this use and occupancy all along
6 and were still faced with the precise question that we are faced
7 with here.

8 MR. CHIEF JUSTICE BURGER: Mr. Dineen, let me see if
9 I can get one thing clear. There were findings here and then
10 there is some colloquy in the record which seemed to explain
11 the findings and I am not sure in which action this took place;
12 the finding I am referring to is the finding of the trial
13 judge in the court in the first instance that this appeal was
14 taken for purposes of delay and not in good faith. Now, do
15 you challenge those findings?

16 MR. DINEEN: Yes, we did challenge those, Your Honor.

17 MR. CHIEF JUSTICE BURGER: Well, now -- let's assume
18 first that you are right and that the findings are in error;
19 do we review a finding of the court of the first instance of
20 states on a factual issue in which undoubtedly, credibility and
21 similar factors are --

22 MR. DINEEN: No, Your Honor. My contention as to
23 that, as well, is that that finding is irrelevant to this
24 appeal. That finding that the appeal was taken for the purpose
25 of delay relates only to a stay of execution.

1 MR. CHIEF JUSTICE BURGER: But does that not also
2 relate whether a bond would be accepted under any circumstances?

3 MR. DIMKEN: No, Your Honor, because as I understand
4 the Appellate Division decision there is no discretion in the
5 court to waive the bond. In other words, even if they thought
6 we were appealing for delay, or not to delay, but were appeal-
7 ing in good faith, whatever the trial court may have found,
8 he still doesn't have the discretion to waive that bond. He
9 requires a bond and failure to put up a bond makes us subject
10 then to a motion to dismiss the appeal. Our feeling is that
11 the finding that the appeal was taken for the purpose of delay
12 is not relevant to the questions before this Court, because
13 that only relates to the stay of execution.

14 The Appellate Division's decision in this matter,
15 when they dismissed the appeal and denied our motion to review,
16 says nothing about any delay; it simply says that we failed to
17 put up a bond, and that the bond was required. The appeal was
18 dismissed because we didn't put up the bond and the bond was
19 not waived because there was no authority in the court to waive
20 the bond.

21 Any question of delay, which we did dispute all
22 along, even assuming that there were delay involved and that
23 the finding of the trial court were correct, is not relevant
24 to this appeal. The only thing that's relevant, as we see it,
25 is the surety bond which requires, in effect, that an advance

1 be made on the rent in lump sum for some five or six months.

2 MR. JUSTICE HARLAN: Now, that would depend a good
3 deal on whether you approached this issue as involving the
4 statute on its face or the statute as applied. Are you arguing
5 that it is a matter of Federal Constitutional law a state
6 could not insist upon security pending appeal in a situation
7 where it made a determination that the appeal was frivolous,
8 harrassing, taken for the purposes of delay; are you arguing
9 that?

10 MR. DINEEN: I am not arguing that, Your Honor.

11 MR. JUSTICE HARLAN: I didn't think so.

12 MR. DINEEN: Under Connecticut law the question of
13 delay or frivolity doesn't relate to your being entitled to
14 appeal. What we are questioning is when there is the right to
15 appeal that's available to everyone, but is conditioned on the
16 posting of this bond, which requires that you, in effect, put
17 up several months rent in advance, that that is unconstitutional
18 because it deprives; it's unconstitutional, we claim, for
19 several reasons, both it denies equal protection of the law and
20 it denies due process.

21 MR. JUSTICE BLACK: Where is that finding?

22 MR. DINEEN: I beg your pardon, Your Honor?

23 MR. JUSTICE BLACK: Where is that finding made in the
24 case?

25 MR. DINEEN: Which finding?

1 MR. JUSTICE BLACK: The finding of fact about whether
2 there was indigency.

3 MR. DINEEN: There was a motion made to the trial
4 court that we be entitled to waive the bond and at that time
5 we filed an affidavit.

6 MR. JUSTICE BLACK: Where is that; in the record?

7 MR. DINEEN: I believe that is in the appendix,
8 Your Honor.

9 MR. CHIEF JUSTICE BURGER: I believe that's Finding
10 1 and 2; I'm not sure what page that's on.

11 MR. DINEEN: In the appendix on Page 10 we have a
12 motion to waive the surety bond; then we have a financial
13 affidavit of the tenants on Page 12.

14 MR. JUSTICE BLACK: Now, where is the finding of the
15 court as to whether there was indigence shown?

16 MR. DINEEN: I don't believe the court ever made a
17 finding, Your Honor. The court then --

18 MR. JUSTICE BLACK: Does it show what the man does?

19 MR. DINEEN: Yes, Your Honor; that's in his --

20 MR. JUSTICE BLACK: What's his occupation?

21 MR. JUSTICE STEWART: Sears Roebuck.

22 MR. DINEEN: He was working at Sears Roebuck at the
23 time.

24 MR. JUSTICE BLACK: Regularly?

25 MR. DINEEN: Not regularly, Your Honor. The problem

1 was this: during the course of the trial this man had a
2 nervous breakdown and was unemployed for a substantial period
3 of time.

4 MR.JUSTICE BLACK: During the course of the trial or
5 before it?

6 MR. DINEEN: During the course of the trial. At the
7 time of the appeal when we filed his financial affidavit he
8 was working with Sears Roebuck. But during the course of the
9 trial he had a nervous breakdown and was unemployed. He tried
10 to obtain welfare assistance for the family but because of the
11 fact that the eviction proceeding was pending, we were unable
12 to get assistance from the welfare department. This is one
13 of the background factors.

14 MR. JUSTICE BLACK: Wasn't it your duty to get some
15 kind of finding from the court to show that he was indigent
16 before you bring the case all the way up here?

17 MR. JUSTICE WHITE: Was it the opinion of the court
18 that this was irrelevant, whether he was indigent or not?

19 MR. DINEEN: Well, this is our understanding of the
20 Court's opinion that whether he is indigent or not, there
21 isn't the power to waive the surety bond. I think that's
22 implicit --

23 MR.JUSTICE BLACK: Well, suppose it's not: if it's a
24 mere theoretical thing why should we have it up here on a
25 constitutional question?

1 MR. DINEEN: Well, the Appellate Court, as I under-
2 stand it, makes it clear that there isn't any power to waive
3 the surety bond; the surety bond must be complied with.

4 MR. JUSTICE BLACK: But suppose there is not;
5 suppose that he doesn't need it waived, would you still claim
6 you could get a decision on a constitutional question --

7 MR. DINEEN: I don't understand, Your Honor.

8 MR. JUSTICE BLACK: Suppose it is not an essential,
9 would you still claim that even though you are not indigent
10 you could a constitutional question decided?

11 MR. DINEEN: If you are not indigent?

12 MR. JUSTICE BLACK: Yes. There is no finding on it.

13 MR. DINEEN: Well, I --

14 MR. JUSTICE BLACK: How do you say you can get to
15 that issue without having something -- some kind of finding,
16 something to show that really he was indigent.

17 MR. DINEEN: Well, we have an affidavit.

18 MR. JUSTICE BLACK: That's right, but is there any
19 finding?

20 MR. JUSTICE WHITE: Could you make the Court make a
21 finding on indigency if they thought it was irrelevant?

22 MR. DINEEN: Since we were denied and as I understand
23 it, on the basis because indigency is irrelevant, because the
24 surety bond is required, I think that raises the constitutional
25 question. We're claiming that the person was indigent. The

1 Court has denied usour request to waive the surety bond, re-
2 gardless of whether he's indigent. I think that's enough to
3 raise the constitutional question.

4 MR. JUSTICE BLACK: Suppose he's worth \$50,000;
5 would you still say that the Court still had to consider that
6 he was indigent?

7 MR. DINEEN: But we have an affidavit, Your Honor,
8 that indicates that he is indigent.

9 MR. JUSTICE BLACK? But I understand you to say that
10 it's irrelevant whether he was or not.

11 MR. DINEEN: That's what the lower court said.
12 That's what the Appellate Court has said, that they would not
13 waive the surety bond because they didn't feel that the statute
14 gave them the power to waive it.

15 MR. CHIEF JUSTICE BURGER: But, if equal protection,
16 on your arguments, is an absolute requirement that there must
17 be a right to appeal, I'm still having some difficulty seeing
18 whether it makes any difference that there is another way to
19 protect the Appellee in this case, the Housing Authority.

20 MR. DINEEN: Well, we make two arguments on the basis
21 of equal protection. One is that this classification - that is
22 to say, those who can put up the surety bond as opposed to those
23 who cannot is without a reasonable basis. The standard equal
24 protection test.

25 MR. CHIEF JUSTICE BURGER: Well, does it make a

1 difference to your case whether he could or could not put up
2 the rent during the pendency of the appeals? Suppose he could
3 not pay the rent at all during the pendency of the appeal,
4 would your position be different here today?

5 MR. DINEEN: Yes. I'm not going that far, Your
6 Honor. Our position is that we offered to pay that and we would
7 pay that and also we offered that if we failed to pay the
8 appeal could be dismissed forthwith, in any one month that we
9 did that. We're not saying -- we're not asking that he need
10 not pay anything at all. We say that the state has a legiti-
11 mate interest in protecting the landlord during the pendency
12 of the appeal. We might even have said if it were a matter of
13 state law that the state might have had a legitimate interest
14 during the previous time, but that's not part of any statement
15 or --

16 MR. CHIEF JUSTICE BURGER: But, if your position is
17 sound on the equal protection grounds, would your posture not be
18 the same if you didn't have a dime to pay into the treasury
19 of the court or refused to pay it?

20 MR. DINEEN: Not precisely, I don't think, because we
21 do recognize that there is a reasonable and legitimate interest
22 that the state may have in protecting landowners after a judgment
23 has been rendered in their favor during the pendency of the
24 appeal. What we're saying is it's arbitrary that they manifest
25 the kind of interest for this protection by, in effect,

1 requiring that five or six months be payable at once, at one
2 time, which is impossible to somebody who can't afford it.
3 We're saying that the reasonable way and the mostobvious way
4 that they would have protected the interest of the landlord
5 was to require that he be paid month by month. That way access
6 to the courts would be available to everybody.

7 MR. JUSTICE BLACK: How many months did you
8 pay?

9 MR. DINEEN: The requirement was that we put up the
10 surety bond --

11 MR. JUSTICE BLACK: I know, but how much money. You
12 said you tendered an offer to pay.

13 MR. DINEEN: We offered to pay month by month from
14 the time of --

15 MR. JUSTICE BLACK: How many months did you offer
16 to pay?

17 MR. DINEEN: We did, in fact, pay, Your Honor, five
18 months during the course of the entire appeal.

19 MR. JUSTICE BLACK: Did you have to put in an affidavit
20 of indigency, not being able to make the bond?

21 MR. DINEEN: The affidavit was that we couldn't make
22 the bond; yes, Your Honor, but the rent was \$72 a month and
23 each month from the time of the appeal for five months there-
24 after, each month we deposited \$72 with one or another court;
25 either the district court or of our own circuit court, so that

1 there is now, in effect, in fact, \$360 is on deposit, which
2 has been deposited; \$72 per month since the time of the appeal.
3 We had been doing, actually what we offered to do when we
4 offered to deposit money in escrow --

5 MR. JUSTICE HARLAN: I thought your claim on
6 indigency was not that you couldn't raise the money to pay the
7 rent as it came due month by month, but you had no liquid
8 collateral which was a condition preceding to your being able
9 to get a surety bond, wasn't it?

10 MR. DINEEN: That's correct.

11 MR. JUSTICE HARLAN: Isn't that the indigency issue?

12 MR. DINEEN: That's correct; Your Honor.

13 MR. JUSTICE BLACK: Well, if that's the issue, why
14 didn't you have the money which was liquid that you put into
15 court? How can you claim in one breath that you don't have it
16 and then pay it into court?

17 MR. DINEEN: We paid only \$72 a month; we didn't
18 pay the full \$360 at one time. We were in possession for five
19 months after the time of the appeal. We had offered in our
20 motion to pay \$72 a month to the court. This was what was
21 denied us. We were indigent to the extent -- not that we
22 couldn't pay the rent; we offered to pay the rent. We were
23 indigent to the extent that we couldn't pay the \$500 to the
24 surety which would have been required in order to put up the
25 surety bond. We could pay our rent monthly.

1 MR. JUSTICE BLACK: You mean they would make you pay
2 \$500 in addition to putting up the money for the rent?

3 MR. DINEEN: No, no, Your Honor; that would cover
4 that -- if we put up the surety bond that would cover the
5 landlord for that period of time during the pendency of the
6 appeal.

7 MR. JUSTICE BLACK: And you had the money to pay the
8 bond just the same as you had the money to put into the court,
9 didn't you?

10 MR. DINEEN: No, we didn't, Your Honor. We didn't
11 have the full amount of the rent. We had the monthly rent;
12 we didn't have the five months rent to put down all at one
13 time. See, the surety bond required that we put down in lump
14 five times or six times each months rent. It would be some-
15 thing like \$400 or \$500 in lump sum at that time. We didn't
16 have that money; we did have enough money to pay the rent each
17 month on the first of the month, or whenever, as it came due,
18 in the amount of \$72, which is what we did and there is now
19 \$360 available to the landlord. But we were only able to pay
20 \$72 a month.

21 MR. JUSTICE BLACK: If you had paid that before he
22 sued you, you wouldn't have had to be sued, would you?

23 MR. DINEEN: We have defenses Your Honor, regardless
24 of what we paid; we have defenses on the rent. The technical-
25 ity of Connecticut law is that you pay on the first, according

1 to the lease. We had defenses that there had been an estab-
2 lished practice that rent was accepted late; this is a housing
3 authority, sir.

4 MR. JUSTICE BLACK: How late?

5 MR. DINEEN: Many times it varied, depending on the
6 tenant, like the 10th, the 15th, something like that, depending
7 on when the tenant had it. This was a housing authority;
8 these are low-income people --

9 MR. JUSTICE BLACK: Is this a test case?

10 MR. DINEEN: I beg your pardon?

11 MR. JUSTICE BLACK: Is this no more than a test case?

12 MR. DINEEN: No, Your Honor --

13 MR. JUSTICE BLACK: Do you really have a genuine
14 litigation here?

15 MR. DINEEN: Yes, Your Honor --

16 MR. JUSTICE BLACK: Well, why couldn't they pay their
17 rent?

18 MR. DINEEN: He could have paid the rent. The fact
19 was that the action was brought at early time, as I said, on
20 the 5th of May without giving him an opportunity to pay the
21 rent for May. In fact, prior to may, in April --

22 MR. JUSTICE BLACK: Four days?

23 MR. DINEEN: I beg your pardon?

24 MR. JUSTICE BLACK: Four days -- three or four days?

25 MR. DINEEN: Three or four days, Your Honor.

1 MR. JUSTICE BLACK: And you said they declined to
2 take it?

3 MR. DINEEN: No, Your Honor, they started the action
4 and they would not take it at that time, once they started the
5 action. As I said in answer to Mr. Justice Stewart, they
6 started the action on the basis of a nuisance, because this
7 really was not, essentially, a nonpayment case. They wanted to
8 evict this tenant originally on the basis of a nuisance. But,
9 as we pointed out in our jurisdictional statement, there is a
10 right to a writ of restitution in Connecticut, so that this
11 tenant can get back into the Housing Authority should we win
12 on appeal.

13 MR. JUSTICE STEWART: Where is the family now; are
14 they in housing authority?

15 MR. DINEEN: No, they are not, Your Honor. But, as
16 we pointed out in our jurisdictional statement, Connecticut
17 does allow a writ of restitution so that we can get back into
18 the housing authority should we win our appeal.

19 MR. JUSTICE HARLAN: I would like to ask you a
20 question: did the subsequent proceeding in the Appellate
21 Division, I guess it was -- did you get any review there of any
22 kind on the merits of your claim?

23 MR. DINEEN: No, Your Honor; not at all.

24 MR. JUSTICE HARLAN: None.

25 MR. DINEEN: Not at all.

1 MR. JUSTICE HARLAN: And that was concerned with
2 what only?

3 MR. DINEEN: The Appellate Division was concerned
4 with the motion to dismiss the appeal and our motion to review
5 the decision of the trial court in denying our motion to waive
6 the surety bond, and they dismissed the appeal --

7 MR. JUSTICE HARLAN: I see.

8 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dineen.
9 Mr. Ahern.

10 ORAL ARGUMENT BY F. MICHAEL AHERN, ASSISTANT
11 ATTORNEY GENERAL OF CONNECTICUT AS AMICUS CURIAE
12 IN SUPPORT OF APPELLEE

13 MR. AHERN: Mr. Chief Justice and may it please the
14 Court; The State of Connecticut is not a named party to this
15 appeal. However, because of the decision of the West Haven
16 Housing Authority, which is the Appellee in this case, not to
17 further brief or orally argue the issue raised by the Appellants
18 in this case. The State of Connecticut filed a motion with
19 this Court for permission to orally argue the issue and the
20 Court graciously granted it; that's why I'm here this morning.

21 MR. CHIEF JUSTICE BURGER: Well, now, what's the
22 state's connection with the housing authority? Is this a
23 Federal --

24 MR. AHERN: The Public Housing Authority is estab-
25 lished by both state and Federal statutes.

1 MR. CHIEF JUSTICE BURGER: The state's interest is
2 through that --

3 MR. AHERN: And also the state's interest in
4 protecing property owners who have been, shall I say, denigrated
5 by the tenants by nonpayment of rent so that they have their
6 rights to their own property and the retention of their own
7 property.

8 Because of the adverse and destructive effect on
9 civil process if this appeal is sustained, the State of
10 Connecticut and 14 of her Sister States, have together entered
11 into an amici curiae brief in this case in support of the
12 Appellee's position. This is pursuant to Rule 42, Subsection
13 4 of the Rules of this Court.

14 If I may, in reviewing the file in this case one
15 cannot help but be amazed at the zealous and vigorous
16 advocacy of the Appellants' rights by counsel in the lower
17 courts.

18 In the period between the initial notice to quite
19 possession on July 12, 1967, until the trial on the merits was
20 had on January 9, 1968, six judges of the Connecticut Circuit
21 Court were called upon to rule on the same number of motions:
22 six motions. The legal maneuvering of counsel for Appellants
23 has followed a tortuous and very exhaustive path through both
24 the State and Federal judicial systems.

25 Appellants have had their day in court, in the

1 Connecticut Circuit Court, in the Appellate Division of the
2 Circuit Court and in the State Supreme Court.

3 Simultaneously, they inaugurated hearings in the
4 United States District Court for the District of Connecticut,
5 the Court of Appeals for the Second Circuit and finally to this
6 Honorable Court this morning. I count 36 separate entries in
7 the files concerning legal action on the part of the Appellants;
8 and if I may, I would like to analyze them for you and high-
9 light certain operations and approaches by the Appellants.

10 They became tenants of the Housing Authority on
11 November 1, 1966 under a written lease, a monthly written lease
12 which was renewable each month at the rate of \$72 per month.
13 The monthly rent was determined by an objective schedule,
14 according to their ability to pay. Having withheld payment of
15 the rent for the months of May, June and July of 1967 the
16 Appellants were given a statutory notice to quit the premises
17 on July 12, 1967.

18 MR. JUSTICE MARSHALL: Was the other case pending
19 then?

20 MR. AHERN: The other case has never been dismissed.

21 MR. JUSTICE MARSHALL: Was it pending during that
22 three-month period that you say they didn't pay their rent?

23 MR. AHERN: I believe it was, Your Honor.

24 MR. JUSTICE MARSHALL: Well, was he correct that when
25 a case of dispossession, the case is pending, you don't usually

1 pay rent?

2 MR. AHERN: Your Honor, I don't understand that to
3 be the situation. The initial summary process for the previous
4 summary process action was brought for reasons other than the
5 statutory reasons for a summary --

6 MR. JUSTICE MARSHALL: Well, why wasn't it carried
7 through?

8 MR. AHERN: I believe it wasn't carried through
9 because the attorneys for the Housing Authority recognized the
10 fact that it wasn't a proper motion and they then had other
11 reasons for bringing the summary process action --

12 MR. JUSTICE MARSHALL: Which was brought about by
13 the first action?

14 MR. AHERN: No; they claim it was brought about by
15 the first action --

16 MR. JUSTICE MARSHALL: Well, that's their claim. So,
17 then you filed the second one. Now, of course you've got them
18 clearly not paying their rent.

19 MR. AHERN: Well, if you please, Justice Marshall,
20 this is the claim of the Appellant that the second summary
21 process action was brought --

22 MR. JUSTICE MARSHALL: Well, it is not their claim
23 that you have never withdrawn the first case; it is still
24 there?

25 MR. AHERN: They have claimed that; yes, sir.

1 MR. JUSTICE MARSHALL: Well, is that true?

2 MR. AHERN: Yes, it is.

3 MR. JUSTICE MARSHALL: Why?

4 MR. AHERN: Since I am not the attorney for the
5 Westhaven Housing Authority, I can't answer that question.

6 MR. JUSTICE MARSHALL: Well, you are defending them
7 here; aren't you?

8 MR. AHERN: I am defending them as an amicus filing
9 a brief on behalf of --

10 MR. JUSTICE MARSHALL: You are not responsible for
11 what they did, of course; I agree with you.

12 MR. AHERN: But you were right that the action was
13 never withdrawn; the first action.

14 MR. JUSTICE MARSHALL: And you just don't know?

15 MR. AHERN: No.

16 The Appellants, not having complied with the notice
17 to quit, were given their -- were asked again to quit and when
18 they refused, a summary process action was instituted in the
19 Circuit Court for the State of Connecticut. That was on July
20 19th of 1967 which was actually three months after the first
21 withholding of the rent.

22 After the preliminary motions were disposed of, trial
23 on the merits was had on January 9 of 1968, which resulted in
24 judgment for possession for the Housing Authority.

25 Pursuant to Section 52-542 of the Connecticut General

1 statutes, the Appellants instituted an appeal which was
2 promptly filed with the Appellate Division of the Circuit Court
3 of Connecticut.

4 In lieu of the surety bond required by the statute,
5 they attached to their appeal a motion to waive surety bond on
6 the grounds of alleged indigency. After a full hearing in the
7 court, the same trial judge who had heard the case on the
8 merits earlier, denied the motion because he found that the
9 appeal was not taken in good faith, but for purposes of delay
10 and obstruction.

11 MR. JUSTICE STEWART: Now, that's Judge Di Cenzo?

12 MR. AHERN: DiCenzo; yes, Your Honor.

13 MR. JUSTICE STEWART: And his denial is on Page 23
14 of this appendix, I gather and the full hearing to which you
15 referred appears on pages 13 to 22 in the appendix; is that
16 what we are talking about?

17 MR. AHERN: Yes, it is, Mr. Justice Stewart.

18 MR. JUSTICE STEWART: And this same Judge Di Cenzo
19 had decided in favor of the Plaintiff landlord on the merits?

20 MR. AHERN: They had a hearing on the merits on
21 January 9, 1968; that's correct.

22 MR. JUSTICE STEWART: That hearing is not in this
23 appendix; is it?

24 MR. AHERN: The hearing is not made a part of the
25 transcript. This decision, I believe is.

1 MR. JUSTICE STEWART: The judgment is, I guess, on
2 Page 7.

3 MR. AHERN: Correct, Mr. Justice Stewart.

4 MR. JUSTICE STEWART: Is that right? Thank you.

5 MR. JUSTICE DOUGLAS: I can't find that the Court of
6 Appeals of the Appellate Division or whatever you call it in
7 Connecticut adopted that, or relied upon that; did they?

8 MR. AHERN: It is mentioned in the decision of the
9 Court of Appeals to the Appellate Division of the Circuit Court
10 that the lower court found that the --

11 MR. JUSTICE DOUGLAS: Is that the reason that they
12 affirmed?

13 MR. AHERN: That's our position, Your Honor; that
14 that's the reason they did affirm.

15 The Appellants filed a motion for review with the
16 Appellate Division of the Circuit Court from the Judge
17 DiCenza's denial of the motion. That motion was denied by the
18 Appellate Division and the appeal was dismissed.

19 Thereafter the Appellants filed a petition for cer-
20 tification in the Circuit Court of the State of Connecticut
21 and that petition was dismissed, or denied.

22 The Housing Authority then moved the Appellate
23 Division of the Circuit Court to terminate the stay of execu-
24 tion, which motion was granted.

25 Now, concurrently with these state legal activities

1 the Appellants, in order to delay their eviction, filed an
2 injunction action in the United States District Court for the
3 District of Connecticut. That court in a very lengthy decision
4 dismissed the Federal complaint and the decision was promptly
5 appealed to the Court of Appeals for the Second Circuit.

6 The Court of Appeals dismissed the Federal Complaint
7 as moot on January 10, 1968 and an appeal was taken to this
8 Court which noted probable jurisdiction, on April 7, 1969.

9 I think it should be emphasized at this point that
10 the Housing Authority finally obtained possession of the pre-
11 mises on July 26, 1968, which was a full year after the filing
12 of the summary process action in the Circuit Court in Connec-
13 ticut and more than 15 months after the tenants decided to
14 withhold the payment of rent to the Authority.

15 MR. JUSTICE STEWART: What has happened to the \$360?

16 MR. AHERN: I believe it is still in the custody of
17 the Court. The Housing Authority has never filed a motion to
18 reach it and the Clerk is holding it, pending the ultimate
19 determination of this case.

20 In addition to the zealous legal representation
21 provided the Appellant by Counsel in the lower courts, they
22 have had the benefit of extensive briefs by their attorneys and
23 also by several organizations who have filed amici curiae
24 briefs in this Court.

25 The question presented by the Appellant's appeal

1 is whether the surety bond requirement of 52-542 of the
2 Connecticut General Statutes, on an appeal in a summary process
3 action is violative of the 14th Amendment to the United States
4 Constitution, the Equal Protection Clause.

5 The Connecticut summary process statute was initially
6 adopted in 1806. Prior to that time if a landowner desired to
7 oust a tenant of possession, he was required to file an action
8 in ejectment in the courts, which was a slow and expensive
9 procedure. The purpose of the summary process statute was to
10 give the company owner an alternate means of recovering
11 possession of his property from the tenant who was either
12 unable or unwilling to pay his rent.

13 I want to emphasize that the Connecticut Summary
14 Process Statute is not a statute of general application. It's
15 applicability is limited to those cases where there is a lease
16 which has terminated, either by time or nonpayment of rent, or
17 where there is occupation, without right or privilege.

18 I also want to emphasize that the property owner
19 utilizing the summary process procedure, does not recover rent.
20 He only recovers possession of his property. In order to
21 reach the unpaid rent he must bring a separate, subsequent
22 legal action for monies owed.

23 MR. JUSTICE DOUGLAS: I have read this opinion three
24 times now and maybe I'm just stupid, but I don't see any
25 indication that the court ruled that if this appeal had been

1 taken without any suggestion of dilatory tactics, that it would
2 have been decided differently.

3 MR. AHERN: All I can suggest, Justice Douglas is
4 that I read it differently. I think we agree with Justice
5 Harlan in his decision on their motion to suspend execution.

6 MR. JUSTICE DOUGLAS: I'm just talking about the
7 opinion that the Appellate --

8 MR. AHERN: I realize and we read it differently;
9 that's all I can say.

10 MR. JUSTICE DOUGLAS: Well, sometime could you supply
11 a supplement to a memorandum. I don't want to take your time.

12 MR. AHERN: We will be glad to do that.

13 MR. JUSTICE DOUGLAS: Underlining or marking the
14 lines and paragraphs in this opinion and possibly indicating --

15 MR. AHERN: We will do that, Justice Douglas.

16 MR. JUSTICE BLACK: I want to ask you a question
17 about that statement on Page 20, practically at the end of the
18 page.

19 MR. AHERN: Page 20?

20 MR. JUSTICE BLACK: The Court says: "You told me
21 that, that it was -- I am satisfied that you are; I'm satisfied
22 that all these monkey wrenches that are thrown in here have
23 been successful so far in keeping them in here and not paying
24 any rent." The Legislature must have had something in mind when
25 it wrote here: "Unless it appears to the judge who tried the

1 case that the appeal was taken for the purpose of delay" --
2 what was he quoting from? Can't you find it?

3 MR. AHERN: I can find it, Mr. Justice Black, but
4 I can't find where the quote is taken from.

5 MR. JUSTICE STEWART: What page?

6 MR. JUSTICE BLACK: Here on Page 20, in the last
7 paragraph.

8 MR. AHERN: This is the colloquy between attorneys
9 for the Plaintiff and the Court.

10 MR. JUSTICE DOUGLAS: It doesn't appear to be in any
11 of the statutes that are cited. There may be other statutes.

12 MR. AHERN: No, it does not.

13 MR. JUSTICE BLACK: He purports to be reading from
14 a statute.

15 MR. AHERN: Yes. Actually his quotation is taken
16 from the Section 52-542 of the Connecticut Statutes.

17 MR. JUSTICE BLACK: That is; what he said?

18 Unless what?

19 MR. AHERN: Unless it appears to the judge who tried
20 the case --

21 MR. JUSTICE BLACK: Well, what's the summary process
22 that that "unless" is based?

23 MR. AHERN: That no appeal shall be taken -- if I may
24 read the whole sentence then you may context your --

25 MR. JUSTICE BLACK: All right.

1 MR. AHERN: "No appeal" -- and this is from the
2 statute.

3 MR. JUSTICE BLACK: All right.

4 MR. AHERN: "No appeal shall be taken except within
5 said period and if an appeal was taken within said period,
6 execution shall be stayed until the final determination of the
7 cause, unless it appears to the judge who tried the case that
8 the appeal was taken for the purpose of delay."

9 MR. JUSTICE BLACK: All right, now we have findings
10 here that this was taken for the purpose of delay. Are you
11 arguing that that settles the case? That statute?

12 MR. AHERN: Yes, I am.

13 MR. JUSTICE BLACK: Well, why doesn't it, if that's
14 the statute?

15 MR. AHERN: Why doesn't it?

16 MR. JUSTICE BLACK: Why does it not? Have they made
17 any argument as to --

18 MR. JUSTICE DOUGLAS: I thought this was an Equal
19 Protection point, not whether the thing should be stayed or not,
20 if
but/the bond should have to be furnished.

21 MR. AHERN: If I may, Justice Douglas, this is the
22 position of the Appellants. We do not feel that there is a
23 substantial Federal question involved.

24 MR. JUSTICE DOUGLAS: I understand that, and there
25 are some members of the Court who feel the same way, perhaps;

1 but I am just trying to -- in the setting of this statute it
2 doesn't say anything about "the bond will be required if the
3 appeal is dilatory and will not be required if it is not."

4 MR. AHERN: No; it just makes provision for a surety
5 bond in all cases.

6 MR. JUSTICE DOUGLAS: No, no; it just says, "It
7 shall be stayed unless it appears," which is hardly relevant
8 to the constitutional question presented here; is it?

9 MR. JUSTICE STEWART: That passage, as Mr. Justice
10 Douglas suggests, if it's the one appearing on Page 4 of the
11 Appellant's brief, has nothing at all to do with the require-
12 ment of a surety bond; has it; just nothing.

13 MR. AHERN: It just states that the bond shall be
14 required.

15 MR. JUSTICE BLACK: Unless?

16 MR. AHERN: Unless it appears to the judge who tried
17 the case that the appeal was taken for the purpose of delay."
18 In other words, the "unless" modifies the state clause.

19 MR. JUSTICE STEWART: Yes.

20 MR. AHERN: Not the surety bond clause.

21 MR. JUSTICE DOUGLAS: Unless I have a different set
22 of the statutes than you have,--

23 MR. AHERN: You raised a point that hadn't occurred
24 to me; that's the trouble, Justice Douglas.

25 MR. CHIEF JUSTICE BURGER: Well, if the stay was

1 entered, Mr. Dineen, would a bond -- if the court decided this
2 was not for delay, but was in good faith, could he then stay
3 the execution of the judgment without a bond?

4 MR. AHERN: Yes, he could; in our opinion.

5 MR. CHIEF JUSTICE BURGER: That would seem to me to
6 be the crux of the case.

7 MR. AHERN: I think this is where the Appellants and
8 the Housing Authority disagree, whether or not the surety bond
9 in all cases must accompany an appeal. Certainly, since it is
10 for the sole protection of the landlord, the landlord could
11 waive the surety bond requirement, we feel.

12 MR. JUSTICE WHITE: Could the Court waive -- could
13 the Court say no bond because the person was indigent and the
14 appeal is in good faith?

15 MR. AHERN: We haven't been able to find a Connecticut
16 case that provides that, Justice White. However, we have
17 cited cases in the appeal that once the matter is before the
18 court that the court could waive the surety bond as long as it
19 provided adequate protection for the landlord.

20 MR. JUSTICE WHITE: Do you think the Appellate Division
21 assumes that waiver of surety bond was permissible if the
22 appeal was in good faith?

23 MR. AHERN: There seems to be language in that
24 decision, as I recall it, that would lead me to believe so;
25 yes.

1 MR. JUSTICE MARSHALL: According to the laws of
2 Connecticut could the court waive a cause bond; surety bond,
3 couldn't it?

4 MR. AHERN: Yes.

5 MR. JUSTICE MARSHALL: And wouldn't those come over
6 here, too; it would seem to say that?

7 MR. AHERN: Justice Marshall, I couldn't say whether
8 they would be appealed to this court. The way things are going
9 today I think everything is appealed up here.

10 MR. JUSTICE MARSHALL: But the problem I really have
11 is why the argument is made by the Appellate that the court
12 could not legally waive the surety bond.

13 MR. AHERN: I think that is ^{probably} because of the word "shall"
14 in this statute and they are referring to the same -- this is
15 the statute under which they have appealed to this court and
16 which they claim is violative of the 14th Amendment; the bond
17 on appeal and stay of execution.

18 MR. JUSTICE MARSHALL: Well, do you agree that "shall"
19 means that?

20 MR. AHERN: I think it means "shall" unless the court
21 feels that there are equitable considerations that should be
22 taken into consideration by the court; either the court can use
23 its good offices to have the landlord waive the surety bond
24 requirement, which I think could be done, because the sole pur-
25 pose of the surety bond is to protect the landlord's interest.

1 Then I think also that if the court felt that the
2 circumstances in the particular case warranted, it could waive
3 the surety bond requirement as long as some means were pro-
4 vided for the protection of the landlord.

5 MR. JUSTICE MARSHALL: But you do see an equal
6 protection problem if "shall" means what it says; don't you?

7 MR. AHERN: That's the crux of this case this
8 morning, I believe, Mr. Justice Marshall.

9 MR. JUSTICE STEWART: As I understand it you don't
10 have any precedents on it; is that correct? Is that fair to/
assume?

11 MR. AHERN: We have had cases in other jurisdictions.

12 MR. JUSTICE STEWART: Yes; in other jurisdictions.

13 MR. AHERN: They would seem to give the courts that
14 authority and we feel they apply to this situation also, but
15 we do not have any Connecticut authority.

16 MR. JUSTICE STEWART: The only Connecticut authority,
17 I guess, is the Appellate Division's opinion in this case;
18 isn't it?

19 MR. AHERN: It's breaking new ground, Mr. Justice
20 Stewart, I believe.

21 The West Haven Housing Authority, as I stated earlier,
22 is a Federal and State instrumentality. It is set up by state
23 and Federal statutes; it's financed by public bond issue and
24 by grants from the United States Department of Housing and
25 Urban Development, which controls its operations. The income

1 derived from the tenant rentals is used to meet its obligations
2 to bondholders and to continue to meet the normal operating
3 expenses of the Authority.

4 In defending the summary process action in the trial
5 court the Appellants advanced seven special defenses, all of
6 which were procedural; and all of which were considered by the
7 trial court and evidently considered meritless.

8 It is obvious from the reading of the first special
9 defense, and the trial brief that the reason the Appellants,
10 the tenants, determined to withhold payment of rent from the
11 Authority was that they were miffed because of the previous
12 summary process action instituted by the Authority which was
13 not prosecuted to effect.

14 The trial court in entering judgment for possession
15 of the premises, expressly found that the Appellants had not
16 paid rent for a period of eight months from April 1967 through
17 December of 1967, which was immediately prior to the trial
18 on the merits. And the trial court made the following signifi-
19 cant statement in its memorandum of decision, dated January 16,
20 1968, and I would like to quote it:

21 "The record in this case clearly shows what can happen
22 to a summary proceeding where the process is abused by dilatory
23 tactics, defense is interposed to delay or obstruct the pro-
24 ceeding, and every effort made to delay a trial of the case on
25 the merits." That can be found in the record appendix at Page 5.

1 Just three days after the above decision was rendered
2 by the trial court, that is on January 19, 1968, the same
3 trial judge heard arguments addressed to the Appellant's
4 motion to waive surety bond. After argument the trial judge
5 found, and again I quote: "This appeal is being taken for the
6 purpose of delay" and the motion was denied.

7 Bond-posting requirements on the privilege of
8 obtaining judicial relief are found in both the state and
9 Federal statutes, and this Court has consistently held that the
10 14th Amendment to the Constitution does not prevent a state
11 from prescribing reasonable and appropriate conditions pre-
12 cedent to the seeking of judicial relief in its courts, so long
13 as the basis of the distinction is real and the conditions
14 imposed have a reasonable relationship to a legitimate object.

15 Applying this standard to the Surety Bond Provision
16 of Section 52-542, we submit, it is clear that the statute
17 prescribes a reasonable and appropriate condition with a
18 legitimate object in view; that is the protection of the land-
19 lord.

20 We, therefore, submit that the statute is constitu-
21 tional on its face.

22 MR. JUSTICE WHITE: You think it's unquestioned
23 under the Connecticut statutes that to take any appeal, whether
24 whether frivolous or nonfrivolous, the bond is required?

25 MR. AHERN: In this case; yes, sir -- in this case --

1 MR. JUSTICE WHITE: Is just isn't a question of
2 getting a sta of execution?

3 MR. AHERN: No. We take the position that an appeal
4 bond is required.

5 MR. JUSTICE WHITE: And that if the appeal bond is
6 not filed, there is no appeal; not just that the order of
7 eviction is executed?

8 MR. AHERN: The surety bond is essential to the
9 appeal.

10 MR. JUSTICE WHITE: In any event?

11 MR. AHERN: That's correct.

12 MR. JUSTICE WHITE: But you think that what you
13 said a while ago, that you thought the --

14 MR. AHERN: I'm talking about the language of the
15 statute at this point. Then the question comes in whether,
16 since both law and equity are fused in our court system,
17 whether the court using equitable considerations itself,
18 waive --

19 MR. JUSTICE WHITE: And you say that it could?

20 MR. AHERN: We feel that it could; yes, Mr. Justice
21 White.

22 MR. JUSTICE WHITE: And that it would, I take it,
23 unless they thought --

24 MR. AHERN: IN the context of the proper case where
25 the situation is such that the tenant, for a valid reason, has

1 not paid the rent or cannot pay the rent, we think that it
2 would. This case, we submit is not a case --

3 MR. JUSTICE WHITE: If they had not paid the rent
4 or put up the bond.

5 MR. AHERN: Pardon me?

6 MR. JUSTICE WHITE: I suppose that the court could
7 decide if there was some valid reason for not paying rent, but
8 for putting up the bond, it was found that he couldn't afford
9 to put up the bond --

10 MR. AHERN: But he coul' continue to pay the rent
11 as they claim in this case.

12 MR. JUSTICE WHITE: Yes. You think that in such a
13 circumstance the court could waive the requirement of a bond?

14 MR. AHERN: Yes, we do, Your Honor; although we
15 haven't found any Connecticut citations, we have cited cases in
16 other jurisdictions.

17 MR. JUSTICE WHITE: But it certainly is not in the
18 teeth of the statute.

19 MR. AHERN: It is in the teeth of the statute as far
20 as its language is concerned; yes, Mr. Justice White.

21 MR. CHIEF JUSTICE BURGER: The trial judge seems to
22 have, at least given some consideration to the idea that if he
23 first found that the appeal was taken in good faith and not for
24 purposes of delay, then he would consider the question, the
25 question of the alternative of paying the rent into the court.

1 At the top of Page 22 in your appendix it says: "If they can",
2 referring to the execution and the stay, "then I won't give
3 any further thought to the alternative plan of substituting
4 the Clerk or the Legal Assistance Association to hold the rent
5 in the interim."

6 MR. AHERN: That is correct, Your Honor. That
7 evidently is the position of Judge Dicenda of the trial court.
8 and we agree with it.

9 MR. CHIEF JUSTICE BURGER: Now, the Appellate Court
10 didn't approach that question?

11 MR. AHERN: I don't think it had to, Mr. Chief
12 Justice, because of the fact that it went along with the findings
13 of the trial court that the action was instituted for purposes
14 of delay.

15 MR. CHIEF JUSTICE BURGER: Well, at least time, by
16 my count here, the trial judge refers permanently and rather
17 vigorously at times, to the reasons why he thought this appeal
18 was taken for purposes of delay, but as Justice Douglas pointed
19 out, the Appellate Division never mentioned that. I would
20 like -- I would hope when you file the supplemental memorandum
21 that Justice Douglas suggested, that you give us your view of
22 why something which the trial court emphasized so much and so
23 often is not referred to by the Appellate Court.

24 MR. AHERN: We will attempt to analyze it to that
25 effect.

1 MR. JUSTICE BRENNAN: As I understand it, Mr. Ahern,
2 you are going to try to demonstrate that Justice Jacobs'
3 opinion -- or is it Judge Jacobs --

4 MR. AHERN: Judge Jacobs.

5 MR. JUSTICE BRENNAN: -- addressed itself, or
6 addresses itself to the stay issue in good faith; is that
7 right?

8 MR. AHERN: If I may --

9 MR. JUSTICE BRENNAN: Is that what you are going to
10 do? In other words you are telling us that we ought to read
11 this opinion as not addressed only to whether the appeal had
12 to be dismissed for want of filing a bond, but also that the
13 opinion addresses itself to whether or not a stay was properly
14 denied because the appeal was taken in bad faith; is that
15 right?

16 MR. AHERN: That is correct, Mr. Justice Brennan.

17 MR. JUSTICE BRENNAN: All right.

18 MR. AHERN: Certainly the plight of the indigent
19 tenants who are unable to pay their bills elicits the sympathy
20 and compassion of all peoples; however we submit that some
21 sympathy and compassion should be reserved for the real
22 property owner who must meet his mortgage obligations and other
23 financial obligations or risk the loss of his property. All
24 landlords are not wealthy; and all tenants are not indigent.
25 And most property owners cannot afford the luxury of a tenant

1 who is either unwilling or unable to pay his rent.

2 MR. CHIEF JUSTICE BURGER: I suppose this Housing
3 Authority, like most public housing authorities, has a waiting
4 list of other poor people who are, or claim to be, eligible
5 for occupancy here? Is there a showing in the record on that?

6 MR. AHERN: Mr. Chief Justice, I don't know whether
7 the record shows it, but certainly I think the Court could
8 take judicial notice of the fact that there aren't sufficient
9 housing accommodations for the poor and that there would be a
10 list of people waiting; and further take notice of the fact
11 that the Housing Authority depends on the tenants' payment of
12 monthly rents in order to meet its obligations to bondholders
13 and its financial obligations in the continuing operation of the
14 Authority.

15 MR. JUSTICE MARSHALL: I still have great difficulty
16 on landlord law, when they paid this \$72 a month into court.
17 It's all the landlord was entitled to; it was in court and
18 anybody that failed to pay it, they lost everything.

19 MR. AHERN: Well, Mr. Justice Marshall, I think the
20 record will show that the offer to make payment in the court
21 was made at the time that the hearing was held on the motion to
22 waive surety bond which was nine months after they stopped pay-
23 ing rent. The offer was to pay current rent into the court;
24 not the back nine months which they had not paid.

25 MR. JUSTICE MARSHALL: Well, then, am I wrong that at

1 that stage if they put up a surety bond they didn't have to
2 pay that nine months behind; did they?

3 MR. AHERN: Not in a summary process action. A
4 separate action would have had to been brought by the landlord

5 MR. JUSTICE MARSHALL: Well, that's what I'm saying.
6 as of this the alternative was the surety bond, or \$72 a month
7 into court.

8 MR. AHERN: That's correct, Your Honor.

9 MR. JUSTICE MARSHALL: And it was solely for the
10 protection of the landlord; and why did he have to have that
11 surety bond when he was assured of his rent? \$72 a month.

12 MR. AHERN: Why would he have to? I believe the
13 reason the court would not accept the recommendation of the
14 attorneys for the Appellants was the fact -- and I think the
15 court asked the direct question of the attorneys, whether they
16 would make payments of the nine months in the arrears, and they
17 said they would not; they would only take of the future pay-
18 ments.

19 MR. JUSTICE MARSHALL: Well, the surety bond wouldn't
20 cover that nine months in arrears, either?

21 MR. AHERN: No, it would not.

22 MR. JUSTICE MARSHALL: Well, so far as that par-
23 ticular point, the nine months arrears, was out of the picture.

24 MR. AHERN: Well, I think this all comes into the
25 fact that the trial judge found that there were dilatory

1 tactics used, because normally a summary process action takes
2 considerably less than seven months to have a hearing on the
3 merits.

4 MR. JUSTICE MARSHALL: Oh, I've seen them in less
5 than two hours.

6 MR. AHERN: Not in Connecticut. They have a hearing
7 in Connecticut; a full hearing on the merits, Justice Marshall.

8 MR. JUSTICE STEWART: Actually, Mr. Ahern, is the
9 action of the Appellate Division of the Circuit Court of
10 April 11, 1968, appearing on Page 66 of the appendix, throws
11 any light on the fact of the question of Mr. Justice Douglas
12 and Mr. Chief Justice on a precedent, that is: whether or not
13 the Appellate Division decided the case on the -- on an
14 absolute and inflexible basis or whether it adopted, in part
15 at least, the reasoning of the trial court?

16 MR. AHERN: Well, certainly on Page 67 the paragraph
17 which starts on that page, they mention that they briefly
18 review the proceedings in the Court below and I would assume
19 that a review of those proceedings, even though they might not
20 mention it here, would take into consideration the activities
21 in the Court below, and the finding of the trial judge.

22 Certainly the Appellate Division had the trial
23 judgment or memorandum of decision before it at the time it
24 reviewed the case.

25 MR. JUSTICE STEWART: This order here has to do with

1 finally, the vacation of the stay of execution; does it not?
2 The one appearing on Page 66?

3 MR. AHERN: Yes, it does, Your Honor.

4 MR. JUSTICE STEWART: And they do review in some
5 length the dilatory -- what they refer to as the dilatory and
6 obstructive tactic.

7 MR. AHERN: That is correct, on Page 67 and there-
8 after, actually.

9 MR. CHIEF JUSTICE BURGER: At 69 of the opinion the
10 Appellate Court also notes, apparently, that some emphasis, as
11 I read it, upon a review of the whole matter. Now, I suppose
12 depending on what the author meant by the "whole matter," the
13 finding of the trial judge on the lack of good faith, becomes
14 more or less important --

15 MR. AHERN: I would trust that the statement of the
16 trial judge would be given its widest application in that
17 connection, Mr. Chief Justice.

18 MR. CHIEF JUSTICE: Thank you.

19 MR. AHERN: Thank you very much.

20 MR. CHIEF JUSTICE BURGER: The case is submitted;
21 thank you gentlemen, for your submissions.

22 (Whereupon, at 11:45 o'clock a.m. the argument in
23 the above-entitled matter was concluded)