In the

Supreme Court of the United States

GRIFFIN B. BELL, et al.,)
)
Petitioners,)
)
v.) No. 77-1829
)
LOUIS WOLFISH, et al.,)
)
Respondents.)

Washington, D.C.
January 16, 1979

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v. No. 77-1829

LOUIS WOLFISH, et al

Respondents

Tuesday, January 16, 1979
Washington, D. C.

The above-entitled matter came on for argument at 10:54 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530 For Petitioners

MRS. PHYLIS SKLOOT BAMBERGER, The Legal Aid Society, Federal Defender Services Unit, 531 United States Courthouse, Foley Square, New York, New York 10007 For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Bell against Wolfish.

Mr. Frey, I think you may proceed when you are ready now.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF PETITIONERS

MR. FREY: Thank you.

Mr. Chief Justice and may it please the Court:

This case is here on writ of certiorari to the Court of Appeals for the Second Circuit to review certain aspects of its decision relating to conditions of confinement at the Metropolitan Correctional Center, a federally-operated short-term custodial facility in New York City.

There are five issues presented to you for decision.

The first and perhaps potentially the most significant from the standpoint of constitutional doctrine involves the constitutionality of double bunking pretrial detainees in rooms designed for single occupancy.

QUESTION: Mr. Frey, when you say "pretrial detainees," I take it you are excluding those who are confined other than in a status as pretrial detainees.

MR. FREY: That is right. There are various classifications of inmates that are kept at a facility like the MCC. In addition to persons who are being held in lieu of bail

awaiting trial on criminal charges there is a significant group of inmates who are -- have been brought in on ad testificandum or ad prosequendum writs to appear in federal court proceedings who are prisoners serving other state or other federal sentences.

There are persons awaiting parole and probation revocation hearings and there are sentenced inmates whose sentences are of such a short duration it is deemed desirable to have them serve their sentence there.

QUESTION: Well, all those categories are people who have been convicted and sentenced to confinement.

MR. FREY: That is correct.

QUESTION: And since the Court of Appeals for the Second Circuit did not find that this was in any way cruel and unusual punishment and no appeal was taken from that, those people are out of the case, are they not?

MR. FREY: As to the double bunking issue.

QUESTION: As to the double bunking business.

MR. FREY: That is correct. They are out of the case.

QUESTION: Now, the people who remain there awaiting trial, by definition they have not been able to secure release on bail or they would not be there.

MR. FREY: The group of people we are talking about in connection with the double bunking issue are people unable

to secure a lease on bail.

QUESTION: Is there any difference between that and the old West Street?

MR. FREY: Is there any difference in the facility?

QUESTION: I know it is new and all but is it the same group of people?

MR. FREY: I believe it is generally the same group of people. Actually, there may be some categories that were kept at West Street and that were shifted to other facilities when the MCC opened because of the population increase of people committed to the Bureau's custody, some immigration-deportation cases and others.

QUESTION: Are the people being held because they are either not allowed to put up bail or could not do it, those who have been indicted for felonies or are there some people charged with misdemeanors?

MR. FREY: I do not know that the record -- I simply do not know the answer to that question.

QUESTION: Mr. Frey, before you get into your argument, if this were a state facility, the cause of action would be brought under 1983 I would suppose. Have you given any thought to what the source of the cause of action that is asserted in this case is? I know that is not your responsibility really but I would just be interested in your opinion.

MR. FREY: Well, it was brought as a habeas corpus

class action and certified as a class action. We have not challenged the jurisdiction. We contested the wisdom of certifying a class action but that was done and we have not challenged that in this Court.

QUESTION: Would you agree that these issues are properly raisable in a habeas corpus proceeding?

MR. FREY: Well, I have not focused my attention in preparing the argument on that question. I am not prepared to dispute it.

QUESTION: This struck me as somewhat anomalous. I was trying to think it through myself and I did not know if the government had a position on it.

MR. FREY: Well, not one that I could state now.

QUESTION: Is there any history of habeas corpus class actions that you are familiar with?

MR. FREY: Well, I believe that there is some authority for habeas corpus class actions and there have been questions that have come to our attention in the Solicitor General's office in connection with whether that should be challenged but to this point we have not sought to challenge the propriety of that and we do not do it in this case.

QUESTION: A more basic question, did not the Preiser case hold that when all of it is challenged, the conditions of confinement by contrast with the fact of confinement, that habeas corpus is inappropriate?

MR. FREY: I am not --

QUESTION: That habeas corpus is appropriate only to secure release, in other words.

MR. FREY: I am not sure that that is correct but --

QUESTION: Do you recall the Preiser case?

MR. FREY: Well, I am generally familiar with it. I have not read it for awhile.

QUESTION: Generally you may have read it but it was awhile ago.

QUESTION: Well, in Mittendorf against Henry which is October term, 1975 I think the opinion of the Court expressly reserved the question as to whether a habeas corpus action could be a class action. I do not think this Court has ever approved it.

MR. FREY: I have not suggested that this Court has but I do not think, I do not perceive of that as the kind of threshold jurisdictional question that you must decide even though we have not brought it to you for decision.

QUESTION: Well, the class action is one thing but the basic availability of habeas corpus is more fundamental. That is jurisdictional, is it not?

MR. FREY: Well, I think that would be right and I am not sure, perhaps my colleague can answer. There may be alternative grounds such as mandamus for --

QUESTION: Well, your colleague is the one who

brought the lawsuit or rather, his client did. He is rehearsed.

QUESTION: The question that I thought my brother gave you is, is do you agree that there is habeas for conditions?

MR. FREY: Well, I think -- my answer is that we have not asked this Court to overturn the judgment below on the grounds that there is a lack of jurisdiction or on grounds of any challenge to the propriety to the class action certification and I am reluctant to state a position for the government on these issues without having given it a great deal of thought.

QUESTION: Well, one way would be if we ruled against you, then you could make a position.

Would not that be one way of getting it done?

Then you would have your position. You would give it to us.

MR. FREY: In any event, the --

QUESTION: Would you say, if I may, what percentage of the total population is represented in the class you have before us?

MR. FREY: Well, the class consists of the total population of inmates, both sentenced and pretrial detainees.

QUESTION: I see.

MR. FREY: I think that there are some internal conflicts of interest between this group but our request to have separate subclasses certified was denied by the District

Court and --

QUESTION: So we have the whole population.

MR. FREY: You have the whole population but not as to every issue. The double bunking issue, the disposition in the Court of Appeals was that it reversed the district court's ban as applied to sentenced inmates and remanded for further proceedings.

It affirmed as applied to pretrial detainees because it perceived that a different legal standard was appropriate to judge the claim in that context.

There are also four rules or practices that are before this Court that are justified on security grounds, the right to receive packages, the so-called "publisher-only" rule, the validity of visual inspection of body cavities after contact visits and the right of the inmate to be present and observe room searches. Now --

QUESTION: And these issues concern the whole class.

MR. FREY: With the exception of the room search issue which applies only to pretrial detainees no distinction was drawn on the other three issues between sentenced inmates and pretrial detainees. Arguably one might be but none has been.

Now, these five issues are the rump contingent of a veritable army of complaints about the operation of the MCC that marched into the United States District Court in November

1975, less than four months after the MCC opened.

The issues raised covered such diverse subjects as housing, food, clothing of inmates, visiting, library facilities, staffing, educational and job opportunities, grievance procedures, mail, telephone service, noise levels, various aspects of the treatment of personal property and many others too numerous to name here.

After initially resolving a few of the issues on summary judgment including the double bunking and the publisher only issue the District Court conducted hearings and issued an extensive opinion granting much of the the relief Respondents sought and denying others of their claims.

The court relied on both constitutional and statutory grounds for its decision. Some of its rulings the government acquiesced in. Others were appealed to the Court of Appeals and the Court of Appeals in turn affirmed in part and reversed in part.

It rejected any statutory basis for the District Court's orders prohibiting various MCC practices and conditions finding that the case generally involved matters committed to agency discretion by law. It accordingly rested its own rulings solely on constitutional grounds.

And as I have said, in setting forth the constitutional standards, it distinguished between sentenced inmates and pretrial detainees.

As to the former, challenged conditions were to be judged by the Eighth Amendment Cruel and Unusual Punishment Standard. For detainees, the Court relied on the presumption of innocence to set a much higher standard. It stated that pre-trial detainees may be subject to "only those restrictions and privations which are inherent in confinement itself or which are justified by compelling necessities of jail administration."

And it made quite clear that challenges to conditions of confinement for detainees are to be adjudicated without consideration of either fiscal or administrative justifications for the particular practice.

It applied these standards for the double bunking issue by in effect adopting a per se rule that two inmates may not be housed in a room designed for one.

With regard to the other issues that are before this Court, the Court of Appeals acknowledged that the maintenance of security and order is a compelling necessity of jail administration but it nevertheless concluded that the government had failed to establish sufficient justification for the practices or rules in question.

Now, as I indicated at the beginning the case breaks down into two different types of issues. The first involves the standards by which the due process rights of pretrial detainees are to be evaluated in the context of a challenge to alleged overcrowding at the MCC.

The second involves the security-related issues.

Now, since the first issue is potentially the more novel and substantial constitutional issue, I intend to devote most or all of my limited time to that question and to rely on the briefs for the other issues.

I would like to say a brief word about the MCC itself before getting into the legal arguments. It is one of a very limited number of federal facilities specifically designed to house pretrial detainees and other short term inmates.

As the Court of Appeals described it, the MCC represented the architectural embodiment of the best and most progressive penological planning. The key design of the MCC that is relevant to the double bunking issue -- and that, indeed, is the central element of the facility -- is the modular unit concept.

In this concept there are self-contained residential units in lieu of the traditional cell block. A typical unit contains 48 rooms which adjoin large multipurpose rooms with facilities for recreation, education, exercise and dining.

The common areas are carpeted. The sleeping areas have doors rather than bars. And for virtually the entire day except seven sleeping hours between 11:00 at night and 6:00 in the morning, the inmates are free to move about their unit without restriction. Also, visiting facilities are attached to each of these units rather than having a central facility

for the institution.

I understand that there are slides in the record with photographs of the institution if you deem it useful to get a look at what it is like.

The MCC was designed to have 449 inmates. However, contemporaneous with its opening in August, 1975 there was a sharp and unexpected increase in the number of persons committed to the Bureau of Prisons custody who the Bureau determined had to be or should be housed at the MCC.

Because the number of inmates exceeded the design capacity of the institution the Bureau determined in order to meet its custodial obligations that a number of the rooms should be used to house two inmates and that bunk beds should replace single beds in the dormitory areas.

Accordingly, bunk beds were installed in place of single beds in 73 of the 389 residential rooms at the MCC.

Now, the Respondents have invoked and the Court of Appeals has relied upon the due process clause for striking down the double bunking in this case. The focus of the issue therefore concerns the substantive content of that clause.

The Court of Appeals held that the due process clause by its own force and without the aid of any other constitutional provisions confers upon pretrial detainees the right to be free of cramped housing conditions in the absence of a governmental showing of compelling necessity --

QUESTION: Is that a liberty interest or a property interest?

MR. FREY: I believe they viewed it as a liberty interest. And we do not dispute in this case that pretrial detainees retain those liberty interests that are not inconsistent with the fact of confinement itself. We simply dispute that the standard that was applied by the Court of Appeals in evaluating the practices that are arguably impinged upon those liberty interests was the right standard.

Now, we think that the Court of Appeals' standard lacks any basis in the constitutional decisions of this Court dealing with the subject of substantive due process and we think that the proper resolution of the issue that was before the Court of Appeals required that the government be afforded the opportunity to reduce the factors that brought about the challenged conditions and the propriety of the government's action having to be assessed by its reasonableness in relation to the legitimate governmental objectives at stake.

Now, two aspects of the constitutional backdrop to this issue are worth highlighting. First, there is no dispute that the conditions of confinement for both pretrial detainees and sentenced inmates must meet minimum levels of decency with regard to such considerations as housing, food, sanitation and medical care and we have spelled out in our brief the reasons for our contention that these standards have been fully

satisfied at the MCC.

QUESTION: When you say there is no dispute that they must, do you mean constitutionally.

MR. FREY: Constitutionally.

QUESTION: Because of the cruel and unusual clause?

MR. FREY: And as to pretrial detainees the due process clause.

QUESTION: What does the due process clause have to do with it?

MR. FREY: Well, it has to do with it in the same sense, I think, that conditions of this kind can be viewed as cruel and unusual punishment under the Eighth Amendment. We are in agreement that pretrial detainees cannot under the due process clause be punished prior to a trial.

QUESTION: They cannot be punished at all, can they?

MR. FREY: Well, after conviction, when they cease being pretrial detainees.

QUESTION: I know but you said pretrial detainees.

MR. FREY: They cannot be punished. That is correct.

QUESTION: At all. Not only cruelly and unusually punished, they cannot be punished at all, can they?

MR. FREY: That is true but --

QUESTION: And that is a matter of due process, you say.

MR. FREY: Yes, we agree.

QUESTION: What is the standard? Could you suggest one that if we were to conclude that a particular type of treatment really had to be classified as punishment then that would violate the due process clause. It did not have to be cruel and unusual but just as long as it is punishment.

MR. FREY: If you concluded that it was punishment then it would violate the due process clause.

Now, we have a great deal of difficulty with the Respondents' argument that what was involved in this case was demonstrated to be punishment. We think the concept of punishment is there, using it as a trivial or tautological concept, it is punishment because they repeatedly say it is punishment but --

QUESTION: What do you call incarceration?

MR. FREY: What do I call incarceration?

QUESTION: If it is not punishment, then what is it?

MR. FREY: Well, if it is not punishment it is custody. It can be -- incarceration of course can be punishment.

QUESTION: But if it is inevitably punishment then there could be no pretrial detainees.

MR. FREY: And if that is the case then the due process clause allows punishment to the extent that pretrial --

QUESTION: It does not allow punishment of anybody who has not been convicted of a criminal offense.

MR. FREY: I think we are getting into a circularity. I do not think this is the central dispute.

QUESTION: You say tautological. If it is punishment there can be no such thing as a pretrial detainee. Everybody would have to be released --

MR. FREY: No one is questioning the validity of the institution of pretrial detention.

QUESTION: -- until found guilty beyond a reasonable doubt.

QUESTION: Well, so then does not your right to detain have to depend on a finding that these people were found not likely to show up for their trial upon furnishing of bail?

MR. FREY: That is true.

QUESTION: Therefore, you had to detain them in order to assure their presence at trial?

MR. FREY: Well, the detention involves an impairment of a fundamental liberty interest protected by the due process clause and the standard that the Court of Appeals applied to double bunking is clearly an appropriate standard to apply to pretrial commitment and, indeed, both the Constitution and the statute require a kind of least-restrictive alternative test so that detention is the last step after you have excluded any other reasonable measure to assure presence at trial.

QUESTION: But if you have met all those tests then you are depriving them of liberty simply in order to assure

their presence at trial.

MR. FREY: That is the purpose for which they are being --

QUESTION: Mr. Frey, I thought some of these people at least would have been released if they could have raised the bail.

MR. FREY: That is true, I assume. I assume very few if any --

QUESTION: You are not keeping them because they are people who would not show up when they are supposed to show up.

MR. FREY: No.

QUESTION: You are keeping them because even though they would show up they could not afford to pay the bail.

MR. FREY: Well, I do not think that is right because the amount of bail is set in the amount necessary to assure their appearance at trial and if they do not post that amount then it follows that there has been a determination that with some lesser amount or personal recognizance bond their appearance at trial cannot be assured and that is the reason why they are --

QUESTION: No but whatever the amount is, had they been able to raise it they would have been released.

MR. FREY: That is correct but they would have then been deterred from fleeing or failure to appear by the --

QUESTION: Is what you have said consistent with the applicable statutes on bail?

MR. FREY: I believe it is. We cited Section 3146 I think in our brief in terms of --

QUESTION: Does there not have to be some finding that some alternatives besides bail would not suffice?

MR. FREY: There are considerations of a number of alternatives, money bail being low down on the list.

QUESTION: So that is not -- what you have said really does not cover what kind of a determination has been made. You have to arrive at some kind of a conclusion that other alternatives will not suffice to --

MR. FREY: Well, I agree with that. I am not sure what bearing -- I do not know what bearing that has on the context of this case because no one is contesting the validity of the institution of pretrial detention. No one is contesting, we are not contesting that a compelling necessity standard is appropriate. The Respondents are not contesting that these people can be detained. It is the subsidiary conditions of confinement incidental to this massive restriction on liberty that is involved in the detention that are at issue here.

QUESTION: But the purpose of the detention, it must have some bearing on the standard of review. If it is punishment it is one thing. If it is simply assuring that they will show up for trial because there is no other way that you

can assure their appearance it may be another.

MR. FREY: Well, let me explain the role that I think that punishment properly plays in this. When a challenge is presented to a condition of confinement, the government is obliged, assuming the challenge crosses some constitutional threshold of presenting some kind of claim of a liberty interest, the government is obliged to show in some fashion and by some standard a justification for the action that it has taken which has impaired this interest.

Now, in the case of a pretrial detainee the government cannot say, one of the reasons we are doing this is punishment. Or, one of the reasons that justifies this practice is to rehabilitate them or to deter others from commiting the offense.

Those are governmental objectives that can only be invoked to support a condition of confinement in the case of convicted inmates.

In the case of pretrial detainees there must be other kinds of considerations invoked.

Our concern in this case is that the very real and substantial fiscal and administrative considerations that made it necessary to resort to a degree of double bunking were totally foreclosed from consideration by the court under a standard which in effect said per se, you just cannot put two people in a room that was designed for one, period. We do not

want to hear why you are doing it.

Now, in this connection there is a lot of suggestion that fiscal considerations and administrative convenience are somehow insubstantial excuses that the government makes up to justify its practices and that administrative convenience is something like not having to work overtime or not having to make modifications in established routines and we think administrative convenience is much more in this context.

The Bureau of Prisons has a certain population of inmates committed to its custody. It has no control over the number of these inmates. It has to house them. The kinds of considerations of administrative convenience which are included in this concept involve where are you going to put these people?

If you cannot double bunk in the MCC then a number of people who perhaps should be in New York City including -- it did not happen in this case but it could -- pretrial detainees will be moved away from their family and friends, away from their lawyers --

QUESTION: You cannot put them in the state facility in New York. They have got more than their quota.

MR. FREY: We could not but this is the kind of issue that would have been explored at a trial and it is not simply administrative convenience of the administrators but encompassed within this rubric is the welfare of the people committed to their custody as a group. And when the MCC was

told, you cannot double bunk any more what happened was that 90 inmates who the Bureau of Prisons judged ought to be housed at the MCC were sent off to other facilities, possibly more crowded or for other reasons less suitable for them.

Now, I do want to, I think, save the balance of my time for rebuttal, if I may.

MR. CHIEF JUSTICE BURGER: Mrs. Bamberger.

ORAL ARGUMENT OF MRS. PHYLIS SKLOOT BAMBERGER

ON BEHALF OF RESPONDENTS

MRS. BAMBERGER: Mr. Chief Justice and may it please the Court:

The Government's application of the Compelling Interest Test as the appropriate standard for determining the rights of pretrial detainees ignores the historical and legal context of that standard and indeed, the very facts of this case.

Furthermore, the Government misconstrues the Second Circuit's test.

What we are dealing with here is the fundamental right of a pretrial detainee not to be punished. This right persists even though the pretrial detainee is placed in custody to assure his appearance in court at the time of trial. This fact of detention has not constitutionally been considered punishment because the Eighth Amendment permits bail and by inference, permits custody in lieu of bail in order to assure

the appearance of the defendant for trial.

QUESTION: Would you think, Mrs. Bamberger, that double bunking, as it has been described, is in itself punishment?

MRS. BAMBERGER: Double bunking, as the district judge saw it and found it, is an in-center punishment because it is not necessary in order to assure the appearance of the defendant at trial and for the security of the institution, which are the only two factors which can be considered in determining whether or not a condition of confinement that is above and beyond the fact of incarceration is punishment.

QUESTION: Would double bunking be a form of punishment in the military services, for example, in an Army camp?

MRS. BAMBERGER: Well, we have to look at the particular --

QUESTION: They are all detained under military discipline.

MRS. BAMBERGER: Are you talking about normal military conditions?

QUESTION: Army, Navy, Marine Corps.

MRS. BAMBERGER: Yes, Your Honor, there is a vast distinction between the governmental purpose in the military context and the governmental purpose here.

QUESTION: No, I am talking about double bunking. Now, you say -- you are supporting the idea that double bunking

is per se punishment.

MRS. BAMBERGER: Oh, no, Your Honor, indeed not. We are saying --

QUESTION: Well, I thought that was the way you answered it.

MRS. BAMBERGER: We are saying that overcrowding, which was in part caused by double bunking in this case on --

QUESTION: Overcrowding caused by double bunking or double bunking caused by overcrowding?

MRS. BAMBERGER: Well, there would have been no overcrowding if there had been no double bunking. The Government has never indicated on the facts of this case an inability to comply with the District Court's order. They have been in compliance for two years without a single request for a stay, without returning to the courts for relief from the order prohibiting double bunking --

QUESTION: How do you define overcrowding, Mrs. Bamberger?

MRS. BAMBERGER: Okay, we define it for purposes of this case, as the District Court sought and as he made findings. We have two people housed in a cell which the judge found was built for one.

The results of this housing of two people in a cell built for one was that there was a very small space for movement of the two people. He looked at it and he saw there was a

very narrow aisle.

Secondly, it requires urination and defecation in the close presence of the other person with the resulting discomforts which the judge described in his opinion.

QUESTION: Well, I do not mean to be anecdotal but the troopship I came back on in the Second World War had bunks stacked six-high in the hold of a ship and I do not think the common view then was that it was a form of punishment or that it was necessarily overcrowding, given the circumstances.

MRS. BAMBERGER: Well, I think, Your Honor, that is a point which can be easily explained. The Government's compelling interest in wartime is far different from the Government's compelling interest as it exists with the detention of presumptively innocent detainees.

The purpose of the wartime confinement was to create a fighting unit which could defend the Government -- which could defend this country.

QUESTION: But in military camps today when we are in no war you will find a considerable amount of double bunking.

MRS. BAMBERGER: Indeed, Your Honor and the conditions of confinement in a military camp, even in normal times, can be justified by the Government because of the Government's need to create a unified fighting force, capable of taking orders and directions and indeed, in wartime conditions living under very severe restrictions and conditions.

That is not true here. The Government's compelling interest is limited to making sure that the individual shows up for court and for protecting the security of the institution and the Government does not claim and, indeed, it never has, that overcrowding by double bunking in this case is justified by anything other than cost and convenience.

QUESTION: Maybe not providing each detainee a suite of rooms is not necessary to assure his showing up at trial, or not providing each one a private bathroom.

MRS. BAMBERGER: No, that is not --

QUESTION: I mean, what is the -- I do not understand the connection.

MRS. BAMBERGER: The connection in this case, Your Honor, is that the conditions which were imposed resulted in a severe loss of privacy and dignity as the judge found on the specific facts in this case.

QUESTION: Well so, arguably, would depriving somebody of a suite of rooms and a private bathroom.

MRS. BAMBERGER: Yes but there are admittedly limitations.

QUESTION: There are, are there not?

MRS. BAMBERGER: Yes, there are limitations and that is why this is not a per se case. That is why in every case --

QUESTION: Well, is it a per se case even with

respect to the class?

Now, by definition, these people are impoverished people or else they could have made bail and been out, released on bond. Would not it be necessary to compare their living conditions before they were in this facility with their living conditions in the facility?

MRS. BAMBERGER: Well, I --

QUESTION: Some might be better. Some might be worse and some might be arguably about the same.

MRS. BAMBERGER: That may very well be true, Your Honor but this is an imposed condition, a condition imposed by the government. Also, in a free atmosphere, the individual would be free to pick himself up and go to another street or take the bus or go to a museum or a library.

QUESTION: Well, that, you concede, could not be allowed to these people, do you not? You concede the legitimacy of pretrial detention, do you not?

MRS. BAMBERGER: Yes, we do concede that but what we are saying is that they are confined to this very small space. We can go -- the judge went further than just looking at the single cells with the exposed toilet and the excretory functions performed in the presence of another and the use of the bunk bed which on one wall causes cold air to blow in on the person sleeping on the top bunk so that his freedom of movement is restricted and if you shifted the bunk bed to the

opposite wall, one end of the bed would be blocking the window and the other --

QUESTION: Could he not put a blanket on?

MRS. BAMBERGER: They did put a blanket on him and what the judge found as a result of that was that the ventilation system was not functioning properly so that --

QUESTION: Well, but this is not supposed to be a spa. It is a prison.

MRS. BAMBERGER: Well, we are not urging that it be a spa. What we are urging is that in these conditions, on these facts, the individuals were deprived. And the judge found a minimal privacy and dignity. The Court of Appeals agreed --

QUESTION: Are bunk beds punishment?

MRS. BAMBERGER: Excuse me, Your Honor?

QUESTION: Are bunk beds punishment? Because if they are, I am going to apologize to my sons.

Would I not be obliged to?

MRS. BAMBERGER: Yes, you would except if he lived in a room like this where if he slept in the top bunk he would be unable to move and if he slept in the bottom bunk with a bunk bed in his room --

QUESTION: What do you mean, he could not move?

MRS. BAMBERGER: Because the air vents blew cold air right across the top of the inmate's body on the top bunk

bed so that his movement was restricted. He could not move his legs, he could not turn over, he could not prop himself up against the wall his body was not --

QUESTION: That is not because of his size. Everybody is not that big.

MRS. BAMBERGER: No, it would be because, Your Honor --

QUESTION: Well, it might be cruel and inhuman to put me in with another guy my size but how about 225-pound fellows? Is that punishment for them?

MRS. BAMBERGER: Well, it -- it --

QUESTION: Is it?

MRS. BAMBERGER: It would be if they could not move in the room.

QUESTION: If the room -- this size room and they have 225-pound guys in it.

MRS. BAMBERGER: Well, we are free to leave this room and --

QUESTION: No, they can move around in that room.

MRS. BAMBERGER: Yes but the judge found that they could not move around in that room.

QUESTION: Regardless of their size.

MRS. BAMBERGER: Regardless of their size.

QUESTION: You mean the walls shrunk?

MRS. BAMBERGER: No, it meant that after there was

the desk and the two chairs -- which the second chair had to be put in because there was a second person -- and the bunk beds that the room, that the aisle was too narrow for them to move around, that they could not leave each other's company in any way, that they were forced to remain together all the time and that within a few inches of each other they had to use the toilet facility and that when the bed was not placed on the wall with the vent it would be placed on the opposite wall where --

QUESTION: Was the lack of private toilet punishment?

MRS. BAMBERGER: Not if -- not per se. What the private toilet -- how the private toilet existed in this case was that there was no room for the person not using the toilet to remove himself --

QUESTION: My point, Mrs. --

MRS. BAMBERGER: -- for any distance except several inches or perhaps --

QUESTION: With this I am through. My whole point is, I understand the Government's position is that they were not permitted to show anything.

MRS. BAMBERGER: That, Your Honor, is not --

QUESTION: There is not anything but close there.

MRS. BAMBERGER: The record in this case disputes that. The Government filed several sets of affidavits. I believe what the Government is contesting in this case is that they were not given the opportunity to present their cost and

justification -- cost and inconvenience justifications. As a matter of law if the fundamental right not to be punished is infringed upon here by the conditions of confinement, cost and inconvenience is simply legally irrelevant.

Even under the Government's enhanced scrutiny test, cost and inconvenience cannot be the sole factors.

QUESTION: So what would you do in the meantime while you are building a new facility?

MRS. BAMBERGER: That question does not come up here because the Government has never asserted that a new facility --

QUESTION: Well, is there a new facility available?

MRS. BAMBERGER: The Government has never asserted the need for one. Here, on appeal in the District Court, the Government has had the right --

QUESTION: Well, I do not see how the Government can show anything when the court takes the position that two people in one cell is bad and a denial of due process. Period.

MRS. BAMBERGER: No but they did not say that.

QUESTION: What did they say?

MRS. BAMBERGER: The court said that with the functional unit system which was viewed by the Bureau of Prisons for this institution, the institution could not service a population which was in excess of the population for which the institution was built, 449.

QUESTION: Well, does not that require a new institution?

MRS. BAMBERGER: No, it does not require a new institution.

QUESTION: Well, does it not require another institution or turning them loose?

MRS. BAMBERGER: Not on this record. There is no indication of that.

QUESTION: Well, how else would you handle it on this or any other record?

MRS. BAMBERGER: The Court of Appeals found that the Government handled it simply by removing from the institution those inmates who were serving their sentences but were kept at the institution as part of a work force for the Government's own convenience.

QUESTION: Mrs. Bamberger, that leads me to the next question that has been on my mind. I gathered somewhere in these briefs -- which I read a good time ago, at Christmastime -- that there has been a change in the situation since this litigation was commenced and that there is now considerably less if, indeed, any overcrowding in this facility.

Am I mistaken about that?

MRS. BAMBERGER: Well, the Government has been in compliance with the Court's full order on overcrowding since August 28th, 1978 and they have never returned to the Court

with proof, with assertions, with facts which would indicate that they are incapable of maintaining that. In fact, they conceded in their brief that they are incapable of maintaining it.

QUESTION: And the fact is that there is no overcrowding of the kind about which you complained. Is that correct?

MRS. BAMBERGER: As far as I understand it, that should be --

QUESTION: And as the case moved.

MRS. BAMBERGER: Well, the Government says that they should be relieved of the obligations because the situation may come up again.

QUESTION: Well, it may but it has disappeared now, has it not? Have not they changed their policies? Do they no longer keep in custody here the work force?

MRS. BAMBERGER: They no longer keep in custody here --

QUESTION: Then why is not the case moot?

MRS. BAMBERGER: Well, I think Your Honor, with all due respect, has to ask the Government whether their statement in their brief that they intend to overcrowd --

QUESTION: Thank you for your suggestion. I will.

QUESTION: Well, if you comply with an injunction, presumably to avoid contempt, you can nonetheless appeal.

MRS. BAMBERGER: Exactly, Your Honor, but the point here is that the Government did not seek a stay of the double-celling -- the overcrowding, double-celling order. They never have. The full --

QUESTION: But that is not a prerequisite to avoidance of mootness.

MRS. BAMBERGER: There are two more factors involved here. First, they have never returned to the District Court claiming impossibility or that they have to construct a new institution or that there has been a substantial change in facts which requires them to be released of their obligations under the order.

QUESTION: Well, those may support your contention here that the order was proper but I do not see how they support the contention that the case is moot because the Court ordered the Government to do something that it did not want to do voluntarily. The Government complied with that order under the threat of contempt sanction and appeal.

MRS. BAMBERGER: Yes, well --

QUESTION: Well, it is conceivable that the case could become moot. If this place had burned down, there were no more MCC the case would probably be moot, would it not?

MRS. BAMBERGER: Yes, that is correct but it is the Government's position here that leaves it open because they say that if the need -- if they say there are -- if they have

a lot of prisoners again that they will put them in the institution, convicted, nonconvicted, pretrial, whatever it may be. And the other fact is --

QUESTION: Mrs. Bamberger, please do not push the point that it is moot because if it is moot your injunction is wrong.

MRS. BAMBERGER: No, I am not pushing that it is moot. What I am urging Your Honor is that we have a situation here which the Government claims is capable of repetition and we are urging that this order is proper on that assertion. To return to the question of the Government's compliance, the District Court included in its order a provision which would permit the warden of the institution to certify that he needed to overcrowd because of an emergency or immediate severe overcrowding. The Government has never availed itself of that portion of the order.

QUESTION: But is not the Government's position as a matter of law that it is entitled to act on its own without going to the District Court and asking for a certificate?

MRS. BAMBERGER: It does not have to go to the Court. It just has to file a copy of its own certification with the Court.

QUESTION: Well, is not its position that it does not have to be subjected to that sort of requirement?

MRS. BAMBERGER: Its position is that but even

though that order is in effect now, the prohibition on overcrowding is in effect now while the case is before this Court, they have not used that remedy.

QUESTION: Well, but if they feel the remedy is improperly imposed as a matter of constitutional law, I suppose they have a right to appeal, even though you suggest they have perhaps an easier out by simply complying with the order but that does not moot the case.

MRS. BAMBERGER: No, no, we are not assuming that the case is moot. We are just saying that there is no factual assertion in this record for the Government's justification that cost and inconvenience permit the overcrowded housing that existed in this facility at the time that this case was tried, that those conditions, those specifications --

QUESTION: Mrs. Bamberger, how can costs or inconvenience have anything to do with the question of whether the particular condition is punishment or not?

QUESTION: It is invalid.

MRS. BAMBERGER: Well, that is the Government's theory and I do not understand that because if it is --

QUESTION: And either it is punishment or not. If it is punishment, it seems to me they concede they would have to spend whatever money is necessary to remove the punishment.

MRS. BAMBERGER: That is exactly the point.

QUESTION: So why are we fighting about money?

MRS. BAMBERGER: Well --

QUESTION: I do not understand.

MRS. BAMBERGER: With that I will move on to one additional --

QUESTION: Before you move on to that, will you tell me, at least, what authority the District Court or the Court of Appeals relied upon to say that the ancient remedy of habeas corpus is a class action? To be used under a class action umbrella?

MRS. BAMBERGER: There have been decisions which I do not have in my head at this moment, Your Honor, in the Florida and California federal courts involving capital punishment sanction in which those cases decided the issues based upon class action status.

QUESTION: Was it a habeas? Were they habeas --

MRS. BAMBERGER: I believe, Your Honor, that they were habeas corpus proceedings. Habeas corpus has been used by the courts in the Second Circuit, for instance -- for instance I cite Sastre against McGinnis -- to release an individual not necessarily from full custody but from those conditions which are unconstitutional .

QUESTION: Well, but in a class action, that is all I am addressing myself to now.

MRS. BAMBERGER: I see. I believe that there are cases which I will be happy to supply the Court with.

One additional fact that the Court considered in the overcrowding issue was the entire set-up of the functional unit system where inmates had to spend virtually 23 hours of every day in that one functional unit and Mr. Frey described for the Court that it meant that the inmates were confined to this area for virtually all activities.

Now, what the judge found was that the institution could not supply the activities which these multipurpose functional unit rooms were supposed to supply because of the overcrowding and this resulted in a breakdown in functioning of the institution.

QUESTION: Mrs. Bamberger, what if the place had been designed originally so that the sleeping rooms were to house two people in exactly the way that the Government ultimately ended up housing them but that the other facilities had met the standards that you think they ought to meet so that it was not a question of later putting in more people than they were designed for but just designing a more closely-confined sleeping room. Do you think that would be unconstitutional?

MRS. BAMBERGER: I think that that would present a more difficult case because --

QUESTION: Why?

MRS. BAMBERGER: Well, because the conditions in the room, the denial of privacy, the cold air blowing in in the vent, the presence of the exposed toilet would still exist.

QUESTION: Well, supposing that was all present but it was simply designed that way; the Government just decided to put twice as many people but that was the architect's plan.

MRS. BAMBERGER: If that was the architect's plan I would submit that the Court could disregard the architect's plan just as though, just as the Court could consider it as an element in deciding whether the room was appropriate for housing more than one person.

QUESTION: So it is not a question of going beyond what the capacity of the prison was originally supposed to house, it is a question of some standard that a court gets from somewhere as to how many square feet each prisoner should have regardless of what the architect plans.

MRS. BAMBERGER: That is correct and, indeed, the Bureau of Prisons has itself, has presented testimony in cases which would indicate that 50 square feet is the minimum required per inmate in a cell in order to give him adequate movement space, adequate psychological space. That testimony is cited in Campbell against McGruder by the D.C. Circuit. The draft standards proposed by the Justice Department indicate that the space which was provided per inmate in this double-celling overcrowded situation is inadequate.

QUESTION: Do you think those are absorbed in the Constitution?

MRS. BAMBERGER: I do not think that they are

absorbed into the Constitution but I suggest to the Court that they are valid evidence which can be considered expert evidence from, in the case of the Government draft standards, its own correctional officials which would indicate what they believe to be adequate and I think that is evidence which the District Court considered and which is appropriate to consider in making an evaluation.

It is the same way in the medical case, doctors' assertions are not constitutional principles but they are relevant evidence in determining what is the proper legal standard to apply.

QUESTION: Mrs. Bamberger, if you have finished responding to Mr. Justice Rehnquist I would like to ask a question. You have emphasized privacy. Does that mean that you would take the same position if the room were, say, the size of an ordinary double room in a small-town hotel with twin beds? Do you object to the fact that two people are in the same room?

MRS. BAMBERGER: No, sir. There is no objection to that and the record does not present that in this case.

QUESTION: What are the dimensions of these cells? I know they are in the record but I cannot put my hand on it.

MRS. BAMBERGER: They are about 75 square feet.

QUESTION: Well, what are the dimensions?

MRS. BAMBERGER: It is --

QUESTION: Thirty feet long and how many feet wide?

I thought I saw something --

MRS. BAMBERGER: Yes, they are in the Supplemental Appendix brief.

QUESTION: I think I saw that somewhere.

MRS. BAMBERGER: Excuse me, Your Honor.

QUESTION: They cannot be much over ten by seven and a half.

MRS. BAMBERGER: That is right.

QUESTION: They cannot be anything over over ten by seven and a half.

MRS. BAMBERGER: My math is none too good.

QUESTION: Well, what are they?

MRS. BAMBERGER: Approximately ten by seven and a half.

QUESTION: Are you relying on the Chief Justice or --?

MRS. BAMBERGER: Well, I think he is good authority.

Now, in this room the toilet juts about two feet into the center of the room so that --

QUESTION: Is that opposite the bunks?

MRS. BAMBERGER: I am sorry?

QUESTION: Is the toilet opposite the bunks?

MRS. BAMBERGER: Well, it is not exactly opposite because it is into the middle of the room so that if the bunk bed were on the side where the toilet juts out toward, the bottom bunk would be just inches from the toilet and the other

end of the bed would be at the window.

QUESTION: How far is the mattress on the top bunk from the ceiling?

MRS. BAMBERGER: That fact is not in the record, Your Honor and it --

QUESTION: I thought you knew because you said that one could not turn over and one could not --

MRS. BAMBERGER: No, it was not the ceiling height, Your Honor, that was of such significance. It was the height of the vents which supplied the air that went in and out of the room.

QUESTION: I see, the cold air is what prevents one from turning over.

MRS. BAMBERGER: That is right. It is about one foot above the body level is what the judge found, for the person lying on the bed.

QUESTION: How wide are the bunks?

MRS. BAMBERGER: There is only one piece of evidence in the record which would indicate that and that was one of our experts who testified that the bunks were six feet by three feet. They are six feet long by three feet wide.

QUESTION: So a bunk three feet wide in a room seven and a half feet wide would leave four and a half feet and you said that people could not pass each other.

MRS. BAMBERGER: Well, the aisle is, the judge found

that it was approximately 30 square feet in width -- I am sorry, 30 square feet so it would be four -- if it were --

QUESTION: The square feet would not necessarily affect the width of the room. It would depend on how they were structured.

MRS. BAMBERGER: No. That is correct. So if it were ten it would be three feet --

QUESTION: But my point is that you were saying they could not pass each other.

MRS. BAMBERGER: Well, it is about three feet wide, the width of the aisle that was left in the room.

QUESTION: It would be tight but your math is a little different from mine. Perhaps you are right.

MRS. BAMBERGER: In any case, the judge made a specific finding --

QUESTION: In any case it is crowded.

MRS. BAMBERGER: -- that that space would make it very crowded and very difficult to move about.

QUESTION: Are the rooms rectangular in shape? I think some of these facilities have triangular rooms.

MRS. BAMBERGER: They are -- no, they are not triangular. They are irregular because of the way the fixtures for plumbing and electricity cut into the room.

These are all in Exhibit 1 to the Government's 9G statement and they are exhibits before the Court and so the

scheme of the room with the placement of the articles is in that.

The Government also relies upon a distortion of the Second Circuit's case to make its argument here. The Second Circuit said that even though there was a compelling interest not to be punished by conditions which were more severe than necessary in order to justify appearance in court and the security of the institution, the particular intrusion imposed by the Government has to be a substantial intrusion so that even the application of the Second Circuit's Compelling Interest Test would leave the Government enormous amounts of room in which to function without returning to the Court each time it had to make a decision and indeed, that is what Judge Kaufman said in his opinion on page 2a of the Petition -- Certiorari Petition Appendix.

Judge Kaufman says twice that the intrusions must be substantial ones and I think that the Government's fears about their returning to court for every time they have something to do were just simply unfounded.

There are four other issues which were presented to this Court by the Government. The question of the anal and genital cavity perusals after each visit -- I believe my time is up.

MR. CHIEF JUSTICE BURGER: No, that is your five-minute warning.

MRS. BAMBERGER: Sorry. Anal and genital cavity perusals after every visit in a context of enormous security precautions, searches, strip searches which required the inmate to completely disrobe.

The second issue presented by the Government relates to the total prohibition on all written material to all inmates in the institution except those coming from the publisher.

QUESTION: The reason for that was to prevent drugs and weapons from being concealed in a book or related matters, is it not?

MRS. BAMBERGER: That is true but the District Court found and the Court of Appeals agreed that there were less-restrictive not-so-overbroad measures which could control that and --

QUESTION: Maybe we should make the district judge or some judge director of the institution?

MRS. BAMBERGER: No, Your Honor. And in fact, the District Court completely disowned that responsibility as did the Court of Appeals. They found inappropriate, as overbroad only the most extreme measures imposed by the Government.

QUESTION: Do you regard it as an extreme measure to prohibit books being handed to the prisoners without inspection?

MRS. BAMBERGER: Oh, yes but the Court said they could inspect. What the Government was doing here was, they

were totally prohibiting it. We asserted that they could search. They could limit the quantity. They could limit the amount that comes in each month. They could say only one, only two, but they could not totally prohibit. That was what the courts were getting at, that the restrictions which the Government imposed were way beyond what was needed to protect their security interests and based on the evidence in large part from the Government's own witnesses, the courts below found that their restrictions on First, Fourth and Fifth Amendment rights were far more than was necessary to protect the interest and that intermediate interests or intermediate regulations which involved less restrictions but could nevertheless protect the Government's security interests could be imposed and this did not prevent the Government from using a reasonable means.

The choice was theirs. They could do whatever they chose to do to protect their interests as long as the restriction that was ultimately found to be used by the government was not so overboard that it went beyond what was necessary to protect the interest.

QUESTION: May I ask two related questions? First, I am not clear. The regulations that were challenged here, were they just for the New York institution or are they the nationwide regulations of the Bureau of Prisons?

MRS. BAMBERGER: Yes, the --

QUESTION: Let me give you the second question and

you can answer them both together.

The second question is the strip-search problem. Does the record show that every time there is a visit to an inmate there is a strip search or is it done spasmodically?

MRS. BAMBERGER: It is done every single time, regardless of -- notwithstanding that the Government has enormous search processes, the strip search is still required --

QUESTION: The answer is yes, in other words.

MRS. BAMBERGER: Yes.

QUESTION: You need not tell me anything further.

MRS. BAMBERGER: Now, with respect to the nationality or the nationwide application of the rules. The Government's publisher-only rule has national application and indeed, the Government has indicated here that they do not even need that broad rule. They are going to narrow the rule.

QUESTION: How about the strip search regulation?

MRS. BAMBERGER: I am not aware of the general applicability of the strip search or of the other two. The Government's draft standards, by the way, indicate that observed visits need not result in anal and genital perusals in every situation without cause and our assertion here is that -- and the record establishes beyond any doubt that these visits are observed. There is a guard. The guard takes the inmate into the visiting room. There is a guard that constantly observes the visiting room.

The laboratories are not available to inmates. A visitor using the laboratory needs to have a key. There is a door in the lavatory room. The inmates wear jumpsuits and the testimony was uncontradicted that contraband could not be inserted by wearing those jumpsuits --

QUESTION: The Government quoted some witnesses that said diametrically the contrary. They said yes, they could be.

MRS. BAMBERGER: No, that -- the Government and we apparently have disputed to the significance of that testimony.

However, the District Court did make a finding that these perusals were not necessary and that there were alternative means and that therefore I think we can infer that every fact which was not found against us was found for us so that the Government does not claim that our interpretation was clearly erroneous.

What their witness was talking about was the ability to hide things orally and swallow them which certainly would not be covered by anal and genital inspections.

The question of the total prohibition on property from outside the institution is not nationally applied.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Bamberger.

Mr. Frey, you have about five minutes.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.

MR. FREY: Thank you, Mr. Chief Justice.

First of all, with regard to the testimony of Government experts in other cases about the amount of space that is necessary, the other case was a case that involved a cell in which people were locked for substantial portions of the day. It is central to the concept of the MCC and it bears repeating that people are not locked into their rooms except during sleeping hours so the inconveniences that we are talking about in this case of two people being in cramped quarters -- and we do not deny that the quarters are cramped -- is an inconvenience in terms of forced togetherness that exists for a period, a relatively brief period and in fact essentially none of the waking hours except when there are certain times when everybody has to go to their rooms for a cell count.

Now, there was no hearing in this case, not only to hear the Government's justification for resorting to double bunking but also no hearing to examine the effect of double bunking on the inmates.

The only evidence that was before the District Court in this case was the affidavit of the Government psychiatrist who had examined the facilities and who concluded that there was no substantial evidence that this was emotionally detrimental under the conditions that existed at the MCC.

Now, the response to this, on the part of both the District Court and the Court of Appeals in large part was, "We already settled this in another case."

The other case in which they already settled it -- and the Court of Appeals made a revealing error in their original opinion at page 18a of the Appendix.

They stated, "Inmate testimony revealed that double-celling had produced numerous disagreements over the choice of activities within the room, had spawned fights, charges of theft, frequent involuntary contact." That was testimony as they later amended the opinion in another case.

The other case was a case in which there were forty square feet for two inmates instead of seventy-six or seventy-seven as in this case. The other case was a case in which the inmates were locked in their rooms for approximately twice the time that they were in this case. The other case was the conventional cellblock kind of jail.

QUESTION: Mr. Frey, was the Government denied the right to put on testimony?

MR. FREY: Summary judgment was granted against us. We submitted affidavits. The District Court went to the jail, visitied it and said, as people have been known to say about obscenity, unconstitutional, I know it when I see it.

This, we consider to be an unsatisfactory way of dealing with this issue and I would like at this point to get back to the question of punishment.

One thing that is very important, you asked why are we inquiring into fiscal and adminsitrative reasons for the

double bunking? Nobody in the lower courts has based any decision on the grounds of what happened here was punishment. That was not the basis of the decision.

That is the argument of the Respondent in any effort to surmount the lack of authority to support the Court of Appeals' conclusion that a compelling necessity standard was appropriate to judge the restriction on the liberty of the inmates that was involved.

The Court of Appeals did not say this was punishment.

Now, they say it was punishment but they do not analyze the concept in the way this Court has analyzed it. That is, they do not look to the standards in Mendoza-Martinez that suggest how you go about the inquiry of determining whether or not something is punishment and we think if you apply that inquiry in this case you would not conclude that what happened here was punishment so I come back to the point that the role --

QUESTION: It is your submission that unless or until there is a finding that this amounts to punishment, the due process clause is not implicated?

MR. FREY: Well, our argument is that unless or until there is a finding that there is a lack of a reasonable relationship under whatever level of judicial scrutiny might be given to the Government's justification between the practice of double bunking and legitimate Governmental objective that might support that practice, the practice stands.

QUESTION: So then, in other words, you do not accept the theory suggested in my question. You think that it violates the due process clause even if it is not punishment. That is the way I understood your answer.

MR. FREY: We think that it could but that is because we do not think the concept of punishment has a useful role to play in analyzing the due process clause.

QUESTION: Well, how is the due process clause implicated?

MR. FREY: I --

QUESTION: Obviously, I think everybody would agree that Government cannot punish somebody until or unless he is convicted of a criminal offense beyond a reasonable doubt. And therefore you cannot take a pretrial detainee and whip him or do anything else that is obviously punishment.

MR. FREY: Right.

QUESTION: Now, then, that would clearly implicate the due process clause of in this case the Fifth Amendment but absent a finding of punishment, how is the due process clause involved? If it is at all.

MR. FREY: Well, that now depends upon what view you take. The view that you have taken in the Moore case, I believe, and perhaps in other places, is that it has to be one of a specific category of interests that are fundamental and that are subjected to search and scrutiny and punishment would be

such an --

QUESTION: Well, here we get to the Constitution and in order to find the answer to a constitutional question you look at the Constitution, do you not?

MR. FREY: Well, I understood the Moore case to suggest that there were five votes on this Court at least for the proposition that the due process concept is a"rational continuum"in Justice Harlan's words and that it does not include just a series of points that are pricked out.

In our view, of course, it does not matter to the disposition of this case. We were entitled to a hearing to show the reasons why and to explore the effects of the conditions.

QUESTION: Well, if it is punishment, all the reasons in the world would not make this constitutional, would it? If you showed there are good reasons to whip these people twice a day.

MR. FREY: I agree. If it is punishment we would have no defense.

QUESTION: Then there would be no defense at all, constitutionally.

MR. FREY: That is correct.

QUESTION: I think that you would concede, though, that if the cells were six -- if they had ten square feet in them and two people, just room for two chairs and they kept them in there 24 hours a day, would you think that you could be

enjoined from doing that?

MR. FREY: Yes, we could be.

QUESTION: On the grounds of the due process clause.

MR. FREY: Well, yes, on the grounds of the due process clause. Now, there are two separate ways, however, to look at the due process analysis.

One is an importation of the Eighth Amendment standard into the due process clause and the second is to view it independently as a liberty interest not to be subjected to overcrowded conditions.

QUESTION: No, but that involves punishment, does it not? The Eighth Amendment.

MR. FREY: Well, the Court has --

QUESTION: That means finding that there is some punishment.

MR. FREY: The Court has, I think -- the courts have approached that concept in a pragmatic way. That is, they are prepared to say that conditions of confinement that fall below minimal standards --

QUESTION: Mr. Frey, let me get one thing straight. I take it you are making the same argument here that if this facility had been designed the way it has been used --

MR. FREY: WEll --

QUESTION: This perhaps is not irrelevant but it

is not crucial that it was planned to hold X number and all of a sudden it had to hold 2X.

MR. FREY: Well, the case might be different because the Court of Appeals made its per se prohibition turn upon the design quality of the -- or aspect of the case. It was designed for one person and they said you cannot put two people in a room designed for one.

QUESTION: Well, my question still is that if it had been designed the way it had been used you would still be here defending it.

MR. FREY: We would defend it, of course.

QUESTION: Yes and you would have won in the Court of Appeals.

MR. FREY: We might have won in the Court of Appeals. That was the point I was trying to make.

QUESTION: Well, Mr. Frey, with respect to the publisher-only rule you indicate in your briefs, as I remember, that the government has now changed its practice and policy and does no longer enforce such a rule with respect to paperback books.

MR. FREY: That is correct.

QUESTION: And that therefore to that extent you are not --

MR. FREY : We are not asking --

QUESTION: -- complaining, you are not asking that

the Court of Appeals judgment be disturbed in that aspect.

MR. FREY: That is correct.

QUESTION: Now, how about the more general change of conditions in the overcrowding in this facility?

MR. FREY: Well --

QUESTION: Is it not, do you not represent to us now that there is no more overcrowding?

MR. FREY: We have explained to the Court that we have been able to comply with the outstanding injunction because the number of pretrial detainees has at present -- is dramatically lower than it was two years ago.

QUESTION: But you are still complaining. Why?

MR. FREY: We still take the position -- the population in the institution at present is fluctuating at or near 449 people. The present capacity --

QUESTION: It was designed for 449, was it not?

MR. FREY: It was designed for 449.

The present capacity in terms of numbers of beds is higher because there are 30 extra beds in the dormitory so actually up to 479 could be held.

In fact, as a practical matter you cannot always do it because you have classifications. That is, you have a unit for women. Male prisoners are not put in that unit. You might have ten empty beds in there that you simply cannot use and there are other kinds of problems like that but it is our

position that an injunction has been issued against us that we believe is improper and unauthorized and without constitutional basis and that we would if the need arose again, and it may, resort to double bunking procedures.

QUESTION: So you would vigorously object to any suggestion that this case is moot.

MR. FREY: Well, I do not know -- I do not -- we would object to a disposition that involved, let us say, a dismissal of the writ.

I do not know that we would object to a disposition of vacating the injunction and remanding it. We just think that under the -- I think the United States against W. T. Grant is a case which indicates that it would not be moot where we say that we will again do what the injunction prohibited.

QUESTION: Yes.

MR. FREY: I do not know in the District Court when it gets down there if you do reverse whether there will be a meaningful controversy because I do not know how the District Court is going to decide whether double bunking is justified at a time when it is not --

QUESTION: When it does not exist.

MR. FREY: It does not exist.

QUESTION: Mr. Frey, do I understand the Government concedes or is taking no position on the question of whether the writ of habeas corpus is subject to a class action?

MR. FREY: Well, I --

QUESTION: Is that not a very important question?

MR. FREY: It may be a very important question. My understanding -- when I made inquiry about that I was advised that there is some Court of Appeals authority to the effect that habeas --

QUESTION: None here.

MR. FREY: -- class action -- there is none here. I am simply --

QUESTION: Do you not think that is an important question in this case?

MR. FREY: I think it is an important question. I do not think it is an important question in this case because we did not raise it and so while perhaps it would have been an important question that we might have raised -- I do not mean to be facetious. I am not clear that it is before the Court presently for decision.

QUESTION: Well, if there is no jurisdiction, it is before the Court, whether anyone has raised it or not.

MR. FREY: Well, but there is a distinction between the kind -- the subject matter jurisdiction and habeas corpus over a claim and the question of whether class action was improperly certified. We do have another case pending on this.

QUESTION: But it is one which deserves some exploration, would you not agree?

MR. FREY: Well, we would be prepared if the Court wants us to, to research the question and submit our views on it .

MR. CHIEF JUSTICE BURGER: Well, we will pass on that later.

We will resume arguments at 1:00 o'clock but subject to Mr. Justice White's question.

MR. JUSTICE WHITE: Now?

MR. CHIEF JUSTICE BURGER: Yes. He will not be back at 1:00 o'clock.

MR. JUSTICE WHITE: Well, he might if you ask him.

QUESTION: Mr. Frey, do you think the issue on the books is moot? Is that what you are suggesting?

MR. FREY: No. No, we are not suggesting that --

QUESTION: No?

MR. FREY: -- at all.

QUESTION: What are you suggesting?

MR. FREY: We are suggesting that we are not requesting relief except as regards hard-cover books.

QUESTION: But you raised this question in your petition.

MR. FREY: We have raised it in our petition.

QUESTION: And you briefed it.

MR. FREY: Well, we -- the way we -- at the time that we briefed it the policy had already been changed and our

briefing was intended to focus on the hard-cover.

QUESTION: So does that mean that the issue has become moot since the filing of the petition for certiorari?

MR. FREY: I think that if the hard-cover books were not involved, if the injunction had been issued only against soft-cover books, then I think the issue would be moot. As I was saying earlier, we have no intention --

QUESTION: And the injunction would then be vacated to that extent?

MR. FREY: I guess. I am not sure that it would be a matter of --

QUESTION: All right, thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

[Whereupon, at 12:03 o'clock noon the case was submitted.]