In the

Supreme Court of the United States

JAMES A. RHODES ET AL.,)
)
PETITIONERS,)
) No. 80-332
V.)
)
KELLY CHAPMAN ET AL.)

Washington, D.C.
March 2, 1981

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JAMES A. RHODES ET AL.,

Petitioners,

v.

KELLY CHAPMAN ET AL.

No. 80-332

Washington, D. C.

Monday, March 2, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:04 o'clock p.m.

APPEARANCES:

ALLEN P. ADLER, ESQ., Assistant Attorney General of Ohio, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215; on behalf of the Petitioners.

MRS. JEAN P. KAMP, ESQ., Legal Aid Society of Columbus, 40 West Gay Street, Columbus, Ohio 43215; on behalf of the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Rhodes v. Chapman.

Mr. Adler, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF ALLEN P. ADLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ADLER: Mr. Chief Justice, and may it please the Court:

This case is here on a writ of certiorari to the United States Court of Appeals for the 6th Circuit for that court's affirmance of a decision of the United States District Court for the Southern District of Ohio holding that double-celling at the Southern Ohio Correctional Facility is unconstitutional.

The single issue before this Court is whether the double-celling of prison inmates constitutes cruel and unusual punishment.

QUESTION: I thought that the District Court at one point in its opinion says it was not holding that double-celling per se was unconstitutional?

MR. ADLER: That's true. The District Court said that it was not holding double-celling per se was unconstitutional, but at three or four different places in that opinion it held that double-celling was unconstitutional. In the

record in the case the judge states another three or four times that the question before the court is a question of double-celling.

QUESTION: You say in effect that since he found nothing but double-celling as a disadvantage to the prisoners he must have held double-celling was unconstitutional?

MR. ADLER: Well, he found a few other unrelated things not to be to his liking. He found nothing in the area of necessary services to be deficient. He only found that double-celling was unconstitutional.

QUESTION: Mr. Adler, would you say that there are some inconsistencies in the district judge's discernment here?

MR. ADLER: I definitely would. As I was saying, the single issue before this Court is whether the double-celling of prison inmates constitutes cruel and unusual punishment where the inmates were provided with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety.

The District Court found SOCF to be a top flight, first class institution, built in the early 1970s. It found the institution to be quiet, light, and airy, the food and food service facilities to be completely adequate. It found the institution to be comfortable, not to be hot or stuffy. It found no excessive noise, and few odors. The visitation

facilities were more than adequate. There had been no increase in the level of violence in the institution, the inmate to guard ratio was better than that recommended by various experts, the lighting was adequate, the plumbing was adequate. 1,150 inmates were working, 426 inmates were attending school. School facilities were light, airy, and well equipped. There was a modern library containing 25,000 volumes, and the law library was adequate; there was no evidence of indifference to the inmates' medical needs. Medical care was adequate. The question of the adequacy of clothing was not raised, nor was the question of disease or illness.

Because the District Court found that prisoners at SOCF were provided with all the services necessary to maintain their lives and health, it cannot now be argued that the institution was unconstitutionally overcrowded. It has been argued that the District Court did not end double-celling and therefore only reduced the inmate population to ameliorate what it saw to be overcrowded conditions.

QUESTION: General Adler, can I ask you just a question about the facts for a moment, and the relief?

The case was decided, I think, in 1978, if I'm not mistaken. And I think the judge ordered you to reduce the population by 25 inmates a month, as I remember the relief. And if my arithmetic is correct, I assume that the order probably brought you down so you don't have any double-celling

anymore?

MR. ADLER: That's correct. They achieved a population of 645 sometime in July of 1979.

QUESTION: So we're kind of arguing -- I understand the State still has an interest and it's not moot but it's kind of a theoretical problem now, I gather.

MR. ADLER: Well, the inmate population of the State of Ohio since this case has been decided had gone up and not down, so we have more of a problem now on a statewide basis than we did at the time.

QUESTION: But not actually -- but not in this particular institution? You're really fighting for the right to transfer people back in, I guess?

MR. ADLER: That's correct. It's the only adequate maximum security institution the State has. And at the time the case was tried the State of Ohio felt, or the administrators felt, that they had 2,300 maximum security prisoners. By reducing that population that would mean maximum security prisoners in the medium security institutions, which has heightened problems in those institutions.

QUESTION: General Adler, actually, of course, it's the Court of Appeals' decision which we're reviewing, which is somewhat perfunctory. At A-3 of the petition, the Court of Appeals says, "Upon consideration of the record on appeal together with the briefs and oral arguments of counsel the

Court concludes that the findings of fact of the District Court are not clearly erroneous on this, that its conclusions of law are permissible from the findings of fact."

Now, isn't that a somewhat unusual statement from a court of appeals to say that a conclusion of law is permissible from a finding of fact? Doesn't a court of appeals ordinarily say it's either right or wrong?

MR. ADLER: I would much prefer if they would say either it's right or its wrong. To tell you the truth, I was very disappointed in that opinion, contrasting with all --

QUESTION: Well, take this or any opinion you lose.

MR. ADLER: Well, in contrast with the recent opinion that came out of the State of Colorado, an opinion of the 10th Circuit that ran on for, I think, 80-some pages, this case was dealt with in less than a page and a half.

QUESTION: Well, on that basis you might say that the 10th Circuit was 50 times as wrong?

MR. ADLER: Possibly.

QUESTION: Mr. Adler, now that we have you interrupted, may I ask something? I notice at A-36 in Judge Hogan's findings of fact, he recites a number of empirical social science studies, as I understand them: the American Correctional Institute, National Sheriffs Association Handbook, Manual on Jail Administration, National Council on Crime and Delinquency, et cetera, and so forth; all of which come up

with some conclusions as to the minimum requirement per inmate in the way of cell space. Have you any suggestion? Incidentally, how did that all get in, do you remember? How did that get into the record? Is this something of which Judge Hogan took judicial notice? Or -- ?

MR. ADLER: If my memory serves me, I don't believe --

QUESTION: I beg pardon?

MR. ADLER: If my memory serves me, he may have taken judicial notice of that. I do not remember that being introduced as an exhibit, and I don't remember oral testimony on that.

QUESTION: Well, have you any suggestion -- I don't see any in the brief -- how we ought to treat social science studies of that kind in deciding Eighth Amendment questions?

MR. ADLER: My opinion is that they should be treated for what they are. They are desires.

QUESTION: They are opinions of the writers, opinions of the authors.

MR. ADLER: Absolutely. And those opinions have changed over the years. I checked the American Correctional Association standards. In 1946 they required 75 square feet per inmate counting cells, day room areas, exercise areas, and hallways.

QUESTION: Well have you or the State any suggestion

as to what would be an adequate amount of floor space per prisoner? Fifteen square feet? Ten square feet, or what?

MR. ADLER: Well, my suggestion would be that where it can be shown that because of the lack of floor space there is a deprivation in one of these areas, these core areas -- sanitation, personal safety, shelter, that's where the cutoff should be, and not just because someone picked 60 feet out of the air and sets that as a minimum standard.

QUESTION: What do you suggest?

MR. ADLER: I'm no expert in that area and I, like I say, I could make no suggestion. As I stated, I personally --

QUESTION: The State made no submission as to what it thought might be minimum, did it?

MR. ADLER: As I stated, our prison administrators desired single-cell inmates at Lucasville in 63 or 68 square feet. That's their desire. They would love to live with the standard. But the present population, due to the present population, they cannot.

QUESTION: Well, just, you mean, as a matter of it being more comfortable than at 68 or 70?

MR. ADLER: They would like to single-cell, they would desire to single-cell, if it were at all possible. Their position is that double-celling inmates in that institution was the best alternative to single-celling inmates

in that institution.

QUESTION: Did the authorities in Ohio recognize that there is any minimum at all?

MR. ADLER: I think that's what they're paid to do. I'm sure that when they have problems that's --

QUESTION: Those things that they desire, they'd like to have single-celling, they'd like to have 68-70, but it hasn't worked out that way. Actually, what has happened is, you have these conditions in the prison of -- what is done? 34 feet, something like that?

MR. ADLER: Probably around 34 feet inside the cells, but that doesn't take --

QUESTION: And even your own authorities think that's not a desirable -- ?

MR. ADLER: That's not desirable; no. They do not desire to double-cell that institution. They would much rather have that institution single-celled.

QUESTION: I take it your position is that everything that's undesirable is not necessarily unconstitutional?

MR. ADLER: That's my position. If desires are a constitutional minimum, I think we're all in a lot of trouble.

QUESTION: This facility was built in the early 1970s?

MR. ADLER: That's correct.

QUESTION: Originally to house how many, designed

to house how many inmates?

MR. ADLER: It was designed with 620 cells in the institution proper. Now, there is a --

QUESTION: Does that mean 620 inmates?

MR. ADMER: 1,620.

MR. ADLER: Sixteen hundred. And there are now 2,300?

MR. ADLER: There were 2,300 at the time of trial. Now, we brought on the consulting architect, a gentleman named Robert Barnes, who was employed by the federal system for years. And Mr. Barnes' testimony was that he never designed any institution to hold any specific number of people, and to back up what he said, he pointed out that all the support facilities in the institution, if the population was supposed to be 1,620, all the support facilities were overdesigned. Currently, this institution has two dining rooms. One is all but shut down.

QUESTION: And Lucasville is near Columbus?

MR. ADLER: Lucasville is about 90 miles south of Columbus. It's near Portsmouth, Ohio.

QUESTION: I see, down the river?

MR. ADLER: Right.

QUESTION: And is the old Ohio State Penitentiary at Columbus closed up nowadays?

MR. ADLER: No, it is not. It was all but closed

as a result of this order. It was -- and -- also, the increase in population, it was necessary to reopen the Ohio Penitentiary and I believe they topped the population out there somewhere around 1,700. We have since agreed to close the Ohio Penitentiary by January 1, 1983.

QUESTION: It's about 100 years old, isn't it?

MR. ADLER: The penitentiary has been on that site for more than 100 years; probably the oldest building on that site must be close to 100 years old by now.

QUESTION: And that was a maximum security institution?

MR. ADLER: That was a maximum security institution when it was in operation and parts of it still are maximum security. Other parts are medium.

QUESTION: Well, 100 years ago they weren't classifying prisons in that way, were they?

MR. ADLER: Ohio's been classifying since about 1932, I believe. Ohio, I might add, has also launched a building program. They have the seed money, the planning money, to put up six new institutions. The State Legislature hasn't as yet funded the building but the plans are being drawn.

QUESTION: Is there still an institution for women at Marietta?

MR. ADLER: Marysville.

QUESTION: Marysville.

MR. ADLER: Yes. That's still there.

QUESTION: And for the criminally insane at Marietta?

MR. ADLER: No, at Lima. Although that's soon to be closed down. They're moving that operation around. There is also a -- well, there are many medium facilities at Marion, Lima, Chillicothe --

QUESTION: And that's medium at Mansfield?

MR. ADLER: Yes. And the old Mansfield Reformatory for younger offenders.

QUESTION: That was at Mansfield.

MR. ADLER: Lebanon. And they've just taken over the Boys' Industrial School in Lancaster as a reformatory-type operation.

Because the District Court found the prisoners at SOCF were provided with all the services necessary to maintain their lives and health, it cannot not now be argued that the institution was unconstitutionally overcrowded. It has been argued that the District Court did not end double-celling, therefore, only reduced the inmate population to alleviate what it saw to be overcrowded conditions. But the Court never found SOCF to be unconstitutionally overcrowded. It did find double-celling to be unconstitutional. The District Court took no action to remedy other conditions it found

objectionable but only ordered the inmate population reduced to what the court perceived as the single-cell capacity of the institution, thereby insuring that each inmate had private sleeping quarters.

The institution contained 1,620 cells measuring variously 63 square feet and 68-1/4 square feet. There are more than 20 acres under one roof.

At the time of trial SOCF had approximately 2,300 inmates. Although it was claimed that SOCF was overcrowded because of a great number of conditions, including double-celling, the court found deficiencies in only four areas: jobs; a delay in education; the number of social workers and psychologists had not increased along with the population of the institution; and it found some past deficiencies in the area of dental care.

QUESTION: One has to reason from the Constitution in a case like this, I suppose, and is overcrowding a synonym for cruel and unusual punishment?

MR. ADLER: Assuming this case was decided in the way other cases have been decided, the courts have held that the institutions are unconstitutionally overcrowded.

QUESTION: Well, is that just kind of a synonym for finding the conditions as a whole below some minimum standard of decency?

MR. ADLER: That's what we're asking. Our position

is that there are no parameters on which to decide these cases. A judge can conceivably take any combination of conditions, put them together, say I've applied the totality of conditions test, and find the institutional unconstitutional or find the inmates are being deprived of their rights beneath the minimum.

QUESTION: Don't most of those cases draw on the Cruel and Unusual Punishment Clause of the Eighth Amendment?

QUESTION: All of them do, don't they?

MR. ADLER: All of them do.

QUESTION: Well, in answer to my brother Rehnquist, I guess the answer is, the unconstitutionality has been found in a holding of violation of the Eighth Amendment.

MR. ADLER: That's correct.

QUESTION: The Court of Appeals didn't use the term. It said that the remedy provided by the District Court was a reasonable response. Now, apparently, they skirted the constitutional issue in terms, while apparently affirming a holding of unconstitutionality by the District Court.

MR. ADLER: Right.

QUESTION: Is that the way you read it?

MR. ADLER: The way I read it is that the District Court found the institution to be unconstitutional. They never found the institution to be in violation of the Eighth Amendment. He mentions the Eighth Amendment in the preface

to his findings of fact and conclusions of law, but at the end simply finds the practice of double-celling to be unconstitutional.

QUESTION: Well, it has to -- I would suppose, maybe your sister can tell us otherwise, but I would suppose that he must have found that it violated the Eighth Amendment's ban on cruel and unusual punishments.

MR. ADLER: I would have to go --

QUESTION: I can't think of any other basis on which it would be unconstitutional. Maybe we'll be informed --

MR. ADLER: Absolutely.

QUESTION: Educated by your sister. But --

QUESTION: Well, of course, the Court of Appeals explicitly said, we do not read, we do not read the district court holding that double-celling is unconstitutional. So notwithstanding the District Court's apparent finding of unconstitutionality, the Court of Appeals declined to read it that way.

MR. ADLER: "Under all circumstances." I believe they finish with that phrase.

QUESTION: Well, this is the only circumstance the court had any business dealing with.

MR. ADLER: Well, I think that language comes right out of the decision itself, where Judge Hogan says, I don't find it unconstitutional under all circumstances, just the

ones before me.

QUESTION: The only circumstance that the trial judge or the Court of Appeals were dealing with was this case.

MR. ADLER: Correct.

QUESTION: Not some hypothetical case.

MR. ADLER: Correct.

QUESTION: Well, certainly the Court of Appeals understood this case as being an Eighth Amendment case, as the first sentence of the per curiam opinion indicates clearly.

MR. ADLER: No, they were saying the District Court never found any condition or combination --

QUESTION: "This is an appeal from a judgment of the District Court finding certain conditions at a state prison to violate the Eighth Amendment prohibition against cruel and unusual punishment." And that's the only basis on which it could have been found unconstitutional, I think --

MR. ADLER: It can be the only basis.

QUESTION: As presently advised.

MR. ADLER: It can be the only basis for --

QUESTION: And that would always be a matter of degree. I suppose you would agree that the Black Hole of Calcutta would be a cruel and unusual punishment, not only overcrowding, but lack of ventilation and lack of light, and maybe lack of food.

MR. ADLER: I would; I would.

QUESTION: General Adler, perhaps this is the same point that Justice Stewart is making, but on the one hand, I suppose, Bell v. Wolfish establishes that double-celling is not always unconstitutional. I suppose you would agree that in some circumstances it might be, if you had, say, 14-foot cells or something like that.

MR. ADLER: Given the proper hypothetical case and the proper real case, I am sure that sooner or later I would agree.

QUESTION: And the question that I'd like to ask is, where is the line between the two extremes?

MR. ADLER: Okay. Our position is that the line between the two extremes is this. In Bell v. Wolfish this Court dealt with what was described as inconvenience and discomfort. And that's all that shows on this record, inconvenience and discomfort.

QUESTION: Well, that's not quite right because, as I understand the District Court's opinion, not necessarily as the result of the double-celling but as a result of the increased population in the prison, there was more violence and more serious incidents as well as --

MR. ADLER: In this case? No, sir.

QUESTION: That's the way I read it; yes.

MR. ADLER: No, sir. There was no increase in the rate of violence.

QUESTION: Not per prisoner, but there was more violence in the institution.

MR. ADLER: Correct.

QUESTION: But just -- you would say it was in arithmetic proportion rather than geometric proportion?

MR. ADLER: Right. It was proportional to the population. If there had been two different institutions with half of 2,300 inmates in each, we would have had the same violence or expected the same violence.

QUESTION: I see.

QUESTION: Mr. Adler, another difference too is in Wolfish most of them were temporary. Isn't that a major difference?

MR. ADLER: Well, that's what I was getting to.

QUESTION: Right.

MR. ADLER: In Wolfish and here, there is only inconvenience and discomfort. Now, the Court seems to hold --

QUESTION: Yes, but Wolfish was temporary. These men are in there for time.

MR. ADLER: That's true, but it's still only inconvenience and discomfort.

QUESTION: Well, is there a difference between inconvenience and discomfort for a week and inconvenience and discomfort for 100 years?

MR. ADLER: We're talking about average sentences

in that institution of about 28 or 29 months.

QUESTION: Well, can't one also say that the distinction in Bell v. Wolfish cuts the other way too? In that they were simply pretrial detainees who had been convicted of nothing in Bell v. Wolfish. Whereas, here, they're convicted and presumably are not challenging their convictions and lodged in a maximum security institution.

QUESTION: Which by itself implies inconvenience and discomfort, deliberately so. That's what imprisonment is.

MR. ADLER: Absolutely. Going to jail is an inconvenience and it's a discomfort. Now, I think you have to have something more for cruel and unusual punishment. And if my reading of Bell v. Wolfish is correct, and you certainly know if it is or it isn't, I read Bell to say that privation and hardship carried out over an extended period of time may be cruel and unusual punishment. But here we don't have the privation and hardship. So my question then is, does the extended period of time make a difference? Since we're only talking about an inconvenience and discomfort.

Now, the District Court did not find double-celling to be per se unconstitutional but found it to be unconstitutional when it was combined with factors that naturally flowed from the practice of double-celling or from the fact of imprisonment. The court found that the inmates were long-term. Well, they were prison inmates, and they were convicted

of felonies. The court found that the population was greater than the number of cells in the institution. Obvious. It also found that the average floor space available to each inmate in each cell was half, and it found the practice of double-celling to have been of long-term duration. The Court's fifth finding, that most double-celled inmates spend most of their time in their cells directly contradicts the evidence in the case, and the Court's previous finding that 75 percent of the inmates can be out of their cells from 6:30 in the morning to 9:30 at night. That's 15 hours each and every day. So, in fact, most double-celled inmates were out of their cells most of the day.

Now, the question of double-celling inmates -- the question here simply boils down to, does a prison inmate have a right to private sleeping quarters? And it's our position that the answer must be no. Two or more people sharing a room is commonly practiced in our homes, on college campuses, in our hospitals, nursing homes, and in the military. The question of double-celling prison inmates has been dealt with by four other federal appellate courts. It has been found to be constitutional in each case. Those courts have held that double-celling is not per se unconstitutional, and only rises to a constitutional question where it contributes to the overcrowding of the institution. At least two of these courts have defined overcrowding as a condition where

those things necessary to the maintaining of health and safety of the inmates are denied. Those things are adequate medical care, food, shelter, clothing, sanitation, and personal safety. And the courts below found no denials in those areas.

QUESTION: Well, wasn't the only factor here that the court fastened on was the double-celling? Did it find any other aspects of the prison life unsatisfactory?

MR. ADLER: It did find that the number of jobs in the institution had been watered down. Now, they had been increased, the number of jobs had been increased, along with the population. But they were watered down. Two inmates doing the same job, in some cases. They found a wait for education. He found no denial in the area of education but he found a wait for education to somehow be less than standard.

QUESTION: Well, what if a prison offered no education opportunities at all, would that be a cruel and unusual punishment?

MR. ADLER: Well, I found these particular findings by Judge Hogan to be particularly strange because in December, 1976, he ruled that prison inmates have no right to education, social services, or jobs. And then he tells us that we're not giving them immediate educations and therefore we're wrong. And I would assume that if you gave them no education

at all, you'd be running a constitutional institution. And as far as the wait for education goes, I don't think anyone gets an immediate education. I mean, schools start in September and end in June.

If there aren't any further questions, I'd like to reserve the balance of my time. Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Kamp.

ORAL ARGUMENT OF MRS. JEAN P. KAMP, ESQ.,

ON BEHALF OF THE RESPONDENTS

MS. KAMP: Mr. Chief Justice; may it please the Court:

The district judge here found that confinement of two men in a 63-square-foot cell in the totality of conditions which existed at Lucasville caused physical and mental injury from long exposure and therefore violated the Eighth Amendment.

QUESTION: Now, do you think the Court of Appeals acted on the constitutional issue?

MS. KAMP: Yes, Your Honor, I think the Court of Appeals looked at the findings of fact, as was quoted earlier.

QUESTION: Well, then why did the Court of Appeals say that they did not read the District Court as deciding the case on the constitutional basis?

MR. KAMP: I read the Court of Appeals to be saying that the District Court did not hold that double-celling

per se was unconstitutional, but rather that under the specific factual findings made about conditions existing at that institution, the double-celling was unconstitutional and that the remedy of reducing population was therefore proper.

QUESTION: In the language of its opinion in its penultimate paragraph, is the usual finding that we associate with Court of Appeals' opinions, finding no clear error. Now, that isn't the traditional way of dealing with making a constitutional finding, is it?

MS. KAMP: No, Your Honor, totality of conditions test is a test --

QUESTION: Well, is it constitutional or not? Not totality. That's a subsidiary question. Did the Court of Appeals in your view decide this case on the constitutional basis?

MS. KAMP: I think it did, Your Honor. It found that double-celling was not per se unconstitutional, just as the District Court had done. It affirmed the District Court's finding that double-celling in the conditions existing at Lucasville, for the period of time they'd existed there, was unconstitutional.

QUESTION: They said double-celling -- the prohibition of double-celling was a reasonable response. Is that a constitutional holding?

MS. KAMP: Your Honor, if all of the conditions at

the Southern Ohio Correctional Facility violate the Eighth Amendment and a method of ending the constitutional violation is to reduce the population, then, yes, I would submit that this is exactly like Hutto v. Finney; that you're taking a series of unconstitutional conditions which together make an unconstitutional whole, taking the least possible intrusive remedies to make again a constitutional institution. I think the 6th Circuit held that that was what the trial judge had done here.

QUESTION: Mrs. Kamp, do you get the feeling from the penultimate sentence of the Court of Appeals' opinion saying that the findings of fact are not clearly erroneous and its conclusions of law are permissible, that, say, if this case had come up before Judge Rubin in Dayton and he had found exactly the same findings of fact but held there was no violation of the Eighth Amendment, the Court of Appeals would have affirmed him?

MS. KAMP: I think, reading the 6th Circuit decision, they might well have. It's a time and totality of conditions test, is a very factual and intensive test, and to the facts found here which are not seriously in dispute about the length of time in cell, the length of time of confinement, the physical and mental injury caused by the confinement, the correct standard is clearly erroneous as applied. Now, as to whether the totality of those conditions reach an Eighth Amendment

standard, that's a mixed question of law and fact. It's the kind of question which I think district courts are particularly an appropriate forum to be deciding.

QUESTION: But then the penal systems of 50 different states are going to be subject to the views of 93 different district federal judges in 93 different districts.

MS. KAMP: No, Your Honor, because all of them have to reach the question of whether the Eighth Amendment has been violated, which means a finding whether, under the totality of conditions, the plaintiffs have been able to show an unnecessary infliction of suffering or --

QUESTION: But you say it's an intensely fact-specific thing that one judge could come out one way and one on the other on precisely the same facts.

MS. KAMP: Well, Your Honor, there could never be precisely the same facts. I think the four cases referred to by my opponent here show that courts looking at different prisons with somewhat similar conditions have come out with different results. That's correct. They've looked at the totality of conditions, they've determined whether that totality in fact caused genuine privation and hardship, violate contemporary standards of decency. If the answer was yes, then it was an Eighth Amendment violation.

QUESTION: Well, Mrs. Kamp, if the trier, the original trier is looking at the totality or one specific conduct

like, let us say, the hanging by the thumbs. The district judge must say, yea, or nay, on whether there's an Eighth Amendment violation, whether it's totality or a specific act. Is that not so?

MS. KAMP: Yes, Your Honor, it's so.

QUESTION: Well, what difference does it make whether he did it on totality or on a specific finding of one cruel punishment?

MS. KAMP: Well, there are some punishments, we would submit, that are so cruel as to by themselves violate the Constitution, such as hanging by the thumbs, such as housing people in 14 square feet, as was mentioned earlier. But that's not what the judge here did. He looked at all of the conditions together and found that double-celling as practised in this particular institution did violate the Eighth Amendment, and therefore he didn't need to reach that.

QUESTION: I hate to repeat it, but the Court of Appeals said that that's what he didn't find. The Court of Appeals said he didn't find that there was a violation here of the Eighth Amendment under all circumstances. Now, all circumstances brings us back to the totality.

MS. KAMP: Well, perhaps it would be helpful if I could talk about what the circumstances were that I think the trial judge relied on --

QUESTION: Well, it's very important to us, what

each of these courts held so we know what it is we're reviewing.

QUESTION: Can I direct your attention to A. 36, last paragraph, where he discusses the cells?

MS. KAMP: Yes, Your Honor.

QUESTION: In the last paragraph he says, he quotes from the Gates v. Collier case -- ?

MS. KAMP: That's right, Your Honor.

QUESTION: And the quotation says, as I read it, that it's a violation of "the Eighth Amendment prohibiting cruel and unusual punishment." Can we just throw that away?

MS. KAMP: No, Your Honor, on that page he's referring to the third of the factors which he considered crucial to the decision in the totality of circumstances. Specifically, he was referring to the size of the cell, 63 square feet; as long, perhaps, as this table, and perhaps twice as wide. He was pointing out that no contemporary standard accepts that kind of cell for two people, that it's been found in all of these --

QUESTION: Well, Mrs. Kamp, I guess you can answer the question I asked your colleague. These are all based on the empirical social studies, aren't they?

MS. KAMP: That's right, Your Honor.

QUESTION: And what's your suggestion as to the propriety of relying on studies of that kind in determining a cruel and unusual punishment matter?

MS. KAMP: Your Honor, I think it's extremely appropriate to rely on such standards. The medical profession in the AMA brief, which has been filed amicus here, shows the reasons for these standards have been developed, not as utopian ideals by any stretch of the imagination. They've been developed because the medical profession has found that you need a certain amount of space in order to preserve mental and physical health.

QUESTION: Well, is there anything to suggest what actually is the adequate amount, in this institution, of floor space per prisoner, to avoid a violation of the Eighth Amendment?

MS. KAMP: Well, what the trial judge did here, he found that in light of the length of time people were in the cells both on a daily basis and over the long term, that 50 square feet would be constitutionally required in order to comply with this kind of standard and and protect the mental and physical health of the prisoners in the institution.

QUESTION: Are you suggesting that 50 square feet --

MS. KAMP: No, I'm suggesting that the court's findings --

QUESTION: Did you argue at the trial?

MS. KAMP: I did not participate in the trial. My understanding is that the briefs did submit these standards of which 50 is the minimum.

QUESTION: And these studies were all submitted, were they, as part of the case?

MS. KAMP: My understanding is that they were part of the briefs.

QUESTION: Part of the briefs?

MS. KAMP: And that in the 6th Circuit some of the standards which have been developed since were also presented to the 6th Circuit.

QUESTION: Was any evidence tendered to the court as to the comparative amount of space for each seaman on a submarine?

MS. KAMP: I'm not aware of any of that kind of evidence, although I am aware now because of the AMA brief about the Army standard, which requires a minimum of 70 square feet and it says that if you have to go below that on an emergency basis for more than a week, you're going to have to assume that you're going to have increased disease and increased disciplinary problems. I think the court's finding of that was true, certainly not clearly erroneous, as amply supported by what was in the record here.

QUESTION: Well, isn't there some rule that unless you do it by stipulation, to offer simply a book in evidence, the opposing party has a right to cross-examine the person who has collected the statistics or arrived at the conclusions?

MS. KAMP: Your Honor, to be honest, the is the first challenge I've heard to the appropriateness of the court considering the contemporary standards of decency which are put out by organizations such as the American Correctional Association --

QUESTION: But what if you had an American Ex-Convict Society that said the minimum standards of celling should be 300 feet long and 200 feet wide? Don't you think the state would have a right to examine the author of that?

MS. KAMP: I would expect them to challenge those. They have never challenged the fact that these are the standards of reputable organizations and that they're based on sociological studies and medical and public health evidence which is available and common knowledge.

QUESTION: No one suggests, though, that they represent what is usual around the country.

MS. KAMP: No, Your Honor. There is no question that in this country Lucasville is not alone in being overcrowded and in being double-celled, and that's clearly why we think this is such an important case, that the District Court has to look at the prison to see if the fact, if the --

QUESTION: Is it cruel -- to see and decide whether it's cruel and unusual?

MS. KAMP: Under the conditions existing in the particular institution, Your Honor. Okay, if I could perhaps get

back to the factors which he found did lead to it. These were people who were serving sentences of four to 25 years or life, two-thirds of them. This had been going on for two years; it was expected to go on indefinitely. There was no indication that the State had any intention of stopping at double-celling or triple-celling, for that matter, and as was just said, Ohio had no limit it had set for itself on the amount of space per person.

Inmates were in these cells for most of the day with their cellmates. This was a specific finding of fact by the trial court, who held that the evidence in the case shows that inmates will be in their cells for most of the day with their cellmates.

QUESTION: Isn't some of this complicated by the certification of the matter as a class action? If you go back to the Weems case and the "cadena temporal" where they have a very particularized description of a punishment inflicted on one particular individual and he appealed and it was found to be cruel and unusual. And here what you have is really not so much saying that a particular individual or individuals are being cruelly and unusually punished, as that an institution is being condemned as being capable of inflicting, capable of cruel and unusual punishment.

MR. KAMP: Yes, Your Honor. I think what we're saying here is not that the punishment is disproportionate in

the Weems sense, but that as a method of punishment it is cruel and unusual because of the way it impacts on the class of people who are housed there.

QUESTION: But yet there are some who, as I read the District Court's finding, he would not have found as to them as individuals that they were suffering cruel and unusual punishment.

MS. KAMP: Yes, that's certainly true. There were approximately 300 people who were never double-celled and who had never been at issue in this case at all. And you're right, there were some who were out and who were in school and job programs who might perhaps -- he did, however, find that 80 percent of the population could be expected to suffer from some sort of mental or emotional disorder and that those conditions would be aggravated by double-celling in the sense of increasing aggressive behavior, increasing tension, increasing violence in a fixed space, even though not geometric. He also found that approximately 15 percent of the population was schizophrenic and that for these people it was extremely cruel. The evidence indicated that for schizophrenics to be in situations like this in a 14-hour-day lockup causes withdrawal to the point of sometimes even suicide. So he was looking at all of the conditions. There was no classification in this institution. The schizophrenics were not housed separately from the other inmates, nor were they given more time out of

their cell, or given single cells, for that matter.

QUESTION: Mrs. Kamp, how do you interpret the finding on page A-18 of the petition with respect to time spent out of cell? It says about 75 percent of the inmates who are in double cells have a choice of spending a considerable amount of their time outside of their cells. And on the preceding page, near the bottom, it says, "the occupants of 960 of those cells" -- and they identify the cells -- "are out of their cells some ten hours a day." Do you question those findings?

MS. KAMP: No, Your Honor. I think they are consistent. I think the first set of findings refer to the fact that on paper the dayrooms were open between 9 in the morning and 9:30 at night and that inmates did leave their cells prior to 9 for breakfast. He later finds that because of the maximum security nature of the prison, the fact that there's, you know, essentially no freedom of movement within the institution, the cell doors are only opened once every hour for movement back and forth; that as a matter of fact, inmates were required to spend 14 hours a day in their cells with their cellmates. And I think the trial judge recognized three or four different times in the decision the importance of the factor of time in cell, and his conclusion is that the evidence shows that most inmates are in, or, all inmates, are in their cells most of the time with their cellmates.

QUESTION: But you read the record to indicate that they had the privilege of being out at least ten hours a day?

MS. KAMP: That on the average they would be out approximately ten hours.

QUESTION: On the average.

MS. KAMP: Of the three-quarters of the population who had that privilege. Of course one-quarter of the double-celled population, which involved about 320 cells, were locked in their cells, essentially all of the time, allowed out either two, four, six hours a week.

QUESTION: Well, you had prisoners in different classifications, of course?

MS. KAMP: Yes, You're right. The general population were the three-quarters that had some freedom of movement. The other quarter were the people who were in protective custody or were in what was called voluntary idle. As we heard, there were not enough jobs available in the institution.

I think the distinction between this kind of prison system and a per se rule which Judge Hogan rejected can be seen in the Federal Bureau of Prisons, which has been set forth in the memorandum filed by the United States Justice Department. There they also double-cell, but they only do it with five percent of the population. Of the people who were in this --

QUESTION: Of those five percent, of course, the impact is the same as if it were the 95 percent, is it not?

MS. KAMP: No, Your Honor, because there's a different totality of conditions. Five percent in an uncrowded institution where services are available for a shorter period of time because you don't have all of the cells double-celled, is a completely different situation from the institution where double-celling is increasing all the time, where most people are in their cells most of the time, where there are minimimal social-psychological and that kind of services. Five percent overcrowding is something that can be dealt with totally differently than a 40 percent overcrowding as here, or potentially, of course, much worse.

QUESTION: Well, they're not normally in their -- confined in their cells most of the time, as you suggest?

MS. KAMP: Well, no, Your Honor. In the federal system eight-tenths of one percent --

QUESTION: They sleep in the cells. The only time they're confined is for some disciplinary measure.

MS. KAMP: I'm saying, if you're referring to Lucasville, it's much more than sleeping. It's, as the trial court found, about 14 hours a day, but of course he'd be in his cell with his cellmate. So this is not like Bell v. Wolfish where you were talking about seven or eight hours a day, or the Federal Bureau of Prisons where for most of them

they were talking about anywhere from five to eight or nine hours a day.

QUESTION: But here the District Court concluded that any reduction in the availability of dayrooms due to double-celling was not significant in any respect, didn't it?

MS. KAMP: He did find that with respect to conditions in the dayroom. That's correct. He clearly considered that in his finding that most prisoners were in their cells, all prisoners, for 14 hours a day or more.

QUESTION: Well, it's kind of circular in a way, because he seems to say that because of the overcrowding the dayrooms are less attractive and then because they're less attractive fewer people used them, and it's very difficult to get a handle on.

MS. KAMP: Well, Your Honor, I think all of that goes to the fact that this is a maximum security prison, where there is so little freedom of movement, wherever you go there's a threat of violence of the kind of assault, homosexual behavior, rape, that he did refer to as increasing. But this is not like the MCC in New York where people could just wander in and out of their cells back and forth to a dayroom. I think that's how you make it consistent.

This, as has been pointed out, is one of many, many cases where conditions in a prison have been challenged. And this Court in Hutto v. Finney impliedly approved the test

used by the district court there of totality of circumstances. That is the test which has been asserted by essentially every court, every lower court, that's dealt with the matter since then. And that it's a workable test. But this Court should not say that 65 square feet is always okay, or that it's never okay, or that 40 square feet is always or never, or any square footage. But this is the kind of question that has to be viewed by the District Court taking into account that the Eighth Amendment prohibits unnecessary infliction of pain and violation of contemporary standards of decency; that those are standards which can be reviewed; that the District Court here made explicit findings as to unnecessary injury, the violation of contemporary standards of decency, and that therefore should be affirmed, because those findings are supported by the record.

QUESTION: I take it you'd suggest that some of these social studies at least bear on contemporary standards of decency?

MS. KAMP: I think they're extremely relevant to contemporary standards of decency. They show the range in which the medical profession, the public health professions, and the correctional experts have seen as necessary to run a constitutional -- or adequate prison. Now, that's not clearly the same as saying they defined the constitutional limits.

QUESTION: Well, they're not public bodies.

MS. KAMP: No, certainly not, and they --

QUESTION: Do the specialists of our society make contemporary conditions of decency? Can those -- be standards?

MS. KAMP: No.

QUESTION: They may propose them, but do they make them?

MS. KAMP: I think the medical profession tells us what is necessary to preserve health. The Eighth Amendment tells us whether that standard is required by the Constitution.

QUESTION: Well, are you raising a health issue here?

MS. KAMP: Yes, Your Honor. The District Court here found mental and physical injury from long exposure to these conditions. There are specific findings about psychological harm done to the schizophrenic population and to the rest of the population insofar as it caused increased acting-out behavior.

QUESTION: The Court of Appeals didn't rule on that, did they?

MS. KAMP: Yes,Your Honor. The decision specifically refers to increased acting-out behavior, increased tension.

QUESTION: The Court of Appeals?

MS. KAMP: No, I'm sorry, Your Honor, the District

Court.

QUESTION: That's what I'm saying. The Court of Appeals is here, the District Court's not here.

MS. KAMP: The Court of Appeals, though, affirmed as not clearly erroneous those findings of the District Court.

QUESTION: Well, did you cross-appeal?

MS. KAMP: I'm sorry?

QUESTION: You didn't cross-petition, did you?

MS. KAMP: No, Your Honor, we accepted the findings of fact of the District Court.

QUESTION: We have to accept the Court of Appeals, if that's what been brought up here, don't you?

MS. KAMP: I'm sorry -- yes, of course, we have to accept the Court of Appeals, and we do stand by that decision.

In summary I want to say that the State has asked the Court to adopt a test similar to the language in Newman v. Alabama of minimum necessities. We would submit that that's the same test we're talking about here, that the totality of conditions requires that you look at all of the particular conditions within an institution and determine whether it violates the Eighth Amendment, and that the place to make that decision is in the district courts. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Adler?

MR. ADLER: Just a few things, Your Honor.

ORAL ARGUMENT OF ALLEN P. ADLER, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. ADLER: First, I again need to point out that Judge Hogan never found conditions at Southern Ohio Correctional Facility to be cruel and unusual, nor did he find any condition in that institution that shocked his conscience.

QUESTION: Why would he have done that? There is no test like that, is there?

MR. ADLER: If it's cruel and unusual punishment?

QUESTION: No.

MR. ADLER: I think someone's got --

QUESTION: Talking of conscience, is that the test under the cruel and unusual punishment?

MR. ADLER: Yes, it is, Your Honor. I think someone's conscience has to be shocked.

QUESTION: Your understanding of the court of Appeals, then, was quite different from yours, because the Court of Appeals begins its short per curiam opinion with a statement that the trial court did find certain conditions at a state prison that violate the Eighth Amendment prohibition against cruel and unusual punishment. That's the way the Court of Appeals opinion begins, at this first sentence.

MR. ADLER: That is what the Court of Appeals stated, but again, nowhere in Judge Hogan's opinion does he find anything that shocks his conscience or that he considers

barbarous treatment. Nowhere.

QUESTION: The Court of Appeals order -- or per curiam, however it's characterized -- doubles back on itself about fifteen lines later, and that is at least a partial contradiction of its earlier hints about the Eighth Amendment.

MR. ADLER: That's true; very true. Now -- Mrs. Kamp has referred to physical and mental injuries as a result of double-celling. Now, four psychologists and a physician testified during the course of this trial. None of those five men knew of any relationship between double-celling, crowding, and any increase in violence.

Also, I'd like to address the AMA standards, since there's never been an epidemic at the Southern Ohio Correctional Facility, and if some mental damage was done these prisoners, that damage did not manifest itself in any way. There was no increase in behavioral problems, there was no increase in violence, and there has never been a riot in that institution.

Now, as to space standards, one of the organizations cited is the American Correctional Association. Now, also appearing as a witness in this case was a Mr. Seigler --

QUESTION: Mr. Adler, let me ask you a question about, supposing you win this case and we say, on the record before us none of these things have been shown. And then you

continue the double-celling for ten years, and it gets even a little bit more crowded. Would res judicata protect you from relitigation of the problem that the longer period of incarceration and perhaps evidence of further harm resulting from several years of this practice?

MR. ADLER: I would hope so, as long as they could prove no harm has resulted. I'm sure if they alleged that a specific harm has resulted from the practice, that we'd be back in court on that question --

QUESTION: Now, say they do it in six months. They say, well, we really -- and they now allege, we now have a lot more evidence of harm than we had in the first trial. I suppose if you just have to allege additional harm, you never get the benefit of res judicata.

MR. ADLER: I assume that it would be a whole new case.

QUESTION: And I suppose it is possible that the longer these conditions persist, the greater risk you have that that might actually happen?

MR. ADLER: Yes. It did go on for some two years.

QUESTION: It's two years, I know, but they're talking about -- these are people who may be in for a good deal longer.

MR. ADLER: Coming at this question from the other end, that institution, as I stated before, since August of 1979 we've

been down to that 1,645. The incidents of violence haven't decreased, the behaviour problems haven't gotten any better.

QUESTION: In other words --

MR. ADLER: And there's a slight increase in one area.

QUESTION: There's an irony in litigation of this kind. It might actually be to the benefit of your employers to lose the litigation so the Legislature would help you out with some of your problems.

MR. ADLER: I've talked to prison administrators in other states and they feel the same way you do, although I can't say that of ours.

Now, Mr. Seigler who at the time he testified was a past president of the American Correctional Association, when he was asked if he knew of the American Correctional Association standards, he said, no, that he didn't.

Also testifying in this case was Mr. Norman Carlson, who is the current Director of the Federal Bureau of Prisons. At the time he testified he was the president-elect of the American Correctional Association, and he testified that he didn't know what the American Correctional Association standards were, and when asked about another set of standards on which his name appeared, he stated that he did not help formulate those standards and that he disagreed with them.

Now, I would also like to point out that

Judge Hogan never found 15 percent of the inmates at SOCF to be schizophrenic. He did find that a doctor named Lindner had testified to that fact. He issued no finding at all in that area.

As for the time out of cells, the plaintiffs in the court below put on an inmate named Anders. And on 159 of the transcript of this case he testified that he was permitted out of his cell from 6:30 in the morning to 9:30 at night, which completely matches the schedules that were also put in the evidence as Plaintiff's Exhibit 8 in the court below, also demonstrating that the dayrooms are open from 9 o'clock in the morning to 9:30 in the evening.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 2:57 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-332

JAMES A. RHODES ET AL.

V.

KELLY CHAPMAN ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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