ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-317

TITLE SHERMAN BLOCK, SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL., Petitioners v. DENNIS RUTHERFORD, ET AL.

PLACE Washington, D. C.

DATE March 28, 1984

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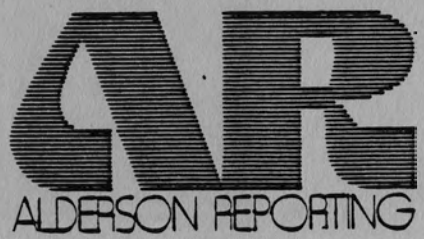

IN THE SUPREME COURT OF THE UNITED STATES

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SHERMAN BLOCK, SHERIFF OF THE :

COUNTY OF LOS ANGELES, ET AL., :

Petitioners :

v. : No. 83-317

DENNIS RUTHERFORD, ET AL. :

- x

Washington, D.C.

Wednesday, March 28, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:51 a.m.

APPEARANCES:

FREDERICK R. BENNETT, ESQ., Los Angeles, Cal.;

on behalf of Petitioners.

ALVIN J. BRONSTEIN, ESQ., Washington, D.C.;

on behalf of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Block against Rutherford.

Mr. Bennett, I think you may proceed when you're ready.

ORAL ARGUMENT OF FREDERICK R. BENNETT, ESQ.,
ON BEHALF OF PETITIONERS

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

This matter is before this Court on a petition for certiorari to the Ninth Circuit, which affirmed two injunctive orders concerning operational aspects of the Los Angeles County men's central jail, a 5,000 inmate facility operated by the sheriff of the County of Los Angeles.

The first order required the sheriff to select up to 1500 inmates from the 5,000 inmate population who he determined presented the least likely opportunity or risk of escape or drug potential and to permit them to visit in a setting where they could touch, kiss and embrace their visitors, a practice that has been referred to in the courts as contact visitation.

The second order required the sheriff to permit inmates to observe routine cell searches and to ask questions during the searches.

This is a large jail, as a reflection of the size of the County of Los Angeles, which encompasses over 4,000 square miles and a population approaching eight million people. That's roughly half the size of the State of Maryland, with about twice that state's population.

QUESTION: Just this one jail, that's over 4,000 square miles?

MR. BENNETT: No, the County is 4,000 square miles.

QUESTION: Oh, I'm sorry.

MR. BENNETT: Although all male inmates are centralized at one facility, in part because of the size of the County and because of some duties that are imposed upon the sheriff under state law. He is required to accept the prisoners from the police departments of the 82 independent cities within the County of Los Angeles.

He has no discretion to refuse them, and is required to transport on a daily basis one-fifth of that jail's population to 26 separate jurisdictional courts located throughout the wide expanse of the County and bring them back again at night.

The jail has a high turnover. It receives over 200,000 prisoners a year. The stay for most of

these is quite short because of the state's rather liberal pretrial release statutes, primarily with regard to misdemeanants. Most inmates stay within the facility less than ten days.

On the other hand, there are longer-term inmates within the facility. These are primarily persons accused of more serious felonies, that are involved in protracted criminal process and appellate process, and they may serve between two and four months or longer between arrest and sentencing.

The Court's order with regard to --

QUESTION: Mr. Bennett, when you say they're involved in appellate process, you mean perhaps a motion to suppress that's appealed prior to trial, that sort of thing?

MR. BENNETT: It could be that. We have really three classes of prisoners within the jail as far as are relevant here. Many of these inmates when they're arrested are picked up on warrants from many of the courts around the jurisdiction. They may be sentenced on one charge, awaiting trial on another. The state sometimes leaves those sentenced inmates with us during some appellate processes before they may be transferred to a state prison facility.

So it is possible, in both appeals and writs,

which is a common practice in the California courts, that they could be involved in appellate process.

QUESTION: But they're not members of the class, are they? Isn't the class just pretrial detainees?

MR. BENNETT: Technically, it was certified as to all prisoners within the jail, which at the time of certification involved a significant number of sentenced inmates. Now the facility is predominately pretrial.

QUESTION: I thought the Court of Appeals' opinion referred only to pretrial detainees, that the order only referred to them.

MR. BENNETT: In the progress of this case, virtually all counsel and the courts at all levels focused only on the matters that dealt with pretrial detainees, although --

QUESTION: I mean, the legal issues would be quite different if they were sentenced people, would they not?

MR. BENNETT: That's perhaps true as to some issues.

QUESTION: But there still are within the technically certified class a small minority who are not pretrial detainees?

MR. BENNETT: We can't say how small, because

if an inmate is sentenced on one charge and is a sentenced inmate, but is awaiting trial on other charges, of which there are many within our facility, we treat him for our classification purposes as if he is a pretrial detainee.

The court's order requiring us to select up to 1500 inmates for these contact visits is in addition to the sheriff's existing procedures to provide inmates an opportunity to maintain their personal relationships, and the sheriff has a three-pronged plan and program to accomplish that.

All inmates in the jail have daily access to telephone calls, for unmonitored telephone calls. There is fairly unrestricted mail.

And all inmates have the daily opportunity for a non-contact visit in a setting where inmates and their visitors sit in separated booths on either side of a large glass window and speak over telephones. In this fashion the sheriff, rather incredibly, handles over 2,000 visitors a day, over 63,000 visitors a month at this one facility.

The sheriff has two concerns which led him to adopt this three-pronged plan. As the district court noted and observed, the sheriff is committed to and well recognizes the importance of permitting inmates to

maintain their personal relationships. At the same time, the sheriff is also committed to housing his prisoners in as safe a manner as possible and free from injury.

And to accomplish these two goals, he has chosen this three-pronged plan of daily telephone calls, unrestricted mail, and non-contact visits because it maximizes the frequency of the opportunity to maintain these personal relationships, while at the same time minimizing the risks involved.

And it's fairly obvious why there's no risk under this plan. The visitors never enter the security of the facility, the inmates never leave it. There is no opportunity to pass contraband.

Because of this and in this fashion, this large number of visitors can be easily handled with minimal risk and without intrusive security measures associated with most other types of visitation: no strip searches, no appointments, no screening, no limitation on the visitors that you can see or their names -- without any of those intrusive measures.

QUESTION: Is there a claim here, Mr. Bennett, that those objectives could have been accomplished by less intrusive, less restrictive measures? That is, using a wire screen that would prevent the passing of

weapons or narcotics, but eliminating the telephone? Is there a claim?

MR. BENNETT: They did not make that request. Unlike some district court cases concerning other jails where the phones were always inoperative and people had to scream back and forth to be heard, I think the record reflects that this is a fairly modern visitation facility, with well-maintained telephones.

The thrust of the plaintiff's claim was contact visits, permitting kissing, touching and embracing, and not so much the fact that one had to communicate over the telephone.

QUESTION: This included children as well as adults?

MR. BENNETT: Yes, it did.

QUESTION: I take it that your New York counterpart disagrees with some of the things you've just said?

MR. BENNETT: Well, I think that the New York facility is certainly different from ours. Even though it's maybe the second or third largest jail in the country, ours is more than twice its size, with unique problems that make it quite different.

Plus, administrators place different priorities on things within their own circumstances and

exercise a different level of prudence. I think the most telling evidence in this case was the testimony of Warden Gaston of the Ryker's Island facility, who was the warden of their largest jail that had permitted contact visits for a number of years. He said two things:

One, he did not see how we could permit contact visitations within our existing facility;

And two, that if contact visitation was required in our facility, that he didn't want to be the manager of it.

Contact visits --

QUESTION: Excuse me, before you go on. Do you have any record or any statistics on the drug problem within the facility? To what extent has there been a drug problem?

MR. BENNETT: I'd like to focus on two aspects: one, our drug problem; and then the drug problem, for instance, at New York jails which permit contact visits.

We do have a drug problem. Within our jail are probably as large a group of drug-oriented gangs that are organized to control drug trafficking within the jail through threats and violence, more than you'll find in any other facility in the country. Drugs do

exist in our facility, because we can't control the inmates at court, they can be hidden in packages in mail, and that is a problem within our facility.

Significantly, at the New York facility, if we listen to Warden Gaston from Ryker's Island, when they permit contact visits he's found that the most prevalent use is the use of a balloon, that is swallowed -- that is passed through a kiss and swallowed to retrieve later. He pointed out that their drug problem was so pervasive that on more than one occasion these empty balloons have clogged up their sewer system.

Contact visitation I think presents a unique and unavoidable opportunity for serious and genuine breaches of a facility's security.

QUESTION: Mr. Bennett, before you get into that. You started to tell us about the three classes of inmates and I was curious to know -- as I understand the district court's order, it only applies to those who have been in the facility for over 30 days, and also it excludes the drug people who can be identified as associated with drug traffic, I guess.

How many people does the order apply to, in your judgment?

MR. BENNETT: Well, the court certainly thought it applied to up to 1500.

QUESTION: Well, it put a ceiling of 1500. It didn't require you to have 1500 visits, as I read the order. It says no more than 1500.

MR. BENNETT: But that number, in terms of total inmates that meet the 30-day requirement, would exceed that number.

QUESTION: And out of those, how many would be -- how many could you segregate out as having association with drug traffic or being particularly violent?

MR. BENNETT: We don't think that we can segregate them within our facility or classify them as to those types of risks.

QUESTION: You don't have any classification system at all?

MR. BENNETT: We do. In fact, the New York people who came out and testified said we had the finest classification system that they had seen in examining all of those. But it's a classification system designed to house inmates by compatibility within a secure facility, which is our main job at this point.

QUESTION: Yes, but for example, if someone's arrested on a drug charge presumably the jailer would know that and just make him ineligible for this visit. That wouldn't be very difficult, would it?

MR. BENNETT: Even if we can segregate out those who might present the lesser risk of drugs or escape, we can't prevent the intermingling within our facility. All or many activities within our jail are centralized: medical care, meals, recreation, law library, school.

QUESTION: What I'm trying to find out -- and I don't know if the record will tell us -- is how many people would get the benefit of this order if the Ninth Circuit were affirmed, in your judgment? If you assume you can identify people who were arrested for murder and people who were arrested on drug charges --

MR. BENNETT: I think it was apparent to us that the court expected us to find at least 1500 people --

QUESTION: I'm not asking you what the court expected you to find. It put a 1500 person ceiling, I understand that. How many people do you think the order will benefit?

MR. BENNETT: I can't say.

QUESTION: You have no idea?

MR. BENNETT: Although I would indicate that, in light of our sheriff's history as reflected in the record, that he would make an effort to try and find 1500 people if he could. The problem --

QUESTION: Well, why would he do that? The court didn't require him to find a lot of people. The court put a ceiling on. Is he going to go out looking for people unnecessarily, to make it as hard a case as possible?

MR. BENNETT: I think it's a reflection of this sheriff who, as the district court pointed out, tried, to the extent that it was told to him that he had to do something, he would make an effort to do that.

QUESTION: Well, what if you told him that you thought he shouldn't do any more than absolutely necessary? How many people would then be involved, in your judgment?

MR. BENNETT: I can't tell you.

QUESTION: You don't have any idea?

MR. BENNETT: No, I can't.

But you've pointed out one problem, that we can't prevent the intermixing of inmates, even if we could separate them by classification. Not only the centralized activities, but this incredible logistics task of pulling out, sometimes with an order telling you who it is only the night before and which court he's going to only the night before, 1,000 inmates, one-fifth of the jail's population, that have to be comingled by court destination and transported out to these courts

and brought back again at night on a daily basis.

The significance of that is that even if you found some inmates that could be trustworthy, and no doubt there are many, that you can't preclude the use of coercion and threats by those with a compulsion to obtain the drugs to coerce these people permitted contact visits to do their deeds for them. And these prison drug trafficking-oriented gangs are a major problem in that respect.

But I think another thing about contact visitation that we have to think about is that the necessary security measures for it are very intrusive and have adverse effects on the inmates. Justice Marshall well pointed out that these strip searches, which are almost universally determined to be necessary with contact visitation, may themselves have adverse psychological impact upon the inmate, that they're certainly degrading, and that they may present the potential --

QUESTION: The inmates and the guards.

MR. BENNETT: That's true.

QUESTION: The guards don't like it either.

MR. BENNETT: They don't.

Also, contact visitation is more protracted, time consuming, and personnel intensive. It may limit

the number of non-contact visits that we can permit to other inmates, and may take immediate personnel away from other important duties within the jail.

Finally, the jail was not designed for contact visitation, and if we were forced to try and deal with such an order it's clear that rather expensive and complex additional construction would be required.

Two decades of prisoner' rights litigation have taught us that the problems of jails are difficult and intractable and not easily solved by judicial decree, and this is because they involve sensitive judgments concerning the confinement of people against their will, to many of whom violence is no stranger, and where the compulsion to obtain narcotics and other contraband may override rationality, and most importantly, were the cost of miscalculation may be human life in its forfeit instant.

I'd like to deal briefly with the search procedures. We've pointed out in our briefs at length --

QUESTION: Well, before you leave the contact visit issue, may I ask you. As I understand it, if we're talking about pretrial detainees the issue is whether it can be punishment under Bell against Wolfish. In your view, could it ever be punishment, no

matter how long the incarceration, to deny a person who has not yet been tried any contact whatsoever with his family? Could that ever constitute punishment?

MR. BENNETT: I don't think the mere question of contact visits rises to constitutional proportions.

QUESTION: Well, it does if it's punishment.

MR. BENNETT: Then the answer is it's not punishment, given the other alternatives that are available to permit the maintenance of these relationships.

QUESTION: Your answer is it could never become punishment as long as other alternatives that are less desirable to the inmate are provided?

MR. BENNETT: I think I would have to take that position.

QUESTION: I think you would.

MR. BENNETT: The search procedures, as we've indicated in our briefs, are really not very distinguishable from this Court's prior examination of that question in the Wolfish decision. In fact, our district court relied in haec verba on the very reasoning and analysis of Judge Frankel that was rejected in that case. That's as close as you can come, I think, to not being able to distinguish a case.

But one thing about searches that may trouble

some members of the Court, the district court here focused on but one aspect and certainly the less important aspect of a dual purpose search. The primary purpose of these searches is to locate weapons and drugs and contraband.

It turns out, because of matter of convenience, we also do a housekeeping function with it. The guards go through, they remove the excess food for sanitation purposes. They take out the excess newspapers and magazines because that presents a fire hazard in great quantity. They take the jail-issued clothing that is in large number, the extra pair of pants, the multiple blankets and towels, and recycle them back into the system.

These are severable functions, although it would be more difficult to do them separately. And to the extent that the court was concerned with the seizure of the magazines or the newspapers or the like, that's part of the housekeeping function. Our security concerns devote primarily to the hunt for contraband and weapons.

With the Court's permission, I'd like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Bronstein.

ORAL ARGUMENT OF ALVIN J. BRONSTEIN, ESQ.,

ON BEHALF OF RESPONDENTS

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

I think Justice Stevens focused on the real issue in this case, which is not, is not, a blanket constitutional right to contact visits, the question presented by the Petitioner. Justice Stevens asked whether under any circumstances the denial of a contact visit could constitute punishment, and I think to accept the County's argument and to overrule the Ninth Circuit this Court would have to say that as a matter of law there are no factual circumstances under which detainees would have the right to a barrier-free visit. That is, that the denial could never constitute punishment, no matter what the facts.

QUESTION: Mr. Bronstein, can you answer the question that was earlier asked Mr. Bennett as to approximately how many people are included within the class certified?

MR. BRONSTEIN: I cannot. I do agree with Justice Stevens that the 1500 was a cap. I have no idea. I was not involved in the trial of the case, Justice Rehnquist. The trial lawyer is now a judge and no longer in the case.

QUESTION: Mr. Bronstein, I have a recollection, but I haven't been able to check it out, of a case that came to us from the Second Circuit that involved a contact visit with the mother bringing a small child in, and in New York they had, or at least in the Second Circuit, there had been a screen barrier that was preventing the transfer of drugs or weapons or anything else.

Do you recall that case?

MR. BRONSTEIN: No --

QUESTION: Perhaps I'm confusing one --

MR. BRONSTEIN: -- not specifically. There is in that circuit, but at the district court level, the Boudin versus Thomas case, which dealt with the right of a woman detainee to visit, to have a contact visit with her infant child.

That case is cited in our brief, and there the Bureau of Prisons wanted to make an exception of this detainee because of her particular notariety and the district court said that the woman should be entitled to a contact visit. That case was not appealed by the Bureau of Prisons. But I don't know specifically which case you're referring to.

I think, going back to whether it could ever constitute punishment, we have to visualize, for

example, the plaintiff Rutherford in this case, who was incarcerated for 39 months, detained for 39 months. Assume that his wife was pregnant when he went into the jail, that she delivered three months after he was incarcerated.

That would mean that for three years that detainee could never touch that child, could never hold that child, could never, as is graphically illustrated in the amicus brief of the New York City Board of Corrections, never put that child on his lap. I'm referring to Appendix C in the Board of Corrections amicus brief.

For three years, I'd say that would be torture, not just punishment, and that's what the County is arguing on that viist.

The County, Mr. Bennett, my distinguished adversary, focused a fair amount on what he believes are the factual support for his position. Unfortunately, the factual findings of the district court are all contrary to his assertions, and those findings were approved by the Ninth Circuit as not being clearly erroneous.

Two separate questions have to be looked at: the constitutional bases for the contact visit order -- which, by the way, Justice Stevens, you are correct,

applied only to detainees and only to that narrow category of low-risk, long-term detainees. The cell search issue, by the way, appears to apply to all prisoners, but only those who are in the area at the time a search is going to be made, and I'll come back.

QUESTION: Well, what is the precise definition of the class certified, do you know, Mr. Bronstein?

MR. BRONSTEIN: There were two classes certified, Justice Rehnquist, a class of detainees and a class of sentenced prisoners. At the time of the trial there were a large number of sentenced prisoners. Now apparently, I agree with Mr. Bennett, there are very few.

But the contact visit order specifically by its terms applies only to detainees.

QUESTION: And is that the one there's the 1500 cap?

MR. BRONSTEIN: That is right.

QUESTION: And that doesn't apply to the convicted ones who are also detainees?

MR. BRONSTEIN: It does not. It speaks exclusively to pretrial detainees.

QUESTION: Well, aren't there some of those that are convicted? Aren't some pretrial detainees

convicted felons?

MR. BRONSTEIN: They may have been convicted in some other case, yes.

QUESTION: Yes. Aren't there many of them?

MR. BRONSTEIN: I don't know.

QUESTION: Does it apply to them?

MR. BRONSTEIN: In this, I don't know the answer to that either, Justice Marshall, whether it would apply to them in this case. I just don't know. Perhaps Mr. Bennett can clarify that on his rebuttal.

The trial court first found, following the teachings of Wolfish, that the total prohibition on contact visits was an exaggerated response by County officials to security concerns, which the trial court found to be punishment in violation of the due process clause. Also going through this issue are the fact that the total prohibition results in unconstitutional interference with important familial rights of detainees and their families, following a long line of Fourteenth Amendment cases.

On the first argument, Wolfish teaches us that a detainee has the right to be free of any punishment, and whether a condition or practice, the total prohibition in this case, is punishment is essentially a factual question.

The County argues that to find inferred punitive intent you must have a condition that on its face appears punitive and the condition must be very harsh, and they refer to footnote 20 in Justice Rehnquist's opinion in Wolfish, the example of loading a chain with detainees in shackles and placing them in a dungeon.

In other words, they argue for a return to the hands-off doctrine. That assertion I submit flies in the face of the facts of this case, the example I gave you of Mr. Rutherford before, and historical facts. Many practices, we know --

QUESTION: Of course, the class is certified not just to include Mr. Rutherford, who you say was there for 39 months, but to include anyone who is there for more than 30 days. So that we have to analyze it in terms of someone who has been there 35 days as well as someone who's been there 39 months.

MR. BRONSTEIN: That's precisely what the district court did, and if you'll notice, the district court in its original order provided that detainees there only 14 days were entitled to visits. Then -- that's after the 17-day trial. Then, on the County's application, the court held another four-day hearing, took further evidence on the contact visit issue, and

made a factual finding that 30 days would be more appropriate, to accommodate the County's concerns.

But many practices that historically started for valid reasons, as I started to say, are today punishment. We know that the penitentiary in this country was started by the Quakers for rehabilitative purposes, and their concept was that you lock people up in silence and in solitude for many years and that they would become penitent and be rehabilitated, and of course most of them went mad. Today we would characterize that treatment as punishment.

Corporal punishment and whipping was common in our prisons for deterrence. It was a benign thing. We would deter bad conduct by publicly whipping a person. Now, of course, we would consider that punishment.

It is true, as the Court said in Wolfish, that effective management and security concerns are legitimate government interests that may justify certain conditions or restrictions on detainees, the kinds of things that Mr. Bennett was talking about, and that the Court should ordinarily defer to corrections officials in the absence -- this language from Wolfish -- in the absence of substantial evidence in the record which indicates that the officials have exaggerated their response. In other words, the deference is not

absolute.

It is true that contact visits, like any other practice, present a security problem. But as Judge Duffey said in the Boudin case I referred to before: "A naked man in chains poses no risk. From that point on, every increase in freedom brings at least some decrease in security. But obviously, we will not countenance keeping a person naked in chains."

QUESTION: I take it that you do not suggest that there's no risk of having drugs or weapons come into prisons, Mr. Bronstein?

MR. BRONSTEIN: I do not suggest that at all, and the district court found that there is some risk, and prisons are --

QUESTION: Some risk?

MR. BRONSTEIN: That's right.

QUESTION: You think it's just some risk, or that it is an enormous risk?

MR. BRONSTEIN: The district court found there was --

QUESTION: I'm speaking of generally. Lay aside the findings of the district judge for a minute.

MR. BRONSTEIN: Generally, in some institutions it is a risk and a problem, in some more, some less. It exists in every jail and prison that I

have visited in this country, and I have visited many, many hundreds.

And the evidence in this record indicates that in almost every prison in this country contact visits is the rule, except for people who violate visiting rules or special categories of prisoners, and in most detection facilities today -- many detention facilities today, including the giant system in New York, contact visits are permitted in spite of the fact that they know there is always some risk.

There is also a risk from correctional officers bringing in drugs. We know that, too. Just two weeks ago at the Metropolitan Correctional Center in New York, the facility the subject of Wolfish, nine correctional officers were indicted for bringing in drugs as contraband. But that doesn't mean that that's the rule every place.

The evidence in this record which led the judge to the findings was heard after 17 days of an initial hearing, four more days on the issue of contact visits, two personal inspections. Let me just briefly review the factors which the district judge found and which the Court of Appeals affirmed as being appropriate findings.

On exaggerated response, why the trial judge

found that this was an exaggerated response, the total prohibit: First, he found there was testimony by corrections experts which revealed the existence of a variety of adequate and tested security precautions available for contact visits.

By the way, Mr. Bennett relies very heavily on Warden Gaston, who testified in New York -- in this case in 1978. As Mr. Bennett knows, Warden Gaston was warden of a facility in New York for two months and 19 days in toto during the very first few months of the experiment with contact visits in New York.

He had nothing upon which to base any kind of experience and testimony, and clearly the judge didn't find his testimony credible. He was only warden for two months and 17 days. The brief amicus of the New York --

QUESTION: If you knew Ryker's Island, you'd find you can learn a whole lot in one day.

MR. BRONSTEIN: Yes, but the brief of the New York City Board of Corrections indicates that last year there were 339,000 contact visits involving an average daily population of almost 10,000, and they were 99.95 incident-free. I think that's much more important testimony than what Mr. Gaston said in 1978.

QUESTION: Is there any -- I know there's no

evidence as to how much of drugs came in during that period.

MR. BRONSTEIN: Nc, there is none.

QUESTION: There is --

MR. BRONSTEIN: Except that there were no incidents in 99.95 percent, no finding --

QUESTION: Well, the incident would be a person being caught.

MR. BRONSTEIN: That's correct.

QUESTION: But there is no record of those who were not caught.

MR. BRONSTEIN: I would concede that some drugs may have come in in some of those visits, obviously.

But the trial judge evaluated all of those things, based on the expert testimony. He found that contact visits were the norm in most prisoners and in many detention facilities. He found that the withdrawal of contact visits was regularly used as punishment for violation of a rule.

He found that the County was able to and it was actually engaged in classifying prisoners for risk. He found two other things which are very significant, because the opinion in Wolfish states that where you have genuine privation and hardship for very extended

periods of time, that may raise a question under the due process clause about punishment:

He found that detainees, some of them, were there for very extended periods of time; and he found that the denial of contact visits, particularly with close family, constituted genuine privation and hardship.

And finally, he had the benefit of all of the professional standards which recommended contact visits in detection facilities.

QUESTION: The trial judge didn't make new findings after the remand, did he?

MR. BRONSTEIN: No, he did not.

QUESTION: He just relied on his --

MR. BRONSTEIN: He was directed by the --

QUESTION: Court of Appeals?

MR. BRONSTEIN: -- Court of Appeals to hold -- to consider it in the light of Wolfish, without an evidentiary hearing.

QUESTION: And he could have held it? He could have made new findings.

MR. BRONSTEIN: He could have made new findings. He did not. And I will in a moment, Justice White, speak to I think why he did not.

But just to finish with the standards, we know

that this Court has often looked to what the Federal Bureau of Prisons does as being instructive of what is professionally appropriate and correct. Well, the Bureau of Prisons -- and I'm referring now to 28 Code of Federal Regulations, Section 540.40 says: "The Bureau of Prisons encourages visiting by family, friends and community groups to maintain the morale of the inmate."

QUESTION: Is that speaking only of pretrial detainees?

MR. BRONSTEIN: No, that's generally, and now I'm going to get to detainees.

The next general rule is in 540.51.G.2: "Staff shall permit limited physical contact, such as handshaking, embracing, and kissing, between an inmate and a visitor." And then finally, 551.120: "Staff shall allow pretrial inmates to receive visits in accordance with the Bureau's rules."

QUESTION: Do you think, Mr. Bronstein, that there is a difference between the classification of prisoners in the federal system and in what we're dealing with here? What kind of crimes bring people, 25, 30,000 people, into federal prisons as compared with --

MR. BRONSTEIN: Well, a great many drug crimes, Your Honor. So that is the main concern. There

are probably as high a percentage of offenders in the federal system with drug histories as there are --

QUESTION: A great many so-called white collar crimes?

MR. BRONSTEIN: Not that many. As we all know, they rarely go away to prison. Most of them get other kinds of alternative treatment.

But today, as the prison population of the federal system has skyrocketed, it's primarily the so-called more violent, more dangerous offender. It is not an increase in white collar crime. That's not on the record, but that's my own personal knowledge.

The trial court had all of these findings. It balanced the deprivations against the security concerns. And again I would like to point out that the determination of an exaggerated response to an alternative purpose is primarily a factual finding. And as this Court said just a year ago in Pullman Standard versus Swint, Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous.

QUESTION: Mr. Bronstein, the Court of Appeals in remanding to the district court said -- this was in giving the district court some guidance:

"A condition is punitive if there is a showing of express intent to punish. Otherwise, if a particular

condition is reasonably related to a legitimate, non-punitive objective, it does not, without more, amount to punishment."

MR. BRONSTEIN: Does not, without more.

QUESTION: Well now, my question to you is, do you think that invites a balancing process?

MR. BRONSTEIN: No. It invites the very process --

QUESTION: Well, it invites an inquiry as to whether a particular restriction is reasonably related to a non-punitive goal?

MR. BRONSTEIN: And also, as Wolfish tells us, whether there were genuine privations and hardships for very extended periods of time, and whether the particular response by the officials was exaggerated to the real concern for security.

QUESTION: Well --

MR. BRONSTEIN: And illustrative --

QUESTION: The district court said: "Thus, it seems to me, regardless of how it's phrased, the test still remains what is reasonable under the circumstances." And you think that's -- you think that Wolfish directs a district judge just to answer, just to decide what he thinks is reasonable?

MR. BRONSTEIN: I don't think that's -- I

think that --

QUESTION: That's what he said.

QUESTION: That's what he said.

MR. BRONSTEIN: But in context, if the entire district court opinion is read, I think it is clear that he specifically follows Wolfish by finding the exaggerated response.

Even before Wolfish, in February of 1979, the district court in its first opinion, at Petitioner's appendix 30, the district court before Wolfish said, utilizing -- that he would utilize the exaggerated response test set forth in Feeley versus Sampson, a First Circuit case approved by this Court in Wolfish at two different points, rather than the strict scrutiny or compelling interest test of Campbell, because it is less burdensome to the custodial authority.

Throughout these proceedings, even before Wolfish -- in fact, the Ninth Circuit thought that the district court had already anticipated Wolfish, but remanded it out of an excess of caution.

QUESTION: Is it your suggestion that a district court's conclusion as to whether or not a condition is reasonably related to a legitimate non-punitive objective is a finding of fact?

MR. BRONSTEIN: Well, that particular thing I

think would be --

QUESTION: Or his result of a balance is a finding of fact?

MR. BRONSTEIN: No. I think the underlying factors that go in to reach that are findings of fact. The ultimate conclusion is a finding, is a mixed finding, one which I think would be governed by this Court's decision in Sumner versus Matar, also a 1982 case. And I think the questions of fact that underlie the ultimate legal conclusion are governed by the presumption of correctness.

The facts in Pullman are very close to this one, because there this Court said that whether the differential impact of a seniority system reflected an intent to discriminate was a factual finding, subject to the clearly erroneous rule. Here, whether there was an intent to punish that could be inferred I think is similarly a factual issue.

QUESTION: You've referred to several times, Mr. Bronstein, to overreaction or -- I've forgot the precise phrase, that there is an overreaction to --

MR. BRONSTEIN: Exaggerated response.

QUESTION: Exaggerated response to the problem. Suppose here, instead of a glass partition and a malfunctioning telephone that you mentioned, they put

up this fine screen which is used in many institutions, where you see the person, you have a conversation normally, but you can't pass any articles to them.

Would you say that that was permissible?

MR. BRONSTEIN: I don't think that would be permissible, and that would not satisfy what Judge Gray was concerned about. The heart of his finding of deprivation was based on the testimony of prisoners, of experts, and all the studies which show that the barrier visit, where a person cannot touch, touch the hair of a small child, put that child on his lap, embrace for a moment, the way the Bureau of Prisons permits, that that was the real deprivation.

To see through the screen again is saying: Your father is an animal, you are not allowed to touch that person. So I don't think the screen would suffice.

I think the County categorically rejected any proposal like that or any other proposal for contact visits -- they didn't reject that specific one -- as the district court found. And the court found:

"It is inescapable that, in the words of the Supreme Court, the County's action was excessive in relation to the alternative purpose of security assigned. The deprivations exceeded the reasonable

requirements of security. To deprive a prisoner for long periods of time of any opportunity to embrace his wife or hug his children is very traumatic treatment, and such treatment is not made necessary by reasonable security requirements. It constitutes severe punishment."

As to the rights specifically of wives and children, those important familial rights, protected by the many decisions of this Court, those fundamental values we would argue should be measured by an even stricter test than that which is set forth under the due process clause in Wolfish, but under the kind of test that Procunier versus Martinez suggests: if the complete elimination of the opportunity to touch their loved ones is greater than necessary or essential to the protection of the governmental interest involved.

In closing on this issue, I would just ask you to visualize, as I think the trial judge did, to visualize a person who is a father or a grandchild behind a glass wall. For months or even years, you can see but not touch that child. I would find that, as I said earlier, not just punishment; I would find that torture.

Let me turn very briefly to the other issue, which I recognize at the outset is a closer question,

the cell search issue. But let me redefine or correct the impression that was left earlier about what that order says.

It is not an order that says that any prisoner has the right to observe a cell search of his cell. What it says is that any prisoner who is in the area may, under these very specific provisions, observe the cell search. So that a prisoner who is in the dining room or at recreation or out at court or visiting and they want to search his cell, they don't have to go get that person and bring him back.

The protection was, if the prisoner happens to be in the cell or right on that block of cells and is there, then there was this special accommodation to allow the prisoner to observe the cell search. And this is a procedural due process issue, as Judge Gray dealt with it, rather than freedom from punishment as a matter of substantive due process. And he distinguished from Wolfish, which was decided basically on Fourth Amendment grounds.

QUESTION: Is that really anything but a rather sophistic distinction?

MR. BRONSTEIN: I don't think so --

QUESTION: I mean, do you think a district court could properly say that, after this court has

analyzed a particular claim under the Fourth Amendment, to reach a wholly different result, just saying, well, I'm going to use a little different constitutional provision?

MR. BRONSTEIN: Well, what I think Judge Gray was concerned about was his observations, his personal observations of the likelihood of the loss of cherished possessions: a photograph of a deceased mother, legal papers, a book that was of very great importance. He saw these kinds of things happening.

QUESTION: Well, how does that bear on our opinion in Wolfish?

MR. BRONSTEIN: Well, what he found was that, I think, that it was not a search and seizure question, but since we have already determined that a prisoner does -- that the state may not take property without some procedural due process, he found that if those things were taken there was no adequate procedural protection, such as the damage claim mentioned by footnote 38 in Wolfish; and that under Parratt v. Taylor, which reaffirms that a state may not take property without some sort of hearing or, as the Court said in Parratt, a meaningful hearing at a meaningful time, the only time to do that is in a prophylactic way, to prevent the taking.

I think that was his analysis. But he clearly limited it, I think because of Wolfish, to those prisoners in the immediate area of the cell search.

He did not strike down the search rule in its entirety, which is what was at issue in Wolfish. He found, after evidence and personal observation, that the risks of improper confiscation of cherished possessions was great and could not be redressed in any future action. That was the basis for his ruling.

I submit, I agree that it is a closer question because the facts are so close to the Wolfish case. But I think, for all of the reasons that I have set forth, this Court should affirm the decision of the Ninth Circuit.

Unless there are any further questions, I will sit down.

QUESTION: Do you have anything further, Mr. Bennett?

REBUTTAL ARGUMENT OF FREDERICK R. BENNETT, ESQ.

ON BEHALF OF PETITIONERS

MR. BENNETT: I'd like to direct my attention just briefly to this 39-month inmate, because it may cause some concern to some members of the Court. There's nothing in the record to indicate that's a routine or other than an exception.

And I point out that every one of these pretrial inmates is before a judge in a pending criminal case, which regularly makes orders concerning confinement and the treatment of that prisoner during trial. What's significant about that is one portion of the record that's easy to overlook, and it's set forth on page 62 of the joint appendix, and it was a fact stipulated to between the parties at the outset of the litigation, and it reads: "Physical contact between prisoners and visitors is not routinely permitted." Not routinely permitted.

We do get orders from judges in cases that are particularly protracted, that are handled on a one on one basis, which is manageable within our facility. In fact, I'm not sure if it appears in the transcript or not, but I was there. Judge Gray himself ordered some such visits. I can't remember if it dealt with Mr. Rutherford himself, but with regard to one inmate who made such a request.

In conclusion, we do argue that the Court as a matter of law should not find contact visits constitutionally required; given the unavoidable risks, given the availability of relatively risk-free alternatives, that the Court should not find that a court is warranted in substituting its judgment either

for the jailer who operates that jail or for the local and state officials and government for which they work.

New York is a prime example. It has gone far beyond constitutional mandates and has indicated that that may occur.

With regard to the findings, as we've indicated in our brief I don't think the findings of the court support either its conclusions or the position of the inmates. It's clear when you compare the three decisions that the court merely substituted its perception of what was reasonable for that of the sheriff.

When you look at the first initial decision, the court looked at two different tests: a compelling necessity test that came out of the New York courts, which required strict scrutiny; and it then looked at the reasonably necessary test, which came out of another circuit. And it said even then, between those two tests, at the petition appendix page 30, that even those two tests were the same, that only they differed in theoretical analysis, but the result was the same. Still a balancing test.

When you get to the final decision after remand after Wolfish, the court no longer talks about the compelling necessity test, but he talks about his

prior test and he says, even the test of Wolfish and what I did before is the same, that really -- and that was at the appendix 25.

Whether you're talking about the compelling necessity test, strict scrutiny, the reasonably necessary test, or the test of Wolfish, the court says, I read the tests the same and the result is the same. And what that tells us is that the court worked in reverse order.

He first looked at his perception of what was an appropriate way to deal with this problem of permitting inmates to maintain personal relationships, and worked backwards to try to make the test fit that result. And really, the one thing that Wolfish tells us is that you go in reverse order. You first look at the determination of the jailer or of the local entity or state government for which he works, and you examine his choice of the range of reasonable solutions and see if it is sufficiently related to legitimate government goals that it's not punishment and thus constitutionally permissible.

And with that, I will submit.

CHIEF JUSTICE BURGER: Thank you, gentlemen. the case is submitted.

(Whereupon, at 11:44 a.m., argument in the

above-entitled case was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#83-317-SHERMAN BLOCK, SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL Petitioners v. DENNIS RUTHERFORD, ET AL.

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BY _____

(REPORTER)