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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1384

TITLE WILLIAM R. TURNER, ET AL., Petitioners V.
LEONARD SAFLEY, ET AL.

PLACE Washington, D. C.

DATE January 13, 1987

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

2 CHIEF JUSTICE REHNQUIST: We will hear
3 argument first this morning in No. 85-1384, William R.
4 Turner v. Leonard Safley.

5 Mr. Herschel, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF HENRY THOMAS HERSCHEL, ESQ.,
8 ON BEHALF OF THE PETITIONERS

9 MR. HERSCHEL: Mr. Chief Justice, and may it
10 please the Court:

11 Initially, I'm going to go through a brief
12 background of the case and the facts. I will then
13 proceed to the correspondence issue, and then discuss
14 the marriage issue.

15 At present, unless there's questions
16 concerning the findings of facts and conclusions of law,
17 I'll leave those for the argument on the briefs.

18 The issue in this case is prisons;
19 specifically, about the level of deference that is going
20 to be given to prison officials to act upon -- to act
21 upon legitimate security -- their legitimate security
22 interests concerning the regulation of inmate-to-inmate
23 correspondence and inmate marriages.

24 This is a class action that was brought
25 pursuant to 42 U.S.C. 1983, which challenged the

1 Missouri Department of Corrections regulations that --
2 regulations concerning the inmate-to-inmate
3 correspondence and inmate marriage problems.

4 The District Court and -- the District Court
5 found that those regulations were far more restrictive
6 than necessary -- for necessariness, and held them
7 unconstitutional

8 This hold was affirmed by the Eighth Circuit
9 Court of Appeals.

10 The visit -- the challenges to the Missouri
11 visitation regulation, and a damage issue, were found
12 in favor of the defendants, and were not appealed.

13 The Renz Correctional Center is a complex
14 prison. What I mean to -- what I mean to say when I say
15 a complex prison is that it's a co-correctional,
16 multilevel security institution.

17 At the Renz Correctional Center, at the time
18 of this trial, we had male and female inmates; we had
19 female maximum security inmates and medium security
20 inmates; and male minimum security inmates.

21 The -- the Renz Correctional Center was also
22 used to hide inmates within the system. For example, if
23 somebody was concerned about their life or something
24 along those lines, the Renz Center would be used to hide
25 them, because the minimum security men were located

1 there.

2 At the present time, we have undergone some
3 changes. The Renz Correctional Center medium security
4 women have been moved to another institution, along with
5 a number of the maximum security. Eventually there will
6 be a maximum security unit for women at another
7 location, and we will move the rest of the women who are
8 now housed at Renz to that institution.k

9 However, Renz will always be a place where we
10 will have some women for medical care and for special
11 security problems. But they'll never have the number of
12 women that it had at the time of this trial, which was
13 approximately 250.

14 The regulations at issue are as follows. The
15 correspondence issue in effect at the -- at that time
16 did not permit correspondence between inmates in
17 different institutions, whether it was in-state or
18 out-of-state, unless the adjustment classification team,
19 which was a team of case workers who reviewed their
20 files before they permitted anyone to correspond, to
21 correspond with any other inmate in another institution,
22 unless it was in their best interests.

23 In addition, they were permitted to correspond
24 with relatives who are also incarcerated within --
25 within the system.

1 The marriage regulation did not prohibit --
2 did not permit the marriage of -- the marriage of
3 inmates unless the superintendent determined there was a
4 compelling reason.

5 In other words, the burden was on the inmate
6 to come forward to the superintendent and present him
7 with a compelling reason.

8 The Eighth Circuit Court of Appeals -- and I
9 believe the evidence would sustain that -- is that
10 basically it was a rather narrow interpretation; it was
11 only going to be on the basis that there was a child
12 involved, or through a previous relationship before they
13 were incarcerated that the prison official or the
14 superintendent would permit the marriage while it was --
15 while they were in -- in prison.

16 The appellant -- the appellants in this case
17 request -- or the petitioner in this case requests the
18 court permit deference to the prison officials, and that
19 the court require that inmates prove that the prison
20 officials have exaggerated their response to the
21 penological interest before they determine that the
22 regulation is overbroad or that it's unconstitutional.

23 The respondents, on the other hand, would
24 burden the prison official to demonstrate a pattern of
25 security concerns before the regulation could be

1 upheld. Then there would be a determination of whether
2 the exercise of the right involved, the inmate exercise,
3 is in some way inherently dangerous, or presumptively
4 dangerous.

5 And then the court would pick between
6 competing reasonable alternatives, or least restrictive
7 alternatives, to determine which alternative achieved
8 this goal.

9 There is no debate, even -- I don't believe
10 there's any debate among the parties -- that even a core
11 right that the respondents have argued deserves a strict
12 scrutiny, can be restricted in some manner by the fact
13 of incarceration.

14 The question is, to what extent can we
15 restrict the rights of inmates while they are
16 incarcerated.

17 This Court, in previous First Amendment cases
18 and prison cases, has used an analysis -- I'm using, to
19 be precise, *Procunier v. Martinez* -- has used an
20 analysis which presented the least restrictive
21 alternative -- which presented the rational relation
22 test.

23 By this examination, the Court required that
24 the decision of the correctional official be
25 demonstrated to be an exaggeration, an exaggerated

1 response to a legitimate penological interest
2 demonstrated by substantial evidence on the record.

3 In determining whether the response has been
4 exaggerated, this Court has examined a number of -- a
5 number of factors.

6 They first examined -- identified the
7 penological interest involved, whether it was a security
8 interest, rehabilitation of inmates, whether it was
9 deterrence of crime or the maintenance of internal
10 order, the Court would always identify.

11 In the present case, the petitioners presented
12 the -- the security interest as the predominant interest
13 in upholding of the -- in the upholding of our
14 regulation between inmate-and-inmate correspondence.

15 We also had some rehabilitation interest, but
16 predominantly it was a security interest. We decided
17 that this was an important issue, because we feel that
18 the control of communication between inmates in
19 institutions is critical to our control of not only
20 inmate -- inmate violence, but inmate gang control and
21 various other -- various other security interests that
22 we would have in isolating inmates between institutions
23 in Missouri.

24 For example, in Missouri, we do have 13
25 institutions, and we have the ability to move them

1 around.

2 The second interest, and the most interest
3 that this Court has examined, is whether the -- the
4 regulation itself was content-neutral. And in the
5 present case, this regulation is content-neutral.

6 Once the regulation is approved -- once the
7 inmate is approved, and this was a prior approval, the
8 inmate was then permitted to correspond.

9 We did not in any way censor any of his
10 correspondence, or in any way try to -- try to confine
11 him to what he could write about the institution in
12 anyway.

13 Finally, the regulation that Court has always
14 -- has examined as a relevant factor, whether
15 alternative means of communication between --
16 alternative ways of achieving the communication.

17 In this present situation, as to that
18 individual inmate, if an inmate is prohibited from
19 corresponding with another inmate, there will be no
20 alternative means of communicating with that particular
21 inmate.

22 However, there will be alternative means of
23 communication.

24 QUESTION: You don't really mean that, do
25 you? Couldn't I write a letter to my mother and tell

1 her to send it to Joe?

2 MR. HERSCHEL: Yes.

3 QUESTION: How would you stop that?

4 MR. HERSCHEL: We -- as there is evidence at
5 the trial, we stopped it by attempting to return the
6 mail after we identified that this was a prison letter
7 between the civilian and the insider.

8 QUESTION: You censor the letter?

9 MR. HERSCHEL: We would not censor the
10 letter. We return the letter.

11 QUESTION: What was in it?

12 MR. HERSCHEL: We were permitted by
13 regulations to scan mail coming into our institutions,
14 and we would scan the mail.

15 QUESTION: And there's a difference between
16 scanning and looking at it?

17 MR. HERSCHEL: No, no difference between
18 scanning and looking at it. But we'd have to look at it
19 to determine whether or not we were -- they were
20 circumventing the mail rule.

21 Because the whole point of this was to control
22 the correspondence between inmates. And if we couldn't
23 control that, then they could always get around us.

24 QUESTION: Isn't the whole (inaudible)?

25 MR. HERSCHEL: We would -- we would scan it

1 whenever we felt there was a problem. Frankly, the
2 number of letters coming in to the institutions prohibit
3 us from scanning every piece of mail, just as this
4 regulation makes it almost impossible -- makes it
5 impossible for us to scan all the letters between the
6 individual institutions.

7 At the present time we are under a regulation
8 --

9 QUESTION: You only scan those you want to,
10 those who are under your suspicion?

11 MR. HERSCHEL: The present case, under
12 probable cause, yes.

13 QUESTION: That's right. And where do you get
14 that right?

15 MR. HERSCHEL: By the regulation. We
16 determine that -- well, you mean, where do we determine
17 whether there's probable cause?

18 QUESTION: (Inaudible.)

19 MR. HERSCHEL: All right. Well, we determine
20 that by either determining through the informant system
21 in the prison, determining whether something seemed
22 irregular about the letter itself, from the envelope,
23 determining whether or not we have identified a person
24 as a gang member. Those kind of things are the things
25 that we assess before you would scan a letter to

1 determine whether or not you need to review it.

2 At the present time, we have the right, as I
3 said, to examine the letters and review the mail, but we
4 found that it's very difficult because for every message
5 we catch, or every indication of a problem we catch,
6 we're concerned that we're missing some.

7 For example, the Texas people indicated that
8 they have problem with codes. We --

9 QUESTION: May I ask this question along the
10 lines of your argument?

11 Does the record show that in fact any mail was
12 being permitted between the inmates?

13 MR. HERSCHEL: Yes.

14 QUESTION: Does it indicate the extent of that
15 mail that was approved?

16 MR. HERSCHEL: Okay, the chief --

17 QUESTION: Does it indicate whether there was
18 a dozen letters approved in a week, or a dozen in a year?

19 MR. HERSCHEL: His testimony -- Mr.
20 Engelbrecht's testimony was that 25 percent of requests
21 were approved.

22 QUESTION: Were approved?

23 MR. HERSCHEL: Were approved. He said that of
24 that number, or of that group, he could review those
25 letters in a period of about an hour a day.

1 What we argue -- and that was used in the
2 Circuit Court opinion, the Eighth Circuit Court opinion,
3 to say, well this was -- you could easily take care of
4 reviewing the mail.

5 Actually, our testimony was that we could
6 review this mail, but if you permitted every inmate in
7 the -- in all the institutions to correspond, we would
8 find that very difficult to handle, and in fact, we have
9 found some difficulty in it.

10 QUESTION: Mr. Herschel, does the record tell
11 us what the volume of this inmate-to-inmate mail is?

12 MR. HERSCHEL: We could only speculate on what
13 it would be at that time, since we had never --

14 QUESTION: But it tell us what -- what it has
15 been at any point in time, attempts to mail?

16 MR. HERSCHEL: It only tells you that of the
17 mail that was approved by the -- by the individual team
18 classification groups, that for example, at Renz, with a
19 population of 350 inmates, that it took them about an
20 hour to approve the mail that had been approved.

21 Now, not every inmate --

22 QUESTION: An hour everyday? Or an hour a
23 week? Or what?

24 MR. HERSCHEL: An hour everyday.

25 QUESTION: An hour everyday. So that must be

1 -- that doesn't tell us how many letters there were --

2 MR. HERSCHEL: No.

3 QUESTION: -- whether they read it closely or
4 scan it or what?

5 MR. HERSCHEL: No, it doesn't tell you. He
6 reviewed it on the basis of, you know, when they found
7 something suspicious, or they found a letter that was
8 going to an inmate that was not on the approval list, he
9 would examine it to determine whether or not it was --
10 whether or not there was --

11 QUESTION: One of the things that puzzles me
12 about the case is, I can't get a feel for how much work
13 is really involved here. I know in service during the
14 war they could go through an awful lot of mail in a
15 fairly brief period of time when they were looking for
16 important stuff.

17 But they really don't know what the volume is.

18 MR. HERSCHEL: The difficulty with our
19 position in the case is, since we had never permitted
20 it, we didn't have an idea except to say that -- you
21 know, except that we had 8,000 inmates, and we figured
22 that they would write. And that's the only kind of --

23 QUESTION: But they might not be writing to
24 inmates in other institutions, regularly, at least. I
25 suppose they primarily write to their family and so

1 forth.

2 MR. HERSCHEL: That's the only think we could
3 speculate on at that time. Now, Kansas -- Sally Halford
4 -- Chandler of Kansas testified that they had an open
5 correspondence program, and that they could not review
6 all the mail; and they did not review all the mail,
7 because they felt they couldn't handle it. And I
8 believe that's a fair assessment of her testimony.

9 QUESTION: Does her testimony tell us how much
10 there was in Kansas?

11 MR. HERSCHEL: No.

12 And in dealing with an alternative means of
13 communication, we would, as I said, prohibit --

14 QUESTION: Let me just ask one other question.

15 In your principal argument, why you must just
16 say, no mail, unless you get advance permission, is,
17 it'd be too much trouble to review the volume that would
18 take place?

19 MR. HERSCHEL: It's too much trouble not
20 because we couldn't hire the people to do it, because
21 that's -- you can always hire more people. I mean, it
22 takes your resources away from something else, but you
23 can hire more people.

24 Our problem is that we feel that the
25 difficulty in reviewing each piece of mail, in light of

1 possible codes, in light of the increasing gang problem
2 in the State of Missouri, would leave us open to having
3 mistakes being made that would result in tragedy.

4 In this situation, if we catch a piece of
5 mail, we solved the problem. But every one piece of
6 mail we catch, we may miss one. And if we miss one, we
7 have concerted activity --

8 QUESTION: But you have precisely the same
9 risk that Justice Marshall identified, don't you, in the
10 mail -- sending it to a civilian who in turn would pass
11 the same message along to the inmate in the other
12 institution?

13 MR. HERSCHEL: You'd have a better chance --

14 QUESTION: And the only way to catch that is
15 to go through all mail, isn't it?

16 MR. HERSCHEL: Well, it's a little bit
17 different in the sense that you can begin to identify,
18 by the patterns of letters coming in, what letters are
19 going in to the same inmate from the same civilian.

20 For example, if a civilian starts to write
21 five or six different inmates, you begin to get the idea
22 that maybe they're using her as a conduit or being used
23 as a conduit.

24 That situation is slightly more specific,
25 although a problem. I mean, we -- this may not be --

1 QUESTION: You think that's easier to handle
2 than just looking at the direct inmate correspondence?

3 MR. HERSCHEL: Yes, we believe it be easier,
4 because we believe it be less -- basically, most
5 civilians won't get involved in that kind of a thing.

6 I mean, we're -- we're basically -- you're
7 asking a civilian there to commit an act in violation of
8 -- in violation of a regulation, in violation -- that
9 could conceivably take away her privileges or his
10 privileges in dealing with the prison system ever again.

11 I mean, if you violate a regulation as a
12 civilian, you don't have a right back in prison.

13 QUESTION: Doesn't most of your danger of some
14 kind of illegal activity between an inmate -- two
15 inmates, one in one institution and one in another,
16 planning some kind of escape or something, wouldn't they
17 almost always have to use a third party to help them
18 with their plans?

19 MR. HERSCHEL: Except it's so much easiser
20 using the third -- it's so much easier --

21 QUESTION: And if there's a third party
22 involved, they just write to the third party, who in
23 turns writes to them.

24 I mean, I just -- I have trouble --

25 MR. HERSCHEL: They're going to have to get a

1 third person involved in the thing, in the scheme. And
2 it's going to have be a civilian.

3 And there's an assumption -- there would be an
4 assumption there, I would assume that most civilians
5 would not necessarily get involved in that thing; and
6 that if you do have a group of civilians who would get --

7 QUESTION: Yes, but if you have a potential
8 escape with a third person civilian, obviously, this is
9 not an honorable civilian.

10 MR. HERSCHEL: Correct.

11 QUESTION: By hypothesis.

12 MR. HERSCHEL: Correct. But the system -- the
13 system is not perfect. We cannot develop a perfect
14 system without stopping all communication between
15 outsiders and insiders.

16 QUESTION: You can make it harder, is what
17 you're saying, isn't it?

18 MR. HERSCHEL: Right, we're making it as
19 difficult as possible.

20 QUESTION: You can't stop it entirely, but you
21 can make it harder.

22 MR. HERSCHEL: Right.

23 QUESTION: So they have to -- and moreover, it
24 isn't just escape you're worried about, it it? You're
25 also worried about prison gangs.

1 MR. HERSCHEL: Right.

2 QUESTION: Assassinations in one prison being
3 directed from another.

4 MR. HERSCHEL: And very importantly --

5 QUESTION: And that doesn't require a civilian
6 at all, does it?

7 MR. HERSCHEL: No. What we're also very
8 concerned about is the concerted action -- for example,
9 the court in the Eighth Circuit said, you're talking
10 about correspondence that is not as presumptively
11 dangerous as the assembly discussed in Jones v. North
12 Carolina, or the solicitation.

13 And they said, it wasn't as dangerous because
14 you have separated prisons. Our argument is that it's
15 more dangerous because we have separated prisons.

16 The danger of the assembly of inmates in Jones
17 versus North Carolina was not that they assembled but
18 because they could perform and have concerted action;
19 that they in some way could cause a disturbance that we
20 could not handle.

21 Permitting inmate-to-inmate correspondence
22 between institutions permit them now to have concerted
23 action in more than one institution. And we would then
24 have to react, stretch our resources, into more than one
25 place.

1 Now, granted, we haven't had a situation like
2 that. But we are predicting, we are attempting to
3 anticipate problems. If we don't anticipate problems in
4 a prison situation, and react to a problem in a prison
5 situation, we are not going to successfully take care of
6 it. We are going to have tragedy.

7 And that's how prison officials -- that's how
8 prison officials deal with it.

9 If we go to a least restrictive alternative
10 analysis --

11 QUESTION: Your mail rules aren't just
12 intended to decrease the volume. They do decrease the
13 volume of mail that you have to review --

14 MR. HERSCHEL: Yes.

15 QUESTION: -- but they also decrease what you
16 might say the risk of the mail that has to be reviewed.
17 That is, even though it may only be 25 percent, the
18 amount of mail, it's much less than 25 percent the
19 amount of attention the amount of attention you have to
20 devote to that mail, isn't that so, because it's not
21 coming from the most dangerous people?

22 MR. HERSCHEL: We hope with our --

23 QUESTION: Well, that's the objective of the
24 system, isn't it?

25 MR. HERSCHEL: Right. It's exactly --

1 QUESTION: So it isn't just a reduction in
2 volume. It also makes it easier for you to review what
3 reduced volume is produced?

4 MR. HERSCHEL: And hopefully we have chosen
5 the people who are going to be the least risk. And the
6 difficulty with having free communication is that
7 basically we are going to have to deal with bad people
8 or people who are dangerous to us, but people who are
9 going to attempt to get around any inspection.

10 QUESTION: Mr. Herschel, is the same
11 correspondence rule applied in all of Missouri's prisons?

12 MR. HERSCHEL: When you say, correspondence --

13 QUESTION: Is the same rule applied in all of
14 Missouri's prisons as in the Renz institution?

15 MR. HERSCHEL: At this time, the same -- the
16 best interest standard was applied. Now, certain
17 institutions permitted correspondence more regularly.
18 Renz was a minimum perimeter prison with maximum
19 security inmates and minimum security inmates in it,
20 whereas the Missouri State Penitentiary --

21 QUESTION: But the general regulation --

22 MR. HERSCHEL: Was the same.

23 QUESTION: -- applied to all. It was
24 administered differently --

25 MR. HERSCHEL: Right.

1 QUESTION: -- at the Renz institution; is that
2 it? More restrictively?

3 MR. HERSCHEL: More restrictively.

4 QUESTION: Do you know what the Federal
5 correspondence rule is for inmates-to-inmates?

6 MR. HERSCHEL: It's inmates-to-inmates, it's
7 prohibited correspondence unless -- and they meet three
8 or four different criteria, and I've forgotten the exact
9 criteria.

10 But I remember reading it last night, and I
11 just can't think of the exact words. But it's based on
12 whether -- there are certain penological statements of
13 benefit that would result from the correspondence
14 between the inmates.

15 QUESTION: Mr. Herschel, could you get to the
16 merit point for a minute?

17 MR. HERSCHEL: Yes.

18 QUESTION: There are two rules involved.
19 Which one is before us?

20 MR. HERSCHEL: Before you would be the
21 December 1st, 1983 one, the one that was in effect at
22 trial.

23 That rule --

24 QUESTION: Is that the second one?

25 MR. HERSCHEL: That was the second one. I

1 believe that was the one in front of you, the one the
2 court struck down as being overly restrictive.

3 QUESTION: And that's the one that's before us?

4 MR. HERSCHEL: And I believe -- and that is my
5 -- after -- I don't believe the other one is before you,
6 because the only issue there would have been damages,
7 that he somehow exceeded his authority and he found no
8 damages against us. I mean, he found us to have acted
9 in good faith, or at least arguably in good faith.

10 QUESTION: What is the content of that rule?
11 You described that rule in your opening remarks as one
12 that prevented marriages between inmates.

13 Is that its limitation, or does it --

14 MR. HERSCHEL: No. Inmate marriages --

15 QUESTION: Oh.

16 MR. HERSCHEL: -- I wasn't clear on that.
17 Although the Eighth Circuit found that the evidence
18 showed that it was only used against inmates, its -- its
19 stretch was toward everybody. It could affect
20 civilians, and would affect civilians.

21 It was not intended to not affect civilians.
22 I don't think --

23 QUESTION: Well, not two civilians who wanted
24 to get married?

25 MR. HERSCHEL: Well, of course not. Civilians

1 who wanted to come in marry inmates. That would be a
2 little beyond our --

3 QUESTION: Couldn't we take it as the Eighth
4 Circuit construed it?

5 MR. HERSCHEL: I would say that -- the issue
6 before the Eighth Circuit was inmate-to-inmate
7 marriages. But in my brief, I point out that it did
8 have -- it could conceivably -- it could have been
9 applied to civilians. And so I didn't want to mislead
10 anybody on it.

11 QUESTION: Well, could I ask, have your rules
12 been changed to conform to this judgment?

13 MR. HERSCHEL: Yes. We were under order to
14 negotiate or submit separate rules.

15 QUESTION: There was no stay or anything?

16 MR. HERSCHEL: There was an initial stay filed
17 concerning when the initial order came down. We then
18 negotiated the order. The court place --

19 QUESTION: So the rules now in effect aren't
20 the rules that were invalidated?

21 MR. HERSCHEL: Right. We're working under the
22 new --

23 QUESTION: Well, why isn't the case moot?

24 MR. HERSCHEL: Okay. The case isn't moot
25 because given the opportunity, we would go back to the

1 other rule if --

2 QUESTION: So you operated -- you put them in
3 under compulsion?

4 MR. HERSCHEL: We put them in under
5 compulsion, and on the basis of administrative -- well,
6 there were some tactical concerns for our administration
7 of our prisons. Because this was our first regulation
8 ever struck down. And we were -- we had some
9 administrative problems that we felt would cause us to
10 have more difficulty later in the implementation than to
11 just appeal it and fight it.

12 We were under compulsion. We would go back
13 immediately to prior approval.

14 QUESTION: What is the marriage rule now in
15 effect?

16 MR. HERSCHEL: We basically, unless the -- we
17 can -- we have a right to counsel inmates. The
18 superintendent can counsel them not to get married. But
19 we cannot stop the marriage, unless the ceremony would
20 in some way interfere with the security of the
21 institution.

22 QUESTION: You have -- you take the position
23 that you can reasonable time, place and manner
24 restrictions on any marriage ceremony.

25 MR. HERSCHEL: Thirty days -- right, on the

1 ceremony. On the ceremony. We couldn't stop the
2 decision itself.

3 QUESTION: But now that's the rule that you
4 put in under compulsion, isn't it?

5 MR. HERSCHEL: Right. The rule before was
6 that we could actually stop a person from getting --
7 from making the decision to get married.

8 And if I might, since we're on the subject, I
9 might go into that a little bit.

10 QUESTION: But before you move to that, I'm
11 looking at some of the findings of fact by the District
12 Court. They're not very favorable to you.

13 MR. HERSCHEL: No, they're not.

14 QUESTION: And they were not found to be
15 clearly erroneous by the Court of Appeals.

16 The one I want to ask you about is No. 7 on
17 page 821. I think I can -- it's just a couple of
18 sentences:

19 The Renz rule against inmate-to-inmate
20 correspondence is enforced without a determination that
21 the security or order of Renz, or the rehabilitation of
22 the inmates, would be harmed.

23 MR. HERSCHEL: Okay.

24 QUESTION: What do you say to that finding of
25 fact? In other words, the indication is that the courts

1 below concluded that the rules were enforced without any
2 reason whatever.

3 MR. HERSCHEL: Well, the court found it. We
4 contended that we did have a security reason for it.
5 That's one of the reasons we have challenged them as
6 clearly erroneous.

7 We believe it came from a misconception of the
8 law, although this one wouldn't have come from it
9 because it was a strict finding of fact.

10 You're in a difficult position when you take
11 findings of fact. I mean, he found that we did not do
12 the kind of inquiry that he expected us to do.

13 QUESTION: Is he asking -- I read that as
14 requiring a case-by-case inquiry.

15 MR. HERSCHEL: And in fact, the testimony was,
16 we did it. I think the sticking point with the District
17 Court is that they didn't refer to the file each time.
18 I mean, we explained that the theory was that you go to
19 the file and talk to the --

20 QUESTION: But if as a matter of law you're
21 not required to make a case-by-case determination to
22 apply those -- this finding of fact is meaningless.

23 MR. HERSCHEL: If we're not required to do
24 that. Now, we felt at the District Court level, that
25 that's what we intended to do. And they did it by not

1 necessarily reference to the file everytime, but they
2 tried to make a case-by-case basis, because that's the
3 way the system would work better.

4 I would agree that this was an incorrect --
5 that it was -- we weren't required to do that under our
6 -- under constitutional law at this point.

7 QUESTION: Mr. Herschel, how could a marriage
8 hurt the State of Missouri?

9 MR. HERSCHEL: Could hurt the State of
10 Missouri?

11 QUESTION: Yes. What harm is there in
12 marriage of two inmates?

13 MR. HERSCHEL: There is no harm in marriage
14 unless it affects a fundamental interest, a legitimate
15 penological interest --

16 QUESTION: Like what?

17 MR. HERSCHEL: -- like for example security.
18 There is evidence --

19 QUESTION: How would it affect security?

20 MR. HERSCHEL: Okay. Security in prison.
21 You're dealing with a prison here. It's a kind of
22 unreal world. You're dealing with people who do not
23 develop relationships; who have had histories of abuse,
24 especially in the women's prison; and have had usually
25 abusive situation with men.

1 The situation is that the fact that they will
2 get married develops love triangles, develop -- develop
3 the sorts of --

4 QUESTION: Well, they won't live together.

5 MR. HERSCHEL: The competing -- the competing
6 affection -- the whole point that most of these people
7 meet, from, say Missouri State Penitentiary and at Renz,
8 which are 30 miles distant. And that doesn't mean that
9 they don't live together.

10 But somebody else can still want to correspond
11 with the same woman. Then we have an extra problem over
12 at MSP to keep these people controlled.

13 Or, for example, the woman may change her
14 mind. When a woman would, for example, say she was
15 going to marry one, decides she's going to marry another
16 man, we then have a problem between those two men.

17 The decision to get married in this situation,
18 granted, is a decision that's done in the abstract.
19 Because all the other instances of marriage are not
20 permitted, or not permitted, but are restricted, really,
21 by the fact of incarceration; the family decisions.

22 QUESTION: Mr. Herschel, this is a collateral
23 question: Do you permit conjugal visits?

24 MR. HERSCHEL: No. We permit contact visits.
25 Not permit inmates, but contact visits between civilians

1 and inmates. At Renz, we permit contact visits.

2 Did I answer your question?

3 QUESTION: I heard what you said.

4 (Laughter.)

5 MR. HERSCHEL: All right, let me explain it
6 this other way.

7 In Zablocki v. Redhail, we had -- the decision
8 was that you had -- a decision to be married was an
9 important right and a fundamental right. And that was
10 because all the other instances of marriage had been --
11 were permitted, and it seemed -- it seemed silly not to
12 permit the decision itself, or protect the decision
13 itself.

14 In this situation, you have a mirror -- the
15 mirror image of it. In this situation, we will -- we
16 have to restrict by the fact of incarceration most of the
17 instances of marriage; and that fact that they can't
18 cohabitate; the fact that their decisions about
19 marriages are changed.

20 All we want to restrict in the decision to be
21 married is, if it affects our security interest or if it
22 affects our rehabilitation interests.

23 However, the District Court did not accept our
24 rehabilitative interest in this. We still believe that
25 we can have a fundamentally good impact on women by, at

1 times, restricting their decision to get married in the
2 Renz Correctional Center.

3 And we're not dealing with the Missouri State
4 Penitentiary or any other place. We're dealing with the
5 Renz Correctional Center, because that was at issue,
6 although the regulation would have -- systemwide.

7 But the testimony was about Mr. Turner's
8 decisions. He felt that he was assisting women to gain
9 self-initiative because they were in a particularly
10 special condition. They were from abused situations.
11 They lacked education in most cases. And that we
12 acknowledged that they had had a derogatory -- I mean,
13 that they had had a life that was a result of a sexist
14 existence. And that was what he was attempting to
15 recognize, not that he was attempting to be sexist in
16 his approach.

17 Now the court found --

18 QUESTION: But if this were an all-male
19 prison, you'd still be making the same argument here,
20 would you not?

21 MR. HERSCHEL: We would be making the same --
22 we probably wouldn't -- it's hard to say -- to decide
23 whether or not Mr. Turner would have said the same thing
24 about men. Because he might have had men in different
25 situations.

1 But women who are in prison are different --

2 QUESTION: But your rules apply across the
3 board, don't they?

4 MR. HERSCHEL: And I tried -- I hope I didn't
5 make that clear -- it be -- be the same, it's clear.
6 And we would -- we would feel that we could stop a man's
7 decision to be married on the same basis, that it
8 affected the security interests, whether -- in that
9 situation, it might be a scam. It might be a setup to
10 set some sort of a deal up between them, even with a
11 civilian, on a drug scheme to get money into the prison.

12 And because a woman -- a married woman --

13 CHIEF JUSTICE REHNQUIST: Mr. Herschel, your
14 time has expired.

15 MR. HERSCHEL: Okay, thank you very much.

16 CHIEF JUSTICE REHNQUIST: We'll hear now from
17 you, Mr. Finch.

18 ORAL ARGUMENT OF FLOYD R. FINCH, ESQ.,

19 ON BEHALF OF THE RESPONDENTS

20 MR. FINCH: Mr. Chief Justice, and may it
21 please the Court:

22 What we have in this case today involves the
23 prison's denial of a recognized fundamental right that
24 at least applies to the Free World which is not
25 inconsistent with incarceration.

1 Both marriage and correspondence were denied
2 at Renz Correctional Center under a vague, best
3 interests standard.

4 If the Court reverses this case outright, then
5 effectively what happens is that Mr. Turner and the
6 officials at Renz Correctional Center, who arrogate to
7 themselves the right to decide which of their charges
8 will be married, and who can write letters to each
9 other, will effectively have no review, no judicial
10 review, of their conduct.

11 They will be effectively the final arbiters of
12 these important decisions that are well recognized in
13 the jurisprudence of this country.

14 I think it's important to note that we have
15 here a prison administration at Renz with a history of
16 abuse of the discretion that it's been given.

17 As the court below pointed out --

18 QUESTION: What is that important?

19 MR. FINCH: Because, Justice Scalia, in this
20 particular case we have one institution that was
21 violating the department-wide rules.

22 QUESTION: I mean, the rules are good or bad.
23 It's a different case if you're bringing a suit about
24 their abuse of discretion.

25 It seems to me the rules are good or bad.

1 MR. FINCH: Well, in fact, Your Honor --

2 QUESTION: I don't see what relevance it has
3 that this -- that they may have abused discretion in the
4 past.

5 I thought it was common practice to place
6 conditions upon parolees, for example, that they not
7 maintain contact with other convicted felons during the
8 term of their parole. Is that not a fairly common
9 condition upon parole?

10 MR. FINCH: Yes, sir, I think that is.

11 QUESTION: Well, now, if that can be placed on
12 a parolee, why is correspondence with other convicted
13 criminals while he's in the prison so clearly a
14 violation of a fundamental right?

15 MR. FINCH: Well, Justice Scalia, I don't
16 know, I'm not aware, of any Supreme Court case
17 recognizing that as an appropriate decision that will
18 stand up.

19 So this is the first time that this Court will
20 have an opportunity to rule on the decisions of two
21 persons to remain in contact, either inmates or parolees.

22 QUESTION: So you would agree, then, that
23 agreeing with you on this would cast doubt on the
24 validity of restrictions upon parolees being in contact
25 with convicted felons?

1 MR. FINCH: Yes, sir.

2 To answer your earlier question, sir, about
3 why the facts of this particular case are important, we
4 had here a prison administrator who was violating the
5 rules of the Department of Corrections.

6 He had his own little fiefdom.

7 QUESTION: That's not the basis on which the
8 Court of Appeals gave you relief, is it? They said that
9 the regulations were bad on their face.

10 MR. FINCH: Yes, sir.

11 QUESTION: So what's the fact that he may have
12 violated his own internal regulations got to do with the
13 issues that are before us?

14 MR. FINCH: The State is arguing that the
15 entire findings of fact of the District Court should be
16 thrown out because the prison administrator should have
17 discretion.

18 And the Chief Justice's question about whether
19 the factual findings of the court below are ever
20 relevant, I'd point out that what happened, and the
21 ability of this particular prison administrator to
22 exercise his discretion, is relevant to the decision of
23 this Court.

24 If you've got somebody who's violating his own
25 rules, who in this case actually was violating the

1 Procunier v. Martinez case by stopping the
2 correspondence of inmates with outsiders, totally
3 innocent correspondence, then you've got someone who I
4 contend cannot be trusted to enforce the rules fairly.

5 QUESTION: Well, so you say this case comes up
6 in a totally different posture than identical
7 regulations from, say, Kansas, because there you might
8 have had an administrator who didn't violate his own
9 regulations?

10 MR. FINCH: Yes, sir.

11 QUESTION: The Eighth Circuit certainly didn't
12 treat it that way.

13 MR. FINCH: Well, it was argued that -- those
14 points were argued to them as well, sir. You see, there
15 was a finding -- excuse me, there was a conclusion of
16 law by the court below that the regulations were
17 arbitrarily and capriciously applied here, and that
18 finding was not appealed.

19 QUESTION: You mean there's no such thing as
20 good or bad regulations in and of themselves. You
21 really have to --

22 MR. FINCH: No, sir, I'm not -- I'm sorry,
23 sir, I'm not arguing that at all.

24 What I am arguing is that when you look at the
25 application of the rules in this case, it's a reason not

1 to trust this administrator with that much discretion.

2 QUESTION: Well, but what if the State agrees
3 to replace the administrator? Do we know that they're
4 going to have the same administrator?

5 MR. FINCH: No, we don't. And we don't know
6 that we're going to have the same problem. Justice
7 Scalia --

8 QUESTION: Did -- was the lower court's
9 determination limited to this rule as applied by this
10 administrator?

11 MR. FINCH: No, sir, it was not.

12 QUESTION: Did it say that the State could
13 adopt the rules as long as it put in a new
14 administrator, or when it got a new administrator?

15 MR. FINCH: No, sir, it was not.

16 QUESTION: Then, evidently, it didn't rule
17 what you said it ruled. The administrator seems to have
18 nothing to do with its decision.

19 MR. FINCH: Well, the Court of Appeals
20 focussed on the rule itself.

21 But my only point was that the District Court
22 also had a separate finding, a conclusion of law, which
23 was not appealed that this particular administrator
24 acted arbitrarily.

25 QUESTION: But do you need that to win?

1 MR. FINCH: No, sir.

2 QUESTION: Then why are you arguing it?

3 MR. FINCH: In response to questions, Justice
4 Marshall.

5 QUESTION: No, I think you started this.

6 MR. FINCH: Well, I made a mistake then.

7 In this particular case, we found that there
8 was very little evidence to support the arguments of the
9 State of Missouri.

10 In regard to correspondence, for example,
11 there was a contention made that we promulgated this
12 rule because of security. But in fact the evidence at
13 trial was that none of the letters which were stopped
14 were stopped for a reason having anything to do with
15 security.

16 In fact, when inmates asked to correspond,
17 there was no discussion, no going back and reviewing the
18 file about whether or not this particular inmate might
19 pose a threat to the inmate he's corresponding with or
20 someone else.

21 The flat rule that was stated in the Renz
22 Correctional Center handbook is: Inmates may not
23 correspond with anybody who is not a family member.

24 So we had in this case a flat denial of
25 correspondence between particular inmates who had no

1 desire to correspond about anything other than simple
2 friendship.

3 In fact, Justice Marshall, your point was well
4 taken about the State's concession, that there was no
5 alternative means of communication between these
6 inmates.

7 That, in fact, was the case. If an inmate
8 wanted to write to a friend he knew on the outside, for
9 example, at Renz, the rule as applied would not let that
10 inmate correspond.

11 QUESTION: Mr. Finch, I still don't understand
12 how this argument goes to whether the rule is valid.

13 What you're telling me was that the rule was
14 not being applied fairly. It was not being applied in
15 such a way that you are allowed to correspond, as the
16 rule said you would and as we've been told was the
17 purpose, as long as there was no security problem.

18 But that means that the administration of it
19 was bad. And as I read the opinion that we're reviewing
20 here, it says the rule is bad, even if it were honestly
21 applied.

22 And isn't that what you're arguing, that the
23 rule is bad?

24 MR. FINCH: Yes, I am, because you give too
25 much -- you give too much vagueness when you put in a

1 standard of best interests.

2 There is no standard to guide the prison
3 administrator. They have other rules which allow the
4 prison administration to stop correspondence which, say,
5 is writing about escape attempts or a fraud of some
6 kind. All of those things are covered.

7 But the vague best interests standard allows
8 the prison administrator to do anything he darn well
9 pleases in regard to the correspondence of inmates.

10 And we had testimony --

11 QUESTION: So there are some applications of
12 the rule that would surely be valid.

13 MR. FINCH: Your Honor --

14 QUESTION: I mean, vagueness, for it to be
15 invalid for vagueness would require that there are no
16 applications that you could understand.

17 MR. FINCH: Well, Justice White, if there is a
18 circumstance where you could stop -- validly stop two
19 inmates from writing because of their best interest,
20 there's no evidence of it in the record below.

21 None of the letters that were stopped had
22 anything having to do with security or an escape
23 attempt. And we reproduce some of them in the brief.

24 QUESTION: Well, it doesn't just relate to the
25 letter. As we've been told, it may relate to the inmate

1 from whom he came. Maybe he was a troublemaker.

2 I mean, what the prison is trying to do is to
3 say, we don't want to have to review all of this mail so
4 intensively. So we just -- we can't possibly catch all
5 of the things that might be in it.

6 So we're simply going to eliminate the
7 correspondence between bad actors.

8 Now, for all we know, the examples you give,
9 although the particular letter was quite harmless, that
10 letter may have come from a very bad actor, from a gang
11 head in another prison. Isn't that possible.

12 MR. FINCH: Justice Scalia, I'm afraid there's
13 no evidence of that in this case. The State never
14 presented testimony that the particular correspondent
15 was a member of a gang or had any reason to cause any
16 harm to the security of either institution.

17 These were simply letters of friendship, many
18 of them simply love letters between a female inmate at
19 Renz and a male inmate someplace else.

20 And I stress, this is the only institution
21 where you have this problem. If a male inmate at the
22 Missouri State Prison wanted to write to a male inmate
23 at Moberly, that sort of correspondence was routinely
24 allowed.

25 Now, perhaps the State could impose

1 restrictions on gang members. But the Department of
2 Justice study which was cited in the briefs in this case
3 points out that 97 -- 93 percent of the Missouri inmates
4 are not members of gangs.

5 So the effect of this rule is, you stop most
6 of the prisoners in Missouri who don't cause any
7 problems from corresponding, because you don't want to
8 read their mail, because some of them might be gang
9 members.

10 And I would suggest that if the State's been
11 able to quantify that 7 -- I believe it's 6.7 percent of
12 their members are gang members, they must know pretty
13 well who they are, and they can limit their
14 correspondence.

15 QUESTION: Let me just be sure I understand
16 one thing.

17 MR. FINCH: Yes, sir.

18 QUESTION: You, then, do not contend that the
19 Constitution restricts the warden to -- the only
20 permissible way to do it would be item-by-item censoring
21 of the mail.

22 You would agree, I take it, from your most
23 recent argument, that if they identify gang members and
24 disperse them among different institutions because they
25 represent a threat, they could ban all mail between

1 those people without bothering to look at it?

2 MR. FINCH: Your Honor --

3 QUESTION: If they have some reasonable basis
4 for identifying a person as a particularly dangerous
5 inmate, they can say, nobody can correspond with him if
6 he's in a different institution?

7 MR. FINCH: Yes, Justice Stevens, to put it in
8 the terms of the Court, of the strict scrutiny test, I
9 think the State would have a compelling State interest,
10 and there may be no least restrictive alternative way of
11 stopping the correspondence which may be harmful between
12 the prison -- the gang member at MSP and the gang member
13 at Moberly.

14 QUESTION: And would you agree that the prison
15 -- the warden would have a fairly broad discretion in
16 deciding who belongs in the 7 percent class as opposed
17 to the 93 percent class?

18 MR. FINCH: Well, I think you're going --

19 QUESTION: You have to have some kind of
20 reason, I suppose.

21 MR. FINCH: There has to be some kind of
22 reason. And frankly, Your Honor, I suggest the best
23 reason is an example of conduct that you don't want to
24 have occurring in the mail, an instruction or perhaps --
25 an instruction to kill an inmate, or perhaps even just

1 an instruction -- the use of a code by one inmate.

2 This Court recognizes --

3 QUESTION: But do you think you have to wait
4 until you find something in the mail? Or what about --
5 say you have a gang form in institution A, and they
6 decide to disperse them to five different institutions,
7 just for general security reasons, but they've never
8 gotten any correspondence.

9 Could they right away impose a ban on those
10 people writing to one another?

11 MR. FINCH: I think they could, Justice
12 Stevens. And then the question would be, what if an
13 inmate at MSP wants to write to someone else, and he
14 wants to write a totally innocent letter?

15 I think under those circumstances, if the
16 prison administrator can read the letter and say, gee,
17 we don't see anything here that's wrong with this
18 letter, then that inmate should be allowed to send it to
19 someone who's not a gang member.

20 But the rule you suggest, allowing all
21 correspondence to be denied for particular inmates,
22 would still suffer from that vice.

23 And perhaps the inmate's got a cousin who
24 would not fit within the Missouri rules as to who is an
25 immediate family member, and he'd like to write to his

1 cousin about his sister's birth of a child.

2 There's no reason that that letter should be
3 stopped, merely because of the speculation that on some
4 other occasions, this same inmate might write something
5 that would harm the security of the institution.

6 QUESTION: Well, of course, you're then
7 insisting on a case-by-case and almost letter-by-letter
8 analysis, which the Department says we just don't have
9 the personnel to do.

10 Do our cases suggest that there has be a
11 case-by-case determination and a letter-by-letter?

12 Certainly the opinion in Jones suggested you
13 could adopt a prophylactic rule if you perceived a
14 danger.

15 MR. FINCH: Yes, Your Honor, Mr. Chief
16 Justice, but the opinion in Jones also recognized that
17 inmates do retain those certain fundamental rights.

18 And if you adopt a prophylactic rule that
19 says, none of the residents of MSP are going to be
20 allowed to correspond with anyone else, in the absence
21 of any evidence that any resident of Renz Correctional
22 Center is a member of a gang, then you're violating
23 everybody's rights, because --

24 QUESTION: Well, are you saying that it is a
25 fundamental right established by our cases that

1 prisoners have to correspond with other prisoners?

2 MR. FINCH: No, sir, I don't think that this
3 Court has ever reached that.

4 QUESTION: I don't think it has either.

5 QUESTION: Well, then why -- then what's the
6 basis for your insisting on strict scrutiny?

7 MR. FINCH: Because, Justice White, I believe
8 that the fundamental right should be recognized in this
9 case, that prison authorities --

10 QUESTION: So you are arguing that there is a
11 fundamental right of prisoners to correspond with one
12 another?

13 MR. FINCH: Yes, that's what I think the Court
14 should adopt in this case, that there are certain core
15 rights, such as the right of a written word --

16 QUESTION: Well, is Martinez the closest case
17 for you or not?

18 MR. FINCH: Yes, sir, it is; Martinez is
19 clearly the closest.

20 QUESTION: Why isn't Jones a more appropriate
21 standard in this case for inmate-to-inmate
22 correspondence, just as it was for inmate-to-inmate
23 meetings?

24 MR. FINCH: Well, there are -- there is some --

25 QUESTION: Martinez had to do with the rights

1 of noninmates, really. And I wonder whether Jones
2 doesn't provide the appropriate test?

3 MR. FINCH: That is the State's argument,
4 Justice O'Connor. But in Jones, there was a specific
5 discussion of the First Amendment rights to inmates to
6 solicit one another for membership in a prison.

7 And what this Court said was, we're not going
8 -- we don't have -- the State -- excuse me, the prison
9 officials do not have to allow mass mailings. But the
10 Court recognized that's because there can still be
11 individual mailings. That channel of communication is
12 not cut off.

13 And we view that as authority for the position
14 we're arguing in this case. When Leonard Safley, one of
15 the named plaintiffs, wanted to write a letter to his
16 fiancée, P.J. Watson, it didn't do any good to tell him
17 he might be able to write to somebody else, because he
18 had a particular target of that correspondence.

19 And Jones recognizes that that existence of no
20 other alternative is what's important. The Court did
21 use a least restrictive analysis in Jones as regards to
22 the First Amendment issue.

23 And I'd also point out that the Court said,
24 First Amendment rights are barely at issue in this
25 case. Well, back in Pell, this Court held that the

1 inmates do have some First Amendment rights which are
2 not inconsistent with incarceration.

3 And the State's conceded that they let at
4 least 25 percent of the inmates write. So it's clear
5 that the mere fact of correspondence is not inconsistent
6 with incarceration. It's what in the letter itself.

7 And the only way you determine what's in the
8 letter is by reading it.

9 I would suggest that there's no real evidence
10 that the State of Missouri can't handle whatever
11 security problems that it thinks may exist. After all,
12 these rules have been in effect for 30 months. There's
13 been no effort to go back to the District Court in this
14 case and say, Judge Sacks, we can't handle this
15 problem. We can't deal with the security concerns.

16 QUESTION: Well, what if the State let --

17 QUESTION: The State is challenging the whole
18 basis on which the regulations were imposed.

19 MR. FINCH: That's right, Chief Justice -- Mr.
20 Chief Justice.

21 QUESTION: I would think perhaps if they lose
22 here, then would be the opportunity to go back to the
23 District Court.

24 But until then, I would think their basic
25 approach is that the District Court and the Court of

1 Appeals were wrong in imposing the regulations they did.

2 MR. FINCH: And in fact, perhaps they may do
3 it at that point, Mr. Chief Justice.

4 But the problem is, at the present time, they
5 have not encountered such a serious problem that they
6 did go back and try to get a change of the rule in the
7 District Court.

8 QUESTION: Counsellor, have they had any
9 marriages?

10 MR. FINCH: Yes, sir. Many people have been
11 married.

12 QUESTION: How many?

13 MR. FINCH: I don't know. At least ten that I
14 am aware of. But I have not tried to keep track of all
15 the marriages that have occurred in Missouri prisons.

16 Now --

17 QUESTION: Mr. Finch, what if this were not
18 just a prison rule, but what if it was a statute enacted
19 by the legislature that said, we're adding to all the
20 punishments that we now have on the books in addition to
21 twenty years or whatnot, anyone who's convicted of a
22 crime will not be able to correspond with other inmates
23 of penal institutions?

24 I mean, avowedly making it part of the
25 punishment. Would that be bad? Is there any difference

1 between that and this situation?

2 MR. FINCH: Well, certainly there's a
3 difference, in that you've got a legislative enactment
4 and not simply a particular administrator at one point.

5 But, judge, I -- excuse me, Justice Scalia, I
6 don't think there's any substantive difference. I would
7 argue that that statute would also be unconstitutional,
8 because of what I believe is an inmate's right --

9 QUESTION: You can take a man out of his home,
10 out of his family, prevent him from contact visits with
11 his family, even, all of the other fundamental liberties
12 can be taken away as a punishment for crime, but the
13 ability to correspond with other felons who are in
14 prison is so fundamental that that can't be imposed?

15 MR. FINCH: Yes, sir, I would say --

16 QUESTION: It seems very strange.

17 MR. FINCH: -- there are certain things, such
18 as communication, the ability to keep open lines, the
19 ability to practice one's central religious beliefs, is
20 something that could not be taken away by State statute.

21 And the ability of a person to marry the
22 person of his choice also should not be taken away by
23 State statute.

24 So long as this Court recognizes in its
25 opinions that inmates retain certain rights, then the

1 question becomes, what rights are they and how can they
2 be protected?

3 If the Court were to simply say as a final
4 matter, well, inmates have no rights and, in this case,
5 they have no correspondence rights, they have no
6 marriage rights, and in the Shabazz case that's coming
7 up before this Court, they have no religious rights,
8 then we can all go home, and there won't be nearly as
9 much prison litigation.

10 But of course the Court has never accepted
11 such a broad proposition. What we have --

12 QUESTION: Well, the Court has accepted, of
13 course, the fact that a convicted felon can be deprived
14 of his liberty, and his opportunity to live with his
15 family. And these are very fundamental rights.

16 And yet you think the right to correspond with
17 another inmate is more fundamental than that, apparently?

18 MR. FINCH: I guess I'll have to answer yes.k

19 QUESTION: Which is a remarkable proposition,
20 I think.

21 MR. FINCH: Well, the prison system of this
22 country recognizes the importance of this communication
23 for rehabilitation of an inmate.

24 The regulations that were in effect in this
25 case, in their preamble clauses, always said that

1 communication is important because it gives the inmate
2 something to look forward to.

3 As I mentioned, many of these letters --

4 QUESTION: But the rule itself says that a
5 prison -- a prisoner may be granted leave for
6 inmate-to-inmate correspondence if it's determined to be
7 in his best interests, or hers.

8 MR. FINCH: Yes, that's right.

9 QUESTION: And we're talking about the
10 validity of the rule facially. And what's the matter
11 with that rule, facially.

12 MR. FINCH: Because it is unduly vague.

13 QUESTION: Under your theory.

14 MR. FINCH: Ma'am, under my -- excuse me,
15 Justice O'Connor, under my theory, it's wrong because it
16 gives too much discretion to prison authorities to deny
17 a letter solely because they don't like the content.
18 And in fact, there was one letter which was stopped
19 because the prison administrators did not like the
20 content of what was said.

21 There was other correspondence that was
22 stopped because a former inmate who'd been released from
23 prison was a quote writ writer, unquote, and the prison
24 authorities didn't want her writing back in to her
25 inmates.

1 QUESTION: So the facial challenge boils down
2 to a vagueness argument?

3 MR. FINCH: Yes, sir -- excuse me, yes,
4 ma'am. I apologize.

5 The other issue, of course, in this case is
6 the right of prison officials to stop inmates from
7 marrying one another.

8 The State has correctly pointed out that there
9 are inmates under the prior rule and under the current
10 -- well, I guess there have been three rules in effect.
11 The first rule was a rule that said inmates -- basically
12 said inmates can get married as soon as the prison
13 officials work out the arrangements.

14 Now, ironically, in this particular case,
15 Justice -- excuse me, Superintendent Turner took it upon
16 himself to stop inmates, even though there was a rule
17 that allowed inmates to be married. He stopped certain
18 inmates from getting married, because in his opinion the
19 marriage was not a good idea.

20 Then about a month before the trial was
21 scheduled, and three months before the trial actually
22 occurred, they -- the State of Missouri set up a new
23 system where an inmate had to come up with some
24 compelling reason for allowing him to get married.

25 QUESTION: Which version of the rule do we

1 have before us on the no marriage?

2 MR. FINCH: Well, the current rule --

3 QUESTION: What is before this Court, do you
4 suppose?

5 MR. FINCH: The last --

6 QUESTION: There are three different versions,
7 and I'm not quite clear which one we're addressing.

8 MR. FINCH: Justice O'Connor, the last rule
9 before the court -- before the trial was a rule that
10 said, an inmate can only be married if he comes up with
11 a compelling reason that the marriage should be allowed.

12 QUESTION: Is that the one we have to deal
13 with?

14 MR. FINCH: Yes, ma'am. The rule that was
15 written by the Missouri Division of Corrections after
16 the case went to trial and the judgment was rendered,
17 allows inmates to be married basically at the
18 convenience of the prison administration.

19 They file a request, and they are allowed to
20 be married when it is convenient, and under certain
21 restrictions, restrictions as to the number of inmates
22 who may attend, the visitors, and that sort of thing.

23 QUESTION: Now, your problem with this one is
24 not that it's vague, or is it? Your attack on this is a
25 bit different from your attack on the other one, isn't

1 it?

2 MR. FINCH: Well, Justice Scalia, it is vague

3 --

4 QUESTION: Compelling reason is less vague,
5 certainly, than the conditions for allowing prison mail,
6 which were unspecified.

7 MR. FINCH: Yes, sir. I would agree that it
8 is vague. I do not suggest that it is -- that there is a
9 common method of understanding.

10 We asked the various prison administrators who
11 testified what their definition was, and they did not
12 come down to exactly the same thing.

13 For example, a defendant Blackwell testified
14 that financial considerations would be good enough to
15 allow two inmates to get married. But Superintendent --
16 or Warden Wirick testified that the only reason he'd
17 allow two people to get married is if they already had
18 an illegitimate child and to give the baby a name.

19 QUESTION: Well, you might ask the nine of us
20 what constitutes a least onerous alternative, and we
21 might all come up with different answers to that.

22 But it's a standard, anyway, just as
23 compelling reason is a standard.

24 MR. FINCH: Yes, sir, it is. And I return to
25 the proposition that I don't think that prison

1 authorities should have the power, in the absence of
2 some compelling reason that they advance, in the absence
3 of showing there's no other way around the problem, a
4 least restrictive alternatives analysis, to stop two
5 consenting adults, who satisfy the statutes of Missouri,
6 from getting married.

7 Justice Powell pointed out earlier that the
8 findings of fact in this case, particularly findings of
9 fact No. 7, do not support the argument of the State in
10 this case, and that is a matter which I would like to
11 deal with.

12 As you pointed out, sir, the District Court
13 heard testimony over five days from 30-some different
14 witnesses, and had the opportunity to listen to Mr.
15 Turner explain why he denied marriages; had the
16 opportunity to hear defendant Engelbrecht testify about
17 the way he handled correspondence.

18 And under those circumstances, his findings of
19 fact are entitled to great weight. Those were then
20 affirmed by the Court of Appeals.

21 And the State, even though it's just arguing
22 in its brief, still contends that this Court should go
23 back and reverse all the findings of fact by the trial
24 court, and presumably enter its own findings at this
25 level.

1 I would suggest that the findings of fact are
2 entitled to particular deference in this case. When we
3 had defendant Turner on the stand in the court itself
4 to cross-examine this man about why he was denying
5 marriage and the standards used for denying
6 correspondence.

7 QUESTION: Mr. Finch, is it clear -- you know,
8 we've said that the right to get married is a
9 fundamental right. But the ordinary marriage has a lot
10 of attributes to it that this marriage here would not.

11 I mean, what is left of the associations of
12 marriage? Nor the right to cohabit. Not the right to
13 beget and rear children in the prison context, right?

14 So it's basically just a demonstration of
15 commitment to someone, which might be made in other
16 ways, right? And I suppose there are inheritance
17 effects if the two people get married.

18 What other -- what other attributes of the
19 normal marital relation continue to exist in the prison
20 context?

21 MR. FINCH: Well, Justice Scalia, if you asked
22 the inmates here why they want to get married, they
23 give, in my opinion, a compelling response. Because
24 they want to share their life with someone, even if it's
25 only by mail.

1 QUESTION: But they don't. I mean, in fact,
2 they don't share their life with one another. They
3 still live apart.

4 MR. FINCH: Well, for one thing, Your Honor --

5 QUESTION: I mean, couldn't they make that
6 commitment just as well by sending them a fraternity
7 ring?

8 (Laughter.)

9 MR. FINCH: I don't think that the religious
10 attributes of a marriage ceremony can be fairly equated
11 with a fraternity ring.

12 It seems to me, sir, that we must also recall
13 that these inmates are not, in most cases, at least, in
14 prison for life.

15 Leonard Safley, one of the plaintiffs in this
16 case, was in the Kansas City honor center, and had the
17 opportunity to come down and visit his wife in Renz
18 Correctional Center, and he did that on a regular basis.

19 Now, admittedly, their marriage at that time
20 may have been limited to letters, sitting together in
21 the visiting room, and holding hands and an occasional
22 kiss when the guard wasn't looking, but that does not
23 mean that that marriage was any less important or
24 sacred.

25 There are many people who marry, perhaps in

1 their 60's or 70's, who may not have a sexual
2 relationship, but still have care for the person that
3 they've chosen to spend the rest of their life with.

4 And it may be, as the District Court
5 recognized, that these marriages may not all work out.
6 But that fact is constitutionally irrelevant, I would
7 submit. Because free people make mistakes, and inmates
8 make mistakes, as the State points out, or they wouldn't
9 be in there.

10 But at least they've got a right to try to
11 make a better life for themselves. We had expert
12 testimony that the important thing about the marriage
13 decision is that the inmate is standing up and saying,
14 hey, while I may be incarcerated, I've got a right to
15 look forward to a better life. I've got a right to plan
16 on something after this institution.

17 And the evidence we had in this case is that
18 the inmates who did get married, despite the prison
19 officials' objections, ended up becoming better
20 prisoners.

21 QUESTION: (Inaudible) the prison stop them
22 from getting engaged?

23 MR. FINCH: To the best of my knowledge, there
24 was not something like that. Although, Justice Scalia,
25 there was something like that that happened at Renz,

1 where both men and women prisoners were located.

2 As soon as prison administrators noticed any
3 sort of friendship more serious than very Platonic, they
4 would immediately move the man to another institution.

5 So they were trying to break up any
6 relationship from developing between inmates of the two
7 sexes at that particular institution.

8 So yes, if -- there was no allowance of
9 allowing two inmates at Renz to get engaged. In fact,
10 Leonard Safley in this case, as soon as the prison
11 administrators became aware that there was a friendship
12 between he and his ultimate fiancée, they moved him to
13 another institution.

14 Even when he was gone, however, they wouldn't
15 let the two inmates correspond. And so Mr. Safley
16 didn't now until he came to Judge Sacks' courtroom about
17 -- in 1982 -- whether she would actually consent to
18 marry him. And that's when, in the courtroom, is when
19 we found out her answer.

20 I think that the prison administration in the
21 State of Missouri can balance the interests of the
22 inmates in correspondence and marriage with their own
23 security needs.

24 As I've suggested, they have been able to do
25 so. All it takes is a little prodding from the courts.

1 But if this Court takes away that prodding by
2 granting too much deference to prison administrators,
3 then we're going to have a series of cases, I would
4 suggest, around the country where --

5 CHIEF JUSTICE REHNQUIST: Your time has
6 expired, Mr. Finch.

7 MR. FINCH: Thank you, sir.

8 CHIEF JUSTICE REHNQUIST: The case is
9 submitted.

10 (Whereupon, at 11:07 a.m., the case in the
11 above-entitled matter was submitted.)

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CERTIFICATION

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

#85-1384 - WILLIAM R. TURNER, ET AL., Petitioners V.

LEONARD SAFLEY. ET AL.

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BY Paul A. Richardson

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