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ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1722

TITLE EDWARD O'LONE, ETC., ET AL., Petitioners V. ESTATE OF AHMAD UTHMAN SHABAZZ AND SADR-UD-DIN NAFIS MATEEN

PLACE Washington. D. C.

DATE March 24, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD O'LONE, ETC., ET AL., :

Petitioners, :

v. : No. 85-1722

ESTATE OF AHMAD UTHMAN SHABAZZ :

AND SADR-UD-DIN NAFIS MATEEN :

- x

Washington, D. C.

Tuesday, March 24, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

MS. LAURIE M. HODIAN, ESQ., Deputy Attorney General of New Jersey; on behalf of the petitioners.

ROGER CLEGG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C.; amicus curiae, supporting petitioners.

JAMES KATZ, ESQ., Haddonfield, New Jersey; on behalf of the respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will now hear argument No. 85-1722, Edward O'Lone versus the Estate of Ahmad Uthman Shabazz and another respondent.

Ms. Hodian, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAURIE M. HODIAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MS. HODIAN: Mr. Chief Justice and may it please the Court.

The issue presented here is the standard of review of a prison regulation which affects the ability of some prisoners to participate in a religious practice.

The case is here on a writ of certiorari to the Court of Appeals for the Third Circuit.

The regulation at issue required prison inmates who are assigned to work outside during the day to remain outside. It prohibited returns to the institution for any reason, save for medical emergencies.

The District Court upheld the regulation against Respondent's First Amendment challenge, finding that it was reasonably related to legitimate goals of security and rehabilitation, and that it was not an exaggerated response to those objectives.

A panel from the Court of Appeals decided the

case under its St. Claire versus Cuyler standard, a reasonable relationship tests. A rehearing en banc was then granted, and the Court of Appeals modified its earlier test, holding that prison officials must prove their regulations are intended to serve and do serve security goals.

And, further, they must prove that there is no reasonable method in existence to accommodate the inmates' religious practices without creating bona fide security problems.

Petitioners submit that the proper analysis to be applied here is the analysis that was applied by this Court in Jones, Pell versus Procunier and Bell versus Wolfish; that is, a regulation must be reasonably related to a legitimate penalogical objective.

Absent evidence that the response is an exaggerated one, the regulation will be upheld.

QUESTION: Ms. Hodian, was the Third Circuit's new test in this case applicable just to free exercise of religion claims on behalf of the prisoners, or was it across the board; do you know?

MS. HODIAN: Of course, only a free exercise claim was raised here. It's unclear whether it would apply to other First Amendment claims.

This Court has recognized the importance of

deferring to the considered judgments that prison officials have to make on a daily basis in regards to questions of security.

Prisons, of course, differ greatly from the outside world. There really is no counterpart to a prison in the outside world.

They are closed, sub-societies, populated by people who have committed crimes against society and often these are very violent crimes.

Of course, they are involuntarily confined; and that, in and of itself, lends itself to great confrontation and tension between the inmates and staff.

In this hostile, adversarial atmosphere prison officials are charged with maintaining security, maintaining an orderly operation; and to the extent possible prison officials have the obligation to attempt to rehabilitate inmates.

However, inmates are constantly making challenges to prison authority. The tensions between inmates and staff make for a very volatile atmosphere, and this atmosphere changes at all times.

Sometimes an institution is running very smoothly, and the superintendent may be able to make further privileges available to inmates. Other times the superintendent will get a sense that there is a

great amount of tension underlying the prison administration.

The Court has said that prisoners' claims must be decided against this background. They must be analyzed in terms of the needs and the problems that confront prison administrators.

In Jones, therefore, this Court held that the burden is not on prison officials to show affirmatively that the regulated activity would be detrimental to proper institutional goals.

Deference is to be extended to their opinions unless there is substantial evidence on the record to show that their response is exaggerated.

This same analysis has been applied -- had been previously applied in Pell versus Procunier, and was subsequently applied in Bell versus Wolfish.

QUESTION: Excuse me, Ms. Hodian. Are you saying that the prison officials don't have to justify their regulation at all?

MS. HODIAN: No, Your Honor, I'm not saying --

QUESTION: I thought that's what you just said, that they don't have to show affirmatively.

MS. HODIAN: That the activity would definitely jeopardize -- the regulated activity would definitely jeopardize the security of the institution.

They must, of course, show that their regulation was adopted in order to meet the security problems.

They must show that it's reasonably related.

QUESTION: All right.

MS. HODIAN: We submit that this same analysis that was applied by this Court in the controlling cases should apply to free exercise claims as well. The cases that I mentioned were all brought pursuant to the First Amendment, and we do not believe that there should be any differentiation in terms of a ranking of constitutional rights, and that the same analysis should apply to free exercise claims.

QUESTION: May I ask at that point: Do you think all free exercise claims should be analyzed in precisely the same way?

Let's say this was a question of diet rather than a question of attending an important religious service. Would the issue be the same?

MS. HODIAN: The standard should still be a reasonable relationship test to legitimate penalogical objectives.

Of course, within that test there is room for taking into account the various needs of the prison officials, the various requests of the plaintiffs -- of

the prisoners.

QUESTION: Well, let's specifically say that here you have a religious ceremony that is claimed to be an important part of the religion of the inmate. Does that require greater attention or a greater degree of reasonableness in saying, "You can't go to your service," than it would to just say, "You have to eat the standard diet that everyone else eats"?

MS. HODIAN: Your Honor, there may be some differences permitted within the reasonable relationship test, but it is very difficult for prison administrators to evaluate the claims of prisoners, in terms of how important it is to their religious beliefs.

It puts the prison officials in a very difficult position of saying, "Well, we think your religion -- your religious practice is central and vital to your religious beliefs, whereas yours is not quite as important."

That lends itself to additional confrontations to inmates, which the prison officials here testified they wanted to avoid. They would prefer to set their standards and then allow the prisoners to practice their religious beliefs to the extent that they can within those parameters.

We submit that --

QUESTION: What if the parameters are that the work schedule is everybody has to work outside the main facility from 9:00 to 5:00 every day, and that we can show that it's much easier to control the population if we do it that way. And one of the unfortunate by-products is that no one can attend religious services.

But they could demonstrate that it's a much more efficient and safe way to run the prison. Would that be -- That would be all they would have to do, I suppose.

MS. HODIAN: Well, as long as it is not considered an exaggerated response and the prisoners do have the opportunity --

QUESTION: It's cheaper; they need less guards; and they can keep count of people much easier. There's a lot of good reasons why I think it would make sense to have everybody follow precisely the same routine throughout the institution.

But that, I take it, would be perfectly permissible, even if these people couldn't go to their services and people of other faiths couldn't go to Saturday or Sunday services. That would still be okay, I suppose.

MS. HODIAN: If the showing the prison officials have made -- and if the Court is able to

determine that those security measures are reasonably related to -- if the measures are reasonably related to security, then it probably would pass constitutional muster.

Of course, as the Solicitor General pointed out in his brief, there are situations where a regulation seems -- or appears to be related to security. And, indeed, the prison officials testify that it is, where the Court was able to determine that it was an exaggerated response.

QUESTION: But it seems to me these things probably boil down to how many guards you need on duty at particular times and places. And if you can always show that "We'll save three guards a week," there's a personnel cost, would that always be sufficient -- or five guards, whatever you might say.

Shouldn't that be -- If you can just prove that, that by having a standardized practice, you will always save X dollars in salary costs and make the place a little bit safer, that would be the answer in every case, I suppose.

MS. HODIAN: It may not be an answer in every case. The circumstances of each case do have to be considered. And again if the prisoners --

QUESTION: Well, say ten guards. Say you

could definitely save ten guards every day by doing it, would that do it?

MS. HODIAN: I'm not so sure --

QUESTION: It seems to me it's always a matter of economics, isn't it?

MS. HODIAN: I'm not so sure it's always a matter of economics, Your Honor. Actually it's an additional problem than that. This case is a example of the additional problem.

We have a rule that was clearly related to the security problems that were arising with this outside work program. And in order to accommodate the inmates, exceptions would have had to have been made for these two particular inmates.

That causes severe problems for prison administration, problems that eventually lead to greater security problems. The other inmates see that one or two or a particular group of inmates is getting a benefit or an exemption from a rule that is supposed to apply across the board, that generates hostility amongst those inmates.

It also, in the eyes of the inmates, allows them to perceive the ones who are getting the benefit as more powerful inmates. And that's very dangerous in a prison society.

QUESTION: Ms. Hodian, New Jersey still has a legislature, doesn't it?

MS. HODIAN: Yes.

QUESTION: They're not likely to allow the prisons to operate seven days a week without any church services for any of the inmates, are they?

MS. HODIAN: No, Your Honor. And this case --

QUESTION: Prison administrators generally like the prisoners to go to church services, I would think, unless your religion is satanism. It generally calms down, rather than stirs up the prison populace, doesn't it?

MS. HODIAN: That's correct, Your Honor. The prison officials do want to accommodate inmates' religious requests, and I think that's very clear from the record in this case.

The Leesburg officials went out of their way to accommodate prisoners' religious beliefs to the extent that they could within sound penalogical policy and theory.

And, in fact, the prison officials testified that they want to avoid confrontations with inmates. So that if inmates make a request to practice a religious service, they're going to allow it unless there's a very good reason not to allow it.

QUESTION: Could I ask: How does your practice compare with that in a federal prison? Now, I realize the SG is on your side.

But would not what is banned here have been permitted in a federal prison?

MS. HODIAN: Your Honor, the Solicitor General did append the Federal Bureau of Prisons' regulations regarding religious accommodation. And, in fact, the Federal Bureau of Prisons, just as the State of New Jersey prison system, attempts to accommodate inmates to the extent that they can.

Of course, there is always a qualification there. It must be within the bounds of security. Whether in this precise situation, where great numbers of inmates are working outside at a great distance from the institution, and where there are definite security problems in allowing them to attend -- to get back to the institution to attend, I can't actually answer whether the Federal Bureau would have the same problem.

But --

QUESTION: Well, I think there's greater accommodation on the federal side than there is in New Jersey.

MS. HODIAN: I'm not so sure I agree. I think the Federal Bureau of Prisons is still concerned about

security. And --

QUESTION: Well, this isn't a New Jersey-wide rule, is it? It's just this one prison that's overcrowded, and they have their prisoners out in the field in order to have fewer there during the day because they just don't have enough room for them during the day.

MS. HODIAN: Exactly, Your Honor.

QUESTION: So this isn't a New Jersey-wide rule. It's just this the one facility.

MS. HODIAN: No, it was a policy that the Leesburg officials instituted to meet the problems that were facing them on a regular basis. And various prisons, of course, are going to have different programs.

Some prisons are going to be complete maximum security prisons, and the inmates are never going to go beyond the walls.

QUESTION: Well, is there any limit to your position? Aren't you, in effect, saying if the prison authorities say it must be thus and so, that's it?

MS. HODIAN: No, Your --

QUESTION: That's the rule of 75 years ago.

MS. HODIAN: No, Your Honor. We're not saying that.

We're saying that the prison officials do have

to show that their regulations have a reasonable basis in security, that they are reasonably related to security and that they are not an exaggerated response.

But we disagree that the burden of proof should be placed on prison officials to show that there is no other alternative to accommodating the competing concerns here.

QUESTION: Ms. Hodian --

QUESTION: Are you familiar with Judge Kaufman's decision in the Second Circuit in the Abdul case?

MS. HODIAN: Yes, Your Honor. There the Court adopted a three-part standard.

QUESTION: What do you think of it?

MS. HODIAN: Well, we have problems with that decision. The Court there said that if the practice sought to be engaged in is presumptively dangerous, then there should be more deference to the prison officials' determinations.

And it's more likely that the rule will be upheld. The problems we have with that are that it's very -- It puts courts and Judges in the position of determining what type of behavior in a particular prison under particular circumstances is presumptively dangerous.

We think that it does not allow enough deference to the judgment of the prison officials, the ones with the expertise in these problems. It also does not recognize other legitimate goals that this Court has recognized, such as rehabilitation.

It requires courts to weigh competing security concerns.

QUESTION: Ms. Hodian, in determining the reasonableness of the rule under your standard, do you think there's room for courts to examine and consider the existence of obvious and less burdensome alternatives?

MS. HODIAN: To a certain extent, Your Honor, that can be part of the analysis. There is room for that in the reasonable relationship standard.

QUESTION: You would have to do that, wouldn't you, if you agree that the prison official has to show it's not an exaggerated response?

MS. HODIAN: Exactly.

QUESTION: Wouldn't the prison official have to show that there isn't -- I mean, if there's something much less drastic that could be done, he'd have to show there wasn't such a thing.

MS. HODIAN: Yes, that's correct.

QUESTION: But does the warden have to show

that the security concerns are genuine, or does he just have to assert them, in your view?

MS. HODIAN: The warden can't make conclusionary statements about security. He does have to demonstrate that they are real concerns.

QUESTION: That they're genuine. But he didn't under the Claire standard, as I understand, at least as Judge Adams described it, he didn't have to do that under the Claire standard.

MS. HODIAN: I think under St. Claire, still the security goals -- the security objectives have to be real, but they do not have to be very immediate; and they don't have to show a past problem, a past history of security concerns, or that these particular inmates have a proclivity to unruly conduct.

QUESTION: But Judge Adams said that under St. Claire, the state was under no burden to establish that such security concerns were genuine and were based on more than speculation.

Do you agree that that's a correct characterization of the standard you're asking us to adopt?

MS. HODIAN: I'm not sure that I would agree with Judge Adams' interpretation of St. Claire. In the St. Claire opinion the analysis there, the prison

officials still have to show that their regulations are related to security, and the Court still has to make a determination that those opinions of the prison officials are sincerely held, and more than that, that they are arguably correct.

So there is still a determination by the Court that these regulations, that their opinions about the need for the regulations are arguably correct.

That means -- of course, if a judge disagrees perhaps -- but if there is room for disagreement, the judge should defer to the prison officials.

QUESTION: Whenever he is arguably correct?

MS. HODIAN: Yes.

QUESTION: That means he can make a good argument for his position, whether the facts support it or not, I suppose.

MS. HODIAN: Well, I think the facts would have to support his opinion.

QUESTION: I must confess: I have some difficulty knowing exactly what we're supposed to decide in this case. I mean, the difference between the St. Claire standard and what was opened to you on remand in this case and what you're saying, it seems to me you're asking us to do something in between -- at least in between what Judge Adams describes as the St. Claire

standard, as in the standard he specified for the remand.

I think you want something in between.

MS. HODIAN: Well, Your Honor, the Third Circuit's new standard does not permit the amount of deference to opinions of prison officials that this Court says should be granted to their opinions.

We think the St. Claire standard of reasonable relationship test, which was based on this Court's decisions in Jones and Pell versus Procunier is the proper test to be applied.

QUESTION: Well, Jones and Pell are the controlling cases in this Court, aren't they? I mean, we needn't deal directly with the St. Claire case, which is authority only in the Third Circuit.

MS. HODIAN: Yes, Your Honor; that's correct. But we believe that St. Claire was based very much on Jones and took language directly from Jones.

The problem with placing any more onerous burden on the prison officials is that it encourages inmates to couch their claims in First Amendment terms and to seek to fit within the particular exemptions that are being granted.

The findings of fact here, which were based on the testimony not only of the officials, but also of the prisoners were that many prisoners were claiming to be

Muslim, so that they could avoid a day of the outside work program.

The testimony was that the outside work program was not very easily accepted by the prisoners, and many of them sought to come within exemptions to the rule.

We submit that prison officials should not be in a position of having to challenge the inmates' sincerity of their beliefs, that if an inmate comes forward and says, "Well, I am of this particular religion, and it requires me to do this particular act," prison officials don't want to challenge that.

And there's really nothing more that they can do, other than making a very minimal inquiry. Once a prisoner says, "This is indeed my religion," there's not much that the prison officials can do.

And yet, undoubtedly, with a very onerous burden on the State, one which will be very difficult to meet, prisoners will be making additional claims.

We noted in our reply brief that the Fifth Circuit recently noted the problem of proliferation of claims amongst inmates.

But the facts here show that the prison officials made a very good faith attempt to accommodate the religious beliefs of inmates. These regulations

were not adopted in a vacuum.

The program had started in April of '83. As problems arose, the prison officials attempted to meet those problems. What they found and what the District Court found was that each time the prison officials eliminated an excuse for the inmates to come in, they came up with a new excuse.

And finally, with these increasing problems, the prison officials, after they discussed it with all the professional staff, adopted this regulation.

QUESTION: Isn't it true that if the facts as you describe them are correct -- and I'm sure that they are -- that you would prevail on remand under Judge Adams' standard?

MS. HODIAN: We're really not sure if we would prevail, Your Honor.

QUESTION: It seems to me you would, given what you've just described.

MS. HODIAN: Despite these findings of fact, Judge Adams seemed to indicate that the prison officials would have to show more than they had already shown.

QUESTION: Thank you, Ms. Hodian. We'll hear now from you, Mr. Clegg.

ORAL ARGUMENT OF ROGER CLEGG, ESQ.,

AMICUS CURIAE SUPPORTING PETITIONERS

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

The issue in this case is what test do we use to determine when a prison rule violates a prisoner's free exercise rights.

It is our position, along with New Jersey, that the rule should be left alone, if it is reasonably related to a legitimate penalogical interest.

I want to make two points, that the test we --

QUESTION: [inaudible] reasonably related?

MR. CLEGG: That's correct.

QUESTION: What do you consider in determining that? What elements are important?

MR. CLEGG: Well --

QUESTION: Is the existence of an obvious, less burdensome alternative something you obviously would be considering?

MR. CLEGG: Yes.

QUESTION: And what else?

MR. CLEGG: -- it certainly is.

QUESTION: The alternatives?

MR. CLEGG: The alternatives, whether the response was an exaggerated one. Let me outline how I think that the test would work in a typical case.

The prisoner would have to come in and show,

first of all, the the prison rule that was being challenged infringed on his free exercise of religion.

It would then be up to the State to show that the regulation was reasonably related to a legitimate penalogical interest.

The prisoner would then have to show that the State was wrong, that there was substantial evidence showing that the rule was not reasonably related to a legitimate penalogical interest.

One way that he could do that is by showing that it was an exaggerated response. And as Justice Scalia pointed out, one indicium of an exaggerated response is the presence of easy and obvious alternatives.

No one can fault the Respondents for wanting to attend their religious service. The prison officials have been handed a very difficult job by society. They are supposed to protect society from the prisoners and the prisoners from one another, while trying to rehabilitate them, all on meager budgets.

I want to stress that when officials act out of security concerns, one of their principal objectives is to protect the lives and safety of other prisoners. So the trade-off in this case wasn't just between Respondents' religious claims and the Petitioner's

satisfaction of having a well-run program.

The trade-off was between these two prisoners' religious claims and the safety of all the other prisoners, as well as the safety of guards and society as a whole.

You can also see in this case that the Respondents' return to the prison would disrupt the rehabilitation program of all the other prisoners.

Now, someone has to make this delicate trade-off between the desires and needs of the various prisoners.

In the federal system, this decision is especially ticklish, given the wide range of religions and the potential for proliferation of claims. Obviously, this is a very subjective decision, which can be done well only by those familiar with prisons and prisoners.

It is not a decision well suited to intensive review. This is why the right standard is to leave the prison rule alone when it is reasonably related to a legitimate penalogical interest.

To require that the rule be for a compelling state interest, and it be the least restrictive means for achieving it will inevitably mean that courts will not give prison officials the deference they are due.

QUESTION: May I ask: If you agree that the response is exaggerated, it can't be -- I'm not sure the difference between the least restrictive response and the most exaggerated -- I'm having trouble stating it.

But wouldn't you agree that when the prisoner shows that it's exaggerated, what he's showing is it's more restrictive than necessary?

MR. CLEGG: No, I think there has to be more than that.

QUESTION: What does it mean to say it's an exaggerated response?

MR. CLEGG: Well, this Court has said in Bell and in Block versus Rutherford that the fact that there is a better way of doing things does not suffice. And I think that that's right.

QUESTION: Of course those are not free exercise cases. Those are not free exercise cases.

MR. CLEGG: No, but I think that the analysis has to be the same. I think this Court has said that it doesn't make sense and it's not right to rank constitutional rights.

Bell was a case that did involve First Amendment rights, hardback books.

QUESTION: Yes.

MR. CLEGG: So I think that the analysis should be the same, at least within the First Amendment. I think --

QUESTION: But you don't have this exaggerated problem in those other areas, do you, the problem of saying that the response was exaggerated because you basically just asked whether the regulation is reasonable. That's all you do in those areas.

MR. CLEGG: No. I mean, the exaggerated response language is taken from Pell versus Procunier, and it was quoted again in Jones versus North Carolina Prisoners' Union.

I think it is something that this Court has applied in these other First Amendment cases and should continue to be applied.

But to answer your question, the fact that there are alternatives is evidence of an exaggerated response, and the easier and more obvious they are, the stronger evidence it is.

But the prison official does not have to show that there is absolutely no other way that this can be achieved.

And in any event, the burden is on the prisoner at that point of showing that there are these other alternatives.

QUESTION: Well, Mr. Clegg, isn't there some danger of just picking up phrases from out of various opinions and treating them as if they were constitutional doctrine?

If you have the idea that the thing has to be reasonably related to a legitimate penalogical concern, presumably, these other factors will come into that test not as separate elements --

MR. CLEGG: Yes. That's right.

QUESTION: -- but as simply a logical inquiry as to whether something is reasonably related to a penalogical concern.

MR. CLEGG: That's correct, and that's why I say that the way we see the test as working is that the prison officials first show that it is reasonably related to a legitimate penalogical interest.

QUESTION: Then do we really need a handbook to say, first, the prison officials say this; then the prisoners go -- I mean, as if it's Stage 1, 2, 3, 4?

MR. CLEGG: No.

QUESTION: Again, if the test is reasonably related to a legitimate penalogical concern, presumably, judges and lawyers can figure out how a case like that should proceed.

MR. CLEGG: That's correct. And I broke it

down that way so that it would be clear what the prison officials had to show, what the burden was on them to show, that the burden is not on them to show anything about the alternatives --

QUESTION: Let me ask --

MR. CLEGG: That is something --

QUESTION: -- what if the prisoner comes in and shows what he claims to be an equally, but less burdensome, alternative to serve the penalogical interest, and the prison official says, "Well, I guess there is that alternative, but we just don't want to follow it, because our rule certainly serves a penalogical interest. Everybody agrees with that."

And the prisoner says, "I agree it serves it, but it is too broad. It's more restrictive than necessary."

And the prison official says, "So what?"

Who is going to win?

MR. CLEGG: The inquiry is whether or not that rule is reasonable. If the alternative is one that is easy and obvious and the denial is one that is dramatic and central, these are all things that will be of evidentiary value in determining whether or not this rule is unreasonable.

But it does not automatically follow that --

as this Court said in Bell and Block -- that because there is another alternative, that that has to be followed.

It is only if the presence of that other alternative shows that what was adopted was unreasonable, that the prisoner will win.

I should also stress that while our standard gives judicial deference to prison officials, it is not a blank check. This standard need not be, and has not been, a toothless one.

In the rare instance when a prison acts irrationally or maliciously, it will afford the prisoner redress.

Finally, a strict scrutiny standard is unnecessary. As Justice Scalia noted, prison officials recognize that religion is a positive force, not only as a general matter, but in terms of the prison's own interest, particularly of security and rehabilitation.

And they also recognize that people feel strongly about religion, and that there is no point in needlessly provoking a confrontation about it.

QUESTION: Of course, since you're urging the same test under not just the religion clause but all other clauses, that argument sort of goes down the tubes.

MR. CLEGG: Well, it doesn't go down the tubes.

QUESTION: Except in the religion case.

MR. CLEGG: It should give you some reassurance in the religion context. I think --

QUESTION: Well, are you proposing a sort of reasonableness test with teeth for the prisoner? Is that what it boils down in these First Amendment cases, certainly in a free --

MR. CLEGG: Yes, yes. But I think that -- I don't think that there's anything new about it. I think that the reasonableness inquiry has teeth. I mean, this Court's decisions under the equal protection clause show that.

I think it's clear from the facts of this case that the New Jersey officials were very sympathetic to the Muslims' desire to attend Jumu'ah, and that respondents themselves recognized in their brief that the Federal prisons share this sympathy.

So religious practices will be accommodated unless and until they begin to threaten the safety of other prisoners, or the prison's efforts at rehabilitation, or some other legitimate penalogical interest.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Clegg.

We'll hear now from you, Mr. Katz.

ORAL ARGUMENT OF JAMES KATZ, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

For almost 200 years religious services have been conducted in prisons for inmates.

While incarceration necessarily places limitations upon the rights enjoyed by free citizens, it is equally true that inmates do not shed all basic constitutional rights by reason of confinement or conviction.

Rather, they retain those rights not inconsistent with their status as prisoners or legitimate penalogical objectives.

This Court has held that prisoners retain the right to practice their religion, and has reaffirmed that prisoners should be accorded all basic opportunities to the free exercise of their religion, as guaranteed by the First and Fourteenth Amendment.

QUESTION: Mr. Katz, you say that religious services have been allowed in prisons for 200 years. What hours the religious service has to be conducted has some bearing on how easy it is for the prison officials to accommodate it, isn't it?

They were perfectly willing to allow a Muslim

service on Friday, as I understand it, but not during the lunch hour, not in the middle of the day.

And it's sort of a standoff between the prison officials and the Muslim faith. I understand that it's the requirement of the faith that the service be at noon, or high noon, during the day.

And that's the only time that the prison officials say that they can't accommodate on Friday. They were willing to accommodate it later that day, right?

MR. KATZ: Your Honor, this service has unique religious content to it.

QUESTION: I understand. I'm not questioning that. But I'm saying to say that prison officials should allow religious services is -- is one thing, when that means at some point on Saturday or Sunday or Friday they have to allow a religious service.

But to say, they have to allow it at noon on Friday, it puts more demands on the system.

MR. KATZ: Your Honor, it may put more demands on the system, but this religious service is, at that time, is central to the Muslim faith. Fourteen hundred years of Islamic scholarship confirm that. The Koran confirms that.

And to tell a Muslim, where the service is so

central to his or her faith, that you can hold the service at a later time effectively eliminates the religious content of that service.

It's like saying that you can hold Christmas on the 4th of July or Passover on St. Patrick's Day.

QUESTION: I understand. But my point is, the more rigid the religious belief is, the more difficult it is for the state to accommodate it in the context of a prison. That stands to reason.

MR. KATZ: Your Honor, with all due respect, this service was accommodated by the state. The record shows that this service was held since 1979 at this prison.

The record shows that prior to March of 1984, all Muslim inmates were permitted to attend that service, both maximum security inmates as well as minimum or gang minimum security inmates.

And the record shows that presently maximum security inmates, those inmates who potentially are the greatest risk to the institution, are allowed to attend that service.

So the question of accommodation, it seems to me, is belied by the facts of this case.

Petitioners in their argument focus on the no-return policy, and argue that that policy was

rationally related to the institution's legitimate security concerns.

The problem with that argument is, it misses the point here. No one is disputing that the no-return policy was rationally related.

The problem here is the issue is not whether the institution's general prison policies are rational. We concede that they are.

The central issue was the justification for the deprivation of these inmates' religious rights.

That's what needs to be focused on. The institution's policies may be rational, but nonetheless that fails to deal with whether, as the Third Circuit held, it is possible to both reasonably accommodate the inmates' commands of conscience and the institution's legitimate security concerns.

Petitioners fail to focus on this. The no-return policy was never applicable to the gang minimum inmates, because under the facts of this case, gang minimum inmates, prior to March of 1984, worked on an alternate work detail.

That work detail was inside the institution. They never had to go back into the institution to participate in the Jumu'ah service.

Moreover, the minimum inmates, who are housed

at the farm, which is a geographically separate and physically distinct facility, were able to go back to the service -- were able to go back and attend the service without passing through the main receiving gate.

So to focus on the no-return policy or to focus on standard 853 is like a magician hiding the ball. That's not the issue before this Court.

The issue here really is whether it was possible to accommodate these inmates.

The evidence shows the alternate work detail occurred without problems. The institution, the witnesses during the hearing below indicated that Muslim inmates do not pose any greater security problems for the institution than any other inmates.

QUESTION: Wasn't one of the objections the alternate work detail, some people would prefer the alternate work, and the prisons had had trouble --

MR. KATZ: Your Honor, the alternate work was not an effort to avoid work; the alternate work was cutting wood.

They weren't trying to get out of their responsibilities, and the institution could use any work it wanted to employ in the alternate work detail. So it's not --

QUESTION: Wasn't one of the objections that

the institution found it penalogically unsound to have gangs or teams of one group, whether they were all fundamentalist Christians or all Moslems or all blacks or all whites or anything else? Wasn't that a proper penalogical concern?

MR. KATZ: Your Honor, there is no evidence in this record, frankly, that their concern was related to this alternate work detail.

This alternate work detail occurred. It was in existence. There was no evidence that the alternate work detail posed any problems. There's no reason why that alternate work detail couldn't have been a mixed detail. That same --

QUESTION: We can't accept what seems like a reasonable judgment by penal officials until they try it and on the specific detail there is a riot or somebody killed?

MR. KATZ: Not at all, Your Honor. It is perfectly appropriate for potential security concerns to be considered.

But what the Third Circuit's test rejected was the notion that sincerely -- beliefs that are merely sincerely held and arguably correct are insufficient, particularly when there is no relationship between the institution's security concerns and the religious

practice at issue.

The test, it seems to me from the Third Circuit, permits those concerns to be evaluated. The Third Circuit does not fail to accord deference to the institution. The Third Circuit appreciated the deference that needed to be accorded.

But what it sought to do, as petitioners even concede in their brief, it sought to establish a test that would protect these fundamental rights that are at issue here.

We are not seeking to establish a hierarchy of constitutional rights. All constitutional rights are equally important.

What we are seeking here is a standard which is appropriate for the rights in question.

Petitioners rely on the cases of Pell, Jones and Bell as supporting their standard here. Those cases, if we look at the facts of those cases, one, they didn't involve free exercise claims.

Two, those cases permitted deference where the institution --

QUESTION: Well, then, Mr. Katz, why should it make a difference that those cases didn't involve free exercise claims if they involved some other claim under the First Amendment?

MR. KATZ: I think we need -- I think that's just the beginning of the analysis, Your Honor.

QUESTION: Well, why does it -- I asked you, why does it make a difference. Why does it?

MR. KATZ: It makes a difference, Your Honor, if the difference is a time, place and manner regulation, which those cases involved, in a free exercise claim.

This Court has applied different standards to time, place and manner regulations.

QUESTION: Well, has it applied different standards to free speech claims as opposed to free exercise claims?

MR. KATZ: Has this -- under -- it has, to free speech claims that were time, place and manner regulations, certainly.

And those opinions make clear -- the Pell opinion is very clear -- that what was a predicate to its opinion is that there were readily available alternatives that could accommodate the inmates' rights. And it went through those alternatives very carefully.

Similarly, the same analysis was applied in Bell. Bell was the publisher-only rule. And that prevented books, hard back books, unless they came from

publishers, book stores, or book clubs.

And what the Court based its decision on was the fact that there were readily available alternatives that could accommodate those inmates' rights.

In Jones, a similar analysis was applied regarding bulk mailing. Those cases, it wasn't just the fact that these issues are occurring in what I would call the geographical approach to constitutional rights.

It's not just the fact that these cases occurred in a prison. The analysis, it seems to me, was more focused than that, and the Court's approach was -- it seemed to me, took cognizance of the fact that there were readily available alternatives; that the regulations were time, place and manner regulations; that they were content-neutral; and that the practices themselves did not pose any -- were not presumptively dangerous.

In contrast here, we don't have a time, place and manner regulation. We have an absolute prohibition on a religious service which the District Court found and petitioner does not contend --

QUESTION: You say it's not a time, place and manner regulation, but again, that may be largely a matter of description.

You can see -- you can say that the prison

officials said there weren't going to be any religious services at midday on Friday.

Now that's a time, place and manner regulation.

MR. KATZ: With all due respect, Your Honor, that's not what they said. They are holding a service on midday on Friday. The service can be attended by the inmates who are the most dangerous to the institution, maximum security inmates.

And indeed, they permitted other inmates to attend that service prior to March, 1984. So it's not a case where the institution has said, we're not going to hold services on Friday.

Moreover, this is not a case --

QUESTION: Well, it said, we're not going to bring a gang in from outside for a midday service.

MR. KATZ: With all due respect, Your Honor, it said we are not going to permit the alternate work detail to continue, and we are not going to permit minimum security inmates to come back on their own to attend the service, where that service has posed no problems; and --

QUESTION: Well, why isn't that a time, place and manner regulation?

MR. KATZ: Because it seems to me, Your Honor, and I don't believe that this Court has ever recognized

-- not that it couldn't do it here -- but I don't think that this Court has ever recognized the notion of a time, place and manner regulation in a free exercise context, where you're talking about a particular service that has unique religious content, and that religious content is predicated upon holding the service at a particular time during the day.

In effect, what this Court would be doing, and in effect, what the state would be doing, is, you would be becoming the arbiters of scriptural interpretation.

You would effectively be saying to these inmates that you can satisfy your religious needs by having this service at a later time. Or you can satisfy your religious needs by having a pork free diet.

It seems to me that it is not the place for either the --

QUESTION: It's not saying that initially. Initially it's saying you can satisfy them by staying, out of jail.

I mean, we're not dealing with free citizens here. We're dealing with people who have been put in a restricted situation, through no fault of the state's, and we're just talking about what kind of accommodation has to be made in that context.

MR. KATZ: Absolutely, Your Honor. And it

seems to me the Third Circuit's opinion recognizes that.

What this Court has repeatedly recognized, and what the Third Circuit recognizes is, you do lose certain rights when you're incarcerated, but you do not lose all of those rights.

And you do not lose those rights that are inconsistent with your status as a prisoner.

The Solicitor General in his brief has recognized that indeed not only does religion frequently serve the rehabilitative efforts of institutions, but there is nothing inherently inconsistent about religion in the context of a prison; frequently, religion is beneficial, and history shows that religion has been beneficial.

So it seems to me -- I agree with you, Your Honor, if we were dealing with a situation which was inherently inconsistent with a presumptively dangerous activity.

That's not this case. That's not free exercise. And indeed, this Court has made that distinction, but the distinction doesn't apply here.

The petitioners talk about the institution's security concerns, and legitimate security concerns. No one argues with that.

But security is not a talismanic phrase that

automatically results in the deprivation of basic First Amendment guarantees. It is true, a naked inmate in a bare cell who is bound poses no security problems for the institution.

But from that point on, every time you apply a little more freedom, that will pose a potential security risk. But that, in and of itself, is not grounds to deny basic constitutional rights.

Not every step that is taken to protect fundamental guarantees will result in chaos or disorder. And indeed, on the record of this case, the rationale which the state has offered for depriving these inmates of attending this basic service simply is not justified.

The alternate work detail was in existence. There were no problems. Muslim inmates don't pose any problems, at least according to the testimony.

There were jobs available. And the question should be: Can we both accommodate --

QUESTION: We're not called upon to decide those facts, are we?

MR. KATZ: No, no. All that is --

QUESTION: We're just called upon to decide what test shall be applied to those facts.

Now you may or may not be right that the work

detail posed a problem, or that it isn't reasonable to think that it would pose a problem.

But all we're really supposed to decide is, on what test should the court that decides those facts decide them, right?

MR. KATZ: Absolutely, Your Honor. The only issue that the Third Circuit decided was the appropriate test. The only issue before this Court is what is the appropriate test.

It will ultimately be up to the District Court to apply the facts to that test. But it seems to me that if we look at the test that the Third Circuit has applied here, it's a test of mutual accommodation.

It's not a test that seeks to substitute the inmates' commands of conscience for the institution's legitimate security concerns.

It is a test that seeks to balance both of them. It's a test that seeks to accommodate both of them.

QUESTION: (Inaudible) the least restrictive alternative?

MR. KATZ: I do not read the opinion as requiring a least restrictive alternative. Indeed, although this may not always be the case, I don't even see the words, least restrictive alternative, anywhere

in that opinion.

That is not necessarily dispositive, certainly. But what the test --

QUESTION: Well, the opinion appeared to say that the prison officials had to establish that no reasonable method to accommodate the respondents' religious exercise could be achieved without security problems, in effect.

MR. KATZ: It said -- and you need to emphasize the word "reasonable", and it was talking about a reasonable method.

It didn't say, no method. And I think that's -- that's an important distinction.

Moreover, it seems to me, you may have various alternatives, which can equally accommodate the institution's legitimate security concerns, as well as the inmates' commands of conscience.

It would be appropriate, under this Court's approaches in Pell and its progeny that when you have readily available alternatives, we should defer.

And so if you do have readily available alternatives, it would be appropriate to defer to the view of the institution to accommodate those alternatives.

But that was not the case here. We were not

dealing here with readily available alternatives; we were dealing here with an absolute prohibition.

And we need to emphasize, the problem with the St. Claire tests, and I understand this Court, with all due respect to the Third Circuit Court of Appeals, certainly is not bound by anything the Third Circuit said as regarding the St. Claire test, nor are you bound by anything that was said in this test.

QUESTION: Who -- how do you understand the Third Circuit would -- how would it apply this reasonable methods of accommodation test in terms of the burden of proof?

Who must show that there is another reasonable way of accommodating -- another reasonable way of proceeding without sacrificing either the state's interest or the prisoners' interest?

MR. KATZ: As I read the opinion, Your Honor, it seems to me that the Third Circuit put that burden on the state.

QUESTION: The state must show there is no other reasonable way, or must a prisoner demonstrate that there is a reasonable way?

MR. KATZ: It seems to me that the state -- it seems to me that the state faces --

QUESTION: Disproving a negative is pretty

hard, isn't it?

MR. KATZ: Well, it seems to me that the state faced with the alternative --

QUESTION: Proving a negative.

MR. KATZ: I understand what -- what you're referring to. But it seems to me, Your Honor, that the state would only be bound by the alternatives that were put forth by the inmates, unless the state could come up with some other alternatives.

But I don't think it's -- I don't think it's an endless exercise. And I think it contrasts with the St. Claire standard which the Third Circuit was operating under.

The St. Claire standard merely said that there needed to be a potential threat to security and that the institution's position was sincerely held -- I doubt whether you'd ever have a situation where a warden would testify that his beliefs were not sincerely held -- and arguably correct.

And then the burden shifted to the inmates to demonstrate by substantial evidence -- not preponderance of the evidence, which is the normal standard in civil cases, but by substantial evidence -- that these security concerns were either exaggerated or unreasonable.

That is a minimal standard --

QUESTION: Substantial evidence is less than a preponderance of the evidence.

MR. KATZ: Substantial evidence, I believe, as the Third Circuit stated in Cole, which was a subsequent decision, is a greater burden than the preponderance of the evidence.

That's what the Third -- that's how the Third Circuit has interpreted the opinion.

Moreover, in either the St. Claire test or a rational relationship test, contrary -- and with all due respect to what the Solicitor General argued here this morning -- there is no requirement to reach readily available alternatives, because you may never get there.

And this case, it seems to me, evidences that. The state has proposed the no-return policy as being rational. It's a general prison policy.

And that policy may very well be rational. And under the St. Claire test, the state's burden ends, and then the burden shifts to the inmates to demonstrate that it's exaggerated.

It very well may not be exaggerated. But that doesn't deal with the issue.

The issue is whether you can accommodate the fundamental constitutional guarantees. And in a

situation like this, where there is no connection with the inmates' religious rights and the institution's legitimate security concerns, you will fail to get to those alternatives.

And that, frankly, is the problem with the test as proposed. And that, it seems to me, is what the Third Circuit was concerned about; and that is the reason, and it was the appreciation of that fact, which led the Third Circuit to an approach which could more appropriately both accommodate the institution's security concerns as well as the inmates' religious rights.

The petitioners have discussed the problems with this test. And they go through a number of potential problems.

First, they claim that it will result in frivolous claims. I submit that frivolous claims should be dealt with precisely like that; they should be dealt with as frivolous claims.

That should not be a vehicle to eviscerate fundamental constitutional rights.

Second, they argue that inmates will recast their claims as free exercise claims. First of all, what is ignored here is, regardless of the test, there is a predicate which must be reached, whether we are

talking about a rational relationship test or a mutual accommodation test or an arguably correct sincerely held test.

And that predicate, which the burden is on the plaintiff, the plaintiff must prove that the rights are religiously based and sincerely held.

And that is going to apply regardless of the test. And that is an appropriate standard to contest the religious claims of inmates.

Secondly, the free exercise clause, as it has existed, obviously, the standards of that have not resulted in a rash of efforts by individuals in a free society to recast their claims as free exercise claims.

QUESTION: I think your opponent's point is that to the extent that the benefits that have to be given upon the assertion of a religious claims are increased, the incentive to assert false religious claims will be increased.

If -- if one of the things you get is that you can come back from the fields on Friday, or not get sent to the fields on Friday, that will induce false religious claims.

I think that's true. Your point is quite right. You're going to have false claims anyway.

But the point being made by the other side is

that to the extent you get more and more benefits if you adopt the least restrictive alternative test, the incentive for those claims will increase.

Now, that's true, isn't it?

MR. KATZ: It's certainly true that to the extent you recognize fundamental constitutional guarantees --

QUESTION: Well, put it that way if you like, but it's true.

MR. KATZ: No, it -- it certainly -- it certainly is true. But the question is, it seems to me, whether that is a justification, in and of itself, number one, to deny those claims; and number two, whether there are not vehicles by which judges and the courts can distinguish that fact.

Indeed, that was an effort this Court recognized in Sherbert and in other free exercise cases, that there is a possibility for fraud anytime you recognize constitutional guarantees, and anytime you recognize free exercise guarantees.

But I think -- I have confidence that the courts are able to distinguish between those claims which are legitimate and those claims which are fraudulent.

And I do not believe that the appropriate

vehicle to do that is to deny basic constitutional guarantees. There are other ways that that can be achieved without denying those very basic and essential rights.

And this should not be the vehicle that's used to do that.

It seems to me that what is essential to look at here is the nature of the right that's being asserted. It's not a novel program. We're not seeking to implement a new initiative.

What we are seeking to do is the continuation of a practice which has occurred without incident for five years.

Secondly, we are not seeking -- we are not seeking to be treated differently than others. This institution already provides on Saturday and Sunday for adherents with religions on those days, the right to attend religious services.

We're simply seeking to be treated equally.

And I might note that the institution claims a lot of -- the problem of overcrowding. And there are a couple of points that I think need to be recognized regarding that.

One, suddenly on weekends, when all of the inmates are confined to the institution, when there are

virtually no outside work details, and where there are less guards available, the problems of overcrowding disappear when it comes to providing religious services for those whose Sabbath falls on a Saturday or Sunday.

So it seems to me we are in effect establishing a different standard for those whose religion falls on different days.

Thirdly, overcrowding, in and of itself -- I think it is extremely dangerous when we permit that to be the rationale to eviscerate basic constitutional rights.

This overcrowding was not an emergency procedure -- emergency problem that suddenly arose in 1984. The governor's executive orders had been in existence in 1981, and effectively, what we're doing here, is because the state, for whatever reason, has failed to appropriate the needed funds to relieve the overcrowding situation, it's then able to bootstrap on that fact by denying these basic constitutional guarantees to these inmates.

QUESTION: So you don't think the overcrowding should be a factor at all?

MR. KATZ: I think that the overcrowding should be a -- a factor, and indeed, I don't think the Third Circuit's test precludes --

QUESTION: It says that the factor such as the endemic crowding in a state's prisons may be considered --

MR. KATZ: May be considered in weighing whether there is a possibility to accommodate both the security interest and the commands of conscience.

It shouldn't be the sole rationale by which they can simply ab initio wipe away these basic constitutional guarantees.

It is important to understand what is at issue here. What is at issue is the right to pray, a basic issue at the heart of the free exercise guarantee.

It is undoubtedly true that prisoners and prisons are dark and dingy worlds. And frequently, it is prayer which is the light. It is prayer which provides the candle of hope.

I urge this Court not to snuff out that light, not to snuff out that candle.

Unless the Court has anything further.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Katz.

The case is submitted.k

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

derson Reporting Company, Inc., hereby certifies that the tached pages represents an accurate transcription of lectronic sound recording of the oral argument before the preme Court of The United States in the Matter of:

#85-1722 - EDWARD O'LONE, ETC., ET AL., Petitioners V.

ESTATE OF AHMAD UTHMAN SHABAZZ AND SADR-UD-DIN NAFIS MATEEN

nd that these attached pages constitutes the original ranscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)