OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL., Petitioners V. JAMES M. THOMPSON, ET AL.

CASE NO: 87-1815

PLACE: WASHINGTON, D.C.

DATE: January 18, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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KENTUCKY DEPARTMENT OF :

CORRECTIONS, ET AL., :

Petitioners :

v. : No. 87-1815

JAMES M. THOMPSON, ET AL. :

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Washington, D.C.

Wednesday, January 18, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

BARBARA WILLETT JONES, ESQ., General Counsel, Corrections Cabinet, Frankfort, Kentucky; on behalf of the Petitioners.

JOSEPH S. ELDER, II, ESQ., Louisville, Kentucky; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 87-1815, the Kentucky Department of Corrections v. James M. Thompson.

Mrs. Jones, you may proceed.

ORAL ARGUMENT OF BARBARA WILLETT JONES

ON BEHALF OF THE PETITIONERS

MRS. JONES: Thank you, Mr. Chief Justice, and may it please the Court:

This case was brought by the Commonwealth because the Sixth Circuit ruled that state procedures written for staff use in the operation of visitation program created a constitutionally-protected right.

In 1980 the Commonwealth signed a consent decree. In that decree the Commonwealth agreed to continue to operate certain programs, at least at their current level, and the continuation of open visitation was one of those programs.

In 1986, the Respondents filed a request with the district court, through appropriate motions, asking the court to direct the Commonwealth to implement due process procedures before it restricted visitation or visitors from the institution.

Respondents argued that the Commonwealth's

failure to implement these due process procedures was in violation of the consent decree and the due process clause.

The district court concluded that no violations of the consent decree had occurred, but ruled that the language of the consent decree itself, which addressed the visitation programs, were so mandatory in character that it gave rise to a liberty interest requiring the implementation of due process procedures. And the Court directed that the Commonwealth implement those kinds of procedures recommended by this Court in Hewitt v. Helms before visitation was suspended or revoked, and that is a notice opportunity to be -- opportunity to respond.

On appeal, the Sixth Circuit concluded that the procedures themselves were mandatory in character, substantively limited the discretion of the state official by enumerating particularized standards or criteria, and created to protect the liberty interest, thus requiring the implementation of due process procedures.

The Sixth Circuit then remanded the case back to the district court for directions in accordance with its mandate.

When determining whether state procedures

create a -- protect the liberty interest, the Commonwealth is urging that this Court draw a line between those procedures which affect the daily management of a prison from those procedures which affect length of confinement, release from confinement, or those procedures which dramatically alter the very nature of confinement.

When state procedures are drafted which affect --

QUESTION: What do you include in that last category? It isn't clear to me what you have in mind --

MRS. JONES: The kinds --

QUESTION: -- with the nature of confinement.

MRS. JONES: The kinds of things that we see in terms of nature of confinement are the kinds of -- I could reference the Court to the cases where we think fall within that definition. And that would be this Court's decisions in Vitek v. Jones, which address mental involuntary commitment to a mental facility; Hewitt v. Helms, where there was incarceration --

QUESTION: Solitary confinement?

MRS. JONES: Yes, Your Honor. We're saying that that dramatically alters the nature of confinement, and when that's written in conjunction with due process procedure -- our procedures are very limiting in the

discretion of the officials, that that would meet that standard.

QUESTION: Well, I suppose the argument of the other side is that having family visitors is so vitally important in terms of a prisoner's existence, that it alters the nature of the confinement.

MRS. JONES: We would view that as a condition of confinement, and this Court has ruled that in Olim and in other cases, but I think Olim addressed the question, although that was not the ruling and the holding of the case -- this Court recognized in Olim that a transfer from Hawaii to California, which would subject an individual to not having access to family or friends, did not implicate any serious interest and denial of visits and visitors is a very normal type of limit of confinement that is expected in penal settings.

QUESTION: What if the denial were totally arbitrary? The guard doesn't like prisoner X and says, "I'm just not going to let you have any visitors."

MRS. JONES: I think that's clearly protected under the cruel and unusual punishment clause or unreasonable and arbitrary harassment that state officials cannot act in that manner towards --

QUESTION: So, you concede that some deprivation of visitors could arise or could amount to

an Eighth Amendment violation?

MRS. JONES: I think some conduct of state officials, if they've singled out an inmate, not necessarily for visiting, but any -- whatever it is, visiting, denying him access to a library -- if it is so arbitrary and unreasonable that it could reach the level of an Eighth Amendment claim --

QUESTION: So -- so cruel and unusual punishment covers more ground than due process?

MRS. JONES: I don't see that. I don't think that's what I'm suggesting. I'm suggesting that I think that this Court has ruled -- and I think it was in Whitley v. Albers -- that there are -- that an inmate is not totally unprotected from -- no, I'm sorry, I believe it's in the Daniels v. Williams and Davidson v. Cannon where this Court said inmates are not totally unprotected from arbitrary and unreasonable conduct by state officials and cannot be -- harassed. And I believe that is within the Eighth Amendment, and I think this Court has recognized that in those decisions.

QUESTION: Mrs. Jones --

QUESTION: What you're talking about here is really state-created rights, isn't it, and not rights that stem from the Constitution themselves?

MRS. JONES: That's correct. And our point

here is you have state-created rights. And this Court has found in most of its decisions that address a penal setting, and in particular Greenholtz, that every executive decision made by an executive branch member is not guaranteed to be error-free.

And we are suggesting that when you find state -- if you define procedures that just address daily policy programs between those procedures which affect substantive areas of incarceration, then you're allowing the state to draft procedures that are very directory in nature to run their programs, but you're not subjecting them to federal liability at every turn when they're trying to run a program or a facility to protect the institution and the community.

QUESTION: Mrs. Jones, why do you have to use the cruel and unusual punishment clause to answer Justice O'Connor's problem? Why wouldn't the equal protection clause cover that situation if the rules are intentionally applied in a -- in an unreasonable manner against a particular prisoner?

MRS. JONES: The way I understand the decisions in the equal protection clause is the individual is going to have to be a member of the suspect class first. And I don't think an inmate is a member of a suspect class.

QUESTION: Is that right? The state can do anything it wants to me and treat me differently from the rest of society unless I'm a member of a suspect class? I didn't understand that. I hope it's not true.

MRS. JONES: I may be misunderstanding the equal protection clause. I'm thinking in terms -- well, I think the -- as I recollect the cases, the Court has only held that equal protection applies in a prison setting when you're dealing with a suspect class, that you couldn't separate inmates on the basis of race alone.

And, although this Court has not addressed sex discrimination cases, those are the only cases that I'm familiar with as they address in a penal setting. Maybe I'm too broadly interpreting the equal protection clause, but that's the way I understand it.

Now, I think the other thing that is important, Your Honor, is that the inmate is not without administrative or state law remedies in a situation where state officials don't conform themselves with their own state policies and procedures.

In the Commonwealth, and I think it's very typical in other states, there are mandamus actions that individuals can bring if the duties that are set out in the state regulation or state law are so ministerial in nature that it -- that a state official must be required

to conform himself.

QUESTION: Oh, but is that true of the particular rights at stake in this case?

MRS. JONES: I don't think these procedures are so ministerial in nature --

QUESTION: Isn't that your position that the -- if the prison officials want to do so, they can just deny, say, the inmate's mother or his wife or some friend visiting privileges and never even tell the inmate.

MRS. JONES: Absolutely. I don't think we have to even have visitation. I think the responsible --

QUESTION: And you -- and you don't even have to give the inmate notice that -- telling him whether or not his wife has tried to see him or not. You just -- it's just one of those minor details of prison management the prisoner has no rights in.

MRS. JONES: Your Honor, I don't think we're taking that broad a position.

QUESTION: Well, I think you are. You're saying there no constitutional right at all.

MRS. JONES: Well, that's correct, we are saying --

QUESTION: And you're saying you have a right to promulgate no regulations at all. Therefore, the

rights you're seeking to vindicate -- is one to simply say I'm sorry, I know you're curious, but we're not going to tell you.

MRS. JONES: That is what the position is --

QUESTION: Yeah.

MRS. JONES: -- in its broadest term. That's correct. Practically speaking I, Your Honor --

QUESTION: Yeah, unless it becomes cruel and unusual and violates the Eighth Amendment. That's the limitation?

MRS. JONES: That's correct. But what we're also suggesting to this Court is this principle of law that was applied by the Sixth Circuit to this fact situation, carried to its logical conclusion, will require every procedure that addresses the daily operation of a prison to create federally protected rights, so that the state is going to have to implement some kind of due process almost in every situation.

And the examples that we have given the Court are those library procedures that are even more mandatory if you're going to interpret our procedures as mandatory.

The library procedures say that we will not deny an inmate access to the library unless he doesn't return the books. That has a shall/unless combination

that has pretty much been looked upon by the courts below as the mandatory-type language that creates these rights.

And we're saying that if we don't -- if the Court doesn't draw a line and make a distinction between procedures that are daily management-type procedures versus procedures which affect certain areas of incarceration, then we've got a very serious problem, and the state only has two choices: They can accept that ruling and continue to operate with very detailed mandatory directory procedures, or they can choose to write no procedures at all, which is not the choice of state officials.

QUESTION: Well, Mrs. Jones, isn't there a possible third solution, like in your library -- to simply reword the regulation so that it's -- it's -- gives some more discretion to the officials. Maybe this isn't what you really want to do, but certainly that would avoid the conclusion that it creates a liberty interest.

MRS. JONES: Certainly the state can reword the procedures. What happens when you reword the procedure to allow total discretion, you have deluded one of the purposes of the procedures.

The purpose of the procedure is to direct

staff so that they can operate the program. It allows for control and discipline to maintain security in the institution.

If you allow total -- if you diluted the procedure to such an extent that you've allowed total discretion, then I don't think you've served the purpose of -- of the prison --

QUESTION: And probably not the purpose of the consent decree.

MRS. JONES: That's correct. In this instance, it wouldn't serve the purpose of the consent decree. But you've also allowed the state officials to carve out the contours of a federally protected right, just by semantical or mechanical word change.

QUESTION: Well, but -- you're talking about a federally protected right. Are we still talking about a right created by these regulations?

QUESTION: Yes.

MRS. JONES: They could be, yes.

QUESTION: Well, then, it's not -- it's not really a federally created right.

MRS. JONES: Well, if I'm using it in an improper term, I apologize. But what we're saying is by the way they're written, they are interpreted as being a liberty interest protected by the due process clause,

and maybe that's a shorthand term.

QUESTION: But I take it you would like to carve out some of these and get less federal supervision.

MRS. JONES: We would like to have a line drawn and distinctions made between certain procedures so that's -- I'm sorry -- so that the state could feel free to write very directory-specific procedures that address daily management problems and if they affect certain areas and they want it to be very nondiscretionary in nature, they are accepting liability for a failure to conform in conjunction with that.

QUESTION: So, you don't want it limited to rules and regulations that affect the basic type of incarceration or the time, the length of incarceration?

MRS. JONES: That would -- those would be included. Those procedures that --

QUESTION: What else?

MRS. JONES: Good time, those type of procedures like Wolff v. McDonnell.

QUESTION: That -- that affects the length of time?

MRS. JONES: Right. And then the other areas that we would suggest -- one way that I think I could suggest to you that may be visually easier to understand is, we would -- it's like a prison door-type situation,

and the parole -- very easily to see that the parole cases and the release from confinement or the good time credits, they go out the prison door.

And the administrative segregation, the inmate goes from a more -- a general population-type situation through the prison door to a more restricted-type setting.

In a mental health-type situation in Vitek, they are going from the institution to another institution involuntary.

In another example that hasn't been addressed by --

QUESTION: How about the door between the visitors' room and the general population?

MRS. JONES: Your Honor --

QUESTION: That's a different kind of prison door.

MRS. JONES: That's a different kind of prison door, and basically this is more addressed to the visitor than it is to the inmate, although the inmate is affected. He is not restricted totally from visitation. He is restricted from one visitor or several visitors at a time.

QUESTION: Yeah, but you could -- you must acknowledge some visitors are more important than others.

MRS. JONES: In some inmates' minds. In some inmates' minds, visitation is not important at all.

QUESTION: You could send in a prison guard to visit with them for a little while, then, I suppose.

MRS. JONES: I'll have to admit that there are more important visitors than others, Your Honor. But, similarly, in that same vein, there are a percentage of inmates who never have visitors, whose canteen privileges are access to the general library or the T.V. or inmate organizations are equally as important as visitors are to inmates.

So, what we're asking --

QUESTION: Isn't that administrative segregation? I mean, I thought that's what administrative segregation was, where you put somebody off where he couldn't have visitor privileges at all -- even to see other -- I mean, solitary confinement, for example.

MRS. JONES: Administrative segregation doesn't totally restrict an individual from visiting. They -- administrative segregation just maybe limits the conditions under which they visit. They might go from contact and non-contact.

QUESTION: And you acknowledge that, that, that you have to give a hearing for that?

MRS. JONES: Yeah -- if -- if the state procedures are very mandatory in style and very -- like the Hewitt decision -- if there is a combination of facts that there is an area that's affected that is not a daily management procedure and the state has drafted procedures that are very mandatory in nature and limit the circumstances --

QUESTION: But I thought you were trying to give us a subject matter line, a clear subject matter line that related to doors or whatever.

MRS. JONES: Well, the best example I can give to fit the cases that we are suggesting -- we think it's a very narrow line, and it is a subject line, and the best example to articulate or demonstrate the kind of cases we're talking about that would give rise to this analysis for liberty interests would be the prison door-type analysis.

QUESTION: Mrs. Jones, does the visitor have a liberty interest?

MRS. JONES: No, Your Honor. The visitor doesn't have any interest and has no right to visit the facility, and this Court's ruled on that in Jones v. North Carolina.

That, as the Court knows, was the press wanting access to the institution, and this Court has

clearly ruled that. And I believe this Court reaffirmed the position on visitors with respect to the Olim decision, although, again, that was not the holding.

More recently, Block v. Rutherford, although it was not -- It was not denial of total visitation, it was a visitation case that dealt with a non-contact versus contact visitation. And I think this Court has made it very clear that visitation and restriction of visitation is very clearly within the normal range of limits. That aspect is expected in a penal facility.

QUESTION: So, your distinction -- you began with this -- something that affects the nature of the confinement, as opposed to routine administration?

MRS. JONES: That's correct. We would like --

QUESTION: What's the constitutional principle or premise that underlies that distinction?

MRS. JONES: Well, we're trying -- I think it arises --

QUESTION: Just the important versus unimportant or --

MRS. JONES: I think it arises from this Court's decisions where this Court has continually in the prison cases in the penal area have recognized there's a need to give deference to the prison administrator, not be continually involved in the daily

operations of a prison setting, and I think some of the language in the Hewitt decision has -- has been concerned that this analysis could create a problem for prison administrators by maybe not creating exception for procedures that are just daily management procedures that affect programs that are just the daily restricted-type programs that involve a way to operate a prison.

And if I state official cannot write procedures running the program that are very directory in nature and mandatory in style and premise participation in that program or the denial of participation in that program on whether that individual or whether that visitor is going to constitute a threat to the security of the institution, which is the primary purpose of the institution, and that's the primary purpose of the policies and procedures is to maintain the security of the institution, then the state really can't write any kind of procedures that direct any of its staff in order to maintain control or discipline over its facility.

And we don't think that the proposition that we're offering this Court is -- is not inconsistent with this Court's opinions.

If, if you review the Court's parole cases,

there the Court found no inherent right to parole, but the Court found that the state statutes which were drafted which affected parole were very limited in nature, very -- they will not be denied parole or they will not be revoked -- their parole would not be revoked unless certain conditions existed.

You had a two-pronged analysis. You had the nature of the interest at stake affected release from confinement, and you had mandatory procedures that were very, very specific and conditioned on certain factors.

Similarly, in the Wolff v. McDonnell case, the Court clearly recognized that there was no right to the establishment of good time credits, but once the state created that right to good time credits, the denial of good time credits or the forfeiture of good time credits again was conditioned on a varied set of circumstances, a very specific set of circumstances, major misconduct, and they would not be forfeited but for those set of circumstances.

So, again, you had a very serious nature of interests created by the state law, which affected the release from confinement, and you had very specific procedures which directed the state not to take away that good time, unless certain conditions existed.

Then in the Vitek cases, which we would

identify to the Court as the type of cases that affect the very nature of confinement, in Vitek in this Court's affirmance of Wright v. Enomoto and then the Hewitt v. Helms decision, I think you're addressing the kind of nature of confinement cases the Commonwealth is suggesting to the Court the line that ought to be drawn.

We would recommend another type of nature of confinement subject that might be involved in this area would be forced medication. Forced medication has not been addressed by this Court, but it's the same kind of nature, very substantive nature of a prison's confinement that addresses very serious areas that could affect them adversely and sort of fits within the prison door concept for an explanation.

And in those decisions that --

QUESTION: I don't --

QUESTION: Well, this isn't an easy line to draw. You're -- it boils down to what's serious or not serious, and I'm not sure how we derive that from the language of the due process clause.

MRS. JONES: I agree completely with Your Honor that it's not a very easy line to draw. The problem that's been created by the decisions in the courts below and in the district court, and I think the record clearly demonstrates that, is that if we don't

draw a line, there's a very serious problem for state officials to operate their facilities.

QUESTION: Your line seems to wavy. I mean, how -- why does forced medication once you've been committed to prison affect the nature and duration of the sentence or the confinement?

MRS. JONES: Well, there's three -- three areas we're suggesting fall within this line: duration, release from confinement, and then the very nature of confinement. And it's -- I agree with you that we are -- it's --

QUESTION: Why do you go into the very nature of confinement? I mean, there you're just getting a lot of judgment calls, it seems to me. You know, forced medication is worse than being denied visitors? Who can say?

MRS. JONES: Well, I think forced medication falls very much in line with Vitek where an individual who does not want to receive medication for a physical problem is very much like an individual who does not want to see -- received medical treatment for a mental health problem, and that's why we follow those -- feel like those fall within those kind of areas.

QUESTION: Oh, we understand why you've adopted it. I mean, it very nicely brings all existing

cases within your role. We're just asking whether it's a line that makes any sense.

MRS. JONES: Well, I think the only alternative, Your Honor, if we don't do that, in order to aid the states, is we would have to take a very restrictive, even more narrow rule unless the state drafts policies that affect substantive rights that have already been recognized as this Court protected by the Constitution itself. To me that's the only other alternative that exists.

QUESTION: Well, that would do away with the Roth case and the whole idea of liberty and interests created by state legislation.

Why not limit yourself to the duration or the confinement?

MRS. JONES: Just the release from confinement?

QUESTION: Yeah.

MRS. JONES: I would have -- we -- the state would have no objection to limiting that.

QUESTION: No, I'm sure they wouldn't.

QUESTION: May I -- may I go back for a second to this particular case.

Under the order of the Court of Appeals here, if you -- you're supposed to draft regulations covering this problem. If your regulations -- if you drafted a

regulation that said whenever a particular person is going to be denied the privilege of visiting inmates, the inmate shall receive notice, written notice of that fact and an explanation of the reason, period. Do you think that would satisfy the Court of Appeals?

MRS. JONES: If we did that, what you said?

QUESTION: Yeah, you just set a regulation. Whenever we deny somebody visitation privileges, we'll tell the inmate and tell them why?

MRS. JONES: That would satisfy the Court of Appeals.

QUESTION: But it's too much of a burden on the state, I gather, is that correct?

MRS. JONES: Well, there's two burdens that exist there. One is the administrative burden, but I think, you know, that is a --

QUESTION: It doesn't seem very serious to me.

MRS. JONES: Well, we're not going to say that's the most serious burden there is.

QUESTION: You're afraid he might -- if you deny him library privilege, you might have to write him a note and say we denied you library privileges because you didn't return that book or something like that?

MRS. JONES: I don't think we're saying that's the most serious burden that's concerning the state

officials here. It is a burden, and we will say that it is. But I think we've demonstrated, correctly demonstrated to this Court over the hears, whatever this Court wants us to do, we can accommodate them. I mean --

QUESTION: Yeah.

MRS. JONES: -- Wolff v. -- I beg your pardon?

QUESTION: It isn't serious?

MRS. JONES: The burden is that this kind of ruling subjects state officials to 1983 civil rights damage liability cases in every instance. It creates a civil rights cause of action against the state officials.

And I think this court can take judicial notice of the fact that when a right is created for a sentenced felon, it is pursued very actively by the inmate, and because of the liberal interpretation that is applied to pro se complaints, the state official are going to have to defend whether or not they provided the notice that was required by the Court.

I think it's very clear that the litigation that arose --

QUESTION: I think they made a mistake there.

QUESTION: Have we ever held that regulations promulgated pursuant to a consent decree can create liberty interests?

MRS. JONES: No, Your Honor, and I don't think

that's the question that's presented.

QUESTION: Well, why didn't you present it? I mean, why do you accept the conclusion of the Sixth Circuit that regulations promulgated pursuant to a consent decree can create the same sort of liberty interests that regulations voluntarily promulgated by the state can create.

MRS. JONES: We didn't interpret the Sixth Circuit as finding that at all. We interpreted the Sixth Circuit decision as finding the procedures themselves, created the protected interest.

I don't think that the Sixth Circuit ruled that the consent decree created that right.

QUESTION: Well, but the procedures were promulgated pursuant to the consent decree, weren't they?

MRS. JONES: No, Your Honor, the procedures were already in place prior to the implementation of the consent decree, and that's in the record in the joint appendix.

And they were just revised throughout the years. But they were not promulgated pursuant to the consent decree. We would agree to continue those.

QUESTION: You did get a --

QUESTION: That was part of the consent decree, wasn't it, that you -- you agreed to continue

those?

MRS. JONES: That's correct.

QUESTION: So you weren't -- you weren't very -- in very good shape to change them?

MRS. JONES: We can change them, as long as we don't substantively change them so that we deny inmates visits at those two institutions.

If I may, I'd like to reserve the remainder --

QUESTION: Just one question. Assume for the moment that we hold that a constitutionally protected right in visitation can be created.

Did this regulation have sufficiently specific and mandatory regulation to do that?

MRS. JONES: No, Your Honor. We don't think that it does, and we would advise the Court that the Respondents didn't think it did when they filed their motion in District Court.

If you read the Respondents' motion in District Court, they argued that the procedures were so vague, they allowed absolute discretion.

And our position is if you have a procedure that limits discretion just because you want to protect the security of the institution is not so mandatory in nature that it's limited its discretion to the extent that it's created an interest.

QUESTION: Who were the plaintiffs in this case?

MRS. JONES: A plaintiff class of inmates at the Kentucky State Reformatory.

QUESTION: And was the remand -- was there any doubt that this rule applied to that, to the reformatory?

MRS. JONES: Not -- not with respect to the parties. It applied to the reformatory.

QUESTION: So, the remand doesn't really concern these people?

MRS. JONES: It concerns the reformatory inmates. It applies to them, the inmates at the reformatory.

QUESTION: Thank you, Mrs. Jones.

Mr. Elder.

ORAL ARGUMENT OF JOSEPH S. ELDER, II

ON BEHALF OF THE RESPONDENTS

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

This portion of the Kentucky prison litigation was filed by inmate James "Shorty" Thompson in 1976 and became known as the case of Thompson v. Bland.

QUESTION: Is this a class action?

MR. ELDER: A class action, yes, ma'am.

QUESTION: And are any of the named plaintiffs

still incarcerated?

MR. ELDER: At the Kentucky State Reformatory? I do not believe so. Some of them are still in the Kentucky Corrections System and in other corrections systems. I'm not aware as to whether or not any of the named -- initial named plaintiffs are still at their former reformatory.

QUESTION: Is it possible, then, that this is moot?

MR. ELDER: No, ma'am. It was settled as a class action, and the consent decree was settled in a manner to bind the Kentucky Corrections Cabinet in the future.

A far-reaching consent decree settling that litigation as continued --

QUESTION: And so that the right here does arise out of the consent decree?

MR. ELDER: It arises, I believe, out of the consent decree and the regulations that were in place both prior and after the consent decree. I think that the opinion of the Sixth Circuit is trifle bit unclear in that at the close of the opinion they say we do not reach the issue of whether a consent decree alone can give rise to a due process case.

I think the consent decree supplies a portion

of the mandatory language required by Hewitt v. Helms.

QUESTION: What's the consent decree got to do with the possible mootness problem?

MR. ELDER: Well, the mootness would be -- the consent because it is a portion of the mandatory language that the Sixth Circuit found --

QUESTION: Well, I know, but these -- the Plaintiffs here were -- were claiming that these regulations which were in place before the decree and after the decree are being administered in a way that is unconstitutional.

And here the Plaintiff -- suppose it hadn't been a class action and the plaintiff had died?

MR. ELDER: It might possibly be moot, Your Honor, but it isn't. It is a class action.

QUESTION: Well, I know, but here's -- here's a -- suppose it hadn't been a class action and the single plaintiff had been -- was out of prison?

MR. ELDER: The --

QUESTION: And all he'd wanted was an injunction.

MR. ELDER: The regulation applies to all inmates incarcerated at that institution. It was a class action. It was a consent decree. It might not apply be -- if that single plaintiff was out of prison,

although it is an issue, I think, clearly capable of evading review because of the problem of, an inmate being out of prison --

QUESTION: So, it is a class action?

MR. ELDER: It is a class action.

QUESTION: But it has to be capable of evading review with respect to these particular people, not with respect -- just with respect to other plaintiff.

MR. ELDER: That's correct, Your Honor. But in this case it is a class action. There is class-based relief on the consent decree.

QUESTION: Supposing that all the named members of the class were now walking the streets of Frankfort or Lexington or Louisville, out of prison. The consent decree would no longer bind, would it?

MR. ELDER: No, sir, the consent decree when it was settled was settled to bind the future.

QUESTION: But you can't -- you can't bind in, in a decree where there are individual plaintiffs or plaintiffs representing a class. You have a consent decree, and all those plaintiffs eventually disappear, isn't that end of the decree?

MR. ELDER: The class action -- it was a certified class action and settled after the class action was certified for -- and by its terms, the

consent decree by its terms, was to bind the defendants in the future.

I don't think the Defendants would take the position that this consent decree does not bind them. It bound them through --

QUESTION: But if it's moot under our case law, whether the Defendants think it binds them really doesn't make any difference.

MR. ELDER: Your Honor, it's not moot because there are members of the class of inmates incarcerated at the reformatory who were given the protection of the consent decree and as a portion of the certified class, the class being all people incarcerated now or incarcerated in the future at the Kentucky State Reformatory. That's not in this particular record, but that was the class that Judge Johnstone certified the District Court level.

The consent decree was intended to protect the inmates incarcerated and all those incarcerated in the future.

QUESTION: That was moot --

QUESTION: The class can include the future?

MR. ELDER: All inmates incarcerated in the Kentucky State Reformatory.

QUESTION: In the future?

MR. ELDER: Yes, sir.

QUESTION: I don't think the decree --

MR. ELDER: These things are --

QUESTION: There's no lives in being plus 21 years kind of limitation to these consent decrees? They just go on and on and on --

(Laughter)

MR. ELDER: Just Johnstone once asked me how long --

QUESTION: -- like the Mississippi?

MR. ELDER: -- I was going to be one this case. I said probably as long as I practice law in the Western District.

(Laughter)

QUESTION: Well --

MR. ELDER: It's not in the record, but there has been a substantial compliance trial, and the judge has indicated that the defendants are in substantial compliance with the consent decree and has moved the case from his active to his inactive status at this point on his inactive docket.

He has indicated that there's a contractual right of all the inmates, as I read it, in perpetuity, to enforce this consent decree in the future, should he dismiss the case.

The case is not yet dismissed. Mootness might be a possibility after he dismisses the case.

QUESTION: But why don't you take the position that under the rules and the information that we have on recidivism that one of them, at least, is back in there?

MR. ELDER: Probably a good chance, Your Honor. I sort of lost track. I've lost track of some of the inmates. One of them may be back in the reformatory at this time.

There was an inmate named Wilgus Hattox and you don't know where Wilgus is on any given day, except he's probably somewhere in the Kentucky Corrections System.

(Laughter)

This consent -- one of the important parts of this case is that this consent decree was the result of four years of vigorous litigation by highly skilled counsel, including myself, Mrs. Jones, and representatives of the United States Justice Department as litigating amicus curiae.

When the case was settled, no fewer than 13 lawyers signed the consent decree. This gives ample evidence of when a state official, after that kind of intensive litigation, signs a consent decree, that it is the volitional act of those state officials.

Prior to the Kentucky correctional policies and procedures being promulgated, there was a prior procedure called the internal management directives. The internal management directives concerning visitation are quite similar to what was later issued post-consent decree.

A case by the name of Bills v. Henderson, a Sixth Circuit case, indicated in 1980 that a consent that a liberty interest could be created in the Sixth Circuit "in the forfeiture or benefit of favorable living conditions."

This case was decided prior to the reissue of -- of the procedures by the State of Kentucky. There was a second set of procedures issued at the institution level at a later date.

QUESTION: Well, is -- is some part -- is some part of your case here saying that these hearings should take place on remand, these procedures, based on the consent decree?

MR. ELDER: Based on --

QUESTION: You've said -- it was in part -- you said, the Sixth Circuit was?

MR. ELDER: The Sixth Circuit found the mandatory language necessary under Hewitt v. Helms to exist partially in the consent decree and partially in

the regulations that were issued --

QUESTION: Have we ever held that a consent -- regulations issued pursuant to a consent decree or a consent decree itself can create a so-called liberty interest?

MR. ELDER: I don't think so, Your Honor, and then the Sixth Circuit said, standing alone, we're not going to reach that issue.

Judge Johnstone indicated in his opinion at the District Court that the "open visitation language in the consent decree in and of itself created the liberty interest."

The Sixth Circuit then came along and said it's the consent decree, plus the regulations.

QUESTION: If you got it entirely out of the consent decree, I suppose you wouldn't have to worry about a liberty interest or something like that if the consent decree binds all the parties, and it says this is what you'll do, you'll go ahead and do it unless you get the consent decree set aside.

MR. ELDER: Sure.

QUESTION: That isn't the way the Sixth Circuit looked at it.

MR. ELDER: No, and that isn't -- the Sixth Circuit, again, Judge Johnstone found that the

defendants were in compliance wit the consent decree. What Judge Johnstone and the Sixth Circuit said was the, "open visitation language and the Sixth Circuit, later the regulations issued, gave the inmates an entitlement to continue open visitation."

And at that point, it had its basis in the consent decree, but the right for the hearing arises from the Fourteenth Amendment because the state has taken the volitional act. The state has extended the right, the state has created this right, and then, therefore, once they create the right and fetter their own discretion, the Fourteenth Amendment comes into play.

QUESTION: How did the state create this right?

MR. ELDER: They created this right three ways: by issuing -- by signing the consent decree and by putting the open visitational language in the consent decree, and by issuing the correctional policies and procedures which are statewide, and the Kentucky State Reformatory policies and procedures, which are institutionwide.

And in -- through each -- throughout each of these there is the mandatory language required by Hewitt, with the substantive predicates to follow.

And in two portions of the regulations a nonexhaustive listing of criteria for the officer to

follow.

Counsel for the defendants has indicated these are for staff goals alone. They're also to assist the inmate in learning what conduct is sufficient within an institution that's going to get you your visitation denied.

And one of the reasons that a prison's supposed to promulgate regulations, according to the American Correctional Association, is so that the inmate knows what's to be expected of him. It's not only for staff benefit but, by its own very nature, is to tell the inmate what limits are to be expected.

I think one of the keys is the fact that through the regulations, there is repeated use of mandatory language. There is the mandatory language of the consent decree. There's also the substantive predicates required in the Hewitt v. Helms.

I think if you look at the regulations that are attached to the Petitioners' brief, the regulations that are going to create the monster, that is going to create the day-to-day problem for the Corrections Cabinet in their opinion of dealing with the Sixth Circuit's opinion is that the mandatory language followed by substantive predicate is simply not there with the possible exception of the library card.

I think this Court could draw a line about library cards. I believe that failure to return a library book and therefore having your library privileges denied could be dealt with by a part of the Hewitt opinion.

One of the thing the Hewitt opinion says in its later stages is that the hearing should create some benefit to the institution and some benefit in dealing with the problem at hand.

For example, would a hearing over whether or not your library privileges be returned be of any benefit to the institution or to the inmate? I think the Court could draw that line.

QUESTION: To get that in real life. I mean, if the library decides to revoke your library privileges, you don't necessarily get a hearing.

MR. ELDER: That's right, Your Honor.

QUESTION: Why should you get one in prison?

MR. ELDER: I don't think you should, Your Honor. I think it's of the nature that this Court -- I think this Court can draw a line. This Court obviously has to draw some line.

If some state was misfortunate enough to have drafted a shall/unless policy about how many pieces of silverware an inmate got on his table at night, I don't

think that would give rise to a due process hearing about why he's missing a knife tonight unless -- I think the Court can draw a --

QUESTION: Well, under your theory it would, though.

MR. ELDER: Please?

QUESTION: Under your theory, as we understand it, it would create exactly that, a 1983 cause of action, attorneys' fees, and the whole bit.

MR. ELDER: I think you can. As I said, if -- If you look to whether or not the hearing in and of itself would create any benefit for the inmate or benefit in determining why he doesn't have his spoon today. No hearing is going -- is going to create that sort of benefit, nor is any hearing going to create any real benefit for the inmate.

QUESTION: Well, is that -- is that the test of our cases, that a -- hearings are granted when they create some ancillary benefit?

MR. ELDER: That is one of the --

QUESTION: I thought it was a predicate right that the hearing was designed to enforce.

MR. ELDER: It is a predicate right. I'm attempting to address the issue of if somebody does create a predicate right in an absolutely minor matter

-- for example, the case I cited in my brief of the United States v. State of Michigan, which deals with whether or not you have the right to food versus a food loaf.

There is no question in that case that the food loaf was adequately nutrition -- was adequately nutritious for the inmate in that situation. It didn't taste as good, basically, was a problem.

The court, in that case, found that you had an entitlement to not having food loaf to having regular food, and then basically at that point dismissed whether or not a hearing had to be held.

It's unclear exactly what standard the court applied in that case. That is only a minor matter. I think this Court could draw it and say a minor matter or a situation where a hearing would have no benefit either to the cabinet or to the inmate.

In the case at bar, as I understand what the Sixth Circuit did on remand, what they put in their remand, was that the hearing does not have to be on the spot. We are not telling the correctional officer at the institution who is standing at a visitation denial for possibly a reason of violence or contraband that they have to stop at that moment and have a hearing.

The Sixth Circuit, I believe, would require

and the district court a hearing within a reasonable time. I believe that a hearing within a reasonable time in which an inmate has some ability to rebut, in essence, the Corrections Cabinet's evidence.

Justice Stevens asked what would be sufficient for the Sixth Circuit, whether or not just a note was sufficient. The Sixth Circuit said -- went one little step further, which is an opportunity to be heard, did not interpret it as requiring a hearing as in court calls Kentucky State Reformatory, or face to face but, essentially, paper.

The State of Kentucky drops the inmate a note saying your mother brought contraband to the prison last week. We're going to suspend her visitation. The inmate write it back and says, I'm sorry, that was inmate Jones' mother and not mine. If you'll check your records, you've made a mistake.

That's all the Sixth Circuit requires. I cannot see how that --

QUESTION: Does that satisfy you?

MR. ELDER: That would satisfy me. That's all the Sixth Circuit requires. It's all that Judge Johnstone requires.

QUESTION: And if you found out the warden was just taking that note and not even reading it, chucking

it in the wastebasket you wouldn't be back here saying now wait a minute. You have to -- you have to consider the note, don't you?

MR. ELDER: I think --

QUESTION: And don't you have to investigate whether it's correct that it was so and so instead of -- right?

MR. ELDER: Part of the answer to that question is Superintendent v. Wolpole which has said that any evidence is sufficient for court call. I suspect if I came back to this court questioning whether there was sufficient evidence in a Hewitt v. Helms hearing, that would get substantially similar treatment to of Superintendent v. Wolpole, that there would be in any evidence a sufficient standard to sustain the warden.

QUESTION: Oh, but he'd have to look into the matter. Wouldn't the warden have to look into the matter?

MR. ELDER: I think he has some good faith duty to do something with --

QUESTION: Legal duty.

MR. ELDER: Some legal duty to do something with the note rather than just put it in his round file next to his desk?

QUESTION: Oh, it's not nothing.

MR. ELDER: It's not nothing. And neither is visitation.

One of the things that's important to remember is the potential that could affect the inmate. If an inmate's visits are suspended for, say, six months with his mother, this potentially is as many as 72 visits. The regulations which the state has promulgated say that in case of contraband, it could be indefinitely.

Now, if a man's serving 30 years and his wife brings contraband to the institution and the warden says indefinitely, that's where we're at. That could be for the rest of that inmate's time. And that is an extremely serious matter, indeed.

QUESTION: Well, but the prison doesn't have to allow any visits.

MR. ELDER: Not on a constitutional basis. They -- under the Kentucky consent decree, visitation has to be at the same level as when the consent decree was entered.

If tomorrow they cut off all vision at the consent decree tomorrow afternoon, I'll be back in front of Judge Johnston saying, wait a minute, Judge Johnston, they're in contempt of the consent decree.

QUESTION: Well, why did Judge Johnstone enter a decree that wasn't based on the Constitution?

MR. ELDER: Because it concretized existing procedure at the reformatory. It says that visitation shall be as at least kept at the level as of entry of the consent decree.

QUESTION: What provision of the Constitution authorized that?

MR. ELDER: Your Honor, I don't think any provision of the Constitution authorized that.

QUESTION: Well, then, what was -- how did it ever get included in a decree that presumably is based solely on the Constitution?

MR. ELDER: Your Honor, because that's what the parties settled on.

QUESTION: Well --

MR. ELDER: I'm not going to sign a consent decree in a prison situation that allows for no visitation whatsoever. My clients would sue me and have me fired within seconds of signing, and I don't think the Court would approve a consent decree under those circumstances. This was a give and take procedure.

QUESTION: You regard the consent decree kind of as just a basic decree trying to create a good prison atmosphere and apply good penal principles?

MR. ELDER: It addressed unconstitutional conditions at the Kentucky State Reformatory. But,

because of the nature of the consent decree that was settled eventually, it encompassed -- any consent decree does in an institutional litigation -- the whole aspect of life at the reformatory.

When we settled with the State of Kentucky, we gave them this and they gave us other things. That's part of settling lawsuits and negotiating consent decrees.

And sometimes you will get more than you're entitled to on a constitutional basis because you've given up something else somewhere else.

QUESTION: It's an interesting theory.

QUESTION: Mr. Elder, could you tell me whether you agree with Mrs. Jones about what happens if -- if a particular inmate -- let's assume there's no due process hearing, but a particular inmate believes that, in fact, he's being picked on. For some reason, he has been singled out. Would he have any constitutional remedy at all?

MR. ELDER: Being harassed by a guard, intentionally harassed?

QUESTION: Intentionally with regard to visitation. He alone is not allowed to see any of his relatives. What, what --

MR. ELDER: I think he would have at least an

arguable protection case, I think, if they singled out this inmate alone. I don't think that would meet a rational basis test under equal protection. I'm not familiar -- I'm not quite sure that's the test in a prison situation, but clearly if that is a test rational basis, there's no rational basis to deny Joe Jones his visitation.

Now, if Joe Jones is on death row or if Joe Jones has done this or that and there is some rational basis, obviously if they deny one class of inmates visitation on race -- on race grounds, that would present a suspect category problem.

QUESTION: May I ask another question about her submission. She's concerned and correctly so in view of the 1983 litigation possibilities of liability by a guard who might have forgotten to give notice or something like that.

Would you -- what would your view be on the question of whether if you set up these procedures, very minimal procedures, and then nobody did give an inmate notice that his mother couldn't visit for the next six months, would he be able to recover damages?

MR. ELDER: I think he might possibly be able to recover damages if there was a total failure of the process. If it got down to a question of whether or not

it was an -- it was a -- the decision was correct, I think this Court would clearly apply a Superintendent v. Wolpole-type standard to that situation.

I think a total failure of the process, it might go as to whether or not it would be a qualified immunity question at that point. I think a total failure of the process would clearly be actionable.

One of the problems, I believe, with the analysis of the state is that it takes -- in, in -- and in a due process analysis, first, I think, in an analysis such as this, you look to the Constitution to see whether or not there is a constitutional right to visitation. It is clear there is no constitutional right to visitation.

Then you look to the actions of the state officials to see whether or not the state officials have created any sort of right. What the state is asking us to do at that point is to come back, if you will, on the back end of substantive -- of derivative due process and impose on the back side, in essence, a substantive due process theory that it would be only in matters of some sort of critical importance.

I think that is beyond the scope of what derivative due process is all about. I believe you have to look to what did the state officials intend. And I

think clearly in this case there is ample evidence, both because of the consent decree and of the regulations that were issued, that they knew exactly what they were doing.

QUESTION: But, now, let me ask you one more question along the lines that I was asking you before. Basically any federal court decree laying down rules for a federal prison is based on the Constitution, isn't it?

MR. ELDER: Yes, sir.

QUESTION: And what business does any court decree have laying down rules for the operation of a prison in a federal court that isn't based on a -- some sort of constitutional right of the prisoners?

MR. ELDER: Clearly -- clearly, initially -- the initial litigation is based on constitutional premises, but I think nothing prohibits the State of Kentucky volitionally granting additional rights, particularly in a consent decree context.

Consent decrees often will -- will literally give the state a road map on how to run its prison for the next 20 years.

QUESTION: What's, what's the basis for that?

MR. ELDER: The give and take for that is that any party when negotiating a consent decree gives up certain things because they want a consent decree.

QUESTION: Doesn't the judge have to look at the decree, though, and make sure that it's the kind of thing he has jurisdiction to enter?

MR. ELDER: Yes, sir. I think under the -- I believe that even though you may step beyond what is constitutional, the court can still have authority over that consent decree, even for visitation. I don't think there's any requirement that this Court, that I'm aware of, that only constitutional issues be brought up in a consent decree. They are -- they're wide ranging.

QUESTION: What about in a litigated decree?

MR. ELDER: In a litigated decree if the judge was to step beyond and accept independent state action, there would be a problem that would be subject to reversal by the court. The parties have agreed that, yes, we're going to do this in return for this.

For example, one of the things that they agreed to do was to have the prison population of the Kentucky State Reformatory at a certain level within so many years. Possibly if I had gone to trial and settled the case, Judge Johnstone might have ordered a quicker timetable to bring the -- the population down to a level where it would be constitutional. Of course, population in and of itself is not a constitutional question, it's a totality, population being only one of the factors.

QUESTION: Of course, in this case we're talking about procedural due process, are we not?

MR. ELDER: Yes, sir.

QUESTION: And I thought the rationale of those cases was that the state is omitting the constitutional duty if it doesn't provide a procedure.

MR. ELDER: That's correct. That's --

QUESTION: But doesn't the consent decree automatically have its own procedure?

MR. ELDER: For a violation of the consent decree, and that would be the traditional contempt powers of the judicial court.

QUESTION: Well, didn't you allege a violation of the consent decree here?

MR. ELDER: All right, at the initial District Court, yes, sir.

QUESTION: Well, you were in the consent decree hearings, weren't you?

MR. ELDER: This was done separately, not a part of substantial compliance. I think about a year prior, Your Honor.

QUESTION: Well --

MR. ELDER: This was a more or less routine motion during my monitoring of --

QUESTION: This wasn't a separate 1983 suit?

MR. ELDER: No, sir. It was as a portion of the Court's monitoring of the consent decree. The Court said --

QUESTION: But the Court then -- you -- you're invoking a mechanism which has very sophisticated procedure, so I don't see how the state is -- has omitted a duty by failing to provide some other procedure.

MR. ELDER: The consent decree --

QUESTION: You don't have to go before a prison official. You can go before a United States district judge.

MR. ELDER: He indicated that the procedures there were constitutional. Your Honor's question is whether or not if an inmate were to tomorrow be denied prison -- be denied his "open visitation," could I then not go back and request that the judge put the case back on a-- on active status and request that the judge hold the state in contempt because this inmate did not have a -- his visitational, open visitation was being denied. That is correct.

However, I think that the Sixth Circuit in saying that we're not going to make this a consent decree matter, that a consent decree is only a portion of it. A consent decree, in and of itself, was only a

portion of the mandatory language required to reach the -- to give an entitlement to due process. I believe that probably, standing alone, the regulations would have been sufficient absent a consent decree.

But, because of the nature of the beast, so to speak, that mandatory language is there. It buttresses the consent decree, and I believe because of, in essence, the double mandatory language gives this Court a stronger basis to say that in this case there was a liberty interest created by the mandatory language of the consent decree, by the correctional policies and procedures and the language therein.

Thank you.

I believe this Court should affirm the Sixth Circuit.

QUESTION: Thank you, Mr. Elder.

Mrs. Jones, you have three minutes remaining.

REBUTTAL ARGUMENT OF BARBARA WILLETT JONES

MRS. JONES: Your Honor, I think it's important to point out that in the consent decree, although the parties did agree to continue open visitation and maintain visitation at their current level, the parties -- the attorneys for the Respondents agreed to the procedures that were in place at the time. The procedures that were in place at the time

were not changed for over six years until the motion was filed. Never required any kind of hearing when we denied a visitor. And I think that's very important.

That was also in place at the signing of the consent decree. So, there was no requirement agreed to by the parties to have a due process hearing before any party was denied visiting at the institution, and that was in place at the time we signed the consent decree, and that was agreed to by parties on both sides.

This did not come up until six years later after the consent decree was signed. The Court of Appeals did not rule that the consent decree was the motivating force for the finding of the mandatory procedures that gave rise to the rights. The Court of Appeals found that it was the procedures themselves that contained the language that gave rise to the liberty interests that requires the implementation of the due process clause.

And I think, more importantly, it is necessary for this Court to draw the line because of the burden that is going to be imposed on state officials if this analysis is continued in the manner in which it's being applied below now.

QUESTION: Just as -- I'm curious. When a visitor wants to come and visit, do they just show up?

MRS. JONES: Yes, Your Honor.

QUESTION: They just show up? There's no writing or anything else?

MRS. JONES: That's correct.

QUESTION: And who -- and who passes on whether the visitor gets in?

MRS. JONES: There's a staff person, a line officer there. If the staff person believes that there is some problem, then he notifies the duty officer and the duty officer makes the decision on whether to deny the visit. But there is no list of permissible visitors. That's what open visitation is. Anyone can come during those hours to visit that inmate.

I think it's limited by numbers and numbers of adults and unlimited children, but they may show up during the hours of visiting. Therefore, we request that this Court seriously consider drawing some distinctions between daily management procedures and those procedures which affect substantive nature of confinement, release from confinement and the very duration of confinement.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mrs. Jones.

The case is submitted.

(Whereupon, at 1:57 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson 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:

No. 87-1815 - KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL., Petitioners V. JAMES M. THOMPSON, ET AL.

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BY Judy Freilicher

(REPORTER)