OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROBERT C. RUFO, SHERIFF OF SUFFOLK COUNTY, ET AL., Petitioners, v. INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.;

and

THOMAS C. RAPONE, COMMISSIONER OF CORRECTION OF MASSACHUSETTS, Petitioner, v. INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.

CASE NO: 90-954; 90-1004

PLACE: Washington, D.C.

DATE: October 9, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT C. RUFO, SHERIFF OF :
SUFFOLK COUNTY, ET AL., :
Petitioners :
v. : No. 90-954
INMATES OF THE SUFFOLK COUNTY :
JAIL, ET AL.; :
and :
THOMAS C. RAPONE, COMMISSIONER :
OF CORRECTION OF MASSACHUSETTS, :
Petitioner :
v. : No. 90-1004
INMATES OF THE SUFFOLK COUNTY :
JAIL, ET AL. :

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Washington, D.C.

Wednesday, October 9, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 p.m.

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APPEARANCES:

CHESTER A. JANIAK, ESQ., Boston, Massachusetts; on behalf of the Petitioners Robert C. Rufo, et al.

JOHN T. MONTGOMERY, ESQ., First Assistant Attorney General of Massachusetts, Boston, Massachusetts; on behalf of the Petitioner Thomas C. Rapone.

MAX D. STERN, ESQ., Boston, Massachusetts; on behalf of the Respondents.

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C O N T E N T S

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P R O C E E D I N G S

(1:56 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 90-954, Robert C. Rufo v. The Inmates of the Suffolk County Jail, and 90-1004, Thomas C. Rapone v. The Inmates of the Suffolk County Jail.

Please proceed.

ORAL ARGUMENT OF CHESTER A. JANIAK

ON BEHALF OF THE PETITIONERS

ROBERT C. RUFO, ET AL.

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

The issue in this case is what standard should be applied to modify -- to resolve a disputed request to modify a consent decree entered into by a public official defendant.

In this case, we submit that a consent decree in such a case should be modified if there has been a change in circumstance since the entry of the consent degree that is adversely affecting public interests or important public institutions and if the consent decree may be modified to avoid those adverse effects and still vindicate the plaintiff's federally guaranteed rights.

In this case, the courts below failed to apply such a standard, with two adverse effects. First, the

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sheriff of Suffolk County has been compelled, because of the single-celling provision in the consent decree in this case, to transfer inmates from the brand-new Suffolk County Jail, which was opened in May of 1990, from that facility into a State correctional system, which is now operating at excess of 170 cent -- 170 percent of capacity.

These inmates are transferred from that brand-new facility into a State system, where, ironically, they are often double- or triple-bunked or, in some instances, compelled to sleep on the floors of those institutions.

These transfers are made pursuant to a State statute which requires the agreement and consent of the sheriff and the commissioner of correction to make such transfers.

These transfers would not be made by the sheriff or the commissioner of correction except for the consent decree entered in this case. They -- the sheriff and the commissioner of correction agree that they are not correctionally sound and have interfered with the operation of the over-burdened State correctional system by placing additional pre-trial detainees into that system; and in addition, it required Suffolk County to expend an additional $1 million a year in transporting inmates from the Suffolk County Jail to these State

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correctional facilities.

QUESTION: Does the record tell us how many of these transfers there are?

MR. JANIAK: I think we could compute. The record doesn't say it directly, Justice, but it would be apparent from simply taking the daily count statistics, which are in the record, and we know what the capacity was at the facility -- you'd have a given point in time. They number, literally, at this point, in the thousands.

QUESTION: Thousands?

MR. JANIAK: Yes, there would be -- there would be --

QUESTION: And would the change in the consent decree that you're asking for totally eliminate these transfers?

MR. JANIAK: They most probably would totally eliminate it. Because what we've asked for, is we have -- in the new facility, which opened in May of 1990, we have 419 cells for male inmates. We've asked to double-bunk 197 of them. Given our count statistics, it is highly unlikely we would ever exceed -- go beyond the 197 that we intend to double-bunk. That is, our counts typically have been lately run -- typically run in the area of 480 inmates, where we have only 419 cells. There are occasions where we've exceeded 500. So this would

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most probably result in a complete cure of this problem.

The second adverse effect, the keeping this consent decree in place, has been on the functioning of the State bail statute. There are occasions where the sheriff does not have a sufficient number of inmates who qualify for transfer to a State correctional facility. Because under State law, the only persons who may be transferred are pre-trial detainees who have served a prior State felony sentence.

If those types of inmates are not available, and the sheriff still has more inmates than 419 cells at the jail, what he must do is then submit a list of names to a superior court judge. And the superior court judge then takes individuals who are being held on bail and reduces them to release on recognizance, so that they may be transferred to a half-way house facility, which is an insecure facility, whereas the jail is a maximum security facility.

Those individuals, the record shows, 10 to 15 percent of those individuals then walk away from that facility. These persons are persons who at least one judge of the courts in Suffolk County -- and in most instances two judges -- have adjudicated as persons for whom the setting of bail is necessary to ensure their appearance at trial.

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This is a second adverse effect of the court's decision below because it is now interfering with the functioning of the State bail statute in having individuals released on recognizance who would not otherwise qualify for that status.

It is these interferences with the administration of the State correctional system, the county pre-trial detention system, and the State bail statute that the sheriff sought to avoid in this case when he proposed to double-bunk 197 of the 400 -- 197 of the 435 cells at the Suffolk County Jail. The remainder of those cells, 34 of them are for female detainees.

When the sheriff made that proposal, he proposed to -- leave in place, all of the remaining provisions of the consent decree. The consent decree in this case provided for the construction of a jail which far exceeds constitutional requirements. And although the sheriff proposed to double-bunk, none of the other features of the consent decree would be disturbed by the sheriff's proposal for modification.

For example, there are outdoor recreation areas which would have been left intact, indoor recreation areas, contact visiting areas. Specialized cells would not be double-bunked. Any of the specialized cells in this facility would remain for those purposes -- that is,

infirmary cells, psychiatric cells, suicide-prevention cells. None of the other architectural feature, or other features of the facility would be altered, except for double-bunking 197 of the cells.

Furthermore, the sheriff's proposal to the district court would have required that individuals who are double-bunked are only those individuals who would have qualified as eligible for double-bunking under the classification program of the National Sheriffs Association, which in this case, was further reviewed and approved by an accredited auditor of the American Correctional Association. And it was this proposal which was denied by the district court, and affirmed by the circuit court below.

QUESTION: How did the -- how did a cell in the new facility compare with the old facility?

MR. JANIAK: The old facility --

QUESTION: If it was going to have two people in it?

MR. JANIAK: The smallest-sized cell in the new facility is -- the minimum-sized cell in the new facility is 70 square feet. In the old facility, which was also single-cell by court order, the cells were, I believe, 80 square feet, or 88 square feet. They were larger.

QUESTION: What about the -- and you suggested

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in the smallest of these cells that some might be double-bunked?

MR. JANIAK: In some instances, in the small, minimum-sized cells of 70 square feet, there would be double-bunking.

QUESTION: Double-bunked, which would be less commodious than the old -- the old --

MR. JANIAK: The cells in the new facility --

QUESTION: -- facility.

MR. JANIAK: The cells in the new facility would be, in some instances, would be smaller than the cells in the old facility.

However, the new facility differs very significantly in other features of the design of the jail. The new jail, for example, has only small, modular units, so that in any unit, there is no more than 40 cells, stacked in 2 tiers. And available to the inmates in that unit is a large, common, day room. So that in the new facility -- although some inmates would be double-bunked, they would be out of their cells --

QUESTION: Yes, but I suppose -- your -- the decree -- the court refused to set aside the decree based on the standard that you attack.

MR. JANIAK: Correct.

QUESTION: Now, let's assume we agreed with you.

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Nobody got around to -- below to deciding whether or not double-bunking in this new facility would be a -- violate the Eighth Amendment.

MR. JANIAK: That's -- the judge below said he did not have to reach any issue, and there are no findings.

QUESTION: What if we agreed with you, wouldn't we just remand to have the Eighth Amendment issue fleshed out in the court below?

MR. JANIAK: I think the -- perhaps the most appropriate result, then, would be to remand to apply a new standard to make the determination of whether double-bunking this particular facility --

QUESTION: Yes.

MR. JANIAK: -- would meet constitutional standards.

QUESTION: Mr. Janiak, do you plan to discuss with us the standard employed below and the standard that you think is applicable?

MR. JANIAK: Yes, Justice O'Connor. Below, what the district court judge did was, first, apply the standard in Swift. After having found that this case did not meet the standard in Swift, the district court judge then purported to apply what he said was a flexible standard. But we submit that in fact, what the judge

applied was a new standard, which is quite unlike both the standard that we've urged on this Court, and unlike the standard that's been applied by -- in the various circuit courts.

QUESTION: Does rule 60(b)(5) have anything to do with the authority of the court to consider a modification?

MR. JANIAK: I think the issue would be, given the language of that rule, what --

QUESTION: Does the rule apply?

MR. JANIAK: Yes.

QUESTION: So the question is whether it's equitable, basically.

MR. JANIAK: I think the question is what does equitable mean in this particular kind of case.

QUESTION: Okay.

MR. JANIAK: And the district court judge first looked to the Swift case in answering that, which I submit is not the proper standard, given this Court's decision in the Dowell case, particularly, and then went on to apply what he said was, quote, "a flexible standard."

But I submit that what he, in fact, did in that case was quite different, both from the standard that we have urged on this Court, and quite different from what any of the circuit courts have done, who've spoken of a

flexible standard.

QUESTION: Does a consent decree have any contractual aspects to it that are the source of special concern?

MR. JANIAK: I think that a consent decree has a contractual aspect to it, but it should not be considered a contract. I think at least since this -- Justice Cardozo's decision in the Swift case, he says that although a consent -- a consent decree is an order of the court and, therefore, is subject to later modification, under the right circumstance -- leaving open the question of what that would be, given the nature of this case.

With respect to there being some consensual aspect to it, I think that's accommodated by the standard that we've urged on this Court. Because what -- because what we have said is that there must be a change in circumstance, producing an adverse effect. And by saying that there must be a change in circumstance, and that must be shown, a public official defendant cannot then go back and simply say I've changed my mind. So I think that our proposal accommodates the consensual aspect of consent decrees.

QUESTION: Is that --

QUESTION: Would you agree that at the outset, a trial court has the authority to impose on the State, by a

consent decree, an obligation that's greater than the Constitution commands?

MR. JANIAK: I think, given this Court's holding in the Local 93 case, that is probably correct, that they would have -- if the parties agree to it, and it goes beyond what the court could have ordered after trial, it may be entered as a consent decree.

I think that the issue presented in this case is a different issue, which is given that that has happened, what -- what is the standard to be applied later, when the parties come back before the court, and there's a disputed request to modify a consent decree.

QUESTION: Would it be an abuse of the discretion for the district court to say I'll do no more than the constitutional minimum?

MR. JANIAK: I think that -- in fact, what the court would be required to do is to look to the underlying Federal law which occasion the court's original intervention --

QUESTION: I mean at the outset of the decree.

Suppose the court, at the outset of the decree, said I will enter no decree that -- exceeds the constitutional minimum.

MR. JANIAK: I believe that the court would have that discretion. And that --

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QUESTION: Well, it may be --

QUESTION: It would be an abuse of discretion to enter a decree that would order a State to do more than the Constitution required, whether consent or not. What do you think of that?

MR. JANIAK: Well, I think that's a tough question, given this Court's -- and which -- I'm sure that's why it was asked, Justice White.

I think that's a difficult question, given it's -- it is my understanding of this Court's decision in Local 93, where there was a decree entered which went beyond what the court could have ordered in that case.

QUESTION: Was that a constitutional case?

MR. JANIAK: That was not a constitutional case. That was a title VII case. It may be that a constitutional case presents a somewhat different issue.

What we've urged --

QUESTION: I suppose a district court can -- if he thinks he's -- there's really a constitutional violation involved, can spell out what he thinks might be an appropriate remedy, and especially if it's consented to, he could enter the order.

But it still has to be, at root, a constitutional violation that he's purporting to enter an order about.

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MR. JANIAK: That's correct. There has to be some Federal violation of the Federal Constitution, or Federal law, which brought the parties before the court initially. Then the question is, does the consent decree contain remedies go beyond the minimum -- go beyond what is required in order to vindicate those federally guaranteed rights.

QUESTION: Mr. Janiak, can I ask you a question about your standard on the changed circumstances? In your view, must those changed circumstances be unforeseen changed circumstances?

MR. JANIAK: I think my -- in my view, they don't have to be foreseeable.

QUESTION: It would be all right if everybody could predict the increase in prison population, and then they still -- you could still rely on that increase to do it. That's critical to your case, I guess, 'cause here the district judge found that circumstances were not unforeseen, didn't he?

MR. JANIAK: Well, what the district court judge did here, Justice Stevens, he looked -- he discussed the issue of foreseeability only in the context of applying the Swift standard. And then I think discuss -- applied a standard which is really different than any foreseeability standard to which any public official should be held.

Because what he did is he conceded, initially, that the phenomenon of increases in jail and prison populations are unpredictable. Having conceded that he was dealing with an unpredictable phenomenon, he then spoke of what was at -- what he found to be an apparent trend, looking back in April of 1990, to 1985. And on that basis, said, well, it wasn't unforeseen.

That seems to me to be a very, tight standard to hold any public official to. You tell me that you're going to talk about apparent trends with respect to unpredictable phenomena. And if you don't foresee this coming, then I'm going to hold you to the original agreement.

QUESTION: But it seems to me your standard has the same problem in it. Because suppose you get the relief that you ask for and then the prison population continues to grow -- as it no doubt will, with so many people being put in jail. And you now come back and say we need another 100 double-cells. Wouldn't he have to give it to you?

QUESTION: You may answer, yes.

MR. JANIAK: That is -- that any time, if there was a change in circumstance, which led to a further increase --

QUESTION: Whether foreseen or unforeseen.

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MR. JANIAK: Foreseen or unforeseen, then you would have to make a showing that that was a change in circumstance, and had an adverse affect. But you would also always have to show that the modification that's requested would ensure that the constitutional rights are being protected.

QUESTION: Thank you, Mr. Janiak.

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

ORAL ARGUMENT OF JOHN T. MONTGOMERY

ON BEHALF OF THE PETITIONER

THOMAS C. RAPONE

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

The commissioner of corrections agrees with the sheriff that the district court should have modified the consent decree, due to changed circumstances. But we maintain that there is another, more fundamental basis for reversal of the district court.

We submit that with the closing of the old jail and the opening of the new jail, it was no longer appropriate for the district court to continue to exercise equitable authority over double-celling under the consent decree.

The new facility contained no vestiges, if you will, of the unconstitutional conditions at the old jail.

And it eliminated any risk of a recurrence of the conditions that offended the Fourteenth Amendment.

That being so, under the general, equitable principles applied by this Court most recently in Board of Education v. Dowell, last term, we maintain that the district court should have concluded that the consent decree's restrictions on double-bunking could have no further, prospective application under rule 60(b)(5).

The Federal Court had played its role. It had succeeded in fully protecting constitutional values, and the time to end judicial tutelage over this jail had come to an end.

QUESTION: If they wanted to have a question about the -- present a question about the new jail, they should start a new lawsuit.

MR. MONTGOMERY: That's exactly right, Your Honor.

QUESTION: You're saying that once the consent decree has been complied with for any period of time, that ends the power of the court to enforce that decree except insofar as a change may fall below constitutional standards. Is that fair to say?

MR. MONTGOMERY: Your Honor, what we're saying is that once the underlying constitutional violations have been cured, and are unlikely to recur, at that

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point -- which we concede is difficult to define in many cases -- the power of the court ends, no matter what the consent decree says.

QUESTION: Then under those -- under your rule, there doesn't have to be any changed circumstance. The constitutional violation is remedied, and you can walk back into court the next morning and say, well it's true. We promised by the consent decree to do something more than the Constitution requires, but we now are under no obligation to do so and the court can't make us do it.

That reads the -- that reads the consensual aspect of the consent decree, in effect, right out of it, doesn't it?

MR. MONTGOMERY: Your Honor, we really make here -- in this case -- two arguments. We agree with the sheriff that there are circumstances when the court must apply equitable principles to determine whether a modification is appropriate because of changed circumstances.

But we speak here, on the facts of this case, of the absolute limits that we think this Court should impose on the court's equitable authority.

QUESTION: But you're saying to the extent that there is an attempt to enforce a consent decree which goes beyond constitutional minima, equitable considerations

really are irrelevant?

MR. MONTGOMERY: We do not go that far, Your Honor.

If the parties agree to a consent decree that is entered by the court which contains an element -- for example, in this case, double-bunking -- which purportedly exceeds constitutional standards, we read Local 93 to permit the court to enter such a consent decree without a searching inquiry into whether every single provision in the decree falls within constitutional standards.

Until there are changed circumstances, there is no basis for a modification. Beyond that, there is no basis, in our view, for the argument we make here, that is that the equitable authority of the court has come to an end until the constitutional violations that led to the decree have been cured -- and a showing can be made that they are unlikely to recur.

QUESTION: Well, you could be more specific -- and you were -- that the decree had to do with the old jail.

MR. MONTGOMERY: That's exactly right, Your Honor.

QUESTION: And the old jail's closed.

MR. MONTGOMERY: That's right.

QUESTION: So the decree is just over. And

you've got a new jail that's never been adjudicated.

MR. MONTGOMERY: That's right. The original consent decree, however, Your Honor, did contemplate the construction of a new jail.

QUESTION: Yes.

MR. MONTGOMERY: Indeed, the consent decree, and its hundreds of pages of attachments, were the architectural plan for the new jail. But we agree, that once the new jail is built, that the essence of the dispute has been resolved. And all of the constitutional --

QUESTION: Well, it isn't -- it isn't if the consent decree, or the court, thought that there was a per se rule against double-bunking in any prison.

MR. MONTGOMERY: That's true. And to the extent that the court thought that --

QUESTION: And if there was a -- if that element was in the decree, why, there's been a changed condition, namely that the law has been changed. If it was -- ever was that law, the law's been changed.

MR. MONTGOMERY: We agree with that, Your Honor. In this particular case, however, the original consent decree does not contain any provision which suggests that the court believed there was a per se right to a single cell.

QUESTION: Mr. Montgomery, I don't really understand what you're saying. This wasn't a suit against the jail; it was a suit against -- against the government. And the government's still there. I mean, why say it's a -- see, it wasn't a -- the jail wasn't being sued. The Government was being sued. The government had been doing something that was unconstitutional. That was the basis of the suit. And these people say the government is still doing something that is unconstitutional. What difference does it make if it's doing it in one building or another building?

MR. MONTGOMERY: Your Honor, the question is the context on which the assessment is made of whether there isn't -- some violation of the law that occurs.

We maintain that the court below ought not to address the double-celling question under the consent decree -- because, as I've said, the limits of the court's equitable authority had come to an end -- but rather, as a fresh complaint.

In this case, the inmates' complaint about the sheriff's plan to double-cell in the future, is like the student reassignment plan in Dowell. Student reassignment was an integral part of the original order that had been entered by the court in Dowell. But what this Court did is it drew a line. And it said that if the plaintiffs

cannot show that there are remaining vestiges of de jures discrimination, and cannot show that there is now threat of recurrence, then -- or excuse me, if they can show that, then the student reassignment plan can be challenged only under a fresh complaint.

What we say here is not that the plaintiff should be deprived of an opportunity to challenge double-celling at the new jail, but that they should do so only on a fresh complaint and under the standards of the Fourteenth Amendment.

QUESTION: Well, what if, in the showing in the -- for the original decree, Mr. Montgomery, it was shown that this sheriff had been sheriff of three or four different jails, and in every one of them he double-celled. It seems to me that the court could then say, indeed, it isn't just the building in which he's in, he just has a propensity to double-cell people. He's apt to do so in the new building, too.

MR. MONTGOMERY: If the court had believed, in 1973 when it entered its original decision after trial that single-celling was, per se, a violation of the Constitution, and such a sheriff were a party to the case, then I would agree with Your Honor's suggestion that it would be difficult to show that there was no a likelihood of recurrence.

But if the Court looks at Judge Garrity's decision in 1973, it is clear that Judge Garrity was very complimentary of the conduct of the public officials in this case. And that he viewed the root cause of the constitutional problems here to be the building. And he sought to bring about a set of circumstances, via his order to close the jail, that wold replace that building.

QUESTION: Your answer to Chief Justice assumes that courts can take account of character evidence, even though juries may not be able to. But we're --

(Laughter.)

QUESTION: But will -- but let it go.

MR. MONTGOMERY: I suppose that's true, Your Honor.

But it is the case, Your Honor, that this record is, frankly, littered with compliments by the district court for the conduct of the public officials.

QUESTION: Under your view, what are the key differences between a consent decree and a judgment after litigation?

MR. MONTGOMERY: For purposes of the argument that we make concerning the limits of the court's authority, there is no difference at all, in our view.

The matter of --

QUESTION: Do consent decrees serve an important

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function in our litigation and adversary system?

MR. MONTGOMERY: They serve a very important function. But consent, Your Honor, does not expand -- we do not believe -- the equitable power of the court.

With respect to the standard modification context, applying principles under Rule 60(b)(5) -- consent, we believe, may very well make a difference. And it is a consideration that the court can take into account in balancing --

QUESTION: Well, does the court have any greater authority to enter relief pursuant to a consent decree than pursuant to a litigated judgment?

MR. MONTGOMERY: Under Local 93, there certainly is an argument to be made that there is some greater authority under a consent decree to enter relief.

On the other hand, we think there is no suggestion in this court's treatment of general, equitable principles, as they apply to both litigated and consent decrees, that would permit the court to expand its ultimate authority.

There is no difference, for example, between the equitable principles that the court applied in Dowell, which involved a litigated decree, and Pasadena v. Spangler, which involved a consent decree. And we think to permit the parties to expand the ultimate power of the

court, by virtue of consent, runs counter to the principle that the court -- I believe has repeatedly -- reaffirmed that the parties may not, by consent, purchase the continuing equitable power of the court.

QUESTION: Mr. Montgomery, on your theory that the power of the court terminated when the new facility was built, what case in this Court most strongly supports your suggestion? Or is this a brand-new theory that we should adopt?

MR. MONTGOMERY: No, I believe Dowell most strongly supports our position.

QUESTION: Dowell was your authority.

MR. MONTGOMERY: As I said in response to Justice Kennedy's question, we see no difference between consent decrees and litigated decrees. And in Dowell, the Court concluded that the limits of enforceability -- assuming that the problems had been cured, the limits of enforceability had been reached and that was the end of the court's power. And any new problems, had to be tested under a fresh complaint, as I said earlier. And we believe that that approach applies fully here.

The desegregation context is one in which the Court has had the most sustained opportunity, over the last 20, 30 years to develop the application of equitable principles. And we believe that they apply fully here.

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We believe that under this -- these circumstances, this is a case for the Court to confirm in a context other than desegregation, that judicial orders, including consent decrees against local officials, are not intended to operate in perpetuity.

We are asking the Court here to make it clear that when the past violations are permanently cured -- and in this case a $54 million building permanently cured the violations that led to so many years of litigation -- that local officials will now be held accountable, not to the Federal courts, but to the democratic process within their communities.

This consent decree gives this jail a special status. And now that the violations have been cured, all of the old violations, the connection, the critical connection between the violation that led to the decree, and the remedy, has become unhinged. And when that happens, the decree takes on a life of its own.

And we suggest that that is inappropriate. And that is a proposition that the Court should not permit to stand.

We respectfully request that the Court remand this case to the district court with instructions to modify the decree.

I would be glad to answer any further questions.

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QUESTION: Thank you, Mr. Montgomery.

MR. MONTGOMERY: I thank the Court.

QUESTION: Mr. Stern, we'll hear now from you.

ORAL ARGUMENT OF MAX D. STERN

ON BEHALF OF THE RESPONDENTS

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

The question presented is what standard should have governed Judge Keeton's exercise of discretion when he considered a 1989 motion to modify an order requiring single occupancy which had been entered in 1979 and then modified and reaffirmed explicitly in 1985.

The 1979 consent decree was entered after this case had been pending since 1971, after a 1973 finding of violation, and an order to close the jail. After 5 years a complete impasse had been developed and no remedy had been supplied or was even proposed by the defendants.

The question was, then, how to get out of this impasse. And the answer that was supplied by the First Circuit was that this jail, at long last, will have to close unless the defendants are prepare to commit in an enforceable way to the specifics of a plan -- that is, a jail, a site, specific criteria, and so forth.

And out of that came the plan which they submitted in October of 1978 and which was approved and

which became the consent decree of 1979 which required single occupancy.

And then, again, in April of 1985 that, a new order was entered which was entered in light of the fact that the population had been rising and was likely to continue to rise. And it, therefore, permitted the defendants to build a new facility of any size without any court permission, provided -- explicitly -- that single occupancy is maintained under the design for the new facility.

So this consent decree and its modification had everything to do with what would be in the new facility.

We say that there must be a showing of inequity beyond collateral attack on the merits. This is required by rule 60(b)(5) and by the policy of encouraging settlements. And settlements are important. And not only in order to preserve judicial resources. Consent decrees provide better relief, it is more finely tuned, it's more sensitive to the interest of plaintiffs, and more deferential to the interest of defendants, and particularly State and local governments and executive agencies.

I submit to Your Honor that a very persuasive informational brief is that supplied by the correctional -- former correctional officials as amici.

QUESTION: Mr. Stern, do you agree with the application of the so-called Swift standard by the lower court in looking at this question?

MR. STERN: We -- yes, we have no problem with the Swift standard. But our position is --

QUESTION: Well, I might have a problem with it because --

MR. STERN: Yes, I understand that. But our position is --

QUESTION: I'm not sure that is the standard that ought to be applied in cases like this.

MR. STERN: Well, perhaps not. But in any event, we agree with the Solicitor General that there must in any event be some minimum threshold standard which is enough to make a consent decree worth entering.

If the parties do not get some benefit of the bargain, if they are not guaranteed something beyond re-litigation in the future, then nobody will enter a consent decree. And we think that if the court adopts a standard which has some minimum threshold showing such as that, then it makes no difference in this case whether the Swift standard is applied or this other standard.

In fact, Judge Keeton applied both the Swift standard and the standard that was suggested by the sheriff at that time. The commissioner --

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QUESTION: Would it be fair to say that he applied the second standard somewhat perfunctorily? He has about one sentence.

MR. STERN: Well, I think it was a little more than one sentence, Your Honor. And I think that he got to the -- and he dealt with what is the central and most important part of the standard, at least as advocated by the Solicitor General and as applied by other courts in other circuits.

And that -- and that is what we think is the first component of any standard is, what were the basic purposes of the decree. A proposed modification must be on account of changed circumstances and in accord with the principle purposes of the original decree. The question is, what was agreed to. Is this really a new circumstance or is this something that was contemplated all along? If the parties in a consent decree agree that if X happens, then you shall do Y, well, then if X ultimately happens, it cannot possibly -- that cannot possibly supply a reason for getting out of the obligation.

QUESTION: Do you agree that a consent decree cannot go beyond what the court has power to -- order without the consent decree?

MR. STERN: No, I do not agree with that. I think that --

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QUESTION: It can go beyond remedying the constitutional violations.

MR. STERN: I believe that is what Local 93 established. There were four criteria: had to be within the subject matter jurisdiction of the court, had to be within the scope of the pleadings. It had to serve the -- objectives of the underlying law. And it had to be not affirmatively prohibited by Federal law.

And I would submit that this case is actually much stronger than Local 93.

QUESTION: What is the authority of a court to do that, to order something that is not necessary to prevent a violation of law?

MR. STERN: Well, it's the basis --

QUESTION: Just the agreement of the parties?

MR. STERN: I would say so, as long as it is within the subject matter jurisdiction of the court.

QUESTION: So the court converts a private contract into a rule of law?

MR. STERN: I suppose you could put it that way, but that is what a consent decree is all about -- although it is not completely a private contract because, since it is also an order, it isn't immutable. There is always an escape hatch where a party can get out for real need.

And that is why rule 60(b) applies. And

rule 60(b) says if its inequitable, you can get out of it.

QUESTION: The judge says to the parties when they come into this consent decree, the judge says to the plaintiff, look, I would never enter an order like this if we litigated this case and you won, I would not enter this order.

And should he just nevertheless enter the consent decree?

MR. STERN: Well, I suppose. There are number of things I would respond to that.

First of all, in a way, that is Local 93 because in Local 93 the statute sets specifically that if this case is tried, this relief cannot be entered. That is what Congress said. And this court nonetheless said, as a matter of consent decree, you can enter it.

Secondly, this case does not present the issue of whether Judge Keeton, in his discretion, declined to enter that decree whether he would be obliged to do it. This consent decree was entered. And now the issue is, is it enforceable.

And thirdly, this case in such a real way comes out of the, serves the objective --

QUESTION: You say that the double-celling provisions should be enforced even though double-celling per se is not necessarily unconstitutional?

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MR. STERN: We say it is -- not necessarily. We agree that there is no per se rule. We think it would be unconstitutional.

QUESTION: But nevertheless, the consent decree should be enforced without even considering whether or not the conditions in the new jail are unconstitutional?

MR. STERN: Your Honor, please, this was --

QUESTION: That is right, is it not?

MR. STERN: Yes, it is. And that is for a number of reasons.

First of all --

QUESTION: That was the deal.

MR. STERN: -- that was the deal. Bell v. Wolfish was pending in this Court at the very moment that we signed that consent decree. Everybody --

QUESTION: But you did not know who was going to win.

MR. STERN: Of course. That was exactly the point. Everybody decided to finesse, everybody decided to hedge their bets and make this deal.

And Bell was decided -- 7 days after the consent decree was entered, Bell was decided. Nobody did anything about it. And, indeed, 6 years later, we reaffirmed the consent decree and provided for single-cell occupancy, way after Bell was decided.

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So that was completely understood at the time.

QUESTION: Well, sue them for breach of contract. I mean, could you not get some monetary -- I mean, if your grievance is that they have welshed on the deal, then you must have some contractual remedy.

But it is a little different saying that the power and force of the Government must be invoked because there has been a breach of contract.

MR. STERN: This is, if I might say so, this is an even stronger case than Local 93 because at least here, unlike Local 93, this was a very disputable issue.

Why can't parties settle disputable issues? And if the answer to it is that they can settle disputable issues, then the answer to that is it must be possible to enforce it at a later time.

QUESTION: But I think one can say, if you are talking about a judgment for damages in the settlement, no difficulty arises. It is over and done with.

But if you are talking about an injunctive decree where the Federal court is involved year after year, surely somewhat different considerations prevail, do you not think?

MR. STERN: That is exactly why rule 60(b)(5) provides the leeway for defendants to get out of it in a substantial change of circumstances.

But I don't think -- unless the Court is prepared to hold that one cannot settle legal issues in equitable cases where the issue is whether there shall be an injunction, then I do not think you can say that a Federal court can never enforce a decree which is arguably greater than the constitution requires.

If you were to hold that, that would be that there would be no end to litigation in any consent decree. Every consent decree would be --

QUESTION: What if in this case the precise same -- rather, a different consent decree had been entered saying that generally speaking double-celling is okay, and Bell v. Wolfish and Rhodes v. Chapman had come out differently in this Court so that there is now a per se rule against double, could the State insist that it can continue to run the jail under that decree?

MR. STERN: I am not sure I understand. If the consent decree had provided for double cells?

QUESTION: Supposing that the consent decree had said no problem with double -- double-celling as a general rule. And then Bell v. Wolfish and Rhodes v. Chapman are decided by this Court the opposite way than they were.

MR. STERN: I see.

QUESTION: Per se rule against doubling. Can the State insist under the consent decree that it will

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continue to double-cell?

MR. STERN: Well, I think you then might have the System Federation case.

QUESTION: Well, that's a deal.

QUESTION: That's the deal, though.

QUESTION: That's the deal.

MR. STERN: Well, the System Federation case held that when the result that was part of the consent decree, it turns out to be affirmatively contrary to Federal law, when the result -- in System Federation the consent decree said union shops are illegal. Then Congress passes a statute.

QUESTION: Well, part of Federal law is that you don't bind -- you do not tell a State how to run its business unless they're trying to run it contrary to the constitution.

MR. STERN: Well, that is certainly the basis for jurisdiction. But then the question is, when can one settle a case?

QUESTION: Mr. Stern, isn't your answer to the Chief Justice that the particular plaintiffs in the case will be bound, but that would not bind the next group of inmates who came in because they certainly would not be bound by a consent decree to which they are not a party?

MR. STERN: I do think that there is parity and

that both sides are bound in this class action. But I think that --

QUESTION: The plead of the plaintiffs in that case would be bound to not to take the benefit of the -- our hypothetical ruling that single- -- double-celling is prohibited.

Do you agree to that?

MR. STERN: I think the question is whether the, whether System Federation would apply, whether there is a difference because this Court has now held that something is illegal. That has not happened in this case.

QUESTION: No, but is not the difference that they could waive the illegality? But it does not follow from that that they can, by an agreement, enlarge the constitutional jurisdiction of the court.

I mean, the one does not follow from the other, even if you assume that the particular inmates can waive the consequently declared illegality. It doesn't follow from that that they can enlarge the constitutional jurisdiction of the court by an agreement.

MR. STERN: We certainly have not argued and don't argue that anything could be done to enlarge the jurisdiction of the court. And I don't think that the defendants have ever said that there is no jurisdiction in this case within the meaning of subject matter

jurisdiction.

So I come back to the question of whether, if you have an issue -- and after all, even under Bell, the issue was always whether it is to a certain degree the question of the totality of the circumstances.

QUESTION: You know what we mean by enlarging the jurisdiction of the court, Mr. Stern. We mean letting the court do something it does not have power to do, to issue a decree that it is not independently empowered to issue apart from this contract that the parties have.

And your answer is?

MR. STERN: I do think that a court does have such power.

QUESTION: It has not.

MR. STERN: But at least it has such power when it is a disputable issue at the time the court approaches it, when it is something that is negotiable, something that could go either way. And that is really what we had here, something that could go either way.

QUESTION: Mr. Stern, was there any constitutional violation proved in this case other than the double-celling?

MR. STERN: Oh, yes, Your Honor. This was --

QUESTION: So the court had the power to fashion a remedy for a constitutional violation that was proved.

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And did anybody question the jurisdiction of the court to enter the decree they entered?

MR. STERN: No one questioned the jurisdiction at the beginning or the middle or the end or anytime during this 20-year episode.

And as I have said, it became essential to find a means of providing a remedy for the original unconstitutionality of the old jail. And that means was to allow the defendants to continue the use of the old facility, which they did for another 10 years, while they constructed a new facility according to specific criteria.

QUESTION: The mechanism for that solution as a practical matter really had to be a consent decree, didn't it? As a practical matter, these parties could not have gone into the realm of private contracts and had a contract because State law provisions were simply too restrictive, I take it -- gift of public funds, binding -- subsequent legislatures, and so forth.

MR. STERN: I agree with Your Honor. I couldn't think of any way.

QUESTION: I could not think of it either.

And therefore, it seems to me that the contract analogy does not help you very much. This was not a case of parties who had a choice of substituting the private contractual mechanism for the court mechanism. The court

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mechanism was all they had.

And if that is so, then it must be governed by rules that are sue generis to that process, it seems to me.

MR. STERN: Perhaps so. I -- we are not saying that we should take the law of contract and simply import it. But certainly in considering how we look at consent decrees and do we look at them differently than adjudicated decrees, we certainly will look to contract law for some of the basic principles.

And the most basic principle of all is the reason people enter into these arrangements is because they expect the court eventually to enforce their settled expectations.

QUESTION: Mr. Stern, how much do you need to assure that?

You said a moment ago that you are not taking the position, apparently -- I don't think you are -- that the court can put into the decree something that is clearly beyond its remedial power. You said, at least where it is arguably within the remedial power. That is really all you are grasping for, right?

MR. STERN: That's all I need in this case.

QUESTION: That's all you need in this case.

Wouldn't it be enough to assure the validity of

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consent decrees or at least the worthwhileness of entering into them if once the decree is entered, the burden is on the party who seeks to overturn the decree to show that it is not a violation of the constitution to violate the decree? Although normally the burden is on the party showing the constitutional violation to prove it.

Once you enter a decree, if you want to get out of it, the burden is on you to show that it is not a constitutional violation to do what you want to do in violation of the decree.

Would that not make it worthwhile to enter into decrees?

MR. STERN: No, it wouldn't, because once the consent decree is negotiated and entered -- first of all, in the process of negotiation, there are mutual trade-offs. It is a process of settlement. They give up something, we give up something. They give up something else, we give up something else.

Most of these are very complicated things with many mutually independent trade-offs.

And secondly --

QUESTION: On close questions of law, as you are saying. The things have to be arguably within the court's jurisdiction.

And once you enter the consent decree you have

it locked to this extent, that the burden of proof would suddenly shift to the other side to show that it is not a violation of the law.

MR. STERN: Some points are close questions of the law, but other points are not.

You might give up one thing in return for another. We gave up another 10 years of confinement in the old jail in return for some form -- for exactly this, for a consent decree which laid out specifically what it would have and, most importantly, within it -- most importantly, and this was clear all the way along, single occupancy. That is what we wanted most of all. That is what Judge Garrity said was most important, what he said they were unequivocally committed to.

QUESTION: And if it were still a close question and if we put the burden on the side trying to break the consent decree to show that double occupancy is not a violation of the constitution, that would normally be hard to show if it was still a close question.

But it is no longer even a close question. It is now absolutely clear that in and of itself it is not a violation.

MR. STERN: It would still mean -- and, of course, that is, the burden is always on the movement. That isn't really any different than what the defendants

are suggesting. They are saying we will take the burden on that point. The movement always has the burden.

But if you allow them to collaterally attack the decree, then what would happen is, in each and every decree, every defendant would move to vacate the decree, modify it, every time they thought they had grounds to -- arguable grounds to undo it. And you would litigate these things and re-litigate them forever, and ultimately I do not think anybody would go into them because after all, as a plaintiff's attorney, why would I give the other side the right to blow the whistle at any time and whatever time and turf they chose, say now we want to litigate. I would rather litigate it at the initial time.

Therefore, I think that it has to be more than collateral attack. And it has to be a purpose. And that's what Judge Keeton found, and that's what the Solicitor General agreed with.

And secondly, there has to be some showing of need, as well. There has to be nexus between the supposed new circumstance and the impracticability of complying with the decree. A temporary problem should not be a reason to do away with a decree all together.

To illustrate in this case, the sheriff in the old jail had a capacity of 342 cells. And for years he made this work, even as the population went up and up and

up. And now when we have the new jail, the new jail opens with a new capacity of 71 additional cells, which I submit to the court that there is absolutely no showing on the basis of that record that there was any need at all to double-bunk on this record.

Now, there is no other record, no better record. We don't know exactly what has been happening on this record in the last year and a half for precisely the reason that the sheriff refused to try it out.

Another one of the criteria that a court must impose as part of the showing of equity, again suggested by us and by the Solicitor General, is he must try in good faith to comply with the decree. He didn't want to try at all. He went to the court. So his record has to do with what happened in the old jail prior to the time he had this enormous increase in capacity.

We say that there's no showing in the short term and much less is there showing in the long term. In 1984 when the jail was -- when the population was going up, the sheriff did not go to the Federal judge then and say, I need to have double occupancy. He went over to the State court and said, I need to have a bigger jail because I am obliged to have single occupancy in the jail.

So over the long term, the State court has held that the sheriff is entitled to have a jail of sufficient

capacity to comply with the Federal order requiring single occupancy.

So there's no showing of need on this record.

QUESTION: Was there any length or term of years on this consent decree?

MR. STERN: No, there isn't.

QUESTION: Rule against perpetuity or something?

MR. STERN: Well, until there is a change of circumstance, if there is one, but at least -- at least beyond the day the jail is supposed to open its doors. At least try it out. That's all we are saying and that is all Judge Keeton said. Try it out.

Certainly, if they tried it out and they had a problem, if there really were transfers that are problematic and so forth, he could then come back and say, this is what the problems were. But he didn't even want to do that.

QUESTION: Of course, all the Government has to do is build another jail to keep up with the prisoner population.

MR. STERN: That is certainly true over the long term.

QUESTION: Which is what happened because of the case that was brought.

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

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I should also add that certainly as a temporary matter, we agree. We are not saying that if there is some temporary emergency that is totally unforeseen, that they cannot do anything about -- if half the jail were to burn and all of a sudden they would have half the capacity, we are not saying that they could not go in and get a modification and order to double-bunk until they could deal with this on a more permanent basis.

This was the Duran case decided by the Seventh Circuit and Judge Posner, where the holding was basically temporarily yes, but temporarily only. And we agree with that.

I should add on this question of need, the real contention of the sheriff, which he makes rather forthrightly in his reply brief, is that what he needs and what he wants is the option to double-cell, the option to double-cell if at some point in the future, in his sole discretion, he should decide he needs to do.

And I think there is where the fundamental fallacy is between the petitioner's position and ours -- in their position. They mix up the question of the deference to be paid to discretion on the merits as opposed to the discretion to be exercised -- official discretion exercised on the question of whether to overthrow a decree.

Certainly, on the merits we have to -- the Federal court is bound to defer to official discretions. There are many problems to be solved. There are many fine lines to be drawn. And by and large, it is not up to a Federal court to draw those lines.

But when you have a consent decree and the official decides I will exercise my discretion, to do it this way, or draw the line that way, and then you get into a consent decree and there are mutual undertakings and it is relied upon in various ways and it goes on for years, at that point the Federal court can't just say, all right, defer to his discretion.

At that point the Federal court has to say, look, is there a legitimate need for this. Because if there is not a legitimate need, if the party isn't even willing to try it out, then essentially what the party has is a unilateral veto over this consent decree, and nobody would ever agree with those.

Another requirement is that the motion be timely. The sheriff waited. He knew that the jail -- the population was going up. Rather than go and try to enlarge the jail as he had before, he just sat on it, waited until the design was literally in concrete.

Now this design was designed specifically -- it was specifically premised on single occupancy. The whole

idea was to preserve privacy while maintaining safety. The way you did it was single occupancy and put the cells in an isolated fashion so they cannot be maintained under constant surveillance, so somebody isn't always looking in the door and watching you go to the bathroom. That was basically what the idea was. We can have it both ways.

Now if the sheriff had moved at a time --

QUESTION: Was that constitutionally required, too? I mean, it's a nice idea, but can you require a State to do it as a matter of Federal law, make it a constitutional requirement by just agreeing to do it?

MR. STERN: Justice Scalia, perhaps not a constitutional requirement.

But the issue presented in this case as a matter of constitutional law is whether having drawn the lines that way, having made a jail that is built in that way, having therefore created a situation where it will be positively dangerous to put people in double -- double-bunk people in cells that are isolated and difficult to observe, would that be unconstitutional?

And that is the position we think the defendants have put us in by waiting all that time to say I want to change the plan. If they had done it earlier -- and you can look at page 261 of the appendix, look at the diagram of the viewing limits from the guard stations and you will

see exactly what I mean about how this jail is configured in a very unique way, creating very serious damage to our client simply by the way they did it.

We could have changed it. We could have made it bigger. We could have made the cells bigger. We could have designed it in a different way -- in changing the consent decree, if there were grounds to do it.

Finally, if I just might say I find it somewhat ironic that the Federal courts in this case would be criticized as somehow anti-federalist. In this case -- this case is a marvel of how to implement relief in a Federal system. The Federal courts never imposed the remedy on the defendants. The Federal court never said how many to hold, how many to release. Judge Keeton even made his order automatically amendable if there was a change of an order in the supreme judicial court.

No one can say Judge Keeton was not sensitive and cautious about the interest of the defendants. All he did was say, I'm not going to let you out of an obligation which you undertook and which you reaffirmed and which was central to the case without good reason. All the said was, you have to try it. And therefore, he should be affirmed.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stern.

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The case is submitted.

(Whereupon, at 2:45 p.m., the case in the above-entitled matter was submitted.)

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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. 90-954-ROBERT C. RUFO, SHERIFF OF SUFFOLK COUNTY, ET AL., Petitioners, v. INMATES OF THE SUFFOLK COUNTY JAIL, ET

and

No. 90-1004-THOMAS C. RAPONE, COMMISSIONER OF CORRECTION OF MASSACHUSETTS, Petitioner, v. INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lora M. May

(REPORTER)